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# The Western Codification of Criminal Law

## A Revision of the Myth of its Predominant French Influence

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# Preface and Acknowledgements

This volume seeks to fill in a historiographical gap, dealing with the contribution of the tradition and foreign influences to the nineteenth-century codification of criminal law. More specifically, it focuses on the extent of the French influence—among others—in European and American Civil Law Jurisdictions. In this vein, the book aims at dispelling some myths concerning the real extent of the influence of the French model on European and Latin American criminal codes. The impact of the Napoleonic criminal code on other jurisdictions was real, but the scope and extent of such influence was less strong than it has sometimes been described. The overemphasis of the French influence on other civil law jurisdictions is partly due to a line of thought that defends the idea that modern criminal codes constituted a break with the past. The question as to whether modern criminal codes constituted a break with the past or just a degree of reform touches on a difficult issue, namely, the dichotomy between tradition and foreign influences in the criminal law codification process. Those who stress that the codes broke with the past, usually tend to overemphasize foreign influences on the criminal codes. Conversely, those who argue that codes did not constitute a break with the past and contained many traditional institutions have the opposite tendency, underrating the role of foreign models.

Since codes cannot come out the blue, the proportions of tradition and foreign influence need to be carefully explored. Familiarity with tradition is the best way to ascertain the weight of foreign influences, and, by the same logic, the study of the foreign influences enhances the recognition of the weight of tradition. Tradition and foreign influences are not mutually exclusive. It would be unwise to overlook that the codes, inasmuch as they consecrated the notions, categories, and principles of the *ius commune* tradition, had a "supranational" flavor, and simultaneously took the guise of "national" law once integrated into the tradition of *ius proprium*. A code is never purely a national product. This perspective enables us to assess the extent to which the codification process in a given jurisdiction brought with it a nationalization or denationalization of its criminal law. Scholarship had unduly ignored this important subject. The present volume aims at filling such scholarly gap.

This book has been undertaken in the context of two research projects entitled "La influencia de la Codificación francesa en la tradición penal española: su concreto alcance en la Parte General de los Códigos decimonónicos" (ref. DER2012-38469), and "Las influencias extranjeras en la Codificación penal española: su concreto alcance en la Parte Especial de los Códigos decimonónicos" (ref. DER2016-78388-P), both financed by the Spanish "Ministerio de Economía y Competitividad." From its very beginning, I envisaged the convenience of inviting a group of distinguished scholars who might contribute to such an important subject from a comparative perspective, including jurisdictions from Europe and Latin America. That was the goal I pursued, and I think it was achieved. Even more, I dare to say that the contributors to this volume went far beyond my original expectations. The merit of this book is due to them, not to me. The only merit I may fairly deserve is to have contacted them and persuaded them to embark in this project. I am grateful to all of them for their generous cooperation and academic excellence.

Most of the contributors had the chance to discuss and exchange their views in the context of two biannual conferences organized by the *European Society for Comparative Legal History* in Macerata (Italy) in 2014, and in Gdansk (Poland) in 2016. The results of the project were presented and debated in the context of an international conference that was held from 9 to 11 November at the Faculty of Law of the University of Valencia, with the title "The Influence of the *Code pénal* (1810) over the Codification in Europe and Latin America: Tradition and Foreign Influences in the Codification Movement," thanks to the financial support of the *Conselleria d'Educació, Investigació, Cultura i Esport* de la *Generalitat Valenciana*, and the cooperation of the *Institute for Social, Political and Legal Studies* (Valencia) and the *Instituto de Historia de la Intolerancia* (adscrito a la *Real Academia de Jurisprudencia y Legislación*). Almost all the contributors of this volume attended the Valencian conference, devoting some hours in the morning to communicate the results to first-year law students—whose questions reflected their sincere interest and their ability to follow and understand the presentations—and several hours after lunch to discuss and debate in a scholarly seminar the most difficult issues of our findings.

I wish to express my gratitude to Georges Martin and Mortimer Sellers, the editors of the series "History of Law and Justice", for agreeing to publish this book in this prestigious Springer's collection, to Neil Olivier, for suggesting to me in Macerata (July 2014) the possibility of publishing this project with Springer, and to Christie Lue, for their generous availability and assistance.

Valencia, Spain Aniceto Masferrer
March 2017

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# Part I
# Introduction

# Tradition and Foreign Influences in the 19th Century Codification of Criminal Law: Dispelling the Myth of the Pervasive French Influence in Europe and Latin America

**Aniceto Masferrer**

**Abstract** Any civil law student knows that most of provisions in any European or Latin American civil code derive from Roman law, that they were the outcome of a long and gradual scholarly elaboration extending from 12th century glossators to the natural lawyers of the 18th century. However, there is no such consensus about criminal law. The civil law tradition has doubtlessly committed more effort to the scholarly development of private law institutions than to those of public law, privileging civil law over criminal law. The main consequences of this fact are twofold: (i) 19th century criminal jurisprudence is sometimes presented as if had arisen out of the blue, or as if institutions contained in the 19th criminal codes broke with the past or bore no traces of Roman law; and (ii) since criminal codes supposedly broke with the past, the extent and scope of foreign influences—and the French in particular—on the criminal codes in Europe and Latin America are overemphasized. The chapter aims at dispelling this common place, and particularly the myth of the overall French influence in Europe and Latin America.

This work was undertaken in the context of two research projects entitled "La influencia de la Codificación francesa en la tradición penal española: su concreto alcance en la Parte General de los Códigos decimonónicos" (ref. DER2012-38469), and "Las influencias extranjeras en la Codificación penal española: su concreto alcance en la Parte Especial de los Códigos decimonónicos" (ref. DER2016-78388-P), both financed by the Spanish 'Ministerio de Economía y Competitividad.'

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## 1 Introduction

In 1994 James Gordley published a somewhat controversial article with a provocative title: "Myths of the French Civil Code."[1] In his view, the Napoleonic code simply laid down some liberal principles from the revolution (property, freedom of contract, torts) rather than set out new, individualistic ones. In fact, this seems to be what Jean-Étienne-Marie Portalis, the main drafter of the French civil code, thought about the *Code Civil* (1804), fully aware of the past's important role in drafting, interpreting, and applying the code.[2]

Any civil law student knows that many provisions in most European or Latin American civil code derive from Roman law, that they were the outcome of a long and gradual scholarly elaboration extending from 12th century glossators to the

[1]James Gordley, "Myths of the French Civil Code," 42 *Am. J. Comp. L.* 459, 488–489 (1994): "The Code did not rebuild the law of property, contract or tort on new and individualistic principles. Indeed, it was drafted in what one can only describe as the trough between two intellectual waves: a wave of natural law theory that crested in the 16th and 17th centuries, and a wave of individualistic will-centred theory that did not emerge clearly until the 19th century. To the extent the drafters were guided by general principles at all, they used those of the natural lawyers which were already old-fashioned. The principles of the Revolution that did influence the drafters were a republican vision of law and the principle of human equality. The republican vision, however, was rejected by the drafters themselves, and the principle of equality did not lead to a reshaping of private law. Although the Code is often said to have abolished feudal property, it is hard to find much of economic consequence that changed."

[2]Portalis, *Preliminary Address delivered on the occasion of the presentation of the draft of the government commission*, on 1 Pluviôse IX (21 January 1801) (available at http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/code/index.html): "But what a great task is the drafting of a civil legislation for a great people! The endeavor would be beyond human powers, if it entailed giving this people an entirely new institution and if, forgetting that civil legislation ranks first among civilized nations, one did not deign to benefit from the experience of the past and from that tradition of good sense, rules and maxims which has come down to us and informs the spirit of centuries.

(…) The lawmaker does not exert an authority so much as a sacred function. He must not lose sight of the fact that laws are made for men, and not men for laws; that (…), rather than change laws, it is almost always more useful to present the citizenry with new reasons to love them; that history offers us the promulgation of no more than two or three good laws over the span of several centuries (…).

It is useful to protect all that need not be destroyed: laws must show consideration for common practices, when such practices are not vices. Too often one reasons as though the human race ended and began at every moment, with no sort of communication between one generation and that which replaces it. Generations, in succeeding one another, mingle, intertwine and merge. A law-maker would be isolating his institutions from all that can naturalize them on earth if he did not carefully observe the natural relationships that always, to varying degrees, bind the present to the past and the future to the present; and that cause a people, unless it is exterminated or falls into a decline worse than annihilation, to always resemble itself to some degree. We have, in our modern times, loved change and reform too much; if, when it comes to institutions and laws, centuries of ignorance have been the arena of abuses, then centuries of philosophy and knowledge have all too often been the arena of excesses."

natural lawyers of the 18th century.[3] However, there is no such consensus about criminal law.

The civil law tradition has doubtlessly committed more effort to the scholarly development of private law institutions than to those of public law, privileging civil law over criminal law. However, it would be naïve to think that 19th century criminal jurisprudence arose out the blue or that the institutions contained in the 19th criminal codes bore no traces of Roman law.[4] Such belief would require a leap of faith much greater than what is needed to believe in God, although not for those who replaced Him with the codes.[5] If codes be gods, then one might argue that they even preceded the beginning of the world and transcended Roman law and history altogether, with prophets announcing the gospel in the 18th century (Voltaire, Feuerbach, Beccaria, etc.), the alleged dawn of an entirely new criminal law. According to this view, no criminal law science antedated the 18th century, and the criminal codes, drafted in line with the Enlightenment and rationalist principles, broke utterly with the past and tradition. Far from consistent, this account is more a fairy tale than a credible account of the historical truth (to the extent history has—or should have—any relation to truth or objectivity), which is a bit more complex.

## 2 Criminal Law Reform and Codification: A Break with the Past?

> … [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.[6]

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[3]On this matter, see the recent work by George Mousourakis, *Roman Law and the Origins of the Civil Law Tradition* (Heidelberg-New York, Dordrecht-London: Springer, 2015); see also Emilija Stanković, "The influence of Roman law on Napoleon's Code Civil," *'Ex iusta causa traditum': Essays in honour of Eric Pool* (Pretoria: Fundamina, 2005), pp. 310–315.

[4]On this matter, see Aniceto Masferrer, *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).

[5]See, for example, Shael Herman, "From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture," *University of Illinois Law Review* 1984, pp. 597–620; see also R.C. Caenegem, *Judges, Legislators and Professors: Chapters in European Legal History* (Cambridge University Press, 1993), p. 89 (explaining that the French Exegetical School treated codes as the bible: "…since it believed in a limited number of holy books containing the law and nothing but the law").

[6]Joaquín Francisco Pacheco, *El Código penal concordado y comentado* (1848; I use the 2nd ed.: 1856, in particular, the facsimilar edition with a preliminary study by Abel Téllez Aguilera, Madrid: Edisofer, 2000), p. 82.

I remember how surprised I was the first time I read this paragraph some years ago. I thought it could not possibly be correct. Even more, I was almost convinced that the author did not say what he really thought about the true role of the criminal law tradition in the codification enterprise. I am not saying he lied. I am just saying he did not show the whole picture, for it emphasized just one side of the "criminal problem"[7] in the late 18th century to the beginning of the 19th century.[8]

## 2.1 *The Liberal System and the 'Constitutionalization' of Criminal Law Principles*

As is well known, criminal law was in disarray at the turn of the 19th century. What is often overlooked is one aspect that explains many other features of criminal law before it was codified, namely, that the main problem of the criminal law was not scientific but political. This explains many aspects that otherwise cannot be properly grasped: that criminal legislation was so harsh; punishments so severe, even sometimes affecting those who did not commit the crime; some punishments were still theoretically in force, though rarely or inconsistently applied in practice (the confiscation of goods, infamy, some degrading punishments, the death penalty, etc.); the disproportionality between crimes and their punishments; the persistence of torture, despite its rare application in many territories; that the kind of punishment applied depended more on political circumstances or interest than on the

[7]Giovanni Tarello, *Storia della cultura giuridica moderna*, vol. I: Assolutismo e codificazione del diritto (Bologna, 1976), p. 383; for an interesting treatment of Enlightenement thought and criminal law, see pp. 383–483.

[8]A description of the Spanish criminal law in the 18th century can be seen in Isabel Ramos Vázquez, "Las reformas borbónicas en el Derecho penal y de Policía criminal de la España dieciochesca" (see http://www.forhistiur.de/zitat/1001ramos.htm); a 18th-century view of that period in criminal law can be found in Joaquín Cadafalch y Burguñá, *Discurso sobre el atraso y descuido del Derecho penal hasta el siglo XVIII* (1849); for an overview on the Codification of criminal in Spain, see Masferrer, *Tradición y reformismo en la Codificación penal española*, already cited; Aniceto Masferrer, "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; Aniceto Masferrer, "Liberal State and Criminal Law Reform in Spain", Mortimer Sellers & Tadeusz Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*. Series: *Ius Gentium: Comparative Perspectives on Law and Justice*, vol. 3 (2010), pp. 19–40.

legislative prescription; that judges enjoyed—and sometimes misused, although less frequently than many suspect—excessive discretion; etc.

*Ius commune* lawyers had defended most of the modern criminal law principles that were claimed by authors like Beccaria, Montesquieu, Feuerbach, Lardizábal, among others. These include the legality of crime and punishment, the proportionality between crime and punishment, the individuality of punishment, favorable decision, favorable interpretation, and the presumption of innocence.[9]

It might seem that this is precisely what the French Revolution demanded and brought about, which is true. However, these criminal law principles were not an original product of the revolution. These principles were well known among scholars, although not politically recognized or implemented.[10] A new political system was needed to protect criminal law from misuse.[11] That was precisely the greatest contribution of the French Revolution to modern criminal law.[12]

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[9]Jesús Lalinde Abadía, *Iniciación histórica al Derecho español* (1983), p. 669; on the presumption of innocence in Enlightenment thought and its roots in glossators' doctrine, see Joachim Hruschka, "Die Unschuldsvemutung in der Rechtsphilosophie der Aufklärung", in *ZStW*, CXII (1990), Heft 2, pp. 285–300.

[10]On this matter, see Masferrer, *Tradición y reformismo en la Codificación penal española*, pp. 69–91; Masferrer, "Codification of Spanish Criminal Law in the Nineteenth Century…", pp. 100–111; Masferrer, "Liberal State and Criminal Law Reform in Spain", pp. 23–40.

[11]The importance of the political context in explaining and reconstructing the historical development of criminal law should not be neglected; on this matter see, Masferrer, *Tradición y reformismo en la Codificación penal española*, pp. 53–54; Masferrer, "La dimensión ejemplarizante del Derecho penal municipal catalán en el marco de la tradición jurídica europea. Algunas reflexiones iushistórico-penales de carácter metodológico", *AHDE* 71 (2001), pp. 439–471, particularly pp. 446–450; R. C. Caenegem, "Criminal Law in England and Flanders under King Henry II and Count Philip of Alsace", *Actes du Congrès de Naples (1980) de la société italienne d'Histoire du Droit. Studia Historica Gandensia* 253, 1982 (republished in R. C. van Caenegem, ed., *Legal History: a European Perspective*, London, 1991, pp. 37–60), p. 254: "The conclusion is that no study of criminal law, in the past or in the present, can be conducted fruitfully without constant reference to the political situation and the power structure in society: criminal law is not the fruit of logical deductions from eternal principles formulated by unworldly scholars." This is particularly important in historical periods of political reforms, convulsions o revolutions, as the French historiography has clearly shown.

[12]On the close link between the political revolution (French Revolution) and the codification of criminal law in France, see Jean-Marie Carbasse, *Introduction historique au droit pénal* (Paris, 1990), pp. 329 ff.; Jean-Marie Carbasse, "Le droit pénal dans la Déclaration des droits", *Droits: Revue française de théorie juridique* VIII (1988), pp. 123–134; Renée Martinage, "Les innovations des constituants en matière de répression", *Une autre justice. Contributions à l'histoire de la justice sous la Révolution française* (dir. Robert Badinter) (Fayard, 1989), pp. 105–126; Jean-Marie Carbasse, "État autoritaire et justice répressive: l'evolution de la législation pénale de 1789 au Code de 1810", *All'ombra dell'Aquila Imperiale. Transformazioni e continuità istituzionali nei territori sabaudi in età napoleonica (1802–1814). Atti del convegno, Torino 15–18 ottobre 1990* (Roma, 1994), I, pp. 313–333; Pierre Lascoumes, "Revolution ou reforme juridique? Les codes penaux français de 1791 a 1810", *Revolutions et justice en Europe. Modeles français et traditions nationales (1780–1830)* (Paris: L'Harmattan, 1999), pp. 61–69; Bernard Schnapper, "Les Systemes repressifs français de 1789 a 1815", *Revolutions et justice en Europe. Modeles français et traditions nationales (1780–1830)* (Paris: L'Harmattan, 1999), pp. 17–35; Pierre

More specifically, both the *Declaration of the Rights of the Man and of the Citizen* (1789) and the first modern French Constitution (1791) instigated a remarkable legacy that I call the 'constitutionalization' of the main criminal-law principles, followed by their 'legalization,' whereby these principles were laid down in criminal codes or—to distinguish them from 'absolutist' theories—the 'liberal' codes.[13]

Lascoumes/Pierrette Poncela, "Classer et punir autrement: les incriminations sous l'Ancien Régime et sous la Constituante", *Une autre justice. Contributions à l'histoire de la justice sous la Révolution française* (dir. Robert Badinter) (Fayard, 1989), pp. 73–104; Antoine Leca, "Les principes de la revolution dans les droits civil et criminel", *Les principes de 1789* (Marseille, 1989), pp. 113–149; Georges Levasseur, "Les grands principes de la Déclaration des droits de l'homme et le droit répressif français", *La Déclaration des droits de l'homme et du citoyen de 1789, ses origines – sa pérennité* (Paris, 1990), pp. 233–250; Renée Martinage, "Les origines de la pénologie dans le code pénal de 1791", *La revolution et l'ordre juridique privé. Rationalité ou scandale? Actes du colloque d'Orléans (11–13 septembre 1986)* (Orléans, 1988), I, pp. 15–29; Renée Martinage, *Punir le crime. La repression judiciaire depuis le code pénal* (Villeneuve-d'Ascq, 1989); Germain Sicard, "Sur la terreur judiciaire a Toulouse (1793-AN II)", *Liber Amicorum. Etudes offertes à Pierre Jaubert* (Bourdeaux, 1992), pp. 679–700; Jean-Pierre Delmas Saint-Hilaire, "1789: un nouveau droit pénal est né…", *Liber Amicorum. Etudes offertes à Pierre Jaubert* (Bourdeaux, 1992), pp. 161–177.

[13]Pio Caroni, *Lecciones catalanas sobre la historia de la Codificación* (Madrid, 1996), pp. 69 ff.; see also Bartolomé Clavero, "La idea de Código en la Ilustración jurídica", *Historia. Instituciones Documentos* 6 (1979), pp. 49–88; Diego Silva Forné, "La Codificación penal y el surgimiento del Estado liberal en España", *Revista de Derecho Penal y Criminología*, 2º época, 7 (2001), pp. 233–309; Masferrer, "Codification of Spanish Criminal Law in the Nineteenth Century…", cited in the fn n. 8; Masferrer, "Liberal State and Criminal Law Reform in Spain", cited in the fn n. 8; Manuel Bermejo Castrillo, "Primeras luces de codificación. El Código como concepto y temprana memoria de su advenimiento en España", *Anuario de Historia del Derecho Español* 83 (2013), pp. 9–63; on the codification movement in the Early Modern Age, see Yves Cartuyvels, *D'où vient le code pénal?: une approche généalogique des premiers codes pénaux absolutistes au XVIIIe siècle* ([Montréal et al.]: Presses de l'Université de Montréal/Presses de l'Université d'Ottawa/De Boeck Université, 1996); Yves Cartuyvels, "Le droit pénal entre consolidation étatique et codification absolutiste au XVIIIe siècle", *Le penal dans tous ses Etats. Justice, Etats et Sociétés en Europe (XIIe-Xxe siècles)* (Bruxelles, 1997), pp. 252–278; Yves Cartuyvels, "Eléments pour une approche généalogique du code penal", *Déviance et Société* 18 (1994), 4, pp. 373–396; Stanislaw Salmonowicz, "Penal codes of the 16th–19th centuries. A discussion of models", *La codification européene du Moyen-Age au siècle des Lunières. Etudes réunies par Stanislaw Salmonowicz* (Warsawa, 1997), pp. 127–141; Katarzyna Sójka-Zielinska, "Über den modernen Kodifikationsbegriff", *La codification européene du Moyen-Age au siècle des Lunières. Etudes réunies par Stanislaw Salmonowicz* (Warsawa, 1997), pp. 9–19; Yves Castan, "Les codifications penales d'Ancien Régime", *Le penal dans ses Etats. Justice, Etats et Sociétés en Europe (XIIe-XXe siècles)* (Bruxelles, 1997), pp. 279–286; Benoît Garnot, "L'évolution récente de l'Histoire de la criminalité en France à l'époque moderne", *Histoire de la Justice* 11 (1998), pp. 225–243; Benoît Garnot, "Justice, infrajustice, parajustice et extrajustice dans la France d'Ancien Régime", *Crime, Histoire et Societés* 2000, vol. 4, n. 1, pp. 103–120.

The aforementioned principles can be found in articles 4–8 of the *Declaration of the Rights of the Man and of the Citizen*,[14] of which the last two are particularly relevant to criminal justice:

Art. 7: "No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law. Any one soliciting, transmitting, executing, or causing to be executed, any arbitrary order shall be punished. But any citizen summoned or arrested in virtue of the law shall submit without delay, as resistance constitutes an offense."

Art. 8: "The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense."

It is highly likely this was the greatest contribution to modern criminal law system from France and the French Revolution.[15] Moreover, France constituted the first continental country that 'constitutionalized' the criminal law principles that *ius commune* lawyers had claimed some centuries before the French Revolution.

From this perspective, Pacheco was right in asserting that criminal law needed a clean break, but the shift from the *ancien régime* to a liberal system that occurred in France during the revolution was more political than scientific. This permitted a new criminal law system to emerge whose main principles were 'constitutionalized' thanks to political will that was incompatible with 18th century absolutist monarchies. The same process would soon recur throughout the Continent. As the American colonies achieved political autonomy from the metropolis, so too did Latin America.

From the political point of view, the criminal law system clearly broke from tradition. This is evident in various European constitutions, some articles of which established the principles of the new concept of justice in criminal law.[16]

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[14]Art. 4 *DRMC* 1789: "Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law."

Art. 5 *DRMC* 1789: "Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law."

Art. 6 *DRMC* 1789: "Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents."

[15]On this matter, see the bibliography cited in the footnote n. 7.

[16]For the Spanish and German constitutionalism, see Aniceto Masferrer, "El alcance de la prohibición de las *penas inhumanas y degradantes* en el constitucionalismo español y europeo. Una contribución histórico-comparada al contenido penal del constitucionalismo español y alemán", *Presente y futuro de la Constitución española de 1978* (Valencia: tirant lo blanc, 2005), pp. 515–544.

The shift from the *ancien régime* to a liberal system occurred in all European countries, and its main consequence in the realm of criminal law was always the same, namely, the 'constitutionalization' of several criminal law principles (legality of crime and punishment, the proportionality between crime and punishment, the individuality of punishment, favorable decision, favorable interpretation, and the presumption of innocence). Whereas the fall of the *ancien régime* followed a revolution in some countries (e.g. France), in others it was the result of an inconstant process that lasted several decades (e.g. Spain).

The Spanish case consequently defies comparison with other European jurisdictions. Spain's singular historical circumstances, especially its relation with France, make this case peculiar. As is well known, Spain fought France for seven years (1808–1814), a period in which the *Cortes* (a representative body or parliament) of Cádiz adopted many liberal reforms and principles. In the field of criminal law, several provisions of the 1812 Constitution innovated criminal law principles: the principle of legality[17]; the principle of the individuality of punishments,[18] the abolition of infamy the offspring of convicted traitors[19] and the confiscation of

[17]The 1812 Constitution was the only one not to incorporate this principle explicitly, but it can be inferred from the interpretation of some provisions. In other Spanish constitutions: art. 9, 1837 Constitution: "No Spaniard can be tried or sentenced except by a judge and a court having jurisdiction under previous laws and [for a] crime in the manner prescribed by law"; art. 9, 1845 Constitution: "No Spaniard can be tried or sentenced except by a judge and a competent court, pursuant to law prior to the crime and in the manner prescribed by law"; art. 10, 1856 Constitution (never promulgated): "No Spaniard can be tried or sentenced except by a judge and jurisdiction, pursuant to law prior to the crime and in the manner prescribed by law"; art. 11, 1869 Constitution: "No Spaniard may be tried or sentenced except by a judge and a court with knowledge and competence in the manner prescribed by law, pursuant to law prior to the crime. Extraordinary courts may not create special commissions to hear any crime"; art. 16, 1876 Constitution: "No Spaniard can be tried or sentenced except by a judge and a competent court, pursuant to law prior to the crime and in the manner prescribed by law"; art. 28, 1931 Constitution: "Only deeds determined prior to their commission are punishable by law. No one shall be tried except by a competent court and in accordance with legal procedures"; 1978 Constitution: "The Constitution guarantees the rule of law …" (art. 3); "No one can be convicted or sentenced for actions or omissions which when committed did not constitute a crime, misdemeanor or administrative offense under the laws then in force." (art. 25.1); on the this matter, see Masferrer, *Tradición y reformismo en la Codificación penal española*, pp. 75–76; Masferrer, "Codification of Spanish Criminal Law in the Nineteenth Century…", pp. 103–104; Masferrer, "Liberal State and Criminal Law Reform in Spain", pp. 28–31; for a more specific and exhaustive view, see Matthew C.Mirow, "The Legality Principle and the Constitution of Cádiz", *Judges' Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trials* (Anthony Musson/Georges Martyn/Heikki Pihlajamäki, eds.) (Duncker & Humblot, 2013), pp. 189–205 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1844486).

[18]Art. 305, 1812 Constitution: No penalty imposed for any crime whatever shall have no effect on the family of the convicted, but shall have its full effect on precisely he who deserves it.

[19]Aniceto Masferrer, *La pena de infamia en el Derecho histórico español. Contribución al estudio de la tradición penal europea en el marco del ius commune* (Madrid: Dykinson, 2001), pp. 373 ff.; and by the same author: "La pena de infamia en la Codificación penal española", *Ius fvgit. Revista interdisciplinar de estudios histórico-jurídicos* 7 (1998), pp. 123–176.

goods[20]; and the principle of due process.[21] These constitutional principles outline the modern criminal law system from which the codes stemmed. This was the initial influence of the French model on the modern Spanish (read: liberal) criminal justice system. Specifically, this influence shows the close relationship between the introduction of a liberal system, the 'constitutionalization' of the modern criminal law principles, and the 'legalization' of these principles using code. Just as the *Code pénal* reflected the criminal law principles laid down in the *Declaration of the Rights of the Man and of the Citizen* (1789) and the 1791 Constitution, 19th-century Spanish codes echoed the Spanish constitutions (1812, 1837, 1845, 1869, 1876).

In fact, this occurred in all European countries, not just Spain. This perspective might obscure the particularity of the Spanish case, since modern criminal law principles were 'constitutionalized' and 'legalized' through codes even in common law jurisdictions.[22]

[20]Art. 304 1812 Constitution: The punishment of confiscation of goods shall not be imposed. In other Spanish Constitutions: Article 10, 1837 Constitution: "There will be never imposed the penalty of confiscation of property, and no Spaniard will be deprived of his property, but for cause of public utility, subject to appropriate compensation"; art. 10, 1845 Constitution: "There will be never imposed the penalty of confiscation of property, and no Spaniard will be deprived of property except on justified grounds of public utility, subject to appropriate compensation"; art. 12, 1856 Constitution (never promulgated): "Nor shall the penalty of confiscation of property be imposed for any offense"; the 1869 Constitution did not expressly prohibit the enforcement of the penalty for the confiscation of property, although it could be implied from art. 13: "No one shall be temporarily or permanently deprived of their property and rights, or disturbed in the possession of them, except by court order. Public officials who, under any pretext violate this requirement shall be personally liable for damage caused …"; art. 10, 1876 Constitution: "The penalty of confiscation of property will be never imposed and no one shall be deprived of his property except by competent authority and for cause of public utility, subject always appropriate compensation", art. 44, 1931 Constitution: "the penalty of confiscation of property shall be imposed in no case"; the current 1978 Constitution does not contain any provision expressly laying down such a prohibition, in the area of taxation, not penal, art. 31.1 provides that "all contribute to sustain public expenditure according to their economic (…), which in no case shall be confiscatory in scope." On this punishment, see Miguel Pino Abad, *La pena de confiscación de bienes en el Derecho histórico español* (Córdoba: Universidad de Córdoba, 1999); on the legal development of the death penalty in Spain, see also Juan Sainz Guerra, *La evolución del Derecho penal en España* (Jaén: Universidad de Jaén, 2004), pp. 349–352.

[21]Arts. 286 ff., 1812 Constitution. In other Spanish Constitutions: arts. 7 and 63 ff., 1837 Constitution; 7 and 66 ff., 1845 Constitution; 8 and 67 ff., 1856 Constitution (never promulgated); arts. 2-4 and 12, 1869 Constitution; 4-8, 16, 17, 76; and 79, 1876 Constitution; arts. 29, 42 and 94 ff., 1931 Constitution, arts. 17.2-4, 24.2 and 117.1, 1978 Constitution.

[22]On this matter, see Aniceto Masferrer, "The Principle of Legality and Codification in the 19th-century Western Criminal Law Reform", *From the Judge's Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trials* (Georges Martyn, Anthony Musson and Heikki Pihlajamäki, eds.) (Duncker & Humblot, 2013), pp. 253–293.

## 2.2 Criminal Codes and Legalization of 'Liberal' Criminal Law Principles: The Legality Principle

A number of political criminal law reforms that originated on the political or constitutional levels and eventually introduced into the codes were included largely without the influence of the French code. This was the case for the principle of legality (concerning both the crime and its punishment), the proportionality of crime and punishment, the individuality of punishment, favorable decision, favorable interpretation, and the presumption of innocence, all of which I mentioned above.[23]

Instead, the influence of the principle of legality over all European jurisdictions was mainly caused by modern constitutions, especially that of France in 1791 and the *Declarations* (particularly that of 1789).[24] However, once this principle was adopted in the French code, this legal source did contribute to expanding its effect to other jurisdictions.

Despite this, it should be emphasized that the generalization of the principle of legality in the Western legal tradition was the result of a broader movement that encompassed several European codes. The early codes observed the principle of legality without accepting all of its consequences, as was the case of the Prussian Code of 1721 (*Verbessertes Landrecht*),[25] the Swedish Law of the Realm of 1734, the *Codex juris criminalis* of Bavaria (1751) and the Austrian Code of 1769 (*Constitutio Theresiana*).

The first European criminal code that unambiguously established the principle of legality, expressly forbidding both judicial discretion and analogy, was the Austrian Code of 1787 (*Allgemeine Gesetz über Verbrechen und Strafen*), enacted by Joseph II.[26] The French code of 1791 established a regime of legality that was too

[23]See the fn n. 9, and its main text.

[24]On this matter, see Masferrer, "The Principle of Legality and Codification in the 19th-century Western Criminal Law Reform", cited in the fn n. 22.

[25]In fact, it could be argued that the Prussian code of 1721 was actually a typical traditional law ("land law") that, comprising many different provisions, was only subsidiary to the *ius commune* and not based on (or did not fully comply with) the principle of legality.

[26]That was the opinion of Karl Ludwig von Bar, *A History of Continental Criminal Law* (originally published: Boston: Little, Brown, and Company, 1916; reprinted 1999 by The Lawbook Exchange), p. 252; see Jerome Hall, "Nulla Poena sine Lege," (1937–1938) *Yale L. J.* 168; in Ancel's view, the Tuscany code of 1786 "drawn up by a commission headed by Beccaria," would be the first that contained a consistent recognition of the principle of legality, constituting "historically the first legislative codification expressing the new penal law of continental Europe" (Ancel, "The Collection of European Penal Codes…", p. 344); in 1803, this code was revised, preserving the principle of legality.

inflexible with fixed punishments without any possibility of pardon. Such inflexibility was corrected by the Napoleonic criminal code (1810).[27] The Bavarian code of 1813,[28] which was inspired—if not drafted—by Feuerbach,[29] also introduced the principle of legality with all of its consequences, thus excluding any judicial discretion or analogy in theory, not in practice, and affirming this principle "more strongly than ever."[30] From then on, many European criminal codes, some partly

[27]The French criminal code of 1810 adopted, however, the principle of legality in a more flexible way, giving judges a legal minimum and a maximum within which they could act. This model was introduced in a number of European countries; on the relationship between the French criminal codes of 1791 and 1810, see Aniceto Masferrer, "Continuismo, reformismo y ruptura en la Codificación penal francesa. Contribución al estudio de una controversia historiográfica actual de alcance europeo", *AHDE* 73 (2003), pp. 403–420; see also Ancel, "The Collection of European Penal Codes…", p. 345.

[28]On this code and its relationship with Feuerbach, see Karl Geisel, *Der Feuerbachsche Entwurf von 1807: sein Strafsystem und dessen Entwicklung. Ein Beitrag zur Entstehung des Bayerischen Strafgesetzbuches von 1813* (Göttingen, 1929); Edwin Baumgarten, "Das bayerische Strafgesetzbuch von 1813 und Anselm von Feuerbach", *Der Gerichtssaal* 81 (1913), Stuttgart, pp. 98 ff.; Karl Arnold, "Erfahrungen aus dem bayerischen *StGB* vom Jahre 1813 und Betrachtungen hierüber", *Archiv des Criminalrechts*, Halle 1843, pp. 96 ff., pp. 240 ff., 377 ff., 512 ff.; 1844, pp. 190 ff.

[29]Paul Johann Anselm von Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* (Gieβen, 1801); Paul Johann Anselm von Feuerbach, *Über die Strafe als Sicherungsmittel vor künftigen Beleidigung des Verbrechers. Nebst einer näheren Prüfung der Kleinischen Strafrechtstheorie* (Chemnitz, 1800), that was Feuerbach's answer to the work written by Ernst Ferdinand Klein, *Grundsätze des gemeinen deutschen und preußischen peinlichen Rechts* (Halle, 1796); on Feuerbach, see the—classical works—written by Karl Binding, "Zum Hundertjährigen Geburtstage Anselm Feuerbachs", *Strafrechtliche und Strafprozessuale Abhandlungen* I (1915), pp. 507–521; Max Grünhut, "Anselm von Feuerbach und das Problem der strafrechtlichen Zurechnung", *Hamburgische Schriften zur gesamten Strafrechtswissenschaft* (Hamburg, 1922); Herbert Blohm, *Feuerbach und das Reichsstrafgesetzbuch von 1871* (Breslau, 1935); Eberhard Kieper, *Johann Paul Anselm Ritter von Feuerbach, sein Leben als Denker, Gesetzgeber und Richter* (Darmstadt, 1969); Gustav Radbruch, *Paul Johann Alselm Feuerbach. Ein Juristenleben* (Göttingen, 1969); Mario A. Cattaneo, *Anselm Feuerbach, filosofo e giurista liberale* (Milano, 1970).

[30]Ancel, "The Collection of European Penal Codes…", p. 345; Hall, "Nulla Poena sine Lege", pp. 169–170.

influenced by the criminal codes of France (1810) and Bavaria (1813),[31] laid down the principle of legality.[32]

Nonetheless, it is important to keep in mind that, even before Feuerbach coined his famous expression *nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena legali* ("No punishment without law, no punishment without crime, no crime without a criminal law") in the Bavarian criminal code (1813),[33] the principle of legality had been constitutionally recognized through the

[31]Ancel, "The Collection of European Penal Codes…", pp. 346 ff.

[32]See, among others, the following 19th-century codes: Code of *Grand-Duché d'Oldemburg* 1814 (*Das Strafgesetzbuch für die Herzoglich–Oldenburguischen Lande von 10. September 1814*, Oldenburg, 1814), Polish criminal Code of 1818, Code of the Two Sicilies of 1819, Parma criminal Code of 1820, Spanish Code of 1822, Russian Code of 1832 (coming into force in 1835), Greek criminal Code of 1834, *Das Strafgesetzbuch für das Königreich Sachsen vom 30. März 1838*…(Dresden, 1838), Sardinia criminal Code of 1839 (governing Piedmont and Sardinia), *Das Strafgesetzbuch für das Grossherzogthum Sachsen-Weimar-Eisenach vom 5. April 1839*… (Eisenach, 1840), *Das Strafgesetzbuch für das Königreich Württemberg vom 5. September 1839* (Stuttgart, 1839), *Allgemeines Criminal-Gesetzbuch für das Königreich Hannover vom 8. August 1840* (Hannover, 1851), *Criminalgesetzbuch für das Grossherzogthum Sachsen-Altenburg vom 3. Mai 1841*…(Darmstadt, 1841), *Strafgesetzbuchs für das Grossherzogthum Hessen vom 17. September 1841*…(Altenburg, 1841), Norwengian Code of 1842, Russian Code of 1845, *Strafgesetzbuch für das Großherzogthum Baden vom 6. März 1845*…(Karlsruhe, 1845), Polish criminal Code of 1847 (coming into force in 1848), *Das Straf-Gesetzbuch für die Frei Stadt Frankfurt und deren Gebiet in seinem Entwurfe vom Jahre 1848 nach dem am 1. Januar 1857 dahier in Kraft tretenden Straf-Gesetzbuch für das Großherzogthum Hessen* (Frankfurt am Main, 1856), Spanish Codes of 1848 and 1850, Prussian Code of 1851 (*Das Strafgesetzbuch für die Preussischen Staaten…vom 14 April 1851*, Berlin, 1851), Austrian Code of 1852 (*Das Strafgesetz über Verbrechen, Vergehen und Übertretungen, die Strafgerichts-Competenz-Verordnungen und die Preßordnung vom 27. Mai 1852 für das Raiserthum Österreich*, Wien, 1852), Portugal Code of 1852, Tuscan Code of 1853, Sardinia criminal Code of 1859 (governing Piedmont, Sardinia and Lombardia), *Criminalgesetzbuch für das Königreich Sachsen vom 11. August 1855*…(Leipzig, 1862), *Das Strafgesetzbuch für das Königreich Bayern vom 10. November 1861* (München, 1861), Swedish Code of 1864, Rumanian criminal Code of 1864, Danish Code of 1866, Belgian Penal Code of 1867, Spanish Code of 1870, *Das neue Strafgesetzbuch für den Norddeutschen Bund… vom 31. Mai 1870* (Berlin, 1870), German Code of 1871 (*Das Strafgesetzbuch für das Deutsche Reich*), Hungarian Code of 1878, Dutch Code of 1881; Portugal Code of 1886, Zanardelli Code of 1889; Finland Code of 1889, Bulgarian Code of 1896; see also the first 20th-century criminal code of Europe: the Norwegian Code of 1902.

[33]Feuerbach's main merit, however, consisted in the legal recognition of the principle of legality within the political context of an absolutist state. While in France the principle of legality was recognized in the context of a political revolution to set up a liberal system, in Bavaria the principle was legally—not constitutionally, like in France—recognized in the absolutist system. On the Bavarian criminal code of 1813, see the classical works written by Ludwig von Jagermann, *Das neue Badische Strafgesetzbuch mit systhematischen Übersichten, Competenzbezeichnungen, Parallelstellen, Register u.s.w., zur Erleichterung des Gebrauchs, besonders für Beamte und Geschworne* (Karlsruhe, 1851); Karl Scheickert, *Das badische Strafedikt von 1803 und das Strafgesetzbuch von 1845. Ein Beitrag zur Geschichte der deutschen Partikularstrafgesetzgebung im 19. Jahrhundert* (Freiburg, 1903); see also Hall, "Nulla Poena sine Lege", pp. 169–170.

*Declaration of the Rights of Man and of the Citizen* (1789)[34] and the *French Constitution* of 1791.

The principle of legality was not conceived in the 18th and 19th centuries, for it had historical antecedents,[35] nor was the dissemination of the legality principle mainly due to the influence of the French code over other European jurisdictions. In the 19th-century Spain, for example, the criminal codes reflected the principle of legality after all constitutions (1812, 1837, 1845, 1869, 1876) prescribed it,[36] though the text of Cádiz did not expressly recognize the legality principle.[37]

[34]Art. 8 Bavarian criminal Code: "No one can be punished except under prior law and legally applied to the crime"; see also Hall, "Nulla Poena sine Lege", pp. 169–170.

[35]On the history of this principle, see J. Ballesteros Llompart, "La Historia y la Historicidad del principio jurídico *nulla poena sine lege*", *Estudios en honor al prof. José Corts Grau* (Valencia, 1977), I, pp. 521–537; César Camargo Hernández, "El Principio de legalidad de los delitos y de las penas", *Revista de la Facultad de Derecho de la Universidad de Madrid*, vol. III, nº5, 1959; Christos Dedes, "Sobre el origen del principio «nullum crimen nulla pena sine lege»," *Revista de Derecho Penal y Criminología*, 2ª Época, nº 9 (2002), pp. 141–146; J. Guallart/L. de Goicoechea, "El principio «Nullum crimen, nulla poena sine previa lege» en los Fueros de Aragón," *Homenaje a la memoria de Don Juan Moneva* (Zaragoza, 1954), pp. 659–682; on the history of this principle in the Spanish historiography, Aniceto Masferrer, "La historiografía penal española del siglo XX. Una aproximación a sus principales líneas temáticas y metodológicas", *Rudimentos Legales* 5 (2003), footnote n. 199; in the German historiography, see A. Schottländer, *Die geschichtliche Entwicklung des Satzes: Nulla poena sine lege* (Ruprecht-Karls-Universität Heidelberg, 1911) (*Strafrechtliche Abhandlungen* 1, Heft 132, 1911); Volker Krey, *Keine Strafe ohne Gesetz. Eine Einführung in die Dogmengeschichte des Satzes "nullum crimen, nulla poena sine lege"* (Berlin-New York, 1983); Rolf Sprandel, "Ivo von Chartres und die moderne Doktrin «nulla poene sine lege»," *Zeitschrift der Savigny-Stiftung für Rechtsgechichte.* Kanonistische Abteilung 47 (1961) pp. 95–108; in the Anglo-American historiography, see Hall, "Nulla Poena sine Lege", pp. 165–193; Stanislaw Pomorski, *American Common Law and the Principle Nullum Crimen sine Lege* (Elzbieta Chodakowska trans., 2nd ed., 1975); Aly Mokhtar, "Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects," (2005) *Statute Law Review* 26: 41.

[36]Only the Constitution of 1812 did not expressly mention this principle, although it can be deduced from the interpretation of certain precepts: Article 9, Constitution 1837; Article 9, Constitution 1845; Article 10, Constitution *nonnata* (1856); Article 11, Constitution 1869; Article 16, Constitution 1876; see also Article 28, Constitution 1931; Articles 3 and 25(1), Constitution of 1978.

[37]On the evolution of this principle in Spanish constitutionalism, see Agustín Ruíz Robledo, "El principio de legalidad penal en la historia constitucional española", *Revista de Derecho Político* XLII (1997), pp. 137–169; see also Mirow, "The Legality Principle and the Constitution of Cádiz", cited in the fn n. 17; Matthew C. Mirow, "Codification and the Constitution of Cádiz", *Estudios Jurídicos en Homenaje al Professor Alejandro Guzmán Brito* (Patricio-Ignacio Carvajal and Massimo Miglietta, eds.) (Edizioni dell'Orso, 2014), vol. 3, pp. 343–361 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1844438); see also Alejandro Agüero & Marta Lorente, "Penal enlightenment in Spain: from Beccaria's reception to the first criminal code" (15. Noviembre 2012), *forum historiae iuris*, nn. 36 & 47 *in fine* (available at http://www.forhistiur.de/2012-11-aguero-lorente/; it has also been republished in *The Spanish Enlightenment revisited*, Jesús Astigarraga, ed., Voltaire Foundation–University of Oxford, 2015).

This also occurred in the Germany[38] and probably in many other European countries.

## 3 Criminal Law Development and Criminal Codes as Continuity and Legal Reform

As mentioned above, from the political point of view the 19th century criminal law system experienced a clear 'break' from tradition, not because of the novelty of its principles, but because of its introduction in both national constitutions ('constitutionalization') and codes ('legalization').

On the contrary, speaking strictly from the perspective of criminal law jurisprudence, both 'continuity' and 'reform' are better terms to describe the development of criminal law from the 18th century to the 19th century. This explains why modern criminal law codes, adopting the 'constitutionalized' criminal law principles, contained many criminal law notions, categories and institutions that stemmed from the tradition. Therefore, I must refute Pacheco's claim that codification was "the system of absolute change".[39]

The *Code pénal* was not the first European criminal code. Several criminal law statutes and codes had been enacted in 18th-century Europe: the Bavarian code of 1751 (Joseph III),[40] the Austrian criminal ordinance of 1768 (Marie Therese),[41] the code of Catherine II (never in force), the Tuscan code of 1786 (Leopold II),[42] the Austrian

[38]In Germany, for example, Art. 103. 2 of the current German constitution is a clear provision in line with German constitutional history itself, considering some of their constitutions, namely, that of Hessen (17.XIL.1820, §105); the *Constitution of the Prussian state* (5.XII.1848, §§7–8) within both the *oktroyierte Verfassung* (1848–1850) and *reidierte Verfassung*, respectively; and the Weimar Constitution (11.VII.1919, art. 116); among others; see the *Dokumente zur Deutschen Verfassungsgeschichte* (Herausgegeben von Ernst Rudolf Huber), 1961. I use the 3rd edition of W. Kohlhammer Verlag, Stuttgard-Berlin-Köln-Mainz, Band 1: *Deutsche Verfassungsdokumente 1803–1850* (1978); Band 2: *Deutsche Verfassungsdokumente 1851–1900* (1986); Band 4: *Deutsche Verfassungsdokumente 1919–1933* (1991); see also Fritz Hartung, *Deutsche Verfassungsgeschichte vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart: Koehler, 9th ed., 1969), pp. 310–342; on this matter, see Masferrer, "The Principle of Legality and Codification in the 19th-century Western Criminal Law Reform", cited in the fn n. 22.

[39]See the footnote n. 6.

[40]*Codex Iuris Bavarici Criminalis de anno MDCCLI* (München, 1751); that code was a traditional *ius commune* type of code such as the famous Carolina of 1532; thus it was not a comprehensive code since many other laws complemented it; one might even argue that it was not a real code from a modern perspective.

[41]*Constitutio Criminalis Theresiana oder der Römisch-Kaiserl. zu Hungarn und Böheim* etc. *König. Apost. Majestät Maria Theresia Erzherzogin zu Oesterreich* etc. *Peinliche Gerichtsordnung vom 31. Dezember 1768* (Wien, 1769).

[42]*Riforma della legislazione criminale Toscana del di 30 novembre 1786* (Siena, 1786); there is a French version: *Nouveau Code criminel pour le Grand-Duché de Toscane* (Lausanne, 1787).

criminal code of 1787 (Joseph II),[43] the French Code of 1791 (General Assembly),[44] the Prussian *Allgemeines Landrecht* of 1794 (Frederick William II),[45] and the Austrian criminal code of 1803,[46] among others.[47] Although some were more humanitarian and enlightened than others,[48] all (except France's) were drafted in similar political contexts in that they were enacted by monarchs rather than parliaments. This led some scholars to distinguish between 'enlightened codes' and 'liberal codes,'[49] which may account for some of the (political) "absolute change" of which Pacheco spoke.

However, whether they were 'enlightened' or 'liberal', most of the notions, categories and institutions they contained came from the same tradition. While *ius commune* lawyers defended the majority of the criminal law principles that enlightened figures later regarded as 'modern', the codes' drafters resorted to the classic categories and institutions had been in force for several centuries and seen scholarly development by lawyers from the 14th century onwards.[50]

This is not to deny the codification movement's positive contribution to the development of criminal law. That contribution can be synthesized in three words: systematization, humanization and secularization. Indeed, the whole codification process entailed gradual and clear processes of systematization, humanization, and secularization.[51]

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[43]*Allgemeines Gesetz über Verbrechen und derselben Bestrafung vom 13. Januar 1787* (Wien, 1787). A German-Polish version was also edited (Wien, 1787).

[44]*Code pénal des 25 septembre–6 October 1791*, in *Collection des lois, décrets, ordonnances, réglements et avis du Conseil d'Etat, publiée sur les editions officielles*…par J.B. Duvergier, t. III; it was also edited in H. Remy, *Les principes généraux du code penal de 1791* (Paris, 1910), pp. 242 ff.

[45]*Allgemeines Landrecht für die Preussischen Staten vom 5. Februar 1794*, Bd. I-IV (Berlin, 1794); it has also been edited as *Allgemeines Landrecht für die Preußischen Staaten von 1794*. Mit einer Einführung von Dr. Hans Hattenhauer und einer Bibliographie von Dr. Günther Bernert. 2. Auflage. Neuwied-Kriftel-Berlin, 1994; see also Arno Burschmann, *Textbuch zur Strafrechtsgeschichte der Neuzeit. Die klassischen Gesetze* (München, 1998), pp. 272 ff.; the German historiography has considerably critizised this code, considering it as a 'dinosaur of the criminal law' (Klaus Volk, "Napoleon und das deutsche Strafrecht", *JuS* 1991, p. 282).

[46]*Strafgesetz über Verbrechen und schwere Polizei-Übertretungen vom 3. September 1803* (*JGS*, Wien, 1816, n. 626, pp. 313 ff.).

[47]Following the Austrian criminal code of 1787 (Joseph II), other codes were enacted by François II in the late 18th–early 19th centuries, namely, the criminal code of 1796 (*Stradgesetzbuch für Westgalizien vom 17. Junius 1796*, in *Gesetz und Verfassungen im Justizfache*, *Justizgesetzsammlung –JGS–*, Praghe, 1796).

[48]In this regard, it is clear than the code of 1786 and the Austrian criminal code of 1787 were more heavily influenced by the Enlightenment and enlightened humanitarianism than the Bavarian code of 1751 and the Austrian criminal ordinance of 1768; on this matter, see Leslau Pauli, *Peines corporelles et capitales dans la législation des États européens des années 1751–1903* (Warsawa-Krakow, 1986), pp. 10–15; Marc Ancel, "The Collection of European Penal Codes and the Study of comparative Law," (1957–1958) 106 *U. Pa. L. Rev.* 329, pp. 344–345.

[49]See the fn n. 13.

[50]On this matter, see, for example, Michele Pifferi, *Generalia delictorum. Il Tractatus criminalis di Tiberio Deciani e la "parte generale" di diritto penale* (Milano: Giuffrè, 2006).

[51]On this matter, see Masferrer, "Codification of Spanish Criminal Law in the Nineteenth Century…", pp. 111–139; Masferrer, "Liberal State and Criminal Law Reform in Spain", pp. 25–27.

Let me emphasize that the codification scheme was never generally understood as a legal tool to break from the past. It contributed to the consolidation of political criminal law reforms that had already been introduced by the liberal system previously laid down in the constitutions.

The question as to whether modern codes constituted a break with the past or merely reformed from a historical point of view has been extensively explored in France,[52] Germany[53] and Spain.[54] The developments in Belgium,[55] Italy,[56] and England,[57] among others,[58] have also seen smaller efforts.

[52]On this matter, see Masferrer, "Continuismo, reformismo y ruptura en la Codificación penal francesa…' cited in fn n. 26; see also X. Rousseau/M.-S. Dupont-Bouchat, "Revolutions et justice penale. Modeles français et traditions nationales (1780–1830)", *Revolutions et justice en Europe. Modeles français et traditions nationales (1780–1830)* (Paris: L'Harmattan, 1999), pp. 9–15.

[53]On the discussion about continuity and reform in nineteenth century Germany, see Karl Härter, "Kontinuität und Reform der Strafjustiz zwischen Reichsverfassung und Rheinbund", *Reich oder Nation? Mitteleuropa 1780–1815* (herausgegeben von Heinz Duchhardt und Andreas Kunz). *Veröffentlichungen des Instituts für Europäische Geschichte Mainz*, Abteilung Universalgeschichte, Beiheft 46 (Mainz, 1998), pp. 219–278; Regula Ludi, *Die Fabrikation des Verbrechens. Zur Geschichte der modernen Kriminalpolitik 1750–1850* (Frühneuzeit-Forschungen 5) (Tübingen, bibliotheca academica, 1999) (a review of this research can be found in Karl Härter, "Von der «Entstehung des öffentlichen Strafrechts» zur «Fabrikation des Verbrechens». Neuere Forschungen zur Entwicklung von Kriminalität und Strafjustiz im früheneuzeitlichen Europa", *Rechtsgeschichte. Zeitschrift des Max-Planck-Institut für europäische Rechtsgeschichte* 1 (2002), pp. 159–196); Karl Härter, "Reichsrecht und Reichsverfassung in der Auflösungsphase des Heiligen Römischen Reichs deutscher Nation: Funktionsfähigkeit, Desintegration und Transfer", *Zeitschrift für Neue Rechtsgeschichte* 28 (2006), Nr. 3/4, pp. 316–337.

[54]Masferrer, *Tradición y reformismo en la Codificación penal española*, cited in the fn n. 8.

[55]Fred Stevens, "La codification penale en Belgique. Heritage français et debats neerlandais (1781–1867)", *Le penal dans tous ses Etats. Justice, Etats et Sociétés en Europe (XIIe-Xxe siècles)* (Bruxelles, 1997), pp. 287–302.

[56]Mario Da Passano, "La codification du droit pénal dans l'Italie jacobine et napoleonienne", *Revolutions et justice en Europe. Modeles français et traditions nationales (1780–1830)* (Paris: L'Harmattan, 1999), pp. 85–99.

[57]Clive Emsley, "Law Reform and Penal Reform in England in the Age of the French Revolution", *Revolutions et justice en Europe. Modeles français et traditions nationales (1780–1830)* (Paris: L'Harmattan, 1999), pp. 319–331.

[58]On the influences exerted on the French codification, see Jacques Godechot, "Les influences étrangères sur le droit pénal de la Révolution française", *La revolution et l'ordre juridique privé. Rationalité ou scandale? Actes du colloque d'Orléans (11–13 septembre 1986)* (Orléans, 1988), I, pp. 47–53.

## 4 Tradition and Foreign Influences in the Codification of Criminal Law

The question as to whether modern criminal codes constituted a break with the past or just a degree of reform touches on a difficult issue, namely, the dichotomy between tradition and foreign influences in the criminal codes. Those who—like Pacheco—stress that the codes broke with the past, usually tend to overemphasize foreign influences on the criminal codes. Affirming that the codes broke with the past also discourages the study of the criminal law tradition.

Conversely, those who argue that codes did not constitute a break with the past and contained many traditional institutions have the opposite tendency, underrating the role of foreign models. According to them, the drafters did not feel the need to resort to foreign codes in drafting the codes. Since codes cannot come out of the blue, the proportions of tradition and foreign influence need to be carefully explored. This would enable assessments of the extent to which the codification process in a given jurisdiction brought with it a nationalization or denationalization of its criminal law.[59]

Scholars have unduly ignored this important subject. German historiography has dealt with the influence of the Napoleonic code over the German codification of criminal law. France occupied the left bank of the Rhine since 1797, and from that year onwards implemented French law in the former German territories which were formally ceded to France through the peace treaty of Luneville (1801).[60] This might partly explain the interest of German historiography in the French influence.[61]

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[59]On this matter, see Aniceto Masferrer, "Codification as Nationalization or Denationalization of Law: The Spanish Case in Comparative Perspective", *Comparative Legal History* 4.2 (2016), pp. 100–130; see also Heikki Pihlajamäki, "Private Law Codification, Modernization and Nationalism: A View from Critical Legal History", *Critical Analysis of Law* 1:2 (2015), pp. 135–152 (available at http://cal.library.utoronto.ca/index.php/cal/article/view/22518).

[60]Reiner Schulze, "Rheinisches Recht im Wandel der Forschungsperspektiven", *ZNR* (2002), pp. 65–90, particularly p. 67; Elisabeth Fehrenbach, *Traditionale Gesellschaft und revolutionäres Recht: Die Einführung des Code Napoleón in den Rheinbundestaaten* (Göttingen, 3 edic., 1983); Stefan Kleinbreuer, *Das Rheinische Strafgesetzbuch. Das materielle Strafrecht und sein Einfluß auf die Strafgesetzgebung in Preußen und im Norddeutschen Bund* (Bonn, 1999); regarding both the private law and the procedural private law, see also Werner Schubert, *Französisches Recht in Deutschland zu Beginn des 19. Jahrhunderts. Zivilrecht, Gerichtsverfassungsrecht und Zivilprozeßrecht* (Köln, 1977).

[61]On this matter, see Von Kräwel, "Über die französischen Elemente im Preußischen Strafgesetzbuch", *Archiv für Preußisches Strafrecht*, Berlin I (1853), pp. 461 ff.; Fritz Hartmann, *Der Einfluß des französischen Rechts auf das Preußische Strafgesetzbuch von 1851 (Allgemeiner Teil).* Göttingen, 1923; Volk, "Napoleon und das deutsche Strafrecht", pp. 281–285; Frank Zieschang, *Das Sanktionensystem in der Reform des französischen Strafrechts im Vergleich mit dem deutschen Strafrecht* (Berlin, 1992); Werner Schubert, *Der Code pénal des Königreichs Westphalen von 1813 mit dem Code pénal von 1810 im Original und in deutscher Übersetzung* (Frankfurt/Main: Peter Lang, 2001); Christian Brandt, *Die Entstehung des Code pénal von 1810 und sein Einfluß auf die Strafgesetzgebung der deutschen Partikularstaaten des 19. Jahrhunderts am Beispiel Bayerns und Preußens* (Frankfurt/Main: Peter Lang, 2002); on the codification of

A group of Spanish scholars have been working on this subject recently, and some results have been published. In the domain of criminal law, the outcomes have been revealing indeed.[62]

For example, chapters IV and V of an edited volume on foreign influences on the Spanish criminal codes of 1822 and 1848 show (i) scant doctrinal or historiographical references to foreign influences on either criminal text; (ii) the direct influence of the Napoleonic code was much slighter than one could expect, given with the received wisdom mentioned above, particularly on the 1848 criminal code; and (iii) drafters' careful examination of both the criminal law tradition and other (non-French) foreign models.[63]

## *4.1 Tradition Versus Foreign Influence?*

Familiarity with tradition is the best way to ascertain the weight of foreign influences, and, by the same logic, the study of the foreign influences enhances the recognition of the weight of tradition.

It would be wrong to think that tradition and foreign influences are mutually exclusive. As has been argued elsewhere,[64] it would be unwise to overlook that the

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criminal law in Germany, see Wolfgang Sellert, "Strafrecht und Strafrechtskodifikation im 18. und 19. Jahrhundert in Deutschland", *Rechtsgeschichtliche Abhandlungen. Publikationen des Lehrstuhls für Ungarische Rechtsgeschichte an der Eötvös-Loránd-Universität*, Redakteur Barno Mezey, Band 21 (Budapest, 1997), pp. 131–139; Jörg Engelbrecht, "The French Model and German Society: the Impact of the Code Penal on the Rhineland", *Revolutions et justice en Europe. Modeles français et traditions nationales (1780–1830)* (Paris: L'Harmattan, 1999), pp. 101–107; see also Masferrer, "Continuismo, reformismo y ruptura en la Codificación penal francesa…", cited in the fn n. 26.

[62]Aniceto Masferrer, "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 Judiciare, 2012), pp. 65–98; Aniceto Masferrer (ed.), *La Codificación española. Una aproximación doctrinal e historiográfica a sus influencias extranjeras, y a la francesa en particular* (Pamplona: Aranzadi–Thomson Reuters, 2014). Aniceto Masferrer (ed.), *La Codificación penal española. Tradición e influencias extranjeras: su contribución al proceso codificador*. Parte General (Pamplona: Aranzadi–Thomson Reuters, 2017).

[63]I. Ramos Vázquez/J. Cañizares-Navarro, "La influencia francesa en la primera Codificación española: el Código penal francés de 1810 y el Código penal español de 1822", *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. 153–212; see also Aniceto Masferrer/Dolores del Mar Sánchez-González, "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.

[64]Masferrer, "Codification as Nationalization or Denationalization of Law: The Spanish Case in Comparative Perspective", cited in the fn n. 58.