

7-1-2008

Examining the Codification of History and the Search for First Principles in Professor Alejandro Guzmán Brito's History of the Codification of Civil Law in Iberoamerica

Pedro J. Martinez-Fraga

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Pedro J. Martinez-Fraga, *Examining the Codification of History and the Search for First Principles in Professor Alejandro Guzmán Brito's History of the Codification of Civil Law in Iberoamerica*, 39 U. Miami Inter-Am. L. Rev. 503 (2008)

Available at: <http://repository.law.miami.edu/umialr/vol39/iss3/5>

BOOK REVIEW

Examining the Codification of History and the Search for First Principles in Professor Alejandro Guzmán Brito's HISTORY OF THE CODIFICATION OF CIVIL LAW IN IBEROAMERICA

Pedro J. Martinez-Fraga*

I.	INTRODUCTION	504
II.	WHAT IS THE PRECEPT OF PRE-INDEPENDENCE JUDICIAL UNITY THAT LED TO CODIFICATION?	507
III.	IS THERE A MEANING TO THE ROLE OF JURIDIC LITERATURE IN THE NEW WORLD AS DESCRIBED BY PROFESSOR GUZMÁN BRITO?	509
IV.	JUXTAPOSING POLITICAL SYSTEMS WITH JUDICIAL FRAMEWORKS	511
	A. <i>Towards a Different Perspective</i>	512
	B. <i>The "Codification" of History</i>	514
V.	ANALYSIS OF <i>Legislación de Patria</i>	516
VI.	THE STATE OF THE LAW PRIOR TO CODIFICATION	520
VII.	IS THERE A DISCERNABLE SPIRIT OF CODIFICATION? ..	525
VIII.	CONCLUSION	527

Athenian Stranger:

"Thus, explain to me stranger, certainly I still have the desire for you to continue to speak and explain how all of this is to be found in and gleaned from the laws that are said to be from Zeus and the Pythian Apollo, the laws laid down by Minos and Lycurgus. Certainly, I would also like you to follow up and teach us why and how it is that their order is so clear to anyone with experience in laws, either because of technical skills and specialized abilities or

* Pedro J. Martinez-Fraga holds a B.A. from St. John's College, Annapolis (1984, Highest Honors), and a J.D. from Columbia University (1987, Harlan Fiske Scholar). He is a practicing attorney, President of the Global Dispute Resolution Center of the Maiestas Foundation, and an Adjunct Professor of International Litigation and Arbitration at the University of Miami School of Law.

because of certain habits, while it remains quite unapparent to the rest of us."

The Laws, by Plato, 632D-632E¹

I. INTRODUCTION

Professor Alejandro Guzmán Brito has blessed us with an opus that synthesizes a conceptual historical void in scholarship, and in so doing, is destined to become a classic and premier contribution to the historical account of the codification of the civil law in Iberoamerica. Much like the symmetry and structure evinced by the entire geometric edifice that we encounter in consulting Euclid's *Elements*, so too Professor Guzmán Brito has availed himself of definitions, postulates, and propositions all endemic to the task that he quite modestly has elected as *The History of the Codification of Civil Law in Iberoamerica*.² Whether the architecture of this meaningful contribution intentionally sought foundation in the analytical construct of Euclidian geometry is materially less meaningful than the uncontroverted premise that indeed it is bottomed on presumably unassailable precepts that rest and build upon each other. Their intimacy and interdependence are such that a part cannot be modified without measurably altering the integrity of the whole. So too is the whole only possible by incrementally developing sequentially harmonized premises.

A second distinctive feature, far beyond mere chorological editing and topical indexing, immediately challenges both reader and author, actor and spectator. Indeed, this jarring concern recurrently pervades Professor Guzmán Brito's brilliant effort. The issue is as simple to identify as it is impenetrably difficult to satisfy analytically. Perhaps unbeknownst to Professor Guzmán Brito, his scholarly achievement does not limit itself to the task of *compilation* and incident assemblage of historical events narrowly constrained by a very specific subject matter. Instead, the author's extraordinary passion and erudition guide him to engage in the very activity that he purports to be describing, but certainly not defining. Put simply, his text is an exercise in historical *codi-*

1. Συτως, ω ξένοι, έγγωγε ίθελον άν ύμας, καί έτι νυν βούλομαι, διεξελθειν πως έν τοις του Διοσ λεγομένοις νόμοις τοις τε του Πυθίου Απόλλωνος, ους Μίνως τε καί Λυκουργος έθέτην, ένεστί τε πάντα παντα, καί όπη τάξιν τινά είληφότα διάδηλά έστι τω περι νόμων έμπείρω τέχνη είτε καί τισιν έθεσι, τοις δέ άλλοις ήμιν ούδαμως έστι καταφανη [Translation by the author.]

2. ALEJANDRO GUZMÁN BRITO, *HISTORIA DE LA CODIFICACIÓN CIVIL EN IBEROAMERICA* [THE HISTORY OF CIVIL CODIFICATION IN IBEROAMERICA] (Thomson/Aranzadi, 2006).

fication, not merely a factual *compilation*. The phenomenology of the work shies from engaging in the perplexing inquiry that seeks to distinguish *compilation* from *codification*.

Space and time render it virtually impossible logistically *and* conceptually to map with the requisite painstaking detail the first principles, definitions, and propositions upon which Professor Guzmán Brito's work rests in a carefully fashioned edifice parallel to the configuration of Euclid's *Elements*. Certainly, fundamental premises or first principles, to some extent, shall and must be identified. The methodology, however, by which first principles are arrived at is too great a challenge to undertake here.

In tracing the contours of the specific issues raised in Professor Guzmán Brito's work, emphasis must be placed on addressing the distinction between *form* and *substance*, *compilation* and *codification*. Without even purporting to approach a conclusive analytical rubric aspiring to air with any degree of detail this difference, the subject compels analysis, commentary, and observation. Glaring because of its stark omission is any effort by Professor Guzmán Brito to engage in sustained examination of the actual codification process beyond quite detailed scholastic references to diverse influences and paragons that form part of the civil law codification process and its place in the history of Iberoamerica.

It is critical to question whether the codification that Professor Guzmán Brito identifies actually comports with an endeavor surpassing a *pastiche* of juridic compilation having no reason for being other than the historical consequence and happenstance of the particular identity of the colonizing empire. Specifically, Professor Guzmán Brito's book irks the reader to ask the simple but exquisitely challenging questions: what exactly constitutes the nature of codification? What is a code? Can a body of laws where the individual elements are related only by legislative procedure or royal fiat, general subject matter, language, and a discernable format, constitute a code? If not, what else is necessary? Should a juridic code bare a greater rational relationship and resemblance to Euclid's *Elements* than to a topical index of legislative enactments?

To be sure, these queries are not *directly* posed in the work that now so much concerns us. Professor Guzmán Brito does, or so this author shall suggest, respond to these questions by himself engaging in what shall here be termed the *act of historical codification*. In identifying underlying first principles (i.e. five such

specific tenets), underscoring unifying objectives, dissecting common pronouncements that cannot be partially modified without affecting the very rudimentary nature of the entire relationship between Castile and the New World,³ Professor Guzmán Brito has brought into high relief the elements of the independence movement in Latin America. A derivative consequence of his work is a substantive commentary on the nature of the independence effort that spawned modern day Latin America. Remarkably, and without attempting to proffer an answer or solution to the question of whether the account that Professor Guzmán Brito relates is more one addressing *compilation* rather than *codification* or the converse, one proposition must be noted. If Professor Guzmán Brito is indeed correct in two critical assertions, or first principles, upon which his entire work rests, namely that (i) judicial unity in the new world was possible only because its formation and transformation did not intercept with, and was only parallel to political influences, and (ii) independence in the Americas was premised on concern for political changes that did not cause fundamental restructuring of social and civic values, then, so the argument says, the independence movement was less revolutionary and more of just a mere initiative grounded on perceived need and pas-

3. In the very first paragraph of his book Professor Guzmán Brito defines the "New World" in the process of articulating the most extraordinary pronouncement that the new world's geopolitical sub-division in *virreinos* and governments do not affect the unity of this vast territory because such structural organization and compartments are only administrative, judicial, and military in nature, and *not* political. Professor Guzmán Brito's exact words followed by the author's translation merit citation in their entirety: *Hasta que se consumo el proceso de independencia de las secciones americanas de la Corona castellana, que dio por resultado la formación de otras tantas repúblicas soberanas, el territorio de Norteamérica comprendido en las actuales California, Texas, otras regiones de los Estados Unidos y México completo, toda Centroamérica y la totalidad de Sudamérica, con excepción del Brasil y otras regiones menores, constituían una unidad política, precisamente por hacer parte de aquella Corona. Su división en virreinos y gobernaciones, por cierto, no afectaba esta unidad, por no tener carácter político tal división, sino sólo administrativo, judicial y militar.*

Until such time as the various sections of the Castilian crown secured their independence, which in turn gave rise to the creation of other sovereign republics, such as all of North America comprising the current states of California, Texas, and other regions of the United States and Mexico, all of Central America, and the whole of South America, with the notable exception of Brazil and other more minor regions, these parts of the Castilian crown constituted a monolithic political unit in large measure because they formed part and parcel of that kingdom. Their division into various geopolitical territories while under the Spanish crown, more commonly known as *virreinos* and *gubernaciones*, in fact did not affect this single unit because these subdivisions were not political in nature but rather only administrative, judicial, and military. [Translation by the author].

sion for autonomy. Here one must question whether in fact it is possible at all for judicial processes to be meaningfully severed from their contemporaneous political framework?

This question too shall be underscored as six specific topics configuring Professor Guzmán Brito's work are examined:

- (i) What is the precept of pre-independence judicial unity that led to codification?,
- (ii) Is there a meaning to the role of juridic literature in the new world as described by Professor Guzmán Brito?,
- (iii) Juxtaposing political systems with judicial frameworks,
- (iv) Analysis of *legislación de patria*,
- (v) The state of the law *prior* to codification,
- (vi) Is there a discernable spirit of codification?

While even the most comprehensive analysis of these issues fails to do justice to Professor Guzmán Brito's notable contribution, we are compelled to study critically each proposition in the context of *codification* versus *compilation*, together with *political change* versus *social reform*.

II. WHAT IS THE PRECEPT OF PRE-INDEPENDENCE JUDICIAL UNITY THAT LED TO CODIFICATION?

Professor Guzmán Brito compellingly argues that (i) Castile's emphasis in governing the New World by emphasizing administrative, judicial, and military concerns in lieu of engrafting upon these vast and varied territories a pristine and definable political scheme, and (ii) a development of a judicial unity among these territories parallel to political transformations, arose from one solitary fundamental predicate: the rule of Castile over the New World. It is further contended that consciousness of the vastness of the American territory comprising the New World was not accompanied by a perceived need to craft flexible political strictures, each unique in character so as to provide a voice for the idiosyncratic nature of each of these regions.⁴ It does follow that the New World became but an extension of Castile even though,

4. Professor Guzmán Brito provides: *La unidad jurídica Indiana, no habiendo sido consecuencia de la política, fue en realidad paralela a ella; vale decir, ambas resultaron ser efecto de otro hecho fundamental: la incorporación de las Indias, ya a poco de su descubrimiento, a la Corona de Castilla, complementado por un hecho negativo: que cuando los gobernantes españoles empezaron a tomar conocimiento paulatino de la inmensidad de los nuevos territorios descubiertos, no pensaron en desmembrarlo para formar varias unidades políticas, a modo de reinos, por ejemplo,*

as Professor Guzmán Brito observes, the incorporation of these territories was one that the *crown* and not the *kingdom* undertook. Indeed, this pivotal distinction played a decisive role in the ideology that pervaded the independence of the New World.⁵

Codification or *compilation*, as the case may be, cannot be severed from the phenomenon of juridic unity that the author identifies. In turn that unity found foundation in five bodies of law that Castile promulgated together with the European tenet of *ius commune*. Without casting them in order of priority or hierarchy, they are easily susceptible to summary. First, the *Leyes de Toro* merit mention. This corpus of positive law was contained in the *Nueva Copilación* and later in the *Novisma*. The *Novisma* represents a compilation of strictures that primarily concern issues involving estates, inheritance, and family law.⁶ In this connection, Charles V in 1530 formally decreed that the laws of Castile would rule the New World in conformance with the *Ley de Toro*.⁷ The centralized imperative to extend the laws of Castile to

desvinculadas entre si, sin perjuicio de su vinculación radial al monarca, según el modelo que regía para la península.

The juridic unity of the new world, not having been a consequence of its political unification, was parallel to its political counterpart. Both were the direct effect and consequence of another fundamental fact; the crown of Castile's rule over the new world *immediately* after its discovery. This proposition was accompanied by a negative development. According to Professor Guzmán Brito, as the Spanish rulers slowly began to note the vastness of the newly discovered territories, it did not occur to them to fragment these lands in order to create multiple political units such as, for example, the formation of *quasi* independent states among themselves without in any way jeopardizing their profound ties to the monarchy; perhaps consonant with the model that was prevalent in the Iberian peninsula. [Translation by the Author.] *Id.* at 32.

5. *Id.* at 33.

6. *Id.* at 34

7. This decree provided: *Ordenamos y mandamos, que en todos los casos, negocios y pleitos en que no estuviere decidido ni declarado lo que se debe proveer por las leyes [de esta Recopilación], o por cédulas, provisiones y ordenanzas dadas y no revocadas para las indias, y las que por nuestra orden se despacharen, se guarden las leyes de nuestro Reino de Castilla, conforme a la de Toro, así en cuanto a la substancia, resolución y decisión de los casos, negocios y pleitos, como a la forma y orden de substanciar. La expresión de esta recopilación, por cierto, fue interpolada en el original al insertarse ésta en la Recopilación de 1680.*

It is ordered and decreed that in all cases, transactions, and contentions where issues are not addressed by applicable law (those of this Recompilation) or by decrees, provisions, and ordinances in place that have not been revoked for the territories of the new world, as well as those that may issue by virtual decree, all should be safeguarded in accordance with the laws of the Kingdom of Castile and harmonized with *La Ley de Toro* as to substance and adjudication of all cases, transactions, and contentions together with methodologies to be applied in any such processes." [Translation by the Author.]

Professor Guzmán Brito observed that the expression "de esta Recopilación", of

the Americas is certainly beyond cavil. Moreover, Professor Guzmán Brito methodically details the multiple compilations and re-compilations that characterized the laws of Castile from 1348⁸ to 1567,⁹ and even until the end of the *Epoca Hispánica* in 1805.¹⁰

Second, *El Fuero Real*, third, *Las Leyes del Estilo*, fourth, *Las Siete Partidas* and fifth, *Roman law*, all are identified as fundamental features of the intricate web of the Castilian normative framework. The *Fuero Real* together with the code of *Las Siete Partidas* are highlighted as being most dominant and important.¹¹ The code of *Las Siete Partidas* embodies private and public law. Accordingly, with respect to private law issues governing family law, contractual obligations, together with wills and estates, *Las Siete Partidas* was the dominant source of organic law. To a lesser extent, but still considerable, weight was placed on the *Fuero Real* as well. The code of *Las Siete Partidas*, in particular, is vested with meaningful concepts derived from Roman law. Indeed, as Professor Guzmán Brito points out, despite the prevalence of the *ius communs*, its role rests on the Roman law precept comprising it, which in turn constitutes an interpretative paradigm for *Las Siete Partidas* and the *Fuero Real*.

III. IS THERE A MEANING TO THE ROLE OF JURIDIC LITERATURE IN THE NEW WORLD AS DESCRIBED BY PROFESSOR GUZMÁN BRITO?

The complexity of Castilian law in the New World is crystallized by *Las Leyes Nuevas* of 1542, which Professor Guzmán Brito underscores as “having been spawned and made clear as a result of a very intense doctrinal debate.”¹² The corpus of juridic litera-

this “recompilation” was included in the original when the decree was inserted in the recompilation of 1680.

8. *See Id.* at 33.

9. *See Id.* at 34. Citing PÉREZ MARTÍN, ANTONIO-SCHULTZ, JOHANES-MICHAEL, *LEGISLACIÓN Y JURISPRUDENCIA EN LA ESPAÑA DEL ANTIGUO RÉGIMEN 15-20* (Universidad de Valencia 1978), and AHORA, MARIA E. IZQUIERDO, JOSÉ, M^a. JOSÉ, *EL ORDENAMIENTO DE MONTALVO Y LA NUEVA RECOPIACIÓN, EN CUADERNOS DE HISTORIA DEL DERECHO 451* (Madrid, 1999).

10. Citing AHORA ESCUDERO, JOSÉ ANTONIO, *SOBRE LA GÉNESIS DE LA NOVÍSIMA RECOPIACIÓN 11* (2003).

11. Notably, the code of *Las Siete Partidas* is comprised of a book addressing issues of public and private law. Professor Guzmán Brito highlights that there is no extant omnibus work addressing *Las Siete Partidas* nor is there an analysis constituting an extensive commentary on this pinnacle work. Professor Guzmán Brito, however, does cite to extensive authority, primarily in the form of journal work, touching upon the subject. *See* GUZMÁN BRITO, *supra* note 1, at 39 n.29.

12. *Id.* at 43.

ture invested with doctrinal normative standing, according to Professor Guzmán Brito, is deeply influenced by both jurists and theologians. The names Juan de Solorzanó Pereira, Antonio de Leon Pinero, Juan Matienso, and Juan Hevia Bolaños are highlighted as emblematic contributors to the juridic literature of the time. In this same vein, the *Recopilación de Leyes de India* is also cited as a general commentary that was proscribed in 1776 in keeping with the prevalent trend followed in Eighteenth Century Europe that was inimical to legal commentary as standing in *pari materia* with legislative positive law. Commentaries, however, were still used as recourse for addressing voids in the corpus of Roman law. The laws of Castile similarly were supplemented by canon law, which was subordinate to Roman jurisprudence. Consequently, the juridic literature was reduced to scholarship and commentary of archaic constructions of Roman and canon law.

The salient feature of the juridic structure of the New World certainly was characterized by codes and compilations: *La Recopilación de Leyes de las Indias* of 1680, local legislation, *La Nueva Recopilación* of 1567, the *Ordenamiento de Montalvo*, and the *Novísima Recopilación* of 1805. These codes or compilations were consulted within the framework of the *corpus idus cibilis*, which in turn comprised four books; (i) *The Institutions*, (ii) the *Digesta*, (iii) the *Codex Iustinianus*, and (iv) the *Iustiniani Novellae*. Also in the same spirit as codes and compilations, canon law was constituted by six distinct books: (i) the *Decreto*, (ii) the *Decretales of Regorie IV*, (iii) the *Liber Sextus of Bonafis VIII*, (iv) the *Constitutiones Clementinae of Clement V*, (v) the *Extravangantes of John XXII*, and (vi) the *Extravangantes Comunes*.¹³

Despite the excellent and exhaustive scholarship identifying the complex elements of Castilian law, its influence in the New World, and the more fundamental legal sources, little attention is placed on the numerous differences between compilations, codes, and the act of codification. Absent from the analysis is any reference to European, New World, or even Castilian standards for codification or compilation. Likewise, other than fleeting references to usage, there is scarce guidance explaining the basis for hierarchy or methodology to be used in assessing different bodies of law. Even though, by way of example, the reader is advised of the subject matter of *Las Siete Partidas*, there is simply no discussion as

13. *Id.* at 47. Professor Guzmán Brito also canvasses the internal characteristics of the laws of the new world by engaging in an exegesis of *Las Siete Partidas*, *El Fuero Real*, and the *Leyes De Toro*. See, e.g., *id.* at 50-52.

to any doctrinal, jurisprudential, or procedural common denominator that would bestow upon *them* the status of a code in contrast to a plain compilation or collection of topically related mandates.

The want of this analysis, to a considerable extent, clouds the proposition that political and legal developments occurred separate and distinct from each other in parallel fashion never intercepting.

IV. JUXTAPOSING POLITICAL SYSTEMS WITH JUDICIAL FRAMEWORKS

A rudimentary principle and fulcrum of Professor Guzmán Brito's work is the proposition that in the New World political and judicial developments were separate and unrelated phenomena. The term "judicial" is defined as private civil law but also includes procedural and criminal jurisprudence. The precept asserts that the judicial realm survived the incessant tribulation and organic law of the independence movement in the Americas virtually intact. Put simply, Professor Guzmán Brito juxtaposes the definition of judicial with the political, which in turn is generically referenced by "changes in political laws rendered evident by a plethora of written constitutions patterned after liberal republican regimes."¹⁴ Professor Guzmán Brito, however, does concede that the radical act of independence necessarily must have some "immediate and necessary effect on private civil law."¹⁵ Thus, it is asserted that, unlike the French or Bolshevik revolutions, the independence movement in the Americas had a purely political configuration and was impervious to social and economic changes. This premise perhaps may find resonance and relevance in the much socially stratified contemporary societies of Latin America, as a very general proposition. Economic independence does not necessarily lead to social reform, according to Professor Guzmán Brito's analysis. In fact, where independence, albeit derivatively from a political movement, is elevated to the status of a social principle to be commercially applied with unbridled discretion in its most pristine form; it is likely to be conducive to social fragmentation rather than the creation of a collective consciousness of equality. The fierce competition that the principle of indepen-

14. *Id.* at 56.

15. *Id.* Here the end of Republican Rome and establishment of participates at the conclusion of the first century A.D. or the substitution of feudalism by the absolute state in the 16th Century are cited as paragons where political change *did not* affect the substance of private civil law.

dence breeds precisely fosters the view that the most skilled shall prevail. It is *inequality* founded on differences displayed by independent actors in the commercial and political arenas that is underscored, highlighted, and rewarded.

A. *Towards a Different Perspective*

A glaring omission completes the contrasts of shadows and lights that the reader experiences in studying Professor Guzmán Brito's work. The independence movement in the Americas can hardly be severed from the concept of a *substantive* political revolution. This particular detachment from the rule emanating from the Iberian Peninsula cannot be reduced to just a want for independence *devoid of all content*. In rejecting rule by the Spanish Crown, a monarchy theoretically purporting to find its normative foundation on more than the command of legions, divine right flatly is being rejected. When viewed through a different prism, independence from monarchical rule in the establishment of republics permeated by the principle of independence arguably emphasizes humanism and the virtues of equality, at least in form if not substance. Additionally, Professor Guzmán Brito's proposition that the rise of republicanism in the Americas caused constitutional reform places considerable strain on the effort to segregate constitutions from the legal realm and to treat the drafting and acceptance of a constitution as an exclusively political phenomenon. The anomaly in this proposition is clear. The liberal constitutions adopted in the Americas are eloquent reflections of meaningful political *and* legal change. Indeed, a constitution is but the talisman of all jurisprudence and positive law. When viewed through these lenses, Professor Guzmán Brito's geometrically symmetrical juxtaposition simply cannot be reconciled.

It is further asserted that because the independence movement in the Americas limited itself only to the pursuit of economic liberty, there was no pressing theoretical imperative for juridic changes. In this connection, that argument continues,

purely political character was a trait common to all of the Latin American independence movements [*las independencias hispano-americanas*], so too shared by all Latin American independent movements were the fruits of no judicial change and the perpetuation of unity in that very domain among all of the new sovereign states, which at their birth did not seriously contemplate the derogation of the old bodies of legislation inherited from the age of col-

onies and substituting them for new and individual legislation.”¹⁶

Finally, the author concludes that “once independence was successfully established, the archaic legislation that ruled in the new world during times of monarchy continued to govern during the advent of republicanism in all of the new states.”¹⁷

By removing content from the revolution of the Americas and advocating the rejection of monarchy, the establishment of republics, the adoption of republican constitutions, and the rejection of divine right as the normative foundation of law and state, is it possible for Professor Guzmán Brito to adhere to the theory that the Old World’s laws persisted despite republican forms of government and complete commercial independence from the Iberian Peninsula? Four observations are exigent.

First, it is less than clear that republicanism is bereft of social and economic content. Quite the contrary, the spirit of republicanism and the principles embodied in semiotic republican representation bespeak a complete restructuring of the relationship of individuals among themselves (citizens) and the state. There can be no greater or more profound a juridic change than that which transforms a *subject* “into” a *citizen*. This transformation defines and redefines the vital space of the *polis* through the creation of legal burdens and rights that find expression and a voice only through law.

Second, through a straightforward exercise in phenomenology (i.e. a merely descriptive narrative of events in the literary tradition of Homer’s *Iliad* or the historical legacy of Thucydides’ *History of the Peloponnesian Wars* where events are “just” narrated and described and not interpreted or subjected to the constraints of conceptual categories) a simple and different account is brought into focus. The newly found republics were very much populated by the former “colonizers.” In addition, a significant percentage of the young republics’ population was comprised by Spanish subjects who had adopted the spirit of republicanism but retained their sense of “*nomos*” from the Old World. The “*criollos*,” as they are called, were immersed in the spirit of Castile. They could not help but embrace the habits that stem from a common religion, language, and morality. If so, to the extent that laws are but a reflection of the idiosyncratic relationship among citizens and

16. *Id.* at 57.

17. *Id.* Professor Guzmán Brito cites to extensive authority for this general proposition and subject matter. *See id.* n. 3.

individuals with the state, it follows that the old legal regime, that its citizenry embodied and reflected, should constitute the last change of any revolutionary process. When viewed in this context, Professor Guzmán Brito's brilliant Euclidian historical exegesis cannot withstand sustained scrutiny. Carving out substance from liberty and independence in the revolution of the Americas so as to render it void of any concern for the exiting social and economic order is not a predicate for understanding a monolithic legal unity of so vast a territory that is so analytically and aptly dissected.

B. *The "Codification" of History*

By organizing the *History of the Codification of Civil Law in Iberoamerica* around such first principles, Professor Guzmán Brito himself has engaged in a codification of history. *The History of the Codification of Civil Law of Iberoamerica* is itself a "codification of history." While the uniform juridic rubric certainly may find explanation in the prominence and preeminence of Castile's rule over the colonies, the enduring nature of that monolithic structure does not have any rational relationship to Professor Guzmán Brito's construction of the revolutions of the Americas as devoid of a social and economic agenda and concerned *only* with independence, without more.

Third, absent from Professor Guzmán Brito's effort is any consideration of the practical workings of Castile's fundamental sources of laws. *Nationhood*, *national consciousness*, and *republicanism* in large measure are not amenable to social and economic concerns. As previously suggested, they necessarily lead to a review and revision of organic law, jurisprudence, and customs inherited from the *ancien regime*.

Fourth, Professor Guzmán Brito's passing reference to the Bolshevik and French revolutions as paradigms, for his purposes as standing for the proposition that both upheavals led to political and substantive social change, is susceptible to measurable challenge and critical analysis. The differences and common denominators between these events and the revolution of the Americas undoubtedly would take tomes to identify, let alone analyze. Here comment is narrowly limited to features that were painfully ignored among Professor Guzmán Brito's observations.

Specifically, Professor Guzmán Brito fails to note a material distinction between a rejection of monarchies, certainly this element pervades all three revolutions (Bolshevik, French, and New World), and a repudiation of monarchical rule by a colonized peo-

ple seeking independence from *colonizers*. Moreover, unlike other independence movements, such as the United Kingdom's experience in India, the revolution of the Americas in many ways resembled a civil war. By that time (the first half of the nineteenth century) Spaniards quite often had crossed the Atlantic and moved *en masse* to the New World. Colonizers and colonized had generated multiple generations of *criollos* in the Americas who, like Hegel's *aufheben*, both accepted and rejected the *nomos* of the Old World. The independence movement of the Americas, in its affinity to a civil war in many deep and penetrating instances, necessarily was fought for more than mere independence.

The categories of *colonizers*, *colonized*, and *subjects* were never simultaneously, or even sequentially, present in the French and Bolshevik revolutions. The distance epitomized by an entire Atlantic Ocean separating central authority from second-tier governors loosely exercising supervised governance over the *colonized* provides for even starker differences when compared to the French and Bolshevik revolutions. Indeed, a comparison becomes contrast. Yet, it is that very contrast that caused a need for a new social and economic order. The added grievances and burdens incident to "colonized" status in addition to that of "subjects" wanting political representation in Spain and devoid of the equities that a vibrant central authority will exercise over its provincial governors, relief in the form of a new revolutionary social structure and economic independence must be assumed for most who experienced the American independence movement.

The characterization of the American independence movement as wanting in social content and economic autonomy misconstrues the phenomenon comprising the relationship between Castile's subjects in the New World, government by Castile, and the monarchy. In addition, it is but a proliferation of placing epicycles upon epicycles on the part of Professor Guzmán Brito in ignoring the extent to which the substantive content of the French and the United States revolutions permeated the winds of change that swept through the Americas and caused the independence of these vast territories during the first half of the nineteenth century. Also, the effort to engraft upon appearances a historical construction that shuns the legal character of a constitution and its reach as a judicial creature and not just a mere child of politics, further contributes to the distortion upon which Professor Guzmán Brito reposes his theory that juridic and political developments in the Americas took place in conformance with non-

intercepting parallel growth. Although interesting to be sure, the theory raises more questions than it could ever satisfactorily answer.

V. ANALYSIS OF *LEGISLACIÓN DE PATRIA*

The anatomical structure and passion with which Professor Guzmán Brito articulates his theory of codification, political development, and lack of social and economic content on the part of American independence movement is also central to the text's analysis of *Legislación Patria*. The author's own words compel recitation:

The ancient political, social, and economic regime in Europe had been abolished by the French Revolution, which elided absolutism and feudalism by substituting them with liberalism in every respect. Napoleon's *Code Civile* had provided a juridic structure to the new regime that was very much a liberal social-economic order. By 1804, the Latin American Revolutions¹⁸ of independence served the identical purpose in the realm of the political as did the French Revolution in Europe: in the Americas too the ancien regimes absolutist monarchy had been abolished; but in the New World¹⁹ the social economic rubric of feudalism did not exist. On other hand, royal legislation that Castile enacted managed to penetrate the new world much like the legislation that the new world itself promulgated, i.e. properly speaking, legislation indigenous to the new world was very much influenced by and impregnated with the structure of state police laws, which is what in fact we have called *Ordenancismo*. Nonetheless, the substitution of the socio-economic indigenous order did not constitute the substance of the independent movement's road map. This feature also materially distinguished the independence movement of the Americas from that of the French revolution. Thus, feudal institutions inherited from Spain were not altered or desecrated by the revolution in the Americas.²⁰

18. Professor Guzmán Brito actually uses the word "*hispano-américa*."

19. Here Professor Guzmán Brito uses the word "*India*."

20. *Id.* at 57-58. Citation to the original text also is necessary: El antiguo régimen político, social y económico había sido liquidado en Europa por la Revolución Francesa, que abolíó el absolutismo, el feudalismo y el ordenancismo regio, substituyéndolos por el liberalismo en todos lo órdenes. NAPOLEÓN, con su *Code Civil*, había dado forma juridical al nuevo régimen socio-económico liberal en 1804. En Hispanoamérica, las revoluciones de independenciam cumplieron en lo político el mismo papel que la Revolución Francesa en Europa: también ahí quedo liquidado el

Having enunciated anew his central organizing principle, Professor Guzmán Brito engages in a painstakingly detailed analysis of the very critical *Legislación Patria*. At the very outset he notes that “[t]his movement revealed itself in a *Legislación Patria*, unique to each of the new states. The *Legislación Patria* was enveloped in a spirit of reform of the new age, i.e. liberalism.”²¹ The purpose of this legislative framework, it is argued, was the “derogation or modification of the old legislation.”²²

The significance that the text accorded to the *Legislación Patria* generally and to each state in particular cannot be minimized as to other first principles upon which *The History of the Codification of Civil Law in Iberoamerica* is bottomed. To be sure, according to the argument, this legislative framework *predated* codification. Therefore, changes endemic to the social or economic order did not come into being together with or as a result of the codification efforts throughout the Americas.²³ Accepting this premise as another organizing principle to Professor Guzmán Brito’s postulates, the author identifies seven examples of issues that the new *Legislación Patria*, in fact cloaked with the new mantle of “liberalization” of a social and economic order, foisted onto the Americas by the *ancien regime*.

First, it is observed that children of slaves (“*libertad de vientre*”) were freed in Chile pursuant to a Congressional Decree

antiguo régimen monárquico absolutista. Pero en Indias no existió el régimen económico-social feudal. Con todo varias figuras singulares que se habían desarrollado en el interior del Feudalismo europeo habían sido trasladadas a Indias. Por otra parte, la legislación real tanto dada para Castilla que alcanzo a penetrar en Indias, como la emitida directamente para estas últimas, o seas, la legislación propiamente indiana, estaban, como vimos, muy impregnadas de intervencionismo y dirigismo estatales (derecho de policía), que es en definitiva lo que hemos denominado ordenancismo. Ahora bien, la substitución de este orden socio-económico indiano no constituyo ningún artículo del programa independentista; ello también diferenció a la independencia Americana de la Revolución Francesa. De este modo, ambas tradiciones integrantes del orden indiano, aquella de las instituciones feudales como la del ordenancismo regio formaron parte no modificada de la herencia de los Estados sucesores y la creación de éstos no implicó ninguna mudanza de dicho orden.

21. *Id.* at 58. Professor Guzmán Brito uses the word “*Liberalismo*” that the author translates as “liberalism.”

22. *Id.*

23. Notably absent from Professor Guzmán Brito’s analysis is the reason (s) occasioning *La Legislación Patria*. In fairness, he does pay fleeting reference to the gales of change of that time, but the readership is moved to ask how the *legislación patria* can be rightfully segregated from the very revolutionary effort without which such legislation would remain in the inkwell reduced to a laudable aspiration: laudable, but an aspiration none-the-less. Similarly, the readership is also compelled to question whether *the legislación patria* is susceptible of being divorced from the codification movement affecting the various nascent states.

issued on October 11, 1813. A similar enactment was also *issued* in Argentina by decree on February 12, 1813. These laws constituted more than just a modest step toward the abolition of slavery in the Americas. The preliminary predicate for the complete abolition of slavery was enacted in Chile pursuant to *La Ley del 24 de Julio de 1823*.²⁴ On April 17, 1824, the *Provincias Unidas de Centroamérica*²⁵ enacted *Decreto del 17 de Abril de 1824*. That very same year, pursuant to *La Ley del 13 de Julio de 1824*, Mexico enacted organic law leading to the abolition of slavery. The Argentine Constitution of 1853 advanced similar decrees and legislation earmarked towards the absolute abolition of slavery from the social fabric of the Americas.²⁶

Second, the restructuring of the social order contemplated, as it must, eliding titles of nobility. The earliest example that Professor Guzmán Brito enunciates is the *Decreto de La Asamblea Constituyente del 21 de Mayo de 1813*.²⁷

Third, providing indigenous populations with civil rights constitutes a rudimentary premise of the *Legislación Civil Patria*. These rights were granted in Argentina by the *Decreto de la Asamblea Constituyente del 12 de Marzo de 1813* and consonant with the Constitution of 1819.²⁸

Fourth, marriage among non-Catholics was extended to the citizenry of the New World as a matter of right. This new entitlement can be traced to *Reglamento del 26 de Mayo 1833*, in Argentina.²⁹

Fifth, intellectual property was accorded protection in Chile in 1834, followed by Venezuela.³⁰ Sixth, the provincial structure pursuant to which every cultural activity and housing of every ilk was supervised by *quasi* official landlords or landlord representatives endowed with considerable "police authority" over workers

24. *Id.* at 59. References made to a specific legislation dated July 24, 1823 purporting to lead to the abolition of slavery.

25. *Id.* at 59.

26. Consider also, *La Ley del 24 de Marzo de 1854* in Venezuela, and other similar legislation that was enacted in that very same year in Perú. *Id.*

27. Comparable enactments were decreed in Chile by decree dated September 15, 1817, and in (*Gran*) Colombia pursuant to the constitution of 1821.

28. *Id.* Referencing a decree issued by the Constitutional Assembly. Professor Guzmán Brito also notes that on March 4, 1819, the "*Senadoconsulto*" in Chile issued a similar decree as did Perú during the peak of San Martín's social and political influence.

29. Similar pronouncements, Professor Guzmán Brito observes, issued in Chile in conformance with *La Ley del 6 de agosto de 1844*.

30. *Id.* Correspondingly, legislation was enacted in Perú pursuant to *La Ley del 3 de Noviembre de 1849*.

was eliminated by dint of legislative decree in Argentina in 1831. Legislation of this very genre issued in (Gran) Colombia de Bolívar (legislation dated July 10, 1824), in Perú (legislation January 11, 1830), and in Chile (legislation dated November 14, 1849).³¹

Seventh, creditors' rights were materially restructured throughout the Americas, first in Chile by decree dated November 8, 1823. Professor Guzmán Brito chronicles that a similar decree was issued in Argentina on March 29, 1836. The *Legislación Patria* in fact corroborates profound social engineering and economic independence separate and apart from that present during colonial rule. The text, however, fails to explain how such legislation, mostly constitutional in nature, could at all be anything but the interception of legal development and political growth. Moreover, the disconnect between idiosyncratic geopolitical rules of law and other strictures involved with normative standing is susceptible to meaningful interpretation irrespective of the independence movement of the Americas. If indeed it is correct that "phenomenology precedes epistemology," then Professor Guzmán Brito has opted for a more synthetic approach that altogether obviates descriptive phenomenological "story-telling" for the organization of sequential events through organizing "first principles." Professor Guzmán Brito's observation that the *Legislación Patria* or *Derecho Patria* was nourished by the liberal social economic ideas of the time, expressly and directly conflicts with his premise that the revolutionary independence movement of the Americas lacked social and economic content, in part, because the New World never experienced a feudalistic socio-economic regime. It is necessary and worth noting, however, that the colonial socio-economic configuration displayed all badges endemic to a feudal society. Were the *Legislación Patria* or *Derecho Patria* altogether to be dissociated from the independent movement of the Americas, it then would best be characterized as a child, but only an illegitimate child, of its time. To hold otherwise would be an anti-historical proposition.

Only by viewing the phenomenon of *Legislación Patria* as a sequentially fragmented event (i.e. one that is not part of the compulsory consequences derived from the revolutionary independence movement of the Americas) can both the independence movement and codification be reinvented to fit Professor Guzmán Brito's novel and unique paradigm.

31. *Id.*

VI. THE STATE OF THE LAW PRIOR TO CODIFICATION

With the rise and development of *Legislación Patria* or *Derecho Patria* the legal structure of the nascent New World sovereignties acquired the elements of a complex mosaic where old and new monarchies and liberal republics expressed a distinct juridic character never before experienced in so vast a domain and galvanized by so particular a colonization effort. In this amalgamation of *ancien regime* and liberal republicanism, Professor Guzmán Brito asserts two salient propositions. First, the *Legislación Patria* did not substitute or otherwise supplant the colonial legislation preceding it. Second, the laws enacted during the colonial reign assumed a non-vibrant “petrified” character reflecting an existence without the vitality of historical relevance or context.³² In furtherance of these propositions, Professor Guzmán Brito finds analytical support in a number of legislative decrees that deserve heightened scrutiny. The foundational document of (Gran) Colombia enacted in the *Villa del Rosario de Cútuco* on October 6, 1821 reads:

It is hereby declared that those laws that until now have governed are not to be displaced unless they directly or indirectly encroach on or contradict this Constitution or the laws enacted by Congress.³³

In this very same spirit, legislation dated May 13, 1825, by the Congress of (Gran) Colombia, in Art. I provides:

The order or hierarchy with which laws are to be implemented and followed in all tribunals and courts of the Republic, irrespective of whether these tribunals are civil, ecclesiastics or military as well as in all civil law and criminal law matters, is the following: First, the decrees or success of enactments issued by the legislative branch; Second, the pragmatic decrees, orders, and ordinances that the Spanish government sanctioned until March 18, 1808, which were in effect and under the auspices of the Spanish government itself through the entire territory comprising the republic; Third, the laws of recompilation of the new world [“Indias”]; Fourth, the laws embodied in the *Nueva Recopilación de Castilla*; and Fifth, those of the *las Siete Partidas*.³⁴

Professor Guzmán Brito teaches that “these decrees later

32. *Id.* at 60.

33. *Id.* at 61.

34. *Id.* at 61.

were embodied as Ecuadorian laws enacted on November 16, 1831 and on August 22, 1835.³⁵ He also stresses that they inspired and were influential on the laws of Nueva Granada and Colombia in 1857, 1864, and 1872.³⁶

The provisional regulation provided for in art. II of the Mexican Empire of 1822 plainly decreed that “[n]onetheless, the laws and decrees previously promulgated in the Empire’s territory until February 24, 1821 shall remain in full force and effect so long as they do not conflict with current regulations, laws, orders or decrees issued as a result of our independence.”³⁷

The provisional regulation in Art. 2 of the Mexican Empire dated 1822 commands close review. The actual plain language highlighted in Professor Guzmán Brito’s work establishes a clear connection between the *Legislación Patria* and the independence movements. A less strained construction of this mandate demonstrates that the *Legislación Patria* or *Derecho Patria* came into being as a direct and proximate result of the independence movement. Their role was precisely that of constituting a framework that would institutionalize and provide expression for the new social and economic order resulting from independence. Thus, while Professor Guzmán Brito is remarkably precise in construing the mosaic of old and new as one where high relief is engrafted upon the new and a sharp lower relief on the old, it is challenging to follow his logic in reasoning that this legislation, while a product of the liberal republicanism of the time, has little or no relationship to any substance or principle underlying the independence movement of the Americas. The circle simply cannot be squared.³⁸

35. *Id.*

36. Citing FERNANDO MAYORGA GARCÍA, *PERVIVENCIA DEL DERECHO ESPAÑOL* 189 (1991).

37. *Id.* The original language states: *El art. 1 de la sección última del Estatuto provisorio dado por el Protector de la libertad del Perú de 1821, declaraba: “Quedan en su fuerza y vigor todas las leyes que regían en el Gobierno antiguo, siempre que no estén en oposición con la independencia del país, con las formas adoptadas por este estatuto y con los decretos o declaraciones que se expidan por el actual Gobierno.”*

38. Parallel legislation emphasizing the primacy of the *Legislación Patria* and the viability of the colonial legal framework that does not conflict or otherwise contradicts the new legislative scheme is found in the following constitutional and legislative article: (1) Article 97 of the Honduras Constitution of 1825 stated that “[t]he laws and dispositions that are now in place and that do not negate or conflict with the federal constitution or the state shall remain in full force and effect.” (2) Art. 164 of the Nicaraguan Constitution of 1826 reads that “[a]ll laws that until now have been in effect shall remain in full force and effect so long as they do not conflict with the constitution of the republic and or of the state, nor should they conflict with the laws

Having accounted for the pre-code schematic of legislation in the New World, Professor Guzmán Brito asserts that two precepts appeared as “relatively original” in the laws of the new American nations. The first of these tenets “can be explained by the contrast created by the former subjection to the crown of Spain and the creation of new sovereign states.” “This principle consisted in contending that the Castilian colonial legislative system should be observed [but for the legislative interpretation already referenced], even though enacted by a despotic and feudal government” that no longer existed in America. Thus, such legislation, despite remaining in force, had lost context with the new and current “*constitución de la libertad*.”³⁹ Professor Guzmán Brito describes the second tenet as “having been directed against the *Derecho Patria* promulgated by the new states in as much as their contingent qualities and idiosyncratic natures had increased the confusion that already pervaded the colonial legislative schematic.” These two principles are presented as recurring *lite motifs*. They are eloquently underscored in a message authored by Simón Bolívar, dated February 15, 1819, that was read to the *Congreso de Angostura*, which governed (Gran) Colombia:

Our laws are vanquished relics of old despotism, that this monstrous edifice should fall and we [as a nation] remove the ruins and create a temple dedicated to justice and under the auspice of the divine inspiration of justice, fashion a code of Venezuelan laws petitioning the establishment and the impaneling of judges, the creation of jurists and of a new code. I have asked Congress to engage in guaranteeing civil liberties for the correction of the most regrettable abuses that our judiciary now suffers from because of its tainted origin in Spanish legislation, which, like time, gathers from all ages and all men works generated by talent as well as the fruits of the unreasonable, decrees well reasoned as well as those that embodied outrage, the gath-

promulgated by the national legislatures of this state.” (3) Most significantly, Art. 281 of the laws of Bolivia dated Jan. 8, 1827 commanded that “the old Spanish legislation shall remain in effect so long as it does not contradict the Constitution and the laws promulgated by the *Government of Independence*.” Notably, as with Art. 2 *Del Reglamento Provisional del Imperio Mexicano* de 1822, this legislation (Art. 281) explicitly references the “Government of Independence”, and thus, further suggests that any construction placed on the legislation construing the colonial framework must be in accord with principles from the independence movement in the form of ordinances, decrees or laws.

39. *Id.* at 64. The exact word that Professor Guzmán Brito uses in the cited text is “desarmonía”, which here has been translated as “had lost context”, rather than the more literal cognate translation “disharmony”.

ering of great monuments of wisdom as well as those that oppressed the countries of Spain. It has served as a burden much more carefully crafted than the ire of heaven has caused on the suffering of this unfortunate empire."⁴⁰

The twin principles that Professor Guzmán Brito articulated conceal more than they reveal. To be sure, the texts on which he reposes the two "novel new world precepts" that inspired the codification movement, the most eloquent of which is exemplified by Simón Bolívar's note to Congress, address confusion or unreasonable idiosyncrasy arising either from the relationship between the *Leyes Patria* and the laws of Spain or incident to the very nature of the *Leyes Patria*. To the contrary, even the most surface analysis of this text reflects that codification was driven by the very forces of change and independence that characterized the independence movement of the Americas. That revolutionary effort witnessed the transformation from *subject* to *citizen* and from a *colony* to a *modern republic*. It is the very ambiguity and chaotic fabric of the laws of the *ancien regime* that galvanized the pleas for codification.

Standing in contrast with Professor Guzmán Brito's analysis, these papers speak for themselves. Illustrative is the note that the Minister of the Interior for Bolivia under the Andrés de Santa Cruz Administration, Mariano Enrique Calvo, served on the Supreme Court during the ceremony held for the naming of the commission of magistrates charged with drafting a civil code. It is the need for change and modernity accompanying the spirit of republican liberalism that is most outstanding in this text:

It is redundant the complete lack of order and confusion present in them [referring to the laws of Spain], the multiplicity of its codes, the struggles and inconsistencies among them, their duplicative nature, and antinomies arising from their poor draftsmanship and the very archaic language that they embodied, much of it is hardly in use. These salient vices in the legislation that we inherited raised from the virtually infinite contentions that impoverished citizens, disturbed the peace of all families, and

40. *Id.* The original text states: Así, Simón Bolívar, en un mensaje de 15 de febrero de 1819, leído ante el Congreso de Angostura, de que saldría erigida la (Gran) Colombia, decía, aunque algo retóricamente: "... nuestras leyes son funestas reliquias de todos los despotismos antiguos y modernos; que este edificio monstruoso se derribe, caiga y apartando hasta sus ruinas, elevemos un templo a la justicia; y bajo los auspicios de su santa inspiración, dictemos un código de leyes venezolanas." [Translation by the author.]

perennially upset the Bolivarian forum. It is these laws themselves that gave rise to injustices, both voluntarily executed and involuntarily applied by the magistrates. . . . It is from this very origin that the ever increasing number of mediocre men of letters spawned. Perhaps human life is incapable of understanding the perfect workings of the signs of legislation so long as that legislation remains so voluminous, archaic, and internally inconsistent, even among its very codes. Those who are not completely committed to its scholarships would be unable to decide their own rights and commercial obligations.⁴¹

The close connection between the independence movement of the Americas and codification is aptly captured by Juan Rodriguez de San Miguel's *Pandectas Hispano-Mexicanas* edited in 1839:

Our legislation after almost 30 years of revolution, not only a revolution of arms but also of customs, government, and state, resents and is damaged more than any other by the compilation, diversity, and uncertainty of laws. The monarchies of several centuries together with codes from Spanish Constitutions in addition to those recompiled and not compiled at all arising from the days of colonialism, following federal formatting as well as those of the structurally centralized government, some with parts that are in full force and effect while others have been changed and yet a third part has been edited in accordance with nomenclatures and authorities relating to corporate matters and causes that have altogether disappeared. . . . These attributes have been disbursed among the legislative, executive, and judicial branches. Giving rise to a fierce chaos they hamper the equitable administration of justice, delayed and confused the authorities' ability to adjudicate properly and impede learning. Because their amalgamation gives rise to a universe of predicates that far surpass the likelihood of any young student of the law's ability to master.⁴²

Patently absent from the very authority that Professor Guzmán Brito cites in support of his twin propositions is even the most passing of references to the terms "*legislación patria*" or "*derechos de patria*." Under no reasonable analysis of fact, logic or law can it be inferred from the contemporaneous literature evincing a thirst and need for codification that the *Derechos Patria* or

41. *Id.* at 65. [Translation by the Author.]

42. *Id.* at 65-66. [Translation by the Author.]

Legislación Patria, together with legislation enacted pursuant to colonial rule, can be served from the genesis of codification itself.

In addition, also painfully absent from Professor Guzmán Brito's account are examples of inconsistencies arising between the *Derecho Patria* and colonial legislation that cannot be resolved by the simple interpretative methodology bestowing preemption status on the *Leyes Patrias*.

VII. IS THERE A DISCERNABLE SPIRIT OF CODIFICATION?

A fundamental tenet underlying Professor Guzmán Brito's thorough historical analysis is the principle that contemporary or modern codification penetrated the spirit of the nascent Latin American countries, or perhaps flourished after remaining dormant, once the process of independence had matured.⁴³ This focus is consonant with Professor Guzmán Brito's reliance on his chosen first principles and postulates,⁴⁴ separating and surgically segregating political independence from judicial, social, and economic reform. The very evidence upon which the theory purports to find foundation is shaded and profoundly qualified by the author. The want of a vision that encompasses simultaneous sequential analysis is most strained even in the attempt to articulate this novel construction. Specifically, Professor Guzmán Brito first must classify actual codification events in Latin America affecting its greatest land masses and most material political domains as mere "exceptions" to a more "general" rule. These "exceptions" cry for closer scrutiny.

At the outset, it is observed that as early as 1811 the Venezuelan Constitutional Congress agreed to create a commission charged with drafting a *civil* and *criminal* code. Moreover, Vene-

43. *Id.* at 76. The original states: "Pero la idea moderna de la codificación penetró en los espíritus, o quizá afloró de ahí, en donde yacía pasiva, por lo general una vez consumado el proceso de la Independencia."

44. The five first principles and postulates around which Professor Guzmán Brito's "codification" of *The History of Iberoamerica Codification of Civil Law* is organized can be synthesized into five precepts: (i) The postulate that political and judicial development in the new world occurred simultaneously but without intercepting, (ii) That constitutional doctrinal development in the new world is separate and distinct from legal permutations or the institutionalization of revolutionary tenets, (iii) The postulate that the independence and revolutionary movement of the Americas was exclusively political in nature and, therefore, bereft of any normative principle premised on social and economic reform, and (iv) The understanding that this spirit and ideal of modern codification in Latin America did not form part of the independence or revolutionary consciousness until *after* independence had been secured, and (v) The postulate that *derechos patria* are separate and distinct from the independence movement of the Americas.

zuela's Federal Charter of 1811 also contemplated the drafting of these various codes.⁴⁵ In the territory that ultimately became the Republic of Argentina, an anonymously drafted constitution for what was then known as the "*Provincias del Río de La Plata*" of 1811 reference the need to draft a "brief and simple code."⁴⁶ In this same vein, in what was to become the Republic of Colombia, the Constitution of 1811 embodied the command in its articles that the legislative body was "to reform the code."⁴⁷ Indeed, as Professor Guzmán Brito himself asserts, the *Acta de Federación de Las Provincias Unidas de la Nueva Granada*, dated November 27, 1811, provided that the *Federación* was to engage in the "formation of criminal and civil codes."⁴⁸

Despite the characterization of these uncontroverted pre-independence aspirations to reform and draft new civil and criminal codes, Professor Guzmán Brito's text elects to temper further the historical import of these pre-independence mandates for codifications so as to conform with his organizing principles in codifying the history of codification in Iberoamerica. He reduces them to the status of *exceptions* that confirm the rule.⁴⁹ It is not necessary to engage in a sustained scholarly analysis to observe that the "exceptions" and intentional disavowance of the regions within the jurisdiction of the Constitution of Cádiz are emblematic and not aberrant phenomena. They belie the general rule.

The examples upon which Professor Guzmán Brito premises "the general rule," likewise, undermine the very proposition. The chronology of events is eloquent enough: (i) the Mexican Independence in 1821 only preceded the decree prescribing civil, penal, commercial, mining, agricultural, and fine arts codification by less than one year;⁵⁰ (ii) it was in July of 1822, hardly four years after Chile's independence, that Bernardo O'Higgins, Chief Justice of

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 27.

49. *Id.* at 77. Quite significantly, in ascribing "exception" status, Professor Guzmán Brito finds no recourse but to state that "these cases [examples], assuming that we also exclude those areas of the Spanish empire where the Constitution of Cádiz were in full force and effect, as they embodied articles that also touched upon codification, then certainly the idea of codification must be understood as something of a phenomenon foreign to the independence process. These examples are but *exceptional moments of foresight* that were not emulated. The general rule, thus, was that only at the end of the independence process was attention focused on Codification." [Translation by the Author.]

50. *Id.*

Chile's Supreme Court, proposed a bill to the Constitutional Congress suggesting substitution of the laws inherited from Spain by implementing five Napoleonic Codes;⁵¹ (iii) (Gran) Colombia was independent in 1819 and within three years General Francisco de Paula Santander, in January 1822, decreed the formation of a Commission charged with the codification of laws for the new republic;⁵² and (iv) Perú's Constitution of 1823, scarcely two years after independence, prescribed the drafting of civil, criminal, military, and commercial codes.⁵³

The chronology supports only a restrictive construction and the most literal interpretation of the proposition that codification and the independence movement are *sequential* and not *contemporaneous*. Even these "examples" point to simultaneity. When viewed in a historical context, codification within one to three years of a nation's birth is illustrative of an independence movement that contemplated judicial, and thus social, reform as part of its very reason for being.

A mandate for codification issued scarcely eighteen months after a nation's independence date scarcely provides a factual basis from which to conclude that codification is little more than an extension of the independence process itself rather than a first principle underlying independence, i.e. social and economic reform and a new relationship between citizens and the state as well as among citizens themselves.

VIII. CONCLUSION

Professor Guzmán Brito's HISTORY OF THE CODIFICATION OF CIVIL LAW IN IBEROAMERICA commands reading and re-reading. It would not be an overstatement to assert that it is the most complete single work in its field in the last twenty years. Its author's laudable effort and achievement seeks more than just engaging in a chronological recitation of the codification process. If a code, in contrast with the compilation of legislation and juridic precepts, must be bound by a ubiquitous judicial philosophy, thematic coherence, subscription to common first principles, and uniformity of terms, so too is Professor Guzmán Brito's work more than a litany of codification dates together with an attendant commentary.

51. *Id.*

52. *Id.*

53. *Id.* Professor Guzmán Brito also cites to the codification process in El Salvador, Bolivia, Honduras, Costa Rica, and Uruguay as further examples of his postulate.

Instead, he relies on five fundamental principles around which his erudite analysis of the codification process is organized:

- i. That the independence movement of the Americas was exclusively political in nature and devoid of any content purporting to affect social and economic reform;
- ii. The postulate that political and judicial development in the Americas' independence movement were parallel and did not intercept;
- iii. The tenet that constitutional development is separate from legal permutations;
- iv. That *Derechos Patria* are unrelated to the independence movement of the Americas; and
- v. The proposition that the spirit and ideal of modern codification did not form part of the independence movement of the Americas until *after* independence was achieved.

The whole of Professor Guzmán Brito's account would be profoundly altered were a single postulate altered, much like an invisible geometry was created when Euclid's Fifth Postulate was challenged. The beautiful edifice that Professor Guzmán Brito has shaped and molded through his analysis of the unique independence movement of the Americas, representative of a historical science that places synthesis before analysis and treats a grounding in propositions as more comprehensive than a phenomenology that experiences this brave consciousness, only enhances the status of the work as a lapidary effort in the field.

These postulates, irrespective of the critical light under which they have been examined in this review, are the thoughtful reflections of a serious scholar and the fruits of a profound understanding of the independence of the Americas. They may well be correct and, hence, so too would Professor Guzmán Brito's work comport with the first principles that nourished revolutionary development and the birth of nationhood in an entire hemisphere. I do not know.

What is clear is the Hegelian observation that "the owl of Minerva flies at dusk." Certainly, it is only *after* the facts have settled and found repose in fragmented time and space that wisdom is at all possible. The question remains: In our seductive, enchanting, and heart-wrenching Latin America, has dusk yet arrived?