

THE U.S. AMERICAN LEGAL SYSTEM AND ITS IMPACT ON PERUVIAN ADMINISTRATIVE LAW

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Abstract

This paper deals with the main consequences and the impact of the most essential principles of the American legal system on Peruvian administrative law.

It is divided into two main sections: the introduction, in which I describe the most important things to know about the relationship between the two countries and their legal systems, and the practical effects of having studied Law at the University of Pittsburgh School of Law (Pitt Law), and how this is seen from a developing country's perspective.

Then, I describe the influence of the American legal system from a philosophical and, at the same time, pragmatic point of view establishing three principal aspects which I consider the strongest when referring to features of U.S. legal principles: *From Deductive to Inductive Reasoning, Legal Pragmatism, and Case Law and its usefulness.*

I will demonstrate these that three aspects have had a clear impact on Peruvian public institutions and private universities where I have had the opportunity to work and teach. I conclude that, using U.S. legal tools, it is possible to change or adapt some peculiar elements of Peruvian public administration without changing the core principles or the regulations that support it.

I. INTRODUCTION

After having studied, during the period of 2000-2001, at the University of Pittsburgh School of Law, many courses related to the ways in which American reasoning and philosophy has influenced the law, I considered how this training would be useful for my work as a Peruvian attorney and a prospective law teacher.

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I did not recognize, at that moment, the different consequences that it would have in my profession and the changes it would provoke at my work places. Even more, I remember that my friends used to frequently question why I had decided to come back from the U.S. in 2002, when almost every young professional who comes from an underdeveloped country,¹ like Peru,² would happily remain in the U.S. to live and work.

A few months after I had returned from my U.S. law experience, both my master's education (LL.M.) and the practical training I received in Pittsburgh, PA, and in Fairfax, VA, I had the chance to enter into the Peruvian administrative bureaucracy, specifically at the Peruvian Federal Emergency Management Agency (FEMA)³ in September of 2002 and then the National Fund for the Financing of State Owned Enterprises (FONAFE)⁴ in July of 2005. At both places I worked as a legal consultant, and therefore, as a public officer.⁵

In the past year, I have also been given the opportunity to start teaching some courses related with administrative law at two Peruvian universities, the University of Lima⁶ and the University of Piura.⁷ In both activities, I have applied what I learned at Pitt Law in several ways that have changed somehow the usual procedures of Peruvian administrative law.

II. ANALYSIS

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1. Or you can call it, also, developing country, it depends on the "politically correct" use of the term.
 2. Perú, its original spanish name, is located in South America, its limits are with Ecuador, Colombia, Brasil, Bolivia and Chile. Currently it has a population of 26 million people living there, which nearly 50% of them earn less than two dollars per day. Nevertheless, its Gross Domestic Product has growth almost 6% during the last three years. These facts can be easily obtained from: www.inei.gob.pe.
 3. The original name, in spanish, of that institution is: Instituto Nacional de Defensa Civil (INDECI).
 4. "Fondo Nacional de Financiamiento de la Actividad Empresarial del Estado," in its original spanish name. For more information about its functions and structure see, www.fonafe.gob.pe. Also, you can find what the World Bank has researched about this peruvian institution and its role, at the following link: [http://www.ifc.org/ifcext/economics.nsf/AttachmentsByTitle/peru_assessment_english/\\$FILE/PERU+assessment+in+english.pdf](http://www.ifc.org/ifcext/economics.nsf/AttachmentsByTitle/peru_assessment_english/$FILE/PERU+assessment+in+english.pdf).
 5. Public officer is defined by peruvian laws as the person who works for the Government, represents it, and is connected with it by any means, could be a public election, a designation, a public contest, or any kind of labor contract or a service one. See *Ley Marco del Empleo Público, Ley No. 28715* at www.congreso.gob.pe.
 6. Universidad de Lima, in its original spanish name.
 7. Universidad de Piura, in its original spanish name.

When I received Professor Brand's invitation to prepare a paper about the relationship between my U.S. and Peruvian legal experiences, I began to consider the huge impact of the time I spend at Pitt Law on two different but somehow connected fields: teaching and practicing administrative law as a public officer.

I've tried to summarize this impact, into what I consider its three main aspects: From Deductive to Inductive Reasoning, Legal Pragmatism, and Case Law and its Usefulness.

A. From Deductive to Inductive Reasoning

In this part, I explore the differences between legal reasoning in civil law countries and in common law ones, and how we can take the best aspects of both to start teaching in unusual ways.

As you might know, teaching experiences in civil law countries are specifically geared towards a deductive reasoning methodology.⁸ Students start learning the basic principles of law, its sources, the Constitution, statutes, and regulations. Students are then trained to apply what they have learned into resolving practical situations or specific cases.

Based on this teaching method, exams at Peruvian universities usually consist of a series of questions evaluating a student's ability to memorize legal principles or rules of law. In other instances, students are asked to describe and comment on the legal definition of a term contained within a statute.

Some example questions from this teaching approach that are often found in a law exam at a Peruvian university, specifically in the administrative law area include:

- *Describe which are the main sources of Peruvian Administrative Law*
- *Why is a public contract different from a private one?*

8. Deductive reasoning is a way of thinking that starts from the universal in order to reach particular conclusions. In Philosophy, it has its beginning with the writings of Descartes and it is developed by such names as Leibnitz, Malebranche and Spinoza. It has a powerful transformation with Kant and the later Hegel and Fichte.

- *Name at least five general principles of administrative law procedures*
- *Talk about public utilities and their relationship with the State*
- *Name the main components of regional and local governments*

Since I have begun teaching, the tests I have designed for my students are clearly different from these examples, reflecting the difference in my teaching methods. In the classroom, I have presented the students with practical legal experiences; fictional and non-fictional situations that require them to start from a particular point of view and reach towards a universal one.

My education at Pitt Law gave me a sense that inductive reasoning is one of the main features of American legal teaching methods. One could clearly see this teaching method when professors conducted their classes by discussing particular situations or judicial decisions related with the topic of the day and then asking the classroom about their opinions concerning that situation, in order to reach a common conclusion. This method has proven to be a real challenge for lawyers who come from legal systems that use a different style of reasoning, such as the Peruvian one.

It has been interesting for both my students and myself to experience this different and new kind of approach to legal education and the way in which we can examine legal problems. This method has had an impact on the students at the two universities where I teach and myself, and can be seen in the different paths and approaches to legal education I have taken as a law professor.

One significant impact can be found in the tests I have designed for my students. These have consisted mainly of two or three practical cases that students must solve using the tools learned throughout the course.

There was never a unique or perfect answer, as is normal in deductive reasoning tests and so inductive reasoning proved to be an interesting experience for these “soon to be” lawyers. The training will benefit them greatly, however, as most of the time they will not find perfect or unique answers for the issues they will have to deal with in their professional lives. The following is an example of a question that could appear on one of my exams.

A) In the regional government of “Uranus” there is an authority, called Regional President, who has the power to execute some legal faculties related with the economy and the region’s cultural development. One day, he decided to start executing them through the use of a legal instrument called “ordenanza” which has, in the region of Uranus, the same hierarchy as a statute given by the congress. But, in this “ordenanza” he regulates not only Uranus’ territory but also one who is closest to it. At the same time this

legal tool opposes directly to a Peruvian statute, and to some parts of the Peruvian Constitution.

As his legal counsel, what advice would you offer to Uranus' Regional President?

B) A citizen wants to start a business in the city of "Andromeda" and he needs a license in order to operate it, which can only be obtained asking for it at Andromeda's city council. This institution has to publish the requirements you need to fulfil in order to get the license in a document called TUPA.⁹

When the citizen approaches the City Council, he is obliged to pay one hundred dollars for the license, notwithstanding that no publication was ever made concerning the requirements or costs to obtain that license.

Citing some legal cases that were decided by the Peruvian Constitutional Tribunal, try to figure out what to do if you were that citizen.

Students at both universities developed a new way to resolve tests and began to think with a combination of deductive and inductive reasoning and seemed happier with this method than the traditional one. Even more, inductive reasoning helped them to use their intelligence in ways that later were useful to them when they were practicing at a legal firm or working for a public agency.

Also, in my particular experience as the author of the work called "Regional Law: Essential Regulations of Peruvian Decentralization Process,"¹⁰ which I published last year, I used inductive reasoning methods in order to discover a new classification of the countries concerning the ways in which they are decentralized. Thus, I started looking at practical experiences, such as the case of United Kingdom or Chile, countries that do not seem to fit in any of the traditional classifications used in legal decentralization theories. From there, I tried to discern what elements make these countries different from others, and so I continued researching many other countries and, in that way, reached a possible new classification system for this topic.¹¹

At the end, I would say that a mixture of both methods is the closest one can get to creating a perfect legal education experience in Peru, as in some situations you will find more useful to guide your students through a deductive

9. "Texto Único de Procedimientos Administrativos," in its spanish original name.

10. "Derecho Regional: Normatividad Esencial del proceso de Descentralización Peruano," in its original spanish name.

11. You can see clearly that in the Third Chapter of the book previously mentioned.

reasoning method (for the specific construction of our legal foundations), but in other cases, inductive reasoning can certainly make them think from a different perspective, discovering that in law the most important concept is to apprehend the concrete aspects of the case, the specifics of the situation to be a good lawyer,¹² and not only learning the statutes, legal terms, and regulations by memory.

B. Legal Pragmatism

At this point, I will talk about the influence of legal pragmatism in the development of modern Peruvian public administration. I would define legal pragmatism as a way of thinking and acting that allows us to overcome difficulties with a spirit of reaching some concrete legal, political or economic goal in a very short period of time.

12. See AGUSTIN GORDILLO, AN INTRODUCTION TO LAW 31-38 (2003) where the author analyzes this idea with extreme clarity.

Pragmatism is defined as a practice that fully resembles the phenomenon of indeterminacy.¹³ Attention to empirical evidence is a necessary condition of legal pragmatism. In that sense, “there is an emphasis upon post-hoc evaluation of the validity of an idea or principle in terms of the consequences it produces and ethical judgments derive from an objective, problematic situation that indicates an objective need to the observer.”¹⁴ As Rorty said, clarifying this concept, “we should cease trying to ground our web of beliefs and values in anything other than pragmatic corrigibility. All disciplines have equal value, contributing to different aspects of human life.”¹⁵

A pragmatic approach to public administration issues will try to resolve, in the fastest possible way, the peculiarities of the specific situation presented to the officer without serious questioning about the rigid methods used or about the values that must be applied. Therefore, this method arguably has material advantages over other techniques used in daily public law conflicts.

This attitude is very important when we deal with bureaucracy issues. It is common in civil law countries that in the public administration field, almost every officer works very slowly and with a ‘complex and extremely careful’ way of acting. This is due to the many controls and rules that the executive power has in civil law countries for the management of public resources, which can cause delay and stops the public officer’s intentions of putting into practice many good ideas.

Since I began to work as a public officer, I have tried to apply a “legal pragmatism” point of view, searching for good results instead of only complying with formal procedures, and acting as fast as the regulations allow me, trying to fill the gaps found in the statutes with clever strategies. I think that this legal pragmatism has helped me to deal with very difficult situations when most of my fellows did not know what to do.

I want to emphasize that mechanisms of control for public administration activities in Latin American countries are very strict. They have a great impact on the conduct of public officers in most situations since any departure from

13. I understand the term “pragmatism” as “an attitude whose common denominator is a future oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action,” *see* WILLIAM JAMES, PRAGMATISM 26-38 (1907).

14. GARY J. JACOBSON, PRAGMATISM, STATESMANSHIP, AND THE SUPREME COURT 102-03 (1977).

15. RICHARD RORTY, CONTINGENCY, IRONY AND SOLIDARITY 51-93 (1988).

the literal text of the statutes or the exact reading of the regulations will likely result in accusations of administrative fault.

Thus, any ideas for reforming public administration in Peru, and most Latin American countries and any attempts to apply these ideas and try to change the formalistic procedures of our public law, carries the risk of being accused of administrative fault and possibly contractual and criminal violations as well. Therefore, pragmatism in public administration is a very difficult thing to practice in civil law countries, as the regulations are very rigid, and “administration by results” is a difficult concept to accept by public officers in this reality.

Administration by results is defined as the one that allows you to perform your duties and responsibilities according to the good results that these decisions lead to, and not only according to procedures or extreme complexities. From my particular point of view, in the specific case of state owned enterprises, legal pragmatism must be used in a lot of different situations because of the nature of these institutions, created to operate as enterprises, with commercial goals to fulfil and, at the same time, controlled by public regulations. In my daily duties as an attorney for FONAFE, I try to show the many different legal roads that can be taken by my bosses to reach their policies' fulfilment in different ways than the traditional ones and at a faster rate. A lot of compromise and a practical way of thinking is required to understand these actions, but in the end they prove to be more effective than the rigid and extremely ordered traditional methods.

As a specific result of this legal pragmatism learned in the U.S., I co-designed and am currently promoting a new statute for the state owned enterprises in Perú, which includes a lot of this legal pragmatism oriented towards the economical benefits that these companies can obtain by rewarding the ones who have the best corporate governance practices and ethical behaviour with less regulations and more freedom to operate, and punishing the bad ones with more regulations and a more strict control of their activities.

C. Case Law and its Usefulness

In this section, I will talk about the use of case law in civil law public administration, as well as in the classroom. Case law helps to interpret civil law statutes in modern and fascinating ways. Every text needs to be interpreted, because of the weakness and, at the same time complexity, of

common words.¹⁶ Interpretations are judged by their ability to make people understand the meaning of their object, and so “they should be supported by constitutive reasons, which show how they do so.”¹⁷ According to Habermas, a correct interpretation “fits, suits, or explicates the meaning of the interpretandum, that which the interpreter is to understand.”¹⁸

If we translate these general ideas about interpretation to the legal arena, a good start could be the expression of Thomas Hobbes, who, in 1651, maintained that: “[A]ll laws, written, and unwritten have need of interpretation.”¹⁹ Indeed, interpretation is essential to our legal practices.²⁰ The

16. As Fiss said, “Interpretation is defined as the process by which the meaning of a text is understood and expressed, and the acts of understanding and expression necessarily entail strong personal elements. The interpreter is not free to assign any meaning he wishes to the text. He is disciplined by a set of rules that specify the relevance and weight to be assigned to the material as well as by those that define basic concepts and that established the procedural circumstances under which the interpretation must occur.” Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982).

17. Joseph Raz, *Why Interpret?* 9 RATIO JURIS 351-55 (1996).

18. JÜRGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* 27 (Christian Lenhardt & Shierry Weber Nichol森 trans., 1996). The German philosopher affirms that understanding what is said requires participation and not merely observation. In this sense, “the interpreter does not have to give meaning to the thing he observes; rather, he has to explicate the given meaning of objectivations that can be understood only from within the context of communication processes.”

19. THOMAS HOBBS, *LEVIATHAN* 205 (Michael Orkeshott ed., 1962).

20. The concept of “translation” is also recurrent to the legal activity, especially when we deal with written texts. In this way, law becomes a discourse that interacts among virtually all the discourses of our world, being the ultimate translation into the ordinary language of the citizen. The law in this particular concept constitutes “a method of cultural criticism and cultural transformation, as well as cultural preservation.” For a more detailed analysis of this thesis, see JAMES BOYD WHITE, *JUSTICE AS*

necessity of interpretation in the legal field is strongly connected with administrative law, because of the need for acceptable reasons to justify the administrative decisions rendered.

From the comparative perspective, there is a slight difference between the civil law systems and the common law concerning the necessity of interpretation. Because of the certainly more *a priori* nature and systematic thoroughness of the codified system of law, legal interpretations based upon it tend to have some continuity and predictability. On the other hand, “what strongly commends the common law approach to legal interpretation is its ability to arrive at just and principled decisions in a manner that—unlike the more abstract and deductive system of codified law—does not force the human subject or the problems requiring litigation into a rigid and pre-established mold of disembodied and sometimes doctrinaire logical and legal categories.”²¹

It is an undisputed fact that civil law thinking about the legal system assigns the courts a restricted role in lawmaking. In fact, in contrast to common law systems, limitations upon the scope of the judicial activity are essential to the validity of the lawmaking process in civil law systems.²² There are many historical and philosophical factors related with this issue, which will be not discussed due to the more specific topic of the present work, but I can summarize all of them in the system’s thinking about the judicial process.

The more mechanical a system’s conception of the judicial function, the more restricted is its idea of this function and of the propriety of judicial lawmaking.²³ This is particularly true in the civil law system where the essentially dogmatic and positivist legal education, the abstract and extremely

21. WALTER B. MEAD, *THE UNITED STATES CONSTITUTION, PERSONALITIES, PRINCIPLES, AND ISSUES* 172-73 (1987).

22. See ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM* 1142 (1996).

23. There are many reasons, which explain this “anti-judiciary” tradition. If we take the case of France, logical explanations of this idea will be found in the unlimited trust in the Rousseau’s doctrine of the general will, the works of Montesquieu and his poor conception of the judicial Branch, the necessity to control the executive acts more than the acts of Congress, and the existence of the *referé législatif* (a special legal institution which consisted in the remanding to the legislative power the last decision in cases concerning the interpretation of “dark parts” of a statute).

formal judicial opinions, and the fact that the judiciary belongs to the general bureaucracy of the State, encourage judges to conceive of their function as a restricted and limited one. In contrast, an American judge is usually encouraged and stimulated to leave his mark on the law, because of, among other reasons, the doctrine of *stare decisis*, the power of judicial review, the independence of the judicial branch, and the long and detailed form of American judicial opinions.

Additionally, in opposition to the common law system, civil law does not usually work with precedents;²⁴ previous decisions of a court do not have binding authority in the latter system. In that sense, administrative law in civil law countries is not connected with the use of the *stare decisis* doctrine, as is the case in the United States.²⁵

The principle of *stare decisis* plays an undeniably binding role in American administrative law interpretation, as part of its common law approach. Because of this, while applying case law to my daily duties, one of the very first things I did when I began to work for the National Fund for the Financing of State Owned Enterprises was to make a summary of all the cases that were researched by various law firms' briefs. I called this paper "FONAFE legal issues" and it was extremely helpful for my performance at that job. The document consisted of a list of all the main issues that well-known attorneys have treated and researched in the briefs that made during the last three years for FONAFE, and specific questions related with concrete cases. I knew that I could relate the cases that were handed to me in the present time to these previous ones, using the "legal issues" and solve them in very similar ways like a "stare decisis" kind of situation. This document is now used by every new employee who enters to FONAFE's legal area.

In the same way, as a professor, I try to teach my classes using a lot of practical examples, cases, and decisions, most from the Peruvian Constitutional Tribunal. This court has had an impact on the traditional way in which the administrative law is studied in civil law countries, because with its decisions it has changed many old concepts and regulations, and so it is

24. There are some exceptions to this general rule, like the concept of *doctrina jurisprudencial* in Latin American countries, an idea borrowed from the Italian legal system, which means that two or more consistent decisions of the Supreme Court in especial constitutional cases must be applied in the same way by the lower courts. However, the doctrine of *stare decisis* does not represent what the civil law courts usually do in their daily activity.

25. However, as MacCormick says, "[T]he authority ascribed to precedents is a reason to decide a case, but it is not a definitive reason, not even a good reason." Neil MacCormick, *Legal Reasoning and Practical Reason*, 8 MIDWEST STUDIES IN PHILOSOPHY 276 (1982).

extremely important for the students to be informed about them, as would be the case with an American law student concerning the U.S. Supreme Court's decisions.

As far as I can see, case law proved to be a fast and handy tool for public administration both at my working and teaching experiences and this is clearly a contribution from the American legal system to the Peruvian Administrative Law, one that I could trace back from the time I spent researching hundreds of cases during the months I was an LL.M. student at Pitt Law.

Now, as a co-founder of the Development and Decentralization Institute,²⁶ a company which deals with decentralization issues, and provides legal and financial counselling to the regional and local governments in Perú, I can firmly say that inductive reasoning, legal pragmatism and case law are three main features of the services we provided, as a group of people who think that public administration could be developed in better and faster ways.

As a general conclusion, I might say that it would be very helpful that the three aspects I've identified and described in the present document could be researched in deeper ways, and maybe we can try to explore how other countries similar to mine can use them, and in that direction we can start changing the traditional Latin American style of administrative law for the betterment of their societies and the public interest that concerns them.

26. Instituto Desarrollo y Descentralización, in its original spanish name. You can find more information about this institution at the following link: www.grupoidd.org.

