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Was the French Civil Code ‘the Model’ of the Spanish One? An Approach to the Uniqueness of the Spanish Civil Code

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Abstract

Continental codes have been presented, following in the French model’s footsteps, as a determining technique to achieve legal unification and legal positivism. From this perspective, codes would not be compatible with non-legal sources (custom, judicial precedent, legal doctrine) and with legal diversity. Looking at the Spanish case one comes to the conclusion that these ideas are myths or, at least, are not entirely true. They may be true for the French case or even for other European jurisdictions, but they failed when applied to Spain.

This may explain why non-Spanish legal historians and comparative lawyers seem to find it difficult to understand the Codification of Civil law in Spain. On the one hand, the French influence over the Spanish civil code is exaggerated. On the other, it would be unimaginable that the French civil code would have supposed to be applicable in defect of regional laws or customs, as it is the case in Spain. Besides, the Napoleon code did not recognize explicitly the custom as a legal source, whereas in the Spanish code did. It is undeniable that drafters of the Spanish civil code had in mind and used the French model, but the final outcome was quite unique.

Spain shows that codification does not necessarily imply legal unification. In fact, Spain constitutes the only case in which the civil code whose application is just 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. The problem is that no other civil law jurisdictions can be used as a model to describe the Spanish case, which on this matter is unique.

The paper focuses on the uniqueness of the Spanish case in codifying its civil law, dispelling some myths and misunderstandings on the notion of codification in general, and on the Spanish civil code in particular.

Keywords

Comparative legal history, Western codification of civil law, French Civil Code, Spanish Civil Code

SUMMARY: 1. Introduction. 2. How non-Spanish legal historians and comparative lawyers look at the Spanish civil code: between myth and reality. 2.1. The Subsidiary Character of the Spanish civil code. 2.2. The Sources of the Spanish civil code: a) The need for the general principles of law, b) Custom, c) Judicial Precedent. 3. Some Concluding Considerations

1. Introduction

Comparative lawyers have usually distinguished civil law and common law traditions by their codified and uncoded character, respectively.¹ In so doing, sometimes the French civil code has been erroneously regarded as the ‘Continental model code’, which

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¹ Although there are also uncoded civil-law systems (Scotland and South Africa); on this matter, see, for example, Tetley, W., “Mixed jurisdictions: common law v. civil law (coded and uncoded)” (2000) 60 LLR 677.

is not accurate, because the European Continent presents other codes which did not follow in the French model's footsteps. I am not just thinking of the existence of two main models, the French and the German,² which explains – at least partly – the distinction between the *Romanistic* and the *German* legal family.³ Nobody denies that the French and German codes are quite different, although they both constituted, once enacted, the first starting point for legal adjudication. I am rather thinking that on the European Continent there are many other codes, some of them not entirely linked to the abovementioned models. The Spanish civil code is one of them.

Nonetheless, Continental codes have been presented, following in the French model's footsteps, as a decisive technique to achieve legal unification and legal positivism. From this perspective, codes would be compatible neither with extra-legal sources of law (custom, judicial precedent, legal doctrine) nor with legal diversity. Judging by the Spanish example, one must conclude that these ideas are myths or, at least, are not entirely true. They may be true for the French case or even for other European jurisdictions, but they simply do not apply to Spain.

This may explain why legal historians and comparative lawyers outside Spain seem to find it difficult to understand the Codification of Civil law in Spain. On the one hand, they tend to exaggerate the French influence over the Spanish civil code. On the other, they neglect to consider that it would be unimaginable that the French civil code might be supposed to be applicable in default of French regional laws or customs, as it is the case in Spain. Besides, the Napoleonic code did not expressly recognize custom as a source of law, whereas the Spanish code clearly did. Moreover, some drafts of the

² On this matter, see Robinson, O.F. / Fergus, T.D. / Gordon, W.M., *European Legal History*, London: Butterworths, 2000, pp. 253 ff.; Stein, P., *Roman Law in European History*, Cambridge: CUP, 1999, pp. 114 ff.; Caenegem, R. C. van, *European Law in the Past and the Future*, Cambridge: CUP, 2002, pp. 90 ff.; Stein, P., *Legal Institutions. The development of Dispute Settlement*, London: Butterworths, 1984, pp. 97 ff.; Merryman, J.H., *The Civil Law Tradition. An Introduction to the Legal Systems of Western Europe and Latin America*, Stanford: Standord University Press, 1985, 2nd ed., pp. 26-33; Watkin, T.G., *A Historical Introduction to Modern Civil Law*, London: Routledge, 1999, pp. 134 ff.; Zweigert, K. / Kötz, H., *An Introduction to Comparative Law*, Oxford: OUP, 1998, pp. 75 ff.; Cruz, P. de, *Comparative Law in a Changing World*, London: Routledge, 2007 3rd ed., pp. 65 ff.; Glendon, M.A. / Carozza P.G. / Picker, C.B., *Comparative Legal Traditions. Texts, Materials and Cases on Western Law*, Thompson/West, 2007 3rd ed., pp. 60-68.

³ In this regard, while common lawyers have tried to emphasize the differences between their own legal tradition and –what they named– the “Continental” or “civil” law tradition, within Continental Europe, German legal doctrine has fostered the distinction between the *Romanistic* and the *German* legal family: “...not everyone would agree that among the legal systems of continental Europe, leaving aside Eastern Europe, a distinction should be drawn between a *Romanistic* and a *German* legal family. It is certainly true that the Romanistic and German legal families are much more closely related to each other than either of them is to the Common Law, but in our view this consideration does not by itself justify us in ignoring the important differences of style to be found in the Continental European systems. (...) the point and purpose of distinguishing these two legal families becomes much clearer if we also take historical development into account. (...) we shall here try to tell the foreign reader in what characteristic points German legal history has diverged from that of the French-Romanistic systems and the English system. Since a different historical development may have a decisive influence on the modern character of a legal system, such a historical sketch can surely help us to understand the particular style which distinguished the German from the Romanistic legal families today, and both of them from the systems based on the Common Law” (Zweigert, K. / Kötz, H., *An Introduction to Comparative Law*. Vol.I: The Framework, North-Holand Publishing, 1977, p. 133; a further explanation of the notion of “legal styles” can be found in the 3rd edition (Zweigert / Kötz, *An Introduction to Comparative Law*, Oxford: OUP 1998, pp. 67-73).

Spanish civil code considered judicial precedent and doctrine as legal sources, which would also been inconceivable in the Napoleonic civil code.

It is undeniable that drafters of the Spanish civil code had the French model in mind and used it, but the final outcome was entirely distinct. As we showed in an earlier article, Spain shows that codification does not necessarily imply legal unification.⁴ Spain constitutes the only case in which the civil code whose application is subsidiary only, that is, it applies when regional laws do not contain a legal rule applicable that solves a legal dispute. In explaining this from historical and comparative perspectives, non-Spanish scholars usually identify regional laws (*Derechos forales*) with *fueros*, customs and local laws, but this is not entirely true. The problem is that no other civil law jurisdiction can be used as a model to describe the Spanish case, which on this matter is unique.

The paper will focus on the uniqueness of the Spanish case in codifying its civil law, dispelling some myths and misunderstandings on the notion of codification in general, and on the Spanish civil code in particular.

2. How non-Spanish legal historians and comparative lawyers look at the Spanish civil code: between myth and reality

Myths are found in legal historiography. Codification is a topic where myths might appear and easily consolidate. The French civil code is not exempt in this regard.⁵ In fact, Napoleonic codes have considerably contributed to poison scholarly discussion on codification in the Western legal tradition, particularly in Anglo-American jurisdictions.⁶

However, codification myths might emerge and flourish everywhere, including in Continental jurisdictions. Sometimes, myths are caused by an opinion which, given by a lawyer in the nineteenth century, is repeated by others up until today. In Spain, for example, it was assumed that criminal codes broke with the past because the main commentator of the 1848 Spanish criminal made a strong statement in this line of thought.⁷ This break with the past led scholars to take for granted the influence of the

⁴ Masferrer, A., "Plurality of Laws, Legal Diversity and Codification in Spain," *Journal of Civil Law Studies* 4, n. 2 (December, 2011), pp. 419-448.

⁵ Gordley, J., "Myths of the French Civil Code," 42 *Am. J. Comp. L.* 459 (1994).

⁶ On this matter, see Masferrer, A., "French Codification and 'Codiphobia' in the Common Law Tradition" (forthcoming; I delivered this paper at the *European Society for Comparative Legal History* (ESCLH) Inaugural Conference (Valencia, 5-6 July 2010), with the broader title "French Codification the Western Legal Traditions"); see also Steiner, E., "Codification in England: The Need to Move from an Ideological to a Functional Approach – A Bridge too Far", *Statute Law Review* (2004) 25 (3), pp. 209-222; on the American context, see Masferrer, A., "The Passionate Discussion among Common Lawyers about postbellum American Codification: An approach to its Legal Argumentation" *Arizona State Law Journal* 40, 1 (2008), pp. 173-256; "Defense of the Common Law against postbellum American Codification: Reasonable and Fallacious Argumentation", *American Journal for Legal History* 50.4 (2008-2010), pp. 355-430.

⁷ "... [A] rule in which nothing was worthy of respect, or conservation: no part could be saved for the ordering of future society. All of it, entirely all, needed to be left behind (...) The cart of destruction and reform had to pass through the ruined building, because in it there was scarcely an arch, scarcely a column, that could nor should be saved ... In Spanish criminal law there was only one legitimate and viable system, the system of codification, the system of absolute change" (Pacheco, J. F.,

French criminal code over the 1848 Spanish one. We never agreed with both assumptions, namely, that the nineteenth-century criminal law science ignored the Spanish criminal law tradition,⁸ and that Spanish criminal codes faithfully followed the Napoleonic model.⁹ In fact, scholarly work has recently given evidence of it,¹⁰ concerning also other legal branches (civil, commercial, civil procedure and criminal procedure).¹¹ Foreign influences in general, and the French one in particular, on the Western codification movement needs to be revisited.¹²

If – as seen – legal historians might have sometimes oversimplified the role of legal tradition, and exaggerated the foreign influences, in describing the nineteenth-century codification process, we cannot be surprised that comparative lawyers might have fallen into the same trap. It is not enough to acknowledge that comparative law would be “unthinkable without history,”¹³ that “[t]he terms Comparative Jurisprudence, Comparative Legal History, Historical Jurisprudence and General History of the Law have been used interchangeably...,”¹⁴ or that ‘legal tradition’ – rather than just ‘legal system’ – is what comparative law is about, putting “legal system into cultural perspective.”¹⁵ It is not easy to deal with both legal history and comparative law,¹⁶ and

El Código penal concordado y comentado, Madrid, 1848 –I used the latest edition, Madrid: Edisofer, 2000–, p. 82).

⁸ Masferrer, A., *Tradición y reformismo en la Codificación penal española. Hacia el ocaso de un mito. Materiales, apuntes y reflexiones para un nuevo enfoque metodológico e historiográfico del movimiento codificador penal europeo*, Jaén: Universidad de Jaén, 2003; Masferrer, A., “Codification of Spanish Criminal Law in the Nineteenth Century. A Comparative Legal History Approach”, *Journal of Comparative Law* Vol. 4, no. 1 (2009), pp. 96-139.

⁹ Masferrer, A., “The Napoleonic *Code pénal* and the Codification of Criminal Law in Spain”, *Le Code Pénal. Les Métamorphoses d’un Modèle 1810-2010. Actes du colloque international Lille/Ghent, 16-18 décembre 2010* (Chantal Aboucaya & Renée Martinage, coords.), Lille: Centre d’Histoire Judiciaire, 2012, pp. 65-98.

¹⁰ Masferrer A. / Sánchez González, D. del M., “Tradición e influencias extranjeras en el Código penal de 1848. Aproximación a un mito historiográfico”, *La Codificación española. Una aproximación doctrinal e historiográfica a sus influencias extranjeras, y a la francesa en particular* (Aniceto Masferrer, ed.), Pamplona: Aranzadi–Thomson Reuters, 2014, pp. 213-274.

¹¹ Masferrer, A. (ed.), *La Codificación española. Una aproximación doctrinal e historiográfica a sus influencias extranjeras, y a la francesa en particular*, Pamplona: Aranzadi–Thomson Reuters, 2014.

¹² Masferrer, A., “La Codificación española y sus influencias extranjeras. Una revisión en torno al alcance del influjo francés”, *La Codificación española. Una aproximación doctrinal e historiográfica a sus influencias extranjeras, y a la francesa en particular* (Aniceto Masferrer, ed.), Pamplona: Aranzadi–Thomson Reuters, 2014, pp. 19-43; on this matter, see two recent collective monographs: *La Codificación penal española. Tradición e influencias extranjeras: su contribución al proceso codificador. Parte General* (Aniceto Masferrer, ed.), Pamplona: Aranzadi–Thomson Reuters, 2017; *The Western Codification of Criminal Law: The Myth of the Predominant French Influence in Europe and America Revisited* (Aniceto Masferrer, ed.), Dordrecht-Heidelberg-London-New York: Springer (Collection ‘History of Law and Justice’), 2018.

¹³ Watson, A., *Legal Transplants. An Approach to Comparative Law*, Scottish Academic Press, 1974, p. 103: “Comparative Law as her understood is unthinkable without history, even if only modern history. But Comparative Law does not only take from Legal History: it can also give. Some of the reflections (...) make a legal historian concerned with his own system more alert to certain aspects of the development.”

¹⁴ Gutteridge, H.C., *Comparative Law. An introduction to the Comparative Method of Legal Study and Research*, Cambridge: CUP, 1949, Reprinted 1971, pp. 27-28.

¹⁵ Merryman, *The Civil Law Tradition*, p. 2: “A legal tradition (...) is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts legal system into cultural perspective.”

this somehow explains why comparative legal history needs to be constantly developed.¹⁷ Although comparative lawyers recognize that “history is probably the most important single factor shaping legal culture,”¹⁸ eventually comparative taxonomy tends to oversimplify reality, perhaps because they think that “history is not properly a part of contemporary legal systems,” but “only the starting point of comparative taxonomy.”¹⁹ History might not be “a part of contemporary legal systems,” but most of the contemporary legal institutions are the product of history and can only be understood by resorting to history and legal development throughout time. Otherwise, the final picture of a legal institution might be more related to preconceived ideas or categories than to the reality.

This is particular true when dealing with a complex or sophisticated reality. Spanish codification of civil laws is, in this regard, paramount.

3. The Subsidiary Character of the Spanish civil code

The complexity comes from a legal diversity which, existing in the Spanish territories from the middle ages, delayed almost a century the enactment of the Spanish Civil code.²⁰ The final outcome was rather curious: instead of enacting a code which was supposed to completely unify the civil laws of Spain and be applicable to all Spaniards – as it was the case in any Continental legal tradition –, it was just subsidiary in most of Spanish territories. This means that in Spain a civil code provision would be applicable only when no regional civil law rule is found to solve the legal dispute brought before the judge.

Thus, the Spanish civil code is unique. No case like it is known anywhere, as far as we know. Which leads to the following question: should legal uniqueness be compared? Or perhaps even better: *can* legal uniqueness be compared?

We do not dare to affirm that the Spanish civil code cannot be compared. But we do say that one should be careful in comparing it or, in other words, this 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, three shortcomings can be found when non-Spanish legal historians and comparative lawyers deal with the Spanish civil code:

a) Taking for granted that codification necessarily implies full legal unification, some scholars considered Spanish civil code as a second-rate codification because it did not fully achieve legal unification (according to the French model);

¹⁶ Gordley, J., “Comparative Law and Legal History,” *The Oxford Handbook of Comparative Law*, Oxford University Press, 2006.

¹⁷ Moréteau, O. / Masferrer, A. / Modéer, K.Å. (eds), *Comparative Legal History: A Research Handbook in Comparative Law*, Edward Elgar Publishing, 2018.

¹⁸ Lawson, C. M., “The Family Affinities of Common Law and Civil law Legal Systems”, 6 *Hastings Int’l & Comp. L. Rev.* 85 1982-1983, p. 88.

¹⁹ *Ibid.*

²⁰ Masferrer, “Plurality of Laws, Legal Diversity and Codification in Spain,” cited in fn n. 4.

b) The assumption that the Spanish civil code was mainly drafted according to the French model, overlooking the important peculiarities of the Spanish civil law system, with its richness and complexity; and

c) 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’*).

Near the beginning of the last century, Edwin Borchard described the Spanish civil code as one that “had not proven entirely satisfactory”:

“The Spanish civil code was promulgated in the Peninsula by the royal decree of July 24, 1889, and was extended to the colonies on July 31, 1889. *It has not proven entirely satisfactory.* This is due perhaps to the peculiar conditions created by the concurrent existence of the foral or local law enjoyed by several provinces and the adoption of some French institutions foreign to Spain.”²¹

According to Borchard, the Spanish civil code was not satisfactory because of “the concurrent existence of the foral or local law enjoyed by several provinces and the adoption of some French institutions foreign to Spain.” However, later he affirmed that the main or “perplexing” problem was the former rather than the latter:

“The question of the relation of the non-Castilian legislations (*‘derecho foral’*) and the customary law to the civil code forms at times a perplexing problem.”²²

At that time, the application of the Spanish civil code constituted – from its approval in 1889 – “a perplexing problem,” because the “the non-Castilian legislations (*‘derecho foral’*) and the customary law, which were supposed to have been applicable prior 1889, had not been even drafted. This meant that the Spanish civil code was hardly applicable in the non-Castilian territories. Non-Castilian territories were not willing to draft their Appendices because this technique (*‘Appendix’*) implied a selection. In other words, it was a restrictive technique, preventing regions from maintaining all their legal institutions, despite art. 13 of the 1889 Civil code allowing the existence of territorial laws and providing matters for the compilation of *foral* laws and their incorporation into the Code as appendices.²³ The situation did not change until 1946, when an important decision was made at a Conference for civil law scholars held in Zaragoza: the substitution of the Appendices’ technique by the Compilation’s technique, whereby regions were allowed to draft their compilations without any restrictive clause. After

²¹ Borchard, E.M. (Dir.), *Guide to the law and legal literature of Spain* (1915) (available at http://archive.org/stream/guidetolawlegall00palmuoft/guidetolawlegall00palmuoft_djvu.txt).

²² *Ibid.*

²³ The 1889 version of article 13 of the Code read as follows:

First. The provisions of this Title [Preliminary Section] shall be mandatory in all the provinces of the reign to the extent that they determine the effect of the laws, statutes and general rules for its application. The provisions of title IV, book I of the Code shall also be mandatory.

Second. As for the rest, the provinces and territories in which *foral* law endures shall conserve them *for the moment* in their integrity; and their actual legal regime, whether written or customary, shall not be altered by the publication of this Code, which shall be applied only as supplementary law, in the absence of what is set forth in the special laws of the *foral* regions. [Emphasis added]; on this matter, see Masferrer, “Plurality of Laws, Legal Diversity and Codification in Spain,” cited in fn n. 1, pp. 441-442.

this decision, within a few years all compilations of the non-Castilian territories were drafted and approved.²⁴

From then onwards “the problem” disappeared, although some might still regard the situation as “perplexing,” because these compilations were primarily applicable and the Spanish civil code was left as subsidiary. ‘How is that possible?’, some may ask themselves. Is that a real code? Is that compatible with the notion of a code?

According to the legal historian Ken Pennington, the Spanish civil code is “a not-entirely successful compromise mixture of codified Castilian law (...) with uncoded foral law”:

“In 1889 the Spanish civil code was enacted. It was an interesting and eclectic piece of legislation drawing on many sources (especially the Code Napoléon, although heavily influenced by Castilian and canon law) and *is thus a not-entirely successful compromise mixture of codified Castilian law (with a number of gaps) with uncoded foral law given precedence where necessary or expedient, and finally, customary law.*”²⁵

Some comparative lawyers seem to be surprised by the fact that in “certain provinces of Spain, notably Catalonia, the national Civil Code does not apply to matters covered by local customary laws (*fueros*).”²⁶

As we saw, Catalonia was not the only territory where the Spanish civil code became subsidiary. Basque Provinces (Vizcaya and Álava), Navarre, Aragón, Balearic Islands and Galicia were also allowed to apply primarily their own compilations, leaving the Spanish civil code as subsidiary. After the promulgation of the current Spanish Constitution (SC), some Spanish territories (so-called ‘Autonomous Communities’) were allowed to “to preserve, amend, and develop” their own civil law institutions. Art. 149.1.8 SC provided that only Autonomous Communities which had some regional laws at the time when the Constitution was sanctioned (1978) would enjoy legislative powers “to preserve, amend, and develop” their own private institutions. In other words, only those old regions which managed to keep their laws in force were called to enjoy legislative competence in civil law matters.²⁷

Almost forty years later, the Spanish civil law has become a kind of multilevel-code system, because some regions have use their constitutional power (art. 149.1.8 SC) to

²⁴ Compilation of Vizcaya and Alava civil law: Law of July 30, 1959; Compilation of Catalonia civil law: Law of July 21, 1960; Compilation of Balearic Islands civil law: Law of April 19, 1961; Compilation of Galicia civil law: Law of December 2, 1963; Compilation of Aragon civil law: Law of April 8, 1967; Compilation of Navarre civil law: Law of March 1, 1973.

²⁵ Pennington, K., [Spanish] “Legal History” (available at <http://faculty.cua.edu/pennington/Law508/SpainLegalHistory.htm>); emphasis is ours; Robinson, O. / Fergus, T. / Gordon, M., in their *An introduction to European legal history*, Butterworths, 2000, limited themselves to affirm, that ‘In Spain, (...) the *Code civil* was admired and largely absorbed.’ Nothing else is said about it.

²⁶ See, for example, Glendon / Carozza / Picker, *Comparative Legal Traditions*, p. 241.

²⁷ On this matter, see Masferrer, “Plurality of Laws, Legal Diversity and Codification in Spain,” pp. 444-448; on the Valencian case, see Masferrer, A., *La pervivencia del Derecho foral valenciano tras los Decretos de Nueva Planta. Contribución al estudio de la práctica forense del siglo XVIII*, Madrid: Dykinson, 2008; Masferrer A. / Obarrio-Moreno, J.A., *La formación del Derecho foral valenciano. Contribución al estudio de las tradiciones jurídicas hispánicas en el marco del ius commune*, Madrid: Dykinson, 2012, Introduction, and chapters VII & VIII.

preserve, amend, and develop regional (or ‘foral’) legal institutions,²⁸ and thus have almost completed a distinct codification of their *own* legal institutions.²⁹

Other scholars, besides giving an outdated account,³⁰ also show also their surprise at the fact that Spain has a civil code without achieving legal unity:

“But even the Código civil has not produced complete legal unity in Spain. Only the rules of matrimonial law and the general provisions in the introductory section concerning the effect of statutes and of private international law are valid throughout the country. The other parts of the Código civil have only subsidiary force in those regions which previously had the *fuero* system.”³¹

By ‘*fuero* system,’ Zweigert and Kötz might seem to refer to the period between 1946 and 1978, in which regions with foral laws in force were allowed to draft their own compilations. It is not clear though, because earlier they had affirmed:

“Thus until the nineteenth century the law of the Spanish kingdom was the so called ‘*fuero* system’: the ‘*compilaciones*’ of royal laws and ordinances had force everywhere, then there were the *fueros* or local customary laws, and finally *Las Siete Partidas*. In the nineteenth century there was a plan to create a unified Spanish private law, stimulated by the impressiveness of the French code, but the resistance of the several provinces was too great.”³²

They dealt with the same ‘*fuero* system’ from the middle ages to the nineteenth century on the one hand, and from 1946 to 1978 on the other. This is simply misleading. Zweigert and Kötz’s ‘*fuero* system’ from the middle ages to nineteenth century is inaccurate and confusing for two reasons: first, they meant to encompass the whole Spanish kingdom when in fact they are dealing only with Castile (following the provisions enacted in the *Ordenamiento de Alcalá* in 1348), not with other territories of what would compose – from 1469 – the Spanish monarchy; and second, there is no chronological distinction between the period before and after the Spanish War of Succession (1700-1714).

²⁸ As it has been noted, the question at stake is the scope of legislative competence Spanish regions have to “conserve, amend and develop” (article 149.1.8 SC) their civil law; on this matter, see Ferrer Vanrell, M.P., “State Powers Regarding Civil Law Versus Balearic Parliament Powers—The Section 30.27 of the Charter of Autonomy of the Balearic Islands,” 3 *INDRET* (2008).

²⁹ Catalonia is the Autonomous Community which has been codifying its civil law more both intensively and widely, counting nowadays with a complete code of its civil law institutions (2002-2015); the current Catalan civil code can be seen in Catalan (<http://civil.udg.es/normacivil/cat/ccc/Index.htm>) and in Spanish (<http://civil.udg.es/normacivil/cat/CCC/ES/Index.htm>); for an account of the Catalan civil law legislation, see http://justicia.gencat.cat/ca/ambits/dret_civil_catala/legislacio_civil_catalana/; for an English version of the book on successions, see http://justicia.gencat.cat/web/.content/documents/arxiu/llei10_2008_angles.pdf; on the book of obligations, see Gete-Alonso i Calera, M. del C., “The Sixth Book of the Catalan Civil Code: When, Why and How to Proceed to its Codification” (February 13, 2009), *InDret*, Vol. 1, 2009 (available at SSRN: <http://ssrn.com/abstract=1368175>); for a general overview on the peculiarities of the Catalan civil law system, see MacQueen, H.L. / Vaquer, A. / Espiau Espiau, S. (eds.), *Regional Private Laws and Codification in Europe*, Cambridge: CUP, 2003.

³⁰ It is the case of Zweigert, K. / Kötz, H., *An Introduction to Comparative Law* (1977), whose authors used – as a source – Hierneis’ book entitled *Das besondere Erbrecht der sogenannten Foralrechtsgebiete Spaniens* (1966), year in which many foral compilations had not been drafted yet and Spain had no Constitution; we are using the 3rd edition (Oxford University Press, 1998), but the matter has not been updated yet (pp. 107-108).

³¹ Zweigert / Kötz, *An Introduction to Comparative Law*, p. 108.

³² Zweigert / Kötz, *An Introduction to Comparative Law*, p. 107.

They found ‘striking’ “the continuing vitality of the *fueros*, or laws particular to different localities, which developed in the course of the Middle Ages in individual provinces, counties and boroughs.”³³

The subsidiary character of the Spanish civil code is connected with the value or validity of the legal sources that the code laid down. Unlike many other European civil codes that followed the French model, the Spanish civil code prescribed the validity of custom. However, it would be wrong to confuse ‘foral laws’ with ‘local laws’, ‘*fueros*’ and ‘customs’. They are not the same. Some comparative lawyers mistakenly used ‘foral laws’ as synonym of ‘local laws’, ‘customs’ and ‘*fueros*’, as if they were the same thing, neglecting that the expression ‘foral law’ is much broader than ‘local law’, ‘*fuego*’ or ‘custom’. Most of the abovementioned quotations reflect this misunderstanding. In this vein, some comparative lawyers, describing the civil law tradition (as distinguishable from the common law one), affirm:

“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. In certain provinces of Spain, notably Catalonia, the national Civil Code does not apply to matters covered by local customary laws (*fueros*).”³⁴

The text makes clear the subsidiary character of the civil code, but misunderstands the legal sources which are primarily applicable (‘local customary laws’ as synonym of ‘*fueros*’). As said, ‘customs’ and ‘*fueros*’ are not the same thing, although populations charters or ‘*fueros*’ might contain some written customs. Besides – as said too –, the expression ‘foral law’ is much broader than ‘*fuego*’ or ‘custom’. It is not either correct to identify ‘foral law’ with ‘local law’:

“The particular legal traditions of Spain were protected in that the code did not set out to replace the foral laws of the several communities which composed the kingdom, but instead was only to operate in those areas of the law where there was no valid foral law in operation. It continued therefore in a supplementary role, together with natural reason and equity in the law of Aragón, together with Roman law and canon law in Catalonia, and together with Roman law and the ‘Siete Partidas’ in Navarre. Today, *these local laws* have themselves been codified, in what are called the ‘Leyes Civiles Forales’ of Spain, the ‘Código Civil’ only operating in those areas where there is no local ‘ley civil foral’ on the issue in question. Thus, a large measure of *local autonomy* still exists within the private law of Spain, which therefore manifests a remarkable blend of the advantages of codification in providing a systematic text with insistence upon the historical school’s view that the law must be in accord with the spirit of the people.”³⁵

The text also makes clear the subsidiary character of the civil code, unfortunately describes ‘foral laws’ as ‘local laws’, and talks about ‘local autonomy’, which is not fully accurate. The expression ‘regional laws’ when referring to the ‘foral laws’ before the 1978 Spanish Constitution, and ‘regional autonomy’ after the Constitution, would have been much more appropriate.

The expression ‘foral law’ (or ‘*Derecho foral*’) may be briefly explained as follows. As we said elsewhere, Spanish monarchy was based on an ‘uneasy balance’ between

³³ Zweigert / Kötz, *An Introduction to Comparative Law*, p. 107.

³⁴ Glendon / Carozza / Picker, *Comparative Legal Traditions*, p. 241.

³⁵ Watkin, *An Historical Introduction to Modern Civil Law*, pp. 144-145; emphasis is mine.

political unity and legal diversity.³⁶ Such a balance changed drastically when the last King of the ‘Casa de Austria’ (the Habsburgs), Charles II, was succeeded by Philip V, a king from another royal dynasty (the Bourbon dynasty), after the War of the Spanish Succession (1701–14). Philip V issued several Decrees of *Nueva Planta*, aiming at abolishing the legislative power enjoyed by all the kingdoms that formed part of the Crown of Aragon, although they were allowed – with the exception of Valencia – to have their own private laws and legal institutions.

It was after these *Nueva Planta* Decrees that the expression ‘*Derecho foral*’ (or ‘foral law’) emerged. The legal impact of the *Nueva Planta* Decrees on the kingdoms of the Crown of Aragon (particularly in Aragon, Catalonia, Valencia and the Balearic Islands) was such that soon after their promulgation a distinction arose between the new Castilian ‘*Derecho común*’ (or ‘common law’) and the ‘*Derecho foral*’ (‘regional’ or ‘foral’ law), the latter being the laws of the old kingdoms (whose territories from then onwards were called ‘*Provincias*’).³⁷

‘Foral law’ was composed by the legal institutions and the plurality of laws or legal sources of each kingdom or territory which had been enjoying legislative power and legal autonomy until the Succession War (Aragón, Catalonia, Valencia and Majorca). Thus a plurality of legal sources formed the ‘foral law’: Royal or Seigniorial Chartres – or ‘*fueros*’–, legislative enactments – both Royal and Parliamentary –, customs, ‘*fazañas*’ (judicial judgments which were given when no other legal source was available), judicial precedents, legal doctrine, natural law, common sense, equity, *ius commune* – including both Roman and canon law –, etc.³⁸

The expression ‘foral law’ was coined by the Valencian lawyer Gregorio Mayans y Siscar.³⁹ He did it when warning the monarch Charles III in 1767 that many legal disputes brought before the Royal *Audiencia* of the kingdom of Valencia needed to be settled according to the former laws of Valencia (which had been abolished – and not revived– through the *Nueva Planta* Decree of 29 June 1707). Thus, he concluded, some of the members of the above-mentioned Valencian tribunal should be of Valencian origin, since only Valencians – rather than Castilians – knew the Valencian ‘foral law’.⁴⁰ This expression was consolidated in the nineteenth century, when a Royal Decree of 23 September 1857 created a new chair (or *Cátedra*) for the law school,

³⁶ On this matter, see Masferrer, A., *Spanish Legal Traditions. A Comparative Legal History Outline*. Madrid: Dykinson, 2009 (2nd Ed., 2012), ch. 11.

³⁷ Masferrer, A., “Plurality of Laws and *Ius Commune* in the Spanish Legal Traditions: The Cases of Catalonia and Valencia,” *Jurisdictional Complexity in Western Legal History, C1600-1900* (Seán Donlan & Dirk Heirbaut, eds.), *Duncker & Humblot*, 2015, pp. 193-222.

³⁸ Masferrer, *Spanish Legal Traditions*, ch. 10.

³⁹ On this figure, see Mestre Sanchís, A., *Mayans y Siscar y el pensamiento ilustrado español contra el absolutismo*, León: Universidad de León, 2007.

⁴⁰ Mayans y Siscar, G., *Idea del nuevo método que se puede practicar en la enseñanza de las Universidades de España. 1 de abril de 1767*, caps. XXI y XXII, Biblioteca Municipal de Valencia, Fondo Serrano Morales, núm. 6384; on this matter, see the *Informe sobre el método de enseñar en las universidades de España (1699-1781)* (presentación, transcripción y notas de I. G. Zuluaga y L. Esteban Mateo), Valencia, 1974; Peset, M. / Peset, J.L., *Mayans y Siscar y la reforma universitaria. Idea del nuevo método que se puede practicar en la enseñanza de las universidades de España, 1 de abril de 1767*, Valencia: Publicaciones del Ayuntamiento de Oliva, 1975.

entitled ‘History and Institutions of Spanish and Foral civil law’ (*Historia e Instituciones del Derecho Civil Español y Foral*).⁴¹

‘Foral law’ should not be then confused with mere ‘fueros’, ‘local laws’ or ‘customs’. However, there is some historical truth behind this confusion. After the *Nueva Planta* Decrees, there was a debate about the extent of the dichotomy between the new ‘common law’ (or ‘*Derecho común*’) of the Spanish monarchy, understood as the Castilian law, and the ‘foral law’ (or ‘*Derecho foral*’), understood as the laws and legal institutions of the former kingdoms of the Crown of Aragón (Aragón, Catalonia, Valencia and Balearic Islands). Moreover, the fierce topic of discussion was the meaning of the ‘foral law’. The Monarchy and the defenders of Royal absolutism started to regard ‘foral law’ as mere local or municipal law (as opposed to the Castilian law, which was considered as the ‘general’ one), and as customary law (as opposed to the Castilian law, which was based upon Royal legislative enactments).⁴²

The consequences of such restrictive meaning of ‘foral law’ were not useless, or did not aim at satisfying just a theoretical or scholastic whim. It had juridical relevance. If ‘foral law’ was supposed to be regarded just as ‘local laws’ or ‘customs’, then these ‘foral’ laws and institutions could be – according to the Royal laws enacted in 1348 (the so-called ‘*Ordenamiento de Alcalá*’) – restrictively interpreted or strictly construed by judges and lawyers. This meant – among other things – that, if a case could not be settled by any of the ‘foral laws’, the Castilian law was applicable. According to such a restrictive conception, ‘foral law’ underwent two restrictions: 1) laws and institutions had to be strictly construed, namely, in line with the restrictions which the ‘*Ordenamiento de Alcalá*’ had imposed to ‘local law’ and ‘custom’ as legal sources; and 2) Castilian law was immediately applicable when a case could not be settled by any of the ‘foral laws’, without the possibility of having recourse to the different subsidiary sources that all ‘foral laws’ prescribed in these case (*ius commune*, *ratio scripta*, natural sense, equity, etc.).⁴³

This debate was particularly intense in Catalonia. Catalans did not accept that the new common law (or ‘*Derecho común*,’ understood as Castilian law) might be of preferable application in Catalonia, replacing the traditional and multi-secular *ius commune* (understood as the Roman and canon law), which had been historically considered not only as subsidiary but also as constituting part of the Catalan legal system. Such debate was settled by a decision of the Spanish Supreme Court in 1845, declaring that *ius commune* was part of the Catalan ‘foral law’, so Castilian law would be applicable only in defect of *ius commune* rule applicable to the case.⁴⁴

This judicial decision also supported the idea that the identification between ‘foral law’ and ‘local law’ or ‘custom’ was simply inaccurate and misleading. However, some non-Spanish legal historians and comparative lawyers seem to fall into this error.

As seen, the subsidiary character of the code does not mean that the Spanish civil code is applicable only in the absence of ‘*fueros*’, ‘local’ or ‘customary’ laws on point. The

⁴¹ On this matter, see Rodríguez Gil, M., “Fueros y desigualdades jurídicas entre ciudadanos: el Fuero de Baylío”, *Foro, Nueva época* 10 (2009), pp. 33-54, particularly pp. 39-40.

⁴² Masferrer, *Spanish Legal Traditions*, chapter 12.

⁴³ On this matter, see fn n. 27; see also Masferrer, *Spanish Legal Traditions*, ch. 12.

⁴⁴ *Ibid.*

subsidiary applicability of the current code is not due to the importance of ‘local laws’ or ‘local customs’, but to a peculiar way of understanding a civil code, which is quite different from that of the French and other Continental civil codes: namely, that a civil code does not imply unification of the law. In other words, a code needed to be compatible with the preservation of the different Spanish legal traditions, and not with just the Castilian legal tradition. Moreover, the non-Castilian legal traditions, which were at least as rich as the Castilian one, were composed of a plurality of legal institutions and legal sources (and not just of some ‘*fueros*’, ‘local’ or ‘customs’).

We hope this essay makes clear that ‘foral law’ is a much broader category than ‘*fueros*’, ‘local laws’ or ‘customs’. The reader may think whether the role of the Spanish civil code is really comparable to that of France. Both codes might be somehow compared, but they represented two different – or even opposed – ways of conceiving a civil code. It seems to us that the Spanish conception of a -- or its -- civil code would have been unimaginable in France. Let us see now another peculiarity of the Spanish civil code in comparison with the French one: the validity of a legal source, namely, the custom.

2.2. The Sources of the Spanish civil code

a) The need for the general principles of law

Article 4 of the Napoleonic Civil Code prescribed that “[T]he judge who shall refuse to determine under pretext of the silence, obscurity, or insufficiency of the law, shall be liable to be proceeded against as guilty of a refusal of justice.” If the code contained laws (as general provisions) and did not attempt – as said in the *Preliminary Address* – to foresee all possible legal disputes which may arise in the future, other legal sources were needed to ensure that all cases could be adjudicated, particularly considering that, as we saw, many codes did not admit the custom as a legal source.

Furthermore, the admission of these secondary legal sources (general principles of law, equity, natural law, etc.) prevented judges from resorting to the lawmaker when they did not find a legal provision to settle the particular case.

The Spanish Civil Code, after reproducing – almost literally – the abovementioned article 4, it added that:

“When there is no law exactly applicable to the point of controversy, the customs of the place shall be observed, and in the absence thereof, the general principles of law.”

The German Civil Code did not mention this source of law, since drafters took for granted that judges would need to resort to the principles which arise from the spirit of the legal order. This idea of legal order or general principles of law is what drafters of the Swiss Civil Code (1907) might have in mind when laid down that:

“If the law does not furnish an applicable provision, the judge shall decide in accordance with the customary law, and failing that, according to the rule which he would establish as legislator. In this he shall be guided by approved legal doctrine and judicial tradition.” (Art. 1)

Since codes could not cover all contingencies, and since cases of first impression must occur in common law jurisdictions as well, the prohibition of *non liquet* demanded recognition of such *rationes decidendi* as have been found in general principles of law, natural law, equity or reason. It may be argued that the nineteenth-century general principles of law were designed to displace natural law, but that is not fully accurate and was not the case in many territories. The *Preliminary Address* stated that “while the foresight of lawmakers is limited, nature is limitless; it applies to everything that may be of interest to men.” Furthermore, it also explicitly recognized that “positive laws could never entirely replace the use of natural reason in life’s affairs.”

b) Custom

Custom constituted the main legal source of the Western legal tradition throughout many centuries, particularly from the downfall of the Western Roman Empire onwards (476). The law of the Middle Ages was based upon custom, both in the civil law and common law traditions. Although in the Early Modern Age customary law went through a crisis all over Europe, being gradually displaced and replaced by other legal sources, it maintained its validity in the legal systems until the modern codification (nineteenth century), period in which custom re-emerged thanks to the cultural context of romanticism.

Nineteenth-century jurisprudence (both the French School of the Exegesis and the German Historical School), following Rousseau’s idea whereby the *lex* was regarded as the “expression of general will,” tended to disregard the Justinian distinction between *leges* and *iura*,⁴⁵ and gave primacy to legislative enactments (*leges*) over other sources of law (*iura*). Consequently, custom was not admitted – when not explicitly rejected – in many modern civil-law codes.

Despite of the explicit recognition of the value of custom in the *Preliminary Address on the First Draft of the Civil Code* (“[m]any things are therefore necessarily left to the authority of custom, to the discussion of learned men, to the arbitration of judges”), the French Civil Code did not dare to laid down any provision declaring custom as a legal source, although several specific references to the custom when regulating some particular matters throughout the codal text.

Despite the fact that the German Historical School of Law theoretically defended the custom as an expression of the German *Volksgeist*, eventually the German civil code did not admit either the custom as a source of law. The development of custom in the Western legal tradition seems to be a bit ambiguous and paradoxical: the less it has been scientifically defended, the more relevance it has enjoyed in the legal system. It may also be said that the value of the custom as a source of law has been inversely proportional to the level of the development of the state power or public authority. In this regard, the creation of European medieval monarchies shifted custom aside in favor of statutory law and, later on, the modern States tended to gradually undervalue it.

The lack of recognition of custom as a legal source in the French model highly influenced many other European and American jurisdictions, by enacting codes which

⁴⁵ Castellucci, I., (2008), “Law v. Statute, Ius v. Lex: An Analysis of a Critical Relation in Roman and Civil Law”, *Global Jurist*: Vol. 8: Iss. 1 (Advances), Article 5 (available at: <http://www.bepress.com/gj/vol8/iss1/art5>).

either explicitly denied the custom as a legal source or did not mention it as such. The only European civil code which explicitly recognized the custom as a legal source was the Spanish one (1888/89):

“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 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.⁴⁶

It would be wrong to think that the Spanish civil code – unlike the French one – explicitly admitted the custom as a legal source because of the importance of the ‘*fueros*’, ‘local’ and ‘customary’ laws. It is true that it would have been paradoxical that whereas ‘foral laws’ were preserving customs and customary institutions, the civil code denied the value of custom as legal source. But I do not think that this was the main reason for admitting custom. It is rather reasonable to maintain that the motives for accepting custom in the Spanish civil code were similar to those used by Portalis to defend custom in the abovementioned *Preliminary Address*.

In North America, Louisiana codes, namely, the Digest of 1808 and the Code Civil of 1825, which also departed from the French influence, explicitly admitted the custom as a legal source as well. In Latin America, Andrés Bello, the drafter of Code Civil of Chile (1856) – which was used as a model by other Latin American jurisdictions –, did explicitly reject the custom as a legal source. The Code Civil of Argentina (1869) adopted the same principle. This explain why the majority of Latin American codes explicitly rejected – Chile (1856), Ecuador (1858), El Salvador (1859), Panamá (1860), Uruguay (1868), Argentina (1869) – or ignored the custom as a legal source – Bolivia (1831), República Dominicana (1845), Mexico (1870), Guatemala (1877), Costa Rica (1887) –, whereas only the Civil Codes of Colombia (1887) and Cuba (1889, which was the Spanish one) admitted the custom as a legal source to be adjudicated when there was no statute (*ley*) applicable. Later, some twenty-century civil codes would admit custom – probably due to the Spanish influence – as a legal source: Honduras (1906), Panamá (1916), Puerto Rico (1930) and Argentina (reform through the Decree/Law 17.711 of 1968).

c) Judicial Precedent

⁴⁶ Brown, L.N., “The Sources o Spanish Civil Law” 5 *Int'l & Comp. L.Q.* 364 1956, pp. 364-365.

The drafters of the French Civil Code did not despise the relevance of previous judicial decisions in the judicial decision making, emphasizing the goodness of having a “compendia, and a continuous tradition of customs, maxims and rules, so that one must, in a sense, judge today as one judged yesterday; and that there are no variations in public judgments other than those brought about by the advance of knowledge and force of circumstance.” In fact, they seem to notably trust in French judges. According to them,

“[T]hey have a wide experience in matters; they have insight and knowledge; and they believe they have a constant duty to consult with each other. There is no telling the degree to which this habit of science and reason mitigates and regulates power. To balance the authority that we give judges to rule on matters not determined by statutes, we invoke the right of every citizen to be judged only according to a previous and constant law.”⁴⁷

“To be judged only according to a previous and constant law” seems to mean that judicial decisions were supposed to be, according to their view, something else than just an authoritative source of legal interpretation. They were not the main source of law, but they were regarded as sources of law and applicable “on matters not determined by statutes.” That was particularly clear in civil law matters.⁴⁸

This may explain why the drafters maintained that “If there is one area in which excessive commentary, discussion and writing can be excused, it is, above all, in jurisprudence.”⁴⁹ According to them, whereas “[t]he lawmaker’s science consists in finding, on every subject, the principles most favorable to the common good, (...) magistrate’s science consists in applying those principles, ramifying them, extending them, through wise and reasoned application, to private hypotheses; in analyzing the spirit of the law when the letter is silent.” They never explicitly referred either to the

⁴⁷ *Preliminary Address on the First Draft of the Civil Code*, presented in the year IX by Messrs. Portalis, Tronchet, Bigot-Préameneu and Maleville, members of the government-appointed commission, p.8 (available at <http://www.justice.gc.ca/eng/pi/icggci/code/civil.pdf>).

⁴⁸ *Preliminary Address on the First Draft of the Civil Code*, presented in the year IX by Messrs. Portalis, Tronchet, Bigot-Préameneu and Maleville, members of the government-appointed commission, pp. 9-10 (<http://www.justice.gc.ca/eng/pi/icggci/code/civil.pdf>): “...in civil matters, the dispute is always between two or more citizens. An issue of property or any other similar issue cannot remain unresolved between them. A decision must be taken; the dispute must somehow be brought to an end. If the parties cannot themselves reach an agreement, what is the State to do? Unable to give them laws on every subject, it offers them, in the person of the public magistrate, an informed and impartial arbitrator whose decision prevents them from coming to blows, and he is certainly more beneficial to them than a prolonged dispute, neither the repercussions nor the outcome of which they could predict. The apparent arbitrariness of equity is better than the turmoil of passions.

In criminal matters, however, the dispute is between the citizen and the State. The intent of the State can only be represented by that of the law. The citizen whose actions do not contravene the law will therefore not be disturbed or accused on behalf of the State. Here, not only is there no need to judge, but there is no matter to be judged. The law that serves as the basis for the accusation must precede the action of which one is accused. The lawmaker must not strike without warning; otherwise, the law, contrary to its fundamental purpose, would not set out to make men better, but only to make them more miserable, which would go against the very essence of things. Thus, in criminal matters, where the judge’s action can be based only on a formal, pre-existing enactment, there must be specific laws and no jurisprudence. This is not so in civil matters. Here, there must be jurisprudence, because it is impossible to regulate every civil matter by laws and because it is necessary to end disputes between individuals that cannot be left unresolved, without forcing every citizen to become the judge in his own case, and not forgetting that justice is the first debt of sovereignty.”

⁴⁹ *Preliminary Address*, p. 7.

‘binding’ force of previous judgments or to judicial precedent as ‘source of law’, but left no doubt about the relevance of jurisprudence as legal source.⁵⁰

This was not, however, the view of some late eighteenth-century political reformers and other nineteenth-century French lawyers, particularly those belonging to the exegetical school. For them – having in mind the experience of the excessive power of the old French *Parlements* –, if judges were just – using the famous Montesquieu’s expression – the ‘bouche de la loi,’ their judgments should not be regarded as a legal source and, therefore, were not binding at all. They might be, at most, an authoritative source of legal interpretation, but not a binding, primary source of law. This explains why French courts were forbidden, for example, to refer to their past cases as the sole basis for their decision, or to pronounce a judgment based on the mere application of principles posited in a previous case.

Italy reflected the French approach. Italian lawyers strongly emphasized the state-legislator as lawmaker, thus reducing the importance of other sources, and particularly the role of jurisprudence. The Italian legislator shared the French horror for ‘the equity of tribunals’. A good example of this attitude is the reception of art. 5 of the *Titre préliminaire* of the French code, (“Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises”) which prevented the extension *erga omnes* of the effects of judicial decisions (*arrêts de règlement*). The French principle is perceptible in the *Italian Statuto Albertino* (1848), whose art. 73 provided: “L’interpretazione delle leggi in modo per tutti obbligatorio è del legislatore.”

However, this was not the common view in other European jurisdictions. In the late nineteenth-century Spain, for example, many lawyers regarded – like the drafters of the French Civil Code – the *jurisprudencia* (or case law) as a source of law. In fact, the 1895 *Spanish Civil Code Project Reform*, in its Art. 1, mentioned the enacted law, the custom and the *jurisprudencia* as legal sources. Furthermore, Art. 3, dealing with the sources of law, reproduced the abovementioned Art. 6 of the 1888/89 Spanish Civil Code, and added – after the enacted law, the custom and the general principles of law – the *jurisprudencia* exactly applicable to the case. Furthermore, Art. 20 provided the cases in which the *jurisprudencia* of the Supreme Court would have both general and binding force, prescribing that in these cases its judgments should be entirely published in the *Gaceta Oficial*, the same journal where enacted laws were published before coming into force. The publication of the Spanish Supreme Court decisions was the logic consequence of the binding force of the *jurisprudencia*, enabling judges and practitioners to know it.

⁵⁰ *Preliminary Address on the First Draft of the Civil Code*, presented in the year IX by Messrs. Portalis, Tronchet, Bigot-Préameneu and Maleville, members of the government-appointed commission, pp. 11-12 (<http://www.justice.gc.ca/eng/pi/icggci/code/civil.pdf>): “The lawmaker must keep a watchful eye on jurisprudence; it can enlighten him, and he, for his part, can improve it; but jurisprudence there must be. In this vastness of the diverse subjects that constitute civil matters, and the judgement of which entails, in the majority of cases, less the application of a specific enactment than the combining of several enactments that lead to, rather than contain, the decision, one can no more do without jurisprudence than without laws. Now, it is to jurisprudence that we leave those rare and exceptional cases that cannot fit within the framework of a reasonable legislation, the too-volatile and too-contentious particulars that must not occupy the lawmaker, and all the subjects it would be futile to try and foresee, or whose hasty prediction could not be free of risk. It is left to experience to continually fill the voids we leave. The codes of peoples are made over time; but, strictly speaking, we do not make them.”

The binding – rather than just persuasive – force of case law in the Spanish civil law has been recognized by comparative lawyers:

“[A] settled line of cases (jurisprudence constante, ständige Rechtsprechung) has great authority anywhere [in civil law jurisdictions]. In some parts of the Spanish-speaking world this settled case law is made binding by legislation.”⁵¹

Art. 1 of the Spanish civil code reads as follows:

1. The sources of the Spanish legal system are statutes (or legislative enactments), customs and general legal principles.

2. Any provisions which contradict another of higher rank shall be invalid.

3. Customs shall only apply in the absence of applicable statutes, provided that they are not contrary to morals or public policy, and that it is proven. Legal uses which are not merely for the interpretation of a declaration of will shall be considered customs.

4. General legal principles shall apply in the absence of applicable statute or custom, without prejudice to the fact that they contribute to shape the legal system.

5. Legal rules contained in international treaties shall have no direct application in Spain until they have become part of the domestic legal system by full publication thereof in the Spanish Official State Gazette.

6. Case law shall complement the legal system by means of the doctrine repeatedly upheld by the Supreme Court in its interpretation and application of statutes, customs and general legal principles.

7. Judges and Courts shall have the inexcusable duty to resolve in any event on the issues brought before them, abiding by system of sources set forth herein.

One may say that since case law is not listed in the first paragraph of art. 1, which refers to the main legal sources (legislative enactments, customs and general legal principles), case law is more a persuasive source of law than a binding one. We do not agree with that.

There are both interpretative and historical reasons which endorse the binding nature of case law in the Spanish civil law tradition. Concerning the former, it should be noted that art. 1.6 prescribes that case law “*complementará el ordenamiento jurídico*” (“shall complement the legal system”), and not just “*puede complementar...*” (“may or might complement...”).

Such interpretation is much more faithful to the Spanish legal tradition. As seen, the 1895 *Spanish Civil Code Project Reform*, in its Art. 1, explicitly admitted case law (or “*jurisprudencia*”) – along with statutes and custom – as legal sources. This option encapsulated an old institution which had been in force in the legal systems of the Crown of Aragón for many centuries. As has been proven, case law was somehow regarded as a binding source of law both in Catalonia⁵² and in Valencia.⁵³ Both legal

⁵¹ Glendon / Carozza / Picker, *Comparative Legal Traditions*, p. 245.

⁵² On Catalonia, see Capdeferro, J., “Práctica y desarrollo del derecho en la Cataluña moderna: a propósito de la jurisprudencia judicial y la doctrina”, *Juristas de Salamanca, siglos XV-XX* (S. de Dios et al., coords.), Salamanca: Ediciones Universidad de Salamanca, 2009, pp. 235-257; Capdeferro, J., “Promoció, edició i difusió d'obres jurídiques a Catalunya a cavall dels segles XVI i XVII,” *Ivs Fvgit* 15-16 (2009), Zaragoza, pp. 537-559; see also the bibliography cited in the fn n. 53.

⁵³ On this matter, see Masferrer, “Plurality of Laws and *Ius Commune* in the Spanish Legal Traditions: The Cases of Catalonia and Valencia”; Masferrer, *La pervivencia del Derecho foral valenciano tras los Decretos de Nueva Planta*, pp. 117-125; Masferrer / Obarrio-Moreno, *La formación del Derecho foral valenciano*, pp. 367-373.

doctrine and forensic sources reveal the value of case law as a binding legal source. This does not mean that all judgments might have an *erga-omnes* effect.⁵⁴

In the beginning of the sixteenth century, a Catalan constitution (*Corts de Montsó*, 1510) prescribed that judicial decisions had to be properly motivated.⁵⁵ These judgments were then published and commented upon (originating a peculiar ‘decisionist’ literature).⁵⁶ They were highly valued and frequently invoked.⁵⁷ Unfortunately, the historiography,⁵⁸ whether Spanish, European and Latin American,⁵⁹ has not paid yet much attention to these sources. The same could be said concerning the Valencian legal tradition.⁶⁰ In the end of the eighteenth century, a Valencian practitioner wrote as follows:

“[T]he lawyer must make use of the knowledge acquired in the painful case-law study concerning the subject-matter of the specific legal dispute, taking the convenient time to

⁵⁴ Ferro-Pomà, V., *El dret Públic Català. Les Institucions a Catalunya fins al Decret de Nova Planta*, Vic: Eumo, 1987, pp. 314-315.

⁵⁵ On this matter, see Pérez Martín, A. / Scholz, J.M., *Legislación y Jurisprudencia en la España del Antiguo Régimen*, Valencia: Universidad de Valencia, 1978, p. 297–301. For Valencia, see *Furs, capitols, provisions, ...*, 1564, Caps. 33 and 46; P. Belluga, *Speculum Principum ac iustitiae*, Paris 1530, rub. 41, 33; C. Crespí de Valdaura, *Observationes illustratae decisionibus Sacri Supremi Regii Aragonum Consilii, Supremi Consilii S. Cruciatæ, et Regiæ Audientiae Valentinae*, Lugduni 1730, I, 5, 107; L. Matheu y Sanz, *Tractatus de regimine urbis et regimini Valentiaæ*, Lyon 1704, III, 11, 1, p. 22–53. For Catalonia, see Ferro-Pomà, *El dret Públic Català*, pp. 341-342; J. Cancer, *Variarum resolutionum juris caesarei, pontificii [et] municipalis Principatus Cathalauniae*, Lyon 1683, 3, 17, 407; B. Tristany Bofill et Benach, *Sacri Supremi regii Cathaloniae Senatus decisions*, Barcelona 1686, vol. I, decis. 27; J.P. Fontanella, *De pactis nuptialibus, sive Capitulis matrimonialibus tractatus, 2: multis Regiæ Audientiae Principatus Cathaloniae & aliorum grauissimorum senatum particulari diligentia ad propositum exquisitis decisionibus ornatus, adeo vt nihil fere dicatur, quod non vna aut altera decisione comprobetur*, Geneva 1659, 7, 3, 10, 49; J.P. Fontanella, *Decisiones Sacri Regii Senatus Cathaloniae*, Geneva 1659, 287, 18-19; 596,6. On the consequences of the prohibition to motivate the judgments in Catalonia after the *Nueva Planta* Decree (1716), see Sarrión Gualda, J., “El Decreto de Nueva Planta para Cataluña: efectos y consecuencias”, J.A. Escudero López (ed.), *Génesis territorial de España*, Zaragoza: El Justicia de Aragón, 2007, p. 205-51 in particular, p. 241-43.

⁵⁶ On the ‘decisionist’ literature in Catalonia, Capdeferro, “Práctica y desarrollo del derecho en la Cataluña moderna: a propósito de la jurisprudencia judicial y la doctrina,” pp. 238 ff.; see also Brocà, J.M., *Historia del Derecho de Cataluña*, I, Barcelona 1918, p. 409, where the main provisions concerning this matter are provided: *Corts de Montsó* of 1510 (*Constitutions i altres Drets de Catalunya* I, 7, 3, 2), of 1542 and 1547; see also Sobrequés i Vidal, S., *Historia General del Derecho Catalán hasta el siglo XVIII*, Barcelona 1989; on the decline of legal doctrine after the *Nueva Planta* Decree, see Sarrión Gualda, “El Decreto de Nueva Planta para Cataluña,” pp. 243-45; Pérez Collados, J.M., “La vertebración de Cataluña en la Monarquía española a raíz de los Decretos de Nueva Planta,” Escudero López (ed.), *Génesis territorial de España*, pp. 266 ff; Pérez Collados, J.M., “La tradición jurídica catalana (Valor de la interpretación y peso de la historia),” *Anuario de Historia del Derecho Español* 74 (2004), pp. 141-145; see also Pérez Collados, J.M., “El derecho catalán de sucesión en vísperas de la codificación”, *Anuario de Historia del Derecho Español* 75 (2005), pp. 331-368.

⁵⁷ The link between the prohibition to motivate the judgments and the decline of the ‘decisionist’ literature has been proven by Sarrión Gualda, “El Decreto de Nueva Planta para Cataluña,” pp. 240-241, 243-244, 251.

⁵⁸ In Valencia – unlike in Catalonia – the ‘decisionist’ literature has been hardly explored yet. On the Valencian legal doctrine, see Marzal Rodríguez, P., “Juristas valencianos en la Edad Moderna,” J. Alvarado (ed.), *Historia de la literatura jurídica en la España del Antiguo Régimen*, Barcelona/Madrid: Marcial Pons, 2000, pp. 186-187.

⁵⁹ On the ‘decisionist’ literature in the Spanish colonies in America, see Barrientos Grandón, J., “La literatura jurídica indiana y el *ius commune*,” Alvarado (ed.), *Historia de la literatura jurídica en la España del Antiguo Régimen*, pp. 253-254.

⁶⁰ See fn n. 53.

examine any determinant legal decision in the question which one may have been asked for.”⁶¹

“In default of authors – a magistrate of the Valencian *Audiencia* pointed out – [the lawyer] should resort to the ones who wrote about the court’s decisions, the fair ones will be taken into account, especially the Supreme Courts’ ones, due to the authority given by the judgment of the wise (or ‘juicio de los sabios’), and prudent magistrates that caused them...”⁶²

It has been affirmed that “[s]ome legal theorists consider that, in rare instances, a line of cases can create a rule of customary law which is then binding as such.”⁶³ This is not a theoretical invention of legal theorists at all. It is rather what has been called as the ‘judicial custom’ (as opposed to the ‘extrajudicial custom’).⁶⁴ Historically, in civil law jurisdictions the case law and the custom were related, given that the judicial precedent created custom, whose binding character obliged tribunals to follow it in later judgments. As stated by a Valencian practitioner, ‘if the judgments were such that they could induce to custom, they should be binding.’⁶⁵

Nevertheless, some authors held that when judgments came not only from the inferior courts – the Royal *Audiencias* among them – but also from the Supreme Council of Aragon, case law was considered law (*lex*), not just custom: ‘and above all was declared in these judgments, by which what was decided became law’.⁶⁶ This thesis was sustained – as the *alegaciones* themselves show – by Valencian authors including León, Bas, Crespí, Trobat, etc., who in turn relied on the opinion of the Catalan author Fontanella. It was, however, the subject of certain restrictions imposed by the Catalan doctrine.⁶⁷

In fact, Cortiada and other authors sustained – as Fontanella did – that in the kingdoms of the Crown of Aragon, the Senate’s decisions did not create law: the Senate did not have power to do so, in accordance with the ruling principle *non exemplis, sed legibus judicandum est*. Now – notwithstanding the above – Cortiada pointed out that the precedent of the Supreme Council of Aragon acquired the value of law if there was neither *Fuero* (*lex*) nor custom applicable to a particular case.⁶⁸

⁶¹ Llamas y Molina, S. de, *Sobre las obligaciones de los abogados. Discurso que en la abertura del tribunal dixo el día 2 de enero de 1798*. D. Sancho de Llamas y Molina, Doctor en sagrados canones de la Universidad de Alcalá, colegial en el mayor de San Ildefonso del consejo de s.m. y regente de la real audiencia de Valencia, Valencia 1798 (it may also be consulted in B.U.V, Varios 102, n. 8), p. 23.

⁶² De Llamas y Molina, *Sobre las obligaciones de los abogados*, p. 24.

⁶³ Glendon / Carozza / Picker, *Comparative Legal Traditions*, p. 245.

⁶⁴ Ferro-Pomà, *El dret Públic Català*, p. 311.

⁶⁵ B.U.V, R-2/362, a.1, n. 10: ‘Por lo cual si fueran tantas las sentencias, que pudiesen inducir costumbre, à ella debería estarse’; B.U.V, Varios 239, a.17, n. 36, p. 20; on this matter, see Leon, *Decisiones*, I, Decis. 60, nums. 28, 30, 45 and 50; Crespí de Valdaura, *Observaciones*, Observaciones 19 and 20; Bas y Galcerán, *Theatrum, Praeludium*, num. 119.

⁶⁶ B.U.V., R-2/362, a.34, n. 28: ‘... y sobre todo asi se declaro en las dichas Sentencias, las cuales en lo que decidieron, hizieron ley.’

⁶⁷ B.U.V., R-2/362, a.32, n. 21, p. 13: ‘Fontanella ... y se refieren dichos catalanes a las sentencias del antes Consejo de Aragon que hazian ley a este reyno’; B.U.V, Varios 239, a.17, n. 53, p. 27: ‘Esfuerza la parte otra la citada autoridad de Trobat, diziendo: Que la sentencia que dicho Autor refiere, por ser del Supremo Consejo de Aragon, se debe mirar como à ley, pues éstas antes en el Reyno tenian fuerza de tal.’

⁶⁸ Cortiada, M. de, *Decisiones cancellarii et Sacri Regii Senatus Cathaloniae...Venetiis 1661-1665-1692-1727*, Pars prima, Decis. 24, num. 24.

This doctrine, although well-known to the Valencian authors,⁶⁹ was occasionally subject to various interpretations, depending on the position of the defendant, conferring more or less importance on Cortiada's restrictions, according to the lack of a regulatory provision and the similarity of the precedent case.⁷⁰

However, most civil law jurisdictions – unlike the Catalan and Valencian legal traditions –, were reluctant to consider case law as a primary, binding source of law, viewing it – at least, theoretically – as a secondary, persuasive source of law:

“Most civil law systems underwent quite a different evolution, relegating case law to the rank of a secondary legal source. Codes and special legislation were recognized as the only primary source of law. In 19th century Europe, the doctrine of the separation of powers was understood to imply that ‘[t]he role of the courts is to solve disputes that are brought before them, not to make laws or regulations’. This strict historical conception of separation of powers was due to general distrust of courts that were manipulated by the king before the French revolution. The ideals of certainty and completeness in the law implied that legislative provisions had to be formulated and interpreted as mathematical canons to avoid any room for discretion or arbitrary decisions in the judiciary.

However, European jurists gradually developed a healthy skepticism concerning the ideals of certainty and completeness in the codified law. As memories of the abuses of pre-revolution regimes began to fade, ideological concerns over the judiciary's role were assuaged. In their own judicial practices, civil law jurisdictions gradually adhered to a system of informal precedent law, where a sequence of analogous cases acquired persuasive force as a source of law. This judicial practice emerges as a way to promote certainty, consistency, and stability in the legal system that codifications had failed to achieve, while minimizing costs to administer justice.

This path of legal development gave rise to *jurisprudence constante*, the doctrine under which a court is required to take past decisions into account only if there is sufficient uniformity in previous case law. No single decision binds a court and no relevance is given to split case law. Once uniform case law develops, courts treat precedents as a persuasive source of law, taking them into account when reaching a decision. The higher the level of uniformity in past precedents, the greater is the persuasive force of case law. Considerable authoritative force, therefore, stems from a consolidated trend of decisions on any given legal issue.’⁷¹

In practice, however, reality shows – as seen, at least, in some civil law traditions – that the case law (or *jurisprudence constante*) may be as binding as the common-law *stare decisis*. The binding force of the *jurisprudence constante* could be even theoretically defended because, being it considered as a judicial custom – as it was in the tradition of many civil law jurisdictions –, would become a primary, binding source of law.

3. Some Concluding Considerations

Some non-Spanish legal historians and comparative lawyers misunderstood the Spanish civil code, its role and its operation. This is due to several reasons:

⁶⁹ B.U.V., R-2/362, a.1, p. 9; B.U.V., R-2/362, a.1, n. 10. On this matter, see also *Cortiada*, *Decisiones cancellarii et Sacri Regii Senatus Cathaloniae*, Pars prima, Decis. 24, num. 24.

⁷⁰ An example of this can be seen in B.U.V., Var. 239, a.17, nn. 53–56, p. 27.

⁷¹ Fon, V. / Parisi, F., “Judicial precedents in civil law systems: A dynamic analysis” *International Review of Law and Economics* 26 (2006) 519–535, p. 522.

1) The Codification of civil law in Spain, with its peculiarities, makes it hardly comparable to other Western or Continental civil codes in general, and to the French code in particular. In this vein, presenting the French codification as a model for any Western and Continental code poses difficult problems in describing other Western codes in general and the Spanish one in particular. Moreover, presenting French codification as the model implies that all codes should be analyzed in accordance with the Napoleonic codes, taking erroneously for granted that all codes necessarily have a resemblance with, and were highly influenced by, the French codes.

2) The lack of historical knowledge of law in general, and of the Spanish legal history in particular, whose reachness and complexity is considerable.

3) Historiography has also contributed to misunderstand the codification of Spanish law. Inaccurate common places on Spanish codification of civil law came from legal historians to comparative lawyers, who depicted a confusing image of it, as we saw.

The Spanish civil code drastically departed from the French model in some aspects, and its subsidiary character is the most important one. This trait of the Spanish civil code cannot be compared to any other civil code all over the world. This uniqueness may somehow explain the difficulty in understanding it and making an accurate presentation of it. It is a matter of really understanding that the Spanish monarchy had – as current Spain still has – not just a legal tradition, but several legal traditions. Catalan deputies – like José de Espiga y Gadea (1758-1824) – supported the drafting of a civil code because they never understood it – as in France – in terms of unifying the law.

The failure of the *García Goyena civil code Project* (1851) made clear that codification should not imply a legal unification based upon the Castilian legal tradition. As it is well known, such failure paralyzed the efforts to enact a civil code for thirty years. In 1880, the idea that the Spanish civil code should fuse both Castilian and other regional private law institutions was rejected. In 1881 the ‘*Ley de Bases*’, by Manuel Alonso Martínez, mainly containing Castilian law institutions was also rejected. Four years later, in 1885, the ‘*Ley de Bases*’, by Francisco Silvela, constituted the right starting point, since it admitted that the Spanish civil code would be subsidiary in all regions whose private law institutions were in force. In these regions (Catalonia, Aragón, Balearic Islands, Navarre, Galicia, Vizcaya and Álava), the civil code would be just filling in the gaps left by their foral or regional laws.

As explained above, the Spanish civil code could hardly operate – after its enactment 1888/1889 – if regions did not draft their foral law institutions. Whereas the Appendix system failed because of its restrictive character (1889-1946), the Compilation system succeeded, thanks to which all regions drafted their compilations from 1959 to 1973.⁷² With the approval of the Spanish Constitution (1878), these regions – called ‘Autonomous Communities’ by the constitutional text – not only were allowed to keep their own private law institutions, but they also were granted legislative “to preserve, amend, and develop” them (art. 149.1.8 SC).⁷³ Such system, after almost four decades of development (1978-2015), has given birth to a multilevel-code system.⁷⁴

⁷² On this matter, see fn n. 24, and its main text.

⁷³ On this matter, see fn n. 27, and its main text.

⁷⁴ On this matter, see fn nn. 28 and 29, and their main texts.

To what extent can it be affirmed that the Spanish civil code did follow the French model? Can we imagine a French civil code like the Spanish one? Does it make sense to approach comparatively realities which might be notably different? To what extent is it appropriate and useful to codification of the Spanish civil law employing the French codification as model? It seems clear that the Spanish case is quite unique. Can – or should – uniqueness be compared?

The Spanish civil code is unique. This does not mean to deny that some of its provisions and legal institutions might have been taken from other civil codes (French, Italian, etc.).⁷⁵ To which extent the text of the Spanish civil code is indebted to these codes, would need to be carefully explored, linking the matter with the Spanish historiography and its discussion as to whether the codification movement brought with it a ‘nationalization’ or ‘denationalization’ of the Spanish law.⁷⁶ It should also be taken into account three different kinds (or levels) of influence of the Napoleonic codes over other European jurisdictions, namely, a) the idea of the code, b) the structure (i.e. distribution of books, chapter, titles, etc.), and c) the content, that is, the existence of some provisions and legal institutions which might stem from the French model.⁷⁷

In doing so we note, for example, that many provisions on the law of obligations/contracts of the Spanish civil code are quite similar to those of the French code. Even in that case, once we admit that the French code was probably used as a model, one might wonder whether such contract law provisions are really French or they rather found their origin in the tradition of the *ius commune*. To answer this question would exceed the limits of the present paper. However, in analyzing the possible influence of the French code over the content of the Spanish one, we would also discover how the Spanish civil code might differ from the French in many other aspects, some of them particularly relevant. It is the case of the regulation of sources of law, and more specifically, the value of custom and case law or (judicial) jurisprudence.

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⁷⁵ Zweigert / Kötz, *An Introduction to Comparative Law*, p. 107: “This code [Spanish civil code, 1889], which is still in force, relies heavily on the Code civil, especially in the area of the law of obligations, where most of the provisions are a simple translation of the French text. In family or inheritance law, on the other hand, the Código contains many institutions indiginous to Spain, especially those from prior Castilian law.”

⁷⁶ On this matter, see Masferrer, A., “Codification as Nationalization or Denationalization of Law: The Spanish Case in Comparative Perspective”, *Comparative Legal History* 4.2 (2016), pp. 100-130; see also Masferrer, “La Codificación española y sus influencias extranjeras...,” pp. 19-43.

⁷⁷ On this matter, see Masferrer, “The Napoleonic *Code pénal* and the Codification of Criminal Law in Spain”, cited in the fn n. 9.

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