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## COMPANY LAW IN LATIN AMERICA: II †

### IV.

The principal concern of the Latin American legislators has been to secure the integrity of the capital, in order to protect creditors and investors, and to adopt measures which will protect minority shareholders. It is with these characteristics of the statutes that we shall now deal. The two problems are interrelated and no sharp delimitation can be drawn.

Foreign writers criticize our law for not paying sufficient attention to the policy of preserving the integrity of the capital. In some respects, it is true that we may fall short of the strict requirements which the Latin American laws exact to control watered stock. In others, our practice is superior, and I am inclined to think these foreign criticisms are based on old books rather than on the present state of our law.

All the laws, like our own, contain prohibitions against the declaration of dividends, or other devices of distribution, except out of surplus net profits; but our prohibitions are more effective in practice.<sup>105</sup>

The principle securing the integrity of the capital is carried to an extreme in those statutes that prohibit any decrease of the capital stock. A corporation charter in Colombia cannot be amended to decrease the capital.<sup>106</sup> The pending Colombian draft recognizes the disadvantage of this drastic rule and permits reduction of capital provided notice has been given to creditors and approval of the Superintendent

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† This is the second of two installments of this article. The first appeared in the Fall issue of Volume XXVII of the *Notre Dame Lawyer*. Limitations of space and the general inaccessibility of foreign material have rendered it inadvisable to attempt to cite authority for every assertion of fact and law; several are based on the author's practical experience and accordingly he invites the reader to accept him on faith. [Editor's note].

<sup>105</sup> The prohibition against illegal dividends is illusory. 1 RIVAROLA, *SOCIEDADES ANONIMAS* 24 (1935).

<sup>106</sup> Decree 2521 of 1950, art. 29.

of Share Companies has been obtained.<sup>107</sup> The pending provision in effect follows the Chilean law which provides that all amendments of the charter are subject to authorization of the President of the Republic.<sup>108</sup>

In Guatemala notice of a proposed reduction must be given to creditors by publication and they may file objections with the Finance Minister.<sup>109</sup> In Venezuela reduction of capital is not effective until three months after the publication, pursuant to court order, of the shareholders' resolution in the Official Gazette. This publication must include a notice stating that any creditor may oppose it by court action during the three months. Stockholders must exercise their opposition by court action within fifteen days after initial publication.<sup>110</sup>

Some statutes prohibit a corporation from buying its own shares, even out of surplus profits. In Mexico, this is absolutely prohibited, except on a judicial sale for the collection of a debt due to the company.<sup>111</sup> In other countries, it is permitted if approved by the corporation bureaus.<sup>112</sup>

In Guatemala, no company may invest more than 25% of its capital in other companies, unless either authorized in the charter or consented to by all its creditors and by the government. In any event the maximum is 50%.<sup>113</sup>

The balance sheet is considered of major importance to evidence the integrity of the capital and the statutes and regulations generally contain copious provisions for its formulation, audit, modification, approval or rejection by the

107 Articles 47-9 and *Exposicion de Motivos*, 3 REVISTA TRIM. DE DERECHO COMERCIAL No. 12-13, 67 (1949).

108 CODE OF COMMERCE art. 427.

109 CODE OF COMMERCE art. 392 (1943).

110 MORALES, ESTUDIOS JURIDICOS 99, 103 (1943). See CODIGO DE COMERCIO arts. 227, 295 (1944).

111 General Law of Mercantile Companies, art. 133.

112 *E.g.*, Chile: Resolution of the Superintendent, July 7, 1931. See CASTRO OSSANDON, JURISPRUDENCIA ADMINISTRATIVA DE LAS SOCIEDADES ANONIMAS 26 (1950).

113 CODIGO DE COMERCIO art. 333 (1942).

shareholders.<sup>114</sup> There is generally a provision forbidding directors to vote at shareholders' meetings on matters relating to the balance sheet or on other matters affecting their liability. Consonant with this are frequent prohibitions against managers, directors or auditors holding proxies.<sup>115</sup> These prohibitions seem wholly unrealistic; our own practice is to the contrary.

The antipathy to no-par value stock also seems to be connected with the feeling that it is incompatible with the policy insuring the integrity of the capital and the formulation of true balance sheets. They are generally prohibited by the affirmative requirement that shares must state the par value.<sup>116</sup> Shares without par value are not authorized save in Chile, Mexico and Panama; even there they are not favored for no corporation has been organized in Chile in this form and only a very few family corporations are to be found in Mexico. They are generally condemned by the commentators. The Chilean provision<sup>117</sup> authorizing no-par shares is described as an ill-conceived provision introduced at the last moment, contemplating a situation infrequent in Chile and extraneous to the local idiosyncrasy and legal organization.<sup>118</sup> It has also been said that the attempt to naturalize this foreign institution, which is without Mexican tradition or antecedents and contrary to all norms of European and Latin American corporation law, has not been successful in Mexico.<sup>119</sup>

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<sup>114</sup> ASCARELLI, *PROBLEMAS DAS SOCIEDADES ANONIMAS* 353 (1945). Ascarelli and other commentators stress the principle of the integrity of the capital; e.g., 2 GAY DE MONTELLA, *TRATADO PRACTICO DE SOCIEDADES MERCANTILES* 49 *et seq.*, 56 (1947).

<sup>115</sup> E.g., Argentina: CODE OF COMMERCE art. 355 (Wilson-Rae's transl. 1904). Brazil: Decree Law of 1940, art. 96. Honduras: COMMERCIAL CODE art. 152 (1950). Venezuela: CODIGO DE COMERCIO art. 290 (1944).

<sup>116</sup> E.g., Guatemala: CODIGO DE COMERCIO art. 395 (1942).

<sup>117</sup> Decree Law 251 of 1931, art. 117 (a).

<sup>118</sup> 2 OLAVARRIA AVILA, *MANUAL DE DERECHO COMERCIAL* 157 (1950).

<sup>119</sup> 1 RODRIGUEZ RODRIGUEZ, *TRATADO DE SOCIEDADES MERCANTILES* 340 *et seq.* (1947).

One feature common to all the corporation laws is the minute regulation of auditors. Theoretically, the auditors, called by an amazing variety of names (*sindico, comisario, revisor fiscal, Junta de Vigilancia, etc.*), have far wider powers than our own auditors. Their right of inspection is generally unlimited, extending to all corporate transactions,<sup>120</sup> and they have a right to convoke shareholders' meetings.

Our system of independent auditors, imposed by practice, or by the requirements of bank credit and stock exchange regulations, is in reality more effective. The fact that the auditors are appointed by the board of directors does not make the audit less effective. In England they are appointed by the general meeting of shareholders and regulated by statute.<sup>121</sup>

Appointment of auditors by the shareholders is the universal statutory rule in Latin America. The Spanish Code of Commerce of 1885 (which is followed in Peru and is law in Cuba) contains no provision as to auditors, but the applicable controls are rooted in practice.<sup>122</sup> In some countries they must be shareholders.

The Argentine *sindicos* or auditors, in practice, furnish no protection to the shareholders and limit themselves to certifying that the balance sheet is in conformity with the account books. Audit by the State is said to be equally ineffective.<sup>123</sup>

In Chile, similarly, all the auditors do is certify that they have compared the balance sheet with the ledger. They can examine business transacted only within their term of office

<sup>120</sup> *E.g.*, Mexico: *Ley General de Sociedades Mercantiles* 166 (IX).

<sup>121</sup> PALMER, *COMPANY LAW* (19th ed., Topham, 1949). Auditors in England are now fully regulated by the Companies Act., 1929, 19 & 20 Geo. 5, c. 23, § 134.

<sup>122</sup> 1 RODRIGUEZ RODRIGUEZ, *op. cit. supra* note 119, at 179.

<sup>123</sup> ROJO CARDENAS, *CONTRALOR POR EL ESTADO DE SOCIEDADES ANONIMAS* 66, 67, 111 (1950). See also, De Sola Canizares, *Les Societes Commerciales en Amerique Latine*, 2 *CAHIERS DE LEGISLATION ET DE BIBLIOGRAPHIE JURIDIQUES DE L'AMERIQUE LATINE*, No. 5, 184 (1950).

and cannot pass on future plans or call for technical reports received by the directors.<sup>124</sup>

In Mexico, practice falls far short of the theoretical conceptions and legislative ideal; the auditors are of little significance in the daily life of corporations.<sup>125</sup>

In the more recent legislation, the auditors may be either natural persons, partnerships or corporations. Trust companies in Mexico may be auditors.<sup>126</sup> But a corporation in the Argentine cannot be appointed *sindico*. The obsolete notion that only natural persons can be subjects of penal liability, that corporations, having no soul, cannot be guilty of a crime, dies hard in doctrinal writings in South America<sup>127</sup> despite the practical realities.

A Mexican provision seems a wise one: a minority representing 25% of the shares has the right to appoint one of the auditors.<sup>128</sup> This principle was followed in the Brazilian law. There, a minority representing at least one-fifth of the capital has the right to elect one member of the auditing committee. The holders of preferred stock as a group have a similar right.<sup>129</sup>

On the whole the prevention of watered stock has been more successful. The issuance of shares for services is frequently prohibited. In lieu of shares, provision is made in some of the statutes for certificates of participation in the

<sup>124</sup> 2 OLAVARRIA AVILA, *op. cit. supra* note 118, No. 262, p. 166 (1950), citing Resolution of the Superintendency, Oct. 21, 1936.

<sup>125</sup> 1 RODRIGUEZ RODRIGUEZ, *op. cit. supra* note 119, at 183. This accords fully with my own observations. Micou also noted that throughout Latin America, auditors are frequently mere whitewashing agencies. Micou, *Corporate Financing under Latin American Law: A Comparative Study*, 22 CORNELL L. Q. 490, 505 (1937). Of course, there are numerous well managed companies whose accounting and auditing procedures (frequently by British or American firms) are up to the highest standards, but this is due to the directors, not the stockholders.

<sup>126</sup> 1 RODRIGUEZ RODRIGUEZ, *op. cit. supra* note 119, at 186; *Ley de Operaciones e Instituciones de Crédito*, art. 44 (c).

<sup>127</sup> E.g., Jimenez de Asua, *La cuestion de la responsabilidad penal de las personas jurídicas*, 5 REVISTA TRIM. DE DERECHO COMERCIAL NOS. 18-19, 39 (1950).

<sup>128</sup> 1 RODRIGUEZ RODRIGUEZ, *op. cit. supra* note 119, at 188; *Ley General de Sociedades Mercantiles* arts. 144, 171 (1932).

<sup>129</sup> De Sola Canizares, *supra* note 123, citing article 125 of the 1940 law.

profits (*acciones de industria, acciones de trabajo*) which however, must be left on deposit with the company until the contract for services is completed,<sup>130</sup> or otherwise they are not transferable.<sup>131</sup> To remunerate promoters, who in former days were styled "the destroyers, not the founders" of the company because of their grasping for exorbitant advantages, founders' shares are provided for in a number of statutes with varying restrictions. Generally, they are limited to a share in profits not to exceed 10% for a fixed term of 5 or 10 years. This is current practice in Bolivia and Mexico.

Where stock is issued as consideration for property, elaborate safeguards are provided. In the Argentine, the Inspector of Corporations (*Inspeccion de Justicia*) usually demands evidence that the value is real and not exaggerated.<sup>132</sup> In Colombia, the Superintendent of Share Companies intervenes in fixing the value and this valuation on organization, must be unanimously accepted by the incorporators. Later contributions require a 75% vote and the owner of the property which is to be turned in cannot vote. The Superintendent can call for appropriate evidence of the real value or appoint appraisers at the expense of the company or owners.<sup>133</sup> In Brazil, property must be valued by three appraisers, but this is unnecessary when it belongs in common to all the shareholders.<sup>134</sup> In Venezuela, any shareholder may ask for an appraisal and the contributor, if already a stockholder, may not vote for acceptance of the property contributed.<sup>135</sup>

The Dominican Republic requires approval of the valuation at two meetings of the shareholders, at which the con-

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<sup>130</sup> E.g., Bolivia: De Sola Canizares, *supra* note 123, at 208, citing Decree of March 8, 1860.

<sup>131</sup> Guatemala: CODIGO DE COMERCIO art. 396 (1942), borrowed from the Mexican law, *Ley General de Sociedades Mercantiles* art. 114 (1932), and originally from France. They have not taken root in Mexico. 1 RODRIGUEZ RODRIGUEZ, *op. cit. supra* note 119, at 353 *et seq.*

<sup>132</sup> MARVEL & O'FARRELL, MEMORANDUM ON COMPANY LAW 1 (3d ed. 1951).

<sup>133</sup> Decree 2521 of 1950, arts. 31-34.

<sup>134</sup> De Sola Canizares, *supra* note 123, at 198, citing arts. 5, 6, Decree of 1940.

<sup>135</sup> CODE OF COMMERCE art. 261 (1942).

tributors of the property may not vote.<sup>136</sup> In Guatemala, the property must be itemized in full and appraised in the articles of association or in an inventory previously accepted by the incorporators.<sup>137</sup> Even then, the appraisals are subject to approval by the Department of Finance.

In Honduras the property must be transferred to a trustee before incorporation of the company, to be delivered to it after completion of the organization. The shares received in return for the property must remain on deposit with the company for two years. If during that time it appears that the property was worth less, by 25%, than the value stated, the contributing shareholder must pay the difference in cash. The company meanwhile has a lien on the shares deposited superior to the rights of any other creditors.<sup>138</sup> This provision, save for the initial part providing for a trustee, was taken from article 141 of the Mexican Law. In the Exposition of Motives accompanying this provision, the Executive of Mexico stated:

No one is ignorant of the fact that such contributions [of property] are at the present time one of the readiest expedients to which promoters resort to defraud the public. The Executive believes that by denying temporarily the negotiability of the certificates which represent such contributions and imposing the duty of paying the difference which may appear, when this difference should be deemed logically to exceed natural errors of valuation, this danger is greatly limited.

This two year inalienability device is also found in the pending Colombian draft.<sup>139</sup> It has been stated however, that a similar provision in Chile<sup>140</sup> has been evaded in practice.<sup>141</sup>

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136 TELLADO, *LAS SOCIEDADES COMERCIALES EN LA REPUBLICA DOMINICANA* 80, 132 (1939). This work is based chiefly on French decisions.

137 CODIGO DE COMERCIO art. 282 (1942).

138 CODIGO DE COMERCIO art. 96 (1950).

139 Article 24 and *Exposición de Motivos*, 3 REVISTA TRIM. DE DERECHO COMERCIAL, 61 (1949).

140 Decree Law 251 of May 31, 1931, art. 95.

141 HERRERA REYES, *SOCIEDADES ANONIMAS* 26 (1935). He attributes the difficulty to defective draftsmanship.



In the attempt to protect the minority shareholders against the majority, artificial restrictions, annoying and generally ineffective, have been imposed on voting rights. The latest of these is the Colombian law which provides that no shareholder may directly or indirectly vote more than 25% of the stock represented at the meeting.<sup>142</sup> In Argentina no shareholder may represent more than one-tenth of the votes conferred by all the outstanding shares nor more than two-tenths of the votes present at the meeting.<sup>143</sup> In Uruguay no one may represent more than six votes if the company is formed of 100 shares or more, nor more than three if it is formed of a lesser number.<sup>144</sup>

It is possible that these restrictions may account for the popularity of bearer shares still prevalent in Argentina and Uruguay, though they are tending to disappear elsewhere. The introduction of bearer shares is attributed to John Law.<sup>145</sup> It has been said that the origin of the principle of limited liability in stock companies was due to the adoption of bearer shares.<sup>146</sup> This hypothesis seems intrinsically probable and is reinforced by comparison with the evolution of the common law. Bearer shares apparently never entered into commercial usage in England, possibly because the courts refused to apply the merchants' concepts of negotiability.

The absorption of the Law Merchant was one of the advantageous triumphs of the common law. We have thereby avoided some of the needless complexities with which continental (excluding Swiss, Italian, Scandinavian and, to a lesser extent, Dutch law) and Latin American law are still plagued. The difference between common ("civil") law and

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<sup>142</sup> Law 58 of 1931, art. 29, is embodied, with additions, in the compilation Decree 2521 of 1950, art. 90 *et seq.*

<sup>143</sup> CODE OF COMMERCE art. 350 (Wilson-Rae's transl. 1904)

<sup>144</sup> MARVEL & O'FARRELL, MEMORANDUM ON COMPANY LAW OF URUGUAY (1951), citing Commercial Code, art. 420.

<sup>145</sup> 1 ASCARELLI, *op. cit. supra* note 114, at 338 n. 14.

<sup>146</sup> 2 GAY DE MONTELLA, *op. cit. supra* note 114, at 34.

commercial law is one of these complexities. The Law Merchant was not fully followed by our courts of common law and equity. They purported to take it over only to the extent that it did not conflict with what were thought to be fundamental principles of the common law. This restriction narrowed the scope of its usefulness. It required the Statute of Anne to correct the refusal of the courts to recognize the negotiability of promissory notes, and as late as 1832 a note payable to bearer was held to be non-negotiable.<sup>147</sup> The general principle of negotiability was not, and is not to this day, fully recognized. We still speak of quasi-negotiability. In foreign law, shares are negotiable instruments in the fullest sense.<sup>148</sup> The principle of the partnership as an entity, recognized by the Law Merchant, has only partially entered our law; and finally, in what here concerns us, the fundamental principles of the corporate structure as evolved by the Law Merchant were not recognized by our courts. The limitation of liability of shareholders required a long legislative struggle. We have not yet overcome the conception that corporate personality and limited liability are a gracious gift from the State. This obsolete theory should be replaced by the more reasonable and factual principle of the Law Merchant that they are inherent and necessary attributes of a stock company, not flowing from any royal, sovereign or legislative grant.

Bearer shares can only be issued for fully-paid stock.<sup>149</sup> Other limitations on their issue have become increasingly frequent. These restrictions have a two-fold purpose: to prevent ownership by aliens in industries or activities restricted to nationals, and to prevent evasion of income and inheritance taxes. Restriction of ownership to nationals is effected by article 160 of the Brazilian Constitution of 1946,

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<sup>147</sup> Bradley v. Trammel, 3 Fed. Cas. 1168, No. 1,788a (Super. Ct. Ark. 1832).

<sup>148</sup> ASCARELLI, *op. cit. supra* note 114, at 343.

<sup>149</sup> A few countries permit shares to bearer when 50% of the subscription has been paid.

prohibiting newspaper publishing and radio broadcasting companies from issuing bearer shares,<sup>150</sup> and in Mexico by similar statutory provisions which accomplish the same purpose.<sup>151</sup> In Brazil, no company issuing bearer shares may do business without listing on the stock exchange.<sup>152</sup> A manifestation of the desire to prevent evasion of taxes is a Peruvian law<sup>153</sup> under which "family corporations" can issue only registered (nominative) shares.<sup>154</sup> Uruguay has very neatly solved the tax problems connected with bearer shares. All stock companies pay a yearly tax on shares issued to bearer, in lieu of death duties, which amounts to 5¾% on the declared capital. In the event of the death of the holder, there is no estate tax payable on the shares. This is a great advantage, especially if the heirs reside abroad, since the surtax on inheritance for non-residents is double the basic amount. It has therefore become common for wealthy families to organize their fortunes as stock companies.

Uruguay is an oasis in a fear-swept world. It is one of the few genuine democracies in Latin America and is noted for its political and economic tranquility. Its tax system is one of the most lenient in South America. Uruguay passed a law on June 24, 1948, covering investment companies which has been commonly, but erroneously, referred to as the Holding Law. Its purpose was to encourage incorporation in Uruguay for portfolio investments abroad (i.e., outside of Uruguay). Investments in Uruguay itself by such companies are subject to certain restrictions, but the tax imposed, in substitution of the estate and all other taxes, is only 3%.<sup>155</sup> The law contains other interesting provisions which we cannot go into here.

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150 THE CONSTITUTION OF THE AMERICAS 96 (Fitzgibbon ed. 1948).

151 1 RODRIGUEZ RODRIGUEZ, *op. cit. supra* note 119, at 369.

152 Decree Law 9783 of Sept. 6, 1946.

153 Law 8548 of June 17, 1937.

154 LEON MONTALBAN, *DERECHO COMERCIAL* 321 (1943).

155 MARVEL & O'FARRELL, *op. cit. supra* note 144. For a detailed study of Uruguayan corporation law, see TASSINO, *SOCIEDADES ANONIMAS* (2d ed. 1944).

Another protection common in Latin America and accorded to dissident shareholders is the right of withdrawal and reimbursement for their shares in case of major changes in the corporate structure, such as change of object, assessments, issue of preferred stock, merger or consolidation.<sup>156</sup> The amount payable is determined by the value of the shares pursuant to the last balance sheet. This contrasts unfavorably with our own law in analogous cases in that it ignores market value, hidden reserves and the future prospects of the company. On the other hand, it avoids the expense and delay of our appraisals under court action. The Latin American provisions had their origin in the Italian Commercial Code of 1882. The statutes create doubt as to whether the right can be waived by a by-law provision, but the prevalent opinion is that it cannot.<sup>157</sup> The courts do not appear to have been sympathetic in their interpretation of the statutes<sup>158</sup> and the right of withdrawal is rarely availed of, even less than in the United States.

Only in recent years have attempts been made to effectively impose liability on managers and directors. In many jurisdictions, their absolution from liability granted by the shareholders' meeting is still final. Moreover, the usual provision that they cannot vote at shareholders' meetings on questions affecting their liability is, of course, ineffective.

In Argentina, the rigid rule that directors cannot contract directly or indirectly with the company<sup>159</sup> is based on public policy and strictly interpreted. In one case a mortgage exe-

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<sup>156</sup> Argentina: COMMERCIAL CODE, art. 354. Brazil: Decree Law 1940, art. 107. Mexico: *Ley General de Sociedades Mercantiles*, art. 206. Uruguay: 1909 law. Venezuela: COMMERCIAL CODE, art. 287 (1942) (does not apply to increase of capital by issuance of new shares). See ASCARELLI, *op. cit. supra* note 114 at 421 *et seq.*

<sup>157</sup> 1 RODRIGUEZ RODRIGUEZ *op. cit. supra* note 119, at 549 *et seq.* See CASTRO NOVARES, *MANUAL DE SOCIEDADES ANONIMAS* No. 519, p. 504 (1941); citing a decision of the *Inspeccion de Justicia*, June 5, 1924. The new Civil Code of Italy, art. 2437 (1942), settles the doubt by prescribing that the right cannot be waived or exercise of it rendered more onerous.

<sup>158</sup> CASTRO NOVARES, *op. cit. supra* note 157, at 454 *et seq.*, 474.

<sup>159</sup> COMMERCIAL CODE, art. 338.

cuted by the corporation in favor of the wife of a director was held void and not cured by a subsequent confirmation at the shareholders' meeting.<sup>160</sup> It has also been held that absolution (*quietus*) by the shareholders' meeting does not prevent an individual shareholder from suing a director for misconduct.<sup>161</sup> In Peru, since the directors are agents, they cannot contract with the company, and any shareholder has the right to demand an accounting.<sup>162</sup> In Chile, by-laws restricting the liability of managers and directors are prohibited.<sup>163</sup> The law in Brazil does not prohibit directors from dealing with the company, but they must advise the other directors of their conflicting interest and abstain from voting.<sup>164</sup> The Colombian prohibition against a director dealing in the shares of the company — unless he has special authorization of the board and unless he does so for non-speculative reasons — with its drastic penalty requiring forfeiture of all his shares in favor of the company, has given rise to absurd results. It is avoided in practice by dummies, and the penalty is evaded by the director when he sells all his shares.<sup>165</sup>

The theory underlying these rules as expressed in the Argentine Code and nearly all the other codes is that the directors or managers are agents (*mandatarios*) subject to fiduciary duties; but in the absence of a doctrine analogous to our constructive trust, the theoretical remedies against them are often ineffective. The remedies offered by the codes are seldom applied in practice, and there is no effective pro-

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<sup>160</sup> ROJO CARDENAS, *op. cit. supra* note 123, at 155, citing *Camara Civil 2a. Capital*, *Junio* 27, 1939, 68 JURISPRUDENCIA ARGENTINA 126; 15 LA LEY 340.

<sup>161</sup> *Id.* at 158, citing *Camara Comercial Capital*, Nov. 9, 1921, 7 JURISPRUDENCIA ARGENTINA 471.

<sup>162</sup> LEON MONTALBAN, *op. cit. supra* note 154, at 304; Valle v. Navas, 41 ANALES JUDICIALES 43 (Supreme Court, March 27, 1945).

<sup>163</sup> De Sola Canizares, *supra* note 123, at 210 *et seq.*, citing art. 4, Decree Law of Nov. 30, 1946.

<sup>164</sup> *Ibid.*, citing art. 120, Law of 1940.

<sup>165</sup> *Exposicion de Motivos*, 3 REVISTA TRIM. DE DERECHO COMERCIAL 81 (1949).

tection for shareholders.<sup>166</sup> In Chile, on the other hand, an advocate of the Superintendency of Share Companies claims that its intervention on behalf of shareholders is beneficial and effective and that while it acts with moderation and discretion to avoid alarm in the securities market, it is nevertheless sufficiently energetic to maintain its prestige.<sup>167</sup>

The commission that prepared the pending draft in Colombia came to the conclusion, after protracted deliberation, that administrative regulation would be more effective than judicial control.<sup>168</sup>

The underlying concept that the directors are agents of the company and of the majority of the shareholders, is different from that underlying our law. With us, the directors are entrusted generally with the control and management of the business of the corporation. Their authority is absolute so long as they act within the law. Only in a limited sense can they be considered agents. The powers of our board of directors are original and undelegated. They are derivative — not from the shareholders as in Latin America — only in the sense that they are received from the State in the act of incorporation.<sup>169</sup> Our concept that directors have the duties and liabilities of trustees is more fruitful than the more restricted concept of agency found in Latin American law and offers solution of many problems of corporate life.<sup>170</sup>

Before attempting a forecast of future developments in Latin American law, it will be useful to ascertain from some

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<sup>166</sup> INSUA RODRIGUEZ, BASES PARA LA REFORMA DEL CODIGO DE COMERCIO ECUATORIANO 43 (1942), referring to the duty of the Commercial Judge (art. 322 of the Commercial Code) to supervise corporate operations.

<sup>167</sup> CASTRO OSSANDON, *op. cit. supra* note 112, at 6.

<sup>168</sup> *Exposicion de Motivos*, 3 REVISTA TRIM. DE DERECHO COMERCIAL 81 (1949).

<sup>169</sup> *Benintendi v. Kenton Hotel Inc.*, 294 N.Y. 112, 60 N.E. (2d) 829 (1945); 2 FLETCHER, CYCLOPEDIA CORPORATIONS §§ 505 *et seq.* (Rev. ed. 1931). One consequence of the Latin-American theory that directors are agents is reflected in the custom in Argentina to enumerate in detail the grants of ordinary powers to the board of directors. This is necessitated by the lengthy and minute requirements of the Civil Code in the chapter on agency.

<sup>170</sup> Eder, *La reforma de la sociedad anonima espanola*, 26 REVISTA DE DERECHO MERCANTIL 261 (1950).

random statistics how far corporate development has already progressed. A capital market exists in only a few countries: Argentina, Brazil, Chile, Cuba and Mexico; and to a lesser extent in Uruguay, Peru, Colombia and Venezuela. In Cuba, investors and speculators are more interested in the New York Stock Exchange than in local securities.

Over 200 companies with a capital of over three billion pesos were listed on the Buenos Aires Stock Exchange at the close of 1949. The total number of shares traded in 1949 was 2,810,313 (a drop from over 5,000,000 in 1948). Seventy-one companies had preferred stock. Exclusive of mortgage bank issues, only 10 company bond issues were traded in.<sup>171</sup> In Brazil, in 1946, there were 4428 corporations with a total invested capital of over 28 billion *cruzeiros*, the most important being banks and finance companies.<sup>172</sup> On the Rio de Janeiro Stock Exchange in 1950, there were transactions in shares of about 40 banks, 25 insurance, 14 textile, 9 transport and 118 miscellaneous companies. Only 16 issues of preferred stocks and bonds of only 15 companies (exclusive of two mortgage bank issues) were traded in. In spite of the high interest rate, ranging from 5% to 9%, many of these bond issues were quoted considerably below par.<sup>173</sup>

In Chile in 1948, there were 709 stock companies with an authorized capital of 17½ billion pesos and a paid-up capital of 15 billion pesos.<sup>174</sup> In Colombia in 1944, there were 943 stock companies, of which 842 were national and 101 foreign, with a paid-up capital and surplus of 356 million pesos and 221 million pesos, respectively.<sup>175</sup> In 1950, about

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<sup>171</sup> *Bolsa de Comercio de Buenos Aires*. Memoria 1949 (1950).

<sup>172</sup> O LIVRO DAS SOCIEDADES ANONIMAS BRASILEIRAS (1946).

<sup>173</sup> *Movimiento da Bolsa durante o anno de 1950*. *Bolsa de Valores*, Rio de Janeiro, Jan. 25, 1951.

<sup>174</sup> OLAVARRIA AVILA, *op. cit. supra* note 118, at 129.

<sup>175</sup> COLOMBIA EN CIFRAS 344 (1944). The capital investment in both categories has increased tremendously since that date. The only private bond issue of importance is that of an electric company.

100 company shares were actively traded in on the Bogota Stock Exchange, but there were only a few private bond issues.

In Mexico, as of May 30, 1950, the shares of 149 banking, insurance and other credit or finance companies, 70 industrial companies (of which 34 had preferred stock), and seven mining companies were listed on the Mexico City exchange. In contrast to other countries, bond issues are of substantial importance; excluding mortgage bank bonds, about 78 companies had listed bond issues. There is a stock exchange also in Monterrey. A great many stock companies, especially banks and finance companies have been organized which are not listed on the exchanges. For example, the total number of insurance companies is 66; banks, trust companies, etc., 269; and auxiliary finance companies, 105.<sup>176</sup>

## V.

As to the future, generalizations are dangerous, prophecies more so, but I venture to draw the following conclusions.

1. There will be progressively less inclination to copy foreign models and future legislation will be based more on preliminary studies of the realities of home life, experience and mercantile usages.

As we showed at the beginning of this article, there was sufficient experience prior to independence on which to build up a body of well adapted corporate law. The well-grounded inheritance of Portuguese, Spanish and colonial law should not have been ignored by the legislatures, as it was, in their search for an ideal law. Nor should the practices developed largely under British influence have been discarded. There is always danger when foreign statutes are copied without regard to local conditions and without due integration into the traditional legal system of a country.

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<sup>176</sup> 10 ANUARIO FINANCIERO DE MEXICO 1949 1034 *et seq.*, 1203 (1950).



This defect has been conspicuous in Latin America. It is now being appreciated.<sup>177</sup>

True to Spanish form, the legislature has often been tilting at windmills. It has had its eye on abuses abroad which never existed and were unlikely at home. They have "legislated in the air and hence done more harm than good." The pronouncements of bureaucrats and politicians to the contrary, corporate practices have been relatively clean and compare favorably with more "advanced" countries. Especially in well-knit small communities, where people know one another, the pressure of public opinion is more effective than paper statutes.

Such a phenomenon as *Argentinismo* has its good side. It is in part a healthy reaction to the subservience in the past to foreign law. The fundamental changes in the life and law of nations must come from within, from the initiative and efforts of the people themselves. Foreign legislation, servilely imitated, has been harmfully influential in the outward aspect of Latin American legislation. In many cases, the result has been a veneer, rootless, ill-digested and frustrating.

2. As surplus capital increases and investments in real estate due to high prices become less attractive, more investment capital will become available for corporations and capital markets will be built up. There will be a tendency towards preferred stock and more favorable legislation to promote bond issues.

I have deemed it unnecessary to discuss preferred stock and bond issues, since the subject has been well covered in previous articles by other authors, and few changes have been made in the law since their publication.<sup>178</sup> The legisla-

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<sup>177</sup> This is evidenced to some extent in the Mexican and Brazilian legislation; in the pending draft in Spain, *REVISTA DE DERECHO MERCANTIL*, Vol. IX, No. 26, *Marzo-Abril* 1950; in 1 RIVAROLA, *op. cit. supra* note 105, at 11 *et seq.*; in ROJO CARDENAS, *op. cit. supra* note 123; and in De Sola Canizares, *supra* note 123, at 17.

<sup>178</sup> Schoenrich, *Corporate Bond Issues in Latin America*, 9 *TULANE L. REV.* 199 (1935); Micou, *supra* note 125; Voelkel, *A Comparative Study of the Laws of*

tion as to bond issues was designed originally to facilitate placing issues abroad, rather than for domestic use. Only mortgage bank bonds have really taken root heretofore.

3. The tendency in the modern statutes and drafts to differentiate between big business and small business and to restrict the corporate form to the former will be accelerated.<sup>179</sup> The latter is well provided for in the limited liability firm, which ranges from a true partnership to an organization closely resembling a corporation and which has become increasingly popular because of the cumbersomeness and expense of the corporate form and its subjection to government control.<sup>180</sup>

There is also a tendency to differentiate between corporations privately financed and those which appeal to the public for funds. The former are in practice already largely left alone by the corporation bureaus even when they have the right of control. Some of the statutes expressly make this differentiation, as do our own blue sky laws and the securities and exchange acts. This is true in Mexico, where a securities and exchange commission was set up in 1939; the present name is *Comision Nacional de Valores* and it is governed by Decree of February 11, 1946.

4. Bearer shares will be eliminated or die out in practice. They have ceased to exist in many countries even where permitted. The many restrictions on their issue in the present

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*Latin America Governing Foreign Business Corporations*, 14 TULANE L. REV. 42 (1940). There has been some improvement in the law in Brazil, Colombia, Peru and the Dominican Republic. For later literature, see PEIRANO FACIO, DE LOS EMPRESTITOS DE LAS SOCIEDADES ANONIMAS, POR EMISION DE OBLIGACIONES NEGOCIABLES (DEBENTURES) (1943); 1 RODRIGUEZ RODRIGUEZ, *op. cit. supra* note 119.

<sup>179</sup> De Sola Canizares, *Le critere de la dimension dans les societes commerciales*, 3 REVUE TRIMESTRELLE DE DROIT COMMERCIAL, 364, 371 (1950). See also the pending Spanish draft, REVISTA DE DERECHO MERCANTIL (Marzo-Abril 1950).

<sup>180</sup> See Eder, *Limited Liability Firms Abroad*, 13 U. OF PITT. L. REV. 193 (1952).

laws have been pointed out. The Superintendency in Chile has always been adverse to them.<sup>181</sup> Ecuador by law of July 28, 1948, prohibited bearer shares; they were practically non-existent before. The pending Colombian draft proposes their abolition; they already have tended to disappear.

The Latin American countries have become fully alive to the dangers resulting where vital enterprises are controlled by foreigners, especially in event of war or financial crisis. The elimination of bearer shares is believed to be a safeguard.<sup>182</sup>

5. The courts will tend to provide the substantial equivalent of equitable remedies to protect stockholders against abuses of management. With increased confidence in the courts, the exorbitant powers of administrative authorities will be pared down.<sup>183</sup> Possibly, government intervention has reached its peak.

Few of these countries have or can develop an efficient civil service capable of satisfactorily tackling the task of government supervision they have assumed. It will doubtless be found in the course of time that legislative and administrative interferences, because so numerous and extreme,

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<sup>181</sup> 2 OLAVARRIA AVILA, *op. cit. supra* note 118, at 129 n. 1.

<sup>182</sup> ROJO CARDENAS, *op. cit. supra* note 123, at 10 *et seq.* This author strongly opposes bearer shares, *id.* at 20 *et seq.*; but he is in error in supposing that registered shares necessarily tend to restrict speculation. Moreover, speculation is an essential to building up capital markets. 1 RODRIGUEZ RODRIGUEZ, *op. cit. supra* note 119, is also inclined to look unfavorably on bearer shares.

<sup>183</sup> There are surprisingly few cases in the reports on fundamental questions of corporation law. In those countries where government control is strong, the living corporation law is to be sought not so much in court decisions as in the rulings of the corporation bureaus. Digests of these decisions have been published recently in Chile, CASTRO OSSANDON, *op. cit. supra* note 112; and in Colombia, DOCTRINAS, 6 REVISTA DE LA SUPERINTENDENCIA DE SOCIEDADES ANONIMAS No. 18, (Dec. 1949). The paucity of decisions in Uruguay is attributed to the provision of the Commercial Code (art. 511) for arbitration. *Informe sobre la Legislacion Uruguaya Vigente* 46 (1947).

have undermined the confidence essential to trade and industry and have impaired, if not destroyed, credit.

There is already an increasing appreciation that no statutory regulation of an institution in as constant change and evolution as the stock company can be perfect, and that the courts aided by doctrinal writings must necessarily play an increasingly important role.<sup>184</sup>

The strictness of the corporation statutes has eliminated resort to the doctrine allowing the corporate veil to be pierced. But to prevent fraud, it will doubtless be applied when needed.<sup>185</sup> There has been a growing tendency on the part of the courts, in order to curb domination by the majority and abuses by the directorate, to apply principles preventing abuse of rights and to interpret the social contract in the light of the requirements of good faith.

6. Concurrently, as industrial corporations increase in magnitude, there will be, on the part of the directors and officers, an ever growing sense of fiduciary responsibility. Generalization here is impossible so much do the different countries and even regions of the same country differ in ethnic, geographical, historical, political, economic and other sociological matters. Laxity in enforcement of the criminal law in general is characteristic of many of the countries. Realistic legislation should reckon with this factor and place little reliance on the effectiveness of penal sanctions in the corporation laws. More faith can be placed on a sound public opinion backed up by the civil courts.

7. The cumbersome procedures for incorporation will be simplified and many artificial restrictions now found in company laws will be eliminated.

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<sup>184</sup> E.g., ROJO CARDENAS *op. cit. supra* note 123, at 2.

<sup>185</sup> ASCARELLI, *op. cit. supra* note 114, at 541 *et seq.*, advocates it. He cites a Brazilian case where a corporation made up of doctors, prohibited by law from operating pharmacies, was declared illegal.

8. The board of directors will be vested with greater inherent powers and the present supreme authority of the general shareholders' meeting correspondingly pared down.

9. The present general rigor of the law as to nullity of corporations for failure to comply strictly with technical formalities of organization will be modified. The Dominican law 1145 provides that nullity cannot be enforced if the defect has disappeared, and in any event there is a statutory limitation of three years. Persons who acquire shares cannot invoke a nullity when the ground for it existed prior to their acquisition.<sup>186</sup> In Mexico, a company cannot be declared void after registry, unless its purpose or business prove to be illegal. The pending Colombian draft provides that once a corporation has been authorized by the Superintendent to do business, there can be no nullity.<sup>187</sup>

10. The basic concepts of our express trust will be adopted and adapted to the civil law and will be availed of especially in the field of corporate activities. The express trust has been incorporated into Panamanian and Mexican law. In Mexico trust companies play an important part in business life. Argentina, Brazil and some other countries have adopted, in part, the corporate trustee.<sup>188</sup>

Our law contains many suggestions for fruitful study by Latin Americans. Their corporation statutes contain many items of interest and some innovations that we have not discussed above. On the whole, however, I agree<sup>189</sup> that we

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<sup>186</sup> TELLADO, *op. cit. supra* note 136, at 168, 169. In Brazil the statute of limitations is one year, but it applies only to defects in the articles of association not to other formalities. The Brazilian law seems unsatisfactory, not even recognizing *de facto* corporations. ASCARELLI, *op. cit. supra* note 114, at 381 *et seq.*

<sup>187</sup> *Exposicion de Motivos*, 3 REVISTA TRIM. DE DERECHO COMERCIAL 59, 60 (1949).

<sup>188</sup> EDER, A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW 86 *et seq.* (1950).

<sup>189</sup> *Micou, supra* note 125, at 511-4.

have nothing to learn from Latin American legislation. On the other hand, we can learn much from the penetrating analysis of basic concepts and the scientific discussion of problems in recent treatises on Ibero-American corporation law.

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