Comparative Tort Law

Global Perspectives

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20. Tort law in Latin America*

Marco de Morpurgo

1. INTRODUCTION

The purpose of this chapter is to offer a broad comparative picture on the law of torts in the legal systems of Latin America. Latin America represents a vast and very diverse geographical region, comprising more than twenty separate jurisdictions, each of which has its own tort regime, with its provisions, case law and scholarly traditions. This makes it perhaps impossible to give a full account of all tort law regimes that are in place in Latin America, unless it be made in such a superficial way as to be of no or little scholarly interest in this context.

By contrast, this chapter intends to contribute to the understanding of Latin American tort law by showing how this area of the law untangles in the region. Taking a historical and comparative perspective, and deliberately overlooking the details of the individual tort systems, the chapter tries to portray Latin American tort law in its macro-dimensions, identifying common features and particularities that have led to relatively homogeneous systems of tort law across the Latin American region, which nevertheless remain separate and marked by important differences.

Therefore, with the necessary degree of generalization, the chapter will first shed light (in Section 3) on the foundations of tort liability in Latin America. The central part of the analysis is located in Sections 4 and 5, which aim to explain what mechanisms and (macro)forces steer the evolution of tort law in Latin America. However, given that the law does not operate in a vacuum, and may only be fully understood in light of the context in which it operates, Section 2 starts the journey by briefly describing the social and cultural context in which Latin American law operates generally. Section 6 will conclude by closing the circle, bringing back my analysis of tort law in Latin America to the premises set forth in the following opening section.

2. LATIN AMERICAN LAW IN CONTEXT

The expression 'Latin America', as commonly understood, comprises such a heteroeneous medley of realities that it is hard to trace them to one single entity. Very diverse

* The expression 'Iberian America' could be better suited than the more common one 'Latin America' to identify the region that is the subject matter of this chapter, which in fact does not include territories that are both American and 'Latin' but not Iberian (e.g., French Guyana, Louisiana, Quebec). See ÁNGEL R. OQUENDO, LATIN AMERICAN LAW (Foundation Press, 2006), at vi. Keeping this caveat in mind, the chapter will stick to the more common expression 'Latin America'.

political, geographical, social, economic and cultural environments run across the subcontinent, giving shape to a complex and multicoloured giant whose features range from socialist Cuba to US-controlled Puerto Rico, from cold Andean summits to warm Caribbean beaches, from luxury villas to crumbling *favelas* and – why not? – from energetic samba to nostalgic tango.

However, there are some features that allow one to speak of Latin America as a single entity. The Latin American region – as it is considered by most, and as it will be considered here – includes those states and jurisdictions that spread south of the Rio Grande all the way to Cape Horn,[1] and whose territories were historically subject to Spanish or Portuguese colonization. According to many authors, despite some well-rooted and perhaps indelible differences, the countries and peoples of Latin America still share a common history and culture – in addition to a common language, with the possible exception of Brazil – and therefore may be considered as one region as a whole.[2]

Nevertheless, from a sociological perspective, Latin America reveals the persistence of a society that is internally broken into heterogeneous pieces, where different social, ethnic and linguistic groups co-habit the region, often even within the same rural areas or urban conglomerates.[3] Similarly, the region is culturally extremely diverse. On top of an already varied array of autochthonous cultures, colonization and post-colonization practices brought a wave of 'modernization' into Latin American culture. In some cases this has been welcome, while in other cases it continues to be rejected, determining striking contrasts between Western influences and local resistances. On the one hand, indigenous and traditional cultures persist in the mountains, forests and other remote areas, vigorously resisting any cultural product coming from the capitalist world. On the other hand, Western influences – European first, and more recently North American – typically spread in all urban areas of the region, often through the channel of local élites, which are a porous vehicle of diffusion of Western culture in the subcontinent.

All the above shadows are cast over the Latin American legal experience. The legal systems of Latin America are characterized by the co-existence of different layers, which either supplement or stand in a competitive relationship with each other. In addition to the 'official' legal system (i.e., the positive law that can be traced to the authority of the state and its institutions), one or more systems of 'unofficial' law develop in parallel, regulating the social and economic relationships of large shares of the population that live outside of the official system. Overall, this generates a legal experience strongly marked by the phenomenon known as legal pluralism,[4] which –

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[1] Diego López-Medina, *The Latin American and Caribbean Legal Traditions*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW (Mauro Bussani and Ugo Mattei eds, Cambridge University Press, 2012), 344, at 344.

[2] See e.g. RICARDO D. RABINOVICH-BERKMAN, PRINCIPIOS GENERALES DEL DERECHO LATINOAMERICANO (Astrea, 2006), at IX–X.

[3] See already Eva Hunt and Robert Hunt, *The Role of Courts in Rural Mexico*, in PEASANTS IN THE MODERN WORLD (Phillip Bock ed, University of New Mexico Press, 1969), 109.

[4] See MAURO BUSSANI, IL DIRITTO DELL'OCCIDENTE (Einaudi, 2010), at 25–39 and further references therein.

besides being a common feature to all legal systems[5] – is arguably one of the main characteristics of many legal systems of Latin America.[6]

The official legal systems of all Latin American countries share a common evolutionary pattern: they were built on the basis of an imported legal model (i.e., that of the colonizing power), and they to a large extent evolved under the influence of foreign legal models rather than an internal creative legal thought.[7] In particular, the evolution of the official legal sector of Latin American countries can be roughly summarized as follows. Prior to the European colonization, well-established and developed legal systems regulated people's political and economic relationships in the region.[8] When European colonizers settled in Latin America, they essentially ignored any pre-existing legal structure, and attempted to build new legal systems from scratch.[9] Those systems were modelled after the colonizers' law, Spanish and Portuguese, both of which have their roots in Roman law.[10] This process determined the formation of official private law systems that were ultimately based on the Roman law model. The colonial territories in Latin America maintained this basis throughout the entire colonial period.[11] After the New World territories obtained their independence from the European crowns,[12] all newly established republics proceeded to a

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[5] Mauro Bussani, *'Integrative' Comparative Law Enterprises and the Inner Stratification of Legal Systems*, 1 EUROPEAN REVIEW OF PRIVATE LAW 85 (2000), at 93–95.

[6] See Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLORIDA LAW REVIEW 41 (2003), at 84; Marco de Morpurgo, *Sobre un sistema jurídico iberoamericano*, REVISTA DE DERECHO Y JURISPRUDENCIA Y GACETA DE LOS TRIBUNALES, CIV/1, 11 (Editorial Jurídica de Chile, 2007), at 22–23.

[7] See Armando Guevara Gil, *Las causas estructurales de la pluralidad legal en el Perú*, 6(1) GLOBAL JURIST FRONTIERS (2006), at 15.

[8] See JOHN HENRY MERRYMAN AND DAVID S. CLARK, COMPARATIVE LAW: WESTERN EUROPE AND LATIN AMERICAN LEGAL SYSTEMS. CASES AND MATERIALS (Bobbs-Merrill, 1978), at 133 ff. Needless to say, a minority view exists in the literature according to which no laws or legal systems existed in Latin American societies prior to the European colonization. See e.g. Vicente Ugarte del Pino, *Peru's National Report: Legal History and Ethnology*, in JORGE A. SÁNCHEZ CORDERO AND GEORGE BERMANN (eds), LEGAL CULTURE AND LEGAL TRANSPLANTS: LA CULTURE JURIDIQUE ET L'ACCULTURTION DU DROIT (México, D.F., 2012), 749, at 750, 758. This view, which is based i.a. on the (false) assumption that writing is necessary for a legal system to develop, should nevertheless be rejected.

[9] José María Castán Vázquez, *El sistema de derecho privado iberoamericano*, in JOSÉ CASTÁN TOBEÑAS, JOSÉ MARIA CASTÁN VÁZQUEZ and ROBERTO MANUEL LÓPEZ CABANA (EDS), SISTEMAS JURÍDICOS CONTEMPORÁNEOS (Buenos Aires, 2000), 145, at 153.

[10] CARLO A. CANNATA, LA GIURISPRUDENZA ROMANA E IL PASSAGGIO DALL'ANTICHITÀ AL MEDIOEVO (Giappichelli, 2nd ed. 1976), at 89–124.

[11] M.C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA (University of Texas Press, 2004), at 11–76; R.D. RABINOVICH-BERKMAN, PRINCIPIOS GENERALES DEL DERECHO LATINOAMERICANO, *supra* note 2, at 193–196.

[12] All territories of Latin America obtained their independence approximately between 1820 and 1830. For a detailed narrative of the events leading up to each former colony's independence see MARIO G. LOSANO, I GRANDI SISTEMI GIURIDICI: INTRODUZIONE AI DIRITTI EUROPEI ED EXTRAEUROPEI (Laterza, 2000), at 225 ff.

codification of their private law on the basis of the continental European examples.[13] Ever since, the latter legal systems, through their legislators, judges and scholars, have exerted a strong influence on the evolution of private law in Latin America.[14]

As a result of these historical processes, private law (and tort law) in Latin America is mostly based on the civil law tradition.[15] This has led traditional comparative law scholarship, mainly focused on private law, to consider Latin American legal systems as part of the civil law tradition, either *tout court* or as an autonomous unique variation within the civil law tradition.[16] This classification has more recently been challenged by the most advanced comparative law scholarship,[17] but the widespread perception among both Latin American and international jurists is that Latin America belongs to the civil law tradition. Nonetheless, during the course of the twentieth century, we have observed to a decreasing influence of the European models on Latin American private law, and a parallel expansion of the role played by the law of the United States.[18]

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[13] See ALEJANDRO GUZMÁN BRITO, LA CODIFICACIÓN CIVIL EN IBEROAMÉRICA: SIGLOS XIX Y XX (Editorial Jurídica de Chile, 2000).

[14] While the subject matter of our discussion remains within the realm of private law, it should be kept in mind that public law in Latin America followed a different path. At first, during the colonial period, public law developed independently from the law of the colonizing powers to a much larger extent than private law. Then, after the colonial territories obtained their independence, US constitutionalism played a central role in the processes that led to the adoption of republican constitutions by Latin American states. See i.a. Jacob Dolinger, *The Influence of American Constitutional Law on the Brazilian Legal System*, 38 AMERICAN JOURNAL OF COMPARATIVE LAW 803 (1990); Agustín Parise, *Legal Transplants and Codification: Exploring the North American Sources of the Civil Code of Argentina (1871)*, in J.A. SÁNCHEZ CORDERO AND G. BERMANN, LEGAL CULTURE AND LEGAL TRANSPLANTS, *supra* note 8, 71, at 85–86; Rogelio Pérez-Perdomo, *The Reception of Modern Law in 19th Century Venezuela*, *ibid.*, 1097, at 1104–1109; R.D. RABINOVICH-BERKMAN, PRINCIPIOS GENERALES DEL DERECHO LATINOAMERICANO, *supra* note 2, at 200–207. For a thorough discussion of the various channels of influence of the Italian legal model on Latin American legal systems, see SABRINA LANNI AND PIETRO SIRENA (eds), IL MODELLO GIURIDICO – SCIENTIFICO E LEGISLATIVO – ITALIANO FUORI DELL'EUROPA. ATTI DEL II CONGRESSO NAZIONALE DELLA SIRD, SIENA, 20–22 SETTEMBRE 2012 (Edizioni Scientifiche Italiane, 2013).

[15] Mauro Bussani and Ugo Mattei, *Making the Other Path Efficient: Economic Analysis of Tort Law in Less Developed Countries*, in THE LAW AND ECONOMICS OF DEVELOPMENT (Edgardo Buscaglia, William Ratliff and Roberto Cooter eds, Jai Press, 1997), 149, at 166.

[16] See i.a. Phanor J. EDER, A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW (New York University Press, 1950); FELIPE DE SOLÁ CAÑIZARES, INICIACIÓN AL DERECHO COMPARADO (Barcelona, 1954); ENRIQUE MARTÍNEZ PAZ, INTRODUCCIÓN AL DERECHO CIVIL COMPARADO (Buenos Aires, 1960); R. DAVID, LES GRANDS SYSTEMES DE DROIT CONTEMPORAINS (Dalloz, 1964); JOHN H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (Stanford University Press, 1969); J.H. MERRYMAN AND D.S. CLARK, COMPARATIVE LAW, *supra* note 8, at ix; José Castán Tobeñas, *Los sistemas jurídicos contemporáneos del mundo occidental*, in JOSÉ CASTÁN TOBEÑAS, JOSÉ MARIA CASTÁN VÁZQUEZ AND ROBERTO MANUEL LÓPEZ CABANA (eds), SISTEMAS JURÍDICOS CONTEMPORÁNEOS, *supra* note 9, 15, at 74.

[17] See e.g. Jorge L. Esquirol, *The Fictions of Latin American Law (Part 1)*, 1997 UTAH LAW REVIEW 425, where Esquirol offers a detailed critical analysis of David's work.

[18] The first signs of US influence on Latin American private law date back to the 1920s and 1930s, when several Latin American countries introduced the Anglo-American institution of

All this being said concerning the evolution of Latin American law *in the books*, the most striking feature of law in this region – undermining the traditional view of its legal systems as part of the civil law (and Western legal) tradition[19] – is the divide between the official and unofficial sector of the law: by looking deeply into the legal reality of Latin American countries, one notices that the official legal system only reaches certain elements of society.[20] By contrast, large shares of the population never enter the official sector. In these settings, an unofficial legal sector spontaneously arises from social and economic practices.[21] This happens mainly as a consequence of two forces. On the one hand, the uneasy access to the sources of regulation and the high economic barriers to enter the official sector determine that people and business organizations often remain excluded from the latter, and therefore generate a parallel alter-economy, giving rise to their own, independent, unofficial system of law.[22] On the

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trust, under the name of *fideicomiso*: for example, Mexico introduced the trust through a series of statutes of 1924, 1926 and 1932 regulating credit institutions and banking establishments. See ÓSCAR RABASA, EL DERECHO ANGLOAMERICANO (México, 1943), at 448 ff; RODOLFO BATIZA, TRES ESTUDIOS SOBRE EL FIDEICOMISO (Imprenta Universitaria, México, 1954), at 18 ff. Panama introduced the trust with a statute of 1925 upon the support expressed by RICARDO J. ALFARO in his book EL FIDEICOMISO (Panama, 1920). However, Latin American private law started to feel a more comprehensive and overwhelming influence of US law during the second half of the twentieth century. As a consequence of the reform initiatives supported by US foundations and agencies (such as the Ford Foundation and the US Agency for International Development) during the 1960s and 1970s, and by the international financial institutions (mainly the International Monetary Fund and the World Bank) during the 1980s and 1990s, US law became the pole star of legal reform in Latin America. This trend is still in place: today, global actors such as the World Bank, through its 'Doing Business' project, are powerful drivers of private law reform in Latin America. The literature on this phenomenon – broadly categorized under the academic movement of Law & Development – is huge. See, e.g., David M. Trubek and Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development*, 1974 WISCONSIN LAW REVIEW 1062 (1974); John H. Merryman, *Comparative Law and Social Change: On the Origins, Style and Revival of the Law and Development Movement,* 25 AMERICAN JOURNAL OF COMPARATIVE LAW 475 (1977); J.L. Esquirol, *Continuing Fictions of Latin American Law*, *supra* note 6; YVES DEZALAY AND BRYANT GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (The University of Chicago Press, 2002); THE NEW LAW AND ECONOMIC DEVELOPMENT, A CRITICAL APPRAISAL (David Trubek and Álvaro Santos eds, Cambridge University Press, 2006); LAW AND THE NEW DEVELOPMENTAL STATE: THE BRAZILIAN EXPERIENCE IN LATIN AMERICAN CONTEXT (David M. Trubek, Helena Alviar Garcia, Diogo R. Coutinho and Alvaro Santos eds, Cambridge University Press, 2013).

[19] M. de Morpurgo, *Sobre un sistema jurídico iberoamericano*, *supra* note 6, at 22–23.

[20] See HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (Basic Books, 2000); Alfredo Sánchez-Castañeda, *Las tendencias del derecho social argentino en América Latina: Brasil, Colombia, México y Perú*, 99 BOLETÍN MEXICANO DE DERECHO COMPARADO 1209 (2000); Henry J. Steiner, *Legal Education and Socio-Economic Change: Brazilian Perspectives*, 19 AMERICAN JOURNAL OF COMPARATIVE LAW 39 (1971), at 46–55.

[21] See Boaventura de Sousa Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada*, 12 LAW AND SOCIETY REVIEW 5 (1977).

[22] Jonathan Miller, *Products Liability in Argentina*, 33 AMERICAN JOURNAL OF COMPARATIVE LAW 611 (1985), at 635.

other hand, the cultural gaps between traditional societies and the 'modern' world are so significant in some instances that traditional law continues to apply locally, within those social settings that have not caught the train of 'modernization', especially with respect to issues such as property, dispute resolution, intergenerational transfers of wealth and family law, among others.[23] Both of these pressures determine a parallel evolution of an unofficial layer of the legal system, which runs side by side with the official law of the state, sometimes in harmony and at other times in a competitive relationship with it. This phenomenon of marked legal pluralism, which is present to different extents in all modern societies,[24] is an intrinsic and typifying feature when it comes to Latin American law.[25]

3. FOUNDATIONS OF THE LAW OF EXTRA-CONTRACTUAL LIABILITY

Unlike in the common law tradition, Latin American legal systems do not consider 'tort law' as an autonomous body of law or standard legal category.[26] Rather, the law designed to provide relief for persons who have suffered harm from the wrongful acts of others – in line with the civil law tradition – is located within the more general category of 'obligations' within the realm of private law.[27] This body of law is referred to as the law of 'extra-contractual liability'.[28]

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[23] See María Teresa Sierra, *Indian Rights and Customary Law in Mexico: A Study on the Nahuas in the Sierra de Puebla*, 29 LAW & SOCIETY REVIEW 227 (1995); H. DE SOTO, THE MYSTERY OF CAPITAL, *supra* note 20; A. Guevara Gil, *Las causas estructurales de la pluralidad legal en el Perú*, *supra* note 7, at 9; M. Bussani and U. Mattei, *Making the Other Path Efficient*, *supra* note 15, at 166–167.

[24] M. Bussani, *'Integrative' Comparative Law Enterprises and the Inner Stratification of Legal Systems*, *supra* note 5, at 93–95.

[25] See J.L. Esquirol, *Continuing Fictions of Latin American Law*, *supra* note 6, at 84; M. de Morpurgo, *Sobre un sistema jurídico iberoamericano*, *supra* note 6, at 22–23.

[26] M.C. MIROW, LATIN AMERICAN LAW, *supra* note 11, at 216.

[27] See RENÉ DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY (Michael Kindred trans., Louisiana State University Press, 1972), at 109.

[28] As in most of the civil law tradition, the distinction between contractual and extra-contractual liability is still dominant in Latin American scholarship. However, the 'dualistic' approach has been criticized by supporters of a 'monistic' approach to liability, with a view to unifying the two types of liability under a single legal regime. See Félix A. Trigo Represas, *Regímenes de responsabilidad civil contractual y extracontractual en nuestro derecho positivo*, in HOMENAJE A LOS CONGRESOS DE DERECHO CIVIL (Luis Moisset De Espanés et al. eds, Academia Nacional de Derecho y Ciencias Sociale de Córdoba, 2009), 1331. Many civil code reform projects in Latin America have taken the unification of the two types of liability into consideration. In particular, the situation in Argentina is remarkable: while the idea of a unification was first introduced in Argentina by Recommendation No. 16 of the Third National Conference on Civil Law in 1961 (but was not included in the civil code reform project of 1968), the unification was formally proposed for the first time in the reform project of 1987 and, even more clearly, in the reform project of 1993. Ever since, reportedly, there has been an almost unanimous agreement in Argentine scholarship regarding the unification. Nevertheless, this has not been put in place but for some specific areas, such as in mining law or consumer protection.

The law of extra-contractual liability in Latin America originally developed around a general clause in the civil codes establishing liability based on fault (it is the so-called 'monist' system[29]).[30] Indeed, Latin American civil codes typically contain provisions worded after Articles 1382 and 1383 of the French civil code, which provide, respectively, that '[a]ny act of a person which causes damage to another makes him by whose fault the damage occurred liable to make reparation for the damage',[31] and that '[e]veryone is liable for the damage he causes not only by his own act, but also by his negligence or imprudence'.[32] For example, the Argentine civil code contains provisions according to which '[a]nyone who performs an act, which by his fault or negligence causes damage to another, is liable to make reparation for the damage',[33] and that require, for liability to attach, the existence of 'an intentional act, fault or negligence'.[34] The Brazilian civil code, similarly, provides that '[a]nyone who, by his intentional act or omission, negligence or imprudence, violates a right and causes a damage to another, … commits a wrongful act',[35] then establishing that 'anyone who causes damage to another through his wrongful act is liable for the reparation of the damage'.[36] In Peru, the civil code provides that '[a]nyone who causes a damage to another due to his intentional act or fault is liable for the reparation of the damage'.[37] Likewise in Colombia, the civil code reads: '[any]one whose crime or negligence caused damage to another is liable for the reparation of the damage'.[38]

In addition to these general clauses establishing fault-based tort liability, most Latin American legal systems have embodied in their civil codes, since their adoption, a limited number of specific strict liability rules. The classical examples are the provisions of most Latin American civil codes establishing strict liability for damages caused by vicious animals.[39]

The provisions establishing fault-based liability in Latin American civil codes played and still play a pivotal role in the development of tort law, which was built and continues to be built around them. The importance of these provisions is such that they often create the misperception (to those not familiar with comparative legal analysis) that the entire law of torts in Latin American countries is included in these few provisions of the civil codes.

Alejandro Borda, *Unificación del resarcimiento en materia de responsabilidad contractual y extracontractual*, *ibid.* 1359, at 1359, 1365, 1368–1369; Sebastián Picasso, *Unidad de la responsabilidad civil y extensión del resarcimiento*, *ibid.* 1399, at 1415–1418.

[29] Aída Kemelmajer de Carlucci, *Funciones y fines de la responsabilidad civil*, in HOMENAJE A LOS CONGRESOS DE DERECHO CIVIL, *supra* note 28, 1287, at 1297.

[30] M.C. MIROW, LATIN AMERICAN LAW, *supra* note 11, at 215.

[31] Article 1382 French civil code (translation by author).

[32] Article 1383 French civil code (translation by author).

[33] Article 1109 Argentine civil code (translation by author).

[34] Article 1067 Argentine civil code (translation by author).

[35] Article 186 Brazilian civil code (translation by author).

[36] Article 927 Brazilian civil code (translation by author).

[37] Article 1969 Peruvian civil code (translation by author).

[38] Article 2341 Colombian civil code (translation by author).

[39] See i.a. Article 1129 Argentine civil code; Article 2327 Chilean civil code; Article 2354 Colombian civil code; Article 1979 Peruvian civil code.

By contrast, on the one hand, the text of the civil code is only one of the formants of the legal system, and a full account of the law of fault-based liability in Latin America requires considering all other formants – including *inter alia* court decisions and scholarly doctrines.[40] Indeed, on the backdrop of these code rules, a jurisprudential evolution in each Latin American country has given shape to well-elaborated systems of fault-based extra-contractual liability. These systems have maintained the few provisions in the civil codes as the axes of the tort system, but courts have really played the major role in the development of the law, under the constant guidance of legal scholarship.

On the other hand, the second half of the twentieth century has witnessed a crisis of the traditional fault-based tort system throughout Latin America, in favour of the rise of a parallel system of strict liability.[41] As happened across most of the Western world[42] – though likely not to an equivalent extent – industrialization and the introduction of capitalist economies (with mass production and consumption) in Latin America determined significant pressures from the modernizing society on the tort law system.[43] In particular, the Third Industrial Revolution introduced new mechanisms of production, as well as transportation, which in turn posed new risks for society. The traditional fault-based tort system, pivoted around fault as the foundational element of liability, was not ready to cope with such significant social changes. This determined a progressive estrangement from the tort system pivoted around fault. Under the influence of international evolutions in legislation, scholarship and judicial creativity, Latin American legal systems moved away from the 'monist' system towards the creation of a 'dualistic' system of tort liability, performing the coexistence of a basic rule of negligence (fault-based liability) and one of 'objective' (strict) liability.

The way in which this trend materialized in the Latin American legal experience is manifold. In some cases, legislators either adopted changes to the civil codes or introduced stand-alone statutory provisions (either substantial or procedural) establishing strict liability in specific cases.[44] In other cases, the adoption of a parallel strict

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[40] Comparative law scholars define as 'legal formants' the different formative elements of a legal system. These include (at least) statutory declamations, their application by courts and their interpretation by legal scholarship, in addition to other verbalized or non-verbalized elements. See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AMERICAN JOURNAL OF COMPARATIVE LAW 1 (1991), at 21–23.

[41] See e.g. Aurora V.S. Besalú Parkinson, *La responsabilidad civil: Tendencias actuales, la experiencia argentina y su posible proyección al derecho mexicano*, 91 BOLETÍN MEXICANO DE DERECHO COMPARADO 53 (1998), at 54–64.

[42] See CEES VAN DAM, EUROPEAN TORT LAW (Oxford University Press, 2006), at 256; Franz Werro, Vernon V. Palmer & Anne-Catherine Hahn, *Strict Liability in European Tort Law: An Introduction*, in THE BOUNDARIES OF STRICT LIABILITY IN EUROPEAN TORT LAW (F. Werro & V.V. Palmer eds., Carolina Academic Press, 2004), 3, at 13.

[43] M. Bussani & U. Mattei, *Making the Other Path Efficient*, *supra* note 15, at 164.

[44] Jonathan Miller suggests that the best example in Argentine law is the Aeronautical Code, which creates strict liability for all injuries on board an aircraft and sets a monetary cap on liability. J. Miller, *Products Liability in Argentina*, *supra* note 22, at 624. Other examples include the Argentine Mining Code of 1866, Argentine Law 9688 of 1915 on Accidents on the Workplace, and the Mexican Labor Law of 1970. See A.V.S. Besalú Parkinson, *La responsabilidad civil*, *supra* note 41, at 68.

liability regime followed a scholarly and jurisprudential path, not accompanied by any variation of the tort rules written in the codes. In particular, scholars elaborated interpretative approaches allowing the abandonment of fault as a foundational element of a tort claim (e.g., the so-called commentator-created irrebuttable presumptions), which the courts eventually accepted.[45]

The gradual introduction of strict liability rules in all Latin American tort systems has generated an animated debate among legal scholars in the region. However, this debate does not focus on issues such as the implications of this trend on society or the economy, or the viability or desirability of such a trend. Rather, this academic debate mainly reveals itself as a highly formalistic exercise: it consists of an exercise of abstract conceptualization, a dogmatic effort towards the systematization of the legislative or judicial novelties in the world of legal concepts. Independently of which national system one considers, and of the legal instrument actually used to introduce the forms of strict liability (legislation or judicial decisions), in no Latin American jurisdiction have scholars as yet reached an agreement on how these solutions should be defined conceptually.[46] The only common feature of those debates is the centrality therein assigned to the 'risk theory' – according to which whoever creates a risk by his dangerous conduct or use of a dangerous thing is liable for any damages he causes, independently of his fault. This theory – of European origin[47] – did attract much interest and largely inspired all scholarly, judicial and legislative interventions on the establishment of strict liability regimes all over the region.[48]

Leaving aside the theoretical constructs of legal scholarship, let me now give two examples of how far-reaching strict liability regimes established themselves in two Latin American countries.

In Argentina, the original model of the civil code written by Vélez Sársfield, which entered into force in 1871, envisaged a tort system pivoted around the general provisions establishing fault-based liability of Articles 1109 and 1067 (quoted above). In addition, a few specific clauses in the civil code established strict liability for isolated, exceptional cases. This structure remained in place in Argentina for approximately one century, without being affected by the additional isolated hypotheses of strict liability introduced by the legislator via statutes regulating specific areas, such as the Mining Code of 1866 and the Aeronautic Code of 1954.[49] The reform of the civil code introduced by Law No. 17711, in 1968, broke with the original structure designed by Sársfield. Among other changes, this reform amended the civil code by adding the following language to Article 1113:

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[45] J. Miller, *Products Liability in Argentina*, *supra* note 22, at 623; and, more in general, A.V.S. Besalú Parkinson, *La responsabilidad civil*, *supra* note 41.

[46] The main division is between those who speak of an introduction of strict liability, and those who prefer speaking of a simple (procedural) shift of the burden of proof concerning fault. See e.g., on the debate in Argentina, HOMENAJE A LOS CONGRESOS DE DERECHO CIVIL, *supra* note 28, at 1511–1595.

[47] Compare François Geny, *Risques et responsabilité*, in REVUE TRIMESTRIELLE DE DROIT CIVIL, 1902, II, 812 ff.; M. TEISSEIRE, ESSAI D'UNE THÉORIE GÉNÉRALE SUR LE FONDEMENT DE LA RESPONSABILITÉ (P.U. d'Aix, 1901).

[48] A.V.S. Besalú Parkinson, *La responsabilidad civil*, *supra* note 41, at 57–73.

[49] *Ibid.* at 68.

> [i]n the event of damages caused by things, the owner or custodian, in order to exclude his liability, must prove that he was not at fault; but if the damage were *caused by the risk* or defect of the thing, he will only exclude his liability by proving the fault of the victim or that of a third party for which he is not responsible. (Emphasis added)[50]

Importantly, this reform introduced for the first time a general provision establishing liability not on the basis of fault, but on the basis of the objective element of *risk*. Argentine legal scholarship is divided on the nature of this form of liability: according to a majority opinion, the new Article 1113 introduces a form of strict liability;[51] according to a minority of scholars, the new provision only establishes a system of presumptions, which shifts the burden of proof concerning the defendant's fault while also increasing the immunity threshold.[52]

In Brazil, the old civil code of 1916 contained a general provision (Article 159) establishing tort liability based on fault. In addition, a few isolated instances of strict liability were provided for, both in the civil code[53] and in special statutory laws outside the code.[54] The new Brazilian civil code of 2002 confirmed this fundamental approach to tort liability. However, it introduced an important novelty: in addition to the general provisions establishing fault-based liability (Articles 186 and 927, discussed above), and a series of single instances of strict liability regulated in either the code or statutes, the new civil code of 2002 introduced (following the Italian model to be found in Article 2050 of the Italian civil code) a general, residual provision establishing strict liability for highly dangerous activities. In particular, Article 927, sole paragraph, now reads: '[l]iability to make reparation for the damage will arise, *independently of fault*, in the cases specified by the law, *or when an activity normally performed by the author of the damage implies, for its own nature, a risk for the rights of others*' (emphasis added).[55]

In both Argentina and Brazil, as well as in other experiences in the Latin American region,[56] the pressures of a modernizing society on the tort systems determined an

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[50] Article 1113 Argentine civil code (translation by author).

[51] Juan José Casiello, *El avance de los factores objetivos de responsabilidad extracontractual: Sumaria mirada comparativa sobre dos códigos de América Latina y los Proyectos de reforma del Código Civil Argentino*, in EL DERECHO PRIVADO ANTE LA INTERNACIONALIDAD, LA INTEGRACIÓN Y LA GLOBALIZACIÓN (Atilio A. Alterini and Noemi L. Nicolau eds, La Ley, 2005), 269, at 272–273; Rodrigo Padilla, *Algunas consideraciones sobre la llamada 'responsabilidad' si culpa*, in HOMENAJE A LOS CONGRESOS DE DERECHO CIVIL, *supra* note 28, 1511, at 1544. As Argentine judge and scholar Sebastián Picasso reported in private correspondence with the author, Argentine courts have unanimously adopted this prevailing interpretation.

[52] See e.g. Benjamín Moisá, *El enigma del Artículo 1113*, in HOMENAJE A LOS CONGRESOS DE DERECHO CIVIL, *supra* note 28, 1547, at 1565–1568.

[53] E.g. Articles 1518 ff. Brazilian civil code 1916.

[54] Examples include the statutes regulating rail transportation (Decree 2681/1912), mining (Law-Decree 227/1967), nuclear activities (Law 6453/1977) and air transportation (Law 7565/1986).

[55] Article 927 Brazilian civil code 2002 (translation by author).

[56] See e.g., on Colombia, Natalia M. Bartels and M. Stuart Madden, *A Comparative Analysis of United States and Colombian Tort Law: Duty, Breach, and Damages*, 13 PACE INTERNATIONAL LAW REVIEW 59 (2001), at 79–82.

expansion of the role of strict liability with respect to the traditional regimes, which envisaged a general rule of liability for fault, supplemented by a few, isolated strict liability rules.[57]

As a consequence, many legal scholars in Latin America now share the view that two general principles, one relying on strict liability and the other on fault, run in parallel across the tort regimes of the region.[58]

4. JUDGES, SCHOLARS AND LEGISLATORS: AN(OTHER) EXAMPLE

Every legal system is shaped by the continuous and intertwined movement of its legal formants, which determine the evolution of the law in all of its substantive areas.[59] For example, a legislator may adopt a very advanced normative solution (e.g., importing it from another country), which legal scholarship then interprets, tracing the contours of the new legal rule, thus providing guidance to the courts. It may also happen that courts set a new precedent, scholarship makes sense of it systematically or criticizes it, and then the legislator issues a statute with a view to clarifying the law. Finally, legal scholarship may be the driving force of change, suggesting solutions that become the basis for court decisions, eventually inspiring the legislator.

Many argue that the evolution of tort law in Latin America, as elsewhere, is jurisprudential.[60] This is certainly true, because courts have been true creators of legal rules by adjudicating cases. The picture is more complex, though. Once it is recalled that the jurisprudential path that shapes Latin American tort law is constantly enlightened by the civil codes' and statutory provisions, what is most important to note is that Latin American judges think, act and rule under the vigorous drive of legal scholarship. In fact, legal commentators in Latin America have great influence and often develop a topic far beyond the letter of the law or court opinions, in effect making the law in that field.[61]

Therefore, tort law in Latin America is not only the product of judicial adjudication. Rather, to use a metaphor, it has evolved as in a trio dance between judges, scholars and legislators. As elsewhere in the civilian world, the prevailing pattern in the evolution of Latin American tort law shows how, on the basis of a few civil code provisions, an ebb and flow of scholarly debate and lines of case law – always maintaining the civil code as the main authority – have given shape to constantly evolving operative tort rules throughout the decades. Moreover in some cases, under the influence of legal scholarship, legislators have intervened with civil code reforms or

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[57] See also NEHEMIAS DOMINGOS DE MELO, DA CULPA E DO RISCO: COMO FUNDAMENTOS DA RESPONSABILIDADE CIVIL (Atlas, 2nd ed. 2012).

[58] B. Moisá, *El enigma del Artículo 1113*, *supra* note 52, at 1563; RAMÓN DANIEL PIZARRO, RESPONSABILIDAD CIVIL POR RIESGO CREADO Y DE EMPRESA (La Ley, 2006), at 123 ff.; GUILLERMO A. BORDA, LA REFORMA AL CÓDIGO CIVIL (Perrot, 1971), at 212 ff.

[59] See *supra* note 40.

[60] M.C. MIROW, LATIN AMERICAN LAW, *supra* note 11, at 194.

[61] J. Miller, *Products Liability in Argentina*, *supra* note 22, at 614.

statutory law, followed in turn by the creative forces of scholarship and courts, in incessant evolution.

Our discussion in Section 3, concerning the foundations of tort liability and the gradual passage from a 'monist' regime of fault-based liability to a 'dual' regime where fault-based and strict liability cohabit the tort system, has already offered some illustrations of this pattern. The remainder of this section aims to give a second example of these evolutionary dynamics by analysing the development of another classical problem in tort law:[62] the possibility for tort victims to recover damages for immaterial harms.

Before entering this discussion, however, a few introductory words on damages in Latin American law are expedient. In general, and from a high level perspective – necessary when attempting to depict a single picture representing over twenty separate jurisdictions – a plaintiff must establish at least the following elements in order to establish a tort claim: a foundation of liability (either fault or an 'objective' element), causation (both factual and legal) and a harm, which plaintiff suffered and for which plaintiff asks compensation. Various notions of damage exist in Latin American tort law. One major distinction is between economic and non-economic damages. The former are subject to assessment in monetary terms, and can be further divided into 'out-of-pocket expenses' and 'loss of earnings' that are the consequence of a tortious act. Non-economic damages (also known as immaterial, non-pecuniary or 'moral' damages), by contrast, are *per se* not fit for such evaluation. Rather, it is up to the judge to quantify the amount of immaterial damages, in some cases with the support of some pre-set guidelines.[63] Importantly, in the Latin American legal tradition the purpose of tort law is to compensate the victim for the actual (and proven) damages suffered, and not in any way to punish the tortfeasor. Therefore, punitive damages are generally not contemplated.[64]

Immaterial harms, also referred to as non-economic or non-pecuniary harms, are the types of harms roughly equivalent to the common law concept of 'pain and suffering'.[65] A constant pattern emerges from the observation of the Latin American experience in this area: starting from fairly restrictive provisions in the civil codes regarding the possibility to recover immaterial damages, a gradual expansion of this possibility has taken place through the work of legal scholarship, judges and legislators. In order to illustrate this pattern, I will focus once again on the experiences of Argentina and Brazil.

It is important to start by specifying that the Latin American legal systems built upon the traditional approach – inherited from Roman law and also typical of continental

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[62] M. Bussani and U. Mattei, *Making the Other Path Efficient*, *supra* note 15, at 161.

[63] Jorge Mario Galdós, *'Cuánto' y 'quién'" por daño moral*, in HOMENAJE A LOS CONGRESOS DE DERECHO CIVIL, *supra* note 28, 1659, at 1673; N.M. Bartels and M.S. Madden, *A Comparative Analysis of United States and Colombian Tort Law*, *supra* note 56, at 89.

[64] N.M. Bartels and M.S. Madden, *A Comparative Analysis of United States and Colombian Tort Law*, *supra* note 56, at 86–87; M.C. MIROW, LATIN AMERICAN LAW, *supra* note 11, at 216; see also M. Bussani and U. Mattei, *Making the Other Path Efficient*, *supra* note 15, at 161.

[65] N.M. Bartels and M.S. Madden, *A Comparative Analysis of United States and Colombian Tort Law*, *supra* note 56, at 89.

European tort law[66] – according to which non-economic damages are normally not subject to reparation. This approach is justified on the theory, once dominant, that private law only ought to serve the protection of economic interests. Accordingly, non-economic interests are not legally relevant except in limited and defined cases with a foundation in criminal law.[67] Yet, with the passage of time and the evolution of society, tort law became gradually distanced from such traditional view. Thanks – once again – to the interplay of advances by legal scholarship, courts and legislators, and in a process where in some cases national constitutions also played a role,[68] tort law progressively opened to the possibility for tort victims to recover for immaterial damages.

In Argentina, prior to the 1968 reform of the civil code, Article 1078 of the code provided that the obligation to make reparation for a tort included immaterial damages 'only if the damage was caused by a felony regulated by criminal law'.[69] Until the 1950s, a restrictive approach to this provision was dominant in the scholarly debate. Authors such as Aguiar[70] and Orgaz,[71] among others, supported an interpretation of Article 1078 strictly in accordance with the letter of the law, and this was ultimately the interpretation adopted by courts. During the 1950s, a new wave of legal scholarship opened the door for a broader reading of Article 1078.[72] This body of scholarship supported an interpretation of Article 1078 that would overcome the limit imposed by the letter of the law, extending the reparation for immaterial harms to all cases of wrongful conduct, including those covered by the general provision on tort liability of Article 1109 of the civil code. This reading of Article 1078 found some validation in the courtroom, generating a debate that ultimately gave rise to the reform of the Argentine civil code in 1968, when the legislator finally solved what had become an uncomfortable interpretative limbo. By replacing Article 1078 of the civil code, Law No. 17711 of 1968 explicitly established that the 'obligation to compensate for the damages caused by a wrongful act includes … the reparation of the moral harm caused to the victim'.[73]

In Brazil, the old civil code of 1916 (framed around the centrality of the individual and his economic interests) contained no express provision setting forth the recoverability of immaterial damages. However, from a theoretical point of view, the general rule establishing tort liability (Article 159) was formulated in terms abstract enough to

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[66] See e.g. Article 2059 Italian civil code.

[67] EL DAÑO MORAL EN LA RESPONSABILIDAD CIVIL. ANÁLISIS EN EL DERECHO COMPARADO Y EL DERECHO NACIONAL (Silvia Roxana Sotomarino Cáceres dir., Universidad de San Martín de Porres, 2009), at 9.

[68] See e.g. the case of Brazil, discussed later in this section.

[69] Article 1078 Argentine civil code, original text (translation by author).

[70] HENOCH D. AGUIAR, HECHOS Y ACTOS JURÍDICOS (T.E.A, 1951), T. IV, at 270 ff.

[71] ALFREDO ORGAZ, EL DAÑO RESARCIBLE (Bibliográfica Omeba, 2nd ed. 1960), at 231 ff.

[72] See for all LUÍS MARÍA REZZÓNICO, ESTUDIO DE LAS OBLIGACIONES EN NUESTRO DERECHO CIVIL (Librería Editorial Ciencias Económicas, 1958), at 594 ff.

[73] Article 1078 Argentine civil code (translation by author). For a discussion, see José Fernando Márquez, *Reparación del daño moral en los casos no previstos por la ley. El Código Civil argentino, los congresos y los proyectos de reforma*, in HOMENAJE A LOS CONGRESOS DE DERECHO CIVIL, *supra* note 28, 1633, at 1637–1646.

embrace both material and immaterial losses caused by tortious behaviour.[74] This allowed the consolidation of two divergent approaches: on the one hand, courts rejected the reparation of non-economic harms, sticking to the letter of the law, with the support of a minority of legal scholarship; on the other hand, the majority of legal scholarship was strongly in favour of the reparation of immaterial damages. This situation of uncertainty received a major shock with the adoption of the 1988 Constitution of Brazil. In its relevant part, Article 5 of the Constitution grants the right to compensation for both pecuniary and non-pecuniary harms as a constitutional right.[75] This provision determined a swerve by Brazilian courts towards awarding compensation for immaterial harms, under the continuous sharpening work of legal scholarship. Finally, the new civil code of Brazil of 2002 brought further clarity to the matter. In fact, the new Article 186 expressly provides for the right to recover 'for even exclusively immaterial losses'.[76]

5. ROLE OF LEGAL SCHOLARSHIP

As said above, legal scholarship has been of fundamental importance in the evolution of Latin American tort law.[77] In particular, scholars' role is to be appreciated from two specific perspectives. On the one hand, it has given continuous impulse to the reform of written tort law rules by legislators; on the other hand, the interpretative constructions of legal scholarship have made tort law evolve well beyond the letter of any legislative materials, guiding the courts in defining rules not stated in the law, or even against the letter of the law.[78]

Given the relevance of legal scholarship as an engine of transformation in the field of tort law in Latin America, it is worth spending some time to offer a broad view on how legal scholarship operates in this peculiar region. This will allow us to get a better sense of the ways in which scholars contribute to the development of law in Latin America, and therefore to better understand the evolution of the law of torts in the region.

Most Latin American countries are equipped with a technically very sophisticated legal scholarship, which has given lots of attention to tort law. I am saying 'technically' sophisticated because scholars in Latin America generally have the analytical skills that allow them to produce very refined intellectual products. However, at least two shortcomings can be identified that ultimately have an impact on the evolution of tort law.

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[74] Leandro Martins Zanitelli, *Achieving Development and Human Rights Protection Through Tort Law Suits: Pain-and-Suffering Damages in Brazil* (19 May 2011), available at: dx.doi.org/10.2139/ssrn.1846693 (last visited 10 October 2013), para. III.

[75] Article 5, Sections V and X, Brazilian Constitution 1988.

[76] Article 186 Brazilian civil code 2002 (translation by author).

[77] See Jorge L. Esquirol, *Writing the Law of Latin America*, 40 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 693 (2008), at 695–697.

[78] On legal scholarship as an unofficial source of law, see for all Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AMERICAN JOURNAL OF COMPARATIVE LAW 343 (1991), at 346–350.

First, legal scholarship in Latin America is typically very positivistic, formalistic and conceptualistic. Latin American scholars heavily focus on the law as written in the statutes, in court decisions or generally *in the books*, as opposed to how the legal phenomenon untangles in practice. Furthermore, the ultimate aspiration of the typical scholarly work in the region is to conceptualize the law and its interpretations within a logical and systemic structure, which is viewed as the essence of the law. Therefore, following the nineteenth century Euro-continental pattern, scholars adopt a reasoning that is strongly focused on abstraction, linguistics and exercises of categorization. In order to do so, they use specialized language, terminological technicalities and other tricks of the trade, thus entering a dimension that ends up distanced from reality.[79] While, more recently, some scholars in Latin America have taken steps and made progress towards the creation of innovative scholarship that takes interdisciplinary paths, introducing critical approaches to the study of the law (often under the influence of their US counterparts), the mainstream scholarly production in the region lacks critical thinking.

Secondly, mainstream Latin American scholarship lacks critical *comparative* thinking. It is indeed common practice for Latin American scholars to keep an eye on scholarly and judicial opinions from foreign countries when reviewing local normative solutions and judicial decisions. However, they do so acritically, conferring uncontested prestige and status to legal doctrines and forms coming from foreign 'advanced' jurisdictions.[80] In particular, in addition to the experiences of other Latin American countries,[81] the focus has traditionally been on Europe (e.g., Belgium, France, Germany, Italy, Spain), while more recently it has shifted to the United States and other common law systems.[82] This is especially self-evident in the realm of tort law, where scholars systematically take into account the decisions of the supreme courts of France

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[79] See Jorge Mosset Iturraspe, *El daño a la persona en el Código civil peruano*, in LOS DIEZ AÑOS DEL CÓDIGO CIVIL PERUANO: BALANCE Y PERSPECTIVAS, T. I (Universidad de Lima, 1994), at 211 ff.; Carlos Fernández Sassarego, *Deslinde conceptual entre 'daño a la persona', 'daño al proyecto de vida' y 'daño moral'*, FORO JURÍDICO, Year I, No. 2 (2003).

[80] D. López-Medina, *The Latin American and Caribbean Legal Traditions*, *supra* note 1, at 360–361.

[81] See e.g. J.J. Casiello, *El avance de los factores objetivos de responsabilidad extracontractual*, *supra* note 51, at 277–280; Jorge Gamarra, *Prueba de la relación de causalidad en la responsabilidad médica*, in OBLIGACIONES Y CONTRATOS EN LOS ALBORES DEL SIGLO XXI (Oscar Ameal and Silvia Tanzi eds, Abeledo, 2001); A.V.S. Besalú Parkinson, *La responsabilidad civil*, *supra* note 41. These authors compare among each other Latin American experiences such as those of Argentina, Brazil, Peru and Uruguay.

[82] See e.g. the national experiences addressed in A. Kemelmajer de Carlucci, *Funciones y fines de la responsabilidad civil*, *supra* note 29, 1287, at 1311. Another example, this time concerning statutory law, is given by Carlos Fernández Sassarego, *Apuntes sobre el daño a la persona*, in LA PERSONA HUMANA (Guillermo A. Borda ed., La Ley, 2001), who refers to France, Italy and Spain. See also A. Parise, *Legal Transplants and Codification*, *supra* note 14, at 84–85; and Édgar Cortés, *L'influenza del diritto italiano in Colombia*, in S. LANNI AND P. SIRENA (eds), IL MODELLO GIURIDICO – SCIENTIFICO E LEGISLATIVO – ITALIANO FUORI DELL'EUROPA, *supra* note 14, 167, at 169–171.

or Italy, and refer to the work of French, Italian, Spanish or US commentators.[83] This can be explained by raising awareness of an important cultural fact.[84] The typical Latin American jurist believes that his own legal system is part of the civil law tradition and, more broadly, of the so-called 'Western legal tradition',[85] which lives under the intellectual leadership of Europe and the United States.

The combination of these cultural attitudes determines remarkable consequences for the evolution of the law. The technicism and abstract mindset of Latin American scholars allow them to treat the law as a separate superstructure that can be compared across any other system on a levelled playing field. Therefore, Latin American scholars feel fully legitimized to take part in transnational scholarly debates, and draw heavily on transnational trends in order to inspire new developments in their own legal systems. However, behind the technicalities of legalese and the seemingly universal transnational debates hides a remarkable mechanism of legal transformation. By 'speaking the language' of, and taking part in, the transnational scholarly debate on tort law, Latin American scholars expand the contours of the sphere of influence of the leading jurisdictions of Europe and the United States. The upshot is that most innovations in Latin American (tort) law are not introduced from the inside, according to a bottom-up approach to lawmaking, but are the product of a foreign, top-down, transnational legal thought, as caught, imported and elaborated by legal scholars.[86]

As a consequence, Latin American legal scholarship hardly takes into account the distinctions between theory and practice, between models and local realities. Notwithstanding the fact that every scholar is aware of the differences existing between the abstract (transnational) legal discourse and social reality in the region, the legal literature does not take such divergence as an issue that deserves scholarly attention. This ultimately determines that Latin American scholars – who are often part of the local élites – become vehicles for the adoption of very advanced interpretative and normative solutions borrowed from abroad, even though their own legal systems are not ready or properly equipped to make them work in practice.[87]

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[83] See e.g. J. Gamarra, *Prueba de la relación de causalidad en la responsabilidad médica*, *supra* note 81, who cites authors from Belgium, Italy, Spain, the United Kingdom and the United States.

[84] This is a classical example of what comparative law scholars refer to as a 'cryptotype', namely a type of legal 'formant' that has not been explicitly verbalized, and which jurists may either not be aware of or may not be able to formulate well, although cryptotypes 'can be immensely important' for understanding the functioning of a legal rule or legal system. R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, *supra* note 78, at 384–387.

[85] DIEGO LÓPEZ MEDINA, TEORÍA IMPURA DEL DERECHO: LA TRANSFORMACIÓN DE LA CULTURA JURÍDICA LATINOAMERICANA (Legis, 3rd repr. 2004), at 12.

[86] See A. Guevara Gil, *Las causas estructurales de la pluralidad legal en el Perú*, supra note 7, at 15. Needless to say, the literature on the circulation of legal models and 'legal transplants' is overwhelming. For an update of the ongoing debate, see e.g. Randall Peerenboom, *Toward a Methodology for Successful Legal Transplants*, 1 CHINESE JOURNAL OF COMPARATIVE LAW 1 (2013); and Ralf Michaels, '*One Size Can Fit All' – Some Heretical Thoughts on the Mass Production of Legal Transplants*, in ORDER FROM TRANSFER: COMPARATIVE CONSTITUTIONAL DESIGN AND LEGAL CULTURE (Günter Frankenberg ed., Edward Elgar, 2013), 56.

[87] See Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AMERICAN JOURNAL OF COMPARATIVE LAW 75 (2008).

6. CONCLUSION: *EL DERECHO Y EL HECHO*

As it has emerged from the above paragraphs, tort law in Latin America is (at least *in the books*) a tort system largely based on the civil law model, which has recently developed under the influence of both European and North American legal thought.[88] This certainly has many explanations. Among other factors, it is largely due to the role and functioning of Latin American legal scholarship, which, on the one hand, primarily focuses on the law as discussed in university classrooms as opposed to its operative dimension in society, and, on the other hand, is culturally eager to adopt legal forms and evolutions originating in other jurisdictions. Similarly, Latin American legislators operate in a very similar fashion, often adopting reforms simply by imitating foreign normative recipes and importing them into their local systems. This has determined the establishment of modern and sophisticated systems of tort law in all Latin American jurisdictions, which advance at a pace set by the Western legal world, or at least follow closely behind.

However, this official system of tort law is often not effective, as it fails to fully penetrate the social and economic context in which it is meant to operate. This generates a gap between the law as written and discussed by legal commentators, and the law as practised. Importantly, such a gap is visible both within the official sector of the law and, even more blatantly, between the official and unofficial sectors.

Within the official sector, the operative dimension of the law does not always correspond to the official rules stated in the codes or statutes and constructed by commentators. On the one hand, this can be noticed in the activity of the public administration (including e.g. licensing, issuing construction permits, etc.). Rather than fully corresponding to the mandates of the law, regulators and enforcement agencies often act pursuant to dynamics that involve personal favours, business relationships and corrupt practices. On the other hand, this can be noticed in the adjudication process, where courts often dissociate themselves from the written rules or prevailing interpretations not on the basis of legal arguments, but rather on the ground of extra-legal factors – even though it should be noted that, in some cases, it is politically impossible for courts to apply the law fully, due to internal balances among economic powers in the country. For example, in those countries that have moved farthest on the road of strict products liability, it may be politically impossible for courts to decide design defects and failure to warn cases under much more than a negligence standard, thus favouring the interest of politically powerful manufacturers, which would otherwise have to internalize the heavy economic burdens arising from a strict application of the law.[89]

Within the unofficial sector, the discrepancy between state tort rules and the actual operative rules that regulate people's relationships is also remarkable. In many Latin American countries, large shares of the population never enter the official sector. These people tend to regulate their relationships and solve their disputes according to a spontaneous unofficial law, which typically draws on tradition and customary practices.

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[88] See A. Guevara Gil, *Las causas estructurales de la pluralidad legal en el Perú*, *supra* note 7, at 4.

[89] J. Miller, *Products Liability in Argentina*, *supra* note 22, at 636.

Within these settings, there is a tendency to use personal channels to solve disputes, instead of accessing the courts, and to solve any disputes according to a *'derecho informal que no necesita de abogados ni de jueces*' (unofficial law which does not require either attorneys or judges).[90]

This complex condition of (tort) law in Latin America has effectively been pictured with the Spanish expression *'el derecho y el hecho'* (literally: 'the law and the fact'),[91] which can be freely translated as 'the law is one thing, reality is another'. Of course, any study on Latin American tort law will inevitably, and justifiably, start from an analysis of the positive rules stated in the civil codes and from a review of the case law and scholarship interpreting them. However, any serious study on Latin American tort law must necessarily take into account the divergence between the official and the unofficial layers of the tort system, between *'el derecho y el hecho'*, in order to fully understand the essence of tort law in the region. And so does (or should do) any serious attempt to reform the (tort) law of Latin America.

[90] M. Bussani and U. Mattei, *Making the Other Path Efficient*, *supra* note 15, at 166; J. Miller, *Products Liability in Argentina*, *supra* note 22, at 635 (translation by author).

[91] M.C. MIROW, LATIN AMERICAN LAW, *supra* note 11, at 235 (translation by author).