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## **The Definition of Property in Andrés Bello's Code and the Limits of Use against the Rights of Others**

*Carlos Felipe AMUNATEGUI PERELLO\**

### **Abstract**

Chilean Civil Code is the most influential codification of South America. Most civil codes on the subcontinent are dependent on it. This work focus on the sources of Chilean's Civil Code definition of property, specially on its limits. It traces its origin back to the Siete Partidas and the Glossa and proposes some legal bases for the application of the Roman Theory of Immssio in South America.

### **I. Introduction**

Andrés Bello's Code is the fundamental work to understand Latin-American

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Professor Tomoyoshi Hayashi, Graduate School of Law and Politics, Osaka University, introduces the author as follows:

Professor Dr. Carlos Felipe Amunátegui Perelló is a very productive Roman law scholar in the Republic of Chile and his vast academic concern covers the “*immissio* theory and the property” as well as the Roman family law, Roman legal education, theories of legal reasoning etc. He and I have been in close contact since we met on September 23, 2008 for the first time as participants of the 62<sup>nd</sup> SIHDA congress at Fribourg, Switzerland and he showed an interest in my article “Roman Law Studies and the Civil Code in Modern Japan – System, Ownership, and Co-ownership,” *Osaka University Law Review*, No. 55, Feb. 2008. He found parallel phenomena and differences between the limit of ownership in the Chilean Civil Code and the Japanese counterpart of it. He hoped to develop comparative studies as to this theme. This English version of his article originally in Spanish translated by himself forms a part of our collaboration. The Spanish version is as follows: Amunátegui Perelló, Carlos, “Consideraciones en torno a nuestra definición de Propiedad, El Uso contra Derecho Ajeno,” *Estudios en Homenaje a Lorenzo de la Maza*, Santiago, 2009.

Though the interest of Japanese scholars in South American legal systems is great, the number of specialists in this field is not as great and the accumulation of research either. As to the Chilean Civil Code and Andres Bello, I can only mention the precious works of Professor Kazuhiko Nakagawa, among which is “The Chilean Civil Code of 1855 and Andres Bello,” *Seijo Hogaku*, No. 45-47, 1993-1994, which was written in Japanese and treats the theme generally. Professor Amunátegui's article focuses on the minute analysis of the historical origins of the limit of property in Chilean Civil Code and will give further academic suggestion to English reading people both in Japan and abroad.

Civil Law. Although it is not the first Codification that ruled a nation that once belonged to the old Spanish Empire, it is the most influential one.

It was written between 1840 and 1855 by Andrés Bello, a Venezuelan intellectual that had passed to the service of the Republic of Chile.<sup>1)</sup>

Approved by Chilean Congress in 1856 it came into rule 1857. Its wise combination of Roman Law, traditional Spanish Law and French Law was so successful that it was rapidly adopted entirely by many other American nations. This is the case of El Salvador (1859), Ecuador (1860), Colombia (1887), Venezuela (only briefly in 1860), Nicaragua (from 1867 to 1904) and Panama (since it became an independent state from Colombia). It was also fundamental for the codification process on Argentina, Paraguay and Brazil, whose Civil Law systems are deeply influenced by Bello's Code.<sup>2)</sup> Today it is the third oldest civil code still ruling, and it is safe to call it one of the most influential ones. To understand Bello's Code, in a way, permits us to understand Latin-American Civil Law.

This work will study Bello's definition of property, its origins and limits. Its results can be extended not only to countries that actually use Bello's Code, but also to the whole of Latin-American doctrine, which is deeply influenced by Bello's work.

It is common to point that our Civil Code, when defining property, would be simply copying the French Civil Code.<sup>3)</sup> The well known Art. 544 of the French Civil Code stands:

*Property is the right to enjoy and dispose of things in the most absolute way, provided that the use made is prohibited neither by laws nor by regulations.*<sup>4)</sup>

In fact, the most common thing to do among XIX century codifications when defining property was simply to transliterate the French concept.<sup>5)</sup> Nevertheless, Bello's Code, although followed in general terms the French model, presents several differences on the matter:

Art. 582: Ownership (which is also called property) is the real right on a corporal thing to enjoy and dispose of it arbitrarily, provided it is not against the Law or against the rights of others.<sup>6)</sup>

Many aspects of the definition call our attention, like the fact that it expressly calls property a real right, or that its object is limited to corporal things.

Nevertheless, for the scope of this investigation, we are only interested in stressing the replacement of the innocuous prohibition of use against regulations, for the more significant interdiction to use against the rights of others.

This originality of Bello, which corresponds to a long historical tradition of limited use of rights, constitutes an important dogmatic reference for our law system.

It comes from the neighborhood relations, and its original scope was to regulate the use of goods in a way that did not cause from that use, damage to other's property or a limitation to the exercise of acts of possession on their real estate.

From this double scope, to protect possession and to avoid damages, two ways of protecting an owner of a thing from the negative externalities of the acts of other owners in their properties have been born. On one hand, we have the theory of Abuse of Right, which belongs to the Law of Torts, and on the other hand we have the Theory of Immissio, a strictly possessorial theory that protects the possession of a thing from acts of others in their own properties that have negative projections on it. This includes, both in Modern and Ancient Law, protection against pollution and environmental threats.

This investigation aims to study the historical origins of this theory and make a contribution to limitation of property on private interest.

## II. Historic context of the prohibition

It's astonishing that for XIX's century tradition, the definition of the French Code had a pretended genuine roman content.<sup>7)</sup>

As an example, we can quote García Goyena,<sup>8)</sup> the author of the Spanish Project of Civil Code in 1851. When he comments Art. 391 (property definition) in his *Concordancias*, he seems to really believe that it is taken directly from Rome. He even quotes a pretended roman definition, falsely attributed to *Codex* 4.35.21.<sup>9)</sup>

The traditional definition of property is really the work of *ius commune*. In fact, it was Bartolus<sup>10)</sup> who made it up from three independent fragments of the *Corpus Iuris*. The first one is the quoted fragment from the *Codex*. There is reproduced a responsum from Constantinus where it is stated that "anyone is moderator and arbiter of his own things."

A special interest was generated around the word *arbiter*, which was interpreted as freedom.<sup>11)</sup> This puts the *responsum* in relation with the second relevant fragment, the definition of freedom of the Digest:

"D. 1.5.4.1<sup>12)</sup> Florentinus, book nine of the institutions. Freedom is one's natural

faculty to do what one wishes, provided it is not prohibited by force or by Law”

In other words, the limitation of property is originally taken from the limits of freedom.

Nevertheless, freedom has a factual dimension together with a juridical one. One is free not only when Law provides that faculty, but also, to be effectively free in real world (and not only in ideal one) the exercise of those faculties must be possible.

To put in simple terms, a man is deprived of his freedom to move either if he is condemned by a Court of Justice or if he is kidnapped. Freedom, without the factual conditions to exercise it, is a joke, which can even turn cruel if, for instance, Law establishes freedom of education and the State does not provide with schools where to get it. In this perspective, the commentary of Florentinus gets into full perspective.

If liberty, as a factual and juridical concept allows to do what one wishes, but always with the double limit of facts (*vi*, the world of real beings) and Law (*iure*, the world of ideal beings), property, as a solely juridical and never factual concept, can have only one limit, Law.

The factual dimension of property is possession, the material having of the thing. This is neatly separated in Roman Civil Law tradition, from property.

If someone loses the factual dimension of property, that is to say, the material having of it, he does not lose property as a right. On the contrary, the most evident juridical manifestation of property is the action to recover the possession of it, *reivindicatio*. That is why our tradition will take from Florentinus' text only the part that specifically points to limitation by Law, which will be taken as equivalent to *Lex*.

The faculties of property, specially the *abuti* or faculty to destroy, where taken from possession. It was considered specifically a fragment of Ulpianus<sup>13)</sup> regarding the damages caused by the bona fides possessor.

The final result was the medieval definition of property that says: “ownership is the right in a corporal thing to dispose of it, except if Law prohibits it.”<sup>14)</sup>

This definition, which is the base of all modern definitions of property, will be completed by Pothier's juridical thought, which will take us one step closer to Bello's definition. The French jurist expressed his own idea of property<sup>15)</sup> as “The right to dispose freely of a thing, without undermining the right of others or acting against the laws. *Jus de re libere disponendi* or *jus utendi et abutendi*.”<sup>16)</sup>

According to Pothier, property has a double limit, on one hand there is the law,

following the main ideas of BARTOLUS, and on the other hand there is the right of others. Pothier connects this second limitation of property by the rights of others with neighborhood relations, which he treats as a *cuasicontractus*. When he explains this limitation of property he states:

“We have defined the right of property, the right to freely dispose of a thing; and adding without undermining the right of others. [We understand here] the right of owners and possessors of real estates nearby”<sup>17)</sup>

This last idea was not received by French Code, and Art. 544 only shows a public interest limitation of property, because it separated itself from Pothier’s ideas on neighborhood relations. Nevertheless, Bello kept the reference to rights of others. French Code preferred Domat’s notions on the matter, and included neighborhood relations in legal servitudes.<sup>18)</sup>

The rather poor limitation that referred simply to laws of the Napoleonic text comes from Bartolus’ definition and goes back to Florentinus’ freedom definition and the limits laws can impose on the use of things. By regulations, the definition points to town hall acts, that, at least theoretically, should regulate relations between neighbors in the absence of legal servitudes.<sup>19)</sup>

Maybe, if Bello had not been under other influences, the text of Art. 582 would have been a copy of Art. 544 of the Civil French Code, as most of XIX century definitions of property are. Anyway, Bello’s historical sensibility opened the Code to other juridical sources from our Law tradition, like the *Siete Partidas*.

The *Siete Partidas* is a Law Codification made for the Kingdom of Castilla by the king Alfonso X the Wise in the XIII century. Its name means “the seven parts”, because the work is divided into seven books or “*partidas*”, in ancient Spanish.

It contains mainly the Spanish reception of *ius commune*. Its objective was to avoid the direct application of the *ius commune*, which was too closely linked to the Germanic Empire, reaffirming the independence of Spanish kings from the emperors. In this way, the superior quality of the *ius commune* would be received in Spain, but not because of the authority of the Emperor, but for the royal promulgation of a complete Law Code that contained it.

The work is written in archaic Spanish, which is remarkable because most of juridical culture in the Middle Ages was made in Latin, and the first works in common language only appeared in the late XVIII century. In fact, this was so unusual that in the XVI century, when a proper Gloss was composed for it, this Gloss was made in Latin.

With the discovery of America, at territories under Spanish authority the Law of Castilla was applied, in absence of a law specially made for the colonies. In this way, the *Siete Partidas* were in use in Spanish Colonies right until their independence at the beginning of the XIX century.

This Law text contemplates two definitions of property. One is established on P.7, T. 33, L. 10:

*We call property the ownership [señorío] of a thing, while possession is to detent it [tenencia]*<sup>20)</sup>

This definition is really a reception of traditional Law of Castilla, where the term *señorío* is used as equivalent to property, while by *tenencia* it is meant possession.<sup>21)</sup> This is not really a definition, but simply an explanation note added to clarify the wording used on *usucapio*.

The second definition has more importance and it is a clear reception of the *ius commune*. We find it in P 3, t. XXVIII, L. 1:

*Ownership is the power that anyone has to do in a thing or of a thing whatever he pleases, according to God and Law*<sup>22)</sup>

In this definition the influence of Florentinus' freedom definition (D. 1.5.4.1) is evident. In fact, the parallel between them is clear, being both freedom and property faculties, powers, to do what one wishes, but with limits. The factual limit of Florentinus' definition (*vis*) has been replaced by a divine limit (God).

Gregorio López's<sup>23)</sup> Gloss to the *Partidas*, offers also two definitions. The first one is a translation into Latin of the definition of the *Partidas*,<sup>24)</sup> but not quite literal. The second one is Bartolus' definition, which is later than the *Partidas*.

The definition of the *Partidas* is specially interesting regarding the limits that imposes on property, God and Law, that is to say, Law of God (or natural Law) and legal Law (or positive Law in our juridical language), as Gregorio López interprets it.

A bit further, on the same Partida III, the legislator of the *Partidas* will develop the idea of limited ownership expressing:

P.3, t. XXXII, L. 13. *According to what ancient [meaning roman] jurisprudents said, anyone has the power to do whatever he wants in his own things. But he must do it in a way that does not harm nor damage others.*<sup>25)</sup>

The disposition is interpreted by the Gloss as a limit on the use of thing. Anyone can act on its own things, but these acts must not interfere with the use and enjoyment that others do with their property. If one does use his property in a way that interferes with others, then he is affecting the possession of other people's goods, and therefore, the *interdicta possessoria* can take place.<sup>26)</sup>

This limited conception of ownership will be finally received by Bello's Civil Code.

We find the definition of property on 1853's first complete project of Civil Code in Art. 686<sup>27)</sup>:

*Ownership (which is also called property) is the real right on a corporal thing to enjoy and dispose of it at our will (arbitrio), provided it is not against the Law or against the rights of others.*<sup>28)</sup>

The only difference with the final wording of Bello's Code of 1857 is that Art. 582 replaces "at our will" (*a nuestro arbitrio*) for arbitrarily (*arbitrariamente*).<sup>29)</sup> Although "at our will" was more precise, and was more concordant with the *arbiter* of Justinian's *Codex*, it seemed rather inelegant for the commission the use of the first person on a definition.<sup>30)</sup>

After analyzing the textual story of Bello's definition of property, we can conclude that he preferred Pothier to the definition of the French Code.<sup>31)</sup> His conception of property as a limited right has a double origin. On one hand there is the Spanish Law tradition with the *Siete Partidas*. This tradition establishes that property, in general, can not be used in a way that can harm others. On the other hand, there is also the neighborhood relations and limits in the use of real estate that come from Pothier.

### III. Conclusions

In Latin-American Law, there has been more attention paid to limits of property in public interest rather than private. Maybe, our recent history of agrarian reform and the limited extend of industrial activity can explain the phenomena.

The prohibition to use property against the right of others has passed a little unattended. One can find its origins in neighborhood relations and it tries to regulate the exercise of property on tort Law and on property Law, specifically on possession.

This limited use of property can be quite useful to introduce Theory of Immissio in our Law, which has proved useful, not only to preserve property, but even to



preserve the environment in European Law.

Bello's Code, with its rich inheritance of Roman, French and traditional Spanish Law can easily evolve and adapt to cover new situations from the legal traditions that constitute its bases. This Code, and the Law tradition that represents, has yet to be explored and developed.

The limitation of property for private interest leads us to Roman Law texts where it was taken from. In fact, both Pothier and the Siete Partidas quote expressly D.8.5.8.5,<sup>32)</sup> the well known case of the cheese factory.<sup>33)</sup> In it, a certain Cerelio Vitalis installed a cheese factory on the lower floor of a building: He expelled thick smoke to the upper floors, and therefore, polluted them. The answer of Aristo, the jurist, was that Cerelio Vitalis was affecting the possession of other owners of their properties: *in suo enim alii hactenus facere licet, quatenus nihil in alienum immittat*.

Thick smoke causes that one can not exercise some of the natural possession acts on a thing, and this was considered not only a case of tort, but a deprivation of possession. Consequentially, the jurist Aristo recommends the use of an *interdictum* to protect possession. This same case was used by Ihering and Spangenberg<sup>34)</sup> to create Theory of *Immissio*, but this is a problem yet to be discussed in another specific work.

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## Notes

- 1) Andrés Bello is one of the most fascinating figures of the XIX century. He was borne on Caracas in 1781. Although he did not belong to an aristocratic family, he got a privileged education and soon made himself renowned as a poet. He was Simón Bolívar's mentor and traveled with him on 1810 to London on an official mission to get England's support for the independence of Venezuela. He remained in England working at the British Museum on Bentham's papers until he entered into the service of the Republic of Chile. He arrived at Chile on 1829 and lived in Santiago until his death on 1865. He became

senator, directed the official newspaper of the Republic, "El Araucano", and founded Chile's first national university, the Universidad de Chile. Chilean Congress gave him Chilean nationality and he is still recognized as the most important cultural figure of the first half of the XIX century.

Although he is the most important jurist of the XIX century in the whole of Latin-American, he never formally studied Law.

- 2) To understand the whole process, see Guzmán Brito, 2005.
- 3) See: Pescio, 1978, p. 274; Lira, 1944, p. 166; Vodanovic, 1940, p. 230, Alessandri, 1937, p. 25, among others.
- 4) 544: *La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.*
- 5) See Art. 439 of Sardinia's Civil Code of 1837; Art. 625 of the Dutch Civil Code of 1838; Art. 240 of the Civil Code of Luzerne of 1839; Art. 422 of Bolivia's Civil Code of 1843; Art. 464 of Fribourg's Civil Code of 1850; Art. 591 of García Goyena's Project of Civil Code for Spain of 1851; Art. 170 of the Danish Civil Code of 1850; Art. 380 of Valais' Civil Code of 1853; Art. 392 of Neuchatel's Civil Code of 1854 and Art. 436 of the Italian Civil Code of 1865.

We find a small variation on Bern's Civil Code, on its book on Things, published on 1827.

In its Art. 377 states:

*La propriété est le droit de disposer arbitrairement et exclusivement de la substance et des fruits d'une chose en se conformant aux lois*

- 6) *El dominio (que se llama también propiedad) es el derecho real en una cosa corporal, para gozar y disponer de ella arbitrariamente; no siendo contra la ley o contra derecho ajeno.*
- 7) See Montes, 1980, p. 62.
- 8) See García Goyena, 1852, pp. 351-352.
- 9) The text offered in the Concordancias is:

*Dominium est jus utendi et abutendi re sua, quatenus juris ratio patitur. Unusquisque enimest rerum suarum moderator et arbiter, nisi lex arbitrium tollat*

Nevertheless, the text that truly exposes the fragment is:

*Imperator Constantinus . In re mandata non pecuniae solum, cuius est certissimum mandati iudicium, verum etiam existimationis periculum est. Nam suae quidem quisque rei moderator atque arbiter non omnia negotia, sed pleraque ex proprio animo facit: aliena vero negotia exacto officio geruntur nec quicquam in eorum administratione neglectum ac declinatum culpa vacuum est \* CONST. A. VOLUSIANO PP. \* <A 313 - 315? >*

- 10) See Piccinelli, 1980, p. 42.
- 11) In this sense, Azo indicates that the word *arbiter* means that the owner "*facit quidquid vult*".
- 12) *Florentinus libro nono institutionum. Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid ui aut iure prohibetur.*
- 13) *D. 5.3.25.11 Ulpianus libro quinto decimo ad edictum. Consuluit senatus bonae fidei possessoribus, ne in totum damno adfici<a>ntur, sed in id dumtaxat teneantur, in quo locupletiores facti sunt. quemcumque igitur sumptum fecerint ex hereditate, si quid dilapidauerunt perdiderunt, dum re sua se abuti putant, non praestabunt. nec si donauerint, locupletiores facti uidebuntur, quamuis ad remunerandum sibi aliquem naturaliter obligauerunt.*
- 14) *dominium est ius de re coporali perfecte disponendi, nisi lex prohibeatur.*
- 15) On the importance of Pothier in constructing an abstract notion of ownership see Grossi,

- 1992, p. 385.
- 16) “*le droit de disposer à son gré d’une chose sans donner néanmoins atteinte au droit d’autrui, ni aux lois; ius de re libere disponendi, ou ius utendi et abutendi*” Pothier, 1827, p.114.
  - 17) “*Nous avons défini le droit de propriété, le droit de disposer à son gré d’une chose, et nous avons ajouté, sans donner néanmoins atteinte au droit d’autrui... cela s’entend aussi du droit des propriétaires et possesseurs de héritages voisins*”, Pothier, 1827, p. 118.
  - 18) Domat, 1835, pp. 188. The whole process is well explained in Egea, 1994, p. 93 n. 144.
  - 19) Maybe this explains that Chilean Civil Law prof. Alessandri, in a rapt of juridical insensibility, qualifies as improper of a Civil Code Art. 856 from Bello’s Code. This article takes the rich roman casuistic that later on was taken by Ihering to construct the Theory of Immsio. See Alessandri, 1937, pp. 235.
  - 20) *Otrosi dezimos que propiedad es el señorio de la cosa: e posesion es la tenecia della*. López, 1555.
  - 21) See, in this same sense, the Fuero Viejo de Castilla where this concepts are used, specially in Book IV, Title IV. Los Códigos Españoles Concordados y Anotados (Madrid, 1847, Imprenta de la Publicidad), t. I, p. 288.
  - 22) *Señorio es poder que ome ha en su cosa de fazer della, e enella lo que quisiere: segun Dios e segund fuero*. López, 1555.
  - 23) Gregorio López’s edition of 1555, made in Salamanca, reached a semiofficial character and was of general use. This edition was the one that Bello used for his Code.
  - 24) *Dominium est potestas faciendi quod quis vult de suis rebus ut ius permittit*
  - 25) *Ca segund que dixeron los sabios antiguos maguer el ome aya poder de fazer en lo suyo lo que quisiere. Pero deue lo fazer de manera que non faga daño, nin tuerto a otro*. López, 1555.
  - 26) “*Taliter debet quis in re sua operari: ne alteri damnum aliquod inde continualias opus illud per iudicem destruetur*”
  - 27) Bello, 1888, t. XII.
  - 28) “*El dominio (que se llama también propiedad) es el derecho real en una cosa corporal, para gozar i disponer de ella a nuestro arbitrio, no siendo contra lei o contra derecho ajeno.*”
  - 29) This will only happen in the last face of the codification process, specifically in the so called “Proyecto Inédito” or Inedited Project. See Bello, 1952.
  - 30) See Claro Solar, 1930, p. 334, n.20.
  - 31) Against this, see Pescio, 1978, p. 274; Lira, 1944, p. 166; Vodanovic, 1940, p. 230, Alessandri, 1937, p. 25, among others.
  - 32) *D. 8,5,8,5 [Ulpianus libro septimo decimo ad edictum] Aristo Cerellio Uitali respondit non putare se ex taberna casiaria fumum in superiora aedificia iure immitti posse, nisi ei rei servitutem talem admittit. idemque ait: et ex superiore in inferiora non aquam, non quid aliud immitti licet: in suo enim alii hactenus facere licet, quatenus nihil in alienum immittat, fumi autem sicut aquae esse immissionem: posse igitur superiorem cum inferiore agere ius illi non esse id ita facere. Alfenus denique scribere ait posse ita agi ius illi non esse in suo lapidem caedere, ut in meum fundum fragmenta cadant. dicit igitur Aristo eum, qui tabernam casiariam a Minturnensibus conduxit, a superiore prohiberi posse fumum immittere, sed Minturnenses ei ex conducto teneri: agique sic posse dicit cum eo, qui eum fumum immittat, ius ei non esse fumum immittere. ergo per contrarium agi poterit ius esse fumum immittere: quod et ipsum uidetur Aristo probare. sed et interdictum uti possidetis*

*poterit locum habere, si quis prohibeatur, qualiter uelit, suo uti.*

- 33) For a complete analysis of the fragment see: Arangio Ruiz, 1908, pp. 467; De Martino, 1942, pp. 137.
- 34) Spangenberg, 1826, pp. 265 and Ihering, 1862.