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1 Introduction

The expression *Sonderweg* is used to refer to a particular or exceptional way. In the case of our topic, *Sonderweg* would refer to the particularities of nation- and state-building processes in Europe and in America. If, however, we admit the existence of *Sonderwege*, we must then allow for the existence of a ‘normal’ *Weg* or normal state- and nation-building process consisting in an unproblematic process of homogenization of culture and society. Something similar happens with the term “Modernization”. There would be a normal way to modernity and exceptional ones or *Sonderwege*. The normality would be represented by Western Europe and specifically by France, and the exceptionality would be in the European periphery and in Latin America. The normal cases would be considered as the successful ones, and the cases not following the same pattern would be failed models.

This approach to nation- and state-building and modernization processes is at the core of traditional legal and political history. They were the result of the observation first-degree observers projected: intellectuals in America or in Europe imagined homogenous communities as a reality or as a goal and compared the local experiences they observed with that ideal. The goal was to create homogenous societies. Diversity was considered an obstacle to modernization which, in the case of young American nations, was equivalent to ‘Europeanization’. The different processes of modernization and state- and nation-building were explained as having been caused by the “tradition”, culture and mentality of the Southern European societies.¹

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1 LUHMANN (1995).

Today, neither this projection of nations as homogenous communities nor the idea of a centre producing ‘normal’ legal and political models being received or transplanted in the periphery is sustainable any longer.² If we adopt the perspective of second-degree observers, we shall easily understand that all ways to modernity are *Sonderwege*, that there are no ‘normal’ models of state- and nation-building, that these are actually projections of first-degree observers. This is applicable to countries of the so-called periphery such as Brazil and Spain but also to the countries traditionally presented as central or normal: diversity is not exclusive to the periphery. Even the French nation- and state- building process involved dealing with cultural, linguistic and social diversity.³

If we study processes of nation- and state-building, we must examine processes of legal change and transformation, and this leads us to analyze the contrast between modernity and modernization and tradition. Today, however, these two concepts are not understood as opposed to each other. Tradition can be seen as an obstacle to modernization and also as a path towards it.⁴ Western societies are thus traditional societies that have experienced an evolution of their living traditions.

In the following pages, I explain how tradition was a tool for the legal modernization and unification in Spain in the 19th and 20th centuries. The Civil Code of 1888 did not unify territorially the civil laws in Spain: traditional regional laws (*derechos forales*), survived the codification and remained the valid civil law in regions such as Catalonia, Aragon, Navarre and others. According to tradition, this is proof of the failure of Spanish codification. However, if we overcome this old way of interpreting legal change, very much influenced by the prestige of the French model, we can conclude that the Spanish codification process was not a *Sonderweg*, but rather a particular model adapted to the circumstances of the Spanish nation- and state-building process in the 19th and 20th centuries.

I start from two basic assumptions. First, in the Spanish nation- and state-building process private law and specifically civil law played a very important role. The State, in fact, “charged the codes with the task of creating a partic-

2 GLENN (2014) 33 ff.; DUVE (2014) 37.

3 ROSANVALLON (1990) 100 ff.

4 GLENN (2014) 2; DUVE (2018).

ular way of community life”.⁵ By regulating heritage, marriage and property rights, the codes were creating the nation. The tensions between modernity and tradition and between homogeneity and diversity are also to be observed in the private law codification process. Second, in the latter half of the 19th century, different regional élites used Catalan legal tradition and historical law still in force to project a different model of social and political modernization prioritizing the protection of property and the traditional family. I shall focus on the Catalan case because of the demographic and economic weight of this region and because of the special incidence of Catalan regionalism and nationalism in the Spanish nation- and state-building process.

2 Nation-building and private law unification

Spain was a uniform country from a religious perspective long before the liberal revolution. However, Spain was and is a diverse country socially, linguistically and also from the point of view of legal traditions. The Bourbonic reforms of the 18th century eliminated the Aragonese, Catalan and Valencian institutions, but King Philip V accepted the continuation of Catalan, Aragonese, Galician, Navarrese, Basque and Balearic law. Catalan elites strongly defended Catalan historical law as an instrument of corporatist social organization. The elites did not, however, defend the local languages spoken by the majority of the population. They preferred the Castilian language even if they rejected the imposition of Castilian law.

According to Spanish historiography, the war against the Napoleonic forces and the Constitution of 1812 are the starting moment of the Spanish nation-building process. The Spanish elites imagined the nation⁶ using both local traditions and also ideas imported from France – and rolled out here.⁷ Representatives of Catalonia and the Basque Country participated in the Cortes de Cádiz and voted for the Constitution and for other legal measures aimed at modernizing the country.

In the first half of the 19th century, the Spanish urban élites defended a liberal project for Spain, including economic and legal unification and modernization. The Catalan elites were especially participative in this project and

5 PETIT (2011) 3.

6 ANDERSON (2016).

7 ÁLVAREZ JUNCO (2002).

were more conscious of their national identity than others. In this incipient nation-building process, references to regional history played a very important role. The Catalan Spanish-Nationalists cultivated a romanticized reconstruction of the Catalan past. To praise the *Glòries Catalanes* was their way of building and praising the greater *Nación Española*. As Joan Lluís Marfany wrote a few years ago, the provincialist antiquarianism was an important element of Spanish nationalism in Catalonia and in other Spanish regions.⁸ The Spanish nation had to be built on the foundation of local and regional traditions, existing or invented.

From a legal perspective, these Catalan elites supported the elimination of some Catalan medieval legal institutions and the unification of private law. Jurists and politicians praised the old laws of Aragon and Catalonia and presented them as precedents of modern Spanish laws recognizing personal and political freedom.⁹ The idealization of the middle Ages and medieval law was a great contribution from Catalonia to the creation of a new Spanish national history, which was fundamental to the nation-building process.

There was no demand for a Catalan codification, but rather for a Spanish civil code. As one of the founders of Catalan nationalism acknowledged in 1906, the unification of Spanish law took place during this first half of the 19th century without “awakening protests”.¹⁰ Civil law unification was a key element of this modernization and state-building process. As Pablo Salvador Coderch stated years ago, the élites in Barcelona were favourable to the elimination of important parts of traditional Catalan law.¹¹

The unification of private law was not questioned. However, the historical base of codification created controversy. Using the words of Patrick H. Glenn, we can say that codification was the production of State law via ‘decantation’ of prior historical law.¹² The Catalan elites advocated for a civil code resulting from the decantation of all existing regional historical laws: Castilian but also Catalan, Aragonese, Navarrese etc.

The regional elites, especially the Catalan landowners and industrialists, did not demand to use nor did they angle for the protection of regional

8 MARFANY (2017) 260 ff.

9 MARFANY (2017) 417–463.

10 PRAT DE LA RIBA (1906) 24.

11 SALVADOR CODERCH (1985) 76.

12 GLENN (2003) 78.

languages. Concerns on that issue arose in the last decades of the 19th century. Furthermore, they did not demand political autonomy for Catalonia, Navarre or Galicia. They were committed to the construction of a unified country with one language and one central authority. They did, however, demand the conservation of a number of traditional legal institutions that were key for the maintenance of their conservative, elitist social model. In Catalonia, the elites defended customary law, the emphyteusis, old agrarian contracts such as the *rabassa morta* and the legal capacity of widows. These institutions were the foundations of the two pillars of Catalan traditional society: private property (*patrimonio*) and the traditional family.¹³

According to Catalan jurists and politicians, the specific character of Catalans, the particularities of the Catalan economy and landscape were based on the historical law of the region. Eliminating these institutions would mean the destruction of the specificity of the Catalan economy and society. As Manuel Duran y Bas,¹⁴ representative of the Catalan Legal School, expressed in a famous law book of 1883:

“The Catalans are moderate and staid; they replenish their strength with a modest fare and return happily to work; drunkenness is rare, a dim view of, this vice being taken in town and country alike; progeny abound round dinner tables, and, in terms of criminality, Catalonia ranks on the low end of the scale.”¹⁵

If, in Brazil, the ‘cordial man’ was praised as a model, in Catalonia, the model was the sober, hard-working Catalan presented by Catalan conservative regionalism in contrast to other Spanish populations. The explanation for this regional character was, according to jurists and politicians, the permanence of Catalan traditional law. Regional diversity in Spain was explained with arguments from both general and legal history.

This explains why the first serious attempt to unify civil law, the *proyecto García Goyena* of 1851, failed. The Spanish government presented a civil code draft which was the result of the decantation only of Castilian law. This famous draft code, according to Salvador Coderch, was a clumsy way of imposing the liberal model: it

13 GLENN (2003) 45 ff.

14 I use Duran y Bas as in the original although this author’s name is often written following the Catalan form, Duran i Bas.

15 DURAN Y BAS (1883) XCIX.

“was inserted (into liberalism) with incredible hamfistedness. Drawn up with absolutely no regard for the various civil laws in force throughout the Spanish State (those of Castile naturally being the exception), it was not short on gratuitous aggression toward practices entrenched in the affected territories.”¹⁶

The content of the draft code was therefore a threat to the survival of Catalan traditions and institutions.¹⁷ Catalan elites along with those of other *regiones forales* or regions with historical law, rejected the idea of a civil code applicable to the entire country.

Another possible cause for the rejection of this important draft code was presented by Johannes Michael Scholz. According to him, by rejecting the project, the Catalan jurists were defending the field of Catalan legal professions from interference by non Catalan jurists.¹⁸ Defending Catalan tradition meant protecting Catalan Lawyers in terms of their professional market.

3 Regional laws and regional identities as part of Spanish state- and nation-building

After the failure of the 1851 Civil Code project, the Spanish elites assumed that it would be impossible to produce a unified civil code in Spain. The Spanish nation-building project needed the support of the powerful regional elites, especially those of Catalonia and the Basque Country, and the same happened with a key element of this process: the Civil Code.

During the *Restauración* (1874–1930), the Catalan elites supported the conservative modernization program of the two monarchist parties. They also participated in Spanish nationalism, but, at the same time, they elaborated a political discourse praising the region. The Spanish nation-building process coexisted with different region-building processes based on history, a particular regional identity and regional law. This was actually not exclusive to Spain: similar processes were underway at the same time in other European countries.¹⁹

It is also worth noting that discourses on the Catalan past from the first half of the 19th century were reinterpreted and recycled to be used in this

16 SALVADOR CODERCH (1985) 13.

17 SALVADOR CODERCH (1985) 14.

18 SCHOLZ (1986) 282.

19 STORM/AUGUSTEJN (2012) 2.

region-building process.²⁰ Something similar happened with legal historical discourses: they were reinterpreted and used to demand the conservation and protection of Catalan traditional private law.

In Catalonia, the *Escola jurídica catalana*, led by the lawyer, civil law professor and politician Manuel Duran y Bas, defended the modernization of law based on regional tradition. This Catalan School did, however, largely reject the creation of a Catalan parliament with the power to create new laws: it defended a modernization of the old historical law (*derecho histórico* or *dret històric*) led by the elites and executed by ‘savant’ jurists.

Manuel Duran y Bas and his followers made particular use of some of Savigny’s ideas. They presented themselves as followers of the German Historical School, even if they read Savigny from French translations and adaptations. Catalan jurists incorporated more slogans than ideas in their discourses. The expression ‘Volkgeist’ struck a particular chord with jurists and politicians from Catalonia. That said, the legal and philosophical models of Savigny were neither studied nor adapted: Savigny was used to give prestige to the publications and demands of a particular social group. This is why Antonio Serrano called this “Rezeptionsästhetik”.²¹ Bartolomé Clavero considers that the ‘reception’ of the Historical School was an excuse to oppose the codification process and to bolster the conservation of traditional institutions.²²

Whether it was an excuse or a ‘Rezeptionsästhetik’, what is important is the social and political program contained in Duran y Bas’ interpretation of Savigny. Lloredo Alix has studied the particular way of combining some of Savigny’s ideas with concepts from the old *Escolástica* to create a particular Catholic, historicist and, in some cases, organicist way of studying law.²³ This is key to understanding that, by defending Catalan traditionalist institutions, Catalan jurists were actually protecting a social model for Catalonia based on property and the traditional family from the threat represented by the industrialization process. The process of elaboration of regional laws had to be based on history and religion and not on the will of the Catalan people. Catalan jurists also defended the continuation of a ‘natural’ social

20 MAREFANY (2017) 584 ff.

21 SERRANO GONZÁLEZ (1997) 51.

22 CLAVERO (1984) 96.

23 LLOREDO ALIX (2014) 256.

order free from the intervention of the State. It was actually the Catalan version of French legal modernism aimed at protecting old social structures from the intervention of the State in the industrial era.²⁴ Regional diversity was used as a discourse to protect social diversity within the regions.

This Catalan traditionalist *foralista* project was not exclusive to Catalan or other regionalist elites. It was perfectly compatible with the conservative elites in Madrid as well. The development of these ideas was parallel to that of corporatist concepts in savant societies such as the *Ateneos* and the *Reales Academias*.²⁵ This explains the relative coincidence of the two political projects represented by central and regional elites and the cooperation in the administration of political power during the *Restauración*.

History played a very important role in the development of *foralismo*, especially in the construction of a medieval past for Catalonia. The past explained and legitimized how Catalonia was special and how there was thus a need to conserve Catalan law. The look into the past was not exclusive to legal discourses. Medieval history and the use of tradition were very influential in Catalan literature, arts and also urban design. The famous *Barri Gòtic* or Gothic Quarter is actually an invention of that time: numerous Gothic elements and buildings were built or restored in the first half of the 20th century, not in the Middle Ages.²⁶

Was this an antimodern national project or a “deficit in the process of modernization”, to use Ribeiro’s words? In my opinion, it was an alternative way to modernity and nation-building, based on tradition and on the actualization of the past, but a process of modernization after all. Legal regionalism or *foralismo* defended the primacy of customary law, the traditional family and the integral transmission of heritage. The *foralistas* are not to blame for the ‘failed’ and late Spanish civil law codification. The literature comparing this codification to the French model created this idea of successful or failed codifications which needs to be overturned.

As Salvador Coderch underlines, the legal institutions defended by the Catalan School had more to do with the corporatist society of the *Ancien Régime* than with the industrial Catalan society of the 20th century.²⁷ This

24 ARAGONESES (2009).

25 SCHOLZ (2005) 149 ff.

26 COCOLA GANT (2014).

27 SALVADOR CODERCH (1985) 177.

does not contradict the idea of modernization: the foralistas, especially the ones represented by the Catalan School, had a corporatist or pre-corporatist project for the modernization of the Spanish State and society.

Let us consider, for instance, the construction of the Gothic Quarter, in tandem with the project of defending Catalan traditional law. This urban planning project enmeshed the need to create broad avenues with a view to attracting tourists and that of recreating Catalan artistic architecture. The result was the famous quarter in the city centre with neo-Gothic buildings and spaces attracting visitors and standing as a symbol of the city. Indeed, as Cocola Gant explains, jurists, such as Manuel Durán y Bas, who led the Catalan School and presented himself as a follower of the German Historical School, also participated in the restoration of Gothic buildings in Catalonia.²⁸

The artificial and imaginative restoration of medieval buildings, the importance of regionalist antiquarist historiography and the demands for the conservation and ‘restoration’ of Catalan historical law ran parallel and expressed a particular project of state-, nation- and region-building. This discourse was successful in the field of civil law. In 1888, the Civil Code was promulgated. It was applicable only in the territories of *derecho común*.

Thus, even after 1888, the actual physical territory where the Civil Code was in force was not completely defined. The regions with a civil law tradition did not have regional civil codes containing the applicable law. In Catalonia and the other *territorios forales*, traditional law, in the form of old books, old customs and old doctrines, was in force. The Spanish Civil Code was applicable in matters of family, heritage and contract laws only in the absence of rules in *derecho foral* and in the subsidiary sources of law recognized therein. The Spanish parliament or Government had no competences in the identification of the applicable law. This task was under the control of the elites: the decantation of legal rules in the different regions was a task to be performed by erudite jurists such as notaries, lawyers and law professors.

This was not the only project of Catalan regionalism. A group of intellectuals, political activists and also artists defended a democratic, federalist or regionalist model for Spain. This project was defeated in 1874, after the

28 COCOLA GANT (2014) 56.

collapse of the First Republic, but reappeared during the *Restauración* (1874–1930). In an article from 1894, the famous jurist, poet and journalist Joan Maragall qualified Catalan law as a “well conserved, embalmed and mummified” corpse and considered its defence by Catalan jurists to be “depressive and ridiculous”.²⁹ Like other representatives of progressive Catalanism, Maragall demanded the creation of a parliament in Catalonia in charge of legislation regarding civil law.³⁰

This federalist or autonomist progressive Catalanism became hegemonic only at the end of the *Restauración*. Catalan republicanism supported the Spanish Second Republic and controlled the autonomous region of Catalonia and its parliament until the victory of Francisco Franco in 1939. The Catalan parliament rejected the legal culture of the Catalan School and started regulating matters of civil law from a democratic perspective.³¹ The Republic was a path to a modern nation-state based on social rights and State interventionism. It was a project of “building modern citizenship” similar to others in Europe and to the one described by Pedro Ribeiro for Brazil, but this project was defeated in 1939 and replaced by a semi-corporatist, traditionalist and totalitarian nationalist project: *Franquismo*.

The Francoist nationalist project was, according to Sebastián Martín, a “restoration of the *Restauración*”.³² Francoism defended a homogenous nation although it allowed for an epidermal recognition of diversity.³³ The old traditional legal cultures contained in the *derechos forales* were functional to this way of managing diversity in Spain. Francoism consolidated the legal and political force of the old Civil Code of 1888.³⁴ At the same time, the dictatorship praised the old traditionalist, Catholic and corporatist ideology contained in regional legal traditionalism. This is one of the reasons why, in 1946, the *Congreso nacional de derecho civil* in Zaragoza concluded with the decision of adding to the Civil Code regional Appendices containing the different regional civil laws. In 1946, the traditional legal cultures protecting traditional social models were more functional to the Francoist

29 MARAGALL (1981) 442.

30 MARAGALL (1981) 441–442.

31 ARAGONESSES (2017a) 280.

32 MARTÍN (2010) 89.

33 CLARET/FUSTER-SOBREPÈRE (2021) 9.

34 PETIT (1996).

project than the Civil Code. The dictatorship promoted the promulgation of “compilaciones de derecho civil”.³⁵ The Catalan one was passed by the Francoist *Cortes* in 1960.

4 Conclusions

The recognition of national, cultural and linguistic diversity via political decentralization is an exception in Spanish constitutional legal history. The Spanish case does, however, represent a different model of recognition of diversity: regional private laws. After 1851, central and regional elites agreed on a project of civil law codification protecting the old legal traditions of the ‘regiones forales’. The Civil Code of 1888 did not eliminate this legal diversity which was functional to the traditional social model of the conservative elites of the *Restauración* and also of Francoism. The nation- and state-building project was not a failed one nor a *Sonderweg* but rather a particular process recognizing diversity in private law as a way to protect a modernization process respecting traditional values and models.

It is worth noting that, in the conservative legal culture, the official and legal recognition of civil law diversity was a way of stopping political decentralization and the democratization of the legislative processes. At the same time, the recognition of ‘derecho foral’ was intended to protect traditional social structures and values from the double threat of industrialization and urbanization. The recognition of diversity in the form of cultural folklores and legal traditions was an instrument of a traditionalist, elitist, from top-to-bottom process of modernization and state- and nation-building which explains many elements of Spanish legal and political cultures today.

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