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ANDRÉS BELLO AND THE CHILEAN CIVIL CODE:  
CORNERSTONES OF THE PRIVATE LAW SYSTEM  
OF LATIN AMERICA

1. INTRODUCTION

Latin American independence is a direct outcome of the French Revolution. This statement is to be understood in two ways, literally, and as a link in a cause-and-effect chain. The first country in Latin America to become independent was Haiti<sup>59</sup>. The proclamation that all men “are born and remain free and equal in rights” in the Declaration of the Rights of Man and of the Citizen had a dramatic, effect, albeit somewhat belatedly, on the mainly black slave population of Latin America, eventually leading to the outbreak of revolution in Haiti, which was the second country in America (after the United States) to declare independence<sup>60</sup>. Haiti not only served as the model and intellectual

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<sup>59</sup> L. BETHELL, *Historia de América Latina. Tomo V. La independencia.*, Barcelona 1991, p. 38-40.

<sup>60</sup> L. BETHELL, *Historia de América Latina. Tomo V...*, p. 124-154; R. BLACKBURN, *Haiti, Slavery and the Age of the Democratic Revolution*, «The William and Mary Quarterly» 63.4/2006, p. 646-648.

inspiration for Latin American republicans, but was also their refuge, the place where they regained their strength and exchanged ideas<sup>61</sup>.

The second way in which the French Revolution influenced the independence movement in Latin America was indirect and occurred in Napoleonic times, especially in outcome of Napoleon's operations in Spain. Following the Abdications of Bayonne<sup>62</sup>, *juntas* (local government authorities) and *cabildos abiertos* (open public assemblies) were established in most of the former colonies and continued to govern on behalf of Ferdinand VII, the legitimate monarch<sup>63</sup>. Meanwhile, the Cortes of Cádiz obtained a declaration from the heir to the throne to adopt a set of revolutionary postulates to liberalise public affairs and thereby meet social expectations<sup>64</sup>. However, Ferdinand's promises turned out to be ephemeral; he treated them only as an instrument to win support for his efforts to depose Joseph Bonaparte and be restored to the throne<sup>65</sup>, thereafter returning to a despotic form of rule<sup>66</sup>.

In 1814, Spanish forces loyal to the crown restored the monarch's control of the government of all the former colonies except Argentina and Paraguay<sup>67</sup>. Nonetheless, the idea of independence remained strong, and the brutal manner in which attempts to achieve it were crushed only strengthened the movement. The first country to win its independence was the former Captaincy General of Chile. On 1 January 1818, General Bernardo O'Higgins declared the independence of the Republic

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<sup>61</sup> Eg. Simón Bolívar and Xavier Mina, see: W.F. LEWIS, *Simón Bolívar and Xavier Mina: A Rendezvous in Haiti*, «Journal of Inter-American Studies» 11.3/1969, p.458-465; or Francisco de Miranda, see: P.P. HILL, *An Expedition to Liberate Venezuela Sails to New York 1806*, «Historian» 78.4/2016, p. 671-689.

<sup>62</sup> M. TUÑÓN DE LARA, J. VALDEÓN BARUQUE, A. DOMÍNGUEZ ORTIZ, *Historia Hiszpanii*, Kraków 2012, p. 388-390.

<sup>63</sup> F. CAMPOS HARRIET, *Historia constitucional de Chile*, Santiago 1969, p. 79-101.

<sup>64</sup> M. TUÑÓN DE LARA, J. VALDEÓN BARUQUE, A. DOMÍNGUEZ ORTIZ, *op.cit.*, p. 394-396.

<sup>65</sup> *Ibidem*, p. 391-392.

<sup>66</sup> *Ibidem*, p. 398.

<sup>67</sup> L. BETHELL, *Historia de América Latina. Tomo V...*, p. 93-101.

of Chile<sup>68</sup>. By 1828, only four colonies, French Guyana, the British colonies of Grenada and Belize, and the Dutch colony of Suriname, were still left on the continent of South America.

The French Revolution exerted a strong intellectual influence on distinguished liberators such as Simón Bolívar<sup>69</sup>, Manuela Sáenz<sup>70</sup>, José de San Martín<sup>71</sup>, Francisco de Miranda<sup>72</sup>, Policarpa Salavarietta<sup>73</sup>, and Bernardo O'Higgins<sup>74</sup>, individuals who played a key part in the independence movement. These personalities enjoyed popular support in their efforts for the independence of their countries, but came up against heavy opposition in their work to accomplish social reform, chiefly from the upper echelons of Creole society, which had risen to power, taking over from the Spanish aristocracy. Most of the liberators died either in exile (that was the fate of O'Higgins<sup>75</sup>, San Martín, and Miranda), or at the hands of their countrymen (that happened to Antonio José de Sucre, whereas Bolívar survived several assassination attempts)<sup>76</sup>.

The reason why the people abandoned the liberators seems to be because they failed to grasp all the realities of the social situation. Once they lost support, they became victims of political intrigues. The misunderstandings appear to have been the outcome of their sincere but overly idealistic attachment to liberal ideas and failure to appreciate

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<sup>68</sup> F. CAMPOS HARRIET, *op.cit.*, p. 99-122; O. SILVA GALDAMES, *Breve Historia Contemporánea de Chile*, México 1995, p. 126-147.

<sup>69</sup> For more, see D. BUSHNELL, *Simón Bolívar: hombre de Caracas, proyecto de América*, Buenos Aires 2002.

<sup>70</sup> For more, see P.S. MURRAY, *For Glory and Bolívar: The Remarkable Life of Manuela Saenz*, Austin 2008.

<sup>71</sup> For more, see M.H. HARRISON, *Captain of the Andes: The life of Jose de San Martin, Liberator of Argentina, Chile and Peru*, New York 2009.

<sup>72</sup> L. BETHELL, *Historia de América Latina. Tomo V...*, p. 209-211.

<sup>73</sup> For more, see J.D. HENDERSON, *Ten Notable Women of Latin America*, Chicago 1978.

<sup>74</sup> L. BETHELL, *Historia de América Latina. Tomo V...*, p. 101-104.

<sup>75</sup> O. SILVA GALDAMES, *op.cit.*, p. 147.

<sup>76</sup> For more, see R. HARVEY, *Liberators: Latin America's Struggle for Independence*, New York, 2002.

the needs and condition of their feudal societies nurtured and shaped by the colonial system.

That was why persons like Andrés Bello, the main character in this paper, who tried to adapt their ideas to the social identity of their people, not the people to their ideas, did most to consolidate power in the newly founded countries and help their people to make progress.

The aim of this article is to define the role played by Andrés Bello and his opus magnum, the Civil Code of the Republic of Chile, in the creation of the legal tradition of Latin America, and to present the diverse positions on legal doctrine concerning the impact of the Chilean Civil Code on the rest of Latin America. In addition, a second aim is to present the conclusion to the research hypothesis I give in the article's title, that the Chilean Civil Code served as the foundation for the Latin American legal order of private law and the key to its proper understanding and study. Little or no research on this issue has been published in Poland so far<sup>77</sup>.

To achieve these aims, I define Bello's concept of the law as it is reflected in the Chilean Civil Code (Chapter IV). I examine his publications and the research conducted later on Bello and his ideas. I go on to determine the geographical impact of Bello's ideas and the Chilean Civil Code, and to do this I have carried out an extensive review of the work published on the subject in Spanish, especially by Chilean authors, and I present an outline of this in Chapters V and VI. I supplement my main observations in Chapter II with a discussion

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<sup>77</sup> The only Polish study that takes a comprehensive look at the Chilean Civil Code, its content and its domestic implications is my article, F. OLSZÓWKA, *Chilijski kodeks cywilny i przyczyna jego sukcesu*, «Czasopismo Prawno-Historyczne», 74.1/2022, p. 101-125. It is also referred to in various contexts by G. Blicharz, *Hiszpania i Ameryka Łacińska a ograniczenia postępu kodyfikacji*, [in:] *Dekodyfikacja prawa prywatnego w europejskiej tradycji prawnej*, ed. F. LONGCHAMPS DE BERIER, Kraków 2019, s. 117-145; J. RUDNICKI, *Prawo cywilne „własne” i „obce” sto lat temu i współcześnie* [in:] *Między tradycją a nowoczesnością. Prawo polskie w 100-lecie odzyskania niepodległości*, ed. Ł. PISARCZYK, Warszawa 2019, p. 265-279; J.F. STAGL, *Zmyślone a rzeczywiste kodyfikacje. O konkurencji komentarza i podręcznika w cywilistyce latynoamerykańskiej*, «Studia Iuridica» 87/2021, p. 446-480; P. LIRA URQUIETA, *Introducción y notas* [in:] *12 Obras Completas de Andrés Bello*, ed. A. MIJARES, Caracas 1954, p. XIV.

of the legal and historical context in which the Chilean Civil Code was drafted, and in Chapter III I give a brief biography of Andrés Bello, which serves as a turnkey to understanding the way he viewed the law and its codification.

## 2. THE LEGAL BACKGROUND TO THE LATIN AMERICAN CODIFICATIONS

.OI shall start by taking a closer look at Latin American society. The social fabric of the Spanish colonies was structured along feudal and class lines. The fundamental criterion determining a person's social class was the ethnic background he or she came from. On the eve of emergence of the independence movement, the top echelons of the social hierarchy were reserved for the Spaniards who had come to Latin America from Spain and had the exclusive right to seek appointment to the royal offices. Below them in the social hierarchy were the Creoles, ethnically „pure” descendants of Spanish settlers, whose social status was determined solely by the fact that they were born in the colonies. The Creole group was highly differentiated in financial terms; they were fully enfranchised economically, but there were limits to their political potential. The indigenous inhabitants of Latin America and black slaves were at the bottom of the social ladder. The Church played a substantial part in social affairs, both on account of the fact that the Spanish and especially the Creole community were Catholics, as well as of its missionary work among the natives. Although we now know that the Black Legend, the unfavourable image attributed to Spain and Spaniards, is largely exaggerated, nonetheless it is true that the universalistic monarchy of Spain was lagging behind with social transformation, which due to geographical distance and a rising rate of Hispanicisation reached its overseas dominions in Latin America even later. So it would perhaps be more accurate to say that this continent had an ossified social structure<sup>78</sup>.

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<sup>78</sup> L. BETHELL, *Historia de América Latina. Tomo IV. América Latina colonial: población, sociedad y cultura*, Barcelona 1991.

The situation as regards the law was analogous. The law applicable throughout the entire universalistic Spanish Empire was *derecho patrio*, or *derecho nacional*, “the law of the home country” or “national law” under the rule of the king of Spain<sup>79</sup>. Spanish law consisted first and foremost of the *Siete Partidas* (literally, “the Seven Parts”)<sup>80</sup>, along with the *Fuero Juzgo*<sup>81</sup> and the *Fuero Real*<sup>82</sup> as well as with over fifty thousand legislative acts,<sup>83</sup> In the Caribbean there was also a *derecho indiano* comprising the *Nueva Recopilación* drafted in 1567, alongside special laws like the *Ordenacoes Filipinas* created for the colonies centrally in Spain or by the colonial administrative authorities<sup>84</sup>. *Ius commune*, viz. Roman and canon law, made up the second pillar supporting the legal order of the West Indies<sup>85</sup>. *Ius commune* was practised in the colonies and pervaded their social structure both thanks to the teaching of law as well as through the activities of the Catholic Church, very often exerting a significant influence on the local customary law, which was also a salient factor in the legal order of the colonies.

*Derecho indiano* provisions were instituted without the due care and were treated as inferior, which resulted in legislation of a poor quality

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<sup>79</sup> B. BRAVO LIRA, *La difusión del Código Civil de Bello en los Países de Derecho Castellano y Portugués*, «Revista de Estudios Histórico -Jurídicos» 7/1982, p. 72-73.

<sup>80</sup> A. GUZMÁN BRITO, *El Código Civil de Chile y sus primeros intérpretes*, «Revista Chilena del Derecho» 19.1/1992, p. 84.

<sup>81</sup> R. SÁNCHEZ DOMINGO, *El Fuero de Verviesca versus Fuero 6*, p. 191-193.

<sup>82</sup> R. PRIETO BANCES, *La legislación del rey de Ovied o. Estudios sobre la monarquía asturiana*. Oviedo 1948, p. 175-221; P. LIRA URQUIETA, *op. cit.*, p. XIV; O. DEL MORAL, *El Código Civil de Bello en Panamá*, «Estudios Socio-Jurídicos» 8.1/2006, p. 171.

<sup>83</sup> R. BERNAD MAINAR, *Irradiación del Código Civil Chileno, especialmente en la codificación venezolana: un factor decisivo en la continuidad de la tradición jurídica romanista Real. Orígenes e innovaciones procesales*, «Cuadernos de Historia del Derecho» 3/199a en *América Latina*, «Revista Interamericana del Derecho Romano» 18/2007, p. 107.

<sup>84</sup> A. GUZMÁN BRITO, *El Código Civil de Chile en sus ciento cincuenta años y crónica de un congreso internacional de conmemoración celebrado en Santiago de Chile*, «Anuario de Derecho Civil» 59.3/2006, p. 1283.

<sup>85</sup> R. BERNAD MAINAR, *Irradiación...*, p. 100.

which was inconsistent, chaotic, very casuistic and full of defects. Attempts to clarify it on an ad hoc basis brought no improvement<sup>86</sup>.

As a consequence, Latin America saw the emergence of a symptomatic situation which Professor Stagl has dubbed „a flight to Rome”<sup>87</sup>. This time, however, the flight went across Castile, or more precisely through the *Siete Partidas*<sup>88</sup>, the legal code drafted in the late thirteenth century by Alfonso X, King of Castile<sup>89</sup>, which Andrés Bello would later call „the purest reception ever of Roman law”<sup>90</sup>. The contribution the *Siete Partidas* made to the legal order in the sixteenth and seventeenth centuries is reminiscent of the part played by Roman law as the *ratio scripta* of medieval Europe<sup>91</sup>.

One might think that the Kingdom of Spain responded fairly quickly to the want of a legal code by drafting the *Novísima Recopilación de las Leyes de España*, which was published in 1805<sup>92</sup>. However, this collection was outmoded from the very outset, well behind the Prussian *Landrecht*, not to mention the Austrian *ABGB* which was issued a few years later, or the French *Code Civil*<sup>93</sup>. The best grounds for such a devastating assessment are given in the words of its chief critic, Francisco Martínez Marina, who described the *Novísima* as „a huge mass raised up from the rubble and ancient ruins; a monstrous edifice composed of incongruous parts and unfathomable orders; a congestion

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<sup>86</sup> B. BRAVO LIRA, *La difusión...*, p. 74-77.

<sup>87</sup> J.F. STAGL, *A flight to Rome: Ernst Rable's intellectual itinerary*, «The Legal History Review» 79.3-4/2011, p. 533-552.

<sup>88</sup> B. BRAVO LIRA, *Vigencia de las Partidas en Chile*, «Revista de Estudios Histórico-Jurídicos» 10/1985, p. 43-105; M.C. MIROW, *Borrowing Private Law in Latin America: Andrés Bello's Use of the Code Napoleon in Drafting the Chilean Civil Code*, «Louisiana Law Review» 61.2/2001, p. 295.

<sup>89</sup> M.W. NICHOLS, *Las Siete Partidas*, «California Law Review» 20.3/1932, p. 260-285.

<sup>90</sup> A. BELLO, «*El Araucano*» December 6, 1839, cited in A. GUZMÁN BRITO, *Andrés Bello codificador*, II, Santiago 1982, p. 158.

<sup>91</sup> B. BRAVO LIRA, *La codificación en Chile. Dentro del Marco de la Codificación Europea e Hispanoamericana*, «Revista de Estudios Histórico-Jurídicos» 12/1987, p. 56-59.

<sup>92</sup> B. BRAVO LIRA, *La codificación...*, p. 63.

<sup>93</sup> B. BRAVO LIRA, *La difusión...*, p. 77-78.

of laws ancient and modern<sup>94</sup>.” Now the intellectual assets of the *Siete Partidas* were rediscovered; it was a code of law both serviceable and underappreciated at the same time. There was a rise in the popularity of the *Partidas*, which filled the vacuum left by the *derecho indiano* and made a lasting imprint on the culture of Latin America, including its legal culture. Moreover, the *Partidas* had a certain effect on the shaping of the law of the Southern States of the USA<sup>95</sup>.

The legal situation of the countries of Latin America did not change after they became independent; they continued to apply *derecho patrio*, or in practice the *Siete Partidas*<sup>96</sup>. This was true especially of private law, as the new countries prioritised constitutional and criminal law in their efforts to organise the state. Attempts were made to make up for the shortcomings of private law with ad hoc remedies such as special legislation or one-off verdicts handed down in the courts<sup>97</sup>.

The codification of a national civil law is a milestone marking progress in the consolidation of the power and authority of the state and has a substantial effect on its economic and social growth. This is what happened in the countries of Latin America, too, which looked to the French *Code civil* to codify their civil law<sup>98</sup>. The first, albeit incomplete codification of civil law instituted in the Americas was the Louisiana *Digeste de la loi civile* of 1808<sup>99</sup>. The aim was to establish a balance between the French tradition of civil law and the common law model required by the federal authorities of the United States, so it could have only a limited impact on the other states in the Union and other countries. In 1825, Haiti adopted the Napoleonic civil code in its pristine form<sup>100</sup>, and the Dominican Republic followed suit in 1845 with

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<sup>94</sup> F. MARTÍNEZ MARINA, *Ensayo histórico-crítico sobre la antigua legislación de los reinos de León y Castilla*, Madrid 1808, p. 399-400.

<sup>95</sup> M. STONE, *Desde las Siete Partidas a los códigos civiles norteamericanos*, «Actas Asociación Internacional de Hispanistas» 11/1992, p. 26-28.

<sup>96</sup> M.C. MIROW, *op.cit.*, p. 296.

<sup>97</sup> *Ibidem*, p. 296.

<sup>98</sup> B. BRAVO LIRA, *La difusión...*, p. 81-82.

<sup>99</sup> A. GUZMÁN BRITO, *La influencia del Código Civil francés en las codificaciones americanas*, «Temas del Derecho» 19.1-2/2000, p. 37-39.

<sup>100</sup> *Ibidem*, p. 39-41.



a modified version<sup>101</sup>. The next codification endeavour was the project in the southern part of Mexico<sup>102</sup>, the incomplete civil code drafted in 1827-1829 for the State of Oaxaca<sup>103</sup>, and its counterpart for the State of Zacatecas, which in fact never came into force<sup>104</sup>. The Código Civil Santa Cruz was instituted in Bolivia in the 1830s<sup>105</sup> and was in force also during the short-lived Peru- Bolivian Confederation<sup>106</sup>. In 1852 Peru adopted a civil code of its own<sup>107</sup>; while Costa Rica instituted its civil code in 1841<sup>108</sup>. These codes never attained to widespread acceptance and were far from perfect. The people inhabiting the respective countries found them strange and did not understand the sense behind the original institutions; nonetheless these endeavours addressed an urgent need for codification<sup>109</sup>. Moreover, they were ephemeral and frequently amended to suit shifting political requirements. In the 1850s, Andrés de Jesús María y José Bello López, a Venezuelan in the service of Chile, President of the University of Chile and a long-standing friend of Simón Bolívar, embarked on an attempt to create order out of the legal chaos.

### 3. A POTTED BIOGRAPHY OF ANDRÉS BELLO

Andrés Bello, one of Chile's national heroes, may be regarded a true American. Born in Caracas, Venezuela, and later serving as a diplomat in London for his home country and for Colombia, Bello was the tutor and friend of Simón Bolívar<sup>110</sup>. He attended Alexander von Humboldt

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<sup>101</sup> *Ibidem*, p. 49-52.

<sup>102</sup> B. BRAVO LIRA, *La codificación...*, p. 66.

<sup>103</sup> A. GUZMÁN BRITO, *La influencia...*, p. 41-43.

<sup>104</sup> B. BRAVO LIRA, *La difusión...*, p. 83.

<sup>105</sup> A. GUZMÁN BRITO, *La influencia...*, p. 43-47.

<sup>106</sup> *Ibidem*, p. 4,7.

<sup>107</sup> A. GUZMÁN BRITO, *El Tradicionalismo del Código Civil Peruano 1852*, «Revista de Estudios Histórico-Jurídicos» 23/2001, p. 551.

<sup>108</sup> A. GUZMÁN BRITO, *La influencia...*, p. 48-49.

<sup>109</sup> *Ibidem*, p. 59-60.

<sup>110</sup> M.C. MIROW, *op.cit.*, p. 297.

on his American expeditions<sup>111</sup>. Finally, when he was in his forties, he returned to America and settled in its southernmost tip in the Republic of Chile<sup>112</sup>. Bello's Pan-Americanism constituted an inherent feature of his character and worldview<sup>113</sup>, as his biography shows<sup>114</sup>.

The life of Andrés Bello shows that he treated Latin America as an integral entity sharing a similar or perhaps the same culture and identity. He is generally remembered outside the milieu of the legal profession for his book on Spanish grammar for Americans, *Gramática de la lengua castellana destinada al uso de los americanos*. His aim in writing this book was to present the basic facts on Spanish to its American speakers and clear it of the unwanted linguistic trammels imported from mainland Spain, thereby shaping it into a universal tongue spoken by all the inhabitants of Spanish America<sup>115</sup> and contributing to the growth of a Pan-American identity<sup>116</sup>.

His codification of civil law was to be the next stage in Pan-American integration<sup>117</sup>, but unfortunately with the passage of time the project started to lose more and more of its supporters, as the diverse countries became entrenched in their particularisms. Bello realised that it would not be easy to put his lofty ideas into practice, so he decided to restrict his plan to drawing up a civil code for Chile. As an adherent of (at least some) of the ideas put forward by the German jurist Friedrich Carl von Savigny, Bello invoked Roman law, which he set up as the paradigm of legal technicality<sup>118</sup>, regarding it as the best and only necessary

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<sup>111</sup> L. BOCAZ, J. RAMÍREZ, *Andrés Bello: una biografía cultural*, Bogotá 2000, p. 99-103.

<sup>112</sup> P. LIRA URQUIETA, *op.cit.*, p. XVI.

<sup>113</sup> R. BERNAD MAINAR, *Irradiación...*, p. 122-123.

<sup>114</sup> More about this curriculum, see e.g., A. GUZMAN BRITO, *Andrés Bello codificador. Historia de la fijación y codificación del derecho civil en Chile*, Santiago 1982, (Volume 1 & 2) and I. JAKSIĆ, *Andrés Bello: la pasión por el orden*, Santiago 2001.

<sup>115</sup> I. JAKSIĆ, *op.cit.*, p. 266-276.

<sup>116</sup> Bello wrote another book, *Indicaciones sobre la conveniencia de simplificar i uniformar la ortografía en América*, on the same subject.

<sup>117</sup> M. URBANO SALERNO, *Consideraciones históricas sobre la unidad del derecho común en Latinoamérica*, «Anales Universidad de Chile» 20/1989, p. 835-845.

<sup>118</sup> F.C. VON SAVIGNY, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, Heidelberg 1814, *passim*.

commentary to the code he devised<sup>119</sup>. He believed that a nation's legal system shared the same fate as its nation, and that was why it should express the national spirit.

#### 4. THE INTELLECTUAL FOUNDATIONS OF BELLO'S CODE

Quite naturally, Latin America drew on the French *Code civil* as its chief source of inspiration for the codification of its civil law. Remarkably, the Latin American civil codes turned out to be far more original than its counterparts drawn up in the same period on the Iberian Peninsula. *Florencio García Goyena* and *António Luís de Seabra* drafted a civil code for Spain and Portugal respectively, but their products can hardly be distinguished from their French model, since at the time the social and political affairs of their countries were subject to strong French influence. At this time, the former overseas colonies of Spain and Portugal were in the midst of a specific conservative backlash following a period of intense influence of the Enlightenment and the French Revolution. This reactionary recoil affected their legal theory and scholarship, materialising in the specific blend we see in the Chilean code, of modern Napoleonic legal arrangements with traditional practices deeply entrenched in the Chilean (and hence Latin American) identity. The same agenda was applied in the Brazilian code drawn up by Augusto Teixeira de Freitas, who followed the ideas adopted by Bello<sup>120</sup>.

Bello applied his skills to make a well-considered choice of sources and put the selected items together, explain their meaning and arrange them in an ordered system<sup>121</sup>. He steered clear of the adversities due to the conflict between the proponents of the French spirit and the diehard conservatives, and succeeded in drawing up a code that

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<sup>119</sup> J.F. STAGL, *Zmysłone...*, passim.

<sup>120</sup> A. GUZMÁN BRITO, *Codificación y consolidación: una comparación entre el pensamiento de A.Bello y el de A.Teixeira de Freitas*, «Revista de Estudios Histórico-Jurídicos» 10/1985, p. 279.

<sup>121</sup> M.C. MIROW, *op.cit.*, p. 292.

reconciled the progressive with the traditional and managed to please both parties in an atmosphere of national concord<sup>122</sup>.

Although Bello's code might at first glance seem conservative, especially in view of its later evolution, for instance in its definition of marriage, which was taken from canon law, nonetheless it fitted in well with the needs of Chilean society. Many of its points concerning personal and family law came from canon law and medieval institutions derived from the *Siete Partidas*, the main source determining the ultimate shape of Bello's code<sup>123</sup>. He fashioned his law on inheritance in a similar, albeit somewhat more liberal way. *Actio in rem* is definitely less conservative in his code, while his law of obligations is practically the quintessence of the contemporary legacy of its counterpart in the *Code civil*<sup>124</sup>. Thus, Bello's Code is a compromise between liberal and conservative values.

The Code's intellectual foundations are considerably more complex than a random mix of diverse institutions drawn from the *derecho comun* and the *Code civil*. First of all, they are not arbitrary. Bello's notes show that every decision he made for provisions to be put into the Code was preceded by a careful compilation and review of the regulations previously in force<sup>125</sup>. Secondly, hid adaptation of provisions from the Napoleonic Code was by no means a straightforward matter. Bello wanted the regulations he took from it to suit the social mentality of the people of Chile, and to achieve this, he looked at how other national legislators had availed themselves of the French legislation. Hence, most of the French institutions he implanted in the Chilean legal substrate tended to be ones which had already been transferred to other codes, such as the ones operating in Louisiana, Peru, Bavaria, Prussia, Sicily, the Swiss Cantons of Vaud and Ticino, and well as the Dutch, Sardinian, and Spanish draft codes<sup>126</sup>. Thirdly, he consulted the opinions of a wide spectrum of distinguished specialists on the doctrine of jurisprudence, such as Bartolus de Saxoferrato, Johann Gottlieb Heineccius, as well

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<sup>122</sup> *Ibidem*, p. 292.

<sup>123</sup> A. GUZMÁN BRITO, *El Código Civil de Chile en sus ciento...*, p. 1290.

<sup>124</sup> R. BERNAD MAINAR, *Irradiación...*, p. 102-103.

<sup>125</sup> A. GUZMÁN BRITO, *Codificación y consolidación...*, p. 271-275.

<sup>126</sup> A. GUZMÁN BRITO, *El Código Civil de Chile en sus ciento...*, p. 1291.

as French commentators such as Pothier, Delvincourt, and Portalis<sup>127</sup>. But above all, his preference was for the work of Castilian and Spanish jurists, culturally closer to the people of Chile, for whom he was drawing up the Code. He resorted to the Spanish school on the law of nature<sup>128</sup>, especially the concepts of Francisco de Vitoria and Francisco Suárez<sup>129</sup>, as well as of Juan de Henia Volano and Joaquín Escriche<sup>130</sup>. Here, again, his aim was to combine a traditional form with a liberal and modern content<sup>131</sup>.

The Code was published on 14 December 1855 and came in force on 1 January 1857<sup>132</sup>. Moreover, it is still in force, which makes it third in the line of the earliest civil codes still in force (after the French *Code civil* and the Austrian *ABGB*)<sup>133</sup>.

## 5. BELLO'S CODE DISSEMINATED THROUGHOUT LATIN AMERICA

Not surprisingly, Bello's Code, which catered so well for the needs of Chilean law, could be adopted quite easily in other Latin American countries, where the basic requisites were much the same as those of Chile. After all, the arrangements Bello recommended addressed the common cultural substrate of Latin America<sup>134</sup>.

Its provisions were adopted to a certain extent in all of the Spanish- and Portuguese-speaking countries of Latin America, not the only region of the world on which Bello's Code left its mark. The Chilean Ministry of Foreign Affairs made a significant contribution to this by

<sup>127</sup> M.C. MIROW, *op.cit.*, p. 311.

<sup>128</sup> A. GUZMÁN BRITO, *Andrés Bello codificador*, vol. 1..., p. 255.

<sup>129</sup> A. GUZMÁN BRITO, *Andrés Bello codificador*, vol. 2..., p. 104.

<sup>130</sup> A. GUZMÁN BRITO, *El Código Civil de Chile en sus ciento...*, p. 1290-1291.

<sup>131</sup> *Ibidem*, p. 1291.

<sup>132</sup> C. AMUNATEGUI PERELLÓ, *Código Civil de Chile. Edición anotada, concordada y con fuentes*, Santiago 2020.

<sup>133</sup> A. GUZMÁN BRITO, *El Código Civil de Chile en sus ciento...*, p. 1283. It would be the fifth earliest if we took the Haitian (1825) and Belgian (1830) full receptions of the *Code civil* into account.

<sup>134</sup> M.C. MIROW, *op.cit.*, p. 325.

sending copies of the Code to its counterparts in the other countries of Latin America<sup>135</sup>. Today it may seem astonishing that in the early nineteenth century Chile did not have much of a standing in its region but it was gradually improving its status, hence the aim of this move was to build up its prestige. The impact Bello's Code made may be observed in all the countries of the *Mundo castellano*, the Spanish term for all the regions historically under the influence of Spain and Portugal, where for centuries the law had been based on the same principles, the *Siete Partidas* version of Roman law. One could venture a claim that the role of the Chilean Code in the Latin American codifications was similar to that played by the French *Code civil* in Europe.

On the other hand, one may also wonder why it was that the principal civil code drawn up in this part of the world was created in the Republic of Chile. Quite simply, because at this time Chile was the most stable country in Latin America. Whereas neighbouring states were in the midst of turmoil due to protracted civil wars<sup>136</sup>, since 1831 Chile had enjoyed a spell of relative peace<sup>137</sup> firmly ruled by Diego Portales and his political heirs<sup>138</sup>, especially after the institution of a stable constitution<sup>139</sup> and an improvement in the country's economy thanks to a boom in its wheat production in the 1830s and 40s<sup>140</sup>. Political stability and a reasonable rate of social progress are the right conditions required not only for a legal code to be drawn up, but also for it to put down firm roots and operate efficiently. That was why Bello would not have been able to draft a civil code for his strife-ridden home country, but instead succeeded in doing so for a country at the other end of the continent, from where the fruits of his labour could be disseminated and serve as a salient factor bringing stability to the region.

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<sup>135</sup> A. GUZMÁN BRITO, *El Código Civil de Chile en sus ciento...*, p. 1293.

<sup>136</sup> See more in: R. DE LA PEDRAJA, *Wars of Latin America 1899-1941*, México 2006.

<sup>137</sup> R. BERNAD MAINAR, *Irradiación...*, p. 93.

<sup>138</sup> B. BRAVO LIRA, *La codificación...*, p. 73-77; R. BERNAD MAINAR, *Irradiación...*, p. 104-105.

<sup>139</sup> F. CAMPOS HARRIET, *op.cit.*, p. 155-183, 331-342.

<sup>140</sup> O. SILVA GALDAMES, *op.cit.*, p. 187-188.

Naturally enough, the Chilean Code was adapted at a gradual rate which varied from country to country. Sometimes it was transferred en bloc or to a large extent; at other times it served solely as an intellectual inspiration for other national codifiers such as Augusto Teixeira de Freitas or Dalmacio Vélez Sarsfield<sup>141</sup>. At any rate, the model of a code of law drawn up by one person on his own, which Bello admired so much and which he had taken from the ideas put forward by Friedrich Carl von Savigny and Jeremy Bentham, spread throughout South America thanks to the effects of Bello's work. It would be pointless to try to give a description of the impact the Chilean Code had on other countries but in compliance with the methodology compiled by Professor Bernardino Bravo Lira<sup>142</sup>.

First of all, the Code was adopted in its entirety by Colombia, Ecuador, El Salvador<sup>143</sup>, Panama<sup>144</sup>, Honduras<sup>145</sup>, Nicaragua<sup>146</sup>, and Venezuela<sup>147</sup>. It is still in force in four of them (El Salvador, Ecuador, Colombia, and Honduras), though over the decades each of the respective national codes embarked on a life of its own and in the course of their evolution started to show distinctive differences<sup>148</sup>.

Secondly, some countries did not adopt the whole of the Chilean Code, nonetheless it made a major contribution to their respective codes. The best examples of this phenomenon are provided by the Argentinian code and *Esboco de Código Civil para Brasil*, its Brazilian counterpart<sup>149</sup>. Both are rooted in the Chilean Code, as evidenced by the fact that their respective founders, Vélez Sarsfield and Teixeira de Freitas, did not hesitate to express their admiration for Andrés Bello<sup>150</sup>. Chilean concepts

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<sup>141</sup> R. BERNAD MAINAR, *Irradiación...*, p. 124.

<sup>142</sup> B. BRAVO LIRA, *La difusión...*, p. 93-94.

<sup>143</sup> B. BRAVO LIRA, *La codificación...*, p.70.

<sup>144</sup> O. DEL MOREL, *op.cit.*, p. 171.

<sup>145</sup> M. VÁSQUEZ, *Impugnación al Código Civil de 1898*, Tegucigalpa 1915, p. 35.

<sup>146</sup> I. ESCOBAR FORNOS, *El Código Civil de Bello en Nicaragua*, [in:] Kelsen, Marshall, *Bello Textos Seleccionados*, Managua 2009, p. 104.

<sup>147</sup> B. BRAVO LIRA, *La difusión...*, p. 93.

<sup>148</sup> A. GUZMÁN BRITO, *El Código Civil de Chile en sus ciento...*, p. 1291.

<sup>149</sup> B. BRAVO LIRA, *La difusión...*, p. 94.

<sup>150</sup> A. GUZMÁN BRITO, *Codificación y consolidación...*, p. 90.

of the law reached Paraguay via Argentina<sup>151</sup>. A Chilean influence may also be observed in the civil code of Uruguay<sup>152</sup>, and to a somewhat lesser extent in Nicaragua and in the Panamanian code of 1917<sup>153</sup>. The codes of these two groups of countries offer paramount proof of the diffusion of Chilean law<sup>154</sup>.

There is also a third group which is much broader but more diffuse. The common factor shared by the members of this group is the impact which the Chilean code made on the legislators listed in it but which has not been fully examined yet. The Chilean Code is regarded as one of the sources influencing them to a greater or lesser extent, often at an intensity fluctuating over the years. One example is the Portuguese code of 1867<sup>155</sup>, which was subsequently introduced in Angola, Mozambique, Guinea-Bissau, Cape Verde, St. Thomas and Prince, Goa, Macau, and East Timor<sup>156</sup>. Other instances are the 1871 and 1884 codes of Mexico<sup>157</sup>, the 1873 and 1916 codes of Venezuela<sup>158</sup>, the 1877 code of Guatemala<sup>159</sup>, the 1888 code of Costa Rica<sup>160</sup>, and the 1889 Spanish civil code, which had earlier served as a source for Chile but now took in a remarkably reflexive way from its erstwhile derivative. This Spanish code was also used in Cuba, Puerto Rico<sup>161</sup>, and the Philippines. The Chilean Code was

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<sup>151</sup> R. BERNAD MAINAR, *Irradiación...*, p. 134.

<sup>152</sup> T. NARVAJA, *Fuentes y notas y concordancias del Código Civil de la República Oriental del Uruguay, escritas por el autor del mismo código, extraídas directamente de sus originales y publicadas por el Dr. Ricarado Narvaia*, Montevideo 1910.

<sup>153</sup> O. DEL MOREL, *op.cit.*, p. 173-179.

<sup>154</sup> A. GUZMÁN BRITO, *El Código Civil de Chile en sus ciento...*, p. 1291.

<sup>155</sup> L. DA CUNHA GONCALVES, *Tratado de Direito Civil em comentario ao Código Civil Portuguez*, XV, Coimbra 1929-1944, p. 128; C. PETIT, *España y el Código civil portugués*, «Análisis Crítico del Discurso» 66/2013, p. 529-586.

<sup>156</sup> B. BRAVO LIRA, *La difusión...*, p. 103.

<sup>157</sup> A. GUZMÁN BRITO, *El Código Civil de Chile y sus primeros...*, p. 85.

<sup>158</sup> R. BERNAD MAINAR, *Manual de historia del Derecho*, Caracas 2013, p. 316-325.

<sup>159</sup> R. BERNAD MAINAR, *Irradiación...*, p. 136.

<sup>160</sup> L.H. BEECHE, F. FOURNIER JIMÉNEZ, *Estudio preliminar al Código civil de Costa Rica*, Madrid 1962, p. 21.

<sup>161</sup> L.F.P. LEIVA FERNÁNDEZ, *La Revisión del Código Civil en Puerto Rico*, «Revista del Derecho Puertorriqueño» 42/2003, p. 4.



also a source for the Brazilian code of 1917<sup>162</sup>. The latest studies show that the Chilean Code was one of the sources for the Japanese code drafted at the turn of the twentieth century<sup>163</sup>.

## 6. SELECTED EXAMPLES OF THE RECEPTION OF CHILEAN LAW

### a. Colombia

In the mid-nineteenth century, Colombia was challenged by serious problems with the consolidation of its power and authority as a state, particularly as regards the emergence of powerful foci of influence centred on local strongmen known in Latin America as *caudillos*. As a state, Colombia operated as an overly loose association of politically miscellaneous entities, and the overriding tendency was to relax rather than to strengthen the ties linking them. The general lawlessness, particularly the chaotic condition of the law and the inability of the State to enforce the rule of law only intensified the downward trend.

The first Colombian state to adopt the Chilean Civil Code was Santander (1858), with Cundinamarca, Cauca, and Panama following suit. For this reason, the authorities of the Republic of Colombia appointed a delegation to ask Andrés Bello for permission to adopt his Code and help them with the necessary amendments<sup>164</sup>. The leader of this delegation was Bello's close friend Manuel Ancízar<sup>165</sup>. As of 1860, the provisions of the Chilean Code were successively adopted as Colombian law, making one of Bello's dreams come true. He had always wanted his Code to act as an agency of unification, and now it was joining up the diverse states of Colombia<sup>166</sup> and became one of the paramount forces creating a uniform legal system in that country

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<sup>162</sup> B. BRAVO LIRA, *La difusión...*, p. 91-92, 94.

<sup>163</sup> C.F. AMUNÁTEGUI PERELLÓ, *Andrés Bello y el Código Civil Japonés* «Revista Chilena del Derecho» 39.2/2012, p. 313.

<sup>164</sup> F. HINESTROSA, *El Código Civil de Bello en Colombia*, «Revista de Derecho Privado» 9/2005, p. 7-8.

<sup>165</sup> B. BRAVO LIRA, *La difusión...*, p. 94.

<sup>166</sup> *Ibidem*, p. 8-9.

and contributing to its eventual unification. The Chilean Civil Code became law throughout the Confederation in 1873 and despite the fact that in 1887 it was superseded by a new national civil code which is still in force in Colombia<sup>167</sup>, the far-reaching diffusion of Chilean law may still be observed in the law of Colombia. The same may be said of the Chilean doctrine, which is still exerting a strong influence on Colombia's academic discourse. Nowadays Colombia's civil code is living a life of its own, but it is still based on the foundations Andrés Bello laid in 1855, especially his concepts and axiology<sup>168</sup>. Colombian civil law may be regarded as stemming from the same roots as its counterparts in Chile and the other countries influenced by Chilean law<sup>169</sup>.

b. Brazil

The first attempt to draw up a civil code for Brazil was made by Augusto Teixeira de Freitas, who was strongly influenced intellectually by Bello and his Code<sup>170</sup>, which he referred to as „a splendid achievement<sup>171</sup>.” Not surprisingly, its impact on de Freitas' work is patent<sup>172</sup>. The Brazilian code was elaborated in two stages, which started in 1857 and followed Bello's methodology, beginning with the collection of all the existing provisions as *Consolidação das leis civis*, which came in force in 1858 and led up to the completion of the full code, published in 1862 as *Esboço de Código Civil para o Brasil*. Although de Freitas' code never became law throughout Brazil, nonetheless it laid the foundation for the next, this time full code, successfully implemented in 1917, which may therefore be said to owe much to the civil code elaborated by Andrés Bello<sup>173</sup>.

c. Argentina

As in Brazil and Colombia, so too in Argentina the principal factor which prompted the implementation of the Chilean Civil Code in that country

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<sup>167</sup> *Ibidem*, p. 14.

<sup>168</sup> *Ibidem*, p. 27.

<sup>169</sup> See: J.F. STAGL, *Zmysłone...*, p. 456.

<sup>170</sup> B. BRAVO LIRA, *La difusión...*, p. 101.

<sup>171</sup> *Ibidem*, p. 102.

<sup>172</sup> A. GUZMÁN BRITO, *Codificación y consolidación...*, p. 275-278.

<sup>173</sup> *Ibidem*, p. 278.

came from the personal inspiration of Andrés Bello and his work exerted on the Argentinian codifier, Dalmacio Vélez Sarsfield. In his official introduction to the first draft he sent to Argentina's Ministry of Justice, Vélez Sarsfield emphasised that he had been inspired by the Chilean Civil Code, which was „far superior to the European codes<sup>174</sup>.” Yet he was also aware of the cultural differences between Argentina and Chile and also of the effects of the substantial communities of immigrants from Europe which had settled in Argentina as well as of the Portuguese and Brazilian cultural impact on the north of the country, so he also took de Freitas' *Esboço* into account as a salient source for his compilation of a code for Argentina<sup>175</sup>. Nonetheless, the surviving notes he made for his compilation show over 250 direct references to the Chilean model<sup>176</sup>. From Argentina, Chile's civil law took a slightly roundabout way to reach Paraguay.

d. Japan

One of the latest studies on the Chilean Civil Code has shown that it served as a source of inspiration for the makers of the civil code of Japan<sup>177</sup>.

Extant records of the work to compile the Japanese code indicate that the codifiers also turned to the „Codes of the Republics of South America<sup>178</sup>.” On the basis of this quotation, we may assume that by virtue of its international resonance, the Chilean Civil Code must have been one of the codifications the Japanese lawyers consulted.

Direct proof for such a surmise comes in Art. 198 of the Japanese code<sup>179</sup>, which, as Carlos Amunátegui Perelló shows, distinctly correlates

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<sup>174</sup> D. VÉLEZ SARSFIELD, *Oficio de remisión del primer libro del Código Civil al Ministro de Justicia, Culto e Instrucción Pública* [in:] *Proyecto de Código Civil para la República Argentina*, lib. I, Buenos Aires 1865, p. 139-140.

<sup>175</sup> *Ibidem*, p. 139-140.

<sup>176</sup> B. BRAVO LIRA, *La difusión...*, p. 103.

<sup>177</sup> C.F. AMUNÁTEGUI PERELLÓ, *Andrés Bello...*, *passim*.

<sup>178</sup> N. HOZUMI, *The New Japanese Civil code as a material for study of comparative jurisprudence*, Tokyo 1904, p. 11.

<sup>179</sup> *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,*

with Art. 921 of the Chilean Civil Code<sup>180</sup>. Both provisions concern damages in the context of protection of property. This is not a typical regulation and it does not occur in European codes. In Roman law, the protection available on the grounds of an interdict did not prescribe the possibility of claims for compensation or damages. The reason for the similarity, the addition of an indemnity clause to the provision for the protection of property, was an innovation Bello introduced in his civil code, thereby marking its entrance into the history of civil codes. In fact, his innovation was the outcome of an erroneous opinion disseminated in the eighteenth century by Heineccius<sup>181</sup>, whom Bello translated, and perhaps regarded as his intellectual mentor<sup>182</sup>. Bello no doubt wanted to return to a pristine reading of Roman law but inadvertently made an interpolation which was later copied in the Japanese code. Hence, if we encounter a civil code with an indemnity accompanying a proprietary complain, we may safely assume it has come down to us from the Chilean Code<sup>183</sup>.

## 7. CONCLUSION

As I have shown, the Chilean Civil Code, the first full codification of its kind in Latin America which turned out to work so well, started to attract the attention of legal experts as soon as it was published in 1855. Its success may be attributed to a large extent to the fact that it offered a combination of items which were liberal and state-of-the-art for their times, chiefly drawn from the French *Code civil*, coupled with a traditional approach to many aspects of social affairs deeply rooted in the medieval Spanish reception of Roman law, especially as reflected in the *Siete Partidas*.

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por. L. LONHOLM, *The Civil Code of Japan Translated*, Tokyo 1898, p. 321. Online at The Civil Code of Japan (core.ac.uk) (accessed 16 March 2024).

<sup>180</sup> C. AMUNATEGUI PERELLÓ, *Andrés Bello...*, p. 319.

<sup>181</sup> J. HEINECCIUS, *Elementa Iuris Civilis*, Gießen 1727, lib. IV, Tit. XV, par. IV.

<sup>182</sup> A. GUZMÁN BRITO, *Andrés Bello...*, vol. II, p. 109-110.

<sup>183</sup> C.F. AMUNATEGUI PERELLÓ, *El Código Civil...*, p. 319-321.

Naturally enough, the Chilean Civil Code achieved the peak of its popularity in Latin America, where in practice all the national legal systems drew on the work accomplished by Andrés Bello. The far-reaching social similarities between the peoples inhabiting the newly founded countries and the problems they experienced helped to make the application of the same principles for a code of civil law an operative prospect throughout the continent. Bello's Code, drawn up in a Pan-American spirit, efficiently addressed the needs of many nations.

Furthermore, the Chilean codification of private law offered a convenient model for the reception of Roman law and a civil code for countries at a much lower stage of social advancement than contemporary France, Prussia, or Austria. Transposing the civil codes used in these European countries to Latin America would not have been a viable solution, despite the obvious advantages of the legal arrangements they recommended. They would not have fitted in well with the social conditions in Latin America, where there was also a shortage of legal experts with the right qualifications to handle the task of modifying paradigms borrowed from Europe. That was why Bello's Code had the best chance to proliferate throughout the Castilian and Portuguese social environment of South America.

Finally, recent studies have confirmed that the Chilean Civil Code exerted an influence well beyond the bounds of the Iberian culture, as far afield as Japan. The potential impact of Andrés Bello's legal concepts beyond Latin America is still an uncharted field and calls for more research. So far only a few sporadic papers have been published on these issues. We may expect that there is more to the influence of Bello's ideas than what I have presented in this article, and that it will offer a fascinating prospect for future research.

#### ANDRÉS BELLO AND THE CHILEAN CIVIL CODE: CORNERSTONES OF THE PRIVATE LAW SYSTEM OF LATIN AMERICA

##### Summary

This article describes the international influence of the 1855 Civil Code of the Republic of Chile, presenting the geographical extent of its impact, the reasons for

its popularity, and the ways in which it was received. The basic idea behind this Code was its Pan-American approach, which was a key feature of the worldview espoused by its Venezuelan maker Andrés Bello, who compiled the Code for the Republic of Chile. To compose his Code and create the foundations of an integrated Pan-American identity, Bello combined the features shared by all the ex-Spanish colonies in South America, that is the Castilian culture and legal tradition, with the revolutionary inspiration of the independence movement of his times. Most of the countries in the region adopted Bello's Code, either in part or in its entirety, and many are still using its legacy today. Moreover, the influence of Bello's Civil Code transcended the borders of the South American continent, reaching other former Iberian colonies and even as far afield as Japan.

#### ANDRES BELLO I CHILIJSKI KODEKS CYWILNY – FUNDAMENTY LATYNOAMERYKAŃSKIEGO PORZĄDKU PRAWA PRYWATNEGO

##### Streszczenie

Artykuł przybliży międzynarodowe oddziaływanie chilijskiej kodyfikacji cywilnej z 1855 r. Omówione zostały zasięg geograficzny ekspansji kodeksu, przyczyny jego popularności, a także główne formy jego recepcji. *Idee fixe* stojącą za kształtem omawianego kodeksu był panamerykanizm, tak istotny dla światopoglądu wenezuelskiego kodyfikatora w chilijskiej służbie, Andresa Bello. Oparł on swoje dzieło na tym co wspólne dla wszystkich dawnych hiszpańskich kolonii w Ameryce, tj. na kastylijskiej kulturze i tradycji prawnej oraz rewolucyjnych inspiracjach ruchu niepodległościowego, chcąc stworzyć podstawy pod budowę jednej panamerykańskiej tożsamości. Kodeks ten w całości lub części przyjęto w większości państw regionu, które do dziś korzystają z jego dorobku. Co więcej, wpływ kodyfikacji wykroczył poza granice kontynentu, docierając do innych dawnych kolonii iberyjskich, a nawet do Japonii.

**Keywords:** The Chilean Civil Code; private law; Latin American law; Chile; Andrés Bello

**Słowa kluczowe:** Kodeks cywilny chilijski; prawo prywatne; prawo latynoamerykańskie; Chile; Andrés Bello

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