THE PRINCIPLES OF LATIN AMERICAN CONTRACT LAW: NATURE, PURPOSES AND PROJECTIONS

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Abstract
This paper analyses the nature and purposes of the Principles of Latin American Contract Law (PLACL), the most recent international instrument of contract law at a regional level. This work proposes that in addition to the usually assigned purposes of the uniform or harmonized law instruments, the PLACL can also fulfil de function of encouraging the study of comparative law in Latin America, making Latin American contract law visible in the frame of the study of comparative law, and promoting the reform of contract law in Latin America. The work also includes a description of the context and history of the PLACL.

Keywords: *Principles of Latin American Contract Law, uniform law, harmonized law, Latin American private law*

1. INTRODUCTION

The harmonization of contract law is a process that has evolved over several decades, not being something new for those dedicated to the study of private law. Various international contract law instruments –both harmonized and uniform– are nowadays an obligatory reference in works that provide a contemporary vision of contract law. Thus, by chronological order and without trying to be thorough, one can cite the Convention on the International Sales of Goods (CISG), the UNIDROIT Principles on International Commercial Contracts (PICC), the European Principles of Contract Law (PECL) and the Draft Common Frame of Reference (DCFR). Those instruments are certainly of different nature and scope of application, but they all intend to constitute a set of harmonized rules for contract law.

The Principles of Latin American Contract Law (PLACL) are the most recent initiative in this field being their final text recently approved by the academics in charge of their drafting. This work aims to deal with the issue related to the significance of a new harmonized contract law instrument, considering that other already existing instruments could fulfil the same purpose, issue that arose in several forums where the PLACL have been presented. Therefore, this work addresses the

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analysis of what the goals of the PLACLs would be. To that end, the context and the gestation of the PLACL (2), the purpose they intend to fulfil (3) and their nature (4) are examined. Finally, according to the view of the author, the functions that the Principles could perform in practice are exposed.

2. THE PLACL. CONTEXT AND HISTORY

2.1 Context. Contract Law in Latin America

Latin American legal systems are undoubtedly part of the so-called Civil or Continental Law system.[1] The already classic work of Zweigert and Kötz, includes Latin American systems within the Civil law tradition, which includes those systems that follow the French law, particularly the *Code Civil*, as source of inspiration.[2] Likewise, for David, Latin American law belongs to the Romano-Germanic family, particularly to those systems with French influence.[3] Notwithstanding the foregoing, the most modern doctrine began to acknowledge Latin American law as unique, constituting a system of its own within the Civil Law tradition.[4]

Without prejudice to the important influence of the *Code Civil* and French law in Latin American law, it must be bared in mind that its development has always been a combination of multiple foreign and domestic sources; leading to a legal system with its own characteristics.[5] This mixture has been described as the "polycentric nature" of Latin American law, meaning that the Latin American legal culture is constituted by a multiplicity of sources and the circulation of ideas among the countries of the region.[6]

However, despite accepting the existence of a Latin American legal system, there has not been a harmonization or unification process in the region, at least in the case of private law. There was a spontaneous harmonization process in the 19th century during the drafting of the Civil Codes of the new republics- mainly due to the huge influence of the Chilean Civil Code - , which was lost with the new generation of civil codes enacted during the twentieth and even the twenty-first centuries.[7]

1 There are exceptions confirming the rule. For example, Puerto Rico and Guyana can be considered as mixed legal systems, having institutions and characteristics that are part of both the Civil and the Common Law. To this end see Du Plessis (2006).

2 Zweigert and Kötz (1998), p. 113-115.

3 David (1950).

4 Schipani (2006), p. 226; also see Guzmán Brito (2006), p. 187, and Fernández Arroyo (1994), pp. 52-55.

5 Kleinheisterkamp (2008), p. 274, who describes the drafters of the Latin American Civil Codes as "de facto comparatists".

6 Lopez-Medina (2012), pp. 360-361; Schmidt (2017), pp.67-69; Siems (2014), pp. 84-85.

7 To see more about the concept of *generations* in the Latin-American codification process, see Parise (2017).

Thus, the reforms of private law in Latin America during the last hundred years have practically ignored the law of each country, focusing on - and therefore being influenced by - European jurisdictions such as Germany Italy, Spain, or the law of the United States. Moreover, the attempts of harmonization by means of private international law instruments - including the Specialized Conferences on Private International Law or CIDIP - or by means of regional integration agreements, have failed due to several reasons.[8]

2.2. Academic Initiatives of Harmonization of Private Law in Latin America

As explained in the previous paragraph, all efforts of harmonization of Latin American private law, aside from the spontaneous harmonization occurred when the first civil codes of the 19th century were drafted, have failed. Thereupon the academic initiatives of harmonization in private law are welcome. In recent years -and motivated by European harmonization projects - some noteworthy initiatives have emerged, although until recently this did not seem a priority for Latin American academics.

Thus, in 2008 the so called "Grupo para la Armonización del Derecho Privado Latinoamericano" (Group for the Harmonization of Private Latin American Law) was created. It's aim was to develop a Latin American legal model with the purpose of establishing the bases for a Code of Obligations.[9] The last meeting took place in 2011, materializing its work in the book "De las obligaciones en general –Coloquio de iusprivatistas de Roma y América". The book contained several works on the topic and the first draft of a proposal of articles for a Model Code of Obligations for Latin America.[10] The rules are not only about contract law, but also applicable to obligations in general, regardless of their source. However, the text is only a compilation of rapporteur´s individual proposals, stating expressly that some important matters remained to be decided.[11]

Continuing the work of the already mentioned group, the "Grupo para la armonización del Derecho de América Latina" ("Group for the harmonization of the law of Latin America"), GADAL, was set up in 2013. Its purpose was to draft legislative instruments - in the form of codes or model laws - for the harmonization or unification of the law of obligations, reflecting the Romanist tradition and the region´s characteristics, what has been identified as the "Latin American Legal Subsystem". The Group comprises academics from Argentina, Brazil, Chile, Colombia, Mexico, Peru and Venezuela. Until now, the articles on definition, elements, sources and general principles of the law of obligations have been approved. The last meeting

8 For a detailed analysis of the harmonization initiatives in Latin America, see Momberg (2017).

9 The Constitutive Declaration of the Group can be found here: https://drive.google.com/file/d/0B4pfm-dmuycMWi16eXNRMkcwMnc/view

10 Morales and Priori (2012). See also Hinestrosa, Schipani and Navia (2011).

11 See footnote of the proposal in Morales and Priori (2012).

was held in June 2017, where the classification of obligations according to the parties and a questionnaire on specific performance were discussed.[12]

2.3 Latin American Principles on Contract Law

Certainly, the most successful academic initiative so far is the so-called Principles of Latin American Contract Law. Behind this idea there is a group of South American academics - most of them with postgraduate studies in France – with the aim of drafting a set of principles, like the PECL or the PICC, under the sponsorship of the *Fondation pour le Droit Continental* in 2010. The goal was to identify the regional legal identity, improving what was already done by other harmonized law instruments, and consequently, serving as a model for the reform or improvement of the contract law in the countries of the region.[13]

The project was also supported by the Fernando Fueyo Foundation (Chile), with the participation of academics from Argentina, Brazil, Chile, Colombia, Guatemala, Paraguay, Uruguay and Venezuela.

2.3.1 Methodology

Since the main challenge of the PLACL has been to demonstrate that they are, to a greater or lesser extent, not only a duplication of other contract law instruments, such as the PICC or the PECL, a relevant issue was the design of an adequate methodology to determine what the drafters called the Latin American legal identity.[14]

The starting material was collected through a questionnaire about the main aspects of contract law on each country.[15] The main goal of the questionnaire was to make the national *rapporteurs* to provide a description of the status of the contract law in their country, particularly referring to developments in doctrine and jurisprudence. The questionnaire was structured in a way that made possible to include the most relevant matters of the so-called general part of contract law: the general principles (good faith, autonomy of will, binding force and privity) and all the stages of the contractual relation, from the pre-contractual phase to the remedies for breach of contract.

The individual country reports were published in the book *El derecho de los contratos en Latinoamérica. Bases para unos principios de derecho de los contratos*.[16] This book is one of the few works – if not the only one - that provides a general comparative vision of Latin-American contract law. By means of the questionnaire the reader can easily

12 More information of GADAL can be found in http://gadal.uexternado.edu.co/.

13 Pizarro (2012), p. 16; Pizarro (2017), p. 23-24.

14 Pizarro (2012), p. 16

15 In this first stage, academics from Argentina, Brazil, Colombia, Chile, Paraguay, Uruguay and Venezuela took part.

16 Pizarro (2012).

explore the topics of the book, being able to identify the similarities and differences between the included national jurisdictions. Therefore, it constitutes an essential instrument for those looking for an introduction to the study of Latin American contract law.

Based on the materials provided by the national reports, thematic commissions were established. Their mission was to analyse the assigned topics in order to produce a report which included a comparative study of the topic, with comments and a proposal for articles. These reports were presented and discussed in the sessions held by the drafting group – which was organized in commissions - where the final text of each article was approved. The final version of the PLACL was approved in August 2017 and its official publication is expected to take place in the first months of 2018.

2.3.2 Weaknesses and Problems

The PLACL are, without question, an initiative that should be welcomed and could be crucial in the development of Latin American contract law, as it will be explained later. However, its formulation faced difficulties that could unfortunately become weaknesses when projecting PLACL at a regional level.

First, the legitimacy of the principles might be questioned. There is no objection to their academic nature, nor to the quality of the work performed, but the claim that they are Latin American in nature might be questioned. As previously stated, the PLACL, although called "Latin American" are essentially "South American". As explained, almost all academics involved in the drafting come from South American countries with the only exception of the representative of Guatemala, who joined during the last stages of the project. Mexico and Panama, important jurisdictions outside the South American sub-continent, did not participate in the drafting of the PLACL. Besides, some important South American jurisdictions did not participate, such as Peru which because of its Civil Code of 1984 could have offered a relevant contribution to the discussion. Finally, even though Brazil took part in the national reports at the beginning, no representative attended the meetings of the drafting group, and Paraguay attended only occasionally.

This issue is not related to the intrinsic quality of the PLACL. As already explained they constitute an extraordinary work in the field of contract law. However, the legitimacy of the PLACL, as an instrument at a regional level, might become an important problem. The lack of effective participation of representatives from countries like Brazil, Mexico and Peru, constitutes clearly a relevant shortcoming that could impact in the acceptance of the PLACL by the Latin American academic and legal community. This includes lawyers, judges and arbitrators, who could consider the Principles as an alien or artificial instrument.

Another issue is the lack of sponsorship to the project by Latin American institutions. Until now, the project has been developed as a private initiative, supported by the universities to which the involved academics belong, the *Fondation pour le Droit Continental* and the *Fundación Fernando Fueyo*. This could be regarded as an advantage in terms of intellectual independence, but the fundraising for the

development of the project has been complicated. For example, the dissemination of the PLACL has been lower than expected, and it has been based mainly on private initiatives of some academics. Until now there is no web site for the project where background information, data on its participants, studies about the Principles, and most importantly, the text itself, can be found.

As proved by the compared experience, institutional support can be essential for the consolidation of the PLACL. The development and consolidation of the PICC would not have been possible without the support of an international organization such as UNIDROIT, and the same happened in Europe, where the support of the European Commission has been fundamental for the various initiatives for the harmonization of law in that continent. In Africa, the *Organisation pour l´Harmonisation en Afrique du Droit des Affaires* (OHADA), composed by 17-member states, has adopted ten Acts of Uniform Law in various matters of private law, working also on the Uniform Act on contract law.

In this regard, the sponsorship of institutions like the OAS or MERCOSUR could be paramount for the Principles to be consolidated at the regional level. It is true that the Latin American institutional structure –at the level of regional organizations– is far from that provided by the European Union, but anyways there are instances such as the Inter-American Juridical Committee, dependent on the OAS, that could support the work of dissemination and consolidation of the PLACL. Finally, international public and private associations shall not be discarded; for example, in the case of Europe, the creation of the *European Law Institute*; or alliances with organizations such as UNIDROIT or UNCITRAL, which bring institutional support to the Principles.[17]

3. AIMS OF THE PLACL ACCORDING TO THE PLACL

Despite what will be explained in the last part of this paper, the stated purpose of the PLACL is to serve as a model for the improvement or reform of Latin American contract law.[18] This is a rather urgent issue in some countries of the region, like Chile and Colombia, where contract law has not undergone substantial changes in more than 150 years, since the enactment in both countries of the Civil Code of Andrés Bello.[19] Instead, in other countries the need of reform of contract law is not so evident, like in Brazil, whose Civil Code dates to 2002, or Argentina, where a new Civil and the Commercial Code came into force in 2015.

17 As happened, for example, with the request of collaboration from OHADA to UNIDROIT in the project of drafting an instrument about uniform contract law, in charge of Professor Marcel Fontaine. For more references see Bonell (2008), p. 20.

18 Pizarro (2017), p. 24; Momberg (2017), p. 16.

19 In the case of Colombia, a new Commerce Code entered into force in 1971, introducing important changes in commercial contracting, for example, acknowledging hardship or change of circumstances. Likewise, a great amount of special legislation has been enacted in Chile and Colombia to modify the regime of certain contracts originally regulated in the Civil Code, such as leases, pledges or loans; as well as the enactment of special legislation on consumer protection.

Undoubtedly, the reform of a civil code can be long and difficult, as it was the case of Argentina: three reform projects failed at some stage of the legislative process since 1926. Finally, in 2014 the code currently in force was approved. An indirect way to achieve law reforms that may be more realistic and effective than modifying the civil code is by the reinterpretation of the current legislation by legal doctrine and case-law.

As expressly provided the PLACL in its art. 2 (Functions): "(1) These Principles apply to interpret international uniform law instruments and domestic law governing the contract. (2) They may also be used as a model for national or international legislators".

The aim of the rule is that the PLACL should be applied by judges and arbitrators for the interpretation - and eventually supplement – of the uniform or internal law applicable to the case, becoming a kind of Latin American *lex mercatoria*. The availability of a set of regional principles could be an incentive for the courts to use a more "familiar" instrument on which to base their decisions.

This is not exempt of complexities, and it may be difficult to materialize. The eventual opposition to the Principles in terms of their legitimacy as a Latin American instrument was already mentioned. In addition, although in many Latin American countries the application of non-state law has been recognized –or is at least possible– and the application of the CISG and the PICC by ordinary and arbitration courts has increased, it is still far from being a common practice.[20] Additionally, the CISG are an international agreement that, if ratified, becomes part of the domestic law of the country, with legal binding force when its conditions are met.

Another way to implement the PLACL into the domestic law is designating them, by the parties, as the applicable law. Logically, this is also recognized by the PLACL, which states in their art. 1 (Scope of application*) "(2)* These Principles apply when: *a)* The parties subject themselves to them, in part or in full. *b)* The parties have agreed that their contract be governed by general principles of law, the *lex mercatoria*, or the like".

Without entering into discussion about the limitations that the application of non-state law could entail according to the internal law of each country, this way of the PLACL for exercising influence over national law seems to be more difficult. Available data about the application of similar instruments by the parties –like the PECL or the PICC– to their contracts is not encouraging. According to a survey carried out in 2007 among 236 lawyers in the United States, the results showed that for only 20% of them the PICC were familiar. Also, more than two thirds of the lawyers mentioned that they had never used the PICC in their contracts. Likewise, an analysis of 3,955 cases before the Arbitration Court of the ICC between 2000 and 2006, revealed that the parties chose the PICC as the regulation of the contract only once. On 21 occasions, a non-national standard that allowed the eventual

20 Moreno (2011), p. 877.

application of the PICC was chosen (international trade law, internationally accepted commercial practices, etc.). Another study among 380 European lawyers in 2012 found out that only 1% of them had incorporated the PICC frequently into their contracts, 7% occasionally, 16% rarely or almost never, and 75% had never incorporated them.[21]

Considering that the PLACL are a recent instrument, it is complicated for them to constitute an option for the contracting parties. As a first step, it is necessary to go through an arduous work of dissemination and consolidation of an important amount of relevant doctrine and case-law, so that the PLACL become a familiar –and useful– reference for the contracting parties. To include the PLACL –formally or informally– in pre-and postgraduate law courses, may be a way to promote their use and knowledge among the legal community.

4. NATURE OF THE PLACL

As indicated in the previous paragraph, the PLACL aim to be more than a compilation of the state of the art in contract law in Latin America. The drafters intended to provide an instrument that serves as a model for the improvement or reform of contract law in the region, what certainly predetermines the legal nature of the PLACL.[22]

But in addition, something else hinders the PLACL to be only a compilation of contract law in the region. Although Latin American countries share a common legal root, after the codifications of the 19th century, the law of Latin American nations developed independently and separately from that of their neighbours, and even with indifference towards the law from the other countries of the region. In fact, Latin American jurists were mainly focused in European or U.S. law, but not in the law of the countries of the continent. Although legal literature usually resorts to comparative law, the references are commonly addressed to French, Spanish, German or Italian law; but not to Argentine, Brazilian, Chilean or Colombian law.[23]

Because of what was mentioned, it has been very difficult for the drafters to determinate the Latin American legal identity. A general review of the questionnaires used as the basis for the PLACL shows differences among jurisdictions not only in detail, but also regarding significant aspects. These differences have conducted to the classification of each Latin American Jurisdiction, in contract law, as "conservative"

21 The references to the studies can be consulted in Vogenauer (2015).

22 Seems almost unnecessary to mention that the PLACL are a "soft law" instrument, therefore, they are not binding for the parties or the judge, since they have no legitimacy from the political power within the state (internal or national legislation) nor at a supranational level (international treaties).

23 Professor Pizarro states that it is surprising our ignorance about the law of our neighbours. Depending on the place where the professors were trained, each academic can speak about the last Italian Court of Cassation's ruling, about the discussion between such and such French professor written in the *Semaine Juridique*, or even to comment about the assumptions about who will become professor in a prestigious university of Spain. See Pizarro (2012), p. 16

and "progressive".[24] The former ones, like Chile, Colombia, Venezuela and Uruguay, are countries where contract law, at least in its general part, has not been modified since the codification in the 19th century or has undergone only minor changes.[25] In these countries, the *pacta sunt servanda* principle remains totally in force, there is no protection for the weak contracting party and judicial review of the contract is rejected. On the other hand, "progressive" jurisdictions are those with civil codes drafted in the second part of the 20th century and in the 21st century, such as Argentina, Brazil or Paraguay. These legal systems have adopted a rather social and less individualistic orientation, considering important exceptions to the *pacta sunt servanda* principle. Also, they have granted protection to the weak party of the contractual relationship, and allowed the judicial review in cases of serious imbalance of the contract resulting in excessive burden for one of the parties.

The last point can be verified checking some differences between the civil codes of the mentioned countries. The civil codes in Argentina, Brazil and Paraguay expressly admit termination of the contract or its review in cases of *laesio* and change of circumstances; whereas the termination of the contract due to *laesio* is only exceptionally allowed in Chile, Colombia and Uruguay, and the review due to change of circumstances is rejected in Chile and Venezuela and it is exceptionally accepted in Colombia and Uruguay. The Brazilian Civil Code recognizes the "social function of the contract" as a limit to the principle of binding force. This is an open concept that links a contract not only to the private interests of the parties, but also to those of the whole society.[26] Finally, it should be noted that the Argentine Civil and Commercial Code includes the general regulation standard contracts, particularly in consumer contracts.[27]

The approved text shows this tension. For example, Article 9 requires for the formation of the contract not only the consent, but also the object, the cause, and formalities in some cases. This differs from the trend of uniform and harmonized law, which aims to facilitate the formation of the contract, eliminating the need of a cause or *consideration*. But to require a cause or not is not an issue on which exists uniformity in Latin American private law. For example, on the one hand, the cause –as a requirement or element of the contract– was abolished in the civil codes of Brazil and Paraguay, but on the other it appears strongly in the recent Argentine Civil and Commercial Code, which differentiate between the cause of the juridical act (Articles 281 to 283) and the cause of the contract (Articles 1012 to 1014).

24 Momberg (2017), p. 18-19.

25 Even though the Civil Code of Venezuela has been reformed on several occasions, the last in 1982, the obligations and contract rules have been remained essentially the same as in the 1873 Code. See Guzmán Brito (2006), p. 343.

26 Article 421 of the Brazilian Civil Code states that "Freedom to contract shall be exercised on the grounds of and within the limits of the social function of the contract". To see the most relevant characteristics of this Code, see Momberg (2014).

27 Articles 984 to 989 (Standard contracts to predisposed general clauses); Articles 1092 to 1122 (Title III, Consumer Contracts, which includes the regulation of the relationship of consumption, formation of consent, special modalities of contracting and unfair terms).

Likewise, the reference to solemnities (Article 40) shows commitment to formalism - usually present in codes and legislation in Latin America -, which contrasts with the principle of freedom of formalities that prevails in other instruments of harmonized and uniform contractual law.[28] Nevertheless, the PLACL include some legal institutions that show a modern approach in the formation of the contract, like the possibility to include modifications in the acceptance of an offer, allowing anyways the formation of the contract (Art. 25) and to include, under the heading of "Defects of the Contract", gross disparity as a cause for modification or nullity of the contract (Art. 37).

Another example of tension between tradition and innovation is manifested in the regulation of the remedies for breach of contract. The denomination *remedios* (remedies), has been expressly rejected because it is alien to the Latin American tradition, using the name "means of relief"[29] instead and keeping the necessity of judicial declaration in case of essential breach. But on the other hand, non-performance has been objectified and all remedies for breach have been placed – at least formally - on the same level, removing the preference for specific performance, a feature which characterizes many Latin American legal systems.

As has been explained, the lack of uniformity among Latin American national legal systems prevents the possibility for the PLACL of being a mere compilation or restatement. If there is no uniformity, and moreover, if the main purpose of the Principles is to serve as a model for the improvement or reform of the contract law in Latin America, it only remains to consider the PLACL as a proposal on how the general part of contract law should be structured, according to the authors. Therefore, their legitimacy and eventual influence shall not depend on whether they reflect, to a greater or lesser extent, the Latin American legal identity, nor in the existence or lack of political-institutional support, but in the quality of the solutions and rules that they propose. In other words, in their intrinsic merit as a legal instrument. This evaluation is still pending, starting with the publication and dissemination of the Principles.

5. FUNCTIONS OF THE PLACL

Frequently, when referring to the functions or purposes of the uniform or the harmonized law instruments, its use as the law governing the contract is mentioned. Either because the parties have established it expressly or indirectly (for example, referring to the *lex mercatoria*), or because the courts establish it, as a mean for the interpretation of the domestic or uniform law. In fact, the same instruments usually establish these functions in their articles, not being the PLACL an exception (articles 1 and 2). However, as it was already explained, the data show that the parties designate the harmonized non-state law only exceptionally as the one applicable to

28 Vogenauer (2014).

29 Pizarro (2017), p. 25

their contracts. The data about the use of these instruments by the courts is more encouraging. Nevertheless, their use is usually delimited to be only one within a set of arguments to justify a decision (generally, the regulation and the national doctrine), but they are not used as the sole or main rule by which a dispute is solved.

Therefore, it seems interesting to look at other functions of the Principles that despite being less obvious, may be more important or plausible. Bearing in mind that the PLACL are not just a compilation of Latin American contract law –they shall be evaluated on their own merits– I believe that they can fulfil several relevant functions for the development of the contract law in the region.

5.1 Encouraging the study of comparative law in Latin America

As mentioned, in the field of private law the Latin American jurists have traditionally paid little or no attention to the law systems of other countries of Latin America, focusing their interest on European or North American law. In each work or treatise of contract law from a Latin American country, a lot of references to Spanish, French, Italian or German law will surely be found, but none or very few referring to a neighbouring country's law. In this regard, an overview of publications in legal journals would probably show that much more attention has been paid to the reform of the *Code Civil* of 2016 than to the Argentine Civil and Commercial Code of 2015.

The formulation of the PLACL has begun to change this scenario. The merit of the project is that it made jurists from different Latin American countries to work together around the same table, what naturally implied to get acquainted with the particularities and development of the contract law of the home countries of the other participants. Several conferences have been organized to discuss different drafts of the Principles, counting with the participation of lawyers and academics from the different countries of Latin American.

The publication of the final text of the Principles should foster further this emerging trend. Hopefully, Latin American doctrine will react to the Principles creating a corpus of bibliography that analyses the Principles critically, not only from the domestic law perspective, but also from a comparative focus, including the law from other countries of the region. This would increase the analysis of neighbouring jurisdictions and the discussions among Latin American jurists; leading to the beginning of new projects and collaboration instances, and the creation of a Latin American corpus of contract law, a real Latin American *ius commune*.[30]

5.2 Making Latin American Contract Law Visible

Traditionally, Latin American contract law has been disregarded in the study of comparative law. The reference works on the subject are, for example, the treatises of Zweigert and Kötz, and René David, devote few pages to Latin America.

30 In the same sense, Schimdt (2017), pp. 93-94, who sets out that the PLACL could be the starting point for a legal discourse within the region.

Different explanations can be found for this, for example, the difficult access to legal materials from Latin American nations, or the comparatively minor economic relevance of Latin America in the global context.[31] Both explanations are to be considered unsatisfactory, because maybe historically the access to legal materials was difficult for European or North American jurists, but currently, most of the countries of the region have implemented on-line systems, including free access and easy to consult databases of legislation and case-law. Furthermore, the economic argument is not plausible either considering economies like Brazil, Argentina, Mexico or Chile, that have proven to be very attractive for European, North American or Asian investments.

What appears to be the genuine reason for the indifference to the study of Latin American private law is that it has been traditionally considered, by Europe and the United States, as little more than a by-product of French law, ignoring the subsequent developments after the codification of the 19th century.[32] This assumption continues to prevail among the jurists of the northern hemisphere, despite being refuted repeatedly, for instance, describing the Latin American legal systems as mixed, not because of the coexistence of civil law and *common law*, but because of the convergence of influences from French, German, Italian, Spanish and Portuguese law, among others.[33]

The existence, and moreover, the dissemination of the PLACL, could be useful to awake interest of Europe and North America in Latin American private law, especially if its text is translated and Latin American authors start writing in English, the *lingua franca* of the law at an international level. Beyond any question whether the PLACL represent the Latin American identity or if that identity exists at all, that cannot be an impediment for considering the PLACL as a subject of study – and criticism – by Latin American legal doctrine. In fact, to have a Latin American instrument on contract law – that is comparable to the CISG, the PICC, the DCFR or other regional initiatives, implies a visibility for Latin American contract law that did not exist before.

5.3 Promoting the Reform of Contract Law in Latin America

The essential criterion to assess if the PLACL fulfil the abovementioned functions, is the development of a significant number of works aiming to disseminate and analyse the Principles. This was the case of other similar initiatives, like the PICC, the PECL and the DCFR, which have originated not only books or articles in legal journals, but also postgraduate programs and lectures in European universities.

The very existence of this *corpus*, with the consequent increase of knowledge about the law of the Region, for both Latin American and foreign jurists, might

31 Schmidt (2017), p. 59.

32 For references, see Schmidt (2017), pp. 59-60.

33 Schmidt (2017), p. 68.

bring as a direct consequence new opportunities for reflection at an internal level about the need to reform national contract law.

This function is not based on mere speculations. The long process of harmonization of private law in Europe is well known, and although it could be argued that the rejection of the CESL implies that it has formally failed, the influence of the institutional and academic initiatives and instruments on the development of European private law, at a supra-state level (European Union) and at a national level, is undeniable.

The most notably example of this influence has been the recent reform of the law of contract and obligations of the *Code Civil*. It is well known that that part of the Code underwent no changes since it was enacted in 1804, as it was the case of Chile and Colombia. But finally, after several unsuccessful initiatives, a substantial reform of the law of contract and obligations was approved by an *Ordonnance* in 2016. I will not analize the reasons, history and details of the reform, but only highlight a point that could give an insight on a function that the Principles might fulfil.[34]

The influence of the European harmonization process on the aforementioned reform is evident. Not only examining the new regulation, but also because it has been expressly acknowledged in the Official Report whereby the French Ministry of Justice presented the *Ordonnance* to the President of the Republic of that country.[35] It appears to be excessive to affirm that with no harmonization initiatives the reform of the *Code Civil* would not have taken place, but seems correct to affirm that without them, the contents of the reform would have been very different.

The French example is the most paradigmatic one, due to the traditional importance of that legal system at an international level, especially in Latin America, and because of the initial resistance of the French jurists to the idea of a harmonized European private law. However, it is far from being the only instance, being also pointed out the impact that the PECL has had on the reform of private law in the Eastern European countries.[36]

I believe that the best way to measure the success of PLACL should be their influence for the reform and modernization –formal or informal– of contract law in Latin American countries. The Principles could be the starting point for the renewal of contract law in Latin America, just as their drafters intend. Nevertheless, this is only achievable if the PLACL start assuming prominence in the Latin American Law discourse, what entails for their drafters and promoters to keep on working far beyond the already approved text, giving rise to an adequate quantity and quality of literature that validates their legitimacy before the legal community.

34 For a detailed analysis of the amendment, see Momberg (2015); about the final approved text, see Cartwright and Whittaker (2017).

35 Report to the President (2016).

36 For a detailed analysis see Iuridica International (2008).

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