CONTRASTS IN LEGAL LOGIC IN THE AMERICAS

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Resumen

El tema de los contrastes en el razonamiento lógico-legal merece una mayor atención, tanto de los abogados formados en el sistema del Common Law, como de aquellos formados en los paises de raiz romana. La creencia de cualquier abogado de que su colega del otro lado está confrontando un problema legal que concierne a ambos a través del mismo sistema de razonamiento, puede conducir a resultados extraños y a veces desastrozos. La diversidad cultural, el distinto desarrollo histórico de los dos sistemas legales y la divergencia en los métodos de educación jurídica, constituyen suficientes razones para una clara distinción entre ellos. Lo mismo las diferencias en cuanto a la organización judicial, a la forma de litigar y a la importancia que se le dá al llamado precedente. El propósito de este articulo es el de contribuir a mejorar las percepciones que los abogados practicantes deben tener de por qué, tanto los abogados del sistema del Common Law como los formados en paises de raiz romana, razonan en la forma en que lo hacen.

Abstract

The subject of contrasts in legal logic warrants more attention from both common lawyers and those trained in civil law. An assumption by either that his foreign colleague is approaching their joint legal problem with the same thought processes can lead to some strange, and sometimes unfortunate, results. Reasons for these differences lie in cultural diversity, the historical development of the two legal systems and the wide divergence in the two systems of legal education. Differences also exist in courts and litigation and the recognition given precedent. Serious misunderstandings can result from a failure of communication between lawyers internationally from the use of

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words and phrases which have different meanings in the two systems of law. The purpose of this article is to contribute to an everyday practitioner's improved perception of why the civilian and common lawyer each thinks as he does.

In 1916, when General Carranza and General John Pershing confronted each other across a parley table, Carranza protested the invasion of Mexico and its sovereignty and stated that he thought he could stop Villa's raids against the United States. Pershing replied, "The trouble with you Mexicans is you are always *thinking* and not acting." The prompt retort was: "The trouble with you Gringos is that you are always *acting* and not thinking."[1]

This inaugural issue of our *Journal* contains articles of practical value to the practitioner of international law; the writer trusts that this article will meet that criterion. While this article is based primarily on my experience in Latin America, I believe that most of its conclusions may be applied as well to Canada, where Gallic reasoning may sometimes confound the classicists of common law.

Before continuing, I must apologize for my use of the general term "Latin America" as though it were one place. It is a convenient term to describe an area that uses a fairly uniform system of civil law. Latin America is of course diverse in many ways, and legal development in the various countries has not always taken the same course. Generalizations can be misleading, but since this article deals with aspects of our subject which are somewhat philosophical, I will continue to make use of several generalities.

The subject of contrasts in legal logic warrants more attention from both common lawyers and those trained in civil law. An assumption by either that his foreign colleague is approaching their joint legal problem with the same thought processes can lead to some strange, and sometimes unfortunate, results. Reasons for these differences lie in cultural diversity and in many hundreds of years of history.

CUSTOMS AND CULTURE

It is obvious that a person's customs and culture do as much to mold his thinking as does his education. We are all proud of our heritages but frequently do not pause to respect those of other people. Latin

1. This episode was related to the writer by Lic. Luis Cabrera, one of the leaders of the Mexican Revolution. He said that Coronel C.S.T. Folsom, acting as Carranza's interpreter, made the retort. My father's recollection was that he could not have been that blunt to Pershing.

Americans are particularly proud of their heritages; ours in the United States are perhaps not as well developed.

Picture this: you have been working for about ten days with a local lawyer in a Latin American country (which shall remain anonymous) to complete a lengthy brief of foreign law (that of the United States) to be filed with the Supreme Court of the Latin country. You are preparing to leave, but your local counterpart surprises you with the announcement that you must visit the President of the Court the next day. Your Latin counsel explains that if the President of the Court should hear that you had been in town and failed to pay him a "courtesy visit," he would be offended. Despite your protests that to visit the President of the Court without opposing counsel present would be a serious breach of ethics, you nevertheless are persuaded to do so.

During your visit, you are "long on courtesy," but the President insists on discussing the merits of the case and ultimately suggests that one point of law needs to be briefed by a young lawyer, expert in the field. He mentions the name of the lawyer, whose name coincides with his own. Later, in discussing with your counsel what you think will be a serious problem, you learn that the young lawyer is the nephew of the President of the Court, recently returned to his home country from Michigan Law School. Your Latin counterpart seems surprised at your belief that you are in a predicament.

Against your better judgment, but following the axiom "when in Rome...," you retain the young lawyer to prepare a short brief of the particular legal point. He has been well educated at Michigan and patiently explains to you that, while he also is embarrassed by his uncle's action, nepotism is expected in his country and his uncle would be criticized if he did not recommend his nephew. The young lawyer's brief is concise and well prepared, if duplicative. Your greatest shock, however, comes later, when you receive a modest bill of $150 from the young lawyer (who is later to become very prominent).

This incident actually occurred many years ago, and while I believe that practice and ethics in our two systems are becoming more congruent, there remain many subtle differences which can lead to serious misunderstandings.

The North American lawyer may pride himself on being pragmatic, but his Latin brother lawyer is not so sure that the trait is an admirable one. The Latin lawyer is usually amused by the deadlines we set for ourselves. He is convinced from experience that many problems, if so permitted, will be cured by the passage of time. As a matter of fact, it has been my experience that I can accomplish more in three days of

work in a lawyer's office in any Central American country than I can in a corresponding number of weeks in a busy New York law office. Of course, the Latin lawyer devotes his undivided attention to one matter during that period and does not try to have a dozen balls in the air at the same time, as we are prone to do.

Complaints may be heard from both directions about the lack of understanding. North American lawyers say that their brothers in Latin America are not practical enough, and that their advice is too abstract, too theoretical and above all, too slow. Looking North, the complaints are almost the reverse. We are too impulsive and demanding in our approach, insisting on action before the matter can be studied properly. We are sure that there must be a "white horse" case to fit the problem, and have little patience with abstract reasoning and theories. We make little attempt to understand local law, and try to force everything into our own legal concepts. We ignore local customs and culture.

Still, over the years, North and Latin American advocates have been drawn closer together. The Organization of American States and the Inter-American Bar Association have done much to improve understanding. Meetings of educators and increased interchange of students among universities of the hemisphere have tended to give us all a common language. Professor Gutteridge, however, warns of the dangers of blind acceptance of what may seem to be a common language:

> It would seem to be clear that a universal language of the law is not merely a dream incapable of realization, but it is a delusion to think that if it existed it would get rid of the problem with which we are concerned. Indeed a similarity of language often conceals a difference of ideas and so merely serves to create confusion.[2]

I do not share Professor Gutteridge's pessimism, although this article perhaps is derived in part from a similar concern. Certainly, legal translations can be very misleading because the same words frequently represent different legal concepts. I learned early that it was impossible to ask one truly trained in both systems of law to translate legal documents. Such a scholar could never complete his

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2. H.C. GUTTERIDGE, COMPARATIVE LAW (2d ed. 1949). For a good discussion of choice of law and language, see PARKER SCHOOL OF STUDIES IN FOREIGN AND COMPARATIVE LAW, INTERNATIONAL CONTRACTS: CHOICE OF LAW AND LANGUAGE (1962). This volume contains an article by this writer with respect to Latin American law and practice.

task, because he would realize that a literal translation would be misleading. On the other hand, a good bilingual secretary, armed with a dictionary, has no trouble in quickly translating legal documents. To the secretary, words printed in the dictionary are gospel.

DEDUCTION VS. INDUCTION

Scholars often state that the basic difference between civil law reasoning and that of the common law is that the former proceeds by deduction and the latter by induction. This is frequently cited as the reason for a difference in approach to the solution of legal problems. Professor F.H. Lawson, in his excellent book *A Common Lawyer Looks at the Civil Law*,[3] devotes but one page to this theory. He seems to believe, as do I, that all lawyers use both types of reasoning to solve legal problems. The civilian may feel a little freer to extend legal principles by analogy, but this is because his available tools are scarce.The civilian is largely restricted to codes and statutes. On the other hand, the common lawyer has much available to him in the form of case law; in fact, he is more often than not swamped with it (without *Shepard's* we would all be lost). In my opinion, the inductive-deductive distinction, hoary with age though it is, does not begin to explain the reason for differences between civil and common law. I believe that the reason may be found primarily in the historical development of the two legal systems.

In order to understand fully the reasoning of a lawyer practicing in another legal system, it is necessary to study that law and the history behind it. This actually is happening more and more as the exchange of students between our universities increases and as lawyers from both continents work together.

HISTORICAL BACKGROUND

Roman Law is the basis of all civil law. As is well known to students of common law, we also borrowed much of our law from the Romans. Mercantile law was infused into English law by Lord Mansfield and others because it was then the international commercial law of the world and English merchants lived by it. How does it happen then that the two systems of law are today so different in approach? One theory which would account for the failure of English judges to adopt

3. F.H. LAWSON, A COMMON LAWYER LOOKS AT THE CIVIL LAW (1953). Professor Lawson's lectures contained in this book should be required reading for any student interested in civil law, although they are directed primarily toward Europe where the approach to legal problems is more similar to ours.

anything other than mercantile law from the Romans is that the great English commentators such as Glanville, Bracton, Littleton, Coke and Blackstone were not codifiers and did not think in such terms. Consequently, they did little to organize the law, in contrast to Pothier and Tronchet, the principal authors of the Napoleonic Codes.

Another theory is that English jurists resisted the injection of Roman Law as an alien system not suited to them. Professor Wigmore attributes this resistance to national patriotism and to the existence of a strong legal profession practicing a unified common law.[4] The Inns of Court, which dominated the study of law then, as they do today, constituted a bulwark against acceptance of the Roman system.

LEGAL EDUCATION

Of all the factors which cause civilians and common lawyers to think and reason differently, I believe that the wide divergence in our two systems of legal education is perhaps the most important. Wigmore states: "In short, *the rise and perpetuation of a legal system is dependent on the development and survival of a highly trained professional class.*"[5]

While several universities existed in Latin America by the middle of the 16th century, and some authors speak of the blending of Spanish and Indian law,[6] this writer believes that the bulk of the law of the Americas was developed in Spain. A number of commentators and compilers of law had been sent out to the colonies, but they worked with law developed and promulgated by Spain.[7] The *Recopilación de las Leyes de las Indias*, issued from Spain in 1681, was a monumental work consisting of nine books, with 6377 laws classified under 218 subjects. Courses in theology were established first in the American universities, followed soon by courses in law (ecclesiastical law in the beginning). Education was only for the select, and a law degree was a status symbol. The reading of anything which "treated of profane and fabulous matters and of imaginary history" was prohibited

4. J.H. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 1077-90 (1928). *See also* C.P. SHERMAN, ROMAN LAW IN THE MODERN WORLD (2d ed. 1924). Sherman traces the influence of Roman Law in the British Isles from the time of its introduction in 55 B.C. and agrees with Wigmore as to why the acceptance of Roman Law in the English courts was limited, but he also points out that the resistance revolved around the church and canon law. The comings and goings of Roman Law in the British Isles make fascinating reading, and I would recommend Sherman's three-volume work to anyone seriously interested in Roman Law.

5. J.H. WIGMORE, *supra* note 4, at 1129.

6. B.W. DIFFIE, LATIN AMERICAN CIVILIZATION 526 (1945).

7. B.W. DIFFIE, *supra* note 6, at 527-28.

by Carlos V. (Apparently the law was never repealed, so it may be risky even today to have a copy of *Don Quixote* in your possession!) Legally speaking, all that was available for reading were religious and juridical works.

A fine article entitled *Revolution in Latin American Legal Education: The Colombian Experience* appeared in *The Lawyer of the Americas*.[8] Notwithstanding that I received some of my formal education there, I had not realized that legal education in Colombia was undergoing such a complete transformation. The author, Edward A. Laing, concedes that the process is just starting and has a long way to go. While I do not agree with all of his views concerning Latin American legal teaching, I do agree with his statement, "In law and legal education the tendency has been to stress historicism and positivism as cardinal features of law, the teaching of which is designed to produce 'jurists'...which extolled professionalism."[9] Latin American writers have certainly not spared criticism of the teaching of law in their universities, and Laing cites a number of good articles on this subject in his footnotes.

I find nothing wrong with producing good jurists and true professionals, but I do agree with much of the current criticism of teaching methods in both Latin American and United States law schools. I still have my volumes of *Derecho Civil Colombiano*, and I must agree that the course might be classified as rigid, narrow and possibly leading to the formation of "limited" professionals, to borrow some words from Laing. It is true that few courses in social sciences are included in the curriculum of a typical Latin American law school. We in the United States seem to have gone overboard in the other direction, and perhaps it is time to return to a more fundamental law.

In the early law schools, such as those in Peru, Chile, Santo Domingo, Mexico and Argentina, the system of teaching was strictly magisterial, and there was little or no student discussion or participation. Class dialogue, student research, use of materials other than basic laws and use of jurisprudence were unknown. This century found teaching methods little changed. Frequently, teaching is by rote, with the whole class reciting provisions from the codes. There is no doubt that these methods tend to subdue inquisitiveness and foster acceptance of the doctrinal at the expense of the practical.

There are always many civil lawyers in attendance at the Academy of American and International Law, which has been held annually at

8. Laing, *Revolution in Latin American Legal Education: The Colombian Experience*, 6 LAW. AM. 370 (1974).
9. *Id.* at 372-73.

the Southwestern Legal Foundation[10] for the past nineteen years. During that time, I have had many discussions with these civil lawyers concerning legal education in Latin America and elsewhere. Most of them are under the impression that our professors follow the Socratic method of teaching, in contrast to their professors' lecture method. They contend that the excessive use of lectures in legal education stifles their ability to reason, either deductively or inductively. Reasoning must be a part of legal education, of course, but without foundation of principles derived from lectures and textbooks, one has no basis from which either to "induce" or "deduce."

Methods of Teaching

When one tries to explain the strict case method of teaching to those trained only in Latin American law, one might as well be talking about a three-headed Yak. It is simply incomprehensible to them. In schools that slavishly adhere to the strict casebook system, first-year law students are expected in effect to write their own hornbooks. This resembles the "sink-or-swim" method of teaching swimming and is, in my opinion, just as defective. Supposedly, it teaches one "to think like a lawyer." At best, I believe it is a terrible waste of time.

An educational system combining a casebook with a good treatise on each subject would certainly facilitate understanding and save time. One finds that practitioners who teach law in the United States tend to use such a method, adding their own practical experience to leaven the concoction. Cases and actual experience are most useful in fixing principles in the minds of students.

Looking toward legal education in Latin America, one would assume that students would receive a large measure of the practical, since their professors are, by and large, part-time practicing lawyers. Tradition, however, is hard to break, and Latin American professors continue to lecture as they have been doing for centuries, only infrequently discussing cases and legal problems which they may have actually worked on themselves.

United States Curricula

One of the most serious defects in the curricula of most law schools in the United States is the failure to provide courses in Roman or civil

10. The nineteen volumes published by the International and Comparative Law Center of the Foundation contain many articles on Latin American law, some of which discuss the differences in our two systems of law.

law. This is a particular handicap for students who wish to practice international private law.

English lawyers are in a much better position to understand civil law and its lawyers than we are, because Roman law is still taught in England. One cannot advocate the teaching of Justinian's *Corpus Juris* or Gaius' *Institutes*, but a basic course in Roman law would help all to understand the civil law and the reasoning of its lawyers, who must study Roman law for as long as four years. Since so much of our own commercial law came from Roman law through England,[11] we could well afford to spend some time learning about a system of law which governs most of the countries of the world.

It is interesting to note that our own Uniform Commercial Code draws as much from basic Roman law as it does from common law. In fact, it could be adopted by most civil law countries in its present form without doing violence to their organic laws. A few countries have copied parts of the Uniform Commercial Code, most notably, the section on banking law.

Dean Roscoe Pound believed that the essential difference between civil and common law is not one of substance, but of method.[12] There is much truth to this observation, and possibly the main point of this article is to show that when one is working with a civilian, and attempting to solve legal problems, methods of thinking are all-important. In casting aside the deductive-inductive argument, Lawson seems to arrive at the conclusion that civil lawyers have orderly, conceptualistic minds, while common lawyers are more inclined to use a half-known outline as soon as they think it may perform the actual task at hand.[13] Our need for "action" may account for this difference.

RECOGNIZING THE DIFFERENCES

In my opinion, our Latin American brethren are more aware of the differences in approach than we are; I believe that this is true because they do study Roman law and are more knowledgeable about history. We could overcome our deficiency by studying civil law in depth, but few of us will have such an opportunity. As previously pointed out, study of Roman law would furnish some of the keys, and I would certainly advocate such study for any student planning to practice international private law. Much of the failure of communication between lawyers internationally arises from the use of words and

11. F.H. LAWSON, *supra* note 3, at 72-75.
12. *Id.* at 45.
13. *Id.* at 66-69.

phrases which have different meanings in the two systems of law. It is beyond the scope of this article to undertake any comprehensive treatment of the institutions behind the words, but perhaps brief comment on a few would be illustrative of the problem. The following areas of civil law are presented only to illustrate basic subjects in which difficulties in communication may arise.

Real Property Law

In Roman law, ownership of real property was absolute. Hohfeld's "bundle of sticks" description of English real property rights had no place in Roman law, because there the concept of estates did not exist. In a sense, registration of title to real property in Latin America follows the Torrens system, but the analogy is not complete. Roman law treats the leasing of land under the concept of hire. Some countries still follow the theory that a lease confers no interest in the property, but the law will vary in Latin America depending on whether it came down directly from the Napoleonic system or through Spain. Also, the ownership of real property is subject to the sometimes vague concept of "social function," so in this sense, title can never be absolute.

Contracts

You will find no civilian struggling with Williston's definition of consideration. The civil law does have its *causa* (which has given birth to law review articles equating the two). They are related but not the same. Civil law is more formal, and contracts are usually reduced to writing. In fact, some types must be made before a notary or protocolized and sometimes registered. With respect to consideration, the civil law simply assumes that if the parties went to the trouble to enter into a formal contract, mutuality must have been present. Grounds for rescission may exist in the case of *lesión enorme*. The law of obligations, the Commercial Code and general mercantile law will govern contracts.[14]

Equity

Equity law, in the sense that we use the term, does not exist in civil law. This seems strange, considering the influence that canon law has

14. Keesee, *The Civil Law Enforcement of Contractual Covenants*, 12 LAW. AM. 273 (1980). The article is much more comprehensive than the title might indicate. The author reviews a number of basic concepts of Costa Rican law, as well as a few possible defects. The article contains a lot of substance.

always had in Latin America. Specific performance is virtually unknown, since monetary damages are assumed to be an adequate remedy. If your Latin colleague advises you that *embargo* is the same as our attachment, question him further. Some trust law has been developed in countries such as Mexico, Panama and Venezuela, but the true concepts of Anglo-American trust law are far from understood even in those countries.[15]

COURTS AND LITIGATION

We common lawyers solve many of our problems in the rough and tumble of the courtroom where "facts" and the applicable law we prepare before trial may change suddenly. The civilian faces no such problem. In the great majority of instances, his case is documentary. He does not have to make any hasty decisions. The facts set forth in documents of opposing witnesses and lawyers will not be subject to the rigors of cross-examination, but will be merely the subject of contradiction in one's own documents. The common lawyer drafting a contradiction in his own documents. The common lawyer drafting a contract usually tests each provision as though it were to be litigated in the future. Such a test rarely occurs to the Latin American lawyer.

Having been enmeshed in several cases involving constitutional issues in Latin America, I can vouch for the fact that there is no better education available than seeing them through the Supreme Courts. In some countries where your case is against the government, discretion is the better part of valor. In such situations, it is much better to settle your controversy out of court. Few countries have adoped our rule that allows the Supreme Court to "overrule" a legislative act and declare it unconstitutional.[16]

Very little has been written in English on the subject of court procedure in Latin America. I recommend Dr. Helen L. Clagett's

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15. Molina Pasquel, *The Mexican Fideicomiso: The Reception, Evolution and Present Status of the Common Law Trust in a Civil Law Country*, 8 COLUM. J. OF TRANSNAT'L L. 54 (1969). Dr. Molina Pasquel's article is an excellent discussion of the development of the *fideicomiso* in Mexico and elsewhere. The author himself points out some of the differences in the *fideicomiso* and our trust, so the uninitiated should not assume that they are identical.

16. Folsom, *Constitutional Development in the Countries of the Americas, Beginning with the Constitution of Philadelphia*, 9 LAW. AM. 495 (1977). The author has written, gently I hope, on the failure of constitutional development in some of the countries of Latin America. All of the constitutions contain more than adequate provisions protecting civil rights. Yet, in practice, the actual protection afforded is often illusory. Although some of the constitutions are based on ours, which has been in effect for 194 years, the average life of a Latin American constitution is only twenty years.

Administration of Justice in Latin America[17] as basic reading on this subject.

PRECEDENT

The author has argued *ad nauseam* the subject of *stare decisis* during the past forty years, and my Latin American friends must be tired of hearing me discuss it. *Stare decisis* is important, though, particularly in the field of constitutional law. Courts in Latin America have gradually begun to pay more attention to decided cases, and, notwithstanding the general rule that a court is not bound by previous decisions, few judges now will fail to heed jurisprudence coming from their highest courts.[18] One serious obstacle to the adoption of *stare decisis* is the lack of reporting in most of Latin America. More and more countries, however, are now reporting and indexing the decisions of their highest courts. Latin lawyers exposed to *Shepard's* and the computerization which is being done now in the United States are dismayed (I am too) at how complicated our system has become.

CONCLUSION[19]

It would be impossible to point out all the pitfalls one may encounter as the result of assuming that because things have the same name, they are the same. In advising clients about Latin American law, I have developed a list of six pages of items to examine. In looking it over, I find that about one-third of the items deal with institutions

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17. H.L. CLAGETT, ADMINISTRATION OF JUSTICE IN LATIN AMERICA (1952). Dr. Helen L. Clagett was Chief of the Latin American Section of the Law Library of the Library of Congress for many years. Her writings deserve the attention of anyone studying Latin American Law.

18. Furnish, *Court and Statute Law in Peru*, 28 AM. J. COMP. L. 487 (1980); MacLean U., *Judicial Reasoning and Social Reality in Peru*, 28 AM. J. COMP. L. 489 (1980). Professor Furnish comments on the recent attempt in Peru to relax the rigidity of applying codes and statutes. Peruvian Supreme Court Justice MacLean supported a new constitutional provision reading, "When it finds, in a case submitted for hearing, that the situation is essentially different from that contemplated by the law which would be formally applicable, [the Supreme Court] may reach a different solution upon unanimous vote of the members of the respective chamber." Furnish, *supra* note 18, at 488. The proposal was attacked and defeated on the ground that it would permit judges to make law. The article points out that Mexico, Argentina and Brazil have moved in the direction of common law flexibility.

19. Suggested supplemental readings: C. MORRIS, HOW LAWYERS THINK (1937); H.E. YNTEMA, THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS (1951); Parker School of Foreign and Comparative Law's series of PRIVATE INTERNATIONAL LAW STUDIES such as P.J. EDER, AMERICAN-COLOMBIAN PRIVATE INTERNATIONAL LAW (1956).

which bear the same name but differ to varying degrees in our two legal systems.

I hope that the observations in this article will not offend my many friends in this hemisphere, and that the article may contribute to an improved perception of why we think as we do. Sound legal systems provide the best framework for maintenance of justice, peace and understanding in the world. We lawyers have a sacred trust to see that they are preserved.