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The Post-Westphalian Polyhedral Dimension of Legal Mutation – A Case Study: Party Autonomy in International Contracts in Latin America

Lorenzo SERAFINELLI[*]

This paper deals with legal mutation and intends to place it in the perspective of a globalized and post-Westphalian world. The major goal of this research is to provide a theoretical sketch to analyze legal mutation by not flattening it to its inter-State movement alone. In other words, it aims to identify suitable tools to describe the ways in which law changes also because of the interactions that occur between its national and international dimensions. This perspective of analysis is defined polyhedral since it is not constrained to the mere bilateral inter-State scenario. Such perspective will be employed to investigate the recent developments occurred in Latin American with regard toparty autonomy in international contracts. The selected case study will thus be used as a test case to check the validity of the theoretical sketches concerning the kind of circulation we have termed post-Westphalian and polyhedral.

Il presente contributo affronta la mutazione giuridica ponendosi nell'ottica di un mondo globalizzato e post-vestfaliano. Obiettivo primario della ricerca è quello fornire un abbozzo teorico di uno schema di analisi attraverso cui osservare la mutazione giuridica non appiattendola al solo suo movimento interstatale. In altri termini, si intende individuare degli strumenti idonei a descrivere le modalità attraverso cui il diritto muta anche a causa delle interazioni che avvengono tra la sua dimensione nazionale e quella internazionale. Questa prospettiva di analisi, definita poliedrica poiché appunto non si limita, nel descrivere il mutamento, alla sola dimensione bilaterale del rapporto inter-statale, sarà impiegata per indagare le ragioni delle recenti evoluzioni latino-americane concernenti l'autonomia dei privati nella contrattualistica internazionale. Il caso di studio selezionato sarà dunque utilizzato come banco di prova per verificare la validità degli abbozzi teorici relativi a quella forma di circolazione che abbiamo definito post-vestfaliana e poliedrica.

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1. INTRODUCTION

This research deals with legal mutation and aims to address such phenomenon by capturing how legal systems change in a way not limited to the inter-State dimension and trajectories of such evolutions[1]. In so doing, it attempts to unhinge the prevailing views that flatten comparative inquiries to a mere analysis of relationships between sovereign subjects. This paper tries to put forward a different perspective, hence, by employing a polyhedral approach to legal mutation.

It focuses on the issue of party autonomy in international contracts in Latin America. Party autonomy is a well-known and globally recognized principle according to which parties to an international contractual relationship have the right to choose the applicable law. As Symeon Symeonides puts it[2]:

> The last 50 years in particular have been a triumphant period for party autonomy. It has been characterized as "perhaps the most widely accepted private international rule of our time," a "fundamental right," and an "irresistible" principle that belongs to "the common core of the legal systems." The vast majority of codifications and conventions adopted during this period have assigned a prominent role to this principle. In fact, as far as it can be ascertained, only three codifications enacted during this period have *not* adopted this principle for contract conflicts—those of Ecuador, Paraguay, and Guinea-Conakry. However, none of these codifications is comprehensive, and the first two are from Latin America, a region that is still under the influence of the Bustamante Code and its negative position on this subject.

As acknowledged by Symeonides, the Latin American region has long been an exception to the recognition of the principle. Traditionally, in fact, the American continent in its entirety was influenced by the ideals of territorialism in conflict of laws; ideals that were widespread during the postcolonialism period, both in North and South Amer-

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[1] «Il diritto muta. Muta senza interruzione. Muta da sempre»: cfr. A. GAMBARO, R. SACCO, *Sistemi giuridici comparati*, in R. SACCO (dir.), *Trattato di diritto comparato*, Torino, 2008, p. 23. *Ex multis*, see J. MERRYMAN, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, in *Am. J. Comp. L.*, 1977, III, p. 457 ff.; A. WATSON, *Legal Transplants: An Approach to Comparative Law*, Edinburgh, 1974, *passim*; ID., *Comparative Law and Legal Change*, *The Cambridge L. J.*, 1978, II, p. 313 ff.; ID., *From Legal Transplants to Legal Formants*, in *Am. J. Comp. L.*, 1995, III, p. 469 ff.; ID., *The Birth of Legal Transplants*, in *Ga. J. Int'l & Comp. L.*, 2013, III, p. 605 ff.; G. AJANI, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, in *Am. J. Comp. L.*, 1995, I, p. 93 ff.; W. EWALD, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, in *Am. J. Comp. L.*, 1995, IV, p. 489 ff.; P. LEGRAND, *The Impossibility of Legal Transplants*, in *Maastricht J. Eur. & Comp. L.*, 1997, II, p. 111 ff.; ID., *What Legal Transplants*, in D. NELKEN, J. FEEST (eds.), *Adapting Legal Cultures*, Oxford-Portland, Oreg., 2001, p. 55 ff.; P.G. MONATERI, *Black Gaius: A Quest for the Multicultural Origins of the Western Legal Tradition*, in *Hastings L.J.*, 2000, III, p. 479 ff.; J. WIENER, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, in *Ecology L.Q.*, 2001, IV, p. 1307 ff.; M. GRAZIADEI, *Legal Transplants and the Frontiers of Legal Knowledge*, in *Theoretical Inq. L.*, 2009, II, p. 723 ff.; G. MARINI, *Diritto e politica: la costruzione delle tradizioni giuridiche nell'epoca della globalizzazione*, in *Polemos*, 2010, I, p. 31 ff.; A. DOLIDZE, *Bridging Comparative and International Law:* Amicus Curiae *Participation as a Vertical Legal Transplant*, in *Eur. J. Int. L.*, 2015, IV, p. 851 ff.; E. GRANDE, *Legal Transplants and the Inoculation Effect*, in *Am. J. Comp. L.*, 2016, III, p. 583 ff.; A. MIRANDA, *Lo "stingimento" delle regole giuridiche tra diritti e limiti nell'era dei flussi migratori e della crisi delle nazioni*, in *Cardozo EL. Bull.*, 2018, p. 1 ff.

[2] S.C. SYMEONIDES, *Codifying Choice of Law Around the World*, Oxford, 2014, p. 114 (citation omitted). For greater clarity, from the time Symeonides wrote, Paraguay enacted, as we have stated above, a new law in 2015 which recognized the principle limited to international commercial contracts.

ica, indeed[3]. The territoriality principle gave tremendous importance to national law, relegating foreign law to a few hypotheses of application. In contract conflicts, such principle and the political trend by which it was inspired, led to the refusal of the more liberal one of party autonomy[4]. The territoriality of law was looked at as a shield against foreign intrusions, to which the American continent was particularly sensitive in the XIX century. As a consequence, the idea that a contract would be governed by a law other than the national one, and particularly by the law of the conquerors, paved the way to hostility to party autonomy and its liberal nature.

This attitude has long survived in Latin America, and has prolonged its influence until recent times. Thus, the major goal of this paper is to set forward a plausible explanation of such Latin American exceptionalism by assuming a comparative law perspective that overcomes the classic views on legal mutation. In my opinion, this *modus operandi* is apt to give a better insight of the dynamics that brought Latin American States to abandon their original strong rejection of party autonomy in international contracts. This paper suggests the need to address the selected case study by assuming a Post-Westphalian polyhedral methodology whereby approaching to legal mutation from a non-exclusively inter-State perspective.

2. ADDRESSING LEGAL MUTATION FROM A POLYHEDRAL PERSPECTIVE

After all, ever since legal comparison emerged as a science, its devotees have sought to develop theoretical models that are apt to intercept the movement and describe it[5].As is widely known, different views have been developed over time about how legal mutation occurs. Each and every one of these views wanting to try to identify a unique model applicable in every context and at every latitude: there has been talk of legal transplants[6], of spreading a model because of its prestige[7], of grafts[8], of inoculations[9], of stinging[10], of imitations, etc.

It is not the purpose of the present research to rekindle the debate about which model most accurately succeeds in describing the dynamics of the legal phenomenon. I take the argument, however, that the most fitting view is the one that admits a circulation of legal rules such that the bodies that transpose these rules contribute to their modification and adaptation to the legal, economic, social, cultural and political context of reception.

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[3] See for a general address J.M. SHAMAN, *The Choice of Law Process: Territorialism and Functionalism*, in *William & Mary L.R.*, 1980, II, p. 227 and L. PEREZNIETO CASTRO, *La tradition territorialiste en droit international privé dans le pays de l'Amérique Latine*, in *Rec. Cours de l'Académie de Droit Intern.*, Vol. 190, 1985, 270 ff., esp. at p. 279.

[4] See H. BATIFFOL, *Les Contrats en Droit International Privé Comparé*, Montréal, 1981, p. 1;E. HERNÁNDEZ BRETÓN, *Autonomía conflictual en América latina. Tendencias actuales*, in *Anuario Hispano-Luso-Americano de derecho internacional*, 2003, p. 41 ff., esp. at p. 450; D.OPERTTI BADÁN, C. FRESNEDO DE AGUIRRE, *Contratos Comerciales Internacionales*, Montevideo, 1997, p. 15; and J. SAMTLEBEN, *Teixeira de Freitas e a autonomia das partes no direito internacional privado latino-americano*, in *Rev. de Informação Leg*., 1986, I, p. 257 ff.

[5] Cfr. G. TARDE, *Le droit comparé et la sociologie*, in *Bull. mensuel de la Soc. leg. comp.*, 1900, p. 530 s.

[6] A. WATSON, *Legal Transplants*, cit.

[7] R. SACCO, P. ROSSI, *Introduzione al diritto comparato*, in *Trattato Sacco*, cit., 2019, p. 130.

[8] E.A. FELDMAN, *Patients' Rights, Citizens' Movements and Japanese Legal Culture*, in D. NELKEN (ed.), *Comparing Legal Cultures*, Aldershot, 1997, p. 215 ff., esp. at p. 220 f.

[9] E. GRANDE, *The Inoculation Effect*, cit.

[10] A. MIRANDA, *Lo stingimento delle regole*, cit.

Such point of view, therefore, is closer to grafts rather than to transplants. The latter, in fact, would assume the absence of any reaction from the receiving organ in deference to an alleged, and unproven, neutrality of legal rules[11]. Being that said, the aspect on which I intend to deal with is strongly related to the subjects involved in the legal mutation.

Let me explain further: a view on legal mutation that is eminently inter-Statist is obvious in not all, but much of the comparative literature. According to the traditional view, the transmigration of models, rules and institutions would occur mainly between States, or in any case one witnesses a major presence of them. Notwithstanding that, the world we live in largely belies this description: legal mutation, in contemporary times, also contemplates the active participation of non-State actors, to whom I refer with the all-encompassing adjective of "international" (International Institutions, International Organizations, Supranational and Regional Bodies etc.).

The vast majority of legal comparative studies on legal mutation has moved from the assumption that the latter occurs through a flow that runs from State to State, in a horizontal and Westphalian dynamic, that is, between subjects who are formally equals. Take, for instance, the following passage from Alan Watson: «The common law has in turn become a legal export commodity to most of Canada and the United States, to Australia, New Zealand, India and elsewhere»[12]. But, ultimately, even those who speak of grafts access an exclusively bipolar view, as this passage from Eric Feldman demonstrates: «Grafts take the form of the fusion of lives of two organisms, the donor and the recipient, or alternatively the superimposition of one on top of the other»[13].

In a globalized world, however, it is also necessary to address legal mutation by envisioning the possibility that the circulation of legal rules (or even of their imposition for a wide variety of reasons) takes place following trajectories other than inter-State ones[14].

The expression "trajectories other than inter-State trajectories" alludes to the so-called dynamics of vertical (but which it would be more correct to call polyhedral) circulation of legal models. They can be summarized as the exchange of models, rules and institutions that takes place between national levels, both in ascending terms (i.e., a State solution is internationalized in an international instrument, for example) and in descending ones (i.e., a solution contained in an international instrument is made its own by a State legal experience). For the avoidance of doubt, the ascending/descending binomial is merely descriptive and does not postulate the existence of an internal opposition between the two forms of circulation. By this I mean, as will be shown below, that in many cases the two different forms of circulation are integrated in the very same dynamic.

[11] A. SOMMA, *Introduzione*, cit., p. 155 ff.

[12] A. WATSON, *Comparative Law and Legal Change*, cit., p. 313 f.

[13] E.A. FELDMAN, *Patients' Rights, Citizens' Movements*, cit., p. 220 f.

[14] See *ex multis* W. TWINING, *Diffusion of Law: A Global Perspective*, in *J. Leg. Plur.*, 2004, p. 1 ff.; ID., *Diffusion and Globalization Discourse*, in *Harv. Int. L.J.*, 2006, II, p. 507 ff.; A. DI MARTINO, *Circolazione delle soluzioni giuridiche e delle idee costituzionali. Questioni di metodo comparativo e prassi tra culture costituzionali e spazi globali*, in *DPCE Online*, 2021, Numero speciale, p. 743 ff.

3. THE IDEA OF "VERTICAL LEGAL TRANSPLANTS": THE POLITICAL SCIENCE PERSPECTIVE

As early as the first half of the XX century, Roscoe Pound pointed out that, in large part, the history of any given legal experience was the history of "borrowings of legal materials" from other legal experiences and the assimilation of material from the sphere of the extra-legal[15].The acme, however, of legal mutation in the comparative discourse occurred in the 1980s, with the widespread popularity enjoyed by Watsonian theories, which were successful but also met with much criticism. In this time frame, legal mutation became a popular topic among comparative scholars. The study of the transnational circulation of ideas has been widely echoed, becoming one of the main objects of study of comparative investigations, leaving out often the interaction between State and international rule-making centers.

There have been, indeed, analyses that have offered research aimed at identifying the national origin of certain rules contained in international instruments. For instance, an effort of this kind was made with reference to the Vienna Convention on the International Sale of Goods[16].This paper aims at fitting into the string of scholarly literature that deals with the subject of legal diffusion from a global and non exclusively Statist perspective[17]. In order to do so, this research tries to elaborate on a theoretical framework that helps to build on a deeper knowledge of global diffusion of law by adapting the conceptual tool of "vertical legal transplant"[18].

A sketch of such theoretical framework can be found in Jonathan Wiener's *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, where the Author puts forward the hypothesis that legal circulation also takes place via the projection of national institutions in the international arena. A dynamic he has termed "trans-echelon"[19]. Wiener was concerned with tracing the provenance from U.S. environmental law of two principles (that of "integration" and that of "market-based emission trading") accepted in the Kyoto Protocol and the United Nations Framework Convention on Climate Change. According to him, the acceptance of U.S. solutions has been possible because of the role played in the negotiations by North American delegates, referred to as "legal entrepreneurs". In Wiener's opinion, these agents can be for instance academics commissioned by governments, NGOs,etc.[20]. Again, he maintains that the choice would have fallen on the U.S. model of environmental law in part because the legal entrepreneurs, very pragmatically, were familiar with that law.

Wiener has in some ways been influenced by works and essays produced by political science. For example, Hidemi Suganami, in *Domestic Analogy and the World Order Proposals*[21], argued that the ideas and the institutions that served as the foundation for the construction of the world order are often State-based. Suganami envisions an ascen-

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[15] R. POUND, *The Formation Era of American Law*, Boston, 1938, p. 94. See also P.G. MONATERI, *Black Gaius*, cit. And S. WILF, *The Invention of Legal Primitivism*, in *Theoretical Inq. L.*, 2009, II, p. 485 ff.

[16] *Convenzione di Vienna del 1980 sulla vendita internazionale di merci*. V. F. GALGANO (ed.), *Atlante di diritto privato comparato*, Bologna, 2011, Tav. no. 6 – "Il diritto uniforme: la vendita internazionale".

[17] See, for a non exclusively State-focused perspective and international in legal mutation, A. SOMMA, *Introduzione*, cit., p. 166 ff. and citations.

[18] See A. DOLIDZE, *Bridging Comparative Law*, cit.

[19] J. WIENER, *Something Borrowed for Something Blue*, cit., p. 1307.

[20] *Ivi*, p. 1349.

[21] H. SUGANAMI, *Domestic Analogy and the World Order Proposals*, Cambridge, 1989.

dant type of circulation which fits well with Wiener's perspective, for that matter. Still then Anne-Marie Slaughter, in *Regulating the World: Multilateralism, International Law and the Projection of the New Deal Regulatory State*, points out that international institutions (e.g., World Food Program, Food and Agriculture Organization, etc.) would be nothing more than a form of international projection of the Alphabet Agencies crafted by the New Deal enacted under the Franklin Delano Roosevelt Administration[22]. By employing this approach, Martha Finnemore and Kathryn Sikkink[23] have attempted to demonstrate the State origin of several international law norms. Being political science studies, they provide an overall depiction of the political explanations and policy changes that led to the selection of certain rules over others. To the contrary and understandably, they do not plunge into the legal effects of their theoretical frameworks. And such is the aim this paper intends to pursue hereinafter.

4. THE IDEA OF "VERTICAL LEGAL TRANSPLANTS": THE COMPARATIVE LAW PERSPECTIVE

In the more strictly comparative legal sphere, the topic of the ascending circulation of norms has recently been taken up by Anne Dolidze in her essay *Bridging Comparative and International Law: Amicus Curiae Participation as a Vertical Legal Transplant*[24]. In it, the Author moves from Wiener's theoretical sketch to elaborate more precisely a theoretical model applicable to the dynamic of vertical migration of models and rules. Overall, Dolidze's approach is convincing, although it requires some necessary adjustments. First, a terminological clarification: in my perspective, it is more appropriate to speak of "circulation" in lieu of "transplants", the latter evoking a scheme in which the receiving organism is limited to a mere passive activity. As it has already been stated, it is difficult, if not impossible, to speak of mere transpositions. In fact, legal mutation necessarily involves reinventions and contaminations between influences from external and internal factors. Second, Dolidze constrains her theoretical scheme to the circulation of patterns by focusing on the ascending path whereas her elaboration – as she herself concedes, indeed – could be also applicable to describe circulation by descending path.

In detail, Dolidze's in-depth study delved into the circulation of the amicus curiae, the well-known Anglo-Saxon procedural tool that allows a subject to appear during a trial to inform the court on questions of law or fact relevant to the decision (or otherwise to make his or her contribution to ascertaining the truth). The amicus curiae is not entitled to any procedural initiative power, not being the owner of an identical or related legal situation to be inferred in court, and who, nevertheless, is admitted participating in the proceedings because of the assistance he or she can provide to the adjudicating body in solving the dispute[25]. Dolidze focuses in particular on the dynamics that led the ECHR Court to accept amicus curiae briefs in its rules of procedure. To this end, she elaborates a model of vertical reconstruction of circulating models that can be summa-

[22] A.-M. SLAUGHTER, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State*, in J. RUGGIE (ed.), *Multilateralism Matters: The Theory and Praxis of an Institutional Form*, New York, 1993, p. 125 ff.

[23] M. FINNEMORE, K. SIKKINK, *International Norm Dynamics and Political Change*, in *Int'l Org.*, 1998, IV, p. 887 ff.

[24] A. DOLIDZE, *Bridging Comparative and International Law*, cit.

[25] See G. CRISCUOLI, Amicus Curiae, in *Riv. trim. dir. e proc. civ.*, 1973, p. 187 ff.

rized as follows. First, vertical circulation contemplates both ascending and descending trends. In the former case, solutions worked out in the State are later accepted in the international arena. In the latter hypothesis, on the contrary, States transpose into their national law solutions developed at the international or supranational level. Even though Dolidze does not specify it, from the reading of her essay it emerges that she deems these two dynamics as being separated and not meant to interact.

As just stated above, this paper diverges on this point and is antithetical to Dolidze to the extent that I argue that a more accurate approach is the one that sees ascending and descending circulation as mere descriptive models that do not postulate a mutually exclusive pair of the kind. Practice, moreover, is replete with examples in which pyramid-type circulations occur, thus contemplating both the one and the other. A major example of it is represented by the good faith clause contained in Dir. 13/93 and which has occupied English literature so much[26]. This general clause, developed in the civil law context, was then conveyed in the Directive on unfair terms in consumer contracts, and then transposed to individual legal systems, including the British one, which had traditionally shunned the application of general clauses.

5. FROM "VERTICAL LEGAL TRANSPLANTS" TO "POLYHEDRAL LEGAL MUTATION", AND ITS MECHANICS

Being that clarified, rather than vertical circulation, which seems to allude to a one-way dynamic (State A → International Institution,i.e., International Institutions -> State B), it would be more appropriate to speak of multilateral circulation. The latter, in fact, contemplates pyramidal dynamics, such as the one just described, but also polyhedral (State A -> International Organization -> International Organization -> State B).

In any case, Dolidze's approach is valuable, especially because she has identified the three conditions necessary for tracing vertical circulation. Notwithstanding the fact that she limits them to the ascending type, they are extendable to descending hypotheses as well:

(a) there must be structural transformations taking place in an international institution or State.

(b) there must be legal entrepreneurs, agents of mutation (academics, experts, organizations, etc.) who spend themselves to affirm a particular legal institution, rule or model.

(c) these agents of mutation must be in a material condition to realize their goal, meaning that they must be capable of impacting the decision-making process that will lead to the packaging of the rule they intend to influence[27].

That of the amicus curiae before the ECHR Court is indeed a fitting example of this theoretical model. The Strasbourg Court, beginning with a 1978 *arrêt*, affirmed that its judgments, although not binding *ultra partes*, would nevertheless constitute a form of persuasive authority[28]. This event constituted condition (a), that is, a structural change in

[26] See H. COLLINS, *Good Faith in European Contract Law*, in *Oxf. J. Leg. Stud.*, 1994, II, p. 229 ff.; J. BEATSON, *The Incorporation of the EC Directive on Unfair Consumer Contracts into English Law,* in *ZEuP*, 1998, VI, p. 957 ff.; G. TEUBNER, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, in *Modern L. Rev.*, 1998, I, p. 11 ff.

[27] A. DOLIDZE, *Bridging Comparative and International Law*, cit., p. 853.

[28] ECHR, *Ireland v. UK*, January18th, 1978.

the relevant legal system. This paradigm shift aroused the concerns of English lawyers, who feared that by doing so, the interests of their clients who were not parties to the judgment, and who were nevertheless "affected" by pronouncements of the Court, would remain unable to be adequately protected[29]. Thus, they began to send applications to participate as amicus curiae, despite the silence of the Court's rules of procedure. Such dynamic satisfies condition (b): English lawyers are the agents of mutation. The ECHR Court ruled favorably toward the request for the first time in the *Wintewerp* case[30]. According to Dolidze, this was possible because the request for participation came from the British government. The U.K., being a founding member of the Court and playing at the time an exalted role in ECHR jurisprudence itself, was able in this way to influence the decision-making process, producing an internationalization of a domestic rule (that of amicus) at the international level[31]. The impact of English lawyers qualifies as condition (c).

6. A LABORATORY OF POLYHEDRAL LEGAL MUTATION: PARTY AUTONOMY AND INTERNATIONAL CONTRACTS IN LATIN AMERICA

The digression on the description of legal mutation in ways other than inter-Statist is instrumental in demonstrating how law evolves by following trajectories that do not involve exclusively State actors and only on inter-State levels. I now intend to show how the theoretical framework I have sketched herein above is well suited to describe the changes occurred in Latin America with regard to party autonomy in international contracts. If one limits his or her scope of analysis on describing the dynamics that have occurred in the southern part of the American continent by having exclusive recourse to the inter-State dynamics of pattern circulation, he or she would be unable to provide an accurate picture. An analysis limited to an inter-Statist approach would lack of the theoretical-conceptual tools to proceed to a coherent analysis of events and changes.

The history of party autonomy in international contracts in Latin America, but more generally the history of Latin American conflict of laws set of rules, is a history of ascending and descending circulation. In fact, the model embraced at the national level have over time been widely reflected in regional codifications of private international law; and the solutions contained therein have in turn influenced, in a descending manner, national solutions aimed at modernizing the legal experiences of individual States. There are at least three events that well exemplifies the polyhedral legal mutation this paper aims to elaborate on.

7. MONTEVIDEO TREATIES

First, the drafting history of the Montevideo Treaties of 1889 and 1940, respectively. Uruguay and Argentina co-sponsored the First South American Congress of Private International Law, held precisely in Montevideo in 1889. This event stands for the first condition of polyhedral circulation: the need to reform private international law. The agents of legal mutation in that case were Uruguay and Argentina, but – especially – the

[29] *Ibid.*

[30] ECHR, *Wintewerp v. The Netherlands*, October 24th, 1979.

[31] Cfr. A. DOLIDZE, *op. cit.*, p. 854 ff.

latter's ambassador, Gonzalo Ramírez. Hence the second condition of the polyhedral legal mutation framework is satisfied. The third one is represented by the circumstance that Gonzalo Ramírez wrote the solutions contained in the Treaty in his own hand, drawing largely from the Argentine conflict of laws discipline.

An analogous dynamic took place in the negotiations of the Montevideo Treaties of 1940. In that context, the Uruguayan representative, Vargas Guillemette, hijacked the Argentinean intentions to include party autonomy. Argentina, in fact, perceived this principle as a vehicle for the modernization of national conflict of laws national set of rules. Vargas Guillemette then was capable of influencing the debate and succeeded in ruling out of the text of the treaties any reference to party autonomy. In detail, he countered the principle in so far as he deemed conflict of laws to be expression of the sovereignty of States, and therefore no space should have left to privates' choices and interests. This position was coherent with the territoriality principle, which in the Uruguayan context of that period served the purposes of the dictatorship of Gabriel Terra[32]. As a consequence, Guillemette's intervention produced the suppression of the first wording of Article 37 of the Argentinean draft, that embraced party autonomy. This principle was relegated into the Annexes to the Montevideo Treaty and indeed downgraded as an ambiguous recognition of a mere "incorporation by reference". Since these legal instruments have significantly impacted on Latin American national reforms in the subject matter, we can infer that the Guillemette's move significantly limited the diffusion of party autonomy at State level. This is a case of upward diffusion (rather conservation of the *status quo*) that was made possible due to the intervention of a norm entrepreneur capable of interfering with the decision-making process in the context of a policy-making reform situation.

8. THE ARGENTINEAN REFORMS IN 1970S

Second, the erosion of party autonomy materialized as a downward diffusion subsequent to the democratic transition occurred in 1970s and further in Latin America. Several Latin American States experienced a democratic transition following the fall of totalitarian regimes in the region. As a form of reaction to previous conditions, these States opened up to the international community, to international law and more in general to cosmopolitism. One of the major downsides of this transition was that Latin-American States were essentially forced to enter into international loan agreements to refinance their economies. Money was loaned by foreign lenders on strict conditions, including the imposition of choice-of-law clauses in favor of lenders' national laws and arbitration clauses (which removed controversies from national tribunals by referring them to private panels of adjudicators). Territorialism, upon which the refusal of party autonomy was historically grounded, entered into a profound crisis, and an irreversible one[33]. Such shift of paradigm is well proven by the radical changes in the attitude of Latin American States' representatives in the context of the negotiations for the amendment of the Vienna Convention on the International Sale of Goods vis-à-vis the one as-

[32] *Si vis*, L. SERAFINELLI, *Le recenti evoluzioni latino-americane in materia di scelta del diritto applicabile ai contratti internazionali – Parte I: L'autonomia conflittuale e la rilevanza della comparazione giuridica nel campo del diritto internazionale privato*, in *Dir. Comm. Int.*, 2020, II, p. 403 ff.

[33] See J. SAMTLEBEN, *Cláusulas de jurisdicción y legislación aplicable en los contratos de endeudamiento externo de los Estados latinoamericanos*, in *Verfassung und Recht in Übersee*, 1988, III, p. 305ff.

sumed in the preparatory work for the International Convention on the Transfer of Technology and Applicable Law[34].

In the latter, Latin American negotiators envisioned the sole possibility of applying foreign law by incorporation by reference, whereas in the former they changed approach to the issue, expressing their favor to the principle of party autonomy (though limited to contracts for the international sale of goods). It is striking that the rule that would have been envisaged by the amendment of the Vienna Convention was extremely liberal, since it also permitted the selection of a law even though it presented no connection with the contract to be governed[35]. Furthermore, several Latin American States adopted the New York Convention on international arbitral awards and the ICSID Convention on foreign investments: both these instruments envisioned party autonomy along with, but it is stating the obvious, arbitration clauses.

In this dynamic one finds a downward diffusion of party autonomy which was capable of eroding its rejection. In other terms, there was a transformation (democratic transition) that required for reforms in a broader sense (not only in a legislative one); there were entrepreneurs, in this case foreign lenders, who realized the purpose to impose their own law and arbitration clauses as a loan condition; and they were successful in imposing such conditions upon heavily indebted poor Countries.

9. RECENT DEVELOPMENTS: FROM THE MEXICO CONVENTION ONWARD

As a consequence, Latin American States became acquainted, forcedly, with party autonomy to such an extent that it was even included in the Mexico Convention in 1994. Even though, internationally, the MC Convention was a failure (since only Mexico and Venezuela adopted it), it impacted nonetheless on the internal reform which occurred in the continent subsequent to its signature. With the exception of Ecuador, every and each national reform in Latin America envisioned such principle in contract conflicts, even though significative divergences among national solutions exist.

Particularly, the polyhedral circulation is apt to describe what occurred in the context of both national reforms in the Rioplatense region and in the drafting of the OAS Guide on the Law Applicable to International Commercial Contracts[36]. Both national reforms and the preparation of the regional soft-law instrument were extensively influenced by the 2013 Hague Principles on the Choice of Law in International Commercial Contracts, which aims to guide legislators, national judges, arbitrators and economic operators in

[34] See G. CABANELLAS JR., *Transfer of Technology and Applicable Law*, in *Int'l Rev. Ind. Prop.*, 1985, I, p. 44 ff.

[35] *Ibid.*

[36] OAS, *Guide On the Law Applicable to International Contracts*, full text available at *http://www.oas.org/en/sla/dil/publications_International_Contracts.asp*. For an early comment on the Guide, *si vis* L. SERAFINELLI, *Le recenti evoluzionilatino-americane in materia di scelta del diritto applicabile ai contratti internazionali – Parte II:* The New OAS Guide on The Law Applicable to International Commercial Contracts, in *Dir. Comm. Int.*, 2021, I, p. 75 ff.; J.A. MORENO RODRÍGUEZ, *La Nueva Guía de la Organización de los Estados Americanos y el derecho aplicable a los contratos internacionales (Parte I)*, in *Rev. Esp. Derecho Intern.*, 2021, I, p. 187 ff.

the field of choice of law in international contracts[37]. It is worth noting that out of Latin America, such instrument played no role in national or regional reforms[38].

There is a particular feature of the Hague Principles which strongly resonated in Latin America, i.e., the issue of contract subject to non-State norms[39]. Principle no. 3 states that «(t)he law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise». It is a formula that is included in the Paraguayan Law on International Commercial Contracts[40], in the new Uruguayan General Law on Private International Law[41], and in the reform of Article 2651 of the Argentinean Civil and Commercial Code. The solution embedded in Principles no. 3 is taken to the extreme in the OAS Guide, since there is no reference to the requirements of neutrality and balance in the selected non-State body of laws[42].

The polyhedral diffusion scheme also applies here: policy-changing processes were put into motion (both at a national level and at a supranational one). Norm entrepreneurs, particularly in the person of José Moreno Antonio Rodríguez, a legal scholar and a lawyer, worked for an a critical recognition of party autonomy and for the right to select non-State body of laws. He in particular was able to influence the results of such procedures by virtue of the role he played both as chief of the reform committee in Paraguay and as First Rapporteurs in the context of the OAS Guide. His ideas were also able to spread in the Rioplatense region due to the rising belief toward cosmopolitism and universalism as opposed to territorialism and ethnocentrism.

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[37] For an analysis of the Hague Principles see S.C. SYMEONIDES, *The Hague Principles on Choice of Law in International Commercial Contracts*, in *Am. J. Comp. L.*, 2013, IV, p. 873 ff.

[38] In Europe, contract conflicts are regulated by Rome I Regulation and a little role, if any, the Hague Principles can play: see F.RAGNO, *I Principi dell'Aja e il Regolamento Roma I: complementarietà o alternatività?*, in *Studi in onore di Maurizio Pedrazza Gorlero*, 2014, p. 681 ff., esp. at p. 681 ff. For the irrelevance of the Principles outside of Europe see S. KHANDERIA, *Indian private international lawvis-à-vis party autonomy in the choice of law*, in *Oxf. Univ. Commonw. L.J.*, 2018, I, p. 1 ff.; T.H.T. NGUYEN, *Party Autonomy in Vietnam – The New Choice of Law Rules for International Contracts in the Civil Code 2015*, in *J. Priv. Int. L.*, 2018, II, p. 343 ff. and J. MONSENEPWO, *Contribution of the Hague Principles on Choice of Law in International Commercial Contracts to the codification of party autonomy under OHADA Law*, in *J. Priv. Int. L.*, 2019, I, p. 162 ff.

[39] See L. GAMA JR., G. SAUMIER, *Contratos Internacionais e os (Futuros) Princípios da Haia: Desafios da Aplicação e Interpretação do Direito Não Estatal (Non-State Law)*, in *Revista de Arbitragem*, 2012, I, p. 72 ff.; IID., *Non-State Law in the (Proposed) Hague Principles in International Commercial Contracts*, in D.P. FERNÁNDEZ ARROYO, J.J. OBANDO PERALTA (eds.), *El Derecho Internacional Privado en los procesos de Integración Regional*, San José, 2014, p. 41; S.C. SYMEONIDES, *The Hague Principles*, cit., p. 892 ff.; R. MICHAELS, *Non-State Law in the Hague Principles on Choice of Law in International Contracts*, 2014, available at *https://scholarship.law.duke.edu/faculty_scholarship/3227/*; ID, *Non-State Law in The Hague Principles on Choice of Law in International Commercial Contracts*, in D.P. FERNÁNDEZ ARROYO, J.A. MORENO RODRÍGUEZ (eds.), *Contratos Internacionales (entre la libertad de las partes y el control de los poderes públicos): jornadas de la ASADIP*, Buenos Aires, 2016, p.153; G.SAUMIER, *The Hague Principles and the Choice of Non-State "Rules of Law" to Govern an International Commercial Contract*, in *Brook. J. Int'l L.*, 2014, I, p. 1 ff.

[40] See Art. 5, *Ley N°5395/2015*: «En esta ley, la referencia a derecho incluye normas de derecho de origen no estatal, generalment eaceptadas como un conjunto de normas neutrals y equilibradas».

[41] Art. 45, *Ley General de Derecho Internacional Privado*, November 17th, 2020: «as partes pueden elegir normas de derecho generalmente aceptadas a nivel internacional como un conjunto de reglas neutrales y equilibradas, siempre que estas emanen de organismos internacionales en los que la República Oriental del Uruguay sea parte».

[42] Rec. no. 6, OAS Guide: «The domestic legal regime on the law applicable to international commercial contracts should recognize and clarify choice of non-State law».

Indeed, the choice to extend choice of law to non-State body of laws seems to be an act of faith, of sentiment and passion rather than a rational choice based on rational arguments. States are usually reluctant to open to such possibility indeed, since while the recognition of foreign national laws enhances the role of any State's law, because it creates what has been defined a *cartel of lawmakers*,[43] they are almost necessarily reluctant to outsiders. Also, economic actors are not particularly inclined to select non-State body of laws: the only available data on this topic comes from the Bulletins of the International Chamber of Commerce, which among other things collects information on contracts and arbitration disputes, indicating which laws are more frequently selected. As it is well known, in international arbitration parties are entitled to select non-State law. However, they do so very unfrequently: between 1999 and 2019, non-State laws were chosen in less than 1% of cases[44]. Even though these data cannot be characterized as statistically relevant, they convey nonetheless the impression that the recognition of non-State laws does not come from the need of the merchants. Indeed, there are several reasons that compromise the viability of selecting non-State law. Primarily, these body of rules often present lacunae. For instance, one of the most important, balanced and neutral set of rules, the UNIDROIT Principles on International Commercial Contracts only covers the general aspects of contracts. Consequently, specific issues should be filled with the recourse to other laws. Thus, parties are required, on the one hand, to agree on the UNIDROIT Principles and, on the other, indicate a non-State body of rules specific to the contract they will enter into. Moreover, as a sort of backup plan, parties must also come to an agreement on a national law which will respond to issues that are not envisaged by the selected non-State laws. In other terms, private actors almost always are forced to resort to national laws, among which some are more often picked than others (e.g., Swiss law and English law)[45]. It is not debatable that such process is lengthy and costly.

It is legitimate then to try to single out the reasons that rendered possible the shift toward the acceptance of the choice of non-State norms principle. The main reason – again assuming the polyhedral approach to legal mutation – is to be found in the role of the agent of change, i.e., Moreno Rodríguez. In several scholarly writings, he expressed his favor not only for conflicting autonomy, but for designating non-State rules as applicable to contracts too. As alluded to, the dynamic here was truly multilateral: Moreno succeeded in bringing together in the Pan-American instrument both the domestic Paraguayan solutions (ascendant) and those embedded in the Principles (Hague Conference/international level -> OAS/international level). The Organization of American States, expressly inspired by the Hague Conference, issued in February 2019 the *Guía sobre el Derecho Aplicable a los Contratos Internacionales en las Américas*. Needless to say, the First Rapporteur, as well as the drafter of the official commentary attached to the Guide, was the Paraguayan jurist himself. Moreover, the possibility of choosing as applicable law a non-State body of rules was implemented in the late 2020 by Uruguay and is now being discussed in Argentina as well. Since 2015, as mentioned, it has been contemplated in Paraguayan law.

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[43] See R. MICHAELS, *The True Lex Mercatoria: Law Beyond the State*, in *Indiana J. Glob. Leg. Stud.*, 2007, II, p. 447 ff., esp. at p. 462.

[44] See G. CUNIBERTI, *The Three Theories of Lex Mercatoria*, in *Colum. J. Transnat'l L.*, 2014, II, p. 369 ff., mapping data since 1999; *ICC Dispute Resolution Bulletin (2015)*, p. 4 ff.; *ICC Dispute Resolution Bulletin (2019)*, p. 15 ff.

[45] *Ibid.*

10. THE AGENTS OF CHANGE: GENERATIONS OF LATIN AMERICAN JURISTS AND LEGAL SCHOLARS

The polyhedral approach also serves the purpose to better understand the contemporary features of the legal mutation phenomena by acknowledging their historical dimension and in the perspective of a genealogy of legal systems[46]. It is noteworthy to give a brief sketch of some historical data and of the main actors of this story in order to take cognizance of the great significance of the Latin American U-turn in favor of party autonomy in international contracts.

Joseph Beale in the United States of America personified and channeled resistance to party autonomy in the XX century, being the drafter of the First Restatement of Conflict of laws. In his view, parties' freedom to agree on the applicable law would have been tantamount to giving them a license to legislate[47]. To the contrary, Beale proposed the *lex loci contractus* rule to select the law governing international contracts which mandated the application of the law of the State in which the contract was made to all aspects of the contract. And this was the rule introduced in the First Restatement, at §332[48]. Beale did not stand alone in arguing that party autonomy would have led to a *contrat sans lois*: Ernest Lorenzen[49], Raleigh Minor[50], and Judge Learned Hand[51] took the same argument.

Resistance to party autonomy had been also embraced in the south of the continent during XIX and XX centuries: Andrés Bello in Chile[52]; Antonio Sánchez de Bustamante y Sirvén in Cuba[53]; Narvaja, Vargas Guillemette[54] and QuintínAlfonsín[55] in Uruguay; in Brazil, Tito Fulgêncio[56], Espínola[57], Machado Villela[58], Octavio[59] and Francesco Cavalcanti Pontes de Miranda[60].

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[46] See A. SOMMA, *Global Legal History, Legal Systemology, and the Genealogy of Law*, in *Am. J. Comp. L.*, 2018, IV, p. 751 ff.

[47] J.H. BEALE, *A Treatise on the Conflict of Laws*, New York, 1935, p. 1080: «at their will [parties] can free themselves from the power of the law which would otherwise apply to their acts».

[48] See *Restatement §332*.

[49] E.G. LORENZEN, *Validity and Effect of Contracts in the Conflict of Laws*, in *Yale L. J.*, 1921, VII, p. 655 ff., esp. at p. 658.

[50] RC. MINOR, *Conflict of Laws or Private International Law*, Boston, 1901, p. 401 f.

[51] *Gerli & Co. v. Cunard S. S. Co.*, 48 F.2d 115, 117 (2d Cir. 1931).

[52] A. BELLO, *Principios de Derecho de Jentes*, Santiago de Chile, 1832, p. 84.

[53] A. SÁNCHEZ DE BUSTAMANTE Y SIRVÉN, *El Código de Derecho Internacional Privado y la Sexta Conferencia Panamericana*, 1929.

[54] Vargas Guillemette played a decisive role both at a supranational level, in the context of the Montevideo Treaties of 1940, and at a national one (the previous Uruguayan conflict of laws set of rules was called *Ley Vargas Guillemette*).

[55] Q. ALFONSÍN, *Regimen internacional de los contratos*, Montevideo, 1950.

[56] V. DE OLIVEIRA MAZZUOLI, G. BOGER PRADO, *L'autonomie de la volonté dans les contrats commerciaux internationaux au Brésil*, in *Rev. Crit. DIP*, 2019, II, p. 427 ff., esp. at p. 435.

[57] Cfr. E. ESPÍNOLA & E. ESPÍNOLA FILHO, *Tratado de Direito Civil Brasileiro, VIII – Do Direito Internacional Privado Brasileiro*, Rio de Janeiro, 1939, p. 501 ff., claiming that party autonomy cannot serve to contract around mandatory rule of the law that would otherwise apply.

[58] A. DA C. MACHADO VILLELA, *O Direito Internacional Privado no Código Civil Brasileiro*, Coimbra, 1921, p. 366 ff.

[59] R. OCTAVIO, *O Direito Internacional Privado. Parte Geral*, São Paulo, 1942, p. 152 ff.

[60] F.C. PONTES DE MIRANDA, *La conception du droit international privé d'après la doctrine et la pratique au Brésil*, in *Rec. Cours de l'Académie de Droit Intern.*, Vol. 39, p. 551 ff., esp. at p. 649, arguing that party autonomy does not exist in international law either as an acceptable principle, either as a legal theory.

Currently, instead, we find a new generation of lawyers who are favorable to party autonomy, both in the United States and in Latin American. In the latter, the eponym, due to his role as promoter of the principle both at a national level and at a supranational one in the context of the Organization of American States, of the new generation is, as reported in the previous paragraph, the Paraguayan José Antonio Moreno Rodríguez.

To become acquainted with the principal characters of the story related to party autonomy serves the purpose to shed light on what were the main legal theories underpinning the refusal of party autonomy in contract conflicts and on which ones its current acceptance is grounded upon. It gives support to contextualize them in the historical timeline in which they operated or still operates, and to unveil the *zeitgeist* they were into. Conclusively, contextualization of "who" is instrumental to explain the "why" question, to which this research now turns on.

Simply put, in the past American jurists deemed conflict of laws to be a powerful instrument to preserve the newly acquired sovereignty. A shield against the law of Kings and Queens who once ruled over the Columbus' discovery. Therefore, the basic idea was that foreign laws should have an extremely limited, if any, application within the borders of newborn American States[61]. Under this belief, the application of foreign laws was perceived as a threat undermining the acquired independence. It was then a precise need that induced lawyers to give a technical apparatus to such belief.

Not surprisingly, indeed, the fact that parties to a contract would have been entitled to select a law other than the national one was looked at suspiciously, at the least. Even though it could appear to be paranoic, the refusal of party autonomy was strongly maintained on the ground that the acceptance of it would have allowed parties to engineer at the point that they would create contracts without any law. This is the exact point made by Beale in his "Treatise": recognizing party autonomy would be tantamount to give parties the right to legislate[62]. It is also the point made by several Latin American scholars, such as Quintín Alfonsín[63] and, more recently, Cecilia Fresnedo de Aguirre[64].

So, it is apparent that conflict of laws rules, and out of necessity the refusal of party autonomy, have represented a political device and still do so. A political device which was used as a standard of sovereignty defense, in the very first place, but also to serve dictatorships' needs to exercise a strict control over the national territory, by – essentially – giving the order of an exclusive application of national law.

In this context, along with the pursuit of practical aims, the refusal of party autonomy has acquired the status of a symbol. In the American context, and particularly in the south, conflict of laws is manifestly entrenched with politics. This is also the case in other environments, such Europe; however, the American peculiarity lies in the fact that it is highly sensitive to political changes. Meaning that the broader context of politics and legal advancements impact in a more manifest and immediate manner on conflict of laws.

Therefore, it does not suffice to say that the refusal of party autonomy derived from the influence of the Bustamante Code over Latin America, as Symeonides argued[65]. For instance, Uruguayan long refusal of party autonomy was grounded primarily on eco-

[61] It is the idea underlying the territoriality principle after all: see L. PEREZNIETO CASTRO, *La tradition territorialiste*, cit.

[62] J. BEALE, *Treatise*, cit.,p. 1080.

[63] Q. ALFONSÍN, *Regimen*, cit.

[64] C. FRESNEDO DE AGUIRRE, *La autonomía de la voluntad en la contratación internacional*, 1991, Montevideo.

[65] S. C. SYMEONIDES, *Codifying Choice of Law*, cit., p. 114.

nomic reasons, i.e., the need to protect its own merchants against foreign competitors, who would have imposed their own national laws in maritime transport contracts. Second, internal politics impacted significantly upon such refusal over history: conflict of laws rules were strongly perceived by Latin American jurists as political devices to either preserve acquired independence or perpetuate dictatorships. To sum up, a sort of juridical xenophobic position. Currently, party autonomy acceptance, along with a trend to the "modernization" of national conflict of laws set of rules, is still a device employed by Latin American States. This time, however, it is aimed at showing to the international community that these systems have become committed to the idea of openness and to cosmopolite ideals.

Therefore, the reforms occurred in this part of the world must be read in light of these changes and revolutions. In detail, novelties in party autonomy, in particular, and conflict of laws, more in general, must be inquired starting from the very reasons which fueled such processes[66].

The reported changes do not represent a "natural" normalization of the Latin America toward party autonomy acceptance. As shown in the previous paragraphs thank to the application of a polyhedral framework to legal mutation, many heterogeneous forces were at work in order to achieve this result. And such forces were not operating exclusively in an inter-State framework. To the contrary, several artificial factors played the role of silent agents of change.

11. THE POST-WESTPHALIAN POLYHEDRAL FRAMEWORK FOR A BETTER APPRAISAL TO LEGAL MUTATION

The inter-State approach to comparative law tends to overstate the quality of law as a rational response to social problems. However, one must take cognizance of the fact that the social functions of the law play an important role, but – as I have attempted to stress in previous paragraphs – not an exclusive one. Law functions for several different purposes, for instance, as a rhetoric for telling stories about the culture that helped to shape it and which it in turn helps to shape, and through which social data are imaginatively rebuilt as legal facts and concepts[67].

It is therefore important to take into consideration the moral and political aspects of laws that may not function as social problem-solvers, but that have different, sometimes antagonist, functions. A critical approach and a polyhedral one to legal mutation give a support to developing different standards of evaluation that can be tailored on the different experiences analyzed. As I have reported, the three conditions for the polyhedral circulation are apt to furnish a set of tools capable of explaining the miscellaneous of events and interests underneath policies adopted by States. Law then serves different and heterogeneous purposes: political, technical, social, rhetorical, religious, spiritual, symbolic etc. It cannot be reduced to the technical dimension as well as its mutation cannot be limited to inter-State and Westphalian schemes.

The further implication of the polyhedral approach, being it pluralistic in its very nature, permits to go beyond the functionalist approach to comparative law. As it is intelli-

[66] See M.J. OCHOA JIMÉNEZ, *Exploring a Minefield: Private International Law in Latin America, Its Neocolonial Character and Its Potentialities*, in *CAL*, 2021, II, p. 87 ff.

[67] M.A. GLENDON, *Abortion and Divorce in Western Laws*, 1987, Cambridge-Mass., p. 8 f.

gently repeated by Myres S. McDougal, «(t)he demand for inquiring into function is, however, but the beginning of insight. Further questions are 'functional' for whom, which respect to what values, determined by what decision-makers under what conditions, how, with what effects»[68]. Paraphrasing him, the demand for inquiring into the inter-State dynamic is, however, the beginning of insight. Further questions are what triggered the reform of a discipline, who were the agents of reforms and to what extent they impacted upon the result of the process. In doing so, one can bring back on the surface the values behind the technique. And it is particularly significant in the conflict of laws branch, where values themselves have long been concealed under the technical cloak[69], being it still deemed to be one of its distinctive features[70]. Indeed, if we take values out of the equation with reference to the Latin American systems, we could not have a comprehensive and complete understanding of the revolution that led from territoriality to this some sort of a-critical cosmopolitism.

In XIX and in the most part of XX century, territorialism shaped conflict of laws set of rules in a fashion which strongly refused the application of foreign laws. It was indeed pivotal, in the first place, for the emancipation of American States from the English and the Spanish dominations, and then – in a different perspective – for securing the power of dictatorships in South America. The rapid and Copernican change occurred in the last part of XX century witnessed a completely different scenario, in which the then-authoritarians States have embarked a journey along the road of opening up to cosmopolitism and universalism. Consequently, then the refusal of party autonomy, and currently its full-fledged recognition calls into question the symbolism of law. To give private parties leeway and an ample margin of maneuver is today the symbol of Latin American States commitments, both at a regional and at a national level, to what we can synthetize with the term "openness". It is also a matter of ransom, of passion and of sentiments. It suggests that Latin American legal systems and their lawyers are affirming their intention to be embedded in the international community, along with a certain degree of denial of a past they desire perhaps to forget and to leave behind.

In light of the above, the analysis of party autonomy in contract conflicts, particularly in Latin America, is not, and cannot be, an aseptic analysis of legal rules. It calls into question – as demonstrated – several other factors, such politics, symbolism and, more in general, values. To fully understand these issues and in order to intercept the other than inter-State trajectories that took place in the evolution process, it is of the essence to assume a polyhedral approach to legal mutation. Otherwise, the analysis would be

[68] M.S. MCDOUGAL, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, in *Am. J. Comp. L.*, 1952, I-II, p. 24 ff., esp. p. 31, footnote 24 (quoting Ernst Rabel).

[69] On values in conflict of laws see H. E. YNTEMA, *The Objectives of Private International Law*, in *Can. B. Rev.*, 1957,721 ff., esp. at p. 730 ff.; K. ZWEIGERT, *Some Reflections on the Sociological Dimensions of Private International Law*, in *U. Colo. L. Rev.*, 1973, II,p. 283 ff.; S.VRELLIS, *Conflit ou coordination de valeurs en droit international privé a la recherche de la justice*, in *Rec. Cours de l'Académie de Droit Intern. de La Haye*, Vol. 328, 2007, p. 175ff.; L. GANNAGÉ, *Les Méthodes du droit international privé à l'épreuve des conflits de culture*, in *Rec. Cours de l'Académie de Droit Intern. deLa Haye*, Vol. 357, 2013, p. 1 ff.; S. TONOLO, *Religious Values and Conflict of Laws*, in *Stato, Chiese e pluralismo confessionale*, 2016, I, p. 1 ff. See also R. MICHAELS, *Private International Law and the Question of Universal Values* and M. REIMANN, *Are There Universal Values in Choice of Law Rules? Should There Be Any?*, in F. FERRARI, D.P. FERNÁNDEZ ARROYO (eds.), *Private International Law: Contemporary Challenges and Continuing Relevance*, Cheltenham, 2019, respectively at p. 148 ff. and p. 178 ff. See also M. GEBAUER, S. HUBER (eds.), *Politisches Kollisionsrecht – Sachnormzwecke, Hoheitsinteressen, Kultur. Symposium zum 85. Geburtstag von Erik Jayme*, Tübingen, 2021.

[70] See R. MICHAELS, *op. ult. cit.*, p. 175, stating that technique in private international law is a meta-value.

subjugated by a magic trick. A trick that would lead the observer to believe that the law is only made of words and sterile social functions and that comparative law only deals with inter-State legal circulation. Such a view would not only be positivistic, but also monolithic in its very nature.