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Napoleon in America?

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Light of the Civil Law Codification in Latin America

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## Napoleon in America?

### Reflections on the Concept of ‘Legal Reception’ in the Light of the Civil Law Codification in Latin America

I. It is quite common to talk about a process or ‘reception’ of French *Code civil* in Latin America.<sup>1</sup> However, departing from a usual concept of ‘reception’ in the legal historiography as a process of “adoption of foreign cultural elements, when a people accepted predominant portions of a ‘foreign’ legal system voluntarily, without being overwhelmed or subjugated,”<sup>2</sup> the issue turns out to be quite dubious, if the actual historical development of civil law codification in the Latin American countries is considered.

The election of the concept ‘reception’ to be discussed here is not arbitrary or gratuitous, but it is due to the fact that comparative lawyers have mainly used it to refer to many processes of legal change in very different chronological, cultural and political circumstances throughout the history, with present echoes.<sup>3</sup> But it seems to be rather an abuse of a technical term performed in legal history in order to describe a very precise legal phenomenon from a European perspective, what could perhaps be understood then as some kind of ‘Eurocentric’ vision of legal reality, not paying enough attention to the specific demands of other contexts than those which have especially influenced the building of such a methodological devise. The aim of this paper is then to try to specify some limits of this concept from a global perspective of legal phenomena in world history and to what extent it is still possible to go on to use it with any productive meaning.

1 ZWEIGERT/KÖTZ (1998) 113 ff.; RAMOS NÚÑEZ (1997) 132 ff.

2 WIEACKER (1995) 93.

3 See a general scope in HÄBERLE (1992).

II. In effect, in the first years following the independence of the Spanish American countries, in spite of the numerous attempts of legislating radical social changes on the levels of constitutional law, there were no radical changes in the field of private law. This phenomenon is due to different reasons. First of all, constitutional and legislative changes did not take immediate social effect; the constitutional modifications did little to change a reality where some types of people (mainly, Spanish descendents, clerics, especially property owners) were still socially privileged and other social groups (Indians, blacks, married women, the poor) continued to suffer from numerous private law incapacities. In many ways, the political and constitutional rhetoric was incapable of making immediate social change. Secondly, the main sources of private law remained the same, and so the private substantive law from the colonial period continued being in force in the new republics. The colonial sources of private law lived on well into the middle and, in many cases, the end of the nineteenth century. Dramatic changes in private law were not a product of independence, but they took place only during later and more stable periods.<sup>4</sup>

Nevertheless, it was clear that reform of private law could not be delayed or neglected forever. The very notion of the term *independence* meant that the new nations would have to be free of Spanish colonial law, or at least appear to be free of it, and the process of establishing national law was certainly encouraged by desires to create a new nation with its own laws. Actually, if private law did not face immediate change after independence, it was not for lack of direction or ideas. In fact, most constitutions of the new republics indicated the belief that legal reform was close at hand by asserting that the laws in force would remain like that until new laws were enacted by the legislatures. But just in the first years after the independence of the Hispanic American countries the idea of setting the private law of the different states in accordance with the new circumstances emerged,<sup>5</sup> as

4 MIROW (2004) 103 ff.

5 For instance, the Spanish Constitution of 1812 (art. 258) established: “El Código civil y criminal y el de comercio serán unos mismos para toda la Monarquía, sin perjuicio de las variaciones que, por las particulares circunstancias, podrán hacer las Cortes.” Similar provisions were passed by several Latin American Constitutions after Independence (e. g. art. 87.1 Const. Venezuela 1830; art. 24 Const. Cundinamarca 1811; art. 7.3 Acta de Federación de las Provincias Unidas de la Nueva Granada 1811; art. 196 and 121 Const. Peru 1823; etc.).

much as the surviving colonial legislation still in force was strongly criticized. There was, however, a big difference between proposing to have the law fixed, even with some developed plans, on the one hand, and the actual performance of such a settlement of the law through articulated texts, namely to establish new authoritative legislative bodies able to efficiently replace the precedent colonial legal order, on the other hand. There were actually two possible parties in the different countries:

1) One was prone to settle the national law on the grounds of the present municipal law in force hitherto in the place, namely the Castilian legal heritage (*Derecho privado indiano*) and the recent national pieces of legislation (*Derecho patrio*), and to reshape it according to the canons of the European *scienza della legislazione* and the republican concept of code, as it had been done in some European countries (Prussia, 1794; France, 1804; Austria, 1811). This was due to numerous influences that prodded drafting committees and legislatures toward eventual codification. These included the success and availability of European codes, their qualities as ‘talismans’ (Jonathan Miller), the circulation of Bentham’s works on codification and his individual communications with Latin American leaders, the general cultural pressure of Europe (and especially France) on the newly independent republics, and the Roman foundations of the European codes.

2) The other one was to adopt *en bloc* (or at least to adapt) one of the existing private law codes, namely the European ones. Legislators of some countries found that the process of thoughtfully revising European codes to fit the particular needs and circumstances of the country, as argued by Montesquieu’s *De l’esprit des lois*, was a difficult, time-consuming task, riddled with possible political objections and stalemates, and thus it seemed to be much more profitable to take up a real, effective foreign statutory body.

The first approach had not been put aside as the first steps towards independence were being taken. There were some attempts to promote fully vernacular codes. Thus, for example, in Chile, in 1831, the representative Gabriel J. Torconal proposed that the Parliament make a revision to the medieval code, still in force in Chile and in the rest of Spanish American territories, the *Siete Partidas*, by keeping the substantive legal content of its provisions and getting rid of all its preambles, quotations of the Bible, the Church fathers and ancient authors, and resolving the questions and doubts which had been raised by the interpreters and had arrived at divergent

answers. Torconal expressly rejected the idea of taking up foreign legislations and using other codes as models. In Bolivia, similar concerns were voiced. Likewise, in Mexico, the jurist Juan Rodríguez de San Miguel shared a similar consideration, as he laid down the *Pandectas hispano-mexicanas ó sea código general comprensivo de las leyes generales, útiles y vivas de las Siete Partidas, Recopilación Novísima, la de las Indias, autos y providencias, conocidas por de Montemayor y Beleña, y cédulas posteriores hasta el año 1820*, published in 1839, which was a compilation of rules taken out of the ancient legislation and fragments of the writings of legal doctrine, ordered in a systematic way.

But these attempts to enact the European models provided with the vernacular, traditional and new Spanish American law failed. This plan to codify the national law as much as possible required a social atmosphere that did not yet exist in the new republics. The final period of the independence process mostly gave way to a situation of high instability and turbulence that obviously disturbed the spirits and deprived them of the calm and concentration necessary to analyze and take over the task of designing a newly-coined codification. It was not the right time for this. Moreover, most of the energies and talents were devoted to prioritizing and the urgent task of organizing the government and administration of the new states, even though in some cases there were proposals of codifying private law even before constitutional law.

In these circumstances, the French codes served, above all, as ready and attractive pieces of legislation to be suggested for adoption by the new countries.<sup>6</sup> They acted as a model, because they showed implicitly that the codification enterprise was possible and feasible, and it was not necessary to carry it out again, because it had been accomplished, and nothing else than borrowing it seemed to be reasonable.

In effect, the Napoleonic codification, and especially the *Code civil*, displayed a lot of advantages for the new American republics. In addition to its technical virtues as a piece of legislation of the modern period and as an outstanding example of legal language, it expressed more generally, and therefore more attractively than its rivals, the ideals of the codification movement throughout the beginnings of the nineteenth century. It was also written in a language that was accessible to the Latin American legislators, in

6 RAMOS NÚÑEZ (1997); GUZMÁN BRITO (2004).

a very clear style, and its internal disposition proved to be very understandable because it was based on the structure of Justinian's *Institutions*, which had become the average civil law manual for most lawyers in Spain and Hispanic America in the eighteenth century.

On the other hand, these codes – and particularly the *Code civil* – embodied the prestige of his author, Napoleon Bonaparte, who was a charismatic figure who fascinated most of the leaders and *caudillos* of the Spanish American Independence. Even before the independence process had begun, the works of the eighteenth century *philosophes*, particularly Voltaire, Rousseau and Montesquieu, were highly influential with the Creole elite, from where the leaders of the Independence emerged, and they were reflected in the strong emphasis placed upon human liberty, republicanism and equality in the basic documents. Those men, when they had to exchange their military activity for a legislative one, namely when they took over the civil government of the territories whose independence they had promoted, thought in many cases about the possibility of directly introducing the French codes *en bloc* to substitute the previous colonial and first republican legislation. Thus, for example, in 1822 the Chilean *Director Supremo* Bernardo O'Higgins asserted in a public address: "Sabéis cuán necesaria es la reformación de las leyes. Ojalá se adopten los cinco códigos celebres, tan dignos de la sabiduría de estos últimos tiempos y que ponen en claro la barbarie de los anteriores." The Chilean ruler suggested, simply, adopting the French codifications. Simón Bolívar<sup>7</sup> also considered something like that, according to the testimony of his secretary José D. Espinal, written in a letter sent on 31 July 1829 to the Home Minister of the (Gran) Colombia: "El Libertador Presidente está altamente penetrado de la sabiduría con que fue redactado el Código de Napoleón. Cree que pudiera plantearse en [Gran] Colombia con algunas modificaciones relativas a las circunstancias y a la moral del país". In Argentina, the Federal Governor of Buenos Aires, Manuel Dorrego, seemed also enthusiastic about the idea of introducing the French Civil Code "*en su mayor parte*," as he was proposed to do it in 1828 by a counsellor who was a former French judge living in the city. In Ecuador as well, between 1830 and 1833 the Congress ordered that this idea be developed, and in Guatemala a similar proposal was passed by the legislature in 1836.

7 MIROW (2000).

As it can be seen through these testimonies, between the two possibilities to act, either to completely adopt the French codifications (namely, the *Code Napoléon*), maybe with some minor modifications, and to take it just as a model to imitate, but not to copy, the first one was definitely dominant. But these were mainly mere declarations. What was in fact more meaningful were the statutory projects actually enacted under the strong influence of the *Code civil*, still according to the principle of its adoption by the new republics.

In this way, as a first step there was certainly some kind of ‘reception’, or rather transposition, of the law of the *Code civil* into several Spanish American states which carried out their civil law codification in an early, well advanced process with regards to their neighbor countries, such as Dominican Republic (1826/1845), the Mexican state of Oaxaca (1827–29), Bolivia (1830/1845), Peru (1836) or Costa Rica (1841). Let us look at them more closely:

1) *Dominican Republic*.<sup>8</sup> The Eastern part of the island of Santo Domingo, firstly Spanish, had belonged to France since 1795, and became independent, as a whole island, in 1804. After some circumstances, it became a part of the Republic of Haiti between 1822 and 1844. At such a time, in 1825, Haiti introduced its own civil code, which was just a copy of the French *Code civil*, with some minimal suppressions and modifications, and this became law in force on 1 January 1826. It was therefore the first of the old territories of the Spanish Crown in the Americas to have a civil code in force. When the Eastern part of the island freed itself from Haiti and became the *República Dominicana*, in 1844, the previous Haitian legislation went on to be in force provisionally, the civil code as well, but on 4 July 1845 the Congress of the Republic decided to deprive the Haitian legislation of legal force, and to return to the sources of the Napoleonic codes themselves, but in their 1816 form (meaning, after the *Restauration*): the *Code civil des Français* was then directly in force (even without any Spanish translation) in the Dominican Republic till 1861 (when the country returned shortly to the Spanish sovereignty) and again between 1865 (when the country became independent again) and 1874 (when it finally passed its own civil code). The Dominican Republic is thus the case of the most absolute and full adoption of the French civil code in the Americas.

8 GUZMÁN BRITO (2000) 293 ff.; ID. (2006) 144 ff.



2) *Oaxaca*.<sup>9</sup> Mexico became fully independent on 27 September 1821. According to the Federal Constitution of 1824, the regions became states, and they had full autonomy to legislate in the field of civil law. This possibility was first taken advantage of by the state of Oaxaca, which stood up because of its federalist spirit (it had declared itself free and sovereign state inside the Mexican federation even before Mexico became properly a Federation). As a sign of its sovereignty, Oaxaca enacted its own civil code (*Código civil para el Gobierno del Estado Libre de Oaxaca*) between 1827 and 1829. It was in force till 1837, just after the abolition of federalism in 1836. This civil code was a quite faithful and literal translation of the *Code Napoléon*, accurately retaining its system and structure with some minor changes such as the deleting of some internal subdivisions of the original text and the merging of their content as well as the abolition of the provisions on divorce in order to adapt the code to the canon law; some matters concerning law of obligations and law of property found nevertheless no development. Some other Mexican states (Zacatecas, Jalisco, Guanajuato) also moved forward with drafts and plans, but without success.

3) *Bolivia*.<sup>10</sup> The independence of the new state (named *Bolivia*) in the territories of the former *Alto Perú* (in the Viceroyalty of Peru) took place in 1825. In 1829, the former general of Simón Bolívar Andrés de Santa Cruz became president of the republic and succeeded with the constitution of a Peruvian-Bolivian Confederation in 1836. In 1829, his Justice Minister Mariano Enrique Calvo organised a Commission of Judges to elaborate a complete civil code, a project which was proposed in October 1830 and, after some modifications, it was promulgated by president Santa Cruz to be in force in 1831. Even though in the decree of Minister Calvo it was said that the new code should be made on the grounds of the law previously in force in the country – meaning the Spanish civil laws –, this provision was not fulfilled (in part because the Minister told the commissioners to finish their task as quickly as possible), and the commissioners elaborated a text modelled upon the *Code civil*: a quite literal translation of the French text – with glaring mistakes – and a similar internal disposition and structure. The commissioners epitomized some of the parts of the original text and added an introduction (*Título preliminar*) full of ideas taken out of the

9 GUZMÁN BRITO (2000) 303 ff.; ID. (2006) 152 ff.

10 GUZMÁN BRITO (2000) 307 ff.; ID. (2006) 155 ff.

traditional Castilian law and canon law, especially to reshape some areas of civil law, such as marriage law and law of succession. Finally, it was a text comprising 1.556 articles (versus 2.281 in the *Code civil*), 476 of which were not directly taken out of the *Code civil* directly. Although this text also moves in the same way as the others, it is not a true adoption of the French code, but rather a quite crude adaptation to the American context. And it is quite meaningful that it is precisely this code that was especially influential in South America in the years that followed. This code was in force till November 1845, even after the fall of Santa Cruz from power; at that time a new code was passed, as part of an attempt to sweep away the work of the former president. The new code (*Código civil boliviano II*) was even more attached to the French model, despite some minor modifications also in the field of marriage and in the law of property, so that it can be said that, in the case of the Bolivian civil code of 1845, it was more an actual adoption than an adaptation of the *Code civil*. Anyway, this second code had a very short life, because of the difficulties in its implementation, and finally, in November 1846 the former code (*Código Santa Cruz*) was re-established and it remained in force till 1976.

4) *Peru*.<sup>11</sup> The first attempts to codify Peruvian civil law were close to the Independence movement and were promoted by Simón Bolívar himself, and developed especially by the judge and politician Manuel Lorenzo de Vidaurre, who wrote out and edited a penal code project (1828) and thereafter, in accordance with the Constitution of 1834, a project of civil code (1834–1836), very original, technically deficient and much more based on natural law than on the traditional Roman-Castilian Law. However, it never came into force, because of political circumstances: in 1836, the Bolivian army invaded Peru and *Protector* Santa Cruz imposed the division of the country. He introduced the Bolivian civil code of 1830 in both territories in which Peru was divided (in Sud-Peru in 1836 and in Nor-Peru in 1837). Therefore, the first civil code in Peru was in fact a slightly modified version of the Bolivian code of 1830 (the *Código Santa Cruz*), which, however, remained in force for just a very short time, because the *Protector* later decided to abolish it in the Nor-Peruvian state in August 1838, and in the Sud-Peruvian it disappeared with the dissolution of the Peruvian-Bolivian

11 GUZMÁN BRITO (2000) 315–317, 335; ID. (2006) 161–163, 179–180.

Confederation in January 1839. It was not till 1852 that Peru could have a civil code again, this time a true Peruvian one.

5) *Costa Rica*.<sup>12</sup> The *Emancipación* of Costa Rica (as with the other countries of Central America) took place in 1821, as a consequence of the independence of Mexico. Thereafter, a new independence, this time from Mexico, took place in 1824, in the form of the Federal Republic of Central America. Inside this Republic, Costa Rica proclaimed the so-called *Estado Libre de Costa Rica*, which became totally independent in 1841. In the years in which it was integrated into the Central American Republic, the country witnessed a movement toward codification which promoted the adoption of the ‘civil code’ of Louisiana (which had in fact been a mixture of Spanish and French civil laws under the name of *Digest de la loi civile* since 1808). But this movement did not have any success in the field of civil law until 1841, after the definitive independence of the country, when the dictator Braulio Carrillo promulgated a so-called *Código General de la República de Costa Rica*, a legal text elaborated on the model of the *Allgemeines Landrecht* (ALR) of Prussia, because it included three parts: civil law, penal law and procedure. In the part on civil law (*Materia civil*), it was just a literal reproduction of the Bolivian civil code of 1830 (*Código Santa Cruz*), that is, the version adopted in the Nor-Peruvian state, with a few of minor modifications in content and extension, even though it was not formally recognized, so that it seemed to be the dictator Carrillo who was the real author of this code – a hypothesis that has been totally discredited by the historical research. This “code” prevailed in Costa Rica, with several innovations, until 1888.

As it has been shown, these first codes were rather mere translations of the French Code, mainly as a symbolic transposition of the (formal) fascination of the political and intellectual leaders of the Spanish American independence with the French political and cultural model. This identification becomes, however, fuzzy, if one takes into account that precisely the first example of this type of codification – and, in fact, the actual immediate precedent of the others – is the civil code of Haiti (1825), an unlikely place to talk about a ‘reception’ of the *Code civil*, as this had in fact been law in force in the country even before its political independence. The introduction

12 GUZMÁN BRITO (2000) 317 ff.; ID. (2006) 163 ff.

of the *Code civil* (or something similar) in this country seems to be simply a case of continuing of the previous legal structures.

Should we talk here, therefore, of a ‘reception’ of the French civil code, or rather of a kind of ‘mimicry’ of a purely Latin American process with political resonances?

More precisely, according to the analysis of Alejandro Guzmán Brito,<sup>13</sup> this initial pre-eminence of the French *Code civil* in the Spanish American republics was probably due to three different, but inter-related facts:

a) At the beginning, there was no easier model to adopt than the French code, because of the language (in contrast to the Prussian or the Austrian codes, which were unintelligible for the Spanish American legislators), but also because of previous traditions, which were obviously more familiar to the Latin American countries in the case of the French model.

b) The urge to have a code quickly was sometimes felt in the new republics for political reasons, normally to get the upper hand in the independence process. For instance, Louisiana felt the need to have a Romanist code just immediately after its incorporation into the United States in 1803 in order to avoid being absorbed by the ‘common law’ area. Oaxaca hurried to enact a civil code inside the Mexican Federation (even before it was proclaimed) as a way of asserting its sovereignty. Similarly the Dominican Republic let a civil code come into force as soon as it left the union with Haiti in 1845, just to escape the dominion of the laws of a hated country, even though the code which was adopted was a foreign one and even in a foreign language.

c) In other cases of the adoption of the *Code civil*, in addition to the previous causes there is a third factor, namely the impatience of rulers with a Napoleonic style, a mixture of authoritarianism and enlightenment: once the decision to replace the ancient legislation with a new statutory body had been made, the quick implementation of such a decision led directly to the *Code civil*, what was a means of demonstrating that there was no other more available and efficient model at their disposal: it was somehow a Northern Star for the codification process in the whole of Latin America. But the ability to get this decision enacted was due to the all-embracing power of such leaders that enable the adoption of this piece of legislation without any higher discussion. That was the case, for example, of the modernizing (but

13 GUZMÁN BRITO (2000) 224–226; ID. (2006) 90–92.

tyrannical) government of Jean Pierre Boyer in Haiti in 1825; or the zeal, not free from some kind of authoritarianism, of the *Protector* Santa Cruz to extend the Bolivian civil code of 1830 to other countries of the continent; or the recovery of the *Code civil des Français*, in its version after 1816, in Costa Rica in 1841, thanks to the keenness of the *progressive* dictator Braulio Carrillo. All these functions were associated with strong characters prone to admire the work and personality of Napoleon Bonaparte, and his devotion to the idea that modernizing the society required solid and fast decisions, which only an authoritarian government was in a condition to successfully carry out.

Neither of these explanations talks about any kind of deep adoption of the model of the *Code civil* in all these Spanish American countries. The explanations for such a phenomenon go quite far removed from the idea of a public conviction at least among the jurists (or the Creole elite) that such a French model was superior to the Castilian-Indiano tradition for those new republics, but only that it was a quicker and perhaps more efficient way of attempting to modernize their societies and to support the independence process, a procedure which finally revealed itself to be a quite a superficial and short-termed program in Spanish American societies.

III. The question seems to be even more complex when the second wave of the Latin American codification is considered, beginning with the second civil code of Peru (1852)<sup>14</sup> and above all the civil codes of Chile (1855) and Argentina (1869). In these codes the French paradigm is present as an external feature, in the codification technique, but this is something which was not exclusive to the French model; indeed this one was actually an application of a technical device designed by the rationalist Natural Law and the *scienza della legislazione* of seventeenth and eighteenth century Europe. But the main point is that these codes – especially the Chilean one – are above all codifications of the traditional Castilian private law of the *Siete Partidas* and the *Derecho indiano* being in force in such territories and even after their *Emancipación* in so much as it had not been altered by the national legislation.

14 GUZMÁN BRITO (2000) 335 ff.; ID. (2006) 175 ff.

In effect, Bello's codification work<sup>15</sup> was a successful mixture of the modern codes of his time, particularly the French *Code civil*<sup>16</sup> (but also some others, though to a lesser extent, e. g. the Peruvian civil code of 1852), and, above all, Roman law (either directly or by the way of the *Siete Partidas* and some other legislative bodies of medieval Spain). Numerous other factors played a role into Bello's construction of the code, including the works of Friedrich Carl von Savigny, the French commentators on the *Code civil*, the writings of Jeremy Bentham on codifications, the works of the Spanish legists and Late Scholastics on private law, and various other European codes and drafts (like the influential Spanish *Proyecto de Código civil de 1851* by Florencio García Goyena). The result was a code which reflected a great step forward for civil law in Chile, but also in the whole of Latin America, as it was adopted in other countries with similar economic, social, and cultural structure.<sup>17</sup>

The arrival of Bello's code put an end to one's own country's efforts at codification (with the exception, maybe, of Vélez Sarsfield's Argentinian civil code<sup>18</sup> and the very substantial *Esboço do Código civil* of Augusto Teixeira de Freitas between 1860 and 1867). Actually, in a region where complete and active state control and institutions were impossible, local rulers have also moved to control the aspects of economic and daily life. The interest of *caudillos* and federalism could shape regional and provincial private law as well as the more evident public law (one must remember that Bello's codification work was also made possible because of presidential support during the autocratic regimes in the Portales era in Chile). Thus, over time, independence unsurprisingly led to greater variation in both institutions and rules of private law when compared with the colonial period. With different nations, each building separate legal structures and rules to respond to the needs or demands of their populations, variations in these aspects became inevitable. New possibilities, however, were also present in this variation. As particular countries attempted institutional experimentation or drafted new codes, these aspects of independent legal development became available sources for other countries. Where one country had exerted great effort in

15 GUZMÁN BRITO (1982); ID. (2000) 359 ff.; ID. (2006) 201 ff.; most recently, MORÁN MARTÍN (2011).

16 MIROW (2001).

17 BRAVO LIRA (1981); CASTÁN VÁZQUEZ (1981).

18 PARISE (2011).

designing a code for private law, such a code became a useful starting point for other countries that had structures, populations and economies that were closer to the Latin American context than to their European counterparts. That is one of the main reasons for the success of the Chilean civil code. It served as a model and indispensable source for the entire region. In Ecuador, for example, several codification commissions worked diligently throughout the early 1850s, only to set their work aside in 1855 to make minor revisions to Bello's code, which was quickly adopted. Similarly, Julián Viso's draft civil code for Venezuela, also based on Bello's work, was passed by the legislature in 1862. The Chilean civil code was also adopted at least by El Salvador (1859), Nicaragua (1867), Colombia (1858), Honduras (1880) and Panama (1860).<sup>19</sup>

If it is taken into account that these latter and more traditional codes were widely spread and accepted in other Latin American countries at the end of nineteenth and the beginning of twentieth centuries (even in the countries where the French *Code civil* had a strongest influence initially, with the logical exception of Haiti), so that the Latin American civil law acquired a peculiar shape which had led many scholars to refer to a "Latin American private law sub-system" within the Roman (or Roman-Germanic) legal system,<sup>20</sup> then the idea of a massive 'reception', in the traditional sense of the word as mentioned above, of the *Code civil* in Latin America must be seriously questioned. The French model was initially accepted (or adapted), but then it was neglected (or, at least, diluted). Different from what happened, for example in the Netherlands, where the French model displaced the traditional 'Roman-Dutch Law', in Latin America an opposite phenomenon took place, namely, that the traditional civil law – linked to the European *ius commune* – expulsed – or, at least, filtered – the imported law taken out of the *Code civil*. One should talk, therefore, at the most, of a 'go and return' reception of French civil law in Latin America.<sup>21</sup>

Notwithstanding there are still two problems when conceptualizing this peculiar 'reception' of the French *Code civil* in Latin America.

First, to which extent are the substantial coincidences between the legal rules of those Latin American and French codes to be explained by the

19 GUZMÁN BRITO (2000) 374–425.

20 See references in SCHIPANI (2005).

21 See also MIROW (2005).

influence of the latter, rather than by the pre-existence of a common model for both of them, founded on the tradition of the European *ius commune*? Can ‘reception’ really be called a process of simple re-formulation of rules which were already in force in the ‘receiving’ territory, according to dogmatic models which are ‘universal’ – or, at least, uniform to the common legal culture? It must be considered that the very *Code civil* was far from being a really revolutionary legal product:<sup>22</sup> it did not rebuild the law of property, contract or tort on new and individualistic principles. Indeed, it was drafted in what could be described as the trough between two intellectual waves: the sixteenth to eighteenth century natural law theory and the individualistic will-centred theory of the beginnings of nineteenth century. When Portalis and the drafters of the code were guided by general principles, they used those of the natural lawyers which were already old-fashioned. It was above all a reworking of Roman law, old customs, and ancient maxims. The drafters rejected expressly the republican vision of the code (as a clear and self-sufficient legislative body, where its rules would describe simple, natural relationships based on reason) and the principle of human equality accepted by them did not lead to a complete reshaping of private law itself. In this sense, insofar as its content is considered, the *Code civil* was not a very unfamiliar body to Spanish American lawyers, as the legal language of both of them was somehow common. This was undoubtedly an essential factor that paved the way for the formal acceptance of it in a first step of the codification process after the independence.

And secondly – and probably a deeper question: How is it possible to talk about ‘reception’ of a law in another, previously not existing one, that means, a law which has come into existence precisely as a result of the so-called ‘reception’, among other factors? The civil laws of the Latin American nations were actually built as independent ones (and not as ‘branches’ of a common *Derecho privado indiano*) through the codification process. The assumed influence of the French *Code civil* which could have taken place in such a process of constructing a new legal order was therefore less a ‘receptioned’ ingredient of such laws than a ‘constituent’ part or ‘building’ element of them. The usual concept of ‘reception’ should therefore be banned in the light of this historical development.

22 GORDLEY (1994).



IV. After the precedent argumentation, it seems to be quite clear that the concept of ‘reception’, as it is commonly used by comparative lawyers (or many comparative legal historians) is not adequate for solving certain questions raised by the phenomenon of the performance of civil codification in nineteenth century Latin America, namely as concerns the participation of French civil code and civilian doctrine in such a process. Of course, the substantial contribution of such a piece of European legislation and intellectual product in the construction of the legal building of these new republics is undeniable. But which kind of conceptual tool could be more suitable to aid the understanding of such a contribution, instead of the hackneyed – or, at least, commonly misunderstood – category of ‘reception’? In particular if we depart from a global perspective, distinct from the traditional European one, this category reveals even darker facets: it appears as a very narrow, rigid, culturally burdened concept, incapable of providing any useful explanation of the subject. Should we turn to other usual ideas coined by comparative lawyers in the last decades like ‘legal transfers’ or ‘legal transplants’ (Watson), ‘legal formants’ (Sacco) or a piece or ‘legal acculturation’? Could there really be any advantage when using the accustomed resource of the ‘reception’ as some kind of universal experience? Or should we better try to coin new, more precise terms to describe specific historical events from a global perspective?<sup>23</sup> In sum, could we accept the traditional methodical tools of legal history – most of them built in a national context, not considering the international perspective at all – to explain the global scope of legal developments over time?

These are all questions that must remain open to discussion here because they go far beyond the modest objectives of this paper, which should be content with carrying out some kind of *pars destruens* of the argument. But the reader could perhaps find some more accurate answers after realising the insufficiencies of the traditional proposals, and after comparing these reflections with the rest of the contributions of this issue, which will give some indications concerning similar problems in different spheres, what will surely open minds to new and deeper answers to old problems.

23 About all these concepts, see most recently DUVE (2012).

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