# THE RECEPTION OF MODERN LAW IN 19TH CENTURY VENEZUELA*

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The use of metaphors is not inconsequential for the process of thinking about issues. Thus, transplant refers to removing a living organ or organism and establishing it in another place. In a legal transplant, a legal institution or piece of legislation generated in one country is converted into law in another country. In this metaphor the law moves from place to place and, once transplanted, can flourish or atrophy in its new environment. But there is no change of the transplanted organ or institution that keeps its function. Reception is an older idea and has a different resonance. It implies that the people in a society voluntarily accept an institution or rule. In the first metaphor, institutions and rules move out and in, in the second they are welcome without major resistance or trauma (Ajani, 2007; Miller, 2007). Both of these metaphors obscure the fact that law is generally imposed by some people on others: individuals and social groups differ in their interests and goals. And the "imported" institutions can have new meaning in the new land. In this paper the focus is on the questions: who wants to impose what? What are the purposes of the changes in the law? And how successful are the proponents of change in shaping the legal culture? The general rapporteur talks about vectors, and I accept this new metaphor borrowed from biology if we keep in mind that we are talking about people and social groups.

The theoretical and practical problems related to law reception and transplants are subjects of discussion among comparative law scholars. In the 1970s, historian of law Alan Watson popularized the term legal transplant and made the phenomenon the great motor of changes and evolution of the law (Watson, 1974, 2007). Watson did not give much attention to the issues of legal cultures and the change in meaning a rule or principle may undergo when adopted in another legal and cultural context. Pierre Legrand (2001)

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has pushed the argument of cultural difference to the point of denying the possibility of transplantation while other scholars place themselves in a middle ground (Nelken, 2003; Nottage, 2004). What can the Latin American experience and, particularly, Venezuela's, teach us about these issues?

The general *rapporteur* suggests that we distinguish four periods for Latin America history of law. The first one corresponds to the time of Spanish and Portuguese colonization (16th to 18th centuries), the second is marked by the independence movement and corresponds to the 19th century. It concludes with the First World War. The third ends with the fall of the Berlin Wall, which initiates the post-modern times. The different length of these periods and the criteria for marking the end of a period are not discussed, but the suggestion is that in each period a different kind of law was transplanted to Latin American countries or produced by them. In this paper we will not discuss the general aspects of this division into periods, but will concentrate on what happened in the 19th century.

At first glance, the situation during the colonial period seems to fit the model of a foreign imposition by a colonizing power (a forced transplant), whereas the situation after independence, in the early 19th century, seems to better fit the reception model. In the 19th century, Venezuelan jurists and politicians were drafting and adopting constitutions, codes, and statutes, and writing law books following modern (mostly European) models. But, what does a close analysis reveal? Was the law that was adopted foreign? Did Venezuelans widely accept the new law?

To serve as a basis for explaining the meaning of subsequent changes, we will describe briefly the law of Spanish dominion in America in an introductory chapter. In the two main chapters we will discuss the subsequent changes of constitutional law in the context of power relations, and of civil law in relation with civil society.

## I. THE LAW OF SPANISH AMERICA IN THE COLONIAL PERIOD. A SOCIAL HISTORY PERSPECTIVE

Like other Latin American countries, Venezuela was part of a theocratic empire from the 16th to 18th century. Generally we accept that these were times of conquest and colonization. According to a common narrative, conquerors and colonists imposed Castilian law in what is today Spanish America, and Portuguese law in Brazil.[1] This paper will contest this narrative. We agree that Spaniards controlled American aboriginals and

[1] In this paper we will refer to Spanish America. The reader should note that in Spanish *antiguo régimen* the law was less centralized than today: there was no Spanish law, but rather the law of Castile, of Navarre, and so on. There were also local rules (*fueros*). The law "applicable" in America was Castilian law.

territories and that the Spanish king became the supreme power. Conquest and colonization also produced vast social changes. By the late 18th century the aboriginal ("Indian") population had decreased, the mixed race ("pardos") population had increased enormously, and over them there was a social stratum of European blood people ("blancos criollos") that had significant wealth and exercised power over the lower strata.[2] At the top were the royal functionaries who oversaw the system.

Race was important, and belonging to a specific ethnic group carried important legal and social consequences. For example, higher education was reserved for the top stratum ("cristianos viejos" without any mixing with "lower" races). Privileges, social obligations and honor differed according to one's status. Even the ways of dressing, the place in church, and so on, were strictly regulated to keep each one in his or her proper place. The basic assumption was that people varied and any idea of equality was subversive to the good order of society. But the definition of race was legalist and its relation with skin color and morphological features was weak. For example, when the father and mother were married, the children had the father's race, even if their skin color did not correspond to the legal definition. Furthermore, the condition of "white" could be bought under certain circumstances. These are details. The important point is that the social order was based on inequality and on a certain conception of race.

The Catholic Church had important political, economic and social functions, and the state apparatus was not comprehensible without consideration of the Church. The King's power came directly from God, but the representative of God on earth was the Catholic Church. It certified the legitimacy of his power. For this reason the most important ceremonies of power were carried out by the church as religious ceremonies. Church and state collaborated intensively: religion was a state business and the King had the *patronato* of the Church. Church and state were closely related, not separated. In addition to the ceremonial and religious functions that we today consider its domain, the Church was the largest land owner and also owned numerous and important urban properties in the 18th century. The Church was funded by rents, contributions, donations, and taxes on production. The Church had important educational roles, including in university education. Most rules in matters related to family and inheritance or estates were a matter of canon law and were applied by church courts.

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[2] C*irca* 1570, Indians were 96 percent of the Latin American population. By around 1825, Indians were 36 percent, the mixed race population was 45 percent and the white population attained 19 per cent (Rosemblat, 1954: I, 36, 38). Among the white population it is important to distinguish the descendents of conquerors and early colonizers (*criollos*), who were the landowners, from the recent immigrants (*blancos de orilla*), who were landless and usually were in charge of minor commerce and other *oficios viles* (common labor). They had a social status close to the *pardos*, or mixed race.

The Church also had important functions of social control and policing (Pérez Perdomo, 2006b).

The law to be applied in Spanish America during colonial times was complex. First of all, according to an early rule of Emperor Charles V in August 1555, conquerors and royal authorities had to respect the indigenous customs and authorities. However, Indian law was applicable with an important proviso: only when it did not conflict with the principles of the Catholic religion or specific royal legislation (*Recopilación de las Leyes de Indias*, book 2, heading I, law 4). In practice, Indian law probably continued to be applied in areas the conquerors did not reach and perhaps in the Indian villages where the Spanish *corregidor* allowed some leeway in the interstices. But for the most part, Indian law and customs disappeared as did most of the Indian religions. The Spanish conquerors and colonizers carried on their customs and religion and imposed them as means of control over and disciplined the Indians and the newly imported slaves from Africa. But, was the Spanish law "received" by the inhabitants of the New World or "imposed" on them? Was it transplanted to these "discovered" territories?

The King, through the Consejo de Indias, produced extensive legislation for administering the American territories. The rules of this colonial legislation (*Indiano law*) had to be preferred to other bodies of Castilian law. Legal historians give great importance to the *Recopilación de las leyes de Indias* (1680) as the main book of the *Indiano* law, the Spanish colonial law of the Americas. Indiano law organized the state-church apparatus of the Indies and established legislation that mostly embodied protective measures for Indians and slaves. Indiano law has been hailed as a model of humane legislation, which accepted a fair degree of pluralism or tolerance. There is only one slight problem. The *Recopilación de las leyes de Indias*, the only official compilation of this extensive legislation, was published in 1681 and not reprinted until 1754 (Pérez Perdomo, 2006a: 140, note 5).[3] Most likely, there was a copy in the office of the Viceroy or governor, and certainly in the Audiencia, but it was not a widely read book. For example, it only occasionally appears in the book lists of private libraries of the time (there were no public libraries), and it was not studied at the universities (Leal, 1979; Pérez Perdomo, 1981). As there was no internet at that time we can wonder where lawyers and the common people, including the illiterate Indians and slaves who were protected by this legislation, could consult it.

When there was not a specific rule in the *Recopilación de Indias*, the interpreter had to search for a rule in the Castilian legislative compilations: Leyes de Toro (1505), Ordenamiento de Alcalá (1348), Fuero Juzgo (1241) and Siete Partidas, the oldest medieval compilation (Recopilación de Leyes

[3] On the criticisms of the *Recopilación* when received in America: Tau Anzoátegui, 1992:189.

de los Reynos de las Indias, book 2, heading 1, law 2). These voluminous compilations were mostly absent in colonial Spanish America and probably were not commonly available in the Peninsula. The only exception was the *Siete Partidas*, the last one in the order of consultation. As there were more copies of the Partidas available, even in America, than of any corpus of Castilian legislation, we can suppose it was more frequently consulted. It was, in fact, frequently cited in legal writings. In addition, it seems to have had some presence in the universities (Pérez Perdomo, 2006:27 and note 13), while the Leyes de Indias and the Leyes de Toro certainly did not.

This leaves us with the question: what was the law that was actually applied? This question is very hard to answer. Most decisions were not reasoned and *ergo* do not state the legal grounds on which they were based. Most judges were not law graduates or lawyers, and in some courts, such as commercial and mining courts, lawyers were banned. This clearly shows the intention to avoid legalism or juridification of decisions. In the highest court, the Audiencia, judges were learned and lawyers were admitted to plea, but the style was not legalistic and usually legal grounds for decisions usually were not recorded. Undoubtedly, the lawyers' training in Roman and canon law had an influence and shaped the legal language. There were also legal cookbooks, such as Febrero's *Librería de escribanos o Instrucción teórico práctica de principiantes* (1769, many later editions), and easy to consult textbooks, such as Sala's *Ilustraciones de derecho español* (1803, many later editions). In the General Rapporteur's language, legal education (Roman and canon law) and legal cookbooks were most likely the "vectors" for the "reception" of a simplified version of Roman and Spanish law in America by the educated elite. The bulk of the population probably remained completely ignorant of Roman and Spanish (including Indiano) law.

From the perspective of this paper, neither the concept of "reception" nor of "imposition" or "transplant" of Spanish law in America seems to be applicable. Who received the Spanish law, on whom was it imposed? Conquerors and colonizers wanted to control the work and behavior of Indians, slaves and pardos, but they were not concerned about the law. Royal legislation was an effort to control conquerors' and colonizers' behavior, and the learned judges were instrumental in carrying out these royal intentions. The Church's apparatus also contributed to this endeavor. Colonial Spanish America was far from an idyllic paradise with full consensus among the elite and protection for slaves, Indians and pardos. There were conflicts and bickering in every social stratum. Even if landowners had significant leeway to discipline their wives, children, servants and slaves, a number of conflicts came to the courts. But we know little about the extent to which the behavior of the courts was consciously legal. In terms of decisions by the Audiencia and other courts, historians have only recently

started to consider this material, and our understanding is quite limited (Diaz, 2008: Pérez Perdomo, 2009).

In these circumstances, it is difficult to speak of the reception (or transplant) of Castilian law in America: it was not studied at the universities, it was not published and, as I contend, it was applied very selectively. But the general culture of Spanish *antiguo regimen* shaped behavior in a broad way. The King was obeyed and royal functionaries were respected. People accepted inequality as the natural order and were proud of their place and privileges within society. Social actors enjoyed honor and acted to protect it (Uribe Urán, 2000).

The Catholic Church was the ideological apparatus for configuring this mentality and establishing this order. In other words, Castilian and Indiano legislation was largely irrelevant, but a certain conception of law –a conception of law and social order created in Europe- was effectively transplanted through priests' preaching, and to a minor degree, through legal education and legal cookbooks. Nevertheless, this conception of law was transformed in the new continent because, unlike in Spain, the law and social order had to consider Indians and slaves. Inequality had a much greater significance on this side of the Atlantic Ocean.

Overall, the Spanish colonization was a considerable success. Most Indians were evangelized and became Catholic, the express purpose of the Spanish effort. Language and other aspects of the culture were "transplanted". Conquerors and colonizers faced a variety of rebellions during this long period, but these rebellions never actually endangered the King's control over these people and territories. This stability and control were achieved without a significant standing army. The military strength of the creole elite and pardos and their loyalty to the crown were sufficient to suppress these rebellions. But Spanish society and law were not fully transplanted: the societies of the New World did not duplicate the Spanish one. By the 18th century the Spanish American elite and population had already developed a separate identity. When the Spanish old order entered into crisis, largely due to the French occupation of Spain and the diffusion of the enlightenment ideas, the kingdoms of the Indies, as they were called, declared independence and, ultimately, constituted the eighteen Spanish American republics we know today. In several countries, and in particular in Venezuela, this was possible only after a war for independence, but it was mostly a civil war. Spain sent only one important expedition to Spanish America (15.000 soldiers in 1815) and most of the battles were fought by creoles and pardos serving on both sides.

Once independence was declared, the first task was political organization. Europe had produced a constitutional science, and there were

ready-made constitutions in the United States of America and in Europe. In the following chapter we will discuss the transplatation or reception of these constitutions and constitutional science in Venezuela and the meaning and impact of this transfer. In the third and last chapter we will deal with private law, especially with the civil codification in its relation with the development of a civil society.

## II. THE CONSTITUTION AND THE CONFIGURATION OF THE REPUBLICAN ORDER

Modern legal and political thought had a rapid diffusion in Spain and the kingdoms of the Indies in the second half of 18th century. The establishment of the chair of natural law in Spain in 1776, which entailed the study of modern authors, is one of the most obvious indicators (García Pelayo, 1950; Perez Perdomo, 1967). But there were also more subtle indicators: both in Spain and in the colonies, Roman law was taught using Justinian's Instituta commentated by Vinnius, a Dutch humanist of the 17th century, and additional commentaries by Heineccius, a well known author of the School of Natural Law of the18th century. Authors such as Locke, Montesquieu, Filangieri, Vattel and Rousseau were known, even if not openly discussed.

In the early 19th century, Spain entered a profound political crisis. There were differences and rivalries between King Carlos IV and Crown Prince Fernando. Napoleon profited from this rivalry and imposed José Bonaparte as the new king. French soldiers occupied Madrid. Part of the Spanish bureaucracy, including the Consejo de Indias, sided with the new king, but a popular rebellion initiated a war for independence. During the war, the Spanish Cortes (the body of popular representation) met and approved a constitution (1812) that recognized Fernando as the constitutional King. When he returned to power, he refused to recognize the constitution, reestablished the absolute monarchy and persecuted the liberals. The political convulsion continued for more than a decade.

The events in Europe had an important impact in America. In April 1810, the Cabildo of Caracas sided with Fernando and established a junta for governing based on Fernando VII's rights. In July 1811, the congress called by the Junta, declared the Venezuelan independence. Similar events took place in the other Spanish colonies, and by 1822 the proponents of independence controlled several countries. In the 1820s, new conflicts in Spain convinced Spanish Americans that it was preferable to govern themselves.

The changed situation required new principles and rules. Venezuelans were no longer subjects of the Spanish king and had to define

the type of political organization they wanted. The new science of law and legislation provided a framework that indicated the steps to be taken what had to be done (Daston & Stolleis, 2008; Filangieri, 1781). Natural law was the new credo and had the legitimacy of scientific knowledge. Given the broader social context, the most sensitive option was the adoption of the modern approach in its liberal and republican version. The republican option suppressed monarchy, nobility and privileges. We became equal citizens before the law. The separate privileges for different social strata formally disappeared. The relation between the Catholic Church and the state had to be redefined as well as the place of religion and church in social life. This effort entailed a redefinition of roles and rules, legal and political modernization. But political practices did not follow these abstract ideas. It is well known that old habits die hard and that we cannot create new citizens by decree. The forces and resistances to this transformation will be analyzed in this part of the paper.

This report emphasizes the contributions of Venezuelan legal scholars of the 19th century. Scholars played an essential role in the reception of ideas and the development of law in Venezuela. They drafted constitutions and codes, reformed the teaching of law and politics, wrote books and political documents and directly acted in the political sphere. Traditional scholarship has focused on constitutions and legislation. This report will mention these traditional topics, but will go farther to focus on the actors and explore teaching and scholarship as means of "reception" of modern legal and political thought in Venezuela. We perceive legislative change as a one step in changing the legal system. True change happens later, when the legal structure, the culture of legal actors and the general culture change. In this report we will emphasize the change in the culture of legal actors, that is, legal education, legal scholars and books, but we will not completely neglect legislation and legal structures on the one side, and actual behavior of people on the other. The question is whether Venezuela truly "received" modern constitutional law in the 19th century.

## III. CONSTITUTIONS: WHIRLWIND AND PERMANENCE

As noted previously, in April 1810, the Caracas *cabildo*, reinvigorated with *representantes del pueblo*, decided to convert itself into *Junta Suprema Conservadora de los Derechos de Fernando VII*. The General Captain and the members of the Audiencia were expelled from the country. A congress was called, and in July 1811, Venezuela declared independence. In December of the same year, the congress approved the first constitution. However, not all provinces and citizens accepted the independence project garbed in republican robes and a bloody civil war ensued. By 1814 royalists had control of most of the territory and in 1815 a huge army came from Spain to pacify all of northern South America. Despite this, the republicans persisted

and waged a war of attrition. In 1821, they defeated the remnants of the royal army.

Constitutional legal scholars have noted the influence of the American federal constitution and the constitution of the French revolution on the 1811 constitution (Parra Pérez, 1939/1992:366ss; Brewer Carías, 2008; Garrido 2008, Gil Fortoul, 1930). In fact, any reader of political philosophers of the 18th century will find many resonances in this document. It is generally recognized that the drafters of the constitution were familiar with 18th century *philosophes* and, of course, the American and French constitutions and literature.

The 1811 constitution had all the elements of modern constitutions: definition of citizens and territory of the new republic, descriptions of state organs or branches of public power, checks and balances among the branches, main rules of organization and the enumeration of rights, including freedom and equality. The constitution was federal, with considerable power vested in the states and limited power in the national executive, which was presided over by a triumvirate. The constitution was short lived because the republic fell within a few months. Young Bolivar (1812) identifies this constitution (and the weakness of the executive power) as one of the main causes of the First Republic's fall.

A new Venezuelan constitution was approved in 1819 (called the *Angostura* constitution, because it was approved in Angostura, today Ciudad Bolivar) when the war was still undecided and the most important part of the territory was in royalists' hands. In 1821 the Congress of Cúcuta approved the Colombian constitution (known later as Great Colombia, because it includes what is today Colombia, Ecuador, Panamá and Venezuela). In 1830 another constitution was devised, which lasted until 1858. The constitutions of 1819 and 1821 reflected a significant contributions from Bolivar's thought, but they were by no means shaped by it. These constitutions were centralist and the President's power was enhanced, as a situation of war made advisable, but the aristocratic features Bolívar wanted were discarded. The1830 constitution was moderately centralist and is important for the purposes of this report. It lasted much longer than prior constitutions, 27 years, and under its aegis a constitutional culture began.

In the early 1860s, Venezuela lived through an extremely divisive and bloody war, called the "federal war". The interpretation of this war still divides Venezuelan historians. In the late 19th century, federation was interpreted as the culmination of independence, but the practical result of federation was the enhancement of the power of regional caudillos. The national state practically ceased to exist. The federal constitution of 1864 reflected this disintegration. The constitution provided that cases of internal

war were to be resolved by applying the principles of public international law (art 120) and the states or national government had to mantain neutrality in the conflicts between other states (art 13, num 9; art 101). The constitution prohibited the federal government from stationing troopes in the territory of any of the states without prior acquiescence (art 100). Justice became a state business, except for a Federal Court with very limited jurisdiction (arts 89, 91). The constitution lasted until 1893 with several successive reforms.

Guzmán Blanco, a federal leader, took power in 1870 and was able to avoid the dissolution of the country by buying off the regional caudillos and, at the same, taking mining and ports-customs taxes out of their control. He was also very able at playing with national symbols, including using the symbolic power of law. He dominated the political scene until 1888 and was trice President of the Republic for a total of 14 years. The successive reforms of 1864 constitution reflected maneuvers by Guzmán Blanco aimed at maintaining the governability of the country and his personal power.

Books on constitutional history (Brewer-Carías, 2008) or on the constitutions themselves (Brewer-Carías, 1985; Mariñas Otero, 1965) point to the variation between constitutions adopted in Venezuela during the 19th century. The image created by this way of presenting constitutional history is one of constant change. However, we should also note several constants amidst this upheaval. Given that Venezuela was a politically unstable country in the 19th century, we can note that a first constant feature is the idea that political change has to be reflected in the constitution. In other words, the constitution was seen as important and was part of the political discussion. Even authoritarian and personalist rulers like Monagas or Guzmán Blanco considered the constitution as essential, and, of course, they tried to adapt the constitution to their projects or needs. The second stable aspect was the structure and content of these constitutions. All the constitutions followed the modern pattern: organization of the state, with separate branches and distribution of power between central authorities and provinces or states, and declaration of rights. All were republican and presidential. Seen form this perspective the constitution did not change much, and for a formalist jurist this would be enough to conclude that the country received the constitutional thinking of the time. The basic similarities of the constitution and the fact that Venezuela had a constitution from the independence onward would be the best indicator of reception.

From the perspective of the social study of law this is not sufficient. Can we consider it reception if the constitution has a different meaning in the constitutional thinking and in political practice? Can we talk of reception of the constitutional law if the main political actors do not pay any attention to the constitution as a guide for their behavior? Did the subjects of the old monarchy become citizens by means of the promulgation of the constitution?

The frequent change of the constitutions, generally as a consequence of political upheavals, should make us cautious about accepting that the promulgation of a constitution is sufficient for the creation of a constitutional culture.

## IV. CONSTITUTIONAL THINKING

The reception of modern legal and constitutional thinking can be documented from late colonial period, in the books circulating as contraband or legally in Hispanic America (Eugenio Martínez, 1988; Romero, 1977), the documents of the so-called conspiracy of Gual and España (Rey et al., 2007), and the work of Miguel José Sanz[4] and Juan Germán Roscio.[5] For this paper we will pay attention to the didactic literature and the work of academic jurists because it is evidence of a general diffusion, at least within the legal profession.

Legal education shapes the jurists' basic attitudes and knowledge. The lack of study of Castilian and Indiano legislation in the colonial universities served as a basis for questioning the general reception of Spanish law, as accepted by indianists and other jurists. In contrast, the constitutional law was incorporated in the law school curriculum from the early 19th century. It appears in the Colombian plan of legal studies of 1826, in the 1827 by-laws of Universidad Central de Venezuela, and all the law school curricula since then. Beginning in the early 1830s, all Venezuelan lawyers have analyzed the Venezuelan constitution in the light of constitutional law text books.

The primary textbook used from 1827 until the 1860s was Benjamin Constant: *Curso de política constitucional*. This was originally translated into Spanish in Burdeos (Bordeaux) in three small volumes ("libremente traducido al español por Manuel Antonio López"). The 1823 edition is identified as the second edition, but we do not know the year of the first edition. The book has the typical contents of a constitutional law book, but adds some important essays by Constant, such as the comparison between modern and ancient conceptions of freedom.

The book we consulted, probably the used by Caracas students 180 years ago, it is not the complete translation of the *Cours de politique*

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[4] Miguel José Sanz (1756-1814) was a very important intellectual and lawyer of late 18th century and an active participant in the independence movement. His writing shows familiarity with and incorporation of modern political thought in Venezuela (Rodríguez Leal, 1963).

[5] Juan Germán Roscio (1763-1821) was professor of Roman law at the University of Caracas in late 18th century and became an important ideologist of the independence movement. Willwoll (1974) and Ugalde (1992) have studied the sources of his thinking, presenting him as a man of the Enlightenment.

*constitutionnelle* published in 1818. The section on freedom of religion was suppressed because the Catholicism was the only recognized religion in the Spanish (and Venezuelan) constitutions. Constant was critical of Rousseau and Mably and was clearly in favor of the modern concept of freedom as protection from the state encroachment. He was for a state very much on the model of England: a representative democracy with a King as head of the state with mostly moderating powers (as opposed to executive power). He was for a judiciary submissive to the legislators and for a decentralized state, with autonomous powers recognized for municipalities. This book was enormously influential in Latin America. The Brazilian imperial constitutional (1824) was clearly inspired by Constant's ideas. This volume was adopted as a textbook for constitutional law in many Latin American countries. In 1864 it was still the textbook at the Universidad Central de Venezuela. Constant's moderate liberal ideas –further moderated by the Spanish translation-, were probably an important part of his appeal.

In 1839, Francisco Javier Yanes published the *Manual político del venezolano*. This book was not written as a text for teaching constitutional law but as a book for the general public. It did not have any pretension of originality but was written to diffuse healthy and useful knowledge (Yanes: 1839/1959:35). In his view, the citizens of a new Republic needed to be aware of the importance and functions of the constitution, the organizational principles of a constitutional government, and the true meaning of the major constitutional rights. And the book was organized in this way, with chapters on representative government, on federation and on the four most important rights: liberty, equality, property and security.

It is a short book. In the 1959 edition that we reference, it has 160 pages. The style is clear and concise. At the time the most common way of propagating the basic political principles was the *catecismo politico* (political or republican catechism). The title *political handbook* suggests continuation of the effort to spread knowledge but with a greater intellectual ambition. Yanes shows an excellent knowledge of the bibliography in Spanish, French and Latin and a complete assimilation of political and economic liberalism. His citations of Locke, Montesquieu, Rousseau, Vatell, Constant, Say, Destutt de Tracy, Beccaria, the Federalist Papers, are frequent. He has a clear knowledge of political regimes of his times and also makes frequent reference to ancient Greece and Rome. In fact, this is a scholarly book, the most scholarly publication of 19th century Venezuelan political thought, but at the same time it is very readable. Yanes is a liberal in political and economic terms[6], and he sees no contradiction between these two branches of liberalism. On the contrary, he perceives them as complementary.

[6] Yanes (Cuba, 1777 - Caracas, 1842 ) was an active participant in the Venezuelan independence as a civilian leader who also took part in military actions. He had important political positions and wrote on law and history. He also published *Idea general o principios elementales del derecho de gentes*

Felipe Larrazábal (1816-1873) was a leading intellectual and politician of the 19th century[7]. In 1864 he became professor of constitutional law at the Universidad Central de Venezuela and published *Principios de derecho político* (1864) with the declared purpose of replacing Benjamin Constant as a textbook. He declares his allegiance to the natural law doctrine: there is a moral code engraved in our conscience and all of law derives from it. The great moral principle is "do not behave towards others the way you would not wish others to behave towards you" (Larrazábal 1864:126). His book starts with the treatments of rights, all of them based on the principles of liberty, equality and fraternity. For example, from the principle of equality derives the universal suffrage, majority rule, the public examination for the appointment of civil servants, universality of taxation and military service, and trial by jury. He also covers the organization of power and many important topics such as political parties, public accountability, political corruption, revolutions, non-retroactivity of legislation, and the nature of criminal law. He frequently cites Bentham, Constant, Beccaria and other contemporary authors. The treatment of topicss was very general: he does not mention at all the difficult circumstances of Venezuelan political life of his time.

Larrazábal's book was not in use for long. In 1873, newly adopted legislation on education established as the textbook the *Lecciones de derecho constitucional* by Florentino González (1869), a liberal author from Colombia who taught in Buenos Aires. This book basically presented the United States constitution as the model for the entire Americas.[8]

## V. POLITICAL SYSTEM AND PRACTICES

The 19th century Venezuelan constitutions and the use of the works we have cited show that the Venezuelan political elite was familiar with the contemporary political thought and that this social group accepted the liberal political and economic thinking. It is hard to imagine it could have been otherwise. They were engaged in constructing new republics, and this thinking had the status of science. They had to rely on the only solid knowledge available to them. Nevertheless the construction of a republican order or a constitutional government is not an intellectual operation. It is far

(1824) which served as a textbook at the University of Caracas. This book was very much based on Vattel and Heineccius, but it was more elementary that his *Manual político.*

[7] Larrazábal was also an accomplished musician and an important journalist and writer. He was one of the founders and leading members of the liberal party.

[8] Florentino González (1805-1875) was an important intellectual who made important contributions to the law and the economica. He was professor in Bogotá starting in 1833, and later taught in Buenos Aires. His *Lecciones de derecho constitutional* were very successful. There were at least editions in 1869, 1871, 1879 and 1889. I consulted the 1869 edition, but the book changed considerably in later editions

more difficult than writing a constitution. The former subjects of a theocratic monarchy do not become citizens of a liberal republic just because the constitution declares it so or because the professors teach Benjamin Constant or Florentino González at the university.

The construction of a modern republic or a constitutional government requires that citizens recognize the authority of those elected to hold public offices and respect the rights of the other citizens as declared by the constitution and the law. It also requires that those holding public offices act within the limits established by law. It can be expected than some people or public officers will not follow the rules. In this case, the judiciary and the apparatus of law enforcement would be expected to act to provide the appropriate corrections. But in the 19th century, the greatest part of the population consisted of illiterate peasants with no political education or republican experience. Their leaders, especially their military leaders, were not necessarily inclined to respect the constitutional rules. The citizens embodied in the constitutions did not coincide with the real inhabitants of the country (Guerrero, 2006; for similar problems in Mexico, Escalante Gonzalbo, 1992).

In Venezuelan 19th century history, the period 1830-1847, has been identified as the time of an intensive effort to organize the state. There were numerous rebellions, but General Páez' military and political skills were sufficient to guarantee stability and progress. Páez' allowed the institutions to work and was quite moderate in exercising his power and leadership. Plaza (2007) calls this period the *voluntarismo institucionalizador* (or institutionalizing voluntarism) but there is no consensus on the label[9]. Nevertheless it is clear that after this period, the institutionalizing effort ceased and a decade later the political conflict became a devastating war (Guerra Federal). The reorganizing effort did not restarted until 1870 when it took the form of a modernizing autocracy, with a new period of intense civil strife in the final decade of the century.

The Venezuelan political system of the 19th century has been considered caudillist. The *caudillo* was a regional-military leader who controlled resources and people, and had prestige and power within a province. The national political power was in fact a network of caudillos. The *primus inter pars* held the presidency of the Republic, but the power relations were "intransitive": the President had to count on regional caudillos in order to exert the power of the presidency (Urbaneja, 1975).

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[9] Gil Fortoul called the period 1830-1847 the conservative oligarchy, as opposed to the liberal oligarchy (1848-1858). The name has made long fortune but it is misleading. Páez and other presidents of the period 1830-1847 were moderated, the newspaper were free, and congressional discussions very important. For these reasons Mijares (1975:105) called the period deliberative government. The period 1848-1858, under Monagas brothers' hegemony was authoritarian and much of the institutionalizing effort was discarded.

The "federal" character of Venezuelan constitution reflected the reality of the political system, but political practice was far from legalist or respectful of constitutional rights. This contrast was clear for the legal scholars of the time. Luis Sanojo (1877:V)[10] condemned the coexistence of "liberal theories and absolutist practices" and, in particular, he acknowledged and criticized the frequency of rebellions. He saw the solution to this divergence between theory and political practice as dependent on adequate political education for the population and envisioned his book on political law as a contribution towards this education. Muñoz Tébar (1890), who was not a jurist,[11] saw the same basic contradiction, between legalism and personalism. He based his criticism of the Venezuelan political system on its personalism and proposed to address this problem creating a legalist political party.

Gil Fortoul (1890) had a more complex interpretation. He criticized the jurists and constitution drafters as having paid no attention to Venezuelan social circumstances. He argued that the tension between the normative imagined world and the social reality had produced the social instability, but he was not explicit about how the constitution and the legal system could have been formulated to be more consistent with the social reality. In any case, he saw the gap filling because Venezuelan society was changing. Even if critical of political liberalism he seems to have kept democracy and rule of law as ideals at that time.[12]

Briefly, although Venezuela had a constitution and the appearance of a modern state, the country did not consolidate as a nation-state. The constitution and law books suggested the presence of a liberal democracy and rule of law, but in fact the values of the constitution and rule of law were not part of the general political culture. Jurists and intellectuals were aware of the acute contradiction and criticized it or tried to understand it. For our purpose, it is enough to note that the reception of modern ideas, and particularly of political liberalism, was restricted to an elite, but these ideas it did not become part of Venezuelan legal and political culture in a popular level.

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[10] Luis Sanojo (1819-1878) is a major legal scholar and the most prolific legal writer of 19th century Venezuela. He had important public positions during the conservative administrations and fell in political disgrace under Guzmán Blanco.

[11] Jesús Muñoz Tébar (1847-1909) was a distinguished engineer, politician and educator. He was cabinet minister, senator and twice rector of the Universidad Central de Venezuela

[12] José Gil Fortoul (1861-1843) is one of the most important intellectuals of the late 19th and early 20th century. He held the most important public offices, including President of the Republic, during the regime of Juan Vicente Gómez, an iron-fisted dictator who unified and pacified the country.

## VI. CIVIL AND COMMERCIAL CODES, LEGAL DOCTRINE AND CIVIL SOCIETY LEGISLATION AND CODIFICATION. THE CIVIL CODE

As a newly independent state, Venezuela quickly began to produce legislation in 1811, but the bloody war, which mostly went against the independence party until 1819, prevented any effort to organize the state. In 1821, once most of today's territories of Venezuela and Colombia were liberated, the Republic of Colombia (today called Great Colombia) was constituted and the political and intellectual elite began the reorganization process. By 1828 political upheavals led to the dissolution of the legislative power and, subsequently, to the dissolution of the Great Colombian union. In 1830, following the achievement of independence by Venezuela, the reorganization process and production of legislation restarted (Pérez Perdomo, 1987).

Legislation in the periods 1821-1828 and 1830-1847 was mostly addressed to the reorganization of the state, and within it, the organization of finances and the judicial branch. We are concerned with the latter aspect, which mostly comprised the legislation organizing (or reorganizing) the judiciary and the Code of Judicial Procedure. Once the efforts to organize the state decayed from 1848 onwards, the production of legislation also declined. Legislative efforts restarted in the decade of 1860, in a time of great instability, with the production of a full set of codes in 1862 and a new Civil Code in 1867. These codes were soon repealed and the age of codification started in full force in the decade of 1870, with a progressive codification mostly following the Italian model. Table 1 presents the elaboration and publication of codes in the second half of the 19th century, connecting the codes to their political "inspirers".

Table 1. *Venezuelan codes in the second half of 19th century*

| *Presidents/ codes* | *Páez* | | *Guzmán1* | *Guzmán2* | *Crespo* | *Castro* |
|---|---|---|---|---|---|---|
| *Civil Code* | 1862 | 1867 | 1873 | 1880 | 1896 | 1904 |
| *Commerce Code* | 1862 | | 1873 | - | - | 1904 |
| *Penal Code* | 1862 | | 1873 | - | 1897 | 1904 |
| *Civil Procedure Code* | 1863 | | 1873 | 1880 | 1897 | 1904 |
| *Penal Procedure Code* | 1863 | | 1873 | 1882 | 1897 | - |

*Source: Pérez Perdomo, 2010*

Beginning early in the independence period Spanish legislation was subject to criticism (Parra Aranguren, 1974). The legislation of the Indies and the Castilian legislation, which was applicable in the Indies, were considered disorganized and antiquated. Jurists and politicians argued for replacing such legislation with modern codes, with the legislation rationally organized. The question is why more than 30 years then elapsed with the civil, commercial and penal codes not even subjected to discussion.

A first answer is that the political priority was the organization of the state and that the legislative body functioned for a limited time each year. This is strong a strong argument. The shared ideology of the time was that less legislation was preferable to extensive legislation and that legislation should be carefully thought through as a warrantee for its rationality. The legislative process, involving two chambers and three discussions in each chamber, was designed to produce a moderate amount of legislation. An elaborated and long code, concerning eventually controversial matters, was not considered the best way to use the legislators' limited time, giving the urgent political matters they needed to attend.

An alternative explanation repeated by historians of law (Parra Aranguren, 1974, for example) is that the elaboration of codes required political stability appropriate for the intellectual work and discussion. This argument is rather weak because the decades of 1860 and 1870 were far more politically agitated that the preceding ones, and yet those decades constituted the fundamental time of codification.

Following the independence the priority was state organization and that was the main purpose of early republican legislation (Pérez Perdomo, 1987). Much of this legislation modified legislation previously approved law in a manner that kept the total amount of republican legislation applicable at any time at a modest level. The *Teatro de la legislacion colombiana y venezolana* (del Castillo, 1852) is a two volume book with a total of 1550 pages. The priority was clearly the organization and reorganization of the state. For this reason, Spanish legislation was theoretically in force until the codification of 1873 for matters concerning civil society. (The federal revolution of 1863 abolished the codification of 1862, with the exception of the Code of Commerce). As already explained, the Spanish legislation was not directly consulted, but there were books like Sala (1803/1845) that had a wide circulation and provided the necessary information. Much of civil law matters, such as marriage, estates and personal registry, were regulated by canon law and the Catholic Church.

For this reason, the regulation of civil society, and particularly of matters in which the Catholic Church had an interest (like marriage and property), was a difficult and controversial area. This controversial character

may go a long way to explain the reluctance of republican legislators to address these matters[13]. This explanation is not only valid for the delay in the codification but also for understanding the avatars of the codification. In 1862, General Páez and the conservative modernizing elite (which included important jurists like Luis Sanojo) decided to codify the entire law. This task was facilitated by the circumstances that extended military conflict had brought about the Paez' dictatorship. As Paez had legislative as well as executive power, codification did not face the usual legislative hurdles. Paez' approval was enough. The climate of war also limited the opportunities for extended discussion of legislative options. The Civil Code adopted was literally the conservative Chilean (Andres Bello) code. It is therefore not surprising that following the federal-liberal triumph in 1863, the entire codification was abolished. The notable exception was the Commercial Code which probably had a constituency that the other codes did not have.

In 1867, with the conservative party controlling again the political scene, the Congress approved a new Civil Code, this time following the conservative model of the Spanish (García Goyena) project. In 1873, General Guzmán Blanco, an important liberal leader, acting as dictator, approved a set of new codes, including a new Civil Code, which was modeled by the Italian (1865) Civil Code. Italian codes served as models for other codes as well. The Italian codes were more to the taste of the liberal elite.

All of these disputes over the codes and the association of codes with particular strong leaders reveal the ideological battles involved. Guzmán Blanco, the most able manipulator of symbols in Venezuelan history, not only ordered broad publication and diffusion of "his" codes, but ordered the publication of the entire republican legislation excluding Paez' codes. Guzmán presented himself as the enlightened organizer of the Republic, and the new codes were part of this new time. Later strongmen, Joaquín Crespo and Cipriano Castro followed his example. Each wanted to associate his name with the codes, as the French Civil Code was associated with Napoleon.

In the eyes of the liberal elite, codes and particularly the Civil Code, were very important. The civil law regulates the relations of citizens among themselves and is central to the life of the nation. The political order only fails where it has not the support of civil institutions of freedom and property (Dominici, 1897, vol I, xxv).[14]

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[13] Luis Sanojo, a participant in several codification committees and an important jurist of the time gives this argument in the introduction (prólogo) of *Instituciones de derecho civil* (1874).

[14] "La base de las instituciones de los pueblos está seguramente en el desarrollo y la práctica del Derecho Civil, que regla de modo permanente las relaciones de los ciudadanos entre sí, y que viene a constituir por esto la ley común de la Nación. Allí es donde de verdad arraigan los

Beyond this ideological justification, was the modernization of legislation really necessary? Venezuela was a poor country, with very limited economic activity and additionally impoverished by a long and cruel civil war. Very clearly the importation of Italian codes was not really necessary for reordering society. Rather, adoption of these codes had an ideological and esthetic function. Nevertheless, they were approved and became the law in the entire territory of the Republic. But how deeply the new rules penetrate in Venezuelan society?

## VII. LAW TEACHING AND LEGAL DOCTRINE IN PRIVATE LAW

In the law curriculum of Venezuela, the study of national law began in 1827. The textbook was Sala[15]: *Ilustraciones del derecho real de España*, originally published in 1803 with many later editions. The book followed the plan of the Justinian's *Institutions*, but explained the rules of Castilian law. After the independence, Sala was adopted as the text for Spanish law, which was the "national" law in the new independent states of Hispanic America. There were many editions of the book with footnotes referring to the law of the new states. There was a Sala Hispano Venezolano (1845) and also a Sala Hispano Mexicano and Hispano Chileno. National law (derecho patrio) was studied for one year. The educational reform of 1874 radically changed the law curriculum, with addition of civil code, commercial code, penal code, code of civil procedure and code of penal procedure. Code was included in the name of the course because the course essentially consisted of explaining the code. A reform in 1900 a reform established as the textbook for Civil Code the commentaries by Sanojo and Dominici, and, of course, the code itself (Pérez Perdomo, 1981).

Luis Sanojo, in the introduction to his massive *Instituciones de derecho civil venezolano* reported on the European discussion on the codification of law and argued that the codification was opening a new era in the study of law (Sanojo, 1874:vii). He explained that his book was not intended to be an original contribution, but rather to be useful to those who will use the code. He is explicit about his sources: "Touiller, Troplong, Savigny, Demolombe, Mourlon, Pacifici Mazzoni, are the author we have consulted more frequently, specially the last two" (Sanojo, 1874: ix). In other words, in addition to codes, we received the modern European doctrine.

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principios de la libertad y la propiedad individuales… y allí en fin, donde se prperan los asociados para el estudio y la observancia de las leyes políticas, que no flaquean sino cuando les falta el apoyo de las instituciones civiles" (Dominici, 1897, vol I, xxv).

[15] Juan de Sala (1731-1806) was a Spanish law professor and lawyer. His *Ilustraciones* became an instant bestseller with many editions in the Spanish speaking world. The last edition we know is from 1888.

Aníbal Dominici (1837-1897) was an important intellectual and politician. He was the first Minister of Education of the Republic and twice Rector of the Central University. He wrote plays and a novel. He was professor of Civil Code and Commercial Code and wrote a comment of both. His *Comentarios al Código Civil* (1897) is "the product of notes for the teaching of Civil Code and Commercial Code that I have done for ten years". The purpose was to put at students' reach the good doctrine of French and Italian authors, but he does not cite any for make reading easy (Dominici, 1897, vol I:xxv-xxvi).

Legalism became part of the academic culture. Judges were now obliged to reason their decisions and refer to the article of the legislation that they were applying. In 1876, the action of cassation (*recurso extraordinario de casación*) was established for correcting inadequate interpretation of legal rules. The legal culture became formalist in its official design. But how deeply did this culture penetrate? This is the question for the last part of this paper.

## VIII. LAW, JUSTICE AND SOCIETY

The elaboration and promulgation of codes and their placement at the center of legal teaching and legal writing did not guarrantee that the new law and the formalist legal culture would penetrate the Venezuelan society. Venezuela was a poor and agrarian country with a very high rate of illiteracy until the first third of the 20th century. In 1891 the rate of urbanization was 9 per cent (Baptista, 1997:37). Epidemics were frequent (Venezuela/ Biografía inacabada, 1983:36) and the rate of illiteracy was very high.Very few people were able to read the codes and much less the commentaries we have mentioned. An indicator of the shallow penetration of legal ideas was the number of lawyers. This number increased very slowly and, in relation with the population, the number actually decreased. Table 2 gives the relevant figures.

Table 2. *Number of lawyers in Venezuela in 19th century*

| *Year* | *N. lawyers* | *Population x 1.000* | *Lawyers/100.000* |
|---|---|---|---|
| 1805 | 105 | 800 | 13.1 |
| 1840 | 120 | 880 | 12.0 |
| 1894 | 246 | 2.445 | 10.1 |

*Source: Pérez Perdomo, 1981:144*

Most lawyers were public functionaries, reflecting the fact given that there was not enough economic activity to generate business to otherwise

support them. The small number of lawyers mostly means that they were not found useful by the population. In addition to the low level of economic activity, much of this activity was not legalized. Many contracts were "pactos de caballeros", which basically meant they were oral and subject to social norms rather than law. Unfortunately we do not have figures on notary activity to ground this assertion.[16]

Another indicator of legal penetration is judicial activity. In sociological terms, judicial cases are not necessarily a gauge of social or interpersonal conflicts but rather the type of business a society chooses to expedite through courts. In 19th century Venezuela, social conflicts were intense, as the frequency and intensity of civil war shows, but these social conflicts did not produce judicial cases. Table 3 compares the judicial activity in 1844 and 1894. Unfortunately we do not have a good statistical base to produce a series of such data and we have to limit ourselves to two moments in time separated by half a century. Statistical information for the periods most affected by war and social disorganization is nonexistent. The first picture is from the period of the effort toward institutionalization of the state. The second picture is from a time of serious political difficulties and shows a decline in the utilization of the legal apparatus of the state. This is consistent with the reduced numbers of lawyers.

Table 3. *Judicial activity in 1844 and 1894 per 100.000 inhabitants*

| | *1844* | *1894* |
|---|---|---|
| *Civil suits in first instance courts* | 519 | 244 |
| *Cases solved in first instance courts* | 134 | 78 |
| *Criminal cases initiated in first instance courts* | 304 | 59 |
| *Criminal cases solved in first instance courts* | 127 | 13 |

*Source: Pérez Perdomo, 2010*

Can we talk of a successful transplant of modern law in Venezuela? Did Venezuelans receive 19th century European law and legal thought? If we look at the universities and university educated people, the answer is yes. The intellectual elite drafted constitutions and codes and wrote books and articles that witness an effort to construct a state and a society following the European models. In the words of Friedman (1975) the *internal legal culture* changed. At this level, we received modern law. The broader society did not move in the direction marked by constitutions and codes. The *external legal culture* was not affected by the effort or was affected only marginally.

[16] The "pactos de caballeros" were still common in early 20th century Venezuela, as I have learned from interview with old informants for other research projects.

The 20th century is a different story. The population grew and urbanized quickly, education expanded, including the universities and law schools. The number of lawyers grew at a much faster pace than the population. Radio, television and other communication media covered the entire country. Education expanded and illiteracy was reduced to a small fraction of the population. These are signs that law got diffusion, but perhaps we still have not received the values of modern law, the rule of law.

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