

Editor-in-Chief: RICHARD M. BUXBAUM  
 Managing Editor: NANCY REIKO KATO  
 Editorial Assistant: KAREN CHIN  
 BOARD OF EDITORS

GEORGE A. BERMAN  
*American Foreign Law Association*  
 CLAUDIO M. GROSSMAN  
*American University*  
*Washington College of Law*  
 BORIS KOZOLCHYK  
*University of Arizona College of Law*  
 DENNIS S. KARJALA  
*Arizona State University College of Law*  
 W. COLE DURHAM, JR.  
*Brigham Young University*  
*J. Reuben Clark Law School*  
 STEFAN A. RIESENFELD  
*University of California School of Law*  
*(Berkeley)*  
 FRIEDRICH K. JUENGER  
*University of California School of Law*  
*(Davis)*  
 WILLIAM ALFORD  
*University of California School of Law*  
*(Los Angeles)*  
 RUDOLF B. SCHLESINGER  
*University of California*  
*Hastings College of the Law*  
 CHIN KIM  
*California Western School of Law*  
 DAVID P. CURRIE  
*University of Chicago Law School*  
 HIROSHI MOTOMURA  
*University of Colorado School of Law*  
 GEORGE A. BERMAN  
*Columbia University*  
*Parker School of Foreign and Comparative Law*  
 RICHARD S. KAY  
*University of Connecticut School of Law*  
 JOHN J. BARCELO III  
*Cornell Law School*  
 VED P. NANDA  
*University of Denver College of Law*  
 M. CHERIF BASSIUNI  
*DePaul University College of Law*  
 BERNARD DOBRANSKI  
*University of Detroit School of Law*  
 HERBERT L. BERNSTEIN  
*Duke University School of Law*  
 BARRY E. HAWK  
*Fordham University School of Law*  
 WALTER O. WEYRAUCH  
*University of Florida*  
 SPENSARD L. HOLLAND  
*Law Center*  
 ROGER J. GOEBEL  
*Fordham University School of Law*  
 GEORGE A. ZAPHIROU  
*George Mason School of Law*  
 JAMES V. FEINERMAN  
*Georgetown University Law Center*  
 JOHN A. SPANOGLE  
*George Washington University National Law Center*  
 MARY ANN GLENDON  
*Harvard Law School*  
 WILLIAMSON B.C. CHANG  
*University of Hawaii School of Law*  
 WILLIAM S. RICHARDSON  
*School of Law*  
 STEPHEN T. ZAMORA  
*University of Houston Law Center*  
 DAVID J. GERBER  
*IIT Chicago-Kent College of Law*  
 PETER HAY  
*University of Illinois College of Law*  
 CRAIG M. BRADLEY  
*Indiana University School of Law*  
 JOHN C. REITZ  
*University of Iowa School of Law*  
 RICHARD E. LEVY  
*University of Kansas School of Law*  
 ALAIN A. LEVASSEUR  
*Louisiana State University Law School*

THOMAS M. HANEY  
*Loyola University School of Law, Chicago*  
 EDITH FRIEDLER  
*Loyola Law School of Los Angeles*  
 PETER E. QUINT  
*University of Maryland School of Law*  
 JOHN E.C. BRIERLEY  
*McGill University Institute of Comparative Law*  
 KEITH S. ROSEN  
*University of Miami School of Law*  
 WHITMORE GRAY  
*University of Michigan Law School*  
 FRED L. MORRISON  
*University of Minnesota School of Law*  
 WILLIAM B. FISCH  
*University of Missouri-Columbia Law School*  
 LUNG-CHU CHEN  
*New York Law School*  
 MICHAEL A. SCHWIND  
*New York University School of Law*  
 MARJORIE GIRTH  
*State University of New York at Buffalo*  
*School of Law*  
 KENNETH W. ABBOTT  
*Northwestern University School of Law*  
 TANG THI THANH TRAI LE  
*Notre Dame Law School*  
 P. JOHN KOZYRUS  
*Ohio State University School of Law*  
 DON BERGER  
*McGeorge School of Law*  
*University of the Pacific*  
 JACK COE, JR.  
*Pepperdine University School of Law*  
 PEDRO F. SILVA-RUIZ  
*University of Puerto Rico School of Law*  
 GEORGE GINSBURGS  
*Rutgers State University of New Jersey*  
*School of Law, Camden*  
 HERBERT LAZEROW  
*University of San Diego School of Law*  
 LUIS J. ROMERO  
*University of Saskatchewan School of Law*  
 BEVERLY MAY CARL  
*Southern Methodist University School of Law*  
 JOHN HENRY MERRYMAN  
*Stanford School of Law*  
 STEPHEN C. HICKS  
*Suffolk University School of Law*  
 PETER E. HERZOG  
*Syracuse University College of Law*  
 HANS W. BAABE  
*University of Texas School of Law*  
 A.N. YIANNPOULOS  
*Tulane University School of Law*  
 DAVID S. CLARK  
*University of Tulsa College of Law*  
 RICHARD T. STITH III  
*Valparaiso University School of Law*  
 IGOR I. KAVASS  
*Vanderbilt University School of Law*  
 JOHN F. MURPHY  
*Villanova University Law School*  
 PAUL B. STEPHAN III  
*University of Virginia School of Law*  
 DAN F. HENDERSON  
*University of Washington School of Law*  
 EDWARD M. WISE  
*Wayne State University Law School*  
 JAMES A.R. NAFZIGER  
*Willamette University College of Law*  
 WALTER L. WILLIAMS, JR.  
*College of William & Mary*  
 Marshall-Wythe School of Law  
 MIRJAN DAMASKA  
*Yale Law School*

RODOLFO SACCO

## Legal Formants: A Dynamic Approach To Comparative Law

(Installment I of II)

### I. THE AIMS OF COMPARATIVE LAW

#### A. *The False Problem of the Aims of Science*

If you ask an astronomer about the aims of astronomy, he will probably answer in a way that repeats the question itself. The aim is knowledge of the nature and movements of the stars. That answer is perfectly appropriate. The aim of science is to satisfy a need for knowledge that is characteristic of man himself. Each individual science satisfies the need to acquire knowledge of its particular object. It is true that theoretical knowledge may subsequently find a practical application. Man would never have set foot on the moon without astronomy. Yet astronomy measured the distances that separate the planets long before the first moon landing. In general, then, the use to which scientific ideas are put affects neither the definition of a science nor the validity of its conclusions.

Jurists are generally aware of this truth. They do not think their work is valid only because it can be used to achieve this or that practical end. In the case of comparative law, however, a different standard is applied, or at least it was thirty years ago. Those who compare legal systems are always asked about the purpose of such comparisons. The idea seems to be that the study of foreign legal systems is a legitimate enterprise only if it results in proposals for the reform of domestic law.<sup>1</sup>

This demand for a redeeming proof of the legitimacy of comparative law has a number of strange consequences. It rules out some areas of comparison entirely: legal anthropology, for example. It distorts the importance of others. We would have to say that the young Italian scholar has deepened his knowledge if he studies at

RODOLFO SACCO is Professor of Law, University of Turin, Italy. Edited by James R. Gordley, whom the author wishes to thank.

1. A partial panorama may be seen in Szabó, "Les buts et les méthodes de la comparaison du droit," in *Rapports généraux au IX Congrès international de droit comparé* 163 (1977).

FRIEDRICH K. JUENGER, Chairman, ex officio  
 EDWARD D. RE, Honorary Chairman  
*American Association for the Comparative Study of Law, Inc.*  
 CONSULTING EDITORS: Alfred F. Conard, John G. Fleming

Yale and discovers institutions the Italians would do well to imitate. On the other hand, if the young American scholar studies Italian law without finding anything he deems worthy of imitation, he has failed to acquire knowledge. The effort to justify comparative law by its practical uses sometimes verges on the ridiculous. According to some sentimentalists, comparison is supposed to increase understanding among peoples and foster the peaceful coexistence of nations. According to that idea, the statesmen who triggered the two world wars would have stopped at the brink of catastrophe had they only attended courses in comparative law. Napoleon himself would have given up his imperialistic dreams had he spent less time over the code that bears his name and more on the *gemeines Recht*, the common law and the *kormchaia pravda*.

Still other people suggest that attaining uniformity among the legal systems of different nations is a breakthrough that comparative law might help to bring about.<sup>2</sup> Uniformity is often described as a patently good thing and hence worthy of encouragement. Actually, both uniformity and particularity among legal systems have their pros and cons. The greater the number of particular legal institutions existing at a given time, the greater may be the probability of certain types of progress.

In any case, history provides no evidence that uniformity is achieved through comparative legal study. In the Middle Ages, Roman law spread throughout Continental Europe because the other systems of rules with which it had to compete lacked its quality and prestige. The jurists who turned to Roman law instead of to local rules did not do so because they had compared the two. In most cases, the Roman rules were the only ones they really knew, and their choice was more the result of ignorance than of comparative study. Similarly, the French *Code Civil* spread throughout Europe, not because of comparative study, but because of the propagation of liberal ideas, the ideal of codification and the prestige of all that was French. Nor was comparative study the reason that German legal ideas spread throughout Europe less than a century later. Roman, French, and German legal ideas could not, of course, have been diffused without some knowledge of them. Yet mere knowledge of

2. Uniformization of norms is the process whereby legislators adopt a formulated norm in the same way, or a single legislator introduces identically formulated norms into more than one system. It is to be distinguished from unification. The latter consists of the creation of a single norm, enforced by authorities belonging to a single pyramid, illustrated by a unitary body of jurists, and designed to substitute a plurality of divergent autonomous norms.

Hence, for example, the coming into force of the Italian Civil Code of 1865 unified Italian civil law: the Geneva conventions and the uniform law on the international sale of goods made uniform the legal sector which they concerned without abrogating it.

these ideas is not the same as study of comparative law. Indeed, sometimes law makers have borrowed a rule or institution expecting that they would learn how to apply it appropriately later on.

This is not to deny that the study of comparative law can contribute to achieving uniformity among legal systems. It has done so in one type of situation which might seem unreal had it not actually occurred. The situation is one in which law is declared to be uniform before the content of the law has been established. In this situation, the judge, aware of the various legal systems in force before the law was declared to be uniform, draws his rules from them. An instance is the European Economic Community. The law that regulates relations between the community itself and enterprises within the community has been declared to be uniform. Nevertheless, the treaties controlling the duties of these enterprises have not defined what constitutes an enterprise or regulated such matters as the restitution of money paid by mistake by private individuals to the community. The court of justice has created judge-made law drawn from the different legal systems that supposedly the uniform law has replaced. In such a situation a political decision mandates uniformity, and the comparative study of law makes the uniformity possible.<sup>3</sup>

When the comparative study of law does contribute to achieving this uniformity, one of the principal instruments by which it does so is by showing that certain differences among legal systems are merely apparent.<sup>4</sup> That is a genuine contribution and one which is cognitive and critical and in this sense "scientific." The task is performed by recognizing similarities in old laws rather than by enacting new uniform laws.

The comparative study of law can be helpful, not only in achieving uniformity, but whenever foreign legal models are imitated. The imitation of foreign legal models need not take the form of a global reception, the effect of a widespread political movement, such as the reception of French models in Europe following 1806. It can also take the form of a selective adoption of particular legal institutions or rules. In the latter case it is no doubt helpful to understand both

3. There is now literature about this: Pescatore, "Le recours dans la jurisprudence de la Cour de justice des Communautés européennes à des normes déduites de la comparaison des droits des Etats membres," *Rev. intern. dr. comp.* 337 (1980).

4. See *infra*. Of course the disavowal of artificial oppositions might have wide-ranging practical consequences.

In 1977 the theme *Nouvelles perspectives d'un droit commun de l'Europe* was debated by fifteen jurists, and the proceedings published under the same title (Mauro Cappelletti ed. 1978). Here, in dealing with the theme *Droit commun de l'Europe, et composantes du droit*, Rodolfo Sacco envisaged the possibility that doing away with a series of artificial oppositions may lead to the creation of a uniform scientific and school models, which would, in turn, introduce uniform operative rules.

the foreign rules and institutions one is borrowing as well as one's own legal system.

We can now answer the question of whether the imitation of foreign legal models must be regarded as the aim of the comparative study of law. Like other sciences, comparative law remains a science as long as it acquires knowledge and regardless of whether or not the knowledge is put to any further use. It remains a science when the jurist does make use of it to borrow the rules or institutions of foreign legal systems. Indeed, it then becomes a science brimming with exciting practical potential. When the legislator borrows from a foreign legal system aided by the sophisticated analysis of a jurist, they earn the respect we accord to enlightened practical activity. Nevertheless, we should not be blind to the splendid results that comparative law conducted as pure research has already achieved: sophisticated analysis of the differences between common law and civil law; detailed reconstructions of ethnic law; profound assessments of the transformation of Afro-Asian law through contact with European law or of the differences between law in capitalist and socialist countries. These breakthroughs have not led to the borrowing of foreign legal models, but they have, nevertheless, increased our knowledge. No one has yet compiled a list of instances in which the borrowing of foreign rules and institutions was made possible by sophisticated comparative research. One fears that if anyone were to do so the result would be simply a blank page. The great receptions—the wheels that keep legal progress rolling—usually occur without prior comparison or on the basis of superficial comparisons for which an elementary knowledge is sufficient. Whatever its potential to assist when such borrowings are made, in the normal course of events, the comparative study of law intervenes at a later stage, analyzing receptions that have already taken place and sometimes have taken place centuries before.

### B. *The Aims of Comparative Law*

Comparative law is like other sciences in that its aim must be the acquisition of knowledge.<sup>5</sup> Like other branches of legal science, it seeks knowledge of law.<sup>6</sup> Comparative law presupposes the exist-

5. An authoritative definition that is completely parallel to the thesis presented in the text is made by Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung*, 16-17, I (2nd ed. 1984). "The primary object of comparative law—as in the case of all scientific methods—is knowledge. . . Comparative law, however, has four more specific practical objectives. . . : comparison provides material for the legislator; it serves as an instrument of interpretation; it plays a role in university instruction; and it is of significance for the supranational unification of law.

6. A group of Italian comparativists—"il circolo di Trento"—begins its manifesto, drawn up in 1987, with the following initial thesis: "Comparative law, understood as a science, necessarily aims at the better understanding of legal data.

ence of a plurality of legal rules and institutions. It studies them in order to establish to what extent they are identical or different.

Because it is concerned with these differences, comparative law is like comparative linguistics or comparative ethnology. In linguistics, comparative methods have proven to be the best means available for highlighting structural regularities that would otherwise pass unobserved. It would be wrong, however, to expect comparative methods to explain the reasons for these regularities. Comparisons do not serve this purpose. Linguistics, for example, has not explained why we say "cow" in English and "boeuf" in French.<sup>7</sup>

Comparative law is like comparative linguistics in another respect as well. Linguistics is independent of political and ethical science and, of course, of sciences that do not deal with linguistic data. The study of linguistics, moreover, has not centered on practical applications. In these respects, comparative law is like cultural anthropology as well.

Those who engage in comparative law should not feel themselves inferior to those who engage in these other comparative sciences and who seem to have garnered everything comparative methods can yield. Nevertheless, those who use comparative methods to study law have yet to realize that comparison must play the same role for them as it does in these other comparative sciences. Comparison follows from a knowledge of the phenomena to be compared. You can only compare what you are acquainted with. What the other comparative sciences realize, and what they can teach us, is that knowledge of these phenomena develops by comparison. Only through comparison do we become aware of certain features of whatever we are studying. Everyone engaged in comparative law knows this from experience. It is precisely when it is speaking of the law of his own country that he must struggle to be understood by his fellow countrymen whose interests are limited to their own system of law and uninfluenced by his more complex experience.

The primary and essential aim of comparative law as a science, then, is better knowledge of legal rules and institutions. That idea,

Ulterior tasks such as the improvement of law or interpretation are worthy of the greatest consideration but nevertheless are only secondary ends of comparative research." The manifesto is signed by Francesco Castro, Paulo Cendon, Aldo Frignani, Antonio Gambaro, Marco Guadagni, Attilio Guarneri, Pier Guiseppe Monateri, Rodolfo Sacco.

7. The difference between a person fluent in many languages and a linguist may help us to understand the difference between a comparativist and a mere expert of different legal systems. The polyglot knows many languages, but is unable to appraise the differences between them, or quantify them: the linguist, on the other hand, is able to do all this. Hence the comparativist possesses a set of notions and data belonging to different legal systems and can compare them, appraising differences and similarities alike.

of course, is neither far fetched nor new. But it is not thought to be an obvious truth anywhere.

The aim of comparative law is to acquire knowledge of the different rules and institutions that are compared. That is, of course, a different aim than to acquire knowledge of a single legal system, be it a foreign system or one's own. Nevertheless, knowledge of single systems can be the fruit of comparative studies and in that respect it is also among the aims of comparative law.

## II. THE COMPARABILITY OF DIFFERENT LEGAL SYSTEMS

### *The Comparability of Socialist and Non-Socialist Legal Systems*

When the differences between systems are sufficiently great, can one still compare them? Or does comparison become impossible because there are no suitable yardsticks?<sup>8</sup>

The answer that comes spontaneously to mind is that legal systems must have a certain amount in common and that this homogeneity makes comparison possible. For half a century, however, jurists have asked whether socialist and non-socialist systems are comparable. Jurists in socialist countries once denied that their law could be compared with bourgeois law. According to them, law is a superstructure arising from the economic base of a society. Since that base is overturned when a capitalist society becomes socialist, law too must be totally overturned and take on a significance opposite to the one it had before the revolution. Indeed, in contrast to the aim of bourgeois law which is the forcible subjection of the exploited classes to the will of the exploiting class, the aim of socialist law is the liberation of workers from all forms of exploitation. Consequently, although sale, inheritance, and compensation for harm may be regulated by identical rules in both socialist and capitalist countries, the antithetical aims of these laws makes the similarities illusory.

Such claims became less insistent after the Second World War. It was recognized that the institutions of both types of society may partially converge. Both may share a public international law and work side by side in the United Nations. Both types of societies have signed international conventions designed to create uniform law which, by definition, must be the same for both. Capitalist countries have introduced measures in their laws to safeguard the interests of the workers. Thus it has been conceded that capitalist and socialist laws can be compared at least as to their surface layer or in

8. On this, among the many, see Ancel, "La confrontation des droits socialistes et des droits occidentaux," in *Théorie du droit. Droit comparé* (Zoltán Péteri ed. 1984).

single areas, even though irreducible differences concerning the end and purpose of law permeate its deepest layer. Consequently, despite their previous diffidence, jurists from socialist countries have been willing to play an active part in international institutes of comparative law such as the I.A.L.S., the International Academy of Comparative Law, and the Faculté Internationale of Strasbourg. In some socialist countries, comparative law is now a subject of research and teaching.

The claim that comparison is impossible has also been questioned by the brothers Trajan and Aurelian Jonașcu and Anita Naschitz in Romania. According to them, certain legal rules can survive a change in the material basis of society because certain legal values such as the disapproval of homicide will outlive such a change. More will be said about this theory when we discuss the borrowing from foreign legal systems.

In fact, however, one can compare the legal systems of countries with different economic bases, not because these systems are more or less similar, but because comparison itself has no fear of differences however large they may be. The very jurists who once denied that capitalist and socialist legal systems were comparable because they are fundamentally diverse were, without realizing it, themselves making a comparison.

Comparison measures the extent of differences be they small or large. It must not concern itself exclusively with the small differences or the large ones. It must not discuss only the common core of different legal systems or only their distinctive elements. Jurists who denied the comparability of capitalist and socialist law were assuming that comparison was impossible simply because these systems appeared dissimilar. Moreover, they underestimated the importance of the so-called "surface layer" of legal systems in the belief that only the infrastructure mattered. In both ways their position lacked scientific detachment.

### *B. The Comparability of the Legal Systems of Peoples That Have, or Do Not Have, a Written Language*

Some people object to including legal anthropology in the comparative study of law. One objection has its source in the positivist conception of law as the creature of the state. Positivists in general see law as the creation of the state because of the way European legal doctrine systematized the reality it was faced with in the nineteenth and twentieth centuries. Marxists see law as the creation of the state because, in their view, law is the tool that the state uses to impose the will of the exploiting class. Rules cannot be law in the same sense when they are found in a stateless, or, indeed, a classless

society. Thus we are either dealing with law and not with anthropology, or with anthropology and not with law.

To deny that people without a written language can have law is the fruit of European ethnocentrism. In Europe, it has been only too convenient to imagine that the law and the state coincide. Yet even if they lack a state, societies without a written language still manage to make their social rules effective. Recently, Marxists themselves have used the idea of a "pre-state" to explain social organization where there are no states or classes (*chiefdoms*, and so forth). One more step and they will be speaking of "pre-law" and acknowledging that it may be compared with law as such.

Actually, the law of stateless societies has certain basic functional and structural features in common with the law of developed countries. It preserves a certain social order through obedience to rules. Of course, it has its own special features as well. There is no body of jurists to apply the rules; there are close links between operational rules and nonlegal doctrines; there is less a tendency to repetitiveness of solutions. In short, the constitutive elements are different from those in, for example, West German or Canadian law. Yet it is still law because it is society's response to the need for social order. If one prefers to say that the rules of such a society are not law, one must at least admit that such rules belong to a wider category to which law belongs as well. Surely there can be no reason for refusing to compare the rules that belong to these two different subcategories.

Indeed, legal anthropology is an informative experience for one who studies comparative law.<sup>9</sup> It teaches him a whole range of basic truths. To begin with, it will never occur to him that the only point of studying foreign law is to improve domestic law, and that the only point of studying domestic law is to enforce it. Quite the contrary, legal anthropologists once sought to give colonial administrations the information they needed to deculturate colonial peoples and impose European values. Now that the colonial era is a thing of the past, anthropology pretends to be neutral as to the values of societies without written languages. It merely studies rules and institutions, their similarities, differences and influence. The promotion of values is not an essential aim of research and insofar as it implies the deculturation of peoples in the name of European values, it is regarded with suspicion.

Moreover, legal anthropology leads the researcher to make interesting generalizations about the rules of different societies and so shows the importance in comparative law of the similarities and dif-

ferences between legal models. The two keys to the study of these models are evolution and diffusion of rules and institutions, and that is a matter on which any student of comparative law may meditate fruitfully.

Above all, a legal anthropologist is confronted by rules that have not been adequately formulated in the very society that applies them. Consequently, if he wishes to explain his findings, he himself must set about formulating these rules using precise concepts expressed in a suitable terminology. Necessarily, he must use his own categories and expressions which are foreign to those of the societies which he studies. Nevertheless he will draw a picture of a rule as it exists in that society. His experience will effortlessly reveal that human groups regularly abide by certain rules of behavior which they do not formulate in advance. At the same time, he will realize the difference between the pattern of behavior reflected in a rule he can formulate and the mental picture people in the society itself have of the rule. This is the first step to understanding a distinction between an operational rule and the way it is understood. Legal anthropologists take it for granted that the operational rule can deviate from the way it is understood, and yet, in developed countries, such deviations are perceived only by a handful of specialists.

Researchers in developed countries are also accustomed to reducing rules to the pattern: "If all the factual elements of situation A are present, the legal relationship B will arise." The legal anthropologist will soon realize that identical facts do not always produce identical legal rules, that the results are affected by other elements which may involve magic, social considerations, the respective power of contenders, pedagogical concerns, and so forth.

Finally, most legal anthropology is concerned with formerly colonial countries in which European rules and institutions have been introduced. These rules and institutions are now administered by natives of the countries, and yet the previous legal substrata is still sufficiently alive to impinge upon the enforcement of these rules. It is therefore possible to distinguish and analyze the roles played by the indigenous substratum and the stratum of European origin.

The interest of the jurist should be aroused, in short, wherever he finds rules to study. He may even take an interest in ethology, the study of animal societies. In fact, the study of these societies shows us that a given rule and distribution of power may be imposed coercively upon members of a group without any linguistic formulation.

9. See Alba Negri, *Il giurista dell'area romanista di fronte all'etnologia giuridica* 161, 169 (1983).

## III. PROBLEMS OF LANGUAGE

A. *The Translatability of Legal Terms*<sup>10</sup>

Some time ago, Professor Kiralfy of the University of London had the job of writing the entry, "revolving funds," for the *International Encyclopedia of Comparative Law*. He circulated a questionnaire about the concept to jurists in different countries. It is not mentioned in European codes. While individual rules outside the codes may touch upon the subject, there is no general rule that concerns "revolving funds."

The first seven questions in Kiralfy's questionnaire were:

1. To what extent, if at all, is a revolving fund treated as a thing or other object independently and apart from its component changeable parts?
2. To what extent, if at all, can it be said to be owned?
3. Who owns it—the management or the beneficiaries?
4. Is the ownership regarded as divided between them?
5. Is the notion of ownership discarded and, to use the terminology of the common law, the legal estate vested in the management, whereas the equitable estate or interest is vested in the beneficiaries?
6. If the ownership is exclusively vested in the management, is it full ownership or is its content automatically limited?
7. If the beneficiaries are not owners, is their interest merely personal or does it have the characteristics of property?

Kiralfy thus wants to discover whether the revolving fund is owned, whether the owner is the management or the beneficiaries, whether the legal estate is vested in the management and the equitable estate or interest in beneficiaries, and so forth. These questions presuppose legal institutions that do not exist in Continental Europe. They are formulated by using conceptual opposites, such as law and equity, and hence legal estate and equitable estate, which have no continental European equivalent. For an Italian, the difficulty of Kiralfy's questionnaire is not so much one of adapting the question to Continental European categories. Thus we encounter one of the main problems of comparative law, that of translating the linguistic expressions that denote legal concepts.

10. On translation, see: Beaupré, Kitamura, De Groot, Herbots, and Sacco, "La traduction juridique," *Les cahiers de droit* 733 ff., XXVIII, (1987); Michael Beaupré, *Constructing Bilingual Legislation in Canada*, B.A. Strashun, *Translating political and legal terminology*, translated from the Russian in *Soviet Law and Government* 84 ff. (1982) (original in *Sov. gos. i pravo* (1981) n.6).

It must be admitted that some expressions are untranslatable. The question we must ask, however, is, "Are some expressions translatable?" Unless the answer is a flat denial, we must ask under what conditions an expression is translatable and when any given translation can be regarded as correct.

B. *The Aim of Translation*

No people invents all of the legal rules and institutions it actually employs, and some principally use rules and institutions developed elsewhere. The reception of these rules and institutions is necessarily accompanied by translation.

In Italy we have seen, in successive waves, translations from French, from German, and most recently, and apart from any immediate reception, from English, from Russian, and from other languages. The reception of rules and institutions first from France and later from Germany has forced Italians to develop legal categories that are supposed to be the same as those developed in these countries. Thus Italian legal vocabulary has twice bent to the need to do so. The word "*nullità*" once meant "invalidity" because of the parallel with the French "*nullité*." More recently it has been used to mean that a transaction is *ab initio* void because of the parallel with the German "*Nichtigkeit*." *Delitto civile* and *fatto illecito* translate the French words *delite* and *fait illicite*; *atto illecito* translates the German *unerlaubte Handlung*. *Dazione in pagamento* parallels the French *dation en paiement* and comes directly from the Latin *datio in solutum*, whereas *prestazione in luogo d'adempimento* is used for the German *Leistung an Erfüllungsstatt*. Thus the Italian language combines two different legal languages, although many today consider the Frenchified language improper.

It is not rare for a language to combine more than one legal language. The French language, for example, combines the legal language of France, of Quebec, and of Switzerland. The legal language of Quebec is not identical to that of France, especially in cases in which terms were chosen by the legislator itself. The Quebec legislator decided to call trust *fiducie* (art. 981 ff. of the *Code Civil du Bas Canada*; art. 600 ff. of the draft of the *Code Civil du Quebec*). Consequently *fiducie* means trust in the legal language of Quebec. The problem is linguistic, not legal.

*Possession* and *possessiono* are French and Italian expressions used by the French and Italians, respectively, to indicate *de facto* power over a thing with *animus domini*. Yet the same French and Italian expressions are used by the Swiss to mean *de facto* power over a thing with *animum domini*. The German word *Besitz* is used by the Germans and Swiss to mean *de facto* power over the thing generally



but by the Austrians to mean power with *animus domini* (art. 2228 ff. French Civil Code; ABGB, § 309 §§ 854 ff. German Civil Code; art. 919 Swiss Civil Code; Art. 1140 Italian Civil Code). From a logical point of view, nothing prevents us from concluding that there exists more than one French language (one for France, one for Switzerland, one for Quebec, one for Congo, and one for Senegal), more than one Italian language (one Frenchified, one Germanized, one for the Ticino Canton), and more than one German language (one Federal-Imperial, one Democratic).

Not only can two codes in different countries use the same words with different meanings, but two codes in the same country may give different meanings to the same words, as indeed, may two articles of the same code, two authors of doctrinal works, or two judges. Words do not, in fact, have absolute permanent meanings. Every speaker, whenever he uses an expression endows it with an unrepeatable specific meaning.

Because of these considerations, we are continually confronted with problems of translation. When we in Italy speak of Italian law from 1865 to 1942—the period, that is, between our first and second Civil Codes, must we use the terminology of the era, or should we replace it with our modern terminology?<sup>11</sup> What is to be done if a certain terminology was prevalent once, but not exclusive, and today a different terminology is prevalent, but not exclusive? How can we express precisely the similarities and dissimilarities? In large part, we simply learn from practice. We consult Italian works of the last century without translating them into modern Italian. The same can be said of the Parisian jurist who consults the literature of Quebec or the jurist in Stuttgart who consults that of Leipzig.

### C. Problems of Translation Arising from Law

UNIDROIT is an international institute based in Rome founded to promote the unification of private law.<sup>12</sup> In 1974, after a successful initiative in the field of international sale of goods, it began editing an international commercial code. The text was to be bilingual, French and English. Three of the most renowned comparativists were chosen to draft the initial chapters: René David, Tudor Popescu and Clive Schmitthoff.

Article 2 of the draft dealt with "contract" and *contrat*, which are not the same thing. A deed transferring property or creating a

mortgage and an agreement for the management of an estate by a nominee are "*contrats*" in France but are not "contracts" in England or the United States where they are regarded as "conveyances" or "trusts."<sup>13</sup>

These were problems that could not be resolved by translation alone. The English language has no term for *contrat*, and the French language has no term for "contract." To resolve the problem, one needs a generic term to embrace both, a term that means "an agreement the subject matter of which concerns legal relations." In that event, however, the meaning of the generic term has to be clarified. We have to decide, in other words, whether the proposition "conveyance is not a contract" expresses a linguistic or a legal truth. In the former case, those competent to modify the meaning of words would be the speakers of the language or a legislator who decided to give words a new meaning and made his decision explicit.

Although the difference between "contract" and *contrat* arises from a difference between concepts, fortunately, the situation is less serious when legal rules differ. "*Obligation de donner*" and "obligation to transfer property" are interchangeable linguistic expressions, although, in France, the "*obligation de donner*" produces an automatic transfer of property (Art. 1138 French Civil Code), whereas, in England, an "obligation to transfer property" merely creates an "equitable interest" in favor of the transferee. The legal rules are different, but the categories and the linguistic terms for them correspond.

These examples show that even when terms correspond and are translatable—like the terms death, *mort* and *Tod*—there may not be the same operative rules.<sup>14</sup> Strange as it sounds, the opposite may also be true: the operative rules of the two systems may be more similar than the vocabularies in which they are expressed.<sup>15</sup>

Translation, then, requires the work of the jurist. To translate, one must establish the meaning of the phrase to be translated and find the right phrase to express this meaning in the language of the

13. In the same way, *donation* and *contrats* which transfer property are *contrats*, whereas gift and bailment are not contracts. This distinction is irrelevant when we are dealing with a commercial Code: *donation* is not a commercial transaction, and bailment entails a commercial act only when it is onerous; in the latter case, it is a "bargain" and may, therefore, be classified in the category of contract.

14. These three terms were certainly more fungible in the past than they are today. Legal death may be made to coincide with the ceasing to function of heart or brain and this possibility of choice might lead to diversifications in the meaning of the terms indicated above.

15. Tom promises to transfer to Harry the ownership of a movable property, and then, despite the nullity of the promise, and albeit aware of such nullity, he delivers him it in execution. In England, France and Germany, ownership, in this case, is conveyed. Yet the rule is expressed with highly diverse, and partially untranslatable formulations.

11. On this, Sacco, "Modèles français et modèles allemands dans le droit civil italien," *Rev. int. de droit comp.* 225 ff. (1975).

12. It was an initiative of UNIDROIT to reach the agreement, known as LUVI and LUFCVI (uniform law on international sale, and uniform law on the formation of international sales contracts, the Hague, 1964), later revised in the Convention of Vienna in 1980.

translation. Both the first and the second of these operations are the work of the jurist, who is the only person competent to decide whether two ideas taken from different legal systems correspond to each other and whether a difference in rules is tantamount to a difference in concepts. The translator, however, must take account of other problems as well which cannot be reduced to finding correlations between words.

#### D. Problems of Translation Arising from Language

The legal rule preexists the linguistic formula we use to describe it. In the case of customary law this truth is evident. The rule is suitably formulated only after it is studied by a class of professional jurists.

The translator, however, appears to be concerned only with the expression he has to translate. That phrase and the phrase he uses in his translation must correspond to a common concept.

This correspondence may be either facilitated or hampered by the characteristic features of the two languages with which the translator is working. Nineteenth century German legal language was easy to translate. The Pandectist School had given it a rich set of well coordinated analytical concepts approaching the ideal in which each concept corresponds to one word and each word to one concept. Difficulties arose when the language that it was translated into lacked corresponding words. How was it—and is it—possible to translate into French such expressions as *rechtswirksames Verhalten*, *Rechtshandlung*, *geschäftsähnliche Handlung*, *Willensgeschäft*, *Willenserklärung*, or *Rechtsgeschäft*? The only expressions the French possess are *acte juridique* (corresponding to *Rechtshandlung*) and *déclaration de volonté* (corresponding to *Willenserklärung*). *Rechtswirksames Verhalten* might be translated with *fait de l'homme*, but the other terms, above all *Rechtsgeschäft*, have no corresponding term in French. Nevertheless, the problems are not insoluble. The translator can, for example, work out the precise meaning of a German term and translate it with a complex expression formed by more than one word.

The real difficulties of translation arise when the relationship between word and concept is not identical in different legal languages. Word and concept may be related in different ways and any theory of legal translation must consider them.

An important example is the use of synecdoche, a linguistic form in which the speaker refers to a part to indicate the whole. A Frenchman may say "*tourner ses épaules*" (literally, "to turn one's shoulders") when he means "to turn one's body." An Englishman may translate this expression as "to turn one's back" since English

allows this specific synecdoche. But is the same operation possible whenever we encounter synecdoche?

The problem is especially interesting to jurists because an important legal language, French, uses synecdoche more than any other.<sup>16</sup> The most characteristic feature of a case is stated instead of all the features that matter. We can see this tendency—of which the French themselves are not particularly aware—in the definitions the French jurists give of important legal terms. For example, contract is defined by mentioning the will without mentioning the need for the will to be declared or the requirement that there be a *cause* (roughly speaking, a good reason for the parties to declare their will and for the law to respect it.) Similarly, tort is defined by mentioning fault and harm, but omitting the requirement that the tortfeasor's conduct be not only blameworthy but contrary to law. Although such definitions, when initially formulated, are instances of synecdoche, it can then happen that the letter of the definition is followed, that is, an element left out of the definition is treated as irrelevant in resolving an actual case—and so the synecdoche is eliminated. The translator of a French text must be on the lookout for such figures of speech. He must not translate them in a way that suggests their literal meaning is the correct one.

Synecdoche and metonymy are only examples of a more general phenomenon. For a variety of reasons, the way rules are stated may be different than the way they are enforced. Yet when, because of a rhetorical figure, there is a difference between the rule as stated and the idea that the speaker wished to express, an attentive translator cannot ignore it.

#### E. Beyond Definition

In legal language, as in scientific language in general, categories should be defined by all their constituent features, and words should correspond to categories. It may be surprising, then, to find that certain legal terms also have connotations that are favorable or unfavorable, implying like or dislike, or that the choice of a word is influenced by the historical origin of a legal rule, or that the use of a word implies a judgment on an institution.

The fact is that the language of law is also the language of political thought in which value judgments are legitimate. The word "saving" has a favorable connotation, unlike the French word "*capitalisation*." It would therefore be wrong to translate *capitalisation* as "saving" even though the extension of the two concepts is the same. Even the terminology of the legislator may reflect emo-

16. Monateri, "Règles et techniques de la définition en France et en Allemagne," *Rev. int. dr. comp.* 77 (1984): Id., *La synecdoche* (1984).



tion, fashion, phobia or mere theatrical flare. Towards the end of the nineteenth century, adherents of German "legal socialism" attacked the terminology used in the draft of the civil code on the grounds that it was too abstract, too removed from popular language, and hence incomprehensible to the masses. When the East German Civil Code was drafted in 1975,<sup>17</sup> the drafters replaced some German legal words with neologisms. They spoke of *Betrieb* instead of *Unternehmen*, *Gemeinschaft* instead of *Gesellschaft*, *Andere* instead of *Dritte*, and so forth. Since the English word "enterprise" and the Russian word *predpriiatiye* have always been used to translate *Unternehmen*, one wonders if they can still be used to translate *Betrieb*.

When legal rules or institutions are imitated, sometimes words are borrowed as well. In such cases, the terms convey information about the borrowing that has occurred. An example is the diffusion in socialist countries of words taken from the language of revolutionary Russia: *khozraschet*, *kokhozl*, *prezidium*, and so forth.

Again, within a language, certain expressions seem to be connected. "Autonomy of the contracting parties" and "freedom of contract" are synonymous but the second phrase suggests a connection with freedom in its more general sense. French law suggests a relationship between "copyright" and "patent" by terming them *propriété littéraire* and *propriété industrielle*.<sup>18</sup>

#### F. Abstract Notions and Their Concrete Expression

An abstract idea finds concrete expression in a given legal language much as, in biology, a genotype or distinctive set of genes is expressed in the phenotype or outward form of a plant or animal. The jurist of an individual country studies the phenotype. The comparativist must study the genotype of which it is the expression.

For example, even within the French, German and Italian languages, the words *possession*, *Besitz* and *possessione* express different abstract concepts. Sometimes these words are used to mean a *de facto* power over a thing coupled with *animus domini*. They are then contrasted with the terms *detention*, *Innehabung* and *detenzione* which mean immediate *de facto* power with or without *animus domini*. *Possession*, *Besitz* and *possessione*, nevertheless, are sometimes used to mean *de facto* power with or without *animus domini*. As this shows, within each single language we find a lin-

guistic divergence. The reason is that the Germans and Swiss broke with Roman law by granting protection to anyone who had *de facto* power regardless of his *animus*. By so doing they have decided a matter of law. When they did so they did not use the words *detention*, *Innehabung* or *detenzione* to describe such a person, for these terms implied a lesser degree of protection than they wished to afford. The person with *possession*, *Besitz* or *possessione* had traditionally been protected even against interferences with his use of a thing that did not oust his possession, for example, against what common lawyers call a nuisance. Therefore they used these terms to indicate a person who is to receive such protection whether or not he has *animus domini*. In 1975, however, a French law on possessory actions called this linguistic usage into question by granting a remedy against nuisance (*complaints*) to the *détenteur*.<sup>19</sup> Yet the protection afforded the *détenteur* is still not as great as that given the *possessionneur* for the former cannot act against someone who has *possession* through his own efforts.

To unravel problems such as these the comparativist must go back to the genotype, to the abstract concept that the language of a legal system expresses. He will encounter similar and even more complex problems from the analysis of such expressions as *contrat*, *contract*, *Vertrag*, and *contratto*, or *propriété* and ownership, or *délit civil* and tort.

#### G. Nouns and Categories

Thus far we have considered nouns that represent abstract categories, such as *contract*, will and damages. Nevertheless, the translator may also encounter words which, although they seem to indicate such categories, have acquired a meaning closely linked to the environment in which they are used. In extreme cases such words become like proper nouns which refer to only one person. Such words cannot be translated. For example, to indicate the King of England, a Frenchman says *roi* and a German says *König*, but to speak of the former sovereigns of Russia both the French and Germans say *tsar* even if they are talking about Russian monarchs who adopted the official title of *imperator*. Honorary titles often use words that cannot be explained by any conceptual distinction: words such as *conte* and *marchese*, *cavaliere* and *commendatore*, *licencé maître*, and *docteur*.<sup>20</sup> Terms such as these have taken root in

17. Crespi, Reghizzi, De Nova, and Sacco, "Il Zivilgesetzbuch della Repubblica Democratica Tedesca," *Riv. dir. civ.* 47 (1976).

18. Art. 22 of the Treaty of Rome instituting the European Economic Community is aimed to exclude any effect of the Treaty itself upon the system of ownership. In French, the term, "propriété," would be compatible with an extensive interpretation.

19. Law 75-596 of 9 July 1975. See Goubeau, "L'extension de la protection possessoire au bénéfice des détenteurs," *Rep. not. defrenois* 374 (1976); Guarneri, "Una legge francese sulle azioni possessorie," *Riv. dir. civ.* 302 I (1980).

20. They may, nonetheless, lead to problems of translation. The French and Italians call the Polish state created in the Napoleonic era the Grand Duchy of War-

many languages because of their origins in medieval Latin or their historical prestige.

In such cases we see a phenomenon one can call legal nominalism: the noun prevails over the meaning. One might say, to speak very loosely, that the noun no longer indicates an idea but rather another noun. There are many examples. No one would translate *soviet* (in the sense of a political assembly) with the word council, although the meanings of the two words correspond.

In some instances legal nominalism is prescribed by political authority. Such instances are odd because, while the creation of legal rules is the prerogative of those in authority, the definition of concepts is usually the prerogative of scholars. Nevertheless, however much scholars may protest, they cannot ignore the decision that those in authority sometimes make about the use of a word. Indeed, the translator must not ignore the fact that this use results from a political decision. For example, in the Soviet Union a state enterprise possesses means of production which it can use for its own benefit. Western jurists would therefore describe the enterprise as the owner or, in French, the *propriétaire* of these means of production. Nevertheless, in conformity with the dictates of political authority, the Soviet jurist Venediktov<sup>21</sup> declared that the state owns these means of production, a declaration repeated in the civil codes enacted in the USSR since the appearance of his work.<sup>22</sup> One who translates the assertion in these codes that the state has *sobstvennost'* of the means of production cannot use a word that genuinely captures the meaning. He must translate *sobstvennost'* as "ownership."

#### H. Translation and Extralinguistic Data

Complete permanent correspondence between two expressions belonging to two different languages can be created only artificially. Leaving aside entirely artificial language, the meaning of a word is artificial if those in authority have declared that a word shall have a certain meaning or that two words shall have the same meaning. A similar decision could be made by people who have a purely moral authority: for example, the scholars in a country might decide that such and such an expression will translate some foreign phrase.

Multilingual texts are, of course, one common instance of this phenomenon. If a bilingual legislator in Quebec decides to call a

saw, but the Poles call it *Księstwo Warszawskie* (or Duchy or Principate of Warsaw), and are clearly upset by the linguistic choice of the Latin tongues.

21. Anatolii Venediktov, *Gosudarstvennaja sotsialisticheskaia sobstvennost'* (1948).

22. Ogz, art. 21, GK RSFSR, art. 94.

given institution both *fiducie* and trust, then *fiducie* means trust in the language of Quebec. Another common instance occurs with legal reception as when an Arab country borrows the rules of the French Civil Code,<sup>23</sup> Germany adopts Roman law, or the Russians adopt the conceptual system developed by German jurists.

In the case of a legal reception, the translator has an advantage. The foreign expression will be translated by a neologism which is taken to correspond to a notion that is well-known to those acquainted with the legal system that is being imitated. There will always be someone ready to explain a phrase the jurists of the country doing the imitating, and hence translation from one language to the other will be easy. For example, when the Italians began to talk about *negozio giuridico*, the definition of this term was clear since everyone knew the term was a translation of the German *Rechtsgeschäft*. The case is slightly more complex when those who speak two different languages decide independently on words in their own languages to stand for an idea expressed by a word in a third language. For example, the French use the word *louage* and the Germans use the word *Miet* to represent the idea of the Latin *locatio*.

#### I. Homologation

Translations imposed by the legislator or adopted during a reception are artificial. In contrast, normal translation simply tries to present the ideas expressed in the original language without change in the language of the translation.

When a scholar translates he cannot use a word without questioning every aspect of its definition. If he cannot refer to a definition provided explicitly or implicitly by the legislator or the case law, he must decide how to guarantee that the word he adopts in the translation corresponds to that in the original. He may adopt either of two approaches.

First, he may prefer not to translate. At a macro comparative level, such a preference is common. The anthropologist hardly ever translates. Normally one does not translate *parquet*, trustee, *Dienstbarkeit*, *khazraschet*, *kokholz*, *tsarina*, and so forth. Alternatively he may pick the closest term available to him in the language he is using, identifying the differences between it and the term in the original language, and then taking care that these differences are irrelevant from the standpoint of the problem he is addressing. Although a thriller may translate *procureur de la République* as

23. It may be possible to use a data computerization system to draw up a body of all the Arabic expressions used to express legal concepts with a European matrix. See here Beck Peccoz, "Verso il riordinamento del lessico giuridico arabo. Il progetto iura islamica informatica," *Riv. dir. civ.* 77 (1985).

"district attorney" and *exécuteur testamentaire* as executor, and *servitude* as legal estate, a legal translation would avoid doing so. Terms such as *président de la République*, *chose mobilière*, *parlement*, *lichmaia sobstvennost'* may be translated, for example, as president of the republic, moveable property, parliament, and ownership of the citizen.<sup>24</sup> Differences in connotation will be regarded as qualities that do not delimit the concept itself.<sup>25</sup>

Second, he may create a special neologism in his own language. The romance languages and German have done so to have terms corresponding to the Latin. Russian has done the same with the French and, above all, the German legal language.

Whether the comparative legal scholar is translating or not, he faces problems like those of a translator when he tries to get at a notion in a conceptual system extraneous to his own. He needs a standard to measure differences and correspondences to the concepts in his own system, and he must seek them in the operational rules of the two systems. If, for example, a French scholar wishes to study "trespass to land," he must reduce "trespass" to more elementary concepts. Let us suppose that, in doing so, he identifies concepts of intention, immovable property, entry, violation of the property rights of another without the owner's permission. He may subsequently discover that the idea of intention he identified is different than his own in the sense that it requires something more or less than the French concept. Perhaps he will also find out that acting in opposition to the will of an owner has a different meaning than the one usual in French. The problem thus arises of establishing correspondences among the different categories. This reduction of the categories of one legal system to the categories of another may be termed "homologation."

The complexity of the problems involved in legal translation makes the carelessness with which they are approached seem incredible. The translation of important contracts is often entrusted to people who have a solely literary knowledge of one of the two languages used. Sometimes a choice of law clause refers to a legal system with a language that does not correspond to the one in which the contract is written. Or an arbitration clause may permit an arbitrator to be chosen from a third country, and the same word may therefore have three different meanings for three arbitrators.

24. What if this term is missing? In this case, it is better to explain than translate. The future belongs to dictionaries which explain foreign terms in the language of the reader, without translating them. This is what Francesco De Franchis has done with his Anglo-Italian legal dictionary.

25. For example, the varying degree of power enjoyed by *Président* and *Président*. The head of state who inherits a title and conserves it for life would, however, represent a different concept.

#### IV. IN SEARCH OF "LEGAL FORMANTS"

##### A. What is a "Legal Rule"?

To speak of comparison, one must have objects to compare. If one asks what students of comparative law compare, the most obvious answer would be, "the rules of different legal systems." What, then, is meant by a "legal rule"?

It is misleading to speak of the legal rule in force in a given country as though there were only one such rule. To illustrate, consider the regulation of collective bargaining agreements in Italy. Article 39 of the Constitution provides that "duly registered trade unions. . . may. . . enter into collective labor agreements which are binding upon all. . ." The constitutional rule, then, is that the unions can enter into binding agreements once they register. Italian legislation, however, has never provided a way in which the unions can register. The statutory or legislative rule, then, is that registration is not possible and collective bargaining agreements therefore are not binding. Nevertheless, Italian judges have consistently enforced the agreements that unions enter into. Thus the judicial rule or case law provides that such agreements are binding. There is a lack of harmony, then, between the constitutional rule, the statutory rule, and the judicial rule. A common lawyer, accustomed to considering judicial precedent as a main source of law, will therefore find it curious that in Italy judicial decisions are not supposed to be a source of law at all.

If, then, we are to compare the rules of the Italian legal system with those of the English system, which rule are we to compare? The constitutional rule, the statutory rule or the judicial rule? In fact, it is wrong to believe that the first step toward comparison is to identify "the legal rule" of the countries to be compared. That is the typical view of an inexperienced jurist. It is a misleading simplification which the student of comparative law has a duty to criticize.

Instead of speaking of "the legal rule" of a country, we must speak instead of the rules of constitutions, legislatures, courts, and, indeed, of the scholars who formulate legal doctrine. The reason jurists often fail to do so is that their thought is dominated by a fundamental idea: that in a given country at a given moment the rule contained in the constitution or in legislation, the rule formulated by scholars, the rule declared by courts, and the rule actually enforced by courts, have an identical content and are therefore the same.

Within a given legal system, the jurists assume this unity. Their main goal is to discover "the legal rule" of their system.<sup>26</sup> For a civil

26. Looking at the matter from a philosophical point of view, a reader might

law jurist, this single rule is supposedly contained in the code. Supposedly, the works of scholars are consulted because they faithfully describe the rule in the code, and decisions of judges are instances in which this rule has been enforced. For a common lawyer, this single rule supposedly is contained in a statute, or when none has been enacted, in the decisions of courts. The works of scholars are consulted because they describe the statute or the judicial decisions.

Nevertheless, civil law and common law jurists all consult statutes and judicial decisions and the opinions of scholars in search of this single rule. Thus, at the outset of their search, they have, not a single rule, but a variety of legal material. The civil lawyer may say that this rule comes, in principle, from the code; the common lawyer may say it comes from a particular statute or from judicial decisions; and yet they both will learn their law initially from the books of legal scholars. Students in civil and common law countries turn to books, manuals, hornbooks or carefully edited casebooks, or at least to the opinions of their professors, to learn, respectively, about the code, and about their case law. Thus, whatever jurists or students supposed to be true as to the ultimate source of a legal rule, they will begin with the work of scholars and pass to a variety of other legal sources. Moreover, empirically, they know that in some cases the case law does not correspond to the opinion of scholars or legislation to the case law. For example, an antiquated or unreasonable statute may have been replaced by a more suitable interpretation developed by judges or by professors. Thus even the jurist who seeks a single legal rule, indeed who proceeds from the axiom that there can be only one rule in force, recognizes implicitly that living law contains many different elements such as statutory rules, the formulations of scholars, and the decisions of judges—elements that he keeps separate in his own thinking. In this essay, we will call them, borrowing from phonetics, the "legal formants." The jurist concerned with the law within a single country examines all of these elements and then eliminates the complications that arise from their multiplicity to arrive at one rule. He does so by a process of interpretation. Yet this process does not guarantee that there is, in his system, only a single rule. Several interpretations will be possible and logic alone will not show that one is correct and another false.

raise against this distinction an objection that is rather awkward for us: in what sense can we speak of a "meaning of the law, of doctrinal formulas, etc.? If it is true that each interpretation of the law modifies it, it is equally true that it is anterior to every interpretation, and independent from every interpretation. From a more empiric perspective, a suitable answer to this objection does exist: in this case, it is necessary to understand the expression, "meaning of the law," in the sense, "empiric literal meaning in conformity with the thought of the writer of the text." If the literal meaning and the thought of the writer are in conflict, it is better to acknowledge that we have before us two distinct "legal formants."

Within a given legal system with multiple "legal formants" there is no guarantee that they will be in harmony rather than in conflict.

### B. *Must There Be a Single Rule?*

In civil law systems, and in common law systems where there is a relevant statute, there is a tendency to say that the will of the legislature creates a legal rule which scholarship interprets and judges enforce. In common law countries when there is no relevant statute, there is a similar tendency to think that a single rule is implicit in the case law, a rule that scholars discover and judges apply in new cases. Thus, in principle, the various rules that legislators, scholars, and judges propound or apply are supposed to be identical. Lack of identity is the fault of the interpreter.

One who studies comparative law cannot think this way. He cannot reject foreign solutions to legal problems because they arise from "wrong interpretations." At the same time, by comparing several systems, he can see that the "legal formants" within a single system may differ.

Consider, for example, the ways in which Italian, French, and Belgian law deal with a case in which a person who believes himself to be heir disposes of property he has inherited by transaction to a third party in good faith and for a valuable consideration. Is the transaction effective or not? In Italy the transaction is effective according to both the civil code (art. 534, par. 2) and the case law. In Belgium the code says nothing and consequently the question must be decided by the general rules governing property. Since, in general, property can only be transferred by its owner, the transaction is ineffective. In France the texts of the code are the same as in Belgium, but the transaction is considered to be effective because various ideas are invoked to justify a departure from the ordinary rules of property: for example, the idea that the heir has a tacit agency.

Can one say that Belgian law is the same as the Italian? Of course not: it is the exact opposite. Can one say that Belgian law is identical to the French? Of course not: the result in practice is the exact opposite. Thus to identify differences and similarities among legal systems, we must take into account both legislation and case law.

We should not think, however, that we understand a legal system when we know only how courts have actually resolved cases. Knowledge of a legal system entails knowledge of factors present today which determine how cases will be resolved in the near future. We must know not only how courts have acted but consider the influences to which judges are subject. Such influences may have a

variety of origins. For example, they may arise because scholars have given wide support to a doctrinal innovation. They may concern the judge's background. A judge appointed from an academic position will tend to put more stress on scholarly opinion than a judge who has always practiced law. The text of a statute is one of these influences even when previous judicial decisions have disregarded it. There is always the possibility that courts will return to the letter of the law.

### C. The Consistency of "Legal Formants"

Suppose we were to study how two different legal systems resolved a problem, for example, the problem of the liability of the manufacturer of defective products for damage caused to someone other than the direct purchaser. Suppose we found that the statutes of the two legal systems were the same. We might then find either that the judges of both systems applied the same rules or that they applied different ones. If they applied the same rules, the reason might be that these rules actually were consequences of the statutes. If, however, they applied different rules, it would be clear that the statutes alone were not responsible for the rules followed by the judges. We could then ask what, if not the statute, might be influencing the judges. A comparative method can thus provide a check on the claim of jurists within a legal system that their method rests purely on logic and deduction. Indeed, the comparative method can show us just how relative is the value of many discussions about the theory of the juridical person, the principle of the autonomy of the will, the nature of ownership, and so forth. The comparative method may thus be a threat to any process of legal reasoning which does not employ comparison. The threat is most direct to those "scientific" methods of legal reasoning that do not measure themselves against practice, but formulate definitions that are supported solely by their consistency with other definitions. In destroying the conclusions reached by these methods, comparison may provide an alternative method that is more solid.

### D. Comparison: An Historical Science

Comparison recognizes that the "legal formants" within a system are not always uniform and therefore contradiction is possible. The principle of non-contradiction, the fetish of municipal lawyers, loses all value in an historical perspective, and the comparative perspective is historical *par excellence*.<sup>27</sup> From this perspective, any

27. We have seen that the jurist "of a single system" sets these asymmetries in relation to the possible errors of the interpreter. But the opposition between true interpretation and false interpretation is a luxury which the comparativist cannot af-

model is true if it has actually existed. Any model that is *de facto* true has as much legitimacy as any other model that is *de facto* just as true. If we consider the French Civil Code in historical perspective, we find that the generation of Louis Philippe gave it one interpretation while the generation of Clemenceau gave it another.<sup>28</sup> While every interpreter, of course, will claim that all previous interpretations are wrong, it would be absurd for a student of comparative law to become mixed up in these generational polemics. From his perspective, all the alternative solutions are true and real with the possible exception of that contained in an overly nervous student's examination answer.

The comparative method is thus the opposite of the dogmatic. The comparative method is founded upon the actual observation of the elements at work in a given legal system. The dogmatic method is founded upon analytical reasoning. The comparative method examines the way in which, in various legal systems, jurists work with specific rules and general categories. The dogmatic method offers

ford. The jurist of a single system fills the gap between the idea (a law which entails a single exact interpretation) and the fact (the presence of numerous interpretations) by making the choice that his personal preferences make him consider to be exact. Yet the comparativist, who is never a good judge on foreign ground, refuses to consecrate this or that interpretation as exact, and has no faith in any criterion that is not objective; indeed he is fully aware that any interpretation made by a jurist is a real interpretation. "Verum ipsum factum" is the criterion that inspires the comparativist in his analysis. As he has no preference for one legal system rather than another, so the comparativist has no preference for one or another "legal formants" of a given system, nor for one or another feature which he finds within a given "legal formant." In the Trento manifesto (see above, to n. 2) figures a thesis (the fourth) which is expressed as follows: "Comparative knowledge of legal systems has the specific merit of checking the coherence of the various elements present in each system after having identified and understood these elements. In particular, it checks whether the unrationalized rules present in each system are compatible with the theoretical propositions elaborated to make the operational rules intelligible."

28. A large number of errors might have been avoided if, in the study of French property law in the nineteenth century, a privileged position had not been allotted to the declamations of writers and the general definition we find in the *Code civil*, and if the importance of the specific rules contained in the code and in special statutes and regulations had been acknowledged. On this see, extensively, Antonio Gambaro, *Ius aedificandi e nozione civilistica della proprietà* (1975). In the Trento manifesto (see above, 2 to n. 2) two theses (the second and the fifth) are expressed as follows: second thesis:

There is no comparative science without measurement of the differences and similarities found among different legal systems. Mere cultural excursions or parallel exposition of fields is not comparative science.

fifth thesis:

"Understanding a legal system is not a monopoly of the jurists who belong to that system. On the contrary, the jurist belonging to a given system, though, on the one hand, advantaged by an abundance of information, is, on the other hand, disadvantaged more than any other jurist by the assumption that the theoretical formulations present in his system are completely coherent with the operational rules of that system."



abstract definitions.<sup>29</sup>

## V. "LEGAL FORMANTS": THEIR STRUCTURE AND RELATIONSHIP

### A. *The Significance of Case Law*

In civil law countries, the use of the comparative method has gone hand in hand with greater attention to case law. Comparative law is an historical science concerned with what is real. It conforms to the criteria of Gian Battista Vico: *verum ipsum factum*. It is therefore natural for the comparativist to direct his attention toward judicial decisions. Especially in Italy, use of comparative methods has led to a reassessment of the role of case law. It has led to the recognition of some operational rules not contained in the Civil Code but nevertheless actually followed by the courts.

This concern with case law, however, is to be found among those who use any non-dogmatic methodology. The exegetical, historical, rational, and sociological methods, as well as legal realism, all look to reality and hence appreciate the importance of judicial decisions. The literature concerning the role of case law has developed, especially in Italy, in a way that would have been unthinkable fifty years ago. It would be unjust to deny that comparative research has favored this phenomenon. It's senseless to reduce it to the product of comparative research.

Conversely, it would be a mistake to reduce the comparative method to the study of cases. The student of comparative law is perfectly aware that a judicial decision has a different significance in countries where the law is based on precedent than in those where it is based on statute.

An example of what comparative methods may uncover through attention to cases are the results Gino Gorla achieved in his study of contract.<sup>30</sup> He compared the role of consideration in English law with that of *cause* or *causa* in French and Italian law. *Cause* means, roughly speaking, a good reason for the parties to enter into a contract and for the law to enforce it. According to both the French and Italian Codes and scholarly doctrine, a contract must have a *cause* to be enforced. Gorla showed, however, that French and Italian case law does not allow the enforceability of a contract to turn

on the presence or absence of a *cause* but on the presence or absence of a non-liberal cause. The courts treat the absence of cause and the presence of a liberal cause in the same way. It is interesting that this result is not expressed in this way even by Gorla himself.

The significance of the presence or absence of a liberal cause, which Gorla discovered to be implicit in the French and Italian legal systems, is explicit in the Anglo-American system, a fact that certainly facilitated Gorla's discovery. As is often the case, the model in question is explicit in one system, and present, but implicit in another.

Gorla's work indicates the importance of distinguishing between the rule announced by the court and the rule it actually applied, or, as a common lawyer would say, between the court's statement of the rule and the holding of the case, that is, the facts on which the court arrives at a certain result.

### B. *The Development of the Factual Approach: The Studies at Cornell*

In civil law countries, law is traditionally explained by saying that the legislature enacts a statute, scholars discover its meaning, and judges, assisted by their conclusions, give the statute a precise application through their decisions. We have seen the unrealism of this view. Can we therefore conclude that this view is wholly fallacious? Can we say that a statute or the reasons given by a court are legal flowers without stem or root, irrelevant to the actual law in force? When the question is asked in that way, it is clear that the answer is "no."

The statutes are not the entire law. The definitions of legal doctrines by scholars are not the entire law. Neither is an exhaustive list of all the reasons given for the decisions made by courts. In order to see the entire law, it is necessary to find a suitable place for statute, definition, reason, holding, and so forth. More precisely, it is necessary to recognize all the "legal formants" of the system and to identify the scope proper to each. One must avoid the optical illusion caused by magnifying the more general statements of law, the large definitions, and neglecting the specific operational rules that courts actually follow. By the same token, one must avoid the error of perspective that makes the more abstract legal conclusions invisible.

The need to recognize the diversity of the "legal formants" and their proper roles is illustrated by the Cornell studies on the formation of contract, a collective comparative research project directed by Rudolf Schlesinger which has left in its wake a monumental

29. The teaching comes from Gino Gorla.

The third thesis of the Trento manifesto (see above) states as follows:

"Comparison turns its attention to various phenomena of legal life operating in the past or the present, considers legal propositions as historical facts including those formulated by legislators, judges and scholars, and so verifies what genuinely occurred. In this sense, comparison is an historical science."

30. Gino Gorla, *Il contratto*, 2 volumes (1955); Id. *Le contrat dans le droit continental* (1958) (lit.).

mass of data.<sup>31</sup> The preliminary problem that Schlesinger had to resolve was how to obtain comparable answers to the questions he wished to ask about different legal systems. The answers had to refer to identical questions interpreted identically by all those replying. Moreover, each answer had to be self-sufficient. It was impossible to use answers which needed further interpretation and hence the answer had to be on a par with the most detailed rules.

Professor Schlesinger therefore had to formulate each question to take account of any relevant circumstances in any one of the legal systems analyzed to be sure that this circumstance would be considered in the analysis of every other system compared. Consequently, generic rules, identically formulated but capable of producing different results, were not regarded as the same.

Another and more important objective was also achieved. Often, the circumstances that operate explicitly and officially in one system are officially ignored and considered to be irrelevant in another and yet, in that other system, they operate secretly, slipping silently in between the formulation of the rule and its application by the courts. The special feature of the work done at Cornell was it made jurists think explicitly about the circumstances that matter by forcing them to answer identically formulated questions.

The solution that Schlesinger adopted to these problems constitutes the most significant methodological feature of the whole survey. The problem was to formulate a question in a uniform way for an Indian, a Spaniard, a Pole, a German, a Norwegian, and so forth. In order to do so, one could not use abstract categories that might not be universally applicable: for example, offer, acceptance, and contract. Representatives from each national legal system would

31. *Formation of Contracts* (Rudolf Schlesinger ed.) (1968). See my review, "Un metodo di lavoro nuovo: il seminario di Cornell," *Riv. dir. civ.* II, 172 ff. (1972).

In 1957 a three-day conference planned comparative research on the formation of contracts (offer, acceptance, revocation of the offer: with appendices on *de facto* contracts and conventional forms). In the following three years the legal systems to be analyzed and reporters were carefully chosen: most important, questionnaires were elaborated. The questions were formulated and constructed in such a way as to have a plausible, complete meaning for jurists of different families: later extremely detailed memoranda were composed to which single reporters had to comply in researching the data of the various systems: finally, the single collaborators produced written (national) reports.

The years in which work was most intense were those between 1960 and 1964. Three times reporters spent together at Cornell University periods varying from two to four months. In these stays, the various national reports were the subject of oral discussion, at the end of which each reporter produced a supplement to his previous contribution. General reports were then prepared, designed to give a picture of the agreements. Albeit preceded by the compilation of drafts by single reporters, these general reports are a collective work. Between 1964 and 1968 the national reports were further revised (to make their contents more consistent with the general reports), and an introduction was written. Finally, the records of proceedings were printed. The result was a work of 1,700 pages.

have seen in these abstract terms the ideas of their own system, or worse yet, their own doctrinal school. To obtain consistency, each question was therefore formulated by presenting a case. The cases were taken not only from Anglo-American countries but from Germanic countries as well. French and Italian cases were not used because the reports of these cases are often not sufficiently clear as to the facts.

This factual approach thus asked respondents about the results that would be reached in particular cases, not about a doctrinal system. To the extent the results of these cases were similar, they may have contained an implicit system. Yet the factual approach is the opposite of a method that concentrates on system.

The work at Cornell met not only with approval but with criticism, especially by Dennis Tallon. He charged that because Schlesinger came from a country, the United States, with a legal system based on precedent, he had, in effect, treated civil law systems as systems based on case law. Schlesinger, however, did not ask jurists from civil law countries to forget that their own law is generally guided by more systematic work of scholars. He asked them only to apply their law to certain particular problems. The informant was free to answer the question by consulting an article of the civil code or a statute or the scholarly literature. He could refer to these sources in explaining his answer.<sup>32</sup>

In our opinion, the work at Cornell was an important step in the history of the comparative method and, perhaps, of the legal method in general. The consistency presumed to exist among the "legal formants" of each system was no longer taken for granted. Once it was recognized that these elements could be inconsistent, it was recognized as well that the national jurist by himself could not judge their consistency. Judging their consistency required work based on a factual method.

At Cornell, the jurist who reported on a given national legal system was, of course, chosen from the nation in question. Yet the method of investigation avoided the risks that usually accompany such parallel collective presentations of information. Usually, in parallel presentations, it is thought that only the jurist of the country in question is initiated in knowledge of his own legal system, and it is thought that this initiation is necessary and sufficient, not only to know codes, scholarly work, and case law in that system, but also to judge the consistency of the code, the conclusions drawn from the code, and the judicial decisions that purport to apply these conclu-

32. In our view, at Cornell some Romanist jurists gave too much emphasis to the "system," whereas others stressed excessively the latest case law (see *Un metodo*, cit.).

sions. The studies at Cornell teach us that in order to have complete knowledge of a country's law, we cannot trust what the jurists of that country say, for there may be wide gaps between operative rules and the rules that are commonly stated.

The work at Cornell highlighted a different phenomenon as well. Often a respondent had to answer questions about his own legal system that had never been asked before. As a result, the reports at Cornell gave a highly different picture of the law than the monographs used in the country in question.

### C. Features of Some "Legal Formants"

Within each legal system there co-exist different "legal formants" which may or may not be in harmony with each other. That would seem to be a proven fact. Thus far, however, we have not explained what these "legal formants" may be.

Important elements of which we have not yet spoken are the reasons and the conclusions given by judges and scholars. Strange as it may sound, the reasons that judges and scholars give are different "legal formants" than their conclusions. The reasons have a life of their own independent of that of the conclusions they supposedly support.

Consider, for example, the French legal rule that a person who believes himself to be heir and who acts in good faith can make a valid conveyance.<sup>33</sup> This conclusion is justified by the jurists who have dealt with it in various ways: (1) by saying there is a collective *sasine* common to all those inheriting; (2) by saying the true heir has tacitly appointed the transferor his agent; (3) by saying there is "apparent ownership"; (4) by saying that the true heir has created a risk for others through his inertia. The conclusion is a fact about the French legal system that is to a large extent independent of the reasons given for it. Nevertheless, one cannot conclude that the reasons do not matter. They are "legal formants" for French law in their own right. Legal systems where the same conclusion is supported by different justifications cannot be regarded as identical. For example, if the conveyance is deemed to be effective because of a tacit agency, there will be a tendency to treat the conveyance by the rules of tacit agency. New rules governing agency may be applied to the person who believes himself to be heir. Thus one must include the justifications given for rules among the "legal formants" of the French system. Other examples would be the justification French jurists give for the *don manuel*, the recovery of money paid by mistake, and so forth.

33. Sacco, "Un cryptotype en droit français: la remise abstraite?" *Etudes Rodière* 273 (1981).

The propositions about law that are put forward as conclusions by scholars, legislators, or judges are another legal formant. The various forms they may take have not yet been widely studied. Sometimes these conclusions seem to explain a legal term. They are supposed to connect the term with its legal effects. For example, the term may be "parents" or "members of Parliament" and the legal effects may be "they have the power to manage the property of their minor children" or "they have the power to make legal rules." Jurists insert a statement in the middle: for example, "parents represent their minor children," or "members of Parliament represent the nation." These statements are not themselves operative rules. They are purported explanations of operative rules. Nevertheless, we should not regard them as superfluous. They can affect the way in which the operational rules they purpose to explain are understood and interpreted. Thus they also rank among the legal formants of a system.

It may be surprising that some explanation of this sort are made by the legislator. His job, after all, is to make rules, not to explain them. Nevertheless, when legislator describes and classifies, he defines terms and sometimes explains their significance. Sometimes, indeed, these definitions or explanations contradict operational rules. Sometimes they are superfluous in the sense that the operational rule alone is sufficient to decide cases. Nevertheless, the explanations of the legislator have an official character and therefore can exert influence. Even if a definition has no direct connection with the decision of cases, it has a hortatory character which may influence other aspects of the legal system.

Declamatory statements often make explicit an ideology, be it the ideology that actually inspired the system in question or the one that a given authority believes to have inspired it or the one this authority wishes people to think inspired it. In civil law and in common law countries, declamatory statements are often made in accordance with the background of *jus naturalism*. Declamatory statements, for example, may insist that contracts are made by consent, while the operational rule requires not only consent but a reason or *cause* for the enforcement of the contract (see, for example, art. 1376 of the Italian Civil Code). Or, for example, in common law countries, there are declamatory statements that property is transferred by the will of the parties while the operational rules require an additional element: for example, consideration or delivery or, for the transfer of immovable property, a conveyance. Often the declamatory statement amounts to a synecdoche, a rhetorical figure which, as mentioned earlier, indicates one necessary element without mentioning the others.

Declamatory statements are especially important in socialist

legal systems.<sup>34</sup> From the beginning, Soviet authority showed a surprising propensity to make such statements, statements that are neutral with respect to operational rules but reveal the ideals and aspirations of those in authority. One of the most fundamental propositions of Soviet law is declamatory: that the means of industrial production belong to the state. From the standpoint of the operational rules, the power of ownership is divided and allocated in various ways between the state and the enterprise.<sup>35</sup> In non-Socialist countries declamatory statements are most frequent in the more basic laws such as constitutions and codes.

The statements which are "legal formants" of the system, hortatory or not, may not be strictly legal. They may be propositions about philosophy, politics, ideology or religion. It would be as difficult to explain canon law without the notion of God as it would be to explain Soviet law without ideas taken from Marx or Engels or Lenin. It would not only be difficult, but inadequate and unfair. Whether strictly legal or not, the propositions that are one of the legal formants of a system may be true or false. In that respect they differ from operational rules which are simply imperatives. Declamatory propositions carry the particular danger of encouraging a false understanding of what a legal system is doing, even if this understanding is sometimes welcomed by those who make such statements. For example, Article 1321 of the Italian Civil Code says that a contract is an agreement, that is, that a contract consists of two wills. Article 1333 says that, in certain cases, a contract can be formed even when the offeree is silent. Jurists have explained that in such cases silence counts as an expression of will. This explanation is declamatory in the sense that it is tagged on to operational rules which it really does not explain. Far from explaining them, it is contradictory, and, like every other contradiction, false.

#### D. Consequences of the Disharmony Among "Legal Formants"

The number of legal formants and their comparative importance varies enormously from one system to another. In some areas of English law, statutes are wholly lacking. Peoples without written alphabets may not have rules that are formulated expressly or bodies of case law or scholarly writing. Some areas of constitutional law have no decided cases.

The comparative importance of a legal formant depends upon

34. Crespi Reghizzi, De Nova, and Sacco, *Il Zivilgesetzbuch*, cit., n. 4, n. 7; Ajani, "The Supremacy of Statutory Law in Socialist Systems," *Rev. Soc. Law* 123 (1985).

35. The cited work by Venediktov is fundamental for the entire problem. See also the resumption of the debate during "the Prague spring" in the proceedings of the Conference of Tremezzo in 1968, *Riv. dir. comm.*, I, 19 ff. (1969).

its capacity to influence the others. That capacity differs from one legal system to another. It is a characteristic of a legal system that is hard to verbalize, hard to quantify and patently of enormous importance. For example, scholarly writing was far more important in Germany between 1880 and 1900 than in France. Case law has been more important in France than in Italy. Ideology has affected scholarly writing much more in socialist countries than elsewhere.

Moreover, the disharmony between one legal formant and another in the same legal system may be greater or smaller, or less important. For example, the disharmony between the civil code and its interpretation is very great in France and much less conspicuous in Germany. In a very compact system, the legal formants are close together.

A jurist who deals with a system that is not his own often has problems of perception with legal formants that do not exist in his own system. Anglo-American jurists, for examples, dismiss the ideological statements in socialist laws and hence the legal categories that socialist jurists produce on the basis of their ideology. The French jurist, struggling to understand German scholarly writing, sometimes imagines it to be a species of (poor) philosophy devoid of interest for the jurist.

#### E. Disharmony Among "Legal Formants" and Knowledge of Law

We can now see that it would be far too simple to say that statutes, scholarly writings and judicial decisions are the legal formants of a system. The legal system contains a far greater range of potentially contrary elements.

Statutes, as we have seen, may contain not only operational rules but explanations that in some cases are merely declamatory. The legislator may make a declamatory declaration that sovereignty belongs to the people, and the legislature should be elected by universal suffrage and yet enact an operational rule denying the franchise to some citizens of full age. Similarly, the legislator may announce that a contract is an agreement and all agreements are to be enforced while providing an operational rule that enforces only those contracts that are based on a *cause* or consideration.

Again, as we have seen, a judicial decision may announce one rule, even though the judge is implicitly following another one. Moreover, the judicial decision may contain the same diverse elements we have seen in statutes such as explanations of rules that may or may not be declamatory.<sup>36</sup>

36. See here Sacco, *La massima mentitoria*, in the records of the conference, "La giurisprudenza per *massime* e il *valore del precedente*," held in Genoa on 11, 12, and 13 March 1988, in Padua (1989).

Scholarly writing may take several different forms. It may be essayistic: it presents an original idea and seeks to persuade the reader of its validity. Or scholarly writing may be didactic: it provides students with a manual. In either case, the writing will at times be informative, at times persuasive. Scholarship that aims to persuade will regularly be accompanied by arguments which, as we have seen, take on a life of their own and become "legal formants" in their own right. Whether it aims to inform or to persuade scholarly writing will usually supply examples. The examples again can acquire an influence of their own and so become an autonomous "legal formant" because, from the examples, one could infer a rule that is not the one about which the scholar intended to inform or persuade us.

We shall not try to compile a list of all the "legal formants" possible in a legal system.<sup>37</sup> We wish to stress, however, that there is a basic distinction between those legal formants that are themselves rules of conduct and others that are developed in order to provide abstract formulations or justifications of rules and conduct. Both are found in the work of legislators, scholars, and courts.

We also wish to stress that these "legal formants" may diverge from one another. Only experience makes it possible to judge the extent of these divergences. Over time, abstract formulations and justifications may adapt themselves to the rules and so the gap may be narrowed. Yet it is also possible for these elements to co-exist without any narrowing of the gap. Indeed, there are a number of techniques that jurists use to prevent the gap from closing. For example, they create "irrebuttable presumptions." Still more common, as already mentioned, are declamatory statements by which one event is treated as its opposite, as when the silence of an offeree is said to be a declaration of his consent.

(Installment II of II will be published in the next issue)

PAUL B. STEPHAN III

## *Perestroyka* and Property: The Law of Ownership in the Post-Socialist Soviet Union

*All of our past ideology presented socialism as the antipode of the market, and regarded admission of the market as an encroachment on socialism. Yes, we are encroaching on socialism, but only the socialism that was built bureaucratically, under which the country veered off the path on which it had embarked in 1917.<sup>1</sup>*

The end came quickly to Soviet socialism. General Secretary (later President) Gorbachev's *perestroyka* (restructuring) campaign, initially designed to reform and rationalize the existing socialist system of state ownership and management, has become a program of destatization and political and economic liberalization. Central to this transformation is the definition of property rights, among state organs, among individuals, and between individuals and the state. To an extent unprecedented in Soviet history, the authorities have blessed the substitution of private property for state-owned or -controlled production.

Many puzzles remain as these revolutionary events unfold. First, what led the Soviet leadership to embrace private property and markets? In Central Europe, nationalist animosity toward what was regarded as Soviet imperialism explains at least in part the suddenness and definitiveness of the rejection of Soviet-style socialism. But anti-Russian nationalism, although a potent political force in parts of the Soviet Union, cannot explain Gorbachev's actions. Second, exactly what does the Soviet leadership propose to embrace? Is it possible, after more than fifty years of nearly complete state ownership of the means of production, to reintroduce private ownership in Soviet society? What problems have the authorities fudged, and what have they overlooked?

\* PAUL B. STEPHAN III is Percy Brown, Jr. Professor of Law, University of Virginia. This paper has grown out of more than a decade of collaboration, both professional and personal, with Herbert Hausmaninger. Anyone who knows Herbert will recognize my great intellectual debt to him, as well as his freedom from responsibility for any errors or misjudgments that appear herein.

1. "Vystupitel'noye slovo M.S. Gorbacheva na Plyenum TsK KPSS" [Introductory Address of M.S. Gorbachev to the Plenum of the Central Committee of the Communist Party of the Soviet Union], *Izvyestiya*, Oct. 9, 1990 at p. 1.

37. A study on the many "legal formants" involved in the *stare decisis* rule in American law is Ugo Mattei, *Stare Decisis* (1988).



RODOLFO SACCO

Legal Formants: A Dynamic Approach  
to Comparative Law  
(Installment II of II)

VI. A FIRST APPLICATION: THE SOURCES OF LAW

A. *The Meaning of "Sources of Law"*

The "legal formants" of a system of law are never in complete harmony. Nevertheless, the "sources of law" are usually explained to suggest that they provide a single answer to every legal problem. In countries such as Germany, France and Italy, hortatory statements are made that acknowledge, as sources of law, those envisaged by the constitution.

Although the disharmony among legal formants of the system is most evident in France, the French constitution preserves the ideas of the late eighteenth century according to which legal rules can only be created by organs of government charged with legislative functions. In France, this constitution is thought to explain completely the creation of rules. Nevertheless, in France, as elsewhere, the civil law evolves incessantly, driven on by innovative judicial solutions. Even in France, jurists acknowledge the contribution made by this *droit prétorien*, which, like the work of the ancient Roman *praetor*, is a pillar of the legal system supporting much of the weight. The French discussions of private law acknowledge this contribution, just as their treatments of constitutional law usually deny it.

In other European countries as well, discussions of constitutional law typically mention one or a very few of the legal formants of the system. Jurists in the fields of private law and labor law, however, are not willing to ignore "practice" which, in continental Europe, consists of those legal formants of the system controlled by judges and administrative organs. This does not mean that the constitutional lawyers are wrong, nor that the experts in private law and labor law are subverting the constitution. It is simply that some elements of the system are constitutionalized, and these are the ones

---

RODOLFO SACCO is Professor of Law, University of Turin (Italy). Edited by James R. Gordley, who the author wishes to thank.

Installment I of this article was published in 39 *Am. J. Comp. L.* 1 (1991).

the constitutional lawyers refer to in their discussions. We might refer to them as enacted legal formants as distinguished from those which have grown up without formal enactment.

No one who wishes to describe the law realistically can ignore the existence of sources other than those formerly recognized in the Constitution. Sometimes these sources are recognized by speaking of a "constitution in action" (*costituzione materiale*) or a living law (*diritto vivente*) and so forth. Others speak as though in an ideal (perfect) legal system the only sources of law would be those indicated in the constitution, even though, in reality, many rules are created by courts, arbitrators, and administrative bodies. Although they try to take account of the actual world, their descriptions contain a contradiction. When they say that the judge creates law, they imply that when he does so, the legislator has been ignored or superceded. Thus the work of the judge, as they describe it, contradicts the rule that they themselves proclaim—that the legislator's will is law and must be obeyed.

Surprisingly enough, however, the contradiction is only apparent. One can believe both in the omnipotence of the legislator and in the creative power of the judge. The reason is that statute and judicial practice are concerned with different legal formants of the system, which themselves may have different contents. One can affirm the power of the legislator to make statutes without denying that judicial decisions are another source of law. To do so, however one must acknowledge that judicial decisions are a source of law, whether or not they are mentioned in the constitution. Any account of the sources of law is incomplete unless it describes all legal formants of the system.

To have a complete account, we must recognize the rules promulgated by organs of the state and enforced by its coercive power are not the only sources of law. The positivist view that law is created and enforced by the state creates a dangerous optical illusion. The organs of the state may choose, conscientiously or unconsciously, to enforce rules created elsewhere, for example, the rules found in scholarly writing, in manuals, and in teaching in the universities. The positivist view leads one to neglect these sources.

## B. Sources of Law and Interpretation

Law cannot be applied unless it is interpreted.<sup>1</sup> When law is ap-

plied, there must be an interaction between a primary source, such as statute or precedent, and an interpretation.

Interpretation, in turn, is determined and disciplined by all those factors that affect the convictions of the interpreter. Whatever affects the convictions of the interpreter is thus a source of law as applied. An obvious example is university teaching.

In truth, legal science has not yet made the least effort to describe this phenomenon correctly. Typically, if a jurist interprets a statute, the statute is said to be the source of the law as applied and no mention is made of the jurist. If the jurist presents his conclusion without support in a statute, and the case law subsequently adopts it, the case law is said to be the source of law and no mention is made of the jurist. Such a description is arbitrary.

Whatever influences interpretation is a source of law. To discover what influences interpretation various methods can be used. For example, one can examine the sources that an interpreter uses, be he lawyer or judge, when he advocates or adopts an interpretation of a rule.

It has been said that the California Civil Code of 1872, drawn up along the lines of the Field Civil Code, was stillborn. According to jurists such as Pomeroy the aim of the Code was to interpret and restate prior common law.<sup>2</sup> Therefore the interpreter had to consult the cases decided before the Code was enacted. Similarly, when Italy adopted a new civil code in 1942 to replace the previous code of 1865, scholars continued to cite earlier German doctrine as, indeed, they had done before this code was enacted. They were convinced that the new code was incomprehensible without an understanding of the concepts underlying it, and that these concepts had been described with unsurpassable accuracy by the German writers. Therefore they consulted German doctrine to interpret the law in force.

One wonders, at this point, to what extent the legislator can ever have its own will respected. This question has a twofold answer. First of all, any normal legislator can make himself obeyed to a considerable extent if he adopts a rule that is clear, precise, and easily understood by the judge who must enforce it. Either the rule must be drafted so that the judges can understand it given their current educational background, or care must be taken to educate judges so that they will be qualified to understand such rules.

Second, however, for a statute to command attention it must somehow be placed on a pedestal. It must be sacralised. Rules have that status when they are felt by those who must enforce them to be the product of a great social breakthrough. The American constitu-

1. Interpretation is guided by what the interpreter thought and felt even before he started to read and analyze the source. This is the clue of Josef Esser's masterpiece, *Vorverständnis und Methodenwahl in der Rechtsfindung* (1972). In agreement with Esser's thesis is Rodolfo Sacco's in *Il concetto di interpretazione del diritto* (1947). See also Jerome Frank, *Law and the Modern Mind* (1931).

2. See Pomeroy, "The True Method of Interpreting the Civil Code," 4 *West Coast Reporter* 109 (1884).

tion is an example.<sup>3</sup> So also are rules that break polemically with the past after a period of acute social conflict such as certain rules enacted during the French Revolution and many of the rules enforced in socialist countries today.

An important form of sacralization takes place when a society elevates the authors of the law to a level higher than the rules themselves. The fact that Dante put Justinian in heaven in his *Divine Comedy* tells us something we might miss reading the commentators on Roman law: the idea, germinating in the medieval cult of Roman law, that the *Corpus iuris civilis* was compiled by a sort of divine mandate.

### C. Scholarship as a Source of Law

We have mentioned that scholarly writings, both essayistic and didactic, are a source of law, that is, they form a "legal formant" of the system.<sup>4</sup> A doctrinal proposition contained in these writings may, however, work in various ways. It may describe the content of a rule, as when a French professor says that the conveyance of a person who believes himself to be heir is effective. It may be a definition unconnected to any rule of decision as when an Italian professor defines a "juristic act". It may describe a method to be followed in reaching legal conclusions as when a professor defends the historical method, the conceptual method, the sociological method, the comparative method, and so forth. Again, a doctrinal proposition may pass judgment on the respective importance of different sources of law. For example, it may urge a person to follow case law despite conflict with a statute or to disregard creative judicial activity and return to the letter of the statute.

At various points in history, doctrinal propositions have been regarded as the supreme source of law. One such case was that of the Roman law in force in continental Europe from the Middle Ages until the enactment of the German Civil Code. Frequent hortatory statements were made that the law in force was the Roman law of the *Corpus iuris* as modified by Canon Law. The legitimacy of the *Corpus iuris* appeared to be guaranteed by the authority (unquestioned hence evident, and, therefore, real) of the Emperor Justinian. Juridically, the Holy Roman Empire was thought to be a continuation of the empire founded by Augustus which Justinian had once ruled. A second source of legitimacy was the intrinsic rationality of

Roman law, a source that is bound to be important whenever positivists' conceptions of law have made concessions to rationalistic and naturalistic conceptions. Moreover, as we have seen, one might even believe, that a divine mandate had been executed by Justinian. The fact that the political authorities of the day such as the Holy Roman Emperors placed their stamp of approval on the Roman law after it had already been received added little to its legitimacy.

Actually, the Justinian *corpus* gave rise to a body of rules explicit in none of its texts and in constant evolution. In the course of this evolution, particular Roman solutions were often consigned to oblivion. Institutions that were not central to the Roman legal system were given wide application. A body of rules emerged applicable to contracts in general, as distinguished from the Roman rules applicable to particular contracts. The rules of contract law, which in Rome was merely a source of obligation, were then allowed to invade the field of transfers of property. Unitary rules of tort law emerged from the Roman rules of particular torts such as those of the *lex Aquilia* which governed damaged wrongfully done. The Roman *condictio* was expanded to create a generalized remedy for unjust enrichment. Indeed, towards the end of this metamorphosis, the glorious doctrine of the creation of legal obligation through the will of the parties was recognized. Methodologically, these results were achieved by studying substantive law without regard to the procedures in which it is enmeshed, through the use of dialectic, and the free pursuit of the *raison d'être* of the rule. The journey began with a letter of the *corpus iuris* and ended with the final draft of the German Civil Code. It was long indeed.

Every step of this journey was taken by interpreters, and in the first instance, by the medieval doctors of the Roman law. It would not be right, however, to ignore the contribution of judges and practitioners. Wieacker, Gorla, Cannata, Gambaro and Dawson have shown the importance in the development of law of the giving of legal advice, judicial decisions, and practice in general. Nevertheless, the person who guides interpretation is, first and foremost, the scholar in his double role as a writer of authoritative works and as a university lecturer. Authority was given to the opinions of single theorists sometimes to the common opinion of a certain number of learned scholars. The citation of Roman law was *pro forma* and was accompanied by a citation to the scholar who interpreted it. Thus the (unquestioned) legitimacy of the Roman legal text was extended to the scholarly interpreter.

The situation has been much the same in Islamic law. The source of Islamic law, legitimized by hortatory statements and religious logic, is a revelation that gives legal propositions the air of infallibility. Nevertheless, though all law (*shari'a*) comes from God,

3. Bodenheimer, in *Law in the U.S.A. for the 1980s, Reports from the U.S.A., for the XI Congress, Supplement to the Amer. Journ. of Comp. Law*, 1982, p. 15 ff.

4. The best synthesis of the theme is Pier Giuseppe Monateri's "Legal Doctrine as a Source of Law," in *Italian National Reports to the XII I.C.C.L., Sidney, 1986*, 1986. See also all reports on the topic (labelled 1-B-2) presented at the congress.

and whatever comes from God to man comes through revelation, the revealed sources do not deal explicitly with all problems and their meaning is often uncertain. The gaps must be filled and the uncertainty dispelled by means of interpretation, priority being given to solutions reached before the tenth century A.D. Although theology may guarantee the infallibility of this interpretation, at a human level, the scholar (*alim*, *faqih*)<sup>5</sup> is recognized as the architect of this immense framework of rules. The revealed texts are only the historical starting point of the *shari'a* which is a scholarly creation. This scholarly monopoly is established or at least strengthened by two circumstances. First, the *shari'a* is part of theology and, in Islam, there is no authority empowered to define a truth of faith. Second, the Islamic judge (*kadi*) does not give reasons for his decisions or explain the point of law at issue. Thus there is little room for a cult of judicial precedent.

Another example is the role that scholars have come to play in the United States. In England, the courts have concerned themselves with the law as applied and little with the work of scholars. The professor writes accounts of what judges do and, in his teaching, tries to familiarize the students with judge-made law. In the United States, although the courts have similar powers to those of England, the coexistence of numerous autonomous state judicial systems forces these systems into competition. Judges in different states decide the same questions differently. The job of comparing solutions is performed by scholars who, by applying logical, doctrinal methods to the cases, express their own conclusions. They become arbitrators who approve or disapprove of judicial decisions. To defend their views, the scholars elaborate systematic criteria for the legal method around which "schools" form such as the current law and economics movement. The importance of scholarly activity is perhaps the feature which most distinguishes American from English law.

#### D. Legitimacy in Scholarly Power

The scholar who creates law does so without wishing to or realizing that he is doing it. He instinctively aspires to be a source of law but is terrified of giving his work an *ad hoc* legitimacy. The German scholars of the last century, the Pandectists, sought legitimacy by claiming to interpret the *Corpus iuris*. The *faqih* has legitimacy because the source he interprets is sacred.

Legitimacy may always be claimed by imagining a very general principle, capable of a hundred different applications, and linking to this general principle whatever practical rules one wishes to pro-

5. See here Francesco Castro, *Les pouvoirs du faqih*, in *Rapports italiens au XI C.I.D.C., Caracas 1982* (1982).

pose. Such a technique is used by those who claim to have reached their conclusions by sociological methods and by those who claim to have done so by balancing the interests. The law and economics movement may be operating in the same way. If we seek a justification for the creation of law by scholars we run the risk of not finding one. It is better to simply describe the instrument by which this creation takes place.

The scholar has no other power than the one that comes from his capacity to persuade. He is, after all, a professor and an author, roles that multiply his chances of influencing the law by force of persuasion. A professor and author influences a student who learns the law from his book or his lectures. The often repeated claim that the student of the civil law learns law from the code is absurd. The student of civil law learns law when he prepares for an examination, and he prepares for the examination with a textbook after attending the professor's lectures. Of course, he has the capacity to criticize the professor's teaching but he will not exercise it until he has listened to a second professor who teaches doctrines different than the first. Once he has become a judge, yesterday's student will be keen to apply the law he has learned in the university.

The history of law is filled with episodes that can serve as examples. Recently, Sudanese judges applied the common law because they knew it even though the law supposedly in force was contained in a code. Now the common law is once more in force, but a new generation of judges still applies the code because it is the only source they know.<sup>6</sup> In France, after the enactment of the *Code Napoléon*, a mass of Roman or old French rules continued to be applied by judges who had trained at the university studying Roman or royal law. The kings of England, Poland and Hungary defended the legal traditions of their countries by preventing future judges from studying Roman law.<sup>7</sup> Conversely, the fortunes of Roman law in Germany were tied to the fact that university education in Roman law was the only route to practice before courts and in offices.<sup>8</sup>

The importance of the creation of law by scholars in different periods might lead us to ask whether, and to what extent, it is possible to see a relation between their role and the structures of a given society. No one has performed such research using a suitable method.

6. Marco Guadagni, *La riforma del diritto privato nel Sudan: uno studio sui modelli normativi nel diritto africano*, in *Raccolta di scritti per il 50° anniversario della Facoltà di Economia, dell'Università di Trieste* (1975).

7. For Hungary and Poland, see Sacco, "The romanist substratum in the civil law of the Socialist Countries," in *Review of Socialist Law* 65-86 (1988).

8. Still today Michel Fromont and Alfred Rieg write of the German situation: "On constate ainsi une profonde pénétration de la doctrine dans la jurisprudence, qui laisse songeur tout juriste français" (*Introduction au droit allemand*, I, 1977, p. 208).

Also worthy of study is the extent to which the nationalization of law inhibits its creation by scholars. At the political level, nationalization occurs when the organs of state authority such as the legislator, ministers, and judges, wish to control the creation of law themselves. Nationalization occurs in the realm of ideas when it is thought that law is a state system of rules, and consequently that the area in which a rule in force coincides with the territorial boundaries of the state or a well determined administrative division of it. Examples of nationalized law are the French system as established by the Jacobin and by Napoleon and preserved thereafter. Other examples are imitations of the French system, including socialist systems and, perhaps in part, the British system. Examples of non-nationalized law are the Roman law of continental Europe before codification and Islamic law. In theory, however, it would be possible for nationalized law to be created by a scholarly authority. For example, in a one party state, a class of theorists might arise that were admired by the party. Or, for example, in a state dominated by some form of personal power, scholars might be given power because they are admired by the ruler.

## VII. A SECOND APPLICATION: THE LAW OF CONTRACT

### A. The Problem

Contract is usually defined in terms of an exchange of promises, or mutual expressions of consent, or the declarations of will of two or more parties.<sup>9</sup> Of course it is necessary to have the consent of all parties if the contract imposes obligations on all parties.<sup>10</sup> The offeree must accept before he can be obligated. If the contract imposes obligations or other burdens on only one of the parties, however, then it is far from obvious that the other party needs to consent.

The need for the other party to consent has been said to follow from either of two premises, each of which has different practical consequences. One premise is that the will of the individual has complete control over whatever happens in the individual's own legal sphere. It is argued from this premise that the individual's sphere cannot be altered for better or for worse by the unilateral will of the other party as long as the alteration is not justified by some previous relationship between the parties. The second premise is that one cannot inflict unjust damage on another. From this

9. Fundamental on the gathering of materials *Formation of contracts*, cit. (Rudolf B. Schlesinger ed.).

10. This definition is already usual in the study of the Pandectis (Georg Friedrich Puchta, *Pandekten*, 12th ed. 1877, § 54 p. 84: "Bilateral juridical agreements are called contracts").

premise, one can argue that individual's legal sphere cannot be altered *for the worse* by the unilateral will of another. If the legislator subscribes to the first premise and all its consequences, he will allow no one to be impoverished without his consent.

Consent, of course, may sometimes be given when the offeree is silent, but here it is important to distinguish. Under some circumstances a judge would rightly conclude that the silence, although an omission, is a means of expressing the offeree's will. Under these circumstances silence indicates a will to accept. In contrast, as soon as the judge is prevented from examining the circumstances in order to determine the meaning of the offeree's silence, it is a fiction to say that the offeree has expressed his will to consent. If a contract is formed nonetheless, then the true rule of law is not that the offeree gives consent by his silence but rather that the offer alone forms a contract provided it is not rejected by the offeree.<sup>11</sup>

### B. Materials

We are now in a position to consider the nature of an agreement or contract in different legal systems. An excellent starting point is Article 1108 of the French Civil Code. According to this article, one element necessary for there to be an agreement (convention) is "the consent of the party who obligates himself" ("le consentement de la partie qui s'oblige"). It would seem, then, that a promise is necessary for an obligation to arise but not an acceptance unless the promisee must obligate himself. By way of exception, the Code requires an acceptance in the case of certain formal contracts, such as donations and agreements affecting property rights between the spouses.

Nevertheless French scholars have reached to different conclusion. They believe that Article 1108 contains an error. An agreement actually requires the consent of both parties, and strangely enough, the scholars support their view by a literalistic reading of Article 1108.<sup>12</sup>

11. The explanation provided by some authors, according to which it is the law that attributes to silence the unequivocal positive meaning is ingenuous. The law may determine the legal effects, but not the *de facto* situation itself.

12. Thus, for example, Charles Demolombe, *Cours de Code Nap.*, XII, n. 45; Karl Zachariae, *Cours de droit civil français*, I, 343, n. 1; Charles Aubry and Charles Rau, *Cours de droit civil*, 6th ed., IV, 343, n. 2, n. 6; René Demogue, *Traité des obligations*, Sources, 1923, II, n. 546. The correction of the letter of the law would become necessary for this motive: once the will of the obligor has been defined as "consent," it would be impossible to prescind from the bilateral nature of the consent itself. Most surprising is the explanation put forward by Victor Marcadé, *Explication théorique et pratique du Code Nap.*, IV, sub-art. 1108, n. 394: "The law demands, above all, the consent of the obligor, that is his assent to the will previously displayed by the other party."

Also Alexandre Duranton, *Cours de droit civil français*, IV, p. 27, n. 95: "Say-



As soon as it was born, therefore, Article 1108 created a schism between the Code and its interpreters. In the 19th century, French scholars went further. They concluded, not only that an unaccepted promise could not produce a contract, but that it could not have legal affect even outside the domain of contract law. Whatever one may think of this conclusion, one can at least say that the French scholars then, unlike French or Italian scholars today, defended a clear operational rule rather than a mere tautology.

Today, supposedly, the rule that contract requires the consent of all parties is supposedly still intact although, since the end of the 19th century, the French have acknowledged exceptions in which some types of unilateral promises are given effect. At a purely logical level, one could criticize the French scholars for not investigating sufficiently the effect of Articles 1101 and 1108 in practice. A much more serious criticism, however, is that the aprioristic, anti-literal approach of the French interpreters is so sterile as to be unusable in practice.

Sensing its difficulties, a number of French authors have made use of the fiction just discussed.<sup>13</sup> They have interpreted the silence of the offeree as a manifestation of his consent without any inquiry into the circumstances and the reasons for his silence. Other authors reject this path and so find themselves forced into more conspicuous contradictions. In the middle of the last century, for example, Demolombe observed that Article 1108 seems to demand the consent of the promisor alone. Yet it seems obvious, he said, that the consent of the other party is also necessary. Since the offeree has no reason to refuse an offer that can only benefit him, Demolombe concluded that this consent should be regarded as implicit.<sup>14</sup> More recently, an important movement in French doctrine

ing with the code that the obligor's consent is necessary, we mean that the will of the party to whose profit the obligation is born contributes to its formation too, because consent necessarily supposes the concurrence of two reciprocal wills."

A similar attitude may be found among German interpreters of the *Code Nap.* Cfr., for example, Bauerband, *Institutionen des französischen in den deutschen Ländern des linken Rheinufers geltenden Civilrechts* (1873) § 242: "The legal validity of a patrimonial contract requires, according to art. 1109, four elements: 1st the consensus ad idem of the *Paciscenten* (*Die Willenseinigung der Paciscenten*) . . ."

13. Charles Demolombe, *Cours*, cit., XII, nn. 57 & 59. In reality, Demolombe, at a certain point, senses the vicious circle of the whole argument, subjoining, as to the silence of the offeree, that he has no motives for refusal: "And perhaps here lies an explanation of art. 1108, which seems only to demand the consent of the party obligated." If Demolombe had transformed this doubt into a certainty, he would have broken the spell that has enchaind French doctrine for such a long time. Gabriel Baudry Lacantinerie and Louis Barde, *Des obligations*, 1895 I, n. 45; René Demogue, *Sources*, cit., II, n. 554 ter (examples: promise of guarantee; here citations of court decisions), and I, n. 189 quater (modification of insurance contract in favour of the assured; here case law).

14. Théophile Huc, *Commentaire théorique et pratique du code civ.*, VII, (1894), n. 26 (and here references); René Demogue, *Sources*, cit., I, n. 232; applied in both to

has reiterated this view. It is evident that such an argument is adopted only to avoid applying the principle that both parties must consent.

Still another way around that principle is taken by those writers who say that the validity of the promisee's declaration can never be attacked because the promisee can have no interest in attacking it.<sup>15</sup>

Even recent scholarship, however, continues to insist on the need for both parties to consent. The need for them to do so is deduced from the definition of contract as agreement. This definition is drawn from Article 1101 without even a mention of Article 1108. When the offeree is silent he is said to have manifested his assent by omission.<sup>16</sup>

The practice of the courts, however, indicates that there is no need to insist on an acceptance by the offeree of a promise that burdens only the promisor. In 1938, the *Chambre des requêtes* of the French Court of Cassation considered a case in which a lessor offered to modify a lease in a manner that burdened only himself:<sup>17</sup> by reducing the rent. The lessee did not reply, and the lessor claimed that the modification was ineffective. The Court of Appeal ruled in favor of the lessee, and this decision was upheld by the Court of Cassation on the ground that the trial court is permitted to find that silence counts as acceptance when an offer is made in the exclusive interest of the offeree. The French jurist Voirin, commenting on the decision, was unable to explain how an unaccepted offer could produce a legal effect. Indeed, the outcry that the decision provoked indicates that its true nature was appreciated by French jurists. Once it is acknowledged that silence counts as acceptance when a offer only imposes sacrifices on the offeror, then the transaction is effective because of the nature of the offer rather than because of an acceptance by the offeree.

Nevertheless, this 1938 decision was reaffirmed by the Court of Cassation in 1970.<sup>18</sup> Other decisions are in harmony with this result. For example, according to the Code, a mortgage arises by agreement but, like other transactions in land, is not valid unless a formality is completed before a notary (Art. 2127). If an agreement requires two

the mistake of the donee, and of the gratuitous bailee. The question is not raised, however, of the incapacity of the promisee because, in France, it is quite certain that "le pupille n'a pas besoin de son tuteur pour faire sa condition meilleure." (arg. ex arts. 1125, 1305, 1306).

15. Ghestin, "Le contrat," in *Traité de droit civil*, (Jacques Ghestin, 1988), n. 278, 5, 284 and ff.

16. Dalloz, 1939, D.P. I, 5.

17. Bull. civ., V, n. 722, p. 590.

18. See summaries of the various positions in François Laurent, *Principes*, n. 438-444. Since then, for the sufficiency of tacit acceptance, Req., 3 November 1903, in D. 1905, I, 529, and all legal scholarship.

declarations of will, and this agreement must be formalized, then it would seem to follow that both the offer and the acceptance should be formalized before the notary. The older scholarship drew this conclusion. The courts, instead, require that only the consent of the mortgagor be certified by the notary. The more recent scholarship has abandoned its old conclusions but has gained partial revenge by speaking of a non-formal, indeed, a tacit acceptance by the mortgagee who manifests his will by requiring notarial certification of the mortgage.<sup>19</sup>

In Germany, the Civil Code does not explicitly define contract (*Vertrag*). Section 145 and the sections following implicitly presuppose that an acceptance is necessary. It is usually said that a contract is formed by the expression of will of both parties.<sup>20</sup>

Nevertheless, according to Section 516, par. 2 of the German Civil Code, when a gift is not accepted, the donor may set a time limit after which the gift is perfected as long as the donee has not refused it. Despite Section 516, however, scholars continue to teach that a gift requires the consent of both parties.<sup>21</sup> In the hands of the scholars, the concept has replaced the rule.

Potentially, Section 516 could be applied not only to a donation in the strict sense but to many other promises which burden the promisor alone. The German Civil Code defines *Schenkung* to include any transfer of property by which an individual enriches another and impoverishes himself when it is understood that the transfer will take place without recompense. Thus, *Schenkung* does not require *animus donandi*,<sup>22</sup> the intention to benefit another gratuitously. Therefore, Section 516 could be applied to transactions which, in Italian law, would not be donations because they lack such an intent: for example, promises to guaranty the obligation of a third party. The disadvantage of interpreting Section 516 in this way is that then, the formal requirements necessary for a donation in the strict sense would be required in other transactions as well, such as

guarantees. For that reason, German courts and scholars have not pushed Section 516 to its limits.

German law has bypassed the need for the offeree's consent in other ways. For example, Section 107 provides that an agreement with a minor is valid if the minor obtains a benefit but assumes no burden. The requirements for making such an agreement, therefore, are allowed to turn on the absence of a burden to the minor.

Other inroads have been made by applying Section 151. According to this section which appears in the part of the Code devoted to contracts in general, a contract may be binding "without the manifestation of an acceptance to the offeror" when "such a manifestation was not to be expected according to commercial custom." In a typical application of this section, an acceptance is said to be unnecessary when offeree has actually begun performance. Interpreters claim that this section does not permit a contract to be formed without an acceptance. It merely recognizes that an acceptance may take place through performance as well as through a communication where custom so prescribes. Nevertheless, the case law has used Section 151 to hold a party to a contract when he is silent after having received the other party's offer, and when he should have spoken, given the previous relations between the parties.<sup>23</sup>

In a further extension of Section 151, an individual's silence has been deemed to be an acceptance when the consent of that individual is "obvious" (*selbstverständlich*). Typical cases involve the abandonment of actions, the assumption of debts, and other unrecompensed benefits to the offeree.<sup>24</sup>

In Italy, Article 1321 of the Civil Code defines a contract as an agreement. According to Article 1333, however, an offer that entails burdens only for the offeror will be binding without an acceptance unless the offeree rejects it "in the manner required by the nature of the business or by custom." Italian scholars, however, continue to defend their traditional views by means of philological expedients, like those of the French. The case law follows the rule of Article 1333 but explains that the offeree has made a "tacit acceptance" through his silence.

Some interpreters have seen that in the cases covered by Article 1333, one cannot presume that the offeree has consented; following Vittorio Scialoja, however, they have denied that the offeror's liability rests on contract. In a monograph written in 1975,<sup>25</sup> I argued

19. German authors insist less on this point than the French. This depends on the fact that their attention is directed mainly to the definition of the juridical act in general, and the clarification of the conceptual relationship between jural act, declaration and non-declaratory behaviour. Nonetheless, in Germany too the definition of the contract as a bilaterally created institution is still solid (see, above all, Ludwig Enneccerus and Hans C. Nipperdey, *Allgem. Teil*, § 161 a.).

20. For example, Erich Molitor, *Schuldrecht* (1948), I, p. 82, n. 1, 16.

21. The intention of the parties must be aimed to the attribution, and to "Unentgeltlichkeit" (the absence of valuable consideration). The intention to make a present (*animus donandi*) is not, however, required by the law (RG. 70, n. 17; 72, n. 191; 73, n. 48; 94, n. 14; 125, n. 385). Cfr. also *Grosskommentare der Praxis*, BGB, II, (1953), § 561, 5.

22. The most famous application concerns the confirmation of orders (*Ziv. Sen.* 24 March 1903, RG, 54, n. 50, p. 177 and ff.; *Ziv. Sen.* 26 April 1904, in RG. 58, n. 18, p. 66 and ff.).

23. See the case law cited in the *Grosskommentare*, cit., BGB, I, § 151, 1. Id. what seems to me perfectly exact citations of RG. 19, 4/07, VII 384/06, JW 1911, 875, RG. Seuff A. 179, n. 89. It is significant that here the result of practice is justified by reference to § 516.

24. *Il contratto* (1975), n. 3 and ff. there bibliographical references.

25. A continental European is struck by the definitions he finds in John

that in such cases liability rests on contract and that there is no reason why a contract cannot be formed by a single party's consent. Despite my arguments, Italian scholars continue to insist that there are only two possibilities: either a single party consents and then liability cannot rest on contract, or both parties consent—the offeree through silence—and then a contract is formed.

We can now summarize some of the results of our brief comparative survey. First, in the codes we have examined, the consent of both parties is required only in the case of contracts with consideration and, in some cases, in the case of formal contracts. Second, the scholars in these countries ignore rules that contradict their principle that both parties must consent. Third, the courts in these countries enforce a promise that burdens the promisor alone, even if it is not accepted, unless there are special reasons for requiring an acceptance. Fourth, the scholars square their conclusions with the codes and the practice of the courts on a purely verbal level by asserting that the silence of the offeree constitutes an acceptance. The reader from a common law country will note that there is a distinct similarity between the Continental definitions and those offered by English and American scholars.<sup>26</sup> He will also note a similarity in practical problems, as in *Carlill vs. Carbolic Smoke Ball Co.* and *Offord vs. Davies*,<sup>27</sup> and a similar search for practical solutions expressed, in the United States, by Section 90 of the Restatement (Second) of Contracts.

### C. The Significance of the Materials

We can conclude that in civil law countries, except in the case of liberalities such as gifts, a promise is binding without an acceptance if the promise is not conditional on the giving of a second promise.

It would not be prudent to rely on this conclusion without further investigation. We have not yet determined whether this conclusion holds for formal contracts and for contracts to transfer property. Also the French examples we have used might be thought unconvincing for three reasons. First, in its 1938 decision, the Court of Cassation did not say that silence constitutes acceptance but that the trial court had power to consider whether silence would count as acceptance. Second, the case concerned the parties to a lease, a fact that might be relevant in deciding whether the offeree had a duty to

Salmond and Glanville Williams, *The Law of Contract* (1945) or the definition put forward by William M. Geldart, *Elements of English Law* (8th ed. 1975). And of course he notes the difference from Arthur L. Corbin, *Contracts* (1963) I, p. 52ff.

26. 1893, I, Q.B., 256; 1862, 12 C.B. (N.S.), 748.

27. See here, Sacco, "Definizioni savantes et droit appliqué," in *Rev. int. dr. comp.* 827 ff. (1965); Pier Giuseppe Monateri, *La sineddoche*, cit., and Paolo Gallo, *L'elemento oggettivo del tort of negligence* (1988).

manifest his will. Finally, the case involved a reduction of rent and so is somewhat like the cancellation or forgiveness of a debt. The cancellation of a debt is a transaction with an ambiguous nature, somewhat like a contract and somewhat like a unilateral renunciation of rights.

Nevertheless, the French case is in point because it illustrates a more general problem. The requirement that both parties consent is not imposed by statute in any of the countries that we have examined. Nevertheless, it is proclaimed everywhere by scholars. Courts manage to read the formulas of the scholars into their statutory texts but, when confronted with an offer that produces only benefits for the offeree, they resort to the fiction of the offeree's tacit, presumed, or feigned consent.

The contrast can be summarized in the following chart:

#### EFFECT OF AN OFFER BURDENING THE OFFEROR ALONE

	Statute	Scholarly Opinion	Case Law
France	valid	invalid	valid
Germany	valid	invalid	valid
Italy	valid	invalid	valid

This chart is misleading in one respect. It neglects the fact that even the judges pay lip service to the principle that contract requires the consent of both parties. It neglects the fact that the scholars, despite their insistence that the consent of the offeree is required, agree with the practical results which the judges have reached. To complete the picture, we should also note that even the statutes contain general definitions of agreement in which the consent of both parties is required (Art. 1101 French Civil Code, Section 145 German Civil Code, Article 1321 Italian Civil Code), as well as particular provisions that dispense with the need for the offeree to consent (Article 1108, French Civil Code, Section 516 German Civil Code, Article 1333 Italian Civil Code). Thus a more accurate picture is given by the following chart:

#### EFFECT OF AN OFFER BURDENING THE OFFEROR ALONE

	Statute		Scholarly Opinion		Case Law	
	General definition	Specific rules	General formulas	Specific results	Rules announced	Results reached
France	invalid	valid	invalid	valid	invalid	valid
Germany	invalid	valid	invalid	valid	invalid	valid
Italy	invalid	valid	invalid	valid	invalid	valid

The contrasts shown in this chart emerge where they would be

least expected. They concern the tortured relationship between general definitions and operative rules. The general definitions or formulae seem to have very little effect on these rules.

Indeed, one might even conclude that in legal systems that are similar, such as those of these three civil law countries, there is a greater resemblance among like legal formants of different systems than among different legal formants of the same system. Of course there are other possibilities as well. The study of other problems would show that sometimes one legal formant such as the operational rules, has a greater tendency to be borrowed by other systems than another legal formant, such as general definitions. In any event, our analysis of this problem has shown clearly how the most general legal formants of a system, the definitions and formulae, tend to overlook the results of particular cases.

#### VIII. A THIRD APPLICATION: THE "OBJECTIVE ELEMENT" IN TORT LIABILITY

##### A. *The Problem*<sup>28</sup>

Strict liability is the exception in civil law as in common law systems. Normally, to recover, plaintiff must show the defendant was at fault and his fault caused the damage that the plaintiff has suffered. The problem we will now consider is whether there is another element necessary for the plaintiff to recover, an element which we shall call "the objective element." If this "objective element" is required, then any damage caused by fault will not give rise to liability. In modern Codes we may at first sight see two alternatives: There may be liability only in certain typical situations. The former, known as principle of *neminem laedere*, is the solution of the French Code. The latter, enacted in the German B.G.B., was the solution of the Roman law and of traditional common law. In both of these systems, there was a list of actions that a plaintiff could bring against the person who had hurt him: in Roman law, actions for theft, robbery, insult, and damage wrongfully done; in English law, for trespass, assault, libel, and so forth.

##### *The French Conception from 1806 to the Present Day*

Although only particular torts were actionable in Roman law, the Roman jurists coined the general formula *neminem laedere*, "injure no one." That formula became the basis of Article 1382 of the Code Napoleon: liability is imposed for "any action of a man which causes damage to another" (*tout fait quelconque de l'homme, qui cause à autrui un dommage*). The text does not necessarily mean,

however, that any damage caused by fault gives rise to liability. The history of the interpretation of the French Civil Code shows that this article is compatible with a system in which tort liability is imposed only where a particular tort has been committed. Indeed, all of the French authors in the first half of the nineteenth century and many thereafter have thought that Article 1382 contains the kind of solution which the German Civil Code adopted later in Section 823. Section 823 limits liability to cases in which "absolute rights" of the victim have been violated. The "absolute rights" of the German Civil Code include, for example, life, health, and freedom of movement.

That Article 1382 does not establish liability for any damage whatsoever that is done through fault is particularly clear in the work of German interpreters of the French Civil Code or French authors influenced by German thought. According to Zachariae,<sup>29</sup> "tort in the sense of the civil law is an act by which, intentionally or negligently, the rights of another person are unlawfully injured." The same definition may be found in Aubry and Rau through the fourth edition of their treatise which first appeared as a translation from the work on the French Code of the German scholar Zachariae.<sup>30</sup> Later editions contain the opposite formula which provides for liability wherever there is fault but that is the result of "up-dating" by Bartin and Esmein. The fact that they found it necessary to make such a change shows that the change was conscious and voluntary.

As far as the nineteenth century is concerned, the definition of Toullier<sup>31</sup> is even more typical than that of Zachariae. This author, who is no longer fashionable in France, gave a restrictive interpretation of Article 1382. He wishes to avoid the risk that lawful behavior would be deemed to fall within the article as, for example, when an owner blocks the light and view of his neighbor without violating his neighbor's easement. According to the formula proposed by Toullier, therefore, Article 1382 applies to actions that cause damage unless the actor is exercising a right. The "right of freedom" consists in doing everything that is not specifically prohibited by some other rule of law. Thus liability presupposes violation of some rule of law protecting the victim other than Article 1382. The same idea is found, albeit with a progressive decrease in clarity, in Laurent and Planiol and even in Demolombe.

29. *Droit civil français*, various eds., § 444.

30. *Le droit civil français*, (4th ed. 1848), VI, nn. 117, 119, 120.

31. François Laurent, *Principes cit.*, XX, n. 404. The identification between tort and invasion of a legal right marked that, in his survey of practical cases the injunctive relief against unfair competition is offered as a plain application of art. 1382 (id. n. 495).

Towards the end of the nineteenth century, this interpretation, which had enjoyed such favor, began to lose ground. It was recognized that the defendant may be liable even when it is difficult to identify an injury to the right of the plaintiff, as in cases of unfair competition, seduction, misleading information, or entering into a void contract.

It is interesting to see how Laurent reacted to this new climate. He was an alert observer of the case law as it was in the last quarter of the nineteenth century. According to him, liability could only rest on injury to a right:

Every civil injury is a tort according to the provision of Article 1382. The principle is clear but its application is not without difficulties. First, there must be a right, but rights, like obligations, arise only under statute and through agreement. It is therefore necessary that a right founded on statute or agreement be injured. Only then is there a tort or a quasi-tort as the aim of Article 1382 is simply to safeguard the rights of men in civilized society granting them an action against whoever injures them.

One must be careful to avoid thinking that the injury consists in the damage caused by an act. The damage is only one element of the tort, and it is not sufficient in itself. A right must be injured.<sup>32</sup>

Yet this definition is watered down by the way in which Laurent and others apply it. Indeed, the applications are ultimately in conflict with the definition itself. The attempt to find a right violated results in some curious configurations. For example, one who by false allegations prevents a father from acknowledging his illegitimate child is said to have violated the child's right to be acknowledged. One who prevents another from making a will or destroys the will is said to have violated that person's right to make the will. In other cases, there is no statute safeguarding the right that supposedly has been violated. Consequently, liability is said to arise because of the abuse of a right as in cases of the confusion caused by similar trademarks, unfair competition in general, and abuse of process.<sup>33</sup> But such contrivances do not always suffice. Such an approach prudently omits any reference to an injured right in order to agree with the case law which grants an action for seduction under promise of marriage, misleading statements that procure credit for the insolvent, mendacious trade references, and the insertion of an individual who has no debts on a list of insolvent debtors.

Nevertheless, these initial breaches in the system may be re-

paired. To do so, one must develop new types of torts or categories of the violation of a right which can then be added to the old ones. At the beginning of the twentieth century, Planiol seems, albeit with circumspection, to have moved toward the idea that only certain types of torts are actionable. Indeed, he seems to have believed that the difference between Article 1382 and Section 823 of the German Civil Code is purely formal:

The expression *tout fait quelconque* is too vague a limitation on the requirement of fault. Not any act will do, but an act defined by its illegitimate character. This basic idea is only hinted at in the French Code. The German Code, on the contrary, says with precision: "He who injures another person unlawfully" (Article 823).

For Planiol, Article 1382 creates sanctions but does not create new duties:

It is fairly easy to make an outline of the number of contractual obligations and their object. . . . Delictual obligations are not the same. It is said at every turn that an individual is liable for his fault by virtue of Article 1382. That is true in a certain sense, because it is this article that obligates a person at fault to repair the consequences. Nevertheless, this text only provides a sanction. It is for tort what Article 1142 is for contract. . . . In itself, it mentions no particular obligations. . . . It is impossible to conceive of fault if there were no prior obligation to act or to abstain.<sup>34</sup>

Nevertheless, other statements by the same author seem to empty these of all meaning. They suggest that there is a general duty to abstain from any act which requires ability or power that the individual does not possess. When he introduces this general liability for unskillfulness, Planiol makes his true thought hard to interpret. In my view, Planiol's ideas are clarified only by his subsequent analysis of damage. Here his premise is that "the nature of damage is of little importance. It always gives rise to liability provided it is real and proven." Then, in his illustrations, he is very careful to choose only instances of damage in which there is also an injury to a right of an individual. He regards unfair competition as involving such an injury. He then discusses injuries to health and life, treating contagion as such an injury in conformity with recent developments in the case law. Again following developments in the case law, he treats injury to honor in the same way as seduction. In order to justify liability to the relatives of the victim, he develops a special category: injury to family concerns. Along with infringe-

32. Op. cit., nn. 405, 406, 497, 500, 412, 511.

33. *Traité élémentaire de droit civil* (4th ed. 1907) II, nn. 863, 865, 866, 868.

34. Nuisances are considered as negligent torts. Planiol treats them as abuses of rights while he could have classed them as injuries to property.



ment of rights, he treats the abuse of rights in which, however, he finds a psychological element different than fault.<sup>35</sup>

The ambiguities in Planiol did not pass without comment. Demogue criticized him for confusing the part (negligence) with the whole (fault).<sup>36</sup> Demogue believed that side by side with the subjective element of negligence, there was an objective element, a civil injury. In truth, however, Demogue's notion of a civil injury is elusive:

We must note that the limit of a person's rights is no simple matter. It sometimes has an objective aspects, sometimes subjective. . . . Sometimes the breadth of the right varies with the circumstances in which it is exercised, sometimes with the persons against whom the right is asserted. Under certain circumstances, the right is extinguished. Sometimes a person has a more extensive right because he exercises it in furtherance of a social interest. Sometimes he has a right protected against only one type of interference. Again, customs can influence the limit of rights.<sup>37</sup>

In the second quarter of the twentieth century, the theory that only certain types of torts are actionable entered into a critical phase. Even in new editions of old works, authors eliminated references to the violation of rights.<sup>38</sup> Nevertheless, an explanation still had to be made of why so many human acts that cause harm do not give rise to liability. One cannot answer saying that whoever exercises a right does not act unlawfully. Indeed, this idea eventually became the butt of serious criticism. Scholars realized that it led to emptying Article 1382 of any content. Thus, as Colin and Capitant observed:

Is it not possible to say that every act of man not expressly prohibited by law constitutes the exercise of a right? The very acts of coming and going, of hunting, of moving around . . . appear to be emanations of those general rights called public rights, or, in the past, the rights of man. Now it is precisely in the performance of such acts that torts to others are most often committed . . . hence, whether we are dealing with rights specifically granted to each individual or

35. René Demogue, *Traité des obligations en général*, Sources, III, (1923), n. 226: "There is fault when certain rights which the law protects are injured"; see also id., n. 240 ter. For the critique to Planiol, see n. 3-225, id.

36. René Demogue, op. loc. cit., n. 226, p. 370. The formula presented here is a lucky synthesis of Demogue's analysis of case law on the right to privacy and reputation; see nn. 227-229.

37. 6th ed. by Aubry and Rau, 1951, adapted by Paul Esmein (1951). The edition by Etienne Bartin (1920) still bears mention of infringement of rights (p. 339).

38. Maurice Colin and Henri Capitant, *Cours élémentaire de droit civil français*, (10th ed. 1953), n. 324, p. 235.

with general rights that guarantee man the free use of his faculties . . . the principle is always the same: a man must always act with diligence in such a way as to avoid harming his fellows. If he fails to do so, he is liable for his actions.<sup>39</sup>

Faced with this convincing logic, the only thing to do was to explain liability in a different way. The doctrine found in the manuals seemed to entrench itself behind a distinction between exercising a general right and exercising specific rights. In the latter case the person who causes damage is supposed to have a defense.<sup>40</sup> Nevertheless, this solution cannot survive the criticism that scholars have aimed at the idea that a person cannot commit a tort if he is exercising a right. The exercise of a specific right may also give rise to liability. As Savatier said, "The damage caused by a wrongdoer with the assistance of his own property is no more lawful than the damage he causes with the assistance of an object of which he is not the owner."<sup>41</sup> Therefore, to find an explanation of liability we must again look elsewhere.

In doing so, scholars have found they must abandon the conceptual procedure that explains "tort" by the concept of "unlawfulness" and "lawfulness" as "the exercise of a right." Scholars have turned to induction, examining the case law to obtain more or less general rules. They have acknowledged that the law cannot arrive at a general explanation. Indeed, Esmein has even said:

According to the civil code, one who causes damage to others through fault must pay compensation. It is therefore the duty of the judge to say which acts are blameworthy beyond those in which a statute itself condemns an act either expressly or by providing a civil or criminal sanction. . . . It is striking that the judge should have such power in an area in which a code is in force.

Although it has been said that there is a general duty in France not to harm others. . . . This statement . . . is not perfectly correct, since in numerous cases one can harm others voluntarily.<sup>42</sup>

39. A clear shift in the 5th and 6th eds. of the manual by Charles Aubry and Charles Rau (based on the original by Etienne Bartin, see op. cit., 6th, § 444 bis; and Paul Esmein, op. cit. 6th, § 444 bis, p. 458). The analogous stand by Maurice Colin and Henri Capitant, op. and loc. cit. is more tiresome but just as sure. The theory is introduced into the work of Marcel Planiol by following editors (see ed; 1952, edited by Paul Esmein and Jean Boulanger, II, n. 984).

40. René Savatier, *Traité*, cit., n. 38, p. 52. Cfr. also Req. 23 March 1927, D. 1928, I, 73: "The exercising of the right of ownership remains subordinate to the condition that no damage be caused to the property of others."

41. Paul Esmein, op. and loc. cit., n. 505.

42. René Savatier, op. and loc. cit., p. 49, n. 36.

These considerations have led jurists to ask why conduct is or is not actionable. According to Savatier, the reasons:

"emerge, when statutes are silent, from the necessities of social life: for example, the right to express one's own thought, the right to protect property or other rights one legitimately claims even to the detriment of others, rights of competition and neighborhood relations. The exercise of all these rights may harm others. When the legislator intervenes, he generally does so to codify a particular instance in which a right such as these has already been acknowledged."<sup>43</sup>

He describes separately each particular justification to explain instances in which conduct does not give rise to liability. One of the most important justifications is the "inevitable parallelism of human activities" which justifies fair competition in similar activities.<sup>44</sup>

By developing justifications such as these, it may be possible to absolve a person who causes harm without abandoning the principle that, in general, one owes compensation for the harm that one does. The prohibition on causing damage to another is presented as the general rule and the instances in which one is free to cause harm are exceptions. In this way, attention is shifted from the legal status of the victim to the behavior of the person who harms him. This attitude is still fashionable in French doctrine. In this approach, moreover, the element of injury is wholly absorbed by that of *faute*. The *faute* is a violation of a duty such as the use of diligence which is not supposed to depend upon the status of the victim.<sup>45</sup>

One could criticize the definitions of Toullier, Zachariae, or Laurent for meddling with the text of Article 1382 by introducing the "objective" element of unlawfulness. Yet their definitions are probably no more arbitrary than the interpretation currently fashionable which excludes any liability if one can find a justification for the activity of the person causing harm.

Article 1382 is therefore compatible with two opposite formulas, one restrictive and the other very broad. These formulas, it would

43. René Savatier, *op. cit.*, n. 37. Charles Aubry and Charles Rau (*op. cit.*, 6th ed., edited by Paul Esmein, § 444 bis, p. 445), with reference to these figures: "Unlawful enrichments are not protected. On the other hand, albeit referring to lawful earnings, certain interests are not protected, either because they are counterbalanced by interests judged to be more important for society, such as the case of damage caused by lawful competition, or because they cannot be fully safeguarded, and because anyone suffering an injury to them has the advantage of being able to inflict the same inconvenience upon others, as in the case of reasonable disturbances of neighbourhood."

44. See Geneviève Viney, *La responsabilité*, in *Traité de droit civil*, (Jacques Ghestin ed. 1982).

45. By so doing not proceeding much differently from the supporters of the interpretation of Toullier in the XIXth century France. See *supra*.

seem, could lead courts to act in two opposite ways: to impose liability whenever harm is done, or to impose liability only in exceptional cases.

### C. The German and Italian Solutions

While French authors begin with a text that suggests any damages compensable, German interpreters begin with one that envisions liability only for injuries to certain rights. According to § 823 of the German Civil Code, individuals are not liable unless they intentionally or negligently injure "the life, body, health, freedom, property or similar right" of the victim. Types of injuries such as seduction or misleading information are dealt with other sections of the code. Finally, § 826 imposes liability on anyone who intentionally causes harm to another in a way that is deemed to be immoral. Thus liability requires something more than fault: Either, objectively, injury to a specific right, or, subjectively, the intention to do wrong. The importance the German law assigns to the intention to do wrong seems, in principle, incompatible with French law which ignores the distinction between intentional wrong and simple negligence.

These differences in principle between the French and German systems lead us to look to the case law of the two countries to identify instances in which a person would be liable in France but not in Germany. Given the difference in the statutory rules, one would expect to find such differences at every step. Nevertheless, one does not. In fact, there is a surprising parallelism.

Towards the end of the last century, French courts imposed liability for making a void contract, for seduction, for misleading information, for unfair competition, and so forth. As a result, French jurists could not help but break with their traditional view. The courts in Germany, at the same time, felt the need to impose liability in the same types of cases. In Germany, however, abandonment of the traditional formula was not necessary to the same extent. The legislator, in drafting the code, was able to enumerate the cases in which liability would be imposed. The recognition of these new torts was not hindered in Germany by the principle that there must be a violation of the right of another. German law does require the violation of such a right but the interpreter can always add new rights to the traditional set, rights, for example, such as the right to the goodwill of a business.<sup>46</sup> If there is no injury to a specifically protected right, there is no tort except in the case of intentional wrong. Nevertheless, the textbooks speak of cases in which the

46. Filippo Ranieri, "La responsabilità da false informazioni," in *Giur. comm.* (1976) I, 630.

*Reichsgericht* has imposed liability for gross negligence. For example, a doctor was held liable when his negligence caused his patient to be declared to lack legal capacity. Cases involving misleading information have been decided in a similar way.<sup>47</sup>

The operational rules are much the same in Germany and France also when the courts deal with the subjective element of fault. The French Civil Code does not distinguish whether fault is intentional or not whereas the German Civil Code emphasizes the distinction. Nevertheless the case law is similar. In France the judge imposes liability for intentional wrongdoing by first acknowledging that the wrongdoer has acted in the exercise of a right and then insisting that since he intended to do harm he has committed an abuse of right. This pattern of reasoning, expressed in various ways, has allowed the French courts to reach results like those of the German. It has been used to impose liability for unfair competition, abuse of process, intentional injury to exclusive contractual rights, which are the classic cases in which, in Germany, liability is imposed under § 826.

We have thus seen two different logical patterns. According to one, which works by addition, all injuries to a right plus all similar cases result in liability. According to the other, which works by subtraction, all damages give rise to liability unless there is some defense. It should not seem clear that, by using this logic, any practical result may be justified. As concretely applied, therefore, the two patterns bring about similar results.

Let us now consider Italy. Here the situation seems hybrid. The legislator does not expressly require the violation of a right for liability to be imposed but does characterize the damage as "unjust." (Article 2043, Civil Code). By failing to clarify this almost philosophical and vague idea of "injustice" he grants the judge true discretionary power. The Italian judge, however, does not exploit this power. During his training at the University, he has learned the two formulas just mentioned, the one imposing liability only where there is injury to a right, and the other imposing liability when anyone is injured. He himself, follows the rule of minimum effort: he applies the narrower rule when he does not impose liability and the broader rule when he does.<sup>48</sup>

47. Between 1960 and today an immense bibliography has developed on this topic. For all necessary information, see Guido Alpa, *Il problema dell'atipicità dell'illecito* (1979).

48. On this topic continental scholars like to consult, most of all, Sir Frederick Pollock, *The Law of Torts* (1887); Anthony Weir, *Casebook on Tort* (1983); Reginald W.M. Dias, and Basil Markesinis, *Tort Law* (1984); Percy H. Winfield and John A. Jolowicz, *On Torts* (12th ed. 1984).

#### D. *The Situation in England and the United States*<sup>49</sup>

In England and the United States, until recently, liability was imposed only in rigidly delimited types of torts. The type of conduct and injury that gave rise to liability varied from one type of tort to another. Trespass required that one interfere with the property of the victim, conversion required that one behave as the owner of another's property, nuisance required that one interfere with the use of property, and so forth. No relief was available for wrongs that did not belong to one of the recognized types.

Towards the end of the last century, something changed. "Negligence" came to be recognized as a tort. Remedies for negligence came to be given in areas in which, until then, liability had been based on other torts such as trespass, conversion, nuisance, and so forth. (When this evolution was completed, an action for negligence had become the most frequent remedy in the area of extra contractual liability.)

The elements of an action for negligence are four: (a) a duty of care, (b) a violation of this duty (c) a harm (d) which is caused proximately by the violation. The requirements that there be a violation of the duty of care, harm, and causation, correspond to the familiar continental requirements that there be negligence, harm, and causation. Liability is imposed in English and American law if these elements are established and the defendant was under a duty to act with care.

At first, the duty to act with care was rather restricted. That is to say, there was no general principle of liability for negligence.<sup>50</sup> With the passing of time, the range of acknowledged duties of care increased. Jurists and courts began to speak of an implied duty of care owed by anyone performing any activity that might cause harm to others.<sup>51</sup> In some cases, as in France, liability was not imposed but the failure to do so was explained by a series of policy considerations. It would appear, then, that common law courts are not longer imposing liability according to the type of tort that has been committed as they did in the last century. It would seem that they are applying a general principle of liability for negligence like the ones we have seen in Continental Europe.

49. Lord Esher in *Le Lievre v. Gould* (1893), 1 Q.B. 491, 497: a man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."

50. "The rule on the basis of which you must love your neighbour is sustained by law: you must not cause injury to your neighbour. And the jurist's question, "Who is my neighbour?", receives a precise answer: you must take reasonable care to avoid acts or omissions which may reasonably be expected to cause injury to your neighbour." Lord Atkin in *Donoghue v. Stevenson*, 1932, A.C., 562, 580.

51. This does not mean that school definitions are more inclined to municipal and territorial specialization. See Pier Giuseppe Monateri, *Legal Doctrine*, cit.

In reality, however, when we examine the case law we can see that this appearance is deceptive. An extension of liability has undoubtedly taken place and may be seen in numerous cases in which it was once usual to deny relief on the grounds that there was no duty of care: For example, the liability of manufacturers, employers, occupiers and owners of land, rescuers, trespassers, prenatal injuries and so forth. Yet liability is imposed in well-defined contexts. First and foremost, it is generally imposed only when there has been physical injury to person or property, that is, in cases reminiscent of § 823 of the German Civil Code. In the vast sector of purely economic loss, a remedy is given in only well-defined cases: For example, those concerning the liability of a professional, of an officer, of a subcontractor, and so forth.

### E. Findings

#### OBJECTIVE ELEMENT OF A TORT

(T=typical situations, specific legal duties  
NL=neminem laedere, general duty of take care  
E=excuses founded on causes of justification  
1/2=intermediate or ambivalent solution)

	Statute		Scholarly formulas			Case Law
	general rule	UNITARY specific rules	general rule	UNITARY detailed rules		
Fr XIX cent.		NL?		T		T
Fr XX cent.		NL?	NL		NL-E	1/2
It XX cent.		1/2		NL or T		1/2
Ger XX cent.	T		(T)	T	(T)	1/2
Eng XIX cent.	—	—	—	T		T
Eng XX cent. and USA	—	—	NL		NL-E	1/2

This chart suggests certain observations. First, where a general rule of liability has been adopted, as in England, America and France, so also have a series of exceptions to that rule. Thus, the case law and even the scholarly doctrine in these countries is considerably closer than one might expect to the situation that prevails when liability is imposed only for particular types of tort.

German doctrine, as the chart shows, is an agreement with the German Civil Code. To understand to scope of the Code, it is necessary to read not only §§ 823 and 826 but the entire chapter devoted to extra contractual liability. We can then see that there is a split in the Code between overall definitions, on the one hand, and particular rules, on the other. The particular rules afford protection to any legislatively protected interest.

Finally, in Italy, scholarly opinion is divided between those who speak of types of damage which give rise to liability, thus moving

toward the German position, and those who adopt a general rule of liability and then recognize particular exceptions, as do the French.

Our conclusion, then, is that one can see transnational operational rules, and hence the existence of a uniform application of law throughout the West aside from a certain delay in the pace of evolution in Italy. This uniform law is at a midpoint between the scholarly formulas used in France, England and the United States, on the one hand, and in Germany, on the other. It is at a midpoint, that is, between a formula enunciating a general principle of liability and one founded upon particular types of injury.

Comparing these results with those we have reached in our discussion of contract, we see a clear difference. In the area of tort liability, the strongest oppositions appear to be at the level of general definitions. The extreme positions are represented by general scholarly formulas and, a short distance behind, by overall legislative rules in France and Germany, whereas, moving toward "midfield," we find the more specific statutory formulations, the detailed scholarly solutions, and, finally, the operational rules applied by courts. These findings do not confirm the hypothesis we suggested after our discussion of contract law: that like legal formats of different legal systems tend to resemble one another more than they resemble unlike legal formants of the same system.

There is, however, a similarity in our findings as to both contracts and torts. In both cases, the overall definitions generalize a rule instead of limiting its application. A contract would *always* appear to be formed by the consent of both parties; damage would seem to be *always* compensable, or liability to be *always* dependent to a right. The operative rules, in contrast, are more articulated.<sup>52</sup>

Our findings thus confirm the belief, rather common among persons acquainted with law, that scholarly doctrines and general formulas are often too "abstract" (that is, too prone to make unauthorized generalizations) and too "far from life" (that is, too prone to forget the significance of some elements of the concrete case).

Finally, we can see reconfirmed one of our observations on French legal thought. The French definition of tort uses two terms (negligence and harm) rather than three (negligence, wrongfulness, and harm). Here, as we have seen earlier, French definitions "simplify" their analysis of a legal concept. Thus, as we have seen, the French will speak of "will" instead of "will and its outward manifestation" in their discussions of contract.<sup>53</sup>

52. See widely Pier Giuseppe Monateri, *La sineddoche*, cit.

53. For the bibliography, and for a wider, more critical exposition of the problems, see my article, "Le transfert de la propriété des choses mobilières

## IX. A FINAL APPLICATION: THE TRANSFER OF MOVABLE PROPERTY

### A. *The Problem*<sup>54</sup>

A final problem we will examine is the transfer of movable property. The elements required by various legal systems are three: (1) consent, (2) "cause" which is an element that explains why consent was given or should be respected, and the (3) delivery of the property accompanied by the will to transfer it. To transfer movable property, each system might require only one element (consent alone or delivery of the property alone) or more than one element (consent and delivery, or consent and cause).

To begin with, we may observe a contrast between the Roman and the Italian rules. In Roman law property is transferred by delivery (*traditio*) coupled with the will to alienate the property (with only a minimal imbalance of *causa*). Under Italian law property is transferred where there is consent coupled with cause.

In order to understand the revolution that occurred we must look to period of the *ius commune* when Roman law was in force throughout Europe. During this period, a greater significance was accorded to the presence of "cause." Consequently the requirements for a transfer of property were thought to be, not mere delivery with an intent to alienate, as in the original Roman system, but as a valid contract (*titulus*) plus delivery (*modus*).

### B. *From Medieval Roman Law to the French and Italian Solutions*

A further change then took place in France. Its result appears explicitly in Article 1138 of the French Civil Code: "The obligation to transfer a thing is perfected by the consent of the contracting parties alone. It makes the creditor the property owner even though delivery has not been made. . . ." This provision requires a series of

déterminées par acte entre vifs," in *Riv. dir. civ.*, 1979, I, 442 ff., and in *General Reports to the 10th international congress of comparative law*, Budapest, 1981, 247. Here wide bibliography works which provide the materials for the following discussion are:

Frederik Vinding Kruse, "What Does Transfer of Property Mean with Regards to Chattels? A Study in Comparative Law," *Am. J. Comp. L.* 500 (1958); Michel Waelbroeck, *Le transfert de la propriété dans la vente d'objets mobiliers corporels en droit comparé* (1961); Georges Sauveplanne, "The protection of the bona fide purchaser of corporeal movables in Comparative Law," *Rabels*, 29 (1965) 651; Ernst von Caemmerer, "Rechtsvergleichung und Reform der Fahrnisübertragung," *Rabels*, 12 (1938-39) 675 ff.; Samuel Williston, *The Law Governing Sales of Goods at Common Law and Under the Uniform Sales Act* (rev. ed. 1968).

54. For further details, see Pier Giuseppe Monateri, *La sineddoche*, cit. Art. 1376 makes use of the usual synecdoche: it speaks of consent, but what it means is contract (i.e. consent + cause).

qualifications. First of all, the word consent (*consentement*) is equivocal. A careless reader might think the law means that a pure meeting of the minds will transfer property even without an element, cause, explaining why consent was given or should be respected. Indeed, in general declamatory statements, French scholars usually speak of the autonomous and sovereign will as the necessary and sufficient condition of property to be transferred. A more careful analysis reveals that here, as in Article 1101, the legislator has had recourse to a synecdoche: he has used a part to stand for the whole. Although he spoke of mere consent, he intended to refer to a contract, that is, to consent given for a valid "cause."<sup>55</sup>

Let us now observe that the legislator in Article 1138 has adopted an unusual legislative technique. He has not merely listed the elements necessary to transfer property. He has pointed out that a delivery is not necessary. We can see why he did so when we remember that in France, before the Code, the law theoretically required delivery (*traditio*) based on the "cause" or reason why delivery should transfer property (*titulus*). Superimposed on this rule was the practice, widespread in the Middle Ages, of dispensing with the physical transfer of property and accepting, as a substitute, an agreement by which the transferor, who had not parted with the property, nevertheless recognized the transferee as its possessor. This strategem, devised and suggested first in Italy by Rolandino de' Passeggeri was widely applied in France. Indeed, in sales and donations, French 18th century jurists considered such an agreement to be implied even when it was omitted.

Let us now consider two other articles of the French Civil Code: Article 1583 and Article 938. According to the first, a sale "is perfect between the parties and the property is acquired by right by the purchaser from the seller at the moment there is agreement as to the thing and the price even if the thing has not been delivered nor the price paid." According to the second, "a duly accepted donation is effective upon consent of the parties alone, and the property in the object is transferred to the donee without need of other delivery." the reference to "other delivery" suggests that, in the drafters' mind, there has already been a first delivery. Presumably they meant the "presumed" delivery of which they were accustomed to speak. When we read these provisions together with Article 1138, we arrive at the following procedure for transferring property. The consent of the parties, meaning consent and "cause," creates an obligation to transfer (*obligation de livrer*) which the law then declares to be perfect (*parfaite*) or already accomplished so that the person

55. The topic is well covered in Silvia Ferreri, *Le azioni reipersecutorie in diritto comparato* (1988).



to whom this obligation is owed immediately becomes the owner. Strictly speaking, the transfer of property is not produced immediately by consent but is produced by the intervention of the legislator who declares the obligation to transfer property to be extinct at the very moment in which it is born.

Italy inherited the mutual consent solution from France by way of the Sardinian Code (art. 1229). The Italian Civil Code of 1865, art. 1125, extended the scope of the solution by providing that the acquisition of a right *in rem* is the result of a "convention" and not of an "obligation to give." The current civil code expressly provides that a contract may produce rights *in rem* as well as obligations (art. 1321) and that "... property ... is conveyed ... as a result of legitimately manifested consent" (art. 1376).

#### C. From the Medieval Roman Law to the German and Austrian Civil Codes

The German system was profoundly affected by the teaching of Savigny. Using as an example the giving of alms to a beggar, he taught that two elements were essential for a transfer of property: the will of both parties that property be transferred, and delivery.

The first element may be called "contract" if by that term we mean a pure meeting of the minds, not a contract supported by *causa*. "Contract," in this sense, does not correspond, therefore, to the *titulus* of the medieval Roman law. The absence of a *causa* does not prevent the transfer of property and is important only because it may give rise for an action for unjust enrichment by the party who is paid without a justification. Thus delivery is a crucial element, the "*modus*" of the Medieval Roman law. Before delivery, in the case of alms, there is nothing, not even an obligation to transfer property, and after it the property has already been conveyed.

Savigny's solution dominated German doctrine and was adopted by the German Civil Code (Section 929 ff.) which provides that the necessary and sufficient conditions for transferring personal property are the will of the parties to do so and delivery. If the person transferring property did so without a justification, if, for example, he delivered as part of a void contract which he believed to be valid, he will be protected by an action for unjust enrichment. Thus, in contrast to France, where the medieval Roman law was simplified by eliminating the requirement of *modus*, in Germany, it was simplified by eliminating the requirement of *titulus*.

Austria codified before Savigny's solution spread. The legislator therefore remained faithful to the medieval Roman law which required both *titulus* and *modus*. These requirements are expressly stated in §§ 425-26 of the Austrian Civil Code. Thus, while the

French Code Civil retained the ideal of *titulus*, and the German Civil Code the idea of *modus*, the Austrians retained both requirements.

#### D. The English System

These solutions do not exhaust all possible combinations of the elements we have isolated. Another possibility is to allow the parties to choose between the use of a system based on consent (with a justification) and one based on delivery. In my view, the English system does so. Before examining this solution we should remember that, in common law, personal property is protected by a number of different personal actions, rather than by a general action such as the continental *rei vindicatio*. Of these personal actions the most significant and similar to *rei vindicatio* is the action of conversion.<sup>56</sup>

We may well suspect borrowing from abroad when we find, in the pages in which English jurists discuss the conveyance of property, an insistence that property is transferred by the will of the parties because of the respect due to their will. This phrase must not deceive us. The will necessary to transfer property between the parties must be expressed in a contract which must be accompanied by consideration. Moreover, the contract transfers property only between the parties themselves. That is the rule of the traditional common law as expressed in the Sale of Goods Act of 1893 reenacted on various occasions, most recently in 1979. The contract of sale transfers property at the moment set by the parties. When the contract has been entered into and payment made, delivery is necessary to make the transfer effective for all purposes.

#### E. From Overall Rules to Applications

If the Austrian rule requiring both *titulus* and *modus* were rigorously applied, a person who has delivered property without *titulus*, that is, without an underlying *causa* or justification, should have not only an action for unjust enrichment but an action to reclaim the property since property rights could not pass by delivery alone. However, the rules of the Austrian Code that concern unjust enrichment deny an action to a person who has delivered property and was not in error about the validity of the *titulus*. Scholars consider it certain that because there is no action for unjust enrichment there cannot be an action to reclaim the property, or to put it another way, delivery that takes place without a *causa* yet without error will transfer the property.

56. In Austrian law, differently than in Italian law, the "manual gift" does not find limits of value.

Austrian scholars have pointed out this consequence, and, consequently, Savigny's theories have enjoyed a certain popularity in Austria. Although the general rule requires both *titulus* and *modus*, specific rules such as the one just mentioned treat *modus* alone as sufficient. Nevertheless, the Austrian system is still different than the German. In Germany, delivery will transfer property, even if the person making delivery is mistaken as to the validity of the *titulus*. Awareness of this difference has led Austrian scholars to move away from Savigny's thesis and to see a donation in a delivery made without error but without any preexisting obligation.<sup>57</sup> Today, scholars tend to see any lawful intention as a *causa* of the delivery and not merely the intention to satisfy a preexisting obligation. According to that view, consequently, *modus* must be accompanied by a *causa* is taken to mean any lawful intention. The Austrian system may, therefore, be placed in an intermediate position between a system that requires *modus* alone and a system that requires both *titulus* and *modus*.

Austria is not the only country in which we can see a change when we move from the rule that is generally stated to the operational rule.

A more important transformation is found in France. We have already seen instances in which jurists "simplify" their statement of French law by leaving out an element: for example, they discuss contract formation by speaking of the will of the parties rather than will plus a "cause"; they discuss the transfer of property by speaking of the will of the parties without mentioning the obligation to transfer property. We will now examine a still more important yet little studied instance of this phenomenon.<sup>58</sup>

According to Articles 1235 and 1376 of the French Civil Code, a person can recover a payment he made when the payment was not due because there was no debt to be paid. "Every payment presupposes a debt; whatever has been paid that was not owed can be recovered." Despite the statutory text, however, French jurists have continued to follow the Roman rule in which recovery is possible only if the person making the payment was in error.<sup>59</sup> It seems obvious to the French that, as a consequence, a person who was not in error cannot claim to be the owner of an object he has delivered in payment or bring an action, as owner, to recover that object. Thus, the French jurists conclude, that the person delivering the object in

57. On this rotation, Rodolfo Sacco, "Un cryptotype en droit français: la remise abstraite?" in *Etudes Rodière*, 1981, p. 273 ff.

58. If the *solvens* brings against the *accipiens* an action *en nullité*, the pronouncement of voidness of the contract might bear restitution with it.

59. Anyone who considers as a purely personal action that for restitution after error should conclude that, as in Germany, the delivery is abstract.

payment has lost ownership of the property, in other words, that his delivery of the object has transferred ownership. In France, therefore, whoever delivers an object in payment, knowing that there is no debt to extinguish, transfers ownership.

Article 931 of the French Civil Code requires notarization for a donation to be effective. Yet the French jurists have always recognized that a donation is effective once delivery has been made. This conclusion reinforces the opinion just mentioned that one cannot reclaim a payment that was not owed unless one was mistaken. Whoever pays what is not owed, knowing that he owes nothing, is considered a donor.

In France, as in other countries, one who pays to fulfill a natural obligation cannot reclaim what he has paid. In practice, any delivery made with the intention of transferring ownership will be made either out of a sense of duty, and so be treated as a payment to fulfill a natural obligation, or out of liberality, and will be treated as a donation accompanied by delivery. In either case, ownership will be transferred by delivery. A remedy will be available, however, if the person making payment was in error. We can conclude that the French solution is similar to the one we found in Austria.<sup>60</sup> We can also say that in France, a person who wishes to alienate property has his choice between entering into a contract with a cause and delivering the property without error intending to alienate it.

In Germany, as well, the law as applied differs from the law in the Code. The law in the Code centers on *modus*. In practice, however, ownership can pass through an agreement, the possessory accord, which takes the place of delivery. Moreover, delivery can be made subject to a condition—even a tacit condition—that it will not transfer ownership if the underlying contract is ineffective.

In Austria, Germany and France ways have been found to transform the general rule. In England, ways have been found to prevent the general rule from being applied.

There was no absolute necessity for these changes to occur. In Holland, Switzerland and Turkey, the solution of the Austrian Code is in force in which both *modus* and *titulus* are required. In Switzerland, payment of what is not due made without error is held to transfer ownership, as in Austria, but in Holland and Turkey, on the

60. *Stock v. Wilson*, 1913, 2 KB, 235, 246, and Geoffrey C. Cheshire and Cecil H. Fifoot, *Cases in the Law of Contract* (1977). Here the problem of the absolute or relative nature of English movable property as is of marginal importance. Silvia Ferreri, op. cit., pp. 151 and ff. for the period in which *Stock v. Wilson* was judged, and for the present moment). An equitable interest of a third party may indeed be present aside of the property we are talking about. But we may overlook this for our purposes.

contrary, this solution has been rejected because it has been deemed to conflict with the rule requiring *titulus*.

The Italian solution is like the French, except that the requirement of *titulus* for ownership to pass has been retained except for modest concessions in the case of executed donations and the fulfillment of natural obligations.

In English law, the doctrinal formulas do not acknowledge the rule that the courts actually apply. The Sale of Goods Act does not provide for the case in which an object is delivered which is not owed pursuant to a contract. The effect of delivery was not clear until 1913, when it was held in *Stock v. Wilson* that ownership is transferred by delivery accompanied by an intent to transfer ownership, even if the delivery is made through the error of a person who wrongly believes he is obliged to deliver.<sup>61</sup> In that case the person making delivery brought an action of conversion, an action that lies against someone who finds himself accidentally in possession of a thing without title to it. When the adverse party claimed title through delivery, he argued that delivery creates but does not justify possession and hence does not give title. The court rejected this claim, stating that delivery creates a title in the person who takes delivery.<sup>62</sup> Thus, in England, we find both a system based on contract and a system based on delivery with the intent to transfer ownership. A person may choose between the two systems as he can in France but in England delivery seems to have greater effect in that it can transfer ownership even in the case of mistake. The English system thus resembles the German in always requiring delivery in order to make the passage of property valid in front of every third party.

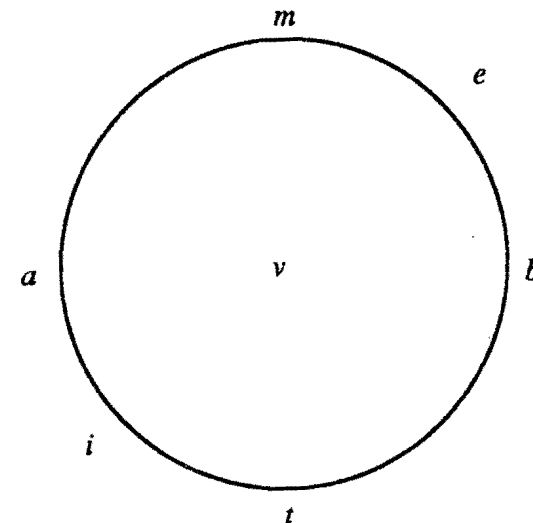
#### F. A Graphical Summary

These conclusions can be represented graphically, although a few words of explanation are needed.

The rule that delivery alone is necessary to transfer ownership has an element in common with the rule that demands both *modus* and *titulus*. It also has an element in common with the rule that gives the transferor an option between delivery and entering into a contract. The rule that demands both *titulus* and *modus* has an element in common with the rule that demands *titulus* alone; it has an element in common with the rule that demands *modus* alone. The

rule that demands *titulus* alone has an element in common with the rule that demands *titulus* and *modus*; it has an element in common with the rule that gives the transferor the alternative just described. The rule that gives the transferor this alternative has something in common with the rule that demands *titulus* alone and with the rule that demands *modus* alone. On the other hand, the rule that requires both *titulus* and *modus* is opposed to the rule that gives the transferor the alternative. The rule that requires *modus* alone is opposed to the rule that requires *titulus* alone.

These similarities and oppositions can be plotted around the circumference of a circle. If we place the rule that requires *modus* alone at due north (marked m), we can then place the rule that requires *titulus* alone at the south (marked t). The rule that gives the transferor the alternative (marked a) can then be placed in the west and the rule that requires *titulus* and *modus* (marked b for both) at the east. Point e, intermediate between m and b, can then represent the system which, in principle, requires both *titulus* and *modus* but in practice acknowledges the sufficiency of delivery provided there is no error. Point i, intermediate between t and a, can then represent the system that in principle demands *titulus* but in practice also acknowledges the sufficiency of delivery provided there is no error. We could then place a point v equally distant from all others described and, hence, in the center of the circle to represent the hortatory statements that the will alone transfers ownership. The pattern will therefore be as follows:



Thus, in this graphic representation, the German solution is represented by point m, the Austrian solution by point b, the French

61. Of course the deliverer may act with a different action in order to obtain the "restitution."

On the absoluteness of the title, see the previous note.

62. Detailed considerations as to this phenomenon are found in Benjamin L. Whorf, *Language, Thought and Reality* (1956). I borrowed the term "cryptotype" from him.

solution by point t. If we consider the effects between the parties, the English solution belongs at point t, but if we consider the effects on non-parties it belongs at point c. A statement that is found everywhere and followed nowhere is represented by point b.

The formulas we have been speaking about may or may not correspond to the operational rules actually enforced in these countries. We must, therefore, consider the possibility that they do not.

### G. General Formulas and Operational Rules

History seems to delight in continually replacing one system with another. The solution of medieval Roman law has given rise to many variants and has left its traces in the Scottish, Austrian and Argentine systems, to name just a few. The changes are usually movements around the circumference we have plotted. Sometimes the movement goes clockwise, for example, from the medieval Roman law to the French Civil Code, and sometimes counter-clockwise, for example, from the medieval Roman law to the German Civil Code. Now, however, we must consider contemporary history, and in particular, incongruities which exist at the same time within a given legal system and are due to the multiplicity of legal formants of that system. An example would be a lack of harmony between statute and the law as applied or between operational rules and the formulas which jurists have deemed to describe those operational rules. The aim of the student of comparative law is to determine whether these instances of disharmony follow predictable and rationally explicable patterns.

Three interesting contrasts are those between statute and the law as applied, the law as applied and the law as described, and between the situation the law deems to be normal and the situation that is normal in a sociological sense. These three contrasts give rise to incongruities that one can find in France, Germany, the low countries, Switzerland, Hungary and England.

In France, the Code contains a variant of the solution represented by point t: the transfer of ownership depends upon the will to obligate oneself, the only exception being in the field of donations. Scholarly doctrine, in contrast, identifies the contractual will and its effects: it requires only a will to transfer property. The case law permits transfer of ownership by delivery as long as the transferor is not in error. The scholars seem unaware of this lack of harmony.

The incongruity, then, works in two directions. The shift from the Code to the case law goes from t to i. The shift from the case law to the law as taught by French jurists goes from i to t and from t to v.

We can also find historical examples in which the model represented by point t has been displaced in favor of that represented by point b.

After the Italian Code of 1865 was enacted, interpreters moved in two directions. Some followed the French toward a system in which there is an alternative between transferring ownership by contract and by delivery. Others return to the past by postponing the transfer of ownership until delivery, thus requiring both *titulus* and *modus*.

In Russia under the Svod Zakonov, the solution borrowed from France, represented by point t, was shifted by interpreters toward that of point b. The GK [RSFSR of 1922, which required *titulus* only, was replaced by the Osnovy of 1961, which, under the pressure of interpretation, was taken to require both *titulus* and *modus*.

In Austria, a system one could represent at a point half-way between b and e gave rise to different scholarly formulations of doctrine that one can locate at points b and m. Here, as usual, the scholars moved toward the least vague solutions.

In England, one finds considerable variety. Ownership passes by contract, equivalent to the civil law *titulus*, or, alternatively, by delivery, equivalent to the civil law *modus*. Nevertheless, jurists sometimes describe the system as though contract were always required and sometimes they even speak of will in a pure form. Thus we find the solutions represented at points a, t, and v. Ownership, not only as between the parties but for all purposes, passes with delivery, and yet jurists say that one needs both the contract and the delivery. Thus we find the solutions represented at points m and c.

The Swiss and Dutch Codes are silent as to when ownership passes. Swiss and Dutch jurists, respectively, have chosen the positions represented by points e and b. Germany still holds to the position that delivery alone passes ownership. Yet, in practice, the effect of the rule is often avoided by two mechanisms mentioned earlier: a condition is enforced which makes the effect of delivery depend on the validity of a contract (a solution that can be represented at points m or c), and a possessory accord is entered into which passes ownership without delivery (a position that can be represented at m or b). Should these two devices mash together, also German law could be seen as a system T.

When *titulus* and *modus* are both required for the transfer of ownership, the relationship of these two elements has been explained in various ways. The Austrians once placed both elements on the same level. They currently say that the transfer of ownership is effected by the agreement of the transferor and the transferee at the moment of delivery that ownership will pass, and that this agreement is the result of the prior contract which the parties

fulfill when they pass ownership. The Swiss also explain the transfer of ownership as the effect of this prior contract. They regard delivery, not as a contract, but as a physical act.

The Socialists (for example, the Soviets, the Hungarians and the East Germans) have always given a similar explanation. They describe the contract as the true cause of the transfer and explain delivery as an indication of the moment at which the transfer takes place.

It is not easy to say whether these different accounts explain the particular rules of the different systems or whether they simply depend upon theories favored by the jurists of the different countries that have no implications for which rules are adopted. In the latter case, they would seem to be useless.

In systems in which mere delivery transfers ownership, theorists still feel in need of an explanation. The effect of delivery seems to them to be an empirical proposition which they have to explain from a dogmatic point of view.

They have done so in various ways. Sometimes the concept of "abstraction" is invoked. "Abstraction" means, roughly speaking, that an act is effective without regard to the underlying transaction of which the act is a part. We have seen that Savigny fastened this solution on German law. A second explanation is based on donation. If the transferor has delivered a thing without being obliged to do so by some prior transaction and without erroneously believing he is obliged to do so, then he must have wished to make a gift. In English law, this explanation is, so to speak, official. It has also found supporters in Austria and, within the limits the system allows, in France. It has been used along with other explanations in Switzerland. A third explanation is that it is possible for a action to validate an earlier, albeit void, act. If someone delivers a thing without being obliged to do so, he is said to have validated a prior act. This explanation prevails in Argentina. Once again, then, the same phenomenon is explained in three different ways.

Legal doctrine has missed an opportunity. It might have developed conceptual categories capable of crossing the frontiers between one legal system and another. Actually, it has done quite the opposite. It has built frontiers within a single legal system, indeed frontiers that have no consequences for the operational rules. One can nevertheless discern a general tendency of scholarship: it favors general formulae, rules of great latitude, such as the points represented by m, b, t, a and perhaps V. The study of comparative law can provide a corrective. To do so, it must begin with the operational rule conceived in the narrowest way. Then it must gradually ascend toward general formulas and overall rules.

## *H. The Transfer of Ownership and the Attributes of the Owner*

We have spoken thus far as if the notion of transferring ownership had a precise meaning. We have noted the possibility of more than one meaning only in mentioning that the English distinguish transfer of ownership between the parties from transfer of ownership for all purposes. Yet transfer of ownership would have a single meaning only if all of the attributes of ownership were transferred simultaneously from one party to the other.

The attributes of ownership, however, include: (1) the power to demand possession from the other party, (2) the power to demand possession from third parties who lack title, (3) the power to dispose of the thing in favor of third parties, (4) the right to whatever fruits the thing may produce, (5) the bearing of the risk of the destruction of the thing, (6) the right to guaranty one's debts by a security interest in the thing, (7) liability for damage caused by the thing to others, and so forth. We have to ask whether these various attributes are transferred simultaneously or not.

In any system, the buyer can demand possession from the seller as soon as the contract is made provided he is not late in paying the price. In a system in which the contract of sale transfers ownership, the buyer can demand possession because he is the owner. In a system in which the contract of sale does not have that effect, the buyer can demand possession because the seller is contractually obliged to give it to him. The consequences are the same even though they are described differently.

If, instead, the buyer is late in making his payment, then even in a system in which ownership has been transferred to him the seller may stop the goods in transit or retain them and has a defense if he is sued for the goods by the buyer. Thus, when the buyer does not pay on time, his right to demand possession is not acquired at the moment that ownership is transferred.

If the object is in the hands of a third party, one would expect that the buyer would have the right to claim it only if he has become the owner. There are numerous exceptions to this rule. In England, the buyer who has become the owner cannot bring actions of conversion or detinue unless he also has the right to possession. In Hungary, the buyer may sue for the object, although he is not yet the owner. In Germany, although the buyer is not yet the owner, he may proceed against the third party (at least if that party is in bad faith) by a delictual action for intentional wrongdoing under Section 826 of the German Civil Code, and his remedy in specific performance can include recovery of the object.

In some countries, property can be recovered by two different actions. One, known as "petitory" can be brought when a third party



possesses an object without title. The other, known as "possessory," can be brought when the third party has obtained possession of the object unlawfully. A possessory action can only be brought by a person who himself had held possession lawfully, that is, by a person who had obtained the object by delivery. Thus, again, it makes little difference whether ownership is said to pass at the moment of delivery or at the moment a contract is made. The buyer who has become owner but has never taken delivery cannot bring a possessory action. We find such a situation in Italy where a person can become owner without taking delivery. We do not find it in Germany where the buyer normally becomes owner upon delivery. We do not find it in France where possessory actions for personal property do not exist. In Italy, in Germany and in Austria, a person who has taken delivery pursuant to a contract can bring the possessory actions, and thus the rules are similar, even though the right to bring these actions is not said to be an attribute of "ownership."

In England and the United States, at common law, ownership is transferred in one way, while an equitable interest that amounts to a proprietary right is transferred in equity in another way entirely. The buyer's right to obtain a thing from a third party does not always depend, therefore, on his becoming the owner at common law.

In many systems ownership is transferred by delivery alone, even if a *titulus* is lacking. In others, transfer of ownership requires a valid underlying contract whether delivery is also required or not. We must remember, however, that when ownership has been acquired without *titulus*, there may be a right to sue the owner for unjust enrichment. Ownership that is subject to such an action may be very different from normal ownership. For example, the person entitled to an action for unjust enrichment against the owner may also be entitled to an action against third parties who have obtained ownership of the thing gratuitously or through fraud. We find this type of protection in Germany under Sections 812 and 826 Par. 1 of the Civil Code. Similar rights of action with respect to third parties are created by Article 1166 of the Code Napoleon and Article 2900 of the Italian Civil Code. Thus the distinction between acquiring ownership subject to an action for unjust enrichment and not acquiring ownership at all may be quite small.

One would expect, again, that the rules on the transfer of ownership should govern the seller's ability to alienate the object to a third party. If the contract of sale, by itself, has transferred ownership to the buyer, one would expect the seller to be unable to sell to a third party. One would expect him to be able to do so if the contract has not transferred ownership to the buyer. Matters are actually very different in all the countries we have discussed. Even the seller who is no longer the owner may sell to a third party if he de-

livers the object and the third party is in good faith. That is the rule in France and Italy, thanks to the principle "possession counts as title" (Article 1141 of the French Civil Code; Article 1153 of the Italian Civil Code). The same result is reached in England thanks to the presumption that the dishonest seller has acted as the buyer's agent. The same result is reached in Louisiana on the grounds that the sale has effect only "between the parties." Thus the consequences are the same as those in countries in which ownership is transferred only at the moment of delivery.

Conversely, the seller who is still the owner is not always able to sell to a third party who knows of the first sale. In Hungary, for example, the second sale is void, as it is contrary to *boni mores*. In Germany, the third party is subject to an action for having committed an intentional wrong, and the remedy may be that he must restore the object to the first buyer. Thus the right to dispose of an object, the *ius disponendi* is not an exclusive attribute of ownership.

Again, one might expect the risk of the destruction of an object would always be borne by the owner (*res perit domino*). It is not absurd, however, to imagine a system in which this risk is borne by the possessor who has custody of the object or by the buyer (*casum sentit creditor*). In reality, one can find systems in which the risk is borne by the buyer-owner even though he is not possessor. This is the solution in France (Article 1182 of the French Civil Code), Italy (Article 1465 of the Italian Civil Code) and England (Sale of Goods Act, Section 30ff). One can also find systems in which the buyer will only bear the risk when he receives ownership of the thing by delivery. Examples are Germany (Section 446ff of the German Civil Code) and Austria (Section 1048 of the Austrian Civil Code). In Holland and Switzerland, however, the risk is transferred at the moment the contract is made without waiting for a transfer of ownership. Under the Vienna Convention (United Nations Convention on Contracts for the International Sale of Goods, Article 69 (1980)) risks are transferred with delivery even if ownership has been transferred in advance by consent. We can find still other similarities if we examine the right of the creditors of the seller to challenge the title acquired by the buyer, the right of the creditor of the buyer to challenge contracts that reserve ownership to the seller, the right of the creditors of the buyer to challenge the seller's right to rescind the contract for non-payment, and so forth.

To what conclusions does this analysis lead us? An important one is that we will distort the rules of a system when we try to capture them in a general proposition that states that ownership is transferred at this or that moment. In the systems we have examined, these general formulas are extreme, in head-on conflict with one another, and without any point of contact. Through com-

parison we can see how the knowledge each jurist has of his own system is deformed, how his attempt to explain his national law by a simple and extreme idea exaggerates the differences existing among various systems. Single operational rules that are uniform in the various systems (e.g. protection of a second buyer in good faith who has received possession) are explained by doctrinal formulae that are very different. These different explanations have not been produced by the necessities of legal science. They only do damage by concealing the uniformity of solutions and distorting the terms of comparison. The general formulae tend toward solutions that are extreme, unitary, and monist: for example, "ownership is transferred at the moment of consent," or "ownership is transferred at the moment of delivery." The particular rules each system actually enforces find intermediate solutions between extremes.

By distinguishing the legal formants of the system, the student of comparative law can find a predictable, if not a commendable, pattern. Doctrinal formulas that reflect the jurist's knowledge of his own system are general, abstract, extremist, and, in a certain sense of the word, rational. Operational rules are inconsistent, empiric and responsive to obscure unconscious underlying ideas, and in that sense, endowed with a rationality of their own. Abstract formulas also tend to be multiplied uselessly. The phenomenon we observe when property is delivered pursuant to an invalid contract is concealed behind five different theoretical formulations concerning the delivery of gifts, natural obligations, the confirmation of void agreements, the unavailability of an action to reclaim a payment once made, the abstractness of an act of execution. It is the duty of true legal scholarship to eliminate false conceptual contrasts, to investigate the significance of various operational rules, and on this basis to evaluate the differences that exist between various legal systems.

## X. THE CONTRIBUTION OF COMPARATIVE LAW TO LEGAL SCHOLARSHIP

### A. *Cryptotypes*

The thesis I am about to put forward should now seem as obvious as Columbus' egg. Of the legal formants we have considered, some are born explicitly formulated such as the formulas of scholars whereas others are not. As we have seen, those which are not can be immensely important. We shall describe them as "cryptotypes."

Man continually follows rules of which he is not aware or which he would not be able to formulate well. Few would be able to formulate the linguistic rule we follow when we say "three dark suits" and not "three suits dark" whereas in special context we might speak of "the meadows green." How many cyclists would be able to

indicate the weight to exert on the pedal in performing various maneuvers on a bicycle? Linguists are now defining this phenomenon. We are subject to specific rules without perceiving them.<sup>63</sup> Our visible, superficial language is the result of identifiable transformations of latent linguistic patterns that are more permanent than the visible ones.

The recognition and study of these implicit rules is an important tendency in modern scholarship. Scholars in many fields now contrast being governed by certain rules with knowing these rules.<sup>64</sup> The scholarly endeavor is to reveal patterns which are implicit but have outward effects. The cryptotype, as we use the term, is the pattern to be revealed. Only comparative studies have the penetration that can make such implicit patterns known.

We can now summarize our reason for making that claim. As long as we confine ourselves to the study of a single legal system, we will be forced or at least, we will be induced to try to capture its features in a synchronic systematic view. We will try to see statute, scholarly formula, proposals for change, the tradition of the schools, the arguments of judges, and the holdings of cases as compatible with one another. The study of domestic law does not allow us to reject completely the great optical illusion founded on the synchronic view. We do not reject it until we find in different legal systems that identical statutes or scholarly formulas give rise to different applications, that identical applications are produced by different statutes or different scholarly formulas, and so forth. The discovery of legal formants diverging from the explicit formulations of a system leads us to the identification of cryptotypes. We realize we are in the presence of a non-verbalized rule when we see a decision is made differently than the one we would envision from the rule as formulated. These implicit patterns play the fundamental

63. See Friedrich A. von Hayek, "Rules, Perception and Intelligibility," in *Proceedings of the British Academy*, XLVIII, 1962. It is explained here how, human beings in their activity use mechanisms (linguistic, etc.) which are impossible to define explicitly: the opposition presented in the text is illustrated: and, more importantly, it is stressed that humans perceive such mechanisms and may transmit them, even though they are unable to define them with any degree of precision. The same author, in *Law, Legislation and Liberty*, vol. 1, *Rules and Order*, (1973), defends the theory that law does not need to be conscious; that we imagine it as rational because of an anthropomorphic conception which reveals it to us as being planned by a mind.

64. We have already seen that a big difference between modern law (written, precedential or consuetudinary) and ethnic law lies in the fact that the former is (to a large extent!) conscious and verbalized —whereas the latter is not verbalized until the ethnologist intervenes from the outside. Ethnic law hence has, as a habitual feature, a quality which is regarded as pathological in the rules of modern law. One of the difficulties that a modern jurist finds if he is called to manage the enforcement of ethnic law is the fact that he is unable to know it without verbalizing it, and he is unable to verbalize a practice that is not repetitive.

role in the law of many so-called primitive societies.<sup>65</sup> By careful analysis, we can see that they play an important role in developed societies as well.

Discovery of a cryptotype is facilitated when—as often happens—an idea implicit in one system is explicit in another. Through the use of such comparisons, we have already been able to identify instances in which legal rules are interpreted in the light of ideas present in the mind but not in outward explanations.

Located somewhere in between the cryptotype and an explicit explanation is the use of synecdoche: only part of a phenomenon is indicated when referring to the whole. We have seen several instances in France, for example, in most cases, the French jurist who speaks of "consent" means consent based on a justification or "cause."

The use of comparative law to reveal implicit patterns can be illustrated by a further example. In German law, delivery (*Übergabe*) is required for ownership to be transferred; nevertheless, the parties can transfer ownership without delivery by entering into an agreement, the so-called possessory accord. It is not clear that they can pledge property by entering into such an agreement. Within the German doctrinal system, it is hard to find a principled distinction between transferring ownership and pledging property. Nevertheless, the debates on this question show that German jurists feel such a distinction can be drawn. A comparison among legal systems shows that in France and Italy, where delivery is not necessary for ownership to be transferred, it is necessary for property to be pledged. The need for delivery when property is pledged is thus recognized implicitly by all these systems, even though a good explanation of the need for it is given by none.

Some cryptotypes are more specific, others more general. The more general they are, the harder they are to identify. In extreme cases they may form the conceptual framework for the whole system.

When verbalized, cryptotypes are perceived and passed on from one generation of justists to another<sup>66</sup> just as the legal rules of the

65. Von Hayek, *Rules*, cit.

66. Alan Watson has dedicated to these problems *Legal Transplants* (1976), *Society and Legal Change* (1977) and *The Evolution of Law* (1985). See also Erik Agostini, *Droit comparé* (1988). The topic was one of the subjects discussed at the XIII Congress of Comparative Law (staged by the International Academy of Comparative Law at Montreal in 1990. Reports were submitted by Rodolfo Sacco, Erik Agostini, Witold Czachorski, David Howes, Edward M. Wise, and other scholars.

The topic of "the overall reception of foreign legal systems" was one of the subjects discussed at the VIII Congress of Comparative Law, staged at Pescara in 1970. Three national reports were published: Imre Zajtay, in *Congrès intern. de droit comparé* (Pescara, 1970), in *Études de droit contemporain, nouvelle série*, Paris, 1970 (*Travaux et recherches de l'Institut de Droit comparé de Paris XXXIII*, p. 31 and ff.;

society without a written alphabet are preserved and handed down.

In the eyes of the people who do so, they soon become "obvious." Normally, a jurist who belongs to a given system finds greater difficulty in freeing himself from the cryptotypes of his system than in abandoning the rules of which he is fully aware. This subjection to cryptotypes constitutes the "mentality" of the jurist of a given country, and such differences in mentality are the greatest obstacle to mutual understanding between judges of different systems. Cryptotypes may be identified and explored only through the use of comparison at a systematic and institutional level.

### B. "Legal Systemology"

When he began the work that laid the foundations of comparative law, René David had a fortunate intuition. His research into the various systems disregarded the most transient elements, the elements that change with the caprices of authority, and identified the most permanent and the least variable features. He sought out features common to whole systems or to large sectors of them. Having done so, he had no difficulty discovering that the most permanent phenomenon by no means coincided with the explicit authoritative rules of the various systems. Such phenomena were, for example, the tendency of common lawyers to frame rules of limited extension in contrast with that of civil lawyers to formulate broad rules. Such phenomena involve the relative positions of scholars and judges, the training of jurists, the presence in a given society of professional jurists, and so forth. Gorla, working in the same direction, has observed how a judicial precedent maintains its authority in France much longer than in Italy. Both David and Gorla have stressed the importance of history in the formation of such durable features.

I, too, have tried to enlarge the amount of information available about different legal systems so that it can be subjected to scholarly analysis. For example, I have drawn attention to the question of whether the rules of a system are formulated explicitly or not, to the presence in some systems of political definitions appropriated by authority and used to influence doctrine, and so forth.

In short, those who study comparative law have drawn attention to certain constant features present in all systems but neglected by the scholars of single systems. A new field of legal scholarship has thus been born. It should not be confused with the formulation of a pure theory of law. On the contrary, in a certain sense, it is the opposite of a general theory. A theory enunciates general rules and

Oeconomidis, in *Revue hellénique de droit international*, 1970, 333 ff.; Stone, in *Legal Thought in The United States of America Under Contemporary Pressures* 127 ff. (John N. Hazard and Wenceslas J. Wagner eds. 1970).

identifies a number of general concepts to express single rules and institutions. It constitutes the most general part of a given legal system. Its conclusions may be valid for many systems. Kelsen, Hohfeld and others have put forward general theories that claim to be valid with regard to any legal system. In our field, in contrast, the scholar attempts to describe empirically how the law of a given country actually functions. This endeavor needs a name. We might call it "systemology," the science that studies systems.

It is significant that this science has been invented by comparativists almost as a by-product of their comparisons of single institutions. Why has this happened? The answer is simple. The jurist who deals with a single system always runs into certain features that he takes to be "obvious" and hence that he does not perceive, identify, or report. These features remain as cryptotypes until the comparativist is struck by the differences in mentality that he observes among different legal environments. When he undertakes the work necessary to describe such difference, he describes the systems themselves.

### *C. Comparative Law in the Service of the Social Sciences*

Comparative law evaluates the differences and similarities within the systems it considers. Can it move beyond this field of study to become part of interdisciplinary research and serve the scholar concerned with problems of sociology and politics? The answer is yes. Comparative law would be a purely doctrinal study if it were to concern itself only with legal forms. Instead, the comparative method is based on an appeal to fact and consequently speaks the language of all sciences that turn to fact.

An initial contribution that comparative law can make to the social sciences can be seen almost intuitively. Comparative law examines the way in which legal institutions are connected, diversified, and transplanted from one country to another. Law, language and culture break down into cultural, linguistic and legal morphemes. If it wishes, sociology can study the behavior of these cultural morphemes, the laws that govern their origin and their movements from one cultural context to another. Comparative law can thus offer its conclusions to sociology. If sociology does not utilize them, it is not the comparativist's fault.

The sociologist may indeed say that the laws governing a transplantation of legal institutions from one cultural context to another lie outside of his main interests. He does not merely wish to know how legal institutions are borrowed. He wants to provide opinions as to the causes of this borrowing: economic, cultural, psychological

and so forth. Can comparative law help him to achieve this objective?

The answer would seem to be that comparative law is indispensable for precisely the task the sociologist has in mind. If some legislative breakthrough occurs in a given country, it would be difficult to see which of five causes is responsible if we continue to play blind man's buff in that country alone. The events that preceded the legislative breakthrough are too numerous to allow the scholar to isolate one event of many as its cause. Comparative law, however, assists by compiling an inventory of the countries in which such an event has taken place. It establishes when similar events have been preceded by similar causes, and on this basis can search out a correspondence between cause and effect.

The principle seems a simple one based on the most elementary principles of scientific research. Yet it is still one of the criteria that is most overlooked. For example, one of the strongest anti-formalist methodological trends relates legal phenomena to economic reality. Most of the representatives of this tendency analyze economic reality in terms of conflicting class interests. We have nothing to say against this way of investigating. However, to reach any sound conclusions one must be able to establish connections between class interest and legal superstructure, legal rules and institutions. To do so one must show that certain legal solutions actually accompany any instance of a given class structure, and that a certain class structure actually correlates with the emergence of a given legal solution.

It is incredible that this methodological principle is hardly ever put into practice. Those who believe in the material and dialectic analysis of social phenomenon expect to find in their profession of faith a sufficient guaranty of their conclusions without the need to verify them. Once periods have been established and given labels, such as the "late feudal age," "competitive free trade," "monopoly capitalism" and the like, one can fit in anything that comes to mind. An extraordinary variety of phenomena are said to characterize "mature capitalism."

Comparative law not only enables one to know domestic law better but to check hypotheses formulated in the sociological analysis of law. Comparative law thus becomes a go-between between legal scholarship and history, and between legal scholarship and general legal theory.

## XI. CHANGES IN LEGAL RULES, INSTITUTIONS, AND METHODS

### A. *Legal Change and Social Change*<sup>67</sup>

Law is not static. It changes incessantly. Every now and then man entertains the illusion that he can find or even that he has found a legal truth, a criterion for choosing among rules and institutions that is invariable, omnicomprehensive, definitive and valid everywhere. Reality has so far refuted such illusions, even though this very noble aspiration to find eternal general rules is a powerful stimulus to the improvement of positive law, purging it of irrationality and spurring it on toward higher and higher values.

Since legal rules do vary, it is legitimate to ask—even if jurists themselves rarely do—whether these variations conform to any law: not in the sense of a higher legal standard but in the sense of an intelligible pattern. Research into the cause of variations in legal rules is, in part, the job of the sociologist. It becomes the job of the jurist as well, however, whenever the cause of variation in the rule depends on its nature or contents.<sup>68</sup>

Consider, for example, the different ways in which the jurist or the linguist study variations in law and language. The linguist devotes a great deal of study to the laws governing linguistic changes, for example, the rotation of consonants in Indo-European languages or the formation of diphthongs in Italian vowels. He believes it to be his job to investigate the causes of such changes, such as, for example, the interaction of various languages or the push towards linguistic economy.

The jurist, at least since he began to study the phenomenon of legal reception, that is, of overall borrowing, has been prepared to discuss the transplantation of legal rules and its causes. On a general plane, he tends to explain change by social pressures of various sorts. These social pressures may be exerted uniformly on legislator, judge and scholarly interpreter. Legal formalism, however, may immunize the scholars so that legal change begins when the pressure gets the better of the legislators' resistance and continues when the judge follows the legislative lead. Where legal formalism is less strong, the scholarly interpreter and the judge may be the first to react to the social pressure, thereby anticipating the solution that the legislator will subsequently adopt.

This pattern of interaction between law and a social situation is

67. Franz Wieacker, in *Privatrechtsgeschichte der Neuzeit* 143 ff. (1967) recalls that, in historical disciplines, it is methodologically preferable to speak of precedents rather than of causes. But anyone considering a large number of variations looks at them with the eye of the sociologist rather than of the historian.

68. Gabriele Crespi Reghizzi and Rodolfo Sacco, *L'abuso del diritto nel sistema civilistico jugoslavo* in *Est-Ovest*, 1977, pp. 55 ff.; Gianmaria Ajani, *Le fonti nonscritte nel diritto dei paesi socialisti* (1985).

not, needless to say, invariably found in practice. Judges often put up a more or less conscious resistance to statutes which themselves may not be the unambiguously necessary response to a social situation. In such cases, judges "create" law in the sense that they do not follow statute but they create only to conserve what already existed before.

An example we have already seen is the preservation by French courts of the requirement of delivery to transfer ownership despite the Code Napoléon. Similarly, French courts have recognized the validity of alienations of property by one who believes himself to be heir, even though Belgian interpreters of the Code have taken the opposite view. The cryptotype that has influenced the French jurists is the solution that prevailed in Roman law.

In socialist countries one could imagine that the general clauses of codes are contrary to the principle of legality. One could also imagine them exalting these clauses as fostering spontaneous evolution of law as society develops without the need for formal legislative procedures. In reality, however, socialist jurists typically have neither praised nor condemned these clauses.<sup>69</sup>

### B. *Legal Change and the Material Structure of Society*

An overall explanation of legal change has been sought in the analysis of society and history given by Marx and Engels. From their perspective, law is a set of rules imposed by force by the ruling class that controls the state apparatus to insure discipline and the relations of production and exchange that correspond to its economic interest. When society has an antagonistic class system, this ruling class is an exploiting class. Outside these rules that govern the economic relationship directly there are others designed to safeguard cultural and moral values that would seem to be non-economic. And yet this cultural and moral ideology is, in turn, an economic superstructure and another defense of the economic discipline of society. The great revolutionary changes of law go hand in hand with the great revolutions in economic structures. Law and state are born with class antagonism, that is, with the birth of slavery. They are revolutionized when slave society makes way for feudal society based on the antagonism between feudal lord and serf. They are revolutionized again when feudal society makes way for capitalistic free trade society, and once more with the establishment of socialism which gives possession of the means of production to the

69. The only limit to randomness seems that every socialist system rejects abstraction (our *Transfert*, cit.). Is this an insuperable limit? Probably not, because the abstraction of the *modus* of purchase is compatible with an action of restitution, which may be functionally similar to the *causa* or ground to justify the circulation of goods.



workers, dissolves class antagonism, and opens the way to the withering of state and law. Any modification of law is nothing other than a reflection of the modification of the economic base of society.

The economic base of society is never completely stationary. In societies with antagonistic class systems, the exploited class will continually take steps to modify its relations with the exploiters. The latter will in turn try to limit the scope of such an attempt. This dialectical antithesis between the efforts of one class and another will create continuous movement which will immediately be reflected in the legal fabric of the society. When society is free from exploitation, the establishment of socialism and the future of communism will proceed by degrees, each degree preparing the way for the next.

This overall theory of the cause of legal change has not, up to now, been investigated in detail by its proponents. To assess the evidence it is, therefore, a new task without precedent in legal literature. Unbiased analysis of the Marxist hypothesis leads to the conclusion that there is not always a correlation between class structure and the solution of a particular legal problem.

Consider the rule whereby motor vehicles must drive on the right or on the left. There are no known cases in which the dissolution of class antagonism changes the side of the road on which motor vehicles have to drive. Consider the transfer of ownership in personal property. The line that distinguishes systems that require *titulus* and *modus* and those that require *titulus* crosses the line that distinguishes free market economies from socialist ones.<sup>70</sup>

Can we, therefore, conclude that there are "neutral" rules from the class point of view? Before proceeding, we observed that even among Marxist jurists, a minority stress that not all rules change with the overturning of the economic base of the society. The prohibition of murder, for example, resists change when capitalism gives way to socialism because it safeguards values that both social structures accept.<sup>71</sup> There are, then, legal models which, in proportion to the values which inspire them, survive through historical change. Moreover, I believe that many legal rules survive revolutions precisely because they do not represent any value, do not correspond to any ideology, are foreign to any moral system and respond to an elementary necessity of social organization. No society will ever be free to allow motor vehicles to drive on the left or right as they please. Any society, however, will be free to choose left or right as the side

upon which to drive. The choice of class, ideology and value do not free the society from the organizational necessities that stand over it and do not influence its choice of one solution or another.

We will be surprised only if we fail to reflect upon a more general truth. If we wish to classify all facts about society as either economic (and therefore structural), or as noneconomic (and therefore superstructural) we must place law in the second subdivision along with language, fashion and so forth. Language provides a typical example of a cultural phenomenon in continuous evolution but the evolution of language is not connected to a class or an axiological or moral choice. The use of language in linguistic borrowings may be influenced by politics, ideology and economic interests, which may, of course, give rise to conspicuous abuses. Yet the content of a language and its changes by no means are the product of class interest. When Germans made voiced consonants unvoiced and unvoiced consonants aspirated (so that "foot" corresponds to the Latin "pedem"), this change was not the product of class conflict, ideology or axiological choice. The plurality of cultural forms is not always the product of class struggle. On the contrary, it dates from an era that is far more remote than the beginning of class conflict as Marxists conceive it. Until the '50s such considerations seemed wholly incompatible with the doctrine of Marx and Engels. In that period, Stalin's famous four articles concerning language introduced into Marxist doctrine the idea that the contents of a language are autonomous with regard to the economic structure of various societies.<sup>72</sup> No one returned to the argument again. If it is admitted, then, that some cultural forms are conditioned by the material base of the society, what is the position of legal morphemes?

There are, indeed, legal morphemes which immediately reflect class interest, or, in general, a political decision based on interests or values. An example would be the nationalization of the ownership of the industrial means of production. Other legal morphemes are neutral with regard to class interest. Nearly all the law with which we are familiar falls into that category. The neutrality of these morphemes explains the survival of Roman rules and institutions in feudal, free market and socialist law (for example, *obligatio*, *rei vindicatio*, *emptio venditio*, and so forth). Conversely, the neutrality of legal morphemes explains why societies with a similar economic base can have rules and institutions that are irreducibly different in the way that certain common law institutions are irreducibly differ-

70. These are the doctrines expressed, in Rumania, by Trajan and Aurelian Jonaşcu and by Anita M. Naschitz (see the latter's *Teorie si tehnica in procesul de creare a dreptului*, 1969, and other works). Rumanian doctrine was perhaps influenced by the need to explain (to the Soviets) why socialist Rumania maintained its 1864 *codul civil* in force.

71. Collected in Josip Stalin, *Marksizm i voprosy jazykoznanija* (1950).

72. Fundamental on judicial reception are the studies of Gino Gorla, *Diritto comparato e diritto comune europeo*, cit., chapter 20 (543 and ff.), and chapter 22 (651 and ff.); id., *La communis opinio totius orbis et la reception jurisprudentielle du droit (...)* in Mauro Cappelletti (ed.), *Nouvelles perspectives d'un droit commun de l'Europe* (1978), which includes appropriate bibliographical references.

ent from those of the civil law. Social dialectics can alter the subjects of a legal relationship so that they become the state instead of the individual, the public corporation instead of the private company, or it can alter the objects of the relationship so that, for example, a slave ceases to be a possible object of ownership. Nevertheless law has a genius of its own which enables these changes to occur while an underlying legal structure endures.

### C. Changes in the "Legal Formants"

If it were true that each legal system regulated each question by a single rule, we would find that all legal formants of the system would change together, legislative, judicial and scholarly. In fact, even when rules are borrowed from abroad, these elements do not move simultaneously.

Anyone unfamiliar with the notion of *negozio giuridico* (juridical act) could not claim to know Italian law. Yet the Italian *Codice Civile* does not mention *negozio*. It speaks, instead, of contract, will, power of attorney, and so forth. The legislator in 1942 used these expressions because he found them in the Code of 1865 and the codes enforced before Italian unification, and ultimately, in the French Civil Code. The doctrine of *negozio* familiar to Italian scholars, however, comes from the German doctrine of the last century. In Italy, therefore, rules of French derivation coexist with doctrines of German derivation. Each was borrowed autonomously.

The Soviet Union and Poland both took over the doctrine of juridical act that was of imperial German origin. Nevertheless, this doctrine has not had the same history in the Soviet Union as in Poland. In Russia, the doctrine was first taken over by the Academy, then disseminated in the universities, then introduced into the 1903 *Grazhdanskoje Ulozhenie* project, then into the 1922 Russian Civil Code and subsequently into the *Osnovy* of the civil law for the USSR for 1961 and into the 1964 republican codes. Thus the German doctrines were borrowed by scholars and then reflected in the various codifications. In Poland, instead, it was decided in 1946 to unify the law of juridical act as a step toward the unification of the law. Those taking part in this endeavor took as a model the general part of the German Civil Code. One can trace the 1964 *Kodeks Cywilny* back to the 1946 decree.

Borrowing and imitation is therefore of central importance to understanding the course of legal change. For example, the French Civil Code has found very many imitators: for example, the Piedmonteses with their *Codice Albertino*, the Neapolitans with their *Codice Borbonico*, many Swiss cantons, the Dutch, the people of Baden, the Poles in the period of the Dutchy of Warsaw, the Rus-

sians at the time of the *Svod Zakonov* (1832), then, in a second wave of imitations, the Romanians, the Bulgarians, Turks (with the Mecelle of 1968), the Egyptians, and, through imitation of the 1949 Egyptian Code, the Somalis (1973), the Algerians (1975), and many others. Again, nineteenth century German doctrine has spread to Scandanavia, Russian, Hungary, Romania, Bulgaria, Slovenia, Croatia, Italy, Spain, Latin America and Holland. The meeting of French rules and institutions and German doctrines has occurred at different times in most civil law countries from Russia to Italy and from Spain to Romania.

Borrowing by judges has been less studied. The judge is less inclined than the scholar or legislator to examine the production of other countries. Nevertheless, three interesting instances of judicial borrowing should be mentioned.

First, there is the direct imitation of judges by judges. A particularly important instance is that in which the judge operates in a system without a code. Until a few years ago, it was thought that the English case law was formed without much borrowing from abroad. Gorla demonstrated that from the middle of the seventeenth century until the first half of the nineteenth, English judges, in fact, read the reports of European *Rotae* and *Camerae*. Within the limits set by the compatibility of common law and civil law institutions, they applied the work of foreign judges to English law.<sup>73</sup> Indeed, the most recent studies show that, before the French Revolution, just as there was a Europe of the universities, so there was a Europe of the judges who not only followed foreign scholarly doctrine but also foreign precedent.

A second important form of judicial borrowing is that which takes place through intermediaries. Today, the existence of super-national bodies has created more room for transnational judicial imitation. For example, the so-called principle of proportionality has long been a feature of German administrative law.<sup>74</sup> When a supra-national body adopted that principle, the French *conseil d'etat*, which is generally disinclined to imitate German rules or institutions, allowed itself to adopt this one, at least temporarily.

Another important way in which judicial borrowing occurs is when scholars formulate their doctrines on the basis of the case law

73. The topic was dealt with at the X Congress of Comparative Law (Budapest, 1978), a bibliography has developed as a result of the publication of the proceedings of the congress. (See *Riv. dir. civ.*, 1978, I, 637).

74. As in other analogous cases, a linguistic conditioning is at work here. During the revolutionary era, Turks knew German as an international language. When knowledge of German fell and knowledge of French grew, the Turks found access to Swiss case law less easy, and they hence turned to French law. Today English is better known than French, but English law reports seem impossible to use for anyone having to make a legal argument with Swiss-Turkish conceptual categories.

of a country, and these doctrines, borrowed by another country, influence its judges. Indeed, this is really an instance of borrowing through intermediaries.

The work of judges, like the work of scholars, is often borrowed without much regard for the rules that are supposed to be in force in the country of its reception. A typical example is the law of Turkey. The code is Swiss and was chosen by the legislator, Kemal Atatürk, as a means of westernizing Turkey through the modernization of its law. The case law, however, is in part an imitation of the French.<sup>75</sup>

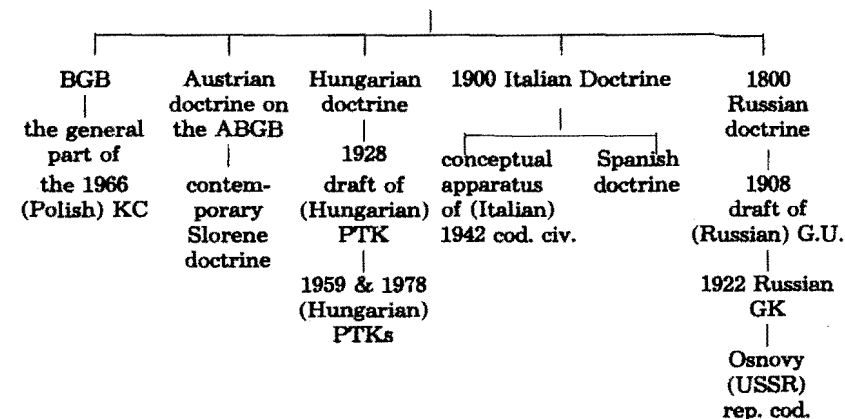
Another example is to be found in Somalia. The Somali Code of 1973 is an imitation of the Egyptian Code. Nevertheless, the Somalis considered their code as an autonomous enactment and therefore do not study the Egyptian case law. Nevertheless, since they commonly speak Italian because of their colonial past, they superimpose an Italian interpretation on a code that is much more French than Italian. Borrowing of this type takes place from the legal formant of one legal system to a similar legal formant of another.

A different type of borrowing, from one legal formant to another dissimilar one, takes place—obviously—within each system. It is completely normal for scholarly doctrine to influence the code and the case law, and for the case law to influence amendments to the code or scholarly doctrine.

The combination of both kinds of borrowing produces family trees like this one:

75. Alan Watson, *op. cit.*, chapter XVI, observes that most legal changes in most legal systems are due to such borrowings.

# THE GERMAN PANDECTIST SCIENTIFIC DOCTRINE



Thus far we have spoken almost exclusively of changes that occur through borrowing or imitation. Of course, if a rule or institution is borrowed, it must have been born beforehand. Nevertheless, the birth of a rule or institution is a rarer phenomenon than its imitation.<sup>76</sup> In particular, no civil code can be original. Political authority, with an *ad hoc* commission, may develop brief formulas but it cannot devise a complex work of thousands of articles. A code arises sometimes from national scholarly doctrine and more frequently through imitation of another code. Of the hundreds of civil codes promulgated since the French Code of 1804, the Austrian and the German codes and, in part, the Czechoslovakian Code of 1964 are of national origin as well as the core of socialist rules contained in the Soviet *Osnovy* of 1961. The rest imitate another code or enact small changes suggested by the case law or by scholars. One can say the same for constitutions, administrative models, codes of procedure, and so forth.

## D. Borrowing

We have seen, then, that legal rules, institutions and styles change continually, as does language, either through slow evolution, as in the transition from Latin to French, or by overall superimposition, as for example, in the transition from Celtic to a system with Celtic and Latin elements to Latin. We have said nothing thus far about the cause of this change. Nor can we trace the cause without drawing a basic distinction between an original innovation and its imitation. It is an original innovation, for example, when a

76. Alan Watson, *op. cit.*, teaches us that foreign law may exert an influence even when it is completely misunderstood.

Scandinavian country institutes the ombudsman, when Venedicktov explains the enterprise's power over the means of production as *pravo upravljenija* or right to operational management, when the commission set up by Maria Theresia draws up a civil code in the narrow sense of the word, or when the Lord Chancellor recognizes the trust in courts of equity. Of all the legal changes that occur, perhaps one in a thousand is an original innovation. Moreover, true originality does not usually receive the fanfare that accompanies imitation. One could collect in an anthology of the grotesque the praise for originality and novelty that has accompanied every imitation of legal rules and institutions.<sup>77</sup>

What causes imitations? Similarities in cultural, environmental, social and economic conditions may be crucial. But just as legal rules and institutions remain after cultural or class revolutions, so imitations may cross cultural frontiers where the boundaries separate economic systems.<sup>78</sup>

There are two fundamental causes of imitation: imposition and prestige. Every culture that has faith in itself tends to spread its own institutions. Anyone with the power to do so tends to impose his own upon others. Receptions due to pure force, however, are reversible and end when the force is removed. Moreover, receptions due to pure force are relatively rare in history. One thinks of the diffusion of European institutions in the colonies and yet, in the colonies, European legal institutions were applied almost exclusively to relations between Europeans or in relations that were unregulated by local law, such as drafts, checks, and limited liability companies. The general application of European rules and institutions came after decolonization and in accordance with the will of the now-independent local authorities.

Usually, reception takes place because of the desire to appropriate the work of others. The desire arises because this work has a quality one can only describe as "prestige." This explanation in terms of prestige is tautological, and comparative law has no definition of the word "prestige" to offer. The analysis of this term is, if anything, the province of other disciplines. Nevertheless, the power

77. Cfr. Alan Watson, *op. cit.* (chapter XVI) observes that the transplant of legal rules is easy from a social point of view (...) and that this holds even when the rules come from a very different system.

78. The *Svod Zakonov* has introduced a rigorous separation of goods between husband and wife. The choice was reaffirmed by the Russian (1918) and Ukrainian (1919) family codes. But tradition was stronger than any obstacle: at a certain point, the Ukrainian supreme court was the first to turn its back on the legal rule and, subsequently, Russian case law, faithful to the consuetudinary model, has induced the 1926 legislator to abandon the modernisation of Russian law. After 1944, the Russian model spread more or less rapidly in the popular democracies, where it defeated all resistance.

of prestige is an indispensable postulate in explaining the imitation of a whole host of cultural phenomenon. If, for example, the inhabitants of the valleys of the Languedoc in Piedmont are willing to speak Italian, one can see at work the influence of schools, newspapers, radio and television. If this same ethnic group, however, were prepared to speak Peidmontese, this explanation would no longer work, and it would be necessary to speak of prestige. Prestige governs the diffusion of fashion in clothes and much else besides. Prestige diffuses each linguistic change after the change has once occurred. Prestige carried the medieval Roman law across Europe. Prestige carried the French Civil Code and German doctrine beyond the frontiers of the civil law. Prestige made the penetration of French and English rules and institutions into Africa irreversible. The prestige of the Shari'a has eroded numerous African usages.

The borrowing of legal rules and institutions often gives rise to strange and artificial rationalizations. The law providing for community acquisition of property by spouses-well rooted in the Germanic customs of the Middle Ages and the peasant customs of the Russian countryside-resisted liberal, enlightenment, rational and finally socialist attempts to modernize it. The medieval peasant model was able to present itself to the Italian legislator in 1975 as worthy of imitation because of its presence in the law of liberal and economically developed societies in America and France and in the Socialist law of the Soviet Union. In adopting this law, the Italians gave a series of rationalizations connected to the values they held in high esteem at the moment of reception. Imitations follow intelligible patterns which must be considered as tendencies. There may be, of course, exceptions due to historical accidents.

Prestige may be enjoyed by a single institution or an entire system. In the latter case, borrowing will take place exclusively from the system vested with prestige to other systems. Today, it is unlikely that a European country will imitate an African model, that the United States will imitate a Venezuelan model, that the Scandinavian countries will imitate an Italian model, and so forth. Imitations in the reverse direction may occur.

It should not be taken for granted that rules or institutions have deeper roots in the area in which they originated than elsewhere. A country that has created a rule or institution that others borrow may have an innovative capacity which will lead it to replace this rule or institution by another. If the original rule or institution has been borrowed in the meantime by other countries, these countries may preserve it longer than the country of its origin. Dutch South Africa offers an example of an area that because of its isolation from the civil law world has been less exposed to the influence of more recent innovations and, therefore, has preserved a system that is

strongly conservative. The Republic of San Marino is an example of an area that resists innovation—thanks to its marginal status.

More intense borrowing, unilateral and reciprocal, tends to occur between similar systems than between very different ones. Indeed, the system that borrows a rule or institution must integrate it with all of its other rules and institutions overcoming difficulties that are as great as the generic differences between the system and the one from which it is borrowed. For example, a legal system cannot borrow elements that are expressed in terms that are foreign to its own doctrine. Conversely, if two systems have the same codes or both have a system of judge-made law, the judges of each country may find it easy to borrow from each other. Imitation is more obvious when one legal formant of a system is borrowed and not the others. Between two totally different systems, an overall reception is easier than wide ranging imitation of particular rules and institutions.

Finally, a legal system will tend to borrow when it is incomplete. An incomplete system will tend to imitate just to fill the gaps.

#### E. Innovation

Innovations are made continually. A judicial decision in a new case and a student's wrong-headed answer to an examination question both entail an innovation. However, the only innovations that really matter are those that originate from an authority or are adopted by an authority or for some other reason are diffused because people find they must imitate them.

Synchronically speaking, an innovation that does not originate from an authority is a "error," be it the error of a judge, of an advocate or of a student. Diachronically, however, the nature of an innovation is more ambiguous. If it finds imitators, it will be a creation, a discovery. If not, it will be an isolated opinion, an error.

We must then ask our usual question: how do these innovations originate? We have already seen that it is not the task of the lawyer to give a complete answer. Perhaps it is not the task of any science to move away from questions concerning how something happens into the treacherous question of why. Comparative law may nevertheless develop partial answers which are useful.

Innovation may depend upon social facts that go beyond the legal system itself. It may depend, that is, upon evolution or revolution in the system of values or upon the seizure of power by representatives of new interests.

Sometimes, however, it depends upon phenomena that are themselves legal. Economy of principle, for example, suggests that where possible two different rules applicable to two different cases

be replaced by a single rule. While civil law systems use one rule to give procedural protection to a person with a usufruct and another to protect anyone who has *de facto* proprietary rights. Another example is the way in which, during the Middle ages, the *actio legis aquiliae* became a generalized action for delictual liability eclipsing the others in Roman law and leading eventually to the general solution of Article 1382 of the French Civil Code. In these cases, innovation is produced by a desire to generalize, to seek harmony, analogy or assimilation.

Generalization suppresses particular features. Rules are simplified by leaving out some of their elements. It is simpler to say that liability in tort requires fault and damage than to say it requires fault, and injury to a right, and damage. It is simpler to say that a contract is formed by two wills than to say it is formed by two wills and two outward declarations of will.

We should bear in mind, however, that the simpler rule often exists only as a hortatory statement of legal scholars, particularly in those contexts, like France and unlike Germany, where scholarly sloshings do not claim to be scientific absolutes. As we have seen the French law adopts simplified definitions that are instances of synecdoche and which the Germans try to avoid. The role of scholars in civil law countries has produced an inclination toward general rules greater than that in common law countries.

At the same time, in every society there is a countervailing tendency toward ever more specialized legal rules that combine elementary legal institutions in ever more complex ways. It must be so if the society is to fulfill its needs through more varied and numerous techniques. Thus every new code deals with a greater number of types of transactions and, indeed, every new codification takes place only after the rules governing these transactions have been worked out in practice. Legal rules and institutions are then rationalized by assimilation, that is, by finding analogies and distinctions among rules and institutions.

On other occasions, an innovation arises in the way in which a well-known proposition is interpreted. Tom states a proposition. Dick wants to repeat the same idea and to explain it better and therefore formulates it in different words. Harry sees in Dick's words a different idea than Tom's and adopts it. In such cases the "new idea" springs from ideas that Dick and Harry already had but did not express before encountering Tom's proposition.

We will never fully understand the way in which an interpreter works, however, until we understand the legal ideas of nonprofessionals, especially of young people. A systematic collection of the errors made by first-year university students in their exams would be of the greatest interest.