ANGLO-AMERICAN LEGAL IDEAS IN THE FORMATION OF SOUTH-AMERICAN PRIVATE LAW: 1820-1870

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ABSTRACT

It is traditionally understood that, following the emancipation of South America from Spain and Portugal, the national private law usually encompassed by the Civil Codes of the newly independent countries was inspired by the French Civil Code, and other civil law models. The aim of this thesis is to explore whether this understanding should be revised in order to account for the influence of Anglo-American law and legal ideas.

The thesis proceeds, first, to provide the context for the research: the channels of communication, the actors involved, and the different types of use of Anglo-American legal ideas during the formative period of South-American private law. Then, the three main areas of legislative use and influence of Anglo-American law and legal ideas detected are explored. First, the reform of intestate succession, which was a case of direct, and overt Anglo-American influence. Second, the use of Bentham's ideas in the abolition of usury laws and laesio, which was a case of direct and conscious, but unacknowledged influence. Finally, the indirect influence of Blackstone's works on the drafting of the rules of statutory interpretation on some South-American Civil Codes.

Four conclusions, which contradict the traditional account, are drawn. First, that in the process of creation of South-American private law, not only civil law sources of inspiration were used, but also Anglo-American ones, to a much lesser extent, but with a relevant impact nevertheless. Second, that while the process of formation of South-American private law has been described as a creative one by many legal historians, the influence of Anglo-American ideas in the development of the identity of South-American

private law has been ignored. Third, that Anglo-American influence gave South-American private law its own identity, making it more liberal than French law in the three fields mentioned above. Fourth, that even in the face of evidence, academic adherence to the traditional view has resulted in an extraordinary relegation of the topic of this thesis.

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CHAPTER 1: INTRODUCTION ([1])

I. Overview and Methodology

1. Objectives

It is traditionally understood that, following the emancipation of South America (1810-1825), the formation of its general private law, mainly encompassed by the Civil Codes of the newly independent countries, was a process influenced *exclusively* by civil law sources, particularly French, Spanish and Roman law. While, originally, this process was understood as an imitative one, many legal scholars currently agree that there is some originality in South-American private law. However, none of them relates that originality with the use of ideas from *outside* the civil law tradition. The aim of this thesis is to explore whether and to what extent this understanding should be corrected in order to account for the influence of Anglo-American law and legal ideas.[2]

Anglo-American inspiration has been understood as being confined to South-American public law,[3] and the influence of the famous English philosopher and legal scholar Jeremy Bentham on the theoretical aspects of codification,[4] civil procedure and

1 Unless otherwise indicated, all translations from Spanish, Portuguese, and French, into English, had been done by the author of this thesis.

2 A definition of 'law and legal ideas' is provided in Section 4.2 below.

3 René David, *L'Originalité des Droits de l'Amérique Latine* (Université de Paris, Centre de Documentation Universitaire 1956) 8.

4 Alejandro Guzmán Brito, *La Codificación Civil en Iberoamérica: Siglos XIX y XX* (Editorial Jurídica de Chile 2000) 228-31; Mathew C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America* (University of Texas Press 2004) 135-6.

evidence.[5] The suggestion that this influence extends to the general private law encompassed by the Civil Codes has been either resisted [6] or dismissed as irrelevant.[7] In this thesis, I argue against that prevailing view by discussing some instances of legal reform in general private law directly or indirectly inspired by Anglo-American law and legal ideas.

Evidence of the interest of South-American legal actors in Anglo-American legal ideas, while not abundant, is sufficiently visible in many South-American jurisdictions. However, the topic has been neglected or ignored. Thus, considerable research had to be carried out in order to determine whether Anglo-American legal ideas inspired developments of private law in South America, how and why. First, the evidence, scattered among books, newspaper articles and notes of the drafters of legislation had to be found and put together. Then, such evidence had to be evaluated in order to determine whether there was any coherence in the assembled data. Lastly, the reasons for, and the impact of, Anglo-American legal ideas on South-American private law, had to be assessed. This research addressed these three aspects.

Based on the evidence collected, I argue that the use of Anglo-American legal ideas was more widespread than is usually suggested, and that such use followed quite a uniform pattern across South-American countries. It was a creative and strategic use, and

5 Jorge Fábrega,'Influencia de Jeremías Bentham en el Movimiento de Reforma Judicial Latinoamericano' in (1979) 38 Estudios de Derecho 285 ff; Andrés Bello, *Obras Completas de don Andrés Bello*: Volumen IX: *Opúsculos Jurídicos* (Imprenta Pedro G Ramírez 1885) 66-70; Juan E Pivel Devoto, *Las ideas Constitucionales del Dr. José Ellauri* (Talleres Graficos Monteverdi 1955) 191.

6 Guzmán Brito (n 4) 228-31.

7 Jan Kleinheisterkamp, 'Development of Comparative Law in Latin America', in Mathias Reimann and Reinhard Zimmerman (eds) *The Oxford Handbook of Comparative Law* (OUP 2006) 271.

not a merely passive employment of ideas. What is more, this use was at the root of the development of some relevant differences vis-à-vis the Spanish and French legal systems. In nineteenth-century terms, the use of Anglo-American legal ideas made South-American private law *more liberal* than French law in the crucial areas of contract, succession, and interpretation of statutory law.

My aim is not to contest the undeniably overwhelming weight of civil law, and particularly the Roman, French and Spanish, influence on the development of South-American private law, but rather to add a new dimension that has so far been dismissed or neglected. This is important not just for the purpose of completing our understanding of South-American law, but also in order to enrich our knowledge of the broader topic of how legal families interact, and how legal ideas travel across the borders of strongly different legal cultures. In other words, the research offers insight into the process of legal borrowing between *different legal families* (in this case, civil law v common law). Some of the categories employed in the following analysis can be useful in similar investigations. For instance, the 'lawyer-cum-politician' characterization of many of the legal actors involved; the contraposition of the legal prestige v political prestige of legal systems; the role played by cross-fertilization (i.e. reciprocal interest among legal scholars from different traditions); and the historical links between jurisdictions (e.g., in this research, the 'London Years' of South-American political leaders).

Lastly, one further question needs to be answered: were Anglo-American legal ideas the *genuine* source of inspiration of the legal reforms addressed in this thesis, or were they just their *strategic*, or even *rhetorical*, ornaments? In other words the question

is whether those ideas provided motivation, or vocabulary. I will argue that –as is the case with much of the other ideological aspects of post-independence South America– Anglo-American legal ideas fulfilled both roles. While there was an ideological interest in making liberal reforms, there were also local needs that determined which ideas were employed, and how they were transformed in the process.

2. The Traditional View on the Sources of South-American Private Law

2.1. The Central Role of Roman, Spanish and French Law

South-American independence sparked a movement for legal reform which accelerated in pace in the second half of the nineteenth century, resulting in the enactment of civil and commercial Codes. Borrowing from foreign law has been described as 'an essential aspect of the movement towards codification in Latin America'.[8]

The traditional view about the sources of inspiration of South-American law has been aptly summarized by a prominent Argentinean legal historian: 'Respecting political organization, looking at the Anglo-Saxon world was the preferred attitude. Regarding private and merchant law, the [continental] European model was preferred'.[9] For instance, in 1855, the drafter of the Chilean Civil Code pointed out that 'as a general rule, the [Spanish] Code of the *Partidas* and the French Civil Code have been the guiding

8 Mirow (n 4) 142.

9 Víctor Tau Anzoátegui, *Las Ideas Jurídicas en la Argentina: Siglos XIX-XX* (2nd edn. Perrot 1987) 77.

lights that we have kept most constantly in view'.[10] In a similar vein, writing in 1869, the drafter of the Uruguayan Civil Code expressed that 'our Code … has followed, with certain modifications, the general plan of the French one'. [11] According to López Medina, a Colombian Scholar:

> On traditional and current maps of comparative law…'Latin American law' ends up being the basic legal structure of the Iberian republics of the Americas that replicates… post-revolutionary law of republican France.[12]

There are, however, two different versions of this traditional account: one emphasizes the influence of the French Civil Code (1804), while the other gives equal relevance to Roman, Spanish and French law. [13] On the one hand, according to the French comparatist René David, it was traditionally understood that Latin American private law lacked originality, their Civil Codes being mere 'imitations… of the Code Napoléon'.[14] In his opinion, there was originality in the amalgamation of several different continental European sources of inspiration, but the influence of the French Civil Code still represented the main reason for the *modernization* of South-American private law.[15] However, writing in the 1970s, Alan Watson still affirmed that Latin-American Civil

10 Iván Jaksic, Andrés Bello: Scholarship and Nation-Building in Nineteenth Century Latin America (CUP 2001) 167.

11 Tristán Narvaja, 'La Nación tiene Código Civil' in Jorge Peirano Facio, *Tristán Narvaja. Un Jurista Rioplatense en tiempos de la Codificación* (Buenos Aires: Instituto de Investigaciones de Historia del Derecho, 2008) 250.

12 Diego López Medina, 'The Latin American and Caribbean Legal Traditions' in Mauro Bussani and Ugo Mattei (eds) *The Cambridge Companion to Comparative Law* (CUP 2012) 348.

13 Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn, Clarendon Press 1998) 113–55.

14 David (n 3) 1.

15 Ibid 11.

Codes 'slavishly' followed the French Code.[16] Lastly, the American legal historian Matthew C. Mirow described the French Civil Code as the 'Northern Star by which […] Latin-American Codes oriented themselves'.[17]

On the other hand, the prominent South-American legal historian Alejandro Guzmán Brito argues in favour of the originality of Latin-American law as a sub-system within the Romanist system[18] and remarks the intense influence of Roman law and the *ius commune* on the South-American Civil Codes of the nineteenth century. Spanish law and the French Civil Code are viewed by him as part of that civil law tradition.[19] In the same line, Sandro Schipani, an Italian author, has affirmed that South-American private law is primarily a 'sub-system' of the 'Roman system', albeit one with its own identity.[20] Several other legal scholars are of the same idea: they affirm the originality of South-American law within the civil law tradition.[21]

In this perspective, the coincidences between the French and the Latin-American Civil Codes can be explained not only as a reception of the French Civil Code, but 'by the preexistence of a common model… founded on the tradition of the European *ius*

16 Alan Watson, 'Comparative Law and Legal Change' (1978) 37 Cambridge Law Journal, 313-336.

17 Mirow (n 4) 138.

18 Guzmán Brito *La Codificación Civil* (n 4) 285.

19 Guzmán Brito, *La Codificación Civil* (n 4) 271-276.

20 Sandro Schipani, 'Reconocimiento del Subsistema Latinoamericano, Interpretación Sistemática, y Unificación del Derecho' in (2010) 149 Boletín de la Academia de Ciencias Políticas y Sociales 413-30.

21 To cite some of them: José Castán Tobeñas, *Los Sistema Jurídicos Contemporáneos del Mundo Occidental* (Reus 1957) 59 ff; Pierangelo Catalano. 'Sistemas Jurídicos: Sistema Jurídico Latinoamericano y Derecho Romano' in (1982) 85 Revista General de Legislación y Jurisprudencia 161 ff; Diego Fernández Arroyo, 'Sobre la Existencia de una Familia Jurídica Latinoamericana' in (1994) 27 Anuario Jurídico y Económico Escurialense 75 ff. .

commune'. [22] The amalgamation that determined the originality of South-American private law resides, in Guzmán Brito's opinion, in the combination of Spanish law with other sources: while the bulk of South-American private law was inspired by Spanish law, South-American law tended to 'guarantee civil freedom', which was in contrast with Spanish law's interventionism.[23] In his view, the French Civil Code provided the new institutions, alien to Spanish law, that were in accordance with the 'liberal spirit that inspired [the drafters of the Civil Codes] and their contemporaries'.[24]

Continental European legal ideas were received both directly and indirectly. Direct influence of Spanish and French law, for example, is attested by the huge quantity of mentions of specific provisions of those legal systems (mainly from the Spanish law of the *Siete Partidas* and the French Civil Code) contained in the notes of the drafters of the South-American Civil Codes. Regarding indirect influence, two clear examples were the Civil Codes of Louisiana and Chile. The Louisiana Digest of 1808 and the Louisiana Civil Code of 1825 were mainly inspired by Spanish and French law, and influenced in turn many South-American Civil Codes (e.g. Chile, Uruguay, Argentina).[25] In some cases, the influence of the Louisiana Civil Code remained 'concealed', as happened, for instance, with the rules on legal entities of the Chilean Civil Code, which were inspired by the Louisiana Civil Code.[26] The same holds true of the Chilean Civil Code of 1855,

22 Francisco J Andrés Santos, 'Napoleon in America? Reflections of the Concept of "Legal Reception" in the Light of the Civil Law Codification in Latin America' in Thomas Duve (ed) *Entanglements in Legal History* (Max Planck Institute for European Legal History, 2014, http://dx.doi.org/10.12946/gplh1) 309-10.

23 Ibid 277.

24 Ibid 256.

25 For this paragraph: Guzmán Brito (n 4) 249-254; Mirow (n 4) 133-142.

26 Rolf Knütel, 'Influences of the Louisiana Civil Code in Latin America' (1995-6) 70 Tul L Rev 1445, at

inspired by Roman, Spanish and French law, which was then transplanted as a whole into other South-American countries (e.g. Ecuador, Colombia, and Venezuela) and inspired many provisions of other South-American Civil Codes (e.g. Argentina and Uruguay). Finally, in some cases, influence occurred through academic legal literature. For instance, in the case of the Argentinean Civil Code (1869), the influence of French legal ideas came, in most cases, not through French positive law, but from the works of the French legal scholars Charles Aubry and Frédéric Charles Rau.[27] Similarly, several French legal ideas that inspired the drafter of the Chilean Civil Code (1855) traveled through academic literature, mainly the works of the French legal scholars Delvincourt and Rogron.[28]

Roman, Spanish and French law had a central inspirational role for the drafters of the South-American Civil Codes. Thus, unless otherwise indicated, all the references to the civil law family or tradition in this thesis are limited to those three legal systems. Covering the whole civilian tradition would be difficult given the scope of this thesis, and does not seem necessary given the central inspirational role occupied by Roman, Spanish and French law, as just mentioned. However, it must be noted that South-American drafters of legislation also made use, albeit to a minor extent, of a variety of other sources from within the same civil law tradition. For instance, many drafters used Antoine de Saint-Joseph's *Concordances*,[29] a systematic compilation which provided the compared texts of the French and other Civil Codes, such as those of Austria and Sardinia, and

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1458-9.

27 Raymundo M Salvat, 'El Código Civil Argentino: Estudio General: Historia, Plan, Método y Fuentes' (1913) VII Revista Argentina de Ciencias Políticas 430.

28 Alejandro Guzmán Brito, *Andrés Bello Codificador: Historia de la Fijación y Codificación del Derecho Civil en Chile: Tomo I* (Ediciones de la Universidad de Chile 1982) 422.

29 Guzmán Brito, *La Codificación Civil* (n 4) 260.

which was published in 1840.[30] Furthermore, a draft of a never-enacted Spanish Civil Code, commented upon at length by its author, Florencio García Goyena, and published in 1852, was a much favored source of inspiration in South America.[31] We will find several allusions to García Goyena's draft in the following chapters. Lastly, the Austrian and Prussian Civil Codes, as much as the works of some German authors (notably Savigny, and Zachariä) were used by the drafters of the South-American Civil Codes.[32]

As mentioned above, the vast variety of sources employed by the drafters of the Civil Codes, and the transformations imposed on them by local needs, have been recognized [33] as the reasons of the own identity of South-American private law. López Medina, for instance, argues that 'the borrowed doctrines have been heavily appropriated and reinterpreted'.[34] However, no author has suggested that South-American private law's identity with regards to Roman, Spanish and French law was related to some influence from *outside* the civil law tradition. My claim is that the use of Anglo-American legal ideas made an important contribution to the creation of that identity as will be explained in the following chapters.

2.2. Anglo-American Legal Ideas in the Traditional View

30 Antoine de Saint-Joseph, *Concordance entre les Codes civils étrangers et le Code Napoléon* (C Hingray 1840).

31 Guzmán Brito, *La Codificación Civil* (n 4) 426-8.

32 Hugo Hanisch, 'La Influencia de Savigny en Bello en materia de Personas Jurídicas, in (1980) 5 Revista de Estudios Històrico-Jurídicos 167; Rolf Knütel, 'Influenza dell'Àllgemeines Landrecht Prussiano del 1794 sul Código Civil Argentino del 1869' in Sandro Schipani (ed) *Dalmacio Vélez Sarsfield e il Diritto Latinoamericano* (Cedam 1991) 79; Guzmán Brito *La Codificación Civil* (n 4) 370-1, 450-1, 502; Mirow (n 4) 138, 140.

33 By R David, S Schipani and A Guzmán Brito, for example, as mentioned above.

34 López Medina (n 12) 360.

While, as just mentioned, many legal historians recognize the originality of South-American private law, they do not generally refer to Anglo-American law or legal ideas as a source of inspiration for the *contents* of South-American *private* law.[35] There are only a few mentions, but they are either unrelated to the *contents* of private law or they are connected only with isolated cases of influence in a single jurisdiction. The use and influence of some Anglo-American legal ideas across all of South America has remained either undetected, or unexplored. Most probably, the hold of the conventional view on South-American researchers, and the academics' pride about their Roman legacy, relegated any signs of Anglo-American influence to the status of anomalies unworthy of further analysis. Let me offer some examples.

One of the most important contemporary South-American legal historians acknowledges the relevant influence of Jeremy Bentham on the *theoretical aspects* of codification in South America. However, in his opinion, Bentham's proposals about the *contents* of private law were too 'abstruse', 'radical' and 'pedantic' to have had any influence.[36] A German legal scholar takes a similar, though less emphatic, view: 'the idea of codification was successful [but South-American Civil Codes'] contents […] show little impact of Bentham's ideas'.[37] López Medina, a prominent Colombian legal scholar, rightly argues that 'Latin-Americans have always been curious and adventurous in the broad markets of comparative law',[38] but does not include Anglo-American law in a long

35 For instance, Zweigert and Kötz's (n 13) do not mention Anglo-American inspiration at all.

36 Guzmán Brito, *La Codificación Civil* (n 4) 231.

37 Jürgen Von Samtleben, 'Menschheitsglück und Gesetzgebungsexport: Zu Jeremy Benthams Wirkung in Lateinamerika'(1986) 50 Rabels Zeitschrift f. Ausländisches und Internationales Privatrecht 451, 481.

38 López Medina (n 12) 360.

list of sources of inspirations that include French, but also Belgian, German and Italian law.

In the case of Blackstone, his influence on the rules of statutory interpretation of the Louisiana Civil Code has been acknowledged by two legal scholars, but considered as 'surprising' (without further analysis) [39] or downright irrelevant.[40] The influence of Bentham on the abolition of usury laws is signaled by some authors, but only in relation to specific isolated jurisdictions,[41] and never as a common feature of South-American law in the 1830s, as in fact it was.

Lastly, in many cases, the reforms inspired by Anglo-American legal ideas were (not accurately) described as 'originalities' or 'innovations' of South-American legislation where 'Latin American countries began to reveal their own unique legal personalities'.[42] That was the case, for example, of the improvement of the rights of surviving spouses in intestate succession law. [43] However, as will be explained below,[44] in Uruguay, Chile, and Argentina there is clear evidence of the use of Anglo-American law and legal ideas in that field.

39 Rodolfo Batiza, 'The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance', (1971) 46 Tulane Law Review, 29.

40 Guzmán Brito 'Las fuentes de las normas sobre interpretación de las leyes del "digeste des lois civiles" ("Code civil") de la Luisiana (1808/1825)' (2009) 31 Revista de Estudios Histórico-Jurídicos, 171. According to Guzmán Brito, Blackstone 'offered no originality', as he had merely followed Samuel Pufendorf, a civil law author.

41 See Chapter 4: Toro for Venezuela, Mendes de Almeida for Brazil, Torres García for Colombia, Guzmán Brito for Chile.

42 Carmen Diana Deere and Magdalena León, 'Liberalism and Married Women's Property Rights in Nineteenth-Century Latin America' (2005) 85:4 Hispanic America Historical Review 630.

43 Eduardo Zannoni, *Derecho Civil: Derecho de las Sucesiones: Tomo II* (3rd edn. Astrea 1983) 90. Abel Cháneton, *Historia de Vélez Sarsfield: Tomo II: La Obra* (Librería y Editorial La Facultad 1937) 58.

44 See Chapter 3.

2.3. Evaluation of the Traditional View

The picture that emerges from the traditional view is far from entirely incorrect. First, it is clear that the overwhelming inspiration did come from the civil law tradition, particularly from Roman, Spanish, and French law. Second, it is also undeniable that the French Civil Code played a key role in the modernization of South-American private law. Those two aspects are confirmed by even a mere superficial look at the notes of the drafters of South-American Civil Codes. Finally, Anglo-American inspiration in matters of private law was quantitatively insignificant when compared with the civil law influence.

However, the traditional view misses the fact that there was a rather uniform pattern of use of Anglo-American legal ideas *across all of South America*, and that there were certain crucial areas where those ideas had a strong impact, such as freedom of contract, the rights of women in intestate succession law, and the formalistic interpretation of statutory law. Under the influence of Anglo-American legal ideas, South-American private law adopted in those crucial fields a *more liberal* outlook than the liberal paradigm of its time, the French Civil Code. [45] That more liberal outlook has been recognized in relation to a few specific topics or jurisdictions, but so far its Anglo-American inspiration has been neglected. For instance, it has been argued that 'an abyss… divides the [French] conception [of intestate succession law] from the one

45 James Gordley has argued that the French Civil Code was *not* an epitome of liberalism, but a quite traditional restatement of Roman, customary, and natural law. However, even if Gordley were right, it was in many aspects a more liberal body of law than most contemporary legal systems. See: James Gordley, 'Myths of the French Civil Code' (1994) 42 *The American Journal of Comparative Law*, 459-505.

adopted by the Argentinean Code',[46] and that 'the liberal doctrine of contract [of the Argentinean Code is] more individualistic than the [one adopted] by the Code Napoléon',[47] but in either case the Anglo-American source of inspiration for such divergences has not been mentioned.

3. Liberalism and Anglo-American Legal Ideas in South America

Following independence, South-American politicians and intellectuals shared a common liberal ground.[48] In political terms, they agreed on the republican form of government, including the principle of separation of powers, and in economic matters there was near unanimity on economic liberalism.[49] Unlike what happened in Europe, the differences between South-American conservatives and liberals were of degree and not of principle.

During the emancipation process, South-American revolutionaries obtained unofficial help from the United Kingdom and the United States, and in the 1820s, those powers openly began to support the cause of the emerging new republics.[50] Between 1810 and 1830, London became an 'intellectual center' for many Spanish American politicians and revolutionaries.[51] Anglo-American institutions held a position of prestige in the minds of

46 Juan Carlos Rébora, *Derecho de las Sucesiones: Tomo II* (Ed. Bibliográfica 1952) 140.

47 Viviana Kluger, 'El Derecho Contractual en la Argentina' (2007) 2/3 Rassegna Forense 559 at 573.

48 Faviola Rivera, 'Liberalism in Latin America', in Edward N. Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Spring 2016 edn.), https://plato.stanford.edu/archives/spr2016/entries/liberalism-latin-america. Accessed 19 December 2016; David Bushnell and Neil Macaulay, *The Emergence of Latin America in the Nineteenth Century* (2nd edn. OUP, 1994) 12.

49 Frank Safford, 'Politics, Ideology and Society in Post-Independence Spanish America', in Leslie Bethell (ed) *The Cambridge History of Latin America* (CUP, 1985) 386.

50 Tulio Halperin Donghi, *Historia Contemporánea de América Latina* (Alianza Editorial 13th edn.1996 reprinted 2008) 111.

51 Vicente Llorens, *Liberales y Románticos: una Emigración Española en Inglaterra: 1823-1834* (3rd.edn.

many South-Americans, who viewed Great Britain and the United States as the 'traditional countries of liberty'.[52] In the 1810s, Great Britain was described by Bernardo Monteagudo, a prominent South-American revolutionary, as the 'classic island, whose example gave the two worlds the first impulse towards freedom'. [53] In 1819, Simón Bolivar (the famous independence leader) urged the Congress of Venezuela to adopt French *and* Anglo-American law as models, in all the areas of law. [54] In a letter to Bentham of 1818, Bernardino Rivadavia, who was to become the first Argentinean President, expressed similar feelings when he wrote: 'how great and glorious is your country!'.[55] Finally, Andrés Bello, the drafter of the Chilean Civil Code, identified England, France and the United States as the main countries having 'truly liberal institutions'[56]

In light of the political prestige that Anglo-American institutions enjoyed in the minds of many South-Americans, I claim that Anglo-American legal ideas were made use of in the reform, not only of constitutional law, but also of private law. These ideas travelled to South America mainly through legal literature, the most consulted works being those of three prominent Anglo-American legal scholars: Jeremy Bentham, William Blackstone

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Ed. Castalia 1979) 288.

52 Fermín Toro, *Reflexiones sobre la Ley del 10 de abril de 1834* (Imprenta de Valentín Espinal 1845) 66.

53 Bernardo de Monteagudo, *Escritos Políticos* (Emecé 2009) 149.

54 Simón Bolívar, 'Discurso ante el Congreso de Angostura' in Rafael Arráiz Lucca y Edgardo Modolfi Gudat (eds) *Textos Fundamentales de Venezuela* (Federico Pacanins y Joanna Vega Editores 1999) 49.

55 Stephen Conway (ed) *The Collected Works of Jeremy Bentham: The Correspondence of Jeremy Bentham: Volume 9* (Clarendon Press, Oxford, 1989) 255.

56 Andrés Bello, *Obras Completas de don Andrés Bello: Volumen IX: Opúsculos Jurídicos* (Imprenta Pedro G Ramírez 1885) 6.

and James Kent. Bentham was the most widely read,[57] and the only one directly corresponding with South-American politicians and lawyers.[58]

This thesis examines three areas in which Anglo-American law and legal ideas had an important influence on South-American Civil Codes. First, in the context of intestate succession law, where the rights of the surviving spouse of the deceased were enhanced at the expense of collateral relatives. Second, in the field of contract law, where usury laws and the doctrine of *laesio enormis* were abolished. Third, in the area of interpretation of the Civil Codes, where provisions indirectly inspired by Blackstone imposed on the judiciary a literal method of interpretation very similar to the *plain meaning rule* adopted by English law.

When compared with French law, the provisions adopted by South-American law in those three areas were more in accordance with nineteenth-century liberalism. In the social sphere, the reform of intestate succession dramatically enhanced the rights of the surviving spouse. This reform was concerned, basically, with improving the rights of women, and has been considered as an essentially liberalizing step,[59] or a movement towards a socially progressive position.[60] The surviving spouse came to inherit jointly with the deceased's children, or to be among the heirs of the deceased in case of lack of the former. By contrast, in French law, the surviving spouse only participated in the succession provided that there were no consanguine relatives of the deceased up to the

57 Safford (n 49) 367.

58 Miriam Williford, *Jeremy Bentham on Spanish America: An Account of his Letters and Proposals to the New World* (Louisiana State University Press 1980), 16.

59 Deere-León (n 42) 628-31.

60 Mirow (n 4) 101.

twelfth degree. Thus, the conception of family underlying succession law in South America changed from a feudal, consanguine model (aimed at preserving ancestrally-held property within the blood family) to a modern, conjugal one (based on the household as a productive unity). [61]

In the economic sphere, the abolition of usury laws in South America enhanced freedom of contract by lifting restrictions for the parties to agree on interest rates in financial transactions. French law limited freedom of contract in this subject until the twentieth century. By contrast, South-American private law not only abolished usury laws, but also lifted another restriction on freedom of contract, *laesio*, which was retained in French law for land sales.[62] Thus, in two steps (the abolition of usury laws, and of *laesio* later), South-American private law adopted a version of freedom of contract more liberal than the one assumed by the French Civil Code.

Finally, on the political level, the principle of separation of powers was reinforced in some South-American jurisdictions by regulating in detail statutory interpretation in the Civil Codes. Those regulations imposed on the judges the literal rule, and were indirectly inspired by the works of the English scholar William Blackstone. The French Civil Code (1804), though based on the same political philosophy, had not regulated judicial interpretation, and until an Act of 1 April 1837, French laws opted for submission of any interpretative difficulty faced by judges to the legislature. The French system, trying to prevent the judiciary from becoming a legislature, instead made the legislature a

61 See Chapter 3 below.

62 See Chapter 4 below.

judge, thus violating the same principle of separation of powers that it intended to consecrate. Being critical of that aspect, and through the indirect influence of Blackstone, some South-American Civil Codes came to adopt a formalistic model of statutory interpretation quite similar to that adopted by English law, which was more attuned to nineteenth-century conceptions of political liberalism.[63]

4. Methodology

This research combines historical and comparative approaches. In the following sections, I explain the main methodological decisions that guided it. First, the reasons for the choice of the jurisdictions are addressed. Second, the concept of *law and legal ideas* utilized along the following chapters is explored. Third, the notions and different kinds of *influence* and *use* of legal ideas are illustrated. Fourth, the different methods for approaching the history of legal ideas are examined, and, lastly, the need to limit the scope of this research to *law in the books* is explained.

4.1. Jurisdictions and Areas of Law Addressed: South-American General Private Law

Latin America extends from Mexico to the southernmost tip of South America (*Tierra del Fuego*). The historical factor uniting these vast regions from 1492 onwards was their colonization by Spain and Portugal. Given the difficulty of covering in a single piece of research all of Latin America, I have opted to limit my investigation to *Spanish South-*

63 See Chapter 5 below.

American jurisdictions, though some references to Brazil will be introduced.[64]

Spanish South America can be considered, from a historical perspective, as a unity different from Mexico, Central America and the Caribbean. Originally, it comprised only one Spanish viceroyalty: the viceroyalty of Peru, which included all Spanish-governed regions of South America. Even following the creation of two new viceroyalties by the end of the eighteenth century, political and cultural links between the different regions of South America remained in place. Likewise, during the struggle for independence, the emancipation movements in the different regions of South America were connected and followed similar patterns.[65] All this justifies singling South America out of Latin America for the purposes of this research.

Within South America, the investigation focuses mainly on five jurisdictions: Argentina, Chile, Uruguay, Colombia and Venezuela, with some few allusions to the other five South-American jurisdictions (Paraguay, Bolivia, Ecuador, Brazil and Peru). The five jurisdictions selected are the ones in which I have been able to locate more relevant evidence of the use of Anglo-American legal ideas in private law, though the amount of evidence relating to each jurisdiction varies.

The focus will be on the legal changes which impacted the *Civil Codes*. Those Codes address the relations between individuals, forming the centre of private law in any

64 Mostly in Chapter 4 in connection with contract law.

65 For instance, Simón Bolívar's influence reached from Venezuela in the north, to Bolivia in the centre of South America, while José de San Martín's activity reached Argentina, Chile, Bolivia and Peru.

civilian legal system.[66] Thus, commercial and corporate law, and the law of civil procedure and evidence are outside the scope of this thesis.

4.2. Law and Legal Ideas

As already mentioned, this research is concerned with the influence of Anglo-American law and legal ideas in South America. While the adjective *Anglo-American*, quite obviously, points to the connection with England and the United States of America, the expression *law and legal ideas* requires a more detailed definition.

On the one hand, by *law* I mean legal norms and sets of legal norms in a wider sense, including both *principles* and specific *rules*. As it has been argued, the legal historian cannot merely concern her or himself with rules, but needs also to evaluate the principles of the legal systems under analysis, in a way that reflects the understanding of contemporaries.[67] On the other hand, by *legal ideas*, I intend referring to both the explanations that legal actors, such as scholars, provide of those legal norms as well as the arguments they advance in support of existing law, or its reform.

As it has been acknowledged, the transfer between different legal systems 'concern[s] not only rules enacted by the sovereign but also ideas and modes of thought'.[68] The expression *law and legal ideas* tries to capture all of those different elements. In the case of South America, both Anglo-American law and legal ideas were

66 Mirow (n 4) 135.

67 Michael Lobban 'Introduction: The Tools and the Tasks of the Legal Historian' in Andrew Lewis-Michael Lobban (eds) *Law and History: Current Legal Issues 2003 Volume 6* (OUP 2004) 5.

68 Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP 2006) 464.

influential. Anglo-American legal ideas analysed in this thesis were of two types: on the one hand, ideas which explained Anglo-American law *as it was*,[69] and on the other hand, ideas postulated in order *to reform* that law.[70]

4.3. Influence

This research belongs to the wider field of the study of 'transplants', 'transfers', 'reception', 'borrowing', 'influence', 'circulation' or 'imitation' of law and legal ideas.[71] The term 'inspiration' has been proposed also as a synonym of 'influence'. The terminology of *transplants* was made popular by Alan Watson in the 1970s, and, in general terms, refers to the contacts of different legal systems or cultures and the changes that such contacts trigger.

Two sets of terms referring to that phenomenon can be distinguished. The first (transplants, reception, transfer, circulation, imitation) seems to point to a set of legal rules or an institution *which does not change in itself*, but is inserted into a new 'soil' or 'body'.[72] Obviously, some modifications in the transplanted entity would not denaturalize the phenomenon. However, the dominant feature that captures our imagination when this terminology is used is that of an unmodified entity being inserted into a new environment. This perception underlies the traditional dispute about the *feasibility* of

69 To be found in William Blackstone's works, for instance. See Chapter 2 Section 4.2.1.

70 Jeremy Bentham's proposals, for example. See Chapter 2 Section 3.

71 For this Section: Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press-University Press of Virginia 1974) 21-30; Otto Kahn-Freud, 'Of Uses and Misuses of Comparative Law' (1974) Modern Law Review 1-27; Graziadei (n 68) 443-4; John W Cairns 'Watson, Walton and the History of Legal Transplants' (2013) 41 Ga. J. Int'l & Comp. L. 637-696.

72 Kahn-Freud (n 71) 5.

legal transplants, with Watson famously arguing that transplants can operate independently from the social and political circumstances of the jurisdictions involved,[73] and others (led by Montesquieu) insisting on the relevance of those non-legal factors.[74]

The terminology of 'transplants' may be appropriate to describe certain Civil Codes of South America, but not the majority. For instance, the Bolivian Civil Code of 1830 was almost a mere translation of the French Civil Code into Spanish. But that is the only case in South America where using the terminology of *transplants* would be accurate. Of course, in a lax sense, we can still make use of the word *transplant* or similar ones to cover situations which fit loosely within it, but we should be careful not to do that when we are trying to define, as precisely as we can, our terminology.

The second set of terms (inspiration, influence, borrowing) has a more open texture, and allows for a wider range of situations to be gathered under the same word. Inspiration and influence include the idea of a transplant, but also other situations more common during the formative period of South-American private law. For instance, this laxer terminology includes cases where foreign law or legal ideas, or just some isolated rule, were taken into account by drafters of legislation or legislatures, and were reflected in some modifications to the existing law, or partially used to complement an already existing or new institution. For example, the drafter of the Chilean Civil Code was *inspired* by the French Civil Code when he restricted the scope of *laesio* (a defect of contract in the *ius commune* and Spanish law), but he did not *transplant* the French

73 Alan Watson, *Society and Legal Change* (2nd. edn. Temple University Press 2010) 5.

74 Cairns (n 71) 640-658

solution (the parties entitled to claim and the description of the defect were different). Therefore, it is much more accurate to describe the Chilean drafter as *inspired* or *influenced* by French law in that case, than as *transplanting* or *transferring* French law. Throughout this research, the notion of influence or inspiration will be mostly used. For inspiration or influence, I will understand the *taking into account* of a legal idea *with, at least, some practical consequences* in the design of a provision or legal institution.

4.4. Use

In addition to *influence* or *inspiration*, there is a more general category that includes the notion of influence, but also others. That more general category is *use*. It encompasses not only the inspirational use of some foreign legal idea, but also, for example, its employment for explanatory purposes in teaching or in academic writing, its *strategic use* where a legal actor advances a certain legal solution (e.g. a new regulation), not being inspired by a foreign legal idea, but using it in order to *justify* his or her own solution to a local problem, or for adapting the law to local reality. Moreover, there may be cases of purely rhetorical employment of legal ideas. One typical case of rhetorical use was that of the institution of religious marriage in English law. Many drafters of Civil Codes in South America were convinced that religious marriage should be maintained as a valid institution,[75] while radical liberals claimed that it should be abolished in favor of civil marriage, as the French Civil Code had done. The reasons that led the drafters of those Codes to adopt religious marriage had nothing to do with English law, but they used the

75 Vélez Sarsfield in Argentina and Narvaja in Uruguay.

fact that England (one of the 'traditional countries of freedom'[76]) had retained religious marriage as a key argument against their opponents. The contraposition between *inspiration*, *strategic use* and *rhetorical use* will be explored in the following chapters.

4.5. Different Kinds of Use and Influence

Lastly, *use*, *influence*, and *inspiration* were present under different forms in South America. Sometimes the influence was *direct*, in the sense of the users of foreign law or legal ideas directly employing materials (whether positive law or legal literature) from the foreign jurisdiction. In other cases it was *indirect*, and it came through the mediation of another legal system. Furthermore, there were cases of *overt* inspiration in which the use of foreign legal ideas was openly acknowledged in commentaries or notes, and cases of *unacknowledged* inspiration, where the use of a foreign a legal idea is clear from other evidence but not explicitly mentioned by the user. Finally, mainly when the influence was indirect, there were cases of *unconscious* influence.

The fact that influence was in some cases indirect, unacknowledged, or unconscious, does not exclude its existence. The core aspect of this research is the mobility and use of legal ideas across the borders of two different legal traditions (common law and civil law), not only the use of foreign legal ideas that were perceived or acknowledged as such by contemporary legal actors. In other words, this thesis focuses on the detection and explanation of *the mobility and use* of legal ideas, and not on the *psychological processes of their users*.

76 See Section 3 above

4.6. Internal Criticism v Contextual Analysis

This thesis partially belongs to the field of intellectual history, or history of ideas: the critical inquiry into the genesis, diffusion, and effects of ideas.[77] Most specifically, as already explained, the research is concerned with the diffusion and use of certain legal ideas in a certain context: Anglo-American legal ideas in the shaping of South-American private law.

It is, therefore, useful to note that two different methodologies have been proposed within the field of history of ideas. Some scholars, like Peter Strawson, have been described as 'liberating the history of philosophy from history'[78] for the sake of focusing in the internal strengths and weaknesses of ideas conceived as different strategies for solving problems. By contrast, Quentin Skinner and other historians have stressed the importance of a historical understanding of ideas over philosophical internal criticism. According to Skinner, we need to study the *context* of any work of political philosophy so as to enable ourselves 'to characterize what their authors were *doing* in writing them'.[79] In other words: should we analyse the *internal coherence* of legal ideas, or should we focus on what the legal actors were *actually doing* with those ideas? Among the legal historians, few would challenge the idea that their task is to understand legal ideas in their historical context.[80] However, there is no inconvenience in

77 Frederick Beiser, 'History of Ideas: A Defence' in Herman Cappelen, Tamar Szabó Gendler, and John Hawthorne (eds) *Oxford Handbook of Philosophical Methodology* (OUP 2016) 505.

78 Ibid 508-11.

79 Quentin Skinner, *The Foundations of Modern Political Thought: Volume One: The Renaissance* (CUP 1978) xiii.

80 Lobban (n 67) 3.

approaching them ahistorically, so long as that approach is not presented as an historical one.[81]

For the purposes of this research it suffices to note, and make use, of these suggestions of alternative methodological approaches: internal criticism and contextual analysis. The use of both methods will enable us to elucidate more fully why and how Anglo-American legal ideas were used in the areas covered by this research. First, when approaching those ideas from an internal perspective, we will be able to evaluate their coherence and relative strengths, *qua* strategies for confronting some 'perennial' problems within private law, such as the extent of freedom of contract, or the conception of family underlying intestate succession law. Second, when looking at what South-American legal actors were *doing* with Anglo-American legal ideas in the nineteenth century from a contexualist perspective, we will be able to explain why some ideas were only partially used (such as Bentham's ideas on freedom of contract in the 1830s), or why their *Englishness* was sometimes emphatically acknowledged and sometimes consistently hidden; as well as, lastly, why some Anglo-American ideas were subtly transformed in the process of putting them into use (such as the English strict literalism on statutory interpretation when influencing the Chilean Civil Code).

4.7. Law in the Books and its Practical Impact

I am conscious that a complete assessment of the topic of this research should include not only the historical process leading to the enactment of law in the books, but also the

81 Ibid 12.

practical impact of those laws once enacted. The gap between paper rules and living law is a recurrent theme in the works of legal historians about South America.[82] However, while some basic evidence of the existence of practical impact of the legal reforms inspired by Anglo-American legal ideas will be provided at times, my work will not address that aspect in depth. It would be difficult to do justice to such an inquiry within the scope of this project. The study of the impact of Anglo-American law and legal ideas on the contents of South-American private law legislation ('law in the books') required of itself much research, given that all secondary sources embrace the traditional view, and thus ignore or neglect that influence. Therefore, this thesis may be seen as, basically, an inquiry into the history of ideas, and a first step towards further research in this field.

II. Historical Aspects

5. South America from the Fifteenth Century Onwards

5.1. Colonial Period

From the fifteenth century onwards, South America began to be governed from Spain or Portugal,[83] with trade being legally restricted to monopolistic exchange with the metropolis. According to the traditional perception, the civilizations existing prior to the arrival of the European colonizers were obliterated, including the highly developed Inca

82 Vivian Kluger, 'South and Central America', in Stanley Katz (ed) *The Oxford International Encyclopedia of Legal History* (OUP 2009). http://ezproxy-prd.bodleian.ox.ac.uk:2232/view/10.1093/acref/9780195134056.001.0001/acref-9780195134056-e-754. Accessed 12 December 2016.

83 With the only exception of the English, French and Dutch colonies of the Guyanas in the North-East corner of South America, with which Spanish and Portuguese America did not interact. As López Medina put it, they still seem to belong to a different continent. Cf. López Medina (n 12) 348.

Empire. While, recently, the law and rights of the 'original peoples' have timidly begun to be recognized,[84] the fate of South America from the sixteenth century onwards has been decided by European colonizers and, after independence, by their descendants.[85]

Colonial society was highly stratified. A small number of individuals of European descent accumulated ownership of land, agriculture being the leading industry.[86] Race also affected social status, whiteness being accepted as a mark of superiority. Finally, Spanish or Portuguese-born white people (*peninsulares*) were considered superior to native-born whites (*criollos*), and monopolized positions in state and church. At the political level, the Spanish empire was a 'highly centralized and rigidly controlled structure' governed from the metropolis.

At the economic level, as with other colonial empires, rules and regulations were directed at maximizing the benefit of the metropolis.[87] Trade between the different regions of South America and with non-Spanish ports was illegal,[88] and government monopolies existed over several products.[89] Colonial society worked under the ultimate direction of the state. [90]

During the eighteenth century, the Bourbon Spanish monarchs[91] launched what

84 Halperin (n 50) 738.

85 Bushnell-Macaulay (n 48) 3-4.

86 Ibid 4-8.

87 Ibid 7-9.

88 Ibid.

89 Halperin (n 50) 25.

90 Bushnell-Macaulay (n 48) 7-9.

91 The Bourbons came to power at the beginning of the eighteenth century, substituting the Hapsburg

the British historian John Lynch has compared to a 'second conquest'.[92] The control over American population was tightened, appointment of *criollos* to high office further decreased, and tax collection increased.[93] At the same time, though the Spanish monarchy was fervently opposed to the subversive political ideas of the European Enlightenment, the spread of the scientific and technical aspects of the same was encouraged, and thus some of the political ideas clandestinely slipped into Spanish America.[94] Lastly, at the economic level, local markets began to be controlled by Spanish *peninsulares*, fueling the resentment of the local *entrepeneurs*, while the development of the industrial revolution in northern Europe increasingly pressured for the opening of the closed colonial commercial system. Similar developments affected Brazil, under the premiership of the marquis of Pombal in Portugal. [95]

5.2. Independence

Within the context described above, an external factor would ignite the process that led to the independence of South America: the Napoleonic invasion of the Iberian Peninsula (1807-08).[96] The Spanish royal family was taken captive into France, and Joseph Bonaparte was crowned king of Spain. Spaniards and Spanish Americans refused to accept the new king, and from 1808 onwards decided to appoint local councils (*Juntas*) to

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dynasty that had reigned in Spain for the two previous centuries.

92 John Lynch, *The Spanish American Revolutions: 1808-1826* (New York 1973) 7.

93 John Charles Chasteen, *Born in Blood & Fire: A Concise History of Latin America* (WW Norton & Co, 2011) 74-5.

94 Bushnell-Macaulay (n 48) 9-11

95 Ibid.

96 For this paragraph: Bushnell-Macaulay (n 48) 11-20

govern temporarily in the name of the deposed Ferdinand VII. However, when the deposed king recovered his throne, the *criollos* would not resign the power they had acquired, and independence was declared. The last Spanish army was defeated in Ayacucho, Peru, in 1824.

In Brazil, things took a slightly different turn which, nevertheless, ended with independence in 1822. When Napoleon's army entered neighbouring Spain, the king of Portugal decided to get out of the way of the French, and moved his court to Brazil. Brazil became the hub of the Portuguese empire.[97] When the French were defeated and the king returned to Lisbon, the Brazilian *criollos* resented their own returning to colonial *status*. An emancipation movement began, and a son of the king of Portugal, Pedro I, declared independence, styling himself Emperor of Brazil.

5.3. The New Countries and South-American Liberalism

Once independence was achieved, ten new sovereign South-American countries were formed. The boundaries between Spanish-America new countries followed some Spanish administrative sub-divisions, but the process has been aptly described as a *fragmentation*.[98] For instance, the three Spanish viceroyalties existing in South America (Peru, New Granada, and the River Plate) were transformed into nine sovereign countries, while only Portuguese Brazil remained united. The boundaries followed divisions that were internal to those viceroyalties, thus generating nations that could be seen as artificial. The white dominant minorities shared a common language, religion,

97 Ibid 14-5.

98 Ibid 13-26.

law and customs. The divisions were the result of the existence of local ruling elites detached from each other, and previously united only by common subjection to the Spanish crown.

The countries emerging after independence adopted a republican frame of government, except for Brazil which became a constitutional monarchy.[99] The white elite of landowners of European origin (*criollos*) monopolized power.[100] The right to vote was limited to five to ten per cent of the population, a percentage of electors similar to those of contemporary England and France.

South America opted for a liberal model of development, like that of England, the United States, and France.[101] A vast majority of South-American politicians and intellectuals adopted liberal opinions in both the political and economic fields.[102] Naturally, the sort of liberalism at play was the *classic* version of it, where the defence of private property from state intervention, and a free market economy were essential components.[103] Mentions of liberalism in this thesis do *not* include *New* or *Social* liberalism, which only began to emerge by the end of the nineteenth century and was characterized by its 'faith in government as a means of supervising economic life'.[104]

99 Bushnell-Macaulay (n 48) 26-7.

100 Chasteen (n 93) 87.

101 Bushnell-Macaulay (n 48) 12.

102 Rivera (n 48) 10. Bushnell-Macaulay (n 48) 12.

103 Gerald Gaus, Shane D Courtland, and David Schmidtz, 'Liberalism' *The Stanford Encyclopedia of Philosophy* (Spring 2015 edn.), Edward N. Zalta (ed) URL = <https://plato.stanford.edu/archives/spr2015/entries/liberalism/>. Accessed 20 October 2016.

104 Ibid.

The political conditions after independence were unstable, though the successive revolutions and civil wars often did not involve huge numbers of combatants.[105] For instance, the number of casualties during all the political turmoil of nineteenth century South America 'came nowhere near to equalling the death toll of the one US Civil War'.[106] However, constant disruptions generated a climate of uncertainty that hindered the social and economic development of the new countries, raising a yearning for order in many South-Americans. The unstable political conditions of South America mirrored those in Spain and Portugal (*coups*, civil wars, etc.). There, after the defeat of the Napoleonic invasion, the monarchs recovered their thrones and returned to absolutism. In doing so, they had to confront the liberal movement that had developed during their absence from power. For instance, in Spain, a liberal Constitution had been approved by the representatives of the people in 1812. The problem common to both the mother countries and South America was the unfamiliarity with republican or constitutional institutions, as distinct from the patriarchal absolutism of the Iberian monarchies.

In the mid-nineteenth century, differences began to emerge between those who were called Liberals and Conservatives in a very *specific South-American terminology*.[107] Both shared vast common ground. Their differences were only of degree: conservatives were more sympathetic to the Catholic Church, and favored a strong and centralized rule. Liberals and Conservatives agreed on a republican form of government, but conservatives favored the centralization of authority in the executive, while Liberals

105 For this paragraph: Bushnell-Macaulay (n 48) 29-32.

106 Ibid 29.

107 Rivera (n 48) 10.

advocated for the democratic aspects of it. The main goal of the conservatives was to install *order* after a chaotic post-independence period of civil war and revolutions. Apart from that, there were no principled differences. This provided quite a different scenario when compared to contemporary Europe. In Europe, the words *conservative* and *liberal* implied marked differences of principle, not only of degree.

This thesis focuses on the period between the independence and, roughly, the 1870s, when most of South-American countries enacted their Civil Codes. Three phases can be distinguished within that period.[108] First, the period between independence and the 1830s, when the first Constitutions and liberal reforms were approved, commerce with England flourished, and money lent from Europe flowed into the new countries. Second, a phase of economic depression, from the 1830s till the mid-nineteenth century, where commerce decreased dramatically, and the loans from foreign banks could not be repaid. This was accompanied by political turbulence and a retraction in liberal reform. Finally, the third quarter of the nineteenth-century (1850-1875), when the economy recovered and investments, mainly from England and France, began to flow into South America. Depending on the historical perception of the precedent and subsequent phases of South-American history, this period (1850-1875) has been variedly described as the 'heyday of liberal reform'[109] or as the 'liberal pause'.[110] In that more prosperous context the new states were consolidated, and the national governments acquired a tight control over their respective countries.[111] It is important to retain that the bulk of the codification of private

108 For this paragraph: Bushnell-Macaulay (n 48) 180-192.

109 Bushnell-Macaulay (n 48) 193.

110 Claudio Véliz, *The Centralist Tradition in Latin America* (Princeton 1980) 9, 11.

111 Halperin (n 50) 214.

law in South America occurred in this period of liberal reform, state consolidation, and economic development.

5.4. Different Perspectives on South-American Independence

Two views of South-American independence have coexisted among historians and more generally, as part of South- American political debate, since the nineteenth century.[112] The more traditional one emphasizes the importance of independence and liberal political change from the 1820s onwards. The other view, which gained wider acceptance in the twentieth century, focuses on the lack of changes brought by independence for the great majority of South-Americans. According to this second view, independence only meant a change of alliances of the local oligarchies: Spain and Portugal were displaced by the ascending power of Great Britain and the United States, and a neo-colonial order emerged.[113] Liberalism tends to be seen, in that ideological context, as the justification or cover-up for what was in fact only a shift in the alliances of the ruling minorities.

Both views, however, agree on the influence of Britain and the Unites States over the new countries. They disagree about the genuine or strategic value to be assigned to the liberal discourse of the actors involved in the process. For instance, the abolition of usury laws, which was inspired by Bentham's ideas,[114] could be either understood as the work of radical idealistic liberals, or the legitimating discourse for the exploitation of the nascent countries by English bankers. In fact, those rival normative assessments were

112 Bushnell-Macaulay (n 48) 13-14.

113 Halperin (n 50) 209-10.

114 As will be explained in Chapter 4.

advanced by some contemporaries of the abolition of usury laws in the 1830s.[115]

6. Brief History of Law and Legal Education in South America

6.1. Spanish and Portuguese Law

South America, as much as the former mother countries, belongs to the civil law tradition. Spanish and Portuguese law remained in force throughout the colonial times, and for decades after independence, and –as already mentioned– had a long-lasting impact on the legal systems of the new countries.[116]

Spanish America, then known as the *Indias* or *Reinos de Indias*, was incorporated as part of the Castilian crown soon after its discovery and, consequently, the laws of Castile became automatically applicable to Spanish America.[117] Castilian law consisted of an intricate web of successive layers of legislation.[118] The intricacy of that web of legislation, however, related mostly to public law. When it came to private law, the *Siete Partidas* was the most common and influential source,[119] as the other sources contained only a few provisions concerning private law. The *Siete Partidas* was a Code almost exclusively based on Roman law as interpreted by the glossators, approved by King Alfonso X of Castile in the thirteenth century.[120] The *Siete Partidas* created a strong link

115 For a detailed analysis, see Chapter 4 Section 3.5.

116 Section 2 above.

117 Guzmán Brito, *La Codificación Civil* (n 4) 149-161.

118 Ibid152-157.

119 Mirow (n 4) 51-2. Guzmán Brito, *La Codificación Civil* (n 4) 159.

120 Mirow (n 4) 17.

between Spanish and Roman law, as many legal historians have remarked.[121] Many of the advisors of the King on this matter were trained in Roman and Canon Law at the University of Bologna, and gave the *Siete Partidas* a sophistication for its times that guaranteed a long life. While its language and its provisions became increasingly obsolete, the *Siete Partidas* managed to survive well into the nineteenth-century as the main source for private law in South America. As to the substance of Spanish law, South-American legal actors usually described it as 'feudal'[122] and 'despotic'.[123] Contemporary legal historians agree, and describe Spanish law as 'interventionist'[124] and as the legal ground for 'societal privileges'.[125]

Regarding Portuguese law, the *Ordenações Filipinas* of 1603 were in force in Brazil, before and after independence. [126] Portuguese law also belonged to the civilian tradition. Pursuant to the *Ordenações,* in case of a gap, Roman and canon law could be applied.[127] As to their contents, and like Spanish law, the *Ordenações Filipinas* have been described as 'perspir[ing] from every pore the intervention of the state in the

121 Section 2 above.

122 Two examples among many: Decree of the President of Bolivia, Andrés Santa Cruz, promulgating the Bolivian Civil Code of 1830, in Raúl Romero Linares, *Apuntes de Derecho Civil Boliviano* (Ed. Juventud 1965) 71. Tristán Narvaja, 'La Nación tiene Código Civil', published in 1870 and reproduced in Jorge Peirano Facio, *Tristán Narvaja. Un Jurista Rioplatense en tiempos de la Codificación* (Instituto de Investigaciones de Historia del Derecho, 2008) 253.

123 As late as 1870, the 'despotism' of Spanish law was still mentioned in the Argentinean Senate in order to urge the entering into force of the Civil Code. Cf. Raymundo M Salvat, *Tratado de Derecho Civil Argentino: Parte General* (Imprenta F Ferreira 1925) 99.

124 Guzmán Brito, *La Codificación Civil* (n 4) 277.

125 Mirow (n 4) 126.

126 Rubens Didone, *A influencia das ordenacoes portuguesas e espanhola na formacao do direito brasileiro do primero império* (http://repositorio.uscs.edu.br/bitstream/123456789/292/2/tese%20doutorado%20Prof%20Didone.pdf). Accessed 5 July 2016. Guzmán Brito (n 4) 494.

127 Guzmán Brito, *La Codificación Civil* (n 4) 495.

economy'.[128]

In South- America, lawyers were trained at the universities, and legal education was focused on Roman and Canon law.[129] There were thirty-one Universities in Spanish America, all of them following the model of the Spanish University of Salamanca. Teaching was restricted to Roman and Canon law, Spanish law was to be learned through practice.[130]

6.2. National Law (*Derecho Patrio*)

Immediately following independence, the main modification of South-American law concerned only *constitutional* law. The change was dramatic, implying as it did a transition from the framework of an absolute monarchy into a republican government (or a constitutional monarchy in the case of Brazil). All the new countries approved their written Constitutions following the models of the United States (1787), France (1792) or the short-lived liberal Spanish Constitution of 1812.[131] Between independence and codification (roughly, between 1820-1870), Spanish and Portuguese *private* law remained in force. This period of South-American law is often referred to as the stage of *Derecho Patrio* (law of the fatherland) or *intermediate law*. During this period, South-American law was mostly composed of Spanish and Portuguese law still in force, with some reforms introduced by the legislatures of the newly independent countries.

128 Didone (n 126) 26.

129 Mirow (n 4) 17 and 30.

130 Guzmán Brito, *La Codificación Civil* (n 4) 163

131 Ibid 179-180.

In a piecemeal fashion, national legislation began to introduce the more urgently needed reforms in order to adapt the law to new liberal demands (abolition of slavery, elimination of primogeniture, abolition of nobility titles, etc.).[132] In Brazil, the trend towards liberalization was much less marked (e.g. slavery was abolished only by the end of the nineteenth century), but many reforms were nonetheless introduced. Two of the cases of Anglo-American legal influence to be analysed in this thesis belong to his period: the abolition of usury laws,[133] and the first Acts enhancing the rights of surviving spouses in intestate succession.[134]

During this period, the study of Roman, Canon and Spanish law remained the core of legal education in all the Universities. However, there were changes, at least in some universities. For instance, in Colombia, Argentina, Chile and Uruguay, Jeremy Bentham's works became textbooks to be used in the law schools.[135] Legal education during this period was conceived of not only as a tool for the training of legal practitioners, but as a broader 'preparation for politically active life'.[136] The use of new authors, such as Bentham, and the emphasis on the training for political life, gave the new South-American lawyers a wide and critical perspective on law, something that we will explore in the following chapter as one of the reasons for their use of Anglo-American legal ideas.

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132 Ibid 182-3.

133 Chapter 4.

134 Chapter 3.

135 See Chapter 2.

136 Rogelio Pérez Perdomo, *Latin American Lawyers: An Historical Introduction* (Stanford University Press 2006) 75. Mirow (n 4) 120.

6.3. Codification

The idea of codification was adopted as a goal of the new states soon after South-American independence. Most South-American Constitutions provided that the newly erected Parliaments should devote themselves, as soon as possible, to the task of codifying the law.[137]

With the sole exception of Bolivia, whose Civil Code was enacted in 1830, it took between thirty and sixty years from independence for the Civil Codes to be enacted. The Peruvian Civil Code of 1852 and the Chilean one of 1855 were the first. The Paraguayan Civil Code of 1876 was the last of the nineteenth-century South-American Civil Codes. Brazil was an exception: only in 1916, almost a century after its independence, was the first Brazilian Civil Code enacted. The following table presents the year of enactment and the names of the drafters of, and the main inspiration for, nineteenth-century South-American Civil Codes.

Country	Year of Enactment	Drafter	Main influence/s
Bolivia	1830	---	An almost literal translation of the French Civil Code (1804)

137 Santos (n 22) 298.

Country	Year of Enactment	Drafter	Main influence/s
Peru ([138])	1852	Parliamentary commission presided by Andrés Martínez	Spanish and Roman law, and, to a lesser extent, the French Civil Code.
Chile	1855	Andrés Bello[139]	Spanish, French and Roman law.
Ecuador	1858	The Supreme Court of Justice of Ecuador	Follows the Chilean Civil Code (1855) with few differences.
Venezuela	1862	Julián Viso	Chilean Civil Code (1855).
	1867	Ángel Ramírez, Diego Bautista Barrios, and Julián Viso	Follows García Goyena's draft of a Civil Code for Spain (1852).

138 A previous draft of a Peruvian Civil Code with extensive commentaries by the judge and politician Manuel Lorenzo Vidaurre was published between 1834 and 1836, but never enacted.

139 Based in Guzmán Brito, *La Codificación Civil* (n 4), Mirow (n 4), and Kleinheisterkamp (n 7).

Country	Year of Enactment	Drafter	Main influence/s
	1873	Diego Bautista Barrios, José Reyes, Ramón Feo, Luis Sanojo, and Diego B. Urbaneja	Italian Civil Code (1865)
Uruguay	1868	First draft (1852): Eduardo Acevedo Final draft: Tristán Narvaja	Spanish law, French Civil Code (1804), Chilean Civil Code (1855), García Goyena's draft of a Civil Code for Spain (1852), Roman law.
Argentina	1869	Dalmacio Vélez Sarsfield	Spanish law, French Civil Code (1804), Augusto Teixeira de Freitas' draft of Civil Code for Brazil, García Goyena's draft of a Civil Code for Spain (1852), Roman law.
Colombia	1873	Agustín Núñez	Follows the Chilean Civil Code (1855) with few differences.

Country	Year of Enactment	Drafter	Main influence/s
	1887	---	Follows the previous Code of 1873, and thus, the Chilean Civil Code (1855) with few differences.
Paraguay	1876	---	Follows the Argentinean Civil Code (1869) with no difference.
Brazil	1916	First draft (1860-67): Augusto Teixeira de Freitas. Final draft (1916): Clovis Bevilacqua	German Civil Code (1900), French Civil Code (1804), Savigny, Roman law.

Thus, in the two decades between 1852 and 1876, the vast majority (*eight out of ten)* of South-American jurisdictions enacted their Civil Codes. This period coincided with the recovery of the South-American economy after a two-decade recession, and on the political and economic sphere it was the 'heyday of liberal reform', as indicated above.[140]

140 See Section 5.3 above.

Bolivia and Brazil were two exceptions.

Consolidiation and codification have been distinguished as two related but different activities. While the first implies a systematic compilation of existing law, the second is an effort to produce a new and rational legal order.[141] While the idea of codification is essentially connected with the movement of the Enlightenment, and the rationalistic school of natural law,[142] the idea of consolidation predates it by many centuries and can be traced back to the Theodosian and Justinianic Codes.[143] The objectives of codification in Europe were two: consolidation of the nation–states through the unification of the law,[144] and rationalization and simplification of the law.[145] The objective of rationalization, however, came to be connected with an specific political objective: 'to overthrow legal privilege[s]' such as primogeniture, entails, ecclesiastical interference with secular matters,etc.[146] Legal historians have also seen South-American Civil Codes under those two perspectives. First, South-American Civil Codes were 'centered on the idea of the constitution of *new nations*'.[147] However, differently from Europe, the main objective of the South-American Codes was not to unify multiple legal orders coexisting with the boundaries of a nation-state, as in France in 1804, for example, but to separate the new systems from the legal order of the former metropolis, and the

141 Manlio Bellomo, *The Common Legal Past* of *Europe* (The Catholic University of America 1995) 1-2.

142 Olivia F Robinson-T David Fergus-William M Gordon, *European Legal History* (3rd edition OUP 2000) 249-53.

143 Guzmán Brito (n 4) 19-20.

144 Bellomo (n 141) 1, Guzmán Brito (n 4) 118.

145 Robinson et al (n 142) 253-4, Bellomo (n 141) 2.

146 Robinson et al (n 142) 253.

147 Ibid.

other new South-American states created after independence.[148] Second, the enactment of the Codes was directed at ending the chaotic and feudal law of the former metropolis.[149] The Codes were seen, by many, as 'important steps along the way in the creation of a *liberal state*'.[150] While there was near unanimity in the need of systematization,[151] there was some fear of innovation from more conservative quarters.[152] As already mentioned, after independence a time of turmoil and economic recession followed. In that context, the French Civil Code was seen by many as an innovatively 'dangerous' model from Revolutionary France. For example, Eduardo Acevedo, who wrote the first draft for a Uruguayan Civil Code in 1852, explicitly declared that, though he often consulted them, he had avoided *quoting* French authors for fear that many would reject his work if he did so. To conjure his contemporaries' fear of innovation he chose, instead, to present his draft as the product of systematization and re-wording of Spanish law.[153]This was a typical case of unacknowledged influence of foreign legal ideas (French in this case), something that we will see again in relation to some Anglo-American legal ideas. Similarly, in order to appease his potential critics, the drafters of the Chilean Civil Code of 1855 and the Venezuelan Civil Code of 1862, publicly argued that codification would not bring substantial alterations to the existing legal order.[154] The initial fears were overcome, and the reformist approach gained momentum, between 1850

148 Guzmán Brito (n 4) 237 -241.

149 Ibid 238.

150 Mirow (n 8) 98.

151 Guzmán Brito (n 4) 218.

152 Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (CUP 2007) 45.

153 Eduardo Acevedo, *Proyecto de un Código Civil* (Montevideo 1851) xi.

154 Guzmán Brito (n 4) 257-8..

and 1875, when South America had entered a period of relative prosperity and political stability. However, the initial caution regarding innovation may explain why Bentham's ideas on the contents of private law were not always acknowledged.

Regarding legal education, the enactment of the Civil Codes marked a new era. Roman and Canon law lost their original importance, and the teaching of private law became centred on the new national Codes.[155] Unlike in the previous period, when the goal had been the training for active political life, legal education adopted narrower methods, focusing mostly on the technical formation of future practitioners.[156] The texts of French legal scholars of the exegetic school supplanted the traditional Spanish authors, [157] as most South-American intellectuals were proficient in French. The Universities helped the new states impose the national Codes. In that context, lawyers trained under the new Codes lost contact with the more eclectic spirit that had characterized the formative period of South-American law. By the early twentieth century, a well-known Argentinean law professor complained that his colleagues still 'live[d] on [their] knees in front of the [Civil] Code',[158] and, at the University of Chile, as a reaction to a similar reality, a movement proposing to go 'beyond the Codes' emerged.[159]

In what is important for this thesis, the Civil Codes marked the end of a period of

155 Tau (n 9) 73.

156 Carlos F Amunátegui, 'La Doctrina Jurídica en Chile' (2016) XXIX no. 1. Revista de Derecho (Valdivia) 9-28.

157 Tau (n 9) 105-7.

158 The phrase is borrowed from Juan Antonio Bibiloni, an Argentinean professor living in the first decades of the twentieth century. Cf. Abel Cháneton, *Historia de Vélez Sarsfield: Tomo II: La Obra* (Librería y Editorial La Facultad 1937). 349.

159 Amunátegui (n 156) 23.

critical exploration that had begun with independence. Immediately following codification, the main task of South-American legal actors was to make the new legal systems work, and to cease speculating creatively about the better substitute for 'despotic' Spanish law. Open-minded interest in, and use of, Anglo-American law and legal ideas pertained to that previous period, and not to the code-centred mentality that followed. Furthermore, the grip of the Codes on the imagination of local legal actors was to obscure the perception of the period leading to their enactment. Perhaps, that is one of the reasons why later generations acquired a sort of 'blindness' for Anglo-American influence on nineteenth-century South-American private law, and endorsed the traditional view of it as an imitation of the French Civil Code, or, at best, as a by-product of an Euro-centric civil law tradition.

7. Plan of the Following Chapters

The following chapters shall cover three aspects. Chapter 2 provides the context for the research: the channels of communication between South America and Anglo-American law and legal ideas, the actors involved, and the different types of use of Anglo-American law and legal ideas during the formative period of South-American private law. The purpose of the chapter is to provide a preliminary explanation of *what* happened with Anglo-American legal ideas in South America, *why* and *how* it happened.

By contrast, chapters 3, 4 and 5 will analyse the three main areas of legislative *use* and *influence* of Anglo-American law and legal ideas. Each of these areas is an example of a different kind of use and influence. Chapter 3 refers to the reform of intestate succession, which is a case of direct, conscious and overt use of Anglo-American law and

legal ideas. Chapter 4 explains the use of Bentham's ideas in the abolition of usury laws and *laesio*. That was a case of direct and conscious, but unacknowledged influence. Chapter 5 refers to the rules of statutory interpretation in four South-American Civil Codes which were influenced by Blackstone's works. This was a case of an indirect, unacknowledged and (at least in some jurisdictions) unconscious influence. Lastly, Chapter 6 offers the conclusions extracted from this research, some of which have been suggested throughout this chapter.

CHAPTER 2: THE BACKGROUND: ACTORS, CHANNELS, AND USES

1. Introduction

1.1.Definitions

This chapter provides an overview of the *use* of Anglo-American law and legal ideas during the formative period of South-American private law (1820-1870). The purpose is to provide the background information for the next three chapters, where concrete uses of those ideas for the purpose of legislative drafting is analysed in detail.

Some definitions need to be introduced from the outset. First, two kinds of *use* of Anglo-American law and legal ideas[160] by South-American legal actors can be seen during the nineteenth century: academic use (use in teaching, and in the production of academic literature) and legislative use (use in drafting, and justification of, new legislation).

Second, by *legal actors*, I will refer to lawyers, law professors and politicians - often one and the same person in South America. These can be divided in two groups: on the one side, those explaining legal norms or postulating legal ideas in one jurisdiction and, on the other, those receiving *and* using those legal ideas in another jurisdiction. In this thesis, Anglo-American actors fall within the first category and South-American ones within the second. However, the main Anglo-American actors analysed here also sometimes fall in some sense into the second group, being recipients of certain Roman or civil law ideas. For example, William Blackstone and James Kent, in expounding English

160 For a definition, see Chapter 1 Section 4.2.

and American law, made significant use of civil law literature. *Cross-fertilization*, understood as *reciprocal* influence between two legal systems or, as in this case, between two legal traditions,[161] is an important aspect in the following analysis.

Finally, the expression *channels of communication* refers to the different mechanisms through which actors at the receiving end accessed Anglo-American law and legal ideas. Theoretically, access to foreign law can be gained either through the direct study of the statutes, case law or other sources of the foreign jurisdiction, or indirectly through the mediation of legal actors who provide explanations or studies of these sources. In nineteenth-century South America, access to Anglo-American law and ideas was usually mediated by English or American legal scholars. Direct access to Anglo-American statutes or case law was rare. Furthermore, access to the works of these Anglo-American scholars could be direct or indirect. In most cases, the Anglo-American actors were directly read. However, in some cases their legal ideas were received indirectly. For example, Blackstone's ideas about the interpretation of statutory law were received through the mediation of the Louisiana Civil Code. Indirect influence happened also when Anglo-American law and ideas were received directly in a particular South-American jurisdiction, and then travelled from that jurisdiction to another South-American one. For example, Bentham's ideas and Anglo-American law inspired the rules on intestate succession of the Chilean Civil Code (1855), which were transplanted into the Colombian Civil Code (1873). Finally, while direct influence implies a *conscious* use of Anglo-American legal ideas, indirect influence usually (but not always) implies an

161 Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP 2006) 444.

unconscious use.

1.2.The Political and Economic Background

The use of Anglo-American law and legal ideas in South America can be better understood by bearing in mind the high level of political and economic prestige that Great Britain and the United States had among South-Americans in the nineteenth century. This fascination was aptly described by a Colombian scholar as *anglomania*.[162] It was based on the perception of England as the main 'liberal stronghold' after the ascension of Napoleon in France, with many South-American revolutionaries living in London from 1810 to 1830, and on the preponderant economic position that England enjoyed in the world.[163] The liberal 'dominant ideology' in South America[164] tended to view England, France, and the United States, as 'prestigious' political models.[165] Economic influence also added to that prestige: following South-American independence, Great Britain was the most important foreign economic actor in the region. [166]

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162 Germán Martínez Argote, 'Introducción' in Germán Martínez Argote (ed) *Benthamismo y Antibenthamismo en Colombia* (Editorial El Búho 1983) 15-6. In this same sense: Jaime Jaramillo Uribe, 'Bentham y los Utilitaristas Colombianos del Siglo XIX', (1962) 4:13 Ideas y Valores 11-28.

163 Otto Carlos Stoetzer, El Pensamiento Político en la América Española durante el Periodo de la Emancipación: 1789-1825. (Instituto de Estudios Políticos 1966) 120-1.

164 See Chapter 1 Section 3 and 6.3. David Bushnell and Neil Macaulay, *The Emergence of Latin America in the Nineteenth Century* (2nd edn OUP, 1994) 12.

165 John Charles Chasteen, *Born in Blood & Fire: A Concise History of Latin America* (WW Norton & Co, 2011) 120.

166 Tulio Halperin Donghi, *Historia Contemporánea de América Latina* (Alianza Editorial 13th edn. 1996 reprinted 2008) 150. Some authors argue that, after independence, British goods 'flooded' South-American seaports, while Platt refers to a 'modest expansion'. Nevertheless, Platt agrees that from the 1850s onwards, British 'leadership in the international trade of Latin America was not in doubt'. Cf. Desmond CM Platt, *Latin America and British Trade*: 1806-1914 (Adam and Charles Black 1972) 3 and 98.

1.3.Main Anglo-American Actors

While from Jeremy Bentham South-Americans received ideas about how law ought to be *reformed*, from Blackstone, Kent and other authors they received explanations about what Anglo-American law *was*. Though not all examples fall within one or the other of those two categories, the taxonomy is helpful in illustrating that there are two different kinds of legal ideas in issue.

The main channel of communication between Anglo-American and South-American jurisdictions was legal literature. In the case of Bentham, communication also developed through correspondence and some face-to-face meetings. Although the use of Anglo-American ideas varied throughout the five jurisdictions addressed in this thesis, some broad generalizations can be made. For instance, in the five jurisdictions, Benthamite reformist ideas inspired the codification program or some other concrete pieces of legislation. In three of them (Argentina, Colombia and Uruguay), Bentham's works were used also for the purposes of legal education. Lastly, the works of Blackstone, Kent and other authors engaged in exposing Anglo-American law, were used in the drafting of the Civil Codes of Argentina, Chile and Uruguay, but were for the most part *not* employed in legal teaching.

In the context of legislative drafting, Anglo-American law and legal ideas were employed for different purposes: inspiring legal reform; strategically adding argumentative support to a reform already decided on the basis of other reasons; contrasting Anglo-American law with a different solution adopted by South-American law, and, finally, merely detecting convergences. In some cases, Anglo-American ideas

were the exclusive foreign influence or strategic support for reform, and in others, they shared that role with ideas from other legal systems, through the blending of South-American drafters. Naturally, while some of those norms or ideas were successfully employed and triggered a legal change, others failed to achieve any concrete result. In this thesis I analyse a range of different instances in which Anglo-American legal norms and ideas had an influence, though special attention will be given to the successful influence of Anglo-American ideas, meaning those cases were they were the most relevant foreign legal ideas used on the drafting of *actually enacted* legislation. These are the instances where Anglo-American ideas had the most perdurable influence on South-American private law. Moreover, they will support my claim that, although the overwhelming foreign influence came from Roman, Spanish and French law, Anglo-American legal ideas had a relevant role, though arguably lesser, in the formation of South-American private law.

2. Disincentives and Incentives

2.1.Disincentives

There were two main disincentives for the use of Anglo-American law or legal ideas in South America: the civilian tradition of South-American law and lawyers, and the lack of interest on the part of Great Britain in *imposing* its own law in foreign countries. As for the first aspect, as already mentioned, one of the possible channels through which legal ideas travel is *direct* exposure of the actors of influenced jurisdictions to the relevant norms of the foreign legal system, through access to compilations of statutes, repertoires of judicial decisions, etc. In the case of Anglo-American law this would have mainly

required direct analysis of Anglo-American case law, something South-American actors would have found difficult. For instance, Andrés Bello, the drafter of the Chilean Civil Code, and a key figure in the process of use of Anglo-American legal ideas, stated that:

> [C]ustomary law [in England], interpreted by the judges and applied to the cases that occur, is consigned in *voluminous* reports of judicial decisions that is necessary to consult in order to achieve *deep* knowledge of the same.[167]

Similarly, José Joaquín de Mora, a lawyer and law professor writing in Chile in the 1830s, referred to the '*infinite* collection of cases' forming a 'vast library' that English lawyers had to deal with, in order to extract from them 'the norm applicable to similar cases'.[168] In light of this it is not surprising that Anglo-American case law was rarely referred to by South-American authors. The divergence between the methodological approaches of the common law and the civil law tradition[169] was an important contributing factor. Due to their civilian formation, South-American lawyers were not familiar with the *abstraction* of principles from case law. The civilian tradition has always favoured a methodology where solutions should be *deducted* from rules or principles. Even those who viewed the development of law through case law positively in the Anglo-American context, deemed it an inappropriate method for South America. For instance, Mora, writing in Chile in 1829, and quoting James Kent's *Commentaries on American Law*, commended the common law as a guarantee of freedom. However, Mora was of the opinion that the lack of a properly staffed judiciary would be an

167 Andrés Bello, *Obras Completas*: Tomo XII: *Código Civil de la República de Chile*, Volumen I (Ministerio de Educación 1955) 28. Emphasis added.

168 José Joaquín de Mora, *Curso de Derechos del Liceo de Chile* (Imprenta del Pueblo 1849) vii. Emphasis added.

169 Stefan Vogenauer, 'Sources of Law and Legal Method in Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds) *The Oxford Handbook of Comparative Law* (OUP 2006) 873-4.

unsurmountable obstacle for the success of a similar system in South America.[170] Direct contact with Anglo-American statutory law was also unusual. This may be attributed to another characteristic of the common law tradition: the lack of systematic compilations or Codes. Whenever statutory law was referred to by South-Americans, the source was usually the writing of some Anglo-American legal scholar. The case of the draft Civil Code of New York (1865) is a telling exception.[171] Therefore, the vast majority of Anglo-American law and legal ideas accessed by South-American actors was received principally through the study of legal literature: William Blackstone and James Kent were the most read for that purpose.

The second disincentive for the use of Anglo-American law and ideas in South America was that the British lacked interest in imposing their own law in other jurisdictions. While following independence from Spain and Portugal, England had a strong political and economic influence in South America, the English did not make use of it to impose their law. That was a characteristic of the British in general, evidenced by the omission to impose British law even in the *colonies*. As Graziadei explains, 'the British policy concerning conquered or ceded colonies was to leave the law that was previously applicable in force'.[172] For instance, in South Africa, Dutch-Roman law was left in place and, even in India, where the English finally imposed their law, they

170 José Joaquín de Mora, 'Preocupaciones Forenses' originally published in (1829) 15 *El Mercurio Chileno* and transcribed in Alejandro Guzmán Brito, *Andrés Bello Codificador: Tomo II* (Ediciones de la Universidad de Chile 1982) 34-7.

171 The Code of New York of 1865 was used by the drafter of the Argentinean Civil Code of 1869.

172 Graziadei (n161) 452.

struggled for decades to keep parts of Indian customary law in force.[173]

2.2. Political Prestige of Anglo-American Ideas as an Incentive

The dissimilarities between the civil law and the common law traditions, and the lack of interest on the part of the British in imposing their own legal ideas, made the use of Anglo-American legal ideas in South America an unlikely possibility. However, those factors were neutralized. On the one hand, as will be analysed below,[174] the works of some Anglo-American scholars were written in a familiar institutional pattern, and were enriched by allusions to civil law ideas, which eased communication between Anglo-American and South-American lawyers. On the other hand, the political and economic prestige of England and the United States provided South-Americans with a powerful motivation.

As is well known, the prestige of a foreign jurisdiction can be a strong incentive for the use of its legal ideas.[175] As previously noted, between the independence (1810-25) and the time by which most of the South-American Civil Codes had been enacted (1870s), a sort of *anglomania* had taken hold among South-American actors.[176] The prestige of England and the United States[177] is one of the main explanations for the interest of South-Americans in Anglo-American legal ideas, though, in the case of

173 James A Jaffe, 'Layering Law upon Custom: The British in Colonial West India' (2014) 10:1 FIU Law Review 85-110.

174 For details, see Section 5.2 below.

175 Alan Watson,'Comparative Law and Legal Change' (1978) *Cambridge LJ* 326-8. Graziadei (n 161) 457-8.

176 Section 1.3 above.

177 For more details, see Chapter 1 Section 3.

Bentham's ideas, other factors too enhanced his own personal prestige as an innovation broker. England and the United States represented systems based on liberal and modern principles which were taken as 'models' for the new Republics. Their institutions were contrasted with the 'feudal'[178] and 'despotic'[179] ones of the former mother country, and perceived as political 'progressive' models.[180]

Furthermore, for some South-Americans, the quality of Anglo-American judicial decisions was remarkable. For example, Andrés Bello, one of the few South-Americans familiar with English case law, who has lived in London for twenty years, contrasted the 'deep and lucid discussions' of the 'collections of cases and judgements published in England, France and the United States' with the 'tortuosity' and the 'lack of philosophy […] and common sense' of the Spanish commentators. [181]

Economic influence added to English prestige. During the nineteenth century, Great Britain was the most important foreign economic actor in South America, though, during that period, British trade had ups and downs. Immediately after independence and following the end of colonial restrictions on trade, British presence in the region

178 Tristán Narvaja, 'La Nación tiene Código Civil' in Peirano Facio, Jorge, *Tristán Narvaja. Un Jurista Rioplatense en tiempos de la Codificación* (Instituto de Investigaciones de Historia del Derecho, 2008) 253.

179 Simón Bolívar, 'Discurso ante el Congreso de Angostura' in Rafael Arráiz Lucca-Edgardo Modolfi Gudat (eds) *Textos Fundamentales de Venezuela* (Federico Pacanins y Joanna Vega Editores 1999) 49. As late as 1870, 'despotism' of Spanish law was mentioned in the Argentinean Senate in order to urge the entering into force of the Argentinean Civil Code. Cf. Raymundo M Salvat, *Tratado de Derecho Civil Argentino: Parte General* (Imprenta F Ferreira 1925) 99.

180 Chasteen (n 165) 120.

181 Andrés Bello quoted in Alejandro Guzmán Brito 'La decisión de las controversias jurisprudenciales como una de las operaciones codificadoras en el pensamiento de Andrés Bello' in Facultad Derecho: Universidad de Chile (ed) *Congreso Internacional "Andrés Bello y el Derecho"* (Editorial Jurídica de Chile 1982) 205-6.

expanded. Thereafter, South-American exports could not match imports and, by the end of the 1820s, South America had been 'written off as a field of profitable investment'. [182] By mid-century, foreign capital returned to the region,[183] and until the 1880s, Great British 'leadership in the international trade of South-America was not in doubt'.[184]

Lastly, the prestige of Anglo-American culture was also relevant. According to Racine, the arrival of Simón Bolívar and Andrés Bello in London in 1810 began 'a long-term flirtation between the Spanish America independence generation and British culture'.[185] Bernardino Rivadavia, the first President of Argentina, sent his children to be educated in England, and convinced General Rodríguez (Governor of Buenos Aires) to do the same.[186] Their children went to Hazelwood School, an institution recommended by Bentham. Florencio Varela, a prominent lawyer and politician in Buenos Aires and Montevideo, made, as a tourist, a long visit to England in the 1840s in order to learn *in situ* about English society. He was so fascinated that one of his biographers has suggested that he even acquired English manners.[187]

2.3. South-American Lawyers, Politicians and Professors

A further incentive for the use of Anglo-American legal ideas in South America was that

182 Bushnell (n 164) 43.

183 Platt (n 166) 3.

184 Ibid 98.

185 Karen Racine, 'Nature and Mother: Foreign Residence and the Evolution of Andrés Bello's American Identity: London 1810-1829' in Ingrid E Fey and Karen Racine (eds) *Strange Pilgrimages: Exile, Travel and National Identity in Latin America: 1800-1990s* (Jaguar Books on Latin America 2000) 6.

186 Luke O'Sullivan and Catherine Fuller (eds) *The Collected Works of Jeremy Bentham: The Correspondence of Jeremy Bentham:* Volume 12 (Clarendon Press Oxford, 2006) 144.

187 Luis L Domínguez, 'Prólogo' in Florencio Varela, *Rosas y su Gobierno* (Freeland 1975) 18-19.

most local prominent lawyers were not *just* legal practitioners, but *also* influential actors in the political and intellectual arenas.

In the process of the use of Anglo-American legal ideas, two different groups of South-American actors can be distinguished. First, politicians, some of whom were in direct contact with Bentham through correspondence or visits. Second, lawyers who made use of Anglo-American law and legal ideas for academic or legislative purposes. However, the misleading aspect of this taxonomy, as just mentioned, is that most prominent South-American lawyers were connected with political circles, advised governments, drafted legislation and, in most cases, occupied positions as ministers, members of Parliament, or judges. It has been acknowledged that, in the period covered by this research:

> [South-American] lawyers were eminent members of the political elite […] Their characteristic of being "public men" was more significant than their position in the legal system.[188]

As has been noted, legal education in South America was conceived as a 'preparation for a politically active life'.[189] In addition to their involvement in politics, many of them were University professors or even chancellors of their Universities. Therefore, they had open to them vast possibilities for influencing both legislation and legal culture. They were what Watson has defined as 'law-shaping lawyers'.[190]

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188 Rogelio Pérez-Perdomo, *Latin American Lawyers: An Historical Introduction* (Stanford University Press 2006) 94. A similar remark in Abelardo Levaggi, *Manual de Historia del Derecho Argentino*: Tomo I (Depalma 1986) 216-7.

189 See Chapter 1 Section 6.2.

190 Watson (n 175) 328.

The drafters of the Civil Codes of Chile (1855), Uruguay (1868) and Argentina (1869) are clear examples of this. Andrés Bello, the drafter the Chilean Civil Code, was professor at the University of Chile, a member of the Chilean Parliament, a close advisor of the President of Chile, Manuel Montt, and, in his early years, a diplomat representing Venezuela in London.[191]

Dalmacio Vélez Sarsfield, the drafter of the Argentinean Civil Code, a graduate from the University of Cordoba in 1820,[192] was the professor of political economy at the University of Buenos Aires from 1826 to 1829, practiced as a legal practitioner in Montevideo (Uruguay) between 1842 and 1846, and after returning to Buenos Aires, became a member of the Parliament of Buenos Aires and a Minister in the provincial and national government.

Finally, Tristán Narvaja, the author of the second and final draft of the Uruguayan Civil Code, had a degree from the University of Córdoba in Argentina, and a doctorate in law from the University of Buenos Aires. He practiced as a legal practitioner in Uruguay and Chile, was professor at the Universidad de la República in Montevideo, a member of the Uruguayan Parliament, and a Minister in the government of Uruguay.[193]

Their parallel professional, political and academic functions placed these figures in a highly influential position in promoting ideas drawn from Anglo-American law.

191 Ivan Jaksic, Andrés Bello: Scholarship and Nation-Building in Nineteenth Century Latin America (CUP 2001) 1-223.

192 For the information on Vélez: Abel Cháneton, *Historia de Vélez Sarsfield: Tomo I: La Vida* (Librería y Editorial La Facultad 1937) 16-437.

193 Jorge Peirano Facio, 'Semblanza de Tristán Narvaja' (1971) 126 Revista Asociación de Escribanos del Uruguay 57-97.

Their influence could spread among legal circles, something that was further enhanced by the fact that, at the time, the number of legal practitioners in South America was relatively small. Around the middle of the nineteenth century, there were 439 legal practitioners in Argentina, 331 in Colombia, 282 in Chile, 120 in Venezuela[194] and 35 in Uruguay.[195] In those small legal communities, knowledge of the use of Anglo-American ideas by the most prominent local lawyers could spread without difficulty. On the other hand, their *lawyer cum politician* position was, as could be expected, different from that of a lawyer interested merely in *purely legal* aspects. The political credentials of Anglo-American law were naturally of greater relevance for them than the *minutiae* of legal formulations. Contrariwise, a lawyer involved only in *purely legal* topics would have had prejudices against the unfamiliar common law techniques.[196] The predominance of the first type of lawyers in South America at that time was, in my view, one of the factors that motivated the use of Anglo-American legal ideas.

3. Anglo-American Reformist Legal Ideas in South America

3.1. Jeremy Bentham

Jeremy Bentham was born in London in 1748 and died, in the same city, in 1832. He studied at the University of Oxford, and after taking his degree there, he entered Lincoln's Inn to train as a barrister. During that period of training he attended William Blackstones's lectures on English law at Oxford. Finally, Bentham was admitted to the

194 Pérez-Perdomo (n 188) 86. The numbers correspond to the middle or the end of the period considered in this research, i.e. 1820-1870.

195 Cháneton (n 192) 156-158.

196 An example of these different approaches can be seen in the debate between Bello and Güemes in chapter 3.

bar, but did not go into practice.[197] His championship of codification, liberal credentials and support for the emancipation of South-America, coupled with the existence of Spanish translations of his works, made him appealing to many South-Americans. [198] Bentham offered proposals on how to reform the law as well as arguments for *why* that should happen.

3.2.Bentham on Law in General

The most characteristic Benthamite ideas in relation to law *in general*, were his rejection of natural law theories, whether based on religion or human reason, his advocacy of codification (a neologism created by him), and his application of utilitarianism to legal matters. As is well known, Bentham is considered the founder of legal positivism. According to Schauer, Bentham endorsed positivism in three different senses: conceptual positivism (law and morality *are not* necessarily connected), normative positivism (in practical terms it is *better* to understand law as disconnected from morality) and decisional positivism (law *should* consist of precise rules so as to minimize adjudicative discretion).[199] Bentham famously argued that natural law was a 'false and dangerous idea',[200] and natural rights, 'nonsense upon stilts'.[201] Therefore, conceptually, for Bentham there was no other law than positive law. This was one of his key criticisms of William Blackstone's theory of law. Bentham's decisional positivism was connected with

197 Ross Harrison, *Arguments of the Philosophers: Bentham* (Routlegde 1999) 1-15.

198 Frank Safford, 'Politics, Ideology and Society in Post-Independence Spanish America', in Leslie Bethell (ed) *The Cambridge History of Latin America* (CUP, 1985) 367.

199 Frederick Schauer 'Positivism before Hart' in Michael Freeman and Patricia Mindus (eds) *The Legacy of John Austin's* Jurisprudence (Springer 2013) 275-80.

200 Jeremy Bentham, *Theory of Legislation* (R. Hildreth tr, 7th. edn. K Paul Trench Trübner 1891) 83.

201 Harrison (n 197) 77-105.

his critique of the common law, which he perceived as 'more like a muddle than a system' or as 'a labyrinth without a clue', manipulated by the corrupt interests of the élites ('Judge & Co').[202] In his view, the common law treated human beings like dogs. People should wait for the judges to *ex post facto* declare what the law was.[203] The solution was rather to create precise, clear and systematic rules sanctioned by Parliament which would facilitate predictability. All of these aspects of Bentham's work (rejection of natural law, criticism of the common law, mistrust of judges and lawyers, and advocacy of codification) were interrelated aspects of his law reform program. Another feature that characterized this program was his belief in the need for encouraging rational acceptance of the law. Bentham did not consider that imposition through force was the best means of achieving compliance with the law. In his opinion, an ideal Code should include clear, systematic and easily accessible rules, *and* the explanation of the rationales for each of them. The aim being that, then, rules would be followed out of conviction. The proffered rationales, however, were not meant to be just *any* rationales.

Bentham was also the founder of the philosophical school of utilitarianism, according to which the moral value of an action was to be determined by the happiness it created. He famously enunciated the principle of utility:

> [T]hat which is conformable to utility, or the interest of a community, is what tends to augment the total sum of the happiness of the individuals that compose it.[204]

Bentham's advocacy of codification based on the need for predictability and his parallel

202 Gerald J Postema, *Bentham and the Common Law Tradition* (Clarendon Press Oxford 1989) 266-8.

203 Ibid 275.

204 Bentham (n 200) Ch.1.

postulation of a utilitarian perspective as the solution to legal problems, created a certain tension. Bentham championed a law formed by clear rules presented in a systematic fashion (the Codes), however his commitment to a utilitarian philosophy sometimes made him more concerned with the substance of the rules than with their formal characteristics. In other words: he postulated a clear and systematic law, but not just *any* law. According to Postema, this tension emerged clearly in Bentham's ideas about adjudication:

> [Bentham] insisted on […] the absolute subordination of the judge to the legislator, which involves both restricting the exercise of judicial discretion and blocking all forms of judicial law-making. However, it is equally clear that he maintained […] the absolute sovereignty of the principle of utility. These demands on law and adjudication seem to pull decisively in opposite directions.[205]

Similarly, whereas in Bentham's writings on adjudication 'the guiding and sole ultimate principle for the judge is the principle of utility',[206] in another work Bentham stated that 'the laws should be literally followed' and condemned legal interpretation as the act of 'a charlatan who astonishes the spectators by making sweet and bitter run from the same cup'.[207] Depending on the interpreter, Bentham could be understood in two different ways: as a positivist concerned only with the predictability of the law based on the formal aspects of the same, and as a utilitarian concerned with its correct substance in accordance with utilitarianism. In fact, as Postema argues, this is reflected in the works of interpreters of Bentham's writings:

> [Some] stress [Bentham's] attacks on the arbitrariness and uncertainty of Common Law […] [and others] stress the broad definition of the role of

205 Postema (n 202) 403-4.

206 Ibid 406.

207 Bentham (n 200) 155-6.

> the judge, and consequently ignore the importance of the Code in Bentham's theory of adjudication.[208]

South-Americans reconstructed this tension in different ways. Some adopted Benthamite positivism and utilitarianism; others endorsed his legal reform program (codification) but rejected his positivism, and finally others only paid attention to some isolated proposals derived from the principle of utility.

Bentham had an important influence in South America both on the theoretical aspects, and methods, of codification. However, even that assessment, usually accepted by modern legal historians, requires some qualifications. Bentham's critique of natural law, for instance, was well known but not generally endorsed in South America,[209] though the Argentinean law professor Pedro Somellera, for instance, was an exception in this regard.[210] Moreover, Bentham's utilitarianism was used in a piecemeal fashion; some of the ideas supported by utilitarian arguments were adopted, but the utilitarian doctrine as a whole was rejected as being 'materialist'.[211] Andrés Bello exemplifies this ambiguity. While, as a Catholic, Bello did not agree with most of utilitarianism, in 1836 he published an article arguing that Bentham's utilitarianism was not totally incompatible with Christian morality.[212]

Finally, mentions of Bentham were almost invariably inserted in general

208 Postema (n 202) 404.

209 Víctor Tau Anzoátegui, *Las Ideas Jurídicas en la Argentina: Siglos XIX-XX* (2nd edn. Perrot 1987) 85.

210 See Section 3.6.1 below.

211 See Section 3.6.5 below.

212 The article was published in the newspaper *El Araucano* on 6 and 13 May 1836, according to Fernando Murillo Rubiera, *Andrés Bello: Historia de una Vida y de una Obra* (La Casa de Bello 1986) 355.

discussions of the necessity, methods and virtues of codification. Bentham's depiction of traditional lawyers and judges as enemies of the systematization and clarification of the law was a recurrent theme. Tristán Narvaja, the drafter of the final draft of the Uruguayan Civil Code, made use of Bentham's argument about Judge & Co.[213] Andrés Bello employed the same argument in Chile in 1833.[214] Vélez Sarsfield, the drafter of the Argentinean Civil Code of 1869, wrote that while drafting the Code, he 'always had in mind Bentham's maxim' that the best body of law would be one that could be understood with little scientific knowledge.[215] However, even in the area of codification, Bentham's ideas were critically assessed. For instance, on the acceptability of Bentham's suggestion that the rationales of rules ought to be published, South-Americans did not universally agree. On the one hand, the official publication of the commentaries to the Argentinean Civil Code, written by its drafter, has been signalled as evidence of Benthamite influence.[216] On the other hand, the drafter of the Uruguayan Civil Code, Tristán Narvaja, departed from Bentham on this matter, explicitly mentioning his divergence with him, and rejecting the requests for the publication of his notes, which were published only after his death.[217] Thus, in South America, use of Bentham's ideas on law in general and codification was selective and critical, as much as it happened with his ideas on private law.

213 Tristán Narvaja, 'Los Antagonistas del Código Civil' in Jorge Peirano Facio, *Tristán Narvaja: Un jurista rioplatense en tiempos de la codificación* (Instituto de Investigaciones de Historia del Derecho 2008) 301.

214 Jaksic (n 191) 160. *El Araucano* (Santiago de Chile, 28 June 1833).

215 Abelardo Levaggi. *Manual de Historia del Derecho Argentino:* Tomo II (Ed. Depalma 1987) 269.

216 Abel Cháneton, *Historia de Vélez Sarsfield: Tomo II: La Obra* (Eudeba 1969) 418-9. Cháneton's claim has been questioned in: Ezequiel Abásolo, 'Las Notas de Dalmacio Vélez Sarsfield como expresiones del *ius commune*' (2004) 26 Revista de Estudios Histórico Jurídicos 423-444.

217 Ricardo Narvaja, 'Introducción' in Tristán Narvaja, *Fuentes, Notas y Concordancias del Código Civil de la República Oriental del Uruguay* (Tipografía y Litografía Oriental 1910) xiv-xv.

3.3.Bentham on Private Law

For ideological and practical reasons that will be explored in the two following chapters, some of Bentham's ideas related to private law were used in South America. In that field, Bentham's ideas were presented as deductions or applications of the principle of utility. In his *Traités de Legislation Civile et Penale* (to be referred as the *Traités*), Bentham states the overarching principle applicable to law as this:

> The legislator ought to confer rights with pleasure, since they are in themselves a good; he ought to impose obligations with reluctance, since they are in themselves an evil. According to the principle of utility, he ought never to impose a burden except for the purpose of conferring a benefit of a clearly greater value.[218]

Hence, his analysis of succession law was based on a utilitarian approach aimed at the protection of the expectations of the persons that lived jointly with the deceased, as is explained in the following chapter. The same utilitarian ideas were the basis of Bentham's approach to contract law, as will be analysed in Chapter 4. In that field, he favoured a radically liberal approach: the individual, and not the government, was the one that could best determine what would produce greatest happiness for him or her: 'the care of his enjoyments ought to be left almost entirely to the individual'.[219] Accordingly, in *Defence of Usury* (1787) he strongly argued against the intervention of judges and government in the determination of interest rates in loans. This original Benthamite claim was more liberal than the position of Adam Smith, who favoured the restriction of interest rates (usury laws). In the common law jurisdictions, *Defence of Usury* had an

218 Bentham (n 200) 93-4.

219 Bentham (n 200) 95.

impact on the specific theme of interest rates, and also on the broader doctrine of freedom of contract. Though Bentham agreed that the price of vital subsistence goods should be regulated by the government,[220] his view epitomized the will theory of contract,[221]as he considered that the will of the individual was usually the best judge of his own welfare.[222] His conception of contract was also utilitarian in another significant way, that will have some impact in the field of contract law in Uruguay and Chile: when considering if a sale could be rescinded on the basis of a mistake of the buyer as to the value of the thing sold, he suggested that this option was appropriate only when the error was *not* the product of negligence, and that the 'total advantage' for society should be taken into account. In Bentham's opinion:

> The total advantage of useful exchanges is far more than equivalent to the total disadvantage of such as are unfavourable… Alienations in general ought, then, to be maintained [223]

Thus, Bentham rejected nullification of contracts on the basis of a mere mistake regarding the value of the purchased item.[224] If such grounds for nullification were admitted, there would be a huge risk of discouraging exchanges in general. As will be explained in the following chapters, these concrete utilitarian ideas influenced legislative drafting in South America.

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220 James E Crimmins, 'Jeremy Bentham' in *The Stanford Encyclopedia of Philosophy* (Spring 2017 edn.), Edward N. Zalta (ed) URL = https://plato.stanford.edu/archives/spr2017/ entries/bentham/ Accessed 17 April 2017.

221 Harry N Scheiber, 'Introduction' in Harry N Scheiber (ed) *The State and Freedom of Contract* (Stanford University Press 1998) 1-12.

222 Bentham (n 200) 95.

223 Bentham (n 200) 171-2.

224 *Laesio enormis* in the civil law.

3.4.Bentham and English Law

It could be questioned whether Bentham should be counted as an *English* legal scholar or as an advocate of law reform disconnected from any particular jurisdiction or legal tradition. His position as a fierce critic of the common law as well as the universal vocation of his proposals, seem to count against his characterization as an English legal scholar. However, the connections of Bentham's ideas with English law were manifest. First, his legal education focused on English law. Bentham's critic of the common law developed from his critique of Blackstone's *Commentaries on the Laws of England*. Hence, English law provided the background for Bentham's own ideas. His preference for codification, and his attacks on the role of judges in the creation of law, were the result of his critical stance against the English legal system. Second, Bentham's ideas were read and discussed in the common law world and inspired some reforms. For instance, the Anglo-Indian Codes of the second half of the nineteenth century,[225] and the draft of the Civil Code of New York (1865),[226] were inspired by his works on codification. In England, his arguments were used in the successive parliamentary discussions which finally led, in 1854, to the abolition of usury law (17&18 Vict c 90).[227] The same happened in the United States, where several states discussed the abolition of their usury laws.[228] Bentham's arguments were used in litigation and discussed by the

225 Alexandra Braun, 'The English Codification Debate and the Role of Jurists in the Development of Legal Doctrines' in Michael Lobban-Julia Moses (eds) *The Impact of Ideas on Legal Development* (CUP 2012) 204-225, at 211.

226 Mathias Reimann, 'The Historical School against Codification: Savigny, Carter and the Defeat of the New York Civil Code' (1989) 37 The American Journal of Comparative Law 95-119.

227 HC Deb 10 February 1819 vol 39 cc. 0-422. HC Deb 19 June 1828 vol 19 cc 1437-43. HL Deb 24 July 1854 vol 135 cc 581-4. For more details, see Chapter 4.

228 Chapter 4 below.

famous American judge and scholar James Kent.[229] Regarding contract law in general, Bentham's ideas were usually invoked by common law advocates of freedom of contract.

Therefore, his critique of the common law and his innovative approach to it, do not disqualify Bentham as an *English* legal scholar. His ideas were nurtured by his knowledge of English law and were the product of a reaction to what he viewed as its defects. Furthermore, some of his ideas were influential in legal change in England and the United States, and, in fact, a place for Bentham in *English* legal history has been acknowledged by legal scholars.[230] .

3.5. Channels of Communication of Bentham's Ideas

3.5.1. Legal Literature

The main channel of diffusion of Bentham's ideas in South America was the direct reading of his works. Bentham was so widely read in South America, that the English writer William Hazlitt ironically commented that he was better known 'in the plains of Chile and the mines of Mexico' than in Great Britain.[231] The most read of his works were the *Traités de Legislation Civile et Penale*, compiled and edited by Etienne Dumont, a Swiss disciple of Bentham, and first published in French in 1802,[232] a language in which cultivated South-Americans were well versed. This book was later translated into Spanish

229 James Kent, Opinion of Chancellor Kent on the Usury Laws (Albany 1837).

230 William Holdsworth, 'Bentham's Place in English Legal History' (1940) Vol. 28 No. 5 California Law Review 568-586.

231 William Hazlitt, The spirit of the age: or Contemporary Portraits (Henry Colburn 1825) 3.

232 Jérémie Bentham, *Traités de Législation Civile et Pénale* (Bossange, Masson et Besson 1802).

by Ramón Salas and published in 1821,[233] and together with other Spanish translations,[234] was widely read in South America.[235]

By 1830, *forty thousand* copies of the *Traités* had been sold to the South-American market.[236] The *Traités* embraced a broad range of subjects. They began with an explanation of the principle of utility, followed by a detailed analysis of private law institutions (property, marriage, succession, contracts, etc) and criminal law. Another influential work of Bentham was his *Defence of Usury,* first published in 1787. This book was published in a Spanish translation in 1828, together with a paper by the French economist Anne R.J. Turgot, [237] and widely distributed in South America.[238] Other works were too available in South America, such as Bentham's works on evidence,[239] the organization of the judiciary,[240] and the functioning of legislative assemblies.[241]

Bentham's books were part of the library of a majority of South America's most prominent legal actors. The authors of the draft Civil Codes of Chile, Argentina and

233 Jeremías Bentham, Tratados de Legislación Civil y Penal: obra extractada de los manuscritos del señor Jeremias Bentham por Esteban Dumont y traducida al Castellano por Ramón Salas (Imprenta de D Fermín Villalpando 1821).

234 Such as the one by Baltasar Anduaga printed in Madrid in 1841-2.

235 Dumont's French version was re-translated into English by R Hildreth under the title *Theory of Legislation*.

236 Germán Martínez Argote, 'Introducción' in Germán Martínez Argote (ed) *Benthamismo y Antibenthamismo en Colombia* (Editorial El Buho 1983) 9.

237 Jeremías Bentham, Defensa de la usura, ó Cartas sobre los inconvenientes de las leyes que fijan la tasa del interés del dinero (Imprenta de Casimir 1828).

238 For further details, see Chapter 4 Section 3.5.4.

239 Jeremy Bentham, Tratado de las pruebas judiciales sacado de los manuscritos de Jeremías Bentham (T Jordan 1835).

240 Jeremías Bentham, Tratados sobre la organización judicial y la codificación traducidos con comentarios por Baltasar Anduaga Espinosa (Oficina del Establecimiento Central 1843).

241 Jérémie Bentham, Tactique des assemblées législatives: suivi d'un traité des sophismes politiques : ouvrage extrait des manuscrits de M. Jérémie Bentham par Ét. Dumont. (J J Paschoud 1816).

Uruguay owned copies of Bentham's *Traités* and other works by him. The library of Andrés Bello, the drafter of the Chilean Civil Code, included copies of Bentham's *Théorie des Peines des Recompenses* (1818*), Traités de Legislation Civile et Penale* (1820), *Traité des Preuves Judiciaries* (1823), *Tactique des Assemblés Legislatives* (1822) and *Organization of the Judiciary* in a Spanish translation (1828).[242] Vélez Sarsfield, the drafter of the Argentinean Civil Code of 1869, owned a copy of Bentham's complete works edited in Brussels in 1840,[243] the third volume of which included the French translation of *Defence of Usury*.[244] Tristán Narvaja, the drafter of the Uruguayan Civil Code of 1868, owned (or had access to) a copy of Bentham's works on the organization of the judiciary which he quoted in an article published in a Uruguayan newspaper in 1869.[245]

In Colombia, the *Traités* were used as a mandatory textbook at Universities, as explained below.[246] Bentham's works were advertised by bookshops across South America. For instance, in Venezuela, in 1847 a bookshop in Calle del Comercio, Caracas, held ten copies of several different works by Bentham, among them, two copies of his complete works.[247] In 1837, the bookshop of Jaime Hernández in Uruguay, advertised

242 A manuscript catalogue of Bello's library is held by the Universidad de Chile: http://biblio.uchile.cl/client/search/asset/92351 accessed on February 8th, 2015.

243 Jeremy Bentham, *Œuvres de Jeremie Bentham*, vol. 3 (3rd edn. Societé Belge de Librairie Hauman et Ce. 1840) 241–82.

244 Enrique Martínez Paz (ed) *Catálogo de la Biblioteca Dalmacio Vélez Sarsfield* (Imprenta de la Universidad Nacional 1940).

245 Tristán Narvaja, 'Los Antagonistas del Código Civil' in Jorge Peirano Facio, *Tristán Narvaja: Un jurista rioplatense en tiempos de la codificación* (Instituto de Investigaciones de Historia del Derecho 2008) 301-2

246 Section 3.6.2 below.

247 Catalogue of a bookshop located at Calle del Comercio Caracas No. 40, dated 1847, held by the National Library of Colombia in

Bentham's *Traités* in a Spanish version.[248]

Furthermore, several South-American political leaders were familiar with Bentham's *Traités*. There were those that directly corresponded with Bentham, and will be examined below,[249] but there is evidence also of many others who owned or used Bentham's works. For example, Bernardo de Monteagudo, a leader of the emancipation movement in Argentina and Peru, had a copy of Bentham's *Traités* as early as 1815. [250] José de San Martin, the famous Argentinean General who commanded the army which liberated Chile and Peru from Spanish rule, owned copies of the *Traités* and Bentham's *Theory of Punishments*.[251] In Colombia, according to Azuero, who was writing in the 1830s, Bentham was frequently referred to 'with respect and admiration by Senators and representatives in the chambers of Congress'.[252] In the Uruguayan constitutional convention of 1830, one of the authors most frequently mentioned was Bentham.[253] Indeed, there are other clear traces of Bentham's influence in Uruguay. Of José Lucas Obes, a prominent Uruguayan politician during the 1830s, it was said that there was not a

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http://catalogoenlinea.bibliotecanacional.gov.co/client/es_ES/search/asset/73671/0, accessed on 15 May 2016.

248 Anonymous, Catálogo de los Libros existentes en la Librería de Jaime Hernández: Diciembre 4 de 1837 (Montevideo 1838).

249 See Section 3.5.2 below.

250 Ricardo Levene, El Mundo de las Ideas y la Revolución Hispanoamericana de 1810 (Editorial Jurídica de Chile 1956) 240.

251 Ibid 251.

252 Vicente Azuero 'Enseñanza de principios de legislación por Bentham' quoted by Annie L Cot, 'Jeremy Bentham's Spanish American Utopia' in José Luis Cardoso et al (ed) *Economic development and global crisis: the Latin American economy in historical perspective* (Routledge 2014) 34.

253 Frank Safford, 'Politics, Ideology and Society in Post-Independence Spanish America' in Leslie Bethell (ed) *The Cambridge History of Latin America* (CUP 1985) 367.

single one of his acts of government that '[was] not modeled on Bentham's doctrine'.[254] José Ellauri, a lawyer, politician and member of the Uruguayan constitutional convention and Parliament, introduced a bill in 1836 for the reform of the judicial system. He declared to his colleagues that 'the enlightenment acquired from the reading and meditation about the works of the famous Bentham on the organization of the judiciary'[255] had convinced him. A year earlier, in Chile, Andrés Bello had recommended the same Benthamite proposal to the public.[256] The survival of some interest in his work is evidenced by a 1925 Argentinean book on private law, which still quoted Bentham's *Traité des preuves judiciaries*.[257]

In a few words, the works of Bentham were widely available in South America, perhaps more than in Europe; they were owned by an array of prominent politicians and lawyers, and studied, not only for speculative purposes, but as a source of inspiration for legislative proposals or governmental action.

3.5.2. Correspondence and Meetings

Now we will turn to the direct relationship of Bentham with several key South-American political leaders. Bentham had an active interest in South-American politics which began even before the emancipation movement. In 1808, he received in London a certain Mr

254 The text was written in 1876 but published much later in: Pedro Bustamante 'La Doctrina de Bentham: Su influencia en el Uruguay' (1953) 179 Revista Nacional 303.

255 Juan E Pivel Devoto, Las ideas Constitucionales del Dr. José Ellauri (Talleres Graficos Monteverdi 1955) 191; Jeremy Bentham, De l'Organization Judiciarie et de la Codification: Extrait des Ouvrages de Jeremie Bentham par Etienne Dumont (Librairie Hector Bossange 1828) 49-52.

256 Andrés Bello (n 56) 66-70. Ávila (n 344) 62. The Articles were published in the numbers 218, 220, 222 and 226 of the newspaper *El Araucano* between November 1834 and January 1835.

257 Salvat (n 123).

'Castella' (actually: Mariano Castilla y Ramos),[258] a businessman from Buenos Aires who, in the past, had been interested in the prospect of transforming Buenos Aires into a British protectorate, something that during its brief occupation of Buenos Aires and Montevideo in 1806-7, the British army failed to achieve. Later, after the independence movement began (1810), Bentham was extremely active in his contact with South-American leaders. He followed the spread of republican ideals, [259] and wrote in favour of independence, and the newly established South-American states. It has been rightly argued that he viewed South America as a utopia.[260] Bentham even planned to move to South America.[261]

During the 1810s, his position towards South America's emancipation was at contrast with the one adopted in England by Lord Holland and Lord Liverpool, the Whig and Tory leaders of the time. Holland and his followers had an extremely cautious attitude towards the old Spanish possessions in America and were distrustful of republican experiments. They considered a constitutional monarchy to be the best political model for the newly emancipated countries.[262] The Tories, under the leadership of Lord Liverpool, favoured the conservative principles of the Congress of Vienna and

258 Letter from Bentham to Mulford, dated 8-10 Novemeber 1808, in John R Dinwiddy (ed) *The Collected Works of Jeremy Bentham: The Correspondence of Jeremy Bentham:* Volume 7 (Clarendon Press Oxford 1988) 564.

259 Bentham embraced republicanism from 1818 onwards. Cf. Philipp Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (OUP 2006) 242.

260 Cot (n 252) 35.

261 Letter from Bentham to John Mulford of 1st November 1810, in Stephen Conway (ed) *The Correspondence of Jeremy Bentham:* Volume 8 (Clarendon Press 1988) 76-8.

262 Klaus Gallo, *The Struggle for an Enlightened Republic: Buenos Aires and Rivadavia* (Institute for the Study of the Americas 2006) 17-22.

did not approve of the new South-American states.[263] Indeed, according to John Lynch, Bentham's attitude towards the emancipation of South America was exceptional, even when compared with that of the liberal thinkers of his time, who on matters of colonies remained as imperialist as the conservatives.[264] Quite obviously, Bentham's open and supportive attitude attracted the politicians and diplomats of the new South-American republics. Though some of them also cultivated Lord Holland's circle, a majority of them met or corresponded with Bentham. As will be explained below,[265] either through meetings at Bentham's home in London or correspondence with him, many South-American leaders deepened their knowledge of the ideas of the English legal philosopher and disseminated the same in their native countries.[266] Later on, when the British government position to the new republics of South America changed to one of open support, some of these allegiances waned. Others have argued that this happened due to pressure from British governmental officers, who disapproved of Bentham's radical political ideas, and his connections within Britain.[267]

The reciprocal interests of Bentham and South-American political leaders opened another channel of communication between them: correspondence and meetings in London. According to Stoetzer, a South-American legal historian, by 1825 there was at

263 Ibid 15-6.

264 John Lynch, *Simón Bolívar: a Life* (Yale University Press 2006) 36.

265 See Section 3.5.2 below.

266 Miriam Williford, *Jeremy Bentham on Spanish America: An Account of his Letters and Proposals to the New World* (Louisiana State University Press 1980) 114-135. Cot (n 252) 34-52. James E Crimmins, *Utilitarian Philosophy and Politics* (Continuum International Publishing Group 2011) 13-14.

267 Jonathan Harris, 'Bernardino Rivadavia and Benthamite "Discipleship" (1998) 33 Latin American Research Review 129-149.

least one Benthamite in the government of all of the regions of South America.[268] Bentham's direct correspondents included Francisco de Miranda and Simón Bolívar from Venezuela, Francisco de Paula Santander from Colombia, Bernardo O'Higgins from Chile and Bernardino Rivadavia from Argentina. Although the number of correspondents was small, their prominent political positions (four of them were Presidents of their countries) contributed to the diffusion of Bentham's legal ideas in political and legal circles.

Simón Bolívar and Francisco de Paula Santander were two of the key political figures of Venezuela and Colombia who corresponded and met with Bentham.[269] What is more, Simón Bolívar (1783-1830), was one of the most prominent heroes of the independence revolution in South America. Bolívar had been in London during 1810, on a diplomatic mission to secure support for the emancipation movement.[270] Thereafter, Bolívar commanded the revolutionary armies that liberated the modern states of Venezuela, Colombia, Ecuador, Peru and Bolivia. He was appointed President of Great Colombia (nowadays Colombia, Venezuela and Ecuador) and was celebrated as 'The Liberator'. Bentham was eager to recall that, in 1810, he had met the 'Great Bolívar' while passing through his garden towards James Mill's house.[271] Through Lord Cochrane (acting as admiral of the Chilean army), Bentham sent his papers on codification to

268 Otto Carlos Stoetzer, 'La Influencia del Pensamiento Político Europeo en la América Española' (1962) 123 Revista de Estudios Políticos 264.

269 Francisco de Miranda, the first Venezuelan leader of independence, had many contacts with Bentham in London and through correspondence, but died in 1816 in a Spanish prison. Cf. Schofield (n 259) 244.

270 Lynch (n 264) 49-54.

271 Lynch (n 264) 245.

Bolívar.[272] Bolívar, on his side, publicly endorsed Bentham's utilitarianism and referred to Bentham as the 'constitutional apostle of the day'.[273] In a letter to Bentham of 1822, Bolívar expressed his hope that 'Mr. Bentham will adopt me as one of his disciples'.[274] Their correspondence comprise a letter dated 13 August 1825, in which Bentham urged Bolívar to abolish usury laws, a topic which will be addressed in one of the following chapters.[275] In another letter that Bolívar received at the end of 1825, Bentham had attached a draft of a Constitution, which according to Levene, an Argentinean legal historian, influenced the drafting of the Bolivian Constitution of 1826.[276] However, by 1828, cordial relations between the two figures came to an end. Due to pressure from Colombian conservatives, Bolívar was required to distance himself from the English philosopher.[277]

Another important figure corresponding with Bentham was Francisco de Paula Santander (1792-1840), a Colombian politician and military leader who occupied the vice-presidency of Great Colombia during Bolívar's presidency, and who was later appointed President of Colombia. Santander was a convinced follower of Bentham whom he met in London in July 1830.[278] Santander had studied law at university in Colombia (though he did not finish his studies), and during his term as Vice President of Great

272 Letter from Bentham to Francis Place, 29 December 1817 in Conway (n 55) 141.

273 Lynch (n 264) 178.

274 Williford (n 266) 117.

275 See Chapter 4 below. Luke O'Sullivan and Catherine Fuller (eds) *The Correspondence of Jeremy Bentham*, vol. 12: July 1824 to June 1828 (Clarendon Press 2006) 148.

276 Levene (n 250) 253-254.

277 Lynch (n 264) 246.

278 Francisco de Paula Santander, *Diario del General Francisco de Paul Santander en Europa y los EEUU* (Imprenta del Banco de la República 1963) 172–3.

Colombia, he issued a decree rendering Bentham's texts *mandatory* reading at the law schools of Colombian universities.[279] Santander maintained his adherence to Benthamite ideas even after Bolívar had changed sides.

In Argentina, at the other extreme of the continent, the most prominent Benthamite politician was Bernardino Rivadavia. He was born in 1780 in Buenos Aires and actively participated in the events of May 1810 which led to the independence of Argentina and Uruguay. In 1814, he was sent on a diplomatic mission to England and France. During one of his stays in London, Rivadavia visited Bentham and met Bolivar and Santander.[280] In 1821, after Rivadavia returned to Buenos Aires, he was appointed Minister of Government by the Governor of the province of Buenos Aires, Martín Rodríguez. His correspondence with Bentham and the reforms he put into practice were a clear sign of his Benthamite persuasion. The most frequently mentioned reforms inspired by Bentham in Buenos Aires were the Act which granted universal suffrage, the suppression of the old colonial municipal authorities, the architectural design of the building housing the legislative assembly, the rules for the legislative procedures (both taken from Bentham's work on *Political Tactics*), the implementation of Lancasterian education, and the creation of the University of Buenos Aires, where Bentham's ideas on the matters of legislation and private law were taught by Pedro Somellera (whose activities are analysed below).[281] Rivadavia was appointed President of Argentina in 1826 but, in the aftermath of a war with Brazil, he resigned in 1827 and went into exile where

279 For further details, see 3.6.2 below.

280 For this paragraph: Gallo (n 262) 5-87.

281 See Section 3.6.1 below.

he died in 1845. However, Rivadavia's period in office between 1821 and 1827, was known to Argentinean liberals as that of the *Féliz Experiencia* (the Happy Experiment).

Bentham's biographer, John Bowring, suggested that Rivadavia was the South-American leader who Bentham considered as the most serious in his attempts to apply utilitarian philosophy to politics.[282] Eight letters from Bentham to Rivadavia written between 1818 and 1824 have been preserved,[283] and at least one meeting in London between the two actors is recorded.[284] Through these means Bentham was aware of several of Rivadavia's efforts and shared the news with his other correspondents. For example, in a letter dated September 1824, and addressed to Johan Jakob Meyer,[285] Bentham spoke of the newly created University of Buenos Aires' course on civil law which *'prend pour texte mes ouvrages sur la legislation'.* [286] By the middle of the 1820s, Rivadavia's correspondence with Bentham ended. It may well be that ending his relationship with Bentham, following pressure from British governmental officials, was the price Rivadavia had to pay for seeking formal recognition of Argentina's independence in Britain. There are, however, different interpretations of that episode. Bentham's own view was that the British government disapproved of the influence his radical political ideas had acquired in Argentina,[287] while J. Harris argues that what British officers feared was the favouritism that certain British merchant friends of

282 Williford (n 266) 114.

283 Stephen Conway (ed) *The Correspondence of Jeremy Bentham,* vol. 10 (Clarendon Press 1994); Catherine Fuller (ed) *The Correspondence of Jeremy Bentham,* vol. 11 (OUP 2000); O´Sullivan (n 95).

284 O´Sullivan (n 95) 150.

285 Meyer was one of Bentham's correspondents involved in the dissemination of his ideas in Greece.

286 Letter addressed to JJ Meyer. O'Sullivan (n 186) 55.

287 Williford (n 266) 131.

Bentham had gained among the Argentinean Government.[288] Be that as it may, Rivadavia played a key role in the diffusion of Bentham's ideas in Argentina.

Finally, another relevant correspondent of Bentham was José Joaquín de Mora, a Spanish lawyer who migrated to South America between 1827 and 1838. He lived in Buenos Aires,[289] where he published four articles analysing several of Bentham's works.[290] Later, he moved to Chile,[291] where he drafted the Chilean Constitution of 1828, and published a book on law (*Curso de Derechos del Liceo de Chile*, printed in Chile in 1830 and re-edited in Bolivia in 1849), with mentions of Bentham's ideas. Between 1820 and 1823, Mora maintained an intense correspondence with Bentham, which referred to private law, among other matters. For example, in one letter Bentham explained to Mora his ideas about codification and the need to publish the rationales of the provisions jointly with the Code (letter from Bentham of 19 September 1820).[292] In another, Bentham sent Mora a copy of his *Defence of Usury* (letter from Bentham of 1st December 1820).[293]

3.5.3. The London Years of Andrés Bello

Another *sui generis* channel of communication was the direct contact through the long residence of the drafter of the Chilean Civil Code of 1855, Andrés Bello, in England.

288 Harris (n 267) 144-146.

289 José de Mesa-Teresa Gisbert, *José Joaquín de Mora: Secretario del Mariscal Andrés de Santa Cruz* (Academia Nacional de Ciencias de Bolivia 1965) 15-19.

290 Published in *Cronica Politica y Literaria de Buenos Aires* 8 to 11 August 1827, according to Luis Monguió, 'Don José Joaquín de Mora en Buenos Aires en 1827' (1965) 1-4 Revista Hispánica Moderna 321.

291 Mesa (n 289) 15-19.

292 Conway (n 283) 67-81.

293 Ibid 216-18.

Andrés Bello (1781-1865) was born in Caracas (nowadays Venezuela), [294] and in 1810 he left for England together with Simón Bolivar and Luis López Méndez, on a diplomatic mission representing the revolutionary government of Venezuela. When the members of the mission arrived in London, Bentham sent them some papers outlining his views on codification. Bello transcribed and preserved them.[295] Furthermore, during his twenty-year of residence in England, Bello was hired by James Mill, Bentham's closest disciple, for the purpose of assisting him in 'deciphering' his master's manuscripts. As a result, Bello had access to the original versions of some of Bentham's works. According to Jaksic, 'Bello was to some extent influenced by Bentham's legal thinking, especially in penal law',[296] and his interest in codification can be traced back to this first contact with Bentham's ideas.

Due to historic circumstances, between 1820 and 1830, London became the 'intellectual centre' of Spain and Spanish America.[297] There, Bello met, for example, José Joaquín de Mora, mentioned earlier. Bello moved from London to Chile in 1829, where he became the rector of the Universidad de Chile, founded in 1842,[298] and advised several Chilean Presidents whilst also serving as a member of the Senate. His intellectual activities spanned several fields. For instance, his *Grammar of the Spanish Language*, first published in 1847, has been one of the most influential texts on the topic in the

294 For this paragraph: Jaksic (n 191) 1-223; Andrés Bello, *Principios de Derecho de Jentes* (Imprenta de la Opinión 1832) ii.

295 Jaksic (n 191) 159. The original is held in Sala Medina of the Biblioteca Nacional de Chile, under the name *Autógrafos de Bentham*.

296 Ibid 43.

297 Vicente Llorens, Liberales y Románticos: una Emigración Española en Inglaterra: 1823-1834 (3rd.edn. Ed. Castalia 1979) 288.

298 Jaksic (n 191) 124-131.

Spanish-speaking world at large, and not only in South America.[299]

From 1840 to 1855, Bello also worked on the draft of the Chilean Civil Code, finally enacted in 1855. According to Jaksic, Bello's strategy was that 'innovations in the [Spanish] law … that could otherwise be disruptive, were presented …as firmly rooted in tradition [Roman law and Spanish law]'.[300] He made use of some of Bentham's ideas in drafting the rules on intestate succession (chapter 3 below) and *laesio* (chapter 4 below). In the field of legal literature, Bello made use of Bentham's ideas in a number of newspaper articles concerned with judiciary organization, and evidence.[301] Finally, in the field of teaching, Bello used Bentham's *Traités* as the basic texts in a course on legislation which he taught at the Colegio de Santiago in 1830, immediately after arriving in Chile.[302]

The influence of the London years on Bello's formation was not limited to Bentham's ideas, however. For example, the American scholar Phanor Eder suggested that a particular rule contained in the Chilean Civil Code, dealing with transfer of property subject to a condition precedent, was 'similar to [the English] trust which Bello may have adopted from his residence in England'.[303] The provision is Article749 of the Chilean Civil Code,[304] which regulates a case of fiduciary ownership that resembles an

299 Andrés Bello, Gramática de la Lengua Castellana para el Uso de los Americanos (Imprenta del Progreso 1847).

300 Ibid 171.

301 Bello (n 56) 66-70.

302 Crimmins (n 266) 13.

303 Phanor J Eder, *A Comparative Survey of Anglo-American and Latin American Law* (New York University Press and OUP 1950) 88-9.

304 Transplanted as Article 808 into the Colombian Civil Code (1887).

English trust. However, I have found no comments from Bello acknowledging Anglo-American influence, but that does not necessarily mean that it did not exist. This is another interesting case to be included in further research.

3.6. Academic Use of Bentham's Legal Ideas in South America

As has already emerged from what I said above, Bentham's ideas had significant influence in legal teaching and legal literature in Argentina, Uruguay and Colombia, and, to a more minor extent, in Chile and Venezuela. It has been noted that, during the period covered by this thesis (1820-1870) 'the principal task of legal education was to provide [in South America] the economic and political preparation required to administer the state'.[305] In this context, Bentham's *Traités* were made use of as texts dealing with 'universal legislation' or, what we would call today, legal theory.

3.6.1. Pedro Somellera in Argentina and Uruguay

Pedro Somellera (1774-1854) studied Philosophy, Theology and Jurisprudence at the University of Córdoba (Argentina) and thereafter moved to Buenos Aires where, in 1802, he was admitted to practice as a legal practitioner. Between 1822 and 1828, Somellera was Professor of civil law at the newly founded University of Buenos Aires,[306] while also acting as an advisor for the government of the Province of Buenos Aires.[307] In the 1830s, he moved to Montevideo (Uruguay) where he continued his teaching at the *Casa General*

305 Pérez-Perdomo (n 188) 75.

306 Pedro de Somellera, *Notas autobiográficas* in <http://repositorio.educacion.gov.ar/dspace/bitstream/handle/123456789/109212/Monitor_9708.pdf?sequence=1, accessed 15 October 2014.

307 Cháneton (n 192) 130.

de Estudios.[308] In 1849, the Uruguayan *Universidad de la República* was installed in Montevideo and Somellera was appointed as its first Professor of civil law. However, briefly after this, he left for Buenos Aires where he died in 1854. Thus, he had an influence in Argentina and Uruguay. While in Uruguay, for instance, he drafted a piece of Benthamite-inspired legislation, enacted in 1837, the effect of which was to improve the rights of surviving spouses in intestate successions, which will be explored in the following chapter.[309]

During his time in Buenos Aires in the 1820s, Somellera published a textbook entitled *Principles of Civil Law* which followed, almost to the letter, and quoted liberally from Bentham's *Traités*.[310] The book was printed in Buenos Aires in 1824 and was used by Somellera when teaching both in Argentina and Uruguay. Somellera's book opened with a utilitarian profession of faith:

> [T]he object of this work will be to present the true principles of utility and convenience, that serve for the formation of our laws, for their intelligence, and application. [311]

Somellera also shared Bentham's view of South America as a land of utopia for legal reform:

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308 Oscar Sarlo, 'La Filosofía del Derecho en Uruguay. Evolución y Panorama Actual' (2004) 24 Anuario de Filosofía Jurídica y Social 147-181; Juan Carlos Gómez Haedo, 'El Doctor Pedro Somellera y la Enseñanza de la Jurisprudencia en Montevideo' (1941) 40 Revista Nacional 54-65.

309 Juan María Gutiérrez, Noticias Históricas sobre Origen y Desarrollo de la Enseñanza Pública Superior en Buenos Aires (La Cultura Argentina 1915) 542. For more details see Chapter 3.

310 Ricardo Picirilli, 'Los Principios de Bentham en la Legislación Porteña' (1960) 11 Revista del Instituto de Historia del Derecho144-149.

311 Pedro Somellera, Principios de Derecho Civil Dictados en la Universidad de Buenos Aires (Imprenta de los Expósitos 1824) iv.

> For the [formation of our laws] we have an advantage regarding all the other peoples of the old world. They derive their laws from occurring needs, born many times from ignorance… when not the instruments of the passions of a tyrant. [312]

According to Somellera 'the political body can also have… its anatomy, its physiology, its pathology… says the incomparable Bentham.'[313] He further shared Bentham's distrust for traditional lawyers: 'I am in need of forgetting much of what the jurists have honoured under the name of jurisprudence'.[314] Somellera subscribed to Bentham's positivism. [315] In fact, within the field of private law, Somellera endorsed many (though not all) of Bentham's ideas, notably, those concerning intestate succession law (discussed in the next chapter) and the utilitarian foundations of the legally binding nature of contracts. Regarding contracts, Somellera postulated that:

> The contract does not produce an obligation because it is [an agreement]: if that were the case, every contract would be binding... The obligation arises from the fact that the contract is sanctioned by the law, and the law does not sanction it but for the utility that results from the same… This reason of utility is independent from the agreement'[316].

Thus, according to Somellera, the reason for granting legal enforcement of contracts was not the moral obligation to fulfil one's promises, nor natural law. It was, rather, their ability to increase general utility, an utilitarian approach that was adopted by other legal actors, at least, in Uruguay.[317]

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312 Ibid iv-v.

313 Ibid v.

314 Ibid vi.

315 Ibid 7.

316 Ibid 187.

317 For details, see Chapter 4 Section 4.

Somellera's *Principles of Civil Law* was further adopted as a textbook by the University of La Paz in Bolivia as well as the College of Cuzco in Peru.[318] Furthermore, from an anonymous manuscript, we learn that this book was also known to Andrés Bello (the drafter of the Chilean Civil Code) and to Tristán Narvaja (the drafter of the Uruguayan Civil Code). This evidences the acquaintance of those Chilean and Uruguayan jurists with the work of Somellera, and illustrates another indirect route by which Bentham's ideas travelled within South America.[319] It has indeed been noted that 'it would be a mistake to underestimate the impact of Somellera's reformist ideas on the young lawyers and future politicians that passed through his lessons'.[320]

The reactions to Somellera's Benthamite opinions were diverse. On the one hand, many of Somellera's former students adopted Benthamite ideas in their works, another way of indirect influence of Anglo-American legal ideas. For example, in 1827, Pablo Font, a student from the University of Buenos Aires, wrote a doctoral thesis in which he followed Bentham in rejecting natural law, and recommended the principle of utility as the guiding principle of legal reform.[321] Another of Somellera's students, Agustín

318 Gutiérrez (n 309) 541.

319 Mafalda V Díaz-Melián, 'Una anónima "Recopilación de Varios Principios de Derecho Civil": 1830' (1995) 31 Revista de Historia del Derecho "Ricardo Levene", 207-286. The manuscript is anonymous, probably written by a student who assisted Somellera's courses. Through oral references, the last owner of the manuscript got to know that it has been part of Tristán Narvaja's archive. There is an annotation on the first page indicating that the manuscript had previously belonged to Andrés Bello. The whole story is plausible: Narvaja lived in Chile for some years, and his cousin, Gabriel Ocampo, was in regular contact with Bello.

320 José Carlos Chiaramonte, *Ciudades, Provincias, Estados: Orígenes de la Nación Argentina :1800-1846* (Espasa Calpe 1997) 190; Jeffrey M Shumway, "The purity of my blood cannot put food on my table": Changing attitudes towards interracial marriage in Nineteenth Century Buenos Aires' (2001) 58-2 The Americas 219.

321 For this paragraph: Ricardo Levene, *El Mundo de las Ideas y la Revolución Hispanoamericana de 1810*, Editorial Jurídica de Chile 1956) 243-246.

Ruano,[322] went further than his professor, and supported divorce, doing so on the basis of Bentham's arguments, something that Somellera had stopped short of doing in his own book. Finally, the thesis of Florencio Varela concerned crimes and punishment, and was based on Beccaria and Bentham.[323] Thus, Bentham's ideas were used in literature and teaching, and that added many followers of the English legal scholar.

However, Somellera's book and his teaching also generated criticism.[324] An article in the newspaper *El Lucero* of 22 October 1829 attacked the use of Bentham's ideas in South-American universities. The author of the article questioned the wisdom of exposing young lawyers to these ideas, the effect of which was to teach them, 'with Bentham', 'to despise any system of jurisprudence' rather than encouraging them to study the particular law of any country. However, Somellera had his defenders: Agustín Jerónimo Ruano answered, through the press, that Somellera's purpose was to teach 'the principles for understanding the grounds of all the laws that have been enacted in the cultivated countries'. An anonymous correspondent suggested that Ruano was wrong, and that what was happening at the University of Buenos Aires was that Bentham was being followed to the letter. The debate then moved on to the pages of another newspaper, the *Gazeta Mercantil*, where Ruano stressed that Somellera was following Bentham *but* that he had also introduced some novelties, such as disagreements on the rights of the state in intestate succession, on marriage, etc. Interestingly, an anti-Benthamist movement gained importance, and in 1833 a University commission

322 Rafael Schiaffino, 'Rosas y la Revolución de 1833 según el Dr. Agustín Gerónimo Ruano' (1938) 14 Revista del Instituto Histórico y Geográfico del Uruguay 271.

323 Ricardo Levene, *Manual de Historia del Derecho Argentino*, (5th edn. Depalma 1985) 356.

324 For this paragraph: Levene (n 321) 246-249.

recommended a new text on private law: the *Instituciones de Derecho Real de España* of José María Álvarez, annotated by Dalmacio Vélez Sarsfield. It was essentially a text which informed the reader on the state of Spanish law, then in force in South America, to which Vélez added the modifications to Spanish law which had been introduced in Argentina since 1810.[325]

Nevertheless, as one anti-Benthamite admitted, Bentham was still read and followed. Manuel Quiroga, Juan Bautista Alberdi,[326]and Esteban Echeverría, three renowned Argentinean intellectuals and politicians, too attacked Benthamite doctrine, and Somellera's teaching. Their main criticism was directed at Bentham's materialism and atheism. Alberdi even blamed the widespread reading of Bentham for the disintegration of the Argentinean society and the political chaos of his times. However, these critics recognized that Bentham was a fighter for the cause of emancipation and freedom in philosophy,[327] and regarded him as an authority on matters of criminal law.[328] Others remained more open to Bentham's ideas: Juan María Gutiérrez, for example, praised the role that Bentham's writings had in Argentina in the renewal of teaching methods of the law schools. A Uruguayan student of Somellera, Andrés Lamas, in his *Impugnación al Fragmento Preliminar* (Montevideo 1837) rejected Alberdi's criticism. As such, followed by some, and rejected but respected by others, Bentham's works have been part of the cultural landscape of Buenos Aires since the 1820s.

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325 José María Álvarez, Instituciones del Derecho Real de España: adicionada con varios apéndices, párrafos &c por Dalmacio Vélez (Buenos Aires 1834).

326 Alberdi was the author of *Fragmento Preliminar al Estudio del Derecho* (Buenos Aires 1837) where he adopted an historicist approach to law, and criticized Bentham.

327 Quiroga.

328 Alberdi.

3.6.2. The Work of Santander in Colombia

In Great Colombia, which included what is now Venezuela, Colombia, Ecuador and Panama, Vice President Francisco de Paula Santander decreed on 9 November 1825, that Bentham's *Traités* were to be used as a mandatory textbook for the teaching of legal courses in all Colombian colleges and universities. The General Plan of Studies of Colombian universities of 1826 reflects that decision.[329] By that time, Simón Bolívar, also a follower of Bentham, was the President of Great Colombia, and was fully aware of these decisions. In a letter dated 6 December 1826, [330] Santander requested Bolívar to pass on his correspondence with Bentham at the request of Vicente Azuero, a prominent politician and public law professor at San Bartolomé College (also known as Central University) of Colombia.[331] Azuero had been teaching Bentham's texts in that University since 1819.

Martínez Argote, a Colombian historian, mentions several reasons for the adoption of Bentham's texts as mandatory in Colombia. First, Bentham was an English citizen, and the prestige of England was based on the fact that it had been the main supporter of South-American independence, and the new hegemonic political power in the region. Second, the need to replace the old legal system inherited from Spain with a new one, more in accordance with the liberal ideology of the new republic. Third, the previous correspondence between Bentham and Bolívar, which encouraged the latter to

329 Martínez Argote (n 162) 13.

330 Julio Gaitán Bohórquez, 'Agenda Ilustrada y Agenda Republicana en la Cuestión Educativa Neo Granadina' (2010) 14 Revista Historia de la Educación Latinoamericana 100-124.

331 Vicente Azuero was the President of the Congress of Colombia in the 1820s. Cot (n 260) 49.

support the study of Bentham's works in Great Colombia.[332]

The marking of Bentham's texts as mandatory in Colombian universities provoked a public debate. Francisco Margallo, a professor of theology, fiercely opposed the use of Bentham's works, while Vicente Azuero, mentioned above, argued in their favour. During 1828, a political crisis developed in Colombia and a group of liberals, many of whom were university students allegedly associated with Santander, attempted to kill Bolívar. In the midst of this heated political climate the syllabus of the university courses, and especially the place of Bentham's ideas within them, were blamed for playing a role in inducing the students to attempt a magnicide. Under the pressure of the conservatives, a disillusioned Bolívar decreed that Bentham's texts should no longer be used (12 March 1828).[333]

Bentham was aware that he had been rejected by Bolívar, his former self-proclaimed disciple, and blamed his *volte face* on the fact that Bolívar had become a despot who could no longer tolerate the principle of utility in his politics.[334] As a consequence of the political crisis, Santander was forced to go into exile. He took the opportunity to visit London where he dined at Bentham's home in July 1829. There, Santander obtained Bentham's support against Bolívar. Following Bolívar's death, Santander returned to Colombia where he was appointed President of the Republic of Colombia. In 1835, he restored the old General Plan of Studies and Bentham's texts became *again* mandatory legal texts to be studied, in spite of opposition from the

332 Martínez Argote (n 162) 15-6.

333 Ibid 18-19.

334 Williford (n 266) 133.

Catholic Church.[335] Bentham's *Traités* were used as the main textbook at law schools until 1842, when a conservative government ended their use and replaced them with Roman law textbooks. In this second period, the most prominent Benthamite professor in Colombia was Ezequiel Rojas, who taught economics and, for a short period, civil and criminal law.[336] From 1857 onwards, Rojas also directed a private seminar at the National Library in Bogotá where Benthamite ideas were again taught and discussed.[337] Finally, in 1868, Rojas was appointed Chancellor of the newly created National University. His appointment was followed by pressure to re-impose the use of Bentham's works. The most extreme position was adopted by Aníbal Galindo, a lawyer and politician representing the government, who argued that:

> Balmes [a philosopher supported by Colombian Catholics] and Bentham cannot shake hands at the university cloisters. While the liberal party is in power, it must teach liberalism.[338]

By 1872, according to a Colombian Anti-Benthamite, Marco Fidel Suárez, Bentham was still 'enthusiastically' taught and followed by a vast number of Colombians.[339] In the 1880s, with the return of the conservative party to power, the teaching of Bentham slowly waned. Until then, in Colombia, Bentham's ideas had a key role in the formation of lawyers, and in political debates.

It is important to note that Colombian Benthamites, as usually happened in South

335 Martínez Argote (n 162) 20.

336 Ibid 25-26.

337 Ibid 30.

338 Ibid 35-36.

339 Marco Fidel Suárez, 'El Utilitarismo' in Martínez Argote (n 162) 193.

America, did not adopt *all* of Bentham's ideas. They took inspiration from Bentham, but translated his ideas into South-American circumstances. [340] For example, they did not denounce their Christian faith. Some, such as Vicente Azuero, argued that Bentham's teaching were not contrary to Christian religion. Others, like Santander, admitted that certain conflicts could arise and argued that, in such cases, the professors should not follow Bentham. [341] Thus, albeit with ups and downs along the way, Bentham's ideas represented a crucial component of legal teaching in Colombia for at least five decades, between the 1820s and the 1870s, and, as happened in other South-American countries were critically assessed and selectively used.

3.6.3. Bello and Mora in Chile

The situation of the teaching of law at Chilean universities during the first half of the nineteenth century has been described as 'precarious'.[342] Nevertheless, there is evidence of the academic use of Bentham's legal ideas in Chile. Andrés Bello used Bentham's *Traités* for his course on 'universal legislation' delivered at the *Colegio de Santiago* in 1830, [343] a course which later became part of the official syllabus of that college.[344] For his courses Bello prepared a text the first two parts of which were formed by extracts directly taken from Bentham's *Traités*.[345] It has been noted that Bello was critical of

340 Ibid 11.

341 Vicente Azuero 'Contra el Doctor Margallo' in Martínez Argote (n 162) 63-64.

342 Pérez-Perdomo, (n 188) 74.

343 Crimmins (n 266) 13.

344 Alamiro de Ávila Martel, 'La Filosofía Jurídica de Andrés Bello' in Departamento de Ciencias del Derecho Facultad de Derecho Universidad de Chile (ed) *Congreso Internacional "Andrés Bello y el Derecho"* (Editorial Jurídica de Chile 1982) 41-42.

345 Alamiro de Ávila Martel, 'The influence of Bentham in the teaching of penal law in Chile' (1980) 5

many of Benthamite ideas: his catholic persuasion did not sit well with Bentham's materialism,[346] and his acceptance of the existence of natural law was the opposite of Bentham's positivism.[347] However, while Bello did not adopt all of Bentham's ideas, he combined many of them in an 'eclectic accumulation' alongside ideas taken from the German historical school (Savigny), and natural law.[348] For instance, in an article published in 1836, Bello argued in favour of the compatibility of Catholicism and Bentham's doctrines.[349] Furthermore, Bentham's texts were used in Chile for the teaching of criminal law,[350] and Mora's *Curso de Derechos*, a textbook for the teaching of law at the *Liceo de Chile* printed in Santiago in 1830, contained some allusions to Bentham. For instance, Bentham was quoted by Mora in support of the abolition of usury laws, a recommendation that Mora endorsed, as we will see in one if the following chapters.[351] By contrast, in another case of selective use, Mora did not accept Bentham's critique of natural law. Interestingly, Mora's allusion to Bentham's positivism shows that he had a clear understanding of the English *context* of Bentham's ideas. On discussing the opposition to natural law, Mora accurately noted that Bentham's position was part of his rejection of Blackstone's *Commentaries on the Laws of England*.

Revista de Estudios Histórico-Jurídicos, 257-265; Ana Inés Ovalle Faúndez, 'Las ideas penales de Andrés Bello' in Departamento de Ciencias del Derecho Facultad de Derecho Universidad de Chile (ed) *Congreso Internacional "Andrés Bello y el Derecho"* (Editorial Jurídica de Chile 1982) 253.

346 Liliana Obregón, 'Construyendo la Región Americana: Andrés Bello y el Derecho Internacional' in Beatriz González-Stephan and Juan Poblete (eds) *Andrés Bello y los Estudios Latinoamericanos* (University of Pittsburgh 2009) 189–218.

347 Rafael Caldera, *Andrés Bello* (John Street tr, George Allen & Unwin Ltd.1977) 108-9.

348 Ávila (n 345) 53.

349 Ibid 46-7.

350 Ávila (n 345) 257-265.

351 See Chapter 4 Section 3.3.

By mid nineteenth century, a controversy arose in Chile, similar to that in Argentina and Colombia, as to what should be taught at law schools. In the midst of that debate, Dean Meneses (a former royalist and ecclesiastic)[352] proposed that Bentham should be removed from the syllabus, as his works 'instilled unhealthy ideas in the youth'. Bello defended the teaching of Bentham's ideas, but eventually the conservative view prevailed, and formal teaching of Bentham ended in Chile in 1852. [353]

3.6.4. Vidaurre in Peru

Lastly, another example of selective academic use of Bentham comes from Peru. Manuel L. Vidaurre, a lawyer and the President of the Supreme Court of Justice of Peru, published between 1834 and 1836 a draft of a Civil Code for Peru. This draft, which was ultimately not enacted, was accompanied by extensive commentaries, which can be counted as academic literature,[354] and which had a significant influence on other South-Americans, such as the drafter of the Venezuelan Civil Code of 1862, Julián Viso.[355] Although Vidaurre made clear that he was 'not a good friend of Bentham, as [he had] never been [a friend] of any other materialist', in the same paragraph he acknowledged that he 'respect[ed] many of [Bentham's] arguments'.[356] Like many other South-Americans who did not endorse all of Bentham's ideas, and even fiercely rejected some

352 Alamiro de Avila Martel, *Mora y Bello en Chile* (Ediciones de la Universidad de Chile 1982) 32.

353 Pérez-Perdomo (n 188) 74.

354 Atilio Aníbal Alterini and Carlos A Soto, 'El proceso de codificación del Derecho Privado en Peru y Argentina' in: http://revistas.pucp.edu.pe/index.php/derechopucp/article/view/6569. Accessed: 04 feb. 2016, 513-4.

355 Fernando Chumaceiro, *Bello y Viso Codificadores* (Universidad del Zulía 1959) 29.

356 Manuel L Vidaurre, Proyecto del Código Civil Peruano dividido en tres partes: 3ª Parte (Lima 1836) 117.

of them (usually Bentham's atheism and materialism), Vidaurre considered Bentham to be a respectable author from whom he could borrow, *selectively,* some arguments. For instance, Vidaurre endorsed the Benthamite distinction between the extension of the fields of morality and law.[357]

3.6.5. Summary

As emerged from the previous sections, in South America, there was a relatively intense use of Bentham's ideas in the fields of legal literature and teaching. Some common characteristics of that use were its critical and selective character, the influence it had in the formation of new lawyers, and even amongst some of his opponents, who respected some of his ideas. Finally, almost invariably, the use of Bentham's works in the academic field, arose opposition mostly from Catholics, who reproached Bentham his atheism and materialism.

4. Blackstone, Kent and Anglo-American law in South America

4.1.Overview

The previous section was devoted to reformist legal ideas postulated by Bentham. This section will consider rules and principles which were already embedded in Anglo-American law, and were influential in South America. Roughly speaking, while Bentham offered proposals as to how to reform the law, and arguments for *why* reform should happen, the exposition of Anglo-American law by some legal scholars, provided South-Americans with an inspiration of a different nature. As already mentioned, Anglo-

357 Ibid.

American law was usually received through the works of scholars, such as William Blackstone and James Kent, rather than through direct access to case law or statutes. Such authors exposed Anglo-American law though, sometimes, they included their own ideas. For example, when Blackstone explained the rules on the interpretation of statutes in English law he was, at the same time, expressing his own conception of how statutory of interpretation *should* be done. Nonetheless, through the works of these scholars, South-Americans were influenced by Anglo-American law *as it was* or as it was perceived by scholars who, unlike Bentham, did not reject the common law system.

4.2. Legal literature

4.2.1. Blackstone's Commentaries on the Laws of England

William Blackstone (London 1723- Oxfordshire 1780) was a fellow of All Souls, Oxford. At different moments of his life, Blackstone practised as a barrister, sat in the House of Commons for nine years (as a Tory MP) and was a judge of the Court of Common Pleas.[358] His book *Commentaries on the Laws of England* (1765–69), a didactic exposition of English law, was the product of Blackstone's lectures at the University of Oxford. There, he was the first holder of the Vinerian professorship of common law (1758). Blackstone's lectures were the first on English law to be delivered in an English university. Jeremy Bentham, who would later become Blacsktone's arch-critic, attended those lectures as a training barrister.

358 Wilfrid Prest, 'Life' in Wilfrid Prest (ed) *Blackstone and his Commentaries* (Hart Publishing 2014) 1-2. Ian Doolittle, *William Blackstone: a Biography* (Ian Doolittle 2001) 3-110.

By the beginning of the nineteenth century, Blackstone's *Commentaries* were the best-known analyses of the doctrines of English law. They were widely read in England and North America[359] and translated several times into French.[360] In England, the influential judge Lord Mansfield recommended Blackstone's *Commentaries*: 'The student will find in [that book] with no trouble the first principles on which our excellent laws rest'.[361] In the United States, Blackstone was cited more than 10,000 times in American judicial opinions, and his Commentaries were viewed as the preferred book for law students given its comprehensiveness and 'scientific arrangement'.[362] This popularity, the availability of French translations (a language in which cultivated South-Americans were versed), and the accessible format of the *Commentaries*, may have brought Blackstone to the attention of South-Americans, as explained below.[363]

In a similar way to Bentham's works, Blackstone's *Commentaries* were held and used by many prominent South-American lawyers, such as Bello[364] and Mora[365] in Chile, Vélez Sarsfield[366] in Argentina, Eduardo Acevedo in Uruguay,[367] Vidaurre in Peru,[368] and

359 Michael Hoeflich, 'American Blackstones' in Wilfrid Prest (ed) *Blackstone and his Commentaries* (Hart Publishing 2014) 171-184.

360 John Emerson, 'Did Blackstone get the Gallic Shrug?' in Wilfrid Prest (ed) *Blackstone and his Commentaries* (Hart Publishing 2014) 185-198.

361 Mansfield quoted by Emerson (n 360) 194.

362 Hoeflich (n 359) 171 and 181.

363 See Section 5.2.5.

364 Catalogue indicated in footnote 242.

365 There are references to Blackstone in Mora (n 168) 119-120.

366 Catalogue indicated in footnote 244.

367 Eduardo Acevedo, *Proyecto de un Código Civil* (Montevideo 1851) 503.

368 See Section 5.3.

Fermín Toro in Venezuela.[369] The familiarity of Colombians with Blackstone, is evidenced by Vicente Azuero who, writing in the 1830s, included Blackstone in a list of those whom he considered to be renowned legal authorities.[370] In 1846, José Rafael Revenga, a Venezuelan politician, quoted Blackstone and Coke in a petition to the Venezuelan Parliament,[371] and, in 1847, the bookshop of Caracas (Venezuela), already referred to above,[372] also offered Blackstone's *Commentaries* to its customers. The use of Blackstone's *Commentaries* persisted in Argentina and Chile into the following century. For instance, in his 1925 treatise on civil law the Argentinean judge and scholar Raymundo Salvat, included Blackstone *Commentaries* in the bibliography.[373] In Chile, Luis Claro Solar, a distinguished practitioner, scholar and politician, quoted Blackstone on various occasions in his prestigious and extensive treatise on Chilean private law first published between 1898 and 1927. [374]

Unlike Bentham, Blackstone had a much more favourable opinion of the common law.[375] According to Blackstone, the judges *declared* the customary law, they did not create it. They were the 'oracles' of such law. Blackstone embraced a natural law

369 Fermín Toro, *Reflexiones sobre la Ley del 10 de abril de 1834* (Imprenta de Valentín Espinal 1845).

370 Vicente Azuero, 'Contra el Doctor Margallo' in Martínez Argote (n 162) 62.

371 http://catalogoenlinea.bibliotecanacional.gov.co/client/es_ES/search/asset/78665/0 accessed 15 May 2016.

372 See Section 3.5.1 above.

373 Salvat (n 123). Salvat used a French translation of the 5th English edn. William Blackstone, *Commentaries sur les lois anglaises*, (NM Chopré tr. París 1872-3).

374 Claro Solar quoted Blackstone in relation to consent and cause (consideration) in contract law, and in connection with the duties of children towards their parents. Cf. Luis Claro Solar, *Explicaciones de Derecho Civil Chileno y Comparado:* Volumen II, Tomo III (Editorial Jurídica de Chile 1979) 161, and Luis Claro Solar, *Explicaciones de Derecho Civil Chileno y Comparado*: Volumen V, Tomo X (Editorial Jurídica de Chile 1992) 98, 317 and 373.

375 William Blackstone, *Commentaries on the laws of England:* Vol. 1 (W Walker 1826) 1-64.

approach, and famously argued that irrational law was not law at all, a point that was strongly criticized by Bentham. However, somewhat contradicting his opinions about natural law, Blackstone's respect for Parliament-made law was remarkable. For instance, he thought that once a statute was enacted by Parliament, there was no authority that could contradict it, no matter how unreasonable it may seem, and was especially distrustful of equitable interpretation on the basis that it compromised the separation of legislative and judicial power. As a result, the consistency of Blackstone's adherence to natural law doctrines has been questioned by many authors. For instance, H.L.A. Hart argued that Blackstone's natural law test for positive law was an empty test that any positive law would pass, [376] while Gareth Jones indicated that it seems impossible to reconcile Blackstone's ideas about natural law with his conception of an 'uncontrolled' sovereign.[377] This was specifically relevant in connection with Blackstone's opinions on statutory interpretation, something to which we will return in one of the following chapters.[378]

Blackstone also believed that the common law was a system that perpetuated freedom, while the civil law, in his view, was associated with despotism. However, Blackstone spoke of the civil law as 'a collection of written reason' and declared that no one was more convinced than him of the 'general excellence of its rules and the equity of its decisions'.[379] As Blackstone himself noted, his *Commentaries* 'frequently' referred to

376 Herbert LA Hart 'Blackstone's Use of the Law of Nature' in [1956] Butterworths S. Afr. L. Rev. 169.

377 Gareth Jones (ed) The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Laws of England (Palgrave Macmillan 1973) xxxviii.

378 As shall be seen in Chapter 5 below.

379 Blackstone (n 375) 2-3.

the civil law, 'by way of illustrating [English] law'.[380] Throughout his work, comparisons with civil law rules can be found, whether for the purpose of highlighting similarities or differences, or for the purpose of advocating the *borrowing* of some rule or institution. Expressions like 'resembling the civil law', 'contrary to the maxim of the civil law', 'probably copied from the civil law', 'borrowed from the civil law' abound in Blackstone's work. Such expressions can be found in relation to a wide range of matters including the rights of persons, public law, rights of things, contract law, trusts, possession, succession law and procedural law.[381] This was a crucial characteristic of Blackstone's *Commentaries* that made them more appealing to South-American legal actors, formed, as they were, in the civil law tradition, something we will consider below.[382]

4.2.2. Kent's Commentaries on American Law

James Kent was born in 1763 in the state of New York, where he died in 1847. He was educated at Yale University and later admitted to the New York bar.[383] In 1793, Kent was appointed as the first law professor at Columbia University. Between 1798 and 1814, he was one of the Justices of the Supreme Court of New York, and then, from 1814 to 1823, Chancellor of the State of New York. When he retired from that post, Kent briefly

380 Ibid 74.

381 An incomplete list of examples include: Blackstone (n 375) 130, 131, 142, 184, 238, 257. William Blackstone, *Commentaries on the laws of England:* Vol. 2 (W Walker 1826) 94, 106, 129, 224, 248, 261, 305, 328, 391, 404, 443, 497, 498,517. William Blackstone, *Commentaries on the laws of England:* Vol. 3 (W Walker 1826) 59, 116, 122, 280.

382 We will return to this in Section 5.2.5.

383 John Duer, A Discourse on the Life, Character, and Public Services of James Kent, Late Chancellor of the State of New-York (New York 1848).

returned to teaching at Columbia and, between 1826 and 1830, published his *Commentaries on American law*. This work experienced wide success in the United States. Some prominent lawyers at the time held the opinion that once American students of law had studied Blackstone's *Commentaries* the necessary next step in their education was to master Kent's *Commentaries*.[384] Similarly to Blackstone's *Commentaries*, Kent's provided a comprehensive overview of the law in the United States. He was, in fact, known as the American Blackstone.[385] Kent's *Commentaries* were owned and used by most of the same South-American lawyers mentioned above: Bello[386] and Mora[387] in Chile, Vélez Sarsfield[388] in Argentina, Tristán Narvaja in Uruguay,[389] and Fermín Toro in Venezuela.[390]

According to Peter Stein, from the American Revolution until the 1850s, the use of civil law in America enjoyed 'increasing favour'.[391] In that context, and similarly to Blackstone, Kent was interested in the civil law, which he considered a source of 'sound principles […] to enlarge, improve and adorn our municipal Codes',[392] and his familiarity with civil law did not go unnoticed among his New York contemporaries.[393] Kent clarified, however, that he was 'a person not educated under that system' and that he

384 Hoeflich (n 359) 181.

385 Ibid.

386 Catalogue indicated in footnote 242.

387 Allusions of Kent's *Commentaries* in Mora (n 170) 34-7.

388 Catalogue indicated in footnote 244.

389 Tristán Narvaja (n 213).

390 Toro (n 369).

391 Peter Stein, 'The Attraction of the Civil Law in Post-Revolutionary America' (1966) Vol. 52 No. Virginia Law Review 403-434.

392 James Kent, *Commentaries on American Law*: Vol. 1 (2nd edn. O Halsted 1832) 514.

393 Duer (n 383).

found it difficult to go through the 'overwhelming mass of learning and criticism' that was to be analysed in order to have a sound understanding of the civil law.[394] Throughout Kent's *Commentaries*, as much as in Blackstone's, allusions to the civil law are made use of, in many different areas, whether to show differences or resemblances with the common law.[395] The famous French jurist, Robert Pothier, who was described by Kent as possessing a 'luminous mind',[396] was quoted approximately seventy times, while the French Civil Code was cited twenty times. This openness to the civil law made Kent's *Commentaries* both attractive and accessible to South-American lawyers, as we will consider below.[397]

4.2.3. Other Literature about Anglo-American Law

Apart from Blackstone and Kent, other Anglo-American authors were consulted by South-American actors, but to a much lesser extent. For example, the drafter of the Argentinean Civil Code consulted Joseph Story's[398] works on *equity*, and the drafter of the Chilean Civil Code, made use of Joseph Chitty's works on commercial law.

A different case was that of Alexandre Laya, a French lawyer, who produced a volume describing the English law under the form of a set of Codes, a volume which was

394 Kent (n 392) 516.

395 Just a few examples: James Kent *Commentaries on American law:* Vol. 2 (2nd edn. O Halsted 1832) 85, 120 (rights of persons), 183 (matrimonial property), 233 (on majority), 269 (corporations). Same edn. Vol. 3: 59, 62, 163 (partnerships). Same edn.Vol. 4: 46, 139, 152, 436 (property law), 392, 397, 419 (succession law).

396 James Kent, *Commentaries on American Law:* Vol. 3 (2nd edn. O Halsted 1832) 264.

397 See Section 5.2.5.

398 According to Stein, Story also favoured the use of civil law in American law. Stein (n 391) 418.

consulted by the drafter of the Argentinean Civil Code.[399] Laya's book represents a peculiar channel of communication between English and South-American law. In that case, the English common law system was presented in a civilian fashion and thus made more accessible to civilian lawyers. The fact that South-Americans did not frequently recur to this sort of 'intermediary literature' is relevant, as it shows that such lawyers relied more often on their first-hand knowledge of Anglo-American legal literature. For instance, Vèlez Sarsfield owned a copy of Laya's book but only once referred to it in his commentaries of the Argentinean Civil Code.

4.2.4. An Exceptional Case: the Civil Code of New York

As already mentioned, knowledge of statutes and case law from England or the United States was usually acquired indirectly by South-Americans through the study of Anglo-American legal literature. The draft of the Civil Code of New York (1865) was an interesting exception. It was published when codification in South America was already quite advanced. However, Vélez Sarsfield, the drafter of the Argentinean Civil Code of 1869, made use of it.

In 1846, the State of New York appointed a commission 'to reduce into a written and systematic Code, the whole body of law of [that] State'.[400] David Dudley Field, an American lawyer, carried out much of the work of the commission. The idea of codification became known to New York, and specifically known to Field, through

399 Alexandre Laya, Droit anglais, ou, Résumé de la législation anglaise sous la forme de Codes (Comptoir des Imprimeurs-Unis 1845).

400 Reimann (n 226) 95-119.

Bentham's writings. Following Bentham, Field argued that the republican form of government of New York necessitated codification because otherwise it would be imperilled by government of interest groups, such as the bench and bar. The final draft of the Code was presented to the legislative body in 1865, though it never entered into force.[401] The substance of the Code was 'overwhelmingly…that of the common and statutory law of New York in the 1860s'.

The draft of a Civil Code of New York (1865) was used by the drafter of the Argentinean Civil Code, Dalmacio Vélez Sarsfield, with regards to partnerships, property law, and mortgages.[402] For instance, according to Article 1670 of the Argentinean Civil Code, an heir of a partner did not become a member of a partnership unless he/she accepted that position. An idea that, as Vélez acknowledged, he had taken from the draft Civil Code of New York.[403] Regarding the denomination of partnerships, articles 1679 and 1680 of the Argentinean Civil Code regulated the use of the name of a partner and a third party in that denomination, being their explicitly acknowledged sources articles 1323 and 1324 of the Code of New York.[404] Lastly, there was another interesting mention of that Code in the field of mortgages where the drafter of the Argentienan Code made a comparison between the provisions of English, United States, and Argentinean law, and the draft Code of New York (1865). The comparison was conducted in order to alert about the differences between the three legal systems. The purpose of that comparison is

401 It was adopted by the New York legislature twice, and both times governors vetoed it. However, it was adopted by the states of California, Idaho, Montana and the Dakotas.

402 República Argentina, *Código Civil de la República Argentina: Edición Oficial* (Buenos Aires 1883) 414, 416, 601, 732-3.

403 Ibid 414.

404 Ibid 416.

not clear, but we can speculate that it was intended as a piece of information for foreign financial investors, and their local advisors.

4.2.5. Cross-Fertilization

As remarked on above, a relevant characteristic of Blackstone's and Kent's *Commentaries* was their use of civil law materials. The use of civil law ideas by Anglo-American authors in the nineteenth century[405] is a sort of *reverse* of the interest of South-Americans in Anglo-American law referred to above.[406]

Both Blackstone and Kent made use of civil law ideas and materials in order to explain Anglo-American law, or to contrast common law rules or institutions with their equivalents in the civil law tradition. Thus, the influence of Anglo-American ideas in South America can perhaps be viewed as part of a wider process of cross-fertilization (i.e. reciprocal influence) taking place simultaneously across the two western legal traditions. Something similar can be said of the New York Civil Code which seems to have been, as Reimann argues, 'common law cast into a civilian form'.[407]

Two further details are remarkable. First, Blackstone's favourable *political* opinion of the common law paralleled that of the South-Americans who, as we said,

405 See for instance: Stein (n 391) 403-434; Catharine Mac Millan 'Mistaken Arguments: The Role of Argument in the Development of a Doctrine of Contractual Mistake in Nineteenth-century England' in Andrew Lewis-Michael Lobban (ed) *Law and History: Current Legal Issues 2003 Volume 6* (OUP 2004) 285-315.

406 See Section 2.

407 See footnote n 400.

admired the 'truly liberal' institutions of Britain and the United States.[408] Second, the same difficulties that South-Americans experienced in accessing the common law (the 'voluminous' or 'infinite' reports of case law to be studied) were faced by Anglo-Americans, when dealing with civil law sources. As Kent indicated, in order to understand the civil law, a common law lawyer was required to go through an 'overwhelming mass' of doctrinal writing. There was, thus, not only a reciprocal influence, but a common awareness of the difficulties of communicating across the boundaries of the two different legal traditions.

What is important for the argument developed in this thesis is that this cross-fertilization helped the dialogue between Anglo-American actors and their counterparts in South America. The recurrent comparison of the common law with the civil law provided a common ground which put South-American legal actors more at ease. This was an additional incentive for the use of Anglo-American legal ideas.[409] Moreover, in some cases, the contrasts or similarities between civil law and Anglo-American law were highlighted by Blackstone or Kent themselves. That was the case, for instance, when Kent compared the rule of the French Civil Code on unregistered mortgages with the common law rule on the same subject. The drafter of the Argentinean Civil Code of 1869 picked up the comparison provided by Kent and put it into use by incorporating the common law rule directly in the Argentinean Civil Code.[410] This is an interesting case for further research, as the rule transplanted from the common law directly contradicted the

408 See Chapter 1 Section 3 above.

409 See Section 2 above.

410 Article 3136 of the Argentinean Civil Code of 1869. Vélez Sarsfield's note in República Argentina (n 402) 739.

solution of the French Civil Code.[411]

In other cases, the use of civil law materials by Blackstone distorted the trace of Anglo-American influence in South America. For instance, the Chilean legal historian Guzmán Brito has argued that Blackstone's *Commentaries* were, in the case of statutory interpretation, just a tortuous channel by which South-Americans were influenced by the *civil* law tradition to which they already belonged. [412] I shall later argue[413] that there were relevant differences between Blackstone's ideas and those of the civil law tradition, but the important point here is a different one: cross-fertilization had the ability to blur the line between Anglo-American ideas and civil law ideas, and made the differences between the two sources not immediately obvious, making it more difficult to see the Anglo-American influence.

4.3. Academic Use of Blackstone and Kent in South America

On some occasions, Blackstone and Kent were made use of for academic purposes, though their works did not enjoy the influence Bentham's works enjoyed, and were never used as textbooks in law schools.

Some examples of their use in South-American legal literature can be seen. First, the already mentioned *Curso de Derechos* published by José Joaquín de Mora in Chile in 1830, and reprinted in Bolivia in 1849, contained two mentions of Blackstone's

411 Article 1071 of the French Civil Code.

412 Alejandro Guzmán Brito, 'Las fuentes de las normas sobre interpretación de las leyes del "digeste des lois civiles" ("Code civil") de la Luisiana (1808/1825)' (2009) 31 Revista de Estudios Histórico-Jurídicos 171.

413 Chapter 5.

Commentaries in the text*:* one in relation to English property law and the other concerning international law.[414] Second, in 1832, Bello published his book on international law *Principios de Derecho de Jentes*, which was the product of the course he taught in Chile by the beginning of the 1830s.[415] He explicitly acknowledged inspiration from two books 'which most constantly had served [him] as a guideline': Kent's *Commentaries on American Law* and Joseph Chitty's *A Treatise on the laws of Commerce and Manufacture and the Contracts relating thereto* (London 1824).[416] In the same book, Bello also adopted Blackstone's definition of *ius gentium*.[417]

Moreover, there are examples of the use of Blackstone and Kent in South-American legal literature disconnected from teaching. A relevant example is the book published in Caracas in 1845 by Fermín Toro, a Venezuelan lawyer, who argues against the abolition of usury law in his country. Toro quoted and made use of arguments drawn from Blackstone, Kent and a decision of Lord Mansfield (one of the few direct allusions to case law in South-American legal literature), and referred to a Bill presented in the British Parliament (another exceptional case of direct mention of statutory law not mediated by legal literature). The reason for his interest in Anglo-American law was made clear by Toro: England and the United States were 'the classical countries of liberty'.[418] Another example comes from the already mentioned comments of Manuel L. Vidaurre, relating to his draft of a Peruvian Civil Code (1834-1836), which, for instance,

414 Mora (n 168) 119-120.

415 Obregón (n 346) 189–218.

416 Andrés Bello, *Principios de Derecho de Jentes* (Imprenta de la Opinión 1832) ii.

417 Ibid 8.

418 Toro (n 369) 66.

were one of the sources used by the drafter of the Venezuelan Civil Code of 1862.[419] On several occasions, this Peruvian lawyer and judge referred to Blackstone's works in connection to the interpretation of wills, freedom of testation, formalities of wills, the origin of trusts, mortgages, usury, deposits, sales and gifts.[420] Thus, in a way similar to Bentham albeit to a much lesser extent, Blackstone and Kent's works were used in South-American legal literature and teaching.

5. Legislative use of Anglo-American Law and Legal Ideas

Besides influencing legal scholarship and teaching, Anglo-American law and legal ideas were also relevant in the field of legal change. As already mentioned,[421] they inspired or provided arguments for legal changes in the fields of intestate succession law, contract law, and the rules of interpretation of the Civil Codes across several jurisdictions of South America. These changes will be explored in the following chapters.

However, while the three just mentioned were the most important impacts of Anglo-American legal ideas in South-American private law, it is useful to mention that there were other less important uses on which we shall not develop in this thesis but which will be briefly specified here.

For instance, regarding the institution of marriage, several legislative provisions were supported with mentions of Anglo-American law by the Chilean, Uruguayan, and

419 3.6.4 above.

420 Vidaurre (n 356) v-vi, 28, 72, 107. Manuel L Vidaurre, *Proyecto del Código Civil Peruano dividido en tres partes:* 2ª Parte (Lima 1835) 183, 198, 209, 235, 287, 358.

421 Chapter 1 Section 3 above.

Argentinean drafters.[422] In Uruguay and Argentina, the allusion to the English acceptance of religious marriage (as opposed to civil marriage) seems a clear example of a rhetorical use of English law. The fact that English law admitted religious marriage was frequently mentioned in order to appease those who were fervently against the power of the Church in this sensitive area. According to Safford, 'efforts at liberal reform divided the political elite principally when they impinged upon the power and privileges of the Church'.[423] However, Englishness was so much associated with liberalism, as already mentioned,[424] that the mention of English law on this matter seemed a good rhetorical argument in favour of religious marriage. In relation to the legitimation of children by subsequent marriage, the Chilean Civil Code (1855) favoured a restrictive approach, by contrast with the civil law tradition. That approach was supported argumentatively with mentions of English law and Blackstone.[425]

Regarding succession law, Andrés Bello favoured a model of freedom of testation, and invoked in his support Anglo-American law,[426] but his proposal failed to convince others, and did not became law. Another failed attempt at borrowing from

422 Regarding promises of marriages and religious marriage, Blackstone was quoted in República Argentina (n 410) 53. With regards to dowry, Kent was quoted in Ibid 324. In connection with the consequences of divorce Bello quoted an English judicial decision in Andrés Bello, *Obras Completas*: Tomo XII: *Código Civil de la República de Chile,* Volumen I (Ministerio de Educación 1954) 143. In relation to religious marriage, English law was used as an argument also by the commission that reviewed the final draft of the Uruguayan Civil Code (1868), in Manuel Herrera y Obes, Antonio Rodríguez, Joaquín Requena and Tristán Narvaja, 'Informe de la Comisión de Codificación de 1867' in Eugenio Cafaro and Santiago Carnelli (eds) *Código Civil de la República Oriental del Uruguay* (Fundación de Cultura Universitaria 1992) xvii.

423 Safford (n 253) 388.

424 Chapter 1 Section 3.

425 Bello, *Código:Vol. I* (n 422) 167-170.

426 Andrés Bello, *Obras Completas*: Tomo XIII: *Código Civil de la República de Chile,* Volumen II (Ministerio de Educación 1955) 187.

Anglo-American legal ideas happened in Chile and Uruguay where the drafters of the Civil Codes originally suggested admitting custom as a source of law, but the proposal, which was supported with arguments from English law and Blackstone, was rejected. [427]

Concerning corporations, the regulation of the Chilean Civil Code of 1855 was inspired by the Louisiana Civil Code, which on this point had been strongly influenced by Blackstone.[428] Thus, here we have another case of indirect and unacknowledged influence of Blackstone, similar to that of statutory interpretation explored in Chapter 5. Also regarding corporations, the Argentinean Civil Code (1869) incorporated a rule allowing corporations to own real estate. This provision was seen as anti-liberal by contemporaries because it allowed the Catholic Church to accumulate real estate Significantly, that provision was defended by the drafter of the Argentinian Code with (explicit but vague) mentions of English and United States law.[429] This might be yet another case of rhetorical use, the implied message being that if 'the traditional countries of freedom' allowed the church to own real estate, local liberals should not oppose.

Lastly, as already mentioned, the draft of a Civil Code of New York (1865) was used by the drafter of the Argentinean Civil Code in connection with several provisions; two on partnership, one on property law, and one on mortgages.[430] In the area of mortgages two further allusions to other Anglo-American law sources were done, [431] and

427 Bello, *Código* (n 426) 28. Eduardo Acevedo, *Proyecto de un Código Civil* (Montevideo 1851) 503.

428 Rolf Knütel, 'Influences of the Louisiana Civil Code in Latin America' (1995-6) 70 Tulane Law Review 1445, at 1458-9.

429 Repùblica Argentina (n 410) 18-19

430 Ibid 414, 416, 601, and 732-3.

431 Ibid 739 (on unregistered mortgages) and Ibid 732-33 (on the nature of mortgages in English law)

within, property law Vélez Sarsfield also referred to the American legal scholar, Joseph Story. [432]

To summarize, though I have chosen to consider the three most significant legislative impacts of Anglo-American legal ideas in South-American private law, there remain other cases to be explored. The impact in those other areas was restricted to fewer jurisdictions, and was not as crucial as the three ones selected for the following chapters, but the preceding summary alerts us to the fact that there is more to be found out there. In other words, the next three chapters represent an important part of Anglo-American influence on South-American private law, but, by no means, not the only one.

6. Preliminary Conclusions

The overview provided in the preceding sections of this chapter suggest some preliminary answers to three questions about the use of Anglo-American law and legal ideas in the formation of South-American private law which will be the focus of the following chapters: *what* happened? *Why* did it happen? And *how* did it happen?

6.1. What Happened?

The first relevant conclusion is that the use of Anglo-American law and legal ideas in South America was a consistent phenomenon, and that it was part of the creative and critical use of a remarkably wide range of foreign sources of inspiration by South-American legal actors.

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432 Ibid 607.

It was not the case that merely *one* isolated author or drafter of legislation eccentrically made use of *one* exotic Anglo-American legal work that he happened, perhaps by accident, to have in his library. On the contrary, throughout South America, prominent lawyers made use of Anglo-American legal ideas. This shows a consistent and quite widespread interest in two legal systems (the English and the American) that are generally thought of as being *totally* alien to nineteenth-century South-American lawyers, with their civilian formation, limited by the difficulties of access imposed by distance and language. The Anglo-American authors most frequently consulted were Bentham, Blackstone and Kent, with Bentham enjoying the highest level of attention. The use of Anglo-American law and legal ideas followed a similar pattern in all the jurisdictions analysed in this thesis: Anglo-American ideas were made use of in the academic world through writing and teaching, influencing the first generations of lawyers formed after independence, as well as in legislative drafting. This is true of all the jurisdictions analysed, though with some differences. For example, the use of Bentham for academic purposes was relatively intense in Colombia, Argentina, and Uruguay, but less so in Chile and Venezuela; the use of Blackstone and Kent for purposes of legislative drafting was more marked in Argentina and Chile, etc.

There was a consistent *pattern* across South America: *prominent* lawyers made use of almost the *same* Anglo-American authors not just for speculative or merely informative purposes, but in order to put them into action for both academic and legislative purposes. The most important aspect of this pattern is that some of the Anglo-American ideas influenced or supported legal changes that resulted in a departure from the tradition of Roman, Spanish and French law. This happened, most notably in the

cases of the abolition of usury law and *laesio enormis* in some jurisdictions (Venezuela, Uruguay and Argentina),[433] and the improvement of the rights of the surviving spouses in intestate succession in almost all South-American jurisdictions.[434]

The use of a wide range of legal models by South-American lawyers and politicians has been pointed out in the legal literature.[435] The generations of South-American lawyers between 1820 and 1870 have been aptly described as 'eclectic', acting on the basis of 'pragmatic' and not merely 'speculative' goals.[436] This pragmatic approach is evidenced also by the piecemeal or selective fashion in which, with a few exceptions aside, they made use of Bentham's ideas. In other words, far from the stereotype of some legal historians of a 'slavishly' imitative movement, this was a creative enterprise undertaken against adverse conditions (independence war, foreign intervention, political turmoil, lack of academic materials and traditions, etc). The width of the sources of inspiration used, the critical reflection on them (both on Spanish, French and Anglo-American ideas), and the adaptation to local problems, are remarkable. This will emerge in more detail in the following three chapters. But this is not surprising: the South-American legal actors involved in the formation of private law *had* to be creative. They had to defy the monarchical Europe of the Holy Alliance, gain independence from absolutist metropolis, and built republican states from scratch in a modern world were, so far, only *one* republican experiment had succeeded (United States). Later generations of

433 Chapter 4.

434 Chapter 3.

435 René David, *L'Originalité des Droits de l'Amérique Latine* (Université de Paris, Centre de Documentation Universitarie 1956) 13.

436 Tau Anzoátegui (n 209) 73.

South-American lawyers, formed in the more stable legal system created by the South-American Civil Codes, did not embrace a similar eclectic and creative approach.[437] My claim is that it is this eclecticism that created room for Anglo-American legal ideas in general *private* law.

To put it succinctly: the use of Anglo-American legal ideas was quantitatively minor when compared with the influence of Roman, Spanish or French law. Nonetheless, the influence of these ideas was a pervasive and important phenomenon during a period when South-American private law was being formed, which gave it in some crucial areas a more liberal outlook than the French Civil Code.

6.2.Why Did It Happen?

A foreign legal system can come to have influence either as a result of imposition or emulation. Imposition is the result of the sheer political or economic power of the foreign country, while emulation is often the result of the prestige of the foreign country. Imposition cannot explain the use of Anglo-American legal ideas in South America. Following South America's emancipation, Great Britain had the political and economic influence that might have allowed it to impose some of its institutions, however, that was not the usual style of the British, as already explained. Prestige among South-American actors, then, is the remaining possible explanation. The question is why Anglo-Ameriacn law and legal ideas were prestigious. South America belonged to the civil law tradition, the common law was not well known, and, hence, it was unlikely to be prestigious on a

437 Ibid.

purely legal basis. By contrast, in the period leading to independence and afterwards, England and the United States were held in high political esteem in South America, the reason being that their institutions were perceived as 'truly liberal' and expressions of 'countries of freedom'. Economically speaking, England was very influential in South America, and during the emancipation struggle London became the refuge of many Spanish Americans (e.g. Bello, Bolívar, Rivadavia) and Spanish liberals connected with South America (e.g, Mora).

All this was especially relevant for the lawyers involved in legal teaching, and in the drafting of legislation. As noted earlier, South-American lawyers were not just practitioners, they acted in political and governmental circles and, in many cases, occupied high political positions. They were, therefore, naturally sensitive to the political credentials of Anglo-American ideas. Thus, the political prestige, and economic influence, of England and the United States, coupled with the political involvement of South-American lawyers, explains the interest of the latter in Anglo-American ideas and the use of these ideas in South America.

Furthermore, in the case of Bentham, some additional factors explain the extraordinary influence of his ideas compared with those of other English or American authors. Bentham actively corresponded with South-American leaders and received them at his house in London. He openly supported the cause of emancipation and the republican model, even when, in the aftermath of the Congress of Vienna (1815), English liberals were cautious. His works provided a new approach to law (positivism, codification, utilitarianism) which contrasted with the scholastic methods associated with

legal teaching in Spanish America's traditional Universities. Although his ideas were fiercely rejected by Catholics, they became part of legal discussions across South America. While some, such as Somellera or Azuero, adhered to *almost* all of Benthamite proposals, the majority, including Bello, Vélez, Narvaja and Vidaurre, adopted an eclectic approach and made a selective and pragmatic use of *some* of his ideas.[438]

6.3.How Did It Happen?

Use of foreign law or legal ideas usually carries with it a number of difficulties, such as the obstacles to accessing foreign materials, differences in language, and uncertainty about the correct understanding of foreign sources. In addition, access to Anglo-American law and legal ideas in South America involved another specific problem: it had to be done across the boundaries of two different legal *traditions*.

As already explained,[439] South-American actors were aware that Anglo-American law was characteristically based and developed through case law, expressed in 'voluminous' or almost 'infinite' reports, and that rules were *abstracted* from case law. This was in contrast with the practice of the civil law tradition which was based on *deducing* solutions for concrete cases *from* general rules. Therefore, direct access to Anglo-American law and ideas was, understandably, very difficult. That explains the *almost* complete absence of mentions of case law by South-American legal actors. Furthermore, in the common law jurisdictions of the nineteenth century, statutory law (a familiar format for civilians) played a very limited role and was not organized in Codes

438 See Section 4.2 above.

439 See Section 3 above.

or systematic compilations. When all this is taken into account, the chances of communication were very limited. The gap was filled by Anglo-American legal literature, but not just *any* literature. The authors favoured by South-Americans were those whose works were accessible to civilian lawyers. Bentham's anti-common law stance and his support of Parliament-made law and codification provided a bridge between South-American and English legal thinking. Blackstone's and Kent's *Commentaries*, with their institutional arrangement, and their frequent allusions to civil law provided another bridge. Moreover, Bentham's and Blackstone's works were published in French, demonstrating that the interest of civil lawyers in them was not just a local phenomenon of South America.

For instance, Pedro Bustamante, writing in the 1870s in Uruguay, epitomised the view of his contemporaries in explaining that Bentham´s ideas had passed *from England to France* and from *there* to South America. Vélez Sarsfield, in Argentina, owned French translations of Bentham's and Blackstone's works, and consulted a French account of English law produced by a French lawyer (Alexandre Laya). The interest of certain Anglo-American legal scholars in the civil law tradition, and of certain civilian lawyers in the common law created the main channels of communication.

The preceding analysis raises the question of how *genuine* the picture of Anglo-American law provided by that literature was. Or to put it more bluntly: were these genuine Anglo-American legal ideas *at all*? The distinction between ideas already embedded in Anglo-American law, on the one hand, and reformist legal ideas, on the other, helps to provide an answer. In the case of Blackstone and Kent, there seems to be

no doubt that their purpose was to present Anglo-American law *as it was*. The fact that their *Commentaries* were used in England and America for the formation of future common law lawyers makes clear that in their own countries they were regarded as accurate explanations of their legal systems. Moreover, in the common law, Blackstone's *Commentaries* were considered as one of the *books of authority*, that is, as 'good evidence of the law as it was at the time when they were written and therefore treated as primary or original sources of English law'.[440]

The fact that Blackstone's and Kent's works were used as introductory texts, however, may raise the suspicion that their content was too schematic, failing to represent Anglo-American law as *perceived* by an experienced Anglo-American practitioner immersed in all the *minutiae* and subtleties of common law practice. Nevertheless, even if that were true, it would not disqualify this literature as a useful means for the transmission of Anglo-American legal ideas.

Regarding Bentham, his characterization as a source of *English* legal ideas may seem quite awkward at first glance. He was a major critic of the common law and his ideas about codification had very limited impact in his native country. However, focusing only on those aspects would ignore that he was trained in English law, that his legal ideas were the product of reflection about English law, and that some of them impacted the evolution of *positive* English law. This was the case, most notably, with his radical defence of freedom of contract, and his arguments for the abolition of usury law, which were endorsed in England in 1854, and had an impact in legal reform in the United

440 Alexandra Braun, 'Burying the Living? The Citation of Legal Writings in English Courts' (2010) 58 American Journal of Comparative Law 27, 35.

States.

CHAPTER 3: ANGLO-AMERICAN AND SOUTH-AMERICAN INTESTATE SUCCESSION LAW

1. Introduction

1.1. Objective of this Chapter

In this chapter I explore a case of legislative use of Anglo-American legal ideas in the field of South-American intestate succession law. Spanish law, still in force in Spanish South America after independence, adopted a consanguine model of descent inspired by Roman law, where the surviving spouse only inherited from the deceased *after* all the collaterals of the tenth degree. According to Zimmermann, while Roman law, at the time of Justinian, took account of the surviving spouse only in exceptional situations, over the centuries the surviving spouse has become ever more prominent in intestate succession law.[441] In South America, I will show that, through a series of reforms beginning in the 1830s, and which were influenced by, and supported with, Bentham's ideas, and other Anglo-American sources, the position of the surviving spouse was substantially improved at the expense of the collateral relatives. Thus, a modern conception of conjugal family, enhancing the rights for the surviving spouse, was adopted as the framework for intestate succession law, which resulted in a move away from Spanish law and the French Civil Code, which had kept the traditional consanguine model of descent.[442]

Rules on intestate successions are concerned with cases where the deceased has not, or has not totally or validly, disposed of his or her assets through a will. This chapter

441 Reinhard Zimmermann, 'Das Ehegattenerbrecht in historisch-vergleichender Perspektive' in (2016) 80-1 Rabels Zeitschrift fuer Auslaendisches und Internationales Privatrecht 39-92.

442 Jan Peter Schmidt, 'Intestate Succession in Latin America' in Kenneth GC Reid, Marius J De Waal and Reinhard Zimmermann (eds) *Comparative Succession Law: Intestate Succession* (OUP 2015) 120.

focuses exclusively on the rights of the surviving spouse as an intestate heir. Other rights which Spanish or South-American legal systems granted to the surviving spouse, such as the *cuarta marital* or the *porción conyugal*, are, however, taken into account, as they partially operate as functional equivalents of inheritance rights. Regarding matrimonial property, under Spanish law it was governed by the regime of participation in profits (*sociedad de gananciales*), which was retained by the South-American Civil Codes analysed in this chapter.[443] Under that regime, the surviving spouse received half of the assets purchased during the marriage. In addition, under Spanish law, wealthy parents were obliged to provide a dowry to their daughters at marriage.[444] Under the new republican Civil Codes this obligation was eliminated. It has been suggested that the improvement of the rights of the suriving spouse in intestate succession was a compensation for the elimination of that obligation.[445] However, as will be explained below, the legal reform of intestate succession law in South America began some decades before the obligation to provide daughters with a dowry was eliminated. Thus, the connection between those two legal reforms can be doubted.

Intestate succession law may be organized on the basis of a consanguine or a conjugal conception of family. The main objective of patrilineal descent is to keep property ancestrally held by a family within that same blood family. Thus, if a married person dies without leaving children, property must go to his or her consanguine relatives and not to the surviving spouse. Succession based on the idea of a conjugal family, on the

443 Carmen Diana Deere–Magdalena León 'Liberalism and Married Women's Property Rights in Nineteenth-Century Latin America' (2005) 85:4 Hispanic America Historical Review, 652.

444 Laws 8 and 9 Title 11 *Partida* 4.

445 María Isabel Seoane, *Historia de la Dote en el Derecho Argentino* (Instituto de Investigaciones de Historia del Derecho 1982) 46-7.

contrary, is concerned with keeping property within the immediate members of the household of the deceased, such as the surviving spouse and the children.

1.2.Anglo-American Influence

There has been little systematic analysis of the origins of the reform in the area of intestate succession law.[446] I argue that the new intestate succession law was inspired, and strategically supported, by Anglo-American law and legal ideas, such as the seventeenth century English Statute of Distribution (22 & 23 Car II c 10), United States legislation and, in particular, the reformist legal ideas of Jeremy Bentham. These ideas influenced, directly, reforms in Uruguay, Chile and Argentina and, indirectly, reforms in Colombia, Venezuela, Paraguay and Bolivia where the Chilean and Argentinean Civil Codes were adopted as models. On the one hand, in Argentina and Uruguay, Bentham's utilitarian arguments about the expectations of the persons living with the deceased (the circle of companions) inspired Somellera to advance the position of the surviving spouse. Bello used the same argument in Chile to justifiy the relegation of collateral relatives. Kent's *Commentaries*, on the other hand, were strategically used by Bello to confront one of his critics (Güemes) by showing that an advanced jurisdiction (the United States) had adopted a legal reform that went in the same direction that he was suggesting.

A combination of factors explains this departure from Roman, Spanish and French law. First, at a political level, there was a wish of the lawyers and politicians of the newly founded republics to move away from the feudal or aristocratic model of

446 Deere–León (n 443) 628-9.

consanguine descent and, perhaps, the desire to improve the position of women as part of a liberal agenda.[447] Second, at the socio-economic level, there was a desire to adapt the law to the already nuclear or conjugal structure of families in some South-American countries.[448] Immigrant families in South America usually built their estates from scratch rather than benefiting from property ancestrally held in the family and, thus, adaptation of succession law was required.[449] In other words, this legal reform can be explained as an *adaptation* to some already existing circumstances and, as a deliberate attempt to further the change of those social circumstances in the direction of conjugal family. Most probably, different combinations of both explanations account for the changes in each of the legal systems addressed in this chapter. Anglo-American law and legal ideas, either as inspiration or as an argumentative device, had a role to play in all of these systems.

1.3.Plan of the Following Sections

In the next section, I explain intestate succession law in Roman, Spanish and French law. In the following one, the Anglo-American law and legal ideas that were used by South-American actors: English law, Jeremy Bentham's works, and United States legislation. Thereafter, I analyse the changes in succession law implemented between 1837 and 1869 in Uruguay, Chile and Argentina, in order to trace the Anglo-American influences at stake. Then, a brief mention is made to other South-American jurisdictions that followed the trend of Chile and Argentina, and were thus indirectly influenced by Anglo-American

447 Ibid 627.

448 Rafael Castellano- Julio R Lascano-Ramona L Meza-Adolfo Casablanca, 'La ley del 20 de mayo de 1857 del Estado de Buenos Aires sobre la Sucesión Ab Intestato del Cónyuge' (1971) 22 Revista del Instituto de Historia del Derecho Ricardo Levene 26.

449 Guillermo A Borda, *Manual de Sucesiones* (9th edition Perrot 1986) 283; Jorge O Perrino, *Derecho de las Sucesiones*: Volumen II (Abeledo Perriot 2011) 1346. Both cited in Schmidt (n 442) 142.

law and legal ideas on this subject. Lastly, some conclusions are presented.

2. Intestate Succession in the Civil Law Tradition

2.1.Roman Law

The Roman law of intestate succession went through different stages beginning with the XII tables and ending with Justinian's Novels 118 and 127.[450] The original Roman system developed around the agnatic principle under which heirs were the persons who had been under the *potestas* of the deceased, connected to him by male relationship, and who became *sui iuris* after his death. Under the XII tables the wife was considered under the *potestas* (*manu*) of her husband and was totally disconnected from her original family. She also received a share in the intestate succession of her husband. [451]

During the following centuries, wives ceased to be under the *manu* of their husbands.[452] Eventually Justinian abolished the old agnatic scheme of succession and introduced one based on, what had come to be considered, more *natural* relationships. Broadly speaking, in Justinian's Novels, succession went in the first place to the descendants; secondly, to the ascendants and siblings of the whole blood; thirdly, to half-brothers and half-sisters; fourthly, to other collaterals with no limit of remoteness, and,

450 Thomas Rüfner, 'Intestate Succession in Roman law' in Kenneth GC Reid, Marius J De Waal and Reinhard Zimmermann (eds) *Comparative Succession Law: Volume II: Intestate Succession* (OUP 2015) 2-32; Robert W Lee, *The Elements of Roman Law with a Translation of the Institutes of Justinian* (Sweet & Maxwell 1952) 257-8; Herbert F Jolowics, *Historical Introduction to the Study of Roman Law* (CUP 1932) 122-4 and 511; and William A Hunter, *A Systematic and Historical Exposition of Roman Law* (3rd. edn. Sweet & Maxwell 1897) 863-5.

451 Similarly, Germanic law, 'owing to its view of marriage bringing the wife into her husband's *mund*, gave increased rights in the succession to the spouses'. Cf. Thomas G Watkin, *An Historical Introduction to Modern Civil Law* (Aldershot 1999) 205.

452 Rüfner (n 450) 4.

lastly, only if all the previously mentioned failed to exist, to the surviving spouse. It has even been argued that surviving spouses were not originally included in the Novels and that they were added later in the *Basilica* compiled under the Byzantine Emperor, Leo the Wise (886-911 AD).[453]

In addition, Justinianic law provided for the so-called *quarter of the poor widow*. Based on Christian-humanitarian motives, Justinian improved the position of the surviving wife: the widow received one quarter of the deceased's estate if she concurred with up to three children and, if there were more than three children, she received the same portion of a child. However, the share due to the poor widow was not to exceed 100 pounds of gold (*aurei*).[454]

2.2. Spanish Law

Spanish law adopted a consanguine model of succession which was based in the Roman law regime of Novels 118 and 127, and 'was fully assumed into the thirteenth-century *Siete Partidas*', which were amended in 1505 by the *Leyes de Toro*. [455] The order of succession was the following: (i) descendants (ii) parents (iii) ascendants, (iv) collaterals up to the tenth degree, with collaterals of the full-blood totally *excluding* those of the half-blood. According to *Ley VI, Título XIII Partida 6ª*, if there were no ascendants,

453 Lee (n 450) 258.

454 Reinhard Zimmermann, 'Compulsory Heirship in Roman Law' in Kenneth Reid and Marius de Waal (eds) *Exploring the Law of Succession: Studies National, Historical and Comparative* (Edinburgh University Press 2007) 46-7.

455 For this Section: Sergio Cámara Lapuente, 'Intestate Succesion in Spanish law' in Kenneth GC Reid, Marius J De Waal and Reinhard Zimmermann (eds) *Comparative Succession Law:* Volume II*: Intestate Succession* (OUP 2015) 97-115; Pedro Somellera, *Principios de Derecho Civil* (Imprenta de los Expósitos 1824) 145-160; Castellano et al (n 448) 11-27.

descendants or collateral relatives up to the tenth degree, the surviving spouse was to inherit from the deceased.[456] Thus, in case of lack of children, property was kept in the respective families of the spouses, a 'feudal' characteristic against which South-American legal actors will react after independence.

By the end of the Spanish rule in South America, the situation of the surviving spouse was even worse. Late eighteenth-century Spanish legislation[457] completely ignored the rights of the surviving spouses in case of intestacy: if there were no collaterals of the fourth degree, the State inherited. It was only after the independence of South America that an Act of 1835 (known as *Ley de Bienes Mostrencos*) reintroduced the surviving spouses in the order of *ab intestate* succession, after collaterals of the fourth degree, and illegitimate children. However, as this Act only came into force after the independence, it never applied to South America, though it was used by some South-American lawyers as an argument to improve the position of the surviving spouse.[458] However, we should not be misled by that fact: the 1835 Spanish Act had not gone as far as the South-American reform of intestate succession law that will occur from 1837 onwards.

Finally, an additional feature of the *Partidas* was that, as under Justinianic law, they accorded to the 'poor' widow a quarter of the deceased's estate or a portion equal to the one of a child (dependant on there being to three or more children). This portion,

456 Ley VI, Título XIII, Partida 6.

457 Decree 27 November 1785 and Instruction of 26 August 1786 of King Charles III of Spain included in the *Novísima Recopilación* of 1805.

458 Augusto César Belluscio, 'La Sucesión Intestada en la Reforma del Código Civil' (1969) 40-41 Lecciones y Ensayos 28.

however, could not have a value exceeding 100 gold pounds (indistinctly known as the *cuarta marital* or *cuarta viudal*). It has been rightly pointed out that the *cuarta marital* fulfilled an alimentary function[459] in that it was a right made conditional on the surviving spouse being poor, that is, not having property the value of which was equal to, or higher than, the value of the *cuarta marital*. Furthermore, the value of any property that the surviving spouse already owned was to be deducted from the *cuarta marital*. Legal scholars suggested that it was 'very dubious' whether the rule on the *cuarta marital* was complied with,[460] or whether it was the case that it was 'rarely' claimed given that a claim usually led to 'scandalous litigation'[461] and that was, therefore, an 'illusory benefit'.[462] García Goyena, a Spanish legal scholar, went so far as to suggest that the requirement that the widow was 'poor' meant that the *cuarta marital* was 'not used at all' ('*completo no uso'*).[463] This explains why the *cuarta marital* was considered in need of reform, as it was perceived as an insufficient remedy for the situation of the surviving spouse.

In 1852, a draft for a Spanish Civil Code was published by Florencio García Goyena.[464] What is remarkable is that its article 773 granted the surviving spouse a share in the *ab-intestate* succession even when concurring with descendants. However, any

459 Schmidt (n 442) 141.

460 Dalmacio Vélez Sarsfield in his notes to the Argentinean Civil Code in República Argentina, *Código Civil de la República Argentina sancionado por el Honorable Congreso el 29 de setiembre de 1869*: Edición Oficial (Buenos Aires 1883) 850-1.

461 Preamble to the Civil Code of Venezuela of 1862 in *Código Civil: Edición Oficial* (Imprenta El Independiente 1862) xxiii.

462 Florencio García Goyena, *Concordancias, Motivos y Comentarios del Código Civil Español*: Tomo II (Imprenta de la Sociedad Tipográfico-Editorial 1852) 360.

463 Ibid.

464 Florencio García Goyena (n 462).

benefit granted to the surviving spouse under the marriage settlement (*capitulaciones matrimoniales*) was to be deducted from his or her share, which made this proposal a hybrid between inheritance rights and the rights of the spouse under marriage law. The publication of this draft, commented on at length by García Goyena, and much read by South-Americans,[465] came after the first South-American reforms were enacted between 1820 and 1850, as is explained in this chapter. As such, this publication surely was a additional influence on a reform which was already under way in South America, but it was not its *original* source.

2.3. French Law

As much as Spanish law, French law also had a definitely conservative outlook in the field of intestate succession. According to legislation enacted during the French Revolution,[466] whenever consanguine descendants, ascendants or collaterals of the deceased existed, they absolutely excluded the surviving spouse. Likewise, the Code Napoléon only granted hereditary rights to the surviving spouse if there was no other relative. Planiol and Ripert acknowledge that the presumed affection of the deceased was *not* taken into account, and that the main purpose of the rules was to prevent property being transferred from one family to another.[467] It has been noted by a French legal scholar that this was indeed a *conservative* model.[468] The surviving spouse was excluded

465 Enrique Martínez Paz, *Introducción al Derecho de la Sucesión Hereditaria* (Tipográfica Ed. Argentina 1953) 59.

466 Act of *17 Nivose an II*, and decrees of 22 November 1790, and 1st December 1790.

467 Marcel Planiol, George Ripert, *Traité Pratique de Droit Civil Francais, Tome IV, Successions* (2nd edn. Libraire Gènèrale de Droit et Jurisprudence 1956) 191-2.

468 Christian Jubault, *Droit Civil. Les successions. Les liberalitès* (2nd. edn. Monthchrestien 2010) 8.

by descendants, ascendants, collateral relatives (who would inherit up to the twelfth degree),[469] and illegitimate descendants. Spouses only preceded the State.[470] Thus, if nineteenth century South-American legal actors were looking for ideas to break with traditional intestate succession law, French law did not offer a suitable model.

3. Intestate Succession in Anglo-American Law

3.1.English Law

As we shall see below, South-American legal actors took inspiration from Anglo-American legal ideas to reform Spanish intestate succession law. During the nineteenth century, English rules for intestate succession to personalty and to realty differed. Broadly speaking, in the case of personalty, the surviving spouse took one third and the deceased's children took the remnant in equal parts. In the case of realty, it passed onto the heir 'which in a simple case meant the eldest living son'.[471]

The distribution of personal property was regulated by a statute from the seventeenth century: 22 & 23 Car II c 10. According to its provisions, once debts and funeral expenses had been paid, and one full year had elapsed, the intestate's personalty was to be distributed in the following way: one third was to go to the surviving spouse, and the residue was to be divided in equal shares between the children of the deceased or their representatives. In the absence of children or descendants, half of the property passed to the surviving spouse, and the other half to the *next of kin* (the relatives in the

469 Code Civil Article 755.

470 Code Civil Article 767.

471 Stuart Anderson, 'Property' in William Cornish et al (ed) *The Oxford History of the Laws of England*: Volume XII: 1820-1914: Private Law (OUP 2010) 5.

nearest degree, which excluded all the other). [472] Therefore, at least in the main forms of real estate, the surviving spouse did not participate at all in the intestate succession. Furthermore, while in relation to the intestate succession of personal property the surviving spouse was in better position than in Spain and France, it has been noted that the advantages were actually limited in practice: even by 1910, fewer than 7% of deceased adults had relevant estates in personalty that merited the following of intestate succession procedures (i.e. the granting of letters of administration).[473] The assimilation of real and personal property, improving the surviving spouse's position in relation to almost all real estate succession, was to come only through the Administration of Estates Act 1925.[474] However, during the nineteenth-century, the English model of intestate succession for movable property, based on a nuclear notion of family, was to be used as inspiration, or as a strategic argument, for the formation of South-American private law.

3.2. Bentham on Succession Law

3.2.1. Utilitarian Foundations of Succession Law.

Bentham's reformist ideas on intestate succession law were also used as inspiration in South America. Based on utilitarian arguments, Bentham advocated a system that in fact implied the extension of the English rules for movable property to real estate. As already mentioned in the preceding chapter, Bentham is well known as a severe critic of the

472 Peter Lovelass, The Law's Disposal of a Person's Estate who Dies without Will or Testament (12th edn. S Sweet 1838) 55, 137-8; Tapping Reeve, A treatise on the law of descents in the several United States of America (Collins & Hannay 1825) xxvi-lxxvii.

473 Anderson (n 471) 5.

474 Stephen Cretney, *Law, Law Reform and the Family* (OUP 1998) 249. Zimmermann (n…) 73.

common law.[475] Succession law was no exception. First, in his opinion, the common law of succession was obscure and to explain it 'it would be necessary to begin with a dictionary of new words'.[476] Second, the common law on succession was full of 'absurdities', 'subtleties', 'cruelties', and 'frauds'.[477] In Bentham's opinion, intestate succession law should rather be based on the principle of utility. The basis for his argument was a social fact: 'every man has about him a circle of companions …united to him by ties of kindred or of marriage [or] by friendship'. Within that circle 'his fortune is commonly the sole fund of subsistence on which many other depend'.[478] There were, thus, pains (and therefore, evils) to avoid when a person died. These were:

> [T]he calamities of which [the circle of companions of the deceased] would be the victims, if death in taking away their friend took from them at the same time the supplies which they draw from his fortune.[479]

According to Postema, utility as 'prevention of disappointment' was the form in which Bentham generally applied the principle of utility to matters of civil law (property, contract, etc).[480] The pain of disappointment in succession law was to be avoided by preferring, as heirs, the immediate circle of companions (children, surviving spouse, parents) over more remote relatives. From the start, Bentham's ideas were built around this 'circle of companions', a group of interdependent persons which enjoy reciprocally their fortunes. His description of this circle was that of a nuclear family.

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475 Gerald J Postema, *Bentham and the Common Law Tradition* (Clarendon Press Oxford 1989) 267-301.

476 Jeremy Bentham, *Theory of Legislation,* R. Hildreth (tr) (7th. edn. K Paul Trench Trübner 1891) 182.

477 Ibid 183.

478 Bentham (n 476) 177.

479 Ibid.

480 Postema (n 475) 417.

The next step in Bentham's argument was to define this 'circle of companions' by inquiring who are the people 'who habitually enjoy these supplies [i.e. the deceased's estate] and in what proportion'. In other words: who were the ones to suffer from the deprivation of the enjoyment of the deceased's fortune. It was only at this stage that the presumed 'degree of affection' of the deceased played its role. Presumed affection was the instrument for determining the persons that usually belonged to the 'circle of companions' (nuclear family), who enjoyed the deceased's property and, therefore, should be his or her heirs.

At first sight, Bentham's rationale looks similar to the one of civil law scholars, such as Hugo Grotius and Samuel Pufendorf. For those scholars, intestate succession seeks to give effect to the presumed intention and will of the deceased.[481] However, Bentham's argument was different. From his perspective, in order to maximise the general wellbeing of the community, the heirs should be the people that will most suffer from the deprivation of the enjoyment of the deceased's property. For the traditional doctrine, affection was to be presumed between blood relatives, but for Bentham the relevant affection was the one that led to live in the same circle of companions with the deceased, commonly enjoying his/her property. While, presumed affection based on blood may exist between the deceased and his/her collaterals, it would not usually lead collaterals to live together with the deceased in the same *circle of companions*. The spouse, instead, would naturally form part of that circle of companions. Thus, Bentham's rationale would reinforce the argument in favour of the rights of the surviving spouse,

481 Alexandra Braun, 'Intestate Succession in Italy' in Kenneth Reid, Marius de Waal, and Reinhard Zimmermann (eds) *Comparative Succession Law: Volume II: Intestate Succession* (OUP 2015) 68,69.

and the nuclear family, rather than the rights of the collaterals, and the consanguine model. This can explain the adoption of the Benthamite argument by South-American drafters of legislation when they were reforming intestate succession law in favour of the surviving spouse.

3.2.2. Bentham's Rules on Intestate Succession Law

Bentham also offered a 'model' of intestate succession law which was based on the foundations already explained. That model was formed by fifteen rules. Article I established that no differences based on sex should apply. Articles II and III provided that, first, 'the widow shall retain half the common property [and] the other half shall be distributed among the children'.[482] The use of the expression 'common property' here is disconcerting. It seems to suggest that the surviving spouse was only to retain half of the conjugal property (which was already his or hers), the children being assigned the other half of the same 'common property.' Furthermore, there was no mention of *other* property of the deceased. Bentham might have had an imperfect knowledge of this theme, and may have confused the distribution of conjugal property with succession. However, in my opinion Bentham must have taken 'common property' to comprise *all* the deceased's property, as there was no other rule indicating who should inherit the *other* property of the deceased (i.e. the one that was not 'common'), and it would be implausible to suggest that Bentham meant for the children not to inherit it. Therefore, the first order of succession included the children and the surviving spouse. The presence of the surviving spouse in that first order was one of Bentham's suggestions later adopted

482 Bentham (n 476) 178-9.

by South-American drafters of legislation. For Bentham, this was the direct consequence of taking the nuclear or conjugal family (the 'circle of companions') as the basis for organizing the succession.

According to article V, 'if there are no descendants, the property shall go in common to the father and the mother', who represented the second order.[483] In Bentham's opinion, parents should exclude siblings because, in their case, inheritance was 'a recompense for services rendered, or rather an indemnity for the pains and expense of educating a child'. Bentham acknowledged that a sibling was 'dear to [one]', but suggested there was a 'superior affection' for parents. He added that 'it is not certain that I am indebted to [my brother] for anything, but it is certain that I am indebted to [my parents] for everything'.[484] In the third order of inheritance, according to articles VI, VII and VIII of Bentham's model of law, were the siblings of the deceased, sharing with the surviving parent, if any. Finally, on Article X, Bentham proposed that in the absence of any of the relatives indicated above (i.e. descendants, spouse, parents, siblings, nephews and nieces) 'the property shall go into the public treasury', and thus not to other more remote collateral relatives. Bentham's argument for the exclusion of other collaterals was the following:

> It may be said that [the collaterals] who will be excluded by this arrangement may be in want. But this is too casual an accident to found a general rule upon. They have, as a natural resource, the property of their respective parents. [485]

483 Ibid 179.

484 Ibid 180.

485 Ibid 181.

He added that collaterals could only 'form their expectations' upon that basis.[486] This rejection of the rights of collaterals fitted the nuclear family model adopted by Bentham as the basis for the organisation of intestate succession law. Granting inheritance rights to other collaterals would have fit a consanguine model of descent. However, the model adopted by Bentham was different, being based on 'the circle of companions' of the deceased (i.e. the nuclear family). This central Benthamite idea was to have a relevant use during the formation of South-American intestate succession law. Bentham's model was similar to English law of intestate succession for movable property, but was not influential in changing the feudal model that prevailed in England regarding the intestate succession of real estate.

3.3.United States

Intestate succession law in the United States had many similarities with Bentham's model. Several States of the Union adopted the English Statute of Distribution of personal property (22 & 23 Car II c 10) as the model for succession law. What is more relevant, the application of the statute was extended to real property:

> [I]n most of the states in the union […] those statutes [22 & 23 Car II c 10] seem to have been the basis on which the laws of these states have been founded respecting descents, where a person seized of, or having a title to real property, has died intestate.[487]

Thus, regarding movable property, as much as in England, in the United States the position of the surviving spouse was in the first order of succession. However, unlike in

486 Ibid.

487 Reeve (n 472) xxvi.

England, in several states this applied to any kind of property. James Kent, whose writings on this field were also consulted in South America, also acknowledged that the English Statute of Distribution was 'pretty closely followed'[488] in many States of the Union. He cited as an example the Revised Statutes of New-York, in force since 1830, which, according to Kent, 'have essentially re-enacted the English Statute of Distributions'.[489] In Kent's words:

> [T]he descent of *real* and personal property [is] to the same persons, and in the same proportions; and the regulation [is] the same in substance in the English Statute of Distributions. Such a uniform rule in the descent of real and personal property gives simplicity and symmetry to the whole doctrine of descent. The English Statute of Distribution [was] well selected, as the most suitable and judicious basis on which to establish our American law of descent and distribution.[490]

Accordingly, the surviving spouse was included as an heir at the same level of the descendants of the deceased. Among the States that had adopted that approach, Kent listed Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, Virginia, Ohio, Indiana, Illinois, Georgia, Kentucky, Missouri, Mississippi, South Carolina and Alabama. According to Reeve, the main reason for the rejection of the English law of succession of real estates was that:

> The English common law of descents had its foundations in *principles of feudal policy* in no measure applicable to the existing state of things in this country, and *calculated to cherish* an *aristocratic spirit hostile to our republican forms of government*.[491]

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488 James Kent, *Commentaries on American Law*, Volume III (2nd edn. O Halsted 1832) 426-7; Reeve (n 472) xxvi.

489 Kent (n 488) 426.

490 Ibid 427-8.

491 Reeve (n 472) i-ii. Emphasis added.

Kent concurred: English succession law regarding real estate law had been, 'universally rejected […] in its most essential features' as it represented a projection of the 'martial policy of the feudal system'.[492]

4. Somellera and Uruguayan law

4.1.Pedro Somellera on Succession Law

4.1.1. Foundations of Succession Law.

As already explained,[493] Pedro Somellera, a lawyer and professor in Argentina and Uruguay, closely followed Bentham's *Traités* in his lectures, and in his textbook, *The Principles of Civil Law*. Regarding intestate succession, Somellera adopted Bentham's foundations and his 'model of law', but departed from it in some aspects. Somellera, like Bentham, reasoned from the basis of the 'circle of companions' of the deceased who 'participate in the enjoyment of goods that correspond only legally to [the deceased]'.[494] Avoiding the pain of those companions being deprived of such benefits was, in his opinion, the objective of succession law. In order to determine who were the members of that 'circle', it was 'necessary to make a calculus based on the principles that introduced them to such enjoyment'. This 'calculus' was to be based on the presumed affections of the deceased.[495] Somellera duly quoted Bentham in this section of his book, and the arguments he uses are almost identical to those deployed by Bentham. According to

492 James Kent, *Commentaries on American Law,* Volume IV (2nd edn. O Halsted 1832) 374, 382.

493 Chapter 2 Section 3.6.1.

494 Somellera (n 455) 146-7.

495 Ibid 147.

Somellera, succession law had three main objectives: the subsistence of the next generation, to avoid as much as possible the cessation of the benefits of the persons surviving the deceased and equality in the distribution of the goods.

4.1.2. Intestate Succession

Regarding intestate succession, more specifically, Somellera expressed the view that Bentham's model of law was *substantially* in accordance with Spanish law, though later in the book he suggested that there was one crucial aspect (the rights of surviving spouses) in which Spanish law was in need of correction:

> Bentham presents a proposal for an Act about *ab-intestato* successions in fifteen articles. Such proposal is substantially in accordance with what the laws in force among us provide.[496]

As mentioned above,[497] under Spanish law (then in force), the descendants excluded all the other relatives, and in the absence of descendants, the ascendants inherited. In the absence of ascendants, the collateral relatives, up to the tenth degree, inherited from the deceased, and the surviving spouse only inherited if there were no collaterals of the tenth degree or below. It was regarding this last rule that Somellera assumed a critical stance:

> In accordance with the principles on which we have founded intestate succession such disposition deserves to be corrected. Presumption of superiority of affection. Who would say that the deceased loved any family relatives in any degree, whom he may not have known of more than the *wife* with whom he jointly lived? […] The *wife* has enjoyed the property of her husband for the entire time of their union and, if excluded

496 Ibid 148.

497 Section 2.2.

by relatives of any degree, *her expectations [...] would be deceived*.[498]

However, at the time he wrote the book, he did not seem to have been entirely convinced. Hence, he added: 'but I do not dare to affirm it yet'. The Benthamite *pedigree* of the criticism is quite obvious here. Not only did Somellera quote Bentham throughout the entire chapter on intestate succession but, in addition, the arguments concretely invoked in relation to the surviving spouse were clearly Benthamite in nature. First, Somellera wrote, the 'union' with the deceased spouse suggests that the surviving spouse would have been able to 'enjoy the property' of the deceased. This is a paraphrase of the Benthamite argument about the circle of companions enjoying the property of each other. Second, he argued that the expectations of the surviving spouse should be protected to avoid the evil of frustrated expectations, otherwise 'her expectations [...] would be deceived', which is a typical utilitarian argument.

Apart from its Benthamite pedigree, it is worth noting two additional characteristics of Somellera's opinion. First, on several occasions, Somellera refers only to the *widow* or the *wife,* and not to the surviving spouse more generally. He was clear that his solution applied to both spouses, but it seems that, for practical purposes, he was more concerned with the situation of the female spouse. This seems to be in line with the suggestion of those who argue that the changes in South-American succession law during the nineteenth century were aimed at improving *women's* property rights.[499] Second, Somellera held that women 'among us' (i.e. Spanish-Americans) 'generally participate in

498 Ibid 154. Emphasis added.

499 Deere-León (n 446) 627.

all of the men's acquisitions'.[500] This comment from Somellera is connected with one of the overarching topics of this thesis, as it suggests that the reform of intestate succession was part of an *adaptation* of the law to the social and economic realities of South-American families, an adaptation that was *strategically* justified by resorting to Anglo-American legal ideas. In other words, Somellera also used these ideas to support his *own* plan.

4.1.3. The Cuarta Marital

Somellera praised the Spanish institution of the *cuarta marital*:

> [Under Spanish law] [t]he *wife inherits* from the husband that dies, whether he has descendants or ascendants or not, one quarter of the property provided she did not had enough [property] or she is not entitled to it. This Spanish rule merits being translated [into Argentinean law]. It *enacts the principles that we have made use of in this chapter*.[501]

In Somellera's opinion, the *cuarta marital* could be understood or justified by the foundations of succession law endorsed by Bentham and himself. In his opinion, the *cuarta marital* adequately dealt with the situation of the surviving spouse in case of testamentary succession, but reform of succession law was required in the case of *intestate* succession: there, the surviving spouse should *exclude the collaterals*.

4.2.The Uruguayan Act of 1837

As already mentioned in the previous chapter, Somellera was exiled in Uruguay during

500 Ibid 150.

501 Ibid 159. Emphasis added.

the 1830s and 1840s, where he was active both as a lawyer and as a law professor. During that time he drafted the Uruguayan Act of 16 June 1837,[502] which reformed the order of *ab-intestate* successions in Uruguay. Its only article read as follows:

> In the absence of legitimate or illegitimate descendants and ascendants, and in the first place before any *ab-intestate* heirs, the law calls the husband to inherit from the wife, and the latter to inherit from the former, provided that they were not legally or *de facto* separated.

Thus, the position of the surviving spouse in intestate succession law was strongly improved, as she/he moved from being excluded by the collaterals up to the tenth degree, to a situation in which she/he excluded all collaterals. This modification aside, Spanish law was not, however, abrogated. By 1837, then, Somellera's ideas were fully implemented in Uruguay: the *cuarta marital* was retained (under Spanish law still in force), and the position of the surviving spouse in intestate succession improved. As a consequence, Bentham's ideas influenced the reform of intestate succession law in Uruguay. Thus, although as we saw earlier, Somellera a was at first hesitant, thirteen years after publishing his book, he was convinced, and had convinced others, of the soundness of the need to improve the position of the spouse. This can not be surprising, given the widespread reading of Bentham in Uruguay during the 1830s, as highlighted in the previous chapter.[503]

During the 1850s, Eduardo Acevedo, a prominent Uruguayan lawyer and politician, drafted the first draft of a Uruguayan Civil Code (never enacted but used as the

502 Juan María Gutiérrez, Noticias Históricas sobre Origen y Desarrollo de la Enseñanza Pública y Superior en Buenos Aires (La Cultura Argentina 1915) 542; Abel Cháneton, Historia de Vélez Sarsfield: Tomo II: La Obra (Librería y Editorial La Facultad 1937) 60.

503 See Chapter 2 Sections 3.5.1 and 3.6.1.

basis for the final draft of the Uruguayan Civil Code of 1868) which incorporated the reforms of the 1837 Act. Article 1124 of Acevedo's draft reads as follows:

> When the deceased leaves no legitimate or illegitimate descendants or ascendants, the non-divorced surviving spouse shall succeed him.[504]

In his notes to article 1124, Acevedo invoked the 1837 Act as its source. Furthermore, Acevedo highlighted in his notes a slight modification he had introduced: only *legally* divorced spouses were *excluded* from the succession, but the 'factually separated' ones were *included*. The concept of 'factually separated' spouses may have seemed problematic due to its uncertainty. Nevertheless, it is worth noting that Acevedo proposed to resolve this difficulty by taking a further step in the direction of improving the spouse's position: even *factually separated* spouses *were* granted inheritance rights.

4.3.The Uruguayan Civil Code of 1868

The 1837 Act, and Acevedo's draft Civil Code of 1852, was followed by the Uruguayan Civil Code, enacted in 1868. The Civil Code of 1868 ameliorated the situation of the surviving spouse even further, and he/she came to be excluded from the succession *only* by legitimate descendants of the deceased. In the absence of such descendants, the surviving spouse was to share the inheritance with the ascendants and the illegitimate children of the deceased. Differently from the Uruguayan Act of 1837, however, if there were no ascendants or illegitimate children, the surviving spouse shared with the siblings of the deceased as well as adoptive children.[505] Unlike Acevedo, Tristán Narvaja, the

504 Eduardo Acevedo, *Proyecto de un Código Civil* (Montevideo 1851) 248.

505 Eduardo Vaz Ferreira, *Tratado de las Sucesiones*: Tomo Cuarto (Barreiro y Ramos 1981) 68-9.

drafter of the 1868 Code, did *not* refer to the 1837 Act in his comments, nor did he mention its Benthamite origins. Nevertheless, he noted that this provision was 'in contrast with all the European Codes'.[506] Clearly then, he was aware of parting company with the European civil law tradition. The Uruguayan Civil Code of 1868, though it made the surviving spouse share with the siblings of the deceased, *pushed* the rights of the surviving spouse upwards, providing for the spouse to share the deceased's estate with the ascendants and the illegitimate children, something which the 1837 Act had not done.

Furthermore, a modified version of the Spanish *cuarta marital* was included in the Uruguayan Civil Code of 1868 under the denomination of *porción conyugal* (conjugal portion). When the surviving spouse concurred with legitimate children, and even in the case of testamentary succession, he or she was entitled to the conjugal portion (*porción conyugal*). This institution was modelled on the Spanish *cuarta marital* (a source that the drafter acknowledged).[507] According to article 836 of the Uruguayan Civil Code:

> The conjugal portion is that part of the estate of the pre-deceased spouse that the law assigns to the surviving spouse that lacks what is necessary for his or her congruous maintenance.

Article 840 of the same Code provides that, if the surviving spouse already owned some property, its value should be deducted from the conjugal portion. Later, by an Act of 12 July 1909, the position of the surviving spouse was improved even further in Uruguay. In the absence of descendants and ascendants the spouse came to be the only heir, *excluding*

506 Tristán Narvaja, Fuentes, Notas y Concordancias del Código Civil de la República Oriental del Uruguay (Tipografía y Litografía Oriental 1910) 165.

507 Narvaja (n 506) 133, quotes *Ley 7 Título13 Partida 6.*

the siblings of the deceased.[508] This progressive amelioration of the situation of the surviving spouse during the decades beginning with the Uruguayan Act of 1837, shows that its basic principle was widely accepted. It was not a short-lived reform but one that would become a long-standing feature of Uruguayan law.

Thus, Bentham's ideas on intestate succession law were used for academic and legislative purposes. The direct influence of Bentham on the Uruguayan Act of 1837, was reflected later, as an indirect influence, in the Uruguayan Civil Code of 1868. The legislative use of Bentham's ideas in those cases was unacknowledged, but clear.

5. The Chilean Civil Code of 1855

5.1.The Rules on Intestate Succession

The Chilean Civil Code of 1855 too improved the position of the surviving spouse at the expense of the collateral relatives. The debate between the drafter of the Code (Andrés Bello), and a local law professor of the *Instituto de Chile* (Miguel María Güemes), provides interesting information about the influence of Anglo-American law and ideas on Bello's draft of the chapter on intestate succession law. When the draft chapter of the Code was published, Bello expressed the view that intestate succession was 'the most defective part of [Spanish] civil legislation'.[509] The message of the Chilean government which accompanied the Bill containing the Civil Code too acknowledged that:

> [T]he intestate succession is the part in which this draft takes *more*

508 Art. 988 of the Uruguayan Civil Code of 1868.

509 Alejandro Guzmán Brito, Andrés Bello Codificador: Historia de la Fijación y Codificación del Derecho Civil en Chile: Tomo II (Ediciones de la Universidad de Chile 1982) 174-5.

> *distance from that which currently exists* […] the position of the spouse and illegitimate children has been notably ameliorated […] the surviving spouse is called by the law to one portion of the intestate succession when there are no legitimate descendants.[510]

The surviving spouse was called to the intestate succession immediately after the legitimate descendants, but, unlike Uruguay, he/she did *not* exclude *all* the other collaterals. The surviving spouse took after the legitimate descendants and shared with collaterals of the second degree (siblings). When compared with Spanish law, the position of the surviving spouse was, thus, notably improved by the Chilean Civil Code. From being excluded by the collaterals up to the tenth degree, the spouse came to be totally excluded only by legitimate descendants, otherwise sharing the inheritance with the ascendants, illegitimate children, and siblings, and excluding all the other collaterals. When there were legitimate descendants, the surviving spouse was entitled to the *porción conyugal*. Certainly, this was not *identical* with the position of the surviving spouse in the United States nor with Bentham's rules, but, as explained below, it was consistent with the general concept of the surviving spouse being one of the *natural* heirs of the deceased. The main difference with these Anglo-American sources examined above was that the surviving spouse was *not* called to the intestate succession *jointly* with the legitimate children. However, the spouse, when concurring with children, was granted the *'porción conyugal'* both in the case of testate and intestate successions. This institution bore a strong resemblance to the Spanish *cuarta marital*, [511] and, thus, it was an alimentary right, quite different from an inheritance right. It was granted only if the

510 Manuel Amunátegui (ed) *Código Civil de la República de Chile* (Valparaíso 1865) vii.

511 Hugo H Vilches Fuentes, 'Notas para una Historia de la Porción Conyugal: en el Derecho Justinianeo y en el Código Civil Chileno' (2005) 32 (3) Revista Chilena de Derecho 439-462.

spouse was poor, as already explained.[512] According to article 1172 of the Chilean Civil Code:

> The conjugal portion is that part of the estate of a deceased person that the law assigns to the surviving spouse that lacks what is necessary for his or her congruous maintenance.

In accordance with article 1176 of the Chilean Code, if the surviving spouse already owned property, it should be deducted from the value of the conjugal portion.

5.2.Anglo-American Legal Ideas in Action: the Bello-Güemes Debate

5.2.1. An Overview of the Debate

That Anglo-American legal ideas influenced the provisions of the Chilean Civil Code on intestate succession is clearly shown by a debate recorded in the pages of *El Araucano*, a newspaper published in Santiago de Chile. The debate took place during 1842 and 1843 between Andrés Bello, the author of several drafts of the Chilean Civil Code, and Miguel María Güemes, an Argentinean lawyer and Roman law professor established in Chile.[513] This debate unfolded long before the enactment of the Chilean Civil Code, but after the first draft of the chapter on succession law was published in the press in 1841.[514] Although in the first draft, the rights of the surviving spouse were not ameliorated as

512 See Section 2.2 above.

513 Miguel María Güemes (1815-1868) was a lawyer who, since 1841, was the professor of Roman law at the *Instituto Nacional*. Cf. Hugo Hanisch Espíndola, 'Los ochenta años de influencia de Andrés Bello en la enseñanza del Derecho Romano en Chile' Facultad de Derecho Universidad de Chile *Congreso Internacional "Andrés Bello y el Derecho"* (Editorial Jurídica de Chile 1982) 161,175.

514 For all the references to Güemes' and Bello's interventions in the debate: Andrés Bello, *Obras Completas de don Andrés Bello: Volumen IX: Opúsculos Jurídicos* (Imprenta Pedro G Ramírez 1885) 304-400.

much as in as in the final version of the Code, Güemes opposed the innovation. The surviving spouse did *not* concur with the descendants, ascendants or the legitimate siblings of the deceased, but concurred with the collateral relatives from the third to the sixth degree, and was the only heir in case there were no collaterals within the first six degrees.[515] In support of this change Bello invoked English and United States succession laws, and Bentham's works. By contrast, Güemes argued that the rights of the surviving spouse should not be improved that much, and in his support invoked Roman, Spanish and French law. Bello explicitly recognised those traditional sources as being in *opposition* to his innovations.

This illustrates that the ideas of certain Anglo-American sources inspired, or at least, were taken as the main argumentative support for the reform. These sources were taken as evidence of the practicability and reasonableness of the new model and, impliedly, they provided it with *politically* modern credentials. The debate between Bello and Güemes is worth a brief analysis in order to compare the use of legal arguments and the conceptions of family which lied behind the legal rules suggested by each side.

5.2.2. Güemes' Position

Güemes was opposed to the reform suggested by Bello, though he admitted that some *more moderate* improvement of the surviving spouse position was required. In his opinion, the spouse should *concur* with the collaterals up to the tenth degree, but not exclude them from the sixth degree onwards. Therefore, and most relevant to this chapter,

515 First Draft of the Chilean Civil Code published between 1841 and 1845. The corresponding provisions were Articles 23 and 25 of the Title II published between May 1841 and August 1842 in the newspaper *El Araucano*.

he criticized Bello's draft of the Code on the basis of the spouse excluding collaterals. He was also critical of the exclusion from the succession of the collaterals beyond the sixth degree from the succession, as this was in contrast with the Spanish rule of the tenth degree, and the French rule of the twelfth degree. His arguments were based on Roman, Spanish and French law. Moreover, regarding half-siblings, he accused Bello of having misunderstood the French Civil Code.

5.2.3. Bello's Use of Anglo-American Law.

In his reply to Güemes, Bello made use of Anglo-American law against Roman, Spanish and French law in order to support his proposal of improvement of the rights of the surviving spouse:

> To the Roman, Spanish and French legislation that are cited in [Güeme´s] article, the legislation of England and the United States may be opposed […] In accordance with the Revised Statutes of New York, which are in force since January 1st 1830, and that had only reproduced in its essence English law, there being descendants, a third of the personal property of the deceased without testament goes to his widow; concurring father and mother, a half; not concurring father or mother, brothers or nephews, the whole.

Regarding English law, which was invoked in favour of the reform, Bello identified the distinction between personal and real property, and then proceeded to remark on the development that had occurred in the United States:

> It is true that in England real property is subject to peculiar rules derived from the feudal system, but in a majority of the United States the transfer of both species of property goes to the same persons and in the same proportions. This uniformity is observed in the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, Virginia, Ohio, Indiana, Illinois, Georgia, Kentucky,

Missouri, Mississippi, South Carolina and Alabama.

Bello took his information directly from Kent's Commentaries *of American Law*. He repeatedly used a copy of the 1832 edition of the Commentaries, which he quoted during this debate.[516] The information, and the list of States that had a uniform system of intestate succession mentioned by him in his articles in *El Araucano*, was identical to that in Kent's *Commentaries*. Even the order in which those States were mentioned was the same.[517] Allusions to United States legislation by Bello could not have come as a surprise to the readers. When the process of drafting the Civil Code began, Bello expressed that, for the purpose of building it, Chile had 'at hand all the intellectual acquisitions of […] the old Europe, and all that North America […] had added to that opulent heritage'.[518]

5.2.4. Bello's use of Bentham's Legal Ideas

Bello also relied on Bentham's ideas in order to argue in favour of his suggested reform. Bentham was mentioned in relation to both the surviving spouse's rights, and the position of the half-blood-siblings. With regards to the surviving spouse, Bello indicated that 'Bentham in his Principles of a Civil Code […] always assigns [to the surviving spouse] a considerable portion of the intestate inheritance'. Moreover, Bello borrowed from Bentham the argument for excluding or postponing collaterals: 'the natural resource of the collaterals is the estate of their parents, they could have not placed their hopes on

516 Bello (n 514) 314.

517 See Section 3.3 above.

518 Guzmán Brito (n 509) 176. The extract comes from an article in *El Araucano* (Santiago de Chile, 21 May 1841).

another basis'.[519] This argument against collaterals was a typically utilitarian one: no expectations were to be disappointed if they were excluded.

Bentham´s influence on Chilean intestate succession law was not restricted to the matter of the surviving spouse. In relation to half-blood siblings, Bello *explicitly acknowledged* that Article 990 (4) of the Chilean Civil Code was 'exactly' the same as Article IX of Bentham's proposed model of intestate succession law.[520] Bello endorsed Bentham's idea of granting the half-blood siblings, half the portion of full-blood ones. This solution differed from the one of Spanish law where full-blood siblings excluded half-blood ones,[521] and from French law where the inheritance rights of siblings were allocated according to their line of descent. [522]

Moreover, when Bello argued in favour of changing the system of representation of Spanish law,[523] he also used utilitarian ideas, overtly quoting Bentham´s *Traités.* [524] Under Spanish law, representation in succession law of the siblings of the deceased by their respective children proceeded *per capita*. [525] For instance, if two siblings of the deceased pre-deceased him/her, and they respectively had one and three children each,

519 The extensive quotation is identical to the same paragraph in Ramón Salas' translation of Bentham's Traités: Jeremías Bentham, Tratados de Legislación Civil y Penal: obra extractada de los manuscritos del señor Jeremias Bentham por Esteban Dumont y traducida al castellano por Ramón Salas (Imprenta de D Fermín Villalpando 1821).

520 Bello, *Opúsculos* (n 514) 335.

521 Cámara (n 455) 100; Schmidt (n 442) 134.

522 Julien Bonnecase, *Tratado Elemental de Derecho Civil*: Volumen 2 (Harla 1997) 569

523 Adopted by Article 985 of the Chilean Civil Code (1855).

524 Andrés Bello, *Obras Completas*: Tomo XIII: *Código Civil de la República de Chile*, Volumen II (Ministerio de Educación 1955) 56.

525 Law 5 Title 13 Partida 6: 'heredaran los sobrinos los bienes de su tio, e partirlos an entre si por cabeças'.

each niece or nephew of the deceased would receive *one quarter* of the assets. Bello made them inherit *per stirpes* (ie in the previous example, half the assets being granted to the *family* of each sibling of the deceased). As Schmidt noted,[526] Bello, explicitly quoting Bentham, argued, in an obviously utilitarian fashion, that representation *per capita* was worst because it 'produces more evil than good' as it would 'disappoint the expectations' of the grand-children about the portion that their *family* would have received if their parent had not died. Thus, Bentham's influence in the Chilean Civil Code was particularly clear, and overtly acknowledged, and comprised several issues.

5.2.5. Bello's Misleading Use of a Roman Law Argument

There is an interesting aspect of Bello's arguments, where he tries to conceal the innovative nature of his proposal on the rights of the surviving spouses. Bello agreed that Roman law did not support his proposal. However, he used a misleading argument by way of response to Güemes: in classical Roman law (under the XII tables) the wife inherited from the husband, concurring with the descendants. In his opinion, the subsequent exclusion of the wife had been motivated by the frequency of divorces. Therefore, when marriage became indissoluble under Christianity, it seemed reasonable to go back to the classical Roman system. This argument had two flaws: first, it was precisely a *Christian* Emperor (Justinian) who endorsed a system opposed to the XII tables and, second, there was a relevant difference between the wives of classical Roman law, and those of the Christian period. In classic Roman law, the wife *abandoned* her original family and came into the *manu* of the husband. Therefore, if her husband died

526 Schmidt (n 442) 128.

without issue, the risk of *his* property leaving *his* family did not exist. In Christian marriage, no matter how indissoluble it was, the wife did not sever her legal ties with her paternal family. The misleading nature of Bello's argument was contested by Güemes: 'during the primitive times of the Roman Republic [the wife] was a slave' of the husband and, as such, parallelism with the present is inappropriate. Güemes was not deceived by Bello's tricky argument. He understood that Bello's only workable comparative law arguments were Anglo-American.

5.2.6. Güemes' Argument Based on Social Traditions

Güemes retaliated. In his opinion, social tradition and the alleged lack of prestige of Anglo-American law in the eyes of civilian lawyers, counted against Bello's ideas. Regarding social traditions or customs, Güemes expressed his concerns about borrowing from common law jurisdictions:

> Can we expect any utility from taking as models of our laws those of the English nation, with which there is not only difference, but opposition, of customs? […] We cannot fear this with respect to the Roman legislation, though old, but to which we can say we are accustomed, as we are accustomed to the Spanish one, its primogenital child.

However, the need for succession law to reflect *local* social institutions was remarked upon, and the modernity of English law, relative to 'old' Roman law, acknowledged. Güemes' passage provides two additional interesting pieces of information. First, he regarded vernacular social institutions as essentially derived from the centuries-old application of Roman law concepts. Second, there was no rejection of the use of comparative law arguments to the extent that they remained within the civil law tradition.

Since the new republics had been subject for centuries to Spanish law, the comparability of their social practices with Spanish law was taken for granted. That idea illustrates the need for a reconsideration of what the term 'indigenous' social practices[527] means in the context of a colonial society, at least for its elites. In this case, the indigenous tradition was seen as equivalent to that of the mother country *legislation*. However, I would argue that, within societies undergoing political and social change, the tension between *indigenous social traditions* and *foreign law* should be understood in a peculiar manner. Foreign law coming from countries regarded as models for political change may recommend themselves for their 'opposition' with local traditions. In my opinion that was Bello's point, as is explained below.

5.2.7. Purely Legal v Political Prestige of Anglo-American Law

As already mentioned, Güemes pointed, among other things, to the lack of prestige of Anglo-American law in the eyes of civilian lawyers:

> [W]e do not believe that English legislation has the celebrity of the Roman and Spanish ones nor of the French Code. Regarding the United States …excepting the one of Louisiana… we have never seen an honourable mention of its legislation.

Güemes' argument stressed the limited appeal (lack of 'celebrity') of Anglo-American law in South America. In other words, he dismissed Bello's comparative law arguments on the sole basis that they came from common law jurisdictions. Significantly, from the United States, Güemes singled out Louisiana, a civil law jurisdiction, as the only one

527 Marius J De Waal, 'Comparative Succession Law' in Mathias Reimann and Reinhard Zimmermann (ed) *The Oxford Handbook of Comparative Law* (OUP 2006) 1072-3.

from which it would be justified, in his opinion, to take inspiration. This was understandable given the nature of the education of local lawyers, and the long tradition of studying Roman law. If this was true, why was it that Andrés Bello used Anglo-American law as an argument in this debate? What appeal did Anglo-American ideas have for him? My claim is that, though they lacked prestige *in the eyes of lawyers* concerned only with purely legal arguments, they had good *political* credentials within the context of the *anglomania* referred to in the previous chapter.[528] For instance, in an 1830 article, Bello had identified England, France and the United States as the main countries having 'truly liberal institutions', [529] while in the 1840s, Federico Errázuriz, a renowned Chilean lawyer and politician, described England as 'the *avant garde* of civilized nations'.[530]

Therefore, given that there was a certain consensus that the situation of the spouse required improvement (to a certain extent Güemes himself agreed), it was natural to look to the models which the South-Americans had politically come to identify themselves with. The purely legal superiority of Roman, Spanish and French law perceived by South-American lawyers was balanced by the political appeal of the Anglo-American legal ideas. Thus, when French law was conservative, as it happened in this case, it seemed natural for South-American lawyers to look to England and the United States for inspiration and arguments.

528 Chapter 2 Section 2.

529 Article in *El Araucano* during 1830, transcribed in Bello (n 514) 6.

530 Federico Errázuriz, 'Memoria leída a la Facultad de Leyes el 2 de Setiembre de 1846' in Alejandro Guzmán Brito, *Andrés Bello Codificador: Historia de la Fijación y Codificación del Derecho Civil en Chile*, Tomo II (Ediciones de la Universidad de Chile 1982) 283.

I argue that this was the prestige to which Bello was appealing to when using these sources to advance his draft. From a South-American perspective, the solution of the paradox was that Anglo-American law was regarded by many as *politically* desirable. This also explains why those ideas were used to confront local traditions. They represented a political model which could guide the reform of traditions in order to make social institutions consistent with the new, more liberal order.

5.2.8. The *Cuarta Marital* in the Debate

Finally, a misleading argument from Güemes, needs to be analysed. If not explained, it may be wrongly taken as showing that there was no real Anglo-American influence on this subject. In one of his articles in *El Araucano*, Güemes argued that the reform proposed by Bello was *unnecessary* because Spanish law already granted the surviving spouse the *cuarta marital*. As already explained, Spanish law accorded to the 'poor' widow a quarter of the deceased estate or the same share as a child, something very similar to the *porción conyugal* under the Chilean Civil Code.

However, even if that was true, Güemes was wrong in presenting this as the focus of his discussion with Bello. The real focus of the discussion between Bello and Güemes was the exclusion of collaterals by the surviving spouse. The rule from Spanish law granted the surviving spouse participation in any succession *concurring* with collaterals, but never *displacing* them. The *cuarta marital* operating *jointly* with Bello's reform put the surviving spouse in a position that was nearer to that accorded to the surviving spouse under United States legislation, or under Bentham's proposal. However, in the absence of Bello's reform, the *cuarta marital* or *porción conyugal* would not have put the surviving

spouse in that position: the surviving spouse would have never *excluded collaterals*.

The fact that Güemes argued against the reform is good evidence that the *cuarta marital*, taken *together* with the rules of intestacy under *Spanish* law, did *not* put the surviving spouse in the same position as Bello's draft would have. If that had been the case, Güemes would not have opposed Bello's reform, as it would have merely involved a change in the *denomination* of the rights involved. But Güemes had grasped that there was a difference and, as a result, opposed the draft. His allusion to the *cuarta marital* was misleading. Bello's use of the *cuarta marital* (under the name of *porción conyugal*) was strategic. Like Somellera in the past, Bello was aware that the *cuarta marital* was an old institution that fitted his reformist program, but also that the complete development of that program required that intestate succession law be amended.

5.3.Summary

The preceding sections offered an overview of the use of Anglo-American legal ideas in the context of the reform of intestate succession laws in Chile. In particular, the Bello-Güemes debate provides valuable evidence for two related points: the use of Anglo-American law and legal ideas on an array of matters within succession law, and the different attitudes South-American legal actors adopted towards those sources.

The influence of Bentham, English Law and United States law was overtly acknowledged, not only in connection with the rights of the surviving spouse, but also in relation to the rights of half-siblings, and with regards to the institution of representation within succession law. Furthermore, Güemes' opposition to Bello's proposal shows

differences in the reactions that Anglo-American law generated among South-American legal actors. On the one hand, Bello was stressing their modern and liberal credentials, while, on the other, Güemes was focusing on the lack of purely legal 'celebrity' of Anglo-American ideas among South-American lawyers who were trained in the civil law tradition.

6. The Buenos Aires Act of 1857 and the Argentinean Civil Code of 1869

6.1.Somellera's Disciples in the University of Buenos Aires

During the thirty years following the publication of the already mentioned Somellera's book *Principles of Civil Law* in 1824,[531] in which, based on Bentham's ideas, Somellera advocated the improvement of the rights of the surviving spouses, eight doctoral theses were produced in the University of Buenos Aires arguing in the same sense.[532] The Argentinean legal historians, Castellano et al, summarize the content of these theses as follows:

> [The theses] invoke in favour of the innovations … old Spanish *foral* dispositions [533]… the ideas of *Bentham* and other thinkers and the *new social practices* that have given the *woman* a better place in society with better rights.

Three theses in particular provide clear evidence of the influence of Anglo-American ideas behind this trend. First, the thesis of Vicente Peralta (1837) expressly mentioned Bentham's model of law of intestate succession. Peralta endorsed the idea that collaterals

531 See chapter 2 Section 3.6.1.

532 The following references to the doctoral theses are reproduced from Castellano (n 448) 19-22.

533 Local customs of some regions of Spain.

do not 'co-participate [with the deceased] in sufferings and fortunes' and, hence, that 'the wife should be preferred to the collaterals'. He also pointed to the political reasons for improving the situation of the widow: 'the lights of our century cannot follow the path of obscurantism that made the woman a very inferior being'. It must be noted (as in Somellera) that, in their own perception, these authors were advancing *women's* rights, though formally their proposals applied to both spouses. Second, Manuel Castaño's thesis (1852) quotes both Somellera and Bentham, and suggests that the surviving spouse should be preferred over the collaterals. Lastly, Juan Antonio García in his thesis of 1849 argues that: 'the United States of America, Chile and the *Banda Oriental* [Uruguay] had given themselves new civil legislation' preferring surviving spouses over collaterals. García's thesis shows that, by 1849, the Uruguayan and Chilean reforms were also known, and taken into account by Argentinean lawyers, and that they were regarded by contemporaries as sharing the same pattern with Anglo-American legislation (from the United States). Thus, there were both direct and indirect Anglo-American influences at play by that time in Argentina.

It is interesting to note also that several theses advanced political arguments in faour of enhancing the rights of the surviving spouses. For instance, Eduardo Basabilbaso, in his thesis of 1855, considered that Spanish intestate succession law had a political objective:

> [T]he purpose of the nobility that supports in this way the conservation of family names, [the law of Spain was] the law of a monarchical country that needs to preserve a certain number of families.

Basabilbaso was clearly referring to the contraposition between the consanguine model of

family, favoured by the aristocratic structure of Spanish society, and the nuclear family, which he associated with anti-monarchical ideals. In the same vein, Juan Antonio García suggested that: 'the Kings of Spain wanted… to foment the noble and privileged class' but that South America should adapt its legal institutions to the republican regime.

With regards to their contemporary social institutions, García also argued that Spanish law was in 'open contradiction with the current situation of Argentinean society'. Hence, García also believed that improving the surviving spouse's rights was necessary in order to adapt succession law to the already existing social realities of his country, something that will be further explored in the conclusions of this chapter.

These theses, thus, confirm that Somellera's suggestion in his book, the example of the Uruguayan Act of 1837, and the discussions of the draft of the Chilean Code of 1855, influenced the following generations of lawyers who graduated from the University of Buenos Aires.

What is more, those developments influenced Argentinean legislation: during the 1850s, private law legislation was within the competence of the provincial Parliaments that formed the Argentinean Confederation,[534] and, in 1855, the province of La Rioja followed, in 1856, by the province of Jujuy, introduced Acts that were similar to the Uruguayan Act of 1837 drafted by Somellera. Following this, in 1857 the Province of Buenos Aires reformed its intestate succession law and the rights of the surviving spouse were improved.

534 Article 105 of the Argentinean Constitution of 1853.

6.2. Reform of Intestate Succession Law in Buenos Aires

The Buenos Aires Act of 20 May 1857 (Articles 1 and 2) provided that:

> In intestate successions, in the absence of mandatory heirs, the legitimate wife shall succeed the husband, and the latter shall succeed the former, excluding any collateral.
>
> In case of judicial separation, during which the death of one of the spouses occurs, the one who caused the separation shall loose the right that is granted by this Act.

Thus, the surviving spouse took after descendants and ascendants (as these were the 'mandatory heirs' referred to in the Act), but excluded all collaterals. This was the same solution as that adopted by the Uruguayan Act of 1837, which Somellera had drafted.

During the debates, members of the Buenos Aires Parliament expressed three different lines of thought about the position that the spouse should occupy in intestate succession. First, some of them suggested a balance between innovation and local traditions. They believed that the situation of the spouse should be improved, but that the collaterals should not be excluded. Juan B. Peña, for example, argued that 'tradition is, up to a certain point, attacked' and suggested that the spouse should share the inheritance with the collaterals. Tradition for him obviously meant Spanish law, as was the case for Güemes. Second, at the opposite extreme, others believed that the reform should be *more radical* and that the spouse should be at the same level as the descendants and ascendants. This position was expressed by Andrés Somellera, a lawyer and member of Parliament, the son of the drafter of the Uruguayan Act of 1837, Pedro Somellera. The tension between tradition and social change also emerged in the speech of Francisco de Elizalde,

another member of Parliament. In his opinion Spanish law was the result of 'retrograde customs' and therefore should be changed. In other words, tradition was not an argument to be taken into account in a society trying to remove itself from the 'retrograde' institutions of its former mother country. Third, it was the intermediate position which finally triumphed. Those who advocated this position suggested a solution which was identical to that of the Uruguayan Act of 1837.

During the debate, the most recurrent argument in favour of the spouse was the presumption of affection of the deceased, taken from Grotius, but used in the innovative sense that the deceased presumably had more affection for the spouse than for the collaterals, something advocated by Bentham. After all, Castellano et al noted that many of the members of Parliament had been educated at the University of Buenos Aires and were, therefore, familiar with Somellera's position, and with Bentham's works. In addition, many of them had been exiled in Uruguay at the time when Somellera drafted the Uruguayan Act of 1837, which was also mentioned in the debates. Therefore, most probably, they took inspiration from all of these sources, However, the arguments in favour of the spouse were mitigated, in the case of some members of Parliament, by the need to respect tradition (i.e. Spanish law).

During the discussions, mention was made of the Chilean Civil Code, the Spanish Act of 1835, and the French Civil Code, the Sardinian Civil Code (1837), and the Dutch Civil Code (1838). Thus the legislature should have been aware that they were breaking new ground. Actually, Valentín Alsina (who argued against the reform) pointed to the 'quasi uniformity to be found in the modern Codes' in which the spouse did *not* exclude

the collaterals.

When all these aspects are taken into account, the most probable explanation is that, concerning Buenos Aires, the influence of Bentham was directly felt, in the first place, through the legal education provided at the University of Buenos Aires (both through the direct reading of his works or through Somellera's classes and textbook). The doctoral theses referred to above are evidence of such influence. In a second way, those ideas also influenced the Uruguayan Parliament during a period when Somellera, and several political *emigrées* from Buenos Aires, were residing in Montevideo. Finally, after returning to their country (following the political changes of 1852),[535] some of those lawyers educated in the pro-Benthamite environment of the University of Buenos Aires, and others in contact with them, proposed similar legislation for their province. The absence of legislative precedents in the civilian tradition, apart from the precedents set by Uruguay and Chile which were also inspired by Anglo-American legal ideas,[536] provide further strength to the argument that the Buenos Aires Act of 1857 was also a case in which Anglo-American law and legal ideas were used directly, and also received indirectly through the vehicle of the Uruguayan and Chilean reforms.

Five years later, in 1862, the provincial Parliaments of Entre Ríos and of Santa Fe enacted similar provisions. Therefore, by the 1860s, at least five provinces of Argentina (La Rioja, Jujuy, Buenos Aires, Santa Fe and Entre Ríos) had improved the rights of the

535 Members of the *Unitario* party (in South-American terms, liberals) returned *en masse* to Buenos Aires after the defeat of Juan Manuel de Rosas, the leader of the Federal party (nationalistic and suspicious of European liberal ideas) in the battle of Caseros in 1852. Cf. David Bushnell and Neil Macaulay, *The Emergence of Latin America in the Nineteenth Century* (2nd edn. OUP 1994) 221-2.

536 See Sections 4 and 5 above.

surviving spouses by giving preference to them over all the collaterals. The reasons leading to this legal change in Argentina seem to be manifold. On the one side, adaptation to Argentinean reality, as mentioned by some members of the Buenos Aires Parliament, and before them, by Pedro Somellera in his textbook. On the other side, by ideological reasons, related to the abolition of 'retrograde' Spanish law, and the amelioration of the situation of women. We shall return to this in the conclusions of this chapter.

6.3.The Argentinean Civil Code of 1869

The Argentinian Civil Code of 1869 followed the same line of the Buenos Aires' Act of 1857, but went further in improving the situation of the surviving spouse, by providing that he or she would *share* the inheritance with the descendants, and, if there were no descendants, he or she shared with the ascendants and illegitimate descendant. In the absence of descendants and ascendants, the surviving spouse took all the inheritance and excluded all collaterals. Furthermore, Article 3592 granted the surviving spouse a reserved portion (*legítima*) *identical* to that of a child, even in the case of testamentary successions. These rules represented a huge step forward when compared to the Chilean and Uruguayan Civil Codes and the previous Uruguayan Act of 1837 and Buenos Aires Act of 1857. While Article 3570 of the Argentinean Code granted the surviving spouse the *same* rights of a legitimate child, the Chilean and Uruguayan Civil Codes only granted the *porción conyugal*.

This resulted in certain conceptual and economical differences. Conceptually, the surviving spouse was considered as an heir even when concurring with legitimate

children. Economically, this right was *not* reduced by the deduction of the value of the property that the surviving spouse already owned. The change was conceptually relevant. The surviving spouse's rights as heir were, broadly speaking, economically similar to those that he or she already had under Spanish law (*cuarta marital*). Though the *cuarta marital* was subject to reduction, and was of a different nature, in the presence of children it consisted of the same share as a legitimate child. The reason for transforming the *cuarta marital* into an inheritance right was that, in Vélez Sarsfield's [537] opinion, compliance with the rules on the *cuarta marital* had been 'very dubious',[538] a view which was shared by the influential Spanish legal scholar, García Goyena, as already mentioned. [539] By this, he meant that enforcing the same had been difficult for the surviving spouses. The difficulties arose from the fact that only the 'poor' surviving spouse was entitled to it, that the property of the same needed to be deducted from the *cuarta marital*, and that it was not clear if it was a right *in rem* against the estate of the succession or merely a legacy or a credit. Transforming the *cuarta marital* into a straightforward inheritance right solved all of those difficulties. Most likely, the influence for this last step came from García Goyena, who had already published his draft of a Spanish Civil Code, where he advocated that solution. Thus, by this time, the original influence of Anglo-American legal ideas had been complemented by this innovative Spanish source of inspiration, that did not exist in the 1830s and 1840s.

The drafter of the Argentinean Civil Code, Vélez Sarsfield, was aware of the

537 The drafter of the Argentinean Civil Code of 1869.

538 Dalmacio Vélez Sarsfield in his notes to the Argentinean Civil Code in República Argentina (n 460) 850-1.

539 That was also the opinion of García Goyena, as mentioned in Section 2.2 above.

innovative character of these rules when compared with other civil law sources. He remarked that 'when there are [other] relatives, the Codes of France and the Netherlands do not grant [the spouses] any right', and indicated also the divergent solutions of the Civil Codes of Naples (1809), Vaud (1819), and Louisiana (1825).[540] Interestingly, he made no mention of Uruguayan or Chilean legislation. It is clear, however, that he was aware of the previous legal reforms in several provinces of Argentina. Acting as the Minister of Government, Vélez Sarsfield, had been involved in the process leading to the enactment of the Buenos Aires Act of 1857.[541] Moreover, his awareness is shown by his comment on Article 3573 of the Argentinean Civil Code.[542] Article 3573 excluded from the intestate succession those spouses who had married *in extremis* to the deceased (i.e. while he or she was suffering from the illness that caused death within 30 days of the marriage). Through such provision, Vélez Sarsfiled had intended to correct a defect of the previous provincial legislation:

> In some provinces of the Republic inheritance rights had been granted to the spouse excluding the collateral relatives and truly scandalous marriages *in extremis* had occurred [there] with the only objective of [the spouse] succeeding immediately the ill person.[543]

While he was implicitly criticizing that legislation for not having prevented those abuses, the central idea informing the provincial Acts was endorsed. However, the Anglo-American influence on the Uruguayan and Chilean reforms, nor Somellera's advocacy of the enhancing of the rights of the surviving spouse, were mentioned by Vélez Sarsfield.

540 República Argentina (n 460) 851.

541 Belluscio (n 458) 32.

542 Martínez Paz (n 465) 207.

543 Ibid.

By the time he drafted the Argentinean Civil Code, the reform had been incorporated into the law of at least five Provinces for some years, and that made unnecessary to provide comparative law arguments.

6.4.Summary

In Argentina, the trace of the Anglo-American influence on intestate succession law reforms is not as explicit as in Uruguay and Chile. The fact that a proposal, similar to that suggested by Bentham, was advanced by the Spanish scholar, García Goyena, in his draft of a Spanish Civil Code (1852), and was available when Argentinean intestate succession law was changed, blurs the picture even further. However, the trace emerges when considering the context of the reform, that is, the exposure of the Argentinean legal actors educated in the University of Buenos Aires to Benthamite doctrine, the allusions made by some doctoral theses on the subject to Anglo-American legal ideas (Bentham, United States law, Somellera), and, indirectly, from the influence of the Uruguayan and Chilean reforms. Lastly, in Argentina, as much as in Chile, we can see in the debates preceding the legal reforms, a convergence of different reasons for the improvement of the rights of the surviving spouse: on the one hand, adaptation to local reality, and, on the other, ideological motivation.

7. Indirect Influence in other South-American Jurisdictions

Anglo-American influence on the Chilean and Argentinean Civil Codes travelled further within South America, and influenced indirectly the Venezuelan Civil Code of 1862, the Colombian Civil Codes of 1873 and 1887, the Paraguayan Civil Code of 1876, and the

1882 reform of the Bolivian Civil Code of 1830.

The first Venezuelan Civil Code was enacted in 1862 and was based on the Chilean Civil Code of 1855.[544] The drafter of the first of the same was Julián Viso, a 'radical' liberal Venezuelan lawyer.[545] The granting of rights to the surviving spouse in intestate successions has been highlighted by a Venezuelan scholar as one of the several 'progressive' provisions that this Code included.[546] The Venezuelan Civil Code of 1862 went even further, and granted the surviving spouse inheritance rights even when there were legitimate descendants, which was later confirmed by the Venezuelan Civil Code of 1873. Regarding Colombia, the Chilean Civil Code of 1855 was the model for the Colombian Civil Codes enacted by the different states that formed the federal Republic of Colombia between 1858 and 1873, including the federal Civil Code of 1873 and the national Civil Code of 1887, once Colombia became a unitary Republic. The rules of Chilean Civil Code of 1855 on intestate succession were literally copied into the Colombian Civil Code of 1887.[547]

One interesting aspect is that, even if the Anglo-American influence in the Colombian Civil Code was indirect, in the sense that it came through the mediation of the

544 Tulio Chiossone, Formación Jurídica de Venezuela en la Colonia y la República (Universidad Central de Venezuela 1980) 202; Rogelio Pérez Perdomo, El Formalismo Jurídico y sus Funciones Sociales en el Siglo XIX Venezolano (Monte Ávila Editores 1978) 52-3.

545 Adriana Hernández, *Jurisprudencia, Liberalismo y Diplomacia: La Vida Pública de Julián Viso* (Instituto de Altos Estudios Diplomáticos 'Pedro Gual' 1999) 102.

546 Ibid 104-5.

547 Articles 1045 to 1048 of the Colombian Civil Code of 1873 followed literally (except for the inclusion of the illegitimate children in the first degree) Articles 988 to 991 of the Chilean Civil Code, which regulated intestate succession. Act number 57 of 1887 transformed the federal Colombian Civil Code of 1873 into the 1887 Colombian Civil Code with some amendments introduced immediately or shortly after, which did not affect the rights of the surviving spouse in intestate succession law.

Chilean Civil Code, some Colombian lawyers were aware of the same. In the 1860s in a judicial claim filed in the courts of Colombia which concerned an intestate succession, the claimant's lawyer, Aníbal Galindo, a supporter of the compulsory reading of Bentham´s legal works at the Colombian Universities,[548] explained that the goal of Colombian intestate succession law was to 'prevent *the pain of deceived expectations*', words resounding of Bentham's ideas, as already explained.[549] By way of backing this argument, he extensively and overtly quoted Bentham's *Traités de Legislation Civile et Penale*. The prevalence of the spouse over the collaterals in Colombian law was justified by Galindo with the same paragraph from Bentham's work that Bello had used for the same purpose in his debate with Güemes in Chile.[550] Thus, the case of Colombia in this context can be viewed as an example of an indirect but conscious influence of Anglo-American legal ideas, something which is unsurprising given the widespread reading of Bentham at the time, which allowed legal actors to perceive influences that would have been undetectable to later legal actors.

Finally, the Anglo-American legal ideas, which directly influenced legal change in Argentina, also influenced indirectly the Civil Code of Paraguay (1876),[551] and the 1882 reform of the Civil Code of Bolivia.[552] Both Codes borrowed the rules of the Argentinian Civil Code on intestate succession.

548 Chapter 2 Section 3.6.2.

549 See Section 3.2.2 above. Ricardo Silva, *En el Juicio de Sucesión Promovido por los Hermanos de Su Padre* (Imprenta a cargo de Foción Mantilla 1869).

550 See Section 5.2.4 above.

551 Alejandro Guzmán Brito, *La Codificación Civil en Iberoamérica: Siglos XIX y XX* (Editorial Jurídica de Chile 2000) 455-7.

552 José Antonio Zegada, *Derecho de Familia: Sucesión Hereditaria:* Tomo II (Ed. Canelas 1962) 223 and 295.

8. Conclusions

8.1. From Somellera's Suggestion to a Wide Consensus.

The shift from the consanguine to the conjugal or nuclear family as the basis for intestate succession law was a peculiarity of nineteenth-century South-American private law. This has been recognized by many scholars.[553] The reform began with hesitant suggestions by Somellera in his 1824 book, and developed through the enactment of the Uruguayan Act of 1837, which he drafted, the debate between Bello and Güemes in Chile during the 1840s, the academic production in the University of Buenos Aires, and, finally, the discussions in the Buenos Aires's Parliament in the 1850s. By the 1880s, the shift to the nuclear family model was a point of political consensus between conservatives and liberals, across several countries, as was represented in the Colombian Civil Code of 1887, enacted under a conservative government. The role Anglo-American law and legal ideas played in that development has been highlighted throughout this chapter. First, there was a direct influence of Bentham, through Somellera, on the 1837 Uruguayan Act, being this a case were academic and legislative use of Anglo-American legal ideas converged. Second, there was direct influence of Anglo-American law and Benthamite ideas on the Chilean Civil Code of 1855. Third, the 1857 Buenos Aires Act was inspired by a combination of direct influences (Bentham and Anglo-American lawn) and indirect influences (through the Uruguayan Act of 1837 and the Chilean Civil Code), but with the additional inspiration, by that time, of García Goyena's draft of Spanish Civil Code (1852) . Finally, the Venezuelan, Colombian, Paraguayan and Bolivian Civil Codes were

553 See Section 1 above.

indirectly influenced by Anglo-American law and legal ideas, through the Chilean and Argentinean Civil Code.

In all these Codes the surviving spouse came to exclude all (or almost all) of the collaterals and, finally, to share the inheritance with the descendants and ascendants. The Argentinean and Venezuelan Civil Codes went much further than the others and put the surviving spouse in the first order of succession, but *all* of the Civil Codes addressed in this chapter 'went much beyond the colonial or European Codes in shifting the transfer of wealth from the consanguine to the conjugal family'.[554]

These reforms did not have precedents within the legal systems of the civil law tradition most frequently consulted by the South-American drafters of legislation, as both contemporary and future commentators have acknowledged. On the one hand, one of the usual models, the French Civil Code, had kept the surviving spouse at the bottom of the list of heirs. Roman and Spanish law did not provide an alternative model. All of those systems, to different degrees, had adhered to consanguine descent principles. On the other hand, Anglo-American law and legal ideas provided an alternative. In some cases the drafters of legislation directly based their drafts on Anglo-American sources (Somellera with regards to the Uruguayan Act of 1837, Bello with regards to the Chilean Civil Code) and acknowledged their influence. In other cases, the drafters used those sources while arguing in favour of the new intestate succession law (as in the Buenos Aires Parliament). Finally, others (like Galindo in Colombia) using them strategically, and drew a connection between new succession law and the teachings of Bentham in

554 Deere-Leòn (n 446) 660.

order to argue a case in judicial courts. While from 1852 onwards, influence of García Goyena's draft of a Spanish Civil Code (never enacted)[555] might have played a role, the reform of intestate succession law in South America had begun much earlier, in the 1830s. Therefore, this is a quite clear case of use of Anglo-American legal ideas in order to build South-American succession law during the nineteenth century.

8.2. Two Possible Accounts: Adaptation and Reform

Regarding the causes of the reform, two possible accounts may be provided. Though they may seem contradictory at first glance, they can complement one another. On one account, through this reform, succession law was *adapted* to the realities of the family in South America (I will call this the *adaptation account*). On the other, legal reform can be regarded as a means of furthering the reform of *social structures* (which I will call the *reformist account*).[556] The adaptation account would stress that the reform of succession law in South America was attuned to existing social relations and aimed at strengthening them, while the reformist account would postulate that the aim of the new South-American succession law was to transform those social relations where they had not evolved yet to the model of nuclear or conjugal family. Whichever approach we adopt, Anglo-American law and legal ideas had a role to play in this legal change.

8.3. The Adaptation Account

The adaptation account would begin by pointing out that, by the beginning of the

555 See Section 2.2 above.

556 Reformism, as used here, refers to the idea that the task of law may be in certain cases to 'define anew…a social and political order'. Cf. Postema (n 475)175.

nineteenth century, South-American families already tended to be, or to be conceived as, conjugal. This is the interpretation endorsed by Castellano et al:

> Since the end of the eighteenth century, [Argentinean] social traditions were frankly evolving, particularly regarding the family life. The family was no longer considered to be the group of persons linked by the blood and subject to the authority of the eldest male… Family had come to be understood as the less extended group formed by parents and children and, within the same, the mother occupied a predominant place in affection and rights. This *de facto* predominance required an adequate legislation.[557]

Schmidt, as already explained,[558] suggests that this reality was a consequence of the economic fact that there were no ancestral family-held estates in South America. The creation of estates was the result of the joint efforts of husband and wife, as in many societies formed by immigrants. This sat uneasily with the idea of the consanguine family underlying Spanish succession law. An Argentinean legal scholar, José L. Pérez Lasala, argues that one of the reasons of the reform was that in nineteenth century South America, the collateral relatives of the deceased spouse would live, usually, in Europe, and be aliens, while the surviving spouse was preferred, as she or he was a member of the local community.[559] Reform of intestate succession then, on the adaptation account, was the result of a need to adjust the law to these already existing characteristics of society. Somellera's suggestion in 1824 that 'between us' (Argentineans at least) it was already normal that the wives participated in the acquisitions of their husbands',[560] can be taken as evidence in favour of the adaptation account. The same notion was expressed in the doctoral theses of Juan Antonio García, written in 1849 at the University of Buenos

557 Castellano et al (n 448) 26.

558 Schmidt (n 442) 120.

559 José Luis Pérez Lasala, *Derecho de Sucesiones:* Tomo II (Depalma 1981) 87.

560 See Section 4.2.2. above.

Aires. According to García, Spanish law was in 'open contradiction with the current situation of Argentinean society', as mentioned earlier.[561] Even Güemes, a critic of the reform, agreed that the position of the surviving spouse should be improved[562] and this may be interpreted as the result of widely held social convictions operating even among the critics of the reform. The role played by Anglo-American law and legal ideas in the adaptation account seems to be clear: they provided the *justificatory* framework that, added to practical realities, made the move from consanguine to conjugal family a legitimate one. The crucial utilitarian Benthamite idea playing this role was that of a 'circle of companions' who should continue the enjoyment of the assets of the deceased's in order to avoid the frustration of their expectations. This argument had two sides. On the one hand, it justified the ascension of the surviving spouse (the one who *had* expectations), on the other, the exclusion of the collateral relatives (whose expectations were negligible). Anglo-American law, provided the legitimizing support of an *actual* legal system which had put into practice those ideas.

However, there is evidence also against the adaptation account. First, some lawyers (such as Güemes and Peña)[563] stressed the need to keep succession law attached to local social institutions, which they identified as Spanish law and its consanguine conception of the family. Second, the reforms did not go so far as to *fully* adopt the conjugal family model for the organization of succession law. In three of the jurisdictions analysed in this chapter (Uruguay, Chile and Colombia) the outcome of the reform was a

561 See Section 6.2 above.

562 See Section 5.2.2 above.

563 See Sections 5.2.6 and 6.2 above.

compromise between old and new. Except for the Venezuelan and Argentinean Civil Codes, the surviving spouse was *not* brought to the first order of succession, and in the absence of ascendants, *the siblings shared the deceased's estate with the surviving spouse*. This suggests a compromise and, therefore, that the realities of the South-American family either were not that pressing or, at least, that there was not a unanimous understanding of such realities. I turn then to two possible reformist accounts.

8.4. The Reformist Account

8.4.1. Abolition of the Feudal Remnants of Succession Law

A first reformist account of the reform of intestate succession law in South America can be based on the fact that Spanish law was recurrently described by promoters of the reform as 'retrograde, 'monarchical', and as favouring the 'nobility'. The consanguine conception of family underlying Spanish law was considered to be a remnant of feudalism.[564] During the nineteenth century, in South America, there was 'an emerging tendency to favour the conjugal rather than the patrilineal family in inheritance'.[565] Instead of preserving Spanish law, which favoured the consanguine family, it *should* be changed in order to favour the conjugal model, and, thus, adapt the law to the new republican context. It has been noted that during the reform of South-American private law after independence:

> [T]he social and political content of inheritance was widely appreciated … and it provided important playing fields where the ideas of economic

564 See Sections 5.2.3 and 6.2 above.

565 Deere-León (n 446) 630.

> liberalism and traditional familial and societal notions contended for supremacy.[566]

The problem for some actors was that their liberal concerns were not addressed by the civil law models that they usually consulted: Roman, Spanish, and French law. When it came to succession law, even the paradigmatically modern French Civil Code, as we said, had a conservative outlook.[567] However, there were two other jurisdictions to consider. South-Americans were accustomed to looking not only to France, but also to Great Britain and the United States, as was explained in the previous chapter.[568] From the perspective of South-Americans, each of these were countries endowed with political liberal institutions, and the *avant-garde* of civilization. However, others like Güemes, distrusted Anglo-American law which was seen by him as lacking the prestige ('celebrity') that French or Roman law had. This lack of prestige in the eyes of South-American lawyers is unsurprising given their civilian education. The common law tradition was seen as one difficult to understand. However, that purely legal distrust was counterbalanced by the modern and liberal credentials that those jurisdictions exhibited. Its inspirational or argumentative value was more political than technical. From this it does not follow that the influence of Anglo-American law and legal ideas should be dismissed as 'non-legal': the usual example of legal influence in South America is the French Civil Code and, as legal historians have often remarked, its prestige was political as much as technical: 'in an environment of liberal ideas […] the [French] Civil Code,

566 Matthew C Mirow, Latin American Law: A History of Private Law and Institutions in Spanish America (University of Texas Press 2004) 153-4.

567 See Section 2.3 above.

568 See chapter 2 Section 2.

was considered the purest decantation of those ideas at the legal level'.[569]

Given their political prestige, Anglo-American law and legal ideas played an important role in the reform of succession law in South America. This observation, in turn, should guide us to a revision of some assumptions about the problematic nature of legal borrowing in succession law. Allegedly, succession law is so tied to 'indigenous' social structures that legal influence between different jurisdictions is, at least, improbable, as it has been deemed to be 'one of the most indigenous branches of the law [which] does not ideally lend itself to comparative research'.[570] The example of South America shows that this assumption is not entirely adequate. During the nineteenth century, South America was emerging from a colonial past. Given South America's colonial past, the mother country's laws had become embedded in local social institutions. Emancipation from the mother country implied, simultaneously, the need to revise those laws *and* social relations, as the separation from Spain involved not only independence but also the emergence of a new republican and liberal political culture. This implied the need to look for models opposed to the colonial ideas about family and succession which were considered 'retrograde'. Borrowing was not only possible but, from the perspective of many, necessary. The purpose of the reformist enterprise was not to *reflect* the 'indigenous' social structures, but to *change* them. The Anglo-American sources fulfilled the role of a model for the implementation of a social change through legal reform.

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569 Alejandro Guzmán Brito, 'La influencia del Código Civil francés en las codificaciones americanas' in VV. AA. *De la codificación a la descodificación: Code Civil (1804-2004)-Código de Bello (1855-2005)* (Ediciones de la Universidad Diego Portales 2005) 35.

570 De Waal (n 527) 1072-3.

The reformist impulse was cautiously managed. In 1824, while introducing his proposal for improvement of the surviving spouse rights, Somellera added that he was not sure of it 'yet'. Bello used Roman law arguments (misleadingly, as we have seen) to balance his own use of Anglo-American sources. Economic interests and cultural resistances were to be expected and advocates of reform must have been aware of that. The reform was not radical. The collaterals were not excluded by the surviving spouse; improvement at that level consisted only of making the surviving spouse *share* the inheritance with the siblings. But the most interesting aspect of this cautious approach is the strategic use of the old Spanish institution of the *cuarta marital*. Somellera praised the same as a traditional hint into the direction of his proposal. From the anti-reformist side, Güemes argued that the surviving spouse's position need not be improved, as the *cuarta marital* already existed. The pro-reform drafters of the Civil Codes addressed in this chapter made a modern use of the old institution. In three cases (Chile, Uruguay and Colombia) when there were legitimate children, they did not go further than that. In Venezuela and Argentina, however, they pushed one (short) step ahead by transforming the *cuarta marital* into an inheritance right, using as an additional justification a procedural aspect: in their opinion, enforcement of the *cuarta marital* had never worked properly. However, it is clear that such transformation would not have occurred if the drafters of the Venezuelan and Argentinean Civil Codes had not previously been convinced that there were substantial reasons for transforming the alimentary right of the spouse into an inheritance right, and the economic advantages that such change resulted in for the surviving spouse.

Finally, a revealing coincidence between United States and South-American law

needs to be highlighted. In the second half of the nineteenth century, intestate succession law in the United States and South America had come to be similar. This regulation was opposed to that of the European Codes (as Narvaja and Vélez Sarsfield remarked)[571] and the English law on real estates (as Kent remarked).[572] In both regions of the New World, the 'feudal' or 'retrograde' characteristics of the laws of the former mother countries had been rejected. As already mentioned, the point was made by Bello and several lawyers and members of Parliament in South America,[573] as well as by Kent in the United States. There was thus a contrast between the New World and the Old. Feudal structures, associated with the traditional consanguine conception of family and intestate succession, never had a strong hold in the Americas, and therefore, once independence was achieved, changing the pattern of succession law to the conjugal family was almost natural in all the Americas.

8.4.2. Improvement of Women's Rights

Another reformist account of the changes in South-American intestate succession law may also be drawn from Deere and León's suggestion that those changes were part of 'the impact of liberalism' which resulted in 'concerted attempts to improve the position of the married women'.[574] That claim would be inadequate if only the 'law in the books' were to be taken into account. The reform of succession law was concerned with the surviving spouse and not only with the surviving wife. However, if we bring into

571 See Sections 4.4 and 6.3 above.

572 See Section 3.3 above.

573 See Section 1 above.

574 Deere-León (n 446) 627 and 630.

consideration some other factors their claim makes sense.

As already noted, in many cases the reflections of the lawyers involved in the reform were mainly concerned with the widow (Somellera is a clear case). Vicente Peralta in Argentina was explicit about this concern: 'the lights of our century cannot follow the path of obscurantism that made the woman a very inferior being'.[575] Also Vélez Sarsfield, the drafter of the Argentinean Civil Code, was committed to the advancement of women's rights. In his opinion 'each step that men gives towards civilization, women advance towards equality with men'.[576] All recognized that the same rules were to be applicable irrespective of the gender of the surviving spouse, but their practical concerns seemed to be on the side of the widow. An explanation would be that, normally in the economic context of nineteenth century South America, men did better than women and, as it has been indicated, it was usually the case that women, and not men, were left in a difficult economic situation after the death of their spouse.[577] Also, in relation to this aspect of the reformist account, the appeal of Anglo-American ideas would be clear as, in the eyes of South-American legal actors, they represented liberal institutions.

However, this reconstruction of the ideas of South-American drafters of legislation seems to be flawed by lack of internal coherence.[578] If the goal of those legal actors was to advance women's rights, why did they keep in force the ancient rules

575 See Section 6.1 above.

576 Vélez Sarsfield quoted by Enrique Martínez Paz, *Dalmacio Vélez Sarsfield y el Código Civil Argentino* (Bautista Cubas 1916) 235.

577 Vilches (n 511) 439-462.

578 Chapter 1 Section 4.6.

putting the husband at the head of the family, and limiting the wife's legal capacity?[579] In other words, why was the emphasis placed on inheritance rights, and not in other aspects that were just as detrimental to women, as the limitations to their capacity to inherit from their husbands? The answer lies, in my opinion, in the fact that the transmission of property was a problem that had to be immediately addressed by countries formed by European immigrants. If those countries wanted to avoid their richness going to distant foreign relatives of the deceased, they needed to change their succession law. Then, the argument of women's rights was, perhaps, an ancillary ornament to support what the drafters of legislation were actually *doing* with Anglo-American legal ideas.

As mentioned above,[580] another explanation related to the protection of women's rights has been advanced. According to it, the improvement of the rights of the surviving spouse was a compensation for the elimination of the obligation of the parents, under Spanish law, to provide a dowry for their daughters, at marriage. However, there are two reasons that militate against that explanation. First, the improvement of the rights of the surviving spouse did not refer exclusively to women. Second, even if we do not pay attention to the first objection, it must be noted that, at least in the cases of the Uruguayan Act of 1837 and the Buenos Aires Act of 1857, the improvement of the rights of the surviving spouse occurred before any modification had been enacted with regards to the Spanish law of dowry. Both Acts predated the corresponding Uruguayan and Argentinean Civil Codes of 1868 and 1869 which modified the Spanish legislation on dowry. Thus, the improvement of the rights of the surviving spouse in intestate succession law *could*

579 Deere-León (n 446) 647.

580 See Section 1.1 of this Chapter.

not be a compensation for a loss that had not yet occurred by 1837 and 1857.

8.5. Blindness to Anglo-American Pedigree?

Lastly, some comments on the perception of later South-American legal scholars about the reform of intestate succession law need to be made. In Chile, one legal historian, Alamiro de Ávila, openly considers the Chilean reform of intestate succession law in 1855 as an 'example of Benthamism',[581] while another, Alejandro Guzmán Brito, describes it as original from Bello. Even after taking into consideration the debate between Bello and Güemes,[582] Guzmán Brito concludes that 'from [that debate] it does not result that the reform was inspired specifically by any certain source'.[583] Of course, Guzmán Brito's opinion can be justified on the basis of a stricter definition of 'influence'. Perhaps, he considers that there was no influence given that Bello did not follow any concrete *rule* enshrined in English or United States legislation, and that his proposal was more timid than the Anglo-American solution. However, the legal historian has to consider not only the *rules*, but also the *principles* at stake.[584] When Bello mentioned Anglo-American law in this context he was referring to the priority given to the surviving spouse over the collateral relatives as a general *principle*, not to the concrete rules of those legal systems. The fact that Bello had taken from Anglo-American legal ideas at least *some* inspiration or arguments, seems difficult to deny, and in fact, as just

581 Alamiro de Ávila Martel, 'La Filosofía Jurídica de Andrés Bello' in Instituto de Chile, *Homenaje a Andrés Bello* (Editorial Jurídica de Chile and Editorial Andrés Bello 1982) 360.

582 See Section 5.2 above.

583 Alejandro Guzmán Brito, *Andrés Bello Codificador: Historia de la Fijación y Codificación del derecho Civil en Chile*, Tomo I (Ediciones de la Universidad de Chile 1982) 429. Emphasis added.

584 See Chapter 1 Section 4.2.

mentioned, another Chilean historian (de Ávila) admits that influence.

We find a similar phenomenon in Argentina: writing in the 1930s, Abel Chaneton, an Argentinean legal historian, argued that the 1857 Act is the 'the most important contribution, the only original one… from Argentinean law to the evolution of the institutions of private law'.[585] He denied Benthamite inspiration: with regards to Somellera, Chaneton suggested that the influence of his 'little treatise', which he described as a 'summary and naive transcription of Bentham's utilitarianism', had been 'exaggerated'.[586] Regarding Uruguayan law (whose 1837 Act he acknowledged was drafted by Somellera), Chaneton argued that it was easily 'forgotten' for being out of touch with local traditions.[587] Both affirmations can be questioned. First, the influence of Somellera on later generations of Argentinean's lawyers on this area is evidenced by the doctoral theses on the rights of the surviving spouse produced from the 1830s onwards.[588] Second, Chaneton's affirmation that the Uruguayan Act of 1837 was 'forgotten' in Uruguay is contradicted by the fact that the first draft of a Uruguayan Civil Code published by Eduardo Acevedo, in 1852, alluded to the 1837 Act, and endorsed its contents.[589] Furthermore, the 1837 Uruguayan Act was not 'forgotten' even in Argentina: it was mentioned in the debates of the Buenos Aires legislature,[590] and Argentinean legal scholars had acknowledged that 'it inspired the legislature of the province of Buenos

585 Cháneton (n 502) 58.

586 Ibid, 340

587 Ibid.

588 See Section 6.1 above.

589 See Section 4.3 above.

590 For example: Manuel García in the session of 20 May 1857. See Section 6.2 above.

Aires in 1857'.[591] Chaneton seems to have been somehow biased against recognizing Somellera's or Bentham's influence. The reasons for this denial in the face of the evidence that himself mentioned, may be ideological antagonism (against Benthamism), dismissal of Somellera's importance, or even nationalistic pride (by not recognizing the influence of the Uruguayan Act).

In other cases, the affirmation of the 'originality' or 'peculiarity' of the reform of intestate succession could be the result of sheer lack of information. For instance, in 1915, Eduardo Prayones, a private law professor at Buenos Aires, commented that the reform of intestate succession was 'one of those that show the mark of our own nationality'.[592] In Venezuela, Aníbal Dominci, considered the improvement of the rights of the surviving spouse as 'a peculiarity of the Venezuelan Civil Code'.[593]

All in all, this shows how strong the grip of the traditional view has always been. On the one hand, solutions that could not be traced to a civil law source of inspiration are readily catalogued as *peculiarities* or *originalities*. On the other, in the face of evidence, Anglo-American influence is for, one reason or another, dismissed as irrelevant. I will suggest that there has been a sort of relative blindness with regards to Anglo-American influence on South-American private law. I will return to this in the last chapter.

591 Luis Ovsejevich, 'Legítima' in *Enciclopedia Jurídica Omeba: Tomo XVIII* (Editorial Bibliográfica Argentina 1964) 42-132.

592 Eduardo Prayones, Nociones de Derecho Civil tomadas de las lecciones dadas por el Dr. Eduardo Prayones en la Facultad de Derecho y Ciencias Sociales de Buenos Aires en el curso de 1915 (Centro de Estudiantes de Derecho, no year indicated) 173. Emphasis added.

593 Aníbal Dominici quoted by Deere-León (n 446) 659.

CHAPTER 4: BENTHAM AND FREEDOM OF CONTRACT IN SOUTH AMERICA

1. Introduction

1.1.Objectives of this Chapter

This chapter explores the direct, but mostly unacknowledged, influence of Bentham's ideas in the abolition of usury laws in South America, and what can be partially considered as its knock-on effect: the abolition of *laesio*. Both usury laws and the doctrine of *laesio* were limitations of freedom of contract in Spanish and Portuguese law, and also in modern French law. Therefore, after the abolition of them, which began in the 1830s, South-American contract law adopted a more liberal outlook than its traditional civil law models.

In the case of the abolition of usury laws, the use of Bentham's doctrines as inspiration or strategic arguments is clear. In the case of the abolition of *laesio* there are only some minor traces of direct Benthamite influence, but my claim is that such abolition can be *partially* construed as an indirect effect of the intellectual climate that had previously led to the derogation of usury laws.

1.2.Economic Freedom of Contract

The economic conditions of a contract are the benefits to be received, and the burdens to be assumed by each of the parties through the performance of the contract. A relevant

question regarding those conditions is: *who* should determine, and *how* they should be distributed. There are three possible answers. The first is *absolute freedom of contract*: *only* the parties to the contract determine appropriate distribution with no limitation or interference of any kind. The second, on the other extreme, is *absolute regulation of economic conditions* (such as government-fixed prices): this model has limited historical relevance but has been applied from time to time to certain goods or during critical periods (e.g. to vital sustenance goods, or during wartime). Finally, *limited freedom of contract (or freedom of contract with limitations)* whereby the parties are in principle free to determine which distribution is appropriate, there are some limitations to that freedom. Thus, under certain circumstances, their agreement may be declared null or reformed on the basis of what the law considers to be an inappropriate distribution. Of course, in this third model, the nature, flexibility or scope of these limitations to freedom of contract may differ.

1.3.Limitations of Freedom of Contract: Usury and *Laesio*

Common limitations of economic freedom of contract in the civil law tradition have been, and in many jurisdictions still are, *laesio enormis* (in Spanish: *lesión*) and usury laws. The terms *laesio* and usury have been, and still are, used with different meanings. As will be observed below, in South-American law, *laesio* usually refers to limitations of the price of goods in sales and other contracts, but not in loans, while usury laws are those that limit the price of money (interest) in loans and financial transactions. However, the words usury or usurious are also employed with different meanings in some legal systems. In German and Swiss law, for instance, the word usury refers to cases where

there is an 'unconscionable exploitaion' of a weaker party in any kind of contract, not only in loans.[594] In Venezuelan consumer law, any contract where there is an objective notorious disproportion between the benefits of the parties is considered usurious, no mater that such contract is a loan or not.[595] However, for the purposes of this chapter we will follow the usual terminology in nineteenth-century South-America, as it will be explained in the following sections. Thus, we will refer to *usury* laws when considering those that limit interest rates in *loans*, and to *laesio*, when considering limitations of the price in other kinds of contracts.

There were, and still are, two types of *laesio* and usury laws. *Laesio* may be objective or subjective. Objective *laesio* consists exclusively of a disparity between economic burdens (usually evidenced by a relevant deviation from market prices), is philosophically supported by the ideal of commutative justice, and relies on the existence of a *iustum pretium*. Subjective *laesio* requires, in addition to the objective disparity of values, an abuse of the weaker position of the party taken advantage of, and therefore is more akin to a protection of the autonomy of that party.[596] *Laesio* leads to a revision of the contract or its nullity. In terms of its scope, *laesio* may affect *all* types of contract or only *some* of them (e.g. only land transactions).

Limitation of interest rates by usury laws also takes two forms: *rigid* usury, in

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594 Reinhard Zimmermann, *The Law of Obligation: Roman Foundations of the Civilian Tradition* (OUP 1996) 176. Thomas Finkenauer, 'Laesio Enormis' in Jürgen Basedow et al (ed) *The Max Planck Encyclopedia of European Private Law; Volume II* (OUP 2012) 1030.

595 Article 6 of the Act for the Protection of Consumers of 2 September 1974, and Article 144 of the *Ley para la Defensa de las Personas en el Acceso a Bienes y Servicios* of 2010.

596 Finkenauer (n 594) 1031. An example of this type of *laesio*, under the name of usury, is that of § 138(2) of the German Civil Code of 1900.

which the limit is expressed as a concrete maximum percentage *per annum* (e.g. 5 per cent or 12 per cent); or *flexible* usury, in which the limit is expressed as a certain margin above market rates (e.g. 1.5 times the market rate).

1.4.Liberalisation of Contract in South America and Bentham's ideas

As already explained, South America emancipated from Spain and Portugal between 1810 and 1825, and the laws of the home countries remained in force in the new nations for several decades, being only progressively replaced by national legislation. Spanish and Portuguese law were models of limited freedom of contract: usury laws that limited interest rates in loans of money at a *fixed rate*, and *objective laesio* applied to *all* contracts. These models were the most restrictive that South America ever got to know.

With regard to limitations to freedom of contract, French law, a recurrent model in the formation of South-American private law, was similar to Spanish and Portuguese law. In France, after a brief period of liberalisation, the maximum interest rates were rigidly fixed by an Act of 3 September 1807 that was in force until 1918, and *laesio*, though abolished for sales of movable assets, remained applicable in the crucial field of transfers of land.

In South America, beginning in the 1830s, there was a progressive move towards liberalisation of contract law. That move was done in two steps. The first one was the abolition of usury laws. The ideas of Jeremy Bentham inspired or were used as arguments at this first stage. In his works Bentham defended absolute freedom of contract for the determination of interest rates, and in general for the determination of any other price. He

had gone further than the famous liberal economist Adam Smith, who argued for freedom of contract in all fields, *except* on interest rates. Bentham's doctrine was influential in the abolition of usury laws in England and in several of the States of the United States. There, Bentham's works were, though not often, explicitly acknowledged in the parliamentary debates leading to the abolition or restriction of usury laws. In South America, however, the influence of Bentham in the abolition of usury laws was an interesting case of clear and direct but *unacknowledged* influence. The fact that Benthamite ideas were influential in this area is abundantly shown by the sort of arguments employed (Chile, Uruguay), the testimony of some contemporaries (Venezuela, Brazil), and later evaluations carried out by local scholars (Colombia, Chile, Argentina). Furthermore, that influence was possible in the context of extensive reading of Bentham in South America, as mentioned earlier.[597]

The second phase of liberalization of contract law in South America began in the 1860s. It brought about the abolition of *laesio* in five jurisdictions (Venezuela, Uruguay, Argentina, Paraguay and Brazil) and a restriction of its scope in another two (Chile and Colombia). Although there are some indications that Benthamite utilitarian ideas were taken into account, Bentham's significant influence in this particular field cannot be affirmed. By contrast, Florencio García Goyena, a Spanish legal scholar, was widely read and openly quoted by South-American legal actors in connection with the subject of *laesio.* In 1852, in his draft of a Spanish Civil Code, García Goyena postulated the abolition of *laesio*.[598] My claim is that, in addition to the inspiration drawn from García

597For details, see Chapter 2 Section 3.5.1.

598 Florencio García Goyena, *Concordancias, Motivos y Comentarios del Código Civil Español*: Tomo II

Goyena, this second step (abolition of *laesio*) was also partially a *knock on* or *secondary effect* of the Benthamite radical version of freedom of contract adopted in South America in the 1830s, expressed by the abolition of usury laws. That movement in the 1830s provided the liberalizing *impetus* needed for the abolition of *laesio*, while the rest of the civilian tradition (including France) retained that institution for a long time.

As a consequence of the process outlined in the preceding paragraphs, nineteenth-century South-American contract law was more liberal than its recurrent liberal model, French law, and also, more obviously, Spanish and Portuguese law. The origin of that divergence was the widespread use of the Benthamite doctrine of absolute freedom of contract, a doctrine which also influenced nineteenth-century Anglo-American law.

1.5.Plan of the Following Sections

The following sections analyse in detail the evolution already outlined. First, an explanation of the evolution of usury laws in the civil law and the common law tradition is provided (Section 2). Second, the unacknowledged, but clear, Benthamite influence in the abolition of usury laws in several South-American jurisdictions is explored (Section 3). Third, the abolition or restriction of *laesio* in the same jurisdictions is partially explained as a knock-on effect of the abolition of usury laws (Section 4). Finally, some general conclusions are offered (Section 5).

2. Usury

(Imprenta de la Sociedad Tipográfico-Editorial 1852) 310.

2.1. Usury Laws

Money may be lent gratuitously or in exchange for some compensation or price. In the second case, the price paid by the borrower is called interest and is calculated as a function of the money lent (the capital or principal) *and* the time elapsed between the day of lending and the day of restitution to the lender. Thus, the interest *rate* is usually expressed as a percentage of the capital per year (p.a.) or month. Interest may also be applicable in the case of any other obligation to pay money such as, for example, when a buyer is allowed to pay the price of the acquired good after a certain time. However, interest is often associated only with loans and financial instruments.

The legal rules concerning interest and interest rates have a long history in which economic, political, moral and religious arguments have always been very near the surface of legal discussions. The different approaches to interest may be synthetized in three basic models: (a) *total prohibition of interest* accompanied by civil and criminal consequences, such as total or partial nullity of the agreement or penalties; (b) *restriction of interest rates*, where interest is admitted, but within a maximum directly or indirectly set by the law: directly through a concrete rate expressed in the law or, indirectly, when the maximum is determined at a certain margin above the usual interest charged in the market; and finally (c) *freedom of interest*, in the case when the parties are left to determine the interest rate freely and with no limitation. The laws establishing a total prohibition of interest or its restriction to a certain maximum are known as *usury laws* and the interest prohibited by the laws (whether the total of it or the portion exceeding the maximum, as the case may be) is called *usurious*.

Usury laws had been in force in Spanish-America for centuries when quite abruptly in the 1830s, several of the newly emancipated countries broke with tradition and adopted the freedom of interest model. The object of this section is to show the direct though unacknowledged, and yet clear, influence of Jeremy Bentham's doctrine on this radical turn. However, before exploring Bentham's impact, the next two sections offer a brief synopsis of usury laws within the civil law and Anglo-American law. Thereafter, the main part of this chapter is devoted to South America and the abolition of usury laws (Section3) and *laesio* (Section 4).

2.2. Usury in the Civil Law Tradition

Within the civilian tradition, usury laws that either directly or indirectly restricted interest have been predominant.[599] Roman law intervened from early dates prohibiting usurious interest rates. The so-called *centesimae usurae*, i.e. the prohibition of interest rates exceeding 12 per cent per year, was maintained essentially unchanged during the Imperial period down to the sixth century. Justinian, influenced by Christian ideas, reduced the maximum interest rate to 6 per cent. During the Middle Ages, the development of usury laws was dominated by canon law, which completely prohibited the charging of interest based on Scriptural texts and on the idea that it entailed the exploitation of the needy, as well as on the fact that, regarding the nature of things, money was barren and could not yield fruits, as Aristotle had famously argued. The total prohibition of interest in the canon law came under attack in the wake of Reformation, 'from Calvin in regard to its theological justification [and] from Carolus Molinaeus and

599 The following paragraph draws on Zimmermann (n 594) 167–75.

Clausius Salmasius as far as its legal basis was concerned'.[600] From then on, the favoured model of usury law was one that allowed interest but with restrictions. Grotius considered that charging interest was not repugnant to natural law, as far as the rate represented a just consideration for what the lender did or might suffer from not having his money.[601] This intermediate model of restriction instead of total prohibition, was to dominate the legal landscape up until today. However, in Catholic countries, the canonical prohibition continued to be maintained *in principle*. At the level of positive law, in France, after a brief period of freedom of interest following the Revolution, a maximum rate was re-established by an Act of 3 September 1807.

In Spain and Spanish America, interest rates were restricted to a maximum of 5 per cent in general private law transactions, and 6 per cent in commercial ones under the *Auto Acordado 16, Título 21, Libro 5* of the *Recopilación Castellana.*[602] This rule was issued by King Phillip IV on 14 November 1652, fixing the maximum interest rate at 5 per cent p.a. and was later amended to allow for 6 per cent in commercial transactions. This restriction remained in force in the immediate aftermath of independence.

As to Portuguese law, in force in Brazil before and after independence, similar limitations were in place. The Portuguese *Ordenações Filipinas* of 1603 have been described as a regulation that 'perspires from every pore the intervention of the State in

600 Ibid 174.

601 Hugo Grotius, *The Rights of War and Peace*, Book 2 (Liberty Fund 2005) ch. 12, para. XXII.

602 Guillermo Torres García, *Historia de la Moneda en Colombia* (Imprenta del Banco de la República 1945) 135. Tomás Enrique Carrillo Batalla (ed) *Historia de las Finanzas Públicas en Venezuela*, vol. 1, *1830–1836* (Caracas 1969) 153.

the economy'.[603] The *Ordenações Filipinas* almost totally prohibited the charging of interest (Book IV Title LXVII), accepting it only for certain exempted transactions. However, an Act (*Alvará*) promulgated on 17 January 1757 admitted interest in loans and other transactions, though restricting it to a maximum of 5 per cent per year.[604]

2.3. Usury in Anglo-American Law and Legal Ideas

2.3.1. William Blackstone and Traditional Legal Ideas

The total prohibition of interest adopted by the Church was followed also in medieval England. Parliamentary statutes enacted from 1487 onwards also made usury a temporal crime.[605] During the sixteenth and seventeenth centuries, charging interest was allowed, but interest rates were capped. During the eighteenth century and the first half of the nineteenth century, 12 Ann st.2 c.16 fixed the maximum rate at 5 per cent p.a.[606].

Blackstone's position on usury was the intermediate one: he accepted the legality of interest but rejected 'exorbitant' rates. In relation to the first aspect, he assimilated hiring and borrowing as contracts 'on which there is only this difference, that hiring is always for price [while] borrowing is gratuitous'.[607] He regarded loans as naturally

603 André Rubens Didone, *A influencia das ordenacoes portuguesas e espanhola na formacao do direito brasileiro do primero império* (http://repositorio.uscs.edu.br/bitstream/123456789/292/2/tese%20doutorado%20Prof%20Didone.pdf) 26. Accesed 15 June 2015.

604 Ibid 1044.

605 Richard H Helmholz, The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s (OUP 2004) 378–9.

606 William Cornish et al, *The Oxford History of the Laws of England*: Vol. 12 (OUP 2010) 142. Warren Swain, *The Law of Contract 1670-1870* (CUP 2015) 154-171.

607 William Blackstone, *Commentaries on the Laws of England*: Vol. 2 (Oxford 1765–9) 454.

gratuitous, but nevertheless accepted that it was legal to receive an increase over the amount lent (i.e. interest) as a compensation to the lender. Blackstone rejected both of the classic arguments employed against usury. With regard to the theological argument, he contended that the prohibition of receiving interest was based on political and not moral reasons, as it was limited to the relationships between Jews, which in his opinion proved that the taking of moderate usury was not *malum in se*. It was Blackstone's view that the total condemnation of interest derived from 'monkish superstition' and that the legality of interest in his times derived from the reinstallation of 'true religion'[608] (i.e. Reformation). With respect to Aristotle's argument concerning the natural barrenness of money, he argued that it was not convincing, as 'the same may with equal force be alleged of houses which never breed houses'.[609] However, Blackstone, who relied on Grotius' analysis of this subject, argued against 'exorbitant' interest rates, which, in his opinion, deserved 'the truly odious appellation of usury'.[610]

2.3.2. Bentham's Reformist Legal Ideas: *Defence of Usury*

One of the most original and best-known claims of Jeremy Bentham was that all usury laws should be abolished. His book, *Defence of Usury*, was first published in 1787, and underwent several editions in English, French and Spanish, showing the interest it arose in different countries and along an extended period of time.[611] A French physiocrat, Anne

608 Ibid 456.

609 Ibid 455.

610 Ibid 457.

611 London 1816 and 1818, Paris 1828 (French translation), New York 1837, Philadelphia 1842, New York 1881. It was also included, in its French version, in the third volume of *Œuvres de Jeremie Bentham*, published in Brussels in 1840, which was distributed in South America. In 1828 a Spanish translation was published.

Robert Turgot (1727-1781), had also argued for absolute freedom in this field, but Turgot´s work was only posthumously published in 1789,[612] two years after Bentham's *Defence of Usury*. As we shall see in the following sections, even if Turgot's work was in some occasions published jointly with Bentham's, the doctrine of absolute freedom of interest rates was usually perceived as Benthamite.

Regarding the traditional arguments in favour of *total* prohibition of interest, Bentham concurred with Blackstone. Bentham ironically commented on Aristotle:

> [W]ith all his industry, and all his penetration, notwithstanding the great number of pieces of money that had passed through his hands [he] had never been able to discover, in any one piece of money, any organs for generating any other such piece. Emboldened … he ventured at last to usher into the world … that all money is in its nature barren.[613]

He also agreed with Blackstone that the 'fountain' of usury laws lay 'in the conceptions of the more considerable part of those through whom our religion has been handed down to us'.[614] From this point onwards, however, Bentham disagreed with Blackstone and proposed a *complete* freedom of interest rates on the grounds of three key arguments: (a) analogy with the absence of restrictions on the price of other goods, (b) irrationality of the *moral* condemnation of usury, and (c) ineffectiveness of usury laws as protective instruments.

First, the convenience of abolishing usury laws was supported by Bentham on the

612 Peter D Groenwegen, *The Economics of A.R.J. Turgot* (Springer Science & Business Media 2012) xxix. Once Bentham knew of this work he contributed to its diffusion and, in 1828 a Spanish editions of Bentham's *Defence of Usury* included an translation of Turgot's work into Spanish.

613 Jeremy Bentham, *Defence of Usury* (T Payne and Son 1787) 99–100.

614 Ibid 97.

basis of *analogical reasoning*. The price of money lent (interest) should be agreed freely, as was the case with the price or rent of land or any other goods. In Bentham's words:

> why a policy, which, as applied to exchanges in general, would be generally deemed absurd and mischievous, should be deemed necessary in the instance of this particular kind of exchange, mankind are as yet to learn.[615]

This reasoning had a relatively simple structure: if the price of goods in general does not have a *maximum*, then interest should not have one either. Bentham rhetorically asked his readers: 'What natural fixed price can there be for the use of money more than for the use of any other thing?'[616]

In *Defence of Usury*, Bentham inserted a paraphrase of Blackstone's text in order to show an inconsistency of the latter. In his *Commentaries of the Laws of England*, Blackstone had argued that a maximum cap on interest rates should be established.[617] He suggested that loans of money and loans of horses were essentially similar, but did not develop the argument, and focused only on money loans. In a caustic tone, Bentham took this parallelism to its extreme consequences. He substituted mentions of *money* and *interest* with *horses* and *purchase price.*[618] What he implicitly argued was that if the new text could persuade the readers to demand a legal maximum on the prices of horses, then, and *only* then, could they validly ask for usury laws.

It must be noted that the analogical argument advanced by Bentham only made

615 Ibid 13.

616 Ibid 9.

617 Blackstone (n 607) 456–8.

618 Bentham (n 613) 84–93.

sense in the context of a legal system, which, as the English, accepted the premise of freedom of contract for the determination of the price in all transactions other than loans. Only on that basis, it could be persuasively argued that, if in transactions in general no state intervention was accepted, none should be accepted in financial transactions either. In civil law systems, such as the ones of South America, all of which included *laesio*, the analogical argument could not work in the same way. Strangely enough that argument was frequently used in South America by the partisans of the abolition of usury laws. This contradiction between the analogical argument against usury laws, and the Spanish and Portuguese law in force in South America, was solved in two different and opposed ways as is explained below, when *laesio* is analysed.[619]

The second argument, according to Bentham, was that tradition implied an *a priori* negative *moral* value in the word *usury*. However, he argued, if usury was defined as charging interest above a certain *maximum rate*, and a *moral* rejection of usury was to be endorsed, then some *moral* maximum should exist independently from the *legal* rules establishing it. The problem, according to Bentham, was that no rational method could be conceived in order to ascertain that *moral* maximum. There was no sound *moral* reason to prefer certain agreements over others in order to determine the *usual* or *normal rate of interest* which, if exceeded, would make interest immoral.[620] Therefore, belief in the intrinsic immorality of usury was irrational.

Third, Bentham alleged that usury laws were *ineffective*. They were ineffective in

619 Section 4 below.

620 Bentham (n 613) 10.

protecting the prodigal, the indigent, and the simple. Preventing prodigality was a usual argument employed to support usury laws. Bentham analysed two potential situations: the prodigal who had something to pledge or dispose of, and the prodigal who had nothing. In the first case,

> [if] the prodigal can find none of those monsters called usurers … he goes on and gets the money he wants, by selling his interest [in other goods] instead of borrowing.[621]

Regarding the second case, prodigals without security to offer were 'not more likely to get money … than an ordinary [person]'.[622] Therefore, usury laws were ineffective in preventing prodigality. Another usual reason pointed out in favour of usury laws was protection of indigent people against extortion. Bentham counter-argued that the legislature was in no better position than the indigent to judge which the right thing to do in the concrete situation was.[623] Finally, Bentham evaluated the argument of protection of the simple against imposition. This was rejected in a utilitarian fashion:

> [Assuming] that were the legislator's judgment ever so much superior to the individual's … the exertion of it on this occasion [would be] useless, so long as there are so many similar occasions … where the simplicity of the individual is equally likely to make him a sufferer.[624]

Finally, Bentham's arguments against usury laws were consigned not only in *Defence of Usury*, but also in his *Tratados de Legislación Civil y Penal*, much read in South

621 Ibid 23.

622 Ibid 24.

623 Ibid 36.

624 Ibid 40.

America.[625] There, Bentham advanced another argument when he discussed the problem of excessive benefits in the sale of certain goods: the functioning of the market will correct that defect. He provided the same answer for money loans:

> as soon as [the excessive benefit] is known several other sellers will come to dispute that benefit, and this rivalry … will make the price fall. There is no other remedy than this against the exorbitance of usury or the interest of money.[626]

2.3.3. Abolition of Usury Laws in England and Bentham's Influence

Bentham's Defence of Usury was very influential in England. He was followed by nearly all the classical economists, including Ricardo, and by the end of the eighteenth century the opinion of English lawyers has turned against usury laws.[627] However, it took longer to convince the Parliament. A Bill for the abolition of usury laws was proposed by Arthur Onslow, MP for Guildford, in 1816, the same year in which a third edition of Bentham's book was released in London, but it was not enacted. In 1824 the same MP proposed another similar Bill, which was debated in the House of Commons on 16 and 27 February 1824. On this occasion Bentham's *Defence of Usury* was praised above the works of Adam Smith. [628] However, the Bill was dropped on 8 April 1824. In 1837 an important concession was made when certain bills of exchange were freed from the usury laws.[629] In 1845, John Byles, an English prominent lawyer, published a book opposing Bentham's

625 See Chapter 2 Section 3.5.1.

626 Jeremías Bentham, *Tratados de Legislación Civil y Penal*, vol 3 (Ramón Salas tr. Imprenta de D Fermín Villalpando 1821) 197.

627 Patrick S Atiyah, *The Rise and Fall of Freedom of Contract* (OUP 1985) 550.

628 Catherine Fuller (ed) *The Correspondence of Jeremy Bentham*, vol. 11 (January 1822 to June 1824) (OUP 2000) 360.

629 Atiyah (n 627) 551.

ideas on usury laws.[630] That opposition was to no avail and, finally, in 1854 a complete repeal of usury laws was enacted.[631] Bentham's arguments were used in the successive parliamentary discussions which led to the abolition of usury law in England: in the House of Commons in 1819 and 1828, and in the House of Lords in 1854.[632] In all this process, according to Dicey, Bentham's *Defence of Usury* supplied 'every argument available' against usury laws. [633]

2.3.4. Bentham and Freedom of Contract in General

According to Scheiber, during the nineteenth century, *Defence of Usury* was invoked in legal debates in England and in the United States *not only* in connection with loans and financial transactions, but also by proponents of freedom of contract in general. [634] Bentham epitomized the contract ideal when writing:

> [N]o man of ripe years and of sound mind, acting freely…ought to be hindered… from making such a bargain… as he thinks fit'. [635]

Arguments against restraints on market exchanges also figured in other of Bentham's works, such as his *Traités*, where he postulated 'competition' as the best means to regulate the price of the services of servants to masters. For Bentham, the value of

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630 Ibid.

631 The Usury Laws Repeal Act 17 & 18 Vict c 90. Cornish (n 606) 142; Swain (n 606) 171.

632 HC Deb 10 February 1819 vol 39 cc. 0-422. HC Deb 19 June 1828 vol 19 cc 1437-43. HL Deb 24 July 1854 vol 135 cc 581-4.

633 Albert V Dicey, *Lectures on the Relationship between Law & Public Opinion in England during the Nineteenth Century* (Macmillan 1905) 33.

634 Harry N Scheiber, 'Introduction' in Harry N Scheiber (ed) *The State and Freedom of Contract* Stanford University Press 1998) 1-12.

635 Quoted in ibid.

freedom of contract derived from its 'tendency to promote general happiness'.[636]

It is interesting to note, that the argument in *Defence of Usury* was perceived by contemporaries as concerned not only with interest rates, but with the wider topic of freedom of contract. It provided arguments against *any* intervention in prices, not just against restrictions on the price of money. Thus, in a civil law context, it had the potential to further influence the debates about *laesio*.

2.3.5. Benthamite Doctrine in the United States

In the United States, 'Jeremy Bentham's *Defence of Usury* was to provide the intellectual foundation for … efforts urging the repeal of usury laws'.[637] Bentham's arguments were used by lawyers in litigation, and specifically discussed by the famous American judge and scholar, James Kent.[638] In 1834, following a petition of a group of citizens, the committee of the Massachusetts' legislature recommended a repeal of usury laws as they applied to negotiable instruments.[639] Horwitz explains that:

> [B]y the time of the Civil War it was substantially easier to engage in usurious transactions [though] no legislature repealed all restrictions on usury. Rather penalties for usury were weakened and exceptions for commercial transactions were greatly expanded.[640]

The fight seems to have persisted for several decades. In 1867, the subject of abolition of

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636 David Lieberman, 'Contract Before "Freedom of Contract"' in Harry N Scheiber (ed) *The State and Freedom of Contract* (Stanford University Press 1998) 101-103

637 Morton J Horwitz, *The Transformation of American Law, 1780–1860* (Harvard University Press 1977) 237.

638 James Kent, Opinion of Chancellor Kent on the Usury Laws (Albany 1837).

639 Ibid, 241.

640 Ibid, 245.

usury laws was once again presented before the Massachusetts legislature, and a Bill to this end was defended by Richard H. Dana Jr in the House of Representatives. In his speech, Dana argued that Adam Smith, who had been in favour of usury laws 'towards the close of his life […], read the argument of Jeremy Bentham and acknowledged himself mistaken'.[641] In addition, Dana emphasized the effect of religious reformation, and specifically of Calvin's writings, upon the old doctrines of Aristotle and the Catholic Church. A divide between the Catholic and Protestant approach to usury was thus asserted. However, Bentham's influence on the development of the topic of usury in the United States was seen as crucial.[642]

3. Bentham and Abolition of Usury Laws in South America

3.1. Usury Law in South America

As indicated above, under Spanish law still in force in South America after its independence, interest rates were limited to 6 per cent per annum in commercial transactions, and to 5 per cent per annum in all other transactions. Portuguese law restricted interests to a maximum of 5 per cent per year.[643]

On the religious and cultural side, 'the Church fulminated against usury'[644] though, paradoxically, it was one of the main investors in real estate mortgages. This

641 The Society for Political Education (ed) *Usury Laws: Their Nature, Expediency and Influence*, Economic Tracts no. IV, Series 1880–1881 (New York 1881) 46.

642 For this paragraph, see Ibid, 43 and 46.

643 See Section 2.2 above

644 John Lloyd Mecham, Church and State in Latin America: A History of Politico-Ecclesiastical Relations (University of North Carolina Press 1934) 40.

obvious contradiction between discourse and action ensured that ecclesiastics were 'indulgent creditors'.[645]

In South America, the radically liberal ideas of Bentham about freedom of contract and, specifically, of interest rates in money loans were not solely disseminated as a product for scholars' consumption. They inspired concrete pieces of legislation in Chile (1832), Brazil (1832), Venezuela (1834), Colombia (1835), Uruguay (1838) and Argentina (1869), which later were transplanted to the Civil Code of Paraguay (1876).

3.2. Diffusion of Bentham's Ideas in South America

Bentham's ideas about usury were known in South America directly through his books, his correspondence, and meetings held in London with South-American leaders, and, indirectly, through the works of other authors. It is important to note that, as Safford argues, in South America, Bentham was usually considered as a *legal* scholar, and not as an economist.[646] Thus, though Bentham's ideas on this topic had been embraced by many economists,[647] South-American *legal* actors tended to look to Bentham on this topic.

Bentham's book, *Defence of Usury*, was translated into Spanish in the 1820s.[648] His correspondence shows that Bentham advocated his policy in a letter dated 13 August

645 Ibid.

646 Frank Safford, 'Politics, Ideology and Society in Post-Independence Spanish America' in Leslie Bethell (ed) *The Cambridge History of Latin America* (CUP 1985) 367.

647 See Section 2.3.3.above,

648 Jeremías Bentham, Defensa de la Usura o Cartas sobre los Inconvenientes de las Leyes que fijan la Tasa de Interés al Dinero (Imprenta de Casimir 1828).

1825 addressed to Simón Bolívar, the Liberator of the Great Colombia.[649] In it, Bentham revealed that his ideas about the abolition of usury laws had been considered in the House of Commons, though he noted that 'they seldom speak of these measures as being mine'.[650] This last fact reveals that even within England, Bentham's influence on this area remained unacknowledged in several cases. The reason was, most probably, that the English promoters of the abolition of usury laws did not want to indispose the adversaries of Bentham's well-known political radicalism (i.e. Tories and Whigs alike).[651]

An indirect channel through which Bentham's ideas on usury travelled to South America was the works of other authors. For instance, as mentioned earlier,[652] José Joaquín de Mora was a Spanish liberal professor of law who, during his exile from Spain, spent time in London, Buenos Aires, Santiago de Chile, Peru and Bolivia. There is a note in Bentham's *Memorandum Book* 'connecting Mora's name with *Defence of Usury*',[653] suggesting that he was working on a translation. In Mora's book *Curso de Derechos*, published in Chile and Bolivia, and used as text-book for law schools in both countries, Mora endorsed Bentham's ideas about the abolition of usury laws.[654]

Furthermore, Bentham's ideas were also endorsed by his Spanish commentator, Ramón

649 Which today includes Ecuador, Colombia, Venezuela, and Panamá.

650 Luke O'Sullivan and Catherine Fuller (ed) *The Correspondence of Jeremy Bentham*, vol. 12: July 1824 to June 1828 (Clarendon Press 2006) 148.

651 See Chapter 2 Section 3.5.2.

652 See Chapter 2 Section 3.5.2.

653 Fuller (n 628) 266–7. The notes correspond to 23 April and 9 September 1823.

654 José Joaquín de Mora, *Curso de Derechos del Liceo de Chile* (Imprenta del Pueblo 1849) 30. This book was published for the first time in Santiago de Chile 1830, and re-printed in La Paz in 1849.

Salas, and his Argentinean follower, Pedro Somellera,[655] the drafter of the Uruguayan Act of 1837 on intestate succession law that we analysed in the previous chapter. This is likely to have increased the visibility of this Benthamite ideas on ususry laws even further. According to Salas:

> The laws should take into consideration [the practices of the country] to determine the interest rate of money but *only* in judicial orders [to pay an amount] or when the interest has not been agreed between the parties, because *in contracts and* transactions*, interest is to be that on which the parties agree*.[656]

Somellera, while considering loans (*mutuo*) and interest, indicated: 'The convention between the contracting parties is what the law sanctions.'[657] The general principle was provided earlier in the chapter: 'Complete freedom in contracts: here is the general rule … let the individual interest operate.'[658]

Bentham's position was also followed by the French economist and divulgator Jean-Baptiste Say, who may be considered one of his closest disciples. A large amount of correspondence between the two men, where Say addresses Bentham as his 'honoured master',[659] has been preserved. Bentham recommended Say to his other correspondents, including Bernardino Rivadavia, the founder of the University of Buenos Aires and future president of Argentina. In a letter to Say dated 28 July 1819, Bentham reports that

655 See Chapter 2 Section 3.6.1.

656 Ramón Salas' comment in Jeremías Bentham, *Tratados de Legislación Civil y Penal*, vol. 5 (Ramón Salas tr. Imprenta de D Fermín Villalpando 1821) 155, emphasis added.

657 Pedro Somellera, Principios de Derecho Civil dictados en la Universidad de Buenos Aires, vol. 1 (Imprenta de los Expósitos 1824) 195–6.

658 Ibid 189.

659 Stephen Conway (ed) *The Correspondence of Jeremy Bentham*, vol. 8 (Clarendon Press 1988) 491.

Rivadavia dined at his house, adding: 'we talked much of you [Say]'.[660] Tellingly one of Say's works, the *Catechism of Political Economy*, was later used by Vélez Sarsfield as a textbook for the Political Economy courses he gave at the University of Buenos Aires in the 1820s.[661] In the *Catechism*, the principle of freedom of interest rates was defended:

> Would it be possible for the government to impose a fixed interest rate on private persons, so as that it would be the rule in all the agreements? No: that would be a violation of freedom of contracts.[662]

Thus, through different direct and indirect channels, ranging from legal literature to face-to-face contact, the ideas of Bentham on usury laws reached South America during the 1820s and 1830s. They were almost immediately put to use for legislative purposes in several South-American jurisdictions as the following sections will show.

3.3. Gandarillas and Abolition of Usury Law in Chile

In 1831 and 1832 the Chilean legislature discussed a Bill aiming to abolish usury laws. It has already been suggested, by a Chilean legal scholar, that the Bill *may have* been the result of Benthamite influence.[663] An exploration of parliamentary records reveals that such influence undoubtedly existed. The documents for the session of 25 June 1832 include a report, also published in the press, [664] which was a summary of the arguments

660 Stephen Conway (ed) *The Correspondence of Jeremy Bentham*, vol. 9 (Clarendon Press 1989) 340.

661 Say called Bentham's attention to his *Catechism* in a letter dated 2 August 1815: 'if little books like this were circulated in all countries, these ideas would gradually make their way'. Conway (n 659) 492.

662 Juan Bautista Say, *Cartilla de Economía Política* (Agustín Pascual tr. Madrid 1822) 61.

663 Alejandro Guzmán Brito, *Andrés Bello Codificador:* Tomo I (Ediciones de la Universidad de Chile 1982) 102.

664 Manuel Gandarillas in *El Correo Mercantil* (Santiago de Chile, 27 June 1832) 113-4. There is no title for the article. Translated into English by the auhtor.

presented to the Senate by Manuel Jose Gandarillas, the drafter of the Bill for the abolition of usury laws, a lawyer and politician of Benthamite leanings.[665] Though Bentham was not expressly quoted, Gandarilla's arguments opened with an obvious paraphrase of Bentham's *Defence of Usury,* as is shown in the following table:

Bentham [666]	Gandarillas [667]
…Aristotle: that celebrated heathen who…had established a despotic empire on the Christian world	…that great heathen philosopher who for many centuries has exercised a despotic empire in the Christian world
…that great philosopher, with all his industry…, notwithstanding the great number of pieces of money that had passed through his hands …had never been able to discover, in any piece of money, any organ for generating any other such piece.[668]	..that great philosopher … notwithstanding the load of work undertaken by him in order to clarify the process, could never discover in any of the many pieces of money that went into his pocket some peculiar organ that made it appropriate to engender or produce another piece…
A consideration that did not happen to	…it was not offered to such talent and

665 Bernardo Subercaseaux, *Historia de las Ideas y de la Cultura en Chile*, vol. 1 (Editorial Universitaria 1997) 20.

666 Jeremy Bentham, *Defence of Usury* (Payne and Foss 1816) 99-100

667 Gandarillas (n 664) 113–4.

668 Bentham (n 666) 99-100.

present itself to that great philosopher …is that though a daric[669] would not beget another daric any more that it would a ram, or an ewe, yet for a daric which a man borrowed, he might get a ram and a couple of ewes.. That then, at the end of the year he would find himself master of three sheep…	penetration [the philosopher's] that, even if a piece of money was as incapable of generating another piece of money, as much as it was of generating a ram or an ewe, however with a piece of borrowed money, a man could buy a ram and two ewes which by the end of one year would naturally produce for him two or three lambs...

Gandarilla's opening attack on Aristotle was obviously taken from Bentham, even though that was not overtly acknowledged. From there, he proceeded to use the Benthamite *analogical argument* [670] indicating that money was something that could be 'sold and rented as any other thing', and that 'being interest the price of money', it should be left to the evolution of the market to determine it.[671] On those grounds, Gandarilla questioned Spanish usury law and suggested its abolition.

The Bill presented by Gandarillas was approved, *with some modifications*, in 1832. The Chilean Act of 1832 reads as follows:

669 A Persian coin used also in Greece.

670 See Section 2.3.2 above.

671 Gandarillas (n 664).

> It is legal … to stipulate through private agreements the interest that the parties want and these agreements shall be respected, it not being acceptable to argue against them the defence of usury; though [such agreements] remain subject to the other provisions of the law regarding contracts and to other defences that may be argued in accordance with the laws.[672]

As a consequence of these provisions Spanish usury laws were tacitly abolished.[673] This piece of legislation unfolded against a specific economic background: the liberation of interest rates coincided with a flow of foreign capital invested in loans to the mining industry, which was beginning to develop into new capitalistic forms.[674] The opposition of a strong Catholic Church has already been noted by Chilean writers.[675] Probably as part of a compromise, Gandarilla's original Bill was modified, and the 1832 Act left open an indirect (and softer) way of challenging the validity of the interest rate agreed by the parties to a loan. In an article published in September 1832, an anonymous author showed where the problem was:

> The Act declares that there is freedom [to enter into any] pacts with respect to the interest of money, without allowing usury to be alleged against the same, but it subjects [the pact] to the other provisions of the law.[676]

As logical or natural as this seemed, in the opinion of the author of the article, the problem was exactly there:

672 Congreso de Chile, *Sesiones de los Cuerpos Legislativos de Chile*, Sesión 18 de julio de 1832, www.historiapolitica.bcn.cl. Accessed 24 November 2014.

673 Valentín Letelier, *Génesis del Derecho* (Editorial Jurídica de Chile 1967) 185.

674 María Angélica Illanes, Chile Des-centrado. Formación socio-cultural republicana y transición capitalista (1810–1910) (LOM Ediciones 2003) 161.

675 Ibid 134–5.

676 *El Araucano* (Santiago de Chile, 28 September 1832) 3. The article has no title and its author is not identified.

> This subjection so vague and indeterminate [to the law of contract] offers a vast field [for] the cunningness of debtors … It seems that *laesio enormis* is … the more powerful defence for non-performing debtors and the one that already makes both creditors and judges feel uneasy.[677]

Thus, the problem was that, even if maximum interest rates had been abolished, some judges could understand that *laesio*, as it was applicable to contracts in general, was also applicable to financial transactions in particular. *Laesio* under Spanish law – then in force throughout the whole of Spanish America – allowed a party to claim nullity of a contract in cases in which the price agreed had a difference of at least 50 per cent with the market price of the good exchanged.[678] Applying *laesio* was not the same as applying usury laws, but nevertheless the mechanism allowed judicial interference with the freedom of the parties to determine the economic conditions of their transactions. The connection between usury laws and *laesio* was perceived by the lawyers or politicians engaged in this discussion. In 1843, the limitation of interest rates through *laesio* was again suggested in a specialized journal.[679] Nevertheless, this was more liberal than Spanish (and French) law: *laesio*, when translated into loans, implied a *flexible (market-driven)* sort of usury law: interests exceeding the usual rate in the market by 50 per cent were null and void. The law did not impose a rigid limit (as Spanish and French law did).

Twenty-three years after the enactment of the 1832 Act, the Civil Code of Chile explicitly recognized this defence against interest rates. Its article 2206 stipulated that

> Conventional interest shall have no other limits than those indicated by special statutory laws, except for that, if not being limited by statutory

677 Ibid 3–4.

678 Somellera (n 657) 209.

679Anonymous article (1843) 96 *Gaceta de los Tribunales* 4.

> law, it exceeds by a half the interest that is proved to have been currently in use by the time when the agreement was made, the judge shall reduce interest to such current interest.

Summarizing: Benthamite influence, though not explicitly acknowledged, was at play when Chile abolished usury laws in the 1830s. This results from the close parallelism between the arguments used by the promoter of the Act (Gandarillas), and Bentham's ideas, and has also been suggested by prominent Chilean legal historian (Guzmàn Brito). Following discussions in the 1830s and 1840s, the Civil Code (1855) reinstated a limitation of interest rates, but, as a secondary effect of the 1832 Act, the Civil Code adopted a *more flexible, market-driven, approach* than Spanish and French law. According to the Chilean Civil Code, the maximum interest rate was fixed by the evolution of market rates, determined by supply and demand, and the parties were allowed a generous 50 per cent margin over those market rates.

3.4. Abolition in Brazil

In Brazil, complete freedom to determine interest rates was adopted by an Act of 24 October 1832. Its first and fourth Articles provided:

> Article 1. Interest or price of money, of whichever species, shall be that which the parties agree on. […]
>
> Article 4. All statutes and provisions to the contrary are hereby repealed.

A distinguished Brazilian legal scholar and politician, Cándido Mendes de Almeida, writing in the 1870s, within living memory of the enactment of the 1832 Act, attributed it to the widespread influence of Bentham's book, *Defence of Usury* among Brazilian legal

actors.[680] This is confirmed by the records of the sessions of the Brazilian Senate, where a first Bill for the abolition of usury laws was discussed in 1826. In the session of 1st July 1826, one of the members of the Senate, the Baron of Cayrú, indicated that the promoter of the Bill (Senator Carneiro de Campos) could invoke the support of Bentham and Say for the Bill.[681] The 1832 Act was followed by the Commercial Code of 1850 which kept in force the liberalisation of interest rates.[682] The Brazilian Civil Code came relatively late compared to the rest of South America. Although the Constitution of the Brazilian Empire (1824) promised a civil Code 'as soon as possible', it was enacted only in 1916.[683] With regard to interest rates, the Brazilian Civil Code of 1916 followed the 1832 Act. It was enacted at a time described by Brazilian scholars as one of 'exacerbated individualism'.[684] The Civil Code regime was one of 'wide' freedom.[685.] Article 1262 of the Code read as follows:

> It is permitted … to apply interest to the loan of money or other fungible assets. That interest can be fixed below or above the legal rate … with or without capitalisation.

Summarizing, in the case of Brazil, the evidence of Bentham's influence comes from a local legal scholar, Mendes de Almeida, and the records of the sessions of the Senate.

680 Cándido Mendes de Almeida (ed) *Ordenações Filipinas*, vol 4 (Instituto Philomathico 1870) 871.

681 Diario da Camara dos Senadores do Imperio do Brasil (Rio de Janeiro, 1º Julio 1826) 323.

682 André Ramos Rodrigues, 'Da evolução normativa da limitação de juros no Brasil e a necessidade constitucional de instaurar-se uma nova etapa' (2002) 11-III Ambito Juridico, http://www.ambitojuridico.com.br/site/index.php?n_link=revista_artigos_leitura&artigo_id=4961&revista_caderno=9.

683 Vieira Ferreira, *O Codigo Civil Annotado* (Leite Ribeiro 1922) xx-xxxiii.

684 Silvio Rodrigues, *Direito Civil – Parte Geral das Obrigações*: Vol II (2nd edn. Saraiva 1965) 338.

685 Christian Sahb Batista Lopes and Mariana Richter Ribeiro, 'A disciplina dos juros no direito brasileiro após o advento do Código Civil de 2002' (2014) 9 Meritum – Belo Horizonte 15, 23.

3.5.The Venezuelan Act of 1834 and Fermín Toro

3.5.1. The Abolition of Usury Law

In Venezuela, an Act of 10 April 1834 established absolute freedom of contract including the complete liberation of interest rates. The influence of Bentham was not acknowledged by the drafter of the Act. However, unlike other South-American jurisdictions, the vivid discussions surrounding the 1834 Act left behind a significant amount of information revealing the use of Anglo-American ideas, which shall be addressed in the following sections. The 1834 Act read as follows:

> [W]hereas: freedom, equality and security of contracts are one of the more powerful remedies that can contribute to the prosperity of the Republic […]:
>
> Art. 1. It can be freely agreed that, for making effective the payment of any credit, the assets of the debtor be auctioned for the amount that is offered in the date and time indicated for the auction.
>
> Art 2. In all other contracts, and also regarding the interest rate agreed therein, whichever it may be, the will of the parties shall be strictly enforced …
>
> Art 5. The creditor or creditors may act as purchasers in the auction …
>
> Art. 7. All other laws that are opposed to the provisions contained herein are derogated.[686]

Thus, as per article 2, absolute freedom of the parties to agree the interest rate was established and article 7 repealed all usury laws previously in force. Additionally, article 1 provided for an easy procedure of enforcement. Under the abrogated Spanish law, the

686 Carrillo Batalla, *Historia* (n 602) 365.

assets of the debtor were to be sold at least at two-thirds of their estimated value, and the creditors were not allowed to purchase them. This made enforcement extremely difficult.[687]

The topic of interest rates had been previously discussed in the Great Colombia Congress during Bolivar's presidency, when Venezuela was a part thereof. A group of members of Parliament, likely supported by Vice-President Santander, argued in favour of liberating interest rates.[688] Although their motion was not approved at the time, it should be remembered that Santander was one ardent Benthamite among those leading the independence movement in South America.[689] The proposal was presented again when Venezuela was separated from Colombia, and this time, was enacted. The influence of Bentham's and Anglo-American legal ideas emerges clearly from the debates about the convenience of freedom of interest that followed some years after the promulgation of the 1834 Act, when Venezuela entered into a period of economic recession. Those debates were fuelled by the social relevance of the 1834 Act, since it regulated the relationship between landowners and the merchant urban elites, in favour of the latter, the usual suppliers of capital.[690]

The drafter of the 1834 Act was Santos Michelena, Minister of Economy of Venezuela at the time. He was appointed minister in 1830. Trained in commercial

687 Michelena's report in Tomás Enrique Carrillo Batalla, *El pensamiento económico de Felipe Larrazábal* (Universidad Central de Venezuela: Consejo de Desarrollo Científico y Humanístico 2004) 154.

688 Ibid 23.

689 See Chapter 2 Section 3.5.2 above.

690 Rogelio Pérez Perdomo, El formalismo jurídico y sus funciones sociales en el siglo XIX venezolano (Monte Ávila Editores 1978) 45.

activities, he had spent six years living in Philadelphia (1813–19), and three in London (1826–8).[691] The government to which he belonged, was characterized by the acceptance of Mancunian notions of allowing the market to find its own level, an ideological position associated with liberal politics.[692] There is a terminological aspect of Venezuelan politics that needs clarification. Michelena belonged to a political group known as the Conservative Party, which was opposed to another known as the Liberal Party. However, the labels did not reflect the economic ideas advanced by each group. The so-called 'Conservative' Party endorsed indeed a very *liberal* economic agenda.[693]

3.5.2. Arguments in Favour of the 1834 Act

According to Berglund, in the message accompanying the draft of the 1834 Act,

> Michelena argued that money was a good like any other good. Since the law did not establish limits on the gains permissible in transactions with other goods, he believed that money should also be left free to respond to the supply and demand of the market place.[694]

Michelena's reasoning relied on Bentham's analogical argument discussed above,[695] though Bentham was not mentioned. He argued that:

> Money being a merchandise just as any other, no reason can be conceived why, while the benefits permitted in all other business are not fixed, they shall be fixed in the renting of coined metals. The value of money is affected like that of all the other things subject to exchange by the higher

691 Tomás Michelena, *Reseña Biográfica de Santos Michelena* (Curazao 1889) 18–41.

692 Susan Berglund, 'Mercantile Credit and Financing in Venezuela, 1830–1870' (1985) 17 *Journal of Latin American Studies* 373.

693 Bushnell-Macaulay (n 535) 105–6.

694 Berglund (n 692) 374.

695 See Section 2.3.2 above

> or lesser benefit that may be obtained from their use or, what is the same, according to the abundance or the scarcity of their circulation.[696]

There were further echoes of Benthamite ideas. Usury laws were described by Michelena as neither founded in reason, nor as having *general utility* as their object. [697] Such allusion to 'general utility' in the context of the first half of the nineteenth-century is usually a clear sign of utilitarian (Benthamite) inspiration. Finally, Michelena argued that the legal limitations of interest were always eluded, which is a simile of Bentham's ineffectiveness argument, as mentioned above.[698]

3.5.3. Economic Recession and Debate

The political discussions which followed some years after the enactment of the 1834 Act, provide a substantial amount of evidence of Anglo-American influence on this area in Venezuela, something which is unrivalled in other jurisdictions. In the words of Safford:

> [The 1834 Act] became a source of serious political conflict [as] coffee planters who had indebted themselves to expand production during years of high prices in the 1830s found themselves unable to repay their creditors when the market declined at the end of the decade. Throughout the 1840s coffee planters campaigned fervently against liberal legislation of 1834 which has freed interest rates from colonial restrictions upon usury.[699]

As a result, though the 1834 Act had been successful in attracting capital for the coffee-

696 Carrillo Batalla, *Pensamiento económico (*n 687*)* 154.

697 Ibid.

698 See Section 2.3.2.

699 Frank Safford, 'Politics, Ideology and Society in Post-Independence Spanish America', in Leslie Bethell (ed) *The Cambridge History of Latin America* (CUP 1985) 386.

planting industry, when South America went into economic recession,[700] borrowers became unable to repay their loans. Cornered as they were, they launched an attack against the 1834 Act. Venezuelan political newspapers, as well as a book, published in the midst of the debates, provide ample evidence of the discussion of Benthamite and Anglo-American legal ideas in connection with the 1834 Act, both by *friends and foes* of the landed classes.

3.5.4. The Debate in Venezuelan Newspapers

In 1838, in a market characterized by increasingly higher interest rates, the newspaper *El Nacional* launched a campaign against the 1834 Act. The editor of the newspaper assumed that the 1834 Act had been inspired by Bentham's ideas, and argued that such doctrine could work in England, but not in Venezuela:

> All of Bentham's doctrines stand on a basis which is the cornerstone of the building of his ideas: freedom, but … Venezuela lacks … the population, wealth and commerce needed in order to prevent monopoly and to determine, through competition, the interest rates or the price of money.[701]

In 1843, the editor of another Caracas' newspaper, *El Promotor*, also argued against the 1834 Act. He described the defenders of freedom of contract in interest rates as trying to follow the example of English legal ideas and, in particular, Benthamite doctrine. According to *El Promotor*, the partisans of the 1834 Act argued that

700 See Chapter 1 Section 6.3.

701 'La Ley de 10 de Abril es funesta al País por Circunstancias Particulares' in *El Nacional* (Caracas, 10 June 1838). The name of the author is not indicated. Quoted by Lucía Raynero, *La Noción de Libertad en los Políticos Venezolanos del siglo XIX: 1830-1848* (Universidad Católica Andrés Bello 2001) 176.

> [I]f England …ha[d] acknowledged that it is convenient to establish the … freedom of interest rates, how can we go back to their restriction? We will commit an offence against the illustrated section of the Venezuelan people.[702]

In short, according to *El Promotor*, the defenders of the 1834 Act argued explicitly that the English view should be followed because it was the most *illustrated* one (i.e. the most rationally motivated). This allusion to England is another example of the political prestige enjoyed by English institutions in the aftermath of South-American independence. As mentioned earlier in this thesis,[703] *Englishness* stood for modern and liberal credentials. The same article in *El Promotor* also mentioned the literature used by the defenders of the 1834 Act. That is to say, Bentham's *Defence of Usury,* and Anne R. Turgot's *Memory about Money Loans* were indicated as if representing one and the same book. This means that some of the editions in which those two works were published together[704] were available in Venezuela. Even more interesting, the article indicates that the volume '[was] in everybody's hands'.[705] The widespread reading of Bentham in Venezuela on this concrete matter was, therefore, not unknown. That, in itself, is not evidence of influence, but shows that the conditions for it were in place.

Finally, an interesting aspect of the article of *El Promotor* is its main argument *against* the 1834 Act. According to the editor of the newspaper, freedom of interest rates had mostly benefited the British Colonial Bank of Caracas,[706] which charged its clients

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702 'Sobre la Tasa del Interés' (1843) Vol.I No. 9 *El Promotor*, 68. The author is not indicated.

703 Chapter 2 Section 2.

704 Most probably the translation into Spanish published in Paris in 1828. See footnote 648 above.

705 'Sobre la Tasa del Interés' (n 702).

706 A local branch of the British Colonial Bank of London. The Venezuelan branch was established in 1839 and closed its operations in 1849. Cf. Matthew Brown, *The Struggle for Power in Post-*

excessive interests (2% monthly).[707] This argument sits well with an interpretation of South-American independence as a mere change of metropolis (Spain for England), and of the liberal ideology, as just one justification for that change.[708] Implicit in that argument was an attack on English ideas: no matter how sound and modern the English were, their dealings with South America were basically tainted by self-interest, and the sincerity of their liberal ideals should be put under suspicion.

3.5.5. Fermín Toro's Book

The discussions about the abolition of usury law spanned across several years, and in 1845, Fermín Toro, a local politician and lawyer, published a book critical of the 1834 Act. That book provides further evidence of the Benthamite inspiration of the supporters of the liberal legislation, and the significant role played by Anglo-American legal ideas on both sides of the debate. Toro argues extensively in favour of a derogation of the Act, and identifies the main features of the debate that followed a few years after the enactment of the 1834 Act.

According to Toro, the supporters of the 1834 Act embraced Bentham's 'utilitarian' and 'positivist' ideas.[709] However, other Anglo-American legal ideas too were present from the very first page of Toro's book. He opened with three quotations, from William Blackstone, James Kent and, the German, Barthold Niebuhr. Later in the

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Independence Colombia and Venezuela (Springer 2012) 140.

707 'Sobre la Tasa del Interés' (n 702).

708 See Chapter 1 Section 6.4.

709 Fermín Toro, *Reflexiones sobre la Ley del 10 de abril de 1834* (Imprenta de Valentín Espinal 1845) 7, 16, 36, 37, 48.

book, Lord Mansfield was quoted. Toro's interest in enlisting the support of some Anglo-American legal actors reveals the relevance assigned to them at that time in Venezuela: Toro was trying to neutralise the rhetorical value of Bentham's *Englishness*. [710] Thus, Toro's use of *other* Anglo-American authors had in itself also a rhetorical value. This is confirmed when, much in the fashion of South-American intellectuals of the time, he refers to England and the United States as 'the classical countries of liberty'.[711]

Blackstone's inaugural quotation in Toro's book reads: 'For the lenders of money my caveat is that neither directly nor indirectly [they should] collect interest above the legal rate'.[712] Blackstone and Lord Mansfield were referred to where Toro explains the disfavour with which usury was regarded by English judges.[713] In *Abrahams* v *Bunn*, [714] Lord Mansfield accepted that 'a person who borrows money upon a usurious contract is a proper witness to prove the whole case'.[715] Toro's point was that this approach implied a strong rejection of the practice of usury in England, as even the person who would benefit from proving the usurious nature of the loan (the borrower) was allowed to act as a witness.

Pointing to the other key aspect of the 1834 Act, Toro quotes James Kent on the related topic of enforcement. He attacks also this aspect of the 1834 Act, and invokes

710 In the context described in Chapter 2 Section 2 above.

711 Toro (n 709) 66.

712 Ibid 3.

713 Ibid 77.

714 *Abrahams qui tam*, v. *Bunn* (1768), 4 Burr 2251, 98 ER 173.

715 Sir William David Evans, A General View of the Decisions of Lord Mansfield in Civil Causes (J Butterworth 1803) 316.

Kent's opinion to remark upon the extreme parsimony with which judicial enforcement was conducted under English law.[716] The quote from Kent is in Spanish and the source is not indicated. However, I have found it to be a well-translated paragraph from Kent's *Commentaries on American Law*. In its English original, the paragraph transcribed by Toro reads as follows:

> When we consider how reluctantly and cautiously real property in England has been subjected to the process of execution, and how reasonable it is that provision should be made … against the precipitancy, and sacrifices, and iron-hearted speculation at sheriffs' sales, there will appear to be no just ground to complain of this branch of our American remedial jurisprudence.[717]

Toro contrasted this with the fast procedures established by the 1834 Act, which, in his opinion, significantly compromised the interest of debtors, usually owners of land. Toro's point was that, in order to protect the rights of debtor's, and similarly to Anglo-American law (which Kent praised in this respect) the process of enforcing a loan should be carried out slowly and cautiously. Probably, this would grant the debtors an opportunity to pay their debts, saving their property from a forced sale. The overarching argument was that not only the lenders, but also the borrowers, should be protected by the law. Toro's perception was that the Venezuelan Act of 1834 had excessively favoured the lenders, to the detriment of the debtors, and he contrasted that with the approach of Anglo-American law, as described by Kent. The defenders of the 1834 Act were, according to Toro,

> the partisans of a speculative rigour that allows every damage, every extortion … if it is exercised in the name of the freedom of industry and with the object of increasing wealth … Say and Bentham … would tell us

716 Toro (n 709) 3, 88, 90.

717 James Kent, *Commentaries on American Law*, vol. 4 (2nd edn. O.Halsted 1832) 438.

> that all of this is natural and legitimate [and] that the nation as a whole benefits from this.[718]

The typical utilitarian reasoning is captured in the last phrase. Once Toro had identified the defenders of the Act, he summarises their arguments as follows: (a) interest rates are legitimate whatever their amount, (b) even if usury was considered illegitimate, the law would be unable to combat it, and (c) interest rates should be freed in order to attract foreign capital.[719] The first was just a rephrasing of the liberal position. The second alluded to the argument about the ineffectiveness of usury laws. The last may be categorized as a 'local' argument based on the appreciation of the economic needs of Venezuela in that time. The abolition of usury laws was meant to attract capital required for the development of the national economy. With regard to the first argument, Toro identifies Say and Bentham as its main proponents:

> The followers of the school of Say, of Bentham and of some other modern writers, mainly economists, consider liberty as an objective [and for them] the intervention of society even when under the form of protection, is nothing but a violation of individual liberty.[720]

These assertions had their counterpart in Bentham's paragraphs quoted above about the illegitimacy of government intervention, and its lack of ability, in the protection of the borrower.[721] Toro's answer points in the direction of equality:

> I contend that liberty [is a] means [and] should be subordinated to the necessary equality […] the freedom that is exercised by some, with

718 Toro (n 709) 7.

719 Ibid, 8.

720 Ibid 15–16.

721 See Section 2.3.2 above.

> damage to the others, is tyranny, is iniquity … it violates equality.[722]

The example he chooses to illustrate his point is taken from the United Kingdom, where troubles between Irish landlords and tenants were about to provoke a change in the law:

> [T]he [British] Parliament is at present working on a Bill that intervenes in the relationships between Landlord and Tenants … Such provision equates a direct invasion of property rights [and] violates liberty, or putting it correctly, limits it in favour of equality.[723]

The information was accurate: in 1843 a Royal Commission presided by the Earl of Devon was appointed to analyse the situation of tenants in Ireland, and it produced a report delivered to the Parliament in 1845,[724] the year in which Toro's book was published. While Bentham saw government intervention as both illegitimate and impractical, Toro deemed it legitimate whenever it was required for restoring equality, and practicable, as evidenced by the Bill being discussed in the United Kingdom legislature. Toro's interest, and up-to-date information about English matters, is quite remarkable, but can be explained as a manifestation of the *anglomania*[725] widespread at the time.

The second confrontation with Bentham referred to the origins of the usury laws. According to Bentham, the 'fountain' of usury laws could be found in religious traditional conceptions. By contrast, Toro's contention is that the unjust nature of usury was recognized *before* and *outside* Christianity, in antiquity and in Islamic countries (on

722 Ibid 16.

723 Ibid 18.

724 William A Dunning, 'Irish Land Legislation since 1845' (1892) 7 Political Science Quarterly 57, 79.

725 See Chapter 2 Section 2.

which point he relied on the authority of Niebuhr),[726] and specifically in pre-Christian Roman law.[727] This is correct, though the motivations for condemnation of usury in early Roman law, and in later Justinianic law, may have differed.[728] In his perspective,

> [the origin of anti-usury attitudes rested] in the moral principle that prohibits one to do evil through whichever means. [I]t is the wisdom of the legislation to protect the incautious and the needy against the extortion of greed.[729]

It is not surprising that Blackstone was not invoked by Toro for these purposes. As already observed, Blackstone argued that the *total* condemnation of interest derived from 'monkish superstition' and its acceptance via the reinstallation of 'true religion'.[730] The division here was a religious one between Catholicism and Protestantism. In this respect, the English debate on usury did not fit easily into the Catholic South American context. Thus, Toro had to make a *selective* use of Blackstone. The condemnation of 'monkish superstition' that emerged, both in Bentham and Blackstone, was difficult to digest in Spanish America, where the 'monks' were still held in high esteem by the majority of the population. Toro circumvented the problem by arguing that the anti-usury laws were *older* and more *widespread* than Christianity. Would it not have been wise for Toro to dismiss Bentham on the basis of him being a native of a Protestant country? If that argument had been likely to be effective, then he would have, at least in *some* form, used it. He did not. This is meaningful in order to understand the cultural environment in which these jurists were operating. Hidden in the background was the contraposition

726 Toro (n 709) 36.

727 Ibid 48.

728 Zimmermann (n 599) 168.

729 Toro ((n 709) 37.

730 Blackstone (n 607) 456.

between *Spanish* as *backward and feudal*, and *English or French* as *advanced and commercially wise*.

In his book, which draws so many arguments from Anglo-American law and legal ideas, Toro laid the basis of a dilemma between freedom and equality in contract law that runs right up to present-day South-American legal discussions. As a result of the debates during the late 1830s and 1840s, the 1834 Act was derogated in 1848 by an Act that limited interest rates to 9% p.a. However, a few years later, absolute freedom of interest rates was reintroduced by the Venezuelan Civil Code of 1862, and remained a characteristic of Venezuelan law till the 1940s.[731]

3.5.6. Summary

Summarizing, four aspects should be retained about the Venezuelan Act of 1834. First, the Benthamite pedigree of the legislation abolishing usury was widely recognized in Venezuela, though there was no direct acknowledgement of that influence by the drafter of the Act or the legislature. Second, Bentham, in particular, was seen as a leading voice among others (Say, Turgot and other economists). Third, through the debate we can perceive the political prestige that Anglo-American legal ideas had in Venezuela in the 1830s. The argumentative value of Anglo-American legal ideas was shown, in the case of Toro, by the need he felt to neutralize Bentham's Englishness, with Blackstone, Kent and

731 For this paragraph: José Alberto Zambrano Velazco, *Teoría General de la Obligación: la Estructura* (Editorial Arte 1985) 84-5; Leopoldo Borjas, 'Régimen Legal de los Intereses' (1981) 6 Revista de Derecho Público 6-33; J Otis Rodner, *El Contrato y la Inflación: el Uso de las Cláusula de Valor en Venezuela* (Editorial Sucre, 1983) 66-71.

Lord Mansfield,[732] and in the case of the press, by the suggestion of the defenders of the 1834 Act that Venezuela was not to stay *behind* England on this issue.[733] Finally, Toro's abundant use of the texts of Blackstone, Bentham and Kent was an illustrative part of a wider phenomenon: the relatively deep knowledge of those authors in South America, something that occurred also in other South-American jurisdictions, such as Colombia, Chile, Argentina, and Uruguay.

3.6.Santander and Abolition of Usury Law in Colombia

In Colombia, after the failed attempt referred to above,[734] an Act abolishing usury laws was passed on 26 May 1835. Its first article read:

> The *Auto Acordado* 16 *Título* 21 *Libro* 5 of the *Recopilación Castellana* and the resolutions that limit or determine the rent for the money given for a premium or interest are hereby derogated.[735]

It must be remembered that the rule from the *Recopilación Castellana* mentioned by the 1835 Act was the one in force in all of Spanish America, which limited interest rates to 6 per cent or 5 per cent depending on the nature of the transaction. The Benthamite influence is commonly acknowledged in the case of Colombia. The Colombian historian Torres García has no doubt that in particular, the 1835 Act 'was the natural outcome of the propaganda of Bentham's doctrine developed in New Granada [Colombia] by

732 See Section 3.5.5 above

733 See Section 3.5.4 above

734 See Section 3.5.1 above.

735 Torres García (n 602) 136.

General Santander'.[736] As explained earlier,[737] Santander was a convinced follower of Bentham, and while in power he issued a decree imposing the mandatory teaching of Bentham's texts at the Colombian universities.

In 1841, the Act received its first attack from Mariano Calvo, a Colombian politician. In his allegation, he emphasized that the 1835 Act was in contrast with the example of French law, which, as already explained,[738] was an important model for South America:

> [A]lmost at the same time that in France … a considerable majority of members of Parliament denied the legal freedom of interest in money, in New Granada [Colombia] it was allowed without any restriction[739]

This highlights not only the objective difference of approach between the two legal systems, but, more importantly, the awareness of contemporaries of the divergence with the civilian tradition, and its more up-to-date version: French law. In spite of Calvo's efforts, freedom of interest persisted until the 1850s when the first Civil Codes of the States forming the Federal Republic of Colombia were enacted. For instance, article 2231 of the Colombian Federal Civil Code of 1873, followed the solution of the Chilean Civil Code analysed above.[740] Article 2231 of the Colombian Civil Code of 1873 provided that:

> The agreed interest that exceeds by a half the one that is proven to have

736 Ibid 140.

737 See Chapter 2 Section 3.5.2.

738 See Chapter 1 Section 2.1 above.

739 Torres García (n 602) 142.

740 See Section 3.2 above.

> been the current interest at the time of the agreement, shall be reduced by the judge to that current interest, provided that the debtor requests such reduction.[741]

Therefore, a flexible, market-driven, model of limitation was adopted, in the form of a margin limit over the market interest rate. Later, that flexible limit remained in force for non-commercial transactions, but Act number 57 of 1887 fixed concrete maximum levels for loans made by banks and corporations at 8 per cent and 10 per cent per annum, depending on the existence or absence of a mortgage as collateral.[742]

All the information points towards Bentham providing the inspiration behind the Colombian Act of 1835. Basically, its accordance with Benthamite doctrine, the fact that it was enacted during the presidency of the prominent Benthamite leader, Francisco de Paula Santander, the testimony of a Colombian legal historian, and the commonly acknowledged strong diffusion of Bentham's doctrines in Colombia during the 1820s and 1830s. Furthermore, the awareness of contemporaries that the Act departed from the civilian tradition, and the cherished French model, in favour of a more liberal one, is another relevant aspect revealed by the discussion following the Colombian Act of 1835.

3.7.Masini, Costa and the Uruguayan Act of 1838

In Uruguay, the first step towards the abolition of usury laws was given during the year 1836 by Ramón Masini, a member of the Uruguayan Parliament:

> [R]eacting against the current ideas of his times [Masini] introduced a Bill

741 Ibid 138.

742 Ibid.

> prescribing that the rate of interest should be the one agreed by the contracting parties.[743]

Two years later, the Bill was defended in the Senate by Antonino Domingo Costa utilizing the analogical argument,[744] though with no explicit mention of Bentham:

> [T]he laws in force … limit interest rates to five and six per cent and call usurious those that exceed such percentages, but they submit to the absolute freedom of the parties the determination of rents, as if the property of an immovable asset was something different from the property of money.[745]

As was the case with Bentham, Costa's assimilation implied that, in his opinion, interest depended on the abundance or scarcity of money in the market and, therefore, that '[it] is regulated by the benefit resulting from the loan for the lender and the borrower, just as it happens with any other kind of goods'.[746] Lastly, the Bill was passed on 2 April 1838. Article 1 of the Uruguayan Act of 1838 established absolute freedom: 'the legal interest of money shall be the one agreed by the contracting parties'.

In 1852, the future author of the Commercial Code expressed similar ideas in the newspaper *La Constitución*: 'money is a merchandise just like any other'.[747] The generalized concern, however, was that in spite of the liberation of interest rates capital was scarce in Uruguay. This fact had not been alarming during the war in which the country had been involved from 1839 to 1851 (the *Guerra Grande*), but after the peace

743 Eduardo Acevedo, *Anales Históricos del Uruguay*: Vol. 1 (Barreiro y Ramos 1933) 507.

744 See Section 2.3.2 above.

745 Ibid.

746 Ibid.

747 Eduardo Acevedo (hijo) (ed) Eduardo Acevedo Años 1815–1863. Su obra como codificador, ministro, legislador y periodista (Imprenta El Siglo Ilustrado 1908) 157.

agreement was signed, it became clear that foreign capital was still not flowing into Uruguay. Eduardo Acevedo, a prominent Uruguayan lawyer and politician, author of the first draft of the Uruguayan Civil Code, deduced that it was necessary to facilitate judicial enforcement, and modernize the mortgages system, in order to provide investors with confidence. This shows a parallelism with Venezuela in two respects: the need to attract foreign capital (indicated by Toro as one of the arguments of the supporters of the 1834 Act), and the liberation of interest rates as an attraction. Bentham's liberal doctrine on interest rates perfectly matched this economic and political agenda. When the Commercial Code of Uruguay was enacted in 1865, the provisions of the 1838 Act were incorporated into it. The commission that reviewed the draft of the Code in 1865 remarked upon the innovation introduced by the 1838 Act:

> [O]ur country has the glory of having been the first if not the only one in our America that, breaking with all the old ideas about money and the *absurd preoccupations against* usury [left] to the parties' interest to calculate the one that they should take and give in exchange for the use of money.[748]

The report was signed by four jurists, among them Tristán Narvaja who by that time was working on the final draft of the Uruguayan Civil Code enacted in 1868. The enthusiasm of the four reporters for the novelty, and the awareness that Uruguayan law had broken ground on that matter, is remarkable. Enthusiasm may have led them to a huge inaccuracy: Uruguay was *not* the first South-American country to abolish usury laws. This oversight may be evidence of two different things. First, communication of ideas or legal news between certain parts of America was deficient. Second, the doctrine of

748 Manuel Herrera y Obes and others 'Informe de la Comisión Correctora', in *Código de Comercio para el Estado Oriental del Uruguay* (Montevideo 1866) ii. Emphasis added.

abolition of usury laws made its way into South America through different channels. For example, the Uruguayan abolition of usury did *not* draw inspiration from the Chilean, Venezuelan or Colombian Acts.

I have not found direct acknowledgments of the use of Benthamite ideas in the process leading up to the 1838 Act, but the arguments advanced in the parliamentary discussions, and afterwards, were similar to those postulated by Bentham. Given the familiarity of several prominent Uruguayan politicians and lawyers with Bentham's works, those similarities cannot be merely accidental.[749] The authors of the 1838 Act (Masini and Costa) had been members of the Constitutional Convention of 1830, and Bentham was among the more widely referred-to authors in the discussions of that Convention.[750] Moreover, Tristán Narvaja, the author of the Civil Code of 1868, considered the 1838 Act so important and unique that he was of the opinion that 'the legislature which enacted it should be recorded in the Parliamentarian annals in bronze letters'.[751] The familiarity of Narvaja with Bentham's works is confirmed by his doctoral thesis in the University of Buenos Aires, and a journalistic article written by him in 1869.[752] When the Uruguayan Civil Code was enacted in 1868, its article 2177 provided for a complete freedom of interest rates. In the notes corresponding to it, the codifier indicated that it was 'against the European Codes' including French law.[753] Therefore, he

749 See Chapter 2 Sections 3.5.1 and 3.6.1.

750 Safford (n 699) 367, emphasis added.

751 Ricardo Narvaja, 'Introducción', in Tristán Narvaja, *Fuentes, Notas y Concordancias del Código Civil de la República Oriental del Uruguay* (Tipografía y Litografía Oriental 1910) xviii.

752 Tristán Narvaja, 'La Nación tiene Código Civil' in Jorge Peirano Facio, *Tristán Narvaja. Un Jurista Rioplatense en tiempos de la Codificación* (Instituto de Investigaciones de Historia del Derecho, 2008) 299–303.

753 Probably, South-Americans were not aware of the recently enacted Italian Civil Code of 1865 which

consciously departed from French or any other civil law influence, and moved towards a more liberal regime on interest rates.[754] The only civilian source in the same vein that he mentioned, was Vélez Sarsfield's draft of a Civil Code for Argentina.

The widespread reading of Bentham among Uruguayan jurists of the time, the similarity between their central argument in favour of the abolition of usury and Bentham's analogical argument, the fact that there was no other available French or civilian material to inspire this piece of legislation, and the awareness of contemporaries that they were breaking new ground in this territory, all point in the direction of a Benthamite influence.

3.8.Freedom of Interest Rates in Argentina

The Argentinean Civil Code draft was authored by Dalmacio Vélez Sarsfiled. The relevant provision concerning interest rates on loans is the following: 'Interests may be attached to the obligation and the interest agreed between creditor and debtor is valid.'[755] This provision was literally copied into the Paraguayan Civil Code of 1876. In his note to the provision on interest rates, Vélez commented:

> The subject of conventional interests is widely treated by several creditworthy writers which could be quoted in support of this article. Regularly the European Codes are against freedom of contract in the

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had abolished limits on interest rates. Cf. Francesco Messineo, *Doctrina General del Contrato*: Tomo I (Ediciones Jurídicas Europa-América 1986) 491.

754 Ibid, 298–9.

755 Código Civil de la República Argentina, redactado por el Dr. Dalmacio Vélez Sarsfield y aprobado por el Honorable Congreso de la República el 29 de setiembre de 1869. Edición Oficial (New York 1870) 157.

matter of interest on capital.[756]

However, he quoted none of these writers. From the list of books contained in his library it is known that he had a copy of Bentham's works edited in Brussels in 1840, the third volume of which includes the whole text of the *Defence of Usury* in a French translation, a language in which he was well versed .[757] Several liberal economists such as Bastiat, or common law scholars such as Blackstone and Kent, were also part of his library collection.[758] Therefore Bentham should be, at least, one of the 'several creditworthy authors' that Vélez was referring to.

It must be remembered, in addition, that Vélez was one of the Professors of Political Economy at the Faculty of Law of the University of Buenos Aires in the 1820s.[759] It has been indicated that:

> [When Vélez] went to Buenos Aires to teach in the first years of his public career he learned [from Political Economy] to see the future of his fatherland in terms of the economical factor translated into that individualistic liberalism of *Bentham* and Adam Smith, spread under the influence of its *divulgators* James Mill or Jean-Baptiste Say.[760]

The doctrine of abolition of usury was Bentham's only, and not Smith's. On the other hand, Mill and Say are correctly identified as 'divulgators'. Even though it could be argued that all the evidence is circumstantial, nevertheless everything seems to point in

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756 Ibid.

757 Jeremy Bentham, *Œuvres de Jeremie Bentham*, vol. 3 (3rd edn. Societé Belge de Librairie Hauman et Ce. 1840) 241–82.

758 Enrique Martínez Paz (ed) *Catálogo de la Biblioteca Dalmacio Vélez Sarsfield* (Imprenta de la Universidad Nacional 1940).

759 Abel Cháneton, *Historia de Vélez Sarsfield*: Vol. 1 (Librería y Editorial La Facultad 1937) 121–2.

760 Martínez Paz (n 758) xix. Emphasis added.

the same direction. Vélez was regarded as following Bentham, among others, in economic matters, and was conscious of going against the European mainstream current; this makes it most likely that his inspiration was coming from Bentham, alongside divulgators, such as Say, as was the case in Venezuela. It should be remembered that in South America, Bentham was considered mainly as a *legal* scholar, and not only as a philosopher or political activist.[761] Thus, it is likely that the legal side of the influence to abolish usury laws came from him.

Bentham's influence in Argentina, extended as an indirect, and most probably unconscious, influence to Paraguay when the Argentinean Civil Code was transplanted, and enacted as the Paraguayan Civil Code of 1876.

3.9.Summary

As a result of the legislation introduced between 1832 and 1876, five of the seven jurisdictions addressed in this chapter *totally* abolished usury laws (Brazil, Venezuela, Uruguay, Argentina, and Paraguay). The other two (Chile and Colombia), after some decades of complete liberalisation, readopted limitations on interest rates though under a more flexible (market-driven) format, different from the rigid version adopted by Spanish, Portuguese and French law.

Bentham's ideas on the subject influenced this movement. Despite not being the only one advocating liberation of interest rates in the 1830s, Bentham was the first to publish his ideas on the subject, and was associated worldwide with a radical idea of

761 Safford (n 699) 367.

freedom of contract that not even Adam Smith, the founder of economic liberalism, had embraced. The fact that the use of Bentham's ideas on this topic was not overtly acknowledged is likely to be connected to political reasons. The vast majority of South-Americans were fervent Catholics, and usury was a practice strongly condemned by the Catholic Church.[762] As mentioned earlier, in South America, Bentham was usually attacked on the basis of his atheism and materialism,[763] and, hence, on a sensitive issue, such as usury, his name would have attracted more enemies than allies. Even in England, Bentham's paternity of the idea of abolition of usury laws was 'seldom spoken of', as he had admitted to Bolivar.[764] His arguments were abundantly used, and even paraphrased, but, in connection with usury, his followers were slow at convoking Bentham's name.

The abolition or relaxation of usury laws was a first step in the liberalisation of South-American contract law. It marked a relevant and early difference with continental European law, and most specifically, with the French model: South-American contract law was *more liberal*.

4. The Abolition of *Laesio* in South America

4.1. A Knock-On Effect

A first step in the liberalisation of South-American contract law was the abolition of usury laws in the 1830s. A further step was to come in the 1860s when *laesio* was

762 See Section 2.2 above.

763 See Chapter 2 Section 3.6

764 See Section3.2 above.

abolished in several South-American jurisdictions. I will argue that although it cannot be traced back to Bentham, the second step was, at least partially, a *knock-on* or secondary effect of the first one.

Anglo-American influence was *not* a determinant of the abolition of *laesio*, but the radically liberal approach to contract law adopted in the 1830s provided the context or the impetus for a step which, in continental Europe, was taken much later, or not at all. This second step completed the picture of a South-American contract law more liberal than the other models within the civil law tradition, and specifically more liberal than French law, which retains *laesio* for sales of land even today.

4.2. Laesio Enormis

Laesio enormis or, simply, *laesio*, did not exist in classical Roman law. According to Zimmerman, the idea was built 'upon the frail foundations of two texts from Justinian's Code',[765] and thereafter, scholastic and natural lawyers came to consider equality of exchange (commutative justice) as a basic principle of contract law.

In Spanish-America, *laesio* and usury laws, as part of the Spanish legal system, were in force for centuries. Spanish law remained applicable in South America after independence until the new countries introduced their own legislation. In the matter of *laesio*, Spanish law originally endorsed a liberal approach: the *Liber Iudiciorum* (Fuero Juzgo) of the first half of the thirteenth century explicitly rejected *laesio* as a defect of

765 For this paragraph: R Zimmermann, The Law of Obligations: Roman Foundations of the Civilian Tradition (OUP 1996) 259.

contract. As this was a compilation of previous laws promulgated by the early Visigothic Kings, it may have expressed a long tradition stretching back into time and identical to *classical* Roman law. However, during that same thirteenth century, Law 56 Title 5 *Partida* 5 (1256-1265) established that: 'the sale that has been done for less than half of the price that [the thing] was worth by the time of the sale can be undone'.[766] The rule applied to movable and immovable assets. It was later expanded to all kinds of contract by the *Ordenamiento de Alcalá* (1348) and the *Novísima Recopilación de Castilla* (1805).[767]

As to Portuguese law, the *Ordenações Filipinas* of 1603 have been described as a regulation that 'perspires from every pore the intervention of the state in the economy'.[768] *Livro IV, Título XIII* of the *Ordenações Filipinas* established that sales of movable or immovable assets affected by *laesio enormis* (difference of 50 per cent with the market price) were subject to rescission, unless the difference with the *iustum pretium* was paid by the buyer or reimbursed by the seller.[769]

By the nineteenth century, however, *laesio* had been relatively discredited. For instance, in accordance with a more liberalistic approach, the French Civil Code retained *laesio* as a remedy only for the seller of land, when there was a deviation of at least five-twelfths from the *iustum pretium*. Though this implied a relevant degree of liberalisation,

766 '[S]e puede desfacer la vendida que fuese fecha por menos de la meytad del derecho prescio que podier valer en la sazón que la ficieron' (The text is written in medieval Spanish).

767 Octavio Rivera Farber, 'La lesión en los contratos civiles' (1993) 103 *Revista de Derecho Notarial Mexicano* 170-80.

768 Didone (n 603) 26.

769 Mendes de Almeida (n 680) 793.

the fact that *laesio* remained applicable for one of the most relevant assets (land), and for the main contract for its transfer (sale), cannot be underestimated.

4.3. The Abolition

4.3.1. The South-American Context

Spanish and Portuguese law were still in force in South America after its independence. In the course of the nineteenth century, *laesio* was abolished in several South-American jurisdictions allowing much more space for freedom of contract than the Code Napoléon had done. By the 1870s, four South-American legal systems had abolished *laesio*: Venezuela, Uruguay, Argentina, Paraguay. Brazil was added to that list in 1916. These were the same countries were usury laws had been completely abolished. Other two systems (Chile and Colombia) retained *laesio*, but limited it to sales and barters of land.

The previously adopted radical liberal stand on usury may have been one of the driving forces behind this second liberalizing step. Bentham's doctrine was seen in his times as related to freedom of contract in general, and not only to financial contracts.[770] It contributed to the intellectual climate leading to this second step. Bentham's main argument was based on the assumption that interference with the price agreed by the parties was such an unsound policy that no one would accept it. By analogy, he argued, the price of money (interest) should not be limited either. This was a perfectly internally coherent argument within common law systems which, in principle, did not allow the courts to evaluate the adequacy of price or consideration. However, it became

770 See Section 2.3.4 above.

problematic when translated to the South-American context: *laesio* was in force there, and thus, the assumption supporting Bentham's argument was not applicable. This incoherence required the attention of some South-Americans. In fact, as already explained, after the abolition of usury laws, some Chilean legal actors suggested that the restriction of *laesio* should apply to interest rates.[771] It is likely that for other South-Americans, the perception of that incoherence suggested the opposite strategy: not *only* usury laws should be abolished, but *also laesio*.

Furthermore, by the middle of the nineteenth century, the abolition of *laesio* was postulated by a Spanish civil law scholar quite influential in South America: Florencio García Goyena. His draft of a Civil Code of Spain (1852) excluded *laesio* as a defect of contract. I have found no literature on Bentham's influence on Spanish private law, but at least one Spanish legal scholar has affirmed that with regard to *laesio* García Goyena had been inspired by Bentham and liberal economists, though without mentioning any evidence.[772] The claim, however, seems plausible: from other sources we learn that Bentham's influence on García Goyena may have come indirectly. In 1821, a Spanish legal scholar, Nicolás Garelly, produced a draft of a Civil Code for Spain 'which [was] receptive of Bentham's works'.[773] This 1821 draft was used as inspiration in a later draft of a Spanish Civil Code of 1836. García Goyena himself acknowledged that the 1836 draft inspired many rules of his later draft of the Spanish Civil Code, published in

771 See Section 3.2 above.

772 Elsa Sabater Bayle, 'Rescisión por Lesión y Usura en el Derecho español, con algunas referencias al Derecho Argentino' in Academia de Derecho y Ciencias Sociales de Córdoba: <http://www.acaderc.org.ar/doctrina/articulos/rescision-por-lesion-y-usura-en-el-derecho-espanol> accessed 12 April 2017, 9.

773 Juan Baró Pazos, *La Codificación del Derecho Civil en España: 1808-1889* (Universidad de Cantabria 1992) 102-3.

1852.[774] Thus, Benthamite inspiration *may* have come to Garcia Goyena indirectly, though the evidence is not conclusive.

Regarding *laesio*, there is no doubt that García Goyena's draft inspired the Venezuelan Civil Code of 1867, the Uruguayan Civil Code of 1868, and the Argentinean Civil Code of 1869.[775] However, no matter how influential it was in South America, García Goyena's draft was *not* transformed into positive law in Spain. That marks a significant difference with what happened in Spain's former colonies: South-American legal culture *was* ripe for a radical liberalisation of contract law, while Spain's was not yet.

In contrast with what we have seen in relation to the abolition of usury laws, the influence of Bentham on the abolition of *laesio* in South America is less clear. I have found *no direct* allusion to him in the comments of the drafters of the South-American legislation that derogated *laesio*, nor any *substantial* unacknowledged borrowing of his ideas in this field. Thus, my claim is a different one. First, there was some *modicum* of use of Bentham's ideas in connection with *laesio* in Chile and Uruguay, and a limited awareness of some parallelism with Anglo-American law in Argentina. Second, Bentham's ideas *fuelled* a process that gained *more impetus* in South America than in other civil law jurisdictions.

In the next two sections I shall address, first and briefly, the abolition or

774 Ibid.

775 Lisandro Segovia, *El Código Civil de la República Argentina: Tomo I* (Libreriía y Editorial La Facultad 1933) 261-2.

restriction of the doctrine of *laesio* in several South-American jurisdictions. Second, I will review the use made of some Benthamite ideas in connection with *laesio*, and the parallelism perceived by one Argentinean scholar with Anglo-American law.

4.3.2. The Second Liberalising Impulse

In relation to *laesio*, some of the countries addressed in this chapter went further than the French model, and others adopted the French solution (objective *laesio* restricted to land transfers). Five jurisdictions adopted a more liberal approach than European continental law, and abolished *laesio*: Venezuela in 1867,[776] Uruguay in 1868, [777]Argentina in 1869,[778] Paraguay in 1876,[779] and Brazil in 1916.[780] Two jurisdictions followed the French model, and kept *laesio* but restricting it to land transactions: Chile in 1855[781] and Colombia in 1873.[782] The number of jurisdictions that abolished *laesio* represented half of the South-American jurisdictions, and if the relevance of Argentina and Brazil within the South-American landscape is taken into account, it can be comfortably argued that the abolition of *laesio* carried decisively more weight.

It must be noted that all the countries which abolished *laesio*, had previously or

776 Article 1072 of the Venezuelan Civil Code of 1867. The same provision was kept in the following Venezuelan Civil Codes of 1873, 1896, 1904 and 1916 (respectively: articles 1247,1277, 1283 and 1376).

777 Article 1238 of the Uruguayan Civil Code of 1868, later renumbered in 1912 as 1277.

778 The Argentinean Civil Code of 1869 simply did not have a provision regarding *laesio*. Its drafter, D Vélez Sarsfield, made explicit his rejection in his comments to the Code, in *República Argentina* (n 755) 254-55.

779 It was a copy of the Argentinean Civil Code of 1869, and, thus, the same explanation applies.

780 No rule of the Brazilian Civil Code of 1916 referred to *laesio* as a defect of contract.

781 Articles 1889 and 1891 of the Chilean Civil Code of 1855.

782 Articles 1947 of the Colombian Civil Code of 1873, and Article 32 of Act 57/87

simultaneously eliminated usury laws.[783] This can be taken as evidence for my claim that the radical liberal stand adopted on usury laws *did have* a secondary effect on the subject of *laesio*. Only in those countries that eliminated usury laws, *laesio* was abolished as well.

4.3.3. Bentham's Ideas and *Laesio* in South America

As remarked above, I have found *a few* traces of Anglo-American legal ideas in direct connection with *laesio* in Chile, Uruguay and Argentina. Regarding Chile, there were two cases of use of Bentham's ideas in the field of *laesio*, both of which were unsuccessful. First, in the 1830s, in his textbook for Chilean and Bolivian universities, José Joaquín de Mora, a Benthamite follower,[784] had suggested, absolute freedom of contract in the determination of prices: 'there can be no better judge of the trues value of a thing, that is, its utility, than the person who wants it'.[785] The utilitarian affiliation of the argument is clear from its own wording ('its utility'), and from the fact that Mora quoted Bentham's *Defence of Usury* in the same textbook.[786] Mora's position was not followed.

Second, in 1847 and 1853, two preliminary drafts of the Chilean Civil Code, both authored by Andrés Bello (the same author of the final draft of 1855), included an additional *subjective* requirement for a claim of *laesio* to proceed. [787] According to those

783 See Sections 3.4, 3.5, 3.7 and 3.8 above

784 See Chapter 2 Section 3.5.2.

785 Mora (n 654) 28-9. Emphasis added.

786 See Section 3.2 above.

787 In the 1847 draft, article 381, and in the 1853 draft, article 2069. Both articles read as follows: 'The party hat claims *laesio enormis* must provide evidence of his/her ignorance of the value of the thing'. Cf. Andrés Bello *Obras Completas*: Tomo XIII: *Código Civil de la República de Chile,*

drafts, the party alleging *laesio* should prove that she/he was *ignorant* of the value of the thing at the time of the contract. Furthermore, if ignorance was the result of negligence, it was not to count as ignorance for those purposes. That version of *laesio* prefigured the subjective one, and was focused on the protection of autonomy, and not on the external imposition of an economic equation on the parties. With that formulation, the problem shifted from one of *iustum pretium* to one of protecting autonomy. This was really a transcendental difference with objective *laesio*. What is more important for our purposes is that, in his *Traités*, Bentham postulated *exactly* the same solution:

> If, in alienating a thing, I was ignorant of a circumstance which tended to augment its value … is that a reason for invalidating the contract? [...] To hold an equal balance between the parties […] we must always examine if this ignorance of the seller [regarding the value of the thing] were not the result of his negligence. [788]

Given Bello's familiarity with Bentham's works, it can be assumed that the requirement of ignorance for a *laesio* claim to proceed, was inspired by Bentham. In this case, the inspiration was not fruitful, but its existence is evidence that Bentham's ideas were considered in South America also in connection with *laesio*. These drafts of the Chilean Civil Code were amended in 1855, and this additional requirement of ignorance was *not* enacted.[789]

In Uruguay, the commission in charge of revising the final draft of the Uruguayan Civil Code (1868) recommended the abolition of *laesio* on several grounds. One of the arguments of the commission was a typically utilitarian one: certainty about ownership

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Volumen II (Ministerio de Educación 1955) 678.

788 Jeremy Bentham, *Theory of Legislation*, (R. Hildreth tr, 7th. edn. K Paul Trench Trübner 1891) 171.

789 Ibid 678.

transmitted through contract was desirable in order to favour the 'development of wealth and the improvement of the material condition of society'.[790] Thus, in the opinion of the Uruguayan Commission, while abolishing *laesio* might favour injustice in some isolated contracts, the general wellbeing of society was to be improved by certainty in contractual matters. Bentham was not mentioned, but in his *Traités*, he had made exactly the same argument:

> The total advantage of useful exchanges is far more than equivalent to the total disadvantage of such as are unfavourable… Alienations in general ought, then, to be maintained. [791]

Thus, in Uruguay, Benthamite utilitarian doctrine was used, though unacknowledged, in order to support the abolition of *laesio*. This is not surprising if we take into account the widespread reading of Bentham in Uruguay.[792]

Finally, in Argentina, a legal scholar writing in the 1920s, attributed the derogation of *laesio* in Argentina to the inspiration which the drafter of the Code, Vélez Sarsfield, had taken from the 'frankly individualistic' economic ideas of James Mill, Bentham's closest disciple.[793] Mill's works on political economy were adopted as a textbook in the University of Buenos Aires.[794] An anecdote has been preserved: after

790 Ibid.

791 Bentham (n 788*)* 171-2.

792 For details, see Chapter 2 Sections 3.5.1 and 3.6.1.

793 Raymundo M Salvat *Tratado de Derecho Civil Argentino: Parte General* (Imprenta F Ferreira 1925) 95.

794 Juan María Gutiérrez, *Noticias Históricas sobre Origen y Desarrollo de la Enseñanza Pública y Superior en Buenos Aires* (La Cultura Argentina 1915) 339. The textbook was *Elements of Political Economy*, which was published in London in 1821, and immediately afterwards translated into Spanish in Buenos Aires.

Vélez Sarsfield graduated, he met Bernardino Rivadavia, a close follower of Bentham,[795] who was by then a powerful member of the Buenos Aires government. Rivadavia, favourably impressed with Vélez's versatility in political economy, asked where he had learned about it. Vélez immediately answered: 'James Mill'.[796] The same Argentinean legal scholar, also remarked that, while *laesio* was still in force in a 'great number of legislations inspired in Roman law', the abolition of *laesio* had left Argentinean law in the almost solitary company of English law.[797] Thus, the utilitarian arguments that supported the abolition of *laesio*, and the parallelism with Anglo-American law that the abolition of *laesio* implied, were perceived by at least one local legal scholar.

4.4. Summary

Although the evidence is not overwhelming, it shows that there was a connection between Bentham's utilitarian doctrines and the abolition of *laesio* in several South-American countries. First, there was a significant coincidence: the countries that completely abolished usury laws also eliminated *laesio.*[798] Second, there are some traces of the use of Bentham's utilitarian ideas in connection with *laesio* in three South-American jurisdictions: Chile, Uruguay, and Argentina. My claim is not meant to deny the obvious influence of García Goyena, who, it was suggested, was himself influenced by Bentham,[799] but rather to show that *additional* factors were at play: the knock-on effect of Bentham's influence regarding usury laws, and the use of some of his utilitarian

795 See Chapter 2 Section 3.5.2.

796 Enrique Martínez Paz, Dalmacio Vélez Sarsfield y el Código Civil Argentino (Córdoba 1916) 30.

797 Salvat (n 793) 934.

798 Venezuela, Uruguay, Argentina, Brazil, and through indirect influence, Paraguay.

799 See pages 231-2 above.

ideas. Those additional factors explain, in my opinion, why certain South-American jurisdictions were able to take the step of *effectively* abolishing *laesio*: while Spain only played with the idea, and France had only abolished *laesio* for sales of movable assets, early Benthamite influence in South America provided the radically liberal context, and the *impetus*, for such step.

5. Conclusions

5.1. South-America's More Liberal Version of Freedom of Contract

Beginning in the 1830s, several South-American jurisdictions underwent a process that resulted in the adoption of a version of the principle of freedom of contract more liberal than the one favoured in Roman, Spanich and French law. The restrictions of Spanish and Portuguese law were totally set aside or relaxed. I believe that this outcome may be credited to the influence of Bentham's *Defence of Usury*, his *Traités*, and his correspondence and face-to face contacts with political leaders (notably Bolívar and Santander in this case), as much as, in general, the widespread dissemination of his ideas in South America.

Certainly, this liberal approach to contract law may not come as a surprise, given the historical context of these developments. However, my claim is that South-American private law was *more* liberal than French law, a common source of inspiration during this period, and that the influence that supported such more liberal version of contract, came *mainly* from Anglo-American legal ideas. The pattern is the same of the previous chapter (rights of the surviving spouse), and it will reappear in the following one (statutory

interpretation): where *relevant* influence of Anglo-American legal ideas in South-American private law is found, the result is a solution which is *more liberal* than the one suggested by the usual liberal model used by South-American drafters of legislation: the French Civil Code. In this chapter, the *more liberal* solution referred to freedom of contract and, hence, to *economic* liberalism.

5.2. Direct Benthamite Influence on the Abolition of Usury Laws

In the 1830s, Bentham's ideas began to be turned into positive law in South America: usury laws were abolished. Abolition of usury laws and, consequently, absolute freedom of contract for the determination of interest rates, was an idea closely associated with Bentham, though also disseminated by others (e.g. Turgot, Say). His early book *Defence of Usury*, first published in 1787, was ground-breaking, and remained a relatively solitary voice in its advocacy in legal and economic literature. It slowly gained supporters in England, North America and South America, as was described in the preceding sections. By the 1830s Bentham's idea began to be turned into positive law. Chile, Brazil, Venezuela, Colombia and Uruguay abrogated their usury laws, followed later by Argentina and Paraguay.

This step marked a break not only with the Spanish law then in force, but, most formidably, with French law , as was clear to some contemporaries. This information per se indicates that *some* other influence may have been at work in order for this turn to be brought about: Bentham. Not only was Bentham widely read among South-American elites in general; in addition, among the actual South-American countries involved in this legislative movement, there is even stronger evidence, namely: the direct testimony, from

Fermín Toro and local newspapers, signalling Benthamite influence in the Venezuelan Act of 1834; the connection made by Colombian scholars between the Colombian Act of 1835, and Bentham's influence through Santander; the arguments in Parliamentary debates in Chile and Brazil; the testimony of an almost contemporary in Brazil, and in Uruguay and Argentina, the familiarity with Bentham's texts and arguments coupled with the awareness that there was no support for this move among the traditional sources (Roman, Spanish, and French law).

5.3. Why Was Bentham's Influence Unacknowledged?

The break with usury laws in South America was remarkable for the tension that it implied with the entrenched religious and moral convictions of contemporaries, which were derived from the centuries-long anti-usury stance of the Catholic Church.[800] A vast majority of South-Americans were Catholics, and we know that the Church strongly resisted the abolition of usury laws, at least in Chile.[801] This fact can explain why Benthamite arguments were used in the debate, but his name was seldom mentioned. The matter was too sensitive in the religious and moral context of South America where Bentham was perceived as a materialist and an atheist.[802] Throwing his name into the discussions would have given the South-American opponents of the abolition of usury laws, an easy extra-argument. Even in England, a Protestant country where the Church had relaxed its stand against usury, Bentham's name, as per his own testimony, was

800 See Section 2.2 above.

801 See Section 3.2 above.

802 See Chapter 2 Section 3.6 above.

'seldom' associated with the abolition of usury laws. [803]

The contradictory weight that Bentham's name carried in South America can be seen in this topic. On the one side, he was an atheist whose name, in the context of a Catholic continent, could contaminate the arguments against usury laws. On the other hand, his name connoted Englishness, and thus modernity and liberal ideas. While his followers concealed his name (to avoid indisposing Catholics), his opponents (most notably, Toro) tried to neutralize Bentham's Englishness with quotes from Blackstone, Kent, and Lord Mansfield (to avoid indisposing liberals).

Of course, this sort of tactics is designed to remain occult, and thus it cannot be known for sure whether South-American legal actors were playing the rhetorical game that I have just described. However, I believe it is quite likely that during the debate on usury laws, the use of Bentham the *atheist* was being tactically concealed by his supporters, as much as Bentham's *Englishness* was being tactically counterbalanced with quotes from other English legal scholars.[804]

5.4. A Knock-On Effect in the 1860s: the Abolition of *Laesio*

Bentham's ideas are likely to have had a knock-on effect on subsequent developments with regard to *laesio* in South America The doctrine of *laesio* was repealed in Venezuela, Uruguay, Argentina, Paraguay and Brazil. While it is clear that García Goyena's draft of a Spanish Civil Code was the direct inspiration, my claim is that the use of Bentham's

803 Letter from Bentham to Bolívar, mentioned in Section 3.2 above.

804 See Section 3.5.5 above

ideas for the abolition of usury laws in South America gave special *impetus* to a movement towards liberalisation of contract that did not took the same pace in other civilian jurisdictions. Benthamite radical ideas on freedom of contract *precipitated* the next step (the elimination of *laesio*), while French law still retained it.

5.5.Internal Criticism of Freedom of Contract in South America

As already explained,[805] one way to approach past ideas is to analyse them 'on their own', in a sort of a-historical quest, looking for their internal coherence. When we look at the internal evolution of the idea of freedom of contract in South America from the 1830s onwards, we can discern two different moments. A first one, in the 1830s when an internal fracture of the idea took place: usury laws were repealed for financial transactions, but *laesio* was *retained* for all contracts. Looking at the idea on its own, irrespective of its historical context, it is clear that the internal coherence of the doctrine of freedom of contract became fragmented. Furthermore, the use of Bentham's analogical argument[806] in South America can be described as quite awkward: why liberating prices in financial contracts and not in all the others? The connection between these two subjects was immediately observed in Chile: the abolition of usury law was followed by the claim that *laesio* had to fill the vacuum left by usury law.[807]

Later, when the Civil Codes were enacted (from 1850s to the 1870s) the internal coherence of the doctrine of contract was recovered. In some legal systems (Venezuela,

805 Chapter 1 Section 4.6.

806 See Section 2.3.2 above.

807 See Section 3.2 above.

Uruguay, Argentina, Brazil) the solution of the dilemma gravitated to a full consecration of freedom of contract: *laesio* was abolished, as were usury laws. In others (Chile and Colombia), usury law was abolished, but *laesio* took its place with regards to financial transactions. However, it is important to note that none of the available models could have suggested this second solution (*laesio* extended to interest rates). It was a product of the interaction of Bentham's doctrine, and traditional civil law institutions, and originated in the debates that followed the abolition of usury law in Chile.

I do not suggest that the lack of coherence was in itself *the force* that led to changes regarding *laesio* in the Civil Codes. No legal actor (not even Fermín Toro) seemed preoccupied with the contradiction incurred by those who attacked usury laws without simultaneously attacking *laesio*. However, at some moment the inconsistency must have been perceived, and the need to solve it must have influenced events. It is not difficult to imagine that those arguing for the liberation of interest rates would have naturally, at some point, realized that they were not being coherent if at the same time they did not also postulate the liberation of *all* prices, and thus, the abolition of *laesio*. The fact that it did take so long for this to happen reveals another side of the story.

How could it be that so much emphasis was given to the liberation of interest rates without noting that, as matter of principle, *laesio* was in essence the same as usury laws? At this point the contextualist approach to the history of legal ideas can prove helpful. [808] A good way to solve the problem is to ask what South-American legal actors were actually *doing* with Bentham's ideas. This can help us understand why the South-

808 See Chapter 1 Section 4.6.

American radically liberal doctrine of freedom of contract was only progressively developed.

5.6.What were South-American Legal Actors Doing?

There are two possible accounts of what was being *done* with the abolition of usury laws. First, some contemporaries and local historians have associated the liberation of interest rates in the 1830s with an impulse directed at attracting foreign capital to the recently formed independent countries. In Venezuela, under the 1834 Act, coffee-planters took loans which they later they were unable to repay, giving rise to criticism to freedom of interest rates.[809] In Uruguay, Eduardo Acevedo lamented that capital did not flow into the economy after the liberation of interest rates in 1838.[810] Finally, in Chile, the development of the mining industry required foreign capital, and the Chilean 1832 Act helped obtaining it.[811] Thus, a first explanation would be that Bentham's ideas were strategically used in order to attract foreign loans. It was not, then, a theoretical quest about freedom of contract that sparked the changes, but rather a more immediate need for capital.

A second possible explanation would be that abolition of usury laws was just an adaptation to an already existing reality. Gandarillas, the drafter of the Chilean Act of 1832, argued that 'from long time ago there was a generally obeyed custom which

809 See Sections 3.5.3 to 3.5.5.

810 See Section 3.7.

811 See Section 3.2.

authorized loans with interest rates that exceeded the ones allowed by the law'. [812] In his account the abolition of usury laws was an *adaptation* of the law to the South-American reality. Coincidentally, Bushnell, an American historian, affirms that the lack of enforcement of usury laws was a phenomenon extended throughout South America, and that their abolition was mostly a 'symbolic' gesture.[813] Thus, according to these sources, usury law was in force in the books, but not in living-law, something that does not sit well with the hostility against the Chilean Act of 1832, and the Venezuelan Act of 1834 that we have reviewed above.[814] Perhaps, usury laws actually were dead-letter by the time they were abolished, but when economic recession unfolded, their abolition was regretted. However, both accounts (the need to attract foreign loans, and the symbolic or genuine need of abolition) can be seen as complementary. Even if it the elimination of usury laws was symbolic, it was useful: symbols are not built for their own sake, but as communicative artefacts. In this case, the audience for the *symbol* were the foreign money-lenders.

The tipping-point occurred in 1831, when the calm waters of non-enforced Spanish usury law were unexpectedly agitated. In that year, a Chilean court enforced the supposedly dead-letter of Spanish usury law. News of the disruptive judicial decision rapidly spread across South America: Gandarillas, the promoter of the Chilean Act of 1832, wrote an article that immediately travelled to Peru, where it was published in *El Mercurio Peruano*, and afterwards to Colombia, where it appeared in *La Gaceta de*

812 Gandarillas (n 664).

813 David Bushnell, 'El Proceso Inicial del Liberalismo en Colombia y en la Argentina: Esquema Comparativo' (1977) 4 Revista de Historia de la Universidad Nacional de Costa Rica 77-91.

814 See Sections 3.3 and 3.5 above.

Nueva Granada.[815] I cannot affirm that there was a chain of reactions,[816] but within six years from that piece of news, Chile, Brazil, Venezuela, Colombia and Uruguay had abolished their usury laws.

Thus, when the story is seen form the contextualist angle, the use of foreign legal ideas in South America is perceived under a different light. These ideas were borrowed from Anglo-American jurisdictions, but on the receiving end, they were creatively and strategically used.

815 Gandarillas (n 664). There is a reference to the publication in *El Mercurio Peruano* in the same Colombian newspaper.

816 If that was the case, it was soon forgotten, at least in Uruguay (See Section 3.7 above).

CHAPTER 5: BLACKSTONE AND STATUTORY INTERPRETATION IN THE CIVIL CODES

1. Introduction

1.1. Objectives of this Chapter

Blackstone directly influenced the drafting of the rules of statutory interpretation of the Louisiana Civil Code (1825), and indirectly the rules on the same subject of the Chilean Civil Code (1855). Those rules provided that the literal meaning should prevail over legislative intent. The Chilean rules were later borrowed by the drafters of the Civil Codes of Ecuador (1858), Uruguay (1868) and Colombia (1887).

Thus, this is a case of *indirect* influence of Anglo-American legal ideas on South-American private law. Nonetheless, I claim that this influence was *significant*, because of the marking differences with the civil tradition, and similitudes with the strict literalism of English law. Furthermore, I argue that in this matter, Bello in Chile, and Narvaja in Uruguay, also made a *direct* use of the ideas of another Anglo-American author, James Kent, in order to relax some of the strictures of the English approach.

1.2.Models of Statutory Interpretation

Statutory interpretation is the process of discerning the meaning of a statute in order for it to be applied.[817] In civil law systems, based mainly on statutory law, this is a particularly important matter. When codification of private law took place in South America, several

817 Kent Greenawalt, 'Constitutional and Statutory Interpretation' in Jules Coleman-Scott Shapiro (ed) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 269.

models of statutory interpretation were available as a source of inspiration. Those models could be found in legal norms, or in the ideas of legal scholars from the civil and the common law tradition. For the purposes of this chapter, a number of concepts need to be clarified from the beginning in order to allow for the historical and comparative analysis that follows.

The first point is that, while some models of statutory interpretation recognise that judges had a role in interpreting statutory law, others restrict that task to the legislature. Examples of the latter approach were the *ius commune* maxim *est enim eius interpretari cuius est concedere*,[818] or, the French institution of the *référé au legislatif*. [819] Those rules were aimed at securing the monopoly of the legislature as the only source of law. In its modern version, the *référé* was connected with the doctrine of separation of powers postulated by Montesquieu.[820] Its goal was to prevent judges from exercising a legislative function. However, as Blackstone, and the drafters of the Louisiana Civil Code of 1825 and the Chilean Code of 1855 noted, ultimately the *référé* allowed the legislature to become a judge, thus violating the same principle of separation of powers.[821]

Second, within the models that admitt *judicial* interpretation, a further distinction can be drawn between those models that *include* detailed legal rules governing the process of interpretation, and those that *lack* such rules. The Louisiana Civil Code (1825)

818 Theodore FT Plucknett, *A Concise History of the Common Law* (Liberty Fund 2010) 329.

819 Raoul C van Caenegem, An Historical Introduction to Private Law (CUP 1992) 130.

820 Ibid.

821 Sections 2.3 below

was an example of the first, while the French Civil Code (1804)[822] was an example of the second.

Third, two methods of interpretation could be discerned by the time that codification took place in South America: the literal method based on the *plain meaning rule*, and the non-literal method based on the intention of the legislature and the reason (spirit) of the law. Literal interpretation focuses on the letter of the statute, and the meaning of its words isolated or taken in light of their context. It prescribes different ways of adjudicating meaning depending on the sort of language used by the legislature. Non-literal interpretation, on the other hand, focuses on the *spirit* or *reason* of the law or on the *intention* of the legislature. Instead of textual exegesis, the judges are supposed to look closely at 'the underlying rationales of texts and practices'.[823]

Lastly, among those models that prescribe rules for the purpose of governing judicial interpretation, a further distinction can be drawn between *hierarchical and non-hierarchical* models. As Greenawalt has noted, one of the most widely discussed topics in statutory interpretation is the role that ought to be played respectively by the 'legislators' ideas about what they have enacted and [the] readers' understanding of [those] enactments'. [824] In other words, and as Manning has put it, 'the question of text versus purpose has always troubled the law of statutory interpretation'.[825] Hierarchical models *privilege* the literal method of interpretation over others. By contrast, non-

822 After the *référé au legislatif* was abolished in France in 1837.

823 Greenawalt (n 817) 269.

824 Ibid 277.

825 John F Manning, 'Textualism and the Equity of the Statute' (2001) 101 Columbia Law Review 1-127, at 4.

hierarchical models allow for the *alternative* or *simultaneous* use of the text, the intention of the legislature, and the reason (*spirit*) of the statute. Both the Louisiana Civil Code (1825), and the writings of Blackstone, were examples of hierarchical models where the literal method was prioritised, and recourse to legislature's intent permitted only if the literal meaning was unclear. This approach was typical of legal actors 'concerned with restricting judicial discretion.'[826] The French scholar Jean Domat, by contrast, suggested a model within which literal and non-literal methods of interpretation could be used simultaneously. [827]

1.3.Methodological Remarks

Some further methodological remarks need to be made. They refer to the contextualist perspective[828] that I will often adopt in this chapter, and the difficulties in dealing with the works of some legal scholars on the subject of statutory interpretation.

First, the historical and comparative analysis conducted in the following sections will be developed on the basis of the simplified ideas about statutory interpretation introduced above. Of course, matters are more complex than those ideas tend to suggest. For instance, the plain meaning or literal rule provides that if the text of the law is clear, it should not be disregarded, and that the *legislature's intent* should be taken into account *only* if the text is unclear. However, Ronald Dworkin, for example, has argued that describing a legal text as 'unclear' is inevitably the *result* of taking into consideration the

826 Greenawalt (n 817) 289.

827 Jean Domat, *The Civil Law in its Natural Order Together with the Publick Law:* Volume I (William Strahan tr. 2nd. edn. London 1737) 7.

828 See Chapter 1 Section 4.6.

reason or purpose of the statute, and *not* the *occasion* for looking at such reason.[829] In a similar way, the legislature's 'intent' is also a problematic concept. Some legal theorists, such as Jeremy Waldron, deny the existence of such *an intention* in the case of multi-member assemblies, such as modern parliaments.[830]

Second, a further problem concerns the clear influence that broader ideas about legal theory had on the views of particular authors. For example, Domat and Pufendorf, two authors frequently consulted in Europe and America on the subject of statutory interpretation, belonged to the natural law school of legal theory. This influenced their ideas about statutory interpretation, and in particular their suggestion that even the clear, literal meaning of a statute was to be disregarded if it was unjust. Blackstone's ideas on statutory interpretation carry their own problems. In particular, while Blackstone's general conception of law leant towards natural law doctrine (*bad law is not law at all*), his approach to statutory interpretation seemed more in line with positivist thinking (no matter how unreasonable a statute was, it could not be disregarded by the judge). As previously mentioned,[831] according to Gareth Jones it seems impossible to reconcile Blackstone's ideas about natural law with his conception of an 'uncontrolled' sovereign,[832] while H.L.A. Hart argued that Blackstone's natural law test for positive law

829 Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 352.

830 Jeremy Waldron, *Law and Disagreement*, (OUP 1999) 121 and 142. Tellingly, the Chilean Code directed the judge to look for the intention of the legislature first of all in the text of the statute itself. That could be a sign of the perception by Bello of the problematic character of the *concept* of legislative intent, and *not* only of the lack of reliable *sources of knowledge* of that intent.

831 Chapter 2 Section 4.2.1.

832 Gareth Jones (ed) The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Laws of England (Palgrave Macmillan 1973) xxxviii.

was empty, and any positive law would pass it. [833]

Third, the positions of the various legal scholars analysed in this chapter were *not* as clear-cut as the explanations contained in the following sections may suggest. All of their works referred to a common set of themes, and maxims (several descending from Roman law). At first (and even second) sight, what each of these scholars seems to provide is a similar and slightly incoherent arsenal of maxims and principles. In order to identify the differences between them, it is important to look at the whole picture, and not to focus too closely on isolated details of the respective conceptions of statutory interpretation. Blackstone is an example of these problems. For instance, in a section of his *Commentaries*,[834] he alerts that granting the judges the power to consider if a statute was reasonable or not, would be subversive of all government. However, following that assertion, Blackstone acknowledged that 'if some collateral matters arises… and happens to be unreasonable' the judge may conclude that this consequence was 'not foreseen by Parliament', and proceed with an equitable interpretation of the statute.[835] Nevertheless, just a few lines below, he adds a new qualification: if the intent of the legislature is clear from 'evident and express words', no matter how unreasonable it may seem, it must be followed. This is a good example of the difficulties of adscribing Blackstone to a *strict* literalist approach. When the whole paragraph is considered there is a tendency to favour a literal approach, but yet there is some space left for the judge to depart from the text (if an unforeseen consequence is perceived). As much as those of other authors,

833 Herbert LA Hart 'Blackstone's Use of the Law of Nature' [1956] Butterworths S. Afr. L. Rev. 169.

834 William Blackstone, *Commentaries of the Laws of England:* Vol.1 (9th edn. W Strahan, T Cadell and D Prince 1783) 91.

835 Ibid.

Blackstone's opinions were not clear-cut. He went back and forward, and always left some space for alternative methods of interpretation. My contention, thus, is not that he was an *avant-la-lettre* strict literalist, but that his writings, when considered as a whole, show a preference for the literal method, and certain distrust for non-literalist approaches. It is only in this sense that I will argue that Blackstone *prefigured* the strict literalism of nineteenth-century English law on this subject.

Lastly, though ideas about the nature of statutory interpretation are always complex, in my opinion they are sufficiently clear for the purposes of the historical and comparative task which is the concern of this chapter. As already explained,[836] we can deal with past ideas in two different ways: through an *internal critique* of those ideas, or through an analysis of what the actors were *doing* with them in their historical context. From an internal perspective, we may consider that literalists were utterly *naïve* in suggesting that judges ought never to disregard *clear* texts, and we may look with scepticism upon any mention of the *legislature's* intent. However, these ideas still seem to have a clear *core* meaning with the result that it remains possible to understand what legal scholars and drafters of legislation were *doing* (or trying to do) with them in the context of South-American problems. Indeed, the vocabulary of literalism, legislative intent, purposive interpretation, etc. is still widely used in legal theory, demonstrating that this language is capable of communicating a reasonably clear idea of what is being *done* with those ideas in the midst of political debates.

1.4. From Blackstone to South America

836 Chapter 1 Section 4.6.

As already mentioned, the Chilean Civil Code (1855) was indirectly inspired by Blackstone's *Commentaries*, through the vehicle of the Louisiana Civil Code (1825), and the rules of the Chilean Civil Code were later borrowed by the Civil Codes of Ecuador, Uruguay and Colombia. Two questions need to be answered. First, was this a *significant* use of Anglo-American legal ideas? Second, was that use conscious?

In my opinion, the use of Blackstone was significant because it marked a difference with the civil law tradition. The problems in this regard are the following. It is clear that the *language* of the rules of the Louisiana Code was directly taken form Blackstone. However, on the subject of statutory interpretation, Blackstone himself was inspired by some civilian authors (notably Samuel Pufendorf), and, thus, some of his ideas were actually of civilian origin. On those grounds, it has been argued by others[837] that his *Commentaries* were only an *intermediary device* between the civilian tradition and the drafters of the Louisiana Civil Code. This would imply that the role played by Blackstone was not that significant. Furthermore, the notes of the drafter of the rules on statutory interpretation contained in the Louisiana Civil Code, Louis Moreau Lislet,[838] did not refer to Blackstone, but rather to Jean Domat (another prominent civilian author), and to Spanish law. [839] However, the notes of Moreau Lislet are frequently misleading, as

837 Alejandro Guzmán Brito 'Las fuentes de las normas sobre interpretación de las leyes del "*digeste des lois civiles*" ("*Code civil*") de la Luisiana (1808/1825)' (2009) 31 Revista de Estudios Histórico-Jurídicos 171; John W Cairns, 'Blackstone in the Bayou: Inscribing Slavery in the Louisina Digest of 1808' in Wilfred Priest (ed) *Re-Interpreting Blackstone's Commentaries: a Seminal Text in National and International Contexts* (Hart Publishing 2014) 73-94 at 88.

838 Louis Moreau Lislet, A reprint of Moreau Lislet's Copy of A Digest of the Civil Laws now in Force in the Territory of Orleans: 1808: Containing Manuscript References to its Sources and Other Civil Laws on the Same Subjects: The de la Vergne Volume (Louisiana State University School of Law and Tulane University School of Law 1968).

839 According to Cairns, another copy of the Louisiana Digest of 1808, known as the *Mouton Manuscript*, with annotations done by at least two different Louisiana lawyer(s), mentioned Blackstone in

they often refer to different or conflicting ideas, and are focused only on Spanish and Roman law, omitting allusions to French law.[840] Finally, at least one article of the Louisiana Civil Code was inspired by the (never enacted) draft of French Civil Code of Year VIII of the Revolution (1800). All these aspects make it necessary to explore whether these alternative candidates were the *real* sources of inspiration, even if the *wording* of the articles of the Louisiana Code was borrowed from Blackstone.

Despite the suggested alternative explanations, I will argue that Blackstone's influence was the dominant one, and that the Louisiana Civil Code marked a departure from the civilian models available at the time. In establishing the prevalence of the literal rule, rejecting the *référé au legislatif*, and attempting to narrow judicial discretion through detailed rules on interpretation, the Louisiana Civil Code borrowed from Blackstone. At the beginning of the nineteenth century, Blackstone's ideas were considered by Kent to represent the then dominant approach of English law. According to those ideas 'an act of Parliament delivered in clear and intelligible terms, cannot be questioned… in any court of justice', as Parliament was 'the highest authority that the kingdom acknowledge[d] upon earth'.[841] Blackstone's ideas were contrasted with those of Sir Edward Coke who, at the beginning of the seventeenth century, famously argued that 'in many cases the common law will control Acts of Parliament'.[842] Kent was referring to the different approaches to constitutional review of statutory law in England

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relation to six provisions. However, this did not happen in connection with statutory interpretation. Cf. John W Cairns 'The De la Vergne Volume and the Digest of 1808' (2009) 24 *Tulane European & Civil Law Forum* 72.

840 Ibid 78-9.

841 James Kent, *Commentaries on American Law:* Volume I (8th edn. William Kent 1854) 493.

842 *Dr.Bonham's Case*, 8 Co. Rep. 114 (Court of Common Pleas [1610]).

(where it did and does not exist) and the United States. However, the contraposition implied, indirectly, a different perspective in matters of interpretation. Kent accepted that if there was only one possible construction of the statute (no matter how unreasonable it may seem) the letter of the law demanded 'perfect obedience' as the English proclaimed. However, he 'admired' Lord Coke's 'powerful sense of justice' in arguing that statutes against common reason were void.[843] Of course, declaring that an *unreasonable* statute is void, is clearly different from *interpreting* a statute in *accordance with reason*. My suggestion is, however, that if one accepts the first proposition (unreasonable statutes are void), one is very likely to accept the second (statutes must be interpreted in accordance with reason, and not only literally). Contrariwise, those (like Blackstone) who considered that the reasonableness of Parliament-made law should not be analysed by the judge, would be logically more inclined to subject the judiciary to a literalist method of statutory interpretation.

Through Blackstone, the Louisiana Code, and later four South-American Civil Codes, came to share a salient characteristic of English law: the prevalence in statutory interpretation of the plain meaning or literal rule. Of course, there were also similarities with civil sources, as I will show, but those alternative potential sources of inspiration did not provide a model of statutory interpretation similar to the Blackstonian or English one

The second question is whether Andrés Bello (the drafter of the Chilean Code) was *conscious* of the Blackstonian origin of the rules of the Louisiana Code. While Bello explicitly mentioned the Louisiana Code as his source, he made *no* mention of

843 Kent (n 841) 493-4.

Blackstone or any other Anglo-American author, including Kent. I will argue, however, that even if Bello failed to acknowledge it, it is most likely that he was *conscious* of the Blackstonian origin of the Louisiana Code rules, and that he also made some use of James Kent's works, which, therefore, represented a secondary inspiration in this matter.

1.5.Plan of the following sections

In the following sections, I will trace the relevant influences in order to support my claims. First, I will analyse the Louisiana Civil Code of 1825, and the role that Blackstonian ideas played in inspiring its rules on statutory interpretation. Second, I will explore and discard the possible alternative sources of inspiration of the Louisiana Civil Code. The aim will be to demonstrate that Blackstone's ideas provided the dominant inspiration and that the drafter did *not* follow the civilian tradition. Third, I will analyse the rules of the Chilean Civil Code on statutory interpretation in order to provide evidence that they were inspired in the Louisiana Civil Code (1825), and that the *indirect* use of Blackstone's ideas marked a move away from the civilian tradition, leading to a convergence with nineteenth century English law. The influence of the rules of the Chilean Civil Code in the Uruguayan Civil Code (1868) will also be explored, for the purposes of demonstrating the use of Kent's writings as an additional source of inspiration. Fourth, I will explore briefly if Bello was conscious or not of using Anglo-American legal ideas on the subject of statutory interpretation, and in case the affirmative holds, why he did not acknowledge such use. Finally, some general conclusions will be presented.

2. Blackstone and the Louisiana Civil Code

2.1.Blackstone's Influence

Before being incorporated into the United States in 1803, Louisiana was successively a colony of France, Spain, and, again, France. It had, thus, always belonged to the civil law tradition. Its entrance into the United States posed a dilemma for the ruling classes of Louisiana between remaining within the civil law tradition, and being absorbed into the common law world. With the objective of avoiding the latter, in 1806, an act declaring Roman and Spanish law to be in force in Louisiana was approved by the legislature, but was vetoed by the Anglo-American governor.[844] Shortly thereafter, however, the Louisiana Digest of 1808, drafted by Louis Moreau Lislet and James Brown, and mostly inspired by French and Spanish law, was enacted.[845] The Digest of 1808 included a number of rules on statutory interpretation. In 1825, a new Civil Code was enacted which retained the same rules on statutory interpretation. Thus, in the following pages I will refer indiscriminately to the rules on statutory interpretation of the Digest (1808) and the Louisiana Civil Code (1825), as one and the same set of rules.

The rules of the Louisiana Digest (1808), and the Civil Code (1825) had two main sources: regarding article 13, the French draft of a Civil Code of Year VIII (hereinafter the 'French *Projet*'),[846] and regarding articles 14 to 18, Blackstone's *Commentaries*. Blackstone's writings have been said to be 'a surprising presence…in a

844 Mitchell Franklin, 'Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana' (1941-1942) 16 Tul L Rev 319.

845 Mack E Barham, 'Methodology of the Civil Law in Louisiana' (1975-1976) 50 Tul L Rev 476; Shael Herman, 'The Louisiana Code of Practice (1825): A Civilian Essay Among Anglo-American Sources' Vol 12.1. Electronic Journal of Comparative Law (May 2008), http://www.ejcl.org. 2-6.

846 Commission Nommée par le Gouvernement le 24 Thermidor An VIII, *Projet de Code Civil* (Chez Emery Ventôse an IX-1801).

civilian Code, particularly in matters of interpretation of law, which had been discussed at length by Domat'.[847] However, this was not the only aspect for which Blackstone's writings provided inspiration, his influence having been traced in relation to other nineteen articles of the Louisiana Civil Code.[848]

According to Rodolfo Batiza, a prominent Louisiana legal scholar, articles 14 to 18 of the Louisiana Civil Code were a *verbatim* or almost *verbatim* transcription of Blackstone.[849] That this is so has also been accepted by Antonio Bascuñan and Alejandro Guzmán Brito in Chile.[850] The following table provides the texts of the Louisiana Code and its corresponding sources of inspiration according to Batiza and Guzmán Brito:

Source of inspiration [851]	**Louisiana Civil Code 1825** (identical to the provisions of the Digest of 1808)
Article V of French Project Year VIII: When the law is clear, its letter is not to be eluded under the pretext of pursuing its spirit, and in the application of an obscure law, its	Art. 13. When a law is clear and free from all ambiguity the letter of it is not to be disregarded, under the pretext of pursuing its spirit.

847 Rodolfo Batiza, 'The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance' (1971) 46 Tul L Rev 4, 29

848 Thomas Tucker, 'Sources of the Louisiana Law of Persons: Blackstone, Domat and the French Codes' (1970) 44 Tulane Law Review 2. Batiza (n 847) 12.

849 Batiza (n 847) 29.

850 According to Guzmán Brito, *Fuentes* (n 837).

851 Ibid.

Source of inspiration [851]	**Louisiana Civil Code 1825** (identical to the provisions of the Digest of 1808)
more natural, and less defective, sense shall be preferred.	
Blackstone: Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use.	Art. 14. The words of a law are generally to be understood in their most known and usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the terms.
Blackstone: …terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade and science.	Art. 15. Terms of art, or technical terms and phrases, are to be interpreted according to their received meaning and acceptation with the learned in the art, trade or profession to which they refer
Blackstone: If words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal or intricate	Art. 16. Where the words of a law are dubious their meaning may be sought by examining the context with which the ambiguous words, phrases and sentences may be compared in order to ascertain their true meaning

Source of inspiration [851]	**Louisiana Civil Code 1825** (identical to the provisions of the Digest of 1808)
Blackstone: …statutes in pari material, or upon the same subject, must be construed with a reference to each other; that is, that what is clear in one statute, shall be called in aid to explain what is obscure and ambiguous in another.	Art. 17. Laws in pari materia, or upon the same subject matter, must be construed with a reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another.
Blackstone: The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it, or the cause which moved the legislature to enact it.	Art. 18. The most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature to enact it.

As this table shows, formally, the majority of the rules of the Louisiana Code closely followed Blackstone's wording. Substantially, those rules adopted a hierarchical model of interpretation in which the literal method was given priority. According to the Code, recourse to the spirit of the law and legislative intent was allowed only when the

'expressions [were] dubious'.[852] Furthermore, a set of detailed rules guided the judge. Those rules on interpretation were drafted by Louis Moreau Lislet, [853] a civilian lawyer and French *émigré*[854] who was familiar with civilian and common law authors in general.[855] His library included a copy of Blackstone's *Commentaries*, [856] and, in a report to the Louisiana legislature, he and the other two drafters of the Code of 1825, acknowledged having resorted to 'the abundant stores of English Jurisprudence'.[857]

In the following sections I will argue that Blackstone prefigured the main characteristics of nineteenth-century English law on statutory construction,[858] and that the Louisiana Civil Code followed quite strictly, not only the wording, but also the ideas of Blackstone on statutory interpretation.[859]

2.2.Blackstone and English law on Statutory Interpretation

The development of statutory interpretation in English law has been divided into three periods: equity of the statute (up to 1830), strict literalism (1830 to 1950) and purposive interpretation (1950 to the present).[860] The development of literalism, according to

852 Article 18 of the Louisiana Civil Code.

853 Batiza (n 847) 28

854 Agustin Parise 'Codification of the Law in Louisiana: Early Nineteenth-Century Oscillation between Continental European and Common Law Systems' (2012) 27 *Tulane European & Civil Law Forum* 133.

855 Batiza (n 847) 28.

856 Mitchell Franklin, 'Libraries of Edward Livingston and Moreau Lislet' (1941) 15 Tul L Rev 401, 405

857 Edward Livingston-Louis Moreau Lislet-Pierre Derbigny, *To the Honorable Senate and House of Representatives of the State of Louisiana* (JC de St Romes State Printer 1823) 6.

858 Section 2.2 below.

859 Section 2.3 below.

860 Horst Klaus Lücke 'Statutory Interpretation: New Comparative Dimensions' Book review of

Plucknett, can be traced back to the middle of the fourteenth century.[861] At that time, statutes were 'regarded as texts which are to be applied exactly as they stand'.[862] Formally deprived of any discretionary power, the common law judges 'took refuge in logic' and devised rules on statutory interpretation of 'great complexity'. According to Plucknett, Blackstone, and Kent, in their *Commentaries,* provided a reasonable outline of the system elaborated by the common law courts.[863] However, the method of interpretation based on the *equity of the statute*, accepted in English law up to the eighteenth century, provided a margin of discretion to the judges 'to avoid inequitable results'.[864] That method according to Bromley C.J. writing in 1554, allowed judges to expound 'the words quite contrary to the text [of the statute] in order to make them agree with reason and equity'.[865] It was the equivalent of the method of interpretation of the civil law tradition based on the *reason* or *spirit* of the law.

The turn to a *strict* literalist approach occurred in the nineteenth century, and was well represented by the decision of the House of Lords in the *Sussex Peerage Claim* in 1844: 'if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words…'.[866] This rule is known in English

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Interpretation of Statutes in England and on the Continent. A Comparative Study of Judicial Jurisprudence and Its Historical Foundations by Stefan Vogenauer (2005) Vol. 54, No. 4 The International and Comparative Law Quarterly 1023-1032.

861 Plucknett (n 818) 333.

862 Ibid.

863 Ibid 334 footnote 1.

864 Manning (n825) 8.

865 *Fulmerston v Steward* (1554), Plowd. 109.

866 *Sussex Peerage Case* (1844) 11 Cl & Fin 85 at 43.

law as the *literal* or *plain meaning* rule.[867] The English judicial tradition of restricting interpretation to the 'plain meaning' of the statute persisted until very recently.[868] For most of the twentieth century, British courts declined to analyse the legislature's intent.[869] Waldron noted that 'reference to legislative intent is … less common in England [than America]'.[870] Furthermore, English judges only resorted to the *context* of the words when their ordinary meaning was unclear. [871]

Finally, the unwillingness of nineteenth century English judges to search into the intention of the legislature was a cornerstone of English law till very recently. Originally, in a 1769 case,[872] the distrust for inquiries into the legislature's intention seems to have been the lack of reliable materials,[873] but as late as the 1970s, when Hansard reports had become clearly reliable materials, they were still criticized for another reason: they often contained conflicting statements made during the parliamentarian debate, and not well-considered responses.[874]

Though the difference in approach is not as wide as commonly thought,[875] the contraposition between English law and civil law on statutory interpretation is still often

867 James W Harris, *Legal Philosophies* (2nd edn. OUP 2007) 157.

868 Brian Bix, *Jurisprudence: Theory and Context* (7th. edn. Sweet & Maxwell 2015) 165. Bix quotes *Pepper v Hart* [1993] A.C. 593.

869 Greenawalt (n 817) 281.

870 Waldron (n 830) 119.

871 Timothy Endicott, 'Law and Language' in Jules Coleman-Scott Shapiro (ed) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 949.

872 *Millar v Taylor* (1769) 1 Burr 2303 at 2332 (Willes J) (KB).

873 Stefan Vogenauer, 'A Retreat from Pepper v Hart? A Reply to Lord Steyn' (2005) 25 OJLS 631.

874 Ibid 630.

875 Vogenauer cited by Gerard Carney, 'Comparative Approaches to Statutory Interpretation in Civil Law and Common Law Jurisdictions' in (2015) 36 Statute Law Review 46 at 50.

summarised as one between textualism and intentionalism:

> [T]he English approach is primarily based on ascertaining the plain meaning of the words used, whereas that of the civil law is directed to ascertaining the intention of the legislature.[876]

In a similar vein, Zweigert and Puttfarken have indicated that the plain meaning rule 'has fallen into almost complete disfavour in civil law jurisprudence', and when such rule is mentioned 'usually meets with severe criticism'.[877] Though writing before the triumph of strict literalism in England, Blackstone can be seen as prefiguring some of its central ideas.As Manning has put it, the century following the Glorious Revolution of 1688 was a period of transition from equitable interpretation to the literalist approach.[878] Blackstone can be seen in such context of transition. He did not adopt strict literalism but advanced some of its positions. For instance, according to Mc Dowell, Blackstone was 'utterly unambiguous' about the danger posed to society if the meaning of the law was left to the will of the judge, [879] which, as explained below, he saw as the consequence of allowing the judge to search into the reason of the statute.

Blackstone's writings systematised the rules developed by common law courts and in doing so, as he frequently did, he also took inspiration from the civil law tradition. In this case he relied heavily on Samuel Pufendorf's works. Blackstone's main ideas can

876 Michael DA Freeman, *Lloyd's Introduction to Jurisprudence* (8th edn. Sweet & Maxwell 2008) 1555.

877 Konrad Zweigert-Hans-Jürgen Puttfarken, 'Statutory Interpretation: Civilian Style' in (1969-70) 44 Tulane Law Review 704 at 713.

878 According to Manning (n 825) the doctrine of the equity of the statute was progressively abandoned after the principle of separation of powers triumphed in the English Revolution of 1688, and literalism began to emerge during the eighteenth century.

879 Gary L McDowell, *The Language of Law and the Foundations of American Constitutionalism* (CUP 2010) 211.

be explained as follows. First, Blackstone rejected the method of interpretation by the legislature (*référé au legislatif*), which he considered to afford 'great room for partiality and oppression'.[880]

Second, he endorsed a hierarchical method of interpretation which had three levels. In the first instance, there was the literal rule, which consisted of interpreting the meaning of the words taken in 'their usual and most known signification' or, in case of 'terms of art, or technical terms' in their signification 'in each art, trade, and science'. This rule only admitted of exceptions when the relevant words had *no sense* or had an *absurd* one (the so-called *golden rule*),[881] for instance, because of the existence of a logical contradiction. The 'golden rule' was not to be applied merely because the judge thought that a certain meaning was unreasonable, or unjust. [882] At the second level, Blackstone recommended resorting to the context of the statute *only* if the relevant 'words happen[ed] to be still dubious'. By *context* Blackstone understood the *preamble* of a statute and '*other laws* [...] that have some affinity with the subject'.[883] Reference to context *only* in cases of doubt, was to be another central characteristic of English law in this matter. Indeed, the no-context approach was relaxed only after the Prince of Hanover case in the 1950,[884] where the House of Lords held that context ought to be taken into

880 William Blackstone, *Commentaries of the Laws of England:* Vol.1 (9th edn. W Strahan, T Cadell and D Prince 1783) 59.

881 Harris (n 867) 158.

882 As Harris remarks 'both the literal and the golden rules emphasise fidelity to the legislature's words, although the latter makes some allowance for consequences'. Harris (n 867) 158.

883 Blackstone (n 880) 60.

884 *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436.

account even in cases where the ordinary meaning of words was clear.[885] Lastly, at a third level, Blackstone indicated that if 'the words [were] still dubious' recourse could be have to the reason of the law (its spirit) or to 'the cause which moved the legislator to enact it' (the legislature's intent).[886] Blackstone's preference for the literal or plain meaning rule was illustrated by his view that the reason of the law was *only* to be examined if the relevant words were dubious. Marking his discrepancy with other (unidentified) legal actors of his time, Blackstone made clear his opinion that the letter of the law was to be followed even if it seemed unreasonable to the judge:

> I know it is generally laid down […] that acts of Parliament contrary to reason are void. But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary form of the constitution that is vested with authority to control it.[887]

In the view of Blackstone, to make available to the judiciary the possibility of declaring void an unreasonable statute 'would be subversive of all government'.[888] Though Blackstone may have been thinking about the equity of the English Court of Chancery, and not only about statutory interpretation, he expressed in general terms his distrust of the doctrine of the *equity of the statute* which he saw as the consequence of a 'method of *interpreting* the laws, by the reason of them'.[889] In Blackstone's opinion, that method 'would make every judge a legislator and introduce most infinite confusion'.[890] He allowed a certain room for equity and equitable interpretation but admonished his readers

885 Endicott (n 871) 949.

886 Blackstone (n 880) 60.

887 Ibid 91.

888 Ibid.

889 Ibid 61. Emphasis added.

890 Ibid 62.

that it should 'not be indulged too far'.[891] In this aspect we see once again the difficulty already indicated [892] about Blackstone's writings on statutory interpretation: his position is not that of a convinced *strict* literalist. In his opinion, the judge can indulge in equitable interpretation… but not too much. He shows discomfort with non-literal interpretation but is not ready to fully reject it. Even though Blackstone tended towards natural law doctrines and argued for the proposition that a *bad law was not law at all*, he preferred a literal approach to statutory interpretation which seemed at odds with these natural law school teachings. Thus, Blackstone's ideas were *similar* to those that will dominate English law in the nineteenth century 'when fidelity to the written word [of the statutes] was at its height'.[893]

2.3.Coincidences between Blackstone and the Louisiana Code

The Louisiana Civil Code not only used phrases from Blackstone's *Commentaries*, but also embodied Blackstone's substantive ideas on statutory interpretation. First, in line with Blackstone, the Louisiana Civil Code did not adopt the mechanism of the *référé au legislatif*. Second, the literal method of interpretation was granted strict priority by Article 13, while the intention of the legislature and the reason of the statute were only to be considered in case the meaning of the letter was 'dubious' (Article 18 of the Louisiana Civil Code).[894] The wording of the rule was identical to that in Blackstone's *Commentaries*. Thus, as much as Blackstone, the Louisiana Civil Code adopted a

891 Ibid.

892 See Section 1.3 above.

893 Harris (n 867) 159.

894 See Section 2.1 above,

hierarchical model of statuary interpretation. Third, according to the Louisiana Civil Code, the context of words was to be taken into account only if the meaning of those words was 'dubious' (Article 16 of Louisiana Civil Code). Blackstone postulated the same: 'If words happen to be still dubious, we may establish their meaning from the context'.[895] Finally, the Louisiana Civil Code included in its Articles 14 and 15 the same detailed rules postulated by Blackstone for the purpose of guiding the judge in the activity of interpretation: words were to be interpreted in accordance with their ordinary meaning, unless it appeared that they were used in a technical sense, in which case their technical meaning should prevail.[896]

Not only did the provisions of the Code indicate coincidences between the opinion of the drafters of the Louisiana Civil Code and Blackstone. In a 1823 report, [897] those drafters explicitly said that the *référé* involved the 'manifest injustice of making the law with reference to an existing case', and, hence, the union of judicial and legislative powers, which was prohibited under the Louisiana Constitution (1812). In their opinion, the central problem with the *référé au legislatif* was that it compromised the principle of the separation of powers, by assigning judicial functions to the legislature. These arguments were very similar to those used by Blackstone, who characterized the *référé* as a source of 'partiality' and 'oppression'.[898]

In the same report of the Louisiana Code's drafters, the judges were described as

895 See Section 2.2 above

896 See Section 2.2 above.

897 Livingston et al (n 857) 5.

898 Blackstone (n 880) 59.

'the organ for *giving voice*… to what the legislative branch has decreed'.[899] The only discretion accorded to the judges, it was said, was that which allowed them 'to determine the meaning of the Law when it [was] *doubtful'*.[900] Again, these propositions reflect perfectly Blackstone's ideas and, in particular, his suggestion that recourse to the reason or spirit of the law, which involved an element of judicial discretion, was reserved to the cases where the meaning of the letter of the law was 'dubious'.[901]

The significant influence of Blackstone on the Louisiana Civil Code is evidenced by a series of factors that must be considered together: the marked similarities of wording between the Louisiana Code and Blackstone's *Commentaries*,[902] the availability of those *Commentaries* to the drafters of the Louisiana Civil Code,[903] the fact that those drafters acknowledged that they had made use of the 'abundant stores' of English jurisprudence,[904] and the clear influence of Blackstone in other areas of the Louisiana Code.[905] Finally, as we shall see in the following section, all the other potential sources of inspiration (either mentioned by the drafters of the Louisiana Code or by legal historians), when considered in their entirety, differed from Blackstone's ideas, and the Louisiana Code provisions.

3. Discarding Alternative Candidates

899 Livingston et al (n 857) 8. Emphasis added.

900 Ibid.

901 Blackstone (n 880) 60.

902 Section 2.1 above.

903 Franklin, *Libraries* (n 856) 405.

904 Livingstion et al (n 857) 6.

905 Rolf Knütel, 'Influences of the Louisiana Civil Code in Latin America' (1995-6) 70 Tul L Rev 1445, at 1458-9.

3.1.The Civil Law Tradition and the Louisiana Civil Code

As already mentioned, [906] doubts about the significance of Blackstone's influence have been voiced, and additionally the drafter of the Louisiana Digest (1808) in this respect (Moraeu Lislet) indicated some other potential sources of inspiration. In theory, the writings of Jean Domat and Samuel Pufendorf, and French and Spanish law could have been the alternative sources of inspiration of the rules of statutory interpretation of the Louisiana Civil Code. In the case of Pufendorf and Domat, their affiliation to the natural law school, and the fact that they wrote before codification, means that their ideas could not be automatically transposed to a context of codified law without some transformations. However, as it has been argued that their works were the sources of the rules on statutory interpretation of the Louisiana and the Chilean Civil Code, [907] we will deal with their respective doctrines in the following sections. In other words, we need to consider now whether some of those other sources were indeed an equal, or more relevant, source of inspiration than Blackstone.[908]

3.2.Jean Domat

In the *De la Vergne Volume*,[909] the drafter of the rules of statutory interpretation of the Louisiana Digest of 1808, made several annotations connecting those rules with the

906 See Sections 1.4 above

907 Alejandro Guzmán Brito, 'La Doctrina de Jean Domat sobre la Interpretación de las Leyes' (2004) 31 Revista Chilena de Derecho 41; Guzmán Brito, *Las Fuentes* (n 837) 171.

908 Rolf Knütel, a prominent German legal scholar, has postulated that the source of inspiration of Article 13 of the Louisiana Civil Code was a rule of Roman law on the interpretation of wills (D 32.25.1). However, he does not provide an explanation for the remaining provisions on statutory interpretation of the Louisiana Code. Cf. Knütel (n 905) 1458.

909 See Section 1.4 above

writings of Jean Domat (1625-1696). Domat was a French legal scholar from the natural law school, who authored *The Civil Law in its Natural Order*, first published in 1689.[910] There, among other things, Domat expressed his ideas about statutory interpretation in the form of rules. The following table presents Domat's rules followed by the articles of the Louisiana Code connected to them, in accordance with Moreau Lislet's notes.

Domat's texts indicated by the drafter of the Louisiana Digest [911]	Louisiana Civil Code
Domat rule XII: 'If the words of a law express clearly the sense and intention of the Law, we must hold to that. But if the true sense of the law cannot be sufficiently understood […] or that the sense of the Law being clear there arise from it inconveniencies to the publick good (sic); we must in this case have recourse to the Prince, to learn of him his intention […]' Domat rule XIX: 'If the difficulties which may happen in the interpretation of a Law	Art. 13. When a law is clear and free from all ambiguity the letter of it is not to be disregarded, under the pretext of pursuing its spirit.

910 Jean Domat, *Les Loix Civiles dans Leur Ordre Naturel* (Chez Jean Baptiste Coignard 1689).

911 Cited from: Jean Domat, *The Civil Law in its Natural Order Together with the Publick Law* (William Strahan tr., London 1737) 7 ff. In the Preliminary Book Title 1 Section 2 (of the Rules of Law in General) Domat provides twenty nine rules numbered from I to XXIX which are referred to in the *De la Vergne Volume*. Emphasis added.

Domat's texts indicated by the drafter of the Louisiana Digest [911]	Louisiana Civil Code
[…] are explained by an ancient Usage we must stick to the sense declared by the constant Practice'	
Domat rule IX: 'The obscurities, ambiguities and other defects of expression, which may render the sense of a Law dubious […] ought to be resolved by the sense that is most natural, that has the greatest relation to the Subject, that is most conformable to the intention of the lawgiver, and most agreeable to Equity […]	Art. 14. The words of a law are generally to be understood in their most known and usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the terms.
There is no reference for this article in the De la Vergne Volume.	Art. 15. Terms of art, or technical terms and phrases, are to be interpreted according to their received meaning and acceptation with the learned in the art, trade or profession to which they refer
Domat rule X: 'For understanding aright the sense of a law, we ought to consider well all	Art. 16. Where the words of a law are dubious their meaning may be sought by

Domat's texts indicated by the drafter of the Louisiana Digest [911]	Louisiana Civil Code
the words of it, and its Preamble, if there be any, that we may judge of the meaning of the law, by its motives, and by the whole tenor of what it prescribes […] Thus, it is to transgress against the Rules and the Spirit of the laws, to make use […] of any one part of a Law taken separately from the rest […]' Domat rule XI: 'If there happens to be omitted in a law anything that is essential to it, or that is a necessary consequence of its disposition, and that tends to give the law its entire effect, according to its motive; we may in this case supply what is wanting in the expression, and extend the disposition of the law to what is included within its intention, altho' not expressed in the words.'	examining the context with which the ambiguous words, phrases and sentences may be compared in order to ascertain their true meaning
Domat XVIII: 'If the Law in which there is some doubt, or other difficulty, have any	Art. 17. Laws in pari materia, or upon the same subject matter, must be construed

Domat's texts indicated by the drafter of the Louisiana Digest [911]	Louisiana Civil Code
relation to other laws which may help to clear up their sense, we must prefer to all other interpretations that which they may have from the other Laws […]'	with reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another.
Domat rule IX: 'The obscurities, ambiguities and other defects of expression, which may render the sense of a Law dubious […] ought to be resolved by the sense that is most natural, that has the greatest relation to the Subject, that is most conformable to the intention of the lawgiver, and most agreeable to Equity […]	Art. 18. The most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature to enact it.

As the preceding table shows, there was a certain parallelism between the rules proposed by Domat and those of the Louisiana Civil Code. Both provided that the law was to be followed in cases where the language was clear, though 'clarity' was differently described (Article 13 of the Louisiana Code), that the meaning assigned to words should be their natural (ordinary) one (Article 14 of the Louisiana Code), that the context and laws *in pari materia* were to be consulted (Articles 16 and 17 of the Louisiana Code), and

that the spirit of the law was to be taken into account in case of obscurity of the letter (Article 18 of the Louisiana Code). However, a number of key *differences* emerge from the *whole picture* of the ideas proposed by Domat on the subject of statutory interpretation. Put briefly: differently from Blackstone and the Louisiana Code, Domat did *not* favour giving unconditional priority to a literal interpretation,[912] and he suggested interpretation by the sovereign when doubts arose (*référé au legislatif*).[913]

In relation to the first difference, while the Louisiana Code provided that 'where the law is clear … the letter of it is not to be disregarded' (Article 13), Domat postulated that in some cases even when 'the sense of the Law [was] clear' if 'there ar[o]se from it inconveniences to the public good' the letter was *not* to be followed, and the prince (the law-giver) should be consulted (Domat's rule XII). This idea was reaffirmed by Domat in another part of the same chapter:

> 'when it happens that the sense of the law, *how clear so ever it may appear in the words*, would lead us […] to Decisions that would be unjust [such event] obliges us to discover […] *not* what the law says, but what it means.'[914]

Thus, according to Domat, literal interpretation should *not* always prevail over other methods. The interpreter could justifiably look for non-literal interpretations when he was convinced that the literal meaning was unjust or against the public good. Contrariwise, Article 13 of the Louisiana Code prohibited disregarding the letter of the law 'under the pretext of pursuing its spirit'. This is a remarkable difference between Domat on the one

912 Domat's Rule XII.

913 Ibid.

914 Domat (n 911) 7. Emphasis added.

hand, and Blackstone and the Louisiana Code, on the other. As already mentioned, Blackstone and the Louisiana Code postulated recourse to the reason (spirit) of the law in cases where the meaning of the letter was dubious.[915] Interestingly, Gabriel Ocampo, a member of the governmental commission which reviewed the draft of the Chilean Civil Code, acknowledged in a manuscript note in his draft of the Code, the existence of this difference between Domat and the Louisiana and Chilean Codes.[916] On the margin of article 19 of the Chilean Civil Code (which reads: 'When the meaning of the law is clear its literal tenor shall not be disregarded under excuse of consulting its spirit'), Ocampo commented: 'Domat seems to profess a contrary opinion'.[917] This is doubly relevant. First, it indicates that some contemporaries were aware of the differences between the Louisiana (and Chilean) Code, and Domat's ideas. Second, Ocampo's annotation is likely to reflect the fact that the difference was discussed in the meetings of the commission with Andrés Bello, the drafter of the Chilean Civil Code, and hence that the departure from Domat was conscious.

The second difference with Domat was that, while Blackstone and the Louisiana Code were opposed to the method of the *référé au legislatif*, Domat argued for it:

> [I]f the true sense of the law cannot be sufficiently understood […] we must in this case have recourse to the Prince, to learn of him his intention.[918]

915 Domat also suggested that in his rule IX. The point is that he admitted the *same* when the letter of the law *was* clear, but unjust or inconvenient.

916 Ocampo's annotated copy of the Chilean Civil Code is preserved at the University of Chile. Consulted at http://libros.uchile.cl/568 on January 2nd, 2017.

917 In Spanish the annotation reads: 'Domat parece profesar una opinion contraria'.

918 Domat's (n 911) Rule XII.

Therefore, even if there was a similitude between the ideas of Domat, and those of Blackstone and the Louisiana Code, the similarity dissolves as soon as the *whole* picture of the rules on statutory interpretation is borne in mind. Domat endorsed the *référé au legislatif* and a *non*-hierarchical model of interpretation, while Blackstone and the Louisiana Code endorsed the *opposite*. As such, Domat might have been a partial inspiration for the Louisiana Code, but not the most significant one.

3.3.Spanish Law

The drafter of the rules on statutory interpretation of the Louisiana Digest of 1808, also mentioned a number of rules of Spanish law in connection with Article 13 of the Digest. The following table compares those Spanish law rules with the Louisiana Civil Code.

Spanish law	Louisiana Civil Code
Law 14 Title 1 Partida 1 [919] Being the meaning of the law doubtful, either due to a mistake in their drafting or to a mistake of the reader, when that meaning needs to be correctly explained and the truth of the law	Art. 13 of the Louisiana Civil Code). When a law is clear and free from all ambiguity the letter of it is not to be disregarded, under the pretext of

919 Gregorio López, Las Siete Partidas del Sabio Rey Don Alonso el Nono nuevamente glosadas por el Licenciado Gregorio López del Consejo Real de Indias de su Majestad: Tomo I (Salamanca 1555) 8. The text in (old) Spanish reads as follows: 'Dubdosas seyendo las leyes por yerro de escriptura, o por mal entendimiento del que las leyesse porque debiessen de ser bien espaladinadas, e fazer entender la verdad dellas: esto non puede ser por otro fecho sino por aquel q las fizo o por otro q sea en su logar, que aya poder de las fazer de nuevo, e guardar aquellas fechas'. The translation to English was done by the author of this thesis.

understood, this can be done only by that who made the law. Law 4 Title 33 Partida 7 [920] No one, but the King, should explain or declare the law when there is some doubt about the words or their understanding Law 3 Title 1 Book 2 Recopilación Castellana [921] And because it belongs to the King and he has power to enact, interpret and declare the law … We think it appropriate that if … some declaration or interpretation is needed… We [the King] shall do it…	pursuing its spirit.

920 Gregorio López (ed) Las Siete Partidas del Sabio Rey Don Alonso el Nono nuevamente glosadas por el Licenciado Gregorio López del Consejo Real de Indias de su Majestad: Tomo VII (Salamanca 1555) 97. The text in (old) Spanish reads as follows: 'Espaladinar, nin declarar, non deve ninguno ,nin puede las leyes si non el Rey quando dubda acaeciesse sobre las palabras, o el entendimiento de ellas'. The translation to English was done by the author of this thesis.

921 *Recopilación de las leyes destos Reynos hecha por mandado de la Majestad Católica del Rey Don Philippe segundo Nuestro Señor* (Alcalá de Henares 1569) 45-46. The source is an Act passed by King Alphonse in 1386. The text in (old) Spanish reads as follows: 'Y porq al Rey pertenece y a poder de hazer fueros y leyes y de las interpretar y declarar … tenemos por bien que si en los dichos fueros …o en algunas leyes… fuere menester declaración y interpretación…que nos lo haremos'. The translation to English was done by the author of this thesis.

The three rules of Spanish law mentioned by the drafter of the Louisiana Digest of 1808 stipulated that interpretation of the law was reserved to the King (*référé au legislatif*). This was clearly in contradiction with the Louisiana Code, which did *not* make use of this idea. Furthermore, these rules of Spanish law were in opposition to the opinion of Blackstone, and the drafters of the Louisiana's Code.[922] The only explanation available for the making of these mentions by Moreau Lislet is that they were done in order to emphasize the divergence. This is not surprising: John W Cairns, a prominent legal historian, has noted that allusions in the *De la Vergne Volume* point to 'similar, equivalent, *and contradictory* provisions in Roman and Spanish law, *not* to sources'.[923] Thus, we can discard Spanish law as a primary source of inspiration of the rules of statutory interpretation of the Louisiana Civil Code, even though the drafter mentioned it.

3.4.Samuel Pufendorf

We must now turn to a suggestions advanced by the prominent Chilean legal historian, Alejandro Guzmán Brito, and supported by John W. Cairns.[924] According to Guzmán Brito, while it is clear that the drafter of the Louisiana Digest's rules on statutory construction made use of Blackstone's ideas, there was nothing original in Blackstone from which the Louisiana Civil Code could benefit.[925] In Guzmán Brito's opinion,

922 Section 2.3 above.

923 Cairns (n 839) 77-8.

924 Cairns, *Blackstone in the Bayou* (n 837) 88. Guzmán Brito and Cairns are the only two authors that I have been able to locate who address in some detail the topic of interpretation in Blackstone in connection with Pufendorf.

925 Alejandro Guzmán Brito, 'Las fuentes de las normas sobre interpretación de las leyes del "digeste des lois civiles" ("Code civil") de la Luisiana (1808/1825)' (2009) 31 Revista de Estudios Histórico-Jurídicos 171.

Blackstone's own ideas were substantially informed by the civil law tradition, through the medium of Samuel Pufendorf's writings. There is a great deal of truth in this assertion: on the matter of statutory interpretation, as with many other topics, Blackstone consulted and partially followed civilian authors. This was a general characteristic of his *Commentaries*, as I remarked earlier.[926] More specifically, in the area of statutory interpretation, Blackstone relied heavily on the works of Samuel Pufendorf (1632-1694), a leading German scholar of the natural law school. In his book, *De Jure Naturae et Gentium (Of the Law of Nature and Nations)*, first published in 1672, Pufendorf devoted one chapter to the interpretation of statutes, explicitly following Hugo Grotius, another prominent member of the natural law school. There were several coincidences in the thinking of Blackstone and Pufendorf. Indeed, it seems clear that many ideas and phrases in Blackstone were taken almost literally from Pufendorf's work, such as the rules on ordinary and technical meanings of words, *parts* of the rule on the intention of the legislature, and many other examples. However, despite these resemblances, there were also some important differences between the views of the two writers. Those differences emerge if, instead of focusing on those *individual* elements, we take a look at the whole picture.

First, the method of interpretation advocated by Pufendorf was a non-hierarchical one in which literal and non-literal elements could be applied simultaneously. According to Pufendorf:

> The True End and Design of Interpretation is to gather the intent of the man from most probable signs … words, and *other conjectures*, which

926 Chapter 2 Section 4.2.5.

> may be considered separately, or both together. [927]

Second, there was a more crucial disagreement between the two writers concerning the relationship between a statute and the reason for its enactment. Pufendorf, as much as Blackstone, recommended caution in the use of equity for interpretative purposes. However, he admitted that we could act 'counter to' the 'letter of the law' if 'we find that the precise adhering to the letter is … repugnant to the law of God or Nature. For to such, no man can be obliged.'[928] The making of this statement by a writer from the natural law school is not surprising. However, as mentioned earlier,[929] Blackstone was in complete disagreement:

> [I]f the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary form of the constitution, that is vested with authority to control it. [930]

Thus, according to Blackstone, a statute issued by Parliament should be obeyed, no matter how 'unreasonable' or, in other words, how unjust it may seem. This proposition has lead several legal scholars to question the consistency of Blackstone's adherence to natural law doctrines. In particular, Gareth Jones has doubted the possibility of reconciling Blackstone's apparent ideas about natural law with his conception of an 'uncontrolled' sovereign (Parliament).[931] Recourse to the reason of the law was confined by Blackstone to the cases 'when the words [were] dubious' (i.e. the cases that could not

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927 Samuel Pufendorf, *Of the Law of Nature and Nations* : Book 5, (William Percivale tr. Oxford 1717) 51.

928 Ibid 315. Emphasis added

929 Section 2.2 above.

930 Blackstone (n 880) 91.

931 Gareth Jones (ed) The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Laws of England (Palgrave Macmillan 1973) xxxviii.

be resolved under the plain meaning rule).

Finally, a comparison of the following passages from the writings of Pufendorf and Blackstone reflects further differences in their approaches to interpretation. While Pufendorf considered the reason or spirit of the law to be 'that which helps us most' in interpretation, Blackstone resorted to the same only 'when the words [were] dubious'.

Pufendorf	Blackstone
'But that which helps us most in the Discovery of the true meaning of the Law is the Reason of it, or the Cause which moved the legislator to enact it'.[932]	'But, lastly, the most universal and effectual way of discovering the meaning of the law, *when the words are dubious*, is by considering the reason and spirit of it'[933]

This difference is remarkable. Throughout his chapter Blackstone was clearly following Pufendorf's text. However, on arriving to Pufendorf's discussion of the spirit of the law, Blackstone took special care to explain that the use of the same should be limited to the cases where the words were dubious, thereby adding a requirement that was *not* present in Pufendorf.

To summarize, Guzman Brito is entirely right in recognising the extensive use that Blackstone made of Pufendorf's writings on the subject of interpretation. However,

932 Pufendorf (n 927) 397.

933 Blacsktone, (n 880) 61. Emphasis added.

there was a *crucial* difference between the works of the two theorists: Blackstone was more inclined to the literal method of interpretation, as a consequence of his deference to Parliament-made law, while Pufendorf was prepared to disregard literal interpretation, where it would result in a violation of natural law. For Blackstone, recourse to the reason of the law or the intention of the legislature, was a merely subsidiary method. That was also the approach adopted by the Louisiana Civil Code (Article 18). Thus, contrary to Guzman Brito's opinion, Blackstone did not merely transcribe Pufendorf's texts, he also contributed other and different ideas.

3.5.French Law

Within French legal ideas, there was a difference between the French *Projet* of a Civil Code of 1800, never enacted, and the French Civil Code, enacted in 1804. While, the French *Projet did* include provisions concerning judicial statutory interpretation, the French Civil Code (1804) did not. Therefore, only the French *Projet* could have served as an inspiration for the Louisiana Civil Code. Moreau Lislet did not mention it in the *De la Vergne Volume*, but the similarities between Article 13 of the Louisiana Code and Article V Title V of the Preliminary Book of the French *Projet* have reasonably led legal scholars to postulate that influence.[934]

Article V, Title V, Preliminary Book of	Louisiana Civil Code

934 Guzmán Brito, *Fuentes* (n 837) 171-195.

the draft of a French Civil Code of Year VIII (1800) [935]	
Article V. When the law is clear, its letter is not to be eluded under the pretext of pursuing its spirit; and in the application of an obscure law, its more natural, and less defective, sense shall be preferred.	Art. 13. When a law is clear and free from all ambiguity the letter of it is not to be disregarded, under the pretext of pursuing its spirit.

The parallelism between the first part of Article 13 of the Louisiana Code and Article V of the French *Projet* is obvious. Both provided that, when the meaning of a statute was clear, this meaning ought not to be eluded under the pretext of looking for the statute's spirit. Furthermore, as much as Article 16 of the Louisiana Civil Code, Article VI of the French draft Civil Code prescribed contextual analysis.[936] But the coincidences ended there. For instance, unlike the Louisiana Civil Code, the French *Projet* was silent on the question of how judges should assign meaning to the words of the statute, and all of the other provisions of the French *Projet* had no parallel in the Louisiana Code. However, while many detailed rules in the two documents differed, the overall conception of statutory interpretation of the French *Projet* was similar to that of the Louisiana Code.

935 Commission nommée par le Gouvernement le 24 Thermidor an VIII, *Projet de Code Civil* (Chez Emery, Ventôse an IX-1801). The translation into English was done by the author of this thesis.

936 Article VI : Pour fixer le vrai sens d'une partie de la loi, il faut en combiner et en reúnir toutes les dispositions.

In addition, there was another coincidence with the Louisiana Code: the French *Projet* (1800) did *not* adopt the method of the *référé au legislatif*, a cornerstone of French law after the Revolution, the goal of which was the subjugation of the judiciary. An Act of August 1790 obliged the courts 'to address themselves to the legislature whenever they think it necessary […] to interpret a law'.[937] This was not new: under the *ancien regime*, an *Ordonnance de Reformation de la Justice Civile* of April 1667 provided that statutory interpretation was reserved to the sovereign.[938] However, in 1800, at the same time of the drafting of the French *Projet* of 1800, the *référé au legislatif* had lost its popularity. In that same year, the *référé au legislatif* was abandoned, and for a *brief* period the *Cour de Cassation*, considered by French contemporaries to be a 'necessary evil', stood as the last word on interpretation.[939]

The model of the French Projet (1800), so similar in its philosophy to the Louisiana Code, had a very short life, and never became positive law. First, the French Civil Code enacted in 1804 did *not* include rules on statutory interpretation. Second, three years later, in 1807, the *référé legislatif* was reintroduced into French law under the form of a *référé* to the executive power.[940] The result was that, by the time that the Louisiana Digest of 1808 was being drafted, French law contrasted strongly with the model adopted in Louisiana.

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937 John P Dawson, *The Oracles of the Law* (University of Michigan Law School 1968) 375-6.

938 Marcel Planiol- Georges Ripert, *Derecho Civil: Parte A: Volumen 3* (Ed. Harla Mèxico 1997) 25.

939 Jacques Ghestin and Gilles Gobeaux, *Traité de Droit Civil: Introduction Générale* (4th ed, LGDJ 1994) 372-3.

940 Ibid ; Dawson (n 937) 379. After a subsequent reform in 1828, the *référé au legislatif* was in force until derogated by an Act of 1st April 1837.

To summarize, the general philosophy on statutory interpretation of the French *Projet* (1800), which never became positive law, certainly coincided with that of the Louisiana Code, but, apart from that, French positive law had little influence in the Louisiana Civil Code. A few years after the drafting of the *Projet*, French law had adopted a different solution: no rule at all governing judicial interpretation (Civil Code of 1804), and a return to the *référé au legislatif* (1807). Naturally, the *political ideal* that the legislature should prevail over the judiciary, had many supporters in France, as much as in Louisiana, throughout the nineteenth century: the French exegetic school as a whole is clear evidence of that. [941] The crucial difference with Louisiana, was not one of political philosophy, but of the form of implementation of that ideal into the law.

3.6.Summary

In the preceding sections, I argued that Blackstone was the most significant inspiration for the rules of the Louisiana Civil Code on statutory interpretation, by showing that none of the other alternatives could have a similar influence. Blackstone's *Commentaries* provided the wording of the provisions, and *also* the broad conception of interpretation adopted by the Louisiana Code. That model had three main characteristics: (a) it was a hierarchical approach: the literal or plain meaning rule unconditionally prevailed over interpretation based on the spirit of the law or the intention of the legislature, in a manner different from the approaches of Domat and Pufendorf, (b) it did not adopt the method of the *référé legislatif*, in contrast with the approaches of Domat, Spanish law, and French Law, and being, thus, more coherent in its respect for the principle of separation of

941 Dawson (n 937) 392-4

powers,[942] and (c) it included detailed legal rules that guided judicial interpretation, unlike the French Civil Code of 1804 and Spanish law (though, quite like Blackstone, Domat and Pufendorf).

Among the sources considered above as potential influences for the Louisiana Code, the model most similar to Blackstone's was that of the short-lived French *Projet* of 1800. First, both were motivated by the political objective of constraining judicial discretion. Second, the French *Projet* inspired one of the articles of the Louisiana Code (Article 13). Lastly, even bearing in mind that almost all the other rules were different from those of the Louisiana Code, it is undeniable that, in general terms, Blackstone and the French *Projet* took a similar approach to statutory interpretation. However, historically speaking there is a key difference between them. While the French *Projet* represented a short lived phenomenon within French legal ideas, Blackstone's ideas became a central characteristic of English law.

Thus, the Louisiana Civil Code, through Blackstone, adopted a central characteristic of nineteenth century English law (the plain meaning rule) which stood in sharp contrast to both the civilian tradition (Pufendorf, Domat and Spanish law) and the lack of regulation of interpretation in the recent French Civil Code (1804). The same can be said of the Chilean Civil Code and its sequel, (Ecuador, Uruguay and Colombia) that were inspired by the Louisiana Civil Code.

Contemporaries were aware that Blackstone and English law coincided on the

942 In the case of French law, except for a brief period between 1800 and 1807 as explained above in Section 2.2.

subject of statutory interpretation. By the beginning of the nineteenth century, James Kent, an Anglo-American author widely read in South America, had written that absolute deference to Parliament-made law was a 'principle of English law', and identified Blackstone as its champion.[943] Through Kent, many South-American legal actors could have become aware of this central characteristic of English law, and that Blackstone could be used as a relevant source of inspiration in that area. For instance, Bello and Narvaja, the drafters of the Chilean and Uruguayan Codes were both readers of Kent, and convinced partisans of literalism in matters of statutory interpretation. In the following section we turn to those aspects while exploring the indirect influence of Blackstone in some South-American Civil Codes.

4. Blackstone's Indirect Influence in South-American Civil Codes

4.1. Statutory Interpretation in the Chilean Civil Code

Articles 19 to 22 of the Chilean Civil Code (1855) dealt with statutory interpretation. As Andrés Bello, the drafter of the Code, explicitly acknowledged, [944] those rules were inspired by the Louisiana Civil Code (1825). In the following table the correlative articles of the Louisiana Civil Code and the Chilean Civil Code are compared and the differences highlighted:

943 Kent (n 841) 493.

944 Andrés Bello, Código Civil de la República de Chile: Volumen I: Introducción y notas de Pedro Lira Urquieta, Profesor de la Universidad de Chile y de la Católica de Santiago: Texto concordado con los distintos Proyectos de Bello (Obras Completas, Volumen XIV, 2nd ed, Fundación La Casa de Bello 1981) 41-42.

Louisiana Civil Code	Chilean Civil Code [945]
Art. 13. When a law is clear and free from all ambiguity the letter of it is not to be disregarded, under the pretext of pursuing its spirit.	Art 19. (First Part).[946] When the meaning of the law is clear its literal tenor is not to be disregarded under pretext of consulting its spirit.
Art. 14. The words of a law are generally to be understood in their most known and *usual* signification, without attending so much to the *niceties of grammar rules* as to the general and *popular* use of the terms.	Art. 20. The words of the law are to be understood in their obvious and *natural* sense, according to the general *[popular]* use of the same words *[niceties of grammar];* **but when the legislator has defined the words expressly for certain subject matters, they are to be given in those subject matters their legal meaning.**
Art. 15. Terms of art, or technical terms and phrases, are to be interpreted according to their received meaning and acceptation with the learned in the art,	Art. 21. Technical terms of any science or art are to be taken according to the meaning given to them by those who profess the same science or art; unless it clearly appears that they have been taken

945 In italic: Louisiana text omitted by Bello. In bold: text added by Bello.

946 In the table above Art 19 of the Chilean Code is divided into its two parts in order to confront it with the different Louisiana articles which were its sources: 13 and 18.

Louisiana Civil Code	Chilean Civil Code [945]
trade or profession to which they refer.	with a different meaning.
Art. 16. Where the words of a law **are dubious** their meaning may be sought by examining the context with which the **ambiguous** words, phrases and sentences may be compared in order to ascertain their true meaning.	Art. 22 Inc. 1°. The context of the law shall serve to illustrate the meaning of each of its parts, so that there is between all of them the due correspondence and harmony.
Art. 17. Laws *in pari materia*, or upon the same subject matter, must be construed with reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another.	Art. 22 inc. 2°. The obscure phrases of a law might be illustrated by means of other laws particularly if they refer to the same subject matter.
Art. 18. The most universal and effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the legislature	Art 19 (Second part). But it is possible, in order to interpret an obscure expression of the law, to have recourse to its intention or spirit, **clearly manifested in itself or in the trustworthy history of its enactment.**

Louisiana Civil Code	Chilean Civil Code [945]
to enact it.	

Thus, as much as the Louisiana Code, the Chilean Civil Code did *not* oblige the judge to consult the legislature in cases of doubt: there was no *référé au legislatif*. Both Codes adopted a *hierarchical* model under which the literal method prevailed, and both included a series of *detailed rules* on interpretation, in an attempt to narrow judicial discretion.

According to the first part of Article 19, interpretation should be focused on the meaning of the letter of the statute ('literal tenor'). The second part of the same article provided that recourse to the intention or the spirit of the law was *only* permitted if some expression of the statute remained 'obscure'. There was a clear coincidence between the Chilean Code's rules, and those contained in Articles 13 and 18 of the Louisiana Civil Code. The other articles of the Chilean Code provided detailed rules on how the letter of the statute should be interpreted, and in doing so, also followed the language of the Louisiana Code: the ordinary meaning of the words was to be preferred, unless they had been used in a technical sense. Furthermore, the context (including the statute within which the words were contained and other statutes concerning a similar subject matter) should be taken into account.

All of these rules were concerned with *literal* interpretation: *what* meaning should be assigned to isolated words (ordinary, technical or legal), and *what* aspects of the

context were to be taken into account (the provisions included in the same statute, and those included in statutes about similar matters). The Chilean rules exhibited a marked preference for a literal method of interpretation. The exploration of the intention of the legislature or the reason (or spirit) of the law, was of secondary priority. The prevalence of the literal method was accompanied by a series of detailed rules that were aimed at further constraining the judge. Except for some differences, which will be explained below, the Chilean Civil Code followed the Louisiana one.

It is understandable that the drafter of the Chilean Civil Code took inspiration form the Louisiana Code, as he was convinced that the literal method was the most adequate solution in matters of statutory interpretation. Writing in 1842, Bello explained:

> We believe that confining [interpretation] to the letter is [the] more sure [method of statutory interpretation]; that we should not extend or restrict it, except when evident absurdities and contradictions derive from that,[947] and that any other system of interpretation opens the gates to *arbitrariness*, and destroys the *empire of law*.[948]

According to Bello, the literal method was a means to avoid 'arbitrariness', something that was against the rule of law ('empire of law'). Perhaps with some irony, Bello referred to the antagonists of the literal method as those who believed that 'interning oneself into the mind of the legislator was the most sublime aspect of legal

947 The expression 'except when evident absurdities and contradictions derive from that' was clearly similar to the golden rule of English law (see Section 2.2 above). Note that, as much as in English law, the golden rule is restricted by Bello to cases of *absurdity* and *contradictions* (i.e. *logical* problems), but it does *not* apply where the judge beliefs that a literal interpretation would lead to *unreasonable* or *unjust* results.

948 Bello (n 944) 41-2: 'Nosotros creemos que lo más seguro es atenerse a la letra; que no debemos ampliarla ni restringirla, sino cuando de ello resultan evidentes absurdos o contradicciones; y que todo otro sistema de interpretación abre anchas puertas a la arbitrariedad, y destruye el imperio de la ley'. Emphasis added.

hermeneutics'.[949] Writing in 1836, long before the Chilean Code was enacted, Bello expressed an obvious distrust towards the judiciary, and wrote that the judge should be 'a slave of the law'.[950] Moreover, as much as Blackstone and the drafters of the Louisiana Code, Bello believed that the *référé au legislatif* was a 'huge inconvenience' as 'statute[s] will *degenerate* into … judicial decision[s]'.[951]

Following the enactment of the Chilean Code, its rules of statutory interpretation were understood by Chilean legal scholars to be an endorsement of the literal method. The law professors of the Universidad de Chile teaching in the 1850s (Enrique Cood and José Clemente Fabres) were of this opinion, which was later endorsed by their successor, Paulino.[952] While Guzmán Brito, a Chilean legal historian, has rightly argued that the opinion of those professors was based on an oversimplification of the civil law tradition,[953] the same scholar agrees that the Chilean Civil Code had effectively *departed* from that tradition.[954] This departure was not only the result of the indirect influence of Blackstone, but it also reflected an essential conviction of Bello. Furthermore, when dealing with Bello's opinions on this subject, we must keep in mind that he was (and still

949 Andrés Bello in *El Araucano* (Santiago de Chile, 30 September 1842) quoted in Bello (n 944) 41-2: 'mientras unos adhieren estrictamente al texto y tratan de licenciosa la inteligencia de sus antagonistas, otros creen que lo sublime de la hermenéutica legal es internarse en al mente del legislador […] Por este medio, según conciben , se toman por guía, no las palabras de la ley sino su intención, su idea.'

950 Bello quoted in Agustín Squella, ´Proyección Jurídica de las Ideas de Bello sobre el Orden y la Libertad´ in Departamento de Ciencias del Derecho: Facultad de Derecho: Universidad de Chile, *Congreso Internacional Andrés Bello y el Derecho* (Editorial Jurídica de Chile 1982) 72.

951 Andrés Bello *Obras Completas*: Tomo XII: *Código Civil de la República de Chile,* Volumen I (Ministerio de Educación 1954) 35.

952 Alejandro Guzmán Brito 'La Historia Dogmática de las normas sobre interpretación recibidas por el Código Civil de Chile' in Universidad de Chile-Universidad Adolfo Ibañez, *Interpretación, Integración y Razonamiento Jurídicos* (Editorial Jurídica de Chile 1992) 41 ff.

953 Ibid.

954 Ibid 81.

is) one of the most connoted grammarians of the Spanish language, and probably, therefore, the most sophisticated actor dealing with this matter among the ones that we are analysing in this chapter. In his *Grammar of the Castilian Language for the use of Americans*, first published in 1847, Bello argued:

> [T]he *utility of grammar* cannot but be huge, either to speak in a way that what we say is well understood […] or to establish accurately the sense of what others have said; which includes nothing less than the correct enunciation and *genuine interpretation of the laws*, contracts, wills […] [955]

The paragraph illustrates Bello's preference for the grammatical approach, an approach which was described by him as being the one which allowed 'genuine' interpretation of the laws. No matter whether, from the internal point of view of the theory of interpretation, we can accept or not the idea of *a* genuine method of interpretation, this passage clearly illustrates the opinion of the author of the Chilean Civil Code, and what he was trying *to do* with his ideas about it. As it has been rightly argued, for Bello, clarity and unity in *language* and *law* was a *political* aim.[956]

4.2.Differences Between the Chilean and the Louisiana Civil Codes

As he himself acknowledged, Bello was inspired by the Louisiana Code, but there were three differences introduced by him.

a) Legal definitions of words

955 Andrés Bello, Gramática de la Lengua Castellana para el Uso de los Americanos (Imprenta del Progreso 1847) 1. Emphasis added.

956 Lisa Hilbink, Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile (CUP 2007) 50.

First, the Chilean Code provided that if a word had been defined in a statute as having a meaning different from its ordinary and technical meaning, then that *legal definition* should be followed.[957] In his notes, Bello admitted that he had 'introduced limitations' to the articles of the Louisiana Code dealing with the sense of ordinary and technical words,[958] and explained that 'a word, technical or not, could be improperly used in a statute' asking rhetorically if it 'would …be reasonable to assign that word a different meaning from that assigned by the legislator'.[959] This limitation was not present in the Louisiana Civil Code.

b) Context not as a subsidiary tool

The second dissimilarity concerned the use of context for interpretative purposes. While the Louisiana Code[960] provided (like Blackstone, and English law) that the context of words should only be consulted when the meaning of words was dubious, under the Chilean Civil Code[961] words were *always* to be interpreted in their context, even when their meaning was clear.

c) Legislative history

Third, and finally, recourse to the intention of the legislature or the spirit of the law, was permitted by the Chilean Code only in case of obscurity. This was identical to the

957 Articles 20 and 21 of the Chilean Civil Code.

958 Articles 14 and 15 of the Louisiana Civil Code

959 Andrés Bello, *Obras Completas*: Tomo XII: *Código Civil de la República de Chile,* Volumen I (Ministerio de Educación 1954) 42-43

960 Article 16 Louisiana Civil Code.

961 Article 22 Chilean Civil Code.

Louisiana Civil Code, and to Blackstone. However, Bello added a further provision: the intention of the legislature was to be inferred *only* from 'trustworthy' (*fidedignas*) sources. The intention should be 'clearly manifested in [the statute] itself or in the trustworthy history of its enactment' (e.g. parliamentary discussions).[962] In his comment on that article, Bello added: 'imaginary intentions should not be attributed' to the legislature.[963] This marked a divergence from English law in which recourse to legislative proceedings (Hansard) had been resisted since the 1760s. [964] Only in 1993, did the House of Lords allow recourse to Hansard, and even then, the decision was met with intense debate. One of the most traditional arguments against resorting to legislative history was the difficulty in reconstructing that process, a difficulty which could only be surmounted when the Hansard Report assumed its modern form in the twentieth century. Bello had similar concerns when insisting that the intention should be 'clear', derived from 'trustworthy' sources, and not 'imaginary'. However, contrary to English law, the Chilean Code allowed the consideration of the legislative history for interpretative purposes.

4.3.Inspiration for the Dissimilarities

The differences between the Chilean Civil Code and the Louisiana Civil Code were not crucial in the sense that the central idea of restricting judicial discretion was reflected in a similar way in both Codes. However, those variances are worth exploring as they show some divergence from the *strict* literalism of English law. In the Chilean Code, the use of

962 Article 19 of the Chilean Civil Code, Second Part.

963 Bello (n 959) 43.

964 For this paragraph: Vogenauer (n 873) 629-74.

context for interpretation even when words were clear, and the legitimacy of recourse to legislative proceedings, made textualism more flexible than English strict literalism.[965] Furthermore, the exploration of these differences will bring to light further Anglo-American inspiration in this area: the ideas of James Kent.

In the following sections, I will first trace back the influence of Kent. For this purpose, we need to turn to the Uruguayan Civil Code, enacted in 1868, in relation to which that inspiration was explicitly acknowledged by Tristán Narvaja, the drafter of the Code. Finally, in the conclusions I will return to the distinction between these two varieties of literalism: English strict literalism and the South-American more flexible version of it.

4.4.The Uruguayan Civil Code and Kent's Influence

4.4.1. Borrowing from the Chilean Civil Code

Articles 17 to 20 of the Uruguayan Civil Code reproduced the rules of the Chilean Code on statutory interpretation, with only one slight (and irrelevant) omission.[966] The drafter of the final version of the Uruguayan Civil Code, Tristán Narvaja, acknowledged the influence of the Chilean Code, an inspiration that was also made obvious by the identical language of the corresponding provisions.

Like Bello, Narvaja held strong views about the matter of statutory

965 Section 2.2 above.

966 Laws *in pari materia* were not mentioned.

interpretation.[967] First, he linked the literal method of interpretation to stability. In this respect, in one of his works, he favourably quoted a French politician (Vaublanc) talking to the National Assembly in 1792: 'Establish […] the despotism of law, or fear the development of all the causes of disorder that France hides in its breast'. Second, Narvaja was explicitly critical of the approach adopted by the French Civil Code (1804) which, as mentioned earlier,[968] did not include rules on statutory interpretation. Narvaja argued that,

> [I]it may happen in some cases that the law […] due to the imperfection of language be obscure […] [T]he Uruguayan Code which anticipated the problem, and *has been more explicit in this part than the French* one […] has desired to provide for the judge in this embarrassing situation, consigning […] hermeneutic rules.[969]

Narvaja considered that the inclusion of rules governing statutory interpretation was to 'impose on everyone the obligation to obey them' in order to prevent those rules from just being mere 'philosophical theses', as they were in France.[970] Thus, just as Bello departed from the civilian tradition, Narvaja departed from the French Civil Code. This information will be relevant when we try to make sense of Anglo-American influences on statutory interpretation.

4.4.2. Kent Used by Narvaja

One of the interesting aspects of the borrowing of the rules of statutory interpretation from Chile to Uruguay, were the comments of Narvaja. Articles 18 to 20 of the

967 For all references contained in this paragaraph: Tristán Narvaja, 'De la Sociedad Conyugal las Dotes' reproduced in Jorge Peirano Facio, *Tristán Narvaja. Un Jurista Rioplatense en tiempos de la Codificación* (Instituto de Investigaciones de Historia del Derecho 2008) 360-361.

968 Section 3.5 above.

969 Narvaja (n 967) 360-1.

970 Ibid.

Uruguayan Code were a literal transcription of articles 20 to 22 of the Chilean Code. As already mentioned, those Chilean articles were inspired by the corresponding rules of the Louisiana Code, but bore some differences with them. Among those differences were the allusion to the *legal definition* of words, and the provision for the consideration of *context* even for interpreting clear words (i.e. not as a subsidiary tool). Narvaja explicitly mentioned Kent in relation to each of those two provisions.

a) Legal definitions

As just mentioned, the Chilean and the Uruguayan Codes provided for the *legal* definition of a word to prevail over its ordinary or technical meaning,[971] an idea that was *not* present in the Louisiana Code. In his notes to the corresponding articles of the Uruguayan Code (18 and 19), Narvaja quoted the following paragraph from Kent:

> If technical words are used, they are to be taken in a technical sense, unless it clearly appears from the context, or other parts of the instrument, that the words were intended to be applied differently from their ordinary or their legal acceptation. Kent's *Commentaries.*[972]

The last part of Kent's sentence cited by Narvaja was almost identical to the addition introduced by Bello in article 21 of the Chilean Code, and borrowed by Narvaja in article 19 of the Uruguayan Code. Kent's expression 'unless it clearly appears' was translated *verbatim* into Spanish as 'a menos que aparezca claramente'. In the table below Kent's paragraph and the corresponding Uruguayan and Chilean articles are compared, with

971 Articles 20 and 21 of the Chilean Civil Code, and the identical Articles 18 and 19 of the Uruguayan Civil Code.

972 Tristán Narvaja, *Fuentes, Notas y Concordancias del Código Civil de la República Oriental del Uruguay* (Tipografía y Litografía Oriental 1910) 5. 'Legal acceptation' in Kent, is to be understood as 'technical meaning'.

similarities being emphasized in bold letters:

Kent's Commentaries[973]	Chilean Code	Uruguayan Code
If technical words are used, they are to be taken in a technical sense, unless it clearly appears from the context, or other parts of the instrument, that the words were intended to be applied differently from their ordinary or their legal acceptation.	Art. 20. The words of the law are to be understood in their obvious and *natural* sense, in accordance with the general use of the same words*;* **but when the legislator has defined the words expressly for certain subject matters, they are to be given in those subject matters their legal meaning**. Art. 21. Technical terms of any science or art are to be taken according to the meaning given to them by those who profess the same science or art; **unless**	Art. 18. The words of the law are to be understood in their obvious and *natural* sense, in accordance with the general use of the same words*;* **but when the legislator has defined the words expressly for certain subject matters, they are to be given in those subject matters their legal meaning**. Art. 19.Technical terms of any science or art are to be taken according to the meaning given to them by those who profess the same science or art; **unless**

973 James Kent, *Commentaries on American Law:* Vol. 1 (7th. edn. William Kent 1851) 511.

	it clearly appears that they have been taken with a different meaning.	**it clearly appears that they have been taken with a different meaning**.

Thus, in addition to Naravaja's *explicit* mention of Kent, there was a clear similitude of wording between the Uruguayan and Chilean Civil Codes, and Kent's paragraph, which, as Narvaja accurately indicated, was taken from Part III, Lecture XX of Kent's *Commentaries on American Law*. Thus, the idea that legal definitions should prevail over the ordinary and technical meaning of words was associated by Narvaja with Kent's ideas, and Kent might well have been Bello's source of inspiration, as will be explained below.

b) Context as more than a subsidiary tool

The drafter of the Uruguayan Civil Code, also alluded to Kent's *Commentaries* in relation to article 20 of the Uruguayan Code. That Article was a *verbatim* transcription of Article 22 of the Chilean Civil Code. As mentioned earlier,[974] differently from the Louisiana Code, that article of the Chilean Code provided that the use of context for interpretative purposes was *not* subject to the words being of dubious meaning. Regarding this particular rule, in his notes, Narvaja referred to Kent Part III Lecture XX,[975] but did not mention a specific paragraph. Nonetheless, it is not difficult to find references in Kent's

974 Section 4.2 above

975 Narvaja (n 972) 5.

work to the idea that the use of context was not subject to the existence of doubts about the meaning of words. For instance, in the same paragraph referred to above, Kent indicated that even when the ordinary or technical meaning of a word was clear 'the context, or other parts of the same instrument' could indicate that a different meaning should be applied.[976] Similarly, in another paragraph, Kent suggested that 'the intention of the lawgiver is to be deducted from the whole and every part of a statute, taken and compared together'.[977] However, this idea is not attributable only to Kent. In his comments, Narvaja also quoted Law 24 Title 3 Book 1 of the Justinianic Digest and Article VI of the French *Projet* (1800), which provided the same. Thus, the use of context even when words were clear, can be seen as a characteristic of the civil law approach, which the Chilean and Uruguayan Civil Codes retained, and Kent adopted, rather than as a significant Anglo-American influence. This marked a difference with the strict literalism of English law which, as already mentioned, until the 1950s, only permitted the consultation of the context in cases of ambiguous language.[978]

c) Legislative proceedings

Narvaja made *no* mention of Kent regarding the use of legislative history. It should be noted that Kent was more open to the use of legislative history than English law was during the nineteenth century.[979] Blackstone concurred with Kent: according to Blackstone in case of *doubt* the preamble and the legislative history should be

976 Kent (8th edn.) 511.

977 Ibid 510.

978 See Section 2.2 above

979 See Section 2.2 above.

consulted.[980] In Kent's opinion, in cases of doubt, the preamble of an act may 'assist in removing ambiguities where the intent is not plain'.[981] However, Kent went further: invoking an English judicial decision from 1792,[982] later overruled by the decision in the Sussex Peerage case of 1844 (the paradigmatic declaration of strict literalism),[983] Kent argued that 'the preamble may be resorted to in restraint of the generality of the enacting clause when it would be *inconvenient* if not restrained'.[984] Kent, as much as Blackstone and Bello, was concerned about the difficulties of reconstructing legislative intent,[985] but did not discard the possibility, and was more open to analyse the legislature's intent than Blackstone and Bello, as the preceding reference shows.

By way of summary, it is not surprising that Kent's influence contributed to the adoption of a more relaxed literalism in the United States, and indirectly in South America. From the beginning of his analysis of statutory law, it is clear that Kent's approach was not the same that came to prevail in English law during the nineteenth-century. For instance, contrary to Blackstone, Kent provided that the intention of the legislature ought to prevail over the literal meaning, when such intention could be clearly

980 See Section 22 above at page …

981 Ibid.

982 *Crespigny v Wittenoom* (1792) 4 Term, Rep 790,792,793.

983 *Sussex Peerage Case* (1844) 11 Cl & Fin 85 at 43. According to the decision in *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 451: 'As to the question of giving effect to the intention of Parliament, […] the *Sussex Peerage Case* [(1844) 11 Cl. & Fin. 85] ignored the long line of decisions that it is permissible to restrict the generality of words so as to accord with the intention of Parliament. […] [T]hose decisions were not cited or considered. That line of decisions [included] *Crespigny v Wittenoom* [(1792) 4 Term Rep. 790, 792, 793]'..

984 Kent (n 973) 510. Emphasis added.

985 According to Kent (n 973) 509: the title and preamble of a statute '*generally*…are not safe expositors of the law'. Emphasis added.

ascertained. [986] In order to support his claim, Kent invoked an English judicial decision (*Crespigny v Wittenoom*) that predated the triumph of strict literalism in English law, a triumph that was marked by the decision in the Sussex Peerage case.[987] Thus, Kent did *not* endorse a hierarchical model, nor subscribe to the radical deference for Parliament-made law which characterized the English approach in the nineteenth century. In a certain sense, the Chilean conception of statutory interpretation occupied a position in between those of English law and Kent. It was more flexible than the strict literalism of English law, but stricter than Kent's ideas.

4.4.3. Why did Narvaja Refer to Kent?

Andrés Bello, the drafter of the Chilean Code, was very familiar with Kent's works, as has been explained in previous Chapters 2 and 3. However, he did not mention Kent as being among his sources of inspiration regarding statutory interpretation. Why then did Narvaja in Uruguay refer to Kent? There are two possible explanations. First, Narvaja discovered for himself that there was an interesting coincidence between the Chilean Code rules and Kent's works, but Narvaja did not suspect that Bello had used them in this area. Second, he had access to evidence indicating that this was not just a fortuitous coincidence, but rather that Bello had been inspired by Kent's ideas, and Narvaja just acknowledged that. In my opinion, the second is the most likely interpreation, though

986 Ibid 510.

987 See footnote 983 above in relation to *Crespigny v Wittenoom*. The United States decision cited by Kent is the one in *The People v Utica Insurance Co* 15 Johnson 380 (1818), which in turn refers to the 'rules to be observed in the construction of a statute' explained byMatthew Bacon in his *New Abridgement of the Law*. The rule quoted by the judicial decision is 'I-5': 'the Intention of the Makers of a Statute ought to be regarded in the Construction of the Statute'. Cf. Matthew Bacon, *New Abridgement of the Law: Volume 7* (A Strahan 1832) 433. Bacon supported this rule with references to English case-law that also predated the Sussex Peerage case.

there are arguments for both explanations.

Regarding the first hypothesis (i.e. Narvaja *himself* discovered the coincidence with Kent in this field), there are two considerations in support of this view. The first, and most obvious, is Bello's silence on Kent. The second is not so obvious: the passage Narvaja cited from Kent,[988] was *not* present in the first *three* editions of Kent's *Commentaries*. It appeared for the first time, in the fourth edition of 1840. This would have given Bello enough time to know of it before he started drafting the rules of statutory interpretation for the first time in 1853.[989] However, this interpretation is problematic because, in relation to another topic in his 1853 draft of the Chilean Code, Bello referred to Kent's *second* edition of his *Commentaries*,[990] in which edition the passage cited by Narvaja did *not* exist. This would tend to support the theory that Naravja, rather than Bello, consulted the writings of Kent on this subject. However, that option would leave unexplained the already mentioned coincidences of wording between Kent and Bello.

On the other hand, there are several factors in support of the second possible explanation (i.e. instead of just assertuing acoincidence found by him, Narvaja was indicating that Bello had been inspired by Kent). As mentioned in previous chapters,[991] Bello was quite interested and familiar with Kent's works, which he consulted on several

988 See Section 4.4.2 (a) above.

989 Andrés Bello, *Obras Completas:* Tomo XIII*: Codigo Civil de la Republica de Chile:* Tomo II (Ministerio de Educación 1955) 1066. In the 1853 draft the rules were numbered 17 to 19.

990 Bello's note to Article 593 of the Chilean Civil Code, on an aspect of international law, explicitly refers to Kent's second edition. Bello, *Código: Vol I* (n 959) 417.

991 Chapter 2 Sections 4.2.2 and 5.

areas (including intestate succession, international law, etc). It is perfectly possible that he had access to, and consulted, later editions of Kent's work, which were readily circulating in South America,[992] without quoting them as such. A second question then arises: if Bello used Kent's fourth (or later) edition, and did not publicly mention that in relation to statutory interpretation, how could Narvaja have known that Bello had been inspired by Kent, and why Bello did not acknowledge that? For the first question, there is quite a simple explanation: Narvaja lived in Chile between 1845 and 1853, during the period when the successive drafts of the Chilean Civil Code were being discussed,[993] so that he could have known about the use of Kent by Bello in this area. In fact, Narvaja's cousin, Gabriel Ocampo, a prominent lawyer also living in Chile, was one of the members of the commission which, jointly with Bello, reviewed the 1853 draft of the Chilean Civil Code. We have already seen that during the works of the commission Ocampo took notes on the subject of statutory interpretation, marking a difference with Domat's ideas.[994] That shows an interest on the topic, and, it is likely, that there was some debate about it in the commission. Moreover, we know that Ocampo was in 'frequent' contact with Narvaja.[995] Therefore, it is possible that Narvaja was aware, through Ocampo, of Bello's use of Kent, even though Bello did not publicly acknowledge it. All of these are just possibilities which make the hypothesis only plausible. However, the key evidence in my opinion is the coincidence of language between the passage of Kent cited by Narvaja, and Article 21 of the Chilean Code. The

992 See Chapter 2 Section 4.2.2.

993 For this and the following references to Naravaja's stay in Chile: Peirano Facio (n 967) 35-36.

994 See Section 3.2 above

995 Jan Kleinheisterkamp 'Development of Comparative Law in Latin America' in Mathias Reimann and Reinhard Zimmerman (ed) *The Oxford Handbook of Comparative Law* (OUP 2006) 7.

expression, 'unless it clearly appears' in both texts, points into the direction of Bello borrowing directly from Kent. In my opinion this last point, taken together with the interest of Bello and other Chilean lawyers in Kent's works at that time,[996] makes it very likely that Bello himself was inspired by Kent, and that Narvaja (who was in a position to know that) merely acknowledged this influence.

As to why Bello was silent on the use of Kent, there are two hypothesis: a neutral, and a political one. The first explanation might be that he considered that Kent's idea was something not as relevant as the use that Bello had made of the Louisiana Code, which provided the core of the rules that influenced the Chilean Civil Code. Thus, Bello perhaps thought that Kent's minor contribution did not merit being mentioned on this subject. The second explanation might be that, knowing that Kent's ideas on statutory interpretation differed from his own literalist approach, Bello did not want to call attention to him as s a valuable source of inspiration. Kent was a critic of Blackstone's and the English deference to Parliament-made law, and favoured judicial review of statutes by judges, in cases were the statutes were in breach of the Constitution. [997] This distinctive aspect of Kent's thinking would not have been welcomed by Bello, who was much more interested in making the judge a 'slave of the law', as we have already seen.[998]

To summarize, it is quite likely that Bello made use of Kent's works in order to amend some of the Louisiana Code's rules on statutory interpretation. He did not acknowledge that use, either for political or non-political reasons, but Narvaja disclosed

996 As explained in Chapter 2 Section 4.2.2.

997 Kent (n 841) 493-4.

998 Section 4.1.above.

the existence of that inspiration.

All things considered, in spite of Kent's not being the core influence at stake, this episode reveals, in my view, an overarching general interest in Anglo-American ideas in the field of statutory interpretation, and most probably, more than that. At the very least, Narvaja was quite interested in them. This in itself is telling: uneasiness with the French solution [999] led Narvaja, and most probably also Bello, to an inquiry into the Anglo-American ideas on the subject, a pattern that we have already seen in other areas of law.[1000]

4.5.Transplant to Ecuador and Colombia.

Blackstone's ideas inspired the Louisiana Civil Code, as showed in the previous sections. From the Louisiana Code those ideas travelled to the Chilean Civil Code of 1855, and were complemented by Kent's ideas. In a final step, Blackstone's ideas travelled to the Civil Codes of Ecuador (1858), Uruguay (1868) and Colombia (1887). As already mentioned, the Chilean rules on statutory interpretation were borrowed by the drafter of the Uruguayan Civil Code.[1001] In the case of Ecuador and Colombia, there was an outright transplant of the Chilean Civil Code as a whole. [1002]

Article 18 of the Ecuadorian Civil Code of 1858 was a copy of the rules on

999 See Section 4.4.1 above.

1000 For instance, in relation to the rights of the surviving spouse in intestate succession law. See Chapter 3 above.

1001 Section 4.4 above

1002 Matthew C Mirow, Latin American Law: A History of Private Law and Institutions in Spanish America (University of Texas Press 2004) 137.

statutory interpretation of the Chilean Civil Code: the four paragraphs of article 18 reproduced Chilean articles 19 to 22. The same happened with the Colombian Civil Code of 1887: its articles 27 to 31 reproduced *verbatim* the rules of the Chilean Code on statutory interpretation.

Therefore, in a three-step process of indirect influence, Blackstone inspired the rules on statutory interpretation of the Louisiana Digest (1808) and Louisiana Civil Code (1825). Louisiana law inspired the Chilean Civil Code (1855), and thereafter, the Chilean rules were transplanted to Ecuador (1858), Uruguay (1868) and Colombia (1887).[1003] Thereby, four jurisdictions in South America came to adopt in their Civil Codes a conception of statutory interpretation inspired by Blackstone. That conception was very similar to English law in the predominance they accorded to the literal or plain meaning rule, though the strict literalism of English law was somehow softened due to civil law and Kent's influence. [1004]

5. Was Bello Conscious of the Influence of Blackstone?

The questions that remain to be answered are those of whether Bello was conscious that Blackstone was the source of the rules on statutory interpretation of the Louisiana Civil Code, and if the answer is in the affirmative, why he did not acknowledge it.

I have found no indication of Bello or Narvaja explicitly acknowledging a link

1003 The Venezuelan Civil Code of 1862, a transplant of the Chilean Code of 1855, also adopted the rules of statutory interpretation of the latter. However, it was a short-lived Code, and when it was supplanted by the Venezuelan Civil Code of 1867 those rules on statutory interpretation were not reproduced.

1004 Section 4.2 above.

between the Louisiana Code and Blackstone on this matter. Moreover, the connection between Blackstone and the Louisiana Code on statutory interpretation was only ascertained by Rodolfo Batiza in the 1970s, and, even then, it was seen as 'surprising'.[1005] In Chile, as late as 2004, a prominent legal scholar was still of the view that, most probably, the source of inspiration for the rules of statutory interpretation of the Louisiana and the Chilean Civil Codes, was Domat through the French *Projet* of 1800,[1006] in spite that the Chilean Code marked literalism was at odds with Domat's ideas. Considering all of this, it would seem reasonable to infer that Bello remained unaware of this connection between the Louisiana Code and Blackstone. How could he have known what was only acknowledged so recently and hesitantly? My claim is that it would be a mistake to make a retrospective judgment based on *our contemporary* frame of mind, as we may be relatively conditioned by the traditional view about the sources of inspiration of South-American private law.

The breadth of reading of Anglo-American legal actors in nineteenth century South America is something which has been often underestimated by contemporary legal historians. The standard perception is that South-American lawyers may have had one or two volumes of Bentham, Blackstone or Kent on their shelves, but that they took nothing concrete or relevant from their reading of these volumes. However, throughout this thesis my claim has been that the writings of South-American lawyers do not just contain accidental allusions to Anglo-American sources, but that they demonstrate a consistent pattern of reading and putting to use Anglo-American legal ideas for academic and

1005 Batiza (n 847) 29.

1006 Alejandro Guzmán Brito, 'La Doctrina de Jean Domat sobre la Interpretación de las Leyes' (2004) 31 Revista Chilena de Derecho 41.

legislative purposes. Nineteenth century's South-American lawyers were more familiar with Anglo-American law than their successors. We have consistently ignored or, at best, underestimated that acquaintance. Taking all this into account, we should adjust our lens in order to evaluate whether Bello or his South-American contemporaries could have been aware of the link between Blackstone and the Louisiana Code in this area.

For instance, it is noteworthy that Bello had lived in England for twenty years, where he had spent some of his time learning English law. He was familiar with Blackstone's works, which he quoted in relation to other to other themes and, as we just saw, most probably Bello also consulted Kent on matters of statutory interpretation. It must further be noted that Kent referred to Blackstone from the beginning of his chapter on statutory interpretation. Kent's mentions of Blackstone were intended to highlight a key dissimilarity between the English and the American approach to the interpretation of statutes: Blackstone was presented by Kent as the champion of the English principle of deference to Parliament-made law. Even if Bello had not consulted Blackstone directly on this topic, Kent's allusion would have led him to the English author. Furthermore, the reading of Bentham, an author with whom Bello was also well acquainted, could have also alerted Bello. Bentham praised Blackstone as one of the legal scholars more respectful of the authority of Parliament. What is more, in Bentham's opinion, Blackstone had the honor to be only second to Bentham himself. Given Bello's interest in ensuring that the judge was a 'slave of law',[1007] all this would not have fallen into deaf ears.

1007 See Section 4.1 above.

Bello owned a copy of Blackstone's *Commentaries* as we know from the inventory of his library,[1008] and made use of it many times. Bearing in mind all of these factors, we can reasonably accept at least one of the following two conclusions: Bello was aware of the similarity in language *and* substance between Blackstone and the Louisiana Code, or, at least, he realised that the conceptions of statutory interpretation in Blackstone and the Louisiana Code were very similar, providing, as they did, for the predominance of the literal rule, and embodying a distrust for the discretion of the judge.

If Bello was conscious of the Blackstonian pedigree of the Louisiana Code's rules on statutory interpretation, why did not he mention it? I think that the explanation is the same tactical one that we have found on other instances of legal borrowing.[1009] In Chile, for example, the debate between Bello and Güemes about intestate succession[1010] revealed that some legal actors preferred civil law sources. Anglo-American sources of inspiration only came into scene when the civil law failed to support the reforms suggested by the drafters of legislation, and they were in need of some credentials for the same (as happened to Bello when he tried to improve the situation of the surviving spouse).[1011] In that context, the Louisiana Code was always a better credential than Blackstone. Its liberal adequacy could not be doubted, and its civil law origin provided a shield to the attacks of narrow-minded practitioners. We must remember than when dismissing English or United States law, Güemes only excepted Louisiana law from his

1008 See Chapter 2, Section 4.2.1.

1009 The Uruguayan Acevedo not citing French authors (page 39 above), or English politicians avoiding references to Bentham (page 197 above).

1010 See Chapter 3 Section 5.2.

1011 As shown in Chapter 3 Section 5.2.

attack.[1012]

In my opinion, it is highly likely that Bello was conscious of the Blackstonian origin of the material he was handling, as much as he was aware that, tactically speaking, it was much better to mention the Louisiana Civil Code, rather than Blackstone. As pointed out earlier,[1013] a similar situation occurred with regards to the use by Bello of the rules concerning corporations or legal entities of the Louisiana Civil Code. They were clearly influenced by Blackstone, but that fact remained unrecognised by Bello.[1014]

Finally, even if the influence of Blackstone was not conscious, it *existed*. As mentioned earlier,[1015] an idea can influence even those who are unaware of its origin. The path backwards from the Chilean Civil Code to Blackstone is clear. Furthermore, the similarity between Blackstone's ideas, and English literalism, shows us that ultimately there was an indirect influence of English law on the Chilean Code (and its sequel) on the subject of statutory interpretation.

6. Conclusions

6.1. From Blackstone to Chile, Ecuador, Uruguay and Colombia

The previous sections of this chapter were concerned with Blackstone's influence on the subject of statutory interpretation in four South-American Civil Codes. They showed that,

1012 Miguel María Güemes' untitled article is included in Andrés Bello, *Obras Completas de don Andrés Bello: Volumen IX: Opúsculos Jurídicos* (Imprenta Pedro G Ramírez 1885) 362-366.

1013 Chapter 1 Section 2.1 and Chapter 2 Section 5.

1014 Knütel (n 905) 1458-9.

1015 Chapter 1 Section 4.6.

first, the rules on statutory interpretation of the Louisiana Civil Code (1825) were clearly inspired by Blackstone. Not only was the language of Articles 14 to 18 of the Louisiana Code clearly taken from Blackstone, but also the broader approach to judicial interpretation embodied in that Code.

Second, contrary to the opinion of a prominent legal scholar,[1016] there *was* 'originality' in Blackstone's ideas which demarcated them from Spanish amd French law, and from the writings of Domat and Pufendorf. Thus, his work was not just an adaptation of civil law ideas taken from Pufendorf. Though not in a strict manner, Blackstone, tended towards the central idea that will come to characterize the English approach to statutory interpretation in the nineteenth century: *literalism.*

Third, the Chilean Civil Code (1855) was inspired by the Louisiana Civil Code on the subject of statutory interpretation, as acknowledged by its drafter, Andrés Bello. Hence, the Chilean Civil Code was indirectly influenced by Blackstone and by English law.

Fourth, a number of modifications to the Louisiana model introduced by Bello were, most probably, inspired by Kent's *Commentaries* and civil law ideas resulting in the Chilean Code's adoption of a relatively flexible approach to literalism, when compared with that made use of in English law (the key differences being related to the interpretative use of context and legislative history).

Finally, the rules on statutory interpretation of the Chilean Civil Code (1855)

1016 Guzmán Brito, *Fuentes* (n 837) 171-195

travelled to other three Civil Codes of South America: Ecuador (1858), Uruguay (1868) and Colombia (1887), where they were adopted without any relevant modification.

6.2.Republican Arrangements and Unsatisfactory Civil Law Models

The four mentioned South-American Civil Codes adopted a formalistic legal model of statutory interpretation which I will refer to as *South-American Literalism*. That model, like the approach developed by Blackstone (in a more flexible manner) and English law (in a stricter version), prioritised the literal or plain meaning rule according to which the judge could only take into consideration the *legislature's intent* or the *reason* (*spirit*) of the law if some doubt persisted *after* the application of the literal rule.

That approach to statutory interpretation can be contrasted with that of Domat and Pufendorf, which are usually regarded as relevant sources of inspiration in this subject by the time the Louisiana and Chilean Civil Codes were enacted. Put simply, these authors did *not* advocate a hierarchical model which gave priority to the literal rule. Instead, in their opinion, the judge *could disregard* the clear letter of the statute, if giving effect to that meaning would run counter to the 'public good' or 'natural law', or if the legislative intention differed from the statute's literal meaning. Regarding the intention of the legislature, those authors represented what, still today, is seen as a characteristic civil law position on this matter: the predominance of the intention of the legislature over the letter of the law.[1017] Some Chilean contemporaries, like Gabriel Ocampo, were aware that the

1017 Freeman (n 876) 1555; Zweigert-Puttfarken (n 877).

model adopted by the Chilean Civil Code implied a departure from Domat's writings.[1018] What is more, South-American literalism can be contrasted also with Spanish law which followed the method of the *référé au legislatif*.[1019] Finally, if we consider other Codes from the civil law tradition, the *specialness* of the Louisiana and Chilean Codes can again be seen. For example, Article 6 of the Austrian Civil Code of 1811, and Article 4 of the Sardinian Civil Code of 1837, [1020] did *not* adopt a hierarchical model. Those Codes provided that the 'meaning of the words' *and* the 'intention of the legislature' were to be taken *simultaneously* into account. Therefore, South-American literalism bore *coincidences* with Blackstone and English law, but *diverged* with the several authors and legal systems of the civil law tradition mentioned in this chapter, with the only exception of the French *Projet* (1800) to which we will now turn.

The only civil law model which could provide inspiration to this South-American branch of literalism was the French *Projet* (1800), one of the articles of which, as we saw,[1021] inspired Article 13 of the Louisiana Civil Code. This unsuccessful draft accorded priority to the literal rule and contained detailed rules on interpretation, though these were quite different from those of the Louisiana Civil Code. However, the *Projet* was soon discarded. Instead, the French Civil Code (1804) did *not* regulate judicial interpretation at all, and shortly thereafter, in 1807, French Law reintroduced the mechanism of the *référé au legislatif*. The French solution was viewed negatively in Louisiana and South America. Narvaja, the drafter of the Uruguayan Civil Code, was explicitly critical of the

1018 Section 3.2 above.

1019 Section 3.3 above.

1020 Mentioned by Narvaja in his notes to the Uruguayan Civil Code. See: Narvaja (n 972) 5.

1021 Section 3.5 above.

absence of rules on statutory interpretation in the French Code.[1022] The *référé au legislatif* was not considered a viable possibility for a number of reasons. First, by the time codification began to progress in South America, the French *référé* had already failed in practical terms, and was abandoned in 1837. Second, like Blackstone, both the Louisiana and Chilean drafters of the Civil Codes, expressed negative opinions about the legislature assuming the role of interpreter of the law in concrete judicial cases. As much as judicial discretion could turn the judiciary into a legislature, the *référé au legislatif* could turn the legislature into a judge. The *référé*, was considered as serious a violation of the principle of separation of powers as judicial discretion.

When all the factors analysed in the previous paragraphs are taken into account, an explanation of the events that led to this 'surprising' convergence with English law finally emerges. South-American legislatures needed to adapt old Spanish law to 'new republican political arrangements'.[1023] These arrangements obviously included a commitment to the principle of separation of powers on which there was a wide consensus: liberalism was 'the dominant political discourse in Latin America'.[1024] The French Civil Code was a preferred model. However, in the absence of an acceptable French solution, South-American drafters of legislation turned to the two other countries, England and the United States, which were seen as possessing liberal institutions.[1025]

1022 Section 4.4.1 above

1023 Iván Jaksic, Andrés Bello, Scholarship and Nation-Building in 19th Century Latin America (CUP 2001) 174.

1024 Faviola Rivera, 'Liberalism in Latin America' in Edward Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Spring 2016 edn. https://plato.stanford.edu/archives/spr2016/entries/liberalism-latin-america/) 1 and 10.

1025 Andrés Bello, 'Publicidad de los Juicios' in Bello *Opúsculos* (n 1012) 6.

6.3.English and South-American Literalism

Similarly to the cases explored in the previous chapters, the influence of Blackstone on statutory interpretation in Chile was not a mere passive imitation but the result of a reflective enterprise, where the original model was critically assessed and creatively adapted to South-American reality. The solution devised by Bello drew inspiration from many disparate sources. In the previous section I have stressed the differences between South-American literalism and the several sources from the civil law tradition. Now we should turn to its divergences with nineteenth-century English *strict* literalism. In fact, this chapter showed the influence of Blackstone, but also some differences with the English model developed in the nineteenth century. There were two *main* dissimilarities:[1026]in South America, the *context* of words was postulated as a *primary* element of interpretation, and the use of *legislative history* for interpretative purposes was *allowed*.

Regarding the use of context, the explanation for the divergence can be technical. Bello was a legal actor but, as we said, also a prominent grammarian.[1027] He would have understood that the Louisiana Code and Blackstone had gone too far. As Endicott suggests, 'every *sensible* technique of legal interpretation includes a version of the context principle'.[1028] It is a general characteristic of languages, not only of legal texts, that 'variations in contexts make it appropriate to extend the application of a word in

1026 The third difference with the Louisiana Code (i.e. the reference to legal definitions in the Chilean Code, inspired by Kent) seems purely technical, and not much important for the purpose of contrasting the two models herein considered.

1027 Chapter 2 Section 3.5.3.

1028 Endicott (n 871) 949-50. Emphasis added

diverse ways'.[1029] My claim is that Bello, with his more sophisticated perception of linguistics, realized that if judges flouted the context principle they would be capable of 'making a hash of the words used in legislation'. [1030] In other words, Bello perceived that the meaning of words could not be ascertained if they were taken out of their context. This perception, in addition to the tradition in civil law, and Kent's opinion, of *always* considering the context,[1031] can explain this difference between the two versions of literalism.

With regards to the second difference (use of legislative history), South-American literalism assumed a position similar to the North American approach.[1032] The Chilean Code and its sequel provided two rules on the use of legislative history. First, the judge could inquire into the legislature's intent only if the text of the statute was not clear. Second, inquiries into legislative intent should be focused on the statute itself, or other 'trustworthy' sources. As Bello put it, judges should not invent 'imaginary' intentions. These rules can be seen in two different lights when compared, first, with the Louisiana Civil Code and Blackstone, and second, with English law as it developed in the nineteenth century.

If we compare the Chilean provision with that of the Louisiana Code or with Blackstone, the Chilean Code can be seen to be more *rigid* and *formalistic*. While the Louisiana Code and Blackstone permitted the search into the legislature's intent in case

1029 Ibid.

1030 Ibid.

1031 For example: Domat and Article VI of the French *Projet* (1800).

1032 Waldron (n 830) 119.

of doubts, they did not limit the sources from which that intent could be elucidated. Bello, seemed to be aware of a problem that Blackstone and the Louisiana Code did not consider. There has always been talk in Anglo-American law of the difficulties of reconstructing legislative history,[1033] Kent, for example, referring to this pragmatic obstacle. The requirement of 'trustworthy' sources in the Chilean Code, was based on this problematic consideration. Thus, that requirement makes the Chilean Code *more* formalistic than its sources (Louisiana Code and Blackstone).[1034]

However, when we compare the Chilean Code with English law concerning the use of legislative history, the Chilean Code looks more *flexible*. English law rejected the use of legislative history even after Hansard was firmly established as an official and 'trustworthy' report at the beginning of the twentieth century. Only in the 1990s, did the House of Lords permit the consultation of legislative history. [1035] What prevented English judges from consultation until this point? And why did that same reason *not* prevent South-American drafters of legislation from permitting consideration of legislative history? It must be something more than the mere *practical* difficulties. There should be some principled reason. Lord Steyn recently suggested that the principle of separation of power was at stake. Given the relationships between government and Parliament in the United Kingdom, statements of legislative intention are in fact 'statements of ministers' made in Parliament, and thus there is a concern that consideration of legislative history

1033 *Millar v Taylor* (1769) 4 Burr 2303 at 2332 (Willes J) (KB)

1034 Someone may argue that the requirement of the Chilean Code is merely redundant. In other words: which judge would postulate a certain intent of the legislature, and following that argue that his/her conclusion is based on *untrustworthy* sources? However, once more, I am not analysing the internal *logical* coherence of the requirement, but the practical preoccupation of the historical actors that it reveals.

1035 *Pepper v Hart* [1993] A.C. 593.

might amount to a shift in law-making power from Parliament to the executive. [1036] These kind of reservations do not apply to North America and South America, due either to the different structure of the relationships between government and Parliament, or to a lack of concern with this sort of interference on the part of executive with the meaning of statutes.

Differently from England, for some nineteenth-century South-Americans, the intervention of the executive in the legislative process, and the admission of the statements of ministers as a relevant consideration in the interpretations of statutes did not seem problematic. Indeed, I will suggest that they could be welcomed. The liberal ideal of separation of powers, widely accepted in South America, can explain the interest in restricting judicial discretion, as well as the rejection of the *référé au legislatif*. It can also explain why South-American drafters of legislation turned to Louisiana and Anglo-American legal ideas for inspiration, in the absence of an acceptable French solution. However, the South-American context in which these ideas were implemented might explain the difference with English law on the matter of the relevance of legislative history. We turn to that in the next section.

6.4. Looking for Separation of Powers or for Order and Certainty?

As explained earlier,[1037] after independence, the vast majority of South-American

1036 Lord Steyn, 'Pepper v Hart: A Re-examination' (2001) 21 OJLS 68,70. The same argument was made in *Black-Clawson International Ltd. V Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 629 (Lord Wilberforce), quoted by Vogenauer (n 873) 632 and 647.

1037 See Chapter 1 Section 5.3.

politicians and intellectuals shared a common liberal ground, [1038] and agreed on republican government, and separation of powers. However, in the middle of the nineteenth century, differences began to emerge between those who were called Liberals and Conservatives, in a specific *South-American terminology*. Both shared common principles, but had divergences on degrees: conservatives preferred more *strong and centralized rule*.[1039] Their main goal was to recover *order* after a chaotic post-independence period.

Bello's attempts at subjugating judges (making them 'slaves of the law')[1040] have been interpreted by some South-American historians as not being part of a liberal agenda but instead, as the expression of his conservative conviction on the need for centralized authority. Bello's adoption of interpretative literalism has been explicitly connected with his concern for 'securing order and stability in Chile', rather than with the ideas of 'Enlightenment thinkers'.[1041] It has been argued that his greatest fear was not that judges would subvert popular will, but that they would erode the authority of the state.[1042]

The same could be said of Narvaja in Uruguay. In the peculiar South-American terms of his days, he was *not* a Liberal,[1043] even if he shared the liberal grounds commonly held by his time. The Uruguayan Civil Code was enacted by a Dictator

1038 David Bushnell and Neil Macaulay, *The Emergence of Latin America in the Nineteenth Century* (2nd edn. OUP 1994) 12; Rivera (n 1024) 10.

1039 Rivera (n 1024) 10.

1040 Squella (n 950) 72.

1041 Hilbink (n 956) 49.

1042 Ibid.

1043 Juan Oddone-Blanca Paris, *Historia de la Universidad de la República:* Tomo I (Ediciones Universitarias 2nd edn. 2010) 129.

(General Venancio Flores), though later ratified by Parliament, and the preoccupations of Narvaja and his contemporaries were mainly focused on installing order and economic progress in Uruguay along liberal economic lines.[1044] In Uruguay, the shift to centralized control 'has dominated narratives about legal reform in this period [second half of nineteenth century]'. [1045] Political leaders with legal training pressed for reforms of the legal system as part of the solution to the disruptive politics of *caudillismo* (local unofficial militia leaders).[1046] Therefore, in Uruguay too, the subjugation of judges could be seen as part of a widespread attempt to consolidate the central authority of the state, as much as part of a liberal effort to implement the separation of powers.

Most probably, the idea of the limitation of judges' discretion was actually inspired by both concerns: securing order, and implementing republican arrangements. However, it is interesting to note that this crucial matter was addressed in the *Civil Codes* and *not* in the *Constitutions* of the South-American new republics. This may be in itself an indication that the main concern was related to providing order and certainty at the economic level. The argument is classic: if you want to attract players to a new market, first of all provide clear rules. In a newspaper article published in 1869, the drafter of the Uruguayan Civil Code expressed that idea: 'the Code … regulates the civil freedoms… to attract the population, the capitals, and the industries that our country lacks'.[1047] In Chile,

1044 John Charles Chasteen, *Born in Blood & Fire: A Concise History of Latin America* (WW Norton & Co, 2011) 194. This was a common characteristic of all economic liberals from the 1870s onwards in South America. The implementation of a liberal economy was usually done through authoritarian governments.

1045 Lauren Benton, "The laws of this Country": Foreigners and the Legal Construction of Sovereignty in Uruguay: 1830-1875' (2001) 19-3 Law and History Review 505,507.

1046 Ibid.

1047 Tristán Narvaja 'La Nación tiene Còdigo Civil' in Peirano Facio (n 967) 251.

Andrés Bello and other legal actors were convinced that if certainty in the interpretation of legal rules was ensured, economic growth will follow.[1048] From that perspective, South-American literalism was part of the enterprise of achieving order and stability for the sake of economic development. Stability was to be achieved not only through codification, but also through the discouragement of the judicial distortion of the Codes by means of its interpretation.

In other words, if we adopt a contextualist approach[1049] about what South-American actors were *doing* with the idea of literalism, we find that in the context of the mid-nineteenth century, subjugating an already powerful judiciary could not be the objective (differently from revolutionary France, for example), as the judiciary could not be powerful at all. The problem faced by South-Americans was the lack of authority of the new states that emerged after independence. *Separation* of powers within the government was, perhaps, the ostensible debate, but creating a proper framework for the *imposition* of the authority of the government was, most probably, the actual objective.

1048 Hilbink (n 956) 45.

1049 Chapter 1 Section 4.6.

CHAPTER 6: CONCLUSIONS

1. Overview

At this point, a comprehensive set of materials allowing for reflection has been presented. First, a general review of the use of Anglo-American legal ideas in South America, later followed by the analysis of three relevant instances of *legislative* use of those ideas. Other cases remain to be analysed, and, in all likelihood, others still remain undetected. However, what we have explored so far, leads to several conclusions that challenge traditional accounts of the development of South-American private law.

First, in the process of creation of South-American private law, not only civil law sources of inspiration were used, but also Anglo-American ones. Second, the process of formation of South-American private law was a creative one, and not one of merely passive imitation. Third, Anglo-American influence, among other reasons, gave South-American private law its own identity, when compared with Roman, Spanish and French law. Fourth, the hold of the traditional view, has generated, amongst academics, a blindness of sorts with respect to Anglo-American influence. These conclusions are presented in more detail in the following sections.

2. The Use of Anglo-American Legal Ideas in South America

The first -and most blatant- challenge to the traditional view in this regard refers to the sources of inspiration influencing South-American legal actors. This inspiration was not limited to continental European law, but included Anglo-American law and legal ideas as

well. Anglo-American legal ideas were used to a much lesser extent than civil law ideas, but they had an important impact in significant areas nevertheless. What is more, this was the result of a uniform pattern of interest which extended throughout South America, as part of a wider phenomenon of *reciprocal* interaction between common law and civil law ideas (cross-fertilization). [1050]

Mostly through legal literature, South-American legal actors became acquainted with Anglo-American legal ideas, which they put to academic and legislative use. The case of Bentham was a special one, since he provided reformist legal ideas, and his communication with South America included both private correspondence and face-to-face meetings. Andrés Bello's London years served as a potent channel for Anglo-American influence too. In London, Bello became personally acquainted with Bentham, and devoted himself to the study of English law.

The obvious question is why this happened. We are accustomed to thinking of legal influence as the product of either imposition or emulation, or a mixture of both. The interest of South-Americans in Anglo-American legal ideas seems to have been based on the political and economic attraction that England and the United States exerted as the 'traditional countries of freedom'. This prestige, which a South-American historian aptly described as *anglomania*,[1051] operated even across the boundaries of two markedly dissimilar legal traditions: civil and common law.

1050 See Chapter 2 Section 4.2.5.

1051 Germán Martínez Argote, 'Introducción' in Germán Martínez Argote (ed) *Benthamismo y Antibenthamismo en Colombia* (Editorial El Búho 1983) 15-6.

Therefore, the attraction of Anglo-American ideas was primarily political rather than strictly based on legal aspects. In newly emancipated countries, where a basic consensus on liberal political and economic models existed, the appeal of Anglo-American legal ideas is easy to understand. However, while those political credentials were appealing for the extended group of South-American legal actors involved in politics, they did not work as well for traditionally-minded practitioners, as evidenced by the Bello-Güemes debate.[1052] That ambiguity explains why, in some cases, Anglo-American influence went unacknowledged.

The dialogue between the common law and civil law traditions was not a matter which only interested South-Americans: on the Anglo-American side, several authors were interested in civil law systems, and their works made frequent references to Roman and French law. Blackstone and Kent are clear examples. Such cross-fertilization perfectly suited the civilian formation of South-American lawyers, and facilitated their access to Anglo-American ideas.

Finally, the preceding ideas can be useful in future investigations concerning the interaction between different legal families or traditions. For instance, as much as in this thesis, the idea that the political prestige of a legal system can outbalance its lack of purely legal prestige seems a promising hypothesis to be explored. Similarly, paying attention to the sensitivity of the legal actors to the political credentials of a foreign legal system, and to the existence or not of cross-fertilization can be also useful suggestions.

1052 See Chapter 3 Section 5.2.7.

3. What South-American Actors *Did* with Anglo-American Legal Ideas

3.1. Creativeness v Imitation

A second conclusion that is reinforced by the preceding chapters contradicts the traditional view in a more general manner: to consider the formation of South-American private law as an 'imitative'[1053] process is far from accurate. This has been already noted by several legal scholars in the past.[1054] However, the fact that Anglo-American ideas were used adds a new, and unexpected, dimension to our perception of the creativity of South-American drafters of legislation.

Rather than just copying or transplanting foreign legal ideas, South-American legal actors used them creatively and strategically. It was not just that some Anglo-American ideas were *used*, but that, in order to make space for them, something else was *being left aside*. As we have seen, on many occasions, Anglo-American legal ideas came into play when French ones were unfavourably assessed by South-American legal actors.[1055] Thus, the use of Anglo-American legal ideas reveals, *at the same time*, an intensely reflective attitude towards French law which the traditional account assumed was 'slavishly'[1056] followed. By contrast, French law was subject to criticism not only from the conservative quarters of those who adhered to old Spanish law (for whom

1053 That was the traditional view about Latin-American law according to René David, which he himself did not share. Cf. René David *L'Originalité des Droits de l'Amérique Latine* (Université de Paris, Centre de Documentation Universitaire 1956) 8.

1054 See Chapter 1 Section 2.1.

1055 In France, usury laws remained in force, the widow inherited only after collaterals, and interpretation of statutes was not regulated.

1056 Alan Watson, 'Comparative Law and Legal Change' (1978) 37 Cambridge Law Journal, 313-336.

France was a symbol of revolutionary instability), but also from those who embraced liberal ideas. The three cases analysed in detail in the previous three chapters are examples of areas were French law came to stand behind South-American law in terms of nineteenth-century liberalism.

3.2. Inspirational v Strategic Use

In the traditional view, the historical role of South-American legislation enacted immediately following independence was 'to liberalise the socio-economic regime … and to prepare the advent of the Codes',[1057] basically through borrowing from the French Civil Code. South-American Civil Codes were usually conceived of as 'important steps along the way in the creation of a liberal state'.[1058] Thus, it sounds as if *a coherent programme for the liberalization* of South-American private law was being developed.

As mentioned earlier,[1059] within the field of intellectual history 'any statement [of an idea] is inescapably …addressed to the solution of a particular problem, and is thus specific to its context'.[1060] That observation is helpful to avoid analysing the use of Anglo-American legal ideas in South America as *just* a process were local actors got involved in the debate of some perennial topics: in this case, the adequate features of private law. As it has been argued, liberals in South America 'were not greatly concerned

1057 Guzman Brito 183-4.

1058 Mirow 98.

1059 Chapter 1 Section 4.6.

1060 Quentin Skinner, *Visions of Politics: Vol. 1: Regarding Method* (Cambridge University Press 2002) 87. Emphasis added.

with systematic theorising'.[1061] They 'primarily employed liberal ideas in order to press for *specific political ends'*,[1062] and, hence, for specific legal solutions. Thus, a complete analysis of the process of influence, requires looking at what actors were '*doing* as well as what they [were] *saying*'. [1063]

The lack of a local systematic theorization of political and legal ideas was the natural consequence of previous dominance of Spain and Portugal. Up until the independence, Universities were closed to new ideas, and the Inquisition persecuted anyone holding or distributing books or pamphlets connected with the Enlightenment, and the American or the French Revolution.[1064] Within such context, intellectuals were constrained to clandestine reading and communication. When independence from Spain was followed by the adoption of republican forms of government and market economy, South-American intellectuals had to implement liberal reforms which had not been matured locally. It is understandable that those reforms were done in a piecemeal fashion.

Similarly, in the legal domain, there was no time for a long period of reflection during which the different legal systems available were compared, and their components merged into a new system of ideas that could work as a theoretical framework for all South-Americans. Except for some textbooks of Spanish law, there was almost no South-American legal literature available. Hence, the identity of South-American private law

1061 Rivera 1.

1062 Ibid.

1063 Ibid 83.

1064 Faviola Rivera, 'Liberalism in Latin America', in Edward N. Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Spring 2016 edn.), https://plato.stanford.edu/archives/spr2016/entries/liberalism-latin-america. Accessed 19 December 2016.

was the result of the *accumulation of particular answers to concrete topics*. As Tau Anzoátegui put it, South-American law was the result of eclectic pragmatic decisions, and not the outcome of a previous period of speculation.[1065] This explains, for instance, why only some of Bentham's utilitarian ideas were used (e.g. on intestate succession and usury laws), while his stand against natural law was not adopted; or why the rules of the Louisiana Civil Code on statutory interpretation (based on Blackstone) were used but modified.

3.3. Reform and Adaptation

In the previous chapters,[1066] two different sorts of motives leading to the legal reforms analysed were presented. On one hand, ideological commitments to modify pre-existing, 'feudal' and 'despotic' Spanish law in accordance with liberal standards, and, on the other hand, the wish to adapt the law to local realities or needs (something that had only become possible after independence). Ideological reform and adaptation to local realities and needs were the two things that South-American legal actors were simultaneously 'doing' with foreign legal ideas, and across the various legal systems.

For instance, regarding the improvement of the rights of surviving spouses in intestate succession, we can easily see both sides. In the 1820s, Somellera, the Argentinean legal scholar, presented his arguments in favour of reform as both a corollary of Bentham's utilitarian ideas, *and* the result of the need to adapt the law to the situation of women, because: 'between [South-Americans]' it was already normal that the

1065 See Chapter 2 Sections 6.1 and 6.2.

1066 Chapters 3, 4 and 5.

wives 'participated in the acquisitions of their husbands'.[1067] The need to adapt the law to the South-American reality derived from the fact that there, the creation of estates was the result of the joint efforts of husbands and wives,[1068] which sat uncomfortably with the idea of the consanguine family underlying Spanish succession law.

Regarding the abolition of usury laws, ideological motives played a key role, as follows from the evidence. Toro's book in Venezuela shows the intensity of the ideological debate surrounding, and following the abolition of usury laws in 1834.[1069] The articles in Chilean newspapers collect arguments of Benthamite origin in favour of the Act of 1832 which abolished usury laws in Chile.[1070] However, abolition of usury laws was also motivated by the need to adapt the law to the realities and needs of South America. The tipping point of the abolition process was a judicial decision in Chile, in 1831, which applied the allegedly dead-letter of Spanish usury law to a concrete loan.[1071] Some believed that 'for a long time, there has been a generally obeyed custom which authorised loans with interest rates that exceeded those allowed by the law'.[1072] Thus, apart from ideological motives, the abolition of usury laws was a form of adapting the law to local reality. Furthermore, in Chile and Venezuela, the liberalisation of interest rates has been explained either as a way to solve a local need of capital for the

1067 Chapter 3 Section 4.1.

1068 Chapter 3 Section 8.3.

1069 Chapter 4 Section 3.5.

1070 Chapter 4 Section 3.3.

1071 Manuel J. Gandarillas, 'Chile: Moción Presentada en la Cámara del Senado el día 29 de setiembre de 1831' in (1832) 15 Gaceta de la Nueva Granada.

1072 Ibid.

development of the coffee-planting and mining industries.[1073] As in the case of intestate succession law, abolition of usury laws has a twofold explanation, the application of Anglo-American utilitarian legal ideas as part of ideologically motivated reform, and adaptation to local realities (the already existing custom) or needs (attraction of capital). Finally, in the case of the rules on statutory interpretation of certain Civil Codes, as mentioned earlier,[1074] there were two possible explanations for their enactment. First, an ideological one, according to which the drafters of the Codes (Bello and Narvaja) tried to advance the ideal of separation of powers in a more satisfactory way than the French Civil Code. Second, some historians argue that the main goal of the drafters of the South-American Civil Codes was to subjugate the judiciary in a period of consolidation of new states. In this second interpretation, the legal actors involved were much more interested in the local, material need for order and certainty, than in the political ideal of separation of powers.

This overview shows that what South-American legal actors were *doing* with Anglo-American legal ideas was quite complex. They were solving genuine local problems, not just transplanting foreign solutions in order to follow what other countries were doing. The fact that the radical liberal ideas of freedom of contract postulated by Bentham were *not* simultaneously extended to other kinds of contracts,[1075] shows that the main drive was not the liberal ideal of freedom of contract, but the need for capital. All this can be taken as concrete evidence for what a Colombian legal scholar, has claimed

1073 Chapter 4 Sections 3.3 and 3.5. In Venezuela, the abolition of usury laws was also explained as the result of the ambition of foreign bankers.

1074 Chapter 5, Section 6.4.

1075 *Laesio* remained in force till the 1860s. See Chapter 4 Section 4.3.1.

about the process of formation of South-American law: 'it certainly [went and] goes on with chunks and pieces of European legal science, but …these chunks and pieces have been widely transformed by many other legal influences and *local political purposes*'.[1076]

Thus, the formation of South-American private law was a creative and eclectic process in which, Anglo-American legal ideas, *inspired* liberal reforms of private law, but were also *strategically used* to address realities and needs that were peculiar to South America.

3.4. The Rhetorical Use of Englishness

As mentioned above, the Anglo-American pedigree of an idea was rhetorically used in some cases just to imply its modernity, or its liberal credentials. Three examples seen in the previous chapters illustrate the point. Regarding abolition of usury laws in Venezuela, Fermín Toro relied from the beginning of his book[1077] on the associations the Anglo-American origin of some ideas would bring to his readers. He did so in order to show that he also could find support for his (anti-Benthamite) position in the 'traditional countries of liberty'. Another example can be drawn from family law. Usually South-American Civil Codes kept religious marriage as the only one valid for Catholics. Rhetorically they used the fact that England had retained religious marriage as a key argument against their opponents.[1078] Finally, an analogous example comes from Chile

1076 Diego López Medina, 'The Latin American and Caribbean Legal Traditions' in Mauro Bussani and Ugo Mattei (eds) *The Cambridge Companion to Comparative Law* (CUP 2012) 355. Emphasis added.

1077 See Chapter 4 Section 3.5.5.

1078 See Chapter 2 Section 5.

where, in 1846, Federico Errázuriz, a lawyer and politician, who later became President of the Republic, argued against codification of private law. To that end, he used the example of common law, referring to England as the *avant garde* of civilized nations.[1079] Thus, the modernity implied by the idea of codification, was rhetorically counterbalanced by Errázuriz with the fact that England, an epitome of modernity, has not codified its laws.

A pattern emerges from these examples. In all cases, Anglo-American legal ideas were mostly used in discussions with those who adopted particularly liberal or modern ideas (e.g. anti-Church liberals).[1080] This is not surprising as these players were the most sensitive to the political prestige of Anglo-American law.

3.5. Why Strategic Use: 'The Infancy of Our Peoples'

If foreign legal ideas were not merely passively 'imitated', but used strategically to provoke change, then the question is what was the need for such use? Of course, anyone advocating a legal change has a natural tendency to accumulate as many arguments and authorities in her/his support as possible. However, why the use of comparative law arguments taken from Europe and the United States was *so* pervasive in South-American private law?

Andrés Bello offers a hint of where the problem laid. In 1841, when the first draft

1079 Federico Errázuriz, 'Memoria leída a la Facultad de Leyes el 2 de Setiembre de 1846' in Alejandro Guzmán Brito, *Andrés Bello Codificador: Historia de la Fijación y Codificación del Derecho Civil en Chile*, Tomo II (Ediciones de la Universidad de Chile 1982) 283.

1080 *Liberals* as opposed to *Conservatives*, in the South-American terminology of the time.

of a Chilean Civil Code was published, Bello depicted the doubts of his contemporaries about the feasibility of the whole codification project. His contemporaries argued that Chile was a newly born country, lacking trained people that could draft a technically appropriate Code for Chile, and that new theories of legislation were impracticable in South America.[1081] Bello acknowledged 'the infancy of our peoples', and offered a solution: to use the ideas of the 'more advanced and cultivated nations' of 'old Europe'.[1082] Thus, the strategic use of foreign legal ideas was designed to confront local criticism. The drafters of legislation were under suspicion, and needed to conceal any creation under a thick layer of European law. Anglo-American legal ideas offered an alternative source of strategic arguments whenever French or Spanish law were found wanting, as was the case in the three topics studied in the previous chapters, as much as in other cases which were only mentioned, such as religious marriage, property rights of corporations, etc.

Anglo-American arguments, however, required an open-minded audience, sensitive to their political appeal. Certainly, in nineteenth century South-America, such audience often existed in the typical form of *lawyer cum politician* characters, but there were also the traditional practitioners attached to Roman law, and the staunch Catholics looking with suspicion at Bentham's atheism. This explains why Anglo-American legal ideas were used strategically, but to a much lesser extent than civilian legal ideas, and why, in some occasions, their use went unacknowledged.

1081 Andrés Bello in the local newspaper *El Araucano* (Santiago de Chile 21 May 1841) transcribed in Andrés Bello Andrés Bello, *Obras Completas*: Tomo XII: *Código Civil de la República de Chile*, Volumen I (Ministerio de Educación 1955) 25.

1082 Ibid.

4. The Identity of South-American Private Law

4.1. A More Liberal Outlook and Anglo-American Legal Ideas

A further conclusion is that South-American private law in the nineteenth century created its own identity: more liberal than Roman, Spanish and French law in many aspects (e.g. contract and intestate succession), and less liberal than the paradigmatic liberal model of its times (the French Civil Code) in others (e.g. religious marriage and divorce).

The mix of inspirational and strategic use in accordance with local needs engendered a system with its own peculiarities. The singularity of South-American law has been proclaimed many times in the past,[1083] but that was not supported by any evidence of departures from the civil law tradition. It is now evident that, at least in three fields examined in this thesis, there were dissimilarities which made South-American laws more liberal or more modern (in nineteenth century terms) than Roman, Spanish, and French law. When compared to French law, the paradigmatic liberal model used in South America, the provisions adopted by South-American private law *in the areas influenced by Anglo-American legal ideas* were more in accordance with nineteenth-century liberalism.

The more liberal outlook of South-American private law compared to French law, and Continental European law in general, emerges in the three cases previously analysed.[1084] The reform of intestate succession law strongly improved the rights of the

1083 As explained in Chapter 1 Section 2.1 above.

1084 Chapters 3 to 5.

surviving spouse. As already mentioned, in the perception of contemporaries and historians, this reform was concerned, basically, with improving the rights of *women*.[1085] Ideas from Bentham, the laws of England and United States law were variously employed in the process leading to this reform, most notably by Pedro Somellera in Argentina and Uruguay, and Andrés Bello in Chile.

In the economic sphere, Bentham's utilitarian ideas were used in the legislative processes leading to the abolition of usury laws from the 1830s onwards.[1086] Brazil and Chile abolished usury laws in 1832, Venezuela in 1834, Colombia in 1835 and Uruguay in 1838. Freedom of contract was, thus, incremented by this lifting of restrictions to agree on interest rates in financial transactions. European Continental law limited freedom of contract in this subject until later in the nineteenth century or, in the case of French law, till the beginning of the twentieth century. That liberalising *impetus* of the 1830s can also be partially credited with the notable expediency with which another restriction on freedom of contract, *laesio*, was also lifted. Finally, at the political level, the principle of separation of powers was reinforced in some South-American jurisdictions by regulating in detail statutory interpretation in the Civil Codes.[1087] The goal of this reform can also be seen as an attempt to introduce certainty, and predictability, in law enforcement, with a view to developing a market economy.

4.2. Was South-American Private Law More Liberal than French Law?

1085 See Chapter 3 Section 8.4.2.

1086 See Chapter 4 above.

1087 See Chapter 5 above.

South-American private law *as a whole* was not *more liberal* than French law. It was simply a *different* liberal model. The dissimilar solutions adopted for marriage and divorce will help illustrate this point. The French Civil Code consecrated civil, instead of religious, marriage, and accepted divorce. Both were typical liberal claims in the nineteenth century. The first was related to the independence of the State from the Church, the second, to freedom in private matters, and a new conception of marriage (based on affection). However, South-American Civil Codes (except for the Colombian Code of 1873) did not adopt civil marriage, nor divorce. Even Pedro Somellera, the Benthamite Argentinean legal scholar, disagreed with his master on the topic of divorce and argued against its acceptance in South America.[1088]

South-American private law was simply *different* from French law. As it has been aptly indicated, 'tendencies that are designated by familiar names ended in *–ism* [like liberalism] usually are compounds [of ideas]. They stand [for] several distinct and often conflicting doctrines'.[1089] Similarly, there is not *one* liberal private law, but many different configurations. South-American private law was a specific configuration of a liberal law, different from French law. The use of Anglo-American legal ideas helped create some of the relevant dissimilarities.

5. A Blindness of Sorts

The final aspect to be highlighted does not refer to the process of formation of

1088 See Chapter 2 Section 3.6.1.

1089 Arthur O Lovejoy, The Great Chain of Being: a Study of the History of an Idea (Harvard University Press 2001) 5.

South-American private law in itself, but to its traditional representations. This final section brings us back to the origin of this thesis: Anglo-American influence going undetected, or being ignored. In all the previous chapters I have tried to substantiate my claim that there *was* some relevant Anglo-American influence. Now I shall address the second half: *why* was it ignored? Why, metaphorically speaking, this blindness of sorts?

It is, perhaps, more striking that Anglo-American influence remained undetected, than the fact that it existed. In other words: the evidence was *not* deeply concealed, the historical facts took place only one or two centuries ago, and most of them were reflected in publications which are reasonably accessible even today. The evidence was not far from our eyes. Let me provide an example from my own country: in the notes of the drafter of the Uruguayan Civil Code (Tristan Narvaja), there is a quote from James Kent, in English.[1090] It is related to statutory interpretation and easily available in a publication of 1910. Moreover, that publication is still consulted in the academic community. However, in a field as crucial as statutory interpretation, this reference in English, never raised the slightest curiosity amongst local legal scholars. Naturally, when looking into Uruguayan law alone, it is easy to dismiss that quote as an isolated peculiarity of Narvaja. However, things look quite differently when one realizes that Kent was being used, at around the same time, also by Vélez Sarsfield in Argentina, Toro in Venezuela, and Bello and Mora in Chile.[1091] The connection between those data was missing. That lack of interest, or difficulty in making the association, probably reveals a mind-set created by, and reproductive of, the traditional view: whatever does not fit into the French or Roman-

1090 See Chapter 5 Section 4.4.2.

1091 See Chapter 2 Sections 4.2.2 and 5.

centred narrative, has been condemned to the margins, and ignored. There are two possible explanations: Anglo-American influence was either forgotten, or it was denied.

In favour of the first account (influence being forgotten) several arguments concur. First, the fact that the use of Anglo-American legal ideas went unacknowledged in many cases added to its lack of visibility. For instance, in the case of the abolition of usury law, the explicit information about the use of Benthamite ideas comes primarily from detractors of the reform, or later accounts of it, but not from its supporters.[1092] Second, another reason explaining the forgetting of Anglo-American influence may be the progressive abandonment of the reading and circulation of Anglo-American legal literature after the enactment of the Civil Codes. As already explained,[1093] for the generations of lawyers trained after the 1870s, the previous widespread interest in Anglo-American legal literature would have become difficult to imagine, as much as is the case today for the vast majority of South-American lawyers. From the 1870s onwards, it is rare to find references to Anglo-American law in South-American legal literature,[1094] which became centered on national Civil Codes and the French exegetic school. Third, quantitatively, the use of Anglo-American legal ideas was minor, substantially less than the use of civil law sources. This, coupled with the precedent reasons may provide an explanation: Anglo-American influence was so tiny and difficult to detect, that it was forgotten. Possibly, in some cases, the affirmation of the 'originality' or 'peculiarity' of

1092 See Chapter 4 Section 5.3.

1093 Chapter 1 Section 6.3.

1094 Claro Solar in Chile, and Raymundo Salvat in Argentina, were exceptions. See Chapter 2 Section 4.2.1.

the reform of intestate succession[1095] could be the result of that sheer lack of information.

So far we have mentioned reasons that would justify Anglo-American influence being forgotten or unwillingly ignored, but how can we explain the cases of denial in the face of evidence? The reasons for such denial may range from different conceptions of 'legal influence' (e.g. paying exclusive attention to rules, and not taking principles into account),[1096] up to ideological antagonism. However, in my opinion, the main reason lies in the hold of the traditional view among legal scholars. The traditional account of the sources of inspiration of South-American private law is so pervasive that any evidence to the contrary tends to be met with disbelief or considered as an exception not meriting further attention. The examples from intestate succession law are the most striking, as in that field, evidence of Anglo-American influence is more visible than in others. As mentioned earlier, in Chile, Alamiro de Ávila, openly considers the reform of intestate succession law as an 'example of Benthamism', but contrariwise, Alejandro Guzmán Brito, describes it as *original*, even after analysing the debate between Bello and Güemes.[1097] It is true that Bello's solution was *creative*, but he actually blended several ideas taken form Spanish law, United States law and Bentham's works, and produced a new one. But the use of the Anglo-American general principle of favouring nuclear over consanguine family is undeniable.

Guzmán's opinion with regards to intestate succession law in Chile is similar to his own position when considering the relevance of Blackstone's ideas on the rules of

1095 See Chapter 3 Section 8.5.

1096 On this aspect see Chapter 1 Section 4.2, and Chapter 3 Section 8.5.

1097 See Chapter 3 Section 8.5.

statutory interpretation of the Louisiana Civil Code (and thus, on the Chilean Civil Code). On that matter, he acknowledges that the *wording* of the provisions of the Louisiana Civil Code was taken from Blackstone, but relativizes the relevance of that fact, given that Blackstone's ideas, in his perception, were the same as Pufendorf's .[1098] All in all, these examples show the strength of the grip that the traditional view holds over South-American academics. Anglo-American influence, and what is implied by it, can be a disturbing factor, as it may compromise the allegedly pure civilian pedigree of South-American law, and add a new argument for defying the traditional narrative of *imitation* of European civil law by a passive periphery, a narrative that has already been questioned by several authors, but never included references to sources of inspiration from outside the civil law tradition.

Thus, willingly or not, the fact that the creativeness of the formative process of South-American general private law, somehow unexpectedly, included the critical and strategic use of Anglo-American legal ideas has been left in the margins of historical reconstruction. This thesis is an attempt to draw attention back to that aspect.

1098 See Chapter 5 Sections 1.4 and 3.4.

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