Third-Party Contracts, Legal Retroactivity, and Punitive Damages: From Europe to Latin America[1]

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ABSTRACT: The civil-law system shows its true face as it travels from the Continental European core to the Latin American periphery. Many of the principal institutions have found a home and thrived in the new and radically different environment. One can best study them there by contemplating how they have preserved some of their most basic features despite having transformed themselves into something else.

The notion of the civil-law tradition and that of codification have themselves undergone this dialectic of transformation and preservation. So have the traditional approach to contractual interpretation and to third-party agreements and the common proscriptions on retroactivity and punitive damages. In Latin America, as well as in Continental Europe, the intent of the parties typically takes precedence over the text of the contract and an agreement normally may benefit a third party despite the general restriction on extra-party effects. Similarly, a relatively strict ban on the retroactive application of statutes and on the imposition of punitive damages prevails on both sides of the Atlantic.

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OUTLINE

I. INTRODUCTION

The civil-law system shows its true face in Latin America. Certainly, it sees its blurry contours grow in blurriness as it travels from the Continental European core to the Latin American periphery. Nevertheless, many of the principal institutions have found a home and thrived in the new and radically different environment. In fact, one can best study them, in their modern globalized form, there, by contemplating how they have preserved their most basic features despite having transformed themselves into something else.

To a great extent, this legal development mirrors its linguistic counterpart. The Spanish and Portuguese languages underwent a similarly dramatic transformation upon crossing the Atlantic Ocean. As currently internationalized, they exist most clearly and call for examination as they have developed in the New World.

Parts II and III will, respectively, explore the notion of the civil-law tradition and that of codification in Continental Europe and, particularly, in Latin America. Part IV will, in turn, analyze the widely shared approach to contractual interpretation generally and to third-party agreements specifically. Finally, Part V will shift from prescriptions to proscriptions, in particular to those on retroactivity and punitive damages. Predictably, Part VI will close with a couple concluding thoughts.

II. THE CIVIL-LAW TRADITION

The civil-law tradition developed in Continental Europe and took root all over the world, principally as a result of European colonialism. Iberian American countries partake in this heritage because they once belonged to the Spanish and Portuguese empires. The law of Spain and Portugal emerged on the Iberian Peninsula, expanded into Latin America, and mostly displaced indigenous legal cultures.[2]

The term 'civil-law tradition' underscores the centrality of civil law. Civil law, as a subcategory of private law, generally regulates relationships between individuals or private entities. It differs fundamentally from public law, which governs disputes involving the government. However, civil law does not exhaust the category of private law because it refers only to those private matters that concern the civil code. It therefore includes areas such as torts, contracts, property, family, and successions, but ordinarily excludes commercial, corporate, traffic, labor, and insurance matters.[3] The civil code, accordingly, defines the boundaries of civil law.[4]

In Latin America, as well as in Continental Europe, civil law reigns supreme. It commands respect, sometimes reverence. Specifically, it serves as a model for other areas, like constitutional, administrative, and criminal law. Furthermore, it represents a common language for all lawyers, regardless

2 *See generally* Mary Ann Glendon, Michael W. Gordon, Christopher Osakwe, Comparative Legal Traditions in a Nutshell (1982); John H. Merryman, The Civil Law Tradition (1985) (introducing the civil law tradition and contrasting it with its common-law counterpart).

3 *See* Glendon *et al.*, *supra* note 1, at 45 ([Civil law] not only does not include the entire legal system, it does not even take in all of private law if, as is usually the case, part of the private law is contained in a commercial code and other codes and statutes."); Merryman, *supra* note 1, at 6-7 ("The oldest subtradition [of the civil law tradition] includes the law of persons, the family, inheritance, property, torts, unjust enrichment, and contracts and the remedies by which interests falling within these categories are judicially protected. . . . The belief that this group of subjects is a related body of law that constitutes the fundamental content of the legal system is deeply rooted in Europe and the other parts of the world that have received the civil law tradition. . . . [T]he legal terminology of lawyers within such a jurisdiction uses 'civil law' to refer to that portion of the legal system just described.").

4 *See* Glendon *et al.*, *supra* note 1, at 45 ("The . . . civil law is the law relating to those subject matter areas covered by the civil codes and their auxiliary statutes.") *See generally* Part III *infra* (analyzing the aims and the content of civil codification).

of their specialization. In fact, it occupies a position somewhat analogous to that of constitutional law in the United States.[5]

The civil-law tradition should not be approached rigidly. It is by no means fixed or uniform, let alone sacred. It encompasses a variety of constantly evolving legal regimes, which frequently differ in their basic structure, as well as in their details. These systems of law simply share what Austrian philosopher Ludwig Wittgenstein calls, more broadly, a "family resemblance."[6] In other words, they do not have a common essence, but, rather, interrelate with each other in a complex manner. They present "a complicated network of similarities overlapping and crosscutting at all levels: general and specific."[7]

For instance, a particular jurisdiction may resemble others in that it officially denies precedential force to decisions stemming from the judiciary, yet it may diverge from them to the extent that it provides specialized courts for constitutional and administrative matters. Further, it may share this latter trait with another group, some of whose members may recognize judicial precedents. In fact, a few legal orders within the tradition do not even codify their civil law and many of the rest conceive of their respective codes so differently that one can hardly speak of a clear convergence.[8]

Nonetheless, the various systems of law resemble each other like family members, who share certain features in a similar way. The entire civil-law tradition has a characteristic style or flavor, which reflects the mentioned interconnections. This commonality, which becomes more evident through a comparison with Anglo-American law, derives from an intense process of cross-fertilization, as well as from a shared history.[9]

5 *See* Glendon *et al.*, *supra* note 1, at 46 ("One of the great links among the 'civil law systems' is that the 'civil law' was for centuries, in fact, the most important and fundamental part of the legal system, and is still regarded so in theory."); Merryman, *supra* note 1, at 6 ("'Civil law' is still fundamental law to most civil lawyers.").

6 Ludwig Wittgenstein, Philosophische Untersuchungen § 67 (1967) ("Familienähnlichkeiten.") Wittgenstein explains that the members of a family do not all share a particular characteristic or group of characteristics. Some resemble others in the smile, others in the personality, and still others in the tone of voice. They are thus all interrelated without converging on a single feature, "for the various resemblances between the members of a family: build, facial features, eye color, gait, temperament, *etc.*, *etc.*, overlap and intercross. . . ." *Id.* ("denn so übergreifen und kreuzen sich die verschiedenen Ähnlichkeiten, die zwischen den Gliedern einer Familie bestehen: Wuchs, Gesichtszüge, Augenfarbe, Gang, Temperament, *etc.*, *etc.*").

7 *Id.* § 66 ("ein kompliziertes Netz von Ähnlichkeiten, die einander übergreifen und kreuzen. Ähnlichkeiten im Großen und Kleinen.").

8 *See* Merryman, *supra* note 1, at 26 ("[A] civil law system need not have codes: Hungary and Greece were civil law countries even before they enacted their civil codes: Hungarian civil law was uncodified until Hungary became a socialist state, and Greece enacted its first civil code after World War II.").

9 *See generally* Part III *infra* (arguing that civil law jurisdictions resemble each other in their approach to codification and diverge from their common-law counterparts).

An understanding of how the tradition as a whole hangs together, along with a requisite antecedent examination of the historical origins and subsequent development, is an invaluable asset in the process of making sense of the underlying regimes. Taking this overarching perspective is especially useful for people trained under a different legal culture, such as the common law. It enables them to perceive a particular civil-law jurisdiction's institutions not as a random assortment, but, rather, as a relatively coherent set. Through this approach, Anglo-American lawyers may discern in Brazil's codification, managerial adjudication, and abstract judicial review the country's civil-law heritage, instead of a quaint *praxis*.

One must proceed with caution when making generalizations, precisely because of the noted variability within the civil law. An even higher degree of circumspection is in order when considering Latin American legal systems. The center of gravity of the civil-law tradition lies in Europe, particularly in Germany and France.[10] Latin American law has evolved on the periphery, under very particular conditions of economic underdevelopment, fierce social conflict, and heavy U.S. influence. Consequently, it often operates at a distance from the European paradigm.

Moreover, Latin America encompasses 20 distinct jurisdictions, which operate independently of each other, even though they share a transnational legal legacy.[11] The main challenge in grasping the law of the region is to perceive the broad parallels without neglecting the particularities. Of course, the recognition of a unified tradition ineluctably colors the interpretation of each of the individual legal orders.

At most, the civil law provides a context for the study of Latin American law. References to that tradition may launch the discussion, but they certainly should not bring it to an end. They simply prepare the way for a thorough analysis of the peculiarities of the particular legal systems that coexist throughout the Continent.

10 *See* Glendon *et al.*, *supra* note 1, at 29 (The French Civil Code of 1804 and the German Civil Code of 1896 "have had such widespread and lasting influence that they and their accompanying ideologies can be said to have become part of the contemporary civil law tradition.").

11 *See* Rogelio Pérez Perdomo, *Notas para una historia social del derecho en América Latina: La relación de las prácticas y los principios jurídicos*, 52 Rev. Colegio de Abogados P.R. 1 (1991) ("La primera y más banal observación es que no existe un sistema jurídico latinoamericano sino veinte estados-naciones, cada uno con su propio sistema. . . . En sentido opuesto puede hacerse también la observación corriente de la relativa unidad cultural de la zona.") ("Obviously, no single, monolithic Latin American legal order exists as such. Each one of the twenty nation-states has its own system. . . . Nonetheless, the cultural unity of the entire territory is self-evident.").

III. CODIFICATION

By and large, Latin American countries share a civil law with each other and with their Continental European counterparts. The various national civil codes reflect this commonality, as well as substantial differences. They converge on their origins and aims, but diverge on their details.[12]

In Latin America, as well as in Continental Europe, codification ensued almost as a logical consequence of legal nationalization. Insofar as the nation-state intended to assert national law, it tended to do so systematically. In other words, it typically put forth a code that served as the sole source of law. The nationalized polity thus decided directly and explicitly what legal norms to apply within its jurisdiction. Of course, it could still hold on to those aspects of the European common law that it wanted to enforce in its domain.[13]

As the codification process unfolded, Latin American countries were on their way out of the colonial fold. By 1822, most of them had achieved independence.[14] Latin America therefore took the road to codification on its own. In fact, it did so earlier and more decisively than the former colonial powers.[15]

After independence, the official legal unity of Latin America came to an end. The different territories broke off from the overarching imperial realm of law and became separate jurisdictions. Nonetheless, the pre-existing substantive legal cohesion largely endured.[16]

The new national regimes preserved Spanish and Portuguese private law, respectively, until they completed the protracted process of codification. They engaged in "intensive comparative study of texts"[17] in order to produce

12 *See generally* Part II *supra* (stressing the convergence among civil law regimes, while acknowledging important differences).

13 *See generally* Peter G. Stein, *Judge and Jurist in the Civil Law: A Historical Interpretation*, 46 La. L. Rev. 241, 248 (1985) ("In the sixteenth century, . . . the various nation-states began to assert what they called their individual sovereignty. This meant that their supreme courts saw themselves as exponents . . . of the particular law of the state. . . . The *ius commune* might be received or it might not, depending on the suitability of the rule in question to the needs of the state; and this decision was the courts'."); Kenneth L. Karst & Keith S. Rosenn, Law and Development in Latin America 44 (1975) ("Codification: Independence stimulated the desire to remake basic legal structures. One reason was to stabilize and consolidate new national regimes.").

14 *See* Karst & Rosenn, *supra* note 12, at 42 ("By 1822, after prolonged and bitter fighting, most of the Latin American nations had achieved or were on the verge of achieving independence.").

15 *See generally* Bernardino Bravo Lira, *Codificación Civil en Ibero-américa y en la Península Ibérica (1827-1917): Derecho Nacional y Europeización*, *in* Fuentes ideológicas y normativas de la codificación latinoamericana (Abelardo Levaggi coord., 1992) (contending that Latin American countries undertook codification earlier, more independently, and more decidedly than Spain or Portugal).

16 *See generally id.* (explaining that after independence, Iberian American jurisdictions continued to apply substantive Spanish and Portuguese private law).

17 John Merryman coined this expression in John H. Merryman, *Comparative Law Scholarship*, 21 Hastings Int'l & Comp. L. Rev. 771, 773 (1998).

their national codes. Each of these societies paid attention broadly to all available European legislation, but especially to Latin American law. It primarily turned to its neighbors' efforts because of the geographical, cultural, linguistic, and legal proximity.[18]

In fact, some countries adopted *verbatim* codes prepared elsewhere in the region. For instance, Colombia, Panama, El Salvador, Ecuador, Venezuela, Nicaragua, and Honduras enacted the Chilean Code of 1857, written mostly by the Venezuelan Andrés Bello. Other nations drew heavily from it. This most influential codification effort constitutes a milestone within the entire civil-law tradition and has had enormous influence throughout Latin America.[19]

Civil Code drafters normally seek to achieve two goals. First, they attempt to rationalize the law.[20] Second, they seek to proclaim the will of the people as represented by elected officials and rationally elaborated by the drafting committee.[21] These two objectives lead to certain expectations regarding adjudication. For instance, courts must regard and interpret the code as a coherent and integrated whole.[22] More importantly, they must strictly adhere to this democratically enacted law when deciding concrete cases.

18 *See generally* Bravo Lira, *supra* note 14 (describing how Iberian American codifiers focused on models from elsewhere in the region and from Continental Europe); Karst & Rosenn, *supra* note 12, at 45-47 (maintaining that code drafters in Latin America turned not only to the French Civil Code but also to sources from all over the civil law universe.).

19 *See generally* Bravo Lira, *supra* note 14 (noting that several Latin American nations enacted Chile's Civil Code and that most others drew heavily on it). *See also* Karst & Rosenn, *supra* note 12, at 47 ("Thus, the Chilean Code was virtually adopted in its entirety in Ecuador and Colombia, and with slight modifications in El Salvador, Nicaragua, and Panama (until 1917).").

20 *See* Peter L. Strauss, *The Common Law and Statutes*, 70 U. Colo. L. Rev. 225, 237 (1998) ("In the civilian code model, a statute is in contemplation self-contained. It is the product of deliberate reflection in terms of a unified structure of law and a coherent and, at least in design, independent and complete intellectual product."); Karst & Rosenn, *supra* note 12, at 47 ("These codes reflected the rationalist, utopian, and highly individualistic values of the Enlightenment and the French Revolution."); Merryman, *supra* note 1, at 29 ("If insistence on a total separation of legislative power from judicial power dictated that the codes be complete, coherent, and clear, the prevailing spirit of optimistic rationalism persuaded those in its spell that it was possible to draft systematic legislation that would have those characteristics. . . .").

21 *See generally* Stein, *supra* note 12, at 252 ("It was the jurists who . . . prepared the ground for the codification movement of the eighteenth century. But that movement was, in part at least, inspired by the layman's suspicion both of jurists and of judges and by a popular desire to weaken the power of both groups."); Merryman, *supra* note 1, at 32 ("Germans, like the French, have incorporated a sharp separation of powers into their system of law and government. It is the function of the legislator to make law, and the judge must be prevented from doing so.").

22 *See, e.g.*, Cd. Civ. (Arg.) (2016), Art. 2 ("La ley debe ser interpretada teniendo en cuenta sus palabras, sus finalidades, las leyes análogas, las disposiciones que surgen de los tratados sobre derechos humanos, los principios y los valores jurídicos, de modo coherente con todo el ordenamiento.") ("The law shall be interpreted taking into account its words, its aims, analogous laws, the provisions of human rights treaties, and legal principles and values, in coherence with the order as a whole."). *See also* Strauss, *supra* note 19, at 235 ("[T]he Code Civile . . . has characteristics that support the more distinctly separated judicial and legislative roles characteristic of western European legal systems. These statutes emerge in a single legislative act, after exquisite intellectual consideration, as an integrated whole.") ; Merryman, *supra* note 1, at 29 ("But if the legislature alone could make laws and the judiciary could only apply them (or, at a later time, interpret and apply them), such legislation had to be complete, coherent, and clear.").

To a considerable degree, Latin American codes embrace the French model on the relationship between legislation and adjudication.[23] Many of them incorporate an equivalent not only of French Article 4, which holds the judge liable for refusing to adjudicate because of the law's silence, obscurity or insufficiency,[24] but also of Article 5, which prohibits generally binding judicial holdings.[25] Chile's Code, like others throughout Latin America, insists on the preeminence of statutes' clear import over any possible construal of their underlying purpose: "When a law's meaning is clear, its literal import shall not be disregarded under the pretext of consulting its spirit."[26]

While the process of codification begins with similar premises everywhere, the specific form it takes ineluctably varies from one country to the next. Moreover, the historical school, which German scholar Friedrich Karl von Savigny most prominently defended, contributed a novel notion. It proposed that the law should reflect the spirit of a particular people.[27] In Latin America, this idea had substantial influence, especially on Andrés Bello.[28]

In any event, Latin American codes began falling out of date from their inception. They intensely continued down this path from the twentieth century on. In response, legislatures have enacted many specialized statutes in areas that have gained prominence since codification, such as insurance, products liability, labor law, corporations, *etc.* In the absence of legislative action, courts have had to update the code when these matters have arisen in concrete cases. Finally, legal

23 *See* Karst & Rosenn, *supra* note 12, at 45 ("The model that most appealed to the jurists designated to draft Latin American codes during the middle of the 19th century was the French Civil Code (*Code Napoléon*), enacted in 1804."); Matthew C. Mirrow, *Borrowing Private Law in Latin America: Andrés Bello's Use of the Code Napoléon in Drafting the Chilean Civil Code*, 61 La. L. Rev. 291, 305 (2001) ("When [Andrés] Bello was drafting the Civil Code, the *Code Napoléon* was widely available, and he had ready access to this work. There is little doubt that the French Civil Code was the most famous and highly appreciated civil code in circulation and that the French jurists who interpreted it were given the utmost respect.").

24 *Compare* Cd. Civ. (Fr.) (1804), art. 4 *with* Cd. Civ. (Arg.) (1871), art. 15; Cd. Civ. (D.R.) (1884), art. 4; Cd. Civ. (Ecuad.) (2005), art. 18; Cd. Civ. Fed. (Mex.) (1928), art. 18; Cd. Civ. (Peru) (1984), art. 8; Cd. Civ. (P.R.) (1930), art. 7; Cd. Civ. (Para.) (1985), art. 6; Cd. Civ. (Uru.) (1868), art. 15.

25 *Compare* Cd. Civ. (Fr.) (1804), art. 5 *with* Cd. Civ. (Chile) (1857), art. 3; Cd. Civ. (Colom.) (1873), arts. 17 & 25; Cd. Civ. (D.R.) (1826), art. 5; Cd. Civ. (Ecuad.) (2005), art. 3; Cd. Civ. (Hond.) (1906), art. 4; Cd. Civ. (Uru.) (1868), art. 12.

26 Cd. Civ. (Chile) (1857), art. 19. *See also* Cd. Civ. (Colom.) (1873), art. 27; Cd. Civ. (Ecuad.) (2005), art. 18(1a); Cd. Civ. (Hond.) (1906), art. 17; Cd. Civ. (P.R.) (1930), art. 14; Cd. Civ. (Uru.) (1868), arts. 17; Cd. Civ. (Venez.) (1982), art. 4.

27 *See generally* Friedrich Karl von Savigny, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft (2012) (arguing that every people has its own law, stemming from its own spirit and reflected in its customary legal practices). Savigny himself, however, opposed the process of codification in Germany. *See* Harold J. Berman & Charles J. Reid, Jr., *Roman Law in Europe and the Jus Commune: A Historical Overview with Emphasis on the New Legal Science of the Sixteenth Century* , 20 Syracuse J. Int'l L. & Com. 1, 28 ("Savigny, the great founder of the historical school, opposed the codification of German civil law in the early nineteenth century, his opposition was based in part on the argument that in the German *Länder* the time was not ripe for such a codification; in the later nineteenth century his followers were among the leaders of the movement that produced the German Civil Code.").

28 *See* Mirrow, *supra* note 22, at 308 ("Bello was firmly in Savigny's camp, and it is possible that Bello saw himself fulfilling for Chile the agenda outlined in Savigny's works.").

scholars have heavily expounded the existing provisions in an attempt to offer guidance for the judiciary, as well as for lawmakers.[29]

For example, civil codes in Latin America, as in France and elsewhere, have required considerable updating in light of their antiquated, sexist view of the role of women in the family and in society. Literally following the original French Article 213, Article 128 of the Uruguayan Civil Code declares, for instance, that "the husband shall protect the wife and the wife shall obey him."[30] The Uruguayan legislature implicitly derogated this provision with the 1946 Women's Civil Capacity Act.[31]

Similarly, Andrés Bello's Civil Code for Chile embraces the initial French position by banning paternity suits. In 1998, the Chilean Congress introduced Article 195, expressly allowing judicial inquiries into filiation.[32] Nonetheless, Chile's Supreme Court appears to have undermined the legislative intent of that provision by requiring extensive documentary support for that kind of complaint.[33] On a more positive note, the same tribunal has discretely moved away from the codified presumption that, upon separation, the mother must "take personal charge of the children's care."[34]

Lawmakers, judges, and scholars have thus preserved the Code from desuetude. As a result, however, they have increasingly led people to look elsewhere for solutions to legal problems. In their effort to maintain its relevance, these actors have, ultimately and paradoxically, rendered the document ever more irrelevant.[35]

Throughout the region, legislative microsystems have cropped up and judicial as well as administrative institutions have taken over entire areas of law.[36] In the twentieth and even twenty-first centuries, moreover, Latin American lawmakers have often distanced themselves from their French or German counterparts by commissioning completely new, ideologically

29 *See generally* John H. Merryman, *How Others Do It: The French and the German Judiciaries*, 61 S. Cal. L. Rev. 1865, 1868-70 (1988) ("Decodification is taking place in several ways. . . . Important microsystems of statutory law have grown up on a variety of civil code topics. . . . Parallel to the growth of statutory microsystems is the growth of equally important systems of judge-made law.").

30 Cd. Civ. (Uru.) (1868), art. 128.

31 L. 10783 (Uru.) (1946), art. 1.

32 L. 19585 (Chile) (1998), art. 195.

33 *See* Báez Sierra v. Dinamarca Henríquez, Rol No. 461-01 (Supr. Ct.) (Chile) (2002); Espinoza González v. Álvarez Díaz, Rol No. 2518-01 (Supr. Ct.) (Chile) (2002).

34 Cd. Civ. (Chile) (1857), art. 225. *See In Re* Carracedo Alvarado, Rol No. 1620-01 (Supr. Ct.) (Chile) (2001).

35 *See generally* Merryman, *supra* note 28, at 1869 ("As the amount of special legislation grows, the codes increasingly become a body of residual law to be turned to only if some more specific provision of special legislation cannot be found. In this way the body of law the judge is called to apply loses its ideological coherence. . . . The code provisions are so rudimentary and so empty of substance that judges have had to create the applicable law on a case-by-case basis.").

36 *See generally id. See also id.* at 1870 ("A further aspect of the decline of legislation and the codes is found in the growth of public administrations.").

updated codes.[37] Unfortunately, they have seldom provided guidance on how codification might advance the social values and solidarity ideals of the welfare state. Moreover, they have never made clear how a code could possibly regulate legal spheres that require permanent renewal and revision.

The previously described process of decodification has taken place in a time in which the common-law world has produced statutes for considerable portions of its private law. Consequently, the contrast between the two western legal traditions no longer assumes the form of a simple opposition between codified and judge-made law. Both legal universes now overlap considerably on the pervasiveness of statutory law.[38]

The fact that court opinions have gained prominence has brought the civil-law realm closer to its common-law counterpart. Of course, even the highest court's judicial decisions are not technically equivalent to case law. They may constitute a functional equivalent, however, inasmuch as they command attention and are broadly followed throughout the jurisdiction.[39]

To a significant extent, this convergence tendency responds to internal causes within each system. Intellectual as well as economic globalization has also played a role in this development. It has led the two legal communities to pay more attention to each other and to borrow not only specific concepts but also general approaches from each other.[40]

Civil, commercial, and procedural codes in Latin America have borne the imprint of the civil-law tradition from the nineteenth century onward. They have faced the same problems of obsolescence and irrelevance as their continental European counterparts.[41] Nonetheless, Latin American codes have run into special difficulties due to the generalized institutional weakness and social injustice in the region.[42] They have

37 *See, e.g.*, Cd. Civ. (Arg.) (2016); Cd. Civ. (Ecuad.) (2005); Cd. Civ. (Braz.) (2003).

38 *See generally* Arthur T. von Mehren, *Some Reflections on Codification and Case Law in the Twenty-First Century*, 31 U.C. Davis L. Rev. 659, 667-68 (1998) ("A quest for greater coherency, comprehensibility, and administrability caused [case-law systems] to take on qualities traditionally associated with codified systems. . . . American jurists have at times been strongly attracted by the codification ideal.").

39 *See generally id.* at 667 ("At the same time, juristic thought in civil-law systems became more teleological in nature and greater attention was given to the claims of fact-specific justice. This is not to suggest that the legal cultures of codified and case-law systems do not still, or will soon cease to, differ in significant respects.")

40 *See generally id.* at 670 ("The experience of the twentieth century makes clear that, as societies and economies become increasingly complex and interrelated, legal orders need to draw on both the civil-law and the common-law traditions in thinking about law and its administration. At the level of method and style, the differences between legal orders in the codification and those in the case-law tradition have diminished and, at the same time, have become more complex.")

41 *See* Merryman, *supra* note 28, at 1868 ("Five basic codes adopted in the nineteenth century—the civil code, commercial code, code of civil procedure, penal code, and code of criminal procedure—historically dominated positive law in Germany and France and hence the work of judges in interpreting and applying the law. . . . The process of decodification thus means more than a formal change in the legislative scheme; a whole ideology of the legal process is being swept away.").

42 *See generally* Pérez Perdomo, *supra* note 10 (underscoring the weakness of the rule of law and the intense social and economic inequality).

therefore often failed to fulfill their mission or deliver on their promise. These fundamental differences notwithstanding, a considerable degree of transatlantic coherence has survived.[43]

IV. CONTRACTUAL INTENT AND THIRD-PARTY AGREEMENTS: PERUVIAN AND LATIN AMERICAN PERSPECTIVES

A. Overview

This Part will analyze how, in Peru and other civil-law jurisdictions, particularly within Latin America, the intent of the contracting parties bears upon the interpretation of a contract, in relation to the text. It will also consider whether third-party agreements call for the application of the same exegetical principles. The discussion will conclude that they generally do and that they specifically escape the restriction on contractual extra-party effects, creating an enforceable right for the beneficiary. In these areas, the civil-law tradition shows considerable cohesion and the code continues to play a central role.

B. Intent of the Contractual Parties

At least since the nineteenth century, the civil-law tradition has, more openly than its common-law counterpart, invited courts to focus on the intent of the parties over and above the ultimately executed contractual text. Of course, throughout the twentieth century, it moved toward imposing social considerations to trump the intent of the parties. For example, Continental European and Latin American jurisdictions started disallowing an oppressive labor contract, even if the signatories had clearly agreed to it.[44] Nonetheless, if no such public interest restriction applies, what the parties intend carries the day, sometimes even over what they write in.

Latin American civil codes, true to their civil-law roots, ordinarily mandate reading a contract through the parties' joint intent. They treat the underlying written instrument as both primary evidence of and subservient to the latter. The Civil Code of Paraguay, providing a stark case in point

43 *See, e.g.*, Parts IV & V *infra* (demonstrating convergence on contractual interpretation and on the approach to *ex post facto* laws and punitive damages).

44 *See, e.g.*, L. Fed. Tbjo. (Mex.) (1970), art. 5 (". . . no producirá efecto legal, . . . , sea escrita o verbal, la estipulación que establezca . . . (II) Una jornada mayor que la permitida por esta Ley; . . . (V) Un salario inferior al mínimo; . . .") (". . . agreements, whether written or oral, establishing the following shall have no legal effect . . . : (II) a workday longer than this Act allows; . . . (V) a salary lower than the minimum wage. . . .").

and essentially echoing its French counterpart, declares: "When interpreting a contract, one should inquire into the common intention of the parties rather than limit oneself to the literal sense of the words."[45] Bolivian law formulates this principle similarly.[46] The Brazilian legal system, inspired by the German model, deploys practically identical language when discussing "declarations of intent," which constitute a key element in contractual exegesis.[47]

Chile's Civil Code, for its part, takes this overall approach most typically: "If clearly known, the intention of the contracting parties shall carry more weight than the contract's literal words."[48] Colombia, Ecuador, and El Salvador each use the same phrasing,[49] while many other nations rely on an equivalent formulation: "If the terms of a contract are clear and leave no doubt about the intention of its parties, one should focus on the literal sense of its clauses. If the words appear to run counter to the parties' clear intention, the latter shall take precedence over the former."[50] Accordingly, a tribunal in any of these jurisdictions should favor an interpretation that the parties manifestly intended over what the contract expresses.

The main provision of the Peruvian Civil Code on this matter, Article 1361, calls for construction from a similar standpoint: "One should presume the terms contained in the contract to coincide with the intent of the parties. Whoever denies such coincidence shall bear the burden of proof."[51] In other words, judges should concentrate on the aim of the parties and treat the ultimately undersigned document as the principal evidentiary

45 Cd. Civ. (Para.) (1985), art. 708 ("Al interpretarse el contrato se deberá indagar cuál ha sido la intención común de parte y no limitarse al sentido literal de las palabras."). *See also* Cd. Civ. (Fr.) (1804), art. 1156 ("On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes.") ("One should inquire into the common intention of the parties to a contract rather than limit oneself to the literal sense of the words.").

46 *See* Cd. Civ. (Bol.) (1976), art. 510 ("En la interpretación de los contratos se debe averiguar cuál ha sido la intención común de las partes y no limitarse al sentido literal de las palabras.") ("When interpreting a contract, one should find out the common intention of the parties rather than limit oneself to the literal meaning of the words.").

47 Cd. Civ. (Braz.) (2003), art. 112 ("Nas declarações de vontade se atenderá mais à intenção nelas consubstanciada do que ao sentido literal da linguagem.") ("Regarding declarations of intent, one should attend more to the intent embodied in them than to the literal sense of the words."). *See also* BGB (Germany) (1900), Art.133 ("Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften.") ("In interpreting a declaration of intent, one should inquire into the actual intent rather than into the literal meaning of the words.").

48 Cd. Civ. (Chile) (1857), art. 1560 ("Conocida claramente la intención de los contratantes, debe estarse a ella más que a lo literal de las palabras.").

49 *See* Cd. Civ. (Colom.) (1887), art. 1618; Cd. Civ. (Ecuad.) (2005), art. 1576; Cd. Civ. (El. Salv.) (1859), art. 1431.

50 *See, e.g.,* Cd. Civ. (Hond.) (1906), art. 1576; Cd. Civ. (Mex., D.F.) (1928), art. 1851; Cd. Civ. (Nicar.) (1904), art. 2496; Cd. Civ. (Pan.) (1961), art. 1132; Cd. Civ. (P.R.) (1939), art. 1233 ("Si los términos de un contrato son claros y no dejan duda sobre la intención de los contratantes, se estará al sentido literal de sus cláusulas. Si las palabras parecieren contrarias a la intención evidente de los contratantes, prevalecerá ésta sobre aquéllas.").

51 Cd. Civ. (Peru) (1984), art. 1361 ("Se presume que la declaración expresada en el contrato responde a la voluntad común de las partes y quien niegue esa coincidencia debe probarla.").

means. Nonetheless, they should privilege the intention over the contractual text in the face of a demonstrable divergence.

Other relevant parts of Peru's Civil Code support this reading. Article 1356, for instance, bears the heading "Primacy of the Intent of the Contracting Parties" and provides that: "Except when mandatory, legal rules on contracts are subject to the intent of the parties."[52] Likewise, Articles 1362 and 1352 establish, respectively, that: "Contracts shall be negotiated, executed, and complied with, in accordance with good faith and the common intent of the parties"[53] and generally "come about simply through the consent of the parties. . . ."[54]

Consequently, courts throughout Latin America, including Peru, must construe a contract to entail A if they find that the parties expected this entailment. They must do so whether the text states A or B and, naturally, when it permits either construction. Coincidentally, the legal order in these countries does not impose any special restrictions, such as the common-law "parol evidence rule,"[55] on the submission of proof in the inquiry into the aim of the parties.

A Paraguayan and a Chilean adjudicator, for example, would each refer to A, in turn, as (1) the "common intention of the parties" into which one should inquire "rather than limit oneself to the literal sense of the words" and (2) the clear "intention of the contracting parties" that carries "more weight than the contract's literal words." Analogously, a Peruvian litigant who proves A to be "the intent of the parties" overcomes any presumption in favor of "the terms contained in the contract." He or she may thereby reinforce the document in writing if convergent, clarify it if ambiguous, or trump it if divergent.

In sum, Latin American law, as part of its civil-law heritage, usually requires reading a contract on the basis of the parties' joint intention. It commands enforcing the latter, when plainly ascertainable, even if at odds with the eventually executed instrument. Along parallel lines, Peru's Civil Code necessitates disregarding the contractual wording upon proof of a contrary

52 Cd. Civ. (Peru) (1984), art. 1356 ("Primacía de la voluntad de contratantes"; "Las disposiciones de la ley sobre contratos son supletorias de la voluntad de las partes, salvo que sean imperativas.").

53 Cd. Civ. (Peru) (1984), art. 1362 ("Los contratos deben negociarse, celebrarse y ejecutarse según las reglas de la buena fe y común intención de las partes.").

54 Cd. Civ. (Peru) (1984), art. 1352 ("Los contratos se perfeccionan por el consentimiento de las partes. . . .").

55 *See* Arthur Corbin, *The Parol Evidence Rule*, 53 Yale L.J. 603, 603 (1944) ("When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.").

intent. Throughout the region, one must interpret a contract to mean A if one ascertains that the parties intended this meaning. One must do so whether the text says A or B and, of course, when it allows either interpretation.

C. Third-Party Contracts

In consequence, the judiciary in Latin America, as in the civil-law tradition as a whole, should normally base itself on the intent of the parties in order to decide whom the contract benefits or entitles and how or to what exactly. It should first turn to the text for guidance, but may have to look beyond to discover what precisely the parties intended. If they meant to confer a benefit or a right to another person in a certain manner, they should have their way, independently of whether the ensuing document affirms so or not. Latin American legal systems do not exempt such agreements from the core precepts of contractual interpretation, let alone advance alternative exegetical fundaments.

The so-called principle of "contractual relativity,"[56] which often prevails in the civil-law world and which establishes that "contracts only obligate and bind the parties,"[57] should not alter the analysis. It merely constitutes a default norm with numerous exceptions.[58] In fact, many of the very laws that espouse the concept also unequivocally legitimate third-party accords.

For instance, Argentina's 2016 Civil Code embraces, in its Article 1021, this "General Rule": "A contract generates effects only among the contracting parties; not with respect to third parties, except as provided by law."[59] To avoid any misunderstanding, it adds the following, in its Article 1022, on "Third Parties": "A contract does not give rise to obligations on the part of third parties. Moreover, third parties have no right to invoke it to impose obligations not agreed upon on the contracting parties, except as provided by law."[60]

56 *See*, *e.g.*, Pilar Jiménez Blanco, El contrato internacional a favor de tercero 33 (Imprenta Universitaria: Santiago de Compostela, Spain) (2002) ("relatividad contractual").

57 *Id.* ("los contratos sólo obligan y vinculan a las partes del mismo").

58 *See* Aníbal Torres Vásquez, *Contrato en favor de tercero*, at 14 (originally published as Aníbal Torres Vásquez, Ch. IX (*Contrato en favor de tercero*), Vol. II, Teoría general del contrato (Instituto Pacífico: Lima) (2012)) (on file with the author) ("Sin embargo, el principio de la relatividad del contrato no es absoluto, porque el ordenamiento jurídico permite que el contrato pueda producir sus efectos favorables en cabeza de un tercero; así sucede cuando uno de los contratantes tiene interés en obtener que la otra parte ejecute su prestación ante un tercero beneficiario, atribuyéndole a este último el derecho de exigirla.") ("Nonetheless, the principle of contractual relativity is not absolute. The law allows a contract to produce effects favorable to a third party. For instance, one of the contracting parties may have an interest in his counterparty performing an action for the benefit of a third-party beneficiary. He thus grants the latter the right to enforce the agreement"). *See also id.* at 55.

59 Cd. Civ. (Arg.) (2016), art. 1021 ("Regla general: El contrato sólo tiene efecto entre las partes contratantes; no lo tiene con respecto a terceros, excepto en los casos previstos por la ley.").

60 *Id.* art. 1022 ("Situación de los terceros: El contrato no hace surgir obligaciones a cargo de terceros, ni los terceros tienen derecho a invocarlo para hacer recaer sobre las partes obligaciones que éstas no han convenido, excepto disposición legal.").

Nonetheless, the same piece of legislation subsequently sanctions an "agreement in favor of a third party," under its Article 1027, in these terms: "If a contract contains an agreement in favor of a third party . . . , the promisor thereby grants that person the corresponding rights or benefits as agreed with the promisee. . . . With his acceptance, the third party acquires the rights and privileges resulting from the agreement in his favor."[61] Hence, the Argentine Civil Code does not defer the specification of exceptional cases to other enactments, but, rather, starts undertaking the task itself.

The civil codes of Bolivia,[62] Nicaragua,[63] Panama,[64] Paraguay,[65] Puerto Rico,[66] and Venezuela,[67] as well as France,[68] embrace essentially the same

61 *Id.* art. 1027 ("Estipulación a favor de tercero: Si el contrato contiene una estipulación a favor de un tercero beneficiario, determinado o determinable, el promitente le confiere los derechos o facultades resultantes de lo que ha convenido con el estipulante. . . . El tercero aceptante obtiene directamente los derechos y las facultades resultantes de la estipulación a su favor.").

62 *See* Cd. Civ. (Bol.) (1976), art. 519 ("El contrato tiene fuerza de ley entre las partes contratantes. No puede ser disuelto sino por consentimiento muto o por las causas autorizadas por la ley.") ("A contract has the force of law among the contracting parties. It may not be dissolved except by mutual consent or as authorized by law."); art. 526 ("Es válida la estipulación en favor de un tercero, cuando el estipulante, actuando en nombre propio, tiene un interés lícito en hacerla.") ("An agreement in favor of a third party is valid when the promisee, acting in his own name, has a legitimate interest in entering into it.").

63 *See* Cd. Civ. (Nicar.) (1904), art. 1836 ("Las obligaciones que nacen de los contratos, tienen fuerza de ley entre las partes contratantes, y deben cumplirse al tenor de los mismos.") ("The obligations arising from a contract have the force of law among the contracting parties and shall be complied with in accordance with the contractual text."); art. 1875 ("Si en la obligación se hubiere estipulado alguna ventaja a favor de un tercero, éste podrá exigir el cumplimiento de la obligación, si la hubiere aceptado y hécholo saber al obligado antes de ser revocada.") ("If an obligation contains an agreement to benefit a third party, the latter may enforce the obligation if he has accepted it and informed the obligated party prior to its revocation.").

64 *See* Cd. Civ. (Pan.) (1961), art. 976 ("Las obligaciones que nacen de los contratos tienen fuerza de ley entre las partes contratantes, y deben cumplirse al tenor de los mismos.") ("The obligations arising from a contract have the force of law among the contracting parties and shall be complied with in accordance with the contractual text."); art. 1108 ("Si el contrato contuviere alguna estipulación en favor de un tercero, éste podrá exigir su cumplimiento, siempre que hubiese hecho saber su aceptación al obligado antes de que haya sido aquella revocada.") ("If the contract contains an agreement in favor of a third party, the latter may enforce the former as long as he informs the obligated party that he has accepted it prior to its revocation.").

65 *See* Cd. Civ. (Para.) (1985), art. 717 ("Los contratos no pueden oponerse a terceros ni ser invocados por ellos, salvo los casos previstos en la ley.") ("Contracts do not bind and may not be invoked by third parties, except as provided by law."); art. 732 ("El que obrando en su propio nombre estipule una obligación a favor de un tercero, tiene el derecho de exigir su ejecución en provecho de ese tercero.") ("Whoever, acting in his own name, agrees to an obligation in favor of a third party has the right to enforce it.").

66 *See* Cd. Civ. (P.R.) (1939), art. 1209 ("Los contratos sólo producen efecto entre las partes que los otorgan y sus herederos. . . . Si el contrato contuviere alguna estipulación en favor de un tercero, éste podrá exigir su cumplimiento, siempre que hubiese hecho saber su aceptación al obligado antes de que haya sido aquélla revocada.") ("Contracts produce effects only among the contracting parties and their heirs. . . . If the contract contains an agreement in favor of a third party, the latter may enforce the former as long as he informs the obligated party that he has accepted it prior to its revocation.").

67 *See* Cd. Civ. (Venez.) (1982), art. 1166 ("Los contratos no tienen efecto sino entre las partes contratantes: no dañan ni aprovechan a los terceros, excepto en los casos establecidos por la Ley.") ("Contracts produce no effects except among the contracting parties. They may neither burden nor benefit third parties, except as provided by law."); art. 1164 ("Se puede estipular en nombre propio en provecho de un tercero cuando se tiene un interés personal, material o moral, en el cumplimiento de la obligación. . . . Salvo convención en contrario, por efecto de la estipulación el tercero adquiere un derecho contra el promitente.") ("One may enter into an agreement in one's own name for the benefit of a third party based on one's own personal, material, or moral interest in the fulfillment of the obligation. . . . . Unless otherwise stipulated, the third party acquires a right against the promisor by virtue of the agreement.").

68 *See* Cd. Civ. (Fr.) (1804), art. 1165 ("Les conventions n'ont d'effet qu'entre les parties contractantes; elles ne nuisent

approach. So does their Peruvian counterpart. The latter embeds in its section on "Contracts in General," among its "General Provisions," Article 1363: "Contracts produce effects only among the parties that executed them. . . ."[69] Of course, it does not thus preclude the enforcement of a contract legitimately intended to deviate from the standard enunciated. After all, Article 1353 already declares the whole "section's general rules" inoperative if "incompatible with the specific rules applicable to" the contract in question.[70] Indeed, Aníbal Torres Vásquez explains that the "rule articulated [in Article 1363] allows many exceptions, in which the contract may produce effects favorable or unfavorable to third parties."[71] He mentions, as one example among many, "liability insurance policies for harm caused by automobile drivers, physicians, *etc.*, establishing that the insurance company will indemnify any victims (third parties to the insurance contract)."[72]

More broadly, two parties may, under the express authorization of Article 1457, enter into a "contract for the benefit of a third party," with one of them committing before the other one "to do something for the benefit of a third party."[73] Article 1458, in turn, echoes the law in Argentina,[74] Nicaragua,[75] and Paraguay,[76] when it proclaims that: "The right of the third party arises directly and immediately upon the execution

point au tiers, et elles ne lui profitent que dans le cas prévu par l'article 1121.") ("Contracts have no effect except among the contracting parties. They may not burden a third party; nor benefit him except as provided under Article 1121.); art. 1121 ("On peut pareillement stipuler au profit d'un tiers lorsque telle est la condition d'une stipulation que l'on fait pour soi-même ou d'une donation que l'on fait à un autre.") ("Similarly, one may contract in favor of a third party, as in a condition to an agreement that one undertakes for oneself or as in a donation that one makes for someone else.").

69 Cd. Civ. (Peru) (1984), art. 1363 ("Los contratos sólo producen efectos entre las partes que los otorgan. . . .").

70 Cd. Civ. (Peru) (1984), art. 1353 ("Todos los contratos de derecho privado . . . quedan sometidos a las reglas generales contenidas en esta sección, salvo en cuanto resulten incompatibles con las reglas particulares de cada contrato.") ("Every private law contract is subject to this section's general rules, except if they are incompatible with the specific rules applicable to it.").

71 Torres Vásquez, *supra* note 57, at 2 ("esta regla presenta muchas excepciones por las que el contrato puede producir efectos favorables o desfavorables para terceros.").

72 *Id.* at 34 ("Los seguros de responsabilidad civil por daños causados por conductores de vehículos, médicos, *etc.*, que establecen que la compañía aseguradora debe indemnizar a las víctimas (terceros ajenos al contrato de seguro).")

73 Cd. Civ. (Peru) (1984), art. 1457 ("Por el contrato en favor de tercero, el promitente se obliga frente al estipulante a cumplir una prestación en beneficio de tercera persona."). Aníbal Torres Vásquez lists "[t]he contract in favor of a third party" as an exception to the relativity principle. ("El contrato celebrado en favor de tercero.") Torres Vásquez, *supra* note 57, at 11.

74 *See* Cd. Civ. (Arg.) (2016), art. 1027 (quoted *supra*, note 60).

75 *See* Cd. Civ. (Nicar.) (1904), art. 2492 ("Después de la aceptación del tercero, el prometiente está obligado directamente para con él, a ejecutar su promesa, y el derecho del tercero queda asegurado con las mismas garantías que el estipulante pactó.") ("With his acceptance, the third party imposes a direct obligation to keep the promise in his favor on the promisor. He thereby secures the same guaranties as agreed with the promisee.")

76 *See* Cd. Civ. (Para.) (1985), art. 730 ("… las relaciones entre el estipulante y el tercero serán juzgadas como si el contrato se hubiere ajustado directamente entre ellos.") (". . .The relationship between the promisee and the third party will be adjudicated as if the two had directly entered the contract with each other.").

of the contract."[77] Furthermore, the same provision stresses that the third party renders "the right . . . enforceable" by telling the parties at any moment that he intends "to exercise that right."[78] Finally, Article 1461, captioned "Enforceability of the Promisor's Compliance," reiterates that "the right to demand the promisor's compliance with the obligation . . . belongs to the third-party beneficiary once he has made the declaration referred to in Article 1458. . . ."[79] "Since the law does not specify the matter," Torres Vásquez elucidates, "the acceptance of the benefit may take place either expressly or tacitly. . . ."[80]

Significantly, Article 1354, which equally appears in the section on "Contracts in General" as one of the "General Provisions," announces that: "The parties may freely determine the contract's content, so long as it does not run counter to a mandatory legal norm."[81] Explicitly denominated a "contract" in its codified definition,[82] a third-party agreement falls squarely under Article 1354,[83] as well as under the previously analyzed precepts on contractual exegesis. Therefore, individuals may set up such a scheme and structure it, to a large extent, as they wish.

77 Cd. Civ. (Peru) (1984), art. 1458 ("El derecho del tercero surge directa e inmediatamente de la celebración del contrato."). *See* Torres Vásquez, *supra* note 57, at 16 ("El Derecho del tercero surge directamente del contrato, sin necesidad que preste su aceptación.") ("The third party's right derives directly from the contract, independently of his acceptance."). *See also id.* at 46, 50, 50-51, 60.

78 Cd. Civ. (Peru) (1984), art. 1458 ("Empero, será necesario que el tercero haga conocer al estipulante y al promitente su voluntad de hacer uso de ese derecho, para que sea exigible, operando esta declaración retroactivamente."). *See* Torres Vásquez, *supra* note 57, at 43 ("Una vez que el tercero hace conocer al estipulante y al promitente su voluntad de hacer uso del derecho establecido en su favor (art. 1458), tiene a su disposición todos los medios compulsivos que corresponden al acreedor contra el deudor (art. 1219).") ("Once the third party informs the promisee and the promissor that he intends to exercise the right established in his favor (art. 1458), he has at his disposal all of the creditor's means of coercion against the debtor (art. 1219)."); *id.* at 16 ("Pero para que este derecho sea exigible, sí es necesario que [el tercero] haga conocer a los contratantes su aceptación de aprovechar la estipulación en su favor.") ("Nonetheless, the enforceability of the right necessitates that [the third party] inform the contracting parties of his acceptance of the agreement in his favor.") . *See also id.* at 49, 50, 55.

79 Cd. Civ. (Peru) (1984), art. 1461 ("Exigibilidad de cumplimiento al promitente: El . . . derecho a exigir el cumplimiento de la obligación por el promitente . . . corresponde al tercero beneficiario una vez que haya efectuado la declaración a que se refiere el artículo 1458. . . .").

80 Torres Vásquez, *supra* note 57, at 44-45 ("Al no existir forma preestablecida por la ley, la aceptación del beneficio puede hacerse en forma expresa o tácita (art. 141). . . .").

81 Cd. Civ. (Peru) (1984), 1354 ("Las partes pueden determinar libremente el contenido del contrato, siempre que no sea contrario a norma legal de carácter imperativo.").

82 *See* Cd. Civ. (Peru) (1984), art. 1457 ("contrato"). *See also* Torres Vásquez, *supra* note 57, at 36 ("*Es un contrato*. Con la figura del contrato a favor de tercero se hace referencia al tipo de contrato con el cual se crea un beneficio o favor económico para terceros.") (*It is a contract*. Third-party contracts produce an economic benefit or advantage for a third party.").

83 *See* Torres Vásquez, *supra* note 57, at 37, 41 ("En el Derecho peruano no hay nada que prohíba [el contrato a favor de tercero], puesto que las partes son libres de determinar el contenido del contrato, siempre que no sea contrario a normas imperativas (art. 1354), al orden público y a las buenas costumbres.") ("Nothing in Peruvian law prohibits third-party contracts, inasmuch as the parties may freely define the contract's content, as long as it does not run counter to a mandatory legal norm (Art. 1354), the public order, or good morals.").

By the same token, the parties do not have to rely on a particular formulation, much less inscribe the instrument with the phrase "third-party contract." They solely have to intend to grant the third party the entitlement or the advantage at stake. Once again, an adjudicator may discern such intent from the face of the ultimately undersigned document or from the underlying circumstances.

In a nutshell, ordinary interpretation principles, which privilege the parties' intent, apply when determining whom the contract benefits or entitles and how or to what exactly. The Civil Code in Peru and elsewhere in the civil-law realm authorizes third-party agreements, exempting them from the fallback principle that restricts contractual effects to the contracting parties. The third party attains his or her right directly and immediately upon execution of the relevant instrument and may vindicate it by notifying the parties, whether explicitly or implicitly, at any time. Freedom of contract, as well as the statutory sanction, empowers people both to enter into such an arrangement and to configure it, to a considerable degree, as they see fit.

D. Recapitulation

First, Latin American law, as part of its civil-law heritage, usually requires reading a contract on the basis of the parties' common intention. It commands enforcing the latter, when plainly demonstrable, even if at odds with the ultimately undersigned document. Along parallel lines, the Peruvian legal system necessitates disregarding the contractual wording upon proof of a contrary intent. Throughout the region, courts must interpret a contract to mean A if they ascertain that the parties intended this meaning. They must do so whether the text says A or B and, of course, when it allows either interpretation.

Secondly, these exegetical principles, which privilege the parties' intent, apply when determining whom the contract benefits or entitles and how or to what exactly. The Civil Code in Peru and elsewhere in the civil-law realm authorizes third-party agreements, exempting them from the default norm that restricts contractual effects to the contracting parties. The third party acquires a right directly and immediately upon execution of the relevant instrument and may vindicate it by notifying the parties, whether explicitly or implicitly, at any time. Freedom of contract, as well as the statutory sanction, empowers people both to enter into such an arrangement and to configure it, to a considerable degree, as they see fit.

V. RETROACTIVITY AND PUNITIVE DAMAGES IN ECUADOR AND LATIN AMERICA

A. For Starters

Mostly, the civil law proscribes applying enactments retroactively and awarding punitive damages. It does so somewhat differently from one country to the next. Nevertheless, these prohibitions operate relatively uniformly throughout.

B. Retroactive Application of Laws: Point and Counterpoint

The bar on retroactivity plays a central role in Latin American civil law. It prohibits the retroactive application of legislation. Accordingly, courts may not rely on an enactment passed after the facts of the complaint occurred.

The Ecuadorian Civil Code, like many others in the civil-law universe, proclaims that laws "shall have no retroactive effect."[84] It thus disallows reliance on a statute in order to challenge conduct that took place earlier. Defendants thus receive protection against having to face liability based on norms that did not hold when they undertook the challenged actions.

Nonetheless, Rule 20(a) of Article 7 carves out a unique exception. It declares, in essence, that purely procedural legislation may become valid immediately.[85] The provision reads: "Laws that concern the substantiation and the solemnities of lawsuits shall prevail over prior laws from the moment in which they enter into effect."[86] Article 163(2) of Ecuador's Organic Judicial Code contains almost identical language.[87]

Of course, a judge may not merely state that an enactment amounts to procedure, rather than substance, in order to apply it. Nor may she focus on its adjective to the exclusion of its substantive components to the same end. If the judiciary had the authority to label, at will, any statute as purely

84 *See* Cd. Civ. (Ecuad.) (2005), art. 7; Cd. Civ. (Ecuad.) (1970), art. 7 ("no tiene efecto retroactivo"). *See also* Cd. Civ. (Arg.) (2016), art. 7; Cd. Civ. (Chile) (1857), art. 2; Cd. Civ. (D.R.) (1826), art. 2; Cd. Civ. (Ecuad.) (2005), art. 7; Cd. Civ. (El Salv.) (1859), art. 9; Cd. Civ. (Fr.) (1804), art. 2; Cd. Civ. (Hond.) (1906), art. 7; Cd. Civ. Fed. (Mex.) (1928), art. 5; Cd. Civ. (Para.) (1985), art. 2; Cd. Civ. (P.R.) (1930), art. 3; Cd. Civ. (Uru.) (1868), art. 7; Cd. Civ. (Venez.) (1982), art. 3. Sometimes, Latin American constitutions, like their U.S. counterpart, embody the same restriction. *See, e.g.,* Const. (Mex.) (1917), art. 14.

85 *See* Cd. Civ. (Ecuad.) (2005), art. 7(20(a)); Cd. Civ. (Ecuad.) (1970), art. 7(20a).

86 *Id.* ("Las leyes concernientes a la sustanciación y ritualidad de los juicios, prevalecen sobre las anteriores desde el momento en que deban comenzar a regir.").

87 Cd. Org. Jud. (2009), art. 163(2) ("Sin embargo, las leyes concernientes a la sustanciación y ritualidad de los juicios, prevalecen sobre las anteriores desde el momento en que deben comenzar a regir.").

procedural for purposes of retroactive application, it could end up hollowing out the ban on *ex post facto* laws. Tribunals must, therefore, rationally and restrictively construe the exemption for legislation that exclusively regards procedure. They must examine the invoked enactment in its entirety before classifying it as strictly formal and deploying it retroactively.

A complex, concrete controversy in which a complainant rests her claim for damages on a newly enacted statute may help illustrate the intricacies of the issue. For instance, she may file a genuinely collective or diffuse action under an environmental law, such as Ecuador's Environmental Management Act,[88] or an equivalent enactment elsewhere in the region.[89] Article 43 of the Ecuadorian statute provides that "persons, legal entities, [and] groups of people united by a common interest and directly affected by the injurious action or omission may sue . . . for damages in relation to any sanitary or environmental harm."[90] It emphasizes that environmental rights are "collective" and "shared by the community" and explicates "diffuse interest[s]," somewhat confusingly, as "homogeneous and indivisible interests held by indeterminate groups of individuals tied by common circumstances."[91]

Consequently, the claimant would apparently be basing her suit on a substantively new enactment that profoundly alters the state of the law. When the contested conduct occurred, the legal system entitled her to seek compensation, under the Civil Code, when someone "negligently or culpably" injured her personally.[92] Since then, it additionally empowers her to demand reparation for any generalized harm to the environment and to the community's health.

88 L. 77, L. Gestión Ambiental (Ecuad.) (1999).

89 *See, e.g.*, Const. (Braz.) (1988), art. 5(LXXIII) ("[A]ny citizen or party with standing [may] file a popular action seeking to annul . . . state action that impinges . . . upon the environment.") ("[Q]ualquer cidadão e parte legítima [pode] propor ação popular que vise a anular ato lesivo . . . de entidade de que o Estado participe, . . . ao meio ambiente."); L. 24 (Pan.) (1995), art. 78 ("Any person may file, under this law, an environmental public action . . . regarding not an individual or direct injury, but rather a threat or injury to diffuse interests or to the interests of a collectivity.") ("En cumplimiento de la presente Ley, toda persona podrá interponer acción pública ambiental, sin necesidad de asunto previo cuando por su naturaleza no exista una lesión individual o directa, sino que atañe a los intereses difusos o a los intereses de la colectividad."); L. 28237, Cd. Procesal Const. (Peru) (2004), art. 40 ("Likewise, any person may file for a writ of protection when a threat to or a violation of environmental or other diffuse rights that have constitutional stature is at stake. . . .") ("Asimismo, puede interponer demanda de amparo cualquier persona cuando se trate de amenaza o violación del derecho al medio ambiente u otros derechos difusos que gocen de reconocimiento constitucional. . . .").

90 L. 77, L. Gestión Ambiental (Ecuad.) (1999), art. 43 ("Las personas naturales, jurídicas o grupos humanos, vinculados por un interés común y afectados directamente por la acción u omisión dañosa podrán interponer ante el Juez competente, acciones por daños y perjuicios y por el deterioro causado a la salud o al medio ambiente incluyendo la biodiversidad con sus elementos constitutivos.").

91 *Id.*, Glosario de Definiciones ("Derechos Ambientales Colectivos") ("Son aquellos compartidos por la comunidad. . . .") ("Inter[eses] Difuso[s]") ("intereses homogéneos y de naturaleza indivisible, cuyos titulares son grupos indeterminados de individuos ligados por circunstancias comunes.").

92 Cd. Civ. (Ecuad.) (2005), art. 2214 ("ha inferido daño"); *id.*, art. 2229 ("malicia o negligencia").

Diffuse claims differ radically from their individual counterparts. The former pertain, indivisibly, to society and are independent of any individual rights that citizens may hold. The latter belong to particular individuals and involve matters that concern them personally, rather than the collectivity.[93]

For example, the community may have claims to a sound environment that transcend those of any of the members. It may, accordingly, demand redress for the contamination of a remote, uninhabited, and inaccessible territory. A citizen who represents the collectivity under these circumstances, assuming a traditionally governmental function, seeks to vindicate an entirely different kind of entitlement than when she pursues compensation for the pollution of a piece of land that she owns.

Hence, the suitor would be hard pressed to portray, with plausibility, the transition from a regime of private entitlements to one of diffuse entitlements as purely procedural. In light of this difficulty, she could try a different strategy. First, she could acknowledge that the environmental legislation does touch upon substantive matters. Then, she could contend that, in a deeper sense, the statute simply empowers a new class of litigants to vindicate a long-established, formerly state-enforced entitlement and, as such, operates mostly procedurally.

In proceeding down this path, however, the complaint starts by conceding that the relevant provisions of the environmental law do bear upon substance. Hence, it renders irrelevant the question whether the statute might, from a more profound perspective, have an adjective character. After all, the Civil Code in Ecuador denies any retroactive effect whatsoever to substantive laws even if they partially regulate or constitute procedure.

At the end of the day, the empowerment of citizens to exercise the diffuse entitlements, whose vindication was formerly the state's prerogative, would seemingly entail, *per se*, a substantive change in the law. It would not only increase the number of potential lawsuits by a sizeable margin but also introduce a significantly different type of plaintiff. The corresponding incentives, requirements, and restrictions differ considerably when private parties, as opposed to the authorities, file the action. In comparison with the state, individuals and non-governmental entities may, *inter alia*, find more of a motivation in the prospect of a substantial monetary reward, need to disclose less about the suit under freedom-of-information or other

93 *See generally* Ángel R. Oquendo, *Justice for All: Certifying Global Class Actions*, Washington U. Global Studies L. Rev. (2017) (forthcoming), IV(E)(3) (distinguishing societal from individual claims).

principles, and confront fewer due-process limitations when interacting with their opponent in court.

An enactment that thus accords citizens standing to enforce the community's diffuse rights would seem not to qualify as just ceremonial precisely because it brings about such a major alteration in the legal order. In the terms of the Civil Code, it would not appear simply to "concern the substantiation [or] the rituality of lawsuits."[94] Ultimately, such a law, upon retroactive deployment, tends to impose on potential defendants exactly the kind of extra burden that the bar on retroactivity aims to spare them.

At this juncture, the complainant could attempt an alternative tack. Instead of purporting to categorize the *ex post facto* statute as procedural, she might assert that it basically boils down to a reenactment of already existing laws entitling individuals to sue. She might first zero in on Civil-Code provisions that institute the right to prosecute a suit in tort.

For example, Article 2214 essentially declares that whoever harms someone else through an illicit act has an obligation to indemnify the injured party.[95] Similarly, Article 2229 generally requires people to repair any damage that they cause through malice or negligence.[96] The claimant may argue that these provisions, which obviously have equivalents throughout the civil-law universe,[97] contain the substantive law upon which her action rests. She may maintain that they may serve to address diffuse injuries to the society as a whole.

Nevertheless, this interpretation entails problematic consequences. Articles 2214 and 2229 posit ordinary tort actions through which plaintiffs vindicate their own individual entitlements, rather than the community's diffuse rights. The judiciary would be transforming these provisions if it read

94 Cd. Civ. (Ecuad.) (2005), art. 7(20a) ("la sustanciación y ritualidad de los juicios").

95 Cd. Civ. (Ecuad.) (2005), art. 2214 ("Whoever commits a criminal or negligent offense that injures someone else, bears an obligation to indemnify, without prejudice to the legally imposed punishment for the offense.") ("El que ha cometido un delito o cuasidelito que ha inferido daño a otro, está obligado a la indemnización; sin perjuicio de la pena que le impongan las leyes por el delito o cuasidelito.").

96 Cd. Civ. (Ecuad.) (2005), art. 2229 ("As a general rule, a person shall repair any harm attributable to his or her malice or negligence.") ("Por regla general todo daño que pueda imputarse a malicia o negligencia de otra persona debe ser reparado por ésta.").

97 *See, e.g.*, Cd. Civ. (Braz.) (2003), art. 927 ("Whoever harms another by an illicit act shall bear an obligation to repair the harm.") ("Aquele que, por ato ilícito, causar dano a outrem, fica obrigado a repará-lo."); Cd. Civ. (Chile) (1857), art. 2329 ("As a general rule, a person shall repair any harm attributable to his or her malice or negligence.") ("Por regla general todo daño que pueda imputarse a malicia o negligencia de otra persona, debe ser reparado por ésta."); Cd. Civ. (Fr.) (1804), art. 1382 ("Whoever culpably harms another shall bear an obligation to repair the harm.") ("Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer. "); Cd. Civ. (P.R.) (1930), art. 1802 ("Whoever harms another by a culpable or negligent act or omission shall bear an obligation to repair the harm.") ("El que por acción u omisión causa daño a otro, interviniendo culpa o negligencia, está obligado a reparar el daño causado.").

an unprecedented diffuse-rights suit into them. In so doing, it would be acting against cardinal civil-law tenets, which command strict adherence to the letter of the Code,[98] as well as expressly condemn the retroactive application of laws.[99]

At this point, the suitor might turn her attention to Article 2236 of the Civil Code.[100] She might note that this provision entitles any person to file a popular action in order to remove a contingent harm, even if the drafters had probably not anticipated the possibility of application to the case at hand. She may insist that legal institutions require updating and evolution and conclude that this popular action lies in environmental cases.

Indeed, the Ecuadorian Civil Code, like many of its counterparts in the region, establishes a series of such private-law popular actions for the enforcement of diffuse rights under specific circumstances.[101] Specifically, Article 2236, like its equivalents elsewhere, authorizes "a popular action in cases in which, because of someone's imprudence or negligence, a contingent harm threatens an indeterminate number of people."[102] It requires a precisely identified contingent harm,[103] in addition to contemplating only injunctive remedies for the purpose of removing the danger at stake.[104]

The hypothesized complaint would presumably fail to meet these requirements. In particular, it does not allege the right kind of injury or pray for the right type of relief. As a result, the provision at stake would evidently not apply to the dispute at hand.

98 *See, e.g.*, Cd. Civ. (Ecuad.) (2005), art. 18.

99 *Id.* art. 7.

100 Cd. Civ. (Ecuad.) (2005), art. 2236. *See infra* note 101 and accompanying text (discussing the popular actions established by this article, as well as by similar provisions in other Spanish American civil codes).

101 *See* Oquendo, *supra* note 92, IV(E)(3) (exploring popular actions under the Civil Code in various Latin American jurisdictions).

102 Cd. Civ. (Ecuad.) (2005), art. 2236 ("Por regla general se concede acción popular en todos los casos de daño contingente que por imprudencia o negligencia de alguno amenace a personas indeterminadas."). *See also* Cd. Civ. (Chile) (1857), art. 2333; Cd. Civ. (Colom.) (1887), art. 2359; Cd. Civ. (El Salv.) (1859), art. 2084.

103 These actions have a preventive character. *See generally* José Luis Diez Schwerter & Verónica Pía Delgado Schneider, *Algunas útiles herramientas olvidadas en nuestra práctica del "derecho de daños,"* 214 Rev. Dcho. Univ. Concepción 143, 144-48 (§ 2) (2003) ("Popular Preventive Actions"); Francisco de la Barra Gili, *Responsabilidad extracontractual por daño ambiental: El problema de la legitimación activa*, 29 Rev. Chilena Dcho. 367, 401-02 (§ 2.5.3) (2002) ("inhibitory mechanism"; "purpose of preventing a contingent harm"); Arturo Alessandri, De la responsabilidad extracontractual en el derecho civil chileno 218 (III(3)) (1983). As such, they target the party who is in charge and, consequently, in a position to prevent the contingent harm. Someone who has no control cannot possibly avert that harm and therefore is not subject to suit.

104 The Article has "the purpose of preventing a contingent harm" and entitles plaintiffs "to appear before a judge so that he can issue an order to forestall [the contingent harm]." Barra Gili, *supra* note 102, at 401 (§ 2.5.3) ("para ocurrir ante el juez a fin de que ordene hacerlo desaparecer"); Alessandri, *supra* note 102, at 218 (III(3)). "A possible or hypothetical harm, based on suppositions or conjectures, . . . does not give rise to a right to indemnification." *Id.* at 218 (III(3)) ("Un daño eventual, hipotético, fundado en suposiciones o conjeturas, . . . no da derecho a indemnización.").

Once again, one must appreciate the difficulty of reading a new and open-ended diffuse-rights action into Article 2236. This construction, like that of Articles 2214 and 2229 previously analyzed, would expand the scope of the provision at issue beyond recognition and run up against the civil-law tradition's interdiction of any judicial deviation from precisely codified language and of retroactive application of laws. Furthermore, it would tend to render the other Civil-Code popular actions superfluous and ultimately to undercut the codifiers' overall approach, which consists in setting up a series of tightly tailored diffuse actions, rather than a single far-reaching suit.

At each turn, the adjudicator might feel tempted to play loose with the standard. She might have to remind herself that the latter embodies a key civic guaranty, which calls for rigorous implementation. Therefore, a tribunal should err on the side of preserving the proscription.

In sum, Ecuador, as well as other nations in the civil-law world, embraces a broad prohibition on retroactivity. It specifically exempts adjective statutes. Nevertheless, judges normally should construe this exemption narrowly in order to avoid undermining the ban or the underlying principles.

C. Keeping Civil Punishment in Check

All in all, punitive damages have no basis in Latin American or in Continental European law. Ecuador's legal system, like its counterparts in the civil-law tradition, does not provide for such a remedy. Of course, scholars such as Argentine Ramón Daniel Pizarro propose opening up to punitive damages under limited circumstances.[105] Still, Pizarro himself typically recognizes the unavailability of this type of relief in Latin America and Continental Europe.[106] In addition, an adjudicator could probably not justify the imposition of punitive damages as an application of a principle of universal law. Finally, she would likely not be able legitimately to reinterpret such an award as involving moral damages because it would satisfy none of the requirements for that kind of compensation.

Civil-law courts ordinarily may not grant punitive damages. In order to disregard this ban on their own, they would have to set aside profoundly ingrained principles, such as those that establish that codified law strictly binds the judiciary. In fact, this restriction retarded the transition from

105 *See infra* notes 112-120 and accompanying text (exploring Pizarro's cautious endorsement of a punitive role for civil legislation).

106 *See infra* notes 112-120 and accompanying text (documenting that Pizarro regards punitive damages as generally unavailable in the civil law tradition).

pecuniary to so-called moral or psychological damages. For a very long time, judges granted compensation for material and economic injuries, but not for pain and suffering. They felt that awarding the latter kind of redress, as opposed to the former, lacked support in the Civil Code and would enable them to exercise unbound and impermissible discretion. In some countries, this attitude changed only upon almost unanimous scholarly condemnation and upon an amendment to the Code, the Constitution, or both.[107]

In order to award punitive damages in Latin America or in Continental Europe, a tribunal would also have to disregard the equally deep-seated conviction that a civil remedy may not operate as punishment. Actually, this widespread persuasion has hindered the development of any significant support, either among scholars or among lawmakers, for the adoption of this kind of reparation. In exceptional cases, Latin American and Continental European jurisdictions sanction not punitive damages generally, but rather relief that transcends compensation and that appears to have a punitive component. The legal systems that take this approach do so, occasionally, in areas like consumer-protection.[108] In the relevant cases, they usually authorize the adjudicator to make the award under limited circumstances and under specific guidelines. She may not generally pass on the reprehensibility of the defendant's conduct and assess a commensurate penalty, as with punitive damages in the United States.

Some civil-law tribunals, like the German Supreme Court, have even gone so far as to declare punitive damages inconsistent with the public order and to decline to execute foreign judgments that include such a remedy.[109] The 2005 Hague Convention on Choice-of-Court Agreements unambiguously authorizes such refusal: "Recognition or enforcement of a judgment may be refused, if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered."[110] Similarly, the European Union Regulation 864/2007, on the Law Applicable to Non-Contractual Obligations, allows member

107 *See generally* Miguel Reale, *Moral Damages in Brazilian Law*, *in* A Panorama of Brazilian Law 121 (Jacob Dolinger & Keith Rosenn eds., 1992) (describing the Brazilian judiciary's resistance to moral damages despite scholarly, codified, and constitutional support for such a remedy).

108 *See, e.g.*, L. 24.240 (Consumer Defense Act) (Arg.) (1993), art. 52*bis* ("The judge may impose, at the request and in favor of the consumer, a civil fine, which will vary depending on the gravity of . . . the case, on providers who fail to meet their legal or contractual duties toward consumers. . . . The civil fine may not exceed" five (5) million *pesos*.).

109 *See, e.g.*, BGHZ 118, 312 (343 f.) (Supr. Ct.) (Germany) (1992) (summarized in Peter Hay, *The Recognition and Enforcement of American Money-Judgments in Germany: The 1992 Decision of the German Supreme Court*, 40 Am. J. Comp. L. 729, 730-31 (1992)).

110 Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, art. 11(1).

states to decline to apply statutes from other European-Union countries on the basis of "considerations of public interest," specifically when the law in question calls on the judiciary to "award . . . non-compensatory exemplary or punitive damages of an excessive nature."[111]

Nonetheless, commentators like Ramón Daniel Pizarro have endorsed the incorporation of a punitive component in civil indemnification under limited circumstances.[112] Significantly, this author actually acknowledges the traditional stance and cautions that "punitive damages have not attained much recognition in the Continental European system or in Latin America."[113] He specifically notes that the punishment of "intentional torts" or of "gross negligence" faces "serious difficulties," mostly due to "*the lack of norms* for the imposition of civil sanctions in such cases."[114]

Aiming to transcend a mere "description of the system,"[115] however, Pizarro advocates the "future" [116] adoption, in Argentina, of this institution, as a "useful instrument,"[117] under "exceptional" and "restricted" [118] circumstances. Not surprisingly, he addresses his proposal to lawmakers and insists that it requires express legislation prior to application. He underscores, using his own italics, "the absolute necessity of providing for such penalties by *law*."[119] "Punishment," he explains, "must be expressly established in the law in order to forestall an encroachment upon basic notions of legal certainty that the Constitution consecrates."[120] At the end

111 Council Regulation 864/2007 (On the Law Applicable to Non-Contractual Obligations) (Rome II), 2007 O.J. (L. 199/40) (EC), Consideration 32.

112 Ramón Daniel Pizarro, Derecho de Daños 287-337 (Ch. XIII ("Daños Punitivos")) (1996).

113 *Id.* at 295 ("Los daños punitivos no han alcanzado mayor repercusión dentro el sistema de Europa Continental ni en Latinoamérica."). Elsewhere, Pizarro states that, "among us [in Argentina], as well as in most countries in Continental Europe and Latin America, [punitive damages] have not attained much recognition." *Id.* at 287 ("Sin embargo, entre nosotros —y en la mayor parte de los países de Europa continental y de Latinoamérica— [los daños punitivos] no han alcanzado mayor repercusión."). He notes, in particular, that civil-law literature has attributed "little importance . . . to the *punitive dimension* of tort law." *Id.* at 289 ("Llama la atención la poca importancia que nuestra doctrina ha prestado a la *faz punitiva* del derecho de daños.").

114 *Id.* at 290 ("agravia intencionado"; "de una grosera negligencia"; "serias dificultades"; "la ausencia de normas que permiten sanciones civiles en tales supuestos"). *See also id.* at 291 ("The problems relating to the punishment of certain torts" stem from "a glaring lack of adequate normative principles") & 297 ("In Latin America . . ., punitive damages find few antecedents.").

115 *Id.* at 288 ("descripción del sistema").

116 *Id.* at 287 ("futura"). *See also id.* at 291 & 336. Pizarro asserts that "punitive damages in the common law constitute one of the possible parameters for consideration in the formulation of future legislation." *Id.* at 291. Nonetheless, he acknowledges that comparative efforts in the civil-law tradition usually restrict themselves "to Continental European law and to the Latin American system" and rarely focus on "the common law and its institutions." *Id.* at 288.

117 *Id.* at 287 ("instrumento útil").

118 *Id.* at 336 ("excepcional"; "restrictiva").

119 *Id.* at 336 ("la necesidad indispensable de consagrar tales puniciones por *ley*.").

120 *Id.* at 290 ("las penas deben estar expresamente provistas por la ley, so riesgo de afectar elementales principios de seguridad jurídica que consagra la Constitución nacional.")

of the day, Pizarro is simply endorsing the kind of punitive relief that has already emerged in the civil-law realm, not the wider-ranging variant that prevails in the United States.

Of course, the Ecuadorian Civil Code's Article 18(7a) establishes that, in the absence of a legal norm applicable to the controversy at hand or to analogous cases, an adjudicator may turn to "the principles of universal law."[121] It thus echoes its counterparts all over Latin America and Continental Europe.[122] All the same, this provision does not entitle judges to apply any imaginable rule to settle the disputes before them. Instead, it creates a narrow exception, which should not undermine the judiciary's overriding obligation to adjudicate, strictly, according to what the Code spells out and explicitly commands.

Consequently, a tribunal must, in applying Article 18(7a) or its equivalents throughout the civil-law universe, first show that no legal norm exists for the case or for any similar controversy. Since the Civil Code comprehensively governs civil-law suits, it does not leave a vacuum of this sort. In fact, it covers all kinds of tort claims, including those pertaining to injuries alleged to have occurred due to "serious culpability, serious negligence, extreme culpability," or even due to "malice (*dolo*)," which "consists in the positive intention to visit harm upon someone else or upon his or her property."[123]

In addition, the Code provides for a wide array of remedies, such as indemnification,[124] reparation,[125] and even moral compensation.[126] In a typical fashion, it does not authorize punitive damages under any circumstances. In any event, inasmuch as courts have at their disposal positive law to address questions of liability and relief, Article 18(7a) does not apply.

Even in the absence of relevant legal parameters, a judge seeking to rely on Article 18(7a) must, additionally, point to a pertinent principle of universal law. As just noted, Latin American and Continental European

121 Cd. Civ. (Ecuad.) (2005), art. 18(7a) ("A falta de ley, se aplicarán las que existan sobre casos análogos; y no habiéndolas, se ocurrirá a los principios del derecho universal.").

122 *See* Cd. Civ. (Arg.) (2016), art. 2; Cd. Civ. (Chile) (1857, art. 24; Cd. Civ. (Colom.) (1873), art. 32; Cd. Civ. (C.R.) (1886), art. 11; Cd. Civ. (Ecuad.) (2005), art. 18(6a & 7a); Cd. Civ. (Hond.) (1906), art. 20; Cd. Civ. Fed. (Mex.) (1928), arts. 18 & 19; Cd. Civ. (Para.) (1985), art. 6; Cd. Civ. (Peru) (1930), art. VIII; Cd. Civ. (P.R.) (1930), art. 7; Cd. Civ. (Uru.) (1868), art. 16; Cd. Civ. (Venez.) (1982), art. 4.

123 Cd. Civ. (Ecuad.) (2005), art. 29 ("Culpa grave, negligencia grave, culpa lata") ("El dolo consiste en la intención positiva de irrogar injuria a la persona o propiedad de otro.").

124 *Id.* arts. 2214-2216.

125 *Id.* art. 2229.

126 *Id.* arts. 2231-2234.

systems universally reject the notion that the judiciary may punish defendants in controversies under the Civil Code. In fact, the remedy in question appears to find clear support only in the United States and in a few other common-law jurisdictions.[127] Therefore, no principle with the necessary degree of universality would sustain an award of punitive damages. If anything, the general practice throughout the world points in the opposite direction, namely, in that of a proscription of this kind of relief.

Finally, one may not persuasively assimilate punitive to moral damages. The latter, as previously pointed out, address mainly psychological and reputational injuries and, as opposed to the former, do not aim at punishment, but rather at compensation. They require that the plaintiff specifically request for such relief,[128] as well as that the adjudicator assess and justify the sum awarded.[129] A condemnation of a defendant to pay a penalty on grounds of allegedly reprehensible conduct would not seem to qualify as an award of moral damages.

D. Wrap-Up

The civil law of Ecuador, like that of other countries in Latin America and Central Europe, forbids the retroactive application of laws and the imposition of punitive damages. These prohibitions play an important role in the legal system and call for strict adherence. In this area, the civil-law tradition evinces an impressive amount of congruence despite the variance in the details.

VI. CONCLUSION

Parts II and III meditated upon, respectively, the notion of the civil-law tradition and that of codification. Thereafter, Part IV investigated the mostly common take on contractual interpretation and on third-party

127 The U.S. Supreme Court has endorsed the constitutional validity of punitive damages, while imposing strict due-process limitations. *See, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); *Philip Morris USA v. Williams,* 549 U.S. 346 (2007); *State Farm Mut. Automobile Ins. Co. v. Campbell,* 538 U.S. 408 (2003); *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996). *Cf.* Honda Canada Inc. v. Keays, 2008 SCC 39, [2008] 2 SCR 362 (Sup. Ct.) (Canada) ("Punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own . . . . Courts should only resort to punitive damages in exceptional cases . . . .); Rookes v. Barnard, 1964 A.C. 1129, 1225-28 (H.L.) (England) (1964) (L. Devlin) (An award of "punitive or exemplary damages" may lie (1) when "oppressive, arbitrary or unconstitutional action by the servants of the government" has taken place; (2) when "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff"; or (3) when "exemplary damages are expressly [authorized] by statute.").

128 *See* Cd. Civ. (Ecuad.) (2005), art. 2233.

129 *See id.* art. 279.

agreements. Finally, Part V scrutinized the characteristic proscriptions against retroactivity and punitive damages.

All in all, this article has reflected upon certain institutions, as well as ideas, that inhabit the civil-law universe. It has shown how they have survived and developed in Latin America. In fact, this legal realm as a whole reveals its true internationalized and modernized face as it goes through this story of survival, development, and even transformation. It possesses no common essence and shows itself as one simply by virtue of a family resemblance among the systems belonging to it. Hence, each one of the latter shares with the rest not a single element, but rather a number thereof, discontinuously and incompletely: in other words, an overarching, variegated and somewhat nebulous history and culture. ❖