

# THE BINDING FORCE AND SOCIAL FUNCTION OF CONTRACTS:

## A STATE OF THE ART IN BRAZIL AND CHILE

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### **Abstract**

This work presents contract law's transit in the Latin American legal context. Despite the nineteenth-century codifications which ostensibly subscribed to individualistic parameters, with which our modern contract law was designed, the region's contemporary codification has distanced itself from this manner of comprehending the contract, its legal bases and purposes, consolidating itself with exigencies of sociability and other social principles. This is particularly analyzed from the standpoint of the embodiment of the social role that contracts have in today's Brazilian legislation, which poses difficulties to the effectiveness of contracts' binding force, and other contractual principles. How this phenomenon reveals the complexity of contract law is presented herein, posing an immediate challenge to the efforts towards harmonization of contract law in Latin America, considering a common basis.

**Key Words:** *contractual binding force, contract's social function, individualism, sociability, Latin American contract law.*

### INTRODUCTION

Modern contract law possesses an undeniable commitment to nineteenth century premises on contracts, and dogmatically upheld because of the fundamental principles of contract law. They are bound together by the individualist foundation that is found throughout private law. The Latin American contract system, on its part, consecrated this way of understanding contracts, and the same permeated throughout the different civil codes of the nineteenth century. However, this common justification presents strong tensions today, given that contemporary codes formulated in Latin America have set themselves apart from such prism, moving

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over to a foundation designed around sociability and other social principles. And, in other legal systems throughout the region, the influence of scholarship and case-law have provoked a revision of the individualist paradigm in the law of contracts, even though its civil legislation has remained without major reforms.

Considering this, the attempts to harmonize the law of contracts in Latin America find themselves with a crucial challenge, related to determining what the foundation from which it is pertinent to promote uniformity of contract law is. The existing tension may be shown, in part, with the relationship between the binding force of contracts and the social function that the contractual relationship is to observe. Although both its foundations and boundaries move in opposite directions, under the current state of things within the Latin American context, the traditional defense of unconditional nature of the first principle of contract law, coexists with its restriction and weakening upon the base of social objectives that the contract is required to satisfy.

In what follows, what will be shown is the transit from the law of contracts forged by the nineteenth century paradigm, and amply taken in by private law systems in Latin America, until its recent critical evaluation, which has unfolded through legislative re-formulation, or with the support of scholarly research, and its reception by case-law. The tension that exists between the binding effect of contracts and its social function will be especially analyzed. For this, our attention will be centered on the Brazilian and Chilean contractual systems, even though the considerations that we will analyze here will also consider the Argentinean and Colombian legal systems. The main objective of this work is to show that contract law's complexity presents difficulties regarding efforts towards harmonization, and this is made transparent when we tend to the foundation of this area of private law. Currently, Latin American contract law presents deep tensions and fissures in the way of understanding the contractual relationship and the principles that make up the law of contracts, constituting an immediate challenge for the agenda of uniformity. It seems that it is not possible to sustain the thesis that contract law in Latin America continues to rest upon individualism.

In the first section, we will develop the nineteenth century claims of contract law that incarnated the codification process, along with the basic principles of contract law that regulate classical contract law, jointly founded upon individualism. Then, in the second section, the new contract law will be profiled, as installed by Brazilian legislation in 2002, considering the principle of sociability, focusing attention on the consecration of the contract's social function and its relation with the binding force of the contractual relationship. In the same manner, we will review the current situation in Chile. Finally, in the third section, the dimensions of the incidence of social principles in Latin American contract law will be presented; and, at the same time, the problems associated with rethinking the foundations of contract law will be reviewed, for the project of harmonization fostered throughout the region.

## 1. NINETEENTH CENTURY PARADIGM AND CONTRACTUAL INDIVIDUALISM

The traditional law of contracts possesses a close commitment with the way of understanding the contractual relationship that was inspired by the Illustration's ideas, and was reflected in nineteenth century codification. This vision conceived individuals as agents with equivalent powers and abilities for negotiating and for defining their contractual obligations; finding themselves, furthermore, in symmetrical positions to participate in the contractual relationships that they deemed fit. Without significant differences between them regarding their competences, the contracting parties could autonomously decide which contracts to conclude, and under which terms. Meanwhile, the justice of their agreements constitutes a matter guaranteed precisely by these very principles; that is to say, since the concluded contract comes from individuals situated in equivalent negotiating positions, and from which the parties freely determined the contractual provisions that govern their legal relationship.

This nineteenth century paradigm of contract law was explained in the codification. The project of systematization and simplification that was embraced by codification required the making of simple, concise, and brief codes, so as to unify the diversity of legal rules in basic legal bodies that were of easy access and focused on a single and abstract image of the subject.<sup>2</sup> Beyond the natural differences that exist among individuals, for the purposes of the legal relationships that these may develop within the framework of private law, codification established a formal model that grouped them all as subjects of the law. From a contractual point of view, there is an egalitarian principle that deals with all agents as equally capable of contracting obligations and exercising rights through contractual relationships, and this allows to dissipate the differences that, at least culturally and economically, irreparably affect the bond between the parties of a contract.

Such contracting paradigm does not naturally have a clear specification of all its implications. Notwithstanding the foregoing, it is possible to identify a group of claims that express this nucleus of beliefs. These point to the following: (i) contractual will; (ii) symmetry between contracting parties; (iii) contractual stability, and (iv) absence of intervention exogenous from parties. We will briefly review the sense of each one of these claims. In the first place, contractual will holds a place of privilege in modern contract law. It is the starting point to generate legal effects through the conclusion of a legal transaction; and, if it be the case, a contractual relationship. At the same time, the enforceability of the terms that the parties have established rests, precisely, upon whether they are the results of concurrence of wills. Of course, the manifestation of will is a necessary but not sufficient element to build a contractual relationship, given that the private legal system has participation in both the consti-

2 TARELLO (1995), pp. 47-52.

tution of, as well as the sanctioning of, the agreements entered into by individuals. But, the manifestation of will is indispensable for the birth of a contract, so long as it is not different from the will of those obligated, in substantial terms.

Second, the contractual symmetry means that the parties that enter into, execute, and fulfill a contract are formally situated on a condition of equality. This does not imply that the parties materially have the same faculties and aptitudes between them. Rather, it means that the private legal system supposes that they are formally in a similar position, choosing neutrality in their regulations and impartiality in favor of the individual on the subject matter of contracts. The most immediate reflection of this institutional consideration of equality lies in that all persons are equally capable of concluding a contract, unless legislation establishes exceptions. Classical law of contracts presupposes that there are no substantial differences between the contracting parties that recommend improving the position of one individual with respect to the situation that favors the other. In this sense, the symmetrical location of parties suggests that they have power to negotiate the terms of the contract in a similar way. Accordingly, it is ensured that the process of negotiation gives way to a collection of rights and obligations that have their origin in the free and informed consent of the contracting parties. It deals with evident parity in the contract, where the common context of deliberation of the contractual clauses neutralizes, at the beginning, any intention to impose or exclude that may sustain the better-positioned contractual party. The parties of a contract, for purposes of classic contract law, enjoy a reciprocal correspondence in their positions, powers, and rights.

In third place, we have the stability of the contractual relationship. Given that the contracting parties, as has been shown, are in an equivalent position that allows them to negotiate, make satisfactory decisions, and protect their interests, the contract is validated as a reflection of their common will. By reconciling the preliminary difference of interests in a contractual body accorded by both parties, the contract ensures formal justice of its terms and guarantees stability of its validity in the unfolding of its progressive phases. This view promotes an expectation of continuity of the contractual relationship, pursuant to which the parties are subject to the originally accorded terms, without there being variation or upheavals in the fulfillment of the obligations or satisfaction of their contractual interests. Such claim of stability advocates in favor of maintenance of conditions and contractual effects for a prolonged period of time. As one may intuit, the continuity or permanence of the contract is a less explicit claim, than the primary role of the will of individuals, or the equivalent position under which they concur in the law of contracts; however, it is latent under both claims of classical contract law.

Finally, in fourth place, classical contract law supposes the absence of intervention of someone external to the contracting parties, in their contractual relationship. A collection of freely accorded provisions by parties, and based on a contractual situation with parity, have to maintain themselves at the margin of the danger that their clauses may be altered or that the enforceability may disappear, if the contracting parties have not yet decided. The playing of factors foreign to those that conclude the contract, are mainly, the judge and the legislator. At a first

glance, both would be impeded to review or invalidate the contract once it has been legally concluded by the individuals, under the purpose or protecting and ratifying the validity of some of the traditional claims of contract law, that seem to be stated between the lines. Hence, for example, while a contractual provision may be burdensome for one of the parties, a matter directly related with the inequality of the bargaining power of the contracting parties, this would not be a sufficient reason to justify that the judge ought to intervene in the contract. For this would mean a heteronomous intromission in a contractual agreement that was freely established by the agents. Of course, even in the nineteenth century codifications, there are situations that authorize the judge to invalidate a contract, when the contract has deviated from the conditions for validity that are found in private law, and others that may decree the alteration of certain provisions when they exceed the allowed legal limits, as the case in Chile, for example, with regards to the price of purchase and sale of real estate. But, these are situations that have, by definition, an exception in operation with regards to the general spectrum of contract law.

This brief summary of the nineteenth century claims of contract law, show in which sense their influence allows to understand the general principles of contract law; that is to say, autonomy of the will, contractual freedom, consensualism, the binding force of contracts, privity of contract, good faith, among other considerations that are traditionally presented by private law scholarship.<sup>3</sup> These principles are present in the diversity of contractual figures that the parties conclude, whether they are previously set forth in legislation, or if they are a consequence of the exercise of the power of disposition of the parties in the private legal sphere, validly creating new forms of contracting. At a scholarly level, this plays an important part in the systematization and internal coherency of the law of contracts, given that they regulate the origin, execution, and termination of the contractual relationship, even when the parties do not expressly prescribe that they are subject to such principles.

The connection among the nineteenth century claims of contract law and its fundamental principles is made explicit in the fact that the latter constitutes a way of legally protecting the validity of the conceptual claims of codification on the matter of contracts. Additionally, its justification resides in the value given to will, asymmetry, and contractual stability, along with the resistance in the face of intervention of foreign sources to the will of the contracting parties.<sup>4</sup> In this way, the theoretical principles of freedom of will, contractual freedom, binding force of contracts, and privity of contract, being the main source of emphasis for this work, admit interpretation as legal mechanisms of implementation of nineteenth century beliefs about contractual relationships, in the normal functioning of the law of contracts.

3 More discussion about these basic principles of contract law can be found in LÓPEZ SANTA MARÍA (2010), pp. 191-360.

4 The connection between the theoretical assumptions of the codification, inspired by the Illustration's Philosophy, and the classical principles of contract law, is suggested by the Chilean Supreme Court in the following terms: "[...] the freedom of will is based upon the very principles of the Illustration of freedom and equality that, taken to the legal context, are translated into equality and legal freedom of the parties". *Comercializadora Trade Logic Ltda. con Empresa Kraft Foods Chile* (2011).

By conjugating the mentioned general principles of contractual law, as is known, what is affirmed is that the parties are free to decide to enter or not into an agreement; and if they decide to do so, they are empowered to autonomously configure the terms and the reach of the agreements that they have subscribed. In the same manner, the spectrum of rights and obligations that were agreed upon, it ties those that gave origin to the contract in an unconditioned way and without exceptions, obligating them to integrally fulfill that which they have committed to, as though it were a law. Finally, this binding force of the contract only covers the legal situation for those that have concurred to the conclusion of the contract, and not third parties that are foreign to its birth, and remain at the margin of its legal effects. The contract is a matter that is relative for the parties that enter into it, and at the beginning, only interest them.

In the same manner, the existing coherence among the nineteenth century claims on contracts, and the basic principles of contracting, is reflected in the justification that underlies ones and others, that is to say, individualism.<sup>5</sup> This can be understood in terms of a differentiation between one's own interests and third party interests, in such a way that the earnings and benefits exclusively belong to those that obtain them; and at the same time, losses are solely born by those who suffer them.<sup>6</sup> Their most decisive characteristic is the demarcation between the interests of the agent, and those that belong to other members of the community. A usual understanding of the contract, then, is connected with the rupture of interests; and from that point, the contractual bond is interpreted as a mechanism for the maximizing of utilities that are destined to the creation and transference of wealth. Even though the contract unveils a communion of wills, interests, and purposes, a contracting party may, in principle, appeal to compliance of what has been accorded to satisfy his or her contractual interests, even when this means a harm for the other contracting party, who has agreed to, or is faced with, unfavorable contractual conditions. Beyond the collaborative origin, every contracting party may oversee his or her interests deposited in the contract, without necessarily having to consider the interests of others, for the purposes of configuring the agreement, its execution, and termination.

The separation between one's own interests and those of others, is clearly expressed when one pays attention to the privity of contract rule. The contract, as has been indicated, only governs the behavior of the parties, and does not extend its rules to the individuals that are not parties to the agreement. Therefore, the interests and expectations that comprise the contract are not to be replicated by the rest of society, neither do contractual terms and clauses require stipulation considering the well-being of society at large, or of an individual that is third party to the convention, but that could benefitted by its virtue. The contract is traditionally conceived as a legal transaction between certain individuals, and is apparently disconnected

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5 A critical analysis of the individualistic assumptions genuinely existent in private Roman law can be found in DE MARTINO (2005).

6 In this sense, see KENNEDY (1976), p. 1713.

from the society in which they operate and develop the relationships of exchange. Its validity is not a matter that depends on whether it has been concluded based on a set of values, ideals, or community purposes. Nor does it depend on whether it provides real benefits for society, or that it has been concluded in light of it. Contractual relationships, on the contrary, suppose a fissure between those that enter into the agreement and those that do not, the latter being disconnected both from the effects as well as the motivations that lead them to conclude the contract in the first place.

Given the foregoing, the principle of autonomy of will constitutes a robust indicator of the apparent hegemony of individualism in matters of private law. In particular, the principle of contractual freedom contributes to the crystallization of the regulative ideal of this general principle of traditional contract law.<sup>7</sup> The decision of contracting or not, as well as the decisions relative to with whom one contracts; and finally, which terms and conditions are most beneficial to do so, all implicate matters of exclusive competence of the contracting parties, in which general or social considerations are generally disregarded, that may be directly or indirectly related with the legal relationship that they are concluding. While it is plausible to think of a contracting party that acts with the same self-interest as with the interest of the counterpart, it is difficult to imagine that the parties configure a contractual relationship in light of social ends or purposes. The exercise of contractual freedom is engaged with an individualistic rationality that is pertinent in inter-subjective contexts, and not for ultra-subjective contexts. To demand a contracting party to exercise his or her contractual freedom considering social interests, could qualify, in these terms, as going beyond the obligation itself.

Under these coordinates of analysis, nineteenth century codification was forged, and Latin America became a faithful heir of these theoretical directives.<sup>8</sup> Even though it was passed during the twentieth century, the Brazilian Civil Code of 1916 (hereinafter, the BCC) maintained the individualistic foundation of the institutions that formed the codification movement of the previous century. Hence, the validity of the conceptual claims was reflected, regarding the nineteenth century paradigm in contract law; furthermore, it was admitted without reservation, that the basic principles of contracting espoused by civil law studies were fully valid, even though the texts were devoid of provisions that expressly espoused them.<sup>9</sup> This was a natural consequence of the common qualification that the Brazilian civil scholarship alluded to, regarding the bases of contract law organized by the BCC; this is to say, in terms of embracing a liberal and individualistic concept.<sup>10</sup>

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7 According to Jorge López Santa María, “[t]he doctrine of free will serves as a backdrop of most contractual principles”. LÓPEZ SANTA MARÍA (2010), p. 192. Against founding the classical theory of contracts in the light of the idea of autonomy, see ACCATINO SCAGLIOTTI (2015), pp. 35-56.

8 A skeptic view on the relationship between the Napoleonic Civil Code and the revolutionary individualistic assumptions can be found in GORDLEY (1994), pp. 459-505.

9 The importance and respect of free will and freedom of contract were without any doubt present in a number of provisions of the BCC, such as articles 85, 88, 115, 129 and 1080, among others.

10 See, for example, BRANCO (2011), p. 35.

The Chilean Civil Code (hereinafter the CHCC), valid since 1855, also participates in this individualistic reading. Its connection with individualism is undeniable as of the influx of the Code of 1804, in Andrés Bello's codification project.<sup>11</sup> Its articles contain a handful of legal rules that reflect the basic principles of concluding contracts, even though many of them deal with this indirectly. While autonomy of the will and contractual liberty appear with greater clarity in articles 1437 and 1438, the consensualism that is found in the final part of article 1443, binding force of contracts is expressly guaranteed by article 1545; the privity of contract follows from this legal provision; and finally, contract good faith is set forth in article 1546 of the legal code. From this group of provisions, it is not a trivial matter that article 1545 is jointly considered as a mediate and immediate expression of the principles of concluding contracts, save for good faith.<sup>12</sup> Its prose reveals the unconditional nature of the binding effect of contracts, establishing that "all contracts legally concluded are law for the contracting parties, and the same may not be invalidated without their mutual consent or due to legal causes".<sup>13</sup>

Both legal bodies participate in this individualistic support; therefore, they express their hostility towards interventions in contractual relationships performed by sources that are external to the parties, whether they come from the legislator or the judge. The binding force of the contract is explicitly embraced in these civil codes, which brings certain difficulties for the development or life of a contractual relationship to be altered or extinguished as a result of the decision of a third party with respect to the contracting parties. In accordance with the foregoing, the individualism found in the law of contracts, which is manifestly placed by both nineteenth century claims as well as by the fundamental principles of the law of contracts, also reveals an institutional matter related to the separation of powers. The logical of the contractual relationship excludes the legislator, and mainly, the judge, in the genesis, unfolding, and termination of the agreement. Their influence is severely impeded by the *pacta sunt servanda* that governs the parties, and only them, depriving such bodies of having the powers to review, correct, or leave without effect what has been provided by the parties. Of course, civil legislation contemplates situations in which the

11 From this point of view, TAPIA RODRÍGUEZ (2008), pp. 240-242.

12 VIAL DEL RÍO (2007), pp. 57-58. This is also argued in LÓPEZ SANTA MARÍA (2010), pp. 192-193, 216-218, 223. The connection between article 1545 and the principle of free will has been defended by courts, establishing that this article of the CHCC "[...] is a new norm by virtue of which the binding force of contracts is founded, meaning that the agreements the parties subscribe – given the principle of free will – must be performed, establishing the source and measure of the obligation contracted". *Sociedad de Profesionales Harasic y López Limitada con Sociedad Concesionaria del Elqui S.A.* (2016). For the elaboration of the contractual rule in the Chilean system of contract law, see VIDAL OLIVARES (2000), pp. 209-227.

13 Its immediate antecedent is the French Civil Code's article 1134, according to which "The agreements legally formed will have binding force among the contracting parties". A critical perspective on the intellectual reconstruction that looks at the free will as basis for the binding force of contracts established by CHCC's article 1545 can be found in PIZARRO WILSON (2004), pp. 225-237. A defense of the value of autonomy to justify the binding force of contracts in PEREIRA FREDES (2016), particularly, pp. 87-123.



judge, for example, can modify some conditions and invalidate the contract. However, these interventions are not directly related with the substantial correction of the agreements concluded, nor does it advocate the social purposes that are to be complied with in the contractual relationships. The respect for the law of the contract, carries with it, a sort of isolation from society and from the institutional competencies such as legislative and judicial, with respect to the contractual relationship.<sup>14</sup>

The next section will describe the new law of contracts, which, unlike contract law inspired by nineteenth century thought, is not exclusively made up of individualistic principles. Rather, in its diverse provisions and institutions, it also has established the claims of sociability, by virtue of which the contract should fulfill objectives that exceed the satisfaction of parties' private interests, seeking to contribute positively to the social scheme under which the contract has taken place.<sup>15</sup> With the irruption of this new state of things, the contractual legal relationship must tend to general considerations. And, for this very reason, institutional competencies are granted to ensure the correspondence between the exercising of contractual freedom and the social function that it is to perform.

## 2. NEW LAW OF CONTRACTS AND SOCIABILITY

The path taken by both codes is diametrically different. While the current Brazilian Civil Code of 2002 (hereinafter referred to as the CBCC) replaced the BCC, the Civil Code of Bello stays in full force until today, without detecting clear efforts for a modification of its text with an updated civil text. The substitution of Brazilian legislation provoked a transformation in how contractual relationship is understood, to the extent that the individualistic substantiation that surrounded the BCC was reformulated by a philosophy centered on the ethics and sociability of the legal relationships that permeate various legal rules and institutions of the CBCC.<sup>16</sup> This transit, at the level of substantiation, leads to question whether we are in the presence of a new law of contracts or not, radically opposite to the one designed based on the nineteenth century paradigm of contract law.

The foregoing is made evident when recalling the words of Miguel Reale, who acted as supervisor for the Elaboration and Review Commissions for the CBCC.

14 Similarly, in European contract law can be observed a similar dilemma regarding the relationship between the unrestricted respect for the disciplining of the European Union and the central role that the judge plays, for the sake of determining the content of numerous contractual terms, intervening in the contracting parties' free will. This is especially important for the *Draft Common Frame of Reference*. A study about this situation can be found in GRONDONA (2012), pp. 135-147.

15 The term in Portuguese '*sociabilidade*' is translated here generically as 'sociability'. This is an option in front of the alternative translation 'sociality'. In the same sense, MOMBERG URIBE (2014), particularly, pp. 163-164.

16 On the social, legal and economic scenario in Brazil that preceded the CBCC, see WALD (2010a), pp. 1023-1034. The analysis of the methodological aspects of this codification is emphasized in BRANCO (2011), pp. 347-372. In addition, it is important to keep in mind the influence of numerous institutions established in the Italian Civil Code of 1942, the Portuguese Civil Code of 1966, and the German *BGB*.

According to him, the current Brazilian civil legislation is based on two grand principles: sociability and ethics. The most decisive characteristic of both parameters is its unrelenting opposition to the individualism that marked the previous legal body in Brazil. In his words:

(...) I give preference to the time of the brain and of the heart, especially to the time of the blows to the heart that open one up to an understanding of ethics and sociability, the two basic values of the new codification, which may be summarized as follows: a collection of open norms, under the function of economic, ethical, and social needs of the Brazilian homeland, without the individualism of the previous century, but rather, with the sociability and ethics required in our day and age.<sup>17</sup>

This social reinterpretation of contracts will have an inevitable incidence on the nineteenth century claims about contracts; and, at the same time, on the basic principles of concluding contracts. Both the claims assumed by XIX century codification, as well as those established by the scholarly studies of contractual private law, advance strong tensions with the idea of sociability. And, at certain times, its original conception seems to be deeply cracked. Although a contract has been legally concluded in the interest of both parties, or regardless of whether it was concluded in light of only one of them, its intangibility and validity will be subject to the fulfillment of the social purposes that escape the inter-subjective agreement. As one may gather, this constitutes a challenge for private law scholarship in its purposes of harmonizing the law of contracts, as well as for the theory of private law, particularly the one focused on the philosophy of contracts.

We shall now review three orders of considerations with regards to the new contractual scene in Latin America, pointed by the CBCC. On the one hand, (we will see) the continuity between the constitutional scope and the private sphere under the Brazilian legal system. On the other hand, the principles that render an account of this reinterpretation of the contract in the CBCC. And finally, the technique employed by the Brazilian legislator to endow the jurisdictional body with powers in its intervention in the development of the contractual relationship, when it harms values and principles connected under the notion of sociability.

In the first place, the Brazilian legislator dispersed into civil legislation, values that had been previously captured by the Federal Constitution of Brazil of 1988. In this Fundamental Charter, the unrestricted respect for the values of the dignity of persons and solidarity are established. While the first is established in article 1 number 2, the second is set forth in article 3 number 1.<sup>18</sup> As will be seen, the principles

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17 REALE (2003). Translations from Portuguese are mine, unless stated otherwise.

18 Article 1 number 3 of the Brazilian Federal Constitution establishes that the Federal Republic of Brazil, founded on a democratic rule of law is based upon human dignity among other values. Article 3 number 1, on its turn, establishes that “Building a free, fair and solidary society are fundamental objectives of the Brazilian Federal Republic”.

inserted into the CBCC regarding the law of contracts, are a manifestation of the validity and operability of the constitutional spectrum in private contractual relationships.<sup>19</sup> This interaction on constitutional matters and on the private law matters puts the traditional division with which scholar studies distinguish public and private law to the test. One of the ways in which this demarcation is made, is by protecting the autonomy of private law with respect to public law.<sup>20</sup> However, according to the perspective of the Brazilian legislator, such independence is not effective. For the private contractual regulations must observe the constitutional principles of dignity and solidarity. This presents roadblocks that are necessary to overcome if one wishes to sustain the marked separation between one and the other in legal terms, given that in these terms, the repercussion and connection are direct.

Second, the CBCC consecrates three principles inspired by human dignity and solidarity, that is to say: (i) the contract's social function; (ii) objective good faith; and (iii) contractual balance or equilibrium.<sup>21</sup> The *contract's social function*, which we will develop on later in this work, represents an important novelty to the current civil regulation with regards to contracts in Brazil. It is legally set forth in article 421, establishing a thick limit to the contractual freedom of parties. Of course, this rule was not a part of the BCC, and it hits both the nineteenth century claims on contract law as well as the basic principles sustained traditionally by scholarship on matters dealing with contracts. Its presence is far from accidental, given that, as mentioned by Gerson Branco "article 421 is not an isolated general clause, but rather several clauses inserted into the legal text, with the purpose of realizing the principles that guided the work of codification".<sup>22</sup> As noted, these were the principles of sociability and ethics.

*Objective good faith*, on the other hand, is expressly established in two provisions: articles 113 and 422. The first legal rule establishes that "legal transactions are to be interpreted according to good faith and the uses of the place of its conclusion". The second, on its part, states that the "contracting parties are obligated to respect, both in the conclusion of the contract and in the execution thereof, the principles of probity and good faith." Good faith, in its objective phase, that is to say, that which is relative to the objective standard of loyal behavior of the contracting parties, was not acknowledged in the BCC. Now, however, it enjoys ample operability that covers three dimensions. It fulfills an interpretative work, it serves for the creation of secondary behavior duties for parties, and it justifies and demands sanctions against the abuse of the right.

19 According to Judith Martins-Costa, the connection between the private and constitutional spheres is reflected upon the principle of social function, according to which "[...] it is established, in general terms, the expression of sociability in private law, projecting in its normative bodies and the different legal disciplines the constitutional principle of social solidarity". MARTINS-COSTA (2005), p. 41.

20 For example, WEINRIB (2012), pp. 204-231.

21 I follow here MOMBERG URIBE (2014), pp. 164-167.

22 BRANCO (2011), p. 355.

Finally, contractual balance protects the contractual relationship in that it is developed according to equitable conditions for both parties. This parameter seeks to avoid asymmetry in bargaining power for one of the parties, whether it is excessively favorable terms for one of the parties, or notoriously harmful for the other. And, when such situation of contractual inequality materializes and harms the other party, the demands of contractual equilibrium claim correction through a series of institutions. Although this principle is not expressly acknowledged, it flows from diverse contractual institutions, such as *laesio* (article 157), excessively onerous circumstances (hardship) (articles 317, 478 to 480), and penalty clauses (article 413).<sup>23</sup>

Third, the CBCC used a highly pertinent legislative technique for the type of project that it carried out. Given that it was related to an effort of re-formulating traditional contract law, the use of open and abstract notions such as social function allowed for the integration into it, of a series of hypotheses that could be qualified as expressions of the exercise of contractual liberty that do not tend to, or do not directly attempt against, the social function of the contract. The latter leads one to transfer, within the law of contracts, the institutional importance from the legislator to the judge. The option of using the terms that are not conceptually demarcated, authorizes for a broader interpretative activity, and a more demanding one, on the part of the judicial body, to determine the scope and to adequately apply the legal rule, so as to honor the constitutional principles that, as has been stated, lead to jurisdictional action. In this sense, the redistribution of competencies generated by the CBCC, tilts the balance in favor of the judge, giving him/her a leading role in contract law for that legal system.

Keeping in mind the foregoing considerations, what follows in this work will focus on the social function of the contract. Perhaps this is a point where the three orders of the previously mentioned considerations will come together most conspicuously. Article 421 states the following: “the freedom of contract shall be exercised in light of the limits of the contract’s social function.” As one may see, this provision incarnates the constitutional principles of dignity and solidarity in the contractual context, and transversally disrupts both the conceptual claims of contract law from nineteenth century codification, as well as a large portion of the fundamental principles of contracts. The legislator did not define the expression “*contract’s social function*”, leaving the semantical borders thereof in the hands of the judge.

One aspect that we must pay attention to, even when the legislator does not explicitly state his/her understanding of the social function of the contract, the same acknowledges that the contract must satisfy a role of *that* kind. With this, the legislator wielded a consistent legal treatment between property and the contract, in that both civil institutions are subject to the social function.<sup>24</sup> So that the contractual

<sup>23</sup> An elaboration of the principle of contractual equilibrium in the context of Chilean contract law can be found in LÓPEZ DÍAZ (2015), pp. 115-181.

<sup>24</sup> With regards to property, CBCC’s article 1228 § 1° establishes that “Property rights must be exercised consistently with its economic and social goals”. The correspondence between property and contracts is reinforced by the terms of the *unique paragraph* of the CBCC, according to which “no

bond, under Brazilian civil legislation, is engaged with interests that exceed those that are directly expressed by the contracting parties, and extend the problem of the justification of the contract to those that do not take part in it, suggesting that the contract is a social institution, and its basis is collective rather than strictly private.

If the contract is to adjust itself to the collective parameters and interests, then, the same cannot be interpreted solely on the basis of being an instrument for the benefit of the contracting parties, maximizing their private revenues and utilities. The contractual relationship must also satisfy social demands that the parties need to keep in consideration at the time of concluding the contract, and during its execution and termination phases. These kinds of observations naturally lead to the conclusion that the CBCC articulates a re-understanding of the contract. Its prism abandons the individualism under which private law and the law of contracts were forged, placing the principle of sociability as a pillar of the law of contracts.<sup>25</sup> At the same time, it enables the judge's intervention in the contractual relationship for the sake of safeguarding the observance to contractual terms, with the social end that such convention is intended to achieve.

As Arnaldo Wald suggests, there is an evolution in the manner in which the contract is conceived. In the face of the irrevocable, static, and rigid nature of the contractual relationship sustained by the classical vision, this new vision conceives that the contract possesses a variable and dynamic content, admitting that the contracting parties perform a sacrifice of their private interests. Wald states:

[I]n the past, the contract would allow the parties to avoid all kinds of future risks, guaranteeing immutability in the agreed obligations, and survival of the convention in the case of unforeseen circumstances, even when they substantially alter the contractual equation. Currently, the contract has lost such continuity, but it did gain flexibility, sacrificing some individual benefits in the name of the parties' common interests, and of social interest.<sup>26</sup>

For the purposes of evaluating the challenges imposed by article 421 of the CBCC, as per the comparative studies of contract law in Latin America, let us see the way in which the idea of the contract's social function introduces tension both to the claims of nineteenth century paradigm, as well as to the basic principles of

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agreement will prevail that is contrary to norms of public order, such as those established by this Code to reassure the social function of property and contracts. The social function of property, in particular, was legally acclaimed previously in the Latin American context by the Bolivian Civil Code of 1975 (BoCC herein after). Its article 106 explicitly established that "property must fulfill a social function".

25 The contraposition between the foundations of both private law regulations is put in manifest with the principle of the social function, since this principle, as an "[...] expression of the 'sociability directive' indicates a path to follow, opposed to predatory individualism [...]". MARTINS-COSTA (2005), p. 41.

26 WALD (2010b), p. 591.

contract law. In relation to the former, one indirect way, at least, is that the contract's social function recognizes the frustration of nineteenth century beliefs surrounding (i) contractual intent, (ii) symmetry of the contracting parties; and (iii) contractual stability. As indicated, the XIX century's codification program subscribed to a model that understood the contract as a manifestation of a joint will of the contracting parties, situated in a joint and egalitarian relationship, and from which obligations that continuously unfold forward are assumed, until the parties freely decide to modify them or to put an end to them. On the other hand, the contract's social function unveils the plummet of these claims in a certain way. The contractual relationship does not constitute a concurrence of wills where only the interests of those that conclude the contract are relevant, but rather, they also have to honor social purposes. That contracts are concluded by virtue of a scheme of positions analogous among themselves is also not correct, guaranteeing that the exchange be done under fair conditions. Finally, freely accorded contracts' scope and terms will not necessarily maintain themselves in time once they have been convened, since this will happen in the measure that such provisions adjust themselves to the social functionality of the contractual figure.

This last point related to the loss of stability of the freely configured contractual relationship, flattens out the road to show a more direct counter-position to the idea of the social function of the contract, with regards to the nineteenth century model; that is to say, a refusal against the claim according to which in a contract, (iv) there needs to be an absence of exogenous intervention from individuals other than the contracting parties. The repositioning of the judges role in the origin and development of contractual relationships, enables the latter to act when such interventions precisely guarantee that the contract satisfies its social purposes, and not only fosters the achievement of the individual contracting parties' aspirations. Indeed, the force that appeals to the constitutional principles of dignity and solidarity that are seated in the contract's social function, encourage the judge to intervene in contractual relationships that do not satisfy this function.<sup>27</sup>

Likewise, CBCC's article 421 is more complexly related to the fundamental principles of contract law. From its prose, two tension points arise, one explicit, and the other implicit. The explicit tension is mediated by the connection between the principle of contractual freedom and the contract's social function.<sup>28</sup> Paradoxically, the rule contained in 421 simultaneously serves as consecration and limitation of

27 In Brazilian scholarship, it is not entirely clear that the contract is the adequate mechanism to promote the constitutional value of social solidarity. In this sense, see BRANCO (2012), pp. 113-141. Likewise, it has been argued that the social function of contracts is based upon distributive justice criteria, attempting to implement social justice through contracts. See BENETTI TIMM (2010), pp. 5-51.

28 Of course, even though article 421 makes an explicit reference to the freedom to contract, we must understand this as the freedom of contract, which has two dimensions: the freedom to conclude whether to contract or not and with whom, and also the freedom of internal configuration to determine the contract's content.

contractual freedom in Brazilian contract law.<sup>29</sup> There is no other provision among its articles that independently establishes the social function that it ought to respect. The exercising thereof, then, is irremediably controlled and subject to the satisfaction of the collective interests situated within the contractual relationship.<sup>30</sup> On the other hand, the implicit tension is revealed in the bond between the contract's binding force and its social function. Even though this principle of contract law was not expressly set forth in CBCC's article 421, it is evident that if the contract is to fulfill collective purposes, then the enforceability of its provisions depends, in the end, on the fact that these be satisfied, and not because they have been freely agreed upon by the parties. This base principle of contract law is inevitably weakened, given that it is not unconditional: the contract obligates the parties, as long as they, in turn, observe its social function.

A similar diagnosis may be projected with regards to the privity of contract doctrine. If the contractual bond has interests that are different than those that have been directly or indirectly advocated by the parties, the contract is no longer, strictly speaking, a private matter the frontiers of which are delimited by those that are parties in it. On the contrary, it would be a legal relationship that interests society at large; and, based on this reason, it is necessary to watch over the fulfillment of interests that the collective has deposited in the contractual institution. The marked line between parties and third parties, under the terms of article 421, lack the strength used by classical private law scholarship, or it simply disappears. The privity of contract doctrine, just as the binding force, does not have an express provision in the CBCC, and both principles are to be understood from the social function that is related to them, and which unlike them, are sheltered in the law.<sup>31</sup>

Let us move now to the way in which the social function of the contract has been understood within the Brazilian private legal system. A precaution that is necessary to bear in mind is that the absence of a definition from the legislator of the notion of the social function of the contract, unleashes the fact that its operation is restricted or broadened according to the jurisprudential criteria that is established by the courts of justice, oftentimes running the risk of facing discrepancies or of detecting cases that do not uniformly exist regarding whether or not there is fulfillment of the contract's social objectives; and at the same time, which consequences follow

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29 As an antecedent of special interest about the restriction on contractual freedom under modern codifications within the region, we can mention article 1355 of the Peruvian Civil Code of 1984 (PCC herein after), which establishes the rule and limits of contracting, in the following terms: "The law, for the matters of social, public or ethic interest can establish rules or limits to the content of contracts". The considerations based upon *social, public or ethic interest* are, as can be seen, particularly similar to the principles acclaimed by the CBCC.

30 In this regard, Reale has noted that an explicit directive of the new codification, that should serve "[...] as a conditioning principle of all the hermeneutic process, [is] that the freedom of contract can only be exercised in accordance with the social aims of the contract, implying the fundamental values of good faith and integrity". REALE (1983), p. 123, quoted in BRANCO (2011), p. 352.

31 The privity of contract rule, however, could be deduced from other legal norms, such as articles 247 and 290 of the CBCC.

when this is not the case. In the same vein, Brazilian private law scholarship has attempted to unpack the central considerations that underlie within the contract's social function; and at the same time, delineating their relationships with the fundamental principles of contract law.<sup>32</sup>

Martins-Costa has warned that article 421 encompasses three topical dimensions. In the first place, such legal rule locates the principle of contractual freedom, giving way, generally speaking, to the law of contracts. Secondly, it establishes the social function as a limit upon the freedom of contract. Thirdly, and last, it situates the social function as the grounds for such freedom.<sup>33</sup> Regarding the first point, the connection between autonomy of will and contractual freedom presents difficulties in justifying that which has been set forth in such CBCC's legal rule, due to the fact that the traditional focus of contract law exacerbates the worth of autonomy, in autonomist and voluntarist terms, exempt of restrictions. The contract's social function, then, supposes a difficulty if one wishes to preserve the classical image of private autonomy, from which the freedom of contracting is preached. The way of conciliating the notion of autonomy and the contract's social function, is, according to Martins-Costa, by starting from the notion of "solidary private autonomy"<sup>34</sup>. In this manner, the Brazilian legal system reinterprets private autonomy in contract law, conjugating freedom of contract, the contract's social function, and the responsibilities that emerge from sociability.

The contract's social function, on the other hand, may be analyzed as a limit upon the freedom of contract, according to that which has been established by the CBCC's article 421. The typology of the limitation of this legal clause imposes an external characteristic. However, by conceiving the social function of the contractual relationship as an external limit, that is to say, as a negative barrier that protects the occurrence of an abusive exercise of freedom, the same would be sterile, since it would include the suppositions that are comprehended in article 187 with regards to wrongful acts. Such provision also establishes that "he/she that is the holder of a right that, upon exercising it, manifestly exceeds the limits imposed by its economic or social end, or by good faith or good customs, also commits a wrongful act." As a result, it becomes necessary to determine what the specificity of the contract's social function is, introduced by the current Brazilian legislation, which was related to its role as grounds for freedom of contract.

This final dimension of analysis is related to the expression employed by the legal precept that we have reviewed, according to which freedom of contract is to be exercised in light of the social function. Its meaning expresses two ideas: (i) the integral social function as a way of constituting the exercise of freedom of contract;

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32 The repercussions of the social function of contracts in the Vienna Convention on the International Sales of Goods (CISG), which was subscribed by Brazil in 2012, are formulated in ALMANZA TORRES and PEREIRA RIBEIRO (2014), pp. 267-293.

33 MARTINS-COSTA (2005), p. 42.

34 MARTINS-COSTA (2005), p. 47.



(ii) its basis acknowledges that all contractual relationships carry with them two different dimensions: an inter-subjective dimension related to the contracting parties themselves; and in the same token, another trans-subjective one that refers to the parties' rights and obligations regarding third parties, whether they be determined or undetermined. This unchains the existence of two areas of the contract social function's efficacy, and the possibility that each one of them develop differentiated groups of cases for an application.<sup>35</sup> According to the foregoing, freedom of contract is, under the point of view of the CBCC, based on the social function that serves as a limit; and, at the same time, as sustenance for extending the contract's efficacy to the interests of others that are not those protected by the parties in their contractual relationships. Thus, according to Martins-Costa, "[...] *the social function not only operates as an external limit; it is also an integrating element of the field of the function of private autonomy in the dominion of freedom of contract*".<sup>36</sup>

A characteristic that is particularly interesting is that Brazilian private law scholars' attention, so far, has been mainly captured by the relationship between the contract's social function and freedom of contract. The principles of binding force and privity of contract have not had the same fortune. This is due to two kinds of reasons. First, a conceptual point related to the fact that both contract principles are considered to be consequences of the applicability of freedom of contract in contract law. Second, regarding the base of an exegetic interpretative directive, CBCC's article 421 only mentions the principle of freedom of contract, limiting them in accordance with the contract's social function. But nothing is said regarding the binding force, nor the privity of contracts. This is why the scholars' efforts are focused on reconciling freedom of contract and the contract's social function, and this cannot be necessarily extrapolated to the principles that have been omitted by the legal provision. The problem of interpretation lies in that the eventual reconciliation could be satisfactorily sustained between freedom of contract and the contract's social function, but not the case regarding its binding effect or the relativity of its rights and obligations. It seems that the strategy of conjugating freedom of contract with the contract's social function assumes that the consecration of the latter, would ineludibly limit the binding force and the privity rule of contracts.<sup>37</sup>

35 The groups of cases of both spheres of contractual efficacy would be delineated between them. The *intersubjective efficacy* comprehends (i) contracts that instrumentalize property of productive goods; (ii) contracts that grant one of the parties with essential services; and (iii) the notion of 'communitarian' contracts, establishing a new element to contractual taxonomy. The *trans-subjective efficacy*, on the other hand, covers the cases of (i) external protection of credit; (ii) contracts with personal interdependence; y, finally, (iii) extension of the efficacy to third parties indeterminate and fundamental goods for communities. See MARTINS-COSTA (2005), pp. 50-58. Under this state of affairs, thus, it is hard to maintain the claim according to which contracts are *res inter alios acta* for third parties.

36 MARTINS-COSTA (2005), p. 50. No emphasis added.

37 On the consequences that the social function of contracts provokes to the privity of contracts doctrine, the Superior Tribunal de Justiça de Brasil, has claimed that "[t]he traditional principle of the privity of contracts (*res inter alios acta*), that appeared from centuries as one of the classic thesis of the Law of Obligations during the twentieth century, deserves now to be moderated admitting that agreements between the parties eventually can interfere within the legal sphere of thirs parties – in a

An interpretative alternative the use of which could be evaluated, consists of sustaining that given the radical change in the foundation established by the CBC, moving abruptly from the individualism that was a characteristic part of the BCC, to sociability that is a part of the current civil norms, the total amount of basic contracting principles require reformulation. The hegemonic justification that, from the parameters of individualism, tied the nineteenth century claims of contract law and the basic principles of contracts, suggests that, once the individualist point of view has been abandoned, such observations must be profoundly reviewed.<sup>38</sup> This re-understanding of the contract as understood by the CBC, requires that we put to the test, the traditionally individualistic justification, that have been used to propose the basic principles of contract law by the research carried out by private law; and, therefore, critically evaluate its pertinence to the new state of things. Of course, these principles should not be removed from the law of contracts, but they need to be jointly interpreted in the light of the ‘contract’s social function’, since such notion reflects the best way of changing Brazil’s contract law paradigm.<sup>39</sup>

The situation in Chile, as is known, is far removed from the Brazilian context. The CHCC remains in force, with relatively minor modifications, according to its nineteenth century formation. Therefore, the conceptual claims that were present in XIX century codification are fully assumed. Also, in its contract law, there is a natural opening from different kinds of principles that are central to contracts, even though they do not all have the same express legal presence. Its justification certainly lies on the individualism that was defended by enlightenment philosophy and explicated in the legal scene, for the codification project. This absence of novelty, however, has not only depended, from my point of view, on the deficit of legislative reform, but also on the lack of openness on the part of Chilean private law scholarship and its desirable jurisdictional transfer, with regards to the urgency of problematizing commitments, justifications, and ends of the contract. As we will see in the final section, the Colombian contract system has received important theoretical inputs

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positive or negative way –, hence contracts have the aptitude of extending its efficacy and reaching persons extraneous to the *inter partes* relationship. The mitigations occur through doctrines such as the third party accomplice doctrine and the protection of the third party in the case of contracts that harm him or her, or through the external protection of credit. In all these cases, the good faith and the social function of contracts emerge”. *Caixa Econômica Federal–CEF con Antônio Osmar Teles Monteiro y otros* (2008).

38 In the same terms with regards to private autonomy, the Brazilian Superior Tribunal de Justiça categorically claims: “[...] private autonomy, as it is well delineated in the Civil Code of 2002 (arts. 421 and 422) and already recognized in the Civil Code of 1916, does not establish an absolute principle in our legal system, being relativized, by, among others, the principles of social function, objective good faith y prevalence of the public interest”. *Crystal Administradora de Shopping Centers Ltda. con FI Comércio de Roupas e Artigos de Couro Ltda. y otros* (2016).

39 This point is suggested when we pay attention to the change on the foundations of the law of contracts in Brazil, since “[t]hese conceptions are reinforced if we keep in mind that such contracts are based upon the *social solidarity*, value that is distanced from individualism, but that nowadays returns to the center of contemporary legal systems by express constitutional and legal recognition”. MARTINS-COSTA (2005), p. 54. No emphasis added.

on matters of contract law, and they have been incorporated by case law, without its legislation being different from that of the CHCC of 1855, being furthermore, both works by Bello.<sup>40</sup>

### 3. INFLUENCE, HARMONIZATION AND THEORETICAL CHALLENGES

For the time being, it is only possible to provide some rough conclusions regarding the influence of the CBCC and the social function of contracts in the law of contracts within Latin America. After the reform of Brazilian legislation on private law, in the context of Latin America only the Argentinean Civil and Commercial Code of 2014 (hereafter ACCC) has been promulgated, which is the most recent codification within the continent. Accordingly, the range for comparison is particularly restricted: CBCC and ACCC. Therefore, it may be more useful not to compare in a detailed way the provisions of both contemporary codes, but rather to discuss how the social principles of the law of contracts has permeated in Latin America, widening the spectrum of analysis to other jurisdictions different than CBCC's and ACCC's.

This strategy is pertinent to face three types of issues. First, it helps to ameliorate the strength of an objection that immediately could be raised, according to which the re-formulation established by the CBCC regarding the individualistic foundations of modern contract law has not been recognized comparatively in Latin America, since the next code after the CBCC –the ACCC– did not incorporate explicitly the notion of the social function of contracts, and such notion is necessary if one seeks to reinterpret the foundations of contract law. Secondly, the strategy allows to extend the scope of considerations to private law systems in Latin America which, regardless of being prior to the scheme established by the CBCC, can express dimensions of influence with regards to the principles, philosophy and purposes that underlie the Brazilian codification enterprise. Finally, what is more important for this work, the strategy reveals that a crucial problem that the harmonization efforts on contract law must face in the context of Latin America is the assessment of the commitments and foundations of the law of contracts that seeks to be established. In other words, the question is whether the law of contracts will be preserved under the nineteenth century's individualistic paradigm, or it is urgent to its reinterpretation by the light of the sociability demands in terms of Brazilian law, or exacerbating its altruistic components that can be found in its structure, functioning and contractual practices.<sup>41</sup>

40 A common aspect that is immediately salient with regards to both legal systems is that in contract law matters, the legislator has been especially respectful of the code's text. About this matter and its impact of the formation of the general theory of contracts in Colombia, see MANTILLA ESPINOSA y TERNERA BARRIOS (2010), pp. 611-646.

41 This challenge was correctly demarcated by Rodrigo Momberg in the following terms: "[t]here is no doubt that the CCB of 2002 constitutes a different model to the one dominating the rest of the Latin American codifications, none of which goes so far as acknowledging y concretizing the social princi-

In these terms, it may be better to look out for the justification and substantive commitments of contractual institutions, rather than its explicit formulation or its absence in legislation. Accordingly, two levels of analysis will be elaborated: (i) direct incidence of the social principles in Latin America and (ii) indirect incidence of the social principles in this legal scenario. Regarding the *direct incidence*, the sociability principles, naturally, are only present – for the time being – in the CBCC. The social principles of the new Brazilian law of contracts related with the social function of the contract were already mentioned above. Therefore, it is not necessary to return to these considerations. The *indirect incidence*, in turn, has for our purposes a superior explicative rendering. As was noted before, only the ACCC was promulgated after the CBCC, and the former did not legally establish the social function of contracts that the latter promoted. However, the ACCC did give place to the other principles of the CBCC, namely, the objective good faith and contractual equilibrium.

The objective good faith is widely recognized in the ACCC. It is established in general terms that include all the stages of the contract in article 961 and, additionally, it is reinforced by specific applications of it, such as the good faith duty in preliminary proceedings (article 991), the demand of interpreting contracts according to the intention of the parties and the principle of good faith (article 1061), and the sanction of the abuse of right, understood as an act that violated the ends of the legal system or exceeds the limits established by good faith, morals and good customs (article 10). It is, thus, an operative aspect analogue to the one established by the CBCC.

Just like in the Brazilian context, the principle of contractual equilibrium does not have in the ACCC an explicit formulation. But the applications that this principle has under the CBCC are replicated, with some modifications in its formulation and extent, in the ACCC. As a consequence, we find *laesio* (article 332), excessively onerous circumstances (hardship) under the label of *imprevisión* (article 1091), and the penalty clause *enormis* or disproportionate (article 794). In these institutions the participation of the judge in the contractual relationship is strengthened, since depending on the case, he or she will be able to declare the nullity or modification of the contract – *laesio* –, partial or total termination of the contract – hardship –, or finally, to reduce the excessive penalties that were agreed upon – disproportionate penalty clause. In a similar way, all of these applications of the contractual equilibrium principle suppose a moderation of the binding force of contracts, at least under its understanding as a traditional principle of the law of contracts. The absolute intangibility of the *pacta sunt servanda* is not followed in those cases in which

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ples in private law. The combination of the social function of contracts (article 422), the principle of objective good faith, and the sanction to the abuse of right (article 187) seems very vigorous. *We will have to wait and see whether this new vision of the Law of Obligations and contracts is able to influence the rest of Latin American private law*". MOMBERG URIBE (2014), p. 171. Emphasis added. The place of altruism in the law of contracts, according to a moderate version of it, can be found PEREIRA FREDES (2017). For its understanding based on the agent's acts that is motivated on the consideration of the others' interest, see NAGEL (2004), p. 89.

the assumption of contractual symmetry is violated and, on the contrary, an abuse of a privileged position of one of the contracting parties against the other can be appreciated.<sup>42</sup>

The continuity that is possible to detect among the principles of objective good faith and contractual equilibrium between the CBCC and the ACCC is not, logically, a mere coincidence. Besides the fact that CBCC's article 421 does not have an equivalent rule in Argentinian private legislation, both codes share the same diagnosis: the decline of the nineteenth century's assumptions on contract law demand private law scholars to critically reflect upon the current state of the basic principles of contracts, in the terms in which they were traditionally formulated. For it seems that the need to review the individualism that characterized modern contract law requires to assess under strict scrutiny the foundations, principles and purposes of the law of contracts. Such evaluation might imply or not direct legislative modifications, such as the case of the CBCC, but it might also imply indirect repercussions in the legislation, such as the case of ACCC. The discrepancy about the social function of contracts is only an aspect of the agudization of the diagnosis that both legislations reflect. This explains why the CBCC radically challenged the individualistic foundations of contract law in Latin America and, at the same time, the ACCC followed the same path of its predecessor. Regardless that it did not establish the social functionality of the contractual relationship, it did assume to a great extent the consequences that are followed by this principle and incorporated other social principles that inspired the legislative change in Brazil.

The variability of the radicalization of the critical diagnosis that both the CBCC and the ACCC share is clearly expressed in the binding force of contracts. The ACCC, in contrast with the CBCC, establishes in article 959 the intensity of this fundamental principle of contract law, in terms of its binding effect, in the following terms: "Every contract validly enacted is binding for the parties. Its content can only be modified or terminated by mutual agreement of the parties or in the cases established by the law". Then, article 960 regulates the powers that courts have to intervene the contractual relationship, establishing that "Judges do not have the powers to modify the contractual terms, except in case it is requested by one of the parties when the law allows it, or ex officio when public order is manifestly contravened". The combination of both rules leads us to conclude that the Brazilian functionality of the binding force of contracts is not present there, according to which the contract is binding *as long as* it fulfills its social function. In addition, even though in Argentina the binding force of contracts is expressly formulated and not only assumed like in the case of Brazilian legislation, such principle has been inevitably

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42 The Argentinean legislator established, for example, in the context of the *enormis* penalty clause in the second paragraph of article 794, that the courts' reduction of penalties must be made when their amount seems disproportionate regarding the seriousness of the wrong that they sanction, taking into account the value of the services and other circumstances of the case, *configure an abusive use of the debtor's* situation. This latter consideration is key to account for the distance the ACCC takes from the nineteenth century's paradigm of contract law, and the authorization of the intervention of courts in the contractual agreements of the parties in front of the frustration of its program.

weakened. Therefore, courts have the power to modify the contractual relationship and, in this sense, we mentioned a number of cases in which such result may occur, courts being able even to determine the termination of the contract.<sup>43</sup>

An aspect that must be noted is that ACCC's article 960 authorizes the court to act *ex officio* in the contractual relationship, when it manifestly contravenes the "public order". It cannot be dismissed that this notion, which is strategically formulated in open and abstract terms for its jurisdictional application, ends up playing an equivalent role to the *social function of contracts*. We already know that that the common diagnosis shared by both legislations reveals that the contractual relationship cannot be understood and justified only in terms of individualistic principles, according to which the contract only protects the particular interests of the parties and seeks to maximize the benefits that the agreement reports to them. If the contract is subject to public order parameters, violation of which allows for the intervention of courts, then its justification does not only lie in individualistic claims.<sup>44</sup> Hence, despite the fact that contracts are an expression of the free will and courts must respect the objectives of those who contracted, its binding force *depends* on whether the order public that the contract must respect was violated. The use of expressions such as 'social function' or 'public order' involve a certain mode of reformulating the contract, removing from it its traditional individualistic understanding and justification.

The *indirect incidence* of the social principles in the law of contracts in Latin America can also be articulated in nineteenth century's codes that remain valid in the present, such as the Chilean Code, without need to any major substantive reforms. For this reason, it was already noted the importance of Colombian contract law at the moment of assessing the complexity of the law of contracts and show how it is possible to reinterpret it, from the scholarly and case law development, even though the original formulation of the Colombian Civil Code (CCC hereinafter) is still in vigor. The contractual solidarism thesis is a tendency that has importantly influenced the Colombian private law system. The reality under which the contractual practices are developed and the way in which they have evolved soon reflected deep problems in the assumptions of the nineteenth century's paradigm of contract law. The contract, on its turn, began to be seen as an instrument of inequality among the contracting parties, allowing that one of them abuse of his or her position against the

43 The PCC, on turn, explicitly consecrates the binding force of contracts in the first paragraph of article 1361, establishing that "contracts are binding to all its terms". Despite the fact that this contractual principle is explicitly formulated, it is clearly more moderate, as the fact that the idea of 'the law of contracts' to refer to the binding force is not mentioned shows. Thus, it should be not surprising that the excessively onerous circumstances, for instance, is regulated in articles 1440 to 1446. On the contrary, a different situation occurs in the case of BoCC's article 519, in which the reference to the legal force of contracts is preserved, in the following terms: "The contract is legally binding between contracting parties. It cannot be terminated unless by mutual agreement or in the cases the law authorizes its termination".

44 On this aspect, it is important to recall CBCC's *unique paragraph*, which establishes the mandatory force of *public order* regulations, mentioning precisely the norms protecting the social function of property and contracts as examples.

other's weak position. The solidarism in contract law was created under this inspiration in France, and its aspiration is to formulate a new contractual order.

This view on contract law has received a significant reception in the Colombian system, without involving yet any reform to the CCC. According to Mariana Bernal-Fandiño, “[t]he solidarism seeks to adapt the contractual relationships that do not stand on a basis of equality”.<sup>45</sup> For this, the doctrine focuses its attention to legislators and judges. Given that the contractual inequilibrium facilitates the production of unfavorable contractual conditions for one of the parties and the perpetuation of abuses on behalf of contracting parties situated in a privileged position, this doctrine demands both actors to intervene facing these state of affairs, demanding the materialization of classical contract law discourse. Judges, in particular, must intervene actively to reestablish the contractual symmetry and avoid that contracting parties suffer from abuses. In a similar vein, solidarism incentives reinterpreting basic notions of contract law and establishing new duties to the contracting parties. In this sense, it has been argued that contractual solidarism in three types of contractual duties.<sup>46</sup> These will be briefly examined in what follows.

First, the duty to cooperate assumes that the contract is an instrument of mutual trust and, hence, the creditor exercising his or her contractual rights cannot abuse with his or her demands, being obliged to exercise his or her rights with moderation and in a reasonable way. The judge is authorized to flexibilize and moderate the rigor of specific performance of the contract, and to avoid putting pressure on the debtor.<sup>47</sup> Secondly, the contractual duty of coherence binds the contracting parties to maintain a consistency in their contractual behavior, abandoning a merely strategic rationality directed toward attracting greater profits and benefits from the contract. Regardless that the will of the parties changes and is dynamic, the judge must secure that the contracting parties do not incur in contradictory behavior which, by the service of the satisfaction of their own particular interests, harm the expectations of their counterpart. Thirdly, the duty of loyalty that is connected with the objective good faith focuses its demands on the parties' secondary duties of conduct, such as in the case of some duties to inform that, even though they are not expressly stipulated in the contract, regulate their contractual relationship and must be applied by courts.

It is possible to appreciate that these duties are particularly similar to the demands claimed by the CBCC's principles of objective good faith and contractual

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45 BERNAL-FANDIÑO (2007), p. 18.

46 BERNAL-FANDIÑO (2007), pp. 19-21.

47 In a similar way, in the context of Brazilian law, the Superior Tribunal de Justiça has claimed that the right to terminate the contract cannot be exercised by the plaintiff in a disproportionate way, establishing the preservation of the contract, in the light of the realization of the principles of objective good faith and the social function of contracts. In this regard, see *BBV Leasing Brasil S/A Arrendamento Mercantil con Mauro Eduardo de Almeida Silva* (2011). In the Chilean context, on turn, the abusive use of the right to choose between remedies and its relevance to the configuration of a system of remedies for breach of contracts, that seeks a balance between both parties' interests is analyzed in LÓPEZ DÍAZ (2012), pp. 13-62.

equilibrium, which are directly or indirectly contemplated in Argentinean legislation. An interesting point to be taken into account is that solidarism aims to understand the contractual relationship as a common goal for the contracting parties, stimulating the collaborative connection among the parties for the satisfaction of all their interests and, hence, excluding from it “[...] that adversarial conception according to which the parties’ interests are opposite”.<sup>48</sup> This understanding of the contract is not, strictly speaking, exactly equivalent to the understanding of the contract developed by the CBCC’s social function of contracts, because in this legal context the contractual relationship involves an evident social matter. For this reason the contract does not only involve the parties’ inter-subjective interests, but rather it must satisfy the expectations, interests and goals of the community as a whole. This is what marks the transit from the contractual inter-subjectivity to the contractual ultra-subjectivity.

The solidarism in contracts, thus, is located in an intermediate point between the classical understanding of contract and the understanding elaborate by the CBCC. While solidarism advocates for putting an end to situations of abuse in the context of contracts as a consequence of the assumptions of the dogmas of nineteenth century’s individualism, attempting to correct the asymmetry existent among the parties, the social function of contracts is rather more demanding: it claims the abandonment of individualism in the law of contracts. It is located in the other side and focuses its attention on the foundation, value commitment and aims of contract law. Solidarism seeks to moderate the harmful consequences of contractual individualism and, in turn, the social function of contracts seeks a reformulation of the law of contracts, eliminating its individualistic prism. It is important to note this contrast, since CBCC’s article 421 has been interpreted as a manifestation of solidarism of contract law in Latin America.<sup>49</sup>

Despite this relative difference regarding the extent of their demands, many expressions of Brazilian contract law’s principle of sociability have been incorporated under the solidarism idea. Such incorporation has been facilitated by the great influence that solidarism plays in all the contractual stages, since its aim is to regulate the formation of contracts, their execution and termination. In the formation stage, limits to the freedom of contract have been imposed and duties for the parties to inform have been established, which reject the idea according to which each one of the contracting parties is the best guardian of his or her own interests and, hence, that the other party is entitled to take advantage of the ignorance on the contract’s subject matter or its essential circumstances. In the execution stage, on turn, positive and collaborative obligations are conceived to crystalize the aims of the contract.

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48 BERNAL-FANDINO (2007), p. 22.

49 According to Wald, the social function of contracts established in the Brazilian would be based on the idea of contractual solidarism, along with the theory of *imprevisión* and objective good faith. He says that these three new principles form “[...] the tripod of innovation that can be designated as contractual solidarism”. In this aspect, see WALD (2010B), p. 559. The social function of contracts is also located under the prism of solidarism in BERNAL-FANDINO (2013), pp. 56-57.



An example of this is the incorporation of the *imprevisión* theory and the obligations to renegotiate in the case of change of circumstances that suppose, as has been suggested earlier, a weakening of the *pact sunt servanda*.<sup>50</sup> Finally, in the execution stage it is to incentive that contracting parties have in consideration the interests of the other with regards to the legitimacy of the motives that justify putting an end to the contractual relationship.

I would like to examine now a common point between solidarism in Colombia and the CBCC's perspective, according to which there are no clear frontiers between constitutional law and private law, and the social function of contracts combines the constitutional principles of dignity and solidarity. In the Colombian private law system it has also been accepted the distribution of institutional competencies, strengthening the judge's position within the development of the contractual relationship. In addition, a constitutionalization of the law of contracts has occurred, without any clause been introduced in the CCC similar to the CBCC's article 421 *social functions of contracts* clause. This phenomenon was caused by the direct application of the constitutional principle of solidarity in private law relationships.<sup>51</sup> On this point, it is possible to trace back a decision from the Constitutional Court of Colombia, in which the principle of solidarity was applied in a loan agreement among privates, avoiding that Colombian banks collected the defendant the total payment of the loan, along with the accelerating clauses and moratory interests. The defendant was kidnapped by the FARC, and for this reason he could not comply with his obligations. His defense was not based on the remission of the debt, but rather on a request that the financial institutions provide him with an agreement on how the payment was going to be made, according with this economic and financial situation, since his family had to pay a significant amount of money to rescue him.

The defendant's infringement of human rights was confirmed by the Constitutional Court, and his protective action was granted. Especially, according to the Court, the banks' decision of rejecting to refinance the credits and, on the contrary, their intention to begin executing procedures against him, implied a transgression to the duty of solidarity. The Court sats, as a fundamental principle,

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50 This process was accurately detected by Patrick Atiyah, in terms of the shifting from the reasons in favor of form to the reasons in favor of substance in contract law. Progressively, courts have seen to be willing to *open* the formally subscribed contractual terms, in order to assess substantive considerations that are hidden, as often occurs with the binding force of contracts. On this point, see ATIYAH (1986), pp. 93-120. In the Colombian context, the duty to review contracts has been articulated based on the respect of good faith, contractual equilibrium and the cooperation between the parties. From this point of view, CHAMIE (2008), pp. 113-138. It is important to note that under the CHCC, the duty to re-negotiate the original contractual terms as a consequence of excessively onerous circumstances has been elaborated based upon the principle of good faith established in article 1546. In this sense, MOMBERG URIBE (2010), pp. 43-72.

51 The principle of solidarity is formulated in numerous provisions of the Colombian Constitution of 1991. In this sense, its article 1 establishes that Colombia is a Welfarist State that is founded on "the respect of human dignity, in the work and solidarity among the people who are part of it, and the general interest prevails".

[...] solidarity establishes some parameters of social conduct to particulars that aim to rationalize certain social exchanges. In a social rule of law, the solidarity principle serves the function of correcting systematically some of the harmful effects that social and economic structures have over the politic life in the long term.<sup>52</sup>

The banks' attitude, on the other hand, violated this duty and, hence, violated the constitutional right to equality (article 13) and the defendant's free development of personality (article 16). According to the Courts' prism, the way in which a plaintiff exercises his or her contractual rights is not a matter constitutionally irrelevant, if such exercising can cause a violation of the debtor's fundamental rights. Therefore, the Court intervened in these contracts validly celebrated.

Regardless that the debtor, before his kidnapping, freely subscribed these loan contracts and expressly stipulated the terms and clauses in favor of his creditors, the Constitutional Court maintained the suspension of execution procedures against him, ordered the novation of the contracts, establishing that the credits can only be demanded one year after the person kidnapped were freed, and additionally, that during the kidnapping, and until one year later, the debts the defendant acquired were only to generate remuneratory interests. The Court rejected, thus, the banks' right to collect moratory interests as a consequence of the non-performance. And lastly, the Court prohibited the banks to demand the anticipated payment of the debt, leaving with no force the acceleration clauses established on the loans. The Court reinforced its argument making a reference to different institutions that legally protect the debtor's position, even though their incorporation affects some general principles of the law of contracts. Such institutions "[...] establish limits to the principle of free will in contract law, and specifically, to the principle of *pacta sunt servanda*, forbidding the creditor to demand performance of the obligation to debtor, differing the possibility to execute the obligation, or changing the terms in which the obligation was initially agreed upon".<sup>53</sup>

In these terms, the binding force of contracts is certainly restricted by virtue of the constitutional principle of solidarity. Contracts, thus, are intangible *only to the extent* their terms and obligations respect the demands of solidarity that defends the Colombian Constitutional Court. Otherwise, this court says it has jurisdiction to remedy the contradiction with harmony, cooperation and solidarity that must govern any contractual relationship, intervening in the contract subscribed by particulars as a direct application of the constitutional order. Its purpose is to avoid the infringement of the fundamental rights of any of the contracting parties by the violation of the duty of solidarity. This prism of analysis is interesting because of the fact that the CCC, in its article 1602, encompass the idea that contracts are law for the contracting parties, in the same categorical terms that CHCC's article 1545

52 *Jurgen Huelsz con Banco de Bogotá, Banco BBVA–Ganadero y otros* (2003), M.P. Rodrigo Escobar Gil.

53 *Jurgen Huelsz con Banco de Bogotá, Banco BBVA–Ganadero y otros* (2003), M.P. Rodrigo Escobar Gil.

employs.<sup>54</sup> This theoretical and jurisprudential line of argument, thus, has been progressively moving forward in this contractual legal system, *despite* the binding effect established in the code.<sup>55</sup>

It is not the objective of this work to critically assess the Colombian Constitutional Court's intervention in contractual relationships, nor evaluating the plausibility of its reasons for doing it, but rather only to suggest that the phenomenon of contractual solidarism has permeated Colombian contract law and, in many of its claims, this perspective is equivalent to the main concerns of Brazilian contract law based on CBCC.<sup>56</sup> The distinction between *direct incidence* and *indirect incidence* of the social principles in the law of contracts in Latin America offers some clues to evaluate the complexity of the law of contracts in this legal context and, in turn, to reveal the critical assessment that currently exists regarding the individualistic foundations of this parcel of private law.

We must not lose in sight the fact that, even though the *direct incidence* is only framed by the CBCC, the *indirect incidence* of the social parameters within Latin American contract law expands considerably the validity of its allegations and zones of application. This last form of repercussion is at the frontiers, at least in part, of the ACCC, and also reaches the Colombian system of contracts, even though the CCC still is – in substantive terms – the text forged during nineteenth century's codification. Naturally, the impact of the social principles along with the critical questioning about the assumptions of XIX century's contract law, and the tensions with the fundamental principles of contracts, are more evident in the contemporary model of codification that Latin America is experiencing. But, as we have seen, this reflective process has been installed indirectly based on contractual solidarism in Colombia, without requiring a modification of its legislation. Other legal systems of the region based on nineteenth century's codification, such as the Chilean, have maintained outside of these processes of scholarly and jurisprudential scrutiny. Its main characteristic is the preservation of the conceptual assumptions and principles of contracts that gave birth to modern contract law.

The state of affairs just described posits, in my view, an urgent challenge to the harmonization efforts that, currently, are developed in the context of the Principles

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54 According to article 1602 of the CCC, “Every contract legally subscribed is a law for the contracting parties, and cannot be invalidated unless there is mutual agreement or for legal reasons”.

55 Later on, the Colombian Constitutional Court indicated that the principle of solidarity inspires the behavior of individuals to set the foundations on cooperative coexistence, rather than selfishness, identifying three meanings: “[...] (i) as a behavior standard according to which individuals must act given certain circumstances; (ii) an interpretative criterion for the analysis of acts and omissions of individuals that threat infringing or violate the fundamental rights; and (iii) as a limit to their own rights. *Lizeth Paola Rueda Mejía con Home Care Hospital E.U. y Ecopetrol S.A.* (2014), M.P. María Victoria Calle Correa.

56 A critical analysis of contractual solidarism and the constitutionalization of contractual law in Colombia phenomenon can be found in MANTILLA ESPINOSA (2011), pp. 187-241.

of Latin American Law of Contracts.<sup>57</sup> The legitimate expectation of homogenizing the different legislations on contracts of the continent based upon the aspects and general principles that they held in common, must necessarily face an obstacle that is progressively gaining more importance: the concern about the *foundations* of the current law of contracts in Latin America. An aspect that must be taken into account is that the *direct incidence* of the social principles in contract law, categorically emphasized with the idea of the social functions of contracts, unravels a direct opposition to the individualism inherited from nineteenth century's codification that the law of contracts inherited. And this critical focus, even in a more moderate version, is also an inspiration source of the expressions of *indirect incidence* of the social claims in Latin American contract law, through the acceptance of its demands in the current Civil Code – as in the Argentinean case – or through the theoretical and jurisprudential development promoted by contractual solidarism – like in the Colombian case.

Accordingly, when one seeks to harmonize the law of contracts in Latin America, it must be determined first what is the common identity and foundations by virtue of which this interesting theoretical aim is pertinent. This necessarily requires to face the substantive question on whether the law of contracts in Latin America will keep being based on nineteenth century's individualism or not. And if the answer is negative, such Latin American law of contracts will be based on the principles of contractual solidarism, the more intense principles of sociability crystalized in the social functions of contracts, or on some other normative ideal such as altruism.<sup>258</sup> All of the above principles suppose a reinterpretation of contract law's traditional coordinates. Both the conceptual assumptions of nineteenth century's contract law and basic principles of contracts are tested by this new way of understanding the institution of contracts, their foundations and their purposes.

The binding force of contracts, for example, could be considered a fertile ground to formulate the harmonization of Latin American contract law. However, and as we have seen, is it possible to claim that classic principle of *pacta sunt servanda* is a crystalline and uniform image of current Latin American contract law? While CHCC's article 1545 calls for an unconditional reassurance of this principle, CB-CC's article 421 dismisses the categorical terms under which the contractual binding force was designed.<sup>59</sup> And the *indirect incidence* of the social principles, on the other

57 Regarding this valuable scholarly effort, the collaborative work based on individual reports from Argentina, Brazil, Colombia, Chile, Paraguay, Uruguay and Venezuela, which was coordinated by Carlos Pizarro Wilson, can be found in PIZARRO WILSON (2012).

58 The explicative and justificatory rendering of altruism, as an alternative foundation to individualism, that is also available in contract law, is developed in PEREIRA FREDES (2017).

59 However, one of the usual questions that those who are in charge of this harmonization project has been to determine the way in which the following principles are established in their private law legislation: a) good faith, b) free will, c) binding force, and d) privity of contracts. They also have to explain, additionally, the way in which these principles have been understood and the contractual institutions that they justify. Paradoxically, on the report elaborated to describe Brazilian contract law, it is not noted a possible tension between *pacta sunt servanda* and the social function of contracts that is currently valid law in this private law system. This general clause is neither mentioned with

hand, inevitably relativizes the privity of contract rule.<sup>60</sup> The same diagnosis can easily be applied to the other principles on which harmonization is supposed to be built upon, such as the principle of freedom of contract and the privity of contract rule.

Therefore, the harmonization project of the law of contracts in Latin America is a valuable opportunity to discuss *what is that* contract law shared by the distinct legal systems of the continent. Given the tension between nineteenth century's individualism and the sociability that has influenced the latest codifications, being introduced even in legislations still based on nineteenth century, it becomes necessary to make a second order reflection, connected with the unpacking of *the* foundation and *the* purposes of contract law in Latin America. This task is a matter in which the theory of contract law and the philosophy of private law have much to say. But is a matter that private law scholarship cannot quickly ignore.

Because if legal scholarship ignores these questions, and it is simply assumed that the law of contracts of the continent is satisfactorily based on the assumptions and demands of individualism according to most of current codifications, then, we would have to inevitably resign to the harmonization endeavor of contract law in Latin America. Or at least, we would have to abandon the substantive sense that justifies the project of articulating a common legal system, assigning to it a uniform identity and incorporating characteristics that belong to each of its integrating members. Currently, the law of contracts in Latin America is a conspicuous indicator of the dense complexity of contract law. And the tense coexistence between, on one hand, the unrestricted defense of the binding force of contracts and, on the other, its elimination or moderation based on the social function that contracts should fulfill is no more than a confirmation of this intuition, a poses a challenge to the harmonization agenda.

#### 4. CONCLUSIONS

The promulgation of the CBCC has involved a profound reformulation of Latin American contract law traditionally based on individualism. The tension between the binding force and the social function of contracts illuminates the way in which the contract law is reinterpreted and its foundations and purposes are redefined. The social principles that serve as a basis for this recent codifications has influenced other legal systems of private law of the region, in which the legislation,

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regards to the privity of contracts doctrine. CBCC's article 421 is only analyzed with respect to the principle of free will that explicitly limits the freedom of contract. See PIZARRO WILSON (2012), pp. 117-124.

60 This is shown by the fact that the Chilean legislature has not been indifferent to this process. Recently, it has been sent to Congress a draft bill proposed by the Executive that modifies the CHCC, regarding the judicial review of private law contracts in cases of change of circumstances, incorporating to the code an article 146 bis [Boletín N° 11.204-07]. This draft bill has been critically analyzed by the Supreme Court's plenary session, in Oficio N° 94-2017, Informe Proyecto de Ley N° 13-2017, of June 28<sup>th</sup> 2017.

scholars or case-law have continued the critical path that Brazilian legislation initiated. While other contractual legal systems, such as the Chilean, have invariably maintained their nineteenth century's coordinates.

When we focus our attention to the foundations of the law of contracts in Latin America, it is revealed the importance of the challenge that these harmonization efforts currently developed in our legal context must face. The *new* law of contracts that has moved from the nineteenth century's paradigm of individualism to its justification in sociability or the substantive social principles, offers difficulties to uniformly reassure the law of contracts within the region based on *one* given principle. After all, it is no longer uncontroversial to claim that individualism in Latin American contract law is a matter resolved with a genuine *harmony*.

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