HOW TO TEACH EUROPEAN COMPARATIVE LEGAL HISTORY WORKSHOP 19–20 AUGUST 2009

The internationalization and globalization of the law has been one of the greatest challenges to the modern nation state. The Maastricht Treaty 1992 emphasized the diversities of the member-states in the EU regarding language, history and culture. In late modern jurisprudence the disciplines legal history and comparative law, representing the perspectives of time and space within the law, have increasingly interacted towards a merge. In Europe as well as in the U.S. the field of comparative legal history has been introduced in the curriculum at many law schools, and the need is great for theoretical and methodological discourses and for class material in this field.

The legal historians at the Faculty of Law at Lund University Sweden arranged in 2009 together with European and American colleagues an international workshop on the topic How to Teach European Comparative Legal History. The papers at this workshop are published in this volume. It not only gives interesting theoretical perspectives. It also contributes to the description of the state of art of this expanding and dynamic discipline within the law. Participants at the meeting at Lund met in June 2010 in Valencia Spain to inaugurate the European Society for Comparative Legal History (ESCLH).

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Spanish Legal History: A need for its Comparative Approach

1. An Introduction to the Legal History Teaching in Spain

Legal History teaching in Spain has a long tradition in the university *curricula*, more specifically in the Faculties of Law. The first legal history chair was set up in 1873.[1] Later on, other two Royal Decrees were issued establishing legal history as an independent discipline within the law curricula studies.[2] Although on several occasions legal history as a law curriculum discipline could have disappeared, fortunately this has never happened[3] Hence legal history has been taught in Spain for almost a century and a half.

In part because legislation enshrined a field called "History of Law and of the Institutions" thereby creating many chairs all over the country, particularly in the last forty years, Spanish legal historians have flourished and spread considerably. There therefore exist today in Spain many scholars who deal exclusively with legal history, both doing research and teaching.

Spanish history has witnessed a long legal development which goes from the period of its legal Romanization until today.[4] Interestingly enough, it has been

[1] Royal Decree on September 2, 1873 (on this matter, see VILLAPALOS, G.: "Memoria de un maestro", *Homenaje al Profesor Alfonso García-Gallo*, vol. I, Madrid, 1996, p. 12).

[2] Royal Decrees on September 2, 1873, and on August 14, 1884 (on this matter, see AGUILERA BARCHET, A.: *Introducción jurídica a la Historia del Derecho*. Madrid, 1994, p. 23).

[3] In this regard, it is memorable that legal history was not abrogated in the context of the global reform process of the university curricula which took place in 1987, particularly considering the fact that in the Committee in charge of the legal reform there was no legal historian at all. Despite of it, the legislation which laid down the criteria to elaborate the law curriculum maintained the legal history as a compulsory course (see the Royal Decree 1497/1987, 27th September; see also the *Reforma de las enseñanzas universitarias. Título: Licenciado en Derecho*, Madrid, 1988, pp. 23–45). Later on, the legal reform concerning the law curriculum approved the compulsory character of the legal history course, granting to universities the possibility of introducing other optional courses dealing with legal history (see the Royal Decree 1424/1990, 26th October).

[4] An interesting question to pose is at what time Spanish legal history really begins. There are different views among legal historiography. Some state that it begins with the Roman conquest (218 B.C), others with the Visigothic period (476 or 568 AD), and others with the Constitution of Cadiz (1812). They give all different arguments to defend their own views. I think it is better to start from the beginning, that is, before the Romanization of the Iberian Peninsula, since it will enable us to cover the history of Roman law in Spain which constituted an important characteristic not only of Spanish legal tradition but also of civil law countries.

said – although not always recognized by non-Spanish scholars[5] – that Spanish legal history is one of the most instructive,[6] oldest[7] and richest[8] legal tradition which has ever existed, a statement which could have been hardly written by a Spanish scholar. Considering at least that Spanish legal history should cover all laws made and applied in the territories that have formed part of the current Spain throughout history, it is clear that Spanish legal history is quite long and rich, as will be seen.

One may ask what has been, is and will be the role of the European Comparative perspective in teaching Spanish legal history. In answering this question I will divide the paper into three parts. First, I will explain what has happened in the past; second, I will turn to what, in my view, should be done about it; and third, I will conclude by saying what I think will probably happen.

2. What Has Happened

In general terms, it could be said that Spanish legal historians have not paid much attention to the European context in which Spanish legal history was born and developed over the centuries. A brief look at the considerable number of Spanish legal history handbooks would be enough to realize that their authors

[5] This is, in my opinion, due to the fact that both not many non-Spanish legal historians can read Spanish and Spanish legal historians have made little effort to publish in other languages different from those used in Spain. This is, nonetheless, another matter that does not concern the topic of this paper.

[6] SCHMIDT, Gustavus: *The Civil Law of Spain and Mexico*. New Orleans, 1851, p. 9: "Few countries have experienced so many vicissitudes as Spain; and few, if any, present more varied and more instructive lessons in social sciences (…) the ancient history of Spain [referring to the period of Iberians, Celts and Phenicians], though obscure and by time and disfigured by fables, affords sufficient information to enable us to ascertain that it was at a very early period a rich and flourishing kingdom".

[7] PUTNAM, Herbert: "Preface" to PALMER, Thomas W. Jr.: *Guide to the Law and Legal Literature of Spain*. Washington, Government Printing Office, 1915, p. 4: "…Spain offers a fruitful field for study. It possesses one of the oldest developed systems of law–a composite of Roman, Germanic and Arabic elements, with a strong infusion of canon law; it is growing in industrial and commercial importance; it is participating actively in the legislative movement for social and economic reform; and – of particular interest to us – is the mother of the legal system of a large part of the world in which we have vital interests"; and later on, its author states that "the history of Spanish law assumes far more than a local importance. In the early Spanish codes and compilations may be traced some of the most lasting institutions of Roman law, and they were the medium through which Spain carried her law into the new world" (p. 26).

[8] KLEFFENS, E.N. van: *Hispanic Law until the end of the Middle Ages*. Edinburgh, 1968, pp. 27–28: "There is no doubt that the history of Spanish law in the middle Ages is exceptionally rich; it's study cannot but broaden the law-student's understanding, and open his eyes to his merits and demerits of a great many solutions for a great many problems which, through the ages, are basically and generally the same everywhere (…). Surely, a legal system of such unique magnitude would seem to deserve more attention than it has hitherto received beyond the frontiers of Spain".

were not very concerned with the European or comparative perspective.[9] Several reasons can explain this fact.

The most important one is that, with only a few exceptions Spanish legal historiography has barely explored Spanish legal history from a European or comparative perspective. Scholars have tended to teach the results of their research, and generally speaking, each scholar has been researching only teaching usually reflects the main research interests of the scholars who cultivate a specific scientific field.

When the first books containing the European perspective were written and published outside Spain,[10] Spanish legal historians' concerns mainly revolved around the medieval legal sources, particularly the local charters and customs or

[9] See, for example –and among others–, the following Spanish legal history handbooks written by CORONAS GONZÁLEZ, Santos M.: *Manuel de Historia del Derecho Español*. Valencia, 1999; ESCUDERO LOPÉZ, José Antonio: *Curso de Historia del Derecho. Fuentes e Instituciones Político-administrativas*. Madrid, 2003; FERNÁNDEZ ESPINAR, R.: *Manual de Historia del Derecho Español*, Madrid, 1989; FONT i RIUS, Josep Mª: *Apuntes de Historia del Derecho Español tomados de las explicaciones ordinarias de la cátedra: parte general: La evolución general del Derecho Español: lecciones 1–37 del programa de clases*. Barcelona: Universidad, D.L. 1974; GACTO FERNÁNDEZ, Enrique (et altri): *Derecho histórico de los pueblos de España*. Madrid, 1992; GARCIA GALLO, Alfonso: *Manual de Historia del Derecho*. Madrid, 1992; GIBERT Rafael, *Historia General del Derecho español*. Madrid, 1975; IGLESIA FERREIRÓS, Aquilino: *La creación del derecho. Una historia de la formación de un derecho estatal español*. 2 vols., Barcelona, 1992; LALINDE, *Jesús: Iniciación a la historia del Derecho español*. Madrid, 1989; MONTAGUT ESTRAGUÉS, Tomàs (coord.): *Historia del dret espanyol*. Edicions de la Universitat Oberta de Catalunya, Barcelona, 1998; PESET, Mariano (y otros): *Historia del derecho*. Valencia, 1989; PÉREZ-BUSTAMANTE, Rogelio: *Historia del Derecho Español. Las fuentes del derecho*, Madrid: Dykinson, 1994; PEREZ PRENDES, Jose Manuel, *Curso de historia del derecho español*, Madrid, 1990; SANCHEZ, Galo: *Curso de Historia del Derecho español. Introducción y fuentes*. Valladolid, 1980; TOMÁS Y VALIENTE, Francisco: *Manual de Historia del Derecho Español*. Madrid, 1992.

[10] See, for example, WIEACKER, F.: *Privatrechtsgeschichte der Neuzeit*. Göttingen, 1967; BERETTA ANGUISOLA, P.: *L'Europa e il suo Diritto, I, Premessa romana*. Florencia 1967 (see its review written by E. Valiño in *Anuario de Historia del Derecho Español* –or *AHDE*– 39, 1969, pp. 779–780); COING, Helmut: "Die europäische Privatrechtsgeschichte der neueren Zeit als einheitlicher Forschungsgebiet", *Jus commune* 1 (1967), pp. 1–33; COING, Helmut: "Die Bedeutung der europäischen Rechtsgeschichte für die Rechtsvergleichung", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 32 (1968), pp. 1–23; CAVANNA, Adriano: *Storia del diritto moderno in Europa. Le fonti e il pensiero giuridico*. I. Milano, 1972; COING, Helmut: "Die historischen Grundlagen der europäischen Rechtseinheit", *Mitteilung aus der Max-Planck-Gesellschaft zur Förderung der Wissenschaft e. V.*, Jahrgang 1973, pp. 241–244; COING, Helmut: *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, Munich 1973, 3 vols. (see its review written by A. García Gallo in *AHDE* 44, 1974, pp. 752–764 and 46, 1976); as known, Coing's *Handbook* remained unfinished: the 1st *Band* has one volume on the Middle Ages; the 2nd *Band* has two volumes; and the third *Band* has five volumes; later on, he published his *Europäisches Privatrecht*, Munich, 2 vols., 1985–1989 (which was translated into Spanish by Antonio Pérez Martín and published by the Fundación Cultural del Notariado, Madrid, 1996).

fueros. Many scholars devoted much interest to these medieval sources.[11] At the same time, it would be inaccurate to say that in the middle of the 20th Century Spanish legal historians were not aware of the emergence of the European perspective: papers written by foreign scholars, once translated into Spanish, were published in Spain,[12] and the celebrated legal historian A. García Gallo also wrote about it.[13] However, among the majority of Spanish legal historians, the national geographical context of interest prevailed,[14] considering the European legal history as a "ghost history", not a real legal history.[15]

The predominance of the study of the legal sources over the legal institutions was an important feature of the Spanish historiography of the second half of the 20th century (particularly in the 60s and 70s). This phenomenon was perfectly understandable since no real research on legal institutions could be done without a previous study of the main legal sources of the different Spanish legal traditions (Castile, Aragon, Catalonia, Valencia, Majorca, Navarre, etc.). In doing so, since much work had to be done, the European perspective was almost ignored or put it aside.

I said "almost" – and not completely – because there were some remarkable exceptions. Building on those exceptions, a European or comparative approach to Spanish legal history would emerge and progressively expand. Several legal historians should be mentioned, all of them focusing on the *ius commune*. The two most notable will be dealt with first: one dealt with the history of canon law (*Corpus iuris canonici*), Antonio García y García, another with the civil law (*Corpus iuris civilis*), Antonio Pérez Martín.

[11] It would be impossible to cite even a part of the Spanish legal historiography dealing with the *fueros*; for an exhaustive list of articles and books published between 1973 and 1998 dealing with it, see PUYOL MONTERO, José Mª: "Un balance de 25 años de historiografía histórico-jurídica en España (1973–1998)", *Cuadernos de Historia del Derecho* 5 (1998), pp. 283–409.

[12] THIEME, Hans: "Unidad y pluralidad en la Historia del Derecho europeo", RDP 49 (1965), pp. 689–700; WALL, Edward: "La unificación de Europa y el Derecho", *Cuadernos de Historia Económica de Cataluña* 21 (1969), pp. 185–190; see later on, in the 1990s, SCHULZE, R.: "De la aportación de la Historia del Derecho a una Ciencia del Derecho Privado Europeo", *AHDE* 66 (1996), pp. 1003–1013.

[13] GARCÍA-GALLO, Alfonso: "Cuestiones de Historiografía jurídica, I. La justificación de la Historia del Derecho; II. La Historia del Derecho Europeo", *AHDE* 44 (1974), pp. 741–764.

[14] On this matter, see CLAVERO, Bartolomé: "Leyes de la China. Orígenes y ficciones de una Historia del Derecho Español", *AHDE* 52, 193–221; PÉREZ MARTÍN, Antonio: "La 'Respublica christiana' medieval: Pontificado, Imperio y Reinos", *El Estado Español en su Dimensión Histórica* (ed. by Manuel J. Peláez). Barcelona, 1984, pp. 59–128; PÉREZ MARTÍN, Antonio: "Planteamiento y objetivos del Simposio Internacional 'España y Europa, un pasado jurídico común'", *España y Europa. Un pasado jurídico común* (ed. by A. Pérez Martín), Murcia, 1986, pp. 12–13; the same cannot be said regarding some historians like SUÁREZ FERNÁNDEZ, Luis: *Europa: una conciencia histórica en la encrucijada*. Valladolid, 1972.

[15] OTERO VARELA, A.: "La delimitación nacional de la historia del derecho. En torno a los orígenes de la nacionalidad española", *Boletín de la Universidad Compostelana* 78 (1971), p. 31.

Antonio García y García started an important task of editing and commenting canon law sources in 1973 in Spain and other European countries.[16] He also participated in many national and international conferences[17] and published in different canon law and legal history journals until the end of the last century.[18] In 1999 a selection of his scattered works dealing with the *ius commune* were collected and re-edited.[19]

Both the research and teaching of Antonio Pérez Martín, whose PhD supervisor had already showed interest in the European legal tradition,[20] were particularly focused on the *ius commune*'s legal sources and literature, taking the European perspective in mind from the very beginning. Working at the Institute Max-Planck for European Legal History (Frankfurt am Main, Germany) for ten years, he published several works in which legal development was approached within the European context.[21] Once back in Spain, as a professor of legal history at the University of Murcia, Pérez Martín's academic activity followed the same line. Regarding his research projects, he continued

[16] See, for example, GARCÍA Y GARCÍA, A.: *Códices operum Bartoli de Saxoferrato recensit. Iter Hispanicum*, Instituto per la Storia dei Postglossatori e Commentatorim, Florencia, 1973.

[17] See, among others, GARCÍA Y GARCÍA, A.: "Investigación y estudio del Derecho común medieval en España", *Atti del Convegno I Glossatori*, Pavia, 1974, pp. 21–41; "Del Derecho canónico visigodo al Derecho común medieval", *Estudios sobre Alfonso VI y la reconquista de Toledo. Actas del II Congreso Internacional de Estudios Mozárabes*, Toledo, 1987, pp. 165–185.

[18] GARCÍA Y GARCÍA, A.: "El jurista catalán de Vallseca. Datos biográficos y tradición manuscrita de sus obras", *La investigación de la Historia hispánica del siglo XIV. Problemas y cuestiones*, Barcelona, 1973, pp. 677–708; *La canonística portuguesa medieval*, Madrid, 1976; "La canonística española postclásica", *Studia Gratiana*, 19 (1976), pp. 225–252; "Nuevos descubrimienttos sobre la canonística salmantina del siglo XV", *AHDE* 50 (1980), pp. 363–374; "La canonística ibérica (1150–1250) en la investigación reciente", *Bulletin of Medieval Canon Law* 11 (1981), pp. 41–75; *Iglesia, sociedad y Derecho*, Salamanca, 1985; "La enseñanza universitaria en las Partidas", *Glossae. Revista de Historia del Derecho*, 2 (1989–1990), pp. 107–118; *Derecho común en España: los juristas y sus obras*, Murcia, 1991; "El derecho canónico medieval", *Dret Comú i Catalunya. Actes del II Simposi Internacional*, Barcelona, 1991; "El derecho canónico medieval", El Dret Comú i Catalunya, 1992, pp. 17–51; "Manuscritos de derecho común medieval en España: Acta et agenda", *El Dret Comú y Catalunya*, Barcelona, 1993, pp. 51–70; "De las colecciones gregorianas al derecho común medieval en Compostela", *Estudios de Historia del Derecho Europeo. Homenaje al Prof. G. Martínez Díez*, Madrid, 1994; "El derecho común en Castilla durante el siglo XIII", *Glossae*, 5–6 (1996), pp. 255 a 277.

[19] GARCÍA y GARCÍA, A.: *En el entorno del Derecho común*. Madrid, Dykinson, 1999.

[20] See, for example, GIBERT SÁNCHEZ DE LA VEGA, R.: *Elementos formativos del Derecho en Europa. Germánico. Románico. Canónico*, Madrid, 1982.

[21] PÉREZ MARTÍN, A.: "Los colegiales de San Clemente de los Españoles en Bolonia (1368–1500)", *Salmanticensis*, XX-1, (1973); "Gesetzgebung in Spanien", *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*. München, 1976, pp. 228–281; "Los colegios de Doctores en Bolonia y su relación con España", *AHDE*, XLVIII (1978), "Büchergeschäfte in Bologneser Regesten aus den Jahren 1265–1350", *Veröffentlichungen des Max-Plank-Instituts für europäische Rechtsgeschichte*, VII (1978), pp. 7–49; (with SCHOLZ, J.M.), *Legislación y jurisprudencia en la España del Antiguo Régimen*, Valencia, 1978; *Proles Aegidiana*, 4 vols., Bolonia, 1979; "'Fori Aragonum' vom Codex von Huesca (1247) bis zur Reform Phillipps II (1547)", 8th volume of the *Mittelalterliche Gesetzbücher Europäischer Länder in Faksimileindrücken*, Vaduz-Liechtenstein, 1979.

publishing on the *ius commune* and its reception in the Spanish kingdoms,[22] organizing some conferences and joint projects in which he encouraged and involved other remarkable scholars from Spain and other European countries. Two conferences held in 1985 deserve to be mentioned: the 1st International Symposium of the *Ius-commune Institute* Pérez Martín held in Murcia on April 26-28,[23] and a Seminar J. Cerdá Ruíz-Funes and P. Salvador Coderch held in Barcelona, on the current developments of the study of the history of private law, in which Pérez Martín gave an interesting paper on the study of the reception of the *ius commune* in Spain.[24] Ten years later, in 1995, Pérez Martín held another conference in Murcia to celebrate the 7th Centennial of the death of Jacobo de las Leyes, who is – in Pérez Martín's view – the author of the Fuero Real and Siete Partidas.[25]

Perez Martín also created the *Instituto de Historia del Derecho Europeo*, along with a legal history journal called *Glossae: Revista de Historia del Derecho Europeo*, where several Spanish and non-Spanish legal historians published between 1988 and 1996 articles about the *ius commune*, European legal history and

[22] PÉREZ MARTÍN, A.: "Importancia de las Universidades en la recepción del Derecho romano en la Península Ibérica", *Studi Sassaresi*, VIII, III (1980–81), pp. 255–332; "Estudiantes zamoranos en Bolonia", *Studia Zamorensia*, 2 (1981); "El *ordo iudiciarius 'Ad summarium notitiam'* y sus derivados. Contribución a la historia de la literatura procesal castellana (I. Estudio) y (II. Edición de textos)", H.I.D. 8 (1981), pp. 195–266; and 9 (1982), pp. 327–423; "Las glosas de Arias de Balboa al Ordenamiento de Alcalá. Su edición y estudio", *Aspekte europäischer Rechtsgeschichte. Festgabe für Helmut Coing zum 70. Geburtstag*, Frankfurt, 1982, pp. 245–292; "El Ordenamiento de Alcalá (1348) y las glosas de Vicente Arias de Balboa", *Ius Commune*, 11 (1984), pp. 55–215; "El Fuero Real y Murcia", *AHDE* 54 (1984), pp. 55–96; "La obra jurídica de Jacobo de las Leyes: las Flores del Derecho", *Cahiers de linguistique hispanique médiévale. De la variation linguistique et textuelle. En l'honeur de Jean Roudil*, n. 22, vol. 2, Paris.

[23] The papers given in this symposium, organized to celebrate the 7th centennial anniversary of Alfonso El Sabio's death, were published in PÉREZ MARTÍN, A.: *España y Europa. Un pasado jurídico común*, Murcia, 1986; particularly interesting are, in this regard –and among others–, the following articles contained in this collective book: PÉREZ MARTÍN, A.: "Planteamiento y objetivos del Simposio Internacional 'España y Europa, un pasado jurídico común'", pp. 11–26; DOLEZALEK, G.: "Observancias sobre el desarrollo del Derecho común hasta la época de Alfonso X el Sabio", pp. 27–44; COING, Helmut: "La contribución de las naciones europeas al Derecho común", pp. 45–61; RANIERI, Filippo: "El estilo judicial español y su influencia en la Europa del Antiguo régimen", pp. 101–118; LALINDE ABADÍA, Jesús: "El Derecho común en los territorios de la Corona de Aragón", pp. 145–178; IGLESIA FERREIRÓS, Aquilino: "La obra legislativa de Alfonso X El Sabio", pp. 275–599.

[24] PÉREZ MARTÍN, A.: "El estudio de la recepción del Derecho común en España", *I Seminario de Historia del Derecho y Derecho Privado: Nuevas técnicas de investigación*. Barcelona, 1985, pp. 241–325.

[25] The papers presented in this conference were published in the volume 5–6 of *Glossae*.

Spanish legal history from a European perspective.[26] Concerning his teaching, Pérez Martín was most probably the first legal historian who taught European legal history as an optional course for some years. Furthermore, Pérez Martín's lectures on Spanish legal history clearly reflected his European or *ius-commune* approach to the history of Spanish law.

In addition to Antonio García y García and Antonio Pérez Martín, other legal historians who paid a considerable attention to either the *ius commune* or the European perspective should be mentioned.

Jesús Lalinde Abadía published in 1980s several works about the reception of the *ius commune* in the Iberian Peninsula,[27] the Spanish Monarchy from a European perspective,[28] as well as the Spanish and European legal historiography.[29] In 1992 he published a book on the history of criminal law looking from different cultural perspectives.[30] It is also worth mentioning his Spanish legal history handbooks,[31] which contained a theoretical and conceptual approach to legal development applicable not only to Spain but also to other European and non-European countries.[32]

[26] See, among others, the following articles: BENITO FRAILE, E.J.: "Notas para el estudio de la sentencia en el proceso civil ordinario desde la recepción del Derecho común hasta la Ley de Enjuiciamiento Civil de 1881", *GLOSSAE. Revista de Historia del Derecho Europeo* I (1988), pp. 135–159; COING, H.: "Unidad en el desarrollo del Derecho en los países de Europa", *Glossae. Revista de Historia del Derecho Europeo* 2 (1989–1990); MONTAGUT ESTRAGUÉS, T. de: "La recepción del Derecho feudal común en Cataluña. I. (1211–1330). (La alienación del feudo sin el consentimiento del Señor)", *Glossae. Revista de Historia del Derecho Europeo* 4 (1992), pp. 9–145; BELLOMO, M.: "Tenemos por bien de fazer estudio de escuelas generales. Tra Italia e Castiglia nel secolo XIII", *Glossae. Revista de Historia del Derecho Europeo* 5–6 (1993–1994), pp. 115–129; MONTAGUT ESTRAGUÉS, T. de: "Sobre la recepció del ius commune a Catalunya en matèria de retiment de comptes: els racionals i els oïdors de comptes", *Glossae. Revista de Historia del Derecho Europeo* 5–6 (1993–1994), pp. 365–390; TOMÁS y VALIENTE, F.: "El 'ius commune europaeum' de ayer y hoy", Glossae. Revista de Historia del Derecho Europeo 5–6 (1993–94), pp. 9–16; WOLF, A.: "Los iura propria en Europa en el siglo XIII", *Glossae. Revista de Historia del Derecho Europeo* 5–6 (1993–1994), pp. 35–44; ARVIZU, F. de: "Ilusiones y realidades de la Historia del Derecho europeo", *Glossae. Revista de Historia del Derecho Europeo* 7 (1995), pp. 155–167; GARCÍA y GARCÍA, A.: "El derecho común en Castilla durante el siglo XIII", *Glossae. Revista de Historia del Derecho Europeo* 5–6 (1996), pp. 255–277.

[27] LALINDE ABADÍA, J.: "El Derecho común en los territorios ibéricos de la Corona de Aragón", *España y Europa. Un pasado jurídico común*, Murcia, 1986, pp. 145 a 178; "La penetración diferenciada del Derecho romano en la Península Ibérica", Studi Sassaresi (Napoli, Edizioni Scientifiche Italiane, VIII (1987), pp. 416–426.

[28] LALINDE ABADÍA, J.: "Perspectiva europea de la Monarquía hispana", *AHDE* 58 (1988), pp. 205–275.

[29] LALINDE ABADÍA, J.: "La iushistoriografía española y europea en el umbral del siglo XXI", *AHDE* 56 (1986), pp. 977–993.

[30] LALINDE ABADÍA, J.: *Las culturas represivas de la Humanidad*. Zaragoza, 1992.

[31] LALINDE ABADÍA, J.: *Iniciación Histórica al Derecho Español. Barcelona, 1970 (whose 4th edition appeared in two vols.*, Barcelona, 1989); LALINDE ABADÍA, J.: Derecho Histórico Español. Barcelona, 1974 (which was reedited several times, the last one in 1989).

[32] See, for example, LALINDE ABADÍA, J.: *El Derecho en la Historia de la Humanidad*, Barcelona, 1991.

Aquilino Iglesia Ferreirós, professor of legal history at the University of Barcelona, along with the publication of some articles on the reception of the *ius commune* in the Iberian Peninsula, particularly in Catalonia,[33] organized several conferences called *Dret Comú i Catalunya* with the participation of prestigious Spanish and non-Spanish legal historians.[34]

Along with the reception of *ius commune* in Spain, a topic that other legal historians have explored, studied and published,[35] other topics have been approached comparatively: some contributions on legal historiography,[36] feudalism,[37] the creation of law in the Middle ages,[38] parliaments and royal

[33] See, for example, IGLESIA FERREIRÓS, A.: «Derecho municipal, derecho señorial, derecho regio», *H.I.D.* 4 (1977), pp. 155–197; «La creación del Derecho en Cataluña», *AHDE* 47 (1977), pp. 99–423; «¿El primer testimonio de la recepción del Derecho en Cataluña?», *Revista Jurídica de Cataluña* 2 (1978), pp. 277–311; "La Cataluña altomedieval y el Código de Justiniano", *Revista Jurídica de Cataluña* 3 (1983).

[34] See, for example, IGLESIA FERREIRÓS, A.: "La difusión del Derecho común en Cataluña", *El Dret Comú i Catalunya*, Barcelona, 1991, pp. 95–278; «La recepción del Derecho común: estado de la cuestión e hipótesis de trabajo», *El Dret Comú i Catalunya*, Barcelona, 1992, pp. 213–330; «O leiro do dreito común», *El Dret Comú i Catalunya*, Barcelona, 1995, pp. 19–27.

[35] See, on this matter, the bibliography cited in previous footnotes; besides, see SÁNCHEZ-ARCILLA, J.: "La pervivencia de la tradición jurídica romana en España y la recepción del Derecho común", *Estudios jurídicos en homenaje al maestro G. Floris Margadant*, México, 1988, pp. 379–413; see also GUZMÁN, A.: *Ratio Scripta*, Frankfurt, 1981; "Decisión de controversias jurisprudenciales y codificación del derecho en la Epoca Moderna", *AHDE* 50 (1980), pp. 851–890; "Historia de las nociones de 'Derecho común' y 'Derecho propio'", *Homenaje al Profesor Don Alfonso García-Gallo*, Madrid, 1996, vol. I, pp. 207–240.

[36] See ESCUDERO, José Antonio: *Historia del Derecho: historiografía y problemas* (Madrid, 1988), which contained three interesting contributions published between 1965 and 1969; TOMÁS y VALIENTE, F.: "La historiografía jurídica en Europa continental (1900–1975)", *HID* 5 (1978), pp. 431–467; "LXXV años de evolución jurídica en el mundo", *Historia del Derecho y Derecho comparado*, México, 1979, II, pp. 7–42; PÉREZ-BUSTAMANTE, R.: "Tendencias actuales de la historiografía romanística y jurídica europea", *Estudios de Historia del Derecho Europeo. Homenaje al P. G. Martínez Díez*, vol. I, Madrid, 1994, pp. 15–20.

[37] On this matter, see FREY, H., *La feudalidad europea y el régimen señorial español*, México, 1988; MASFERRER, A. / HEIRBAUT, D.: "La contribución de F.L. Ganshof a la historiografía feudal europea. Una revisión crítica a la historiografía española en torno al feudalismo ganshofiano", *Anuario de Historia del Derecho Español* 75 (2005), pp. 595–636; HEIRBAUT, D. / MASFERRER, A.: "François Louis Ganshof, a Belgian view of the Middle Ages", *Rewriting the Middle Ages in the Twentieth Century* (ed. by J. Aurell and F. Crosas). Tornhout (Belgium), Brepols International Academic Publishers, 2005, pp. 223–241.

[38] ÁLVAREZ CORA, Enrique: *La producción normativa medieval según las Compilaciones de Sicilia, Aragón y Castilla*. Milano, 1998.

power,[39] universities,[40] legal doctrine,[41] some private law institutions,[42] Indian law,[43] and the history of the European Union,[44] among others.

During the last twenty years some legal historians have made considerable efforts to approach the development of criminal law from a European or comparative perspective, as the Spanish historiography shows.[45]

Tomás y Valiente was probably the first who made a considerable effort in this

[39] DÍEZ DEL CORRAL, L.: *La monarquía hispánica en el pensamiento político europeo. De Maquiavelo a Humboldt*, Madrid 1976; GÓMEZ RIVERO, R.: «Análisis comparado del pase foral en el País Vasco a partir del siglo XVIII», *Boletín de la Real Sociedad Vascongada de Amigos del País* 39, 3–4, (1983); FERNÁNDEZ ALBALADEJO, P.: «Cortes y poder real: una perspectiva comparada», *Las Cortes de Castilla y León en la Edad Moderna. Actas de la Segunda Etapa del Congreso Científico sobre la Historia de las Cortes de Castilla y León*, Valladolid, 1989, pp. 477–499.

[40] PESET REIG, M., "Universidades españolas y universidades europeas", *Ius commune* 12 (1984), pp. 71–89; on this matter, see also the bibliographical references already cited in the footnotes containing some publications of Antonio Pérez Martín.

[41] PETIT, C.: "La categoria giuridica nella cultura europea del Medioevo (with Jesús Vallejo), Storia d'Europa, III: Il Medioevo (secoli V–XV), a cura di Gherardo Ortalli, Torino, Einaudi, 1994, pp. 721–760; "Derecho común y Derecho castellano. Notas de literatura jurídica para su estudio (siglos XV–XVII)", *Revue d'Histoire du Droit* / TvRG 50 (1982), pp. 157–195.

[42] See, for example, ALEJANDRE GARCÍA, J.A.: «El arte de la Notaría y los formularios notariales del Derecho común hasta la Ley del Notariado», *Revista de Historia del Derecho*, II-1, Granada, 1977–1978, pp. 189–220; TATJER PRAT, M.T., «Survivance du ius commune dans le droit des succesions en Catalogne. Une institutution concrète: le fidéicommis», *Revue Internationale des Droits de l'Antiquité*, Brussels, 3rd serie, vol. 40 (1993), pp. 427–443.

[43] BRAVO LIRA, B.: «El Derecho Indiano y sus raíces europeas. Derecho común y propio de Castilla», *AHDE* 68 (1988), pp. 5–80.

[44] PÉREZ-BUSTAMANTE, Rogelio: *Los Estados de la Unión Europea: Historia política y constitucional*. Madrid, 1994; PÉREZ-BUSTAMANTE, Rogelio: *Historia política de la Unión Europea (1945–1995)*. Madrid, 1995; PÉREZ-BUSTAMANTE, Rogelio / WRANA, Javier: *La unión económica y monetaria en Europa: una introducción histórica (1969–1998)*. Madrid, 1999; PÉREZ-BUSTAMANTE, Rogelio / CONDE, Elena: *La unión política Europea (1968–1999)*. Madrid, 1999; PÉREZ-BUSTAMANTE, Rogelio: *Cronología de la Unión Europea, 1914–2004*. Madrid, 2004.

[45] On this matter, see MASFERRER, A.: "El *ius commune* en la historiografía penal española. Una apuesta metodológica de apertura hacia lo supranacional y europeo", O. Condorelli, E. Montanos-Ferrín, K. Pennington, Hgg., *Studi in Onore di Manlio Bellomo*, Roma, 2004, t. III, pp. 563–587; MASFERRER, A.: "La historiografía penal española del siglo XX. Una aproximación a su alcance temático", *Rudimentos Legales* 5 (2003), pp. 29–125; BARÓ PAZOS, Juan: "Historiografía sobre la Codificación del Derecho penal en el siglo XIX", *Doce Estudios de Historiografía Contemporánea*. Santander, 1991, pp. 11–40; ALVAREZ ALONSO, Clara: "Tendencias generales de la historiografía penal en España desde el s. XIX", *Hispania. Entre derechos propios y derechos nacionales. Atti dell'Incontro di Studio (Firenze-Lucca, 25–27 maggio 1989)*. Milano, 1990, 2 vols. (vol. 34/35 de la colec. *Per la Storia del Pensiero Giuridico Moderno*), pp. 969–984; interesting outlooks on the history of criminal law can be seen in GACTO FERNÁNDEZ, Enrique: "Aproximación a la Historia del derecho penal español", *Per la storia pensiero giuridico moderno 34/35. Hispania. Entre derechos propios y derechos nacionales. Atti dell'Incontro di Studio (Firenze-Lucca, 25–27 maggio 1989)*. Milano, 1990, 2 vols. (vol. 34/35 of the *Per la Storia del Pensiero Giuridico Moderno*), pp. 501–530; OTERO VARELA, Alfonso: "Historia del Derecho criminal en Compostela", *Dereito* 8 (nº 1), 1999, pp. 141–186.

regard.[46] Some years later, several works followed Tomas y Valiente's footsteps by focusing on the *ius-commune* approach to criminal law tradition.[47] In 1999 a young criminal lawyer also published a book on self-defense from a comparative perspective.[48] I have also been doing research on this field – taking the European approach – and published several works in the last ten years. I started with my PhD work, published in 2001, which dealt with the punishment of infamy and its development from the Romanization period until its suppression in 1848.[49] A year later I wrote a paper whose main purpose was describing the legal regime of some humiliating punishments which were common not only in Catalonia but all over Europe, suggesting some methodological ideas for the research of the criminal law development.[50] In 2003 I published a book on the codification

[46] TOMÁS y VALIENTE, Francisco: *El Derecho penal de la Monarquía absoluta (siglos XVI–XVIII)*. Ed. Tecnos, Madrid, 1969 (2nd edit., 1992); Tomás y Valiente affirmed to have knowledge of the work written by SCHAFFSTEIN, Friedrich: *Die Europäische Strafrechtswissenschaft im Zeitalter des Humanismus* (Göttingen, 1954), although he used the Spanish version (*La Ciencia europea del Derecho penal en la época del Humanismo*. Madrid, Instituto de Estudios Políticos, 1957), translated by JMª Rodríguez Devesa. Surprisingly enough, he did not seem to know about Schaffstein's main work (*Die allgemeinen Lehren vom Verbrechen in ihrer Entwicklung durch die Wissenschaft des gemeinen Strafrechts. Beiträge zur Strafrechtsentwicklung von der Carolina bis Carpzov*. Berlin, 1930 –reed. by Verlag Aalen, 1986–), although Tomas y Valiente's book presents such a similar methodological approach to that of Schaffstein's *Die allgemeinen Lehren*… that it makes me think that Tomas y Valiente did know that book and used it in writing his *Derecho penal de la Monarquía absoluta* (on this matter, see MASFERRER, "El *ius commune* en la historiografía penal española. Una apuesta metodológica de apertura hacia lo supranacional y europeo", pp. 577–578).

[47] See, for example, MONTANOS FERRÍN, Emma: "An de die vel de nocte", *Rivista Internazionale di Diritto Commune* 9 (1998), pp. 49–80; MONTANOS FERRÍN, Emma: "¿Por qué suena la campana?, *Rivista Internazionale di Diritto Commune* 10 (1999), pp. 37–52; see also ORTEGO GIL, Pedro A.: "La literatura jurídica como fundamento en la aplicación práctica de la ley penal en la edad Moderna", *La Historia de la Filosofía Jurídica Española* (F. Puy Muñoz and S. Rus Rufino, eds.). Santiago, 1998, pp. 77–108; ORTEGO GIL, Pedro A.: "Algunas consideraciones sobre la pena de azotes durante los siglos XVI–XVIII", *Hispania*, LXII/3, n. 212 (2002), pp. 849–906.

[48] IGLESIAS RÍO, Miguel Ángel: *Perspectiva histórico-cultural y comparada de la legítima defensa*. Burgos, 1999.

[49] MASFERRER, A.: *La pena de infamia en el Derecho histórico español. Contribución al estudio de la tradición penal europea en el marco de ius commune*. Dykinson, Madrid, 2001; for its review see, for example, José SARRIÓN GUALDA (*Revista d'Història del Dret català* I, 2001, pp. 296–298 y *Anuario de Historia del Derecho Español* 71, 2001, pp. 836–837); Antonio PÉREZ MARTÍN (*Anuario de Historia del Derecho Español* 71, 2001, pp. 758–759); Jan HALLEBEEK (*Tijdschrift voor rechtsgeschiedenis* 70, 2002, pp. 356–360).

[50] MASFERRER, A.: "La dimensión ejemplarizante del Derecho penal municipal catalán en el marco de la tradición jurídica europea. Algunas reflexiones iushistórico-penales de carácter metodológico", *Anuario de Historia del Derecho Español* 71 (2001), pp. 439–471.

of Spanish criminal law,[51] and an article on the codification of French criminal law, both from a European perspective.[52] In 2005 two other papers were published, one on the influence of the canon law and theology over the modern criminal legal science in Europe,[53] the other on a comparative approach to the humiliating punishments in the Spanish and German constitutionalism.[54] In 2009 a comparative legal history research was published, presenting not just the historical development of an institution from a European or comparative perspective, but describing it and its evolution in different jurisdictions belonging to both the civil law and common law traditions. More specifically, the book analyzed the disqualification from holding public office in the European and Anglo-American criminal law tradition.[55] In 2009 and 2010 I published two papers set in the Anglo-American context,[56] presenting English versions of the outcomes accomplished in previous works dealing with the history of Spanish criminal law from a comparative perspective.[57]

[51] MASFERRER, A.: *Tradición y reformismo en la Codificación penal española. Hacia el ocaso de un mito. Materiales, apuntes y reflexiones para un nuevo enfoque metodológico e historiográfico del movimiento codificador penal europeo*. Prólogo de J. Sainz Guerra. Universidad de Jaén, 2003; its review can be seen in Juan Alfredo OBARRIO MORENO (*Anuario de Historia del Derecho Español* 86, 2006, pp. 808–810); Patricia ZAMBRANO MORAL (Revista de Estudios Histórico-Jurídicos, Universidad Católica de Valparaíso, Valparaíso, XXVI, 2004, pp. 658–659).

[52] MASFERRER, A.: "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.

[53] MASFERRER, A.: "Contribución de la Teología y ciencia canónica al Derecho penal europeo moderno. Materiales y breves notas para su estudio", *Europa, sé tú misma. Actas del VI Congreso Católicos y Vida Pública (Madrid, 19–21 de noviembre de 2004)*. Madrid, 2005, vol. I, pp. 185–200.

[54] MASFERRER, A.: "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* (editado por la Facultad de Dret de la Universitat de València y Tirant lo Blanch, ISBN 84-8456-248-4). Valencia 2005, pp. 515–544.

[55] MASFERRER, A.: *La inhabilitación y suspensión del ejercicio de la función pública en la tradición penal europea y anglosajona. Especial consideración a los Derechos francés, alemán, español, inglés y norteamericano* (galardonado con el 1er Accésit del Premio Nacional Victoria Kent 2008). Prólogo de José A. Escudero. Madrid, Servicio de Publicaciones del Ministerio del Interior, 2009, 483 pp. Several reviews of it have been written: Juan Alfredo OBARRIO MORENO (*Iustel. Revista General de Derecho Romano* 12, diciembre 2009); Juan SAINZ GUERRA (Anuario de Historia del Derecho Español 78–79, 2008–2009).

[56] MASFERRER, A.: "Codification of Spanish Criminal Law in the Nineteenth Century. A Comparative Legal History Approach", *Journal of Comparative Law* Vol. 4, no. 1 (2009), pp. 96–139; MASFERRER, A.: "Liberal State and Criminal Law Reform in Spain", Sellers, Mortimer; Tomaszewski, Tadeusz (Eds.), *The Rule of Law in Comparative Perspective*. Series: *Ius Gentium: Comparative Perspectives on Law and Justice*, vol. 3 (2010), pp. 19–40.

[57] MASFERRER, A.: "La ciencia del Derecho penal en la Codificación decimonónica. Una aproximación panorámica a su contenido y rasgos fundamentales", *Estudios de Historia de las ciencias criminales en España*, Madrid, Dykinson, 2007, pp. 273–349; see also my book cited in the footnote number 42.

The constitutionalism or history of Spanish constitutions (1808-1978) has been studied in comparative perspective by some scholars, not all of them legal historians. In this regard, García de Enterría explored the influence of the French revolution to the making of the European public law.[58] It is also worthwhile to note the contribution of authors like Bartolomé Clavero,[59] Varela Suanzes,[60] Garriga and Lorente,[61] Petit,[62] Álvarez Alonso,[63] Portillo Valdés[64] and Blanco Valdés,[65] who have all been publishing interesting works that seek to link the history of Spanish constitutionalism within the European or Anglo-American context. Some of these authors have published frequently in the *Historia Constitucional*, a constitutional history journal, created in 2000, that usually approaches topics on foreign legal texts and literature.[66]

Some general topics like the Liberal political system have been also analyzed comparatively.[67] The same can be said concerning the Spanish monarchy,[68] the separation of powers.[69]

Despite all the efforts made by the aforementioned scholars to approach the Spanish constitutional history from a comparative perspective, there are no handbooks on this subject adopting the comparative approach. This is particularly surprising when there have been authors whose profound knowledge would have enabled them to do it successfully. This would be the case of

[58] GARCÍA DE ENTERRÍA, Eduardo: *Revolución francesa y Administración contemporánea*. Madrid, Taurus, 1972 (2nd ed., 1981); GARCÍA DE ENTERRÍA, Eduardo: La lengua de los derechos. *La formación del Derecho Público europeo tras la Revolución Francesa*. Madrid, 1994.

[59] See, for example, CLAVERO, Bartolomé: *Happy Constitution. Cultura y lengua constitucionales*. Madrid 1997.

[60] VARELA SUANZES, Joaquín "La Monarquía en el pensamiento del Benjamín Constant (Inglaterra como modelo)", *Revista del Centro de Estudios Constitucionales* 10 (1991); Varela Suanzes edited the *Textos básicos de la Historia constitucional comparada* (Madrid, CEPC, 1998), where one can find the Spanish version of the main sources of the Contiental and Anglo-American constitutionalism.

[61] C. GARRIGA / M. LORENTE: *Cádiz, 1812. La Constitución jurisdiccional*. Madrid, CEPC, 2007.

[62] See, for example, PETIT, C.: "Una Constitución europea para Cádiz, 1812", Andrea Romano (ed.), *Alle origini del constituzionalismo europeo*, Messina, Accademia Peloritana, 1991, pp. 57–71.

[63] ÁLVAREZ ALONSO, Clara: "Un Rey, una Ley, una Religión (Goticismo y Constitución histórica en el debate constitucional gaditano)", *Historia Constitucional* (revista electrónica), n. 1, 2000.

[64] PORTILLO VALDÉS, José María: *Revolución de nación. Orígenes de la cultura constitucional en España, 1780–1812*. Madrid, CEPC, 2000.

[65] BLANCO VALDÉS, Roberto: *El valor de la constitución: separación de poderes, supremacía de la ley y control de constitucionalidad en los orígenes del Estado liberal*, Madrid, 1994.

[66] See http://www.historiaconstitucional.com/index.php/historiaconstitucional/index. The current Director of this journal is Joaquín Varela Suanzes-Carpegna.

[67] See *El primer liberalismo: España y Europa, una perspectiva comparada. Foro de debate, Valencia, 25 a 27 de octubre de 2001* (E. La Parra and G. Ramírez, eds.). Valencia, Biblioteca Valenciana, 2003.

[68] PAPELL, Antonio: *La monarquía española y el Derecho constitucional europeo*. Barcelona, Edit. Labor, 1980.

[69] ALVARADO PLANAS, Javier: *De la ideología trifuncional a la separación de poderes*. Madrid, 1993.

Bartolomé Clavero;[70] and Joaquín Varela promised to publish a comparative constitutional history some years ago, but we are still waiting for it.[71] Meanwhile, some constitutional lawyers have published interesting historical introductions to constitutional law whose approach is more comparative than those which have been written by legal historians.[72]

The same could be said of handbooks on Spanish legal history. Despite the efforts made. Despite the efforts made by some legal historians to deal with the *ius commune* and its reception, or to approach some aspects of the legal development comparatively, Spanish legal history handbooks have barely paid attention to the *ius commune* and seem to ignore the European perspective.

There are also some exceptions in this regard. Jose A. Escudero's handbook, for instance, inasmuch as it tends to describe the main institutions taking into account Spanish and foreign literature, following their creation and historical development within a broader context than the Spanish one. This is particularly clear in its treatment of some institutions like feudalism, royal power, municipalities, parliaments, Indian laws, etc.[73]

The same can be said – although to a less extent – regarding Tomás y Valiente's handbook,[74] though it does not contain legal institutions as Escudero's handbook does. However, it does treat the *ius commune* and its development much better and more extensively than any other – perhaps, except one –[75] Spanish legal history handbook.

Emma Montanos made an effort to describe a panoramic view of Spanish legal history from a European perspective.[76]

The main source of the European approach to Spanish legal history teaching is the emergence and reception of *ius commune*, and, to a lesser extent, the codification movement that would not be clearly explained without resorting to

[70] See, for example, his elementary –but thoroughful– *Evolución histórica del Constitucionalismo español*. Madrid, 1984 (reedited several times); see also his *Manual de historia constitucional de España*. Madrid, 1989 (also reedited several times).

[71] Joaquín Varela, in his prologue to his *Textos básicos de la Historia constitucional comparada* (Madrid, CEPC, 1998), expressed his intention of writing a comparative constitutional history handbook that has not been published yet.

[72] This would be the case, for example, of JIMÉNEZ ASENSIO, Rafael: *Introducción a una historia del constitucionalismo español*. Valencia, tirant lo blanch, 1993; JIMÉNEZ ASENSIO, Rafael: *El Constitucionalismo*. Oñati, IVAP, 2001.

[73] ESCUDERO LOPÉZ, José Antonio: *Curso de Historia del Derecho. Fuentes e Instituciones Político-administrativas*. Madrid, 2003.

[74] TOMÁS y VALIENTE, Francisco: *Manual de Historia del Derecho Español*. Madrid, 1992.

[75] CLAVERO, B.: *Temas de Historia del Derecho: Derecho Común*, Sevilla, 1977, (2ª ed., Salamanca, 1994).

[76] MONTANOS FERRÍN, E.: *España en la configuración histórico-jurídica de Europa. I. Entre el mundo antiguo y la primera edad medieval*, Il Cigno Galileo Galilei, Roma, 1997.

the French and German codifications. Leaving aside the *ius commune* and the codification movement, and despite the research projects of few legal historians, it would not be true to state that Spanish legal history has been traditionally taught from a European or comparative perspective. Moreover, only a few universities in Spain have offered optional courses on European legal history. In fact, as far as I know, these courses have only been offered at the universities of Murcia and Illes Balears (in Majorca), in the former taught by Antonio Pérez Martín, in the latter by Román Piña Homs.[77]

Spanish case is quite the opposite to some other European countries, such as Belgium, which have to some extent lacked a national legal history.[78] Political and historical reasons explain the different path followed by Belgium, whose legal historians have tended to write more on European legal history than on their own national legal tradition,[79] and the same could be said about other European countries whose small seize led their legal historians to look beyond their own national borders.[80]

Some may think that Spain belongs to the group of the big European countries like France, Germany and Italy, among others, whose legal traditions are rich enough to "ignore" a bit the European legal context, particularly considering that their legal histories constitute an important part of the European legal tradition. This may be partly true but should not justify, however, a narrow-minded approach to national legal history, since any national legal tradition can be only explained within a geographical context which goes beyond the national boundaries. In my view, it is undeniable that an important part of the European legal tradition, particularly as cultural and scientific realities, cannot be confined to the political circumstances which caused the boundaries to move from one place to another over the centuries.

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[77] To that purpose the following handbook was written, published and recommended to the students enrolled in that course, PIÑA HOMS, R.: *Fundamentos jurídicos de Europa. Apuntes para una Historia del Derecho europeo*. Palma de Mallorca, 2001; as far as we know, this is the only European legal history handbook which until today has been published in Spain.

[78] HEIRBAUT, Dirk: "The Belgian legal tradition: does it exist?", H. Bocken / W. De Bondt, *Introduction to Belgian law*, Kluwer, 2001 (2000), 1–22.

[79] See, for example, some books written by CAENEGEM R. VAN: *Judges, legislators and professors: chapters in European legal history*, Cambridge, 1987; *An historical introduction to western constitutional law*, Cambridge, 1995; *European law in the past and the future. Unity and diversity over two milennia*, Cambridge, 2002; on this matter, see Dirk Heirbaut's article contained in this volume (with the title "European comparative legal history as a necessity: the Belgian experience"), particularly its first part entitled "The impossibility of a national legal history in Belgium".

[80] On this matter, see Heikki Pihlajamäki's article (in this volume) according to which a distinction between small and big countries should be made: while the latter already have a great history of their own and thus there is less need of looking beyond the borders, in smaller countries the situation is the opposite.

3. What Should Happen

Now that it is clear what has happened in Spain concerning the teaching of Spanish legal history, I want to focus on what it should happen. In other words, let me explain now how – at least, in my opinion – Spanish legal history should be taught.

a) Law and Legal History

Anyone who has even a summary knowledge of Spanish legal tradition knows that current law is in debt, and sometimes quite in debt heavily, to ancient traditions, no matter whether we talk about criminal, private, commercial, or procedural law. Consequently, the study of legal history is not an activity merely for scholarly minds seeking to satisfy their curiosity, but also for jurists pursuing a thorough understanding of contemporary Spanish law. And the same could be said regarding other national legal traditions. Looking back at the legal tradition one may find many concepts that are out of phase with current thinking, yet there are also a number of elements and principles that are maintained in modern European legal systems. There are even occasions when trends and concepts that had seemed to be buried by history centuries ago resurface and gain new relevance.

It would be incorrect to maintain that once legal tradition was codified according to a rationalist conception of law, legal history lost its *raison être*. This idea would be false at least for three reasons. First, it is untrue that codification constituted an absolute break with tradition. Second, only history enables us to approach the present law with perspective enough to understand our current legal institutions and their development over the time. Third, both legal rules and legal institutions contained in the codes need to be interpreted before their application to specific cases, so the legislator laid down, among others, the historical interpretation of the provisions. Hence, Art. 3.1 of the Spanish civil code prescribes that laws should be interpreted, among other criteria, "according to the context, historical and legislative antecedents". The same criterion can be seen in other European civil codes.

There is another reason which explains the importance of historical approach to the current law: the historicity of law. Let us explain it briefly. Law has been, is and will be in continual flux. The law in each historical period is thus the result of centuries of development, at the same time the law of each period contains the seed for future changes. Yet while all this is certainly true, it is also the case that the law needs a certain degree of stability, without which it lacks

meaning.[81] In other words, although it is undeniable that law is constantly developing, there would be no legal security or certainty if it had no continuity at all. The people would never know what the law says. For this reason, although legal certainty will not ever be entirely attained, the validity of law constitutes an important notion and tool to grant a minimum degree of stability to the law. Consequently, citizens feel legally secure when they know for sure that, because some legal sources and institutions are "in force", they will be applied by courts if a legal dispute arises.

The law requires a certain degree of stability, without that law becomes meaningless. A key route for this is that once it has been promulgated in the form of legislation and comes into force, that law becomes valid and accepted to regulate future cases and situations. Nonetheless, nobody can deny that, in fact, such a legal norm or regulation belongs to the past, since it was enacted in the past and according to a historical, social, economic and cultural context. This is precisely the meaning of the expression "historicity of law" because legal sources are promulgated or approved at a moment which belongs to history, although they remain in force unless are they explicitly suppressed or implicitly abrogated (e.g., by falling in disuse

b) Legal History and Comparative Law? A Comparative Approach to Legal History

As noted above –and according to the historicity of law– the law belongs to the past, since it was made in the past and according to a historical, social, economic and cultural context. It is precisely such historical, social, economic and cultural context which, going beyond national boundaries, makes the comparative approach absolutely necessary. In the case of Spain or any other European country, the European perspective is unavoidable. The resort to Comparative law is not just a means to contrast a national legal history with others, so that students may broaden their knowledge on legal culture. It is not just a matter of relating two disciplines (legal history and comparative law) which should assist and support

[81] On this matter, see some German historiography: MITTEIS, Heinrich: *Die Rechtsgeschichte und das Problem der historischen Kontinuität*, Berlin, 1947; BETTI, Emilio: *Das Problem der Kontinuität im Lichte der Rechtshistorischen Auslegung*, Roma, 1957; THIEME, Hans: "Ideesgeschichte und Rechtsgeschichte", *Ideesgeschichte und rechtsgeschichte. Gesammelte Schriften von Hans Thieme*, Böhlau Verlag Köln-Wien, 1986, pp. 3–26; THIEME, Hans: "Kontinuität – Diskontinuität in der Sicht der Rechtsgeschichte", *Ideesgeschichte und Rechtsgeschichte. Gesammelte Schriften von Hans Thieme*, Böhlau Verlag Köln-Wien, 1986, pp. 63–79.

one another.[82] It is something more. The problem is that the comparative approach constitutes a necessary –not just an optional– requirement to deal with legal history; otherwise, legal history would not be real legal history because both law and history need such comparative approach. In this regard, to talk about the relationship between legal history and comparative law is somehow redundant and would be a tautology because legal history itself brings with it the comparative approach. This does not imply denying that there are different ways of approaching legal tradition comparatively. Let us briefly describe some reasons which demonstrate to what extent it is true that a comparative approach constitutes a necessary requirement to study any legal tradition.

First, any legal historian should take seriously the comparative approach for no legal history of a particular jurisdiction can be considered a self-contained and self-sufficient legal order, disconnected or isolated from others which were made and developed within the same or similar historical, social, economic and cultural context. Hence, we can talk about the civil law tradition and the common law tradition, belonging both to the Western legal traditions.[83]

Second, the existence of such Western legal traditions implies some common features whose reception and validity in different jurisdictions could not be explained unless legal history goes beyond the national boundaries. Cultural movements and other historical realities like feudalism, seigniorial regime, the emergence of the royal power, municipalities and parliaments, the *ius commune*, the Enlightenment and the legal codification cannot –and should not– be explained just from a national perspective. Otherwise, the historical reality would be considerably distorted. In this regard, it has been claimed that the falsehood of the traditional view of the English common law as an exceptional legal tradition, independent from the European *ius-commune* legal science.[84] A prestigious legal historian rightly stated that lawyers "applied a mixed legal system whose components were on the one hand local statutes and customs

[82] On the relationship between legal history and comparative law (or viceversa), which has become a classical topic, see the recent work written by GORDLEY, James: "Comparative Law and Legal History", *The Oxford Handbook of Comparative Law* (ed. by Matthias Reimann and Reinhard Zimmermann). Oxford University Press, 2006, pp. 753–773.

[83] On the convenience to emphasize the common features of the European and Anglo-American legal systems for they belong all to the Western legal traditions, see, for example, LAWSON, C.M.: "The Family Affinities of Common-Law and Civil-Law Legal Systems," 6 *Hastings Int'l and Comparative Law Review* 86 (1982–1983), pp. 85–131.

[84] DONLAN, Seán Patrick: "'All this together make up our Common Law': legal hybridity in England and Ireland, 1704–1804", ÖRÜCÜ, E, *Mixed legal systems at new frontiers* (2010). This article grew out of DONLAN, "'Our laws are as mixed as our language': commentaries on the laws of England and Ireland, 1704–1804", *Journal of Comparative Law* 3 (2008) 178 (also available as *Electronic Journal of Comparative law* 12 (2008) at www.ecjl.org/121/abs121-6.html).

and on the other hand the law books of Justinian and the Canon Law".[85] And the same has been recognized by some common-law legal historians.[86]

Third, if different jurisdictions were born and developed within the same cultural context, as, for example, the Western legal traditions, it is reasonable to think about the existence of exchanges of legal components or particularities between jurisdictions. In this regard, it has been said that "no legal tradition is a purely native growth".[87] I could not agree more with Donlan, who, recognizing that "significant and explicit legal hybridity was, in fact, the norm across Europe before the nineteenth century", states clearly that "the failure to acknowledge legal hybridity and diffusion both distorts the past and obscures our understanding of the present. This neglect is arguably most significant in the Anglo-American legal traditions".[88] In this regard, the notion of legal transplant was conceived in the last century – and has been used and developed until today –[89] as a way to express that "borrowing is the name of the legal game and is the most prominent means of legal change".[90]

Hence, to research and teach legal history without taking into account such a comparative approach would be a considerable mistake, with deplorable consequences for both legal historians (in their research and teaching) and law students. It would certainly deprive the latter of a clear understanding of the current law to which they devote several years in the law school.

[85] COING, H.: "The Roman Law as Ius Commune on the Continent", *Law Quarterly Review* 89 (1973), p. 510.

[86] See, for example, DONAHUE, C. Jr.: "Ius commune, canon law, and common law in England' *Tulane Law Review* 66 (1992), p. 1748: "[I]n the realm of basic principles, organizing ideas, techniques of argumentation, and habits of thought, the parallels are sufficiently great that one might want to call the common law simply a variant, admittedly an eccentric variant, of the multitude of legal systems that ultimately derive from the ius commune"; and DONLAN, Seán Patrick: "*The Debt Is Forgotten': A Compendious View of Arthur Browne, c1756–1805*, vol 13.3 (September 2009) *Electronic Journal of Comparative Law* (available at http://www.ejcl.org/133/art133-3.pdf).

[87] ÖRÜCÜ, E.: "A general view of 'legal families' and of 'mixing systems'", ÖRÜCÜ, E. / NELKEN, D.: *Comparative law: a handbook* (2007), p. 177; see also Palmer, "Mixed legal systems ... and the myth of pure laws", *Louisiana Law Review* 67 (2007), p. 1207; see also DONLAN, "'All this together make up our Common Law': legal hybridity in England and Ireland, 1704–1804", cited above.

[88] DONLAN, "'All this together make up our *Common* Law': legal hybridity in England and Ireland, 1704–1804", p. 267; see also McKNIGHT, J.: "Some historical observations on mixed systems of law", *Juridical Review* 22 (1977), p. 178, where he affirmed: "However mixed his system is in fact the English lawyer does not think of it as such". (cited by Donlan); on this matter, see also CASTELLUCCI, Ignazio: "How Mixed Must a Mixed System Be?", vol 12.1 (May 2008) *Electronic Journal of Comparative Law* (available at http://www.ejcl.org/121/art121-4.pdf); and the –almost already, classical– work written by TETLEY, William: "Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified) (Part I)", *4 Unif. L. Rev.* 591 (1999), pp. 591–619.

[89] On this concept, see WATSON, Alan: *Legal Transplants: An Approach to Comparative Law*. Athens, GA: University of Georgia Press, 2nd ed., 1993; further information on Watson's publications concerning the notion of "legal transplants", see http://www.alanwatson.org/home.htm.

[90] Alan Watson, http://www.alanwatson.org/law_reality_society.pdf.

c) How Spanish Legal History Should Be Taught

Any national legal history should be approached comparatively. Thus, questions as to whether legal history needs to be European to be comparative, or whether it needs to be comparative to be European, are pointless. I maintain that legal history needs to be comparative anyway; whether it is European, Anglo-American, or Spanish. Otherwise, it would not be real legal history.

Consequently, I understand that it should not be necessary to add the expression "comparative" or "European" to the legal history of any European jurisdiction since such "European" or "comparative" approach should be taken for granted, being assumed just by the fact of dealing with legal history. In this regard, I wonder whether there is today in Europe any legal historian who really thinks that it is possible to teach legal history without the European perspective, or that it is possible to teach legal history without the comparative approach. They are probably a rare breed indeed.

The Spanish legal history clearly reveals that it is not possible to reconstruct the history of Spanish law without resorting to both the European and comparative perspectives. A Spanish law student enrolled in a legal history course should acquire a minimum degree of knowledge about the making and development of both legal sources and legal institutions from a comparative perspective, including both the European legal tradition and the Anglo-American legal tradition (devoting logically to the former more time than to the latter though).[91]

In teaching Spanish legal history, several aspects should be approached comparatively:[92]

aa) Historical periods

In describing the historical development of law in Spain –like in other European countries– it is not surprising to realize the parallels between the Spanish and the European, historical periods as well as the existence of common, cultural movements.

Many legal historians –though not all of them– have divided Spanish legal history into the following epochs:

[91] In practice, nonetheless, it is well known that the lack of time makes it difficult to deal with both the history of legal sources and the history of legal institutions.

[92] This part of the article has been heavily drawn from my own experience in teaching Spanish legal history (see MASFERRER, Aniceto: *Spanish Legal Traditions. A Comparative Legal History Outline*. Madrid, Dykinson, 2009, 429 pp.).

aaa) Ancient times

This epoch includes the Primitive Spain (up to 218 B.C.) and the Roman conquest (218 B.C. – 476 AD). What is referred to as Primitive Spain stretches from the beginnings of civilization in the Spanish Peninsula until the arrival of the Romans in the third century BC. The Law of this period is referred to as Archaic or Primitive Law. The Romanization of the Peninsula began in the year 218 BC. The Romanization period comprises the time of the Roman conquest of the Peninsula, beginning with the disembarkation of Roman soldiers in *Ampurias* (Emporia) in the year 218 BC, until the year 476 AD.

bbb) The Middle Ages

This epoch contains various periods: Early [, High] and Late Middle Ages:
– The earliest stage is the Visigothic period, which has two phases:
– The Gallic phase (from the year 476 until the year 568).
– The Hispanic phase (from the year 568 until the year 711).
– The Muslim invasion of the Peninsula began in the year 711.
Muslim Law was completely different from the legal systems that had existed on the Peninsula before the invasion. During this period of occupation the Roman legal traditions persisted, as we will see, although in intimate coexistence with Germanic Law (through the legal texts of the Visigoths).

This period also saw the elaboration of the first collections of Canon law. The Reconquest began before the middle of the eighth century (Covadonga Battle, 722). It is a common opinion among historians that the Middle Ages began at this moment. So, the strict Middle Ages are divided into…
– Early Middle Ages, which designates the period between the 8th century and the 11th century, and the
– Late Middle Ages, which covers the period from the 11th century to the 15th century (1469).

ccc) The Early Modern Age

The start of this period coincides with the reign of the Catholic Monarchs at the end of the fifteenth century (19th October 1469, Isabel and Fernando's marriage) and lasts until 1812.

ddd) The Modern Age (or Constitutional epoch)

The final phase starts in the nineteenth century with the collapse of the *ancien régime*. This is the phase in which a Constitutional regime begins and is later consolidated. The first Spanish Constitution was promulgated on 19th March 1812, (known as the Cádiz Constitution), which set up a new political system:

liberal regime or Constitutional regime, state or nation. (By comparison, from 1808 Constitution was granted by the French King José Bonaparte but not freely assumed by the Spanish nation.)

As is evident, the main features of the law in the majority of these periods are common to all over the European countries: the pre-Roman (or Primitive) laws; the first Romanization of many European countries; the influence of the Germanic laws; the impact of Canon law (also by adopting Roman laws –"*Ecclesia vivit secundum legem romanam*"–, but somehow modifying it); the second Romanization (or *ius commune*) all over Europe from 11th century onwards, being first developed by the school of glossators (11th-13th centuries), and then the post-glossators or commentators (14th-15th centuries), the school of the *usus modernus pandectarum* (16th-17th centuries), the natural law theory of the Enlightenment (18th century); the nationalization of law through its codification (19th century); the process of de-codification, the creation of the European Union and the attempts to codify the European private law by elaborating drafts to harmonize the law from different jurisdictions which somehow share the same legal tradition, based mainly upon the old, European *ius commune* (20th-21st centuries).

bb) Common European tendencies and shifts

Besides the parallel, historical periods between the Spanish and the European legal histories, the comparative approach is also highly convenient in analyzing some important tendencies or shifts to which both the law both in Spain and in Europe went through. In this regard, and concerning the History of legal sources, it is important to emphasize:

aaa) The decisive role and influence of Roman law

The law in Spain, like in other European countries, was particularly influenced by Roman law, first the Post-classical and vulgar, from the Roman conquest until the downfall of the West Roman Empire in 476 AD,[93] later the emergence

[93] On this matter, see, for example, LEVY, E.: "West Roman Vulgar Law. The Law of Property", *Memoirs of the American Philosophical Society* 29 (1951); WIEACKER, F.: "Vulgarismus und Klassizismus im Recht der Spätantike", *Sitzungsberichte der Heildelberger Akademie der Wissenschaften* 3 (1955); BOLIN, S.: *State and Currency in the Roman Empire to 300 AD*. Stockholm, 1958; BROUGHTON, T.R.S.: "The Romanization of Spain: the Problem and the Evidence", *Proceedings of the American Philosophy Socienty* 103 (Philadelphia, 1959); ARNOLD, W.T.: *The Roman System of Provincial Administration to the Accession of Constantine the Great* (1914, 3rd edit. revis. by E.S Bouchier, Roma, 1968); BOSWORTH, A.B.: "Vespasian and the Provinces. Some Problems of the Early 70's AD", *Athenaeum* 51 (1973), 49 ff.; WIEACKER, F.: "Vulgarrecht und Vulgarismus: alte und neue Diskussionen", *Studi in honore di Arnaldo Biscardi*. Milan, 1982, vol. I, pp. 33–51; BARNES, T.D.: *Early Christianity and the Roman Empire*. London, 1984; KULIKOWSKI, Michael: Late Roman Spain and Its Cities. JHU Press, 2004.

of the *ius commune* or Classical both Roman law[94] and Canon law,[95] and the reception and development of them –with varieties– in the different European jurisdictions from 11th to 18th centuries). Such tendency is common to all the European jurisdictions.

bbb) Shift from a local, customary law to a law based upon territorial, legal enactments
While the law of some periods (Pre-Roman epoch, Early and High Middle Ages) was based on custom, from the Late Middle Ages onwards the law started to be based upon legal enactments. This shift took place substantially in the Late Middle Ages because of the legal enactments emanating from the monarch and the parliaments (*Cortes*). Legislation did not generally abolish customary law, but customs lost protagonism. Consequently, the late medieval law was characterized by the preservation of the early medieval customs and the emergence of legislation coming from the monarch and parliaments. This shift brought with it two other common tendencies, experiencing the law two important changes concerning its: b.1) validity, going from the local to a territorial (or general) one; and b.2) making, going from a private (or popular) to an official one through legal enactments.

In the Early Middle Ages the law was essentially local in origin and application, being this trait a clear consequence of the customary nature of law. Nonetheless, several institutions emerged in the early Middle Ages (*Curia Regia*, Councils and Assemblies of Peace and Truce of God), would constitute important exceptions

[94] On this matter, see, for example, CANNATA, Carlo Augusto: *Historia de la ciencia jurídica europea* (trans. by L.Gutiérrez-Masson). Madrid, 1989; PENNINGTON, K.: *The prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition*. Berkekey, 1993; BELLOMO, Manlio: *The Common Legal Past of Europe, 1000–1800*. The Catholic University of America Press, 1995; STEIN, Peter: *Roman Law in European History*. Cambridge University Press, 1999; ROBINSON O. F. / GORDON, W. M. / FERGUS, David: *European Legal History* (3rd ed., Abingdon: LexisNexis UK, 2000), pp. 107–124 and 169 ff.; PÉREZ MARTÍN, Antonio: "Ius commune", *Power, Law and Legislation* (Spain and Sweeden: Encounters throughout History). Puertollano, Marcial Pons-B.W Foundation, 2001; CAENEGEM, R. C. van: *European Law in the Past and the Future: Unity and Diversity over Two Millennia*. New York and Cambridge, England: Cambridge University Press, 2002.

[95] On this matter, see, for example, LINEHAN, P.: *The Spanish Church and the Papacy in the Thirteenth Century* (1971) (*The Library of Iberian Resources Online* http://libro.uca.edu/title.htm); GRATIAN: *Treatise on Laws* (translated by Augustine Thompson and James Gordley). Washington, DC: Catholic University Press, 1993; HELMHOLZ, R.H.: *The Spirit of Classical Canon Law*. London-New York, 1995; BRUNDAGE, James A.: *Medieval Canon Law*, Longman, 1995; WINROTH, A.: *The Making of Gratian's Decretum*. Cambridge, 2000; LOGAN, F. Donald: *The History of the Church in the Middle Ages*. London-New York: Routledge, 2002; DONDORP, H. / HALLEBEEK, J.: "The Church as Promoter of the Law: The Emergence of Canon Law as a Separate Discipline in the Middle Ages", *Kultur- und rechtshistorische Wurzeln Europas. Arbeitsbuch* (ed. by Jörg Wolff). MG, Forum Verlag Godesberg, 2005, 43–62; PENNINGTON, K. / HARTMANN, W. (eds.): *The History of Canon Law in the Classical Period, 1140–1234: From Gratian to the Decretals of Pope Gregory* IX. Washington, D.C.: The Catholic University of America Press, 2008.

whose development would have important consequences in the Late Middle Ages. Local, customary diversities remained, but were gradually changed by the fact that the provisions from both the king and parliaments were called to have validity over the whole kingdom. That was also due to the development of the afore-mentioned institutions which arose in the early Middle Ages. Nonetheless, it is also true that they also contributed to increase the amount of legislation by enacting different kinds of legal dispositions. The local, customary law was, however, importantly threatened by the emergence of the *ius commune*, a new legal science based mainly upon the Justinian compilation of Roman law which disseminated all over Europe. Consequently, from the late Middle Ages onwards law can be characterized by a gradual process of legal unification due to both, the legislation of general validity emanating from the king and Parliaments, and the emergence and reception of *ius commune*.

ccc) Shift from a non-technical and rudimentary law to a technical and specialized juridical science
All over Europe – and not just in Spain – the law essentially evolved from ancient and popular practices. In the Early Middle Ages, for example, the law did not contemplate complex juridical problems but rather sought to satisfy the fundamental needs of the community that it served. Crude and primitive methods acquired juridical force.[96] In the Late Middle Ages, the law changed completely in this regard because of the revival and reception of *ius commune*. Thus the late medieval law was characterized by *its scientific nature*, being the law (both the civil and canon law: *utrumque ius*) one of the three disciplines (along with Philosophy-Theology and Medicine) studied at the new-founded medieval universities. As already said, from then onwards –and until today–, law would be scientifically approached and developed.[97]

[96] One example of these methods was the *ordalías* that allowed God to be called upon as a witness in trials. The most famous of these "*Ordalías*" had the revealing name of the "red hot iron" ("*hierro candente*", in Spanish).

[97] All over Europe from 11th century onwards, law was first developed by the school of glossators (11th–13th centuries), and then the post-glossators or commentators (14th–15th centuries), the school of the *usus modernus pandectarum* (16th–17th centuries), the natural law theory of the Enlightenment (18th century); the national law and legal positivism: the French School of Exegesis and the German Historical School of Law (19th century); etc.

ddd) Shift from a theological concept of natural law to a philosophical conception of the natural law theory and its deviation to legal positivism

The notion and historical development of natural law is complex and belongs more to the European context than to the Spanish one. There are different conceptions of natural law. However, roughly speaking, natural law or the law of nature (*lex naturalis*, in Latin) is a theory that posits the existence of a law whose content is set by nature and that therefore has universal validity. The expression *natural law* is sometimes opposed to the positive law of a given political community, society, or nation-state, thus can function as a standard by which to criticize that law. So man-made law would be only legitimate in so much as it respects the divinely created natural order of things.

In the Middle Ages, the main contribution on the natural law was done by Aquinas. According to him, the natural law is a participation in the eternal law. Eternal law, for Aquinas, is that rational plan whereby all creation is ordered; natural law is the way that the human being "participates" in the eternal law. While non-rational beings partake in eternal law only by being determined by it – their non-free action results from their determinate natures, natures the existence of which results from God's will in accordance with God's eternal plan – rational beings like us are able to grasp our share in the eternal law and freely act on it. It is this feature of the natural law that justifies, on Aquinas's view, our calling the natural law "law." Law, as Aquinas defines it, is a rule of action put into place by one who takes care of the community; and as God takes care of the entire universe, God's choice to bring into existence beings who can act freely and in accordance with principles of reason is enough to justify our thinking of those principles of reason as law.

While the scholastic model of natural justice posited the existence of a natural law that reflected the harmonious essence of the divine, the rationalist (or philosophical) model proposed a system of natural laws based on reason (following the philosophy of Descartes).[98] According to this rationalist model, laws could be written in manner that could be considered the fruit of pure reason. Such laws could be valid for all time and among all nationalities (with periodic revisions over time to account for linguistic variations). The philosophical conception of a rational natural law was intimately connected with the idea of the superiority of written law over all other sources. Written law displaced custom,

[98] Thus Rationalist philosophy, which elevated human reason to the category of the supreme attribute of the individual and humanity, was first formulated in the Renaissance (René Descartes). This philosophy was furthered in different fields throughout the ages. Grotius and Puffendorf working in the 17th century were its most celebrated jurists, Rousseau its most significant theologian, and Kant its most profound philosophical exponent. Rationalism was a truly European intellectual movement.

jurisprudence and the opinion of legal experts in the legal hierarchy. Again, this happened in general terms across Europe, not just in Spain.[99]

eee) Shift from a non-equality juridical model to the recognition of the principle of equality

In the Ancient times and in the Early Middle Ages there were different legal regimes for different classes of person. Each legal order accorded a different juridical status to subjects depending on their religion or ethnic origin, social class, profession, or the region in which they lived. In the Late Middle Ages and Early Modern Age the law did not change much, keeping the same characteristic trait. Furthermore, in emerging a new social class, the merchants, a new law and jurisdiction were born, the commercial law and its own tribunals which settle the legal disputes between merchants according to their own laws.

The desired change was partly a result of the liberal system and its partner idea, modern constitutionalism (18th and 19th centuries, although in England that happened in the 17th century). From then onwards – and by comparison – if the social order of the *ancien régime* can be seen as the division of society into estates (the nobles, the clergy, the universities) and privileged members of corporations, then the new social order was individualistic and egalitarian. This move entailed the abolition of class based privileges. The beneficiaries of this new "equality" were, at first, the bourgeoisie, and then men in general.[100] More importantly, all juridical privileges and distinctions made on grounds of class, race, religious belief, or gender were to be abolished.[101]

cc) The necessary, European Approach to the Late-Medieval, legal context:

Historical periods need a geographical context which goes beyond national boundaries. In other words, it needs, at least, the European context and, if possible, the context of the Western legal cultures. This broad perspective can be applied to all historical periods but it is particularly necessary from the Late Middle Ages onwards. Let us try to present a brief synthesis which could be

[99] The political events that convulsed Europe at the end of the eighteenth century and the beginning of the 19th century favoured the adoption and the spread of new and unfamiliar ideas of different kinds among certain sectors of Spanish society, while at the same time provoking rejection amongst other sectors. The differences among these ideas can perhaps be said to originate with the strong influence that humanism exerted over "ius commune", to the point where it enabled the development of a theoretical basis for a juridical system that was separate from that derived from the scholastic theories of natural law.

[100] In Spain, the working class male was given the vote in 1868, while women were finally extended this right in 1931.

[101] In Spain, a decree dated the 6th of December 1868 unified legal jurisdiction and gave all Spanish citizens equal juridical status. The abolition of the "estates" cleared the way for a new social hierarchy based primarily on wealth.

useful to clarify the shift which the law underwent from the Early to the Late Middle Ages, a shift whose context was clearly European.

The majority of the changes of the law in the Late Middle Ages were caused by the emergence of several political institutions without which the law had probably remained as it was in the Early Middle Ages, and from which emerged other relevant institutions. The main political institutions emerged in Europe between the 12th and 13th centuries were:

– The monarchy;[102]
– The city, from which emerged the merchant class;[103]
– The Parliament.[104]

Within this political, social and economic context, two important things concerning the legal development happened all over Europe:

– the creation of universities,[105] where law was one of the three original university degrees;[106] and

[102] Once the figure of the Emperor declined, the main secular authority was the monarch, who succeeded in consolidating his authority before the cities since the reconquest, and started to organize a political burocracy which, formed by royal offices (most of them jurists), gradually developed during the Late Middle Ages, enabling him to create a consistent State in the Early Modern Age. The law which had conferred legal legitimacy to the Emperor and the Pope was now used to support the monarchy (*rex superiorem non cognoscens in regno suo est imperator*), affirming his absolute power (*plenitudo potestatis*).
[103] In some territories the cities developed more than in others. Within the Spanish context, for example, in Castile, where the nobility was particularly strong, there was not a relevant merchant class, which limited the power of the cities. In Catalonia, on the contrary, where the nobility almost disappeared in the 15th century, the cities, populated by an active merchant class, were stronger than in Castile.
[104] As known, parliaments originated when the king started to convoke and summon, along with the nobility and the clergy, the representatives of the cities.
[105] The university (group of students and professors), also called *Studium Generale* (because several disciplines were taught), or the *Third Power* (because its culture enabled students to free from the Empire and the Church or Pontificate), born in the urban context, played since its creation an important role in the development of law, the political power, the monarchy, the parliaments, the cities, etc. The universities, which substituted the Early medieval schools which taught the *Trivium* (Gramatics, Rethoric –including *ars loquenda* and *ars dictandi*–, and Logics or Dialectics) and *Quadrivium* (Aritmetics, Geometry, Music and Astrology), taught only three disciplines: Philosophy-Theology (being Paris the best University for that), Medicine (Salerno) and Law (Bologne). The universities had to be located in a pontifical or imperial (or royal) city, since their titles had universal character (*licentia ubique docendi*). They employed the scholastic method, which was based on: a) the authority of old texts: Articela or collection of writings from Hipocrates (Medicine), *Sentences*, by Pedro Lombardo (Theology), and *Corpus Iuris Civilis / Corpus Iuris Canonici* (Law); and b) the analysis of the texts by using the Aristotelian logic to elaborate *propositiones, genera y differentia specifica*, etc.
[106] Bologne was the first Faculty of Law (1088, founded by Irnerius), followed by many others all over the medieval Europe. In the 13th century there were in Bologne over 1000 students. Later on, other universities were created in Italy and in other European countries; in Italy: Padua (1222), Vercelli, Vicenza, Arezzo, Reggio, Parma, Siena, Pavia (1361), Ferrara (1391), Turin (1405) Catania (1443); in France: Paris, Montpellier (1260), Orleans (1230), Avignon (1256), Orange (1265), Cahors (1332), Poitiers (1431), Caen (1432), Burdeos (1441), Nantes (1460), Bourges (1464); in Spain: Palencia (at the end of 12th century), Salamanca (1218), Valladolid, Lleida (1300), Perpignan (1349); in Germany: Praga (1348), Vienne (1365), Heidelberg (1386), Cologne (1388), Erfurt (1392), Leipzig (1409), Rostock (1419), Fribourg (1457), Tubingen (1477), Uppsala (1477), etc.

– the emergence and reception of *ius commune* in all the European jurisdictions. It would not be wrong to affirm that the discovery of the Justinian Compilation by Irnerius in the 11th century and the subsequent progressive study and reception of the *Corpus Iuris Civilis* and the *Corpus Iuris Canonici* in Europe were not only the most relevant aspect of the High and Late medieval law. They marked a shift that would last until the 19th century and still influences contemporary law. But, most important, they represent the most important event of the European legal tradition. Again, the rediscovery of Roman law (or Justinian Compilation) by the end of the 11th century was a unique event in legal history and would mark the future of European law.[107] Shadowy figures with unusual names like Pepus and Irnerius began to teach the law of the ancient Romans at Bologna.[108]

In short, the *ius commune* was a legal science based on Roman Law, Canon law and Lombardian feudal law, which was valid and in force throughout Europe with the exception of England to some extent. That *ius commune* would not have been possible without its legal sources (*Corpus Iuris Civilis* and the *Corpus Iuris Canonici*), is indeed true. However, it is also true that it would neither have existed without universities, where the jurists received not only the legal education based upon the afore-mentioned legal sources, but also the legal methods which enabled them to apply the Roman and Canon rules and principles in different chronological periods and geographical contexts. This explains why the *ius commune* was, first of all, a legal science and a law of jurists, since nobody else was able to manage it.[109]

[107] Justinian Compilation consisted of four parts: the Institutes, an introduction to Roman law originally written for first year law students; the Codex, containing imperial legislation from the second to the sixth century; the Digest, a compilation of excerpts from the writings of the Roman jurists; and finally, the Novellae, a compilation of Justinian's legislation. The Digest was of particularly fundamental importance for understanding the intricacies of Roman law. The excerpts from the Roman jurisconsults defined terms, discussed theoretical difficulties, cited court cases, and made the mass of legislation found in the Codex understandable and, therefore, usable. Without the Digest Roman law would have had little influence for European legal systems of the Middle Ages.
[108] The jurists in Bologna recovered the key text of Roman law, the Digest, in stages during the late eleventh and early twelfth centuries. These Bolognese jurists were the first to recognize the importance of the Digest, and, like their Humanist successors in the 15th century, they must have searched for manuscripts copies of it. The law that they taught was late imperial law that had been compiled by the Emperor Justinian in the 6th century. This codification, the *Corpus iuris civilis*, yielded the material for teaching Roman law in the 11th century. Its doctrines provided medieval jurists with a sophisticated model for contracts, rules of procedure, family law, testaments, and a strong monarchical constitutional system. Six hundred years after his death, Justinian's name became eponymous for legislator and codifier.
[109] As Peter Stein affirmed in his book entitled *Roman Law in the History of Europe*, what explains how a legal compilation of the 6th century can provide the needed legal rule for completely different geographical and chronological contexts, is the fact that the *Corpus Iuris Civilis* was, for the jurists, *like a legal supermarket*, from which they could take what they needed, and applied it after a proper legal interpretation to update or adapt such old legal provision to the present social, economic and political context.

Such *ius commune*, or common law, co-existed with the particular law of every European kingdom or jurisdiction, called *ius proprium*. As a result, from the Late Middle Ages to the Modern Ages, there was a duality between the *ius commune* and *ius proprium*. This duality,[110] which was consolidated during the reception of *ius commune* all over Europe, explains the situation of the law in the different European kingdoms up until the codification period (19th century).

The characteristics of *ius commune* could be summed up as follows:

- It was based upon the *corpora iura* (*Corpus Iuris Civilis* and the *Corpus Iuris Canonici*).
- It was scientifically developed by jurists through a legal doctrine with its ideology, methodology and different legal schools: glossators and commentators (*mos italicus*, *mos gallicus*, *usus modernus pandectarum*, etc.).[111]
- It was a legal science common to all Western Europe (*Respublica Christiana*), different from that of other religions (Jews and Muslims), of Eastern Europe (Byzantine law /Ortodox Church), or of England (which had its own *common law*).
- It was a law technically sophisticated (a law of jurists who have studied it at the University).
- It was composed of three different elements (Roman law, the Canon law and the Lombardian feudal law) which were strongly connected and worked together (particularly the Roman law and Canon law). With canon law, Roman law formed the medieval *ius commune* of Western Europe. To separate the two legal systems would be artificial and even misleading. Both laws were taught in law schools throughout Christendom, students studied both laws as a part of their legal education, and the medieval jurisprudence can only be understood with knowledge of each. The vocabulary and structures of Roman and canon law shaped academic and secular law.
- It was dynamic, being able to adopt other legal orders and transform them (it is the case of the feudal law, the commercial law, or the statutory law).
- It was different from the *iura propria* (laws of the kingdoms: customs, priviledges, royal law, municipal law, etc.), but co-existed with, and influenced them.

[110] The *ius proprium* and *ius commune* duality came from the First Book of Gaius' Institutions (I.1, later transcribed in Digest 1, 1, 9: "Omnes populi"). The text stated that all the cities ruled by laws and customs, "in part" use their "own" law or "civil law", and "in part" the law common to all men.

[111] The most significant accomplishment of the *ius commune* in the Middle Ages consisted of encouraging literary activity of the jurists all over Europe. From the 12th century onwards they explored every nook and cranny of Justinian's Corpus *iuris civilis* and produced a massive legacy of juristic writings. They interpreted Roman law by writing glosses (comments on individual words or phrases), commentaries and *summas* (an extended analysis of a law book, title, or law), *questions* (disputations on legal points held as academic exercises), *consilia* (briefs written for an actual case).

- Latin was its main language, being also the official university language. The language of medieval legal Latin creates significant problems for the modern reader.
- It strongly influenced the current law and institutions.

If the social, political and cultural context in which law and legal institutions developed was not just Spanish, French, German, Dutch, etc., but European, it would be wrong to approach legal development just from a national perspective.

What should be said about some Early-medieval legal institutions? It would be also wrong to think that there was a break up between the early and the late Middle Ages. We would be mistaken by not keeping in mind the existence and survival of the two different early medieval legal regimes, namely, the seigniorial regime and the municipal regime. In fact, the cities had arisen in the Early Middle Ages, constituting the alternative to the seigniorial regime. And this did not occur just in Spain, but in many other European countries.

What about the feudal system? Did it exist still in the Late Middle Ages? The answer will depend upon which is understood by the expression "feudalism". According to its economic conception, feudalism would remain up to the French revolution; according with its juridical-institutional conception, feudalism would have collapsed with the emergence of the monarchy in the 13th century; according with its social conception, some feudal institutions could be witnessed in the Late Middle Ages and even in the Early Modern Age.[112]

Anyway, it would be erroneous not to bear in mind what has been said regarding the social, economic, legal and political context of the Early Middle Ages, forgetting about the seigniorial regime, the municipal regime and the possible survival of some feudal institutions. In fact, without keeping them in mind it would be rather difficult to understand the emergence of the monarchy, the development and autonomy of the cities, the rise of the merchant class and the origin of the Parliaments, etc., since the emergence and development of all these realities are strongly connected.

If not, try to explain how the monarch could have managed to affirm his authority before the nobility without resorting to the cities and the Roman law; how the Parliament could have originated without the previous existence of the cities; how the cities could have developed their autonomy without the rise of the merchants and the royal support; how the *ius commune* could have been so appealing and successful without the existence of cities which needed an urban law, or without the support of the king, who, in turn, saw his legitimacy and public authority reinforced;

[112] On this matter, see the bibliography cited in the footnote n. 37.

how the *ius commune* could have developed without universities; how universities, created at the beginning by the Church, could have emerged without the social and economic stability provided by the municipal environment, and later survived without the royal support; etc. To understand properly the shift of the law from the Early to the Late Middle Ages is convenient to observe the mutual relationship between all the afore-mentioned institutions within the European context.[113]

dd) The necessary, comparative approach to any legal tradition with a plurality of laws: One of the features of the European legal traditions is the existence of a plurality of laws within each jurisdiction. In other words, the legal tradition of any European jurisdiction consisted of a plurality of laws whose study and analysis require a comparative approach.

Such plurality of laws – or legal pluralism –[114] does not refer just to the afore-mentioned duality between *ius commune* and *ius proprium* (or *iura propria*).[115]In Spain, for example, the variety of legal sources of the different kingdoms was, like in other European territories, considerable. In exploring and describing such complexity, a comparative approach is highly recommended. Otherwise, it would be difficult to capture a clear picture of the different Spanish legal traditions. In doing so, the legal systems of Castile, Catalonia, Aragon, Valencia, Majorca, Navarre and Basque territories (Guipúzcoa, Alava and Vizcaya) need to be analyzed from different aspects, revolving all of them around the plurality of legal sources:

a) brief presentation of the main legal sources;
b) the *Cortes* and the King as lawmakers;
c) the role of the *ius commune* in the different Spanish legal traditions;
d) The enforcement of the law in a juridical system of divergent legal sources: the hierarchy of legal sources; and
e) the role of the judicial precedent and legal doctrine in developing law and legal science.

[113] In this regard, it is particularly useful to analyze the whole development from the royal perspective, since the monarchy eventually needed to deal with the cities (the merchants and the municipal regime), the nobility (seigniorial regime), the clergy (seigniorial regime and the Church), the universities and the *ius commune* (upon which his legislative and political power was grounded).

[114] I used both expressions –plurality of laws or legal pluralism– as synonymous, although some authors tend to distinguish between these concepts; on this matter, see DONLAN, "'All this together make up our *Common* Law': legal hybridity in England and Ireland, 1704–1804", and some of the bibliographical references concerning this matter contained in Donlan's article.

[115] As said, the *ius commune*, or common law, co-existed with the particular law of every European kingdom or jurisdiction, called *ius proprium*. As a result, from the Late Middle Ages to the Modern Ages, there was a duality between the *ius commune* and *ius proprium*.

Applying the comparative approach to the Spanish mixed, complex legal system constitutes a necessary requirement to appreciate a plurality of laws and legal traditions in force as of today. Although these legal traditions underwent a significant process of legal unification, it is important to keep in mind that in Spain legal unification never was entirely achieved.

Leaving aside political and ideological tendencies, the historical approach of Spanish Law shows the existence of diverse cultures – Christian, Muslim, and Jewish, and different ethnic groups that populated the Iberian Peninsula. Spain was – and is – "an aggregation of different regions, diverse populations and languages, with historical struggles to maintain a centralized national "Spanish" State in the face of cultural pluralism".[116] When the Spanish occupied the New World, for example, they also recognized Indian laws and courts. On August 6, 1555, Emperor Don Carlos (Charles V) and Queen Dona Juana issued a decree that "ordered and commanded" that "the laws and good customs" of Indians, along with their "usages and customs," must "be kept and enforced." This principle, firmly accepted in Spanish Indian Law, was lost when new states emerged in Latin America following the period of revolutions.[117]

In short, a Spanish Legal History which, ignoring the cultural history of Spain, would not emphasize an ongoing struggle between local autonomy and central authority, would not be consistent enough. The comparative approach cannot be avoided for juridical pluralism requires necessarily a comparative approach. In this regard, a Spanish legal history handbook should include at least three levels of comparative perspective: the Spanish level, comparing the different legal traditions within the Iberian Peninsula; the European level, comparing and analyzing the duality *ius proprium* and *ius commune*, looking at the diverse kinds of reception of the latter to both the Spanish and European contexts; and the Anglo-American level, considering and contrasting it with the European legal tradition.

The reader may think that, considering the short amount of time available

[116] CROW, John A.: *Spain: The Root and the Flower*, 1985; in this sense, it has been said that following the complete reconquest of Spain by Christians in 1492, the national legal system that emerged was based on beliefs "that there was a natural law binding on all people and peoples whoever they might be," and there was "a variety of human observance, all of it permissible so long as it did not conflict with natural law and *ius gentium*," "a common body of law and custom that might be found in the practices of all peoples" (BORAH, Woodrow: *Justice by Insurance: the General Indian Court of Colonial Mexico and the Legal Aides of the Half-Real* 6, 1983). It has also recognized that, when Christians retook control of Spain, "Moslems were allowed to live under their own law and custom and to resort to their own courts for matters concerning themselves" (SEED, Patricia: *Ceremonies of Possession in Europe's Conquest of the New World 1492– 1640*, 1995, pp. 69, 99).

[117] JUNEAU, Donald: "The Light of Dead Stars," 11, 1 *American Indian L. Rev.* 1, 13.

to teach a legal history course, such a comparative perspective is unrealistic. It may be true, but it depends on how deep the comparative approach is employed. Sometimes, it would be enough to state explicitly that some historical process, cultural movement or legal institution are common to all Europe, and it is not just a Spanish, French or Belgian reality. Other times, it would be useful to add something else; for example, in dealing with the creation of the medieval parliaments (*Cortes*) in Spain, it could be added that "the representative assemblies received different names throughout Europe. While in the Anglo-Saxon territories were used the expression "Parliament", in Spain it was known as *Cortes* (General Estates, in France and in the Low Countries; Diet, in Germany) (...). Since the beginning of the 12th century, and due to the development of urban life in Western Europe, the bourgeoisie became a social and economical power aware of their common interests, and united by mutual protection and supporting defence. Thus both the king and this new social class of traders and merchants recognized the convenience of allowing the cities' representatives to take part in the royal assemblies, in which they could give advice and financial support to the king. It was, then, a matter of mutual interest."[118]

Let me give another example. When lecturing law students, I usually explain that the bourgeoisie formed social groups characterised by its particular legal and social status. Throughout Spain, the bourgeoisie was known by the denomination of *ciudadanos* (citizens). In Catalonia and Valencia they were sometimes called *burgueses* (bourgeois), and in Leon and Castile with the special name of *hombres buenos de las ciudades y villas* (good men of the cities and villages). Having said this, I usually add that "in the rest of Europe the names also differed from region to region. In England they received the name of *commons*; and in France, since the 14th century, they were called *common estate* or *Third estate*. During the 13th century, the sessions of the extraordinary assemblies of the royal *Curia* became "estate assemblies" or *Parlamentos* (Parliaments). The participation of the *Third estate* in public life was clearly backed up by the growing economical power of the bourgeoisie. Since the 12th century, the bourgeoisie entered into

[118] It would also be clarifying to add a terminological explanation of the expression "parliament" to avoid possible misunderstandings: "Since the English expression "courts" refers to the tribunals, and not to the Spanish "Parlamento" or "Cortes", it is important not to confuse the Spanish "Cortes" with the English "courts". The expression "Parliament" was first mentioned in Ireland in the 13th century, following closely on their appearance in England. The word parliamentum meant "parley" or "discussion" (in its proper English sense), and seems to have been a newfangled term for the long established colloquies between kings and their leading lay and ecclesiastical subjects. It acquired additional significance during the disputes between Henry III and his barons (1258–65)." (MASFERRER, Spanish Legal Traditions. A Comparative Legal History Outline, p.142).

the extraordinary *Curias* of all Western Europe, being this access admitted in Spain faster than any other European country."[119]

I do not think it is matter of having much time available for lecturing. It is rather a matter of keeping constantly in mind the comparative approach, teaching – in my case – Spanish legal history within the European perspective. My teaching experience shows me that law students get interested in legal history inasmuch as they discover its real interest, if they feel the necessity to know it. In pursuing so, the comparative approach is really helpful. For this reason, every year I start my first lecture asking why a law student has to deal with legal history. My answer is as follows:

> "On November 23, 1880, an outstanding American lawyer and scholar named Oliver Wendell Holmes, giving a Lowell Lecture at Harvard Law School, stated:
>
> 'The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.'
>
> (Oliver Wendell Holmes, *The Common Law and Other Writings*, Birmingham, The Legal Classics Library, 1881).
>
> The statement that *the life of the law has not been logic; it has been experience*, is clear enough to realise to which extend it is important to know what the law has been in order to understand what the law is in the present. It is the knowledge of our legal past what enables us to have a better understanding of our present legal institutions (...).

[119] MASFERRER, *Spanish Legal Traditions. A Comparative Legal History Outline*, p.143.

Our Western Civilization witnesses two main legal traditions whose knowledge is highly convenient for any law student: the civil law and the common law tradition. The former is also called the "Continental" or "European" legal system, while the latter is also called the "Anglo-American" legal system. While the European countries, besides United Kingdom, South and Central America, as well as many Asian territories belong to civil law tradition, England, USA, Canada, Australia and New Zealand belong to common law tradition.

Only history can explain the existence of these two different legal traditions. Only history can show their main characteristics. Only history can give reason of their development and present state. This has always been so, it is now so, and it will always be so, no matter whether legal history will be taught in the future as a compulsory law course or not."[120]

I have seen several times to which extent this answer captures students' attention from the first day, installing in them an open and positive disposition to know about the Spanish legal history from a comparative approach.

4. Concluding Considerations: What will Probably Happen

Although it is hard to predict what will happen in the future with the Spanish legal history, I do have the conviction – and not just the desire – that a comparative approach will help considerably. This is more than wishful thinking, it is a prediction based upon the facts and the current context of the Spanish legal history scholarship.

It is true that traditionally Spanish legal history has been not really come close to a comparative or European perspective, but it is also true that the contributions written by some legal historians in this regard in the last thirty years have possessed a scientific consistency which goes beyond the common standards. One could be surprised that this literature has not have much influence over the Spanish legal history teaching. That is partly true, since some legal historians have been teaching not only the Spanish legal history course from a European perspective, but also a European legal history course.[121] For example, a course on "Legal history of the European Union" ("Historia Jurídica de la Integración Europea", in Spanish) has been offered and taught by a legal historian, Rogelio

[120] MASFERRER, *Spanish Legal Traditions. A Comparative Legal History Outline*, p.16.

[121] See the footnote n. 77 and its main text, which shows the Spanish universities that offer a course on European legal history, as well as the lecturers who teach it: University of Murcia (Antonio Pérez Martín) and University of Illes Balears, Majorca (Román Piña Homs).

Pérez-Bustamante,[122] at the University of Rey Juan Carlos (Madrid) for some years until today.

Furthermore, I have seen the synopsis of some legal history courses taught today in some Spanish law schools. Looking at their content, they could be called European legal history rather than Spanish legal history. In some universities, the title of the course has been even modified, being called just "legal history" instead of "Spanish legal history".[123] I do not have time now to give concrete examples revealing this move towards the comparative approach, but it is true and understandable considering the current tendency of young –and not that young– legal historians to spend time abroad doing research, and who, back to Spain, tend to look at the Spanish legal tradition from a comparative perspective, using a foreign literature which enables them to write, publish and teach consequently in accordance to their comparative legal mind.

Other factor which is – and will be – encouraging Spanish legal historians to teach legal history from a comparative perspective is the introduction of teaching innovation programs. One of these consists in teaching in English courses towards a law degree. Not only Erasmus students from all over Europe are attracted to spend time (a semester or a year) enrolled in Spanish universities. Spanish students are also given the chance to add some special distinction to a law degree otherwise held by many other law students, enabling them to keep open other professional doors in a broader geographical context, that is, beyond the Spanish borders.

The first Spanish law school which implemented a law degree in English was that of the University of Valencia, where I have taught the Spanish legal history course (in English) in the last three years. During these years, I have realized that to teach a legal history course in English constitutes a challenge which encourages the lecturer to go beyond the national boundaries, since both the lecturer and the students are expecting something more than teaching and learning a strict national legal history. Alongside the Spanish legal history course (which is compulsory), I have also been giving an optional course entitled "History of Codes and Constitutions" devoted to the constitutionalism and the codification movement from a comparative perspective, including both the Continental and the Anglo-American legal traditions. It seems to me that students enjoyed these courses mainly because of the comparative perspective, and it is clear to me that the majority of them like comparative legal history. They are fully aware that

[122] Topic upon which he has published extensively (on that, see the bibliographical references contained in the footnote n. 44).

[123] This has occurred, for example, in the University of Navarre.

they are attending a course on comparative legal history, and not just on legal history or just on comparative law. In my view, it is a course on legal history because I take for granted the comparative approach; otherwise – as said –, it would not be a real or consistent legal history course.[124]

This year the law school of the University of Castilla-La Mancha has offered a similar course called "Comparative legal systems" ("Sistemas Jurídicos Comparados", in Spanish). The course is taught in English by Sara Granda (who has spent time doing research in the UK and in the USA). This year also the law school of the University Rey Juan Carlos (Madrid) has offered a course called "Comparative history of legal institutions", which has been taught in English by Gabriela Cobo del Rosal (who has also spent time abroad doing research). Next year the law school of the University of Navarre will offer an optional course called Comparative history of legal institutions ("Historia comparada de las instituciones jurídicas", in Spanish), which will be taught by Rafael García Pérez (who has been abroad several times: France, Italy and USA).

I am sure that, in the near future, optional courses like these will proliferate, and the compulsory course on Spanish legal history will be taught much more comparatively than it has been done in the past. My prediction is optimistic: Spanish legal historians will be more comparative in both doing research and teaching, so our contribution to the law student's education will be greater than ever. But this will require the student's active engagement with interactive methodological systems of legal education whose goodness and positive results I have already tested and appreciated in the last three years.

[124] Most probably my view on this matter is due mainly to the stays abroad I have made in the last ten years: Visiting Professor at Tasmania Law School (January–February 2010), Visiting Scholar at Melbourne Law School (January–February 2010 and July–September 2008), Visiting Scholar at Harvard Law School (2006–07), Herbert Smith Visiting Professor at Cambridge University (UK, February–July 2005), and Fellow Researcher at Max-Planck Institute for European Legal History (Frankfurt/Main, Germany, May–August, 2000–02). I'm very grateful to Matt Dyson (UK) and Orlando Rivero (USA) for revising my English version.