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Latin American Principles of Contract Law: A Critique

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The Latin American Principles of Contract Law (PLACL) are the result of a laudable academic initiative. One of the features that makes this endeavour fascinating is that their drafters claim that it is not an iteration of other harmonisation processes. Rather, it is argued, the PLACL draw on Latin American legal culture, tradition, and identity. From a methodological standpoint, this suggests that the PLACL's drafters adopted a culturalist approach to comparative legal studies. However, unlike other culturalist approaches, such as Pierre Legrand's,[1] the drafters do not emphasize the differences or particularities between the different legal systems under consideration – instead they focus on similarities. I submit that presenting this project as one that embraces the Latin American legal culture is quite demanding. The drafters should provide an account of what the Latin American legal culture is, and then show how the PLACL are rooted in that legal culture. This is critical, because the existence of a unique Latin American legal identity may be called into question. But more importantly, because it is one of the foundations of the project. Against this background, I argue that there is a perplexing indefiniteness regarding the legal culture that the PLACL would express. I shall proceed in three parts. First, I shall identify a methodological problem concerning representation. Second, I shall highlight a problem that stems from a method that focuses only on legal rules, doctrinal analysis, and case law. Finally, I shall question the inexistence of an analysis that identify the Latin American cultural identity.

The method chosen by the working group to identify the Latin American legal culture was that of questionnaires. Accordingly, some members prepared a questionnaire on key issues of contract law, which included questions on matters such as the principle of good faith, freedom of contract, binding force and relative effect of contracts, bodies of law that contain systematic regulation of contracts, body(ies) of law(s) where the formation of consent is regulated, amongst others. The rapporteurs of the countries represented in the working group (i.e., Argentina, Brazil, Colombia, Chile, Paraguay, Uruguay, and Venezuela) answered thoroughly this questionnaire and followed an identical methodology. Furthermore, in their responses, rapporteurs were asked to look at legal rules, doctrinal analysis, and case law, and to avoid references to foreign authors. Their responses were compiled and published in the book titled "El derecho de los contratos en Latinoamerica; Bases para unos principios de derecho en los contratos" (Universidad Externado, 2012). Arguably, this book represents the most significant compilation of the law of contract covering various South American jurisdictions.

Nevertheless, this work raises significant concerns from a methodological standpoint. First, there are problems concerning representation. This is by no means a problem that only concerns the PLACL. Mårten Schultz[2] has raised similar difficulties regarding the Principles of European Tort Law. The reasoning goes as follows: It does not

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[1] LEGRAND (2003).

[2] SCHULTZ (2010).

seem adequate to speak of *Latin American* principles of contract law if their drafting process did not consider the law of *all* Latin American jurisdictions. Or, alternatively, the drafters did not explain why the law of the jurisdictions incorporated in the project would be representative of the Latin American legal culture as a whole. This is no trivial. The project had no rapporteur providing an account of jurisdictions as relevant as Mexico or Perú.

The second problem concerns the questionnaire's methodology, which is clearly unable to identify the Latin American legal culture. The notion of legal culture is undoubtedly complex. However, while legal scholars disagree on various aspects of it, there is agreement that to fully grasp a legal culture we have to look beyond legal rules. It is true that the questionnaire covered doctrinal analysis and case law, but it fell short of incorporating all the elements that impact on the operation of the law. As they are, the questionnaires only reflect the legal system's façade, in circumstances that we need to dig deeper. Thus, those who emphasize legal culture should look also at non-rule elements.[3] What these elements are? There is no single answer. Franz Wiecker[4] takes the view that political and social history are fundamental components in the definition of the European legal culture. Roger Cotterrel[5] suggests that comparatists may look at different elements such as the principles that inspire the different legal systems, the shared beliefs, the ways of thinking, etc. In the book "Comparing Legal Cultures", Jørn Øyrehagen Sunde[6] offers a model that would reflect what he believes is –at least– the surface of legal cultures. He distinguishes between institutional structure and intellectual structure, considering elements such as the idea of justice, the legal method, the degree of professionalization, and so on.

What this brief review of the vast literature suggests is that the concept of legal culture is extremely complex and shall be constructed by looking at several components. Nevertheless, the complexity of the notion does not mean that scholars who invoke it does not have to make clear what elements they are looking at.[7]

Yet, even if we accept that it is possible to evince the legal culture of a country or region by looking only to statutory provisions, doctrinal analysis, and case law, we are confronted with a third problem. This is that the book does not offer any comparative analysis identifying the similarities and differences between the several legal systems involved in the PLACL. Regrettably, the book does not provide a systematization of the similarities between these systems. This would have been the basis for making the case for the alleged Latin American legal culture. Furthermore, the existence of significant differences between these jurisdictions raises serious doubts about the existence of that shared identity. Thus, Rodrigo Momberg[8] argues that the national reports revealed the existence of two types of jurisdictions. On one hand, the so-called "conservative jurisdictions" (Chile, Colombia, Venezuela, and Uruguay) characterised by the preservation of contractual freedom, generally assuming equality between the contracting parties. On the other hand, the so-called "progressive jurisdictions" (Argentina, Brazil, and Paraguay), that implement a more 'socially oriented legislation'. Which of these two groups embodies the

[3] COTTERRELL (2019).

[4] WIEACKER Y BODENHEIMER (1990).

[5] COTTERRELL (2019).

[6] SUNDE (2017).

[7] NELKEN (2016).

[8] MOMBERG (2017).

Latin American legal culture? Or, alternatively, is it the case that there are two discrete legal cultures in the region? Can these differences be reconciled? And if so, how?

Other scholars have already raised doubts as to whether the PLACL are an expression of the "Latin American legal culture". Several reports show that the alleged Latin American legal identity of the PLACL was one of the central issues tackled in 2017, at the conference titled "The Future of Contract Law in Latin America" at Keble College, Oxford. Furthermore, in the book that collect most of those conference papers Jan Peter Schmidt openly posed the following question: "what makes the PLACL 'Latin American', apart from the origin of their drafters?"[9] This question is significant, as it unveils that for a German legal scholar, the Latin American credentials of the PLACL appear unclear. On account of this, Schmidt asked: "what prevented the drafters of the PLACL from simply copying the Principles or [sic] European Contract Law (PECL) or PICC?"[10] To this day, Schmidt's pressing questions remain unanswered.

The final text of the PLACL was published in 2017. Its introduction contains several explicit references to the Latin American legal identity.[11] It asserts, for instance, that there was a "deliberate and conscious effort" to embrace the Latin American "cultural identity". It also claims that the PLACL adopt "certain particularities of the legal tradition and practice in the region". These claims tell us about the belief on the part of the drafters of the PLACL on the existence of a common cultural identity in Latin America, which they deem worthy of consideration. Nonetheless, they leave us with the most important question unanswered: how should the Latin American legal culture be conceptualised? This is perplexing, not least because the authors recognize the "plurality" of legal influences in Latin America, and that the contract law landscape in the region is "rather dissimilar", thus making the Latin American identity "elusive" and "erratic".

To be fair to the drafters, there is a brief reference to the principles that inspire the Latin American legal systems in the PLACL's introduction. These are the principle of freedom of contract, the principle of good faith, and the principle of binding force of contracts. This mention is not trivial if we bear in mind that Coterrell[12] states that one of the elements that one can look at when speaking about legal culture are the underlying principles of a legal system. However, we may ask to what extent are these principles Latin American? While it seems apparent that a principle such as that of good faith, adopted by the different Latin American legal systems, is a distinctive feature of the law of this region when compared to English law,[13] the difference does not stand when it comes to continental European law or the law of the United States. Here it is worth noting that, as Cotterrell argues: "It can (...) be said that to invoke legal culture is always to imply both similarity (within) and difference (between) cultures."[14] So, what are the differences between Latin American and European legal culture?

All in all, despite the praiseworthy academic efforts made by the PLACL's drafters, it is still unclear what is the Latin American legal culture that it would embody. As that the PLACL's final text was already published, some of the shortcomings identified in this piece are hardly remediable. Fortunately, however, there are others that can be improved. In

[9] SCHMIDT (2017).

[10] SCHMIDT (2017).

[11] DE LA MAZA, PIZARRO, ET AL. (2017).

[12] COTTERRELL (2019).

[13] TEUBNER (1998).

[14] COTTERRELL (2019).

2017, Hugh Beale[15] suggested that the PLACL could be supplemented by incorporating comments and comparative notes explaining decisions, similarities, and differences between the legal systems under consideration. Some progress has been made in this respect, but a lot of work remains to be done. Yet, even if this is the case, if we take the idea of legal culture seriously, I suspect that the distinctiveness of the PLACL will continue to be called into question.

[15] BEALE (2017).

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