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Some Thoughts on the Codification Process in Latin America. Andrés Bello, from America to Japan?[1]

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Abstract. This article describes the reception of Roman law in Latin America and its first codification attempts, establishing the influence of Andrés Bello's code as the base of most Latin American legal systems and even of one out of the continent, that of Japan.

Keywords: Japanese New Civil Code, Andrés Bello, codification, Latin America

I. Introduction

Law is a mirror in which society reflects, where it expresses its wishes and fears trying to self define. For instance, a society that perceives itself as unequal, will probably express its wish to improve proclaiming the fundamental equality of all men in its constitution. It might also express rejection of some common conducts that are believed to be harmful by regulating them as crimes in its penal laws. Nevertheless, the legal dogmatic that most civil codes contain is quite similar, mostly coming from Ancient Rome, and is ruling societies that seem culturally very different. The autonomous character of Roman legal development may be the reason for this adaptability of Roman dogmatic to different social and cultural environments. In fact, if we take a look at the XII Tables, we can immediately appreciate the neutrality of the norms contained by it. For instance, in T, 5 '*si intestato moritur, tui suis heres necescit, adgantus proximus familiam habeto*' (if [he] dies untested and has no *sui* heirs, may the nearest agnate have the family). Many questions arise as, for instance, whether who dies? A man, a

1 This article was presented in Japan before the JALHA (Japan Legal History Association) at the Kyoto University as also in a staff seminar before the professors of Legal history at the Osaka University. It is part of the investigation project VRI 2009/1 Roma y el concepto de propiedad en el Código Civil del Japón and Fondecyt 1100452.

woman, a plebeian, a patrician? The validity of the norm does not depend on the person's social or political conditions. Law remains neuter before the cultural circumstances of society.[2] We may also add that *familia*, as an object of Law is also an open concept in the norm. Does it include cults? Only physical goods? This tendency to abstraction deepens itself with the development of professional jurisprudence during the 2nd and 1st centuries B.C., until it became a model of scientific legal knowledge, which could be valid independently from the cultural and social particularities of any society. That is why its fundamental structure has remained valid for very different communities, as Classical Rome, the Byzantine Empire, late medieval Europe, Japan or Latin America.

Nevertheless, the particular way these institutions are summoned by each society, putting local flavour into them, harmonising them with the ideological particularities of each community, permits these institutions and legal reasoning to become a part of the local culture. To say it in short, who the legally valid actor is and which exactly the objects of any legal institution are, cannot be answered from an abstract and dogmatic point of view. These questions need some definitions that can only come from the cultural atmosphere in which the norm will be applied. The reception of Roman law cannot be a simple copy of legal ideas. The juridical institutions must be adapted to the cultural atmosphere in which they should be applied. The Japanese codification process appears as a model where a profound work of adaptation of Western legal institutions was necessary in order to successfully accomplish the elaboration of the New Civil Code of 1898.

For Latin America, the process of elaborating civil codes also needed a significant amount of adaptation, which turned the process slow and difficult. Eventually, after the Chilean codification of 1856, the process was accelerated and the adaptation was easily completed by most countries, thanks to which they were able to express their particular perception of reality through Roman legal dogmatic. This was the first mirror in which Latin American societies could reflect themselves, as an expression of their own spirit.

In the present work we will study this process, starting with the forced reception of Roman legal ideas in America, through Spanish conquest, and the elaboration of a particular legal system for the Indies. Then we will describe the first codification attempts, to focus ourselves on the first success in this process, which we can identify with Andrés Bello's code of 1856. This Code was the basis for most Latin American codifications of the 19th century and, therefore, is the foundation of South American legal systems. Finally, we will approach the influence of this Code – it is not limited to Latin American legal subsystem boundaries. We will finish raising a question, could its influence extend to the Japanese code of 1898?

2 On the problem, and making a comparison between Chinese and Roman law, see Miquel 2007. 461–479.

II. Roman Law and the Conquest of America

The history of the penetration of Roman law in Latin America is the chronicle of its incorporation into the Spanish Empire. Naturally, by 1492, when the discovery and conquest begian, there were many different native laws among the people that populated the continent that would eventually be known as America. Nevertheless, the conquest provoked a heavy cultural mixture between Spanish and native elements that also included Law. The institutions that ruled in Spanish America soon acquired a distinctive character. A particular legal system (the law for the Indies) was formed, which ruled the American colonies all through the Spanish domination. This system was quite complex and had different types of rules that should apply to regulate social life in a specific order. The top place in the structure was for the statutes which were made specifically for the territories of Spanish colonies, whether they were made for all of them or for a specific Viceroyalty or 'Capitanía General'. Most of these statutes were concerned with public law, intending to organise the American territories and regulate the statue of the Catholic Church and natives. Formulated by the Counsel of the Indies (Consejo de Indias)[3] and formally promulgated by the Spanish kings, they covered different matters in an unsystematic fashion. In short time, there were so many statutes of such different nature that to avoid the growing tendency to chaos they were ordered in an extensive compilation called *Recopilación de Leyes de Indias* in 1680. Nevertheless, it was only a partial solution, for not all the valid statutes for America were compiled in it and the legal instruments that were not part of it still remained valid. On the other hand, the 'Consejo de Indias' kept actively legislating after 1680, so the compilation was only a partial solution for the entropic nature of legal proliferation.

Formally, the second place in the law for the Indies was for the different laws of the native people of America, called *Derecho indígena*. Surprisingly, these laws were not formally abolished by the Spanish kings, who, against what one would expect, even pronounced actively for their validity, maybe expecting to secure the collaboration of the local elites. The native laws were mainly pieces of oral tradition that belonged to the different Native American societies. They kept being in force for the Spanish kings recognised their validity when they were not incompatible with Christianity or with the specific statutes given for

3 The 'Consejo de Indias' was an administrative organ of the Crown of Castile. It was in charge of the administration of the American colonies. Created by the emperor Charles V in 1542, it was initially composed of a President, a Great Chancellor of the Indies, eight counselors and a Tenet of the Great Chancellor. (See, *Recopilación de las Leyes de Indias*, Second Book, Tit. II, L. I, vol. II. Madrid, 1889. 215.) Its faculties covered different aspects of American administration, and at the very top position regarding legal matters, where it had not only legislative competence, but also acted as a Supreme Court.

America.[4] These native legal traditions also had a second influence on the law of the Indies, for some institutions specifically designed for America were based on Pre-Columbine models.[5] Nevertheless, given the small scope of matters these law traditions covered, and the fact that the members of the courts in charge of applying law in America were educated in Spanish law, from a theoretical point of view native law was valid, in practice its rule was rather exceptional. In fact, most of the members of the *Reales Audiencias*,[6] the jurisdictional organs that applied law in Spanish America, were judges trained in *ius commune* at university.[7]

The third element in the complex Indian legal system was the Law of Castile. At the time of the conquest of America, Spain did not have a unified legal system. What we now call Spain was nothing more than a group of kingdoms dynastically united by the marriage of Isabella of Castile and Ferdinand of Aragon. Each of the territories (or kingdoms) that composed it kept their own legal systems. Nevertheless, all of these systems were pretty close to each other, for they were all based on *ius commune* and, therefore, had a strong roman component. The territories of the Empire overseas belonged to the Kingdom of Castile, for Christopher Columbus was under the service of this latter when he made his discoveries. Therefore, the American colonies came under Castile's law after the conquest.[8]

4 On the matter, in 1555 Charles V specifically establishes: '*We order and mandate that all laws and good traditions that previously the Indians had for their good government and police, and their uses and costumes must be observed and kept if they [the Indians] are Christians and they [the laws] are not against the sacred religion and the laws of this book. (Ordenamos y mandamos, que las leyes y buenas costumbres que antiguamente tenían los indios para su buen gobierno y policía, y sus usos y costumbres observadas y guardadas después que son cristianos, y que no se encuentran con nuestra sagrada religión, ni con las leyes de este libro, y las que se han hecho y ordenado de nuevo se guarden y ejecuten…)*' *Recopilación de las Leyes de Indias* 1889. 197. See also Ravi Mumford 2008. 5–40.

5 With the words of Levene 1920. 144. '*The native law survived after the Spanish conquest and inspired Indian legislation beyond what is commonly believed. (El derecho indígena sobrevivió después de la conquista española e inspiró la legislación indiana más de lo que comúnmente se cree.)*' We can find an interesting example of it in the '*yanaconazgo*'. On the problem see Cuena Boy 2006. 401–424.

6 For a recent study, with abundant bibliography on the Reales Audiencias in Chile, see Barrientos Grandon 2003. 233–338.

7 For instance, in 1605, when the Real Audiencia of Santiago de Chile was created, every candidate to be a judge in it ('*oidor*', as Audiencia means hearing, the *oidor* is the one that hears) had a university degree in Law. See Barrientos Grandon 2003. 233–338.
Fort the case of the Real Audiencia of Lima one can see the same phenomenon. See Puente Brunke 2001. 23.

8 In the ordinances for the 'Reales Audiencias' emperor Charles V specifies that: '*In all the cases, contracts and litigations that [are not specially solved by the statutes provided for America should come under] the law of our kingdom of Castile. (En todos los casos, negocios y pleitos que [no estuviesen especialmente resueltos por una legislación específica destinada a América se rigiesen por] las leyes de nuestro reino de Castilla.)*' *Recopilación de las Leyes de Indias*, book II, Tit. I, L. II, v. II. 1889. 196.
On the incorporation of America into the Kingdom of Castile, see Sánchez Prieto 2004. 294–295, as also the classical work by García Gallo 1972. 473 ff.

Castile's law was quite complicated. It was formed by a group of different legal texts that came from different eras, product of the curious medieval Spanish history. Among them, there was the whole *ius commune*, that is to say, the medieval interpretations of Justinian's *Corpus Iuris* made by the glossators and commentators; the *Siete Partidas*, an extensive work written in archaic Spanish, made under the personal direction of King Alphonse the Wise around 1265, which basically collected *ius commune* adapting it to the kingdom of Castile. There was also the extremely complex *fueros* and *cartas pueblas* system. These were particular legal statutes of different cities and regions that were given by different kings granting them special privileges. With all the above mentioned, the ancient *Fuero Juzgo* was still in force in some regions. This was the Spanish translation of the extremely old *Liber Iudiciorum*,[9] a legal text composed by the time of the Visigothic kings, which remained as the traditional law of the Christians *(mozárabes)* during the Arabic occupation of the Hispanic Peninsula. By the time of the conquest of America, in the city of Toro, the Courts of Castile (an equivalent to English medieval Parliament or to French medieval États Généraux) were summoned to try to give some coherence to their legal system and decide the precise order in which the different legal texts should be applied. The result was the *Leyes de Toro* (1505), which fixed an order for their appliance. The absolute preference was given to the *Leyes de Toro* and the other statues given by the monarchs; secondly, the particular *fueros* of each city or region, among which it was included the *Fuero Juzgo* and, in third place, the *Siete Partidas*.[10] Although formally the *ius commune* was excluded from Castile's law system, in reality it was still very much in use, for it was at the very heart of the legal education both in Castile and America.[11] In fact, *ius commune* was the only thing studied at universities, while the *Siete Partidas*, the different *fueros* and the statutes given by the different kings were not. The judges used to found their decisions on *ius commune* although it was specifically forbidden, claiming its internal rationality *(pro ratione)*,[12] so finally *ius commune* ended up being one of the main sources of Castile's law.

Summarising, the Law of the Indies was formed by: (1) the statutes specifically given for the American territories, (2) the native law and (3) the law of Castile. Nevertheless, for most of the above mentioned were mainly concerned with public law, generally speaking, the majority of cases were solved using the *Siete Partidas*, the content of which was basically Roman law, what was anyway reinforced with the fact that all judges and lawyers were educated in *ius commune*. In a way, Roman law came up as the centre of traditional law in Latin America. With all the complexities of the Hispanic legal tradition, Justinian's Roman law came to America.

9 See Nótári 2013. 180.
10 See Leyes de Toro 1826. 4 ff. For a general outlook, see Guzmán Brito 2000. 152 ff.
11 For the specific case of Colonial Chile, see Bravo Lira 1998. passim.
12 See Guzmán Brito 2000. 23–36.

III. Independence Process and Criticism of Traditional Law of Indies

During the first decade of the 19th century, the whole of Latin America entered into a revolutionary process of deep historical consequences. As a result of Napoleon's invasion of Spain in 1808, the whole Hispanic Empire crumbled and the different regions that composed it turned into independent states. Generally speaking, we can say that around 1810 local elites formed autonomous governments in Latin America. In the Capitanía General of Venezuela (April 19, 1810), the Viceroyalty of Nueva Granada (May 20, 1810), the Viceroyalty of La Plata (May 25, 1810), and the Capitanía General of Chile (September 18, 1810) local government commissions (Juntas de Gobierno) were constituted and, although all of them declared themselves loyal to Ferdinand VII of Spain, who was made a captive by Napoleon, in reality they started the independence wars which would only end in the Ayacucho battle on December 9, 1824, after taking the lives of nearly one fourth of the population in some regions.[13]

Anyway, political independence of the different territories of Latin America did not mean a complete break with the law system of the Indies. Although public law did experience fundamental changes,[14] especially after the dictation of several constitutions for the new American nations, private law remained stable. All countries that once had been part of the old Spanish Empire kept the traditional Law for the Indies. We might add that '*never a political change, for radical that it might be, affects necessarily and immediately Private law*'.[15] The system, with all

13 Maybe the cruellest wars were those of Venezuela and Chile, where vast zones became practically depopulated. For the first of those, we can remember Bolívar's decree of July 15, 1813 declaring what came to be known as war to the death: '*Any Spanish who does not conspire against the tyranny and in favour of the just cause, by the most active and efficient means, will be counted as an enemy and punished for treason, and consequently, will be put to death. (Todo español que no conspire contra la tiranía en favor de la justa causa, por los medios más activos y eficaces, será tenido por enemigo, y castigado como traidor a la patria y, por consecuencia, será irremisiblemente pasado por las armas.)*' In the case of Chile, most of the natives were forced to take a side, whether for or against the independence.

14 The transformations brought by the Independence in public law were vast and this might not be the place to focus on them. Nevertheless, the complex system of personal status that established a blood nobility, the difference between the 'peninsulares' (people born in Spain), the 'criollos' (the ones born in the colonies, but with Spanish antecessors), the 'mestizos' (half breeds between natives and Spanish) and the natives were abolished. Also, it was declared the freedom of newborn from slaves and, finally, the complete prohibition of all ways of slavery. All these changes made possible the end of the semi-feudal regime that lived in Spanish America. For the Chilean case, the freedom of newborn was decreed on October 11, 1813, the abolition of nobility in September 15, 1817, the full legal capacity for natives on March 4, 1819 and on July 24, 1823 slavery was finally abolished. See Guzmán Brito 1982. 83.

15 '*[N]unca una pura mudanza en el régimen político, por radical que resulte, afecta necesaria e inmediatamente a la disciplina del Derecho privado.*' Guzmán Brito 2000. 181.

its complexity, was still valid for there was nothing to replace it. On the other side, however radical the independence revolution was, society had still an economic and social structure similar to the late colonial period, and it would take decades of republicanism and, what is even more important, peace, to vary those structures. The end of the colonial regime in the Spanish America meant the beginning of a long period of civil wars in the different regions that were once part of the Spanish Empire, which, in most cases, covered the whole 19th century.

Although the replacement of the old Spanish legal structure was part of the revolutionary programme of independence, imitating French law under the ideological model of the 1789 revolution, still long time was needed before society was in a condition to produce jurists and men of culture who were able to fulfil such a task. It is worth calling the attention on the fact that some of the revolutionary leaders, who new quite little about law but were strongly influenced by the French ideology, pointed the incompatibility of the Spanish legal structure with independence. For instance, Bolívar declared before the Congress in Angostura in 1819 that: '*our laws are fatal residues of ancient and modern despotism. This monstrous structure must be turned to the ground and from its ruins we must build a temple for Justice*'.[16] Nevertheless, most of the new American states established by statute the validity of the old legal regime, including the Great Colombia founded by the same Bolívar.[17]

Anyway, harsh criticism of the old Spanish law became a common place in the recently independent societies, especially on its formal side, for it was composed by a multitude of different legal texts, many times contradicting one another and written in different languages (Latin, Archaic Spanish and Modern Spanish). Most of the criticism was fair and it was even taken from Spanish authors that criticised their own legal system and also wanted to replace it with a legal code. In this context, there was the idea in the intellectual atmosphere to simply translate the Code Napoleon and enact it. The arguments on behalf of it were the indisputable prestige of the Code Napoleon as a model of rational ordination of

16 '*Nuestras leyes son funestas reliquias de despotismos antiguos y modernos; que este edificio monstruoso se derribe, caiga y apartando hasta sus ruinas, elevemos un templo a la justicia.*' Guzmán Brito 2000. 190 f.

17 This was made expressly by:
- The Reglamento Provisorio para la Administración del Estado of 1817, sec. II, cap. I, art. 2. of the United Provinces of River la Plata (the future Argentina) and its Constitution of 1819 in its article 135.
- The Provisionary Constitution of Chile of 1818, tit. V, cap. I, art.2.
- The Constitution of the Great Colombia of 1821 (the state created by Simón Bolívar which covered nowadays Venezuela, Colombia and Ecuador).
- Estatuto Provisorio given by the Protector of Freedom of Peru (José de San Martín) of 1821
- Reglamento Provisional of the Empire of Mexico of 1822, art. 2.
- The Constitution of El Salvador of 1824, art. 81
- The Constitution of Honduras of 1825, art. 97
- The Constitution of Nicaragua of 1826, art. 164

law and the fact that the ideological matrix of the independence was the French Revolution. In 1822, the Chilean leader of the independence, O'Higgins, who governed the country at the time, proposed to simply substitute the Law for the Indies with the five French codes, although the idea did not prosper. The French codes were enacted in Haiti, Oxaca (a state of Mexican Federal Republic), the Northern and Southern Peruvian states of the fleeting Confederation of Peru and Bolivia and in Bolivia. Nevertheless, its force was somehow transitory,[18] maybe for the lack of connection with local traditions, or for its incompatibility with local legal culture. The most curious example of this tendency is, without any doubt, the case of the Dominican Republic, which enacted the Code Napoleon in its original French language, although it is a Spanish speaking country, and had it in force for nearly forty (1844–1884) years![19]

It was only in 1852 that the first truly Latin American Civil Code came out in Peru. Although its significance is high, its influence was limited to Guatemala, maybe because of its conservative structure.[20] For instance, it kept the validity of slavery[21] and regulated in a very conservative way the statue of clergy.[22] For practical terms, it would not be until 1856, when the Civil Code of the Republic of Chile was enacted, that Latin America had its first autochthonous codification model, which dominated legal thought for the next fifty years. Due to its importance we will centre our attention on such a process, for the Chilean codification is the base for most Latin American ones.

IV. Codification in Chile

During the second and third decades of the 19th century, in Chile the debate on the need to codify law became central.[23] It was focused not on the need to codify but on the way to do it. The discussion focused on whether codification should be a simple reception of French law or an adaptation of the Spanish legal material putting it in a modern mold, that is to say, to follow the axiomatic method of Leibniz and the Gaian-Justinian order, or to create an all inclusive code, whether under Bentham's model, the *Allgemeines Landrecht*'s one or another newly

18 See: Guzmán Brito, Alejandro, El tradicionalismo del Código Civil Peruano de 1852 in Revista de Estudios Histórico-Jurídicos (2001) 23.

19 This happened for many historical circumstances. The Dominican Republic was incorporated into Haiti, which is a French-speaking country, and simply adopted the French code in its original language. When Dominican Republic finally separated itself from Haiti, the discussions about the translation of the code became endless and there was no agreement on the matter until 1884. For the details see Guzmán Brito 2000. 289–301.

20 On the matter see Guzmán Brito 2001. 23; Guzmán Brito 2000. 338–342.

21 Book I, sec. II, tit. V.

22 Book I, sec. II, tit. IV.

23 For a detailed discussion see Guzmán Brito 1982. 115–238.

designed.[24] For it was not likely that a decision would be taken, Diego Portales, one of the state ministers, around 1834 privately commended the mission to Andrés Bello.[25] From then on, the destiny of Chilean codification would be united with the fate of a man who was not only born outside of Chile, but did not even have a degree in law!

It was chance that brought such a character to Chile. He was born in Caracas in 1781 and graduated as a bachelor of arts in 1800. He did start to study law, but he quit under his father's pressure.[26] He tutored Bolívar, with whom he maintained a somehow distant relation, once the old pupil became the bright star of American independence. He was a self educated man, learned English and French on his own. As for his language skills, he was in quite an exceptional position in 1810, when Venezuela was looking for English support for its independence. Probably his knowledge of the English language, which was very uncommon at that time in Caracas, encouraged the government to send him, together with Bolívar and Luis López Méndez to London to try and convince England to aid Venezuela.

Soon enough it was evident that England would never support Venezuela's independence, for, once Spain had been invaded by Napoleon, it became an ally against France. Therefore, Bolívar returned to Venezuela and left Bello in England. Bello, without any economical support from Venezuela stayed at the very edge of misery permanently for the next twenty years. Given his intellectual capacity, he entered John Mill's circle, one of the main utilitarian philosophers, who hired him to help in copying Jeremy Bentham's notes. By this time he became aware of the codification, because Bentham was not only an active promoter of it, but he even invented the word 'codification'.

His law studies seem to have started in quite an unusual way. As a student of philology he focused on the *Cantar del Mio Cid*, a medieval epical poem composed in the 12th century and finally written down under Alphonse the Wise. In order to understand the language of the poem he studied the *Siete Partidas*, which were written in the same historical period. His contact with Bentham brought him under the influence of Blackstone and Kent, whom he quotes on several occasions. In other to approach Roman legal thinking, he also studied Vinnius and Heinnecius. He even made a Spanish translation of this latter author, which was in use in Chile during the whole 19th century.

In 1822, he was hired by the Chilean diplomatic delegation in London and, in 1829, he finally abandoned England and moved into Chile. He elaborated most of his works in this last country, which he never left until his death in 1865.

24 It was even discussed to make a kind of legal encyclopedia, imitating a Spanish work from the 18th century from Antonio Xavier Pérez y López called *Teatro de la legislación universal de España e Indias*.

25 We follow Guzmán Brito's thesis on the problem. See Guzmán Brito 2005. 16 ff.

26 An interesting description of this scene can be found in Edwards Bello 1978. 14.

It was in his Chilean period that he was commissioned for the civil law codification and this took him to deepen his knowledge about the Code Napoleon and the works of Pothier, as well as about the commentaries made by the first exegetic school, that is to say, Rogron, Delvincourt and Troplong. He also made extensive comparative studies of the different civil codes that existed by his time, especially through the Concordances of Saint Joseph. Last, but not least, we should mention the influence of Savigny, whom he studied thanks to the publication of the famous translation of his *System* made by Charles Guenoux, published in 8 volumes in 1840 under the title *Traité de Droit Romain*. All this cultural baggage was poured into his Civil Code, which he wrote alone. Form 1840 on, his work was revised by a commission appointed by congress.

Bello's idea for codification was not focused on changing the dogmatic content of Spanish law, but to reorganise it in a more rational way. On the problem he states: '*The codification plan must be separated carefully from the reform plan. To mix one with the other would be to fight with two different difficulties at the same time, and to sink in a swamp of speculations in which there are so many and too terrible difficulties.*' So the project should limit to the '*sole organizing of our written and not written law*'[27] and finally convert *'all civil laws into a well organized body, without the litter of preambles and redundant phrases, without the multitude of words and expressions out of use*'.[28]

His intention seems to have been not to change the fundamental legal dogmatic, but to adapt and rationalise it. The result was a deeply original work, though inspired by the codification techniques of the first half of the 19th century, as the presentation of the work in congress suggests: '*Of course, you will understand that we cannot simply copy any of the modern codes. It was necessary to use them, but without forgetting the particular circumstances of our own country. But, when there were no obstacles for it, we took the chance of innovating.*'[29]

By the year 1841, the book of successions *mortis causa* was finished and, therefore, Bello decided to publish it in the newspaper called *El Araucano*, which he directed. Bello's idea of codification involved public discussion of the content of the Code. He was intellectually close to the Historical School, so this was a way of making the Code a national work, reflection of its 'spirit'. In fact

27 '*El plan de codificación debe, a nuestro concepto, separarse cuidadosamente del plan de reforma. Amalgamar desde el principio uno y otro sería luchar de frente contra dos dificultades a un tiempo, y engolfarnos desde luego en el vasto piélago de las especulaciones, en que son tantos y tan temibles los escollos.*' Bello 1885. 36.

28 '[...] *las leyes civiles a un cuerpo bien ordenado, sin la hojarasca de preámbulos y frases redundantes, sin la multitud de vocablos y locuciones desusadas que ahora embrollan y oscurecen.*' Bello 1885. 37.

29 'Mensaje' of the Chilean Civil Code: '*Desde luego concebiréis que no nos hallábamos en el caso de copiar a la letra ninguno de los códigos modernos. Era menester servirse de ellos sin perder de vista las circunstancias peculiares de nuestro país. Pero en lo que éstas no presentaban obstáculos reales, no se ha trepidado en introducir provechosas innovaciones.*'

there was some debate on the content of the code, which was developed publicly through letters sent to the newspaper and published by it.[30]

While the commission revised the book of *mortis causa* successions and the Preliminary Title of the Code, Bello worked on the book of contracts, which was examined by the commission and published afterwards. By 1844 some of the commissioners died, so the commission ceased to exist and Bello continued his work alone. Although a new commission was appointed, it never retook the revision work. Finally, in 1846 Bello edited and published a corrected version of the book of *mortis causa* succession and, in 1847 he made a second edition of the book of contracts. The hardness of the solitary work of an old man is manifest in a note he added in the book of contracts: '*soon our work will be finish, if our age and strength allows it*'.[31] But making the Civil Code was not his only duty, for by that time he was also senator of the Republic, president of the University of Chile, which he founded, and, as we already mentioned, editor of a newspaper. While he was working on the Code, he also wrote an impressive work of philosophy (quite close to utilitarianism), the first Spanish grammar written in America, a general book on international law, many other philological works and even some books of poetry.

Fortunately, age and strength allowed him to continue, for in 1853 he finished the first complete draft of the Civil Code. This draft contains also footnotes that enable us to trace some of the sources used. A new commission was appointed and after two years the project known as the 1855 Code was finally sent to Congress. It was approved without any discussion on December 14, 1855 to be enacted the on January 1, 1857. Nevertheless, the Congress commissioned Bello to correct some errata in the text and he introduced some 200 changes to the text originally approved by Congress. In 1856 the final edition of the Civil Code of the Republic of Chile was published.

By its structure, the Code belongs to the French family, for it follows the Gaian-Justinian order. It starts with a Preliminary Title, where it gives some general rules and definitions, including a set of rules to interpret statues, where it shows the influence of the Louisiana Code and Blackstone.[32] The first book is dedicated to persons, incorporating the notion of artificial persons. The second book is dedicated to *iura in rem*. He follows the *ius commune* system of transfer of property, distinguishing between *titulus* and *modus*, incorporating a special title on *actiones possessoriae*, which is rather exceptional. The third book is on succession *mortis causa*, while the fourth one regulates contracts.

On the sources, though the structure is quite close to the Code Napoleon, the order of that is altered on several occasions, adopting the structure of the *Siete*

30 The whole debate is in Bello 1885. 300 ff.

31 '*Dentro de poco habremos terminado nuestro trabajo, si la vida y las fuerzas nos alcanzan.*' Taken from Guzmán Brito 2005. 44.

32 See Guzmán Brito 2010.

Partidas (for instance, when it includes a title for *actiones possessoriae* after the one concerned with *servitudines*) or to the Louisianas (including rules to interpret statutes), the content seems closer to Pothier and the Siete Partidas rather than to the French Code,[33] which is especially evident when it adopts the *titulus-modus* system for transference of property.

V. Expansion of Andrés Bello's Civil Code. Did it Influence the Japanese Code?

It was the local flavour of Bello's Code and its reception of traditional Spanish law what guaranteed its success and its quick adoption by other Latin American countries. Therefore, it was enacted in El Salvador (1859), Equator (1860), Colombia (1887), Venezuela (briefly from 1860), Nicaragua (1867–1904) and Panama (since its independence from Colombia). It was a fundamental influence for the Argentinean, Uruguayan and Paraguayan codes, as also to the first codification project of Brasil, Freita's Esboço. Nowadays it is the third oldest Civil Code still in force, after the Code Napoleon and the Austrian ABGB.

Although its continental influence is completely out of discussion, we would like to finish this paper by raising a question. Did it have any influence in a wider outlook, as for instance, in the New Japanese Civil Code of 1898? It was Professor Domingo who called our attention to the complex set of materials that inspired the Japanese Civil Code.[34] As a matter of fact, Hozumi, one of the three members of the commission appointed to make the New Civil Code of 1898, states that the commission consulted more than thirty different codes[35] while preparing it. He even declares that the material content of the Code was taken from different places: '*In some parts, rules were adopted from the French Civil Code; in others, the principles of English common law were followed; in others again, such laws as the Swiss Federal Code of Obligations of 1881, the new Spanish Civil Code of 1889, the Property Code*

33 For instance, the definition of property seems to be a mixture between the one given by the Siete Partidas and the Book on Property of Pothier, and is not based on the Code Napoleon. Art. 544 of the Code states: '*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.*' Pothier: '*le droit de disposer á son gré d'une chose sans donner néanmoins atteinte au droit d'autrui, ni aux lois; ius de re libere disponendi, ou ius utendi et abutendi.*' Pothier 1827. 114. And the Siete Partidas (P 3, t. XXVIII, L. 1) '*Señorío es poder que ome ha en su cosa de fazer della, e enella lo que quisiere: segun Dios e segund fuero.*' While Art. 582 of the Chilean Civil Code: '*El dominio (que se llama también propiedad) es un derecho real en una cosa corporal para gozar y disponer de ella arbitrariamente no siendo contra ley o derecho ajeno.*' For a detailed explanation see Amunátegui Perelló 2010. 107–118.

34 Especially Domingo 2006. 289–304.

35 Hozumi 1904. 10.

of Montenegro, Indian Succession and Contract Acts or the Civil Codes of Louisiana, Lower Canada or the South American Republics or the draft Civil Code of New York, and the like have given materials for the framers of the Code.'[36]

Hozumi expressly mentions codes of 'South American Republics', which probably, for its diffusion and influence, could mean Andrés Bello's Code. Also, when he, in different parts of his study, *The new Japanese civil code as a material for the study of comparative jurisprudence*, mentions generically the codes of South America,[37] the declarations seem to fit Bello's Code. This might enable us to speculate about an influence of this Code to Japan's, although this is quite hard to prove, especially for most civil codes seem to have similar rules and it is not easy to demonstrate the belonging of any particular rule to one specific code. To try and determine some reception of Bello's Code into the New Japanese Code we will briefly analyse an exceptional rule contained in Bello's Code, were eventually an influence could be clearly established. Both codes give the possibility of obtaining compensation in the *uti possidetis* interdict. So declares article 198 of the New Japanese Civil Code: '*If a possessor is disturbed in his possession, he may by an action for the maintenance of possession claim the stoppage of the disturbance and compensation for damage.*'[38] The Chilean Code also declares: Art. 921. '*The possessor has the right to demand that he is not disturbed or embarrassed in his possession nor striped from it, and to be compensated for the damage suffered, and guaranteed against the one he rightly fears.*'

Both articles are quite close in wording and content. This similarity becomes more significant when one considers that Bello's regime for *actiones possessoriae* is very exceptional. In fact, Bello did not follow the French model, which does not even regulate *actiones possessoriae*, just as he did not follow the majority of the existing codes of his time. Civil codes usually left the problem to procedure codes, following the French model.[39] Specialised textbooks used to explain the problem after having finished substantive law, when explaining procedures, following the Gain-Justinian structure[40] or treat them while explaining either

36 Hozumi 1904. 11.

37 Hozumi 1904. 36; 45.

38 Taken from the English version of Lonholm 1898.

39 Nevertheless paragraph 339 of the ABGB does regulate the matter and, probably also under the same influence of Heneccius, includes the possibility of compensation: '*Der Besitz mag von was immer für einer Beschaffenheit seyn, so ist niemand befugt, denselben eigenmächtig zu stören. Der Gestörte hat das Recht, die Untersagung des Eingriffes, und den Ersatz des erweislichen Schadens gerichtlich zu fordern.*' Still, the ABGB is very general about it. It simply contemplates the possibility of the possessor demanding compensation without really regulating the *interdictae*, as the Japanese and Chilean codes do. In fact, the compensation is claimed in a common procedure, without the character of *actiones possessoriae*.

40 In Gaius's *Institutes*, and consequently in Justinian's ones, the *interdicta possessoria* are explained in the fourth book on actions. Therefore, this is the traditional order to study the problem, as, for example, does Juan Sala, an 18th century scholar, whose works were very much in use at the beginning of the 19th century. See Sala 1845. book II, tit. XI, par. 10 ff.

possession[41] or *usucapio.*[42] Bello's Code regulated the problem in its second book, dedicated to things, right after *servitudines*. The exact location seems to come from the *Siete Partidas.*[43]

But what is more interesting to the case is that the material content of the rule comes from a misunderstood interpretation of Classical Roman law. In principle, Roman law did not contemplate compensation of damages in *interdictae possessoriae*, for their exclusive aim was to stop the disturbances suffered by the possessor. Nevertheless, it was especially common opinion among Spanish scholars (though not exclusively Spanish[44]) of the 19th century that they in fact allowed it. The confusion seems to come from a wrong interpretation of D. 43, 17, 3, 11.[45] In the fragment it is discussed the amount of the *condemnatio* in a procedure for contravention of *interdictum uti possidetis*, which originally limited to the economical value of the thing at the moment of the interposition of the action. This, in the Roman legal system does not stand as a compensation of damages, for the punishment in any procedure always involved money, and the defendant was not condemned to give back the *res*. Nevertheless, this amount of the *condemnatio* discussed by Ulpian was interpreted as damage compensation, while the defendant was anyhow convicted to return the object to the possessor. The misinterpretation seems to come from Heneccius, who is the first to express it,[46] and for the high degree of diffusion that his works had among Spanish scholars, this became a commonplace by the beginning of the 19th century. It is quite revealing to read the explanation that Andrés Bello gives in his *Instituciones de Derecho Romano*, which is a translation of Heneccius's comments on Justinian: '*The rentinendae interdicts are uti possidetis and utrubi. The first is given to the possessor of a real estate that, by the time of litiscontestatio posses it nec vi, nec clam, nec precario against the one that disturbs this possession, for him to cease, give compensation and gives non turbando guarantee.*'[47]

41 See Pothier 1846. 291 ff.

42 Troplong 1835. I. 459 ff.

43 P. 3, t. XXXII.

44 See, for instance, Troplong 1835. I. 462 f. '*Ils avaient pour but de défendre le possesseur d'une agression ou d'un trouble, et ils étaient accordés: 1º lorsque la force ou la voie de fait exercée contre le possesseur lui causait un dommage actuel dont il voulait obtenir réparation.*' Then, to justify his opinion, he quotes Ulpian l, 1, D. *uti possidetis.*

45 D. 43, 17, 3, 11 [Ulpianus libro sexagensimo nono ad edictum] *Non videor vi possidere, qui ab eo, quem scirem vi in possessionem esse, fundum accipiam. In hoc interdicto condemnationis summa refertur ad rei ipsius aestimationem. 'Quanti res est' sic accipimus 'quanti uniuscuiusque interest possessionem retinere'. Servii autem sententia est existimantis tanti possessionem aestimandam, quanti ipsa res est: sed hoc nequaquam opinandum est: longe enim aliud est rei pretium, aliud possessionis.*

46 Heineccius, Recitaciones, Lib. IV, Tit XV, par. IV.

47 Bello 1878. 214. '*Son interdictos retinendae, el uti possidetis y el utrubi. Dase el primero al poseedor de una finca que al tiempo de la listiscontestación la posee nec vi, nec clam, nec precario, contra el que turba esta posesión, para que desista, le indemnice y le preste fianza de non turbando.*'

So, Bello's Code, trying to return to Roman law, was really innovative including a damage compensation system in *actiones possessoriae*.

Article 198 of the New Japanese Civil Code is usually believed to be taken from paragraph 862 on the BGB.[48] Nevertheless, the wording of this last regulation does not seem compatible with the Japanese one. Even more, the BGB, in accordance with Classical Roman law, does not even contemplate the possibility of compensation: '*(1) Wird der Besitzer durch verbotene Eigenmacht im Besitz gestört, so kann er von dem Störer die Beseitigung der Störung verlangen. Sind weitere Störungen zu besorgen, so kann der Besitzer auf Unterlassung klagen. (2) Der Anspruch ist ausgeschlossen, wenn der Besitzer dem Störer oder dessen Rechtsvorgänger gegenüber fehlerhaft besitzt und der Besitz in dem letzten Jahr vor der Störung erlangt worden ist.*'

We believe that the special nature of articles 921 of the Chilean Civil Code and 198 of the Japanese Code allows us to assert an influence of Andrés Bello's Code upon the New Japanese Code of 1898. This finds confirmation in Hozumi's statement where he mentions taking some dispositions from some South American codes – which would probably be Bello's Code. It also explains the plural used by him, 'codes', for Bello's Code was valid in several countries. It is possible that, once this first influence is detected, others might appear, but that is something to be left to future investigations.

Conclusions

We would like to point out that our main conclusion on the problem is that the scope and application of an historical comparative perspective to understand legal studies is far from being done. Unexpected relations between codified legal systems are still to be explored and the somehow obscure relation between the Japanese Civil Code and the Chilean one is just one example to how different legal systems happen to relate if taken in an historical context.

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48 As, for instance, Domingo does in his translation of the New Japanese Civil Code. See art. 198 in Domingo 2000.

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