

Oxford Handbooks Online

Development of Comparative Law in Latin America

Jan Kleinheisterkamp

The Oxford Handbook of Comparative Law

Edited by Mathias Reimann and Reinhard Zimmermann

Print Publication Date: Nov 2006 Subject: Law, Comparative Law

Online Publication Date: Sep 2012 DOI: 10.1093/oxfordhb/9780199296064.013.0009

Abstract and Keywords

Latin American law has largely been neglected by mainstream comparative law. The presumed ‘familiarity’ and the consequent perception of Latin American law as lacking sufficient originality, or rather exoticism, may explain why comparative works have often dedicated considerably more attention to Islamic, Hindu, and East-Asian law. The topics of both Latin American law as the object of comparative law, and comparative law as a subject in Latin American jurisprudence, have remained in the shade with the result that they have become battlegrounds for influence and domination. This article aims to provide a rough sketch of the development of comparative law in Latin America and its significance for, and impact on, the legal systems of the Latin American countries today.

Keywords: Latin American law, legal systems, comparative law, jurisprudence

I. Introduction 262

II. The Colonial Period 263

1. First Legal Structure 263
2. The Existing Spanish Legal Order 264
3. The Cradle of Comparative Law in Portugal and Brazil 266

III. Independence and Codification 267

1. The Latin American Constitutions 267
2. Codification Efforts 270
 - (a) Early Copying of Foreign, especially French, Law 271
 - (b) Indigenous Attempts to Codify Civil Law and the Role of Foreign Law 273
 - (c) Bello and Ocampo in Chile 274
 - (d) Teixeira de Freitas in Brazil 276
 - (e) Vélex Sarsfield, Acevedo, and Narvaja in Argentina and Uruguay 279
 - (f) Further Developments between Mimicry and Wild Eclecticism 282
 - (g) Bevilacqua and Comparative Law in Brazil 283

3. Summary of the Development in the First Century of Independence 285

(p. 262) IV. From the Twentieth Century to the Present Day 285

1. The Growing Influence of the Common Law 285
2. A Battlefield for Influence: The Unification of Law 288
 - (a) Pan-Americanism versus Ibero-Americanism 289
 - (b) Unification of Home-Grown and Transplanted Law: CIDIP 290
 - (c) The Role of 'Sub'-Regional Integration: MERCOSUR and the Andean Community 292
3. Developments Determining, and Determined by, Comparative Law 293
 - (a) The High Degree of Eclecticism 293
 - (b) The Authority and Challenges of Comparative Law 295
 - (c) Comparative Law in Action: The Supreme Courts of Argentina and Brazil 298

V. Final Remark 300

I. Introduction

LATIN American law has largely been neglected by mainstream comparative law.¹ Common wisdom has been that Latin American law is largely an offspring of and, at best, a variation of French law due to its reception of the *Code Napoléon*.² Accordingly, Latin-American law has typically been put in the box of the 'French' or 'Romanistic' legal family—and left there without much more attention.³ A striking example is Merryman's *The Civil Law Tradition—An Introduction to the Legal Systems of Western Europe and Latin America*, where one will, on the whole, (p. 263) search in vain for any reference to Latin American law.⁴ The presumed 'familiarity' and the consequent perception of Latin American law as lacking sufficient originality,⁵ or rather exoticism, may explain why comparative works have often dedicated considerably more attention to Islamic, Hindu, and East-Asian law (not to speak of 'giants' such as Switzerland, Austria, Louisiana, etc.).⁶ The topics of both Latin American law as the object of comparative law, and comparative law as a subject in Latin American jurisprudence, have remained in the shade with the result that they have, as we shall see later on, become battlegrounds for influence and domination. The present contribution tries to provide a rough sketch of the development of comparative law in Latin America and its significance for, and impact on, the legal systems of the Latin American countries today.

II. The Colonial Period

1. First Legal Structures

Latin American law existed even before it had been discovered by Europeans. Some of its indigenous populations, especially the Aztecs, but probably also the Incas, developed highly complex legal systems that well reflected their social and political structures.⁷ Moreover, the Spanish Catholic monarchs had already established the legal bases that were to govern the new world, which was yet to be discovered, with the *Capitulaciones de Santa Fe* of 17 April 1492, that is, even before Columbus's departure into the unknown.⁸ Spanish law poured into the newly discovered territory, which was formally taken into possession on behalf of the Spanish Crown. (p. 264) However, Spanish law did not wipe out the pre-existing indigenous laws and customs: these continued—at least in theory—to be valid and enforceable as long as they were not in conflict with the religion and the laws of Spain.⁹ To some extent, this created the first challenge to comparative law in Latin America. Indigenous law was frequently found to be largely compatible with Spanish legal institutions, such as the payment of tributes, slavery, forced labour, jointly held land, or special courts for particular classes of litigants.¹⁰ Accordingly, indigenous laws and customs continued to govern many aspects of intra-indigenous relations and were apparently applied by royal courts.¹¹

2. The Existing Spanish Legal Order

The strict control of access to the Americas and the prohibition of trade with non-Spaniards meant that there was no need to worry about foreign laws or conflict of laws.¹² However, Spanish law in itself was everything but consolidated and very much marked by the need to analyse and compare legal provisions of different provenance. The key role in the contemporary legal jumble was held by Roman law, the foreign law *par excellence*, whose popularity among legal scholars and practitioners constantly undermined the Spanish Crown's authority in legislative matters. As early as AD 654, the Visigoth King Recceswinth had provided in his *Liber Judicum*:¹³ 'We instruct, allow, and wish that everybody studies the laws of the foreign people for his own benefit; but as regards the decisions in courts we prohibit them and reject their use'.

This prohibition was reiterated many times during the following thousand years, as lawyers continued virtually to ignore the chaotic royal law of Castile and resorted to the writings of scholars in the Roman-Canon *ius commune* when arguing their cases. The result was a considerable degree of legal uncertainty.¹⁴ Disgusted by the court practices in Castile, and apparently worried about maintaining the legal order on the new continent, the Crown in 1509 prohibited lawyers from travelling to the (p. 265) West Indies.¹⁵ This prohibition was only abolished after legal practice in the Indies had been heavily regulated in 1563.¹⁶ Nevertheless, the *conquistadores* brought with them to the new continent the legislative confusion of their homeland, and it was soon increased by specific legislation *de las Indias*.¹⁷ Eventually this led to the same troublesome court practices that had existed in Castile: litigation was slow, costly, highly unpredictable, and

often prone to corruption.¹⁸ It is also this context of legislative confusion and remoteness from the centralist power of the Crown, combined with vacillating policies, corrupt administrative personnel, and contradictory messages from the motherland, that gave rise to the practice of *la ley se acata pero no se cumple* (the law is acknowledged but not enforced),¹⁹ a proverb that is still frequently used today to describe the role of the law in Latin America.²⁰ In view of this, lawyers and judges in both the motherland and overseas remained strongly attached to the Roman-Canon *ius commune* for arguing their cases and founding their decisions,²¹ thus dashing any hope that Castilian and colonial legislation would be learned in practice.²² This was only natural: contemporary lawyers had been trained exclusively in Roman law and Canon law, and their libraries were predominantly stocked with Romanist literature.²³ As a result, the law of the Spanish Empire remained desperately chaotic and barely able to provide a satisfactory basis for legal practice.

(p. 266) 3. The Cradle of Comparative Law in Portugal and Brazil

The development of the legal order of the Portuguese empire, which had legalized its claim to Brazil in the Treaty of Tordesillas (1493), was equally marked by considerable legislative confusion despite various attempts at consolidation in *Ordenações*,²⁴ related to the exclusive teaching of Roman and common law,²⁵ the rules on the application *in subsidio* of these two 'learned laws',²⁶ and their resulting use and abuse in legal practice.²⁷ The Crown's struggle against this phenomenon culminated in 1769 when the Empire's governor, the Marquis de Pombal, a man who was fiercely anti-clerical and imbued by the spirit of Natural law, decreed the so-called *Lei da Boa Razão*: Roman law could still be consulted, but was not to be applied unless it passed the test of the *boa razão* (ie good reason), either as found in the most fundamental principles of Natural law, in the rules of the *ius gentium* of the civilized nations, or in political, economic, commercial, and maritime matters, 'as reflected by the modern laws of the civilized nations'.²⁸ This radical shift from the *ratio scripta* to the *rectius ratio* revolutionized Portuguese and Brazilian jurisprudence, legal education, and practice. Not only did the *usus modernus pandectarum*, as reflected by contemporary German and Dutch doctrines, become the benchmark for the application of Roman law,²⁹ the shift also brought about the massive and systematic, but sometimes also excessive, use of comparative law in general,³⁰ especially the comparison with German and Italian law, and later also with French law.³¹ A good example of the new impact of comparative law has been given by the Portuguese professor Moncada,³² who shows how the Portuguese law of succession changed substantially under the influence of the statutes of the German cities of Hamburg and Lübeck, as cited in Heineccius' *Elementa Iuris Germanici*. A Brazilian writer has concluded as follows:³³

(p. 267) The result was a passion—... still undiminished in our days—for arguing with the opinions of foreign authors and writings in order to contrast and to supplement national law. This exchange of ideas can be considered as a permanent reception of foreign law by which the fatal immobility of the Codes is compensated.

III. Independence and Codification

Following Napoleon's occupation of the Iberian Peninsula in 1807, the independence movements in Spanish America benefited from Spain's weakness. This finally culminated—after bloody wars against the Spanish forces—in the constitution of the new republics of Latin America between 1810 and 1825.³⁴ At the same time, the constitution of these new republics frustrated the dream of the main leader of the movement, Simón Bolívar, which was to maintain the political unity of former Spanish America, and thereby also marked the end of legal uniformity.

Brazil also experienced some fighting; none the less, its independence came about quite differently. Portugal's King Dom João VI, who had fled from Napoleon's troops to Brazil, returned to Lisbon in 1821. His son Pedro, Regent-Prince of Brazil, refused to obey when called back to Lisbon and declared Brazil's independence on 22 September 1822. He ejected his father's troops and eventually suppressed the republican independence movements himself. Brazil remained a centralist empire until 1889, when it became a federal republic.³⁵

1. The Latin American Constitutions

The Spanish-American independence movement was very familiar with the French enlightenment philosophy and the French Declaration of Human and Civil Rights of 1789,³⁶ as well as the United States Constitution of 1787 and Hamilton and Madison's Federalist Papers, which had been translated into Spanish and (p. 268) circulated widely in Latin America during the wars of independence.³⁷ Bolívar himself, who had been a pupil of Andrés Bello (who was to become Chile's great codifier), had studied the writings of Locke, Montesquieu, and Rousseau, and kept in his library various treatises on Roman, Canon, and Spanish royal law. Like most Latin American independence leaders, he was also in contact with Jeremy Bentham.³⁸ It is therefore not surprising that all these sources influenced—in varying degrees—the drafting of the first constitutions of the newly created Latin American states.³⁹

Bolivia's first Constitution of 1826, for example, based on a draft written by Bolívar himself, contained elements of Roman antecedents (such as the three-chamber legislature consisting of the senate, the tribunate, and the censor).⁴⁰ Traces of the Roman model could also be found in Argentina's and Chile's first republican period, which recognized temporary dictatorship (*director supremo*) in times of crisis.⁴¹ More interesting is the clear influence of Spain's short-lived liberal Constitution of 1812 (repealed with the restoration of Ferdinand VII in 1814 but reinstated on several occasions thereafter), as evidenced, for example, by the cumbersome procedure for electing members of the Parliament (by provincial electors who were, in turn, elected by parish electors), which was inserted in various early constitutions with only slight modifications.⁴²

Much more influential was the US American model, especially where the federal system was adopted, as in Mexico and Brazil (1891).⁴³ The most typical example of United States

influence, however, is Argentina, which had seen many years of war between the provinces before they united (1810–29, followed by a dictatorship lasting until 1852). Although its direct affiliation with the United States Constitution (p. 269) has been disputed,⁴⁴ it remains a fact that the wording of the Argentinean Constitution (1853, amended in 1860) is in many respects similar to the United States model and that almost all treatises on constitutional law published in Argentina during the nineteenth century turned particularly to the United States for their comparative analysis.⁴⁵ Moreover, from the outset Argentina's *Corte Suprema* has systematically referred to United States Supreme Court case law and United States legal doctrine when interpreting the Argentinian Constitution:⁴⁶ a tradition that continues today.⁴⁷

It is in respect of the writ of *amparo* that the influence of the Constitution of the United States has attracted the greatest attention of comparative lawyers. This is a special and extraordinary legal remedy against abusive acts of public authorities which embraces elements of *habeas corpus* and writs of injunction, error, *mandamus*, and *certiorari*.⁴⁸ The origin of the most prominent Mexican *amparo* is much less clear than claimed by many (especially North American) authors.⁴⁹ There have been fierce debates as to whether the *amparo*'s origin lies in French, the United States, or more recent Spanish constitutional law,⁵⁰ but there is also much evidence that the writ of protection against abuses of public discretion was already practised under Spanish rule as early as the seventeenth century.⁵¹ Nevertheless, and despite the fact that the Mexican *amparo* developed into a genuinely local institution, the comparison with United States constitutional law remained an important element in Mexican legal scholarship.⁵² *Habeas corpus* and writs of protection also developed, under the influence of Anglo-American doctrine, (p. 270) though always with distinct peculiarities,⁵³ in the Latin American countries, such as in Argentina,⁵⁴ Chile,⁵⁵ Peru,⁵⁶ and much of Central America.⁵⁷ The first specific *habeas corpus* provisions in Latin America were found in Brazil as early as 1830 and have since developed into much broader writs of protection, especially the *mandado de segurança*.⁵⁸ It is interesting to note that these were based on the English *Habeas Corpus* Acts of 1640, 1689, and 1816, and the practice as expounded by Blackstone and other English authorities.⁵⁹ This heritage can still be seen today in the fact that the word 'writ' has become part of the Brazilian legal vocabulary.

2. Codification Efforts

As regards the law below the level of the constitution, the young Latin American states inherited the legislative jumble described above: the Spanish *Siete Partidas*, *Leyes de Toro*, *Leyes de las Indias*, *Recopilaciones*, and so on (and, in Brazil, the equally confusing Portuguese law) remained in force provisionally, but only as far as they did not conflict with the *orden público* of the new constitutions. This only increased the uncertainties inherent in the application of these legal sources.⁶⁰ Partly because of Bentham's writings, the independence leaders were already considering the idea of bringing some order into the prevailing legal chaos by means of comprehensive codifications.⁶¹ A contemporary source said that '[Bentham's] (p. 271) name is little known in England, better in Europe, best of all in the plains of Chile and the mines of Mexico'.⁶² However, his massive

lobbying in 1822 to be appointed as the draftsman of a general code for all of Latin America⁶³ failed and his influence remained quite limited. Most of the young constitutions contained a mandate for codifying the criminal, civil, and commercial law, following the model of the Spanish Constitution of 1812, whose respective provision had, in turn, been taken from the French Constitution of 1791.⁶⁴ Codification evolved in a peculiar way in each country and, as shown by Guzmán Brito, differently from the general understanding that codification meant the mere adoption of French law.

(a) Early Copying of Foreign, especially French, Law

The military—and later political—leaders of the independence movement, such as Bolívar himself, Chile's *Director Supremo* O'Higgins, or Bolivia's (and later also Peru's) *Protector* Santa Cruz,⁶⁵ did, indeed, push for the adoption of the French Codes. This preference, however, can probably best be explained by the leaders' personal admiration for Napoleon. Most evidence points in this direction rather than supporting the alternative thesis that they were seeking legislation which represented the revolutionary ideals of liberalism as opposed to those of the hated Spanish regime. After all, the liberal Spanish Constitution of 1812 had been quite influential in most of the new republics;⁶⁶ also, all provisions of the Spanish *ancien régime* contrary to the liberal spirit of the new constitutions had already been abolished right after the attainment of independence.⁶⁷ Furthermore, no liberal legislation was wanted for family law and the law of succession, which continued to be governed by the restrictive principles of Canon law and the Spanish and Portuguese royal law based on them.⁶⁸ As a consequence, for example, marriage and divorce were governed in Brazil by the canons of the Council of Trent (1563) until 1890, that is, the advent of the Republic.⁶⁹

In fact, only Santa Cruz was able successfully to imitate Napoleon with the promulgation of Bolivia's *Código Santa Cruz* of 1830, which was imposed with few (p. 272) modifications on North and South Peru in 1836. In 1841 it became part of Costa Rica's first *Código General*.⁷⁰ The French *Code civil* also continued to be in force in the former French Haiti (1825). When the Spanish-speaking Dominican Republic was first annexed by Haiti, the *Code civil* was imposed upon it; the French language version was retained even after the Dominican Republic regained independence in 1844, and it was only forty years later that a Spanish translation came to be enacted.⁷¹ As early as 1827, the Mexican State of Oaxaca had also adopted a literal translation of the *Code civil* in order to assert its autonomy within a future Mexican federation.⁷²

Other examples of the more or less direct influence of French law can be found in the field of commercial law. Santa Cruz's Bolivian Commercial Code (1830) was, of course, also copied directly from the French Code of 1807.⁷³ In 1831, shortly after splitting from Bolívar's Federation of *Gran Colombia*, Ecuador directly enacted the Spanish Commercial Code of 1829,⁷⁴ which—despite some innovations—was largely a copy of the French Code of 1807. The Commercial Codes of Colombia and Peru (both of 1853) were also, like some others, literal copies of the Spanish Code, that is, essentially based on French law.⁷⁵ The same holds true—although to a lesser degree—for the Brazilian Commercial Code, which was enacted in 1850 on the basis of a draft elaborated in 1834 by a commission of two

jurists, two merchants, and the Swedish Consul in Rio.⁷⁶ This draft was based on the French *Code commercial*, the Spanish Code of 1829, and the Portuguese Code of 1833 (which itself had been based on the first two codes mentioned).⁷⁷ Despite being considered by contemporaries as the 'most advanced legislation' of its time,⁷⁸ it is not surprising that these rather unsophisticated transplants subsequently came to be qualified as being out of date and badly adapted to the new nations' usages and requirements.⁷⁹

(p. 273) (b) Indigenous Attempts to Codify Civil Law and the Role of Foreign Law

It is striking that in virtually all Latin American countries the idea—propagated mostly by their politicians—of replacing the old legal institutions by modern foreign law faced stern opposition by lawyers in the field of civil law. Nevertheless the conviction prevailed that there was a need to bring order to the existing legislative mess and, once it had been consolidated, to modernize it in line with the latest international standards. In this context, the supplementary recourse to foreign law built on an inverse logic to that underlying the Portuguese *Lei da Boa Razão*: foreign law was used where it best reflected the existing law, especially where that existing law was based on Roman law. This was particularly clearly stated by Uruguay's Eduardo Acevedo (1852) and Venezuela's Julián Viso (1853):⁸⁰

[O]ur work, with some rare exceptions, is no more than the editing in the form of a modern code of the same laws and doctrines which our tribunals use each day. If it were to come into operation tomorrow ... nobody, except for the lawyers, would notice that our legislation had changed. It would seem to the general public as if we had never left the *Fuero Juzgo*, the *Siete Partidas*, and Roman law. [Acevedo]

In the plan of the Code there is absolutely no intention to vary the substance of the existing law, but only to bring it up to the level of the intellectual movement of the most advanced nations and to overcome the numerous divergences of some Spanish scholars on various questions of law. [Viso]

Guzmán Brito offers two clear examples for the recourse to foreign law: he shows that the formulations of Art 1135 of the Chilean *Código civil* and Art 3383 of the Argentine Code (both addressing the problem where a testator bequeaths a piece of property, but then sells or pledges it) are based upon Art 1038 of the French *Code civil*, though only because the French rule constituted the best generalized formulation (taken, in fact, from Pothier) of the respective Roman law rules (D. 32, 10, 12; 34, 4, 18 and 34, 4, 15), which were, in turn, the sources of the then still applicable Laws 6, 9, 17 and 6, 9, 40 of the *Siete Partidas*. In the same fashion, Art 1645 of the Chilean and Arts 877 and 886 of the Argentine Code (on the return of a document of indebtedness which is taken to be part of discharge), which seem to be taken from Arts 1282, 1283, and 1286 of the *Code civil*, are based on the French provisions because they best reformulated the Roman origin of Laws 5, 14, 9 and 5, 13, 40 of the *Siete Partidas*.⁸¹ Determining which points require codification and searching for the best solutions by systematizing the national law and analysing it in the light of foreign law require much time and effort as well as considerable legal talent. These resources (p. 274) were not

Development of Comparative Law in Latin America

readily available in the new Latin American states, most of which experienced difficult periods of civil strife after gaining independence. The scarcer these resources were, the more codifiers simply tended to copy from foreign sources.

The first successful attempt at enacting an indigenous civil code was undertaken by Peru. After having been freed from Bolivian occupation by a Chilean intervention in 1839, the despised 'Bolivian codes', that is, the copies of French law imposed by Santa Cruz in 1836, were immediately abolished and a commission was formed to elaborate new codes on the basis of the existing law. The resulting draft of 1847 was enacted with some minor changes as the Peruvian *Código Civil* in 1852, which remained in force until 1936. Despite some borrowing from the French *Code civil* (as eg in the chapter on the essential requirements for the formation of a contract), the Peruvian Code of 1852 was essentially based on Spanish law and the Roman *Corpus Iuris Civilis*.⁸²

This pattern of indigenous codification using comparative law as a catalyst was to characterize the Latin American civil codes much more than Napoléon's code. Three men, in particular, were to perfect this method of codification and become the most influential codifiers—and *de facto* comparative scholars—of the nineteenth century in Latin America: Chile's Andrés Bello, Brazil's Augusto Teixeira de Freitas, and—laying the foundations of a tradition of eclecticism—Argentina's Dalmacio Vélez Sarsfield.

(c) Bello and Ocampo in Chile

Andrés Bello (1781–1865) was born in Caracas as the son of a lawyer. He started to learn Latin at the age of 7 and, aged 15, began his studies at the University of Caracas, where he read philosophy and experimental physics, followed by the study of laws. Initially, under the old regime, this entailed Canon law and Roman law (which were abolished after independence and was replaced by the teaching of Natural law, national law, and civil law based on the Spanish *Instituciones* by Asso and Manuel of 1775). During his studies he was the private tutor of Simón Bolívar, who was almost of the same age. After participating in Humboldt's famous expedition and serving in public administration, he was sent to London in 1810 as part of a delegation headed by the young Bolívar. He stayed there until 1829 as an envoy of his newly created country. During this period Bello studied English law and the law of the United States, and apparently also deepened his knowledge of Roman and medieval Spanish law. He also worked as a secretary for Jeremy Bentham, despite his rejection of Bentham's utilitarianism due to his Catholic faith. In 1829 he moved to Chile, becoming a Chilean citizen a few years later. In 1830 he started teaching a general introductory course to law based on Bentham's writings, followed in 1831 by a course on Natural and international law, and in 1834 by a course on modern Roman law (reintroduced at his insistence). For the latter, in 1843 he (p. 275) eventually published his *Instituciones de Derecho Romano*, which were based primarily on Heineccius' *Elementa juris civilis secundum ordinem Institutionum*. In that year, in which he also inaugurated the University of Chile in Santiago as its first rector, Bello (who had also become a senator) was heavily involved in the works of the parliamentary

Development of Comparative Law in Latin America

commission (1840–5) that reviewed his proposal for a Chilean Code, which the Minister of Justice had asked him to prepare in 1833.⁸³

Bello's *Código Civil*, which was finally enacted in 1855 and—with some reforms—is still in force today in Chile, is the product of his broad legal, but also linguistic and literary, genius. (Bello is still highly admired for his fundamental work on Spanish grammar and his other writings and poems.) The structure of his codification is based—with few modifications—on Justinian's *Institutes*. Bello's rich annotations show the sources which he used, as far as the substance is concerned. As for the consolidation of 'national' law, his primary source was the *Siete Partidas* as glossed by Gregorio López, but he also directly relied upon the *Corpus Iuris Civilis* and, to a lesser degree, on the other sources of Spanish law, as well as the writings of Spanish scholars. For his comparative research with a view to modernizing the national law, like all other codifiers, he mainly used the *Concordance entre les Codes Civils Étrangers et le Code Napoléon* by Anthoine de Saint-Joseph, the leading French comparative work that elaborated the parallels between the provisions of the *Code civil* and the codes of Bavaria, Prussia, Austria, Sardinia, Louisiana, the Netherlands, and the Swiss Canton of Vaud, many of which were apparently also at his disposal. For doctrinal help, Bello turned primarily to the writings of many French scholars available at that time, especially the *Traité*s of Pothier and the later works of Delvincourt and Rogron, but also, although to a lesser degree, to Savigny's Treatise on modern Roman law.⁸⁴ As explained above, the role of comparative law, especially French law, was rather that of a source of inspiration. Comparative law was one of Bello's tools to find the best reformulation of Roman law rules contained in the ancient Spanish law. Among the foreign influences, the French was certainly predominant;⁸⁵ however, as Guzmán Brito put it:⁸⁶

[T]he code of Bello turned out to be a body that is substantially based on the ancient law, reformulated in the style of the modern codifications by means of a number of technical operations, and reformed, according to the precepts of legal liberalism, in the spirit of his time; for the rest, he stuck with devotion to the old Roman-Castilian institutions.

A similar, but more eclectic, approach could be found in the codification of (p. 276) Chilean commercial law, prepared by José Gabriel Ocampo Dávila (1799–1882). Ocampo Dávila was an experienced and highly successful Argentinian lawyer who arrived in Chile in 1841, after fleeing Buenos Aires when the persecutions under the regime of the first Argentine *caudillo* Ortiz de Rosas (1829–52) became too threatening for him.⁸⁷ Ocampo, who also became a member of the Commission revising Bello's Civil Code (1853–5), was commissioned to codify Chile's commercial law in 1852 after previous attempts had failed. Despite following the structure of the Spanish Code of 1829, his work has been hailed as highly sophisticated and original.⁸⁸ Parting from the still governing old Spanish law and especially the *Ordenanzas de Bilbao*, Ocampo applied the same method as the draftsman of the United States Uniform Commercial Code, Karl Llewellyn, that is, he investigated contemporary commercial practices through interviews, discussions, and scholarly writings.⁸⁹ Although he created many new provisions himself where ancient Spanish law appeared to be incomplete (as, for example, with respect to the rules regarding corporations) or deficient (as in the case of the rules concerning bankruptcy),⁹⁰ Ocampo turned

primarily to French law; apart from that, guided by Saint-Joseph's *Concordance entre les codes de commerce étrangers et le code de commerce français*, he also used solutions from the Codes of Portugal, the Netherlands, Hungary, Prussia, and Buenos Aires, as well as from the writings of French, Spanish, and Italian authors.⁹¹

(d) Teixeira de Freitas in Brazil

The biography of Augusto Teixeira de Freitas (1816–83) is strikingly different from Bello's. Born into a noble family in the province (today state) of Bahia, Freitas at the age of sixteen started to study law at the Academy of Olinda, which was one of the two universities founded in 1827 and modelled on Coimbra. In his second year he switched to the University of São Paulo, but after quarrelling with his professors and almost failing in his fourth year, he returned to the poorly equipped Olinda. Legal training focused on the interpretation of the Imperial Constitution of 1823 and the constitutional theories of the Swiss Benjamin Constant, on the *Ordenações*, the rules and definitions of Roman law, and, as part of 'the study of the law comparable to that of the civilized nations', the *Code civil*, for which the knowledge of French was mandatory (English became mandatory in 1853, German becoming (p. 277) an alternative option in 1891).⁹² After political quarrels in his home province of Bahia, Freitas moved to Rio de Janeiro in 1843, where he soon built a reputation as a brilliant lawyer and became the co-founder of the influential *Instituto dos Advogados Brasileiros*, the forerunner of the National Bar Association.⁹³

In 1855 the Empire's Minister of Justice approached Freitas to draft a civil code. Freitas rejected the Portuguese draft Code prepared by the Viscount of Seabra (1857–9, finally enacted in 1867) as too heavily influenced by French law (one of the most controversial points being the automatic transfer of property upon the conclusion of a contract of sale⁹⁴). Instead he proposed an approach which was similar to Bello's, although more cautious. Before attempting a new codification, Freitas prepared a consolidation of the existing Portuguese law: the *Consolidação*, which he finished in 1858 and which consisted of 1,332 articles. While strictly keeping to the content of national law (which he described as incomplete and poor), he restructured it, faithful to the tradition of the Portuguese *Lei da Boa Razão*:⁹⁵

[H]e went to search for the foundations of his systematization of the law in the profound analysis of the nature of legal relations contained in the works of recent German Romanists, and presented them with the help of Hugo, Heineccius, Savigny, Mackeldey, Ortolan. In presenting the character of this work he does not pretend to absolute originality to which he could not aspire; but without ceasing to be traditional, he gave his thoughts a serious sense of modernity; he gathered from the Roman jurisprudence, restored in Germany, not what could be found in its primitive form but in its modern substance; and, without any revolutionary spirit, he managed to bring about a transformation which gave a modern meaning to the legislation.

A result of this quest for a new structure was the extraction of rules that govern all specific provisions in a general part, a structure that was kept by the later Brazilian Civil Codes of 1916 and 2002, and which Brazilian law shares with the German Civil Code of 1900.⁹⁶

(p. 278) The imperial government officially approved the *Consolidação* in 1858; and even though it lacked any legal force, it was enthusiastically embraced by courts and lawyers as a clear and structured body of rules with complete references to its sources.⁹⁷ Freitas was immediately commissioned to elaborate a draft civil code, but he opted for yet another intermediary step: the elaboration of a 'sketch', the *Esboço*, which was to be published in parts as soon as these were finished in order to allow a public discussion before submitting a draft to Parliament. In 1860 Freitas published the general part (on persons, objects and (legal) facts), in 1861 the beginning of the social part: the second book (on rights in general) and sections 1 and 2 of the third book (on personal rights in general and in family relations), and only in 1865 its massive section 3 (on personal rights in civil relations, ie the law of obligations). The fourth book (on real rights) was finished in 1866, but the fifth book (on provisions common to real and personal rights, ie succession and prescription) remained incomplete. There are numerous reasons for this; in particular, he was annoyed by the French influenced Commercial Code of 1850 (which already contained many provisions on general civil matters) and decided in 1867 that a codification of civil law without the integration of commercial law would not make sense. (He was apparently unaware of a similar proposal of the Italian Montanelli from 1847.)⁹⁸ The government refused to change its approach and assured him that it was very pleased with the parts of the *Esboço* that had already been published. Freitas replied in great detail that he was not pleased at all, and—possibly already affected by his subsequent serious mental illness—abandoned his work after having already drafted almost 5,000 articles.

For the elaboration of the *Esboço*, Freitas also consulted the foreign codes available through Saint-Joseph's *Concordances*. For doctrinal guidance, for his structure and for the reformulation of many concepts, Freitas relied fundamentally on the works of Savigny. Furthermore he considered 'all the literature that was *en vogue* in the mid nineteenth century', ie the leading German, French, and Belgian works on civil law.⁹⁹ Nevertheless, his work remained genuinely indigenous, a perfection of the law inherited from Portugal, to such a degree that the Brazilian Civil Code of 1916, which relied largely on Freitas' *Esboço*, is held to have preserved the legal tradition of Portugal, based on Roman law, much more than the Portuguese codes.¹⁰⁰

(p. 279) (e) Vélez Sarsfield, Acevedo, and Narvaja in Argentina and Uruguay

The interplay between commercial law and civil law was more fortunate in Argentina and Uruguay, where the difficulties under Rosas's dictatorship had paralysed all efforts at codification. After Rosas's fall in 1852, the cooperation between the Uruguayan Eduardo Acevedo and the Argentinian Dalmacio Vélez Sarsfield pushed comparative law even closer to the centre of codification efforts due to their high degree of eclecticism.

Dalmacio Vélez Sarsfield (1800–75) was born in Córdoba (Argentina), where he studied at the *Colegio de Montserrat* and the University of Córdoba, from which he graduated in 1820. Both institutions had also been attended, first two years earlier, by José Gabriel Ocampo, the later codifier of Chilean commercial law, which suggests that the two knew each other. Vélez's studies probably included works on Roman law by Cujas, Vinnius, and

Development of Comparative Law in Latin America

Heineccius, as well as the French *Code civil* and the *Cours de droit civil français* by Aubry and Rau (based on the German work of Zachariae).¹⁰¹ Once admitted to the bar in Buenos Aires in 1823, he had his first experiences of drafting legislation as a young deputy to the Constituent Congress of 1824 and also taught political economy at the University of Buenos Aires. Having being persecuted during Rosas's dictatorship and after a period of exile in Montevideo, Vélez engaged in national politics in Buenos Aires after Rosas was overthrown in 1852. In 1853 he was named as a member of a commission for the elaboration of a civil code, which, however, never started work due to Buenos Aires' splitting from the Confederation.¹⁰² His misfortune ended in 1856 when he joined the efforts of the Uruguayan Eduardo Acevedo in drafting a commercial code.

Acevedo (1815–65) had worked as a young lawyer in Ocampo's law firm in Buenos Aires between 1836 and 1839.¹⁰³ Back in Uruguay, Acevedo had pursued his private project of producing a draft civil code for his country, which he finished sometime between 1848 and 1851. He had abandoned his original idea of merely translating and adapting the French *Code civil* for fear of being reproached with wanting to transplant 'exotic' foreign legislation which was out of tune with the local realities. Instead, he followed the approach of the Peruvian and Chilean projects, that is, he based his draft primarily on the governing law inherited from Spain.¹⁰⁴ It is interesting to note that Acevedo nevertheless relied significantly on the works of the French writers Domat, Pothier, Toullier, Merlin, and Troplong, but confessed that he avoided citing them in order 'to give everything a national character, taking away the foreign appearance which would be criticized. This (p. 280) reached such a level that whenever an article had been suggested to us by Toullier, we would justify it with an opinion of [the Spanish] Sala or Acevedo'.¹⁰⁵ Despite becoming a bill in the Uruguayan Parliament in 1853, Acevedo's draft was never adopted, apparently due to lack of political support. An initiative to enact his draft for the Argentine province of Buenos Aires in 1856 was also unsuccessful for the same reason.¹⁰⁶

The alliance between the ambitious Vélez and Acevedo proved more successful. Their privately drafted commercial code was adopted by the Province of Buenos Aires in 1859 and in 1862, after the reintegration of Buenos Aires into the Confederation, also for all of Argentina. This was many years before a civil code was adopted. This commercial code was primarily based on Acevedo's draft civil code for Uruguay, the *Ordenanzas de Bilbao*, the Brazilian Commercial Code (itself based on the French, Spanish, and Portuguese codes) and the Dutch Code, but also the Code of Württemberg (for the bills of exchange provisions), combined with the drafters' knowledge of local experience and commercial practice.¹⁰⁷ Nevertheless, this Code, which was also enacted in Uruguay in 1865, followed the fate of most other commercial codes of the time: it soon became outdated due to the rapid development of trade. Thus, it was amended in 1889; the general civil law provisions were removed and other rules were introduced which had been partly copied not only from Italian and Portuguese law, but also from German and English legislation.¹⁰⁸ The Code, and its clumsy amendment, have been blamed for the serious commercial crisis which occurred at the end of the century, when a wave of poorly handled bankruptcies shook the country.¹⁰⁹

Vélez's next project was to prove a greater success. In 1864 he was finally officially commissioned to draft a civil code for Argentina. Following the tradition of Florencio García Goyena's Spanish draft Civil Code of 1851 (which was based heavily on the French *Code civil* and annotated according to Saint-Joseph's *Concordances*),¹¹⁰ and also Freitas's method (with whom Vélez was in close contact),¹¹¹ Vélez was requested by the government to justify each draft provision with annotations concerning their conformity with, or divergence from, the existing law and 'the civil codes of the leading nations of the world'.¹¹²

(p. 281) The final count of the different sources was as follows: roughly 1,200 provisions from Freitas's *Esboço*, 800 directly from the Roman *Corpus Iuris Civilis*, 700 provisions from the French textbook of Aubry and Rau (based on Zachariae), 300 from the Spanish draft of García Goyena, 170 (or maybe 300) from the Chilean Code, 145 directly from the French *Code civil* (although almost half of the content of Vélez's code is indirectly reflected in the Argentinian Code as they are based on the same Roman law foundations), 70 from Zachariae's (German) work on French law, 52 from Demolombe's commentary to the French *Code civil*, 52 from the Code of Louisiana, 50 from Troplong's (French) treatises on contracts and succession, 27 from the Uruguayan draft Civil Code of Acevedo, 13 from the Russian Code, 11 from the writings of the Belgian author Molitor on possession and servitudes, and 4 from the statutes of the State of New York. The number of provisions inspired by the French Pothier, Mercadé, and Duranton, by the French translations of Savigny's treatises on modern Roman law and the law of obligations, and by the Italian Code of 1865 has not been ascertained.¹¹³ Rejecting the structure of Justinian's *Institutiones* and of the French *Code civil*, Vélez followed the structure of Freitas's *Consolidação*, yet dissolved its general part. Thus the structure of his code was as follows: I. Persons (legal and natural persons, family); II. Personal rights in civil relations (creation and extinction of obligations, general theory of legal facts and legal acts, general theory of contracts, specific contracts); III. Real rights (property and possession); IV. Provisions common to personal and real rights (succession, rights of creditors, prescription). The final code, a massive work of 4,051 articles, was approved *en bloc* by Congress in 1869 and entered into force in 1871.¹¹⁴

Despite the works of Acevedo, Uruguay finally received its civil code from an Argentinian, Tristan Narvaja Davila, who was a relative of Ocampo. Supported by Ocampo, through whom he probably got to know Bello, Narvaja spent eight years in Chile between 1845 and 1853, that is during which time Bello finalized his draft Civil Code. After moving to Montevideo, and apparently inspired by the Chilean efforts, he started a private attempt at drafting a civil code based on Acevedo's draft. This was finally enacted by the Uruguayan dictator Flores in 1868. It has been calculated that about one-third of that code is based on the Chilean model, one-fifth on the Spanish draft of García Goyena (which was itself based on the French Code), and one-sixth on Acevedo's draft, while the drafts of Freitas and Vélez had only little influence as they were considered to be too lengthy and complicated.¹¹⁵

(p. 282) (f) Further Developments between Mimicry and Wild Eclecticism

The Chilean codes were to prove to be the most influential models of codification in Latin America. Bello's and Ocampo's codes were adopted by Ecuador, Colombia, and Venezuela (where Julián Viso had dropped his own project in favour of Bello's code in 1861), as well as by the Central American states of El Salvador, Nicaragua, and Honduras.¹¹⁶ Guatemala also adopted Chile's Commercial Code, but preferred in 1877 to copy Peru's Civil Code of 1852, apparently for political reasons.¹¹⁷ Argentina's Civil Code was enacted in Paraguay in 1876 after the country had lost its war against the Triple Alliance of Argentina, Brazil, and Uruguay, and with it much of its territory and four-fifths of its male population.¹¹⁸

A striking example of the adoption of foreign codes is Venezuela. It had adopted the Chilean Civil Code under the regime of General Páez in 1862. Along with most legislation of that regime, the Code was revoked in 1863 after the dictator's fall, leading to the return to ancient Spanish law. After fruitless efforts at drafting a new code, a commission of experts was given forty days in 1867 to present a new proposal. This eventually resulted in the plain copying of the Spanish draft of García Goyena (1851). In 1873 this second Civil Code was itself dropped in favour of a modestly amended copy of the Italian *Codice Civile* of 1865, which was itself largely an imitation of the French *Code civil*.¹¹⁹

Colombia provides another example of an unsophisticated transplant.¹²⁰ In 1853 it had copied the Spanish Commercial Code of 1829, and with it—unconsciously—its ground-breaking innovation: the freedom of incorporation subject only to registration, which, at that stage, was recognized only by Spain and England. The Colombian draftsmen, however, were not aware that in 1848, after a severe crash that had followed the early founders' boom, Spain had revoked the freedom of incorporation and had returned to the previous system that required government authorization for incorporation. Colombian entrepreneurs, on the other hand, were not very aware of the possibilities that incorporation offered and continued to operate as unlimited partnerships rather than seeking the protection of limited liability that the law now offered, with the result that neither a founders' boom nor a crash occurred. Nevertheless, Colombia abandoned free incorporation—again unconsciously—in 1887: the Commercial Code of Panama (at that time a state of the Colombian Federation) of 1867, which was essentially based on Ocampo's code of 1852 for Chile, was enacted for all of Colombia as it was considered to constitute the state of the art. Once again, the Colombian draftsmen had ignored the fact that, a few months after the enactment of Panama's code, in (p. 283) 1867, France had followed England in accepting free incorporation, as had Spain in 1869, Germany in 1870, and Delaware in the United States in 1883. A year later the Colombian draftsmen became aware of their ignorance and abolished the requirement of two presidential decrees of incorporation,¹²¹ but left untouched the remaining provisions, which were structured around a principle of strict government surveillance.

Other countries, such as Costa Rica (1886), eventually opted to try to develop their own code.¹²² These generally followed the highly eclectic method adopted by Vélez Sarsfield, yet rarely with as much sophistication. An unfortunate example of unsophisticated eclectic copying is the Civil Code of Nicaragua of 1907, which is said to have taken 878

articles from the Argentine Code, 811 from the Mexican, 609 from the Chilean, 373 from the Costa Rican, 329 from the Spanish, 254 from the Portuguese, 181 from the Italian, 116 from the Guatemalan, and 51 from the Uruguayan Code. It is hardly surprising that this code suffered from a serious lack of coherence and from irremediable contradictions.¹²³

(g) Bevilacqua and Comparative Law in Brazil

However, there has been at least one other highlight of successful codification: the Brazilian Civil Code of 1916, which entered into force on 1 January 1917. After numerous attempts to produce a draft civil code on the basis of Freitas's *Esboço*, the task was finally entrusted in 1899 to Clovis Bevilacqua (1859–1944).¹²⁴ He was an academic and the first professor of comparative law at the University of Recife (an offspring of the Academy of Olinda).¹²⁵ Coinciding with the tradition of the *Lei da Boa Razão* and Teixeira de Freitas, Bevilacqua had a strong affinity for German pandectist jurisprudence, as he was part of the *Escola de Recife*, a modernist and republican movement that opposed the traditional orientation towards French culture and that emphasized the study of German literature, philosophy, and legal doctrine (especially the works of Rudolf von Jhering). It was the chapter on the method of comparative law in Bevilacqua's book summarizing his lectures on comparative legislation of 1893 (2nd edition, 1897) that first introduced to Brazil (at least in theory) the modern concept of comparative law, which—inspired by psychology, ethnology, anthropology, and sociology—went beyond the mere (p. 284) comparison of statutes and sought to identify the underlying reasons for commonalities and differences.¹²⁶

Bevilacqua produced his draft civil code in eight months; it was based both on the existing drafts, especially Freitas's *Esboço*, and also on his own comparative experience. What followed were four years of intensive parliamentary and academic discussions, which were equally dominated by comparative arguments.¹²⁷ After having been massively reformulated in terms of drafting and linguistic style (but not as regards substance) by Senator Ruy Barbosa, the eminent mastermind of the Brazilian Constitution of 1891 and another pupil of the *Escola de Recife*, the first Brazilian Civil Code was finally approved in 1916 and remained in force between 1917 and 2002. Strangely enough, the German *BGB*, which was promulgated in 1896, did not have much impact on the content of the Brazilian Code.¹²⁸ (Bevilacqua apparently only possessed a French translation by Raoul de la Grasserie.)¹²⁹ Nevertheless, the structure of both codes is very similar due to extent to which Freitas was influenced by German pandectist doctrine. The Brazilian Code of 1916 had 1807 articles, and it was divided into a general part containing three books on persons, goods, and legal facts, and a specific part containing four books on family law, real rights, obligations, and succession. An introductory law regulated the Code's applicability. Following Freitas's tradition, the Brazilian Code was predominantly an indigenous product: more than a third of its provisions are based on the pre-existing law, and another third are new provisions of original Brazilian pedigree, taken mainly from Freitas's *Esboço*. Accordingly, only about one-quarter of its provisions are based on exogenous sources, the most influential of which was the French *Code civil*. Again, as

shown by Pontes de Miranda, French law was resorted to 'less for its own sake than for the modern formulation which it gave to Roman law'.¹³⁰

(p. 285) 3. Summary of the Development in the First Century of Independence

The creation of the new Latin American states and the development of their young legal systems was marked from the beginning by the influence of comparative law. In constitutional matters the quest for new models led to the law of the United States exerting considerable influence. In commercial and civil matters, initially the most important model was French law; however subsequently new models were developed, based mainly on the pre-existing law, which was corrected and complemented by references to modern foreign law. Roman law and its *usus modernus* was originally the most important source for the indigenous codifications. However, the trend towards an increasing eclecticism for justifying the solutions proposed the basis for a new approach to comparative law in Latin America: the focus slowly shifted from the search for the best available modern reformulation of Roman law towards a direct interest in the foreign legislative solutions on their own merits. Apart from being a source for legislative reform, comparative law was a highly practical discipline, as underlined by Clovis Bevilacqua in 1897 (who was still alluding to the *Lei da Boa Razão*):¹³¹

Ultimately, the judge cannot limit himself to the knowledge of his own law, because in many cases he will have to study conscientiously the foreign sources which have inspired the legislator, in order to understand the provisions of his own law ...; because in many other cases the gaps and deficiencies of the law of his country can be remedied by recourse to suitable provisions of the laws of the civilized nations; and in yet other cases because he will find himself obliged to apply the foreign law as a result of the commands of the principles of conflict of laws.

IV. From the Twentieth Century to the Present Day

1. The Growing Influence of the Common Law

While the codifications created more or less stable frameworks for civil law, by the end of the nineteenth century commerce and commercial law were evolving at a much faster pace. As already mentioned, the commercial codes quickly became outdated and required urgent amendment. At that point the Anglo-Saxon impact (p. 286) became significant as a result of England's, and later the United States', domination of international trade in Latin America.

In commercial law the great role has been played by international commercial usages, as the real living law—what civilians call international corporative law—not by the bare text of a statute. Insurance policies, sales contracts, charter parties, bills of lading, warehouse receipts, corporation by-laws, letter of credit and other bank documents and usages of all kinds have tended to follow British or [United States] American models. This practical incorporation has been facilitated by the historical fact that our law itself had its roots in the general law merchant of the European continent. But our law has found its way also into express legislation. Argentina even adopted the English word ‘warrant’ in its law on warehouse receipts, as it did ‘debentures.’ Maritime mortgages arose in England, spread to the Continent and thence to South America. Stoppage in transit of common law origin has been recognized in Brazil, Chile and elsewhere. The Argentine law of cheques was intended to be based on the English law, and the Costa Rican Bills of Exchange Act was modelled on Chalmers' codification.¹³²

It is not surprising that the United States' growing economic interest in Latin America (evidenced, for example, by Theodore Roosevelt's capture of the Panama Canal in 1903, or the sharp rise of United States investments in Latin America in the first third of the twentieth century) started to have an impact on Latin American legislation. The leading example is the reform of the banking sector in Guatemala, Colombia, Chile, Ecuador, Bolivia, and Peru between 1919 and 1934, which was promoted by a United States mission headed by Edwin W. Kemmerer, Professor at Princeton. As well as establishing central banks and banking surveillance along the lines of the United States model, these reforms led to the adoption of provisions on negotiable titles that were modelled on the United States Uniform Negotiable Instruments Law. The literal (although deficiently translated) copy of United States law in Colombia proved to be ‘a striking example of how not to legislate’ and was apparently completely ignored by Colombia's banking sector.¹³³ The Chilean experience was more positive, as Kemmerer's proposals only served as a source of inspiration for indigenous reforms of the Commercial Code.¹³⁴ Upon Kemmerer's recommendations, banks in Colombia, Peru, Chile, and Bolivia were authorized to open trust departments (*comisiones de confianza*). This sign of the recognition of the express trust of the common law caused much excitement among lawyers in the United States.¹³⁵ Before the trust was adopted in Argentina, Colombia, Ecuador, Mexico, Peru, Uruguay, and Venezuela,¹³⁶ its introduction into a civil law jurisdiction had been spearheaded by Panama in 1924, which modelled (p. 287) its corporate law on that of Arizona and Florida.¹³⁷ The result is that ‘Panama ... has become a haven for corporations—thousands have been organized there, owned by foreigners, especially Americans, to the profit of the country and its bar’.¹³⁸ That conclusion might today, with hindsight, have been formulated less enthusiastically. The liberalization of Chile's economy under Pinochet's regime and the influence of the ‘Chicago boys’ introduced more important changes originating in the United States; these affected, *inter alia*, the legislation on corporations and securities. The experiences of many other Latin American countries are similar.¹³⁹ In 1981 Chile—at least indirectly inspired by United States' legislation—abandoned its traditional concept of governmental supervision of corporations in favour of a system relying on individual court actions being brought by shareholders in case of mismanagement. It further introduced concepts such as the distinction between open and closed corporations, or shares without par value.¹⁴⁰

Another interesting example of legislation inspired by common law ideas is the Brazilian adoption of legislation allowing various types of class actions.¹⁴¹ Based on studies of the class action, as recognized in the United States, and its compatibility with the civil law system by Italian scholars in the 1970s (among them Professor Mauro Cappelletti, who is highly esteemed especially among Latin American jurists), a group of prestigious Brazilian jurists elaborated a proposal to adopt the possibility of group actions for pursuing public interests. The law was passed by the Brazilian parliament in 1985 and has subsequently been extended and applied to a variety of situations in which collective interests are affected.¹⁴² Brazilian courts and lawyers have quickly accepted the new instrument, which has, however, developed independently of the North American model, and thus quite differently.¹⁴³ About 95 per cent of all group actions are initiated by the *Ministério Público*, official prosecutors who act in the public interest;¹⁴⁴ and in most cases, such as those related to local taxes and increases in bus fares, defendants are public bodies. But there have also been some actions against private enterprises relating to misleading advertisements, environmental damage, defective products, and consumer matters; and there have been a few, albeit rather rudimentary, mass tort claims.¹⁴⁵ One of its advocates views the Brazilian *ação civil pública* as a 'responsible transplant' and promotes it as a model for all civil law countries, especially the other Ibero-American countries:¹⁴⁶

Adapted to the civil-law tradition and the peculiarities of local culture and needs, the Brazilian class action legislation is a unique regulation addressing standing to sue, types of group rights, *res judicata*, *lis pendens*, and several other important aspects. The Brazilian experience demonstrates that civil law systems can employ a class suit procedure but cannot transplant the American class action model into their systems without substantial adaptation.¹⁴⁷

It is interesting to note that in Argentina an attempt by a representative of the public interest (*Defensoría del Pueblo*) to bundle mass claims of a large number of aggrieved parties who had suffered damages due to the interruption of electricity by the privatized provider has been rejected by the court. After a detailed analysis of the system of class actions in the United States, the court concluded that, in the absence of a specific legal basis, the existing provisions on *Defensoría*'s powers could not be interpreted as allowing a collective action.¹⁴⁸

2. A Battlefield for Influence: The Unification of Law

The general shift 'from Europe to America'¹⁴⁹ has accelerated since the end of World War II. Many young Latin American jurists now prefer LL M courses in the United States over French or German doctorates.¹⁵⁰ The change was also supported by the efforts of the short-lived 'law and development' movement in the 1960s, which sought to implement the rule of law in Latin America by means of legal education.¹⁵¹ This change of emphasis must be seen in the larger context of 'Pan-Americanism', the United States' answer to the French concept of *l'Amérique latine*, by means of which France had tried to invoke a common linguistic and cultural heritage during its military intervention in Mexico in 1864–6. Pan-Americanism is a child of the Monroe Doctrine, which was first formulated in 1823, that is, the claim by the United States to be entitled to exclude European

interference in the Americas. French hegemony and legal influence eventually gave way to US American predominance, contrary to what a Francophile author still hoped in 1954.¹⁵²

It would be erroneous, however, to draw pessimistic conclusions as to the destiny of French law in Latin America. The existence of French law on this part of the American continent is not jeopardized by an invasion of common law concepts.... It even seems probable to me that if one day a real Latin American law should be born out of the diversity found currently in these countries, it would have to be a system based on French law.

(a) Pan-Americanism versus Ibero-Americanism

At the First Pan-American Conference in Washington in 1889–90, the United States proposed, *inter alia*, the adoption of uniform systems of weights and measures, protection of intellectual and industrial property rights, common rules on imports and exports, and an American customs union similar to the German *Zollverein* of 1834, which helped to pave the way towards the unification of Germany in 1871.¹⁵³ This resulted in the creation of the Commercial Bureau of the American Republics, which became the Pan-American Union in 1910 and had the task of promoting the commercial and cultural links between the countries of the Americas, *inter alia*, through the elaboration of conventions, that is, the unification of laws.¹⁵⁴ Despite considerable activities and a large budget, this institution, which became the Organization of American States (OAS) in 1948, has always been confronted with Latin-American suspicions concerning the interests of the *Yanquis*, as they were bitterly formulated by the Peruvian writer and diplomat García Calderón in 1917:¹⁵⁵ ‘Pan-Americanism, by the end of the last century, is a delusive synonym for arrogance, for the association of nations brought about by force, [as a result of which] the peoples of the tropics obey the orders of Washington and work for the benefit of a distant dictator ...’.

The rejection of the growing influence of the United States gave rise to a competing model of legal unification, grounded in the Ibero-Americanism movement. It invoked the old dream of a reunification of law, especially private law, in Latin America on the basis of the historical legal unity which had existed under the Spanish and Portuguese reign and under the auspices of Roman law. It is in this context that the vision of using comparative law as a tool for the unification of law, (p. 290) as formulated by Raymond Saleilles at the International Congress on Comparative Law of Paris in 1900,¹⁵⁶ was extended to Latin America, as in the highly polemical proposal of the Spanish professor Emilio Miñana y Villagrasa for *The Unification of the Hispano-American Commercial Law* in 1925.¹⁵⁷ The Ibero-American spirit of legal unification can still be found today in a small number of specifically Ibero-American congresses and institutes, such as the influential *Instituto Ibero-americano de Derecho Procesal*, which currently promotes the Brazilian version of class actions in the form of an ‘Ibero-American Model Code’.¹⁵⁸

(b) Unification of Home-Grown and Transplanted Law: CIDIP

The adherents of the Pan-American ideal have also recognized comparative law as a central tool for the unification of law.¹⁵⁹ However, their perspective is often quite different. Rather than searching for a common core as the basis for unification, the focus has been on the quest for new solutions adapted to the new social reality. This has entailed the rejection of traditional sources, such as, in particular, Roman law.¹⁶⁰ Comparative studies, therefore, also became relevant for finding the means of transplanting new, and often foreign, concepts into the existing, often outdated legal structures. The degree of sensitivity to the compatibility of the old native and the new foreign concepts with each other has varied significantly, and has often depended on the economic interest lying behind the proposed innovations. Examples of this kind of influence can be found in the activities of the OAS's Inter-American Specialized Conferences on Private International Law which have taken place since 1975 and are mostly known under the Spanish abbreviation CIDIP. The CIDIP was originally intended to merge the efforts of the Lima Conference of 1877 (the first international conference in this field), the Treaties of Montevideo 1889 and 1939–40, and the Bustamante Code, which was signed in Havana in 1929, in the light of the American Law Institute's Restatement of the Law of Conflict of Laws (1934/71).¹⁶¹ Beginning in 1975, the CIDIP focused for some time on the enforceability of foreign titles, judgments, and awards, as well as on the (p. 291) conflict of laws. While most initiatives regarding classical questions of family law or status have Latin American origins (frequently duplicating the efforts of the Hague Conference on Private International Law), initiatives in commercial matters were typically proposed by the United States. One example is the Panama Convention of 1975 on the recognition of foreign arbitral awards, which was proposed as a regional solution in order to overcome the rejection of the New York Convention of 1958 by most Latin American countries.¹⁶²

The latest CIDIP VI, held in Washington in 2002, brought about a new dimension:¹⁶³ the harmonization of substantive law through model laws, making the CIDIP the vehicle for the preparation of a uniform legal framework for the functioning of the Free Trade Area of the Americas (FTAA), the negotiations for which had been formally launched in 1998.¹⁶⁴ The first Inter-American model law has been yet another effort of 'selling' a common law-based concept to the Latin American partners. Based on the conviction that a transplanted version of Art 9 Uniform Commercial Code (UCC) may be able to reproduce its success story of stimulating economic growth by providing more flexible and cheaper credit, the United States had proposed an Inter-American Model Law on Secured Transactions that would allow the creation of a security interest without the actual possession of the collateral. This proposal faced much resistance from the Latin American countries as it was conceived as being incompatible with the Roman law basis of their legal systems. Furthermore, the proposal's significant strengthening of creditors' rights gave rise to much suspicion about the interests at work. Nevertheless, because Mexico had already partly accepted a similar reform under the influence of its partners in NAFTA,¹⁶⁵ and in view of a complete re-writing and 'latinization' of the draft by the Uruguayan *rapporteur* Ronald Herbert the night before the final session, the Model Law

was finally adopted—yet with the general implicit understanding that, in any case, ‘no Latin American parliament would enact such a solution’.¹⁶⁶ However, it remains to be seen whether the Latin American countries (p. 292) will be able to ignore this model, which they have officially endorsed, in any future negotiations with the IMF, the World Bank, or the Inter-American Bank of Development for the raising of finance. These institutions, too, have already played a role in bringing about important legislative changes as is evidenced, for example, by the adoption of new laws on arbitration in Bolivia and Paraguay on the basis of the UNCITRAL-Model Law on International Commercial Arbitration.¹⁶⁷ It can only be hoped that Latin American countries will listen to the warnings formulated in this respect:¹⁶⁸

The practical field for uniformity is very limited. It is restricted to private international law and to a few phases of commercial law, such as bills of exchange, overseas sales and the like. In many branches of the law, attempted unification would do more harm than good. The law should be adapted to the specific conditions and customs of each people. It is these countries that are creating their own law that are making the greatest progress in the field of law. Copying foreign legislation may well be highly disastrous.

(c) The Role of ‘Sub’-Regional Integration: MERCOSUR and the Andean Community

A certain counterbalance to the United States dominated Pan-Americanism can be found in ‘sub’-regional projects of integration: the Common Market of the South (MERCOSUR) between Argentina, Brazil, Paraguay, Uruguay, and now also Venezuela¹⁶⁹ and the Andean Community (CAN) which includes Bolivia, Colombia, Ecuador, Peru, and Venezuela¹⁷⁰ (which are—together with Chile—also associated with the MERCOSUR). Both of these alliances were founded under the institutional umbrella of the (otherwise insignificant) Latin American Association of Integration (ALADI).¹⁷¹ Both projects aim at the formation of a true common market, such as the one established by the European Union, that is, economic and social integration flanked by legal integration. To date, however, the degree of legal integration is still far from being comparable to that of the European model.

Some significant efforts have been undertaken by the MERCOSUR states in the field of international civil procedure (recognition of foreign decisions, cooperation and jurisdictional assistance, international arbitration).¹⁷² But because the (p. 293) legislative process is still dominated by political rather than legal issues, preparatory comparative studies have apparently rarely played a significant role. Attempts at a harmonization of the laws on consumer protection, based on the Santa Maria Protocol of 1996 on jurisdiction in consumer matters (which was never ratified by any of the four signatory states), failed due to fundamentally different national conceptions in this area; Brazil, in particular, refused any harmonization, for fear that it would lower its existing standard of protection.¹⁷³ Interestingly, however, Brazilian judges turned, *inter alia*, to the definition

given by the failed Protocol when interpreting the term 'consumer' in the Brazilian *Código de Defesa do Consumidor*.¹⁷⁴

In the absence of an institution comparable to the European Court of Justice, another key role that comparative law may be expected to play in the context of South American unification and harmonization of laws is that of guaranteeing the uniform interpretation and application of the 'community law' in all member states of the MERCOSUR.¹⁷⁵ The recent publication by the Secretariat of the MERCOSUR on the application of the law of the MERCOSUR by national courts shows that this necessity is finally being recognized.¹⁷⁶

3. Developments Determining, and Determined by, Comparative Law

The significant growth in the influence of US American law since the beginning of the twentieth century is just one of the facets of the development of comparative law in Latin America. Today the picture is far from being as homogeneous or linear as it may have appeared in the mid-nineteenth century. A number of highly particular aspects have to be taken into consideration in order to understand the crucial role of comparative law for Latin American law.

(a) The High Degree of Eclecticism

The high degree of eclecticism, already mentioned above, is certainly the most striking feature of the recourse to foreign law, both by draftsmen of legislation and (p. 294) scholars. Its extent often depends on the intellectual and educational background of those who resort to comparative law. One example of this is the Peruvian Civil Code of 1984. Like the Bolivian Code of 1976 and the Paraguayan Code of 1985, its general source of inspiration was the Italian *Codice civile* of 1942 (a model that was generally popular in Latin America, particularly as a result of its language being easily accessible).¹⁷⁷ The chapter on agency (*mandato*) was drafted on the basis of a careful study of the concept's historical origins, the confusion between *mandat* and *représentation légale* in French law and its transplants, as well as the subsequent clarification by Windscheid and Laband; essentially it follows the models of Italian and Portuguese law.¹⁷⁸ The chapter on the general provisions on contracts, on the other hand, is primarily based on Italian law, but also adopted provisions from various European codes (Germany, the Netherlands, Portugal, and Switzerland), and Latin American codes (Bolivia, Cuba, Mexico, and Portugal), as well as those of the Philippines, Lebanon, and Ethiopia.¹⁷⁹ The chapter on unjustified enrichment (*enriquecimiento sin causa*), which switched from a system of restitution to a system of compensation of damages (*indemnización*),¹⁸⁰ is commented upon laconically in the *Exposición de Motivos*:¹⁸¹

In comparative law, unjustified enrichment is regulated by Articles 812 to 822 of the German Civil Code, Articles 703 ff. of the Japanese Civil Code, Articles 2041 and 2042 of the Italian Civil Code, Articles 62 to 67 of the Swiss Federal Code of Obligations, Articles 399 ff. of the Soviet Civil Code, Articles 179 to 183 of the Chinese Civil Code, Articles 123 to 127 of the Polish Code of Obligations, Articles

66 to 73 of the Franco-Italian Draft Code of Obligations and Contracts, Articles 1882 to 1895 of the Mexican Civil Code.

Just a few years earlier, the renowned Peruvian professor and Supreme Court judge Roberto G. MacLean had already lamented:¹⁸²

Legislation often is drafted without the necessary studies and information. The national reality has just begun to be explored and, faced with a lack of facts and figures and ignorant of precise situations to be regulated in many cases, legislation is done 'by ear,' frequently working from the legislative models available from other countries. Recourse to comparative (p. 295) law as an aid to the legislator, if made injudiciously, carries with it the danger of causing a serious distortion of the juridical function. Laws are a reflection of the conflicting interests existing in a society and its duty is to neutralize them and put them in equilibrium. For this reason, when a law is transplanted from one country to another, it may be then in the new country the law does not satisfactorily resolve the conflicts between interests, simply because the conflicts are distinct. In such cases, they remain at least partially up in the air and without resolution.

Some—but certainly not all—academic studies also seriously suffer from a wild eclecticism which lacks reflection. An extreme example for this is a recent Colombian publication on unjustified enrichment, which—besides citing a host of Roman, Spanish, French, Italian, English, and German authors—develops the analysis of forty-eight national laws, but spends only five pages on the law of Colombia.¹⁸³ This phenomenon has also been observed by Kenneth L. Karst and Keith S. Rosenn:¹⁸⁴

Student theses tend to be in the scissors and paste tradition—back-to-back quotations from German, French, Italian, and Spanish authors. The law of the author's own jurisdiction may receive little attention, and rarely is there an attempt to appraise a particular legal rule against the background of the Latin-American socio-economic scene.

(b) The Authority and Challenges of Comparative Law

The degree of authority of foreign law is certainly a striking feature of Latin American law in general, and of Brazilian law in particular. An example of the heritage of the *Lei da Boa Razão*, that is, the overriding authority of foreign law where positive national law does not provide satisfactory solutions, can be found in the Brazilian law of delict. The Brazilian Civil Code of 1916 had not adopted the solution of Teixeira de Freitas's *Esboço* of 1865 that accepted a special responsibility of the owner for his belongings.¹⁸⁵ Rather, the spirit of individualism led Bevilacqua to tie extra-contractual liability to the strict necessity of fault, with only limited exceptions for owners of animals or houses, and the *actio de effusis vel deiectis*, thus adopting a much more restrictive regime than the original French *Code civil*.¹⁸⁶ Between 1896 and 1930 the French courts further developed the system of liability on the basis of the general wording of Art 1384 al 1 *Code civil* by accepting the *responsabilité du fait de chose*, that is, liability for things 'which one has under one's (p. 296) Control', irrespective of fault.¹⁸⁷ This very extensive concept of

liability, in sharp contrast to the concept of the Brazilian Civil Code of 1916, soon caught the attention of a Brazilian scholar, who held in 1944:¹⁸⁸ 'If the French Civil Code has accepted this solution, there can be no doubt that it is also adequate for our law, since it was inspired by the former as regards the general framework and the details of delictual liability'. After having been originally rejected by the courts, the *teoria do risco* was ultimately accepted about ten years later, in cases of car accidents and defective machines, on the model of the French solution.¹⁸⁹ Based on that case law, the *teoria do risco* also came to be incorporated into the new Civil Code of 2002.¹⁹⁰ The phenomenon of citing foreign legal doctrine when interpreting legal provisions that are fundamentally different from those to which the foreign doctrine refers is not rare. Another example of this is the monumental and highly influential *Tratado de Direito Privado*, a treatise in sixty volumes by Francisco Pontes de Miranda,¹⁹¹ who, as a pupil of the *Escola de Recife*, had developed close ties to Germany. In this work Miranda cites almost every available German publication on any topic treated in his work, often regardless of whether the Brazilian solution coincides with the German one or not. It is in this light that one has to understand the somewhat exaggerated assertion by René David (who had lived for some time in Brazil) that every law has to be studied according to its own methods:¹⁹²

In Brazil, scholarly writings, both foreign and national, seem to play a prominent role: French, Italian, Portuguese, Spanish and Argentine authors are constantly cited and commented upon by the judges in their decisions. Whoever studies a question of Brazilian law has to take this into account and should not pretend to resolve that question by considering only the Brazilian laws, court decisions and scholarly opinions.

The *grand connaisseur* of Latin American law, Phanor J. Eder, identifies two particular difficulties with this approach. For one, there is a constant danger of distortion with the resulting possibility of creating obstacles to the development of the national law; furthermore, there is a gulf between the sophisticated approach of the elite and the much poorer local practice.¹⁹³

(p. 297) In the dearth of published reports of the courts, and in view of the fact that the codes are in such large part of foreign origin, the Latin American lawyer is compelled to resort to comparative law. Nowhere else does comparative law become of such practical value. Nearly every treatise of note is a comparative study, and the contribution of Latin American law to the field of jurisprudence is of high merit. The shelves of prosperous lawyers are filled with foreign books. In the bookstores one is apt to find a more extensive stock of French books and of translations into Spanish from all Continental languages than of national law books. The lower and intermediate courts, on the other hand, are rarely, if ever, supplied with adequate libraries, and the judges are too poorly paid to buy books. Except for a few enlightened and well-educated judges, court decisions are not directly influenced by foreign law to the extent one may expect. They turn, rather, on a refined, generally casuistic, and narrow interpretation of articles of the codes and statutes, which does not help the evolution or the growth of the law. It is to

the universities, not the courts, that one looks for progress. Practical conditions and business requirements are rarely taken into account.

The difficulties associated with the comparative approach also led the abolition of the principle of nationality by Brazil, a traditional country of immigration, in its rules on conflict of laws in favour of the principle of residence (which has always been the standard of its neighbours Argentina and Uruguay):¹⁹⁴ 'What is incomprehensible is the massive application, especially by judges in rural areas, who are poorly paid and incapable of having perfect knowledge, of the laws of Syria, Japan, Germany, etc.'.

The other aspect mentioned by Eder may be a key to understanding the large role of comparative law in Latin America: the exclusivity of knowledge of, and access to, foreign and presumably better developed law has been a crucial factor for building and securing the positions of the local elites. Yves Dezalay and Bryant G. Garth have demonstrated how the new generations of young Latin American lawyers (and economists) that invested in their legal training in the United States since World War II have managed to enjoy important careers back home, whereas the older elites with their traditional orientation towards Continental Europe could not always keep up with the changes of the internationalized and US dominated economy, not to mention those who had no means of internationalizing their professional portfolio.¹⁹⁵ Individual legal and linguistic capacities have been important determinants for the development of comparative law and of Latin American law as such. The struggle for influence in Argentine administrative law between the traditional French and the more recent US American approach provides a good example. The former school of thought is represented by Juan Carlos Cassagne, professor at the *Universidad de Buenos Aires*, who speaks French as a foreign language and has close contacts with France and Spain; the latter is headed by Hector Mairal, the holder of the other chair of administrative law at the same university, (p. 298) who speaks both French and English, holds a masters in Comparative Law from the United States, and has been a visiting professor at Harvard and Cambridge.¹⁹⁶ This aspect of individual capacities, but also that of the diversification of foreign sources and the role of the authority of comparative arguments is illustrated by a snapshot of the role of comparative law in two Latin American Supreme Courts whose constitutional traditions have their roots in US American constitutional law.

(c) Comparative Law in Action: The Supreme Courts of Argentina and Brazil

As noted above in the discussion of nineteenth-century constitutional law, the Argentine *Corte Suprema* readily turned to constitutional doctrine and case law from the United States to interpret its own Constitution, and still regularly does so today wherever it seems appropriate.¹⁹⁷ US law, however, is no longer the only persuasive authority from abroad. One example is a sensitive case in 1998 in which the brother of a victim of the military regime, who had disappeared in 1976, sued for access to government sources of information. The opinions delivered by most of the judges contained numerous references to, and sometimes even detailed analyses of, not only international treaties and soft law on the matter, but also foreign developments on the question of *habeas data*, such as in Colombian, Brazilian, and German constitutional law, in addition to that of the United States.¹⁹⁸ On the question of whether somebody condemned *in absentia* could be

extradited, the judges also, apart from US law, referred in some detail to English, Italian, French, and German law, as well as to the case law of the European Court of Human Rights.¹⁹⁹ In general, it is interesting to note that comparative arguments are also often found in dissenting opinions,²⁰⁰ and that they are regularly invoked by the same judges.

(p. 299) A look at some recent cases of the Brazilian *Supremo Tribunal Federal* shows a very similar but even more complex picture. While references to foreign sources sometimes serve as mere ‘decoration’ of the judge’s opinion,²⁰¹ serious comparative arguments are quite frequent.²⁰² Recourse to US constitutional case law can be found in some sensitive decisions by Judge Celso de Mello (who went to high school in the United States) and the recently appointed Judge Joaquim Barbosa (who wrote his doctorate in France and has been a visiting professor at the University of California, Los Angeles and Columbia Law School);²⁰³ these decisions, *inter alia*, concern the limitations of a foreign state’s immunity,²⁰⁴ the limitations of the jurisdiction of martial courts,²⁰⁵ or abortion in case of anencephaly.²⁰⁶ It is, however, another recently appointed judge who has been particularly conspicuous for bringing insights from comparative law to bear upon the decisions of the Court: Judge Gilmar Mendes (who had studied for an LL M and written his doctorate on comparative constitutional law in Germany).²⁰⁷ A number of his opinions in fundamental cases contain elaborate comparative arguments. On the question whether the declaration of unconstitutionality of a law operates only *ex tunc*, he relied not only on constitutional doctrine and case law from the United States, but also Austrian, German, Spanish, and Portuguese law, as well as the case law of the European Court of Human Rights.²⁰⁸ In a case on whether pensions of public servants may be privileged in terms of taxation he referred mainly to German, but also to French and Italian, constitutional law. In other cases, his (p. 300) comparative arguments have been limited to German constitutional doctrine.²⁰⁹ But also in the field of private law, Mendes’s recourse to comparative law has had some impact. An example is a decision according to which the invalidity of labour contracts has no retroactive effect. This was based on the German doctrine of *faktisches Arbeitsverhältnis*, with additional support being derived from French, Mexican, and Italian law.²¹⁰

V. Final Remark

The almost paradoxical and Janus-faced character of comparative law is probably inevitable as it is part of the highly complex legal tradition and culture of Latin America.²¹¹ In respect of Latin America, one may certainly not end a summary of the past one hundred years of modern comparative law with the conclusion that ‘its influence on legal practice, at least outside the legislation of Western states [of the “First World”], has been rather marginal’.²¹² Although often not directly visible, the influence of comparative law in Latin America has been—and still is—pervasive, sometimes almost excessively so.

The result of this mixture is a mosaic of highly diverse legal systems which, even if located in the circle of the ‘civil law’ family, show a special coloration with its own and particular characteristics. It is thus not surprising that Latin America has

been qualified as 'a comparatist's dream'. The fact that much Latin-American legislation has foreign origins explains why comparative law is of paramount practical importance. The Latin-American lawyer is obliged to turn to comparative law. Accordingly, comparative studies are so familiar to Latin-American lawyers that they are often not even noticed.²¹³

Bibliography

Phanor J. Eder, 'Law and Justice in Latin America', in *Law—A Century of Progress 1835–1935* (1937), 39ff

Phanor J. Eder, *A Comparative Survey of Anglo-American and Latin-American Law* (1950)

Julio Olavarria Ávila, *Los Códigos de Comercio Latinoamericanos* (1961)

Kenneth L. Karst and Keith S. Rosenn, *Law and Development in Latin America: A Case Book* (1975)

Alejandro Garro, 'Unification and Harmonization of Private Law in Latin America', (1992) 40 *AJCL* 584 ff

John H. Merryman, David S. Clark, and John O. Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia* (1994)

Alejandro Guzmán Brito, *La Codificación Civil en Iberoamérica—Siglos XIX y XX* (2000)

Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars* (2002)

Matthew C. Mirow, *Latin American Law—A History of Private Law and Institutions in Spanish America* (2004) (p. 302)

Notes:

(1) This has already been observed in 1878 by Léonel Oudin, 'Étude sur le *Code civil* du Chili', (1878) VII *Bulletin de la Société de Législation Comparée* 506 ff: 'Notre Société, dans ces études sur les législations de divers pays, n'a pas eu souvent l'occasion de s'occuper des États de l'Amérique du Sud ...'.

(2) For the repercussions of such simplistic classification see eg the astonishing conclusions drawn by economists trying to show that legal origins predetermine legal efficiency and even economic performance: 'Latin America suffers from relatively uninformative financial statements and relatively weak protection of shareholders, partly due to its Napoleonic legal heritage': Ross Levine, 'Napoleon, Bourses, and Growth in Latin America', (1998) *Inter-American Development Bank—Office of the Chief Economist Working paper no. 365*, available at <<http://www.iadb.org/oce>> (accessed 13 January 2006).

- (3) See eg Imre Zajtay, 'Les destinées du *Code civil*', (1954) 6 *Revue internationale de droit comparé* 792, 804. For an overview of the works of the first half of the twentieth century, following this scheme, see René David, 'L'originalité des droits de l'Amérique latine', in *idem*, *Le droit comparé: Droits d'hier, droits de demain* (1982), 161, 164 (a reprint of an unpublished *polycopie* of 1953), citing, *inter alia*, the works of Wigmore, Schnitzer, Gutteridge, Sarfatti, and Ionesco. The same attitude can still be found today in Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (trans Tony Weir, 3rd edn, 1998), 113–15.
- (4) John H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (2nd edn, 1985), referring at 89, 96, 137, 139, and 140 only very briefly to Latin American constitutional law.
- (5) See the provocative introduction by René David, 'Structure et idéologie du Droit brésilien', (1954) 17–18 *Cahiers de Législation de Bibliographie juridique de l'Amérique latine* 7, 8: 'The first impression of both Brazilian law as well as all other aspects of the Brazilian spirit is without doubt the absence of originality'. See also *idem* (n 3), 161 for all of Latin American law.
- (6) See eg in quantitative terms Zweigert and Kötz (n 3), who dedicate as much space (one and a half pages) to all of Latin American law as to the law of Louisiana or Quebec (at 115–18), which is still only a small fraction of the attention given to the civil codes of Austria or Switzerland.
- (7) John Merryman, David S. Clark, and John O. Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia* (1994), 352–62 (on the legal system of the Incas and Aztecs); Jerome A. Offner, *Law and Politics in Aztec Texcoco* (1983); Miguel Bonifaz, *Derecho Indiano* (1955), 72–121 (sketching the legal systems of the Aztecs, the Maya-Quitches, the Chibchas, the Kollas, and the Incas).
- (8) See José María Castán Vázquez, 'El sistema de derecho privado iberoamericano', (1969) 28 *Estudios de Derecho* 5, 12.
- (9) *Ordenanzas* of 6 August 1555 and of 13 July 1530, restated by the 'Recopilación de las Leyes de las Indias' (1681) Book 2, Title 1, Law 4 and Book 5, Title 2, Law 22, in Juan Manzano Manzano, *Recopilación de leyes de los reynos de las Indias* (1943, reprint 1973); see also <<http://www.congreso.gob.pe/ntley/LeyIndiaP.htm>> (accessed 13 January 2006).
- (10) cf Ricardo Levene, *Manual de historia del derecho argentino* (5th edn, 1985), 199–200; Matthew C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (2004), 6–7.
- (11) See Clarence Henry Haring, *The Spanish Empire in America* (1975), 101; Mirow (n 10), 51.
- (12) See Alfonso García Gallo, *Los orígenes españoles de las instituciones americanas* (1987), 269.

(13) *Liber Iudicum* (AD 654) Book 2, Title 1, Law 8, in *Los códigos españoles concordados y anotados* (vol I, 2nd edn, 1872), 5; this rule can also be found in the Castilian version of the *Liber Iudiciorum*, the *Fuero Juzgo* (AD 681), *ibid* at 111.

(14) For many others, see Mirow (n 10), 16–17.

(15) Alfonso García-Gallo, *Antología de las fuentes del antiguo Derecho* (1982), 145.

(16) See the *Ordenanzas de Audiencia* of 1563, restated in the *Recopilación de la Leyes de las Indias* (n 9), Book 2, Title 24, Laws 1–28.

(17) See the *Ordenanzas de Audiencia* of 1530, restated in the *Recopilación de las Indias* (n 9), Book 2, Title 1, Law 2.

(18) Keith S. Rosenn, 'Brazil's Legal Culture: The *Jeito* Revisited', (1984) 1 *Florida International LJ* 1, 9–12; *idem*, 'The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation', (1990) 22 *University of Miami Inter-American LR* 1, 25–6; Woodrow Borah, 'Assistance in Conflict Resolution for the Poor and Indians in Colonial Mexico', (1996) 63 *Recueils de la société Jean Bodin pour l'histoire comparative des institutions* 217, 222.

(19) Guillermo F. Margadant S., *An Introduction to the History of Mexican Law* (1983), 72–3. For an analysis based on the conflicting standards hypothesis, see John L. Phelan, 'Authority and Flexibility in the Spanish Imperial Bureaucracy', (1960) 5 *Administrative Science Quarterly* 47–65.

(20) For the Latin American concepts of 'flexibility', see Howard J. Wiarda, 'Law and Political Development in Latin America: Towards a Framework for Analysis', (1971) 19 *AJCL* 434, 460–3; Keith S. Rosenn, 'The *Jeito*: Brazil's Institutional Bypass of the Formal Legal System and its Developmental Implications', (1971) 19 *AJCL* 514–49.

(21) Javier Barrientos Grandón, *La cultura jurídica en la Nueva España* (1993), 116–22; Guzmán Brito (below n 23), 87–9.

(22) Margadant (n 19), 44–5.

(23) See eg Alejandro Guzmán Brito, 'La vigencia del derecho romano en Indias según el jurista Juan del Corral Calvo de la Torre', in *Justicia, Sociedad y Economía en la América Española (Siglos XVI, XVII y XVIII)* (1983), 71, 88–9 (with further references in n 70); see also Castán Vázquez (n 8), 14, referring to Irving A. Leonard, *Los libros del Conquistador* (1953), 269–358.

(24) For the development of the *Ordenações Afonsinas* (1447), *Manuelinas* (1521), and *Filipinas* (1595), see in detail Mário Júlio Almeida Costa, *Historia do Direito Português* (3rd edn, 1996), 273–93.

(25) See Almeida Costa (n 24), 229–32.

(26) Ibid 308–16.

(27) Ibid 316–17 (printing out that even Spanish law was sometimes applied despite not being admitted as a source of law).

(28) § 9 *Lei da Boa Razão*. See also the *Estatutos da Univ. de Coimbra do ano de 1772* (vol II, 1773), 269 (Book 2, Title 5, Law 3), cited by L. Cabral de Moncada, *Estudos de História do Direito* (1948), 103 (n 1).

(29) Moncada (n 28), 104: ‘... thereby placing the entire Portuguese [and thus Brazilian] legal life under the influence of the German and Dutch doctrine, humanism and legal rationalism’.

(30) Clovis Bevilacqua, *Resumo das Licções de Legislação Comparada sobre o Direito Privado* (2nd edn, 1897), 27 (still using the *Lei da Boa Razão* to justify the necessity of comparative law in 1897); Francisco C. Pontes de Miranda, *Fontes e Evolução do Direito Civil Brasileiro* (1928), 87–98 (noting that this did not bring about the relief for judicial practice that had been hoped for, but rather contributed to the chaos by citing contradictory sources); see also below n 185.

(31) Almeida Costa (n 24), 377; Moncada (n 28), 124; Clóvis V. Couto e Silva, ‘O direito civil brasileiro em perspectiva histórica e visão de futuro’, (1988) 97 *Revista de Informação Legislativa* 163–180, at 167 and 171 (referring to the influence of the Prussian *Allgemeines Landrecht* of 1794 and then of the French *Code civil* of 1904).

(32) See in detail Moncada (n 28), 105–24.

(33) Couto e Silva (n 31), 171–2.

(34) The countries resulting from the breakup of the former Spanish American empire were Argentina, Bolivia, Chile, Colombia (including Panama), Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and, eventually, Uruguay and Venezuela.

(35) For the general history from 1808 to 1889, see Mary del Priore and Renato Pinto Venâncio, *História do Brasil* (2001), 198–268.

(36) See Ovidio García Regueiro, ‘1789 y la América española: eco ultramarino de los acontecimientos franceses’, in *Revolución, contrarrevolución e independencia: La Revolución Francesa, España y América* (1989), 108.

(37) Gerald E. Fitzgerald, *The Constitutions of Latin America* (1968), x–xi; David S. Clark, ‘Judicial Protection of the Constitution in Latin America’, (1975) 2 *Hastings Constitutional Law Quarterly* 405, 413. For the Brazilian independence movement, which was destined to fail, see Haroldo Valladão, ‘L’étude et l’enseignement du Droit comparé au Brésil: XIX^e et XX^e siècle’, in Marc Ancel (ed), *Livre du centenaire de la Société de législation comparée: Évolution internationale et problèmes du droit comparé* (1971), 311–12.

(38) Later on, however, Bolívar prohibited the writings of Bentham for being too liberal; Jürgen Samtleben, 'Menschheitsglück und Gesetzgebungsexport: Zu Jeremy Benthams Wirkung in Lateinamerika', (1986) 50 *RabelsZ* 451, 454-5.

(39) For an analysis of the influence of the different sources, see Otto Carlos Stoetzer, *El pensamiento político en la América española durante el período de la emancipación (1789-1825)* (1966).

(40) Fitzgerald (n 37), x-xi.

(41) For Argentina see section 3 of the *Estatuto Provisional* of 5 May 1815; for Chile see Art 80 of the Constitution of 30 October 1822 and Art 14 of the Constitution of 29 December 1823; available at <<http://www.cervantesvirtual.com/portal/constituciones/>> (accessed 13 January 2006).

(42) See Ignacio Fernández Sarasola, 'La constitución española de 1812 y su proyección europea e iberoamericana', (2000) 2 *Fundamentos* (Spain) 359-466.

(43) For the troubled Mexican constitutional history, see Helen L. Clagett and David M. Valderrama, *A Revised Guide to Law & Legal Literature of Mexico* (1973), 1-13; for Brazil, see Jacob Dolinger, 'The Influence of American Constitutional Law on the Brazilian Legal System', (1990) 38 *AJCL* 803, 823.

(44) For details, see Jonathan M. Miller, 'The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith', (1997) 46 *American University LR* 1483, 1514-22.

(45) See Edwin M. Borchard, *Guide to the Law and Legal Literature of Argentina, Brazil and Chile* (1917), 123-8; also Miller (n 44), 1508-32 and 1545-61.

(46) The very first decisions are Corte Suprema de Justicia de la Nación, 12 April 1864, *Fiscal General de la Nación c/ M.G. Argerich*, (1865) 1 *Fallos* 130-48 (on the question of whether the Federation has jurisdiction to prosecute insults made in the press, with a thorough discussion of the writings of Story and Kent and of case law from the US Supreme Court) and 3 May 1865, *Domingo Mendoza y Hermano c/ Provincia de San Luis s/ derechos de exportación*, (1865) 1 *Fallos* 485-98 (discussion of United States doctrine on the question of federal jurisdiction in cases of a claim against a province by a 'foreigner').

(47) See below, n 198.

(48) For the development of the *amparo*, see Clagett and Valderrama (n 43), 38-61 (who characterize it as a legal remedy that is unique to Mexico).

(49) See eg Phanor J. Eder, 'The Impact of the Common Law on Latin America', (1949-50) 4 *Miami Law Quarterly* 435, 436-7: 'It is one of the best fruits of comparative law in action'.

(50) See the references by Clagett and Valderrama (n 43), 39–40.

(51) Alfonso Noriega Cantú, 'El origen nacional y los antecedentes hispánicos del juicio del amparo', (1942) 9 *Jus* (Mexico) 151–7; see also Merryman *et al* (n 7), 396.

(52) See eg the comparative work of Ignacio Vallarta (President of the Supreme Court from 1879–83): *El juicio de amparo y el writ of habeas corpus* (1881).

(53) See eg Pedro P. Camargo, 'The Right to Judicial Protection: "Amparo" and Other Latin American Remedies for the Protection of Human Rights', (1971) 3 *Lawyer of the Americas* 191, 211–16; Fix Zamudio, 'Diversos Significados Jurídicos del Amparo en el Derecho Ibero-americano', (1965) 18 *Boletín del Instituto de Derecho Comparado de México* 119.

(54) Art 18 of the first Argentine Constitution (1853/60) (*habeas corpus*); Corte Suprema de Justicia de la Nación, 5 September 1958, *Samuel Kot S.R.L. s/habeas corpus*, (1958) 241 *Fallos* 291, 292. See today Art 43 of the Constitution (1994), *Ley del Amparo* No. 16986 (18 October 1966), *Ley del Habeas Corpus* No. 23098 (28 September 1984), *Ley de Habeas Data* Law No. 25326 (4 October 2000); Kenneth L. Karst and Keith S. Rosenn, *Law and Development in Latin America: A Case Book* (1975), 160; J. P. Mandler, 'Habeas Corpus and the Protection of Human Rights in Argentina', (1991) 16 *Yale Journal of International Law* 5–12.

(55) Richard Cappalli, 'Comparative South American Civil Procedure: A Chilean Perspective', (1989–90) 21 *University of Miami Inter-American LR* 239, 296–301.

(56) Art 200 of the Constitution of 1993.

(57) Karst and Rosenn (n 54), 182–3; see also Phanor J. Eder, 'Habeas Corpus Disembodied, The Latin-American Experience', in Kurt H. Nadelmann, Arthur T. von Mehren, and John N. Hazard (eds), *XXth Century Essays in Honor of Hessel E. Yntema* (1961), 463; Clark, (1975) 2 *Hastings Constitutional Law Quarterly* 405.

(58) For the *habeas corpus*, *habeas data*, and the *mandado de segurança* see now Art 5 § 63, 69–73 of the Brazilian Constitution of 1988. For details, see Keith S. Rosenn, 'Brazil's new Constitution: An Exercise in Transient Constitutionalism for a Transitional Society', (1990) 38 *AJCL* 773, 794–8.

(59) Eder (n 57), 465–9.

(60) For a list of the different national provisions see Alejandro Guzmán Brito, *La Codificación Civil en Iberoamérica—Siglos XI—XX* (2000), 186–9.

(61) Samtleben, (1986) 50 *RabelsZ* 468.

(62) William Hazlitt, 'The Spirit of the Age', (1825), in A. R. Waller and A. Glover (eds), *The Collected Works* (vol IV, 1902), 185, 189.

- (63) Kurt Lipstein, 'Bentham, Foreign Law and Foreign Lawyers', in George Keeton and Georg Schwarzenberger (eds), *Jeremy Bentham and the Law: A Symposium* (1948), 216.
- (64) Guzmán Brito (n 60), 231-7.
- (65) Ibid 238-40.
- (66) See text accompanying n 42.
- (67) See Guzmán Brito (n 60), 184-5 (pointing to the partial abolition of slavery, the abolition of privileges of the nobility and of the primogeniture inheritance pattern for land (the *mayorazgo*), the introduction of legal capacity of the Indians, marriage between non-Catholics, intellectual property rights, the abolition of the discretionary remission of debt by the royal administration, and the right of privileged withdrawal from contracts).
- (68) Ibid 263.
- (69) Law of 3 November 1827 (maintaining *Alvará* of 11 September 1564 and Law of 8 April 1569) was only abolished by Decree No. 181 of 24 January 1890; see Pontes de Miranda (n 30), 95-6.
- (70) Ibid 307-24.
- (71) Ibid 289-302.
- (72) Ibid 304-5.
- (73) Julio Olavarriá Ávila, *Los Códigos de Comercio Latinoamericanos* (1961), 245-7.
- (74) In fact, by a mere reference to the Spanish code in Law No. 4 of 1831; Luis Monsalve Pozo, *Derecho Mercantil Ecuatoriano* (1968), 60-1.
- (75) José Gabino Pinzón, *Introducción al Derecho Comercial* (2nd edn, 1966), 33; Miguel Antonio de la Lama, *Código de Comercio* (1902), xxxvii. For one of the few, but significant, deviations of the Spanish Code of 1829 from French law, see the text accompanying n 121.
- (76) Silvio Meira, *Teixeira de Freitas: O jurisconsulto do Império* (1983), 272. See also generally W. R. Swartz, 'Codification in Latin America: The Brazilian Commercial Code of 1850', (1975) 10 *Texas International LJ* 347 ff.
- (77) Dylson Doria, *Curso de Direito Comercial* (vol I, 4th edn, 1986), 24-9; Olavarriá (n 73), 245-7.
- (78) Candido Luiz Maria de Oliveira, *Curso de Legislação Comparada* (1903), 198.
- (79) For Brazil, see Waldemar Martins Ferreira, *Tratado de Direito Comercial* (vol XIV, 1965), 3 and Olavarriá (n 73), 214 (referring especially to the provisions on bankruptcy);

for Colombia, see Robert C. Means, *Underdevelopment and the Development of Law: Corporations and Corporation Law in Nineteenth-Century Colombia* (1989), 151.

(80) Eduardo Acevedo, *Proyecto de un Código Civil para el Estado Oriental del Uruguay* (1852), 12; Julián Viso as cited by Gonzalo Parra-Aranguren, 'Nuevos Antecedentes sobre la codificación civil venezolana (1810-1862)', in *La codificación de Paez: Código Civil de 1862* (vol I, 1974), xiii, liii; cf also the overview by Guzmán Brito (n 60), 258.

(81) Guzmán Brito (n 60), 264-71.

(82) Ibid 317, 338-42.

(83) See, with further references, Máximo Pacheco G., 'Don Andrés Bello y la formación del jurista', in *Andrés Bello y el Derecho Latinoamericano: Congreso Internacional Roma 10/12 diciembre 1981* (1987), 185-7; Sandro Schipani, 'Andrés Bello Romanista-Institucionalista', in *ibid*, 205, 232-43; M. C. Mirow, 'Borrowing Private Law in Latin America: Andrés Bello's Use of the Code Napoléon in Drafting the Chilean Civil Code', (2001) 61 *Louisiana LR* 291, 297-99.

(84) See eg Guzmán Brito (n 60), 368-73 (with further references).

(85) For more detail on the use of the *Code civil* see also Mirow, (2001) 61 *Louisiana LR* 291-329.

(86) Guzmán Brito (n 60), 373.

(87) For the background of Ocampo, see Armando Braun Méndez, *José Gabriel Ocampo y el Código de Comercio de Chile* (1951), 13-21.

(88) Means (n 79), 194.

(89) Braun Méndez (n 88), 26-9; Mirow (n 10), 159.

(90) Ángel Fernández Villamayor, *El régimen legal de la sociedad anónima en Chile* (1977), 20-1; Villar Laheras, 'Comentario al Mensaje del Código de Comercio', in Universidad de Chile (ed), *XVI Memorias de Licenciados: Derecho Comercial* (1951), 13, 83.

(91) Olavarria (n 73), 272. The city and province of Buenos Aires had left the Argentine Federation one year after its formation in 1852 and only rejoined, after protracted negotiations in 1861. During this time, Buenos Aires enacted a Commercial Code; see below text after n 107.

(92) Meira (n 76), 44; Valladão (n 37), 312-13.

(93) See eg Meira (n 76), 39-87; Rodrigo Octávio, 'La codification du droit civil au Brésil : Teixeira de Freitas et l'unité du droit privé', (1930) 29 *Revue trimestrielle de droit civil* 727-50.

- (94) See Art 1549 of the Portuguese Civil Code of 1867 (based on Art 1583 of the *Code civil*), retained in Arts 408 and 874 of the new Code of 1966 (which is otherwise primarily influenced by the German *BGB*); see António dos Santos Justo, 'O direito brasileiro: Raízes históricas', (2002) 20 *Revista Brasileira de Direito Comparado* 131, 142, 151–2.
- (95) Enrique Martínez Paz, *Freitas y su influencia sobre el Código Civil argentino* (1927), 35, cited by Octávio, (1930) 29 *Revue trimestrielle de droit civil* 738–9.
- (96) It has been suggested, *inter alia*, by Meira (n 76), 455 ff that the draftsmen of the German Civil Code may have been inspired by Freitas' structure—a not very convincing theory, in view of the fact that the use of a general part for civil law codifications was already widely discussed in German pandectist scholarship which, in turn, had inspired Freitas; the idea had already been implemented by the draft Saxonian Civil Code of 1852; see Mathias Schmoeckel, 'Vor § 1—Der Allgemeine Teil in der Ordnung des BGB', in Mathias Schmoeckel, Joachim Rückert, and Reinhard Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB* (vol I, 2003), 123, 146 ff.
- (97) See eg Octávio, (1930) 29 *Revue trimestrielle de droit civil* 739–40.
- (98) Ibid 746, referring to the position of Giovanni Montanelli, *Introduzione filosofica allo studio del diritto commerciale positive* (1847) in chapters XIII and XIV. Teixeira de Freitas had already insisted on the necessity of abolishing the existing codes of commercial law and civil procedure in his initial acceptance to draft the *Consolidação* of 10 July 1854; letter reproduced by Meira (n 76), 92.
- (99) Meira (n 76), 351.
- (100) Gultierme Braga da Cruz, 'A formação histórica do moderno direito privado português e brasileiro (1)', (1955) 50 *Revista da Faculdade de* 32, 69; Justo, (2002) 20 *Revista Brasileira de Direito Comparado* 150–3.
- (101) Ricardo Levene, *Manual de historia del derecho argentine* (5th edn, 1985), 427–33; Mirow (n 10), 138.
- (102) Guzmán Brito (n 60), 444–5.
- (103) Guzmán Brito (n 60), 460 n 1130; Levene (n 102), 447–8; Mirow (n 10), 158.
- (104) See the text cited at n 81.
- (105) Guzmán Brito (n 60), 462.
- (106) Ibid.
- (107) Guillermo Sánchez Sorondo, 'Introduction', in George Wilson-Rae and Bernardo de Speluzzi (eds and trans), *Argentine Republic: Code of Commerce* (1904), vii–viii; Salvador Perrota, 'Introducción al Estudio de las Fuentes del Código de Comercio de 1862', in

Libro del Centenario del Código de Comercio (1966), 95, 132, and 143 (qualifying the provisions for corporations as original legislation ‘fortified by foreign concepts’).

(108) Report of the Commission, cited by Carlos R. S. Alconada Arambrurú, *Código de Comercio Anotado* (vol I, 1954), xlv, lxxi, lxxvi, lxxiii.

(109) Sánchez Sorondo (n 108), ix-x; Borchard (n 45), 77-8.

(110) See Florencio García Goyena, *Concordancias, Motivos y Comentarios del Código Civil Español* (1852, reprinted 1974).

(111) Meira (n 76), 267-345.

(112) Guzmán Brito (n 60), 453 n 1110.

(113) cf Guzmán Brito (n 60), 451-2, relying on Lisandro Segovia, ‘Introduction’, in *idem* (ed), *El Código Civil de la República Argentina* (1881), xix-xxiv; also Karst and Rosenn (n 54), 46; Mirow (n 10), 130-40; Ignacio Winizky, ‘Le droit comparé en Argentine durant les cent dernières années’, in Ancel (n 37), 301, 305.

(114) Guzmán Brito (n 60), 448-50.

(115) *Ibid* 463-6 (with further references).

(116) For the civil codes, see Guzmán Brito (n 60), 374 ff; for the commercial codes, see Olavarria (n 73), 299 ff.

(117) Guzmán Brito (n 60), 348.

(118) *Ibid* 455-7.

(119) *Ibid* 414-18, 428-9.

(120) See Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp, and Marc D. West, ‘Evolution of Corporate Law’, (2002) 23 *University of Pennsylvania Journal of International Economic Law* 791, 806-8, 842-7.

(121) Art 17 of Law 27 of 1888; Means (n 79), 267.

(122) On the Costa Rican Code of 1886 see Thilo Scholl, *Die Rezeption des kontinental-europäischen Privatrechts in Lateinamerika am Beispiel der allgemeinen Vertragslehren in Costa Rica* (1999); Guzmán Brito (n 60), 467-9.

(123) Guzmán Brito (n 60), 469-71, relying on Carlos Morales, Joaquín Cuadra Zavala, and Mariano Argüello, ‘Cómputo general de los orígenes de los artículos de este Código Civil y del Reglamento del Registro Público’, in *idem*, *Código Civil de la República de Nicaragua* (vol II, 3rd edn, 1931).

(124) For the history of the different drafts see Borchard (n 45), 240-4.

(125) On Clovis Bevilacqua, see Rodrigo Octávio, 'La codification du Droit civil au Brésil: Clovis Bevilacqua et la codification du Droit civil', (1930) 29 *Revue trimestrielle de droit civil* 1011, 1024 ff.

(126) Bevilacqua (n 30), 19–29.

(127) For details of many of the comparative arguments, see the Report of the Baron of Loreto on secured transactions in *Projeto do Código Civil Brasileiro: Trabalhos da Comissão Especial da Câmara de Deputados* (vol I, 1902), 13 ff, where every provision of the draft is placed in the comparative context of a host of foreign codes (including the Japanese Code of 1896) and commented upon, mainly on the basis of French writings.

(128) Pontes de Miranda (n 30), 108; the Report of the Baron of Loreto (n 127), 14 also complains about the failure to consider the German *BGB*.

(129) Bevilacqua (n 30), ii–iii and *idem*, *Código Civil dos Estados Unidos do Brasil* (vol I, 1926) (where he refers to the *Code civil allemand, publié par le Comité de législation comparé*); the Report of the Baron of Loreto (n 127), merely mentions the French translation of de la Grasserie.

(130) *Ibid* 119–20.

(131) Bevilacqua (n 30), 26–7; also Oliveira (n 78), 30.

(132) Eder, (1949–50) 4 *Miami Law Quarterly* 438–9.

(133) Eder, (1949–50) 4 *Miami Law Quarterly* 439; Olavarria (n 73), 304, 309–11 n 40.

(134) Olavarria (n 73), 279–80, 295 n 54.

(135) Eder, (1949–50) 4 *Miami Law Quarterly* 438.

(136) For an overview see Maurizio Lupoi, *Trusts: A Comparative Study* (2000). For the new Uruguayan Law 17703 of 27 October 2003 (Fideicomiso. Certificados de Depósito y Warrants. Régimen) see its justification of 20 November 2002 at <<http://www.parlamento.gub.uy/repartidos/camara/D2003091413-00.htm>> (accessed 13 January 2006).

(137) Phanor J. Eder, 'Common and Civil Law Concepts in the Western Hemisphere', in *A Symposium on the Law of Latin America* (1959), 1, 4.

(138) *Ibid*.

(139) For Mexico's securities regulations law of 1953, see Mirow (n 10), 169; for Brazil's Capital Market Law of 1965 and its effects, see Rosenn, 'Teaching Latin-American Law', (1971) 19 *AJCL* 692, 693–4.

(140) Law 18045 (*Ley de Mercado de Valores*) and Law 18046 (*Ley de Sociedades Anónimas*), both of 21 October 1981; see Álvaro Puelma Accorsi, *Sociedades: Sociedad Anónima* (vol II, 1996), 397–8.

(141) Law 7347 of 24 July 1985 (*Lei da Ação Civil Publica*).

(142) António Gidi, 'Class Actions in Brazil: A Model for Civil Law Countries', (2003) 51 *AJCL* 311, 323–30.

(143) See Gidi, (2003) 51 *AJCL* 311, 404 n 296: 'American law, and particularly American civil procedure, is virtually unknown in Brazil. Even though the class action debate began in Brazil as early as 1977, the first studies of class action that used American sources were published only in the 1990s.'

(144) Author unknown, 'Ação Civil Pública completa 20 anos', (2005) (May/June) *RT Informa* 4–5.

(145) Gidi, (2003) 51 *AJCL* 332–3.

(146) See Ada Pellegrini Grinover, Kazuo Watanabe, and Antonio Gidi, 'Anteproyecto de Código Modelo de Procesos Colectivos para Iberoamérica', (2004) 5 *Revista Ibero-americana de Derecho Procesal* 13.

(147) Gidi, (2003) 51 *AJCL* 314.

(148) Cámara Nacional de Apelaciones en lo Civil y Comercial Federal, 14 March 2000, Case No. 539/99, *Defensoría del Pueblo de la Ciudad de Buenos Aires c/ EDESUR SA s/ responsabilidad por daños*, available at <<http://www.csjn.gov.ar/jurisp/principal.htm>> (accessed 13 January 2006).

(149) Mirow (n 10), 167–70.

(150) See generally Yves Dezalay and Bryant Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (2002).

(151) For a critical evaluation, see James Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (1980); for a denial of the alleged legal imperialist intentions, see John H. Merryman, 'Law and Development Memoirs I: The Chile Law Program', (2000) 48 *AJCL* 481 ff.

(152) Imre Zajtay, 'Les destinées du *Code civil*', (1954) 6 *Revue Internationale de Droit Comparé* 792, 802.

(153) Emilio Miñana y Villagrasa, *La unificación del derecho mercantile Hispano-Americano: Bases para una legislación común* (1925), 111–12.

(154) For these efforts, see the collection of texts by the Carnegie Endowment for International Peace (ed), *Conferencias Internacionales Americanas 1889–1936* (1938).

(155) Francisco García Calderón, cited by Miñana (n 153), 110.

(156) Raymond Saleilles, 'Conception et objet de la science du droit comparé', (1900) XXIX *Bulletin de la Société de législation comparé* 383, 397.

(157) Emilio Miñana y Villagrasa, *La Unificación del Derecho Mercantil Hispano-Americano* (1925), 322-6.

(158) See n 146.

(159) See International Commission of Jurists (of the Pan-American Union), 'Projects Concerning Permanent Technical Organs—Resolution Concerning the Unification of Legislation', (1928) 22 *American Journal of International Law* (Supplement: Codification of International Law) 328-9.

(160) See especially the preface written by Antonio Sánchez de Bustamante (the Cuban draftsman of the *Código Bustamante* of 1928, an important treaty establishing uniform rules in the field of private international law) to Francesco Consentini, *Código Civil Pan-Americano* (1929), v-vii.

(161) See generally Alejandro Garro, 'Unification and Harmonization of Private Law in Latin America', (1992) 40 *AJCL* 584, 593-604; Jürgen Samtleben, 'Neue interamerikanische Konventionen zum Internationalen Privatrecht', (1992) 56 *RabelsZ* 1-115; Diego P. Fernández Arroyo, *La codificación del Derecho Internacional Privado en América Latina* (1994).

(162) For details, see Jan Kleinheisterkamp, *International Commercial Arbitration in Latin America: Regulation and Practice in the MERCOSUR and the Associated Countries* (2005), 18-28.

(163) For details, see Diego P. Fernández Arroyo and Jan Kleinheisterkamp, 'The VIth Inter-American Specialized Conference on Private International Law (CIDIP VI): A New Step Towards Inter-American Legal Integration', (2002) IV *Yearbook of Private International Law* 237-55.

(164) The plan for the FTAA has its origin in the US Government's 'Enterprise for the Americas' of 1990, (1990) *International Legal Materials* 1567. For the FTAA see <<http://www.ftaa-alca.org>>.

(165) See John Wilson Molina, 'Secured Financing in Latin America: Current Law and the Model Inter-American Law on Secured Transactions', (2000) 33 *Uniform Commercial Code Journal* 46, 63-5; Mario de la Madrid Andrade, 'La prenda sin transmisión de posesión: Estudio comparativo con la Ley modelo interamericana de garantías mobiliarias', (2001) 9 *Revista Mexicana de Derecho Internacional Privado* 11 ff; Lionél Pereznieto Castro, 'Comentarios al 'Proyecto México-Estadounidense para una Ley Modelo en Materias de Garantías Mobiliarias'', (2001) 10 *Revista Mexicana de Derecho Internacional Privado* 66 ff.

(166) Remark made to the author, who was the observer for the Federal Republic of Germany at the CIDIP VI, by a number of Latin American delegates.

(167) Kleinheisterkamp (n 162), 7, 10, 190.

(168) Phanor J. Eder, 'Common and Civil Law Concepts in the Western Hemisphere', in The Washington Foreign Law Society (ed), *A Symposium on the Law of Latin America* (1959), 1 (referring to the Colombian example cited at n 133).

(169) See <<http://www.mercosur.org.uy>>.

(170) See <<http://www.comunidadandina.org>>. The term 'sub'-regional integration is widely used with regard to CAN and MERCOSUR in contrast to ALADI which comprises the entire region (of Latin America).

(171) See <<http://www.aladi.org>>.

(172) See Jürgen Samtleben, 'Das Internationale Prozeß- und Privatrecht des MERCOSUR —Ein Überblick', (1999) *RabelsZ* 1-63; *idem*, 'Die Entwicklung des Internationalen Privat- und Prozessrechts im MERCOSUR', (2005) *Praxis des Internationalen Privat- und Verfahrensrechts* 376-83.

(173) See Claudia Lima Marques, 'Direitos do consumidor no MERCOSUL: Algumas sugestões frente ao impasse', (1999-III) *Jurisprudencia Argentina* 912 ff = (1999) 32 *Revista de Direito do Consumidor* 16 ff.

(174) *Tribunal de Justiça de Santa Catarina* (3^a Câmara de Direito Comercial), 26 June 2003, AC 2002.022015-4/So; and 11 September 2003, AC 2003.001897-2/Bl; cited by Secretaría del MERCOSUR *et al* (eds), *Primer informe sobre la aplicación del derecho del MERCOSUR por los tribunales nacionales* (2003) (2005), 82-3.

(175) For details, see Jan Kleinheisterkamp, 'Legal Certainty in the MERCOSUR: The Uniform Interpretation of Community Law', (2000) 6 *NAFTA: Law and Business Review of the Americas* 5, 29-34.

(176) See Secretaría del MERCOSUR (n 174).

(177) For the development of these three codes, see Guzmán (n 60), 522-8.

(178) Carlos Cárdenas Quirós, 'Exposición de Motivos y Comentarios: Mandato', in Delia Revoredo de Debaquey (ed), *Código Civil: Exposición de Motivos y Comentarios* (vol VI, 1984), 481-520, relying on the study by Luis Díez Picazo, *La representación en derecho privado* (1979).

(179) Max Arias Schreiber Pezet, 'Exposición de Motivos y Comentarios: Contratos en General', in Delia Reverendo Debaquey (ed), *Exposición de Motivos y Comentarios* (vol VI, 1984), 10 ff.

Development of Comparative Law in Latin America

(180) Delia Revoredo de Debaquey, 'Comentarios: Enriquecimiento sin causa', in *idem* (ed), *Código Civil: Exposición de Motivos y Comentarios* (vol VI, 1984), 775, 778; see Arts 1954 and 1955: 'Aquel que se enriquece indebidamente a expensas de otro está obligado a indemnizarlo'. 'La acción a que se refiere el artículo 1954 no es procedente cuando la persona que ha sufrido el perjuicio puede ejercitar otra acción para obtener la respectiva indemnización.'

(181) Debaquey (n 180), 775–8.

(182) Roberto G. MacLean, 'Judicial Reasoning and Social Reality in Peru', (1980) 28 *AJCL* 489, 490.

(183) Jorge Fabrega Ponce, *El enriquecimiento sin causa* (vol I, 1996) (apparently after having visited the Max Planck Institute's library in Hamburg).

(184) Karst and Rosenn (n 54), 67. See also already Augusto Teixeira de Freitas, *Consolidação das Leis Civis* (1st edn, 1858, 3rd edn, 1896), xxxii: 'All of this resulted in our jurists loading their works with foreign materials, going far beyond the mere filling of gaps. Matters have gone so far that our own law is hardly known and studied on the basis of our own statutes ...'.

(185) Silvio de Salvo Venosa, *Direito Civil* (vol IV, 4th edn, 2004), 92.

(186) Compare Arts 159, 1518, 1521, 1523, 1527–29 of the Brazilian Civil Code of 1916 to Arts 1382–6 (esp 1384) of the French Civil Code.

(187) The landmark decision was *Cour de Cassation*, Ch réunies, 13 February 1930, D. 1930, I, 57; for an overview of the case law, see Philippe Malaurie, Laurent Aynès, and Philippe Stoffel-Munck, *Les obligations* (2003), 88–90.

(188) José de Aguiar Dias, *Da Responsabilidade Civil* (vol II, 1944).

(189) *Tribunal de Justiça Rio Grande*, 9 December 1955, Ap 10872, (1957) 170 *Revista Forense* 300; *Supremo Tribunal Federal*, 4 August 1955, RE 27857, (1957) 2 *Revista Trimestral de Jurisprudencia* 264, 266 (in a case of concurring contractual and extra-contractual liability); and especially *Tribunal de Justiça da Guanabara*, 19 May 1964, Ap civ 34314, (1966) 365 *Revista dos Tribunais* 285, 286.

(190) *Código Civil* (2002), Art 927 *Parágrafo único*.

(191) Francisco C. Pontes de Miranda, *Tratado de Direito Privado* (vols I–LX, 1954–69).

(192) René David, *Traité élémentaire de Droit civil comparé* (1st edn, 1950), 243. David, incidentally, forgot to mention the German legal writing.

(193) Phanor J. Eder, 'Law and Justice in Latin America', in *Law: A Century of Progress 1835–1935* (1937), 39, 63–4.

(194) Press conference of the Brazilian Minister of Justice Campos in July 1939, (1939) 79 *Revista Forense* 355, 360–1.

(195) Dezalay and Garth (n 150).

(196) Jonathan M. Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process', (2003) 51 *AJCL* 839, 878–9.

(197) For the most recent examples, see Corte Suprema de Justicia de la Nación, 5 April 2005, A.126.XXXVI, *Angel Estrada y Cía. S.A. c/ resol. 71/96—Sec. Ener. y Puertos* para 13 (on the admissibility of attribution jurisdiction to adjudicate to government agencies in administrative matters); 5 April 2005, G.2181.XXXIX, *Galli, Hugo Gabriel y otro c/ PEN s/ amparo sobre ley 25.561*, opinion of Judges Zaffaroni and Lorenzetti para 10 (on the support of the Constitutional Court for the monetary sovereignty of the Congress).

(198) Corte Suprema de Justicia de la Nación, 15 October 1998, U.14.XXXIII, *Urteaga, Facundo Raúl c/ Estado Nacional—Estado Mayor Conjunto de las FF.AA.—s/ amparo ley 16.986* para 13, but especially the opinion of Judge Petracchi paras 10–11.

(199) Corte Suprema de Justicia de la Nación, 5 November 1996, N.1.XXXI, *Nardelli, Pietro Antonio s/ extradición*, opinion of the Judges Fayt, Petracchi, and Bossert paras 21–9.

(200) For some recent examples, see Corte Suprema de Justicia de la Nación, 8, March 2005, A.869.XXXVII, *Arancibia Clavel, Enrique Lautaro s/homicidio y asociación ilícita*, dissenting opinions of Judge Petracchi, paras 7, 17, Judge Belluscio paras 15–16, Judge Fayt paras 15, 18 (relying on case law of the European Court of Human Rights and on German case law and legal authors for the principle of due process in criminal proceedings); 30 March 2004, R.663.XXXVII, *Roviralta, Huberto c/ Editorial Tres Puntos S.A. s/ daños y perjuicios*, dissenting opinion of Judge Fayt paras 7–9 (referring to US law and to the case law of the Constitutional Court of Spain concerning the right to privacy).

(201) See eg the opinion of Judge Grau in STF, 18 August 2004, ADI 3105, on the question whether pensions of public servants may be privileged as regards taxation, citing Ulpianus, Alexy (a German professor of legal theory), Kelsen, Aristotle and Plato; available at <<http://www.stf.gov.br/jurisprudencia/jurisp.asp>> (accessed 13 January 2006).

(202) For the fiercest battle, so far, of comparative arguments see STF, 17 September 2003, HC 82424 (the entire judgment is 488 pages long), where the judges had to decide whether the publication of a book denying the Holocaust and describing the German people as the real victims of World War II has to be qualified as an 'act of racism' which, according to Art 5 No. XLII of the Brazilian Constitution, is a crime that is not subject to any statutory time-limitation; French, Spanish, Portuguese, German, English, and US law were used to defend both the extensive and the restrictive interpretation of the Constitution.

(203) For the judges' backgrounds, see <<http://www.stf.gov.br/institucional/galeria/>> (accessed 13 January 2006).

(204) Supremo Tribunal Federal, 20 June 1995, AgRg 139671, opinion of Judge de Mello, 12–13 (invoking the Foreign Sovereign Immunities Act of 1976 against the defence of immunity of the US Embassy against a claim by a former employee).

(205) Supremo Tribunal Federal, 18 June 2002, HC 81963, opinion of Judge de Mello, 9–13 (reproducing large parts of the 'valuable historic precedent' *ex parte Milligan* of 1866 to argue that the mere injury to a serviceman cannot give rise to martial jurisdiction in times of peace).

(206) Supremo Tribunal Federal, 4 March 2004, HC 84025, opinion of Judge Barbosa, 17–19 (relying, *inter alia*, on citations from the leading US case *Roe v Wade* of 1973); for the parallel case in Argentina see Corte Suprema de Justicia de la Nación, 11 January 2001 (n 197).

(207) Furthermore, he is fluent in English, French, and German, and received a decoration from the German President in 1982, ie before he took his doctorate in Germany, see n 204.

(208) Supremo Tribunal Federal, 9 June 2004, AC 189, opinion of Judge Mendes, 3–8.

(209) Supremo Tribunal Federal, 23 October 2003, Rcl 2363, opinion of Judge Mendes, 4–10 (citing from his own book).

(210) Supremo Tribunal Federal, 30 November 2004, AI 476950, opinion of Judge Mendes, 3–12.

(211) Eder (n 193), 42–3: 'How can we reconcile and understand the curious combination of an outward respect for legal formalities and rituals, evidencing a real reverence for law, and a complete disregard of the substance and essence of parts of the written law?'; cited by Karst and Rosenn (n 54), 58.

(212) Ralf Michaels in his otherwise brilliant essay 'Im Westen nichts Neues: 100 Jahre Pariser Kongreß für Rechtsvergleichung—Gedanken anlässlich einer Jubiläumskonferenz in New Orleans', (2002) 66 *RabelsZ* 97, 112.

(213) Eugenio Hernández-Bretón, 'Sueño o pesadilla de un comparatista: el derecho en Suramérica', (1998) 109 *Revista de la Facultad de Ciencias Jurídicas y Políticas* 33, 35 (the expression 'South-America' has been replaced by 'Latin-America'); the quotation 'a comparatist's dream' refers to Rosenn, (1971) 19 *AJCL* 692.

Development of Comparative Law in Latin America

Jan Kleinheisterkamp

Jan Kleinheisterkamp is Assistant Professor of Law, École des Hautes Études Commerciales—HEC School of Management, Paris

