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Civil Law Workshop
Saúl Litvinoff Series
Civil Law and Common Law: Cross Influences, Contamination and Permeability

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Civil Law Workshop
Saúl Litvinoff Series
Civil Law and Common Law:
Cross Influences, Contamination, and Permeability

FOREWORD

The Saúl Litvinoff Civil Law Workshop Series was the second of its kind to be conducted at the Louisiana State University Center of Civil Law Studies (CCLS). It was conducted under the leadership of the two signatories of the present foreword, co-editors of the Series, who also happened to be friends and colleagues of Don Saúl.

The LSU Law Center had declared 2009 the Year of Litvinoff. The Civil Law Workshop Series that started in 2009 and ended in the spring of 2010 was dedicated to our regretted civilian and comparatist, at a time where he moved to retirement after a rich career as practitioner, teacher, author, and reformer of the civil law of Louisiana. He attended the first sessions, but passed away in January 2010, at a time when the Series was moving to its conclusion. Every single contribution in this volume honors Don Saúl and echoes the vibrant tribute by Dr. Agustín Parise and Julio Romañach, Esq. The present volume also publishes the list of Saúl Litvinoff's academic publications, which reflects his prolific and diverse scope of writings. It complements the *Liber Amicorum* offered to Don Saúl in 2008 by his friends and published by his beloved CCLS.[1]

A broad theme had to be found, so that the series could be enriched by the contributions of Distinguished Visiting Professors teaching short courses at the LSU Law Center and Visiting Scholars conducting research at the CCLS. Given the bijural nature of the LSU curriculum and the focus on mixed or hybrid jurisdictions in recent years, the editors of the series thought that cross influences between the civil law and the common law was a topic to be visited under multiple, if not kaleidoscopic, angles.

Here is how the editors introduced this Workshop Series on *Civil Law and Common Law: Cross Influences, Contamination and Permeability*:

> This Civil Law Workshop Series visits the relationship between the civil law and the common law. How much and

1. ESSAYS IN HONOR OF SAÚL LITVINOFF (Olivier Moréteau et al. eds. 2008).

> to what extent does each system influence or contaminate the other?
>
> At all times, legal ideas have circulated, often ignoring the boundaries between legal families such as the civil law and the common law. At the time of its Revolution, France borrowed from England the jury system and justices of the peace, yet with considerable adjustments. Earlier on, English law had borrowed many techniques from Roman law and Canon law, making them distinctly English. The Anglo-American doctrine of mistake in contract is based on Pothier's *Treatise on Obligations*. The American UCC did not invent the irrevocability of offers. Trusts prosper in a number of civil law countries. Examples are manifold and can be found in every jurisdiction, "purely" civil or "purely" common law or "mixed," like Louisiana implanting promissory estoppel in its Civil Code.
>
> This Civil Law Workshop Series does not aim at tackling all cross references and transplants. Speakers will identify cross influences in their area of scholarship and are invited to determine whether outside influences strengthen, weaken, or contaminate a given system, in an attempt to answer the following question: to what extent are the civil law and the common law permeable to each other?
>
> Topics will cover areas of substantive law, procedure, law making and legal reform techniques, and legal education.[2]

Volume 3 of the JCLS follows the sequence of the Workshop presentations. Essays presented at the Workshop are preceded with an *Introduction to Contamination* by Professor Olivier Moréteau, proposing the adoption of a preliminary provision to the Louisiana Civil Code in order to remedy the impact of common law contamination in areas of private law governed by ancillary statutes. They are followed with a short article where Professor Juan Cianciardo, Dean of the Austral University School of Law (Buenos Aires, Argentina) develops challenging thoughts on the principle of proportionality. The principle is applied in both civil

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2. This is how the topic is described on the CCLS website. *See* www.law.lsu.edu/civillaw; and more precisely, http://www.law.lsu.edu/index.cfm?geaux=ccls.civillawworkshopsecondseries (last visited July 10, 2010).

law and common law systems, in countless jurisdictions. The article shows the application of the principle does not always guarantee the supremacy of the human rights and makes proposals to remedy the problem without abandoning proportionality.

The Series opens with a proposal to revive the case method in civil law education, authored by Professor Fernando Toller, also from Austral University School of Law, where he serves as the director of doctoral studies. His oral presentation was objected to by some members of the civil law faculty at the LSU Law Center, who feared that the case method may weaken the civil law in the State of Louisiana. Contamination would likely happen if the case method was to be applied according to the model recommended by Langdell for the Harvard Law School during the late nineteenth century. The case method familiar to students all over the United States was conceived not only as a teaching method, but also as the best tool for the discovery of the principles of the common law.

Professor Toller must be read carefully. He takes us back to the medieval origins of the academic tradition on the European continent, pointing out the importance of casuistry in moral science. The magisterial lecture, which remains the dominating teaching method in the civil law world, was in medieval times preceded by the *quaestiones disputatae*, or disputed questions, which took at least as much time as the lecture. Cases were debated, two students engaging in a dialectic competition. The teacher would then wrap up the arguments, cite the authorities, and give his solution. Fernando Toller shows how this practice was lost with the advent of the national codes and makes a strong case for reviving case discussion in legal education, elaborating on the experience made at the Austral University School of Law. Readers will understand the term "case method" may either be used for lack of a better word or simply to show that if there is a common law way of doing it (the Langdellian model), there is also room for a civil law model. Under the civil law model, case studies are meant to combine with lectures educating the students to the principles of the civil law. Intelligently combined, case studies and lectures help students gasp that the civil law is an organized system, not to be confused with the inchoate maze of cases, patchy statutes, and burgeoning solutions, as the common law may appear through a purely Langdellian approach.

In his Tucker Lecture given in 2008 at the LSU Law Center, Professor Emeritus Jacques Vanderlinden argued that the generalization of the case method had been the turning point anchoring American law in the common law tradition, showing that until then, the deductive method prevailed over the inductive approach.[3] Teaching methods may have a strong and sometimes unexpected impact on the evolution of legal practice. This is why Toller's proposal may be found controversial, especially in those parts of the world where the civil law tradition is weakened and the risk of contamination very high. However, moral and legal issues do emerge in the context of disputes. They can be debated in fact based situations without weakening the principles structuring and underlying the civil law. Legal education is no doubt an area of cross-fertilization between the civil law and the common law traditions. More case discussion is needed in the traditional civil law classroom and some lecture-based overview of the subject would better serve the training of the common law jurist.[4]

Things are moving the world over, not only in Europe or Latin America, the regions visited by Fernando Toller, but also in East Asia, as described by Professor Xiangshun Ding, of the Renmin University School of Law in China. Professor Ding gives a brief historical survey of the development of legal education in China and Japan. He points to some American influence, in China in the 1990s with the creation of the Jurist Master (J.M.) program, and after 2001 in Japan with the development of new professional law schools. The Chinese J.M. seems to be modeled on the American J.D., and reformation has been made on the initiative of the government. In Japan, the initiative came from the private sector, in an attempt to triple the number of lawyers by the year 2010, offering legal education and training at graduate level. Whilst being aware of the limits of the American influence, the reading shows how much stress is now placed in the development of legal skills, with attempts to have more legal practitioners teaching in

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3. Jacques Vanderlinden, "From the Civil Code of Louisiana to Langdell– Some Hypothesis about the Nature of Legal Systems," 35th John H. Tucker, Jr. Lecture in Civil Law, Baton Rouge, May 16, 2008. To be published under the title *Is the Pre-20th Century American Legal System a Common Law System? An Exercise in Legal Taxonomy*, in 4 JCLS (forthcoming 2011).

4. *See* Olivier Moréteau, *Bilan de santé de l'enseignement du droit*, ETUDIER ET ENSEIGNER LE DROIT : HIER, AUJOURD'HUI ET DEMAIN. ETUDES OFFERTES A JACQUES VANDERLINDEN 273 (2006).

classrooms, as well as increased participation in simulation and moot court competitions, the development of externships and internships, and the dawn of clinical legal education.

Professor Ulrich Magnus, of the University of Hamburg, invites Leibnitz to tell us that developing a legal system combining civil law and common law techniques makes us live in "the best of all possible worlds."[5] The pessimist may not agree that this is the case in Louisiana, though this no doubt makes it a fascinating jurisdiction to study for purposes of understanding the dynamic of legal systems in an age of globalization. Professor Magnus clearly demonstrates that the Vienna Sales Convention (CISG), after thirty years of existence, still offers the best possible compromise between the two leading legal traditions. We are proud to publish this masterful comparative essay in the year 2010, marking the thirtieth anniversary of the signature of this very successful and most promising international instrument.

Anxiety may, however, plague both the civil law and the common law, as demonstrated by Professor Sheldon Leader, of the University of Essex. Professor Leader writes: "The civil and common law systems both raise a question that is well known. How is it possible to combine the acknowledged fact that courts often make fresh law with the belief that the legislature is the site for law making with which democracies are most comfortable?"[6] He then introduces the question of judicial bias, which is more troubling when the judge acts in good faith. Cures are looked for both in legal positivism and natural law, and an intermediate theory is proposed, inspired by Ronald Dworkin. Judges decide cases on the basis of settled law, a collection of valid statements that may be explicit but also implicit. Dworkin makes the argument that judges may add to the body of explicit law as long as they remain faithful to the body of implicit law and keep the system coherent. The issue of moral impartiality is also discussed and the beauty of this analysis is that it fits the shoes of both civil law and common law jurists: Best of both worlds? The role of the judiciary is no doubt magnified, yet does not sacrifice democracy, as discussed at the end of this short but major contribution, showing the convergence of the two western legal traditions.

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5. GOTTFRIED WILHELM LEIBNIZ, ESSAI DE THÉODICÉE (1710).

6. Sheldon Leader, *Legal Theory and the Variety of Legal Cultures*, 3 JCLS 99 (2010).

Reading Dr. Nono Makarim's essay on freedom of the press in Indonesia, one comes to realize that anxieties such as those described by Professor Leader may be blissful dreams in other parts of the world. Indonesia received Dutch law during the colonial period and has a codified legal system with a sophisticated civilian heritage. However, the essay indicates that it still has a long way to go to have a fully independent judiciary. During a three-month Fulbright visit at the LSU Law Center, Dr. Nono Makarim, holder of both an LL.M. and a Doctorate in Law from the Harvard Law School, co-founder, thirty years ago, of one of a leading law firms in Jakarta, worked at evaluating the teaching of legal method in order to assist the Indonesian Judicial Commission in the design and administration of law exams to assess candidates for the position of Justice at the Indonesian Supreme Court. His essay is rich in legal analyses, presented in the context of a complex political, economic, and social evolution. Dr. Makarim proves, if need be, that legal analysis does not go that far if limited to the study of black letter law. Comparison with other East-Asian countries shows a rather conservative judiciary and a slow move from dictatorship to democracy, whilst statistics reveal that Indonesia seems to do better than its neighbors in protecting freedom of the press. Comparatists know that everything is relative, and yet this does not prevent the article from making a number of strong points on matters of interest for constitutional law, tort law, and criminal law scholars. Freedom of the press is challenged in many ways in all parts of the world, including Europe and Latin America. One can only benefit from a diversity of perspective and experience in understanding the problems and testing possible solutions.

Professor Santiago Legarre, of the Catholic University School of Law (Buenos Aires, Argentina), is a longtime friend of the LSU Law Center, where he has taught several times as a Distinguished Visiting Professor. He explains how the model of the United States Constitution inspired the Argentine Constitution of 1853, allowed Congress to enact, in the words of Legarre, a general legislation for all the provinces to be applied by federal courts. Provincial courts were left with a smaller spectrum of laws to apply. Once Buenos Aires joined the federation, a revision of the constitution took place in 1860, allowing provincial courts to apply

federal *derecho común* (*ius commune*). This resulted in the development of provincial variations in the interpretation of that *derecho común*, to which no remedy has been found so far.

Professor Legarre's article starts with a vibrant homage to Saúl Litvinoff, rich in personal anecdotes adding to the "Litvinovian" legend of intransigence, elegance, culture, wit, and charm. It is too late to ask Don Saùl to make concluding remarks to this volume. He was second to none at bridging differences between the civil law and the common law without tampering with each system's integrity. An art largely reflected in his publications, the list of which concludes the present volume.

The Saúl Litvinoff Series also included a presentation by Professor Jörg Fedtke, a distinguished German scholar who joined the Tulane University School of Law, where he is a Co-Director of the Eason Weinmann Center for Comparative Law. His *Time to Move On-Challenging a Tired Division-Common Law Methods in a Civil Law System* was not ready in time and had to be moved on to a forthcoming volume, proving that our theme is too broad to be dealt within a single volume.

Our last fore-words will be of thanks, to our devoted student editors, to Jennifer Lane who facilitates everything, to our wonderful Information Technology team, and last but not least to our unsurpassable Managing Editor, Dr. Agustín Parise, who served during four years as a most active and efficient Research Associate at the CCLS before heading to Europe, and must be remembered as the co-founder of the Journal of Civil Law Studies: *"En unión y libertad,"* and, if I may add, *"y amistad!"*

Olivier Moréteau & Ronald J. Scalise Jr.
Saúl Litvinoff Civil Law Workshop Series Editors

AN INTRODUCTION TO CONTAMINATION

Olivier Moréteau*

I. CONTAMINATION DEFINED

The word contamination occupies a central place in the title of the Saúl Litvinoff Civil Law Workshop Series, *Civil Law and Common Law: Cross Influences, Contamination and Permeability*. The text announcing the Series left the word contamination unexplained.[1] Influences and cross influences are familiar to legal historians and comparatists alike.[2] They have been visited and addressed under a variety of names that include reception,[3] legal transplants,[4] migration[5] or circulation of legal ideas,[6] diffusion[7] or transposition.[8] Contamination is not one of those, though a useful term to indicate the permeability of legal systems and the sometimes less visible influences they may have on one another. It was discussed at the fringe of the Second International Congress of the World Society of Mixed Jurisdictions Jurists in the summer of 2007. At the end of this two day congress, a group of enthusiastic scholars had gathered in the back room of a tavern in the oldest part of Edinburgh. While savoring haggish and sipping beer or

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1. Cited in the *Foreword* by O. Moréteau and R. Scalise, presenting the Series papers gathered in the present volume.

2. For a recent overview, *see* Michele Graziadei, *Comparative Law as the study of Transplants and Receptions, in* THE OXFORD HANDBOOK OF COMP. L. 441 (2006).

3. LA RECEPTION DES SYSTEMES JURIDIQUES: IMPLANTATION ET DESTIN (Michel Doucet & Jacques Vanderlinden eds. 1994).

4. ALAN WATSON, LEGAL TRANSPLANTS (2d ed. 1993).

5. ERIC AGOSTINI, DROIT COMPARE 243 (1988), (*Les migrations de systèmes juridiques*).

6. Rodolfo Sacco, *La circulation des modèles juridiques, in* RAPPORTS GENERAUX AU XIIIE CONGRES INTERNATIONAL DE DROIT COMPARE– MONTREAL 1990 (1992).

7. William Twinning, *Diffusion of Law: A Global Perspective*, 49 JOURNAL OF LEGAL PLURALISM 1 (2005).

8. Esin Örücü, *Law as Transposition*, 51 INT'L & COMP. L.Q. 205 (2002).

scotch, we discussed possible terms that may go beyond the word mix. Contamination happened to be the word of the day. P.G. Monateri used it in the context of the law.[9] It is not a clean and comfortable word like hybrid, transplant, reception, or circulation. It has troubling, unhealthy overtones. Yet, contamination is not a fully negative term, for instance when used in the context of linguistics or musicology.

When taken out of the medical sphere, where it typically indicates that something is going wrong, the word goes back to its etymological sense. Contamination means "to enter in contact with."[10] The Latin *tamen* (*taminare*) is the fact of touching, and is also connected to impure contact with (*cum*).[11]

From an anthropological viewpoint, this is a very rich concept, inviting to revisit the interference of legal traditions with a new and less conventional eye. Contact among human beings generates changes in identity and behavior and the same applies to human groups and societies. There is always a risk of being altered by the contact of another. Alter means otherness but leads to alteration, with its ambivalent connotation. The same can be said of contamination. The identity of a group may be altered at the contact of another. Groups, societies, and individuals have fluctuating identities, and they change when influenced by other groups, societies, and individuals. The same applies to legal systems that grow organically in symbiosis with the group

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9. Pier Giuseppe Monateri, *The Weak Law: Contaminations and Legal Cultures*, 1 GLOBAL JURIST ADVANCES, Issue 3, Article 5 (2001), *available at* http://www.bepress.com/gj/advances/vol1/iss3/art5 (last visited Oct. 8, 2010).

10. Contaminate, from the Latin *contaminatus*, past participle of *contaminare*, bring into contact. THE BARNHART CONCISE DICTIONARY OF ETYMOLOGY (1995).

11. Originally the word was used in a religious context, with a meaning of impure contact: LE ROBERT, DICTIONNAIRE HISTORIQUE DE LA LANGUE FRANÇAISE (Alain Rey ed. 1992). Religion abandoned the word. In the 17th century, contaminate meant "Soil by an impure contact," (*souiller par un contact impur*) but was marked as an "old" word. Medicine gave it a revival in 1863. Contagion had given the French *contagionner*, which disappeared and was replaced by *contaminer*. The word was the connecter to pathology. A figurative sense was "*changer la nature de quelque chose*," "change the nature of something," "*altérer*," "alter." Remarkably, the word "*altérer*" or to "alter" which means to render other has developed a negative connotation. Linguists use the word contamination in a neutral way. There is no value judgment in describing a linguistic contamination.

generating them and react to the contact with other social groups and legal systems.

What does the word contamination add to the more conventional language describing these phenomena? Reception, transplants, migration, circulation, and the like describe the visible. Contamination refers to the less visible. Its effects, good or bad, may appear later on. A transplant may take place with all its visible effects, yet generating some invisible or less visible changes in the system of the recipient. This is where contamination takes place.

It is important to identify contamination and be aware of it. When contamination has a negative effect, remedies or ways to lessen that effect may be found and implemented. The following is an example of a systemic contamination in the context of Louisiana, with a proposal for a possible remedy.

II. CONTAMINATION IN LOUISIANA

After the Louisiana Purchase in 1803, the Territory of Orleans, later to become the State of Louisiana, resisted political attempts to impose the common law.[12] The civil law was maintained[13] and the adoption of a Digest of the Civil Laws in 1808 and of a Civil Code in 1825 confirmed that Louisiana belonged to the civil law world at least as far as private substantive law was concerned. The State Constitution contains provision that prohibits the adoption of the common law by reference,[14] as had been done in a number of other states. The Civil Code in its revised version makes provisions regarding its interpretation.[15] These provisions, like the rest of the Code, are of civil law fabric.[16]

The Civil Code however does not contain the entire legislation governing matters that fall within the realm of private law. Many

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12. For a detailed account, *see* GEORGE DARGO, JEFFERSON'S LOUISIANA, POLITICS AND THE CLASH OF LEGAL TRADITIONS (rev. ed. 2009).

13. Act of March 2, 1805, 8th Cong., 2d Sess., 2 Stat. 331, sec. 4.

14. LA. CONST. art. III, §15B: "A bill enacting, amending, or reviving a law shall set forth completely the provisions of the law enacted, amended, or revived. No system or code of laws shall be adopted by general reference to it." This provision appeared in the first Louisiana Constitution of 1812, § 11, and is to be found in all subsequent versions.

15. Articles 9–13, revised by 1987 La. Acts No. 124, § 1.

16. *Id.*

statutory rules affecting matters dealt with in the Civil Code are found in the Revised Statutes. They form Title 9 of the Revised Statutes, under the heading of Civil Code Ancillaries.

> The structure of Title 9 runs parallel to that of the Civil Code but the organization is somewhat confusing. It contains . . . the Louisiana Trusts Code, to be found at R.S. 9:1721–9:2252. [Provisions for instance deal] with procedural details that pertain to a topic dealt with in the Civil Code, like in the case of divorce (see R.S. 9:301–9:376). They also contain matters not dealt with in the Code and that could have found a place there, like the law on human embryos (R.S. 9:121 to 9:133).[17]

Title 9 is just one among 56 titles:

> The big bulk of legislation in Louisiana is to be found in the Revised Statutes. The Revised Statutes are arranged in Titles running in alphabetic order, with General Provisions in Title 1 and running from Aeronautics (Title 2) to Wildlife and Fisheries (Title 56).[18]

But there is more to it:

> The General Provisions of Title 1 start with a Chapter 1, Interpretation of Revised Statutes, which contains interpretative provisions that differ from the traditional rules to be found in the Civil Code and are of a common law facture. For instance, R.S. 1:7 and 8, providing that singular may denote plural and one gender may denote others, sound like Section 6 of the British Interpretation Act 1978 or similar provisions of other states' codes.[19]

As indicated by the amount of detail found therein, the length of the provisions, the lack of systematic organization, the heavy legislative style, the Revised Statutes are of common law fabric.[20] Louisiana judges are more likely than not to apply common law methods of interpretation when applying the Revised Statutes,

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17. Olivier Moréteau & Agustín Parise, *Recodification in Louisiana and Latin America*, 83 TUL. L. REV. 1103, 1120 (2009).

18. *Id.*

19. *Id.*

20. Though examples of poorly drafted legislation can be found in most civil law jurisdictions.

moving away from the civilian idea that a code is a system where provisions are to be interpreted by reference to one another. This may make sense, since the Revised Statutes are not a code in the civilian sense. But it is a sign of common law contamination, since this conflicts with the civil law tradition.

In civil law jurisdictions, much ancillary legislation is to be found outside the civil code, sometimes compiled in codes that may be described as satellite codes.[21] These satellite codes revolve around a civil code that tends these days to be weakened by a decodification process, due to piecemeal revision breaking the harmony or consistency of the civil code, or as a consequence of removing provisions from the code to develop the law outside the code, in ancillary statutes or satellite codes.[22] These processes are endogenous to civil law systems. They happen regardless of any significant exogenous influence or contamination by another legal system.

However, even where the civil code is losing some of its density and attractive force, it is understood that it contains all basic rules that would apply by default in the absence of specific provisions to be found in satellite codes or ancillary statutes. This means that satellite legislation is interpreted by reference to the civil code. If the civil code grants a right and a special statute limits this right, the limitation will be regarded as an exception to the rule and will therefore be interpreted restrictively: *exceptio est strictissimae interpretationis*.[23] This means that the scope of the special rule that makes exception to the general rule may not be enlarged by analogy. Likewise, a special rule (*lex specialis*) found outside the civil code will derogate the general law (*lex generalis*) found in the civil code (*specialia generalibus derogant*),[24] which means that the civil code must apply whenever a situation falls outside the scope of the special provision.[25]

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21. Moréteau & Parise, *supra* note 17, at 1109–1112.

22. *See id.*

23. *See* HENRI ROLAND, LEXIQUE JURIDIQUE, EXPRESSIONS LATINES 83 (3rd ed. 2004).

24. For instance, the New Home Warranty Act, *see* LA. REV. STAT. §9:3141–3150 (2010).

25. The fact that ancillary legislation sometimes provides for "exclusiveness" (*See e.g.* New Home Warranty Act, LA. REV. STAT. §9:3150 (2010)) does not exclude the application of the Civil Code for claims not falling within the ambit of the ancillary provisions. As a matter of fact, such

Under the influence of the common law methodology, some judges in Louisiana tend to forget these rules and to interpret the Revised Statutes as if they were autonomous, using common law methodology and making no reference to the Civil Code. It is fortunate that other judges continue interpreting satellite legislation on the background of the Civil Code. The fact however that courts may be divided on the issue indicates that some contamination is at work, which is not at all surprising in a mixed jurisdiction.[26]

III. THE CASE FOR A PRELIMINARY PROVISION

Other mixed jurisdictions are similarly affected. To avoid common law contamination, Quebec adopted a preliminary provision in its 1991 Civil Code,[27] reminding citizens and jurists alike that the Civil Code is a central star in the private law galaxy. The Preliminary Provision says:

> The Civil Code of Québec, in harmony with the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs persons, relations between persons, and property.
>
> The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.[28]

"exclusiveness provisions" are redundant in civil law jurisdictions where judges know that the applicability of the *lex specialis* excludes that of the *lex generalis*. "Exclusiveness" provisions exist in Louisiana because the State is a mixed jurisdiction where a number of attorneys and judges operate without having a full training in the civil law.

26. *See e.g.*Carter v. Duhe Construction, Inc., 921 So.2d 963 (La. 2006) with a powerful dissent by Knoll J. applying Civil Code methodology in interpreting the New Home Warranty Act, LA. REV. STAT. §9:3150 (2010).

27. *See* CODE CIVIL [C. CIV.], Preliminary Provision (Que.). 1991, c. 64, in force since January 1st, 1994.

28. *Id.* The words "droit commun" used in the French version were translated by *ius commune*, for lack of a better word in English. The term "common law," though linguistically correct, had to be rejected, by fear of . . . contamination!

In a recent reflection on the place of the civil code in Louisiana and the legal universe, I advocate the adoption in Louisiana of a Quebec style Preliminary Provision.[29] The provision could read as follows:

> The Civil Code comprises a body of rules governing basic obligations and rights of citizens regarding their person, property, and relations between persons and property which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it. It must be interpreted in harmony with the general principles of law and subject to norms having a constitutional nature.[30]

A debate over such a draft provision would help reveal and assess the extent of the ongoing contamination. Further research on the Quebec Preliminary Provision tends to prove the efficiency of the proposed remedy,[31] in helping keep the civil law tradition and methodology alive and fertile throughout the major areas of private law that are not directly governed by the Civil Code, much as the sun dispenses light and energy to all planets within the solar system.

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29. Olivier Moréteau, *De Revolutionibus: The Place of the Civil Code in Louisiana and in the Legal Universe* (forthcoming 2010).

30. *Id.*

31. On the Quebec Civil Code Preliminary Provision, *see* Alain-François Brisson, *La Disposition pré1iminaire du Code civil du Québec*, 44 MCGILL L. J. 539 (1998-1999). *See also* Jean-Maurice Brisson, *Le Code civil, droit commun?*, LE NOUVEAU CODE CIVIL, INTERPRETATION ET APPLICATION (1992); H. Patrick Glenn, *La disposition préliminaire du Code civil du Québec, le droit commun et les principes généraux du droit*, 46 LES CAHIERS DE DROIT 339 (2005).

DON SAÚL LITVINOFF (1925-2010)[*]

Agustín Parise[†] & Julio Romañach Jr.[‡]

On January 5, 2010, in his adoptive city of Baton Rouge, Louisiana, the great Argentine jurist, Saúl Litvinoff, bid farewell to his family, students, and colleagues. Don Saúl was born in Buenos Aires on March 15, 1925. He graduated from the National High School of Buenos Aires (*Colegio Nacional de Buenos Aires*) in 1944 and the law school of the University of Buenos Aires (*Facultad de Derecho de la Universidad de Buenos Aires*) in 1949. He received a doctorate from that same university in 1956, and obtained the degree of master of laws from Yale University, in the United States, in 1964. Since 2002, he had been a corresponding member of the National Academy of Law and Social Sciences of Buenos Aires (*Academia Nacional de Derecho y Ciencias Sociales de Buenos Aires*).

His vocation for teaching led Dr. Litvinoff to be a law professor in several universities, in the Americas as well as in Europe. However, his teaching activities took place primarily at Louisiana State University (LSU). He was a professor at that university from 1965 to 2009, in which year he was named professor emeritus. His most important contributions to the science of the law include the two volumes of his treatise on obligations[1] and his course books on sales[2] and obligations.[3]

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[*] Originally published in Spanish in REVISTA JURÍDICA LA LEY (Febr. 2, 2010) (Arg.), at 1-2.

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1. SAÚL LITVINOFF, THE LAW OF OBLIGATIONS: OBLIGATIONS IN GENERAL, 5 LOUISIANA CIVIL LAW TREATISE (2nd ed. 2001); and SAÚL LITVINOFF, THE LAW OF OBLIGATIONS: PUTTING IN DEFAULT AND DAMAGES, 6 LOUISIANA CIVIL LAW TREATISE (1999).

2. SAÚL LITVINOFF, SALE AND LEASE IN THE LOUISIANA JURISPRUDENCE (1978) (followed by several editions, the last of which was published in 1997).

3. SAÚL LITVINOFF, THE LAW OF OBLIGATIONS IN LOUISIANA JURISPRUDENCE (1979) (followed by several editions, the last of which was published in 2008).

Dr. Litvinoff occupied a fundamental role in the development of the Louisiana Civil Code that is currently in force. Starting in 1969, he was appointed Reporter of the Louisiana State Law Institute,[4] and was in charge of the revision of the titles on the law of obligations of that civil code. Thereafter, also acting as Reporter, he was in charge of the revision projects of the contracts of sale, compromise, and exchange, among others. Dr. Litvinoff was the best ambassador that Argentine law could have had in the United States.

The impact of the work of Dr. Litvinoff was valued in Louisiana, not only by the local universities, but also by the state legislature and bar. It is noteworthy, for example that the LSU Law Center declared 2009-2010 to be the *Year of Litvinoff*. In addition, in 2008 and under the direction of Olivier Moréteau, the Center of Civil Law Studies at LSU, which Dr. Litvinoff directed between 1976 and 2005, published a *Liber Amicorum* in his honor.[5] The book includes works of lawyers and legal scholars from around the world who paid tribute to his life.

Don Saúl's teaching vocation was very strong, and it could only be matched by his vast knowledge. He could quote legislation on a particular subject area from, among others, Argentina, Brazil, Ethiopia, France, Italy, the Netherlands, Nigeria, Panama, and Spain, and at the same time remember the names and nicknames (designed by him) of all the students in his class. It is very rare to find professors of that caliber. Our notebooks would become full of notes, not only of legal matters, but also of how to conduct a law course, and more importantly, how to treat human beings. His students, who became brothers in spirit in his classes, were able to discover and appreciate the many levels of his knowledge and of his zeal for life. His sources were infinite in many aspects! Don Saúl's brilliant work performance enticed students and colleagues to join the ranks of his admirers and the many that were grateful to him.

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4. The Louisiana State Law Institute is an official law revision agency for the State of Louisiana. For more information on the Institute, *see*, William E. Crawford & Cordell H. Haymon, *Louisiana State Law Institute Recognizes 70-Year Milestone: Origin, History and Accomplishments*, 56 LOUISIANA BAR JOURNAL 85 (2008).

5. ESSAYS IN HONOR OF SAÚL LITVINOFF (Olivier Moréteau, Julio Romañach. jr., & Alberto Zuppi eds. 2008).

It is worth adding that Dr. Litvinoff was not only a renowned academician and codification expert, but he was also a legal consultant to many American and multinational companies and to innumerable law firms in the United States that frequently solicited his expert opinion on innumerable practical problems. Don Saúl prided himself on being a legal professional in the broad sense of the term.

What a privilege to have known that great Argentine jurist Don Saúl, who managed to make clear what was obscure and to render the difficult, simple—that one corresponding member of the National Academy of Law and Social Sciences who, *certainly* dedicated his life to the human aspect of the law!

The academic world and his students are grateful for his dedication, intelligence, and intellectual generosity.

FOUNDATIONS FOR A REVIVAL OF THE CASE METHOD IN CIVIL LAW EDUCATION*

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*This article is based in the Inaugural Session of the Civil Law Workshop-Saúl Litvinoff Series "Civil Law and Common Law: Cross-Influences, Contamination, and Permeability," in the LSU Paul M. Hebert Law Center, Baton Rouge, La., February 12, 2009.

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I have a priceless debt to the late Professor Litvinoff, who kindly attended my presentation, for his mastery, his leadership, his nobleness and humanity, and especially for his friendship. I was honored to be a speaker in this series, in that special and last homage to the remembered and illustrious Argentinean professor, a true legend, in his home law school. There at the LSU Law Center, Common Law and Civil Law are compared in real life. I am also thankful to the participants in that workshop for my enrichment with the vivid and fruitful discussion that took place after my presentation. I think that it would have been difficult to have a better public to share and discuss the topic of this article with the blend in the Louisiana faculty of American and foreign professors.

I have an especial debt with Professor Olivier Moréteau, another true master in law and life and a permanent source of inspiration. He encouraged me to deliver my presentation and to write about the present topic, and provided priceless aid and suggestions to this article—particularly regarding the examination of current legal education in Europe. Another acknowledgment is due here to Agustín Parise, for his permanent advises and patience and for the superb job of him and his staff in the edition of this article.

Ignacio Cofone and Juan Ignacio Stampalija, Assistant Lecturers at Austral University Law School, translated most of this article from Spanish. I did a careful revision of their translation and I am very grateful for their fine work. Cecilia Rinaldi, Assistant Lecturer at Austral University Law School, helped me to edit the footnotes.

ABSTRACT

The article explores the origins, foundations, and present development of the case method in the Civil Law tradition. It supports the idea that, properly defined, this methodology is very suitable for law, and not only in Common Law jurisdictions, but also the Civil Law and is even more appropriate in Continental law schools. There are indeed some undisputable common roots between Common Law and Civil Law regarding this pedagogical tool.

The misunderstandings and skepticism about the usability of this method in Civil Law education are challenged and answered. The article proves that the case method is a serious and useful scholarly tool; it is not a new pedagogical technique, but is rooted and was nourished in ancient educational tradition, especially in humanities and law; it fits law as well as business, not only in the Common Law but also in the Civil Law tradition; it is deeply related to the entire history and development of the Civil Law.

The author claims that it is not accurate to affirm that the case method is inherent and exclusively bound to a system using case law as a primary legal source, such as the Common Law tradition. He points out that it can be a fertile method in the Civil Law tradition.

The work encourages a rebirth of this methodology for the teaching and learning of the Civil legal system, demonstrating that the Civil Law was taught with this methodology in the past and that present experience in contemporary law schools proves that it is an outstanding teaching tool in Civil Law jurisdictions.

The case method is not an exotic flower having no place in the garden of Civil Law, but an important pedagogical element for the renovation of the Civil Law, the revival of which ought to be encouraged.

I. INTRODUCTION: WHY A *REVIVAL* OF THE CASE METHOD IN THE CIVIL LAW TRADITION?

Currently, the case method is—especially in the Anglo-Saxon world—a pedagogical tool used in a wide variety of disciplines—if not all—both in social and "hard" sciences.[1] Cases are used in exact sciences to illustrate a physical principle or to train students

1. *See* MICHAEL MASONER, AN AUDIT OF THE CASE STUDY METHOD 1, 11, 41-42, 46 (1988); MICHAEL R. LEENDERS & JAMES A. ERSKINE, CASE RESEARCH: THE CASE WRITING PROCESS 4 (2d ed. 1978).

in the use of the algebraic method—e.g. "exercises" or "problems." For instance, cases are used in naval academies: students analyze the possible courses of action that Nelson had in Trafalgar, learning the use of tactics and strategies. Case methodology is also used to analyze agricultural, governmental, or engineering problems. Although not referring to them as "cases," many schools and universities present students with problems of logistics, journalism, and architecture. Furthermore, it is well known that the case method is widely used in business and legal studies, especially in the United States.

The operation and functioning of this methodology is different depending on the discipline. The methods used to teach accounting are not the same as the ones used in teaching political science. Nevertheless, in every example cited the educational device used is the case method. In these fields, this methodology consists in some kind of analysis of a real or hypothetical situation, an examination of the different forms of scrutiny and alternatives available and an evaluation and discussion of possible correct solutions and sometimes trying to find the best one. In this article, sometimes I use the concept of "case" and "case method" in this broad sense—for instance, regarding this methodology in the study of medicine—a little more comprehensive than the specific legal use of case method that I will explore further in this article. I think that is important to widen the focus to better understand the varieties and possibilities of this methodology. In this way a greater awareness of the sources and roots of the case method and its educational legacy and potential in the law becomes clear.

In this article I am adopting a working concept of case method in legal education that encompasses Langdellian and non-Langdellian approaches. Here the case method referred to is a pedagogical tool mainly consisting of the discussion in classrooms wherein judicial decisions are studied and students analyze written hypothetical or situational cases that are supplied by professors. It does not impair the case method to use it in a different way from the Langdellian approach of strict observance. This theme is later developed in III.C. In this approach the professor never explains the law, but exclusively gets it by extracting the principles from cases after painful and meticulous discussion carried on with the students. I propose that the case method could improve by adding previous, correlative, or posterior explanations by professors of the general principles governing a legal institution or a juridical problem or situation. This could then be supplemented with the use of codes, hornbooks, and manuals. This would enrich the case method, and for several reasons, improve the old Langdellian

system. This improved method could then be used in both Common Law and Civil Law courses.

We use this approach for two decades to teach Civil Law in Austral University Law School, with encouraging results, as I demonstrate *infra* in V.E. Therefore, I am including here both the Langdellian goal to find out the law from the case discussion and to reintroduce an entire science in an inductive way with a more modern approach to case method. The core of the operation of case method wherein the discussion or analysis of the professor with students and between the students. This would enable the use of interpretative devices and options to reach a solution and show the value of different paths that could be used by legal advisers or judges. They would thus better understand adjudications and the correct, just and suitable answers for the given situation. Consequently, this methodology endeavors for the students to develop and cultivate a critical legal mind that is oriented towards problem-solving. It is key that they understand the principles of law not as abstract conceptualizations, but as the answers to the complex juridical problems found in real life.[2]

These comments lead to the following questions: Where does this methodology come from and how has it spread so quickly? Is it really suitable for legal studies? A positive answer to the latter leads to another question: Is the methodology appropriate for the study of the Civil Law, as much as it is for the Common Law? These questions will be answered using a historical perspective, with a focus on the antecedents and the origins of the use of the case method, and on its relation with similar methodologies used in the past. Revealing its foundations will show how to address the difficulties generated by a revival of the case method in Civil

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2. For my complete concept of "case method," and the correlative concept of "case," *see* my work ENSEÑAR Y APRENDER DERECHO CON EL MÉTODO DEL CASO: FUNDAMENTOS Y MODOS DE IMPLEMENTACIÓN (forthcoming March 2011), especially chapters III, §§ 16-17, VI, §§ 29-36, and XII, III, § 78. I am not excluding alternative forms to perform it pursuing specific educational goals in the broad field in which I draw the general scope of this methodology. For example, I am not excluding, neither the debate of mini-cases in the development of a theoretical lecture, nor discussion and analysis using role playing, or the discussion of problematic fragments of movies, nor the analysis of cases outside the classroom hours, individually or in groups, just orally or in written form. One of the main problems on the comprehension of this methodology is that different professors, of diverse traditions or sciences, frequently have a narrow view of the case method, in some way parochial, to see different and complementary approaches that are available within case law methodology.

Law education, and uncover some of the extraordinary possibilities for the methodology in this legal tradition.[3]

Legal education is a fascinating and challenging topic when explored in the context of the relationship between the Civil Law and Common Law traditions. There are at least two main reasons for that. The first one is that education is the beginning of several things, and to spread and develop the tradition in teaching, learning and training in law is a very important matter. This is especially true since there is undoubtedly a cross fertilization between education and practice. The second reason is that legal education is probably one of the main topics revealing the cross influences, the common roots and future permeability of the Common Law and Civil Law traditions. I am of opinion that such permeability does not contaminate or impair one tradition or the other, but helps to improve both of them.

Why speaking of a "revival" of the case method in Civil Law education? There are several reasons why exploring the foundations of the case method in civilian legal education: a) because it is necessary in order to understand, teach and further the knowledge and learning of the Civil Law; b) because it may be convenient, and even mandatory, in the forthcoming Bologna unification process of education in Europe; c) because the case method fits the Civil Law very well; d) because the Civil Law was in fact taught with the case method; e) because there are several common roots between the Common Law—where the case method flourished—and the Civil Law regarding this kind of pedagogical tool; f) because, based on the last points, the case method is not an exotic flower that has no place in the garden of Continental Law; and g) because there is, currently, a revival of case method in Civil Law education.

The topic of this work, besides the relevance that it has for those interested in this didactic method, has an added benefit. Many law professors in the Civil Law tradition look at the case method with skeptical eyes, in the belief that it is inexorably linked to the characteristics of what they mistakenly think is its origins or its nature. Such bias reveals a triple misunderstanding: firstly, that

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3. Due to the scope of this paper, I will not deal with the different versions of the method in the 20th century in the two main areas where it is used, law and business. For the expansion and use of the method in law schools, *see* JULIO CUETO RÚA, EL "COMMON LAW": SU ESTRUCTURA NORMATIVA. SU ENSEÑANZA 301-05, 311-23, 350-94 (1957). For the use of this methodology in business schools, *see* FRITZ ROETHLISBERGER, THE ELUSIVE PHENOMENA: AN AUTOBIOGRAPHICAL ACCOUNT OF MY WORK IN THE FIELD OF ORGANIZATIONAL BEHAVIOR AT THE HARVARD BUSINESS SCHOOL 141-142, 171-172, 233, 236-238, 275, 288-289 (George F. Lombard ed., 1977).

the case method is some kind of educational toy deprived of utility in serious science or scholarship; secondly, that the case method is useful to teach business administration, but unfit for a more organized and sophisticated discipline like the law; and thirdly, that the case method is characteristic of the Anglo-Saxon world, that is only useful for teaching the Common Law. Is it possible to answer these objections to the use of the case method in Civil Law education? May we make these professors realize what the origins and fundamentals of the case method are or can be? The aim of this article is to dispel these erroneous and preconceived notions and help to uncover the usefulness and possible applications of the case method thereby encouraging Civil Law scholars to further the revival of this powerful tool within Civil Law education.

In short, we are going to explore the roots of legal education with the case method and use this knowledge to understand present legal education and influence the future of legal education in Civil Law jurisdictions. This article endeavors to support the view that there are compelling reasons to *reintroduce* the case method in the Civil Law world. This articles calls for a revival of this methodology.

II. FIRST MISCONCEPTION: THE CASE METHOD IS NOT FOR SERIOUS SCIENCE

The idea that law may be taught with the case method meets a formidable intellectual resistance among civilians, especially those who are solely academics. This may be due to several erroneous positions and assumptions.

Some law professors are afraid to be challenged by students and feel that the exercise of case method is more demanding than explaining a theoretical point. Others think that the method only fits a seminar size system of education, with classes of fifteen or twenty students and may not be workable with classes of forty-five, sixty, or more students. Others point to the shortage of casebooks in Civil Law countries, unlike America where more than 6,000 casebooks have been published since the time of Langdell.

Nevertheless, most professors have a skeptical or distant attitude towards the case method due to graver concerns. Namely, Civil Law professors commonly reject the use of the case method with the belief that it is not a serious pedagogical device to be used for a serious academic discipline. They espouse the idea that the dogmatic dimension of the law demands a dogmatic, lecture-based style of instruction. The professor lectures *ex cathedra*, students

take notes and, sometimes, ask questions to the teacher for clarification.

The study of the law is a science. Moreover, the law is a complex system that combines techniques from art, science, and philosophy. To fully understand the problems individuals and society have in relation to justice and to resolve them, it is necessary to synthesize all these disciplines within the context of law. Taking into account the scientific character of the study of the law, I believe that considering its use in other disciplines that that are widely accepted as "sciences" can dissipate Civil Law professors' misunderstandings of case method. To this end, it is useful to see how it was used, from the very beginning, in medical education.

A careful observation of medical education reveals that the analysis of cases has been used for a considerable time.[4] This methodology was first used by Galen (200-129 B. C.), who taught his pupils with concrete "cases," who were sick people, and then asking his students about the right diagnosis and possible treatments.

The pedagogical ideas of Galen continue to be valid today. In medical schools, students examine actual patients, evaluate their symptoms, diagnose them, and consider and recommend therapeutic alternatives.[5] Furthermore, the so-called "medical athenaeums" of old handed down by tradition, consisted of a professor or physician presenting a case wherein the pathology of a patient, were discussed with medical students.

It is therefore not surprising that the modern manifestation of this case method is carried out in the classroom in which is used for teaching students at the Harvard Medical School. It was borrowed from the Harvard schools of law and business.[6] Clearly, the case method is undoubtedly compatible with "serious" scientific study.

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4. *See* LEENDERS & ERSKINE, *supra* note 1, at 14.

5. On the relationship between case method and the practitioners' formation in Medicine, *see* HARPER W. BOYD JR., DONALD M.T. GIBSON, CHARLES P. IFFLAND & LEE A. TAVIS, CASOS EN "MARKETING" 4 (Stanford Business School trans., 1967; original in English: MARKETING MANAGEMENT: CASES FROM THE EMERGING COUNTRIES, 1966).

6. For an interesting presentation of the change of teaching methodology carried out a few years ago in that famous American medical school, and of the program elaborated for that change, *see*: Daniel A. Goodenough, *Changing Ground: To Medical School Lecturer Turns to Discussion Teaching*, *in* EDUCATION FOR JUDGMENT: THE ARTISTRY OF DISCUSSION LEADERSHIP 83-98 (C. Roland Christensen, David A. Garvin & Ann Sweet eds., 1991). In Argentina, the Austral University Biomedical School uses case method for the same purposes.

III. SECOND MISCONCEPTION: THE CASE METHOD IS NOT FOR LAW, BUT FOR BUSINESS SCHOOLS

A. From Errors to Denial

For many, including those connected to the business world, particularly Civil Law professors, the case method is viewed as having been created in the twentieth century in the American business schools, and more specifically, in the Harvard Business School. The model is then seen as having spread to other universities around the world, where it is now used extensively to teach business management.

From this understanding arose the first objection of most Continental Law professors to the use of case method in the learning and teaching of Civil Law: the case method is not for law, but only for business schools. We are going to demonstrate that this assumption is clearly inaccurate.

B. The Fruits of the Law: The Beginning of the Case Method in the Harvard Business School

In the nineteenth century the case method was used for teaching business and commerce in France and Germany,[7] but the Harvard Business School has the honor of being the first to use the case method in a conscious and systematic way in the business world. However, as American lawyers know quite well, the case method was used to teach law previously to its introduction for the teaching of executives. Furthermore, searching the origins of the methodology, it is possible to see that the case method had been used previously not only in law, but in other sciences and arts as well. The story is as follows.

The first American business school, Wharton, was created in 1881. Wharton is now part of the University of Pennsylvania. The case method was not used there.

The Harvard Business School was created in 1908, under the name of Graduate School of Business Administration. It was part of the Graduate Department, in the Faculty of Arts and Sciences at Harvard University.[8] Up until that moment, American business

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7. *See* MASONER, *supra* note 1, at 10-11.

8. *See The Harvard Guide: History, Lore, and More. Did You Know?* (2007), *in* http://www.news.harvard.edu/guide/lore/lore9.html (last visited July 10, 2010); and JOSÉ LUIS GÓMEZ LÓPEZ-EGEA, MÉTODOS ACTIVOS EN LAS ENSEÑANZAS DE DIRECCIÓN: ANÁLISIS Y CONCLUSIONES DE LA EXPERIENCIA DEL IAE 65 (Research paper; Universidad de Navarra, Pamplone, 2000; unpublished).

schools focused solely on undergraduate studies. Harvard, with the intention of making business a true profession, innovated by accepting graduate students.[9]

In the early twenties, under Dean Wallace B. Donham, the Harvard Business School made the first use of the case method as a pedagogic tool within a business context. The dean was a Harvard Law School graduate, and was first exposed to the case method while at law school. He borrowed this debate method and applied it to the business school. The transplant was made, naturally, with minor modifications born of the natural differences between law and business.[10]

In 1910, Donham's predecessor in the Deanship, Professor Edwin Francis Gay, advised Professor Melvin Thomas Copeland to complement his lectures with debates between students. The advice was implemented and executives who taught the classes introduced business problems in class and asked their students to solve them in writing, making recommendations. Donham's training in law introduced him to the case method and he soon recognized the importance of using this tool in the field of business. In 1920, he encouraged Copeland to publish in 1920 the first casebook on business—*Marketing Problems*[11]—and within a few years the school faculty committed to using the case method.[12]

It is undisputable that the development of case method in management education has been due largely to the Harvard Business School.[13] Furthermore, horseshoe or U shape classrooms were invented there in the 1950s to facilitate discussion amongst the students to enable them and the professor to effectively interact with one another.[14] In Harvard MBA classes, the case method remains the chief pedagogical tool. Their students analyze an average of 600 cases over the course of two years.[15] Thousands of

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9. *See The Harvard Guide*, *id*., referred in the previous footnote.

10. *See* ROETHLISBERGER, *supra* note 3, at 123.

11. It was later published several times under the name PROBLEMS IN MARKETING.

12. *See* LEENDERS & ERSKINE, *supra* note 1, at 14, 102.

13. *See* MASONER, *supra* note 1, at 11. Regarding the precise way of utilizing the case method in the Harvard Business School see these classical works: THE CASE METHOD OF TEACHING HUMAN RELATIONS AND ADMINISTRATION: AN INTERIM STATEMENT (Kenneth R. Andrews ed., 1953); THE CASE METHOD AT THE HARVARD BUSINESS SCHOOL: PAPERS BY PRESENT AND PAST MEMBERS OF THE FACULTY AND STAFF (Malcolm P. McNair & Anita Hersum eds., 1954); and TEACHING AND THE CASE METHOD: TEXT, CASES, AND READINGS (Louis B. Barnes et al. eds., 3d ed. 1994).

14. *See* Roland Christensen et al., *Acknowledgments*, *in* EDUCATION FOR JUDGMENT (C. Roland Christensen et al. eds.), *supra* note 6, at xxv.

15. *Cf.* ROBERT RONSTADT, THE ART OF CASE ANALYSIS 6 (3d ed. 1993).

cases were studied in Harvard and gradually became available to other schools and professors. Thus, this methodology has actively spread, first to other American business schools and then to business schools all over the world.

Having established this, let us leave business schools and go back to the law schools, where the professors of management found the case method.

C. The Restoration of Case Method in the Contemporary World: Langdell and the Harvard Law School

In the modern times, the case method experienced a renaissance in 1870 at Harvard Law School. Christopher Columbus Langdell became dean of the school for the academic year 1869-1870 and remained there until 1900. He introduced the case method as the main instrument to teach principles of judge-made law and to teach the students how to think in a legal way.

Prior to Langdell stretching back to and since the colonial age, retired judges delivered strictly theoretical classes to teach the law. Practical training was left to practicing lawyers, who dispensed it in an informal setting over a certain period of time, without much institutional organization.[16] The theoretical framework for American lawyers was laid by reading the four volumes of Blackstone's *Commentaries on the Laws of England*.[17] Following the creation of American universities, this teaching system remained mostly untouched within the academic world.

In a rudimentary stage before Langdell, cases were used to teach American law students. In 1810, Zephaniah Swift used a casebook to teach law at his law firm in Connecticut. Later in 1865, Professor John Norton Pomeroy used cases to teach law at New York University. Langdell's innovation, strictly speaking, was in making the teaching and learning with cases the main

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16. *See* CHARLES EISENMANN, THE UNIVERSITY TEACHING SOCIAL OF SCIENCES: LAW 19, 67-68, 89-90, 92 (1954). It was a report on the teaching of law by this professor at the University of Paris for the International Committee of Comparative Law.

17. The COMMENTARIES were written between 1765 and 1769 based on Blackstone's classes in Oxford, being the first clear and complete exposition of the Common Law system. It is because of this that the treatise was considered the most important authoritative source on Common Law, thus enjoying a predominant position in England and the United States. See about this SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 702-727 (reprint 1966) (1938); DICTIONARY OF ENGLISH LAW 252 (Earl Jowitt & Clifford Walsh eds., 1959).

instrument of legal education.[18] His influential and visible position as professor of law and dean of the Harvard Law School contributed decisively to the success of his proposal. It is worth highlighting that Langdell introduced cases in the study of contracts, a key course in the study of law, and published his casebook with a prestigious publishing company, thus making it widely available for purchase to the public.

Langdell explained his method in his book, *A Selection of Cases on the Law of Contracts*, the first part of which was published in 1870—a year after his arrival to Harvard. It was used the first time during the first semester of the academic year 1870-1871. Its methodology rested on two main ideas: legal gnoseology within a positivist matrix and legal pedagogy.

Through his legal gnoseology, he denied the existence of general principles deriving from nature and instead believed that induction could be used to analyze all the Common Law precedents and reduce them to general principles. From there, rules could be obtained and applied to concrete cases. The applicable law for new cases could be obtained from principles obtained from previous cases. In this way case law could be clear and scientific, a key principle for the practice of law. According to Langdell, the science of law could be created following this method.

From a pedagogical standpoint, Langdell conceived the case method as a way to lead students to acquire by themselves, by means of their personal work and methodically oriented discussions, the juridical spirit. Rather than memorizing the law, they would start from a concrete case and use principles derived from them to reach general principles that could then be analogized and applied to other cases.[19] He did not hand books and materials to students to be studied, but instead used course

18. *See* RAMÓN BADENES GASSET, METODOLOGÍA DEL DERECHO 433 (1959).

19. About the philosophical and pedagogical ideas of Langdell *see* C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS v-vi (1871). The first part, published in 1870 with the same publisher, has 460 pages. The following year, his complete new edition had 1022 pages, with 336 cases, mainly full text without brackets or edition. For a complete and deep study on Langdell and his legal ideas *see* WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994). About his legal ideas *see also* William C. Chase, *Book Review*, J. AM. HIST. 1752-1753 (1995) and BADENES GASSET, *supra* note 18, at 434.

materials to be used as information for problem solving and to discover the legal rule through induction.[20]

For a fruitful application of the method, Langdell created three principles and explained them in the foreword of his book on contracts as follows:

> I entered upon the duties of my present position, a year and a half ago, with a settled conviction that law could only be taught or learned effectively by means of cases in some form...
>
> I was expected to take a large class of pupils, meet them regularly from day to day, and give them systematic instruction in such branches of law as had been assigned to me. To accomplish this successfully, it was necessary, first, that the efforts of the pupils should go hand in hand with mine, that is, that they should study with direct reference to my instruction; secondly, that the study thus required of them should be of the kind from which they might reap the greatest and most lasting benefit; thirdly, that the instruction should be of such a character that the pupils might at least derive a greater advantage from attending it than from devoting the same time to private study.
>
> How could this threefold object be accomplished? Only one mode occurred to me, which seemed to hold out any reasonable prospect of success; and that was, to make a series of cases, carefully selected from the books of reports, the subject alike of study.[21]

After several early difficulties and resistances, the case method gradually gained popularity, and eventually achieved a consolidated position towards the end of the nineteenth century and into the early twentieth century.[22] After a rocky start, for more than a hundred years the case law methodology has remained the basic pedagogic methodology for teaching law in the United States.[23]

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20. *See* Julio Barboza, *Reflexiones acerca del Punto II del temario*, *in* INSTITUTO INTERAMERICANO DE ESTUDIOS JURÍDICOS INTERNACIONALES, LA ENSEÑANZA Y LA INVESTIGACIÓN DEL DERECHO INTERNACIONAL 175 (1969).

21. LANGDELL, *supra* note 19, at v.

22. *See* JOSEPH REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS (REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING), 84 (1914). The same idea in BADENES GASSET, *supra* note 18, at 433.

23. *See* EISENMANN, *supra* note 16, at 111.

Two powerful reasons converged to create the success of case method. The first one is that United States is, fundamentally—and even more in Langdell's time—*case law*. Juridical principles usually come from rulings and statutes are interpreted through these decisions under the rubric of *stare decisis*. The second reason is that the goal of law schools in the United States is to prepare law students to be practicing attorneys who can solve cases correctly and think clearly. Therefore, it is crucial that those studying law be able to interpret, reason from, and use cases to support their position.[24]

It is worth mentioning that Langdell's epistemological principles were strongly resisted by those who favored legal realism—particularly Holmes[25] and Llewellyn.[26] Legal realists disapproved of and criticized the case method's attempt to teach law, which they viewed as a science, through the studying of cases. Nevertheless, it is possible to keep Langdell's pedagogic method to educate lawyers using debates about cases without sharing his idea of the law as a science. The two ideas are very different and this fact has not been stressed enough.[27] Yet it is essential to grasp the fact that one may use the case method without endorsing a philosophical approach to the law that conforms to the "empirical" conception of the Common Law—a conception in the Anglo-Saxon tradition and that clearly contradicts some fundamental tenets of the Civil Law tradition.

In conclusion, the case method is not an educational resource born in business school, but one that originated in and was perfected as a specific legal educational device.

IV. THIRD MISCONCEPTION: THE CASE METHOD IS ONLY FOR THE COMMON LAW

A. Cases and Discussions: From Rome to the Renaissance Theology, and Back to Socrates

The second major objection to the case method in Civil Law education is that the case method only applies to the teaching of

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24. *See id.* at 115-116; and CUETO RÚA, *supra* note 3, at 308-309.

25. *See* Oliver W. Holmes, *Book Notices-Review of CC Langdell, Summary of the Law of Contracts and WR Anson, Principles of the Law of Contract*, 14 AM. L. REV. 233-234 (1880).

26. *See* Karl N. Llewellyn, *A Realistic Jurisprudence-The Next Step*, 30 COLUM. L. REV. 431 (1930); and Karl N. Llewellyn, *On What Is Wrong with Legal So-Called Education*, 35 COLUM. L. REV. 665 (1935).

27. *See* William Epstein, *The Classical Tradition of Dialectics and Legal American Education*, 31 J. LEGAL EDUC. 399, 399-400, 422-423 (1981).

the Common Law because the tradition is created on a case-by-case basis. It is absolutely dependent on the case made law and *stare decisis*, and this is viewed as being inadequate in a Civil Law system, which is based on pre-existing legal *rules*.

Although Langdell was the modern "inventor" of case method for its use in a classroom, he can more properly be seen as a "restorer" in light of pertinent historical antecedents. The use of cases in legal education is indeed much older than Langdell and its use in the Harvard Law School. It is deeply connected to the Civil Law and Continental tradition, starting with Roman Law—the wellspring of Civil Law. The case method has remained a component of legal education in the European and Latin American law schools, and experienced great expansion with the teaching of moral and ethics. Moving further back in time, one discovers the genesis of this methodology in Greek philosophy, within the Socratic methodology and Aristotilian dialectics.

B. The Focus on Cases as the Core of Roman Law

Roman jurists understood quite well the relationship between cases and law. They did not conceive of the law as a mere rationalistic abstraction. Rather, they viewed it as a discipline that required the exercise of prudence in each individual case. Thus, the early Greeks gave importance to circumstances and exceptions, paying attention to different shades and factual adaptations. It was in this context that the jurist Alfen could say *in causa ius esse positum*: "the fair solution depends on the case," or "the right is determined in the case."[28]

Casuistry is therefore one of the main elements of the spirit of Roman Law, which explains its current pedagogical utility. The Romans were the genius inspirers of this juridical method that flourished as a method to solve cases.[29] The essential flexibility of *ius* of Rome lies in the *prudentia iuris*, cause of the *ars iuris*; and this is what makes Roman Law so fertile and vital to this day.[30] It did not develop as a "science of law," but as casuistry and practice wherein situational law, sought to achieve a fair solution for each

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28. D. 9, 2, 52 [DIGEST].

29. *See* MANUEL JESÚS GARCÍA GARRIDO, RESPONSA: CASOS PRÁCTICOS DE DERECHO ROMANO PLANTEADOS Y RESUELTOS 17 (10th ed. 2003); and Alfredo Di Pietro, *Foreword, in* GABRIEL DE REINA TARTIÈRE, CASOS DE DERECHO ROMANO 10-11 (2004).

30. *See* Alfredo Di Pietro, note *in* GAIUS, INSTITUTAS 38 (Alfredo Di Pietro, trans. 4th ed., 1993).

case. Hence, the Romans understood the law, *ius*, to be that which is just, fair.[31]

This attention to cases in Roman Law derives from a unique feature: they had the legal rules of the *responsa* of Roman *iurisprudentes* or *iurisconsulti* as main source of their laws. These "answers" were authoritative elaborations based on concrete problems or "cases that were formulated as verdicts, legal opinions or answers to the praetor, to the *iudex*, or directly to the parties involved in the lawsuit, generating a doctrinal precedent.[32] Besides their intrinsic value, the importance of the answers remained in the fact that, as Gaius says, "the sources of law for the Roman people are . . . [among others] the answers of the prudent,"[33] conceived as "the decisions and opinions of those to whom it has been granted to create law."[34] In this way, although "private" jurists, who had the authority of their author, gave many answers, many other jurists had a special privilege given by the emperor, known as *ius publicæ respondendi*. These decisions-answers were vested with the strength of mandatory authority for judges.[35]

In 533, Justinian's jurists gleaned from those answers the famous *Digest*, a restatement of legal opinions about actual cases. It is interesting to note that the *Digestus* or *Pandectis*—as it was also known—formed one of the fundamental parts of the *Corpus Iuris Civilis*. The *Digest* was made as an official selection of Roman case law by the Emperor. Useful for practical application of the law by judges, these cases were primarily meant for the education of those aspiring to serve the office of justice. Justinian understood that the education of the new jurists was of greater importance and effectiveness than the coercive imposition of opinions to the court magistrates. Centuries later, his theory was validated when the summary of opinions on cases was used for the formation of jurists in the European *ius commune*.[36]

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31. *See* JULIO CÉSAR CASTIGLIONE, LAS LECCIONES DEL DERECHO ROMANO O EL NACIMIENTO DEL DERECHO 61, 64, 97-98 (1995).

32. *See* PONPONIUS, D. 1, 2, 2; F.C. DE SAVIGNY, I SISTEMA DE DERECHO ROMANO ACTUAL 154-155 (Jacinto Mesía & Manuel Poley trans. 2d ed., 1870); ALVARO D´ORS, DERECHO PRIVADO ROMANO 28 footnote 4 (1968); and Di Pietro, *in* GAIUS, *supra* note 30, at 58-59 n. 8.

33. GAIUS, *supra* note 30, at I, 2. I have consulted the versions of Di Pietro, aforementioned, and of JAVIER NÚÑEZ DE PRADO, INSTITUCIONES JURÍDICAS (1965). About the "answer of the prudent" as source of law, *see also* PAPINIAN, D. 1, 1, 7.

34. GAIUS, *supra* note 30, at I, 7.

35. *See* L.B. CURZON, ROMAN LAW 18-20 (2d ed.1974) (1969).

36. About that idea of Justinian and the use of the Digest in the education of students in the *ius commune*, *see* A. D´ORS, F. HERNÁNDEZ-TEJEDOR, P.

Furthermore, Romans invented the *Institutes* or *Institutas,* or method of institutions. This is the best possible way of explicating the law in a scientific manner. The best exponents of this method are Gaius's *Institutes* and, some centuries later, Justinian's *Institutes*. They were introductory works, which were a compilation of a comprehensive theoretical material based on casuistry, culled from the infinite number of answers to actual and specific legal problems where the jurists attempted to find the fairest solution possible to the problems presented.

That is the last reason that explains why Roman Law was eminently practical, focused in its application. Roman jurists reasoned from particular cases to general principles. They took into consideration each problem and studied it in light of the general principles, and endeavored to arrive at practical, well-founded solutions.[37] Ihering, one of the greatest Roman Law experts and one of the finest Civil Law thinkers and writers, spoke about the spirit of this ancient system of law and said that its goal was to regulate the reality. He pointed out:

> Law exists to be applied. Law's application is its life and truth. What doesn't really exist, what exists only in statutes and paper, it's only a legal ghost; . . . on the contrary, what is carried out as law, is law, even though it is not in the statutes, and even though neither the people nor the doctrine are aware of it.[38]

Ihering also pointed out that, while the modern law is structured by concepts, Roman Law was structured without dividing or isolating concepts from concrete cases.[39]

As shown above, the study of case law or casuistry is the best method for teaching Roman Law.[40] It is not a surprise, therefore, that those opinions, together with the *Institutes*, were studied in both the rival schools of the Sabinians and the Proculeians, private institutions called *stationes ius publicæ docentium et*

FUENTESECA, M. GARCÍA-GARRIDO & J. BURILLO, I EL DIGESTO DE JUSTINIANO 7 (1968).

37. *See* PAUL (PABLO) KRÜGER, HISTORIA, FUENTES Y LITERATURA DEL DERECHO ROMANO 49-50 (ca. 1880).

38. RUDOLF VON IHERING, III L'ESPRIT DU DROIT ROMAIN DANS LES DIVERSES PHASES DE SON DÉVELOPPEMENT § 43 (O. de Menlenaere & A. Maresq trans., 3d ed. 1877).

39. *Id*. at § 58.

40. *See* D´ORS, *supra* note 32, at 7; *id.*, *El valor formativo del Derecho Romano*, in *id.*, PAPELES DEL OFICIO UNIVERSITARIO 159-169 (1961); and *id.*, *El dogma jurídico*, *in* PAPELES, 170-184.

respondentium.[41] There, the law student was an *auditor*: he listened to the consultations made to the *iurisprudentes*, whose opinions, while rather short, could have as companions detailed explanations in form of discussions with the students.[42]

One cannot but agree with Rudolf Stammler, when he said that the texts of the Roman jurists are crucial for developing *critical thinking* in law students. For Stammler, it was inconceivable that this magnificent way of teaching future judges and lawyers was abandoned.[43]

Thus, we can conclude that Roman Law, from where the Civil Law sprung, had the use of and the studying of cases at the very core of its practice and spirit. The reading of cases, the researching of them, the study with cases, is no abandonment of the Roman Law heritage, but honoring it in a higher degree.

C. Case Analysis in Legal Education in Renaissance Europe and the Colonial Americas

Centuries later, the Glossators and Post-Glossators did not use cases as the Roman *iurisprudentes* did. Rather, they worked exclusively with Roman jurists' opinions and elaborations on the cases. But it was not necessary to wait for Langdell: between Ulpian and him, continuity was broken by the *ius commune* and, with it, by the *ius canonicum*.

In some prominent law schools both in Europe and the Americas—especially in the paradigmatic schools of Salamanca, Lima, and Mexico—the Civil Law was taught with cases and principles obtained from Justinian's *Digest* and *Code*, and Canon Law with the *Decree* of Gratian and the *Decretals* of Gregory IX.[44] The method consisted in reading a text, asking questions and receiving answers from the students. After that, they "put the case" to the learned principles, that is, real and hypothetical cases about the theory and norms were explained. With all these elements a discussion was held based on the laws extracted from the cases and authorities.[45] In the University of Mexico, for example, Pedro Farfán's *Constitutions* of 1580 prescribed that in the learning of canons, laws, or theology reading, disputes, and

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41. *See* JOSÉ M. CARAMES FERRO, HISTORIA DEL DERECHO ROMANO DESDE SUS ORÍGENES HASTA LA ÉPOCA CONTEMPORÁNEA 214 (5t ed. 1993).

42. *See* KRÜGER, *supra* note 37, at 53.

43. *See* EL JUEZ, 44 et seq. (Emilio F. Camus trans., 1941), quoted by BADENES GASSET, *supra* note 18, at 429.

44. *See* VÍCTOR TAU ANZOÁTEGUI, CASUISMO Y SISTEMA: INDAGACIÓN HISTÓRICA SOBRE EL ESPÍRITU DEL DERECHO INDIANO 235 (1992).

45. *Id.* at 237.

solutions were practiced "so that students could develop their memory and cultivate their intelligence and understanding."[46]

It is interesting to point out that in the book *Arte Legal para Estudiar la Jurisprudencia* (Legal Art to Study Law), which was published in Salamanca in 1612 by Francisco Bermúdez de Pedraza as a repertoire of advice to students, it was stated that laws or canons should be read before attending class, and that it should be done "very slowly, one, two, or three times, until understanding it and putting a case to it."[47] That is, students new to the study of law were advised to study slowly and to imagine cases of application to prepare themselves for the discussion that would take place in class. Similarly, the exam given at the conclusion of the students' formal university training, which consisted of an hour exposition about the assigned point, followed the requirement that the student "put the case to the text" and "bring the reason to doubt and to decide."[48]

In this way, the introduction of case for discussion and the application of the studied texts, in sixteenth to eighteenth century law schools helped to stress the idea that the law should be applied to constantly changing facts, thus the art of deciding and solving cases with unique facts was paramount.[49]

D. Not Only for Law: Casuistry in Moral Science

The science of ethics is very close to the study of law. Legal reasoning and ethical reasoning can be seen as brothers, or even twins. For this reason it is fruitful to explore the utilization of the case method in the study and research of ethics.

At the end of the sixteenth century, morality began to bifurcate from the other theological disciplines, and casuistry began to manifest in its teachings. This tendency became clear by the middle of the seventeenth century due to the influence of Canon Law.

It is important to remember here the deep influence of the Civil Law on Canon Law and, through it, of Roman Law. Martín de Azpilcueta, the so-called *Doctor Navarrus* (1493-1586), famous canonist and moralist from the University of Salamanca,

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46. *Id*. at 240.

47. BERMÚDEZ OF PEDRAZA, ARTE LEGAL PARA ESTUDIAR LA JURISPRUDENCIA 103-104 (1612), quoted in TAU ANZOÁTEGUI, *supra* note 44, at 236-237.

48. *See* TAU ANZOÁTEGUI, *supra* note 44, at 240.

49. *Id.* at 238-242.

played a key role in the development of casuistry with his *Manuale sive Enchiridion Confessariorum et Poenitentium*.[50]

The decisive year for its development came in 1600 when the Spanish Jesuit Juan de Azor (1536-1603) published the first volume of his *Institutiones Morales*. It was a truly *summa*, following the new system of presenting and discussing series of hypothetical cases on concrete moral issues with solutions. The work was intended as a manual that would explain morals and teach them to confessors.[51]

Another important man in the application of the case method to the exposition of Morality was Cardinal Francisco Toledo, SI (†1596), who wrote *Instructio Sacerdotum s. Summa Cassum Constientiæ*.[52]

In this way the use of casuistry was first seen in moral theology. As a result, works of true scientific merit and some monumental works, such as Antonio Diana's (1585-1663) *Resolutiones Morales*, known as *Summa Diana*, were produced.[53]

Unfortunately, the system was flawed. It lacked the prudential method of Roman Law and ossified due to its adherence to rigid rules and strict use of rationalism. These authors of Catholic casuistic works were the true products of their authors who were primarily concerned with repelling the threat posed by Protestantism. Thus, they aimed primarily at giving to confessors, who may have no instruction in theology, solutions that were thought of in advance. In this way, these works focused on distinguishing mortal sins from venial sins and neglected an examination of the principles and nature of goodness. That is why, distancing themselves from the Roman Law methodology, they started to develop sophisticated ways of distinguishing the moral acts, trying to avoid the committal of mortal sins by introducing subtle shades and exceptions, frequently forced.[54]

Gradually, the casuistic method fell into disfavor. When the Jesuits had their controversy with the Jansenists, it suffered a

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50. About the surging of casuistry and the influence of Azpilcueta, *see* MARTIN GRABMANN, HISTORIA DE LA TEOLOGÍA CATÓLICA 231-233 (David Gutiérrez trans., 1940).

51. *See* JOSÉ LUIS ILLANES & JOSEP IGNASI SARANYANA, HISTORIA DE LA TEOLOGÍA 206-208 (1995); and GRABMANN, *supra* note 50, at 231-233. The works of Azor had three volumes and was published between 1600 and 1611, with the complete name of INSTITUTIONES MORALES, IN QUIBUS UNIVERSÆ QUESTIONES AD CONSCIENTIEM RECTE AUT PRAVE FACTORUM PERTINENTES BREVITER TRACTANTU.

52. *See* GRABMANN, *supra* note 50, at 233.

53. *Id.* at 233-234, 236; ILLANES & SARANYANA, *supra* note 51, at 208-209.

54. See about this respect HENRY S. MAINE, ANCIENT LAW 337-341 (4th American ed. 1884, from the tenth London ed.).

serious blow from the hands of Blaise Pascal (1623-1662), who hardly censored it in his attack to Jesuits—who used it as their theological methodology. In 1656 and 1657, the French mathematician who was a Jansenist wrote eighteen letters—the famous *Lettres Provinciales*—in defense of a friend of his who was also a famous Jansenist. Pascal's use of wit and irony introduced the previously unknown topic to the general public. Those *Provincial Letters*, besides their Jansenist origins, popularized the rejection of casuistry in ethics. As a result, to the extent that many influential moralists actively tried to avoid using the methodology.[55]

In the twentieth century, the disfavor for the casuistic method for teaching morality was due to strictly theological—and not pedagogic—reasons. Indeed, the method became so modified as to begin to separate moral casuistry from integral theology and philosophical anthropology. Many books ended up as a simple compendium of ethical obligations with solutions and punishments.[56] As previously shown, this state of development was far from the spirit of Roman casuistry, from where the method began. Nevertheless, using practical cases in the teaching of ethics is a clear methodological contribution from the discipline. It still has—and should continue having—a preponderant role on both the discussion of theoretical problems and in the learning of the concrete usage of general principles.[57]

E. Greek Dialectics and the Socratic Method as Fundamentals of Modern Case Method

Before examining the case method's current manifestation, it is instructive to once more look to the ancient world in order to

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55. On this intervention of Pascal, well known, see, among others, *id.* at 341.

56. *See* GRABMANN, *supra* note 50, at 231-232; and ILLANES & SARANYANA, *supra* note 51, at 209. However that is not of direct importance to the history of case method, we could say that today the moral theology is again in the good path, recovering the value of individual conscience, of biblical sources, of foundation of ethical solutions in the dogmatic theology, etc. On this *see* SERVAIS PINCKAERS, LAS FUENTES DE LA MORAL CRISTINA: SU MÉTODO, SU CONTENIDO, SU HISTORIA 309-336 (2d ed. 2000); and AURELIO FERNANDEZ, I TEOLOGÍA MORAL 352 (2d ed. 1995).

57. *See* ILLANES & SARANYANA, *supra* note 51, at 209. To have a complete view about the history, scope of the casuistry as a method of morals, this author recommends to consult H. Lio, *Casuistica*, *in* I DICTIONARIUM MORALE ET CANONICUM 573-578 (1962); R. Boluillard, *Casuistique*, *in* II CATHOLICISME 630-637 (1949); and E. Dublanchy, *Casuistique*, *in* II DICTIONNAIRE DE THÉOLOGIE CATHOLIQUE cols. 1859-1877 (1923).

uncover its basis. The Civil Law tradition was and still is greatly influenced by Greek philosophy. The dialectics and the Socratic method are central to this philosophy. Although they did not deal overly with "cases," the dialectical and Socratic method have long been exercised in university teaching—particularly in English speaking countries.

It is generally recognized that the Greek dialectical method, where one evaluated and considered counterarguments to arrive to a decision, is a superior method to arrive at the truth when debating an opponent. It also forms the foundation and supports the modern American system of legal education by means of the training in reasoning through the case method. Thus, the classic pattern that is used to teach the law develops critical thinking skills, the ability to speak intelligently and persuasively, and how to point out the errors and inaccuracies of one's opponent. Hence, facts, that are relative to important general or abstract aspects of the law are learned and the process of how the law works exposed.[58]

Three great Greek thinkers are primarily credited with helping to create the dialectical method. Socrates (469-399 B. C.) was the first to contribute with his method of discovering error by means of questions.

In second place, Plato (427-347 B. C.) offered the supreme study of dialectics, as a method of questions and answers to educate those that would be the ruling philosophers. With this system, he tried to discover the last and deepest truths of the world of pure forms, with a rational process of analyzing arguments critically and eliminating false propositions.[59]

Finally, Aristotle (384-322 B. C.) studied the dialectical method and used it as a critical process for the study and teaching of the human problems of aphoristic nature. For him it is characteristic of the practical and prudential truth—especially, in the ethics and in the politics—where the premises are generally accepted, but not evident themselves—as it happens in apodictic environment, typical of metaphysics. Aristotle conceived of the dialectical method as a useful pedagogical tool wherein truth was

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58. *See* Epstein, *supra* note 27, at 400, 416-423. This article stresses the contribution to dialectics of the three big Greek thinkers, and its relevancy for the learning of the practice of the law, in the sense pointed in the text. Of this work of Epstein, at 401-408, I have also condensed the following paragraphs of the text, with Socrates's, Plato's and Aristotle's contributions.

59. See *id.,* REPUBLIC 531e, 532a-b, 533b-c, 534e, 535a, 537c, 541b and 543b-c.

expected to emerge from the interaction of opposing arguments.[60] From some of his texts, where he asserts that the teacher should always say what he thinks and never teach something that is false. The interrogatory facet of the debate in case method should not carry the professor to strive only for ingenious obfuscation. Ultimately, he must fulfill his special obligation to further righteousness and truthfulness.[61]

The Socratic method, also called *maieutics*—pertaining to midwifery—,should be said to consist of teaching through the discussion of problems and the skillful interrogation of students. The teacher "gives birth" or induces the ideas in the students who discover them by themselves. This method was immortalized in Plato's *Dialogues*. More precisely, *maieutics*, the second moment of the Socratic method, which started with the irony—from *eiro*, to interrogate, is an interrogation that is intended to make the speaker aware of his or her ignorance. Ignored wisdom is the beginning of the acquisition of knowledge. Socrates began the dialogue admitting his ignorance; then he asked for the student's opinion. After the answer, he asked new questions that confused the speaker, until the student admitted that he ignored the topic. In that moment, *maieutics* began, founded in Socrates' idea that the truth does not emanate from the outside, but rather it is inside everyone. Thus, the teacher's task is to facilitate its emergence. Plato explained this phenomenon found by this method of learning as the process of remembering ideas that we have from our previous life, and that were forgotten. Taking into account different opinions, Socrates achieved a definition accepted by all the speakers, showing, against the Sophists, that the truth could be arrived at using this method.[62]

The Socratic methodology of philosophical analysis, used by modern law professors has five clear characteristics. It is *doubtful* or *uncertain*. The professor begins with an actual or professed ignorance for the discussed topic. In this way, the search for

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60. See especially the treaty of the TOPICS and, therein, the points I.1 100a 25-101a 18, I.2 101b 3-4, I.14 105b 19-22, VIII.5 159a 25-32, and VIII.10 160b 22-40. Aristotle also worked on dialectics in PERIHERMENEIAS—on the interpretation and the propositions—, the PRIOR ANALYTICS—syllogisms to know the truth—, the POSTERIOR ANALYTICS—truths that can be known by syllogisms—, the SOPHISTICAL REFUTATIONS—acknowledgment of false reasoning—and the RHETORIC—rules of argumentation in a debate.

61. This is the opinion of Epstein, *supra* note 27, at 405-407, pointing out Aristotle's texts in TOPICS, VIII.5 159a 25-32, VIII.9 160b 10-13, and VIII.10 160b 22-40.

62. *See* JUAN CARLOS ZURETTI, BREVE HISTORIA DE LA EDUCACIÓN 54-55, 59-60 (1988); and ENRIQUE D. N. TELLO ROLDÁN, MANUAL DE HISTORIA DE LA EDUCACIÓN Y LA PEDAGOGÍA 104-105, 107 (1999).

knowledge is begun. It is also *dialectical* or *dialogic*, as didactic mechanism and technique for the actual discovery of truth, by means of the *maieutics* of questions and answers that start from an accepted conception, to arrive to a different and more appropriate one. Additionally, it is also *conceptualizing* or *definitional* in its endeavor to acquire philosophical concepts. It is *empiric* or *inductive* by criticizing the starting concept by referring to concrete issues and common experiences. And, finally, it is *deductive*. It proves that the definition elaborated by means of its implications and consequences is correct.[63]

In Greece, the Socratic method coexisted with lessons that were given directly by the teachers.[64]

Though not coinciding exactly with the case method, the Socratic method shares with it obvious similarities.[65] In this sense, it is generally accepted that Socrates' method constitutes the basis and foundation of the modern case method. Moreover, in the American legal system they are frequently seen as being synonymous.

Before moving to the next step, it is important to reiterate that the dialectics and the Socratic method, which are so strongly connected with the American approach to case method in legal education, were highly influential in the western tradition, where the Civil Law appeared and developed.

F. Discussion Method, Foundation of Medieval Teaching

Our next stop is in the first medieval universities, where we find a widely spread pedagogical tool: the methodology of discussion or debate. The medieval debate method is closely related with Greek dialectics and the Socratic method. The discussion is one of the main elements of the case method, to such an extent that it is sometimes named this way.

The discussion method generated in the debate clubs in Anglo-American universities. It also relates to the current *problem method*, appearing sometime around 1930 in the United States as a derivation of the law school case method and marking a return to the original Socratic method. It tried to enlarge the student's creativity and participation while addressing legal problems with a

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63. *See* Ken Samples, *The Socratic Method*, *in* http://www.str.org/site/news2?page=NewsArticle&id=5631 (1998) (last visited July 10, 2010). It can be seen, as paradigmatic example of the idea pointed out in the text, the platonic dialogue MENON, where Socrates interrogates if it is possible to transmit knowledge.

64. *See* ZURETTI, *supra* note 62, at 83.

65. *See* GÓMEZ LÓPEZ-EGEA, *supra* note 8, at 25, 89.

scientific approach, as a counterpart to the single discussion of solutions already given by the courts.[66]

The use of debate between two contenders, as a didactical method, finds its origin near the year 1100, in the school that the University of Paris originated from. It grew from the hands of William of Champeaux (1070-1121), and, especially, of his apprentice and then leader of a rival school, Peter Abelard (1079-1142).[67] The method was very successful and, though it originated in the School of Theology, it also spread and dominated in the schools of arts—philosophy—, law and medicine during the thirteenth and fourteenth centuries.[68] The method gained the denomination of *quæstiones disputatæ*—disputed questions—and became typical of the medieval teaching, sharing equal footing with the *lectio*—lesson or lecture.

Between Socrates' method and the debate method there was a narrow relationship: the first raised different *quæstiones*, some of them to get a quick solution for the teacher, while others, more meaningfully, gave material for the *dispute,* of which consisted the second method.[69]

In the disputes, which were common practice in medieval universities, two students engaged in a dialectical competition on a previously determined issue, under the supervision of one or several teachers. After one or several sessions discussing an issue,

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66. On the problem method like an intermediary among the theoretical teaching and the case method, *see* MASONER, *supra* note 1, at 12; and EISENMANN, *supra* note 16, at 111. One of the first to propose the problem method, as superior of mere case method, for the reason pointed in the text, was Jacob Henry Landman in his book THE METHOD OF STUDYING LAW (1930). Anyway, Landman's critique of the case method has diverse inconsistencies, generalizations without enough elements and many confusing aspects of that methodology. Among these last ones there is critic to the original method of Langdell that had already evolved for the time when the book was written, without need of giving for good the judge's reasons, like it happened in its original version. *Cf.* in this respect H. Claude Horak, *Scanning Old Procedures*, 2 J. HIGHER ED. 52-53 (1-1931), where reviews the book of Landman. On the origins of the problem method in the United States, *see* María T. del Rosario Moya, *La utilización de los fallos y opiniones consultivas de la Corte Internacional de Justicia y las decisiones de otros tribunales internacionales en la enseñanza del Derecho Internacional Público*, *in* INSTITUTO INTERAMERICANO DE ESTUDIOS JURÍDICOS INTERNACIONALES, *supra* note 20, at 195.

67. *See* MAURICE BAYEN, HISTORIA DE LAS UNIVERSIDADES 21-22, 27 (A. Giralt Pont trans., 1978).

68. *See* Laura E. Corso de Estrada, *Rasgos de una* Quæstio Disputata *del siglo XIII*, in TOMÁS DE AQUINO, CUESTIÓN DISPUTADA SOBRE LAS VIRTUDES EN GENERAL 22 (1998).

69. *Id.* at 20-21, and corresponding footnotes.

the teacher summarized the opposing arguments, typically based on reasoning and the citation of numerous profane and religious authors, expressing the cultural heritage of the time. He analyzed and confronted them, and finally gave his solution. Disputes have, accordingly, an *aporia-lysis* structure originating with Socrates, Plato and Aristotle: an issue to discuss, some alternatives, and a solution to the problem.[70]

On the other hand, much like in Antiquity, many teaching methods became literary forms for investigation. A number of *Quæstiones Disputatæ* published by philosophers and theologians of that period give testimony of that oral methodology.[71] Among them, those written by Thomas Aquinas (1224-1274) should be mentioned as giving an extraordinary example of an author following the method to elucidate different matters.

Those written disputes not only originated in the private disputes among one teacher's students, but also in those carried out openly, on a weekly or biweekly basis, where, choosing topics that constituted a comprehensive theme, teachers debated among themselves for entire mornings, in the presence of the whole school, with bachelors and students also intervening. Then, in a second part that took place the following day, a teacher unified logically the adduced reasons, expressed the authorities that endorsed what he would sustain, exposed his own doctrine—*determinatio magistralis*—and, finally, answered each of the contrary reasons. In the end, the teacher's thought on an issue was the subject of discussion and scrutiny by the university community. Some people took notes, which were reviewed and improved by the teacher: these are the works that came to us.[72]

Twice a year, extraordinary disputes opposed the most qualified professors "with open agenda," since they were *ad voluntatem cuiuslibet.* Books followed under the title of *Quæstiones Quodlibetales*, like those written by Thomas Aquinas, or by William of Ockham (ca. 1280-1349).[73]

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70. *Id.* at 18, 24-25.

71. *Id.* at 17-20, and corresponding footnotes.

72. *Id.* at 22-26, with corresponding quotations. Each disputed question would correspond to what has come to us as *quæstio*, corresponding the different articles that an issue is composed to the extension of a private dispute, *in scholis*. The number of existent *quæstiones* can give us an idea, on the other hand, of the great frequency with which the disputes were carried out. *See id.* at 26-27 and footnote 39.

73. On the lessons and medieval disputes, *cf.* also ETIENNE GILSON, LA FILOSOFÍA EN LA EDAD MEDIA 135-136 (M.M. and J.C. trans., 1940). With regard to the *quodlibetales* questions, *see also* Corso de Estrada, *supra* note 68, at 27-28.

An application of the disputed question method, though not in the oral form, may be found in the book *Sic et Non* of Abelard. The book gathers Bible and Church Fathers doctrines on many issues that are apparently contradictory, with the purpose of formulating the problems and encouraging a desire to solve them. Nearly a hundred years later, Abelard's method, that immediately deserved a large adhesion, was entirely adopted by Alexander of Hales (1185-1245) and also by Thomas Aquinas in many of his works, especially in his *Summa Theologiæ*.[74]

Aquinas offers a paradigmatic example of the system. When following this method, his works are divided in different treatises, first outlining a general *quæstio* that contained different problems or articles. Each of these articles opens with quotations from different authorities that express opinion contrary to the author's—more than twenty in *Quæstiones Disputatæ*, five or six in *Summa Theologiæ*. Then, these authorities are contradicted with quotations from other thinkers (*sed contra*), helping Aquinas shape the status of the question (*status quæstionis*). Aquinas then expresses the solution that he maintains, with his reasons and proofs (*corpus articuli*, *solutio* or *respondeo*). Finally, he answers with detail to each of the objections outlined in the first place(*ad primum*, *ad secundum*, etc).

Not only did medieval thinkers create universities, but they also developed a more efficient teaching and research methods, contributing to a renaissance rather than a dark age. Their pattern of analyzing the problem, alternatives, solution, and answers to the incorrect alternatives comes very close to the IRAC (Issue, Rule, Analysis, Conclusion) system of analysis of cases in American law schools.[75] The medieval writing methodology is a very suitable methodology for scholarly work. The only criticism one may suggest is to finish the answers to the alternatives before exploring one's own solution.

In relation with these medieval analytic and teaching methods, another aspect of the purest classic tradition in education should be explored. The *trivium* was an introduction to university studies, leading to the "bachelor" degree. It developed from the

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74. On Abelard and their system of "yes and not," *see* GILSON, *supra* note 73, at 75, 139.

75. The IRAC system organizes the case analysis following the next or similar questions: ISSUE–What factual elements could be taken into account and what issues arise from that specific circumstances? RULE–Which is the law or rule that could govern and solve the issue? ANALYSIS, APPLICATION OR ALTERNATIVES–Am I bound to apply this rule to this facts? How does one apply this rule to these specific facts? Are there other alternatives of solution? CONCLUSION–Which is the most satisfactory solution and why?

Carolingian Renaissance to the first centuries of university teaching. By means of three subjects, the students were introduced to wisdom and to the heights of thought. These three subjects were: rhetoric—oratory and literary style—, dialectics—logics, argumentation, and art of discussing—and grammar—including literature and analysis of written texts. This knowledge was the core of medieval teaching. Together with the *quadrivium*—arithmetic, geometry, astronomy and music—, they formed the famous *seven liberal arts*, called this way for their liberating effect on the mind. They developed in human beings an ability to think with discipline and ease, and were characteristic of free men.[76] The Socratic method was central to the training in the three arts of the *trivium*, the conjunction of which being a clear antecedent to the case method.[77]

Therefore, we can conclude that the medieval discussion method of analyzing issues in oral or written form is an important antecedent to the modern case method, especially in law and business, taking from them several elements of its dynamics and functioning.

G. Case Method in Classroom and Medieval "Apprentice's" System out of the Schools

Before explaining when and why the Civil Law lost the case method, its relationship with professional training or apprenticeship must be explored; this element is deeply rooted in western tradition.

The educational system for apprentices of occupations and professions consists of learning an art through direct experience under the guidance of a master, with whom the apprentice can learn, "case by case," the secrets of the specific job. This reveals how much the case method can be a "vicarious experience,"

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76. On these seven liberal arts and their influence during that period, see GILSON, *supra* note 73, at 17-18, 39, 84; and ZURETTI, *supra* note 62, at 117, 119, 129. This classification was introduced in schools by Alcuin of York (735 - 804), Charlemagne's educational and more important collaborator, who wrote a treaty on each one of the arts of the *trivium*: DE GRAMMATICA, DE RHETORICA and DE DIALECTICA. Added to philosophy, theology, law and medicine, they somehow summarized the "arts"—humanities—and the "sciences." With relationship to Alcuin and his educational influence *see also* Salvador Claramunt, *Alcuino de York*, *in* I GRAN ENCICLOPEDIA RIALP 502-503 (2d ed. 1981).

77. Also relates the way of teaching the *trivium* with case method, MASONER, *supra* note 1, at 10.

because it bases the learning and training on the reproduction of real experience of a job, with its advantages and limitations.[78]

This system of *apprenticeship* or learning by training has been regulated since the Code of Hammurabi and had an outstanding importance in the Middle Age, where it structured most of the teaching system. Its significance must be highlighted: it is still perpetuated nowadays as an unavoidable element in the formation of young professionals starting in a function or a company.[79]

Apprenticeship is a worldwide constraint for the young lawyer. It is sometimes optional—although often generalized— in those systems promoting educative internships during legal studies or after graduation, like in Argentina. It is often compulsory. In many European countries, such as France or Italy, there is no special emphasis on the case method in law school but professional practice with attorneys at law or in the judiciary varying between one year and five years, before being licensed to practice is required.[80]

In conclusion, the case method is an extraordinary tool that vicariously teaches the real functioning of law across legal studies, and apprenticeship is the natural continuation of the case method in the last years of study and after graduation.

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78. With regard to that characteristic of case method, *see* W. Waller Carson, Jr., *Development of a Student Under the Method*, *in* THE CASE METHOD AT THE HARVARD BUSINESS SCHOOL (McNair & Hersum eds.), *supra* note 13, at 86; RONSTADT, *supra* note 15, at 2-3, 8; and GÓMEZ LÓPEZ-EJEA, *supra* note 8, at 3, 78-81, 85-86, 160-161.

79. On the relationship among the apprentices' system and case method, *cf.* Juan Antonio Pérez López, *El método del caso: instrumento pedagógico para el profesional de la acción* 2, Nota técnica 0-394-023 ASNN-3, IESE-Universidad de Navarra (1993); and MASONER, *supra* note 1, at 9.

80. This system is actually used in Germany (one year and half of practice), Belgium (three to five years), Denmark (three years at least, plus exam), France (three years), Ireland (one or two years), Italy (two years and an exam), the Netherlands (three years for the attorneys at law and four for the judges), Greece (one year and half, plus exams), and England (after an exam, one period of practice of two years). On this *see* II CONVOCATORIA DE AYUDAS DE LA ANECA PARA EL DISEÑO DE PLANES DE ESTUDIOS Y TÍTULOS DE GRADO: LICENCIADO EN DERECHO ("LIBRO BLANCO" DE LA LICENCIATURA EN DERECHO), 19-21 (june 2005). This study was presented to the ANECA by fifty five law schools from Spain; it was published *in* http://derecho.usal.es/libroblanco/05PartePrimera.pdf and http://derecho.usal.es/libroblanco/06PartePrimera.pdf (last visited July 10, 2010). That specific part of this work was done by professors Alarcón Caracuel, Campins, Arenas, and Camas.

H. When and Why the Civil Law System Lost the Cases

All the previous epigraphs show a legal pedagogy inclined towards casuistry and discussion. The use of the case method in the Civil Law tradition, with variations in times and places, started in Rome and went across the Middle Ages and the Modern Age. Things changed when, under rationalistic ideas, Roman Law was largely put aside to be replaced with the study of National Law with the codification movement starting in the late eighteenth century.[81]

The change was not negative in itself. What is negative is the positivist and legalist deviation that accompanied this change in the nineteenth and twentieth century. This influence led to the abandonment of prudentialism in juridical analysis and, thus, of cases, leading to the loss of the case method.[82]

This abandonment generated an alarming situation:

- the classroom was filled only with the lecture method, and the classes became boring and the students were not involved.
- the law is perceived solely as a system of abstract concepts logically related, without relation to real life and real problems.
- the textbook—a good idea and a valuable product of the Civil Law tradition—, largely replaces cases.
- the students remain passive and generally do not learn in a critical way.
- the key of education is to be able to repeat memorized rules, principles, and concepts in the examinations. The ability to use them and transfer them to real situations being all too often neglected.
- there can be an abyss between law school and the life of lawyers. Students often have no idea how to deal with a real problem.

This phenomenon gained influence in Europe and the Americas, yet with some exceptions.[83]

V. THE REVIVAL OF THE CASE METHOD IN CIVIL LAW EDUCATION: FROM IHERING TO THE THIRD MILLENNIUM

As pointed out already, in modern times the United Stated is, without any doubt, the leading country in teaching law with the

81. *See* TAU ANZOÁTEGUI, *supra* note 44, at 242-251.
82. *Id.* at 250.
83. *Id.*

case method. It has not been completely alone in this endeavor. Emerging from the deep roots explored in the past sections, several attempts (some very successful) to use the case method in Civil Law classrooms have been made.

A. Legal Education in Germany

In first place, we should consider Germany, with experiences preceding national codification. Rudolf von Ihering (1818-1892) allegedly used an experimental and Socratic method in class, starting in 1847. Also, in the Fourth German Congress of Jurists in Mainz in 1863, the judicial advisor Volkmar, of Berlin, put forward a reform project of legal studies, where he insisted in the practical and pedagogical formation of the professorship and in the creation of a legal clinic to support the needs of practice.[84]

That is why in Germany in the late nineteenth and early twentieth century, many professors taught with hypothetical cases that the students should resolve, inside or outside the classroom, written or orally, in order to be discussed later. Some volumes were published with cases in order to teach. This method was praised for forming critical legal minds and stimulating a scientific study of the law in the quest for answers to practical problems. It highly favored by the Pandectists, simultaneously favorable to meeting students with social needs that was going to solve the law.[85]

The German experience revived by Ihering can be traced back to the medieval *ius commune*. Based on the old Bologna model and developed with a rich contribution by German scholars trained in Roman Law, it was taken to its most sophisticated refinement by the great Pandectists until the day a civil code—BGB—was substituted to the *usus modernus pandectarum*. To this day, a significant part of class work in German law schools is dedicated to the study and discussion of cases, and exams frequently consist of analysis of concrete legal situations.[86]

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84. On Ihering and Volkmar, *see* BADENES GASSET, *supra* note 18, at 440.

85. *See* OLIVER, LA ENSEÑANZA SUPERIOR EN ALEMANIA 89 (1918), quoted by BADENES GASSET, *supra* note 18, at 440.

86. I appreciate the several explanations that were kindly made to me on the German legal education by professors Peter Sester (Universität Freiburg and Universität Karlsruhe), Ulrich Magnus (Universität Hamburg), and Álvaro Pérez Ragone (Universität Köln and P.U.C.V.).

B. Some Endeavors for a Practical Legal Education in France, Italy, and Spain

Several practical attempts took place within the European legal education. Let us see at a glance the situation in the last century in three law-leading countries.

In France, the Code Napoleon and the abstract approach of the School of Exegesis largely influenced the legal education. At the beginning of the twentieth century some law professors also chose to introduce, along with theoretical classes, some practical applications of the principles by means of exercises with cases.[87] Furthermore, legal studies were amended in 1954, in view of getting the student more in touch with practice.[88] Nowadays in France, in addition to the traditional lecture (*cours magistral*), from first year to fourth French Law students attend seminars (*travaux dirigés*), complementing core subjects, where they are invited to discuss and comment court decisions and hypothetical cases. However, this vital part of the teaching is assigned to the least experienced teachers. Students are invited to write or present orally a commentary on a case, which must satisfy stringent formalistic canons, with the risk of prioritizing form over substance.[89]

Something similar happened in Italy, where in 1920 practical exercises in legal teaching became compulsory.[90] Their case method is used partially for discussions in universities and in some seminars organized by non-university institutions.[91]

In Spain, after a long history of theoretical approach to legal education, legal studies were reformed in 1990, with a timid attempt to include practical teaching. This includes the

87. *See* Alfredo Orgaz, *La enseñanza práctica en la Facultad de Derecho de París*, 6 REV. DE DERECHO Y CIENCIAS SOCIALES 782 (1927) (Arg.), quoted by BADENES GASSET, *supra* note 18, at 440-441.

88. BADENES GASSET, *supra* note 18, at 441.

89. *Cf.* Olivier Moréteau, *Bilan de santé de l'enseignement du droit*, *in* ETUDIER ET ENSEIGNER LE DROIT: HIER, AUJOURD'HUI ET DEMAIN. ETUDES OFFERTES À JACQUES VANDERLINDEN 273, 285-301 (2006).

90. *See* BADENES GASSET, *supra* note 18, at 441.

91. *See* René-Jean Dupuy, *in* THE UNIVERSITY TEACHING SOCIAL OF SCIENCES: INTERNATIONAL LAW 19 (René-Jean Dupuy ed., 1967) (It was a report on the teaching of International Law carried out in the International Association of Legal Sciences, under the direction of this professor from Nice, answering a request by Unesco); and G. Arangio-Ruiz, *Italy*, *in id.*, 62 (that is one of the national reports content in the general report).

introduction of a *Practicum* at the end of legal studies and practical credits in different subjects.[92]

Nonetheless, despite these initiatives in the direction of more practical teaching, one cannot say that the use of the case method is widespread in France,[93] Italy,[94] or Spain.[95]

C. The Civil Law Education in Europe and the "Declaration of Bologna"

The current situation in France, Italy, Spain, and many other countries may change in the wake of the "Declaration of Bologna," carried out on June 19, 1999, by the Secretaries of Education of a number of European states, most of them members or future members of the European Union. The "Bologna Process" that started with the Declaration is not a European Union initiative, but rather an intergovernmental project. More than 45 countries (n.b. countries outside Europe are admitted) have now signed the Declaration, which creates a European Space of Higher Education, an idea to be found in the earlier Declaration of La Sorbonne (1998). With a set deadline in the current year 2010, the signatories must make efforts towards the convergence of their national systems of higher education, making them consistent and compatible, facilitating the recognition of degrees among different countries. Access to a unified work market must be facilitated within the European Union and must remove obstacles for the mobility of students, professors, and researchers.

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92. *See* Royal Decree 1424/1990, of October 26, which establishes the official law degree and the general guidelines of studies to obtaining it, *in* B.O.E of November 20, 1990, number 278; and CONSEJO DE UNIVERSIDADES, REFORMA DE LAS ENSEÑANZAS UNIVERSITARIAS – TÍTULO: LICENCIADO EN DERECHO. PROPUESTAS ALTERNATIVAS, OBSERVACIONES Y SUGERENCIAS FORMULADAS AL INFORME TÉCNICO DURANTE EL PERÍODO DE INFORMACIÓN Y DEBATE PÚBLICOS 40-41 (1988) (Informe técnico del grupo de trabajo N° 10– Título de Licenciado en Derecho). *See also* the references, very few, to the need of more critical and practical teaching, done by some professors or universities that sent their suggestions to the project, *id*. at 152-153, 630-631, 745-746. In the book there are also oppositions and resistances to the introduction of practical activities in universities, for different reasons, like it happens at 161-167 and 200-201.

93. *See* Moréteau, *supra* note 89, at 285-290; and Dupuy, *supra* note 91, at 19-20, 35-36.

94. In Italy, legal education traditionally has been theoretical and, although it has been tried to emphasize practice, most of the teaching consists of *formal lectures*. *See also* Arangio-Ruiz, *supra* note 91, at 61.

95. I spent five years teaching law in Spain, and it is widely known that the lecture is almost the unique pedagogical tool used there.

The principal elements of the European university convergence may be summarized as follows. Degrees are structured in two mandatory cycles: graduate—bachelor—and postgraduate—master—, or undergraduate and graduate studies, to use the American lexicon. The first cycle is comprised of three years (180 credits) and the second cycle of two years (120 credits), with the possibility to extend the first one to four years (240 credits) and to shorten the second to only one (60 credits). A third cycle leads to the doctorate, typically of three years of duration.

Subjects or courses are measured in "European credits," or ECTS—*European Credit Transfer System*—, calculated on the assumption that a full time student works for 60 credits a year or 30 in a semester. Each institution is free to allocate the number of credits to each course or learning experience. Computation of credits is not exclusively based on the number of course hours like in English speaking countries, but on the average of expected working hours dedicated to the subject by students. For a given course or activity, this may include lectures, supervised work in small groups, personal study time, and various ways of evaluation. Motivation of professors and students is required, with the intent to establish an education based on learning and not exclusively on teaching. The student is expected to have an active role in his studies and the professor is his or her tutor in that process.[96]

The Bologna Process has pushed the Old Continent to change, with an effort to adapt the different national university systems to the Declaration. Almost every European country has made adjustments towards a mandatory two-cycle system regarding legal education: first cycle—Bachelor, *Licenciatura*, *Licence*, *Baccalauréat*, or other variants—, plus second cycle—Master—, plus the elective third cycle—Doctoral studies. The "bachelor" degree should enable people to access law-related jobs in companies, public administration, or as legal representatives. However it will not be enough to qualify as a judge or attorney. A master is required, often supplemented by compulsory professional training and additional exams, the system varying from country to country.[97]

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96. Other elements of the system of Bologna are: it requires a system of information that reveals the contents and level of received education; it has tried to avoid an excessive duration of the higher studies with respect to their nominal duration, instead trying that the studies are carried out in the years in which they are structured.

97. On the European system of studying law under the Declaration of Bologna, *see* the comparative study included in II CONVOCATORIA DE AYUDAS, *supra* note 80, at 5-18. Professors M.R. Alarcón Caracuel, Mar Campins, Rafael

Italy was the first country of the European Union to adopt the Bologna system, applying it in 1999 and 2000 to all fields, including law.[98] France and Germany had their reforms in 2002.[99] Other countries already had a Bologna compatible system—Greece, Finland, England, and Scotland—, while others like Spain or Portugal, have delayed the process.[100] Many countries adopted the "three plus two" years formula, while others followed a "four plus one," or "four plus two."

Arenas and Ferran Camas, from the Universities of Sevilla, Barcelona, Autónoma of Barcelona and Girona, carried out this part of the study.

98. Italy made changes in 1999 (Decree n. 509 of November 3, 1999) and 2000 (Ministerial Decree of August 4, 2000), and other countries follow its approach. In legal studies this country adopted a three level system (graduate, postgraduate, and doctoral levels) that last three, two, and three years, the first two compulsory. The first cycle (180 ECTS), which is started by the students at 19 years old, offers the degree *Laurea Triennale in Giurisprudenza* and has as an objective to provide the students adequate dominium of the general scientifics methods and contents, and of specific profesional skills. The second cycle (120 ECTS) gives the *Laurea Specialistica* degree, with five concentrations or orientations, which is intended to preparate higly qualify professional activities in specifics areas. In the first two years of the *Laurea Specialistica* there is the *Master di primo livello* (60 ECTS), and in the second year the elaboration and presentation of an original work of end of studies is required. For an analysis of the new Italian system *see* Manuel J. Peláez, *La Historia del Derecho y la Historia de las Instituciones en las nuevas Licenciaturas italianas adaptadas a Europa (El Decreto m. de 4 de agosto de 2000 del Ministerio de Universidades y de la Investigación Científica y Tecnológica)*, 25 REV. DE ESTUDIOS HISTÓRICO-JURÍDICOS 507-512 (2003) (Chile).

99. Germany, as is pointed out by Peláez in the work mentioned in the previous footnote, reformed the law studies in 2002, not including structural or substantial reforms regarding the subjects of the law degree that were in operation before that year.

100. Let us take the Spain case. This country became part of the European space of higher education since the 2008-2009 academic year. In the Organic Act 6/2001, of December 21, the topic was discussed, with a generic regulation in articles 87-89 (B.O.E., December 24, 2001). The Real Law Decree 9/2005, of June 6 (B.O.E., June 7, 2005), has modified the Act on some points. Spain will have a four years graduate degree, with a master of one year or two, both necessary to become an attorney at law. To begin doctoral studies it is necessary to have a previous Master degree. *Cf.* II CONVOCATORIA DE AYUDAS, *supra* note 80, at 21. The *X Conferencia de Decanos y Decanas de las Facultades de Derecho de las Universidades Españolas*, that took place in Vigo on June 28, 2008, confirmed that basic legal formation requires in Spain a minimum content of 240 credits ECTS, which means four years of full time studies.

D. Perils and Menaces against the Revival of the Case Method in European Civil Law Education

It can be expected that all the effort put on the European Space of Higher Education will come to fruition and will not be mere wishful thinking. Signs already exist that the generalization in that continent of master studies of professional character which embrace the adoption of case method in legal education, is increasing its use in European countries.

Despite the positive signs and promising openings, triggered by the Declaration of Bologna, a lot remains to be done to promote the case method in Civil Law education. Whilst promoting more active student participation, the Declaration of Bologna does not put a special emphasis on the practical formation of university students. In addition, one should not neglect the idiosyncrasy and manifold traditions of different societies and academic communities.

Unfortunately, reality shows that many law schools of continental Europe keep a predominantly lecture-based legal education, making little room for case discussion, which keeps students in a passive role as spectators of the professor's teachings.[101] The situation in Latin America is the same.[102] Therefore, except for some law schools, some professionally oriented programs (usually at Master level), or some individual professors, in Continental Law or Civil Law countries facts demonstrate that the practical teaching in legal education is limited or remains nonexistent, despite expressed desires, official plans or statements to the contrary. Many professors from continental Europe give more value to a dogmatic formation, which they give by means of classes with formal lessons, rather than investing time in the discussion of cases. Many have never used this methodology in class.[103] When recognizing that things should change, they put the blame on the large number of students and lack of resources: the lecture system appears to be more compatible with mass education. But they ignore the fact that in United States it is common to see classes of more than a hundred students learning with the case method, especially in the first year

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101. This, which is well known, is outlined, among many others, by Moréteau, *supra* note 89, at 285-290; Dupuy, *supra* note 91, at 19-20, 35-36; Arangio-Ruiz, *in id.*, at 61.

102. *Cf.* E. Jiménez of Aréchaga, *Latin America*, *in* THE UNIVERSITY TEACHING SOCIAL OF SCIENCES: INTERNATIONAL LAW 19 (René-Jean Dupuy ed., 1967), at 72, 76-77.

103. *See* Dupuy, *supra* note 91, at 19; Moréteau, *supra* note 89, at 285-290.

of legal studies. The number of students is not the problem, the real purpose of the professor is.

The same lecture-based legal education is the rule in law schools in countries with quite different legal traditions, like Japan, Eastern Europe, the Nordic countries,[104] and also in some Common Law countries.[105] It is necessary to exclude England of this panorama, because it has made spectacular strides in promoting case discussion in class, with a multiplication of casebooks in the last twenty or thirty years.[106]

In consequence, there is no systematic and generalized teaching with a legal, critical, and practical mentality. With some exceptions, the use of the case method in class as a privileged tool for developing that mentality is almost inexistent in many countries. The theoretical class, current version of the medieval *lectio*, remains largely predominant.

The *lectio*, originated in cathedral and monkish schools where it coexisted with *disputes*, consisted in the reading of a text—something necessary in a time previous to Guttemberg—, from which the professor carried out a comment and developed his own ideas.[107] The development of printing did not change this pattern. The debate system of education, close to the Roman prudentialism forgotten, the influence of rationalism leads the university education to be based on the accumulation of knowledge by the professor and its oral transmission to students, all too often in a

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104. *See* S. Tsuruoka, *Japan*, *in* THE UNIVERSITY TEACHING SOCIAL OF SCIENCES: INTERNATIONAL LAW 19 (René-Jean Dupuy ed., 1967), at 67-68; and I. Hambro, *The Scandinavian States*, *id*. at 89; G. Haraszti, *Hungary*, *id.* at 45-46; and S. Jankovi.ć, *Yugoslavia*, *id.* at 146-147.

105. *See* P. K. Iranian, *India*, *in* THE UNIVERSITY TEACHING SOCIAL OF SCIENCES: INTERNATIONAL LAW 19 (René-Jean Dupuy ed., 1967), at 53-54; and E. I. Nwogugu, *Nigeria*, *id.* at 80-81.

106. This way, England completes the extended previous use of cases in its jurisdiction, with great quantity of books that followed the methodology of the restatements, where the state of case made law is summarized in a certain field, sometimes beginning with 14th century decisions and many of those books being perpetuated because of generation-to-generation updates. Before the current circumstances, when the case method spread more and more in British law schools, they used to expose the English legal system, mainly based on cases, in a theoretical or abstract way and not using case discussion or debates, and they did not have significant casebooks. On the previous situation in English law schools, *see* EISENMANN, *supra* note 16, at 116; and K. R. Simmonds, *United Kingdom*, *in* THE UNIVERSITY TEACHING SOCIAL OF SCIENCES: INTERNATIONAL LAW 19 (René-Jean Dupuy ed., 1967), at 115-117, 121.

107. *See* JAIME PUJOL BALCELLS & JOSÉ LUIS FONS MARTIN, LOS MÉTODOS EN LA ENSEÑANZA UNIVERSITARIA 19 (2d ed.1981).

way similar to dictation.[108] This way, lecture method is a system "based mainly on a continuing exposition of a lecturer" and where students can "ask or participate in a small discussion, but generally they just listen and take notes."[109]

Therefore, in most Civil Law countries law schools have not realized at all, or some of them not fully realized, that the case method can be effective to carry out very diverse exercises and legal training, with great utility and benefits. A Civil Law professor wrote in Buenos Aires, cases can be used to let the student employ rules and principles to different facts, analyze cases interpreting pertinent rules and looking for different alternatives of construction and application, identify and qualify facts and evidences, commit in the search and analysis of alternatives in a situation, etc.[110]

E. The Blend between Civil Law Substance and American Approach to Legal Education in the Revival of the Case Method in Some Latin American Law Schools

Several law schools in Latin America, especially in Argentina and Brazil, apply the case method intensively in legal education. They successfully blend the Civil Law tradition of explaining the codes, the rules, and the legal system, with the Common Law approach of the last century of teaching and learning with cases and recovering the roots of the old Civil Law tradition to teach law with cases.

Among the law schools that are applying the case method in legal education, the Austral University Law School (Facultad de Derecho de la Universidad Austral), from Buenos Aires, is a leader. It has been a pioneer in promoting a participatory approach to legal education since 1988, when it started as an institute of research and postgraduate studies. This institution delved deeply into the case method when starting a masters' degree in the beginning of the 1990s and a J.D. program in the middle of the same decade. Austral Law School has compiled collections of cases, trained hundreds of law professors in the case method, and is spreading the methodology in law schools in Brazil, Chile, Colombia, Guatemala, Mexico, and Peru.

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108. *Id.* at 20-21, 23-24.

109. *See* UNIVERSITY GRANTS COMMITTEE, REPORT OF THE COMMITTEE ON UNIVERSITY TEACHING METHODS (THE PULLS REPORT) 170 (1964), quoted in PUJOL BALCELLS & FONS MARTIN, *supra* note 107, at 21.

110. On this, *see* ABEL M. FLEITAS ORTIZ DE ROSAS, DERECHO DE FAMILIA–MÉTODO DE ENSEÑANZA. CASOS Y OTRAS VARIANTES 25-79 (1996) (1994), where the author gives many ideas on the point.

It could be convenient to provide at this point of our survey a short explanation of the case method used for twenty years in the Civil Law tradition at Austral Law School. The employment of this methodology largely resembles the use in American law schools; Austral tried to follow and adapt to Civil Law needs. The use of case method in this Argentinean law school is therefore much closer to the current American legal education approach than to the way this methodology was used in the Civil Law in ancient, medieval, and colonial times. Nevertheless, the utilization of case method in Austral adds to the United States common experience a strong combination with the teaching of general framework of legal concepts that is required for a logic and structured legal system like the Civil Law. The results of using this methodology to expand the benefits of an ordered system like the Civil Law for the training of a critical legal mind are extraordinary. However, naturally, the use of case method in the environment of Civil Law demands a special and continuous effort, and Austral Law School needs to focus again and again its commitment with this methodology. The reasons probably are the constraints to know the complete logic system, characteristic of Civil Law, and the formation and customs of the professors of this legal tradition, conspires against the use of this pedagogical tool.

The case method in Austral is used both in the basic law degree and at the LL.M. level. In the J.D. courses the professors devote one third of their time in classroom to discuss cases with the students, and in the LL.M. programs the proportion is two thirds of the classroom hours. The remaining time is for the explanations and explorations of principles and theory, aimed to structure the knowledge, trying to achieve that not in a one way style, but in a participatory and Socratic approach. In the LL.M. one-third to a half of the time devoted to case debate is carried out in groups of discussion of five to eight students, using special small seminar rooms dedicated only to this purpose. The professors visit the teams, spending five to ten minutes with each group of discussion. In the J.D. program, the group discussions are not mandatory, but some professors do that for specific case debate in the classroom, or sometimes, out of classroom time giving assignments to a group to deal with a specially complex case analysis in written form.

The J.D. and LL.M. students at Austral are required to use theoretical materials and casebooks—hornbooks, manuals and articles, on the one hand, and published casebooks when available or more commonly a set of cases tailor made by the professors, on the other hand. Because of the Civil Law tradition and needs, the

systematic knowledge and theoretical approach is strongly further underlined there than it is in American law schools. Therefore, the relation between cases and materials are opposite to American legal education: the quantity of cases never surpasses the theoretical materials and rarely is 50% of the total elements to study. It is more common that 60 to 80% of the pages to study and analyze are of theoretical and scientific nature, and 20 to 40% of the total amount consist solely of cases—judgments or hypothetical.

The cases are mainly judicial decisions—mostly of the Supreme Court and upper courts, but also from lower courts. Like in American law schools, depending on the professor the discussion could be about a unique case for an entire class hour—more common—, or about a line of decisions—e.g. two to five judgments. Currently most of the large cases—20 to 100 or more pages—are given to the students edited with brackets, focusing on the important excerpts, but is not uncommon to discuss a very long decision. In the last decade the use of hypothetical or "situational" cases increased in classroom discussion and examinations, for the benefits of students: learning law facing a problem without the rigid structure of a closed case, with the main problems mostly answered by majorities and dissents in upper court decisions. This way, with the situational cases, Austral follows the *approach from the front* to cases suggested by Llewellyn.[111] The midterm and final examinations consists of analysis of cases—judgments and hypothetical—, combined with theoretical questions and problems in the J.D. program, and exclusively at the LL.M. level.

Other remarkable institutions promoting the case method in law are the Escolas de Direito da Fundação Getulio Vargas, located in São Paulo and Rio de Janeiro. The São Paulo branch is developing an extraordinary "*Casoteca Latino-Americana de Direito e Política Pública*" that may be consulted on the Internet,[112] resembling the Harvard Business School cases clearing house. This *Escola* also published two interesting books about the case method and other participatory methodologies in the teaching of the law.[113]

However, a number of issues have to be dealt with. In Argentina, for example, there was much discussion about the

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111. *Cf.* Karl N. Llewellyn, *The Current Crisis in Legal Education*, 1 J. LEGAL EDUC. 211, 212-213 (1948-1949).

112. *See* http://www.gvdireito.com.br/casoteca (last visited July 10, 2010).

113. *See* MÉTODOS DE ENSINO EM DIREITO: CONCEITOS PARA UM DEBATE (José Garcez Ghirardi org., 2009); and ENSINO JURÍDICO PARTICIPATIVO: CONSTRUÇÃO DE PROGRAMAS, EXPERIÊNCIAS DIDÁTICAS (José Garcez Ghirardi & Rafael Domingos Faiardo Vanzella orgs., 2008).

practical approach to legal education and the refusal of the lecture method. Nevertheless, with some exceptions, the case method did not spread in all the classrooms. Most professors who try to apply the case method think that it consists mostly in narrating cases to students, not sharp discussions about them.

The situation will hopefully improve. Between 2002 and 2006, an Argentinean National Commission of Private Law Schools prepared a project of guidelines for the national accreditation of law schools. In this guidelines project, the case method is required for all legal education. In the near future, this requirement may be made mandatory by administrative decision.

However, despite the multiple shadows that the case method situation has in Europe and in Latin America, I firmly believe that in 30 years the main question will be not about which law school is using the case method, but which law school has the best performance in using the case method, because all of them will need it, similar to how the current discussion is not who uses the lecture method, but which law school has the best lecturers.

VI. BENEFITS OF MERGING THE LEGAL EDUCATION APPROACH OF CIVIL LAW AND COMMON LAW TRADITIONS

A. A Possible Combination of Legal Education Styles and the Utility of the Case Method in a Comprehensive Civil Law Education

In the Cambridge Symposium on the Teaching of Law, in 1952, the celebrated professor Henry Batiffol summarized the meeting advocating for a combination of lecture method—commonly used in Civil Law schools—and case method—mostly used in Common Law schools. He invited law schools in Common Law countries to explain more the law in class and Civil Law professors to introduce the case method in their teaching.[114]

Evidently, influences and permeability between legal systems should be strongly encouraged. Legal education is an area where cross-influences between Common Law and Civil Law are not only possible, but may also be extraordinarily beneficial.

The utility of the case method in a comprehensive Civil Law legal education is extraordinary, because it can be really good to carry out very diverse exercises and legal training, all of great utility. For this goal could be important looking for the roots of this methodology in its origins, experience and progress of Civil

114. *See* the transcripts of the *Conclusions*, *in* EISENMANN, *supra* note 16, at 123.

Law tradition, and borrowing its current uses and developments in Common Law schools. That way, cases can be used in Civil Law schools to let the students:

- employ rules and principles to different facts,
- analyze cases interpreting pertinent rules and looking for different alternatives,
- identify and qualify facts and evidences,
- commit to the search and analysis of alternatives in a situation,
- to select facts and principles,
- to analyze principles and rules and their application,
- to prevent consequences,
- to imagine solutions,
- to decide,
- to argue,
- to look for alternatives,
- to ask, listen to others,
- to change one's or others' mind when necessary,
- and, in conclusion, to integrate a deep knowledge and understanding of the law, including its practical aspects.

The case method can achieve these aims, giving life, sense of reality and fortitude to the legal system. For the reasons given above and some others that I may not develop in the context of this paper, the combination of legal logic and prudential approach to cases of a comprehensive legal education in Civil Law may favor something in some ways better than Common Law education. The reason is its unique contribution to the formation of a critical legal mind, because this legal tradition can unify logic and a systematic comprehension with a problem-solving oriented capability.

B. A Being that Tells Stories, and the Education as an Activity of Central Human Interest

That way—without forgetting the readings of treatises and handbooks, the study of codes, and good lectures—with the case method it is possible to bring reality to the classroom, and to take full advantage of the advise of Aristotle who wrote: "the things we have to learn before we can do them, we learn by doing them, e.g. men become builders by building and lyre players by playing the lyre."[115] That is the nature of man and the nature of law. We are beings that tell stories, beings that hear stories . . . We become

115. ARISTOTLE, NICOMACHEAN ETHICS, II, chap. 1, 1103a 32-33.

involved in the stories. And our best achievements arise when a sharp mind joins a heart full of illusions and magic.

Proceeding in that mode, it is possible to feel the rewards of a transforming education.[116] Without a doubt, this method involves more technicalities in legal education: it involves the direct and ineffable experience of teaching and learning that transforms people and helps persons to grow. It is a tool that truly empowers people.[117] It is something like a magical process, interlacing a common achievement, a common space.[118] Considered and experienced in that way, education reveals itself as an activity of central human interest.[119]

Most case method professors know that this methodology produces a stimulating atmosphere that involves and educates the students, and that stimulates and educates the professor too.[120] As Professor Christensen of the Harvard Business School said, this method and atmosphere produces classes that are moments full of enjoyment, a true "celebration of education."

C. Achieve a Mixture of Legal Traditions as an Invaluable Service to the Cause of the Law

In that line, to finish this work and before the conclusions, let us read what Professor Cueto Rúa wrote more than 50 years ago, in the last part of his section on the case method, in his excellent book on the Common Law:

> The education system of Civil or Roman tradition . . . may contribute to the law universe with important pedagogical elements to the solving of limitations and inconveniences that the "case method" may present, especially regarding the transmission of knowledge, the teaching of statute law, and the building of a General Theory that integrate the

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116. *See* Richard F. Elmore, *Foreword, in* EDUCATION FOR JUDGMENT (C. Roland Christensen, David A. Garvin & Ann Sweet eds.), *supra* note 6, at ix-xix, ix, xi-xii, xvi.

117. *See* Colleen Burke, *Tulips, Tinfoil, and Teaching: Journal of a Freshman Teacher*, *in* EDUCATION FOR JUDGMENT (C. Roland Christensen et al. eds.), *supra* note 6, at 37-67, 43, 58, 64-66; and Christensen, *Premises and Practices of Discussion Teaching*, *in id.* at 15-31.

118. *See* FLEITAS ORTIZ DE ROSAS, *supra* note 110, at 1; and Michael A. Berger, *In Defense of the Case Method: A Reply to Argyris*, 8 ACAD. MANAGEMENT REV. 329, 332 (1983-2).

119. *See* David A. Garvin, *Preface, in* EDUCATION FOR JUDGMENT (C. Roland Christensen et al. eds.), *supra* note 6, at xxii.

120. On the importance of a community of learning that supports a rigorous intellectual analysis, *see* Christensen, *Premises*, *in id.* at 19-20.

> dispersion of cases. On the other hand, the [Anglo-Saxon] case method may contribute in a valuable way to prevent the lecture classes of the aridity that characterizes them, giving to students a more convenient and accurate notion of the legal reality, of the necessary skills to solve individual problems, and of the instrumental, vital and human aspect of the law.[121]

After that, this great master of the law concluded:

> A good synthesis could produce highly rewarding results. Such synthesis is worth a try, when considering the crisis in legal education, which is acknowledged in the U.S., and latent, even when not less real, in Argentina. He or she who achieves such synthesis will have delivered a valuable service to the cause of the law.[122]

The best of Europe and the best of America can be recombined: the legal system, on the one hand, and a critical and dynamic legal education, on the other hand. My hope with this article is to contribute a new step in this direction.

VII. EIGHT CONCLUSIONS ON THE FOUNDATIONS OF THE CASE METHOD AND ITS RELATIONSHIP WITH THE CIVIL LAW TRADITION

This long journey can lead to eight conclusive elements, which support the announcement and encouragement of a revival of the case method in Civil Law education.

In the first place, this study shows that the case method is suitable for serious scientific or scholarly work. The method of case analysis is adapted to a multitude of arts and sciences, having proved its merits in medicine, law, ethics, and business, and being able to provide important services in many other academic disciplines.

Secondly, we could see that case method is not a teaching technique without lineage, just created in the laboratory of pedagogues of the *avant garde*, a need to pass the sieve of the time to demonstrate its relevancy and utility, but is rather connected and nourished in an ancient educational tradition.

Thirdly, it can be pointed out that the case method has not arisen *ex nihilo* from modern business schools.

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121. *See* CUETO RÚA *supra*, note 3, at 329.

122. *Id.*

Fourthly, the case method did not develop from the teaching of the Common Law, but has its roots in legal and ethical sciences going back to the Antique Age and the Middle Ages.

Fifthly, I can affirm that the case method was somehow applied in Roman Law, in the *ius commune* and in the *ius canonicum*, and was applied too in the colonial law schools of Hispanic America.

As a sixth conclusion, I can point out that the case method is used, as a matter of fact, and with full success, in some law schools in Europe and Latin America, and there is hope that the Declaration of Bologna and a developing competition among the best law schools is going to strongly encourage, in the near future, this methodology across European legal education.

As a seventh conclusion, the case method is strongly related to the dialectics, to the participatory methods rooted in the Socratic style, to the diverse applications of casuistry and to the dispute of texts or issues, all of them so characteristic of the first medieval universities, and, outside universities, with apprenticeship as a professional training system. For that reason, it can be affirmed that the case method is related with some of the western culture most characteristic pedagogic elements—culture that is the adjunction of the Judeo-Christian vision, the Greek philosophy, and the Roman Law—all of which it is deeply impregnated.

Lastly, it is possible to conclude in the eighth place that the case method did not arise in the world of the Common Law, featuring case law as an essential element, but was applied in some ways in Roman Law, in the medieval teaching of the *ius commune* and *ius canonicum*, in the colonial law schools, and is applied with energy today in some houses of legal education of Europe and Latin America. This indicates that it is not accurate to claim that this methodology is inherent and definitively bound to systems having judicial decisions as a primary legal source, namely the Common Law tradition. On the contrary, it can be a fertile method in other legal system such as the Civil Law tradition, helping to reconnect with its genesis and its essence, reencountering the original taste and flavor of the law.

THE VIENNA SALES CONVENTION (CISG) BETWEEN CIVIL AND COMMON LAW–BEST OF ALL WORLDS?

Ulrich Magnus*

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I dedicate this paper to the memory of Saúl Litvinoff, who passed away in January 2010 at the biblical age of 84. He was in the audience when I presented this paper to the Law Faculty at LSU in February 2009. He took a very active interest in the subject and posed difficult and critical questions that were only too justified.

I. INTRODUCTION

A. Leibniz and a Country at the Crossroads

In many respects Louisiana is a country at the crossroads. Here, the outgoing trade from the Mississippi Valley meets with the incoming trade from South America. Here, French and Spanish culture and lifestyle have met and still meet with what is regarded as the typical American way of life. In particular, Louisiana's legal system combines elements of civil and common law. Not surprisingly, Louisiana as a mixed jurisdiction[1] has been termed a

1. Generally on mixed jurisdictions *see* MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (Vernon Palmer ed., Cambridge University Press

system "between the worlds"[2] or even "the best of both worlds."[3] Indeed, law-wise the citizens of Louisiana may live in what Leibniz,[4] the great philosopher, lawyer and all-round scientist at the beginning of the Age of Enlightenment, thought we all live in: "the best of all possible worlds."[5] This is not the perfect world without any shortcomings but the best one can expect–with the least weaknesses.

B. A Global Sales Convention

On the global level and for the field of international sales transactions, the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) may come close to the Louisiana model. *In nuce* and confined to sales law, the Convention is–similar to the legal system of a mixed jurisdiction[6]–equally an example of a combination and merger of influences from the major legal systems.[7] The CISG, its roots in different

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2001); id. (ed.), *First Worldwide Congress on Mixed Jurisdiction: Salience and Unity in the Mixed Jurisdiction Experience: Traits, Patterns, Culture, Commonalities: Salience and Unity in the Mixed Jurisdictions: The Papers of the World Congress* , 78 Tul. L. Rev. 1 (2003); MIXED JURISDICTIONS COMPARED: PRIVATE LAW IN LOUISIANA AND SCOTLAND (Vernon Palmer ed., Edinburgh University Press 2009); Jacques Du Plessis, *Comparative Law and the Study of Mixed Legal Systems*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 477 (Mathias Reimann & Reinhard Zimmermann eds., Oxford University Press 2006); MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE: PROPERTY AND OBLIGATIONS IN SCOTLAND AND SOUTH AFRICA (Reinhard Zimmermann et al. eds. 2004).

2. Joachim Zekoll, Zwischen den Welten–*Das Privatrecht von Louisiana als europäisch-amerikanische Mischrechtsordnung*, *in* AMERIKANISCHE RECHTSKULTUR UND EUROPÄISCHES PRIVATRECHT 11 et seq. (Reinhard Zimmermann ed. 1995).

3. Joachim Zekoll, *The Louisiana Private-Law System: the Best of Both Worlds*, 10 TUL. EUR. & CIV. L.F. 1 et seq. (1995).

4. Gottfried Wilhelm Freiherr von Leibniz (1646 – 1716).

5. He explained this idea in his work *Essai de théodicée* (1710).

6. *See supra* note 1.

7. *See* also Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INTERNATIONAL LAWYER 443, 452 (1989); for a comprehensive comparison between the CISG and the sales law of Louisiana *see* Alain Levasseur, *The Louisiana Experience*, *in* THE 1980 UNIFORM SALES LAW: OLD ISSUES

legal traditions and the manner in which the Convention has treated the various influences, is the subject of this paper.

C. Questions: Cross-influences, Contamination, Permeability–Synthesis?

Which is the aim of the present paper? It will first trace the divergent sources from which the Convention has borrowed and then pursue the way in which these sources were used and merged. As will be seen the questions of cross-influences, permeability or even contamination (whatever that may mean in regard of law and legal institutions) arise also within the scope of the CISG though in a form somewhat different from the exchanges that comparatists are used to observe between legal systems. And it shall be asked whether the CISG can be regarded as a synthesis that bridges gaps between the civil and the common law.

II. THE CISG AND ITS COMPARATIVE BACKGROUND

A. Aims of the CISG

The essential aims of the CISG are addressed in the Preamble to the Convention. First, the unification of substantive sales law shall remove legal barriers for international trade in order to facilitate trade between merchants from different countries and to promote international trade. Secondly, intensified international trade "on the basis of equality and mutual benefit" is seen as an "important element in promoting friendly relations among States."[8] The unification of substantive trade law is hoped to serve as a means to keep peace among nations. Certainly the first of these aims has been achieved while success of the second aim remains in doubt.

REVISITED IN THE LIGHT OF RECENT EXPERIENCES 73 et seq. (Franco Ferrari ed. 2003).

8. *See* the text of the Preamble.

B. The CISG's Importance

The CISG has acquired undeniable importance in a number of respects. Indeed, the Convention has become the most important legal basis of today's globalised trade. The CISG has been accepted by many states, and what counts more in this respect, by many economically important states. Thus far, 76 States from all continents have ratified it, among them almost all major trading nations. The CISG now governs most of the world's trade (unless the parties have excluded the application of the CISG).[9] It is estimated that at least three-quarters of global trade automatically falls within the scope of the CISG.[10] Also in practice, the CISG has made its way: It is often applied and dealt with by international case law–both by state courts and arbitration tribunals. By now, there are several thousand decisions published in English[11] from all over the world resolving most if not all interpretation problems of the Convention.[12] Furthermore, the CISG has strongly influenced legislation in many states. The Convention has become the most influential source for legislation in the field of private law–both on the national and international level. Particularly those states that reformed their legal systems after the political change in the beginning of the 1990s used the CISG as a model either for their sales law or the general law of obligations.[13] Most amazingly, even the European Directive on Consumer Sales of 1999,[14] which aims at consumer protection, owes a lot to the CISG. Despite the

9. The United Nations Convention on Contracts for the International Sale of Goods [CISG] article 6 allows the free exclusion of the Convention but requires that this must be done clearly.

10. *See* Ingeborg Schwenzer, *Einleitung*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG 25 (Peter Schlechtriem & Ingeborg Schwenzer eds., 5th ed. 2008).

11. At least in form of English abstracts; *see* in particular the databank CLOUT (Case Law on UNCITRAL Texts), http://www.uncitral.org; and the databank of Pace University, http://www.cisg.law.pace.edu (last visited July 10, 2010).

12. *Id.* The 2010 CISG databank of Pace University counts more than 2,500 published decisions and estimates that double that figure exists.

13. *See* the reports in THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS (Franco Ferrari ed. 2008).

14. Directive 1999/44/EC of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees of 25 May 1999, O.J. no. L 171 of 7 July 1999, at 12 et seq.

CISG's devotion to international commercial sales and transactions between merchants the drafters of the Directive saw fit to incorporate verbal passages from central provisions of the Convention as well as central structural elements.[15] In addition, the CISG was the model for international sets of principles like the UNIDROIT Principles of International Commercial Contracts,[16] the Principles of European Contract Law[17] or the so-called Draft Common Frame of Reference.[18]

For the science of sales law and generally the law of obligations, the CISG is a constant fountain of inspiration. It further contributes enormously to an international discussion and a basic uniform understanding of contract problems, thereby forming an international community of science and scientists.[19]

The Convention is the tree from which ever new branches grow. Its importance for the practice of international transactions as well as a cornerstone for national and international legislation–both on sales law and the general law of obligations–can hardly be overestimated.

C. Comparison of Legal Systems as Basis of the CISG

The Convention was not created out of the blue. It is the fruit of intensive comparative work and long preparation. That leads back to the origin of the CISG which is coupled with the rise of comparative law as a discipline. The CISG's beginnings date back

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15. In particular the definition of non-conformity of the goods and the essential structure of remedies (except the remedy of damages) was taken from the CISG.

16. UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2004 (UNIDROIT ed. 2004).

17. PRINCIPLES OF EUROPEAN CONTRACT LAW I & II (Ole Lando & Hugh Beale eds. 2000); PRINCIPLES OF EUROPEAN CONTRACT LAW III (Ole Lando et al. eds. 2003).

18. PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE, Outline Edition (Christian von Bar et al. eds. 2009).

19. A clear sign for this was the scientific conferences around the globe on the occasion of the CISG's 25th anniversary in 2005, which was celebrated for instance in Paris, Pittsburgh, Singapore, Vienna and Würzburg. *See* Ulrich Magnus, *25 Jahre UN-Kaufrecht*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 96 (2006).

to the late 1920s, when the unification of substantive sales law was put on the agenda of the then just established international research institute, UNIDROIT, in Rome.[20] For this purpose, a small group of most distinguished European comparatists was installed.[21] The "mastermind"[22] behind the project was Ernst Rabel,[23] one of the most influential founders of modern comparative law.[24] He exemplified his functional approach of comparison and the search for the best solution on the sales unification project in a way that set standards still applicable today. The first draft of a uniform sales law in 1935-36 benefited immensely from the thorough and intense comparison of almost all legal systems of the time which Rabel and his collaborators in Berlin had prepared and which was published as "*Das Recht des Warenkaufs*" ("The Law of the Sale of Goods").[25] The draft of 1935-36 already contained the basic structure of the later Convention. Many of the early provisions have survived and form part of the present CISG despite the fact that a "first try" of sales unification in form of the Hague Uniform Sales Law of 1964[26] proved a failure because only few states accepted it.[27]

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20. UNIDROIT (*Institut international pour l'unification du droit privé*) [International Institute for the Unification of Private Law]) was established in 1926 as an institution of the League of Nations, the predecessor of the United Nations. UNIDROIT accepted the sales unification project proposed by Ernst Rabel in 1929.

21. The UNIDROIT Sales Committee consisted of the two English law professors H.C. Gutteridge and Cecil J.B. Hurst, who represented the common law in the Working Group; the two French professors Henry Capitant and Joseph Hamel, representing the Romanic civil law jurisdictions; the two Swedes Algot Bagge and Martin Fehr for the Nordic legal systems; and for the Germanic civil law jurisdictions, the Germans Rabel as General Reporter and Hans Ficker as secretary; *see* Ernst Rabel, *Der Entwurf eines einheitlichen Kaufgesetzes*, RABELSZ 9, at 1 et seq. (1935).

22. Bernhard Grossfeld & Peter Winship, *The Law Professor Refugee*, 18 SYRACUSE J. INT'L L. & COM. 3, 11 (1992).

23. 1874–1955.

24. *See* Ulrich Drobnig, *Die Geburt der modernen Rechtsvergleichung. Zum 50. Todestag von Ernst Rabel*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 821 et seq. (2005).

25. Vol. I (1936, Nachdruck 1957), Vol. II (1958).

26. Uniform Law on the International Sale of Goods (ULIS) and Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF).

27. The two Hague Conventions had been ratified by only nine–mostly Western European–states. After entering into force in 1972-1974, the Hague

III. THE CISG'S BASIC STRUCTURE: COMMON LAW HERITAGE

The CISG can be, and often is, regarded as a compromise between different legal systems.[28] Indeed, in many CISG provisions one can still identify certain traces of specific national legal structures, rules or provisions. Nonetheless, it would be wrong to classify the Convention as a mere compromise, let alone one on the lowest common level. It was Rabel's aim and vision to find by comparison the best solution for each sales problem and from these solutions form a body of its own.[29] To a large extent the CISG conforms to that ideal. Even though–unavoidably–most of its provisions have a clear national origin, their inclusion in the Convention and the commandment to interpret the CISG in an autonomous way[30] have freed the Convention from its national backgrounds since long. When the following text traces the most visible of these national influences it is not the aim to 'renationalise' parts of the CISG. On the contrary, the objective is to show how legal institutes of specific national character were merged and often modified to fit the purposes of international sales transactions.

In addition, it has to be borne in mind that the solutions achieved under the CISG correspond to a very high percentage to those which national law would also reach.

A. The CISG's Skeleton: English Common Law

It was already Rabel's conviction that for practical purposes the English common law structure of sales law was best suited for the international unification of this part of the law.[31] The CISG

Sales Law gained practical importance only in Belgium, Germany, Italy and the Netherlands.

28. *See* CESARE MASSIMO BIANCA & JOACHIM MICHAEL BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION, Introduction ¶ 2.2.1 (Giuffrè 1987).

29. *See* Rabel, *supra* note 21, at 6: "…(dass) die Eigentümlichkeiten, die in den Landesrechten noch aus verschiedenen überholten Epochen verblieben sind, ohne irgendwelchen Schaden und mit außerordentlichem Vorteil in einer höheren Einheit aufgelöst werden können…"

30. *See* CISG Art. 7.

31. *See* Rabel's comments on the first draft of a uniform sales law: Rabel, *supra* note 21, at 45 et seq..; *see* also the many single solutions of sales problems

follows in essence that structure. Only a few ingredients from other legal systems have been added. In sum and simplified, the structure is as follows: Each party is strictly liable for any breach of the contractual promise it gave (so called unitary approach because there is only one category of breach of contract; by contrast the civilian jurisdictions distinguish between general breach and special breach of warranty).[32] Liability means that the liable party must at least pay damages. The remedy of termination of contract is available only if the breach is severe and fundamental. An exemption from liability is confined to causes outside the control of the party in breach. These main structural elements shall be explained in more detail.

B. Liability for Breach of Contractual Promise

It has been the standpoint of the common law that a party is liable for keeping its contractual promise in principle irrespective of any fault, whereas the civilian tradition held the party liable for a breach of contract only if the party was at fault. In the field of sales law the common law followed its general approach of strict liability but implied as warranties or conditions certain tacit promises as to title, quality, fitness and conformity of the goods sold.[33] On the other hand, civil law, in the Roman tradition,[34] applied a rather high fault threshold: Were the goods defective or non-conforming, only fraud or breach of a special guarantee sufficed for a damages claim.[35] However, like in Roman

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where Rabel states that the common law solution is the most practicable and should be preferred; *see* as examples for many more Rabel, *Das Recht des Warenkaufs* I 326, 329, 378, 452, 524 (1936, Nachdruck 1957).

32. *See* KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 488 et seq. (Tony Weir trans., 3rd ed. 1998,) ; Peter Huber, *Comparative Sales Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 1, at 956.

33. *See* English Sale of Goods Act 1979, sec. 12 et seq.

34. *See* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 327 et seq. (Oxford University Press 1996).

35. Compare CODE CIVIL [C. CIV.] art. 1645 (Fr.) (Seller's knowledge of the defects is required for the buyer's claim for damages; the professional seller is, however, irrebuttably presumed to know defects of the goods sold.); § 463 former German Civil Code (BGB, valid until 2002). The European Consumer

law,[36] the buyer of non-conforming goods could always reduce the price or terminate the contract even if the seller was not at fault.

The CISG follows the unitary approach. It has merged the different concepts to a certain extent. Its basis is the common law approach; each breach of contract makes one liable irrespective of fault.[37] Only in extraordinary circumstances can exemption from liability be claimed.[38] The CISG further grants termination of contract under rather restrictive conditions.[39] But in contrast to the common law, it maintains the civil law remedy of price reduction,[40] which is more or less unknown in common law.

C. Main Remedy: Damages

Common law regards damages as the usual and most practical remedy for all kinds of breach of contract,[41] while specific performance is an exceptional remedy that steps in where damages are insufficient to fully compensate the loss flowing from the breach.[42] On the contrary, civil law countries generally grant in the first line a claim for specific performance and, as mentioned, price reduction or termination of contract. As seen, the traditional sales law of civil law countries awards damages very reluctantly.[43] Here, the old adage *caveat emptor* had and partly still has some truth in it.[44]

Sales Directive led to a change and adaptation of the German law of obligations and of sales to the CISG and thus basically to the common law (except for the remedy of damages).

36. Under Roman law the *actio quanti minoris* or *actio estimatoria* and the *actio redhibitoria* were available; *see* MAX KASER & ROLF KNÜTEL, RÖMISCHES PRIVATRECHT 234 et seq. (19th ed. 2008).

37. *See* CISG Art. 45(1)(b) and 61(1)(b).

38. CISG Art. 79.

39. CISG Art. 49 and 64.

40. CISG Art. 50.

41. *See* JOSEPH CHITTY, CHITTY ON CONTRACTS, 2 vols. (Hugh Beale ed., 30th ed. 2008) at ¶ 26-001.

42. *See* English Sale of Goods Act 1979, sec. 52. For a comparative survey on specific performance *see* ZWEIGERT & KÖTZ, *supra* note 32, at 470–85.

43. *See* C. CIV. art. 1645 (Fr.); old BGB § 463 (since 2002 in Germany the hurdle for contractual damages in sales cases has been reduced to simple fault, which is presumed).

44. However, the presumption of the professional seller's knowledge of defects and the seller's consequential liability in damages in French law has

The CISG combines the two remedies: a party can claim specific performance[45] and damages (if there remains any compensable loss after specific performance) or may freely choose between the two remedies.[46] However, as a bow to common law the Convention allows courts, in particular those of common law countries, to deny specific performance if they would decide to do so in comparable cases under their domestic law.[47] Fortunately, this specific common law reservation does not play any significant role in practice.[48]

D. Termination Only in Case of Fundamental Breach

In principle, common law allows a party, but not easily, to terminate a contract. Under the English Sale of Goods Act 1979 with its later amendments, termination is available if the breach of contract is a breach of a condition on whose strict fulfilment the existence of the contract shall depend, or else is serious enough to allow termination.[49] Traditional civil law, on the basis of Roman law, had been more generous with termination (in French, *action redhibitoire*; in German, *Wandlung*) in sales cases. Were the delivered goods defective, the buyer could always terminate the contract.[50]

The CISG follows in essence the common law approach. To allow termination the breach of contract must be fundamental.[51] More or less that means that, from an objective point of view, the

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provided considerable protection to buyers since long. By contrast, under German law the buyer had to beware until 2002, because damages were only due in case of seller's fraud or breach of guarantee.

45. CISG Art. 46 and 62.

46. CISG Art. 45(1)(b) and 61(1)(b).

47. CISG Art. 28.

48. THE UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS (UNCITRAL ed, 2008, *available at* http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html (last visited July 10, 2010). Eighty-seven reports, only one U.S. decision dealing with CISG Art. 28.

49. *See* in detail J.P BENJAMIN, BENJAMIN'S SALE OF GOODS ¶ 12-017 (7th ed. 2006); MICHAEL BRIDGE, THE SALE OF GOODS 146 et seq. (Oxford University Press 2nd ed. 1997) .

50. *See* C. CIV. art. 1644 (Fr.). German law entitles the buyer to termination only after a fruitless '*Nachfrist*' (BGB § 440).

51. CISG Art. 49 and 64.

innocent party must have lost its interest in the contract and that the other party could foresee such a result.[52] Termination is therefore a remedy of last resort (*ultima ratio*) that is not easily available under the CISG.[53]

It is noteworthy that the European Directive on Consumer Sales adopted the CISG approach and also reserved termination as a remedy of last resort.[54] All E.U. member states implemented this in their law on consumer sales.[55] Germany accepted this solution to a certain extent even as its general law of obligations.[56]

E. Exemption from Contractual Liability

The far-reaching guarantee principle of contract law that is characteristic of the common law requires nonetheless exceptions. Under the rules on frustration a party is relieved from its own obligations if performance became impossible due to circumstances for which this party neither bore the risk nor was at fault.[57] The civil law countries know of similar reasons for exemption.[58] However, here the exemption provision plays a less important role because these countries follow the fault principle, although with many exceptions.[59]

The CISG, having adopted the common law position of generally strict liability, also had to adopt an exemption provision: A party is freed from its own obligation if the failure of performance "was due to an impediment beyond his control" that could be neither foreseen nor avoided.[60] "Impediment beyond

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52. *See* the definition in CISG Art. 25.

53. German Bundesgerichtshof 3 April 1996, CLOUT no. 171; Austrian Oberster Gerichtshof 7 September 2000, CLOUT no. 428.

54. *See* Consumer Sales Directive Art. 3(5) and (6).

55. *See* the survey over all E.U. member states in Ulrich Magnus, *Verbrauchsgüterkaufrichtlinie, in* IV DAS RECHT DER EUROPÄISCHEN UNION, (Eberhard Grabitz & Meinhard Hilf eds. 2007) A 15, Anhang at 1 et seq.

56. *See* BGB § 323(5). This provision excludes termination where the breach is "*unerheblich*" (minor).

57. *See* in regard of sales contracts BRIDGE, *supra* note 49, at 131 et seq.

58. *See* C. CIV. art. 1148 (Fr.) (exemption for force majeure and act of a third person); § 275 BGB (exemption for impossibility).

59. For a comparative survey *see* ZWEIGERT & KÖTZ,*supra* note 32 at 486–515.

60. CISG Art. 79.

control" includes *force majeure* in the sense of unavoidable natural events but also acts of third persons and, according to the prevailing view, even extreme economic hardship.[61]

IV. SPECIFIC U.S. TRAITS

A. The American Influence on the CISG

In the early stages of the unification process of sales law, which already laid the grounds for the present structure of the CISG and for its main policy decisions,[62] the United States played no major role.[63] Nor did U.S. law have a significant impact on the preparatory comparison of legal systems;[64] the common law was represented by English law and in the UNIDROIT working group by English lawyers.[65] However, in the further stages there was a considerable U.S.-American influence on the preparation of the CISG, in which the U.S. professors John Honnold and Allan Farnsworth were particularly involved. Honnold had already attended the conference in 1964 on the Hague Uniform Sales Law. He then became the Secretary of UNCITRAL during the phase (1969 – 1974) when the first CISG draft (on the basis of the Hague Sales Law) was elaborated.[66] He further led the U.S. delegation, of which Farnsworth was also a member, at the Vienna Conference that concluded the Convention in 1980. The Conference materials

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61. JOHN O. HONNOLD & HARRY M. FLECHTNER, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION ¶ 432.2, 627–28 (4th ed. 2009); *see* Schwenzer, *Article 79*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, ¶ 30; Ulrich Magnus, *Article 79*, *in* JULIUS VON STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN ¶¶ 22, 24 (2005).

62. *See* the first Draft of a Uniform Sales Law published in RabelsZ 9, 8 (1935).

63. However, Rabel reports that at one or few meetings of the UNIDROIT Sales Committee Llewellyn was present. Rabel, *supra* note 21, at 4.

64. *See* RABEL, *supra* note 31, at 24 (paying throughout attention to the US sales law but characterizing it as a close follower of English common law). By the time Rabel's (and his collaborators') report was finished, the Uniform Commercial Code of 1955 had not yet been prepared. The US Uniform Sales Act of 1896 was mainly a copy of the English Sale of Goods Act of 1893.

65. *See supra* note 21.

66. *See also* HONNOLD & FLECHTNER, *supra* note 61, at VII.

prove that the interventions of both had a considerable impact on the decisions taken by the Conference.[67]

B. Seller's Right to Cure

The most visible sign of the U.S.-American influence on the CISG is the Convention's right to cure:[68] The seller is entitled to put a defective tender right even after the date for performance has lapsed if the cure is possible without delay and unreasonable inconvenience for the buyer.[69] This provision corresponds to some extent to UCC § 2-508, whereas a formal statutory right to cure is generally unknown to civil law countries[70] and even to English common law.[71] This does not mean that these legal systems would never take into account a seller's offer to cure a defect. Under estoppel or good faith considerations the buyer may even be

67. *See* JOHN HONNOLD, DOCUMENTARY HISTORY OF THE UNIFORM LAW FOR INTERNATIONAL SALES (1989) (also containing the minutes of the meetings at the Vienna Conference).

68. *See* UTA GUTKNECHT, DAS NACHERFÜLLUNGSRECHT DES VERKÄUFERS BEI KAUF- UND WERKLIEFERUNGSVERTRÄGEN. RECHTSVERGLEICHENDE UNTERSUCHUNG ZUM CISG, ZUM US-AMERIKANISCHEN UNIFORM COMMERCIAL CODE, ZUM DEUTSCHEN RECHT UND ZU DEM VORSCHLAG DER KOMMISSION ZUR ÜBERARBEITUNG DES DEUTSCHEN SCHULDRECHTS (1997).

69. *See* CISG art. 48. The CISG predecessor, the Hague Uniform Sales Law, contained already a similar provision which was inspired by the UCC. *See* ULIS art. 44 (1964), *available at* http://www.unidroit.org/english/conventions/c-ulis.htm (last visited July 10, 2010).

70. *See* LANDO & BEALE, *supra* note 17, at 369 (containing a survey). However, the Consumer Sales Directive mandates that all EU Member states introduce a rule for consumer sales that the consumer must almost always grant the professional seller who has delivered defective goods an additional period of time ("*Nachfrist*") to remedy performance. Although this is no right of the seller but an obligation of the buyer it comes close to a right of cure. By its reform of the law of obligations in 2002, Germany generalized this rule for all contracts (BGB §§ 281(1), 323(1)). A civil law jurisdiction that had recognized by statute a—rather limited—right to cure is Switzerland (*see* Schweizerisches Obligationenrecht [OR] art. 206(2) (only in case of generic goods which had not to be transported from another place)).

71. The English Sale of Goods Act 1979 does not contain a provision that corresponds with UCC § 2-508. The work of Bridge (*supra* note 49) does not even mention "cure."

obliged to accept such offer.[72] However, that depends on the very circumstances of the individual case and does not give the seller a principal right to cure. Like the UCC, the CISG has introduced a general right of the seller to cure. The details vary, however. The CISG explicitly reserves the buyer's prevailing right to avoidance[73] while the UCC requires that the buyer has rejected the goods.[74] Although the CISG regulation leaves some doubt as to the relation between seller's right to cure and buyer's concurrent right to avoidance, in practice the conflict between the two contradicting rights does not matter very much. Where the improper performance is easily curable the breach will rarely amount to a fundamental breach that allows avoidance.[75]

The CISG has used a statutory invention of U.S. law, however in a modified form. Via the CISG the right to cure made its way into the UNIDROIT Principles,[76] the Principles of European Contract Law[77] and the DCFR.[78]

V. SPECIFIC FRENCH TRAITS

A. The French Influence on the CISG

Since the beginning of the efforts to internationally unify sales law, French law was one of the legal systems whose solutions were particularly taken into account. Equally, French lawyers were always involved in the long legislative history of the present Convention.[79]

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72. *See* LANDO & BEALE, *supra* note 17, at 369 (containing a comparative account).

73. *See* CISG art. 48(1).

74. UCC § 2-508(2).

75. *See* inMarkus Müller-Chen, *Article 48*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 18.

76. *See* UNIDROIT Principles art. 7.1.4.

77. Principles of European Contract Law art. 8:104.

78. DCFR Art. III.-3:201.

79. *See supra* note 21.

B. Claim for Specific Performance

The French *Code civil* is particularly explicit on the general right of a contract party to claim specific performance if the other party does not perform and if performance is possible.[80] But generally the civil law countries grant a claim for specific performance.[81] By contrast, in common law jurisdictions specific performance is rather the exception.[82]

The CISG entitles the aggrieved party generally to request performance.[83] Where the seller has delivered non-conforming goods the specific performance claim is somewhat limited: the buyer can claim repair as far as it is reasonable under the circumstances.[84] According to its choice the buyer may also claim delivery of substitute goods however only if the non-conformity of the delivered goods amounts to a fundamental breach of contract.[85]

The CISG specifies and details the remedy of specific performance generally available in civil law jurisdictions, yet without forcing the common law jurisdictions to accept this solution. This is the only situation where the substantive provisions of the CISG allow a split solution for different legal systems.

C. No Open Price Contract

A certain relic, not only, but mainly, of French law is the CISG provision that an offer, in order to be valid, must fix the contract price or contain at least a method to determine it, be it even impliedly.[86] Until the mid-1990s French law regarded an open

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80. *See* C. CIV. art. 1184(2) (Fr.); Cass. civ., Dalloz 2005, IR 1504.

81. *See* the comparative survey by Lando & Beale, *supra* note 17), at 399 et seq.

82. *See supra* III.C.

83. CISG arts. 46(1) and 62. But note the restriction of CISG article 28 (*see supra* note 45 and the text therein).

84. CISG art. 46(3). In particular, noneconomic repair cannot be claimed. *See* Müller-Chen, *Article 46*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 40; Magnus, *supra* note 61, at ¶ 61.

85. CISG art. 46(2).

86. CISG art. 14(1).

price contract in principle as invalid.[87] But since 1994 this view has changed. French courts now no longer strictly invalidate every open price contract.[88]

The CISG still requires that the offer must allow the determination of the price. It is, however, the clearly prevailing view that the parties can conclude a valid contract without fixing the price because the CISG allows the parties to vary every provision,[89] and certainly also the determinable price provision.[90] It is therefore the parties' full autonomy to validly conclude an open price contract. Then, the current market price is considered as the agreed price.[91]

Here, the CISG has adopted a policy decision that the underlying national law later abandoned. But irrespective of this national development, the CISG's provisions appear flexible enough to guarantee a reasonable solution.

D. Compensation of Foreseeable Loss

The CISG limits damages for breach in a specific way that actually originates from France. Art. 1150 of the French *Code civil* provides that the contractual debtor must compensate only those losses that s/he foresaw or that could be foreseen at the time of conclusion of contract unless the breach was wilful.[92] This provision of the *Code civil* of 1804 had some impact on the famous English case *Hadley v. Baxendale* of 1854,[93] which is the central

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87. C. CIV. art. 1591 (Fr.) (prescribing that the price must be fixed, "Le prix de la vente doit être déterminé et désigné par les parties.").

88. *See* Cass. civ., JCP 1995 II 22371 (with note Ghestin); Cass. (Ass. pl.) JCP 1996 II 22565 (with note Ghestin).

89. *See* CISG art. 6.

90. *See* HONNOLD & FLECHTNER, *supra* note 61), ¶ 137.6, at 211; Ulrich Schroeter, *Article 14*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 21 ; Magnus, *supra* note 61, at ¶ 33.

91. *See* CISG art. 55.

92. It must be noted that the general French rule of article 1150 is almost inapplicable in French sales law because the seller who knows the defects of the sold goods must compensate all losses ("tous les dommages et intérêts"). *See* C. CIV. art. 1645 (Fr.). And since the professional seller is irrebuttably presumed to know the defects (*see supra* notes 35, 44), he or she is always liable even for unforeseeable losses if causation is established.

93. (1854) 9 Ex. 341.

common law decision on contractual damages. It established the rule that the debtor must recompense losses which were either the natural result of a breach or which were or should have been in the contemplation of the parties as a probable result of a breach (so-called foreseeability test).[94] The main purpose of the rule is that the debtor shall not be liable for too remote consequences of a breach of contract but shall be able to oversee and calculate the risk that s/he assumes with the contract.

The CISG has adopted the foreseeability test as a means to reasonably limit damages.[95] The Convention thus follows the general French rule, though in its common law clothing. The interpretation of the damages provisions of the CISG can—and should—take account of this background, in particular to reveal the purpose of the provisions. Nonetheless, the interpretation must be autonomous and independent of the peculiar interpretation of the respective rule in France, England or the U.S.

VI. SPECIFIC GERMAN TRAITS

A. German Influence on the CISG

The German influence on the CISG is essentially tied to the name of Ernst Rabel. *His* first draft of 1935 already included the two legal institutes that evidence a specific German origin: the notice procedure and the "*Nachfrist*".

There is also a certain German influence on the application of the CISG at least for the first decade after the CISG internationally entered into force (1988). For instance, in 2000, one-third of all CISG decisions reported by CLOUT[96] were German decisions. This had the effect that leading German decisions were followed

94. To a certain extent the rules of *Hadley v. Baxendale* were brought into statutory form in the English Sale of Goods Acts of 1893 and 1979. *See* Sale of Goods Acts [SGA] §§ 50(2), 51(2), and 53(2)(1893/1979) and in the US-American UCC (§§ 2-714(1) and 2-715(2)).

95. *See* CISG art. 74; FLORIAN FAUST, DIE VORHERSEHBARKEIT DES SCHADENS GEMÄß ART. 74 SATZ 2 UN-KAUFRECHT (CISG) (1996).

96. CLOUT (Case Law on UNCITRAL Texts) is the databank of UNCITRAL primarily for CISG cases, *available at* http://www.uncitral.org (last visited July 10, 2010).

elsewhere and had, and still have, a considerable influence on the interpretation of the Convention.[97]

B. Notice Procedure

The CISG requires the buyer to notify the seller if the goods are defective and do not conform to the contract.[98] Basically, it is self-understanding and the normal course of dealing that a dissatisfied buyer informs the seller of the ground for the dissatisfaction.

However the CISG makes it incumbent upon the buyer to give notice within a reasonable time because, without notice in correct time and form, the buyer loses all remedies which s/he otherwise could avail of.[99] Furthermore, the reasonable time starts when the buyer could have examined and discovered the defects. That obliges the buyer who will not lose any remedy to examine the goods. The CISG restricts the time for examination to "as short a period as is practicable in the circumstances."[100] In order to maintain his or her rights in respect of non-conforming goods, the buyer must therefore rather promptly and carefully examine them and must also notify the seller of any eventual defect within a little longer time.[101]

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97. A particularly prominent example is the U.S. decision in *Medical Marketing International v. Internazionale Medico Scientifica, S.R.L.*, No.Civ.A. 99-0380, 1999 WL 311945, at *2 (E.D. La., May 17, 1999). The decision concerned the import of Italian mammography devices to the U.S. which did not comply with U.S. safety standards. The U.S. court relied very much on a decision of the German Federal Court (8 March 1995, NJW 1995, 2099) which held that in principle the buyer bears the risk that the goods conform to safety standards or other public law requirements in the buyer's country. However, the German court had also stated several exceptions. The U.S. court applied one of these exceptions.

98. *See* CISG art. 39.

99. There are only two exceptions to that rule: where the seller knew or could not be unaware of the defects (Art. 40 CISG) or where the buyer had a reasonable excuse (CISG art. 44).

100. *See* Art. 38 CISG.

101. As to the time frames under articlesrt. 38 and 39 of CISG and the international case law thereon, *see* the UNCITRAL Digest, *supra* note 48), *available at* http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html (last visited July 10, 2010).

This whole notice procedure stems from German commercial law.[102] There the commercial buyer is obliged to examine and notify immediately and very precisely. Its main purpose is to clear by a simple procedure within a short period whether or not the transaction is completely finished. The CISG adopted the general concept but softened the requirements of immediate reaction to, and very precise description of, the defect. These requirements were regarded as too harsh for international transactions between parties who partly are unfamiliar with such strict practice.

Again, the CISG uses a specific national legal phenomenon but modifies it in a reasonable way that secures fairness in international sales transactions.

C. "Nachfrist"

Another quasi-procedural element of German law adopted by the CISG is the so-called "*Nachfrist.*" Under German contract law, if the debtor has not fully and correctly performed in time, the creditor can set the following procedure in motion: s/he can fix an additional (reasonable) period of time for performance; if even then the debtor does not perform, the creditor is entitled to terminate the contract.[103] If the additional period, the "*Nachfrist*," has lapsed without success, then, in principle, the weight and seriousness of the breach no longer matter except where the breach is minor ("*unerheblich*").[104] Almost always the creditor can thus achieve a right of termination by setting a "*Nachfrist.*" The "*Nachfrist*" procedure avoids the uncertainties that one can encounter if termination exclusively depends on the fundamentality of the breach, because rather often it will be doubtful whether or not a breach is fundamental. To declare the contract terminated is then a high risk for a party because the unjustified termination is itself a fundamental breach of contract entitling the other party to termination. The "*Nachfrist*" is a simple and generally fair mechanism to clear that situation.

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102. *See* German Handelsgesetzbuch [HGB] [Commercial Code], § 377.

103. *See* BGB § 323.

104. BGB § 323(5). In practice a breach is minor if the costs to remedy it are less than 10% of the contract price; *See* Christian Grüneberg, § 323 ¶ 32, *in* BGB (Otto Palandt ed., 69th ed. 2010).

The CISG follows the German "*Nachfrist*" concept partly but not fully. The CISG limits the effect that the unsuccessful lapse of an additional time period has – to transform a non-fundamental breach into a fundamental one – to specific breaches, namely to the total non-performance of the parties' basic obligations. Concerning the seller's duties, it is only in the case of non-delivery of the goods[105] where a "*Nachfrist*" can lead to a right of termination.[106] For all other breaches which the seller commits, the additional time period as such is no means to automatically convert a non-fundamental breach into a fundamental one.[107] Concerning the buyer's duties, the "*Nachfrist*" mechanism applies to the non-performance of the obligation to pay and to take delivery of the goods,[108] but not to other duties.[109] The reason for this elective use of the "*Nachfrist*" procedure is the CISG's underlying decision to preserve the contract as far as possible and reasonable, primarily in order to avoid unnecessary costs for international transportation of the goods. Therefore, a party shall not be entitled to convert a minor, non-fundamental breach into one that justifies termination by mere lapse of additional time unless the other party has done nothing–neither delivered nor paid nor taken the goods.

Again, it can be observed that the CISG did not fully copy a national solution but collected ingredients from a national law as far as regarded useful for international sales transactions.

VII. REJECTION OF SPECIFIC NATIONAL TRAITS

So far we have seen how the CISG merged elements from different legal systems. Some of these elements were peculiar, even characteristic, for certain legal systems. It is equally

105. This generally means total non-delivery. In case of partial non-delivery the right of termination–after the unsuccessful lapse of a *Nachfrist*–covers only the lacking part. *See* CISG art. 51(1).

106. *See* CISG art. 49(1)(b).

107. *See* HONNOLD & FLECHTNER, *supra* note 61, ¶ 305, at 437–38; Müller-Chen, *Article 49*, in KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 15; Magnus, *supra* note 61, at ¶ 21.

108. CISG art. 64(1)(b).

109. *See* HONNOLD & FLECHTNER, *supra* note 61, ¶ 354, at 503; Günter Hager & Felix Maultzsch, *Article 64, in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 8; Magnus, *supra* note 61, at ¶ 22.

interesting to identify which national peculiarities the CISG consciously set aside and excluded from its scope.

A. No Consideration Doctrine

One of the most famous and intriguing characteristics of the common law is the doctrine of consideration.[110] Under this doctrine, one-sided promises for which nothing is given or promised in exchange and which are not made in form of a deed are regularly enforceable.[111] In the field of sales contracts, it is not the sales contract itself that can be unenforceable because of lack of consideration. In a sales contract there are always mutual promises that constitute consideration. Here, problems with consideration can occur with the revocability of one-sided offers and with the parties' agreement on the modification of the contract.[112] The civil law jurisdictions do not require a consideration although they developed some other means[113] to restrict the validity and enforceability of promises to deserving cases.[114]

The CISG has done away with consideration. Two of its provisions make this clear.[115] Although consideration can be regarded as a question of contract validity which is in general outside the scope of the CISG,[116] its Art. 16(2)(a) and Art. 29 explicitly regulate a one-sided offer and modification of the contract and do not require consideration for their binding effect. It was also the intention of the drafters of the CISG to exclude the

110. *See* Chitty, *supra* note 41, at ¶¶ 3–001 et seq.

111. A deed is a specific form of signed writing with seal or attestation of the signature. The deed must further be delivered to the other party.

112. *See* the leading case *Stilk v. Myrick*, (1809) 170 Eng. Rep. 1168.

113. In French law a valid contract requires a "cause" (*see* C. CIV. arts. 1131–1133 (Fr.)). German law requires notarial form for the validity of certain contracts (in particular the purchase of land and the promise of gifts). *See* BGB §§ 311b, 518.

114. For a comparison, *see* ZWEIGERT & KÖTZ, *supra* note 32, at 388–99; E. Allan Farnsworth, Comparative Contracts Law, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 1, at 908–10.

115. *See* CISG arts. 16(2)(a) and 29.

116. *See Id.* art. 4(a).

consideration doctrine for the whole Convention.[117] This doctrine therefore has no place under the CISG.[118]

Here, the CISG was bold enough to abolish a time-honoured though disputed legal institution that is part of many national laws.

B. No Parol Evidence Rule

The common law tends to be stricter than the civil law with written contracts. The so-called "parol evidence rule" of the common law prohibits in principle that oral (parol) evidence by witnesses or other extrinsic evidence is adduced to prove content of the contract that is contrary to the written text.[119] Such proof is not admissible although there are rather many exceptions.[120] In civil law jurisdictions a written contract may also raise the presumption of its completeness and correctness; however, this presumption is regularly rebuttable by any means of proof.[121]

Even clearer than with respect to the consideration doctrine, the CISG abolished for its scope of application the parol evidence rule. Article 11, sentence 2 of CISG provides that a contract "may be proved by any means, including witnesses."[122] This formulation applies even if the contract is in writing.[123] The clearly prevailing view is that the formulation excludes the parol evidence rule.[124]

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117. *See* Commentary of the Secretariat to article 27 paragraph 2 (CISG article 27 of the Draft was the later article 29), *available at* http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-29.html (last visited July 10, 2010).

118. *See* Samuel K. Date-Bah, *Article 29*, in COMMENTARY ON THE INTERNATIONAL SALES LAW. THE 1980 VIENNA SALES CONVENTION, *supra* note 28, at ¶¶ 1.3, 2.1; HONNOLD & FLECHTNER, *supra* note 61, ¶ 204.4, at 307; Schroeter, *Article 29*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 4; Magnus, *supra* note 61, at ¶ 6.

119. *See* Kim Lewison, THE INTERPRETATION OF CONTRACTS 85–91 (4th ed. 2007) (for an extensive commentary on the parol evidence rule in England). For the US, *see* UCC § 2-202.

120. *See* Lewison, *supra* note 119, at 85.

121. *See* for Germany BGH NJW 1980, 1680; BGH 2002, 3164.

122. CISG art. 11.

123. *See* Schroeter, *Article 11*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 13; Magnus, *supra* note 61, at ¶ 11.

124. Calzaturificio Claudia s.n. v. Olivieri Footwear Ltd., No. 96 Civ. 8052(HB) (THK), 1998 WL 164824, at *4 (S.D.N.Y, Apr. 7, 1998); MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d'Agostino, S.p.A., 144 F.3d

Again, the CISG rather boldly sets aside a rule that enjoys widespread application and trusts that greater freedom with respect to the proof of contracts will better serve international sales transactions.

C. No Délai de Grâce

French law allows the judge to fix an additional period of time during which the debtor may perform (*délai de grace* means "period of grace").[125] The CISG explicitly excludes such possibility.[126] The purpose of the exclusion is to secure legal certainty and foreseeability for the contracting parties.

The *délai de grâce* of French law do not fit for commercial transactions between professional people. The CISG therefore rejected them.

D. No Løfte Theory

An internationally rather disputed issue is the question of how binding offers should be.[127] In this respect, the Nordic countries[128] which are deemed to form a separate legal family[129] take a particularly outspoken stance. They generally regard an offer as binding and irrevocable (according to the so-called *løfteteorie*).[130]

1384, 1388–92 (11th Cir. 1998); Mitchell Aircraft Spares, Inc. v. European Aircraft Service, AB, 23 F. Supp. 2d 915, 919–22 (N.D. Ill. 1998); Filanto SpA v. Chilewich International Corp, 789 F. Supp. 1229, 1238 n.7 (S.D.N.Y. 1992). *See also* HONNOLD & FLECHTNER, *supra* note 61, ¶ 110, at 164–65; Martin Schmidt-Kessel, *Article 10*, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 13; Magnus, *supra* note 61 ¶ 16; *but see* Beijing Metals & Minerals Import/Export Corp. v. American Business Center, Inc., 993 Fed.2d 1178, 1182–84 (5th Cir. 1993) (interpreting contractual provisions under Texas law).

125. For the termination remedy, *see* C. CIV. art. 1184(3) (Fr.); for payment obligations, which could include the obligation to pay damages, *see* C. CIV. art. 1244–1 (Fr.) (introduced in 1991; however, the former article 1244 contained a similar provision).

126. *See* CISG arts. 45(3) and 61(3).

127. For a comparison *see* ZWEIGERT & KÖTZ, *supra* note 32, at 356–64.

128. They include Denmark, Finland, Iceland, Norway, and Sweden.

129. *See* ZWEIGERT & KÖTZ, *supra* note 32, at 276–85.

130. *See* Nordic Contracts Act §§ 1–3, 7; Joseph Lookofsky, *The Scandinavian Experience*, *in* THE 1980 UNIFORM SALES LAW. OLD ISSUES

Also under German law an offer is generally irrevocable if not otherwise indicated. The offeror is bound for a period within which an offeree could regularly answer.[131] The opposite position is taken by the common law, where an offer without consideration is not binding even if it says that it is irrevocable.[132] However, no matter from which position one starts there is always a problem of time. The free revocability position must nevertheless fix a point of time when the revocability of the offer ends (normally by its acceptance). Likewise, the irrevocability position must fix a point of time when the irrevocability ends because an offeror cannot be bound endlessly.

The CISG starts from the standpoint that an offer is always revocable.[133] But it reduces this position considerably. If the offer indicates explicitly or implicitly that it shall be irrevocable, then it cannot be revoked.[134] The same applies if the offeree was justified to rely on the offer as irrevocable and acted in reliance on it.[135]

The CISG regulation on revocability of offers was one of the reasons for the Scandinavian countries[136] to ratify the CISG only partly, namely without the Convention's Part II on the formation of contracts (Art. 14 – 24).[137] Art. 92 allowed this reservation. Recently the Scandinavian countries have renounced their reservation against Part II.

The CISG produced here more than a mere compromise. It takes a reasonable middle position between the extremes of full

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REVISITED IN THE LIGHT OF RECENT EXPERIENCES. VERONA CONFERENCE 2003, *supra* note 7, at 95, 104; JOSEPH LOOKOFSKY , UNDERSTANDING THE CISG 52–3 (3d ed. 2008).

131. BGB § 145.

132. *See* the comparative survey in ZWEIGERT & KÖTZ, *supra* note 32, at 356–64.

133. CISG arts. 15(2) and 16(1).

134. *Id.* art. 16(2)(a). This is in line with the CISG's disregard of the consideration doctrine.

135. *Id.* art. 16(2)(b).

136. Iceland did not use the reservation possibility of CISG article 92.

137. *See* Ulrich Magnus, *The Scandinavian Reservation Under Art. 92 CISG*, *in* CISG PART II CONFERENCE. STOCKHOLM, 4 – 5 SEPTEMBER 2008 59 et seq. (Jan Kleineman ed. 2009).

irrevocability and full revocability that in practice did not raise problems.[138]

E. No General "Nachfrist" Procedure

It has already been mentioned that the CISG adopted the German "*Nachfrist*" mechanism not as a general concept but only partly where seller or buyer do not at all perform their most basic obligations.[139] The CISG proceeded here in a selective way.

VIII. SHORTCOMINGS?

A survey on the CISG's position between common law and civil law must also ask whether the Convention leaves deplorable gaps or suffers from unacceptable shortcomings.

A. Law of Important Countries Not Taken into Account?

A first critique could be raised that the Uniform Sales Law is the fruit of comparison mainly between the common law, French law and its descendants, and German law and its descendants. It could be said that important contemporary legal systems like the laws of Brazil, China or India have not been taken into account. However, this critique neglects to consider that the laws of the mentioned countries have been strongly influenced by the common law, French and German law, and by the CISG itself.

The most evident example is India, where the English introduced the Indian Sale of Goods Act of 1930, which is a copy of the English Sale of Goods Act 1893. Still today Indian courts refer to English precedents concerning sales law or other issues of law. Brazil's civil code to a considerable extent contains elements of French and German law.[140] Rabel's comparative survey always

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138. The UNCITRAL Digest, *supra* note 48, reports three cases concerning Art. 16 CISG, *available at:* http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html (last visited July 10, 2010). All three cases do not focus directly on the revocability issue.

139. *See supra* VI.C.

140. *See* José Maria Othon Sidou, *Brazil*, *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW B-48 et seq. (René David et al. eds. 1972). The new civil code of Brazil of 2002 preserves the influence of the BGB.

included Brazilian law.[141] Finally, China's modern sales law, the Contract Act of 1999, shows a rather close vicinity to the CISG.[142]

It would be thus an ill-founded critique that the CISG's solutions disregard important contemporary legal systems.

B. Not in Line with Modern Sets of Principles?

Another critique that can be raised is that the CISG is not in line with the modern UNIDROIT Principles and Principles of European Contract Law (PECL). Indeed, these sets of principles are of a younger age than the CISG, therefore the CISG could not take into account their solutions. However, although there are differences between the CISG and the two sets of principles,[143] in most respects the solutions do not vary. This is no surprise; the CISG was the most important source of inspiration for these sets of principles.[144] Indirectly this is also largely true for the Draft Common Frame of Reference which in part is based on the PECL[145] and thereby again on the CISG. Today, the principles can

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See, among others, Véra Fradera, *La traduction francais du Code civil brésilien*, REVUE INERNATIONALE DE DROIT COMPARÉ 773, 775 (2010).

141. *See* Rabel, *supra* note 31, at 22 et seq.

142. *See* Bernhard Vetter von der Lilie, DAS CHINESISCHE VERTRAGSRECHT IM RECHTSVERGLEICH MIT DEM UN-KAUFRECHT UND DEN GRUNDREGELN DES EUROPÄISCHEN VERTRAGSRECHTS 63 (2008).

143. *See generally* Harry M. Flechtner, *The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, *in* THE 1980 UNIFORM SALES LAW. OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES. VERONA CONFERENCE 2003, *supra* note 7, at 176–87 (containing tables of concordance); Ulrich Magnus, *Die UNIDROIT Principles und die Wiener Kaufrechtskonvention*, *in* THE UNIDROIT PRINCIPLES 2004. THEIR IMPACT ON CONTRACTUAL PRACTICE, JURISPRUDENCE AND CODIFICATION 57 (Eleanor Cashin Ritaine & Eva Lein eds. 2007).

144. *See* MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 305–06 (3d ed. 2005); Flechtner, *supra* note 143; Magnus, *supra* note 143; Stefan Vogenauer, *Introduction*, *in* COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) ¶ 22 (Stefan Vogenauer & Jan Kleinheisterkamp eds. 2009).

145. *See* PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE, *supra* note 18, at 30.

serve as an aid for interpretation of the CISG[146] unless the CISG deliberately left gaps that then have to be filled by the applicable national law.[147] There is thus a certain mutual influence between the CISG and the sets of principles that keeps the CISG *à jour*.

C. Loopholes

Theoretically, the CISG leaves no loopholes because any gap has to be filled by the general principles underlying the CISG and, in their absence, by the applicable national law.[148] In practice, it cannot be denied that there are some points of uncertainty for which an explicit solution in the CISG would be preferable. The most deplorable omission is that the CISG does not itself determine the rate of interest for sums due under the Convention.[149] For various reasons this question was deliberately left open. It is unfortunate that only in order to answer this frequent question it is necessary to determine the applicable law for the contract at hand, a procedure that the Convention in all other important and frequently relevant respects avoids. Nonetheless, by redress to national law the CISG provides for a though less comfortable solution.

Further points which could be regarded as loopholes are the lack of specific rules on the incorporation of standard terms, on letters of confirmation and on the well-known battle of forms. But despite this lack, courts have been able to find reasonable solutions for all these problems within the CISG and its underlying general principles. The courts have inferred from CISG Art. 8, 14, 18 that the incorporation of standard terms requires that the terms have been made sufficiently available to the other party, generally by sending them.[150] Likewise, the problem of silence on a letter of confirmation can be, and has been, solved within the CISG.

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146. On few occasions, courts have done that. For a general account of the use of the UNIDROIT Principles in court practice *see* Vogenauer, *supra* note 144, at 37 et seq.

147. *See* CISG art. 7(2).

148. *Id.* art. 7(2).

149. *See id.* arts. 78 and 84(1).

150. *See, e.g.*, German Federal Court 31 October 2001, Internationales Handelsrecht 2002, 14; for an exception *see* Austrian Oberster Gerichtshof 31 August 2005, Internationales Handelsrecht 2005, 31.

Except where there exists a respective practice between the parties or an international trade usage[151] that silence on a letter of confirmation makes the content binding, the Convention does not allow such effect.[152] Finally, the CISG also enables a reasonable solution for the battle of contradicting standard forms. The fairer and more modern solution neutralizes and invalidates the conflicting terms at least if the parties began to perform their contract (knock-out rule). In effect, CISG case law confirms this view.[153]

Though it could appear desirable that the CISG contained more explicit rules in certain respects, it has to be stated that the Convention allows reasonable solutions for the problematic points.

IX. CONCLUSIONS

A. CISG Not Perfect but Best of All Possible Worlds

In law it is particularly naïve to expect that regulations be or even can be perfect. Codifications will always have their shortcomings, be it only due to change of time and convictions since their enactment. But given this fact and in the light of the practice under the CISG, this Convention can be regarded as a relative optimum. It is a codification that allows for reasonable solutions of most sales problems. Its certain vagueness in some respects secures on the other hand the necessary flexibility. In Leibniz's view the CISG probably would be the best possible world of sales law.

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151. According to article 9 of CISG such practices and trade usages must be given preference.

152. *See* the decisions cited in the UNCITRAL Digest, *supra* note 48, *available at* http://www.uncitral.org/uncitral/en/case_law/digests/cisg.html (last visited July 10, 2010); *see also* HONNOLD & FLECHTNER, *supra* note 61, ¶ 120.1, at 173–74; Schmidt-Kessel, Article 9, *in* KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG, *supra* note 10, at ¶ 22; Magnus, *supra* note 61, at ¶ 27.

153. *See, e.g.*, French Cour de cassation, Droit d'affaires 1998, 1694; German Bundesgerichtshof, Internationales Handelsrecht 2002, 16; German Oberlandesgericht Köln, Internationales Handelsrecht 2006, 147; Austrian Oberlandesgericht Linz, Internationales Handelsrecht 2007, 123.

B. Conclusions for Comparative Law

The CISG is an example and probably the best one that by intense comparison of law solutions–and their worldwide understandable expression in a transparently structured codification–can be found that assembles advantages of different legal systems and largely avoids their disadvantages. The CISG proves that contradictions and differences between legal systems, in particular the gap between common law and civil law (how deep this gap may ever be regarded) can be successfully overcome. The CISG evidences further that this bridging of gaps is not only theoretically possible but also that it works in practice. If an international convention witnesses the value and need of comparative law, the CISG is the best witness. The more intense the comparative preparation of international instruments, the better the outcome.

C. Is Global Harmonization Still Utopia?

For some, global harmonization of law is no aim, but a nightmare. However, for international sales transactions the CISG already brings us close to global harmonization of that part of the law. Those concerned with legal problems of transborder sales in reality–attorneys, judges, arbitrators–do not appear to reject this development, just the contrary.[154] In specific fields such as

154. It has now been documented by the many commentaries, textbooks, articles, etc. on the CISG written by practitioners, that, while in the beginning of the sales unification and even for a certain period after the CISG came into force, legal scholars and theoreticians almost exclusively dominated the discussion. *See, e.g.*, COMMENTARY ON THE INTERNATIONAL SALES LAW. THE 1980 VIENNA SALES CONVENTION, *supra* note 28; the first edition of KOMMENTAR ZUM EINHEITLICHEN UN-KAUFRECHT–CISG (von Caemmerer & Schlechtriem eds, 1990) [now Schlechtriem & Schwenzer eds.] to which only very few practitioners contributed). Only German examples of comprehensive works exclusively written by practitioners are for instance: Wilhelm Albrecht Achilles, *Kommentar zum UN-Kaufrechtsübereinkommen (CISG), in* GEMEINSCHAFTSKOMMENTAR ZUM HANDELSGESETZBUCH MIT UN-KAUFRECHT (Ensthaler ed., 7th ed. 2007); BURGHARD PILTZ, INTERNATIONALES KAUFRECHT. DAS UN-KAUFRECHT IN PRAXISORIENTIERTER DARSTELLUNG (2d ed. 2008); URS VERWEYEN, VICTOR FOERSTER, & OLIVERTOUFAR, HANDBUCH DES INTERNATIONALEN WARENKAUFS. UN-KAUFRECHT (CISG) (2d ed. 2008);

international sales the Utopia of a global law that Rabel envisioned evidently can be realized to a large extent.

WOLFGANG WITZ, HANNS-CHRISTIAN SALGER, & MANUEL LORENZ, INTERNATIONAL EINHEITLICHES KAUFRECHT (2000).

LEGAL THEORY AND THE VARIETY OF LEGAL CULTURES

Sheldon Leader*

This essay begins with a consideration of two anxieties about courts that are common to the civil and common law traditions: a worry about illegitimate judicial law making, and a worry about judicial bias. It will then move to the contribution legal theories might make in dealing with these shared anxieties, with a focus on a position that draws on the two largest contestants: natural law and legal positivism. It will end with an indication of the further distance that theory needs to take us before these worries about the judiciary can be effectively tackled.

I. THE TWO ANXIETIES

The civil and common law systems both raise a question that is well known. How is it possible to combine the acknowledged fact that courts often make fresh law with the belief that the legislature is the site for law making with which democracies are most comfortable? Courts create new law as frequently as they deliver answers to questions which codes, statute and/or previous judicial interpretations of a body of norms leave open. How can the democratic suspicion of this law making capacity be given its proper place while acknowledging the undeniable fact of judicial

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creativity that takes place every time a need to interpret the law is placed before the court?

This dilemma accompanies the other one indicated at the beginning: how can one identify and cope with judicial bias? The latter is more of a practical than a fundamental concern when we are dealing with straightforward corruption of the judicial office. But it becomes a more complex and elusive defect when we try to track down what can be called unintentional bias. Here we need to tease apart legitimate moral and political convictions that judges must bring to bear on many open questions of law from those moral and political beliefs that, if allowed to sway judgement, we condemn as an abuse. The hunt for judicial bias is, in its easier version, a hunt for bad faith: watching out for the judge who hides his or her moral and political objectives beneath a set of principles that appear to be neutral. The more troublesome situation, however, arises when judges are of good faith. The latter believe in all honesty that they are deploying a principle impartially as they reason towards a result, but an observer can spot the fact that despite good intentions the decision is deploying a principle that should not be brought to bear without, at the very least, being voted on by the people at large.[1]

II. CURES

A. Positivism

One popular way of guiding people through these dilemmas is proposed by legal positivism. This takes the view that moral and political impartiality within a legal system is achieved via relying on value free sources of law. That is, if we have a stable and shareable way of seeing what the existing law is, whatever else separates us in moral and political belief, then this terrain can serve as a benchmark for seeing when judges have overstepped their limits by being unduly creative, and we can then also see when bias–albeit unintentional–has crept into what they are doing. What the existing law says at present, says the positivist, must be rigorously separated from considerations of what the law ought to be in the future.

Given the anxieties that we are focused on here, it is useful to flag two variants of positivism that are relevant. One can be called a two-stage model. According to this, a properly functioning legal

1. Sheldon Leader, *Impartiality, Bias, and the Judiciary, in* READING DWORKIN CRITICALLY 241-268 (Alan Hunt ed. 1992).

system contains rules and principles giving guidance to judges enabling them to identify the existing law. They must attend to this guidance, without bringing to bear any view about what they want law to be in the future. That is a second stage activity, which must be rigorously separated from the first. If a judge allows his forward looking preferences about what future law should look like to color his perception of what the existing law says, then he is doing a particular sort of damage: he is allowing his preferences to be smuggled into what looks on the surface like a *description* of the present law. The losing party is then told that he has broken the law as it is, when in reality, says the positivist, he has broken the law that the judge would like to put in place–well after the action for which the defendant is brought before the court. The loser is, in short, being retroactively punished.

The work of HLA Hart tries to show us when this abuse happens.[2] A rule of recognition, he argues, exists in all legal systems worthy of the name. This rule reports the converging views of legal officials about where existing law is to be found: about how certain norms can be picked out from the forest of maxims, customs, and convictions we live by in society. That which is identified in this way can be stably recognised as existing law–a candidate for application in a fresh case. If it turns out that the candidature fails–that a new case is not clearly or satisfactorily covered by existing law–then the judge is, Hart argues, entitled to proceed to the next stage of adding to the body of law with a fresh decision.

We are not told by this variety of positivism what the proper scope for judicial creativity is at that next stage. Hart confines himself to the task of avoiding mystification: barring the judge from delivering a solution to what he pretends, or honestly but mistakenly believes, to be the existing law when he is actually shaping the law in the way he wants it to develop in the future. This positivist tries to offer a solution for the two anxieties with tools that yield clarity. Once we are clear about the stage at which the judge is applying existing law and the stage at which he is making fresh law then at least we are able to engage, says the positivist, in a useful debate about the proper dimensions of the judge's adventures at the second stage. Without this protocol in hand, the positivist insists, we will not be able to reach that debate because the judge will not be able to see, at any point in time, when she has identified existing law and when she is unconsciously drawing on her vision of the future.

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2. HERBERT LIONEL ADOLPHUS HART, CONCEPT OF LAW (2d ed. 1994).

A second variant of legal positivism goes further, and does so in a way that is relevant for present purposes. According to this species, the law enacted, particularly in the form of a code, is 'complete.' This does not mean that the code is complete in the sense that it already contains all answers to the questions that it may be used to answer: it is not a claim that the enacted law is normatively omniscient, containing already all answers to any possible questions put to it. It is instead a different thesis: that the enacted code already contains the answers to all open questions of law *appropriate for courts* to use as they apply the instrument. If the answer is not to be found, and a solution is nevertheless needed, then legislative amendment of enacted law is appropriate, not a change in the law introduced by judge.

This brand of legal positivism is therefore much more prescriptive about the role of courts than is the first. Judges must confine themselves to looking for existing law to apply to fresh cases, and if the code or statute does not contain the answers, then for judicial purposes the matter is finished. The code commands him or her to deliver a solution that reflects the fact that the plaintiff does not have the law on her side, and hence that the defendant cannot be made to suffer on the basis of a solution that the judge thinks would be the right one to offer. If full justice is not achieved in such a case, because people like the defendant should, for moral reasons, be held accountable for what they did, then we are told that the solution is to be delivered at another time and in another place: where the will of the people is registered.[3] Future defendants of this type can then be caught by fresh law, and if the people will a retroactive application of law to the defendant, making him guilty now for what he was not liable for back when he did what he did, then Hart tells us that we are at least remaining clear that this is what is happening.

B. Natural Law

Natural law proposes a quite distinct cure for the two anxieties we are focusing on. However, it is important to start by noticing that the natural lawyer's position takes as its point of departure a belief that is actually shared by positivists. That is, natural lawyers start with a conviction that we must rigorously distinguish existing law from the law to be shaped by man in the future. Natural lawyers do this, as do the positivists, in order to prevent

3. For a recent statement of this view, extending beyond codes to the interpretation of constitutions, *see* JEREMY WALDRON, LAW AND DISAGREEMENT (2001) *passim*.

people from being punished by rules that pretend to be existing law, but falsely so. Here, however, the means used to reach this objective are radically different. The existing law, says the natural lawyer, is at certain crucial points quite separate from anything human beings can enact. It is binding law, but is so because of the force of the values that all valid legal systems must embody, failing which they do not qualify as legal systems.[4]

The difference between these two orientations–as bulwarks against undue judicial creativity and against judicial bias–is that the positivist will allow the judge to rely on a moral, political, or economic principle that might be highly divisive within the polity–and to do so under the mantle of applying the existing law–only if that principle has been imported into the legal system by a past legal event: constitutional enactment, legislation, or previous judicial decision. If he cannot do that, then he will be changing the law as a judge–which the first but not the second species of positivist will allow. The natural lawyer, by contrast, waits on no such past enactment of positive law: a judge might bring to bear a moral principle that is strongly controversial within a particular polity, but if he can show this principle to flow from natural morality rather than a contingently existing positive moral code, he will not be altering but rather giving effect to existing law.

C. An Intermediate Theory

Both positivism and natural law carry their own frustrations when trying to work with them in order to respond to our two anxieties about courts. A general treatment of those shortcomings is not relevant here. It is, however, possible to draw on both of these traditions, and via this synthesis to find a different way of responding to the two concerns. The first point to notice in building an alternative strategy is that it is necessary to jettison the positivist injunction to the judge to confine herself to a source that will itself provide the appropriate values that apply in a given case. It is possible to rely on sources, but it is an illusion to think that these stand in front of the judge ready for inspection, independent of her views about what the law should be. The reason is that what *counts* as a source of law is itself the product of deploying moral values. For example, the judge might accept the injunction to 'follow precedent' in a common law system, but this injunction does not tell him whether to opt for recent developments in

4. For a secular example of this position, *see* LON FULLER, THE MORALITY OF LAW (rev. ed. 1969).

collateral areas of the law, or to give priority to the direct line of cases that deal with the subject matter at hand. Doing the latter might yield one result in a case, while doing the former might lead to the opposite result.[5] In the civil law tradition, deciding what the Code 'says' is a product of first deciding on the weight to give to e.g. the enactor's intentions, developments in later social conditions, etc.

We also need to revisit the claim that a piece of enacted law can be complete. If this means that the judge is not to draw on values lying outside of those that have already been enacted, then again this does not look adequate. It is a variant of the positivist mistake about sources. The completeness thesis claims that a divisive moral, political, or economic principle may well be part of the existing law, but only if they are first enacted into the system by an authoritative step taken by the legislature, in the form of, say, a code. That simply reproduces the view that what counts as part of the code can be identified in a value free way. If it is true that there is no way of construing a source, such as legal precedent without deciding, in the light of moral or political principle, what scope and weight to give to different branches of precedent, then the assignment of that scope and weight must come from values that lie outside of any given set of precedents. The same point applies to a code. A code cannot generate from within itself the values that will guide those interpreting it when they must decide what weight to give to each of its features. If it tries to do this–by giving a schedule of answers to all questions about its proper mode of interpretation–there must be a prior commitment of the interpreter to accept this protocol as binding: that is itself a commitment that must come from outside of the code itself.

This is not just a dry point of conceptual housekeeping. It can color judicial attitudes of deference to any given code. Why should any particular judge accept the injunction to stay within the values already announced in the code, and to rely on legislative amendment of that code if she is not happy with what she finds? Why should she not take it on herself to supply what she is convinced is missing, and would make the code better? Courts are often willing and indeed should override the letter *and* spirit of any single piece of enacted law in order to achieve a larger coherence, as well as a result that corresponds to the best normative position that the judiciary can in good faith deploy.

This last point is central to one of the better-known theorists occupying this intermediate position, Ronald Dworkin.

5. For an example, *see*, R v Lemon (1979) 1 All ER 898.

Dworkin's view is particularly worth exploring–both for its merits and its shortcomings–as helping to see what common and civil law traditions can do to cope with the two anxieties about judicial power.

III. DWORKIN'S POSITION

When a judge reaches an answer to open question of law, he or she is properly confined to 'finding' appropriate answers within the existing law, argues Dworkin. But this not same sense of 'finding' an answer as is deployed by the natural lawyer, nor by the species of positivist who believes that the enacted law is complete in the sense identified above.

Some initial definitions will help here in order to pin down what is meant by judges finding rather than creating law:

Settled law: This is a collection of valid statements of law, as in the report that a given system provides 1, protection against unwarranted use of trade secrets; 2, against publication of an author's work without his or her consent; 3, against circulation of photographic images of someone; and finally 4, that it provides a general right to privacy.[6] These examples divide into two types: explicit and implicit propositions. Imagine that the explicit propositions are 1 through 3, but not 4.

The first three statements are true because of enactment by an authoritative source: judges in previous cases, legislation, or an enacted code. The statement that there is a right to privacy within the settled law, by way of contrast, is not true because of any specific enactment. It is instead a right that has emerged over time. It stands to the explicitly enacted rights as a genus stands in relation to distinct species. The latter have enough in common to allow them to be grouped together into a generic class. The genus contains elements that enable us to understand each of the separate species more comprehensively and effectively than is possible if each species is grasped separately. Thus, Warren and Brandeis offered their famous demonstration that the right to privacy formed part of the existing law by showing that it emerged from the more narrowly defined range of explicit rights in the set made up *inter alia* of rights 1 through 3. To posit the existence of the right to privacy allowed them to understand and to justify a range of explicit rights, even if it is not formally announced by the courts or legislature or constitution.

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6. This is a well known set of examples drawn from the analysis of the right to privacy by Warren and Brandeis. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

Implicit propositions of law are built up out of earlier legal events, which enact the more narrowly defined norms in the system. These implicit elements allow us to link a range of differently grounded answers to past questions of law and also to provide a generic category or principle under which a fresh case can be subsumed.[7]

Finding and making law by judges: Judges can make law in the course of their decisions in one of two ways: they might add to the explicit elements in the system, adding, for example, an extension or a narrowing to the coverage or a given rule. This happens frequently and routinely. Or, they might add to the body of implicit propositions within the system. This is very rare, but can and does happen.

Judges can find law in two corresponding senses: they might find an existing explicit norm; or they might 'find' an implicit norm. In doing the latter a judge may conclude that while there is no explicit law governing a new situation, there *is* implicit law governing it because the generic principles that make most sense of the previous explicit norms lead coherently to this situation being covered as well. It should be noted that when a judge finds the law in this second sense he or she is constructing a rationale for previous explicit norms *post hoc*: that is, a fresh and more comprehensive principle is substituted for the one which in fact grounded the particular, more narrowly grounded norm.

A. Dworkin's Argument

A way of rendering Dworkin's position is to say that judges may add to the body of explicit law, but in doing so they should stay faithful to the body of implicit law. Within this constraint, the judge is entitled to extend the coverage of implicit law on grounds of coherence. If, for example, he or she can unify the solutions from past enacted law under the mantle of a right to privacy, then even if not expressed that way before and even if earlier law was actually grounded on different principles, the law is properly extended in this way.

How do a judge's moral convictions fit into this picture? If the building up of an implicit part of the law was simply a matter of reporting what explicit law says, and then of reporting the areas in

7. Another example, drawn from civil law, could be the emergence or liability for unjust enrichment, implicitly drawn from decisions on a provision in the French civil code requiring the restoring of money 'paid when no debt was owing.'

which distinct branches of that law overlap such that the new implicit principle is a notional lowest common denominator, then there is no room for moral judgement. It is a matter of description, however complex that description might be. But this misconstrues the demands of this approach. In constructing a plausible implicit part of the law, there are various ways in which the construction can happen. If we go back to the right to privacy, the area of overlap between the explicit parts of the law identified by Warren and Brandeis converges on the proposition that one has, as they put it, a "right to be left alone." But there is a good deal more that has to be decided about the nature of the entitlement to be left alone before it can function as an implicit part of the system. We have to know if it is a right that can be overridden relatively easily by, say, an employer who wants to tap telephones because he wants to know if personnel have critical attitudes toward management that could make a difference to corporate performance, or if he can only legitimately tap those telephones if he reasonably suspects some graver harm, such as employee frauds. In other words, decisions have to be made about the character of the right: about its relative weight against competing rights; about the character of the interests it is best suited to protect; about its availability against interference by private as well as public bodies; etc.

These characterising decisions are themselves moral and political. They are not dictated by the character of separate parts of explicit law, and cannot be extracted by seeing where those separate simply overlap. Moral values have to be brought to bear. They are choices that cannot flatly contradict the values that explicit law is grounded on, but they can fill out those values in ways that are unexpected by the authors of past legislation, constitutions, or legal decisions. They must, as Dworkin puts it, 'fit.'[8]

This intermediate position, and the form it takes in Dworkin's theory, would easily find himself in the shoes of the civilian jurist as depicted by Julio Cueto-Rua, "...every case should be considered as an example of a class; the class, species of genus; the genus as a species of another genus of a hither degree of generality; and so on until very general and basic concepts are finally defined."[9]

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8. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986) *passim*.

9. Julio C. Cueto-Rua, *The Future of the Civil Law*, 37 LA. L. REV. 646, 647 (1997).

B. Critique

How well has intermediate theoretical position responded to the two anxieties that our systems share: the concern to place limits on judicial law making, and the concern to achieve moral and political impartiality? Insofar as Civil Law holds to belief in the completeness of Codes in the form examined–a preference for legislative amendment over judicial development of the law–then this is a constraint that Dworkin would be likely to reject. So, it seems, would many civilians. But how far are they willing to go in Dworkin's direction? The ideal judge for Dworkin legitimately reaches across all elements of enacted law, all codes and all case law, to achieve harmony between them. The guardian of the keystone principles, on this approach, should be the judiciary. This seems to complement Cueto-Rua's argument that the civilian approach leads the system to keep pushing for coherence across domains of law "...until very general and basic concepts are finally defined." Such coherence is not, and cannot be, in the ultimate control of legislatures.

Such a conclusion might raise difficulties about democracy in a particular way. Concerns about the undemocratic nature of judicial power arise from two related directions. One has to do with the problem of majority rule and minority rights, asking how far it is legitimate to frustrate the former in order to protect the latter. Linked to this, however, is another less well publicised problem that is relevant to the issues dealt with in this essay: what weight is to be given to an understanding of law as an expression of will and law as an instantiation of principle?

To rely on the *will* of the people when interpreting the law is to accept that 'this is the law because they want it this way and the fact that they have expressed their preference deserves respect.' To rely on principle is to reach for results that are due respect not because the fit with the wishes of a particular body, but because good convincing reasons, independent of those wishes, can be given to show that this solution is defensible. Dworkin is inclined to allow principle to have a dominant role in the polity.

That dominant role makes sense when we are dealing with single fundamental values, and asking about their coherent extension. It is more of a problem when we have to assign priorities to–or otherwise combine–competing values, all *prima facie* fundamental and each backed with competing fundamental rights. Here, the relevant considerations unfold in more complex ways. Courts are best placed to deal with these competing rights when the exercise of one will have a very damaging effect on one

and will make a marginal impact on the other. For example, exercising ones right to free speech under an opponent's bedroom window seems intuitively to call for an adjustment of the former in order to do less damage to the latter.

However, there are some situations where both of the right holders can have their backs to the wall: one or the other must win, leaving the loser with little room for an alternative way of exercising their right. The winner takes all. The parties find themselves in this situation if, for example, a small business is in financial crisis, and has to work on Sundays: can it legitimately require its employees to work those days when their church explicitly requires Sunday attendance? Can an employee be put in this position when he or she does not have a realistic prospect of finding an alternative job? If someone's only prospect of proving her partner's violence is to adduce private correspondence in court, should the right to privacy give way to the right to bodily safety? If a doctor has to choose between killing one of two Siamese twins or letting both die, how should he proceed?

Here it may be that the clash of values is close enough that we need a decision that is respected just because it has been rendered in good faith, and not because we happen to be convinced by the strength of the principles adduced in support of it. It may be too close a call for the latter approach. Of course, these clashes may first surface in front of a court, and the court must do its best to decide given the urgency of the situation. But it would be better if the priorities between basic rights here could be guided at least by principles given to us by other law making organs: organs such as legislatures where law as an expression of will finds a greater place. *Ultimate* clashes of value, such as here, should better be proactively dealt with–wherever realistic to do so–by legislatures.

IV. CONCLUSION

The civil and common law systems share worries about judicial power and seem to entertain similar solutions to those worries. Each is legitimately frustrated by the proposals that natural law or legal positivism offer. Both can potentially make use of the intermediate theory sketched here. Civilian and common lawyers, in their daily work, put a challenge to that theory: they force it to answer the large questions about the division of powers between judiciary and legislature via the more narrow and detailed questions that arise when basic rights compete with one another in concrete cases. The common need to get these

answers right overshadows anything that might separate the two systems.

THE REFORM OF LEGAL EDUCATION IN CHINA AND JAPAN: SHIFTING FROM THE CONTINENTAL TO THE AMERICAN MODEL

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There are several common features of the legal profession and legal education in China and Japan.[1] Both China and Japan have traditionally focused on teaching legal knowledge to undergraduate and graduate students rather than providing professional skills education; however, since the end of the twentieth century, legal education in the two countries started to fundamentally change both institutionally and pedagogically.[2] The first part of this paper will describe the basic characteristics of legal education embraced in China and Japan as traditionally continental countries. The second part will introduce the trend of reforms of legal education in the two countries since the end of last century. In part three and four we will make some comparisons on the approaches to reforms of legal education in the two countries. The fifth part will depict the endeavors of the pedagogies for nurturing lawyers provided in new law schools or Jurist Programs in the two countries. The last

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1. For additional information regarding legal education in China and Japan, *see* RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA (Alford ed. 2007); Yooncheol Choi, *The Reforms of Legal Education and Bar Examination in South Korea*, 6 THE JURIST (Renmin University of China Law School 2009); Matthew S. Erie, *Legal Education Reform in China Through U.S.-Inspired Transplants*, 59 J. LEGAL EDUC. 60 (2009); Huang Jin *The Structure Of Legal Education In China*, *available at* http://www.aals.org/2000international/english/china.htm (last visited July 10, 2010); Suzuki Ken, *At Crossroad for Japanese Law School System*, 6 THE JURIST (Renmin University of China Law School 2009); Judith A. Mcmorrow, *Introduction to U.S. Legal Education and Preparation for the Practice of Law*, 6 THE JURIST (Renmin University of China Law School 2009); Annelise Riles & Takashi Uchida, *Reforming Knowledge? A Socio-Legal Critique of the Legal Education Reforms in Japan*, 1 DREXEL L. REV. 3 (2009); Takahiro Saito, *The Tragedy of Japanese Legal Education: Japanese 'American' Law Schools*, 24 WIS. INT'L L.J. 197 (2006); Shiho Seido Kaikaku Shigikai (Justice System Reform Council), 2001 Recommendations of the Justice System Reform Council –For a Justice System to Support Japan in the 21st Century, official translation *available at* http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html (last visited July 10, 2010); Wang Weiguo *A Brief Introduction To The Legal Education In China*, *available at* http://www.aals.org/2000international/english/chinaintro.htm (last visited July 10, 2010); Ding Xiangshun, *The Reform of Legal Education in East Asia from the Perspective of Comparison*, 6 THE JURIST (Renmin University of China Law School 2009); and Hou Xinyi, *Modern Legal Education in China*, 31 OKLA. CITY U. L. REV. 293 (2006).

2. *See* Setsuo Miyazawa et al., *The Reform of Legal Education in East Asia*. 4 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 333 (2008).

part will concentrate on the opportunities and challenges that the legal educators are facing after drawing the key features of different approaches in terms of education reform.

I. CONTEXT AND GOAL OF LEGAL EDUCATION IN CHINA AND JAPAN

China and Japan trace their legal systems to the influence of western continental legal systems, including Germany and France. The development of codes in China and Japan and the growth of their economies created a demand for new legal talent. The discussion below will highlight the features of legal education in the two countries and provide the context for further discussion.

A. China

With the end of the Cultural Revolution in 1976, China began to reconstruct her legal system and the expansion of legal education has been rapid and dramatic. There were only two functioning law institutions at the end of the Cultural Revolution in 1977. [3] There are over 620 today, and there has been a corresponding rapid increase in the number of law students in the past 30 years. By the end of 2007, there were 290,000 full-time undergraduate students, 44,000 full-time and part-time master level postgraduate students, and 7,000 full-time and part-time doctoral students registered in the above mentioned institutions.[4] Although coexisting with diploma programs, correspondence courses, television education programs, etc, the mainstream in China's legal education system is the four-year undergraduate program (LL.B.) offered by law institutions affiliated with public universities, which admit high school graduates through a National Admission Test. At the postgraduate level, there are LL.M. and doctorate programs,

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3. *See* ZENG XIANYI & ZHANG WENXIAN, ZHONG GUO FA XUE ZHUAN YE JIAO YU JIAO XUE GAI GE YU FA ZHAN ZHAN LUE YAN JIU 65 (High Education Press 2002) (Zeng Xianyi is Dean Emeritus of Renmin University School of Law and Chairman of the China Legal Education Society. Professor Zhang Wenxian is Deputy Chairman of the China Legal Education Society. Both are prominent law professors who are playing an important role in the development of legal education in China.).

4. *See* Zeng Xianyi, *FaxueJjia yu Sanshinian Hu huang Chen jiu:Rencai Zhanlue Tuidong Fazhi Zhongguo*, CHINA COMMENT 2008 at 63 (Special Edition, Democratic Politics 2008).

which are academically oriented and mainly aimed at nurturing future scholars. In 1996, an additional postgraduate was created: the Juris Master (J.M.), which was originally modeled on the American J.D. program.[5]

The target of legal education in the four-year program is to teach legal knowledge and provide a general education for students rather than train future lawyers. It is a general arts education program and in principle a theoretical study of the law, lacking practical training.[6] Law students are required to fulfill at least 16 core legal courses and non-law courses such as foreign languages, physical education, even political theories like Marxism and Deng Xiaoping theories.[7] Most graduates serve as public employees, businessmen or women, etc, that may or may not relate directly to the practice of law. LL.M. and doctoral programs are originally academic-oriented programs and divided into separate sub disciplines (majors) such as jurisprudence, legal history, civil law, criminal law, procedure law, business law, international law, military law, environmental and natural resources protection law; however, most graduates have careers outside academic circles.

There is no institutional connection between the formal legal education in higher education and the pathway to taking the bar examinations. Historically, there have been few professional requirements for Chinese judges, prosecutors, and lawyers. It was not until 1986 that the national lawyer's professional qualification examination was implemented. Even for judges and prosecutors between the years 1986 and 1995, there were still no qualifying exams. In 1995, the Judges Law and Procurators Law were changed to require the internal staff of the courts and prosecutor offices to take a national qualifying examination. In 2001, the Judges Law, Procurators Law and Lawyers Law were amended to add the provision that judges and prosecutors also needed to take a unified qualification examination. The unified national judicial examination has been administered annually since 2002. The only

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5. *See* Setsuo Miyazawa et al., *supra* note 2, at 335.

6. *Id.* at 336.

7. The 16 core courses are jurisprudence, Chinese constitutional law, administrative law and procedure, Chinese legal history, civil law, civil procedure, criminal law, criminal procedure, commercial law, intellectual property, business law, public international law, private international law, international business law, labor law and social security, and environment law and the protection of resources.

educational requirements to qualify to sit for the unified national judicial examination are that one holds an undergraduate degree or, in some economically deprived regions, completes a shorter, three-year college education. There are no legal educational requirements, so about one half of those who have passed the examination do not have any formal legal education.[8]

B. Japan

In Japan, modern legal education was established during the 1870s in the period of Meiji and reformed after World War II. There are nearly 100 undergraduate law faculties, with approximately 200,000 students.[9] Since their introduction in the late nineteenth century, though, these undergraduate law faculties have never been considered as part of the educational process for future lawyers.[10] Law faculties have functioned as general education programs to produce a workforce for business, government, and other walks of life. An undergraduate law degree (LL.B.) is not required for one to take the national bar examination, which was established in 1948. As in China, undergraduate legal education in Japan is a general arts education, and therefore, social science courses are mandatory. Compared to China, however, postgraduate legal education is less representative and focuses on nurturing scholars for law faculties.

To become a judge, public prosecutor, or practicing attorney, one must usually pass the bar examination, and complete the training at the Legal Training and Research Institute for one and a half years (two years for those who entered the Institute prior to 1998). Before 2006, the old system of legal education and training of lawyers in Japan consisted only of taking the national bar exam and participating in an apprenticeship administered by the Supreme Court. Under this system of selection of lawyers, anyone is

8. There are no official statistics released. That information, nevertheless, has been disclosed at meetings where the author attended in his capacity of member of the research group for the national bar examination set by the Ministry of Justice. Professor Huai Xiaofeng, president of the national bar examination, disclosed that in 2004 the pass rate for applicants without formal legal education was 2% higher than the one for those applicants with formal legal education.

9. *See* Setsuo Miyazawa et al., *supra* note 2, at 340.

10. *Id.*

qualified to sit for the examination, but those who have completed the study of liberal arts required for obtaining the bachelor's degree are exempt from the first phase of the examination, which is regarded as a qualification test.[11] Because completion of formal legal education is not a requirement, a large number of people take the national bar examination and most of them also attend crammer schools where they concentrate on exam skills education. Therefore, although most of those who pass the bar examination are actually graduates of undergraduate (or postgraduate) law faculties, their legal education is provided to a significant degree by crammer schools.[12] This has led to the double schools phenomenon (a trend of going to two schools, the university and the preparatory school) that was criticized to be a waste of educational resources and as merely acquiring the techniques needed for passing the examination "rather than a sound education by legal educators in Japan."[13]

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11. The bar examination consists of two examinations (i.e., first and second examinations).

The first examination is conducted to determine whether the examinee has a sufficient level of cultural knowledge and academic skills to take the second examination. Those applicants that have completed the study of liberal arts required for obtaining the bachelor degree in university are exempted from this first examination.

The second examination is comprised of a written (Q&As and essays) and an oral test. The Q&As are on the Constitution of Japan, the Civil Code, and the Penal Code. The essays and the oral test are on the Constitution of Japan, the Civil Code, the Penal Code, the Commercial Law, an optional subject on procedural law, and an optional subject on other laws. Since 2000, the optional subjects have been abolished, and the essays are on the six subjects of the Constitution of Japan, the Civil Code, the Penal Code, the Commercial Law, the Code of Civil Procedure and the Code of Criminal Procedure; while the oral test is on five subjects, excluding Commercial Law. *See* http://www.kantei.go.jp/foreign/judiciary/0620system.html (last visited July 10, 2010).

12. *See* Setsuo Miyazawa et al., *supra* note 2, at 341.

13. *See* Peter A. Joy et al., *Building Clinical Legal Education Programs in a Country without a Tradition of Graduate Professional Legal Education: Japan Educational Reform as a Case Study* 13 CLINICAL L. REV. 417 (2006).

II. LEGAL EDUCATIONAL REFORMS IN CHINA AND JAPAN SINCE 1990S

Since the end of the twentieth century, legal education in China and Japan started to experience reform both institutionally and pedagogically. A common feature of those changes was the introduction of postgraduate professional law schools to existing undergraduate legal education or replacing undergraduate legal education with postgraduate professional law schools.[14]

In China, legal educational reform started from the middle of the 1990s, when the educational authority initiated the J.M., which is similar to the J.D. from American law schools. This program is offered to students without requiring them to major in law during their undergraduate studies. From 1996 to 2009, the number of law schools approved to hold a J.M. program increased from eight to 115, and the number of enrolled students increased from 425 to 40,000. Since its introduction, a total of 50,000 students have received their J.M. degrees.[15]

In Japan, in 2001 and upon recommendation of the government, the Justice System Reform Council (JSRC)[16] was created. The JSRC called for a complete overhaul of legal education in Japan and the creation of new "professional" law schools that would "bridge theoretical education and practical education" and provide students with the opportunity to acquire the specialized legal knowledge, lawyer skills, and professional values "necessary for solving actual legal problems." The JSRC defined law schools as "professional schools providing education specially for the training for the legal profession."[17] Amongst the goals of JSRC are: (a) to create a three-year program; (b) to ensure

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14. *See* Setsuo Miyazawa et al., *supra* note 2, at 333.

15. *See* Zeng Xianyi, *Zhong Guo Fa Lv Shuo Shi Zhuan Ye Xue Wei Jiao Yu de Chuang Ban Yu Fa Zhan*, 3 JURIST REVIEW 113 (Renmin University Law School 2007).

16. The JSRC is a panel body created by the government under the cabinet from July, 1999 to June, 2001, for discussing and clarifying the issues and direction of the judicial reform in Japan. On June 12, 2001, the JSRC presented its recommendations for a comprehensive reform of the justice system to the cabinet and the reform was implemented by the Japanese government.

17. *See* Recommendations of the Justice System Reform Council-For a Justice System to Support Japan in the 21st Century, *available at* http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html (last visited July 10, 2010).

diversity by admitting students from a broad range of academic disciplines and students with real-world experience; (c) to enhance critical and analytical skills, creativity, and skill in advocacy through small classes (less than 50 students), with extensive use of interactive discussion (rather than one-way lecture); (d) to bridge theory and practice, partly by hiring a substantial number of adjunct faculty members; (e) to achieve quality control by chartering standards, periodical third-party accreditation after chartering, and other measures of accountability; (f) to practice strict grading and evaluation of students; and (g) to provide a "thorough education such that a significant ratio of successful graduates (e.g., 70 to 80%) can pass the new exam," so that "students can concentrate on their coursework."[18]

As part of the reforms in Japan, 68 new Japanese professional law schools (*Houka Daigakuin*) opened their doors in April 2004, and there were 74 new law schools by April 2008. The annual enrollment of students is over 6000.[19]

With the establishment of new law schools, the new national bar examination (which only admitted graduates of new Japanese law schools) was established in 2006. The current national bar examination and the new Japanese law examination will coexist during the period 2006 to 2011. In 2011, the new national bar examination will completely replace the current one (old bar examination), which means basically only graduates from Japanese law schools will be qualified to sit for the bar examination and to practice law in Japan.

III. WHY MODELED ON AMERICAN LAW SCHOOLS? SOME COMPARISONS ON BACKGROUND AND MOTIVE

Some scholars view the reforms in the two countries as the introduction of elements of the American system of legal education.[20] American-style professional education has had an impact on the reforms of legal education in these two countries; therefore, it is better to make an analysis on why the two countries introduced American legal education elements as the direction of

18. *See* Setsuo Miyazawa et al., *supra* note 2, at 343.
19. *Id.* at 346.
20. *Id.* at 343.

the reforms and how American professional legal education systems affected the new systems in China and Japan.

The motivations and inspirations for initiating the reforms of legal education in the two countries are different. Nevertheless, since the late 1990s, both in China and Japan emerged demands for numerous legal talents with high quality. The knowledge-oriented legal education could not meet the demand for nurturing competitive legal talents in the newly complicated legal services environment.

In China, the authority described the motivations of establishing the J.M. degree in the official approving document, and stated:

> With the development of the socialist market economy and the deepening of reform and opening to the outside world, the legal matters relating to all kinds of economic activities and social development and social stability is getting complicated, specialized and international in terms of scale and level, thus a large number of high quality professionals and managements talents, especially a number of high level legal practical and managerial legal talents who may meet the need of market economy and legal construction, are required in the legislature, judiciary, prosecution and legal service. But the current legal graduate education and the situation of the legal profession can not meet such need as following: first, generally the graduate education is still academic-oriented and far away from the practical requirement; second, the scale of graduate education can not meet the increasing demand in terms of quality and quantity from practical circles.[21]

Since the late 1970s, China has begun to take the policy of reform and opening up, by reconstructing its legal system. In the past 30 years, there has been rapid and continuous economic growth in China. Meanwhile, legal matters have become increasingly complicated leading to a rapid and substantial increase in legal needs and a demand for high-level legal talent. Thus, the

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21. GUAN YU ZAI WO GUO SHE ZHI HE SHI BAN FA LV ZHUAN YE SHUO SHI XUE WEI DE JI DIAN YUAN ZE YI JIAN (Commission of Degree of State Council, May 12, 1994). *See* ZHONGGUO FALV SHUOSHI ZHUANYE XUEWEI JIAOYU DE SHIJIAN YU TANSUO 10 (Huo Xiandan ed. 2001).

need arose for a legal education program at a postgraduate level that could produce a large number of high-level talents to work in practice.[22] But obviously as traditional lecture-oriented courses could not meet the demand, some officials in the Ministry of Justice joined with scholars to submit a report in 1994 proposing to introduce an American-style legal education. Afterwards, a committee jointly with the Ministry of Justice, the Ministry of Education, as well as some prominent scholars was established for the preparation of a new program. Although this new program is modeled on the American J.D. program, it was named Jurist Master because it is equivalent to a master degree in the Chinese degree system. Throughout this process, the Ministry of Justice played an important role in pushing the adoption of a new legal education program and is still involved in the approval and supervision in J.M programs. In China, usually the administration of education, not administration of justice, controls the legal education. The two ministries jointly approving and supervising the J.M. programs shows the determination of bridging education and practice: so that law graduates may meet the demand of legal practice.

Whereas in China reformation originated with the government, in Japan the pressure came from within the business community, especially from Kendanren (Federation of Economic Organizations), which has been the most powerful interest group in postwar Japan. In May 1998, Kendanren proposed to establish postgraduate professional law schools as a measure to increase the number of better-educated lawyers with a broader background.[23] Such proposal was adopted by the then governing Liberal Democracy Party (LDP). LDP's proposed report for comprehensive reform, issued in June 1998, led to the establishment of the Justice System Reform Council (JSRC), under the cabinet on July 27, 1999. The composition of JSRC also indicated the impact and concern from society: seven of the 13 members of JSRC were appointed from outside legal circles. In the recommendation submitted by JSRC on June 12, 1999, JSRC called on a comprehensive reform to meet the demand to access to justice for Japanese citizens. In order to access justice, a greater number of practicing lawyers was required, more than those Japan

22. *See* Setsuo Miyazawa et al., *supra* note 2, at 336.
23. *Id.* at 342.

had to offer at the time. Hence, JSRC prioritized an increase in the number of lawyers, setting a goal to triple the number of new lawyers by 2010 and recommending the establishment of law schools at a postgraduate level by 2004 as a centerpiece of the new system.[24] In the JSRC recommendation, the system of selection of lawyers was criticized because lawyers (including judges and prosecutors) were selected by a single method–the national bar examination administered by the Ministry of Justice. The disconnection between bar examination and legal education in universities implied a waste of social resources, which in turn led to a lower quality of future lawyers.

Since the systems could meet the demand of increasing a large number of lawyers with high quality needed in a transformed society, a new system that was designed to educate a large number of lawyers with high quality legal talents emerged in 2004 in Japan.

Both in China and Japan, increasing the number of high quality lawyers became the motivation and goal behind creating new law schools, which also contributed to the introduction of an American influenced legal education. However, different from the demand of increasing the number of lawyers (addressed by the Economic Organization in Japan), was the discussion in China relating to increasing the number of high quality legal professionals. This discussion in China remained within the legal circles of the country and the introduction of a new legal education system was conducted by the internal documents issued by the Chinese Ministries of Justice and of Education. It is obvious the reform of legal education and the establishment of Japanese law schools emerged within the context of comprehensive reform initiated by the cabinet and stipulated by laws passed by the legislature. The reaction to the demands for creating a new legal education system and the approaches that introduced an American type legal education determined partly the contents and characteristics of the new legal education systems in the two countries.

24. *Id.* at 340.

IV. EXTENT OF SIMILARITIES BETWEEN THE AMERICAN LAW SCHOOLS AND THE J.M. PROGRAMS AND JAPANESE LAW SCHOOLS

Although the designers of the new legal education systems claimed they modeled or took as reference the American-style legal education, the characteristics are quite different from American law school. Therefore, a comparison with American law schools becomes crucial for observing the new legal education systems in the two countries.

The J.M. program allow students from diverse backgrounds at undergraduate level to study law in their postgraduate law schools, which is quite similar to the American system. However, different from the four LSAT subjects in the United States, the scope of subjects for the admission test includes law subjects such as Chinese legal history, constitutional law, civil law, criminal law, etc. The diversification of law students in Japan is implemented by admitting students who major in non-law degrees in undergraduate studies. But quite different from China, and similarly to the United States, Japan's Ministry of Education authorized two organizations to administer aptitude tests for law school applicants. These tests exclude the subjects of law, and law schools are allowed to choose either of them as the standard for admission. Students who achieve a good score on either or both of these tests and obtain a good GPA in their undergraduate studies are admitted to Japanese law schools. In China, many scholars criticized that it does not make sense to test the legal knowledge of those who have not yet studied law, but there are no signs of change to the current way of testing and offering admission.[25]

Unlike the U.S. law schools, the new J.M. program (or new law school system) is based on the old undergraduate-oriented legal education systems in China and Japan. Therefore, the new programs have to deal with the graduates who have already obtained LL.B. degrees.

In China, J.M. programs recruit two types of students: full-time students and part-time students from 1995 to 2009. Only those who were non-law majors could be qualified to apply as full-time students and sit for the admission examination. But for those who

25. Wang Jian, *Zhongguo Falv Shuoshi Jiaoyu de Chuangban Fazhan yu Chengjiu: 1996—2006*, 5 LAW AND SOCIAL DEVELOPMENT 59 (2007); and Fang Liufang, *Falv Shuoshi Jiaoyu Mianlin de Sange Wenti*, 1 THE JOURNAL OF CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW 101 (2007).

have working experiences and apply for the part-time program, even law major undergraduates, are eligible. Nevertheless, since 2009, the Education Administration decided to extend the scale of J.M. programs and even those who major in law as undergraduates are permitted to apply for full-time J.M. programs. This raised a new problem of how to teach students who have different backgrounds and various levels of legal knowledge. In Japan, the length of studying terms differed based on the backgrounds of students: two-year programs for law major students and three-year programs for non-law major students as undergraduates. But even graduates from law schools are required to pass a legal ability examination to test whether the ability of the examinee on legal knowledge is eligible for the two-year program. Students who fail the exam have to attend the three-year program in law school although they may have completed their undergraduate legal education.

To reach the goal of educating highly qualified lawyers or legal talents, the new J.M. program or new law schools have to find qualified faculty with real world experience practicing law. But different from American law faculty with practical experiences, Japanese and Chinese law professors rarely have practical experience outside the classroom. To resolve such a problem, the Japanese legislature passed a law in which judges and prosecutors are dispatched to teach at Japanese law schools for some time when their positions are suspended. However, there are no complete changes in the teaching faculties in Chinese J.M. programs and the old academic-oriented faculty members are still the main teaching body in J.M. programs. Therefore, although some changes in pedagogies emerged, the new J.M. program does not distinguish from the old legal education system in China. However, in Japan, lined up with practical legal education, the government set up many guidelines regulating new law schools. These guidelines include: limitations on class size, and the initiation of new practical curriculum; these regulations have made the new Japanese law schools more independent.

Since 2006, and as part of a systemic comprehensive reform in Japan, the new bar examination–to which only graduates from Japanese law school are allowed to sit–coexists with the old bar examination system. In 2011, and once the old examination that everyone can sit is cancelled, those applicants who have never

graduated from a Japanese law school will have to take a special examination in order to obtain qualification to sit at the new (predictably limited) bar examination. In China no changes connected with the qualification for the bar examination have been produced by the creation of the J.M. program. The system for obtaining legal professional qualification is still separated from legal education. There are no limitations for applicants on whether they have finished formal legal education, for sitting for the unified professional examination. There are no institutional connections between legal education (even in the J.M. program) and bar examination in China, and hence this is different from the new Japanese law schools and American law schools.

From the comparison of institutional changes between Japanese law schools and Chinese J.M. programs, we may conclude that the system of Japanese law schools is much closer to the American legal education than the Chinese J.M. program. The J.M. program does not bring new elements into the Chinese legal education system except the diversity of backgrounds for J.M. students.

V. PEDAGOGICAL CHANGES FOLLOWING THE REFORMS OF LEGAL EDUCATION IN THE TWO COUNTRIES.

China and Japan share many similarities in legal education. The goal of legal education was not traditionally to nurture legal professionals. Most applicants who successfully pass the bar examination are law graduates and the demands from legal circles also require law institutes to conduct skill education, combining theory and practice.

Although the approaches on the legal education reforms in China and Japan are different, the goals for the new programs are similar. Both seek to foster highly specialized professionals with social responsibility, which means building new teaching methodologies. Since the beginning of the twenty-first century, both countries started to take some measures to teach law students legal skills rather than doctrinal education. The main methodologies of teaching lawyering skills in China and Japan are emerging in J.M. programs and Japanese law schools.

A. Simulation and Moot Court Programs

In both China and Japan, the simulation teaching method is used widely in lecture and seminar classes. To encourage students to master lawyering skills, law schools in China usually provide context to simulate the true case and use a moot courtroom for simulation training. Some law schools organize moot court competitions as a student activity rather than a credit course. Sponsored by grants, some top law schools have even organized national moot court competitions, such as the Jessup International Law Moot Court Competition organized by Renmin University School of Law.

In Japan, simulation combined with case method and seminars has been adopted in the traditional law faculties gradually. Since 2004, they are widely used in the new Japanese law schools.[26]

B. Internship and Externship

Externships are required for law students with a high GPA in China. Students are typically assigned to institutions relating to law enforcement or judicial organs, such as courts and offices of prosecutors at all levels, in addition to law firms as well as governmental agencies to observe legal practices.

However, because of the rapid increase in the number of law schools, some schools cannot provide opportunities and platforms for externships for all law students. Furthermore, due to the lack of supervision by experienced faculty members or lawyers, the effect of an externship depends on law schools and the supervisors, and hence, does not play an important role in legal education.

C. Clinical Legal Education

Clinical legal education was introduced into China and Japan in the beginning of the twenty-first century. Educators in the two counties are starting to be convinced that clinical legal education can help train law students on the lawyering skills and values necessary for the delivery of high-quality legal services into the new century.

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26. *See* Peter A. Joy et al., *supra* note 13, at 441.

In September 2000, with the support from the Ford Foundation, clinical legal education programs based on the American model were offered by seven top law schools in China. In addition, as of January of 2009, 87 law schools in China opened clinical legal education courses as selective two or three-credit courses.[27]

In Japan, with the establishment of the new J.D. program, clinical legal education has been transplanted into the new legal education system as an important approach to help Japan transform its legal profession. According to a study of 2006, from the 74 new Japanese law schools, as many as 52 schools claim to offer clinic courses. Though some of these law schools have only externship programs, a majority of the law schools offering clinical courses have adopted a combination of legal clinics, simulation courses, and externships. Among these, there are ten law schools that are known to have established in-house law offices on campus.[28]

VI. FACING THE FUTURE OPPORTUNITIES AND CHALLENGES OF LEGAL EDUCATION IN CHINA AND JAPAN

In China and Japan, the demand for high-level legal talents in the development of a global market economy is the motivation and inspiration for the reforms of legal education and the legal profession. As mentioned above, the legal education systems in these two countries are in a transitional process from the tradition of lecture-oriented to more professional and more skill-oriented education. How to train law students to master lawyering skills and have law students with practical abilities enter into the legal community is becoming critical to complete these goals, for this reason, the J.M. program in the Chinese and the Japanese law schools was introduced as one important step of nurturing better trained lawyers.

Nevertheless, in China, neither the J.M. program nor other programs like undergraduate law programs and LL.M. programs relate to obtaining legal professional qualification, either for the purposes of taking the bar exam or for demonstrating that the

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27. *See* the contents of the official website of the Committee of Chinese Clinical Legal Educators (CCCLE), *available at* www.cliniclaw.cn (last visited July 10, 2010).

28. *See* Peter A. Joy et al., *supra* note 13, at 446.

student acquired lawyering skills. If students intend to take the bar examination, they focus heavily on the doctrinal courses. Therefore, even if law schools provide some lawyering skills education for students, these kind of courses are not considered as important as some basic courses like civil law, procedure laws, etc. which are tested in the national bar examination. In China, there are no mandatory courses of lawyering skills in the curriculum of law schools.

In Japan, due to the great number of approved new law schools and the low pass rate of the national bar examination, students at law schools have to struggle with the examination after graduation as the first step to becoming a lawyer. It is not surprising that students also focus on all examination skills or knowledge that helps them pass the national bar examination.[29]

The critical element of expanding lawyering skills is to convince students that, not just the bar examination, but also skills training is important for becoming a lawyer. Better training will help in their future performance. In my view, the development of lawyering skill education in both China and Japan must come from those who design the bar examination and from the legal educators. For China, the legal educators have to redesign the goal of legal education to give greater importance to training lawyers and should include required courses in practical skills along with those providing doctrinal legal knowledge. The bar examination process must consider whether to grant law graduates only the privileges to sit for the examination. The bar examiners should also consider whether there are ways to evaluate, not only knowledge, but also skills.[30] Japan similarly has to face adjustments in its bar examination, especially if the bar passage rate does not improve.[31]

We can expect resistance because of the concern that law schools will become university-based versions of crammer schools, geared only towards passing the national bar examination. Law schools also are facing some difficulties from inside and outside in providing an education on lawyering skills. Unlike in the United States and many other countries, in China and Japan there is no

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29. *See* Setsuo Miyazawa et al., *supra* note 2, at 459.

30. *See* Zeng Xianyi, *Gouzhu Faxue Jiaoyu yu Sifa Kaoshi de Xinxing Hudong Guanxi*, 4 CHINA LAWYER 18 (2002).

31. *See* Setsuo Miyazawa et al., *supra* note 2, at 459.

established pool of experienced practitioners to serve as practical law professor. Law professors usually hold practical experience in contempt. Law schools have no pressure to attract experienced lawyers to join the law faculty. In Japan, many new law schools have recruited a selection of talented attorneys to join the faculty, although these new members have not yet been fully integrated into the faculty.[32] The U.S. experience also indicates that expanding skills and clinical courses is more expensive because classes need to be smaller to allow time for close supervision and feedback.

In addition, the support from the bench and bar is important for the development of lawyering skills training and clinical legal education. In the U.S., a model student practice rule helped pave the way for students to practice law. In China and Japan, the status of student representation of clients in clinical legal education is uncertain. There is a need for a student practice rule. Lawyering skill training will not develop in both countries without legislation permitting students to practice or without a willingness on the part of judges, prosecutors, attorneys, and bar associations to permit a greater number of students to be involved in legal representation.

Although the two countries are facing difficulties in conducting professional education, opportunities also exist and more people are convinced that lawyering skill education is highly effective in educating future attorneys. The acceptance of the U.S. graduate school model shows that some common legal skills exist beyond legal systems and lawyering skill education is possible in East Asia. The rapid development of legal clinical education in the two countries is a good opportunity.

We can expect that the need for better trained lawyers will only continue. First, the transition of legal practice is creating a need for high quality legal skills. In China and Japan, the legal system is becoming more and more adversarial. The lawyers increasingly have to question witnesses in the court, and therefore have to master advocacy skills. Second, law schools and law students also demand more lawyering education. The rapid development of legal education in the two countries has caused some chaos, but has also brought a hard competition. Only the law schools that may provide high quality education may survive and only law students with high professional ability may get labor opportunities

32. *Id.* at 457.

in the future. Therefore, the market mechanisms will likely affect how both countries provide legal education in the future. Third, private organizations and law firms have started to explore the new way of legal skill education. International foundations have started to sponsor more programs relating to lawyering skill programs.[33]

33. For example, since 2000, the Ford Foundation in China has provided the China Clinic Legal Program. A joint program with the China Advocacy Institute has conducted advocacy skill training in over 50 law schools over the past four years. In addition to law schools, the trend of lawyering skills education provided by private agencies initiated by practicing lawyers is also developing in China.

PRESS FREEDOM IN INDONESIA: A CASE OF DRACONIAN LAWS, STATUTORY MISINTERPRETATION, BUT STILL ONE OF THE FREEST IN SOUTHEAST ASIA

Nono Anwar Makarim*

I. SUMMARY

In assessing the state of press freedom in Indonesia, the key-word to look up is *insult.* It is listed as a crime in a special Title of the Criminal Code the country inherited from its colonial past. The word *insult,* or *belediging* in the original Dutch language is often referred to in the Indonesian language as *fitnah,* an Arabic word. In the Arabic lexicon, the word *fitnah* is linked to at least two

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references in the *Holy Qur'an* which define it as *more cruel than murder*. Secular laws and religious condemnation lend legitimacy to judicial intransigence to appeals for the removal of excessively severe laws against *insult.* Prosecution, the judiciary, and the majority of the Indonesian polity demand that the criminalization of *insult* be maintained. Those on the other side of social critique, which include all three branches of the state, want even harsher punishments, stiffer fines, and larger damage awards. It is *civil society* in the French meaning of the term, that is, the collectivity of persons with individual liberty who objects to jailing critics. *Civil society* in transitional democracies, constitutes a tiny minority in urgent need of organization.

The civil suit against *insult* is begun by lodging a complaint with the court. Civil Code Article 1372 allows the plaintiff to claim real and verifiable damages, and damages for the restoration of honor and good name. In addition, a defendant may also be compelled to make public apologies. The article directly links the civil code with the criminal code's special Title XVI on *Insult* and its 12 articles. The provisions under this title, articles 310-322, set the size of fines and the terms of imprisonment. The filing of a civil suit does not bar the public prosecutor from commencing criminal proceedings against the defendant in the civil case if the plaintiff had him reported to the police. The *insulter* may, therefore, expect a series of punishments consisting of pecuniary compensation for real damage, awards for restorative damages, public apologies, criminal fines, and jail terms. *Insult* is a serious matter.

In order to come within the scope of *insult* as defined in the Criminal Code an *accuser* must deliberately direct an accusation of certain facts to the person of the *accusee.* The civil suit will not be admitted, and the *accuser* will escape criminal punishment, if he has clearly acted in the *public interest.* The truth of the accusation is of no importance, unless the accusation was motivated by a *public interest* concern, in which case the judge may allow the *accuser* to prove the truth of his accusation. These statutory rules have not been consistently applied by the courts. In one case, an editor wrote an angry piece sharply criticizing the installation of an official as member of a city council notwithstanding the council's knowledge of the candidate's involvement in two customs proceedings. *Public interest* motive was clearly proven, and truth of the allegation was established. The editor was sent to jail anyway. On the other hand, failure to prove the truth of accusations in other cases got the publications exonerated for

reasons that they tried to cover both sides, and offered to respect the *insultees'* right of response. Not much guidance in terms of predictability of the law here. The fact remains that a regime of laws hostile to criticism, particularly when directed at government, are retained in the old codes and the new statutes.

Among the restrictive provisions, three sets of laws stand out as particularly hostile: the so-called *hate-sowing* articles 154-157, the "major" *lèse majesté* articles 134-137 of the Code regarding insults directed at the president or the vice president, and the "lesser" *lèse majesté* articles 207 and 208 on insults to government authorities. While the concordance principle had Indonesia take over the Dutch codes lock, stock, and barrel, most of these oppressive provisions are not to be found in the codes of the Netherlands. They were tailor-made for the colony.

The *hate-sowing* articles made public expressions of feelings of hatred, hostility, and contempt against established authority punishable by imprisonment for up to seven years. These were *formal* offences. The mere expression of those feelings is sufficient for the prosecution to move in with indictments. These articles were recently challenged in the Constitutional Court and found to be in violation of fundamental rights guaranteed in the Indonesian Constitution. The sound decision was a bit marred by dicta expressing the Court's relief that a new draft Penal Code includes the very same provisions, this time as *material* offences.

Articles 134-137 of the Criminal Code were successfully challenged as well. The articles protecting the president and vice president from insults were found by the Constitutional Court to be in contravention of the basic principle of *equality before the law*. The provisions were declared unconstitutional and having no force of effect, but then the Court proceeded to split both the president and the vice president in two parts: The part of the *individual person* has, like everybody else, recourse to Criminal Code articles 310 *et seq* when insulted. The *presidential* and *vice presidential person* parts, however, were to remain protected by articles 207 and 208, the "lesser" *lèse majesté* provisions in the code.

The principle of *equality before the law* was maintained by pronouncing the government dignitaries subject to laws applicable to everybody else, but promptly set aside this action by placing them under the protective regulations for government authorities.

The issue with Criminal Code articles 207 and 208 is more serious than was thought when the articles were simply thrown in the grab bag of complaints filed with the Constitutional Court. Not

only were they thought unfit to be placed in the codes of civilized European nations and, therefore, absent from the Dutch Criminal Code, they were also deliberately made to make it easier to prosecute offences which are not punishable under Dutch law. Criminal Code Article 207 withholds from offenders their right to the defense of *public interest*, and removed the judicial discretion to order offenders to prove the truth of their allegations. The article which was specifically enacted for governing a subjugated nation, conflicts with section 2 of article 312, a systemic part of Title XVI, Book 2 of the Criminal Code. The section allows the offender to present proof of his accusation against a government official in the performance of his duties. Thus, a right granted by law to offenders is revoked by way of choosing which law to apply for one and the same offence. This is a violation of serious proportions.

So far Criminal Code Articles 207 and 208 have not been challenged in the Constitutional Court as a generically different set of laws from other, equally oppressive provisions in the Criminal Code. The articles have usually been lumped together with others in the rush to request their collective repeal. In its decision on the *hate-sowing* articles, the Court held the request for constitutional review of 207 and 208 inadmissible because of a procedural matter: the Court did not acknowledge petitioners' legal standing regarding the articles. In deciding the unconstitutionality of the *lèse majesté* articles, however, the Court gave a clear indication that a request for constitutional review of Criminal Code Articles 207 and 208 would not be favorably received.

Judging from a number of decisions bearing on freedom of expression, it seems that the Indonesian Constitutional Court has decided to opt for the status quo rather than risk controversy. It has consistently turned down opportunities to confirm change and lead to a future of accountable governance. This avoidance of change was not because there are no Asian examples of how courts have adopted changes gracefully and responsibly. The Korean Constitutional Court reasoned that too strict an implementation of the requirement to prove *truth and public interest* would stifle press freedom. The Japanese Supreme Court cautioned against giving too much protection to the honor and good name of government officials, and promotes the free flow of information and opinion to enable the people to partake responsibly in political decision-making. The Indonesian Constitutional Court chose to maintain colonial and post-independence laws, which are inimical

to freedom of expression. This was done by way of expounding on a theory of requisite balances between rights and duties, between the exercise of freedom and its limitation by the freedom of others. Balances are conditions of rest. In a context of rapid change, it conduces to abrupt changes, often violent, and always ill-prepared.

Draconian laws applied, within circumstances sometimes described as systemic corruption, contribute to abuses of power, selective prosecution, and miscarriage of justice. Notwithstanding these serious obstacles to freedom of expression, Indonesia has been listed as having one of the freest presses in Southeast Asia. The Indonesian press is presently continuing its multilateral engagement of the public, the state, and the courts. If the past is of any guidance, change may have to be seized through careful legislation and the ponderous processes in the conventional court hierarchy.

II. INTRODUCTION

In 1941, a year before the Japanese armies routed the Dutch military force in the then Netherlands East Indies, a middle-aged well to do Chinese businessman absconded with a 19 year old girl and carried on weeks of extra-marital activities with her. The daily newspaper *Keng Po* took up the story in all its concupiscent details.[1] The rich man appointed a top litigator and sued for libel. The defendant argued that the victim was only 19, while the perpetrator had a daughter who was already 17. He also argued that the despicable act could be construed as concubinage, a practice forbidden by the Criminal Code, and yet fashionable among men of means of a specific ethnicity. *Keng Po* was promoting a newly emerging ethical movement called *New Life*, and felt duty-bound to campaign against this disgraceful behavior. The write-up was done for the purpose of defending the *public interest*, the only excuse the Criminal Code allows to escape punishment.

The court disagreed and held the newspaper liable for intrusion into the plaintiff's private life, adding that the salacious language used in the coverage of the matter was improper. Ethical movements must employ ethical words and phrases. Damages in

1. KENG PO, an Indonesian language daily newspaper in its editions of May 20 and 24, and June 10, 1939.

the amount of *f*450 (four hundred fifty Dutch colonial guilders)[2] was awarded to the plaintiff.[3] At no time did the plaintiff contest the facts stated in the newspaper coverage. The truth was established, but truth is of little import and easily brushed aside as insignificant in torts involving defamation. Proving the truth of an allegation is not a right defendants have under either the Civil Code or the Criminal Code. It is a favor the judge may bestow only if the defendant alleges that it was *public interest* which moved him to publicize the allegedly libelous statements. Judges are not obliged to order defendants to prove their allegations even if they were moved by considerations of *public interest.* Even when public interest was accepted, and truth was established, the defendant will still be punished.[4] To establish a valid cause of action it is sufficient for plaintiff to feel hurt by the allegation made against him, and that it has done harm to his good name and reputation.

Armed with the victory in the colony's capital, the enthused abductor proceeded to file a suit against a publication in the town of Semarang covering the same matter. The Semarang court awarded damages in the amount of *f*500 but startled the legal fraternity when it held the writer, the editor and publisher liable as joint actors in the commission of the offence.[5] The decision contravened consistently upheld rulings of the Dutch Supreme Court that ex-article 1372 Civil Code damages claims:

(i) are only admitted against defendants who deliberately commit the offence,[6] and that

(ii) publishers can be held liable only if they have prior knowledge of the libelous content of writings appearing in their publications.[7]

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2. When asked what *f*450 would be in today's currency, octogenarians interviewed recalled that it would probably buy three *Raleigh* 3-speed bicycles.

3. Raad van Justitie, Batavia First Chamber, August 22, 1941, *Tijdschrift van het Recht* ("*T*") 154, at 730-731.

4. *See infra* page 15 and note 36.

5. The *Matahari* case was referenced in the case report on the Batavia *Raad van Justitie* (the Court of First Instance for Europeans and those who had submitted themselves to the Civil Code by, in this case for instance, by claiming a cause of action pursuant to Article 1372 of the code) decision, *id.* at 734. No separate report on the case is available.

6. Hoge Raad, December 19, 1913, N.J. 1914, at 305 (as cited by the author of the end-note to the Batavia court decision, writing under the initials of "v. H.").

7. Hoge Raad, April 9, 1926, N.J. 1926, at 525 (cited by the same author of the above-cited end-note.).

The precedents regarding this matter should by no means be interpreted as barring damage suits against publishers in an increasingly complex management structure of modern newspapers. A negligent publisher can always be held accountable for libel damages, but the suit ought to be brought on the basis of his status as employer of the editor. The suit may be filed pursuant to Article 1367 of the Civil Code which provides that employers may be held liable for torts committed by their employees.[8] Deciding on the choice between an Article 1367 cause of action and a suit pursuant to Article 1372 has pecuniary consequences. Courts insist that the measure of damages claimed under the tort articles proper[9] must be strictly confined to real and quantifiable damage incurred. The fat prize is given to claims under Article 1372 which provides for both quantifiable and immaterial damages.[10]

III. STRETCHING TORTS AND DAMAGES

Mr. Cohen lived in Amsterdam. He was in the printing business. Sometime, in the early twentieth century, he managed to persuade an employee of *Mr. Lindenbaum*, his business competitor, to divulge company secrets in exchange for certain promises. For an extended period of time *Mr. Cohen* became the

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Dutch Supreme Court precedents may be applied to similar cases in Indonesia pursuant to the so-called *concordance* principle. *See* Sections (1) and (2) of Article 159 of the Law on the Governance of the State of the Netherlands East Indies (Law of September 2, 1854, State Gazette of the Netherlands: S.1854-2, State Gazette of the Netherlands Indies: S. 1855-2 *jo* 1).

Note also that almost all of the articles of the Indonesian Civil Code, Commercial Code, Criminal Code, and Civil Procedural Code have their Dutch code counterpart article numbers printed on the side of each page. Indonesian law codes are basically old Dutch codes.

8. *See* "v. H." end notes to the Batavia court report in T.154, at 735-737; "v. H." is thought to be the initials of the very prominent Criminal Law scholar Professor W.F.C. van Hattum, co-author with Professor J.M. van Bemmelen of one of the leading texts on Criminal Law, the 2-volume HAND- EN LEERBOEK VAN HET NEDERLANDSE STRAFRECHT.

9. INDONESIAN CIV. CODE 1365-1371.

10. INDONESIAN CIV. CODE 1372:

> The civil suit regarding insult aims at compensating the damage, and at curing the loss suffered in honor and good name.
>
> In the valuation thereof the judge shall pay attention to the degree of grossness of the insult, besides the condition, status and the wealth of the adversaries.

(the unofficial translation from the Dutch original is the author's).

recipient of lists of customers, the range of prices charged, and contents of letters marketing *Lindenbaum's* products and services, all highly confidential information of the competitor's business. *Mr. Cohen*'s business flourished, while *Mr. Lindenbaum*'s declined. The cause of this unfortunate course of event was soon discovered, and *Mr. Lindenbaum* sued for damages under the civil code's general tort article 1401.[11] On 18 March 1918 the Court of Appeal in Amsterdam rejected *Lindenbaum's* claim on the theory that *Cohen* did not commit any act which was prohibited under the law.[12] The *fault* element, indispensible for the determination of a tort, was missing. *Lindenbaum* appealed, and the Supreme Court gave him what he wanted, and in the process shocked the Dutch legal community.[13] The core article for tort, literally an *unlawful act*, Indonesian Civil Code Article 1365, required the presence of the following elements:

(i) the commission or omission of an act;
(ii) the act is unlawful; hence the existence of a fault;
(iii) the act has caused harm to another person or property owned by another;
(iv) the harm is caused directly and immediately after the Act;

The decision by the highest court in the Netherlands held that, in addition to the aforementioned ingredients, tort could also be established if the defendant's action is:

(v) in conflict with his obligation, or
(vi) violates the principle of morality, or
(vii) contravenes the duty of care, or propriety in social interaction towards other persons, or towards the property of others.

The decision became a precedent in the Netherlands and, through the *concordance* principle,[14] was faithfully followed by courts in Indonesia. It was occasionally, either by mistake or

11. The referenced article number is for the Dutch Civil Code (old); its Indonesian counterpart is INDONESIAN CIV. CODE 1365.

12. The *Cohen-Lindenbaum* case, Hooggerechtshof (court of appeal) of Amsterdam, March 18, 1918, *N.J.* 1918, at 1094; *see also* A. PITLO, HET VERBINTENISSENRECHT NAAR HET NEDERLANDS BURGERLIJK WETBOEK 218-219 (3rd print. 1952).

13. The *Cohen-Lindenbaum* case, Hoge Raad, January 31, 1919, N.J. 1919, at 161; it was said that the aim and consequence of the decision was like the introduction of a new *Book* in the civil code. *See also* H.F.A. VÖLLMAR, INLEIDING NEDERLANDS BURGERLIJK RECHT, N.V. 467 (Uitgevers-Maatschappij W.E.J. Tjeenk Willink, Zwolle, 1955).

14. *See supra* note 6.

design, used by plaintiffs to expand the reach of the special tort of insult. On May 24, 1999, one year after the fall of president *Suharto, Time Magazine* came out with an issue covering the financial exploits of a family who had been in power in Indonesia for over 32 years.[15] The coverage used terms and phrases such as:

(i) *Suharto Inc.*

(ii) *How Indonesia's longtime boss built a family fortune;* and

(iii) *A staggering sum of money linked to Indonesia had been shifted from a bank in Switzerland to another in Austria, now considered a safer haven for hush bank deposits.*

The family sued *Time* for libel. The case was thrown out by both the court of first instance[16] and the court of appeal.[17] The Supreme Court, however, overruled the lower courts' decisions and awarded damages in the staggering amount of Rp. 189 trillion.[18] In its decision, the panel of Justices[19] adopted plaintiff's argument that the lower courts failed to take sufficient note of plaintiff's brief in their reasoning for rejecting the cause of action. Lawyers for the plaintiff filed their double-barreled claim by using the general tort article 1365 concurrently with the special tort article 1372 on *insult*. Civil Code Article 1365 was resorted to for its expansive reach pursuant to the 1919 Dutch Supreme Court decision.[20] Obviously, Article 1372 was employed not merely because it is the legally designated basis for defamation suits, but more importantly because it allows plaintiff to claim both quantifiable and verifiable damage, and whatever amount of money it takes to restore the good name and reputation of the victim. Having taken advantage of the wide reach of torts pursuant to *Cohen vs Lindenbaum,* plaintiff proceeded to substitute the doctrine of *objective criteria* for the strict requirement under Criminal Code Article 310, to prove that the defendant had

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15. Major-General *Suharto* seized power in March 1966 and was forced to step down in 1998.

16. Suharto v. Time Inc., Central Jakarta District Court, June 6, 2000, Decision No.338/PDT.G/1999/PN.JKT.PST.

17. Suharto v. Time Inc., Jakarta High Court, March 16, 2001, Decision No.551/PDT/2000/PT.DKI.

18. Suharto v. Time Inc., Supreme Court, August 30, 2007, Decision No. 3215K/PDT/200. The Rp.-US$ exchange rate at the time was approximately Rp.10.000,- to the US$.

19. The panel consisted of a military judge, acting as chairman of the panel, and two religious court judges.

20. *See supra* note 11.

committed the defamatory act deliberately. The doctrine originated in the cause-and-effect theory of the general tort. It was alleged that the modern theory of *objective criteria* has superseded the ancient *dolus* and *animus injuriandi* concepts of the Criminal Code. The *objective criteria* theory would have the actor liable if he was aware that the impact of his deed would result in a specific effect on the victim. In the heat of an international campaign against corruption, it wasn't easy to assess the specific effects of an investigative report on a fallen leader who had been ill for some time.[21] Domestic and international coverage of the accumulated wealth of Suharto's family prior to *Time's* May 1999 issue had been widespread and intensive with no noticeable reaction from either Suharto himself or his family.[22]

The Supreme Court almost paraphrased plaintiff's brief, overruled the lower courts' decisions, took over the matter, and awarded damages in the exact amount demanded by plaintiff. Upon judicial review a different panel of judges of the same court overruled the decision, and affirmed the lower courts' decisions. The court held that *Time* fulfilled norms governing the activities of

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21. Suharto has been in ill health before his forced retirement. BBCIndonesia.com reported on May 19, 2006 that the fallen leader has had intensive testing done during a 3-day stay (July 9-11, 1996) at the Heart Center in Bad Oeyenhausen, Germany; he suffered a light stroke on July 20, 1999 and was rushed to the hospital, and since then had been in and out of hospital for bleeding intestines, appendicitis operations, pace-maker implant, lung infection, difficulty in breathing, and high fevers. In August 2002 the Indonesian Supreme Court ordered the suspension of court proceedings against Suharto pending an examination on his condition of frequent lapses of memory, emotional flare-ups due to irritation caused by incapacity to express thoughts in words, and speaking difficulty reducing communication to 4 words at a time. *See* on the late president, IndonesiaNow BlogSpot, *available at* http://theindonesianowulasan.blogspot.com/2008/01/jejak-soeharto-di-rumah-sakit.html (last visited July 10, 2010).

22. Note that the *Time* publication at issue was the investigative report appearing in its Volume 153, No. 20, of May 24, 1999. That was preceded by the daily MERDEKA on September 15, 1998 likening Suharto to the Pharaoh depicted in religious texts as the epitome of evil and sinfulness; the daily KOMPAS on November 17, 1998 carrying a report that the assembly of all university rectors in the country demanded the tracing of Suharto's assets; the newsweekly magazine GATRA on August 15, 1998 had a caricature on its cover depicting a drowning Suharto in a basket with US$100 bills and the caption in big letters *Assets of Cendana* [*i.e.* Suharto's private residence] *in Switzerland and Austria*; THE FAR EASTERN ECONOMIC REVIEW *A Monopoly is Forever* (February 26, 1987); THE SYDNEY MORNING HERALD (April 6, 1998): SUHARTO Inc.; *Things Fall Apart*, THE FAR EASTERN ECONOMIC REVIEW (May 13, 1999); and many more publications.

the press, and the content and wording of the coverage were within the scope of journalistic ethics. It concluded that the investigative report in question did not meet the requirements for it to be adjudged an unlawful act.[23] The Judicial Review panel, headed by Chief Justice *Tumpa*, indicated that the May 24, 1999, *Time* issue should be seen within the context of the national anti-corruption campaign. The court stated that the media's depiction of former president *Suharto* as a target of investigation must not be deemed an intent to defame. It was the People's Consultative Assembly, the nation's highest political authority, which passed a resolution mandating the investigation of the former president.[24] The Court finally ruled that defamation suits should be exclusively filed under Civil Code Article 1372.[25] That seems to confirm the *communis opinio doctorum* that for tort without deliberateness the plaintiff is directed to seek remedies offered by Civil Code Articles 1365-1371, and that suits against deliberate insults are dealt with by Civil Code Articles 1372-1380, with specific reference to Criminal Code Articles 310 *et seq.* It has led scholars to refer to Civil Code Articles 1365-1371 as the *lex generalis* of tort, and Articles 1372-1380 as the *lex specialis*[26] for the specific tort of insult.

The distinction is of special importance for pecuniary and procedural purposes. Under Civil Code Articles 1365-1371, plaintiffs may only sue for damages which are quantifiable and verifiable. These must be real, calculated in detail, and supported by evidence. The general tort articles do not support claims for immaterial damages unless the tort resulted in a death or permanent disability.[27] Claims for immaterial damages to restore

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23. The Supreme Court's Judicial Review decision is cited as No.273PK/PDT/2008 of April 16, 2009.

24. PEOPLE'S CONSULTATIVE ASSEMBLY RESOLUTION (*Ketetapan*, sometimes abbreviated as *Tap*) No. XI/MPR/1998 of November 13, 1998.

25. This view finds considerable support in the leading texts on private law. *See* C. ASSER, HANDLEIDING TOT DE BEOEFENING VAN HET NEDERLANDS BURGERLIJK RECHT, Derde Deel – Verbintenissenrecht, Tweede Stuk: De Overeenkomst en de Verbintenis Uit de Wet, bewerkt door Mr. L.E.H. Rutten, N.V. Uitgevers-Maatschappij, W.E.J. Tjeenk Willink, Zwolle (1954), at 619.

26. Jan de Meij, *Freedom of the Press and Defamation in the Netherlands*, unpublished paper submitted at *Law Colloquium 2004: From Insult to Slander, Defamation and Freedom of the Press*, Jakarta, July 28-29, 2004.

27. INDONESIAN CIV. CODE 1370 and 1371 allow for claims for loss of support for the family of the victim of a tort resulting in death, and for claims for the loss of livelihood in case the victim is incapacitated for life due to injuries sustained as a consequence of the tort.

the victim's good name and reputation must be based on an action against insult, and the suit must be based on Civil Code Articles 1372-1380.

Another feature of importance in distinguishing the *lex specialis* of the tort of insult from the general tort provisions, the *lex generalis,* is that the former is not self-contained within the private law system. In order to define *insult,* one has to consult the Criminal Code. Historically, Civil Code Articles 1365-1380 were part of the original civil code which was promulgated in 1847.[28] But articles 1372-1380 were substantially amended in 1917 linking them closer to the Criminal Code and the Criminal Procedural Code.[29] The amendments were announced in the *State Gazette* which promulgated the Dutch Criminal Code in the colony.[30] Six of the 9 articles on defamation have clear links mentioned in the articles with the Criminal and Criminal Procedural Codes.[31] Only two of the general tort articles share this feature.[32] Finally, the most obvious distinction between the general tort of Civil Code Articles 1365-1371 and the special tort articles 1372-1380 is that the former insist on the presence of the element of *fault, culpa,* while the latter come into motion upon proof of *dolus, deliberateness,* the *animus injuriandi.*

Note that the Court of First Instance, adjudicating the *Suharto vs. Time* suit, found no cause of action in its decision on June 6, 2000, and that the Court of Appeal affirmed the lower court's judgment on March 16, 2001. There was a wait of no less than 6 years before a Supreme Court panel overturned the lower courts' decisions, and awarded a spectacular Rp. 1 trillion damages to the plaintiff. In the meantime, another celebrated case was making its way to court.

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28. STAATSBLAD (State Gazette) 1847 No. 23.

29. Reference to the changes are provided (between brackets) in lines before the texts of articles 1372, 1373, 1375-1377, and 1380.

30. STAATSBLAD 1917 No. 497.

31. Explicit references, at the end of the wording of the article, are called *schakel bepalingen* (linked provisions) to either the criminal code and the Criminal Procedural Code are to be found in INDONESIAN CIV. CODE 1372, 1373, and 1376-1379.

32. INDONESIAN CIV. CODE 1365 on general tort refers to criminal code article 382bis on unfair competition or fraudulence in competition, introduced through STAATSBLAD 1920-556, quite possibly in response to the *Cohen-Lindenbaum* decision, while INDONESIAN CIV. CODE 1368 (on liability of owners of animals for harm done by the animals) stipulates a link to criminal code article 490 regarding the control of dangerous animals.

Big fires, in traditional bazaars, in Indonesia are almost always followed by the construction of modern shopping centers, supermarkets, and malls. The fires are as a rule preceded by failed negotiations to persuade existing tenants to move to temporary quarters pending the completion of their new, and more expensive shops in the newly built premises. There has always been a suspicion, but no proof, that the developers somehow had something to do with the fires. In 2003 a major fire broke out in *Pasar Tanah Abang*, probably one of Southeast Asia's largest garment and textile markets. *Tempo*, the leading national newsweekly, covered the fire and mentioned the name of a developer with close links to the army as a party who was highly interested in a new *Pasar Tanah Abang* project.[33] Sensing the hidden accusation, and irritated by the use of certain terms in the coverage, the developer sued for libel. The Central Jakarta Court of First Instance agreed with plaintiff that the investigative report was libelous, and awarded damages in the amount of Rp.500.000.000,- (five hundred million rupiah),[34] and a penalty of Rp.300.000,- (three hundred thousand rupiah) for each day of delay in paying the awarded sum. The court also ordered the placement of a public apology in several newspapers with a national circulation.[35] The defendant appealed, and the High Court overruled the lower court's decision and took over the adjudication of the matter. The court rejected the damages claim for reasons that plaintiff had not submitted detailed and convincing quantification in arriving at the claimed amount. The Court also ruled that *Tempo* had correctly balanced out its freedom of expression by providing for the citizen's right of response.[36] In 2005, the Indonesian Supreme Court rejected plaintiff's appeal and affirmed the High Court's decision.[37]

IV. DISREGARD OF THE "PUBLIC INTEREST" DEFENSE

In order to be successful with a suit for material and immaterial damages under Civil Code Article 1372, a court of law must

33. THE WEEKLY TEMPO (March 3-9, 2003).

34. Equivalent to US$53,000 at the rate prevailing in June 2010.

35. Tomy Winata vs Tempo, Decision of the Central Jakarta Court of First Instance, No.233/Pdt.G/2003/P.N. Jkt.Pst., on March 18, 2004.

36. Decision of the Jakarta High Court No.314/PDT/2004/P.T. DKI, dated September 3, 2004.

37. Decision of the Supreme Court No.903K/PDT/2005, dated February 9, 2006.

establish that the defendant's act meets the requirements set forth in Criminal Code Articles 310 *et seq.* The act must be:

(i) deliberate;
(ii) an assault against the good name and reputation of the victim;
(iii) an accusation of a certain fact;
(iv) with the clear aim to publicize the fact.

Pre-independence court decisions had borne out that for the printed media the requirements set out above under items (i) and (iv) were deemed met by the mere fact of publication.[38] Although the *public interest* motive is the only way to escape punishment, the concept is underdeveloped due to the scarcity of decisions establishing guidelines. *Public interest* is known more for what it is not, than what it is. During the colonial era, court reports have recorded only one case where defense of *public interest* was successful.[39] The matter involved an editor of a daily newspaper published in Surabaya, a major harbor city in East Java. The editor allowed two unsigned articles to appear in his paper warning readers that a city council member scheduled to be installed was facing two customs suits, and should never be admitted to sit on the council. Notwithstanding the warnings the installation was carried through. This prompted the editor to release a harsh article criticizing the government department. The colony's highest court rejected the prosecution's count of defamation, but affirmed the lower court's finding that the editor afforded the offender, the writer whose identity the editor refused to disclose, with the opportunity to publish the punishable article. The *public interest* excuse was admitted, but the editor received a 3-day jail sentence for being an accessory to the offence committed by the unidentified offender. In addition for being locked up for 3 days, he was charged the costs of the proceedings in both the lower and

38. None of the court decisions cited in this essay raised the issues of *deliberateness* and *publicity* which are central to a determination whether a criminal code article 310 "insult" was indeed committed. There is solid doctrinal support for this position in HAZEWINKEL-SURINGA, INLEIDING TOT DE STUDIE VAN HET NEDERLANDSE STRAFRECHT 584 (15 ed., updated by J. Remmelink, 1966), and II T.J. NOYON, HET WETBOEK VAN STRAFRECHT 256-257 (6th ed., updated by G.E. Langemeijer, 1954).

39. Hooggerechtshof (the highest court in the colony) van Nederlandsch-Indië, Second Chamber, Decision July 30, 1924 regarding the defamation of a public authority or complicity to it, on appeal regarding the defense of having acted in the public interest, *T.*121, at 451.

the appeals courts. *Truth* and the *public interest* were not considered judicially sufficient reasons to let him walk free.

V. THE HORSE, THE RIDER, AND THE LAW

The term *pers delict* or "press offence" does not constitute a separate class of offences within the Indonesian criminal law system. Most of the offences termed *pers delict* are general offences committed by persons, including journalists, writers, editors, and publishers. Most of the provisions curtailing media freedom are to be found in the Criminal Code.[40]

Using the pen-name *Multatuli*,[41] Eduard Douwes Dekker, wrote *Max Havelaar, or The Coffee Auctions of the Dutch Trading Company*, a novel dealing with plunder, oppression and extortion of the Javanese by their feudal masters. The book, first published in 1860, accused the colonial authorities of knowing about the mistreatments, and yet choosing to do nothing against it. Translated in 34 languages, an English version came out in 1868. It was reported that a shiver went through Europe when the book appeared.[42] The author lost his job in the colonial administration, and wrote many letters to friends and editors. One of those letters contained the following famous phrase: "Insulinde[43] is a magnificent horse. Its rider is a thief."[44]

One Sunday morning at 09:00 on September 3, 1922, the Indies Social Democratic Party convened a congress, at the Oriental Movie Theatre, in the West Javanese town of Bandung. There, on

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40. Criminal code articles 61 and 62 on requirements to be met if editors and publishers are to be exempted from prosecution; Criminal code articles 207 and 208 on insults directed to state authorities (the articles release the judge from an optional obligation of granting the right of defendants to prove their allegations); criminal code articles 310-328 defining insult, libel, slander, deliberateness, and the punishments for committing the offence; criminal code articles 155-157, the so-called *hatred-sowing* articles against statements, writings, posters containing expressions of hatred, hostility, and contempt against government, or ethnic, religious, and racial groups; criminal code article 160 prohibiting the advocacy of civil disobedience.

41. Latin for *I have suffered much.*

42. The first English translation from the original manuscript was done by Baron Alphonse Nahuijs, Edmonton & Douglas (Edinburgh, 1868); see a Dutch edited version, *available at* http://cf.hum.uva.nl/dsp/ljc/multatuli/havelaar/index.html (last visited July 10, 2010).

43. A poetic name for Indonesia, the largest archipelago in the world.

44. *Letter written to G.J.A. Boulet*, April 5, 1876, published in volumes of collected writings of the author cited as VW XVIII, at 333.

the door handle of the movie house, young party enthusiasts hung a white cardboard with precisely that phrase written in big letters. The prosecution moved to indict on the basis of Criminal Code Article 154, the so-called *hate-sowing* article. Article 154 prohibits people from publicly expressing hatred, hostility, and contempt against government, or population groups in the colony. The subsequent articles add the requirement of intentional publicity, and expand the target audience to population groups distinguished by race, religion, ethnicity, descent or nationality. The court found the phrase insulting. It also found the presence of elements required under article 154, including the aim to publicize or increase exposure in view of the location of the cinema on a busy public road by the town square.[45] The defendants were fined f300, which was convertible to a 2-months jail term if the offenders failed to pay up within two months of sentencing. On appeal, the Court of Appeal affirmed the lower court's judgment.[46]

Article 154 of the Criminal Code used to read ". . . whosoever arouses or promotes feelings of hostility, hatred or contempt . . ." That was indeed how it read in the Dutch Criminal Code. In 1918, at the behest of the then Dutch Minister of Colonies, changes were made to the colony's version of the provision. It was then made to read ". . . whosoever expresses feelings of hostility, hatred, and contempt . . ." The change did away with the requirement of evidence of the prohibited arousal and promotion. The erstwhile material offence was turned into a formal offence. Henceforth, it was enough for a person to merely express the forbidden feelings, for that person to be sentenced to a jail term up to a maximum of 7 years. It was only on July 17, 2007, and 62 years after independence, that the Constitutional Court declared Criminal Code Articles 154 and 155 in contravention with the human rights guarantees in the Constitution of the Republic of Indonesia.[47]

Emerging from a different era in the evolution of perceptions about government and the state, the Indonesian Criminal Code carries provisions which are excessively hostile to the media. Articles 207 and 208 stand out as being particularly ill-disposed to

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45. Raad van Justitie Batavia, Second Chamber, April 6, 1923, *T.* 120, at 496-500.

46. Hooggerechtshof, Second Chamber, June 6, 1923, *T.* 120, at 496 and 500-501.

47. Constitutional Court Decision No. 6/PUU-V/2007. The Decision was limited to criminal code articles 154 and 155. The request to find the notorious criminal code articles 207 and 208 (insults against public authorities) unconstitutional was rejected.

freedom of opinion and social critique. The articles deal with insults directed against government agencies, and dispense with the basic principle that only natural persons are capable of feeling insulted. Fictitious persons, like the limited liability, can make insulting allegations through members of its board of management,[48] and can even incur damages caused by defamatory remarks at their expense. However, the cause of action does not lie with the special tort of insult, but rather with the general tort regime of Civil Code Articles 1365-1371. With Criminal Code Articles 207 and 208, we have a corporate entity called government, or its agencies capable of feelings thought to be invested exclusively in the human person.

Early 1938, the colony was feasting. The Royal House of Orange-Nassau was expecting the birth of *Princess Beatrix*, and the daily newspaper *Keng Po* was at it again. It published an article under the heading of *For the Knowledge of the Resident of Serang.*[49] A *Resident* was the highest Dutch colonial authority in the *residency*, a region which would now be equivalent to either a province, or half of it, depending on the area's economic importance to the colonial administration. The article told the story of festivities prepared, by the *Bupati*,[50] of Pandeglang in the town square using local bamboo and manpower without paying for either. The poor villagers, already living a subsistence life, were sunk deeper into poverty, but nobody dared to protest because the order was given by the *Bupati* himself. The article ended with the sentence: "If that were true . . . why make the people sad when jubilation is in order for the House of Orange-Nassau?"[51]

Criminal Code Article 207 was used by the prosecution because the article does not afford the judge with the prerogative of allowing the defendant to prove the truth of his allegation. The use of the article was intimated in private to the scholar who wrote the end note to the law report on the decision as *de rigueur* among prosecutors in the colony.[52] The court of first instance rejected the

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48. As with employer's liability for tort committed by employees, the limited liability company may escape liability for a director's libelous act if the act was committed outside the scope of work for which the director was contracted to perform.

49. *The Keng Po (Pandeglang)* case, Raad van Justitie Batavia, November 3, 1938, *T.* 149, at 67.

50. The *Bupati* is the highest ranking authority in the hierarchy of the local indigenous bureaucracy.

51. *See supra* note 46.

52. *Id.* at 74.

application of Criminal Code Article 207 for the simple reason that the insult was directed to the person of the *Bupati*, not to the Netherlands Indies administration as a body.[53] The court ruled that Criminal Code Article 310 was the more correct article to apply to the matter at hand. The prosecution was not satisfied and appealed to the colony's highest court. On November 29, 1938, the colony's Court of Appeal, Second Chamber in Batavia, ruled that the lower court had erred in its opinion that the insult was directed to the person of the *Bupati* , and not to the organ of the administration: ". . . Wasn't the aggrieved party called the Regent of Pandeglang?," the court queried. ". . . It was indeed directed to a person, to be precise. But it is a person equipped with a public authority!"[54] Article 207 applied. Seventy years passed. *Insulinde, the magnificent horse* had become independent. The colonial *rider* had been chased away. He didn't take 207 with him. The new *rider* likes it.

In October 2007, a writer by the name of *Bersihar Lubis* wrote a piece for the *Tempo Daily* criticizing the burning of banned books per order of the Attorney General.[55] The heading of his article was "The Story of the Dumb Interrogator." *Lubis* wrote about the interrogation by prosecutors of a certain *Joesoef Isak*, publisher of novels written by the left-leaning author *Pramoediya Ananta Toer*. *Isak* recounted to *Lubis* the reason given him by the prosecutor why he was summoned for the interview: "Pramoediya's books have the smell of Marxism . . ." The prosecutor later intimated that he actually carried out the summons and interview because his superior wanted him to. Personally he liked *Pramoediya's* books. To this *Isak* commented to *Bersihar Lubis* that a decision on the basis of a command is *dumb.* It was the inclusion of this word, *dumb*, in his article that got *Lubis* into trouble. The prosecutor's office in the *Depok* district reported the matter to the police. Eight months later *Bersihar Lubis* attended his trial at the *Depok* court of first instance for insulting a government agency. The court found him guilty of libel and sentenced him to a jail term of 1 month with a probationary period of 3 months, a considerably lighter punishment than the 8 months demanded by the prosecution.[56] Both parties appealed, and the

53. *Id.* at 65-68.

54. *Id.* at 69.

55. KORAN TEMPO, March 17, 2007.

56. The *Bersihar Lubis* case Decision, The Depok Court of First Instance, February 20, 2008 (unpublished).

High Court affirmed the lower court's decision.[57] At the time of writing this essay, the case is still on final appeal at the Supreme Court.

Bersihar Lubis and friends challenged the constitutionality of the jailing provisions in the criminal code before the Constitutional Court, particularly in the face of Indonesia's constitutional provisions protecting the freedom of expression and freedom from fear.[58]

The request was for a material review of the jailing provisions of Criminal Code Articles 310, 311, and 316. The petitioners also requested a review of the constitutionality of Criminal Code Article 207 due to its implication of the privileged position granted to government agencies before the law, a violation of constitutional principle of *equality before the law.* In its decision on August 15, 2008 the Court found each and every petitioned criminal code articles in accord with the Constitution upon the following reasoning:

(i) no freedom may be exercised without limitation;

(ii) freedoms may be limited by considerations of public order, moral and public health, national security, rights and reputation of others, and limitations based on necessity in a democratic society, on the condition that the limitations must be prescribed by law;

(iii) "The need for separate protection of public officials in the exercise of their duty (is warranted) because in their function, besides involving the subjective element of the individual person of the official, there is also an objective element of the institution which requires credibility, authority, and capability in order to effectively perform their public duties."[59]

(iv) the request relating to the preference of fines over incarceration has to do with the judicial application of the law, not with its constitutionality.[60]

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57. Mr. Hendrayana of the Press Legal Aid Institute told the author that on May 24, 2010 the High Court affirmed the Depok District Court (Court of First Instance) decision.

58. Request for review dated May 7, 2008 listed by the Court Registrar on May 12, 2008 under registration Number 14/PUU-VI/2008, corrected on June 3, 2008.

59. Constitutional Court Decision Number 14/PUU-VI/2008, August 15, 2008, at 286.

60. *Id.* at 287.

The decision contrasts unfavorably with the views of the commentator expressed in the End Note to the decision of the colonial Hooggerechtshof (Second Chamber) of November 29, 1938 in the Keng Po (Pandeglang) case.[61] Commenting on the Court's support for the use of Criminal Code Article 207 by the *standing magistrate* to catch offences which according to the Dutch Criminal Code are not punishable, Professor W.F.C. van Hattum declared that such a position contravenes the very system of criminal law. He referred to Criminal Code Article 312 Section 2 which provides that when a government official is accused of a certain fact in the performance of his duties, the law allows the accuser to prove that fact. It violates this system if that right to prove the accusation is withheld by prosecuting the accuser pursuant to a statute not written for this case. The law was introduced exclusively to cover cases of insult which are not punishable according to Dutch law. The distinction between insult to the person and insult to the authority of the person is not only difficult to discern, it is also not acceptable if offenders of article 207 are not guaranteed the right of not being punished if they acted in the public interest. The right to critique is to some extent guaranteed under article 312 section 2. ". . . If this guarantee is rendered worthless by simply disqualifying the application of article 310, and replacing it by article 207, we would be taking another step on the road to the police-state."[62]

VI. LEX SPECIALIS, OR "DROIT DE RÉPONSE"?

For over four decades, the Indonesian press suffered closures of newspapers and imprisonment of journalists under either oppressive dictatorships, or harsh treatment by the law. The day of liberation came, or so it was widely assumed, when a new press law was promulgated in 1999.[63] The law states that under no circumstances will there ever be any closures of newspapers by the state.[64] Any measure which has the effect of curtailing the freedom of the press will be fined.[65] Victims of libelous publications have the right to respond, and the media publishing the libelous allegations have the obligation to fulfil that right.[66]

61. *T.* 149, at 71-74.
62. *Id.* at 74.
63. Law No. 40 of 1999 Regarding the Press.
64. *Id.* at Article 4, Section (2).
65. *Id.* at Article 18, Section (1).
66. *Id.* at Article 5, Sections (1) and (2).

The law also establishes a Press Council to act as a watchdog of ethics of journalism.[67] The government, the media, and parliament celebrated the law as the *lex specialis* for all possible offences committed by the media. The Press Law was widely hailed as governing all activities of the print media and, therefore, rendering inapplicable all other laws relating to the press. In the ensuing debates, it was mentioned that even if no consensus can be reached about its *lex specialis* status the matter can be settled simply by a Supreme Court Circular declaring it to be so.[68] The courts disagree, and rightly so.

The Press Law of 1999 was never meant to function as a self-contained and exclusive regime governing the media. It is by no means a collection of primary rules on a specific matter demanding priority over secondary rules provided by a *lex generalis.* The law itself in two instances, one in the body of the text, and another in its official elucidation refers to other laws as still applicable.[69] A cursory examination would also show that the Press Law bears some resemblance with the nineteenth century *Reglement op de Drukwerken,*[70] a piece of legislation normally referred to in legal texts as the *droit de réponse.* It provides a right for victims to respond to defamatory press coverage.[71]

An interesting decision on this matter was issued by the Batavia Court of First Instance[72] on March 7, 1935.[73] The court ruled that the *droit de réponse* of Article 19 of the *Reglement op de Drukwerken* aimed at providing the victim of libelous acts with an opportunity to defend himself within the forum of the offender by way of a response to reach the same readers. A complaint filed with the court, in the matter of an insult, on the other hand, merely aims to enable the state to prosecute a punishable act which, absent

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67. *Id.* at Chapter V, Article 15.

68. KOMPAS DAILY, July 19, 2004, at 7.

69. Article 19 of Law No. 40 of 1999 provides that all provisions of law bearing on the press which were still in effect at the time the Press Law was promulgated will remain so insofar as they do not conflict with, or have not been replaced by new laws arising out of the Press Law. The official elucidation of article 12 of the law stipulates that criminal liability is still governed by the criminal code.

70. *Regulation on Printed Matter*, STAATSBLAD 1856-74, after being reduced from 35 to 10 articles.

71. *Id.* at article 19.

72. The court known as *Landgerecht* was, much like the *Raad van Justitie,* the court of first instance for Europeans during the German occupation of the Netherlands.

73. *T.* 142 at 773.

a complaint would not be possible. The *droit de réponse* and the filing of a complaint with the court are two causes which may be pursued independently from each other. The filing of a complaint with the court in no way bars the plaintiff from making use of his right to reply.[74]

There may well have been a time when the belief prevailed that the *Reglement op de Drukwerken* was some kind of a special law applicable to special offences, sometimes called *pers delicten* or press offences, committed by a special group of people such as writers, editors, publishers, and even printers. The *Reglement* itself was a solid 35-articles piece of legislation when it was issued in the mid-nineteenth century. Looking at the regulation now shows that 16 of the 35 articles were withdrawn, while 9 articles were repealed with the entry into force of the Criminal Code. Punishable offences committed by the printing press, which were originally in the *Reglement*, were taken out and put in the Criminal Code. The measure was probably motivated by the difficulties in defining press offences. To be sure, it represents a certain group of offences, but as a law category it is considered too limiting to deserve the attribute of a *lex specialis*. Offences committed by using the print media are only part of a larger category of offences involving, among others, public disclosures of thoughts and feelings. Press offences strictly relate to the means of such disclosures, not to the punishable offence of the disclosure itself. Articles in the Criminal Code prohibiting disclosure of secrets, for instance, cannot be categorized as press offences as understood by the law. Neither publicity, nor the public exposure of a thought is required under those articles. The 9 articles removed from the *Reglement op de Drukpers* were not considered press offences proper, but were offences of a more general nature which could be committed through the print media.

VII. SOLUTIONS, COMPARATIVELY SPEAKING

Most code provisions on defamation are more or less similar in civil code countries in Asia, be they Germanic or French in origin. In South Korea, both the Constitutional Court and the Supreme Court have chosen the creatively path-breaking route to respond to the changing times. On June 24, 1999 the Korean Constitutional Court pronounced that the standard of scrutiny in the criminalization of libel should be more strictly applied when the

74. *Id.*

victim is a private person rather than a public figure, and the matter alleged is of private rather than of public concern.[75] Matters of public concern, thus the Court, have to do with the public right to know, in order for the public to responsibly participate in political decision-making in a democracy. The Court underscored the chilling effect of criminal libel law on freedom of the press:

> If the requirement of libel defenses (truth and only for public interest) under the Criminal Code are too narrowly applied, the scope of criminal sanctions will expand and press freedom will shrink. If criminal punishment is used to preclude criticism and debates about matters of public concern, freedom of the press will be suffocated and the balancing scale will be tipped too far towards reputational protection.[76]

In both Korea and Japan, "truth and the public interest" are formidable defenses against Criminal Code punishment. In a decision dated February 27, 2004 the Korean Supreme Court held that a defendant is not liable if there is proof of the truth of his allegation, or the belief that the accusation is true notwithstanding the absence of evidence.[77] This applies even if there is only a reasonable ground to believe that the defamatory allegations are true. The burden of proof, however, remains with the media.

Similarly, the Japanese Supreme Court held in a case decided as early as June 25, 1969 that the defendant needs only to prove that the statement was made under the mistaken but reasonable belief, based on reliable materials and a reliable source, that it was true.[78] Statements made in good faith are not actionable because they do not indicate a criminal intent on the part of the publisher.

The Japanese also made a couple of conceptual refinements. The '*truth*' defense concept, for instance, applied only in cases where defamation was inflicted on public figures. The private

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75. Cited as "Constitutional Court, 97 Honma 265, June 24, 1999," in Kyu Ho-youm, *Press Freedom and Defamation in South Korea,* , unpublished paper submitted at *Law Colloquium 2004: From Insult to Slander, Defamation and Freedom of the Press*, Jakarta, July 28-29, 2004, at 26.

76. *Id.* at 27-28.

77. *Id.* cited as "Supreme Court 2001, Ta 53387, February 27, 2004", at 25.

78. *The Yukan Wakayama Jiji* case, cited as "23 Keishu 975, Supreme Court, June 25, 1969" in Masao Horibe, *A Draft on Defamation and Freedom of the Press in Japan*, unpublished paper submitted at *Law Colloquium 2004: From Insult to Slander, Defamation and Freedom of the Press*, Jakarta, July 28-29, 2004, at 25.

person-public figure dichotomy was removed from its black-and-white realm. In 1981 the Japanese Supreme Court held that even the private behavior of a private person could be of public concern depending on the nature of the person's social activities and the extent of his influence in society.[79] The decision concerned improprieties carried out by a *Daisaku Ikeda*, honorary chairman of a Buddhist lay organization, towards two women members of the organization.

Japan's doctrine of popular sovereignty, a prominent principle in the nation's constitution, provides the rationale for the reduced protection of public officials against allegations thrown at their feet because they are "servants of the whole community" and, therefore, subjected to the people's will to hire or fire.[80] The doctrine is of particular interest because most national constitutions carry the same principle, but very few gave it the legal interpretation as far-reaching as Japan's.

The Indonesian judiciary is timid, cautiously conformist, more conventional, and less progressive compared to their East Asian counterparts. They prefer not to lead. In this regard, the Constitutional Court is more consistently so, while the Supreme Court occasionally issues a serendipitous decision or two. The latter's decision on the *Suharto vs. Time* review matter[81] was both painful, since the Court had to censure its own decision,[82] and clear-sighted. It annulled the Supreme Court decision of August 30, 2007, viewed *Time*'s coverage within the context of national campaigns against corruption, saw no intention of *Time* to defame Suharto mainly because the People's Consultative Assembly in its resolution had mandated the investigation of Suharto's assets. A major issue it cleared up was that suits for damages due to insults must be exclusively conducted pursuant to Civil Code Article 1372.

Compared to the image of valiant resolve emerging from the *Time* review decision, the outcome of one of the many *Tempo* matters came across as *listless.* In March 2003, in the wake of the *Tempo* coverage of the big fire at *Pasar Tanah Abang*, the office of the weekly news magazine was visited by a group of angry people. The editors of the magazine felt themselves threatened and

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79. *Id.* at 24-25, the Gekkan Pen. Case, cited as "1000 Hanrei Jiho 25, Supreme Court, April 16, 1981."

80. *Id.* at 26.

81. *Supra n*ote 23.

82. *Supra* notes 18, 15, and 16.

reported the matter to the police. Coming out from the police station, a senior editor explained to the media who were gathered outside that *Tempo* demanded the *attack* to be fully investigated, lest the country would fall into the hands of *gangsters.* The businessman whose employees paid the visit to *Tempo*'s offices felt insulted and filed a suit under Civil Code Article 1372 against the senior editor, the daily newspaper *Koran Tempo* which reported the senior editor's statement, and the company publishing the newspaper.[83] The damages demanded ran up to Rp. 1 billion for actual damage incurred, and Rp. 20 billion for restoring good name and reputation.[84] Additionally, plaintiff demanded that defendants issued public apologies in 4 daily newspapers, including the defendants' newspaper, the attachment for security purposes of the residence of the senior editor and the newspaper's office spaces, and a daily late performance penalty of Rp.10 million. The court of first instance found the defendants guilty of the tort of insult, rejected the plaintiff's damages claims because of insufficient precision in itemizing, calculating the amount demanded. The court lifted the attachment of the senior editor's residence, but ordered the defendants to issue the public apologies with the claimed daily late performance penalty.[85] The Jakarta Court of Appeal upheld the lower court's decision, but the senior editor lodged an appeal to the Supreme Court. The Court rejected the appeal,[86] and Chief Justice *Harifin Tumpa* suggested that the editor offer his apologies to the plaintiff.[87] The Supreme Court decision vacated the Rp.1 billion fine, and reduced the daily Rp.1 million penalty for performance delays. Lawyers for the defendants were quick in their response that a Judicial Review will be lodged with the Supreme Court. *Harifin Tumpa,* Chief Justice

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83. Tomy Winata vs Gunawan Mohamad (the senior editor), KORAN TEMPO (the daily newspaper), and P.T. Tempo Inti Media Harian (the publisher of the daily newspaper).

84. The Rp.:US$ exchange rate in 2003 was between Rp.8897,20 (January) and Rp.8487,75 (December) according to x-rates.com, *available at* http://www.x-rates.com/d/IDR/USD/hist2003.html (last visited July 10, 2010).

85. Decision of the East Jakarta Court of First Instance No.180/PDT.G/2003/PN.JKT.TIM (unpublished).

86. No reports were available of either the High Court decision, or the Supreme Court rejection of the appeal. The information about the appeal and rejection of the appeal was published in VIVA NEWS of August 13-14, 2009, *available at* http://nasional.vivanews.com/news/read/82892-ma_tak_gunakan_uu_pers; and http://nasional.vivanews.com/news/read/82694-goenawan_mohamad_ajukan_peninjauan_ (last visited July 10, 2010).

87. *Id.*

of the Supreme Court, was asked why he chose not to reprimand the lower courts for not consulting the Press Council in arriving at their decisions,[88] as he recommended in a recent instruction. Justice Tumpa answered that no instructions were issued, only an appeal. Judges should not be told what law to apply as that would violate judicial independence, he said. When asked what was to be done when lower courts refused to comply with the appeal, he referred to the institution of the judicial review as a last resort.[89] It never came to that. The last news heard about the case was that plaintiff and defendants got together on October 6, 2009, had dinner, and made peace.[90]

VIII. SOMETHING HAPPENED ON THE WAY TO FREEDOM

A focus on the work of the Constitutional Court produces glum perspectives not only because of its authoritarian proclivities evident in their decisions regarding the Blasphemy Law,[91] the Pornography Law,[92] and maintenance of the Film Censor Board.[93] Reading through the detailed and timely produced reports of decisions it was not easy to suppress a sense of *déjà vu*. The tone in these decisions was paternalistic, gentle but steely, and convincingly set on a course of rolling back liberties perceived as having gone too far. The court meticulously maintained a clinical separation between the law on the books and its interpretation and enforcement by the police, the prosecution and the courts. Indonesia's Constitutional Court perceives its mandate to be limited to the constitutional review of positive law. The decisions impart the impression that no consideration was admitted of the general context within which the protected laws have been, and continue to be interpreted and enforced. That general context

88. On December 30, 2008, Chief Justice Harifin Tumpa issued Supreme Court Circular Letter No. 14 to all courts in Indonesia in which he recommended the judiciary to consult the Press Council on whether certain acts were or were not defamatory, and seek to mediate the conflict in accord with the provisions of the Press Law.

89. VIVA NEWS, August 14, 2009.

90. TEMPO INTERACTIVE, October 7, 2009, *available at* http://www.tempointeractive.com/hg/nasional/2009/10/07/brk,20091007-201319,uk.html (last visited July 10, 2010).

91. Constitutional Court Decision Number 140/PUU-VII/2009, April 12, 2010.

92. Constitutional Court Decision Number 10-17-23/PUU-VII/2009, March 25, 2010.

93. Constitutional Court Decision Number 29/PUU-V/2007, April 30, 2008.

discloses a field of abuses of power, arbitrary and selective enforcement of the law, and miscarriages of justice within a general atmosphere of corruption, collusion, and nepotism.

On the Corruption Perception Index list compiled by Transparency International for 2009, Indonesia occupies the 111th position on a list of 180 countries. The country shares the spot with Algeria, Djibouti, Egypt, Kiribati, Mali, Solomon Islands, and Togo. The recent exposures of widespread case brokerage activities involving the judiciary, the prosecution, and the police, have singled out the latter as the most corrupt institution in the country. Its latest exploit consisted of jailing a whistle-blowing police general, and the fabrication of indictments against two deputy heads of the Corruption Eradication Commission.[94] Two prosecutors and a judge were indicted for brokering a tax evasion case involving US$1.6 million. The judge confessed to having received bribes to the amount of US$ 5,000.[95] The head prosecutor at the Attorney General's office investigating a big corruption matter was caught red-handed receiving a bribe of US$660,000.[96] To add spice to the context, on and around November 5, 2009, Chief Justice Mohamad Mahfud Md. of the Constitutional Court, ordered the Corruption Eradication Commission to deliver tapes to the Court the contents, of which had been circulating through mobile phones and computers. The 4.5-hour tapes, recording conversations between prosecutors, the police and a judge, were played in a court and exposed a conspiracy involving the law enforcement institutions and the person accused of siphoning off cash from a failed bank which was being bailed out with government money. The conspirators fabricated a bribery case against two deputy heads of the Corruption Eradication Commission. Coming out of the court room, Chief Justice Mahfud was interviewed and caught on TV saying how sad it was for him to witness law enforcers being controlled like animals by financiers. In retaliation against the playing of the tape, and saying unkind words about the police, the entire police contingent on personal guard duty to the Chief Justice and his family was withdrawn the next day.

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94. THE JAKARTA GLOBE, October 5, 2009; THE JAKARTA POST, June 14, 2010.

95. THE JAKARTA POST, April 21, 2010; THE JAKARTA GLOBE WEBSITE, April 14, 2010.

96. Nurlis E. Meuko, *Misteri Aliran Dana Joko Versi Bibit*, VIVA NEWS, October 1, 2009, *available at* http://korupsi.vivanews.com/news/read/93712-misteri_aliran_dana_djoko_versi_bibit (last visited July 10, 2010).

The nine justices of the Constitutional Court do not work in a vacuum. The very same context is a continuing source of concern, worry, and fear for the ordinary citizen at the other end of enforcement. It is this fear that they brought to the Court when they asked for protection from the harshness, uncertainties, and abuses of colonial laws which are frequently interpreted and applied by less than caring police and the standing magistrature. Almost without exception, they have been turned away empty-handed. To wit, they have asked whether jailing journalists was not too excessive considering that they already have to suffer the obligation to abide by the victim's right of response, the hefty damages awards under Civil Code Article 1372, and the fines mentioned in Criminal Code Articles 310 *et seq.* Perhaps the jailing provisions could be found to be violating the *freedom from fear* protected by the constitution? The Court would have none of it.[97] They asked the Court whether it was possible at all to stick to the principle of equality before the law, and do away with the colonial *lèse majesté* clauses and have the law treat insults directed to the president and vice president the same way as insults aimed at the citizen. The Court seemed a bit moved, and bent over backwards to split the president and vice president in two. One part is to be the person of the president. If the person feels insulted, that part can resort to Criminal Code Article 310 *et seq* like everybody else. The presidential part of the person, however, is directed to Criminal Code Article 207, a no less colonial piece of legislation than the abrogated *lèse majesté* articles.[98] The decision assumes that a presidency is susceptible to feelings of being insulted.[99] None of the petitions, however, mentioned that the article violates the criminal law system. Nor did anybody raise the matter of a step-wise walk in the direction of the *police state* which concerned the writer of the end-note to the *Keng Po* (Pandeglang) case in 1938.[100]

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97. Decision of the Constitutional Court Number 14/PUU-VI/2008, August 15, 2008.

98. These would be Criminal Code Articles 134, 136bis, and 137. *See infra* page 20-21 for a scholarly comment on the popularity of criminal code article 207 by colonial prosecutors.

99. *But see*, the Keng Po (Pandeglang) case, at *infra* pages 18 and 19 ; one of the leading texts in Criminal Law insists that *insult* can only be inflicted against a natural or biological person, a principle faithfully maintained in all articles in the entire title XVI by consistently using the word "somebody" to designate the victim of the *insult* and, as a consequence thereof, by using the term "the deceased" in criminal code article 320 and 321.

100. *T.*149 at 74.

The dissenting opinion to the decision offered some interesting observations. It saw the president as distillation of the Indonesian people so that the president is actually a personal manifestation of, and represents the dignity and grandeur of the people (the personal embodiment and representative of people dignity and majesty).

The opinion wanted more splits in the president, and produced the president as a Head of State, a Head of Government, a Commander-in-Chief of the Armed Forces, and a Chief Diplomat, all these functions are stipulated in the constitution, the implication being that each part of a president may have different feelings of being insulted. The dissent also quoted *dicta* allegedly cultivated by the U.S. Supreme Court which the dissenting judge interpreted as a refutation of the principle of equality before the law: The principle of equality does not mean that every law must have universal application for all who are not by nature, attainment or circumstances in the same position, as the varying needs of different classes of persons often require separate treatment.[101]

No citation was given for the U.S. Supreme Court quotation. It could either be taken out of context, or refer to differentiation rather than discrimination. To allow maternity leave to women and not to men is a recognition of difference, not a discrimination. A legal system granting a right to some but not to others is discriminative, as would be a law the breach of which is punishable to the man-in-the-street, but not to journalists. Granting the right to a *public interest* defense against accusations of libel when the victim is a private individual, but withholding it when the target of the insult is a government official is discrimination.

To some, the description of a president, as the "distillation of the people" conjures images of a dictatorship.[102] The last time Indonesia had a president called *the voice of the people,* the show ended up in the most horrendous bloodbath the nation has known in its modern history.[103] The *lèse majesté* articles in the Indonesian

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101. Decision of the Constitutional Court Number 013-022/PUU-IV/2006, at 74.

102. It also brings back recollections about the phrase "*All animals are equal, but some animals are more equal than others"* in GEORGE ORWELL, ANIMAL FARM (1945).

103. On September 30, 1965 a heavily armed contingent of the palace guard murdered almost the entire general staff of the army. The support of the Indonesian Communist Party, the largest party outside the Sino-Soviet bloc, was thought to be evident from editorials in the People's Daily, the party's *agitprop* organ, and the almost immediate nationwide formation of Revolutionary

Criminal Code were repealed in form, but promptly replaced in essence. Criminal Code Articles 134, 136bis and 137 were declared unconstitutional and devoid of force and effect. The Constitutional Court replaced them with Criminal Code Articles 310 *et seq* and 207. The opinion of the slim majority of the justices of the Court that there is no place in a democratic republic with popular sovereignty for articles which contradict the principle of *equality before the law* was not reflected in the decision.

Criminal Code Articles 154 *et seq* prohibit expressions of hostility, hatred, and contempt towards the government of Indonesia, hence the name *hate-sowing* articles. The petition to declare the articles unconstitutional included the request to review article 107 on rebellion, articles 160 and 161 on instigations to disobey government measures, and articles 207-208 on insulting government agencies. Legal standing of petitioners were recognized only in the case of the *hate-sowing* articles. The court found the petitioners wanting of legal standing for the remaining articles. The decision was passed by a thin majority of five to four. *The hate-sowing* articles were to be scrapped because they are formal offences, because they lend themselves to arbitrary interpretation by the authorities, and because critique tended to be easily qualified as an expression of hostility, hatred and contempt. The decision pointed out that the Dutch Minister of Justice himself stated that the *hate-sowing* provisions were meant to apply to colonial communities, and definitely not fit to be taken over by the realm in Europe. It is interesting to note that the majority thought the articles irrational because it is just not possible that citizens of an independent and sovereign country could be hostile towards their own state and government. Nevertheless, the Court hailed the government's testimony which stated that the same provisions have been maintained in the new draft criminal code, this time as material offences.[104]

Councils. Within weeks the Party's organization was paralyzed by massive uprisings of non-communist political forces under the protection of army elements. The resulting witch-hunt and massacres claimed the lives of people estimated at between 60,000 to 200,000 men and women.

104. Constitutional Court Decision Number 6/PUU-V/2007, at 77-79.

IX. A CLAUSE TO OVERTURN ALL CLAUSES

After its second amendment, the Constitution of Indonesia[105] was said to contain *a world-standard Bill of Rights.*[106] Chapter XA on Human Rights contains 10 human rights clauses. It reads as if the entire contents of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights had been condensed into one chapter and bravely inserted in the Constitution. The way the clauses have been and continue to be interpreted by the judiciary, however, have been a source of serious concern to Indonesian as well as international rights organizations. A recurrent theme in rejecting applications for judicial review of oppressive criminal code provisions is the didactically prescriptive balancing of rights and obligations, and the consequent limitation of human rights. It is considered the state's duty to protect persons whose rights are violated by the exercise of the freedoms of other persons. The nine human rights articles in the Indonesian Constitution seem to be at the mercy of Article 28J at the end of the list which allows their limitation by statutory enactment.[107] Of tremendous support to the potential roll-back of rights provided by this clause is the similar clause in Article 19 Paragraph 3 of the *International Covenant on Civil and Political Rights* ("ICCPR").[108] Considerable support for maintaining the oppressive anti-defamation laws is derived from

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105. Resolved at the Session of the People's Consultative Assembly ("M.P.R.") on August 18, 2000.

106. Simon Butt & Firmansyah Arifin, *Corruption and the Judiciary in Indonesia, in* POLICY BRIEFS 2 (2008), *available at:* http://www.aigrp.anu.edu.au/publications/briefs.php (last visited July 10, 2010).

107. Indonesian Constitution, Chapter XA, Article 28J, Section (2):

> In exercising his rights and freedoms, every person is obliged to submit to limitations stipulated by law aimed exclusively to guarantee the recognition of- and respect for the freedom rights of other persons and for the satisfaction of just demands in accordance with moral, religious values, security, and public order considerations in a democratic society.

108. International Covenant on Civil and Political Rights, Article 19, Paragraph 3:

> The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> a. For respect for the rights and reputations of others;
>
> b. For the protection of national security or of public order (ordre public), or of public health or morals.

the translation of the term *slander* into the Indonesian language by the word *fitnah,* a word of Arabic origin defined by the Qur'an as an act more heinous than murder.[109] The severity of punishment for defamation in the secular codes thereby obtains solid endorsement and legitimacy in religious doctrine. In independent Indonesia, *Fitnah* and sedition are widely felt to be deserving of more severe punishment, larger damage awards, bigger fines, and longer jail sentences than was ever meted out by colonial judiciaries.

It is not true that the Indonesian political elite has mobilized a broad move to roll back freedoms which were already granted. Restrictions on freedoms have always been present either by products of colonial legislation, or by laws passed by rubber-stamp parliaments under dictatorships during some 40 years, as well as laws made in the everlasting so-called *transition period* towards full democracy.[110] It is this law-making aspect of the past, which Harold J. Berman referred to as the *law-based state,* known in Indonesia as the *Rechtsstaat,* or the system of Rule-by-Law, to distinguish it from a system of Rule-of-Law.[111] The unintended implication of this distinction is that freedoms are more rooted in the rule of law state, and that these are mostly found in common law countries. The identifications, however, do not fit reality. The

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109. THE HOLY QUR'AN, Surah 2, *Al-Baqarah,* verses 191 and 217.

110. President Sukarno dissolved the Indonesian Constituent Assembly, seizes power on July 5, 1959, and established the national-democratic stage of his revolution. On March 11, 1966 it was Suharto's turn to wrest away power from President Sukarno, and sets up a military dictatorship that lasted until 1998;

111. Harold J. Berman, *The Rule of Law and the Law-Based State (Rechtsstaat), With Special Reference to the Soviet Union, in* TOWARD THE "RULE OF LAW" IN RUSSIA? POLITICAL AND LEGAL REFORM IN THE TRANSITION PERIOD especially n. 11 (Donald D. Barry ed. 1992). Jeffrey Kahn explains the Rule–by-Law as a consequence of the doctrine of representative democracy with parliament being the exclusive actualizers of sovereignty of the people. Laws made by elected representatives of those who hold the exclusive sovereignty of the nation hold the supreme authority in the state. The legislature being an arm of the state holds monopoly power over the making of laws. The executive state enforces, while the judiciary implements. The concept is clinically neutral from value judgments on the exercise of power by the state. Hence, Nazi Germany was a *Rechtsstaat,* as was *Stalin's* Soviet Union. "There is no substantive prescription beyond the positivist procedural requirements of rule by laws." *See* JEFFREY KAHN, FEDERALISM, DEMOCRATIZATION, AND THE RULE OF LAW IN RUSSIA 54 (2002). The Rule of Law, on the other hand, is the system which does not accept the state as the exclusive fountainhead of law. In *common law* states the depoliticized courts have acted as a major source of law and what Kahn called *other normative standards.*

countries in Western Europe are *rechtsstaat* countries, yet their states are not only subject to state-made laws, but to judge-made laws, international law and tribunals as well. Closer to Indonesia, Malaysia and Singapore, both wedded to the common law system, generate many complaints about "the blatant use of the criminal law as a political instrument . . . harsh laws which censor public opinion. . ." and then again ". . . established practice of Singapore which routinely uses defamation and contempt charges against foreign journalists and opposition politicians."[112] Much like Indonesia, the legal infrastructure to restrict liberties already exists in both Singapore and Malaysia. It is the heritage of colonial times to which is added a newly set of enacted statutes after independence to lend a local flavor to "foreign" legislation.[113]

In Indonesia, the inundation of the Constitutional Court with petitions demanding the review of laws deemed obstructing the free flow of information, opinions and critique stems from a complex mental perspective. There is the thought ingrained in the back of the professional mind by decades of experience at the hands of dictatorship that the only threat to freedom of the press is the closure of publications. Such was indeed the single deadly measure the military regime unleashed unto critical media. The euphoria which accompanied the passing of the Press Law [114] by a parliament liberated by the fall of a dictator,[115] brought the wrong impression that the law will take care of all existing and potential dangers confronting journalists and the media. Finally there was the mixture of indignation, surprise, and panic at being faced by a plethora of lawsuits filed by plaintiffs, some of whom would not normally command the respect of the community, yet managed to persuade the judiciary to mete out stiff sentences and large awards. It was this complex of feelings, thoughts, and circumstances which moved petitioners to demand constitutional reviews of laws

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112. Kanishka Jayasurya, The Rule of Law and Regimes of Exception in East Asia, Working Paper No. 96, Asia Research Center, Murdoch University, July 2000, at 3.

113. For a treatment on the subject during the military dictatorship in Indonesia, see Daniel S. Lev, *Colonial Law and the Genesis of the Indonesian State*, 40 INDONESIA (Oct. 1985). Referring to the take-over of oppressive colonial legislation by an independent Indonesia, Lev wrote: "It is not simply that such legal provisions have been retained, but that their retention implies the same understanding of political prerogative from which they originated," *id.* at 73.

114. Law No.40 of 1999.

115. General Suharto was deposed in the wake of the monetary crisis of 1998.

deemed hostile to press freedom. The Constitutional Court rejected most of the demands, and acceded to some because other laws, no less hostile, are or will be substituted for the statutes to be repealed.

Human Rights Watch issued a most recent report on the state of freedom of expression in Indonesia.[116] It is a scathing indictment against an excessively oppressive criminal defamation law regime, and a willing law enforcement apparatus to pursue the accuser rather than investigate the offence the plaintiff is accused of. The report complains that in the hands of financially and politically powerful personalities, criminal anti-defamation laws become destructive implements against critique and opposition. These laws are more susceptible to abuse and manipulation, particularly when employed by government officials with investigative authority backed by financially strong parties. The Information & Electronic Transaction Law[117] was singled out as particularly hostile with its threat of imprisonment of up to 6 years, a fine of up to Rp. 1 billion, and a possible pretrial detention.[118]

The bad conditions of freedom of the press in Indonesia seems to be somewhat shared by its neighbors. Despite its bad report card, Indonesia is deemed to have the freest press in Southeast Asia by *Reporters Without Borders.* On its worldwide press freedom index for 2009, Indonesia was given a score of 28.50, over and above its neighbors. Eritrea stood at the bottom of the list with a score of 115.5. Scandinavian countries and Ireland were on top of the list and rated 0 (zero). It must have been a satisfying sight for the Indonesian government to watch Indonesia leading its neighbors in the Association of Southeast Asian Nations in press freedom.[119]

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116. *See, Turning Critics into Criminals, The Human Rights Consequences of Criminal Defamation in Indonesia*, HUMAN RIGHTS WATCH, May 3, 2010, *available at:* http://www.hrw.org/en/reports/2010/05/04/turning-critics-criminals (last visited July 10, 2010).

117. Law No.11/2008 on Information & Electronic Transaction.

118. A petition for constitutional review of two articles in the law submitted by citizens was squarely rejected by the Constitutional Court in its decision Number 50/puu-VI/2008, on May 5, 2009.

119. On the Reporters without Borders World Press Freedom Index for 2009, Indonesia scored 28.50, above the Philippines (38.25), Thailand (44), Malaysia (44.25), and Singapore (45). *See,* Press Freedom Index 2009, *available at* http://en.rsf.org/press-freedom-index-2009,1001.html (last visited July 10, 2010).

X. TO CONCLUDE

The road to freedom meets a dead-end at Constitution junction. The Indonesian Constitutional Court is not ready to lead the nation on the way to reform. The Court is resolved to maintain laws on the books which were promulgated for the security and ease of law enforcement in a colony. The Court also held on to statutes which were enacted after independence by authoritarian regimes and compliant parliaments. The only way out is to muddle through the conventional judicial process and cope with its capricious outcomes. That is not an easy task. There is no discernible method in the way courts arrive at their decisions. This makes it very difficult to navigate a way through the hazards planted in the colonial civil and criminal codes, and the considerably more hostile post-independence statutes. The use of such "insulting" words as *dumb*,[120] or *thief*,[121] or *scavenger*,[122] or *Suharto Inc*.[123] is punished, but so are complaints against allegedly fraudulent sellers.[124] A patient sending an e-mail to friends complaining of maltreatment in a hospital,[125] editors warning authorities not to install an official who was still facing customs suits, and consumers complaining about bad service through letters to the editor are brought to trial. The Press Law of 1999 is not an adequate bar against criminal prosecution or tort suits.[126] An issue of grave concern is that serious critique, and by any standard necessary,[127] directed against public authority, even if *public*

120. The *Bersihar Lubis* case. *See supra* notes 56 and 57.

121. The *Indies Social Democratic Party Congress* case in Bandung, Raad van Justitie Batavia, Second Chamber, April 6, 1923, T.120 at 496-500.

122. The *Tomy Winata v Tempo* case, Central Jakarta Court of First Instance, Decision No.233/Pdt.G/2003/P.N.Jkt.Pst, March 18, 2004.

123. The *Suharto v Time Magazine* case, Supreme Court Decision No.3215 K/PDT/200, August 30, 2007.

124. The North Jakarta Court of First Instance Decision Number 178/PDT/G/2007/PN.JKT.UT, in the *Seng Seng* case on May 6, 2008.

125. The celebrated case of *Prita-of-the-Coins* (nationwide contributions of coins in support for the defense of *Prita Mulyasari*, a pregnant mother of two being the first victim of pretrial detention under the Information & Electronic Transaction Law); her criminal prosecution was dismissed by the Tangerang Court of First Instance (Decision Number 1269/Pid.B/2009/PN.TNG), but the prosecution appealed to the Supreme Court, while the hospital's civil suit against her awarded the plaintiff damages in the sum of Rp.204.000.000, an amount she could not afford.

126. *See supra* notes 70-71.

127. *See supra* note 46.

interest is judicially recognized remains punishable.[128] On the other hand, as if to increase the level of general uncertainty, defendants who failed proving the truth of their allegedly libelous accusations are pardoned.[129] It seems as if a message is forcefully imposed on the general public that complaints about bad treatment or fraud by sellers of goods or services must be kept a secret between the *complainer* and the *complainee*, or between the victim and the police. Complaints must not be put in *letters to the editor*, nor in e-mails if the latter is accessible by others. No bad words, no critique, and no complaints.

All of these decisions were reached by courts by having the facts meet with the law. This is how the law is interpreted, applied, and enforced. This IS the law. There is no way in which the law on the books can be clinically divorced from the way it is operated in practice. Statements by justices at the Constitutional Court that laws in operation are none of the Court's business, implying that the Court's exclusive mandate is to mathematically project a statute against provisions in the constitution. This understanding is excessively legistic and lack support in the dicta, holdings, and rulings in their own decisions.

The wait now is for more widespread publicity of decisions and transparency in the process of decision-making. A more brief and simplified version of law reports rather than the unnecessarily long and repetitive texts of decisions should persuade commentators to dwell more on the reasoning rather than the end result of court decisions. Open discussions and the emergence of recognizable doctrinal consensus in the civil and criminal law system of Indonesia, acknowledged sources of law, should persuade the judiciary to look beyond the black letter of the law in their search for justice. For justice is also to be found among the practitioners, enforcers, and those who receive its painful assaults. Nobody said that change was going to be easy for a system that survived centuries of feudal rule, colonial administration, and four decades of post-independence dictatorships.

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128. *See supra* note 36.

129. Time Inc. failed to prove allegations regarding Suharto's shifting of huge amounts of money between bank accounts in Switzerland and Austria. Tempo was not able to prove that plaintiff Winata took an interest in the rebuilding of one of the largest garment and textile markets in Asia. *See supra* note 23, and notes 36 and 37.

COMMON LAW, CIVIL LAW, AND THE CHALLENGE FROM FEDERALISM

Santiago Legarre*

I. LITVINOVIA

Let me start with some personal anecdotes regarding the life of he who was rightly termed "the great Litvinoff."[1] Borrowing again from the same source, I shall call them "Litvinovian observations."[2] To each observation I shall assign a label; each will attempt to illustrate some trait of his intriguing personality.

The first one I shall name, not without a certain boldness, "Litvinovian Intransigence."[3] From the outset I must clarify that I am talking about intransigence in certain matters only—minor

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1. From the words read by don Saúl's colleague and friend Cheney C. Joseph, Jr. on the occasion of don Saúl's funeral, a copy of which is on file with the author. The great Litvinoff's life was aptly evocated in a piece by Agustín Parise and Julio Romañach, the latter having a long standing friendship with don Saúl. *See* Agustin Parise & Julio Romañach, *Saúl Litvinoff (1925-2010),* LA LEY [L.L.] Feb. 2, 2010 (Arg.); and the English version in this same volume of the JCLS, at 17. For a more detached point of view on Litvinoff's life, *see* Honoring the Legacy of Litvinoff, Years of Service 1964-2009, 6.6 THE CIVILIAN, Feb. 2010 at 1.

2. Professor Paul R. Baier rightly pointed out to me that they are actually "Legarrian observations" on don Saúl's life. Comment by Prof. Baier subsequent to the oral presentation of February 4th, 2010 at the LSU Law Center.

3. Let me share with you, gentle reader, that after some hesitation the senior members of the faculty present at the workshop laughed heartily—with seeming approval—when I promulgated my choice of this label.

matters it would seem, matters of detail. I shall illustrate Litvinovian Intransigence with two one-on-one experiences.

My first encounter with Saúl Litvinoff occurred at a time when he and other LSU faculty were visiting Argentina. Roberto Bosca, then Dean of Universidad Austral Law School, had asked if I could take don Saúl and him as my guests to the Jockey Club in Buenos Aires. The three of us were to have dinner. But at the lobby of the Club, don Saúl was kindly requested to wear a blue jacket in place of the extremely elegant beige jacket that he was wearing. I had completely forgotten to forewarn my guest that light colors are not admitted at night in this traditional venue. This omission would not have been a problem since the Club has extra blue jackets intended precisely for these situations. That is, it would not have been a problem had it not been for Litvinovian Intransigence.

Saúl refused to take the old, worn out, rather dirty jacket he was offered by the bewildered janitor. He would not remove his own beautiful garment, even if that entailed leaving the Jockey Club and, as it turned out, dining at a much less elegant restaurant: a last minute, improvised choice. For don Saúl, the only thing that really mattered was that his own elegance had been preserved.

The second anecdote instantiating Litvinovian Intransigence also took place in the early 2000's in Buenos Aires. During this period of time, my country was in the midst of economic turmoil. Many businesses would not take Argentine currency; only U.S. dollars. That was the case at the Alvear Palace, a venerable Parisian-like hotel located on the most beautiful street in the city. The Alvear Palace was Saúl's favorite hotel.

When Saúl attempted to pay with pesos, the manager explained to him the Alvear Palace's policy (and perhaps the reasons thereof: I do not remember). The reaction was immediate. Saúl stated, "I am Argentine, I am in Argentina, I will pay pesos or I will lodge somewhere else." The manager was perplexed. But even before any kind of response could have been elicited, Litvinoff had already exited the building. Litvinoff would not negotiate. He would stick to principle. What principle? That I do not know.[4]

I move now to "Litvinovian Culture," another remarkable trait of don Saúl. My next story happened in Argentina in 2001 when several members of this faculty, including then Chancellor John

4. This reference to principle was (by far) the remark that the audience celebrated the most. As it happens, it was an *ad-lib*.

Costonis, were visiting IAE—the Universidad Austral Business School. At some point we were all in the Chapel with an unknown gentleman showing us around. The gentleman indicated that the altarpiece—a Nativity scene—was by a famous Spanish painter whose name I don't recall. "That is incorrect," interjected Saúl, reminding me of Muriel Spark's unfathomable *Miss Jean Brodie*. "The painter," he proceeded, "was indeed called [. . .] but this was by a namesake of his [. . .] who is Mexican, not Spanish." Of course, the guide was flabbergasted. He had given this tour a number of times, and he spoke with a mixture of relaxed pride and carelessness typical of one who thinks that he already knows everything about his trade. He had not counted on Litvinovian Culture.[5] Nor had the gentleman counted on "Litvinovian Wit," which takes me to a third remarkable trait of don Saúl.

Cheney Joseph observed, on the occasion of the funeral, that Saúl was endowed with "sarcasm laced with warm affection."[6] I think these words capture "Litvinovian Wit."

In 2005, I was lingering in the faculty lounge of the LSU Law Center when our beloved colleague unexpectedly showed up. It was a Saturday morning. "Are you free tonight?" he asked. "Yes," I replied. Saúl stated, "Well, in that case I could take you to the movies. Is there one you would like to see?" Unlike the first question, which took me by surprise, I replied immediately, "The Phantom of the Opera." And "The Phantom" it was.

I had listened to the music a thousand times and found the idea of watching the movie version of the Broadway show extremely exciting. As we exited the theatre, master Litvinoff asked if I had enjoyed the movie. With some hesitation due to the tone of the question, I passionately described the movie version of "The Phantom" as a fabulous, incredible adaptation. But Saúl wryly observed:

> Well, my dear, [actually, he said *Querido*, one of his favorite Spanish terms] the movie was indeed very bad. It could have been worse, but it was really bad. Nevertheless,

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5. John C. Costonis observed as we left the Chapel, seemingly intent in distressing all of us present: "Saúl is a renaissance man." And how right he was!

6. From Cheney C. Joseph, Jr. words on the occasion of the funeral, *see supra* note 1.

> your whim has been indulged, and that was what mattered this time.

Perhaps this was a taste of "sarcasm laced with warm affection."

Finally: "Litvinovian Charm." On one occasion, Saúl was a dinner guest at my parent's residence. I have very fond and funny recollections of the dinner. When I learned of his death a few weeks ago, I asked my mother if there was anything she recalled from that evening so that I could share it with you today. Interestingly, she did not single out any particular moment (although I remember, for example, that Litvinoff arrived with remarkable presents for both of my parents). Instead, she said, "What a charming old man he was!" Surely, intransigence, culture, and wit had been displayed throughout the dinner. But the only thing that caught my mother's memory was Litvinovian Charm—the one characteristic among all of the Litvinovia I have selected that we all should cherish in our own memories as we move on in this land that Saúl has relinquished for good to be with the "great spirit up there."[7] With his charm in mind, and using it as a source of inspiration, I will move on to the second part of this lecture.

II THE MULTIFARIOUS FRAGMENTATION OF UNIFORM LAW

The title of this presentation is an ambitious one: "Common Law, Civil Law, and the Challenge from Federalism."[8] Henri

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7. *See* e-mail from Saúl Litvinoff to Santiago Legarre (Sep. 20, 2009) (on file with author). The full sentence was: "*Si me verás depende de tu gran espíritu allá arriba, pero si yo sigo abajo te veré con mucho gusto pues ya se te espera con cariño*," which translates to: "Whether you see me or not [when you come to LSU in February 2010] depends on your great spirit up there, but if I am still down here I shall have much pleasure in seeing you." I have reason to think that Saúl was a believer, although I acknowledge that this view is contrary to a widespread assumption favored and reinforced by Saúl himself. I will not go further into Saúl's religious views here other than to mention one more exchange with Saúl. In reply to my Christmas wishes of 2006, he wrote: "*Tus plegarias siempre me vienen muy bien y te las agradezco mucho*," which translates to: "Your prayers always do me good and I appreciate them very much." *See* e-mail from Saúl Litvinoff to Santiago Legarre (Dec. 22, 2006) (on file with the author).

8. After some reflection and consultation with my friend Paul Yowell, I decided that "from Federalism" does a better job here than "of Federalism." The

Lapeyre, Jr., a distinguished member of the Louisiana bar in attendance here today, made an astute observation: "I can't imagine how you can cover the subject of your talk in only an hour and fifteen minutes, but then, perhaps, you will not attempt to lecture on ALL there is to know about the common law, civil law, and the challenge from federalism."[9]

Maybe the title should not be taken too seriously. Maybe it is more like a catch-phrase. Had I chosen a title such as "Recent developments of federalism in Greenland" (or in Argentina, for that matter), Professor Moréteau would likely be the lone member in attendance. On the other hand, a title that includes three key notions in it—common law, civil law, and federalism—has a greater likelihood to catch the interest of lawyers. Indeed, such a title is relevant to a family lawyer, a criminal lawyer, a constitutional lawyer, a civil lawyer, and a common lawyer alike.

The title, however, is not only a catch-phrase. It also illustrates a methodology or style of presentation which involves the picking of an excuse to deal with a substantial problem of law. For instance, my mental process for selecting this title was the following.

I would like to deal with a certain issue that really matters, try to understand it better, explore its potential, and then be able to explain it to others (colleagues, students). For those purposes I choose a given jurisdiction—an excuse—that instantiates the problem at stake in an interesting and rich way. It is not about how *many* jurisdictions I pick; it is about how *much* I can learn from the selected one(s).[10] In other words, it is not so much about the

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reader shall judge after exploring the argument. I would like to share with the reader that one of the reasons I had in mind for the choice of preposition was that, when I Google'd both alternatives, there were a million more of the one I ultimately rejected. That should tell you a lot about the extent of my love for Google searches as source of authority.

9. E-mail from F. Henri Lapeyre, Jr., to Santiago Legarre (Jan. 27, 2010) (on file with author).

10. The same, by the way, happens with the study and teaching of the class I have been charged with for the last few years at LSU Law Center, "Comparative Constitutional Law." When it comes to selection of countries for purposes of comparative analysis the medieval saying applies: "*Non multa sed multum*"—a saying that captures the essence of the distinction between the English words many and much.

quantity of comparisons as it is about having a topic deserving to be compared on account of its worth and relevance.

What is the topic and why is it relevant? Relevance being a relative concept in law, I will rephrase the latter part of my question. Why is it relevant for an American readership and audience?

The challenges for the common law that flow from federalism in the United States can be exemplified in a way which may illuminate both the connection of the Argentine situation to those challenges and the relevance of my analysis with a view towards a possible solution to some American problems.

The following are only a few examples of these American problems that are related to the aforementioned Argentine situation: the *Erie*[11] doctrine and the idea that there is no such thing as national common law; the Restatements of the Law and other works by the American Law Institute; the Uniform Commercial Code and the varying interpretations by the U.S. state courts; and the several instances of the U.S. federal government using federal funding to mandate conformity with national standards set forth in federal legislation.[12]

Moving now to my *excuse*: the case of my country: what I have called "the Argentine situation." It is a well-known fact that in 1853 Argentina used the Constitution of the United States as a source of inspiration for its own constitution enacted in that year. Another well-known fact is that Argentina deviated from this model in some instances. It is not so well-known, however, that one of these deviations was the distribution of powers to make and apply the law.

Pursuant to the American model of 1787, the powers not delegated to the Federal Government are reserved to the states.

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11. The *Erie* Doctrine, which follows from the Supreme Court landmark decision in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), requires U.S. federal courts to honor state common law when deciding state law issues.

12. Patrick H. Martin mentioned to me the proposed legislation requiring each state in the U.S. to forbid text-messaging while driving if the state wishes to receive Federal highway funding. Michael Leachman also noted that this strong-arm approach was successfully used by the U.S. federal government to mandate a uniform minimum age of 21 for purchasing and publicly possessing alcoholic beverages. *See*, The National Minimum Drinking Age Act, 23 U.S.C. § 158 (1984).

This general principle of federalism permeates the whole American constitutional design and is confirmed by the Tenth Amendment.[13]

The Argentine text of 1853 embraced this general principle of federalism and expressly memorialized it in Article 101 of the Federal Constitution (currently, Article 121).[14] Nevertheless, a power the framers of the U.S. Constitution did *not* delegate to the Federal Government—and which, therefore, was retained by the states—was indeed delegated by the Argentine drafters to the Federal Government: the general legislative power, if I may call it so on this occasion, using a hopefully justified simplification.[15]

Rather limited legislative powers have been vested in the United States Congress[16] (at least in theory[17]). Instead, most legislative powers have been retained by the states. These legislative powers are exercised primarily by the respective state legislatures (in all cases, but especially in Louisiana) and secondarily by the state courts interpreting and applying statutes and the common law.[18]

By way of contrast, the Argentine Constitution vested in the Federal Congress the power to make and subsequently develop what in our country is termed "*derecho común*," or substantive law, *i.e.*, legislation on civil, commercial, criminal and other matters. Although *derecho común* translates literally as "common

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13. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." US. CONST. amend. X.

14. "The Provinces retain all powers not delegated by this Constitution to the Federal Government." In the case of older texts, I follow Ma. Laura San Martino de Dromi's compilation: MA. LAURA SAN MARTINO DE DROMI, DOCUMENTOS CONSTITUCIONALES ARGENTINOS (1994).

15. In the United States the adjective "general" is used to describe the power of each state. Thus: "power is shared between state governments of *general* jurisdiction and a federal government of delegated and enumerated powers." Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 20 (2000) (emphasis added).

16. *Cf.* the different clauses of US. CONST. art. I, § 8, and their interpretation by the U.S. Supreme Court in United States v. Lopez, 514 U.S. 549, 552 (1995). The foregoing is without prejudice to open rules allowing for a limited extension of enumerated powers. *Cf.* particularly US. CONST. art. I, § 8, cl. 18.

17. Questions have been raised, rightly, as to the extent of this limited delegation in practice. George, *supra* note 15, at 22-23.

18. *See generally* ALLAN E. FARNSWORTH, UNA INTRODUCCIÓN AL SISTEMA LEGAL DE LOS ESTADOS UNIDOS (1990).

law" it is better described under the name of *ius commune*, to avoid confusion with the common law system.[19] Having said that, in the Argentine legal system, the content of *derecho común* is analogous to that of common law in the United States, in the sense that both are "general law," even though they obviously differ considerably in other aspects, *e.g.*, "*derecho común*" is enacted, whereas common law is case law. In sum, the Argentine provinces—unlike the American states—delegated to the Federal Government the enactment of "general" law.

Why so? The situation of colonial legislation, mostly imported from, or consisting of Spanish law, was absolutely chaotic. In the words of one of the most conspicuous members of the 1853 Constitutional Convention, Benjamín Gorostiaga, a new legislation was needed in order to replace the Spanish laws, which were confusing—on account of their number—and inconsistent. Furthermore, he added, if as a consequence of the emulation of the American model every province were to retain their general legislative power, the country's legislation would become a baffling maze of legal rules leading to "inconceivable evils."[20]

Objections had been raised when this criterion was put forward at the Constitutional Convention of 1853. Delegate Zavalía asserted that the idea entailed an undue encroachment on the powers of local legislatures and, therefore, on each province's sovereignty. And, as source of authority, he brought up the American model, where "each of them [in reference to the states] enacts its own laws."[21]

Delegate Zenteno tried to mediate this debate. In an attempt to ease delegate Zavalía's concerns, delegate Zenteno explained that the Federal Congress was "a meeting of men from all the provinces"[22] which would be sufficient to protect provincial sovereignty and interests.

Ultimately, the Argentine drafters chose to deviate from the U.S. model in an attempt to unify the law with a view to putting an end to the chaos brought about by Spanish legislation. For this

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19. *Cf. infra* note 26.

20. 4 EMILIO RAVIGNANI, ASAMBLEAS CONSTITUYENTES ARGENTINAS 528-529 (1937).

21. *Id.* 528.

22. *Id.*at 529.

purpose, a centralizing legislative movement was deemed suitable.[23] "Inconceivable evils" would, therefore, be avoided.

But this had, perhaps, an unintended effect: the delegation of the mass of legislative powers to the Federal Congress left the provincial judiciaries with little law to apply.[24] If the Federal Congress was to enact *derecho común*, then this law would naturally be federal and, therefore, be applied by the Federal Judiciary pursuant to the predominant federalist principle enshrined in the constitutions of countries such as the United States.[25]

This story, however, does not finish just there. One of the original provinces, Buenos Aires, had decided not to join the newly born Argentine Republic in 1853 for reasons that are not germane here. When this large and rich province changed its mind seven years later, it established as a condition precedent that a Provincial Constitutional Convention would review the original text of the Federal Constitution.

In order to prevent the aforesaid implications of the centralizing movement, the Buenos Aires Provincial Convention proposed the so-called "reservation" in favor of provincial jurisdictions in 1860. Federal drafters accepted this proposal soon afterwards at a new *ad hoc* Constitutional Convention convened that same year. By means of a rule rather cryptically worded,[26]

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23. Centralization was not complete, since—by virtue of the principle laid down in the current Article 121 of the Argentine Constitution (*see supra* note 14)—the provinces retained legislative power to enact legislation on local procedure and public law.

24. In Argentina, like in the United States, the federal judiciary coexists with a local judiciary: the provincial courts, in the former country; the state courts, in the latter one.

25. *Cf.* US. CONST. art. III, § 2 cl. 1.

26. The original wording—of 1853—of Article 64, paragraph 11, of the Argentine Constitution included among the powers of the Federal Congress: "[t]o lay down the civil, commercial, criminal and mining Codes;" but in 1860 an addition was made: "those codes shall not alter local jurisdiction, and [. . .] shall be applied by provincial courts." Accordingly, Article 100 was amended that year as well, so the original text: "the Supreme Court and the lower courts of the Nation shall hear and decide all cases concerning issues governed [. . .] by the federal laws" was completed with the phrase "except for the reservation of Article 67 [former 64], paragraph 11." The latter article is precisely where the term "reservation" is used to describe the spirit of this amendment. At present, these provisions are included in Articles 75, paragraph 12, and 116, respectively.

provincial courts were granted the application of *derecho común*, despite *derecho común* being federal in nature. Thus, an exception to the aforementioned federalist principle was established.

In 1910—a time equally distant between the bicentennial Argentina celebrates this year and the 1810 revolution that marked the path toward independence—the eminent jurist Felipe Espil shrewdly noted that this so-called "reservation" marked a departure from the rationale behind the U.S. system.[27] Espil captured the very essence of the problem I want to raise awareness about here. As he put it, the original effort at unification had resulted in the possibility—perhaps unnoticed in 1853—of "depriving [provincial courts] of their power to hear and resolve cases on matters already under their jurisdiction."[28] In 1860, in order to remedy an anomaly (according to American federal terms), a new anomaly came into being: pursuant to the new article 67, paragraph 11, each Provincial Judiciary would be qualified to render an *actually different interpretation* of the same *federal* rule, be it the Civil, Commercial, Criminal codes, or the like. This explains why 100 years ago Espil complained that "there were fourteen interpretations of just one code across the nation."[29] His complaint, amplified by the greater number of provincial jurisdictions existing today, still seems to ring in our ears. Unfortunately, all of the attempts to cure the problem have failed so far.[30]

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27. FELIPE ESPIL, LA SUPREMA CORTE FEDERAL 193 (1915): "we have, for compelling reasons, departed from that rationale [behind the U.S. system]."

28. *Id.* at 193-194.

29. *Id.* at 194.

30. For the various attempts to unify law—Federal Court of Cassation, grant of jurisdictional authority to the Argentine Supreme Court of Justice to decide on substantial matters concerning *derecho común*, etc.—*see* SANTIAGO LEGARRE, EL REQUISITO DE LA TRASCENDENCIA EN EL RECURSO EXTRAORDINARIO 44-71 (1994).

THE PRINCIPLE OF PROPORTIONALITY: THE CHALLENGES OF HUMAN RIGHTS

Juan Cianciardo*

The purpose of the present paper can be synthesized in the following points: a) to expose the concept of the principle of proportionality in its broadest sense and its different components or dimensions; b) to draw the attention to an approach which is usually not studied by authors, that is, the fact that the application of the principle is not enough to guarantee the supremacy of the human rights, at least in some cases; c) lastly, to point out those requirements that could protect proportionality from the risk mentioned in b).

I. INTRODUCTION: THE PRINCIPLE OF PROPORTIONALITY AND ITS DIMENSIONS

For the last twenty years, constitutional courts have applied the principle of proportionality as a procedure that aims to guarantee the full respect of human rights (or fundamental rights) by the state. This principle is applied in both civil law and common law systems, in countries such as the United States, Argentina, Germany, Great Britain, Spain, Italy, France, Belgium, Denmark, Ireland, Greece, Luxemburg, Holland, Portugal, and Switzerland, just to mention a few; and also by the European Court of Human

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Rights, the Inter-American Court of Human Rights and the European Court of Justice.[1] It has been correctly said:

> the parameter of rationality—a problematic restoration of the *rationabilitias* in the medieval juridical culture—can be recognized in the constitutional jurisprudence of the vast majority of the liberal-democratic systems of our days. No matter what its shades are, this is the question about the "reasonable basis" of the differentiation in the doctrine of the American Supreme Court, that of "reasonable justification" which is put forth by the Federal Supreme Court of Switzerland; the criteria of "non arbitrariness" which, following the thinking of Leibholz, is used by the Constitutional Court of Germany, or the rule of *ragionevolezza*, which became a general principle of law by the ruling of the Italian Constitutional Court (sentence 81, 1963). Among us, the criteria of "reasonableness" of normative differentiations introduced by the legislator was

1. *See* JÜRGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 680-702 (1992); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW (1996); Michael Akehurst, *The Application of General Principles of Law by the Court of Justice of the European Communities*, 1981 BRIT. Y.B. INT'L L. 29, 38-51 (U.K.); Sophie Boyron, *Proportionality in English Administrative Law: A Faulty Translation?*, 12 OXFORD J. LEGAL STUD. 237 (1992) (U.K); Javier Barnes, *Introducción al principio de proporcionalidad en el derecho comparado y comunitario*, 135 REVISTA DE ADMINISTRACIÓN PÚBLICA 495, 495-99 (1994) (Spain); George A. Bermann, *The Principle of Proportionality*, 26 AM. J. COMP. L. (SUPP.) 415 (1978); Guy Braibant, *Le principe de la proportionnalité, in* MÉLANGES OFFERTS À MARCEL WALINE 297 (1974); Jean-Marie Auby, *Le contrôle jurisdictionnel du degré de gravité d'une sanction disciplinaire*, REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET À L'ÉTRANGER, janvier-fevrier 1979, at 227-238 (Fr.); JUAN FRANCISCO LINARES, RAZONABILIDAD DE LAS LEYES (2d ed. 1989); JUAN CARLOS GAVARA DE CARA, DERECHOS FUNDAMENTALES Y DESARROLLO LEGISLATIVO 293-326 (1994); ROBERT ALEXY, TEORÍA DE LOS DERECHOS FUNDAMENTALES 111-112 (2d ed. 2001); WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929); Anna N. Georgiadou, *Le principe de la proportionnalité dans le cadre de la Jurisprudence de la Cour de Justice de la Communauté Europée*, 81 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 532 (1995) (Ger.); and Javier Jiménez Campo, *La igualdad jurídica como límite al legislador*, 1983 REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL, no. 9, at 71, 72 (Spain).

invocated by the Constitutional Court, following, in part, those jurisprudential orientations.[2]

In the common law systems, the principle is usually called "principle of reasonableness."[3] In those places, it is possible to find court decisions in which the principle is applied not only in constitutional issues but also in civil law, administrative law, criminal law, etc.

The principle of proportionality prescribes that all statutes that affect human rights should be proportionate or reasonable. The analysis of proportionality is made up of three sub-principles: adequacy, necessity, and proportionality *stricto sensu*.

The first sub-principle is that of adequacy, which establishes that the statute which affects a human right must be suitable to achieve the purpose that was sought by the lawmaker. That is to say, once the interpreter has defined the end that the legislator aimed for and the means that the legislator has designed to obtain such end, then the interpreter must verify if the means are capable of achieving such end.

Through the second sub-principle, the interpreter evaluates if the lawmaker has chosen, among the means capable of obtaining the desired end, the one which is the least restrictive of the human

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2. Jiménez Campo, *supra* note 1, at 73. The importance of proportionality is so big that it has been said to be "the most important general principle of the communitarian law." SCHWARZE, *supra*, at 677 (quoting Jürgen Gündisch, *Allgemeine Rechtsgrundsätze inder Rechtsprechung des Europäischen Gerichtshof, in* DAS WIRTSCHAFTSRECHT DES GEMEINSAMEN MARKTES IN DER AKTUELLEN RECHTSENTWICKLUNG 97, 108 (Institut fur Integrationsforschung ed., 1983) (Ger.)).

3. However, in some cases it is called "proportionality." *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2852 (U.S. 2008) (Breyer, J., dissenting). *See also* Roper v. Simmons, 543 U.S. 551 (2005); United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Tennessee v. Lane, 541 U.S. 509 (2004); Vieth v. Jubelirer, 541 U.S. 267 (2004); Virginia v. Hicks, 539 U.S. 113 (2003); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

The references to the idea of "reasonableness" are very common and frequent. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005). *See also* Smith v. City of Jackson, 544 U.S. 228 (2005); Muehler v. Mena, 544 U.S. 93 (2005); Illinois v. Caballes, 542 U.S. 405 (2005); United States v. Booker, 543 U.S. 220 (2005); Brosseau v. Haugen, 543 U.S. 194 (2004); Florida v. Nixon, 543 U.S. 175 (2004); Devenpeck v. Alford, 543 U.S. 146 (2004); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

rights. In other words, the norm will only pass the test of necessity if it is the one among those similar in efficacy which is the least restrictive of the rights.

Once it has been established that the norm has complied with the first and the second sub-principles, the interpreter should determine whether it is reasonable *stricto sensu*, or not. The doctrine and the jurisprudence have defined this sub-principle as an examination of the balance between the advantages and disadvantages brought about by the law. "The [sub]principle of proportionality *stricto sensu* means that the application of a given instrument or means to achieve a given end or objective should not be unreasonable in its reciprocal relationships."[4] The interpreter must evaluate whether this balance is proportional (in other words, reasonable), or not. In spite of this initial coincidence between the doctrine and the jurisprudence, the dissidences in the specification of what a "reasonable" relationship is still to come up. The dominant position proposes that judges should weigh the advantages and the disadvantages of the measure under analysis. In French law, this alternative interpretation is called "balance between costs and benefits."[5] Also, the Spanish Constitutional Court and doctrine have reached a similar characterization.[6] For example, in STC 66/1995, the court stated that a restriction of a right is proportional *stricto sensu* if it is "pondered or balanced because more benefits or advantages for the general interest are

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4. GAVARA DE CARA, *supra* note 1, at 308; BVerfGE 7, 377; 8, 71; 13, 97; 78, 77; y 79, 29].

5. *Cf.* Jeanne Lemasurier, *Expropriation:"Bilan-cout-avantages" et necessite publique*, LA REVUE ADMINISTRATIVE, septembre-octobre 1979, at 502 (Fr.). *See* EMILIOU, *supra* note 1, at 67-114, 92-95; Auby, *supra* note 1; and Braibant, *supra* note 1.

6. The proportionality *stricto sensu* prescribes that:

> There should be a tendency to reach a balance between the advantages and disadvantages which will inevitably appear when a right is limited, in order to protect another right or good which is constitutionally protected. It is necessary to carry out an evaluation in which particular and collective interest will be confronted, which implies taking into consideration all the relevant circumstances in the case.

MANUEL MEDINA GUERRERO, LA VINCULACIÓN NEGATIVA DEL LEGISLADOR A LOS DERECHOS FUNDAMENTALES 132, 134 (1996) (Spain).

The author insists on this when he says that the balancing test is: "the well adjusted relationship between the means and the ends in terms of costs and benefits." *Id.*

derived from it than damages against other goods or values in conflict."[7]

The expression "balance between costs and benefits" seems to indicate that any norm with a cost proportionate to its benefits will be reasonable. Therefore, if the hypothetical benefits are high, the way in which human rights may be affected is expected to be high too, and this will be acceptable.[8] This may be expressed with the following formulas, using a scale from 1 to 3 to measure the degree of restriction (3 being the most restrictive measure) and a scale from "a" to "c" to measure the importance of the end ("a" being the most important end):

(1) If measure 1 (M1) restricts (r) in a second degree, and it leads to an end (E) of importance b, then it is proportional;

(2) If M2 r 3, and E c, then the measure is disproportional;

(3) If M3 r 1, then it is sufficient for E to be constitutional for the measure to be considered proportional.

II. PROPORTIONALITY AND RESPECT OF HUMAN RIGHTS

A. The Problem

A proportional norm will be: a) adequate to the end; b) the least restrictive of the human rights among all the adequate options that could be applied; and, finally, c) proportional *stricto sensu*, that is, it must keep the balance between the costs and the its benefits.

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7. S.T.C., May 8, 1995 (S.T.C., No. 66/1995) (Spain). In Spanish: "Ponderada o equilibrada por derivarse de ella más beneficios o ventajas para el interés general que perjuicios sobre otros bienes o valores en conflicto." *Id.*

8. *Cf.* GERMÁN JOSÉ BIDART CAMPOS, LA CORTE SUPREMA: EL TRIBUNAL DE LAS GARANTÍAS CONSTITUCIONALES 107 (1984) (Arg.).

The Argentine Supreme Court has said: "the higher the hierarchy of the protected interest, the stronger the regulation could be." Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/6/1962, "Partido Obrero (Cap. Fed.) / personería" Fallos (1962-253-154) (Arg.).

However, the principle which says that "the regulation cannot alter the human right involved in the case, but it should go untouched and in its integrity, without corrupting nor extinguishing it, in whole or in part." Is still in force. *See* CSJN, 5/9/1903, "Hileret y Rodríguez c. Provincia de Tucumán / inconstitucionalidad de ley provincial del 14 de junio de 1902 y devolución de dinero" Fallos (1903-98-20), at 24 (Arg.).

In my opinion, and this is the thesis of the present article, this conception of proportionality does not necessarily prevent the legislator from violating the human rights, at least in some cases.

In other words, if the principle of proportionality were just a balance between the "weight" of the right and that of the reasons that have led the legislator to decide to restrict such right, then, ultimately, that human right could lose its characteristic of impassable barrier for the state. Indeed, the invocation of a more or less convincing *raison d'état* could justify the sacrifice of some human rights. We can find an example of this in the excesses of the de facto governments in some Latin American countries during the 1970s and 1980s. The consequences of this viewpoint cannot be more disastrous for the general theory of human rights: at best, the rights will depend on consensus; in all cases, they will never be called victories in front of the majorities.[9]

The risk mentioned above can be clearly seen in the following formula:

If *M4 r 3* and if F a, then the norm would seem to be proportional. However, M4 restricts the norm (N4) so much, that it causes the violation of the essential content of the human right involved.

Therefore, it would be sufficient to find an end which is important enough and a means that can be justified by that end to transform the principle of proportionality in a mere formal criterion, that is, without the capacity to guarantee the supremacy of human rights.[10]

B. Possible Solutions

There are two alternatives to make the principle of proportionality more meaningful.

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9. According to a well known expression, human rights are "are political trumps held by individuals." Thus, they cannot be altered, not even by consensus. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

10. That has been pointed out by A. B. Bianchi, in his critique of the Argentine case "Peralta, Luis A. y otro c. Estado Nacional." CSJN, 27/12/1990, "Peralta, Luis A. y otro c. Estado Nacional (Ministerio de Economía - Banco Central de la República Argentina) / amparo" El Derecho [E.D.] (1990-141-519) (Arg.). *Cf.* Alberto B. Bianchi, *La Corte Suprema ha establecido su tesis oficial sobre la emergencia económica*, 1991 L.L 5, 5-6 (Arg.).

The first one is to evaluate whether the norm respects the principle of proportionality *stricto sensu* or not,[11] and subsequently, whether the essential content[12] is also respected in a given case. Those who defend this opinion should accept that it is possible for a proportionate norm—in spite of its being so—to be unconstitutional if it affects the essential content of a human right.[13]

The second alternative completely rules this possibility out. On the one hand, it does not seem appropriate to accept the proportionality of a norm that violates a human right, both from a theoretical point of view (because it would be contradictory) and from a pragmatic point of view (as it would give place to bad interpretations). On the other hand, the evaluation of the proportion between costs and benefits cannot be satisfactorily done without considering the content of the human rights involved in the case.

Consequently, from this second perspective, a norm can only be proportionate if it does not affect the essential content of the involved rights. For example, this is the position held by the Argentinean Supreme Court. For this court, the principle of proportionality (*principio de razonabilidad)* is the technical instrument it uses to apply article 28 of the Argentinean Constitution, which prescribes that human rights cannot be affected.[14]

The position of the Argentinean Supreme Court does not transform the two steps explained in the first alternative into one. In fact, the court admits the existence of the two steps, as the evaluation of the proportionality of the norm is different from the evaluation of the essential content. However, the court changes the

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11. *See* MEDINA GUERRERO, *supra* note 5, at 145-165.

12. *See* GAVARA DE CARA, *supra* note 1; ANTONIO LUIS MARTÍNEZ-PUJALTE, LA GARANTÍA DEL CONTENIDO ESENCIAL DE LOS DERECHOS FUNDAMENTALES (1997).

13. "No matter how difficult the task may be and, consequently, how strong the temptation to reduce the content of the limits to the proportionality test, the guarantee recognized by article 53.1 of the Spanish Constitution undoubtedly demands its autonomous application as a technique aimed to control the *proportional* limits." MEDINA GUERRERO, *supra* note 5, at 165.

14. "The principles, guarantees, and rights recognized in the preceding sections shall not be modified by the laws that regulate their enforcement." Art. 28, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

order in which it performs the evaluations. First, the tribunal must check if the content of the right has been affected. Then, it must examine if the norm preserves a proportional relationship between the advantages and the cost that it produces.

Such analysis may give the following results:

(1) If measure 1 (M1) alters (a) the content of human right 1 (D1), it is disproportional;

(2) If M2 ¬ (a) D2, but r 3, and F c, it is disproportional;

(3) If M3 ¬ (a) D3, and r 2, and F to, it is proportional.

As a preliminary conclusion, we may say that the proportionality of a measure (3) presupposes: a) that the measure does not alter the content of the involved human rights; and b) that the measure which does not alter the human rights restricts the norms about human rights in an acceptable degree, taking into account the importance of the pursued end. Then, there are two possible types of violation of the principle of proportionality: disproportionality due to the alteration of the human rights involved (hypothesis 1), and disproportionality due to the lack of justification of the restriction (hypothesis 2).

The evaluation concerning the alteration should come before the evaluation concerning the justification because the latter requires determining the degree in which the involved right is being restricted. Thus, it is necessary to learn which the limits and the characteristics of the rights are, the relationship between the specific human rights involved and other human rights, and the relationship between such human rights and the common good. Such knowledge may only be acquired if the contents of the human rights are analyzed. Moreover, it is necessary to inquire about the degree of public interest inherent to the norm under consideration.[15]

In fact, the temporal sequence above described is not lineal. There is a circle of comprehension that involves both the

15. The Argentine Supreme Court has said: "the degree of the public interests affected and the principles to be protected will determine the degree of the regulations in each case." CSJN, 1/9/1944, "Pedro Inchauspe c. Junta Nacional de Carnes" Fallos (1944-199-483) (Arg.). Such statement seems to be extremist. In my opinion, the relationship between public interest and human rights should not be a one-way road, but there should be a reciprocal influence. Just as the degree of public interest affected cannot be indifferent, the human right involved cannot be indifferent either.

examination of the alteration and of the justification in a process of mutual feedback (called by Engisch "*hin-und herwandern des blicks*"). For this reason, the degree of importance given to the norm in relation to the common good can influence on the determination of the precise content of the human right involved in the case. However, we can conclude, too, that examining the alteration is the starting point and the key to proportionality *stricto sensu*.[16] The light shed by examining the alteration transmits its clarity to the darkness of the exam of justification and thus, the temptation of utilitarianism may be avoided.

Now a question arises: how should the examination of the alteration be carried out? To determine if a measure alters a human right or not, the inquiry about the essential content of such right should be performed. Once the essential content has been established, it is necessary to determine if the measure interferes with it or not. Thus, the most important point is to identify which is the inalterable content. This is a task to be performed by the constitutional interpreter, especially by the judges with constitutional competence. It will be done "in the light of the constitutional norms, through a systematic and specific interpretation of the Constitution, and through an understanding of each human right in relation to its underlying moral values and concepts, and to the objectives to be achieved through its protection."[17]

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16. So much so, that without this test the principle of proportionality becomes meaningless. If this step is omitted, it may lead to not applying the principle at all, as Jiménez Campo did. According to him:

> The evaluation of the law would not lose much, and it would even achieve some certainty, if the principle of proportionality, as an autonomous and direct canon, were less demanded and applied and, maybe, even excluded. To assess the proportionality of a norm, maybe legal or not, is, in short, just to compare, to balance or to weight "losses" and "profits" which, from a juridical point of view, are not rationally measurable and they leave narrow margin to the argumentation and counter argumentation according to objective criteria.

Javier Jiménez Campo, *Artículo 53. Protección de los derechos fundamentales*, in COMENTARIOS A LA CONSTITUCIÓN ESPAÑOLA DE 1978, t. IV, at 438, 488 (Oscar Alzaga Villaamil ed., 1996).

17. MARTÍNEZ PUJALTE, *supra* note 1, at 73.

In my opinion, the decisive point will be to make a teleological inquiry of the human rights involved,[18] especially taking into account the goods whose protection is looked for through their constitutional recognition,[19] and without forgetting about the significant role played by the facts of the case,[20] in the manner in which it has been stated by the Spanish Constitutional Court.[21]

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18. *See* 1 RAFAEL BIELSA, *La locución justo y razonable en el derecho y en la jurisprudencia*, *in* ESTUDIOS DE DERECHO PÚBLICO: DERECHO ADMINISTRATIVO (1950).

19. Pedro Serna Bermúdez, *Derechos fundamentales: el mito de los conflictos*, 4 HUMANA IURA 197, 225 (1994); MARTÍNEZ PUJALTE, *supra* note 1, at 72.

From another viewpoint, "the principle of proportionality *stricto sensu* must be understood as a formal principle from which no material content for judicial review is derived." GAVARA DE CARA, *supra* note 1, at 319-320. According to A. Boggiano, "to judge about the reasonableness of the positive law is to judge about the fundamentals of the positive law in the natural law." ANTONIO BOGGIANO, POR QUÉ UNA TEORÍA DEL DERECHO: INTRODUCCIÓN A UN DERECHO CONSTITUCIONAL 42 (1992).

20. *See* Guy Braibant, *Le principe de la proportionnalité*, *in* MÉLANGES OFFERTS À MARCEL WALINE 297, 306 (1974).

21. See S.T.S., Jan. 18, 1991 (R.T.C. 1991-I-195, FJ 2) (Spain), in which the Constitutional Court stated: "the Constitution includes a value system which respects the demand of a teleological interpretation of the Constitution." *See also* S.T.S., Apr. 8, 1981 (R.T.C.1981-173, FJ 10) (Spain); S.T.S., Feb. 17, 1984 (R.T.C. 1984-I-227, FFJJ 2, 5) (Spain). *See* MARTÍNEZ PUJALTE, *supra* note 1, at 72.

ACADEMIC LEGAL WRITINGS BY SAÚL LITVINOFF*

I. BOOKS & MONOGRAPHS

- DOS PALABRAS SOBRE RELACIONES HUMANAS (Edición del Autor, Buenos Aires 1961).
- LAS VENTAS A PLAZOS EN EL DERECHO PUERTORRIQUEÑO (Equity Publishing Co. 1965).
- LOUISIANA CIVIL LAW TREATISE–OBLIGATIONS, VOLUME I (West Publishing Co. 1969).
- LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS (Claitor's 1969).
- THE BANKING LAWS OF HONDURAS (Numbered Private Edition 1973).
- THE BANKING LAWS OF EL SALVADOR (Numbered Private Edition 1973).
- THE BANKING LAWS OF NICARAGUA (Numbered Private Edition 1974).
- THE BANKING LAWS OF MEXICO, VOLUME I (Numbered Private Edition 1974).
- THE BANKING LAWS OF MEXICO, VOLUME II (Numbered Private Edition 1974).
- LOUISIANA CIVIL LAW TREATISE–OBLIGATIONS, VOLUME II (West Publishing Co. 1975).

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* Bibliographical information previously published in *Publications, in* ESSAYS IN HONOR OF SAÚL LITVINOFF xvii-xx (Olivier Moréteau, Julio Romañach. jr., & Alberto Zuppi eds. 2008).

- FIDEICOMISO Y BANCA (Banco de los Trabajadores 1979).
- LA JUSTICE CONTRACTUELLE (Montreal 1981).
- THE LAW OF OBLIGATIONS IN THE LOUISIANA JURISPRUDENCE (2d ed., LSU Paul M. Hebert Law Center Publications Institute 1985).
- SALE AND LEASE IN THE LOUISIANA JURISPRUDENCE (2d ed., LSU Paul M. Hebert Law Center Publications Institute 1986).
- THE LAW OF OBLIGATIONS, VOLUME I (West Publishing Co. 1992).
- THE LAW OF OBLIGATIONS, VOLUME II (West Group 1999).
- THE LAW OF OBLIGATIONS IN THE LOUISIANA JURISPRUDENCE (5th ed., LSU Paul M. Hebert Law Center Publications Institute 2000).
- SALE AND LEASE IN THE LOUISIANA JURISPRUDENCE (4th ed., LSU Paul M. Hebert Law Center Publications Institute 2000).
- THE LAW OF OBLIGATIONS, VOLUME I (2d ed., West Group 2001).
- THE LAW OF OBLIGATIONS IN THE LOUISIANA JURISPRUDENCE, A COURSEBOOK (1979) (6th rev. ed., with Ronald J. Scalise, jr., LSU Paul M. Hebert Law Center Publications Institute 2008).

II. CHAPTERS IN BOOKS

- *The Action in Declaration of Simulation in Louisiana Law, in* ESSAYS ON THE CIVIL LAW OF OBLIGATIONS 139-147 (Joseph Dainow ed., Louisiana State University Press 1969).

- *Error in the Civil Law*, *in* ESSAYS ON THE CIVIL LAW OF OBLIGATIONS 222-269 (Joseph Dainow ed., Louisiana State University Press 1969).

III. LAW REVIEW ARTICLES

- *Principios Generales del Derecho* (*General Principles of Law*), REVISTA JURÍDICA DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD DE BUENOS AIRES (1956).

- *Creeping Expropriation*, 33 UNIVERSITY OF PUERTO RICO LAW JOURNAL 217 (1964).

- *Offer and Acceptance in Louisiana Law: A Comparative Analysis, Part I – Offer*, 28 LA. L. REV. 1 (1967).

- *Of the Promise of Sale and the Contract of Sale*, Special Issue of the Louisiana Law Review, 34 LA. L. REV. 1017 (1974).

- *Moral Damages*, 38 LA. L. REV. 1 (1977).

- *Stipulations as to Liability and as to Damages*, 52 TUL. L. REV. 258 (1978).

- *La protection du consommateur*, 10 REVUE GENERALE DE DROIT 24 (1979).

- *The Revision of the Louisiana Law of Obligations*, L.B.A. (Paris Congress 1983).

- *Colonel Tucker, The Scholar*, 45 LA. L. REV. 1007 (1985).

- *Introduction to the 1984 Revision of the Louisiana Civil Code's Articles on Obligations–A Student Symposium*, 45 LA. L. REV. 747 (1985).

- *Force Majeure, Failure of Cause, and Théorie de L'Imprévision: Louisiana Law and Beyond*, 46 LA. L. REV. 1 (1985).

- *Offer and Acceptance Option Right of First Refusal and Contracts of Adhesion in the Revision of the Louisiana Law of Obligations*, 47 LA. L. REV. 699 (1987).

- *Still another Look at Cause*, 48 LA. L. REV. 3 (1987).

- *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 LA. L. REV. 6 (1989).

- *Subrogation*, 50 LA. L. REV. 6 (1990).

- *Good Faith*, 71 TUL. L. REV. 6 (1997).

- *Contract, Delict, Morals, and Law*, 45 LOY. L. REV. 1 (1999).

- *Damages, Mitigation, and Good Faith*, 73 TUL. L. REV. 1161 (1999).

- *The European Union and Electronic Commerce*, 62 LA. L. REV. 1221 (2001).

- *Global Law in the Perspective of the Bijural Curriculum*, 52 J. LEGAL EDUC. 49 (2002).

- *Closing Remarks*, Symposium on Law Making in a Global World, 67 LA. L. REV. 1219 (2007).