Tenurial Revolution and Law: Some comparisons between Latin America and New Zealand in the 19th Century

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> Como Aurelianotenía en esaépocamuyconfusassobrelasdiferencias entre conservatores y liberales, susuegro le dabaleccionesesquemáticas. Los liberales, le decía, eranmasones; gente de mala índole, partidaria de ahorcar a los curas, de implanter el matrimonio civil y el divorcio, de reconocerigualesderechos a los hijosque a los legítimos, y de despedazar al país en un sistema federal quedespojara de poderes a la autoridadsuprema. Los conservadores, en cambio, quehabíanrecibido el poderdirectamente de Dios, propugnabanpor la estabilidaddelordenpúblico y la moral familiar; eran los defensores de la fe de Cristo, del principio de autoridad, y no estabandispuestos a permitirque el países fueradescuartizado en entidadesautónomas. Porsentimientoshumanitarios, Aurelianosimpatizaba con la actitud liberal respecto de los derechos de los hijosnaturales, pero de todosmodos no entendíacómo se llegaba al extremo de hacerunaguerraporcosasque no podíantocarse con lasmanos.
> (Gabriel GarcíaMárquez, *Cienaños de soledad.*[2])

ABSTRACT: This paper takes as its starting point the similarities between the law relating to indigenous tenures in the law of some of the Spanish American countries and New Zealand in the 19th century. This is not in itself surprising or remarkable, as the same is true of the law of many countries at this time, including Spain and Britain. The paper goes on to consider more specifically the role played by law in this process, and argues that the law which was of pivotal importance was not the general law as exemplified in codes and constitutions (in the Spanish American case) or in English Common Law, but rather statute law (legislación). It is argued further that with this type of law-making economic policy and law most closely converge, and so it is quite possible for countries belonging to different legal traditions to have similar statutory systems. Arguably the focus of comparative law studies on general legal cultures and traditions is unhelpful when it comes to studying the intersection between law and economic history. Statute law has many advantages as a method of giving legal effect to economic policies, but on the other hand a proliferation of statutes can cause significant legal confusion. It is also argued that there are connections between legislation and the phenomenon of "internal conquest", i.e.the forcible subjection of all persons living in liberal states to the law which is binding on all citizens regardless of status, ethnicity etc.

1.1 Introduction

In 1873 two legal processes took place on opposite sides of the Pacific ocean. The first occurred in the Soltepec (or Sultepec) region of central Mexico. Nieves Salvador, who lived in the village of San SimónSosocoltepec, part of the *municipio* of Amatepec, made a formal land title application to the district administrator of Soltepec in which his village lay. Nieves made a formal declaration that he had been born and brought up in his village and that he was in possession of a portion of land which had belonged to his ancestors since time immemorial. He stated also that he had the necessary documents to prove his title. The land in issue was a small plot split into two sections, one of which produced half a *fanega*of maize every year, and the other which was a small market garden. He stated that he wished to have a formal legal title to this property under the provisions of the *Ley Lerdo,* a reforming statute of the Mexican parliament enacted on 25 June 1856. The district administrator forwarded the application on to the town council *(ayuntamiento)* of Amatepec so that an inquiry could be made into the application and a price determined. The mayor of Amatepec with the town secretary visited Nieves, inspected his land, and filed a report describing the boundaries and made an estimate that the land was worth 60 pesos. The required details were sent to the district officials, and the administrator ordered that a title should be issued and allocated to Nieves Salvador as owner. The

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[2] (Cátedra, Madrid, 14a. ed., 2003, 193-4) [1967]

brief title document, just a single page, gave some brief details about Nieves as grantee, and the location, value and agricultural potential of the parcel.[3]

Also in 1873, half a world away from Mexico, the Native Land Court of New Zealand, sitting at the small country town of Foxton located in the Horowhenua district on the west coast of the North Island to the north of Wellington, gave judgment relating to a block of land named Kukutauaki. The Court derived its powers from the Native Lands Act of 1865, a statute of the New Zealand parliament. The judgment is dated 4 March 1873 and is written out in longhand by the clerk of the court in the relevant minute book volume of the Native Land Court. The Court, comprised of two European judges and a Maori assessor named Hemi Tautari, ruled that Kukutauaki belonged principally to the Ngati Raukawa tribe. A translation of the judgment, drafted in English, was read out in the Maori language to those present in Court. The decision was controversial, and generated a great deal of discussion in the courtroom.[4] The main part of the block was vested in ten representative Ngati Raukawa individuals, giving them the right to apply to the government for a formal title to Kukutauaki. The relevant title documents can still be found in the records of the Native Land Court, and the evidence given in the case and the Court's decision are recorded in the Otaki Minute Books of the Native Land Court of New Zealand.[5]

Nieves Salvador, who was Nahua and whose first language was Nahuatl, the same language spoken by Aztecs when Hernan Cortes landed at Veracuz in 1519, and the Maori-speaking members of the Ngati Raukawa, Muaupoko and Rangitane tribes assembled in the courtroom in Foxton had no awareness of one another. Maori land tenure is quite unlike Mesoamerican tenures.[6] But they nevertheless had something in common, apart, that is, from the fact that they were all believing Christians (Catholic in the case of Soltepec, and Anglican in the case of Ngati Raukawa). They were alike and at the same time engaged in legal processes which were designed to radically change their

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[3] On Nieves Salvador's title application, see Frank Schenk, "La Desamortización de los TierrasComunales en el Estado de México (1856-1911): El Caso de Distrito de Sultepec', *Historia Mexicana,* Vol 45 No 1 (1995) 3-47, at 3-5.

[4] On the Kukutauaki case see my *Native Land Court 1862-1887,* 697-704. The handwritten original of the judgment can be found at (1873) 1 Otaki Minute Book [MB] 176-178.

[5] On the social and economic effects of tenurial change on the Maori people (which I do not discuss in detail this article, but which in fact have been a central concern of my work) see my *Buying the Land, Selling the Land: Governments and Maori Land in the North Island, 1865-1912,* (Victoria University Press and Victoria University of Wellington Law Review, 2008). For a more comprehensive treatment of the history of Maori land and of the Native/Maori Land Court see Boast, *The Native Land Court: A Historical Study, Cases and Commentary, 1862-1887* (Thomson Reuters, Wellington, 2013), and Boast, *The Native Land Court: Vol 2, 1887-1909: A Historical Study, Cases and Commentary,* (Thomson Reuters, Wellington, 2015). Vol 3 of this work, currently in preparation, will cover the history of the Court to 1953. The Court, as the Maori Land Court, still exists and is a busy institution, and it has a separate appeal court (Maori Appellate Court). The Court is not to be confused with the Waitangi Tribunal, a completely different body, established by the Treaty of Waitangi Act 1975. However many of the Tribunal's inquiries into historic Maori grievances are concerned with the effects of the Native Lands Acts and the Native Land Court on Maori society. On the Tribunal see Janine Hayward and Nicola Wheen, *The Waitangi Tribunal* (Bridget Williams Books, Wellington, 2004); Michael Belgrave, *Historical Frictions: Maori Claims and Reinvented Histories* (Auckland University Press, Auckland, 2005); Giselle Byrnes, *The Waitangi Tribunal and New Zealand History,* (Oxford University Press, Melbourne, 2004).For an important reflection on New Zealand historiography by a great New Zealand historian, see J G A Pocock, "Law, Sovereignty and History in a Divided Culture: the Case of New Zealand and the Treaty of Waitangi" in J G A Pocock, *The Discovery of Islands* (Cambridge University Press, Cambridge, 2005), 226-255

[6] The classic study of Maori land tenure is I H Kawharu, *Maori Land Tenure: Studies of a Changing Institution,* (Oxford University Press, Oxford, 1977). There is a vast literature on Maori social and cultural anthropology, ethnohistory, social and economic history, art, literature, linguistics, tribal history, and contemporary politics. They are probably the most written-about indigenous people in the world, and Maori write about themselves a great deal as well. Some distinguished works are Angela Ballara, *Iwi: The dynamics of Maori tribal organisation* (Victoria University Press, Wellington, 1998); Judith Binney,*Encircled Lands: Te Urewera, 1820-1921* (Bridget Williams Books, Wellington, 2009); Binney, *Stories Without End: Essays 1975-2010* (Bridget Williams Books, Wellington, 2010); Lindsay Cox, *Kotahitanga: The Search for Maori Political Unity* (Oxford University Press, Oxford, 1993); Steven Webster, *Patrons of Maori Culture* (University of Otago Press, Dunedin, 1998). On Maori population issues see Ian Pool, *Te Iwi Maori: A New Zealand Population: Past, Present & Projected* (Auckland University Press, Auckland, 1991).

landholdings. The *Ley Lerdo*of 1856 and the Native Lands Act of 1865 were different in many ways, but pivotally they reflected a common vision. At the heart of this vision was the view that customary tenures, whether Nahua or Maori, belonged to an earlier and archaic world and needed to be swept away in order to encourage prosperity and progress. This vision was, in short, an ideology – an ideology manufactured originally in Europe, and which by 1873 was affecting the lives of people on opposite sides of the Pacific Ocean.

1.2 **An International Phenomenon**

New Zealand's tenurial revolution as exemplified by the Native Lands Acts, the establishment of the Native Land Court, Crown purchase and confiscation of Maori land and granting it to settlers was not at all an isolated phenomenon.[7] Strikingly similar policies can be found all around the globe at more or less the same time. These tenurial changes could even have significant geopolitical consequences. Mexico's ill-advised secularisation of mission lands in California set "thousands of Indians adrift, creating a pool of cheap labor and freeing choice coastal lands for private land".[8] These changes were one of the reasons which drew a flood of overland migrants from the United States to California in the 1840s, and which contributed to the eventual loss of Alta California to Mexico. The legislation enacted in New Zealand cannot be explained merely as a transformation that was specific to New Zealand and which arose of a need for 'settlers' to gain access to Maori land. The legislation was founded on a particular ideology that can be found in many countries around the world, whether they were 'settler colonies' or not. The legislation arose not from "social Darwinsm", as is sometimes believed, but rather from that array of ideas, ideals and rhetoric which, for convenience, we call 'liberalism' – which by the 19th century was running in three overlapping main strands: that deriving from the more conservative wing of the European enlightenment; its more radical Jacobin counterpart, exemplified by the French Revolution; and a British Isles variant, connected to the Whig tradition and Locke and to the thinkers and historians of the Scottish Enlightenment, especially Adam Smith, but also Hume, Robertson, and Ferguson.

All these strands, naturally interconnected. One important component of the liberal brew was a belief in the social and economic benefits of individual – rather than corporate, or collective – ownership of land. This basic idea underpins land reform statutes across the world in the 19th century, including Prussia's *AllgemeinesLandsrecht*(1807), General Enclosure Acts in Britain, the *Ley Madoz* in Spain (1855), Mexico's *Ley Lerdo*(1856), the Ottoman Land Code of 1858 – and New Zealand's Native Lands Acts of 1862 and 1865. Individualisation "was an article of faith of the liberals of the 19th century: individual property rights in real property would provide the stimulus for national economic progress; consequently it was necessary to put an end to both ecclesiastical and civil corporate ownership".[9] Leading Spanish American constitutional theorists, including the Colombian José María Samper and the the Argentinian Juan Bautista Alberdi were strong believers in liberalism and laissez-faire, and their ideas were reflected in important constitutional documents such as the Argentine Constitution of 1853.[10]The central notion has never been better conveyed than by Eric Hobsbawm:[11]

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[7] Other people have pointed out the global dimensions of tenurial revolution in the 19th century. Robert Jackson, writing in 1997, was struck by the parallels between Spanish America, the United States, and South Africa (Jackson, "Introduction", in Jackson (ed), *Liberals, the Church, and Indian Peasants* (University of New Mexico Press, Albuquerque, 1997), 1-11, at 9.

[8] David J. Weber, *The Mexican Frontier 1821-1846*, University of New Mexico Press, Albuquerque, 1982, 198.

[9] Robert J Knowlton, "La division de lastierras de los pueblos durante el siglo XIX: el caso de Michoacán", *Historia Mexicana*, Vol 40, No 1, (Jul-Sep 1990), pp 3-35, at 4 ("El individualismofueartículo de fe de los liberales del siglo XIX: la propiedadinvididual de los bienesraícesproporcionaría el estímulo para el progresoeconómico del país; consecuentemente, era necesarioponer fin a la propiedad corporative, eclesiástica y civil".)

[10] Gargarella, *Latin American Constitutionalism*, 2013, 15-16.

[11] Hobsbawm, *Age of Revolution*, 149.

> The great frozen ice-cap of the world's traditional agrarian systems and rural social relations lay above the fertile soil of economic growth. It had at all costs to be melted, so that that soil could be ploughed by the forces of profit-producing private enterprise.

Land, writes Hobsbawm, should be made "free"- that is, turned into a commodity - and it had "it had to pass into the ownership of a class of men willing to develop its productive resources for the market and impelled by reason, i.e. enlightened self-interest and profit".[12]

1.3 **Roman law on the Pacific rim**

The European law that first came to the Pacific rim was the common law of Castile, and therefore "Roman". The 'Spanish lake' was, to the extent that it was subject to European law at all, a lake regulated by Roman law. It is misleading to speak of 'Spanish' law at the dawn of the colonial era, as there was no entity in existence called 'Spain' at that time. There were two separate kingdoms, Castile and Aragon, with their own distinctive legal traditions and local and regional jurisdictions and legal variations, but both of which owed legal allegiance to Rome.[13]Castillian legal culture shares with its Roman parent the sense that civility is equivalent to living under the law: in the Roman empire the concept of *Romanitas*"hinged around an idea of *civilitas,* a certain mode of behaviour, and above all ideas of education, of freedom and living according to the law".[14]

By 1500 the Iberian peninsula had already had a very complex legal history. A number of different legal cultures had each contributed to the overall development of Castilian and Aragonese law: the Romans, the Visigoths, Islam, local *fueros,* and various royal medieval law codes. Spanish-American law originated, however, in Castile. The most famous of the Castilian royal codes was *Las SietePartidas*(the 'seven Parts'), produced in 1256 during the reign of Alfonso X of Castile. This was "a new codification that was heavily influenced by principles of Roman law, sprinkled with Visigothic and canon law principles".[15] This great code was printed at Seville for the first time in 1491, just one year before Columbus set sail from Palos, and can be said to be one of the more important components of the Columbian exchange: the Americas sent gold and silver to Spain, and Spain, or more accurately Castile, exported her own variant of Roman law to the Americas and the Pacific. This great legal text became very familiar to Spaniards and was an important point of reference in general political discourse. One example was the great historian Oviedo's characterisation of Pizarro in Peru as a "tyrant", "applying that term as it was used in the *SietePartidas,* the Castilian medieval code of law, as a man who seized power in defiance of the rightful authority of the king".[16]

Castilian common law, as embodied in the *Siete Partidas* and other codes, was the foundation of ordinary private law: property, obligations (i.e. contracts and torts) and family and inheritance law. This has to be distinguished from imperial law, the "law of the Indies" (*derecho indiano).* Governing the vast empire required a lot of law, much of which emanated directly from Spain: "[f]or the first hundred years of empire, laws and decrees arrived from Spain by every ship, deriving from the Board of Trade at Seville, or the supreme Council of the Indies".[17] These laws included some particularly celebrated ordinances, including the Laws of Burgos of 1512 - the first attempt by the Crown to regulate the treatment of the native peoples of the Americas - the New Laws of 1542 (*las Leyes Nuevas*) and its revised version of 1552, and the Ordinance Concerning Discoveries, issued by Philip II in 1573. These decrees, however, were only the foundation of a vast elaboration of law. By around

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12 Ibid.

13 How 'Roman' are the 'Roman law' systems in actuality? Castilian common law may be ancestrally linked to Roman law, in the sense that English common law is not, but it is nevertheless highly distinctive.

14 Guy Halsall, "The Barbarian Invasions", in Paul Fouracre (ed), *New Cambridge Medieval History: Vol I: c 500-c.700,* Cambridge University Press, Cambridge, 2005, 35-55, at 40.

15 Zamora et. al., *Mexican Law,* 10.

16 Brading, *First America,* 36-40. On Oviedo (Gonzalo Fernández de Oviedo y Valdés, 1478-1557), whose work on the history of the Indies was first published – in part – in 1535 see Brading, ibid, 36-8; Kathleen Ann Myers, *Fernandez de Oviedo's Chronicle of America: A New History for a New World,* (University of Texas Press, Austin, 2007).

17 Thomas, *Cuba,* 46.

1620 thousands of royal ordinances (*cédulas)* had been issued relating to the "Indies" (including the Philippines), creating a complex and often inconsistent colonial body of public and administrative law.[18] On top of this was an even bigger array of local ordinances and directives of various kinds that emanated from the viceroys and other law-making bodies within Spanish America itself.Why this complexity? According Professor Antonio Dougnac Rodriguez, the explanation lies firstly in the particular style of Spanish legislation, "el estilar de legislar castellano", which was "enormemente casuistico", and secondly, more obviously, because it had become necessary for the Crown to organise"un mundonuevo".[19]

As early as 1570 King Philip had decided to codify the Laws of the Indies and the task was entrusted to the distinguished lawyer Juan de Ovando**.** Ovando, however, was promoted to higher things, and the project languished. The codification was eventually completed by Antonio Leon Pinelo in 1635, but it was not until 1680 that the whole text, much upated and modified, was finally officially published as the *Recopilacion de leyes de los reinos de las Indias*(Compilation of the Laws of the Kingdoms of the Indies). It was made up of nine books of varied lengths, and reduced the legal morass to 6,377 legal directions. The *Recopilación*is only in part concerned with the rights of the Indians, and deals as well with the Church establishment, royal administration, the viceroys, taxation, rights of slaves, the regulation of commerce, and shipping and maritime affairs.It is one of the most ambitious and impressive codification projects known to legal history. It was a monumental achievement, albeit marred by a lot of trivial detail.[20]As can easily happen with grand schemes of legal codification, new laws soon made the *Recopilación* in need of revision, but this was never done. There were a number of reprintings in the 18th and 19th centuries, some of which contained additional material set out in Appendices.

Detailed it may have been, but *derecho indiano* rested on clear intellectual foundations derived in turn from medieval Castilian law and its Roman and Christian foundations. The conceptual foundations of *derecho indiano* are quite different from those of modern liberal legal systems, as Professor Dougnac has explained:[21]

> In marked contrast to the foundation of our modern legal systems, that of equality, set in place by the the liberal Constutions which now dominate us, that of the *ancien regime* – prior to the French Revolution and the Constitution of Cadiz – was the principle of inequality. This was so because it was felt that each social group had a special role to play in the community.

The liberal project during and after independence was utterly opposed to the whole vision of society and conceptual underpinnings of *derecho indiano.* After the Spanish American countries became independent they discarded *derecho indiano*in favour of their own codes and statutes. The new republics had no use for the great imperial code. Whether Indians gained from its departure, however, is a moot point. The *Recopilación*was also based on the humane, if paternalist, ideals emanating from the Spanish Renaissance and the writings of Vítoria and Las Casas, which also rested on Aristotelian foundations. Native people were now at the mercy of statutes emanating from the legislatures of the republics. *Derecho indiano* continued to be regarded as good law only in Cuba, Puerto Rico, Santo Domingo and the Philippines until the loss of those colonies at the end of the century after the Spanish-American war and their subordination to legal colonisation by the United States. After 1898 this astonishing system was no longer operative anywhere, although some of its more humane and paternalistic ideals live on in Spanish American law.

1.4 **Legal worlds in flux: the Common Law reaches the Pacific**

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18 Dougnac Rodriguez, *Manual de Historiadel Derecho Indiano,* 11.

19 Vease Dougnac Rodriguez, op.cit., 12.

20 McAlister, *Spain and Portugal in the New World,* 435.

21 Dougnac, *Manual de Historia del Dercho Indiano,* 313 (my translation): [A diferencia del punto de partida de nuestro Sistema jurídico actual, que es el de la igualdad, establecido en las Constituciones liberales que nos rigen, el del Antiguo Régimen – anterior a la Revolución francesa y a la Constitución de Cádiz – se fundamenta en la desigualdad.

Arguably the most important development in world legal history since the expansion of Roman law to the Americas in 16th century, the 19th century saw a dramatic expansion of the Common Law around the Pacific rim. Today many of the Common Law world's most important appellate courts are based around the perimeter of the Pacific, including the Supreme Court of California (one of the most important and generally regarded as the most innovative of the major courts in the United States System), the British Columbia Court of Appeal, the High Court of Australia, the New Zealand Supreme Court, the Supreme Court of Singapore, and the Court of Final Appeal of Hong Kong. Yet the Common Law has been a presence in the Pacific region for barely just over 200 years and did not become a really solid presence until around 1860.

In 1819, Sir Stamford Raffles acting on behalf of the East India Company signed the treaty which allowed the Company to set up a 'factory' (a trading base) at Singapore. In 1824 Singapore, along with Melacca and Penang, were rearranged into the Straits Settlements, which became a British Crown Colony in 1867.[22] The incremental colonisation of Malaya, Sarawak, and North Borneo followed. Hong Kong was occupied by the British in 1841, during the First Opium War with China. British sovereignty was proclaimed over New Zealand in May 1840, and it was formally separated from New South Wales into a separate Crown colony the following year. The Port Phillip District became the separate colony of Victoria in 1851, which grew explosively after the discovery of gold soon after separation: by 1890 the city of Melbourne had a population of 500,000. In 1846 US forces occupied Los Angeles during the Mexican-American war; four years later, as part of the Compromise of 1850, California became a state of the Union; like Victoria, it grew explosively from the gold rushes. Oregon became a state of the Union in 1859. The city of Seattle was founded in 1853, and the state of Washington, originally part of the Oregon Territory, became a state of the Union in 1889. A formal government for British Columbia was established in 1858, and after a long process of debate and hesitation, the colony of British Columbia was confederated with the newly established Dominion of Canada in 1871 – although at that time there was no overland connection between British Columbia and the rest of Canada. In 1867 the United States bought Alaska from Russia for $7,200,000, and Alaska was then administered by the United States as the 'Department' and then as the 'District' of Alaska, before becoming the Alaska Territory in 1912 and finally a state of the Union in 1959.

These facts are of course well-known, but less remarked on is that as these new Anglo-American entities became established, they became new centres of the Common Law and that by 1900 millions of people around the Pacific rim were under its sway. It is difficult to state precisely how many Common Law jurisdictions there are around the Pacific rim today. There are 7 major countries (Canada, the US, Australia, New Zealand, Singapore, Malaysia, and Hong Kong) but one count, treating the Australian and US states as separate jurisdictions (which, in point of law, they are) and omitting small Pacific countries, which would inflate the total somewhat, gives a total of 17.[23] The Civil Law remains in Russia, the Spanish American countries facing the Pacific, in French Polynesia and New Caledonia, and is important in varying ways in Japan, Vietnam, and Indonesia; one country, the Philippines, is usually classed as a hybrid of the Common Law and the Civil Law. The bean-counting is not of itself important; but what is undeniably true is that there has been a huge expansion of the Common Law in the Pacific region since the mid-nineteenth century. The effect of the Common Law on indigenous societies is an important subject, and has been explored in a number

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[22] See generally Benedict CW Teo, "The Historical Evolution of Singapore's Status in International Law", in K YL Tan and M Hor (eds), *Encounters with Singapore Legal History,* Singapore Journal of Legal Studies, Faculty of Law, National University of Singapore, Singapore, 2009, 129-159.

[23] By my count, moving clockwise around the Pacific rim, these are (1) Alaska, (2) British Columbia, (3) Washington, (4) Oregon, (5) California, (6), New Zealand, (7) Tasmania, (8) South Australia, (9) Victoria, (10) New South Wales, (11) Queensland; (12) Papua-New Guinea; (13) Singapore; (14) Malaysia; (15) Hong Kong. Within the Pacific there are (16) Hawai'i, (17) Fiji. This ignores the small Pacific Island jurisdictions (such as the Cook Islands, Niue, Nauru, Tonga etc.) and excludes Western Australia and the Northern Territory. Arguably it could be said, although it is stretching the point somewhat, to say that the Australian and New Zealand Antarctic territories are governed by the Common Law. The Civil Law has also gained to some extent, in French Polynesia, Russia, etc.

of key works by New Zealand scholars, including Paul McHugh (of Sidney Sussex College, Cambridge)[24] and Mark Hickford (Victoria University of Wellington).[25]

Important as this transformation is in the geopolitics of legal systems, it is nevertheless the case that the legal transformations that I am concerned with in this book occurred in *both* Roman law and Common law countries, and at more or less the same time. In one instance, California – as has been argued above – the transformation began in Roman-law New Spain and Mexico, and was continued and accelerated in Common Law California. The *Ley Lerdo*in Mexico and the Native Lands Acts in New Zealand emerged at roughly the same time. Both were the products of law, but they arose not out of deep-seated legal decisions and the development of doctrine by the courts, but by legislation. This fact is worthy of further consideration.

1.5 **Liberal constitutionalism and codifications in Spanish America**

The liberal revolutionaries were constitutionalists and law reformers *á la française.* There was a liberal constitution to hand with the constitution of Cádiz, and its basic style and approach was soon emulated in one of the most creative episodes of constitution making known to legal history, as country after country adopted new liberal written constitutions. All of these constitutional texts sought to bring all citizens of the national territory under a unified rule of law applicable to all persons, although not always did all nationals have the status of "citizens". The colonial system and its underlying legal ideas were swept away. By the 1850s "liberalizing states began to discard the juridical remnants of the colonial 'dual republic' in their halting efforts to bring all Indian subjects under one unifying rule of law".[26]

One early constitution which repays careful study is the Chilean constitution of 1822. The central planks of the public law of the new republic were the doctrine of the separation of powers, deriving from Montesquieu, and parliamentary law-making. Articles 12 and 13 of the 1822 constitution state:

> Art. 12. El Gobierno de Chile será siempre representativo, compuesto de tres poderes independientes – Legislativo – Ejecutivo – y Judicial.
> Art. 13. El Poder Legislativo residirá en un Congreso, El Ejecutivo en un Director; y el Judicial en los Tribunales de la Justicia.

The Constitution "identified the nation's borders as extending to the Strait of Magellan and declared that all persons born within these borders were Chilean".[27] At the time this was a mere fiction. "With the stroke of a pen, Araucanians became Chileans, their status as a separate people erased along with their historic boundary at the Biobío."[28] In classical republican style, however, the Chilean constitution distinguished carefully between those who were nationals of the republic and those who were its "citizens". "Independent Araucanians might be Chileans under the law, but they would not meet the requirements of citizenship".[29]

Liberalism is a notoriously protean concept. Robert Jackson has noted the variety of "liberal" approaches to land and tenure in Spanish America, and believes that "theory and policy were at times contradictory and difficult to implement at the local or regional level".[30] In order to give the term more analytical clarity a number of historians of 19th century Latin America have distinguished between various aspects of liberalism. One such schema is that developed by Alan Knight, a prominent historian of Mexico and the Mexican revolution. In a long article published in Spanish in

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[24] See P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-determinaton,* (Oxford University Press, Oxford, 2004); *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights,* (Oxford University Press, Oxford, 2011).

[25] Mark Hickford, *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford University Press, Oxford, 2011).

[26] Larson, *Trials of Nation Making,* 11.

[27] Weber, *Bárbaros,* 265.

[28] Ibid, 265.

[29] Weber, *Bárbaros,* 266.

[30] Jackson, "Introduction", in Jackson (ed), *Liberals, the Church and Indian Peasants,* 3.

Historia Mexicana in 1985 Knight wrote of liberalism as a "family" of concepts which continued to develop and interconnect in the course of the 19th century.[31] No one component of liberalism, however, became dominant over the others, and indeed quite diverse groups, some of which were antagonistic to each other, nevertheless all claimed to be "liberal".[32]

Knight's first category is constitutional liberalism, which grew rapidly in Mexico after independence, which espoused political reforms to establish representative government, the rule of law and a balance between local and state government and the federal government.[33] This type of liberalism is epitomised by the Constitution of 1824 and was represented during the Mexican revolutionary era of 1910-1920 by Madero and his supporters. Secondly, there was a current of "institutional liberalism" (liberalismo institucional) which was somewhat more thoroughgoing, which was focused not merely on the constitution but which sought rather to transform society, to overcome the "colonial apparatus" and to use the power of the state to promote economic progress by encouraging private property and the stripping the Church of its wealth and legal privileges.[34] Its principal spokesman was José María Luis Mora. This strain of liberalism is represented in Mexico by the two great statutes of 1855-56 - the Ley Juárez, which ended the legal privileges of the clergy, and the Ley Lerdo, which disentailed real property held by corporate bodies (of which more below) – and by the Constitution of 1857. This legal text was a much more programmatic and ideological statement than its 1824 counterpart.

The Mexican land reform statutes shared a common vision with the Constitution of 1857, a liberal and anti-clerical statement which employed a discourse of individual rights and the sovereignty of the people which in turn drew its inspiration from the French Revolutions of 1789 and 1830, the French Civil Code of 1804, the Cortes of Cadiz of 1812, and the French Constitution of 1848.[35] The noble phrases of the 1857 Constitution affirmed the liberal vision. Much of the document is concerned with with basic liberal freedoms. The first section of the constitution sets out basic rights. Article 1 states ringingly that the "Mexican people recognises that the rights of man are the foundation and the object of social institutions".[36] All citizens of the Republic were deemed to be born free, and all slaves who entered the national territory obtained their liberty and the full protection of the law.[37] The old colonial economy of estates, hierarchies and tributes was disavowed. The professions were declared to open to all and personal labour services were abolished.[38] The "manifestation" of ideas could be the subject of "ninguna inquisicion [surely not an accidental turn of phrase] judicial ó administrativo".[39] Freedom of writing and publishing was guaranteed.[40] Everyone had the right to bear arms ("todo hombre tiene derecho de poseer y portar armas para suseguridad y legitima defensa").[41] This should be seen as part of the programme of abolishing estates and corporate privileges: in the colonial era the right to bear arms was differentiated by class and ethnicity. Article 12 took this further by abolishing all titles of nobility and hereditary honours: ("there are not, nor shall the Republic recognise, titles of nobility, nor prerogative rights nor hereditary honours"). These constitutional guarantees, repeated in many other Latin American constitutional texts, link Latin America indissolubly to European

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31 Knight, "El LiberalismoMexicanodesde la Reforma hasta la Revolución (Una Interpretación), *Historia Mexicana*, Vol 35 (Jul.-Sep. 1985), 59-1.

32 Ibid, 59: "A lo largo del siglo XIX puede observarse el desarrollo de esos tres tipos como respuesta a cambios sociales, económicos, y poíticos. Pero el resultado no fue la sustitución de un liberalismo por otro, sino la acumulación de de ideas, programas y grupos liberales. En consecuencia, el liberalismo en 1910 era una ideología dominante y heterodoxa capaz de atraer, como lo demostró la revolución, los grupos más diferentes y antagónicos."

33 Ibid, 60.

34 Ibid, 61.

35 See F-X Guerra, *Antiguo Régimen a la Revolución*, 37.

36 Constitución Política de República Mexicana de 1857, Art 1 ("El pueblo mexicano reconoce, que los derechos del hombre son la base y el objeto de las instituciones sociales.")

37 Ibid, Art 2.

38 Ibid, Articles 4 and 5.

39 Ibid, Article 6.

40 Ibid, Article 7.

41 Ibid, Article 10. This was not an absolute right, and could be restrained by the law.

liberalism, and if it is objected that not always have these guarantees been observed by Latin American governments, which is only too true, certainly Europe is in no position to point the finger.

However the 1857 constitution is not confined to basic freedoms and republican equality. Article 13, abolishing all private jurisdictions and special tribunals, is a clear illustration of Knight's concept of institutional liberalism. No one could be judged by non-state laws or by special tribunals.. All *fueros*(legal privileges attaching to corporate bodies or particular regions or provinces) were abolished, with the sole exception of the law relating to breaches of military discipline.[42] Probably this was principally aimed at whatever church courts had survived in Mexico until 1857. Article 27, which provided that no civil or ecclesiastical corporation was permitted to aquire or administer real property – apart, that is, from edifices required "immediately and directly" for the needs of the institution - is a counterpart to the *Ley Lerdo*and in fact enshrines the statute's basic objectives in basic public law.

There was however yet a third strand of liberalism, in some ways "less obviously liberal" but more "original and combative".[43] This variant, which Knight calls "development liberalism" (liberalismo "desarrollista") emerged in the last quarter of the 19th century. Liberals of this school sought to *prioritise* economic development and stability, even at the expense of constitutional government and civil rights. Liberals of this stamp were technocrats, who drew their philosophical inspiration from positivism, so-called (*positivismo*) which was powerful in a number of other countries at this time, particularly Brazil. "Development liberals" were less interested in balancing federal and state governments: they were unabashed centralists, believers in a powerful central state. These "liberal" technocrats were willing to augment presidential authority in the interests of a rapid development programme involving the construction of railways, ports, drainage schemes, the institution of a national system of education; at the same time they wanted the state to crack down on on vice, filth, indolence, gambling, drunkenness, blood sports, and prostitution. One can see here an echo of the Jacobin strand of the French revolution. These somewhat Puritanical, or perhaps Prussian or Jacobin liberals, also tended to hold a low opinion of the bulk of the Mexican population, especially its indigenous components, and favoured large-scale immigration from Europe. This group were the *cientificos*("scientists") and they were the driving force behind the *Porfiriato*, a kind of "development" liberal dictatorship.

1.6 **The pre-eminence of statute in the liberal state**

Colombianos, las armas os han dado la independencia, las leyes os darán la libertad. (Santander.)

An obvious, but little-noted, (and quite fundamental) component of the tenurial revolutions that took place in 19th century Spanish America and in the Pacific is the legal means by which this transformation took place. New Zealand's Native Lands Acts, the Kuleana Act in Hawai'i, the General Allotment Act in the United States, and the *Ley Lerdo* in Mexico have a basic element in common: they are all statutes passed by national legislatures. It might be thought that this is a trivial or uninteresting point of commonality, but I would argue that this is not so. There is a clear link between the development of national sovereign legislatures and tenurial reform. One important precedent was the French Napoleonic Code of 1804 *(Code Civil)*, with its emphasis on individualism and protection of private property rights, seen at the time as a liberal and emancipatory break with the suffocating traditions of the *ancien regime.* The Code Civil turn became the foundation of new civil codes in Spain, Portugal, and in the Italian peninsula. The 19th century was an age of codes, constitutions, and enlightened legislation, accompanied by a great deal of wishful thinking on the part of liberal elites about the importance of legislation and its value as a means of instructing the unenlightened as to how they should behave. (There are still those, true heirs of the Enlightenment, who believe in, or at least profess, the "educative" role of statute.)

Scholars interested in comparative legal history tend to take as their natural unit of study the supposed great legal 'families' or 'traditions' of the world, notably the Common Law and Civil Law countries, and to focus on particular styles of legal reasoning, approaches to precedent, legal

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42 Ibid, Article 12.

43 Ibid.

education, the role of codification, and approaches to legal argumentation and legal scholarship.[44] These are the standard foundations of the subject known as comparative law (*droit comparé/derecho comparado*). This traditional emphasis on legal culture and legal families can obscure as much as it reveals. Moreover studies of the relationship between law and indigenous peoples in the Anglosphere has tended to focus particularly on the common law, rather than statute, no doubt because the common law is fascinating and statutes are boring.[45] According to Douglas Hay and Paul Craven, "[t]o the limited degree that it has been described by historians and lawyers, rather than simply evoked, the general law of empire usually has been regarded as the common law".[46] Not many comparative legal historians, with some important exceptions, are very interested in statutes, which can sometimes be regarded as an inherently inferior and mundane form of law-making which offer little of interest as they are in a constant process of enactment, repeal, and amendment, and which offer less grounds for theorising (or wishful thinking) about the supposedly deep-seated cultural differences between Roman Law and Common Law. Statutes are ephemeral; historians are drawn to what is durable. In fact it is often Marxists, less interested in legal cultures and more prone to see the law as merely coercive, who tend to be most interested in statutes.[47] I would argue, however, that it is the ephemerability and flexibility of statutes, combined with the fact that they are – obviously – the emanations of politicised legislatures, that is the very thing that makes them important and interesting. In fact it could be said that the availability of statute as a means of law-making was a basic prerequisite for tenurial reform. Moreover if statute law is moved to centre stage, then what becomes striking is not the differences between land tenure law in (for example) Colombia, Mexico, the United States, Canada, and New Zealand, but their similarities. The point could be pressed even further by arguing that the concept of legal families, beloved of comparative lawyers, has significant limitations as means of studying comparative legal history, at least in some contexts.

Criollo elites in pre-independence Spanish America could not translate their ideals into statute law because statute law emanates from sovereign legislatures, and there were no legislatures in the viceroyalties – which can be contrasted, for instance, with the British North American colonies. In the Spanish viceroyalties (*virreinatos*) law making was in the hands of the Crown, the viceroys, and the judges of the *audiencias.* If by "legislation" is meant *parliamentary* legislation, that is formal law-making by representative bodies (as opposed to royal ordinances and decrees and so forth) then there was no parliamentary legislation in the Spanish empire, although there was certainly a great deal of law. Independence meant not only independence from Spain, it meant the establishment of sovereign legislatures run by liberal elites who now had a means ready to hand of translating their programmes and policies into statute law (*legislación).* Liberal leaders in Central America such as Francisco Morazán and Mariana Gálvez believed that "enlightened legislation could make Central America a modern, progressive republic, according to liberal tenets".[48] Every Latin American city seems to have its statues of 19th century politicians who are presented as wise and enlightened statesman and law-makers, recasting liberal politicians in Guatemala or Ecuador as Gaius and Tiberius Gracchus.

Land tenure was a core component of the liberal vision in Latin America, as indeed it was everywhere.With the coming of independence land and tenure became part of the political discourse within the new republics.[49]Immediately after the achievement of Mexican independence, for example,"a debate emerged for the first time concerning the best method for putting into place liberal

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[44] The common law has always seen itself as something apart from European-Roman law: "[t]he mythology of the common law contended that it had always existed as a self-contained system, uncontaminated by any other legal code, rugged and immemorial, resisting foreign intrusions": J C D Clark, *The Language of Liberty*, 3.

[45] See e.g. Daniel J Hulseboch, "Imperia in Imperio": The Multiple Constitutions of Empire in New York, 1750-1777", *Law and History Review*, vol 16 (1992); Hulseboch, "The Ancient Constitution and Expanding Empire: Sir Edmund Coke's British Jurisprudence", *Law and History Review*, vol 21 (2003); McHugh, *Aboriginal Societies and the Common Law* (2005); etc.

[46] Douglas Hay and Paul Craven, 'Introduction', in Hay and Craven (eds), *Masters, Servants and Magistrates in Britain and the Empire, 1562-1955*, University of North Carolina Press,Chapel Hill, 2007, p. 2.

[47] See, for example, E P Thompson, *Whigs and Hunters: The Origins of the Black Act*, Penguin Books, Harmondsworth, 1977.

[48] Woodward, *Rafael Carrera and the Emergence of the Republic of Guatemala*, 48.

[49] Schenk, "Desamortización", 5.

policies for the disentailment of lay properties in the particular social and cultural context of rural Mexico".[50] The complex transformations that resulted have been most closely and comprehensively investigated in the case of Mexico, where the principal indigenous form of political organisation, at least in the central and southern parts of the country, was the autonomous indigenous town – the Nahua*altepetl,* the Mixtec*ñuu,* or the Maya *cah*[51] – all of which possessed various types of communal lands. The main Federal Mexican statute was the *Ley Lerdo*or *Ley de Desamortización* of 25 June 1856. (It was, however preceded by by earlier repartitional laws in the Mexican states of Chiapas (1826), Veracruz (1826) Michoacán (1827) and others. These seem to be more of conceptual importance, however, than their results.) The *Ley Lerdo,* building on the Constitution of Cadiz, the *Ley Juárez*and the earlier state statutes, made *desamortizació*na national programme. It began as a decree of 25 June 1856 and was converted into a statute by the Congress on 28 June (78 votes against 15). The preamble to the statute sets out the Liberal position with the great clarity:[52]

> Whereas one of the principal obstacles to the prosperity and growth of the nation is the lack of movement or free circulation of a great part of real property, the fundamental basis of public prosperity….

It was a general *desamortización*law, aimed not only at ecclesiastical corporations but civil ones as well. Section 1 provided that all urban and rural properties held by civil or ecclesiastical corporate bodies were determined to belong to those currently renting them, the annual rents being converted to capital repayments with one year's rental being calculated at six per cent of the value of the land. Such properties as were not under lease were required to be sold at a public auction and allocated to the highest bidder.[53] The Church was thus being forced to compulsorily sell its vast landed wealth to private persons, but the legislation was not, in fact confiscatory, and was in fact a reasonably moderate law. There is a long-standing debate in Mexican historiography about whether the *Ley Lerdo*was in fact aimed principally at the Church, or whether indigenous corporations were a prime target of the Act from the beginning.[54] This on the face of it certainly did extend to all corporate bodies, not merely ecclesiastical ones. In his classic work *Los grandes problemas nacionales* Andrés Molina Enríquez described the inclusion of all civil corporations within the statutory framework as a "disfraz" (disguise)[55] to obscure the fact that the statute was aimed at the Church.[56] Other historians think it is impossible to know for certain, or disagree. To see the width of coverage of the statute as a disguise is to ignore the entire tradition of liberal opinion on the subject of land and tenure from the Enlightenment onwards, including the proposals to abolish corporate tenures in 18th century Spain, the writings of Manuel Abad y Queipo and other theorists, and the legislation enacted by the Cortes of Cádiz.[57] Church lands were a target because they were held by permanent corporations (and were thus "dead"), not because of anticlericalism per se

The immediate effects of the *Ley Lerdo*and the other liberal laws of the 1850s and 1860s are very difficult to chart. One key problem is that "[r]eliable historical statistics on land tenure patterns

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50 Aurora Gómez Galvarriato and Emilio Kouri, "La reforma económica: FinanzaPúblicas, Mercados y Tierras", in Erika Pani (ed), *Nación, Constitución y Reforma, 1821-1908,* Fondo de Cultura Económica, México D F, 2010, 101 (my translation).

51 See Lockhart, *Nahuas after the Conquest,* 14-15; Terraciano, *Mixtecs of Colonial Oaxaca,* 103-4; Restall, *Maya World,* 15-16.

52 Ley de 25 de Junio 1856, Preamble (Labastida, *Colección,* 1) ("Queconsiderandoqueuno de los mayor es obstáculos para la prosperidad y engrandecimiento de la nación, es la falta de movimiento ó libre circulación de una gran parte de la propiedadraíz, base fundamental de la riquezapublica…").

53 Ibid, s 5: "Tanto las urbanas, como las rústicas que no estén arrendadas á la fecha de la publicación de esta ley, se adjudicarán al major postor, en almonedaque se celebrará ante la primera autoridad política del Partido".

54 For summaries of the historiography, see D J Fraser, "La Política de Desamortización en lasComunidadesIndígenas, 1856-1872", *Historia Mexicana,* Vol 21, No 4 (1972), 615-652;

55 In Spanish the word also conveys the sense of a fancy dress.

56 Molina Enríquez, *Los grandes problemas nacionales,* (México D F, 1964), 73.

57 See Fraser op.cit., 618.

in Mexico do not exist".[58] Some historians of an earlier generation, for instance G M McBride, author of a well-known study on Mexican land systems (1923), took the view that claims of a massive impact on community lands were exaggerated.[59] In an article published in 1966 José Miranda claimed that by around 1910 40% of the communities had managed to retain their lands, but historians are now much more cautious.[60] The recent proliferation of regional and local studies has revealed a complex picture, hardly surprising in the case of a country as vast and diverse as Mexico. The general view is that there was no immediate or dramatic transformation at least with respect to community – as opposed to ecclesiastical – properties. Neither was there an immediate privatisation or rapid absorption of individualised lands by capitalists and large landowners. One study has found that political chaos in Mexico "together with the miserable state of the economy inhibited wholesale absorption of village lands by the haciendas".[61] Nevertheless there *was* a transformation, but it was a gradual one, and was not solely a consequence of the Reform laws. The gradual effect of the law also seems to be attributable to legal confusion, and uncertainty at the beginning of the process whether *ejidos*were supposed to be allotted and individualised or not.[62] Not until around 1890 did the federal government issue clear instructions that the *ejidos*should be privatised.[63] Once again there still appears to have a great deal of variation in practice.[64] A measure of stability, however, returned to Mexico during the liberal dictatorship of PorfirioDíaz (1876-1911). The consensus is that it was during this period, known in Mexican history as the *Porfiriato,* that the laws of the *Reforma* really began to take effect.

New Zealand reveals the same pattern of a move from ordinances and imperial law to local statutes, but characteristically at high speed. Indigenous land policy during the Crown colony period in New Zealand remained highly traditionalist, based on the standard concept of Crown pre-emption. With, however, the advent of representative government liberal elites soon took control of the national and provincial legislatures and had translated their programmes into legislation by as early as 1862, with the first of the Native Lands Acts (Native Land Act 1862). It was soon followed and replaced by the Native Lands Act 1865, which set in place the system of Maori land tenure that still exists in New Zealand today, and created the Native (today, Maori) Land Court. As in New Zealand's counterparts in Australasia, South Australia and Victoria, the Crown colony period in New Zealand was brief and the advent of representative institutions rapid. Once the institutions were in place liberal colonists took control of them and, amongst other things, began enacting statutes. Liberals are, above all, parliamentarians and legislators. The law relating to land and indigenous tenures in New Zealand is in fact almost *entirely* statutory and the common law – assuming that there actually *is* a long-established and coherent body of common law relating to something that can be called "native title" (an assumption that a distinguished commentator has recently doubted) – is more or less irrelevant.

It can also be argued that compared to other forms of law-making, such decisions of courts, royal instructions to viceroys and so on, statute is inherently superior as a means of putting into effect a political programme such as the reform of customary tenures. Probably judges in 19th century Latin America, the United States, and Australia and New Zealand shared many of the ideological convictions of the law-making colleagues in the legislatures. But courts decide particular decisions, and although individual decisions can certainly be very influential – irrespective of whether the formal doctrine of *stare decisis*exists in a particular jurisdiction or not – judicial law-making is a much slower and more hesitant means of ideological transformation than a statute. Decisions of the courts impact primarily on the litigants before them, although in English law at least decisions of law

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58 John Coatsworth, "Railroads, Landholding, and Agrarian Protest in the Early Porfiriato", *HAHR*, vol 54, No 1 (February 1974), pp 48-71, at 51.

59 McBride, *The Land Systems of Mexico* (American Geographical Society, New York, 1923). For commentary on McBride's analysis see Schenk, "Desamortización", 7-8.

60 Miranda, "La propiedad communal de la tierra y la cohesion social de los pueblos indígenasmexicanos", in *Cuadernos Americanos*, vol 9 (1966), vol 149, 168-182.

61 John Coatsworth, "Railroads, Landholding, and Agrarian Protest in the Early Porfiriato", *HAHR*, vol54, No 1 (February 1974), pp 48-71, at 53.

62 On the variations in practice from 1856-1878 see Knowlton, "El EjidoMexicano" 81-84.

63 The key document appears to be a formal instruction from the federal government to all state governors of 30 August 1888 (Labastida, *Colección*, 45).

64 Schenk, "Desamortización", 15

made by courts of record create binding rules applicable to all.[65] Statutes are of general effect, and especially so in unitary sovereign republics. They are in theory commands of the sovereign legislature and become law binding on all on their enactment. Indigenous people in the liberal state are citizens like all others, and have no particular corporate status, and like all citizens are equally bound by whatever statutes the liberal-dominated legislatures decide to enact, whether or not indigenous people are represented in the legislatures or whether they are even able to vote.[66] Statutes, moreover, are not only easy to enact, they are easy to amend and to get rid of.

If this seems obvious, perhaps what is less obvious is that for statutes to have this effect, then there has to actually *be* a concept of the legal supremacy of the statute. This was something of a novelty in 19th century Latin America. In the colonial period, as seen, there had certainly been ordinances and regulations of various kinds, but their exact status was not always certain, and Crown officials by means of the famous formula of "I obey but I do not comply" could sometimes decline to put them into effect.[67] British settlers in Australia and New Zealand, on the other hand came from a culture well-used to parliamentary government and statutes: the English Reformation, after all, had been established by parliamentary legislation.[68] When it came to the Common Law, however, statutes had tended to be partial, interstitial, concerned with particular cases rather than statements of general principle, and were a gloss on the Common Law rather than an attempt to supplement or override it. The purpose of a statute was not to restate or remodel the law but to remedy a gap or a 'mischief', an idea which survives in the 'mischief rule' of statutory interpretation. In the Anglo-American world the transformation was more one of the scope, reach, and applicability of statute, a famous example being Peel's reforms of the criminal law in the 1830s, a move from the particular to the general. New Zealand's Native Lands Acts were by no means a gloss on the Common Law, but an ambitious recasting of the law on new foundations combined with the establishment of a new and specialist tribunal to apply it. For its day this was an exceptionally radical and ambitious step, one not experimented with elsewhere to my knowledge.

In the Australasian colonies it is very noticeable that land law, quintessentially a product of English law Common Law, became recast on solidly statutory formations and thus under the control of politicians and legislatures. Here there was a major change. The complexities of English real property and conveyancing law were not wanted in the new settler colonies. Land law became statutory, much more so than it did in England. Legislation, however, can be changed and supplemented at the whim of legislatures, which meant that in a key field such as land tenure the enacted law could quickly become amazingly intricate. John Weaver has found that by 1900 New South Wales had over 100 statutes which dealt with land tenure and land transactions.[69] New Zealand could not have been far behind. The Native Lands Acts and their various re-enactments, amendments, and supplementary statutes were a famously intricate jungle in their own right. The law relating to confiscation of land from Maori in a "state of rebellion" in New Zealand is another example.[70] When one turns to the Spanish American republics the situation is no different. It is a mistake to believe that Civil Law countries reduce all their enacted law to a body of comprehensible codes. The codes are supplemented by a vast and confusing of ordinary statutes, and essentially the role of legislation in, say, Guatemala or Costa Rica and New Zealand is the same. The sheer volume of statutes and supplementary regulations and decrees enacted in the Latin American republics to give effect to the liberal programme is extraordinary – and, of course, unstudied by comparative lawyers. An official

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65 The Court of Chancery acting in the exercise of its bill jurisidiction was different, at least in theory: see Baker, *OHLE*, Vol 6, 2003, 42.

66 In New Zealand, at least, they were, and could. New Zealand, in the 19th century at least, seems exceptional.

67 Rendered in Spanish variously as "acato pero no cumplo", or "se respeta, pero no se cumple"" or "se obedece pero no se cumple": see M C Mirow, "Latin American Legal History: Some Essential Spanish Terms", (2000) 12 *La Raza Law Journal* 43, at 45.

68 Baker, *OHLE*, Vol 6, 2003, 37.

69 Weaver, *The Great Land Rush and the Making of the Modern World*, McGill-Queen's University Press, Montreal and Kingston, 2003, 64.

70 See Boast, "'An Expensive Mistake': Law, Courts, and Confiscation on the New Zealand Colonial Frontier", in R P Boast and R Hill (eds), *Raupatu: The Confiscation of Maori Land*, Victoria University Press, Wellington, 2009, 145-168.

collection of the *desamortización* laws published by the Mexican government in 1891 runs to 536 closely-printed pages.[71] A reference guide indexing economic legislation enacted in Guatemala during the *Reforma Liberal* consists of 409 pages listing hundreds of statutes, decrees and ordinances, and the edited collection of legislative material itself fills four bulky volumes.[72] Liberal law-makers may have seen themselves as grave senators making enlightened laws for the well-being of the republic after due and proper deliberation, but the reality was otherwise.

The supremacy of statute implies that all citizens are subject to the national law. The law is the state's law, given effect to by statute, which is not the resolution of a dispute but a command to all citizens. Other forms of law are subordinate to it (the canon law of the Catholic church, for instance). The advent of the modern liberal state has a legal component: the triumph of the state's laws over extra-territorial codes and internal customary codes and practices, whether this be regional customary codes or entrenched behaviours such as the blood feud in Corsica. The law now applies to all citizens alike. Robin Blackburn has observed that while "[t]he Spanish American republics evolved into oligarchies characterised by wide inequalities and a racial hierarchy" they nevertheless "offered citizenship to all".[73] There was no exclusion on the grounds of race or religion. All were equal citizens, but all had to obey the directives of the sovereign legislatures that supposedly gave effect to the people's will. "In revolutionary regimes, nationality came to mean the duty of allegiance owed by the individual to the abstract state, secular and non-monarchical, and therefore to the common culture."[74] The universal application of general law applicable to all citizens and in the same manner lay at the heart of the ideals of the French Revolution.[75]In the liberal state, while there still might be a commercial code and commercial courts, the law relating to contracts was designed to be applicable to all, and set out in codes and statutes binding on all citizens.

1.7 **Sovereignty and legislation**

The supremacy of statute presupposes effective sovereign control of the entire national territory. During the colonial period much of Spanish America was to all intents and purposes completely outside the control of the Crown and the viceroys. The pivots of the Spanish empire were the tightly controlled and well-populated zones of the highland zones of Mexico and the Andes, mining centres such as Potosí in what is now Bolivia and Zacatecas in Mexico, and ports which connected the empire to Europe and Asia: Lima, Cartagena, Acapulco, Veracruz, Havana. Large areas such as southern Chile, the Caribbean coast of Central America, the region between the northern Yucatan and the Guatemalan highlands, and the vast northern expanses of New Spain remained effectively autonomous and independent.[76] They were controlled by *indios no sometidos*:[77] Apaches, Comanches,

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71 Luis G Labastida (ed), *Coleccion de Leyesrelativos a Desamortización*(1893).

72 Roberto Díaz Castillo, *Legislacion Economica de Guatemala durante la Reforma Liberal: Catalogo,* Editorial Universitaria de Guatemala and Editorial Universitaria Centroamericana, Guatemala City, 1973

73 Robin Blackburn, *American Crucible,* 252.

74 J C D Clark, *The Language of Liberty,* 53.

75 France followed through with these Jacobin concepts - in a way - in the 19th and 20th centuries when a distinction was drawn between 'citizens' and 'subjects' in French imperial possessions such as Senegal, Madagascar, and Algeria. French people were citizens, as were certain privileged members of the local elites. As in the Roman Empire, 'citizenship' was regarded as a gift, bestowing emancipation and equality. 'Subjects', however, were controlled by the detested colonial legal code, the *indigénat.*

76 There is a large literature on the persistence of these autonomous zones during the colonial period (and sometimes into the republican era). On the Maya area see e.g Pedro Bracamonte y Sousa, *La conquistainconclusa de Yucatán: Los mayas de la montaña, 1560-1680,* Porrúa, México D F, 2001; Laura Caso Barrera, *Caminos en la selva: Migración, comercio y Resistencia: Mayas yucatecos y itzaes, siglos XVII-XIX,* Colegio de México and Fondo de CulturaEconómica, México D F 2002 (a detailed study of the "encomienda communities" – those under Spanish control – and the "refuge communities" - "los pueblos de huidos"- and the relations between them); Jan de Vos, *La paz de Dios y Del Rey* (The Peace of God and the King), Secretaría de Educación y Cultura de Chiapas yFondo de CulturaEconómica, Méxco D F, 1980 (on the late survival and eventual conquest in 1695 and extinction of the LacandonChol of Chiapas); Nancy Farriss, *Maya Society under Colonial Rule: The Collective Enterprise of Survival,* Princeton University Press, Princeton, 1984 (esp pp 75-78); Grant Jones, *The Conquest of the Last Maya Kingdom,* Stanford University Press, Stanford, 1998 (on the Spanish conquest of Nojpeten, or Tayasal, the last independent Maya city-state, in 1697).

Araucanians (Mapuche), Pampas and many others. It comes as something of a surprise to think that fully-functioning Maya city-states lasted almost to the 18th century, 150 years after the "conquest' of the Maya people was supposedly finally completed in 1547. Not until the very end of the 17th century were the Lacandon of Chiapas and the Itza of Tayasalin what is now northern Guatemala were finally 'reduced' or 'pacified'.The scale of the incompleteness of imperial control is emphasised by David Weber.[78]He adds: "[c]early, Spain had not completed the conquest of America in the Age of Conquest".[79] One Panamanian scholar has estimated that at least 30% of all Central America was still in Indian hands at the end of the colonial period in 1810.[80] What was true of Spanish America was equally true of Brazil, the boundaries of which had by no means been resolved by 1810, and for that matter of the United States and the British North American colonies.

As well as Indians, the vast spaces of Mexico, Central America and South America contained numerous colonies of runaway slaves. In Spanish America runaway slaves were known as *cimarrones*, many of whom lived in "el centro de la nada" as the Spanish expression has it ("in the centre of nowhere") in fortified stockades (*palenques).*[81] These could endure for years, or decades.

However the advent of independent autonomous republics after 1820 implied the full control of each over their respective national territories and the supreme authority of the statute law of the legislatures over all citizens. Empires, focused on the metropolis, can tolerate zones of de facto autonomy provided that the structure holds together. Independent liberal republics have a different perspective. The Spanish empire was now a collection of autonomous semi-Jacobin republics each animatedto varying degrees by the ideals of the Enlightenment and the French revolution, each open to the outside world (in contrast to the enclosed system of the Spanish empires), in which public ideologies no longer revolved around the Crown, the Church and the defence of Catholic orthodoxy, but rather the centrality of the state, legal equality, and the subjection of all citizens to the law. As Carmen Bernand has put it, "[p]rogessivement, les sociétésd'AncienRégimeserontremplacées par un systèmed'organisationpolitique et socialecirconscritdans des frontièresterritorialesclairementtracées".[82] Instead of belonging to corporate groups - Native towns, or regulated missions - indigenous people were now autonomous citizens of the republic like everyone else. The remnants of particular corporate exclusions were swept away. In 1848, to take just one illustration, the Paraguayan president Carlos Antonio Lopez abolished what remained of the special framework of the Paraguayan missions, the last remnants of the famous Jesuit *Estado,* and decreed that the Guaraní mission Indians were now free and autonomous citizens of the Republic.[83]

For much of the 19th century the creation of the unitary republican regime in the Spanish American republics remained an aspiration, rather than a reality. This is just of true of the British settler colony of New Zealand, where parts of the North Island remained autonomous and under de facto Maori control until the 1890s.[84] This is not surprising given that the same position prevailed to varying dgrees in Europe. Even in a powerful metropolitan country like France, parts of the national territory were still more or less autonomous in 1800, and were only brought under centralised

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77 Unconquered Indians, as contrasted with *indiossometidos, tributarios,* etc.

78 Weber, *Bárbaros: Spaniards and Their Savages in the Age of Enlightenment,* Yale University Press, New Haven and London, 2005, 12.

79 Ibid.

80 Alfredo CastilleroCalvo, *Conquista, evangelisación y resistencia: ¿Triunfo o fracas de la políticaindigenista?,*Editorial Mariano Arosemena y InstitutoNacional de Cultura, Panamá, 26 (cited Weber, *Bárbaros*, 281).

81 On the *palenques*in Cuba see Thomas, *Cuba,* 37-8.

82 Bernand, *Les Indiens face à la construction de l'État-nation,* 11.

83 Armani, *Ciudad de Dios y Ciudad del Sol,* 210.

84 See R P Boast, "Recognising Multi-Textualism: Rethinking New Zealand's Legal History", (2006) 37 *Victoria University of Wellington Law Review* 547-582; Boast, "Treaties Nobody Counted On", 42 *Victoria University of Wellington Law Review* 653-670.In these articles I consider some of the insights developed by Professor Levaggi of the University of Buenos Aires and apply them to New Zealand legal history. The title to the first of these articles echoes some lines by a famous New Zealand poet, Alan Curnow: "And whatever islands may be/Under or over the sea/Is something different, something/Nobody counted on." (Curmow, "The Unhistoric Story", in Robert McDonald Chapman and Jonathan Francis Bennett (eds), *An Anthology of New Zealand Verse* (Oxford University Press, Oxford, 1956) 150.

authority with some difficulty during the course of the 19th century.[85] The same is true, or even more true, of many of the countries of Latin America, and the effective control of the state remains incomplete in some countries even today. In some regions, such as northern Mexico, the collapse of Spanish authority and its replacement by a weakened and unstable federal republic led to a power vacuum in what is now the American Southwest and an enhanced vulnerability of the settled areas to the south from destructive attacks from the Comanches in the northeast and the Apaches to the northwest.[86] As late as 1879 even a modern and economically expanding country like the Republic of Argentina was still laboriously engaged in a military conquest of its own national territory, the so-called Conquest of the Desert: "subduing and killing Indians, [the army] "cleansed" the southern and western pampa to Patagonia"; those who survived "endured a program of forced acculturation, euphemistically called regeneration, which included the dissolution of tribal governments, prohibition of native languages, and forced labor at menial work or obligatory service in the national guard or the navy".[87] Some Argentinian essayists, notably Vicente Fidel López, theorised that the Argentinian state had taken over the responsibility of the supposedly "Aryan" Inca state to conquer and rule the "barbarians" of the desert.[88] The Mapuche people of southern Chile had maintained their independence against Spain for centuries, but were finally crushed by the Chilean army during a long and grim campaign which lasted from 1867-1883. What Spain could not do, or had not thought it worthwhile to do, Chile decided to do for herself. Similarly the Yaqui people of northwestern Mexico, who like the Mapuches had held their own against the Spanish, were defeated by the Mexican army in a bitter campaign in 1885-86 which ended with the execution of the Yaqui leader Cajeme by firing squad in 1887.[89] Campaigns of this kind also allowed for the expansion of rural settlement and thus economic growth. The expansion of the frontier in Argentina during the late nineteenth century allowed the state to add some 30 million hectares of land to the national economy.[90] There are therefore obvious connections between statutory authority and effective military and policing control over a country. This was a project that countries as diverse as New Zealand, Chile, Argentina, Mexico, Brazil, and the United States were actively engaged in during the 19th century and which had been more or less achieved by around 1900, although even by then there were still some areas that remained outside the effective control of the national states. The advent of the state as Leviathan may have been inevitable and even beneficial in the long term – who could mourn the departure of the Corsican blood feud or intertribal violence? – but it came at a price.

1.8 **Revisiting Law and Economic History**

No doubt this paper has been far too discursive, and has attempted to cover too much ground. It may assist if I restate what I see as some important key themes and ideas:

(a) The Spanish American republics and New Zealand, like many other countries (Spain, for example) enacted in the 19th century laws relating to land tenure which rested on common ideological foundations deriving ultimately from Europe. In countries with significant

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85 Most famously in the case of Corsica, although Corsica is something of a special case, as it was only ceded to France by Genoa in 1768. Nineteenth-century Corsica was still dominated by the blood feud as the principal means of social organisation. See generally Stephen Wilson,

86 Weber, *Mexican Frontier*, 83-93.

87 Weber, *Bárbaros*, 273. See also VanniBlengino, *La zanja de la Patagonia: Los nuevos conquistadores, militares, sacerdotes y escritores*, Fondo de Cultura y Económica de Argentina, Buenos Aires, 2005 (reflections on a proposal to build a massive fortified ditch more than 600 kilometres long from the Andes to the Atlantic to separate the settled regions of Argentina from the Indian peoples of the far south). For a very different interpretation of Argentine history, however, see AbelardoLevaggi, *Paz en la Frontera: Historia de lasrelaccionesdiplomáticas con lascommunidadesindígenas en la Argentina (Siglos XVI-XIX)*, Universidad delMuseo Social, Buenos Aires, 2000.

88 See Carmen Bernand, *Un Inca platonicien: Garcilaso de la Vega 1539-1616*, Fayard, Paris, 2006, 324.

89 On the campaigns against the Yaqui nation, see Evelyn Hu-Dellart, "Yaqui Resistance to Mexican Expansion", in in John E. Kicza (ed), *The Indian in Latin American History: Resistance, Resilience, and Acculturation*, S R Books, Lanham, MD, 2000, 213-241.

90 Jorge Álvarez, "The Evolution of Inequality in Australasia and the River Plate", unpublished paper presented at the 16th World Economic History Conference, July 2012, Stellenbosch University, South Africa, 17.

indigenous communities (New Zealand, Mexico, Guatemala, Chile etc.) the effect of these laws, whether of general applicability (the Ley Lerdo) or specifically focused on indigenous tenures (Native Lands Acts in New Zealand) on the lands and social organisation of such communities has been significant.

(b) Liberal ideologies could be equally powerful in an English-speaking quasi-republic like New Zealand (or South Australia, or Victoria, to take other examples, or states of the US federal system such as California) as they were in liberal republics *de jure* such as Mexico (it was not, of course, a republic continuously after independence), Guatemala, El Salvador etc.

(c) But liberal ideologies relating to land and land tenures do not just become effective merely because they are ideologies. They must be translated into action by some means, in particular given legal effect, and it is here that the zones of legal and economic history intersect.

(d) The general legal traditions of New Zealand (and South Australia, Victoria, British Coumbia etc.) on the one hand and the Spanish American republics (and, of course, Brasil) on the other, are different: New Zealand law in a general sense derives from English Common Law, Spanish American law from Roman law via the common law of Castile, from derecho indiano, and from the codifications and constitution-making of the 19th century (the latter happens to be of little significance in the Common Law countries).

(e) However, when it comes to economic history, the law that really matters is typically not the general law or even constitutional law, but rather ordinary statutes, which are the products of law-making of elected legislatures dominated by liberal elites. Statute is a very effective form of law-making in this sense, but it can also get out of control and lead to great legal complexity – as the leyes de la Reforma and New Zealand's Maori land law exemplify clearly.

(f) Equally a key component of the liberal project is taking control of the entire national territory de facto as well as de jure, and in so doing to bring all of the land in the country and all of its population subject to the reach of statute law. Here there are very strong similarities between Argentina, Chile, Mexico, etc.