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# Essay: Shakespeare's Contribution to the Teaching of Comparative Law—Some Reflections on *The Merchant of Venice*

Edith Z. Friedler\*

## I. INTRODUCTION

Comparative law is going through a mid-life crisis. One common manifestation of this crisis is a lack of self-confidence accompanied by a critical evaluation of the past and angst about the future. Evidence of this state of affairs can be found in the symposium issue of many law reviews devoted to reconstructing the subject and ascertaining its role in the new millennium.<sup>1</sup> There is a rejection of the traditional approach that looks for similarities and differences between the common law and the civil law. The contours of the new comparative law remain unsettled. There is a clear shift from private law to public law. From there on, however, the picture blurs. For some, comparative law plays a key role in the modern "global village." For others, it can only survive as a "law and discipline" or specifically as law and economics. There are also those who would like to see a closer connection between comparative law and legal history and those who think of comparative law more as comparative jurisprudence. I believe these recent efforts to give comparative law a facelift are directed more towards scholars than classroom teachers. They bring to mind Roscoe Pound's insistence that this is a discipline for academics and legislators, not for a law school class.<sup>2</sup> It has been pointed out that although many American law schools offer some type of comparative law courses in their curriculum, the truth is that very few students enroll.

The scope of this essay is modest: it addresses only the *teaching* of comparative law in law schools that generally offer a single survey class on the subject, providing the sole exposure to other legal systems for the future graduate. As an introductory course, the comparison between the civil law and the common law must touch on core concepts and specific rules of a foreign legal system while explaining why and how they function. This requires knowledge of the players involved and the societies in which they live.

Shakespeare's works and their relationship to law have been the subject of countless writings and commentaries raising issues as diverse as the dichotomy between law and equity to feminist jurisprudence, just to name two.<sup>3</sup> *The Merchant*

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1. *Symposium: New Approaches to Comparative Law*, 1997 Utah L. Rev. 255 (1997); *Sixteenth Annual Symposium: The Future of Comparative Law*, 21 Hastings Int'l & Comp. L. Rev. 765 (1998); *Symposium: New Directions in Comparative Law*, 46 Am. J. Comp. L. 597 (1998).

2. See generally, Roscoe Pound, *The Place of Comparative Law in the American Law School Curriculum*, 8 Tul. L. Rev. 161 (1934). The contributions to the symposia mentioned in note 1 contain exciting ideas about new ways to look at comparative law, but a case book or other teaching tool has yet to materialize as a result of these efforts.

3. See Michael J. Wilson, Essay, *A View of Justice in Shakespeare's The Merchant of Venice and Measure for Measure*, 70 Notre Dame L. Rev. 695 (1995); Carrie Menkel-Meadow, *Portia Redux*:

of *Venice*, alone, has had more than its fair share of critical commentary, and it is precisely the controversy that surrounds the play that makes it so attractive in the classroom. To my knowledge, however, it has never been used specifically to teach comparative law. Yet, it provides a survey class with a unique way of achieving its main purpose, that of jolting students out of their parochialism. In other words, it allows for an interesting cultural immersion<sup>4</sup> into the society of Venice in the sixteenth century to learn how the law functioned and to understand the relationship between law and life. It is the outrageous character of the penalty clause, the degree of Shylock's passion and revenge, the depth of Antonio's love for Bassanio that makes him welcome death to satisfy the bond he undertook for his friend, and the multifaceted personality of Portia, not the accuracy of the legal rules themselves that create the atmosphere conducive to comparative work.<sup>5</sup> This is also a great opportunity for the teacher as a comparativist to deal constructively with the perceived shortcomings of Shakespeare's legal knowledge and to build the bridge to today's legal culture. It is with these observations in mind that I present this paper as one more reflection on *The Merchant of Venice*.

This paper will assume familiarity with the three plots in Shakespeare's play: (1) The loan of three thousand ducats to Bassanio to woo Portia, with Antonio as his surety; Antonio's forfeiture of his bond and Shylock's legal action to collect "the pound of flesh"; (2) the tale of the three caskets and the test submitted to Portia's suitors; and (3) the elopement of Jessica, Shylock's daughter with Lorenzo, a gentile and close friend of Bassanio and Antonio. The discussion will focus on the contract containing the penalty clause and the breach that leads to litigation.

To begin with, Shakespeare himself is engaging in some form of comparative law by his choice of Venice as the setting. The unstated assumption is that for the plot to be even remotely plausible, the action has to take place under a legal system that operated differently from the one in effect in England. Shakespeare makes good use of some of these differences, the first one being the role of the Notary.

## II. IMPORTANCE OF THE NOTARY IN THE CIVIL LAW LEGAL SYSTEMS

In the best civil law tradition, the first thing Shylock does after he and Antonio agree on a no-interest loan to Bassanio of three thousand ducats is tell Antonio:

Go with me to a *notary*, seal me there  
Your single bond; and, in a merry sport,  
If you repay me not on such a day,  
In such a place, such sum or sums as are

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*Another Look at Gender, Feminism, and Legal Ethics*, 2 Va. J. Soc. Pol'y & L. 75 (1994). For legal issues generally in Shakespeare's plays see Note, *Shakespeare and The Legal Process: Four Essays*, 61 Va. L. Rev. 390 (1975); and Daniel Kornstein, *Kill All the Lawyers? Shakespeare's Legal Appeal* (1994).

4. See Vivian G. Curran, *Cultural Immersions, Difference and Categories in U.S. Comparative Law*, 46 Am. J. Comp. L. 43 (1998).

5. There are many non-legal issues raised by *The Merchant of Venice*, but, like so many of Shakespeare's plays, it is above all about human nature.

Express'd in the condition, let the forfeit  
Be nominated for an equal pound  
Of your fair flesh, to be cut off and taken  
In what part of your body pleaseth me.<sup>6</sup>

This passage demonstrates the key role that notaries play in the civil law world. The Notary is an experienced lawyer in good standing who receives from the state the exclusive authority to perform certain legal functions and to impart the required formality to certain legal transactions. The Notary owes a duty to the transaction, rather than to the party. He provides a service to "interested parties" and not to "clients." He represents the *publica fides*. In Italy, notaries were regulated by legislation in the various city-states between the thirteenth and sixteenth centuries. As a general rule, the notarial document is authentic and executory and constitutes proof of the facts asserted therein. The existence of the notarized document creates presumptions of truthfulness and legality.

The fact that Shylock's contract with Antonio is notarized raises the most important legal issue in this play: Would a Notary have clothed this promise with a seal of approval if it were illegal? Surely not. The Notary is the witness *par excellence* who must give form and authorization to the transaction that has been agreed to, and who must advise the parties of the legal aspects of the instrument. American notaries have no such powers. In the United States, a notary requires no legal training. Her only function is to ascertain the correct identities of the parties.<sup>7</sup> Although all legal systems require compliance with certain formalities in order to render promises enforceable, the difference between civil law systems and common law systems in this respect is striking. Although both systems limit proof of the terms of a written contract (in civil law, the notary's approval sets the terms; in the common law, the parol evidence rule limits the parties' ability to alter the terms of a writing), civil systems place far more importance on writings as evidence. This is in stark contrast to the testimony of witnesses, so ubiquitous in the common law. Students are often surprised to learn that in civilian systems, a written document is required even to prove obligations of relatively low value.<sup>8</sup> This contrast can be the starting point of a lively classroom debate on the role of evidence in a legal system that follows an inquisitorial model rather than an adversarial model. This discussion also allows students to understand why many rules of evidence, such as the hearsay rules, are necessary to avoid prejudice by influencing the jury. This in turn can lead to a discussion of the reasons for the absence of juries in the civil law

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6. William Shakespeare, *The Merchant of Venice*, act 1, sc. 3 (Alfred Harbage ed., Penguin Group 1975) (emphasis added).

7. One unfortunate consequence of the different role of the notary is the faith that Latin American immigrants place in the *notarios* to handle their immigration problems only to find themselves in deportation proceedings.

8. See French Civil Code article 1341. *Law No. 80-525, 12 July 1980, Art. 2*: "An instrument must be executed before notaries or under private signatures for all things exceeding the sum or value fixed by decree, even for voluntary bailments, and no evidence by witness against and outside of the content of instruments is allowed, or as to what is alleged to have been said before, at the time of, or after the instruments, even when it is a question of lesser sum or value." (Former Article 1341 required written instrument before a notary for things exceeding the value of 50 "new" francs.)

world and the importance of procedure as a factor that explains many differences between the civil law and the common law.

### III. VALIDITY OF THE CONTRACT

The civil codes of most civil law countries state that four conditions are essential to the validity of every contract: capacity of the parties, consent, object and cause.<sup>9</sup> Consent and cause are important in evaluating the contract in *The Merchant of Venice*.<sup>10</sup> The Notary's imprimatur gives Shylock's loan to Antonio presumptive validity, but there is more. The dialogue between Shylock and Antonio immediately preceding the agreement shows that there is a meeting of the minds with no mistake, duress, or undue influence. Therefore, from the very beginning, it appears as a valid and enforceable promise. This same dialogue between the two merchants clearly indicates that this is a commercial transaction, entered into freely by two adults who acknowledge their differences and enmity. When Antonio asks Shylock for a loan to help his friend Bassiano, a very surprised Shylock responds:

What should I say to you? Should I not say  
'Hath a dog money? Is it possible  
A cur can lend three thousand ducats?' or  
Shall I bend low, and in a bondman's key  
With bated breath and whispering humbleness,  
Say this,—  
"Fair sir, you spit on me Wednesday last,  
You spurn'd me such a day, another time  
You call'd me dog; and for these courtesies  
I'll lend you thus much moneys'?"

To which Antonio, without the slightest hesitation, replies:

I am as like to call thee so again,  
To spit on thee again, to spurn thee too.  
If thou wilt lend this money, lend it not  
As to thy friends, for when did friendship take  
A breed for barren metal of his friend?  
But lend it rather to thine enemy,  
Who, if he break, thou mayst with better face  
Exact the penalty.<sup>11</sup>

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9. See French Civil Code article 1108.

10. This Essay views the *object* of this promise as a valid object in that it is the lending of money free of interest. The legality of the penalty clause itself is discussed, *infra* Section IV. The discussion of *cause* is in the context of *abuse of right* and *contra bonos mores*.

11. See Shakespeare, *supra* note 6, at act 1, sc. 3.

## IV. THE PENALTY CLAUSE

## A. Background

Shakespeare once more draws from a legal system so foreign to his own and yet so eminently suitable to the purposes of this story. The question is, of course, whether penalty clauses were enforceable in civil law generally, and specifically under Venetian law. Here, Shakespeare was on pretty solid legal ground since penalty clauses have always been favored in civil law. Without condoning the taking of a person's life to secure a debt, the lesson here is that the personal preceded the pecuniary guarantee amongst all ancient peoples.<sup>12</sup> Leaving aside for the moment the fact that until recently debtors who did not pay their debts often times were imprisoned, the notion of a pound of flesh to satisfy a debt is found in the old Roman Law, specifically in the Law of the XII Tables.

The Law of the XII Tables dates from 451-450 B.C. and many of its more primitive procedural provisions had been modified during the classical period in the formulary procedure and later in Justinian's *Corpus Iuris Civilis*. As is well known, Justinian's work was discovered to the West in the eleventh century, and the University of Bologna became the center for the study of Roman Law. This play takes place at the end of the sixteenth century. At that time, the School known as the Post Glossators or Commentators was the authority on Justinian's Digest, and whatever may then have been the law regarding the enforcement of penalty clauses, there is some authority for the "pound of flesh" in Table III which describes the right of creditors.

This law establishes the procedure to be followed after judgment is rendered and the debtor does not satisfy the debt within the 30-day grace period following the judgment. Specifically, line 2 provides: "After that, then arrest of debtor may be made by laying on hands. Bring him into court."<sup>13</sup> Lines 3 to 5 describe the fate of debtors in the creditor's hands if no one in court offers himself as a surety, but requires that debtors be taken before the praetor's court on three successive market days and the amount for which they were judged liable be announced. And on the third market day they suffered capital punishment or were delivered up for sale abroad, across the Tiber. Of particular relevance to *The Merchant of Venice* is line 6, which states: "On third market day creditors shall cut pieces. Should they have cut more or less than their due, it shall be with impunity."<sup>14</sup> As will be shown later,<sup>15</sup> one of the conditions that Portia, as the judge, imposes on Shylock to collect the penalty is that he not cut as much as a hair more than the pound to which he is entitled. This glance at Roman law materials shows that Portia's impossible-to-meet condition was contrary to express law and teaches students the importance of legal history in the study of comparative law. The reference to Roman law allows for a short lecture on the civil law tradition until the enactment of the codes in the

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12. In antiquity, this was a consequence of the right itself of the creditor, who, in case of breach of performance, without more, took possession of the person of the debtor.

13. *The Law of the XII Tables*, in 3 *Remains of Old Latin* at 437-39 (E. H. Warrington ed., 1938).

14. *Id.* (emphasis added).

15. See *infra* text accompanying note 33.

nineteenth century. It also allows for a look at the gradual improvement of the rights of debtors and, at the option of the teacher, a comparison of basic concepts of bankruptcy in the common law and the civil law. Of particular interest is the notion that contrary to the common law where anyone can file for bankruptcy, in the civil law, only merchants can do so.

*B. The Pound of Flesh: Specific Performance and the Civil Law*

Antonio voluntarily agreed to give Shylock a pound of his flesh if he breached the contract for the loan of three thousand ducats.<sup>16</sup>

Recall the exchange of words between Shylock and Antonio as the latter tried to persuade Shylock to make the loan: "But lend it rather to thine enemy, who if he break, thou mayst with better face exact the penalty." Antonio, completely aware of the consequence of his actions, tells Shylock to lend him the money as his enemy. This dialogue emphasizes the commercial nature of the transaction between these two merchants and is not only crucial to the validity of this agreement, but more importantly, to an understanding of why there is not even a hint in the play that this is not an enforceable contract.

To comprehend fully why a contract that today would be so clearly unconscionable<sup>17</sup> was perfectly valid under Venetian law requires knowledge of the meaning and function of the "penalty clause" in a civil law legal system. This requires understanding the concept of "obligation" and of "contract" as one of the sources of "obligation." More to the point, it requires understanding a core concept of contract law epitomized in the maxim *pacta sunt servanda*, that is, promises are meant to be kept.<sup>18</sup> The binding nature of a promise comes from the moral duty of keeping one's word. Therefore, contrary to the common law, in the civil law the ordinary remedy for breach of contract is specific performance and not damages. It is important to communicate this notion to future lawyers, not only to guide them when negotiating with foreign counsel, but also because this might be the remedy provided in an international convention governing an international contract. A treaty between countries with different legal systems is by necessity the result of compromise. Thus, it should not come as a surprise that the United Nations Convention for the International Sale of Goods has a very distinct civil law flavor and lays down the general rule that the buyer "may require performance"<sup>19</sup> and that the seller "may require the buyer to pay the price."<sup>20</sup>

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16. At the end of the sixteenth century, three thousand ducats was an enormous sum of money. See Federico Andahazi, *The Anatomist* 14 n.5 (Alberto Manguel trans., Doubleday 1998). The author remarks that "a thousand ducats was a fortune sufficient to live all one's life in the lap of luxury."

17. Cal. Civ. Code § 1670.5 makes the doctrine of unconscionability applicable to all contracts. Strictly speaking, unconscionability requires both procedural and substantive unconscionability. See *infra* text accompanying note 38.

18. This maxim has a long historical evolution, especially if we remember that the Romans called *pacta* the contracts that were not actionable under the *ius civile*, and later the term *contractus* was used opposite to *pacta nuda* or *conventiones* (not independently actionable). Max Kaser, *Private Roman Law* 165 (Butterworths 1965).

19. See CISG art. 46(1), 1489 UNTS 3 (1988).

20. See CISG art. 62, 149 UNTS 3 (1988).

To ensure that the promisor will fulfill his end of the bargain, the civil law not only allows, but also encourages the addition of a penalty precisely to do what the common law abhors: to compel performance. Although in civil law the penalty clause will also operate to assess damages in advance of breach and avoid the need to prove actual damages (which is the role of a liquidated damages clause in the common law), its main function is to operate *in terrorem*, to compel performance. To make this point clear, Article 1226 of the French Civil Code defines a penalty as "[A] clause by which a person, in order to insure the performance of an agreement, promises something in case such agreement is not performed [by him]." Once the role of the penalty clause is established, it is easy to understand that the term "penalty" is appropriate: in case of breach, the promisor is expected to "pay" considerably beyond the promisee's actual damages. This view of the penalty is so strong in civil law that until 1975, article 1152 of the French Civil Code stated: "When an agreement provides that he who fails to execute it shall pay a certain sum by way of damages, there may not be awarded to the other party a greater or lesser sum."<sup>21</sup> This article was interpreted strictly in conjunction with article 1134 of the same code, which declares: "Agreements legally made take the place of law for those who make them," thus preventing judicial intervention regardless of the severity of the penalty. From the beginning, the German Civil Code, in contrast to the French, always allowed judges to lower a very high penalty, but as between merchants (like Antonio and Shylock) the German Commercial Code, even today, forbids courts to interfere with the penalty clause.<sup>22</sup>

The "penalty clause," both as a way to compel performance and to determine the amount of damages in advance of breach, like so many civil law concepts, has its source in Roman Law. As explained earlier, at the end of the sixteenth century, Justinian's *Corpus Iuris Civilis*, had been studied by the Glossators and the Post Glossators or Commentators and more recently by the Humanist School. There is a consensus that "penalty clauses" were an important feature of contract law and were strictly enforced at the time. These notions were later incorporated into the civil codes of the nineteenth century and are in effect today without major changes.

This is a good time to teach students that today, Shylock would have been ordered to accept performance plus costs and interest. The reason is that, even if the choice of remedies for breach in the civil law belongs to the creditor,<sup>23</sup> before the creditor can enforce the penalty and ask for damages, she must put the debtor "in default."<sup>24</sup> The debtor can still defeat an action seeking damages by tendering performance with interest (or other damages for the delay) and costs. This confirms the idea that specific performance is to be preferred over damages.

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21. In 1985 a second paragraph was added to Article 1152: "Nevertheless, the judge, even on his own motion, may moderate or increase the penalty which had been agreed upon, if it is manifestly excessive or pitiful. Any contrary stipulation will be considered not written." However, the idea of a penalty is so strong that even after this amendment, judges are reluctant to intervene by reducing the penalty and will do so only if the breaching party is in good faith.

22. See German Commercial Code § 348.

23. See German Civil Code article 241.

24. This is a procedure by which a creditor puts the debtor on notice that she intends to ask for damages.



The relationship between specific performance as the ordinary remedy for breach of contract and the penalty clause raises an interesting contrast with the common law concept of "efficient breach." It is very unlikely that the promisor in civil law will ever find it more advantageous to breach and pay damages if a penalty clause is part of the contract. In the common law, however, the theory of efficient breach encourages a promisor to breach a contract if she can compensate the promisee and still remain better off than if she had fully performed. Thus, the contrast is very stark: in civil law, breach cannot be justified by ordinary economic considerations. The free marketplace—a key feature of common law nations—requires that breach be allowed when efficient economically. These concepts are indispensable for lawyers representing clients who enter into international transactions, especially when negotiating forum selection and choice of law clauses.

The reasons that would make a court enforce an onerous penalty present a good opportunity to introduce a law and economics perspective in the comparison between penalty clauses and liquidated damages<sup>25</sup> clauses and the use of the concept of "efficient breach."<sup>26</sup>

The "penalty clause" in the promissory note between Antonio and Shylock is on firm legal ground under the law of Venice. The document containing the clause has the seal of the Notary and the dialogue preceding the agreement clearly indicates that Antonio knew exactly how far he would need to go to help his friend, Bassanio. When Antonio defaults on the loan and is summoned to court, his friends tell him that the Duke of Venice will never allow Shylock to forfeit on the bond. Antonio's answer shows a clear understanding of his situation:

For the commodity that strangers have  
With us in Venice, if it be denied,  
Will much impeach the justice of the state,  
Since that the trade and profit of the city  
Consisteth of all nations. Therefore, go.  
These griefs and losses have so bated me,  
That I shall hardly spare a pound of flesh  
Tomorrow to my bloody creditor.<sup>27</sup>

That the penalty clause is on firm legal ground may also explain the beautiful speech on the quality of mercy that Portia, as the judge, delivers to Shylock to

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25. Prior to July 1, 1978, Cal. Civ. Code § 1670 provided that liquidated damages were void, except as expressly authorized in Section 1671 (when damages were extremely difficult to fix). Today, new Section 1671(b) states the general rule that liquidated damages are *prima facie* valid if reasonable. See also, U.C.C. § 2-718.

26. For an excellent comparative law discussion from a law and economics perspective, see Ugo Mattei, *The Comparative Law and Economics of Penalty Clauses in Contracts*, 43 Am. J. Comp. L. 427 (1995).

27. See Shakespeare, *supra* note 6, at act 3, sc. 3.

persuade him not to pursue a legal right he is perfectly entitled to and to which there is seemingly no defense.<sup>28</sup> The last lines of her speech are:

We do pray for mercy,  
And that same prayer doth teach us all to render  
The deeds of mercy. I have spoke thus much  
To mitigate the justice of thy plea,  
Which, if thou follow, this strict court of Venice  
Must needs give sentence 'gainst the merchant there.<sup>29</sup>

However, Shylock insists on exercising his rights and answers:

My deeds upon my head! I crave the law,  
The penalty and forfeit of my bond.<sup>30</sup>

At this point, Bassanio, realizing that Shylock would not accept an offer even ten times the amount of the original loan, says to Portia, who is still disguised as the judge:

And I beseech you,  
Wrest once the law to your authority.  
To do a great right, do a little wrong,  
And curb this cruel devil of his will.

To which Portia immediately replies:

It must not be. There is no power in Venice  
Can alter a decree established.  
'Twill be recorded for a precedent,  
And many an error by the same example  
Will rush into the state. It cannot be.<sup>31</sup>

These last words of Portia underline the supremacy of the legislature in classical civil law doctrine; courts are powerless to deviate from the letter of the law. Unfortunately, Portia's speech is also confusing because these lines appear to convey the common law doctrine of *stare decisis*, that does not exist in the civil law. For the teacher, this is a good time to clarify concepts and open the discussion to the relationship between judges and legislators in the two legal systems and the very different concepts of judicial review. It is important to mention that the civil law

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28. The speech on mercy can have a different and contrary interpretation: Portia insists that Shylock be merciful to help him out, since only she knew of a law that would deprive Shylock not only of his right, but also of his life.

29. See Shakespeare, *supra* note 6, at act 4, sc. 1.

30. *Id.*

31. *Id.*

and the common law have undergone a gradual process of conversion and that case law is as important in civil law as legislation is in the common law.

By now, it is clear that Shylock is set on forfeiting on his bond. Apparently moved more by revenge<sup>32</sup> than by the desire to recover his money with a windfall, Shylock becomes the villain. It is also clear that Portia acknowledges Shylock's enforceable right to exact the contractual penalty.

#### V. THE DECISION OF THE COURT

A pound of that same merchant's flesh is thine,  
The court awards it, and the law doth give it.

\* \* \*

And you must cut his flesh from off his breast.<sup>33</sup>  
The law allows it, and the court awards it.<sup>34</sup>

The trial scene up to now confirms the enforceability of the penalty clause. Just as Shylock is getting ready to execute the judgment, Portia cuts him short by resorting to a very strict and literal interpretation of the contract as the only way to prevent the outcome of what was until then an open and shut case. She tells Shylock:

Therefore prepare thee to cut off the flesh.  
Shed thou no blood, nor cut thou less nor more  
But just a pound of flesh. If you tak'st more  
Or less than just a pound, be it but so much  
As makes it light or heavy in the substance  
Or the division of the twentieth part  
Of one poor scruple; nay, if the scale do turn  
But in the estimation of a hair,  
Thou diest, and all thy goods are confiscate.<sup>35</sup>

This strict interpretation contradicts the Law of the XII Tables that expressly states that if the creditor cuts more than his due, it shall be with impunity.<sup>36</sup> Portia's reading of the contract is also in total disregard of the intention of the parties and of Antonio's clear understanding of the consequences of his acts. Article 1156 of the French Civil Code simply states the rule: "In interpreting agreements, one ought to seek the common intention of the contracting parties, instead of adhering to the literal meaning of the words." However, this contrived form of interpretation *ad*

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32. Shylock's motivation may have been influenced by the fact that just before the trial he is informed by his friend Tubal that his daughter Jessica has eloped with Lorenzo and taken with her some of Shylock's money and jewels, including the engagement ring he had given her mother which Jessica had exchanged for a monkey.

33. The agreed penalty makes no reference to Antonio's breast. It uses the words "in what part of your body pleaseth me."

34. See Shakespeare, *supra* note 6, at act 4, sc. 1.

35. See Shakespeare, *supra* note 6, at act 4, sc. 1.

36. See *Law of the XII Tables*, *supra* note 13.

*absurdum* provides an opportunity to teach students how two important civil law doctrines, abuse of rights and *contra bonos mores*, could have helped Portia defeat Shylock's claim without engaging in these manipulations.

## VI. TWO PERVASIVE CIVIL LAW DOCTRINES

### A. Abuse of Rights

Abuse of rights is a civil law concept that seeks to prevent the holder of a right from exercising it in a way that causes damage to another person without any benefit to the holder of the right. Like the penalty clause, it is not clear what the status of other important Roman Law derived civil law doctrines was at the end of the sixteenth century, but Shylock's conduct provides a wonderful vehicle for explaining this controversial yet pervasive doctrine. Whether explicitly derived from a code article or as part of general principles of law, abuse of right operates as a sword or as a shield and can be a very powerful tool in the hands of an activist judge.

In this case, Shylock has a valid contract, entered into freely by two sophisticated businessmen. Antonio has breached that contract and Shylock is entitled to enforce the penalty. The traditional civil law elements of a contract are there: the parties have the required capacity, the agreement is free from any vice of consent, and both the object and the cause are legal.<sup>37</sup> The penalty, spelled out up front and accepted with full knowledge of its meaning and consequence, appears to be valid in spite of that same consequence. Finally, the contract is in writing and signed before a Notary. All this gives Shylock an unqualified right to enforce this contract upon breach.

It is precisely the quality of having a seemingly unquestionable right that renders controversial the notion that an exercise of that right can, at the same time, constitute an abuse. And yet, this is precisely what the notion of abuse of rights is all about and what Antonio might have claimed as a defense. The classic statement of this doctrine is that when a right is exercised with the sole purpose of harming someone without any benefit to the owner of the right, the right is being abused. Of course, it is difficult to determine a person's purpose or motive, and the presence of mixed motives injects an additional complication if the additional motive is something *other* than harm to the other party. The question then is whether this *other* motive bars a finding of "abuse."

A comparative law class could engage in a useful discussion of Shylock's intent in enforcing the penalty. At first blush, it appears that Shylock is only moved by the desire to kill Antonio. Even accepting that the law at the time contemplated the loss of the debtor's life for the non-payment of an obligation, was the death of Antonio Shylock's only motivation, and if so, was it one that would bring Shylock no benefit? It is easy to find benefit to the holder of the right in the elimination of competition, a valid business argument that might prevent a finding of abuse of right. However, if the holder of the right's dominant motive was the infliction of

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37. For more on cause, see *infra* text accompanying note 44.

harm, abuse of right is a good defense. There is also the potential for a discussion of what it might mean for someone like Shylock, a Jew and an alien in a society that despises him, to have, just once, and for a change, the law on his side. And so Shylock says:

What judgment shall I dread, doing no wrong?  
 You have among you many a purchased slave  
 Which, like your asses and your dogs and mules,  
 You use in abject and in slavish parts,  
 Because you bought them. Shall I say to you,  
 "Let them be free, marry them to your heirs!  
 Why sweat they under burthens? Let their beds  
 Be made as soft as yours, and let their palates  
 Be season'd with such viands"? You will answer  
 "The slaves are ours." So do I answer you:  
 The pound of flesh, which I demand of him,  
 Is dearly bought as mine, and I will have it.  
 If you deny me, fie upon your law!  
 There is no force in the decrees of Venice.  
 I stand for judgment. Answer: shall I have it?<sup>38</sup>

There is a certain pathos in that faith in the law coming from Shylock, who more often than not has been on the receiving end of that same law as a victim of discrimination and arbitrariness. Shakespeare forces us to think seriously about "the law" and its potential use to perpetuate unfairness instead of correcting it. This undertaking is more appropriately the subject of a jurisprudence class, but it is here that comparative law can be taught as comparative jurisprudence.<sup>39</sup> Abuse of rights and its potential use outside of the area of private law can lead to challenging possibilities that include application to abuse of human rights.

There is another explanation for Shylock's insistence on executing on his bond: it may be seen as an example of the civil law notion that certain rights are discretionary or absolute with the result that their exercise can never result in an abuse.<sup>40</sup> Although the number of absolute rights has never been large, there was a time when, under French law, the right to enforce a contractual penalty was one of them.<sup>41</sup> At this time, the teacher may engage in a comparison of abuse of rights with the common law doctrine of unconscionability. However, between Shylock and Antonio, there is no "oppression" (inequality of bargaining power) and no

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38. See Shakespeare, *supra* note 6, at act 4, sc. 1.

39. William Ewald, *Comparative Jurisprudence (I): What Was It Like To Try A Rat?*, 143 U. Pa. L. Rev. 1889 (1995).

40. For a list of these rights, see R.B. Schlesinger et al., *Comparative Law, Cases, Text, Materials*, 745 n.5 (5th ed. 1988). But see R.B. Schlesinger et al., *Comparative Law, Cases, Text, Materials* 831 n.21 (6th ed. 1998) indicating that these rights have all but disappeared.

41. See *supra* note 21.

"surprise" (terms of the bargain hidden in the printed text). Therefore, the absence of procedural unfairness prevents a finding of unconscionability.<sup>42</sup>

Shylock's right to his bond and his zeal in the pursuit of that right is a good way to teach a notion as complex and controversial as abuse of rights. Today, many modern civil codes have introduced one version or other of this doctrine in their Preliminary Chapters thus giving it generalized application.

### B. *Contra Bonos Mores*

The doctrine of *contra bonos mores* is tersely stated in Section 138 (1) of the German Civil Code: "A legal transaction which violates the command of morality is void." Section 138 is found in the General Part of the German Civil Code, meaning that it applies across the board to *any* legal transaction. There is no consensus as to the correct translation of the Latin *contra bonos mores*, let alone agreement as to its meaning. But few civil law notions trace their pedigree to Roman Law as clearly as this one.<sup>43</sup> So pervasive is this notion of *contra bonos mores* in the civil law that it appears as a distinct category from what we would call public policy or public order. And so, the Preliminary Title of the French Civil Code provides in Article 6: "One may not derogate by private agreements from laws which involve *public policy and morality*" (emphasis added). The reference to both *ordre public* and *contra bonos mores* is ubiquitous in the civil codes and allows for an interesting discussion as to the meaning of public policy under our law, especially as a limitation on party autonomy.

### C. *The Relationship Between Causa and Contra Bonos Mores*

Shylock could have accepted Bassanio's repeated offers to repay Antonio's debt at two, three or ten times its value, but he chose not to. Those present at the trial cannot fathom a reason why Shylock does not take the money and walk away a wealthier man. It would be impossible to ask these Venetians to understand that this has nothing to do with money. It is here that the concept of *causa* as one of the four essential elements of a civil law contract plays another fundamental role in the comparison between the two legal systems. Therefore, this may be the appropriate moment in which to ask the students whether there is any *consideration* for this promise and to explain the differences between cause and consideration and the role they play in their respective legal systems. Whether or not there is consideration is irrelevant for the validity of this contract under the civil law. What is relevant is *causa*, the reason or motivation for each party's promise.

Relevant to *The Merchant of Venice* are the sections of the civil codes that deal with contracts and the requirements for a valid contract. One of the requirements is that promises have a licit cause. Section 1133 of the French Civil Code states

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42. *Perdue v. Crocker Nat'l Bank*, 38 Cal. 3d 913, 925 (1985). For a comparative approach to unconscionability, see *Symposium on Unconscionability Around the World: Seven Perspectives on the Contractual Doctrine*, 14 Loy. L.A. Int'l & Comp. L.J. 435 (1992).

43. Digest, 28, 15, 7; Institutes, 23, 20, 3.

that: "A cause is illicit when it is prohibited by law, or when it is contrary to good morals or to public order."<sup>44</sup>

For Antonio, this is very clear: he wants to help his dear friend Bassanio. The agreement between Antonio and Shylock is one that, at first blush, is advantageous to Antonio since he does not need to change his financial arrangements to help his friend Bassanio; he will receive the sizable amount of three thousand ducats free of interest. At the time, it seemed inconceivable that Antonio would not repay the money in three months when it was due and so, to obtain an interest-free loan was quite a windfall. Antonio's motivation was to help his dear friend Bassanio even at the possible, though not probable, expense of his life.<sup>45</sup> For Shylock, the cause is not that clear since this is certainly not a transaction to maximize his wealth: he cannot make money by charging interest for the same loan to someone else since he does not have the three thousand ducats. There seems to be nothing illicit or immoral in Shylock's motivation to loan Antonio the money he requested. It provided him with an opportunity to show that he too could loan money at little or no interest (thus dispelling the notion of a "cur"). There is also language in the play that Shylock may have construed the penalty as a "merry sport" and only as a far-fetched eventuality.<sup>46</sup> Therefore, it seems that the *causa* of the principal contract is neither illicit nor immoral.

The problem here is the penalty clause and the real issue is whether the "pound of flesh" is *contra bonos mores*. For Portia, the judge, a finding that the penalty clause is *contra bonos mores* would have been the easiest solution. From a legal perspective, this finding is perhaps the most satisfying one, because even though a penalty clause may be onerous, there comes a point when it becomes *contra bonos mores* and must be struck down.

The use of *contra bonos mores* to strike down a clause in a contract is a good way to explain *contra bonos mores* as one of the so called "general clauses" of the civil codes and engage in a lively discussion as to the relationship between principles and rules. More importantly, the "general clauses" of the codes provide an excellent explanation for the enduring power of the codes and opens the door to an understanding of the "unofficial" portrait of the civil law judge: a judge invested with much more power than the "official" portrait suggests.<sup>47</sup> Students also learn the importance of the location of an article in the civil code in relation to the book and title in which it appears and in relation to other articles. At the same time, they would understand the extent to which an article in a Preliminary Title or General Part can trump other articles that directly address on point the issue before the court. Of course, using *contra bonos mores* deprives the play of its *denouement*. It takes away all the suspense and excitement of the trial scene and leaves the audience disappointed. Such an ending might have justified labeling *The Merchant of Venice* a comedy, a label that is clearly inappropriate given the real ending of the play. As

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44. An almost identical provision is found in Article 1343 of the Italian Civil Code.

45. This statement is made without reference to commentators who have questioned the nature of Antonio's feelings toward Bassanio, suggesting some kind of homosexual relationship.

46. See Shakespeare, *supra* note 6, at act 1, sc. 3.

47. See Mitchel de S. O. I'E. Lasser, *Judicial (Self) Portraits: Judicial Discourse in the French Legal System*, 104 Yale L.J. 1325 (1995).

indicated earlier, another "general clause," that of *abuse of right*, could also have avoided a criminal lawsuit, but did not have the legal fit provided by *contra bonos mores*.

## VII. SENTENCING AND PUNISHMENT

As Shylock prepares to leave the courthouse after Portia denied him his bond, Portia says:

Tarry, Jew!  
The law hath yet another hold on you.  
It is enacted in the laws of Venice,  
If it be proved against an alien  
That by direct or indirect attempts  
He seek the life of any citizen,  
The party 'gainst the which he doth contrive  
Shall seize one half his goods; the other half  
Comes to the privy coffer of the state,  
And the offender's life lies in the mercy  
Of the Duke only, 'gainst all other voice.<sup>48</sup>

The transformation of a civil proceeding into a criminal one is difficult to explain, although in very early common law, civil and criminal proceedings were not separate. In civil law, a civil action for damages is very often a part of the criminal case, but not the other way around. However, for the teaching of comparative law, the lesson is that application of *contra bonos mores* to this case would have resulted in striking down the offensive penalty, while allowing for the enforcement of the original contract. Instead, Portia retrieves as from a magician's hat, a Venetian law, until that moment unknown to everyone but her, that turns Shylock's unqualified right into an attempt on the life of Antonio.

## VIII. CONCLUSION

*The Merchant of Venice* raises an infinite variety of legal issues, making it difficult to resist the temptation to mention others. This essay has examined only some of the issues that directly relate to comparative law. Alan Watson had it right when he observed that comparative law as an academic discipline is a very personal subject, giving its proponents great liberty in choosing their interests.<sup>49</sup> The choice of interests is a very important one because it delineates those areas in which the teacher must master not only the rules, but also the language, the culture, the history, and the approach to law of at least two legal systems. I chose issues of private law because I am familiar with them. But I also view *The Merchant of Venice* as a link to public law. Aside from the potential application of abuse of

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48. See Shakespeare, *supra* note 6, at act 4, sc. 1.

49. Alan Watson, *From Legal Transplants to Legal Formants*, 43 Am. J. Comp. L. 469 (1995).



rights to the law of human rights, I am particularly interested in the way legal systems apply their law to non-citizens.

As unsympathetic as Shylock's character may appear, let us remember that Portia is not a fair and neutral judge: after all, it is *her* money that Bassanio is offering Shylock and it is *her* husband's best friend who is the defendant. However, one look at the cultural climate of the time reminds us of the precarious conditions in which Jews lived in medieval times in Europe, especially after the expulsion from Spain in 1492. This explains why Portia not only denies Shylock his contractual rights, but also accuses him of attempting to kill a Venetian citizen. It also helps to understand why the Duke grants Shylock his life in exchange for his conversion to Christianity. The importance of placing the legal actors and the legal rules within their culture is critical to the correct understanding of the same. This is also the only way to understand why *The Merchant of Venice* is listed as a "comedy." Unfortunately, the language quoted in Act IV, Scene 1 not only reflects the past: today we are faced with an anti-immigrant and anti-foreigner climate that should remind us why citizenship matters, how vulnerable certain minorities are, and of the importance of the Equal Protection Clause in the United States Constitution. But although this is a topic for another essay, it does provide a hypothetical to end this one: Would Portia have allowed Shylock to leave the courtroom after denying his claim if instead of being an "alien," he had been a Venetian citizen?