

# The Power of Codification in Latin America: Simón Bolívar and the *Code Napoléon*

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*Codification can be an effective means to centralize and to consolidate state power. The use of codification in this manner runs against the commonly perceived notion that it promotes republican and egalitarian values. As Simón Bolívar's dictatorship quickly crumbled around him, he turned to codification based on the Code Napoléon as part of an attempt to unify Gran Colombia. Factors leading him to this undertaking and source were the need for legal reform, his emulation of Napoleon, his exposure to the works of Jeremy Bentham, and, speculatively, the influence of Andrés Bello. Bolívar's attempt at codification was not to complete a successful and well-structured liberal reform agenda for his country, but rather to reassert central power and to create legal dependence on his regime. Amongst the political anarchy of the country and the disorganization, bad luck, and inaction of those charged with drafting the code, the project failed. Nonetheless, Bolívar's hopes of appropriating the Code Napoléon demonstrate that it was an important source for Latin American thought on civil law several decades before Bello used it in drafting the Chilean Civil Code.*

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*“Independence was a simple question of winning the war,” Bolívar told them.*

*“The great sacrifices came later, to make from these peoples a single nation.”<sup>1</sup>*

*I now think it useless to think about anything that is fixed and stable. Now we do not need to prepare civil codes or anything that supposes a permanent order. We have to leave for other generations the wish to be happy.<sup>2</sup>*

The French Civil Code of 1804 (*Code Napoléon* or *Code Civil*) is without doubt a fundamental source of private law in Latin American countries today. That it served as a model and important source for Andrés Bello’s Chilean Civil Code of 1855 is evident from Bello’s own admissions, as well as an examination of the Code itself.<sup>3</sup> Bello’s Civil Code was, in turn, used as a model for numerous civil codes of the newly independent states of Latin America.<sup>4</sup> For example, a standard history of codification in Colombia notes the

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1. GABRIEL GARCÍA MÁRQUEZ, *EL GENERAL EN SU LABERINTO* 104 (1989) (author’s translation).

2. Letter from Mosquera to Restrepo, Bolívar’s Minister of Interior (Sept. 1829), in LUIS AUGUSTO CUERVO, *EPISTOLARIO DE DOCTOR RUFINO CUERVO* 175 (1918) (author’s translation).

3. See 12 & 13 ANDRÉS BELLO, *OBRAS COMPLETAS DE ANDRÉS BELLO* (Caracas 1954). Bello’s presentation of the Civil Code to the Chilean Congress in 1855 notes his sources: “As a general rule, the code of the *Partidas* and the French Civil Code have been the two guiding lights that we have kept most constant in view.” ANDRÉS BELLO, *SELECTED WRITINGS OF ANDRÉS BELLO* 283 (Frances M. López-Morillas trans., Iván Jaksi• ed. 1997); see also Alejandro Guzmán, *El pensamiento de Bello sobre codificación entre las discusiones chilenas en torno a la fijación del derecho civil*, 443-44 *ATENEA* 239, 255-56 (1981).

4. A widely used textbook notes the influence of Bello’s Code on the legislation of Argentina, Colombia, Ecuador, Nicaragua, Paraguay, El Salvador, Uruguay, and Venezuela. See JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 471 (1994) (providing an extract of Juan G. Matus Valencia, *The Centenary of the Chilean Civil Code*, 7 *AM. J. COMP. L.* 71, 71-77 (1958)); see also ALEJANDRO GUZMÁN BRITO, ANDRÉS BELLO CODIFICADOR: HISTORIA DE LA FIJACIÓN Y CODIFICACIÓN DEL DERECHO CIVIL EN CHILE 467-68 (1982); Charles Sumner Lobingier, *Napoleon and His Code*, 32 *HARV. L. REV.* 114 (1918); Pedro N. Zelaya Etchegaray, *Portalis y el sentido del texto*, 14 *REVISTA CHILENA DE HISTORIA DEL DERECHO* 259 (1991).

great influence of Bello's Chilean Civil Code on Colombian legislation.<sup>5</sup>

This Article asserts that the *Code Civil* must be recognized as an important source for Latin American legal thought before the massively successful work of Andrés Bello. In fact, the *Code Civil* was the source from which Bolívar launched a last-ditch effort to unify the crumbling remains of Gran Colombia in 1829.<sup>6</sup> This Article attempts to place this failed codification attempt into the political context of Bolívar's slipping political control of Gran Colombia and the psychological context of Bolívar's emulation of his hero Napoleon Bonaparte. These aspects are accompanied by a third influence: the historical context of codification in Latin America, particularly as it relates to the work of Jeremy Bentham.

In delving into these influences on Bolívar's codification proposal of 1829, one is inclined to agree with the noted Colombian historian Ramón Zapata who wrote, "The powerful mind of Bolívar is not one of those in which it is easy to discover foreign influences."<sup>7</sup> Nonetheless, the foreign influences of Napoleon and Bentham shed light on Bolívar's aims in proposing civil law codification in the midst of the political deterioration of Gran Colombia. Bolívar's turn toward the *Code Civil* was a political move aimed at reasserting power to

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5. See MIGUEL AGUILERA, *LA LEGISLACIÓN Y EL DERECHO EN COLOMBIA* 289 (1965); see also ROBERT CHARLES MEANS, *UNDERDEVELOPMENT AND THE DEVELOPMENT OF LAW: CORPORATIONS AND CORPORATION LAW IN NINETEENTH-CENTURY COLOMBIA* 143 n.17, 184-87 (1980).

6. The event is noted without comment or analysis in various works. See NUMA QUEVEDO, *BOLÍVAR LEGISLADOR Y JURISTA* 52-53 (1974); Manuel Pérez Vila, *El Código Napoleón en la Gran Colombia, una iniciativa trascendental del Libertador*, 19 *REVISTA DE LA SOCIEDAD BOLIVARIANA DE VENEZUELA* 819 (1960); Fernando Mayorga García, *Pervivencia del derecho español durante el siglo XIX y proceso de codificación civil en Colombia*, 14 *REVISTA CHILENA DE HISTORIA DEL DERECHO* 291, 297 (1991) (citing 1 ANGEL CUERVO & RUFINO JOSÉ CUERVO, *VIDA DE RUFINO CUERVO Y NOTICIAS DE SU ÉPOCA* 108 (2d ed. 1946)). Means, likely through typographical error, dates the proposal studied here as 1820. *Supra* note 5, at 143 n.14.

Sadly, Petzold Pernia's detailed study of Bolívar's political thought does not give sufficient account of the important place of legal reform and codification in the thinking of Bolívar. See H. PETZOLD PERIA, *BOLÍVAR Y LA ORDENACIÓN DE LOS PODERES PÚBLICOS EN LOS ESTADOS EMANCIPADOS* (1987); see also C. PARRA-PÉREZ, *BOLÍVAR: A CONTRIBUTION TO THE STUDY OF HIS POLITICAL IDEAS* (N.A.N. Cleven trans., 1928); Jorge Ricardo Vejarano, *Bolívar, legislador: las ideas políticas de Bolívar*, in *BOLÍVAR* (M. Trujillo ed., 1983). Most standard biographies of Bolívar do not note this attempt at codification. See generally INDALECIO LIÉVANO AGUIRRE, *BOLÍVAR* (Caracas 1988); GERHARD MASUR, *SIMÓN BOLÍVAR* (1969); AUGUSTO MIJARES, *EL LIBERTADOR* (1987).

Gran Colombia was composed of the former viceroyalty of Nueva Granada and captaincy-general of Venezuela, in other words, the approximate areas of present-day Colombia, Ecuador, Panama, and Venezuela. EDWIN EARLY, *THE HISTORY ATLAS OF SOUTH AMERICA* 93 (1998).

7. RAMÓN ZAPATA, *LIBROS QUE LEYÓ EL LIBERTADOR SIMÓN BOLÍVAR* 61 (1997) (author's translation).

further his dream of a unified South America equal to the United States of America in strength and prosperity. Even if a new national codification of civil law did not result in Bolívar retaking control of Gran Colombia, he would leave a legacy to Latin America similar to Napoleon's legacy to Europe and Justinian's legacy to Rome, an enduring law that would last far beyond a lost empire.<sup>8</sup>

When Bolívar secured independence for Latin America from Spanish rule, he was faced with the task of providing the newly independent states with legal doctrine and structures.<sup>9</sup> Recognized as a successful, if not brilliant, military commander, Bolívar as a law-giver and legislator has been the subject of debate among historians.<sup>10</sup> The task of assessing Bolívar's activities and skills as a law-giver is obscured by his military success and the mythology surrounding almost all aspects of his life. Part I of this Article presents two views of codification: in one view, codification is used to transform society by legislating new liberal, republican rules and structures; in the other view, codification is used to assert centralized state power regardless of the underlying social content of the code. Part II examines the influences leading Bolívar to the *Code Civil* during his dictatorship. Part III chronicles the failure of the proposal in 1829 through Bolívar's decrees and the correspondence of the drafters. Part IV concludes that Bolívar's attempt provides an example of codification used as an instrument of political power rather than social change.

#### I. CODIFICATION AS AGENT OF SOCIAL CHANGE AND AS AGENT OF POLITICAL POWER

The independence of Latin America from Spanish rule fell firmly within the period identified by a noted legal historian as the "age of codifications."<sup>11</sup> There was a congruity of purpose in codifying law and in throwing off the yoke of a colonial oppressor. With the code, legislators could rewrite the structure of society in simple terms that were known to all. Feudal relationships and privileges imbedded in rank and nobility could be swept away. The enlightenment values of life, liberty, and property for all could be etched into the new law.

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8. See ALAN WATSON, *LEGAL TRANSPLANTS* 89 (2d ed. 1993) (discussion of the General-Legislator archetype and several other examples).

9. Bolívar was not unique in this respect. To maintain power, generals must become legislators if a peacetime rule of law replaces military rule. Thus, the problem faced by Bolívar was similar to problems faced by any newly independent state.

10. See *supra* note 6.

11. MANLIO BELLOMO, *THE COMMON LEGAL PAST OF EUROPE 1000-1800*, at 2 (Lydia G. Cochrane trans., 2d ed. 1995).

Thus, “[t]he code is characterized by a claim to construct a ‘new,’ ‘complete,’ and ‘definitive’ legal order . . . .”<sup>12</sup> Adding to these defining elements and borrowing from the work of Giovanni Tarello, Bellomo offers an additional and important attribute distinguishing the codes after the French Revolution from earlier ones:

After the [French] Revolution, codes produced a unity of the legal subject that replaced the plurality of legal subjects of the eighteenth-century law codes. Henceforth it was not only possible but mandatory to legislate solely and in unified fashion for the “citizen” rather than for the “noble,” the “bourgeois” and the “peasant.”<sup>13</sup>

Because codification offered the promise of a new republican society, the goal of codification was incorporated into the earliest constitutions of the newly independent states of Latin America.<sup>14</sup>

By the time Bolívar pursued codification in May 1829, the heady days of new independence were long gone. In Ocaña in April 1828, Bolívar had unsuccessfully pressed Gran Colombia to adopt a constitution based on his draft constitution for Bolivia. This constitution, with its three-house legislature and president for life, has been compared to both Napoleon’s constitutional structure in Europe and to Augustus Caesar’s of ancient Rome.<sup>15</sup> No new constitution for Gran Colombia was to result from the assembly, and by June 1828, in the midst of this constitutional crisis, Bolívar had assumed dictatorial powers to “save the republic.”<sup>16</sup>

Bolívar’s actions as dictator are generally viewed as a rollback from overly liberal policies:

Dictatorial decrees came forth on every possible subject: restoring monasteries, raising import duties, giving special privileges to the military, even reviving Indian tribute. This rollback of liberal reforms had started even before the proclamation of dictatorship . . . [b]ut the conservative reaction was not truly sweeping in scope until after Bolívar became dictator.<sup>17</sup>

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12. *Id.* (quoting TULLIO ASCARELLI, SAGGI GIURIDICI 48-49 (1949)).

13. *Id.* at 7. It was, of course, the bourgeois class that was equated with the “citizen.” *Id.* at 8.

14. See, e.g., ACT OF FEDERATION OF THE UNITED PROVINCES OF NEW GRANADA (1811), art. 7(3), in WILLIAM MARION GIBSON, THE CONSTITUTIONS OF COLOMBIA 15 (1948). The codification of law as a national goal was incorporated into the constitutions of 1811 and 1812 and adopted immediately after the first declarations of independence. See MEANS, *supra* note 5, at 142.

15. See DAVID BUSHNELL, THE MAKING OF MODERN COLOMBIA 63 (1993). A comparison of Bolívar’s and Napoleon’s constitutional structures is found in VÍCTOR ANDRÉS BELAUNDE, BOLÍVAR AND THE POLITICAL THOUGHT OF THE SPANISH AMERICAN REVOLUTION 236-51 (1967).

16. BUSHNELL, *supra* note 15, at 67.

17. *Id.* at 68.

In September 1828, Bolívar survived an assassination attempt, he put fourteen of the liberal conspirators to death, and he sent Santander, once his trusted general and vice-president, into exile. Venezuela and Ecuador were fast falling away from Bolívar's dream of a united Latin America.<sup>18</sup> Setting out the historiography of Bolívar's dictatorship, David Bushnell summarizes a Venezuelan historian's view of Bolívar during the dictatorship this way:

At a moment of crisis he merely did what came naturally to him, which, in Acosta Signés's opinion, was to safeguard as best he could the ultimately repressive social structure of which his own class was the prime beneficiary after, exactly as before, the coming of independence.<sup>19</sup>

Bolívar's codification proposal was not planted in the newly free and optimistic soil of recent independence; rather it was raised in the midst of crisis, less than a year before Bolívar was to resign from the presidency and Venezuela and Ecuador were to establish their independence from Gran Colombia. It was launched during a regime that "can by no stretch of the imagination be described as socially progressive."<sup>20</sup> The question why Bolívar would mount a major law reform program under such conditions cannot be answered if one looks at such a program as an attempt to restructure society. The answer lies instead in the use of codification as a tool to establish political power over the population by creating legal dependence and asserting centralized control.<sup>21</sup> A related, second reason is found in Bolívar's identification with the great general and law-giver Napoleon.

Codification is not only a tool to establish enlightenment values; it can also be a fundamental tool of political control. Surprisingly, little scholarship has addressed the use of codification in legal systems and the reasons why codification might be pursued as an organizational structure of legal doctrine. The desirability and efficacy of codification are often assumed by lawyers and even legal historians, and to question codification is to question one of the foundations of the western legal tradition. The most recent complete

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18. See *id.* at 69-71.

19. David Bushnell, *The Last Dictatorship: Betrayal or Consummation?*, 63 *HISPANIC AM. HIST. REV.* 73 (1983).

20. *Id.* at 103.

21. Other codification efforts were launched in an atmosphere of disintegrating empire. See C. Dickerman Williams, *Introduction to THE THEODOSIAN CODE AND THE SIRMUNDIAN CONSTITUTIONS*, at xvii, xvii, xix (C. Pharr et al. eds., 1952).

study is by Csaba Varga.<sup>22</sup> His careful analysis of the phenomenon helps explain one aspect of Bolívar's move towards codification. Emphasizing the relationship between codification and political control, Varga states:

If we now look at codification not simply as a technical instrument in the formal organization of law, but as a means of *the political power of the state to assert a central will uniformly in the whole community*, then we can explore yet another feature generally characteristic of codification. In respect of its ultimate effect, codification is nothing but a means for the state to assert its domination by shaping and controlling law.

As a matter of fact, codification is the means, and also the product, of the transformation of law from its role being an agent of preserving the traditional framework of everyday life to being an agent to formulate and also to assert the arbitrary will of the ruler, effective by its formal enactment and open to further development in any direction through formally controlled processes.<sup>23</sup>

In Varga's view, codification is more about asserting state power than reforming society, and other important scholars of codification have noted its use as an effective means to assert political power through monopolizing law.<sup>24</sup> As his country was crumbling, Bolívar latched onto this aspect of codification. Bolívar's proposal was a last attempt to gain political control over the entire area by supplying an unparalleled civil law system for the country in conjunction with a new constitution to be enacted at a constitutional assembly in January 1830. Nonetheless, in pressing this proposal, Bolívar would rely on a rhetoric of needed reform and republican values.

## II. BOLÍVAR'S IDEAS OF CODIFICATION BEFORE THE 1829 PROPOSAL

Before reading Bolívar's proposal of 1829, in light of Varga's analysis, an examination of Bolívar's view of codification during the independence period is useful, particularly to contrast these early ideas with his final attempt to codify civil law for Gran Colombia. There were numerous influences leading Bolívar towards codification. It was the "age of codification," and the structure of pre-independence Spanish law, by all accounts, presented a confusing jumble of sources, even if a trained lawyer had access to the

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22. See CSABA VARGA, *CODIFICATION AS A SOCIO-HISTORICAL PHENOMENON* (Sándor Eszenyi et al. trans., 1991); see also JACQUES VANDERLINDEN, *LE CONCEPT DE CODE EN EUROPE OCCIDENTALE DU XIII<sup>e</sup> AU XIX<sup>e</sup> SIÈCLE, ESSAI DE DÉFINITION* (1967).

23. VARGA, *supra* note 22, at 334. Others have recognized the link between codification and autocratic power. See Mirjan Damaska, *On Circumstances Favoring Codification*, 52 *REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO* 360 (1983).

24. See VANDERLINDEN, *supra* note 22, at 223-25, 243.

appropriate books.<sup>25</sup> The rhetoric of enlightenment values could be effectively put to the plan. Personal intellectual influences weighed heavily in Bolívar's proposal as well. Napoleon stood as an example for Bolívar, not only as general, but also as legislator. Jeremy Bentham, riding the wave of independence liberalism, was offering his codification services to any new leader who would listen. Andrés Bello, who in 1855 would successfully lead Latin America into the codification of civil law, had been, decades earlier, Bolívar's tutor in Venezuela. Underlying this convergence of interests and influences was Bolívar's recognition of the power of codification to serve as a politically unifying force.

A. *Bolívar's View of the Colonial Law and the Need for Codification*

The need for reform of the civil law and of law generally in the early independence period was widely recognized.<sup>26</sup> The Constitutions of new states usually indicated that Spanish law would control until new codes were enacted to replace this elaborate, poorly organized, and difficult to use system. For example, as early as 1822, Santander as vice-president of Colombia sought the preparation of a draft civil code.<sup>27</sup> His commission was composed of the newly appointed Minister of the Interior, José Manuel Restrepo; the Minister

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25. Both trained lawyers and law books were scarce in most parts of late colonial and early independence Latin America.

26. Although exceptional, proposals for certain law reforms might originate on the local level. Archivo General de la Nación, Bogotá, Colombia, Sección República, Fondo Congreso, Legajo 27, ff. 107-118 (legal reform sought by municipality of Socorro to exempt poor people from using expensive sealed paper [*papel sellado*] in certain actions).

27. See Mayorga García, *supra* note 6, at 297; MEANS, *supra* note 5, at 143 n.14 (citing Decree of 5 Jan. 1822, 7 Cod. Nac'l 44; 4 PEDRO IBAÑEZ, CRÓNICA DE BOGOTÁ 295-96 (1951)).

In 1822, O'Higgins made a similar, unsuccessful proposal to adopt the Napoleonic Code for Chile. See Guzmán, *supra* note 3, at 239-59. The article provides a fine analysis of the Chilean attempts to codify the civil law before Bello. See also the numerous articles by Guzmán cited in Alejandro Guzmán Brito, *Para la historia de la fijación del derecho civil en Chile durante la república (XII)*, 9 REVISTA CHILENA DE HISTORIA DEL DERECHO 263-80 (1983). Taking too broad a view for this study is SANDRO SCHIPANI, ANTECEDENTES DEL CÓDIGO CIVIL ANDRÉS BELLO (Fernando Hinestrosa trans., 1989).

Margadant notices that the Spanish Constitution of Cádiz of 1812 contemplated a civil law codification, but that it was not until the 1860s that Mexico successfully moved ahead with a code. See GUILLERMO FLORIS MARGADANT S., INTRODUCCIÓN A LA HISTORIA DEL DERECHO MEXICANO 173-74 (9th ed. 1990). Surveying Mexican attempts from 1814 on to codify the civil law is Carmen García Mendieta, *Más allá del liberalismo en algunas figuras jurídicas del derecho civil mexicano*, 1 MEMORIA DEL IV CONGRESO DE HISTORIA DEL DERECHO MEXICANO 333-40 (México 1988).

Argentina considered codification of civil law sporadically from 1813 until the successful Civil Code, also grounded in the *Code Civil*, of Dalmacio Vélez Sársfield, enacted in 1871. See RICARDO LEVENE, MANUAL DE HISTORIA DEL DERECHO ARGENTINO 296, 358, 436-45 (5th ed. Buenos Aires 1985).



of the Supreme Court, Félix Restrepo; the Minister of the Central Superior Court of Justice, Diego Fernández Gómez; and the lawyer Tomás Tenorio—all members of Colombia's legal élite of the period.<sup>28</sup> There is no record of their work, and one must assume other pressing matters prevented them from moving forward with the project.

Contemporary sources reveal the complexity of the civil law at the time of independence. Even without the additional problem of being able to find all of the applicable books, the possible sources of law were numerous, overlapping, and inconsistent. Determining the applicable rule of civil law in 1829 was governed by the Law of Civil Procedure of May 13, 1825, which provided that the sources of the law were, in decreasing order of importance:

1. those decreed or those in the future decreed by the legislative power;
2. the *pragmáticas*, *cédulas*, orders, decrees and ordinances of the Spanish government in effect as of March 18, 1808 which were in observance under the same government of the territory which forms the republic;
3. the law of the *Recopilación de Indias*;
4. the laws of the *Nueva Recopilación de Castilla*; and
5. the laws of the *Siete Partidas*.<sup>29</sup>

For practical purposes this meant that where there was no new legislation after independence (which there usually was not for civil law), the issue would be governed by a rule of law from the *Nueva Recopilación de Castilla* (1567) or the *Siete Partidas* (1265).<sup>30</sup> To attack the complex and labyrinthine nature of legal sources and to assert the need for codification were common in this period.<sup>31</sup>

Bolívar criticized this situation as early as 1819 in his Speech to the Congress of Angostura. The polemical nature of the document does little to undermine the substance of his criticism:

In asking the stability of judges, the creation of juries and a new code, I ask the Congress for the guaranty of civil liberty, the most precious, the most just, the most necessary thing, the only liberty, for without it the rest are nothing. I ask for the correction of the saddest abuses of that excess of Spanish legislation that like time collects from all ages and from all men, from the works of dementia as well as those of talent, from sensible products as well as extravagant ones, from the monuments of genius as

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28. See Mayorga García, *supra* note 6, at 297.

29. *Id.* at 292 (author's translation).

30. See JOSÉ MARÍA OTS CAPDEQUÍ, *ESPAÑA EN AMÉRICA* 38-39, 41 (2d ed. 1952).

31. See JAIME JARAMILLO URIBE, *EL PENSAMIENTO COLOMBIANO EN EL SIGLO XIX* 182-83 (1996). Jaramillo Uribe notes Juan García del Río's public support of Bolívar's proposal to adapt the *Code Civil* to Colombia. See *id.* at 47 (citing JUAN GARCÍA DEL RÍO, *MEDITACIONES COLOMBIANAS* 170-71 (2d ed. 1945)).

well as those of whim—this judicial encyclopedia, a monster with ten thousand heads, which until now has been the whip of the Spanish peoples, it is the most refined torture that the wrath of heaven has permitted to let loose on this unhappy empire.<sup>32</sup>

Almost ten years later, Bolívar would repeat this criticism:

Observe that our now overly bulky code instead of leading to happiness, presents obstacles to its progress. Our laws appear made by chance: they lack unity, method, classification, and legal idiom. They are self-contradictory, confused, at times unnecessary, and even contrary to their ends.<sup>33</sup>

Bolívar had, at least, a passing familiarity with the practical and academic sources of colonial private law and its burdensome complexity. Lists of books in his library from 1795 on indicate that among his possessions were four volumes of the *Nueva Recopilación de las Indias*, Cavallario's *Instituciones Canónicas*, Juan Sala's *Instituciones Romanas y Españolas*, Hevia Bolaños's *Curia Filípica*, and Vinnius's *Comentarios de las Instituciones de Justiniano*.<sup>34</sup> In addition to his reading, Bolívar was to live first hand the complexity of applying colonial Spanish law in civil dispute. The most important case Bolívar was personally connected to was his attempt to gain title to the mines at Aroa. On receiving word of the lawsuit, Bolívar wrote: "What a scandal! If they do this to me, what will they do to others? You are right to complain about our laws and our judges."<sup>35</sup> The dispute was still alive in 1830.<sup>36</sup>

The solution to this complex Spanish legal legacy was, in Bolívar's view, codification. Reading these passages in light of Varga's analysis, a confluence of factors probably led Bolívar to strive for codification at this time. "In general, the codification phenomenon can be explained by situations developing in a society

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32. See Simón Bolívar, *Discurso ante el Congreso de Angostura*, M. ACOSTA SAIGNÉS, INTRODUCCIÓN A SIMÓN BOLÍVAR 110 (1983) (author's translation); see also VARGA, *supra* note 22, at 59 (noting Vanderlinden's example of the Code Du Roy Henry III (1587) as evidence of similar concerns with the state of French law). The problems with such sources of law are assumed to be self-evident. Although not in the vocabulary Bolívar would chose, Varga notes what were then most likely Bolívar's goals: "The *transplants* of laws through codification bear the promise of *optimum bourgeois development* in the image of these codes. They are the media of modernization and capitalist development, indeed, *Europeanization* of the legal systems in question." *Id.* at 125.

33. Simón Bolívar, *Message to the Ocaña Convention*, 3 SIMÓN BOLÍVAR, OBRAS COMPLETAS 791 (Vicente Lecuna ed., 2d ed. 1950).

34. 1 ESCRITOS DEL LIBERTADOR 319, 321 (Cristóbal L. Mendoza et al. eds., 1964).

35. Bolívar, Letter to María Antonia Bolívar, Oct. 27, 1825, in 2 SIMÓN BOLÍVAR, OBRAS COMPLETAS 254 (Vicente Lecuna ed., 2d ed. 1950) (author's translation).

36. See 3 SIMÓN BOLÍVAR, OBRAS COMPLETAS 441-46 (Vicente Lecuna ed., 1950).

under the influence of various economic, political, etc. factors, where the law can no longer fill its *service role*, except by the development of a definite method.”<sup>37</sup> Bolívar indicates, in his own terms, that the law was no longer filling its “service role” in independent society. Two other passages from the Speech indicate his desire for codification:

That the tribunals be strengthened through stability, and the independence of judges through the establishing of juries, of civil and criminal codes that are dictated by neither antiquity nor conquering kings, but rather by the voice of nature, by the cry of justice, and by the genius of wisdom.<sup>38</sup>

Does not the *Spirit of the Law* say that it should be characteristic of the people who make it? that it is a great coincidence that the laws of one nation are able to suit another? that the laws ought to be relative to the physical characteristics of the country, to the climate, to the nature of the terrain, to its location, its extension, to the type of life of its peoples? that it ought to refer to the level of liberty the constitution may permit, to the religion of its inhabitants, to their inclinations, to their riches, to their number, to their commerce, to their customs, to their manners? Here is the code we ought to consult, not that of Washington!<sup>39</sup>

From both the practitioner’s and the politician’s standpoint, the civil law was a mess and needed to be reshaped.

Furthermore, Bolívar expressed the idea that the reshaping provided by codification must take account of numerous cultural, political, and social factors.<sup>40</sup> In this regard, Bolívar’s view of codification differed greatly from Bentham’s. For Bentham, such factors were not to be considered in codification, but rather the code would transform the society.<sup>41</sup> In addition to the influence of Montesquieu, the incorporation of such social and cultural factors probably came from Bolívar’s reading of Cayetano Filangieri’s

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37. See VARGA, *supra* note 22, at 250.

38. See Bolívar, *supra* note 32, at 106. It seems that nothing was done to establish juries during Bolívar’s time in his countries. A simple code of law accessible to a lay jury was necessary for such a system to work. See also U.M. Rose, *The Code Napoleon—How It Was Made and Its Place in the World’s Jurisprudence*, 40 AM. L. REV. 833, 842 (1906).

39. See Bolívar, *supra* note 32, at 93. *The Spirit of the Law* is one of the most cited works in Bolívar’s writings and was influential in Bolívar’s thought. See ZAPATA, *supra* note 7, at 71-76. See generally Roland D. Hussey, *Traces of French Enlightenment in Colonial Hispanic America in LATIN AMERICA AND THE ENLIGHTENMENT* 23-51 (A.P. Whitaker ed., 2d ed. 1961).

40. See generally MEANS, *supra* note 5, at 144 n.18. “To the extent that these statements represent a reaction against what was perceived as the excessive rationalism of the early republican reforms, they are not unrelated to the thinking of Savigny and his disciples.” *Id.*

41. See MIRIAM WILLIFORD, *JEREMY BENTHAM ON SPANISH AMERICA* 21-22 (1980).

*Ciencia de la legislación*.<sup>42</sup> Filangieri argued that effective codification took account of such factors:

If the relative value of social rights may change with the political connection of the people, the legislator should reflect on these variations, when setting punishments. . . . If the moral ideas of a people may yet alter the relative value of social rights, the legislator should calculate this reaction in his penal code. For example, on a people who universally accept the doctrine of the transmigration of souls, the death penalty will make a lighter impression than on people who do not hold this absurd opinion. . . . If the spirit and particular character of a people, if the climate and other physical circumstances may influence this relative value of social rights, the legislator should neglect none of these things. In a warlike and ferocious nation, where men are accustomed to despise life, the death penalty will not make a big impression. For greedy people, monetary punishments may be very useful. In an extremely hot or cold climate, exile from the country will be a very light punishment. . . . If all the political, physical, and moral conditions of peoples may influence, not only upon the value of social rights, but on the usefulness of some punishments, and on the uselessness of others, it is necessary that the legislator deeply examine what is called the state of the nation, before drafting the penal code.<sup>43</sup>

Filangieri and Montesquieu are the likely sources of Bolívar's desires to adapt Colombian legislation to the social, moral, political, physical, and religious conditions of the country. Bolívar's writings indicate that he followed Montesquieu's idea that legislation must adjust to the people it was aimed to govern, rather than Bentham's hope that legislation not adapted to a particular country would shape society according to liberal principles.<sup>44</sup>

Although the need for change was recognized, legal institutions remained tied to the colonial past. For example, in the related field of commercial law, Bolívar established a Commercial Court in Guayaquil on August 1, 1829. The court was "established according to the *Cédula de erección* of the Consul of Cartagena given June 14, 1795" and was to use as its principal sources the "Ordinances of Bilbao and the Laws of the Indies as are in effect."<sup>45</sup> Such reliance on colonial institutions must have greatly disturbed the general who had dedicated his life to casting off the Spanish yoke, yet he knew for practical purposes, nothing else could be done.

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42. See ZAPATA, *supra* note 7, at 127-29; see also GAETANO FILANGIERI, *LA SCIENCE DE LA LEGISLATION* (Paris, Dufort ed. 1798) (French translation of his Italian work).

43. See 4 FILANGIERI, *supra* note 42, at 3-5 (author's translation).

44. For the manner in which codification furthers national consciousness, see VARGA, *supra* note 22, at 103-04.

45. 3 SOCIEDAD BOLIVARIANA DE VENEZUELA, *DECRETOS DEL LIBERTADOR* 352 (1961).

*B. Napoleon as Model*

Napoleon served as a model for Bolívar. In 1804, the very year the *Code Civil* was enacted, Bolívar, then in his early twenties, was in Paris.<sup>46</sup> From these early years of Bolívar's life, Napoleon and the idea of Napoleon were to be both guide and foil for Bolívar. Of course the influence of Napoleon on Bolívar echoed a more general influence of Napoleon on legislation in newly independent Latin American countries.<sup>47</sup>

A list of books Bolívar brought with him from Guayaquil to Bogotá in 1825 indicate that books concerning Napoleon were often with him.<sup>48</sup> This list includes *Oeuvres de Napoléon*, *Mémoires de Napoléon*, *Histoire de Napoléon*, Montholon's *Mémoires de Napoléon*,<sup>49</sup> and *Judgement impartial de Napoléon*.<sup>50</sup> Also in 1825, Bolívar brought books on Napoleon with him from Cuzco to Alto, Perú, including Montholon's *Mémoires* and the *Obras de Napoleón*.<sup>51</sup> Works on and about Napoleon were Bolívar's traveling companions. It is likely that if Bolívar, generally Spartan in his manner, brought these works with him, it was to read them rather than to display them; and he was known to have been a voracious reader.<sup>52</sup> Records indicate that three years later, Bolívar's library continued to contain several works by and about Napoleon including *Cours politique et diplomatique de Bonaparte*, *Oeuvres de Napoléon*, *Mémoires de Napoléon*, and *Histoire de Napoléon*.<sup>53</sup> Many of these works detail Napoleon's military accomplishments, but they are not without reference to his work on the code, even praising it above his work as a general. It is likely that Bolívar ran across the following words of Napoleon in his reading: "My glory is not that I won forty battles and dictated the law to kings . . . . Waterloo wipes out the memory of all

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46. See CARLOS MEJIA GUTIÉRREZ, *BOLÍVAR EN PARÍS* 117-26 (1986).

47. See Abelardo Levaggi, *Las fuentes formales del derecho patrio argentino*, 14 *REVISTA CHILENA DE HISTORIA DEL DERECHO* 267, 273-74 (1991).

48. See ZAPATA, *supra* note 7, at 89. Another source indicates that Bolívar had Segur's *Historia de Napoleón* (2 vols.), the *Juicio imparcial sobre Napoleón* (2 vols.), the *Obras de Napoleón* (5 vols.), and a *Historia de Napoleón*. See *id.*

49. A Spanish edition of the work was then available. See C.J.T. MONTHOLON, *MEMORIAS DE NAPOLEÓN* (Paris, Bossange ed., 1825) (Spanish edition).

50. See DON L.S. Y V., *JUICIO IMPARCIAL, CRISTIANO Y POLÍTICO SOBRE EL PÉRFIDO CARÁCTER DEL EMPERADOR DE LOS FRANCESES* (Sevilla, 1808, Biblioteca Nacional de Colombia, Fondo Quijano 108(5)).

51. See ZAPATA, *supra* note 7, at 89.

52. See *id.* at 10.

53. See 7 SIMÓN BOLÍVAR, *CARTAS DEL LIBERTADOR* 155 (Vicente Lacuna ed., 1929).

my victories. . . . But what will be wiped out by nothing and will live forever, is my civil code.”<sup>54</sup>

Although his library and reading lists provide substantial evidence of Napoleon’s influence on Bolívar, Bolívar’s own words demonstrate this connection even more clearly. After early disenchantment with Napoleon, Bolívar, as his life began to parallel Napoleon’s, was less critical, but the intellectual relationship and the influence also became more complex.

At the coronation of Napoleon as Emperor in 1804, Bolívar became infuriated at what he saw as a pompous betrayal of French republican values.<sup>55</sup> Nonetheless, by 1829, Bolívar had become what the Bolívar of 1804 scorned. He had assumed dictatorial power over Gran Colombia and his codification proposal was steeped in the desire to regain central control of the nation.<sup>56</sup>

Later in his life, Bolívar was to express his thoughts on Napoleon candidly this way:

You will have noticed, without doubt, that in my conversations with those of my house, and other persons, I never praise Napoleon, that, on the contrary, when I come to speak of him or of his deeds it is to criticize them rather than praise them, and that more than once it had happened that I called him tyrant, despot, as well as having censured various of his great political measures, and some of his military operations. All this has been and is even necessary for me, although my opinion be different; but I have to hide it and disguise it to avoid that it is thought that my politics imitate Napoleon, that my views and projects are equally his, that like him I want to become an emperor or king, to dominate South America as he has dominated Europe; all this would have been said if I had made known my admiration and my enthusiasm for that great man.

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54. I MONTHOLON, *RÉCITS DE LA CAPTIVITÉ DE L'EMPEREUR NAPOLÉON À ST. HELENA* 401 (1847), *quoted and translated in* VARGA, *supra* note 22, at 132 n.51.

55. One biographer of Bolívar has seen this episode as destroying his faith in Napoleon permanently. “From that moment, Bolívar could no longer tolerate praise for Bonaparte. Since Napoleon became king, he would say, his glory seems to me like the splendor of hell, the flames of a volcano which covered the world.” FELIPE LARRAZÁBAL, *VIDA DEL LIBERTADOR SIMÓN BOLÍVAR*, *quoted in* ZAPATA, *supra* note 7, at 52 (author’s translation). Another sees Napoleon’s impression on Bolívar originating during his stay in Paris. *See* GUTIÉRREZ, *supra* note 46, at 117-26. Yet others note a common theme of Bolívar’s “pursuit of the Napoleonic model.” Bushnell, *supra* note 19, at 73; GERHARD MASUR, *SIMÓN BOLÍVAR* 37-40 (1969) (Bolívar’s reactions to Napoleon’s coronation in Paris in 1804 and Milan in 1805), 61-62, 129, 136 (Bolívar’s Order of the Liberator mirroring Napoleon’s Legion of Honor), 137, 154, 178, 180, 183, 249, 273, 393, 394, 401-03, 479, 489-90; SALVADOR DE MADARIAGA, *BOLÍVAR* 64-67 (Bolívar’s reaction to Napoleon’s coronation), 223, 363-64, 424-25, 453, 598-600 (1967).

56. During the dictatorship, not only was Bolívar to follow Napoleon in codification, but also in the related activity of administration by renaming the departmental chiefs “prefects” along Napoleonic lines. *See* Bushnell, *supra* note 19, at 77.

As much my enemies have said: they would have accused me of wanting to create a nobility and a military state equal to that of Napoleon's in power, prerogatives, and honors. Do not doubt that this would have happened if I had shown myself, as I am, a great admirer of the French hero, if they had heard me praise his politics, to speak enthusiastically of his victories, preconceive him as the first captain of the world, as man of state, as philosopher and as wise man. All these are my opinions about Napoleon, and all to which he refers is for me the most agreeable and most beneficial reading; there is where one ought to study the art of war, of politics, and of government.<sup>57</sup>

Finally, the books in Bolívar's library that formerly belonged to Napoleon were given special mention in Bolívar's testament:

It is my will that the two works that my friend General Wilson gave me, and that formerly belonged to the library of Napoleon, entitled *The Social Contract*, of Rousseau, and *The Military Art*, by Montecuculi, be given to the University of Caracas.<sup>58</sup>

Although many historians and biographers of Bolívar have noted his emulation of Napoleon's thoughts and actions, few have considered that this link extended into the realm of legislation. In fact, the very process of codification has been identified with the phenomenon of imitation on a psychological level, as an attempt to outshine past codifications and revel in one's personal glory.<sup>59</sup>

### C. Bentham's Advances and Bolívar's Scorn

If emulation of Napoleon was not enough to bring codification to Bolívar's attention, the English utilitarian philosopher and codification zealot Jeremy Bentham was persistently circulating his ideas on the subject throughout the world. As unlikely as it may seem, Bentham's works, often translated into Spanish, were standard reading and highly influential texts in post-independence Latin America.<sup>60</sup> Bentham believed that codification could put

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57. See L. PERU DE LECROIX, *DIARIO DE BUCARAMANGA* 152-53 (Paris, n.d.) (author's translation). A similar version is found in L. PERU DE LECROIX, *DIARIO DE BUCARAMANGA* 116-17 (1949).

58. Testament of Simón Bolívar (Dec. 10, 1830), *quoted in* ZAPATA, *supra* note 7, at 169 (author's translation).

59. See VANDERLINDEN, *supra* note 22, at 220-21.

60. See JEREMY BENTHAM, *COLONIES, COMMERCE, AND CONSTITUTIONAL LAW: RID YOURSELVES OF ULTRAMARIA AND OTHER WRITINGS ON SPAIN AND SPANISH AMERICA* (Philip Schofield ed., 1995); J. CARLOS GARCÍA BASALO, *SAN MARTÍN Y LA REFORMA CARCELARIA* (1954); Claire Gobli, *Edward Blaquiére: agente de liberalismo*, 117 *CUADERNOS HISPANOAMERICANOS* 306 (1979); JARAMILLO URIBE, *supra* note 31, at 415-50; Abelardo Levaggi, *Las fuentes formales del derecho patrio argentino*, 14 *REVISTA CHILENA DE HISTORIA DEL DERECHO* 267, 273 (1991); WILLIFORD, *supra* note 41.

utilitarianism into practice, but in England, such a goal proved to be an uphill battle which came to naught.<sup>61</sup> Like so many whose ideas are not appreciated at home, Bentham looked elsewhere, and the newly independent states of Latin America were seen as fertile soil in which to plant his codes. In the early days of independence, Bentham wanted to emigrate first to Mexico and later to Venezuela where he had exchanged letters with Francisco Miranda. After the death of Miranda in 1816, it appears that Bentham abandoned his plans to travel to Latin America, but, at the same time, he continued to press his intellectual presence in these embryonic countries.<sup>62</sup> In the early 1820s, he wrote political tracts encouraging Spain to free her colonies in America.<sup>63</sup> Having a reputation for such views no doubt made him a trustworthy counselor to leaders of the new nations. He dreamed of free countries with governments based on his ideas of utilitarianism and ruled by his codes. With this in mind, he frequently wrote to Bernardino Rivadavia in Argentina, José del Valle in Guatemala, and Simón Bolívar in Gran Colombia.<sup>64</sup> Bentham wrote Bolívar twice in 1820 and once again in 1823. Reminded of Bentham by correspondence with Edward Blaquiére, Bolívar wrote to Bentham in 1822.<sup>65</sup> These early letters reveal Bentham's zeal in promoting his ideas of codification.<sup>66</sup> Apart from individual contact, another method Bentham used to circulate his ideas for comprehensive codification was his *Codification Proposal* (1822), later translated into Spanish under the title *Propuesta de Código*.<sup>67</sup>

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61. See generally G.J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 263-336 (1986); Margery Fry, *Bentham and English Penal Reform*, in JEREMY BENTHAM AND THE LAW 38-42 (G.W. Keeton & G. Schwarzenberger eds., 1948); R.H. Graveson, *The Restless Spirit of English Law*, in JEREMY BENTHAM AND THE LAW 101-22 (G.W. Keeton & G. Schwarzenberger eds., 1948).

62. See WILLIFORD, *supra* note 41, at 6-13.

63. See Philip Schofield, *Editorial Introduction* to JEREMY BENTHAM, COLONIES, COMMERCE, AND CONSTITUTIONAL LAW: RID YOURSELVES OF ULTRAMARIA AND OTHER WRITINGS ON SPAIN AND SPANISH AMERICA, at xv-lxv (Philip Schofield ed., 1995).

64. Bolívar had earlier visited James Mill in Bentham's London house, but Bentham, unaware of the power Bolívar would have in the future, did not meet him. See WILLIFORD, *supra* note 41, at 23.

65. See Gobli, *supra* note 60, at 320.

66. See WILLIFORD, *supra* note 41, at 116-17.

67. The work was available in Spanish the same year. See JEREMIAS BENTHAM, PROPUESTA DE CÓDIGO A TODAS LAS NACIONES QUE PROFESAN OPINIONES LIBERALES (Ed[itorial] Taylor, Londres, 1822). Biblioteca Nacional de Colombia, Sala 1a, No. 8870, Pieza 20. Discussing foreign-language editions of Bentham, but underestimating their importance in Latin America is K. Lipstein, *Bentham, Foreign Law and Foreign Lawyers*, in JEREMY BENTHAM AND THE LAW 202-21 (G.W. Keeton & G. Schwarzenberger eds., 1948).



In July 1825, Bentham wrote Bolívar, sending copies of his *Codification Proposal*.<sup>68</sup> In August of the same year, a second letter included Bentham's principles for a constitutional code and other constitutional materials.<sup>69</sup> This second letter also described the civil code proposal in several paragraphs.<sup>70</sup> Bolívar did not receive the second letter until December 1826, and he said that he never received the copies of the proposal.<sup>71</sup> Nonetheless, by the first months of 1825, Bolívar had at least one volume written by Bentham, although we do not know the title.<sup>72</sup> In January 1827, Bolívar wrote Bentham and requested that copies of Bentham's works be sent to him again.<sup>73</sup>

Even by 1825, the ideas of Bentham were widely known in Colombia.<sup>74</sup> In that year, Santander, as vice-president of Gran Colombia, issued a decree modifying the law school curriculum. The first two years of the six-year program included the course "Principles of universal legislation and of civil and penal legislation," based on the works of Bentham, particularly his *Treatise on Legislation*.<sup>75</sup> In fact, the law school curriculum later became so politicized that Bentham's removal from, or addition to, the course of study would change according to the political philosophy of those in power.<sup>76</sup> Because of the radical political and religious consequences that implementation of utilitarianism might entail, the use of Bentham's texts in instruction led to charges of sedition as early as 1826.<sup>77</sup>

Although a generalization, it may be said that after 1827 the liberal, federalist Santanderistas supported Bentham and the conservative, centralist Bolivarianos did not. For example, in his decrees for legal education in Caracas and Quito in 1827, Bolívar

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68. See WILLIFORD, *supra* note 41, at 21. Complaining about its quality and accuracy, Bentham sent the Spanish translation and then later the original in English. Letter of Jeremias Bentham to Simón Bolívar (Aug. 13, 1825), in 12 MEMORIAS DEL GENERAL O'LEARY 266 (Simón B. O'Leary ed., Caracas, 1881).

69. See WILLIFORD, *supra* note 41, at 24.

70. See 12 MEMORIAS DEL GENERAL O'LEARY, *supra* note 68, at 266-69.

71. See WILLIFORD, *supra* note 41, at 25.

72. See ZAPATA, *supra* note 7, at 89.

73. See 2 BOLÍVAR, *supra* note 35, at 528-29.

74. See JARAMILLO URIBE, *supra* note 31, at 1149-51; MEANS, *supra* note 5, at 140 n.6.

75. JARAMILLO URIBE, *supra* note 31, at 149-51. Jaramillo Uribe dates the decree Nov. 8, 1825. Means gives a date of 1826. MEANS, *supra* note 5, at 115-16. A Spanish language edition was available by then. JEREMIAH BENTHAM, TRATADOS DE LEGISLACIÓN CIVIL Y PENAL DE JEREMÍAS BENTHAM TRADUCIDOS AL CASTELLANO CON COMENTARIOS POR RAMÓN SALAS (París 1823). Biblioteca Nacional de Colombia, Sala 1, N-485. There was also an edition of Salas's translation printed in Spain in 1821. See JARAMILLO URIBE, *supra* note 31, at 416.

76. See EZEQUIEL MÁRQUEZ, SIMÓN BOLÍVAR Y LA ENSEÑANZA DE DERECHO (1924).

77. Archivo General de la Nación, Bogotá, Colombia, Sección República, Fondo Historia, Legajo 3, ff. 942-954 (1826).

stuck to a more conservative plan of study.<sup>78</sup> In 1828, Bolívar decreed that Bentham should not be used in courses on legislation.<sup>79</sup> In the early 1830s, when Gran Colombia had collapsed, Bolívar had died, and Santander was president of New Granada, Bentham was back in the curriculum.<sup>80</sup> If Bolívar could not later politically align himself with the liberal ideas of Bentham, he could be influenced generally by the idea of codification so forcefully advocated by Bentham. Thus, Bolívar may have liked the method, but not the social goal of this influential Englishman.

#### D. *The Early Influence of Andrés Bello*

Another possible influence on Bolívar's desire to use the *Code Civil* as a model for legislation in Gran Colombia may have been Andrés Bello. The connection between Bello and Bolívar was to last for many years.<sup>81</sup> Bello was Bolívar's tutor in Caracas and years later Bolívar would serve as patron to Bello, although in Bello's view somewhat unsatisfactorily.<sup>82</sup> In the late 1820s, Bello would handle the legal work associated with Bolívar's claims to and sale of copper mines at Aroa, the only substantial personal legal dispute Bolívar would be involved in during his life.<sup>83</sup> Although Bello was only two years older than Bolívar, his genius qualified him well to tutor Bolívar in letters (*bellas letras*) and geography.<sup>84</sup> One source indicates that Bolívar raised the question of codification for Latin America generally with Bello as early as the 1810s.<sup>85</sup>

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78. See MEANS, *supra* note 5, at 119. Popular tracts argued against the use of Bentham. See OBERVACIONES Y ARGUMENTOS SOBRE EL ESTADO POLÍTICO DE LA REPÚBLICA DE COLOMBIA (1827), Biblioteca Nacional de Colombia, Sala J.A.S., Misc. 60(1); see also MÁRQUEZ, *supra* note 76.

79. See MEANS, *supra* note 5, at 120; SOCIEDAD BOLIVARIANA DE VENEZUELA, *supra* note 45, at 53. Bentham continued as a symbol of liberalism into the 1830s. ANONYMOUS, SOBRE DECRETO DE NO ENSEÑAR BENTHAM 1-48 (1836) (source can be located at Biblioteca Nacional de Colombia, Sala J.A.S. Misc. 348(6)).

80. See BUSHNELL, *supra* note 15, at 88. Bentham's ideas would be influential in Colombian political thought until the 1870s. See JARAMILLO URIBE, *supra* note 31, at 415-50.

81. See generally ANTONIO CUSSEN, BELLO AND BOLÍVAR: POETRY AND POLITICS IN THE SPANISH AMERICAN REVOLUTION (1992).

82. See MIJARES, *supra* note 6, at 84; 8 CARTAS DEL LIBERTADOR 305 (Vicente Lecuna, ed. 1929); 25 ANDRÉS BELLO, OBRAS COMPLETAS DE ANDRÉS BELLO: EPISTOLARIO 224-25, 262-64, 287-89, 296-97 (Rafael Caldera et al. eds., 1984).

83. See BELLO, *supra* note 82, at 289-90, 337-38, 367-68, 374-76, 389-91 (Rafael Caldera et al. eds., 1984). Personal legal disputes shaping one's view of law are a useful, but often neglected, source for the historian. Matthew C. Mirow, *Roman Catholicism on Trial in Victorian England: The Libel Case of John Henry Newman and Dr. Achilli*, 36 CATH. LAW. 401-53 (1997).

84. See MIJARES, *supra* note 6, at 101.

85. See *id.* at 193-94. Mijares does not provide a source for this assertion.

One cannot know with certainty if codification was discussed between Bello and Bolívar during Bolívar's early training. Bello's own work on codification seems to date from his arrival in Chile in 1829, and his ideas for the codification of civil law date from, at the latest, 1831.<sup>86</sup> Four letters from Bello to Bolívar between 1826 and 1828 record Bello's happiness at the establishment of constitutional order under Bolívar and the desire to further commerce and economic prosperity, but do not directly mention civil law codification as a tool to effect these goals.<sup>87</sup> Nonetheless, in a letter dated May 26, 1827, Bolívar notes that José Fernandez Madrid and Andrés Bello sent some suggestions for legal reform to him.<sup>88</sup> The evidence of a direct influence on Bolívar is less than one might expect considering the close relationship between the two men.

*E. The Peruvian Commission of 1825: A First False Start?*

It appears that Bolívar did not take action on these ideas until 1825, when by decree he appointed a commission to draft a Civil and Criminal Code for Peru.<sup>89</sup> The decree issued from the Dictatorial Palace in Lima states:

Considering:

1. That according to article 121 of the Constitution all the laws which are not in opposition to its principles or to the system of independence ought to govern while the civil and criminal codes are prepared;
2. That the rule of the Republic urgently demands this preparation in accordance with the fundamental law, and as the only way to avoid the doubts and contradictions that frequently are observed in the application of the law;
3. That this object cannot be achieved except through a plan of civil and criminal codes which are formed by a special commission which facilitates the work of the Congress, I have come to decree.

I decree:

1. A commission is named composed of the President of the Supreme Court of Justice, of Doctor Don Francisco Valdivieso, of Doctor Don José Cabero y Salazar, of the President of the Superior Court,<sup>90</sup> of Doctors Don

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86. See Pedro Lira Urquieta, *Introducción y notas*, in 12 ANDRÉS BELLO, OBRAS COMPLETAS DE ANDRÉS BELLO, at xxv (1954).

87. See 9 MEMORIAS DEL GENERAL O'LEARY, *supra* note 68, at 371-76.

88. See 6 CARTAS DEL LIBERTADOR 293 (Vicente Lecuna ed., 1929).

89. See *Nombramiento de una comisión con el objeto de formar un proyecto de Código Civil y Criminal* (Jan. 31, 1825), in 1 DECRETOS DEL LIBERTADOR 356 (1961).

90. It appears that Valdivieso was the President of the Supreme Court of Justice at the time and that Cabero Salazar was the President of the Superior Court. See Isabel de la Peña de Calderón, *La obra de legislador de Bolívar en el Perú*, 20 REVISTA DE LA SOCIEDAD BOLÍVARIANA DE VENEZUELA 86 (1961). Francisco Valdivieso y Prada attended the Colegio de San Carlos and

Miguel Tadeo Fernández de Córdoba, Don Ignacio Ortíz de Ceballos, Don José de Larrea y Loredó,<sup>91</sup> Don Manuel Tellería,<sup>92</sup> Don Ignacio Moreno,<sup>93</sup> Don José Armas, Don Justo Figuerola<sup>94</sup> y Don Agustín Quijano, formerly the Count of Torre Velarde.

2. The object of the commission is to make plan of civil and criminal codes, and present them, as soon as possible, to the government, so that it may submit them to the Congress.

3. In necessary cases, the commission will speak to the ministers who, according to their departments ought to have intervention in this work.

4. The Ministry of State in the Department of Government is charged with the execution of this decree.<sup>95</sup>

The civil and criminal law was in a state of confusion and the Constitution required that new codes be prepared. Only through new codes could the Constitutional principles of life, liberty, and property be protected. The commission fits squarely within Bolívar's ideas about codification to this date. This important project was entrusted to a group of men who were legally trained and perhaps more familiar with the pre-independence law than with the new ideas of French codification. The project seems destined, at first, for Peru.<sup>96</sup> Little apparently became of the project, and this researcher found no draft of

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later held a chair in arts there. He was a prestigious legal practitioner and in 1827 served as a delegate to the constitutional convention. Sometime after 1822 he was judge of the Supreme Court. See also 9 CARLOS MILLA BATRES, *DICCIONARIO HISTÓRICO Y BIOGRÁFICO DEL PERÚ SIGLOS XV-XX*, at 171 (1986).

91. Larrea y Loredó (1780-1830) studied at the Santo Toribio Seminary and obtained a doctorate in laws. Before independence, he practiced before the Real Audiencia of Lima. In 1825, he was made the Minister of the Treasury. See CAMILA ESTREMADOYRO ROBLES, *DICCIONARIO HISTÓRICO BIOGRÁFICO: PERUANOS ILUSTRES 239-40* (1987); 5 MILLA BATRES, *supra* note 90, at 173-74.

92. Tellería (1789-1839) studied at the Convictorio de San Carlos and became a lawyer. He later served on the Supreme Court of Lima. In 1827 he served as a delegate for Lima to the constitutional congress, and served as vice-president and president of congress. See 9 MILLA BATRES, *supra* note 90, at 3.

93. José Ignacio Moreno (1767-1841) studied at the Seminary San Carlos and later the Convictorio Carolina where in 1787 he delivered a public address on natural law a vice-rector. Demonstrating his abilities in ecclesiastical sciences, he wrote a *Dialogo sobre los diezmos* and an *Ensayo sobre la Supremacía del Papa*. In 1789, he received a *Bachiller en cánones* from the University of San Marcos. In 1792, he was made a lawyer before the Real Audiencia of Lima. He also served as a parish priest. See 6 MILLA BATRES, *supra* note 90, at 213-14.

94. Figuerola (1771-1854) was a judge and politician. He was a lawyer from the Convictorio Carolina and later held a Chair in moral philosophy at the University of San Marcos. He was later a judge of the Supreme Court and vice-president of the Council of State. He held the *Mando Supremo* from 1843. He was author of the work *Práctica Forense*. See ESTREMADOYRO ROBLES, *supra* note 91, at 161-62; 4 MILLA BATRES, *supra* note 90, at 51-52.

95. See generally Bolívar, *supra* note 89, at 356.

96. See de la Peña de Calderón, *supra* note 90, at 83-94 (merely paraphrasing the decree concerning this project).

the commission's work or further information in the libraries consulted. No correspondence between any of the members and Bolívar related to the codification project is to be found in Bolívar's correspondence.<sup>97</sup>

*F. Bolívar's Administration of Justice as an Exercise of Political Power*

Bolívar's proposals for codification must not be considered only in the light of the historical, cultural, and intellectual influences that played on him, but also in the light of what other activities and views Bolívar had of the law and the administration of justice. In general, Bolívar spent his energy trying to improve and restructure legal institutions rather than substantive rules of law. Even when he does turn his attention to codification, it is as the originator of the idea, rather than as an active participant in the drafting and selection of legal rules. He expected to appoint legal experts who would work out the details of codification by adapting existing codifications to Colombian experience and conditions. He was not intimately connected to or concerned with the detailed rules of law.<sup>98</sup>

Bolívar's concern for judicial administration indicates that he viewed efforts dealing with the legal system as an essential part of seizing political control and governing. From the moment independence was gained, and increasingly during his dictatorship, Bolívar was active in establishing and reforming courts and appointing judges for them.<sup>99</sup> He required officials to monitor and

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97. See generally 1-10 CARTAS DE LIBERTADOR (Vicente Lecuna ed., 1929).

98. See 3 DECRETOS DEL LIBERTADOR, *supra* note 45, at 349 (1961) (citing the decree of July 31, 1829, which is apparently foresighted concerning the protection of the forests).

99. See 1 DECRETOS DEL LIBERTADOR at 84-87 (decree of Oct. 6, 1817, establishing inferior and superior courts), 162 (decree of Sept. 15, 1819, appointing justices), 326 (decree of Dec. 19, 1824, establishing a supreme court of justice), 330 (decree of Dec. 22, 1824, establishing a superior court of justice), 351-58 (decree of Feb. 1, 1825, establishing a superior court in Arequipa), 358-59 (decree of Feb. 1, 1825, establishing a superior court in Cuzco); 2 DECRETOS DEL LIBERTADOR at 41 (decree of Nov. 24, 1826, suspending the creation of university-trained judges [*juces letrados*] of first instance and continuing the civil and criminal jurisdiction of the local judge [*alcaldes municipales*] for financial reasons), 48-49 (decree of Nov. 24, 1826, suspending the superior courts of Guayaquil and Zulia [jurisdictions assumed by the superior court of the southern district and the court of Venezuela, respectively] for financial reasons), 93 (decree of Feb. 16, 1827, reorganizing superior courts), 426 (decree of Dec. 11, 1827, replacing judges); 3 DECRETOS DEL LIBERTADOR at 9 (decree of Jan. 4, 1828, appointing judges for the superior court of Magdalena), 9 (decree of Jan. 4, 1828, appointing judges for the superior court of Ecuador), 41 (decree of March 3, 1828, appointing Estanislao Vergara President of the high court [*alta corte de justicia*] of the republic), 47 (decree of Mar. 6, 1828, requiring certain officials to serve as first instance judges in treasury cases), 148-50 (decree of Aug. 30, 1828, establishing military tribunal based on the Spanish Ordinances of 1768), 192-93 (decree of Nov. 6, 1828, reforming the court of appeals of Bogotá), 194-95 (decree of Nov. 6, 1828, suspending

report on the functioning of courts, as well as created commissions to investigate the administration of justice.<sup>100</sup> Concerned with keeping commerce functioning smoothly, Bolívar made numerous adjustments to the structure of commercial tribunals.<sup>101</sup> As noted earlier, legal education was tied to political power, and Bolívar's decrees demonstrate active vigilance in this area as well.<sup>102</sup> He legislated on the activity of scribes.<sup>103</sup> He required the publication of laws.<sup>104</sup> On occasion he might grant the title of lawyer.<sup>105</sup>

In these ways, Bolívar worked to shape his country's legal institutions. His own words demonstrate his identification with legislation and legal reform. Writing to Santander in 1826, Bolívar stated, "I have done nothing more than two things: fight and give some ideas about legislation, the rest is foreign, and as it is not mine, I do not want it for me."<sup>106</sup> In fact, furthering his ideas about legislation and reshaping judicial administration took a prominent

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the court of appeals of Magdalena because there were no university-trained lawyers to serve as judges), 252 (decree of Nov. 29, 1828, creating appeals courts for the north and the south), 253 (decree of Dec. 29, 1828, appointing judges to the supreme court, Felix Restrepo as President of court), 254 (decree of Nov. 29, 1828, appointing judges to the court of appeals for the northern district), 258 (decree of Dec. 23, 1828, creating new political and economic structures), 281-84 (decree of Dec. 24, 1828, granting jurisdiction to local judges [*alguaciles mayores*]), 313-14 (decree of Feb. 24, 1829, concerning judges for taxes [*jueces de hecho*]), and 322 (decree of Apr. 13, 1829, concerning the supreme military court).

100. See 1 DECRETOS DEL LIBERTADOR at 206 1 (decree of June 21, 1820, creating the commission); 2 DECRETOS DEL LIBERTADOR at 52-56 (decree of Nov. 24, 1826, requiring officials to monitor the courts in treasury and criminal cases), and 364-365 (decree of September 26, 1827, requiring courts to report of the status of all civil and criminal cases pending in the republic).

101. See 1 DECRETOS DEL LIBERTADOR 266 (Caracas 1961) (decree of Aug. 31, 1822, continuing certain commercial tribunals); 269 (decree of Sept. 18, 1822, permitting a commercial tribunal in Cuenca); 3 DECRETOS DEL LIBERTADOR at 352-53 (decree of Aug. 1, 1829, establishing a court of commerce in Guayaquil), and 386-90 (decree of Feb. 3, 1830, reestablishing a consulate of commerce).

102. See 1 DECRETOS DEL LIBERTADOR at 300-02 (decree of May 10, 1824, founding the University of Trujillo and providing for the instruction of law); 2 DECRETOS DEL LIBERTADOR at 428-31 (decree of Dec. 12, 1827, permitting the College of Antioquia to teach civil and canon law); 3 DECRETOS DEL LIBERTADOR at 53-54 (Caracas 1961) (decree of Mar. 12, 1828, prohibiting the use of Bentham's treatises in all the universities of Colombia), 183-84 (decree of Oct. 20, 1828, reforming law curriculum for University of Bogotá and prohibiting Bentham, by José Manuel Restrepo), and 248-251 (decree of Nov. 29, 1828, regulating the teaching of law at San Bartolomé and the Rosario).

103. See 1 DECRETOS DEL LIBERTADOR at 349 (decree of Jan. 12, 1825, regulating scribes).

104. See 2 DECRETOS DEL LIBERTADOR at 352-53 (decree of July 4, 1827, continuing the publication of law in the *Gaceta*); 3 DECRETOS DEL LIBERTADOR at 210-14 (Caracas 1961) (decree of Nov. 17, 1828, creating a civil register of laws and decrees to be published by the Minister of Interior).

105. See 1 DECRETOS DEL LIBERTADOR 169-70 (Caracas 1961) (decree of Oct. 13, 1819, granting title to Francisco Orbegoso).

106. Letter from Bolívar to Santander (June 23, 1826), 5 CARTAS SANTANDER-BOLÍVAR 1825-1826, at 233 (Germán Arciniegas et al. eds., 1990).

place in Bolívar's dictatorship.<sup>107</sup> Thus, Bolívar's self-perception was that of general-legislator, of Justinian, and of Napoleon.

As Gran Colombia crumbled around him in the last year of the 1820s, Bolívar attempted to restructure and reshape legal institutions to gain a better grasp on the nation. Codification would certainly have an important function in the newly solidified legal institutions Bolívar unsuccessfully attempted to build. A lasting judicial structure was impossible without money and adequately trained personnel. Nonetheless, when viewed in the light of Bolívar's institutional attempts, the codification proposal fits well within such plans. Refurbished institutions and a new substantive law based on a Napoleonic model would be one of Bolívar's anchors of power stabilizing his Gran Colombia. These activities accord with Varga's observations concerning the use of codification to assert state power: "Since codification proved to be the most suitable means of making the law relatively complete and well-arranged, the local points of *codification development* frequently coincided with the *progress of administrative organizations*."<sup>108</sup> Late in Bolívar's time of power, we see him actively at work on such administrative aspects.

### III. THE *CODE CIVIL* FOR GRAN COLOMBIA

#### A. *The Project*

Bolívar considered the possibility of using the *Code Napoléon* as a basis for a Civil Code for use in Gran Colombia in 1829.<sup>109</sup> Wishing for a new civil code and drafting one were two different things. A series of letters from that date indicate interest in the project, but also demonstrate that the work of preparing the draft would be swept away in the same instability and lack of resources that destroyed the institutions Bolívar attempted to build.

On May 13, 1829, Bolívar's General Secretary, José D. Espinosa, wrote to the Minister of the Interior, José Manuel Restrepo,<sup>110</sup> the following letter:

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107. See Bushnell, *supra* note 19, at 75; see also TOMÁS POLANCO ALCÁNTARA, BOLÍVAR: LA JUSTICIA, PRIMERA NECESIDAD DEL ESTADO (1983) (providing a survey of Bolívar's implementation of judicial administration).

108. See VARGA, *supra* note 22, at 335.

109. See generally QUEVEDO, *supra* note 6; Pérez Vila, *supra* note 6.

110. José Manuel Restrepo Vélez was admitted to the bar in 1808 and held a number of political appointments in Antioquia during the Patria Boba period (1810-1816). He served as governor of Antioquia around 1820, and was the Minister of the Interior from 1821 to 1830. See Victor Uribe, *Rebellion of the Young Mandarins: Lawyers, Political Parties and the State in Colombia, 1780-1850*, at 504 (1993) (University of Pittsburgh, Ph.D.). The author thanks Professor Victor Uribe for supplying selections of this work. Restrepo studied at San Bartolomé

The Liberator President is highly aware of the wisdom with which the Code Napoleon was drafted. He believes that it might be adopted in Colombia with some modifications related to the country's circumstances and moral position. Consequentially, he orders that you name a special commission of educated people to examine said code, make the appropriate reforms in it, which are to be proposed to the next Constituent Congress.

The Spanish translation is judged preferable for the aforesaid object; and for this you are permitted to buy the necessary copies; or in their defect, the most correct translation of the mentioned code is to be made.

With sentiments of distinguished consideration and profound respect, I am your very obedient servant.<sup>111</sup>

A marginal note reads as follows:

Bogotá, July 31, 1829—Resolved that this be done in all its parts, and Messrs. Miguel Tobar, Francisco Pereira, Rufino Cuervo, Manuel Camacho Quesada will make up the considered commission. The commission will be under the immediate direction of the Minister of the Interior, and also will preside at their meetings when he cannot attend, and will begin the project, the first named, to whom will be passed a copy of the order of the Liberator and of this decree.<sup>112</sup>

This letter reflects the various aspects of Bolívar's thoughts on codification discussed above. It was the *Code Civil* that was to serve as a model. No such specific mention was made for the 1825 project for Peru. Here, Bolívar was seeking to emulate Napoleon. Furthermore, the use of the *Code Civil* as a model could be supported by the high reputation it had as an authority to be copied.<sup>113</sup>

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and was an early abolitionist in the region. He was known as one of the foremost historians of his time and in 1833 he was named director of the National Academy. See José Manuel Marroquín, *José Manuel Restrepo*, in *HISTORIADORES DE AMÉRICA* (1948). Restrepo also participated in the Congress of Cúcuta as the head of the assembly that drafted the law manumitting slaves. See generally Rafael Gomez Hoyos, *Bicentenario del Natalicio de Don José Manuel Restrepo, historiador de Colombia*, 737 *BOLETÍN DE HISTORIA Y ANTIGÜEDADES* 410, 414 (1982). He translated Montesquieu's *Spirit of the Law* into Spanish. See generally Daniel Restrepo Manrique, *Bibliografía del historiador Don José Manuel Restrepo*, 740 *BOLETÍN DE HISTORIA Y ANTIGÜEDADES* 255, 270 (1983). He was also the author of the October 20, 1828, decree prohibiting the teaching of Bentham in the University of Bogotá because Bentham was against "religion, morality, and the peace of the people." See 3 *DECRETOS DEL LIBERTADOR*, *supra* note 45, at 183.

111. See Pérez Vila, *supra* note 6, at 823 (citing Fundación John Boulton, Sección Venezolana del Archivo de la Gran Colombia, J, VIII, 131-32) (author's translation). It is somewhat odd that the directive should come in the form of a letter rather than a dictatorial decree of Bolívar during this period. In this sense, it is not a typical form of legislative instruction initiating codification. See VANDERLINDEN, *supra* note 22, at 51-54. Nonetheless, the letter was taken as a decree.

112. Pérez Vila, *supra* note 6, at 823.

113. See WATSON, *supra* note 8, at 44-60, 90 (explaining authoritative reputation as a factor in legal borrowing); see also Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study*



Following his understanding of Montesquieu and Filangieri and rejecting Bentham's position, Bolívar instructed that the *Code Civil* was to be adopted. Also, like Justinian and Napoleon, Bolívar wanted the drafting done by a commission of legal experts.

Manuel Pérez Vila provides further evidence concerning the composition of the commission. He provides the following passage from the *Life of Rufino Cuervo (Vida de Rufino Cuervo)*:

In the middle of 1829, Bolívar ordered that a commission presided by the Minister of the Interior examine the *Code Napoléon*, with the goal of presenting it with the necessary reforms to the Constituent Congress, and in the month of August, the Council of Ministers designated to this effect Don Miguel Tobar and Dr. Cuervo. The first had to renounce, then in October Dr. Cuervo, Don Manuel Camacho Quesada and Don José Angel Lastra made up the commission. We do not know to what point this revision reached,<sup>114</sup> but we refer to a curious anecdote which shows the distant differences of literary life in small places. Dr. Cuervo mentioned the undertaking he was working on to his friend, the canon Mosquera, asking him to take over a part; he did willingly, offering to work on the area of succession, and when the work was already well advanced, Bolívar came back from Ecuador, and asked the Prefect to receive him in the house where Mosquera was living; he had to move quickly, and after a few days of forced suspension, he casually recognized a fragment of his manuscript in a bunch of lavender; he ran to look, he found neither papers nor a printed code, all his efforts were useless, because in a small store they told him about them; it was the only copy in Popayán, and it had been lent by a friend. His friendly cooperation had this end.<sup>115</sup>

It appears that Cuervo was to lead whatever activities furthered the proposal. The Minister of Interior, José Manuel Restrepo, was apparently occupied with other pressing matters; neither his *History of the Revolution of the Republic of Colombia* nor his *Diary* mentions the charge to lead the project.<sup>116</sup> Furthermore, it appears that Bolívar did not monitor the progress of the commission.

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*of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite's Leap of Faith*, 46 AM. U. L. REV. 1483 (1997).

114. Pérez Vila indicates that this was from the Fifth Colombian Meditation, dated December 19, 1829. See Pérez Vila, *supra* note 6, at 820. In his Fifth Colombian Meditation, García del Río argues forcefully for adapting the *Code Civil* to Colombia, only to indicate that he does not know the progress of the commission. See JUAN GARCÍA DEL RÍO, *MEDITACIONES COLOMBIANAS* 170-71 (2d ed. 1945).

115. See Pérez Vila, *supra* note 6, at 820 (author's translation).

116. See 6 JOSÉ MANUEL RESTREPO, *HISTORIA DE LA REVOLUCIÓN DE COLOMBIA* (1969); 2 JOSÉ MANUEL RESTREPO, *DIARIO POLÍTICO Y MILITAR* (1954). A cursory review of his correspondence also supports this conclusion. Archivo General de la Nación, Bogotá, Colombia, sección colecciones, José Manuel Restrepo, fondo IX, rollos 16 and 19.

If Mosquera's cooperation turned out in the end to have been in vain, his initiation to the project was equally hesitant. On August 25, 1829, he wrote Cuervo with his concerns about the reality of producing such a demanding project in such limited time:

My excellent and dear friend:

It seems to me appropriate to work on shaping the draft of the Civil Code, based on that of Napoleon, in June, although the undertaking presents an enormous difficulty on its own combined with such little time that has been given to you. Neither do I think the Congress is able to busy itself with a legislative matter like this. I do not know who has such Code in Spanish, here I only know the French edition of my cousin Santiago, but I will diligently look to see if I can help you with this matter.<sup>117</sup>

The same day, Mosquera wrote Cuervo again:

My dear friend:

After having written to you today and having put it in the mail, I managed to talk with my cousin Santiago, and that he told me that he has one of this type, modified for Spain, and that he gave it to Mr. Canabal. He also told me that Mr. Castillo had the Criminal [Code] of the same kind. I hope this news helps, now that I cannot do anything more.<sup>118</sup>

Additional letters presented by Pérez Vila demonstrate that Restrepo was successful in obtaining a copy of the code translated into Spanish, or at least had one sent to him. A letter dated September 25, 1829, by Eusebio María Canabal from Cartegena reads:

I have the honor of sending you by today's mail sack, a copy of the *Code Napoléon*, translated into Spanish, that you have requested by memo of the 14<sup>th</sup> of this month, to help with the work you are undertaking by the command of His Excellency the Liberator President. I am glad this is the book that you seek; and any other thing of my property that can be of service to the government or to you remains equally at your disposition.<sup>119</sup>

Bolívar's knowledge of the *Code Napoléon* is clear. Furthermore, it appears that Spanish translations of the Code were available for use by the commission. Despite the minor success of locating a copy of the Code in Spanish, Mosquera continued to doubt his ability to contribute to the project. The September 1829 revolt in Antioquia added to his doubts about the project:

My Dear Friend,

At the same time I read your letter in which you do me the favor of supposing that I am very learned in the civil law, I received news of the

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117. See 1 Cuervo, *supra* note 2, at 170 (author's translation).

118. See *id.* at 171 (author's translation).

119. See Pérez Vila, *supra* note 6, at 824 (citing Fundación John Boulton, Sección Venezolana del Archivo de la Gran Colombia, B, CXVIII, 1) (author's translation).

new revolution in Medellín. I now think it useless to think about anything that is fixed and stable. Now we do not need to prepare civil codes or anything that supposes a permanent order. We have to leave for other generations the wish to be happy.<sup>120</sup>

Shortly afterwards, Mosquera recanted and was once again working on the section of the code concerning succession and transfers. His change of heart might have been a result of the swift quashing of the revolt.<sup>121</sup> On October 6, he wrote to Cuervo:

... If after a good conscience only talent and wisdom are inevitable, I feel today in my heart the passion of envy for both things. How great is the emptiness I find in me for the arduous undertaking with which you charge me! I have neither the learning nor the practice necessary to be able to discern the useful and the good in the Civil Code. ... But do not think, my friend, that ... I say this to excuse myself when you have wished that I help you. ... I need some time to read and extract successions and transfers from the said code. ... Thus, if my little help provides something, you shall have it in January or February.<sup>122</sup>

It appears that after hesitation, Mosquera had formally begun his work on succession and transfers. Neither the lack of a ready copy of the Civil Code in Spanish nor the uncertainty of the time, of which the Medellín revolt was only one example, stood in his way. In the same letter Mosquera indicated that he was getting the appropriate material for the project; "My cousin Santiago has repeated to me that Mr. Castillo has the work of *Las Cortes* on the *Code Napoléon*."<sup>123</sup> In the end, however, it appears he never was to produce the sections of the code with which he was charged. We have his own sad account chronicling the loss of his work during a rushed evacuation of his home to provide lodging for Bolívar himself. On November 29, 1829, Mosquera wrote Cuervo:

My very dear friend:

With great sorrow I write you this letter, having to give you very bad news of my work on the Civil Code. I had translated and organized up to Chapter 5 of the title of successions, and at the same time I was keeping on a sheet a memorandum of some little things that I wanted to put in other chapters. At this point, I had to move lodgings to give the house of Tomás, where I was living, to the Prefect to receive the Liberator in it. As he advanced in his journey four days more than was wished, I had to hurry the night of the 17<sup>th</sup> to move my books, etc., etc., to the house of Manuel

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120. 1 Cuervo, *supra* note 2, at 175 (author's translation).

121. María Teresa Uribe, *La Política en Medellín, 1820-1845*, in 1 HISTORIA DE MEDELLÍN 179 (Jorge Orlando Melo ed., 1996).

122. 1 Cuervo, *supra* note 2, at 176 (author's translation).

123. *Id.* at 177.

Arboleda and in the transfer the workers threw out the volume of the five codes with the file of my unhappy work. With the hurry of the arrival of the Liberator and the mail, I could not put hand to this work until the 24<sup>th</sup>, on which day I lacked the book and the papers tied to it. After a thousand searches and re-searches, I asked the workers, without any luck, until after offering tips and doing a thousand errands, I found my draft by coincidence in a paper bag of lavender. With this clue, I then found the pharmacy where this attempt was done. I searched more diligently for the volume of the codes, and equal luck was given to all of the Napoleon and some part of the code of procedure. Such a miserable event has caused me a displeasure you can imagine. Your waiting for my drafts and the book which was my cousin Santiago's were for me reasons for the greatest hypochondria. But what just overtook me with sadness was not finding another code in which to work, because there was not here other than the one I have been talking about. You have me, then, with my hands tied to serve you as you wish, although I doubt my works would have served. Recommending in this case to your own sensibilities that you judge my sorrow and you forgive me indulgently, being that it is not my will that is lacking, but rather my luck.

I write today to Cartagena ordering the codes to return them to my cousin Santiago, they were the edition of 1812, by the lawyer Pailliet, with the title of *Manuel de droit français*, and I know that there is someone who has them. If you have them in the same edition in Bogotá, do me the favor of getting them for me.<sup>124</sup>

From this final letter, it becomes apparent that those working on the project did not use a Spanish translation of the code, but rather an edition in French. The *Manuel* provides the texts of the civil code and other French codes with annotations explaining and cross-referencing various provisions.<sup>125</sup>

To begin the project with work on succession was probably not accidental. Regional powerful elites might hold their land in entailed estates (*mayorazgos*) that perpetuated familial power through primogeniture succession.<sup>126</sup> Although the institution was generally under attack during this period, and the Colombian Constitution of 1821 prohibited the creation of new entailed estates, the status of those already created was unclear, and early nineteenth-century

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124. *Id.* at 186-87. Although Cuervo and Mosquera were to continue their frequent correspondence, after this date there is no mention of the codification proposal.

125. See M. PAILLIET, *MANUEL DE DROIT FRANÇAIS* (Paris, 2d ed. 1813). The author thanks Professor A.A. Wijffels for providing copies of this edition.

126. See OTS CAPDEQUÍ, *supra* note 30, at 43-46. For the importance of such leaders, see JOHN LYNCH, *CAUDILLOS IN SPANISH AMERICA 1800-1850* (1992).

examples exist.<sup>127</sup> The *Code Napoléon* made no provision for such estates, and its enactment would have undercut local power bases by distributing such lands much more broadly throughout the family than a primogeniture scheme would. Thus, local powerful landholders had much to fear from Bolívar's new regimes for succession of property and these concerns may have been reflected in Canon Mosquera's reticence and even, perhaps, his negligence in losing the papers.

After December 1829, the commission consisted of Rufino Cuervo,<sup>128</sup> Manuel Camacho Quesada,<sup>129</sup> and José Angel Lastra.<sup>130</sup> It is odd that the note by Cuervo does not mention Francisco Pereira.<sup>131</sup> Miguel Tobar<sup>132</sup> should also be considered as one of the original

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127. See GIBSON, *supra* note 14, at 64; HUMBERTO GUTIÉRREZ SARMIENTO, *EL DERECHO CIVILEN LA CONFORMACIÓN DE AMÉRICA* 110 (1992).

128. Cuervo held a number of judicial and political appointments before and after his designation to the commission. A student at the San Bartolomé and later at the Rosario, he received his doctorate from the latter in 1819. In the mid-1820s he served at a judge in Cauca and taught civil and penal legislation at the University of Popayán. In 1828, he returned to Bogotá to fill another judicial appointment. He was a member of an aristocratic circle of lawyers in Bogotá which included Tobar and Lastra. He served as vice-president of New Granada after 1847. See 1 Uribe, *supra* note 110, at 498; MINISTERIO DE EDUCACIÓN NACIONAL, DEPARTAMENTO DE BIBLIOTECA Y ARCHIVO NACIONAL, *EXPOSICIÓN BIO-BIBLIOGRÁFICA A HONOR DEL ILUSTRÍSIMO SEÑOR DON MANUEL JOSÉ MOSQUERA, ARZOBISPO DE BOGOTÁ, Y DEL DOCTOR RUFINO CUERVO, VICE-PRESIDENTE DE LA NUEVA GRANADA CON OCASIÓN DEL PRIMER CENTENARIO DE SU MUERTE* 47 (1953).

It appears that Cuervo continued to be associated with codification efforts even after the end of Gran Colombia. The Biblioteca Nacional de Colombia contains a copy of the 1831 *Código Civil Santa Cruz* bearing the inscription "para el sñr Dr. Rufino Cuervo de su amigo Santa Cruz." ANDRÉS SANTA-CRUZ, *CÓDIGO CIVIL SANTA CRUZ (BOLIVIA)* (Paz de Ayacucho, Imp. Del Colegio de Educandas (1831), Biblioteca Nacional de Columbia, Fondo Cuervo N-4445. The work of 1556 articles is in three books (persons, goods and modifications to property, and methods of acquiring property). The work states that four citizens aided Santa Cruz with drafting the code, *id.* at 11, and the following names are found at the end of the code: Manuel María Ureulla, Manuel José de Antequera, Casimiro Olañeta, and José María de la Lloza, *id.* at 226.

129. Little is known about Camacho Quesada. He was admitted to the bar in 1803 and taught law at the Rosario in the early 1820s. See 1 Uribe, *supra* note 110, at 496.

130. Lastra was admitted to the bar c. 1820 and wrote antimilitary newspapers in the mid-1820s with Cuervo. See *id.* at 500.

131. José Francisco Pereira studied at the Colegio de Cartago and later at San Bartolomé where he obtained his licenciado in law in 1810. He served in the junta of Cali and Popayán during the Patria Boba and obtained a doctor of civil and canon law in 1814 through San Bartolomé. In 1821 he served at the Cúcuta Congress and later as a representative to for Cauca and Choco until 1825. He then served as a justice of the Supreme Court and taught law in Bogotá. In 1828 he was appointed to the tribunal that tried those who attempted Bolívar's assassination, but recused himself because of conflicts between his executive and judicial functions. He later served as Minister of the Interior and Justice and was appointed to Council of State from 1833-1837. In the 1830s he helped draft various codes, including those for civil procedure and judicial reform. See generally Jose Ignacio Vernaza, *Vida del Dr. José Francisco Pereira*, in *HOMENAJE A CARTAGO EN EL IV CENTENARIO DE SU FUNDACIÓN (1540-1940)* (1941).

132. Tobar was admitted to the bar in 1809 and was a delegate to the Cúcuta Congress in 1821. He served as justice of the Supreme Court from 1821 to 1830 and taught law in Bogotá during this period. See 1 Uribe, *supra* note 110, at 505. Tobar was known for his excellent

commission members. It is not surprising to find that the members of the commission share similar backgrounds. They were trained in law in the elite educational system available in Bogotá and continued their associations with these institutions as professors during their professional career. They served during the independence movement during the *Patria Boba* and had survived the winnowing of the revolutionary elite by Morillo when Spain again gained control.<sup>133</sup> Several served as delegates to the constitutional convention in Cúcuta in 1821 and several were probably slated to bring the codification project before the 1830 convention. They were all from rather distinguished colonial families and they were part of the family-bureaucratic legal networks common in the late colonial and early independence period.<sup>134</sup> They were chosen for their learning, skill, and political and social acceptability. It is perhaps worthy of note that José Manuel Restrepo had translated the *Spirit of the Law* into Spanish and Bolívar relied on this text in advocating codification ten years earlier in his speech before the Congress of Angostura. Restrepo was a natural choice to spearhead the project. He was the Minister of the Interior, had significant legal background, and was involved in Santander's attempted codifications in 1822. Importantly, his dislike of Bentham, whom he believed to be a radical in codification, was well known. Later in 1829, Restrepo would write the decree prohibiting Bentham's works from Bogotá classrooms.<sup>135</sup>

Had the commission prepared a draft, it appears that a clear constitutional and legislative path would have been prepared for its adoption at the 1830 Congress. The Constitution adopted at the 1830 Congress gave explicit legislative power to Congress "to draw up national codes of all kinds."<sup>136</sup> Furthermore, there were at least two signatories of the Constitution who would have stood ready to introduce the proposal. Juan García del Río, who advocated the *Code Civil* project in his *Colombian Meditation* of December 1829, was one of the Deputies for Cartagena. Miguel Tobar, originally appointed to the drafting commission, was one of the Deputies for Bogotá.<sup>137</sup>

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library, and his love of classical literature. See Victor E. Caro, *Miguel de Tobar (1782-1861)*, 1912-13 BOLETÍN DE HISTORIA Y ANTIGÜEDADES 624-29 (Bogotá). He was a student at the Rosario and was a delegate to the 1830 constitutional convention. See Joaquín Ospina, *Tobar y Serrate, Miguel*, in 3 DICCIONARIO BIOGRÁFICO Y BIBLIOGRÁFICO DE COLOMBIA 734 (1939).

133. BUSHNELL, *supra* note 15, at 46.

134. See Victor M. Uribe, *The Lawyers and New Granada's Late Colonial State*, 27 J. LATIN AM. STUD. 517-49 (1995).

135. See MIGUEL AGUILERA, LA LEGISLACIÓN Y EL DERECHO EN COLOMBIA 406-07 (1965).

136. Constitution of Colombia of 1830 art. 36(22), in GIBSON, *supra* note 14, at 86.

137. See *id.* at 105 (showing the signatories of the Constitution of Colombia of 1830).

*B. Codification and Revolution*

The years leading up to Bolívar's codification proposal were peppered with unrest and separatism. To the south, Ecuador had been pulling away since 1826<sup>138</sup> and to the west, Venezuela rose in rebellion under General José Antonio Páez the same year.<sup>139</sup>

Gran Colombia was also in an economic crisis. By mid-1826 Gran Colombia was facing the first major foreign debt crisis of Latin America; it was in default on a thirty million peso loan it had received from English investors in 1824.<sup>140</sup> The institutional changes Bolívar sought were no doubt connected with this crisis. One may note the concern for monitoring treasury cases and the inability to support various tribunals for financial reasons.

Bolívar's hopes to solve all through a constitution calling for life-presidency failed at the Constitutional Convention at Ocaña in 1828.<sup>141</sup> A similar result was reached by his assuming dictatorial powers in June, 1828, and wiping away many of Santander's liberal reforms. Santander was removed as vice-president and Bolívar's mistress staged his mock execution during a dinner party. Things only got worse during the second half of 1828. Bolívar dealt with an assassination attempt in September, the Cauca Revolt in October, and a war with Peru. The months leading up to and during the codification proposal in 1829 were no better. In September, Antioquia revolted, some members of Bolívar's cabinet contacted Britain and France seeking a European prince to fill Bolívar's place after his death or retirement, and the Páez separatists in Venezuela had effectively won their battle.<sup>142</sup> The same month that Bolívar's Minister of the Interior, José Manuel Restrepo, received the letter initiating the work on Bolívar's civil code, he recorded in his diary, "This unhappy republic is in anarchy, and revolutions are occurring quickly."<sup>143</sup> These were not, of course, enlightened, independent, republican revolutions against a foreign European power. They were the riots and schisms blasting Gran Colombia apart.

Such were the times leading to the 1830 Constitutional Convention in Bogotá at which Bolívar hoped to introduce a new civil

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138. See Roger P. Davis, *The Local Dynamics of National Dissent: The Ecuadorian Pronunciamientos of 1826*, 55 *HISTORIAN* 289 (1993).

139. See BUSHNELL, *supra* note 15, at 61-63.

140. See *id.* at 59-60.

141. See *id.* at 63-67. The political crisis is evident from the unconstitutionality of calling a constitution convention three years earlier than was permitted under the 1831 Constitution of Cúcuta. See *id.* at 63.

142. See *id.* at 67-71.

143. See 2 RESTREPO, *DIARIO*, *supra* note 116, at 18.

code for Gran Colombia. In March 1830, just nine months after proposing the civil code, Bolívar resigned from the presidency, leaving the way open for the Convention to appoint someone else. Before the end of the year, Bolívar died near the Caribbean coast while traveling towards self-imposed European exile.<sup>144</sup>

#### IV. CONCLUSION

Whatever Bolívar's ideas were in proposing codification at this politically late date, they were not to finish a successful and well-structured liberal reform agenda for Gran Colombia. In light of these events, it is much more likely that Bolívar looked to codification as a last attempt to gather central control of the fast-dissolving country. Not only would a national codification of civil law direct power towards Bolívar and his central government, it would also have furthered the political goal of centralism while damaging the competing cause of federalism. Codification here was not for the purpose of social change.<sup>145</sup> If such changes were brought along with a new code, they were secondary results. Rather, codification here was being used as a government tool to reassert power and to create legal dependence on Bolívar's regime. Thus, Bolívar's codification proposal of 1829 is a better example of Varga's theory of codification than it is of Bellomo's reading of post-French-revolution codification. Nonetheless, rhetoric based on Bellomo's ideas would lend credence to a play for power through codification. Such ideas are certainly found in Bolívar's earlier writing about codification, and probably would have been brought out again if a draft had been presented to the 1830 Congress. They were raised in December 1829 by García del Río who would soon serve as Deputy for Cartagena at the 1830 Congress.<sup>146</sup> Although by 1829 Bolívar thought that the liberalism of Bentham had gone too far and had done a great deal to destroy the country, he was aware that the tool Bentham advocated, codification, was an extremely useful device.

It is also likely that in the dark hours of Bolívar's dictatorship, he might have turned to the writings of his secret French hero, Napoleon, where "one ought to study the art of war, of politics, and of

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144. See BUSHNELL, *supra* note 15, at 71-73.

145. The more conservative themes of unity, peace, stability, and legal reform were presented by Bolívar in his Installation of the Constituent Congress of Bogotá in 1830. *Gaceta de Colombia*, No. 449, Bogotá, Jan. 24, 1830, second and third unpaginated page.

146. See García del Río, *supra* note 31, at 170-71. Signatures on Constitution of 1830 as translated in GIBSON, *supra* note 14, at 105.



government.”<sup>147</sup> If Bolívar could not unite South America, or even keep Gran Colombia from falling apart, he still hoped to leave to his countries a legacy of a Bolivarian Civil Code. Thus, as the Napoleonic Code survived the collapse of the Empire, so too might his code survive the collapse of Gran Colombia.<sup>148</sup> Thus, when Mosquera complained that the Antioquia uprising made codification efforts useless for Bolívar, he was wrong; for Bolívar, times of anarchy were the perfect time to reestablish central control through the tools of codification and legal institutions.

On presenting several of the documents related to Bolívar’s codification proposal to the Bolivarian Society of Venezuela in 1960, Manuel Pérez Vila viewed the proposal as an important or transcendental initiative of Bolívar who sought to complete the independence process supporting it with a new juridical order of “triumphant liberalism.”<sup>149</sup> Consistent with his views of codification, it is likely that Bolívar would use the rhetoric of liberalism to justify his proposal of 1829. Nonetheless, other forces were in effect by that date. Bolívar was seeking to save a nation rather than build a liberal utopia. He had fought the liberal reforms of Santander, he had battled to keep power centralized, and he had assumed dictatorial control over the country. It was hardly the time to place the capstone on his great liberal state. Bolívar’s codification project of 1829 was not an attempt to set social gains into stone, or to legislate recent social changes.

The project was to fail. It appears the commission never produced a draft which could have been put before the 1830 Congress, even if that body were prepared to consider such a codification of civil law. Perhaps without knowing the grand design behind Bolívar’s late attempts at the codification of civil law, the other members of the commission were inclined to agree with Mosquera’s assessment of the country. In the end, the anarchy of the country, the personal disorganization and bad luck of Mosquera, and the apparent inaction of the commission were to leave the idea to dissolve along with Gran Colombia. The 1830 Congress itself was

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147. Peru DE LECROIX, *supra* note 57, at 153.

148. Perhaps one reason for the failure of Bolívar’s proposal was that when it came to personal involvement with the project he did not model his conduct after Justinian or Napoleon who both monitored, if not contributed, to the codification effort. Justinian’s “relation to the codification which stands in his name is to be conceived as similar to that of Napoleon to the French *Code civil*: lively interest, political authorship, constant harrying of those entrusted with the task, but rarely or never actual composition.” See TONY HONORÉ, *TRIBONIAN* 26 (1978) (citing 2 E. STEIN, *HISTOIRE DU BAS-EMPIRE* 281 (1949)); see also VARGA, *supra* note 22, at 104.

149. See Pérez Vila, *supra* note 6, at 819, 822.

unable to adopt a constitution and unable to reunite an already fractionated Gran Colombia. The *Code Civil* would not provide the centralization of power Bolívar sought, an aspect of codification presented clearly by Vargas. The *Code Civil* would not provide the changes in the society of Gran Colombia sought by Bentham; the proposal was not an initiative to etch “triumphant liberalism” into stone. Bolívar would not join Justinian and Napoleon as lawgiver-generals who provided codes that live far beyond their shattered empires. It was left to the teacher to do what his student could not. Twenty-five years after the death of Bolívar, under a very different set of circumstances and with very different aims, Andrés Bello would watch his civil code be enacted into law.