MAPPING THE HISTORY OF CODIFICATION[1]

MAPEANDO A HISTÓRIA DA CODIFICAÇÃO

Jean Louis Halpérin[*]

Resumo:
Bentham defendeu a ideia de uma codificação geral como um "mapa do direito", que poderia permitir a comparação entre as leis de diferentes nações. Este trabalho propõe-se a usar essa relação sobre as ideias de codificação do direito e mapear as leis para pensar sobre uma possibilidade de mapear a própria história da codificação, tomando como ponto de partida a redação dos códigos especializados - e não apenas dos códigos civis. O mapeamento pode ser um meio para lidar com as relações entre os países que adotam um código, uma oportunidade para considerar as relações entre os códigos e a criação de novos Estados, os processos nacionais de unificação, a adoção de Constituições, as revoluções políticas e sociais e as rupturas. O trabalho tentará, ainda, fazer correspondências entre esses fenômenos para construir tabelas que poderão ser representadas por meio de mapas futuros.

Palavras-chave: Codificação. Código Civil. Mundialização da codificação. Legislação e criação de estados nacionais. Ideais de codificação.

Abstract:
Bentham has defended the idea of a general codification as a "map of the law" that could allow the comparison between the laws of different nations. This essay aims to use this relationship about the ideas of codifying the law and mapping the laws to think about the possibility of mapping the history of codification, taking as its point of departure the writing specialized codes - not only the civil codes. Mapping can be a means to deal with the relationships between the countries adopting a code, the opportunity to consider the relationships between the codes and the creation of new States, the national processes of unification, the adoption, the political and social revolutions and ruptures. Also, it will try to make correspondences between these phenomena in order to construct tables that could be represented through future maps.

Keywords: Codification. Civil Code. World-wide spreading of codification. Legislation and nation-states creation. Codification ideals.

As it is well known, the word "codification" was invented and promoted by Jeremy Bentham. In 1817, Bentham published himself a book entitled *Papers Relative to Codification and Public Instruction*. This book gathered letters Bentham addressed to the

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[*] Professor no Departamento de Ciências Sociais da École Normale Supérieure de Paris desde 2003. Foi pesquisador e professor em História do Direito pelas universidades de Lyon III (1988-1998) e Bolonha (1998-2003). É membro sênior do Instituto Universitário Francês desde 2013.

President of the United States of America Madison (1811), to the tsar of Russia Alexander (1813-1814) and to different authorities in Geneva, Spain, Portugal and South America. Before the texts about public instruction, the volume contained a circular "on the subject of codification" that could be sent to the Governor of any State (BENTHAM, 1817). If it can be said that the history of the word "codification" begins with Bentham, it is not the case with the noun "code". The Latin word "*codex*" was used in the Late Antiquity when bound books took the place of rolls. It was chosen to refer to authoritative collections of imperial laws, the *Codex Theodosianus* (438) and the *Codex Justinianus* (533-534). Then there was an eclipse of this word, corresponding to the weakening of the legislative power of rulers during the Middle Ages.[2] The word "code" knew a kind a revival from the 17th century onwards with the blossoming of the so-called Modern School of Natural Law and the development of legislative activity of absolute monarchies. However, neither Grotius nor Pufendorf used the word "code" or proposed the gathering of laws in a simple body. Leibniz was probably the first one to promote in the years 1670 the writing of a *Leopold code* that was never achieved. At the same period, private editors published the great ordinances of the French king Louis the fourteenth about civil and penal procedure (1667 and 1670) under the title *Code Louis*. And the 1683 Danish statute book named *Danske Lov* (literally *Danish Law*) was considered, notably by Bentham, as a code, like the 1734 *Sveriges Rikes Lag*, literally the Law of the Swedish Empire.

Bentham has developed his works from the time of the publishing of the project of the Prussian *Code Frédéric* (published in French in 1751), of Beccaria *Dei delitti e delle pene* (1764), of the 1786 *Codice Leopoldino* (this Tuscan Penal Code was published under the title *Riforma della legislazione criminale Toscana* and named *Codice Leopoldino* or *Leopoldina* by the Grand-Duke himself) (SCHLOSSER, 2010, p. 1) until the epoch of the French Napoleonic Codes (five Codes from 1804 to 1810) and of the Brazilian Penal Code. Of course, Bentham was not the sole of his contemporaries to link these different codes and to consider that there was a general movement in Europe, at the turning point of the 18th and of the 19th century, to write down comprehensive books of statutory laws. One can say that the "ideology" of codification has preceded the works of Bentham and that this legal thinker has theorized a legislative practice developed outside England and independently from his works.

This ideology of codification is itself one aspect of a more general trend towards the "standardization" or "rationalization" of law, a trend that was also expressed in the development of more systematized collections of case law in England. Another manifestation of this trend is the use of the expression "map of the law". To explain

[2] But the question can be asked if the *Siete Partidas* was a "code" or not.

the task of the first professor of English law in Oxford, Blackstone had proposed this metaphor for his teaching:

> an academical expounder of the law… should consider his course as a general map of the law, marking out the shape of the country, its connexions and boundaries, its greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet. (BLACKSTONE, 1765, § 1, p. 35).

This project of a systematic, simplified (or stylized) description of the laws of one country was also the one of Bentham, despite the violent critics he addressed to Blackstone. Bentham has defended the idea of a general codification as a "map of the law" that could allow the comparison between the laws of different nations (BENTHAM, 1970, p. 242-246).

I propose to use this relationship about the ideas of codifying the law and mapping the laws to think about the possibility of mapping the history of codification. Before any attempt to draw up geographical maps, it is necessary to think about the concept of codification and the way to construct tables with countries and codes, which can be represented through maps in a second stage. The works of Bentham seem to me a good point of departure for deciding which bodies of laws have to be considered as *species* in the genre "codification". Bentham did not truly propose a definition of what is a legal "code". For promoting the writing of codes, he presented the qualities of the body of laws he recommended to write down in every country (BENTHAM, 1817, p. 100). Knowing that a code was a collection of statutory laws, Bentham insisted on the completeness of a code with the ideal of gathering all the legal rules of a country in a *Pannomion*. All the codes Bentham could quote were considered by legislators as complete: the Danish, Swedish, Prussian (Bentham curiously quoted the project of *Code Frédéric* and not the *Allgemeines Landrecht*), Sardinian codes, as well as the Napoleonic Codes. These ones were deemed "more complete" than the previous ones but Bentham was not completely satisfied with the French Penal Code of 1810[3] and not very talkative about the Civil Code.[4] In the same time, Bentham considered that the penal code had to be written down before the civil code (BENTHAM, 1829, t. 1, p. 312).

[3] Letter of 17 January 1814, from Etienne Dumont, *The correspondence of Jeremy Bentham*. Oxford: Oxford University Press, 1988. p. 366. (Ed. by Stephen Conway). «Le Code pénal de Napoléon, ce qu'on a fait de mieux en ce genre me paraît encore bien loin de ce qu'il devrait être».

[4] BENTHAM, Jeremy. *Papers relative to codification and public instruction*. London: J. M. Creery, 1817. p. 78 and 130. Bentham noticed that the monarchies of the Restoration in Europe, despite their hatred against Napoleon, did not revoke completely the Napoleonic codes.

In the final version of his plans, Bentham theorized a "universal" codification, purported to gather the law in one "general" body and in a collection of small particular codes devoted to every class of the society (BENTHAM, 1817, p. 8). This plan was never realized in any country. It is noteworthy that the examples of almost complete codes given by Bentham, the Danish and the Swedish Codes, are considered today as examples of compiled legislations to be differentiated from the "modern" codes. The current historiography makes the distinction between old codes that gathered previous materials according to a succession of different topics[5] and modern codes written *de novo* and devoted to a specific branch of the law. According to this distinction, that was not the one of Bentham, the Danish and the Swedish Codes are not modern Codes, the model of which is proposed by the five Napoleonic Codes. The Bavarian Codes (the 1751 Criminal Code, the 1753 Judiciary Code and the 1756 Civil Code) and the 1794 *Allgemeines Landrecht* (ALR) can be considered as "intermediary" systems between the ancient and the modern codes: the Bavarian codes are specialized, but not truly innovative, whereas the *Allgemeines Landrecht* was written *de novo*, but conceived as a general code (with a general part and a series of particular codes according to the different corporate groups, *Stände*, of the society). The Russian *Svod Zakonov*, a collection of laws published by the tsar Nicolas I in 1833, was also an example of an old codification. Its 60 000 articles gathered into 15 volumes the different rules about civil, penal, commercial and public law, without achieving a complete codification of the Russian law, the peasants law remaining outside this collection.

What is interesting for an attempt to map the codification movement is of course the adoption of modern codes, what means of specialized codes. Until now, the histories of civil and penal Codes have been developed rather separately and the comparative studies about the history of codes of procedure or of codes of commerce remain scarce. The studies about civil codification have logically focused on the "unification function" of codes which, in, many cases, took the place of a plurality of laws applicable to the different parts of the country or to the different groups of the society (CARONI, 1998, p. 6-13). This goal of unification is less present in the case of penal codes or of codes of commerce, which also corresponded to other objectives: the reinforcement of a public order guaranteed by the State, the integration inside the international commerce between "civilized nations".

I think that the construction of historical maps about the codification movement has to take its point of departure in the phenomenon of writing specialized

[5] For example, nine books in the 1734 *Sveriges Rikes Lag* from Marriage Law to Commercial, Penal and Processual Law; one can also quote the 1723-1729, then 1770 *Leggi e costituzioni* in Piedmont-Sardinia or the Spanish 1567 *Nueva Recopilación* and 1805 *Novísima Recopilación.*

codes and not only in the realization of civil codes. An analysis of the different *sequences* of codes, in all the countries of the world that are concerned by the codification, is a first stage of mapping. In a second stage, mapping can also be a means to deal with the *links* or relationships between the countries adopting a code. It is not only the case of the classical phenomenon of legal transplants and of the influences of "great" codes as models, but also the opportunity to consider the relationships between the codes on one hand, and the creation of new States, the national processes of unification, the adoption of constitutions (that Bentham qualified as constitutional codes), the political and social revolutions or ruptures on the other hand. In a second part, I will try to make correspondences between these phenomena in order to construct tables that could be represented through future maps.

1. Codification Sequences

If Bentham did not succeed to trigger a penal codification in his own country and did not get a positive answer to his letters offering his services around the world, the writing down of a penal code was, during the nineteenth century, a global phenomenon, which has gained less attention that the diffusion of civil codification. More than fifty countries around the world adopted a penal code during the nineteenth century and the drawing up of historical maps of this movement of penal codification raises a number of methodological questions.

The first one has been dealt with the classical book of Yves Cartuyvels, *D'où vient le Code penal?* (1996) (CARTUYVELS, 1996). It is the matter of distinguishing between the old "codified" statutes concerning penal laws _ as the three last books of the *Codex Justinianus* or the 1532 *Constitutio Criminalis Carolina* with its 219 articles _ and the modern codifications based on the principles of a specialized systematic for penal law (separated from civil law and, to a lesser extent, from criminal procedure) and of the legality of crimes of penalties. The break is not immediate in the second half of the eighteenth century. The 1751 *Codex iuris bavarici criminalis* is a mixture of old characters (the union between penal law and criminal procedure, the large powers given to the judges, the inequality of penalties according to the diversity of social status) and new features, like the abrogation of the previous statutes and rules in favour of a new legislation organized according to a systematic plan (distinguishing general and special penal law) (CARTUYVELS, 1996, p. 124-132). A new era is open with the 1786 Tuscan Penal Code, the 1787 Austrian Penal Code and the 1791 French Penal Code, three codes that were inspired by the principles of Beccaria, *Dei delitti et delle pene*. If penal law and criminal procedure remained associated in the same Code in Tuscany, the specialization of the penal matter is clearly established in the Austrian and the French Penal Codes, which can

be contrasted with the penal clauses of the Prussian General Code (*Allgemeines Landrecht* of 1794). At the time of the apparition of the first professorships specialized in penal law (in Germany, in France and in Italy), penal codification became synonymous of a stricter legality of crimes of penalties, associated with the completeness of the code (sometimes nuanced by the existence of other statutory laws for lesser offences or misdemeanours). The penal codes of the years 1800-1820 were largely influenced by these three models of the end of the eighteenth century that have pre-dated the works and the influence of Bentham. For example, the 1807-1808 (one volume for crimes or *Verbrechen*, another volume for lesser offences or *Vergehen*), Penal Code of the canton of Saint-Gall was influenced by the Austrian Code, whereas the 1808 Penal Code of Netherlands (under the authority of Louis Bonaparte and before that the Napoleonic Penal Code was imposed in the annexed Holland) was inspired by the 1791 French Penal Code. Then, the penal codes of the years 1810 and 1820 were inspired by the new models of the 1810 French Penal Code, of the 1813 (Feuerbach's) Bavarian Penal Code and of the 1822 Spanish Penal Code, let alone the impact of Bentham's works and of Livingstone's project of Penal Code for Louisiana (1825).

If the genealogy of penal codes can be clearly identified after the end of the eighteenth century, a second question concerns the title of Penal (or Criminal) "Code". This question is fundamental to include or not in the sequences of penal codification the penal statutes adopted since the beginning of the nineteenth century in several federated States of the United States of America. There is no doubt that Livingstone's project of Penal Code for Louisiana belonged to the codification movement inspired by the European codifications and by Bentham. But this project was never adopted. It is generally considered that the 1816 Penal Code of the State of Georgia _ with more than 200 articles taking the place of a more limited 1811 act "to meliorate the Criminal Code" _ is the first (North) American Penal Code.[6] There is more difficulty to distinguish in the successive decades the compilations of statutory laws about penal matters and the "true" penal codes. If one uses only the criterion of the title of the published legislation, the 1829 *Revised statutes of the state of New York* were not a penal code (because this compilation mixed different matters, the penal laws were gathered in the fourth part with seven titles), whereas the 1834 *Code of criminal law of New Jersey* was another example of a specialized codification after the Penal Code of Georgia (MITTERMAIER, 1835, p. 463). But the *Code of criminal law of New Jersey* was inspired by the statutes of New York and the Empire State of New York adopted a Penal Code (with an express article 1 giving this title) in 1881. Following the titles used in statutory laws, I have considered that

[6] SURRENCY, Erwin C. The first American criminal code: the Georgia code of 1816. *The Georgia Historical Quarterly*, Gambier, v. 63, n. 4, p. 420-434, Winter 1979. The drafters of this code are unknown.

there were also penal codes in the States of Illinois (1827,[7] with a revision in 1845), Texas (1856, with 829 articles),[8] California (1872)[9] and in North Dakota (1877). On the contrary the 1851 Iowa penal laws are part of a general code.[10]

With these preliminary considerations, the succession of penal codes during the nineteenth century can be tabled, then mapped in the different decades. Outside France and Austria, the Swiss canton of Aargau, just constituted in 1803, adopted in 1804 a Penal Code inspired by the Austrian model and Penal Codes were published for Lucca (1807) and Piombino (1808). For the decade 1810-1820, the movement concerns Bavaria, the kingdom of Naples, the principality of Parma, the canton of Ticino and the American State of Georgia. For the decade 1821-1830, Spain and the City of Bale are the only States concerned in Europe, whereas the movement reached Latin America with Haiti (1826), El Salvador (1826), Bolivia (1826), Peru (1828), and Brazil (1830), and also the State of Illinois. The decade 1831-1840 is the most represented with fifteen states: Wurttemberg, Saxony, Brunswick, Hannover, Piedmont-Sardinia, the cantons of Zurich and Bale, Greece (with the 1833 Code in 708 articles) in Europe, Peru, Ecuador, Colombia, Guatemala, Nicaragua, the Mexican state of Veracruz in Latin America, New Jersey in USA. Then, during the decade 1841-1850, six Penal Codes were written down in the German States of Baden and Hessen, in the Swiss cantons of Thurgau, Vaud and Fribourg, whereas the codification of penal law reached Russia (1845-1846) and a new writing of the Code of Georgia was realized in the USA. The decade 1851-1860 is again very fruitful, with the penal codes of Portugal, Modena, Grisons, Neuchâtel, Valais, Solothurn, Schaffhausen, Serbia, Prussia, Oldenburg and the extension of the movement to Texas, the Ottoman Empire and India through the British colonizers and the Indian Penal Code (1860). In the decade 1861-1870, Penal Codes were adopted in Bern, Romania and Venezuela and Belgium replaced the Napoleonic Code by a new Penal Code (1867). The decade 1871-1880 concerned mainly America with the penal codes of Mexico, California (influenced by the 1865 Field's project in New York), Dakota, Paraguay, Honduras, but also the German Reich (1871) and the first code in Africa, the Egyptian penal code (1875). During the decades 1881-1890, new penal codes were written down in Netherlands, Russia, Portugal, Italy (the *Codice Zanardelli*), Ecuador, whereas the first codifications of penal law were realized in Argentina, Uruguay, New York and in the Far East with the Japanese Penal Code (1882) written by the French professor Boissonade. After 1891 and before World

7 *The revised code of laws of Illinois*, Vandalia, Robert Blackwell, 1827, p. 125-174: An Act relative to criminal jurisprudence (August 1, 1827), constituting the «code of criminal jurisprudence of this state».

8 *The Penal Code of the State of Texas*, Galveston, 1857.

9 *The Penal Code of California*, Bancroft-Whitney Company, 1903.

10 *The code of Iowa: passed on the session of the General Assembly of 1850-1851,* Iowa, Palmer and Pall, 1851, Part Fourth § 2565-2572 about offences followed by § 2573-3167 about criminal procedures.

War I, penal codes were adopted in Canada (1892), New Zealand (1893), Montenegro (1906), Thailand (1909) and Liberia (1914), the second country in Africa endowed with a Penal Code (followed in the first half of the twentieth century, before the decolonization, by Ethiopia in 1930). Before World War I, penal codification reached all the continents in the world and concerned more than fifty countries.

If we consider 57 countries (including Swiss cantons) adopting their first penal code during the nineteenth centuries, 27 have realized a penal codification before achieving a civil one: Bavaria, Austria, France, Aargau, Saint-Gall, Ticino, Zurich, Grisons, Schaffhausen, Netherlands, El Salvador, Nicaragua, Peru, Brazil, Bolivia, Ecuador, Colombia, Guatemala, Saxony, Germany, Spain, Italy, Portugal, Greece, Russia, the Ottoman Empire and Japan. Seven countries have written down the two codifications, in penal and civil law, during the same year: Naples, Haiti, Romania, Costa Rica, Honduras, California and Panama. In thirteen other territories, the civil codification preceded the penal one: Louisiana, Piedmont Sardinia, Vaud, Fribourg, Solothurn, Modena, Montenegro, Chile, Mexico (with the Civil Code of the Oaxaca State), Venezuela, Argentina, Uruguay and Paraguay. And in ten countries, the penal codification was not followed by a civil one: Tuscany, Bade, Wurttemberg, Hessen, Georgia, New Jersey, Texas, India, Canada and New Zealand.

These figures support some arguments to say that in many cases the codification of penal law was a preliminary to the codification of civil law. One can consider political reasons to give priority to the writing down of a Penal Code. Several constitutions have planned in the same article the writing of a civil and of a penal code, for instance the 1824 Brazilian constitution. However, the determination of penal law could be considered as more urgent for the public order, especially in new independent States. Six Swiss cantons and eight Latin American new States have begun with a Penal Code, as a means to affirm their sovereignty by a uniform and well framed penal law. The case of Greece is also one of a new State governed by Bavarian kings and counsellors: the 1833 Penal Code was drafted by two Bavarian jurists Maurer and Geib who knew of course the Bavarian and the French Penal codes. They considered probably that a new State could not work without a modern penal law. The reform of penal law could be easily endorsed by conservative governments, whereas the idea of a Civil Code suggested revolutionary ideas linked with the Napoleonic Code, like the secularization of marriage or the equality between heirs. For modernizing and "westernizing" old States, like Russia, the Ottoman Empire, or Japan, the penal codification was also conceived as a first step. Twelve years after the achievement of the *Svod Zakonov*, the Russian government decided to separate the penal laws from this general compilation and to adopt a Penal Code. The same idea can explain why the Prussians replaced in 1851 the penal rules of the *Allgemeines Landrecht* through an independent Penal Code, which was planned to replace the French

Penal Code in Prussian Rhineland. Just after the unification of Italy and of Germany, the Penal Code was also a priority. Whereas in the Ottoman Empire, the Commercial Code was judged more urgent than the Penal Code in the *Tanzimat* reforms, the choice was to adopt a Westernized penal Code through the abandon of the Koranic penalties (*hudood*). In Japan, the French expert Boissonade thought also that the process of codification had to begin with a penal law and the Japanese rulers considered that it was crucial to show that Japanese justice was no more "arbitrary" and "cruel".

In a strictly legal point of view, one can consider that the codification of penal law was easier to realize: the unification of penal law was for a great part achieved before the codification (as in France or in Austria), there were a lot of models to imitate (the Austrian, French, Bavarian, Spanish codifications, later the Zanardelli Italian Code, also Livingstone's project and Field's draft in America) and transplantation was not very hindered by cultural particularisms, many specialists of penal law of the nineteenth century considering that there were "universal" offences. The main goal of these codifications was to realize the legality of offences and penalties, which explained the contacts between consolidated (or compiled) statutes and true codes. Based since Beccaria on the codification's program (what meant the restriction of judges powers and the humanization of penalties) the science of penal law has acquired an independent status, with specialized professorships in many universities, from the end of the eighteenth century onwards. There were reputed specialists in Italy (Pagano, Filangieri, Romagnosi) and in Spain (Galiano and Villanova y Jordan),[11] many of them being acquainted with Bentham's works. In many cases, the first penal codification could be achieved by a single lawyer or by a couple of lawyers using the foreign models. For example, the Ticino Penal Code was written down by the two lawyers (from Milan and Lugano) Marocco and Albrizzi who could know the French, Austrian and Italian texts (CARONI, 2007, p. 425-438). In this Swiss canton, the penal code preceded the civil one during twenty-two years and this penal code was much more revolutionary than a civil code letting the *jus commune* as a subsidiary source of law. In the kingdom of Naples, the adoption of a unique *Codice per lo Regno dello Due Sicile* in 1819 does not prevent a clear separation between the *Leggi penali* (second part of the code) and the other parts devoted to civil, procedural and commercial law. There was a special commission of six members (among them there were five judges) endowed with the task to write down a penal code, very similar to its "Italian" (the 1806 Romagnosi's

[11] RAMOS VÁZQUEZ, Isabel; CAÑIZARES NAVARRO, Juan B. La influencia francesa en la primera codificación española: el código penal Francés de 1810 y el código penal Español de 1822. In: MASFERRER, Aniceto (Ed.). *La codificación española*: una aproximación doctrinal e historiográfica a sus influencias extranjeras, y a la francesa en particular. Cizur Menor: Thomson Reuters/Aranzadi, 2014. p. 219. It is noteworthy that Galiano spoke in 1813 of a "universal legislation" like Bentham.

project and the law of 1808 for the kingdom of Naples), Austrian and French models (NOVARESE, 2000, p. 31-32).

One can think that the writing of a penal code prepared many lawyers, in the considered countries, to acquire the technique of codification and to suggest drafts of other codes, like a commercial code (for example Bernardo Pereira de Vasconcelos in Brazil) (BENTIVOGLIO, 2005, p. 12-14) or a civil code, the last one requiring more work about the unification of legal rules (especially in Spain, Germany or Switzerland). Finally a group of common law countries adopted a penal code, but never planned to realize a civil code: Beccaria's model acquired more success in the United States than the Napoleonic Code that was more difficult to acclimate with the cultural environment of American lawyers.

Of course, one has to take account of the opposed situation, where the civil codification preceded the penal one especially in Latin America. In the case of Venezuela (as in the one the federal codes of Mexico) the difference of only one year between the promulgation of the Civil Code and the one of the Penal Code does not mean something important. In Chile, the idea of codifying the penal law was very old, but one must wait until 1859 (after Bello's Civil Code) for the publishing of a first unachieved project and the discussion lasted until 1874 because of the opposition of the Church that wanted to maintain its jurisdiction. In Argentina, Carlos Tejedor's project of Penal Code was ready since 1867 (following a 1863 law empowering President Mitre to choose the writer of the Code) and it was a series of contingencies that delayed the promulgation until 1886: the numerous critics addressed to the project and, in the same time, its adoption by the majority of Argentinian provinces. In Switzerland the achievement of a federal penal code, in 1937-1938, was more difficult that the one of the civil code (1907-1912). One cannot find general explanations for these situations in which the promulgation of a penal code was delayed.

The adoption of a commercial code can be also considered as a step towards a specialized and modern codification. Commercial law (or Law Merchant, *derecho mercantil)* was identified as a special branch of the law before the codification's movement. The French royal ordinances of 1673 (about commerce) and of 1681 (about sea law) appeared as models for the autonomy of commercial law towards civil law. Inside the Spanish *Recopilación* there was a special book for the ordinances and "*consuladas*" (notably from Bilbao) concerning commercial law and there were projects for an independent commercial code since the end of the eighteenth century (PERONA TOMÁS, 2014, p. 353-356). Again, the French model of the five Napoleonic Codes, including the 1807 Commercial Code, was the main factor for the adoption of a separate code of commerce. Thirty-one countries have chosen this path during the nineteenth century, two thirds promulgating their commercial code in the same year (Naples, Netherlands, Italy,

Venezuela, Uruguay, Guatemala, Honduras, Egypt, Dominican, Republic) or some years later (generally a few ones) than their Civil Code. In all these cases, the French structure of a Commercial Code conceived as a complement of the Civil Code and as an exceptional law was followed.

More interesting is the sequence that concerns ten countries in which the commercial code was adopted before the civil code during the nineteenth century. The case of Greece can be explained by the decision of the Government in 1837 to simply apply the French translation of the French Commercial Code. The situation of Germany has to be explained through the projects to unify commercial law, first inside the *Zollverein* (with a project of Commercial Code in Wurttemberg in 1836-1839), then inside the Germanic Confederation (after the 1848 Law of Change adopted by the Frankfort Assembly and the Nuremberg Commission preparing the *Allgemeines Deutsches Handelsgesetzbuch*, common to Austrian and Germany until 1899). The fact that the 1850 Ottoman Commercial Code had the priority towards the 1876 Civil Code corresponds to the policy of commercial openness towards Europe linked with the *Tanzimat* reforms.

In eight Lusitanian-Hispanic countries,[12] the Code of commerce was voted before the Civil Code and this feature must be underlined. Whereas the codification of civil law was so long and so difficult in Spain, because of the "resistance" of *foral* laws, the codification of commercial, as well as the one, of penal law was seen by Spanish rulers and jurists as a necessity to modernize the country. The 1812 Constitution of Cadiz has planned the writing down of three codes, the civil, the penal and the commercial ones. The 1829 *Código de Comercio* was a single man work, achieved in three years by Pedro Sainz de Andino, a lawyer who was also an *afrancesado*, forced to exile during many years in Paris, with a commercial practice and the drafting of a penal code. Sainz de Andino got a library of more than 2 000 volumes including the works of French and German lawyers (he used a little the *Allgemeines Landrecht*) and Bentham's books. His commercial code was an original achievement, longer than the French Commercial Code, and exercised a great influence over Portugal and Latin America. The 1833 Portuguese Commercial Code (achieved more than thirty years before the Civil Code) was also written by one man, José Ferreira Borges who was influenced by Sainz de Andino and by the growing role of comparative law in commercial matters (notably with the model of some British laws). It is not a surprise that afterwards, the 1831 Ecuador Code, the 1834 Bolivian Code and the 1847 Costa Rica Code, the 1850 Brazilian Commercial Code, then the codes of commerce of Colombia,[13] Salvador, Mexico and Argentina were strongly influenced by the Spanish

[12] Spain, Portugal, Colombia, Ecuador, Brazil, Argentina, Salvador, Mexico.

[13] MIRROW, Mathew C. *Latin American law*: a history of private law and institutions in Spanish America. Austin: University of Texas Press, 2004. p. 156 about this 1855 Code of commerce, that was very influenced

and Portuguese models, what can explain for the five last countries the anteriority of the commercial code towards the civil code. In all these States, the commercial code, associated with commercial courts, was demanded by businessmen and supported by rulers that wanted to open their countries to international exchanges. In Brazil, a commission for writing a commercial code was created in 1831 and the delay to adopt this code in 1850 is explained by parliamentary instability (SCHMIDT, 2009, p. 21-22). In Chile, after two unsuccessful attempts from 1846 onwards, the commercial code was drafted by Ocampo (a jurist from Argentinian origin). In Argentina, Vélez Sarsfield participated in the writing of the 1857 commercial code before the drafting of the 1864 Civil Code (SCHIPIANI, 1991, p. 16). It is also noteworthy that in the years 1860s Augusto Teixeira de Freitas, after composing a comprehensive project of Civil Code, thought about a *Código general*: it can be interpreted as a return to the ideas of Bentham, to a vision agglomerating civil and commercial law and finally as one of the first examples of decline for the projects of separate commercial code, the next step being of course the 1881-1883 Swiss Code of Obligations.

The codification of commercial law has its own history during the nineteenth century, which includes the comparison with uncodified statutory laws (like in the United Kingdom or in the US States) or with the "new editions" of the part of the Russian General Code concerning commercial matters, that were considered as kinds of "false" Commercial Code (KLIBANSKI, 1911, t. 35, p. XI). As the contract law of the Napoleonic Code, the Commercial Code was a "talisman" of economic liberalism and a means to attract foreign investments. With the development of company law, the goal was to modernize the legal rules rather than to unify diverse sources.

The question of the meaning of the sequences concerning the codes of civil and criminal procedure is more complex. First, it is the matter of "adjective" codes, the writing of which is less dependent from the codification ideology than for codes reforming substantial laws. Second, these codes were often linked with judicial reforms that took place inside "ordinary" laws and not in codes. France has experienced the royal ordinances of 1667 and 1670 about civil and penal procedure a long time before the corresponding codes, which borrowed many elements to these quasi-codified statutes. At the beginning of the history of modern codification, Austria has known the 1781 *Allgemeine Gerichtsordnung* and the 1788 *Kriminalgerichtsordnung* as complements of the Penal (1787 and 1803) and Civil (1811) Codes. There were no Spanish Codes of civil and criminal procedure: the two laws of civil procedure (*leyes de Enjuiciamiento civil*), adopted successively in 1855 (after the suppression of the general commission of codification created in 1843) and 1881, were

by the Spanish model and was not seriously applied.

consolidations of previous laws that maintained the old process (written and rather long) of the *jus commune* (PINO ABAD, 2014, p. 430). However, the main writer of the 1855 Law, Gómez de la Serna was an influent writer about civil, commercial and penal law whose works can be integrated inside the codification movement. The contemporaries could speak about a Code of civil procedure and the same phenomenon happened for the 1872 and 1882 *Ley de Enjuiciamiento criminal* that comprised more reforms and were influenced by foreign Codes of Criminal Procedure, like the 1873 Austrian one (BÁDENAS ZAMORA, 2014, p. 468-478).

Of course, there were also many cases of adopting a true Code of civil procedure in a general process of codification of private law. The French model, consisting in adopting in the same time (or in a very short space of time) a Civil Code and a Code of civil procedure was followed in Naples (1819), Parma (1820), Bolivia (1831-1833), Peru (1836[14] and 1852), Costa Rica (1841), Romania (1864), Italy (1865) and Egypt (1875).[15] Codes of civil procedure were adopted in Ecuador (1835), in Venezuela (1836) before the Civil Code, but more lately and after the Civil Code in Argentina (1878 for the State of Buenos Aires after a federal law of 1850), in Mexico (1872, then 1880 under the model of the 1850 Spanish Law) (MIRROW, 2004, p. 138 and p. 141) and in Brazil only in 1939. Colombia has known a *Ley de Enjuiciamiento* according to the Spanish model before adopting in 1872 a Code of civil procedure. Outside Latin American, one finds also a great diversity of situations: some codes of civil procedure got ahead of Civil Code (in Germany with the 1877 *Zivilprozessordnung* inspired by the 1864 Hanover reform, in Russia with a 1864 Judiciary Law, in Japan with a 1890 Code of civil procedure before the 1898 Civil Code). Even in North America, one can find diverse situations: the 1826 Louisiana *Code of practice* after the 1808 and 1825 Civil Codes, the 1849 Field's Code of civil procedure in New York that was never followed by a Civil Code, the 1872 California and the 1895 North Dakota Codes adopted in the same time as Civil Codes, all inspired by Fields' projects. In India the 1858 Code of civil procedure is the first codification that was enforced just after the end of the East India Company and the establishment of the *Raj*: it corresponded to the unification of the judicial system in favour of High Courts. It appears impossible to conclude about some general relationships between the sequences

[14] One has to take account of the fact that in 1836 the State of Nord-Peru, then the Confederation Peru-Boliviana adopted the Bolivian Civil Code, whereas the State of Nord-Peru adopted a Code of Civil Procedure: RAMOS NUÑEZ, Carlos. *Historia del derecho civil peruano*: siglos XIX y XX. Lima: Pontificia Universidad Católica del Perú, 2005. p. 77. Peru got its own Code of civil procedure in 1852.

[15] In the Ottoman Empire, the delay is also short between the 1876 Civil Code and the 1879 Code of civil procedure.

of codification of substantial law and of procedural law, the same being true about the Codes of criminal procedure.[16]

Another phenomenon is the use of the word "Code" and of the technique of codification outside the field of the Napoleonic "Five Codes". First, one has to take account of use of the wordings *Code noir* or *Código Negro* for the colonial legislations, which were maintained until the abolition of slavery during the 19th century.[17] It is also the matter for Military Penal Codes or Codes of Military Justice that have blossomed since the nineteenth century in Europe and in America. To quote some examples, the 1840 *Codice penale militare* in Piedmont-Sardinia, (PENE VIDARI, 2007, p. 423) the 1852 French *Code de justice militaire* or the military Codes in Belgium (1870), Spain (1884), Portugal (1875 ands 1895) or Brazil (1916). It is noteworthy that in the United States, Francis Lieber accepted to call "code" the draft he wrote down for the laws of war that was adopted in 1863 as an Instruction for the Government of Armies of the United States in the Field (HARTIGAN, 2011, p. 73). More specific to Latin American countries are the Mining Codes who took the place of Spanish *Ordenanza de minería* during the 19th century. The first *Código de minería* was the Bolivian one, decided by Santa Cruz in 1834, suspended in 1836, then replaced by a new Mining Code in 1852. Venezuela (1854), Colombia (1867), Chile (1874), Mexico (1884), Uruguay (1885), Argentina (1885), Brazil (1891) and Peru (1900) followed the same path (BULMER-THOMAS; COATSWORTH; CORTÉS CONDE, 2006, p. 189); (MIROW, 2004, p. 163).

These mining codes used the technique of codification to secure mines business and, in a weaker way, to protect the workers. They can be considered as a first step towards Labour Codes. France was the first country to plan such a code in 1910: this code was conceived as a plan to compile statutory laws about the protection of workers and was partially completed in 1924 and 1927 (JEAMMAUD, 1998, p. 161-172). Labour Codes were then adopted in Latin America from the 1930s onwards: first, during the same year 1931, in Chile with the title *Código de trabajo* and in Mexico with the title *Ley Federal de Trabajo*, then in Venezuela (1936), in Ecuador (1936), in Bolivia (1939), in Costa Rica (1943), Nicaragua (1945), Guatemala and Panama (1947). Brazil has known in

[16] One finds again phenomena of simultaneity between Penal Codes and Code of Penal Procedure (Naples 1819, Brazil 1830 and 1832, India 1861, Italy 1865, Texas, North Dakota), cases of Code of Penal Procedure adopted before (Greece 1834, Vaud 1836, Portugal 1841 with a law of civil and penal procedure, Uruguay 1878) or after (Piedmont-Sardinia 1847, Ecuador 1855, Spanish laws of 1872 and 1882, Montenegro 1910) the Penal Code.

[17] The French Ordinance of 1685 that was edited with the title *Code noir,* maintained in Caribbean colonies until 1848 and source of the first Black Code of Louisiana (1724, then replaced by a 1808 law and the articles of the 1825 Civil Code); the title *Codigo negro* was used for ordinances in Santo Domingo (1768 and 1783, the so called Código Carolino) that were applied in Spanish colonies. Brazil had no "*Codigo negro*" as special law separated from the old ordinances or from the Penal Code.

1943 a consolidated and comprehensive labour law that has been considered and modified since this date as *Codificação de lãs Leyes del Trabajo*. After World War II, other civil law or mixed law countries, like Quebec (1964) or Philippines, have promulgated a Labour Code. The technique of codification has been deemed consistent with the idea of a State interventionism in labour relationships.

During the twentieth century, new kinds of codes have appeared and only a very general description can be proposed here about these sequences. After the communist revolution in Russia, it was first decided to write down a Family Code and a Code of Labour Laws in 1918, two codes integrating deep reforms in these branches of law. Then the Civil Code, promulgated in 1922 during the New Economic Policy and reduced to patrimonial issues (ownership and contacts), was accompanied by a Penal Code and by a Land Code. Until today, the tradition of a Land Code remains in Russia. In France, the idea of a "rural code" was present since the French Revolution and several projects failed (except the 1827 *Code forestier*, a Code devoted only to Forest Law) until the compilation of different laws under the title *Code rural* since the end of the 19th century. The concept of Family Code was also successful in communist States (like Cuba) and in Muslim countries to designate the codified law of personal status (for example in Iraq, Algeria or Senegal; Kuwait is also an example of an Islamic country adopting a Civil Code in 1980). This separation between personal law in the Family Code and patrimonial law in the Civil Code (1948 Civil Code of Egypt) or in a Code of obligations (1906 in Tunisia, 1913 in Morocco, 1932 in Lebanon, 1964 in Senegal) has not to be confused with the relaxed use of the word *Code de la famille* for a 1939 decree-law in France that contained different clauses about adoption and social protection. The wording "code" has been used in the same way for penal law of minors (the 1927 *Código de menores do Brasil*), for administrative law, for nationality issues (the 1945 French *Code de la nationalité*, which is no more in force) and for new branches of law (Consumers Law,[18] Environment Law) according to the French model of gathering in numerous codes all the laws about the same topic. With more than fifty codes adopted France is certainly the world champion of specialized codes. This phenomenon can be interpreted as a "dilution" of the codification movement, which would have lost all of its reformative force to become a pure technique of compilation, making the frontier between consolidated laws and true codifications more and more fuzzy. On the contrary, the movements of re-codification (with the adoption of new penal and civil codes), as well as the extension of codification (of penal law[19] or of civil law[20]) to new

[18] Brazil has a 1990-1991 law referred as Code of defence of consumers before the French *Code de la consommation* in 1993.

[19] More than thirty African countries (including ex-British colonies, like Kenya, Zambia and Botswana) have a penal or criminal code, as Thailand, Iran or China.

[20] For example in Thailand, Iran, Madagascar, Ivory Coast and in Kuwait (1980).

countries (including the United States with the 1952 Uniform Commercial Code) or new parts of law can be seen as a proof of the vigour of the codification ideology. The study of Codification Sequences is one of the "indicators" about mapping the specialization among law topics and an invitation to produce maps spatializing the development of codes in the world.

2. Codification Links

With this very vague word "links", I am referring to all the relationships that can be considered between the codes of different countries or between the codes and other political or social phenomena. The first question is classic, it is the one of legal transplants linked with the writing down of codes. Generally speaking, and especially from a French point of view, this issue has been dealt with the ideas of circulation of the "great models" of Code, like the French Napoleonic Code or the German BGB. It has been noted from a long time that one part of this circulation is linked with imperialism (during the Napoleonic Wars in Europe) or colonialism (in the French, Spanish, Portuguese and Dutch Empires) and than another part is associated with the prestige of the French codifications (a prestige also combined with the diffusion or translations of French literature about the commentaries of codes). This distinction between different factors of legal circulation shows that the transplanting process of codes was rarely a simple and unilateral transfer from one exporting country towards an importing State. Rather than continuing to draw up maps of legal families, that are based only on the affiliation of civil codes (like the ones of Japan or Brazil) to the French or to the German models, it would be useful to let appear lines and arrows between different countries or even between corresponding jurists.

The development of studies about the history of the codification movement has confirmed that, in many cases, a lot of foreign influences happened in the codification process. Through an early practice of a comparative and eclectic method, the codes drafters found their inspiration not only in all the previous codes about the concerned issues, but also in some projects of code that were never in force. The influence of positive codes has to be combined with the one of Bentham's works, or of Spanish projects of Civil Code before 1880 or of Field's project of a Civil Code for the State of New York. As the codes were one of the main objects of study for the first comparativists of the 19th century, there were also "feedback" processes, by which old codifying countries could be influenced by the outcomes achieved by more recent codifying countries.

A few examples can illustrate these networks between drafters of code. Concerning the first penal codes, the influence of the French 1810 model has first to be combined with the Italian projects or codes for small principalities (like the penal codes of Lucca and Piombino) and with the Bavarian Code that was imitated through German

lawyers in Greece. The drafters of the 1819 Neapolitan Penal Code used the 1808 Italian Project, the 1810 French Code, but also the Austrian 1803 Code (NOVARESE, 2000, p. 88). In the 1822 Spanish Code, the French influence was mitigated through the impact of the Spanish legal science and the knowledge of Bentham's works. The writers of the 1830 Brazilian Penal Code could use this Spanish Code, as well as the French and the Neapolitan ones. Albeit it was not applied for a long time in Spain, the 1822 Spanish Code was largely imitated in Salvador (1826), Bolivia (1834) and Veracruz (1835). The Brazilian Code was used by the writers of the 1848 Spanish Code (reformed in 1850), who influenced in turn the drafters of Penal Codes in Peru (1862) (ARMAZA GALDÓS, 2001, p. 70), Venezuela, Paraguay, Mexico and Argentina. Then the 1889 Italian Penal Code was very influential in Uruguay, Argentina, Panama and Venezuela. In Germany, the two successive generations of professors of penal law represented by the leading figures of Mittermaier and Liszt developed a large correspondence and a network of legal reviews that made the information very diffused about the new penal codes.

The history of commercial codifications, though it was not linked directly with the works of Bentham, is another example of this intensive and multipolar circulation of models. Again, the 1807 French Code was translated (in Spanish in a very short time, in Italian for the Lombard-Venetian territories in which the Austrians maintained the French code), copied (in a simple translation in Greece) or imitated, but also quickly in competition with the 1829 Spanish Code that was very influential in Portugal and in Latin America. Many specialists of commercial law during the 19th century were convinced by the idea of universal rules that were common to all nations and that had to be adopted by new partners in international commerce. For example, the German Roesler, whose 1890 project inspired the 1899 Japanese Commercial Code, borrowed elements from the French, Spanish, Dutch, German-Austrian, Italian and Egyptian codes in a very eclectic way (HALPÉRIN, 2009, p. 399-409). In the same time, commercial lawyers used the comparative method to integrate the new techniques of company law developed in Great Britain or in the United States in order to find the best means to favour the development of commerce. The US Uniform Commercial Code can be linked with this international circulation of models, as well as the debates about the unification of civil and commercial obligations.

For civil codes, one has to make a clearer distinction between imitations of the Napoleonic Code and authentic creations of domestic codifiers. The first case corresponds to the situation of Haiti (where the Code was implemented in French language, extended to San Domingo in 1825, maintained in this Eastern part of the island in 1845, translated in Spanish for the Dominican Republic in 1862 with some modifications), of Belgium (since the Independence in 1831 and with the legislative reforms adopted since the years 1850s). The second case is the one of Swiss cantons (POUDRET, 1991, p. 41-

61) and of Latin American countries, which adapted the French model, copying a great part of its articles in the law of property and obligations, but modifying some important clauses of the law of persons, especially about marriage and divorce. The example of the 1827-1828 Oaxaca Civil Code shows how a small group of unknown lawyers could make their own translation of the Napoleonic Code and combine this partial translation with some independent ideas (HALPÉRIN, 2011, p. 83-124). It is well known that the Bello's code was imitated in Ecuador, Colombia, Panama, Salvador, Nicaragua and Honduras (RAMOS NUÑEZ, 1997). Of course, the great codifiers, like Bello, Texeira de Freitas and Sarsfield (who developed an important correspondence), then Clovis Bevilaqua got a large knowledge of all the civil codes of their times. The links between the diverse civil codes were well established a long time before the more recent re-codifications in Netherlands, Quebec, Russia or Brazil, which were the products of an intensive comparative work.

After the links between codes of diverse countries, it would be possible to create maps about the links of codes with constitutional and political phenomena. Since Bentham's constitutional code, the comparisons between codes and constitutions have been numerous (CLAVERO, 1989, p. 79-145). I propose only some remarks for the establishments of maps. A first phenomenon is purely chronological: it is the matter to consider the succession of constitutions and of codes. In the majority of States, constitutions were adopted before codes (but it is not true in Prussia or Austria) and they were linked with the formation of the State for new independent countries or processes of unification. A second aspect to consider concerns the express clauses in favour of law codification in a few constitutions (for example, the 1791 French Constitution, the 1812 Spanish Constitution, the 1824 Brazilian Constitution) and the determination of legislative competences inside Federal States. The third question is focused on the substantial contacts between constitutional clauses (for example, about marriage, penalties, land law) and some articles of the Code (for example, the 1867 Portuguese Civil Code with its articles about the freedom of expression and press). Whereas the distinction between a constitution (with only great outlines marked and a large room for interpretation) and a "legal code" (associated with prolixity) was theorized by the Chief Justice Marshall,[21] many State constitutions of the 19th and of the 20th centuries have incorporated substantial clauses that can be compared with the ones of codes (HALPÉRIN, 2013).

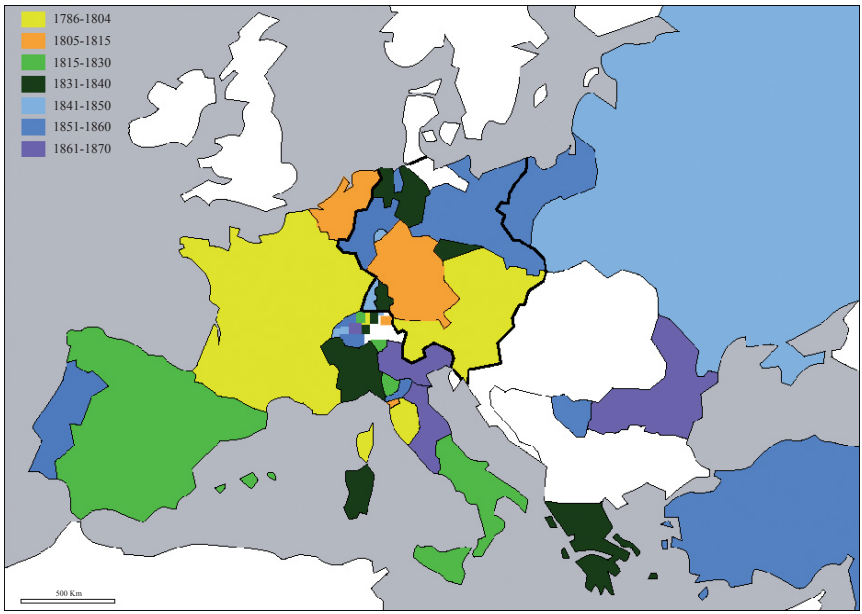
More subjective criteria intervene when one tries to link codes with political transformations and not only with the succession of constitutional texts. One possible classification could oppose the revolutionary codes and the conservative ones. The former are associated with a political and social revolution that happened a few years before the

[21] *McCulloch v. Maryland*, 17 US (4 Wheat.) 316 (1819).

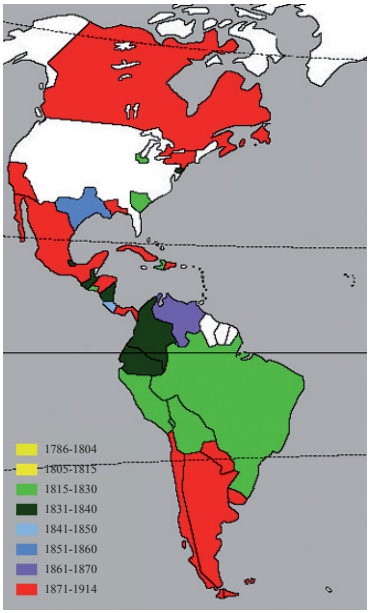
drafting of the code: it is the case of the Napoleonic codification, but also of the 1822 Spanish Penal code linked with the *Trienio liberal*, of the 1928 Federal Civil Code of Mexico that was a by-product of the 1910 Revolution, as well as with the Soviet, then post-communist codes. The latter were planned by conservative rulers that were opposed to any idea of revolution, like the Prussian codes, the Neapolitan Codes or Bello's Civil Code in Chile. But this distinction has to be immediately nuanced. One has to take account of the fact that many codes were imposed by authoritarian powers or by *caudillos* (like the Santa Cruz codes in Bolivia or the 1841 *Código General* of Guatemala under the presidency of Carillo), whereas other codes were truly discussed by Parliaments (like the BGB or the Brazilian Civil Code). There are also differences in the political process between codes prepared by a single jurist (Livingstone, Bello, Sarsfield, Huber, Bevilaqua) and codes collectively drafted by a commission with different group of lawyers or non-lawyers. The first penal codes were in the same time revolutionary (because of a break with the old *jus commune* with its arbitrary penalties) and stabilizing (because of the reinforcement of the public order) works. In Brazil, Bevilaqua has proposed a rather conservative code, but has worked in a context characterized by the 1888 abolition of slavery and the 1889 proclamation of the Republic. With the long delays that were necessary to write down many codes, the links with the political environment are not easy to categorize: many codes were likely to supersede different political regimes.

Mapping the history of codes can be a means, among other approaches, to understand the global phenomenon of law codification since the end of the 18th century. First, it highlights the importance of the emergence of specialized codes (according to the French model and contrary to Bentham's ideas) in the "cutting" of legal matters and in the ways of reasoning, even in common law countries. Second, it does not prevent to make differences between the codes, taking account of the large range of contexts in which the codes are embedded. Third, it leads to reconsider the large impact of codification, even outside the traditional "civil law countries". Codification is one worldwide phenomenon that has to be compared with other processes of standardization of legal rules, as the parallel diffusion of a rationalized case law through law reports or the more recent increase of the influence of constitutional law. A future project of constructing historical maps with all the codes can help to enlarge the perspectives about law in change and law in action.

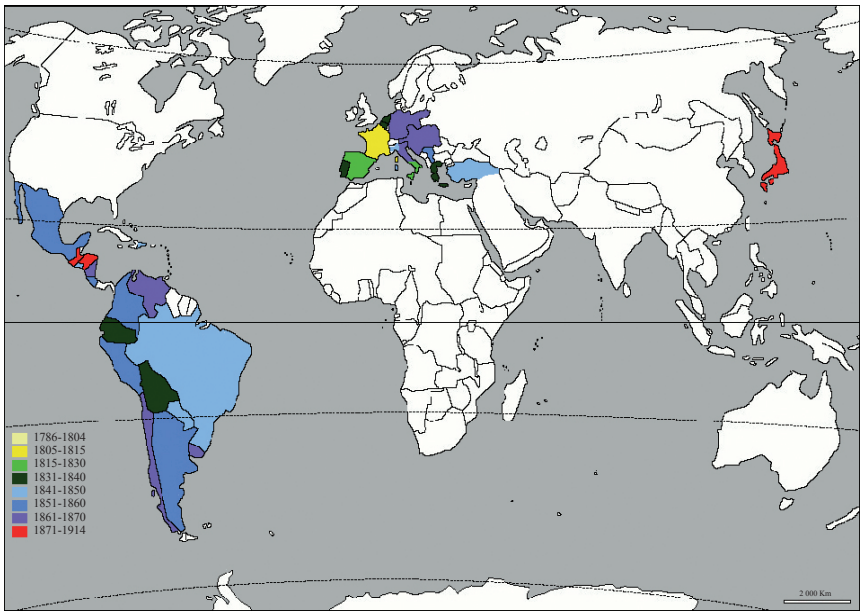
Map 1: Penal Codes in Europe 1786-1870



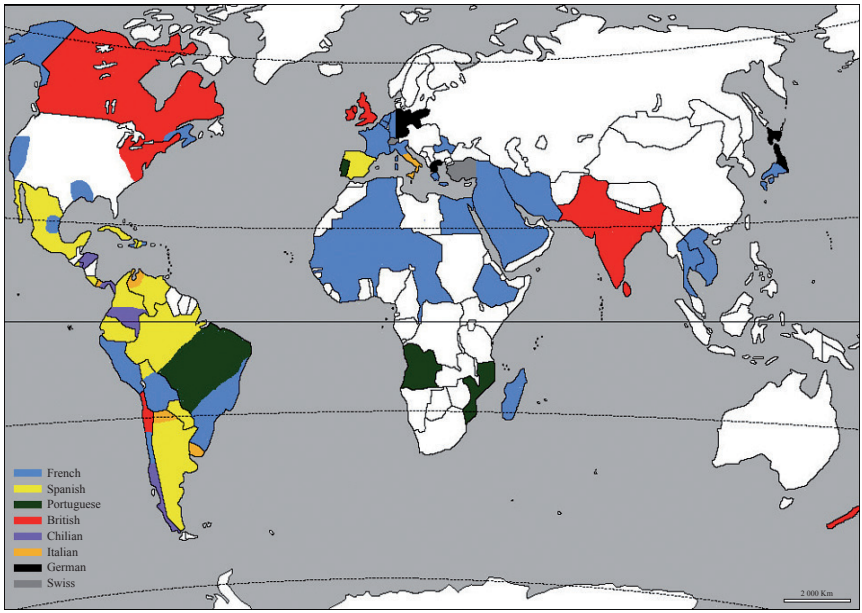
Map 2: Penal Codes in America 1816-1914



Map 3: Commercial Codes 1807-1914



Map 4: An essay of crossed influences on the writing of codes



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