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## COMMERCIAL LAW RECODIFICATION AND ECONOMIC DEVELOPMENT IN LATIN AMERICA\*

BORIS KOZOLCHYK\*\*

In reporting on commercial law recodification in Latin America, I would have wanted to describe an impressive array of accomplishments, much as the natural and — especially these days — social scientists report to their learned Societies. Accordingly, I would have had to refer to how new Latin American commercial legal institutions, as found in the recently enacted codes, were going to revolutionize legal theory and practice, thereby forcing jurists to re-study their commercial law and, more importantly, bringing about prosperity and economic development to Latin America. I regret not being able to do this. In fact, I think that a very good case could be made for the proposition that very little development of true significance in Latin American commercial law since colonial days can be attributed to the periodic enactment of “modern” codes or to their partial equivalents i.e. statutes covering entire fields of commercial law such as business associations or credit transactions law.

Codification and re-codification of commercial law have been a constant juristic activity in Latin America since colonial days. Even if drafts were rejected or confined to oblivion by the legislature, the re-drafting efforts persisted. Ever so often, as in the early 1970's, there came a period of fruition.<sup>1</sup> The enormous normative value ascribed to codification

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in Latin America results from the assumptions that the enactment of new codes, or major segments thereof, is tantamount to legal development and that legal development either brings about or goes hand in hand with economic development.<sup>2</sup> Underlying these assumptions, rests the belief that codes, when carefully drawn, are devices for the attainment of utmost legal certainty, and certainty is the essential prerequisite of the sort of predictability that encourages economically desirable planning and decision-making by private and public sectors.

I have recently challenged this assumption by suggesting, in a study concerning the role of law in the economic development of Costa Rica,<sup>3</sup> that the main function of a legal system in bringing about economic development is to instill trust in legal institutions. And this trust results not only from the efficient operation of legal institutions, that is to say, when these institutions perform predictably and in the least costly manner, but also from their fairness. Surely there is fairness in the certainty that prompts good faith reliance in rules or principles of interpretation, as there is predictability in those rules or principles that embody a community's standards of fairness. Yet, as it also appeared in this study, when fairness was ignored by the codifier or when it was subordinated to the satisfactions of demands for certainty, the effects were detrimental to Costa Rica's economic development.<sup>4</sup>

In the field of business associations law, for example, the codifier decided to heed the demands for greater freedom of action in the creation, reorganization and liquidation of corporations as formulated by controlling stockholders of closely held corporations and by their lawyers and accountants. Behind these demands, there was a desire to provide greater certainty in planning the avoidance of corporate, income and estate taxes.<sup>5</sup> In heeding these demands, however, the codifier ignored the need for fairer rules regarding the protection of minority stockholders in publicly held companies, a most important element in the reassurance required for the creation of an equity securities market in Costa Rica.<sup>6</sup> Consequently, investors still distrust the equity security investment and the Costa Rican corporation has remained closely held. Rather than performing the function of attracting "many small contributions . . . from numerous minority stockholders," as was desired by the codifiers,<sup>7</sup> the Costa Rican Code of Commerce has continued to serve as a device for the avoidance of taxation by closely held corporations through periodic reorganization and decapitalization.<sup>8</sup>

Similarly, in the field of credit transactions law, fairness in the treatment of debtors was subordinated to a draconian like certainty in the enforcement of creditors' rights. Secured and unsecured creditors were

provided with the means for obtaining their debtors' imprisonment upon default.<sup>9</sup> Yet, while relying upon the threat of imprisonment, the Costa Rican codifier neglected to develop fair and functional remedies to insure the repossession and sale of validly acquired security interests. And since imprisonment for debt is quite an unpopular procedure with judicial and law enforcement officials (who are also frequently debtors), and also an impediment to the debtors' ability to repay, the certainty of collection was far from improved by the recodification of credit transactions law.<sup>10</sup> Interest rates in Costa Rica, contrary to what was expected by the codifiers, failed to come down from pre-1964 levels, despite the large influx of lending capital as a result of the removal of the prohibition against usurious lending.<sup>11</sup>

One might think that the inability to instill greater fairness in the codification of commercial law is a phenomenon peculiar only to a given Latin American country or its draftsmen. This is not so. An examination of another recent attempt to bring about greater fairness in the corporate and credit transactions law in Colombia, illustrates some of the problems that characterize the recodification of commercial law in Latin America.

In contrast with the Costa Rican Code of Commerce, the Colombian Code of Commerce of 1971<sup>12</sup> addressed itself to improving a rudimentary, yet viable, securities' market. Unlike Costa Rica, it is not unusual in Colombia for a person of modest means to own corporate stock in one or more of Colombia's widely held corporations. The necessary level of liquidity of corporate stock, undoubtedly an essential element in the reassurance required by a prospective investor in his first investment decision, seems to have been attained in Colombia more than a generation ago.<sup>13</sup> Coupled with liquidity, the possibility of receiving dividends as a steady source of income has encouraged the acquisition of several corporate stocks in Colombia. In addition, Colombia has had almost a 40-year experience with a government agency that supervises corporate activity (*Superintendencia de Sociedades Anónimas*).<sup>14</sup> This agency has developed numerous guidelines and has set forth copious rulings on the various aspects of corporate life.<sup>15</sup>

Despite the viability of Colombia's securities market, it has become apparent in the last decade, that the creation of new industries has not been, as a rule, financed by the issuance of equity securities.<sup>16</sup> Equally significant is that despite the high level of corporate reinvestment, the increased book values of common stock have not been reflected in their market price.<sup>17</sup> Thus, it is clear, that the Colombian securities market still lacks the mechanism of reassurance that could bring about even a moderate level of capital appreciation in most security investments.

Students of the Colombian corporate legal reality have no difficulty in identifying abusive practices developed under the preceding corporate statutory law. These practices were meant to bring about and take advantage of the absence of capital appreciation in the securities market. By artificially depressing the value of corporate stock, for example, certain groups of stockholders have managed either to gain or retain control of large corporations. Prominent among such practices is the failure to declare dividends during one or more fiscal periods by exercising powers allegedly delegated to the board of directors through the uncurbed solicitation of voting proxies or by the creation of artificially high earned and retained surplus accounts.<sup>18</sup>

Faced with such abusive practices, the draftsmen of the Code of Commerce decided *inter alia* to impose in Article 155 a mandatory dividend declaration per fiscal year of 50% of the corporation's net profits.<sup>19</sup> Under certain circumstances, this mandatory rate could go up to as high as 75% of the net profit.<sup>20</sup> The Code proceeded to insure the feasibility of the dividend distribution by setting up a special fund and also by providing the minority stockholder with a specific action in the event of an unjustified lack of distribution.<sup>21</sup> At the same time, however, the Code provided that 70% of the stocks represented in the shareholders meeting deciding on dividend distribution could ignore the mandatory distribution rule.<sup>22</sup>

Article 155 of the Colombian Code of Commerce can, therefore, be regarded as an attempt to bring about fairness in the area of dividend distribution by providing mechanisms to insure the certainty of dividend declaration. Nevertheless, the Code, by committing the corporation to a rigid and arbitrary rate of continuous dividend payments and thus decapitalization precludes reinvestments that could easily raise the level of future distributions. At the same time, however, it sanctions the continued perpetration of unfairness toward minority stockholders by allowing 70% of the voting stock present at the meeting, regardless of cause or justification, to block a proposed and perhaps highly advisable distribution. Given the propensity by many controlling groups of stockholders to take advantage of loopholes in the regulation of voting mechanisms in order to impose the dividend policy most favorable to their interests, it is predictable that such policies will continue in effect despite the 70% vote required by the present code.

In evaluating the wisdom as well as the fairness of Article 155 of the Colombian Code of Commerce it should be kept in mind, that the lack of capital gain from an investment in equity securities is detrimental to the

interests of majority and minority stockholders alike. The only stockholder who stands to profit from lower market prices is one who wishes to purchase shares as part of a plan to acquire higher control. Thus, even the stockholder who may wish to manipulate market prices in order to facilitate his acquisition would only want to do so for a limited period of time, because continued lower prices would only reduce his ultimate profits. Nevertheless, the Code has singled out the behavior typical of a manipulator of market prices when engaged in his manipulation as the model for the rule that governs dividend distribution by manipulators and non-manipulators alike. It should also be noted that despite the vast experience accumulated by the Colombian *Superintendencia de Sociedades Anónimas* with abusive distribution practices, the Code of Commerce did not turn to this agency for ad hoc determinations on the advisability of dividends. A delegation that would have allowed development of adjudicative criteria based upon models of behavior consistent with the goal of greater capital appreciation for investments in equity securities.

In the field of credit transactions, and particularly in negotiable instruments law, the Colombian codifier, as his Costa Rican counterpart, pursued a policy of maximizing the certainty of collection by protecting the rights of creditors-holders of negotiable instruments.<sup>23</sup> He also recognized, however, the need to qualify the rights of holders of negotiable instruments, lest creditor protection become the correlative of debtor inequity. Accordingly, the minority and the incapacity of the signer or the fraudulent nature of the transaction were listed among the defenses available against the holder.<sup>24</sup> In doing this, the Colombian codifier was merely restating pre-existing law.<sup>25</sup> But under the preceding regulation it was not clear whether those who acquired commercial paper with knowledge of an insufficiency or inadequacy of consideration in the underlying transaction were immune to such defenses by being deemed holders in due course. If the transferees were deemed entitled to such a characterization as a matter of course, this would definitely encourage sharp practices among installment sellers and moneylenders. By simply transferring the instruments, unscrupulous merchants would prevent signers from raising the above mentioned defenses in the expeditious procedures used in the collection of negotiable instruments. Forced to pay on their negotiable instruments debts, the buyer's or borrower's only recourse would be to bring lengthy and costly breach of contract actions against their sellers or lenders. What was missing under pre-existing law, therefore, was a standard or a set of guidelines to help evaluate the extent of a holder's knowledge concerning the underlying transaction that could compromise his presumed good faith.<sup>26</sup>

The Codifier of the 1971 Code of Commerce did not provide a standard or guidelines on what is deemed good faith in the acquisition of negotiable instruments. Indirectly one may infer from the provisions referring to bad faith that unless the holder was aware of his transferor's lack of ownership of the instrument by its having been stolen, embezzled, forged or filled without the signer's authority, the presumption of good faith would apply and the holder would be deemed in due course.<sup>27</sup>

Consequently, a party who purchases commercial paper knowing that the drawer or acceptor did not intend to create a negotiable instrument could conceivably still be immune to such a defense because, while the Code requires delivery of the instrument with the intent that it be negotiable, it also presumes such an intent from the fact that it is in the hands of someone other than the signer.<sup>28</sup> Furthermore, the Code expressly precludes raising the defense of lack of intent to create a negotiable instrument against one deemed a holder in good faith, someone who, as we have just seen, only has to prove a valid title of acquisition.

This state of the law seems very convenient to Colombian creditors as it is also clearly inequitable to the victims of sharp practices and unconscionability by creditors. Yet it may be predicted that in Colombia, as in Costa Rica, the cost of credit will not be lowered by the initial certainty of collection based upon one-sided remedies. As proven by the Costa Rican experience, the unfairness of the system prompts an adverse reaction by debtors that leads to greater uncertainty and ultimately to higher costs of collection.<sup>29</sup>

At this point, one might be tempted to object, and perhaps with good reason, that the codifier is not the party best suited for the establishment of standards in areas such as good faith in the distribution of dividends or in the acquisition of negotiable instruments. For where such guidelines are available, they usually have been the result of a case by case determination by courts of analysis by doctrinal writings.<sup>30</sup> Yet, where neither courts nor doctrinal writers have attempted to supply such guidelines, or where the codifier has ignored whatever guidelines existed in decisional and doctrinal law, as has happened in Costa Rica, Colombia and other Latin American countries, the method, purpose and scope of codification must be re-evaluated.

It is noteworthy that, as a rule, Latin American code draftsmen do not evaluate existing and future statutory law in light of national or regional decisional law trends. The comparison that permits an evaluation is usually provided by what is stated in other codes, especially recent European enactments, and in scholarly treatises. Commercial law practice is taken

into consideration but usually only from the standpoint of a given group interested in the enactment of specific rules that may affect its business or lines of work. Thus if there is an expression of interest in a certain rule by a group of bankers, corporate counsel or accountants, the opinion of other parties likely to be affected by the proposed rules are only taken into account if they coincide with the views held by the codifiers themselves. There is an absence in the Latin American codifying process of what I described elsewhere as the "conflictive advocacy" of fair lawmaking.<sup>31</sup> It may well be argued that codification is ill-suited for the method of conflictive advocacy, particularly since the number of rules that would be subject to intensive debate would be so numerous that the costs would be prohibitive. Thus, the argument would run, codification must sacrifice popular participation in drafting in favor of technical legal skills indispensable in the formulation of code rules. The question remains, however, whether code rules or their drafting method, as conceived in Latin America, are inconsistent with the goal of attaining greater fairness in the regulation of the various institutions.

In preparing his draft, the Latin American codifier first of all feels an obligation to conform to the standards of what is generally referred to as "legal science." Legal science requires that the concepts used in a code be, above all, logically sound and consistent. This attitude is responsible for what could be described as a McLuhanesque phenomenon: the manner in which rules are expressed, or the normative "media," if you will, becomes the message. The style of expression, almost imperceptibly becomes the normative guideline or the rule itself. This metamorphosis usually starts with the attempt to define the various institutions subject to code regulation, a task undertaken by most self-respecting code draftsmen prior to working on the text of the actual rules. In trying to arrive at a valid definition, in a neo-Aristotelian fashion,<sup>32</sup> the codifier asks himself, what is the essence of the institution in question; is, say, a negotiable instrument a contract or a unilateral act?; or is it perhaps a multilateral transaction?; is the creation of a corporation a contract?, and if it is a contract, is it, in turn, "formal" or "real," unilateral or bilateral and so on. What the codifier forgets is that these apparently essential elements or categories of the "being" of commercial legal institutions are nothing but inter-dependent concepts, mere linguistic utensils of the definitional mechanism characteristic of pure or abstract reason. In other words, there is nothing truly essential in a determination that concludes that a negotiable instrument is a unilateral act or that a corporation is a multilateral transaction. In fact, all such definitions are in a large measure tautological

and, to the extent that they ignore the empirical legal reality upon which they are supposed to be based, they are also normatively ineffective.<sup>33</sup>

Once he has committed himself to a given definition, however, the codifier frequently feels that he has no choice but to follow through by adopting whatever are its "logical" consequences. The results are frequently unjust and downright paradoxical if one expects to find an enactment of a codifier's avowed social policy. Thus, a draftsman who sincerely professes to be a defender of the poor and under-privileged, could easily end up adopting a rule that will operate injustice against poor buyers and borrowers because of a "legal science" dictate. This is illustrated by the rule that sets forth the time at which a negotiable instrument is deemed binding on its signer in the recent draft of a Uniform Negotiable Instruments Law for Latin America.<sup>34</sup> This project adopts a widely accepted definition of a negotiable instrument advanced by Cesar Vivante, a distinguished Italian Commercial Law Professor of the turn of the century: "Negotiable instruments are the documents necessary for the exercise of the literal and autonomous rights therein set forth."<sup>35</sup> And in furtherance of a conceptual symmetry that assertedly requires the bindingness of form in negotiable instruments law, much weight is placed by the Project's draftsmen and by most draftsmen of recent commercial codes who adopted the Vivante definition, upon the act of signing the instrument bearing the prescribed form. More weight is given to it, in fact, than to the true intention to create a negotiable instrument evidenced not only by its signature but also by its delivery to an intended holder.<sup>36</sup> In doing this, however, the draftsmen either overlooked or felt they had no choice but to ignore the fact that the parties more apt to take advantage of the rule are those who make it their business to procure signatures on negotiable instruments for the purpose of collecting otherwise uncollectable or difficult to collect debts. Similarly in corporate law, another field of commercial code regulation in Latin America, the codifier implements the asserted conceptual analogy between a shareholders meeting and a democracy by vesting almost absolute powers on the meeting. The fact that working majorities could be easily manipulated by controlling groups to bring about most undemocratic results is again either ignored or set aside.

In sum, one is led to conclude that the method of recodification of commercial law in Latin America has either sacrificed fairness to the certainty embodied in what is regarded as conceptual symmetry, or has been unable to provide valid standards in areas where it attempted to. I shall now turn to the purpose and scope of commercial law re-codification.

If it is agreed that the main function of a legal system in bringing about economic development is to instill trust in legal institutions then, clearly, the purpose of commercial law codification is to bring about the requisite amount of trust in its regulation of commercial transactions. We have just seen, however, how failure to contribute valid standards of fairness impedes greater reliance on commercial legal institutions in Latin American societies. We have also questioned whether the codifier is the party best suited to set forth these standards. Furthermore, it is obvious that if there is widespread distrust among the participants in commercial transactions, the amount of reassurance required from legal institutions will be enormous, and beyond a given point, possibly ineffective. As put to me once by an experienced banker: "If a customer wants me to issue a letter of credit because he is afraid of his own shadow, I would be well-advised to reject his application, no amount of assurance is ever going to satisfy him. . . ." Similarly, if it is a widespread attitude toward the law and legal institutions that "whoever invented the law also invented the way to get around it," then it can be expected that the law will only be able to induce desirable behavior by providing palatable incentives for obedience. And as the cost of these incentives mounts, the state may well find its normative function too expensive to undertake seriously. In essence, what I am suggesting is that an effective normative function by codification or other methods not only must instill trust but also depends upon its presence among the participants in the commercial and legal relationship.

Having lived and worked in Latin America for half of my life, I feel safe in saying that, possibly as a result of the generalized dislike for mercantile activities in pre-colonial and colonial Spanish civilization,<sup>37</sup> Hispanic Americans, by and large, are still quite distrustful of each other in commercial transactions. Moreover, I believe that empirical studies could bear out the hypothesis that a substantial number of Latin Americans, when approaching a commercial transaction, and the law that applies to it, behave in a fashion described by the 16th Spanish "picaresque" literature: For one party to win or to profit, the other party must be a loser, possibly by having been outwitted.<sup>38</sup> This view of mercantile man occasionally determines a legislative language, which assumes trickery as the most likely behavior. Thus, Article 155 of the Colombian Code of Commerce assumes that corporate dividend policy is necessarily the result of an attempt to manipulate an acquisition of securities. It also prevents other institutions from being tested even though in theory it appears that they could operate at a lesser cost than that of the institution in force. For example, to this day, no commercial codifier in Latin America would allow the private foreclosure by sale set forth in Section 9-504 of the U.C.C.<sup>39</sup> as

an alternative to the cumbersome and costly judicial sale. As put to me by one South American code draftsman: “. . . to allow the creditor to repossess and resell privately the chattel would be virtually to wipe out any hope of the debtor’s recovery of his equity of redemption. It would be as if we would give to the thief the key to the very premises he intended to steal from. . . .”

I hasten to add, lest I be accused of mouthing “racist” or Anglo-American supremacy homilies, that the distrust I have found in commercial transactions contrasts sharply with the trust placed upon each other by Latin Americans when acting as friends. Indeed, I am convinced that friendship in Latin America implies a much deeper and genuine commitment than the one I have observed among Anglo-American business or professional associates. However, the very size of industrial market settings, the large number of participants and volume of transactions prevents friendship from acting as a significant reassuring element. An industrial market presupposes an “impersonal” nature for most of its commercial transactions. Under these circumstances, an overall model or standard of commercial behavior other than the picaresque one must shape the determination of rights and duties. Merchants and their customers, corporate directors and shareholders must be able to assume that one party’s profits are not necessarily inconsistent with the other’s, and that in fact, one of the best ways to insure continued profitability is by assuring that both parties to the bargain could profit from it.

*Obviously it would be illusory to assume that the law, by itself, can induce a more trusting archetypal behavior in commercial transactions. Ingrained social attitudes can only be changed after a long and frequently painful educational process. Nevertheless, the law plays an essential role in this process by providing standards of fairness consistent with the desirable model of behavior.*

These are the standards that should allow judges, lawyers, law professors and students to evaluate mercantile conduct and even without express reference to statutory, decisional or doctrinal authority be able to express an intelligent opinion on whether the conduct in question “sounds” or does not sound “right,” or, better still, whether it is “reasonable” or “in good faith.” The standards should not only influence official lawmaking but also the law made by contracting parties themselves, many of whom in Latin America still feel that only an obligation that is fully spelled out could be binding on the obligor; an attitude which ignores the fact that many obligations and particularly, those which require the exercise of

discretion by the obligor are only susceptible of being described in terms such as "reasonable" or "in good faith".

Far from being abstract formulations of behavior, the standards of fairness therefore must be based upon an "adjudicative" reality, that is to say they must grow out of actual or potential conflicts of rights, interests or "de facto claims", and therefore must involve serious enough disputes. Mere differences of opinion on the actual facts or vague declarations of principle are not the stuff of which these standards are made. In addition, the standards must be consistent with what was described elsewhere as "guiding" institutions of a legal system. Thus, "it is implicit in a legal system whose participants distinguish between, on the one hand, a contract of sale, or a loan performed in good faith and, on the other hand, an illicit act of obtaining money under false pretenses, that one sidedness in the right to exact the other party's performance is unfair. The mere fact that the participants choose to call their relationship a contract cannot be ignored when evaluating its fairness".<sup>40</sup>

Consequently, it becomes clear that courts and other adjudicative bodies, regardless of whether the jurisdiction is civil or common law oriented, are in the best position and therefore have an ongoing responsibility for the elaboration of the standards of fairness necessary for the adjustment of commercial legal institutions to the desirable behavior. It is also clear that in civil law jurisdictions where the elaboration of rules of general binding effect is almost exclusively a legislative function, the legislature must, from time to time, incorporate these standards to the statutory complex, and either abrogate inconsistent institutions or else supplement those in the codes or statute books. It may also have to introduce totally new institutions and either set forth or allow for the elaboration of related standards by decisional law. Yet if this creative and corrective process is to be meaningful, it must be pinpointed; wholesale abrogation and replacement, or massive introduction of new institutions as usually done by re-codification carries a very high price tag in terms of the adjudicative and compliance functions of the system. In the first place, many of the standards elaborated in relation to preceding institutions and predicated upon a certain conceptual and textual basis would have to be discarded, even though the mercantile activities involved remained the same.

Secondly, the import of "exotic" institutions on the sole basis of their success in a foreign jurisdiction or their doctrinal acceptability, if not coupled with an actual need for such institutions only results in a distorted or pathological use. The imported institution is adapted to serve as

a device with which to circumvent prohibitions applicable to the institutions in actual use thereby diminishing if not destroying, the effectiveness of the prohibition.<sup>41</sup> Finally, the ever present possibility of re-codification encourages a judicial attitude of literal and unimaginative interpretation of existing statutory rules, because "if the law is not what it literally says it is, let the legislature say so". Accordingly, courts rationalize their unwillingness to be more equitable and creative in their interpretation of statutory law.

In light of these considerations, it appears that the scope of re-codification is much more limited than what it is widely perceived to be in Latin America. I would like to submit in conclusion, that much is to be gained in the fairness and efficiency of Latin American commercial law if the resources invested in the periodic re-drafting of commercial codes were applied to the creative interpretation and careful revision of the existing ones.

#### NOTES

<sup>1</sup>See, for example, the Guatemalan Code of Commerce that came into effect January 1, 1971, replacing the Code of Commerce of September 15, 1942, in Zelaya Gil, *Nuevo Código de Comercio de Guatemala* (1st ed., 1970); the Code of Commerce of El Salvador that came into effect on January 1, 1971, in 228 *Diario Oficial* N.140 of July 31, 1970, replacing the Code of Commerce enacted by decree of March 17, 1904, *Diario Oficial* de 4 de Julio, 1904; and the Colombian Code of Commerce in Decreto No. 410 de Marzo 27, 1971, in Ministerio de Hacienda y Crédito Público, *Código de Comercio (Bogotá, 1971)* replacing the Code of Commerce of 1874 which came into force by Ley 57 de 1887. The Costa Rican Code of Commerce enacted on April 24, 1964, will be discussed as one of the representative codes in the latest attempt at recodification, for a text of this code see N. Valle Peralta y H. Zurcher, *Código de Comercio y sus Reformas* (San José, 1967). For a brief description and evaluation of the new Guatemalan Code of Commerce, see Bayitch, *Guatemala: Commercial Code, 1970*, 27 *Lawyer of the Americas* (1971), for a legislative history and an occasional evaluation of the new Colombian Code of Commerce see authorities cited *infra* notes 18 and 23: on the Costa Rican Code of Commerce of 1964, see Kozolchyk and Torrealba, *Curso de Derecho Mercantil* (Multi-volume, San José, Costa Rica, 1969).

<sup>2</sup>See, for example, N. Valle Peralta and H. Zurcher, *supra* n.1 at XII-XV and Zelaya Gil, *supra* n.1 at 3 transcribing the three introductory "whereases" of the new code of commerce.

<sup>3</sup>B. Kozolchyk, *Toward a Theory on Law in Economic Development: The Costa Rican USAID-ROCAP Law Reform Project, 1971 Law and Social Order 681-755* [hereafter referred to as Kozolchyk] and its Spanish version, *Hacia Una Teoría del Derecho en el Desarrollo Económico: El Proyecto de Reforma Jurídica USAID-ROCAP*, *Revista de Ciencias Jurídicas*, Universidad de Costa Rica, Junio, 1972.

<sup>4</sup>Kozolchyk at 740-44.

<sup>5</sup>A demand was defined as "an expressed or articulated claim for legal action which is actively being passed by a social group or organization," Kozolchyk at 689. It was contrasted to "aspiration," defined as "a general desire for legal action, but unlike the demand either not articulated or only vaguely articulated, and not at the time actively being pressed by a social group or organization and with an 'expectation,' defined as a specific or determinate aspiration, a desire for social action that,

like the aspiration is not actively being pressed, but unlike the aspiration is clearly articulated in terms of the desired time, quantity or quality of the action. See, Kozolchyk at 689, and at 740.

<sup>6</sup>Kozolchyk, 705-714.

<sup>7</sup>See, Valle Peralta and Zurcher, *supra* n.1 at IX and X and also Valle Peralta, La Sociedad Anónima, 1963 Revista de Ciencias Jurídicas 21-22 (San José, Costa Rica).

<sup>8</sup>Kozolchyk, at 714.

<sup>9</sup>See, Código de Comercio, *supra* n.1, Article 568 and Articles 1001 and 1003 of the Civil Code (1888) in Código Civil (Ed. Lehmann, 1966).

<sup>10</sup>Kozolchyk, at 731-734.

<sup>11</sup>*Id.*

<sup>12</sup>*Supra*, n.1.

<sup>13</sup>Sec J. Franco Holguín, Evolución de las Instituciones Financieras en Colombia, 236-240, especially tables 13-16 (CEMLA, Mexico, 1966), see also CEMLA REUNIONES, Los Mercados de Capitales en América Latina, 184-193 (México, 1966). For monographic studies on the Colombian capital market, see A. Basch, M. Kybal, El Mercado de Capitales en Colombia (CEMLA, Mexico, 1969). In contrast with the Costa Rican Corporation whose average number of shareholders is a handful or less and whose widely held stock company has less than 2,000 shareholders, in Colombia there are more than 10 stock companies with more than 5,000 stockholders each. For statistics on the numbers of per company shareholders in Colombia, see XXII Revista Superintendencia de Sociedades Anónimas, 96-113, n.38 (Diciembre, 1966).

<sup>14</sup>See, Ley 58 de 23 de Abril de 1931 which came into effect on September 1, 1937, in J. Ortega y Torres, Código de Comercio Terrestre, 491 (Bogotá, 1969).

<sup>15</sup>On the functions of the Superintendencia de Sociedades Anónimas see, for example, V Revista de Superintendencia de Sociedades Anónimas, 96 n.17 (Abril, 1949) and X Revista de Superintendencia de Sociedades Anónimas, 256 n.24 (1955).

<sup>16</sup>Sec Departamento Nacional de Planeación, Planes y Programs de Desarrollo, 1969-72, pp. 1.17-1.24, Tables n.15, 16, 17, and 18, (Documento, DN P-417, Bogotá, 1969), and also, W. Prendergast, Jr., and J. Franco Holguín, Report (unpublished report of October 31, 1969, on file with University of Arizona Law Library), Corporaciones Financieras of Colombia at 8 and 9 which points out that during the period 1964-68 private investment decreased from 80% to 70% in proportion to total investment, while public investment increased from 16% to 30%. According to this study, for each peso invested in new industrial projects, nearly 5 pesos have been utilized for capital increases of existing industries. This meant that the industrial sector, potentially the most dynamic in the economy, has developed relatively few new ventures. The consequences, according to this report, are reflected in high unemployment.

<sup>17</sup>In the 10-year period 1953-62, despite a declining rate of distribution of dividends which corresponded to an increase in corporate reinvestments, there was no significant increase in the stock market price of many of Colombia's "blue chips," particularly in the fields of textiles and food (chocolate production). This is apparent by comparing the table on rates of dividend distribution in XVIII Revista de Superintendencia de Sociedades Anónimas, 10 n.34 (Agosto, 1962) with annual tables-indexes on prices for shares of Colombia's industrial companies, as for example, in the same Revista at 132.

<sup>18</sup>See M. Prieto, Superintendencia de Sociedades Anónimas Memorandum de Septiembre 7, 1970, a J. Valencia Jaramillo, Minister of Economics and Development and M. Escobar Mendez, Minister of Justice at 4-6 (on file with the University of Arizona College of Law Library, Foreign Law Collection), see also Gabino Pinzón, Las Sociedades en el Nuevo Código de Comercio, Revista de la Cámara de Comercio de Bogotá 45 at 51 (No. 3, Junio de 1971). For incomplete, but nevertheless, quite

telling statistics on the distribution of dividends and reinvestment practices in Colombia's corporations see, XIX Revista de Superintendencia de Sociedades Anónimas 28-29, Tables 11 and 12 (n.35, 1963), see also same Revista, Vol. XX, p. 32, Table 13 (n.36, 1964).

<sup>19</sup>Article 155 of the Code of Commerce reads in part as follows: "Except when decided differently by 70% of the shares of stock represented in the shareholders' meeting . . . corporations shall distribute no less than 50% of their net profits in each fiscal year . . ." No reasons were given in any of the commentaries to the drafts of what eventually became article 155 for the specific rates of distribution chosen; interestingly, Article 166 of the pre-final draft set forth a 40% mandatory distribution (see M. Prieto, Memo, *supra* n.17 at 4-5). Also of interest is that the rule in question survived various revisions by jurists of varying ideology virtually unscathed, see W. Villa Uribe, J. L. Narvaez, S. Finkielstein, H. Tapias Rocha, Código de Comercio (Terrestre) Título Preliminar, Libros Primero y Segundo, Arts. 65 and 319 (undated, on file at the University of Arizona College of Law Library). The only published criticism available to this writer on the future text of Article 155 was a terse statement by the National Association of Manufacturers (Asociación Nacional de Industriales) in a memorandum addressed to "Comisión Revisora del Proyecto de Código de Comercio" (September, 1970) reprinted without date by the Superintendencia de Sociedades. Addressing itself to former article 42 of the pre-final draft of the Code of Commerce (present Article 155), the Association stated in p. 14 and 15 of the Memorandum: ". . . The principle of a minimum dividend distribution is subject to criticism. On the one hand, it goes against the need for higher savings experienced by the national economy. On the other hand, it ignores the problems of financial management posed by the distribution of dividends. The protection of minority stockholders may be obtained by other devices not as harmful (to the corporation) as this one." (My translation and parenthesis).

<sup>20</sup>See Articles 155 and 454 of the Colombian Code of Commerce.

<sup>21</sup>See Articles 154, 156, and 451 to 456, of the Colombian Code of Commerce.

<sup>22</sup>See Article 155 of the Colombian Code of Commerce.

<sup>23</sup>See generally, Robledo Uribe, Los Títulos Valores En el Nuevo Código de Comercio, 3 Revista Cámara de Comercio de Bogotá 75 at 79 (June, 1971) and Perez Vives, Los Títulos Valores en el Nuevo Código de Comercio, 3 Revista Cámara de Comercio de Bogotá 81 (June, 1971); for a more detailed discussion of some of the theories influential on the draftsmen, see Londono Hoyos, Títulos Valores en el Nuevo Código de Comercio, 4 Revista de Cámara de Comercio de Bogotá, 93-105 (September, 1971).

<sup>24</sup>See Article 784 (2) of the Code of Commerce.

<sup>25</sup>See Article 57 of the Ley 46 de 1923 (virtually a literal translation of the United States Negotiable Instruments Act) in Ortega Torres, *supra* n.14 at 422.

<sup>26</sup>Article 55 of the Ley 46 of 1923 required from the holder in due course (*tenedor en debida forma*) *inter alia* that he receive the instrument in good faith and for value. Article 61 of this law set forth a rebuttable presumption of good faith in the holder's favor. This presumption ceased to operate if, in accordance with Article 57 the holder "obtained the instrument or some of its signatures by fraud, duress or coercion or by any other illegal means or when he negotiates in bad faith or in circumstances that amount to fraud." (My translation.) Professor Rengifo's research of Colombia's Supreme Court decisions rendered during the last 40 years has failed to discern any consistent guidelines on what was deemed a bad faith acquisition under the Ley 46 of 1923. Even the most basic questions such as is the holder deemed not to have acquired in good faith if he failed to pay value for the instrument, have not received a clear cut resolution by the Supreme Court.

<sup>27</sup>See Articles 784 (11) and (12) and 622 *a contrario*, Article 820 allows an action to recover the instrument against anyone not a diligent holder in good faith thus suggesting that lack of diligence may in certain cases, be deemed tantamount to bad faith, or at least to absence of good faith. Professor Rengifo in Títulos Valores,

Texto y Materiales de Estudio el Tenedor en Debida Forma 24 (1972) (on file in the University of Arizona College of Law Library) subscribes to the title of acquisition test for the determination of bad faith in the 1971 Code of Commerce.

<sup>28</sup>See Article 625 of the Code of Commerce. A legislative intent may be inferred from the rule on a signature by an accommodation party whose accommodation is known to a holder and who is unable to allege such knowledge as a defense against "any holder who has paid value for the instrument." On this, see Article 639 of the Code of Commerce.

<sup>29</sup>See, Kozolchyk, 729-734.

<sup>30</sup>For a brief description of the various European and Latin American doctrinal views on the meaning of good and bad faith in the acquisition of negotiable instruments and on its legislative formulation with a view toward uniformity, see S. D. Bergel, *La Exceptio Dolis Generalis en la Ley Cambiaria*, *Revista del Derecho Comercial y de las Obligaciones*, Año 1, n.1-6, p. 785, 787-800 (Buenos Aires, 1968). For a brief account of the elaboration of standards of good faith of acquisition in Anglo-American law, see W. E. Britton, *Bills and Notes*, 244-300 (St. Paul, 1961).

<sup>31</sup>Kozolchyk, 698, 701, 714 and 736.

<sup>32</sup>Aristotle describes a definition as "a phrase signifying a thing's essence." An essential characteristic, in turn, is one which "is not predicated on a subject other than itself," see *The Basic Works of Aristotle* 191, 691-94 (McKeon edition, undated).

<sup>33</sup>For the influence of scholastic conceptualism and particularly on the use of definitions and classification on Latin American legal education and thought, see Kozolchyk at 751-52.

<sup>34</sup>See INTAL, *Proyecto de Ley Uniforme de Títulos Valores para América Latina* 20, (Buenos Aires, 1967). Articles 7 and 9 of this article may be translated in part as follows: "Any negotiable instrument obligation stems from a signature placed in the negotiable instrument and . . . the signer of a negotiable instrument will be bound in the literal terms of the instrument, even though the instrument gains circulation against his will or after his death or incapacity."

<sup>35</sup>See Article 1 of the Draft, *op. cit.*, *supra* n.34 at 19; see also C. Vivante, III *Tratado de Derecho Mercantil* 136 (Spanish translation, Madrid, 1936).

<sup>36</sup>See C. Vivante, *op. cit.*, *supra* n.35 at 146 where he asserts that the obligation assumed by the signer of a negotiable instrument is more serious than the one assumed by the signer of non-commercial (civil or common) paper and bases this assertion on the reliance that must be induced by negotiable instruments. In this respect, compare Guatemalan Code of Commerce Article 393 which following the Draft rule states that "the signer of a negotiable instrument remains bound by it even though the instrument gained circulation against his will . . ." with the Colombian Code of Commerce Article 625 which states: ". . . negotiable instruments are binding upon their signature and delivery with the intention that they become negotiable. When the instrument is in the hands of a person other than the signer, such delivery is presumed. . . ."

<sup>37</sup>Americo Castro, one of the foremost students of Spanish civilization, attributes the disrepute of intellectual and mercantile activities among Spaniards since the 15th Century to the fear of being identified as descendants from Jews or Moors: "As I have elsewhere shown with abundant evidence, from the end of the 15th Century on, it was considered dishonorable to be descended from Jews or Moors . . ."; and ". . . The Christian was interested in maintaining his 'honor,' in being a hidalgo . . . Moors had betrayed their inferiority by being conquered, and Jews excelled in a type of activity that, seen from below, seemed nothing but oppressive usury and exaction of taxes, from which hidalgos were exempt. . . ." See Castro, *The Spanish People, The Texas Quarterly, Spec. Issue, The Image of Spain* at 4 and 10 (Spring-Summer, 1961), see also A. Castro, *La Realidad Histórica de España* 472-484 (Mexico, 1954).

<sup>38</sup>This type of behavior is exemplified at the sheer subsistence level of trade by the exploits of *El Lazarillo de Tormes*, a Spanish anonymous novel (c. 1554).

<sup>39</sup>Uniform Commercial Code, Section 9-504:

"SECURED PARTY'S RIGHT TO DISPOSE OF COLLATERAL AFTER DEFAULT; EFFECT ON DISPOSITION.

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the Article on Sales (Article 2). The proceeds of disposition shall be applied in the order following to

- (a) the reasonable expenses of retaking, holding preparing for sale, selling and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;
- (b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;
- (c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale." Please note the crucial role of concepts such as "commercially reasonable" and "reasonable notification" in the determination of the legality and fairness of this remedy and the interplay between these concepts and what is customary in trade. See, Uniform Commercial Code Sections 1-203 and 1-205(2).

<sup>40</sup>See Kozolchyk, at 741.

<sup>41</sup>Circumvention of the law and particularly of prohibitions through the use of "simulations," that is, by providing the appearance of entering into a permissible act or contract when in fact the parties are entering into another one that is illegal, is a widespread practice in Latin America, see Kozolchyk, *Law and Credit Structure in Latin America* 7 Va. *Journal of International Law*, n.2 at 11, 12, 33, 34 (1967). Rosenn, *The Jeito*, Brazil's Institutional Bypass of the Formal Legal System and its Development Implications, 19 *American Journal of Comparative Law* 514 (1971). These simulations are greatly facilitated by the availability of idle and amorphous

institutions, i.e., acts or contracts which have no direct bearing on prevailing commercial practices and which therefore can be adapted to serve as mere covers for the forbidden transactions. A case in point is that of the so-called *reporto* contract found in many of the recent Latin American re-codifications of commercial law. Originally an equivalent of what in Anglo-American law would be the "short" sale, it is now being used to circumvent prohibitions on the control of corporations by given shareholders or by holders of certain classes of shares. For the cost of simulation in the economic development process, see Kozolchik, 744.