

DAMNUM INIURIA DATUM AND THE LAW OF TORTS: FROM
CASES TO RULES

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THE CONTRIBUTION OF THE LL.M. EXPERIENCE TO MY UNDERSTANDING OF
ROMAN LAW SOURCES

As a researcher in the field of Roman law, my main object of study is represented by the Justinian's Digest.¹ The LL.M. experience has strongly contributed to my understanding of the proper perspective with which the material contained in the Digest is to be examined. For now, I can anticipate that the favorite dimension of Roman lawyers is the rule, not the case from beginning to end. Ancient Roman lawyers cared more for the setting than for the solution of disputes. To them, the case ends when the standard to be followed is clear. From then on it will only be a matter of balanced arbitration, a place where, in their view, the law has little to say.

The perception that the Digest is very similar to the Italian Civil Code is not widely shared. On the contrary, the most common perception is that the Code contains only rules and concepts, whereas the Digest also contains cases. I argue instead that the Digest and the Code are closer than they appear at first glance. In fact, they are similar in that their content had been eradicated from the original background. In both cases only the "brief descriptions" remain.

A SEMINAR AT THE UNIVERSITY OF TRENTO

In order to set my observations on solid ground, let me use an example and describe what happened when I was recently asked to prepare a seminar that had to be held in the frame of a class dedicated to the study of a Roman Tort called "*damnum iniuria datum*."² The seminar had to have a practical

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1. The Digest (*Digesta* or *Pandectae*) is an anthology of writings of ancient jurists (mostly dating back to the second and third centuries B.C.) that was completed in the year 533 BC by a committee of lawyers appointed by the emperor Justinian.

2. *Damnum iniuria datum* ensues from a *plebiscite* (*lex Aquilia*, named after the tribune *Aquilius* who presented the text to the *concilia plebis*) of uncertain age (most commonly dated in the third century

approach. It was supposed to be a training session, so that the students could have a direct experience of the issues of tortious liability. The different approach was intended to differentiate the seminar from a course taught in the traditional way (that mainly consisted in the reading and comment of the Title³ on *lex Aquilia*).

The task was not as simple as it may seem. I had in mind a clear idea of what I wanted to do. I had experienced it many years ago, during my LL.M. education at the University of Pittsburgh School of Law (Pitt Law), where all of my lessons were based on real problems that were discussed in collaboration with the students. As I put myself to work on preparing the lessons, however, I realized that the legal material available on the topic did not constitute a sufficient basis on which one could organize a genuine debate on pragmatic issues. The qualification of Roman law as “case based” is, nevertheless, commonly maintained. This led me to question why I was unable to obtain the necessary subject material to use in a more discussion-oriented environment.

THE NATURE OF THE AVAILABLE SOURCES OF ROMAN LAW

Ancient Roman lawyers in their writings do often make reference to fact patterns (that prompted the need for a legal opinion or that are reported as an essential background to some explanation) and to potential legal arguments, however, it is very rare to find something that resembles a “real” case. Let me present five examples of the legal writings on *damnum iniuria datum*.

BC) that mainly tackled the issue of quantifying the amount of damages that were to be awarded to whom suffered harm as a consequence of the killing of a slave or of a domestic animal or as a consequence of the destruction of a thing. The punishable conducts were four: the killing, the burning, the shattering, the breaking (*occidere, urere, frangere, rumpere*). For example, the first chapter of the law provides as follows: “If anyone kills unjustly (*iniuria*) a slave or female slave belonging to someone else or a four-footed beast of the class of cattle, let him be condemned to pay the owner the highest market value that the property had attained in the preceding year.” The monetary sum due to the owner was regarded as a punishment (the *lex Aquilia* constitutes an example of penal private law) and the wrongdoer could be sued under the *lex Aquilia* even if his conduct was unintentional.

3. The main source of Roman law is represented by the writings contained in the Digest. The Digest is sub-divided in books (50), titles, fragments and paragraphs (the material regarding specifically the *lex Aquilia* is contained in the fragments of the second title of the ninth book: D.9.2). I cannot in this context indulge in describing the different theories that try to explain the order followed by the Justinian's committee in distributing the fragments inside the Digest. It would be sufficient to say that the fragments do not follow a precise logical path (on the contrary, most of the time the sequence jumps from an issue to another) and that each fragment keeps a heading that tells the reader the name of the author and the title of the ancient book from which it was extracted by the Justinian committee.

A)

We must here not take “iniuria” as meaning some sort of offence, as it indicates in the action for affront, but as indicating something done not accordingly to what is put forward by the law, or as indicating something done against the law, that is, when someone kills with fault. Sometimes the action under the *lex Aquilia* and the action for affront concur, and in such a case there will be two assessed heads of damages, one for wrongful harm and one for affront. Therefore, we interpret *iniuria* for present purposes, as including damage caused in a blameworthy fashion, even by one who did not intend to do harm.⁴

Ulpian is trying to clarify the meaning of the adverb “*iniuria*” (roughly translated with “unjustly”) with which the text of the law connotes the action of the wrongdoer. With a text like this it would be possible to indulge in a discussion with the students focused on the interpretation of three potential different delicate nuances of the concept of *iniuria* (*non iure* = “not in accordance with a statute,” *contra ius* = “against the law,” *culpa* = “negligently”). This is what is normally done during traditional Roman law classes, but that is exactly the kind of work that I was not supposed to do in my seminar.

B)

The excerpts of the writings of the ancient lawyers can also be less abstract. The question is asked whether there is an action under the *lex Aquilia* if a mentally impaired person causes damage. Pegasus says there is not; for he asks how there can be any accountable fault in him who is out of his mind; and he is undoubtedly right. Therefore, the Aquilian action will fail in such a case, just as it fails if an animal has caused damage or if a tile has fallen; and the same must be said if an infant has caused damage, though Labeo says that if the child were over seven years of age, he could be liable under the *lex Aquilia* in just the same way as he could be liable for theft. I think this is correct, provided the child was capable of *iniuria*.⁵

4. In this excerpt, like in all others, I follow, with some variation, the translation edited by Alan Watson, *The Digest of Justinian*, University of Pennsylvania Press, 1998. Ulp. 18 *ad ed.* D.9.2.5.1: *Iniuriam autem hic accipere nos oportet non quemadmodum circa iniuriarum actionem contumeliam quandam, sed quod non iure factum est, hoc est contra ius, id est si culpa quis occiderit: et ideo interdum utraque actio concurrit et legis aquiliae et iniuriarum, sed duae erunt aestimationes, alia damni, alia contumeliae. igitur iniuriam hic damnum accipiemus culpa datum etiam ab eo, qui nocere noluit.*

5. Ulp. 18 *ad ed.* D.9.2.5.2: *Et ideo quaerimus, si furiosus damnum dederit, an legis aquiliae actio sit? et Pegasus negavit: quae enim in eo culpa sit, cum suae mentis non sit? et hoc est verissimum. cessabit igitur aquiliae actio, quemadmodum, si quadrupes damnum dederit, aquilia cessat, aut si tegula ceciderit. sed et si infans damnum dederit, idem erit dicendum. quodsi impubes id fecerit, labeo ait, quia furti tenetur, teneri et aquilia eum: et hoc puto verum, si sit iam iniuriae capax.*

Here, the narration contains references to factual circumstances. The jurist is asked whether or not there is a cause of action under the *lex Aquilia*, and the problem of subjective liability is investigated through a potential analogy between mentally impaired persons, animals and tiles blown off by the wind. The analysis culminates with the rule that even a child can be considered liable when he is over seven years of age and provided that he is capable of *iniuria*. This rule, in addition, depends once more on the unclear concept of *iniuria*. In fact, the reader is eventually left with a concept that is difficult to clarify. How can a child be *iniuriae capax*?

C)

“If a teacher kills or wounds a slave during a lesson, is he liable under the *lex Aquilia* for having done unlawful damage? Julian writes that a man who had put out a pupil’s eye in the course of instruction was held liable under the *lex Aquilia*. There is all the more reason, therefore, for saying the same if he kills him. Julian also puts this case: a shoemaker, he says, struck with a last at the neck of a boy (a freeborn youngster) who was learning under him, because he had done badly what he had been teaching him, with the result that the boy’s eye was knocked out. On such facts, says Julian, the action for affront does not lie because he struck him not with intent to make an affront, but in order to correct and teach him; he wonders whether there is an action for breach of the contract for his services as a teacher, since a teacher only has the right to administer reasonable chastisement, but I have no doubt that action can be brought against him under the *lex Aquilia*.” In the following paragraph the jurist Paul adds on the point that “in fact, excessive brutality on the part of the teacher is blame-worthy.”⁶

Here, Ulpian examines the issue of the potential “not unjust” nature of the harm in a manner that is quite tangible; he recalls a case described by Julian where a shoemaker strikes a young apprentice in the neck. The global analysis is a mix of facts and authoritative assertions, but the arguments presented by the opposing parties and, most of all, the exact set of facts that prompted the dispute of the shoemaker solved by Julian, are not available. What had the pupil done to anger the master? What exactly did the master do? Did the pupil’s father challenge the defense of the teacher? We cannot ask these questions because Julian’s case is described by Ulpian only to support the

6. Ulp. 18 ad ed. D.9.2.5.3: *Si magister in disciplina vulneraverit servum vel occiderit, an aquilia teneatur, quasi damnum iniuria dederit? et Iulianus scribit aquilia teneri eum, qui eluscaverat discipulum in disciplina: multo magis igitur in occiso idem erit dicendum. proponitur autem apud eum species talis: sutor, inquit, puero discenti ingenuo filio familias, parum bene facienti quod demonstraverit, forma calcei cervicem percussit, ut oculus puero perfunderetur. dicit igitur Iulianus iniuriarum quidem actionem non competere, quia non faciendae iniuriae causa percusserit, sed monendi et docendi causa: an ex locato, dubitat, quia levis dumtaxat castigatio concessa est docenti: sed lege aquilia posse agi non dubito. Paul. 22 ad ed. D.9.2.6 pr.: Praeceptoris enim nimia saevitia culpae adsignatur.*

opinion that the presence of a specific defense (right to castigate) leaves nonetheless room for a cause of action.

D)

Mela writes that some people were playing with a ball. One of them hit it vehemently and it knocked the hands of a barber with the result that the throat of a slave whom the barber was shaving was cut by the jerking of the razor. Whoever is at fault (*culpa*) has to answer under the *lex Aquilia* action. Proculus says the *culpa* is the barber's, and surely, if he was doing shaving in a place where people customarily played games or where there was much going to and fro, the blame will be imputed to him; but it is no bad point in reply that if someone entrusts himself to a barber who has his chair in a dangerous place he has only himself to blame for his own misfortune.⁷

The analysis of Ulpian this time offers an example of two potential opposing arguments: the owner of the slave blames the barber for the choosing of the work-place; the barber replies that the slave was well aware of the danger. These opposing arguments are, as I said, hypothetical. Was it the slave who asked the barber to shave him there because he wanted to look at the game? Was the game conducted in a place customarily used to play with a ball? Could the player who kicked the ball be blamed as well for having given an improper kick? A thorough discussion on all the implications of the dispute is once more precluded.

E)

Finally, in order to fully appreciate the rule-oriented nature of the cases contained in the Digest, consider the following that is one of the most notorious.

Some mules were pulling two loaded carts up the Capitoline hill. The front cart had tipped up, so the drivers were trying to lift the back to make it easier for the mules to pull it up the hill, but suddenly it started to roll backward. The muleteers, seeing that they would be caught between the two carts, leaped out of its path, and it rolled back and struck the rear cart, which careened down the hill and run over someone's slave-boy. The owner of the boy asked me whom he should sue. I replied that it all depends on the facts of the case. If the drivers who were holding up the front cart had got out of its way of

7. Ulp. 18 *ad ed.* D.9.2.11 pr.: *Item Mela scribit, si, cum pila quidam luderent, vehementius quis pila percussa in tonsoris manus eam deiecerit et sic servi, quem tonsor habebat, gula sit praecisa adiecto cultello: in quocumque eorum culpa sit, eum lege aquilia teneri. Proculus in tonsore esse culpam: et sane si ibi tondebat, ubi ex consuetudine ludebatur vel ubi transitus frequens erat, est quod ei imputetur: quamvis nec illud male dicatur, si in loco periculoso sellam habenti tonsori se quis commiserit, ipsum de se queri debere.*

their own accord and that had been the reason why the mules could not take the weight of the cart and had been pulled back by it, in my opinion no action could be brought against the owner of the mules. The boy's owner should rather sue the men who had been holding up the cart; for a damage is imputable even when someone voluntarily lets go of something that, as a consequence, hurts someone. For example, if a man failed to restrain an ass that he was driving, he would be liable for any damage that he caused, just as if he threw a missile or anything else from his hand. But if the accident that we are considering had occurred because the mules had shied at something and the drivers had left the cart for fear of being crushed, no action would lie against them; but in such a case, action should be brought against the owner of the mules. On the other hand, if neither the mules nor the drivers were at fault, as, for example, if the mules just could not take the weight or if in trying to do so they had slipped and fallen and the cart had then rolled down the hill because the men could not hold it when it tipped up, there would be no liability on the owner or on the drivers. It is quite clear, furthermore, that however the accident happened, no action could be brought against the owner of the mules pulling the cart behind; for they fell back down the hill not through any fault of theirs, but because they were struck by the cart in front.⁸

The granularity of the description is finer than in the previous examples. Alfenus has to give an answer to this question: who should the owner of the boy sue? The central issue here is causation. The narration, still, does not tell us many essential details and Alfenus does not seem to care; in fact, the answer is given through hypothesis. The first step taken by Alfenus is really remarkable and should be regarded as a keystone of legal methodology: "it all depends on the facts of the case." Unfortunately, in the above excerpt they are not fully described and serve only as examples to better illustrate the alternatives that stem out of a long chain of events complicated by the issue of indirect causation.

8. Alf. 2 dig. D.9.2.52.2: *In clivo capitolino duo plostra onusta mulae ducebant: prioris plostri muliones conversum plostrum sublevabant, quo facile mulae ducerent: inter superius plostrum cessim ire coepit et cum muliones, qui inter duo plostra fuerunt, e medio exissent, posterius plostrum a priore percussum retro redierat et puerum cuiusdam obriverat: dominus pueri consulebat, cum quo se agere oporteret. respondi in causa ius esse positum: nam 'eam' si muliones, qui superius plostrum sustinissent, sua sponte se subduxissent et ideo factum esset, ut mulae plostrum retinere non possint atque onere ipso retraherentur, cum domino mularum nullam esse actionem, cum hominibus, qui conversum plostrum sustinissent, lege aquilia agi posse: nam nihilo minus eum damnum dare, qui quod sustineret mitteret sua voluntate, ut id aliquem feriret: veluti si quis asellum cum agitasset non retinisset, aequae si quis ex manu telum aut aliud quid immisisset, damnum iniuria daret. sed si mulae, quia aliquid reformidassent et muliones timore permoti, ne opprimerentur, plostrum reliquissent, cum hominibus actionem nullam esse, cum domino mularum esse. quod si neque mulae neque homines in causa essent, sed mulae retinere onus nequissent aut cum coniterentur lapsae concidissent et ideo plostrum cessim redisset atque hi quo conversum fuisset onus sustinere nequissent, neque cum domino mularum neque cum hominibus esse actionem. illud quidem certe, quoquo modo res se haberet, cum domino posteriorum mularum agi non posse, quoniam non sua sponte, sed percussae retro redissent.*

RULES AND CASES

I believe that a common law lawyer would immediately perceive the distance that runs between the excerpts illustrated above and the cases he is used to working with. To him the fragments contained in the Digest should, perhaps, look like “briefs,” or examples, where the facts are less important than the elaboration of a “standard.” The fragments reported above expressed many rules: there cannot be any accountable fault in whom is out of his mind; a child could be liable under the *lex Aquilia* provided that he is capable of *iniuria*; the defense is lost whenever it is disproportioned to the harm; whoever is at fault (*culpa*) has to answer under the *lex Aquilia* action; damage is imputable even when someone voluntarily lets go of something that, as a consequence, hurts someone. Now the question is can a legal solution, and a profitable debate with training lawyers, be directly derived only from rules, concepts, and definitions.

The best answer was given by the Roman jurist Paulus, who said that “a rule is something which briefly describes how a thing is; the law may not be derived from a rule, but a rule must arise from the law as it is (*iure quod est*); by means of a rule, therefore, a brief description of things is handed down.”⁹

THE TEACHING EXPERIMENT: FROM COMMON LAW CASES TO ROMAN
LAW RULES

My firm intention, as anticipated above, was to model the seminar along the same line of teaching I had experienced in Pittsburgh. The brief descriptions were not enough. I therefore decided to begin with a discussion on common law tort cases. I chose a set of classics. I will not spend time in describing the common law cases I used, but they were some of the most traditional cases studied by first year common law students. Let me just remark on how “revolutionary” the opening of *Palsgraf*¹⁰ sounded to the ears of a student who is used to reading the traditional “conceptual case law” where the factual circumstances consist of a few neutralized details.

For the very end, I left the more theoretical analysis. Only then did I make reference to Roman law, connecting the factual problems experienced in the common law tort cases with the solutions offered by Roman lawyers. After

9. Paul. 16 *ad Plaut.* D.50.17.1: *Regula est, quae rem quae est breviter enarrat. Non ex regula ius sumatur, sed ex iure quod est regula fiat. Per regulam igitur brevis narratio traditur . . .*

10. *Palsgraf v. Long Island R. R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

Palsgraf, even the mules on Capitoline Hill could be seen in a different light and the same was for the barber's mishap. (Just to give some further examples: I introduced the case of the shoemaker apprentice with a discussion on *Tinkham*¹¹ and, with reference to the problem of minor's liability, I used *Garrat*.)¹² The students showed interest and seemed to have reached a deeper understanding of the complexity concealed underneath the apparent linearity of the Roman rules regarding *iniuria*, fault, intent, etc.

The Efficacy of the Method

The reasons for the success of the "transplant" of cases from a certain place and time to another place and very removed time are in part due to the special characteristics of the law of torts and the value of the didactic approach I experienced during my LL.M. education at Pitt Law. The law of torts is a legal field in which the dynamics are less susceptible to being disciplined in detail: it is an area where logic takes precedence over legislative authority and, therefore, it is an area particularly disposed to accepting the transfer of experiences.

The value of the didactic methodology I had been introduced to through my classes at Pitt Law depends on two factors. It focuses on the correct direction through which the law develops, from cases to rules and not *vice versa*. Secondly, the completeness of the material allows an intelligent dialogue with students who are led to conclusions through questions instead of answers, the main tenet of the Socratic Method system of teaching. This technique is valuable not only for its traditional power of transmitting knowledge, but also precious because it allows the students to experience why there is no such thing as a legal solution with no possible alternative.

THE CURRENT DEBATE ON METHODOLOGY PROMPTED BY RECENT ACADEMIC REFORMS

Even those professors who do not think that law has more the character of a practice than of an intellectual activity, must concede that judicial disputes are at the core of the every day legal activity. The challenge, then, is to train students who are just beginning to learn the law in concepts and techniques that can take a lifetime to master. Confronted with this problem,

11. *Thinkham v. Kole*, 252 Iowa 1303, 110 N.W.2d 258 (Iowa 1961).

12. *Garratt v. Dailey*, 46 Wash. 2d 197, 279 P.2d 1091 (1955).

different legal education traditions have resorted to different solutions and each solution is obviously coherent with the way in which the every day activity of law is conducted.

Earlier, I said that I integrated the deficiency of the Roman law sources with common law cases. An implicit question that I did not answer at the time was if it was possible to use Italian contemporary cases. I am afraid it was not.

The Italian tradition not only descends from the study of the Roman law sources (whose preference for rules and concepts I have tried to demonstrate), but has also long been under the influence of legal positivism, characterized by a desire to replace judge-made law with legislative enacted statutes. That influence is reflected in every aspect of Italian legal life. One can follow it from the political choice that favors statutes and codes, to the books for the students (manuals) and, finally, to the content of our databases of case law. Nine out of ten are databases of “abstracts”: only the most relevant “holdings” are offered to the user. In addition, the few databases that contain “full text” judgments do not offer a thorough description of the facts and of the opposing arguments.

If I compare the two most important didactic experiences I personally made, I draw the following conclusions. All the classes I took during the LL.M. program at Pitt Law shared three fundamental characteristics. First, the main didactic tool in every class consisted of a casebook. Second, the lessons were based on real cases. That is, actual disputes were the fact patterns and the opposing arguments were described in detail. Finally, the lessons were conducted in the form of a dialogue with the students, so that when and if a specific conclusion was reached (“the rule”), it came out at the end of the class and was not simply given to students without their involvement and effort.

In Italy, the current didactic methodology is exactly the opposite. In contrast to the casebook, the main didactic tool in Italian classes consists of a “manual” or “book of instructions.” The “manual” and the lessons start and finish with concepts. Italian lawyers, therefore, too often take their first steps in the law with the incorrect belief that the law is comprised only of rules. And finally, the lessons are based on a lecture format. The professor explains to the students what the law is and the students (try to) listen.

The result of this is that the civil law student encounters a lot of difficulties in looking beyond the rules in order to face the “law as it is.”¹³ It is true that he or she develops a very good grasp of conceptual thinking, but,

13. *Ex iure quod est*. Paul. 16 *ad Plaut.* D.50.17.1, cit. *supra* note 9.

on the other hand, the student is rarely allowed to obtain a firm “grip” on the problems. Most of the time, the rules become a sort of shield that veils the law, “depends on the facts of the case,”¹⁴ and misleads the lawyers without them even realizing it.

Academic Reforms

Recent academic reforms, however, have promoted a deep rethinking of the consolidated Italian didactic methodology. After having obtained the traditional five years degree, students can now enroll into “schools of specializations” established by most universities. Attending these schools allows the training lawyer to take the Bar or the state examination for becoming a notary public after just one year of practice (instead of the otherwise mandatory two) and constitutes title for taking the state examination for becoming a judge. These schools are designed to propel the student towards the real legal life that is waiting “out there.” This aim has encouraged the more vigilant professors to adopt a new didactic methodology. The students are the first to ask for something different. They do not want erudite lessons any more. They have a contingent aim of passing an examination and want to learn how to organize a brief and how to find an empiric solution.

In my role as *tutor* for the classes of “Roman law” and “foundations of the European law” to be taught at the School of specialization of the University of Parma, I have recently had the opportunity to contribute to the organization of an additional course on “methodology.” In this class, the professor¹⁵ insists on the removal of the false certainties provided by positivism and focuses on his exclusive belief in legislatively enacted law.¹⁶ In his view, these certainties are to be replaced with a rediscovered role of argumentation. The model for this encouraged new methodology is, as Professor Maurizio Manzin recently told me,¹⁷ the methodology adopted in the U.S. schools of law.

14. *In causa ius esse positum*. Alf. 2 dig. D.9.2.52.2, cit. *supra* note 8.

15. The lessons are given by components of the “Research Centre on Legal Methodology” (CERMEG) based in Trento and presided by Professor Francesco Cavalla (<http://www.cermeg.it/eng/>).

16. The first illusion that should be abandoned is the so called “utopia of the judicial syllogism.” This utopia can be looked at as the most extreme and never realizable hope of legal positivism. Its authoritative justification is to be found in art. 4 of Code Napoleon, where the activity of the judge is described as the “voice of the law.” According to this utopia a judgment should be molded in the form of a syllogism with a major premise, a minor premise, and an inexorable conclusion. The legislative provision should act as the major premise, the facts as the minor premise and the judgment as the conclusion.

17. Director of CERMEG.

Unfortunately, the progress we make in this new approach is slow. As I tried to show above, even those who desire to teach through cases are often obliged to use “abstracts” that, in my opinion, do not allow the building of a strong and genuine debate with the students. In order to enter into a dialogue one must know all the facts,¹⁸ not just a few selected in the holding of the judgment, and all the real arguments offered by the opposing parties, not just those that are selected and recalled in the reasoning of the judge. A dialogue over abstract notions would be difficult even among specialists and is almost certainly destined to generate fruitless conclusions.

Unfortunately, many of these schools are experiencing a decrease in enrollment that I believe could be linked to the resistance to a quicker change in the didactic approach displayed by many faculty members. In fact, many students protest that the schools tend to replicate the model of the five years degree and, as a consequence, are perceived to be of little value.

CIVIL LAW AND COMMON LAW

The observation made above regarding the better position of the common law didactic methodology in conveying the law in reality to students inevitably brings me to reflect, once more, on the differences between the two legal traditions of common law and civil law. As previously mentioned, it is in fact easy to assume that the didactic methodology adopted at law Schools in the U.S. reflects a different way of “living” the law in the first place. As it always happens whenever someone stops and tries to elaborate a level of thought about a complex experience, the risk of producing sterile considerations that repeat what has long and more properly been said is very high. Here the risk is even greater because of the innumerable efforts displayed by comparative lawyers in defining the essence or, at least, the characteristics of the two traditions.

18. I am aware that the medium of natural language has its limits. In a reported case we do not find facts but only descriptions. Even the more precise accounts of what happened are inexorably destined to be incomplete. Between a deed and its description there is always a gap. That is not, however, a good reason to reduce the scope of the description. In fact, we experiment every day that natural language is working well and, while for the aim of a judge the selection and reduction of the relevant facts is of the essence (every judgment is based on the selection of a few coherent premises), for didactic purposes the multitude of the factual details contributes to a better understanding and a better discussion.

The Lecture Given by Professor Pierre Legrand

In order to reduce that risk, let me make reference here only to the content of a lecture given by Professor Pierre Legrand, invited by Professor Vivian Curran, during my LL.M. studies at Pitt Law in 1996-1997. Among the many contributions I read and heard on the topic, I still bear in mind the assertions of Professor Legrand which back then, sounded almost provocative. He contended that common lawyers differ from civil lawyers in the way in which they “experience the world” and, as a result, their traditions are doomed to remain separate.

I rediscovered this thesis in an article that dates back to the year I was in Pittsburgh: “European Legal System are Non-Converging.”¹⁹ I have found this article to be precious for the purposes of this paper: it both brings back memories from my LL.M. experience and gives some sharp insights regarding the reasons for the influence of that program on my didactic activity here in Italy. The article makes observations that strongly confirm my impressions regarding the Roman law sources, the Italian case law and, finally, the Italian didactic methodology.

Among the many aspects upon which Legrand, in the abovementioned article, argues for irreducible differences between civil law and common law, special attention is given to the role of rules (opposed to the role of facts) in continental Europe. Legrand directed his attention to rules because he wanted to refute a thesis. This thesis was that a European convergence was taking place, because the European countries were in the process of having common sources of law, and that they were creating a reservoir of common rules and concepts. Legrand proposes that rules and concepts, which he qualifies as “propositional knowledge,” do not reveal much of a legal system. In fact, he argues that “whether they be legislative or judicial in origin, rules are pernicious to the extent that they present but a surface image of a legal system” because “they limit the observer to a ‘thin description.’”²⁰ Furthermore, he summarized his thoughts by saying “[m]y contention is, therefore, that law simply cannot be captured by a set of neatly organized rules, that ‘the law’ and ‘the rules’ do not coexist, and there is much ‘law’ to be found beyond the rules.”²¹

19. P. Legrand, “*European Legal System are non converging*,” in *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY*, vol. 45, 52-81 (1996).

20. *Id.*

21. *Id.*

After saying that, Legrand tries to illustrate the reasons why the common law *mentalité* is irreducibly different from the civil law's:

- “The common law has not left the inductive stage of methodological development”;
- “One cannot axiomatise English legal thought”;
- “The common law mind . . . is repelled by brevity”;²²
- “In England, law is seen as a technique of dispute resolution”;
- “English lawyers and writers have tended to think of it as almost a virtue to be illogical . . . ‘being logical’ is an eccentric continental practice”;²³
- “The alphabet is virtually the only instrument of intellectual order of which the common law makes use”;²⁴
- “The rules of judge-made law are never authentically promulgated as rules, but are left to be inferred from cases”;²⁵
- “The ‘rules’ are, therefore, no more than renditions by later judges of patterns which they perceive as having emerged from discrete and particularistic judicial interventions”;²⁶

The impact of this tradition on education is synthetically described in the following two propositions:

- “The empirical approach privileged by the common law inevitably favors an idiosyncratic frame of thinking focusing on experience, casuistry and description, which reflects itself into, and conditions, legal education”;
- “The English lawyer is taught to remember factual situations: for ‘[e]very decision must be read in light of the facts on which it is based.’”²⁷

The civil law is by contrast portrayed like as “a system of *institutiones*²⁸ capable of transcending disputes by moving away from factual immediacies,” because “the instinct of the civilian is to systematize.”²⁹

22. This is a citation from A.W.B. Simpson, *The Common Law and Legal Theory*, in his *LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW* 381 (1987).

23. Citation from NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 40 (1978).

24. Citation from Bernard Rudden, *Torticles*, 6/7 *TULANE CIV. L. FORUM* 105, 110 (1991-92).

25. Citation from O.W. Holmes, *Codes, and the Arrangement of the Law*, 44 *HARV. L. REV.* 725, 728 (1931) (reprint from the 1870 publication).

26. Citation from FREDERICK SCHAUER, *PLAYING BY THE RULES* 175 (1991).

27. Citation from *Masterson v. Holden*, [1986] 3 All E.R. 39, 43 (Glidewell, LJ).

28. Reference is here symbolically made to the prototypical systematic law book, the Institutes of Gaius (*Gai institutiones*), a rule based “manual” written by the Roman Jurist *Gaius* who lived in the second century A.D. In this manual the law is treated systematically and is divided in three parts: *personae* (law regarding persons), *res* (law regarding things, succession and obligations), *actiones* (law regarding the forms of actions).

29. Citation from Thomas Mackay Cooper, *The Common and the Civil Law—A Scot’s View*, 63 *HARV. L. REV.* 468, 470 (1950).

Legrand supports his thesis by marking the outline of his perceptions. His propositions and citations seem intended to be provocative. Take for instance the citation regarding the use of the alphabet as the only instrument of intellectual order: if put under strict scrutiny, this assertion could be used to reply that the alphabet makes possible the natural language that, in turn, can be seen as the *logos* that justifies our belief in the possibility of rational knowledge. On the other hand the global message comes out very clearly and, indeed, when someone wants to take a strong position he must put the alternatives in their extreme positions. If after ten years, I still bear impressed in my mind these arguments, it is probably because they did capture something that is really important. This something can be described as “a taste for the particular . . . for reality . . . apart from all abstract ideas”³⁰ that should be regarded as the essential characteristic of the common law as opposed to that of the civil law.

CONCLUSION

I could here reverse an assertion of Professor Legrand (“an English lawyer can never step into the shoes of a German or Dutch or Spanish Lawyer: all he can do is imaginatively step into his shoes”), by saying that during my LL.M. studies, I had the opportunity to step a little into the shoes of a common lawyer; in fact, I had the opportunity to experience (not just to “learn”) a different way of studying the law that, in turn, put me in position to perceive in the Roman law sources limits where there should be none.

Those who study Roman law, however, are better off than scholars in different fields in developing the awareness that the law cannot be found only in a system of rules. Even if the sources that have come down to us are more rule oriented than case-based (as I already said, I believe that Roman jurists were inclined to look for something that went beyond the contingencies and could be projected in the future in the form of a rule), the Romans did perceive the importance of the background for the solution of every dispute.³¹ The scholars dedicated to the study of Roman law can, therefore, still feel the importance of the factual premises, but are nonetheless obliged to work on texts that presents the limits I tried to show above. Not having the opportunity

30. Citation from Fritz Pringsheim, *The Inner Relationship Between English and Roman Law*, CAMB. L.J. 347, 348 (1953).

31. The two methodological rules set forth by *Paulus* and *Alfenus* testify a strong awareness of the link between law and life and of the consequent utopia of a law intellectually derived from a system of rules, see *supra* note 8 and note 9.

to work with “different” cases, even Roman lawyers tend to develop an inclination for abstract thinking that generates tremendous erudite studies, but poor pragmatic solutions, and no contribution to our needs of today.

In other fields of study like, civil, administrative, or criminal law, the didactic approach does not incline toward erudition but is abstract nonetheless. In those fields, the positivistic heritage still generates lessons that are built upon rules and definitions extracted from codes, statutes and doctrine. In the end, I agree with Professor Legrand’s position that, at least in the Italian didactic approach, the feeling for the importance of facts has progressively dwindled and has reached its lowest point. Something is changing but it is still difficult to predict whether a conversion towards a new methodology will soon materialize. The first sign of success will certainly be the adoption of a new “case law.”

Let me finally end by stating the obvious: I do not want to convey the idea that I believe that the Roman and continental jurisprudence and doctrine has no value at all and should be replaced by something completely different. Every culture has its value that is to be respected and preserved. What I really hope for is, therefore, that the traditional and precious contribution provided by the Digest and the Codes could improve towards a more balanced awareness, that I believe could be achieved through a rediscovered attention for the details of every day real life. In fact, the study and the implementation of “rules” should change and improve if the student or the practicing lawyer was able to immediately see, beyond the rule, the complex factual background (the rule is only the traditional “tip of the iceberg”) from which, sometimes many years ago,³² it was eradicated. The factual background, moreover, present the advantage that it should be recognizable in our life of today, and also in the empirical problems dealt with in disputes like those, discussed in a different time and in different countries, that I used in the seminar on *damnum iniuria datum*.

32. This is, for example, the case of the rules contained in the Civil Code. Many but not all of them are traceable back to pragmatic needs and disputes solved by Roman lawyers. As historians of Italian law are keen of pointing out, our contemporary civil law has many fathers. What is important is that, regardless of the historical origins, the law is always strictly connected to the every day real life and a well trained student should immediately see the aspects of life to which the rule is making reference.