

How did the French Criminal Code influence the European and Latin-American Codification?

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This was one of the main questions explored in the International Seminar (GERN Interlabo), entitled *The influence of the 1810 French Penal Code on Penal Codification in 19^e Century Europe: Myth or reality?*, that was celebrated on Thursday, 20 June 2019, at the Seminario de Profesores de Derecho Romano (4th Floor, Room 4P03), University of Valencia Law School. The International Seminar (GERN Interlabo) was organized by Yves Cartuyvels (University of Saint-Louis – Bruxelles, Belgium) and Aniceto Masferrer (University of Valencia, Spain), and financed by the *Groupe Européen de Recherches sur les Normativités (GERN)* Interlabo, the University of Saint-Louis (Bruxelles), and the University of Valencia (in the context of the research project entitled “Las influencias extranjeras en la Codificación penal española: su concreto alcance en la Parte Especial de los Códigos decimonónicos”, ref. DER2016-78388-P, funded by the Spanish ‘Ministerio de Economía y Competitividad’).

In presenting that Seminar, I gave a general overview of the Project, with some of its challenges and results.¹

I explained that the book was well received by in scholarship in the field. In fact, I received messages of congratulations from some colleagues.² There is a book review published in GLOSSAE³ and some more on the way.⁴

What were the results of our research, in case it would be possible to present a synthesis encompassing most of the chapters? In answering this question, I’ll address four issues:

¹ The main results are included in *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; this is the written version of the presentation I made to open the International Seminar (see its program in the Appendix).

² Numbers of downloads until 17.6.2019: 2.870 (Springer); it can be found in many online book sellers (Amazon, etc.); it is cited in Wikipedia: ‘*Nulla poena sine lege*’; Googlebooks (e.g. <http://www.icconnectblog.com/2018/05/whats-new-in-public-law-99/>); it can be downloaded at [http://www.book-free.me/get-file.pdf?q=the western codification of criminal law a revision of the myth of its predominant french influence studies in the history of law and justice](http://www.book-free.me/get-file.pdf?q=the+western+codification+of+criminal+law+a+revision+of+the+myth+of+its+predominant+french+i+nfluence+studies+in+the+history+of+law+and+justice) or at <http://aaden.thatsthespirit.co/B07BCBQ629-the-western-codification-of-criminal-law-a-revision-of-the-myth-of-its-predominant-french-influence-studies-in-the-history-of-law-and-justice.pdf>

³ José Franco wrote a four-page review and was published in *GLOSSAE. European Journal of Legal History* 15 (2018), pp. 274-277 (<http://www.glossae.eu/wp-content/uploads/2019/02/recension-franco.pdf>).

⁴ Some journals seem to be interested in publishing other book reviews: *Journal of Legal History* (UK), *CLH* (ESCLH); *Tijdschrift voor Rechtsgeschiedenis*; and *American Journal of American Legal History*.

1. Does the title of the book reflect the content of the volume?

As you may remember, this is something we discuss here three years ago. With the title ‘The Western Codification of Criminal Law’ we encompassed Europe and America (Mexico, Brazil and Argentine), but not the common law jurisdictions.

With the subtitle ‘A Revision of the Myth of its Predominant French Influence’, we asked ourselves: Was there a myth? Myths are sometimes created out of lack of research. In that case, the *vis attractiva* (or the driving force) of the *Code pénal* was clear, but that is not enough. There is no need to insist here on the three different levels of influence: 1) idea of code, 2) formal or structural influence and 3) substantive influence.⁵

In general, the chapters of our volume show that:

- a) The French code exerted an influence, particularly until the end of the middle of the nineteenth century;
- b) From that moment onwards, other codes prevailed over the French one (both in Europe and America);
- c) The circulation of codes was also an important point. Diego Nunes and Emilia Iñesta-Pastor have touched upon this matter;
- d) The relevance of autochthonous legal traditions was notable because either drafters decided to resort to their own legal tradition, or because many European codes derived from a transnational legal heritage that was common to all of them, namely, the *ius commune*.
- e) The foreign influence came not only through codes but also through legal doctrine (Bentham, Feuerbach, Pellegrino Rossi, etc.).

2. What are the merits of the book?

Let me underline what I consider to be the three main merits:

First, the book filled in a relevant gap in the criminal law historiography. Unlike in civil or private law, there was no book with an extensive analysis on the precise extent of the role of foreign influences on both European and American criminal codes.

Second, since there were more studies (articles and book chapters) published in Spanish (by scholars from Spain, such as Emilia Iñesta-Pastor, and Latin American countries,

⁵ On this matter, see my works “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; “Tradición e influencias extranjeras en la codificación penal española”, *La Codificación penal española. Tradición e influencias extranjeras: su contribución al proceso codificador. Parte General* (Aniceto Masferrer, ed.), Pamplona: Aranzadi–Thomson Reuters, 2017, pp. 27-56; “Tradition and Foreign Influences in the 19th-century Codification of Criminal Law. Dispelling the Myth of the overall French Influence in Europe and Latin America”, *The Western Codification of Criminal Law: The Myth of its Predominant French Influence Revisited* (Aniceto Masferrer, ed.), Dordrecht-Heidelberg-London-New York, Springer (Collection ‘History of Law and Justice’), 2018, pp. 3-50.

such as B. Bravo Lira), it was particularly pertinent that the book was published a) in English and b) in a big Publisher House as it is Springer (which is now in the third position, after OUP and Giuffrè, according the Scholar Publishers Indicator, SPI).

Third, the results open new possibilities and fields of research, matter upon which I'll touch in a few moments.

3. What were the main difficulties we encountered in drafting our chapters?

I think most of legal historians involved in the project encountered two difficulties:

1) *Sources were insufficient to unveil both the scope of foreign influences and the weight of each autochthonous legal tradition.* Sometimes, the influence was not clear and sources did not shed much light on the matter (discussions among drafters or in the Parliament before the approval of the code, books commenting on the legal provisions of the code, etc.).

2) *The diversity and complexity of influences.* There were several levels of influences that came from different autochthonous legal traditions + several codes (e.g. the foreign influence in drafting the Spanish Criminal Code (SCC) of 1848 came from several codes (French, Brazil, Two Sicily, Austria, etc.). The final map or landscape of influences was not easy because of the complexity of the matter.

4. What were some of the most surprising aspects of the results?

The influence was relevant when drafting and approving the first criminal code. After that, the relevance of foreign influences notably decreased or even fully disappeared. In Spain, this is particularly clear with the 1848 CC. After its promulgation, the other codes (1850, 1870, 1928, 1932, 1944 and 1995) were very similar to that of the 1848 Spanish one.

This leads me to two issues that notably surprise me (and I'd like to know your views about both questions, if you will):

First: why did some countries such as Spain prefer to enact different codes even though they were substantially the same, instead of following the path of other jurisdictions, such as France and Germany, where the 19th-century code was subject to reform but not fully abrogated?

Second: how can the fact that the legal provisions of criminal codes changed so little over time (a century and a half, for example) be explained? In many cases, just minor changes concerning the penalties for the commission of some crimes. How should this be interpreted?

I believe that there may be two possible answers to this second issue:

a) Even though the political, social, economic and cultural context changed considerably from the nineteenth to the middle of the twentieth century, *criminal offences do not change that much, and substantial reforms take a long time to be realized or implemented*;

b) *Is it possible that legal doctrine and case law might play an important role in adjusting criminal law offences and provisions to the needs of each social context?* To answer ‘yes’ would imply that criminal law did not comply with the principle of legality in the context of liberal or constitutional systems. Moreover, criminal offences and penalties are not supposed to be changed either by scholars or by judges. However, is it possible that they may play a role in advancing criminal law during such a long period in which the scope of legal reforms was quite limited? An example would be the legal provisions concerning crimes against religion, crimes against honesty, or crimes against public morality.

What was role of legal doctrine and case law from the middle of the nineteenth century to the middle of the twentieth century?

One example: the Project we’ll be discussing tomorrow is somehow connected to this question. The new positivistic schools started to be present in the late nineteenth-century criminal law discourses, but not in many jurisdictions. Social defense’s claims were introduced in the criminal codes through legal reform.

Another example: it has been demonstrated that case law played a very important role in the context of the absolutistic –or non-constitutional– period that started in 1823 until the promulgation of the 1848 SCC. Could it be possible that case law resumed its relevance from 1848 onwards?

Stefano Vinci has been working on the contribution of the Italian Supreme Court in the criminal law of several nineteenth-century decades. I wonder whether he or any other might shed light on the relevance of jurisprudence in the making of criminal law, and whether this source might explain the lack of substantive criminal law reform in a period of intensive political, social and cultural changes.

A Third response to my question could be as follows: the nineteenth-century utilitarianism and positivism that appeared in the Western World, particularly in Europe and America, started –beside some exceptions– to have an important impact in terms of legal reform – and not just on the theoretical level or in the scholarship– by the middle of the twentieth century. In the case of Spain, it would be after Franco’s dictatorship, from 1975 onwards.

I don’t want to explain that for two reasons: first, because I’m interested in having a bit of colloquium right now on the issues I just raised in my presentation, and second, because tomorrow I’ll develop a bit more some of this hypothesis with which I wanted to conclude my fourth question concerning the most surprising aspects of the results of my part of the research project.

The Seminar followed the program (see it in the Appendix) and all contributors made interesting presentations that were later on followed by enriching colloquiums with questions and comments.

Program of the International Seminar GERN Interlabo
The influence of the 1810 French Penal Code on Penal Codification in 19^e Century
Europe: Myth or reality?

9h00-9h15 : Introduction et présentation of the research project: “Tradition and Foreign Influences in the 19th-century Codification of Criminal Law. Dispelling the Myth of the overall French Influence in Europe and Latin America”, **Aniceto Masferrer**, (University of Valencia, Spain)

9h15-9h35 : “The Myth of French Influence over Spanish Codification: The General Part of the Criminal Codes of 1822 and 1848”, **Aniceto Masferrer** (University of Valencia, Spain)

9h35-9h55 : “The influence of the French Penal Code of 1810 on the Belgian Penal Code of 1867: between continuity and innovation”, **Yves Cartuyvels** (University of Saint-Louis – Bruxelles, Belgium)

9h55-10h15: Discussion

10h15-10h35 : “The influence exerted by the 1819 Criminal Code of the Two Sicilies upon Nineteenth-Century Spanish Criminal Law Codification and its projection in Latin-America”, **Emilia Iñesta-Pastor** (University of Alicante, Spain)

10h35-10h55 : “The roots of Italian penal codification: Nation building and the claim for a peculiar identity in criminal law”, **Michele Pifferi** (University of Ferrara, Italy)

10h55-11h15 : “The Zanardelli Code and the first case law applications”, **Stefano Vinci** (University of Bari, Italy)

11h15-11h35 : Discussion and Pause-café

12h00-12h20: “The Mexican codification of criminal Law”, **Oscar Cruz Barney** (UNAM, México)

12h20-12h40: “The Influence of the Napoleonic Penal Code on the Development of Criminal Law in Germany: Juridical Discourses, Legal Transfer and Codification”, **Karl Härter** (Max-Planck-Institut für europäische Rechtsgeschichte - University of Darmstadt, Germany)

12h40-13h00 : Discussion

13h00- 13h20 : Conclusions, **A. Masferrer** (University of Valencia)⁶

13h30 : Lunch

* This **International Seminar** was organized by Yves Cartuyvels (University of Saint-Louis – Bruxelles, Belgium) and Aniceto Masferrer (University of Valencia, Spain), and financed by the *Groupe Européen de Recherches sur les Normativités (GERN) Interlabo*, the University of Saint-Louis (Bruxelles), and the University of Valencia (in the context of the research project entitled “Las influencias extranjeras en la Codificación penal española: su concreto alcance en la Parte Especial de los Códigos decimonónicos”, ref. DER2016-78388-P, financed by the Spanish ‘Ministerio de Economía y Competitividad’).

⁶ The contributions ‘Ignoring France? Possible French Influences on the Development of Austrian Penal Law in the 19th Century’, **Martin Paul Schennach** (University of Innsbruck, Austria) and “The influence of the French Penal Code of 1810 over the ‘general part’ of the Portuguese Penal Code of 1852: the visible and the invisible”, **Frederico de Lacerda da Costa Pinto** (University of Lisbon) & **Pedro Caeiro** (University of Coimbra, Portugal) will not be presented (Authors not present); **José Franco-Chasán** attended the Seminar and talked about “Code and Especial Laws in Civil Law and Criminal Law: The Spanish Case.”