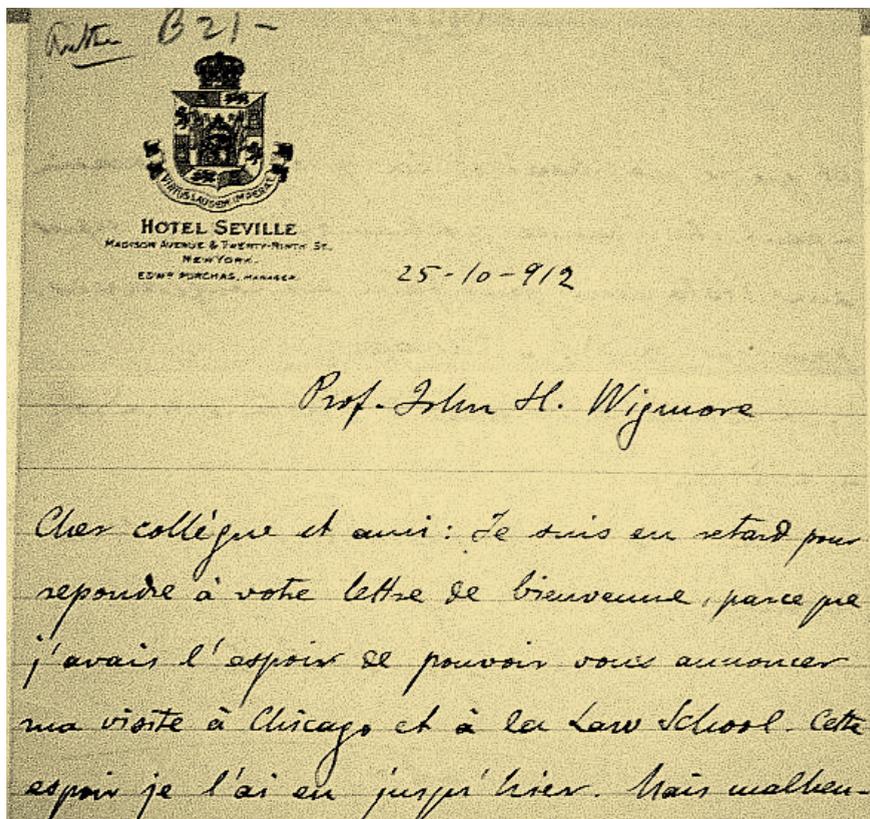


S Rafael Altamira

Spain

Sources and Development of Law

Edición
y estudio preliminar
de Carlos Petit



SPAIN
SOURCES AND DEVELOPMENT OF LAW

The Figuerola Institute
Programme: Legal History

The Programme "Legal History" of the Figuerola Institute of Social Science History –a part of the Carlos III University of Madrid– is devoted to improve the overall knowledge on the history of law from different points of view –academically, culturally, socially, and institutionally– covering both ancient and modern eras. A number of experts from several countries have participated in the Programme, bringing in their specialized knowledge and dedication to the subject of their expertise.

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SPAIN. SOURCES AND DEVELOPMENT OF LAW

Rafael Altamira

Estudio preliminar y edición de
Carlos Petit

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ALTAMIRA EN CHICAGO

En 1912 se publicó la primera exposición moderna de la Historia del Derecho Español. Cosa ciertamente olvidada, aunque las obras generales sobre nuestro pasado jurídico –de las más antiguas a las más recientes– siguen, sin acaso saberlo, el sendero de ese texto pionero¹. Desde luego, las circunstancias de la edición contribuyeron al olvido: está escrito en lengua inglesa y forma parte de un libro colectivo, publicado con singular elegancia tipográfica por la casa Brown, Little and Co. (Boston, Massachusetts)².

Rafael Altamira y Crevea (1866-1951) fue el autor de la rara aportación. Su sede, un volumen misceláneo de la *Continental Legal History Series* que había nacido hacía poco gracias al tesón de John Henry Wigmore (1863-1943). Fue este Coronel Wigmore –así lo conocieron los suyos– uno de los juristas más notables de la *Progressive Era*: “a man who belonged to every club and society, and who meticulously clipped every reference to his activities in the most trivial of newsletters” (Annelise Riles). Responsable, en última instancia, del texto inglés de Altamira, sobre Wigmore disponemos de una informada biografía³; aquí basta precisar que tan destacado profesor –uno

1 De Galo Sánchez, *Curso de Historia del derecho* (ca. 1925), Valladolid, Universidad, 1972, a Francisco Tomás y Valiente, *Manual de Historia del derecho español* (1979), Madrid, Tecnos, 2ª ed. 1980. Pero sobre la tradición hispana de empezar por el principio –una historia jurídica desde la Dama de Elche hasta el Código civil– se trata más adelante.

2 *A General Survey of Events, Sources, Persons and Movements in Continental Legal History*, by Various European Authors. Boston, Little, Brown, and Co., 1912. No lo veo en la bibliografía que ofrece Rafael Altamira y Crevea. *El historiador y el hombre*, México, UNAM, 21986; tampoco figura en Rafael Asín Vergara, *Rafael Altamira. Bibliografía*, Alicante, Biblioteca Virtual Miguel de Cervantes, 2012 (<http://www.cervantesvirtual.com/nd/ark:/59851/bmcbv829>). No escapó a Manuel Martínez Neira, “Los orígenes de la historia del derecho en la universidad española”, en *Cuadernos del Instituto Antonio de Nebrija de estudios sobre la universidad* [CIAN] 3 (2000), 71-164, p. 144 y n. 128.; en realidad, para conocer su existencia basta con leer el prólogo de Rafael Altamira, *Cuestiones de Historia del derecho y de legislación comparada*, Madrid, Sucesores de Hernando, 1914, pp. 8-9.

3 William R. Roalfe, *John Henry Wigmore, Scholar and Reformer*, Evanston (Ill.), Northwestern University Press, 1977. También, Annelise Riles, “Encountering Amateurism: John Henry Wigmore and the Uses of American Formalism”, en *ibid.*, *Rethinking the Masters of Comparative Law*, Oxford-Portland (Or.), Hart Pub., 2001, 94-126, p. 95 para la cita recogida.

de los primeros hombres formados en el Harvard de Langdell, novel profesor en Japón y decano de Derecho en la *Northwestern University* casi toda su larga vida— concibió un amplio programa de traducciones de textos europeos con la mente puesta en el desarrollo de un pensamiento específicamente norteamericano⁴. Y así, a una pionera serie criminológica (*The Modern Criminal Science Series*, 1911-1917, 9 vols.) pronto siguió la serie histórica que nos interesa (1912-1928, 10 vols.), otra iusfilosófica (*Modern Legal Philosophies Series*, 1911-1925, 11 vols.) e incluso una pintoresca y breve colección de antropología jurídica (*The Evolution of Law*, 1915-1918, 3 vols.)⁵. Cuando se anunciaba desde Harvard que el cultivo de los saberes jurídicos era mucho más que mero aprendizaje profesional, cuando la manera de arreglar los estudios —con los mismos rasgos de las demás disciplinas universitarias— debía aún abrirse camino hacia el Oeste; en fin, cuando despejaba en los Estados Unidos una literatura jurídica de pretensiones teóricas, traducir más de treinta gruesos volúmenes de escogidos publicistas europeos resultó ser un empeño ambicioso que reclamó notables energías y una extensa red de complicidades. La posición protagonista de Wigmore, figura central en la corporación de escuelas de Derecho (*American Association of Law Schools*, AALS), un órgano que siempre secundó sus iniciativas, le dio apoyo institucional y numerosos colaboradores: desde el comité editorial de cada serie a los muchos traductores, los responsables de edición, los autores de prólogos y de escritos similares. Los contactos internacionales de Wigmore, fruto de sus viajes pero también de una incesante correspondencia, consiguieron el resto⁶.

4 “The efforts of the committee of publication of the *Legal Philosophy Series* will furnish us new philosophic bases upon which to reconstruct our system or at least our methods, and the *Continental Legal History Series* will show us how other peoples have worked out their legal problems in an experimental way”, opinó una apreciativa reseña del volumen que aquí nos interesa: cf. *Michigan Law Review* 11 (1913), 342-345 (J. H. D.), p. 345. Para el contexto de estos esfuerzos, cf. James E. Herget – Stephen Wallace, “The German Free Law Movement as the Source of American Legal Realism”, en *Virginia Law Review* 73 (1987), 399-455. También, N. E. H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence*, Chicago (Ill.), University of Chicago Press, 1998, a pesar de su indiferencia ante la dimensión internacional de ambas personalidades.

5 Pero la vocación teórica y compilatoria de Wigmore había nacido con *Select Essays in Anglo-American Legal History* (1907-1909, 3 vols.). Hace unos años estudié la serie criminológica: Carlos Petit, “Lombroso en Chicago. Presencias europeas en la *Modern Criminal Science* americana”, en *Quaderni fiorentini* 36 (2007), 801-900.

6 Se conservan cuadernos de viajes por Europa, que documentan los encuentros: cf.

I. SERIE Y 'BIBLIOTECA'

En otra ocasión tuve la oportunidad de reflexionar sobre el que llamé, à la Darnton, “efecto biblioteca” para referirme a las transformaciones que sufren los textos cuando pasan a otra lengua y forman una colección⁷. Títulos de diferente origen, radicalmente diversos –no obstante la cercanía entre sus fechas– por el marco local de producción, sufren con el salto lingüístico un violento proceso de *uniformización*. En efecto, se trataría de “reunir las distintas visiones del mundo en una coherencia única y perfecta”, según ha escrito Georg Steiner sobre la compleja maniobra que está detrás de toda traducción. Algo particularmente notable en las versiones de Wigmore, que no sólo anunciaron, apenas iniciado el siglo, una pérdida de la variedad idiomática de los textos académicos a beneficio de aquel “esperanto angloamericano [empleado] en todo el planeta” (Steiner): comprometieron además los contrastes que separaban autores, libros y tendencias, diluyéndolos en un mismo código expresivo e idéntica forma editorial.

Enseguida veremos los paratextos y demás elementos que adornaron los tomos sobre historia jurídica –once los programados y diez finalmente los impresos, entre 1912 y 1928– y que sirvieron así para acentuar la uniformidad de escritos desiguales por el entorno de composición y el idioma, pues conviene advertir que la *uniformización* derivada del recordado ‘efecto’ se complicó en el caso de Altamira, autor de una sección contenida en un volumen plural: una pequeña biblioteca considerado en sí mismo, compuesto según las reglas y convenciones que impuso el editor (“as needed to adapt it to the information of American readers, and the general plan of our book”)⁸.

el completo catálogo –accesible en línea– [Northwestern University Archives], *John Henry Wigmore (1863-1943) Papers*, 1868-2006, Series 17/20, Boxes 1-245, en especial box 11, folders 8 y 9, box 12, folders 1-12 de “Travel diaries”. En lo que hace directamente a la *Continental Legal History* cf. por ejemplo el memorándum de Wigmore al comité de la serie, 10 de octubre, 1910, sobre la selección de obras alemanas: “During a visit in Munich this summer I went over this subject very fully with Professor Karl Von Amira, who took a great deal of interest. He realized all of our difficulties, and he concluded by strongly recommended Huebner as the very best book for our purpose” (*Wigmore Papers*, box 198, folder 5 [“Advisers”]). De una visita (1913) a Madrid nos informa un par de tarjetas que conserva el Fondo Altamira (Instituto de Enseñanza Secundaria “Jorge Juan”, Alicante), vid. apénd. nn^o 25 y 26.

7 Petit, “Lombroso en Chicago”, cit. (n. 5), pp. 855 ss.

8 Wigmore a Altamira, carta de 17 de abril, 1911 (apénd. n^o 3).

Conviene saber, en primer lugar, que Altamira se encontraba rodeado de una ilustre y abigarrada compañía⁹. Tras una presentación de Maitland, se abría ese volumen con un capítulo sobre la transición al feudalismo (Carlo Calisse), de inmediato seguido por crónicas particulares: fuentes, acontecimientos y escuelas jurídicas de Italia (Calisse), Francia (Jean Brissaud, Marcel Planiol), Alemania (“more composite”, confesó Wigmore: un auténtico mosaico formado por pasajes de Heinrich Brunner, Roderich Stintzing, Ernst Landesberg, Johannes E. Otto Stobbe, Richard Schröder, Heinrich Siegel, Heinrich Zoepfel, Ernst Freund), Países Bajos (Joost Adriaan van Hamel), Suiza (Eugen Huber) y Escandinavia (Ebbe Hertzberg, “with the partial collaboration of other eminent scholars in Denmark, Norway, and Sweden”); seguía la aportación de Altamira –pronto veremos las razones– “specially prepared for this work” y cerraba el conjunto una parte sobre derecho canónico del recordado historiador Brissaud. Empeño sin duda original en la Europa de los códigos, este complejo volume presentaba un contenido “that there does not exist at this moment (nor has existed for one hundred years) in *any* European language... a conspectus in one volume of the external data of the movement of the law (including the persons and circumstances constituting the moving forces) in all the principal countries of Europe”; un libro único y útil, añadía el editor, como introducción enciclopédica al estudio del derecho comparado¹⁰.

Sería de interés perseguir la deriva comparativa de los estudios aquí propuesta por Wigmore, también responsable de difundir en Norteamérica los esfuerzos y los encuentros europeos relativos a la incipiente especialidad¹¹, si no fuera porque el análisis de las olvidadas páginas de Altamira impone limitaciones. En efecto, sin abandonar el libro que estudiamos se observa,

9 Cf. John Henry Wigmore, “Editorial Preface to this Volume”, XXIII-XLIV, en *A General Survey* cit. (n. 2).

10 Wigmore a Altamira, 17 de abril, 1911, cit. (n. 8).

11 Bastará recordar su papel en el Congreso de La Haya (1932), primero de una larga serie que llega a nuestros días, junto al francés Edouard Lambert: cf. “An International Congress of Comparative Law in 1931”, en *Illinois Law Review* 24 (1929-1930), 656-665. La introducción de la serie insistía sobre el extremo, con referencia a la creación de un “Comparative Law Bureau” en la *American Bar Association*, al “Pan-American Scientific Congress”, a las conferencias para la legislación uniforme, a las colecciones de libros jurídicos foráneos: cf. “General Introduction to the Series”, en *A General Survey* cit. (n. 2), p. XII. Poco después publicó un peculiar tratado, con profusión de tablas e ilustraciones: *A Panorama of the World’s Legal Systems* I-III, St. Paul, West Pub., 1928.

en segundo lugar, que su índice omite los nombres de los catorce autores traducidos (otros dos, el fallecido Frederic Maitland y Ernst Freund, eran angloparlantes)¹², según una concepción demasiado radical de la *uniformización* impuesta por Wigmore: convertido en único autor de un mosaico que combinaba teselas preexistentes (“by patching together parts of... different books”, en carta de 8 de abril, 1911, apénd. n^o 2), como tal irrelevantes, pues sólo preocupaba lograr la imagen final. Mientras que el capítulo de Rafael Altamira tradujo un texto precedente que Wigmore le hizo reescribir con intensidad, el predominio del “plan general” sobre la singularidad de las contribuciones llegó a su máximo, como sabemos, en las páginas consagradas a la historia jurídica germana¹³. Y entonces, igualados por lengua, introducciones, sistema y forma editorial (“octavo in size, bound in cloth, practically uniform with *The Modern Criminal Science Series* and *Essays in Anglo-American Legal History*”, advertían los catálogos de librería)¹⁴, esta primera derivada del ‘efecto biblioteca’ engendró ‘traducciones’ carentes de texto de base; sólo existentes en la versión americana¹⁵.

A prolongar el ‘efecto’ en cuanto tenía de uniformador contribuían las piezas de apertura; en este primer volumen un largo prólogo de Wigmore (“Editorial Preface”, pp. xxxiii-xliv), una primera introducción de Oliver W. Holmes (“Introduction”, pp. xlv-xlvii) y otra más de Edwards Jenks (“Introduction”, pp. xlix-liii); en otras palabras, del autor espiritual de la obra y de dos cultivadores del *common law*, bien conocidos: un magistrado del Tribunal Supremo

12 Pero se ofrecía al lector una “List of Collaborators”, p. v, donde los autores se perdían tras los responsables de introducciones y los traductores – Wigmore, por supuesto, entre ellos.

13 “Necessarily uneven and often scrappy”, opinó un severo lector en *Harvard Law Review* 26 (1913), 766-767 (C. H. H.).

14 Cf. Little, Brown, & Company, “The Law Book Bulletin”, n^o 60 (March, 1912), en *Wigmore Papers*, box 198, folder 8 (“Promotional Materials, 1912”).

15 Una buena ilustración del argumento se contiene en el “Rapport to the Committee in the Study of Legal History”, elaborado para el *meeting* de la *Association* de 1914. “The Association should know that the editorial work is anxiously supervised”, leemos en la minuta (*Wigmore Papers*, box 198, folder 6 “[General Correspondence]”). “Each manuscript is revised in toto by one member of the Committee, before being sent to the printer; the proofs are then read by both the translator and the editorial member, and a duplicate is inspected by the Chairman of the Committee. The amount of scholarly skill and laborious time devoted by most of the translators is worthy of the highest respect, and this Committee desires publicly to acknowledge its gratitude”.

americano y un destacado profesor y publicista de la *Law Society* de Inglaterra. A salvo una información sumaria relativa a las partes del tomo, sus autores y traductores, cosa que tocó a Wigmore, esos otros textos iniciales sublimaban, mediante una concepción que buscaba la unidad en la evolución del derecho (Holmes) y un relato histórico paneuropeo y coherente (Jenks), los contrastes territoriales que desgranaban luego los capítulos; todos finalmente ensamblados para formar un *unicum* con escasas desviaciones. Las “tendencias” comparadas, la existencia de “ciclos jurídicos”, la identidad de respuestas normativas ante los mismos estímulos... advertían a los lectores que las muchas diferencias que habría de encontrar su consulta, en el fondo, eran aparentes.

“La historia es como un tejido sin costuras”, sentenció Maitland; “quien pretende narrar una porción tiene que saber que lo rasga apenas pronuncie la primera frase”. Y todavía: “ninguna pieza es verdadera cuando se separa o aísla del contexto. Cada una de ellas es una porción de la totalidad que forman los elementos imbricados y necesita incluirse en la cadena de los hechos para recibir color y valor; todos somos partícipes de una aventura común” (Woodrow Wilson). Ambas advertencias, recogidas tenazmente en los tomos de la *Continental Legal History Series*, conducen de modo natural a otra característica del recordado ‘efecto’. Suspendidas entre “la necesidad de producción de facsímiles y la de hacer recreaciones” (Steiner) las traducciones de Wigmore adquirieron una nueva identidad: se trata de la parte del ‘efecto’ que califico como *identificación*. Un par de volúmenes sobre historia jurídica de Italia, una historia del proceso elaborada en Francia, varios capítulos sobre fuentes y literatura de los principales países occidentales... se convirtieron, al formar *biblioteca*, en una nueva y desconocida “historia del derecho continental”. Las teselas diversas se disponían en un cuadro unitario donde ciertos elementos étnicos –los llamados, en la terminología desenvuelta de la época, los “elementos raciales” (esto es, “Iberian, Celtic, Roman, Gothic, Frankish, Moorish, Reconquest, Bourbon” para el caso español, a tenor de la citada misiva de 17 de abril)– y un mismo pasado jurídico (“the posthumous power of Roman law, forever resisting, struggling, and coalescing with the other”) simplificaban en un instante compartido la diversidad nacional. La identidad se logró además alterando las aportaciones según criterios editoriales mediante la selección de períodos históricos y de las fuentes más relevantes.

La historia del derecho continental, germánica y romana, precipitaba así en las grandes experiencias occidentales, “from Danzig to Sicily, from London to Vienna”; al este del Óder y al sur del Danubio ya no existía la Europa

jurídica o, al menos, no existía para los lectores americanos, como tampoco aparecían en el cuadro –en el tomo– entidades políticas consideradas “menores” (pensemos en Bélgica o Portugal), diluidas entre sus vecinos “mayores”; algún crítico reprochó además el silencio sobre la proyección colonial de los derechos metropolitanos, omisión lamentable tratándose de Francia o de España¹⁶. No había sido diferente el horizonte –limitadamente internacional– del Congreso parisino de derecho comparado (1900)¹⁷. Desde luego, la *identificación* de un núcleo en la biblioteca genera, como tercera componente del ‘efecto’, la *inclusión* de libros y de autores que el editor estimaba ilustres, con el consiguiente reconocimiento profesional que honraba a los seleccionados: todos prontos a seguir los deseos del colega americano, confesó Rafael Altamira, “dado el valor moral que le doy al hecho de colaborar en una obra Americana de la importancia que Vs. proyectan” (Altamira a Wigmore, carta de 7 de junio, 1911, apénd. n.º 4)¹⁸. Ahora bien, lo inclusivo también es *excluyente*, en tanto que deja fuera de foco otros muchos libros que, siquiera en potencia, tendrían los méritos precisos para figurar en la serie. A este último respecto el ejemplo español fue un asunto delicado, pues su presencia en la *Continental Legal History*, querida desde el principio según comprobaremos, no fue posible por falta de textos aptos para la traducción-recreación: la introducción general de la serie anunciaba obras de Francia, Alemania e Italia, advirtiendo que “Spain would have been included as a fourth”; por desgracia, “not suitable book was in existence”. Y se añadía: “the unanimous opinion of competent scholars is that a suitable history of Spanish law has not been yet written”.

Una historia jurídica todavía no escrita... Habrá que volver sobre la penuria denunciada que, como poco, mitigó en contra de la balbuciente historio-

16 “The plan of the work does not include Eastern Europe nor, what is a more serious omission, European colonies. Any full treatment of colonial law would, of course, have been out of the question, but a large part of the significance of certain legal systems lies in the extent of their influence, and the reader would at least like to know something of the spread of the law of France and Spain to the New World”. En *Harvard Law Review* 26 (1913) cit. (n. 13).

17 Carlos Petit, “Lambert en la *Tour Eiffel*, o el derecho comparado de la *belle époque*”, en Antonio Padoa-Schioppa (ed.), *La comparazione giuridica tra Otto e Novecento*, Milano, Istituto Lombardo, 2001, 53-98.

18 “The authors are among the most eminent in their fields”, p. 4, proclamaban con orgullo los catálogos. Cf. *The Continental Legal History Series...* Translated and Published under the Auspices of the American Association of Law Schools, Boston, Little, Brown, and Company. En *Wigmore Papers*, box 198, folder 8 (“Promotional Materials, ca. 1912”).

grafía hispana una cuarta resultante del ‘efecto biblioteca’: me refiero a la *expansión* o circulación de una pieza literaria singular en círculos más amplios a consecuencia de la traducción mas, sobre todo, de la pertenencia a una *serie* establecida; situado en el seno de la misma, está claro que el usuario de cualquiera de los tomos bien puede llegar a consultar los demás. El subscriptor de los libros de Wigmore saltó entonces de la *History of French Private Law* de Jean Brissaud a la *History of Continental Criminal Law* de Ludwig von Bahr... No tuvo, en cambio, obras similares de la Península Ibérica.

II. A SUITABLE BOOK ON SPANISH LEGAL HISTORY

“A Series is a marketable thing; that was what most availed to launch the four Series, for which I have chaired the Editorial Committee; the publishers felt hopes for a Series which would bring in the price of eight or ten books on a single subscription”¹⁹. En 1909, los días 25 y 26 de agosto, tuvo lugar la novena asamblea de la *American Association of Law Schools* (Detroit, Michigan). Protagonista del encuentro fue el decano Wigmore de *Northwestern University*, quien venía de celebrar, justo hacía dos meses, un magno simposio en Chicago de derecho penal y criminología. El precedente favoreció que una de las resoluciones del encuentro criminológico –la moción relativa a publicar traducciones de tratados europeos– se presentase igualmente, y con éxito, ante los académicos reunidos en Detroit. A tenor de los razonamientos de Wigmore, el interés creciente por la comparación en Estados Unidos chocaba con la falta de textos, accesibles en inglés, que narrasen la formación y las transformaciones de las tradiciones europeas. Y sin embargo, una visión conjunta y un conocimiento sólido de los avatares históricos que modelaron sus diferencias y sus similitudes era la base científica inexcusable de los ejercicios comparativos; a tal fin se propuso y obtuvo la formación de un comité editorial encargado de arreglar una colección de traducciones (“of some of the best works in Continental legal history”) bajo los auspicios de la *Association*. Y así, con presidencia del propio Wigmore, Ernst Freund (University of Chicago), Charles H. Huberich (University of Standford), Ernest G. Lorenzen (University of Wisconsin) y William E. Mikell (University of Pennsylvania) conformaron el deseado comité²⁰.

19 John H. Wigmore a Harold J. Laski, 3 de julio, 1916, *ibid*.

20 Cf. “The Meeting of the Association of American Law Schools”, en *American Law*

El flamante “Committee on the Study of Legal History of the Association of American Law Schools” (sencilla y familiarmente, “Committee on Translations”)²¹ se puso en marcha de inmediato. Entre el otoño de 1909 y la primavera del año siguiente Wigmore escribió a sus colegas europeos en busca de orientación²². Las respuestas no se hicieron esperar y el trabajo procedía. Pero encontró un serio problema con los textos españoles. “No suitable book is as yet known to the Committee”, advertía en mayo de 1910 una minuta de Wigmore para el *meeting* anual de la AALS. “Hinojosa’s comes down only to the Gothic period. Marichalar’s six volumes are too old and too large; and his, with Chapado’s and other scholarly books are more occupied with the sources than with the specific legal institutions developmentally treated. The Committee are convinced that the only treatment that will be of any real service to American students is a treatment of the various specific topics of contracts, leases, mortgage, successions, wills, marriage, adoption, paternal power, bailments, corporations, partnerships, procedure, responsibility, etc. etc. – each noted in its various stages of development; a treatment, in short, so admirably exemplified in Goldschmidt’s Commercial Law, and in almost all the leading Italian works, notably Calisse, Ciccaglione, Salvioli, Schupfer, and Solmi”. Una dura dificultad bibliográfica, reconocía Wigmore meses después (13 de enero, 1911); “I can’t find anything suitable... We could, if necessary, leave Spain out of the Schedule”.

Un mes más tarde el decano se confesaba desolado: “as to Spain I give up the struggle. I can find nothing anywhere that seems to me quite feasible”, añadiendo, con ironía: “perhaps we may have to put an advertisement in the daily newspapers”²³. Sin embargo, la cosa no llegó a tal extremo y poco después se recibieron en Chicago unas cuantas referencias. Tiene interés la correspondencia establecida con George H. Allen, joven latinista de Cincinnati que había realizado hacía poco una edición del texto mayor entre los derechos

School Review 2 (1906-1911), 318 ss; así como “General Introduction”, en *A General Survey* cit. (n.2), pp. xi-xv. Varios de los mencionados fueron también traductores: en el tomo de Altamira, por ejemplo, Wigmore se encargó de los textos en italiano.

21 Así aparece en una minuta de contrato de 1 de noviembre, 1910, suscrita por Wigmore. Cf. *Wigmore Papers*, box 198, folder 10 (“Translations – General, 1910-1914”).

22 La información que sigue procede, salvo otra advertencia, de *Wigmore Papers*, box 198, folder 5 (“Continental Legal History Series – Advisers”).

23 Cf. *Wigmore Papers*, box 198, folder 6 (“General Correspondence”). Ahí también el *memorandum* de 13 de enero.

locales hispanos; se trata, claro está, del Fuero de Cuenca²⁴. La llegada de un ejemplar a Chicago fue excusa para una carta de Wigmore (23 de marzo, 1911, apénd. n.º 18) donde, tras las felicitaciones de rigor (“I have noted with great pleasure that we have in this country a scholar who can undertake a critical edition of such things”), se exponía la petición: el comité de traducciones necesitaba dar con una breve historia del derecho privado español que pudiera agregarse a los títulos, antes seleccionados, de autores franceses, italianos, alemanes; frente a ello, “we are quite at sea for Spain”. El decano también preguntaba por alguna historia de las fuentes y de los juristas que, igualmente disponible para los citados países, no localizaba en España. Próximo a iniciar una larga estancia en Berlín, la respuesta del filólogo llegó a vuelta de correo (28 de marzo): por desgracia nada conocía ajustado a los requerimientos; no lo hacía, desde luego, el primer tomo de los *Estudios* de Felipe Sánchez Román (2^a1899), con todo “the standard work to-day on the external history”, aunque cabía citar el ensayo bibliográfico de Rafael Altamira defendido en el congreso internacional de ciencias históricas celebrado en Berlín (1908)²⁵; en esa ocasión, en prueba de la pobreza historiográfica el autor llegó al extremo de pedir a sus colegas extranjeros que procedieran a estudiar la olvidada historia jurídica de España (“hispanists abroad should devote their attention to Spanish legal, as well as literary monuments”), no sin antes lamentar “the inability of Spanish scholars to treat exhaustively the source material for Spanish law”. Y aunque Allen no pasó por alto las obras generales más conocidas (siempre anticuadas: “the general works of Martínez Marina, Antequera, Sempere”), eran exposiciones que acentuaban, en su opinión, las cuestiones puramente históricas en detrimento del contenido jurídico (apénd. n.º 19).

Justo cuando se dirigía Wigmore a Allen en petición de informaciones Rafael Altamira escribía al primero (apénd. n.º 1). No conocemos la anterior carta del decano –acaso manuscrita, ¿en tarjeta postal, como otras que se conservan

24 George H. Allen, *Forum Conche, Fuero de Cuenca. The Latin Text of the Municipal Charter and Laws of the City of Cuenca, Spain*, Cincinnati, Cincinnati University Press, 1909. Enviada una copia a la Real Academia de la Historia años después se publicó el correspondiente informe: Rafael de Ureña, “Las ediciones del Fuero de Cuenca”, en *Boletín de la Real Academia de la Historia* 70 (1917), 5-83; es la base de la célebre edición aparecida en 1935.

25 Y Allen recomendaba a Wigmore la edición posterior, más completa: “État actuel des Études sur l’histoire du Droit espagnol et de l’Enseignement de cette science en Espagne”, en *Bulletin Hispanique* 11, 1909, 172-199. En el mismo plano se citaba la lección inaugural de Ureña (Universidad Central, 1906).

entre los papeles de Altamira?— pero es fácil imaginar su tenor²⁶. A la inevitable solicitud de ayuda respondía el catedrático de Oviedo con la oferta de elaborar personalmente, sobre la base de propias publicaciones, el capítulo que se deseaba; podría servir, en efecto, un “resumen de Historia del Derecho civil, único trabajo que sobre la materia existe” que, junto con otros trabajos, le enviaba a Chicago²⁷. Que el “resumen” tenía interés lo confirmó la respuesta de otro colega español, el prestigioso profesor Gumersindo de Azcárate. Una carta de 5 de abril —escrita en esforzado inglés— presentaba una lista de títulos; sin tener a mano esa historia de las fuentes, que Wigmore quería, parecía posible componerla *ad hoc* (“it might be done employing the books underlined”) juntando la información de varios textos: obras de Hinojosa, Martínez Marina, Sánchez-Román, Ureña... Pero Azcárate recordaba en especial el Altamira de las *Cuestiones preliminares* y el trabajo aparecido en la *Revista de Legislación y Jurisprudencia*: la ligera confusión entre títulos no impide identificar en la referencia aquel “resumen” realmente aparecido en la *Revista de Legislación Universal* (apénd. n° 20). Como Azcárate le ofrecía además noticia de obras de filosofía para la *Modern Legal Philosophies Series*, la respuesta de Wigmore se deshizo en los agradecimientos (apénd. n° 21).

La recepción en Chicago (“delayed by the mail”) de las separatas le convenció definitivamente. Si en una misiva anterior (apénd. n° 2) había aceptado las sugerencias de Altamira y le encomendaba el capítulo español (8 de abril, 1911), ahora comprobaba que aquellas páginas de síntesis satisfacían por completo las expectativas (“on reading it, I perceive that it supplies a basis for precisely what we need”). Bastaría con introducir cambios menores (cf. de nuevo apénd. n° 3) para despachar en unas cien páginas una descripción general de las fuentes y la evolución del derecho español. Todo tenía que estar listo a primeros de octubre, pero algo se hizo esperar. Poca cosa: dos o tres semanas de trabajo (“j’ai dédiéé tous les moments libres de ma besogne officielle à rédiger le chapitre d’histoire du Droit en Espagne d’après vos indications”, 22 de octubre, apénd. n° 9) le permitieron a Altamira absolver su compromiso.

26 Me cuesta trabajo creer que esa carta desconocida no fuese un texto mecanografiado, como en otros casos; faltaba la familiaridad que más adelante manifestó Wigmore a Rafael Altamira, incluidas las visitas a su casa en la calle Lagasca, de Madrid.

27 Rafael Altamira, “Origen y desarrollo del Derecho civil español”, en *Revista de Legislación Universal y de Jurisprudencia Española* 7 (1908), 209-217, 241-246, 273-284, 312-320, 338-344; 8 (1909), 13-21, 51-61, 118-124, 224-230.

III. ALTAMIRA, HISTORIADOR DEL DERECHO

El 1 de mayo de 1897 tomó posesión Altamira de su cátedra ovetense (“Historia General del Derecho”)²⁸. Daba así inicio la larga y fructífera carrera del miembro del “grupo de Oviedo” destinado a brillar con mayor intensidad, y no sólo en su profesión: la experiencia de Altamira en la menor de las universidades españolas, coronada por una embajada cultural americana que alcanzó un éxito resonante (1909-1910), fue el comienzo de una dilatada trayectoria pública (inspector general y director de Primera Enseñanza, 1910-1911; catedrático de Doctorado –“Historia de las instituciones políticas y civiles de América”– en Madrid, 1914; socio numerario de las Reales Academias de Ciencias Morales y Políticas, 1912, y de la Historia, 1922; senador de orientación liberal por la Universidad de Valencia, 1916; juez del Tribunal Permanente de Justicia Internacional, 1921 y 1930; fugaz decano de la facultad de Derecho de Madrid, 1931; doctor *honoris causa* por las universidades de París-Sorbona, Burdeos, Cambridge, La Plata, Santiago (Chile), Columbia, San Marcos de Lima; propuesto en varias ocasiones al Premio Nobel de Literatura y al de la Paz), sólo segada por un triste, aún fructífero, exilio mexicano (1944-1951)²⁹.

En el ámbito de su colaboración con Wigmore, el flamante catedrático de historia del derecho –un hombre de “constitución física robusta”, ojos “castaños claros”, “nariz recta”, 172 cms. de estatura, larga barba pronto blanca, sin señas físicas particulares y en posesión del francés y del inglés³⁰, según la descripción del Servicio mexicano de Migración³¹– consiguió convertir una

28 Cf. Carlos Petit, “Tríptico ovetense. La universidad en el cambio de siglo”, en CIAN 13 (2010), 191-236, pp. 208 ss, que me sirven ahora.

29 Daniel Moya Fuster – Domingo Martínez Verdú, “Rafael Altamira y los Nobel” en *Rafael Altamira, hijo adoptivo de San Vicente del Raspeig*, 1910, Ayuntamiento de San Vicente, 2001, 211-224. En general, “Rafael Altamira y Crevea”, en AA. VV., *Diccionario de catedráticos españoles de Derecho, 1847-1943* (Eva Elizabeth Martínez Chávez), accesible en línea (www.uc3m.es/diccionariodecatedraticos).

30 Pero algo de alemán también sabía; al menos, fue vocal del tribunal de una cátedra para la enseñanza de esa lengua, en el Instituto General y Técnico de Oviedo, nombrado por el rector el 5 de noviembre, 1901. Por nada decir de sus referencias a obras alemanas.

31 Archivo General de la Nación (México), Gobernación (siglo XX). Migración, serie: españoles, expte. 028 (1944), que me pasa Elizabeth Martínez; a su amabilidad también debo datos sobre Altamira en el Archivo Histórico de la Universidad Complutense de Ma-

materia histórica sin particular relieve en una disciplina rigurosa y presente en los debates internacionales³². Se había incorporado a una pequeña escuela, con una facultad de Derecho, tres cátedras de Letras y el esbozo de una facultad de Ciencias; el cantón septentrional de una red de establecimientos estatales donde sólo resultaba grande la Universidad de Madrid: único centro español con todas las licenciaturas y todas las especialidades universitarias, y con el monopolio del grado de doctor. La Universidad justamente llamada *central* disponía así de cátedras para la formación de los aspirantes al doctorado, en una suerte de academia preparatoria de futuros catedráticos; al poco de publicar con Wigmore, una de esas plazas, tan apetecidas, la ocupó Rafael Altamira (1914).

A su modo –un modo limitado por exigencias de ordenación académica, según el Plan Gamazo (1883-1884)– las diferencias de envergadura y recursos de las universidades hispanas se reproducían en el cuerpo docente. Corto, aunque conocido tanto en España como fuera de ella, era por entonces el claustro de Oviedo: el célebre escritor Leopoldo García-Alas (poco importa que *Clarín* [1852-1901] enseñara abstrusamente el Derecho Natural)³³, los dos Adolfo (Álvarez-Buylla [1850-1927] en Economía y Hacienda Pública; González-Posada [1860-1944] en Derecho Político y Administrativo), Aniceto Sela (1863-1935), tercer –o cuarto, si contamos al inclasificable *Clarín*– ‘krausista’ de la facultad (Derecho Internacional), los ‘regionalistas’ Fermín Canella (Derecho Civil, 1849-1924) y Félix de Aramburu (Derecho Penal, 1848-1913), el taimado ex-rector Juan M^a Rodríguez-Arango (Procedimientos y Práctica Forense, 1833-1911), Eduardo Serrano (1856-1914), hombre en Asturias del Partido Liberal (Derecho Civil), Víctor Díaz-Ordóñez (1848-1932), católico y conservador (Derecho Canónico), José M^a Rogelio Jove y Bravo (1851-1927), otro asturiano de derechas, director de *El Carbayón* (Derecho Político y Administrativo), en fin, el abogado Gerardo Berjano (Derecho

drid, Personal, caja 436, expte. 5. Otros proceden del expediente de catedrático: Archivo General de la Administración [AGA], Educación y Ciencia, Educación, 32/16139.

32 Martínez Neira, “Los orígenes” cit. (n. 2), pp. 101 ss sobre provisión de cátedras (1884-1897), pp. 114 ss sobre la cátedra de Oviedo.

33 No hablan a favor de su actividad docente los horribles apuntes (1896) ahora publicados: cf. *Apuntes de clase de “Clarín”*. Recogidos por José María Acebal. Comentarios de Luis García-San Miguel y Elías Díaz, [Oviedo], Biblioteca Académica Asturiana (Caja de Ahorros de Asturias), [1986]. Seguramente salva al oscurísimo García-Alas la autoironía que demuestra *Clarín*: cf. por ejemplo “Zurita” (1884), en *Pipá*, ed. Antonio Ramos-Gascón, Madrid, Cátedra, 1986, 313-355.

Mercantil, 1850-1924) fueron los colegas que recibieron a Rafael Altamira en su nueva facultad³⁴.

A ellos se sumó Altamira tras una operación de política académica bien planificada. “Anúnciase á oposición la cátedra de *Historia del Derecho* en Oviedo”, escribió a su influyente amigo Marcelino Menéndez y Pelayo (27 de agosto, 1895). “Sabe V. que desde antiguo es esta mi materia favorita, á la cual he dedicado la mayor parte de mi tiempo y á la que quisiera dedicar el que me resta de vida en mejores condiciones... Pero V. conoce muy bien cuan excusados son todos los esfuerzos si no se cuenta, no digo ya con un tribunal favorable *personalmente*, pero, á lo menos, imparcial ó con garantías de que ha de serlo... ¿Quiere V. prestarme su ayuda en esta ocasión? Lo que importa ante todo, es el nombramiento de un tribunal seguro, con personas rectas y competentes, como Hinojosa, Costa, Azcárate, Torreonaz, Posada y algun otro, de los cuales es seguro que votarán lo justo, sin mirar personas, ideas y demás tranquilas. Aparte de esto, convendría preparar á los amigos más íntimos de V. en Oviedo, para que no gestionaran en contrario, demostrando V. interés por mí”³⁵. Y el célebre polígrafo, senador por la Universidad cuya cátedra histórico-jurídica estaba en liza, procedió como se esperaba³⁶: entre los nombres aludidos en la carta de agosto, Azcárate y el propio Menéndez y Pelayo juzgaron finalmente las oposiciones de Altamira³⁷.

Había sido estudiante en Valencia (1881-1886), donde tuvo excelentes maestros comprometidos con el saber jurídico y la causa liberal (Eduardo So-

34 Los datos pertinentes en AA.VV., *Diccionario de catedráticos* cit. (n. 29).

35 Marcelino Menéndez y Pelayo, *Epistolario*, ed. Manuel Revuelta Sañudo, Madrid, Fundación Universitaria Española, 1981-1991, vol. 13, n^o 433.

36 “No necesito encarecer á Vd. el interés que tomo en el asunto de la cátedra á que Vd. con razón aspira”, respondió Menéndez Pelayo a vuelta de correo, “mi influencia directa ó indirecta, cualquiera que ella sea, no ha de faltar á Vd. en ningun caso”, 30 de agosto, 1896, en *ibid.* n^o 466.

37 Además, figuraron en el tribunal Matías Barrio y Mier, Federico Brusi y Enrique Ferreyro, más los ‘competentes’ Esteban Jiménez y Antonio Balbín de Unquera; cf. Carlos Petit, “Canseco y el Fuero de León”, en *Anuario de Historia del Derecho Español* 66 (1996), 881-898; también Manuel Martínez Neira, “Los orígenes” cit. (n. 2), pp. 139 ss. Según escribió Altamira a Gabriel Llabrés y Quintana por esas fechas (7 de enero, 1897), en cuestión de oposiciones a cátedra había que “tener preparado el camino; á lo menos para que otro no nos gane la mano”, en Ignacio Peiró Martín, “La historia de una ilusión. Costa y sus recuerdos universitarios”, en *Anales de la Fundación Joaquín Costa* 13 (1996), 209-312, p. 221.

ler, Eduardo Pérez Pujol)³⁸. Aconsejado por Soler la aventura del doctorado le acercó al krausismo, con Francisco Giner de los Ríos (1839-1915), catedrático de Filosofía del Derecho en la Central, como figura protagonista; el citado Azcárate, titular de Legislación Comparada, le dirigió la tesis: una *Historia de la propiedad comunal* (1887, publicada en 1890)³⁹ de rara envergadura y calidad. Esta obra primeriza (declarada de mérito, “previos los informes correspondientes”, por real orden de 20 de abril, 1914) constituyó el principal aporte español a los debates sobre los orígenes de la familia, la propiedad privada y el Estado que recorrían Europa desde los mediados de siglo, con el economista belga Émile de Laveleye (1822-1892) como principal animador⁴⁰. En la España del Código Altamira daba una voz de alarma a favor de la costumbre, la fuente jurídica más auténtica y democrática: el momento ciudadano en la formación y vida de las normas y una posibilidad envidiable para la interpretación del derecho vigente⁴¹. Por eso no extrañará que el novel doctor, al sumarse a la empresa periodística de otro intelectual krausista (el presidente de la República en 1873, Nicolás Salmerón [1838-1908]), emprendiera desde las páginas de *La Justicia. Diario republicano* una intensa campaña contra el texto normativo que acababa de ver la luz: si el Código civil neonato nada valía, ello era debido al absolutismo de una ley opuesta a la ciencia y la

38 Obtuvo el grado de licenciado en Derecho (sección Derecho Civil y Canónico) el 16 de junio, 1886, con sobresaliente y premio extraordinario; su título fue expedido el 30 de noviembre. En Alicante hizo el bachillerato (título del 6 de septiembre, 1881), también con sobresaliente en el segundo ejercicio (aprobado en el primero).

39 Se doctoró el 16 de diciembre, 1887, con la calificación de sobresaliente. El título lleva la tardía fecha de 24 de marzo, 1897, lo que se explica: como tantos otros estudiosos, satisfizo las altísimas tasas de expedición cuando no tuvo otro remedio si quería ejercer la cátedra (nombramiento: 26 de abril, 1897; posesión 1 de mayo).

40 Cf. Paolo Grossi, *Un altro modo di possedere. L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria*, Milano, Giuffrè, 1977.

41 Además, Altamira participó –con éxito– en las convocatorias sobre derecho consuetudinario de la Academia de Ciencias Morales y Políticas: cf. *Derecho consuetudinario y economía popular de la provincia de Alicante*, Madrid 1905, premiada en el sexto concurso (1903): *vid.* Pablo Ramírez Jerez – Manuel Martínez Neira, *La historia del derecho en la Real Academia de Ciencias Morales y Políticas. Los concursos de derecho consuetudinario*, Madrid, Dykinson-Universidad Carlos III de Madrid, 2017, p. 151; académico numerario desde 1911, tuvo ocasión (en 1915) de juzgar las monografías presentadas a concurso, *ibid.* p. 139-140. Previamente, Altamira había contribuido al *Derecho consuetudinario* de Joaquín Costa con un trabajo sobre “Mercado de agua para riego en la Huerta de Alicante y en otras localidades de la Península y Canarias”, *ibid.* p. 169.

opinión; de una envejecida impronta iusnaturalista, ciega a las culturas patrias, las experiencias locales, las libertades individuales⁴².

La reflexión de Altamira sobre el derecho se hacía conciencia histórica al tiempo que su visión de jurista le condujo a la inquietud del pedagogo. Una reciente institución, el Museo de Instrucción Primaria (luego Museo Pedagógico Nacional) de Manuel B. Cossío, contó con Altamira como su secretario segundo (interino, 1888; titular por oposición en virtud de real orden de 27 de julio, 1889); con categoría de profesor de escuela de magisterio y encargado de impartir materias históricas (“Historia de la civilización española”, “Historia de España en el siglo XVIII”) y metodológicas (“Metodología de la historia”), entre otros cursos (también “Educación cívica”), su primera obra historiográfica fue, en rigor, una contribución pedagógica⁴³.

“Se le acogió [en Oviedo] con verdadero entusiasmo... Altamira conquistó rápidamente el aprecio general y en especial, el de los estudiantes”⁴⁴. La red de complicidades y apoyos databa de unos cuantos años antes. Fue crucial el Cuarto Centenario de Colón, como se decía por entonces; una ocasión oportuna

42 “El Código civil que se está publicando en la *Gaceta*”, proclamó Altamira, “no es obra de las Cortes, ni se apoya en la expresión franca del voto popular, ni debe cosa alguna á la vida jurídica de nuestro pueblo, manifestada de continuo por hechos no previstos por nuestras leyes; es, ni más ni menos, un Código que ha escrito D. Manuel Alonso Martínez en el último tercio del siglo decimonono, y el cual magnánimamente cede y dona á un cierto número de gentes iberas, sobre las cuales se extiende su jurisdicción”. Cf. [Rafael Altamira y Crevea], “El nuevo Código civil” (I-XIII, inacabado). En *La Justicia* (Madrid), viernes 2 de noviembre – martes 18 de diciembre, 1888, correspondiendo la cita a la primera entrega de la serie.

43 *La Enseñanza de la Historia*, Madrid, Fortanet, 1891; *ibid.*, Victoriano Suárez, 1895, versión que utilizo. El libro, lleno de experiencias personales, nació de un ciclo de conferencias dictadas en el Museo Pedagógico: cf. *El Imparcial*, viernes 7 de marzo, 1890.

44 Adolfo [González]-Posada, *Fragmentos de mis memorias*, Oviedo, Universidad (Servicio de Publicaciones), 1983, p 206, p. 252. Y todo ello sin perjuicio, claro está, de los recelos que suscitó en la provinciana Vetusta un personaje acaso demasiado grande: “fue, repito Altamira un gran refuerzo: en un sentido, que no diré que en otro no haya sido un obstáculo, un disociante” (*ibid.* pp. 206-207)... “Al lado del o dentro del profesor y del amable colega... hay, había, el hombre... Suavemente, deslizándose sin roces sensibles, como resultado espontáneo e indomable del carácter, el historiador se fue diferenciando del pequeño grupo: no podía sentirse a gusto en la modestísima actitud de sus colegas... No era claro nuestro amigo: no se entregaba ni podía uno entregarse” (p. 253). Son juicios demasiado duros –ese Altamira, “gran escultor de sí mismo” (p. 207)– en un libro amable que no prodiga esta clase de manifestaciones.

tuna para convocar un “Congreso Pedagógico Hispano – Portugués – Americano” (Madrid, 14-16 de octubre, 1892) donde no faltaron los profesores de Vetusta ni Rafael Altamira en el comité de dirección; el secretariado de la 4ª sección (“Educación Superior”) contó, en efecto, con el llamado ‘grupo de Oviedo’ (Posada y Sela, más Altamira)⁴⁵. Sabemos además que, unos meses después, al hacerse cargo Altamira de *La Justicia* pensó en Azcárate, pero también en la trinidad krausista asturiana (Posada, Sela, Buylla: “hombres, sin lo cual sería [el nuevo periódico] plan teórico”) para el cuadro de colaboradores⁴⁶. Consta finalmente sus presencias en una ambiciosa revista aparecida en aquel año de las celebraciones; se trata de *La Nueva Ciencia Jurídica*, donde unas brillantes páginas de nuestro autor –sobre ellas en seguida volveremos– alternaban con las del rector ovetense Félix Pío de Aramburu y otras más de ambos Adolfos⁴⁷. Y de una relación cordial entre Altamira y *Clarín* habla el prólogo de Alas al libro *Mi Primera Campaña* (1893), un experimento narrativo y literario (“críticas y cuentos”) del colega alicantino. De todos modos, no creo que esos tratos agotasen las razones por las que Altamira buscó el apoyo de Oviedo para la aventura de sus oposiciones.

¿Qué clase de universidad se encontró al llegar? Instalado cómodamente en la calle Campomanes (nº 8, 3º) el ambiente amable de Asturias y el dinamismo cultural de su facultad pronto lo conquistaron. “Oviedo me obsequia con cielo azul y sol espléndido”, escribió a su mentor santanderino a 15 de

45 Aniceto Sela – Adolfo Posada, “Procedimientos de enseñanza en la Facultad de Derecho”, en *Boletín de la Institución Libre de Enseñanza* [BILE] 16 (1892), 347-349, ponencia al Congreso: Giner de los Ríos, Buylla, Posada y Alas aparecían junto a nuestro autor –el Altamira de la *Enseñanza de la historia*– como autoridades que marcaron la nueva dirección; Rafael Altamira, “El movimiento pedagógico en España”, en *La España Moderna* 48 (1892), 142-162. Sobre la comisión directiva del encuentro, cf. *El Liberal*, lunes 4 de abril, 1892; sobre la composición de la mesa universitaria, cf. A. G., “Crónica del Congreso Pedagógico hispano-portugués-americano”, en *La Escuela Moderna* 2 (1892), 306-315, p. 310.

46 Carta de Altamira a Joaquín Costa (3 de diciembre, 1892), ed. G. J. G. Cheyne, *El renacimiento ideal. Epistolario de Joaquín Costa y Rafael Altamira (1888-1911)*, Alicante, Instituto de Cultura Juan Gil-Albert, 1992, pp. 67-68; pero la experiencia periodística no llegó a un año: cf. *La Época*, viernes 3 de noviembre, 1893. Tampoco duró la participación de Altamira en la lucha política (candidato de Unión Republicana por Alicante, cf. *La Correspondencia de España*, jueves 23 de febrero, 1893).

47 En cambio, no encuentro a Altamira en otra publicación similar: la *Revista de Derecho y Sociología* que lanza (1895) Posada con el penalista salmantino Dorado Montero; allí están presentes los amigos de Oviedo (Sela, *Clarín*, Buylla).

octubre, 1897 (XIV, nº 368); “este país me sigue probando muy bien”, insistía en las navidades de 1897, “he aumentado 6 kilos, tengo salud y trabajo tanto ó más que en Madrid. Los compañeros son todos excelentes: y aunque salvo Canella y algún otro, no los hay que cultiven especialmente la historia, todos le tienen afición y leen los más de los libros de este género que se publican. En la Biblioteca de la Facultad, cuyo director es Posada, están todas las obras de V., incluso los tomos de Lope, que se compran a medida que salen; las de Cotarelo; la de Menéndez Pidal y otras muchas de este género, así como las especiales de historia jurídica que á todos los profesores interesan” (XIV, nº 415). En resumen: aparte esos kilos de más, inquietudes históricas y buenas bibliotecas⁴⁸.

Ante todo, los libros. Frente a otras universidades peor abastecidas, con librerías que eran más bien depósitos de fondos desamortizados o procedentes de las casas de jesuitas⁴⁹, desde hacía un par de décadas Oviedo había sabido crear una óptima colección de libros de derecho, “plantada por el antiguo Rector Sr. Salmeán con el Decano Sr. Fernandez Cuevas, auxiliado por una comisión de... catedráticos”. Bajo la primitiva dirección de Fermín Canella (1879) y en manos de Adolfo Posada desde 1884, esta joven “Biblioteca especial de la Facultad de Derecho de Oviedo” –también existía otra, la provincial universitaria– se vio favorecida por todos los decanos y por algunos donantes generosos (Díaz-Ordóñez, Vallina)⁵⁰; cuando la descubrió Altamira contaba con unos 2.500 tomos de títulos modernos, “las obras y revistas más notables y los nombres de los publicistas más ilustres que marchan a la cabeza del movimiento intelectual de nuestro siglo en los principales pueblos de Europa y América”. Al cabo de pocos años las obras coleccionadas pasaban de seis mil⁵¹.

48 Por eso me es difícil explicar un intento de traslado a la Universidad de Zaragoza, para cuya cátedra histórica-jurídica llegó a ser designado: cf. *Gaceta de Instrucción Pública*, 10 (1898, nº 30 de octubre), 1388. Altamira renunció enseguida, sin tomar posesión: *ibid.* 11 (1899, nº 15 de enero), 13; también, *El Imparcial*, miércoles 25 de enero. Una real orden de 31 de enero aceptó la renuncia y anunció la provisión por concurso de antigüedad.

49 Cf. Carlos Petit, “La prensa en la Universidad: Rafael Ureña y la *Revista de Ciencias Jurídicas y Sociales* (1918-1936)”, en *Quaderni fiorentini* 24 (1995), 199-302, p. 245, con datos sobre la pobrísima situación de la Universidad Central, a partir del registro de adquisiciones (1863-1916); entrado el nuevo siglo, Madrid apenas gastaba cuatrocientas pesetas anuales en ese concepto.

50 Cf. *El Carbayón*, sábado 10 de octubre, 1885: Díaz-Ordóñez dona para adquirir libros la suma de 1.300 ptas., obtenida por ciertos servicios extraordinarios.

51 Fermín Canella, *Historia de la Universidad de Oviedo y noticias de los estable-*

De los libros a la historia. Según se adelantó, la vocación de Altamira como historiador del derecho tenía que ver con su participación intelectual en los debates contemporáneos. El denostado Código civil, el valor jurídico de la costumbre, las formas ancestrales de la propiedad... eran los asuntos que le preocupaban, la materia de sus primeros estudios; qué alegría comprobar, una vez llegado a Vetusta, que sus nuevos colegas compartían idéntica inquietud. Por supuesto, no estaba en cuestión la suerte de una disciplina erudita, simple adorno para juristas cultivados. A su modo lo mostró el catedrático y abogado Gregorio Berjano en una lección *De la Historia general del Derecho Español*; un estado de la cuestión de calidad apreciable que insistía en el problema de la codificación civil unitaria⁵². Tratándose de Altamira –autor de otro discurso inaugural, en la línea pedagógica que había iniciado Posada (curso 1884-1885)⁵³– la historia, entendida como práctica historiográfica (la tarea del experto habría de consistir en “restaurar el crédito de nuestra historia”, p. 360), resultaba un poderoso medio para regenerar España en los momentos tristes de depresión nacional; lo que sin duda tocaba al derecho (“sirva de ejemplo la restauración actual de los autores socialistas y colectivistas antiguos, y la rectificación que se pretende hacer de los excesos individualistas de nuestra época”, p. 365), pero que, también sin duda alguna, iba mucho más allá de lo jurídico⁵⁴. El pesimismo de los tiempos presentes –es-

cimientos de enseñanza de su distrito... (1873), Oviedo, Imp. de Flórez, Gusano y Cia, 1903 (rep. facs. 1994, con prólogo de Santiago Melón), pp. 212-214. Cf. Adolfo Posada, “La Biblioteca especial de la Facultad de Derecho”, en *Anales de la Universidad de Oviedo* 1 (1901), 353-356; del mismo, *Ideas pedagógicas modernas* (1892), Madrid, Daniel Jorro, 1904, p. 301; últimamente, Ramón Rodríguez Álvarez, “La biblioteca de la Universidad de Oviedo”, en Ramón Rodríguez Álvarez et al. (coord.), *Patrimonio documental y bibliográfico asturiano*, Oviedo, Universidad de Oviedo, 1998, 275-292.

52 Gerardo Berjano y Escobar, *Discurso leído en el acto de la apertura del curso académico de 1885 a 1886, por el doctor D. ...* Oviedo, Imp. y Lit. de Vicente Brid, 1885 (ed. Coronas, II, 137-187), p. 139, pp. 186-187.

53 *Discurso leído en la solemne apertura del curso académico de 1898 a 1899...* Oviedo, Imp. y Lit. de Vicente Brid, 1898, ahora en Santos M. Coronas González (ed.), *El grupo de Oviedo. Discursos de apertura de curso, 1862-1903*, Oviedo, Universidad de Oviedo, 2002, vol. II, 357-399. En la misma dirección, Adolfo Álvarez-Buylla, *Discurso leído en la solemne apertura del curso académico de 1901-1902...* Oviedo, Imp. La Económica, 1901 (*ibid.* II, 7-28), sobre el recién fallecido Clarín como educador y “pedagogo práctico”.

54 “Ejemplo elocuente de esto es el viaje científico del Dr. Francisco Hernández (1570), primero en su género en el mundo, dedicado, no sólo al estudio de la Historia Natural de la Nueva España y Perú, sino también al de geografía e historia, y organizado

tamos en 1898– sólo podría superarse devolviendo al pueblo la confianza en sus propias fuerzas mediante “la reivindicación de nuestra historia intelectual y civilizadora” (p. 363), porque “el pasado suele ser ¡quién lo diría!, en vez de obstáculo, auxiliar eficaz de las reformas futuras” (p. 366). Con ese reto por delante –sobre cuya matriz fichteana no es necesario insistir– la universidad habría de contribuir “renovando la lectura de los autores españoles antiguos que, por la elevación de su pensamiento... son todavía elementos útiles de trabajo, bien a título de colaboradores de la ciencia actual, bien como factores sugestivos de reflexión... No olvidemos que el presente vive del pasado, y que muchas ideas que nos parecen hijas de nuestro siglo no son sino fructificaciones, quién sabe si desviadas o incompletas, de gérmenes antiguos” (p. 371). Si parecía adecuado el año de estudios doctorales en Madrid (Altamira tendría en mente el caso de Rafael de Ureña, ilustre catedrático que lo fue de Oviedo y responsable de enseñar en la Central una “Historia de la literatura jurídica” animada por los mismos objetivos que esbozaba su lección), también valdría para orientar localmente las enseñanzas de licenciatura y aun fuera de ella: un horizonte de cursos regionales subvencionados por las autoridades locales, líneas de extensión universitaria (“la tutela educativa de las clases obreras” como nuevo envite académico, p. 375), excursiones pedagógica y estancias de estudiantes y profesores en los grandes centros extranjeros se diseñaba en el discurso, exhibiéndose en el paraninfo ovetense algunos logros puestos en marcha y anunciándose otros, no menos ambiciosos, que pronto dieron justa fama a la pequeña Universidad. Y en la circunstancia maldita de su derrota, España encontraría –falsa paradoja– la ocasión para descubrirse a sí misma y recordar a las repúblicas americanas su verdadero papel: el de nación hermana y de la misma lengua, más experimentada y mejor situada en el mapa y por eso capaz de producir investigaciones a favor de los americanos (“hinchidas de contenido... pertenecientes al orden de las ciencias jurídicas, de la economía, de la experimentación fisiológica, de los estudios de educación y enseñanza, de la misma modernísima sociología, particularmente en lo que se roza con los problemas penales”, p. 390); una madre patria generosa,

y preparado de manera (dice el Sr. Jiménez de la Espada en las Relaciones geográficas de Indias, I) que los de hoy ‘podrán ser más numerosos y mejor dotados de recursos materiales, pero en cuanto a la clase de personal, objeto de su cometido y modo de desempeñarlo, en el fondo pocas diferencias ofrecen’...”, p. 363, n. 1. Para la concepción de la ciencia y de la práctica histórica de Altamira, cf. ahora Ignacio Peiró Martín, *Historiadores en España. Historia de la historia y memoria de la profesión*, Zaragoza, Prensas de la Universidad, 2011, pp. 85 ss.

abierta a los estudiosos ultramarinos y capaz de enviar, llegado que fuera el caso⁵⁵, excelentes expertos para cursos, conferencias, congresos.

Por encima de sus méritos la lección inaugural de Altamira, pronunciada justo al año de vencer en las oposiciones, ofrece un testimonio fiel del encuentro con el grupo de innovadores ovetenses⁵⁶: pues es evidente que aquella enseñanza tan conveniente a la patria había tomado cuerpo en Asturias, donde el *desideratum* pedagógico se hacía realidad. “¡Qué universidad –microscópica, sí, señor, pero Universidad– están haciendo ustedes poco a poco!”, exclamó entusiasmado Giner en carta a *Clarín* datada unos cursos atrás⁵⁷. Como ambos sabían, los motivos de la educación, la investigación y las reformas universitarias habían calado hondo en Europa y América⁵⁸; haciéndolos suyos, los de Oviedo fueron los pioneros dentro de una casta académica por lo general aún indolente y ultramontana – o, al menos, recelosa ante esa especie diversa de universitario patriota que aquéllos encarnaban y que teorizó Alta-

55 Y el caso le llegó a Altamira en tanto “delegado de la Universidad de Oviedo en las Repúblicas hispano-americanas del Uruguay, Argentina, Chile, Perú, Méjico y Cuba, que visitó con este carácter, explicando en sus Universidades y otros Centros, desde Junio de 1909 á Mayo de 1910, conferencias y lecciones, sin subvención de la Universidad ni del Estado [...] Los resultados de esta Comisión van expuestos en el libro *Mi viaje á América, Madrid 1910*”, según precisa una hoja de servicios en su expediente del Archivo Histórico de la Universidad Complutense. *Vid.* sobre todo, Gustavo H. Prado, *Rafael Altamira en América (1909-1910). Historia e historiografía del proyecto americanista de la Universidad de Oviedo*, Madrid, Consejo Superior de Investigaciones Científicas, 2008.

56 Significó además el avance de un título posterior (*Psicología del pueblo español*, Barcelona, Biblioteca Moderna de Ciencias Sociales, 1902). Cf. *La Época*, lunes 16 de junio, 1902.

57 Cf. Francisco Giner, *Cartas y ensayos. Edición de homenaje en el cincuentenario de su muerte*, México, Fondo de Cultura Económica, 1965, 112-115. *Clarín* anunciaba la llegada de un doctorando a Madrid y comentaba su próximo discurso inaugural (18 de agosto, 1891); anteriormente Posada le había pedido ayuda para preparar el suyo, recibiendo sugerencias: carta de Giner a Posada, 25 de julio, 1884, pp. 104-108. El maestro lo reseñó luego (cf. “La reforma de la enseñanza del Derecho”, 1884, en Francisco Giner de los Ríos, *La Universidad española*, Madrid 1916 [= Obras completas, II], 263-271), situando justamente en Oviedo los inicios de una transformación renovadora.

58 James E. Russell, *The Extension of University Teaching in England and America. A Study in Practical Pedagogy*, Inaug. Diss. Leipzig 1895; Henri Marion, *L'éducation dans l'Université* [de Paris], Paris, A. Colin, 1896; Antonio Labriola, *L'università e la libertà della scienza* (1897), Napoli, La Città del Sole, 2002; Giacomo Tauro, *La pedagogia nell'università*, Torino, G.B. Paravia, 1904; Aniceto Sela, *La educación nacional. Hechos e ideas*, Madrid, Victoriano Suárez, 1910.

mira en su lección: “es un gran dolor para mí que tenga Vd. que continuarla [sc. la *Revista crítica de historia y literatura españolas*] desde Oviedo”, se quejó Marcelino Menéndez y Pelayo (1 de noviembre, 1897), “en esa atmósfera de krausistería pedagógica, tan adversa a todos los trabajos de erudición española”⁵⁹.

Ahora bien, la *krausistería* de Oviedo –la preocupación didáctica, en general– alcanzó una particular intensidad en el supuesto de la facultad de Derecho, donde la diferencia de concepciones pedagógicas significaba, a esas alturas, la existencia de dos ideologías jurídicas opuestas⁶⁰. En lo concerniente al ‘grupo’ ovetense la inquietud pretendía superar el gastado proyecto liberal: por decirlo con un título de época⁶¹ era el empeño educativo correspondiente a una *nueva fase* en la evolución del derecho –no hace falta recordar que la novedad respondía a la ‘cuestión social’– donde la ciencia jurídica abandonaba su vieja torre de marfil para descubrir la existencia de *relaciones económicas y sociales*⁶². El control judicial de los actos administrativos, el asombro ante los nuevos agentes (entes colectivos, obreros, mujeres) que ocupaban el espacio público, la tensión entre el juez y el legislador, la búsqueda de métodos para interpretar un *derecho* que ya no cabía identificar sin más con la *ley*... conducían a terrenos desconocidos⁶³. Y en este panorama abigarrado la inquietud por los estudios de facultad⁶⁴ era la metáfora de un amplio movi-

59 Menéndez y Pelayo a Rafael Altamira, *Epistolario* cit. (n. 35), vol. XIV, n° 384.

60 Sebastián Martín, “Funciones del jurista y transformaciones del pensamiento jurídico-político español (1870-1945)”, I, en *Historia Constitucional* 11 (2010), 89-125, pp. 91 ss.

61 Me refiero a Enrico Cimbali, *La nuova fase del Diritto civile nei rapporti economici e sociali, con proposte di riforma della legislazione civile vigente*, 1885, una obra leída con aplauso en España (*La nueva fase del Derecho civil en sus relaciones económicas y sociales*, Madrid, Sucesores de Rivadenyra, 1893, con prólogo de Felipe Sánchez Román).

62 Y disponemos, para lo que aquí interesa, de Jorge Uría, “Posada, el Grupo de Oviedo y la percepción del conflicto social”, en Uría (coord.), *Institucionismo y reforma social en España. El grupo de Oviedo*, Madrid, Talasa, 2000, 109-145.

63 Cf. Bartolomé Clavero, “Estudio preliminar”, en Giuseppe Salvioli, *El derecho civil y el proletariado*, trad. Ricardo Oyuelos (1907), Sevilla, Universidad, 1979, 9-44; Paolo Grossi, *Scienza giuridica italiana. Un profilo storico, 1860-1950*, Milano, Giuffrè, 2000; Duncan Kennedy, “Two Globalizations of Law & Legal Thought: 1850-1968”, en *Suffolk University Law Review* 36 (2003), 631-679.

64 Francisco Giner de los Ríos, “Sobre el estado de los estudios jurídicos en nuestras universidades” (1888), en *La universidad española*, Madrid 1916 [= *Obras completas*, II], 169-186; Adolfo Posada, *Ideas pedagógicas*, (1892), Madrid, Daniel Jorro, 1904; Édouard

miento de política jurídica –las “propuestas de reforma de la legislación civil vigente”, por expresarlo otra vez con Cimbali– donde se hallaban los motivos del orden futuro. Un pensamiento *de iure condendo*, en suma, como nunca antes había imaginado el jurista europeo⁶⁵.

Las *krausisterías* operaban entonces en un contexto complejo. “Es dato curioso que en España”, escribieron los Adolfo, “algunos de los más fervientes propagandistas de la reforma de nuestra enseñanza pertenecen á la facultad de Derecho”⁶⁶. Para su mejor desarrollo existían en Oviedo condiciones favorables. “Un profesorado excelente, cuya divergencia de opiniones no alcanza a herir... la unanimidad con que entienden su verdadera misión... corto número de alumnos; posición envidiable en una de las más bellas regiones de Europa; una ciudad pequeña, donde será fácil a los maestros influir sobre la vida entera de sus discípulos...” eran las ventajas de esa diminuta universidad. Espoleados por Giner de los Ríos –autor de las frases anteriores⁶⁷– los de Asturias habían aprendido en sus visitas europeas (Posada le acompañó en 1886, con Cossío, Sales y Ferré y Buylla, en sus viajes por Francia, Bélgica, Holanda, Suiza, Alemania e Inglaterra; Rafael Altamira alegó por su parte que “en Mayo de 1890 fue comisionado por el Ministerio de Fomento para estudiar en Francia especialmente la organización de los estudios históricos”)⁶⁸ que existía un modo diferente de enseñar derecho y de formar a los ciudada-

Lambert, “Une réforme nécessaire des études de Droit civil”, en *Revue internationale de l'enseignement* 40 (1900), 216-243; Maurice Hauriou, “Les Facultés de droit et la sociologie”, en *Revue Générale du Droit* 17 (1893), 289-295; Rafael Altamira, “La reforma de las Facultades de Derecho en Francia”, *BILE* 13 (1889), 25-26; del mismo, “Metodología de la enseñanza del Derecho”, *ibid.* 27 (1903), 359-364; Alfred von Halban, *Die Reform des rechts- und staatswissenschaftlichen Studiums in Österreich*, Wien, F. Tempsky, 1906; Adolfo Posada, “Los estudios de la Facultad de Derecho en España”, *BILE* 30 (1906), 97-102.

65 Martín, “Funciones del jurista” cit. (n. 61), p. 106, quien sitúa acertadamente en la especulación sobre el derecho constituyente (“nomotesia”) “el producto genuino de la mentalidad jurídica del cambio de siglo”.

66 Cf. “Sobre la reforma universitaria”, *BILE* 12 (1888), 181-185, p. 182, n. 2.

67 Giner, “La reforma de la enseñanza del Derecho” (1884), en *La Universidad* cit. (n. 64), 263-271, p. 265.

68 Posada, *Fragmentos*, cit. (n. 44), pp. 229 ss; en relación con Altamira remito a la hoja de servicios citada. Por su parte, en 1894, durante las vacaciones de verano y con gratuidad para el presupuesto, Sela, Posada y Buylla fueron autorizados (real orden de 7 de mayo) para visitar varios establecimientos educativos de Francia y elaborar una memoria sobre exámenes: cf. AGA, Educación y Ciencia, 32/16247.

nos viriles de los tiempos modernos: “la regeneración, si ha de venir (y yo creo firmemente en ella), ha de ser obra de una minoría que impulse a la masa, la arrastre y la eduque”, insistía en su discurso inaugural el nuevo catedrático (p. 396). Si usáramos el tropo eficaz de Bauman⁶⁹, descubrimos en esas expresiones a un intelectual convencido de su papel como *legislador*, quiere decirse: responsable de lanzar consignas y modelos de comportamiento para la sociedad a partir de su rara y reconocida competencia técnica.

Si volvemos la mirada a la obra de Altamira podremos comprender por fin el compromiso del profesor desde su conciencia de jurista. Tengo presentes las páginas que publicó en la recordada *La Nueva Ciencia Jurídica*, revista de vida tan intensa como breve, lanzada por Posada en aquel año de los encuentros (1892); una excelente aportación, idealmente próxima a la compañía adversa al Código que popularizó el diario *La Justicia*, cuyo título –“El método positivo en derecho civil”– dejaba bien claros los propósitos del autor⁷⁰.

“Método”, en primer lugar, fue un término ausente del vocabulario del primer liberalismo, que no lo requería: pues el derecho resultaba, desde sus coordenadas ideales, un proyecto natural que surgía *in abstracto* de la naturaleza de las cosas y definía exclusivamente el legislador; bastaría entonces comentar la ley *ad pedem litterae*, conseguir que las palabras normativas del príncipe –el mandato dictado *cum imperio*– desempeñasen su más obvia función para legitimar a una clase jurídica especializada. Según esta otra concepción –en palabras contundentes de Cirilo Álvarez (1807-1878), un notable del foro isabelino, ministro de Gracia y Justicia (1856) y presidente del Tribunal Supremo (1872)– “ley es toda resolución soberana, promulgada solemnemente... Para serlo no necesita ser justa, útil, ni reunir las otras cualidades que suponen de esencia algunos tratadistas de nuestro derecho. Si emana del que tiene el poder, y si se promulga solemnemente, será siempre una ley, aunque no reúna otras virtudes”⁷¹. Claro está que, desde el influyente *Curso*

69 Cf. Zygmunt Bauman, *Legislators and Interpreters. On Modernity, Post-modernity and Intellectuals*, Ithaca (N.Y.), Cornell University Press, 1987. Sobre lo nuestro, Gonzalo Capellán, “Intelectuales, universidad y opinión pública. El grupo de Oviedo”, en *Historia y Política* 8 (2002), 9-37.

70 Cf. *La Nueva Ciencia Jurídica. Antropología, Sociología* 1 (1892), 268-275; 2 (1892), 81-90. Se incluyó en *Cuestiones de Historia del derecho* cit. (n. 2), 202-242, por donde cito.

71 Ahí tenemos la tesis del ‘absolutismo jurídico’ enunciada por Paolo Grossi (cf. *Absolutismo giuridico e diritto privato*, Milano, Giuffrè, 1998), de gran potencia analítica y, por ello, no exenta de controversias. Aquí sirve para explicar el ejemplo (hablamos del

de Ahrens, todos compartían el llamado *método filosófico-histórico* y combinaban las reflexiones sobre el orden jurídico racional con las posibilidades de su realización práctica⁷². Pero rara vez se anunció un interés específico por las cuestiones metodológicas: ello simplemente no cabía desde “la idolatría de la ley, como norma del Derecho” (cf. “Método positivo”, p. 209).

Y sólo ahora, desde la conciencia de la *nuova fase*, empezaba a debatirse sobre los *métodos*⁷³. El alegado por Altamira –puesto en práctica en numerosos trabajos, como los que enviará al colega de Chicago⁷⁴– resultaba, en segundo lugar, un método “positivo”, quiere decirse, un análisis empírico que descansaba en la observación de la vida en su radical diversidad: “el método de estudio del Derecho civil tiene que basarse en informaciones particulares hechas por los políticos, por los hombres de profesiones jurídicas, por los catedráticos de Universidad y por los mismos alumnos de éstas... único modo de llegar a conocer la verdadera realidad de la vida popular” (p. 213). Se trataba de la única vía para conocer un derecho también *positivo* – en el sentido sociológico y científico de nuestro profesor: “el que se vive y realiza, no el meramente escrito en la ley, que muchas veces, sea o no justa, es letra muerta” (p. 237).

Se describía así la estrategia que hacía posible comprender, en tercer lu-

primer manual ‘moderno’ dedicado a la materia) de donde procede mi cita: Cirilo Álvarez, *Instituciones de derecho civil*, Valladolid, Impta. de Don Julián Pastor, 1840, pp. xiv-xv.

72 Cf. específicamente Martín, “Funciones del jurista” cit. (n. 60), pp. 104 ss. Sobre Ahrens y su influjo en España, *vid.* José M. Pérez-Prendes, “Consideraciones sobre el influjo del krausismo en el pensamiento jurídico español” (1999), ahora en *Interpretatio. Revista de historia del derecho* 10 (2004), 49-68; también, Gonzalo Capellán Miguel, *La España armónica, El proyecto del krausismo español para una sociedad en conflicto*, Madrid, Biblioteca Nueva, 2006.

73 Y la década en que sale este artículo fue decisiva. Sin entrar en la (más exótica) *Freirechtsschule*, es suficiente recordar Raymond Saleilles, “Quelques mots sur le rôle de la méthode historique dans l’enseignement du droit”, *RIE* 19 (1890), 482-503, así como François Gény, *Méthode d’interprétation et sources en droit privé positif. Essai critique*, Paris, Chevalier-Maresque, 1899. Más próximo Altamira al primero, que se cita y se conoce (en 1903 compartirá además con Saleilles la experiencia del congreso de ciencias históricas de Roma), que al segundo; ambos difundidos en España.

74 Cf. “La propiedad comunal en el nuevo Código civil de Montenegro”, en *BILE* 12 (1888), 165-167 y 190-192; “La propiedad comunal en la época del feudalismo”, *ibid.* 219-224, 234-237, 247-250, 259-264 y 272-275; “Colaboración de los abogados para la Historia del Derecho”, en *Revista general de Legislación y Jurisprudencia* 37 (1889), 734-744; “Derecho Notarial”, *ibid.* 38 (1890), 517-531.

gar, el tal “Derecho civil”. Altamira identificaba, mal que bien, esta denominación con el llamado *derecho privado* –“con tanta impropiedad en ambos términos como inseguridad en su comprensión”, p. 202– para rechazar de ese modo la difundida concepción que confinaba en el *derecho público* la capacidad de adaptación a las exigencias de los tiempos modernos. Por el contrario, también el derecho privado podía y debía abrirse a las reformas y realizar la libertad civil del ciudadano, en un doble sentido: “como derecho a mantener la vida jurídica espontánea... y como derecho... a una fórmula legal expansiva que le garantice... cierta variedad y riqueza de formas” (p. 231).

De la *libertad civil* y el rechazo al código unitario a las *krausisterías pedagógicas* de Oviedo, podríamos entonces concluir. En 1897, una vez llegado a esa escuela (“esta práctica se ha introducido ya en alguna Universidad española, donde varios profesores, como el Sr. Posada en su cátedra de Derecho político y el Sr. Buylla en la de Economía, entregan a sus alumnos cuestionarios sobre las costumbres, supervivencias e instituciones de las localidades asturianas... bases de futuras monografías”) el pensamiento de Altamira se convertía en docencia cotidiana⁷⁵.

IV. “ORIGEN” Y *SURVEY*

“El método positivo” y la cátedra de Oviedo dibujaron, entonces, el horizonte de las aportaciones que sedujeron al colega americano: “los viajes, la residencia por algún tiempo en el círculo en que se producen... Fácil es notar, desde luego, el grande auxilio que para esta clase de trabajo pueden prestar los establecimientos de enseñanza en sus diversos grados y en especial las Facultades de Derecho... La observación de los hechos consuetudinarios, de las supervivencias y de la génesis real de las formas jurídicas, es un trabajo de laboratorio, propio de la enseñanza superior y el más apropiado para desarrollar en los alumnos las cualidades características de los investigadores” (p. 236). No conozco el escrito enviado a Chicago, 187 cuartillas (“la plupart, manuscrites”) que pasaron a manos del traductor⁷⁶. Resulta difícil perseguir

⁷⁵ Cf. Rafael Altamira, “Metodología de la enseñanza del Derecho”, *BILE* 27 (1903), 359-364.

⁷⁶ Pero Wigmore lo puso finalmente a disposición de Altamira (“perhaps you might wish to publish it in Spanish”), como consta por carta de 6 de marzo, 1912 (apénd. n° 12). Altamira publicó otra vez su “Origen”... en *Cuestiones de Historia del derecho* (1914, *vid.*

las modificaciones sufridas por el texto original hasta formar el capítulo en cuestión, que además fue alterado por designios editoriales de última hora⁷⁷; en cualquier caso, nada indica que Altamira llegara a revisar la traducción de Philbrick – lo que hubiese hecho posible su aceptable manejo del inglés⁷⁸.

Ya sabemos que “Origen y desarrollo del Derecho civil español” apareció en varios fascículos (1908-1909) de la *Revista de Legislación Universal y de Jurisprudencia Española*: empresa intelectual de Alejo García Moreno (1842-1913), escritor krausista y federalista y experto en derecho internacional, bastante conocido por sus ediciones de leyes extranjeras⁷⁹. Pero las circunstancias de esta colaboración con García Moreno causan cierta perplejidad. Una primera nota del artículo de Altamira –falta en la versión inglesa– presentaba el trabajo como “parte de la Introducción á la primera parte de nuestra obra *Derecho positivo comparado*, cuyo tomo I, aparecerá á fines de Diciembre próximo, y cuyo prospecto insertaremos en breve en esta Revista”. Pero ni salió el anunciado prospecto ni –menos aún– se concluyó ese libro de “derecho positivo comparado” que Altamira prometía para finales de diciembre (1908). Perdimos así una insólita aportación a la bibliografía jurídica española⁸⁰.

abajo), pero reprodujo –con ligeros retoques en alguna nota– la versión publicada en la *Revista de Legislación Universal*; en el prólogo razona (p. 8) la exclusión en este libro del texto americano, elaborado “en vista de las necesidades de un público extranjero”.

77 “You will notice that we have made one or two slight alterations in your essay”, escribió Wigmore a Altamira en la carta arriba indicada, “by making a different division of parts, and by changing the order of one or two sections. This we found necessary in order to make it conform with to the scheme of the other parts of the book”.

78 Corrigió sin embargo las pruebas, lo que le permitió aclarar un par de puntos dudosos: cf. Rafael Altamira a Francis S. Philbrick, 29 de abril, 1912 (apénd. n^o 14). La nota editorial del volumen advierte que “the translation of the text (the notes less so) has been made as nearly literal as possible”. Como se sabe, Altamira había traducido (1892) los *Estudios jurídicos* de Thomas B. Macaulay, publicados en *La España Moderna*.

79 Sobre García Moreno contamos con la noticia de Manuel Ossorio y Bernard, *Ensayo de un catálogo de periodistas españoles del siglo XIX*, Madrid, Impta. J. Palacios, 1903, 160-161. Sobre su obra, *vid.* Bartolomé Clavero, “Legislación universal para pueblos modernos (1868-1914): un programa de textos para una comunidad de naciones”, en Víctor Tau Anzoátegui (ed.), *La revista jurídica en la cultura contemporánea*, Buenos Aires, Editorial Ciudad Argentina, 1997, 31-55; últimamente, Ignacio de la Rasilla del Moral, “El estudio del Derecho internacional en el corto siglo XIX español”, en *Rechtsgeschichte – Legal History* 21 (2013), 48-65.

80 Nota ^(a) en RLV 7 (1908), p. 209. Altamira también llegó a anunciar un tratado de

No conviene especular sobre su contenido, aunque la llamada *legislación comparada* –en el sentido de esta gastada expresión, equivalente a ordenamiento o sistema sin omitir la costumbre (“forma fundamental del derecho positivo”)– resultaba en el pensamiento de Altamira una noble orientación de la historia jurídica⁸¹. Tampoco conozco los particulares que hicieron fracasar el ambicioso proyecto – cuya culminación no facilitaron, ciertamente, la larga gira americana (1909-1910) y su nombramiento como director general (1911-1913). Con todo, la correspondencia de Menéndez y Pelayo viene otra vez en nuestra ayuda: “tengo también en revisión un resumen de la historia del Derecho civil”, le escribió desde Oviedo el 9 de marzo (1909)⁸², “un balance de lo poco que sabemos y de lo mucho que ignoramos, con abundante bibliografía, que espero servirá para orientar á las gentes y para despertar la dormida iniciativa de los jóvenes que lo creen todo resuelto y averiguado. La impresión provisional que de ese trabajo hace ahora –contra mi opinión– la *Revista de legislación universal*, no debe leerse. Una vez corregida y aumentada, figurará como prólogo á un libro de Derecho civil comparado, y allí lo verá V.” Si es evidente que el tal “resumen de la historia del Derecho civil” fue lo que permitió *in extremis* una presencia española en el libro de John H. Wigmore, resulta más difícil interpretar el rechazo de Altamira a esta “impresión provisional” de su escrito: consciente de “las corrientes de solidaridad entre los pueblos” que recorrían el mundo moderno, la *Revista* en cuestión era una sede idónea para los estudios comparativos⁸³. ¿Sería acaso la publica-

metodología histórica, versión definitiva de sus conferencias en la Universidad de La Plata (1909), igualmente fracasado: Juan José Carreras Ares, “Altamira y la historiografía europea”, en Armando Alberola (ed.), *Estudios sobre Rafael Altamira*, Alicante, Inst. Juan Gil-Albert, 1987, 395-413.

81 “Lo que ha de compararse”, escribió en “La Legislación comparada y la Historia del Derecho”, (cf. *Historia del Derecho español. Cuestiones preliminares*, Madrid, Victoriano Suárez, 1903, 49-58), “son las legislaciones y costumbres de los diferentes pueblos y de sus épocas sucesivas, para ver (objeto primero de toda comparación) sus semejanzas, sus diferencias, las relaciones y mutuos influjos que entre ellas se han producido, los tipos jurídicos que acusan, etc. Entendida así la Legislación comparada, entra por completo en el campo de la historia”, p. 51. Pero cf. *Historia de la propiedad comunal* (1890), Madrid, Instituto de Estudios de Administración local, 1981; también, “Les études de Droit comparé en Espagne”, en *Mémoires de l'Académie Internationale de Droit Comparé* 1 (1928), 97-109.

82 Menéndez y Pelayo, *Epistolario* cit. (n.35), vol. XX, nº 161.

83 Alejo García Moreno, “Nuestro propósito”, en RLU 1 (1902), 2-3; también, del mismo, “Creación del Instituto Ibero-Americano de Derecho comparado”, *ibid.* 7 (1908),

ción del artículo “Origen y desarrollo” exigencia de García Moreno a cambio de incluir en sus colecciones el futuro *Derecho civil comparado* que acariciaba Altamira? ¿Se debió la incomodidad de nuestro autor a la dispersión de un trabajo unitario a lo largo de nueve fascículos y dos anualidades? ¿O simplemente expresaba contrariedad por tener que adelantar el prólogo de una obra mayor? No lo creo; de todos modos, que la dicha “impresión provisional” no le disgustó del todo lo demostraría, aparte la colaboración con Wigmore, su presencia en las *Cuestiones de Historia del derecho* que Altamira dio a la luz poco después⁸⁴.

Mientras no aparezca el manuscrito original de 187 cuartillas –acaso una de las muchas pérdidas documentales que sufrió Altamira⁸⁵– sólo cabe hacerse una pálida idea de su alcance mediante el cotejo de los artículos aparecidos en la *Revista* con el *Survey* finalmente publicado. Y de ahí resulta, en primer lugar, que la estructura del escrito se modificó, según dictados del editor americano, para incluir una introducción y cuatro capítulos que distinguían, a su vez, varios “tópicos”⁸⁶; su contenido (“wholly recast for the present volume, and much new material has been added”) se desplegaba seguidamente

305-311. Cf. A. García Góngora, “Derecho positivo comparado. Japón: el Código civil japonés. Su origen y plan”, *ibid.* 8 (1909), 341-349.

84 *Cuestiones de Historia del derecho* cit. (n. 2), 83-183; *vid.* también p. 9, con las circunstancias de la primera publicación y alusión al “tratado de Derecho civil comparado que no llegó a publicarse” – pero sin referencias a la versión americana. Altamira citó su “Origen” desde el principio: cf. “État actuel des études”, p. 184, sobre “mon tableau de l’Origine et développement du Droit civil en Espagne, qui est sous presse”.

85 La edición de Rocío Charques Gámez y otros, *La labor periodística de Rafael Altamira (I)*... Alicante, Universidad de Alicante, 2008, reproduce unos párrafos manuscritos de “Inventario de mis pérdidas económicas, intelectuales y morales, por causa de la guerra civil en España (1936-37)”, donde el autor lamentaba la desaparición de “mi biblioteca de Campello (unos 10.000 volúmenes), gran parte de la cual había de ser distribuida, a mi muerte, a centros de enseñanzas públicos y privados”, así como de “mi biblioteca escogida de Madrid, con libros de Arte de gran valor y los de trabajo de mi cátedra”. Por desgracia, mis búsquedas en el Fondo Altamira han sido infructuosas.

86 “A chapter is essentially a printer’s division only signifying a start on a new page”, leemos en un folio de instrucciones para los traductores; “hence, the grand topical division of the book should be so organized or re-constructed, if necessary, as to show the sequence of topics, by Titles or Topics. This is especially likely to be needed in German books, which are apt not to make enough topical subdivisions. Topical headings can be inserted within Chapters; if so, they should be numbered in Arabic”. Cf. *Wigmore Papers*, box 198, folder 10 (“Translation General, 1910-1914”).

en cuarenta y un párrafos, rotulados con epígrafes y numerados de forma correlativa⁸⁷. Los cambios sistemáticos siguieron con fidelidad las instrucciones, pero sabemos que Wigmore introdujo en el manuscrito cambios de última hora, “in order to make it conform with to the scheme of the other parts of the book”, como sabemos (carta de 6 de marzo, 1912, apénd. n° 12).

Son evidentes, en segundo lugar, las amputaciones y, sobre todo, las ampliaciones en el texto primitivo. Al fin y al cabo se trataba, en palabras de Altamira, de “un resumen de la historia que ordinariamente se llama *externa*, y parte de la *interna*, de nuestro Derecho... realmente [escrito] para satisfacer las condiciones del plan acordado por la Sociedad norteamericana, en vista de las necesidades de un público extranjero”⁸⁸. Los cortes no fueron intensos: situados al inicio de un par de capítulos, afectaron ante todo al § 4 (“Obscurity of the Celtic-Iberian Origins”) y al § 1 (“The Inadequacy of Existing Historical Accounts”), donde desaparecieron las habituales quejas por la escasez bibliográfica. Pero se suprimió también la definición preliminar del derecho civil, concebido –nada banalmente– como la rama jurídica relativa a “los derechos de la personalidad, con exclusión de los propiamente políticos, en todos sus grados: la institución familiar, los derechos relativos a los bienes, en que entran las sucesiones, y la contratación civil”⁸⁹. No fue supresión menor, pues la parte dedicada en la versión de la *Revista* a las instituciones civiles del absolutismo (cf. RUL 8 [1909], pp. 51-61) pasó a ser una historia de las fuentes y de la literatura jurídica (§§ 29-32). Además, el público americano perdió varias páginas sobre los fueros medievales⁹⁰.

“The passages giving details of concrete rules... might be cut down, because our volume is concerned with the *external* history of the law, and uses

87 El texto de la *Revista de Legislación Universal* está dividido en secciones numeradas, carentes de epígrafes; la inclusión de éstos (y de los signos de párrafo) constituyen una inserción, introducida seguramente por el propio Altamira; como modelo Wigmore le había enviado lo correspondiente a Italia (carta de 8 de abril, 1911, apénd. n° 2). Lógicamente, la estructura general del libro americano alteró la ordenación original del capítulo español.

88 *Cuestiones de Historia del derecho* cit. (n. 2), p. 8.

89 Sin duda tenía presente el Código civil portugués (1867) y su teoría de los “direitos originários”, que tanto interesó en los círculos adversos a la ley civil de Manuel Alonso Martínez – y que éste criticó.

90 Vid. Chap. 1, Topic 4, (“Christian and Moorish Kingdoms, a. d. 700-1300”) en relación con RLU 7 [1908], pp. 273-279. A veces en el texto para Wigmore se ha suprimido un número de párrafo (así el n. 18, libros jurídico alfonsinos) aunque no su contenido.

of the particular only as examples to illustrate the influence of a general movement”, había advertido Wigmore en una carta de 17 de abril, 1911 (apénd. n° 3). Ahora bien, para el lector de la *Series* parecía más útil que perderse en detalles incluir una presentación de los ‘elementos genéticos’ del derecho español y la noticia de los juristas hispanos y sus principales escuelas: exactamente, la solicitada historia *externa* de nuestro derecho – cosa que el mismo Altamira, desde un plano teórico, no dejó de criticar⁹¹. Por eso, las adiciones a los artículos de la *Revista* –unas treinta páginas según cálculos de Wigmore, quien pecó de corto– se multiplicaron en la traducción americana:

§ 3. Sketch of Legal Development by Periods from the Origins to the Present Day

§ 10. Statutory Source of the Visigothic Law (contiene una profunda reelaboración del original, con varios añadidos)

§ 16. Legal Sources in Castile (en general, todo el ‘topic’ 5 –“The Indigenous Groundwork of the Law in the 1200s”– de este capítulo primero presenta un contenido nuevo)

§ 19. History of the Legal Sources (León y Castilla)

§ 25. History of Legal Sources (reinos no castellanos)

§ 28. Notable Jurists of the Period (baja edad media)

§ 30. History of Legal Sources (edad moderna)

§ 31. Progress in the Unification of Law (*id.*)

§ 32. Legal Science in the Habsburg Period

§ 33. History of Legal Sources (siglo XVIII)

§ 34. Legal Science and Literature of the Bourbon Period

§ 35. Reform of Public Law (siglo XIX)

§ 41. Legal Science and Literature of the Period (*id.*)

Trece párrafos de los cuarenta y uno que completan el *Survey*, esto es: ese tercio de páginas extra escritas para la traducción; su condición de adiciones se revela en la parquedad –a veces, la total falta– de referencias. Por lo demás, el artículo primitivo se tradujo sin muchos sobresaltos, aunque Altamira (¿sus colegas de Chicago?) reordenó ciertos contenidos (el § 13 equivale al n° 11 de la *Revista*; el § 14 es el n° 15; el § 27 corresponde al n° 24 más un párrafo sobre Navarra que procede del n° 25 de 1909; los §§ 39-40 han sido el destino de los primitivos nn° 33-34...) y modificó la puntuación (cf. § 38, p. 118 *infra*); en este caso aparecían las notas, por lo común mantenidas con las pocas alteraciones derivadas de aclarar una cita (cf. n. 19, p. 20 *infra*), simplificar una noticia (n. 24, p. 23 *infra*) o completar, en fin, la información del

⁹¹ Vid. Rafael Altamira, “La distinción de la historia externa y la interna del Derecho”, en sus *Cuestiones preliminares* cit. (n. 81), 35-47.

texto originario (n. 10, p. 119 *infra*)⁹². Las advertencias del traductor, no muy numerosas (dieciséis en total), se insertaron entre corchetes.

V. A LEGAL HISTORY OF SPAIN

Nada que Wigmore no impusiera, en resumen, a los restantes autores y sus abnegados ayudantes; como vimos (I, n. 15), en la *Continental Legal History Series* quedó claro que “the editorial work is anxiously supervised”. De todas formas, la transformación del “resúmen” para la serie americana fue cosa sencilla en relación, por ejemplo, con la *History of Continental Criminal Procedure* (1913): verdadera *mélange* de capítulos extraídos del *Traité théorique et pratique du droit pénal* de René Garraud (1898-1892) y de la *Histoire de la procédure criminelle* (1882) de Edhémar Esmein, adornado todavía con retazos del viejo Mittermaier (*Das deutsche Strafverfahren*, 1845)⁹³. O comparada también al caso –lo usó Wigmore de modelo– del italiano Calisse: “I therefore desire to use your three volumes of Public, Private and Criminal Law”, escribió Wigmore a su colega italiano, “to make a single volumen on Italian Law; and we desire to use portion of your volumen on Sources to make two chapters in the Survey volume”⁹⁴.

Pero la técnica musivaria usada en las traducciones resultó inaplicable, lo sabemos, para España, donde la búsqueda de un libro adecuado –un título equiparable a Brissaud en Francia, Brunner en Alemania, Calisse en Italia– obligaba a retroceder un par de generaciones; justamente, hasta los tiempos de Juan Sempere y Guarinos⁹⁵. A pesar de los hallazgos y ediciones que aportó el fértil momento ilustrado (Burriel, Asso y De Manuel, Mayans, Campo-

92 Sospecho que, en algunos casos, los editores intervinieron en el aparato crítico. Así, el § 11 se cerraba con una nota 26 que cita la edición (1903) de la *Lex Romana Visigothorum* de Max Conrat (Cohn); esta información, que falta en la *Revista*, tampoco aparece en la versión de *Cuestiones de Historia del derecho* cit. (n. 2), p. 102.

93 Cf. *Wigmore Papers*, box 98, folder 9 (“Publication: General”), con *memoranda* sobre la preparación de los libros; el título aludido aparece ahí como “History of Criminal Procedure in France, with an Excursus on... Germany”, y estaba previsto añadir a los nombres de Esmein, Garraud y Mittermaier los Henri [sic por Jean-Baptiste] Brissaud y Ewald Löwe.

94 John H. Wigmore a Carlo Calisse, 10 de abril, 1911, en *Wigmore Papers*, box 190, folder 12 (“Carlo Calisse”).

95 Juan Sempere (1754-1830), *Historia del Derecho español*. Madrid: Imp. Nacional, 1822-1823.

manes, Floranes, Palomares, Martínez Marina)⁹⁶, la atención por el derecho pretérito decayó de forma acusada en la España liberal. Mientras en otros países europeos el saber histórico-jurídico experimentaba gran desarrollo y alcanzaba estatuto científico con cátedras, revistas, monografías y tratados especializados⁹⁷, aquí sólo tuvo presencia como una veloz introducción a las disciplinas positivas, en particular el Derecho Civil (“Historia e instituciones del derecho civil de España” y “Ampliación del derecho español civil y penal”, plan de 1850; “Historia y elementos del derecho civil español” y “Ampliación del derecho civil y códigos españoles”, plan de 1868)⁹⁸. Sus escasos cultivadores eran en realidad profesores de otras materias cuyas lecciones de historia jurídica se limitaban a describir fuentes legales todavía vigentes, con atención a sus fechas y circunstancias de aprobación: “el cuadro del desenvolvimiento progresivo de la legislación española ha sido expuesto, durante muchos años, en la cátedra de *Derecho civil*”, razonó uno de los más destacados, “los tratadistas de esta rama del derecho, al trazar su historia, han abarcado la

96 Jesús Vallejo, “El Fuero Real bajo las Luces, o las sombras de la edición de 1781”, en *Initium* 1 (1996), 611-643; del mismo, “Academia y Fuero: historia del Real en la Real de la Historia”, *ibid.* 3 (1998), 419-484; Esteban Conde, *Medioevo ilustrado. La edición erudita del Ordenamiento de Alcalá*, Sevilla, Universidad, 1998; Magdalena Rodríguez Gil, *Rafael de Floranes y Encinas, historiador del Derecho*, Madrid, Colegio de Registradores, 2009; José M^a García Martín – Ángeles Romero Cambrón, *El Fuero Juzgo. Historia y lengua*, Madrid-Frankfurt/Main, Iberoamericana - Vervuert, 2016.

97 Jean-Louis Halpérin, “L’histoire du droit constituée en discipline: consécration ou repli identitaire?”, en *Revue d’Histoire des Sciences Humaines* 4 (2001), 9-32; Manuel Martínez Neira, “Sobre los orígenes de la enseñanza de la historia del derecho en la universidad italiana”, en *CIAN* 7 (2004), 117-154.

98 Manuel Martínez Neira, “Los orígenes” cit. (n. 2), pp. 79 ss para el repaso de los textos oficiales (Gómez de la Serna, Del Viso, Domingo de Morató). Como recuerda el autor, las recomendaciones ministeriales ordenaban no detenerse mucho en la parte histórica inicial (“la historia del derecho español ocupará el primer mes del curso. Los restantes se invertirán en el estudio de las instituciones civiles y mercantiles”, en una instrucción de 1842, p. 77), lo que siguieron con fidelidad los programas para oposiciones y para la formación de los estudiantes; así el (inédito) elaborado por Salvador del Viso (1800-1861) para la asignatura de “Derecho civil, mercantil y penal de España”, donde se aborda sucesivamente la historia del derecho español (lecciones 1-16), el derecho civil (lecc. 17-80), el mercantil (lecc. 81-100) y el penal (lecc. 101-110), cf. “Salvador del Viso y Arañó”, en AA. VV., *Diccionario de catedráticos* cit. (n. 29) (Carlos Petit). Sobre el programa de Sánchez Román, Martínez Neira *ibid.*, pp. 91 ss.

general del derecho español”⁹⁹. La narración enfatizaba la unidad jurídica lograda bajo los visigodos, a la espera de aquella unificación legal definitiva que habría de traer consigo el deseado Código civil. Y aunque el libro de Sempere se mantuvo presente en las aulas hasta mediados de siglo, los títulos que le siguieron –como la *Historia de la legislación española* de José M^a Antequera (1849, ²1884)– carecían del método documental y del espíritu crítico propugnados por la mejor historiografía¹⁰⁰.

La difusión tardía de ese método en España coincidió con el nacimiento de la “Historia general del Derecho español” como asignatura autónoma en los planes de Derecho gracias a las reformas de los años 1880. Había llegado por fin el momento de llevar también a las facultades jurídicas la ideología de la Nación, el sujeto histórico-político del derecho y del Estado liberal¹⁰¹. En esa coyuntura tan comprometida el flamante catedrático de Oviedo “aparecía como una bisagra que cerraba una etapa y abría otra en esta disciplina universitaria... con él concluían... los orígenes para adentrarnos en los tiempos de madurez”¹⁰².

En realidad, las enseñanzas históricas impartidas bajo la Restauración eran la excusa para brillantes ejercicios oratorios donde el pasado se sometía al juicio de los contemporáneos y se lanzaban las consignas –religión, monarquía, unidad– que, desde el catedrático universitario a los futuros escola-

99 Martínez Neira, “Los orígenes” cit. (n. 2), p. 79, con uso de los *Estudios de derecho civil* de Felipe Sánchez Román (1890).

100 Gonzalo V. Pasamar Alzuria, “La invención del método histórico y la Historia metódica en el siglo XIX”, en *Historia Contemporánea* 11 (1994), 183-214; Ignacio Peiró Martín – Gonzalo Pasamar Alzuria, *La Escuela Superior de Diplomática. Los archiveros en la historiografía española contemporánea*, Madrid, ANABAD, 1996; Ignacio Peiró Martín, *Los Guardianes de la Historia. La Historiografía Académica de la Restauración*, Zaragoza, Institución Fernando el Católico, ²2006.

101 “Para conocer bien las instituciones, hay que verlas en su historia, y sólo mediante ésta podrán combatirse la idolatría hacia lo legislado y actual y la pretensión de que el legislador lo es todo, tan frecuentes en los abogados”, en *La Enseñanza de la Historia* cit. (n. 43), pp. 445-446. Sobre ello insistió en sus conferencias de Argentina: cf. Manuel Martínez Neira, “Los orígenes” cit. (n. 2), p. 163.

102 Manuel Martínez Neira, “Hacia la madurez de una disciplina. Las oposiciones a cátedra de Historia del Derecho Español entre 1898 y 1936”, en *CIAN* 5 (2002), 331-458, p. 331. Sobre la contribución de esta asignatura a la cultura de la *nación* desliza atinadas observaciones el mismo Martínez Neira en “Los orígenes” cit. (n. 2), pp. 162 ss; últimamente, Pedro J. Chacón Delgado, *Costa y el regeneracionismo en el fin de siglo*, Santander, Universidad de Cantabria, 2013.

res de los estudiantes de Letras, tenían que forjar la conciencia del auténtico ciudadano. Unos ciudadanos patriotas pero acrílicos, formados con libros elementales que también lo eran. “Las cosas corrían mansamente por el prefijado cauce de la santa rutina. El profesor de Historia –el que trabajaba y tenía fama de buen maestro, se entiende– reducía... su misión a pronunciar un discurso vehemente y retórico, acalorándose mucho en pro o en contra de personajes que fenecieron cinco o acaso veinte siglos ha... A nadie se le ocurría que el alumno trabajara por sí, que viera las cosas; no ya que manejase fuentes, sino que, al menos, utilizara material de enseñanza, como era utilizado en las clases de Física o de Historia Natural... Yo, superviviente de aquel sistema didáctico, recuerdo que abandoné las aulas de Historia sin ver ni un mapa, ni una lámina, ni un libro que no fuera el de texto: ni un papel, salvo los de mi cuaderno de notas”¹⁰³.

Ahora bien, si los cursos universitarios de “Historia de España” no iban más allá del libro de texto y los apuntes, la investigación avanzaba gracias a los esfuerzos de una constelación de eruditos locales, archiveros, arqueólogos... que seguían con fidelidad los dictados de la Real Academia. Otras materias históricas presentaban un panorama similar¹⁰⁴. La relativa al derecho estaba, empero, en situación más comprometida. El “curso preparatorio” de historia española que, contra muchas opiniones, habían respetado las reformas de Gamazo y Sardeal reproducía simplemente los tópicos habituales de la materia –listas de guerras y reyes, aprendidas de memoria– para juristas en ciernes; mientras tanto, la historia propiamente jurídica, nacida de esas mismas reformas, tenía que buscar su lugar en una facultad con clara vocación práctica: una “fábrica de abogados”, llegó a opinar Altamira, “aunque lo sea realmente en la intención y no en el hecho”¹⁰⁵.

Visto desde el ángulo del profesor, la bibliografía existente no permitía si-

103 Son recuerdos del modernista José Deleito Piñuela (1918) que recupera Ignacio Peiró, “La historia de una ilusión” cit. (n. 37), p. 217. Se trata de uno de los incontables interlocutores de Altamira: cf. carta de Deleito informando de sus trabajos y petición de consejo, en Fondo Altamira, sig. C-7/37, 3 de julio, 1911; pero son numerosas las comunicaciones por esas fechas, cuando Deleito estaba pensionado por la Junta de Ampliación de Estudios.

104 Gonzalo Pasamar Alzuria, “De la historia de las bellas artes a la historia del arte. (La profesionalización de la historiografía artística española)”, en AA. VV., *Historiografía del arte español en los siglos XIX y XX*, Madrid, Alpuerto (Departamento de Historia del Arte “Diego Velázquez” – CSIC), 1995, 137-149.

105 *La enseñanza de la Historia* cit. (n. 43), p. 443.

quiera pergeñar una aceptable visión de conjunto. Los trabajos de anticuarios (Rodríguez de Berlanga) o de diplomatas (Muñoz y Romero), con unas pocas excepciones más ‘jurídicas’ limitadas a las instituciones visigodas (Pérez Pujol) y las medievales (Hinojosa), aún se contaban con los dedos de la mano, así que lanzarse a escribir una obra “según las últimas investigaciones” (lo intentó Hinojosa con el derecho romano) resultaba un empeño comprometido. De modo en absoluto casual, Matías Barrio y Eugenio M^a Chapado –ambos coetáneos de Altamira, aunque pertenecientes a la generación anterior– solamente publicaron manuales, notas de clase y algún discurso ceremonial¹⁰⁶.

Muy diferentes fueron las circunstancias del profesor de Oviedo. Firma bien conocida en la prensa (no sólo la jurídica) finisecular, autor de estudios monográficos¹⁰⁷, ponente en congresos internacionales¹⁰⁸, la desconfianza de Rafael Altamira ante los manuales universitarios se basaba en varias razones.

106 De Chapado conocemos su discurso de doctorado (*Examen y juicio crítico del Ordenamiento de Alcalá*, Madrid, Impta. Eugenio Aguado, 1863) y la lección inaugural del curso 1904-05 en la Universidad de Valladolid (*La ciencia del Derecho es importante factor de la regeneración social*, Valladolid, Tip. Cuesta, 1904); de Barrio, apenas el discurso doctoral (*Teoría fundamental de las circunstancias agravantes y atenuantes de los delitos*, Madrid, Impta. Segundo Martínez, 1866). Desconozco si la poca inclinación de Barrio a los estudios especializados estuvo detrás de su negativa a utilizar obras de consulta cuando tuvo que preparar la lección (nº 17 de su programa, sobre la caída del reino de Toledo) en las oposiciones a la cátedra de Madrid (1891); cf. Martínez Neira, “Los orígenes” cit. (n. 2), p. 111.

107 “La propiedad comunal en el nuevo Código civil de Montenegro” (1888); “La cuestión de la propiedad comunal” (1888); “La propiedad comunal y la legislación contemporánea” (1889); “Colaboración de los abogados para la Historia del Derecho” (1889); *Historia de la propiedad comunal* (1890); “Nota sobre la cuarta edición del libro de Laveleye *La propiedad comunal en la historia*” (1891); “Mercado de agua para riego en la huerta de Alicante y en otras localidades de la península” (1892); “*Colectivismo agrario en España* de J. Costa” (1898); *Derecho consuetudinario y economía popular de la provincia de Alicante* (1905). Pero la atención monográfica, volcada en las instituciones y fuentes indianas, se disparó en el exilio: “La legislación indiana como elemento de las ideas coloniales españolas” (1938); “El texto de las Leyes de Burgos de 1512” (1938); “El manuscrito de la gobernación espiritual y temporal de las Indias y su lugar en la historia de la Recopilación” (1939); “Autonomía y descentralización administrativa en el régimen colonial español” (1944-1945); “La extraña historia de la recopilación de Antonio de León Pinel” (1949-1951), etc.

108 Tengo presente los trabajos de Altamira en los congresos de Ciencias Históricas celebrados en Roma (1903), Berlín (1908) y Londres (1913). También participó en el congreso de Instituciones de Educación Popular en Buenos Aires (1909) y en el de Pedagogía de Bruselas (1911).

Primeramente, contrario, como en efecto lo era, al denostado “procedimiento memorista, bueno para repetir nombres y fechas, pero absolutamente inútil para que el alumno forme sentido de los hechos humanos, del proceso de su desarrollo y de la manera de formar críticamente su conocimiento”, Altamira se esforzó en conceder a sus estudiantes un papel protagonista. En sus cursos de Oviedo, tras unas sesiones de naturaleza introductoria –llegaron a incluir la lectura de “ejemplos de escritura española en diferentes épocas”– eran los alumnos quienes, con los materiales sugeridos por el profesor, exponían las lecciones del programa¹⁰⁹. De modo paralelo funcionaban además los seminarios, ya fueran sobre “la vida del obrero en España a partir del siglo VIII, y principalmente en lo relativo a jornales, jornada de trabajo y consideración social y jurídica”, ya sobre “la literatura amena como fuente para el conocimiento de las ideas y de las instituciones jurídicas”, por citar ejemplos conocidos. El número corto de matriculados facilitó la práctica de estas experiencias –se trataban, en rigor, de investigaciones colectivas– que encontraban natural desarrollo sin necesidad de contar con los manuales de la asignatura¹¹⁰.

La índole elemental de los disponibles y los propósitos de sus autores tampoco le causaban particular entusiasmo. “Tiene el manual ó ‘libro de texto’ –había observado Altamira años antes de Oviedo– dos gravísimos inconvenientes: 1.º, ser, por lo común, obra de tercera o cuarta mano, escrita de prisa, sin escrúpulo y con fin comercial, más bien que científico; 2.º, el carácter dogmático, cerrado y seco con que pretende ‘contestar a las preguntas del programa’. Añádase á estas dos faltas la de ceñirse, según el concepto antiguo, á los hechos externos de la vida política, y se tendrá retratado el carácter de ese medio de enseñanza, tal y como ha sido hasta nuestros días”¹¹¹. Y lo que resul-

109 “21. Nov. Termino la Introducción y expongo el plan de trabajo para en adelante. El curso sistemático (exposición del Programa) lo harán los alumnos mismos, preparando cada lección con las fuentes que se le indiquen y explicándola luego. Yo corregiré las faltas”, anotó Altamira en su cuaderno de cátedra (curso 1908-1909). Para todo esto cf. Agustín Bermúdez, “Rafael Altamira y la didáctica histórico-jurídica”, en Enrique Rubio Cremades y otros (eds.), *Rafael Altamira. Historia, literatura y derecho*, Alicante, Universidad, 2004, 141-155, con uso de material docente inédito.

110 “Organización práctica de un curso de Historia del Derecho”, en *Cuestiones preliminares* cit. (n. 82), 117-124, p. 117; para la crónica de sus seminarios, cf. “Trabajos realizados en el seminario de Historia del Derecho”, en *Cuestiones de Historia del Derecho* cit. (n. 2), 355-381. La teoría del caso en *La Enseñanza de la Historia* cit. (n. 43), p. 79 (visita a la École de Chartes), pp, 444 ss.

111 *Ibid.*, p. 325.

taba aún peor: el nivel de los manuales españoles –con rarísimas excepciones– exasperaba los límites de un género de por sí empobrecido. “Historias nacionales del Derecho las hay, pero siempre de poca extensión”, escribió al penalista salmantino Dorado Montero; “Schupfer y Pertile para Italia; Braga para Portugal; Klimrath y Guiraud para Francia; Brunner en Alemania, etc. no le sacarán a V. de apuros. Lo mismo digo de las Historias del Derecho español. Todas son peores, además; salvo la incompleta de Hinojosa”¹¹².

Se vislumbra a contraluz el deseo de disponer de un manual de historia jurídica más sugerente que dogmático, elaborado con investigaciones de primera (o segunda) mano y carente de fines comerciales; una exposición que, si fuera necesario, quedase libre de los límites marcados por los programas canónicos de la disciplina. Mientras llegara el momento de ese texto ideal no había que detener la edición de fuentes –una de las grandes carencias de la bibliografía española– ni la factura de trabajos específicos, como los que impulsó Altamira, a partir de 1914, en su cátedra de historia de las instituciones americanas. Ni tampoco convenía soslayar la factura de una síntesis informada, aunque fuese provisional; por ejemplo, como introducción a un tratado de derecho civil comparado.

Tocamos así el objeto de estas páginas. “Origen y desarrollo del derecho civil español” fue el ensayo sintético (“resumen brevísimo del estado actual de los conocimientos de Historia jurídica española en materia civil”) que elaboró Rafael Altamira. En tanto “resumen de la historia que ordinariamente se llama *externa*, y parte de la *interna*, de nuestro Derecho”, privilegiaba la atención por las fuentes jurídicas (“de las *fuentes* y de los sucesos políticos ó sociales necesarios para su explicación”, según cita recogida por el autor)¹¹³; algo sin duda coherente con la tradición de los libros de ‘códigos’, pero también necesario para avanzar hacia la ‘historia interna’ (“el fondo del Derecho, de sus disposiciones y de sus principios”) que sólo harían posible futuras investigaciones. “Lo único que se ha hecho hasta ahora con carácter general”, reconoció Altamira en su artículo, “es la historia del desarrollo de algunas instituciones á través de los llamados códigos, de texto a texto, marcando las

112 Laureano Robles, “Cartas de Altamira a Dorado Montero y Unamuno”, en Alberola (ed.), *Estudios sobre Rafael Altamira* cit. (n. 81), 73-125, carta de 23 de febrero, 1898, en pp. 94-97. Un error de lectura, que corrijo en mi cita, convierte el apellido Pertile en ‘Pepese’; en el mismo caso, el ‘Klönrrath’ de la transcripción se refiere a Henri Klimrath: malgrado historiador y jurista alsaciano (1807-1837), cuyos escritos Altamira conoció perfectamente: cf. “La distinción de la historia externa y la interna” cit. (n. 91), p. 37, n. 1.

113 “La distinción” cit., p. 37.

variaciones que en ellos se observan; pero no la historia integral de ellas, utilizando las demás fuentes de Derecho (la costumbre, la jurisprudencia, las leyes de Cortes, etc., etc.); cosa que, por otra parte, será imposible mientras no se realice la infinidad de investigaciones de detalle que faltan”.

Confrontada esta síntesis con los manuales de historia jurídica se observan ciertos puntos compartidos y (las más) destacadas diferencias. Ha sido común ordenar la narración según un criterio cronológico: períodos históricos sucesivos según las divisiones habituales del pasado español; un modo de proceder “clásico y realmente el más propio (el único propio, puede decirse) de la Historia”. Pero Altamira sabía perfectamente que existían otras posibilidades; por ejemplo, valorar las influencias o los aportes “raciales”, aunque los partidarios de esta orientación la dejaran atrás al culminar la alta edad media, o entender que los cambios decisivos en una experiencia tan compleja como la jurídica obedecieron a muchas causas, entre ellas las “condiciones extrajurídicas del vivir de un pueblo”¹¹⁴.

Un criterio “flexible” siguió Altamira en sus páginas americanas¹¹⁵. De la historiografía general tomó, en primer lugar, los nueve momentos decisivos en la aventura histórica española: (i) la fase más primitiva, (ii) la colonización fenicia y griega, (iii) la dominación romana, (iv) la visigoda; (v) la dominación árabe y la primera reconquista, (vi) los reinos cristianos y el final de la reconquista, (vii) la monarquía absoluta de la casa de Austria, (viii) la de los Borbones, y (ix) el momento constitucional. Que el autor advirtiera falta de coherencia y bastantes dificultades en la aplicación de estas divisiones al espacio de la historia jurídica (“because the events, taken as divisional lines... did not always bring them after important modifications in legal institutions, not even in legal sources”) no impidió finalmente su utilización: aparecían tras los capítulos que, en inevitable cadencia temporal, presenta el *Survey* de Altamira¹¹⁶.

114 Rafael Altamira, “El plan de la Historia del Derecho español”, en *Historia del Derecho español* cit. (n. 82), 151-160. Domingo de Morató siguió un principio de ordenación estrictamente jurídico-legislativo: habría fases históricas en que “no se dicta ley alguna en el territorio de la península española” y fases de consumación o realización del derecho español –las inauguró el reinado de Eurico– plenamente legislativas, que, a su vez, contenían una primera etapa dominada por la variedad de legislaciones (la España de los fueros) y otra, desde el Ordenamiento de Alcalá, de marcha progresiva hacia la unidad legal; cf. Martínez Neira, “Los orígenes” cit. (n. 2), pp. 136 ss.

115 Cf. *infra* pp. 6 ss, escritas especialmente para la edición de Wigmore.

116 “Quizá lo mejor respecto de ellas”, afirmó Altamira en referencia a las divisiones

Mas esos capítulos, en segundo lugar, respondían a tres fases distintas, donde se aprecia la proclamada “flexibilidad”: un largo momento “pre-nacional” del derecho español (de los orígenes más remotos a mediados del siglo XIII), donde diferentes “racial layers” están detrás de la evolución jurídica, seguido de otro “nacional” –subdivido, a su vez, en dos ciclos: la monarquía absoluta (siglos XVI a XVIII) y la España constitucional (siglos XIX y XX)– cuando las cesuras temporales reposan en los avatares de la historia política.

Compartido con otros textos elementales resultó, además, el empeño característico de la historiografía jurídica hispana –que, de modo asombroso, todavía pervive– en comenzar desde el principio, esto es, en trazar una narración “desde los tiempos más remotos hasta nuestros días” (Antequera). Así lo había hecho el viejo Prieto y Sotelo, cuya *Historia del derecho real de España* (1738) prometía “la noticia de alguna de las primitivas Leyes y antiquísimas Costumbres de los Españoles” y así siguieron Sempere, el recordado Antequera, Hinojosa, los libros de “códigos españoles” y los manuales o apuntes escritos al calor de la nueva disciplina. Tampoco se libraron de este síndrome de (*très*) *longue durée* los programas universitarios ni las listas de preguntas para los opositores a cátedras.

¿Se trataba de evocar un brumoso pasado, aquejado por la más completa dispersión jurídica, para introducir así aquel *desideratum* unitario que la antigua Roma y, sobre todo, la monarquía católica visigoda llegaron por fin a realizar?¹¹⁷ La propuesta de Altamira recorrió ese camino pero lo hizo desde escenarios propios. Jugaba el interés *fin de siècle* por la enigmática época prehistórica y las condiciones de vida en las cavernas, una vez zanjada, a favor de la ciencia española, la polémica sobre el arte rupestre del Cantábrico¹¹⁸. Y

cronológicas, “sería adoptar provisionalmente los períodos que se suelen distinguir en la historia total de cada pueblo y que suelen tener su resonancia en parte, mayor ó menor, de la vida jurídica”. Cf. *Historia del Derecho español* cit. (n. 81), pp. 159-160.

117 “No faltan por completo, á pesar de lo remoto de aquellos tiempos, noticias sobre la constitución política y religiosa de España en el período que reseñamos, y que podemos decir, en vista de ellas, que no llegó á formar cuerpo de nación bajo tal ó cuál forma de gobierno; sino que cada territorio, cada región, y aun tal vez cada tribu, obraban con independencia de los demás”. Cf. José M^a Antequera, *Historia de la legislación española...* Madrid, Impta. de A. Pérez Dubrull, ²1884, p. 15.

118 Marco de la Rasilla Vives – David Santamaría Álvarez, “Algunos promotores de la investigación prehistórica hispana a principios del siglo XX”, en *Archæia* 3-5 (2003-2005), 209-214; de los mismos, “La Exposición de Arte Prehistórico Español de 1921: el cometido del arte rupestre en la institucionalización de la arqueología prehistórica en España”, en

además existían trabajos –casi todos, extranjeros: D’Arbois de Jubainville, Cordier, Brissaud, Hübner– que Altamira citaba en sus páginas y le permitían presentar los torturados datos disponibles.

Y en fin, su admiración por el desbordante Joaquín Costa –“mi maestro y primer iniciador en las investigaciones prácticas de historia”, según la dedicatoria de *Cuestiones modernas de Historia* (1904)– daba una dimensión particular al estudio de las etapas más oscuras de nuestra historia jurídica. Siglos parcamente documentados por dos o tres autores greco-latinos y por los epígrafes –dos tipos de fuentes que Costa sabía usar con soltura– entre los primeros pobladores de Iberia se buscaba el arranque de instituciones ancestrales (el matriarcado, la propiedad colectiva, la hospitalidad), aún en parte vivas como usos regionales que no había logrado borrar el malquistado Código civil¹¹⁹. Y así la Hispania prerromana, dominio natural de la costumbre, por fuerza tenía que atraer a ese par de expertos en derecho consuetudinario¹²⁰.

“Creo que debe dar V. mayor importancia, y por tanto mayor latitud, a lo nacional (o sea, a lo ibérico y céltico)”, le aconsejó Costa ante las galeradas de la *Historia de la propiedad comunal*¹²¹, “que la que resulta de su relato, dema-

Suscum sevit. Estudios en homenaje a Eloy Benito Ruano, Oviedo, Facultad de Geografía e Historia, 2004, I, 3-47, pp. 16-17 sobre el desagravio institucional a Marcelino Sanz de Sautuola y Juan Vilanova. Prueba del interés de nuestro autor por estas cuestiones, el Fondo Altamira de Alicante (C-48/1) conserva una pequeña colección de fotos y recortes sobre hallazgos prehistóricos.

119 Tal vez interese saber que la *Revista de Legislación Universal* se estrenó con unas páginas severas de Rafael de Ureña, otro crítico del Código: *vid.* “La moderna evolución del Derecho civil en España”, en *RLU* 1 (1902), 83-86, 100-103. Un estrecho amigo de Ureña, principal autor del informe que estuvo detrás de la reforma de los planes, insistió en las denuncias: Felipe Sánchez Román, “Revisión de titulado del Código civil español y de las denominadas legislaciones forales”, *ibid.* 4 (1905), 164-167. Por supuesto, la costumbre también estuvo presente en ese órgano periódico: cf. Manuel Lezón, “Génesis y evolución del Derecho consuetudinario”, *ibid.* 3 (1904), 51-55.

120 Cf. Rafael Altamira, “Le droit coutumier espagnol moderne”, en *Recueil d’études sur les sources du droit en l’honneur de François Gény*, II, Paris, Sirey, ca. 1935, 269-271; del mismo, *Estudios sobre las Fuentes de conocimiento de la Historia del Derecho indiano. La costumbre jurídica en la colonización española*, México D.F., Revista de la Escuela Nacional de Jurisprudencia, 1949.

121 Cf. Cheyne (ed.), *El renacimiento ideal* cit. (n. 46), carta de 25 de agosto, 1889, p. 31. Pero las noticias sobre inscripciones, bibliografía extranjera, derecho consuetudinario... son numerosas en la colección.

siado sucinto, y que no caracteriza suficientemente lo peninsular ni contiene lo más sustancial que distinga esta civilización de las griega, latina, etc.” Visto entonces desde España el *Survey* de Altamira disponía de tradición y contexto, pero desde luego lo perdía una vez inserto en el volumen de Chicago. Y desde sus comienzos: la resolución corporativa que aprobó publicar la *Continental Legal History Series* (1909) contemplaba cubrir la antigüedad tardía, la edad media y los tiempos modernos (“from the fall of the Western Roman Empire in 476 to modern times”)¹²²; nadie pensó entonces en atender etapas más remotas, como revela además el inicio del tomo primero: unos capítulos de Carlo Calisse que discurren de Justiniano al feudalismo (pp. 3-85). En consecuencia, las síntesis territoriales arrancaban en el año Mil o, al máximo, se remontaban al pasado germánico¹²³; la incursión por la pre- y protohistoria fue una rareza española que obligó al editor a incluir una ‘fase Cero’ (un tiempo *pre-national*, se decía, “on account of the peculiar and complex origins of Spanish law”)¹²⁴, continuado por una etapa segunda –en rigor, la *primera*– que abrían los libros legales alfonsinos (“the ensuing period is here termed the first Period, in correspondence with the First Periods of Italian, French, and German national law”, cf. *infra* p. 12, n. 1).

“A suitable history of Spanish law has not yet been written”. Y sin embargo, el largo trabajo de Altamira, sin constituir un volumen autónomo, ofrecía con amplitud un panorama completo de fuentes e instituciones jurídico-civiles. Quizá por añorar esa historia no escrita los editores fueron más generosos con España: un total de 123 páginas impresas –eso dieron de sí aquellas 187 cuartillas “la plupart, manuscrites” enviadas por Altamira– solamente superadas en extensión por el *compositum* correspondiente a las tierras alemanas (pp. 307-451). El caso español ocupó así un lugar especial entre los ejemplos ‘menores’ de la tradición continental (Holanda: pp. 453-479; Suiza: pp. 481-530; Escandinavia: pp. 531-576), lo que saludaron positivamente los críticos (“the editors... have been particularly fortunate in securing the aid of

122 *The American Political Science Review* 6 (1912), 645-648 (Edwin M. Bochart).

123 *A General Survey* cit. (n. 2): Países Bajos, § 2. *Primitiv Period*, pp. 456-457; Suiza, § 2. *Primitiv Germanic Local Law*, pp. 484-488; Escandinavia, § 1. *Primitive Usages*, pp. 533-534.

124 “Part VIII takes up *Spain*”, recordó Wigmore en su “Editorial Preface”, p. xli. “Its mixture of racial elements makes its local legal history perhaps the most complex and interesting. As a source of movements of legal thought, it plays no extensive part. But as a colonizer, it carries its law over the western hemisphere, and thus acquires a world-importance”.

Senor Rafael Altamira”)¹²⁵. También ayudó, ciertamente, una aceptable traducción¹²⁶.

Ya se observó antes (cf. iv) que un tercio del texto traducido se escribió especialmente para esta edición. A beneficio de los lectores anglosajones Altamira acentuó los contenidos de ‘historia externa’ –noticia y descripción de fuentes– y añadió informaciones sobre la literatura jurídica –creo que muy atinadas y, desde luego, todavía de provechosa lectura– de los autores medievales y de edad moderna (cf. *infra* pp. 79 ss, pp. 92 ss, pp. 105 ss); para ciertos detalles de ‘historia interna’ valía una remisión a sus propias publicaciones: esto es, la versión original de “Origen”, pero también la *Historia de la civilización española*. Con todo, la parte de Altamira ofrecía al lector más notas y referencias de lo habitual en el tomo donde se coloca¹²⁷.

125 “The editors of this Series found that no adequate history of the law in Spain was in existence, but they have been particularly fortunate in securing the aid of Senor Rafael Altamira, until recently (1910) Professor of Legal History in the University of Oviedo, and at present director general of primary education in Spain, to write the article for the present volume. It is quite evident that Professor Altamira is a master of his subject. This is shown by his close adherence to the sources and the cautious reserve with which he lays down the limitations of our present knowledge of Spanish law”, opinó J. H. D. en *Michigan Law Review* 11 (1913) cit. (n. 4), p. 343; también p. 344 (“the best sections are those on the law of Italy and on the law of Spain, possibly because of the greater unity of the themes in these two cases”). A su vez la revista de Harvard saludó los capítulos españoles de *A General Survey* como “relatively full... of special interest to the American reader”, en *Harvard Law Review* 26 (1913), cit. (n. 13). Seguían, en realidad, la opinion adelantada por Wigmore en su prefacio: “the chapter here contributed is that of a master of the legal sources, and is admirably conceived to carry out the Committee’s plan for the book”, p. xxxix.

126 “In general the translation of the Spanish text runs smoothly, although in some instances the translator in his desire to give a literal translation of the text has apparently transliterated some linguistic or stylistic peculiarities of the Spanish original”, en *Michigan Law Review* 11 (1913) cit. (n. 4), pp. 344-345. No sé mucho de Francis S. Philbrik (1876-1970), un estudioso de Iowa con amplia experiencia académica en Europa (Berlín, Madrid, París), doctor por Harvard y abogado en Washington D.C cuando tradujo la pieza de Altamira (y las de Hübner y Huber) para la *Continental Legal History Series* (cf. Wigmore, “Editorial Preface”, pp. xxxix-xl). Su firma consta en revistas jurídicas (cf. “Changing Conceptions of Property in Law”, en *University of Pennsylvania Law Review* 86 [1938], 691 ss.) y en obras de historia jurídica (*The Rise of the West, 1754-1830*, 1965; “Laws of Indiana Territory, 1801-1809”, 1932).

127 Puede compararse, por ejemplo, con los capítulos sobre Alemania, donde el inicio del párrafo sirve para ofrecer una relación de las fuentes y de los principales autores

El repaso de las similitudes o, si se prefiere, de los puntos en común que su ensayo mantenía con los manuales no oculta las muchas diferencias. Comparado, por ejemplo, con la *Historia general del Derecho español* de Matías Barrio y Mier, colega de Altamira y uno de los jueces de sus oposiciones¹²⁸. Catedrático de la disciplina en Madrid desde 1892 (antes lo fue de “Geografía histórica” en Zaragoza, 1874; de “Prolegómenos de Derecho e Historia y Elementos de Derecho Romano” en Valencia, 1880; de “Historia y Elementos de Derecho civil español” en Oviedo, 1881)¹²⁹ circularon sus lecciones en ediciones impresas. Los textos de Barrio eran, por tanto, un producto directo de sus clases, transcritas por algún alumno y luego revisadas por el profesor; esta circunstancia explica los límites de una exposición general –siempre de naturaleza descriptiva– de “hechos jurídicos relativos á España ó al pueblo español” (I, p. 68), que nunca pasó de las ochenta y tres Leyes de Toro (1505). El texto se resolvía, en realidad, en un relato al estilo de los cursos de ‘códigos españoles’ (circunstancias ‘externas’ y ordenación ‘interna’ de los libros legales, con atención superficial a las instituciones públicas y privadas) y carente de aparato crítico, cuyo referente final era una *patria* procedente de la noche de los tiempos (“desde que España es España”, I, p. 18); una Nación española, precipitado sintético de varios elementos raciales (autóctono, romano, cristiano, germano, tradicional, extranjero: *vid* I, p. 69) que se identificaba, en última instancia, por la geografía física¹³⁰.

El *Survey* de Altamira tenía características propias. Ajeno a la docencia

que las analizaban; las restantes páginas quedan libres de anotaciones. Ello fue lo habitual (Francia, Italia, Escandinavia, Suiza).

128 Me refiero a la *Historia general del Derecho Español. Extracto taquigráfico de las explicaciones por D. Matías Barrio y Mier...* I-IV, Madrid, Victoriano Suárez, 2ª ed. corregida y aumentada. Carente de fecha, Martínez Neira, “Los orígenes” cit. (n. 2), p. 127 y n. 102, sitúa la obra después de 1894; en realidad debió publicarse en torno a 1900, pues veladamente se aluden los desastres de 1898: cf. I, pp. 12-13, pp. 16-17.

129 Sin mencionar otras experiencias docentes, como su cátedra en Vitoria a cargo de la administración municipal o sus trabajos en la universidad carlista de Oñate; cf. Matías Barrio y Mier, en AA. VV., *Diccionario de catedráticos* cit. (n. 29) (Carlos Petit).

130 “Las condiciones topográficas de nuestro suelo han dado al pueblo español ese aislamiento en que ha desarrollado su vida, ese amor á la independencia que ha mostrado siempre, esa falta de unión entre los habitantes de unas y otras regiones, que tanto retraso en la constitución de nuestra nacionalidad, y ese apego y fidelidad, que en todos los momentos de su vida, ha sentido por el suelo que lo vió nacer”, en *Historia general...* cit. (n. 128), I, pp. 125-126.

como sabemos, las afirmaciones irrefutables del anterior manual cedían ahora el paso a dudas e inseguridades: pues los estudios de historia del derecho eran aún incipientes, fragmentarios, llenos de errores; limitados al derecho legislado, dejaban además de lado la costumbre y la práctica de los tribunales (*infra*, p. 5); de ahí la atención por la bibliografía disponible, que Altamira citaba sin celar sus limitaciones; incluso tratándose del maestro Costa, cuyas sugerencias sobre el parentesco entre iberos y libios parecían demasiado hipotéticas (“not yet definitely accepted”, cf. *infra* p. 13). Mayor atención recibía el polígrafo de Graus en los párrafos últimos, donde la historia de la codificación civil española se completaba con la cuestión del derecho consuetudinario (*infra* pp. 124 ss). La principal diferencia, sin embargo, residía en la ‘ideología nacional’ que recorría, o que acaso no recorría, esta obra. Sin particular énfasis en el empleo del término-concepto “nación” –ni una sola vez se hablaba de “Spanish Nation”– lo *nacional* era uno más entre otros adjetivos que servían a Rafael Altamira para calificar lo español, lo autóctono, incluso, lo regional-local: un vocablo de alcance relativo (y así *nacional* vs. *romano-canónico*) que no parecía encerrar carga política alguna. Pero toca al lector presente descubrir otros puntos singulares –pienso ahora en la reticencia con que se evocaba la famosa conversión de Recaredo (*infra* p. 24)– para reconstruir la constitución material de España a partir de la síntesis histórica que nos dejó Rafael Altamira.

VI. LA PRESENTE EDICIÓN

En la reproducción de sus capítulos para *A General Survey of Events, Sources, Persons and Movements in Continental Legal History* procedo como sigue.

1. Respeto el texto de 1912, salvo la corrección de alguna errata; el respeto se extiende a las notas del traductor –van entre [corchetes]– incluso cuando sus aclaraciones no parecen necesarias para el lector medio¹³¹. Por supuesto, la bibliografía no se ha actualizado.

131 “The whole text can be re-touched”, escribió Wigmore a Altamira (apénd. nº 3), “so as to address it, not to its original audience (i.e. of critics and scholars of Spain), but to an audience composed of lawyers but foreigners, i.e. ignorant of the platitudes of Spanish legal history”.

2. Suprimo sin embargo unas líneas editoriales del comienzo¹³², inútiles en una edición exenta.

3. Según lo que hoy es habitual las notas se numeran correlativamente y por capítulos. En la publicación americana –también en las entregas de la *Revista de Legislación Universal* y en la versión de las *Cuestiones*– la numeración se abría en cada página.

4. La parte VIII del *General Survey*, como informe territorial que era, se titulaba, sin más, “Spain”, pero su publicación autónoma recomienda hallar un título que sea más explícito. Una carta de 18 agosto, 1911 (apénd. n^o 7) identifica la aportación como “Sources and Development of Law in your country”, lo que me autoriza a presentar la publicación como *Spain. Sources and Development of Law*.

132 “For an account of the author of this Part, Professor Rafael Altamira of Madrid, see the Editorial Preface to this volume”.

Apéndice documental

Mis trabajos en los *University Archives* de la *Northwestern University* (Evanston, Illinois), realizados en un lluvioso verano algo perdido en el tiempo, me permitieron estudiar los papeles que generó el empeño editorial de John H. Wigmore y las cartas cruzadas por este enérgico personaje con Rafael Altamira y Crevea. Disfruté entonces de la colaboración inestimable del archivero Mr Kevin B. Leonard, responsable de los *Wigmore Papers* (Box 198/F5 y Box 199/F2, para los fondos que nos ocupan). A su acogida amable y eficaz se ha sumado ahora su disposición al confirmar ciertas lecturas y completar con nuevas copias textos defectuosos.

Publico, en primer lugar (I), las dieciséis cartas (Box 199/F2, “Rafael Altamira”) que se cruzaron los dos principales protagonistas de este texto, correspondientes al período breve que transcurre entre el 23 de marzo de 1911 y el 25 de octubre del año siguiente: nueve de Altamira (de las cuales una para su traductor, Francis S. Philbrick) y siete de Wigmore; todas éstas en inglés, mientras el primero ha usado español (nnº 1, 2, 14), francés (nnº 8, 9, 11, 15, 16) e inglés (nº 13). Por varias referencias consta que existió una primera carta de Wigmore (25 de febrero, 1911), cuya respuesta es la nota correspondiente al 23 de marzo arriba mencionada (nº 1); otras misivas de Altamira responden o aluden a tarjetas postales del colega de Chicago que acaso estuvieron en las colecciones de ese autor –donde hoy día sólo queda lo que transcribo más abajo– pues los *Papers* de Evanston sólo conservan misivas de Altamira, siempre manuscritas, y copias de papel carbón de las cartas mecanografiadas que le dirigió Wigmore.

Siguen (II) cinco cartas con informaciones relativas a la literatura y los autores españoles relevantes para los proyectos de Wigmore (Box 198/F5, “Continental Legal History – Advisers”). Son textos de Walter Fairleigh Dodd (1880-1960), profesor de Ciencia Política en *Johns Hopkins University*; George H. Allen, latinista de Cincinnati y pionero editor del *Fuero de Cuenca*; y Gumersindo de Azcárate (1840-1917), maestro de Altamira y uno de los mayores juristas españoles de su tiempo. Esa correspondencia muestra el *modus operandi* de los americanos, su interés por las traducciones y, en definitiva, la adaptación de la ciencia jurídica europea.

Finalmente, una tercera parte del apéndice (III) es fruto de mis pesquisas en el Fondo Altamira que conserva –perfectamente inventariado– el Instituto de Enseñanza Secundaria ‘Jorge Juan’ (Alicante), a cuyo director, Prof. Luis E. Martín Mata, agradezco las facilidades de consulta; las indicaciones de signatura van en la transcripción. Faltan textos a los que la correspondencia recuperada hacen referencia, pero al menos hay nueve tarjetas postales (ocho manuscritas y una felicitación impresa) de Wigmore datadas entre 1912 y 1923, pocas sobre nuestro asunto; en un caso aislado (apénd. n^o 24) encontramos la respuesta a una tarjeta de los *Papers* (apend. n^o 16). Revelan, empero, el interés del profesor americano por mantener los intercambios con su colega español. Y también un buen manejo de nuestra lengua.

He respetado la ortografía de Altamira pero incluyo los acentos, casi siempre omitidos en el texto original; respeto también sus deslices lingüísticos con advertencia [sic] al lector. Trato con iguales criterios las cartas en inglés de Altamira y de Azcárate, pero corrijo alguna aislada errata deslizada en las de Wigmore. Mas el interés primordial de los documentos pasa por su contenido, que, gracias a la meticulosidad del decano de la *Northwestern University* y a la eficacia de sus empleados, nos permiten hoy conocer el proceso de producción, intelectual y material, de una notable obra científica.

C. P.

1911, marzo 23.

Rafael Altamira responde una carta anterior de John H. Wigmore y se ofrece a colaborar en el volumen que éste prepara, con otros particulares.

El Inspector General de Enseñanza

23 Marzo 1911

Mr John H. Wigmore

Muy Sr. mío y de mi consideración distinguida: Puesto que de los juicios que V. emite sobre libros españoles, puedo deducir la consecuencia de que lee V. sin dificultad el castellano, le ruego que me permita expresarme en este idioma para ser lo más claro posible en mis explicaciones.

Su carta de 25 Febrero ha llegado con retraso á mi poder, porque desde hace dos meses he dejado mi cátedra de Oviedo para encargarme, en Madrid, de la Dirección Gral. de 1ª enseñanza. Esto explica á V. el retraso de mi contestación.

Paso á ocuparme de los asuntos de su carta.

1. *Historia del Derecho civil en España.*- No poseemos, en efecto, ningún libro español que pueda, ni remotamente, equipararse al vol. II de la *Histoire* de Brissaud. Nadie ha escrito aquí la Historia de nuestro Derecho privado ó civil. Los Historiadores generales de nuestro Derecho, como Hinojosa, Antequera, Marichalar, etc. han incluido la materia aquella, en párrafos ó capítulos que sería difícil separar, y que en todo caso, tienen poco desarrollo. Por lo común –salvo Hinojosa, cuyo libro no pasa del siglo V– solo hacen historia de las fuentes.

Yo he escrito un resumen de Historia del Derecho civil, único trabajo sobre la materia que existe. Es breve, pero creo que suficiente para orientar al lector. Lo he publicado en una revista española, cuyos números enviaré á V. para que lea y juzgue el trabajo; pero yo creo que dada su corta dimensión, no llena el hueco de una Historia como la que Vds. desean, y más bien podría autorizarse para un capítulo del volumen correspondiente al nº 2.

2. *Introducción al estudio de las fuentes de la Historia del Derecho en España.*– El capítulo referente á España que Vds. desean para el Introductory volume on sources, puede componerse bien con los siguientes trabajos míos:

– a) Los capítulos V y VI de mi *Historia del Derecho español. Cuestiones preliminares.*

– b) El Rapport “État actuel des études d’Histoire du droit en Espagne” que presenté en el Congreso de Berlín (1908) y que es un resumen bibliográfico y crítico de fuentes y del estado actual de su estudio.

– c) El trabajo sobre la Historia del Derecho civil, de que he hablado antes.

– d) La monografía *Les lacunes de l’histoire du droit romain en Espagne*, que publiqué en “Mélanges Fitting”.

A esto añadiría un breve párrafo con nota de los principales jurisprudencias.

Si no se hiciese de este modo, sería preciso escribir expresamente el capítulo que Vds. desean, porque ni en Alcubilla, ni en Escriche, ni en ninguno de los libros de la lista nº II, hay nada parecido. La *Historia* de Pérez Pujol es una obra absolutamente inútil y llena de errores.

Envío a Vs. los trabajos b), c) y d) para que vean si, como yo propongo, uniéndolos con cierta habilidad a los capítulos mencionados en a), compondrían en sustancia lo que Vds. apetezen tener.

3. *Filosofía del Derecho*. Como verán Vds. parte de los capítulos de mis *Cuestiones preliminares*, son, propiamente, de Filosofía del Derecho.- Pero el libro capital entre nosotros y que principalmente se puede recomendar es el *Resumen de Filosofía del Derecho* por F. Giner y A. Calderón. Madrid, 1898.

Yours truly
Rafael Altamira

2

1911, abril 8.

John H. Wigmore agradece la buena disposición de Rafael Altamira, acepta su propuesta y le informa de la traducción y del monto de sus derechos de autor.

8º April 1911

Senor Don Rafael Altamira y Crevea
El Inspector General de Enseñanza
M A D R I D, Spain

Dear Sir,

I am extremely indebted to you for your very courteous and particularly valuable letter of 23 March, which has served to enlighten our committee, and to make its path easier. Already, of course, members of our Committee, especially

Dr. Francis S. Philbrick of New York, the translator, were quite familiar with your most distinguished work in the History of Spanish Law, and had already called my attention to your own essays and books on that subject. It was because of your distinguished position as a modern scholar that we desired to ask your advice. I perceive from your letter that the material for our Introductory Survey of Sources cannot be obtained even by patching together parts of the different books which you mention. A reference to those books has shown me that they deal with the sources in a critical manner, suitable for these who are already familiar with the sources, but not suitable for those who are seeking information for the first time. Our committee, therefore, is anxious to accept the suggestion made in your letter, that you will have both time and inclination to do this. We do not need the chapter until the first October; at that time Dr Philbrick would be ready to translate it into English.

The publishers have allowed us as honorarium to the author the sum of \$100 for each volume to be translated. As this Introductory Volume is to be made up of 10 or 12 articles, of course the amount which we could offer to each author is very small. But several of the authors (such as Professor Brunner) had given their consent without asking for an honorarium, and thus we should have some more money at our disposal as a special honorarium for yourself in consideration of the express preparation of the chapter for our purpose. The amount which could be allotted to you should be \$40 gold. I may add that the members of the editorial committee do not received any compensation.

As to the nature of the chapter, I can do no better than by sending you a short list of the topics to the corresponding chapter for Italy, which is a translation of the excellent Vol. I of Calisse. You will notice that we desire both the medieval principal sources and the jurists and schools of thought, and the legislative and literary sources, but that most of all we desire to tell the story in a connected form, showing the evolution and connection of periods and influences. The limit for Spain must be 100 printed pages, assuming about 600 words to the page. The amount allotted already to France, Germany and Italy is about 120 each.

I sincerely trust that this project will be agreeable to you. Certainly we should take great pleasure in introducing your name to America, and should feel that the scholar of Spain would applaud us in the selection. I enclosed three copies of the form of contract. Will kindly return two of them to me, with your signature.

Sincerely yours,
JHW

1911, abril 17.

John H. Wigmore acusa recibo de las separatas anunciadas y transmite instrucciones sobre la versión que, sobre tal base, ha de preparar Rafael Altamira.

17 April 1911

Senor Don Rafael Altamira

April 17

After writing the forgoing, your essay on "Origen y desarrollo etc." came to hand, being delayed in the mail. On reading it, I perceive that it supplies a basis for precisely what we need. I therefore suggest that you use its 71 pages as the *corpus* of your chapter for us, with the following additions and changes, which I humbly beg to suggest as needed to adapt it to the information of American readers, and the general plan of our book.

(1) The passages giving details of concrete rules (e.g. §§27-29) might be cut down, because our volume is concerned with the *external* history of the law, and uses of the particular only as examples to illustrate the influence of a general movement.

(2) A skeleton should be supplied, as an introductory § of 5 pages, on which to hang the flesh and blood, i.e. an outline of the framework of Iberian, Celtic, Roman, Gothic, Frankish, Moorish, Reconquest, Bourbon, etc. dominations, to remind the reader of the successive racial and dynastic changes by which the law was scolded.

(3) After the Fuero Juzgo, i.e. from §13, the dates of the notable legislative acts (e.g. Fuero Real, Ord. de Alcalá, Recopilacion, etc.) should be inserted (as is already done for the Partidas, etc.), because our people do not know these things.

(4) The names and achievements of the most notable jurists of the 1500's-1900's should be inserted in the proper §§, to the extent of 5 pages in all.

(5) So also the various schools of thought and philosophic influences of the 1500's-1700's, should be mentioned (as contained in Hinojosas' essay, cited in §26), to the extent of 5 pages. This and (4) and (7) are the three *most important* needs.

(6) Probably also something especial (1 page) should be added in §27 about the legislative reform movement in general in the 1700's under Carlos III.

(7) The Commercial, Procedural, Criminal, Colonial, and Ecclesiastical Laws, should receive a special mention (with a short list of sources) probably in §§ inserted after §29. This is essential, and could be given 15 pages.

Thus the total addition need not take more than 30 pages, making 100 pages in all. The whole text can be re-touched, so as to address it, not to its original audience (i.e. of critics and scholars of Spain), but to an audience composed of lawyers but foreigners, i.e. ignorant of the platitudes of Spanish legal history.

If you will do this, it will make us very proud of our book, and quite confident of its exact fitness for its purpose. And I will remind you that there does not exist at this moment (nor has existed for one hundred years) in *any* European language, a book such as we plan, viz. a conspectus in one volume of the external data of the movement of the law (including the persons and circumstances constituting the moving forces) in all the principal countries of Europe. This book would be unique, and could well be of service in any country of Europe as an encyclopedic introduction to the study of comparative law. And just as today, general biology is the introduction to the study of anthropology, so the time is at hand when a broad view of the organic development of European law will be considered a natural preliminary to the study of the life of each individual national law.

Commending our proposal to your favorable consideration, and assuring you of our distinguished admiration and sincere esteem,

I am

Most respectfully yours.

JHW

4

1911, junio 7.

Rafael Altamira expresa su conformidad con las condiciones editoriales y económicas de su contribución al volumen que prepara John H. Wigmore.

El Director General
de Primera Enseñanza

7 Junio 1911
Mr. John H. Wigmore
Chicago

Muy Sr. mío y colega: Contesto con gran retraso a su carta del 8 Abril, porque he pasado una gran temporada de viaje fuera de Madrid. Reintegrado a mi casa, puedo atender á la correspondencia llegada mientras tanto.

Celebro mucho que mi trabajo “Origen y desarrollo etc.” parezca a Vs. una buena base para el capítulo que desean. Con toda franqueza le diré que por carencia absoluta de tiempo, no me hubiera podido comprometer ahora a escribir totalmente un trabajo de 100 páginas. A 30, que representan –según el cálculo de V.– las adiciones que necesita aquel estudio mío para llevar al plan del libro que Vs. preparan, ya puedo atreverme; y aunque en mi cargo oficial es difícil de que se disponga de tiempo cuando convenga, creo que puedo prometer en firme que para el 1º de Octubre tendrán Vs. en su poder mi original. Si se produjese algún retraso por causas ajenas á mi voluntad, procuraré que fuese lo más corto posible; pero no quiero ocultar á V. la contingencia de que así ocurra.

Estoy conforme con los honorarios que me ofrece V. Para escribir de nuevo las 100 páginas no hubiera podido aceptarlos; pero por las breves adiciones y la introducción, me parecen suficientes, dado el valor moral que le doy al hecho de colaborar en una obra americana de la importancia que Vs. proyectan.

Queda entendido, por supuesto, que no siendo igual la actual redacción de mi “Origen y desarrollo etc.”, a la que tendrá el mismo texto cuando se adopte el plan de Vs., yo quedo en libertad de reproducir aquél –no el de Vs.– en ediciones españolas como mejor me parezca.

Como de él no tengo más ejemplares que el que envié á V., le ruego que me lo devuelva para hacer sobre él las necesarias correcciones y adiciones.

Le repito las gracias por la honrosa distinción que me concede y por sus amables palabras con relación á mis trabajos de Historia del Derecho, y me repito suyo affoss. y colega

Rafael Altamira

1911, junio 20.

John H. Wigmore responde a Rafael Altamira con consejos sobre la preparación de su original.

20 June 1911
 Senor don Rafael Altamira
 El Director General
 De Primera Ensenanza
 Madrid, Spain

Dear Professor Altamira,

I am very glad to learn, from your letter of June 7, that you have agreed to undertake the article which we have requested from you. I accede to your various suggestions, and shall confidently hope to have the manuscript in hand here by October 21.

In regard to your concluding request that I return to you the copy of the essay which you already sent to me, I am sorry not to be able to do it at this moment. I have already forwarded it to the translator, Dr. Francis S. Philbrick, address Villa Kreuzmatt, Luzern, Switzerland, for his study. I have now written to him asking him to send it to you. But as the letter may take some time to reach him, I believe that you had better obtain another copy for your purpose. In fact, I should think that the manuscript would be much clearer and more suitable for the printer, if you re-wrote even the parts which are not to be changed, instead of merely inserting additions and alterations. This will also be the best way for making the literary unity of the new article. Moreover, it might take too much delay if you waited until you could receive that other copy from the translator.

I regret that it is out of my power to send back the original essay to you immediately. I did not suppose that this was your only one.

With much regard, and my assurances of distinguished consideration, and of the satisfaction of our colleagues that you will cooperate in our undertaking, I am

Yours faithfully

JHW

6

1911, julio 21.

John H. Wigmore da noticias a Rafael Altamira del traductor y recuerda la fecha en que espera recibir el original.

21 July 1911

Senor Don
Rafael Altamira
Madrid, Spain

Dear Sir,

Permit me to say that I have just received a letter from the translator, Dr. Philbrick, in Switzerland, telling me that he has forwarded to you by registered mail, the printed copy of your essay on Spanish Legal Sources, which you desired for re-writing to be translated in our volume.

I beg to remind you that we hope to have the manuscript from you by October 1st. next. Please send the manuscript by registered mail, to my address; and then I can forward it to the translator as he will by that time have returned to this country.

Yours faithfully

JHW

7

1911, agosto 18.

John H. Wigmore insiste sobre la fecha de entrega del original.

18 August 1911

Senor Don Rafael Altamira
Madrid, Spainn

Dear Professor Altamira,

I take the liberty of sending this note merely to remind you that we are expecting to receive your essay on the Sources and Development of Law in your country by October first.

The rest of the material for that volume is now almost all ready for the printer. Kindly send your manuscript directly to me.

With much appreciation of your interest in our undertaking, I am

Yours very truly

JHW

8

1911, septiembre 20.

Rafael Altamira da cuenta de sus muchas ocupaciones y anuncia a John H. Wigmore algún retraso en la entrega del original.

El Director General
de Enseñanza Primaria
20-9-911

M. le Prof. John H. Wigmore

Cher collègue,

Je viens de rentrer à Madrid après un long séjour hors d'Espagne occupé d'une mission officielle du Gouvernement. C'est à cause de cela, que mon travail – que je commence aujourd'hui – ne pourra pas être dans vos mains à la date du 1er Octobre prochain. Vous savez bien que je vous avais prévenu d'avance sur une contingence possible.

Mais mon retard ne sera pas long et vous aurez avant la fin d'Octobre – probablement vers le 15 – mon manuscrit. La copie envoyée par le Dr. Philbrick est dans mon pouvoir.

Agréé toujours, je vous prie, l'assurance de ma considération distinguée et de mon amitié

R. Altamira

9

1911, octobre 22.

Rafael Altamira anuncia el envío de su contribución a John H. Wigmore y discute detalles de su contenido.

El Director General
de Primera Enseñanza

le 22 Octobre 1911

Mon cher collègue : Comme je vous avais promis dans ma dernière lettre, j'ai dédiée tous les moments libres de ma besogne officielle à rédiger le chapitre d'histoire du Droit en Espagne d'après vos indications. Je crois avoir fait ce que vous désirez, en écrivant de nouveau la plupart de paragraphes après avoir coupé ceux qui renfermaient, dans la monographie primitive (p.e. §27-29), des détails qui n'étaient pas nécessaires au but de votre publication. A cause de ce travail qui a refait presque tout le texte, il m'a été impossible d'en arriver au but plutôt dans le mois courant.

Toutes les matières signalées par vous dans votre lettre du 17 avril ont été agrégées, et je pense que les 187 feuilles dont se compose mon envoi –la plupart, manuscrites– ne dépasseront pas les 100 pages de l'imprimé. J'ai signalé, cependant, quelques paragraphes avec du crayon *rouge*, qui peuvent être retranchés si vous le trouvez nécessaire.

Bien que le manuscrit est assez claire, je vois qu'il serait bon de me remettre des épreuves de la traduction anglaise. Elles vous seront retournées tout de suite.

Avec l'espoir d'avoir satisfait vos désirs, agréez, je vous prie, mes salutations amicales.

Rafael Altamira

Le ms. est remis aujourd'hui, recommandé.

Mr. John H. Wigmore
Chicago

10

1911, noviembre 11.

John H. Wigmore agradece a Rafael Altamira el original, anunciando su plena conformidad con el mismo.

11 November 1911

Senor Don Rafael Altamira
El Director General de Primera Ensenanza
Madrid, Spain

Dear Professor Altamira,

I have just received your letter of October 22, and the accompanying MS. I hasten to say that upon a hasty perusal, it seems to me exactly what we desire.

I will write you later more fully, and will now merely acknowledge the safe arrival of the MS:

Sincerely yours

JHW

1911, diciembre 3.

Rafael Altamira envía noticias biográficas y menciona sus obras principales.

El Director General
de Primera Enseñanza
3-12-911

Cher Monsieur

En réponse de votre carte postale du 10 Nov. je le plaisir de vous remettre ci-joint, deux articles biographiques que, je pense, vous donneront tous les renseignements désirés.

Ils vont vous donner aussi, j'en suis sûr, l'impression d'un esprit un peu dispersé, puisque j'ai écrit d'histoire, de littérature (même romances et nouvelles), de pédagogie. Mais les points centrales de mon activité ont été l'histoire (du Droit et générale de la civilisation espagnole) et l'enseignement. Pendant 13 années, j'étais professeur à l'Université d'Oviedo et j'ai organisé dans les Asturies l'University Extension dans un caractère tout à fait démocratique, puisque son public a été, dans sa majorité pris dans la classe de travailleurs manuels. Depuis le 1er Janvier de l'année courante me voilà chargé, au ponit de vue technique (pas du tout politique) de la Direction de l'enseignement primaire.

Mes livres les plus lus sont : *l'Historie d'Espagne et de la civilisation espagnole* (deux éditions parues), *l'Enseignement de l'histoire* (deux éditions), ceux dédiés à l'histoire du Droit et les deux volumes concernant ma champagne amé-ricaniste.

Voilà tout ce que, peut-être peut intéresser les lecteurs américains.

Ma chaire à Oviedo a été d'Histoire du Droit espagnol.

R. Altamira

Prof. Mr. John H. Wigmore
Chicago

1912, marzo 6.

John H. Wigmore expresa a Rafael Altamira su admiración, con instrucciones sobre corrección y envío de pruebas de imprenta.

Senor [sic] don Rafael Altamira
El Director General
de Primera Ensenanza
Madrid, Spain
6 March 1912

Dear Professor Altamira,

Herewith goes to you the proof sheets of your chapter on the History of Spanish Law. Permit me to renew my admiration for the extensive learning and fine scholarship of this production; and also to congratulate our Association of American Law Schools on being able to represent Spain by such an interesting and worthy essay.

Please observe the following directions in regard to these proof sheets:

1. As soon as this present package arrives in your hands, please send me a postal card notifying me of its safe arrival.
2. Do not held then longer than five days.
3. Do not make any additions to the text.
4. Your chief function will be to be sure that the personal names and the citations are correct.
5. When finished, please mail the proof sheets, by registered package, to the translator, Dr. Francis S. Philbrick, 2339 18th Street NW, Washington D. C. He will transfer your emendations to his copy of the proof.

Do you wish us to return to you your original MS after we have corrected the proof? Perhaps you might wish to publish it in Spanish.

You will notice that we have made one or two slight alterations in your essay, by making a different division of parts, and by changing the order of one or two sections. This we found necessary in order to make it conform with to the scheme of the other parts of the book.

With assurance of great esteem, I am

Sincerely yours,

JHW

1912, abril 25.

Rafael Altamira acusa recibo de las pruebas y se compromete a una inmediata corrección.

Madrid
25 - 4 - 912

Dear Sir,

The proofs are just arrived to me and will be returned [sic] to the translator if possible in the term of the five days. I say "if possible" by cause [sic] of some corrections necessary by lacking of my Spanish copy, and my wish of being the more accurate than I can be [sic].

Many thanks for your kindly opinion on my production.

Yours very truly

R. Altamira

14

1912, abril 29.

Rafael Altamira anuncia al traductor la remisión de las pruebas corregidas.

El Director General
de Primera Enseñanza

29 - 4 - 912

Muy Sr. mío y distinguido colega: Con esta fecha tengo el gusto de enviar á V. las pruebas corregidas, hasta la pág. 508¹, (que es lo recibido hasta ahora) de mi trabajo sobre la Historia jurídica Española, que V. se ha tomado la molestia de traducir al inglés.

No obstante la advertencia del Prof. Wigmore tocante á añadir nada en el texto, he tenido necesidad de incluir dos nuevas referencias bibliográficas en las notas. Como son muy importantes, según V. verá, y breves, espero que sean admitidas.

Advertiré V. igualmente algunas correcciones y una ó dos consultas con referencia á mi original castellano. De haberme enviado éste con las pruebas, hubiera sido más fácil resolver algunas dudas. Así, V. habrá de tomarse la pena de hacerlo, por lo cual le anticipo las gracias.

1 *Add. alia man.*] The other 50 pp. came to me at the same time, so evidently he found these and hurried their examination.

Créame muy suyo attmo. y colega
Que le besa

Rafael Altamira

Al Prof. Dr. Francis S. Philbrick.
Washington

15

1912, mayo 3.

Rafael Altamira comunica a John H. Wigmore el envío de las pruebas al traductor Philbrick.

Madrid

3 - 5 - 912

Cher Monsieur et collègue,

Je viens de recevoir votre carte postale du 18 et lettre du 21 Avril dernier, qui demandent l'envoi urgente des épreuves de mon chapitre. Heureusement [sic] il m'a été possible de ne pas attarder ce travail ; et le 1^{er} du courant –c'est à dire– il y a trois jours *toutes* les épreuves ont été remises à Mr. Philbrick, dûment recommandées. J'espère donc qu'elles vont arriver sans retard pour ne pas empêcher l'impression de l'ouvrage.

Agrééz toujours mes sentiments très cordiales [sic].

Rafael Altamira

16

1912, octubre 25.

Rafael Altamira lamenta no poder aceptar la invitación de John H. Wigmore en Chicago.

Hotel Seville
Madison Avenue & Twenty-Nineth St.
New York
Edw^d Purchas, Manager

25 – 10 – 1912
Prof. John H. Wigmore

Cher collègue et ami : Je suis en retard pour répondre à votre lettre de bienvenue, parce que j'avais l'espoir de pouvoir vous annoncer ma visite à Chicago et à la Law School. Cette [sic] espoir je l'ai eu jusqu'hier. Mais malheureusement le temps me presse pour retourner en Espagne, puisque la congée [sic] qu'on m'a donné maintenant est très courte et les affaires du Ministère réclament ma présence à Madrid.

Vous pouvez être bien sûr que je reste très obligé à votre aimable invitation et que je profiterai de la prochaine occasion [sic] –peut être l'année prochaine– de venir express aux Etats Unis pour faire des conférences, pour me rendre à Chicago.

Est-ce que le volume d'Histoire du Droit a déjà paru ?
Croyez-moi, cher Monsieur votre bien dévoué

Rafael Altamira

II. Cartas varias sobre materiales españoles (1910-1911)

17

1910, abril 21.

Walter F. Dood escribe a John H. Wigmore con información bibliográfica sobre la historiografía española y otros pormenores.

Johns Hopkins University,
Baltimore, Maryland,
April 21, 1910

Professor John H. Wigmore
Northwestern University Law School
87 Lake Street, Chicago, Ill.

Dear Prof. Wigmore:

Your note came in time to get into the May number of the American Political Science Review. I am sure that readers of the Review will be very much interested in the proposed translation of works dealing with legal history. Certainly all persons who concern themselves with the study of jurisprudence own you a heavy debt for planning this series of translations and that dealing with criminal law².

With reference to the work on French legal history which should be chosen for translation, I take it that you must restrict your consideration to Viollet's *Histoire du droit civil français*, Esmein's *Cours élémentaire d'histoire du droit français*, and Glasson's *Précis élémentaire de l'histoire du droit français*. Viollet's work can hardly be used because of its dealing only with civil law, although there is nothing, so far as I know, which compares with his treatment of the sources of French legal history (pp. 1-212). As between Glasson and Esmein, I should prefer Esmein. One objection of both Esmein and Glasson is that they do not bring their treatment behind 1789. But Esmein has partially answered this objection by his *Précis élémentaire de l'histoire du droit français de 1789 à 1814*, and might

² Cf. *The American Political Science Review* 4 (1910), 256-257, con noticia (anónima) sobre la serie histórico-jurídica, los componentes del comité editorial y sus primeros acuerdos en relación con las obras a traducir. En pp. 255-256 noticia de la *Modern Criminal Science* y el naciente *Journal of the American Institute of Criminal Law and Criminology*.

perhaps be persuaded to write a brief supplement to his larger work covering the period since 1789.

Several years ago I made an unsuccessful effort to bring about the translation and publication of a work dealing with Spanish legal history. At that time my feeling was that Antequera's *Historia de la legislación Española* should be used, but I have not thought much about the matter recently. Chapado García's *Historia general del derecho español* is, I believe, practically the only other available work and it is much longer than Antequera's book.

Very truly yours,

W. F. Dodd

18

1911, marzo 23.

John H. Wigmore agradece a George Allen el envío de su edición del Fuero de Cuenca, le comunica sus planes editoriales y solicita información sobre bibliografía española.

23 March 1911

Dr. George H. Allen
Cincinnati, Ohio

Dear Sir,

We have received a copy of your edition of the Fuero de Cuenca, and I have noted with great pleasure that we have in this country a scholar who can undertake a critical edition of such things. I have long been interested in the Spanish Fueros, and in the Gary Library of Ancient, Oriental and Medieval Law we have tried to keep adding to our collection of them. I seldom find any critical editions coming upon the market, and in various occasions of French catalogs, I have just missed bargain, which reached us too late to be of service. Nevertheless, we have a few of the older editions in our collection.

At present I am very much interested in trying to find a good history of Spanish Private Law in one volume. I am chairman of a Committee of the Association of American Law Schools, which is undertaking to publish a series of translations from volumes of Continental Legal History. We have already selected works rep-

resenting the best scholars in France, Germany, and Italy. But we are quite at sea for Spain. I believe that we have in the Gary Library about 2/3rds of the histories of Spanish law, and have recently ordered the few remaining ones. We have had come good advice from Dr. Philbrick of New York, and some others. But it seems still hopeless to find either of the following two things:

1) A history of Spanish Private Law within the compass of one volume, giving the history of the institutions themselves, and not merely the external history of the sources.

2) A history of the Sources and the Jurists within a hundred or so pages. We have just such material from the other countries; and we are not committed to quitting Spain from our series. Have you any light on this subject?

Yours faithfully,
JHW

19

1911, marzo 28.

George H. Hallen informa a John H. Wigmore sobre historiografía jurídica española.

University of Cincinnati
Department of Latin

March 28, 1911

Professor John H. Wigmore
Dean of the Northwestern
University School of Law,
Chicago

My dear Professor Wigmore;

Your very kind letter was received yesterday and I feel great satisfaction at this proof that the Fuero de Cuenca is meeting with a favorable reception.

I wonder whether you know the following contributions:

1. Discurso leído en la solemne inauguración del curso académico de 1906 a 1907 por D. Rafael de Ureña y Smenjaud, Madrid, 1906.

2. Altamira, *État actuel des Études sur l'Histoire du Droit espagnol et de l'Enseignement de cette science en Espagne*; *Bulletin Hispanique*, tome XI (1909), pp. 172-199.

These are invaluable for bibliographical data and determining the scope of works already accomplished. The latter is the complete text of a report which was read in abridged form before the International Congress of Historical Sciences at Berlin, 1908. Altamira pleads the inability of Spanish scholars to treat exhaustively the source material for Spanish law and urges that Hispanists abroad should devote their attention to Spanish legal, as well as literary, monuments.

In reply to your questions:

1. In general the history of Private Law is treated almost exclusively from the external point of view. The history of the substance of the law is confined to a partial treatment in essays and monographs of the legislative development of particular institutions. The aggregate range of these sporadic efforts is meager when compared with the whole field. A concrete example of them is Cárdenas: *Estudios Jurídicos*, (Madrid, 1884, which contains a number of historical essays such as "Ensayo sobre los bienes gananciales", and another on the dowry in Spanish law. I can say with confidence that what you desire does not exist, for the general works of Martínez Marina, Antequera, Sempere, put the emphasis on the historical scheme, not on the legal material.

2. I think that the introductory volume of Sánchez Román: *Derecho Civil* (Tomo I, *Historia General*, segunda edición, Madrid, 1899) may be taken as the standard work to-day on the external history. Of course it is much longer than you desire. Ladreda: *Estudios históricos sobre los Códigos de Castilla*, Madrid, 1896, would conform more nearly to your requirements in point of brevity. I possess this book but have not examined it carefully enough to vouch for its accuracy or scientific value. In this connection the contribution of Ureña y Smenjaud quoted above is of the utmost importance. But I know of nothing in exactly the form which you wish.

Do you know the following recent editions of foral institutions?

Mora y Lando: *Ordenaciones de la Ciudad de Çaragoça*, Zaragoza, 1908.

Bonilla y Ureña, *Fuero de Usagre*. This is exceptional in containing a glossary of mediaeval legal terms.

I trust that it will not seem inappropriate if I inform you of my plans for the future, since you have taken an interest in my work on the fuero. I have accepted a position with the Bureau of University Travel for a period of 5 years as their Berlin Director. I intend to continue the study of comparative law at the University of Berlin in so far as my other duties will permit, and hope ultimately to secure the doctor's degree in that department, presenting some study based on the fueros as thesis.

If at any time I can be of any service to you by reason of my residence in Berlin, I shall be very glad to have the opportunity.

Yours very faithfully
George H. Allen

Address After Oct. 1, 1991
26 Speyererstrasse, Berlin

20

1911, abril 5.

Gumersindo de Azcárate envía a John H. Wigmore listas de bibliografía española, con sus observaciones.

Instituto de Reformas Sociales
Presidencia

Madrid the 5th of April 1911

To the Professor
John Wigmore, Esq.
Chicago

Dear Sir

Referring to your letter asking whether [sic] it would be, in a single volume, among our juridical literature any History of the Spanish Civil Law, in order to be translated, not being adequate any of the books included in the list n^o 1, not knowing whether [sic] any of those included in the list n^o 2 would be useful for the case, unfortunately, my answer is quite categorical.

Neither in both lists nor out of them there is any book in the conditions you mention, that is to say, containing in a single volume a History of the Spanish Civil Law.

As you say also that in the introduction to the sources of the European Law you will dedicate about 100 pages to the Spanish Law pointing out the sources of the middle ages – the principal lawyers – the chief modern laws – influences [sic] in their development, you ask me whether [sic] it exists such a work already done, if not, which books would be useful to do it, I shall tell you that such a work

has not been done yet but it might be done employing the books underlined in the list n^o 1, also those indicated in the list n^o 3.

Concerning to your third question about Spanish authors of Philosophy of the Law I mention you the principal authors of several tendencies in the list n^o 4.

I regret, sir, not to be possible to give you more explicit, satisfactory answers.

Yours truly

G. de Azácarate

[Listas]

G. de Azácarate

Abogado

Alarcón, 1

LISTA NUM^o 1

Antequera

Branchitsch

Cárdenas

Chapado

Costa

Hinojosa

Marichalar y Manrique

Marina

Sánchez Román

Ureña

Sempere

Elías

LISTA NUM^o 2

Altamira – Historia del Derecho Español – Cuestiones preliminares.

Doubouys – Historia del Derecho penal de España.

Manresa – Historia legal de España. (1841-1848).

Morató – Estudios de ampliación de Derecho.

Pérez Pujol – Historia del Derecho español (Valencia 1886).

LISTA NUM^o 3

Broca y Amell – Instituciones de Derecho Civil de Cataluña.
Altamira – Artículos publicados en la Revista de Legislación y Jurisprudencia (1909).
Hinojosa – Trabajo presentado al Congreso de Ciencias Históricas de Berlín de 1908, sobre la influencia del elemento germánico en el Derecho Español.
El mismo – Estudios de Historia del Derecho Español.
El mismo – El régimen señorial y la cuestión agraria en Cataluña.
El mismo – La condición de la mujer en el Derecho Civil.

LISTA NUM^o 4

Giner y Calderón – Filosofía del Derecho.
Rodríguez de Cepeda – Elementos de Derecho Natural.
P. Mendive – Derecho Natural.
Mendizábal – Derecho Natural.

21

1911, mayo 22.

John H. Wigmore agradece a Gumersindo de Azcárate sus informaciones bibliográficas.

22 May 1911

Senor [sic] Don F. [sic] de Azcarate [sic]
Presidencia, del
Instituto de Reformas Sociales
Madrid, Spain

My dear Sir,

I thank you sincerely for your letter of April 5, with your very careful advice for our assistance in the selection of our books on Spanish law. I bet to express to you, on behalf of our Committee, my indebtedness for you extraordinary kindness in taking so much trouble to facilitate the labors of our Committee.

With assurance of our distinguished consideration, and our deep obligation,
I am

Yours sincerely,
JHW

*III. Tarjetas postales de Wigmore en el Fondo Altamira
(1912-1923)*

22

1912, abril 18.

John H. Wigmore urge la entrega de pruebas de su contribución.

Prof. Rafael Altamira
Director de la Primera Enseñanza
Madrid
Spain

April 18. If the printer's proof is not yet sent off by you, pray do so immediately, without waiting to finish it. We must proceed to press without further delay to keep our engagement with the Association.

John H. Wigmore

[Fondo Altamira C-10/11]

23

1912, mayo 7

John H. Wigmore señala término perentorio para el envío de las pruebas.

Prof. Rafael Altamira
Dirección de la Primera Enseñanza
Madrid
Spain

May 7

Dear Prof. Altamira,

The last day for our awaiting your proofs will be May 25. On that day the translator will send the proofs to the printer. Should your proofs arrive too late, I will try to cause the printer to use them.

John H. Wigmore

[Fondo Altamira, C-7/122]

1912, noviembre 2.

John H. Wigmore lamenta que las prisas de Altamira le impidieran una visita a Chicago.

Sr. D. Rafael Altamira
Dirección de la Primera Enseñanza
Madrid
Spain

Chicago, November 2

I am sorry to hear from you that your haste prevented a visit to Chicago. The History volume will be awaiting you on your arrival home.

Cordially,

John H. Wigmore

[Fondo Altamira, C-7/156]

1912, diciembre 7

John H. Wigmore felicita el nuevo año a Rafael Altamira, a quien desea encontrar el próximo verano.

Señor
Don Rafael Altamira
Dirección de la Primera Enseñanza
Madrid
Spain

Dic. 2 / 12

Compliments of the New Year. I was sorry I miss you in America but hope to see you next July in Madrid.

John H. Wigmore

[Fondo Altamira, C-7/161]

1913, diciembre 8

John H. Wigmore felicita a Rafael Altamira y le agradece sus atenciones cuando estuvo en Madrid.

Sr. Don
Rafael Altamira y Crevea
Calle Lagasca, nº 99³

Chicago, 31 West Lake St.

Decemb. 8

Con recuerdos agradables de su cortesía de V. del estío pasado, le deseo salud y prosperidades en el año nuevo.

John H. Wigmore

He recogido en todo más de 25 fueros, también una docena de retratos

[Fondo Altamira C-8/88]

1914, diciembre 8.

John H. Wigmore felicita a Rafael Altamira por el nuevo año.

Don
Rafael Altamira y Crevea
Lagasca 99
Madrid
Spain

Dec. 8, 14

Best wishes for the New Year from one not forgetful of your kindness.

John H Wigmore
31 West Lake St.
Chicago

[Fondo Altamira C-8/176]

3 Tachado: Direccion de la Primera Enseñanza

1916, diciembre 8.

John H. Wigmore felicita el nuevo año.

Sr. Don
Rafael Altamira
Lagasca 99
Madrid
Spain

Evanston, Illinois, Dec. 8 / 16

John H. Wigmore con sus mejores deseos en el nuevo año

[Fondo Altamira C-9/3]

1922, agosto 14.

John H. Wigmore envía una separate y expresa sus mejores deseos ante los comienzos del Tribunal Internacional de Justicia.

Sr. Don Rafael Altamira y Crevea
Lagasca 101
Madrid, Spain

T. W. H. Chicago, Aug. 14/22

Herewith I send you a recent essay of mine, which may interest you, though it is a slight performance. I trust that the World Court is now well started, and that you and my friend Prof. Moore are now well acquainted⁴.

John H. Wigmore

[Fondo Altamira C-10/134]

⁴ La calidad de la copia me impide descifrar una anotación inicial, creo que de otra mano, que no incide, desde luego, en el contenido de esta comunicación.

1923, diciembre [tarjeta impresa]

John H. Wigmore y su esposa Emma felicitan el nuevo año.

1923. Christmas greetings and New Year wishes from John H. and Emma H.
D. Wigmore

[Fondo Altamira C-11/25]

SPAIN

SOURCES AND DEVELOPMENT OF LAW

By

Rafael Altamira

EDITOR

The present chapter is in part a revision of articles published by the author, in the “Revista de Legislación Universal y de Jurisprudencia Española,” August, 1908 *et seq.*, on the “Origen y desarrollo del derecho civil español,” – in which the reader will find some points more fully treated than in the present essay. These articles have been, however, wholly recast for the present volume, and much new material has been added.

The translation of the text (the notes less so) has been made as nearly literal as possible.

The works cited frequently in the footnotes under abbreviated titles are as follows:

TREATISES: *R. Altamira*, “Civilización española” = “Historia de España y de la civilización española” (4 vols., Madrid, 1900-1910); *R. Altamira*, “Cuestiones preliminares” = “Historia del derecho español. Cuestiones preliminares” (Madrid, 1905); *R. Altamira*, “Droit Romain” = “Les lacunes de l’histoire du droit Romain en Espagne” (vol. I of the “Mélanges Fitting,” Montpellier, 1907); *R. Altamira*, “Estudios de Historia Jurídica” = “Sobre el estado actual de los estudios de historia jurídica y de la enseñanza de este orden en España” (Memoir presented to the International Congress of Historical Science. Berlin, 1908; printed also in the Bulletin Hispanique, 1909); *J. Costa*, “Derecho consuetudinario” = “D. C. y economía política popular de España” (2 vols., Barcelona, n.d. = 1902); *J. Costa*, “Plan de historia” = “Ensayo de un plan de historia del derecho español en la antigüedad” (in the R.G.L.J., vols. 68–75, and Madrid, 1889); *J. Costa*, “Colectivismo agrario” = “C. a. en España” (Madrid, 1898); *E. de Hinojosa*, “Derecho español” = “Historia general del derecho español,” vol. I (no more pub. – Madrid, 1887); *E. Hinojosa*, “Estudios” = “Estudios sobre la historia del derecho español” (Madrid, 1903); *E. Hinojosa*, “Discursos leídos” = “D. I. en la Real Academia de Ciencias Morales y Políticas en la recepción pública del autor” (Madrid, 1907); *A. Marichalar* and *C.*

Manrique, “Historia” = “H. de la legislación y recitaciones del derecho civil de España” (9 vols., Madrid, 1861-1872); *F. Sánchez Román*, “Derecho civil” = “Estudios de derecho civil ... é historia general de la legislación española,” 2d ed. (5 vol. in 6, vol. 2 = 1889-1890, vol. 3-5 and 1 = 1898-1900); *R. de Ureña*, “Literatura Jurídica” = “Historia de la literatura jurídica española. ... Intento de una historia de las ideas jurídicas en España” (2d ed., Tomo 1 in 2 volumes, Madrid, 1906).

Journals: R.G.L.J. = Revista General de Legislación y Jurisprudencia, vol. I, 1853+; Bol. Ac. H. = Boletín de la Academia de Historia; Ann. Éc. P. H. Etudes = Annuaire de l’Ecole pratique des hautes études. Section des sciences historiques et philosophiques.

INTRODUCTION

FACTORS AND PERIODS

§ 1. THE INADEQUACY OF EXISTING HISTORICAL ACCOUNTS

That the studies relating to the subject are still for the most part incipient, fragmentary, and full of errors, is the first caution which one undertaking to sketch the history of Spanish law is in duty bound to give. The only contributions made, up to the present time, of a general character (as, for example, by Gutiérrez, Morató, and almost all the historians of the Spanish codes and Spanish legislation) have been histories of the development of certain institutions followed from text to text through the so-called codes, with indication of the mutations which these record; not complete histories of such institutions, utilizing the other sources of the law (custom, the decisions of the courts, the statutes of the Cortes, etc., etc.). Such histories, for that matter, must remain impossible until after the completion of an infinity of detailed investigations that are now lacking.¹

It is clear that the present occasion does not permit the remedy of this deficiency, which it will be impossible to make good until after many years, when innumerable documents, preserved to-day inedited in archives, shall have been printed in critically emendated editions, and the task of synthesis prepared for by a long series of monographs. The writer's pretensions in this essay extend no further –and were he capable of more, the limitations fixed upon the present study permit nothing more– than to present the briefest summary of the actual state of our knowledge of Spanish legal history, without dwelling on details; such a summary as may leave the reader a general impression of the predominant tendencies which the law has apparently fol-

¹ *Altamira*, “Cuestiones preliminares,” “Droit romain,” and “Estudios de historia jurídica.”

lowed in the different periods of its development, as well of the frequent gaps which its history presents. To facilitate the amplification of these notions, which each reader can undertake for himself, we shall indicate, in the case of matters of primary importance, the chief sources of information.

§ 2. GENERAL INFLUENCES AND TRADITIONAL PERIODS IN SPANISH LEGAL HISTORY

Spanish law has taken form gradually under multiple influences and changes. These influences, down to the middle of the medieval period, originated in political –or at least in territorial– domination for commercial ends. Phœnicians (and possibly, before them, other peoples of Asia or Africa), Greeks, Romans, Goths, and Moslems, who came from foreign lands for ends either of conquest or of economic exploitation, brought with them their own systems of law and spread them through the Peninsula, sometimes merely through social contact, sometimes by a deliberate imposition which political circumstances counselled or even rendered indispensable. After the Arabic invasion the influences which operated upon the inhabitants of the Peninsula had another origin. These were no longer due to invasion, save during the brief period when the Spanish Mark was held by Charlemagne and his successors; but to intercourse and commerce with other peoples, – namely, with the French and the Italians in the northeast, in Catalonia; with the French also at various points in the rest of the Peninsula, where religious communities (for example, the monks of Cluny), or groups of merchants and soldiers (the Dukes of Burgundy were intermarried with Alfonso VI of Castile), either settled permanently or shared for a time in Spanish life. The same is true of the modern age, beginning with Charles I, in which such influences were broadened and spiritualized in proportion with the growth of international relations – as has been true of all countries. It is nevertheless clear that of all influences the most intense were those that resulted from conquests. These also have been the most studied and are the best known, excepting that of the Arabs, which has only begun to be the object of investigation, but is reputed by the majority of authors to have been very feeble in the field of law. To yet another alien people who lived in the Peninsula in great number and during many centuries –the Jews– it would seem that at most only a very slight influence upon legal institutions is attributable; an influence, however, not as yet accurately defined. The accession of the Bourbons to the throne of Spain in 1700 has been generally considered in legal history as beginning a new

period of foreign domination. In fact, it does not merit the title. It is indeed true that in the 1700s French intellectual tendencies had great influence in Spain, and French politics greatly influenced Spanish. But if in manners, literature, and science the influence of France caused notable changes, in the field of law these were reduced to certain innovations in administration and political institutions which, in many cases, merely completed an evolution already begun in earlier centuries. In the other branches of the law there were no important changes that can be attributed to that influence.

It is customary, in view of all these factors, to divide the history of Spanish law into the following nine periods: the primitive period; Phœnician and Greek colonization; the Roman domination, from the 200s B.C. to the 400s A.D.; the Visigothic domination, from the 400s to the 600s; the Arabic domination, and early period of the Reconquest, from the 700s to the 1200s; the reigns of the Christian Kings, and the end of the Reconquest, from the 1200s to the 1400s; the absolute monarchy of the Austrian house, in the 1500s and 1600s; the absolute monarchy of the Bourbons, in the 1700s; and the constitutional period, the 1800s. But if one reflects a moment upon this division (which is the current one), it will be seen at once that it is not logical, nor are all its divisions appropriate to legal history. It is not logical, because the criteria by which the periods are distinguished are unlike; the invasion of an alien race, for example, is not the same as a change of dynasty, especially where this, as was the case in the accession of the Habsburgs, did not at all signify a new influence in civilization. Nor is it proper and congruent to the subject; because the events taken as divisional lines, though of some import in external politics, did not always bring them after important modifications in legal institutions, nor even in legal sources, and consequently cannot fittingly be used to separate distinct periods.

A succinct résumé of the character of each of the periods named will make evident the justness of these remarks.

§ 3. SKETCH OF LEGAL DEVELOPMENT BY PERIODS FROM THE ORIGINS TO THE PRESENT DAY

The primitive period should, in rigorous accuracy, include the time anterior to all foreign contact, when the legal institutions of the Iberians and Celts (taking these to be the indigenous inhabitants of Spain, – although the latter were unquestionably invaders, and almost certainly the former also;

one and the other being new elements superimposed upon and fused with unknown primitive races) were maintained in purity, free of all alien influence. Inasmuch, however, as the notices we possess of Iberian and Celtic law in the Peninsula date from times cotemporaneous with, or even subsequent to, the influence of Phœnicians, Greeks, and Latins, it is not possible to say, with strict correctness, how far they indicate original laws or customs, and how far they present these to us already modified. Although Strabo speaks of versified laws of the Turdetanians (a tribe of the south of the Peninsula), it may be safely affirmed that the ordinary type of law among Iberians and Celts was that of unwritten custom; and its sources are in consequence lacking. As the Iberian idiom, in which the earliest inscriptions are written, is imperfectly understood, we do not know whether or not there may exist among them some utilizable texts of law.

Of the second period as well we have no texts. Saving such knowledge as we may affirm (at times only conjecturally) of the cities and territories where Phœnicians and Greeks, as settlers and rulers, maintained, at least for themselves, their own law, hardly anything can be said of the influence of those races, as factors of legal development, upon the indigenous population.²

The third period, that of the Roman rule, is perfectly well marked, and we possess of it numerous legal sources, which will be indicated below, – municipal statutes, imperial constitutions, decrees of Roman governors, treaties, etc. The Roman influence was profound, alike in public and private law, and constitutes an indelible element in history.

The Visigothic rule, without suppressing this element, –and indeed rather affirming it in the beginning, through the recognition of a peculiar law for Spanish-Romans, and the codification of this in the “*Lex Romana Visigothorum*,” – created by the side of the Roman a new Germanic law. This was embodied in two fundamental forms: that of a written law, which is alone apparent in the 400s to 600s, and that of custom; which last, although not outwardly apparent, had great influence in actual legal development. The considerable fusion of the two elements, Roman and German (beginning with the first redaction of the common code, which came to be known later as the “*Fuero Juzgo*”), although it did not extend to all institutions of the law, marked a new stage in its growth, and incorporated in it definitively Germanic influences.

² The most complete picture of these influences (not always determinable with certainty) is to be found in *Costa*, “*Plan de historia*.” And *cf. Hinojosa*, “*Derecho español*,” vol. I.

The Arabic domination had a twofold effect in those territories held by the invaders, – namely, the application as to them and all others who conformed to the Moslem life, of the Moslem law; and as to the Mozarabic population, the continuance, though in a form daily more bastardized, of the Visigothic legislation of the “Fuero Juzgo.” Within the Christian kingdoms that gradually took form, very diverse factors were active: the “Fuero Juzgo,” whose text suffered interpolations and modifications; the “Lex Romana Visigothorum,” which in some districts retained influence as representing the pre-Justinian Roman tradition; a great mass of Germanic customs, which the anarchy of the times and debility of the central powers permitted to appear on the surface, and frequently to be fixed in written precept; the incursive bodies of pre-feudal and true feudal law, which had especial influence in the north and northeast; and, lastly, land allotment-charters, town “fueros,” privileges, etc., which constituted the local or cantonal legislation of seigniories and municipalities. This multiplicity of factors, –among which three main currents are clearly marked, the Germanic, Roman, and feudal, – in union with new social necessities, peculiar in each kingdom and naturally seeking embodiment in new and appropriate legal forms, produced a body of law which can already be called Spanish, inasmuch as it was a product of the idiosyncrasies of the country, based upon older sources assimilated and adapted. It developed in time a diversity of forms, determined first by the kingdoms formed within the Peninsula (law of Castile, of Aragon, of Catalonia, of Navarre, etc.), and secondarily, within each of these, by variations of locality. This was the fermentive period, whence issued (once added the further element of the Justinian law), completely formed, the distinct systems of law that preceded the legal unity of the Peninsula.

This new element appeared in the 1200s. Its introduction was prepared for by the attendance of many Spaniards in the Romanist schools of France and Italy, and by the coming of Italian jurists to Spain. The Romanism of the Justinian code, which was in essence an influence of pure erudition, but soon dominated legislation and legal practice, was manifested in works of such importance as the so-called “Código de las Siete Partidas” (Code of the Seven Parts). This was written in the time of Alfonso X of Castile (1245) and received a century later (1348) as a supplementary source of Castilian law. Concurrently with the doctrines and texts of Justinian, it invaded the customs, legislation, and decisions of the courts of the other Christian kingdoms, although with different intensity of influence. The victory of Romanism was

nevertheless neither definitive nor complete. In Castile, at the same time that the *Partidas* were circulated as a text and reference book in the universities and in the offices of lawyers, there was digested and promulgated a model “fuero” (the so-called “Fuero Real”) that perpetuated the characteristic type of native legislation; and other town “fueros” as well were granted or confirmed from the 1200s to the 1400s. In the other kingdoms, also, the core of the ancient laws persisted. By the side of these there grew up two other species of law, likewise national in origin: the statutes of the Cortes and royal orders (ordinances, pragmatics, letters close and patent, etc.), which gradually increased in number, the copious collection formed in the 1400s under the name of “Ordenamiento de Montalvo” containing hardly anything more than these elements. The legislation of Aragon, Catalonia, Valencia, Navarre, and the Basque provinces was similarly expanded with ordinances of the Cortes and regulations of the crown.

In the opening years of the 1500s the formation of the native law may be said to have ended in all parts of the Peninsula. The house of Austria went on, indeed, issuing pragmatics and orders, and occasionally a few statutes given with assent of the Cortes, and united these new elements with older ones in the digest known as the “Nueva Recopilación” (1567); but the changes, with the exception of certain matters of public law, were not numerous, and the earlier codes retained in the main their authority. The greatest novelty, in number and in importance, was represented by the statutes relative to the colonies (“Leyes de Indias,” 1680) and by a mass of regulations relative to industry, commerce, the army, and questions of the Church, which had already produced considerable changes in the time of the Catholic Kings.

The house of Bourbon abrogated nothing of the Castilian law. It brought together in successive and enlarged or revised editions of the “Nueva Recopilación” (ten between 1567 and 1777) new royal orders and a new variety of statutes called “autos acordados” (decrees concerted, or accords in Council), which emanated from the Council of Castile. The Bourbons ended the work of political unification begun by the Austrian house by annulling the “special laws” enjoyed by Catalonia, Majorca, Valencia, and Aragon – in all as regards the public law (with slight exceptions), and in Valencia as regards the civil law as well. At the same time, and inspired by a liberal spirit (in the social sense of the word), they modified the colonial statutes relative to commerce and administration, modernized *in toto* those relating to industry and public instruction, and in part those that defined the relations of Church and State.

For the rest, and particularly as regards the civil law, the legislative diversity, not only as between the different ancient kingdoms of the Peninsula, but also within Castile itself, continued; and the juriconsults of the 1700s and early 1800s proved unequal to the task of fusing all these elements either into one code or into two (one of public and one of private) that should assemble them organically. The digest known as the "Novísima Recopilación" (1805) is a chaos of general dispositions for the whole of Spain (but particularly for Castile), in which are mingled provisions of the Cortes, fueros, kings, and Council of Castile from the medieval period down to the date of publication.

The work of fusion and codification, truly speaking, was the contribution of the 1800s, – in public law through the victory of the constitutional regimen, which accomplished centralization, (above all sacrificing to unity almost all the special regional laws that had remained in force: those of the Basque provinces and Navarre); and in private law, by codifications of the civil and commercial law, the latter for the whole of the Peninsula, but the former for Castile alone, respecting within the field of civil law the peculiar legislation of Catalonia, Aragon, Navarre, and the Basque provinces (save for certain institutions or groups of such, which were made to conform to modern principles and generalized). Political constitutions, organic statutes, and codes were the threefold expression of this movement, whose details appear in their proper place below. The influences observable in these legal sources are manifold, owing to the variety of foreign relations and the international character of legal science. In political institutions, the dominance of French and English doctrines is particularly marked; in civil law, that of French and Italian thought, but here there is a considerable groundwork purely Spanish. As for the other branches of the law, the origin of the theories and ideas which are to-day, or have been at times, expressed in legislation, could only be indicated by descending to details.

CHAPTER I

PRE-NATIONAL PERIOD: TO A.D. 1252.¹ SUCCESSIVE RACIAL LAYERS IN SPANISH LAW

TOPIC 1

CELTIC-IBERIAN FOUNDATIONS AND GREEK AND PHENICIAN COLONIES (TO B.C. 200)

§ 4. OBSCURITY OF THE CELTIC-IBERIAN ORIGINS

To the historian of Spanish law, it were important to know with accuracy which of the customs or laws of the first historic inhabitants of Spain, revealed to us in the writings of Greek and Latin authors or by inscriptions and coins, correspond to the Iberian stock and which to the Celtic stock, which to the fusion of both, and which to the pervasion of the colonizing influences already referred to. But these things cannot to-day be determined (and possibly never can be), and for various reasons; among them, the uncertainty that still exists with regard to the origin and peculiarities of the Iberians, and the imperfection of our knowledge of Celtic law,² due to the universality of certain primitive institutions which may equally well be Celtic or Iberian. The differentiation has nevertheless been partially attempted, as regards the period supposedly antecedent to the invasion of the Celts (at the end of the

1 [This Part VIII, on account of the peculiar and complex origins of Spanish law, goes back to the beginning and deals with the first stages in a preliminary Chapter I, "Pre-national Period." Chapter II then takes up the story at the chronological point corresponding roughly to that where Part I of this volume breaks off. Thus, the ensuing period is here termed the First Period, in correspondence with the First Periods of Italian, French, and German national law (Parts II, III, and IV of this volume) – Ed.]

2 *D'Arbois de Jubainville*, preface to vol. 2 of his «Études sur le droit celtique» (vol. 8, – Paris, 1895, – of the «Cours de littérature celtique,» 12 vol., Paris, 1883-1902).

400s B.C.), and with limitation to the influences of Phœnician-Carthaginians and Greeks, by a Spanish historian, Joaquin Costa.³ The conclusions of the author rest, however, primarily on the hypothesis, not yet definitely accepted, of a relationship between the Iberians and the Libyans, and on a further hypothetical attribution to the Iberian stock (an assumption whose great probability in many cases is not equivalent in logic to a rigorous exactitude) of legal survivals much posterior to the primitive period. The existence of such tendential views in investigations relative to the origins of the civil law should not be unknown to its students, but it is also necessary that their doubtful character should be known as well.

§ 5. SOCIAL ORGANIZATION

Renouncing, then, all attempts to differentiate institutions in detail, it may be said that the Iberian-Celtic law known to us to-day, and in which we must assume Greek and Asiatic influences (some of them concretely determined), demonstrates: (1) the existence of different legal types, that is, distinct customs and rules, among the various tribes of the Peninsula; and, (2) legal institutions generally primitive, and proper to peoples who while conserving very archaic stages of organization are in a period of transition. The principal marks of these appear to be: a truncal or gentilitial family; a mixture of monogamy and polygamy; patriarchy not entirely dominant, inasmuch as there are visible sporadic survivals of matriarchy, or (more safely stated) of a law preferential to women; landed property, in places individual, in other places communal; servitude; commendation, or clientship of freemen; and adoption into artificial military brotherhoods.⁴

Concretely, nothing more can safely be said as regards institutions of civil law of recognized Celtic type than that (of all which have been up to the present day thoroughly studied)⁵ only a single purely civil one – the benefice or fief based upon cattle («cheptel») – can, in the opinion of D'Arbois,⁶ be referred to with any certainty (on the authority of an inscription of the Roman period) as

3 *J. Costa*, "Plan de historia."

4 *J. Costa*, "Estudios Ibéricos" (Madrid, 1895), pp. lxxv–lxxxii.

5 *Cf.* the two volumes of *D'Arbois* cited in § 4 above.

6 *D'Arbois, op. cit.*, vol. I, §§ 119-121. On the relations between the «cheptel» and modern customs of the Basque territories *cf.* W. Webster, "Les assurances mutuels du bétail et le cheptel parmi les fermiers et paysans du sud-Ouest de la France et du Nord de l'Espagne» (Bayonne, 1894).

existing in the Peninsula,⁷ for the judicial combat (proved by the narrative of Livy) is not an institution of civil law, but one of legal procedure, and besides is not exclusively Celtic. No others as yet established as existing in Gaul or Ireland appear by reliable testimony to have existed in the Iberian Peninsula; unless exception be made of the communal ownership of land, whose generality among different races in antiquity does not permit its attribution to any one particularly; so that we can only assume its existence, inasmuch as the same race that carried it to Gaul and Ireland settled also in Spain.

The division of society into freemen and slaves, apparently universal among all peoples, was doubtless general throughout the Peninsula. As for the slaves, some were privately held, and others by the State; it is a mooted question whether there existed also serfs like the “*coloni*” of the Roman law or the medieval serfs of the glebe.⁸ The nobles could boast of the usufruct of the high offices of State under granted franchises; and, by virtue of their social status, of wealth in land or cattle and numerous retinues of clients, – some of whom (“*soldurii*”) were united to their chiefs by an oath of obedience, and by fidelity which extended to the sacrifice of life (*cf.* the soldiers of Sertorius). It is possible, also, that the status of nobility involved *ipso facto* in some regions the enjoyment of a larger portion than ordinary of the common lands which were periodically allotted. Regarding the civil condition of the ordinary freemen, we possess not a single detail of evidence.

The truncal family (or “*gentilitas*,” as it is called by the Latin authors who speak of Spain, and in the Latin inscriptions of this period) appears to have had the same organization as the primitive gens of Indo-Germans, Slavs, Indians, Greeks, and other races. Its basis was supposedly the principle of blood relationship, real or fictitious. It constituted an association for protection and mutual defence, whose chief or whose popular assembly exercised penal power over the members and made resolutions binding upon all. It is possible that its individuality was recognized as a unit in the distribution of allotted lands, the labor of the fields being performed by all the members in common; and that

7 A compact of hospitage and clientage, *Corpus inscrip. latin.*, vol. 2, no. 2633; this is the celebrated inscription of the Desonci and Tridiavi, “*ex gente Zoelarum*,” *cf. Bruns. “Fontes Juris Romani Antiqui,”* 4th ed., pp. 245-246; *Rodríguez de Berlanga*, “El nuevo bronce de Itálica” (Málaga, 1891), pp. 274-278.

8 An excellent resume of primitive Spanish institutions will be found in *Hinojosa. “Derecho Español.”* Of purely civil “hermandades” (brotherhoods) there are no evidences in this period; *cf.* § 14.

in the localities or regions where no tribal communities existed there did exist the “gentilitas,” – as was the case in later centuries and may still be observed today in the “familia labradora” (tiller group) of upper Aragon, the “sociedad familiar” (family union) of Asturias and Galicia, etc. The members of each gens bore its name in addition to their individual and patronymic names.⁹

As regards the family in the narrow sense, we know of one form of marriage among the Lusitanians, analogous to that of the Greeks; the existence of espousals subject to certain solemnities (and to civil penalties, in case of transgressions of these) among the Cordovans; the “dot” of the husband, doubtless representing the purchase price of the woman or of the power of her father over her, among the Cantabrians (*cf.* Viriato); the preference enjoyed by the women of Cantabria over their brothers in inheritance; and the curious custom of the “couvade» among the Cantabrians, the explanation and significance of which are still in dispute.¹⁰

Regarding property law, we possess two classes of data: one which demonstrates the existence of individual (or family) property in the soil; the other revealing a tribal communism. The latter has been established with reference to but a single tribe, that of the Vacceos in the district of Campos, which apportioned its arable lands annually by lot, the harvest gathered by the members being afterward combined before distribution. It is not known whether this took place according to necessities or social rank.

The compact of hospitage might be, according to the parties making it, either wholly private or semi-public. It was possible, that is to say, to have hospitage between two cities, between two families (clans), and between a city and a foreign individual (and his family), – that is, one belonging to another tribe. The existence of compacts of hospitage of the last two kinds in Spain is established.¹¹ They were made with the intervention of a magistrate,

9 J. Costa, “Organización política, civil y religiosa de los celtiberos” (Madrid, 1881), and “Programa de un curso.”

10 The “couvade» (a peculiar custom for the husband’s observance at the time of a childbirth), whose existence among the Cantabrians is affirmed by *Strabo* (“Geography,” 3: 165), was an institution often found among primitive peoples of Asia, Europe, and America. *Cf.* *Cordier*, “La famille chez les Basques” (*Revue Historique du droit*, vol. XIV); *Corre*, “La mère et l’enfant dans les races humaines» (Paris, 1887); *J. Brissaud*, “La couvade en Béarn et chez les Basques» (*Revue des Pyrénées*, vol. XII, 1900).

11 Five compacts of a city with an individual, one of a clan with a clan, all of the same tribe. See the texts in *Berlenga*, “Nuevo Bronce de Itálica.” All are of the Roman epoch.

and ordinarily were recorded in a written document (“tessera”). “They created a permanent and reciprocal relation, and, according to the ideas dominant in the peoples of antiquity, not only continued in force during the lives of the contracting parties, but extended likewise to their children and other descendants.” The mutual obligations were: lodging and maintenance whenever either party or a representative came within the domicile or the territory of the other; of protection and succor; reciprocal good offices in business; the representation of a contracting city by an individual stranger covenanting with it in the latter’s city; and perhaps also the right to participate in the domestic or public cult of the other party. The compact was terminated by express or implied repudiation.¹² It will be seen that there were included in it elements which would be classed under legal notions of the present day as strictly private, and others which would be called public.

Distinct from the compact of hospitage, and, likewise consensual, was that of clientship, which might be established between the same classes of persons as the other, except between two cities. We possess evidence of the celebration of this sort of contract between various cities and individuals, between two families and individuals, and between corporations or colleges and one or several individuals.¹³

At times compacts of clientship and hospitage occurred in union.

§ 6. INSTITUTIONS OF CIVIL AND PUBLIC LAW

With respect to the hybrid civil laws, –in general terms, Hispano-Phoenician, Hispano-Greek, and Hispano-Oriental,– the formation of which in various parts of Spain might with probability be assumed (and Strabo affirms the fact with reference to the Greek colony of Emporion), nothing concrete and reliable can be said. The conjectures, and very probable ones, which are here permissible can be found in the “Programa” of Costa already referred to.

In public law, the characteristic fact is the segregation of the tribes or of groups of these into independent States, which at times, under necessities of defence against invasion, united in federations or confederations. Internally, each tribe had a monarchical or diarchical government, and tribal assemblies.

¹² *Hinojosa*, “Derecho español,” vol. I, pp. 85-87.

¹³ See the texts in *Berlanga*, *op. cit.*, pp. 267-288.

TOPIC 2

THE ROMAN RULE (B.C. 200-A.D. 400)

§ 7. THE ROMAN INFLUENCE

In a general way, the measure of Romanization within the field of law can be fixed to-day without qualifications; it was extremely great, but not absolute. This is the effect, in the first place, of the evidence, documentary and official, which we possess of indigenous civil institutions, corresponding to all periods of the Roman domination. It is confirmed, in the field of legislation, by a constitution of the Emperor Constantine preserved in the Codex of Justinian (VIII, 53), by another of the Code of Theodosius (V, 22), and by a fragment of the Digest (*De legibus*, 1:3); all prove the recognition, down to the latest times, of the validity of the «*mos provintiale*.» To what extent, concretely considered, there existed materials in the 200s and 300s to which this general principle was applicable, especially after the unitarian prudence of the emperors had broken down those limitations under which the Roman law had originally possessed only a supplementary and subsidiary character for the alien residents («*peregrini*») under provincial laws,¹⁴ cannot be more than very indefinitely determined. Neither did the Roman legislation descend to these particulars (which neither its nature nor its interest led it to consider), nor did the juriconsults of those times take sufficient interest to record them. The gradual concession of the rights of citizenship to the inhabitants of the provinces and of the territory of Italy itself («*jus Italicum*,» «*jus Latium minus*» and «*majus*,» the decree of Caracalla, etc.), and the formation of the «*jus gentium civile*,» which modified the ancient Roman law, little by little removed individuals and groups from the action of the native law, subjecting them in large measure to the authority of the new system; although here again the historian cannot determine precisely the results that were thus, and of necessity, produced at any particular time, nor even the definitive conjunct results. Even as regards those institutions which in the end were moulded to the Roman forms, though it were important to know at what moment or by what gradations they lost their original type, we are equally ignorant.¹⁵

14 The order of precedence of the sources of the so-called positive law was, according to fragment 32 of the Digest, «*de legibus*»: treaties, the native law, and the Roman law.

15 The single affirmation that we can make at present is a negative one with respect to the end of this period: «There is no evidence whatever which accredits the subsistence of

In some of the imperial constitutions there occur references to matters of civil law; and especially in private documents that have come down to us in epigraphic form, variants from the pure Roman law, which prove the existence of local legal growths that are extremely interesting.¹⁶ They indicate the influence of the native upon the principles of the Roman law, or testify to the formation of that Roman provincial law, sometimes customary, sometimes enjoying the higher status of regional written law, part of which was revealed in the “*Lex Romana Visigothorum*,” a century after the disappearance of the Western Empire. Detailed studies of these variations have, however, not yet been made; not even the conclusions pertinent to the subject that are to be found in the commentaries of Spanish epigraphists have been utilized in any manual of legal history.

§ 8. INSTITUTIONAL RESULTS OF THE ROMAN INFLUENCE

Within the schematic form imposed by its conditions, the “Programa” of Sr. Costa, already repeatedly referred to, offers a guide, and the most complete and detailed that we possess, of the institutions of Roman public and civil law that were introduced into the Peninsula (and made *ipso facto* into Spanish law); of the hybrid institutions created by the contact of the two legal types; and of the indigenous variants juxtaposed or fused with the legal forms of the Roman colonies.¹⁷ Of these groups those important for the present purpose are the second and the third. The first represents only a phase in the spread of the Roman law, as a part of which it should be studied; on this, it suffices for our purposes to make a single and general remark: that the fundamental categories of the Roman law respecting persons, things, and obligations, and those common to the systems of Roman provincial law, governed the law of

the native law in Spain in the latest period of the Empire” (*Hinojosa*, “Derecho español,” p. 142).

¹⁶ Take, for example, the legacy of Fabia Hadriana, a Sevillian lady, in favor of the illegitimate and free children of the “colonia” Julia Rómula, commented on by *Bachofen*.

¹⁷ Among them the betrothal customs of Cordova (paragraph 4); in particular, the statute as to kisses (penalty of lessened inheritance for kissing the bride—before marriage—except in the presence of eight relatives or neighbors), which was adopted as general law by a constitution of Constantine of the year 336, was included in the “*Lex Romana Visigothorum*” (parag. 9), and was later perpetuated in Castilian codes of the medieval and modern periods. For a general statement of the legal sources of Roman Spain see *Hinojosa*, “Derecho español.”

Spain, constituting a basis in the legal evolution of the national genius which was never to lose its influence.

Taken in the main, this influence made itself felt in a dissolution of the native gentilitial organization, and a development of individualism, as well within the field of family relations (and consequently in heredity) as in the general law of property, in contrast with the communistic modes of enjoyment to whose existence in the Peninsula reference has already been made. That such effects were not uniform in all regions may be safely averred; and also that the process was interrupted by the Germanic invasions when, in all probability, there still existed, in the form of custom, institutions not attested by legal documents and persisting for some time in popular legal practices. As regards public law, notwithstanding that the diversity of political status of the primitive native cities (federated, free, tributary, – and, in those assimilated to the Roman classes, the variant types of “jus Latii,” “jus Italicum,” etc.) apparently persisted down to the latest times of the Roman period, we have no proof whatever of the continuance (and much less in what proportion and extent) of the Iberian and Celtic organization which the Latin writers themselves attest for the earlier period. It is, however, very probable that it disappeared, absorbed in the centralization and reforms of the imperial period.

TOPIC 3

THE GERMANIC INVASIONS AND VISIGOTHIC DOMINION (A.D. 400-700)

§ 9. CONTRAST OF THE ROMAN AND VISIGOTHIC INFLUENCES

The Germans represented in Spain, in the general character of their legal genius, a retrocession to the primitive Iberian-Celtic type, whose customary law, in many essential points, that of the Germans *resembles*.¹⁸ Thus, for example, they opposed to the Roman individualism, which was destructive of the cohesion of the primitive household, a great respect for ties of blood, and

¹⁸ Sources: *Tacitus*, “Germania.” (or “De Moribus Germanorum”); *Caesar*, “De Bello Gallico.” Two excellent resumes of modern investigations relative to Germanic customs will be found in *Hinojosa*, “Derecho español,” and *Dahn*, “Urgeschichte der germanischen und romanischen Völker” (4 vols., Berlin, 1881-1890; Spanish ed., Barcelona, 1890: „Historia primitiva de los pueblos germánicos y romanos“).

a rigid solidarity which they maintained among all members of the clan (“parentela,” “Sippe“), – a solidarity which was influential, not only in civil law (as in tutelage, inheritance, property, etc.), but also in criminal law. They reacted also against the urban life of the Roman epoch, returning in great part to rustic life. This was socially more propitious than that of the cities or urban groups to the maintenance of traditional customs, and, economically, was reflective of the regimen, chiefly agricultural and pastoral, that brought with it these appropriate forms of legal institutions.

It is true, of course, that the importance of both factors appears lessened by the legislation that, before and after Kindasvinth, already appears under the influence of the Roman law. But this modification was more apparent than real; and one may to-day aver, upon concrete evidence, that many primitive Germanic customs survived and continued in practice, hidden beneath the external norms of the law, until such time as they could reappear in the 700s and following centuries, after the disappearance of the Visigothic kingdom, with greater indications of purity than those which appear in the documents of the 400s to 600s.¹⁹

On the other hand, as regards the law of persons, outside of family relations, the Germanic influence was concurrent with that of the Roman of the latest period, excepting only as regards the rights of civil association and the liberty of labor. These the Roman legislation modified in a liberal sense, relaxing the bonds of subjection which had formerly restrained artisans and laborers in the formation of “collegia” and corporations. The characteristics of Visigothic society were therefore an accentuation of the personal dependence of the weak and poor, in relation to the rich and powerful, and an accentuation of agricultural servitude, creating thus a series of numerous social grades between slavery and complete liberty. The practical effect of this, brought about by the transfer of lands, was to merge a majority of the population in one positive status of dependence, which tended toward a constant-

19 This fact, vaguely seen by *P. J. Pidal*, “Historia del gobierno y legislación de España” (Madrid, 1880, pp. 232, 299-300), and by *Muñoz y Romero*, “Discursos leídos ante la Academia de la Historia” on “Instituciones españolas de la Edad Media” (Madrid, 1860, pp. 47-50), has been concretely established by the investigations of *J. Ficker*, “Über die natürliche Verwandtschaft zwischen gotisches und norwegisch-isländisches Recht» (Innsbruck, 1887). See also *Ureña*, “La legislación gótico-hispana” (Madrid, 1905), pp. 200-201, and in other places. The most recent and satisfactory monograph on this subject is that of *Hinojosa*, “Das germanische Element im spanischen Rechte,” in *Z.²R.G.*, vol. XXXI, pp. 282-359.

ly increasing transformation of personal into predial servitude. Civil liberty steadily declined in proportion as economic dependence increased, even the “bucelarios” (household servants), freemen by birth, finding it advantageous to maintain their dependence upon a patron, and but rarely breaking it, notwithstanding their right to do so²⁰ and change their lord.

§ 10. STATUTORY SOURCE OF THE VISIGOTHIC LAW

A summary of the legal sources of the Visigothic period will aid in understanding the preceding explanations and those that follow.

The first Visigothic law-text known is of the age of Euric (467-485), – notwithstanding a few authors would date it of the preceding reign. St. Isidore, however, declares explicitly that Euric was the first king who gave laws to the Goths. These laws, compiled in a code, were in large part only a written record of Germanic custom, although already showing sporadic Roman influences. It is not certain that we possess to-day the text of this code of Euric; for it is disputed whether a palimpsest in St. Germain des Prés in Paris, containing numerous statutes and fragments of others, manifestly of the Visigothic time, is to be considered a copy of it (if yes, then the only one yet discovered, save for insignificant remnants found in a manuscript of the Vallicellana library at Rome), or a redaction of the time of Reccared.²¹ The only thing certain is that the compilation or code in question was promulgated in the time of Euric, and that as public law it was valid over all inhabitants (with the exceptions discussed below), and as private law in all cases involving parties of different nationality, that is to say, questions between Visigoths and Hispano-Romans. Racial law, or “personal” law, as it was called –respect, that is, for the individual law of subject peoples in all matters not prejudicial to the supremacy of the constituted powers– was a principle of Germanic jural politics. Thanks to this principle, Hispano-Romans continued to live under the Roman law more or less modified by custom, although they also adopted at times the legal principles of their Visigothic conquerors. In the reign of Alaric this condition of things was solemnly ratified, and was regulated in the interest of the natives of the Peninsula themselves, by the compilation of a digest of Roman

²⁰ Fragment CCCX of the Paris palimpsest referred to below in § 10.

²¹ The question is well set forth, in accord with the most recent studies, in the work of R. de Ureña, “La legislación gótico-hispana” (Madrid, 1905; incorporated in his “Literatura Jurídica,” vol. 2).

texts, selected from the codes of Gregory, Hermogenianus, Theodosius, and other imperial sources; a compilation known in history under the name of the Breviary (or Code) of Alaric (506), and among scholars of the present day as the “*Lex Romana Visigothorum*.”²² Under this double system of law the two bodies of Spanish population continued to live until the reign of Kindasvinth (642-653). The only changes were the addition to the common statutes of certain others granted on petition of the Councils of Toledo, and successive editions of the code of Euric, made in the time of Leovigild and his son Recared (perhaps also one of later date), in which the Roman law seems to have had somewhat more influence than formerly.

With Kindasvinth the situation changed. The double or racial legislation now disappeared, and was supplanted by a law common to all the inhabitants of the Peninsula. This common law was not one of those formerly existent, but a new one, framed upon the basis of the “*Lex Romana Visigothorum*,” the last editions of the Code of Euric, and the statutes of the Councils; a reconciliation of the interests and ideals of both races being procured through this fusion. Kindasvinth also abrogated the prohibition of marriages between Romans and Hispano-Romans enforced by the Code of Alaric; by which it is not meant that such unions were not celebrated before the abrogation (witness that of King Theudis), but only that the State did not concede them legal force, unless in exceptional cases.

The son of Kindasvinth, Reccesvinth, improved the work of his father, revising twice the new code and seeking to give it greater uniformity and a systematic character. The text of Reccesvinth has come down to us in its integrity (“*Lex Visigothorum Reccesvindiana*,” or “*Liber Iudiciorum*”). It suffered still further modifications or additions in the time of Ervig and of Egica. Of the revision of Ervig we possess to-day two manuscripts; of that of Egica none whatever. This code, which covers all fields of the law, but by no means represents all the principles controlling the institutions of that time (as is logically to be concluded from its many gaps and also from the continuance of

22 In this code one must take account not only of the text of its statutes, but also of the marginal glosses (“*interpretatio*”) that accompany many of them, expressive of the modifications of the statutory precept by custom in the different provinces. As to this see *Haenel's* preface to his edition of the code; *Fitting* in the *Z.R.G.*, vol. XI; *Lécrivain*, “*Remarques sur l'interpretatio de la lex romana visigothorum*» (Toulouse, 1909; reprinted from the *Annales du Midi*. vol. I); and *Stouff*, “*L'interpretatio de la loi romaine des Wisigoths*» (in the «*Mélanges Fitting*»).

Germanic customs, not referred to in it) is that which later came to be known under the name of the “Fuero Juzgo.”

§ 11. LEGAL INSTITUTIONS OF THE VISIGOTHIC PERIOD

It is impossible at this day to trace the history of the institutions of Visigothic Spain before Kindasvinth. It is made so by the scarcity of documents, the uncertainty in which we still remain (as already stated) respecting the identification of the fragments of ancient Visigothic laws as yet discovered, and the like obscurity which involves the question of the greater or lesser degree to which the written law (“ley”) was truly positive, that is to say, prevailed over custom. According as the fragments in the Paris palimpsest (the most numerous and important) be regarded as of the age of Euric (end of the 400s) or of Reccared (586-601), the conclusions one may draw regarding the permeation of Romanism and of the Canon law into the Visigothic legislation are very different. The time that elapsed between the two reigns is very considerable (101 year exactly from the death of Euric to that of Leovigild), and these fragments are the most important documentary source we possess for determining the legal conditions of Visigothic society before the first redaction of the common code (“Fuero Juzgo”) in the time of Kindasvinth (642-649). For these reasons, whatever averments may be made in detail regarding the civil law of the Visigoths during the first two centuries of their dominion and the first half of the third, cannot be more than very fragmentary.²³

As regards the civil law of the Hispano-Romans, the case is different. The “Lex Romana Visigothorum” shows us not only the law in force among them (thanks to the system of “personality” of laws), but also, what is more important, the modifications introduced by legal practice into the Roman law. These modifications are indicated (as has been remarked) by the “interpretatio” or gloss which accompanies many laws in the code, either in explanation or in criticism of these. The gloss is anterior to the date of the code (that is, to the date of the compilation, in 506, of the Roman texts that compose it), as Lécivain has shown,²⁴ and contributes greatly toward clearing up “the devel-

23 All that it is possible to say has been said by *Hinojosa* in his “Historia de España desde la invasión de los pueblos germánicos hasta la ruina de la monarquía visigoda,” vol. I (Madrid, 1896).

24 *Lécivain*, “Remarques,» cited above (§ 10, n. 2), pp. 13, 24, 36-37. The like opinion is expressed by *Kruger*, “Historia, fuentes y literatura del derecho romano” (Spanish

opment of the Roman law in the period between the decline of the classical jurisprudence and the legislative enterprise of Justinian.”²⁵ The same is true of the epitome of the Institutes of Gaius (“*liber Gaii*”) which figures in the “*Lex Romana Visigothorum*.”

Not all the matter included in the code relates to the civil law, although – on the strength of the fact that it establishes a divisional line between the legislations of “conquerors” and “conquered” as regards the separation of public and private law, and upon an assumption that the Hispano-Romans enjoyed a peculiar regimen in the latter only– that has been ordinarily believed. On the contrary, the “*Lex Romana Visigothorum*” treats of subjects of political law (municipal government, public provincial functionaries) and judicature (the judicial hierarchy, competence, and procedure proper). Matters of civil law do, however, preponderate, and among those which are glossed mention may be made of the appointment of tutors, donations, registry of wills and adoptions, inventories of minors’ property, and interracial marriages.²⁶

§ 12. HYBRID LEGAL INSTITUTIONS

The separation of legal systems between the two races was not, however, so marked as the existence of two different codes might lead one to suppose. The unifying effect produced by the conversion of Reccared, drawing together the Arian and the Catholic classes in society, has been repeatedly extolled. As regards the approximation thus brought about between the Hispano-Roman “*senatores*” and the Visigothic “*seniores*,” the process has been partly reconstructed by Pérez Pujol.²⁷ Aside from the indirect influence which religious unity represented (notwithstanding the persistence in Arianism of a considerable Visigothic population), the general contact of the two racial elements, the practical necessities born of common life, and the permeation of the Visigothic statutes by Roman ideas, led to the birth of mixed institutions.

transl.), pp. 289-291. *Fitting* believes that part of the glosses are by the compilers of the code.

²⁵ *Hinojosa*, “*Derecho español*,” vol. I, p. 357, following *Fitting*, *Z.R.G.*, vol. XI.

²⁶ The recent edition of the “*Lex Romana Visigothorum*,” by Professor *Max Conrat* (Cohn), affords a systematic classification by subject matter of the statutes contained in that code which enables one to find readily those of public and those of private law.

²⁷ *Pérez Pujol*, “*Historia de las instituciones sociales de la España goda*,” vol. IV (Madrid, 1896), pp. 193-197, 203.

Their expression we find in the texts of the collection of formularies, or models of public documents, known by the name of “Fórmulas Visigóticas,” the redaction of which must be placed between 615 and 620. In these are manifested “in amalgamation the principles of Germanic and of Roman law, generally... Although some of them were designed only for the Roman subjects, many were intended to be common to the two races.”²⁸ Thus the formulas were on one hand a hybrid Hispano-Visigothic law, and on the other hand an embodiment of those provincial modifications of the Roman law which are represented by the “interpretatio” of the “Lex Romana Visigothorum.”

The civil matters which it covers include: emancipation, the “peculium” of freedmen, gifts to the Church, the sale of slaves, bargain and sale, antenuptial gifts, gifts between husband and wife, dotal property given by the husband to the wife, testaments, gifts, barter, self-sale into personal serfdom or slavery (a Germanic principle), partition of inheritances, and leases at will (“precaria”). Among the amalgamations of Roman and Germanic law the confusion introduced between the “Morgengabe” and the „dos“ (formula XX) may be particularly mentioned. Formula XXXVI concerning „precaria“ is important for the element of personal submission that figures in it, which connects it with precedents of the feudal system.²⁹

The mere fact of the establishment of the Visigoths in the Roman provinces of Gaul as allies of the Empire also produced one hybrid institution (or at least a legal condition that was the source of numerous and important relations between the two races) in a matter so essentially one of civil law as the institution of property. We refer to the distribution of lands and other property which was made in Gaul in conformity to the law of allotments, in pursuance to which two-thirds of the Roman proprietors became the property of the Visigoths, a third only remaining to the former (the “tercia Romanorum”). It is known positively that in Spain the Swabians made such a partition; and it cannot be doubted that the Goths did the same, after the conquests of Euric and in the regions where they settled, as regards the arable lands and a part of the woodland. It is probable, also, that a like distribution

28 *Hinojosa*, “Derecho español,” p. 366.

29 *Pérez Pujol*, *op. cit.*, IV, 216, 220-221. [In translating “precaria” in places as “leases at will,” it must of course be understood that the transition from *true* “precaria” to *true* leases, first by custom (villein tenure) and then by contract (free tenure), was gradual. But substitution of leases for years or life as free tenancies for the former servile holdings is the point indicated. – Transl.]

would have been made of houses, slaves or serfs used to cultivate the fields, and of farming utensils. The Visigothic statutes (Paris fragments), and later the “Fuero Juzgo,” necessarily devoted themselves in detail to this division, which produced a long line of economic-legal relations.³⁰

§ 13. THE LEGISLATION OF KINDASVINTH

This hybrid law, as well as that peculiar to each of the two peoples, disappeared, as regards the forms in which they existed prior to Kindasvinth, under the great legislative novelties introduced by that king. The “Lex Romana Visigothorum” was abrogated;³¹ the statutes were extended to the Hispano-Romans, and the new code was one which harmonized and fused the two elements. Compared with the texts of the Visigoths statutes that are known to us, it reflects a great influence of Roman legislation; although when compared –as regards its effect upon the Hispano-Romans– with the “Lex Romana Visigothorum” it shows, on the contrary, the imposition of numerous principles of Germanic origin.

The doctrines of civil law which appear in it most different from the Roman law are those relating to marriage, conjugal property, relationship,³² some principles of property, and much of the law of persons. On the other hand, the preponderance of the Roman law is noted in matters of inheritance (especially testamentary), prescription, and contract; although indeed as regards the form of these last, there prevails a broad and liberal principle very different from the rigid classification of the Roman law.

By this legislation the influence of the Germanic spirit was securely affirmed as one of the universal factors in Spanish law, and the work of Romanization, already of so profound effect within the field of law, was (temporarily) shattered.³³

30 See on this point *Pérez Pujol, op. cit.*, II, 145-158.

31 This is the prevailing opinion; *Gaudenzi* alone dissents, believing it to have been repealed by *Leovigild*.

32 As regards the intervention of relatives in tutelage and marriage –wherein one sees the first precedent of the Spanish family council– consult *J. Costa*, “Derecho consuetudinario,” vol. I, pp. 63-66.

33 See in *Hinojosa*, “Discursos leídos,” pp. 13-20, the details given regarding certain clan institutions of this epoch, derived from or influenced by Roman or Germanic Law.

TOPIC 4
CHRISTIAN AND MOORISH KINGDOMS
(A.D. 700-1300)

§ 14. THE INFLUENCE OF THE CHURCH

In the transforming process of this period the Church exercised a partial influence. It is notorious that the actual effect of Christianity upon the laws was not (above all, in the beginning) so ample as its doctrines might be taken to promise. The fact that the Church had accepted the general conditions of the civil and political organization of the world in which it had appeared, and had founded and developed its life in conformity with them, made impossible for the time being –and this was a canon of its policy– any direct attack, any action one would to-day call revolutionary, against institutions which were fundamentally repugnant to the teachings of Jesus. Thus, for example, the Church did not destroy slavery, nor social inequalities, nor the institution of individual property; although it did partially break the cohesion of the pagan households, which, as we have seen, was later to resurge under the impulse of other social factors. The influence of Christianity was for this reason indirect, and as a rule only moral.³⁴ Its effects, –apart from the significance in the law of persons of the mere existence of a juristic person of life so positive and independent of the State as was the Church itself,– were exercised, essentially, through a constant effort to lessen oppression, the rule of violence of the times, the inhuman trade in slaves and other classes of dependents, and to defend the weak by institutions of protection against the despotism of the powerful. In this sense, the Church was already influential in the Visigothic period. It coöperated with the Roman law “in the equalizing of the two sexes in matters of inheritance, in the power of the mother over the children, and in the independence of the widow’s status,” as well as “in the subordination of wife to husband, and the establishment of a dowry as a prerequisite of marriage,” and of course in safeguarding the rights of inferiors.³⁵ It continued to act in like manner in the period we are now discussing. This may be seen in the melioration of the status of the predial serfs through recognizing their

³⁴ *Hinojosa* summarizes this effect well and weightily, as regards the condition of women, in two paragraphs of his “Discursos leídos,” pp. 10-11.

³⁵ The words in quotation marks are from the “Discursos leídos” of *Hinojosa*. See also the work of *Pérez Pujol* above cited.

family relationships, defining their tributes and services, and rescuing them thus from the egotistic and capricious will of their lords; in granting the liberty of changing domicile without loss of “peculium” (resolution of the King of León and the archbishop of Santiago in 1215), and in the establishment of the Truce and the Peace of God;³⁶ meliorations in which the economic interest of the landowners powerfully coöperated with religion.³⁷

Neither the action of the Church nor that of the Canon law, for which this was a formative period, could extend much beyond these effects in the first centuries of the Reconquest. On one hand, the primary contest for the liberation of the Church from the power of the State, which was consummated under Gregory VII at the end of the 1000s, but whose practical influence was not immediately felt in all the fields to which either the autonomy of the Church or its legal influence might extend, largely diverted the application of its energies to other classes of questions. On the other hand, the fact that the clergy were involved as factors in the existing feudal and seigniorial regimen and economic organization was bound to deprive them of any freedom to move in the direction of substantial changes. Thus, in the territories of León, Castile, and Galicia, we find that the resistance of the ecclesiastical lords to the civil and political emancipation of their serfs and vassals was greater than that of the secular lords, – or at least it provoked more prolonged and bloody struggles;³⁸ that in Catalonia churches and monasteries constituted great seignories whose efforts continued in the following period to resist the liberation of the peasants; that in Navarre the lot of the monasterial serfs was harder than that of others, etc.³⁹

In other fields the influence of the Church began to be used, although the effects upon legislation and customs fall in later centuries, in combating forms of sexual union that differed from the canonic type of marriage – and especially (and logically) the concubinage of the clergy; and also in the law of persons as regards the members of non-Christian religions (canons restrictive of the civil liberties of Jews and Mozarabs) and heretics.

36 *Hinojosa*, “Estudios,” pp. 39-40.

37 *Ibid.*, pp. 40-42.

38 *Hinojosa*, same work, pp. 43-65. The Cluniac influence resulted, in some regions, in an aggravation of the bonds that held the serfs in subjection (*Hinojosa*, par. 16).

39 *Altamira*, “Civilización española,” vol. I, pp. 322-325, 462-465, 478-480, and vol. II, pp. 127-132 (1st edition); *Pella*, “Historia del Ampurdán.”

§ 15. ROMAN, MOORISH, AND OTHER FOREIGN INFLUENCES

Reference has been already made to other factors influencing Spanish law in this period.

We may begin with the *Roman influence*. This was slight, and hardly visible. It must have continued its action through the Roman portions of the "Fuero Juzgo" (*supra*, § 11); but we do not know, in a concrete way, how far and in what regions it was able to overcome the opposing tendencies of the regional law. The history of the "Fuero Juzgo" from the 700s to the 1200s remains to be written. Up to the present, writers have confined themselves to the averment that that code continued in practice in the different Christian kingdoms and among the Mozarabs, and to an indication of the scanty evidences, either too indefinite or too limited (as a citation of some isolated statute, or decision, or act of Council), upon which the affirmation is based. We do know that in the "Usatici Barchinonæ" the code was in part utilized,⁴⁰ as were also two passages of the "Lex Romana Visigothorum,"⁴¹ and others of the "Etymologies" of St. Isidore. Beyond this we know nothing definite. No one has thus far undertaken to discover the element of more or less immediate Roman origin, discoverable in the municipal "fueros," in charters, in the acts of Councils and Cortes, and in the judgments of the courts.⁴² The statement may, however, be ventured *a priori* that it must be minute. As for the Catalan territories, the generalizations of writers respecting the persistence of the Romanic element are (aside from the three concrete facts just mentioned) too vague, and are usually made in reliance upon documents of relatively modern date,⁴³ posterior of course to the influence of the Justinian revival.

40 *Brocá and Amell*, "Instituciones del derecho civil catalán vigente" (Barcelona, 1880; 2d. edition, 1886), 2d ed., pp. 17-26.

41 In the introductory remarks of *Mommsen's* edition of the Theodosian Code which are entitled "De uso Breviarum Alariciani forensi et scolastico per Hispaniam, Italiam, Galliam, etc.," A. von Wretschko cites other fragments of the "Lex Romana" in a manuscript of the 1000s that originated in Ripoll.

42 An exception is the study of the custom of denying sepulture to debtors (a custom derived directly from the Roman law, and perpetuated in different parts of Spain) which we owe to *Hinojosa*, "Estudios," pp. 145-177.

43 *Brocá and Amell*, *op. cit.*, tell us that "Roman institutions have been perpetuated in Catalonia by popular custom and through notarial practices," but in support of this they cite only the general statements of Savigny and a statute of 1337. Equal vagueness in

The influence of the *Moslem law* is no better known. The studies relating to it are but beginning, and in only very few points have arrived at trustworthy conclusions. As for the institutions of private law, it is said, or is supposed, that the following are of Arabic introduction: the Aragonese contract of partnership in the lease of land on shares (“aparcería”), called “exarica”;⁴⁴ the irrigation law of Aragon, Valencia, Murcia, and other regions;⁴⁵ a part at least of the primitive market ordinances of certain cities, and the rules therein regulating contracts of sale and barter;⁴⁶ the creditor’s rights of distress with usufruct (confined to agricultural leases) in the Aragonese law (“Rahu”);⁴⁷ the plantation partnerships, met with in Toledo, Valencia, Estremadura, Jaén, and Ciudad Rodrigo; and the emphyteutic estates for lives, known as “rabassa-morta” in Catalonia;⁴⁸ gifts of unlimited usufruct (“alhob”);⁴⁹ partnerships;⁵⁰ possibly, the obligation which many “fueros” impose of publicly crying found articles;⁵¹ the general recognition of freedom of contract noticeable in many of

Durán y Bas, “Memoria acerca de las instituciones del derecho foral de Cataluña” (Barcelona, 1883). *Pella*, “Historia del Ampurdán” (Barcelona, 1883), p. 575, says: “It is my opinion that—in the counties of Ampurias and Peralada, especially in the former, the Roman legislation was authority in private or civil law from a very early date, as the patrimony of the conquered race. Its existence is revealed in the Code of Peralada in the treatment of the Lex Aquilla of legitimes, and other matters; and in the county of Ampurias in the preceding decree [one of King Martin], under the name of ‘the common law,’ which was that given to the Roman law in the Middle Ages.” But the Code of Peralada, in the edition known to us, is certainly not of earlier date than the 1200s, and the decree of King Martin is of 1402.

44 *Ribera*, “Orígenes del Justicia de Aragón” (Zaragoza, 1897), p. 39; *Ureña*, “La influencia semita en el derecho medioeval de España” (Madrid, 1898), p. 23; reprinted in his “Sumario de las lecciones de historia crítica de la literatura jurídica española” (Madrid, 1897-1898), vol. I, pp. 305-344. On the “exaricos,” the two meanings of this word in Aragon and the generality of the contract in other countries, see *Hinojosa*, “Mezquinos y Exaricos.”

45 *Ribera*, pp. 37-38.

46 *Ibid.*, p. 32.

47 *Ureña*, p. 21.

48 *Ibid.*, pp. 22-33. [Cf. § 18 below, note 3, and § 23 note 2. According to *Sánchez Román*, “Estudios de derecho civil,” vol. I (2d. ed., 1889), p. 462, the “censo enfiteutico casi puede considerarse como originario de toda propiedad en Cataluña.” – Transl.]

49 *Ibid.*, pp. 24-26.

50 *Ibid.*, p. 26.

51 *Ibid.*, p. 9.

the same documents;⁵² concubinage and juratory marriage (“á yuras”);⁵³ the suppression of “mejoras,” which had been recognized by the “Fuero Juzgo”;⁵⁴ the conception of the “patria potestas” as a guardianship in Aragon, Navarre, and in some Castilian “fueros,” and its concession to mothers;⁵⁵ the dual system of dowry in Aragon, and the “axovar” (paraphernalia);⁵⁶ the notion of “hijos manceres” (children of prostitutes);⁵⁷ the system of separation of conjugal property, which is found in customs of Cordova and in the law of Valencia and Majorca, as an exception to the general recognition of community;⁵⁸ the limitation to one fifth (in cases of sickness) of the property subject to free testamentary disposition;⁵⁹ perhaps, the widow’s rights of dower⁶⁰ under certain “fueros”; and others. But many of these ascriptions are still doubtful and disputable.⁶¹ It is notorious that in studies of comparative law we fall easily into the danger of imagining influences or derivations where there is only a coincidence of statutes and customs produced among different peoples by identical

52 *Ibid.*, p. 21.

53 *Ibid.*, pp.28-29.

54 *Ibid.*, p.39. [“Mejoras” has two meanings in Spanish law: 1st, property added to the estate, fruits and profits; 2d, the excess or beneficial interests under a will given to compulsory heirs above the “legítima,” or statutory portion to which they would be entitled. It was in the second sense that “mejoras” (improvements) were recognized by the “Fuero Juzgo”; and it is in the same sense that it appears elsewhere in this essay. – Transl.]

55 *Ibid.*, pp. 30-32.

56 *Ibid.*, pp. 10-13, 33-36; and as to the “axovar,” *Ribera*, p. 38. It may be noted that the dual system is found also in the Celtic law; cf. *D’Arbois de Jubainville*, «Etudes sur le droit celtique» (Paris, 1875), vol. I, pp. 231-235. See also with reference to these same institutions, *Hinojosa*, “Discursos leídos,” pp. 26,29-30. [Paraphernalia is used in the translation in the peculiar sense of the English law, and is not to be confused with “parapherna.” – Transl.]

57 *Ibid.*, pp. 8-9.

58 *Ibid.*, p. 36.

59 *Ureña*, pp. 38-39.

60 [“Fuero de viudedad,” “viudedad,” “derechos de viudedad,” derechos de usufructo,” are all translated as in the text. The only important difference between the various provincial forms was the extent to which the rights were consensual or statutory. – Transl.]

61 An abundant arsenal of data for the study of these influences and of their reaction upon the Visigothic law that continued in force among the Mozarabs, is afforded in the Toledan archives, part of which were made known by *Pons Boigues* in his “Apuntes sobre las escrituras mozárabes toledanas” (Madrid, 1897), and which *Ureña* has utilized to some extent.

or analogous circumstances. The universality of not a few legal institutions practised by nations and tribes of very distinct origins, and among which there has been no contact known to history, is good proof of this, and dictates a prudent reserve in accepting definitive conclusions.⁶²

Attention should be called, lastly, to the indubitable but nevertheless vague influence –at one time very greatly exaggerated– of the *French law*, not only in the Pyrenean regions, but also in other parts of the Peninsula. That in the former the French influence persisted after the independence of the Spanish Mark, might be affirmed a priori, considering the multiplicity and continuity of the bonds between Aragon, Catalonia, and the South of France (Roussillon, the county of Toulouse, etc.), not only in the political order, but also in religious, literary, and other relations; but it is also concretely blazoned in the recurrent identity of feudal, municipal, civil, and other institutions that is observable between one and the other region. There is needed, however, a conjunctive study or series of monographs that shall gather together the scattered data that are at present known, test them, add to them, and reduce to certain knowledge what as yet cannot be so called.⁶³

With regard to León and Castile, although it is certain that the exaggerated conclusions of Helferich and Clermont can no longer be sustained since the criticism to which they were subjected by Muñoz y Romero,⁶⁴ it is also indubitable that the French law was influential upon that of those regions, both through the influence of the settlements of the Cluny monks,⁶⁵ and through

62 The one hundred and thirty documents analyzed by *Pons* are all of the period with which we are now dealing, from the year 1095 (Era 1133) to that of 1222; eighty–six of them are of the 1100s and the rest of the 1200s. They comprise contracts of bargain and sale, barter and gift, wills, etc., and are rich in data relating to civil law.

63 Whenever *Hinojosa* shall publish his promised monograph upon the “Relaciones entre el derecho español y el de la Francia meridional,” the fruit of extended investigations, the question will be greatly clarified. Until then the reader should consult: *Bascle de Lagrèze*, «Histoire du droit dans les Pyrénées» (Paris, 1867), and «La Navarre française» (Paris, 1882); *P. Dognon*, “Les institutions politiques et administratives du pays de Languedoc” (Toulouse, n. d.); *W. Webster*, “Les loisirs d’un étranger au pays basque” (Châlons-sur-Saône, 1901); *Pella*, “Historia del Ampurdán.”

64 *Muñoz y Romero*, “Fueros francos: Juicio crítico de la obra de Helferich y Clermont” in the *R.G.L.J.*, vol. XXXI (1867).

65 On this important question see the work of E. Sackur, “Die Cluniacenser in ihrer kirchlichen und allgemeineschichtlichen Wirksamkeit,” vol. II (1894), ch. 5, „Die Kluniacenser in Spanien”; *U. Robert*, “État des monastères espagnols de l’ordre de Cluny aux

the immigration of groups of French colonists, especially after the Conquest of Toledo. How deeply this influence penetrated, and what legal institutions it eventually modified, are questions which it is desirable that future investigations should determine;⁶⁶ but the fact, in a general way, is unquestionable.

TOPIC 5

THE INDIGEOUS GROUNDWORK OF THE LAW IN THE 1200S

§ 16. LEGAL SOURCES IN CASTILE

The “external” history (that is, of the sources) of Spanish law in this period is somewhat complicated by the differences it shows in the different kingdoms. For greater clarity we will therefore treat each of these separately; and first, of *Castile*, including all the territories of Northern, Northeastern, and Central Spain that later were united under the Castilian crown.

In the first centuries (600s to 1000s) the “*Liber Iudiciorum*” or “*Iudicum*” of the Visigoths continued in force, under varying names; it finally came to be termed the “*Forum* (or “*Fori*”) *Iudicum*” – in Castilian, “*Fuero Juzgo*.” Its observance was uninterrupted, being confirmed by ratifications of the kings from Alfonso II onward, and by various decisions of the royal courts, which enforced it. Alfonso III created in León a tribunal called that of “the *Fuero*,” or of “the *Libro*” (book), especially charged to give judgments conformably to the Visigothic law. As exceptions to its authority, there were delimited little by little the “*fueros*” of the villages and towns, which in the beginning were apparently not written, but were administered as custom. The “*fueros*,” however, did not comprehend all local law, but generally only such regulations as concerned the status of the inhabitants of the foral district, exemption from tributes and services, the local government, and certain details of police and

13^e et 15^e siècles, d’après les actes des visites et des chapitres généraux» (see the *Bol. Ac. H.*, 1892); and the reports by *Robin* upon his investigations of the political, military, and monastic influence of France in medieval Spain in the *Ann. Ee. P. H. Études*, 1906-1907 (Paris, 1905-1906). See also an article by *P. Fito* in the *Bol. Ac. R.*, vol. XXIV, no. 4.

66 It is notorious that the effect of that influence in aggravating the tributes and services of the vassals of certain monasteries (as, *e.g.*, Sahagún), and in modifying the discipline and ritual, has been repeatedly affirmed. See *e.g.*, the “*Historia eclesiástica de España*” of *V. de La Fuente* (Madrid, 1873-1875).

justice. Thus there was being created a new political and administrative law that differed from the Visigothic type. In those matters which the local “fuero” did not regulate, men followed either the “Fuero Juzgo” (whose text suffered modifications and received additions that gave rise to a new form of it) or the traditions and customs of the locality. These customs were, as already remarked, in large part of Visigothic origin, reintegrated and reestablished in all their former vigor, thanks to the nature of the age, in which the energy of the central power and the unifying force of the legislation of Toledo had been greatly weakened. The people, returning through the accidents of war to a type of life analogous in certain respects to that of the ancient Germans, returned as well to the ancient customs, ignored by the royal legislation, but preserved in the memory of the masses. In the “fueros” themselves we find reflections of these, and even more in the private “fueros” (liberties) that lie within the field of civil law.⁶⁷ It may be, too, that along with these Germanic customs there sprouted also Iberian customs, until then repressed by a Romanistic centralizing legislation.

One must also bear in mind the “fueros” conceded by the kings; also those granted by territorial lords and bishops, which form a special body of legislation, although very similar to the royal “fueros”; and lastly, the privileges of the nobility, –whose sources were either tradition or special documents by which the kings recognized or granted privileges to individual nobles,– and the privileges similarly conceded to churches and monasteries, whose body of franchises and charters of gift (“*cartas de donación*”), respectively immunities from the common law, and licenses to collect tribute, – constitute an important branch of the legislation of the time.

The king was aided in his legislative functions by the councils. These were continued from the Visigothic period with representation of the palatine nobility and the higher clergy, assembled on the royal initiative, in which it was customary to enact important “fueros” and statutes of a general character. After these councils were transformed into Cortes (1188 would seem the earliest date assignable in Castile), that is to say, when citizens representative of the free municipalities came to form part of the councils, statutes originating in petitions to the king in Cortes and conceded under that authority increased in

67 With reference to the customary basis of local life declared by the fueros themselves, see *Hinojosa*, “Estudios,” pp. 21, 29, 30, 34, 36, 47, 67; *W. Webster*, “Influencia de los fueros pirenaicos en la constitución inglesa”; *J. Costa* “Poesía popular española y mitología y literatura celto-hispanas” (Madrid. 1881).

number and importance. These were designated by the name of “privy” legislation, as a species of statute law which, along with the regulations made by the monarch “*motu proprio*” (ordinances, pragmatics, “*cédulas*,” letters patent, etc.), signified a unitive and generalizing tendency, in opposition to the diversified and local influence of the “*fueros*.” The latter, however, continued to be granted in great number down to the end of this period. Besides the “*fueros*,” the particularistic tendency was equally represented by the ordinances issued by municipalities for their interior regimen (subject to the principles of the local “*fuero*”), whose issue was now beginning; by the sentences of military judges, arbitrators, etc., and even of the judges ordinary,⁶⁸ who were creating a new source of law, customary or circumstantial in basis, known in certain cases as “*fazañas*” (precedents) and “*albedríos*” (arbitraments).

Even in the foral legislation, however, a unitarian influence (or at least one tending against diversity), made its appearance, – namely, in the creation of so-called type or model “*fueros*,” – “*fueros*,” that is to say, which having originally been given to one municipality were later successively granted without substantial variation to others, which might become (and sometimes were) numerous; by this process the number of different “*fueros*” was diminished, and groups of homogeneous legislation were gradually formed.

To Alfonso VII has been ascribed the compilation or digest of the “*fueros*” of the Castilian nobles in an “*Ordenamiento*” supposedly authorized in the Cortes held at Nájera; although there is no sufficient documentary basis for such averment. To Ferdinand III is attributed the idea of forming a code or compilation of laws that should be of authority throughout the kingdom; and it is believed that the fragments of a book – called a “*Septenario*,” because it was to consist of seven parts – which was begun but not completed at this time were the fruit of that idea. It is probable, however, that we have to do here with a doctrinal work analogous to what the “*Siete Partidas*” represented in a later time.

§ 17. LEGAL SOURCES OF ARAGON, CATALONIA, NAVARRE, AND VALENCIA

Here, as in the territories of the Castilian crown, the “*Fuero Juzgo*” continued at first as the common law, although in its application in the political

68 [The “*Partidas*” recognized three classes of judges: arbitrators, judges legate, and judges ordinary; the last being permanent district judges of various grades whose jurisdiction was “*ex officio*,” as distinguished from the others, who acted under special commissions. – Transl.]

order it was more corrupted by modifications of legal practice than in the kingdoms of Asturias and León, which were the true successors of the Visigothic monarchy. Little by little, there appeared, as in Castile, various “*fueros*” and “*leyes especiales*” (bodies of special statute law), granted now to a city or town, now to a social class, some as exceptional privileges, others as confirmations of custom. Of these, supposedly the most ancient of *Aragon* is that known as the “*Fuero de Sobrarbe*,” a supposed collection of purely political dispositions defining the privileges of the nobility, and long believed to be of the first years of the Reconquest. Inasmuch, however, as the text of this “*fuego*” has not come down to us, and the writers who first described it are of very much later date (of the 1300s and later), its existence being moreover unproved by any authentic document whatsoever, the general opinion of modern historians considers as purely fabulous this pretended primitive political charter.

As in the kingdoms of Castile there were Councils, so in that of *Aragon* there were in these first centuries Assemblies, with the nobility and the clergy as their constituent elements. The time at which the Cortes here appeared is uncertain: some authors assign 1163 as the date, others 1274; which would carry the origin down into the next historical period. The Cortes once established, legislation originating in them naturally began, while at the same time the municipal “*fueros*,” –some of them of great fame throughout all Spain,– were extended, and numerous bodies of custom, some general and others regional and local, were defined. This varied mixture of sources, which was aggravated by the corruption of ill-copied texts, gave origin to the idea of a compilation that should order and depurate them. James I, who was a contemporary of Ferdinand III of Castile and survived the latter twenty-four years, intrusted with this work Bishop Vidal de Canellas, who prepared a work known by the name of the “*Compilación de Canellas*” (or “*of Huesca*,” – 1247). This reflects the customary law of *Aragon*, without mixture either of the Canon or the Roman, although the study of this already claimed many adherents in that kingdom; but it establishes as supplementary sources right reason and equity, by which provision, critically considered, the way was opened for the application of both the alien systems mentioned. This compilation did not abrogate the special “*fueros*” of particular towns and cities; it was considered as a supplementary law, applicable in cases appealed to the king. It contained originally no provisions whatever of political law. Those of this class were added later, in 1265, on the occasion of the confirmation of various privileges of the nobility made by James I in the Cortes of Egea.

The original law of *Catalonia* embraced the “Fuero Juzgo,” and the charters and statutes (capitularies) issued by the French kings during the French domination. When this part of the Peninsula attained independence, there began to appear municipal “fueros” (in many of which allusions occur to the “Fuero Juzgo”) and liberties; among which those conceded to Barcelona from 1025 onward came to constitute, because of the importance of the city, a notable group. At the same time the customary law grew and affirmed itself, as in Aragon; an example of this in its feudal portions being the code of the “Usáticos” granted in 1068 by Ramón Berenguer I, with the advice and assent of the nobles assembled with the Count of Barcelona. The publication of this code was due to the necessity of defining, unifying, reducing to writing, and solemnly promulgating for all the feudal territories the numerous and varied rules of law that had been developing under changing circumstances and influences. These “Usáticos” (“Usatici” or “Lex usuaria”: in Catalan, into which idiom it was later translated, “Usatges”) continued provisions of civil, criminal, political, and procedural nature. In the political order these confirmed the feudal organization, although betraying a certain conception of territorial unity. As regards the social organization, they recognize the class divisions, affirm the obligations of vassals under a penal sanction, and accentuate the slavery of the Moorish prisoners of war. In civil law they establish for the lord, among other rights, the liberty of testament and the right of succession to intestate vassals (“intestia”).⁶⁹ They prescribe also laws protective of the traveller, whatsoever his estate and religion, commanding for him justice more speedy than for the native. On the other hand, they preserve for delicts differences in penalties and fines based on the social class of the wrong-doer (a common and characteristic principle of the age); talionic penalties, judicial combat, the ordeal of boiling water, etc. The “Usatges” attained general observance throughout the ancient Mark, –save in a few counties in which, apparently, they were never of authority,– but without prejudice to special “fueros,” the “Fuero Juzgo,” or the customs not included in the “Usatges” itself. The primitive text of this has not come down to us. Later this was modified and added to.

In the free municipalities there were formed “cuadernos” (books) of ordinances or customs, distinct from the “fueros,” which at times possessed the character of true codes. To this class belong the Custumal of Lérida, compiled

⁶⁹ The best edition of the “Usatges” in Latin text is to be found in vol. I of the “Cortes de Aragon, Cataluña y Valencia” published by the Academia de la Historia.

in 1229 by Guillermo Botet, and those of Tortosa, of the end of this period, which contain political, civil, criminal, and maritime statutes, and already reflect the influence of the Justinian law. Of the general customs of Catalonia, aside from those contained in the "Usatges," a private collection was made at the time of James I by the canon Pedro Albert. The Cortes date in Catalonia from 1218.

Navarre. – The legend of the "Fuero of Sobrarbe" is common to Navarre and Aragon; for both regions were united, until, on the death of Sancho the Elder (1035), the Aragonese kingdom was formed, independent of Navarre; but it has already been remarked that the legend lacks foundation. Down to the middle of the 1200s –that is to say, until the end of the period we are now discussing– the Navarrese legislation discloses a character exclusively foral. Its "fueros" were municipal, and some of them were also of authority in the Basque territories. The Cortes are of a later date.

The formation of the general "fuero" of Navarre is attributed to the time of Theobald I (1237), but it is most probable that the one known in later time by that name is not so ancient, although many of its elements, as, for example, the "Fazañas," exhibit an archaic character; and it is even probable that its first redaction was a purely private work rather than a statutory expression of public power.

Valencia, after its conquest by James I of Aragon, was granted special "fueros," whose history and development will be noted in the succeeding period. The same is true of the *Balearic Islands*.

§ 18. GENERAL RESULTS AND TENDENCIES

The general phenomenon of this period, and particularly from the beginning of the 1000s onward, was the definition of those original or indigenous particularities that were destined to characterize the genius of the law in the four great divisions of Spain that must, in this respect, be distinguished: the Castilian, with its lesser progeny of the South and East that eventually blended in the general type; the Aragonese; the Catalan, whose sphere of influence included Valencia and the Balearic Islands; and the Navarro-Basque, which was in great measure a mingling of Aragonese and Castilian origins. From this differentiation (which was itself grounded in multiple causes of an economic and social order, and perhaps, as some believe, in psychological idiosyncrasies) there resulted the varying degree to which, in the next period, the

Roman law was assimilated and worked results in the four regions indicated. Hence, too, this renaissance of Romanism, though it appeared as a unifying solvent, did not operate in that manner, but, on the contrary, brought after it unlike consequences in each region, correspondent to the reaction that each opposed to the new influence.

The general aspect presented at this time by Spanish legal institutions is therefore one correspondent to a society whose personal basis rested in most profound inequalities. Special privileges involved the economic dependence of the greater part of the inhabitants on a few individuals. The economic basis was agricultural and pastoral, with servile or semiservile labor. Owing to these two preceding conditions, the dominant forms of property law deal with various fractional interests rather than with absolute titles. The protection given by the State to personal rights had little force, and was replaced by the protection by magnates in the forms of clientage and the patronage of towns (“benefactoría”) – a new source of inequality. The scantiness of population relatively to territory compelled the protection by all available means of nativity and domicile; hence a great laxity in the matter of sexual unions and blood relationship, and endeavors to consolidate the family also by economic advantages (forms of family and marital and fraternal community, widow’s dower, etc.).⁷⁰ This same necessity, with that of territorial exploitation, favored the cultivation and fallowing of lands, and consequently facilitated means of appropriation, and the conversion of possession into ownership wherever there was formed a group of men truly free, or without lords (“municipios”). Through the exigencies of agriculture and the cohesion of related social elements for mutual defence or aid, truncan families were perpetuated or reconstituted with strong paternalistic power, as in Galicia, the Asturias, the territory of the Pyrenees, Navarre, Aragon, and Catalonia; the bonds of

70 Respecting the antiquity and nature of the contract of continued community and fraternal community (“unidad y hermandad”) in León and Castile, see *Hinojosa*, “Discursos leídos,” p. 25. It occurs also in all the foral regions, as do also the simple “gananciales” (marital community) and the widow’s dower (Navarrese “fueros” of the 1000s and 1100s, Catalan documents of this period, etc.). Cf. the work of *Hinojosa*, pp. 26-35. [“Gananciales” were “mejoras” (as defined in the first sense, § 15, n. 15) of the conjugal estate: *i.e.* the fruits of the property contributed by both to the community, property bought by either with money or labor, acquisitions by common title, whether by gift or for consideration, and the fruits of all such added property, during cohabitation. The contract of “hermandad” was somewhat more general than that of “unidad.” – Transl.]

kinship were more closely knitted – as witness the fraternities of artificial brotherhood in the Kingdom of León; and associations were formed for the needs of social life – communities of serfs, communal property in different forms, – guilds, confraternities, etc.⁷¹

In the same way we must explain the privileges of married persons, particularly those with children; the variety of matrimonial institutions of equal or very similar legal status (as marriage “by benediction” – *i.e.* canonic; “juratory” unions; concubinage); the facility of conjugal separations, divorces, and the right of “mañería” (escheat for defect of heirs); the general prevalence of communal property between spouses, “a system truly national ... whose origins can be referred with cause to the combined influence of Christianity and Germanic customs”; the subjection of children to paternal and maternal power, and the denial to them of rights of individual property and of testamentary capacity; the indivision of the associate property in the family groups of Aragon, Catalonia, the Asturias, etc., – which was later combined with a liberty of devise to the eldest (“hereu”) or other son, the patrimony being thus kept from disintegration; the shortening of the prescriptive period in acquisition of title; the disappearance of the “mejoras” (Castilian “fueros”); the equality or approximation of rights among children of all classes; the right of kinship (“troncalidad”) and the preferential rights of relatives to purchase of estates;⁷² the absolute right of fathers to control the marriage of daughters; the importance acquired in legislation by contracts relative to the working of the soil under divided “dominium” (leases at will, emphyteutic and “foro” leases (copyholds) “encomiendas,” etc.); and the existence in all the Christian

71 On the perpetuation of family bonds in the embryonic type of family council recognized by the “Fuero Juzgo,” see *Costa*, who cites on this point the “fueros” of Sepúlveda, Cáceres, Salamanca, and Alcalá. The institution was later adopted for the tutelage of minors by the “Fuero Real” (par. 18).

72 [The “fuero de troncalidad” was that by which in the law of succession preference was given, among collaterals and descendants, to those in the line or of the “stirps” of the decedent. – On preferential purchase, *cf.* § 22, note 3. – As to the leases at will, *cf.* § 12, note 3. – As to emphyteutic leases, *cf.* the author’s remark in § 20. “Foro” leases in Asturias and Galicia, and the “rabassa-morta” leases of Catalonia were temporary, not perpetual, leases, otherwise emphyteutic in qualities; *cf.* § 23, n. 2. – An “encomienda” was “la merced ò renta vitalicia que se da sobre algun lugar, heredamiento ò territorio” (Escriche). –The “caballero” was, strictly speaking, a gentleman (“hidalgo”) of distinguished nobility. The “collazo” was a predial serf. “Payeses” were serfs of different classes; as to the “payeses de remensa” *cf.* § 17, n. 1 above. – Transl.]

kingdom of a social hierarchy of multiple and varied grades, whose basis was a large population of slaves and serfs (Moors, predial serfs, vassals “signiser-vitii,” “collazos,” “payeses,” “mezquinos,” “exaricos,” etc.), or of free clients living on the grace of others, notwithstanding the noble rank of many of them (“caballeros,” “emparats,” holders of “encomiendas,” etc.). Within these general limits; there persisted a rich variety of local institutional forms, founded upon the observance of custom, in the ample borderland left to compact, that is to say to the will of the contracting parties⁷³.

In the depths, however, of this society, the natural reaction of repressed elements, the political interest of the crown, and to a considerable extent changes beyond the will of men, in the economic conditions of different religions, were already working a profound modification of certain of its bases. This came to the surface in the emancipation of servile and dependent classes (a fact substantially completed in Castile by the end of this period), in the appearance of a middle class of freemen in the towns, and in the growth of industry and commerce, which last was bound to raise the economic status of movable property, depress that of immovables, produce a differentiation of commercial law; and bring after it into social life new institutions and legal systems.

73 Besides the customary exposition of the content of each legal source (“fueros,” “Usatges”) which is given in most histories of law or legislation, the reader will find general accounts, or important details, of the institutions of public and private law in this period in: *Martínez Marina*, “Ensayo histórico-crítico de la antigua legislación” (2 vols., Madrid, 1808); *Cárdenas*, “Ensayo sobre la historia de la propiedad territorial” (2 vols., Madrid, 1873-1875); *Muñoz y Romero*, “Del estado de las personas en los reinos de Asturias y León en los primeros siglos posteriores a la invasión de los árabes” (Madrid, 1883), and in his “Discursos leídos” cited above, § 9, note 2; *Hinojosa*, “Estudios,” “El régimen señorial y la cuestión agraria en Cataluña,” “Mezquinos y exaricos,” “La servidumbre de la gleba en Aragón” (in *España Moderna*, Oct., 1904) and other articles; *Gama Barros*, “Historia da administração publica em Portugal” (2 vols., Lisbon, 1885-1897); *Pella*, *op. cit.* above, § 15, n. 4; *Costa*, “Colectivismo agrario”; *F. Aznar*, “Los solariegos en León y Castilla” in the *Cultura Española*, 1907; and the well-known essays of *Durán y Bas*, *Naval*, *Franco y Guillén*, *Morales*, and others, upon the civil law of the foral provinces.

CHAPTER II

FIRST PERIOD: A.D. 1252-1511 THE CHRISTIAN RECONQUEST AND THE POLITICAL UNIFICATION OF THE PENINSULA

TOPIC 1

SPREAD OF THE JUSTINIAN AND CANON LAW IN CASTILE AND LEÓN

§ 19. HISTORY OF THE LEGAL SOURCES

In order to render understandable the references in the following paragraphs that explain the fundamental fact in the legal history of this period, namely, the incurrence of two new influences, alien to the national law, it is best to sketch briefly the history of legal sources from Alfonso X to the reign of Joanna the Mad.

One's attention is attracted in the first place to the enormous legislative activity of these centuries, befitting the transformation which institutions suffered, and the growing complexity that social life was rapidly taking on. Of the ordinances of the Cortes alone a goodly number can be counted. Add to these the general statutes of exclusively royal initiative, the municipal "fue-ros" granted without the concurrence of the Cortes, and innumerable charters, letters patent, "cédulas," and king's letters, issued in benefit of private interests, but which often affected matters of a public interest and modified regulations of general character, or filled the gaps in these (above all, at the close of the 1200s and in the 1300s, that is to say in the reigns of Sancho IV, Ferdinand IV, Alfonso XI, and Pedro I), – and one has an idea of the wealth of legal documents which the period has to offer.

The predominantly particularistic character of the legislation of the preceding period is apparently not modified in this. The granting of municipal

“fueros” –which always signified exceptions and heterogeneity of regimen– continued, in numbers equal or nearly equal to those of preceding centuries.¹ Although many of these “fueros” were replicas, with but very slight alterations, of certain models or types, and others were of exceedingly little importance, their swollen numbers attest the persistence of the particularistic spirit. By their side ruled the “Fuero Juzgo” (whose translation into Castilian had been recently begun), albeit greatly wasted in authority, and contradicted in not a few of its statutes. Of its validity and acceptance as a general statute by juriconsults there are evidences in the 1300s and 1400s. But it is noticeable, in regard to it, that despite its character as a general law, it yielded to the dominant current, assuming at one time or place the character of a municipal “fuero” (in this sense Fernando III conferred it on Cordova), and suffering at another, local alterations of its text such as are observable in comparing the translation supposedly made in the time of Alfonso IX, and is preserved at Santiago, with those that circulated in Castile.

On the other hand, a unitive tendency manifested itself at different times. Even in the field of the “fueros” Alfonso X issued, in 1254, a volume known variously as that of “the Statutes,” the “Book of the Councils of Castile,” “Fuero Castellano,” “Fuero Real,” and otherwise – which is nothing else than a model, more complete and systematic than all preceding ones, based upon these and the “Fuero Juzgo” with additions, and conserving with some modifications the general character of Visigothic, Leonese, and Castilian law as elaborated during the first centuries of the Reconquest. It embraces political, procedural, civil, criminal, and commercial law, developed in four books; and its redaction, we are told in the preface, was due to the lack of any true “fuero” in a great part of the kingdom, on which account men were forced to govern themselves under precedents, arbitrations, and customs, which were often pernicious, wherefore the cities themselves demanded that the king give them a new law. This Royal “Fuero” was adopted by the royal court as its authority in appellate cases and for the jurisdiction of the capital. It was also conceded as a municipal “fuero” in 1255, for the first time, to Aguilar de los Campos, and later to other cities, as for example Burgos, Valladolid, Simancas, Tudela, Soria, Ávila, Madrid, Plasencia, and Segovia; being, in short, one of the model “fueros” to which reference has been made, and of these the most widely disseminated. The original text suffered modifications (by Alfonso X himself

1 E.g. more than one hundred and twenty-seven from Alfonso X to 1299, and above ninety-four in the 1300s, most of these of Alfonso XI.

in 1278-1279, by the Cortes of Valladolid of 1293), and local variants of it also existed, as is evident from the differences between the manuscript copies that remain to us. Its importance is shown, not alone in the modifications just referred to and by the great extent of territory over which its authority extended, but also by the legal problems which its enforcement elicited. These may be seen in a legal manuscript that accompanies some of the copies of the "Fuero Real," entitled "Leyes del Estilo," or interpretations of the foral laws. Although these cannot be designated infallibly as a statute (since it is not established that they were promulgated by King or Cortes), they serve at least to show (and this whether the manuscript be the result of the private initiative of some jurist, or a digest of legal decisions, or of any other nature) the endeavor made to adjust the work of Alfonso X to traditional customs, – in other words the variance between it and the new necessities of the time; and unquestionably, too, gaps and obscurities that blemished it.

More certainty exists regarding another group of statutes called "Nuevas" (new), which are said to have been promulgated by Alfonso X after the "Fuero Real," and which, to judge by the preamble common to many of them, were also issued to settle doubts felt by the judges in the application of the law. In the copies that have come down to us, a chief portion of these laws is duplicated in the different copies along with others that are variable, and which in some respects betray the hand of a private compiler rather than a legislator. At all events these "Leyes Nuevas" embrace only a few legal topics, – the relations between Christians and Jews in the matter of loans, civil procedure, and inheritance.

On this line the unification of the law made, as we have seen, little advance; for the very "Fuero Real" itself, notwithstanding its wide scope (reflected in some of its names), embraced only an exceedingly slight part of the content of the municipal "fueros" in force within the wide territories of the Castilian crown. It has been supposed that Alfonso X and his father devoted no little attention and labor to the aim of accomplishing at a stroke this unification, embodying their efforts in legal works that have made them celebrated and to which reference must now be made.

To Fernando III is attributed, as already seen, not only the conception, but also the partial preparation, of a code which, because it was intended to embrace seven parts, was called the "Septenario," and which was completed by Alfonso X. It is so stated, in fact, in the preface to the work, which, with one book dedicated to the exposition of topics of theology and Canon law, is all of

the “Septenario” (or “Setenario”) that has come down to us (in a manuscript of the 1400s). What is certain is that it was not administered as statute, inasmuch as it was not promulgated; and that the character of the text does not even justify one in considering it a work of true legislation, – but rather only as an encyclopædic and doctrinal work; and finally, that not even the general character of the body of the work, whether characterized like the “Fuero Real” by traditional tendencies or reflecting Romanist influences, can to-day be conjectured.

Of this same period of Alfonso X, and prepared either at his command or on private initiative, we possess a compilation of legal character, analogous to the “Septenario”; namely, the so-called “Espéculo (or “Espejo”) de todos los Derechos,” or Mirror of all the Laws, – a name much used at the time throughout Europe to designate doctrinal treatises, – of which there have come down to us fragments preserved in a manuscript of the late 1200s or early 1300s. In the prologue it is stated that the book was composed by selecting from all the “fueros” whatever was best and most valuable, and with the counsel and accord of church authorities, men of wealth, and jurists; and that it was communicated to the cities for their government. The last statement is not, however, established by any historical evidence whatever; and so this new attempt at unification (if it was actually made) remained also fruitless. This “Espéculo” was, however, utilized by lawyers of the time as a text and reference book, as is inferable from manuscripts of the 1300s in which its principles are contrasted with the existing law and with doctrinal treatises.

The “Espéculo” was not the last work of this character produced in the time of Alfonso X. The enterprise of a great legal compilation reappears years later in a new and more ample work, similar in some respects to its predecessors, but of greater scope and of very different fate, – a so-called Statute Book (“Libro de las Leyes”), which, from its division into seven parts, came to be known already in the 1300s as “Las Partidas” or “Leyes de Partidas,” names which have prevailed, and which are to-day those used to designate it. Its compilation was begun in 1256 and was completed, it would seem, in 1265. Its sources were the “fueros” and worthy customs of Castile and León (for example, the “Fuero Juzgo,” “Fuero Real,” and the “fueros” of Cuenca and Córdoba), the accepted Canon law (the Decretals), and the works of the Roman juriconsults included in the Pandects, together with those of the Italian commentators upon the Justinian law. Of these three elements, the preponderant were the canon and the Roman; and although they were not always

accepted with servility, their doctrines being modified as to some points, the general character of the "Partidas" is that of an encyclopædia or systematic compendium of those two legal systems. They signalize a great novelty in the legal history of Castile, as well for the new material which they added as for the modifications they effected of the Visigothic and foral tradition in the field of private and (in part) of public law. The redaction of the "Partidas" was the work of several jurists whose names are not cited in the text, and was done under the supervision, and subject (how much cannot be determined) to the active intervention of Alfonso, who was himself an author of zeal.

What could have been the king's intent in causing the compilation of the "Libro de las Leyes?" Was it to compose a legal encyclopædia, analogous to others which he made in other fields of knowledge, in conformity to the spirit of the time (favorable in both Moslem and Christian countries to this sort of works)? Or did he rather wish to prepare a statute or code expressive of the new influences of the Canon and Roman law, in order to impose it as a common law –and consequently to annul the "Fuero Juzgo," the municipal "fueros," and the very "Fuero Real" itself– upon all his subjects? The latter intent seems inferable from a paragraph of the preface to the "Partidas" in which we read: "We are pleased to command that all persons of our dominion be governed by these statutes and by no other statute or 'fuero,'" and from other similar passages in various statutes of the same collection; and though the same may be read in the "Espéculo," which was never law, the declaration, sufficiently explicit and repeated in other passages, does not on that account the less exist, and appears to justify our inference. Yet if this be trustworthy, it would nevertheless clash with various significant facts in Alfonso's reign: namely, on one hand, with the prohibition against the observance in Castile of the Roman laws embodied in a letter of the king to the alcaldes of Valladolid, August, 1258; and, on the other hand, with the repeated confirmations of the local "fueros" (as of Zamora in 1274; Valladolid, 1255; Segovia, 1256) made by him in different Cortes, the concession of many new ones (the majority of those of the second half of the 1200s being of Don Alfonso), and the promulgation of the "Fuero Real" itself. These were acts preceding, cotemporaneous with, and following the compilation of the "Partidas," and by them the king himself contradicted the ostensible character and purpose of that work.

In whatever way this contradiction may be explained, the fact is that the "Partidas" were not confirmed as a common and inevitably ordained law, either in the reign of that king or of his successors, until Alfonso XI. These went

on, as already noted, granting municipal “*fueros*,” sanctioning the “*Fuero Juzgo*” and “*Fuero Real*,” making alterations in the last, and punishing whatever was contrary to the local liberties; thus denying not only the pretended general authority of the “*Partidas*,” but also the innovations which the doctrine of that work represented.

And yet the compilation of Alfonso X went on gaining ground among men. Among students, notably the lawyers, and in the universities – classes especially influenced by the Roman and the Canon law – the “*Partidas*” served as a text and reference book. This is indicated by the glosses of the manuscript copies of the 1200s and 1300s, by the fact of its being read and expounded in the university classes (in Portugal and Catalonia as well), and by the publication of isolated fragments as doctrinal texts. This tendency was favored by the strictly didactic character (scientific, ethical, or historical) of not a few of the statutes, – as had been likewise true of the “*Fuero Juzgo*.” Doubtless through the influence of lawyers educated in the universities, who were already devoting much thought to public affairs (Alfonso X states in more than one place in his works that he consulted “men learned in the law”), many portions of the “*Partidas*” were gaining authority in legal theory, sanctioned by the then new and great prestige of the Roman law, as well as in the practice of the courts, and in the opinions of counsel. One cannot otherwise understand why, in a number of Cortes (for example those of Segovia in 1347), representations were made to the king against certain details of the *Partidas*, which, if they had *not* been enforced, could not fittingly have been characterized by the petitioners as infractions of the law. In the Cortes of Alcalá (1348) the ordinance confirmed by Alfonso XI also seems to allude to conflicts provoked by the enforcement of statutes of the *Partidas*. And indubitably the movement in favor of these had come to be very powerful; for in that same ordinance it was resolved to promulgate the compilation of Alfonso X, making it obligatory in all points not contradictory of the municipal “*fueros*,” the “*Fuero Real*,” and the privileges of the nobility.

With this the idea of Alfonso the Wise was realized. Thenceforward the Canon and Roman doctrines could influence openly and legally the positive law, in modification of the native law of León and Castile. To Alfonso X was also due a special law relating to the justices of the appellate royal court (“*adelantados mayores*”), and a regulation of gambling houses.

The “*Ordenamiento of Alcalá*” was not limited to giving the force of law to the “*Partidas*” (with the limitations mentioned); it also formulated in out-

line a hierarchy of sources within the positive law. In the first place, it puts the statutes resolved in the Cortes, which concerned various matters of political law, judicature and procedure, civil law, criminal law, and public finance, introducing important changes, to a number of which reference has already been made. After these come the “Fuero Real” (“Fuero de las Leyes”) – “which is observed in our court and which certain cities of our realm keep as their fuero” – and the municipal “fueros,” whose authority (except in matters “against God and reason”) Alfonso XI confirmed, though reserving the right to amend and better them. Lastly, and as a supplementary law, come the “Partidas,” – “albeit it appears not that they have been thus far published by mandate of the king, nor were ever held for laws.” Similarly it confirmed the “fueros” or privileges of the nobility and their vassals, – the special one of trial by judicial combat (“rieptos”), and the general one of rank (“fijosdalgo”), – which Alfonso XI decreed on the basis of that said to have been granted in the Cortes of Nájera, and which is given at the end of the ordinance. As for the “Partidas,” the king notes that he had caused it to be “harmonized, amended, and amplified in certain matters”; that is to say, the text of the “Partidas” in force from this time was not the same as that originally put forth by Alfonso X, which had been revised with regard to the needs of the age. It must also be noted that the new statutes of the “Ordenamiento” (whose authority controlled) modified substantially many important principles of the Alfonsine compilation; for example, in judicial procedure, contracts, the regulation of conjugal property, and inheritance; while the traditional royal and municipal foral law was in great part affirmed.

Legislative variety continued, as is seen, in the same degree as that in which Alfonso the Wise left it, and his great-grandson (Alfonso XI) not only sanctioned it in the “Ordenamiento of Alcalá,” but further confirmed it by concessions of many municipal “fueros,” as has already been pointed out.

The common elements of the positive law, nevertheless, went on rapidly growing in number and gaining ground. The great legislative activity of the Cortes and the steadily growing absolutism of the kings – which was manifested in the frequency and abundance with which they legislated “*motu proprio*” in “*cédulas*,” letters patent, king’s letters, and ordinances – went on overlaying the diversities of the “fueros” with a mass of regulations of common observance, which gradually lessened the special province of the local laws and annulled many of their provisions. And the unitive process was bound to end thus, even though not through promulgating any general and

common code or expressly abrogating the “*fueros*,” but instead confirming and even increasing them (as already seen, and as continued to be done in the statutes of Cortes and royal acts of the 1300s and 1400s); for these confirmations and additions had continually less actual meaning, representing exemptions more apparent than real, increasingly curtailed from day to day. The ordinances of the Cortes and the dispositions of the crown had gone on modifying and unifying political and criminal law, the law of judicature, and that of public finance, which constituted the very basis of the particularism of the “*fueros*”; and the innovations of the private and procedural law of the “*Partidas*” passed through these channels from the status of a supplementary to that of a preferential law. In appearance, the gradation of sources indicated in the “*Ordenamiento of Alcalá*” was not altered. But from Alfonso XI to the Catholic Kings matters changed greatly in essence; for the power of emending and bettering the “*fueros*” which the king had reserved to himself came to be the thing of most importance, through which the new law was enthroned in supremacy in the greater part of social relations. In conformity with this tendency Peter I made a new revision of the text of the “*Partidas*” in the Cortes of 1351, and later kings repeatedly confirmed their authority. The fact should be noted that various Cortes of the 1400s (Madrid, 1433 and 1458; Valladolid, 1447; Medina, 1465) petitioned the formation of new compilations of the law and elucidations of those existing; this was yet another proof of the great complexity of the positive law, and of the confusion and doubt that continually resulted in attempting to determine what was really obligatory in any case.

To Peter I has come to be attributed a code comprehensive of the special “*fueros*” of the nobility, and known under the name of the “*Fuero Viejo*” of Castile. Its existence was unknown until at the close of the 1700s two Aragonese scholars discovered its text in ancient manuscripts and published it, accepting its authenticity as certain. But the fact that the preface (in which the history of the “*Fuero Viejo*” is set forth and the pretension is made that Peter I ordered and republished it in 1356) is full of errors; the circumstance that it contains statutes expressive of legal conditions whose actual existence in Castile is very doubtful, and the clearing up of the royal sources of its text (accomplished in recent times) compel a belief that it was never a legal code, but rather a compilation made in the 1400s on private initiative and for private ends, upon the basis of other private compilations and the “*Ordenamiento of Alcalá*,” although with notable variations. It is true, however, that the compil-

er does show himself well informed of the actual law, to judge by the concordance of many statutes of this “Fuero” with authentic documents of the time.

The sources of the privileges or “fueros” of the nobility in this period are to be sought mainly in charters, the “Fuero Real,” the “Partidas,” and the “Ordenamiento de Fijosdalgo” (“Ordinance of Gentlemen”) granted by Alfonso XI.

The reign of the “Catholic Kings,” Ferdinand and Isabella, represented in the history of Spain great changes in the political order – the conquest of Granada, the curbing of the nobility of Castile, the annexation of the lands discovered in America and of Navarre, conquests in Italy and in Africa, and the reorganization of the army; as well as in criminal law (the Inquisition), and in society (expulsion of the Jews, conversion of the Andalusian Moors, etc.); and all these changes necessarily produced a great development of legislation.²

Despite the importance of certain Cortes of this time, as those of Madrigal, Toledo, and Toro, and others of Aragon, the greater part of the dispositions promulgated were due to the personal initiative of the king, and were in the form of “cédulas,” king’s letters, provisions, capitulations, instructions, etc. And, notwithstanding all this, the necessity of a new and ordered compilation was profoundly felt, for that of the time of Philip II, incomplete and behind the age, was in many respects deficient. This labor was undertaken by two jurists, by both it would seem by commission of Queen Isabella: Dr. Alfonso (or Alonso) Díaz de Montalvo, and Dr. Galíndez de Carvajal. The publication of only the former’s compilation was realized, under the title of “Ordenanzas Reales de Castilla” (1484?); it was popularly known as the “Ordenamiento del Doctor Montalvo.” The work is divided into eight books and comprises ordinances of the Cortes from that of Alcala of 1348 onward, and various classes of royal acts from the time of Alfonso X, including some taken from earlier legal source-books: in number, a total of 1163 statutes relative to political, administrative, procedural, civil, and criminal law, of which 230 were of the Catholic Kings. It is doubtful whether Montalvo’s collection attained legal authority, or only remained a mere essay which the crown did not come to promulgate as law. At all events it was neither perfect nor complete. There are statutes in it that are duplicated, others of corrupted text, some the ascription of whose origin is not trustworthy; and of course it does not contain all the dispositions of the crown and of the Cortes anterior to the Catholic Kings, nor

² A detailed statement of them will be found in vol. 2 of *Altamira*, “Civilización Española.”

all those issued in their time down to 1484. There were later promulgated and printed, in casual issues, various instructions and ordinances,³ and a compilation known by the name of Juan Ramírez, which includes papal bulls and Castilian laws (1503). But the necessity of a good compilation, clear and methodical, continued. In her will Queen Isabella recommended its preparation.

An important group among the laws of the time is formed by those relative to the American dominions, which later, in the time of Charles II, came to constitute a part of the "Recopilación de las Leyes de Indias," which will be later referred to.⁴

§ 20. ROMAN ELEMENTS IN THE STATUTORY LAW, AND PARTICULARLY IN THE «PARTIDAS»

Having now described the external history of the sources of the law, it remains to be seen how the Roman law of Justinian and the Canon law made their way into them and into legal practice generally.

The influence of the former found its entry already prepared for by events anterior to the 1200s; but in that century it was strikingly revealed in legislative measures and didactic works. A formidable struggle was thus begun between it and the legislation and native customs whose distinctive character has been noted above. The renascence of the Justinian law in Europe, thanks to the labors of the Italian and French schools, especially from the end of the 1000s onward, did not fail to show effects in the Peninsula.⁵

That that law had exercised some influence in Spain before the 1200s, and even upon legislation, cannot be doubted, although it cannot be affirmed as to

3 See their enumeration in the work just cited (2d ed.), vol. II, p. 485. Among them the most important is the group known as the "Leyes de Toro" which are referred to below in § 22.

4 For an enumeration and elaborate analysis of them see generally the book of A. Fabié. "Ensayo histórico sobre la legislación de los Estados españoles de Ultramar" (vol. I of the "Colección de Documentos Inéditos" in publication by the Academia de la Historia); and for a systematic exposition of their novelties see especially §§ 574, 575, 587, and 588.

5 It is well known that the classic work of *Savigny* upon this subject, "Geschichte des römischen Rechts im Mittelalter" (1815-1831 and 1834-1835) has been rectified and supplemented in many points by Fitting, Ficker, Schupfer, and many other modern Romanists. Readers of Spanish will find a good account of the actual state of our knowledge regarding this question in the excellent book of *F. Clemente de Diego*, "Introducción al estudio de las instituciones de derecho romano" (Madrid 1900).

all the matters professed by certain writers. Thus, for example, the utilization, albeit inconsiderable, in the “Usatici Barchinonæ” is established by the compilation called “Petri Exceptiones Legum Romanorum” (of uncertain date and authorship).⁶ It is also said that vestiges of the same law are betrayed by a manuscript of Petrus de Ganon of the 1000s, cited by Nicolas Antonio.⁷ That it must have been influential in the Visigothic period is an assumption not indisputable, although it is indeed highly probable that it was introduced into the Spanish territories ruled by the Byzantines, and that the statute of Reccesvinth (or Kindasvinth) prohibiting the application of “remotis alienarum gentium legibus” is a reference to it.⁸ But these Roman fragments, even were they to be completely proved to be such, are of scant importance. The Justinian element did not attain importance in the Peninsula until the 1200s. In that and the preceding century the knowledge and cultivation of the Roman law in Spain is attested by the names of various jurisconsults (some of them students or professors in foreign Universities, for the most part at Bologna; others, of Italian origin resident in Spain, as the “magister” Jacome Ruiz); by the diffusion of Justinian texts in the original or translations; and by the existence of legal works inspired by the Justinian system.⁹

Of these works, there was in Castile in the 1200s only one of a truly legislative character, “The Fuero Real.” For it does not appear that either the “Septenario” of Ferdinand III (whose only preserved fragment does not permit one either to affirm or deny that it was Romanist in character, although the affirmative be probable), or the “Espéculo” was promulgated or enforced as law; and as for the “Partidas,” we have seen that they did not enjoy the status of an obligatory code in the time of Alfonso the Wise.

Although the “Fuero Real” was (as already stated) predominantly indige-

6 See Ficker on the “Usatici Barchinonæ” and their relations with the “Exceptiones Legum Romanorum” in the “Mitteilungen des Instituts für Österreichische Geschichtsforschung,” vol. VII, suppl. vol. II, pt. 1.

7 N. Antonio, “Biblioteca Hispana Vetus,” vol. I, p. 518. The affirmation is made by Ureña, “Sumario.”

8 Ureña, who agrees with one or another foreign authority, believes that it is also traceable in the “Fórmulas Visigóticas” (which Hinojosa denies); as well as in the division into 12 books of the Code of Reccesvinth, and perhaps in a statute (ley 1. tit. 3, bk. 3) of the “Forum Iudicum.” Clemente, *op. cit.*, p. 192 says: “The legislation of Justinian was introduced into Italy after the conquests of Narses. It attained especial dominance in Romagna, was more or less widely known in the Gallic provinces, and *perhaps also in Spain.*”

9 Cf. Altamira, “Lacunes.”

nous in its elements, it offered certain novelties that indicate the inflow of the Roman law into the field of civil law. Such are various of the rules of interstate succession; testamentary executors; adoption – whose regulation is adjusted to the Justinian system; the accession of “insula nata”; and a good part of the theory of contracts. In other matters (such as “mejoras,” the prescriptive period for gaining title, and marriage), the “Fuero Real” rectified the earlier municipal “fueros” without adopting the Roman law; sometimes reviving mandates of the “Fuero Juzgo” that had fallen into desuetude; at other times establishing rules of distinct form borrowed from the Canon law or other sources. A novelty of importance, and not of Roman origin, is the testament by agency (“por comisario”).

There was a larger Roman element, as already seen, in the “Partidas.” Within the field of civil law the Romanism of this code is displayed especially in the following topics: the theory of the nature of law and custom;¹⁰ the theory of status; the division of things and of rights into those real and personal; the doctrine of ownership; modes of acquisition; possession; servitudes; hypothec and pledge; emphyteusis, the principles of which came to be confounded with those of other medieval contracts which were, strictly considered, different, (§ 18 above, n. 3); the classes and formalities of contract; the distinction between pact and contract; extinction of obligations; dowry of the wife (making that derived from the husband (“arras”) equivalent to the gift “propter nuptias,” and introducing the inalienability of the former and its security by a legal hypothec upon the property of the husband); modification of the rules regulating the “ganancial” (community) system –which the “Partidas” do not expressly regulate, but, so far as the local custom permits, assume in matrimonial contracts– as respects the property that might constitute them, excluding the fruits of the dowry and the “arras”; the suppression of the widow’s dower, –though not of the compact of community (§ 18 above),– and the introduction on the other hand of the rule giving a fourth part of the inheritance to the young widow who brings no dowry; the definition of the legal incapacities of women established by the “Senatus consultum Vellejanum,” with the exceptions introduced by the Glossators, and the constitution “Sia qua mulier”; administration of her “parapherna” by a wife when she did not intrust them to the husband for administration by him¹¹; the principles

10 *Universidad de Oviedo*, “Trabajos de investigación en la cátedra y seminario de Historia general del Derecho,” 1905.

11 *Hinojosa*, “Discursos leídos,” etc.

of legitimacy and of adoption, and the entire theory of the “*patria potestas*,” with negation of maternal authority; the principles of wills (their classes, formalities, etc.); “*legítimas*” (compulsory testamentary shares), which were adjusted to the 118th Novel of Justinian, with some variations; the rules of the division of the inheritance; the repudiation of the right of kinship; and, finally, intestate succession.¹²

If the immediate imposition of so considerable a mass of innovations upon the cities of the Castilian crown had been possible, the derangements produced in civil life would have been enormous. Fortunately, impositions of this sort are not reconcilable with the processes of history. When they are attempted, they are futile, since the people will not receive or tolerate them. Nor was this contemplated by Alfonso X, who did not promulgate the “*Partidas*” (despite the repeated expression in their text of the obligatory character of the laws of that compilation); nor can any such intent be attributed with probability to him, seeing that his whole conduct as a legislator contradicts it.¹³ As little did his successors attempt it, until Alfonso XI, who in one of the statutes passed in the Cortes of Alcalá of 1348 –and inserted, as we have seen, in the “*Ordenamiento*” that bears the name of that assembly– ordered the publication of the “*Partidas*” (according to them an authority of the lowest order, as supplementary to the royal statutes), the “*Fuero Real*,” and, so far as these were of actual authority, the municipal “*fueros*.” If 1265 be accepted as the year in which the composition of the “*Partidas*” was ended, we have a period of eighty-three years during which the work of Alfonso X remained, in legal phraseology, suspended.

As we have seen, however, this was so only in appearance. Its fame, which corresponded to the merits of its execution, rapidly opened it a way and gave it, among the embodiments of the national legal genius, a rank as high as any which Alfonso’s ambition could have craved for it. The manner in which its influence was spread has been indicated above in § 19. But though this process is known to us in its general features, we know very little of it in detail. We possess to-day very few data in regard to the actual enforcement of the Alfonsine compilation in the judgments of the courts, the resolutions of the

12 See *Martínez Marina*, “Ensayo histórico-crítico de la antigua legislación,” books 8 and 9; *La Serna*, preface to the edition of the “*Partidas*” published by the editorial house (and known under the name of) La Publicidad, Madrid, 1848. Cf. *Altamira*, “*Lacunes*,” pp. 10-11.

13 *Altamira*, “*Civilización española*,” vol. II, p. 79.

Royal Council, and other embodiments of the positive law. Martínez Marina gathered together all the evidence that on this point is adducible: petitions, passages in the acts of the Cortes anterior to 1348, some of them of doubtful meaning; a “ley del Estilo” (§ 19) – likewise questionable as regards the legal force of the collection to which it belongs; three statutes of the “Ordenamiento of Alcalá”; and the political question of the succession of the crown of Castile provoked between the heirs of the eldest son of Alfonso X and his second son Sancho. A very scanty showing, as is evident; and even of these we must eliminate, for our purposes, the portions that do not relate to the private law. In order to arrive at a more precise determination of the diffusion of the Roman element of the “Partidas” up to 1348 it would be necessary to study the judge-made law of the preceding eighty-three years (of which it cannot be doubted many documents will be found in the archives); the diplomatic collections of the Kings Alfonso X, Sancho IV, Ferdinand IV, and Alfonso XI (up to 1348); and the papers of the Royal Council,¹⁴ extracting from them all the concrete references to a preferential enforcement of the Roman doctrines as contrasted with the native. Until this investigation shall have been made (be its results what they may), we cannot rest content with our knowledge of this period, so important in the legal history of Castile.¹⁵

§ 21. THE STATUS OF THE «PARTIDAS» AFTER THE «ORDENAMIENTO OF ALCALÁ» (1348)

The question of the penetration of Roman theory into Spanish civil law was not settled by the statute of the “Ordenamiento of Alcalá” above referred to. The “Ordenamiento” was in this respect evidently the product of compromises. Allusions are made in it to conflicts provoked by the (unlawful) application of the statutes of the “Partidas”; and one need not feel doubts in believing that the solution offered by Alfonso XI proves the strength which the opinions favorable to the Roman element had acquired. In contrast to the satisfaction thus given to these opinions in ranking the “Partidas” as a

14 On the Council and the influence in it of the legists, see *Conde de Torreánaz*, “Los consejos del rey en la edad media.”

15 In the pragmatics and royal orders subsequent to the “Partidas,” which we know to-day through the “Compilación del Doctor Montalvo,” evidences of Roman influence are not discernible; on the contrary, there are confirmations of statutes of the “Fuero Real,” and of native institutions such as the “gananciales.” Much still remains to be determined, however, in this field.

supplementary law, there appear nevertheless statutes that mark, beyond all uncertainty, a reaction in favor of the native element, and which confirm this, expressly and concretely, in preference to certain principles of the Justinian law. Examples of such statutes are those relative to the dispensation of formalities in contract, the administration of matrimonial property, succession, and the necessity of the appointment of an heir (which they repudiate).

After 1348, however, the question reappears for us in similar terms, – since that which we are interested in knowing is what effective enforcement was enjoyed after that date by the code of Alfonso X (corrected by Alfonso XI when he promulgated it); whether as a law strictly supplementary to, or –in the manner noted before 1348– as a rule superior to and derogative of the native law, notwithstanding the precedence given these in the “Ordenamiento.” Martínez Marina attacked this problem and established in reference to it direct and indirect proofs of the enforcement of the “Partidas” from the 1300s onward.¹⁶ He reaches this general conclusion: That the legists, imbued with the theories of Justinian and the Canon law, and of the Glossators and Commentators of the Renaissance, habitually cited all this rubbish in the civil courts, where these doctrines “served as the norm of judgment, and as interpretations of the national statutes, particularly the ‘Partidas.’” To this code, because derived from those sources and especially adjusted to their distortions, they assigned arbitrarily a chief, or more exactly, a sole authority, although indeed always maintaining it in a status of dependence upon Justinian and his interpreters.¹⁷ The author failed however, to develop this averment with the accumulation of concrete citations that one might desire; and consequently this question also remains expectant upon scholarly investigations of the documentary source of legal decisions, the acts of the Cortes, and the pragmatics of the crown.¹⁸

16 All are set forth in detail in *Altamira*, “Lacunes,” pp. 13-15.

17 *Martínez Marina*, “Ensayo histórico-crítico de la antigua legislación,” bk. 9, par. 24. Note the contrasts he establishes between the pure Roman law and the “Partidas.” In this matter he only continues the distinction which is discernible in all the civilians of the 1700s, who include the “Partidas” in the Spanish law even when they are protesting against the Roman and in favor of the native. Such inclusion was, for that matter, traditional, and may be seen in chapter 19 of the instruction for “Corregidores” issued in the time of the Catholic Kings and cited by Martínez Marina.

18 As an example of what can be gleaned in these sources, recall the statute issued by John II at Olmedo on May 15, 1445, declaratory of certain statutes of the 2d “Partida” and of the “Fuero Real,” and which was pointed out by *Asso* and *De Manuel* in their “Instituciones del derecho civil de Castilla” (4th ed., Madrid. 1786.) p. lxxxvi.

§ 22. THE «LEYES DE TORO»

This struggle between Romanism and the native law was prolonged throughout the rest of the 1300s and all of the 1400s. It was attempted to impose the former, as has been seen, through two channels: the “Partidas,” on one hand; on the other, the Justinian law and the doctrines of the Commentators not included in that code, and whose citation before the courts was prohibited by a pragmatic of John II as early as 1427. The Catholic Kings followed in this respect a vacillating and contradictory policy, as is shown by a comparison of the pragmatic of 1499, that of 1502, and that known as of Barcelona.¹⁹

The result of this struggle was the recurrence at the end of this period of the same state of doubt, of uncertainty in the application of the law, and of conflicts between the various sources which, now statutes and now the servile opinions of the legists, were introducing into practice. The “Ordenamiento” of the Cortes of Toledo of 1502, first promulgated in 1505 in the Cortes of Toro (“Leyes de Toro”) was an answer to this and an attempt at a new clearing up of the situation. The pragmatic promulgating the “Ordenamiento” expresses with sufficient clearness its motive:

“Be it known that reports of the great hurt and damage done to my subjects and natives by the great variety and diversities that prevailed in the understanding of certain statutes of these my realms, as well of the “Fuero” as of the “Partidas” and of “Ordenamientos,” and of other matters that had need of interpretation though there were no laws concerning them, were reported to the King my lord and father and to the Queen my lady and mother, whom may God keep: wherefore it came to pass that in certain parts of these my kingdoms, and even in my own courts judgments were taken and sentences given in identical cases sometimes one way and other times another, which was the cause of the great variety and diversity that existed in the understanding of the said laws among the lawyers of these my realms,” etc.

The “Leyes de Toro” resolved some of these cases of “variety and diversity.” Sometimes they inclined toward the native, but usually to the Roman and Canon law; in certain institutes they adopted a compromised policy, consisting in the recognition of both systems at the same time. The familiarity of these laws and the abundance of extensive and profound commen-

¹⁹ *Altamira*, “Lacunes,” pp. 14-16.

taries upon them, some modern,²⁰ excuses us from tarrying in an exposition of their principles; but we may indicate their chief novelties and most important principles. The “Partidas” triumph in them in the law relative to sealed testaments; various particularities of succession; the right of preferential purchase by a cotenant;²¹ the dowry brought by the wife, implicitly recognized at the same time as that derived from the husband, to which was given the erroneous name of “arras”; prescriptive periods; the validity of the “*Senatus consultum Vellejanum*” (relating to a wife’s contracts); and in other details. On the other hand, the principles of that code were contradicted, or others ignored by it were affirmed, in the recognition of the testamentary acts of those condemned to death, and of sons under tutelage; in the “ganancial” (community) system; in the portion of the inheritance left to free testamentary disposition (only a fifth, as in the “Fuero Real”); in testament by agency, which was confirmed and perfected; in the relatives’ right of preferential purchase; etc.

Other statutes of the “Fuero Real” were also ratified, and the “Orde-namiento” of 1348 was reproduced, as regards the preferential rank of legal sources; the inferior status of the “Partidas” as a supplementary code being thus maintained.

An important novelty in the “Leyes de Toro” is the development of estates tail (“mayorazgos”) – already regulated in the “Partidas”; they possessed even a more ancient national lineage, and were rapidly to take root in custom. The entailing of estates began, as is well known, in the time of Alfonso X, under private charters, and went on spreading in like form among the estates of the noble class, both as regards their own estates and of those received by grant from the crown as “heredades” and “villas” in inalienable title and with limitation to primogenital succession. This was the form taken by the greater part of the royal gifts and grants that were so frequent from the time of Henry

20 By *Antonio Gómez* (1555); by *Llamas y Molina* (1827); by *Pacheco* (1862); and by *González Serrano* (1867).

21 [If a tenant in common alienated his share, his fellows had a certain time to invalidate the sale, taking the share at the same price – “*retracto de comuneros*.” If a person alienated part of a family estate, his near relatives had a similar right to invalidate the sale and take the property, “*retracto de parientes*.” “*Tanteos*” differed from “*retractos*” in this, that the former were similar rights of bidding in, exercised before the sale was consummated. – Transl.]

II onward.²² The “Leyes de Toro” sanctioned this new institution, providing general rules regulative of it, thus implanting securely one of the peculiarities of Castilian civil law, which persisted until the middle of the 1800s.²³

§ 23. DIFFUSION OF THE CANON LAW

At the same time that the Roman influence had been thus penetrating into the legal system of Castile, a like phenomenon was occurring with the Canon law. The renaissance which was brought about in the Church from the time of Gregory VII carried with it an extension of the Church’s power, a favorable modification of its relations with the State, and the enlargement of the personal and real immunities of the clergy, the latter being reflected in the practices of Civil law. At the same time there was operating within the Church’s economic administration, and parallel to the development of entails among the nobles, the entailing of immovables; and this process (coincidentally again with the development taking place in the municipalities as regards the communal lands and other property) had, by the end of this period, modified the distribution of property to an extent that was of extraordinary importance socially and legally.²⁴ Again, and through the principle of related causes, the Church was at the same time subjecting to its jurisdiction and to the rule of the Canon law many institutions of the civil law, such as marriage, usurious loans, rent-charges,²⁵ etc. The slow penetration of that law into the customs

22 [The name “mayorazgo” (“vínculo”) –from “major natu” (?)– indicates the original nature of such holdings. But at least in the later law a “mayorazgo” was not necessarily primogenital; the “vinculación” (entailment) accomplished merely continuance in a “familia,” – i.e. a truncal family, collaterals not being excluded. And they could be temporary as well as perpetual. – Transl.]

23 *Sempere y Guarinos*, “Historia de los vínculos y mayorazgos” (2d ed., Madrid, 1847); *Cambrero*, “La institución de los mayorazgos” (Madrid, 1820); *Cárdenas*, *op. cit.* above, § 18, n. 4.

24 On civil and ecclesiastical amortization, see the book of *Cárdenas* cited above, § 18, n. 4, and on the extension of the Church’s power see the general picture in *Altamira*, “Civilización española,” par. 459, 460, 590.

25 [“Censo,” –the contract by which one acquired an annuity in exchange for something delivered; or the right to such annuity; or the charge itself. The “censo” was “consignativo” when a charge on the property or labor of the payer; “enfiteútico” when reserved by one who transferred for a long time or forever to the payer the beneficiary title to something; “reservativo” when both the beneficiary title and the legal title were so transferred.

and statute-book of Castile is particularly observable in the field of family law, beginning with marriage itself, and in certain classes of contract, – not to mention the modifications it produced in the fields of public, political, and criminal law (concession of the crown by the Pope, absolution of the subjects from oaths of allegiance, changes in criminal procedure).

Among the more remote evidences of the influence of the Church upon family law are the following: the replacement of the direct delivery (“*traditio*”) of the wife to the husband from the father by the indirect delivery through the priest, which already appears in the Ritual of Cardeña (1200s).²⁶ This was followed by a prohibition in the civil law of all marriages not “solemn” or canonical, a prohibition encountered already in the “Fuero Real,” accentuated in the “Partidas,” and repeated in the “Leyes de Toro”; the special persecution of the concubinage of the clergy, both directly, through prohibitions and penalties, and indirectly, as for example by disqualifying sacrilegious children from succession to their clerical fathers and other relations (statute 22, tit. 3, bk. 1, “Ordenanzas Reales”), or by reducing the sons of the regular clergy to the status of serfs of the Church; the recognition of ecclesiastical jurisdiction in cases of marriage, divorce, etc., –tearing them from the civil jurisdiction,– which appears in the “Fuero Real” and the Alfonsine code; the sanction of the entire lot of canonical impediments to marriage, found in the same two codes; the reduction of the rights of illegitimate children, and even the division of such (common to the Roman and the Canon law) into natural children and those “of corrupt and criminal connection,” which the “Leyes de Toro” particularly develop; the continuation of the movement restrictive of the civil rights of Jews and Mudejars, involved in the negation of capacity to inherit and of capacity to be executors to those who were not Christians (“Fuero Real”); the establishment of the Church’s rights to first fruits and tithes (the “Partidas”);²⁷ the acceptance of canonic doctrines relative to usury; the ap-

“Censos,” then, could be owed by the person or the property; but they were most important as rent-charges, notably as quit-rents. The “censo reservativo” was unknown in the Catalan foral law. The “foros” of the North and the “rabassa morta” of Catalonia – *cf.* § 18, n. 3 and § 15, n. 9 above – the former most frequently for three lives and the latter of the same or fifty years, were of the emphyteusis type. – Transl.]

²⁶ *Hinojosa*, “Estudios,” pp. 105-106.

²⁷ Royal tithes (the only ones known in Spain) were, as is well known, anterior to the 1100s. The first certain confirmation to the crown of those which were the share of the Spanish churches is of the time of Alfonso X. The “Partidas” contain the entire canonic

plication of these in the regulation of the “foros,”²⁸ a contract much used by churches and monasteries; etc.

In contrast with these acceptances of the Canon law or of ethico-legal theories of ecclesiastical writers, some restrictions are found that emanated from the crown to check the ecclesiastical intrusions upon the civil order. An example of these is the revocation by the Catholic Kings of the privileges and charters on which the procurators of the Orders of the Trinity and of Saint Olalla founded the right to take legacies bequeathed in their favor by laymen, and the whole inheritance of intestates.

§ 24. NEW LEGAL INSTITUTIONS OF THE PERIOD

Aside from all these innovations, it is important, in an examination of the influx of the Roman and Canon law in this period, to make note of others which (like that of entailed estates already mentioned) either first showed themselves or acquired especially great growth in the 1200s to 1400s because of varied, and frequently complex, causes.

The total property of society had greatly increased, and had continued to accentuate the change of form which it had already begun to show in the preceding period. To speak more exactly, there had been adopted side by side with the primitive forms (agriculture and grazing, as regards the class of industry or the medium exploited; collectivism, concentration in a few hands, and servile cultivation, as regards the subjects of property and of its enjoyment) other new ones, the results of the growth of settlement and of the changes that had intervened in social classes. Urban wealth, movable property from industries, and commerce²⁹ – were every day growing in importance; while the great mass of seigniorial estates, in earlier times cultivated by servile and semiservile classes, was disintegrating. This influence, together with the protection of the municipalities, the liberty conceded to the “solariego” and the “forero” (small cultivators) and the conversion of servile holdings

doctrine of tithes and first fruits (2d “Partida,” tit. 19 and 20). On the elements of Canon law in the “Partidas” see *Martínez Marina*, “Ensayo histórico-crítico de la antigua legislación;” which study, however, is not to be supposed complete or, definitive.

28 See *J. Villaamil*, “Los foros de Galicia en la Edad Media” (Madrid, 1884).

29 Which was increasing in progressive ratio, and had developed considerable export relations with France, England, and above all with Flanders. See *Altamira*, “Civilización española,” vol. II. pp. 208-219, 487-492, 494-498.

into leases, permitted the formation of a class of small proprietors which the regional law protected, throwing obstacles in the way of their being again absorbed by the nobility. The result of this was a great development of the contract of lease (“arrendamiento”) in its various forms, –of which that on shares (“aparcería”) was very frequent,– in place of the ancient contracts of villeinage, copyhold, leases at will, etc.³⁰

The old dependence of property upon the social condition of the owner continued nevertheless to show its effects. As a general principle, the land of the noble was free or exempt land; the land of a villein or ordinary freeman was burdened. When a woman of the nobility married a villein her property was converted into tributary property; although on the death of the husband it became again exempt provided the wife repudiated the villein status acquired by her marriage. By analogous reasons every acquisition of lands that a “solariego” might make followed his own status, and was attributed to the noble estate to which he was attached, unless it should be a royal demesne, in which the rights of the king as regarded taxation were safeguarded. So the law still stood in the “Ordenamiento of Alcalá.” It was precisely this great influence of the social condition of the proprietor upon the legal classification of his property to which were due the frequent prohibitions in general and local law of sales to lords and churches. The right of alienation was also limited by other shackles, that reflected the traditions of the clan or quasi-socialistic conceptions of the State; such as the sumptuary regulation of the dowry festivals, and apparel, the fixing of market prices and wages, the relatives’ preferential right of purchase, etc. At the same time, the privileges conceded to the grazing interests, every day greater, limited the rights of owners of the soil. Finally, the frequent evidences of arable lands periodically allotted in the cities, and constituting a goodly part of the landed property of the com-

30 Reference should here be made to the question of the origin of the “foros” and the historical relation of this contract (the opinion opposed to which as early as the 1400s was already of formidable strength) with other and earlier forms of divided dominium. See as to this the book of *Villaamil* just cited, and that of *R. Jove y Bravo*, “Los Foros, Estudio histórico y doctrinal” (Madrid, 1883). [For the understanding of the text it should be added that the “solariego” was originally one belonging to the ancestral noble estate (“solar”), a villein; and as the “villanos” or inhabitants of the vill or manor (“villa”), from being serfs came to be the commonalty, so in time a “solariego,” as land, came to be a holding in fee simple; and every building lot became a “solar.” The text indicates that the “forero” was once unfree. The “forero” was later the lessee in the contract of “foro.” – Transl.]

munity, indicate the persistence of communal customs, despite the individualistic tendencies of the Roman influence. In reference to contracts relating to property, there is noticeable in the "Partidas" the importance which annuities or rent-charges, reserved in perpetual or long leases and in sales ("censo enfitéutico" and "reservativo") were steadily acquiring; the latter were much used by nobles, churches, and monasteries in substitution of the earlier servile exploitation, and as a secure and convenient source of income.

The growth of industries and commerce gave rise to the creation and greatest development ever reached of collective juristic persons called "cofradías" and "gremios" ("confraternities" and guilds); these are important in civil law, not alone for their bearing upon questions of jural capacity or personality, but also with reference to contracts of sale and for services. These corporations of merchants and artisans were generally composed of individuals devoted to the same trade or profession. They grew greatly in number from the 1200s onward; but it is evident from the character of their members that there must always have been included in their purposes technical or professional ends, along with that of resistance to external dangers; and it is not always easy to determine surely from such documents as we to-day possess whether the economic end predominates or any other of the social purposes that can be attained through corporate organization. Strictly speaking, the word "gremio," which broadly signifies a professional group, should not be used except with reference to corporations of exclusively or predominately professional character. But as it is not so used, the guilds are confounded with the more general type of "cofraderías" (or "cofradías") and "hermandades" (or brotherhoods, – any body of individuals formed for the better realization of one or more political or social ends, under a religious patronage), and with simple bodies of artisans ("oficiales"). In these forms we find the journeymen ("menestrales") grouped from the 1100s onward; and especially and already with perfect clearness (*e.g.* in the "fueros" of Santiago), in the 1200s. Alfonso X, in an ordinance of 1258, alludes to the lawful ends for which the "cofradías" might legitimately be formed, such as providing food for the poor, carrying luminaries, burying the poor, and giving funeral dinners, and prohibits their formation for ends political, immoral, or illegal: a prohibition repeated at various times by later kings, and particularly as regards "defensive" or political "cofradías," leagues, and "hermandades." Those attained, however, the greatest development and importance which did not transgress the proper field of trades and industries, much favored by the monarchs of this period; a

period marked, if by anything in this field, by an excess of legislation relating to industrial life.

The general ordinances of journeymen and artisans, as well as the special ordinances of each guild, regulated the internal organization of these organizations: the contracts of apprenticeship and of artisanship, liberty of labor; daily tasks; the sale of products, their appraisal, and market qualities; the wage of common laborers, especially agricultural, government pawnshops; and dominical rest (for religious but not for hygienic or other reasons).³¹ With reference to the regulation of daily tasks, wages and prices, this legislation had ancient precedents, for many “*fueros*” since the 1000s declare the right of municipal councils or assemblies to regulate these matters.³²

Finally, reference should be made to the rights of women in civil life, a matter of singular importance and of very curious manifestations.³³ Those that concern her economic status during marriage and widowhood having already been referred to, we may sum up the general status of the feminine sex by copying the following weighty paragraphs of Hinojosa:

“Until the beginnings of the 1200s (in which century took place the reception of the Roman law) the Germanic law relative to the personal and property relations of married persons predominated in all the kingdoms of Christian Spain. From that century onward, although in degrees very diverse in different States, they begin to be transformed under the influence of the Justinian law, elaborated and modified by the Glossators and post-Glossators: radically in Catalonia, less so but still considerably in León and Castile, and in even less degree in Aragon. Its influence is scarcely perceptible in Portugal, Navarre, and the Basque provinces. In León and Castile, in contrast with what we observe in the Visigothic period, we find the tutelage of women established, not alone as regards the married woman, but also the spinster, and even widow, in times subsequent to the Arabic invasion.

“If we reflect upon the dangers that constantly threatened women (of which the exceedingly frequent mention of rape in the municipal ‘*fueros*’ enables us to form some idea), it will be understood that such tutelage of women

31 For a book covering the whole matter see *Uña*, “Las asociaciones obreras en España” (Madrid, 1900); also *Altamira*, “Civilización española,” vol. I, pp. 499-500, and vol. II, pp. 103-105, 492-493, and on “La vida del obrero en España a partir del siglo VIII” in the “Trabajos de Investigación” of the University of Oviedo, 1903-1905 and 1905-1907.

32 *Altamira*, “Civilización española,” vol. I, §§ 302-303.

33 The only study of the matter is that of *Hinojosa*, “Discursos leídos.”

was a necessity of the age. The strict subjection of women to domestic authority in the first centuries of the Middle Ages is explainable, in part, by the rude and semi-barbarous manners of the times, and by the absence of a strong and vigorous public power capable of protecting the person and property of the subject. Under such circumstances woman could not exercise her rights effectively; she needed the representation and protection of the family head. Her personality was absorbed in that of her father, or, in his absence, in that of her nearest male relative, if she were unmarried or a widow; in that of her husband if she were married; and this condition, far from being for her a disadvantage, was a positive good.”

This situation was gradually modified in proportion as the medieval period advances until at the end, of the period we are examining the change has become of extreme importance.

“Various causes” –continues the writer just cited– “were influential in bettering the personal and property rights of women in the Roman-Germanic States and in the modern nations that sprang from them: on one hand, the slow but constant action of Christian ideas; on the other, the modifications suffered by the authority of the family head and by the firm coherence between its members when the State, with full consciousness of its mission, reclaimed for itself the protection and guardianship of the weak; and lastly, the reception of the Roman law, with its principles favorable to the economic independence of women. The perpetual tutelage of women disappears completely, or persists only for legal purposes, or was converted into a mere assistance, and ceased completely with respect to widows, from the moment that tutelage came to be based on age, and consequent lack of intellectual development and worldly experience, and not upon inherent incapacity of sex. The movement favorable to the abolition of the tutelage of women went through the same stages in almost all the cultured nations of Europe, as well Latin as Germanic. Its limitation had so far progressed as to have disappeared by the end of the Middle Ages as regarded unmarried women (not minors) and widows, –not, however, without persisting in some parts of Germany and Switzerland; while the authority of the husband over the wife, though reduced to more reasonable limits, still prevails in the majority of the countries of Europe and America. Economic transformations, of a character analogous to those which to-day demand transcendent reforms in the civil conditions of the married woman, and like these common to all the civilized nations of Europe, produced in the Middle Ages modifications in this field so important as

the recognition, within certain limits, of the civil capacity of women engaged in trade, certain changes favorable to creditors in the administration of conjugal property (which made their appearance in the towns, and were developed in proportion to the progress of industry and commerce); and the admissibility, and frequent practice, of renunciations by the wife of the special privileges granted her by the Roman law, – which were mainly limitations upon her capacity to assume legal obligations (such as the ‘Senatus–consultum Vellejanum,’ the Authentic ‘Si qua mulier,’ and the ‘Epistola Divi Hadriani’).”

TOPIC 2

SPREAD OF THE JUSTINIAN AND CANON LAWS IN THE OTHER KINGDOMS OF THE PENINSULA

§ 25. HISTORY OF LEGAL SOURCES

We will now indicate, as has been done in the case of Castile, and before passing to a study of the penetration of the Roman influence in the other portions of the Peninsula, a succinct summary of the history of their legal sources.

Aragon. – Upon the basis of the compilation of Huesca (*ante*, § 15), the statutes of general character were collected as additions to that work of Vidal de Canellas. Thus in 1283 the “Privilegio General,” of political character, was added; later, in 1300, all the reforms of public and private law made by James II were united in a book that was added as the ninth to the eight earlier ones; and Peter IV (1348) made a tenth out of new texts. Finally, in the time of John I and Martin, two more books were added, the eleventh and twelfth. Thus was completed the code or compilation of the “Fueros Generales Aragoneses”; among whose statutes those relating to the political order, the administration of justice, and rights which since the 1800s have been called “individual” predominate. Alongside this code there continued the local legislation of the municipal “fueros” and local customs, relating especially to civil law. Various new “fueros” were granted in this period, as, for example, those of Albarracín (1370), Arán (1313), and Camprodón (1321); and the special “fuero” of the Twenty (a political tribunal) of Saragossa was confirmed (1283).

It is also necessary to note the ordinances of municipalities and communes, and private documents, in which local customs are reflected, in or-

der to form an exact idea of the legal conditions of the country. Customals, especially, began to be formed in the 1300s (reign of James II), under the title of "Observancias." The first of such compilers, whose work has been lost, was the justiciar Pérez de Salanova. In response to the initiative of Alfonso V, who proposed in the Cortes of Teruel of 1427-1428 the compilation of the customs and practices of the realm, a new collection enlarged by certain "acts of Cortes" was made by Martín Díaz de Aux, who took as a basis for his labors the above-mentioned work and the writings of jurisconsults. These "Observancias," with others known as "New," came later to be united to the twelve books of the "Fueros Generales." And lastly, the resolutions or "fueros" of the Cortes, which were not included in the twelve books and which constitute nine volumes (1413-1467), must be enumerated among the important elements of the Aragonese legislation. The subsequent acts of the Cortes were only later included in the general collection.

Catalonia. – The same variety of legislation as in the preceding period continues, but with the particularity that the concessions of new municipal "fueros" are now lessening in number, and the constitutions, capitulations, acts of Cortes, pragmatics, and other expressions of the legislative powers of the crown are increasing, although indeed subject to the condition (at least in theory) that they should not contradict the general statutes of the kingdom, as was repeatedly declared in Cortes of 1289, 1292, 1311, and 1413. In this last year it was resolved to form a compilation of the whole Catalan law, a commission of three jurists (Narciso de San Dionisio, Jaime Callis, and Bonnonatus de San Pedro) being named for that purpose. The commission, taking as their model the "Codex Repetitæ Prælectionis," distributed the material into certain books and titles, translating the "Usatici" and other laws from Latin into Catalan. This collection was printed in the reign of Ferdinand the Catholic. It is to be noted that in the time of King Martin, and by virtue of the annexation to the Aragonese crown of the county of Ampurias, the authority of the "Usatici" and of the Constitutions had been extended over that territory.

Of the 1200s and 1300s we possess other compilations made by private individuals or for the use of corporations, such as one of constitutions and customs presented in the cathedral of Lérida. In 1279, in the first years of the reign of Peter III, the customs of Tortosa were definitely edited and codified in the form in which they have come down to us. This customal, a sort of settlement between the lord of the city and the inhabitants, is one of the most complete municipal codes of the Middle Ages. Of the following centuries the

Constitutions of the “baylia”³⁴ of Mirabel are interesting in the history of private law. The feudal customs of Gerona were compiled in a *custumal* of the middle of the 1400s. The “Ordenaciones de la Casa Real” were promulgated in the time of Peter IV for the government of the court.

Valencia. – In the reign of Alfonso IV the legislation of Valencia suffered a most important modification through the concession made to the nobles that Aragonese legislation (which was called “Alfonsine”) should rule in their seignories, the validity of the “fueros” (there called “furs”) being thus limited to the territories of the crown. The feudal law of Aragón was authority in the territories of Jérica, the baronies of Arenoso, Alzamora, Benaguacil, and Manisa, and in the lieutenancy of Alcalatén, allusions to some twenty-eight municipalities subject solely to these laws appearing in documents much later than this period. The “fueros” of Valencia were of authority in the rest of the land, which was its greater portion; and were continually augmented and modified by the charters granted by different kings (all of which referred to the political and administrative order), and by the resolutions of the Cortes. It is also to be borne in mind that in the kingdom of Valencia there were cities united to Barcelona by the bond of “carreratge” or patronage, which enjoyed the immunities that went with that relation. A collection was made of the “fueros” in 1482, comprising those granted from the reign of James I to that of Alfonso V. Of the charters another collection was made in 1515 with the title “Aureum Opus Regalium Privilegiorum Civitatis et Regni Valentiaë.”

Navarre. – The “Fuero General” neither accomplished nor pretended to accomplish legal unification. It was recast with improvements and additions in 1309 by Luis Hutin, in 1330 by Philip III, and in 1418 by Charles III; and Queen Catherine de Foix seems to have contemplated another revision in 1511, shortly before the annexation to Castile. Although the «Fuero» covered almost all branches of the law, its authority was never more than supplementary to the municipal «fueros» and liberties granted by the crown. It is in these, in the royal ordinances, and in the resolutions of Cortes that one must seek the elements in the formation of a common law, which went on steadily limiting the exceptions of the feudal and regional law. The franchises granted by King Theobald I were gathered together in a private collection known by the name of the «Cartulario Magno.» But at the same time municipal «fueros» continued to be granted or confirmed; as in Viana, Espronceda,

34 [The smallest royal administrative district in Catalonia, – *cf. Marichalar and Manrique*, “Historia.” vol. VII, p. 160. – Transl.]

San Juan de Pie de Puerto, Tudela (a confirmation, 1330), Torres, Corcella, Santesteban de Lerín, etc.

Basque (Vascongadas) Provinces. – In the first centuries of the Reconquest, before the annexation to Castile, when *Alava* was constituted of an aggregation of confederated seignories, which owed obedience to a common overlord chosen by them in accordance with the law governing free towns (“*behetrías*”) the statute law seems to have consisted of the “*Fuero Juzgo*” and *custumals*.

In proportion as the organization of free municipalities proceeded, under the influence of Castile and Navarre, whose kings extended to Alavese territories the foral legislation of those States, the sources mentioned were supplemented by “*fueros*,” –either original, such as those of Vitoria (1181) and Laguardia (1168), or mere adoptions of existing ones,– as, for example that of Logroño, which was granted to many districts. It is said of Alfonso X that he gave to Vitoria the “*Fuero Real*,” and of Ferdinand IV that he granted the “*fuego*” of Soportilla, applicable particularly to nobles and seigniorial relations. The compact celebrated with Alfonso XI (“*Privilegio de Contrato*”) in 1322 provided that the “*Fuero Real*” should have authority in private law as a common law of the towns, and at the same time confirmed that of Soportilla as the special law of the “*hidalgos*.” The legislation subsequent to this time was constituted of books of ordinances issued by the crown (1417, 1458, 1463), of which that of 1417 has reference to the regulation of the general councils of the provinces.

Through the confused history of *Biscay* (*Vizcaya*) in the earliest centuries one discovers the existence of a feudal nobility who were the founders of the towns, and of a free popular class dwelling in the settlements of the plain. The towns were governed under seigniorial privileges, which, in proportion with the progress of the liberation of the original servile classes, were alleviated in their application to these by the concession of such liberties as “*fueros*” like that of Logroño, and by compacts or charters by which rights were increasingly conceded to the villeins and serfs. The free settlements, the nucleus of the middle class, were governed by custom, and perhaps also under some few “*fueros*” and privileges granted by the kings of Navarre and Castile and by the overlords of Biscay. The difference of law between the two parts of the country is confirmed by the diversities of civil law noticeable even nowadays between the cities (of seigniorial origin) and the rural districts. After the consolidation, by inheritance, of the lordship of the province with the Castilian

crown (1370), the kings granted some few ordinances of a political and administrative nature, among which are notable those of the licentiate Chinchilla, granted at Bilbao in 1484, for the purpose of repressing and punishing the civil strife between the factions of the country. The customs were first put into written form in 1542, and were confirmed by the Castilian crown.

Guipúzcoa's political status was that of a free town until 1200; its lords were sometimes the kings of Navarre and at other times those of Castile; the latter were represented by Counts, the existence of whom in the 1000s and 1100s is established. After the definitive union with the Castilian crown (1200), the territory became a province or administrative-judicial district ("merindad") of Castile, directly dependent on the crown; except the territory of Oñate with its dependent districts, whose jurisdictional autonomy long prevented its treatment as part of the province. Legislation consisted of the franchises of the lords; the municipal "fueros," whose extension went on little by little, – those of Vitoria and of San Sebastian acquiring the character of model "fueros," which were adopted over a large part of the country; general ordinances issued by the kings; and special ordinances of the hermandades. Deserving of mention among the general ordinances, which were the basis of the "special laws" or "fueros" of Guipuzcoa are those of 1375 and 1377, whose text has been lost; those of the "hermandad" of 1379 prepared by the Junta of Guetaria; those of the "hermandad-general" of the entire province, of 1451 – revised in 1463 and 1472; and the book of statutes granted by Henry IV in 1457, and comprehensive of dispositions relative to the administration of justice and the convocation of the councils ("juntas").

§ 26. ROMAN ELEMENTS IN THE LAW OF CATALONIA

We may now proceed to note the chief phenomenon in the legal history of the period: the penetration of the Roman influence into all the regions referred to in this chapter. This penetration was realized in varying extent and result in all of them. The region in which Romanization extended farthest was Catalonia, and this is also the one where the process modificative of civil institutions that resulted from the double influence of the Roman and the Canon law is best known to us, – a process which has as yet been but very inadequately investigated as regards Aragon and Navarre.³⁵

³⁵ See *Altamira*, "Lacunes," and especially *Hinojosa*, "La réception du droit romain en Catalogne" (Mélanges Fitting, vol. 11).

In *Catalonia*, the penetration of the Roman law was primarily the work of jurists educated in Bologna and in the universities of Toulouse and Montpellier.³⁶ Already in the 1100s there are legislative evidences of the Romanistic influence. For example a constitution of Alfonso I (1192) which speaks of “Roman laws”; and a somewhat later pragmatic of the same king (1210) adopts a certain provision of the Justinian code in the law of emphyteusis. These are in addition to the curious statement made by a contemporary jurist, Miguel Ferrer, that the Catalan Jews “constantly use the Roman law as their peculiar law.” The frequent application of the Roman system as a supplementary law at the end 1100s is, in a general way, established. In the reign of James I (1213-1276) the Roman influence was so great that the social elements whose privileges and traditional law were threatened by the innovation, secured in the Cortes of 1243 a prohibition against the citation of the Roman laws in so far as the customs and the “Usatges” might suffice. A little later, in 1251, the nobles, carrying still further the reaction against Romanism, secured from the king its unqualified prohibition, which was extended to the Canon law. But these measures proved futile. The Justinian system and the Canon law continued their progress in custom, in the decisions of the courts, in legal theory, and in legislation, everywhere imposing themselves. Evidences of the profundity of this influence are found in legislative documents of such importance in the 1200s as the Customary of Lérida, which recognized the Roman as a supplementary law,³⁷ and in that of Tortosa (1279). The latter’s plan, as already stated, is copied from the Justinian code, and often even the rubrics of its titles; whose provisions are also frequently taken from that source, now directly, now with modifications; moreover, it accepts the Justinian as a supplementary law.³⁸

The diffusion of the Roman influence in Catalonia, was not effected, as in Castile, through the increasingly wide enforcement of a largely Romanized general code, – for none such was there produced; but, primarily, through the acceptance and diffusion of the principle that a “natural reason and equi-

36 On the diffusion of Justinian texts, in the original and in translation, from the 1100s onward, see *Balari*, “Orígenes históricos de Cataluña” (Barcelona, 1899), pp. 470-472; and *Suchier*, “Die Handschriften der kastilianischen Übersetzung des Codi” (Halle, 1900).

37 *Brocá and Amell*, cited in § 15, n. 3 above.

38 *B. Oliver*, “Historia del derecho en Cataluña, Mallorca y Valencia,” (Madrid, 1876), vol. I, ch. 9, 13, 14.

ty” constitute the suppletory source of national laws and customs. To the jurists imbued with the doctrines of the Digest, Code, and Institutes, a “natural reason and equity” were synonymous with the Roman law. In other words, there was an inevitable bias in favor of that law. In consequence of this mode of diffusion, in localities where the opposition to the change was not over great, the Roman law openly assumed the position of a legal source, the statutes of Justinian being expressly cited. On the other hand, where it met with strong resistance, the jurists adopted the tactics of “vulgarizing the principles of the Digest and of the Code and giving them a national character or color, by translating into the idiom of the country, with slight modifications, the imperial texts.”³⁹ This is what was done in Tortosa, where at times, instead of taking inspiration from the Justinian system, “the Roman law abolished by Justinian was reestablished.”⁴⁰ The penetration of this latter is also noticed in the liberties granted to Barcelona by Peter II in 1283, known by the name of “*Recognoverunt Proceres*.”⁴¹

To these data of the 1200s others can be added which were the manifestations of the same process in the 1300s and 1400s. It is seen in Barcelona and other parts of Catalonia in legislation on the following points; in the compulsory share of an heir, – respecting which a constitution of Alfonso III (1311) had already extended the application of Roman principles to localities where a custom in accord with the Gothic law had been previously applied;⁴² in testaments, in a privilege granted to Barcelona by Peter III;⁴³ in tutelage, an institution whose regulation evidently tended to follow the Roman law, inasmuch as a constitution of 1350 forbids this; in assignments by insolvent debtors (statute of 1363); in succession (Cortes of Monzón, 1363);

39 *Oliver, op. cit.*

40 *Oliver, op. cit.*, gives numerous eases of this retrogression, which he is inclined to derive from the “*Lex Romana Visigothorum*.” The importance for the history of the Catalan civil law of this lead in a direction divergent from the Justinian system is evident. Oliver indicates without exhausting it, and it still remains unstudied in other fields of Catalan law.

41 *Brocá and Amell, op. cit.*

42 On this extension of the Roman law and its effects, see the article of *G. M. de Brocá*, “*Sucesión ab intestado de los ascendientes*” in the “*Revista Jurídica de Cataluña*,” November, 1896.

43 On the extension of this privilege, see the articles of *Joaquín Almela* on “*La constitución de Don Pedro III de 1399*,” published in the “*Revista Jurídica de Cataluña*,” vol. I (1895), nos. 2 and 5.

in the modification of the Visigothic dowry of a tithé ("Fuero Juzgo"), which we find subsisting until the 1200s, but which already in the 1100s appears united with voluntary betrothal gifts ("esponsalicias") of variable amount, – generally half the value of the paraphernalia; as regards the dowry brought by the wife, which assumes all the features peculiar to this institution in the Roman law; in the acceptance of the "Senatus consultum Vellejanum" (as to a wife's contracts) and the Novel "Si qua mulier," conformably to the interpretations of the Glossators; and in the adoption of the widow's fourth ("cuarta marital," – § 20 above).⁴⁴

This wide pervasion of the Roman system along with that of the Canon law –which exerted influence in questions of marriage,⁴⁵ the status of children, one form of testament, etc.– was finally recognized and regularized by a resolution of the Cortes of Barcelona of 1409. This established a hierarchy of sources in the positive law (as the "Ordenamiento of Alcalá" had done in Castile), admitting the common law ("dret comú"), that is to say, the Roman and the canonic systems,⁴⁶ as a law supplementary to "usatges," constitutions, capitularies and acts of Cortes, uses, customs, franchises, immunities, and liberties; but with precedence over equity and natural reason.

Aside from these evidences of the victory of Romanism, –which nevertheless did not annihilate either the Germanic element or that born of the confluence of the varied factors and novel circumstances of the time, which may properly be called indigenous,– and aside, also, from others which the character of the present essay forbids us to detail,⁴⁷ we may indicate certain

44 On these institutions of family law, beginning with the Visigothic dowry, see *Hinojosa*, "Discursos leídos," pp. 29-37; and on the relation between dowry and "exovar" or "axovar," the "Datos históricos," published by *Juan de Porciolos* in the Barcelona periodical "La Notaría," March, 1901. Many data could be gathered from the decisions of the courts in these centuries.

45 Nevertheless there persist in the written customs of some localities principles such as the licit character of the relations of a married man with an unmarried woman.

46 The "dret comú" on its Roman side, included not only the statutes but also the "opinions of the doctors," *i.e.* to say the doctrines of the Glossators. Of the penetration of these we have already given an example; and they were also of influence in Catalonia. In 1429 a jurisconsult, *Mieres*, compiled the "Usantiae et consuetudines civitatis et diócesis Gerundae," which show an abundant element of Justinian and pre-Justinian law, – *e.g.* in the doctrine of compulsory shares of heirs. Cf. *J. B. Torroella*, "Lo dret civil gironí" (Mataró, 1899).

47 See *e.g.* the studies of *G. Platon*, "La scriptura de terç en droit catalán" (Paris, 1903), and "Le droit de famille en droit andorrain" (Paris, 1903).

peculiarities of the Catalan civil law that appear, or gain body and development, in the period now under discussion. These include: the modification of the amount of the heirs' compulsory share (which according to the customary law constituted eight-fifteenths of the inheritance, and which Peter IV, on the petition of the burgesses of Barcelona, reduced to a fourth part of the corpus, thus favoring the testamentary liberty of the father and the nomination of an heir); the emancipation of sons through marriage, established by a charter of 1351; the widow's rights of dower, of ancient origin, which from the middle of the 1300s lose their obligatory character, "persisting contractually until our days in the designation by the husband of the wife as 'senyora mayora y usufructuaria;'" the family council, provided for cases of gifts, transfers, or renunciations of the property of minors by an "usatge" of Peter III (1351); etc.

In the domain of personal rights, an important innovation was marked by the abolition of "evil practices" that afflicted the peasants "de remensa" (the lowest class of villeins), and affected certain civil rights such as marriage; and the relief of those ancient serfs through the well-known arbitral award of Guadalupe.⁴⁸

The confraternities and guilds developed powerfully in Catalonia owing to the impulse of its great industrial and commercial activity. Their organization and law followed the same lines as in Castile, and their effects upon trade were similar.⁴⁹

§ 27. ROMAN ELEMENTS IN THE LAW OF ARAGON, NAVARRE, VALENCIA, THE BALEARIC ISLANDS, AND THE BASQUE PROVINCES

In *Aragon*, Romanism neither spread so widely as in Catalonia nor had such profound effects upon civil institutions.⁵⁰ The Roman law was already cultivated intensively among jurists in the 1200s; and the chronicle of James I testifies to the frequency with which the Roman lawyers figured at the royal

48 Fundamental for this is the book of *Hinojosa*, "Régimen señorial," cited in § 18, n. 4.

49 For this the fundamental book is *Capmany's* "Memorias históricas sobre la marina, el comercio y las artes de la antigua ciudad de Barcelona" (Madrid, 1779), and that of *Uña* cited in § 24, note 3.

50 A well-known expression of protest against the Roman influence is the saying "De consuetudine regni non habemus patriam potestatem" (*i.e.* they had not a "patria potestas" of the Roman type, but of the indigenous tutelary type, yes).

court. Against this tendency the Cortes protested (Alcañiz, 1250 and 1251), as in Catalonia, opposing the citation of the Roman and Canon laws in the tribunals of the kingdom.

Among the principal novelties of the period was the establishment of complete liberty of testament, first for the nobles (1307) –who brought it about in the necessity of “conserving their ancestral estates in good condition,” a reason analogous to that which served to give origin to the estates tail of Castile,– and then (1311) for all citizens and inhabitants of the towns, under the single condition that there be left to legitimate sons, if there were such, a compulsory share equal to five “sueldos” of movable and another five of immovable property,⁵¹ – excess gifts (“mejoras”) being, with the authorization of the wife, also permissible. By this means, and as a result of Roman theory, there was introduced and given a growing dominance to succession by a single son to the exclusion of the rest, and also the entailed estate. Further we find the creation of a “father of orphans,” a sort of guardianship conjectured to date from this period, although it does not appear in legislation until the 1300s. By the side of these institutions figure other local ones that trace their origin from earlier times, though suffering indeed some alterations through the Romanist influence: the “axovar” or dowry of the wife; that derived from the husband (“firma de dote”); the community of property between spouses; the “avantajas forales” (foral privileges); the conception of the marital union; the widow’s rights of dower; and, very particularly, –at once for its importance and its persistence down to our day,– the type of tillage groups, in which all the sons (as well as persons not related by the tie of blood) live together under the control of the father, or of a family council, or of some member of the family (generally the eldest son), with indivision of the associate property.⁵² The family council appears to be regulated by a general “fuero” of 1348, also by another in the Huesca collection, and by the first “Observancia de jure dotium.” In the law of property there continue the recognition of the right of

51 [An exact value cannot be given to the “sueldo” (now “soldo”), but even for that day it was a very slight sum. Cf. *Marichalar and Manrique*, “Historia de la legislación ... de España,” vol. II (Madrid, 1861), p. 520. – “Pueden los cónyuges antes de proceder à la división de gananciales, reclamar cada uno las ventajas forales,” – namely domestic animals, clothing, and other personal effects suited to their respective needs. *Sánchez Román*, “Estudios de Derecho Civil,” vol. I, (2d. ed., Madrid, 1899), p. 453. – Transl.]

52 *J. Costa*, “Alto Aragón. Derecho de Familia,” in vol. I of his “Derecho consuetudinario.”

profits “a prendre” (“adprision”) in woods and waste and abandoned lands, and the forms of communal ownership and enjoyment which have persisted down to the present time.⁵³ The institution of confraternities and guilds was analogous to that already described for Castile and Catalonia, and had likewise a great development.⁵⁴

As for the servile classes of society, there is no betterment of their civil rights in Aragon in this period, but rather a retrogression in the direction of tightening and aggravating the civil and economic dependence of the servile cultivators of the soil; over them the courts had no jurisdiction, being consequently unable to protect them.⁵⁵

In *Navarre*, very little is known of the spread of Roman law, as indeed generally of the legal history of that region. For this reason it is still impossible to fix the date of origin of most of its institutions, or to define the precise changes that they suffered through the Justinian and Canon law, save in so far as these exerted everywhere an equal influence which has been referred to in treating of Castile. Society, however, resisted longer in Navarre than in other parts of the Peninsula the pressure of the Church against illegitimate unions; such as the simple contractual juratory marriage, without the intervention of the priest, which sufficed for separation and divorce, as well among the nobles as among the working class. Concubinage was so frequent in the 1400s that even the clergy, especially in rural districts, lived in it, as the acts of the Cortes and the narratives of travellers of the time testify. King Charles III (1387-1425) denied the claims of their concubines to enjoy the ecclesiastical immunities of legitimate wives, and ordered that they should pay the taxes to which they were liable, though recognizing at the same time the lawfulness of such unions. The law and the customs were in general very lenient with illegitimate relations, recognizing those of the noble woman with the villein, those of the widow, and those of the married man, who, though he could not make a contract of concubinage, could live in fact in concubinage. On the other hand, they were severe upon the adulterous wife. It was permitted to determine the parentage of “natural” children,⁵⁶ using the ordeal of boiling

53 *J. Costa*. “Colectivismo agrario en España.”

54 *Uña* as cited in § 24, n. 3, and the sources cited by him upon this point.

55 *Muñoz y Romero*, “Discurso” cited above in § 9. n. 2; *Hinojosa*, “Mezquinos y exaricos.” and “La servidumbre de la gleba en Aragón,” cited above, § 18, n. 4; *Altamira*, “Civilización española,” vol. II, pp. 106-108, 408.

56 [In Spanish law “natural” and “illegitimate” children have been regarded different-

water; but differences in rights were early introduced between the various classes of offspring, those of adulterous (singly or doubly), incestuous, and sacrilegious children being very limited. In the time of John II (1400s) the Cortes forbade the custom by which the children of clergy took the inheritance of their fathers.

The wife's property right upon widowhood was already recognized in the "fueros" of the 1000s and 1100s. In the "Fuero General" of the 1200s we find it conceded also to the widower.

In the period now in question there continued the dowry derived from the husband ("arras"), fixed at first for nobles ("infanzones") at three "heredades"; the "ganancial" community system of marital acquets, the principles governing which were almost identical with those in Castile; compulsory shares of heirs (without excess gifts) for the farming classes, – which were eluded by stipulating in matrimonial contracts the anticipatory nomination of one son as the sole heir with apportionment to the others of unequal shares of the estate, by which means the unity of the family was successfully maintained; the principle of kinship ("troncalidad"), which was evidenced in the reversion to the family of property acquired by junior sons living in the ancestral house, and in the relatives' right of preferential purchase (a condition in the practice of which was that the sales must be made publicly, with ringing of bells); the family council; agrarian communities among the servile classes; and other medieval institutions.⁵⁷ We find evidence of the existence in this period, among the noble class, of an absolute testamentary liberty whence resulted estates tail; also of the institution of the "father of orphans"; irrigation communities, with ordinances of ancient date; and confraternities for military, religious, and charitable purpose. Of true guilds there are no concrete evidences until the 1500s.

It was in this same century, in the Cortes of Pamplona, of 1576 (9th statute), that the Roman law received statutory recognition as a supplementary law.

The legal history of *Valencia*, as a Christian State, began, as is well known, well on in the 1200s, and consequently was subjected from the beginning to the influence of the Roman law. Thus the Valencian foral code follows in the

ly, and this is still true of the present Civil Code. Natural children are those that are capable of legitimation. – "Heredad" was apparently used, generally, for any cultivated holding; its technical sense, as a definite holding, has not been defined. – Transl.]

57 On certain civil institutions see *W. Webster*, cited ante, § 15, n. 24; § 16, n. 1.

distribution of material that of Justinian, and reproduced in its text many laws of this Code and the Digest, though in others it departs from these to adopt the pre-Justinian Roman law.⁵⁸ Apart from the Roman influence, the law of Valencia shows many others that are Catalan and Aragonese, and possibly a few that are Moslem. It recognizes maternal authority; the systems of double dowry; the reciprocal rights of widowhood, with certain excess amounts in the case of widows who are poor; inheritance by illegitimate children, in default of legitimate descendants, ascendants, and collateral relatives; the “father of orphans”; unlimited community of property between spouses (“agermanament”) – which was of Catalan origin but received rich additions of local variants.⁵⁹ The marital community of acquests (“ganancial” system) is not recognized. The guilds acquired here an extraordinary development, the law relating to them being very similar to the Catalan.⁶⁰

Of the *Balearic Islands* it is true, as of Valencia, that its law was formed of Roman and Catalan elements. We find evidences here of the existence of the Visigothic dowry, along with an “excreix” which by a law of Sancho IV of 1316 was limited to the fourth part of the dowry; an increase of the dowry customary among converted Jews in the 1400s, and which later passed from them to the Christians; the grant of a portion of the “excreix” to the wife, in property up to 1316, and in usufruct from that date onward; the Roman dowry, which was customarily delivered as a part of the marriage ceremony, and might by agreement be reckoned a part of the community property, but not of the acquests; and both the widow’s fourth (*ante*, § 26) and the dower authorized by the testament of the husband.⁶¹ Of agricultural contracts, singular interest attaches to those of the “forenses,” poor farm-hands who acquired the right to cultivate small parcels of land in consideration of obligations and rents complicated by other onerous pecuniary charges; these resulted, when un-

58 *Oliver*, cited in § 26, above; *R. Chabas*, “Génesis del derecho foral de Valencia” (Valencia, 1902); *Danvila*, “Estudios críticos acerca de los orígenes y vicisitudes de la legislación escrita del antiguo reino de Valencia” (Madrid, 1905). The last author merely compares the variations or agreements of the Justinian law with the Valencian code in its various manuscripts, and with that of Tortosa.

59 *Hinojosa*, “Discursos leídos,” p. 36.

60 *Tramoyeres*, “Instituciones gremiales: su origen y organización en Valencia” (Valencia, 1889).

61 “Legislación foral de España. Derecho civil vigente en Mallorca” (Madrid, 1888). Also *Hinojosa*, “Discursos leídos.”

satisfied, in liens and sales upon which their city creditors grew rich. Whence resulted the well-known social struggles of the 1400s and 1500s.⁶²

As for the civil law of the *Basque Provinces*, we have seen that it reflects a mingling of Castilian and Navarrese influences, modified by influences of the Roman and Canon law. The only peculiarities are found in the administration of the rural districts of Biscay, whose customs were partially committed to writing along the middle of the 1400s.⁶³

§ 28. NOTABLE JURISTS OF THE PERIOD

To complete the picture of the legal history of the period, we will indicate briefly the principal jurists and the different tendencies they represented in the various parts of the Peninsula.

Until the 1200s there appears no Spanish jurist of reputation whose works are known to us. In the preceding centuries we come upon the names of a few professors and students in Italy, such as a Juan Español and a Pedro Hispano; but beyond that we know nothing of them. From the 1200s on the situation is quite different.

We do not know who were the authors of the "Partidas"; and in view of our ignorance it is not strange that critics should ascribe that work to the well-known jurisconsults of the time, some of whom are cited in its text. Such are the "magistri," Jacobo de las Leyes (or Jácome Ruiz), Fernando Martínez, and Roldán. The first was an Italian by birth, naturalized in Spain, where there are traces of him down to 1270. He was tutor to Alfonso X, for whom he wrote a summary, the "Flores de las Leyes," a sort of encyclopædia or anthology in which he compiled various materials relative to civil law, judicial organization, and procedure, from the works of Italian jurists of the time, which he calls "books of the sages." Many of these materials were later incorporated in the "Partidas;" and the "Flores de las Leyes" itself was translated into Catalan and Portuguese. Of the same author are also the two treatises called "Tiempos de las Causas (or Pleitos)" and "Doctrinal de todos los Pleitos," which are both still unpublished. Martínez, a prebendary of Zamora, bishop-elect of Oviedo in 1269, and ambassador of the Italian king near the Pope, was a jurist

62 *Quadrado*, "Mallorca."

63 *Vicario*, "Derecho consuetudinario de Vizcaya" (Madrid, 1891); *Chalbard*, "La troncalidad en el fuero de Vizcaya" (Bilbao, 1888); *La Plaza*, "El fuero de Vizcaya en lo civil" (Bilbao, 1894-1895); *W. Webster*, above cited.

of celebrity. There are attributed to him two works, both unpublished: one entitled "Margarita de los Pleitos" (Pearl of Lawsuits) and the other, in Latin, "De Orden de los Juicios" ("Bullarium sui Ordinis"). Roldán, besides being reputed as a legist, edited the "Ordenamiento de las Tafurerias," a regulation of gambling houses that were the property of the State and were rented by it to individuals. Mention is made also of a jurisconsult named Oldrado who is believed to have been a contemporary of Fernando IV, but of whom we know nothing, nor of any work certainly his. On the other hand, we do know those of Vicente Arias de Balboa (or Valbuena), bishop of Plasencia, who died in 1414, and who is remembered as a canonist and as the author of commentaries upon the "Ordenamiento of Alcalá," a gloss upon the "Fuero Real," and a collection of opinions by contemporary jurists relative to the succession to the crown of Aragon.

Certainly these were not the only legal writers of the time. Considering the abundant legislative output that existed from Alfonso X to Henry IV, and the preëminence enjoyed by lawyers at the court, one is justified in averring that there must have been many others. That this was so is evidenced by a fact characteristic of the 1300s and 1400s, namely, the abundance of private legal compilations whose materials were distributed in the form of statutes; an arrangement that has caused modern critics to mistake for genuine legislation what in fact was the product of some antiquarian's or lawyer's cabinet. The collections from which, apparently, the "Fuero Viejo" was compiled, that code itself, and perhaps also the "Leyes del Estilo," the "Leyes Nuevas," the "Setenario," and the "Espéculo," are all examples of this curious sort of literature, whose authors are to-day unknown to us. In the library of the University of Madrid there are preserved various other unpublished legal treatises of the 1400s. The questions chiefly treated in all of these works are those of judicial procedure. In the libraries and in the loan records of the 1200s and 1300s the legislative works of Justinian figure repeatedly.

The preceding sketch may be completed by a list of the Spaniards who appear in foreign universities and at the Papal court as writers upon and professors of the law. In the 1200s the earliest one known to us to-day is one Bernardo of (Santiago de) Compostela, who was a member of the faculty of Bologna. Another of like name, called the younger, was auditor and chaplain of Pope Innocent IV, and compiler of and commentator upon the third or Roman collection of decretals. Likewise of Santiago and contemporary of the latter was a Juan Hispano, a writer upon both the Roman and the Canon law.

Pedro Hispano, a Dominican and professor at Paris, was the author of a compendium of Aristotle's "Logic" entitled "Summula," or briefer summa. Juan García el Hispano expounded the civil and Canon law at Bologna, and wrote notable works. Similar notoriety was gained as decretalists by one Lorenzo and one Vicente whose works exist, but of whose life very little is known. Finally, Cardinal Torquemada lectured at Paris and wrote certain "Commentaries" upon Gratian's Decretal.

At the Papal court many Spaniards won distinction as canonists: Juan de Mella, professor of Salamanca and bishop of Zamora; Cardinal Juan de Carvajal, one of the most eminent and talented statesmen that served the Papacy in the 1400s, a writer, diplomat, and warrior; and the no less celebrated Cardinal Albornoz, a native of Cuenca, contemporary of Alfonso XI and Peter I, a personage of exceeding influence in the Church's policy, the reconqueror of many of the States of the Holy See, and promulgator of the important Italian code entitled "Constituciones de la Marca de Ancona." In Spain, and especially at the court of Pedro Tenorio (contemporary of John II), archbishop of Toledo and potent politician, there figured a few other prelates as canonists, such as Gonzalo, Bishop of Segovia, and Doctor Juan Alonso of Madrid.

The above data refer to the territories of the Castilian crown. In the same centuries jurisconsults of importance shone with brilliant talent in those of Aragon. Of these the civilians and Romanists included García "el Español" (a Catalan), professor at Bologna in the late 1200s; Juan Español (an Aragonese), professor of Canon and civil law; Jaime Hospital (Aragonese), collector of and commentator upon the "Observancias"; Jaime Callis (or Calicio), of Vich, commentator upon the "Usatges," and author of various works upon politics and finance; Vallseca, Mieres, Socarrat, Marquillas, all (like Callis) expositors and critics of the Catalan law; Micer (Master) Bononat Père, counsellor to the Aragonese crown (1400s); the celebrated Majorcan, Mateo Malferit; his compatriots Ferrando and Teseo Valenti, especially the latter, who was professor at Bologna; Jaime Pau, called the "gloria juris Cæsaris" because of his notes upon the imperial law; Juan Ramón Ferrer, the author of a legal dictionary; Jerónimo Pau; and others, lawyers or ordinary notaries or court notaries, who lived in the time of Alfonso V, as well in Spain as in Naples. In the field of Canon law, Catalonia offered as a model the great decretalist Raimundo de Peñafort, a contemporary of James I, professor at Bologna, and compiler, by order of Pope Gregory IX, of a collection of decretals or pontifical constitutions – book V of the "Corpus Juris Canonici." His example

and tradition was followed by other writers, among whom mention should be made of Guillermo de Montserrat, the author of a commentary upon the resolutions of the councils of Constance and Basel.

The expositors of the science of political theology merit consideration apart. First place among them is taken by the Catalan Franciscan, Francisco Eximenis (or Jimenez), bishop of Elna, author of a book that bears the title, "Crestiá" or "Llibre de regiment de Princeps e de la cosa publica" (1379), – or Book of Regimen for Princes and the Commonwealth;⁶⁴ "not inferior," says one critic (Hinojosa) "in its doctrine to the best books of analogous nature written in other countries, and superior to all of these in its grandiose plan and copious and select erudition." Of the same period was Friar Nicolas Eymerich, inquisitor-general of Aragon, who sets forth the theories and practices of the tribunal of the Inquisition in his work "Directorium Inquisitorium," which was probably written in 1376, and was later enlarged by the author himself.

The flowerage of legal science was no less rich in Spain during the reign of the Catholic Kings. Among civilists, Romanists, or statesmen there shone then Doctor Montalvo, who, in addition to the "Ordenanzas Reales" already cited, wrote a "Repertorio de Derecho" –a sort of dictionary, with a supplement to which he gave the title "Segunda Compilación," – edited with glosses and commentary the "Fuero Real" and the "Partidas," and founded a sort of law school; Juan Lopez de Vivexro, popularly known as Palacios Rubios (1447-1523), professor at Salamanca and counsellor to the Catholic Kings, joint editor of the "Leyes de Toro," upon which he wrote a commentary, compiler of the liberties of the "mesta" (an association of graziers), author of a treatise upon gifts between husband and wife, of another and interesting book in which, on the command of King Ferdinand, who felt scruples for the conquest of Navarre, he attempted to demonstrate the legal justification of the annexation of that kingdom, of another upon the crown advowsons, and several political works; Galíndez de Carvajal (1472-1530?), likewise professor and royal counsellor, whose compilation of statutes we have already mentioned; Antonio de Nebrija (1444-1522), reviser of the glosses of the Italian Accursius, author of certain "Observaciones sobre las Pandectas," and of a "Lexicon Juris Civilis"; Martín de Azpilcueta, and Gregorio López, –the for-

64 For details regarding this "Crestiá," see *Hinojosa*, "Influencia que tuvieron en el derecho político de su patria y singularmente en el derecho penal, los filósofos y teólogos españoles anteriores a nuestro siglo" (Madrid, 1890), pp. 68 *et seq.*

mer a canonist, the latter a civilian,— who belong more properly in the succeeding periods; Micer Miguel del Molino, who wrote a “*Repertorium Fororum et Observantiarum Regni Aragonum*” (1513); and other writers of less importance. As a canonist, Doctor Juan Alfonso de Benavente, professor of Salamanca, is cited with especial eulogy by Marineo Sículo; and Alfonso Soto, a native of Ciudad Rodrigo, distinguished himself in Rome, and was the author of a “Glosa” upon the rules of the papal chancery, and of a treatise upon the coming Church Council which he dedicated to Pope Sixtus IV.

CHAPTER III

SECOND PERIOD: A.D. 1511-1808 THE AGE OF ABSOLUTE MONARCHY

TOPIC 1

THE AUSTRIAN DYNASTY (1500S AND 1600S)

§ 29. IMPERFECTION OF EXISTING HISTORICAL GUIDES TO THESE CENTURIES

By the beginning of the 1500s, Spanish law, in its various regional embodiments, was already substantially formed, equally as regards the essential factors in its general mass, and the character of the different institutions. Its history from that time to the opening years of the 1800s consists, when taken in the large, in an accentuation within the civil law of the Romanist influence. This gains ground little by little, to-day supplanting one, to-morrow another, of the Germanic or medieval principles which, up to the end of the 1400s, it had succeeded in withstanding. This substitution is nothing like complete. Romanism advances, it is affirmed in statutes and in scientific theory, but it does not succeed in destroying national institutions that were deeply rooted, such as the husband's dowry in some of the non-Catholic provinces, the "ganancial" and the community systems, communal organization in the enjoyment of land, etc.¹

The history of the three centuries mentioned is less complex and abundant in variety than that of those preceding, but it is not for that reason the better known. The absence in it of great legal events, the occult and peculiar manner in which reforms proceeded, and the mere complement of statutes

¹ In these institutions there is indeed rather a recrudescence, due possibly to scientific theories that were favorable to them. Cf. *Costa*. "Colectivismo agrario," and *Altamira*, "Civilización española," III, 428-429.

(mostly ancient) which distinguishes the character of many of the so-called codes that were published in this period in Castile² and other provinces, have served to weaken the interest of the historians of these three centuries, who for the most part have studied hardly any other changes than those that were produced in public law.

We may consider first and in a general way the development of the sources.

§ 30. HISTORY OF THE LEGAL SOURCES

The regimen of an absolute monarchy, the steadily increasing bureaucracy of the government, and the formalistic and regulative spirit of the lawyers of the age were reflected in the abundance of statutes, in their minute details and casuistic character, and in the increase of those issued directly upon the royal initiative, in consequence of the infrequency of the Cortes, –and especially in Castile,– even before their suppression in the minority of Charles II. The abundance of legislation, along with the pressure of scientific tendencies for its codification in the systematic form that had already been adopted in the “Partidas” and the “Ordenamiento of Alcalá,” were the cause of repeated petitions in Castile for new collections, and in the other kingdoms for the continuation of those already realized in the preceding period, – demands which were steadily strengthened by reforms and innovations to which there was no interruption.

We have seen that the Ordinances of Montalvo had not by any means removed the difficulty that they were designed to remove. Their deficiencies grew as time passed, and there continued to appear ordinances of the Cortes, pragmatics, “cédulas,” royal orders, and resolutions of Council. It is not to be wondered at, therefore, that at different times in the reign even of Charles I the procurators of the cities petitioned for a codification of statutes, which were scattered and very often contradictory. In their meeting in 1544 at Valencia they reduced the idea to concrete form, soliciting the publication of the collection of Galíndez de Carvajal; this, they said, existed in the possession of the author’s sons, – although this can hardly have been the case, since they were told in reply to present that book if they knew where it was to be found, and it does not appear that they did so. Charles I himself had already, before

2 The portion of the civil law contained in book 10 of the “Nueva Recopilación” and book 10 of the “Novísima Recopilación,” is taken almost wholly from the “Fuero Real,” the “Ordenamiento of Alcalá,” and the “Leyes de Toro.”

1523, commanded Doctor Pedro López de Alcocer to make a new collection, and on the death of Alcocer before its termination the commission was intrusted to Doctor Escudero, who failed likewise to conclude it.

The undertaking was prosecuted by Philip II, and was finally realized by the licentiate Bartolomé de Arrieta. A compilation in nine books of “ordenamientos” of Cortes and royal orders – which collection, with reference to that of Montalvo, was named the “Nueva Recopilación” – was published and promulgated, as arranged by him, in 1564. The pragmatic in which Philip II ordained it assigns as reasons for the preparation of the work, not only the number and variety of the existing statutes, but also “the corruption in the text of many statutes, either incorrectly copied or poorly printed; the doubts that many had excited; the unrighteousness of others which, though just enough in their day, had ceased to be so through the change of circumstances; and finally, the disorder with which they were separated and distributed in divers works and volumes, and some of them not even printed, nor incorporated in the others.”

It would naturally be expected, in view of so just an understanding of the problem which the Castilian legislation presented that the various jurists who labored on the “Nueva Recopilación” should have undertaken to reduce to a true doctrinal system the statutory law, defining clearly and concretely the law actually in force; with prime attention to the profound changes slowly brought about in the autonomy and local diversity of the “fueros” by means of the centralization of the monarchy and the establishment of the law of the “Partidas” as an effective factor in the legal practice of Castile. Not such, however, was the view of those jurists, if we may judge by the end which their work embodies. Theoretically, as the promulgatory pragmatic indicates, the elements which it was necessary to reduce to clarity and order were “the many and diverse statutes, pragmatics, ordinances, capitulations of Cortes, and letters in Council.” The word “statutes” (“leyes”) might have been given a broad meaning, comprehensive of all that the others did not specify. But in fact they gave it a sense narrow in the extreme, limiting it doubtless to royal orders issued “*motu proprio*,” that is, without petition of the Cortes. Thus the “Nueva Recopilación” turned out to be no more than an elaboration of Montalvo’s in its identical elements, enlarged by examples posterior to 1484; it excluded all the other elements which the “Leyes de Toro” had already enumerated, although reduced in the pragmatic here in question (we do not know whether by intention) to the “Partidas” and the “Fuero Real,” the

only ones it mentions. Even as regards these it must have been necessary to determine clearly what was considered as actually incorporated in the legislative law. Neither could the "Fuero Real" be so considered as a whole (since many of its provisions were already abrogated by later statutes, and the best solution would have been to suppress such); nor was it true, as later became evident, that the "Partidas" could be considered as merely a supplementary law, either as a whole or in certain parts, since they had, on the contrary, in *fact* been elevated to the category of primary law.

The result of the failure to clear up the relative status of all these elements, such as the "Fuero Juzgo" (though something of this passed into the "Recopilación") and the municipal "fueros," was that the previous confusion continued, and the statutory law was one thing in appearance and another in reality.

What made the attempted work the greater abortion was that the "Nueva Recopilación" suffered (even within the limits to which it was reduced) from the defects identical with those of Montalvo's. It neither included all the royal orders and petitions of Cortes that had been granted and were properly to be considered of authority in 1567 (many of both classes, but especially petitions, being omitted), nor eliminated all those fallen into desuetude, nor corrected in all cases corrupted texts. Hence the slight reputation of the "Recopilación," which neither commanded the respect of the legal profession (being simply ignored in legal education), nor was observed in practice, as is evidenced by the representations of the Cortes of 1579, 1586, 1588, and 1602 relative to the observance of the new code. Nevertheless, four editions of it were issued after the original, in 1581, 1592, 1598 and 1640, each including the new statutes that were being continually issued.

In the practice of the courts, and particularly in civil law, more favor was enjoyed by the scientific Roman system. We see this from a resolution of the full Council, which, though issued indeed in 1713, was naturally caused by antecedent facts of the period we are now discussing:

According to this resolution, "Many causes are argued and decided in the courts of these realms, in reliance upon the doctrines of foreign books and authors, ... and not only this alone, but when there exists a statute clear and determinant, if it be not among those newly collected, many persons are mistakenly persuaded, in ignorance or malicious disregard of what is prescribed (in the national laws), that it is not in force, and need not be respected; and likewise if there be found in the Recopilación some law or other, or pragmatic, that has been suspended or abrogated, then although there be no other

explicit statute decisive of the case, and that which is annulled or suspended would elucidate and decide it, no force is given to it; and what is more intolerable, there is a belief that greater weight ought to be given in the royal courts to the civil (that is to say the Roman) and Canon laws than to the laws of these realms, and this though the civil laws are not laws in Spain, nor should be called such, but rather judgments of wise men which may be followed only in the lack of law.”

The fact deducible from this is that the “Leyes de Partidas” and the pure Justinian law itself had passed, even to a greater extent than in earlier times, from the status of supplementary to that of predominant factors in the courts; and this augmented the confusion in the positive law. Instead of recognizing the force of facts, it was zealously endeavored to maintain in legislation the show of an exact obedience to the first of the “Leyes de Toro” relative to the hierarchy of legal sources, a fiction which was thus continued during all the rest of this and in the following period.

At the same time that the effort was made to codify in the “Nueva Recopilación” a part of the general law of Castile (and up to a certain point, as we shall see, of all Spain), a strong impulse was given to the redaction of the municipal ordinances, of which many were published in the 1500s and 1600s. These documents, expressive evidences of the lessened local autonomy that remained in the ancient councils, are interesting for the information they afford of that autonomy, particularly in the field of administration, and for the wealth of legal customs which were in them given fixed form, receiving the sanction of the central government.

The Aragonese, like the Castilians, petitioned repeatedly of their kings the revision and codification of the statutory law, which suffered from defects similar to those of the Castilian legislation. Finally, in 1547, an editorial commission was named, which was composed of representatives of the four “arms” of the Cortes, and completed its labors the same year. The work produced included: the twelve books of the “Fueros Generales” and the pamphlet laws of the Cortes issued between 1412 and 1495, the whole reduced to nine books, and the statutes distributed according to their subject matter, after the model of the Justinian Code, (which was then commonly used in its first nine books only); the “Observancias” of Martín Díaz de Aux; “fueros” that had fallen into desuetude; and the resolutions of the Cortes relative to civil law. The promulgation of new statutes, some of them so important as those of Tarazona of 1592, necessitated other editions of the collection with variants

from the original, the last (in this period) being of 1664-1667. In addition, a few pamphlet-laws of the Cortes were printed, the last one known of these being of 1686-1687.

Catalonia, after various attempts, secured in 1588-1589 (as a result of a resolution of the Cortes of Monzón of 1585) a new compilation, comprehending the “usatges” actually in force, constitutions, capitulations, acts of the Cortes, royal pragmatics, royal judgments, arbitrations, and resolutions; as well as of superfluous, contradictory, or altered statutes, – all of them distributed in books, according to the subject matter. The commission that accomplished the compilations was composed of the regent of the royal chancery, Miguel Cordelles; Doctor Martín Juan Franquesa, a member of the Audiencia; Francisco Puig, a member of the Civil Royal Council; Onofre Pau Celler, a canon of Barcelona; and the “Micer-magnificus” Miguel Pomet, doctor of civil and Canon law and citizen of Barcelona, who was elected by the commonalty. No other compilation was made until the 1700s. The customs of Tortosa were printed for the first time in 1539.

In *Valencia* various attempts were made to codify the legislative law, but none of them was carried through officially. Private initiative responded better to the aspirations of the time, producing in 1548 an edition of ancient and modern “fueros” down to 1542, arranged according to subject matter, and in 1580 certain “Instituciones de los Fueros y Privilegios del Reino de Valencia.” The edition of 1548 was utilized as official, and to it were added in separate issues the “fueros” conceded by the Cortes from 1545 to 1643.

The Court of *Majorca* ordered the collection, about the middle of the 1600s, of the legislation of that ancient realm, and this was accomplished in 1663 by the “Ordinacions y Sumari dels Privilegis Consuetid y Bous Usos del Regne de Mallorca,” of the jurist Antonio Moll, – the only compilation known.

In *Navarre*, the annexation to Castile disturbed the development of the national legislation, although it is true, as we have seen, that the Castilian kings continued to convoke the separate Cortes of that country with considerable frequency (seventy three times), and to issue through them statutes and privileges. A reduced edition of the ancient “fuero” was made in 1525 and a complete imprint in 1628-1686; the first enjoying no statutory force, and the second little application in legal practice, notwithstanding that it had been voted in the Cortes. In 1557 a first collection was made of the ordinances and statutes of the Cortes and afterward as many as five others; of these one, made by the syndics Sada and Ollacarizqueta, included the dispositions pro-

mulgated up to 1604 and printed in 1614, and was declared the sole official collection; until in 1686 the last was published, the work of a lawyer, Antonio Chavier, this being thenceforward the one officially preferred.

The *Basque Provinces* followed the general tendency. The first result in *Biscay* was a compilation of the custom of the rural district, approved by Charles I in 1527 under the title "Fueros, Privilegios, Franquezas y Libertades, del muy Noble y muy Leal Señorío de Vizcaya." To this were afterwards added various complementary royal statutes, and in 1630 a resolution; as a result of this the traditional differences between the cities and the towns, which affected in certain particulars the autonomic regimen, disappeared. With these additions the collection of 1527 remained in force until the 1800s. – *Guipúzcoa*, at the end of the 1600s and upon the basis of a "new book of the Community" (published in 1463 as a revision of its predecessors, and confirmed in 1821 by Charles I), collected all its law then in force in a "Nueva Recopilación de los Fueros, Privilegios, Buenos Usos y Costumbres, Leyes y Ordenes" (1696). – *Alava* formed no such compilation of its statutes, although those collected in the book of 1463 were greatly added to by others, issued by the Castilian crown either "motu proprio" or at the instance of the Junta.

As for the *colonial dominions*, the irregularity and abundance of their legislation necessitated some arrangement of it in codified form. As early as 1543 a "book" was published at Alcalá which contained the statutes and ordinances recently issued by Charles I. In 1563 the Viceroy of New Spain, Luis de Velasco, began a compilation by collecting and printing all the documents that existed in the audience of that province. Shortly afterward the president of the Council of the Indies, Juan de Ovando, formed a "Recopilación" in seven books, of which there was published of the second book a single title, treating of the Council (1571). A "Nueva Recopilación," modelled upon this and printed in 1593, failed to realize the end in view, and after new studies and the nomination of editorial juntas, there was promulgated in 1680 a "Recopilación de las leyes de Indias," in nine books, arranged according to subject-matter, which contained all the dispositions then in force.

§ 31. PROGRESS IN THE UNIFICATION OF THE LAW

What was the effect of all these collections and codes upon the unification of the law within the territories of the Spanish monarchy? If we disregard the "Leyes de Indias" (in view of their special character despite the general princi-

ple of assimilation to the Peninsular law) and confine ourselves to the Peninsula, we have already examined the question in one of its aspects, namely, the political. On the part of the State, there could be no interest taken outside of this field; to the unification of the private law, because unconnected with the sovereign status and effective absolutism of the crown, the kings gave no heed. We must remember too, how slight was the progress of political centralization, notwithstanding the insistence of Olivares, the force of his arguments (given the standpoint which he occupied), and the alluring opportunities offered by the rebellions of Valencia and Majorca in the times of Charles I, of Aragon in the time of Philip II, and of Catalonia under Philip IV. Nevertheless, if one carefully examines the royal legislation of the 1500s and 1600s (partly recorded in the "Nueva Recopilación"), one notes the substantial, albeit silent, progress of unification. It extended to many governmental matters common to all, the subjects of the monarchy, – a unification in harmony with the aspirations of the kings of that age throughout the world, and favored in Spain by the circumstance that there was a common sovereign over all the ancient kingdoms of the Peninsula. Within the field of the civil law the sole dissolvent was the Roman law; this, as we have seen, was active not alone in Castile but also in other regions, and in some, as for example Catalonia, in notable degree.

This unitive process was more widely and more potently effective within the different kingdoms taken individually. It was realized in a fragmentary manner, affecting to-day one matter and tomorrow another, varying in its details, and creating new institutions. Without a formal abrogation of the ancient statutes, which it apparently respected, in truth it reduced them, as regards many of their extremes, to mere fleshless skeletons. In this manner, and especially in Castile, there was brought about a tacit and almost absolute annulment of all the ancient charters of municipal legislation within the field of public law, and of many of those which in the medieval period marked the distinctions of social classes, and the dependence in which the members of one regularly stood in relation to those of others. In the other kingdoms and in the same parts of the law like results were realized, although on a lesser scale, as we have seen above in the sections relating to the State and social classes. Opportunity for these changes was very often found in confirming the municipal "fueros," which were generally profoundly modified and emended upon such occasions. A salient example of this shrewd method of altering the medieval statute law is found in the treatment of the "fuero" of Teruel in the time of Philip II.

§ 32. LEGAL SCIENCE IN THE HABSBURG PERIOD

The importance of the scientific study of the law was extremely great in the three centuries (1500s to 1700s) of this period. Legal science was indeed one of the most extensive and most intensely cultivated fields of Spanish learning in the 1500s and 1600s, and one of those in which Spanish writers can present the most indisputable claims of originality and of positive influence upon the culture of other countries. Two leading causes explain the special development of this class of studies. On one hand, constant incitement must have been offered to thinking men by the many legal problems presented in Spain in consequence of the special orientation of its military and religious policy, and the vast colonization begun at the close of the 1400s. On the other hand, a certain natural tendency is observable in the Spanish mind to busy itself with the practical aspects of questions. These influences inevitably deflected philosophy towards its applications in morals, law, etc. We can thus understand why two of the greatest philosophers of the age, Vives and Suárez, were, the one a pedagogue and the other a jurist, of unrivalled rank. Besides, the intrinsic relations of theology (then so much cultivated) and law, and the already traditional philosophical principle of the "connection of causes," naturally led theologians to the study of legal questions, and thus resulted, of course, in a rich flowerage of the Canon law. And, finally, the extensive participation by the legists (Romanists) in political life, and the frequent consultation by the kings of the learned members of the clergy, were other and powerful influences in the development of legal studies.

The branches to which Spanish jurists devoted especial study, and in which they gained the greatest renown, were those of international, political, criminal, procedural, and civil law, including in the last both the Roman and the native systems.

In international law, a part of the philosophy of law until then unknown or barely outlined in incidental studies or in the examination of wholly concrete cases, —such as the conquest of Navarre, which gave rise to the book of Palacio Rubios,— Spanish writers laid the basis of what was to be later a special and important science, and which found already in their works a development of great significance. The special causes for this are found in the continual wars between Spanish kings and other European sovereigns, in the grave political questions that were in dispute between them and the papacy, and in the problems created by the conquest and colonization of the Indies.

The chief representatives of this class of studies were: Arias de Valderas, who in his book "De Bello et Ejus Justitia" (1533) discussed the theory of the persecution of heretics and the right to make war upon the Pope; Álvarez Guerra, who undertook to define the doctrines of war, just and unjust (1543); Soto, the mediator in the dispute between Las Casas and Sepúlveda, champion of the Indians and enemy of the slave trade; Vázquez Menchaca, who in his "Libri Tres Controversarium" (1572) studied the laws of war; Juan de Cartagena, a furious ultramontanist, the champion of the pope in the dispute with Venice; Covarrubias, who wrote upon the slavery of captives made in war; Ginés de Sepúlveda, whose ideas regarding the justification of the conquest of inferior peoples and the slavery of the Indians may be read in his elegant Latin dialogues entitled "Democrates"; Baltasar de Ayala, Francisco Arias, Juan López, and various others. All of these were exceeded in genius by Francisco Vitoria, the master of some of those named, professor at Salamanca, whose university lectures (which Melchor Cano later published under the title of "Theologica Relectionis") treat in a profound manner of the law of war and of the question of the Indies, in addition to other theses relative to the ecclesiastical supremacy of the Pope and Council, the civil power, marriage, etc. Hugo Grotius (1583-1645), who was long considered the founder of the science of international law, owes a great part of his ideas to these Spanish precursors, whom he cites, and not rarely with especial eulogy (for example, Vitoria and Vázquez), in his book "De Jure Belli ac Pacis" (1625).

Among the cultivators of *political law*, opinion is almost unvaryingly monarchical, saving only Fox Morcillo, for whom the form of government is indifferent, since it is the substance and manner of administration that are important. The notion of monarchy common to all of them is similar to that of the writers of the Visigothic period and the authors of the "Partidas." One marks the evident deliberation with which they strive to refute the imperialistic doctrines of the Roman law, so widely spread at that time throughout all Europe, and in Spain itself. The solicitude with which the king made answer to these ideas led them to defend (Fox Morcillo) the propriety of deposing a monarch who should prove unequal to the discharge of his duties; and to establish, subject to more or less numerous conditions, the people's right of rebellion in the case of tyranny; and even the right of tyrannicide (Molina, Mariana). In the diffusion of these theories, the fears excited by the example of Protestant kings and princes who had swept their people from their past beliefs were unquestionably influential; to the Catholic writers it seemed that

the only way of avoiding the repetition of such occurrences lay in the affirmation of rebellion and tyrannicide as rights inherent in the people whenever the monarch should act against the principles of human and divine law.

More interesting than these doctrines are those that refer directly to factors and actors of the Spanish States at that time, because they reveal to us the character of a portion of the national opinion, and that of the most cultured class. The defence of the Cortes, of their necessity, of their power in matters of finance, and even of their participation in legislative functions (which is made by a number of writers of such repute as Rivadeneira, Mariana, and Márquez, opposing thus with theory the actual decadence of the institution), is important in this connection. In speaking of the taxes voted by the Cortes, Rivadeneira says that that which they thus give to the kings is called a service, subsidy, or gift because "it is a voluntary and not an obligatory service." These doctrines produced, however, no effect whatever upon the policy of the crown.

To the same effect, as regards the internal government of the country, the same writers (Vitoria, Fox, Contreras) pronounced against the sale of public offices, then so commonly resorted to, and with such injury to the nation; and against the perpetuity of political and administrative charges. They maintain also the necessity of the king's governing with the counsel of men of experience and culture; and one of those who sustain this thesis (Sepúlveda) takes much pains to anathematize the institution of "validos" or favorites, which he had seen produce disastrous effects during the reigns of John II and Henry IV, and which was very soon to be revived in Spain. Perhaps there was no opinion held more unanimously at that time than this one adverse to royal favorites, unquestionably because the experience of the harm that such men produced was not only evident to the view of all but its effects were felt by all. Finally, the general desire men felt that the monarch should in fact respond to the directive function in theory attributed to him, we find demonstrated in the attention bestowed upon the condition of his political and general education, a matter that gave rise to a vast literature, which enjoyed, as we shall see, an extraordinary fame throughout the world.

By the side of the leading names already cited –Suárez (who in his "Tractatus de Legibus et Deo Legislatore," 1612, not only examines the question of statutes and legislation from the point of view of practical politics, but from all those it presents to a general philosopher of the law), Mariana, Vázquez, Fox Morcillo, Molina, and others– mention must be made of still others, who

studied either general political problems, such as the forms of States and governments, tyranny, etc., or the special problem of colonial government, or the theme, then so attractive, of the education of princes. Among such writers were Arias Montano, author of an "Instrucción de Príncipes" and of a book, "Varia Republic"; Rivadeneira, whose "Tratado del Príncipe Cristiano" is a refutation of Machiavelli; Gracián, who in his works, "El Héroe," "El Discreto," "El Cortesano," and others, studied the requisites of a chief of State, and laid down political maxims of an admirable sagacity; Solórzano Pereira, author of a celebrated work entitled "Política Indiana," in which he defended the Spanish colonial system; Ramos del Manzano, diplomat, and preceptor of Charles II, for whom he wrote a treatise upon "Reinados de Menor Edad y de Grandes Reyes" (1674); Castrillo, who showed himself favorable to the pretensions of the Comuneros, though not to the methods which they, in order to maintain those, were compelled to follow; Sepúlveda, already referred to; Furió y Ceriol, author of "El Consejo y Consejeros del Príncipe"; Quevedo, whose works "Marco Bruto" and "Política de Cristo" are two excellent political studies; Saavedra Fajardo, whose "Empresas Políticas" attained a great celebrity in all countries; Jerónimo de Blancas and Jerónimo Martel, who expounded and commented upon the parliamentary law of Aragon; friar Juan de Sta. María, who wrote a book "De Republica y Policía Cristiana"; Antonio Pérez, the secretary of Philip II; his homonym, a professor in the University of Louvain from 1619 onward; Jerónimo Mirola, whose curious work "République Original Treta del Cos Humá" (Barcelona, 1587) studies the participation in the government of the different classes of society; Orozco, Torres, Simancas, Osorio, Guevara, – who enjoyed great celebrity abroad; and many others, together a legion, who figured in the literature of court and politics, so popular in those times. The Catalan rebellion of 1640 produced in that country an interesting flowerage of political science, in which Salas and other writers won distinction.

Criminal law was especially cultivated in connection with the controversies over the right to punish heretics and the development given by the persecutions of the Inquisition to the principles and procedure of the criminal law. The chief representatives of this literature were: Alfonso de Castro, whose two books "De Justa Hæreticorum Punitione" and "De Potestate Legis Penalís," aside from their general value as penological studies, are of great importance for an understanding of the prevalent opinions of the age relative to the repression of heresy; Soto, Vitoria, Molina, and others cited above; Antonio Gó-

mez, rated by many as the prince of Spanish criminalists of the 1500s, besides being a famous civilist, and commentator of the “Leyes de Toro”; the Jesuit Martín del Río, who in his “Disquisitionum Magicarum” (1593) treated of the magic superstitions of the age, and of their repression; Simancas, author of a work, “De Catholicis Institutionibus” (1552); Cerdán de Tallada, juriconsult of Valencia of the 1600s and procedurist, particularly notable for his book entitled “Visita de la Cárcel,” which besides giving us a realistic picture of the condition of prisons in the 1500s, suggests many ideas relative to prison reform; Diego Vallalpando, in the 1400s in his commentary upon the “Leyes de Partidas,” and Bernardino de Sandoval in the 1500s, had done the like for various questions of criminal law. Of great importance also is a group of Catalan criminalists and procedurists of the 1600s: Oliba, Ripoll, Xauar, Vilosa, Cancer, and very especially Peguera (a regalianist in issues between Church and State), and Calderó, whose book on criminal jurisprudence (1605) is the most complete of those published in Catalonia.

We may include in the group of *canonists*, with those properly so called, the writers upon questions of jurisdiction between Church and State. In the field of Canon law the Spanish clergy had a glorious tradition to preserve: that set them by St. Raimundo de Peñafort and Cardinal Albornoz. It was followed by Bishop Antonio Agustín, auditor of the “Rota Romana” (Court of Appeal) and nuncio, a man of the greatest erudition in archæology and the humanities, emendator of the texts of Gratian (a task in which, by command of the pope, Torres, Taxaquet, Charon, and other Spaniards aided), and founder of the external history of the Canon law, in which field of study he is to-day considered as notable as Alciat and Cujas in that of the Roman law; Martin Navarro de Azpilcueta, known as the “master among all the doctors of Spain,” professor of Salamanca and Coimbra, and author of various treatises on “Rentas Eclesiásticas,” “Horas Canónicas,” etc.; his disciple Covarrubias, author of the reformatory decree of the Council of Trent; the Bishop of Calahorra, Díaz de Lugo, author of a “Práctica Criminal Canónica”; Vallalpando, who wrote commentaries upon the councils of Toledo; Loaysa, compiler of the Spanish councils; Mendoza, compiler of that of Iliberes; Archbishop Caranza, to whom we owe a “Summa” or compendium of the councils; Bishop Juan Bautista Pérez, extremely important for his historical investigations relative to the same subject; Dr. Romaguera, of Ampurdán, counsellor to all the monasteries and ecclesiastical chapters of Catalonia, and author of certain extremely important “Constitutiones Synodales Diocesis Gerundensis” (1691);

Gouvea, Ruiz de Moros, Retes, Barbosa, González Téllez, Sánchez Simancas, and many others, among whom should be counted some of the theologians and philosophers already mentioned in other fields. In the second group we must include the regalianists Salgado de Somoza, Castillo de Sotomayor, Sesé, Ceballos, Salcido, Pereira, P. Enríquez, Ramos del Manzano, and various of those cited among the cultivators of international law.

Among the *civilians* also there are names that must be repeated. Such are those of Antonio Agustín, editor of an emended text of the Pandects and a commentator of equal celebrity with Gouvea, a rival of his contemporary Cujas; Ramos del Manzano; Covarrubias, of whom his contemporaries said that he was the Bartolus of Spain; Antonio Vinuesa Pichardo, precursor of Heineccius as a commentator upon the Institutes; Francisco de Arnaya, whose three books of "Observationes Juris" (1643) place him in the front rank among the legists of the 1600s; Loaces, Tomás, Vázquez, Altamirano, Retes, Quintadueñas, and others of great renown.

Although (as already remarked) the national civil (or, private) law, (as distinguished from Roman law and from local customs) was given no chair in the universities, nevertheless, the inevitable necessities of politics, of the administration of justice, and of legal practice caused men to cultivate its study.³ This was the desire of Queen Isabella, as shown by the second of the "Leyes de Toro"; and to the same end other statutes must have been issued in the 1500s and 1600s, to which allusion appears to be made in two accords of Council of the early 1700s (1713, 1741). This tendency was manifested in numerous legal works, some designed as commentaries upon, and others as concordances of, the institutes of the national law, some devoted to determining the difference between them and the Roman, and yet others to investigations of their origin and history. The list of commentators is very long; one notes that if many of the Castilian civilians figure in it, almost without exception it includes those of Aragon, Catalonia, Valencia, and the other non-Castilian regions. It is true that not a few of them write their commentaries from a Romanist point of view, or in their observations make use of an erudition chiefly illustrated by Roman data; but even with these the consideration of the peculiarities of the native law plays a large part, as was inevitable. Restricting ourselves to names especially eminent, we may refer to Gregorio López, whose text of and commentaries upon the "Partidas" were recognized as official in the courts;⁴ An-

3 In this field the professors of Valladolid shone with singular brilliancy.

4 With respect to the great favor which his edition enjoyed in the courts and among

tonio Gómez, commentator upon the “Leyes de Toro” in a work considered as the “vade-mecum” and favorite guide of lawyers and judges, the authority of which is attested by the various editions and summaries that were made of it; Micer Miguel de Molino, author of a famous repertory of the Aragonese “fueros,” already cited; and his compatriot Bernardo de Monsoriu; Sessé, commentator on the decisions of the Aragonese courts; Molina, who treated the subject of entailed estates, respecting which he is recognized as the first authority; Micer Pedro Tarazona, author of an “Instituta del Derecho Valenciano”; Acevedo and Gutiérrez, commentators upon the “Nueva Recopilación,” and the first also a procedurist; Cristóbal de Paz, commentator on the “Leyes del Estilo”; Alfonso de Villadiego, editor of the “Fuero Juzgo”; and finally a group of Catalans, –Cancer, Fontanella, Ferrer, and perhaps a few others of those already mentioned– who collected or wrote commentaries upon the law of their country. – It is of interest to note that in this period there were printed various works of jurists of earlier times, as Marquilles, Vallseca, Callicio, Socarrats, and others. Among the cultivators of comparative studies we should not forget Sebastian Jiménez; Juan Martínez de Olano, author of an “Antinomia Juris Hispanorum et Civile”; and Juan Bautista de Villalobos. The first showed himself a strong partisan of the Roman law, but the other two recognize all the value and importance of the native.

Finally, there began in this period the historical study of the Spanish law, which is represented by the works of certain of the juriconsults above mentioned –for example, Villadiego– and of many of the canonists; by those of Dr. Espinosa, who wrote (in the 1500s) upon the origin of the statutes, “fueros,” and ordinances of Spain; those of the chronicler of Charles I, Lorenzo de Padilla, who provided with historical notes various ancient Castilian statutes; those of certain Catalans and Aragonese, as Oliba, Blancas, Ustarroz, and – ranking above all others in erudite researches– Juan Lucas Cortés, author of a “Biblioteca de los Jurisconsultos Españoles” (the first work of its class), which was appropriated and published as his own in the first of the 1700s by a Dane, Ernest von Franckenau (“Sacra Themidis Hispanae Arcana”). All of these had predecessors, after whom to follow, in various authors of the Middle Ages (for example, Socarrats).

jurists, *Martínez Marina* notes that this was a significant mark of the advance of Romanist doctrine, inasmuch as the glosses of López were “adapted to the taste of the schools” and included “all the principles of the (Roman) civil and the canon law, as well as those of the Romanists and glossators.”

Of civilians devoted to pure doctrine (that is, neither commentators nor students of comparative law) there were few, because legal science was still bound to exegesis and to practical problems, and was not commonly devoted to pure speculation; much less had it attained, in its special branches, the systematic construction characteristic of it centuries later. A similar statement may be made regarding any pure philosophy of the law, or study of its general problems. Strictly speaking, of works of this nature one can only cite that of Suárez; one (to-day lost) upon natural law written by Vázquez Menchaca; and some of the treatises “De Justitia et Jure,” – among them that of the Jesuit Luis de Molina (1599-1600), notable for its abundant references to the legal institutions of Spain and Portugal. Lastly, we may cite two of the rare cultivators of commercial law, which in part was studied by the civilians and in part by the canonists: Hevia Bolaños, author of a book entitled “Curia Philipica” (1615) which expounds the whole mercantile and maritime law; and Díaz Ramón, translator into Castilian of the “Libro del Consulado” of Barcelona.

All this exuberant legal literature was enriched also by numerous translations of classical works upon the philosophy of the law (Aristotle, Plato, Cicero); to this were devoted Helenists and Latinists like Pedro Simon Abril, Viciano, Sepúlveda, Vergara, and others.⁵

TOPIC 2

THE BOURBON DYNASTY (1700-1808)

§ 33. HISTORY OF THE LEGAL SOURCES

The 1700s were an age of great reforms in the social and political life of Spain. The causes lay in the influence of France, and in the general spirit of the times, which throughout Europe was propitious to innovations and prog-

5 Details concerning jurists of the 1500s and 1600s, and of their doctrines considered in relation to public (and especially criminal) law, can be found in the excellent monograph of *Hinojosa*, “Influencia que tuvieron en el derecho publico de su patria, y singularmente en el derecho penal, los filósofos y teólogos españoles anteriores á nuestro siglo” (Madrid, 1800). As the title indicates, it also contains data prior to the 1500s, indeed from the Visigothic period onward. Biographical and bibliographical data respecting the chief jurists from the Roman period down to the 1800s will be found in the “Nociones de bibliografía y literatura jurídicas de España” (Madrid, 1884) of M. Torres Campos.

ress even within the limits of the old regime, – thanks to the dual idealistic currents of philanthropy and enlightened despotism. The reforms carried through by the Bourbon dynasty, only some of which can here be mentioned, gave origin to a great number of statutes, almost all in the form of royal orders (under varying names) and resolutions in council.

(1) As a consequence, the labors of compilation represented by the “Nueva Recopilación” of 1567 not only became insufficient, but were in part confounded and destroyed, the same excess and confusion of statutes again resulting as that of which the Cortes of the 1500s had complained. Nothing more, however, was done during the 1700s than to reëdit five times the “Nueva Recopilación,” each time adding a part, but not all, of the new legislation. Thus in that of 1723 there was added a volume of acts and resolutions of the Council. This could not remedy, however, either the unsystematic division into books, nor the confused assemblage in some titles of statutes belonging in others. The preparation of a supplement, to comprise statutes and resolutions of Council subsequent to 1745, was entrusted to the jurist Lardizábal but was not published. Years later approval was given to the project of another compilation which rearranged that of 1567 and all its supplements into twelve books, and was printed in 1805 under the title of a “Novísima Recopilación de las Leyes de España.” Its author, Juan de la Reguera Valdelomar, claimed to have solved the problem of concentrating the legislative law; but the reality fell far short of the assertion. His work suffered from many defects, some of method and others of omission, inasmuch as it did not include all that was actually in force in the classes of royal orders, statutes of Cortes, and resolutions of Council. As for the other elements of existing legislation, the “Novísima” left things as they were in 1567: *i.e.* it reproduced the statute of the “Ordenamiento of Alcalá,” which had been repeated in the “Leyes de Toro” and in the “Nueva Recopilación”; according to which the “Fuero Real,” the municipal “fueros” in so far as not repealed, and –with supplementary character– the “Partidas,” remained in authority.

Thus the “Novísima” did not satisfy the necessity which it assumed to meet, nor the aspirations of a theoretical nature of the jurists of the day; and Spanish legislation in general, and that of each province as well, continued to lack unity and clarity. Every one of the existing bodies of legislative law (wrote a statesman of the time of Charles IV) had been formed by successive aggregations, very often without the complete annulment of the earlier by the later law. Moreover, by the side of the codes of obligatory authority there

were supplemental systems of optional character; and resort was frequently taken to the Roman law, to the doctrinal works of juriconsults of repute, and to the decisions of the courts. The civil judges of the Council, he adds, possess as their sole resource, "a mass of texts more or less well digested, and expect that the king should command them to interpret these to his liking, and that he should give them in recompense the wherewithal to live."

(2) That the Roman law, as in the preceding centuries, continued in great repute is proved among other evidences by the resolution of Council of 1713 (cited above), and by a royal "cédula" of July 15, 1778; in this the king commands his courts to obey, in cases of succession, statue 12, title 2, book 4 of the "Fuero Juzgo" "with less manifestation of adherence to that of the 'Partida,' which is exclusively based upon the Roman Novels and the Canon common law." This "cédula" refers us then, as was to be expected, to the study of the decisions of the courts and the doctrinal works of the time. If to these we should add the statutes issued continually by the crown, and the resolutions of Council in the "Nueva" and the "Novísima Recopilación," we could determine the concrete advances which not only the "Partidas" (ordinarily cited as primary authority) but also the pure Justinian system and the doctrines of the Glossators continued to make, notwithstanding the unfriendly disposition of the government. For such an investigation great aid is offered by the law manuals published in this period, particularly after the university reforms of the 1700s by which the "royal" (that is, Spanish) law was included in the curriculum of legal studies. Most of these manuals compare to some extent,⁶ and some of them very especially, the native with the Roman law; thus making evident the situation which the institutions of Castile and other provinces had reached, at the dates of their respective publication, as a result of the continued conflict of opposing influences. Nobody has, however, yet made such a historical study, either with reference to the territories of the Castilian crown or with reference to the other kingdoms.⁷

The law of the Castilian territories suffered great changes in the 1700s as

6 As those of *Torres Velasco, Asso and De Manuel, Maimó, Danvila*, the various ones of *Sala*, and others.

7 The reception of Roman doctrines in Catalonia in this period (1500s to 1800s) is testified to both by Catalan juriconsults and foreign glossarists and commentators. But this general affirmation should be developed and made concrete by a study of the works of the Catalan authors, which also contain much information (*Brocá and Amell* advert to this, without detail in their work cited above in § 15, n. 1) relative to the judicial law of the period.

a result of the centralizing and unitarian spirit of the monarchy. An excuse, of unquestionable gravity, for the following of such tendencies was given by the War of Succession, in which a great part of Aragon, Catalonia, and Valencia took a stand against Philip V in aid of the Archduke of Austria. It is true that from the 1400s onward the autonomy and independent administration of the ancient kingdoms, outside of Castile,⁸ had continued to suffer certain losses. But the chief institutions of Aragon, Catalonia, Valencia, Majorca, and the Basque provinces, political, administrative, and of civil law, still subsisted substantially intact at the opening of the 1700s.

Philip V, once the War of Succession was over, radically altered this situation. By a decree of June 29, 1707, he abolished the “fueros, privileges, practices, and customs until now observed” in *Aragon* and *Valencia*, subjecting them “to the laws of Castile, and to the usages, practice, and form of government that exists and has existed therein and in its tribunals, without variance whatever in any matter.” Complementary to this decree were those of September of the same year, in which the king declared his intention not to consider abrogated any “fuero” or custom favorable to the royal prerogative; one of 1708, which maintained in Valencia the seigniorial jurisdictions of the Alfonsine “fuero”; and that of August 3, 1711, in which it was ordered that criminal causes should be judged in the tribunal of Saragossa in accord with the “custom and statutes of Castile” and civil cases “under the municipal statutes of this realm of Aragon.” In other words, all the peculiar public law of Aragon and of Valencia was abolished, while their special civil law was conserved to Aragon.

In Catalonia and in Majorca the abolition was not accomplished until after the victories of 1714 and 1715. It began in *Catalonia* with the abolition of the special governmental institutions of the Principality (the Council of One Hundred, the Deputation, etc), and was followed by other abolitions or assimilations to the Castilian law. The Cortes were effectually dissolved, the Catalan representation being incorporated in the Cortes of Castile. (It is not true that the Catalan “fueros” were burned, either publicly or privately.) These preliminary reforms were completed by a decree of January 16, 1716, called the “Nueva Planta” (New Plantation), which expressly abolished in toto the ancient forms of government in all the cities, towns, and places of Catalonia, reformed the ancient manners, customs, and practices relative to the political and economic regimen, and offices of supreme and ordinary judicature,

8 See *Altamira*, “Civilización española,” vol. III, §§ 580 and 681.

establishing also a new system in the institution and conduct of legal causes. Notwithstanding this, the legal peculiarities of Catalonia did not wholly disappear, nor was unification absolute in the field of public law. Not until well after the beginning of the 1800s did Catalonia lose completely her criminal and procedural law, her special coinage, her system of taxation based upon registers of realty, her exemption from military drafts, the office of notary public (though the king assumed the right of nomination), nor other peculiarities, political and administrative, which the decree left in subsistence. And this is explicitly stated by the decree itself as regards “the ordinances that may exist for the political government of the cities, towns, and places in so far as not inconsistent with what is here commanded,” – though subject to the reservation of their revision “in matters which may be considered to merit reformation.” The civil law and commercial law also remained unaltered in their whole extent including “the liberties and political rights relative to the family, property, and the individual.” Commercial contracts continued to be written in Catalan; and primary education continued Catalan as before. In 1768 the king’s feudal court of peers, which till then had existed, was abolished, the cognizance of the causes to which its jurisdiction extended being given to the “audiencia.”

As for *Majorca*, a decree was issued of November 28, 1715, which modified the government of the city of Palma and established an “audiencia.” The civil and criminal law, the “Consulado del Mar” (a court of commercial jurisdiction), and until 1718 the Great and General Council, were all conserved. – Of legislation anterior to these reforms a new compilation was made for Catalonia in 1704, revising that of 1588; and in 1791 the jurist Capmany published a corrected edition of the commercial laws known as the “Consulado del Mar.”

In the *Basque Provinces*, although in general its “fueros” were respected, –as was explicitly ordered in the case of Alava by a royal resolution of 1794,– the central government continued to introduce its representatives and delegates who (without apparent violence to the traditional institutions) subjected the provincial government to the oversight or intervention of the ministers or Council. Some modifications also were introduced into the local government.⁹

Navarre preserved intact its Cortes, its permanent Deputation, its Council, its auditorial office, its coinage, its privilege of suffering no other foreign authorities than the viceroy and five others, its exemption from military duties and from the jurisdiction of the treasury, and its civil law. In 1735 was

⁹ *Altamira*, “Civilización española,” vol. IV, pp. 159-160.

published a “*Novísima Recopilación*” of Navarrese legislation, known as that of Elizondo, approved by the Cortes in 1726, and containing in five books the statutes of the Cortes (till then dispersed) and others.

The mass of *colonial* legislation was continually enlarged by new royal orders and “*cédulas*.” Among them stands out in importance the “*Instrucción*” of 1786, which established the office of intendants; these were in appearance officers of purely fiscal character, but they supplanted in a goodly part of their functions the viceroys and the judges, inasmuch as they were intrusted with matters of law, police, finance, and war. We note also the “*Instrucción*” of 1754 to the visitor-general of finance sent to Mexico; the secret instructions to the Viceroy Superunda relative to the administration of justice; the reforms carried through in the matter of communication (the creation of a naval postal service and the incorporation of the inland service with the crown); in commerce (open commerce between a large number of Spanish ports and others in America, lower tariff duties, abolition of the system of the “*flotas*,” etc.), in agriculture, and other matters; and a multitude of changes made in the political and administrative system, public works, public instruction, etc., by a pleiad of notable viceroys, who, in the time of Charles III and even later, bettered the situation of the colonies.¹⁰

In the law of the Peninsula the chief changes were the following: the modifications of the statute fixing the succession to the crown, made by Philip V in the “*Resolution in Council*” or Regulation of 1713, and by Charles IV;¹¹ the increase and alteration of the functions of the ancient secretaryships of the crown, which little by little take on the character of modern ministries, supplanting in many matters the royal Councils; the reform of these last consultative bodies; the reforms of a democratic nature made in municipal government by the “*cédula*” of May 5, 1766, and others; the great improvements in the financial administration and in the public services of the State; the new ordinances of the army and the navy; the impulse given to education of all grades, and in general to the cultivation of the sciences and arts; the great quantity of dispositions relative to the industries, trades, agriculture, etc., of the Peninsula; and the substantial changes made in the relations of Church and State, manifested in the first Spanish Concordat, signed September 26, 1737, and reformed by that of 1753.¹²

10 Details in *Altamira*, “*Civilización española*,” vol. IV, §§ 811–829, 837.

11 *Altamira*. “*Civilización española*,” vol. IV, pp. 206-210.

12 Details as to all these reforms in *Altamira*, “*Civilización española*,” vol. IV. The

§ 34. LEGAL SCIENCE AND LITERATURE OF THE BOURBON PERIOD

In philosophy, the nature of the questions that were chiefly agitated in Spain under the Bourbon dynasty, and the character of the propaganda carried on throughout the world by the philosophic precursors of the French Revolution and by the publicists who devoted themselves to vulgarizing the principles that inspired that formidable explosion, led men naturally and preferentially to that part of philosophic study that concerns itself with the law. It happens thus that the 1700s constituted in Spain an epoch of flowerage in legal studies; not of a disinterested and speculative character, but with the end of examining and defending or combating the most salient facts in the contemporary political life, both of Spain and of foreign countries.

The works of this nature that were then published may be classified in four great groups: one, in which figure all those works directed to the diffusion or discussion of the new juridical ideas, and especially those of the revolutionary authors; another, comprising those books and pamphlets that sustained the struggle for jurisdiction between Church and State; a third, of writings relative to political government and the reforms of which it stood in need; and the fourth, of those manuals necessary for instruction in the law, particularly after the inclusion of new subjects in the university curriculum.

In the first group belong the book of Hervás y Panduro, "Causas de la Revolución de Francia en el Año 1790" (printed first in 1803 under the title of "Revolución Religiosa y Civil de los Franceses"); that of Joaquín Lorenzo Villanueva, "Catecismo de Estado según los Principios de la Religión" (1793), an apology of Cæsarism in the lace of revolution; those of Padre Cevallos on the "Causas de la Desigualdad entre los Hombres" and the "Falsa Filosofía, Crimen de Estado," which combat Helvetius, Hobbes, Rousseau, and other authors in the field of politics, while in other writings he reviews Voltaire, Beccaria, etc.; the important essay of Professor Campos on the "Desigualdad de las personas en la sociedad civil," against Rousseau; the "Memorias de la Revolución Francesa" of Padre Gustá (in Italian, 1793), and many others, aside from the translations of French revolutionary writers, especially Rousseau, which were numerous.

To the second group belong, among others, the "Información" of Macanaz

novelties in private law introduced in the time of both the Austrian and Bourbon houses will be found in ch. 8 of *Altamira*. "Origen y desarrollo del derecho civil español," cited above § 1, n. 1.

(1713) relative to questions with the papal court; the “Observaciones sobre el Concordato de 1753” of Mayans; the “Tratado de la Regalía de Amortización,” the “Memorial Ajustado” (relative to the Bishop of Cuenca), and the “Respuesta” dealing with the Spanish Carthusians, which we owe to the pen of Campomanes; the “Historia Legal de la Bula in Coena Domini,” which was compiled by Juan Luis López (1768) of the Royal Council, and is provided with an introduction by Campomanes; the “Juicio Imparcial sobre las Letras en forma de Breve,” the “Representación Fiscal sobre el Monitorio de Parma,” and other papers of the Conde de Floridablanca.

In the third group belong all the publications made with the intent of modifying the Aragonese, Catalan, and Valencian “fueros”; the numerous writings of Macanaz, among them the “Explicación Jurídica é Histórica de la Consulta que hizo el Consejo de Castilla relativamente a su Autoridad y Atribuciones,” and the “Auxilios para bien gobernar una Monarquía Católica”; the “Colección de Memorias y Noticias sobre el Gobierno General y Político del Consejo” by Antonio Martínez Salazar (1764); the “Práctica del Consejo en el Despacho de Negocios” by Pedro Escolano (1796); the “Memorial” of Floridablanca upon administration; the two “Alegaciones Fiscales” of Campomanes in the question of escheats of the seigniories of nobles to the crown; the “Respuesta” of Floridablanca, in the like question, relative to the claim to the seigniorie of Montaragut (1768); the “Cartas” of the Conde de Cabarrús (1792-1795) and the “Cartas Político-económicas” that are likewise attributed to him; the two works of Campillo, Minister of State, “Lo que Hay de Más y de Menos en España” (which expounds at the same time a political programme and a sort of national psychology) and “La España Despierta”; the political writings of Gándara, – “Apuntes sobre el Bien y el Mal de España” (1762); those of Aranda, Ulloa, Jorge Juan, and others relative to colonial administration; and others of like character.

Works of the fourth class were numerous, including original works and translations of Heineccius, Vattel, Van Espen, Berandi, Filangieri, Bielfeld, and others. We may mention, as chief among the Romanists and Spanish civilians, such authors as Finestres, Asso and De Manuel, Sala, Berni, Murillo, Maimó, and Marín y Mendoza. To these should be added those whose end was to modify the plan or methodics of legal studies, – such as the two “Discursos” of Jovellanos upon the relations between law and universal history, and upon legal texts and phraseology, as well as his “Cartas sobre el Modo de Estudiar el Derecho”, and a few works of other authors.

The study of legal principles was also influenced by the new ideas presented in several works not directly destined for that purpose – notably the translation of the “Tratado” of Beccaria upon Crimes and Penalties, which provoked the excellent “Discurso sobre las Penas” of Manuel de Lardizábal (1782); the “Observaciones sobre la perplejidad de la Tortura” of Forner and his refutation of Padre Cevallos (who defended capital punishment), with whom Alfonso Acebedo likewise carried on a controversy upon the same subject; the “Biblioteca Española Económica-política” of Sempere y Guarinos; the “Principios de la Práctica Criminal” of Posadilla; the “Noticia de la Cárcel de Filadelfia” (1801) of Arquellada; the “Tratado Jurídico y Político sobre las Presas de Mar” of Abreu; and the writings of Mora y Jaraba, Acevedo, and others. Finally, we may note those on the history of Spanish law, – among which those of Martínez Marina, Burriel, Jovellanos, Sempere, Asso and De Manuel, and Llorente, are most important, – and those of certain economists who treated of the legal aspects of their respective subjects, – for example, Jovellanos in his “Informe sobre la Ley Agraria.”¹³

It is interesting also to note, as a part of that movement favoring the study of the genuinely Spanish law, as contrasted with the Roman to which reference was made in treating of the statutory sources, the first manifestations of regionalism in the field of law. As such we must count the allusions to Aragonese law that occur in the book of Asso and De Manuel; but the same is shown in a more accentuated character by certain events in Catalonia, and particularly: by a motion of the secretary of the Academy of Theoretical and Practical Jurisprudence (founded in Barcelona in 1788) for the study of national Catalan law; by the inedited work of a jurisconsult of the period (cited by the same secretary) in which he commented upon the Roman law in union with “the elements and institutions of our own national legislation”; and by the “Notas de nuestro Derecho Municipal para cada Título de las Instituciones Romanas,” written by Juan Muyal, professor in the University of Cervera.

13 On economists and legal historians see *Altamira*, “Civilización española,” vol. IV, §§ 41–42.

CHAPTER IV

THIRD PERIOD: SINCE A.D. 1808 MODERN LEGAL REFORMS

§ 35. REFORM OF THE PUBLIC LAW

The last century was in Spain one of great reforms and innovations in the legal order. Its public law suffered a total transformation; legal sources were given unity and regularity; and legal science was opened to influences which, if contrasted with the spirit of preceding centuries, were of exceeding novelty.

These transformations began with public law. The Napoleonic invasion and the exile of the Spanish kings, prisoners in France from 1808-1814, created a peculiar political situation of transcendent consequences. Without a central government that could direct it, and distrustful of the superior authorities left it, who were dominated by the French, the nation took the initiative itself in the War of Independence and in the direction of public affairs. Thus all the political and social aspirations stifled by the absolutism of the antecedent regimen could reveal themselves publicly and unreservedly. By a natural tendency the various regions of the Peninsula constituted themselves centres of action under administrative Councils, and aspired to resuscitate the ancient Cortes as a national organ that should be representative of all, and should act in the absence of the king in accord with the necessities and desires of the country. And this was done. An Assembly formed of four classes of deputies – those of the cities which had held votes in earlier Cortes; those of the provincial Juntas recently constituted; those of the people, electing a representative for every 50,000 souls; and those of America (one for every 100,000 whites) – came together at Cadiz (1810-1813). A great number of these deputies, particularly the representatives of the Councils (“Juntas”), brought with them a spirit of reform already manifested in the petitions of

those bodies, in which were condensed the philanthropic and liberal ideals of the 1700s and the recent influences of the French Revolution. It is noteworthy that many members of this inspiration were clericals, – for example, Ruiz del Padón and Muñoz Torrero.

The Cortes, once organized as “extraordinary” and supreme in the field of legislation (the first time that they had possessed such character in Spain), and the parliamentary and constitutional system of government being thus inaugurated, they began their task. Its basis was the fourfold oath taken by the members, which bound them to maintain the Catholic religion, the integrity of the national territory, and fidelity to the laws and to Fernando VII, whom they proclaimed as king. In successive laws and resolutions, afterwards condensed in the Constitution of 1812, they developed the new programme of liberalism. Its fundamentals were: the sovereignty of the people jointly with the king; constitutional monarchy; separation of governmental powers; inviolability of the deputies to Cortes; the incompatibility of their duties with the occupancy of other public offices; equality of rights between Peninsulars and Americans; abolition of abusive powers over the Indians; political liberty of the press, which should be subject to censorship only in religious questions; submission of Ferdinand to the Cortes in the matter of his marriage, and the same with respect to international treaties which he might make while in captivity; abolition of judicial torture; the formation of a national budget, subjecting even the clergy to taxes necessary for the war; abolition of feudal Jurisdictions wherever they still existed, and of rights of lordship and vassalage; initiation of the emancipation of the negro slaves, and abolition of the penalties of the scourge and imprisonment upon Indians rejecting baptism; recognition of intangible individual rights of civil liberty, property, capacity for public offices, equality before the law, etc.; amendability of the Constitution; responsibility of the ministers of the crown; municipal governments with elective councils; a national militia and standing army; a great development of public instruction; abolition of the tribunal of the Inquisition, and transfer of the jurisdiction over ecclesiastical offences to the Episcopal tribunals; limitations upon the number of religious communities; distribution of waste and communal lands among the poor and soldiers honorably discharged; suppression of whipping in the schools; establishment of a single and direct tax; and still others of a like tendency.

Although all these reforms were approved by a great majority of deputies, these did not represent herein other than the opinion of all persons of

enlightenment influenced by the reformist spirit of the time. On the other hand, the reforms encountered many enemies, and at their head the King, who with disgust beheld himself thus shorn of the absolutism of his powers. All the social classes and all those organizations whose ancient privileges were threatened by the rise of legal equality, and especially a great part of the clergy, fomented this hostile opinion. The masses, passive in indifference, or through ignorance of the new ideals, could more readily be swept away by a movement in line with traditions than by one of reform. Thus it was possible for Ferdinand, on his return to Spain in 1814, to annul entirely the work of the Cortes of Cadiz. With this began a bitter struggle between the partisans of absolute and those of constitutional government. This filled the greater part of the century, – properly speaking, down to the revolution of 1868. Yet during this time, despite alternative victories for one or the other party, the transformation of the Spanish State was painfully progressing. Legislative landmarks in this progress were the “Letter in Council” or Royal Statute of 1834 (essentially a regulation of the Cortes), the constitutions of 1837, 1845, 1855 (with the supplementary act of 1856), the constitutional project of 1857, and the Constitution of 1869. This was fruit of the Revolution, and reflected the new ideals of liberalism – much more advanced, as was natural, than at the beginning of the century – in combination with those of 1812. The restoration of 1875 annulled the Constitution of 1869, and replaced it with that of 1876, now in force. In this, notwithstanding the vagueness of its phraseology, which leaves ample field for very diverse interpretations, there are recognized in more or less attenuated form some of the principles of liberalism. The action of the Liberal party since 1881, aided by the Republican, has added to the Constitution, in the form of special statutes, other parts of the creed of 1869, such as universal suffrage, trial by jury, liberty of the press, etc.¹

At the same time that liberal principles were thus advancing in legislative law, it was also realizing two ideals which already in the 1700s had received eloquent expression: that of legislative unity within the field of public law,

¹ This exceedingly summary statement can be supplemented by the reading of the “Tratado de derecho político” (3 vols., Madrid, 1893-1894) of *Adolfo Posada*; and the book or *H. Gmelin*, “Studien zur spanischen Verfassungsgeschichte des neunzehnten Jahrhunderts” (Stuttgart, 1905); and, with special reference to municipal law, –which followed the vicissitudes of political parties,– the book of *A. Posada*, “Evolución legislativa del régimen local en España,” 1812-1909 (Madrid, 1910). Reference might also be made to chapters 22 to 25 of *Antequera’s* “Historia de la legislación española” (4th ed., Madrid, 1895).

subjecting all Spaniards to identical rules, and that of the equality of all citizens before the law.

To the first of these were opposed the remnants of the political and administrative “*fueros*” that had persisted in Navarre, in the Basque Provinces, and even in Catalonia (*ante*, § 32); these after successive reductions and abolitions ended by disappearing save in a few details still conserved in Navarre and the Basque Provinces, especially in the economic order. Simultaneously, the organization and procedure of the courts were unified by successive reforms down to the statute of 1870, now in force, with its supplement of 1882. The notarial system was revised by the statute of 1862. Public instruction was centralized by a statute of 1845, and regulated generally by another of 1857; itself modified since then, in almost all its details, by a multitude of decrees, orders, and other statutes. Criminal law was covered by codes of 1810, 1822, 1848 (revised in 1850), and two statutes of procedure of 1872 and 1882. Commercial law was dealt with by codes of 1829 and 1885, the second in force today. Military matters were regulated by a penal code of 1882, another of 1884 fixing the organization and attributes of military courts, another of procedure of 1886, and, finally, a code of military law of 1890; aside from many other laws relative to recruitment, organization, etc.

The effect of all these statutes, and of others which in order to avoid details are not enumerated, and which relate to all the fields of public life, has been, as already said, to reform in less than a century the Spanish law; replacing the old régime by that of modern States, and its multiplicity of statutory expressions (which the “*Novísima Recopilación*” still reflected) by systematic and unitarian statutes applicable throughout the whole of Spain.

The principle of equality before the law had been contradicted, when the century opened, by vestiges of feudal jurisdictions in many regions, and by the existence of special courts for certain classes of society (the clergy, the army, merchants, and others). Even in the enforcement of the criminal law distinctions were made according to the social class of the delinquent, and likewise in the payment of taxes. But the whole spirit of the century, and particularly the whole strength of liberalism, were now directed against such exceptions. Thanks to those forces, the jurisdictions and “*fueros*” of special classes have been abolished at different times since 1812, until only those of the army and navy remain.

As regards the relations of Church and State, the Concordat of 1753 was replaced by that of 1851, –following the suppression of the religious orders in

1837, and the mortmain laws of 1837,— and that by one of 1860. But the problem remains unsolved, and has given rise to recent proposals and agitations not yet terminated.²

The revolution of the continental colonies of America at the beginning of the 1800s, and the independence which they speedily acquired, put an end in those regions to the authority of the “Leyes de Indias” and their supplements and additions, saving only certain parts taken over into the legislation of the new republics. The problem remained reduced to the Antilles, the Philippines, and other islands. In regard to these, the dominant tendency, and especially as respects Cuba and Puerto Rico, was to consider them not as colonies but as ultramarine provinces, though without adopting on that ground an unlimited policy of administrative assimilation, — in other words, without applying to them, unmodified, all provisions of public law as adopted for the Peninsula. Thus, although in 1878 in making applicable to Cuba the municipal law the island was given again the right to elect deputies to Cortes (which was granted to Puerto Rico in 1869), it was done with considerable restrictions upon the electoral franchise, — greater than in Spain. Similarly there were applied (to both islands), with modifications, the hypothecary legislation of 1880, the Constitution of 1876 in 1881; the code of procedure in 1885, the commercial code in 1886, etc. In 1882 a statute was passed regulating commercial relations between Cuba and Spain, and in 1895 one of political and administrative reforms. For the Philippines the criminal code was promulgated in 1884 (effective beginning with 1886); in 1888 the commercial code, and in 1889 the notarial statute.³

§ 36. REFORM OF PRIVATE LAW

The same spirit of reform that manifested itself in the public law found expression, albeit with delay and with less disputatiousness and passion, in the private or civil law. Here too was felt the reformative impulse of the French Revolution and the new currents of idealism that agitated Europe, from the middle of the 1700s onward, within the field of legal speculations. The effects

² American readers will find a brief statement of the present status of the question in the article “Church and State in Spain” in the “North American Review” of February, 1911. See also *Luis Morote*, “Los frailes en España” (Madrid, 1904).

³ Amplifications of this summary, and information regarding other statutes anterior to 1869 can be found in chapter 28 of the book of *Antequera* cited above.

of this renovation were first made visible, logically enough, in those civil institutions most nearly connected with the public law, or whose public aspect is more striking; and afterwards, as we shall see, the reform spread gradually to other branches more distinctly private, – if indeed such a distinction be strictly permissible.

Taken in the large, the spirit of reform permeated the whole compass of civil law so far as this was regarded in the ideas of that time, as the “positive law” and the “efficient cause” of its changes.⁴ It either modified the formative principles that had ruled the past, or introduced novelties totally unconceived of under the old regime. These reforms, nevertheless, do not represent in all their parts a radical change of front significant of the entry into the law of a factor repugnant to those tendencies that had made themselves increasingly evident in civil institutions since the 1200s. Rather may it be said that, on the whole, down to the last third of the 1800s, the reform of the civil law is nothing else than the culmination of the Roman influence, with its characteristic individualism. This was the consummation on Spanish soil of the victory won by the “Partidas” and the Justinian theories, – excepting only certain points in which the principles of the national law maintained themselves. A new current in the law peculiar to the present day, and which diverges in many respects from the Romanist tradition, is however observable in the legal ideas of the end of the century, and in the statutes (without precedents in the past) that have widened the field of law under the impulse of new social and economic necessities.

The second characteristic of the history of the civil law in this period is that in the reforms of one and the other of these classes there were active influences distinct from those that are noted in earlier centuries. The struggle was no longer merely one between Roman principles and Canon law, on the one hand, and the national medieval law, on the other. That traditional opposition was now combined with others, involved in the penetration of ideas derived from the legislation and legal science of France, England, Germany, and Italy – from the Code Napoléon, Bentham, Kant, Savigny, Krause, the Italian Code, and socialist doctrine. All of these give to the legal history of these years

4 [Spanish writers, after treating of the subjects and objects of legal rights, treat the “elemento generador ó causa eficiente” of these; namely such jural *facts* (“hechos”) as are not results but causes of legal relations, which special facts they call jural *acts*, “actos jurídicos.” See *e.g.* *Sánchez Román*, “Estudios de derecho civil,” vol. II (2d. ed. 1889-1890), pp. 522 *et seq.* – Transl.]

a complexity as yet imperfectly analyzed and understood, as well as a peculiarly dramatic interest. On one hand is contrasted what is national with what is alien (the cause of frequent disputes and of declamations very commonly rhetorical); on the other hand are the various influences just referred to, each endeavoring to overcome the other, and impose itself now upon the general course of legal development, now in one or another institution. One interesting episode, among others, of these conflicts was the opposition between the rationalistic spirit of the jurists educated in the ideas of the 1700s, and the national and «customary» spirit (in Spain rather legislative than customary) of those influenced by the historical school; an episode which, like all the others, still awaits, in its details, a historian. One result of it has been a struggle between the partisans of unitarian codification of the civil law and those of regional variants, to which reference is later made (*post*, §§ 38, 39).

Yet a third characteristic –to whose production the regalianist traditions of the old regime contributed, on one hand, and on the other, revolutionary theories– is secularism: the endeavor to wrest from the jurisdiction and tutelage of the Church and the Canon law such civil institutions as still remained subjected to them, – some of which still remain so to-day.

The three characteristics mentioned are supplemented by two others which we must refer to in more detail: that of the *codification* of the civil law, and that of legislative *unification*, either national, or peculiar to individual regions of the Peninsula, reëlaborating the scattered materials that are the sources of the positive law, with greater or less additions of elements truly new.

§ 37. PARTIAL CODIFICATIONS OF THE CIVIL LAW PRIOR TO THE CÓDIGO CIVIL

Let us not review summarily the reforms realized prior to the Civil Code in the different branches of the civil law. They began in the Cortes of Cadiz with a group of provisions which refer principally to the law of persons and of property.

To the first belong isolated statutes and the articles of the Constitution of 1812 relative to Spaniards and aliens, Americans, the Indians, and the negro slaves,⁵ and reflect as regards the last three classes a spirit of assimilation and liberty, although the emancipation of the negroes was not decreed.

To the second belong five statutes, two of them fundamental in their scope and as expressions of a liberal and individualistic tendency. (1) The decree of

5 See *R. M. de Labra*, “La constitución de Cádiz.”

August 11, 1811, abolished feudal jurisdictions, and at the same time such services due from the vassals (and this very name itself) as owed their origin to jurisdictional rights; and further the exclusive and prohibitive personal rights of fishing, hearth-wood, mills, and the like, all of which were left to the free enjoyment of the municipalities subject to the common law and to such regulations as should be made in each of these. Therewith the ancient seigniorial and feudal law came to an end, as regards all traces of a legal character. (2) The decree of June 11, 1813, to the end of "protecting the right of property," declared that all pastures, cultivated estates, or other lands of whatsoever class "held in individual ownership, whether in freehold or in tail" should be forever enclosed or delimited; while other provisions of individualistic and liberal character regulated leases, merchandizing (prohibiting the fixing of prices of provisions), the liberty of sale and commerce in grains, embargo on vegetable products, etc. Herein was continued and affirmed the spirit of various laws of the 1700s relating to enclosures (*ante*, § 25) and tending to protect agriculture against the privileges of the grazing interests, or reactive against communistic usages,⁶ or embodying ideas hostile to the guilds. With this decree may be taken (3) the statute of July 19, 1813, abolishing the exclusive and prohibitive property rights of the crown in certain localities of Aragon. – The remaining statutes were (4) the decree of June 10, 1813, for preserving to writers the property of their works during their life and for ten years after death, thus recasting in a broader spirit the regulations of the rights of intellectual property already recognized in the "Novísima Recopilación"; and, finally, (5) the decree of January 4, 1813, which ordered the distribution of waste, crown, and municipal lands, with the exception of enclosed commons.

Of these statutes, the second, third, and last were annulled by the reaction of 1814 (and in part the first); but all three were reestablished by the new constitutional government of 1820.

From that time onward, and very especially after 1833, reforms became every day more numerous and ample. Thanks to these, the law of property has been profoundly reformed –although always in the direction indicated and on the basis of Roman conceptions– by the following measures. First, the abolition of "mayorazgos" and all the species of entailed estates by statute of October 11, 1820, repealed in 1824, reenacted in 1836 and 1841. Secondly, statutes against mortmain, civil and ecclesiastical; initiated as early

6 See on this *J. Costa*, "Colectivismo agrario," in which the author has also recorded data relative to anti-individualist bills in the Cortes.

as 1818 by a decree ordering the sale of waste and crown lands, established more generally in principle in 1820 on the basis of the decree of 1813, and finally established in full extent by the statute of May 1, 1855. All of these dispositions, though directed, in legislative intent, only to assuring the alienation of uncultivated lands and of the realty of municipalities and religious corporations, nevertheless in fact reached in their effects the lands of communal cultivation. This indiscriminate result, though often due to the heedlessness of the government, was in other cases only the unconscious expression of the individualistic spirit of the epoch; which was revealed also in the various dispositions of 1835 and other years prohibitive of licenses to pasture in stubble (“derrotas”) and other communal practices.⁷ Thirdly, the detailed definition of the rules regulating expropriation under powers of eminent domain (statute of July 17, 1836, and others). Fourthly, the hypothecary system and registry of titles and other real rights. By this radical change, the old system of implied, general, and judicial hypothecs gave way to one of express and statutory hypothecs, and the registration of claims replaced a system of secrecy with one of publicity; with other principles of great consequence in matters of ownership and other rights in realty (statute of 1861; revised 1870, modified by royal decree of May 20, 1880, and interpreted by various other dispositions). Fifthly, mining legislation, begun in 1825 and totally renovated in 1868 upon principles which regulate it to-day. And finally, sundry changes, affecting the use of inland waters (1880); the acquisition, enjoyment, and encouragement of hunting rights, fixed by a decree of 1835 and later by a statute of 1879; the disposition of estates unclaimed or in abeyance, regulated by a statute of May 16, 1835; industrial property, which began as a special body of legislation with the decrees of 1826 and 1829, such property being later more amply regulated in a statute of 1878; the cultivation contracts known as “foros” (§ 18, *ante*), “sub-foros,” grain-rents (“censos frumentarios”) and annuities “rabassa-morta” (§ 15, *ante*), wherein a change of transcendent influence (already initiated in the 1700s, as already seen) consisted in the redemption of such interests, under a statute enacted in 1873 but suspended in 1874; intellectual property, the principles of 1813-1820 relating to which were modified by various others and finally by the statute of 1879; interest on money loaned, abolished by a law of 1856 and fixed at five per cent as the

7 On this see *Altamira*, “Historia de la propiedad comunal” (Madrid, 1890), ch. 4, and on the mortmain legislation in general, *Cardenas* and *Antequera* as cited in §§ 18 and 35 above.

legal rate by a statute of 1899; appraisal of preferential rights of purchase (§ 22, *ante*, “retractos”), of terminating leases (“desahucios”), and other real rights, modified expressly or implicitly by the code of civil procedure (1881); leases, –law of 1842; and other subjects.

With regard to the law of persons, one may note the statutes relative to religious orders, – those of 1837 suppressing them, modifying them, fixing their rights to hold property, etc., the Concordat of 1851, and others; statutes relative to the abolition of slavery in the colonies (1873, 1880); those relative to liberty of industry and commerce, which put an end to the guilds; those relating to “*gracias al sacar*,” *i.e.* to the concession of emancipation, legitimation, dispensation of age, of capacity, and other matters of ministerial discretion (1838); those of 1852 fixing the civil capacities of aliens; that of 1880 defining civil incapacity; those of 1878 for the protection of children; and various others of civil incapacity relative to the rights of manual workers, – association, strikes, accidents, etc.⁸ Of capital importance is the statute of 1870, which subjected to civil registry the facts of birth, death, marriage, and naturalization, secularizing them and their documentary proof.

The family law is particularly treated in certain statutes that have not essentially modified the organization or the relations between its members, – such as the royal decree of 1876 fixing the rights of unemancipated children; that of 1862 relative to paternal consent as a precondition of marriage (compare its precedent of the 1700s); various dispositions of the code of civil procedure relative to minors, tutelage, etc.; and other statutes of lesser importance. Of great importance was the statute of civil marriage enacted in 1870, which secularized that institution in its legal aspects, respecting the Catholic sacrament but subjecting all citizens to the direct intervention of the State in the celebration of the contract. This statute, however, was repealed by a decree of 1875, and a modified renewal of it was never realized.

As for the law of succession, a single modification was made respecting intestacy, by a statute of 1836; which, in default of descendants, ascendants, and collateral relatives within four degrees, recognized the successive claims of “natural” children recognized by their father, the decedent’s spouse (in the absence of separation between them), and collaterals of the fifth to the tenth degree inclusive. In 1881 a general registry of last wills and testaments was established in the Ministry of Grace and Justice.

⁸ For legislation in this field of the civil law, to-day of so great and constantly increasing importance, consult the publications of the “Instituto de Reformas Sociales.”

We may also mention, because of its importance for the establishment and guaranty of titles in many acts of civil character, the statute regulative of “the public faith” (notarial statute of 1862 revised in 1873 and 1874).

And finally, it is to be noted that in the 1800s there was brought about, and that very early, a complete legal differentiation of the civil and commercial law, thanks to the publication of the commercial code of 1829.

§ 38. HISTORY OF THE REDACTION OF THE PRESENT «CÓDIGO CIVIL»

The movement for codification of the law, which appeared in Spain as in the other countries of Europe, reflecting a tendency general throughout the world, and producing the same struggles as those which in France and Germany are particularly associated with the names of Thibaut and Savigny, represented in Spain two fundamental ideas. One of them, traditional since the 1400s, was the remedy of the confusion resultant from the variety and disorder of legislation, particularly in Castile, – a necessity left unsatisfied, as is well known, by the “Novísima Recopilación.” The other and new one was the unification and modernization of the whole law.

As regards unification, strictly considered, without confusing with this the introduction of new principles, –so far, that is to say, as such unification was to be accomplished upon the basis of the actual law and not through its reform,– the question was really, at the opening of the century, rather one of form than of substance; inasmuch as there had been slowly progressing in both the public and the private law (of Castile) a unification which in civil matters was based upon the primacy of the system embodied in the “Partidas” and in the fundamental statutes of the 1500s to 1700s.⁹ The codifiers of the last century aspired, however, to something further. They desired, on one hand, to introduce novelties suggested by the ideas of the period, and above all by the necessities that social and economic changes were creating; and, on

⁹ On this see Altamira, “Cuestiones preliminares,” ch. 6, and particularly pp. 111-116. A writer so little to be suspected of modernism as *Domingo de Morató* has written as follows in his “Estudios de ampliación de historia de los códigos españoles” (3d ed., Valladolid, 1884), p. 312: “But considering the same question from a practical point of view, we may recall what has been pointed out in the introductory essay, namely, that though the legislator has indeed stood still, the procedure and judgments of the courts have reduced legislation in the field of civil law almost to a unitarian system through the preference, little less than exclusive, conceded to the Código de las Siete Partidas over all earlier codes,”

the other hand, to fuse in a single mass the diverse civil legislation of Castile, Aragon, Catalonia, Navarre, and the Basque Provinces. This made the problem more complex, and gave origin to various important questions to which reference will be made below. As for the manner of its realization, the ideal of many jurists was the redaction of a single code that should embody the whole matter of the civil law; but because of the delays that marked its preparation, and the urgency of necessities, that matter was in fact embodied, in its different branches or subjects, in various groups of statutes, of which only a part have been taken over into the "Código Civil."

The history of the Code is not a simple one. It begins with an article (259) of the Constitution of Cadiz that lays down at once the principles of unification and codification: "a single Civil Code shall be in force in all the dominions of the Spanish monarchy," – an ideal which was repeated in more general form in the Constitutions of 1869 and 1876. Neither the Cortes of Cadiz, nor those of the second constitutional period, succeeded in realizing even the formulation of a draft for a civil code, although in both periods it was attempted. The first work officially accomplished toward that end was that done by the Code Commission of 1843-1846 (namely books 1 and 2, and part of book 3). The Commission that succeeded this one was able to advance farther, delivering to the government in 1851 the draft of a complete code,¹⁰ chiefly based upon the Castilian civil law, with the addition of a number of principles taken from the regional laws and others taken from foreign systems, especially from the French. After the rejection of this draft, the idea reappeared in 1880, and now with the decided aim of fusing the Castilian civil law with that of the other regions of the Peninsula; to which end there were incorporated in the Code Commission members representing Aragon, Catalonia, Majorca, Navarre, Biscay, and Galicia. The presence of the last, representing a region included in the territory of the Castilian crown, presupposed a recognition, within that, of peculiarities which it was thought necessary to preserve; but at the same time indicates very clearly the illogical attitude of the jurists of that time, inasmuch as Galicia (as is notorious, and as we shall point out below) is not the only region that has peculiar civil institutions, and, there being others, it was unjust to make an exception in favor of one alone.

Nevertheless the draft for a uniform Code (or at least one general for the Peninsula) came to nothing. The foral territories manifested with the utmost

¹⁰ Relative to this see the book of *F. García Goyena*, "Concordancias, motivos y comentarios del Código civil español" (Madrid, 1852, 4 vols.).

clearness their aspiration to conserve intact their own law, without fusion with the Castilian; and, indeed, even to exclude wholly the influence of this.

In 1881 the Minister of Grace and Justice, Manuel Alonso Martínez, presented to the Cortes, first a statute embodying the principles of a Code (“Ley de Bases”), and afterward the partial text of one; but his labor was rendered fruitless through political changes. In 1885 another minister, Sr. Silvela, presented in his turn another draft of principles (“bases”) which became law on May 11, 1888. By this the government was authorized to publish a Code that should be prepared by the Section of Civil Law of the General Code Commission, and which should comprise the Castilian law alone; as regards the “provinces and territories in which there exists a foral law” it was declared that this should be respected “for the time being, in all its integrity, without alteration of their present legal system by the publication of the Code, which shall there possess in any of such regions merely an authority supplementary of gaps that may exist in its special law.” The Code was accordingly published by royal decree of October 6, 1888, and after discussion in the Cortes a new and revised edition was prepared in 1889, which is that now in force.¹¹

§ 39. GENERAL CHARACTER AND LIMITATIONS OF THE «CÓDIGO CIVIL»

Neither the exposition of the doctrine of the Code (a part of actual legislation), nor even the critical appraisal of its innovations and its tendency,¹² are desirable in this place; but we may properly indicate, as historical data, the influences which it principally expresses, and some of the more notable reforms that it introduced. The former were very varied, nor were they united in the Code in subjection to any organic conception. The individualist principle naturally predominates, being that which is dominant with jurists; but with vacillations, – which nevertheless do not do satisfaction to other tendencies in legal thought, nor even afford them expression; as may be seen, among other details, in the title improperly styled “Of the community of property,”

¹¹ For a detailed history of the preparation of the Code see vol. I of *Sánchez Román*, “Estudios de derecho civil” (2d ed., Madrid, 1899), ch. 27-29.

¹² For this see especially, beside the commentaries on it (*Manresa*, *Costa*, etc.), the book of *Sánchez Román* just cited; that of *A. Comas*, “El proyecto del código civil,” (Madrid, 1884); the speeches pronounced in the Cortes in the discussion of the bill – particularly a few, such as those of *Azcárate*; and the articles published in this connection in the press, as *e.g.* the anonymous ones that came out in the newspaper “La Justicia.”

and in the deficient regulation of social or juristic persons, and of contracts which relate to the industrial relations of laborers. In this respect the Civil Code presents many less novelties than might off-hand be expected. Such as exist refer principally to a few institutions (tutelage, the family council, preferential rights of purchase, heirs' compulsory share, etc.) which either represent a national tradition or one borrowed from foreign legislation, especially from the Italian Code; but which do not, we repeat, characterize the work as a whole. As regards its content, the new statute does not satisfy the aspirations for codification, not alone because of its many "lacunæ," which it will be necessary to fill gradually with special statutes, but also because it left untouched not a few such anterior to itself, such as the statutes of civil registry, hypothecary law, waters, mines, hunting and fisheries, etc.

Aside from all this, the Code has opened up three interesting problems, which, because of their historical relations, we should here consider: that of the non-Castilian legislations (a problem which we have seen was planted with us before the Code), that of judicial interpretation, and that of the customary law.

As regards the non-Castilian or foral systems, the Civil Code contains a few general provisions that became obligatory in those territories, abrogating all law in opposition to them; but in other matters it is only supplementary, – subordinate to natural reason and equity in Aragon, to the Canon and Roman law ("dret comú") in Catalonia, to the Roman law and the "Partidas" in Navarre. There remain in pendency, however, in this connection, two further elements: first, the question of the formulation of the appendices of "foral institutions which it is desirable to conserve," forepromised in article 6 of the law-of-bases; and secondly, the spread of the Castilian law through the decisions of the Supreme Court, which passes in the last instance upon appeals from the whole of Spain.

Nothing has been done officially with reference to the appendices of foral law whose preparation is commanded by article 7 of the statute just mentioned. That of Aragon is already in writing, but awaits revision, and of course has not been promulgated.¹³ That of Catalonia, prepared by Sr. Trias, follow-

13 On Aragonese law that must be considered as of actual authority see: *Lapeña*, "Fueros y observancias vigentes en Aragón"; meetings of the "Congreso de Jurisconsultos aragoneses, – conclusiones votadas"; *Franco López*, "Memoria sobre el derecho civil aragonés" (Zaragoza, 1886); Colegio de Abogados de Huesca, "Informe sobre la Memoria," just cited; the earlier volumes of *Franco Guillén*, "Instituciones del derecho civil aragonés"

ing the deliberations and labors of the “Academia de Derecho” of Barcelona, has been presented to the government, but has likewise not been promulgated.¹⁴ The appendices for the other foral territories have not even been redacted; although the elements for their formulation are to be found in the books of Morales y Gómez, as respects Navarre (Pamplona, 1884); Ripoll y Palou, as respects the Balearic Islands (Palma, 1885); Lecanda, as respects Biscay (Madrid, 1888); and López de Lago, as respects Galicia (Madrid, 1885).

The question how far the doctrines of the Castilian law may or do exert influence upon the foral law of the provinces, through the judgments of the Supreme Court, is one which preoccupies especially the jurists of Catalonia. Among them it gives rise to obstinate discussions, the importance of which for us lies in the historical character of the phenomenon which they suggest, —one so often repeated in former centuries,— and in the consequences which it may have in the elaboration of a common law of the future if its action continues.¹⁵

It should be noted with reference to such judge-made law that the Code does not include it among the sources of the law; thus it denies not only a doctrine recognized elsewhere in existing statutes, as *e.g.* in the Code of Civil Procedure, but —what is more grave— a positive fact, which has made itself felt in all periods, and will continue to do so notwithstanding the Code: the vital and creative force of the decisions of the courts. The question possesses undeniable practical importance, which cannot here be examined; but historical as well (for which reason we point it out), inasmuch as the Code, in overlooking it, ignores an essential factor in the history of the civil law (and of all legal systems), and may give rise to perturbations of a grave nature in future legal developments.¹⁶

(Zaragoza, 1841); *A. Blas*, “Derecho civil aragonés” (Madrid, 1873); and *Costa*, “La libertad civil y el Congreso de jurisconsultos aragoneses,” (Madrid, 1883).

14 On the Catalan law see: *Durán y Bas*, “Memoria,” cited above in § 15 n. 4 (Barcelona, 1883); “Exposición del Instituto agrícola catalán de San Isidro al Ministro de Gracia y Justicia” (1890); *Brocá and Amell*, cited above, § 15, n. 1; and the works cited below in § 40.

15 See *Antoni Maria Donell*, “El codic civil a Catalunya” (Barcelona, n.d.—1904), *Q. Martí y Miralles*, “La qüestió de la parcería” (Barcelona, 1904) and “La qüestió de la parcería y la moral del advocat” (Barcelona, 1905); *E. Sagner y Olivet*, “De la parcería y'l judici de desahuci” (Gerona, 1905).

16 The question was discussed in the Congreso Jurídico of Madrid in 1886 (reports by *Costa*, *Giner de los Ríos*, *Oliver*, and *Pantoja*) and in that of Barcelona (as the principal

§ 40. THE «CÓDIGO CIVIL» AND THE CUSTOMARY LAW

Of even graver import, if that be possible, is the doctrine of the Code relative to customary law, – though indeed it here only repeats, in part, notions current among jurists of the old school, unenlightened by the ideas of the historical school of Savigny, and its derivatives. The Code denies, namely, all value to customs opposed to statutes; and with regard to such as are opposed to no legal precedents because dealing with matters unforeseen by the legislator, it admits the suppletory character of local, but not of general, customs.

Now it is notorious to everyone who knows the legal life of the Spanish people (or that of any other), not from books but from the observation of realities, that custom contrary to the statute-book, alike in questions of civil, administrative, political, or other law, is continually produced, frequently prevails in practice, and oftentimes has in its favor not only the assent of the public and the force there from derived, but also the principles of justice, – of law that is adjusted to the circumstances, – which the statute does not always possess; and is therefore preferable to the precept of the legislator.

Without discussing the question here under its general aspects (or, as is commonly said, “theoretically”)¹⁷ it must be remarked, as a fact falling within our historical purpose, that the actual civil legislation –the Civil Code, and special statutes; foral codes or compilations, etc.– does not comprise by any means all the positive civil law of Spain; but that this remains to a considerable extent a law of customs, not alone local but general as well, whether contrary or not to the statute-book; and that this in the “majority of cases is a continuation of earlier historic conditions, with profound rootage in the spirit of the people, – a spirit which does not merely conserve forms of the past, but continues to modify them, also by way of custom, following the compass of the times and molding them to new necessities.

However vast the domain of custom may remain to-day, as it has always been,¹⁸ its scope begins at least to be seen, thanks to the investigations of Sr. Costa and of his imitators and disciples, which are revealing the existence of this form of legal life in many regions of Spain. And it is to be noted that its existence is provable, not only in the regions of foral law, where the statutory

thesis) in 1888 (reports by *Gil Robles* and *Plá*, and critiques by various others), See *Altamira*, “Cuestiones preliminares,” ch. 4, no. 9.

¹⁷ *Altamira*, “Cuestiones preliminares,” ch. 4, nos. 1-8.

¹⁸ See the same work, ch. 5.

law itself has at times assembled it, giving it a written form (as in Aragon, Catalonia, and elsewhere),¹⁹ but in those of Castile as well in spite of the general belief that the statute-book has there imposed itself upon everything and has made everything in life uniform. It suffices, if one would inform himself of it, to read the essays published²⁰ upon the customary law of León, Ciudad Real, Galicia, Castilla la Vieja, Mancha, Alicante, Aliste, Salamanca, Asturias, etc., and those upon general agricultural customs;²¹ and the very "Memorias" of the registers of property themselves (under the caption of "especialidades," and at times outside of it) refer to numerous living customs in the midst of the Castilian and Valencian territories.²²

The customary law, then, continues to be an essential in the present history of the civil law (and in part of the public), and one must bear in mind its reality in defining the other's contemporary phase, which the uninterrupted succession of events is casting every day into the history of the past; the only history which is vulgarly considered as such, although it is nourished by the present, and is at once creator and offspring of this.

§ 41. LEGAL SCIENCE AND LITERATURE OF THE PERIOD

Spanish legal science in the 1800s does not show a flowerage so abundant as that in the preceding centuries whose history has been outlined; although it can show notable writers, especially in the fields of public, civil (Spanish), and criminal law, and in legal history. The Romanists and Canonists, exceedingly few in number, have not the importance of those of the 1500s, 1600s, or even of the 1700s.

Salient facts of the century were: A double influence, French and English in political and administrative law, represented by distinctive groups of lib-

19 In Catalonia jurists are at present giving much attention to the customary law, and to the question of the weight it should be given in practice. See *e.g.* *J. D. Torroella*, "La dret civil gironi" (Mataró, 1899), and *Borrell*, as cited in "Cuestiones preliminares," *supra*.

20 In the volume by *Costa* and others, "Derecho consuetudinario"; in the prize essays of the "Academia de Ciencias Morales y Políticas"; in the "Anales" or the University of Oviedo, etc.

21 *Espejo*, "Memoria" upon customary agricultural contracts in the whole Peninsula.

22 See on this point *Altamira*, "El método positivo en el derecho civil" in "La Nueva Ciencia Jurídica" of May, August, and September of 1892, where some of these peculiarities are mentioned.

eral refugees at the beginning, and of doctrinaires in the middle of the century;²³ the influence, first of the German Krause, and later of French positivism, upon legal philosophy (thus marking a triple influence of Germany, England, and France); and that of the Italian anthropological school in criminal law, succeeding to that of the German Röder and the reformative school. The influence of the Krausian philosophy has been particularly profound. It sprang from the translation of Ahrens' "Cours de droit naturel" (Paris, 1838) made by Navarro Zamorano in 1841, and from the lectures of Professor Sanz del Río in his chair of philosophy in the University of Madrid; and went so far as the formation of a school, which—with more or less modification of Krausian principles by the doctrines of the historical and positivist schools, and after exposure to the influence of Ahrens, Röder, and other writers of similar tendency—finally attained a certain character of originality. The course of the current may still be noted in those jurists who maintain a hostile attitude toward it, or in those who, without going to that extreme, maintain a certain independence of doctrine.

Noteworthy jurists of one or the other of these different tendencies (and of others still, such as the Catholic school, so called) have been²⁴: Pacheco, Álvarez, Vizmanos, Hernández de la Rúa, and Silvela in criminal law; García Goyena, Cortina, Álvarez, Pérez Hernández, Cepeda, Laserna y Montalbán, Gutiérrez, Vives y Cebriá, Alonso Martínez, Durán y Bas, Pérez Pujol, Manresa Galindo de Vera, Escosura, Comás and Costa, in civil law; Argüelles, Flórez Estrada, Alcalá Galiano, Pacheco, Donoso, Ríos Rosas, Olózaga, Bravo Murillo, Cos Gayón, Colmeiro, Alcubiella, Cánovas Silvela, Martos, Costa, and others in political and administrative law; Ortiz de Zúñiga, Díez de Salcedo, Carromolino, Viado, Vicente y Caravantes, Castro y Orozco, Reus, Arrazola, and Manresa, in the law of procedure; González Huebra, Martí Eixalà Durán, etc., in commercial law; Aguirre, Inguanzo, Salazar, Aguilar, and La Fuente, in Canon law; Orfila and Mata, in medical jurisprudence. The principal cultivators of the philosophy of law, properly speaking, are still living. As for the

23 The French influence is the better known and of more abundant literature. The English influence demands a special study, which has not yet been attempted.

24 A bibliography of Spanish legal literature, which although not complete is very abundant, has been published by *Torres Campos*, "Bibliografía española contemporánea del derecho y de la política" (2 vols., Madrid, 1883 and 1898, covering respectively the periods 1800-1880 and 1881-1896).

The text here does not purport to deal with living jurists.

historians, they have been numerous throughout the century from Martínez Marina, who wrote several of his works after 1808, to Joaquín Costa, one of the most versatile and erudite of Spanish writers and a scholar of the most exalted ideals.

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