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CONSUMER PROTECTION IN LESS DEVELOPED COUNTRIES: THE LATIN AMERICAN EXPERIENCE

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INTRODUCTION

Consumers are not all alike, either within a given country or in different countries. There are rich and poor consumers; there are informed consumers and others totally ignorant of new technologies; there are activist and passive consumers; there are consumers who have access to justice and others who never realise they can bring their claims to court.

In spite of all those differences, I believe that consumer protection is increasingly less an individual and parochial issue as it becomes "socialised" (as a collective issue) and internationalised (as a supranational or global issue). Underlying the whole gamut of subjective differences is a series of issues common to consumers worldwide, starting from the very acceptance that their protection as a social *sine qua non* is in itself a universal demand.

This article seeks to analyse, in the Latin American context, the inroads of consumer protection in less developed countries (LDCs). The approach to Consumer Law adopted here might be judged by some as timid, narrow or even elitist, since it is not advocated as the solution to any or all consumer problems faced by the citizen.¹ In other words, under this analytical approach, the formulation of Consumer Law assumes that "citizens consume" and that they are part of a consumer society. This word of caution may seem excessive or at least odd to those who are unfamiliar with the reality of LDCs where in certain areas (and in whole countries), extreme poverty conditions have kept consumer concerns at a stage prior to consumption itself:

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¹ A more in-depth review of the subject in Spanish is found in Antonio Herman V. Benjamin, "El derecho del consumidor", in *Estudios Sobre Consum.*, Madrid, Tecnos y Instituto Nacional del Consumo, n. 24, August 1992, pp. 11 ff.

meaning underconsumption with all its implications (malnutrition, low life expectancy, or sheer lack of access to goods and services at minimum acceptable standards prevailing this late in the 20th century). Here, there are no consumers *strictu sensu*; citizens are simply deprived of the options inherent in mass consumption, denied the benefits of a consumer society. The issue at stake is not one of the quality of goods and services but the availability of those goods or access to them by the individual.

Consumer Law, at least in its current stage, has no answer to problems of this magnitude. Such issues surround consumer policy, not Consumer Law² proper. I mean to say that not all that concerns or forms part of public policy affecting the consumer (especially the major socioeconomic challenges like inflation, poverty, unemployment, etc.) is intrinsically and directly connected with Consumer Law. To be sure, there is no theoretical barrier preventing Consumer Law from extending that far. But it seems to me that this would be a task of too great a magnitude for a still nascent legal field that is just now earning some recognition.³

This article proposes to study the most general aspects of consumer protection in LDCs, pointing out the difficulties and prospects for Latin American consumerism.

Special emphasis will be given to the legislative efforts made over the past few years to produce effectively several consumer protection laws.

² The concern with determining the scope (the object) of Consumer Law is not merely academic. It has practical implications, as evidenced by a recent example. When the Brazilian Consumer Protection Code (CPC) was being drafted, newspaper reporters who interviewed me often asked what we (the drafters) meant to do to curb inflation or eradicate hunger.

³ As I explain further below, although Consumer Law has not sought solutions to those social macroissues, it is sensitive to the plight of the marginal consumer, the "ghetto consumer", and takes this into consideration when enforcing certain legal standards such as unfairness or misleading practices. The Brazilian CPC, in a wise provision, expressly acknowledges the "vulnerability" of all consumers to professionals (art. 4, I). Furthermore in certain cases a judge is allowed to add another factor to this vulnerability, i.e. to consider the consumer's "underprivileged" socioeconomic status. Therefore, under the CPC which already favours all consumers, the underprivileged consumer is granted even more favourable treatment. A judge may, for example, reverse the burden of proof where further evidence is required of the consumer (art. 6, VII), in addition to the general strict liability standard already provided for (arts. 12 and 14).

CONSUMER PROTECTION AS A UNIVERSAL PHENOMENON

As a social demand, consumer protection is traditionally seen as a social-political-legal phenomenon of the affluent society.⁴ But it is not only that!⁵ Consumer protection may—and must—be seen as a universal issue,⁶ inherent in modernity and in any consumer society.⁷ Wherever there are consumers, there must be also (at least in theory) a legal-institutional framework for their protection. This includes protection for rich consumers and poor consumers, informed and uninformed consumers, and consumers in developed and less developed countries.⁸

Just as contemporary corporations know no borders, those boundaries should also be eliminated to provide for a fairer society. For our purposes, this means more equitable market and legal systems which are the foundations of any consumer protection policy. In other words, consumer protection as a social need must see no racial or cultural distinctions, must see no economic disparities or geographical differences, must supersede political systems.

Consumer protection, previously an eminently parochial subject, has now assumed impressive international proportions.⁹ This internationalisation is a latecomer, however,

4 The term "affluent society" was popularized by John Kenneth Galbraith; cf. *a Sociedade Afluente*, translated by Carlos Afonso Malferrari, São Paulo, 1987.

5 Thierry Bourgoignie, "Éléments pour une Théorie du Droit de la Consommation", Bruxelles, *D. Story-Scientia*, 1988, p. 2.

6 It is in this context that the United Nations' involvement in the matter ("The United Nations Guidelines for Consumer Protection", adopted on April 9, 1985) must be understood. These Guidelines represent the recognition that "consumer policy can no longer be viewed solely in national domestic terms" (David Harland, *The United Nations Guidelines for Consumer Protection*, paper presented at the South Pacific Consumer Affairs Workshop, Sydney, February 4–9, 1990, p. 1).

7 While it is true that consumer protection, with the social goal of creating a more equitable society, cannot be limited to developed countries, it is equally undeniable that until very recently the actual provision and enforcement of consumer rights were in practice only in the so-called "first world". In fact, as S. Sothi Rachagan states so accurately, "Most developed countries have suitable legislation, effective watchdog government agencies and appropriate redress mechanisms to safeguard their consumers", while in LDCs, "the controls are non-existent, inadequate or unenforced" ("Legislation, Double Standards and Dumping in the Third World", discussion paper presented at the Summer Session in European Community Consumer Law, July 16–28, 1992, Centre de Droit de la Consommation, Faculté de Droit, Université Catholique de Louvain, Belgique, p. 1).

8 I have avoided the term "third world" which, with the breakdown of the communist governments in Europe, is clearly eroded and does not say much in itself.

9 The internationalisation of consumer protection is due to five main reasons: a) a repetition in every country of certain types of trade practices unfair to the consumer; b) the growth of international trade; c) the global reach of multinational corporations; d) a strengthened consumer movement acting through international networks and under a coordinating body (CI); and finally e) overlapping of the environmental and the consumer agendas (green consumerism). Cf. on a similar vein Evelyn Horowitz, "International Guidelines for Consumer Protection", in *The CTC Reporter*, no. 19, Spring 1985, United Nations, New York, p. 41.

because multinationals have long employed uniform production standards and marketing techniques on a global scale. To these corporations in particular, the world had turned into a single vast market. Modern day corporations as a rule have no time, resources or will to plan their sales strategies on strictly local bases. Therefore, consumers from this half of the planet are faced with the same kinds of problems plaguing consumers in Asia and the Pacific Rim.¹⁰

As in the example of the environmental issue (for obvious reasons, since the air we breathe and the water we drink know no borders), consumer protection (as trade becomes international) is not only in force in one way or another in every country in the world, but has been built on political-legal foundations common to a variety of peoples and—most interesting and important—to different legal systems.¹¹

CONSUMER PROTECTION IN RICH AND POOR COUNTRIES: COMMON PROBLEMS AND DIFFERENCES

In manuals and journals, Consumer Law addresses the problems and solutions found in rich countries. This is understandable, considering that consumer protection and industrialisation are in a way inseparable concepts. Despite doctrinal disputes, developed countries have reached a measure of consensus about the role of Consumer Law, its goals, major problems and limitations. The reason is that in those countries, consumer protection has been definitively incorporated into the social fabric.

Conversely, in LDCs consumer protection is still a new issue unfamiliar to many and not a reality in the life of the average citizen, in corporate practices, in legislation or in public policy making. In fact, elementary consumer rights taken for granted in other countries are often totally ignored. This neglect is actually ironic because it is precisely in the poorer countries, given the consumers' economic and psychological weakness, that the

10 To Patrizio Merciai, "International concerns for consumer protection are therefore closely linked to the ongoing debate on the control of multinationals, particularly with respect to competition, pricing policies, advertising and marketing techniques, effects on consumption patterns and on health, as well as possible impact on traditional culture" (Consumer Protection and the United Nations, *Journal of World Trade Law*, volume 20, number 2, 1986, p. 206).

11 It should be noted that, just as the line between Public and Private Law is gradually vanishing, the dividing line between common law and civil law is also disappearing. The legal tenets of both models overlap here and there and are transferred with little hesitation. This is true even in terms of enforcement where surely the influence of local reality is much stronger. Such was the case, for instance, with the spread of class action a collective redress mechanism. For this reason the traditional statement that Latin America follows the Continental European civil law model no longer holds. What model is this when, through its community Law and Directives, the Continental European legal system is directly influenced by U.S. Law?

existence and enforcement of those basic rights are most urgently needed.¹²

It is true that consumer safety, product and service quality, misleading and unfair advertising, unfair trade practices, inadequate access to justice, and a number of other problems typical of an affluent society are not concerns solely of industrialised countries. LDCs, however, share those same problems in different economic, social, political and cultural environments and at different orders of magnitude, and as I will show later this uniqueness may call for diverse patterns of consumer protection. In these countries, as emphasised earlier, in addition to concerns directly linked to Consumer Law, consumers are still confronted with other specific issues like poverty, hunger, inflation, a constant threat to democratic institutions, widespread illiteracy, unemployment, endemic diseases, total lack of information, etc.

Instead of eliciting, as a rule, a positive response from the state, business leaders and consumers themselves, this predicament of LDC consumers tends to distort the discussion of consumer issues in those countries, with major implications regarding the tools selected to confront market evils.

The consumer issue in underdeveloped environments, where much of the population cannot even be called consumers, does not command as much attention as in developed countries. It is obscured and pushed into the background in view of the urgency of more pressing needs such as food supply, health, employment, education, transportation, and housing. When confronted with this reality, poorer countries often lacking other alternatives "choose" a development-at-any-price model, with losses—many of them irreparable—to the environment and the general well-being of consumers.

Thus, the consumer protection issue in rich and poor countries is paradoxically both *similar* and *distinct*. LDCs suffer simultaneously from all the evils typical of developed economies as addressed by Consumer Law, as well as from their own unique challenges. As a result of such peculiarities, the common problems are overcome through a variety of consumer protection patterns not always identical to those of richer nations.

In the majority of LDCs, the consumer citizen is a forgotten entity.¹³ Such is the dilemma of Consumer Law in those countries; to assert its importance when the basic needs of a sizeable segment of the population remain unmet. Along this line of thought, one might ask about the importance of *economic citizenship* (the consumers' democracy¹⁴) when in many of

those countries run by dictatorships, not even *political citizenship* (the citizens' democracy) is ensured?¹⁵

ENVIRONMENTAL, PROCEDURAL AND POLITICAL PECULIARITIES

If we assume, as proposed at the beginning of this article, that the scope of consumer policy in LDCs is broader than that of Consumer Law, it follows that it makes no sense to talk about Consumer Law in developed countries and in LDCs (since both deal with more or less common problems) as divergent or even conflicting issues. If Consumer Law is thus narrowed down¹⁶ and separated from the goals of consumer policy,¹⁷ the problems to be resolved by consumer protection legislation in any country become *substantially* very similar.¹⁸ This does not mean that Consumer Law is or should be the same for rich and poor countries alike. The intent is merely to show that, with the methodological approach described above, Consumer Law in either case arises from more or less common problems, although the instruments utilised are not always the same.

¹⁵ One of the most prominent legal scholars of Latin America rightly contends that "the discontinuity of democratic systems has caused a well-known delay in the evolution of Consumer Law itself (incompatible with authoritarian legal systems) which was firmly established in Europe in the 1970s—and prior to that in the U.S.—but has failed to develop in Latin America, except for Mexico and Venezuela, until a decade later, when the rule of law was more extensively restored in our countries" (Gabriel A. Stiglitz, "La protección del consumidor y las practicas abusivas. Realidad y perspectivas en la Argentina", in *Doctrina Judicial*, año VIII, n. 19, Buenos Aires, April 8, 1992, p. 737).

¹⁶ This would leave out of its agenda—but does not ignore—certain social challenges of the highest relevance, common to nearly all LDCs. First, the high *illiteracy rate* which makes informing consumers about goods and services available extremely difficult and renders them vulnerable to misleading advertising and unfair trade practices. Second, the tremendous *concentration of income* in the hands of a minority, inhibiting the development of a strong and protesting middle class. Third, the long *tradition of oppressive regimes* in those countries causes any attempt to organise consumers to be seen as a threat to the survival of the State. Fourth, the multinationals use double standards, giving LDC consumers (and markets) different treatment than they offer at home. Fifth, as a result of *aggressive competition* from the multinationals, governmental intervention in the economy is still widespread, either by the creation of State owned corporations or by the regulation of the market in such a way as to generate monopoly situations that benefit a small group of domestic (or foreign) companies. Sixth, corruption wipes out more sophisticated and modern efforts at protective legislation, thus defeating any planned enforcement of new rights. Finally, the shortage of resources is such that national governments can hardly meet the basic needs of education, health, food, housing, and transportation.

¹⁷ If one assumes that the basic needs of citizens (housing, health, food, transportation, employment, etc.) are usually satisfied in developed countries, the respective domains of consumer policy and Consumer Law do not have to be as tightly defined.

¹⁸ As I already mentioned the basic problems affecting consumers and possibly settled by Consumer Law, whether in Europe or Latin America, are essentially the same: unsafe and poor quality goods and services, lack of information, unfair advertising, unfair contract terms, overindebtedness, aggressive debt collection, inadequate access to justice, etc. Problems of this nature will always be found in any country, to a greater or lesser extent.

¹² "Consumer rights are essentially nonexistent—and this in the nations where such rights are most desperately needed. Thus in a fundamental sense, all LDC consumers are underprivileged consumers" (Hans B. Thorelli and Gerald D. Sentell, *Consumer Emancipation and Economic Development: the Case of Thailand*, London, Jai Press Inc., 1982, p. 246).

¹³ Hans B. Thorelli and Gerald D. Sentell, *op. cit.* p. 246.

¹⁴ The term "democrazia dei consumatori" was coined by Franco Galgano as quoted by Guido Alpa, *Diritto Privato dei Consumi*, Bologna, il Mulino, 1986, p. 48.

Variations encountered, therefore, do not lie in the issue *per se* but a) in the context surrounding the issue (*environmental peculiarities*), b) in the development and enforcement of consumer rights (*instrumental peculiarities*), and c) in the stronger or weaker political will to develop and shape such rights either in accordance with consumer needs or, conversely, in line with the interests of business (*political peculiarities*).

It is obvious that these peculiarities ultimately lend unique undertones to Consumer Law in LDCs, often requiring tighter instruments for consumers who are at a much greater disadvantage *vis-à-vis* business professionals.

The peculiarities listed above seem to "envelop" the typical shortcomings of Consumer Law and sometimes may change the protection mechanism eventually adopted. In other words, similar problems but in different contexts may require unique solutions.¹⁹

In the first place, the environment in which those problems become manifest undeniably varies from country to country. These *environmental peculiarities* attach to the consumer movement as a simultaneously *external and internal* component. They become manifest in conditions that are either social (illiteracy, for example), economic (market failures affecting competition or an extremely strong grey market economy,²⁰ for instance), or cultural (greater sensitivity to certain problems such as violence and racial discrimination), and which end up affecting the scope and impact of certain corporate practices. Thus, an advertisement circulated worldwide may be considered misleading or unfair for local socio-cultural reasons in one country but not in the next. Likewise, a contract term internationally adopted by a corporation may be deemed unfair to consumers in a given area but not in another. Even a product, by reason of those peculiarities, may also be harmful in one country but not in another.²¹

On the other hand, the *instrumental peculiarities* are so called because they have to do not with how consumer problems arise in a society, but rather with legal tools and

approaches employed in their solution, in or out of court. In other words, relative to the consumer movement, they are *external factors with internal implications* for the development and enforcement of consumer protection policies. They are obstacles familiar to us all, such as absence of democratic channels for consumer participation in public policy-making²² and uneven access to justice. Here again local peculiarities will contribute to the shaping of different solutions for the same problem. Take for instance class action, now an internationally acclaimed enforcement procedure (despite the many hurdles in American courts!). What is its significance in a country where victims hesitate (often also for economic reasons) to stand up for their own rights, let alone demand redress on behalf of a whole group? Unless the representative plaintiff format is changed (as it was in the CPC—Brazilian Consumer Protection Code), granting standing to certain public and private institutions, a solution which is perfectly operational and realistic in another jurisdiction, will become merely law in the books by force of an instrumental peculiarity.²³

Finally, identical or similar problems may give rise to diverse solutions (or a lack thereof), not because consumers so deserve or wish, but simply because as a political force they cannot effectively communicate their views to public (or even private) policy-makers. These are the *political peculiarities*. Often neighbouring countries, economically and culturally akin and even joined by free trade agreements, have different if not opposing sets of consumer policies, with direct reflections on the legal system as a whole and on Consumer Law in particular. Such is the case right now of Brazil and Uruguay: while one has an extremely modern consumer protection legislation (Brazil), the other (Uruguay) leaves its consumers under the "wings" of the traditional legal system, that is, unprotected. Political peculiarities are not issues basically external to the consumer movement, linked to the availability or absence of democratic participation channels. They are *internal matters with external repercussions*, as they deal with how consumers organise and how much political power they wield as a pressure group to tip the scales towards public policies dear to their hearts.²⁴

19 According to one of the drafters of the United Nations Guidelines for Consumer Protection, "The Guidelines also recognise that although the basic problems and principles of consumer policy are the same everywhere, no one solution will have universal validity" (David Harland, *op cit.* p. 4).

20 Within an informal economy thrive small businesses, all of which contribute to prevent fast, fair and effective solutions to consumer disputes (cf. Jean-Michel Arrighi, "Les problèmes des pays en voie de développement: le cas de l'Amérique Latine", paper presented at the "Cours d'Été en Droit de la Consommation", organised by the Centre de Droit de la Consommation, Louvain-la-Neuve, Belgium, July 16–28, 1992, p. 8).

21 Such was the case of Nestlé's baby food products in the late '60s, the so-called "infant formula controversy" caused by the perception that these products were being sold to consumers who, for socio-cultural reasons, were unprepared or unable to use them properly. "The controversy opened up the entire question of the appropriateness of commercial food products in environments where minimum conditions for safe use could not be guaranteed" (James E. Post, International consumerism in the aftermath of the infant formula controversy, in *The Future of Consumerism*, Paul N. Bloom and Ruth Belk Smith (eds.), Lexington, Lexington Books, p. 170, our italics).

22 The issue of consumer participation in policy-making, contrary to popular opinion, has not changed substantially with the return to democracy of Latin American countries in the '80s. It is not always easy for the State to accept new actors such as consumer associations (cf. Jean-Michel Arrighi, *op. cit.* p. 9).

23 Another example is the empowerment of consumer associations to sign "collective consumer agreements" with industry and business representatives. Because the weakness of Latin American consumer associations is the first characteristic pointed out in any study of consumerism in the region, it should be no surprise, therefore, that such a legislative provision as contained in the CPC has become only law in the books due to the non-existence or total weakness of one of the players.

24 A corollary to this modest "fire power" is "the general perception of decision makers in Third World countries that the consumer cause is incongruent with local realities and of no relevance for the poverty-stricken" (S. Sothi Rchagan, paper cit., p. 3).

CHALLENGES AND PROSPECTS FOR CONSUMER PROTECTION IN LATIN AMERICA

Geographically speaking, Latin America is more than a single region for it spans the territories of South America, Central America and North America (Mexico).²⁵

As a common backbone, all Latin American countries share an economic, social, political and cultural identity, including language (Spanish except for Brazil, where Portuguese is spoken), European settlement, religion (predominantly Catholic), culture (Iberian), a mostly urban population, a legal system rooted in the Old World (civil law, based on codification), and to a certain extent, routine economic and political crisis.²⁶

Despite the similarities, Latin America is far from a homogeneous whole. Differences can be found both between nations (South America versus Central America, Brazil versus Mexico) and even within a single state (it is said that there are actually several "Brazils").

Evidently, therefore, when one proposes to analyse "consumer protection in Latin America", many such dissimilarities have to be discounted, and something that in a more detailed and rigorous scientific approach would have to be examined individually must be "put in the same bag". General consumer problems that can be addressed by Consumer Law may be the same throughout Latin America. However, as indicated above, local and regional (environmental, instrumental and political) variables profoundly alter the background against which these issues must be seen.

WHO IS THE "CONSUMER" NEEDING PROTECTION? THERE IS NO SUCH THING AS A STANDARD LATIN AMERICAN CONSUMER

It has been stated above that the general consumer problems challenging Consumer Law makers are, to a certain point,

²⁵ South America has 17 million square kilometers while Central America total 776,360 square kilometers.

²⁶ Current economic problems are severe, witness the foreign debt in the late '80s (roughly 440 billion dollars, excluding the English-speaking Caribbean countries); and this against exports in the order of 121 billion and a net transfer of capital overseas of around 25 billion.

A very realistic analysis of the year 1990 states that "Latin America and the Caribbean are still seeking, amid tremendous difficulties, a definitive solution out of a crisis that has afflicted them for almost a decade. Their hopes are based on the outcome of the deep and irreversible structural changes under way in the countries of the region. However, a resumption of the previous development drive is still elusive: the burden of overindebtedness and of the negative transfer of funds is still unbearable, investment efforts take too long to consolidate, the purchasing power of vast segments of the population is depressed, fiscal systems are weak, and there is little room for economic policy manoeuvring. Stagnation, inflation and the severe deterioration of living conditions bear witness to hardship in advancing structural change precisely because of the time required for it to crystallise and the magnitude of obstacles encountered. The latter are further worsened by the shortage of foreign capital, poor markets for the major exports, and trade restrictions" (Gert Rosenthal, "Balance preliminar de la economía de América Latina y el Caribe, 1990", in *Comercio Exterior*, vol. 41, no. 3, Mexico, March 1991, p. 281).

substantially or materially the same whatever the country. This is not true, though, of certain local or regional peculiarities involving consumer issues, nor of solutions eventually adopted.

In addition, consumers vary as individuals and victims of those problems. What this means is that, despite a similarity of problems, there is no standard Latin American consumer, let alone a world consumer²⁷ that legislators or enforcers may use as their sole reference. This statement has major implications because it acknowledges that, although Consumer Law is shaped and operates around reasonably common grounds, it cannot ignore the group and individual differences of the beneficiaries of its rules and special legal provisions, that is, consumers. Consumer Law, especially in LDCs with widely heterogeneous populations, must take such differences into consideration. Otherwise it will reflect only the needs of consumers who have powers of representation and a voice, consequently taking them as a (false) standard for legal purposes.²⁸ In such a case we would have a Consumer Law of those who are "present" and which would ignore the "absent", those who for a number of reasons have no weight or voice in either the legislative or legal systems.

As indicated previously, this analysis methodically narrows down Consumer Law in relation to the consumer policies of LDCs. Very importantly, it is not acceptable for Consumer Law, by ignoring the heterogeneity of consumers, to become a set of rules made available to all in an abstract and formal way, but enforced effectively by a minority of society, basically the middle and upper classes. It is no news that poverty reached unprecedented levels in Latin America during the '80s. On the one hand, we have the upper classes with a handful of privileged families; on the other, the middle class at grips with gradual and increasing impoverishment, shrinking more each day. Therefore, to develop Consumer Law in terms of providing protection essentially to those two classes is to give it an elitist connotation, detracting from its role of regulator for all consumers, rich or poor, informed and uninformed.

Consumer protection as we see it is not an instrument to support only the more affluent and articulate consumer. It is true that consumerism, as an organised consumer movement, has very strong links with the middle classes in developed countries. In LDCs, the chief challenge, therefore, is to make

²⁷ The fact that consumers do not fall under a subjectively uniform category, "un tutto unitario", does not preclude us from advocating "Consumer Law" as a legal set of rules applicable to all consumers (Guido Alpa, *op. cit.* pp. 24-25). The foundation of a Consumer Law is not at all that of uniformity among the whole range of consumers (or, for that matter, in any other human category). Two basic sets of assumptions in fact determine and legitimise the creation of Consumer Law as a differentiated legal discipline. First, on the objective side, the occurrence of a number of problems more or less common to all consumers; second, on the subjective side, the trait of *vulnerability vis-à-vis* corporations, equally shared by all consumers (which is therefore often presumed by the law itself). As stated very accurately by Jean Calais-Auloy, "la relation entre professionnel et consommateur est naturellement déséquilibrée" (*Droit de la Consommation*, 3e édition, Paris, Dalloz, 1992, p. 1).

²⁸ It is what the French call "le consommateur moyen" formula, poor adaptation of the older and more traditional idea of a "bon père de famille".

possible the development of a Consumer Law despite the minority status of their middle classes and the fact that poverty is the rule rather than the exception.

At least in theory, protecting the consumer makes as much sense in an affluent society of minor social inequalities as it does in a less developed society where the rich are very rich and the poor are extremely poor. In other words, Consumer Law can—and must—exist in LDCs. It is precisely in those societies, as explained below, that a consumer protection policy is most sorely needed.

Because there is no standard Latin American consumer,²⁹ since economic and social disparities are so widespread, any legislation built on such an assumption is doomed to failure and inequitable enforcement. To deny the existence of a standard consumer does not relieve the burden of legislators and law enforcers.³⁰ Therefore, in LDCs and in Latin America particularly, any use of a standard consumer rule by lawmakers and enforcers of Consumer Law—in the unfortunate circumstance that it is used—must target those who are the majority in a society, that is, low-income poorly educated consumers. Unlike what happens in developed countries, the “ghetto” here is not a minority but the vast majority.

THREE BROADER ISSUES

Even the most superficial analysis of consumer protection in Latin America cannot ignore *three* aspects—apparently obvious but essential—that underlie any discussion of the matter.

One must first address the *need and appropriateness of legal rules* for effective consumer protection. On the other hand, although it is acknowledged that most countries show some similarity in industrialisation patterns and market organisation, one must ask whether consumer protection afforded by the law is to follow a *single universal model* or, on the contrary, should be adapted to the specific realities of each society, bearing in mind the environmental, instrumental and political peculiarities previously described. Finally, there must be a discussion of the *legislative approaches* that might lead LDCs toward a legal system effective in protecting the consumer.

Despite a rekindling of the neoliberal appeal in developed countries after the fall of “Thatcherism” and “Reaganism”, those who preach “let the market take care of itself”³¹ are still very

strong in several countries of Latin America.³² While such advocates have been powerless to prevent the enactment of specific consumer protection laws, they have at least managed to delay or reduce the scope of that protection. On the other hand, it seems unlikely that national legislators, even in countries with no consumer protection tradition, are willing to solve the problems of consumers in the market by merely importing legislative models adopted by other societies. Last but not least, it seems evident that, given the many enforcement problems, Latin American consumers cannot be properly protected with scattered and asystematic laws.

These are then the three primary difficulties facing Consumer Law in Latin America: a) defining the extent of legal regulation of economic activity; b) adapting instruments already in force in developed countries to the different reality of less sophisticated or less homogeneous markets; and c) selecting formal models to shape Consumer Law.

Consumer Law as market control in Latin America

Whatever the country, law has a key role to play in terms of consumer protection. In LDCs it is impossible to effectively protect the consumer without the support of legal rules. But in Latin America, only recently has the legal system and legislators begun to show an interest in the consumer defined as such.

The formalist and conservative Latin American legal system still generally reflects the principles and doctrine of a farming society. It is a law shaped for another era, that only now is starting to undergo a slow and sometimes inadequate but promising process of change and improvement. Consumer Law arises as a by-product of this broader movement for political freedom, for social justice, for a more humane legal system, and for control of unfair market practices. Consumer protection is instrumental in questioning the role of the state as regulator of the economy, the “social function” of property, reviewing concepts such as freedom of contract and civil liability, and facilitating access to justice.

Changes, slow at first, have in recent years gradually accelerated. The last ten years have witnessed a true revolution

29 There is no standard Brazilian consumer either. For this reason, it is unacceptable for a judge, in enforcing the law, to take as a reference a certain “average consumer”, a “moyen” consumer. Therefore, the standard reference under circumstances of social, economic and information disparities, must always be *in concreto* and only exceptionally *in abstracto*.

30 Cf. Jean-Michel Arrighi, *op. cit.* p. 8.

31 “La mode est à la fin de l’Etat-providence et à la déréglementation” (Thierry Bourgoignie, *op. cit.* p. 95).

32 There is reason to believe that the liberal trend in Latin America will get stronger as a result of the 1994 American election and the anti-regulation Republican Congress and its “Contract with America” programme.

But even before this fact in both Argentina and Chile, deregulation has reached incredible proportions. A substantial part of the Argentinian administration recently advocated the repeal pure and simple of its labour legislation. In those countries, legal consumer protection is seen as a movement against modernity. On the Argentinian situation, Gabriel A. Stiglitz contends that “the early ’90s show that many Latin American governments (the Argentinian in particular) are clearly retreating, withdrawing a strong State role in consumer protection, and in support of the most underprivileged segments: they convey an individualistic ideology and a rigid economic outlook according to which the free play of market forces alone is enough to ensure protection to the consumer” (Gabriel A. Stiglitz, *op. cit.* p. 737).

In Brazil, the neoliberal movement has meant privatisation of public corporations rather than an actual slackening of social legislation. Proof of this is that the CPC was passed at the height of the neoliberal Collor de Mello administration. There is no indication that President Fernando Henrique Cardoso, elected in 1994, will change this trend.

in Latin American Law, especially in Brazil. Issues previously unknown or ignored, such as the protection of the environment, the handicapped, the elderly, AIDS patients, and consumers are now discussed broadly and often regulated by way of modern and well-intentioned laws.

Few legal scholars will openly speak up in defence of traditional law, its principles and doctrine. The courts in turn seek ingenious ways to protect the previously unprotected. There is thus a favorable climate for consumer protection to develop. However, we cannot forget that other more serious social issues exist, and although they do not fall within the scope of what is known as Consumer Law, they ultimately affect its formulation and enforcement. On the other hand, due to a measure of "artificiality" (since they do not evolve gradually), in some consumer protection measures that go against deeply-ingrained unfair practices, the special legislation does not always achieve the expected results. Courts hesitate to enforce them, suppliers hire the best legal advisors in the country to draft expert opinions in their favour, the consumers themselves do not trust the efficacy of the legislation (too good to be true!).

Despite what one might hope, Consumer Law in LDCs, at least in its early stages, does not play its social role or, when it does, fails to do so completely: inevitably it ends up being a legal discipline for a minority of consumers rather than for *all* consumers. Only consumers who have overcome the underconsumption stage—and no longer have to worry about problems unknown or seldom known in developed countries—can effectively and fully exercise the protective options offered by Consumer Law.

Contrary to popular opinion, and despite having to manage many more urgent matters and lacking a local consumer tradition, LDCs—notably in Latin America—have legislated for the consumer. Three "waves" so to speak can be identified in pro-consumer Latin American legislation.

The *first wave* involved a number of laws focusing on certain aspects of consumer protection. It was not comprehensive or systematic regulation but rather laws and decrees dealing with specific issues such as weights and measures, food and drug control and especially price control. It was an unsuccessful attempt made by the traditional legal system to afford the consumer some degree of protection albeit without express acknowledgment of the consumer as such.

The *second wave* began in 1974 with the enactment of specific consumer protection laws in Costa Rica,³³ Venezuela,³⁴

Mexico,³⁵ and Colombia.³⁶ Here, unlike what happened in the first wave, the consumer, identified clearly as the weak party in the market, is afforded ample protection.

The *third—and present—stage* started in 1985 with the "United Nations Guidelines for Consumer Protection", adopted by the General Assembly on April 9. This third wave includes legislation in Guatemala,³⁷ Honduras,³⁸ Brazil,³⁹ Peru, Ecuador,⁴⁰ El Salvador,⁴¹ Venezuela (amendment of the 1974 law),⁴² Paraguay,⁴³ Mexico (amendment of the 1975 law)⁴⁴ and

35 "Ley Federal de Protección al Consumidor" (published in Diario Oficial de la Federación on December 22, 1975 but did not enter into force until February 5, 1976). The Law was subsequently reviewed and expanded (February 7, 1985). In its earlier version, according to Mexican experts the law was imprecise, vague and obscure. A little over three years after its enforcement, it was already argued that "su reforma constituye una tarea urgente" (Jorge Barrera Graf, "La protección al consumidor en el derecho mexicano. Logros y deficiencias", in La Protección del Consumidor, Jorge A. Sánchez Cordero Dávila (coordinator), Mexico, Editorial Nueva Imagen, 1981, p. 97).

36 First through the "Estatuto del Consumidor" (Ley n. 73 of 1981). Later, four Decrees enacted in 1982 enlarge the scope of the matter (Decrees n. 1441, 3466, 3467, and 3468). For a full analysis of their content, please see (in English) Ariel Armel, Consumer protection in Colombia, in Consumer Protection for Latin America and the Caribbean, Report of the Seminar on Consumer Protection for Latin America and the Caribbean, Montevideo, March 9–11, 1987, Organised by the Department of International Economic and Social Affairs, United Nations Secretariat, in cooperation with the United Nations Development Programme, pp. 34 et seq.

37 "Ley de Protección al Consumidor" of 1985 (Decreto-Ley n. 1–85) with just 13 articles, regulated on January 25, 1985.

38 "Ley de Protección al Consumidor", published in the Daily Journal "La Gaceta" no. 25819 of April 29, 1989, enforced on May 19, 1989, regulated by "Reglamento General de la Ley de Protección al Consumidor," published on August 17, 1989.

39 Código de Defesa do Consumidor" (Law n. 8078 of September 11, 1990, entering into force six months later).

40 "Ley de Defensa del Consumidor," published in the "Registro Oficial" of September 12, 1990 consisting of 57 articles under seven Chapters: "Naturaleza e Objetivos" (Capítulo Primero), "De los Bienes y Servicios" (Capítulo Segundo), "De la Publicidad" (Capítulo Tercero), "Del Control de Precios, Calidad y Cantidad" (Capítulo Cuarto), "De las Asociaciones de Consumidores" (Capítulo Quinto), "De las Infracciones y sus penas" (Capítulo Sexto), and "De la Competencia, Jurisdicción y Procedimiento" (Capítulo Séptimo).

41 "Ley de Protección al Consumidor."

42 Passed in February 1992, it is quite comprehensive and complex and therefore not limited to merely amending the previous law. The Brazilian CPC seems to have influenced its provisions to a certain extent.

43 Bill no. 66, "De Protección al Consumidor de Productos y Usuarios de Servicios y Lealtad Comercial", approved by the National Congress on October 15, 1992, was partially vetoed (arts. 1, 2, 7, 11, 17 literals "d" and "e", and 22 literal "e") by the President of the Republic through Decree no. 15,428 of November 5, 1992.

44 Second amendment of the 1975 Law, published on December 24, 1992.

33 "Ley de Protección al Consumidor" (Ley n. 5665 of February 28, 1975), consisting of 29 articles. It was regulated on July 2, 1975.

34 "Ley de Protección al Consumidor" dated August 5, 1975.

Argentina.⁴⁵ Approval is expected in the near future for similar laws in Uruguay⁴⁶ and Chile,⁴⁷ as well as a new law for Costa Rica.⁴⁸

This third stage certainly was the climax of many years of dissatisfaction, accusations of insufficient protection and reform effects. At this point, there is really room for hope.⁴⁹ Such optimism must be tempered with caution, however. Indeed, because the challenge of protecting consumers of LDCs is not met merely by the enactment of laws that formally guarantee consumer rights and provide for business liability. The law, because of the peculiarities discussed above, simply provides a framework. In Latin America, legislation does not always have the same practical consequences it has in developed countries. Even when there is legislation, unfair practices persist because of more pressing public policy matters, of a shortage of resources (material and human), of inefficient enforcement, inadequate administrative⁵⁰ and legal⁵¹ mechanisms, as well as

45 "Ley de Defensa del Consumidor" (Ley 24.240), passed in 1993 and drafted by Professors Atilio A. Alterini, Roberto M. Lopez Cabana and Gabriel A. Stiglitz; for an introduction to its system, see Rubén S. Stiglitz and Gabriel A. Stiglitz, *Comentarios a la ley de defensa del consumidor. Ley 24.240*, Rosario, Editorial Juris, 1993, and *Derechos y Defensa de los Consumidores*, Buenos Aires, Ediciones La Rocca, 1994; Jorge Mosset Iturraspe e Ricardo Luis Lorenzetti, *Defensa del Consumidor. Ley 24.240*, Santa Fe, Rubinzal-Culzoni Editores, 1993.

46 One of its authors is professor Jean-Michel Arrighi.

47 One of its drafters is Luis Sanchez Castellon.

48 On December 23, 1992, President Rafael Angel Calderón Fournier sent Congress a bill drafted under the coordination of the "Ministerio de Economía, Industria y Comercio," "Ley de Promoción de la Competencia y Defensa Efectiva del Consumidor," containing 70 articles, to supersede the 1975 legislation. Recognizing that the former law "contiene disposiciones totalmente anacrónicas para defender al consumidor en la actualidad", the bill introduces among other innovations, improved disclosure and advertising control provisions. Professors Rubén Stiglitz and Gabriel Stiglitz from Argentina acted as consultants to the Costa Rican government.

49 Accordingly, at the 2nd IOCU Regional Conference for Latin America and the Caribbean held in Santiago, Chile, on November 19–23, 1990, the governmental consumer protection agencies submitted a "Draft Declaration" expressly stating that "The consumer protection and defense movement in Latin America and the Caribbean is embryonic although still developing and therefore its organisation will take time and great effort."

50 Ross Cranston, *Consumers and the Law*, 2nd ed. (London 1984), p. 9.

51 In countries of sharp social stratification, the Judiciary ends up being "swallowed", though unwillingly, by the economically and politically powerful. It is not just that the legal system, faced with a poorly represented majority, becomes the tool of a minority. It involves judges who come to interpret the law in such a way as to reflect the views of those who do have access to the courts. In the traditional legal model followed by LDCs, consumers can knock at the doors of justice only in exceptional cases. And when they do, it is usually in the disadvantageous position of defendant. Analysing the situation in India, Rajendra Kumar Naya states that "the helpless consumer neither has the means nor the courage to knock at the doors of the appropriate court for the solution of the problem" (*Consumer Protection in India (Bombay, 1991)*, p. 6). Here again, where enforcement is concerned, the rich consumer is also favoured. To him, member of a minority, "consumer protection through judicial redress is not a problem", for he has plenty of lawyers available to fight for his rights. He does not feel "in the least threatened with the encroachment of

because of corruption problems.⁵² Another common feature is the cooption ("capture") of public enforcement agencies by precisely those corporations they should be watching.⁵³ Maybe a fourth wave should be envisaged, where enforcement problems can be settled or at least confronted directly, a sort of offshoot from an effective "consumerist awareness", with public agencies and private associations in an active role. But for the moment, the mere fact that, in spite of all shortcomings, we have managed to pass modern consumer protection legislation is enough reason to celebrate.

Importing and changing legislation

To recapitulate, we have shown that in less developed countries, the major issues of Consumer Law are basically the same as in developed nations. Differences lie in the external social-economic-political cauldron where they operate. They are environmental, instrumental and political peculiarities.

Consequently, the alternatives chosen by developed countries are not always as suitable to solve consumer problems in LDCs. Environmental, instrumental and political peculiarities demand models appropriate to the specific requirements of those less developed societies.

In view of such peculiarities, it stands to reason that as a merely formal document, the law is not enough. There is an equally important need to ensure that legislation does not become law in the books. It is on the level of enforcement that an imbalance of power between consumer and supplier really comes to light.⁵⁴ So, any legislation enacted in those countries strictly on the basis of models imported from developed nations,

a right. The problem ... lies with the rest of the ninety-nine per cent of that population, from the level of the middle class to the poor, to whom extrajudicial redress may be the only venue to justice ... (Louise Y. Gochan, *The Consumer's Alternative: A Study on Consumer Grievance Mechanisms*, in *Philippine Law Journal*, volume 56, September, 1981, p. 408).

52 See on this same subject, S. Sothi Rachagan, *op. cit.* p. 4.

53 Charges are often heard about "the linkages and overlap of political and producer interest, with many political leaders having vested interests in business" (S. Sothi Rachagan, *op. cit.* p. 4). This cooption is frequently direct and undisguised. During the Collor de Mello administration, the official responsible for consumer protection policy, Secretary of the "National Economic Law Secretariat-SNDE" under the Ministry of Justice, had ties with FIESP—the São Paulo State Federation of Industries, the country's most powerful business interest group. In the same period, the Insurers' representative association donated computers to fully automate SUSEP—Private Insurance Superintendency, precisely the agency in charge of overseeing and controlling the insurance industry for the protection of consumers.

54 It is true, as noted by Norbert Reich, that such procedural remedies imbalances also occur in developed countries (*Internal Market and Diffuse Interests*, Bruxelles, E. Storey-Scientia, 1990, p. 13). But it is in LDCs that consumer rights, when granted, are either ignored or openly infringed, and where unequal enforcement is most prominent. For example, before the CPC in Brazil, it was common practice for a consumer to complain about a product or service, only to hear the supplier reply, "go ahead, fight for your rights". That was the pat answer because he knew that when the consumer did choose to "fight", he would find he had no rights. Or if he did, the doors to redress would be closed to him.

where it is taken for granted that laws are there to be enforced, will be doomed to failure. This does not mean that there should be two entirely distinct consumer protection systems, one for rich countries and another for poorer nations. However, what works well in one country may not necessarily work the same in another.

The creation of mechanisms for effective enforcement of the law, more so than the development of general and abstract consumer rights, must take into account the three types of peculiarities discussed above and especially the availability of resources in each country.

Specialisation and unification of Consumer Law

Having addressed the issue of legal rules required for consumer protection (*i.e.* state regulation of the market), and the need for caution in importing legal models from developed countries into less developed ones, the next question is: what type of legal rules should legislators in LDCs enact to control the market to the consumers' benefit?⁵⁵

In civil law countries, two possibilities have been raised. One, traditional, is the enactment of special laws for each major area of consumer protection. This would result in a body of scattered laws joined only by the thread of a common goal, *i.e.* consumer protection. There would be a statute for advertising, another for product and service liability, yet another for general contract terms, one for access to justice, and so forth.⁵⁶ The main features of such a system are: a) scattering of the rules; b) absence of a systematic approach and consistency; and c) management difficulties.

The second form of legal consumer protection comes through unification of Consumer Law via a "General Law" or "Code". It is the most modern alternative and a technical improvement,⁵⁷ in our opinion, as developed in the original

French "Project de Code de la Consommation",⁵⁸ under the chairmanship of Professor Jean Calais-Auloy, and also, to a lesser degree, in the American "models acts".⁵⁹ This is the solution we advocate for the less developed countries.

With the enactment of Law no. 8078/90 (CPC), Brazil became the first country in the world to have a true "Consumer Code" as a national act covering the main areas of concern in Consumer Law.

UNITED NATIONS GUIDELINES AND LATIN AMERICA

Resolution no. 39/248, adopted by the United Nations General Assembly on April 9, 1985, set guidelines for consumer protection, and has had a tremendous impact in LDCs, particularly in Latin America.⁶⁰ Already in 1987, from March 9-11, several countries of this hemisphere met in Montevideo, Uruguay, to discuss the guidelines from their own perspectives.⁶¹ At the close of the meeting, participants concluded that "the Latin American and Caribbean consumers experience a variety of problems different from those of developed nations" and that "it is essential to appeal to the support of organised consumers in Latin America and the Caribbean to encourage Latin American legislatures to open the way to the enforcement of dynamic and modern national consumer protection laws".

For the first time, therefore, LDCs received from the United Nations a set of minimum general rules to guide a more encompassing domestic legislative effort. We cannot underestimate the importance of those guidelines for Latin America. In Brazil, to cite an example, consumer groups utilised them in 1987 to draft the wording they wished to insert in the new Federal Constitution, the first after 20 years of military dictatorship, then being prepared by the National Constitutional Assembly. Thus, at least in the Brazilian case, shortly after their enactment the guidelines were already having practical effects.

The practical impact of the guidelines arises from the fact that its wording—a set of articulate provisions—lends

55 This is not meant to be, even superficially, a discussion of the many Consumer Law or consumer protection "models". Our purpose is merely to show which of two alternatives should be followed by LDC legislators. Issues such as self-regulation, for example, are not even addressed since we are dealing here with *legal* models for consumer protection. For a comprehensive and original review of the several possible consumer protection models (formal, adaptive, participative, and mixed), cf. Thierry Bourgoignie, *op. cit.* pp. 155 et seq.

56 Although this is the option chosen by the European Union, Latin American countries which usually follow the general guidelines of European law seem to prefer the unification approach, whether codified or not. The Brazilian CPC simply embodies a trend already detected in the region. In a broader sense, Jose Vargas, Director of the IOCU Regional Office for Latin America and the Caribbean, appointed a Legal Experts Committee in 1992 to draft a "Model Code" for Latin America. The Committee, initially chaired by Uruguayan Professor Jean-Michel Arrighi, had among its members Gabriel Stiglitz (Argentina), Luis Sanchez Castellon (Chile), Josué Rios (Brazil), and Antonio Herman Benjamin (Brazil).

57 This approach has earned increasing support also in Environmental Law. Cf. the English translation of Germany's "Draft General Part of an Environmental Code" (unpublished).

58 Which, as indicated in the introduction to the report by the "Commission de Refonte", "n'est pas une simple compilation des textes existents" (Jean Calais-Auloy, Propositions pour un Nouveau Droit de la Consommation, Paris, La Documentation Française, 1985, p. 13).

59 To wit the Uniform Consumer Sales Practices Act adopted in 1971 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association, and enacted in three states only (Kansas, Ohio, and Utah). Cf. Dee Pridgen, Consumer Protection and the Law (New York, 1986, pp. 3-7).

60 It should be noted that it was precisely the LDCs, with the invaluable support of IOCU (International Organisation of Consumers Unions), which most strongly urged the United Nations to enact that Resolution: "... the thrust to elaborate guidelines within the United Nations was provided mainly by developing countries, supported by non-governmental organisations and chiefly by the International Organisation of Consumers Unions ..." (Patrizio Merciai, *op. cit.* p. 207).

61 See Consumer Protection for Latin America and the Caribbean, *op. cit.*

objectivity and consistency to the claims of local consumer groups. And since they were issued by the U.N., with no ideological connotations, their legitimacy is unassailable. In fact, Brazilian consumer organisations had been utilising those guidelines as a starting point and common basis for their demands even before the enactment of the CPC. The 1988 Federal Constitution and the CPC⁶² were surely the fruit of that effort.

CONCLUSION

In conclusion, it may be stated with some certainty that consumer protection is today truly a world issue, affecting the affluent North and the poor South alike. The 1985 U.N. Guidelines have unquestionably contributed to this internationalisation. But it must be acknowledged that even prior to 1985, clear signs were already apparent, indicating the growing awareness of LDCs of the vulnerable position of consumers in the market. Generally speaking, those countries which had been totally alienated from the consumer movement suddenly—and in spite of their severe economic, social, and political problems—realised that consumer protection was an important component of their public policies. They abandoned the misconception that poverty and consumer protection were incompatible issues. Consumer protection was no longer construed as a luxury or a fad of rich countries. It was an

awakening, albeit a little late, to the need to support the consumer with something that might effectively contribute to the well-being of society as a whole. Simultaneously, reacting to the criticism and response of legal specialists, traditional law in those countries, which was usually at the service of corporate interests and insensitive to consumer problems, also slowly started to look into the legal status of consumers, seeking formulas to remedy their vulnerability. Thus Consumer Law was born.

In other words, the situation of extreme poverty of several less developed countries has not prevented them from incorporating into their policies and legal systems the consumer protection issue which, just a few years back, was believed to be unique to rich countries and affluent societies.

There is still a lot to do in these countries before we reach the consumer protection level already in force in industrial nations. But the mere fact that several States, from Latin America to Asia, from the Pacific to Africa, realise that consumer protection is among their responsibilities, reflects the enormous progress achieved.

I therefore honestly believe that Consumer Law has a promising future in LDCs in general, and in Latin America in particular. And more so because, like Thierry Bourgoignie,⁶³ I am sure that a) consumer protection is not a phenomenon unique to the affluent society; b) the ideal of a fairer society and market is universal; and c) consumer protection helps and guides economic development and the eradication of poverty.

62 "... the Guidelines are to bring new strength and thrust to development-oriented consumerism, for the sponsoring countries and the IOCU will certainly use them as a legitimizing instrument and as a springboard for further demands" (Patrizio Merciai, *art. cit.* p. 224).

63 "Consumer law is not a transient form of law that meets the isolated demands of a vogue phenomenon, and is even less a form of law restricted to affluent societies" (Characteristics of consumer law, in (1992) 14 *Journal of Consumer Policy*, p. 314).