The Reception of Legal Systems in the Americas: Diversities and Convergences

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"Il faut éclairer l'histoire par les lois, et les lois par l'histoire."

—Montesquieu[1]

I. INTRODUCTION

The history of mankind is a magnificent drama in which nations, after centuries of preparation, are called upon to play their part.[2] It is safe to say that the history of the laws in a nation is, in a sense, the history of the integrity of that particular State.[3] On numerous occasions, in the absence of an historical narrative of the jurisprudence, each jurist must, by his own account, acquaint himself with the background of the creation and progress of the legal system of every nation that they intend to study and analyze.[4] Nations, like individuals, do not follow the same path in their scientific development.[5]

The reception of Legal Systems in the Americas is a subject that, due to its vastness and complexity, forces the analysis to be more suggestive rather than intensive, and will inevitably result in formulating questions rather than answering them.

The interaction of cultural systems involves various processes of acculturation or transculturation and the reception of legal systems is inevitably immersed in that process. The territories of the Americas have been frequently presented as passive objects of transpositions and legal grafts; the absence of a detailed analysis hinders our understanding of the legal culture that prevails in our countries.

There is evidence that, for geographical reasons, the societies of the Americas at the time of the encounter with the West were not subordinate to other cultures, at least not in a form that was recognized in Euro Asia[6]

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1. MONTESQUIEU, ESPRIT DES LOIS [THE SPIRIT OF THE LAWS] bk. XXXI, ch. II in fine, p. 541 (Librairie de Firmin Didot Frères, Paris 1849).

2. GUSTAVUS SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO p. 1 (printed for the author by Thomas Rea, New Orleans 1851) (arranged on the principle of the Modern Codes, with notes and references, preceded by a *Historical Introduction to the Spanish and Mexican Law*, and embodying in an appendix some of the most important acts of the Mexican Congress).

3. Granier de Cassagnac, *Histoire du Droit Français* [*A History of French Law*], *in* DU DROIT COMME BASE DE L'HISTOIRE [THE LAW AS A BASIS IN HISTORY], *cited in* SCHMIDT, *supra* note 2.

4. SCHMIDT, *supra* note 2, p. 7.

5. *Id.* p. 5.

6. SILVIO ZAVALA, EL MUNDO AMERICANO EN LA ÉPOCA COLONIAL [THE AMERICAN WORLD IN THE COLONIAL ERA] p. 62 (Biblioteca Porrúa, tomo I, Segunda Edición, México 1990).

and therefore the composition of the national heritage of the Americas was seen as significantly different, enigmatic and fascinating. The existence of cultural borders explains the singularity and complexity of the transculturation process, and the notion of cultural borders is crucial in explaining the shaping of legal cultures. It is precisely this notion[7] which explains how, in specific geographic zones, diverse cultures interacted as much with each other as with their physical surroundings; this rich dynamic of cultural and environmental variables is unique in inextricably linking time and space with the acculturation process.[8] This peculiarity comes from the fact that cultural interaction is caused by the impact of an extensive range of cultural, political, environmental and religious variables. The result of this cultural transformation is the most important catalyst for historical change.[9]

The Americas may be seen as a legal kaleidoscope whose evolution has been molded by the combination of its physical and human surroundings. It is not only the physical surroundings that determine the impact of cultural borders on a society, but also the values that migrate with migrating people themselves.[10]

The specificity that was incorporated in the conquest was the existence of the indigenous population and the extent and level of its culture, even though that incorporation occurred under coercion, or alternatively, through mestization and transculturation.[11]

The Spanish conquerors came from a peninsula which, for seven centuries, had been trying to overthrow the infidels. The success of this effort in 1492, with the fall of the Alhambra, provided the opening for political freedom and an unusual series of opportunities for social mobility in the Spanish military. During the recapture, the Spanish dream was always nourished by the material rewards that would be obtained from the affluent Muslims of Andalusia and the spiritual benefits gained from the extension of Catholicism across the peninsula. A few years later, blinded by these same convictions, the Spanish conquest of America was embarked upon.

During the conquest of America, the Spanish institutions and their legal systems had to modify and adapt to the new societies and circumstances. It must be emphasized that the natives were not the only

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7. JANE M. RAUSCH, WHERE CULTURES MEET: FRONTIERS IN LATIN AMERICA HISTORY p. xvii (David J. Weber & Jane M. Rausch eds., Wilmington 1994).

8. *Id.* p. xiv.

9. *Id.* p. xxi.

10. Silvio Zavala, *The Frontiers in Hispanic America*, *in* RAUSCH, *supra* note 7, p. 42 and following.

11. RAUSCH, *supra* note 7, p. xx.

ones to undergo the processes of transculturation; the wild ones, or "maroons" to use the English terminology, also underwent such a process. The Afro-Americans founded *palenques*[12] as a response to their own institutions.[13]

At the beginning of the conquest, different forms of social organization competed with each other and were absorbed into the construction of a new culture. Two legal orders entered into competition: the *República de Indios* and the *República de Españoles*. These contrasting legal orders interacted with each other, with unexpected results, in a slow process of legal acculturation where there were two outstanding aspects: the political organization and the application of the Spanish civil legislation.

The historic events in Europe in the late XVIII and early XIX centuries was a revolutionary period that quickly affected Spanish America. We must consider that this entailed cultural and political mutations different from the prevailing ones during colonization. A new political vocabulary and new forms were adopted to define the individual in society, in authority, in government, and in contemporary life.[14]

In 1808, after three hundred years of iron-fisted colonization, cracks began to appear in the values of the Creoles, due to historic events in Europe, the decline of Colonial wealth and the passivity of the Creoles towards events affecting the Spanish Monarchy. The prevailing events and ideas irreversibly altered the multi-secular scheme of cultural references and brought about a strong reaction in the Spanish American culture that obstinately sought the preservation of its privileges. European events obliged the Creoles to take a political position and to act against two important considerations that were imposed on them by the force of circumstances: the survival of the Spanish Monarchy and the political relations between both continents.

New conceptions forced them to rethink the mode of government. In its infancy, the inertia of colonial thinking dominated the pro-independence movement: a constant feature was loyalty to the crown and to the principles embodied by the Monarchy. In this period, the first indications of independence arose. A buried demand for equal rights

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12. *Id.* p. xxvi.
13. *Id.*
14. Francois-Xavier Guerra, Conocimiento y Representaciones Contemporáneos del Proceso de Continuidad y Ruptura" [Knowledge and Contemporary Representations of the Process of Continuity and Ruptura], in G. CARRERA DAMAS, HISTORIA GENERAL DE AMÉRICA LATINA, LA CRISIS ESTRUCTURAL DE LAS SOCIEDADES IMPLANTADAS [GENERAL HISTORY OF LATIN AMERICA, THE STRUCTURAL CRISIS OF THE IMPLANTED SOCIETIES] vol. V, p. 442 (Trotta 2003) [hereinafter HISTORIA GENERAL DE AMÉRICA LATINA].

bubbled to the surface in numerous guises between the two continents: equality in the administration of the Colonies, in the ecclesiastical structure, in short, equality in political representation.[15] This demand evolved in a context that was dominated by the notion of the inferiority of the new continent and its inhabitants.[16]

It is in this context that we see the blossoming of the search for identity, whose main concern was the determination of those subjects entitled to this new freedom. The Creole moved between ambiguous feelings. On the one hand, there were the patriarchal families who fought against the Spanish domination, whose coat of arms identified them with their ancestors and mythical deeds, and who paradoxically lead the independence processes.[17] And on the other hand, along with these equivocal sentiments, there was an idealistic indigenous ancestry shared by the inhabitants of America who saw themselves as a mirror reflecting the glorified past of an "archaeological indigenous people" who had inevitably submitted.[18]

The pro-independence Creoles, like their peers in the Latin, French and Hispanic revolutionary field, participated in the same dualistic vision of history: the pre-revolutionary era occurred in an *Ancien Régime*, where despotism and ignorance prevailed. The colonial regime was suddenly characterized by the abominable domination outside Spain, when in fact, during the colonial regime; the Monarchy was powerless against the elites of the Colonies.[19] Past offences and vindications, old rivalries between European Creoles and political arrogance were rapidly incorporated into the Creole's vocabulary and thought "in an explanation more effective than coherent".[20]

The key cohesive element of the Indies was the Spanish Crown and the vertical position from which it had organized the Indies. However, the Independence movement irreparably fractured the political unity of the Crown, not only in peninsular Spain, but also in the various American "*pueblos*". The formation of "*Juntas*" began, but no one had sufficient power to dominate the others. Therefore, the attempt to determine the geographic areas of the "*Juntas*", whose background was to find the solution to the representation of the Indies failed.

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15. *Id.* p. 425.
16. *Id.* p. 438.
17. *Id.* p. 442.
18. *Id.*
19. As seen in the composition of the Audiencias between 1687 and 1808, a period known as the "Age of Impotence". *See* MARK BURKHOLDER & D.S. CHANDLER, FROM IMPOTENCE TO AUTHORITY: SPANISH CROWN AND THE AMERICAN AUDIENCIAS, 1687-1808 (1977).
20. Guerra, *supra* note 14, p. 441.

The trends marking the history of Spanish America in the XIX century were the deterioration as a result of political rupture and searches for identity, the rebellious rivalries, and the contradictory legitimacies and identities in the gestation process.[21] In this context the second period of transculturation should be developed.[22]

These processes clearly show several periods of transculturation on different levels. In the first period, institutions and forms of Spanish government were transposed, by way of arms, along with the Spanish legal system and an endless number of variables. According to the orthodox application of western *jus belli*, the right to conquer was the right to impose a language, a religion and a legal system; its application in the Indies was without maltreatment. The second period that initiated the movement of political independence was characterized by a steadfast search for a national State and the gradual replacement of the colonial legal system.

II. THE FIRST PERIOD OF ACCULTURATION

A. The Fundamental Decisions

The unexpected encounter of the West with the pre-Columbian cultures forced the Spanish Crown, in the face of unknown situations, to develop State policies that are unparalleled in history. Among the many relevant state policies to be adopted, two of these are fundamental: the form in which the Indies had to be governed and the legal system that had to be applied. The implementation of these decisions was incredibly complex and was not always accepted in the sense that the law and its spirit demanded. In the downfall of the Spanish Crown, it should be emphasized that when they tried to foster a new legal order for the Indies, the Spanish Crown was dominated by ancestral and particular conceptions, which could never be avoided. It faced new and unfamiliar situations, which prevented it from having the necessary perspective that was required when making these fundamental decisions.

1. The Form of Government

After the conquest, the Spanish Crown tried to devise a form of administration and government which assured the dependency of the conquered territories and rendered the respective benefits to the Crown. The recapture of the Arab territories overshadowed royal decisions; the

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21. *Id.* p. 433.
22. *Id.* p. 440.

Crown's granting of territories was at the expense of royal power and therefore raised the new power of the aristocracy to a level that rivaled the Crown. This was the context in which the legal order unfolded and the Spanish Crown had to make fundamental decisions for the Indies. Its existing legislation and institutions lacked the universality and flexibility required to be transposed to societies with diametrically different traditions. Nevertheless, it is to be recognized that any attempt to identify legal models in other latitudes would have been in vain as they were totally different from the prevailing thoughts at the time and in particular, they would have been in opposition to the submission sentiment.

The decisions that were taken had far from the desired effects and, to a great extent, were attributable to the deficient form of the prevailing administration at the time. The Spanish Crown perceived the Indies like many of its strongholds, as being governed by monarchs in the strict interests of the Crown. The Spanish Monarchs saw the Indies as their deprived dominions, from which they would extract the maximum benefits and where the settlers were mere occupants. The colonies were a royal monopoly, whose administration belonged exclusively to the monarch.[23]

In trying to avoid the scheme that was applied to the infidels, the interests of the settlers were neglected. This conception prevailed throughout the whole colonial regime and hindered the course of the settler's legitimate aspirations, which had been systematically rejected and considered out of place,[24] to attain the status of Spanish citizens with a right to the same privileges as the *Peninsulares*. Even when the extent of the discovered territories was still unknown, it was still decided to incorporate the Indies, *in toto*, to the Crown of Castilla and not to the Kingdom of Castilla. This decision of eminent importance would have considerable effects over the next three hundred years and would have an impact on the decisive form of the independence movement of Spanish America.[25]

One of the multiple effects of this State decision was the assurance of a legal unity in the Indies, with other models of government, such as the imperial model,[26] being rejected as a form of government for the

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23. SCHMIDT, *supra* note 2, p. 92.
24. *Id.*
25. ALEJANDRO GUZMAN BRITO, HISTORIA DE LA CODIFICACIÓN CIVIL EN IBEROAMÉRICA [THE HISTORY OF CIVIL CODIFICATION IN IBERO-AMERICA] p. 33 (Aranzadi ed., Madrid 2006).
26. *Id.* p. 32.

Indies, though as radiating dependencies each political unit might have been motivated to develop its own legal system.[27]

The legal unity forced the creation of a *jus commune* for the Indies and is unprecedented in history.

This State decision implied an abandonment of the prevailing model in the Iberian Peninsula and rejected the idea of dividing the discovered territories into political units where, although ties inter se would have been broken, they would have had coherent links to Spain.[28] In contrast, the governmental organization of the Indies was of an exclusively administrative, judicial or military nature and therefore did not alter the political and legal unity of the Indies.

In 1501, the previous Spanish Crown prohibited all persons who were not vassals of the Crown to enter the Indies and to have dealings therein except by express royal authorization. It is what was designated the "colonial exclusive feature".[29] In this manner, Spanish law ordered the exclusion of all foreign individuals who lived in the Indies[30] and barred them from participation in the Spanish process.[31]

Over time, Spanish politics became more severe. Felipe II exclusively favored the *Peninsulares* in the colonization,[32] except for the commerce on the coast, from which were excluded the Italian, Flamenco and Burgundian colonization efforts, even though they were subjects of the Spanish Crown. The Indies journeyed in this manner from "colonial exclusivism" to "Spanish exclusivism", that ethnically and culturally determined the Indies.[33]

B. The Legal System of the Indies

1. The Spanish Legal System

The Iberian Peninsula has been characterized by the vicissitudes of its history, where the concept of cultural borders acquires a special importance. A mere listing of the different migrations of peoples is fertile soil for the imagination. These migrations meant that there were

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27. *Id.*
28. *Id.*
29. LEONEL PÉREZ NIETO CASTRO, LA TRADITION TERRITORIALISTE EN DROIT INTERNATIONAL PRIVÉ DANS LES PAYS DE L'AMÉRIQUE LATINE [THE TERRITORIALIST TRADITION IN INTERNATIONAL PRIVATE LAW IN LATIN AMERICAN COUNTRIES] p. 325 (Académie de Droit International, Dordrecht/Boston/Lancaster 1985).
30. *Id.*
31. SCHMIDT, *supra* note 2, p. 93.
32. Tomo cuarto del libro noveno, libro XXVII, ley XXXI of the *Recopilación de Indias*.
33. JUAN RUIZ DE ALARCÓN, OBRAS COMPLETAS [COMPLETE WORKS] tomo II, p. 10 (Biblioteca Americana, Mexico 1996).

frequent and radical changes of government without escaping the cultural ingredients and peculiar characteristics contained in the Spanish peninsula.[34]

The changes to the legal orders in the Iberian Peninsula coincide with the various periods of old Spain: Roman, Visigoth, Arab and the stage following the expulsion of the Arabs. Although these chronological frameworks can prove useful for didactic purposes, they are not as such for legal purposes in that they cannot be delimited in temporal terms, whatever they may be. Although each legal order can be identified with an historical period to which it belongs, the law is inherent to human nature and man's customs and habits. The effects are lasting even when the law has formally been countermanded. A doctrine of feudal law was affixed to this system and was modified by the municipal institutions to conform to the Spanish legal system.

Unlike other legal cultures, such as the English and North American, the authority of the Spanish legal system did not come from decisional precedents; it came, of course, from the different *Códigos*, enriched by commentaries of jurists, plagued with references to Roman law and later, to the monarch. This manner in which the law was formed, explains the need to depend on *Recopilaciónes* for provisions, which Spain generously satisfied but with a frugality in specific areas.[35]

A legal order of this nature had, without discussion, the benefit of stability, but this turned out to be inadequate for solving the growing needs of expanding communities, as in Spanish America.[36] Another one of the serious disadvantages of this legal system that proved tremendously difficult was the basic impossibility of providing mechanisms to solve controversies that arose from the length and complexity of the compiled legislation.

Feudalism crossed from France to Spain. This form of social organization was of the utmost importance for Christian Spain since it effectively contributed to the extension and preservation of the territories conquered by the Arabs. The reconquest was gradual and took several centuries.[37] The Spanish monarchs understood from the beginning that in order to be able to maintain the general interest, they had to make it compatible with interest of the individual. For that reason, the sovereign

34. SCHMIDT, *supra* note 2, p. 10.

35. *Id.* p. 11.

36. *Id.* p. 12.

37. It was during this period that the Kingdom of the Castilla emerged, taking its name from the innumerable castles, in which the feudal leaders who were called upon to fight against the infidels resided.

conferred the reconquered territories, free of charge, to their Spanish vassals, which they could then be inherited through the primogeniture. The history of Spain between the XIth and the XVth century is characterized by the improvidence of granting these territories to the nobility and by diminishing royal power and control. This is demonstrated by the exorbitant power that the *Hijosdalgos* and the *Ricoshomes* acquired, that frequently neutralized the power of the sovereigns.[38]

This power was so intolerable that the Monarchs themselves were forced to favor the emergence of a third power: the municipal power. A clarification is fundamental: the municipal power was not a monarchic creation. It had existed since time immemorial, but in Christian Spain, it took on particular characteristics and, in consequence, it empowered the Municipalities to resist the threat of the aristocracy. In order to favor the insurgence of the urban population, the monarchs conferred a series of privileges to them, which were contained in "*cartas pueblos*" or municipal jurisdictions.[39] These jurisdictions allowed the citizens to choose their own judges and to manage the administration of city matters, as well as the property known as "*propios*"[40] and provided the foundation of the sovereignty of the "*pueblos*", which would then be determined during the independence movements.

Over time several regulations followed one another in Spanish territory, each of them responding to specific situations, such as the *Fuero Juzgo*,[41] the *Fuero Real*, the *leyes de Estilo*,[42] the *Fuero Viejo de Castilla*[43] and the *Siete Partidas*, among others.[44]

The *Siete Partidas* was worshipped for its style, method and rules[45] and has been the most highly regarded law of Spain. The *Siete Partidas*

38. SCHMIDT, *supra* note 2, p. 63.
39. *Id.*
40. *Id.* p. 64.
41. The *Fuero Juzgo* was not just a *Recopilación* of ancient customs, nor was it an attempt at reform: it was a universal code, a political, civil and criminal code, systematically drafted to satisfy the society's needs. It was not a simple *Código* or an ensemble of legislations, but a philosophical system.. It contained dissertations on the origins of society and the composition and publication of laws. It was not solely a system, but an inexhaustible source of moral exhortations, warnings and advice.
42. The *leyes de Estilo* were a code of practices, which were adopted by the Courts of the time and published as an appendix to the *Fuero Real*.
43. The *Fueros Municipales* reflected the Spanish democratic character and became an emblem for the *pueblos*, who recovered their freedom at a cost of great sacrifice and effort. The *Fuero Viejo de Castilla* contained the stately privileges of the Castilian nobility and the legal validation of those privileges.
44. SCHMIDT, *supra* note 2, p. 41.
45. *Id.* p. 74.

mark the period of transition when the monarchy was being reorganized; it draws from sources like Roman and canonical Law.[46] The monarchic tradition accepted the municipal privileges and the prerogatives of the nobility as a crucial compromise. With the introduction of the *Siete Partidas* the clergy recovered its jurisdiction, and, for the first time, Rome recognized the supremacy principle, which had been lacking for so long in Spain.[47] The version of the *Siete Partidas* by Gregorio Lopez in 1555 modernized the text and adapted it to the commentator's version in such a way that it can be maintained that the *Siete Partidas* constitute a "private Roman code".[48] The *Siete Partidas* was fundamental in the application of the law of the Indies and the means of fostering the Romanization process of the Indies. The *Siete Partidas* became the common and general law of the Kingdom of *Castilla* and, by extension, of all the Indies.[49]

There were constant complaints regarding the obscurity and confusion of the texts in force; the legal texts were vague and their application was difficult to understand due to their lack of order, connection and unity.[50] This confusion was inherent in the Spanish legislation[51] until the codification movement came into play.[52]

The difficulty in coherently organizing the legislation in force shows the serious problems encountered in comprehending the law. The Spanish legal system at the time of the encounter between these two worlds was characterized by strong roots in feudal customs and by formal legislation whose main sources were the Roman and ecclesiastic laws. This combination made the Spanish legal system an extremely complex one and this complexity was irremediably transposed to the Indies.

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46. The *Siete Partidas* possessed legislative authority until 1348 under the reign of Alfonso XI, when they were sanctioned by *las Cortes* in Alcalá de Henares, by *las Cortes* in Burgos under the reign of Enrique II in 1367 and by Juan I, in 1380 in *las Cortes de Soria* and finally by Juan II in *las Cortes de Toro* in the year of 1505. This law of the Toro, was later incorporated into the *Nueva Recopilación*, and later transferred to the *Novísima Recopilación*. Las *Siete Partidas*, the most celebrated law in Spain, was printed for the first time, under the reign of Fernando de Castilla and Isabel de Aragón, and was succeeded by sixteen publications, the one with the greatest authority being the one published in Madrid in 1807 by the Royal Academy, even though the publication in Madrid in 1787 with notes by Gregorio Lopez is possibly the most revered and of course the most consulted.

47. SCHMIDT, *supra* note 2, p. 13.

48. GUZMAN BRITO, *supra* note 25, p. 40.

49. *Id.*

50. SCHMIDT, *supra* note 2, p. 12.

51. *Id.* p. 13.

52. The *Novísima Recopilación* was under the charge of Reguera Valdelomar. SCHMIDT, *supra* note 2, p. 78.

2. The Indies' Legislation

a. The "*Recopilación de Indias*"

The original laws of Spain for the governing of the colonies were issued in various forms: proceedings,[53] warrants, "*Autos Acordados*",[54] "decretos",[55] "resoluciones",[56] "reglamentos"[57] and "pragmáticas".[58]

With time, these regulations became so numerous, that at the beginning of Felipe II's reign,, there was confusion over exactly which laws were being applied in the Indies. In order to overcome this situation, the monarch ordered an accumulation of the colonial laws, which was carried out at such an unhurried rate that it was not until the reign of Carlos II that the "*Recopilación de leyes de los Reinos de las Indias*" commonly known as "*Recopilación de Indias*", was promulgated. The method employed was similar to that of the *Nueva Recopilación*, containing an endless number of regulations enacted by different monarchs that, although initially limited in their effect, had the authority of the law.

Consequently a legal labyrinth was unavoidable, as witnessed by the repetitious laws on the same subject, those maintained with modifications, and others which were either partially or totally abrogated. It is important to emphasize that Spanish legislation initially declared that later laws were merely superimposed over previous ones. It was thus indispensable to compile all classes of legislation on a single subject in order to analyze a certain case. The respect of the compilers towards the text of the law and to those who had promulgated them, especially if they were issued by the monarch or his predecessors, to whom they were obliged to pledge loyalty, inhibited them from omitting or modifying a royal ordinance. This inclusiveness displayed the compilers' own act of faith toward the Crown. This legal system has been rationally described as an historical law, formed by different layers where a later one does not replace a previous one.[59]

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53. *Id.* p. 89.

54. The *Autos Acordados* and warrants were orders that stemmed from a court, promulgated in name and under the authority of the monarch.

55. *Los Decretos* or Decrees were similar orders in ecclesiastical subjects.

56. *Resoluciones* were opinions expressed by a superior authority to an inferior one in reference to a decision, for their knowledge and good governing.

57. *Reglamentos* were written instructions sent by a competent authority without the observance of a specific form.

58. The *Ordenamientos* and *Pragmáticas* were orders sent by the monarch and were different from the warrants in their form of promulgation.

59. GUZMAN BRITO, *supra* note 25, p. 94.

The *Recopilación de Indias* was concentrated on political, military and fiscal matters of the Spanish Colonies. Even though this legislation pretended to be a comprehensive *Code Civil* for the governing of the colonies, it should be seen as a simple enumeration of exceptions to the Spanish general system. The *Recopilación de Indias*' own dispositions declared that wherever there were gaps and omissions, the laws of the Kingdom of Castilla had to be applied.[60] It was in this manner that the Spanish civil legislation was applied in the Spanish colonies. Nevertheless, in recognition of the great divergences between Spain and its colonies, Felipe IV decreed that no effective legislation in Spain would be applicable in the colonies, without first obtaining the approval of the *Consejo de Indias*.

As a consequence, many of the laws effective in Spain were not applied in the Indies and some that were no longer in use in Spain were applied in the Indies.[61]

The legal order of the Indies can be summarized as a Romanized background against which feudal institutions originating in Spanish Medieval Law and unheard of in Roman law were juxtaposed.[62] The Romanization process reached its limits very fast in the encounter with the institutions of Spanish medieval laws and usages such as primogeniture.[63]

There were numerous driving forces that contributed in different manners to the formation of the Indies' Legal System. Roman Law contributed a certain freedom to its institutions in that it promoted, the free circulation of goods, the rapid division of estate, a degree of testamentary freedom and free contracting and tended to unify the law.[64] Spanish medieval law contributed a corporative and familiar rationale. Lastly the Indies law shifted towards the protection of the indigenous people and the preservation of the ecclesiastic order and the Spanish State.[65]

b. The Legislation Prior to Independence

Following the French invasion, the Revolution in Spain caused a new form of government to emerge under the control of the *Cortés*, a legislative branch, whose decrees were considered compulsory for the

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60. *Id.* p. 46.
61. Law 40, vol. I, bk. 2 and Law 2.
62. SCHMIDT, *supra* note 2, p. 51.
63. *Id.* p. 52.
64. *Id.*
65. *Id.*

Indies when they were express or inferred. After the re-establishment of the absolute monarchy in Spain in 1814, the monarchs continued promulgating laws for Spanish America until 1820 when independence spread across Spanish America.

Acevedo, a pioneer in the codification processes of Uruguay and Argentina, expressed his concern regarding the existence of more than fifty thousand dispositions that were invoked daily in the courts. The labyrinth was of such magnitude that it was impossible to know which codes were in force and which prevailing order provided the solution. It was a matter for discussion whether the *Fuero Juzgo* or the *Fuero Real* was in force, whether they were the regulations of Spain or the Indies, whether the warrants had been passed through the Council of the Indies and whether they had been communicated to the respective *Audiencia* so that they were applicable in the Indies.[66] This statement can be transposed across the entire Indies' region.

The results were chaotic since the validity of the legal order was at issue. The legislation, as it was perceived, was bound together by the monarchic laws of several centuries and the laws of the Indies, compiled or not, or as in the case of Mexico, whether in a federal or central form. The nomenclature of the legislation came from causes, authorities or governmental agencies which had disappeared by that point and whose competence was redistributed among the legislative, executive and judicial branches.[67]

This legislative confusion, very typical of the Spanish legal system of the time, introduced damaging elements of uncertainty into the Indies society. The perpetuation of this confusion was foreseen.[68] An assessment of the condition of the system by an author of the time was that its study and knowledge "easily exceeded the life of an individual"[69]. To this it is necessary to add that on many occasions the legal

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66. Héctor Gros Espiell, *Constitucionalismos y Codificación Latinoamericana: de la Sociedad Colonial a la Sociedad Republicana* [*Constitutionalism and Latin American Codification: In the Colonial Society and the Republican Society*], *in* HISTORIA GENERAL DE AMÉRICA LATINA, *supra* note 14, vol. V, p. 466.

67. JUAN N. RODRIGUEZ DE SAN MIGUEL, PANDECTAS HISPANO-MEXICANAS vol. 1 (new ed., Librería de J.F. Rosa, México 1852) (or the General Code for understanding the useful laws and lives of the Siete Partidas, the Recopilación Novísima, the Indies' law, known Autos and rulings such as Montemayor and Beleña, later Warrants up until 1820 with the exclusion of the ineffective and repeated ones and those specifically countermanded).

68. Jorge Sanchez Cordero, *La recepción de la cultura Jurídica. La experiencia mexicana* [*The Reception of Legal Culture, the Mexican Experience*], 6 REVISTA MEXICANA DE DERECHO [MEXICAN L.J.] p. 317 (2004).

69. JOHN T. VANCE & HELEN L. CLAGGET, A GUIDE TO THE LAW AND LEGAL LITERATURE OF MEXICO p. 21 (Library of Congress, Wash. 1945).

dispositions did not arrive at the courts and that it was difficult for the judiciary to conduct themselves in this legal labyrinth.[70]

C. The Law Practice of the Indies

1. The Practice in the Courts

As a general rule, the "*Recopilación de Indias*" should be considered as an authentic collection of decrees and regulations that governed Spanish America until 1680.

The *Audiencias*[71] of the Viceroys of New Spain and Peru sometimes published rules and regulations, known as *Autos Acordados* and *Providencias de Gobierno*, whose observance was compulsory. These were gathered together, without contravening their authority, under the orders of the viceroy in New Spain.

2. Indigenous Customary Law

The Spanish Crown approved the use of indigenous customary law when it was not opposed to the Catholic faith and royal legislation.[72] In this way, European law was clarified in substantive form in a way that was totally alien to the pre-Hispanic societies.

The *Codex Osuna* was one of the prime examples of the legal acculturation process. The *Códex Osuna* was one of the most attractive and politicized *Códices* written after the conquest. It documents the initial municipal life of the indigenous population in Mexico City.[73] This *Códex*, only comparable in artistic purity with the *Códex Mendocino*, was initially published in 1878[74] and is much more that a chronicle of the development of a process. It offers an invaluable perspective on the interaction between two different legal orders and on the consequent conflict that emerged between the Hispanic culture and the indigenous culture, as well as the interaction between the written text and pictographic documents of this period.

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70. Julio Cesar Rivera, *Le droit comparé et le droit uniforme dans l'élaboration du projet de Code Civil Argentin* [*Comparative Law and Uniform Law in the Development Project of the Argentine Civil Code*], 4 REVUE DE DROIT UNIFORME (NS) 863 (1999).

71. The highest judicial jurisdiction in Spanish America.

72. As seen in the Royal Warrant and the *Recopilación de Indias*, vol. II, bk. VI, tit. II, law 1.

73. The ancient Mexicans were confined to the San Juan, San Pablo, Santa María and San Sebastián neighbourhoods of México City between the years of 1551 and 1565.

74. The Osuna Codex was found in the library of the Duke of Osuna, in forty pages, in Madrid; currently it is an ampler document of more than 400 pages.

D. *The Organization of Power in the Indies*

It is clear that in the extensive territories of the Indies, colonial power was concentrated in a small Creole elite. Brading[75] forcefully states that in each province of the Empire, the administration was placed in the hands of a small colonial group, made up of the Creole elite—lawyers, landowners and ecclesiastics—a few civil servants of the Peninsula with many years of service, and the great merchants dedicated to importation. The sale of positions prevailed in all levels of administration. The composition of the *Audiencias* clearly showed the controlling power of the Creoles that created the "Age of Impotence", until the Bourbon reforms restored the "Authority".[76] Over time, the Spanish Crown lost direct colonial control undergoing a considerable reduction in fiscal takings that were ceded in favor of individuals.

With the famous phrase "it should be obeyed, but not enforced" the colonial civil servants honored their loyalty to the Crown and simultaneously safeguarded colonial interests.

III. THE SECOND PERIOD OF ACCULTURATION

A. *The Political Rupture*

The different independence movements revealed the absence of Spanish American identity, even though the notion of identity was used as a reference in the movements. The insurgent movements demonstrated that the only cohesive element uniting the Spanish American "*pueblos*" with each other[77] was their vertical bond to the monarch. When the Spanish monarchy ceased to exist, there ensued the "dissolution of the Spanish nation", a keen expression of the independence literature and, correlative to this dissolution, the dispersion of the sovereignty to the population began.

The Indies proliferated their own version of the Spanish "*Juntas*" in that period. However, the supremacy of one "*Junta*" over another was totally nonviable and, as a result, so was the possibility of maintaining the political unity of the Indies. It irremediably brought about the political fragmentation of the old Indies into a plurality of sovereign states.

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75. DAVID A. BRADING, THE FIRST AMERICA: THE SPANISH MONARCHY, CREOLE PATRIOTS AND THE LIBERAL STATE 1492-1867, p. 153 (Cambridge Univ. Press, 1991).

76. Between 1687, when they began to sell positions, and 1750, 138 Creoles and 157 Peninsulares were named in the *Audiencia* of Lima. Jorge Gelman, *La Lucha por el control del Estado: Administración y Élites coloniales en Hispanoamérica* [*The Fight for the Control of the State: Administration and Colonial Elites in Hispanoamerica*], *in* HISTORIA GENERAL DE AMÉRICA LATINA, *supra* note 14, vol. iv., p. 252.

77. Guerra, *supra* note 14, p. 447.

Although these new states were independent political communities, they did not possess the attributes of a modern nation, namely, undisputed territory,[78] a mutual feeling of belonging by all inhabitants, a shared history and a common State project.[79] The disintegration of the Indies in its various areas was the ominous and undesired effect of the way in which the independence movement unexpectedly unfolded.[80]

B. The Perpetuation of the Ancien Régime

There is no doubt that the different movements for independence sustained the *Ancien Régime*. The substitution of the Indies socioeconomic order was not contained in any libertarian program. This is what substantially differentiates the libertarian movements in Spanish America from its immediate antecedent, the French Revolution.

The independence of Spanish America did not entail the break-up of old "*jus commune*", as was the case in the French Revolution. The French Revolution abruptly eliminated absolutism, feudalism, and the monarchic legal order, replacing it with liberalism in all orders.[81]

In contrast, in the Spanish American pro-independence movements, the social structures of the colonial regime remained untouched, as many of the semi feudal institutions and royal legal orders remained unaffected. The creation of the national States did not entail an alteration of this order and its initial effect was the preservation of the legal order in independent America. The *status quo ante* was maintained.

The effect of the Indies' legal order, with its Romanized feature that housed royal elements of feudal law, was expressly or tacitly ratified *in toto* by the new constitutions, except for some modifications in obvious response to Creole interests, such as freedom of commerce which had already been hinted at prior to independence.[82]

The ideas of the *Enlightenment* began to unsettle the American elites, especially the idea of adopting political and social constitutions founded on liberty.[83] One of the initial criticisms in relation to the colonial *Ancien Régime* was that it was established by a despotic and feudal regime, in contrast to a new regime under "the constitution of

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78. *Id.* p. 446.
79. *Id.* p. 447.
80. *Id.* p. 424.
81. GUZMAN BRITO, *supra* note 25, p. 57.
82. *Id.* p. 59.
83. *Id.* p. 101.

freedom". This was a clear criticism of the Indies' dependence on the Crown of Castilla and not the Kingdom.[84]

One of the characteristic features of the *Enlightenment*, was the codification system that made laws certain, stable and accessible. Codification, thanks to its rational, comprehensive and scientific form, turned out to be a neutral instrument for society that rose above any particular ideology.

This induced the insurgents to adopt codification, even though it was predictable that its adoption would initiate a change in the social structures. Nevertheless, its impulse lay in the prevailing idea that codification was correlative to the foundation of the national State. The codification movement, safe from any political and social conception, could be associated with the government's political program and in response to a strong demand by the urban elite.[85]

Codification therefore generated the second great movement of legal acculturation, though with the aggravating factor of having to root the codes in social structures that widely contradicted them. This generates one of the most complex and fascinating processes of transculturation in history.

C. The Search for the National State

1. The Beginning

In 1810 loyalty to the monarchy still existed, as much in the elites as in the Spanish American popular classes. The historical events which have been traced in this analysis brought about the movements of independence and the adoption of a form of government for the Republic "more through lethargy than with conviction".[86] The notion of "Republic" encountered great difficulties. The Creole community were convinced of the need for a permanence of monarchic habits, and were aware of the risk of territorial disintegration. Nevertheless, the restoration of the absolute monarchy by Fernando VII was introduced into the insurgent movement before fear was lodged in the Creoles, and was clearly an antimonarchical and explicitly Republican speech on the predictable retaliation of the *Peninsulares*. The liberals in Spain felt in jeopardy and this sentiment was diffused among the Creoles. The political rupture with Spain was radical and imminent.

84. *Id.* p. 64.
85. *Id.* p. 86.
86. Guerra, *supra* note 14, p. 446.

2. The Governing Principles

The postulates of the *Ancien Regime* were replaced with new points of reference. In this manner, the transition began from a corporative society to a society founded on the voluntary union of individuals, from corporative privileges to a law with general character and from a hierarchical society to one of equality. In the Creole language a new political subject appears, the nation. Popular sovereignty replaces the divine power of the monarch and the sole legislative power lay in civic expression which, by way of a vote, chose representatives who were delegated constituted powers.[87]

3. The Language

A notable aspect in this transition was the mutation of the language. At the start of XIXth century, old or new words acquired different semantic content that by the force of history have been absorbed into the vocabulary of the Creoles. In just a short period of time, new words made their appearance in daily language, whilst others disappeared or acquired new meanings, preventing us from accurately knowing the new and old semantic content. Various semantic meanings co-existed and merely added to the ambivalence of language, as is often seen in strategies of political figures. For example; the use of the expression "*pueblo*" or "*pueblos*" which was fundamental in this era, held such degree of polysemy that only the analysis of the context and historical consequences allows us to explain the intended meaning behind the expression. This simply shows that the use of words constitutes as much an access route to thought and imagery, as combat weapons and smoke screens to disguise intentions that have yet to be clearly formulated.[88]

Another important aspect of the transition period was the noticeable contrast between the political proclamations and manifestos and the actual results of an action. It was frequently the undesired consequences of decisions, the "efectos perversos",[89] which dominated the revolutionary period.[90]

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87. *Id.* p. 445.
88. *Id.*
89. *Id.*
90. *Id.*

4. The Notion of Constitution

The constant in the drafting of the Latin American constitutions[91] at the onset of independence was its structure, unique texts and strict character, with one dogmatic part and one organic part.[92] The Constitution in the XVIIIth and XIXth centuries did not aspire to be a supreme normative text, rather a manifesto and a proclamation of the aspirations of independence, freedom and the Republic.[93]

It has been maintained that Latin-American constitutionalism at the onset of the XIXth century encouraged each State to incorporate various elements into its constitutional text: an organized structure of the state, the rights of the people, the sovereignty, the formation of political will, the definition of nationality and citizenship, the suffrage, and the organization and guarantees of the form and structure of government and its powers.[94]

The political elites and urban intellectuals advanced the postulate of the Constitution, but leaving the popular and indigenous classes aside.[95] Running parallel to the ideas of freedom, independence, a catholic denominational State, a republican representative government, limited suffrage for the illustrious and literate individuals, was the notion of sovereignty which was more a negation of its divine origin than an affirmation of its existence rooted in the *pueblo* or the nation. The new notion of sovereignty delegated the exercise of the constituted powers,[96] although the urban elite determined that the *pueblo* should remain marginal.

5. The Republic

The models available to replace the monarchic order were clear: the Constitution of the United States of North America of 1787, the French Constitution of 1791 and the Constitution of Cadiz of 1812.[97] These three models offered diverse solutions. The North American model served as a reference for constructing a common sovereignty from different sovereignties; what was equally important was the compatibility in a political regime between notion of a Republic and that of slavery. The French model that arose out of the French Revolution signified a

91. *Id.* p. 451.
92. *Id.* p. 452.
93. *Id.* p. 453.
94. *Id.* p. 452.
95. *Id.* p. 454.
96. *Id.*
97. *Id.* p. 444.

model of rational and universalistic character and reflected a nation that had split with the *Ancien Regime*. The nation was the original depositor of national sovereignty; the French model supposed equality,[98] freedom, the elimination of estates and privileges, a universality of citizenship, the vote, and the abolition of slavery.[99]

The *Cortes Generales of Cadiz*[100] and the constitution of the Hispanic Monarchy had a great influence on the insurgents.[101] An analysis reflects that a significant number of regulations enacted by the "*juntas*" and the Creoles' congresses; freedom of the press, the destruction of the social structures in the *Ancien Régime*, the nobility, the notion of citizenship and the vote; initially derive from the dispositions of *Cortes*, and then later from the Constitution.[102]

6. Federalism

Federalism was one of the great controversial subjects in the political debate. It was correctly said that the adoption of the federal system did not result in an intellectual dependence on the United States legal model, but rather the search for a solution to the form of government for the new states. The debate consisted of "how to constitute the nation from *pueblos* involving the construction of a political unity and a supramunicipal government."[103]

The transposition of legal models predictably provoked unexpected results. One of the founders of Mexico expressed it in a fashion which became part of the vernacular: "In the United States, federalism joined what was split, whereas in Mexico it split what was joined".

7. Conclusions

It should be pointed out that these governmental mutations changed the structures of the Latin American societies that were grounded in the *Ancien Régime*. The evidence exists everywhere: in the country and the popular classes, but also in the urban classes and the elites.[104] The

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98. Héctor Gros Espiell sustained that all the Latin American Constitutions of this period asserted the principle of equality, conceived as equality in the eyes of the law. Gros Espiell, *supra* note 66, p. 455.

99. Guerra, *supra* note 14, p. 445.

100. Initially promulgated on March 19th, 1812, then later declared void by Fernando VII on May 4th, 1814, when he declared an absolute monarchy once again.

101. The Constitution of Cadiz had in Europe a great influence since it was the only model that made a monarchy moderately viable.

102. Guerra, *supra* note 14, p. 445.

103. *Id.* p. 444.

104. *Id.* p. 447.

familiar social structure, the close-knit commercial networks, the militia, the clergy and the people and professions continued in the social and political scenes either just directly outside, or through individuals who came to dominate the political scene.

This process of transculturation reveals the persistent search for the National State, which would dominate the XIXth century in semi-feudal Latin America: The foundation of the National State required the self-imposition of personal links in structured societies; the economic structures would remain untouched. The social and economic activity continued without great changes until the introduction of the system of free trade, together with its vicissitudes, at the end of the XIXth century.[105]

The colonial tradition did not provide the necessary conditions in order for the notion of the "Republic" to constitute the ideal normative frame for a pacific transition to democracy.[106] The structure of the Latin American societies prevented it. There was a lack of any cultural tradition of democracy regarding the legal order, and neither was there the political experience or habits of tolerance. The constituents at the beginning of the XIXth century in Latin America ignored the reality and in the end, they created very frustrating situations. They constructed a government structure that was contradictory to the social structures and in this way they generated an "institutional pathology",[107] where they was a proliferation of *de facto* government and, in this manner, they brought about violent routes to constitutional change.

IV. THE PHASES OF CODIFICATION IN IBERO-AMERICA

A. *Introduction*

It is pertinent to emphasize that the civil law was essentially the same as the constitution in a society. Civil law was marked by a slow and deep evolution; a legal reform assimilated itself into society when civil law integrated it. Civil legislation was the result of a social effort that aspired to reach a common objective; it was the cultural expression of a society that reflected its proposed needs and objectives.[108]

The reception of law at the outset of the XIXth century was a very slow process and it extended gradually across the entire region. The

105. *Id.*
106. Gros Espiell, *supra* note 66, p. 459.
107. *Id.* p. 455.
108. Sanchez Cordero, *supra* note 68, p. 378.

consolidation of the society can be traced from the time of its total acceptance and the generalization of its effects.

One of the more relevant antecedents of the codification movement in the Indies was the Constitution of Cadiz, which was first promulgated on March 19, 1812.[109] This Constitution, even though it did not enact any mode of legislation until it was effective, served to extend the effects of the codes: "The Civil, Criminal and Commerce Codes were the same ones for all the monarchy, and, notwithstanding the variations of particular circumstances, were able to constitute *las Cortes*."[110]

The substitution of the *status quo ante* prior to the consummation of the political independence of Spanish America was conceptually associated with the foundation of the national State, and, predictably, could be fulfilled after many and varied vicissitudes. Therefore, legal independence could only be realized much later than political independence. The replacement of the complex Indies' legal order was a challenge of great dimension. There were two focal points for the replacement of the legal order: the first was the existence of the Indies' own legislation, along with the legislation promulgated during the euphoria of independence, but which was drafted according to modern legislative methodology: the other was a reference to the European models, either by adopting them, adapting them or modifying them. This resulted in an unprecedented hybridization process; on the one hand, the attempt to replace the colonial order through codification and on the other, the perpetuation of colonial legislation. These two tendencies entailed notions of diametrically opposed societies.[111]

The initial phase began immediately after the realization of political independence and started with the adoption or adaptation of the French legislation in the élan of the modernization spirit of the legislation; it was associated with the idea of progress and the Indies' legislation strongly opposed this spirit. The ideas of Enlightenment had seduced the Creoles and the adoption of the European codes signified the propitious occasion to effectuate them in American territories. The consideration of the previous legislation required a maturity that the times immediately after independence did not offer; on the contrary, the inherent instability and turbulences of these processes consumed the capacity of the pro-

109. GUILLERMO FLORIS MARGADANT, INTRODUCCIÓN A LA HISTORIA DEL DERECHO MEXICANO [INTRODUCTION TO THE HISTORY OF MEXICAN LAW] p. 139 (1st ed. 1971).

110. MANUEL DUBLÁN & JOSÉ MARÍA LOZANO, LEGISLACIÓN MEXICANA O COLECCIÓN COMPLETA DE LAS DISPOSICIONES LEGISLATIVAS EXPEDIDAS DESDE LA INDEPENDENCIA DE LA REPÚBLICA [MEXICAN LEGISLATION OR COMPETE COLLECTION OF THE LEGISLATIVE DISPOSITIONS ISSUED SINCE THE INDEPENDENCE OF THE REPUBLIC] tomo I, p. 349 (2004).

111. Sanchez Cordero, *supra* note 68, p. 326.

independence crowd. The search for the national State and the geopolitical movements in the nebulous newborn States prevented a genuine codification processes from being materialized. Before the emergence of national States, the incipient construction of a nation, easy enough for rhetorical purposes but complex in its formation, organization and administration, gave rise to fateful times that seriously complicated the codification process.

The lawmaker abandoned the method of the *Recopilación*, which consisted of the simple juxtaposition and chronological ordering of legal rules, to become an arrangement of current regulations, presided over by the legal and political rulings of the community itself.[112] The law, it was argued, had to be a national manifesto of rational and it attempted to guarantee the rights of an individual in a legal system. The codification function was conceived to be a scientific and nonpolitical task.[113]

The drafting of a unique text in a sober and abstract form which suited codification contrasted with the multiplicity of texts from the various eras, drafted in different styles, which brought about diverse legal interpretations; in effect, the method of *recopilación* introduced an element of unpredictability in its enforcement, along with a high level of legal uncertainty[114]

Those adhering to the *status quo ante* were reluctant to accept ideas which altered the social structure and threatened the privileges of the Mexican Creoles, the landowners, the high clergy and the militia. The old conception, dominated by the scholastics and the Church rectory, predetermined the position of a person in society and the degree of their individuality. It considered their civil acts as sacraments and reduced the family to canonical law and maintained the system of nobility[115] as a method for the acquisition of wealth.[116]

B. The Adoption or Adaptation of French Legislation

The codification process in the New World began in Louisiana in 1808 with the enacting of the first modern *Code* in the hemisphere, called the *Digeste de la loi civile*. After this first effort, the Republic of Haiti followed in 1825[117]. Later the southern Mexican state of Oaxaca in

112. *Id.* p. 361.
113. *Id.* p. 326.
114. *Id.*
115. JUAN SALA, ILUSTRACIÓN DEL DERECHO REAL DE ESPAÑA ORDENADO [ILLUSTRATION OF ORDERED SPANISH ROYAL LAW] tomo I, p. 195 (Mexico, 1831) (reformed and added to with various Doctrines and recent dispositions of recent laws).
116. Sanchez Cordero, *supra* note 68, pp. 326, 317.
117. At the time, the Republic of Haiti included the entire island of Santo Domingo.

1827 and 1828 translated *verbatim* the French *Code civil* of 1804, though a certain level of creativity was added by the flaws that emerged from the translating.

The complexity of the transposition was clearly shown in the Civil Code of Oaxaca; its application was limited to the capital of this Mexican province. Since the population of Oaxaca was mainly indigenous, it was difficult to obtain the desired effects. This Code was quickly revoked.

In 1830, the initiative passed to Bolivia in South America, and next, in 1836 to the Northern and Southern Peruvian States with two *Codes Civiles*. Then in 1844 the newly formed Dominican Republic adopted in the French language the French *Code civil*, and the cycle was completed with Bolivia again in 1845.

This first phase is characterized by the adoption of the French *Code civil*, but in different modalities: the *Code Civil* of Louisiana partly followed the draft of the *Code Civil* from the year VIII (1800), and, in other parts, it closely followed the French *Code civil* of 1804. The Haiti *Code Civil* of 1825 and the State of Oaxaca *Code Civil* of 1827-1829 gravitated around the French *Code civil* of 1804. The *Code Civil* of Bolivia of 1830 (and doubly Peruvian, by extension, in 1836) was the French *Code civil* of 1804, with some modifications of Spanish law. The second Bolivian *Code Civil* of 1845 was clearly inspired by the French and the *Code civil* of the Dominican Republic of 1844, but, in the latter, the version was taken from the edition from the Restoration period in France.

Other *Code Civil* drafts should be inserted in this first phase, such as Chile in 1822, (Great) Colombia in 1829; Ecuador between 1830 and 1833 and Guatemala in 1836.

C. *The Circulation of Different Model Codes*

It is clear that in this era the same codification models circulated in Europe and Latin America. At the apex was the *Code Civil* of 1804. Except for the Austrian *Code Civil* of the 1811[118] and the circulation of different model Codes in Ibero America, there was no exception.

The first phase which entailed the adapting or adopting of the French model ended in 1852 with the Peruvian *Code Civil* of that year, published in 1847, but the considerable efforts in the writing of the *Codes Civiles* should be noted as they were the first Chilean drafts of *Andrés Bello*, published in 1841-1847.

118. GUZMAN BRITO, *supra* note 25, p. 115.

In this period of transition, one should mention the attempt of Costa Rica to adapt the *Digeste de la loi civile* of Louisiana which culminated in 1841 with the adaptation of the Northern-*Peruvian* State *Code Civil* of 1836, and was nothing more than the Bolivian *Code Civil* that in its turn had adopted the French *Code civil* with some slight reforms of the Spanish legislation.

1. The Reception of Civil Institutions

Many of the institutions that were incorporated in the new *Codes Civiles* of Latin America adhere to the liberal spirit that governed the thought at the time, but in others, a clear social reluctance is apparent. The transposition of liberal institutions took the enormous risk of contradicting the social structures of the time and its mere promulgation was a catalyst for change. It is for this reason that it is easy to perceive the contradictions within a same text in this codification movement, where liberal ideas converge and others are deeply preserved.[119]

The postulates, which responded to the liberal spirit, can be identified in the regime of individual rights and contract law. The individualism, originating from the *Enlightenment* permeated the Indies' society; the placing of equality at the forefront of the law was its best expression. The secularization of the Civil Registry Acts by the prevailing power of the Catholic Church was quite challenging.[120] Ambivalence subsisted in some countries which recognized canon law but in others; a radical negation was expressed. The concurrence of two legal orders forced this radical approach whose general vocation was elimination of the concurrent legal order, even though the usages and customs were ignored.[121]

This liberal contractual regime coexisted with a conservative probate law, which originated from the Indies' legislation, with the exception of trusts clauses or successive usufructs deriving from the French legislation.[122]

2. The Return to the Indies' Legislation

During the second part of the XIXth century a strong codification movement emerged in Latin America. First of all one should mention the Chilean and Peruvian *Codes Civiles*, both from 1847 and the Peruvian

119. Sanchez Cordero, *supra* note 68, p. 338.
120. *Id.*
121. *Id.*
122. GUZMAN BRITO, *supra* note 25, p. 116.

Code Civil of 1852. Other *Code Civil* drafts also deserve to be acknowledged: the Uruguayan draft by *Acevedo* in 1847, the Granadino draft by the Panamanian jurist *Arosemena* in 1853, the Chilean by *Bello* in 1853, the Venezuelan by *Viso* of the same year (republican in 1854), the Chilean *Code Civil* of 1855, the Argentinian draft by *Ugarte* in 1858 and the *Consolidação das leis civis* by the Brazilian *Teixeira de Freitas* in 1858; by the end of 1859 the Mexican *Sierra* presented *Book I* for a code of government (which had been started in 1858), he then added *Book II* and the first three chapters of *Book III* in January,1860. In 1861 they were published as a *Proyecto de un Código Civil mexicano* that was enacted as a *Code Civil* in the State of Veracruz in December, 1861. In this same year came the publication of *Esboço de Teixeira de Freitas*, which was completed in 1867.

All of these drafts were important in the second phase of codification that begins with the Peruvian *Código Civil* between 1847 and 1852. That phase consists of the abandonment of the adaptation or adoption of the French model, drawing instead from the fundamental structure of vernacular law; the French *Code civil* only has a marginal influence.

The Peruvian codification of 1847-1852 is the first to apply the codification techniques to the Indies legislation. From this moment the codification trend takes a different course. It was necessary to return to the origins, where the legislation translated the social structures of the emergent states. In 1853, the Panamanian jurist *Arosemena* presented to the Congress of New Granada (future Colombia), a draft of the *Code Civil*, which was an adaptation of the Peruvian *Proyecto de Código Civil* of 1847. The *Arosemena draft* was later promulgated as the *Code Civil* by the Granadino State of Magdalena in 1857 and later in 1877 by Guatemala, which adopted the Peruvian *Code Civil* as its own.

The climax of this codification movement is without a doubt the Chilean *Code Civil*, enacted in 1855 and written up by *Andres Bello*. *Bello*, of Venezuelan origin and Chilean citizenship continued this trend and completely abandoned the adoption or adaptation of the French *Code civil*, in order to address vernacular law. This conception caused this *Code civil* to have a great influence in the emergent States.

Chile, unlike other Latin American countries, had an exceptional political stability. It was ruled by a constitution from 1833 and the formation of the idea of nation was quickly consolidated. The national feeling rapidly began to take root with the effect of rescuing the vernacular tradition, in which the Indies' legislation had a prominent place. Familiarity with this basic knowledge of a country, which not long

ago had been governed by *jus commune* quickly produced a third alternative.

Ecuador adopted it in 1858 and the states of the *Granadina* Confederation successively made it their own between 1859 and 1866 then the Republic of Colombia in 1887; El Salvador in 1859; Venezuela in 1862; Nicaragua in 1867 and Honduras in 1880 and again, after an interval, in 1906. The *Code Civil* drafted by *Bello* had an important influence on the *Code Civil* of Uruguay in 1868. The cross-references that were made in Latin America show that the *Code Civil* drafted by *Bello* was recurrently consulted. The writings of such prestigious authors such as *Teixeira de Freitas*, *Velez Sarsfield*, and *Bevilaqua*[123] featured this *Code Civil*

By the end of the fifties and the beginning of the sixties, the following countries had adopted the codification system: Haiti, the Mexican State of Oaxaca, Bolivia, Costa Rica, Dominican Republic, Peru, Chile, Ecuador, El Salvador, the States of Colombia and Venezuela. These countries reflected the alternatives of adopting or adapting the French *Code civil* (Haiti, Dominican Republic, Oaxaca, Bolivia) or one closely dependent (Costa Rica) or to formulate their own code (Peru and Chile); plus one new third option: the adoption of the Peru *Code Civil* (the State of Granadino de Magdalena) or the Chile *Code Civil* (Ecuador, El Salvador, the States of Colombia and Venezuela).

There was therefore a lack of codification in: Argentina, Uruguay, Paraguay, Brazil, Honduras, Guatemala, Nicaragua and the Mexican States, except for the southern State of Oaxaca. These countries could exhaust any of the three stated alternatives and some of them finished doing so: in Nicaragua in 1867 and Honduras in 1880 where both adopted the Chilean *Code Civil* drafted by *Bello*; and in Guatemala in 1877 who formed its own using the Peruvian *Code Civil*.

D. The Conclusion of the Codification Process

The vitality of the codification movement induced the remaining countries of Latin America to enter on the road to codification. In fact, Argentina promulgated its *Code Civil* in 1869, with a marked French influence, but also using other sources such as the *Consolidação das leis civis* and the *Esboço* by *Teixeira de Freitas* and the Chilean *Code Civil* drafted by *Bello*. With regards to Uruguay, its *Code Civil* of 1868 was influenced by, among others, the Argentinian *Code Civil*, the Chilean

123. Beviláqua drafted the Brazilian *Código Civil* in 1899.

Code Civil by *Bello* and the cited work of *Teixeira de Freitas*. Paraguay adopted the Argentinian *Code Civil* in 1876.[124]

Mexico represented a particular case in the codification process. The *Sierra* draft served as a base for the Second Empire *Códigos* (1866) and the II Republic *Codes Civiles* (1870). The *Sierra draft*, just like Venezuela in 1867 did not resort to the accessible Hispano-American models, but instead to a European act: the Spanish *Proyecto de Código Civil of 1851* by *García Goyena*, whose influence reached the national States that had already adapted a *Code Civil* formulated from various, but essentially European, sources, like Costa Rica from 1841, Nicaragua from 1867, Venezuela in 1867 and Honduras from 1880 who decided to replace them.

Cuba and Puerto Rico remained separate from the codification movement and continued their affinity with the Spanish Crown. They consequently adopted the Spanish *Code Civil* of 1889.

The classic era of the Latin American codification movement culminated in 1916. In that year the Panamanian *Code Civil* was promulgated, replacing the civil legislation that had remained in force in Panama since its separation from Colombia in 1903. That same year the Brazilian *Code Civil* which derived from the 1899 draft was decreed. In this same era existed the important works of *Teixeira de Freitas* as well as another important reference: the German *Bürgerliches Gesetzbuch*.

V. THE INDIGENOUS CAUSE

The indigenous communities surprisingly did not have any involvement in the independence movements of the Americas of 1808 to 1825. The claims of the insurgents did not contain any mention of the indigenous communities; except for the postulate of legal equality where the ethnic designations would have had to be eliminated. The independence movement was usurped by the Creoles and the *pueblo* was left aside.

Despite this libertarian speech, the abolition of slavery was not uniform, nor general in Latin America. Some political constitutions contained radical dispositions in favor of the abolition, others, with major tinges declared that nobody would be born enslaved in the future without actually abolishing the statute of slavery and in other constitutions slavery survived.[125] Slavery was progressively abolished in Latin America in the XIXth century. The last vestiges were Brazil at the end of

124. GUZMAN BRITO, *supra* note 25, p. 293.
125. Gros Espiell, *supra* note 66, p. 460.

the Empire and the proclamation of the Republic, and Colonial Cuba. In any case, the abolition of slavery in Latin America happened prior to the constitutional Amendment XIII of 1865 in the United States that prohibited slavery.[126]

The liberal Latin Americans maintained that any specific protections during the colonial period should be abolished. In an equal manner, they postulated that the indigenous territories should be deemed as communities rather than being cultivated or alienated. Even so, the governments at the beginning of independence were so weak and politically unstable that they could not effectively carry out these postulates and constantly needed resources. Other governments resorted to the "indigenous contribution" in an effort to differentiate them from their colonial equivalents.[127]

The last part of the XIXth century from 1870 was possibly the worst time for the indigenous communities. Under the influence of a Western Capitalism that was eager for the raw materials and minerals in the Americas and the chronic necessity of these for foreign capital, the development of the railway system and harbors, regional governments were inclined to promote capitalist development and was favorable towards foreign private investment. The multiculturalism of the colonial regime did not cause any concern in the constitutional postulates in Latin America during the XIXth century; on the contrary, it sustained the imposition of a unique cultural model, a single language, and the taxation of the elite.[128] The cultural and linguistic unities were considered as essential cohesive elements in the uniformity and homogenization of the national State. This premise assumed the superiority of western civilization and the language as a symbol of political power.

The lawmakers also ignored the customary indigenous legislation. Nevertheless, the codes had to be applied to the indigenous communities under the postulate of the legal equality and abolished the protective legislation from which they had benefited throughout the colonial period.[129] An author of the time, Jose Maria Alvarez, anxiously maintained that the natives found themselves suddenly devoid of specific legislation originating in the Christian paternalism of the monarchs of the Habsburg and the benevolent despotism of the Bourbons.[130] The consequences were foreseeable. The colonial social structure and its civil

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126. *Id.*
127. Zavala, *supra* note 10, p. xviv and following.
128. Gros Espiell, *supra* note 66, p. 462.
129. GUZMAN BRITO, *supra* note 25, p. 130.
130. FLORIS MARGADANT, *supra* note 109, p. 25.

constitution, or legislation of civil order, were left untouched. With the contradictions perceived in all social process, in trying to adopt the Creole, we can identify some ideological postulates in the republican principle of legal equality. The transposition of this premise to a colonial social structure produced damaging effects; the implementation of the new constitutional dispositions vanquished the specific legal statute of the natives and were compared to that of the Creoles and the mestizos.

VI. EPILOGUE

After the independence movements Latin America developed, in a practically uninterrupted form, into a continent torn between rival factions, controversial and contradictory legitimacies, and the search for national identity and the national State.[131] The political ruptures and the identity processes began to have a higher relevance than the same formal declarations of independence, which intervened at various intervals. The sentiment of the liberated Creoles, laden with liberal ideas, retained an important dose of traditionalism.

The society of the Indies ventured from the marginalization and intellectual isolation that occurred under the iron fisted regime of the Conquistadors, to the discovery of the postulates of the *Enlightenment*. It was inspired to try and adopt them into its old colonial structure and thus move from a scholastic conception of the individual, consisting of serving the pre-established order to the affirmation of individuality and free will; from the sacraments to the civil registry acts and secularization;[132] from a canonical regime of government with intra-family relations to its secularization; from an economic regime with feudal vices to an incipient market economy grounded in the notion of private property.[133]

The reception of codification as a method of normative order was the driving force of this second period of legal acculturation in Hispanic America: the adoption or adaptation of the French legislation, strongly moderated in Chile between 1841 and 1855 by the works of *Andrés Bello*, and in Peru between 1847 and 1852, which strongly rejected the adoption or adaptation of the French model which served as the background to this process. The French *Code civil* acted as a guide, but the vernacular model prevailed. The Spanish *Proyecto de Código Civil of 1851* by *García Goyena* was transformed by its author into a useful

131. Guerra, *supra* note 14, p. 433.
132. VANCE & CLAGGET, *supra* note 69, p. 21.
133. *Id.* p. 313.

compendium of comparative law. And finally, the *Esboço* by *Teixeira de Freitas*, with its surprising appearance and content, was transformed into a new model.

It is not fortuitous that the first committees of codification in American territory, a plethora of illustrious men equipped with the best intentions, were not able to complete their works. The first efforts were frustrated. The authors of the *Codes Civiles* mentioned the need to consult a profusion of foreign legislation, though the *Siete Partidas* had been the backbone of the Indies' civil law.

The replacement of the *status quo ante* was in many cases exclusively formal. Advances were accompanied by the persistence of institutions and legal mechanisms originating from the *Ancien Régime*. To a great extent in Hispanic America, models directed at the legal assurance of civil law predominated, and not to the fortification of territorial legal unity or the legal prerogatives of the lawmaker.

The contradictions found in this process of legal acculturation are palpable to a regime of the freedom of ownership, the circulation of goods and contracting; the succession of a marital regime and the colonial and canonical regime.

The Creole societies continued to be organized on a basis that has been accurately labeled as nobility and aristocracy,[134] with a strong tendency towards the formation of an oligarchic society.[135] Libertarian laws and ideas were exclusively valid for the urban elites and for cultural reasons excluded the masses of farmers and natives, because they were governed by another legal order of customary character. This legal order lacked the core of monogamous matrimony, undisputed and absolute ownership, free contracting, and the testamentary inheritance that constituted the foundations of freedom inherent to the liberal legal order.

Nevertheless, this liberal law coexisted with the noble elite, who could preserve its privileges through large tracts of agricultural property that were the foundation of wealth and social influence during the XIXth century. These large tracts of agricultural properties remained undivided through successive laws. The liberal force of the formal laws found its limits in the customary law. The legal liberalism contained in the codification of Latin America remained, in general terms, a theory that barely corresponded with the reality.

The *Enlightenment* ideal of drafting laws in a popular style to make them comprehensible to society remained an illusion.[136]

134. FLORIS MARGADANT, *supra* note 109, p. 132.
135. *Id.*
136. GUZMAN BRITO, *supra* note 25, p. 151.

The legal order was an elite law; the *pueblo* received the law through intermediaries such as jurists, academic and judges, who evidently belonged to the cultured class[137].

For the jurists, lawyers, judges and politicians who possessed legal knowledge, law became a means of domination. It was possible for them to administer the law to the *pueblo* and conceal their function in such a way that assured their social pre-eminence and social prestige.[138]

The replacement of the XIXth Century *Codes Civils* in Hispanic America during the XXth century was carried out by means of special and singular laws responding to social and economic change. New doctrines and outlooks ran through the XXth century. The urban proletariat, unlike the farmers, had difficulty accepting governance by customary law. Furthermore,; industrialization, the disrepute of liberalism the ascent of the middle-class and economic inflation led to the promulgation of special or singular laws which undermined the authority of the *Code Civil*, provoking a de-codification movement. The old conception of the *Code Civil* as a comprehensive model was fractured.

The analysis of legal acculturation must therefore continue throughout the XXth century, but with a totally different premise.

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137. *Id.*
138. *Id.*