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Codification as nationalisation or denationalisation of law: the Spanish case in comparative perspective

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Some scholars have presented codification as a means to both nationalise and denationalise European legal traditions. This seems to be a paradox. On the one hand, the fact that laws needed to be approved by national parliaments and the *ius commune* – which was somehow regarded as a foreign law – ceased to be in force, gives evidence of how much codification contributed to the nationalisation of law. On the other hand, the fact that national parliaments enacted codes whose content had been highly influenced by foreign codes reveals that codification also contributed to the denationalisation of law. Different perspectives and arguments may lead to completely opposite outcomes. This debate has been particularly present in the Spanish scholarship. In the end, it seems that the view of codification as a means of denationalisation of law has prevailed, giving either a biased and partisan view of codification, or simplifying its richness. The consequences of such an approach have been notable in describing the codification of all legal branches, particularly in the civil law domain. After the Introduction (I), the paper will explore the Spanish historiography on this matter in a European context (II.1), paying particular attention to Belgium (II.2) and Romania (II.3). I will finish with some concluding considerations (III).

Keywords: comparative legal history; codification; civil code; legal traditions; foreign influences; nationalisation of law; denationalisation of law; historiography

I. Introduction

Could we imagine Napoleon promulgating the *Code civil* as a mere subsidiary law, that is, only applicable when no regional custom or legal provision was found? Can we imagine the French civil code giving a general sanction to custom or natural sense as legal sources or explicitly prescribing the binding force of case law? If that was the case, it is probable that Continental codes would not have been presented as a determining technique to achieve legal unification and legal positivism. European Codes would have been regarded as perfectly compatible

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with non-legal sources (custom, judicial precedent, legal doctrine) and with legal diversity. Had this been the case, it could have been said with confidence that the Spanish civil code followed in the French model's footsteps. It would have been easier to recognise the French code as the model of the Spanish civil code and, most probably, non-Spanish legal historians and comparative lawyers would not find it that difficult to understand the codification of civil law in Spain.

The reality is, however, different. The promulgation of the *Code civil* entailed the unification of the French civil law (by abolishing all regional and customary laws), whereas the Spanish civil code was promulgated under the express requirement of maintaining the validity of existing regional laws. The example of Spain shows that codification does not necessarily imply legal unification.[1] In fact, Spain constitutes the only case in which the application of the civil code is merely subsidiary, that is, when regional laws do not contain a legal rule applicable to solve a legal dispute. In explaining this from a historical and comparative perspective, non-Spanish scholars usually identify regional laws (*Derechos forales*) with *fueros*, customs and local laws, but this is not entirely true. Since no other civil law jurisdiction can be used as a model to describe the Spanish case, which on this matter is unique, elsewhere I asked myself: 'Should legal uniqueness be compared?' Or perhaps even better: '*Can* legal uniqueness be compared?' That was precisely the title of a recent work where I focused on the uniqueness of the Spanish case in codifying its civil law, trying to dispel some myths and misunderstandings on the notion of codification in general, and on the Spanish civil code in particular.[2]

I do not dare to suggest that the Spanish civil code cannot be compared. But I do submit that one should be careful in comparing it or, in other words, the comparison should be properly done. Otherwise, some comparisons or comparative law categories might not accommodate the peculiarities of the Spanish Codification of civil law. In this regard, I argued that three shortcomings can be found when non-Spanish legal historians and comparative lawyers deal with the Spanish civil code: (1) regarding Spanish civil code as a second-rate codification because it did not fully achieve legal unification (according to the French model); (2) overlooking the important peculiarities of the Spanish civil law system, with its richness and complexity; and (3) lack of understanding of the way different legal systems or traditions operate in Spain, confusing the category of 'foral laws' ('*Derechos forales*') with 'local laws' ('*Derechos locales*') or 'customs' ('*costumbres*').

[1] Aniceto Masferrer, 'Plurality of Laws, Legal Diversity and Codification in Spain' (2011) 4 *Journal of Civil Law Studies* 419.

[2] Aniceto Masferrer and Juan B Cañizares, 'Should Legal Uniqueness Be Compared? The Spanish Civil Code: Its Subsidiary Character' in A Albarian and O Moréteau (eds), *Comparative law and ... / Droit Comparé et ...* (Presses universitaires d'Aix-Marseille, 2015) 85.

All of these shortcomings are due to taking for granted the fact that Spanish drafters used the French civil code extensively as a model – copying most of the French provisions – and the lack of knowledge of Spanish legal traditions. Being aware of it, in previous works I have tried to addressed some of these misunderstandings.[3] Whereas some Spanish legal historians have stressed some peculiarities of the Spanish codification,[4] only more recently has the particular extent of French – and other foreign influences – been properly emphasised.[5] In doing so, it has been shown, for example, how the French influence over Europe and Latin America changed throughout the nineteenth century.[6] In Spain, the French influence over the Committees in charge of drafting the civil code notably diminished after the rejection of the *García Goyena Project* (1851).[7] In Latin America, such change also took place in the middle of the nineteenth century, after the publication of the *García Goyena Project* and the enactment of the Civil Codes of Perú (1852) and Chile (1855).[8]

However, Spanish scholars should have made a greater effort to put more emphasis on the subsidiary validity of the Spanish civil code from a comparative

[3]See Masferrer, 'Plurality of Laws, Legal Diversity' (n 1); Masferrer and Cañizares (n 2); see also Aniceto Masferrer, 'Plurality of Laws and *Ius Commune* in the Spanish Legal Traditions: The Cases of Catalonia and Valencia' in Seán Donlan and Dirk Heirbaut (eds), *The Laws' Many Bodies, c1600–1900* (Duncker & Humblot, 2015) 193–222.

[4]See e.g. Rafael D García Pérez, 'Derechos forales y Codificación civil en España (1808–1880)' (2012) 82 *Anuario de Historia del Derecho Español* 149; Bartolomé Clavero, 'La gran dificultad. Frustración de una ciencia del derecho en la España del siglo XIX' (1984) 12 *Ius Commune* 91.

[5]See Aniceto Masferrer (ed), *La Codificación española. Una aproximación doctrinal e historiográfica a sus influencias extranjeras, y a la francesa en particular* (Aranzadi–Thomson Reuters, 2014).

[6]P Arregui, 'Intercambios codificadores entre ambos lados del Atlántico' (2012) 82 *Anuario de Historia del Derecho Español* 337.

[7]See e.g. Rafael Gibert, 'La codificación civil en España (1752–1889)' in *La formazione storica del diritto moderno in Europa. Atti del terzo congreso internazionale della Società italiana di Storia del Diritto* (Olschki Ed., 1977) II; on the *García Goyena Project*, see M Reparaz Padrós, 'García Goyena: biografía de un jurista liberal (Una aportación al estudio de la codificación civil española)' (1996) 66 *Anuario de Historia del Derecho Español* 689.

[8]On this matter, see A Guzmán Brito, 'La influencia del Código civil francés en las codificaciones americanas' in *De la codificación a la descodificación. Code civil (1804–2004). Código de Bello (1885–2005)* (Santiago de Chile, 2005) 27–60; A Guzmán Brito, *Historia de la codificación civil en Iberoamérica* (Pamplona, 2006); Carlos A Ramos Núñez, *El Código napoleónico y su recepción en América Latina* (Pontificia Universidad Católica del Perú, 1997); more recently, see Agustin Parise, 'Importing Manufacture from the Low Countries: The Use of the Dutch Civil Code (1838) in the Drafting of the Argentine Civil Code (1871)' in Dave de Ruysscher and others (eds), *Rechtsgeschiedenis op nieuwe wegen: Legal History, Moving In New Directions* (Maklu, 2015) 331–54 (noting the relevance of García Goyena Concordances – *Concordancias, motivos y comentarios del Código civil español*, 4 vols, Madrid 1852 – as a useful tool to spread the influence of some civil codes, e.g. the Dutch Civil Code over the Argentine one).

perspective, and on other particularities like the sources of law. For example, the fact that the Napoleonic code did not recognise explicitly custom as a legal source whereas the Spanish code did. Despite this, some non-Spanish comparative lawyers paid heed to this fact.[9]

This negligence is probably due to the fact that, until recently, Spanish legal historians have not paid much attention to the dichotomy between tradition and foreign influences in the codification movement.[10] Furthermore, the French influence over the Spanish codification was taken for granted without sufficiently exploring its particular extent or scope. This way of looking at the Spanish codification by some scholars is related to the debate as to whether the codification brought with it the nationalisation or the denationalisation of law.

Some scholars have presented codification as a means to both nationalise and denationalise European legal traditions. This seems to be a paradox. On the one hand, the fact that laws needed to be approved by national parliaments and the *ius commune* – which was somehow regarded as a foreign law – ceased to be in force, shows how much codification contributed to the nationalisation of law. On the other hand, the fact that national parliaments enacted codes the content of which had been highly influenced by foreign codes reveals that codification also contributed to the denationalisation of law. Different perspectives and arguments may lead to completely opposite outcomes. This debate has been particularly present in the Spanish scholarship. In the end, it seems that the view of codification as a means of denationalisation of law has prevailed, giving either a biased and partisan view of codification, or simplifying its richness. The consequences of such an approach have been notable in describing the codification of all legal branches, particularly in the civil law domain.

It is undeniable that drafters of the Spanish civil code had in mind and used the French and other foreign models, but the final outcome was quite unique in many aspects. Can this uniqueness be compared? Yes, it can be compared, but it should neither be dismissed nor overlooked. Otherwise, national and legal identity would be disregarded and mistreated. A comparative analysis of codification with rigid models which prevent the integration of the peculiarities of legal traditions can be notably misleading. Making comparisons with a stereotyped ideal or model of code would prevent us from reflecting on the particularities of different legal identities. The codification movement cannot be accurately studied by comparing codes with just one or two models. The outcome would excessively simplify reality. Reality shows that codification is a diverse and complex process which resembles a challenging mosaic made up of many different codes.

[9]See e.g. MA Glendon, PG Carozza and CB Picker, *Comparative Legal Traditions. Texts, Materials, and Cases on Western Law* (Thomson/West, 2007) 241: 'In the civil law theory of sources of law, custom is regularly listed as a primary source, but routinely dismissed as of slight practical importance, except in Spain and some of the other Spanish-speaking countries.'

[10]See Masferrer, *La Codificación española* (n 5).

This issue certainly deserves attention, which – from my point of view – has not been given until recently. The present article aims to contribute to this scholarly cause. It only consists of a starting point. If this work manages to stimulate the spirit of jurists and legal historians who decide to study the specific scope of foreign influences – and therefore the actual weight of tradition – in legal institutions set out in our Codes, then the effort will have been worthwhile.

After the Introduction (I), the present article will explore the Spanish historiography on this matter in a European context, paying particular attention to Belgium and Romania (II). It will then provide some examples of the view of the Spanish civil code (1889) as a supposed denationalisation of law, namely the validity of extra-legal sources of law in the Spanish codification (III). I will finish with some concluding considerations (IV).

II. Codification as nationalisation or denationalisation of law: an overview of the Spanish historiography in the European context

The shift in the law from the eighteenth to the nineteenth centuries constitutes one of the most complex periods to understand and describe, both in Spain and throughout the West. The revolutions in North America (1776) and France (1789) led to the emergence of a new political framework, the liberal or constitutional, which promoted a juridical transformation, a renewal of the law which, according to some scholars, meant a rupture with the then existing one.

1. *Spain*

In Spain it is quite widely believed that both the Codification movement and the codification of the different branches of the law were primarily derived from the French model, as well as from other foreign Codes that our Codes' drafters had at their disposal when preparing the texts that would be sent to the legislature for discussion and, where appropriate, approval.

Such an idea clearly appears in the textbook entitled *History of Spanish Law* (I. Origin and evolution of the law), by Alfonso García-Gallo, who, after dealing with 'the fullness of national law' (Modern Age, 1474–1808) – in which period barely existed the concept of the 'nation' – defines or characterizes the contemporary period as 'the denationalization of the Spanish law' (since 1808). Such denationalisation was not only the result of 'cultural denationalization', but mainly of the 'imitation of the foreign law':

> The innovations that were introduced or attempted to introduce in the existing law, did not involve the more or less radical reform thereof; but its replacement by a new one. This, among the most exalted, was a purely rational creation based on the doctrinal lucubrations of the French philosophers of the 18th century, or in the systems of certain foreign thinkers of the 19th century. However, innovators usually tried to imitate and copy – rather than to seek inspiration or formation – the law of those countries that they believed to be ahead of progress. During the 19th century,

> French law was the preferred model by everyone in its diverse aspects. To a lesser extent, and especially in criminal matters, Italian law was resorted to also; and in a certain political aspect, the English one was also referred to. Later on, in the 20th century, a radical change of direction was conducted, abandoning the previous models in order to find new inspirations in German law. Finally, under the Second Republic, extremists tried to imitate in some aspects the Russian Communist law. With all of this, Roman law, which throughout the decades had been a source of inspiration for jurists, managed to lose the interest of these jurists, and its development fell in Spain in the most prostration.[11]

This general characterisation of the nineteenth-century Spanish legal system as 'denationalisation' did not prevent him from recognising that

> the civil code project of 1851 sought to introduce multiple changes, turning away from traditional law and following the French one and others; hence the reason why it was rejected. On the other hand, the code of 1888–1889 remained faithful to the ancient law, at least in the essential.[12]

Meanwhile, Galo Sánchez characterised the same period with the opposite expression, 'national law', highlighting 'the national nature of the laws, given now for the whole Spanish nation', while acknowledging that 'the influence of French law is not only seen regarding the legal content, but also in the technique of legislation and in the characteristics that it presents with regard to the scope of its application and its centralist spirit'.[13] The 'nationalisation' of the law also meant the end of the validity of a supranational law which was in force throughout the European Continent, the *ius commune*. With the promulgation of codes, Roman canon-law definitively lost its binding force after more than six centuries of an increased legal, doctrinal and jurisprudential role.[14] Such *ius commune* of a supranational origin did not seem compatible with a 'national' conception of law. With the promulgation of codes, the liberal Cortes achieved that which the absolute monarchs never could, that is, the final suppression of the *ius commune* as a normative and applicable source in the forensic practice. The stormy controversy

[11] A García-Gallo, *Manual de Historia del Derecho español I. Origen y evolución del Derecho* (1984) 123; as will be seen, Galo Sánchez, in his *Curso de Historia del Derecho* (1980), employed the expression 'Derecho nacional' when dealing with the nineteenth century (section VII, 175–80); a similar expression – though not identical – is used by Aquilino Iglesia Ferreirós, *La creación del Derecho. Una historia de la formación de un derecho estatal español* (1992) II ch 25 ('La creación del Derecho en el Estado nacional') 383–418.

[12] García-Gallo (n 11) 128.

[13] Sánchez (n 11) 175.

[14] On this matter, see, for example, Aniceto Masferrer and Juan A Obarrio, *La formación del Derecho foral valenciano. Contribución al estudio de las tradiciones jurídicas hispánicas en el marco del ius commune* (Dykinson, 2012).

between the royal/national law and the *ius commune* of the Enlightenment was left behind.[15]

Both García-Gallo and Sánchez were partially right, and their characterisations are consistent with their diverse approaches. Nevertheless, characterising or describing the evolution of the nineteenth-century law with the terms 'nationalisation' or 'denationalisation' fails to describe the richness and complexity of the historical reality itself. And, in fact, neither the 'nationalisation' meant the end of the influence of the *ius commune*, nor the 'denationalisation' necessarily implied renouncing the existing legal tradition. In this sense, it should be noted that, although codification ended with the legal validity of the *ius commune*, it collected much of that legacy in its precepts, largely contributing to its consecration and consolidation. The codification movement was the final result of the scientific treatment of some sources (Roman-canonical) which, although lacking in the eighteenth century the prestige they had enjoyed previously, constituted the basis upon which the new building was built, whose scaffold (notions, categories and principles) was less innovative than the historiography has sometimes suggested.[16] In this vein, even though I accept the term 'nationalisation' to refer to the fact that the validity of law could only derive from its approval by the whole nation, represented in Parliament, and that, as a consequence, the *ius commune* lost its legal validity or binding force, it would be unwise, nevertheless, to overlook the fact that the Codes, inasmuch as they consecrated the notions, categories and principles of the tradition of the *ius commune*, were of a 'supranational' flavour, and, at the same time – once integrated in the tradition of the *ius proprium* – took the guise of 'national' law.

It would be pointless, therefore, to hold that any influence or element arising from foreign models represented a 'denationalisation' of the law. We should examine in each case whether an alleged foreign influence could come from the

[15]On this matter, see Ramon Riaza, 'El Derecho romano y el Derecho nacional en Castilla durante el siglo XVIII' (1929) 12 *Revista de Ciencias Jurídicas y Sociales* 104; A Álvarez de Morales, *La Ilustración y la reforma de la Universidad en la España del siglo XVIII* (Madrid, 1971); Mariano Peset and José Luis Peset, *La Universidad española (siglos XVIII-XIX). Despotismo ilustrado y Renovación liberal* (Madrid, 1974); Mariano Peset, 'Derecho romano y Derecho real en las Universidades del siglo XVIII' (1975) 45 *Anuario de Historia del Derecho Español* 273; for an overview, see Santos M Coronas González, 'La literatura jurídica española del siglo XVIII' in J Alvarado (ed), *Historia de la literatura jurídica en la España del Antiguo Régimen* (Madrid, 2000) 527–74; and 'El pensamiento jurídico de la Ilustración en España' in Tomás de Montagut (ed), *Història del pensament jurídic* (Universitat Pompeu Fabra, 1999).

[16]On this matter, see Aniceto Masferrer, *Tradición y reformismo en la Codificación penal española*. (Universidad de Jaén, 2003); Aniceto Masferrer, 'La ciencia del Derecho penal en la Codificación decimonónica. Una aproximación panorámica a su contenido y rasgos fundamentales' in *Estudios de Historia de las ciencias criminales en España* (Dykinson, 2007) 273–349; Aniceto Masferrer, 'Codification of Spanish Criminal Law in the Nineteenth Century: A Comparative Legal History Approach' (2009) 4(1) *Journal of Comparative Law* 96.

doctrinal development of categories and principles of the *ius commune*, integrated in the tradition of *ius proprium* of several Spanish territories, rather than from a real transplant or adoption of an institution outside the peninsular tradition itself. In this regard, it should be examined to what extent, and despite the similarity of the articles concerning obligations and contracts between the French and Spanish civil code (and Italian, among others), these precepts did not imply much of a 'denationalisation' of the Spanish law as a consecration of a Spanish legal centuries-old tradition, thanks to the scholarly contributions of the French jurists Jean Domat (1625–96),[17] Henri François D'Aguesseau (1668–1751)[18] and Robert-Joseph Pothier (1699–1772).[19]

Describing the nineteenth-century law as 'nationalisation' or 'denationalisation' whilst forgetting the fact that codes were the final result of a supranational legal science, and that they consecrated notions, categories, principles and institutions whose validity was supranational and, at the same time – once integrated in the *iura propria* – autochthonous or national, constitutes an erroneous and ambiguous interpretation of the reality. Only the recognition of the close connection between codes and the *ius-commune* science makes sense of the terms 'nationalisation' and 'denationalisation' in this context, granting them their true scope and meaning, while qualifying and relativising their most literal sense.[20]

Perhaps it is precisely the poor and limited Spanish legal science of the eighteenth century which has contributed both to the overlooking of the close connection between codes and the tradition itself (including both the *ius commune* and *iura propria*), and to the overestimation of foreign models' influence in the Spanish codification process. Indeed, the Spanish legal science of the eighteenth century – and part of the nineteenth – was so poor that – as García-Gallo so eloquently stated – 'the new literature completely broke away from the tradition'.[21] Such 'detachment' between the new doctrine and tradition, reflecting the Spanish literature of the

[17]Jean Domat, *Les lois civiles dans leur ordre natural*, 3 vols (1689–1694).

[18]Henri F d'Aguesseau, *Oeuvres complètes du chancelier d'Aguesseau*, 13 vols (1759–1789); Jean M Pardessus edited a revised version in 16 volumes (1819).

[19]Robert Joseph Pothier, *Pandectae Iustinianeae in novum ordinem digestae*, 3 vols (1748–1752); Robert Joseph Pothier *Traité des obligations*, 2 vols (1761–64).

[20]In this regard, I could not agree more with Juan Baró Pazos, who concluded, in his book chapter 'La influencia del Código civil francés (1804) en el Código civil español (1889)' in Masferrer, *La Codificación española* (n 5) 114–17, that the influence of *Code civil* over the Spanish one was due to its Romanist character, because both states shared the same *ius commune* tradition; for the opposite view, see Manuel J Peláez Albendea, 'Le *Code* de 1804, le *Code* civil espagnol de 1889 et le principe de la liberté (Réception particulière a l'Espagne)' in Jean-Luc Chabot, Jean L, P Didier and J Ferrand (eds), *Le Code civil et les droits de l'homme*. Actes du Colloque international de Grenoble (L'Harmattan, 2005) 309–17; according to his opinion, the influence of the Digest or *Partidas* has been exaggerated:

'la rédaction de quelques-uns des articles du Code civil spagnol, dont on considère qu'elle provient du Digeste ou des Partidas (qui à 70% sont du droit romain), a été, en réalité, extraite du Code napoléonien, en adoptant le critère ou la solution romaniste' (310, 311, 315).

[21]García-Gallo (n 11) 129.

eighteenth and nineteenth centuries – unlike the French, German or Italian one – has not only made it difficult to appreciate the influence that tradition had in the new codified law, but has also provided, as a logical consequence, a rather generic, topical and gloomy picture regarding the true extent of foreign influences in the different Spanish codes. Likewise, later historiography has hardly addressed this issue, simply repeating and reiterating – sometimes even literally – statements made by some of the greatest commentators of the nineteenth century.

In this regard, textbooks explicitly state that the Codification movement was a European phenomenon[22] which would later spread into Latin America, just as the Spanish legal tradition in previous centuries had been distinctively European, thus enabling and possibly requiring the legal historian to apply a comparative approach.[23] Within Europe, handbooks highlight how the success of the French Revolution, and especially the promulgation of Napoleonic codes, erected the French law, that is, its Constitutions and Codes, in a model for other European countries.

That the idea of a modern liberal code was identified with France, and that French codes turned out to be the model for many European countries, is not a matter of dispute. The fact that this affected Spain is also indisputable. Spanish handbooks give clear evidence of this fact, highlighting in particular the role of the *Code civil* (1804).[24] Even though the Napoleonic civil code was not the only one approved – since it was followed by the criminal, commercial and procedural ones (civil and criminal) – 'none, however, had such importance and quality as the *Code civil*, whose influence throughout continental Europe and later through several American countries was vast and lasting'.[25] In such a way,

[22]Francisco Tomás y Valiente, *Manual de Historia del Derecho Español* (Tecnos, 1995) 468; José Antonio Escudero, *Curso de Historia del Derecho. Fuentes e instituciones político-administrativas* (2003) 888; José Antonio Alejandre García, *Temas de Historia del Derecho: Derecho del constitucionalismo y codificación* (1978) 110; Tomás de Montagut Estragués and Carlos J Maluquer, *Història del dret español* (Edicions de Universitat Oberta de Catalunya, 1997) 233; Jesús Lalinde Abadía, *Iniciación histórica al Derecho español* (1970) 241; Galo Sánchez, *Curso de Historia del Derecho* (Instituto Editorial Reus, 1960) 175; Josep Mª Font Rius, *Apuntes de Historia del Derecho español (tomadas de las explicaciones ordinarias de la Cátedra*) (1969) 326, 340; Mariano Peset, *Lecciones de Historia del Derecho* (2000) ch. 24 ('Codificación liberal'); Mariano Peset, *Historia de las Constituciones y los Códigos* (1997); Santos M Coronas González, *Manual de Historia del Derecho español* (1996) 420–22; Aniceto Masferrer, *Spanish Legal Traditions: A Comparative Legal History Outline* (Dykinson, 2012) 317.

[23]On this matter, see Aniceto Masferrer, 'Spanish Legal History: A Need for its Comparative Approach' in Kjell Å Modéer and Per Nilsén (eds), *How to Teach European Comparative Legal History* (Workshop, Faculty of Law, Lund University, 19–20 August 2009) (Juristförlaget, 2011) 107–42.

[24]See, for example, Jesús Lalinde Abadía, *Derecho Histórico Español* (Juristförlaget, 1974) 100; Tomás y Valiente (n 22) 478–81; Escudero (n 22) 888–89; De Montagut Estragués and Maluquer (n 22) 234–35; Peset, *Lecciones de Historia* (n 22) 339–41; Peset, *Historia de las Constituciones* (n 22) 66–69.

[25]Tomás y Valiente (n 22) 480.

Escudero and Peset synthesise the important role of the *Code civil* as a model in the European Codification movement in general and in Spain in particular:

> The high scholarly profile of this legal body and refined literary concepts … explain the rapid spread of the Codification process both in France and Europe. There, the promulgation of the *Code de Commerce,* the *Code de procedure* and the *Code Pénal*, turned in a few years' time that country into the leader of the new bourgeois codification in the world. The *Code civil* was the main and sometimes literal model of those made by other countries during the 19th century.[26]
>
> The French and German codes are the most remarkable of the European codification. Both are an example for many, for different nations; they represent two versions of the treatment that Civil law and property in the new Europe would receive. The influence of the French one over projects and the Spanish civil code is noticeable.[27]

Napoleonic codes thus became the model with which modern liberal codification was initiated in Europe in the early nineteenth century, as Clavero has highlighted with the following terms:

> France even provided us with a textual model … At this stage, regarding its most specific content, what was understood by codes was the idea of more tangible texts. Those promulgated in France by Napoleon were understood in this way. It did not simply involve, under the Constitution of 1808, their translation and preparation for their promulgation in Spain, although this was not accomplished. It may also be the case that another idea of Code, having existed in France itself, was not considered. The codification program had actually emerged in the French revolution as a precise requirement of the declaration or recognition of rights, mainly individual ones, and the corresponding demand for the abolition of all kinds of estate orders and privileges, as well as traditional corporations.[28]

In describing the Spanish case, handbooks make reference to the French influence in the various codifications, with particular emphasis on the Civil and Commercial versions. Regarding Civil codification, there are explicit references to the French influence in the Projects of 1821,[29] 1832,[30] 1851,[31] as well as – by means

[26]Escudero (n 22) 889.
[27]Peset, *Lecciones de Historia* (n 22) 339; see also Peset, *Historia de las Constituciones* (n 22) 66.
[28]Bartolomé Clavero, *Manual de Historia Constitucional de España* (Alianza Editorial, 1989) 22.
[29]Tomás y Valiente (n 22) 539; Escudero (n 22) 905; Enrique Gacto Fernández, Juan A Alejandre García and José Mª García Marín, *Manual básico de Historia del derecho (temas y antología de textos)* (Alianza Editorial, 2005) 424; José Sánchez Arcilla, *Historia del Derecho I. instituciones político-administrativas* (Dykinson, 1995) 987; Peset, *Lecciones de Historia* (n 22) 340; Peset, *Historia de las Constituciones* (n 22) 84; Coronas González (n 22) 472.
[30]Font Rius (n 22) 359; Coronas González (n 22) 472.
[31]Lalinde Abadía, *Derecho histórico español* (n 24) 101; Lalinde Abadía, *Iniciación histórica* (n 22) 241; Font Rius (n 22) 360; Tomás y Valiente (n 22) 550; Gacto Fernández,

of the latter one – the civil code of 1888/89.[32] Along with Civil codification, commercial codification was – according to handbooks, apparently reflecting the course of historiography – where the French influence was significantly more noticeable, especially in the Code of 1829[33] (the basis for the Code of 1885), albeit 'still taking into account Castilian law'[34] as well as 'traditional Mediterranean maritime law'.[35]

Regarding Criminal codification, reference is made to the influences when dealing with the Codes of 1822 and 1848. Concerning the first one, handbooks echo – if not textually reproduce – Joaquín Francisco Pacheco's well-known statement, which sought to show that the Spanish code had 'some of the *Fuero Juzgo* and the *Partidas*, wrapped with the Napoleonic code's character'.[36] As regards the Code of 1848, it had been often noted that the French influence came about through the Brazilian Code of 1830, which served as the main model for drafters.[37] Recent historiography has shown that the influence of the Napoleonic criminal code radically decreased after the promulgation of the criminal Code of Brazil (1830), whose main drafter – called Bernardo Pereira de Vasconcelos – drew much more heavily upon the Austrian criminal code (1803) than the French one (1810).[38] According to this view, the French model was overcome by the

Alejandre García and García Marín (n 29) 426; Sánchez Arcilla (n 29) 987; Peset, *Lecciones de Historia* (n 22) 351; Peset, *Historia de las Constituciones* (n 22) 85–86; Coronas González (n 22) 472–73.

[32]Lalinde Abadía, *Derecho histórico español* (n 24) 102; Lalinde Abadía, *Iniciación histórica* (n 22) 242; Font Rius (n 22) 361; Tomás y Valiente (n 22) 550; Escudero (n 22) 907; Gacto Fernández, Alejandre García and García Marín (n 29) 436; Peset, *Lecciones de Historia* (n 22) 357; Peset, *Historia de las Constituciones* (n 22) 92; Coronas González (n 22) 475.

[33]Lalinde Abadía, *Derecho histórico español* (n 24) 102; Lalinde Abadía, *Iniciación histórica* (n 22) 243; Font Rius (n 22) 358; Tomás y Valiente (n 22) 508; Escudero (n 22) 899; Gacto Fernández, Alejandre García and García Marín (n 29) 405; Peset, *Lecciones de Historia* (n 22) 341; Sánchez Arcilla (n 29) 979; Coronas González (n 22) 467; De Montagut Estragués and Maluquer (n 22) 237.

[34]Lalinde Abadía, *Derecho histórico español* (n 24) 102; Lalinde Abadía, *Iniciación histórica* (n 22) 243.

[35]Font Rius (n 22) 358.

[36]Joaquín Francisco Pacheco, *Código penal concordado y comentado* (Madrid, 1856) I 54; see e.g. Lalinde Abadía, *Derecho histórico español* (n 24) 103; Lalinde Abadía, *Iniciación histórica* (n 22) 243; Font Rius (n 22) 356; Tomás y Valiente (n 22) 497; Escudero (n 22) 894; Sánchez Arcilla (n 29) 974; Peset, *Lecciones de Historia* (n 22) 350; Peset, *Historia de las Constituciones* (n 22) 95; Iglesia Ferreirós (n 11) 477; Coronas González (n 22) 464.

[37]See, for example, Lalinde Abadía, *Derecho histórico español* (n 24) 103; Lalinde Abadía, *Iniciación histórica* (n 22) 244; Tomás y Valiente (n 22) 499; Escudero (n 22) 895; Sánchez Arcilla (n 29) 976; Gacto Fernández, Alejandre García and García Marín (n 29) 398–99; Peset, *Historia de las Constituciones* (n 22) 95–96; Coronas González (n 22) 465.

[38]On this matter, see Bernardino Bravo Lira, 'Fortuna del Código penal español de 1848. Historia en cuatro actos y tres Continentes: de Mello Freire y Zeiller a Vasconcelos y Seijas Lozano' (2004) 74 *Anuario de Historia del Derecho Español* 23, esp 40ff;

superiority of the rational constructions of the Central European ones.[39] A code is never a pure national product.[40]

Finally, it should be added that Spanish legal history handbooks hardly include anything on the influence of Procedural codes[41] and mortgage law, which does not reflect the rigorous studies of the Spanish historiography on these areas.[42]

Upon accepting the premise concerning the influence that the Napoleonic legal work had as a 'model code' throughout Europe in general and Spain in particular, the scope of that particular influence should be considered, together with influences emanating from other Codes (European and American). In addition, the weight of the tradition in the elaboration and final approval of the various codes should be carefully analysed. In this vein, dealing with the Spanish civil code, some authors refer to the influence of the tradition of 'Castilian law' or 'not failing to take into account Castilian law',[43] to having 'largely respected Castilian law',[44] to the 'scientific commitment between old Castilian law and the advances of the French code',[45] to 'few doses of Castilian law',[46] to the 'elements of Castilian law',[47] to 'Codification not being a foreign transcript, but dealing with traditional Spanish law'[48] etc.

This issue, that is, the specific scope of the several foreign influences – and not just the French one – and the weight of tradition itself in Codification, certainly requires a further study. The starting point of which should be a thorough analysis of historiography and doctrinal sources.

Bernardino Bravo Lira, 'Bicentenario del Código penal de Austria. Su proyección desde el Danubio a Filipinas' (2004) 26 *Revista de Estudios Histórico-Jurídicos de Valparaíso* 140.

[39]Bravo Lira, 'Fortuna del Código penal' (n 38) 57. There the author resorts to the thesis of André-Jean Arnaud, *Origines doctrinelles du code civil francais* (Paris, 1969): 'Francia no estaba preparada en su conjunto para las construcciones racionalistas que gozaban de gran favor en Europa central. Los juristas franceses seguían adheridos al viejo plan tripartito de las *Instituciones*, con las antedichas aproximaciones al espíritu moderno. Otro tanto hicieron los codificadores.'

[40]Bravo Lira, 'Fortuna del Código penal' (n 38) 24.

[41]On the French influence over criminal procedure (*Ley de Enjuiciamiento Criminal*, in force from 1872 to 1879), see Lalinde Abadía, *Derecho histórico español* (n 24) 103; Lalinde Abadía, *Iniciación histórica* (n 22) 245.

[42]Margarita Serna Vallejo, *La publicidad inmobiliaria en el derecho hipotecario histórico español* (Madrid, 1996); concerning the codification of civil and criminal procedure, see Enrique Álvarez Cora, *La arquitectura de la justicia burguesa. Una introducción al enjuiciamiento civil en el siglo XIX* (Madrid, 2002); Paz Alonso Romero, *Orden procesal y garantías entre Antiguo Régimen y constitucionalismo gaditano* (Madrid, 2008); Isabel Ramos Vázquez, 'La Comisión de Justicia y el Proyecto de Reglamento para las causas criminales de 1811' (2009) 5 *Revista de Sociales y Jurídicas* supp 92.

[43]Lalinde Abadía, *Derecho histórico español* (n 24) 102.

[44]Lalinde Abadía, *Iniciación histórica* (n 22) 242.

[45]Escudero (n 22) 907.

[46]Peset, *Lecciones de Historia* (n 22) 357; Peset, *Historia de las Constituciones* (n 22) 92.

[47]Peset, *Historia de las Constituciones* (n 22) 85.

[48]Lalinde Abadía, *Iniciación histórica* (n 22) 240.

As is well known, Napoleonic codification constituted the first triumph of the modern codification technique. Indeed, within a few years, Napoleon managed to promulgate almost all of French law (Civil code, 1804; Civil procedure code, 1806; Commercial code, 1807; Criminal procedure code, 1808; Criminal code, 1810), and its codes set themselves as the first and foremost model of the European continental tradition.

While some countries opted – either on grounds of conquest (or political domain) or by mere persuasion – for the full adoption of the Napoleonic codes, others, such as Spain – as well as the Netherlands, Italy, Romania and Portugal – drafted their Codes drawing on them to a greater or lesser extent.[49]

While the total or partial literal adoption of a Code is readily detectable, the analysis of the specific scope of a Code's inspiration (French) over another (Spanish) is not so easy to discern. In any case, Spanish historiography, perhaps following the disregard shown by the legal literature of the nineteenth century, has not addressed this issue, but has instead contributed to the general consensus that the Spanish codification movement is largely (albeit not exclusively) indebted to the French model.

It is true that, in recent years, works starting to pay attention to the French influence in the Spanish codification of civil law have been published.[50] Moreover, previous works on the codification of particular civil-law institutions might be helpful in ascertaining the scope of the French and other foreign influences over the Spanish civil code. In fact, rigorous works on the codification of family law[51] – including the dowry,[52] contracts[53] and successions[54] – led a legal historian to state that the Spanish civil code was considerably indebted to

[49]On the territorial expansion of the French civil code through conquest, persuasion or inspiration, see J Limpens, 'Territorial Expansion of the Code' in Bernard Schwartz (ed), *The Code of Napoleon and the Common-Law World* (New York University Press, 1956, The Lawbook Exchange, 1998) 92–109.

[50]For a general overview, see Baró Pazos (n 20) 53–128; see also Carlos Petit, 'España y el *Code* Napoleon' in (2008) 41:4 *Anuario de Derecho Civil* 1774–1840; Peláez Albendea (n 20) 309–17.

[51]Manuel A Bermejo Castrillo, *Entre Ordenamientos y Códigos. Legislación y doctrina sobre familia a partir de las Leyes de Toro* (Madrid, 2009); Enrique Gacto, 'Sobre el modelo jurídico del grupo familiar en el siglo XIX' (1998) 25 *Historia. Instituciones. Documentos* 219.

[52]J García Martín, *Costumbre y fiscalidad de la dote. Las Leyes de Toro, entre Derecho Común, Germánico y Ius Commune* (Madrid, 2004).

[53]On this matter, see the works by Enrique Álvarez Cora, *La teoría de los contratos en Castilla (siglos XIII–XVIII)* (Madrid, 2005); *La codificación de los contratos de compraventa y permuta* (Madrid, 2008).

[54]Francisco L Pacheco Caballero, 'Derecho histórico y Codificación. El derecho sucesorio' (2012) 82 *Anuario de Historia del Derecho Español* 134; R Núñez Lagos, 'El derecho sucesorio ante la tradición española y el Código civil' (1951) 189 *Revista general de legislación y jurisprudencia* 385.

its own legal traditions.[55] The regulation of property seems to have been particularly influenced by the French model.[56]

Concerning the criminal law domain, in the last few years, scholars have explored the French and other foreign influences over the Spanish Codification. Some works present a general overview of the French influence in the criminal-law codification in Spain,[57] whereas others contain a historiographical approach to foreign influences in specific criminal codes (particularly, those of 1822[58] and 1848–1850[59]). Some works went in depth in reconstructing the particular extent of foreign influences in the codification of particular criminal law institutions.[60] In doing so, the contribution of some exhaustive monographs on the criminal code of 1848–50 has been remarkable.[61] All of these scholarly works constitute a mere starting point of a line of research in progress.[62] There is still much to be done.[63] Despite this, obtained results are

[55]Baró Pazos (n 20) 95–102.

[56]This is the view of Mariano Peset in his works: 'Acerca de la propiedad en el *Code*' (1976) LII (515) *Revista Crítica de Derecho Inmobiliario* 879; 'Derecho y propiedad en la España liberal' (1976–1977) I(5–6) *Quaderni Fiorentini* 463; *Dos ensayos sobre la historia de la propiedad de la tierra* (Madrid, 1982); see also Bartolomé Clavero, 'La propiedad considerada como capital, en los orígenes doctrinales del derecho actual español' (1976–77) 5–6 *Quaderni Fiorentini* I 509; JL de los Mozos, 'La formación del concepto de propiedad que acoge el Código Civil' (1992) 68 *Revista Crítica de Derecho Inmobiliario* 581; Jorge Correa Ballester, 'La propiedad liberal en los manuales del derecho civil' in *Las Universidades Hispánicas de la Monarquía de los Austrias al Centralismo Liberal* (Salamanca, 2000) 91–110; more recently, Margarita Serna Vallejo, 'Apuntes para la revisión del concepto de propiedad liberal en España' (2011) 81 *Anuario de Historia del Derecho Español* 469–91.

[57]Aniceto Masferrer, 'The Napoleonic Code pénal and the Codification of Criminal Law in Spain' in *Le Code penal. Les metamorphoses d'un modèle 1810–1820. Actes du colloque international Lille/Gand 16–18 décembre 2012*. Textes réunis et présentés par Chantal Aboucaya et Renée Martinage (Centre d'Histoire Judiciaire, 2012) 65–98; Aniceto Masferrer, 'La Codificación española y sus influencias extranjeras. Una revisión en torno al alcance del influjo francés' in Masferrer, *La Codificación española* (n 5) 19–43.

[58]Juan B Cañizares-Navarro, 'El Código Penal de 1822: sus fuentes inspiradoras. Balance historiográfico (desde el s XX)' (2013) 10 *GLOSSAE. European Journal of Legal History* 108; Isabel Ramos Vázquez and Juan B Cañizares-Navarro, 'La influencia francesa en la primera Codificación española: el Código penal francés de 1810 y el Código penal español de 1822' in Masferrer, *La Codificación española* (n 5) 153–212; A Agüero and M Lorente, 'Penal enlightenment in Spain: from Beccaria's reception to the first criminal code' (2012) *Forum Historiae Iuris*, http://www.forhistiur.de/zitat/1211aguero-lorente.htm (accessed 23 September 2016).

[59]Aniceto Masferrer and Mª Dolores del Mar Sánchez González, 'Tradición e influencias extranjeras en el Código penal de 1848. Aproximación a un mito historiográfico' in Masferrer, *La Codificación española* (n 5) 213–74.

[60]See e.g. Isabel Ramos Vázquez, 'La individualización judicial de la pena en la primera codificación francesa y española' (2014) 84 *Anuario de Historia del Derecho Español* 315.

[61]Emilia Iñesta Pastor, *El Código penal de 1848* (Tirant lo blanc, 2010); Mª Dolores del Mar Sánchez González, *Los Códigos Penales de 1848 y 1850* (Madrid, 2004).

already comparable to those of the criminal historiography of other European jurisdictions like Italy[64] and Germany.[65]

[62]Aniceto Masferrer (ed), *La Codificación penal española. Contribución al estudio de sus influencias extranjeras, y de la francesa en particular* (Aranzadi–Thomson Reuters, forthcoming 2017).

[63]'The French Influence in the Western Criminal Law Codification' is the title of a research project (in progress) in which several European and American legal scholars are involved. Hopefully its first results will come out soon: Aniceto Masferrer (ed), *The Western Codification of Criminal Law: The Myth of its Predominant French Influence Revisited* (Springer, forthcoming 2017).

[64]A Cavanna, 'Codificazione del diritto italiano e imperialismo giuridico francese nella Milano napoleonica. Giuseppe Luosi e il diritto penale' in *Ius Mediolani. Studi di Storia del diritto milanese offerti dagli allievi a Giulio Vismara* (Milano, 1996) 659–760; A Cavanna, *La codificazione penale in Italia. Le origine lombade* (Milano, 1975); M da Passano, 'La codification du droit pénal dans l'Italie jacobine et napoleonienne' in *Revolutions et justice en Europe. Modeles francais et traditions nationales (1780–1830)* (L'Harmattan, 1999) 85–99; E Dezza, 'Un critico milanese della codificazione penale napoleonica. Pietro Mantegazza e le Osservazione criminaledel cessato Regno d'Italia (1814)' in *Ius Mediolani. Studi di Storia del diritto milanese offerti dagli allievi a Giulio Vismara* (Milano, 1996) 909–77.

[65]Christian Brandt, *Die Entstehung des Code pénal von 1810 und sein Einfluß auf die Strafgesetzgebung der deutschen Partikularstaaten des 19. Jahrhunderts am Beispiel Bayerns und Preußens* (Peter Lang, 2002); J Engelbrecht, 'The French Model and German Society: The Impact of the Code Penal on the Rhineland' in *Revolutions et justice en Europe. Modeles francais et traditions nationales (1780–1830)* (L'Harmattan, 1999) 101–107; E Feherenbach, *Traditionale Gesellschaft und revolutionäres Recht: Die Einführung des Code Napoleón in den Rheinbundestaaten* (Göttingen, 3rd edn 1983); K Häfner, *Die Strafen des französischen Rechtes und ihr Vollzug, ein Grundriss* (Gieβen, 1936); Karl Härter, 'Kontinuität und Reform der Strafjustiz zwischen Reichsverfassung und Rheinbund' in Heinz Duchhardt und Andreas Kunz (eds), *Reich oder Nation*? *Mitteleuropa 1780–1815* (Mainz, 1998) 219–78; Karl Härter, 'Von der "Entstehung des öffentlichen Strafrechts" zur "Fabrikation des Verbrechens". Neuere Forschungen zur Entwicklung von Kriminalität und Strafjustiz im früheneuzeitlichen Europa' (2002) 1 *Rechtsgeschichte. Zeitschrift des Max Planck-Institut für europäische Rechtsgeschichte* 159; F Hartmann, *Der Einfluß des französischen Rechts auf das Preußische Strafgesetzbuch von 1851 (Allgemeiner Teil)* (Göttingen, 1923); S Kleinbreuer, *Das Rheinische Strafgesetzbuch. Das materielle Strafrecht und sein Einfluß auf die Strafgesetzgebung in Preußen und im Norddeutschen Bund* (Bonn, 1999); KJA Mittermaier, 'Blicke auf den Zustand der Ausbildung des Criminalrechts in Frankreich' (1831) 3 *Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes* 414–43; KJA Mittermaier, 'Über den neusten Zustand der Gefängnisse in England und Frankreich' (1820) 4, article nr. XXV, *Neues Archiv des Criminalrechts* 571–95; EJ Paraquin, *Die französische Gesetzgebung. Das Strafgesetzbuch,* vol V (München, 1861); W Schubert, *Französisches Recht in Deutschland zu Beginn des 19. Jahrhunderts. Zivilrecht, Gerichtsverfassungsrecht und Zivilprozeßrecht* (Köln 1977); W Schubert, *Der Code pénal des Königreichs Westphalen von 1813 mit dem Code pénal von 1810 im Original und in deutscher Übersetzung* (Peter Lang, 2001); L von Stein, *Geschichte des französischen Strafrechts und des Prozesses* (Basel, 1875; Aalen Verlag, 1968); K Volk, 'Napoleon und das deutsche Strafrecht' [1991] *JuS* 281ff.

When analysing the extent of the French influence in the Spanish codification movement, it is necessary to distinguish three different levels: (1) the inspiration arising out of the 'modern idea of Code', an area in which French codes enjoyed an indisputable – and undisputed – authority up to the mid-nineteenth century; (2) the 'formal (or structural) influence', which could have been followed to a greater or lesser extent by other European codes (including the Spanish one) and (3) a 'substantive influence' in the strictest sense, which allows the identification of the extent to which notions, principles and institutions from Spanish codes were inspired by those of the French model, and whether they constituted an autochthonous legacy (or French itself) or the product resulting from the development of institutions coming from the *ius commune*, of a supranational scope, provided with validity and integrated into the *iura propria* of several European territories.[66]

Often, the repeated and accepted cliché and commonplace – regarding the extent of the French influence over the Spanish codification movement – has been based on the opinion consigned by a commentator of a nineteenth-century Code, sometimes without much of a scientific basis or offering a slightly reductionist view of the French influence. Moreover, along with the references made to the French codification's influence, studies should also render a timely account of other foreign influences, in order to properly contextualise the French influx within the diverse foreign influences. Otherwise, it would lack any rigour, for example, to talk about the French influence of the Criminal code of 1848, without making reference to the influence of the Brazilian Criminal code of 1830, despite it being true that the French influence also arose through it. It is no way intended to deny nor reject the Napoleonic codes' influence in the Spanish codification movement, but I do think that its particular scope should be more accurately analysed. In fact, several studies dealing with concrete legal and criminal institutions of the eighteenth and nineteenth centuries indicate that in Spain, the French model exerted a smaller influence than in other European countries such as Germany or Italy.[67]

Let us return to the province of civil law. In Spain, unlike other countries where the Napoleonic Civil code was adopted for either military reasons – of conquest (being imposed in part of Germany, Belgium, Luxemburg, Italy – Parma, Plasencia and Guastalla – etc.) – or persuasive reasons (freely choosing to literally approve it in Westphalia, Hanover, Baden, Warsaw, certain Swiss cantons, etc.), the *Code civil* became just an inspiring source,[68] as some countries did in Europe (Greece, 1827; Netherlands, 1838; Italy, 1865; Romania, 1865; Portugal, 1867)[69] and America (Louisiana, 1808, 1825; Perú, 1852; Brasil: *Esboço* de Teixeira Freitas, 1859–67,

[66]Masferrer, 'The Napoleonic Code pénal' (n 57) 74–98.
[67]This is what I showed in my book entitled *La inhabilitación y suspensión del ejercicio de la función pública en la tradición penal europea y anglosajona. Especial consideración a los Derechos francés, alemán, español, inglés y norteamericano* (Servicio de Publicaciones del Ministerio del Interior, 2009) (awarded the National Prize Victoria Kent 2008).
[68]Petit (n 50) 1801ff.
[69]See n 32.

1916; Chile, 1855; Mexico: Estado de Oaxaca, 1827–29, 1852; Ecuador, 1858, 1860; Haiti, 1826; Bolivia: Code of Santa Cruz, 1830, 1845; Costa Rica, 1841; Venezuela, 1867; Argentina; 1869),[70] among other territories.[71]

To note that a Spanish code received 'basic inspiration from the Napoleonic code',[72] or that it presents 'the cover of the … Napoleonic model',[73] are accurate but very basic and generic statements – a characteristic of handbooks – and provides nothing on the specific scope of this influence. This requires detailed and rigorous analysis that historiography – with the abovementioned exceptions[74] – has hardly carried out.

Perhaps some time ago the claim stating that 'it is not the duty of the historian, but of the civil lawyer to analyse and assess the Code's content',[75] could have been accepted. The same could be said regarding the Criminal, Commercial and Procedural lawyer. But the truth is that after almost two centuries since the enactment of the first Spanish code (1822), it is not beneficial to have hardly studied the extent of foreign influences, as well as the weight of the autochthonous tradition. It is as if the idea whereby Spanish codification is indebted to the French one, regardless of the extent to which this was so, was valid. The Spanish legal tradition is too rich, complex and diverse to infer that the French influence simply standardised it. Despite it being true that French and Spanish traditions may well have shared common traits and elements, there is no doubt that they also present their own legal distinctiveness as a consequence of their cultural, socio-economic and political diversity.

The Spanish civil code (1889) contained both elements from foreign codes (French 1804,[76] Italian 1865,[77] Belgian,[78] Portuguese,[79] Mexican 1852,[80]

[70]Guzmán Brito, 'La influencia' (n 8) 27–60; see also Parise (n 8) 331–54.
[71]In the Near East, Africa, Eastern Asia, some states of North America, Canada (Quebec), some former French colonies (e.g. Haiti, 1816, 1825), Dominican Republic (1825), Japan, etc. On the latter, see Jean-Louis Halpérin and N Kanayama, *Droit japonais et droit français au miroir de la modernité* (Dalloz, 2007); Rafael Domingo Oslé, 'Estudio preliminar' in R Domingo and N Hayashi, *Código civil japonés* (Madrid, 2000) 19–50, 19ff; see also Baró Pazos (n 20) 60–61.
[72]Font Rius (n 22) 361.
[73]*Ibid*, 356.
[74]See the references in n 50.
[75]Tomás y Valiente (n 22) 550.
[76]See the references at n 50.
[77]Juan Baró Pazos, *La codificación del derecho civil en España* (1808–1889) (Universidad de Cantabria, 1993) 287.
[78]F Laurent, *Principes de Droit civil* (3rd edn, 33 vols, Brussels-Paris, 1869–78); P Salvador Coderch and LlM Josep Santdiumenge, 'La influencia del Avant-Projet de revisión du *Code* civil belga de François Laurent en el Código civil español de 1889' in *Centenario del Código civil. Asociación de profesores de derecho civil* (Madrid, 1990) II 1927–65; on Laurent and his project for a new civil code, see Dirk Heirbaut, 'Een hopeloze zaak François Laurents ontwerp van burgerlijk wetboek voor België' in [2013] *Pro Memorie* 261.
[79]Carlos Petit, 'España y el *Código civil portuguez* (1867)' (2013) 66 *Anuario de Derecho Civil* II 525.
[80]Baró Pazos (n 77) 289–90.

Argentinean 1869,[81] Chilean 1855,[82] etc., as appropriate) and from its own tradition. To unravel the tradition of the reform, as well as the autochthonous legacy of the foreign, is an unavoidable task of the legal historian, and should not be left to civil, commercial, procedural and criminal lawyers, unless they are willing to study in depth legal transplants' impact,[83] or use the *Kulturtransfer* or *transferts culturels*' theory. This methodology emerged within the Franco-German geographical context at the end of the last century in order to analyse the ways through which foreign elements can be adopted in a determined society, noting how they change in the course of the adoption process.[84] Such methodology is particularly useful when it comes to carrying out a comparative study in a period which, as the French revolution and the Napoleonic stage, had European or transnational effects. Although this theory, merged in the philological and historical-cultural sphere, has been employed in order to study the aforementioned stage,[85] there are already studies that show their usefulness in comparative legal history.[86]

The supposed link between the civil-law codification and nationalisation of law needs to be carefully scrutinised in each jurisdiction.[87] Whereas in some countries their civil codes might reflect more or less faithfully their own legal tradition, others regard their codes as foreign texts which are all but an expression of their own legal tradition. In the European context, Belgium and Romania are paramount.

[81]V Tau Anzoátegui, *La codificación en la Argentina 1810–1870. Mentalidad social e ideas jurídicas* (Buenos Aires, 1977).

[82]A Guzmán Brito, *Andrés Bello codificador. Historia de la fijación y codificación del derecho civil en Chile* (Santiago, 1982).

[83]On this matter, see Alan Watson, *Legal Transplants* (Edinburgh, 1974; Athens GA, 1993, 2nd ed); for the opposite view, see Pierre Legrand, 'The Impossibility of "Legal Transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111; Watson's answer to Pierre Legrand can be seen in A Watson, 'Legal Transplants and European Private Law' (2000) 4(4) *Electronic Journal of Comparative Law*. www.ejcl.org/ejcl/44/44-2.html

[84]M Espagne and M Werner, 'Deutsch-französischer Kulturtransfer im 18 und 19 Jahrhundert. Zu einem neuen interdisziplinären Forschungsprogramm des CNRS' (1985) 13 *Francia: Forschungen zur westeuropäischen Geschichte* 502; M Espagne and M Werner, 'La construction d'une référence culturelle allemande en France: genèse et histoire (1750–1914)' (1987) 42 *Annales. Économies, Sociétés, Civilisations* 969; Michel Espagne, *Les transferts culturels francoallemand* (Presses Universitaires de France, 1999).

[85]See e.g. R Reichardt, 'Die Französische Revolution als Maßstab des deutschen "Sonderweges"? Kleines Nachwort zu einer großen Debatte' in Jürgen Voss (ed), *Deutschland und die Französische Revolution* (München, 1983) 323–27.

[86]See, for example, Martijn van der Burg, 'Cultural and Legal Transfer in Napoleonic Europe: Codification of Dutch Civil Law as a Cross-national Process' (2015) 3(1) *Comparative Legal History* 85.

[87]See e.g. Heikki Pihlajamäki, 'Private Law Codification, Modernisation and Nationalism: A View from Critical Legal History' (2015) 1(2) *Critical Analysis of Law* 135.

2. *Belgium*

Belgium is a relatively young country. It came into existence as an independent state in 1830, when the Southern part of the then United Kingdom of the Netherlands seceded. From a legal perspective, before 1830, Southern Netherlands – called Belgium after that year – went through different periods (Middle Ages, Early Modern period – end of the fifteenth century to 1795; French period – 1795 to 1815 and Dutch period –1815 to 1830).[88] In the medieval period – as Dirk Heirbaut states,

> [i]t is hard to see how a "Belgian" legal tradition could have existed in the autonomous principalities. There was no political unity between them and, thus, no unified law. Even within each of these principalities, there was no common legal system. Medieval law in the Southern Netherlands was largely customary and each place had its own customs and, thus, its own laws.[89]

Along with the variety of local customs, the presence of municipal legislation and the reception of *ius commune* from the thirteen century onwards should also be noted.[90] In the early modern period political unity did not bring with it legal unity. In 1795 the 'French Period' started, the Southern Netherlands was annexed to France under Napoleon, resulting in the main legal consequence that all Napoleonic codes and other reforms were introduced to the Southern Netherlands.[91] After the French occupation (1814), the Southern Netherlands entered into the newly-created United Kingdom of the Netherlands (under William I of the House of Orange), but this lasted only a few years, since in 1830 the South – more French and practically oriented than the North – seceded.

After this brief description of the history of Belgium, one may ask whether there was a Belgian legal tradition before Belgian independence in 1830. According to a leading Belgian scholar the answer is no.[92] Interestingly enough, he gives the same answer as to whether a Belgian legal tradition existed after Belgian independence in 1830. He argues that after the Belgian Revolution – whose major legal consequence was the approval of the Constitution (1831) – Belgium was not able to get rid of the French influence. In others words, the political independence did not lead to the making of a Belgian legal tradition. Heirbaut explains it as follows:

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[88]Dirk Heirbaut, 'The Belgian Legal Tradition: Does It Exist?' in H Bocken, W De Bondt and M Kruithof (eds), *Introduction to Belgian law* (Kluwer Law International, forthcoming 2016).
[89]*Ibid*.
[90]On this matter, see Dirk Heirbaut and Jean-François Gerkens, 'In the Shadow of France: Legal Acculturation and Legal Transplants in the Southern Netherlands/Belgium' in E Dirix and Y-L Leleu (eds), *The Belgian Reports at the Congress of Washington of the International Academy of Comparative Law* (Bruylant, 2011) 3–34.
[91]*Code civil*, 1804; Judicial organisation, 1800; *Code de procédure civile*, 1806; *Code de commerce*, 1807; *Code d'Instruction criminelle*, 1808; and *Code pénal*, 1810.
[92]Heirbaut (n 88).

> The result of this was that during most of the nineteenth century independence of the legal system was further away than ever. The judicial organisation still ran along Napoleonic lines. There were few changes to the French codes. Most attempts at revising them failed.[93]

And later on, he concluded with a radical paragraph:

> The country most faithful to Napoleon's codes, or, a French province, these expressions neatly sum up Belgium during the nineteenth century. Only a few changes to the French codes were made. Even these changes should not be overestimated and be seen as the embryonic developments of a legal tradition of its own. They were made only when necessary. Besides, some of them were not very Belgian. Laurent was a native of Luxembourg, and many other more or less original legal thinkers, like Haus were of German origin. It is hard to see how a Belgian legal tradition could have come into existence with only French codes and foreign scholars to nurture it. Paradoxically, throughout the nineteenth century Belgium's highest magistrates paid lip service to the country's old legal traditions and its great jurists of the past, as if to compensate for a reality which went completely against their discourse.[94]

The current situation of the Belgian law does not seem to have changed much regarding the making of a national legal culture. In fact, two regional legal cultures have emerged, one in Flanders (the Dutch-speaking part of Belgium), and the other in Wallonia (the French-speaking part of Belgium). And since '[d]ifferences will only grow stronger in the future', Heirbaut concluded his work as follows:

> A Belgian legal tradition does not exist. Before the coming of the French, there were mostly local and regional laws. Thereafter, Belgium had French laws. The weakening of French influence has not led to the development of a national legal culture, but rather of two regional legal cultures, one in Flanders, and the other in the French-speaking part of Belgium. Yet, there is one common element in the legal history of Belgium: a pragmatic attitude toward law, which has, so far, enabled its jurists and politicians to find compromises in spite of the growing rift between Dutch- and French-speaking Belgium.[95]

The Belgian case is particularly interesting. It is somehow unique. Its legal system seems to be more French than Belgian and, therefore, more foreign than national.[96] Moreover, from 1830 a variety of social, political, cultural and religious factors led Belgium to stick to the French system rather than building a supposed national legal tradition. As has been said,

> Belgian may be even more faithful to its French heritage than France itself. Its judicial organisation is still closer to the Napoleonic model. In 2004, at the

[93] *Ibid*.
[94] *Ibid*.
[95] *Ibid*.
[96] On French influence in Belgium, see Heirbaut and Gerkens (n 90).

> commemoration of two hundred years since the enactment of the Civil Code, Belgium had preserved more of the original articles than France.[97]

In Belgium, for example, despite the existence of a Dutch translation for the Dutch-speaking part of the country,[98] the official version of the *Code civil* is still the 1807 Code Napoléon, whereas that is no longer true in France since 1807. Belgium somehow offered resistance during a first generation to the new French code,[99] but French law eventually prevailed and still survives as one of the main constituent parts of the Belgian legal system.[100]

Does this all mean that Belgium has no legal tradition or no 'national' legal tradition? In my view, Belgium has indeed a legal tradition. I have no doubt about it. Another question is whether this legal tradition might be labelled as 'Belgian' or as 'national'. Since before 1830 the use of the expression Belgium (instead of 'Southern Netherlands') would be anachronistic,[101] and would not have been an accurate representation. Nevertheless, this does not prevent one from recognising that the legal tradition of the Southern Netherlands belongs to the legal history of Belgium. In Spain, some scholars argued that a 'Spanish legal history' course should only encompass the legal development from the making of the Constitution of Cádiz (1812) onwards, because only in that period did 'Spain' originate as a nation.[102] Terms or expressions are relevant

[97] *Ibid*, 17.

[98] On this matter, see Dirk Heirbaut, 'Introduction à l'édition cumulative du Code civil en Belgique: sources et méthodologie' in D Heirbaut and G Baeteman (eds), *Cumulatieve editie van het Burgerlijk Wetboek* (Tijdschrift voor privaatrecht, 2004) lxxxiii-cxix; Dirk Heirbaut, 'Editing and Translating the Code Civil in Belgium' (2004) 72 *Tijdschrift voor rechtsgeschiedenis* 215.

[99] Dirk Heirbaut, 'Conclusions: Codification: A New Beginning for the Nation: The Relationship of the Code Civil to the Old Law and to Nationalism' in R Beauthier, *Le Code Napoléon, un ancêtre vénéré?* (Bruylant, 2004) 319–33.

[100] On the survival of French law in Belgium, see the works of Dirk Heirbaut, 'L'émancipation tardive d'une pupille de la nation française. L'histoire du droit belge aux 19ème et 20ème siècles' in A Wijffels, *Le Code civil entre ius commune et droit civil européen* (Bruylant, 2005) 611–42; Dirk Heirbaut and Matthias E Storme, 'The Belgian Legal Tradition: From a Long Quest For Legal Independence to a Longing For Independence' in E Dirix and Y-H Leleu, *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law* (Bruylant, 2006) 3–43; Dirk Heirbaut, 'Cowardice as a Virtue: A History of the Policies of the Belgian Justice Ministers since 1830' in B Diestelkamp and others (eds), *Liber amicorum Kjell Å Modéer* (Juristförlaget, 2007) 211–24; Dirk Heirbaut, 'The Survival of the French Codification in Belgium' in L Zhang (ed), *Codification, Decodification and Anti-codification of Civil Law* (Cuplpress, 2008) 221–25.

[101] P Godding, 'Peut-on parler d'un droit privé «belge» avant 1830?' (1984) 70, fifth series, *Académie royale de Belgique. Bulletin de la classe des lettres et des sciences morales et politiques* 270 (cited by Heirbaut [n 88]).

[102] According to this line of thought, before that time, Spain *stricto sensu* did not exist. They think that what existed was Hispania (as a territory – or Province – under the Roman Empire), the Hispanic Visigothic kingdom (568–711), the Hispanic Christian territories

but not as much as the historical development of particular territories and people. It might be more accurate to use the expression 'Southern Netherlands' to refer to the history of Belgium before 1830, but this period still belongs – *velis nolis* – to the history of Belgium.

As to whether Belgium has a national legal tradition after 1830, the answer might depend on the meaning of the expression 'national'. From a constitutional perspective, the answer is affirmative, inasmuch as Belgian laws have been approved by the Belgian parliament or the legislative power, institutions in which resides the national sovereignty of the state.

From a legal-cultural perspective, the answer is much harder but also affirmative. I fully agree with Heirbaut's statement whereby '[i]t is hard to see how a Belgian legal tradition could have come into existence with only French codes and foreign scholars to nurture it'.[103] Harshness means difficulty but not impossibility. What seems impossible is the idea that there is an absence of a legal tradition, even a somehow 'national' one. Does 'national' mean that the majority of the state's legal provisions should be autochthonous, stemming from your own legal culture (old customs, legal institutions etc.), and not from foreign lands? If yes, what is the percentage of autochthonous laws and legal institutions required for the existence of a 'national' legal tradition? Or does a 'national' legal tradition mean having a 'unified law'? Is legal unification a necessary requirement for having a 'national' legal tradition? Is the plurality of laws or legal diversity a weakness of a legal tradition, incompatible with a 'national' legal tradition? Does a 'national' legal tradition require a developed legal doctrine by autochthonous scholars (rather than foreign)? I do not think so.

If law is a part of culture, and culture is an important part of a nation, I do not see why a state cannot have a 'national' legal tradition if it went through a massive legislative import (mainly French), that never achieved – perhaps nor pretended to have – a unified law, and was not much developed– at least scholarly, not pragmatically – by autochthonous lawyers. In my view, only a prejudiced or biased notion of the 'national' character of a legal tradition may lead us to deny it in some nations like Belgium. It is understandable that some Belgian lawyers might feel uneasy with the strong – or excessive – French influence over their own legal tradition, or might lament that Belgian law never achieved a desirable degree of legal unification, that the nineteenth-century Laurent's civil code project failed, or that the rift between the two legal cultures of Belgium (the Dutch- and the French-speaking one) is growing. However, such uneasiness should not obscure the fact that all these realities are part of the national legal tradition of Belgium.

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and kingdoms (in the context of the reconquest process, 722–1492), the Hispanic monarchy (with Fernando of Aragon and Isabel of Castile, but particularly from Carlos I – or V of the Holy Roman Empire – onwards), but not Spain, and less as a nation. Others argue that Spain as state started in the Early Modern period, with Carlos I of Spain (1516–1556).

[103] Heirbaut (n 88).

Some might think that the 'national' legal tradition of Belgium is peculiar, and from a 'national' perspective, a failure. I do not agree. The legal history of Belgium shows the variety of medieval customs, municipal legislation and the particular reception of *ius commune*, as other European jurisdictions. The nineteenth-century introduction of the Napoleonic codes did not imply an expulsion of 'Belgian' legal tradition, not only because many of the codes' provisions came from the *ius commune*, but also because the legal culture of Belgium prevented the application of many legal provisions as it would be done in France. As is well known, that is one of the main effects of any legal transplant.[104] The final outcome of the same *Code civil*'s legal provision might considerably differ when applied in France or in Belgium. This is particularly evident when analysing the Belgian legal practice after the promulgation of codes. In this vein, the first generation of Belgian lawyers after the Napoleonic codifications continued to quote the old customs and *ius commune*, the latter 'in its Franco-Belgian variant', and the former 'in a Franco-Belgian context'.[105] This changed around 1830 with the second generation of lawyers, when 'the old law was still quoted, but it had lost its prestige'. Later on, in the 1860s, references to the old law disappeared almost completely. However, this did not mean 'that the legal rules themselves changed, but rather that they were put within the framework of French codifications and that judges henceforward referred to their own precedents, instead of the old law, which had gone underground'.[106] In other words, many of the traditional legal rules of the Southern Netherlands/Belgium – within the framework of French codes though – were still applied.

Moreover, despite the French legislative import, Belgium has never ceased to approach law in a pragmatic way, and it is here where we can see a divergence from the French influence. This pragmatic attitude towards law – 'law has to be practical' – is something other than just 'a general phenomenon in Belgium'.[107] It is part of the Belgian culture in general and the Belgian legal culture(s) in particular.

The existence of different legal cultures (in plural) in one nation (e.g. Belgium) does not make the legal system (or tradition) less 'national'. I rather think that, in some territories, legal unification might have the danger of diluting the notion that law can be understood as part of culture. In this regard, Spain is the paramount example. Spanish legal history shows the existence of several legal traditions,[108] and this explains why the French influence in the civil-law codification process did

[104]On this matter, see Watson, 'Legal Transplants and European Private Law' (n 83) 2–3, where he states that 'that the same legal rule operates differently in two countries … [I]t is rules … that are borrowed, not the 'spirit' of a legal system.'
[105]Heirbaut and Storme (n 100) s 3 entitled 'Legal Practice: Moving from Foreign to Indigenous'.
[106]*Ibid*.
[107]Heirbaut (n 88).
[108]Masferrer, *Spanish Legal Traditions* (n 22); see also the references at n 3.

not change this notable trait of the Spanish legal culture. Should this variety be regarded as a weakness of a national legal tradition? Perhaps just from a rationalistic and positivistic approach to law such richness can be seen as a weakness, as something under-developed or incomplete.

Summing up, it is hard for me to accept that there is no Belgian legal tradition. It might be less 'Belgian' than one may have wished, but nevertheless, it exists and is perhaps richer and more complex than other legal traditions. Moreover, considering that Belgium has two distinctive legal cultures – the French- (Wallonia) and Dutch-speaking one (Flanders), it might be even more appropriate to talk about Belgian legal traditions (in plural). It is true that French- and Dutch-speaking Belgium are different, but they still have more in common with one another than with, for example, the Netherlands.

It might also be the case that the origin of the problem of linking national legal tradition with 'Belgium' does not reside so much in the lack of a legal tradition but in the uneasiness caused by the singular 'Belgian' label. It seems to me that a formal recognition of two distinctive legal traditions in Belgium, the 'Flemish' legal tradition and the 'French-speaking' one, would be much more appealing from a nationalistic perspective. If not, I can understand the reluctance to admit the existence of a 'Belgian' legal tradition, precisely because law is part of legal culture.

From a different perspective, the reluctance to accept the existence of a legal tradition as 'Belgian' or 'national' might also be due to the fact that 'national' legal rules and institutions were supposed to be home-grown. Here a comparison with customary law can be made – what makes something a custom is not only the idea that it was made by the people. In many cases 'customs' were originally case law or legislation. What turned them into custom was the acceptance by the people. From this standpoint, it could be said that what makes Belgian law 'national' is its acceptance by the people of Belgium. From this perspective, acceptance by the country's political institutions and/or people(s) would suffice, but nobody might deny that home-grown legal rules and institutions can be always more easily regarded as 'national'.

3. *Romania*

Unlike Belgium, in Romania scholars have no problem in recognising its national legal tradition, despite the fact that Romania has belonged to three different legal traditions. Romania gradually receded from being a part of the Byzantine legal tradition and joined the Western legal tradition from the 1840s/1860s. Since 1948, Romania joined the Socialist legal tradition. Eventually, since 1989, Romania returned to the Western (Roman-Germanic) legal tradition.

The two Principalities which were the basis for the formation of the current Romania were under the suzerainty of the Ottoman Empire since the fifteenth century, but without ever being a part of the Empire. The Romanian Principalities were loyal in the political and commercial realms (paying the annual tribute), but

were allowed to apply their local legal tradition in the provinces of both private and public law. Both Principalities resorted to a set of unwritten rules – called 'folk law' or 'custom of the land' – which were sufficient to settle legal disputes.[109]

Note that in the Romanian Principalities (Romania, since 1862), in the period between the fourteenth and the beginning of the nineteenth century, two different kinds of legal institutions were applied: those pertaining to the 'custom of the land' (an oral – non-written and organically developed legal tradition) and those pertaining to the Byzantine law. The latter were transplanted by the Romanian princes with the help of the Orthodox Church and were circulated in written codes (*pravila*) containing laic and ecclesiastical/canonical legal provisions. In medieval times, there were no rules for settling the competition between these two groups of legal institutions. They were randomly applied by the Romanian courts. The 'custom of the land' was codified in the second half of the eighteenth century and the beginning of the nineteenth century along with the Byzantine law, mainly in two major codifications: Caragea Code (1918, in Wallachia) and Callimachi code (1817, in Moldavia). These codes, containing mainly civil law provisions, were applied until 1865, when the Romanian Civil Code started to produce effects.

In the nineteenth century,[110] the Romanian political elite, who had been fascinated with the French Revolution and longed for the introduction of French law in Romania,[111] decided to use legal transplants as a way to attain the desired social and legal modernisation. In doing so, Romania went through massive legal imports from Western European law, particularly from France and Belgium. Summing up, the Belgian Constitution (1831) and the Napoleonic codes (1804–10) were imported to the Romanian legal system, particularly in the period 1848 to 1866.[112]

[109]Manuel Gutan, 'Building the Romanian Modern Law – Why Is It Based on Legal Transplant?' [2005] *Acta Universitatis Lucian Blaga* supp 130–43, esp 132–33.

[110]Romania went through the following historical periods: (1) under Ottoman occupation since the sixteenth century (the two principalities Moldova and Wallachia); (2) under Hungarian and Austrian sovereignty until 1918 (Transylvania); (3) Personal union – under Prince Alexandru Ioan Cuza (1859–66) – since 1859 (Moldova + Wallachia); (4) unified and unitary state since 1862 ('Romania') and (5) Independent state since 1877–78.

[111]On this matter, see P Eliade, *De l'influence française sur l'ésprit public en Roumanie. Les origines* (Ernest Leroux, 1898).

[112]Manuel Gutan, 'Legal Transplant as a Socio-Legal Engineering in Modern Romania' in Michael Stolleis (ed), *Konflikt und Koexistenz: Die Rechtordnungen Südosteuropas im 19 und 20 Jahrhundert* (Band I: Rumänien, Bulgaries und Griechenland) (Vitorio Klosterman, 2015) 481–530, esp 488.

Gutan states that:

> 'Being imported especially from the French and Belgian legal models, modernized Romanian law covers all the branches of the legal system. The French Commercial Code had already been imported in 1839. The French Civil Code and Criminal Code

As a consequence of the urgency of modernising law and society and of gaining European legitimacy to consolidate Romania as a state, the Romanian political elite decided to resort to legal transplants. The outcome of massive legal transplants caused problems in the Romanian legal system. To put it simply, the urgent need for legal modernisation led the Romanian political elite, who were obsessed with France,[113] to undertake biased and irrational legal transplants[114] with the aid of 'some European powers (especially France) [that] were willing to support Romania's political efforts towards political unification, and there was no time to waste in academic or scientific debates about the proper means of modernisation'.[115] This explains why the first Romanian Constitution (1866) was hardly linked to the national and constitutional culture of Romania,[116] and the Romanian Codes – particularly the Civil one (1864) – were adopted in parliament without debate or dialogue.[117]

The Civil code of 1864 mirrored neither the society nor the legal culture of Romania. Moreover, it produced 'cultural-dissolving effects, endangering the romantic identitarian project of building the Romanian state and Romanian nation around a unitary Romanian »national character / nature« *(caracter naţional)*'.[118] In Romania, then, the codification based on the French model was regarded as something worse than mere legal denationalisation. It somehow revealed the weakness of the Romania legal tradition and, at the same time, it weakened it further.[119] In addition, it had 'dissolving' effects, giving birth to

> a conflict between legal-cultural identities: on the one hand the legal-cultural identity based on the Romanian legal tradition(s) and, on the other, the legal-cultural identity

were faithfully imported in 1864. The Belgian influence was no less present: the part of the Civil Code regulating the law of obligations was taken from the Belgian civil law, and the two important laws which modernized local public administration were imported in 1864 from Belgian administrative law. Last but not least, the first Romanian Constitution was designed in 1866 under the important influence of the Belgian Constitution of 1831.'

[113]Gutan, 'Building' (n 109) 133–35.

[114]Gutan, 'Legal Transplant' (n 112) 484 ff.

[115]*Ibid*, 486.

[116]*Ibid*, 497–98; on this matter, see Manuel Gutan, 'The Challenges of the Romanian Constitutional Tradition. I. Between Ideological Transplant and Institutional Metamorphoses' (2013) 25 *Journal of Constitutional History* 223; Manuel Gutan, 'The Challenges of the Romanian Constitutional Tradition. II. Between Constitutional Transplant and (Failed) Cultural Engineering' (2013) 26 *Journal of Constitutional History* 217; Bianca Selejan-Gutan, *The Constitution of Romania: A Contextual Analysis* (Hart Publishing, 2016) 7–10.

[117]Gutan, 'Legal Transplant' (n 112) 498; this is not that exceptional since in other jurisdictions some codes were also approved without parliamentary debate, e.g. the Argentine Civil Code (1871), as has been noted in Parise (n 8) 333.

[118]Gutan, 'Legal Transplant' (n 112) 503.

[119]Manuel Gutan, 'Romanian Tradition in Legal Import: Between Necessity and Weakness' in *Impérialisme et chauvinisme juridiques. Rapports présentés au colloque à l'occasion du 20e anniversaire de l'Institut suisse de droit comparé* (Schulthess, 2004) 65–79.

> underpinned by the Western European legal traditions. At the end of the day, the "battlefield" belonged to a third type of Romanian legal-cultural identity, a controverted interplay between the two former identities.[120]

The irrationality of legal transplants by the Romanian political elite was fiercely criticised by a nineteenth-century intellectual movement which dominated the scholarly debate about 'the interplay between tradition or culture and legal import in the process of social, economic, political and legal modernisation',[121] or 'the interplay between law and society, about the imported law and socio-cultural background in the importing society'.[122] They created the so-called theory of 'forms without substance'.[123] Whereas 'the "form" usually meant the cultural institutions, generally, or legal institutions, particularly, imported from Western Europe, the 'substance usually meant the general culture of Romanian society, its traditions, mentality and behaviors'.[124]

The strong intellectual reaction against the Romanian civil code of 1864 by scholars was fuelled in the theory of 'forms without substance'. A fierce debate emerged about the modalities and limits of the transplant which occurred from the French civil code of 1804. The Romanian civil code was not quite a direct and faithful translation of the *Code civil*, but

> a small-scale domesticated version of the French one, through the perpetuation of a few traditional Romanian legal traditions, the concession to an important number of the French Code's articles and, last but not least, through the adaptation of the juridical French language to a timid juridical Romanian language.

Manuel Gutan describes the final outcome of the text as follows:

> The result was rather puzzling, as the text was full of incoherence, lacunas and mistranslations. It would have been better had the French Civil Code been faithfully copied and translated into Romanian. Lacking a serious rational analysis of the interplay between what already existed and what should have been imported, the result was completely dysfunctional. In this case, […], a faithful and complete legal import would have been more advantageous than combining foreign legal institutions with domestic legal traditions.[125]

An example of legal-cultural disturbances that the legal import (*Code civil*) created in the importing society (the Romanian one) was anti-clericalism. The

[120] Gutan, 'Legal Transplant' (n 112) 483.
[121] *Ibid*, 504.
[122] *Ibid*, 505.
[123] *Ibid*, 504ff; see also Manuel Gutan, 'Le droit comparé contemporain et l'actualité de la théorie des "formes sans fond" en Roumanie' (2013) 3 *Revue de droit international et de droit compare* 427; 'Comparative Law in Romania: History, Present and Perspectives' (2010) 1 *Romanian Journal of Comparative Law* 9, 53–70.
[124] Gutan, 'Legal Transplant' (n 112) 505.
[125] *Ibid*, 497.

Romanian civil code imported French anti-clericalism and laicism to an Eastern society where 'an intimate and peaceful relationship traditionally existed between church and state',[126] causing a notable negative reaction among Romanian orthodox believers (particularly among the clerical body).

After the 1989 Revolution,[127] a debate arose as to whether the Romanian 1865 civil code should be substantially amended or entirely abrogated. The conclusion was that it should be abrogated and replaced by a new civil code. Consequently, the new Romanian civil code entered into force in 2011 while the old civil code of 1865 was abrogated. The problem resided in the sources of this new civil code. The Romanian scholars who drew up the project were deeply indebted to the civil code of Quebec from 1994. Although a detailed comparative analysis of the Canadian and the Romanian texts needs to be done, the earlier drafts of the new Romanian civil code were widely translated from the Quebec civil code. The final version, which is currently in force, has been profoundly transplanted from the Quebec civil code but – as said – further analyses would be needed to precisely ascertain the extent of the legal transplant.

Thus, in re-codifying the civil law after the fall of communism, Romanian scholars showed neither objection nor reluctance to resort to legal transplant. On the contrary, the legal transplant was used in order to modernise Romanian law after 1989. Romanian scholars had no problem with transplanting foreign legal solutions.[128] Today, the national legal identity, with which the pre-communist elites were obsessed, is no longer at stake. The Romanian scholars of today have a very pragmatic attitude regarding law and legal transplants. They have no problem with massively transplanting foreign solutions if they are deemed to be useful to the Romanian legal system. Today, there does not seem to be any protest against the fact that the contemporary Romanian legal system features many transplanted foreign legal institutions which are not working within the legal system itself. This is especially due to their foreignness. Generally, the Romanian legal elite are continuing to frequently use the legal transplant method like the Romanian elite of the nineteenth century did, but today there is no intellectual reaction like the theory of 'forms without substance'. Today, Romanian scholars seem to be only interested in having a modernised post-communist law, which is legitimising the presence of Romania in the EU and NATO.

Despite this, some Romanian scholars have extensively and accurately worked on legal transplants, analysing their necessary conditions or requirements for their success,[129] to better understand the Romanian legal tradition and to learn from the

[126] *Ibid*, 510.
[127] As a curiosity, it should be recalled that Romania was the only communist country who did not abrogate its bourgeois civil code during the socialist era.
[128] On this matter and the way the Romanian legal elite is approaching today the Western legal culture, see Manuel Gutan, 'Le droit civil roumain entre recodification "nationale" et uniformisation européenne' (2008) 2 *SUBB Jurisprudentia* 171.
[129] Gutan, 'Legal Transplant' (n 112) 517–20.

past. In this vein, the failures of the importation of foreign models in Romania could have contributed to the emergence of comparative law studies and, more specifically, to comparative legal history studies in Romania.[130]

III. Concluding considerations

Can the Spanish civil code be compared to other codes? Yes, it can. However, in doing so, foreign models should be carefully employed. Otherwise, comparisons might be misleading, misrepresenting the peculiarities of codes which somehow reflect the identity and legal traditions of a nation. Did drafters of the Spanish civil code use the French model and other foreign codes? Yes, but such recognition should not lead to simplistic conclusions or general statements, whereby the Spanish civil code, for example, is somehow a replication of some foreign models. This might be true in some parts of the code (e.g. book of obligations and contracts), where the Spanish drafters realised that the French model contained the *ius commune* legacy (which had also been part of the Spanish legal tradition). However, such a general statement would be completely wrong when referring to the role of the code itself in the private law system, or to other substantive parts of the code. The validity of extra-legal sources of law (e.g. custom) would be an example of it.

Part of the responsibility of such misrepresentations belongs to Spanish legal historians, for having neglected the study of the *código civil* from a more comparative perspective. Had they done so, non-Spanish legal historians and comparative lawyers would not be satisfied by simplistic views on the Spanish codification of civil law. Fortunately, at least some foreign scholars have been able to capture the particular peculiarities of the Spanish civil code, recognising the 'originality of the Spanish theory of sources' and that 'the Code remain[ed] loyal to Spanish traditions'.[131]

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[130]Manuel Gutan, *Transplant constituțional și constitutionalism în statul roman modern [Constitutional Transplant and Constitutionalism in Modern Romania 1802–1866]* (Editura Hamangiu, 2013); particularly remarkable is the creation of the *Romanian Journal of Comparative Law* and the 'Editorial' in Gutan, 'Comparative Law in Romania' (n 123).

[131]L Neville Brown, 'The Sources of Spanish Civil Law' (1956) 5 *The International and Comparative Law Quarterly* 364, 364–65:

> 'Article 6 of the Spanish Civil Code of 1889 consists of two paragraphs. The first states that the court which refuses to reach a decision because of the silence, obscurity or insufficiency of the laws *(las leyes)* incurs a legal liability. The second paragraph explains how the judge is to escape from this dilemma: 'When there is no statute (*ley*) exactly applicable to the issue in question, one shall apply the custom of the place *(la costumbre del lugar*) and, in default, the general principles of the law (*los principios generales de derecho*).'
> The two paragraphs read in conjunction show that the primary source of law is *la ley:* in this the Code remains loyal to Spanish traditions and the principles of the modern

The codification movement did not contribute to enhance or promote a Belgian legal tradition. However, it cannot be stressed enough that Belgium does indeed have a legal tradition or, more accurately, legal traditions. Since Belgium has two distinctive legal cultures – the French- (Wallonia) and Dutch-speaking one (Flanders) – it might be even more appropriate to talk about Belgian legal traditions (in the plural). Although these two legal traditions are different, they still have more in common with one another than with other European legal traditions (e.g. that of the Netherlands). The linkage of 'Belgium' with a 'national' legal tradition is somehow problematic, not because Belgium lacks a legal tradition – which, though peculiar, still exists – but precisely because of the use of the label 'Belgian' as representing the national reality. In this regard, since law is part of legal culture, the formal recognition of two distinctive legal traditions in Belgium, the 'Flemish' legal tradition and the 'French-speaking' legal tradition, would be much more appealing from a nationalist perspective.

From a different perspective, the reluctance to accept the existence of a legal tradition as 'Belgian' or 'national' might also be due to the fact that 'national' legal rules and institutions are supposed to be home-grown. Like customary law, it could be said that what makes Belgian law 'national' is its acceptance by the people of Belgium. From this perspective, acceptance by the country's political institutions and/or people(s) would suffice, but it is understandable that home-grown legal rules and institutions would be more easily regarded as 'national'.

The Romanian codification process was also more foreign than national. Romanian Codes – and particularly, the Civil ones of 1864 and 2011 – mirrored neither the society nor the legal culture of Romania. In Romania, codification brought with it the denationalisation of law, triggering 'dissolving' effects and giving birth to a conflict between legal-cultural identities (the legal-cultural identity based on the Romanian legal tradition(s) and the Western legal-cultural identities, particularly those of France, Belgium and Quebec).

Romania is a very good example of how codification in the context of denationalisation (i.e. massive transplantation of foreign legal solutions) could result

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civilians. Only in the absence of a provision of *la ley* can one turn to the two 'extra-legal' subsidiary sources indicated in the Code, namely, local custom and the general principles of the law […].

In recognising local custom as a second source of legal rules the Code does not prescribe the conditions which the particular custom may satisfy before the judge may accept it as a rule of law applicable to the case before him. Rather these conditions have been evolved by the jurists and the judges themselves in the manner of the English law: it is not surprising that the list of conditions is very similar to that required by English law.

In the absence of a provision of la ley or of a local custom Article 6 directs the judge to apply the general principles of the law (*los principios generales de derecho*). The purpose of this article is to examine this expression; its analysis will reveal the originality of the Spanish theory of sources and provide an interesting comparison with both French and English law.

from a necessity for change in particular circumstances (urgency of legal reform and need of international legitimation, that existed both in the nineteenth century and after the fall of communism), and how this could trigger particular forms of (re)nationalisation. In the nineteenth century, the intellectual reaction of 'forms without substance' envisaged a nationalisation of the Romanian civil law by rejecting the denationalised Romanian civil code of 1865. The stringent need to build a national legal identity had no time to wait for a nationalisation through adaptation of the civil code to the Romanian society. Even more, this kind of nationalisation was not a possible as decades went by, as the civil code was felt as a foreign corpus in the rural world.

After the fall of communism, the (re)codification through denationalisation was again at stake, and occurred through transplantation from the Quebec civil code of 1994. But nationalisation or renationalisation of the foreign legal institutions has lost its relevance, as the national legal identity is no longer at stake. In a very pragmatic way, today Romanians seem to be interested only in having an up-to-date civil law, a modernised codification and the applause of EU officials.[132]

The study of comparative legal history is probably the best way to ensure that legal transplants are properly done, without causing the annihilation of a legal tradition. In other words, it enables the drafting of laws and undertaking of legal reforms that enhance social and national cohesion. If properly done, codes and legal reforms might genuinely express a legal culture and contribute to its mature and organic development. To put it simply, comparative legal history studies can contribute to having and regarding laws in general and codes in particular as authentic expressions of a legal tradition or culture.

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[132]Nobody should be surprised by the rapid process of elaboration and enactment of the 2011 Romanian civil code, which was speed up under the intense pressures of the European Commission.