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The Peruvian Civil Code, Property and Plunder. Time For a Latin American Alliance to Resist the Neo Liberal Order.

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The Peruvian Civil Code, Property and Plunder. Time For a Latin American Alliance to Resist the Neo Liberal Order.*

Ugo Mattei

Abstract

In Latin America as elsewhere, legal institutions imported from the capitalistic center have legitimized and covered up a process of economic and political domination. Traditional civilian legal culture first, and U.S. dominated rhetoric of the rule of law later, have provided a degree of intellectual legitimization. By looking at global economic transformations in the lifetime of the Code, this paper attempts to show that the real issues crucial to property law in Peru: resource distribution, social inequality and ethnic segregation, as elsewhere in Latin America, have not been tackled and truly discussed by legal scholars. Legal scholars have become prisoners of the myth of political neutrality first by civilian private law and later by the technocratic ideology of American inspired law and economics in development. They should rather unite to develop a new social constitution of Property, perhaps in the form of a Pan Latin American Code, granting to the historically exploited a right to International debt default. This paper was presented at the Catholic University of Lima for the 20 year Anniversary of the Peruvian Civil Code at an International Conference held in Lima, Peru on November 12, 2003.

KEYWORDS: Latin America Law, Peruvian Law, Peruvian Civil Code, Codification

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I. It has become fashionable in recent times amongst legal scholars to celebrate the birthday of civil codes. The most ancient and prestigious code, the Napoleonic Code, father of both the previous Peruvian Codes - that of 1852 and that of 1936 -, received birthday parties for its 200 years in France, Belgium, Italy, the United States, Scotland (just to mention a few happenings to which I have been invited). The sixty years of the Italian Civil Code of 1942, which is considered the model for today's "birthday boy" the Peruvian Civil Code (there is no dispute on the gender of civil codes comparable to that on the gender of the common law!), has been celebrated in Turin and Rome. This impressive conference at the Catholic University of Lima, for which we are grateful to Lysser Leon and Gaston Fernandez for organizing, is now following in this tradition of birthday celebration for its own Peruvian Civil Code, which came into effect on November 14 1984¹. I am honored to be invited and to offer, two days in advance of the birthday of this Code, this paper as a symbolic present.

The Code in the civil law tradition is the most significant expression of the legal culture of a given country. The preparation of this Code involved Peruvian jurists for almost as long as its life-span (the Drafting Committee was set up by Decree No. 95 of March 1, 1965),² today I present my remarks in the spirit of

¹ The Peruvian Civil Code of 1984 came into force on 14 November 1984 and is organized as follows:

Preliminary Title (dealing with publication, effects and application of laws in general) (Articles I-IX)

Book I. Of Persons (Articles 1-139)

Book II. Legal Transaction (Acto Juridico) (Articles 140-232)

Book III. Family Law (Articles 233-659)

Book IV. Law of Successions (Articles 660-880)

Book V. Real Rights (Articles 881-1131)

Book VI. Law of Obligations (Articles 1132-1350)

Book VII. Sources of Obligations (Articles 1351-1988)

Book VIII. Prescription and Peremption (Articles 1989-2007)

Book IX. Public Registers (Articles 2008-2045)

Book X. Private International Law (Articles 2046-2111)

Final Title. (Provisions dealing with the transition period) (Articles 2111-2122)

² Through a painstaking process, the Committee worked on a Draft Civil Code which underwent several changes during the long drafting period. [The draft is reproduced in 77 *Revista Peruana de Derecho Internacional*, (December 1980)]. An Advisory Commission was created under Law. 23.403 of May 27, 1982, in order to review the draft submitted by the Drafting Committee. The Advisory Commission was chaired by Felipe Osterling Parodi and composed of three Senators and three Congressmen appointed by their respective Houses as well as three legal scholars nominated by the Ministry of Justice. According to Article 2 of the Law No. 23.756 the project submitted by the Advisory Commission abrogates and amends the former Peruvian Civil Code of 1936 and ancillary laws. Finally, the new Civil Code was enacted by Legislative-Decree No. 295 of July 24, 1984, signed by President Belaunde Terry." *Peru: Private International Law in New Civil Code of 1984*, 24 I.L.M. 997 (1985).

profound respect for the past and of sincere hope for the future of Peruvian and more generally Latin American legal scholarship. I hope to contribute to this conference by putting the issue of codified property law in global perspective, giving due account to the spirit, the economics, the context, and the ideology of this branch of law. It is property law more than any other area of law which constitutes the institutional foundation of market capitalism and is thus a critical battle ground in the fight for social justice and wealth redistribution.

My thesis is that civil codes matter much more for their symbolism than for their text, and in Peru, as in most other developing countries, formalism and textual legal cultures imported from Europe and development ideology imposed by U.S. dominated technocracy, have conspired to betray the social contents, mandates and symbols of the most recent generation of Codes. Civil Codes such as the Peruvian and most recently the Brazilian civil code, run the risk of being interpreted as neutral depositories of rules which protects the status quo, rather than as progressive documents aimed at the pursuit of social justice. In Latin America as elsewhere, legal institutions imported from the capitalistic center have legitimized and covered up a process of economic and political domination. Traditional civilian legal culture first, and U.S. dominated rhetoric of the rule of law later, have provided a degree of intellectual legitimization. By looking at global economic transformations in the lifetime of the Code, I will attempt to show that the real issues crucial to property law in Peru: resource distribution, social inequality and ethnic segregation, as elsewhere in Latin America, have not been tackled and truly discussed by legal scholars. Legal scholars have become prisoners of the myth of political neutrality first by civilian private law and later by the technocratic ideology of American inspired law and economics of development³.

I will argue in this paper that legal institutions produced at the center are a dangerous commodity to import in the periphery. They perpetuate a pattern of domination and exploitation that should be rejected. In evaluating the last twenty years of legal development within the framework of the 1984 Code, Peruvian legal culture should not forget that the challenge for Latin America in this moment in history is to work out its own institutional arrangements for the purpose of liberation from neo-colonial domination.

II. In the last days of 1977 the largest crowd ever seen in the streets of Lima carried the coffin of Juan Velasco Alvarado to the cemetery. His government was the last to attempt a thorough process of social and economic reform in the interest of the dispossessed multitudes. Alvarado's reforms

³ See R. Cooter-E. Buscaglia-J Ratliff, *Law and Economics Of Development*, 1994

attempted to utilize property law to break the strangling dialectic between latifundio and minifundio, which has been for five hundred years the fundamental institutional structure of the exploited economy of Latin America. General Alvarado, born in poverty in a remote village in northern Peru, understood that by serving the interest of the dispossessed through property law the general interest of the entire country would benefit. Following the 1968 revolt, the military government, which has been accredited for undertaking “the deepest and more far reaching attempt at change” in Peru “pushed genuine agrarian reform and opened the door to recovery of the natural resources usurped by foreign capital.”⁴ Not long before Alvarado’s death, the revolution met its death too; its creative process strangled by loans, blackmail and by the weakness of a paternalistic project lacking an organized popular base. Ultimately, from the point of view of social impact, these laws of reform have not been anymore effective than the sixteenth century provisions of the *Compilation of the Laws of the Indies*, which forbid infringement of Indian rights essentially resulting in equal rights for Indians and Spaniards to exploit the mines. It was through the *Compilation of the Laws* that the mines of the Cerro Rico in Potosì for three hundred years swallowed Indians like an infernal monster, consuming eight million of the population as economic fuel for the British Empire, leaving nothing behind for Latin America but the ashes of colonial destruction.

A few years before Alvarado’s attempt to tackle the issue of property distribution, another popular hero, Salvador Allende, had also attempted a similar effort in neighboring Chile. His generous attempt at reform, developing socialism within an innovative vision of the rule of law, was killed with him and with the thousands of *desaparecidos* by the brutal U.S. sponsored regime of Pinochet. When I visited the World Bank in 1998, Chile was shamelessly presented as a success story. Today, the very same U.S. dominated forces use the rule of law as a powerful ideological apparatus of global governance and legitimizing guise of other murderous practices in the Middle East and elsewhere⁵. Attempts at social reform, similar to those of General Alvarado, were carried out during the Cold War by a variety of countries in Latin America such as Guatemala, Bolivia, Uruguay, Brazil and Argentina, and all invariably and tragically resulted in the maintenance of the capitalist “option” throughout Latin America. The Monroe doctrine, claiming in 1823 legitimate rights of imperial succession for the United States, had little mercy for attempts at social reform. Social reforms were an obstacle to US interests: in keeping the price of labor low, raw resources extraction, and of intensive agro-business exploitation. As we know from basic

⁴ See E. Galeano, *Open Veins of Latin America*, Rev. Ed. New York, 2000, 269

⁵ The critique and the parallel of present day neo-liberal practices of domination with colonization is developed in the forthcoming book Ugo Mattei –Laura Nader, *Plunder. Imperial Uses of the Rule of Law*.

economic theory, high unemployment rates, widespread poverty, and a property law structure impeding local rural subsistence and development are the most powerful forces in maintaining low labor prices in both industrial and rural areas.

In the nineteenth eighties the last British imperial war in Latin America fought over Malvinas came to symbolize, at the highest international level, the birth of the current Anglo-American dominated neo-liberal World Order. Neo-liberalism, the dismantling of social protection in favor of military industry and of police repression, was inaugurated by the Reagan-Thatcher revolution as an effort to conclude the Cold War. The triumphant rhetoric of Cold War victory has “constitutionalized” neo-liberalism, allowing its simplistic doctrines to conquer the platform of the opposition, the so called “third way,” symbolized by the Clinton-Blair duo. Today, neo-liberalism is interpreted “with gloves off” by the Bush neo-con doctrines, dominating all the branches of what used to be the “checks and balances” system of the much celebrated American democracy. At the International level, neo-liberal policy, with its black and white efficiency based theory of property law, is interpreted and propagated by the WTO, the IMF, the World Bank and its Regional offices (Inter American Development Bank), as well as by all governments in the G7-G8 club.

III. Two hundred years ago Napoleon codified ideas of property, rooted in Natural law, to better serve the economic needs of the rising European commercial bourgeoisie. The very same Natural law was used by Cortes and Pizarro to justify murder and plunder in Latin America, as an “original” acquisition of title to non-owned land in the name of the Christian sovereign. Peru imported the fundamental structure of the Napoleonic Code twice, in 1852 and again in 1936, with no impact on the country’s economic reality, which was before and after San Martin’s liberation, governed, controlled, and dominated by British capitalism. Private law formally lives, yesterday as today, in full compatibility with any structure of power, as has been demonstrated by innumerable scholarly contributions. Whatever legal form private law took in Peru, property rights were ultimately governed by imperialism and its counterpart, the structure of international debt. Beginning with the Spanish empire’s murder and plunder of Latin America to pay off debts to British bankers to the remarkable pattern of continuity today in which the post-colonial local bourgeoisie, incapable of creating any local markets because of the latifundia-minifundia tragedy, has continued to extract everything, from guano, to timber, to minerals, selling at cheap prices, most always on credit, to foot its luxurious consumption habits produced by its French tastes to the British. In fashion as in the law: the form is French, the economic substance is British, and the victims are the multitudes.

In the history of Peruvian foreign trade, Italy has had quite a marginal role. Bankers from Genoa lent money to early Spanish expeditions and participated, together with the British and the Swiss, to give more of a “global economic” and less of a political complexion to early colonialism. Marble from Carrara was a fashionable extravagance in wealthy colonial dwelling, and early in the last century quite a number of Italian dispossessed found their way to Latin America, mainly to Argentina and Brazil, through the marble trade. Arguably included amongst these Italian exports is the Civil Code of 1942, which perhaps explains the participation of so many Italian scholars at this conference.⁶ Italy usually finds itself as a “context of reception”⁷ in law, so for me to look at us as an exporting legal culture is a new experience.

The Italian Codification of 1942 produced an interesting synthesis between Fascist “corporativist” economic and political theory, which denied class conflict, and traditional liberal legal scholarship. The Code challenged notions of the social functions of rights as a threat to the cherished status quo. In Italy, the debate over the political inspiration of the civil code maintains the same intensity today as it did at its birth,⁸ but to the present purpose only two points matter.

The first point is that the Code must be read in connection with the Constitution of 1948, which provided an interpretation of the Code with a needed dose of socialist thinking. This new found spirit of the Code provided by the 1948 Constitution can be attributed to the large role played in the Constitutional convention by communist leader Togliatti and by social catholic leader Dossetti. The Code paired with the Constitution forged what has been recognized as a remarkable example of *socially responsible legislation*. However the spirit of social responsibility, embodied by the Constitution, was systematically betrayed by post-1980 global neo-liberal trends. Italian legal culture, to say the least, has not been able to play any effective role in contrasting or resisting such trends as the reactionary IMF inspired reforms, in matters such as intellectual property, housing, labor, corporate governance, and cultural property.

The second point of significance of the Code is that the book of the Code related to property law has become a lost occasion, incapable of reflecting the real

⁶ The Italian Civil Code of 1942 significantly influenced the Peruvian codification of 1984. Maria Luisa Murillo, *The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification*, 11 J. Transnat'l L. & Pol'y 163, 176 (2001) (citing Luis Diez-Picazo-Ponce de Leon, *Codificacion, Descodificacion y Recodificacion*, in *Anuario de Derecho Civil*, Apr.- Jun. 1992, at 473-84). Most recently it is worth reading the excellent book by , Lysser Leon, *El sentido de la codificacion civil. Estudios sobre la circulation de los modelos juridicos y su influencia en elCodigo Civil peruano*, Lima, 2004.

⁷ See Diego Lopez Medina, *Teoria Impura del Derecho*, Bogotà, (2004).

⁸ cfr Giovanni Battista Ferri, *Filippo Vassalli o il diritto civile come opera d' arte*, Padova, 2002.

novelty of the merger between civil law and commercial law. Consequently, its break with the Napoleonic model, as seen in such provisions as *immissions* and *aemulatio*, are superficial and the breadth of Italian property law today has become located almost entirely outside of the Code.⁹

The reception in Peru of a piece of *socially responsible legislation* in a time of neo-liberalism (1984) can have only two meanings: either that the Peruvian legal culture was willing to resist global political trends, in which case Italy is certainly not a good role-model, or as I believe is more likely, the adopted civil code, at least as far as property law was concerned, did not truly matter much in the panorama of the sources of law. In either case the symbol of a socially responsible role of the law was put into place. It is now up to the Peruvians of today to expand or reject its symbolism.

While the adoption of the Italian Civil Code is significant to the Peruvian legal landscape, however let me add that Peru is a context of legal pluralism¹⁰. From the perspective of comparative law the legal tradition in Latin America is far from being unitary, both from one State to the other, as a legacy of Colonial partition, and within the modern State. This last "modular" tradition is particularly clearly legally pluralistic, where much contemporary constitutional law is largely influenced by U.S. law, while private law is rooted in the Romanist tradition¹¹. However even in the private law, Common Law influences are not lacking "with regard to the adoption of the express trust by a number of Central and South American countries"¹².

Latin American private law derives in large measure from Spanish and Portuguese law. The conquistadores, during their ruthless exploitation of the new territories, transferred their institutions and their legal tradition to the "New World", realizing that the modernization of law was an important ideological component of the colonial project. European colonization however has not completely displaced the legal tradition of the native populations (Aztecs, Mayas, Incas, etc.).¹³ Even today these customary traditions maintain a certain importance in Peru particularly between the people of Inca heritage and more generally between the most marginalized parts of the population. Consequently, in small villages in the internal

⁹ See Antonio Gambaro, *La Proprietà*, In Trattato di Diritto Civile Diretto da Cicu e Messineo, Milano, Giuffrè 1995. See also, Ugo Mattei, *Il diritto di proprietà*, in Trattato di diritto civile diretto da R. Sacco, Utet, Torino, 2001.

¹⁰ See M. Guadagni, *Legal Pluralism*, in *The New Palgrave. A Dictionary of Economics and the Law*, (P. Newman Ed.) London 1998.

¹¹ Schlesinger-Baade-Damaska-Herzog, *Comparative Law*, V Ed. New York, 1988, 500 (5 ed.).

¹² Id. 315ff.

¹³ See J. H. Merryman, *The Civil Law Tradition*. See also, for a discussion of the early failure to consider the specificities of Latin American Law, J. Gardner, *Legal Imperialism*, Madison, 1980.

area of the continent as well as in the sprawling poverty stricken suburbs of Lima, social life is organized for a majority of the population according to a legal custom which has nothing to do with the formal authoritative and learned law of the State, taught in the Universities according to the long established Civil Law tradition. As it has been said, a large majority of the Latin American population lives according to a "derecho informal que no necesita de abogados ni jueces" (informal law which requires neither attorneys nor judges)¹⁴.

It is upon this foundation of customary law, what I call the "first layer," that the Spaniards, the Portuguese, and other Europeans have established their law and legal institutions either by direct sovereignty or later by indirect credit-based domination. This credit-based domination is aimed at the development of a stable system of extraction, for purpose of exportation of raw materials for Western consumption. Therefore in Latin American we find a phenomenon of legal stratification: the second layer being the Civil Law (Spanish and Portuguese) as applied during the colonial experience. The third layer was produced in the course of the nineteenth century after the overthrow of colonial domination when newly independent Latin American countries began to codify. Though in this context, codification did not introduce substantial breaches with its colonial past. It is through a sub layer within the layer of codification, the enactment of a remarkable amount of "political law" (special statutes) created by local history, social revolutions, reforms, and authoritarian involutions, that a distinctly modern Latin American legal culture emerged. These statutes acted to weaken the role of the judiciary in framing the law, particularly in those countries in which express provisions prohibit case law. This has resulted in the weakening of the judiciary's role as a check on political law and thus the role has been assumed by Latin American legal scholars¹⁵.

Among the sources of non enacted local law, it is these scholars and their legal scholarship which provides possibly the most influential source of law. However today, with the neo-liberal demise of the peripheral State, mighty international political actors such as the World Bank, the IMF, and the WTO compete with Latin American scholars by attempting to impose their conception of property rights (including concentration of intellectual property, the new latifundio) upon Latin American states. It is the imposition of these actors' conception of property rights, which makes to a great extent, any attempt at property reform and social redistribution of wealth impossible. It is these international actors who are producing a new, most often Americanized, layer of law to govern the formal sector

¹⁴ R. Perez Perdomo, *Imperativos Y Alternativas de la Réforma de la Educacion Yuridica En America Latina*, in A. Giuliani –N. Picardi (Eds.) *L' Educacione Giuridica*, 2, 287, Milano, 1979.

¹⁵ On the role of *political law* in Latin America see Ugo Mattei, *Three Patterns of Law. Taxonomy and Change in the World's Legal Systems*, Am. Journal Comparative Law, 1998.

of the economy. This layer is legitimized by the prestige of American law and American law schools to serve, as it has always been the case, the interests of foreign capitalism and its local cronies¹⁶.

The property law contained in the Code of 1984 has been defeated and marginalized by two opposing though paradoxically complementary phenomena. On the ground level, most people are unaffected by the Code's form, inspiration, and its substance because they are governed by an alternative form of legality, based on the desperate needs of solidarity mandated by the difficulty of subsisting on less than two dollars a day. At the upper level, codified property law and its "social" inspiration is defeated by the mighty layer of imperial law, governing with the relentless logic of market imperialism.

IV. I presented General Juan Velasco Alvarado as the symbol of social reform attempts (not necessarily progressive, many times paternalistic or populist) in Latin America in the interest of the local people rather than of foreign capital. Such attempts, shared by other Latin American countries, occurred in the historical moment of Cold War equilibrium. Ruling elites were genuinely fearful of socialist revolution, and rightly so, given the example of Cuba¹⁷. Generally foreign rulers preferred the stick of terror to the carrot of welfare as a tool to pacify the Latin American multitudes, and consequently programs of social reform never really succeeded during this period in Latin America. However notions of the "social function of property rights," such as those incorporated in the philosophy of the 1984 Peruvian civil code and more recently in the new Brazilian codification, despite their political ambiguity, developed as a "carrot" response to fears of socialist revolution in early twentieth century Europe. This notion of the "social function of property rights" was tremendously successful and "globalized" in a staggering variety of geographical contexts all the way through the seventies of this last century.¹⁸ Beginning in the eighties, even these moderate attempts to distribute resources, which made the development of local markets possible by cutting the chains of imperialist domination, were abandoned. The triumphant wave of one way economic neo-liberalism pursued by the WTO and the so called Structural Adjustment programs forced local producers to compete with highly subsidized foreign products. These programs were accompanied with the stick of violent repression of dissent rather than by the carrot of redistribution. Extreme poverty is functional to the "maquilladora" programs, to the special

¹⁶ See Ives Dezalay –Brian G. Garth, *The Internalization of Palace Wars*, University of Chicago Press, April 2002.

¹⁷ See the excellent discussion of Jorge G. Castaneda, *Utopia Unarmed. The Latin American Left after the Cold War*, New York, 1994.

¹⁸ See Duncan Kennedy, *Two Globalizations*, in *Suffolk L. Rev.*, 2003.

economic zones, and to the monocultures. Violent management of dissent is functional to the needs of corporations with interests in privatized jails and of privatized vigilantes in wealthy neighborhoods surrounded by misery.

Another internationally renowned Peruvian, Hernando de Soto, can be seen as the symbol of the shameless arrogance with which, as a result of Cold War victory, Western capitalist imperialism imposes its values and interests on weaker contexts. Property law is once more central in this story. The Western path of economic development presents itself as a success story, while erasing the fact that imperial plunder has played a much more important role than domestic property law in Western capitalist development. Western capitalist development occurred because of Colonial exploitation, a system of global protracted illegality that paradoxically has used and continues to use the law as one of its most powerful ideological apparatuses. Nevertheless, De Soto in two world-acclaimed best sellers *El Otro Sendero* and the *Mystery of Capital* credits Western development with a better domestic structure of property rights and charges the poor countries of *lacking* such a structure. By doing so, as in the tradition of the World Bank's ideology, it places blame of underdevelopment on the victim rather than on the oppressor.

De Soto emphasizes, as do many of his admirers (economists, lawyers, and policy makers), the ability of a developed Western system of property to use physical assets as a tool for producing capital. Western property systems allow assets through ownership documentation to lead an "invisible, parallel life alongside their material existence."¹⁹ In contrast, the property systems in nations like Peru or Brazil, despite their modern Civil Codes, *lack* comparable means of documentation and formalization to integrate property into a broader scheme of investment. The resulting dead capital systematically prevents many property owners from taking out mortgages to invest in their businesses. Proper ownership documentation can "provide a link to the owner's credit history, an accountable address for the collection of debts and taxes, the basis for creation of reliable public utilities, and a foundation for the creation of securities (like mortgage backed bonds) that can be rediscounted and sold in secondary markets." However, even when developing nations create a legal framework (i.e. Civil Codes) for citizens to use property to produce wealth, most citizens cannot use the laws.

The gap between the economic theory of property and the reality of life can be explained by looking at the underlying current property distribution, which scholars like De Soto conveniently and purposefully ignore. The system takes the present distribution of resources as natural, working within the IMF-WB

¹⁹ Hernando De Soto, *The Mystery of Capital* 6 (2000).

sponsored ideas of the *rule of law*, preventing significant re-distribution.²⁰ The movement for “formalization” of informal property rights presents an illusory economic theory to justify the freezing and naturalization of the status quo. De Soto seems to believe that it is property theory and not poverty, illiteracy, hunger, desperation, and conscious oppression from powerful interests, which prevent the wretched of the earth from using the law.

De Soto’s economic ideology is functional to the neo-liberal project for it continues the tradition originated by colonial powers of systematically stunting the development of local markets in order to prevent the emergence of a Latin American middle class, as much a dangerous foe to the colonial project today as yesterday. Whenever a Latin American government attempted to defend local industry by protectionist practices, much lighter than those routinely used in developed countries, it invariably became the target of relentless ideological and physical attack in the name of free competition. In the eighteen thirties, Juan Manuel de Rosas introduced a protectionist policy to defend infant Argentinean industry. He banned the importation of iron and tin products, equipment products, ponchos, belts, farm products and other commodities traditionally produced in central Argentina in order to combat “dumping” by British manufacturers. These British manufacturers were subsidized by colonial loot and selling at prices with which it was impossible to compete. A blockade and finally a battle brought Rosas down in 1852. His memory, like that of José Artigas, who dared to attempt Agrarian reform thirty years earlier in what is today’s Uruguay, has yet to be recovered to this day because of official vilification. In Peru there was no attempt after independence to protect the local thriving industry of ponchos by implementing Simon de Bolivar agrarian reforms of 1824, which could have facilitated a break from latifundio and provided protection for Indians. Colonial production provided ponchos the nature of which, “were never as perfect as the native textiles at Pizarro’s time but the economic performance based on Indian slavery was very great.”²¹ As a result this infant industry, significant in places such as Ajacucho, Cacamorsa and Tarma, has been simply erased by British competition. This is the story that the World Bank, which continues to blame industrial underdevelopment on Latin America, never tells.

Scholars have shown how De Soto’s ideas are technically wrong from a legal perspective and are based on a series of ideologically driven myths²². Hendrix for example argues that in fact titles do not provide indisputable proof of ownership nor protection from uncertainty and fraud:

²⁰ I develop a full critique of this “reactive project” in U. Mattei, *A Theory of Imperial Law. A Study on U.S. Hegemony and the Latin Resistance*, 10 *Indiana J. Global Legal Studies* (2002).

²¹ Eduardo Galeano, *cit. supra* at 176.

²² Hendrix, *Myths of Property Rights*, 12 *Ariz. J. Int’l & Comp. Law* at 192. (1995)

“In deed registry ‘notice’ jurisdictions, such as most of the United States, Peru, Bolivia, Guatemala, Venezuela and other countries, the government does not guarantee ownership of land simply because a document to it is registered. Rather, the law provides that if a document is recorded, that inscription provides constructive notice of the transaction to everyone. If the document is not recorded, it is effective only between the contracting parties despite lack of registration. Against a bona fide purchaser, it is worthless. Further, the government does not guarantee the truthfulness of the contents of the recorded document. Consequently, deed recording systems fall short of providing indisputable proof of ownership, much less protection from uncertainty and fraud.”

Despite the theoretical weakness and the political biases of such theories that make imperialist distribution of wealth, if at all “one of the problems,” not *the problem* to be faced today, De Soto’s Institute for Liberty and Democracy has been able to translate its formalization proposals into Decree Law No. 803 in March 1996. Decree Law No. 803 created the Commission for the Formalization of Informal Property (COFOPRI) as well as the start-up programs and the strategies for this organization. De Soto’s ILD “Popular Mortgage” program that allowed new titleholders to mortgage their houses to get capital processed only twenty mortgages before closing.²³

It is no surprise that De Soto’s ideas were well received under President Fujimori’s tenure. This past Peruvian government was a darling of the International Financial institutions because of its free trade policies favoring international imperialism and its violence in handling socialist dissent. After all, formalization of title, as claimed by its very proponent, provides the government with one more controlling process and is thus a powerful system in normalizing resistance created from desperation. More surprising and to be sure more worrisome, through the political ambiguity of economist’s rhetoric there is evidence of some of De Soto’s ideas in President Lula of Brazil reform package.

While I have not been able to locate reliable data about Peru’s wealth disparity and present property distribution, the fundamental social context in which any property law and more generally any private law system should be evaluated, I have been able to find interesting information about the squatter population of Brazil, also targeted by De Soto’s proposals:

²³ Tina Rosenberg, *So-So De Soto: A Peruvian Phony*, *The New Republic*, 10/7/91, at 21.

“As in many developing countries, there is a great disparity in wealth and property ownership among Brazilian citizens. The United States Department of State reported that ‘large disparities in income distribution continue to exist, with the poorest fifth of the population earning only 2 percent of national income, while the richest tenth receive 51 percent.’²⁴ This disparity in wealth has created a housing shortage that was estimated to be at ten million units in 1992. In Brazil, forty-six percent of the land is owned by wealthy landowners, who account for one percent of the Brazilian population. According to the Brazilian Institute for Geography and Statistics, just three percent of the land is owned by the Brazilian rural poor, who make up fifty-three percent of the country's population. Many of the landless are upset because large tracts of land are going unused in Brazil. Not surprisingly, this disparity in land ownership has led to squatting and subsequent violent reactions by landowners.”²⁵

Five hundred years of history have shown that Latin American property law has never been able to solve either the agrarian question or the industrial question for a significant amount of time. The reason for this shortcoming is not in inherent local deficiencies, but rather must be located in the international structure of capitalism, which is interested in keeping Latin America as a context for cheap extraction. Not only the law but the whole institutional structure of Latin America is framed in a way to facilitate this international division of roles. Today intellectual property law reproduces this structure of domination at an even higher echelon.

Legal scholars have an important role and thus an important responsibility to reverse this state of affairs. It is not by piecemeal reforms, formalization of titles, or more importation of Western modes of thought that will aid in the liberation of their country, your country, from foreign oppression and intellectual and material dependency. It is not through the lauding of programs forced upon Latin America, which blames the victims for their “lack of” rather than on the actions of its oppressors, that will allow for Latin America to take a significant role in the present era of legal globalization.

V. Subsequent rounds of importation of law from Western countries, both of the civil law and of the common law family, have produced in the mind of

²⁴ U.S. Department of State, *Brazil Human Rights Practices*, 1995, Department of State Dispatch (Mar. 1996).

²⁵ Brian Gardiner, *Squatters' Rights And Adverse Possession: A Search for Equitable Application of Property Laws*, 8 *Ind. Int'l & Comp. L. Rev.* 119, 149-50.

lawyers the idea that law is a neutral technical exercise of problem solving. Local specificities and histories have been downplayed, and formal professional law has not been able to walk an independent path. Northern hubris has conspired with Latin resignation, opportunism and division foreclosing independent critical legal thinking. Similar attitudes have foreclosed independent developments not only in the law but in other areas of culture and politics as well. The result in front of us today is a class of jurists whose role remains marginal in the creation of a better and more just society, and serve to the contrary powerful international interests and their allies, the local powerful elite. In 1989 the fall of the Berlin Wall convinced the world that only one path of development was possible, that of Western capitalism, legitimized by economic efficiency and relentless individualism. This system has resulted in the oligarchic progressive concentration of property and the unsustainable diffusion of poverty. Today we must admit the degree of injustice created by this model of development and condemn it.

The world looks for new models of development, new social organizations, and new legal ideas capable of refusing a notion of the law governed by economic interests. Such new ideas and practices can come only from countries that have experienced oppression, that know the real costs of western capitalism, that understand that there is no future outside of an equitable distribution of resources, that there is no peace without justice. Latin America is such a context. Today is such a moment. These issues of distribution of property, social equality, and the unsustainable nature of this world order are before Latin American jurists, Latin American social organizations, and the Latin American people to confront and to solve. Within the current division of wealth and power either one is against this oppressive and strangling system or is an accomplice to the system.

Elsewhere I advocated a Latin resistance capable of subverting this state of affairs²⁶. Today, I advocate the birth of a cosmopolitan Latin American legal culture of resistance, which is critical in its perceptions, militant in its goals and methods, capable of finally opening up communication and cooperation continent-wide to serve as an intellectual leader for resistance in other exploited countries, suffering today, if at all possible, much worse than here. The issue of property law and resource distribution should be boldly confronted in the effort to create a legal context for an independent and liberated economy, for the first time in more than five hundred years, at the service of the local multitudes rather than of the international monopolies and their local cronies. Such an undertaking would facilitate an institutional structure that would allow the economy to look inward rather than outward, to break the continuum: from the extraction of the

²⁶ See, *A Theory of Imperial Law*, cit. supra.

conquistadores, to the domination of British Empire, to the current IMF-sponsored blackmail-conditionality of the Structural Adjustment Plans serving United States interests. The creation of this new “economic constitution of property,” born in traditionally subordinate contexts, based on solidarity and redistribution, is indeed a new *declaration of independence*, intellectually and economically, in a political moment exceptionally ripe for continental unity and progressive thought²⁷.

Latin America was envisioned as a single territory in the dreams and hopes of Simon Bolivar, José Artigas, and José de San Martin. This same dream was later pursued by Ernesto (Che) Guevara de la Serna. Colonial fragmentation was functional to the interests of international domination and was secured by the oligarchies of the free trade ports, through the nineteenth and twentieth century, a long history -- possibly continuing today -- making communication with Europe much easier than internal communication. Latin America today must finally become *a unified legal, political, economic and cultural space*; it must develop a unified legal culture, an economic constitution of solidarity between the oppressed, perhaps tomorrow a unified civil code.

There is a crucial need to reject the imperialist rhetoric of guilt and lack, the ideological weapons of the World Bank and of its simple-minded economic advisors, who are unable to support the “success” of their absurd efficiency based formula for “development.” In a context in which there is high unemployment it is senseless to pursue importation of technology that reduces the need for manpower. In a context where a local industry never developed because of unfair international competition it is absurd to accept free trade receipts. It has been proven through centuries that foreign investment does not yield returns to Latin America. Lawyers have a duty to develop notions of justice and accountability capable of supporting their governments, to free themselves from the grip of the International Financial Institutions. United debtors, supported by a well articulated theory, are a mighty force as every lawyer worth his/her salt knows quite well.

Lawyers should provide themselves with a cosmopolitan culture, challenging the barriers of legal formalism, purism, and those of dialogues limited to economists. Perez Perdomo’s “law and society model” of legal education in Caracas might offer a new important example. Lawyers, once endowed with a culture reaching beyond the black letter formalism and technocratic skills, will eventually realize the truth of what Uruguayan intellectual Eduardo Galeano once said: “development is a banquet to which few are invited and whose main dishes

²⁷ Democratically elected progressive governments are in office today through Latin America, including Brazil, Argentina, Venezuela, Peru, and Uruguay.

are reserved for foreign stomachs”. When such a new lawyer is born, perhaps we will meet here one day to celebrate the birthday of a Pan-Latin American Code; one finally effective in the pursuit of social justice and capable of offering to the world a significant contribution in breaking the chains of corporate domination.

The strategy for liberation that I submit tonight is to encourage Latin America to capitalize on the power of historically exploited debtors and to finally place the blame where it belongs. To approach this necessary task of no common magnitude it is crucial to understand that the interests of the “contexts of reception” of law are not the same of those within “the contexts of production,” so that local law and legal science serve the former and not the latter. Western conceptions of property law, invariably selfish and individualistic, serve the interests of the political contexts in which they are produced, and should therefore be abandoned and substituted with new ideas serving the Latin American people rather than global profit. Imports of obsolete legal ideas and conceptions, from the European Continent or from the United States, serve the chain of domination exactly in the same way in which imports of obsolete technology depresses local innovation and favors dependency. It is time to embrace a new and rich treasury in Latin America: that of alternative legal cultures.