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Kenneth A. Manaster
Santa Clara University School of Law, kmanaster@scu.edu

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THE PROBLEM OF URBAN SQUATTERS IN DEVELOPING COUNTRIES: PERU

KENNETH A. MANASTER*

I. THE URBAN SQUATTER PROBLEM

The recent massive growth of cities in Africa, Asia, and Latin America has brought a multitude of new problems to these areas. One of the most critical is the problem of urban squatters.[1] Literally millions of people now reside in major cities of the developing countries without having any lawful right to be on the land they occupy. The problem presented is both complex and serious. Basically it is the question of how and when the countries involved are going to offer these masses of urban dwellers the opportunity and resources for legally acquiring the housing they need.

Squatting is, at present, the result of unparalleled population growth and the rush from the economically stricken countryside to the cities, which offer—or promise—a better life. The critical squatter situations are not isolated instances of land-grabbing by lawless individuals. They are, instead, social movements of great magnitude founded on the legitimate needs of large groups of people. The challenge for the law is to strike a balance between these needs and the interests of the land owners under the prevailing legal system. More generally, a solution must be found that will serve society's needs by facilitating, instead of impeding, the fairest and most beneficial use of land. If serious social changes are in fact at the roots of squatting, then a failure to adapt legal concepts and methods to meet these changes means that the law is serving neither as an effective vehicle for social order or social progress, nor for the balancing of these two interests.

There is a small but growing quantity of research on urban squatters. What it indicates is that population growth and increased migration from rural to urban areas in developing coun-

* Member of the Illinois Bar. A.B., 1963, LL.B., 1966, Harvard University. Fulbright Grantee, University of San Marcos, Lima, Peru 1966-1967.

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[1] Squatters can be defined as persons who occupy, without consent, land owned by others, with the purpose of occupying such lands indefinitely for residential and occupational uses. The following are recent estimates of the percentages of squatters in various cities: Ankara, Turkey, 45%; Istanbul, Turkey, 21%; Karachi, Pakistan, 33%; Manila, Philippines, 20%; Caracas, Venezuela, 35%; Maracaibo, Venezuela, 50%; Cali, Colombia, 30%; Santiago, Chile, 25%. C. ABRAMS, MAN'S STRUGGLE FOR SHELTER IN AN URBANIZING WORLD 13 (1964). One estimate places Delhi's squatters at 150,000, and Singapore reportedly had as many as 300,000 in 1950. *Id.* at 22.

tries have far surpassed available urban housing facilities for middle and low income persons.[2] The result has been that a variety of types of squatter colonies have grown up on vacant lands in the central areas and on the outskirts of major cities. The living conditions are usually crowded and unsanitary; little or no attention is paid to whatever building, health, and safety regulations may exist. In some areas, however, the dwellings are fairly clean and well equipped, and some substantial, sturdy homes and stores have even been built. Such areas show that lack of available housing—rather than poverty alone—is probably the immediate cause of most squatting.[3]

Most urban squatting takes place on government owned land, although private land is not safe.[4] In many instances the numbers and the determination of squatters have been so great that private landowners have feared personal retaliation if they attempt to remove the squatters. Similarly, recent government attempts to evict squatters have met forcible resistance.[5]

II. URBAN SQUATTERS IN PERU

Peru has had an increasingly large and serious squatter problem which the government has attempted to confront directly. Current estimates place the number of city squatters in Peru at 750,000 or more. Most are in the Lima area but some are also found in Arequipa and a number of other smaller cities.[6] Indicative of the

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[2] *See generally* C. ABRAMS, *supra* note 1, at 12-24, 323-36; P. NEHEMKIS, LATIN AMERICA: MYTH AND REALITY 183-92 (1966); Haar, *Latin America's Troubled Cities*, 41 FOREIGN AFFAIRS 536 (1963); Morgan, *Squatter Settlements*, 217 SCIENTIFIC AM., Oct. 1967, at 21; C. Abrams, Squatter Settlements: The Problem and the Opportunity, 1965 (preliminary draft of a paper for the Office of International Housing, United States Department of Housing and Urban Development); J.F.C. Turner, Uncontrolled Urban Development and the Resettlement of Squatters, 1965 (unpublished preliminary report on housing and planning standards for the Bureau of Social Affairs, United Nations).

[3] *See, e.g.*, C. ABRAMS, *supra* note 1, at 14, 16, 18.

[4] *Id.* at 13-14.

[5] N.Y. Times, April 13, 1966, at 15, col. 1.

[6] This figure is based on estimates by J.F.C. Turner. His extensive research in Peru has indicated that squatters account for 25-30% of the population of Lima and 35-45% of those provincial towns which are undergoing rapid urbanization. This places Lima's squatters at about 500,000 and the other cities' at upwards of 250,000. *See also* H. Dietz, Uncontrolled Urban Development in Lima: A Brief History and Evaluation, 1967, at 3 (unpublished graduate student research paper, University of Indiana); Turner & Goetze, *Environmental Security and Housing Input*, 9 CARNEGIE REV. 13 (1966); J.F.C. TURNER, COLONIZACION URBANA NO REGULADA: PROBLEMAS QUE CREA Y CRITERIOS PUBLICOS AL RESPECTO 72. An official study estimated in 1962 a total of 528,905 nationally, of which more than 180,000 were outside the Lima area. CORPORACION NACIONAL DE LA VIVIENDA, INFORMACION BASICA SOBRE BARRIOS MARGINALES EN LA REPUBLICA DEL PERU 213.

rapid urban growth and squatter influx in Peru is the fact that the number of squatters in the Lima area was estimated at 130,000 in 1958,[7] 338,000 in 1962,[8] and 500,000 in 1966.[9] The total population of Lima is over two million; thus about 25 percent are squatters. In 1942, Lima's population was about 521,000;[10] certainly no more than 5,000 were squatters.

Since our focus is on the legal issues raised by the squatters, further detailed examination of the characteristics or causes of the Peruvian squatter settlements—the barriadas[11] or barrios marginales—is unnecessary.[12] It should be enough to present here some indications of the magnitude of the barriadas and a few of their major characteristics.

The barriadas lack completed residences, adequate water and sanitation facilities, effective police and fire services, good roads, and educational and health services. Nevertheless, the conditions in the barriadas, especially those on the outskirts of Lima, are far superior to what is found in the densely populated, central city slums.

The barriadas principally represent a massive expression of a desire for self-improvement and security as rural migrants move first to the innercity slums then later to the outlying areas with better conditions and the chance for eventual home ownership on land which they can appropriate without payment. In some instances this latter movement has been undertaken by organized groups of slum dwellers who have invaded vacant land and established new residences, at times by force. These groups have often arranged their new holdings in orderly patterns on peripheral, flat lands, providing for street planning and the eventual acquisition of needed public facilities. In other cases small, individual settlements have gradually developed into large areas involving thousands of squatters, many on hillsides closer to the central city.

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7 A. CORDOVO V., LA VIVIENDA EN EL PERU: ESTADO ACTUAL Y EVALUACION DE LAS NECESIDADES 76 (1958).

8 CORPORACION NACIONAL DE LA VIVIENDA, *supra* note 7, at 213.

9 J.F.C. TURNER, *supra* note 6.

10 F. VIOLICH, CITIES OF LATIN AMERICA 244 (1944).

11 The most comprehensive description of the conditions in the barriadas is COMISION PARA LA REFORMA AGRARIA Y LA VIVIENDA, INFORME SOBRE LA VIVIENDA EN EL PERU (1958). This report is said to be the basis for the legislation which became the Barriadas Law. J.F.C. TURNER, COLONIZACION URBANA NO REGULADA: PROBLEMS QUE CREA Y CRITERIOS PUBLICOS AL RESPECTO 72. A popularized description of conditions in the barriadas is P. BERCKHOLTZ S., BARRIOS MARGINALES: ABERRACION SOCIAL (1963).

12 Extensive studies along those lines are being made by experts in city planning, housing, anthropology, and other fields and are now being published, making important contributions to the field. See note 2 *supra*. Turner's study of the urban squatter problem and related aspects of uncontrolled urban growth will be published shortly by the Harvard-M.I.T. Joint Center for Urban Affairs.

One observer has described the general process of barriada formation as follows:

> The barriada areas serve as very broad settings for what can be called political and social consolidation, especially for the rural migrant who has become acquainted with Lima and who is dissatisfied with what is readily available for housing. Moreover, the very existence of the barriadas and their extremely rapid growth argues a relatively high political and social maturation on the part of the inhabitants.[13]

These migrants appear to be persons who have attained some minimal degree of economic achievement in the city, allowing them to consider moving to a new location and building a house which will give them the added degree of security that is missing in a city slum. While the barriadas inhabitants thus are not the most poverty-stricken urban dwellers in Peru,[14] they are definitely not middle class.

One analysis of barriadas housing has pointed out that many of the barriadas residents "have built themselves substantial houses of brick and reinforced concrete and almost all have started permanent construction."[15] One particularly interesting feature of squatter settlements is that the extent to which squatters improve their dwellings and make them more permanent and valuable seems to be a function of the degree of security which the squatters feel they have in their present locations.[16] If eviction appears imminent, a well built and stable community is unlikely. This fact helps to suggest an approach to the solution of the many problems facing squatters and the urban areas in which they live. For if the factor of security in the right to use land has a great bearing on the use which will be made of it, policies for the alleviation of squatter problems might usefully concentrate, as a first major step, upon measures for clarifying and stabilizing the legal rights of the squatters.[17] A program of this sort would involve a legal determination of the questions of land ownership and use. By achieving some security in their occupancy, squatters would

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[13] H. Dietz, *supra* note 6, at 14.

[14] W. HARRIS & H. HOSSE, HOUSING IN PERU 590 (1963).

[15] Turner & Goetze, *supra* note 6, at 13.

[16] C. ABRAMS, *supra* note 1, at 16; C. Abrams, Squatter Settlements: The Problem and the Opportunity, 1965 (preliminary draft of a paper for the Office of International Housing, United States Department of Housing and Urban Development); J.F.C. Turner, *supra* note 2, at 11-12.

[17] "[G]rant of ownership to squatters on public property would give them a greater incentive to improve it. Conveyance or legal rental of the property will tend to spur law observance." C. Abrams, Squatter Settlements: The Problem and the Opportunity, 1965, at 62 (preliminary draft of a paper for the Office of International Housing, United States Department of Housing and Urban Development).

be more likely to improve their holdings and to take an interest, individually and in common, in the development of their communities. It is a matter of having a stake in the community.[18]

Delineation of legal rights at the outset will avoid or reduce many of the problems associated with squatter colonies.[19] Not the least of the gains which new, clearly presented legal arrangements will foster will be public awareness that the law *is* changeable and attuned to the needs of the population. Viewed solely as a matter of respect for law and public order, then, the long term interests of society would be well served by measures of this sort. For it is certainly no indicator of a strong government that persons can defiantly use public land contrary to declared public policies. Nor does it promote respect for the law and existing institutions if private owners of land cannot get enforcement of what they had had reason to believe were ownership rights or official acknowledgement that their rights continue to exist.

Furthermore, clarification of squatters' rights would provide a basis for other improvement programs with greater cooperation and interest by the squatters, and a greater administrative feasibility than would otherwise be possible. Broader urban planning schemes could be more readily implemented if squatter colonies were recognized, regulated, and given some status under the law. The squatters could also begin to fill active roles as responsible citizens. Perhaps above all, a government and a legal system which can serve the needs and aspirations of large portions of the population is doing what they exist to do. In short, the manifold problems of squatter life and urbanization in the developing nations would have the best chance of solution if careful, multifaceted programs were instituted, with their foundation being a realistic clarification of legal rights in the land. Peru is one of the very few countries that seems to have instituted such programs.

Since 1961, Peru has had a comprehensive piece of legislation aimed at clarifying rights to the ownership and use of barriadas land, affording the squatters concrete opportunities to gain security in their places of residence, and developing stable, healthful communities. An examination of Peru's new laws may suggest approaches and concepts useful for other nations, few of which have attempted anything similar. It may also be relevant to

[18] Such a program would have a greater chance for effective impact if it were supplemented by such programs as technical assistance in material improvements and community organization; the opening of sources of low-cost credit, especially for building purposes; the provision of basic public services, such as water, electricity, and sewage disposal; improved educational and basic literacy programs; and the organization of cooperative enterprises. The importance of these programs in particular areas at particular times, might be at least as important as legal tenure programs.

[19] These considerations would also apply to the *rural* squatter problems which also exist in many countries.

Peru's administration and improvement of these laws.

Before analyzing the new legislative efforts in Peru, we must identify and examine the basic legal concepts comprising traditional Peruvian property law and see how they bear on the legal status of the squatters in the barriadas. These concepts are found primarily in the Constitution and Civil Code of Peru and in treatises based upon the Code. Hopefully this will serve to show the types of attitudes and legal concepts and provisions which should be avoided, as well as those which seem likely to be most useful.

III. PERUVIAN CIVIL LAW AND THE RIGHTS OF SQUATTERS

A. *Legal Terminology and Constitutional Provisions on Property*

The squatter problem challenges nations such as Peru to realize that it may be necessary to effect major readjustments of existing property rights between the land owners and nonland owners who have little opportunity of becoming owners. To begin to understand the present delineation of legal rights of ownership as codified in Peru, we must first examine the "right of property."[20]

The right of property (*el derecho de propiedad*) refers to the fullest ownership allowed. This right is the most important and complete "real right" (*derecho real*) allowed by the Civil Code of 1936. Real rights are rights of privilege and exclusion in relation to material things, and can either be real property (*inmuebles*) or personal property (*muebles*).[21]

Peruvian legal thinkers have often debated the question of just how full, complete, and absolute the right of property really is.[22] While avoiding some of the intricacies of this often highly theoretical dispute, let us focus upon the relevant written law. Article 29 of the present Constitution of Peru, promulgated in 1933, is the most unqualified statement of the completeness of the right of property:

> Property is inviolable, be it material, intellectual, literary, or artistic. No one can be deprived of his property except for reason of public utility legally proved and prior indemnification appraised.

While this statement appears to admit no restrictions of any sort on the right of property other than by the expropriation-indemnification route which article 29 itself authorizes,[23] other con-

[20] E. ROMERO R., 1 DERECHO CIVIL: LOS DEROCHOS REALES 66 (2d ed.) [hereinafter cited as ROMERO]; J.E. CASTANEDA, 1 INSTITUCIONES DE DERECHO CIVIL: LOS DERECHOS REALES 183 (3d ed.) [hereinafter cited as CASTANEDA].

[21] ROMERO 14-16; V. ARCE H., EL DERECHO DE PROPRIEDAD: PRESCRIPCION Y ABANDONA 110 (1963) [hereinafter cited as ARCE]. *Cf.* CASTANEDA 2, where different theories on the exact nature of *derechos reales* are explored.

[22] ROMERO 114-16. *See generally*, ARCE, especially 1-76; CASTANEDA 182-217.

[23] ROMERO 182.

stitutional provisions indicate that despite article 29, latitude for restrictions on the exercise of the right of property does exist.[24]

We find that while property is "inviolable" in Peru (Constitution, article 29), it must be used in harmony with "the social interest" (Constitution, article 35) and "within the limits of the law" (Civil Code, article 850). It may be expropriated for reasons of "public utility" (Constitution, article 29), its acquisition and transfer may be curbed for the "national interest" (Constitution, article 35), and legal restrictions may be established for the "public interest" (Civil Code, article 851). The vagueness of these standards, and the rather overlapping, unintegrated way in which they are presented in the Constitution and Code, help account for the continuing debate over just how much inviolability the right of property now has.

It cannot be asserted with confidence that more precise constitutional limitations on the right of private ownership could be formulated. It would seem, however, that it could be made much clearer that some limitations are constitutionally permissible.

This lack of clarity is unfortunate and dangerous, because of the possibility that restrictions on property will be imposed arbitrarily and without general policy guidelines to give purpose and coherence to the measures taken. The property holder maintains an important interest in conserving at least some fair portion of his holdings; he must be afforded a logical legal basis for peaceful defense of his property in the face of any limitations placed on his rights.

With these general limits on absolute ownership in mind, we can proceed to examine the restrictions on property rights which have developed in the traditional Civil Code law and then consider the barriadas legislation, with its new approaches to property use and distribution to meet new public needs.

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[24] The following articles of CODIGO CIVIL (J.E. Castañeda 1966) (Peru) make the point most strongly:

> Art. 31: Property, whoever is its owner, is governed exclusively by the laws of the Republic and is subject to the assessments, encumbrances and limitations that they establish.
>
> Art. 34: Property should be used in harmony with the social interest. The law will establish the limits and formalities of the right of property.
>
> Art. 35: The law, for reasons of national interest, can establish restrictions and special prohibitions for the acquisition and transfer of determined classes of property, be it by their nature, or by their condition, or by their situation in the territory.

It is clear from these three provisions that the Peruvian Constitution does envision restrictions on the right of property. Article 31 is echoed in article 850 of the Civil Code, the first article in the section which specifically concerns the right of property: "The owner of an asset has the right to possess it, to receive its benefits (percibir sus frutos), to regain possession of it and dispose of it within the limits of the law." Also worthy of attention, but not directly relevant to urban land, is article 47. It authorizes expropriation of extensive rural landholdings (*latifundios*) in order to encourage small property ownership. ROMERO 115.

B. *Acquisitive Prescription*

There are three principal features found in the Civil Code which limit the right of property by encouraging the use of land and penalizing nonuse: acquisitive prescription, extinctive prescription, and abandonment.

Acquisitive prescription is presented in article 871 of the Civil Code:

> Persons who have possessed in the same manner as owners and in a continuous manner during ten years with just title and good faith, or during thirty years without these last two requirements, acquire immovables by prescription.

This article makes clear (and the commentaries confirm) that full ownership, "the right of property," is acquired by the possessor who complies with its terms. Further, the former owner's right of property is extinguished automatically when the possessor's right comes into being at the end of the prescription period. The applicable period for squatters would be 30 years. The 10 years provision would not apply because squatters would not have either the requisite "just title,"[25] or the requisite "good faith."[26]

Article 872 establishes a route which the possessor may follow in order to achieve full recognition of his new right of property under article 871 and to officially terminate the prior owner's right:

> Whoever acquires an immovable by prescription can bring suit in order that he may be declared owner. The judgment that accedes to the request is title for registration of the property in the registry and in order to cancel the entry in favor of the old owner.

Within articles 871 and 872 there are at least three major features which seem especially useful for dealing with the squatter problem. These features are not generally found in the analogous Anglo-American doctrine of adverse possession. First of all, the Peruvian Civil Code distinguishes between acquisitive prescription and extinctive prescription. The former is based upon the Roman Law concept of "*usucapio*," by which a good faith possessor under claim of title could acquire ownership. The latter corresponds to ordinary statutes of limitation on legal actions of all sorts. As we shall see, this distinction has been a source of considerable

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[25] "Just title" means rights derived from any apparently lawful transfer of ownership, although not necessarily by written document. ROMERO 159; CASTANEDA 311.

[26] "Good Faith" is defined in the following articles of CODIGO CIVIL (J.E. Castañeda 1966) (Peru):

> Art. 832: Possession is in good faith when the possessor believes in its lawfulness, by error of fact or of law regarding the defect that invalidates his title.
> Art. 833: Good faith lasts while the circumstances permit the possessor to presume that he possesses lawfully or until he is summoned in a lawsuit.

confusion. At this point it is important simply to realize that article 871's separate existence appears to signify that continued possession of land in the manner of an ordinary owner is enough to justify eventual acquisition of full ownership by the possessor.

This is of great importance for squatter colonies because it indicates that acquisitive prescription can be seen as having the purpose and effect of protecting squatters' interests by granting them ownership rights. This separate, positive provision on the acquisition of rights avoids much of the uncertainty encountered in Anglo-American law where the doctrine of adverse possession has been constructed on the basis of statutes of limitations alone.

Article 871 could be used to grant modern urban squatters full ownership to the plots of land they occupy if the prescription period was shortened to considerably less than the present 30 years. The 30 year period seems far in excess of what is necessary in order to demonstrate the validity of squatters' needs, the effective permanency of their settlements, and the fact that the owners are not inclined to defend their lands by legal action. With shorter periods in force squatters would be able to gain ownership without extensive and unnecessary delay.

Such shorter periods do exist for personal property. Article 893 of the Code sets the prescription period at two years for possession with good faith and owner's title and at four years for possession without these things. Perhaps it must now be recognized that urban real property is not so different from personal property in view of the need of many persons for secure areas of residence. A difference of 30 years for realty versus four years for personalty may now be unjustified.

The enactment of shorter periods, however, would be subject to the prohibition on retroactive laws contained in the following provisions: Constitution, article 25, "No law has retroactive force or effect," and Civil Code, article 1824, "The dispositions of this Code will govern the juridical effects of anterior events, if with its application no rights already acquired will be violated." It would seem most likely that an attempt to effect immediate ownership changes by a completely retroactive shortening of the statutory period would be contrary to both of these provisions. A prospective change, on the other hand, could be a very effective way of bringing about adjudication of squatters' claims within reasonable periods of time.

This might be done by complete amendment of article 871 as it applies to all lands or by partial amendment of it to alter prescription periods only for the barriadas areas or for urban areas which are likely to be subject to squatting. Although the latter solution seems to imply bias against the owners of barriadas and other specified urban land, compared with owners of land else-

where, this distinction would probably not be contrary to the protections of property afforded by the Peruvian Constitution. Considering article 35, for example, it could be said that differentiated prescription periods for the barriadas fall within the permissible "restrictions and special prohibitions for the acquisition and transfer of determined classes of property, be it by their nature, or by their condition, or by their situation in the territory." Another useful innovation would be a greater specification of the types of uses which would satisfy the possession requirement for acquisitive prescription. This could aim at insuring that rights would go only to persons actually in worthwhile residence or economic activity.

The first noteworthy element of article 871, to reiterate, is its straightforward concern with the possessor, the person who is using the land and seeking to acquire ownership of it. Peruvian law punishes negligent landowners who neither use nor defend their land, a separate goal than affording to persons who do use the land an opportunity to gain secure ownership rights. Even if we were to find that the overlap between the acquisitive and extinctive provisions is so great that they amount to almost precisely the same thing—a result which the common sense of statutory construction presumably can avoid in this case—we could still say that the separation is important because it highlights the purpose of protecting possessors on the basis of their use of the land. The Code provisions, commentaries, and case law regarding what constitutes "possession" in "the same manner as owners" make clear that ordinary use of land is the type of possession which acquisitive prescription is intended to protect.[27] This approach would seem to be of definite relevance and benefit to the modern urban squatters since they occupy land, above all, for basic, residential purposes.

The second important aspect of Peru's acquisitive prescription provisions is that article 872 explicitly authorizes a judicial action

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[27] CODIGO CIVIL, art. 824 (J.E. Castañeda 1966) (Peru) declares, "He who exercises in fact the powers inherent in the right of property or one or more of them is possessor." CODIGO DE PROCEDIMIENTOS CIVILES, art. 991 (Peru) says, "Possession of immovables should be proved by positive acts such as the cutting of timbers, the construction of buildings, the setting of landmarks, plantings, the breeding of cattle, and others of equal significance, executed by the possessor himself or by his order or commission."

Castañeda tells us that the requisite possession under article 871 must be continuous, uninterrupted, public, and must not have been acquired violently. CASTANEDA 308-09. This last requirement might exclude some squatters who have occupied land by forceful invasions. Also, Castañeda points out that the possessor must have the intention of possessing in the complete, indefinite manner of an owner, and not as a limited occupant such as a tenant. This intention, however, is presumed by law, in the absence of a contrary showing. CODIGO CIVIL, art. 827 (J.E. Castañeda 1966) (Peru).

by which the successful possessor may have his right recognized. The previous owner, of course, can contest this declaratory action by showing that the alleged possessor has not met the conditions of article 871, or that the prescription period in the particular case has been prolonged by "suspension" or terminated by "interruption."[28] This type of judicial action by the possessor could serve as a useful mechanism for resolving contested ownership issues under an amended article 871, as mentioned above. It would probably be essential, however, to find some efficient means of consolidating the evidentiary and judgmental processes of the lawsuits, or establish a special judicial or quasi-judicial agency to handle the tremendous number of barriadas residents' claims which a prescription period of two or five years would probably engender.

The third important aspect of these articles is that the judgment in the declaratory suit is registrable title. This is a clear, convenient way of giving the new owner all the recognition and formal evidence of his ownership which he will need in order to defend it against adverse claims and take fullest economic advantage of it—as by using it as a firm base on which to seek credit, and to protect it under Peru's optional land registration system.[29]

In short, acquisitive prescription in articles 871 and 872 presents a clear purpose and explicit mechanism for protecting squatters. If the acquisitive prescription provisions are to be useful in combating the squatter problem, fair and realistic time periods must be established and honest, energetic judicial and administrative or-

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[28] The causes of suspension, which is a temporary lapse in the running of the prescription period, are enumerated in article 1157 and are made applicable to acquisitive prescription by article 876. The causes of interruption, which permanently terminates the running of the period for a possession already established, are found in article 875 and also in article 1163, which article 876 makes applicable.

[29] Romero points out the necessity for the owner to present documents of title when he attempts to defend his right of property. ROMERO 43, 117. Romero also indicates that article 1046, regarding the requisites for an initial registration of land, prevents article 872 from being applicable in cases of prescription of unregistered land. Accordingly, he says, a possessor under the 30 years provision on unregistered land must go through the formal, noncontentious procedure detailed in articles 1296-1305 of the Code of Civil Proceedings in order to obtain the "supplementary titles" which, under article 1046, are acceptable by the registry if the possessor cannot prove 20 years of uninterrupted title-holding. ROMERO 170-71.

It is not at all clear why article 1046 should override article 872 in this important respect, instead of being complementary to it. Furthermore, the lawsuit under article 872 seems to determine more relevant issues of ownership than does the supplementary titles proceeding, and exactly the same issues as would the latter proceeding when combined with a contentious suit against the possessor by the unregistered owner. Castañeda takes this latter position and says that the possessor under the 30 year provision on unregistered land has a choice of the article 872 lawsuit or the supplementary titles proceeding in order to get a registerable title. CASTANEDA 343-45.

ganizations must be developed for the protection of diligent owners and the adjudication of a large number of claims.

Since most urban land in Peru which has been taken over by squatters is owned by the government, we should note that not all public land in Peru is immune from prescription, as in the United States. Article 822 of the Civil Code enumerates the various types of property which belong to the state including "assets of public use." Article 823 then says, "Assets of public use are imprescriptible and inalienable." The commentaries make clear that "assets of public use" refers to things such as streets, roads, public squares, canals, bridges, and schools.[30] Prescription is therefore not possible against this category of public property. It thus seems probable that the acquisitive prescription laws could benefit the squatters on government land—most of which was vacant before the squatters appropriated it—as well as those on private land. If so, it would show that it is more important for the government to deal with the squatters' needs than it is to allow the land to lie unused because of lack of government action.

C. *Extinctive Prescription*

"Extinctive prescription" is basically the same concept as Anglo-American statutes of limitations: after a specified period of time the holder of an unused right of action against a particular person will lose that right.

Article 1168 of the Civil Code, the main provision on extinctive prescription, is part of the important "Juridical Acts" section of the Code's Fifth Book, titled "Of the Law of Obligations." The article's first clause states that real actions are prescribed in 20 years. This clause *appears* to apply to the "*acción revindicatoria*," which is the owner's action for recovery of possession of his property and is unquestionably a "real action."[31]

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[30] ROMERO 43; CASTANEDA 36-38. CONSTITUTICION DE LA REPUBLICA DEL PERU art. 33, also says, "Public things, whose use is by all, such as rivers, lakes, and public roads, are not the object of private property."

[31] CASTANEDA 201; ARCE 114 ("the real action par excellence"). This action, since it is not described specifically in the Civil Code or the Code of Civil Proceedings, seems to be an "ordinary lawsuit" (*juicio ordinario*), governed by title 1 of the second section of the Code of Civil Proceedings. ROMERO 96. One commentator has described the action by saying, "The acción reivindicatoria is that which is born from ownership and belongs exclusively to the owner who is not the possessor, and through which he demands that the possessor who is not owner restore the possession of the asset which he illegally retains." ARCE 106-07.

In considering this description of the action, it is worth noting that the *acción reivindicatoria* is not available to a mere possessor who does not have title. The action operates only in favor of one who asserts a right of property, and it makes a binding determination of ownership rights. It would not be available to a possessor without a right of property to assert. This situation is different from that in American law, where the approach

Some commentators on the Civil Code have asserted that article 1168 in fact does apply to recovery actions by owners of land.[32] Others have concluded that even though the owner's recovery action is a real action, article 1168 is not applicable and, instead, article 871 governs exclusively.[33] This latter conclusion seems more sensible. The main point of confusion is the time periods: under article 871 a possessor gains the *right* to the land in 30 years, thus ending the right of the former owner; under article 1168 the owner loses his *action* to oust an illegal possessor after 20 years, thus leaving the possessor as the de facto, if not de jure owner. One way of reconciling this conflict is simply to say that article 871 is a provision in the Book of the Code which specifically deals with real rights. In the context of a controversy over ownership rights in immovables, such a provision arguably should take precedence over the general limitations of article 1168 in Of the Law of Obligations.

It can also be noted that an interpretation which attempts to apply both provisions runs into innumerable complexities. If the 20 year period has run under article 1168 to bar an owner's action against a possessor without good faith or just title, is the original owner's right of property then ended or does it continue for 10 more years, albeit without judicial actions available to give it actual effect? If the owner's right does end, does the possessor immediately gain ownership despite article 871, or does ownership go automatically to the state under a provision such as that for state ownership of abandoned and unowned lands in article 822?

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is that any possessor, be he owner or not, may bring the basic legal action of ejectment against anyone who deprives him of his possession. The mere possessor under Peruvian law does have some recourse for the protection of his holding, however, by means of the interdictions (*los interdictos*), which are a variety of actions of a summary nature for the protection of possession and enjoyment of prescriptible assets. The interdictions are dealt with in articles 988-1029 of the Code of Civil Proceedings. Most of the interdictions are available to "the possessor or holder of a thing," as is also suggested by the Civil Code in article 831. This designation would seem to include squatters, but it still does not afford them a route to the conclusive, secure protection of their holdings in which they are most interested. In short, it would not recognize permanent possession or ownership rights in them.

The Code provisions which complement article 1168 make clear that extinctive prescription is a plea in defense to an action that has been begun. Under articles 1153-54 the defense may be raised at any stage of the case, and must be alleged in order to be a basis for the judge's decision. On the face of these provisions it would seem that an owner's recovery action for land would be subject to the defense of 20 years possession elapsed under article 1168.

32 ARCE 106-17.

33 Castañeda takes this position firmly. CASTANEDA 331. Leon seems to assume this position without seeing any problems in it. J. LEON B., MANUAL DEL ACTO JURIDICO 83. Romero sees a real conflict in the two provisions and no clear resolution of it, apart from modification of the Code. ROMERO 172-75.

If the state does obtain ownership, should this terminate (interrupt) the running of the prescription term? Actually the Code is fairly clear that interruption should not occur just because of changes in ownership;[34] yet the idea of the state automatically becoming owner of land on which it must sue for possession within 10 years or lose its rights is somewhat anomalous. It might be said that state ownership on these terms could be viewed as allowing the government to obtain control of squatter lands to administer programs of regulation and distribution. But it would still seem that article 1168, when taken in conjunction with article 871, is not a very apt, firm, or clear way of bringing about state ownership for this purpose. Another question posed by attempts to apply articles 871 and 1168 together is this: If it is said that the 20 year period in article 1168 has no possible application where the 10 year, short prescription period allowed under article 871 applies, does that in itself also suggest that article 1168 is not meant to apply at all in an instance of the 30 year prescription?

Such questions lead to the conclusion that article 1168 should give way to article 871 in the latter's area. Certainly the same sorts of policies promoted by extinctive prescription in general—such as punishing negligent landowners; giving stability to existing, economically useful fact situations; putting a limit on old claims; and avoiding requirements of proof that is so old as to be difficult to obtain[35]—are promoted by article 871 as well. There would appear to be no loss whatsoever, in terms of policy goals, if article 1168 is considered inapplicable to actions for the recovery of lands. Thus the ordinary statutes of limitation in Peruvian law are of no real utility for the squatters.

D. Abandonment

The third aspect of the Civil Code which restricts the right of property is abandonment (*abandono*). This concept is only briefly mentioned in the Code and is neither defined nor explained there. The most important reference to abandonment of land is in article 822. That article, in specifying the types of property which belong to the state, includes, in section 4, "the public lands, understanding by such lands those which have not had an owner and those which have been abandoned by the owner that they had." The other major reference is in article 848: "Possession is lost by the abandonment of the asset, and in general when the exercise in fact to which Article 824 refers is lost." Article 824 states simply, "He who exercises in fact the powers inherent in the right of property or one or more of them is possessor."

Article 822 clearly indicates that privately owned, but aban-

[34] LEON, *supra* note 33, at 85-86.
[35] ARCE 119; ROMERO 157-58; CASTANEDA 280-81.

doned, property becomes the state's. Since the Code does not define abandonment, we must turn to the commentators.

Article 822 is intended to terminate the idea of *res nullius*, or ownerless property. This is the interpretation given to "lands . . . which have not had an owner."[36] This means, to take a clear example, that land of a decedent without any heirs must become the state's; article 774 of the Code specifically provides for this result. It cannot be said in the case of a decedent without heirs that there is any real restriction of a property right because no holder of the former right exists. When a landowner is alive, however, then abandonment can have its possible restrictive effects.

If the owner is alive, it seems that the state cannot secure ownership under article 822 unless it does one of two things: (1) either brings suit under article 822 for the declaration of an abandonment and of the state's consequent, new ownership,[37] or (2) acts under specific legislation intended to implement the Code in certain circumstances. On the basis of present and past codes and commentaries, the former route appears to allow tremendous leeway for *court* discretion as to what constitutes abandonment. The latter route acknowledges that the *legislature* has great latitude to clarify policies for the promotion of land use, the punishment of nonuse, and the redistribution of land to persons deemed to be in justifiable need of it.

By using the "state suit" route it is clear that the courts have various approaches among such cases. It is generally agreed that abandonment includes a failure of the owner to make use of or possess his property in fact. Abandonment could be considered, then, as involving a termination of possession coupled with a more or less explicit intention to give up ownership. This type of intention, however, is more aptly referred to as the concept of willful renunciation (*renuncia*).[38] Abandonment can include this concept, of course, but it also can have a more important, broader meaning.

It can be considered as a giving up of possession which, by its own factual circumstances, affords the courts a justification for *presuming* an intention to end ownership.[39] Implicit in this view is always a policy choice, however limited or minimal, against land lying unused. The problem is how ambitious a policy choice of

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[36] ROMERO 48. *See also* comments to article 774, CODIGO CIVIL (J.E. Castañeda 1966) (Peru).

[37] Castañeda appears to be suggesting such a lawsuit. CASTANEDA 48-49.

[38] ACRE 161.

[39] *Id.* at 89-91, 165. Romero describes abandonment as a possessor's "voluntary act" of giving up possession. He does not specify the kinds of situations in which he considers the element of volition to be present, however, and thus he seems to be either equating abandonment with renunciation, or distinguishing the two while disregarding those abandonment cases involving unknown ownership in which intent is presumed.

this sort can properly be given effect through the abandonment provision. Since article 822 specifies no time period or other criterion or policy which would justify an abandonment presumption, and since article 848 is vague regarding the character of the loss of possession requisite for abandonment, the courts must take each case on its facts. In doing this they should always bear in mind that because of the serious effects of article 822 on private rights of property, it should not be brought into operation without a very strong factual showing of termination of possession and some suggestion of intent.

Within the general framework for government lawsuits under article 822, a major question is whether *any* defense presented by the property owner is inherently a *good* defense. In other words, will the owner's contentious appearance in the proceeding itself rebut any possible presumption of an intent to abandon the property? If any defense is a good defense, the abandonment concept is no real restriction on the right of property; it then becomes only a device for transferring to the state ownerless lands and lands whose owners have not actively exercised their ownership and are not willing to contest the proposed transfers.[40] If, on the other hand, an owner can conceivably have his property declared abandoned because of his past neglect, despite his present objections, then the concept of abandonment does constitute an important restriction on the right of property, and a possibly fertile area in which new land use policies can be promoted.

This latter approach should not be taken by the courts without specific legislative warrant, except, perhaps, in the case of long-standing neglect of land or where the land is of considerable public importance. Article 822 is so vague and its possible effects so serious that it should be given only very limited effect by the courts as a restriction on landowners unless specific, implementing legislation defines the article's scope.

Some ambitious legislative attempts along these lines have been made, the most important being Decree-Law Number 11061, promulgated in 1949. This law deemed the state to have entered into "possession" of all uncultivated lands in Peru in which no private act of possession had been exercised. There has been extensive

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[40] This is Castañeda's view, clearly set forth at CASTANEDA 46-49. It is based upon his idea that the right of property includes the right of nonuse, even as to land. Accordingly, he sees this very narrow scope for the abandonment concept and also believes that loss of ownership of land by prescription is based solely on the policy of rewarding the user, not at all on a policy of punishing the nonuser by extinguishing his ownership. CASTANEDA 330. As I have indicated in the text, I believe this latter, negative policy should be considered part of the reason for the provision on obtaining ownership by prescription, even though that provision's wording and separate placement as article 871 do give main emphasis to the interests of the user-possessor.

criticism of this broad ambiguous law and of the regulations promulgated under it.[41] One criticism was that the law declared the state in "possession" when it obviously meant for the state to take ownership ("property"). It is also fairly certain that the regulations go beyond what the law authorizes, and probably constitute an unconstitutional confiscation of property. The law in itself also raises questions of constitutionality and policy.

This Decree-Law takes a comprehensive approach, attempting to bring all uncultivated land under article 822 and thus into state ownership. Many questions are posed by this approach. Why is the state attempting to take ownership of all uncultivated land and for what purpose? What lands are to be considered "uncultivated" (*eriazas*)? Are only rural lands covered? Only arid, unused lands? Only lands suitable for agriculture? Only lands not farmed for a long period of years? These questions are worthy of consideration because it is difficult to see the intrinsic value in the government of a developing nation suddenly becoming owner of vast amounts of what was privately owned, but unused, land. It is a different matter, of course, if the government has plans and resources for stimulating productive use of that land.

The importance of the abandonment concept and of law 11061 for urban squatter colonies in Peru is that this would be a relatively simple, inexpensive means by which the state could gain control of squatter lands in order to subject them to regulation and redistribution plans for the benefit of the squatters. Admittedly, this device would not be of primary importance because most squatter land in Peru is already government owned. Nevertheless, it is worth noting that this device might be usable in some instances. The Civil Code in article 822 arguably authorizes this approach by promoting a general policy of encouraging land use through the negative device of extinguishing rights of property for at least some owners who have failed to use their land.

Abandonment legislation regarding squatter areas could take two useful forms. One would concentrate upon the amount of time during which the owner has failed to possess his land or attempted to do so. Possession would be defined in the general terms used in the Civil Code.[42] One treatise writer who has advocated this form of legislation, however, has gone beyond a simple "possession" test. He has advocated a 10 year period during which a failure, not simply to "possess," but to engage in an economic use of the land suitable to its particular characteristics, would constitute abandonment.[43] Although he has not intended his approach for urban lands, it would seem applicable to them;

41 *See* 69 REVISTA DEL FORO 71-74 (1962), criticizing Law 11061 and the similar Decree-Law 14197 of 1962; CASTANEDA 49-51; ROMERO 53-55.

42 *See* note 31 *supra*.

43 ACRE 148-58, especially 154.

however, a shorter period, such as five years, might be more appropriate for the fast growing cities of Peru.[44]

The second form which abandonment legislation could take would concentrate less on the time period of owner neglect and more on the immediate facts of the squatter settlement itself. The time element would still be important, but the central issue would be this: Considering the size of the squatter settlement, the manner of its formation, and, in view of the demand for land and housing in the particular urban area, its likely permanency, does its period of nonuse or vacancy prior to the squatter occupation justify a finding of inexcusable owner neglect and, thus, of abandonment? Also to be considered would be the kind of legal efforts the owner has made to remove the squatters, and possibly his own intentions for use of the land if the squatters are removed and his ownership continued.[45]

If all of these elements were carefully considered, this second sort of abandonment law would be an effective way to curb unproductive ownership and bring critical squatter areas under state ownership and land use planning. This sort of legislation, however, seems extremely difficult to enact with clear detailed standards. Because of this difficulty and the tremendous impact on the right of property, we must question the wisdom and constitutionality of such a serious restriction.

It has been argued that *any* form of abandonment proceeding which seeks to terminate the ownership of an unwilling property holder is an unconstitutional deprivation of property because article 29 provides compensated expropriation as the only means by which a person can be legally deprived of his property.[46] Yet abandonment is not a deprivation of a right of property; it merely recognizes that the right has ceased to exist.[47] Since the result and main focus in either expropriation or abandonment,

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[44] *Id.* at 207. By so restricting the type of possession that would prevent a finding of abandonment, we could be sure that an owner could maintain his ownership simply by removing squatters from his land and then enclosing it and leaving it unused. Rather, the total period of time during which he had failed to attempt productive use of his land would determine if abandonment had taken place.

[45] There is some warrant for this sort of factual approach in article 47 of the Constitution. *See* note 8 *supra.* In authorizing legal limits on the maximum extent of rural land one person can own, the article says the limits should be set "according to the type of utilization to which the land is dedicated and taking into account the demographic, social, and geographic peculiarities of each zone or region, in the same manner as natural conditions and techniques of production." This does not apply to urban land, but this sort of factual approach seems applicable to the barriadas by means of the abandonment concept.

[46] This apparently is Castañeda's view, based upon his conception of the perpetual character of the right of property, which nonuse cannot terminate. CASTANEDA 48-49, 330-31. *See also* note 40 *supra.*

[47] ARCE 193.

however, is that property of an existing private owner becomes the government's, this answer seems too abstract to be of any real value. Especially when the attempt is made to set broad legislative standards for abandonment cases, abandonment becomes indistinguishable from government land-taking. Thus, both proposed approaches seem to be invalid in relation to article 29; they are not just "restrictions" or "limitations" on property rights.

In defense of the suggested form of legislation based upon a fixed period, however, it is argued further than even if abandonment does involve something like a deprivation of property, article 29 is not exclusive inasmuch as the concept of acquisitive prescription has long been accepted as encompassing the loss of an owner's right of property.[48] The first proposed type of legislation emphasizes a fixed time period of owner neglect and thus seems related to the traditional prescription device, having that degree of clarity and predictability which is found with prescription, but which, of course, was lacking in the second proposed type of abandonment law. Since a private owner's neglect of his land for a specified period justifies its loss to a possessor under article 871 of the Code, perhaps this kind of neglect justifies state assumption of ownership to deal with such major public problems as the squatter colonies. Abandonment legislation with five-year terms, for example, could result in state ownership of squatter lands much sooner than the present article 871 could give ownership to the squatters directly. Also, the indirect effect of such an abandonment policy in promoting productive use of land for the future—owners would try to avoid losing their land to the state—might be considerable, encouraging new forms of land and housing development.

Still, article 29 does exist and the taking of property by government is very different from private taking. Remember that acquisitive prescription is only a measure for transfer of property to private ownership. It is a measure for the continuing, automatic redistribution of property rights among private individuals. Abandonment, on the other hand, under article 822 results in a transfer of private to state ownership, without compensation. This would seem to be the result which article 29 definitely intended to prevent when it says, "No one can be deprived of his property except . . . ."

In short, although the concept of abandonment appears to be a useful device for penalizing nonuse of land, for promoting land use, and for giving the state control of lands which private owners have failed to use productively or responsibly, abandonment is still not the sort of restriction on the right of property which should be considered authorized by the Peruvian Constitution. Although financial resources for the expropriations considered necessary in

[48] *Id.* at 204.

order to advance squatter policies may be difficult to obtain, this problem in itself is not insurmountable, and does not alone justify resort to the more inexpensive abandonment approach.

The fact that the abandonment concept offers no guarantee to the land owners or the public that land taken by the government will, in fact, be put to beneficial use under responsible land planning programs is another reason why the abandonment concept should not be used to aid squatter areas. This problem could be overcome, in turn, by a provision in abandonment laws that barriadas land declared abandoned would simply either be granted directly to the squatters or through the same procedures applicable to squatters already on government land. The fact that Peruvian law still respects a "right of property," with some limitations, and its protection from arbitrary, excessive government land taking, is the overriding reason for confining abandonment to the narrow realm of possible state lawsuits under the present Code—the realm of express renunciation of ownership, uncontested abandonment cases, and cases of extreme owner neglect.

E. Implications of the Civil Law to the Squatters

We have seen that neither the abandonment nor the extinctive prescription provisions in the Civil Code are useful legal measures for confronting Peru's urban squatter problem. Acquisitive prescription, on the other hand, seems to present a worthwhile, positive approach to squatter interests and is susceptible of adaptation to modern needs.

But since acquisitive prescription cannot have significant retroactive effect, its primary potentiality is as a mechanism for future readjustment of ownership rights within new, reasonably short time periods. This function will probably be best served after the existing squatter problems have been dealt with by more immediate, comprehensive, new legislation. The squatter problems appear to require new law for their solution because the old legal concepts do not solve existing problems or prevent future ones. Peru does have new legislation for its barriadas which we shall now examine.

IV. THE BARRIADAS LEGISLATION

A. Law Number 13517

Peru's principal effort to meet the continuing squatter crisis by legal measures is law 13517, officially called the "Organic Law of Marginal Districts" (*Barrios Marginales*) or, more commonly, the Barriadas Law.[49] This law was passed by the Peruvian Congress

[49] Prior legislative and executive pronouncements aimed at alleviating the barriadas problem include: Supreme Decree No. 178 of January 12, 1957, creating the National Barriadas Office; Supreme Resolution No. 99 of

on February 10, 1961, and approved by the President of the Republic four days later. The law contains 74 articles under seven titles.[50] Regulations, authorized by article 71, were formulated by the National Housing Corporation (*Corporación National de la Vivienda, CNV*) and given effect by Supreme Decree Number 23 of July 21, 1961.

The law and its regulations are clear, important examples of how one developing country has added to and altered some aspects of its system of property rights for the purpose of redistributing certain urban property to meet the squatters' needs for land and homes in a more just and orderly way. We shall focus upon the law as enacted, rather than as administered. The analysis is limited to the intentions and ideas in the law and to the practical value they appear to have for Peru and for other nations. Unfortunately, it must be remembered that Peru, like the other countries of Latin America, manifests "a [strong] degree of disparity between the written law and the law in action characteristic of the world's developing societies."[51] Just how great this disparity may prove to be in the case of the Barriadas Law remains to be studied.

B. The Problem and the Goals

The first task is to examine how the Barriadas Law defines the problem and the goals it seeks to achieve. The general problem, of course, is the squatter settlements found in and around most of Peru's cities and which, in particular, surround the capital city, Lima. These settlements, the barriadas, are defined by the law in article 4(a):

> 'Barrio Marginal' or 'Barriada': Zone of land of government, municipal, communal, or private property that is found within the limits of populated capital centers of political-administrative jurisdictions, or in their respective suburban or bordering areas, in which, by invasion and at the margin of legal dispositions over property, with municipal authorization or without it, over lots distributed without officially approved street plans, groups of houses

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December 21, 1957, regarding judicial action against barriadas formed on government lands; Supreme Decree of June 26, 1958, stating standards for the solution of the problem of the barrios marginales.

[50] The seven titles into which the law is organized are:
Object and Goals of this Law
Requirements for the Acquisition of Lots and Constructions in the Barrios Marginales
Powers the Law Confers on the National Housing Corporation
Expropriation of Lands Occupied by Barrios Marginales
Proceedings of Adjudication and Legalization of Marginal Lots
Special Resources of the National Housing Corporation for the Application of this Law
General Dispositions.

[51] K. KARST, LATIN AMERICAN LEGAL INSTITUTIONS 9 (1966).

> of whatever structure have been built, the zone itself lacking as a whole one or more of the following services: potable water, drainage, lighting, pavements, routes of vehicular transit, etc.[52]

This definition brings at least four diverse elements into the law's conception of the barriada problem. First, is the illegality of the residences built within a principal urban center "by invasion and at the margin of legal dispositions over property." Second, is the absence of an officially approved plan outlining the area occupied and the location of things such as streets, water sources, and sewage facilities within the area. Third, the houses have been built "of whatever structure," with regulations as to size or construction materials for health or safety purposes not being observed. Fourth, is the absence of various important public facilities in the "zone." The law appears to apply only to zones that demonstrate all four of these traits.

This approach eliminates from the law's benefits areas of illegal occupancy in which, for example, water, sewage, and lighting are present and adequate, for the area is not a barriada. This result makes the law partially a wasted effort because property rights in better developed areas of illegal occupancy would remain uncertain, while rights would be clarified under the law only for illegal occupancies in poorer living conditions. There is no apparent reason for this difference. Rather, the law should aim mainly at the illegality problem with only a subsidiary focus on the residence conditions, public facilities needs, and planning requirements of these areas. Nevertheless, to combine the last three problems with the illegality issue was a sensible, practical step for Peru to take in its legislation because in fact the squatter settlements, at least up to 1961, clearly encompassed all four problems. In another country, in which squatting was taking place in more developed urban areas and with better home construction, an all-inclusive definition such as that in article 4(a) would not be as sensible.

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[52] The restriction of the definition to "capital centers" of provinces, departments, and districts appears to be a pragmatic limitation. It seeks to restrict the law's effects to urban areas with sizable squatter problems, while excluding rural towns having isolated instances of squatting within their boundaries.

The phrase "with municipal authorization or without it" seems to contradict the notion of "invasion," illegal entry and occupation. This possible contradiction does not seem to affect the law's focus on illegal urban settlers, those having no proper authorization from the owners whose land they occupy. Perhaps the explanation for the contradiction is that some municipalities may have attempted to authorize or approve illegal settlements; presumably such authorizations would be without legal effect, at least on land not municipally owned. This phrase also has been criticized for seeming to suggest that municipal authorization could be given to illegal acts of violence. 19 REVISTA DE JURISPRUDENCIA PERUANA 769 (1961).

With this understanding of the Barriadas Law in mind, let us examine the law's goals. Article 1 declares of "public necessity and utility and national interest," "the remodeling, sanitation, and legalization" of the barriadas. Article 4 gives the following definitions of these three goals:

> Article 4(b): "Remodeling": To adapt a barrio marginal, in accordance with the pertinent technical studies, to basic planning norms in order to endow it, at the least, with essential urban conditions and characteristics.

It is fairly clear that remodeling as here defined aims at rectifying the lack of planning and the disorder in building construction which are characteristic of many, although not all, of Peru's squatter areas.

> Article 4(c): "Sanitation": The execution of necessary works for the desiccation of the ground, channeling of irrigation and drainage trenches, elimination of debris, burning of refuse, installation of services of potable water and drainage systems. By extension it includes the construction or improvement of the transit routes; in the same manner the establishment of public and private electric lighting.

This goal covers the lack of public services and facilities included in Article 4(a)'s definition of barriadas.

> Article 4(d): "Legalization": The procedure for delimiting a barrio marginal and recognizing it or assigning it a name that identifies it together with the administrative or judicial proceeding, according to the case, that permits to be established the juridical situation of the owner of the land over which the barriada has been constructed, and in the same manner the juridical situation of the occupant without intention of profit established in each lot.

If this goal is met, the problem of widespread illegal occupancy should be resolved. The law explicitly seeks to clarify, first, the rights of the existing property owner and, second, the rights of the actual occupant, if he is one who has settled for his own personal needs rather than for profit.

As a third aspect of legalization, and as the beginning of article 4(d) suggests and other articles make clear, the law is concerned with the barriadas as identifiable, legal communities—as orderly, self-improving, and well-defined areas of lawful residence and social, political, and limited economic activity. This broad focus on community development seems to be an ambitious, progressive step beyond the basic goal of clarification of property rights. Article 1 describes this broader goal as the "tendency to transform barrios marginales into popular urbanizations of social interest." This tendency is seen as an overriding part of the three-fold process of remodeling, sanitation, and legalization.

Our analysis of the law shall look at the measures established for the attainment of the three goals of article 1 and the overall goal of establishing well-organized, well-constructed, and self-improving communities. The law's provisions on the illegality question will be stressed since that is the feature which distinguishes squatter areas from other problematic urban housing situations and which constitutes the squatters' challenge to existing systems of property rights.

It should be noted that execution of the law is entrusted to the National Housing Board (*Junta Nacional de la Vivienda, JNV*) by article 3(i) of Decree-Law Number 14390. The creation of the *JNV* was an attempt to centralize all governmental activities relating to housing. Article 3(j) of the Decree-Law directs the *JNV* to promote, regulate, and authorize the formation of popular urbanizations of social interest. The *JNV* reflects the governmental attitude that the squatter problem is of national concern.[53]

C. *Illegality: Prohibitions and Popular Urbanizations*

The law first attempts to confront the illegality of the barriadas—the fact that the occupants are subject to owners' legal actions for recovery of possession and criminal penalties for the unlawful taking of possession of other persons' land[54]—by limiting the barriadas to approximately their existing size and number at the time of the law's passage. This is attempted by article 2:

> The formation of barrios marginales is prohibited. Those that, notwithstanding this prohibition, try to form themselves or do form themselves after the promulgation of this law, or that have been constituted after September 20, 1960, remain excluded from the benefits that this law grants only for preexisting barrios marginales.

Article 2 is simply an attempt to stop the formation of barriadas by direct prohibition and the indirect penalty of excluding new invaders from the law's benefits. The purpose seems to be to allow the *JNV* to assess the size of the existing settlements and to concentrate on rectifying the problems in those identifiable areas. Presumably it would be almost impossible for the *JNV* to set priorities in its programs, or to estimate its financial and personnel needs if the law were to apply to any and all future squatters who might form new barriadas or add to existing ones and then seek the law's benefits. Article 2 also stands as a declaration of the illegality of squatting and thus attempts to reaffirm that the rule of law is still in force in the cities of Peru.

Although it is probably a sensible provision from these two points of view, article 2 poses the serious risk of breeding further

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53 The *JNV* is the successor to the *CNV* which was abolished in 1953.

54 *See, e.g.*, CODIGO PENAL, art. 257.

disrespect for law and government if no realistic provisions are made for the needs of potential future squatters. The probable result would be overt defiance and lack of effective enforcement of the article's prohibition; this would only point up the gap between what is enacted and what is needed. In this sense, article 2 may do more harm than good, despite its sensible, limited purposes. As we shall see, this may well have been the effect of article 2, an effect which other countries should seek to avoid.

Understanding that the negative provision in article 2 cannot itself stop the potential urban squatters from doing whatever seems necessary in order to secure areas for settlement, the framers of the law authorized setting aside specified areas of government land for regulated future settlement. These areas are given the same name as article 1 applies to barriadas after they have been legalized, remodeled, and provided with sanitation facilities: "popular urbanizations of social interest." Article 3 empowers the *JNV* to authorize the formation of such urban settlements, "preferably with the collective work of their future populators." The *JNV* is to draw plans and projects for the formation of these urbanizations in areas either acquired by the state or reserved for this purpose under article 16. In the execution of these plans, Populators Associations organized in accordance with chapter 9 of the regulations will have priority and will be obligated to contribute through self-help programs.

The law does not detail the procedure for formation of the Popular Urbanizations or their necessary elements or size, but article 1.01 of the regulations says the *JNV* is charged by articles 1 and 3 of the law with authorizing the formation of the Popular Urbanizations, "for which effect it ought to abide by the existing dispositions over urbanizations and the bringing of lands into use, excepting the cases specifically contemplated in the indicated Law 13517." Other laws are thus to guide the *JNV* in the creation of the Popular Urbanizations; presumably it has to turn to enactments such as the Regulation of Urbanizations and Land Subdivisions of 1955, Supreme Decree Number 1 of January 20, 1955, and the updated regulation passed in 1964, Supreme Decree Number 82-F of October 16, 1964.

Without discussing the desired characteristics of these preplanned areas for settlement, we can say that such areas are almost inevitably a necessary concomitant of the type of prohibition on squatting which is found in article 2. Further, unless these areas are established, squatting will not be deterred by a flat prohibition alone. One recent observer of the squatter situation has stated that the Popular Urbanizations program under Law 13517 "has not been applied vigorously enough to provide a substitute for invasions. Thus, though these are prohibited by law, they have con-

tinued."[55] This comment reminds us, of course, that careful planning, energetic and ever courageous administration, and adequate financial resources are essential for the success of this law in all its aspects and of the Popular Urbanizations policy and article 2's prohibition in particular. A law such as Law 13517 cannot itself guarantee all of these things. This law only states the basic, necessary policy regarding future squatting, and does not contain a clear explanation of what is needed for success. Nevertheless, the main characteristics of the improved, legalized barriadas, as the law describes them, do give us a general picture of the desired characteristics of the Popular Urbanizations.

D. Illegality: Rating the Existing Barriadas

Having prohibited further squatting, and generally provided for future settlement areas for those who otherwise probably would be squatters, the law deals directly with the existing barriadas in the following way: Article 15 provides that if a barriada is suitably located and susceptible of improvement, it will be legalized, provided with necessary public facilities, and subjected to orderly planning. If it is unwisely located or not suitable for substantial improvement, it will be eradicated and its occupants resettled in other barriadas or in new Popular Urbanizations. The *JNV* is to assign adequate lots in the same barriada or in another to occupants who have to be moved. This rating process is to be undertaken within a broader range of studies, plans, and setting of priorities authorized in articles 13 and 14. This working principle, of article 15, along with article 2's prohibition of new squatting and article 3's authorization of Popular Urbanizations, should be considered the heart of the law. As we examine the intended operation of this principle and its probable effects, we shall see that it includes a number of new ideas for regulating property rights.

E. Distribution of Property Rights

If a barriada is to be continued in existence, property rights must be clarified and redistribution begun. Similarly, once resettlement of displaced barriada occupants is to occur, distribution of land use rights is necessary in the resettlement areas. The process in either case is basically the same; it is delineated carefully in the law, primarily in article 29.

1. GRANTING OWNERSHIP TO SQUATTERS

Article 29 declares that once the ratings under article 15 are made, the *JNV* will "adjudicate" the respective lot to the occupant "whose right as acquirer has been recognized according to this

[55] F. Truslow, Urban Redevelopment in Peru, April 1966, at 22 (study prepared for Regional and Urban Planning Implementation, Inc.).

Law."[56] Inasmuch as article 29 is the main provision which directly recognizes the occupant's right to acquire ownership, the last phrase seems to make the article somewhat circular in meaning. The circularity is partially removed by article 22, which states that barriadas lots on land which the state expropriates or buys "will be acquired by their occupants after payment of the corresponding value." But since this provision does not cover barriadas formed on land already owned by the government, the circularity is not completely erased.

Another possible, and even preferable, explanation of this phrase is that it refers to article 7, which states the qualifications necessary before a person can legally acquire a lot in a barriada. This article lays down the following "indispensable conditions": (1) The person must be of full legal age; (2) he must be neither owner nor possessor of another piece of urban real property within the same Department of Peru's territory, nor can his spouse or descendants of minor age possess or own such property; (4) he must have begun occupying the lot personally prior to September 20, 1960, and he must still occupy it.

With these specifications, article 7 seeks to insure that the benefits of article 29—the granting of legal rights to a barriada lot—will accrue only to squatters occupying property for their personal and family residence, not for profit. Consistent with this focus on the needy squatter, article 9 provides that no person can acquire more than one lot in one or more barrios marginales, no matter what right he invokes. The requirements in article 7, and this limitation in article 9, are concrete legislative attempts to insure that the law will benefit only persons honestly in need of land for urban residence, and as many of such persons as possible. This approach demonstrates that the Barriadas Law recognizes the legitimacy of the urban squatters' needs in Peru. It also recognizes the inadequacy of present law for meeting these needs and the illegal actions they provoke, and the corresponding necessity for new legislation, legal devices, and government powers. With this approach in mind, the details of article 29 have greater significance.

2. EXPROPRIATION POWERS

To make clear the possible effect of article 29, we should note the extensive expropriation powers which the law vests in the *JNV*. The expropriation provision found principally in article 21, allows the *JNV* to pursue normal expropriation proceedings under law 9125 (the Law of Compulsory Expropriation of June 4, 1940) "if the land that constitutes a barrio marginal is of municipal, communal, or private property." "Communal" refers to areas

[56] "Adjudicate" in article 29 does not carry the meaning of a judicial proceeding, but rather refers to an awarding or granting of rights via the *JNV's* administrative processes.

owned by groups of Peruvian Indians. The compensation which the law declares must be given the owner "will be made considering the value that [the] land had before the barrio marginal was formed."

This approach raises many questions, but two are most critical. First, how can it be determined exactly when a barriada was "formed" for the purposes of article 21? This is a very difficult determination, and will of necessity be arbitrary in the cases of barriadas which have grown slowly.[57] Second, is it fair to compensate an owner only on the basis of his land's value before the barriada "was formed"? Since urban land values have greatly increased in recent years, and since some barriadas in Peru are well over a decade old, owners frequently may get much less than the present value of their land. Perhaps the justification for article 21's stringent rule is that the framers of the law believed or assumed that the owners had not attempted to take advantage of the land's growing value when they could have; now that a critical social problem has arisen, they should not make the profits they earlier failed to seek, and they especially should not receive them now at public expense. A further assumption behind the article 21 provision is that payment of full, present value, which is so often inflated in modern urban land markets,[58] could not be expected of the squatters. In a different country and squatter situation, in which the squatters were able to pay much more than they can in Peru, it would be feasible and fairer to compensate the owners at present land values.

An additional assumption behind article 21 is that, even if the squatters themselves cannot pay enough to permit greater compensation for the owners, the government cannot and should not pay more from public funds for this purpose. In any case, the rule of article 21 is strict, eliminating even such possibilities as long-term payments to the owners at full present value or immediate payment of a percentage—arbitrary or otherwise—of present value.

Article 21, in short, shows little sympathy for the owners of barriadas land, and manifests a bold policy choice, a recognition of the urgency of readjusting ownership in the barriadas without the hindrances or delays that excessive land costs might impose. This urgency is further emphasized by article 23 which allows the *JNV* to begin the technical work, construction, and other activities incident to remodeling, improvement, and legalization in a barriada

[57] A later enactment, Supreme Decree of September 25, 1962, made an addition to article 3.08 of the regulations, which relates to the expropriation process. Although the 1962 decree says that the *JNV* will exclusively determine the time of the past formation of a barriada, the decree states no criteria for this determination and thus leaves the overriding question unanswered.

[58] W. HARRIS & H. HOSSE, *supra* note 14, at 627.

before the termination of related expropriation proceedings or judicial actions contesting ownership or possession rights to the barriadas land or buildings. Article 23 represents a modification of the normal expropriation process and its effects in order to allow for immediate action to improve the barriadas. Both articles 23 and 21 present a probable frustration of the hopes of landowners who have left their land undeveloped to cash in later as cities and city housing problems grow. Unfortunately, it probably also frustrates honest expectations of landowners who, because of carelessness, ineptitude, or whatever other cause, did not develop or sell their land fast enough, and whose holdings were the object of squatter invasions which were practically impossible to reverse.[59]

We have seen that the law provides that all distributions of lots be made from government-owned land. The barriadas will first become government land, by expropriation or purchase, if they are not in government ownership already. The law makes no attempt to use such tools as the doctrines of prescription and abandonment, or to compel or encourage rentals, sales, or grants of usufruct rights directly from owners to squatters as a means of redistributing land ownership in the barriadas. The law allows the government to become owner of all land in the barriadas, though it does not require this or decree its automatic occurrence. The speed and comprehensiveness of this process apparently remains in the discretion of the *JNV*.

3. "PROVISIONAL TITLE OF ACQUIRER": CREDIT SALES TO SQUATTERS

The *JNV* is directed by article 29 to award barriadas lots to occupants by granting them "Provisional Title of Acquirer, with the limitation that Article 1426 of the Civil Code establishes." Article 1426 declares that in credit sales, it is valid for the parties to agree that the seller (government) reserves ownership until the price is totally paid, even though the land has been delivered to the buyer. Article 31 specifies that the *JNV* can allow up to seven years for payment of the purchase price. Article 6.07 of the regulations says that payments can be made on a monthly basis.

As for the actual amount of the purchase price, article 30 sets forth two rules. If the land was originally government-owned, the occupant will pay his proportional share of the cost of water and sewage works for the barriada, depending upon the size of his lot,

[59] Presumably constitutional objections could be raised regarding the low valuations likely under article 21. It would not seem, however, that these objections would have great force in view of the policy considerations underlying the article. Furthermore, article 29 of the Constitution only requires "prior indemnification" for expropriated property; it does not say the appraisal must be based on present value, or even that it must be reasonable or just.

plus an additional one *Sol*, approximately $.0375 (U.S.), per square meter. If the land was acquired by the national government from private, municipal, or communal ownership, the acquirer pays his proportional share of the government's purchase expense for the land and his share of the cost of the water and sewage facilities. The amount the government has paid to acquire the land is determined by purchase agreements with former owners and by article 21's expropriation assessments.

The amount the squatter has to pay to the government under this system of credit sales is related (by article 30) primarily to the size of the lot acquired. There is no standard size for lots, which is sensible in view of the variety of terrains and structures found in Peru's barriadas. Article 4(e) defines a "marginal lot" as that part of the land of a barrio marginal that "is delineated in some form" so as to precisely determine the rights of the possessor or occupant and over which a house or residence of any structure has been built. The significant words are "delimited in some form." This shows that "lot" is defined for practicality and flexible application of the law. Exact boundaries and measurements are not presupposed or required; it would probably be impossible to impose them without first destroying the barriadas and then trying to rebuild them. Nevertheless, article 29 states that the titles to lots will be granted according to a *JNV* prepared remodeling plan for the particular barriada. This assumes that some degree of order and means of demarcating lots will be imposed.

Chapter 4 of the regulations lists various criteria to guide the *JNV* in forming the eradication and remodeling plans for the different barriadas. Article 4.13 sets forth an extremely flexible standard, based on various practical considerations, for establishing the minimum size of barriadas lots:

> The minimum area of the lots will be what is necessary in each case in order to give space to a residence satisfying the essential conditions of habitability, understanding by these the indispensable surroundings for the functions of daily life (living room, dining room, bedrooms, service rooms, kitchen), with dimensions and number in relation to the quantity of persons that comprise the family, and these surroundings should be provided with the necessary illumination and ventilation from open spaces.

The article states further that other factors, including the "use and customs" of the locality and the climate should be taken into account.

Maximum limits for the barriadas lots are indicated by reference to the regulations' article 10.08, which states both minimum and maximum lot areas for the Popular Urbanizations, depending upon whether they are in Peru's coastal area, mountains, or jungle.

Since article 10.08 poses a maximum limit of 250 square meters for lots on the coast, it can be said that article 30's price standard of one *Sol* per square meter of government land is intended to set low prices for the squatters. A lot of 250 square meters would only amount to about $9.00 (U.S.). Further, because the expropriation costs under article 21 are likely to be very low in relation to present land value, and because the law seeks to encourage self-help and community construction projects for public works in the barriadas and Popular Urbanizations, we can say that article 30 aims at very low prices for the squatters. But, because expropriation costs and public works expenses are variable according to a variety of circumstances difficult to predict, it cannot be said with certainty that the law's price provisions actually insure prices within the reach of the squatters.

4. CONDITIONAL SALES: USE OF TRADITIONAL LAW IN A NEW CONTEXT

We have seen that the sale of lots to the occupants is conditional on full payment within seven years, and that the title passed is "provisional." This appears to be mainly for the squatters' benefit and convenience. Presumably it also was decided that it was better to sell the property rather than lease or grant usufruct rights to the squatters. A variety of possible reasons led to this choice including public revenue interests and the importance of land ownership for individual security and self-responsibility.

There are other limitations and conditions accompanying the reservation of full title in the government, and they seem to serve important purposes. Article 36, for example, says that while the installment sales contract is in force, neither the land nor the residence constructed on it can be rented by the purchasers. This restriction refers to the seven year period, but the article imposes an even stricter limitation. It says that "in no case" can renting take place within five years of the original date of the sales contract. Thus even if an occupant pays his contract within three years, he cannot rent for two more years.

The renting restriction guarantees that the acquiring occupant and his family are securely located in a residence under *JNV* supervision for at least five to seven years. They presumably will have adequate living conditions and will not be displaced or crowded by renting to others. Article 36, therefore, protects the squatters from themselves—from their own propensity to rent even though the tangible effect might be detrimental. Article 8.04 of the regulations lends further support to this interpretation, for it says that during the five to seven year period the holder of the provisional title "not only will not be able to rent the residence, as article 36 of the law provides, but moreover will be obligated to occupy it permanently together with his family." It is overly protective or paternalistic in its purpose, for it is hard to

see how a barriadas resident and his family can be compelled to continue living on the lot awarded to them.

Similarly, the prohibition on renting may well be unenforceable in practice, unless the government is prepared to keep a constantly up-to-date record of each resident of the barriadas and of the exact relationship of each to the family group with which he lives. The prohibition on renting may also discourage barriadas residents from expanding and improving their residences. Many barriadas residents build their homes gradually, aiming at a two-story structure.[60] The rental prohibition would therefore seem to be a disincentive to home improvement and might cut off what the residents see as a source of additional income. Perhaps a wiser provision would prohibit renting only if it would involve displacement or unhealthy crowding of the buyer and his family. Even a provision such as that, however, would seem difficult to enforce.

Article 36 also nullifies any sort of transfer of rights by the holder of the provisional title during the seven year period. Although the article is unclear, it seems that the five year restriction also applies to this provision; article 8.04 of the regulations takes this position, and also interprets "transfers" to include encumbrances of whatever sort. The *JNV*, however, can authorize transfers, with the transferee assuming the transferor's obligations. Transfers by hereditary succession or between co-heirs are allowed at any time.

These conditions—payment of purchase price within seven years, no renting, no transfers or encumbrances, and required residence during a period of at least five and no more than seven years—are supported by various sanctions stated in the law and regulations. Article 6.09 of the regulations declares the penalty for nonpayment. By reference to Law Number 10722, the sanctions are rescission of the sale or, at the government's option, levying on the debtor's property for the amounts remaining due. Presumably it will be more sensible to use the rescission penalty so that the debtor's small resources will not be depleted and other needy persons have an opportunity to purchase the lot.

Attempted transfers, encumbrances, or rentals seem to be subject solely to the penalty of nullity, but it is also arguable that these restrictions can be seen as contractual conditions which must be complied with before the *JNV* is obligated to give full ownership to the occupant and before he is qualified to acquire it. These penalties all would be consistent with the law's policy of offering secure tenure to the squatters while insuring that they meet payment obligations for the land and do not unwittingly bargain away what the law offers them. The restriction on transfers of any rights certainly aims at curbing speculators and those who, at the

[60] Turner & Goetze, *supra* note 6, at 14.

expense of others who need secure living space and residences, would obtain larger holdings than they personally need. Similarly, the limitation on encumbrances should prevent an occupant's land from becoming subject to claims of outside creditors.

It should be clear by now that the restrictions in article 36 and the regulations go far beyond what article 1426 alone authorizes. If the payment condition of article 1426 is met within five years, the government as seller and former owner still seems able, by virtue of article 36, to continue to require the new owner to reside on the property and not rent, transfer, or subject it to encumbrances. Unlike Anglo-American law, there does not appear to be any prohibition in Peruvian law on these sorts of limitations on land use, even if they are to apply after the sales contract is completed and full title has passed.[61]

Since article 1 declares "the national interest" involved in the barriadas problem, the restrictions we are discussing seem to be proper measures under article 35 of the Constitution. Thus we see that the framers of the Barriadas Law have fashioned a useful type of contract specifically to further the law's purposes, and they have done so on the basis of article 1426's conditional sales concept, article 1103's broad authorization of conditions in agreements such as land sales contracts, and article 35 of the Constitution's allowance of restrictions on the acquisition and transfer of land for reasons of national interest.[62]

F. The Populators Associations

The restrictions we have examined above also serve to simplify the *JNV*'s role in supervising the development, organization, and needs of the barriadas. Article 37 of the law and regulations articles 8.03-.14 also establish special registries which the *JNV* is to maintain to help it fulfill its duties and keep the barriadas residents' rights to their lots and residences as clear as possible. It is worth mentioning that considerable responsibility is placed in the Populators Associations as another means toward fulfilling this

[61] Actually there is some suggestion in Peruvian doctrine that the notion of unlawful restraints on alienation does exist in that country. CASTANEDA 465. Nevertheless, article 1103 of the Civil Code says "any conditions can be imposed that are not contrary to the laws or the morality." This general provision applies to land sale contracts. More importantly, article 35 of the Peruvian Constitution says that for reasons of national interest, the law can restrict and prohibit the acquisition and transfer of certain classes of property.

[62] Commentaries on article 1103 suggest that the type of condition we are here discussing is what is classified as a "resolutory condition." With a condition of this type, "the act which has already been executed is left without effect in the case that the event happens (or does not happen, according to what the condition may be, as to its form, positive or negative)." LEON, *supra* note 33, at 42. In other words, it is a condition for defeasance of title in the land sale contract situation. *See also* ARCE 88.

role, and for the even more important purpose of fostering community self-help and self-government. These groups, which in many cases originated as organizations for squatter invasions, are recognized in article 3 as vehicles for self-help construction in the new Popular Urbanizations. Articles 6.03-.06 of the regulations make clear that self-help—group efforts in the construction and installation of community facilities and public works—is also to be encouraged in the existing barriadas, even though responsibility for these functions is primarily in the *JNV*.

Chapter 9 of the regulations governs the structure and activities of the associations. It describes them as

> the entities, representative of the populators of a barrio marginal, whose fundamental purpose is to collaborate in its remodeling, sanitation, and legalization in the form that the Law and these Regulations determine, as well as in the solution of the problems that affect the community and require the civic cooperation of the populators.

Alongside this broad statement, there are limitations on the associations. They are prohibited, for example, by article 65 of the law from attempting to collect any monetary amount, by judicial means or otherwise, for the granting of rights in the barriadas. If the broad general description is viewed along with this limitation, it is apparent that the law is not only trying to foster powers of community action for the improvement of the barriadas, it is also trying to direct existing groups—which may have begun with illegal purposes and actions—away from illegal activity and toward helping to execute the law in some of its principal aspects. Frequently this simply would entail officially approving and extending assistance to squatter self-improvement efforts already under way.

Article 66 says that once provisional titles have been granted, only persons possessing them can belong to the associations. This further suggests that it is not just the illegality of the individual squatters' actions which the law must deal with, but also that the strength of squatter groups which encompass and stimulate the individual must be brought into a constructive role in the legalized development of the barriadas. Another indication of this is that the second part of article 7 says that associations themselves can acquire ownership of lots they already occupy for various community services. Although the law's approach with regard to the associations seems purposeful and constructive in these respects, it would be a worthwhile area for future research to see whether in fact the law has been successful in promoting and channelling squatter self-development efforts within the framework of the law. The possibility should be considered that the original squatter organizations may lose some or all of their strength and constructive energies and become routinized, even suspect, vehicles of official *JNV* policy. This likelihood might be increased if article 65 is in-

terpreted to prevent the collection of dues by the associations. Article 9.09 of the regulations does suggest that the dues-collecting power will be limited.

The associations, however, appear to be the major direct means for approaching that broad goal of active, orderly, and self-improving communities which we identified earlier when the three areas of interests involved in the law's definition of the goal of "legalization" were discussed. One area, that of the interests and rights of the property owners, we have seen is handled by expropriation with limited compensation. As for the second area, article 29's process for distributing ownership to the squatters is a firm recognition of their interests in secure legal rights to their areas of residence. Finally, the Populators Associations are a recognition of the third area of interests, namely, Peru's long-range interests in bringing the squatter groups into orderly cooperation with the government and in developing progressive, viable urban communities. In each of these three areas, it is clear that the lawmakers of Peru have made definite policy choices, reflected both in the ways in which they have defined the barriadas problem and in the ways they have proposed to solve it.

G. Rights to Land and Rights to Buildings

We have discussed the major characteristics of the law's system for distribution of property rights. Our discussion, however, has concentrated only on the distribution of rights to "lots" in the barriadas. Article 29 goes beyond this; it contains two provisions which separately consider rights to the buildings and other structures on the lots.

The second paragraph of article 29 declares that if the purchaser proves that he owns the construction on the lot, the provisional title will mention this fact. Article 8.02 of the regulations supplements this paragraph by presuming that the construction is the property of the person inhabiting it, unless contrary proof is presented to the *JNV*. The regulation fixes the time for presentation of this proof at 90 days after issuance of the regulations. This time period apparently was fixed on the assumption that all owners of these constructions know of the issuance of the regulations, understand them, and are able to act on them within 90 days.

The more difficult cases—those in which the construction is the property of a person other than the acquirer of the lot—are dealt with in the third paragraph. This provision says that the existence of this situation will be recorded in the provisional title "for the effects of what is ordered by Article 8 and with the obligation of legalizing the property system over the construction in accordance with Articles 30 and 33." The reference to article 8 gives this third paragraph its operative significance.

Article 8 provides for the transfer of barriadas constructions, such as residences, from their present owners to those who actually occupy them. These occupants are described as "hirers or sub-tenants"; presumably the law is aiming at squatters who rent from other squatters who built on land they do not own. It is also aiming both at squatters living in structures built by owners of the land, and at nominal tenants of these owners. Such persons, provided they fulfill the basic "indispensable conditions" of article 7, "acquire immediately the right to be purchasers on installments of the corresponding construction built by the lessor."

The article also says that future rental value will be considered as payments on the price of the sale contract. Also, "the same persons also automatically acquire the preferential right to consolidate in their favor the respective ownerships" of the land beneath the construction. This last statement is ambiguous. As we shall discuss shortly, it either means the occupants acquire preferential rights to buy directly from the owner of the land, or it is simply a repetition of the basic provision of article 29, recognizing occupants' rights to receive land ownership from the government.

The second and third paragraphs of article 29, with their reference to article 8, are an important adjunct to the basic scheme of government sales of barriadas land found in the first paragraph of that article. The interesting point is that article 8 allows for redistribution of ownership rights in buildings to take place on a voluntary, private bargaining basis between owners and squatters. It separates rights to constructions from rights to land. What is unclear, however, is whether the private transfer of rights applies to the land as well as the buildings on the land. A look at article 33 will help resolve the uncertainty.

Article 33 establishes important rules to govern "the legalization of the system of property in the building or construction to which Article 8 refers." No reference is made to the land itself. Transfer of land ownership remains exclusively a matter of government acquisition of ownership followed by distribution under article 29's provisional sale terms. The actual wording of the third paragraph of that article further supports this interpretation, for it refers to articles 8 and 33 solely regarding "the construction" and even mentions the provisional title an occupant receives as if it were something already awarded by the government regardless of whether rights to the buildings have been resolved by private agreement.

What we have, then, is a mixed system for redistributing legal ownership in the barriadas. Distribution of land ownership will be exclusively under *JNV* control, through article 21's expropriations and article 29's adjudications. Distribution of building ownership will be allowed through private bargaining; how-

ever, if that does not produce agreements, then the government will impose solutions.[63]

It is significant that the law makes this distinction. Apparently the law is willing to give the owner an opportunity to get a fair price for his building, even though he may have to take an exceptionally low price for the land. The reason for this difference in approach is far from clear, but perhaps it rests in the notion that an owner who has built on his land has attempted to develop it and, therefore, is not the sort of unproductive or speculation-minded owner contemplated in the strict valuation provision of article 21.[64]

There is an additional indication in the law that the difference in treatment of land and buildings reflects a policy of allowing some degree of reward for owners' efforts to make good use of their property. Article 11 says that article 8 will not apply if an owner has invested 10,000 *Soles*, about $375.00 (U.S.), or more in materials for the construction and if he owns no other real estate in the same Department of Peru. Then, pursuant to regulations articles 7.10-.13, the occupant will be forced to resettle when a lot is available elsewhere. The owner of the construction, presumably whether he owned the land originally or was a squatter on it when he built, then will be obligated to occupy what he has built. Presumably he will be the "occupant" to whom the government then will award or confirm ownership of the land. These provisions combine the idea of not penalizing the owner who has attempted to make worthwhile use of his property, with the intention of allowing him to enjoy the valuable edifice he has constructed without fear of squatter intrusions.

One final aspect of the system for sales of barriadas structures deserves to be mentioned. Article 67 provides that the courts will decree the cutting off of all lawsuits for eviction and ejectment of tenants, collection of rents, and interdictions against renters and occupants of houses, residences, or other places located within the barrios marginales. The purpose is to give effect to articles 8 and

[63] This is made clear in articles 33 and 11, and in regulations articles 7.04-.06 and 7.10-.13. Article 33 says that if the lessor, who owns the construction, and the purchaser of the lot have agreed on the price, the agreement will have the intended legal effects once the *JNV* has approved it. If, however, these persons have not reached a "voluntary accord," the *JNV* will evaluate the construction and indicate the terms of the contract, including the periods for payment of the price. Articles 7.04-.06 of the regulations further delineate this process.

[64] Of course, the owner's actual bargaining power is restricted by the existence of only one person as a possible buyer—the occupant. An additional restriction is that the *JNV* is always hovering in the background, able to set terms if no voluntary agreement is reached. Depending on the probable level of the valuations which the *JNV* may have to make, its ultimate power to set the price may actually add to the bargaining power of either the buyer or seller.

33. This provision has been implemented and expanded by subsequent legislation.[65] The net result is that all of the above lawsuits have been ordered terminated, even at the stage of judgment execution. This is true whether the lawsuits relate to areas recognized as barriadas by the *JNV*, or areas not yet so recognized but in which the occupants have already sought and are awaiting this official recognition as a barriada.

The significance of article 67 is that its existence and effect constitutes a further acknowledgement that the traditional, Civil Code system of property rights, as defended through the types of lawsuits just mentioned, is inadequate to meet the squatters' challenge to the existing distribution of urban property ownership. Accordingly, the usual lawsuits are ended so that the new, presumably more equitable and up-to-date provisions of the Barriadas Law can have full effect, without the hindrance of contrary property rights being advanced in the courts. A similar example of this overt overriding of the usual Civil Code property rights was found in article 9. It restricts barriadas dwellers to the acquisition of one lot under this law, "whatever may be the right that is invoked." Apparently this would cut off rights such as those asserted under the acquisitive prescription concept, ironic as this result may be in view of that concept's usual relevance to squatter interests.

The objection which has been raised to these provisions is that they are retroactive deprivations of legally acquired rights and are unconstitutional, being contrary to the prohibition of retroactivity in article 25 of the Constitution.[66] There is an apparent validity to these objections, especially as to the ending of lawsuits initiated prior to the passage of the law. Perhaps it is a measure of the urgency of the need for redistribution of ownership in the barriadas that we can see that it is very unlikely these objections will have any significant effect on the actual implementation or validity of the law.

V. CONCLUSION

The mixed system for distributing property rights which we have analyzed clearly indicates that the Barriadas Law combines traditional Civil Code and constitutional provisions with new legal devices and modes of exercising government power—all for the purpose of giving effect to the policy choices which have been made regarding the redistribution of urban property rights in the barriadas areas. In all its features, the Barriadas Law of Peru is a strong example of the important process by which law is adapted and developed. Old concepts and tools are blended with the new to keep pace with rapid social change.

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[65] *See* Supreme Decree of February 10, 1962; Decree-Law Number 14476 of May 4, 1963; Law Number 15016 of April 23, 1965.

[66] 19 REV. DE JUR. PER. 771 (1961).

Modern efforts such as Peru's may not meet with great, concrete success. No one should assert that implementation of legislation such as the Barriadas Law is a simple task. Nor should we forget that this law is primarily remedial legislation, aimed at correcting a problematic situation which existing law has not been able to solve. There remains the need for more legislative measures of a prospective sort, to discourage the development of the barriadas by making provision for the needs which give rise to the illegal settlements. Certainly the Popular Urbanizations program is an important example of what is needed, but in addition there should be something on the order of new prescription laws and other direct and indirect provisions for continuing urban property distribution and land use regulation.

The kind of pragmatic, imaginative adaptation of old legal concepts to new problems which we see in this law is the kind of first step which Peru and many other countries must take if they wish to begin to confront the squatter crises effectively, peacefully, and fairly within the framework of legal systems which are both progressive and just.