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ARTICLES

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- *Interspousal Claims at the Crossroads of Tort Law and Family Law:
The Delicate Balance between Family and Individual* Biagio Andò
- *Legal Protection of Minority Shareholders of Listed Corporations in Brazil:
Brief History, Legal Structure
and Empirical Evidence* Bruno Meyerhof Salama & Viviane Muller Prado
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CONTENTS

ARTICLES

- Is the Pre-20th Century American Legal System a Common Law System?
An Exercise in Legal Taxonomy
Jacques Vanderlinden 1
- Juridical Personality and Intimacy
Michael McAuley 23
- Transition without Transformation:
Legal Reform in the Democratization and Development Processes
Ermal Frasheri 59
- Interspousal Claims at the Crossroads of Tort Law and Family Law:
The Delicate Balance between Family and Individual
Biagio Andò 113
- Legal Protection of Minority Shareholders of Listed Corporations in Brazil:
Brief History, Legal Structure and Empirical Evidence
Bruno Meyerhof Salama & Viviane Muller Prado 147
- The Slaves and Slavery of Marie Claire Chabert:
Familial Black Slaveholding in Antebellum Louisiana
Mitra Sharafi 187

BOOK REVIEW

- N. Whitty & R. Zimmermann, Rights of Personality in Scots Law
Olivier Moréteau 217

IS THE PRE-20TH CENTURY AMERICAN LEGAL SYSTEM A COMMON LAW SYSTEM? AN EXERCISE IN LEGAL TAXONOMY

Jacques Vanderlinden*

I. Introduction	1
II. The Colonial Period	5
III. From Independence to the Early 19th Century	9
A. The Adoption of Constitutions.....	9
B. The Departure from the Legal Scene of Many Prominent Lawyers	10
C. The Increased Lack of Law Reports	11
D. The Rise of Treatises.....	11
E. The Creation of the First Law Schools.....	12
IV. From Early-19th Century to Langdell	13
A. Professional Lawyers Take Control of the Production of the Common Law	14
B. The Triumph of Formalism	15
C. The Flourishing of Treatises	15
V. The Times of Langdell (The Last Quarter of the 19th Century)	17
VI. Conclusion	19

I. INTRODUCTION

Many, many years ago, in 1973, I was invited to teach for a full academic year at the University of South Carolina. A former American colleague from the times when the going was good in Ethiopia a few years earlier encouraged me to come to Columbia, South Carolina, as the weather there would allow us to renew our epic tennis games all year round! Having accepted the invitation,

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This paper was delivered as the 35th John H. Tucker , Jr. Lecture in Civil Law, at the Louisiana State University Law Center (2008).

the next point was to decide what to teach. Comparative law and jurisprudence were the usual choices for foreigners untrained in the common law. In addition to these obvious choices a course in African political systems was suggested in the Faculty of Arts. As it turned out, I respectfully submitted a proposal to teach a course on the law of common lands in South Carolina. This was unusual, as the topic was governed by state law and not usually taught at the law school. But these were also the years when Professor Sax was developing his ideas about public trust as a legal status for the beaches on the Pacific coast in Oregon or Washington states. The Faculty in Columbia kindly accepted my suggestion and I started my exploration of the law on common lands; this was in fact my first experience in the direct tackling of a common law topic and also my first direct acquaintance with the case method I had decided to use in class. And there came the surprise.

The more I was getting lost in the *South Carolina Law Reports* of the 19th century, the more I was fascinated by the contents of the law. I discovered that the State Supreme Court had indeed formulated the doctrine of the public trust for common lands in the early years of that century, but I was also puzzled by the scarcity of references to cases in the decisions and the abundance of quotations of Blackstone's and, later, Kent's classical commentaries. These two authors, and also some less-known ones, provided the starting-point of reasoning which appeared to me much more deductive than inductive.

I made a note of it for a possible further study, but more than thirty years went on without a chance of going any further in the matter although my South Carolinian experience still lingered in the back of my mind. In the course of these years I also developed my familiarity with the common law and my liking for comparison at the level of legal systems as a whole and for their taxonomy.¹ Finally I am perfectly aware of the fact that even if that type of exercise has gone out of fashion today, everyone still speaks of legal systems belonging to different families of laws as something self-evident.

Having reached the end of a half-a-century career as a law teacher and not having much to lose, I accordingly decided to take advantage of the great honour bestowed upon me by the Paul M. Hebert Law Center in asking me to deliver the 35th Tucker Lecture, to present in full the problem arising out in my view from

1. See J. Vanderlinden, *Religious Laws as Systems of Law: A Comparatist's View*, in *RELIGION, LAW AND TRADITION: COMPARATIVE STUDIES IN RELIGIOUS LAW* 165-182 (A. Huxley ed. 2002).

of the practice of considering the pre-20th century American law system as a common law system.

This, of course, requires a definition of the class “common law system,” in which we envisage the classification of the species “pre-20th century American law system.” There’s the rub. Of course, there’s no place here for a theoretical discussion on the “true” nature of a common law system, if there is one. Defining a system is a risky task, but it has to be done if the language of the law has to come out of the messy situation described by Karl Llewellyn in *The Bramble Bush*.² My own assumption is that there are a few possibilities. The essential characters of the “pre-20th century American legal system” may coincide with those of the “common law system” and the question asked in the title of this talk will be answered positively, or they won’t and the only solution, if we stick to the idea, will necessarily lead us to a redefinition of what is common law system as a whole. Another possibility is to consider that the American legal system is a system *sui generis* which escapes classification, as obviously I would not contemplate classifying it in the civil law systems. The last possibility is to consider that such taxonomic game is not worth playing and that not only my time, but also yours unfortunately has been totally lost. If such is the case, please, accept my most embarrassed apologies. Yet, allow me to take up the challenge of defining the class, “common law system,” if only for the sake of this essay.

The easiest way to characterize the common law is to use the well-known expression “judge-made law,” which would however not satisfy me fully as a person interested in comparison for two reasons. One is that, contrary to the theory which pretends to consider the judges’ *dicta* as simple authorities and not “sources,” the judges tend to play such a role in the production of the so-called “codified systems,” that the contents of the latter cannot be satisfactorily apprehended on the face of the code sections and, in many cases, require, in the most absolute manner, a maze of statements produced by the courts in order to be properly understood.³ Two is that English judges never miss an opportunity to assert the pre-eminence of the legislator in the law-making process and have as frequently repeated that if there was a gap in the law it was not their duty to fill it, but that such task was exclusively that of Parliament. Thus to give the impression that the

2. KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 83 (Oceana 1978).

3. J. Vanderlinden, *The Law-Making Power of the Judiciary in French Law*, JURIDICAL REVIEW 1-20 (1967).

common law is judge-made seems to be an oversimplification which does not provide a satisfactory criterion in the comparison of legal systems.

It is more useful to consider the steps followed by the English judge in his production of the cornerstone of the system, the precedent. If I am repeating it here, it is not to teach anything to anyone in this audience, it is only to make my reasoning as clear as possible. The English judge normally starts from facts brought to his attention. He is careful to present them at the opening of his judgment in the clearest and most possibly complete way; this is also, possibly, an opportunity to reveal his true personality as Lord Denning did so frequently and wonderfully in his opening statements. Once the facts of the case are clear, the judge goes on a search for previous decisions based on similar facts. Obviously he will very rarely, if ever, find absolutely similar facts. Thus he will have to decide upon the degree of satisfactory similarity existing between the facts at hand and the facts in the previous case. Once he is satisfied, he will look at the legal solution adopted in the previous case and will apply it to the instant case. It is only at that moment that the precedent is born; until then it is but a judgment in a maze of decisions in which the judge has to sift out the best from the worst, the technique of distinctions allowing him to navigate through the impossible total similarity between factual situations.

In conclusion allow me to quote two famous authors located at the beginning and the end of the long process of the history of the common law. Henry de Bracton⁴ recommended to the lawyers of his times to proceed “*a similibus ad similia*”, from the same facts to the same solutions. Jeremy Bentham⁵ characterized the common law as being an “*ex post facto* law.” These two terse formulas encapsulate what I have just written as to the nature of the common law. Let us turn now towards the late colonial and 19th century United States. Consider five major periods: the period of colonial America, the early post-independence period, the period preceding the civil war and, finally, the period following it up to the reform of legal education generally attributed to Langdell.

But, before entering the heart of the matter, let me express an important caveat. Is one able to write any statement which is globally valid for “the American colonies” as they progressively take shape during the two centuries separating the late 16th from the late 18th century and between what is now Maine down to South Carolina? The diversity of the colonial settlements

4. Circa 1210-1268.

5. 1748-1832.

amalgamated in what is known in common parlance as British North America is huge whether from a cultural, economic, political or social point of view even if they have a common language and a common origin. Envisaging the problem from the angle of the legal historian is even more difficult due to the scarcity of the readily available sources as to what the administration of law effectively was in each colony or later, state. This fundamental problem has not yet really frightened all those who have written volumes about colonial America or the United States at large. We'll meet in this short and necessarily summary presentation an example in the field of reactions towards Loyalists after independence of how the situation in one state, in the case Maryland, can radically differ from what is assumed to be a "national" situation. Nevertheless I'll follow the example of my colleagues who assume that one can generalize some conclusions at the level of the United States, while being fully aware of the high relativity of whatever I write under such heading. This had to be said before venturing in this brief presentation.

II. THE COLONIAL PERIOD

There are many ways through which the English common law came into the American colonies. The earliest and most common was the so-called birthright implying that every settler carried at his shoe soles the law under which he was born. One often quotes in that respect the article of James the First's Charter of Virginia, 1606 which runs as follows:

Also we do, for Us, our Heirs, and Successors, DECLARE, by these Presents, that all and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions.⁶

Obviously the text doesn't refer to the common law as such, but rather to the "Liberties, Franchises, and Immunities" of all English subjects of the Crown. But that general statement is often

6. Available at <http://www.yale.edu/lawweb/avalon/states/va01.htm> (last visited April 21, 2011).

supplemented by provisions in the charters given to colonies and referring to the application of English Law or, at least, to a law, either imported or established locally, being “as near as may be” to the laws of England.⁷

If our perspective is narrower, what we must look for are court decisions which stand at the very beginning of a possible inductive process towards precedent. There’s the rub. What we are looking for is what Sir John Holt, Lord Chief Justice of England and Wales between 1689 and 1710, described as: “these scrambling reports [which] will make us to appear to posterity for a parcel of blockheads.”⁸ Not only are they scrambling but also they are numerous. A quick and quite summary count of the pages included in the 120 volumes or so of law reports published in England prior to 1776 comes up to a total of many tens of thousands pages of which no common index existed. There were not many lawyers in colonial America who could afford such a collection outside the main economic or political centers of the Northeast.

Law schools or law libraries did not exist at that time and everyone wishing to go into the business of law had to master his own documentary resources. The happy few, some 150 of them,⁹ who went to England were perhaps better placed as originating from reasonably affluent (and influent) families, but these were the exception.

The example of the resources available to John Adams, future vice-president and president of the United States, when he was articling is well known and fairly documented through his diary.¹⁰ Among all sorts of books, he successively reads Justinian’s *Institutes* (in Latin), Gilbert’s *Tenures* (at night), Wood, two

7. For example, in the charter of the same Queen to Sir Walter Raleigh which reads when dealing with the latter’s legislative power: “So always as the said statutes, lawes, and ordinances may be as neere as conveniently may be, agreeable to the forme of the lawes, statutes, gouvernement, or pollicie of England”, available at http://avalon.law.yale.edu/16th_century/raleigh.asp (last visited April 21, 2011); see also BARNES T.G., “As Near as May be Agreeable to the Laws of this Kingdom:” *Legal Birthright and Legal Baggage at Chebucto, 1749*, in *LAW IN A COLONIAL SOCIETY: THE NOVA SCOTIA EXPERIENCE* (Waite et al. eds. 1984).

8. Slater v. May, 2 Ld. Raym 1072.

9. CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 188-189 (1911).

10. See John Adams, *Experiences as a Law Student, 1758*, in 1 *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES*, 93-106 (Steve Sheppard ed. 1999); see also, Daniel R. Coquillette, *Justinian in Braintree: John Adams, Civilian Learning and Legal Elitism 1758-1775*, in 1 *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES* 75-92 (Steve Sheppard ed. 1999). This volume includes similar testimonies by two other famous lawyers, John Marshall and James Kent.

volumes of both Coke's *Reports* and John Lilly's *Practical Register or General Abridgment of the Law* (1719), Hawkins' *Pleas of the Crown*, and Fortescue; he also recites aloud Cicero's discourses against Catilina to improve his pulmonary capacity and speaking abilities. When he comes back to Boston, his first reading is, again, Justinian's *Institutes* with the hope of gaining the support of two veteran lawyers from the local bar. The reports are not much in the picture.

But, had they been on the shelves, finding the cases of which the facts were similar to those you had to deal with was another nearly insuperable challenge. It may accordingly be assumed that their current use at the level of practitioners outside these main centers was minimal and excluded.

Thus many people who wanted to become acquainted with the common law would certainly have been inclined to follow the advice to his nephew of another respected judge of these times,¹¹ Lord Thomas Reeve, Chief Justice of the Common Pleas (1736-1737) encouraged him at the beginning of his legal career¹² to only tackle the Law Reports after having perused and mastered Thomas Wood's *Institutes*,¹³ Jacob's *Dictionary*,¹⁴ Littleton's *Tenures*, and *An abridgment of the first part of my Ld. Coke's Institutes* by William Hawkins! Obviously, there was not yet any idea of a case method.

This does not mean that where precedents were available, lawyers would not respect them. But they were not conceived as the starting point of a deductive process. They were only there to allow a discovery of what the common law was through their rationale.

Thus most lawyers of these times, especially in what was then the south of the country, e.g. the Carolinas, would rather or had to (if only by the lack of English reports) rely upon a short practical presentation of the law of the kind cited in the last paragraph. In that respect, the real turning point is the publication in England, then in the United States of Blackstone's *Commentaries* published in four volumes between 1765 and 1769 at the Cambridge University Press; to Blackstone I'll come back in the following act.

11. 1 HARGRAVE F., COLLECTANEA JURIDICA 79-81(1791).

12. The letter was also given to be read by the first lawyer who accepted to take John Adams as an apprentice in Boston. See *supra* note 8, at 100.

13. Who also appears in the readings of John Adams.

14. References to this apparently well-known dictionary in his time are also found in the first judgments of the Supreme Court of Nova Scotia, the first one established by a British Government in what was still the colony of Nova Scotia, long before Canada was created in 1867.

But what about the knowledge and use of the common law in the meantime?

The impression which prevails is that we are confronted with what I would call on the one hand a “folk” knowledge of the law at large by non-lawyers and on the other hand a very indirect knowledge of an embryonic legal profession through the use of works like Wood’s *Institutions* at the best from a scholarly point of view and like those of Jacob’s *New Law Dictionary* at the best from a practitioner’s one. Wood’s is, in many respects a pioneer and an ardent supporter of the common law from whom Blackstone must have drawn much inspiration and Jacob’s *New Law Dictionary*, published in 1729, reached five editions before 1744 and was continued by T. E. Tomlins, who published its first American edition in six volumes in 1811 under the title *The Law Dictionary*. Whether one looks at the educated public or at the lawyer, the approach to the common law is essentially practical in everyday life.

Behind this earthly concern was a solid cultural background of basic principles about what justice should be in accordance with deep religious feelings. They included not only the law of God, but also “principles, that are permanent, uniform and universal.”¹⁵ Hence a fundamentally deductive approach going from the top, God, to the subject of the Crown in his daily activities. A high respect for what law should be in such surroundings certainly trumped technicalities and the doctrine of precedent (assuming it did exist at that time and is not a projection in history of more recent doctrines). One looked for the law in a diffuse corpus of Godly natural law or of reason, the lay face of which we profusely find in the English cases of the time.¹⁶ If they could support through a quotation or another a common cultural and obvious doctrine, thus making it “legal,” so much the better. The result was a narrow conception to the judge’s role. He was, as one often says, a “discoverer” of a common law which fitted with his cultural background. His task was not to innovate or create law and he accordingly most willingly practised a strict doctrine of *stare decisis*.¹⁷

Quite different was the frontier lawyer. The concept of frontier itself is not altogether well defined, but let us consider that it

15. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 7 (1992).

16. See Charles J. Reid, Jr., *Judicial Precedent in the Late Eighteenth and Early Nineteenth Centuries: A Commentary on Chancellor Kent’s Commentaries*, (2006) University of St. Thomas School of Law, Legal Studies Research Paper No. 06-28, specially at 16-27.

17. HORWITZ, *supra* note 15, at 8-9.

encompasses the territories on the western edge of the 13 colonies where progressively settlers established themselves before its parts progressively obtain the status of territory, followed by that of state in the Union at the very end of the 18th and the early 19th century; that first frontier will give birth to States like Alabama, Missouri, Ohio, or Tennessee.¹⁸ From then on the frontier would carry on its progressive march westwards. As for the Frontier or Pioneer (Adventurer in the sense of the Merchant Adventurer of the 15th century and later would be an as good or even better qualification) lawyer.¹⁹ The generally young man with a fairly recent legal baggage acquired by articling or passing through one of the early law schools, one can easily imagine that his luggage strapped near his saddle would not leave much room for many books, even of the size of Jacob's *Dictionary* or—but this was much heavier—Blackstone. The Bible (indispensable to administer oaths or be read in the last minutes before the hanging of a murderer among other things) was more likely to be in the bags in front of or behind his saddle.

III. FROM INDEPENDENCE TO THE EARLY 19TH CENTURY

The period around the Declaration of Independence by the American colonies in 1776 and the 1820's opened up from the point of view of the production of law with five major events which may be seen as somewhat linked together by a common starting point: the Declaration of Independence itself and its legal form, the *Articles of Confederation*, followed by the *Constitution of the United States*. Centering on these fundamental texts, let us only mention these five major events: in chronological order, 1) the adoption of constitutional texts; 2) the departure from the legal scene of many prominent lawyers of the times; 3) the increased lack of law reports; 4) the rise of major treaties; and 5) the creation of the first law schools.

A. *The Adoption of Constitutions*

I am not going to elaborate on this, but let me just remind the reader of the importance, from the point of view of the formal sources of law, of the appearance of a text encompassing all the fundamental features of the structure of the State. It was of course known in the English legal history since the passing of the

18. In alphabetical not chronological order.

19. See, e.g. WILLIAM FRANCIS ENGLISH, *THE PIONEER LAWYER AND JURIST IN MISSOURI* XXI 2 (1947).

Instrument of Government of 1653, but had been deliberately wiped off from memory as unconstitutional and thus, altogether with all the laws of the Commonwealth, sent back to the limbos of non-existence. Whatever “legal” had taken place during a period of some fifteen years was replaced by the first “legal” years of the reign in absentia of Charles II in exile in the Netherlands.²⁰ From then on and until today, England (and later the United Kingdoms) never felt the need for a single constitutional document, although its constitution is far from being totally unwritten.

On the contrary, as from the *Articles of Confederation* the United States (and, in the immediately following years, their thirteen members) were living under a basic legal document. Even if at the beginning it did not matter much for the current adjudication of litigation between common citizens, it laid next to the principles of justice and natural law inherited from colonial times as another term of reference when starting the quest for law. That is, as a document where one would find some principle from which to *deduct* a possible solution to a legal problem.

B. The Departure from the Legal Scene of Many Prominent Lawyers

One of the first results of the American Revolution was the Loyalist diaspora which, for example, led to Canada between forty and fifty thousand British subjects who were faithful to the Crown. Among them were many lawyers of whose the exact number seems unknown although they have recently attracted more interest, especially insofar Nova Scotia is concerned.²¹ Among those who remained many went into politics or the judiciary at a high level. The names of Adams, Kent and Marshall, each in its own sphere, the State, and/or the Judiciary, have become the most glaring examples of that phenomenon. But it is likely that these are the trees concealing the forest. Finally, many Loyalists who had reached a respectable status in the profession and could or would not migrate for various reasons preferred retirement to the risk of being disbarred for their political opinions. Some of them depending on where they resided, were effectively expelled from the bar, but this attitude was far from making unanimity. Major

20. The first acts passed by Parliament after the return of Charles II in 1660 were numbered 12 Charles II.

21. See, among others, the recent article, Jim Phillips, *The Court and the Legal Profession: Loyalist Lawyers and the Nova Scotia Supreme Court, 1785–1790, The Promise and Perils of Law: Lawyers in Canadian History* (Wesley Pue & Backhouse eds. 2009); see also www.loyalistresearchnet.org (last visited April 21, 2011).

figures, like Alexander Hamilton took a clear stand against it and he was not alone in his stand. As a result, for some authors, independence “wrought havoc upon the American legal profession;” this quantity-wise, the quality-wise approach being as strong under the pen E. Griswold, “There is no doubt that this was a serious set-back to the overall calibre of the profession in America.”²² Such statements, which are common saying among the most prominent legal historians of the period, must be taken with caution, as Nolan has quite convincingly demonstrated by showing how different the situation was in Maryland.²³ One thing, however, may be accepted: training for the bar through apprenticeship became more difficult, which does not mean that it disappeared.

C. The Increased Lack of Law Reports

We have seen that in the previous period referring to cases was not an easy task for various reasons. The quasi-permanent conflict with Britain until the end of 1814 just accentuated the problem. Not only would English reports arrive with more difficulties, but the revolutionary spirit was prone to reject English law as such, it being one of the symbols of previous oppression. As for local reports it took some fifteen years for the first ones to appear in many states and one could not expect decided cases by the supreme or appeal courts to immediately cover the whole field of law. As Kent wrote at the end of the century, “one never dreamed of volumes of reports and written opinions.”²⁴ Thus the ground was not yet ready for the development of a possible inductive approach.

D. The Rise of Treatises

Five years before independence was proclaimed and two years after the publication of its last volume by the Cambridge University Press, William Blackstone’s four volumes of his *Commentaries* were published in Philadelphia and had an immediate success in the United States: 1400 copies were rapidly sold, supplemented by 2500 before 1776. Very quickly, Wood and Jacob were forgotten. Here, at last, a handy (four in eight volumes, instead of the similar folios of Wood) and systematic (as we have

22. The two quotations are in the seminal paper Dennis R. Nolan, *The Effect of the Revolution on the Bar: the Maryland Experience*, 62 VA. L. REV. 969 (1976).

23. *Id.*

24. See James B. Thayer, *The Teaching of English Law at the Universities*, 9 HARV. L. REV. 169, 170 (1895) (quoting Kent).

seen the plan of Justinian's *Institutes*, which Blackstone follows, was familiar to colonial lawyers) description of the common law was available. No wonder that the frequency of the references to the *Commentaries* had so quickly struck me when ventured for the first time in the South Carolina law reports many, many years ago. There is no need to elaborate on that success story which appears in all text-books about early American legal history. Blackstone was not only a source for judges. It also struck young men either articling or studying in one of the early law schools, or even some of them temporarily lost in the countryside because of the War of Independence.²⁵ As Nolan quite convincingly showed, his influence was "more indirect and far more diffuse, but no less significant, than is usually claimed."²⁶

But Blackstone presented a major problem as of 1776. The public law part of his work was pure blasphemy in the Republic. There was also a point here and there where the clause "as near as may be" had transformed English common law in American common law. No wonder thus that "annotated" versions of the *Commentaries* appeared rapidly, the best known being that of St-John Tucker published in 1803. Interestingly enough the notes updated Blackstone in accordance with the American constitution and laws, but also with the same of the Commonwealth of Virginia.

If Blackstone's work played a fundamental role in the shaping of American legal minds—one must not undervalue from our point of view, the influence of the many specific treatises—at first directly imported from England or locally republished and later on more or less adapted to the local law. To cite two examples, in the first group we find some standard textbooks like Gilbert's *Law of Evidence*, and in the second one, Chitty's *A Treatise on the Bills of Exchange*.²⁷

E. The Creation of the First Law Schools

Legal education in the common law as it was practiced in the colonies was not organized on a collective basis before independence. It appeared in Connecticut in 1784 in the town of Litchfield and was an initiative of a practitioner of high local

25. *Id.* at 170, still quoting Kent discovering "with awe" the *Commentaries* and "reading them again and again" in his later life.

26. Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y. U. L. REV. 731, 767 (1976); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996).

27. Quite interesting in that respect is A.W. Brian Simpson, *The Rise and Fall of the Treatise*, 48 U. CHI. L. REV. 632, 668-671 (1981).

reputation, Tapping Reeve. It lasted for nearly fifty years and trained a thousand or so lawyers among whom many achieved a reputation in the legal profession and beyond it.²⁸

For the first time, the definitely erratic articling system which is reflected in some diaries like the one of John Adams gave place to a systematic overview of the law spread on two years at the rate of a lecture a day delivered in the morning by Reeve or, later, by his associate John Gould. Afternoons were spent at questioning teachers, discussions between students and reading books or cases in the school small library which was also its only classroom located next to Reeve's house. Weekly examinations and moot courts also prepared the students for a career at the bar. The focus in the lectures was on principles corroborated by references to authors (Blackstone was prominent among them) or cases.

The impact of the school on American law can be appreciated by the careers of its graduates who came from all around the United States: three became Supreme Court Justices and thirty-four sat on state supreme courts, while scores of them became lower court judges or law professors. Finally, looked at from our point of view, it was very much in the traditional pre-independence approach of looking for or at principles when confronted with a case and buttressing the deducted solution by a reference to books of authority.

The case of small professional law schools like Lichtfield is not unique,²⁹ but other forms of formal legal education appeared during the period. They range from the setting up of a course of law in an Arts Faculty, the appointment of a professor of law or the beginnings of institutions such as Yale or Harvard Law Schools. Some of these ventures, including a first try at Harvard, aborted more or less rapidly. But they all shared a similar deductive approach when dealing with the production of legal solutions: from the facts of the case directly up to the principle and from the principle down to the solution of the case.

IV. FROM EARLY-19TH CENTURY TO LANGDELL

From our point of view, three points emerge from the half-century or so which separates the definitive independence of the United States from Britain at the end of the Anglo-American War

28. See Andrew M. Siegel, *To Learn and Make Respectable Hereafter: The Litchfield Law School in Cultural Context*, N. Y. U. L. REV. 1978 (1998).

29. See ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 132-150 (The Carnegie Foundation for the Advancement of Teaching 1921).

from the appointment of Christopher Columbus Langdell as professor at Harvard: 1) professional lawyers take control of the production of the common law; 2) specific treatises flourish; and 3) formalism prevails.

A. Professional Lawyers Take Control of the Production of the Common Law

If no real change appears in principle in the way of producing the law, something different but fundamental resulted from the change in legal education which characterizes the previous period. A class of professional lawyers was born endowed with a similar way of dealing with legal problems in times of deep changes in the cultural, economic, political and social features of American society. That class of lawyers was to provide to these changing times not only the legal superstructure and judiciary it needed, but also a good deal of its political elites. And when the latter would, in their view, default at the legislative or executive levels, the activism of the former would be there to supplement their shortcomings. Such approach was needed. Changing circumstances which characterize the first half of the 19th century required legal solutions which Blackstone could not necessarily provide. Or, if he could, at least come reinterpretation was needed in order to tackle these new challenges. This was an intense period of legal activity which shaped American law. It was based, like previous ones, on new credos which in turn were formulated in legal terms by the judiciary.

As Horwitz writes, “[w]hat dramatically distinguished nineteenth century law from its eighteenth century counterpart was the extent to which common law judges came to play a central role in directing the course of social change.”³⁰ Horwitz considers quite validly that judges have taken the place of the legislator by “establishing rules of very general application.”³¹ These rules were equivalent to legislation and became the basic term of reference towards which one would turn to solve legal problems. Thus the judge begins to consider himself as a legislator, someone who provides “remedies according to the growing wants, and varying circumstances of men ...”³²

30. HORWITZ, *supra* note 15, at 1.

31. *Id.* at 2.

32. *Id.* at 23.

B. The Triumph of Formalism

Once the transformation was achieved, the judiciary took up the task of buttressing the new legal framework he has contributed to create for the advantage of “men.” Horwitz’s phrase has to be completed by defining which men he refers to. The answer comes some two hundred pages later in his book. The beneficiaries of judicial activism are the ones who hold “political and economic power,” the “merchant and entrepreneurial groups” who manage “to forge an alliance with the legal profession.” One thinks irresistibly of what happened during the Tudor period in England when, in the 16th century, merchants, parliamentarians and lawyers joined in a ruling cultural, economic, political and social class. In the United States, the legal tool used for the purpose was formalism. The growing wants and varying circumstances of a class of men were satisfied and the resulting legal system took the new dimension of being self-evident and rational, thus completely objective and detached from the state of the Union. And so were, in principle, its fundamental values which, from then on, supported its development through interpretation. The latter became highly “rational” and “formal.”

In such framework, arguments of “justice,” “morality,” and “equity” were preposterous, and the latter, considered as a distinct mode of production of law would rapidly disappear being merged into the common law. They were replaced by a “scientific” approach to law, which was reflected in the treatise literature as we shall see. Such an approach implied a deductive method where solutions inexorably flow from pre-existing principles.

C. The Flourishing of Treatises

As we have seen specific treatises directly inspired from English law were known and used in the previous period alongside with major works offering an overall view of the same. We also had a glimpse at the progressive americanization of these doctrinal contributions. Thus the time had come for genuine American specific treatises. The first step, very much in the line of the previous period, was the publication of Kent’s *Commentaries* during the years 1826 to 1830. Then followed more specific writers: The most prolific of these was Joseph Story, Justice of the Supreme Court since 1811 and concurrently Dane Professor of Law at Harvard since 1829. In thirteen years, he published nine major treatises. From then on, treatises were part of the American legal landscape. From our point of view, they did not encourage a

deductive approach in the production of the common law. In spite of a growing load of State case law. It was not used much when confronted with concrete problems in order to launch an inductive process.

The apex of that doctrine characterizing the treatise tradition of the pre-civil war period which concentrated on the principles from which solutions were deduced is perhaps best described by William W. Story, a son of the previous one, in his *A Treatise on the Law of Contracts not under Seal*.³³ 1) principles come before cases; 2) cases, even the most interesting ones, are purely illustrative of the principle; 3) accordingly the place of cases is in the footnotes. Such a description would perfectly fit (but for the replacement of principles by articles of a code) any French treatise of the same period. This approach of law resulted of a strong belief in the “scientific” character of law and the correlated idea that the objective of any science was the discovery of fundamental principles from which the practitioner would deduct logical step by logical step a solution to the concrete problem he was confronted with in daily life. Thus principles established by the science of law would replace those which, in the previous period, came from God or non-religious natural law.³⁴

* * *

During that period, Louisiana constitutes a well-known exception on which there is no need for me to expand in front of auditors or readers of whom I am only a most grateful and humble guest. Louisiana stands at the confluent of three legal traditions which have their own laws even if two of them belong to the same “family;” it explains its qualification as a “mixed” system on which I’ll come back in my conclusion.³⁵ The contributions of Spanish and French law and lawyers to the development of Louisiana’s legal system are well-known.³⁶ Blackstone and his commentaries (or his followers) were nevertheless not completely absent from the picture. There are good reasons to this as much of Louisiana’s law is indeed common law. Thus, no wonder that if

33. WILLIAM W. STORY A TREATISE ON THE LAW OF CONTRACTS NOT UNDER SEAL (1844).

34. Simpson, *supra* note 27, at 671-672.

35. On this evolution which has given rise to a huge amount of literature, see, for example, volume 63, issue 4, of the University of Chicago Law Review (2003).

36. See, among so many others, the contribution of one of my predecessor in the Tucker Lectures, Professor Robert A. Pascal, *Of the Civil Code and Us*, 59 LA. L.REV. 301 (1998).

one looks at cases from the State Supreme Court between 1809 and 1834, one finds some 30 references to Blackstone, but also 39 to Kent's *Commentaries*, or other specific treatises written by well-known English jurists supplementing the Code provisions.

V. THE TIMES OF LANGDELL
(THE LAST QUARTER OF THE 19TH CENTURY)

Some ten years, after Christopher C. Langdell was appointed Dane Professor of Law at Harvard University, Holmes reacted in his *The Common Law* against what Horwitz characterizes as the development by judges and jurists of “a small group of fundamental conceptions—fault, will, property rights—from which one could logically deduce virtually all legal rules and doctrines.”³⁷ If one accepts that perception of the common law at the origins of our last act, there is no doubt that the assumption that American law is founded on an inductive method progressing from case to case towards a formulation of what law is in a specific case was still highly challengeable when Langdell enters the stage at our fourth and last act.

Langdell shares the belief of his contemporaries that law is a science and that accordingly the task of scholars is the discovery of the principles governing its object, i.e. the law.³⁸ There is however a reaction on Langdell's part which is twofold: 1) the number and volume of the law reports in which the principles were to be found became difficult to master by the students and 2) that intellectually the re-discovery of the principle by the student through the study of the judge's reasoning was educationally more fruitful than the reading and memorization of what the treatise said. As Langdell himself put it: “The object of the case system is to compel the mind to work out the principles from the cases.”³⁹ Complementary to that statement, came the fact that, in the mass of the decisions, only the “leading cases” had to be studied and studied in depth. The direct result for the teacher was his responsibility to provide classes with casebooks in which the student could find the path (or the successive stages) which led to a principle.

The question, from our point of view is: Has Langdell, through the establishment of a method of legal education (the presently everywhere practiced in the common law world case-method)

37. HORWITZ, *supra* note 15, at 129.

38. Harold J. Berman & Charles J. Reid Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L. J. 438, 513-514 (1996).

39. Cited in *The Increasing Influence of the Langdell Case System of Instruction.*, 5 HARV. L. REV. 89 (1891).

brought a fundamental change in the way the common law is produced? In other words has the production of the law by American judges become inductive?

I am in no position or ability even to risk an assessment of Langdell's contribution to a possible change in the nature of American law as a common law system; some of my most distinguished colleagues have been tempted by the challenge,⁴⁰ but again I have neither the wish nor the means to support or not their conclusions. Let me only mention them in their essentials. Horwitz, speaking of the structure of legal reasoning in the period 1870-1905, refers to the "[d]eduction from general principles and analogies among cases and doctrines" which he sees as "the crystallisation of a 'legalistic' mindset" which, as we have seen, had emerged in the previous half-century. In a totally apparently contradicting way, Kimball speaks of Langdell's "inductive approach" which differs so much from the previous ones.⁴¹ Kimball insists on that character of Langdell's approach in the discovery of principles, but, once they are established, he admits that it turns deductive in the application of principles to facts. Thus it appears that pre-existing principles still govern the production of the law.

In spite of the impossibility for me to propose a clear-cut answer to the question of Langdell's position and before concluding this presentation, I would like to offer a few personal remarks on the subject. Assuming that Langdell's supporters are right, his induction process seems to focus on extracting principles from the solutions offered by the courts; hence the need of a careful study of case-law; hence the case method while training lawyers. While fully supporting that method—which I have been applying to my teachings ever since I got familiar with it in South Carolina—I would only most carefully and humbly suggest that this is not starting from the facts, looking for similar facts, then for the legal solution resulting from the latter and finally applying it with possible distinctions to the pending case thus erecting the previous one to the status of precedent. *Mutatis mutandis* Langdell's inductive approach appears to me nearer to that of Lord Atkin in *Donoghue* when he suggests a quest for the general principles of tort law as they can be found in the existing cases. But as much as I am willing to admit that my reading of Langdell

40. See, e.g. HORWITZ, *supra* note 15, at 16-17; Bruce A. Kimball, *Langdell on Contracts & Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HIST. REV. 345 (2007); see also Berman & Reid, *supra* note 38, at 513-515.

41. *Id.* at 349.

is erring, I am also willing to admit that I am misreading Lord Atkin.

VI. CONCLUSION

What American practitioners and scholars developed during the 19th century can be characterized by many features of the “classical” common law system as it was born and grew up in totally different surroundings in England during some five or six (my starting point is either Henry the First or Henry the Second) centuries or so until the eve of the American Revolution. There is no doubt that one may say that what followed in the two countries was a “judge-made” system of law, even if there can be differences in the meaning of the adjective on both sides of the Atlantic and also some general reservations as to its inapplicability to civil law systems.⁴²

One may also maintain the opinion that preceding cases play an important, if not fundamental, role in the solution the judge will build up when confronted with the facts of a case. But, if one refers then to “precedent,” things change radically. The English precedent is indeed fundamental. So are facts. The American precedent is quite different, as it appears ancillary to the principles while the English lawyer is reluctant to refer to principles possibly deducted from precedents. Nothing is further away from facts than principle. This difference cannot be ignored as the latter inevitably provides a starting point for a deductive process while the latter remains deeply rooted in induction. And, for reasons which I believe I have shown to be obvious, the American system has developed around principles.

Now, all this relies on a choice made by the outside observer as to which factors matter in the definition of systems or families of laws and, of course, on the validity or even interest of taxonomy in its application to social phenomena. It could very well be that the latter are totally impervious to such approach. Or that the latter is totally out of fashion if not preposterous. I am most willing to accept all these.

The introduction of taxonomy in the field of legal systems is fairly recent; it dates back to the beginning of the previous century when the comparison of legal systems took a new start. Since then the taxonomy has developed and various combinations of some 19 criteria were proposed as a basis for the classification of legal systems. Among these, one found all sorts of possible

42. See Vanderlinden, *supra* note 3.

characteristic of laws or legal systems: their conceptual apparatus, their stage of development, the place they gave to fundamental rights, their dynamism, the hierarchy of their formal sources, their history, their economic, political or social ideology, their characteristic institutions, the development of their legal language, their way of thinking the law, their methods of interpretation, their way of reason, the number of people they governed, the place they left to religion, the race of the people they governed, their economic system, the role of the lawyers in their development, their material sources and, finally, their structures. Among all these, the specialists would combine a number of them ranging from one to seven.

As for the “families” accordingly constituted there were 20. In most cases, reference was made to a geographical area: Africa, Africa and Asia, Europe and America, the Far-East, Nordic countries, Western countries, and Scandinavia. Culture was involved when referring to religious laws or one of them, specifically Islamic law or languages when speaking of Slavonic laws. Then came an economic reference with the Socialist laws; oddly enough no one ever referred to a family of capitalist laws! There were also some odd families, like the Classical Antiquity one, that of the “civilized” laws which was easily opposed to the family of “primitive” laws, or, finally, that of the “other laws” regrouping all laws which would not fit into the other ones! As for the last four, they were, at last, referring to laws (or legal traditions): the common law family, the Germanic laws family, the Romanist laws family, and a combination of the last two, the Romano-Germanic legal family.

Such taxonomies did not make much sense. Finally the most often mentioned were the common law, Islamic law, romano-germanic and socialist families, but quite frequently selected on a different mixture of characteristics. This also was, in my view, not satisfying. If we bring laws together in “families,” there must be some logic in the selection justifying this or that grouping. The logical inescapable conclusion of such process is that every single potential member of a family must satisfy the requirements set down for entering the family as defined in its characterization. If it doesn't, it has to find another family or build a family of its own. Or we have to change the requirements asked for entering the family, thus its essential features. This is the choice I believe we are confronted with when looking for a family for the 19th century American legal system.

Thus, either the latter meets the requirement of a so-called common law family, including that fundamental one which is the

inductive method of law producing. Or it does not, which is what I tend to believe having read my fellow legal historians specializing in American legal history. Or, if we absolutely want to include American law in the common law systems, we have to exclude the inductive method from the essential characteristics of a common law system, which I am not willing to do when reading my fellow legal theorists of the English legal system which I still consider to be the archetype of common law systems.

Perhaps is it also true that logic itself is not any more part of the grid we are tempted to apply to social phenomena. We live in a time of disorder not of order, of irrationality not of rationality. It could very well be that if we look at the producers, forms, contents and processes characteristic of every law, each of them will appear as a mixed system—would I dare to say a bastard as it would have no real family. What we are contemplating today is, nearly everywhere, a complex ever-moving thoroughfare of producers, forms, contents and processes fighting and fertilizing one another. If this is the case, I would be completely satisfied. Being myself convinced, as a radical legal pluralist, that, in many cases if not most of them, law is but what every individual claims it is, I would appear so much contradicting myself when pleading for taxonomy, that I feel it much better to stop here before making a complete fool of myself.

Here cracks a noble scientific process
Good night sweet taxonomy
And flights of angels sing thee to thy rest.⁴³

Baton Rouge, May 16 2008-
Brussels, March 10 2011

43. I hope the bard of Stratford-upon-Avon will forgive me this free adaptation of the closing sentence of his *Hamlet*.

JURIDICAL PERSONALITY AND INTIMACY

Michael McAuley^{*}

You will take him in your arms, embrace and caress him the way a man caresses his wife. He will be your double, your second self, a man who is loyal, who will stand at your side through the greatest dangers. Soon you will meet him, the companion of your heart.

Gilgamesh[†]

I. Introduction: Persons and Personality	24
II. Juridical Personality and Intimacy	32
III. Attributes of Juridical Personality	39
IV. Sources of Intimacy	46
V. Intimate Associations	52
VI. Conclusion	55

^{*} Michael McAuley is an advocate and practices in Montreal. This paper wants to be adventurous and unorthodox. All *law* sources, formal and informal, are treated on a horizontal plane. All *non-law* sources are treated as having legal value. This paper does not specify a particular time or place although it has been written for the traditions and systems of the West. It also endeavours to reinforce the idea that any discussion of a legal conception necessarily involves some definition of *law*, as well as some agreement on how the word *law* is used and what notions it embraces. This paper has been designed to be accessible to a wide range of educated citizens. Accordingly, with a view to promoting efficient reading, all material that does not add to the argument is relegated to the footnotes.

[†] See GILGAMESH 83-84 (Stephen Mitchell trans., Free Press, New York, 2004). The earliest surviving texts relating legends of Gilgamesh date from 2100 BCE. *Id.* at 3. The Standard Version of the Epic of Gilgamesh dates from about 1200 BCE. *Id.* at 6. The story of Gilgamesh is his relationship with Enkidu with whom Gilgamesh has a homoerotic and, perhaps, homosexual bond. *Id.* at 13. Yet, his physical bond, as this text indicates, nourishes *fides*—the fidelity of a loyal and intimate companion. The battle of these heroes is “an entrance into intimacy, and as close to lovemaking as to violence.” *Id.* at 23.

I. INTRODUCTION: PERSONS AND PERSONALITY

It is best to begin boldly.

What is the law? Is it nothing more than a particular system of principles, rules, and standards, enacted by a constituted authority, that govern people at a particular time and in a particular place? On Main Street, people may think of the law as such, as a set of sovereign pronouncements without ethical direction. Or, like many private-law practitioners, they may think of the law as a random scheme of rules of allocative efficiency and maximization of wealth.

Thoughtful citizens, however, know that the law's empire is more than a grouping of prescriptions and sanctions. Throughout the ages, they have talked about the law as a complex of truthful ideas and moral propositions of ways to regulate the conduct of people in society amongst themselves, in their relations to things, and in their dealings with the sovereign. Thus, it is only in a highly limited, indeed unnatural, sense that the law, as a topic and as a system of rules, can be said to be purely positivistic¹ and value-free.²

1. Positivism is popularly perceived both as a denial that equity, justice and reason form part of an imperative *ius commune* and as an assertion that there are no supereminent principles to which legislation must confirm. Yet, positivism does admit that there *may* be some moral and ethical content to law or, at the very least, that positive laws make moral norms effective. See Brian H. Bix, *Natural Law: The Modern Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 60, 95-98 (Jules Coleman & Scott Shapiro eds., Oxford University Press, 2002) (summarizing the modern tradition of the natural law theory and its relation to positivism). As Bix notes, the positive law school has two major approaches (inclusivism and exclusivism) to the treatment of moral and ethical matters. *Id.* at 7-8. Even where it is admitted that law may have some moral and ethical content, positivism, at first blush, would seem open to a plurality of moral and ethical standards or at least open to as many such standards as there are systems. Can many moralities be compared? For an assessment of positivism within the context of comparative law, see Catherine Valcke, *Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713, 724-731 (arguing that positivism, by reason of the plurality of approaches, does not allow for comparison of legal systems).

2. Finnis has an appealing definition of law that refers to both enacted rules but also to un-enacted, community-regulating norms that are not (or have not yet been) recognized by the constituted authority. Although the thrust of his definition seems highly positivistic, the reference to the “common good” as the *telos* of the law is the definition's focus and is, of course, the definition's contentious core. See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 276-281 (Oxford University Press, 2000). His definition is:

As it happens, earnest debate on the nature of the law gives every indication that the law is ethically ambitious and that it aspires, in very practical ways, to put in place love-based³ rules for good social order. Good law does not adopt single-value approaches. It harkens for a healthy relativism attuned to the community. It accepts the pluralism of moral values, and it acknowledges that the source of these values is likely both secular and theological.⁴ Thus, good law is polycentric, facilitative, and responsive to personal autonomy.⁵

[The law] refer[s] primarily to rules made, in accordance with regulative legal rules, by a determinate and effective authority (itself identified and, standardly, constituted as an institution by legal rules) for a 'complete' community, and buttressed by sanctions in accordance with the rule-guided stipulations of adjudicative institutions, this ensemble of rules and institutions being directed to reasonably resolving any of the community's co-ordination problems (and to ratifying, tolerating, regulating, or overriding co-ordination solutions from any other institutions or sources of norms) for the common good of that community, according to a manner and form itself adapted to that common good by features of specificity, minimization of arbitrariness, and maintenance of a quality of reciprocity between the subjects of the law both amongst themselves and in their relations with the lawful authorities.

Id. at 276-277.

3. See HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 313-318 (1993). "I would contend that law, understood in a Christian perspective, is a process of creating conditions in which sacrificial love, the kind of love personified by Jesus Christ, can take root in society and grow." *Id.* at 313. Sacrificial love is *agape*. Again, from a Christian viewpoint, it is by loving our fellow men and women that we know God. To love is to cooperate.

4. See generally George P. Fletcher, *What Law is Like*, 50 S.M.U.L. REV. 1599, 1610-1612 (1997). "The law is more like religion than the practitioners of either are likely to recognize." *Id.* at 1611. "But lawyers and theologians share a pursuit of ultimate truth in the context of culture-specific traditions. They must mediate between the demands of universal reason and their localized respect for particular sources." *Id.* "Because their authorities are not always moral, both law and religion end up endorsing views that sensitive free-thinkers find abhorrent." *Id.*

5. Polycentricity looks at legal relationships as relationships between the normative orders of a particular society. It seeks the recognition of these relationships within the legal system of that society. See generally SURYA PRAKASH SINHA, *LEGAL POLYCENTRICITY* 1-17 (1996). Legal polycentricity accepts the pluralism of moral values. *Id.* at 6. It does not accept that "... conflicting values are reconcilable under one truth." *Id.* at 3. Legal polycentricity "provides facilities to persons for realizing their particular objectives." *Id.* at 13. It accommodates personal autonomy. *Id.* The Law Reform Commission of New Zealand acknowledges law's facilitative function. See generally *The Law Reform Commission of New Zealand, Recognising Same-Sex Relationships*, Study Paper 4 (Dec. 1999). "The history of mankind

So, the law in motion endeavors to bring about the common and actually⁶ moral good, as this good is tentatively and modestly understood and experienced in today's context. In this regard, the law is meekly cognizant of its own forward-looking—indeed, one might say—its own eschatological dimensions.⁷

One of the subject matters of the law is personhood. “[A] person in law is one who can play a part in the life of the law.”⁸ The law asks: who is a person, and what is her condition? It addresses this question by considering the essential qualities of a

demonstrates that one of the ways in which human sexuality manifests itself is in the formation of publicly avowed and socially recognised relationships intended to be enduring. The legal code of a state properly responsive to the aspirations of its citizens will make provision for such relationships be they heterosexual or homosexual.” *Id.* at 9.

6. “Actually” means a “good” rooted in actual persons’ desires and experiences. See Steven D. Smith, *Natural Law and Contemporary Moral Thought: A Guide from the Perplexed*, 42 AM J. JURIS. 299, 316-330 (1997) (book review) (questioning the value of the “objective” account of sexual morality, and advocating a discourse of “good” where “good” is personal and subjective in some important sense). “[T]he natural lawyer severs goods from our language and understanding, in which things are “good” *to and for persons* and *as experienced by persons* To put the point differently, *our* moral discourse is conducted by *us*, for better or worse, for *our* purposes and subject to *our* understandings.” *Id.* at 320.

7. See Michael McAuley, *The Gay Man and His Civil Code*, 64 LA. L. REV. 443, 449 (2004) (stating that culturally constructed identities will not survive the grave and that the eschatological vocation of a good civil code means that people must learn to live with each other here and today). See also GARETH MOORE OP, THE BODY IN CONTEXT—SEX AND CATHOLICISM 2-3 (Continuum, London, 2001) (1992). “To be fit to live in the kingdom is to live with others in a particular way or range of ways. If a Christian ethic may be seen as eschatological, it is also social. It is about learning to be with each other.” *Id.* at 3. On the relationship of eschatology and ethics, and on “action for the world’s betterment,” see Kathryn Tanner, *Eschatology and Ethics*, in THE OXFORD HANDBOOK OF THEOLOGICAL ETHICS 41, 52-56 (Gilbert Meilaender & William Werpehowski eds., Oxford, 2005). See also Margaret A. Farley, *New Patterns of Relationship: Beginnings of a Moral Revolution*, 36 THEOLOGICAL STUDIES 627 (1975).

If the ultimate normative model for relationships between persons is the very life of the Trinitarian God, then a strong eschatological ethic suggests itself as a context for Christian justice. That is to say, interpersonal communion characterized by equality, mutuality, and reciprocity may serve not only as a norm against which every pattern of relationship may be measured but as a goal to which every pattern of relationship is ordered.

Id. at 645-646. It should be noted that Farley’s observations focus on male-female relationships.

8. H., J., AND L. MAZEAUD, LEÇONS DE DROIT CIVIL, t. 1, v. 2, no. 438 (trans.) (7th ed., Montchrestien, Paris, 1986), cited in QUEBEC CIVIL LAW: AN INTRODUCTION TO QUEBEC PRIVATE LAW 203 (John E.C. Brierley and Roderick A. Macdonald, eds., Emond Montgomery, Toronto, 1993).

person under a topic called *personality*. When talking about personality, the law calls persons *actors* or *subjects* and says that they must be free in order to have full personality since the law has had, at times, relatively developed notions of deprivation or absence of personality.⁹

Each citizen is one-of-one, but each is also one-of-many since all citizens belong to political, social and economic communities. In one sense, a person is a citizen because she belongs to one of these communities, and her rights and duties are specified by that community. In another sense, her citizenship is coextensive with her personhood and extends beyond national boundaries. Her citizenship reflects her participation in communities and her implication in their life.

In these communities, citizens are called to cooperate with each other.¹⁰ The nature and scope of the right-owning and duty-owing attributes of a citizen's personality are determined on the basis of her status (or statuses) in these communities. Across the board, family status largely determines a person's capacity to enjoy and exercise rights in the society where she lives.

In civil society,¹¹ in contemporary¹² private law,¹³ and in the West,¹⁴ the family is the benchmark that indicates people's

9. At times, the attributes of personality have not been extended to non-citizens, outlaws, the imprisoned, and the enslaved. Personality has also been interested in human physiology. For example, in Roman law and in the *ancien droit* of France, *monstres* (monsters, in the sense of deformed neonates) had no personality. See AUBRY & RAU, 1 DROIT CIVIL FRANÇAIS 363 n.10 (7th ed., André Ponsard ed., Paris, 1964).

10. In the context of property law, see JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD-LESSONS ON THE OBLIGATIONS OF OWNERSHIP 20-25 (Beacon Press, Boston, 2000). "Rights must be limited to protect rights. This paradox arises because we do not live alone. The law—including the law of property – recognizes that our fate is tied to the fate of others. Moreover, the law does not exist only to protect our interests; it exists also to promote liberty and justice. These goals cannot be realized unless we act in ways that respect the interests of others." *Id.* at 20.

11. Civil society is a society governed by civil law—*ius civile*. In this sense, the civil law means the secular law applicable to citizens of a particular place that regulates their public and private lives and that accords to them certain civil rights and freedoms. On the history of the meaning of civil law, see generally Alain Sériaux, *Droit civil*, in DICTIONNAIRE DE LA CULTURE JURIDIQUE 435 (Denis Alland & Stéphane Rials eds., Presses universitaires de France, Paris, 2003).

12. Roland Barthes asks: "De qui suis-je le contemporain? Avec qui est-ce que je vis?" (Who is my contemporary? With whom do I live?). See ROLAND BARTHES, COMMENT VIVRE ENSEMBLE—NOTES DE COURS ET DE SEMINAIRES AU COLLEGE DE FRANCE, 1976–1977 36 (Éditions du Seuil 2002). Barthes states that contemporaneity is a very complex and little examined topic. *Id.*

personal status, and the rights and duties related to that status. Accordingly, personality usually is discussed in a traditional family context,¹⁵ dominated by the metanarrative of marriage¹⁶ as

13. Private law is the ensemble of legal rules governing relations among persons and, sometimes, between individuals and public bodies. Private law usually encompasses civil law, commercial law and, perhaps, judicial law. *See* the entry for “private law” in PRIVATE LAW DICTIONARY AND BILINGUAL LEXICONS 339 (2d ed., Les Éditions Yvon Blais, Cowansville, 1991). *See also* Introduction, in 1 ENGLISH PRIVATE LAW xxxvi (Peter Birks ed., Oxford University Press, 2000). “The whole of the law is either public law or private law. There is no need to pause on this, nor to investigate the boundary disputes. Our present business is only with private law. *English Public Law* will deal with the other side. It will deal with constitutional law, human rights, administrative law, and criminal law.” *Id.* *English Public Law* seems to take the position that the sources of fundamental rights are found either in constitutional documents, statutes or case-law. In the absence of a written constitution, as is the case for England, judges have exclusive control over the sources for legal justifications. *See* Evelyn Ellis, *Constitutional Fundamentals: Sources of Law and the Hierarchy of Norms*, in ENGLISH PUBLIC LAW 3, 44-45 (David Feldman ed., Oxford University Press, 2004). *Quaere*, where do judges find their sources? From a certain perspective, the British inability to protect fundamental rights (owing to the absence of written constitutional documents) has been somewhat mitigated by the Human Rights Act 1998. Under the terms of this Act, specified rights were adopted into municipal law. Presumably on account of the parliamentary adoption of certain provisions of the European Convention, Ellis’ co-contributor and the volume’s general editor, David Feldman, deals with the topic of privacy, lifestyle, personal integrity, status, gender, sexuality, and family life solely under the Convention and the Act. *See* David Feldman, *Rights to Life, Physical and Moral Integrity, Freedom of Lifestyle and Religion or Belief*, in ENGLISH PUBLIC LAW, *supra* at 471-479. Feldman does not discuss the topic of the origin of the rights or the notion that human rights might be innate in the *persona* (personhood) of the human person (and not conferred by the sovereign or otherwise formally justified).

14. Where is the West? It is a hemisphere. It indicates a direction on a compass, but also a metaphorical direction: “Go West, young man.” However, the West, in the law, might be taken to mean all those traditions and systems that have a like approach to issues and that have a common *mentalité* (mental, or intellectual, disposition) characterized by their attention to personalism (individual freedom and social duty), legalism (the need to base decisions on a general rule of law), and intellectualism (conceptual and systematic legal methodology). *See* Franz Wieacker, *Foundations of European Legal Culture*, 38 AM. J. COMP. L. 1, 19-27 (1990). *See also* BERMAN, *supra* note 3 at 23-33 (describing the characteristic elements of the Western legal tradition). On modern perspectives of the nature of a legal tradition, *see* Ugo Mattei & Anna di Robilant, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 TUL. L. REV. 1053, 1071-1077 (2004). “Membership in one legal tradition is not exclusive, because tradition is not an ontological entity; rather, it is an interpretive entity largely defined by a sense of belonging and identity.” *Id.* at 1072.

15. “Tradition” and “traditional” are unsafe words, especially in the domain of intimate personal relationships. One might sensibly propose the following definition. “Tradition” is a complex of customs and practices handed down from one living generation to another living generation, the elements of

related by its mythweavers.¹⁷ This is so notwithstanding modern disestablishment of the conventional marriage model.¹⁸

The personality in the law, or juridical personality, of the human person is a personality of a person who has human self-consciousness, self-identity, and center of reference.¹⁹ It deals with

which can be found in the actual experience of a living generation or the accurate memory of a living generation of the historically verified experience of a former generation or generations. Can “tradition” mean anything more than this? Today’s lawmakers and popular media use “traditional marriage” in the sense of marriage as experienced everywhere since the beginning of time and, of course, as linked to the “intelligent design” of human existence. The tedious and mantric repetition of “traditional marriage” (and its imagined, immemorial incidents and effects) constitutes not only a mistaken reality but a clearly invented tradition. On the nature of an invented tradition, *see generally* Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION* 1-14 (Eric Hobsbawm & Terence Ranger eds., Cambridge University Press, 1983). Hobsbawm states:

‘Invented tradition’ is taken to mean a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past. In fact, where possible, they normally attempt to establish continuity with a suitable historic past.

Id. at 1.

It is the contrast between the constant change and innovation of the modern world and the attempt to structure at least some parts of social life within it as unchanging and invariant, that makes the ‘invention of tradition’ so interesting for historians of the past two centuries.

Id. at 2.

16. Fineman discusses social and cultural “narratives” about the family and marriage as an institution. *See* MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 145-176 (1995).

17. For the word “mythweaver”, *see* IF NOT, WINTER—FRAGMENTS OF SAPPHO 353, 382 (Ann Carson trans. 2002).

18. Cott summarizes various reasons for the disestablishment, dejuridification, delegalization, and privatization of marriage in the United States. *See generally*, Nancy F. Cott, *PUBLIC VOWS—A HISTORY OF MARRIAGE AND THE NATION* 200-227 (2000). For the use of disestablishment and its synonyms, *see id.* at 283, n.17. Most of the reasons are economic. They include: two-earner families; households of unrelated groups; cohabiting couples; more than one generation living together; single-person households; single mothers and fathers; *transgressive* (italics added) sexuality; and enforcement of support obligations outside of the marital bond. *Id.* at 214-215. When Cott uses the word “transgressive,” does she mean sinful sexuality or sexuality not conformable with certain societal expectations?

19. *See* GERALD O’COLLINS, S.J., *CHRISTOLOGY—A BIBLICAL, HISTORICAL, AND SYSTEMATIC STUDY OF JESUS* 224-249 (Oxford University Press, 1995) (discussing the divine and human natures of Christ). “The ego of his human consciousness is also the Word of God as humanly conscious and self-conscious, that is, as operating in and through *this* human awareness. God the

her existence, her voluntary action, and her rights and obligations.²⁰ It is the free action of the citizen and her free access to legal institutions. Juridical personality is also her free enjoyment and exercise of civil rights, and her freely assumed obligation to undertake and discharge her civil duties. She has a patrimony²¹ and, in the private law, rights and duties relate either to her patrimonial assets and debts or to her extrapatrimonial rights (and concomitant duties) to the respect of her personal dignity, integrity and privacy, as well as to the respect of her other civil rights and fundamental freedoms.²² In public law she also has a patrimonial stake in property that belongs to the community whether local, regional or international. She and all others are stakeholders and are entrusted to preserve and safeguard the common patrimony for transmission from generation unto generation.²³

Son takes as his own this human self-consciousness, self-identity, and centre of reference." *Id.* at 247.

20. The law is interested in a person's existence, identity (name, domicile or residence, civil and family status, and sex), and her attributes (subjective rights). *See generally* JEAN CARBONNIER, *DROIT CIVIL 1: LES PERSONNES* 15, 19-177 (21st ed., Presses Universitaires de France, Paris, 2000). The objective law attributes subjective rights. *Id.* at 15. Modern French scholarship still adheres to a formal definition of law. Law is a series of prescriptive rules for social conduct that are sanctioned by a public authority. The French carefully distinguish legal and moral rules: their objectives are different. *See generally* JEAN-LOUIS BERGEL, *THEORIE GENERALE DU DROIT* 42-52 (4th ed., Dalloz, Paris, 2003).

21. A patrimony is the aggregate of a person's rights and obligations determined or determinable in economic or pecuniary terms. "Extrapatrimonial" primarily refers to rights that are "out of commerce" and have no monetary value. *See generally* the entries for "patrimony", "extrapatrimonial", and "extrapatrimonial right", *supra* note 13, *PRIVATE LAW DICTIONARY AND BILINGUAL LEXICONS* at 157, 311-312. A breach of an extrapatrimonial right has patrimonial implications.

22. "Civil rights," "civil freedoms," "fundamental freedoms," "civil liberties" and other terms of like ilk are often used interchangeably. As used in this paper, "civil rights" refers to those "rights" recognized explicitly or implicitly by the private law, and "fundamental freedoms" to those "rights" formally or informally present in the public law and, in particular, in the constitutions, written or unwritten, of sovereign bodies. Of course, there is considerable travel between the private and public spheres of the law, and it is often difficult to determine whether the private law or the public law first recognized any particular right. For a short, readable account of the various senses of "rights", *see* MAURICE CRANSTON, *WHAT ARE HUMAN RIGHTS?* 19-24 (The Bodley Head, London, 1973).

23. The notion of "*patrimoine commun*" (common patrimony) is particularly useful in connection with environmental protection issues. *See generally* Marie-José Del Rey, *La notion controversée de patrimoine commun*, D. 2006, No. 6, 388. As a juridical conception, the idea of common patrimony promotes awareness that every individual is a stakeholder. *Id.* at 389. Although

This paper examines intimate association, under the rubric of intimacy, as the actual, aspiringly good experience of people in the law. In this paper, intimate association is unmoored from legal abstractions of an ideal or canonically imagined society of robotic citizens and released from any pre-existing or pre-conceived morality that militates in favor of a single form of intimate association. It is transsystemic²⁴ and cross-disciplinary in that it is interested in the *best* approach to intimacy in Western legal traditions and systems²⁵ and in the social sciences. The *best* approach is supranational and is fashioned from a *ius commune* that is a “shared international fund of private law [thinking].”²⁶

Accordingly, this paper first discusses the relationship between juridical personality and intimacy. It then sets out to identify the contours of juridical personality and further define its attributes. Third, it looks at the right of intimacy, considered as an attribute of

touted as a novel conception in civil law scholarship, its notions are similar to those that have long been known to underscore the chthonic legal tradition. *See generally* H.P. GLENN, *LEGAL TRADITIONS OF THE WORLD—SUSTAINABLE DIVERSITY IN THE LAW* 59-91 (2d ed., Oxford University Press, 2005).

24. On the meaning of the word “transsystemic” as a way of knowing the law, *see generally* Nicholas Kasirer, *Bijuralism in Law’s Empire and in Law’s Cosmos*, 52 J. LEG. EDUC. 29 (2002).

25. The notion of a legal system is roughly understood as an interconnected and interrelated body of institutions, rules and norms that formally or informally govern society in a particular place. A University of London student subject guide nicely describes a legal system as “a complex of operations, processes, human actions, institutions and ideals.” *See* WAYNE MORRISON ET AL., *COMMON LAW REASONING AND INSTITUTIONS* 26 (Publications Office, The External Programme, University of London 2004). A legal tradition has been well defined by Merryman. *See* John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 1-4*, in *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICAN, AND EAST ASIA—CASES AND MATERIALS* 3 (John Henry Merryman et al. eds., The Michie Company, Charlottesville, 1994, 2000 repr.).

[A legal tradition] is a set of deeply rooted, historically conditioned attitudes about the nature of the law, about the role of law in society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.

Id. at 3-4.

26. *See* FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 193 (Martinus Nijhoff Publishers, The Netherlands, 1993). Juenger proposes a new methodological pluralism for the resolution of choice-of-law issues in American conflicts law. *Id.* at 191-194. For the use of the word “best” and for a methodological approach similar to Juenger’s proposal, *see generally* L. McDougall III, *Toward Application of the Best Rule of Law in Choice of Law Cases*, 35 *MERCER L. REV.* 483 (1984) (advocating that courts should apply the best rule of law in choice-of-law cases).

juridical personality and as a private-law right of intimate association. It endeavors to locate the formal and informal sources of intimacy in close, personal relationships. The paper next tries to specify intimate associations. By way of conclusion, it restates the nature of juridical personality and its intimate components.

II. JURIDICAL PERSONALITY AND INTIMACY

Juridical personality recognizes that the citizen has important rights of intimacy in her life and at home. These rights include the right of intimacy, expressed as a right at large, and particular rights of intimacy. Particular rights, for example, relate to the protection of her physical and intellectual intimacy, the intimacy of her appearance, image and reputation, the protection of her intimate private life against undue public scrutiny, her intimacy as an expectant mother concerning the circumstances of conception and birth, and the intimacy relating to her personal health, especially her decisions for final care.²⁷

There is no set classification of rights. However, in this list of particularized rights, there are rights that might be recognized as rights of privacy; there are also other rights, sometimes referred to as personality rights, e.g. privacy-based and property-based protection of her image, and the protection of her reputation; and, there are rights that relate to her physical integrity, e.g. the intimacy of her body and the circumstances of conception. Indeed, intimacy, privacy, and integrity often are used synonymously.²⁸

27. The discussion draft of the Civil Code of Puerto Rico refers to the right of intimacy (*intimidad*) as a fundamental right (*derecho esencial*) in the text of its art. 8 of Book One (Jural Relations). See Comisión Conjunta Permanente para la Revisión y Reforma del Código Civil de Puerto Rico, Memorial Explicativo, Código Civil de Puerto Rico (Borrador para discusión) (revised March 5, 2003) 14, available at <http://www.oslpr.org> (last visited February 21, 2011). See also the comments on various rights of intimacy. *Id.* at 9, 10, 11, 20, 33, 39, 41 and 42. Both dignity (*dignidad*), joined to the concept of honor (*honor*), and physical and moral integrity (*integridad física y moral*) are specified rights in art. 8. *Id.* at 14. Dignity and intimacy are used to describe the rights of an expectant mother. *Id.* at 10. Respect of dignity and integrity is required for autopsies and for the disposal of remains and bodily parts. *Id.* at 37.

28. There are language problems when talking about intimacy. Although intimacy, in English and Spanish, embody similar notions of close friendship and sexual relations, the words “*privacidad*” and “*intimidad*,” in Spanish, both express the idea of “privacy” in English. See THE OXFORD SPANISH DICTIONARY 1593 (3d ed., Oxford University Press, 2003). The French Civil Code relates the concept of “*intimité*” (intimacy) to the concept of “*vie privée*” (private life). See art. 9, Code Civil 2010 (Éditions Dalloz, Paris, 2009).

They are all attached to the general notion of dignity,²⁹ and dignity is itself identified both as a separate attribute of the person and an overarching notion of the human condition. Indeed, dignity-at-large patently requires a high level of respect for the way by which a person fashions her private life and the degree to which her private life is, aptly and fortunately, strange. It is her *étrangeté* that announces not only her diversity and her choice of intimacy, but also her enigma and her *mysterium*.³⁰

Yet, in a person's private life, intimacy is not limited to her emotions or sentiments or to her privacy. Nor is it limited to her right of privacy of sexual intimacy. It goes beyond her sexuality and sexual conduct.³¹ Its expression, in general terms, as a right, embraces a right of intimate association between adults and a right of choice of a close personal, economic, social, and sexual relationship³² with another person. It also refers to other close or

29. The Supreme Court of Canada has defined "dignity." See *M. v. H.*, [1999] 2 S.C.R. 3, para. 261 (Supreme Court of Canada). "The central purpose of the equality guarantee in s. 15(1) of the *Charter* is the protection and promotion of human dignity. The concept of human dignity is concerned with the autonomy, self-worth, and self-respect of individuals. As Iacobucci J. points out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, . . . "[h]uman dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits." *Id.* Iacobucci, J.'s conception of human dignity would seem to reflect the thin meaning of this term. See Doron Shultziner, *Human Dignity—Functions and Meanings*, GLOBAL JURIST TOPICS 1, 12-16 (vol. 3, issue 3, article 3) (2003) (defining the thin meaning of human dignity as a meaning related to humiliation and self-worth). Shultziner explains how the thin meaning relates to other meanings:

Whereas rights and duties, and honor, are contained within the upward wide moral view that is meant to harmonize human moral worth and one's proper social-political relation with other human beings, the thin meaning is contained within a thin moral view that is focused on the crude violation of that basic moral worth.

Id. at 12.

30. Didier Eribon quotes the French poet René Char (1907–1988) as saying: "Développez votre *étrangeté légitime*." See DIDIER ERIBON, *REFLEXIONS SUR LA QUESTION GAY* 486 (Fayard, Paris, 1999). The French word "*étrangeté*" embraces, as perhaps the English "strangeness" does, meanings of singularity, originality and, of course, eccentricity. See also *M. v. H.*, *supra* note 29 at para. 260 (Gonthier J.) "It is important to note that it is not a denial of human dignity to recognize difference; to the contrary, acknowledging individual personal traits is a means of fostering human dignity. By recognizing individuality, and rejecting forced uniformity, the law celebrates differences, fostering the autonomy and integrity of the individual." *Id.* at para. 262.

31. See *infra* Part. III & IV.

32. For the right of choice of a sexual relationship, see, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting). "The fact that

intimate associations that encompass most, but not necessarily all, of these relational aspects. These associations involve living together.³³ They do not imply and are not predicated on sexual relations, although access to state-administered benefits may require some sort of sexual relationship.³⁴ This right of intimate association might be said to belong to a new category of private-law rights—civil equality rights. These rights are linked to notions of equality before the law and to protection against unlawful discrimination.³⁵ The notion of civil equality rights relates to the following question and answer. Who is entitled to civil rights? Everyone.

The right of intimacy, at large, relates to status and to the capacity to perform specific activities. Status is understood to have two classic components: *status civitatis* (nationality) and *status familiae* (family status) although other notions of status, such as a person's age, health, profession, or occupation, have surfaced.³⁶ Status answers the questions: who is a legal subject, and who possess rights? In the 19th century, non-nationals had limited civil rights in many legal systems. In modern law, the concept of nationality as a portal to capacity has been largely displaced by

individuals define themselves in a significant way through their sexual relationships suggests...that much of the richness of a relationship will come from the freedom to *choose* the form and nature of these intensely personal bonds." *Id.*

33. On the rational and sentimental meaning of "living together", see generally Nicholas Kasirer, *What Is Vie Commune? Qu'est-ce que living together?*, in MELANGES PAUL-ANDRE CREPEAU 487 (Cowansville, Yvon Blais, 1997).

34. For example, private-law and public-law benefits and obligations, in Canada, under the federal authority and administered by that authority, have been extended to "... all couples who have been cohabiting in a conjugal relationship for at least one year, in order to reflect values of tolerance, respect and equality, consistent with the *Canadian Charter of Rights and Freedoms*." See Summary, *An Act to modernize the Statutes of Canada in relation to benefits and obligations*, S.C. 2000, c.12 (Bill C-23). What is "a conjugal relationship"? It has long been presumed that this type of relationship must be marriage-like and involve sexual relations. For a discussion of conjugality and non-conjugality, see generally Brenda Cossman and Bruce Ryder, *What is Marriage-Like Like?*, 18 CAN. J. FAM. L. 269 (2001). The Supreme Court of Canada has observed that a conjugal relationship may exist even in the absence of a sexual relationship. *Id.* at 291-300 (discussing the Court's views of conjugality in the context of a same-sex relationship).

35. See Carbonnier, *supra* note 20, at 158-163, 174-177.

36. But see Aubry & Rau, *supra* note 9, at 355-357 (arguing that notions of the physical state of a person, her age, health, social position, religion, profession or occupation, are not status matters).

domicile. Today, status is mostly concerned with acts of civil status that identify the person as born,³⁷ married, or dead, provide her with a name, fix her domicile, and sometimes identify her ethnic or cultural group.³⁸ Capacity answers the questions: who is able to enjoy civil rights, and who can exercise these rights?³⁹

The right of intimacy has patrimonial and extrapatrimonial consequences in that, patrimonially, an intimate association refers to a person's voluntary undertakings to acquire assets and assume liabilities in the close presence of another (and to that person's profit or detriment) and, extrapatrimonially, intimacy relates to her right of privacy of the personal, economic, social and sexual aspects of her intimate association (and the duties of recognition of others' intimacy). Her rights commit her to the discharge of her duties. The respect of her intimacy is companion to her respect of the intimacy of others in whose favor her rights are impressed with a trust.⁴⁰

For the most part, the meaning of *intimacy* has been understood either in terms of fundamental freedoms and the public law's approval or disapproval of intimate sexual relations, or in terms of

37. The act of birth will be the first act of civil status to indicate a person's sex: male or female. However, there are intersexual children, and there is a wide range of intersexual states. Chau and Herring have recently examined the topic and advocate a legal definition of sex that recognizes a scale of sexual identity or a sexual continuum. They admit that this has obvious consequences for marriage. See Pak-Lee Chau and Jonathan Herring, *Men, Women, People: The Definition of Sex*, in *SEXUALITY REPOSITIONED—DIVERSITY AND THE LAW* 187 (Brooks-Gordon et al. eds., Hart Publishing, Oxford-Portland, 2004). As a result, the law will no longer place any legal significance on sexual differences. *Id.* at 206. "Instead of talking of men and women the law will treat each individual as a person..." *Id.* at 207.

38. On the interdependence of culture and national law, see Marie-Noël Capogna, *Identité juridique et identité culturelle de la personne physique: quels rapports?*, in *L'IDENTITÉ DE LA PERSONNE HUMAINE—ÉTUDE DE DROIT FRANÇAIS ET DE DROIT COMPARÉ* 911, 919-922 (J. Pousson-Petit ed., Bruyant, Brussels, 2002).

39. The capacity to enjoy civil rights is sometimes referred to as "aptitude." See CIVIL CODE REVISION OFFICE, REPORT ON THE QUEBEC CIVIL CODE—VOLUME II—COMMENTARIES—Tome 1, Books 1 to 4 (Éditeur officiel, Quebec, 1977). *Id.* at 23. See also Aubry & Rau, at 357. "[La] capacité juridique est l'aptitude à devenir le sujet de droit et d'obligations et à les exercer." *Id.* Important, however, is the distinction between status and capacity. *Id.* 357-358, note 13.

40. See John Finnis, *Natural Law: The Classical Tradition*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW*, *supra* note 1 at 1, 51-2 (discussing the philosophy of property law and its moral content). "[A]t the same time [property rights] are morally subject to a kind of inchoate trust, mortgage, lien, or usufruct in favour of *all other persons*." *Id.* at 51.

marriage and the private law's disapproval of non-marital relations and its sole regard for marriage as generative of the family and, hence, of the personal status of a citizen and home of her juridical personality.⁴¹ The law imagines and images intimacy horizontally.⁴² Therefore, it is no surprise that the institutions of marriage and the husband-wife-child family, in much of the secular positive law of the West, have been classically considered as the ideal, if not sole, repositories for husband-wife sexual action.⁴³ Indeed, historically and in the Common Era, the secular West has considered the disembodiment of sexual action from the institution of marriage as dystopian.

Until recently, the sexual action of marriage has been an *idée fixe* underscoring the private law of persons. It has been framed as "an act which in its intentions and kind is apt to actualize, express, and allow the spouses to experience their friendship, commitment, and openness to procreation of offspring."⁴⁴

41. See also Fineman, *supra* note 16 at 145-147. Moreover, Borrillo states that early Christian thinkers originally considered the sexual action of marriage as a necessary sin; it was necessary to contain *luxuria* (lust, wantonness or concupiscence)—and, of course, to direct it to propagation. See generally Daniel Borrillo, *La luxure-L'orthodoxie matrimoniale comme remède contre les errances de la passion*, in LES SEPT PECHES CAPITAUX ET LE DROIT PRIVE (Fortin et al. eds., Éditions Thémis, Montreal, 2007).

42. See Fineman, *id.*, at 145-146.

. . . the family is experienced as an institution of primarily "horizontal" intimacy, founded on the romantic sexual affiliation between one man and one woman. The dominant paradigm, however, privileges the couples as foundational and fundamental. . . . Intergenerational relationships—vertical lines of intimacy—may be temporarily accommodated . . . Children achieve adulthood and go on to form their own discrete, primary, horizontal and sexual connections . . .

Id. at 146.

The image of horizontally organized intimacy is a crucial component of contemporary patriarchal ideology in that it ensures that men are perceived as central to the family.

Id. at 147.

43. Fineman proposes the re-orientation of the concept of the husband-wife-child family (and the constitutional and common-law protection of its privacy) towards a core family unit of mother-child. See Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955 (1991). "Family and sexuality would not be confluent, rather, mother-child formation would be the "natural" or core family unit; it would be the base entity around which social policy and legal rules are fashioned. The intergenerational, nonsexual organization of intimacy is what would be protected and privileged in law and policy." *Id.* at 971.

44. See Finnis, *supra* note 40 at 42. Finnis discusses the meaning of *fides* in Thomas Aquinas as one of marital friendship. "This positive *fides* is the willingness and commitment to belong to, and be united in mind *and body* with,

This rigid conception is, for all intents and purposes, the idea of the sexual action of marriage prevalent both in the secular tradition of the West and in the catechetical tradition of most of the Christian West.⁴⁵ From a certain perspective, marriage is a truth claim—a claim, like all truth claims, that is a “compelling story told by persons in positions of power in order to perpetuate their way of seeing and organizing the natural and social world.”⁴⁶ Today, powerful marriage-narrators are inciting people to attribute social ills and to project the failures of marriage onto other intimate associations. In this way and as René Girard might say, people mimetically channel the deficiencies of marriage onto legally vulnerable relationships. These relationships become institutional scapegoats.⁴⁷

one's spouse in the distinct form of *societas* and friendship which we call marriage.” See John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 AM. J. JURIS. 97, 108 (1997). *Fides* is “the whole justice, usefulness, pleasure . . . , and delight . . . in shared virtue which can be found in a good marriage with its division of complementary roles.” *Id.* at note 40. For Finnis, sexual acts are not unitive unless they are marital, and they are not marital unless they involve *fides* and procreation. Marital sexual acts have “procreative significance” because they are “. . . actualizations, so far as the spouses then and there can, of the reproductive function in which they are biologically and thus personally one.” See John Finnis, *Law, Morality, and “Sexual Orientation,”* 69 NOTRE DAME L. REV. 1049, 1067 (1994).

45. There are said to be two ethical traditions in the Christian West: Catholic and Protestant. See ERIC FUCHS, *SEXUAL DESIRE & LOVE* 149-167 (Marsha Daigle trans., 1983). “. . . Catholic ethics remain faithful to the patristic tradition: sexuality belongs to the order of impurity having no justification other than procreation. . . .” *Id.* at 150. The Protestant tradition focuses on the couple. Each owes the other affection and tenderness, *Id.* at 161. “Thus begins a reflection on the couple, which aims more and more at bringing out its value, by going beyond the traditional notion of procreation as the primary justification for conjugal life.” *Id.* For Fuchs, the West does not appear to include the East, that is to say, the Eastern and Oriental Churches, notwithstanding the Eastern ecclesiastical tradition of some European countries, e.g., Bulgaria, Romania, and Greece. Moreover, it is altogether unclear whether the Latin and Greek patristic traditions are identical on the topic of marriage and procreation.

46. See Kevin J. Vanhoozer, *Theology and the Condition of Postmodernity: A Report on Knowledge (of God)*, in THE CAMBRIDGE COMPANION TO POSTMODERN THEOLOGY 11 (Kevin J. Vanhoozer ed., Cambridge University Press, 2003) (discussing postmodernism in truth and history).

47. See Austen Ivereigh et al., *In Conversation—Scapegoats and Saviours*, THE TABLET, Oct. 16, 2004 at 8 (summarizing Girard's thinking). “We learn from one another what it is we desire, he [Girard] argues, and then desire it, imitating one another. This “mimetic desire then encourages us to channel our violence towards vulnerable people (the scapegoats) at times of crisis, as if this resolves the problem.” *Id.* See also René Girard, *Mimesis and Violence*, in THE

Very important economic and social benefits flow from this sexual action. Does the sexual profile of marriage (whether procreative intercourse and marital friendship, procreation alone, or discouragement of promiscuity and concupiscence) sufficiently justify a disregard of the sexual action (if there are sexual relations), commitment, and friendship of other intimate associations in modern society?

The sexual profile of this elite institution⁴⁸ does not justify this disregard and does not adequately sustain its claim to self-appropriation of substantially all economic aspects of intimate bonds, as is the case in many Western systems. Nor is the affective profile of a person (her emotions, her psyche, and her spirit) delimited by the nuptial profile of the human body, as it appears to be in a certain ecclesial tradition.⁴⁹ Indeed, the assertion that “[marriage] is an *intrinsic* good, with two constitutive and mutually supportive aspects, friendship and procreation”⁵⁰ does not provide a full and rational account for the objectives of legal rules and institutions that are disinterested (or only marginally interested) in marital friendship and procreation,⁵¹ such as

GIRARD READER 9-19 (James G. Williams ed., 1996) (summarizing his mimetic model).

48. See Barbara Dafoe Whitehead, *For Love & Money: Has Marriage Become an Elite Institution*, COMMONWEALTH, Dec. 2, 2005, at 6 (discussing today's marriage as a privilege reserved to the well-educated and wealthy).

49. See Post-Synodal Apostolic Exhortation *Pastores Dabo Vobis* to the Bishops, Clergy and Faithful on the Formation of Priests in the Circumstances of the Present Day, March 25, 1992, para. 44. The Exhortation tells us that “affective maturity presupposes an awareness that love has a central role in human life.” *Id.* Moreover, “[m]an cannot live without love. He remains a being that is incomprehensible for himself; his life is meaningless if love is not revealed to him, if he does not encounter love, if he does not experience it and make it his own, if he does not participate intimately.” *Id.* The text then states: “. . . we are speaking of a love that involves the entire person, in all his or her aspects—physical, psychic and spiritual—and which is expressed in the “nuptial meaning” of the human body, thanks to which a person gives oneself to another and takes the other to oneself.” *Id.* Affective maturity brings to celibate priests “serene friendship and deep brotherliness.” *Id.*

50. Finnis, *supra* note 40, at 43.

51. Apart from the rational disjunction, in very many cases, between procreation and governmental rules and policies regulating the economic consequences of intimate associations, is it not a reasonable proposition that global population growth and, for example, the chronic poverty, disease, and burgeoning populations of sub-Saharan Africa, militate against institutional policies favoring procreation? These policies would appear irresponsible, even in the West. For a readable overview discussing population growth over the next 50 years, see Joel E. Cohen, *Human Population grows up*, SCI. AM., Sept. 2005 at 48-55 (outlining problems relating to population growth) and Jeffrey D. Sachs,

retirement pensions, spousal survivorship benefits, and access to public housing. Should two intimates' entitlement to homestead protection conform to the sexual strictures of St. Paul?

Investigations into the functional underpinning of rules and institutions, especially of public authorities, should not be reserved to the scrutiny of the sexual and affective profiles of same-sex couples. Indeed, the notion of an intimate association extends to a great number of people who are unmarried, divorced, widows or widowers. Stories of these intimates are not stories, in the sense of fables, but stories, in the sense of real experiences.⁵²

Now, what is the content of juridical personality and how does it relate to the right of intimacy?

III. ATTRIBUTES OF JURIDICAL PERSONALITY

Juridical personality⁵³ is also known as *legal personality*, and sometimes as *legal personhood*. In the civil law tradition—a

Can Extreme Poverty be eliminated?, *id.* at 56-65 (discussing poverty and proposing solutions).

52. Roderick Macdonald, first President of the Law Commission of Canada, tells the story of the fiftieth wedding anniversary of his wife's parents. The anniversary celebration included only a small number of actually married couples. See RODERICK ALEXANDER MACDONALD, *LESSONS OF EVERYDAY LAW* 59–63 (McGill-Queen's University Press, 2002). Macdonald relates:

There were an elderly brother and sister (a widower and widow) who had been sharing an apartment for five years. There were two sisters who had never married and who had lived in the same house for over 40 years. There were two air force friends of my father-in-law (one widowed, one divorced) who also were sharing an apartment. There were three unmarried couples in their forties and fifties who had each been living together for more than a decade after their respective divorces. There were single fathers and single mothers trying to re-establish a relationship with a new partner. There were never-married guests currently living alone who had in the past been involved in a longterm relationship. And there was one same-sex couple. The obvious diversity of these domestic situations caused me to realize just how few long-married, never-divorced couples such as my wife's parents there really were, and just how many other forms of a stable domestic relationship now exist.

Id. at 60.

53. Juridical personality is known under many names. In the structured environment of civil codes of the civil law tradition, the term "juridical personality" (*personalité juridique*) is used in the Civil Code of Québec (*see, e.g., C.C.Q. art. 1*) for both human beings, "natural persons" (*personnes physiques*), and "legal persons" (*personnes morales*) (corporations and other entities constituted by law) (*see e.g. C.C.Q., art. 3083*). The Civil Code of Chile employs "juridical personality" (*personalidad jurídica*) (*see e.g. art. 54*) but

tradition noted for its scientific approach to these matters—the *personality* or *civil personality* of human beings is often contrasted with the *juridical personality*, *legal personality*, or the *moral personality* of entities. In that legal tradition, human persons are *natural persons* or *physical persons*, and entities are *juridical persons*, *legal persons*, or *moral persons*. In the common law tradition—a tradition that is said to know little and to care less for the construct of *personality*—there are sightings of *artificial personality*, *artificial persons*, and *juristic persons*.⁵⁴ Generally

reserves its use to entities. The Louisiana Civil Code uses “natural personality” for human beings (*see e.g.* C.C. art. 25). The term “civil personality” (“*personalidade civil*”) is used in the new Brazilian Civil Code of 2002 (*see e.g.* C.C. art. 2) and in the Spanish Civil Code (*see e.g.* C.C. art. 32) for human beings. “Juridical personality” makes a civil law appearance in the English language version of the draft Québec Civil Code (1977) (*see e.g.* art. 1) although the English language version of the 1976 committee report for this draft Code uses the word “legal personality.” Human beings are known as natural persons (Quebec, Chile, Louisiana, Brazil, and Spain) and entities are called either juridical persons (Chile, Louisiana, Brazil, and Spain) or legal persons (in the English version of the Civil Code of Québec). In Louisiana, an in vitro fertilized human ovum is a “juridical person” (*see e.g.* R.S. 9:124). French doctrinal writing uses “juridical personality” for both persons and entities, but often “*personalité juridique*” appears as a term reserved for entities. In the French Civil Code, the terms “moral personality” (*personalité morale*) and “moral person” (*personne morale*) make a showing (*see e.g.* C.C. art. 1842, 1844-1845). The Civil Code of Argentina distinguishes between *personas de existencia visible* and *personas de existencia ideal* also called *personas jurídicas* (*see e.g.* art. 32). For an extensive list of persons with their attributes, see the entries under “Persona” in MANUEL OSSORIO, *DICCIONARIO DE CIENCIAS JURÍDICAS, POLÍTICAS Y SOCIALES* (31st ed., Heliasta, Buenos Aires, 2005). Finally, it should be noted that the English language commonly uses one word, “legal”, as a descriptive for matters of *ius* and *lex*. Moreover, when civil law terms are expressed in English, there are obvious challenges of translation.

In the common law, the term “legal personality” is much preferred, but is most often limited to “legal persons”, “artificial persons”, or “juristic persons”, such as corporations and associations. The term “legal personality” is not used to describe an overarching concept of the person, embracing natural and juristic persons. *But see* W. M. Geldart, *Legal Personality*, 27 L.Q. REV. 90, 95 (1911). There are sightings of “artificial personality” especially for public bodies, religious bodies, foreign states and international organizations.

In American legal writing, the use of “juridical personality” as applicable to the rights of individuals is rare. *But see, e.g.*, Gary A. Ahrens, *Privacy and Property: Can They Remain After Juridical Personality is Lost?*, 11 CREIGHTON L. REV. 1077, 1079, 1132, 1134, 1136 (1977-1978). In the social sciences, there are references to both the juridical and the legal personality of human persons.

54. On the topic of persons and personality in English law, *see generally* William Swadling, *Property: General Principles*, in 1 ENGLISH PRIVATE L. 141-155 (Peter Birks ed., Oxford University Press, 2000). The English courts are said to have no use for “personality.”

Questions of this sort do not often strike the English courts as having a practical bearing on the cases which they must decide,

speaking, in the common law, human persons are persons, *tout court*.

In this paper, “juridical personality” expresses the right-owning and duty-owing status of human persons.

Every natural person has juridical personality, and every entity has juridical personality to the extent allowed by law.⁵⁵ The juridical personality of the natural person does not depend on the sovereign; that of the entity largely does.

The personality of a natural person vests at birth⁵⁶ although it may, in certain cases, exist at the moment of conception or at some intermediate time between conception and birth, whether or not a viable birth. The boundary posts separating the fertilized ovum or the fetus, as a potential human being (but, in law, often still considered a thing or entity), from the right-owning-duty-owing human person, frequently shift in the minds of lawmakers, judges, and scholars. Yet, identification of viable human existence is crucial to the exercise of important rights.

Simply put, juridical personality is the enjoyment of rights and the capacity to exercise these rights. It is also expressed as the capacity for jural relations (or legal relations).⁵⁷ It is *real* law, especially in most of the civil law tradition, because it has a legislative expression. Moreover, in the civil law, where scholarly

and even when they declare themselves to be ‘concerned with abstract jurisprudential concepts [so far as these] assist towards clarity of thought’, they generally recoil from discussing them in any detail.

Id. at 144.

55. Dias summarizes Kelsen as arguing that the “biological character of human beings is outside the [law]’s province” and that, moreover, there is no distinction in law between “natural” and “legal” persons. *See* R. W. M. DIAS, JURISPRUDENCE 267 (5th ed., Butterworths, London, 1985). The importance of juridical personality, as a legal construct, is disputed. For example, there has been considerable debate on the necessity of this construct for legal entities and, even if necessary, its nature and scope. Dias outlines the theories. *Id.* at 265-269.

56. For some, a “human being” may arguably exist on or about the time of conception, and a human being might become a “human person” sometime thereafter. An ecclesiological conception of personality might be based on yet another event, for example baptism. In the Roman Catholic Church, it is at baptism that a person is the subject of rights and duties and, therefore, is conferred with canonical legal personality. *See* 1983 Code c. 96. Spiritual personality is another concept. *See* 1983 Code c. 204, § 1.

57. Smith cites Salmond as defining a “legal” person as “any being to whom the law attributes a capacity of interests and, therefore, of rights, of acts and, therefore, of duties.” *See* Salmond, Jurisprudence 273 (5th ed., 1916) *cited in* Bryant Smith, *Legal Personality*, 37 YALE L. J. 283, 284 (1927-1928). This definition conflates the two concepts of enjoyment of rights and exercise of rights.

writing is considered a source of the law, albeit a secondary source, juridical personality has an important doctrinal expression. In the West, juridical personality is also *abstract* law. To study it, as a conception, is a way of understanding the nature of rules governing the general conduct of a person and his relations to other persons and to things.⁵⁸ Its finality is to correctly structure capacity for jural relations. It does so from two very real and practical perspectives. First, the exercise of rights and duties may be limited, such as in cases of minority or incompetence, as but two examples. Second, although the enjoyment of civil rights and fundamental freedoms may never be renounced, the exercise of some of these rights may be waived under certain circumstances.

Jural relations are relations between people and between people and things that have consequences in the law. Not all intimate relations between persons are jural relations because the law does not have a rule (or does not care to have a rule) to regulate all possible intimacies. By like token, not all aspects of intimate associations and not all their commonplace events interest the law. However, to the extent that the law is sufficiently interested or intrigued by the daily routine and experience of intimates,⁵⁹ it provides rules for the coordination of jural relations.

These rules or “sorts of law” are described by Honoré: rules of existence, categorizing rules, rules of scope, position-specifying rules, and directly normative rules.⁶⁰ Various aspects of juridical

58. A lawyer’s collection of books can indicate the contours of his juridical personality. His law books may act as guides and pointers to the sorts and qualities of his relationships with family, friends, colleagues, and other legal actors or subjects. In this regard, see Angela Fernandez, *Albert Mayrand’s Private Law Library: An Investigation of the Person, the Law of Persons, and ‘Legal Personality’ in a Collection of Law Books*, 53 UNIV. OF TORONTO L.J. 37 (2003).

59. The topic of “everyday” law is examined by Macdonald. See generally Macdonald, *supra* note 52 at 1–12. Macdonald states that experience, wisdom, and good judgment provide the authority for everyday law and that this everyday law makes official law possible. *Id.* at 6–7.

60. See generally A. M. Honoré, Real Laws, in *LAW, MORALITY AND SOCIETY—ESSAYS IN HONOUR OF H. L. A. HART* 99 (Clarendon Press, Oxford, 1977).

1. *Existence* laws create, destroy, or provide for the existence or non-existence of entities . . . 3. *Categorizing rules* explain how to translate actions, events, and other facts into the appropriate categories. 4. *Rules of scope* fix the scope of other rules. 5. *Position-specifying rules* set out the legal position of persons or things in terms of rights, liabilities, status, and the like. 6. *Directly normative rules* . . . guide the conduct of the citizen as such.

personality can be assigned to one or another of these classes of rules; however, juridical personality is really about status and the capacity to enjoy and exercise rights related to that status; accordingly, the rules are, in large part, position-specifying.

Civil rights and fundamental freedoms are extrapatrimonial rights. The law provides recourses for undue interference with them. When there has been actionable interference with these rights, they are patrimonialized because damage claims have a monetary value.

How many rights and freedoms are there? They certainly include the right to sue in court, the right to acquire, own, and dispose of property, the right to life, the right to personal and physical integrity, the right to the safeguard of one's reputation, and the right of privacy. Examples of rights of privacy might include a right to prevent unlawful interception of private correspondence and a right to prevent the disclosure of personal information. Codes and statutes specify seemingly innumerable rights: the right to refuse specimen taking or tissue removal, the right to alienate a body part, the right of a child to the protection, security and attention of his parents, and the list goes on. Civil codes in the civil law list these rights but the list of any particular civil code is a function of the time and place of its writing and whether the lawmaker at the time considered it expedient to formally express these rights. Today, the rights to make healthcare decisions and to protect private personal and financial information are topical; tomorrow, intimacy of association may be the order of the day.

The Civil Code of Québec⁶¹ provides an example of a recent approach to the architecture and enumeration of rights. After a preliminary title on the enjoyment and exercise of civil rights in its book on persons, the code has a second title on personality rights. The first chapter of the second title announces the integrity of the person ("Every person is inviolable and is entitled to the integrity of his person . . .") in a single article.⁶² That chapter then proceeds to its first section on the care of the person⁶³ and its second section

Id. at 112. His second class, "rules of inference," relates to proof and evidence.

61. See CIVIL CODE OF QUÉBEC (18th ed., Jean-Maurice Brisson & Nicholas Kasirer eds., 2010-2011) (hereinafter C.C.Q.).

62. *Id.* at art.10.

63. *Id.* at art. 11-25.

on confinement in an institution and psychiatric assessment.⁶⁴ Its second chapter provides for children's rights.⁶⁵ Its third chapter deals with the respect of a person's reputation and privacy.⁶⁶ Its final chapter provides for the respect of the body after death.⁶⁷ Much of the rest of the book is devoted to particulars of status (name, change of name, change of designation of sex, records of civil status, etc.)⁶⁸ and capacity (majority, minority, emancipation, and various form of protective supervision for incapables).⁶⁹ The draft Civil Code of Puerto Rico has a more extensive list of rights, including the right of intimacy and physical and moral integrity, in its principal article (article 8) on the enjoyment of *derechos esenciales* (fundamental rights), but fewer specific details than the Quebec code, save in connection with the integrity and care of the person.⁷⁰

Rights pre-exist their restatement in formal constitutions and statutes, but the understanding of rights occurs in the legal and social environment where their pre-existing nature is first (or again) debated. In this regard, it might be stated—and unequivocally so—that the sovereign authority, through its legislative bodies and courts, merely recognizes rights that arise from the particular actions and conduct of people at particular times. How could it be otherwise? Does it seem credible to assert that rights, including rights of intimacy, spring as spontaneously in formal law (because the formal law purports to have created them) as sprung Venus from Neptune's life-giving froth? Formal law and public law do not create rights; they specify them.⁷¹

Indeed, the thrust of the 1948 Universal Declaration of Human Rights is that the human rights noted in the Universal Declaration are innate and that their pre-existence is simply made textually explicit in that declaration; accordingly, formal expression of all rights, including the general right of intimacy, occurs in contexts of place and time. Formal law hopes (but can do no more than hope) that it has expressed the rights according to the best contemporary (and informed) understanding of their inherent nature. As often

64. *Id.* at art. 26-31.

65. *Id.* at art. 32-34.

66. *Id.* at art. 35-41.

67. *Id.* at art. 42-49.

68. *Id.* at art. 50-152.

69. *Id.* at art. 153-297.

70. *See supra* note 27.

71. *See supra* note 13 for the position in English public law.

happens, rights are made juridic—juridified as it were—in a single, static form. In these cases, the challenge lies in re-establishing the connection with the human person.

The right of intimate association as a real (and not supposed) civil right and fundamental freedom in cosmopolitan private law is, indeed, contextual because it is a good to and for persons and because it is experienced by persons living, as they do, at a particular time and in a particular place in the West.⁷² In other words, its content is historically conditioned and, on account of this historical mediation, intimate association can be objectively assessed. Its intrinsic goodness can be concretely and specifically understood.

In sum, the legal content of intimacy is not the private transcendent experience of any one individual (or lawmaker).⁷³ The intimacy and dignity of “inclusive moral citizenship”⁷⁴ is adverse to platitudes of family and sexual morality that do not take account of the social and economic life of every individual in the community. Intimacy is readily plastic. It is predicated on the good experience of the living. Since this is so, intimacy cannot be delimited; it cannot be restricted to a particular set of human experiences, especially those sourced in invented traditions. Recognition of intimate associations will not entice people away from marriage. Indeed, even if all heterosexual and homosexual intimate associations, other than marriage, are adjudged morally

72. Beyond the formal law and constitutional framework of any particular system, there are supranational and global communitarian aspects to human rights. *See generally* Carl F. Stychin, *Same-Sex Sexualities and the Globalization of Human Rights Discourse*, 49 MCGILL L. J. 951 (2004) (discussing the use of universal human rights by local gay rights activists and arguing that rights struggles will be successful when based on international human rights standards and global, communitarian political debate).

73. The law can be understood in a manner not dissimilar to the theological phenomenon of revelation. Roger Haight says that revelation is experiential and that, as religious experience, it is historically mediated. *See* ROGER HAIGHT, *DYNAMICS OF THEOLOGY* 51-67 (2001) (discussing the structure of revelation). Haight discusses (and argues against) transcendental analysis. *Id.* at 6-7. For the theologian Haight and for the legal scholar Sinha, man belongs to his history. *See* Sinha, note 5 at 3.

74. For the use of the phrase “inclusive moral citizenship,” *see* Fourie and Bonthuis v. Minister of Home Affairs, case no 232/2003 (Supreme Court of Appeal of South Africa, 2004) at 10. This South African case recognized same-sex marriage as valid.

destructive to the institution of marriage, surely these associations cannot be any more destructive than divorce and remarriage.⁷⁵

The narrative of intimacy (together with its happy post-modern disorder!⁷⁶) is next discussed.

IV. SOURCES OF INTIMACY

Pure reason—the practical reason of natural law philosophers—is neither a satisfactory nor a truly rational method of examining intimacy. It presupposes that there is but a single, correct reason for human conduct. It ignores the here-and-now factual situations that meaningfully contextualize reason. Pure reason disregards the plurality of rational and sentient ways of defining intimate associations, in the East and the West. It takes no stock of different logics and reasonings that are predicated on different community realities and values. In this light, it would seem that the proponents of natural law approaches reckon social anthropology as a useless science vacant of any forward-looking *telos*. Only theological anthropology would seem deserving.⁷⁷ Nonetheless, even unkind

78. See Charles E. Curran, *Sexual Orientation and Human Rights in American Religious Discourse: A Roman Catholic Perspective*, in *SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 85, 97-98 (Saul M. Olyan & Martha C. Nussbaum eds., Oxford University Press, 1998). “Thus one could maintain that the provision of domestic partnership laws does less harm to marriage and the family than do the existing laws about divorced and remarried people.” *Id.* at 98. Importantly, domestic partnership laws respond to human economic and social needs. See also Margaret A. Farley, *Response to James Hanigan and Charles Curran*, in *SEXUAL ORIENTATION & HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE*, *supra* at 101, 108 (stating that domestic partnerships respond to needs for psychic security, economic security, and sometimes physical safety). Farley understands domestic partnerships in the sense of legal unions reserved to gays and lesbians. *Id.* at 106-108.

76. Disorder and post-modernism are neatly (and nicely) associated in Roderick A. Macdonald, *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*, 15 *ARIZ. J. INT’L & COMP. L.* 69, 71 (1998). “If, as a conception of social organization, modernism was primarily about rationalism, universalism, certainty and order, post-modernism seems to be about empiricism, particularism, indeterminacy and disorder.” *Id.* at 71.

77. On account of fallen human nature, the need for redemption and the doctrines of original sin, judgment and atonement, legal theory may not be split from theological doctrine. See John J. Coughlin, *Canon Law and the Human Person*, 19 *J. OF L. & REL.* 1, 56 (2003-2004). Coughlin discusses the secular and theological doctrines of human will and freedom. *Id.* at 53. Mainstream legal theory has a negative concept of freedom, i.e. an absence of constraint and an over-emphasis of autonomy and subjective preferences. This negative theory leads to an inability to act for human good and an inability to understand that

critics of natural law agree that its suppositions and theories must be carefully considered. Natural law, therefore, remains a vital trampoline for discussion and debate.

A diversity of intimate associations necessitates a method for the determination of their legal parameters. How do we know what we know about personal associations? Is there a strict methodological path, or is there a multiplicity of paths? Does a hierarchical disorder of relevant sources lead to approaches that are too relaxed for any practical and useful understanding of the topic?

Legal methodology may be defined as the study of legal know-how. It is the study of those legal methods and techniques that allow the law to be known and understood (fundamental methodology) as well as implemented (applied methodology). The topic of sources is essential to legal methodology. This topic is interested in answering the questions: "Where do I find the law?" and "Where is the essence, cause or origin of the law?" In this way, the discovery of sources tries to offer a tentative answer to the general question: "What is it to have knowledge of the law."⁷⁸

The word *sources* is used in two different senses. Sometimes *sources of law* means *material sources*, that is to say, "where lawyers look in order to find out what the law is."⁷⁹ Sometimes *sources of law* means the *sources of legal justifications* or *formal reasons*, that is to say, the grouping of ". . . legally authoritative reasons on which judges and others are empowered or required to base a decision or action . . ."⁸⁰ There are numberless sources that might constitute sufficient authority for legal decisions relating to intimacy and intimate associations. The identification of these sources is not difficult. It is the classification and ranking of these sources as, say, primary or secondary, or authoritative or persuasive, and the determination whether they are, for example, obligatory, prudential, hortatory, or illustrative, that is highly problematic.

transcendence of self-interest is necessary for genuine human fulfillment. *Id.* at 53-57.

78. GEOFFREY SAMUEL, *EPISTEMOLOGY AND METHOD IN LAW* 6 (2003) (asking: what is it to have knowledge of the law?).

79. See John Bell, *Sources of Law*, in 1 *ENGLISH PRIVATE LAW* 3 (Peter Birks ed., Oxford University Press, 2000).

80. See P.S. ATIYAH AND ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 2 (Oxford, 1987).

In these matters, Western courts have latched onto different approaches.

In *Goodridge v. Department of Public Health*,⁸¹ the Massachusetts Supreme Judicial Court reformulated the definition of marriage to include same-sex couples. The Court cited case-law and statute law, with very occasional references to law books.⁸² The Court's psychological and sociological observations were unsupported.

On the other hand, the Supreme Court of Canada made use of a catholic selection of materials in *M. v. H.*⁸³ In that case, two women, M. and H., lived together in a same-sex relationship. They had a home and started a business. After ten years, M. left the common home and sought an order for partition and sale of the house and, importantly, claimed support. The Supreme Court of Canada reviewed the relevant Ontario statutory provisions and extended to same-sex couples in Ontario the right to claim support upon termination of an intimate relationship.⁸⁴

81. *Goodridge v. Department of Public Health*, 798 N. E. 2d 941 (Mass. 2003).

82. *See e.g. id.* at 952, 967.

83. *M. v. H.*, 2 S.C.R. 3 (1999) (Supreme Court of Canada).

84. In *M. v. H.* intimacy is associated with economic dependence. The Supreme Court delineated the notion of "intimacy" as follows:

Section 29 [of the Family Law Act, 1986] refers to individuals who have "cohabited". Section 1(1) . . . defines "cohabit" as "to live together in a conjugal relationship, whether within or outside marriage". The accepted characteristics of a conjugal relationship, as outlined by Cory J. at para. 59, go to the core of what we would generally refer to as "intimacy."

Id. at para. 99.

Cory, J. states:

Molodowich v. Penttinen (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many other "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal."

Id. at para. 59.

The Court's written reasons indicate that sources as diverse as statistical surveys, behavioral and psychological studies, and law reform commission reports, were treated as persuasive materials and listed under the rubric "Authors Cited," together with hornbooks, law review articles and sundry doctrinal materials. Statutes and case-law, that is to say, primary sources in the common law tradition of Ontario, were separately identified. Some of these *authors-cited* sources—helpful but informal, from a traditional legal viewpoint, yet formal and authoritative in their respective social science disciplines—must have influenced the court. By way of example, the court expressly referred to (and appeared to have critically examined) several studies on the nature of lesbian relationships.⁸⁵ Reference to these sources tells us that some courts are prepared to position social science materials directly—and not cleansed or filtered through law review articles and comments—somewhere (and somewhere important) in the hierarchy of sources. These materials provide some of the best elements of legal discussions and proceedings relating to intimate

85. See, e.g., the remarks of Cory and Iacobucci, JJ:

Although there is evidence to suggest that same-sex relationships are not typically characterized by the same economic and other inequalities which affect opposite-sex relationships (see, e.g., M. S. Schneider, "The Relationships of Cohabiting Lesbian and Heterosexual Couples: A Comparison", *Psychology of Women Quarterly*, 10 (1986), at p. 237, and J. M. Lynch and M. E. Reilly, "Role Relationships: Lesbian Perspectives", *Journal of Homosexuality*, 12(2) (Winter 1985/86), at pp. 53-54, 66), this does not, in my mind, explain why the right to apply for support is limited to heterosexuals.

Id. at para. 110.

See also this statement:

Studies presented to this Court demonstrate that when men are in such a position, they expect less from their partner in housework: P. Blumstein and P. Schwartz, *American Couples* (1983), at p. 151. In other words, the dynamic of dependence also exists for men in opposite-sex relationships, as a type of "division of labour" is created, where the man will often assume additional duties at home while his partner is at work: M. S. Schneider, "The Relationships of Cohabiting Lesbian and Heterosexual Couples: A Comparison", *Psychology of Women Quarterly*, 10 (1986), at p. 234. Other evidence submitted to this Court demonstrate other forms of dependency that are similarly unique to individuals in opposite-sex relationships: J. M. Lynch and M. E. Reilly, "Role Relationships: Lesbian Perspectives", *Journal of Homosexuality*, 12(2) (Winter 1985/86), at p. 53.

Id. at para. 239.

relationships.⁸⁶ Moreover, firsthand accounts,⁸⁷ interviews,⁸⁸ personal sentiment,⁸⁹ polemics,⁹⁰ and literature⁹¹ also usefully

86. Is the “law” blind to its historical and social contexts? Do legal actors adequately understand the various factors that influence and fashion their decisions. Nelken discusses these issues. *See generally*, David Nelken, *Blinding Insights?—The Limits of a Reflexive Sociology of Law*, 25 J. OF L. AND SOCIETY 407 (1998).

87. *See generally* KEVIN BOURASSA AND JOE VARNELL, JUST MARRIED—GAY MARRIAGE AND THE EXPANSION OF HUMAN RIGHTS (2002). Bourassa’s and Varnell’s chatty personal account of the circumstances surrounding their 2001 marriage in Ontario was published prior to the decision of *Halpern v. Attorney General of Canada*, (2003) 65 O.R. (3d) 161; (2003) 225 D.L.R. (4th) 529 (Court of Appeal for Ontario). That decision reformulated the common law definition of marriage to read: “the voluntary union for life of two persons to the exclusion of all others.” *Id.* at para. 156. It also ordered the Province to register Bourassa’s and Varnell’s, together with other parties’, marriages. *Id.*

88. *See* Cece Cox, *To Have and To Hold-Or Not: The Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States*, 14 L. & SEX. 1 (2005) at note 39, where Cox refers the reader to an interview by Kevin Bourassa and Joe Varnell with Kees Waaldijk of Leiden University. Bourassa and Varnell published the interview on their website: www.samesexmarriage.ca/advocacy/turin/KeesWaaldijk2002.htm (last visited Feb. 21, 2011).

89. *See Halpern, supra* note 87 at para. 9-12. For example, the Court reported the following:

Two couples, Kevin Bourassa and Joe Varnell and Elaine and Anne Vautour, decided to be married in a religious ceremony at MCCT. In an affidavit, Elaine and Anne Vautour explained their decision:

We love one another and are happy to be married. We highly value the love and commitment to our relationship that marriage implies. Our parents were married for over 40 and 50 years respectively, and we value the tradition of marriage as seriously as did our parents.

Id. at para. 12.

90. For an example of polemical legal writing in France written for general public, the scholarship of Daniel Borrillo (of the University of Paris X—Nanterre) is representative. Borrillo argues for (and on behalf of) the gay community on personal, social and economic issues throughout the European community. For typical Borrillo thinking, *see* McAuley, *supra* note 7 at notes 33-34. The scholarship of Michael Mello of the University of Vermont is a recent example of American polemical writing reviewing Vermont’s civil union legislation and arguing for gay marriage. *See generally* MICHAEL MELLO, LEGALIZING GAY MARRIAGE (2004). Mello’s book has impressive endnotes drawing on traditional legal materials—law review articles and similar kinds of scholarship—as well newspaper articles and letters to the editor. *Id.* at 197–256. His source materials have been called “heterodox.” *See* Times Literary Supplement, May 20, 2005, at 7 (book review).

91. *See generally* THE M WORD—WRITERS ON SAME-SEX MARRIAGE (KATHY PORIES, ED., 2004). The front flap of this collection of stories and essays states:

As it heads through the courts, dividing the nation and shaping the political landscape, the issue of same-sex marriage is becoming one of the major civil rights battles of our generation. Now, some

inform courts, again directly or indirectly. They have a place in the hierarchy of persuasive authority, however horizontal that hierarchy may appear to be. In fact, the history of privacy and intimacy is most convincingly illustrated by lively narratives and spirited monographs on discrete aspects of intimate relationships.⁹² Once again,⁹³ stories are the stuff of intimate bonds. If marriage is the institutionalization of the ways that people drink, eat and sleep together—*Boire, manger, coucher ensemble, est mariage, ce me semble*—then narratives of intimacy demonstrate the striking similarity of many relationships.⁹⁴

These informal narratives are subsequently formalized. For example, law reform commissions are usually attentive to canvassing the citizenry and collecting evidence of popular opinion, whether at public hearings or on the web.

of the country's finest writers, gay and straight, explore the nuances of one of the most complicated issues of our time.

THE MCGILL SHAKESPEARE MOOT PROJECT (www.mcgill.ca/shakespearemoot/) (last visited Feb. 21, 2011), a remarkable interdisciplinary project, in which the body of legal knowledge consists solely of the complete works of Shakespeare, has debated same-sex marriage. In the case of Attorney General of Canada v. Peter Pears, Ben Britten and Others, 2 C. of Sh. 1 (2004), some of the Court of Shakespeare's judgments have been published. See generally Desmond Manderson and Paul Yachnin, *Love on Trial: Nature, Law, and Same-Sex Marriage in the Court of Shakespeare*, 49 MCGILL L.J. 475 (2004).

92. See generally LAWRENCE M. FRIEDMAN, *PRIVATE LIVES—FAMILIES, INDIVIDUALS, AND THE LAW* (2004). Friedman has an admirable blend of scholarly sources: case-law, law review articles, psychiatry, sociology, statutes, general books on family law topics, etc., all of which are marshalled, in no specific hierarchical order, to support his account of modern American family law issues. Using another approach, the Law Commission of Canada listed the source materials for its report on adult relationships under headings, e.g. discussion documents, background research papers, reports, books, journals, and research studies. The Commission also consulted the reports of other reform bodies, such as the Australian Law Reform Commission and the law commissions and institutes of a number of Canadian provinces. See LAW COMMISSION OF CANADA, *BEYOND CONJUGALITY-RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* 147-172 (2001).

93. See *supra* note 52.

94. This is Antoine Loisel's adage. Loisel was a Paris lawyer whose *Institutes coutumières* were published in 1607. See Alain-François Bisson, *Sur un adage trompeur : «En mariage, il trompe qui peut»*, in *LE FAUX EN DROIT PRIVE* 155, 158 (Nicholas Kasirer ed., Les Éditions Thémis, 2000). The adage in full reads: *Boire, manger, coucher ensemble, est mariage, ce me semble: mais il faut que l'église y passe*. The full text, therefore, speaks to the requirement of a public ceremony *in facie Ecclesiae*. *Id.* at 159. The necessity of a church ceremony has (totally?) disappeared in the West although, of course, a church marriage, in some Western systems, may suffice for civil purposes.

V. INTIMATE ASSOCIATIONS

There are formal incidents and effects arising from the emotionality and conviviality of couples' lives and consequent upon their sleeping-place. These incidents and effects have been surveyed for European countries,⁹⁵ and the findings compared in five "dimensions," that is to say, "the dimensions of marriage, registered partnership and cohabitation, between different-sex and same-sex partners, between different areas of private and public law, between different countries, and between now and previous years or decades."⁹⁶

This survey clearly illustrates (as do other similar surveys⁹⁷) that the number and variety of intimate associations are almost

95. See generally Kees Waaldijk and others, *More or less together: Levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners: A comparative study of nine European countries* (Document de travail 125) (Institut National d'Études Démographiques, Paris, 2005) (available at <http://www.ined.fr>) (last visited Feb. 21, 2011). A survey of the incidents and effects of same-sex intimate relationships in Europe, together with essays and comments on these relationships, was published in 2004 and used by Waaldijk and his team to prepare their 2005 findings. See generally *Same-sex couples, same-sex partnerships & homosexual marriages: A focus on cross-national differences* (Document de travail 124) (Marie Digoix & Patrick Festy eds., Institut National d'Études Démographiques, Paris, 2004) (available at <http://www.ined.fr>) (last visited Feb. 21, 2011).

96. Waaldijk, *supra* 95 at 3. Waaldijk and his team's survey compared "levels of legal consequences" in private and public law. Comparative analyses were made for parenting consequences (*id.* at 12), "material" consequences (such as allocation and redistribution of property and debts on dissolution of the relationship, and payment of alimony) (*id.* at 16), "positive material" consequences in public law (such as lower property and income tax rates, access to public health insurance, and exemption from inheritance tax) (*id.* at 20), "negative material" consequences in public law (such as higher property or income tax rates) (*id.* at 24), and other consequences (such as residency and citizenship, testimony in criminal proceedings, and use of surnames) (*id.* at 28). The reporters for each of the countries compared the consequences for same and opposite-sex marriage, registered partnerships, and informal cohabitation on other discrete topics, e.g. insurance, medically-assisted insemination, workmen's compensation survivorship benefits, organ donations, and the legal duty to have sexual relations (*id.* at 58, 60). The templates were structured to compare marriage, partnership, and *informal* cohabitation even though Belgium has a distinct legal regime of rights and benefits for each of *de iure* and *de facto* cohabitation.

97. See e.g. AMERICAN BAR ASSOCIATION, A WHITE PAPER: AN ANALYSIS OF THE LAW REGARDING SAME-SEX MARRIAGE, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS (2004). The report reviews legal developments on the topics of sexual orientation, gender identity, same-sex marriage, statutory protections for same-sex couples, and other related issues. The disparate rights and duties in each state that are attached to same-sex relationships are outlined.

beyond reckoning. Surveys illustrate that there are numerous and divergent manners of arrangement of the economic and social consequences of living-together and *vie commune*.

Different types of marriage,⁹⁸ registered or domestic partnerships or pacts, civil unions, civil partnerships, and countless modes of *de iure* and *de facto* cohabitation exist in the West.⁹⁹ These associations can occur (or not occur) cumulatively, co-extensively, or co-equally.¹⁰⁰ Moreover, one-way travel between co-equal associations, say, from civil union to marriage, is possible in at least one jurisdiction.¹⁰¹

Id. at 22-29. A casual reader might think that different social and cultural realities are described whereas the nature of same-sex intimacy is *grosso modo* similar from state to state in the United States. The report does not outline every right and duty. Its authors state: "Four states provide between sixteen and several hundred statutory protections and rights to same-sex couples. Ten states provide benefits to some state employees in same-sex relationships. Several other states provide between one and a few hundred rights or protections for same-sex couples, and those rights and protections vary from state to state." *Id.* at 22. Courts have taken judicial notice of the benefits of marriage and prepared lists of statutory benefits. *See* Goodridge, 798 N. E. 2d at 955-956.

98. In a single Western system, there can be several kinds of marriage differentiated by the formalities of solemnization, by the scope of spousal duties and rights, and by the nature of incidents and effects. *See generally* 6 HALSBURY'S LAWS OF INDIA 50.009-50.020 (Butterworths India, New Delhi, 1999). In India, family laws, including marriage and maintenance, are referred to as personal laws and are sourced in religious laws. *See id.* at 50.009. Is India in the West? Its methodology—how it knows and expresses the law—is manifestly Western.

99. The divergent relationship models present particular challenges for private international law. *See generally* SWISS INSTITUTE OF COMPARATIVE LAW, ASPECTS DE DROIT INTERNATIONAL PRIVÉ DES PARTENARIATS ENREGISTRÉS EN EUROPE—ACTES DE LA XVII^E JOURNÉE DE DROIT INTERNATIONAL PRIVÉ DU 5 MARS 2004 À LAUSANNE (Schulthess, 2004) (discussing marriage, cohabitation, and partnerships for Germany, Great Britain, Netherlands, the Nordic countries, Spain, France, Belgium, and Switzerland).

100. The intimate relationships might be cumulative, e.g., a person might be statutorily recognized as a cohabitant, for Canadian federal purposes, and recognized as united (the civil union of Quebec) or partnered (the domestic partnership of Nova Scotia) for provincial rights and benefits. Co-extensively, a person might be both civilly united (in Quebec) and civilly registered (in the United Kingdom). Finally, a number of recognized relationships are co-equal, e.g., the institutions of civil union and marriage both in Quebec and in Vermont. Yet, this co-equality is not identical in Quebec and Vermont since the constitutional prerogatives of the province and of the state and their relations with their respective federal authorities are different.

101. Quebec allows civil union spouses to convert their civil union into marriage. However, Quebec can only provide for one-way travel. The province is arguably not constitutionally competent to provide for the conversion of marriage into a civil union. The conversion will not confer any additional rights in Quebec private law although it may be advantageous, in a limited number of cases, for federal entitlements. *See An Act to amend the Civil Code as regards*

Intimate associations can exist or co-exist at differing intensities of social and economic intimacy in a single jurisdiction. This graduated intimacy, that is to say intimacy measured by degrees of social and economic functionality, is troubling; yet, it is no more troubling than the distinct social and economic consequences of marriage that are now prevalent in the West, e.g. ownership and management of marital property.

Specific rights and duties attach to all of these relationships. Some were (and still are) initially available for either homosexuals *or* heterosexuals and some are now available for homosexuals *and* heterosexuals. Although legal recognition of heterosexual cohabitation started first and later embraced homosexual cohabitation, civil unions and domestic partnerships were conceived in the first instance for gay and lesbian couples. Sometimes, their conception has been an honest attempt to introduce a new edifice to house the rights and duties of intimates between themselves and in their relations with the sovereign.

However, in the United States, civil unions and domestic partnerships do not seem to have been conceived on the basis of their intrinsic merits nor imagined as refreshed secular institutions to complement (or replace) erstwhile civil marriage, now in a high state of desecularization and resacramentalization. Nor can it be said that they were conceived for economically symmetrical relationships, in contrast to the continued asymmetry of marriage.¹⁰² Rather, these unions and partnerships were intended as legislative comforters for public anxiety, real or imagined, over gay marriage.

All these institutions compete for the attention of the lawmaker and vie with the paradigmatic institution of marriage. Yet, marriage is a confused paradigm. In most of the West, marriage has been defined as a *sui generis* secular contract, divorced from

marriage, S.Q. c. 23 (2004) (Quebec). The Explanatory Notes state that this will allow couples “to continue their life together as a married couple” and that marriage dissolves the civil union but that the effects of the civil union continue into the marriage. Is this an upgrade (or a downgrade)? Opinions differ.

102. The life-profile theory of marriage suggests that long-term support promises protect specific investment by the economically vulnerable spouse. *See generally* ANTHONY W. DNES, THE LIFE-PROFILE THEORY OF MARRIAGE, COHABITATION, AND SAME-SEX MARRIAGE (MAY 2004) (American Law & Economics Association 14th Annual Meeting: Working Paper 65). “Marriage enables a man and woman to plan their lives and to avoid turning a sexual asymmetry into the basis for exploitation of the weaker party.” *Id.* at 10-11.

its former religious and sacramental past.¹⁰³ It is, therefore, a civil and purely temporal institution. In this regard, citizens are told that this is why civil marriage is called civil.¹⁰⁴ Despite all this clarity, its secular nature remains unfathomable to some religious bodies. Regardless of the secular rhetoric of the civil law, the institution of marriage has been unable to detach itself from its sacramental tattoo.

VI. CONCLUSION

Where did we start? Where have we gone? What is law? What is intimacy? In the good law of today for the people of now, there is a place for intimacy. There is room for every person's socially-tempered autonomy in the choice of an intimate partner. The life of the citizen is a life of legal travel, with all of its "mishaps and disappointments" not a life of legal tourism "cushioned against misadventure."¹⁰⁵ Her implication in the law requires that she and her mate cooperate with the community in which they live and love, full of both *eros* and *agape*,¹⁰⁶ and in which they enjoy and

103. Daniel Borrillo briefly addresses the institution of marriage in France, a country that prizes its secular tradition. *See generally*, Daniel Borrillo, *Le mariage homosexuel: hommage de l'hérésie à l'orthodoxie?*, in *LA SEXUALITÉ A-T-ELLE UN AVENIR?* 39-54 (Presses universitaires de France, 1999). Borrillo points out that the 1791 French constitution clearly states: "La loi ne considère le mariage que comme un contrat civil." *Id.* at 47. For the continued French interest in its secular tradition, *see generally* CONSEIL D'ÉTAT, *RAPPORT PUBLIC 2004: JURISPRUDENCE ET AVIS DE 2003. UN SIÈCLE DE LAÏCITÉ* (La Documentation française, Paris, 2004). For an official affirmation of secular marriage, *see id.* at 250, 354-356. In France, clerics are expressly prohibited under the *Code pénal* (Criminal Code) from conducting a religious marriage before a civil marriage has taken place. *Id.* at 354-355. Yet, notwithstanding its secular tradition, French courts considered the Roman Catholic moral position relating to homosexuality as a valid ground for the dismissal of an assistant sacristan. *See* D. 30 mars 1990 (Cour d'appel de Paris) at 596-597 (stating that the Roman Catholic Church has always strongly condemned homosexuality as being radically contrary to divine law as this law is embodied in human nature.).

104. The Canadian government took great pains to stress the civil nature of marriage in its legislation on the topic. *See* An Act respecting certain aspects of legal capacity for marriage for civil purposes (Civil Marriage Act) (Bill C-38), S.C. 2005, chapter 33. *See* section 2: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."

105. *See* Lawrence Durrell, *Reflections on Travel*, in *SPIRIT OF PLACE: LETTERS AND ESSAYS ON TRAVEL* 423, 426 (Alan G. Thomas, ed., Marlowe & Company, New York, 1969).

106. For a current statement (restatement?) of the Roman Catholic position on love (*eros*, *philia*, and *agape*) and its many meanings, *see* the Encyclical Letter of Benedict XVI *Deus Caritas Est* (2005) at para.2-8. The

exercise their rights as individuals and as intimates. They are right-owners and duty-owers. In recognition of their economic and social contributions, the community respectfully greets them. The community is mindful that each of them and all other citizens have juridical personality, not third-person personality but first-person self-aware personality. Simone Weil might say that their juridical personality is their *metaxu*, that is to say “those . . . blessings (home, country, traditions, culture, etc.) which warm and nourish the soul and without which, short of sainthood, a *human* life is not possible.”¹⁰⁷ These *metaxu*—these blessings—are steppingstones from the temporal to the spiritual and fullness of being.¹⁰⁸

Juridical personality is a way of understanding the private law. In the civil law tradition, it is the starting-point for all law-talk. By logical necessity, all legal operations are predicated on knowledge of the nature and scope of the individual rights and duties at play. An examination of the content of these rights and duties is unavoidable when determining the effectiveness of any particular act or fact.

In the common law tradition, an understanding of juridical personality is also indispensable for correctly establishing the boundaries of the private law and for identifying the number and quality of civil rights. Civil rights are rights that, in and of themselves, justify private-law operations. They do not seek nor do they need the endorsement of the public law. They are inherent in the person and suffice for all juridical acts and facts. These rights and duties are not constant. Each legal operation individually and the aggregate of all operations add texture to the assembled attributes of personality.

In the West, and especially in the common-law West, the construct of juridical personality is vital for any intelligent discussion of rights and freedoms.¹⁰⁹ It contains the public law to

Letter is available at: <http://www.vatican.va/holyfather/benedictxvi/encyclicals/documents/hfben-xvienc20051225deus-caritas-esten.html> (last visited Feb. 21, 2011). All kinds of love represent “a single reality, but with different dimensions; at different times, one or other dimension may emerge more clearly.” *Id.* at para. 8.

107. See Simone Weil, *Metaxu*, in THE SIMONE WEIL READER 363, 365 (George A. Panichas ed., Moyer Bell, 7th prtg. 1999).

108. See generally *id.* at 363-365.

109. Juridical personality has always been vital in the civil-law West. This is tellingly noted by the title of H. Patrick Glenn’s personal survey of the world’s legal traditions. See GLENN, *supra* note 23. Glenn entitles his chapter on the civil law: “A Civil Law Tradition: The Centrality of the Person.” *Id.* at 125-

its proper sphere of operation, and it provides a proper foundation for the exercise of rights other than a constitutional foundation. In the Anglo-American tradition, rights and freedoms are almost always examined in the context of public law norms formally and officially issued by the political State. They operate or fail to operate on grounds related to the interpretation of charters or bills of rights and other like documents. The merits and demerits of intimate associations and, in particular, same-sex marriage, have been debated on constitutional grounds in Canada and the United States. As a result, the public is cajoled to believe that any exposition of dignity, autonomy, diversity, intimacy, or privacy is a top-down development. In fact, rights and duties inevitably take form bottom-up, from the person to the sovereign. Indeed, they move from the non-law to the law, and from folkways, to morals (*mores*), to law.¹¹⁰

The absence of the conception of juridical personality in the common law tradition has encouraged an inappropriate expansion of the public law, fully to the detriment of the private law, and heightened the positivistic profile of the general law. It has increased the girth of legislation as lawmakers endeavor to frame all rights and duties as emanations of sovereign authority and as special concessions of the state. All of this flies in the face of the Universal Declaration of Human Rights.

In the public or private law realms of intimate associations, it seems likely that current ideological quarrels will bear as much

169. He addresses the issue of centrality by referring, on the one hand, to the Enlightenment thinking with respect to property, with its focus on individual ownership, and with respect to contract, as the meeting of autonomous wills, and by referring, on the other hand, to the notions of subjective law and social equality. *Id.* at 140-143.

So all the great concepts of western civilization come together in a kind of package, and at the base is the centrality of the person, now a rather abstract concept even if seen originally as a divine representative of the Jewish and Christian God. And then, once the theoretical package is in place, you have to look around and see if it is being applied properly, or whether the tradition is neglecting someone or something.

Id. at 142-143.

110. On the topic of the relation between non-law (*non-droit*) and law (*law*), see generally JEAN CARBONNIER, *FLEXIBLE DROIT: POUR UNE SOCIOLOGIE DU DROIT SANS RIGUEUR* (7th ed., Librairie générale de droit et de jurisprudence, Paris, 1992) at 23-48. Carbonnier discusses their hierarchy and chronology. Does non-law precede law? Which of the two takes first place? *Id.* at 36-44. Carbonnier seems inclined to the view that non-law results when law withdraws and abandons its interest in certain human relations. *Id.* at 25, 37.

fruit as ecumenical dialogue, that is to say, none. If this is so, then more questions should be asked about the role of the law, about personality, and about a citizen's autonomy in her social, economic, and sexual interactions with and within the community. Here are some of these questions.

Does the private law need a new civil institution, one that is truly secular and one that does not interfere with sacramental conceptions of marriage? Such an institution would not be a civil union that is more or less co-equal with marriage, but an institution that would act as an umbrella for all intimate associations and that would function as the only vessel for the patrimonial relations of the couple. Why should all intimate relationships be configured on the marriage model of procreation, paternal authority, monogamy, indissolubility, and legitimate succession? Should the law not provide citizens with a new type of close relationship that recognizes the diversity of economic and sexual profiles?

There are many notions of marriage that make no reference to procreation. Marriage shares these notions with other intimate associations. There is friendship. There is the *amicitia* of intimates, and this *amicitia* "induces people to love one another greatly."¹¹¹ Thus, love and friendship, emotionality, living-together, stability, mutuality, continuity, reciprocal dependence, reliance, loyalty, and companionship—all the constituents of *fides*—are some of the denominators.

These common characteristics might constitute the skeleton of a secular *consortium*—a new institution for intimates and a new well for their juridical personality.

111. See LAS SIETE PARTIDAS, PART. IV, TIT. XXVII (Samuel Parsons Scott trans., Robert I. Burns ed., University of Pennsylvania Press, 2001). This remarkable Title (Concerning the Mutual Obligation Existing Between Men, by Reason of Friendship) defines and describes *amicitia* (friendship) in feudal Spain. The nature of the male *amicitia* of this Title might well describe the relationship between Gilgamesh and Enkidu. See *supra* note †.

TRANSITION WITHOUT TRANSFORMATION: LEGAL REFORM IN THE DEMOCRATIZATION AND DEVELOPMENT PROCESS

Ermal Frasheri*

I. Abstract.....	60
II. Introduction	61
III. Chapter One: Twenty Years of Transition: Politics and Actors.....	69
A. Politics of Transition and Transformation	70
B. Actors of the Lawmaking Process.....	78
IV. Chapter Two: The Traffic of Legal Norms.....	86
A. The Supply and Demand of Transplants: Diversity of Origins–Diversity of Results.....	88
B. A Comparative Perspective of the Legislative and Constitution Making Process	95
V. Chapter Three: Proposals for the Future of the Lawmaking Process	102

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A. International Arrangements on Participation and Evaluation	103
B. Reflections on Public Participation	108
VI. Conclusion	112

I. ABSTRACT

Modernization relies on law as the means of transformation. Democratization and development strategies of the last 20 years, such as the Washington consensus and its successor: good governance and institution building, have embraced the instrumentalization of law in order to create democratic societies and market economies. In these great processes of transformation, from regime changes in Eastern Europe to state building across Central Asia, the process of lawmaking rests upon premises that have a tendency to perpetuate transition without transforming the relationship of the individual to power. This alienizing feature of transition is reflected in lawmaking practices. In this paper, I argue that a wider participation in the lawmaking process enhances the legitimacy of the democratic regime, and it helps to fill the gap between the law in the book and the law in action. I rest my thesis on the premise that the reformation of laws, and therefore the system, is characterized by a dichotomy between the legality and the legitimacy of the lawmaking process. I analyze and expose two different and contradictory patterns that are inherent in lawmaking processes in countries in transition. On the one hand, a rule of law society presupposes clear, transparent and predictable rules, a certain formalism associated with modern states and societies. On the other hand, the flexible nature of transition demands solutions outside the legal framework. I use dichotomies such as legality and legitimacy, expertise and wider participation to analyze the contents of lawmaking practices as well as the role of international actors and elites in the democratization and development process. Juxtaposing transformation with participation, this paper elucidates the practices of modern lawmaking in societies in transition.

I should have sought a country, in which the right of legislation was vested in all the citizens; for who can

*judge better than they of the conditions under which they
had best dwell together in the same society?*

Jean Jacques Rousseau,
*Discourse on the Origin
of Inequality*

II. INTRODUCTION

The process of transition from one political regime to another, in the last twenty years, has required structural political and economic reforms. These reforms in turn have relied on the role of law as an instrument of social change.¹ Thus for instance, the political and economic changes of the 1990s in Eastern Europe were followed by the establishment of a new legal order, which was necessary to foster democratization, and create the market economies.² On the economic front, the transformation of Eastern Europe in the early 1990s followed the model of shock therapies prescribed in the Washington consensus as quick liberalization, privatization and stabilization.³ During these great processes of transformation, the social dimension of the state was either

1. In twenty years of transition in Albania, between 1990 and 2010, approximately 3000 new laws and thousands of by-laws were adopted. Data gathered from the database of the Albanian Parliament, <http://www.parliament.al> (last visited April 21, 2011). *See generally* European Bank for Reconstruction and Development, The Law in Transition Series, <http://www.ebrd.com/pages/research/publications/newsletters/archive/archive.shtml> (last visited April 21, 2011), for a description on the launch of legal reform projects. By Eastern Europe I am referring to all the former socialist countries east of Germany, not including the Soviet Union.

2. In contrast to the democratization in Eastern Europe, a post third wave of democratization in Central Asia seems to rely more upon conventional norms of democratization through Constitution making and power sharing agreements. In Nepal, for instance, the process of transition from monarchy towards a republican form of government is relying almost exclusively on the adoption of a Constitution, which is one of the conditions of the peace process between the Maoist guerrillas and the former royal army. *See* Reports of the Secretary-General on the Request of Nepal for United Nations Assistance in Support of its Peace Process, available at <http://www.ohchr.org/EN/Countries/Pages/SecretaryGeneralReportsNP.aspx> (last visited April 21, 2011).

3. *See generally*, Alexander N. Domrin et al., *Ten Years of Legal Reform in the Former Soviet Union: A "Progress" Report*, 93 PROCEEDINGS OF THE ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 235 (Mar. 24-27, 1999).

abandoned or relegated to the exigencies of the market.⁴ At this moment, we come across the first paradox of transition. On the one hand, legal reform aims at democratizing the societies and creating the necessary legal framework that would legitimize the new regime. The assumption is that legal reform would either be forward or backward looking, leading or following social developments, attempting to formalize or regulate them.⁵ It does so, however, by following one of the two dogmas of development, i.e. the neoliberal model or the good governance and institution building. In both paradigms, the emphasis is on economic reforms and institutions rather than on maintaining the social dimension of the state.⁶

On the other hand, the abandonment of the social role by the state undermines the legitimacy of the new democratic regime. This becomes particularly acute when considering that the totalitarian regime based its legitimacy on performance, that is to say on the role of the state as a social regulator. Since most of the new governments face an uphill battle regarding performance, the social dimension of the state is reduced while the performance is simply not there. In a situation where constituents perceive the legitimacy of regimes connected closely with performance, the withdrawal of the social elements threatens the legitimacy of the new democracies. Further, the method of reformation exacerbates the distrust towards governments, and in turn the legitimacy of the law. The reforms are typically adopted on the basis of a top-down approach that tends to reinforce the belief that transition is permanent. The process of establishing a new legal order is conditioned by the relationship between domestic and international actors. The latter have influenced the understanding of law and also stimulated the need for legal reform projects. This immense legal reform took place in all former socialist countries, in what

4. While the state was obliged to abandon the regulation on social services, that did not mean that society was left unregulated. The emergence of informal law filled the vacuum left in place by the withdrawal of the state.

5. See PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (1992) (when discussing the presumption that law and society are inseparable and that law governs all men).

6. It should be said that in recent years the two paradigms are not mutually exclusive.

Gianmaria Ajani calls an international traffic of legal ideas.⁷ It is worth emphasizing that the existence of a legal base does not automatically translate into optimal operation of laws in everyday life. The large number of laws adopted, or what I call “the inflation of legislation,” is devoid of any significant impact on how the society functions.

There are two features inherent in the transition process. The first is characterized by the problematic nature of reforms themselves; the second refers to the process through which these reforms are adopted.⁸ In this paper, I use a dichotomy between the legality and legitimacy of legal reform projects to analyze the practices of actors involved in lawmaking. Against this background, I argue for a more participatory process of reforms as a step for adding legitimacy to the new regime, and also subsequently to the transformation process itself. In turn, this increased participation contributes towards enhancing the legitimacy of laws. A wider participation of the public is necessary to ameliorate the alienation in the relationship of the individual to governance and government.⁹ The problem identified in democratization processes is that there is transition without transformation of the relationship of the individual to power. While participation could add legitimacy to laws and address the democratic deficit, it does not necessarily follow that the process itself is the only missing piece of the puzzle.¹⁰ The very nature of

7. Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 1, 93, 95 (1995).

8. On the lack of a theory on large scale institutional transformation see Matjaz Nahtigal, *Remarks*, in Alexander N. Domrin et al., *Ten Years of Legal Reform in the Former Soviet Union: A "Progress" Report*, 93 PROCEEDINGS OF THE ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 235, 239 (1999) (Matjaz states that “Central and Eastern Europe had no broad theoretical knowledge on how reform is to be coordinated among several branches of government, or between the government and the private sector, the government and civil society or the government and pressure groups. We had no experience on how to run things without the government. So the immediate withdrawal of government from every level of society caused an institutional vacuum, which did not allow for development to arise from the bottom up, but, rather, generated an intermediate struggle for private ownership.”).

9. I adopt a wide definition of the public as essentially including anyone with a representative function, and, of course, elites.

10. For an account of the need for local actors to understand legal norms see Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 1,

the paradigms of change, such as the neoliberal prescriptions as well as the good governance and institution building, on which democratization and development are premised, ought to be addressed as well. However, for the purpose of this paper, I focus on the dynamics of the process. A wider participation is one of the components of a successful transformation process, along with the nature of the development paradigms, institutional capacities, and the political will of the elites.¹¹

The goal of this paper therefore is to examine the nature of the transition process as it is reflected in the operation of legal reform programs and lawmaking practices. This analysis and approach are in the function of exposing two different and contradictory patterns that accompany the lawmaking process in transitional countries. On the one hand, the contemporary understanding of a rule of law

163 (2003), and Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 1, 97 (2002). Berkowitz writes that for law to be effective it has to be meaningful in the context in which it is applied, while Pistor makes a reference to the need for embedding laws in a local culture. *But see* Kevin E. Davis & Michael J. Trebilcock, *Legal Reforms and Development*, 22 THIRD WORLD Q. 1, 21 (2001), and Thomas W Waelde & James L. Gunderson, *Legislative Reform in Transition Economies: Western Transplants: A Short-Cut to Social Market Economy*, 43 THE INT'L AND COMP. L. Q. 2, 347, 361 (1994) (for an account on the need for institutions in transition). Davis and Trebilcock argue that the current wave of legal reforms must be situated in a broader agenda of public sector reform if these are not to suffer the same fate as the reforms inspired by the original law and development movement. Waelde and Gunderson write, "any effort at mere legislative reform will fail if it does not cover as well, or more so, the challenges of helping to build up the organisations required and the institutional environment within which a legal culture can emerge and flourish. Substantive legal reform and institution building must therefore be implemented together so that each reinforces the other . . . The effectiveness of law in the economic and social reality of a nation is usually intimately linked to the institutional set-up of government and economic organisations and the shape and focus of social and economic forces and their interaction." While this is true that one needs a bureaucracy to enforce laws, I argue that one cannot rely only on the existence of a bureaucracy in transitional societies, where by definition state structures are weak. Hence, there is a need for participation to alleviate legitimacy and implementation.

11. For the purpose of this paper, I define "elites" as political actors, including members of parliament, senior government officials, and also legal professionals, the latter essentially constituting a lawmaking group. Regarding the role of lawyers as an elite group, *see* William Ewald, *The Logic of Legal Transplants*, 43 AM. J. COMP. L. 4, 489, 499 (1995) (Ewald writes that lawyers constitute an elite lawmaking group).

society calls for clear, transparent, and predictable rules, a certain formalism in the societal interrelations. On the other hand, the fluid nature of transition demands solutions outside the legal framework. In this context, it is necessary to note that there is more to the effectiveness and legitimacy of a normative order than technical considerations dictated by experts. The legitimacy of law, where legitimacy means acceptance as the basis of social coordination, requires a social and political foundation.¹² This raises the need to ensure a democratic and participatory process of lawmaking, which is able to give legitimacy to adopted laws, and prevent lawmaking within closed door chambers.

In this paper, I draw from the experiences that I had while I was working on legislative policies at the Albanian Ministry of Justice. I also draw upon a more modest experience in Nepal where I was drafting a key piece of the legal framework on microfinance. What makes studying the Albanian legislative process interesting and relevant to the contemporary processes of state building, democratization and development is the degree and complexity of experiments done and still being done today in reforming the political landscape, economy, society and the legal system. In that *milieu* are embedded all versions of Frankenberg's comparative lawyer, as well as successive mutations of comparative law in

12. See Scott Newton, *Transplantation And Transition: Legality And Legitimacy In The Kazakhstani Legislative Process*, in *LAW AND INFORMAL PRACTICES, THE POST COMMUNIST EXPERIENCE* 151 (Denis J. Galligan & Marina Kurkchiyan eds., 2003). Newton argues that foundation can be based on interaction and reciprocity. For other accounts of legitimacy in legal reforms see generally Samuel J. M. Donnelly, *Reflecting on the Rule of Law: Its Reciprocal Relation with Rights, Legitimacy, and Other Concepts and Institutions*, 603 *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES, LAW, SOCIETY AND DEMOCRACY: COMPARATIVE PERSPECTIVES* 37, at 44 (2006). Donnelly writes that changes or developments in law or legal institutions can enhance the legitimacy power of the courts or society or they can produce legitimacy costs. Legitimacy power can accumulate slowly during a sequence of law reform or over the history of an institution. Thomas Franck writes, "legitimacy is the quality of a rule, or a system of rules, or a process for making or interpreting rules that pulls both the rule makers and those addressed by the rules toward voluntary compliance. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *AM. J. INT'L L.* 46, 50 (1992). Duncan Kennedy also provides a series of contexts in which emerges the concept of "legitimacy power." Duncan Kennedy, *Freedom and Constraint in Adjudication, A Critical Phenomenology*, 36 *J. OF LEGAL EDUC.* 518 (1986).

action.¹³ Those in turn, are associated with differing political wills and legacies of the multitude of domestic and international actors.

The first Chapter looks at the practices and requirements of the lawmaking process, thus illustrating the dynamic of the early years of transition, which are common to all transitioning countries. It provides a narrative of the political transformation process and discusses the rise of the informal sector. I also map key actors of legal reforms. Taking into consideration the horizontalization of lawmaking, the role of various institutions and exogenous actors that participate in reforming the system is analyzed against the dichotomy of informal and formal norms inherent in a transition process.

The second Chapter probes the relationship between the legality and the legitimacy of the lawmaking process. In discussing the lawmaking methodologies, I analyze this relationship *vis-à-vis* the legitimacy derived from a democratic law making process. The methodologies of reforming the legislation reflect the background and assumptions of the actors involved.¹⁴ In this context, as Ajani puts it, one could speak in terms of an offer and demand of legislation.¹⁵ This approach highlights the effect of the diversity of origins of laws introduced to the legal system.

The lawmaking practices raise more questions than answers *vis-à-vis* the compatibility, adaptability and functioning of legislation originated from different legal systems, the enforcement of standards and norms in local communities, and the compliance with requirements of public participation. They also open the Pandora box regarding the implications of adopting international standards, and the role of international organizations as providers

13. Günter Frankenberg, *Stranger than Paradise: identity and Politics in Comparative Law*, 2 UTAH L. REV. 259 (1997) (Frankenberg discusses interchangeably the identities of comparative lawyers when advising a foreign government. The case in question is based from a business trip to the Albanian Ministry of Justice).

14. For instance, international organizations and foreign donors' projects were aimed at incorporating international standards as well as relying heavily upon harmonizing laws with existing standards by mostly transplanting legislation of developed countries, but not only. When OSCE was advising Albania to revise its Election Code, legal sources as far dispersed as those from the former Zaire to Azerbaijan were presented as examples. I had just started working at that time, in the summer of 2000, and the materials were on my own desk.

15. Ajani, *supra* note 7, at 97.

of expertise and norms. One of the problems associated with legal reforms projects is the emphasis on the technical rather than political or social nature of expertise.¹⁶ While this approach allows legal work to be carried out even in those areas considered inherently political with the justification that it could increase the legitimacy of the outcome through prestige, more often than not the result is the contrary. The recipients of laws often stay outside the political and lawmaking process, which in turn is conditioned by the central influences of domestic elites and international factors.

The methodology of preparing laws, within the technical assistance framework provided by international actors has changed twice in the last 20 years. In the early 1990s until 2002, weak state structures exacerbated the lack of coordination among various actors involved in the reformation of laws. The preferred approach of preparing laws consisted of the establishment of closed working groups, no more than three to four experts each, working on a particular law. As mentioned earlier, during this time, a legion of legal reform projects in similar areas, sometimes even working on the same legislative measure, but from different perspectives created a plethora of results. No one has dared, or dares, to embark on a study of evaluating the effects and results of those laws.¹⁷ The myriad of legal reform projects combined with the diversity of experts, bringing their own backgrounds in drafting law, resulted in conflicts in the codification efforts of the late 1990s.¹⁸

16. David Kennedy makes a general case on the need to bring politics in expertise and comparative law. See generally David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYDNEY J. OF INT'L L. 5 (2005), and *The Methods and Politics of Comparative Law*, in THE COMMON CORE OF EUROPEAN PRIVATE LAW: ESSAYS ON THE PROJECT 131 (Mauro Bussani & Ugo Mattei eds., Kluwer Law International 2003).

17. There are no studies indicating the implementation or the extent of harmonization of particular pieces of legislation with international standards broadly defined. However, there are reports on the progress of Southeast European countries toward membership or association with the European Union, which contain passages on the status of different sectors related to the internal market, as well as project implementation reports from the World Bank and country reports in the WTO.

18. For instance, the Albanian civil code was drafted within the framework of a Council of Europe (CoE) and was adopted relatively quickly by the Parliament in 1994, partly because the elements of the market economy needed some legal basis. At the same time, two other projects from the German Technical Assistance (GTZ), were working on the commercial legislation and

The modern era of legal reform is mostly devoted to the approximation of legislation with the European Union (EU) *acquis*.¹⁹ The challenge here, since the EU legislation formally does not have direct effect on candidate or associated countries, is to transpose the standards laid down by the EU Treaties, regulations and directives into domestic laws.²⁰ The methodology adopted by the Executive branch is to create working groups with experts from interested line ministries that often fall back in the default mode of transposition of their predecessors of the early 1990s.

The proliferation of law, or as I call it “the inflation of legislation,” aimed at filling the gaps between the law in the book and the law in action is in fact only exacerbating the contradictions in the legal system, and simultaneously highlighting the defective nature of the lawmaking process. The implementation of legislation has encountered two barriers that derive their nature from the legislative process. First, there is little understanding in the administration about the EU standards and how to transpose them into the domestic system. This is followed by a poor performance in enforcing laws. The desire for a closer integration with the international, or for greater Europeanization, has provided a powerful incentive to adopt more laws than it is possible to absorb and enforce. Any piece of legislation with a European Union label is fast tracked to the Parliament.²¹ The problem with

competition, with German experts. The result was that after completing the legislation and after the Parliament adopted it, the experts from both projects saw that with respect to consumer protection and commercial registry, these two pieces of legislation had conflicting provisions and solutions.

19. The body of European Union regulations and standards of primary and secondary legislation, as well as European Court of Justice jurisprudence, case law. By modern era, I mean the results of approximation that started in 2000.

20. The choice of the legal median is left to the enforcing country, and it can either be a law, almost always initiated by the executive branch and voted by the parliament in the so called fast track procedure, or executive orders-by-laws. Within ten years, or sooner, any country associated with the EU, and aspiring for membership, has to incorporate approximately 100,000 pages of *acquis*, the number keeps growing each year.

21. The fast track procedure is widely used in Central and Eastern European parliaments, and as a matter of fact, it is adopted solely for the purpose of adopting laws required under the relationship with the EU.

this is not the existence of just weak administrative capacities, but with the approach taken to the harmonization of legislation. Second, as the institution responsible for enforcing such contradictory and incoherent laws, the judiciary is the ultimate bearer of inadequacies of the legislative process. Among many complaints from judges is their relative ignorance of the laws, and the inability to understand, interpret and enforce legislation. This trend is a result of their absolute absence from the lawmaking process.

The third Chapter puts forward some proposals to ameliorate the lawmaking process by introducing several ways of assessing and evaluating legislation. Almost every report from the international community on Albania emphasizes the failure to enforce laws. This problem is often attributed to inadequate capacities or political will. Instead, it should serve as a cause for inquiring about the coherence of the legal reform programs. The fact that despite 20 years of transition Albania is still in transition facing the same type of problems indicates that questioning the human and institutional capital does not fully address the issue. It is feasible to assume that in 20 years people would have had the time to train and learn, even by a trial and error method.

Concluding, this paper elucidates the complexity of lawmaking in a transitioning process and exposes conflicting aspects of the legal reform, which tend to favor legality over legitimacy. The implication, ultimately, is the perpetuation of transition and the withering away of the legitimacy of democratic regimes.

III. CHAPTER ONE: TWENTY YEARS OF TRANSITION: POLITICS AND ACTORS

In this Chapter, I lay the context to my argument that attempts to reform legislation during periods of transition are inherently unable to reflect the complex and ever shifting social forces that regulate relationships in a society. This inherent inability in turn emphasizes the tension in the relationship between the legality of normative measures and the legitimacy of solutions, which undermines the credibility of law as an instrument of change. I provide a narrative of the transition process in Albania during the 1990s, focusing on two aspects, first, highlighting the chaotic

nature of the process and the erosion of the state associated with the rise of informality, and second, the actors that largely drive the transformation process. The choice of Albania is not simply based on knowledge of the country, but rather one based on the merits of the case. The experience of the legal reform in Albania is in itself a study in complexity. It includes phenomena common to most of the other former socialist countries, and in some aspects it outpaces them in its extremity and severity. It is illustrative of a country that experienced a period of modernization through industrialization and urbanization between 1924-1989. In turn, from 1991 until present day, it is systematically and structurally deindustrialized, with one fourth of the population leaving to go overseas. Furthermore, it is illustrative of a country where democratization after Huntingtonian's third wave model is being reinjected.²²

A. Politics of Transition and Transformation

It becomes therefore necessary to say a few words about the forces and phenomena that shape the context in which we find the seeds of legal reform programs as instruments of change. The transition from a communist country towards a liberal democracy in the early 1990s relied heavily on law. Hart has argued that the need for certainty about rules points to the need for a legal system.²³ This central and formal understanding of law was

22. In this latter context, the country experienced a brief period of democratization in mid 1920s until 1939. After 1947, with the consolidation of the Communist Party's grasp of power, the totalitarian ideology permeated every particle of the society, economy and politics, thus treating these three components as one. The transition process taking place since 1991 is structurally transforming the society, economy and politics, treating each one of these components individually. However, I use the term "reinjected" not only to denote the above-mentioned cycle, but also to the fluctuations between democracy and quasi-authoritarianism that characterized the political landscape between 1991-2010. Respectively, 1991-1995 and 2001-2007 were the most democratic periods, whereas 1995-2001 and 2007-2010 were periods where quasi-authoritarianism was on the rise.

23. H.L.A. HART, *THE CONCEPT OF LAW* (2d ed., Oxford University Press 1994). On the extent of the role of law in social change, *see generally* a summary of legal reform projects published by the European Bank for Reconstruction and Development, *Law in Transition: Ten Years of Legal Transition* (Autumn, 2002), available at <http://www.ebrd.com/downloads/legal/secured/lit022.pdf> (last visited April 21, 2011).

considered as the necessary vehicle to achieve society's goals and inspirations. The centrality and omnipresence of law takes a totalitarian dimension when considering the attempts to refer to law and to formalize almost every aspect of life, or as David Kennedy says "there is law at every turn."²⁴ Even the political rhetoric embraced concepts such as "respect for law," and "rule of law, often ascribing to it a legitimizing function."²⁵ However, few actually understand the meaning of rule of law or agree on its implications. Indeed, the formalization of law, or for better words, the drive towards formalism, is pervasive and utterly imported.

Within each society law is embedded differently in the social texture, varying in its form, substance, social functions, regulative impact and in its legislative procedures.²⁶ While the content and consequences of a law could be judged separately from the process by which it is made, I argue that the process itself has an influence on the attitudes and on the acceptance of law. Needless to say, an open law-making process enables the law to positively deal with major social issues, inform the interested communities about the envisioned goals, objectives and procedures, and adjust the role of the implementing institutions.

In a totalitarian state, law has a subservient position to the party guidelines.²⁷ It thus takes an instrumental role in the Party's interests. For instance, in Albania the functioning of the secret police was not regulated by a legal framework, and its absence did not prevent the secret police from enforcing laws, or the "party's line." On the other hand, there was an extreme attempt at legalizing, or formalizing, other aspects of life. As the communist system matured, so it formalized the relationship of the individual to the state, extending to the utmost details of life in the gulags. The more the socialist state matured, the more laws it adopted. The

24. David Kennedy, *Challenging Expert Rule: The Politics of Global Governance* 27 SYDNEY J. OF INT'L L. 5, 1 (2005).

25. It is worth mentioning that there is no translation of the "rule of law" into the Albanian language. The substituted version, which supposedly means rule of law in the local context is indeed "shtet ligjor," "Rechtsstaat," "a legal state."

26. Marina Kurkchiyan, *The Illegitimacy of Law in Post-Soviet Societies*, in *LAW AND INFORMAL PRACTICES, THE POST COMMUNIST EXPERIENCE* 25, 31 (Denis J. Galligan & Marina Kurkchiyan eds., 2003).

27. The slogan was, "What the people say the party does, and what the party say, people do."

establishment of “the rule of law society,” or *Rechtsstaat*, is portrayed to correspond with the victory of rules against informalism. However, the exact definition of the rule of law in countries in transition is ambiguous. It constantly shifts according to the exclusive function of what an organization needs to do to justify legal reforms projects. In assessing the rule of law programs sponsored by the World Bank, Alvaro Santos tracks the variations of the concept of rule of law in legal reform programs according to institutional and substantive, instrumental and intrinsic criteria of classification.²⁸

The abrupt decentralization of governmental powers, along with the reduction in competencies and size of the central and local governments, resulting from neoliberal prescriptions on the role of government as a watchdog, contributed to a gap between law in the books and law in action. What followed after the collapse of the *ancien régime* was a move from a highly centralized state towards a mutation of the government’s role in the society following the *laissez faire* doctrine.”²⁹ Law became the epicenter and the rule of law rhetoric became the slogan of the day. Regardless of the size of government, and in the early 1990s the size of the public sector decreased steadily, the number of laws increased on a daily basis. This process transformed law into a product. Today, for instance, the number of laws produced by any Ministry is the measure of effectiveness for that institution, a measure of productivity and efficacy, a symbol of its success. It determines the fate of one’s career and furthermore, it determines the understanding of law and its relation to the society. Experts and institutions are seen as factors of production; law is therefore commodified.

The economic component of transition is outliving its contemporaries elsewhere. It has achieved the goal of fundamentally restructuring the economy by utterly deindustrializing it. This form of restructuring has allowed only for

28. Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 253 (Cambridge University Press 2006).

29. The approach of shock therapies can be conceptualized as a fluctuation between “seizing the window of opportunity” and therefore relying on discretion and standards to achieve the ends of a liberal democratic society with a functioning market economy, and the return to institutions, understood as rules of the games, as a precondition for the functioning of the market.

the emergence of trafficking of human beings and drugs, as well as the remittance of migrant workers. It has systematically encouraged immigration by effectively turning it into the single biggest input of the GDP, and it has eroded any trust in the legitimacy of the system.

The lack of trust in the legal system results in a surge towards the informal, which being more efficient, contributes to the decline of the trust in the system.³⁰ In the context of customary law, or informal normative aspects of the society and formal rules, Sigismund Diamond writes that “[c]ustom is the modality of primitive society; law is the instrument of civilization, of political society sanctioned by organized force, presumably above society at large, and buttressing a new set of social interests,” or as Sir Henry Maine has famously conceptualized the development of law and society as moving from status to contract.³¹

“Social norms are relevant to legal failure,” writes Galligan, in the first place they tend to undermine the function of law as a distinct means of social regulations.³² They do so by undermining or diminishing the special qualities law needs in order to be effective.³³ If law is not seen as important in serving social needs, the conditions for its being able to develop in order to do so are likely to be missing. Another way social norms are relevant to legal failure is when their content conflicts with the law. In the case of Albania, social norms associated with the *ancien régime* quickly became taboo, and instead the society turned towards the formal and informal law for guidance. What took place can be described as a competition of forces in the vacuum resulting from a

30. A perfect example of the informalism in the economy and the silence of the legal system is the phenomenon regarding the financial “pyramid” schemes of 1995-’97. Promoted by every single international organization with a presence in the country as a success story among Central and Eastern European countries, “a poster child,” the Albanian government encouraged the system of informal money lending. The epilogue of this two year-old process consisted of the presence of a stabilization police mission of the European Community in Albania in order to restore public order after the collapse of the “pyramids.”

31. Sigismund Diamond, *The Rule of Law versus the Order of Custom*, 38 SOC. RES. 42 (1971); SIR HENRY MAINE, *ANCIENT LAW* (1861).

32. Denis J. Galligan, *Legal Failure in Post-Communist Europe*, in *LAW AND INFORMAL PRACTICES, THE POST COMMUNIST EXPERIENCE* 1, 4 (Denis J. Galligan & Marina Kurkchiyan eds., 2003).

33. *Id.*

lack of social norms to operate in a free society on the one hand, and the lack of the enforcement of laws on the other.

During the last twenty years, there is a parallel development of social norms and legal formalism. The former is a product of peripheries: people cut off from the chores of running a state. The latter is a newborn, a transplant, a product of the center, the nation's capital, where the domestic cooperates successfully with the international. The surge of formalism as the way of understanding law came from the center, from adopting policies related to the necessities of the market, that is to say the demand for clear, precise, and systemic laws that are supposed to guarantee the functioning of the market and to attract foreign investments.

The change in the understanding of development results in the change of rhetoric on the meaning of rule of law. Whereas Washington consensus policies ascribed an instrumental function to the law in eradicating the past and providing for the future, relying both on formal and informal norms, the new development strategy of the mid to late 1990s based on good governance, foregrounds the law.³⁴ This latter approach treats law not only as an instrument of change, but as the goal of transformation, heavily vested with formal characteristics.

A similarity between these two strategies is in the technical nature of the legal reform. The first focuses on questions of efficiency, whereas the second on questions of good governance, rather than on questions of distribution or government. The elimination of the political and therefore of the role of ideology in the functioning of the market and good governance, is done in the name of expertise and technicality that sees win-win situations. However, it is a hard sell to maintain that law is merely technical in nature, and there is no reason to assume that they will be effective on their own.³⁵ Reforming legislation is ultimately a

34. See David Kennedy, *The New Law and Economic Development*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 95 (David Trubek & Alvaro Santos eds., Cambridge University Press 2006).

35. In an article on the role of law in political transformation, Ruti Teitel argues that the previous politicized nature of law and adjudication partially justifies non-adherence during the transition. This understanding of the rule of law as anti-politics is a common theme. Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L. J. 7, 2009, 2030 (1997).

political objective that needs a political coalition in place to support it, and public acceptance to enforce it.

The two paradigms of development transcend political divisions. In three consequent periods 1992-1997, 1998-2005, and 2005-2009, governments from both ends of the political spectrum have adopted the above-mentioned strategies. During the first period informality went to the extreme.³⁶ Informal economy, and informal relations in the public administration. The late governments of 1997-2009, under the new paradigm of governance as development have taken steps at formalizing the economy and public administration. However, it does not mean those efforts have made any impact on the relationship of the individual as a political animal to the government and power. While in the socialist regimes it was accepted that the will of the individual was subsumed to the will of the collective, the new democratic regime has yet to provide the emancipation of the individual for which the socialist regime was changed.³⁷ In the new system, the individual has become unhinged and there is a total sense of alienation from the society and a strong move towards familial amorality.

This narrative on the complexities of transition from a communist legal regime towards a liberal democratic legal order highlights the dilemmas and challenges that a government faces when at the same time it attempts to behave both pragmatically and visionary, legally and politically, in order to control the chaos and direct the transformation.

The fluidity of the relationship between law and politics, or legality and legitimacy, is well illustrated by the phenomenon of political round tables. Whenever there is a political crisis, regardless of the nature and motives, usually the party in power would posit itself as the defender of the legality of some normative act, or institution, such as preferably the Constitution or the courts. The challenger, in its attempts to shake the legitimacy of the system, would demand a solution outside the regular institutional

36. The 1997 financial crisis was attributed to the collapse of the "pyramid schemes."

37. On the political transformation and the role of values *see generally* Teitel, *supra* note 35, at 2026 (Teitel holds that no one rule of law value is essential in the movement toward construction of a more liberal political system).

channels. In a situation like this, the role of the international community is virtually or realistically emphasized by both parties. Never allowing a good crisis to be wasted, the international actors would strive to find followers in need of patronage. This latter game is carefully played out, without giving direct messages, but rather subtly hinting and confounding the local actors with ambiguous messages. The Organization for Security and Cooperation in Europe, OSCE, has become the default player, accumulating legitimacy for itself and also giving legitimacy to its solutions. On the one hand, international actors are involved head over heels in promoting an institutional and formal legal culture, the rule of law society, and on the other hand, the adventurism and quest for solutions outside the institutional framework is rewarded as an adequate response to the difficult nature of transition.

The relevant point here is not about the fact that the Albanian parties disregard the requirements of the rule of law, after all the political rhetoric emphasizes that they are not fully matured democratic actors. Instead, it is the blessing of the international community for orchestrating solutions outside the box.³⁸ In these situations, the line between political solutions and respect for the rule of law is extremely thin, reflecting an ever present dichotomy of “engagement with local leaders, in other words the informal, and the promotion of respect for the rule of law.”³⁹

The axiom that law should be recognized as having an important part in social organization is questioned by the primary actors who adopt it. Savigny’s writes that “[l]aw is only law where it maintains a close relationship with the common consciousness of the people,” the key element in the creation of public confidence in the legal system is the belief that rules agreed to in a democratic manner are followed by the entire society and by state structures.⁴⁰

The rise in the authority of international factors, throughout twenty years of transition, as the ultimate arbiter and source of legitimacy in determining constitutional solutions outside the

38. There are several explanations for the failure of law, ranging from weak democratic principles to old mentality from the socialist past.

39. This latter point is illustrated by the engagement of international actors with locals in the political crisis of 1997.

40. FRIEDERICH VON SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* (Madras: J. Higginbotham 1867).

institutional framework, as well as in the top-down approach to disregarding legal formulas, has created the belief of politics *über alles*. It is not clear how this situation fits with the description and final analyses of legal reform projects and workshops that train politicians to think in legal terms. It is not altogether uncommon for the same actors to be encouraged to find solutions outside the system, and the next day to participate in training on the absolute authority of institutions and the rule of law. This latter concept is seriously pursued in transforming the local culture by sowing the concept of law as incubated from the everyday, able to function within the limits that insulate judges and decision makers from outside influences.

The discussion of political culture extends more specifically into the question of access to the legislative process. Whenever people are not effectively consulted in the development of law, and have little reason to view institutions as legitimate, they do not own the law. Consequently, they perceive little obligation to obey it, their decisions on compliance resting on an assessment of the coercive power of the state.⁴¹ In this case the only way to succeed in making laws work is to enforce them with impunity.⁴²

The characteristics of the modern state emphasize the rationality of law and the need for adopting legislative procedures—in particular to contend with inflationary tendencies in legislative production—so as to guarantee the quality of legislation and implement its results. The application of law sometimes takes tyrannical features, reflecting a Weberian sense of the drive towards bureaucratizing any aspect of life in an organized society.⁴³ The indispensability of acting according to the legal

41. Neil MacFarlane, *Politics and the Rule of Law in the CIS*, in *LAW AND INFORMAL PRACTICES, THE POST COMMUNIST EXPERIENCE* 61, 74 (Denis J. Galligan & Marina Kurkchyan eds., 2003).

42. This leads to an interesting comparison of the intensity of enforcement of laws and deeply rooted social norms. The Northern part of Albania functioned under the norms of the Kanun of Leka, a 500 year-old formalized customary law, that even existed during the Ottoman occupation, and regulated most aspects of family, civil and penal law. The communist government enforced with an unprecedented impunity its laws, and especially in the Northern part, and with great success. However, as soon as communism fell, the norms of the Kanun resurfaced almost immediately.

43. *MAX WEBER'S ECONOMY AND SOCIETY* (Charles Camic et al. eds., Stanford University Press 2005).

process is attributed to the strengthening of the rule of law *vis-à-vis* ordinary people, and disregarding its relation to the political class. In this context, law can demand absolute fanaticism to the formality of say issuance of birth certificates, where it can be scrupulously implemented. From the perspective of a political party, a formal approach to law can threaten the fragile democratic nature of the state, and thus any attempts at reinforcing legality are swiftly denounced as authoritarian actions by the state.

In authoritarian regimes the legislative process by definition is hermetic. Whereas, the systemic changes of the 1990s attempted to constitute a clean break regarding the substance of legislation, we cannot say the same for the lawmaking process.⁴⁴ This is not to say that I am overlooking the significance of the content of new rules creating new rights and obligations. After all Hart said that “. . . some of the distinctive features of a legal system lie in the provisions it makes . . . ,” however my interests in the procedure are closely connected to the outcome. In this context there is a relationship between the domestic and international factors that dominate the process.

B. Actors of the Lawmaking Process

In this section, I narrate briefly a panorama of the main actors and their activities involved in legal reform in Albania. I map some the most influential actors, without necessarily attempting to comprehensively and exhaustively covering who's who or who's doing what. In this context, I provide a typology of some of the most influential actors involved in lawmaking.⁴⁵ There are two broad categories that could be used to characterize the actors involved in lawmaking. That is to say I group them according to their origin. In this sense, there are international and domestic actors. Each has its own sub-division between state and non-state actors.

The international actors involved in legal reform programs in Albania can be divided in two groups. The first consists of international organizations, most notably, the European Union

44. Hart, *supra* note 23.

45. Influence in this context is related to the perceived power that is exercised by the said actors.

(EU), Council of Europe (CoE), and World Bank (WB). The second group consists of donor countries acting through their own governmental and non-governmental organizations, most notably the German Technical Assistance (GTZ), United States Agency for International Development (USAID), and Central and Eastern European Legal Initiative (CEELI). All of these groups work with the local government and non-state actors in conceptualizing and implementing legal reform programs.

The European Community established contractual relations with Albania in 1992 with a Trade and Co-operation Agreement that promoted trade on the basis of non-discrimination and reciprocity. This agreement did contain a provision on the approximation of legislation in the areas of the internal market, but it lacked an institutional approach for large-scale legal reform. However, the “great leap forward” in the EU-Albania relations took place with the launch of the Stabilization and Association Process (SAP) for the Western Balkans in 1999.⁴⁶ It was aimed at assisting the Southeast European countries to undergo a political and economic transition that prepared them for a new form of contractual relationship with the EU known as stabilization and association agreements. The Stabilization and Association Agreements (SAA) combine political and economic conditions, such as respect for democratic principles, reform of the judiciary, and strengthening links of the countries of the region with the EC single market. They foresee the establishment of a free trade area with the EC and set out rights and obligations in areas such as competition and state aid rules, intellectual property and establishment, which are supposed to allow the economies of the region to integrate with that of the EU.⁴⁷ The Stabilization and Association Agreements contain provisions for the approximation of domestic legislation with the EU *acquis* in two stages during a 10 year period.

46. As a framework, SAP combined various instruments, an assistance program (CARDS), technical advice, trade preferences, co-operation in fields such as justice and home affairs, and political dialogue.

47. See The Stabilization and Association Process, *available at*: http://ec.europa.eu/enlargement/enlargement_process/accession_process/how_does_a_country_join_the_eu/index_en.htm (last visited April 21, 2011).

Each year, a national plan for the approximation with the *acquis* specifies the legal areas and measures that are to be harmonized with the EU standards.⁴⁸ It is the largest and most influential package of reformatory instruments adopted each year as part of the EU conditionality for candidate for membership countries. The first areas that are targeted include competition law, intellectual property law, standards and certification law, public procurement law and data protection law. Legal approximation in other sectors of the internal market is an obligation to be met at the end of the transition period. During the second stage of the transitional period the approximation of laws will extend to the elements of the *acquis* that are not covered in the first stage.⁴⁹

During the negotiation period, a Consultative Task Force (CTF) of the European Commission and Albanian government examines the progress of legislation. Every six weeks the Executive is obliged to submit a progress report to the Commission on the status of legislative and institutional measures identified during the CTF, negotiations and in the European Partnership document. In addition to this, the launch of the TAIEX assistance for the approximation of legislation, monitors changes in legislation on a monthly basis.⁵⁰

The Council of Europe is an example of an intergovernmental organization where the Member States, at least conceptually, have greater influence in determining the influence of CoE in their own domestic legal reform projects. However, this is not the case with the former socialist countries. Legal reform programs have been on

48. Otherwise referred to as simply NPAA, containing annual legislative and institutional measures to be adopted with a year in order to implement Community legislation and raising administrative capacities to enforce them.

49. Excerpts from the draft European Community and Member States Stabilization and Association Agreement with Albania (unpublished material) (2004).

50. TAIEX is the Technical Assistance and Information Exchange Instrument of the Institution Building unit of Directorate-General Enlargement of the European Commission. Its aim is to provide to the New Member States, acceding countries, candidate countries, and the administrations of the Western Balkans, short-term technical assistance, in line with the overall policy objectives of the European Commission, and in the field of approximation, application and enforcement of EU legislation. Assistance is also provided to those countries included in the EU's European Neighborhood Policy, as well as Russia.

the agenda of the Council of Europe since the beginning of the '90s.⁵¹ Its assistance has focused on drafting legislation in civil and criminal areas, consistent with CoE conventions and treaties. In particular, legal instruments such as the civil code, the Constitution, an anti-corruption package, and special legislation in the criminal area have all been prepared with CoE expertise.⁵² It has been a working practice and understanding between Albania and CoE, that the Ministry of Justice, or the Constitutional Court would submit major draft laws⁵³ to CoE's Legal Affairs Department for opinion and expertise, or ask for *opinio juris*. In this context, there was a silent agreement between CoE and the Executive branch that in their relations with the Parliament, or the public, a draft law would be considered prepared with CoE expertise as long as it was submitted to it, without CoE necessarily issuing an opinion. Labeling a particular law with CoE brand strengthens the legitimacy of actors and silences political conflicts.

The World Bank has been involved in four different ways in legal reform programs. It has traditionally characterized governance as neutral and technical in character, thus paving the way for reforming the legal systems of host countries.⁵⁴ The Bank has contributed to the development of legislation in the areas of

51. The CoE has focused on the process of lawmaking as well. One of its projects was to support member states' administrations in their efforts to improve the quality of law making. The project's activities aimed at promoting application of a uniform law-drafting technique and style and identify and disseminate best practice concerning the management of the preparation, discussion, adoption and publication of legislation. Its major themes included transparency of the legislative process where the project's activities promote more active consultation of external interested organizations and civil society representatives on draft laws and regulations. Broad consultation was also one of the principal tools to enable evaluation of the impact of legislation, which is another important activity of the project aiming at improving the stability of legislation. The project dealt with issues concerning better access to legislation, including the functioning of the official gazettes and design of electronic legal databases.

52. Data from the Council of Europe, available at: <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=3&MA=999&PO=ALB&SI=2&CL=ENG> (last visited April 21, 2011).

53. Usually these are draft laws dealing explicitly with political ends. This practice is of importance to the executive but also to other political forces because it can rubber stamp approval or disagreement to their initiatives thus eliminating most of the contested domestic debate.

54. WORLD BANK, *GOVERNANCE: THE WORLD BANK'S EXPERIENCE* (1994).

public procurement, property registration and property law, bankruptcy, collateral laws and laws on the structure of the judiciary. Its Legal and Judicial Reform Project of 2000 reflected a new development paradigm that treats good governance and rule of law as a development strategy. Despite millions of dollars spent mostly on foreign expertise, the results of World Bank's engagement in legal reform have been disappointing. One of the components, the improvement of the legal education at the Law School of the University of Tirana has not given any particular results.⁵⁵ The legal education in the country is by all domestic and international comparisons anemic, to say the least. A project to rehabilitate the school actually left the school in shambles. In an act of triumph of hope versus the experience, the Bank spent considerable funds in futile attempts to build an arbitration center in Tirana, a country where it is fairly easy to bribe any judge, despite numerous ethical and criminal provisions prohibiting it. To this day, after at least six years of existence, the center has still to be used.⁵⁶ The transition process fuels distrust in government and authorities. In this case, how the World Bank tried to bridge the distance remains a puzzle. In this context, what is there to prevent anyone from corrupting any arbitrator, when there are no regulations against the conflict of interests or subjecting arbitrators to the jurisdiction of the penal code? Fast tracking the adoption of ethical codes for arbitrators won't solve the deeply entrenched lack of trust towards any institutions. Furthermore, a stakeholder approach adopted by the World Bank to encourage local authorities to participate in formulating and implementing its recommendations did not make any difference in the process of

55. This particular component aimed at funding twinning arrangements to train faculty staff abroad and technical assistance; strengthening the institutional capacity of the Law School and funding textbook preparation and teaching materials, financing investments, and rehabilitating and expanding the premises of the law faculty building.

56. World Bank, Legal and Judicial Reform in Europe and Central Asia (2002), *available at* <http://web.worldbank.org/external/default/main?menuPK=301446&pagePK=141143&piPK=399272&theSitePK=301412> (last visited April 21, 2011).

adopting national strategies.⁵⁷ The process is as hermetic as it ever was.⁵⁸

The second group that has contributed considerably to legal reform programs consists mainly of government sponsored organizations, such as the GTZ,⁵⁹ USAID,⁶⁰ and CEELI.⁶¹ The context for their involvement is the international aid allocated by donor countries, and channeled through them either in the form of direct grants, but mainly in the form of technical assistance. Benefiting from their own expertise and financial resources at hand, they become influential sources of power and legitimation for the host government and local actors. As it will be discussed later in the paper, reliance on dogmatic premises, such as the USAID's paradigm of creating legal systems that better support democratic practices, or twin competition and rivalries among

57. See World Bank Projects and Programs, <http://www.worldbank.org.al> (last visited April 21, 2011). The Strategy went by the name of National Strategy for Economic and Social Development.

58. I was in charge of conceptualizing legislative policies at the Ministry of Justice and despite my position, neither my colleagues nor I was ever involved in the World Bank legal reform projects.

59. GTZ in Albania, <http://www.gtz.de/en/weltweit/europa-kaucasus-zentralasien/648.htm> (last visited April 21, 2011). The bilateral cooperation between GTZ and Albania began in 1988, even before the Communist era had ended, and it focused mainly on the economic sector. In this framework the legal expertise of the GTZ has been influential to the development of the Albanian commercial legislation and registry of companies, civil procedure, insolvency law, and recently of the competition and consumer protection laws.

60. USAID in Albania, Rule of Law, <http://albania.usaid.gov> (last visited April 21, 2011). Its programs aimed at improving the professional and ethical performance of the judiciary and judicial institutions, promoting anti-corruption and avoidance of conflicts of interests, land titles, mobilizing citizens to demand accountability and transparency from the government, promoting public awareness and education, domestic violence and the new family code.

61. CEELI activities in Albania, http://apps.americanbar.org/rol/europe_and_eurasia/albania.html (last visited April 21, 2011). The Central and Eastern European Legal Initiative (CEELI) was active in Albania right after the collapse of the regime in 1992. It supported Eastern European countries and not it is focusing on Central Asia. Since commencing its program CEELI's major projects have included: substantial assistance in support of the drafting of a new, democratic constitution, adopted through a popular referendum in 1998; promotion of judicial independence by supporting the creation of the Albanian Magistrates School and facilitating the establishment of the National Judicial Conference; and substantial support of legal profession reform and legal education by providing expertise and assistance to the National Chamber of Advocates. From 1998 to 2001, CEELI conducted a Criminal Law Reform Program, and from 2002 it worked in the anti-corruption campaign.

organizations can serve as illuminating lessons for modern day lawmaking and democratization.⁶²

The domestic actors can be divided in governmental actors, in particular the Parliament and Ministries, and a potpourri of sub national non-state actors. The latter are often created and maintained through family ties to the government, or through alliances. Based on that connection, a rotation of fortunes for these organizations takes place whenever the right or the left come to power. Formally, Article 81§1 of the Constitution gives the right to initiate laws to the Council of Ministers, members of parliament, and 20,000 voters.⁶³ An interesting shift in legislative powers can be traced to the rise of the Executive branch as the predominant actor in lawmaking. Approximately 99% of all legislation approved by the Parliament is initiated by the Council of Ministers.⁶⁴ Article 26 of the law “On the Organization and Functioning of the Council of Ministers” recognizes the right of legislative initiatives only for ministries and their dependent agencies. Every ministry proposes legal acts in accordance with the area of competencies and with the activities of the dependent agencies and central institutions. Among the ministries, the most influential is the Ministry of Justice, which not only has the right to initiate laws, but most importantly is the gatekeeper for the compatibility of laws.

The Ministry of Justice, reestablished in 1990 after three decades of inexistence in the socialist regime, where the presumption was that the state and the party were always right hence there was no need for public defenders, practicing lawyers and a Ministry of Justice, is the principal state institution responsible for the implementation of general government policy

62. As it will be discussed later in the paper, the rivalry was between two German organizations, GTZ and IRZ. Since 2000, the GTZ and IRZ, two leading German organizations shifted their focus toward providing the impetus for domestic reform and regional cooperation for a closer rapprochement with the European Union. The common areas of work and competence lead to a serious rivalry among these two organizations for funds which both of them received from the funds allocated by the German Ministry of Foreign Affairs to Albania.

63. The Albanian Constitution is one of the latest constitutions of Eastern Europe, adopted by a referendum on 28 November 1998.

64. This is an estimated number from my own experience at the General Department of Codification in the Ministry of Justice.

in the field of justice and is generally responsible for justice and legislative reform.⁶⁵ Through its Directorate of Codification it has a central role in the preparation of government's legislative policies and legislation, and most importantly in checking the compatibility of draft laws and other normative acts.⁶⁶

The problem with the legislative actors is twofold. As part of the regulatory scheme, the Constitution empowers the MPs with the right to initiate legislation. However, as the statistics show, this right is used in very rare occasions.⁶⁷ It looks like the transformation of the society through law is a task serious enough not to be trusted exclusively to the parliamentarians. Downgrading the role of Parliament from the legislator into the approver, or rubber stamp, directly and gravely influences the parliamentary basis of the state.⁶⁸ On the other hand, there is a *modus operandi* among the international organizations, governmental sponsored organizations and the local government and organizations that foster a culture of self-perpetuation and legitimization for the conceptualization and implementation of legal reform projects. These legislative practices effectively restrict access to lawmaking, and there are no incentives on the part of the main actors to change the status quo.

The relationship between democratic decision-making and rule of law principles is a two way street. Just as democracy rests in considerable measure on the rule of law, the latter rests in turn on democratic institutions and processes. Hence a balanced relationship between the rule of law and a democratic legislative process is needed to ease the transformation of the regimes. The legislative process in Albania during 20 years of transition displays chaotic characteristics, giving few opportunities to the public to get it involved in the lawmaking process.⁶⁹ In this context the notion of

65. Law No. 8678, dated 14/05/2001 "On the organization and Functioning of the Ministry of Justice."

66. *Id.*

67. Approximately 99% of the laws are initiated outside the parliament, with the latter always voting in favor of tabled laws. Data from the Albanian Parliament, www.parlament.al (last visited April 21, 2011).

68. Albania is a Parliamentary Republic, according to Art. 1 of the Constitution.

69. According to the OSCE Legal Sector Report: Albania (2004), public confidence in the Albanian legal sector is low.

law as an instrument of reform reflects a top-down approach. Despite some merits to this approach, the need for bottom-up considerations takes a more accentuated role in democratic societies and is a legitimate one in the prism of participatory democracy.⁷⁰ Direct participation could increase access to the political system and greater voters' involvement in the legislative process, thus giving more legitimacy to the system.

IV. CHAPTER TWO: THE TRAFFIC OF LEGAL NORMS

Legal reform does not take place in a vacuum. The need to fill gaps in a short time, combined with international pressure to stimulate the need creates an environment that is forced to receive norms and institutions. This process resembles a sophisticated system of offer and demand for legal norms.⁷¹ Expertise and financial rewards are key mechanisms to the functioning of the system. The feasibility of projects relies mostly on the origin of the organization(s) involved. The more Western an organization is, the higher the chances for funding and trading in influence. Prestige carries a lot of weight.

In this chapter, I attempt to elucidate the dark sides of legal engineering. In particular, I draw attention to the practices of legal experts and the form of expertise involved in lawmaking in Albania and Nepal, where I have had the opportunity to witness first hand how laws are made. I also draw upon some theoretical frameworks of comparative law to help me navigate and streamline the information that I gathered while working on legal reform programs. A particular discussion is dedicated to the workings of the legislative process, which is contrasted with the Constitution making process. While I make the argument for more inclusive participatory politics in lawmaking, I also caution against the

70. It is obvious that the adoption of Napoleon's Civil Code was of benefit not only for the French society but also it had a strong resonance in other European countries as well, which as a result of the spill over effect incorporated that code into their domestic legal systems. On the other hand, the paradoxes that associated the communist legal reform regarding collectivization and the crimes against state are an example of seeing the law as a mere instrument of government.

71. Ajani, *supra* note 7, at 97.

formality of the process as substituting the political will of the parties.

If law is made to be a means to an end rather than *vice versa*, then it follows that it should take into account the moral and social norms of a particular society.⁷² According to Merryman, legal reform either tinkers with the legal system, follows or leads the social change.⁷³ Two immediate problems are associated with legal reform projects. The first is the evident mismatch of the supply and demand of legal norms. The premise of this problem is the assumption that formalism demands the production of laws. In this context, pragmatic or dogmatic perspectives on the nature of transformation stimulate the demand for laws. The second problem refers to the nature of transplants.⁷⁴ The multitude of actors and methodologies for transplanting laws has created a situation where it is impossible to trace the origin of laws. In this case, transplants take on a life of their own, losing their original meaning and intent.⁷⁵ Frankenberg calls this process of supply and demand of expertise and laws as “[j]uridic midwives of capitalism . . . monitored by representatives of supra-or international organizations they dismantle and overhaul the old normative

72. But see ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 97, 109 (1993) (“It follows from the four reflections to this point that usually legal rules are not peculiarly devised for the particular society in which they now operate and also that this is not a matter for great concern.” “. . . The fact is, I believe, that even in theory there is no simple correlation between a society and its law.”).

73. John Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 3, 457, 462 (1977).

74. Jonathan Miller provides a typology of transplants classifying them as cost-saving transplants, externally dictated transplants, legitimacy generating transplants, and entrepreneurial transplants. All these types are found interchangeably in legal reform projects. Usually the entrepreneurial and legitimacy generating transplants are the most used, although the cost-saving is often used when there are no administrative capacities able to provide an analysis of a particular transplant, save the case of a legitimacy generating transplant. Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 4, 839 (2003).

75. See Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 THEORETICAL INQUIRIES IN L.: HISTORIES OF LEGAL TRANSPLANTS (2009), available at: <http://www.bepress.com/til/default/vol10/iss2/art14> (last visited April 21, 2011).

superstructure, importing, adapting, and transplanting legal codes.”⁷⁶

A. The Supply and Demand of Transplants: Diversity of Origins–Diversity of Results

In one of my early days at the Ministry of Justice in Albania, I found a folder containing the *travaux préparatoire* of the Election Code. Curiosity took the better of me and I started going through it. The working group was established under the auspices of the OSCE, which was very active in 2000 in establishing the rule of law in the country. Several of its experts were involved in drafting the Code, which was supposed to cure once and for all whatever was wrong with Albanian elections. I could not believe the surprise and sheer amazement I felt when I found in the folder the Election Code of former Zaire. One needs to be especially skilled in legal engineering to extract and adapt Mobutu’s Zaire electoral rules in order to democratize Albania of 2001. However strange this may be, it was a part of a larger pattern. The reformatory process in Albania was characterized by a diversity of approaches and methods in drafting laws. The result consisted of an amalgam of laws, broadly taken by the common law tradition and Germanic-Roman law.⁷⁷ Of course, the first draft of the Election code in 2000 had the exotic nuances of Zaire.

A diametrically different experience was in the case of Nepal. At the Center of Micro-Finance where I was helping with drafting the legal framework on microfinance, a more inclusive, participatory process was in place. Most of the relevant stakeholders were part of a process in which they learnt of our efforts and at the same time they contributed valuable comments and suggestions. The draft law was drawn from the experience of Nepal and from other neighboring countries. This is not to say that

76. Frankenberg, *supra* note 13.

77. For instance, the Civil Code was drafted after the French Code Civil in the framework of a Council of Europe project, while simultaneously, GTZ experts drafted the first part of the commercial legislation with the registry of companies modeled after the French and German legislation. The registration of private property recently was developed under the auspices of the USAID, whereas the criminal and criminal procedure code were aligned with the Italian legislation.

the final draft was a combination of transplants, at contrary, the law was entirely home grown on the premise that it benefited from lessons learned either in Nepal, or in neighboring countries. Having in mind the reformatory aspect of the law, the legal framework also reflected international standards of accountability and good governance. In this way, it was more productive to engage with a local product that aimed at achieving higher standards for governance.

There are two direct consequences resulting from the diversity of the methodologies and projects of the legal reform. First, there is a sense of confusion or alienation that is derived from the chaotic nature of the legal system and its incoherence. Second, a sense that the lack of action on the part of government or private actors is attributed to the vacuum in legislation. This implies an urge to adopt more laws in order to bring the country up to date with modern standards. As it was mentioned in the first Chapter, generating laws is the measurement of success and efficacy of public institutions. It is an imposed solution in a closed administration and civic society catering to the needs of project awarders. This creates a vicious circle, which perpetuates a need to adopt new laws every day. In turn, they are practically never absorbed by the administration itself, by the elite, or by the public. As an example, shortly after I started working in Albania, during one of the negotiations in the framework of accession to NATO, the Ministry of Foreign Affairs had no data regarding the UN conventions ratified by Albania. The large number of adopted laws and by laws also makes the lawmaking process difficult to manage.⁷⁸ It is obvious to say that the process needs management in order to ensure effectiveness in adoption and in implementation.

Pressure from the interaction with international organizations and donor countries is being brought to bear on the Executive branch as well as the Parliament.⁷⁹ The membership in

78. A direct result, which is connected with the large number of normative acts adopted by the Government is the lack of disseminating information in the communities of lawyers and judges. A shared complaint by the members of the judiciary is the frequent amendment to laws, and the lack of codification.

79. See Robert C. Bergeron, *Globalization of the Dialogue on the Legislative Process*, 23 *STATUTE L. REV.* 85 (2002). Examples include the need to incorporate structural changes and “rule of law” reforms into domestic law as

international organizations, such as the WTO for instance, requires constant assessment of the existing legislation against the international norms. An element worth mentioning here is that while there is a vigorous debate in EU circles about the relationship of WTO norms not only on states individually, but also on the EU and its institutions. In Albania, the relationship of domestic law to international law takes a very formalistic, and dogmatic perspective.⁸⁰ There is little room for discussion among judges and other practitioners on whether international law supercedes national law in whatever form, period. The WTO and the related treaties, such as WIPO, were ratified in a single session in Parliament. The prospective membership in the EU brings with it a requirement for a comprehensive rehaul of legislation in order to bring it up to EU standards. It also requires the examination of the entire legislative process to ensure that future laws meet the required standards. In this latter context, beginner's luck was to accompany me during the first year at the Ministry of Justice. In one of the office visits by legal experts, I was abruptly introduced to the world of legal reform projects. Under the goal of modernizing the legislation, an expert introduced me to the inefficiencies of the Albanian insolvencies law which was drafted by his organization some years ago (GTZ). He eloquently argued that I should inform the Minister about the immediate need to amend the legislation in order to align it with the *acquis*. His organization was only too happy to assist us.

Newton says: "[t]he very term 'transplantation,' biased towards the technical, masks the political realities, for 'legal transplantation' is always necessarily a species of the genus legislation. To speak, as comparativists typically do, of transplantation as 'reception' is to obscure the political calculations and complex play of interests behind any modern instance of importing statutes (or concepts or provisions)."⁸¹ Watson on the

a condition for obtaining loans from the World Bank, and the orchestrated revision of the monetary, banking and fiscal legislation under the conditionality of the IMF.

80. See generally ARMIN VON BOGDANDY, *EUROPEAN INTEGRATION AND INTERNATIONAL COORDINATION* (2002).

81. Newton, *supra* note 12, at 152.

other hand makes the case that transplantation has occurred all the time and the modern legal systems are the fruits of massive transplantations.⁸² Limited in the technicality of the term, the reform in changing and aligning legislation with the international standards and with the EU *acquis* becomes easier to be conceptualized and adopted. This approach however misses the point of how are the transplants incorporated and how are implemented.

The multitude of national strategies and action plans addressing particular recommendations can be evaluated twofold.⁸³ Firstly, there is a lack of coherence among the goals and objectives of legal reform programs proposed by the interested actors, which results not only in sporadic implementation, but resonates problems in codification, and creates the need for repetitious revisions in all areas of legislation. Secondly, there is a lack of cohesiveness within a single legal reform project, manifested in terms of maintaining uniformity and cohesion in conceptualizing goals and objectives and drafting legislation.

The process of adoption of the NPAA and APIEP was typical of the Albanian administration. It merits a few words of explanation to illustrate the process and methodology.⁸⁴ The drafting process of the APIEP started in early May 2004 with the aim of finalizing it by early June. The methodology adopted to draft the Plan was the result of a “compromise” of two different EU technical assistance experts assigned to the Ministry of

82. WATSON, *supra* note 72.

83. NPAA, APIEP are instruments regarding the European Union, whereas the National Strategy for Economic and Social Development was adopted as a requirement from the World Bank.

84. See generally European Partnerships for Western Balkans, http://www.europa.eu.int/comm/external_relations/see/docs/index.htm (last visited April 21, 2011). The approximation of legislation is conceptualized in the National Plan for the Adoption of the *Acquis* (NPAA), as well as in the Action Plan for the Implementation of the European Partnerships (APIEP). These plans contain annual as well as medium term legislative and institutional building measures. The launch of European Partnerships in 2004, in addition to the annual preparation of National Plan for the Adoption of *Acquis* (NPAA), has put the focus on identifying short and mid-term priorities regarding the preparations for further integration with the European Union identified in the Commission’s 2004 Annual Reports and serves as a checklist against which to measure progress. The NPAA and the APIEP are developed independently by national authorities, subject to revisions and monitoring by the technical joint committees associated country-European Commission.

European Integration, which had conflicting perspectives and proposed different methodologies.⁸⁵ The conflicting methodological viewpoint, poor training on the part of ministries' experts as well as the hermetic process of consultations and drafting prevented the working group from coming up with a final draft, even four months after the formal start of the project.⁸⁶ The question is not simply that if there were only one set of experts then the confusion would have been avoided. The problem goes deeper into the incoherency of strategic objectives.

It is significantly easier to adopt legislation that comes from a well-established source. The authority of the legislation provides not only for a broader acceptance in the Parliament but serves as a legitimacy claim by the Executive versus opposition, and towards the population at large. The foreign technical expertise, alignment with the international standards, and the process of Europeanization of the legislation contain sufficient dosages of authority to facilitate the adoption of laws. It should be said that the alignment of the domestic legislation with international standards is not objectionable in itself. On the contrary, the drive of formerly oppressed societies towards universalistic virtues brings much vitality and needed energy. A flaw of this process is the strong emphasis on product over process that dominates the reform.⁸⁷ In this context, the gap, or the contradiction, between the objectives and results makes the case of a careful review of the lawmaking process.

The focus over the product is closely connected to the underlying motives that propel actors to become involved in legal reform projects. Furthermore, the legal reform projects overlap not only with regard to their substance, but also with regard to the actors. Legal reform projects have become a source of income for

85. One of the projects was intended to support Albania with the approximation of legislation before the negotiations for the Stabilization and Association Agreement were opened, preparing the country for them. Thanks to the Brussels bureaucracy it started some three years later, after the negotiations started. The second one was of course associated with the development of the SAA negotiations as technical support to the administration.

86. The methodologies used for drafting the Plan were revised on a bi-weekly basis, acting on differing proposals from the two projects' expertise. Needless to say it threw the whole administrative network tasked with preparing the document into a state of constant chaos and incertitude.

87. Newton, *supra* note 12, at 153.

many NGOs, founded by former or current ministers, or their wives. The quest for funds bypasses gap analyses on the need for a particular piece of legislation. The hierarchic and economic liaisons of the workplace enable many government experts to offer their expertise in the framework of the projects. In a different spin, the mobility and rotation in power of existing and former high level government civil servants influences the conception and implementation of assistance programs and the division of projects.

The following example illustrates the dynamic of actors' rivalry. In 2000-2001, two leading German organizations, German Technical Assistance (GTZ) and the German Foundation for International Legal Cooperation entered the market of approximation of Albanian legislation with the EU *acquis*. Both of them were funded by the German Ministry of Foreign Affairs and were competing for the same assistance for the Department of Approximation of Legislation in the Ministry of Justice. The competitive situation derogated to the point that the intervention of the German Embassy was necessary to basically remove IRZ from the approximation of legislation and encourage it to participate in other activities in the country. The result of the competition among the legal reform providers is not limited to projects working in the same area.

The predominant methodology of drafting laws in Albania consisted largely of transplanting laws or provisions from different experiences. For instance, the working group on drafting the copyright law tried to transplant part of the Italian, Romanian and Greek copyright laws.⁸⁸ This approach stands in contrast to the process of approximation of legislation with the *acquis*. The requirements of the EU alignment consist of the transposition of Treaty provisions, regulations and standards of directives into domestic laws.⁸⁹ This form of transposition demands a new

88. The initial version comprising these different parts of the law, was rejected as being artificial and not aligned with the international standards in copyright regime and with incorporating EU *acquis*. The working group in 2004 finalized the drafting of a law, which largely transposed the EC directives in this field.

89. The White Paper of the European Council (1994). The EU White Paper is focused on the need to adopt legislation, which is essential for the functioning of the internal market. It presents this legislation in a way which

strategy of drafting laws that differs from a classical transplant based approach. Instead of eyeing similar legislation in different Member States, some working groups, for example in the area of competition and consumer protection, based their work on standards set by relevant directives and regulations. According to this approach, the legislation of Member States has a complimentary role in providing a comparative bases for evaluating different models and in challenging, or affirming the assumptions of a particular law, rather than an *in promptu* translation and incorporation into the domestic system.

Regardless of sporadic episodes of bringing laws closer to the social context, the political will and the reformatory goals, the trend of legal transplants will continue to influence the lawmaking process. The benefits of comparative law can easily be demonstrated as lessons learned from other jurisdictions. However, it can or should not substitute for drafting laws that reflect the social context, the political will and the reformatory goals. The accession into the European Union is in itself a great exercise in reforming the legislation. The approximation of legislation with 100,000 pages of *acquis* is a process that requires first of all, and at least, a well-coordinated mechanism in order to prevent frequent amendments of legislation and to ensure wide acceptance for the necessary reforms.⁹⁰ Wider participation of the concerned actors and public can influence the zeal with which the proponents of EU advocate swifter lawmaking.

The tendency to adopt and incorporate as many international agreements as possible and EU *acquis* comes mainly from the lack

shows the key measures in each sector and those measures which should be tackled first, but it does not attempt to establish priorities as between sectors. It also describes in some detail the administrative and organizational structures, which are required in each sector if the legislation is to be effectively implemented and enforced.

90. I do not mean here to imply that the problem with harmonization of the *acquis* is exclusively one of coordination, as in that case the remedy would not be difficult to find. While I address in other works some of the problems associated with the nature of *acquis*, as a system, or a body of law that can be put under a critique of its own regarding its existence as a system, and therefore its internal coherence, in this paper as I state in the beginning, I take a process oriented perspective on the implementation of legal reform projects, rather than a substantive approach to their conceptualization.

of deliberations in the legislative process. In the situation when it is fairly easy to initiate a draft law under the label “European Integration” even the formal requirements of the lawmaking process become a mere formality. One can pass almost anything as long as it is properly labeled. The heavier (read powerful) the authority submitting a draft law, the faster the lawmaking process works. They are in direct proportion. In this way, they reflect the contradiction between the need to adopt legislation using the fast-tracking parliamentary procedures, in order to speed the pace of integration, and the need for a greater public deliberation, in order to ensure the “stakeholders as process owners” perspective.

B. A Comparative Perspective of the Legislative and Constitution Making Process

In this section, I explore the nuances of the lawmaking process in two different contexts. The first is a typical procedure that is used for adopting laws, and it includes both the drafting, and the passing of the laws by the Parliament. A caveat to that is the process of adopting EU *acquis*, which I explain immediately below. The second context is provided by the process, in which the Constitution was drafted in 1998. As described earlier in the Chapter, the large amount of legislation enacted every year, overlooking the process, contributes to the lack of implementation. A hypothesis could be raised whether normative acts would have a better chance of being implemented if a participatory lawmaking process was in place. In the interest of promoting much discussed democratic standards of transparency and accountability, such an approach could vest the system with more legitimacy.

The tension between a participatory lawmaking process and the product of legal reform projects becomes palpable in the case of adoption of the EU *acquis*. The usual legislative procedure is more preoccupied with ensuring the legality of the process, rather than establishing the mechanisms for ensuring legitimacy. Prior to the start of the negotiations for the SAA the approach to legal reform varied from one actor to the other. As noted earlier, the different approaches produced a myriad of results. The EU *acquis* were almost never taken into consideration by any working groups or legal reform projects. The laws were drafted to resemble particular

legislation of different countries, regardless of whether they were EU Member States or not.

In order to convey the commitment to the European integration, the Parliament has introduced a *de-facto* fast-track parliamentary procedure to pass legislation that aims at approximating domestic laws with the EU *acquis* or demands. Under this procedure, the Parliament has a limited time to review a particular draft law introduced by the Council of Ministers. The latter has the sole authority to carry out negotiations and maintain relations with the EU. According to the annual legislative plans, a majority of laws come from the EU conditionality for membership. For fairness sake, the EU is not the only international organization that wields power. The OSCE, World Bank, IMF, UN, WTO, and any other donor country have the prerogative to dictate conditions, and a *de facto* fast-track procedure is established for adopting laws coming from these organizations.

The typical law drafting in Albania starts with the preparation and adoption every January by the Council of Ministers of an annual legislative plan. It is coordinated through the Department of Coordination at the Prime Minister's Office with the legal departments of the line ministries and the central institutions. According to the law "On the Organization and Functioning of the Council of Ministers," each ministry sets up working groups to come up with planned legislative measures. Representatives from the Ministry of Justice and the Ministry of European Integration are invited to participate in the working groups charged with drafting normative acts.

After the working group completes the draft, it goes for revision to the interested line ministries and to the Department of Coordination, in order to settle disputes and approve the final version before introducing the draft law for approval in the Council of Ministers. Although formalized, this procedure is not exclusive and there have been numerous occasions when draft laws are introduced outside of this procedure. A *sine qua non* of the legislative process is the opinion of the Ministry of Justice for all normative acts and of the Ministry of European Integration for those normative acts that affect one of the areas of the *acquis*.

Pending review and approval by the Council of Ministers, a draft law is submitted to the relevant Parliamentary commissions

with jurisdiction on the subject area of the draft law and always to the Legal Affairs Commissions. Although members of Parliament have the legislative initiative, very few laws are adopted by the MP's initiative. It could be stated that the Parliament in a Parliamentary Republic has relinquished its legislative role by giving the Executive branch a *quasi* monopoly on legislation.

Formally, meetings of parliamentary commissions are open and MPs reserve the right to invite experts to discuss proposed laws. The process is intended to be deliberative. Actually, proceedings before parliamentary commissions are routine matters, where there is almost no deliberation. Rarely does anyone read the texts of a proposed legislative acts. Unless a proposed law is of a political nature, all others are adopted, almost always unanimously. After adoption by the relevant commissions, a report is prepared regarding the status of the draft law. In case members of the commissions have reservations regarding the draft law, they are included in the report.

Regarding the incorporation of international agreements into the domestic law, the situation is even simpler. Few would dare to run counter the "will" of integration and the internationalization of the legal system. A draft law incorporating the agreement is sent for opinion to the Ministry of Justice and the Ministry of foreign Affairs. The process of reviewing the international agreements is practically non-existent. The pressure to modernize the laws, and to have friendly relations with all international organizations and donor countries, influences the depth of reviewing the contents of international agreements. The proceedings before the Parliamentary commissions also in this case are quite fast and without much debate.

In this respect, the membership in the WTO was a perfect example of the hermetic nature of the legislative process. Most of the interested communities, the local producers, did not have a chance to participate in the negotiations and the preparatory work for concluding the membership agreement. Six years after the accession to the WTO, most of the business community frequently demands the renegotiation of the membership agreement, and the renegotiation of all free trade agreements with various countries. The seriousness of the matter was taken into consideration by

political parties in their election campaigns of July 2005, promising to renegotiate all the concerned agreements.

From a purely formalist position, it should be noted that there is no law guaranteeing citizens the opportunity to become part of the process of drafting laws, and this affects all ministries. As there is no legal provision that would require the Ministry of Justice to regulate public participation in drafting laws, the Ministry of Justice sees itself under no legal obligation to do so.

Access to law is an essential element of any state governed by the rule of law, and a problematic area that I tried to raise in this paper. However, despite the obvious benefits of an open minded approach to public participation, a right to public participation is not a recipe for success, and it's worth looking at some of its dark sides and blind spots. Apart from the traditional means of publicizing the law such as "official gazettes," information technology is now extensively used to enable wide-ranging possibilities for electronic access to legal texts. Public participation should not be taken to mean voting, as for example electing a constitutional convention or ratifying a constitutional text by a referendum. At its best, participatory constitutionalism works and counteracts the arguments in support of elite negotiation as the sole effective model.

The Constitution making process reflects the greater participation that attempted to lend legitimacy to the product. Although, by contrast to the traditional process of lawmaking, the Constitution making process was much more participatory and deliberative, the political boycotting by the opposition party contributed to the anemic nature of the final product.⁹¹ With this caution in mind, it is worth contrasting these two lawmaking processes to highlight the nature of participation and deliberation. It is also necessary to emphasize the important role of mechanisms that are needed to ensure the right to participate and deliberate. During the process of drafting the Albanian Constitution, Frankenberg wrote about the rules that would guide the legislative process: (1) institutions must be simple; (2) functions must be

91. It should be said that while the Constitution suffers from a lack of enforcement, due to its problematic substantive elements, and the initial political taint, the process of making it represents an interesting practice worth studying and illustrating.

clearly divided among the institutions; (3) the legislative process must be transparent; (4) the legislative process must be efficient (as guaranteed by public scrutiny); and (5) popular participation must be permitted.⁹²

Despite the practice of a participatory lawmaking process that characterized the Constitution making process, the supreme law of the country does not contain a single provision for the public access in the lawmaking process. The process of drafting the Constitution took into account the need for a wide participatory approach in order to best exploit the resources of local and international NGOs, and reflect the perspectives of the local experts and of the public in a more general tone.

The Administrative Center for the Coordination of Assistance and Public Participation (ACCAPP), a joint initiative of ABA/CEELI, GTZ, and OSCE, served as a liaison between and among Albanian and international participants in the constitutional drafting process.⁹³ Its function was to ensure that all interested parties had the opportunity to participate fully and to avoid duplicative and conflicting initiatives.⁹⁴ As such it was working to create a program of public participation. It solicited assistance from Albanian NGOs and international donors to provide materials, training, and financial assistance to develop strategies for organizing assistance and promoting public participation in the constitutional drafting process.⁹⁵

The program that they managed to put together consisted of two phases, collecting input into the drafting of the Constitution, and submitting draft provisions to the public for comment.⁹⁶

92. Günter Frankenberg, notes from THE THREE POWERS SYMPOSIUM ON THE CONSTITUTION-MAKING IN ALBANIA (May 13-15, 1998).

93. Scott Carlson & Molly Inman, *Forging a Democratic Constitution: Transparency and Participation in the 1998 Albanian Constitutional Process*. In the Fall of 2003, the US Institute of Peace in cooperation with the UNDP organized a series of workshops with experts on constitution making practices. I was invited to participate as a country expert in the workshop of the Constitution making in Albania. In the workshop we discussed the findings of Scot Carlson's paper, as well as debated the legitimacy questions of public participation and the politicization of the Constitution making process.

94. SCOTT CARLSON & MOLLY INMAN, *FORGING A DEMOCRATIC CONSTITUTION: TRANSPARENCY AND PARTICIPATION IN THE 1998 ALBANIAN CONSTITUTIONAL PROCESS*.

95. *Id.*

96. *Id.*

Throughout the duration of the program, its officers traveled all over Albania to generate public awareness and participation in the constitution making process. The results of these fora provided Commission members and its technical staff with a basic outline of the issues that the public considered important.⁹⁷ In a second phase, the review of the constitution was largely done by individuals and organizations either in Albania or abroad.⁹⁸ This public review was in addition to the drafting consultations provided by foreign experts.⁹⁹ This approach by the ACCAPP provided at least a mechanism to ensure wider participation in the lawmaking process.

Although the Constitution drafting project involved input gathering on a national scale, it did not provide answers to the methodologies adopted to filter the information gathered from the public participation into the drafting. The problem was threefold. The first was the relation of the political class to the final outcome. The Democratic Party, the major opposition force in the country was opposed to a Constitution being drafted by the Socialist, whom they considered to have come to power through a Bolshevik like revolution after the collapse of the financial sector in early 1997. They did not consider the government to be legitimate, and they did not support the process as they perceived it to being controlled and manipulated by the Socialists and their allies, even among the international actors. Hence, the final product, the Constitution, which was adopted formally by a referendum on 28 November 2008, purposely coinciding with the National Independence Day, did not have the full backing of the political elite. The second was the perceived role of the international community in legitimizing the process and product. The public perception at that time was that while making a constitution is generally viewed with optimism, the process and product were perceived to be too much controlled by the government and the international actors. In other words, the public perception was that yes, it is good that a constitution is being drafted, but we do not have any influence in it whatsoever. The third was the relation of

97. *Id.*

98. *Id.*

99. *Id.*

selected expertise and opinions generated in town hall meetings and the final product. Despite the fact that this exercise formally introduced the concept of the public as a participant in the lawmaking process, and as such constituted a break from the established mentality of closed doors working groups, without adequate methodological framework and proper safeguards it did not guarantee that the public input would find its way in the final draft.¹⁰⁰

The legal framework establishes virtually no formal opportunities for public participation in governmental and parliamentary decision-making.¹⁰¹ The relationship between the government, NGOs, and the public is a complicated one. Because of the lack of procedures for incorporating public input, relations between the government and the public and NGO community depend heavily on the discretion of governmental officials. The predominant attitude among government and parliamentary officials is that public participation hinders the lawmaking process instead of improving it. Moreover, public administration tends to show interest in public participation in the lawmaking and policy preparations process only when it expects that the public will approve of their intended decisions.

The law on the Council of Ministers, and the regulations on Parliamentary commissions do not prohibit the participation of other experts in the drafting process, but in the absence of an explicit provision and mechanism to ensure it, the right to invite outside experts is left to the discretion of MPs. There is a contradiction in the proceedings of the working groups. When a particular law is part of a legal reform project, the project experts

100. For instance, Frankenberg's article *Stranger than Paradise*, provides an example of a typical working group. Two to three local experts and a foreign consultant, tasked with drafting a major law, such as the Administrative Procedure Code. This practice until early 2000 was well entrenched in the set up and proceedings of the working groups.

101. Law no. 9000, dated 30/01/2003 "On the Organization and Functioning of the Council of Ministers". Article 24 of the law provides:

1. The initiators send the draft acts along with an explanatory memo on the goal, objectives and the substance of the draft act for opinion to the interested ministries and other institutions.
2. In any case, the draft acts, with the exception of those with an individual character, are sent for opinion to the Ministry of Justice, on the legality of their form and substance.

have a rather strong voice in the proceedings and in the final outcome of the law. However, if an interested NGO or a concerned community were to ask to participate in some of the meetings of the working groups, the decision to invite or not would be the chairperson's alone. Taking into consideration the past practices of lawmaking, the need for public consultations should be explicitly provided in the law rather than left to the discretion of the administration. The only direct participation by the public in governance and government consists on electing representatives to the Parliament.

V. CHAPTER THREE: PROPOSALS FOR THE FUTURE OF THE LAWMAKING PROCESS

How legislation is made, and of course what it says, are equally important and complementary. Process has become equally as important as the content of the final document for the legitimacy of legislation.¹⁰² The previous Chapters analyzed the contradiction among rules, and the deficits of the legislative process. In this Chapter, I discuss some perspectives on filling the gap between the law in the book and the law in action through greater participation in lawmaking and evaluation of legislation. From a political science perspective, Archon Fung juxtaposes the representative democracy with the participatory democracy. Fung highlights the democratic deficit of the policy making process where preferences are not matched by outcomes and where deliberation or participation is absent from the lawmaking process. Underlying the potential disruption of representative institutions, Fung nonetheless proposes that “for countries where patron-client exchanges are highly stable, entrenched and reinforcing dynamics of a policy-

102. Writers such as Daniel Berkowitz and Katharina Pistor have respectively focused on the legality and effectiveness aspects of the legal reform, and the need for legal professionals to embrace the laws in order to ensure effectiveness. This is another occasion to emphasize that my focus in this paper has been on the need to ensure broader participation by the public in order to enhance the legitimacy of the process and products of legal reform projects, rather than their legality. Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 1, 163 (2003); Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 1, 97 (2002).

making process, participatory reform may be an effective corrective.”¹⁰³

In the context of an emerging right for public participation in democratic governance, Thomas Franck wrote that the legitimacy of governments will be measured by international law and process.¹⁰⁴ The right to public participation in democratic governance exists today in international law. This right packs a moral punch but it lacks legal teeth and effective enforcement. Does this right extend from everyday governance to the process of constitution making? The United Nations Committee on Human Rights has recognized a specific right to participate in constitution making. The Aarhus Convention, even though a regional instrument, fortified the concept of public participation.¹⁰⁵

103. Archon Fung, *Democratizing the Policy Process*, in PUBLIC POLICY 669 (Michael Moran et al. eds., 2006). On an extreme use of anti-representative institutions, Bruce Cain and Kenneth Miller discuss the role of populist politics as opposed to progressive politics and representative democracy in undermining the legislature ability to set the policy agenda, frame policy options, balance competing interests, and protect minority rights. Bruce E. Cain & Kenneth P. Miller, *Populist Legacy: Initiatives and the Undermining of Representative Government*, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 33 (Larry J. Sabato et al. eds., 2001).

104. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 50 (1992).

105. A ruling in 1991 of the UNCHR, acting in its judicial capacity to hear individual complaints under Optional Protocol I to the ICCPR, in the case of *Marshall v. Canada* (Human Rights Committee, CCPR/C/43/D/205/1986, 3 December 1991). This was a case brought in 1986 and decided five years later, first authorized a specific right to participate in constitution making as an undoubted part of public affairs. The right to participate in constitution making might logically be derived from the general meaning of “democratic participation” in the UN Declaration of Human Rights (1948, Article 21) and especially Article 25 of the ICCPR (a covenant agreed in 1966 and entered into force in 1976). Article 25 establishes a right to participate in public affairs, to vote, and to have access to public service: “Every citizen shall have the right and the opportunity . . . without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country.” The right of public to participate was also recognized by the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25 June 1998.

A. International Arrangements on Participation and Evaluation

It is of interest to study how international law deals with the access to legal norms and what we can learn from the EU response. The right of public participation to legal norms and legislative process has been recognized in international law. Such an instrument is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. It was adopted on 25 June 1998, in the Danish city of Aarhus at the Fourth Ministerial Conference in the “Environment for Europe” process. The Convention, although it relates to the environmental issues, represents the most advanced instrument that regulates the right to public participation. Since signing the Convention in 1998, the EU has taken important steps to update existing legal provisions in order to meet the requirements of the Aarhus Convention by adopting directives for the Member States, but also for its own institutions. In particular, two directives¹⁰⁶ concerning access to environmental information and public participation in environmental decision-making (“first” and “second pillar” of the Aarhus Convention) were adopted by the European Parliament and the Council in 2003. They have to be implemented in national law respectively by 14 February and 25 June 2005.

The Convention adopts a rights-based approach and establishes minimum standards to be achieved, but does not prevent any Party from adopting measures which go further in the direction of providing access to information, public participation or access to justice.¹⁰⁷ Article 6 of the Convention establishes certain public participation requirements for decision-making on whether to license or permit certain types of activity listed in Annex I to the Convention. The “public concerned” is defined as ‘the public affected or likely to be affected by, or having an interest in, the

106. Council & Parliament Directive 2003/4/EC of 28 January 2003 On Public Access to Environmental Information and Repealing Council Directive 90/313/EEC, (OJ L 41 of 14.02.2003, p. 26), Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003.

107. The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998).

environmental decision-making,' and explicitly includes NGOs promoting environmental protection and meeting any requirements under national law.¹⁰⁸

The public participation requirements include: timely and effective notification of the public concerned; reasonable timeframes for participation, including provision for participation at an early stage; the right for the public concerned to inspect information which is relevant to the decision-making process free of charge; an obligation of the decision-making body to take due account of the outcome of the public participation; and prompt public notification of the decision, with the text of the decision and the reasons and considerations on which it is based being made publicly accessible.¹⁰⁹ What is important in this picture for us is to take into consideration the spirit and scope of its provisions.

The aim of all legislative work is to produce relatively good laws, because to produce absolutely good laws means to attain justice and justice is an ideal.¹¹⁰ The mechanic process of adopting laws in Albania has contributed to a large number of adopted laws over a relatively short period of time. As the previous Chapters illustrated, this tendency has provoked a lack of transparency, and this also is reflected in the quality of legislation. Part of the blame can be attributed to the handicaps of the lawmaking process: i.e. the deficiencies in the functioning of the supply and demand scheme for legal norms, which contribute to what I call the inflation of legislation. The problems are also reflected in the inadequate time for reflection and reviews, as well as in a greater isolation between the Executive and other branches of the government.

According to the Council of Europe, evaluation of the effects of laws is a relatively recent development in Europe. Its growing importance is related to changes in the form of legislation. Modern legislation has taken the form of programs, which are targeted to achieve certain goals; therefore, the traditional verification of the legality of legislation should be gradually accompanied or

108. *Id.*

109. *Id.*

110. COUNCIL OF EUROPE, EVALUATION OF LEGISLATION, PROCEEDINGS OF THE COUNCIL OF EUROPE'S LEGAL CO-OPERATION AND ASSISTANCE ACTIVITIES (2000-2001) (2001).

combined with the evaluation of the effects of legislation.¹¹¹ The most frequently mentioned evaluation criteria are the effectiveness, efficacy and efficiency. The focus is on the content of the law rather than on the procedures of collecting the input of the target populations into the given legislation.

The approach taken by the Council of Europe with respect to evaluation of legislation restricts itself to the effect and the implementation of the legislation. Little is said about the need to evaluate the legislative process itself. This approach focuses on the technicality of the lawmaking process, leaving outside political, economical, and social factors that are the driving forces of legislation.¹¹²

In this context, legislative evaluation is seen as an indispensable aspect of the democratic debate. In order to fully play its part in ensuring legal certainty, evaluation cannot be restricted to purely financial concerns or consistency of the legal order, but must also monitor how efficacious, efficient and effective a given norm is, as well as any other expected or unexpected effects. There should be provisions for evaluation at the time of *travaux préparatoires*, so as to foresee the effects (*ex ante* evaluation), and during the implementation, so as to be able to draw conclusions about the legislation's content and the implementation methods (*ex post* evaluation).¹¹³

In this framework, evaluation of legislation is thought to be an element of the sociology of legislation as well as an essential part of legislative methodology. Unlike legislative drafting, it concerns the material and substantial aspects of legislation rather than its formal aspects. It is particularly concerned with the relation between normative contents and their consequences in the social

111. *Id.*

112. *Id.* Legislative evaluation is a necessary discipline, but it has still to be widely developed in all European countries. Every Council of Europe member state or candidate for membership should independently look into the question and set itself the goal, when drafting legislation, of establishing machinery that makes it possible to have a better understanding of the legislation's impact. As part of its ADACS legal co-operation program, the Council of Europe might encourage and support these efforts by organizing both bilateral activities and discussion among all the countries in the program, and by developing, in partnership with national and NGO bodies concerned, networks for monitoring and exchange of information and experience . . . ”

113. *Supra* note 110.

reality, in the “real world.”¹¹⁴ Therefore, it is imperative to emphasize the nexus between the substance and procedure of lawmaking.

The analytical or theoretical model underlying the methodical approach to be used for preparing legislation considers the legislative process as a reiterative learning process.¹¹⁵ It is a process in which the evaluation of the effects of legislation is one of the fundamental prerequisites and tools for learning. A process, in which the responsiveness of the legislator to social reality and the social adequacy of legislative action should be guaranteed.

Taking into consideration that the Europeanization of legislation is the single biggest legal reform, much attention is needed to provide a scrupulous process of reviewing legislation initiated by the executive in the framework of the Europeanization of legislation.¹¹⁶ The establishment of the necessary domestic participatory and evaluation mechanism becomes relevant when considering that the EU does its homework quite well. Through the introduction of TAIEX programs in Albania, EU evaluates the Albanian legislation on an automatic basis.¹¹⁷ Every month, line ministries and the Ministry of European Integration are obliged to update a list of all normative acts adopted by the Council of Ministers and the Parliament in a database monitored by the European Commission TAIEX office. This process evaluates how many laws are adopted in a particular area and their level of compatibility with the *acquis*. During the implementation of the Stabilization and Association Process joint working groups and

114. *Id.*

115. *Id.*

116. In addition to international instruments on evaluating legislation, renown law and development scholars, Bob and Ann Seidman, have done remarkable work in preparing manuals for lawyers on drafting and evaluating legislation. ROBERT SEIDMAN ET AL., *LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE: A MANUAL FOR DRAFTERS* (Kluwer Law International 2001); and *ASSESSING LEGISLATION: A MANUAL FOR LEGISLATORS* (Boston University School of Law 2003).

117. TAIEX is the Technical Assistance and Information Exchange instrument managed by the Directorate-General Enlargement of the European Commission. TAIEX supports partner countries with regard to the approximation, application and enforcement of EU legislation. It is largely demand driven and facilitates the delivery of appropriate tailor-made expertise to address issues at short notice. http://ec.europa.eu/enlargement/taix/what-is-taix/index_en.htm (last visited April 21, 2011).

committees evaluate the implementation of the agreement and *ex officio* as well as the enforcement of legislation. The concern here is not about preserving nationalist, or culturalist sensitivities. It is more about providing alternatives and achieving a higher standard of comparison and evaluation rather than the basic level of alignment with the *acquis*.

There are few aspects that merit attention when talking about the effectiveness of evaluation. What I find missing and consider worth noticing is the important question of the subjects of the evaluation. Answers to these questions raise identity prerogatives for the executive and parliament. In this context, taking into account the shift in power from the legislature to the executive branch, regulatory agencies and the courts, it is about time to give something back to the lawmakers.

B. Reflections on Public Participation

The typology of critique against public participation is usually made in the context of lawmaking initiatives in America. Whereas my argument does not involve direct democracy, but calls for greater participation in the lawmaking process using the existing institutions of the representative democracy, nonetheless it is worthwhile to bring up the critique and discuss how it is refuted. The critique against forms of direct democracy in lawmaking highlights the role of special interests in formulating policies, the inexperience and incompetence of voters in conceptualizing policy proposals and formulating laws, and the risk for infringing minority rights.¹¹⁸ In an empirical study, Elisabeth Gerner refutes the critique by showing that the evidence fails to support the claims that there are more special interests involved in lawmaking initiatives, and that the voters are uninformed.¹¹⁹ Whereas, there

118. Elisabeth R. Gerber, *The Logic of Reform: Assessing Initiative Reform Strategies*, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 143 (Larry J. Sabato et al. eds., 2001).

119. *Id.* Furthermore, in the context of greater participation in the lawmaking process, an experiment was conducted in British Columbia where a Citizens' Assembly was created by the Government of British Columbia with the unanimous support of the B.C. Legislature. It was an independent, non-partisan assembly of citizens who examined the province's electoral system. The Citizens' Assembly had 160 members, one man and one woman from each of B.C.'s 79 provincial electoral districts (constituencies) plus two Aboriginal

could be a potential to harm minority interests, Gerner uses a Madisonian argument to conclude that risks could be mitigated by controlling the effects rather than the causes of antiminority tendencies.¹²⁰

According to Fuller, non-publication of law, contradictory rules, and a gap between law and implementation are among the elements that contribute to failing to make law.¹²¹ In the context of implementation, well-designed institutions are not the only answer, since the best institutions will fail in making law effective unless both officials and citizens display general attitudes of respect and compliance, unless, that is, they have a view of legal rules as binding.

Every single report on Albania evidences the relatively sound legal base, and the drastic lack of implementation. There are several factors that contribute to the failure of law, starting from socio-anthropological arguments on the attitude of Mediterranean populations towards formalized rules, lack of clarity in adopted legislation, lack of administrative capacities and resources, incoherence of proposed laws and of the system they intend to build, as well as a lack of political will to implement the reforms and recommendations of the international community. In a report about the state of the judiciary in Albania, the lack of professionalism and discipline, lack of implementation, conflicting and arbitrary legal interpretations, the lack of coherence and consistency in the law itself and its application form a set of

members. They were representative of the province as a whole, and worked for all British Columbians. Members were picked by random draw from a pool that reflected the gender, age and geographical make-up of British Columbia. They spent 11 months in 2004 studying electoral systems in use around the world, holding public hearings, accepting public submissions, and finally reached a decision on a new electoral system, which was put to voters in a referendum. The process was divided into three phases where they learnt about the electoral systems, held public hearings, and deliberated on the new system. This experiment emphasized the relevance of greater participation in the lawmaking process and the use of alternative mechanisms to the usual institutions of a representative democracy. Information Data available at <http://www.citizensassembly.bc.ca/public/inaction> (last visited April 21, 2011).

120. *Id.*

121. L.L. FULLER, *THE MORALITY OF LAW* (New Haven: Yale University Press 1964).

challenges for the law enforcement authorities.¹²² The list is long, and one can attribute the failure to almost anything. Distinguishing chaff from grain is the persuasiveness and cohesiveness of arguments. The “production” of laws, as commodities, has certainly negatively influenced their coherence and quality *vis-à-vis* clarity and precision. Legislative problems are universal problems; they should be dealt with in a multidisciplinary way, as they have a theoretical as well as a practical dimension.

The legislative loophole in the Albanian legislation regarding the participation in the lawmaking process has contributed to minimal initiatives to get the public to participate in the legislative drafting process throughout the years. Adding to the confusion, it has also led to inadequate publicizing of draft laws and poorly developed media contacts that would allow the process to be open to the public, not mentioning the failure to publish adopted law and by laws. With the exception of some isolated cases, the public generally has not played an active part in the process of legislative drafting.¹²³ This pattern fuels the hypotheses that enacted laws lack sufficient transparency and are predestined not to be implemented.

In order to open this process and ensure that the public has a voice in the process of drafting legislation the executive should and in some sporadic cases has started working to provide proper conditions to achieve participation, especially through the open invitations via such simple mass media as internet. The lack of a clear obligation or the lack of capacities cannot constitute excuses for not allowing interested groups to play an active role in lawmaking. Developing the necessary legal standards for determining when public participation is required and educating the public about the importance of public participation in legislative drafting are of primary importance, and would directly

122. Roland Miklau, *The Albanian Judicial System and Access to Legal Information*, in *LAW IN TRANSITION* (EBRD Autumn, 2009), www.ebrd.com/downloads/research/law/lit092.pdf (last visited April 21, 2011).

123. OSCE Legal Sector Report: Albania (2004). For example, public participation in discussions related to legislation package on NFO-s, draft laws on environmental issues (which reflects the obligation required by the “Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,” signed in Aarhus, Denmark on 25 June 1998 and entered into force on 30 October 2001, ratified by Albania on 27 June 2001).

contribute to the quality and legitimacy of the laws. In the words of Vivien Hart “[t]he context of a traditional constitution, presumed to stand above and to structure democratic politics, the extension of democratic process to include free, open, and responsive discussion of the constitutional settlement itself represents a radical departure, but one that attempts to overcome the problems of entry of new participants and of an equal voice for all concerned regardless of their expertise.”¹²⁴ It would also encourage citizens to participate in the various associations that would be involved in the process of commenting on legislation, thereby instilling important civic virtues.¹²⁵

Innovative ways to bring about great participation are usually commendable, but when in shortage, valuable tools can be used from other practices. Comparisons with the U.S. notice and comment practices can thus be a starting point.¹²⁶ In order to make these methods work efficiently in practice, there must be proper methodological mechanisms guaranteeing sufficient and real participation. The most important ones are the dissemination of information (public notice of and access to the latest drafts, either through the production and publication of information leaflets or through media and internet coverage), the creation of concrete possibility of organizations and interested parties to comment on existing draft laws at various stages, and ensuring that hearings are held at a time and in a manner that it is truly possible for comments to be evaluated and the final decisions to be influenced.¹²⁷

It should be stressed that these are not simply matters of ensuring citizen rights, though they do enhance democratic principles. By allowing sufficient participation in the drafting process, the public administration can avoid considerable amounts

124. See Vivien Hart, *Democratic Constitution Making: Special Report*, United States Institute of Peace 107 (2003).

125. OSCE LEGAL SECTOR REPORT: ALBANIA (2004).

126. For an account of the need to adopt notice and comment procedure in European law see Francesca Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment Comitology*, 40 HARVARD INT'L L. J. 451 (1999) (Bignami identifies an inadequacy in the rulemaking procedures in the European Union that fuels the democratic deficit and argues for the adoption of a revised notice and comment procedure in order to allow for greater participation but for a reduced role of courts and interest groups in light of cross-cultural differences in beliefs and interest organizations).

127. OSCE, *supra* note 125.

of criticism after laws have been passed. Participation also ensures the anticipation of a wider range of potential problems with the draft laws, thus lessening the need to amend legislation at a later stage. Despite the criticism of participatory-like arrangements and their shortcomings in lawmaking procedures, the situations that I analyzed earlier in the paper indicate an urgent need to reform the reform. Extracting the legislative process from the incubator to a more open and mature environment cannot help but bring healthier products and legitimacy to them.

VI. CONCLUSION

The co-existence of parallel processes in the modernization project, transformation and deliberation, formalism and informalism, legality and legitimacy, is nothing new, but what is experienced daily in most of the transitioning societies. The relationship of local values with prescriptions from the center is subject to a legitimacy test. In other words, there has to be a process where the local permeates the universal, and where the universal at the same time gradually influences the local.¹²⁸ Therefore, how law is made does matter. It matters whether groups and the population at large are able to contribute to the process.¹²⁹ A claim of necessity for participation is based on the assumption that the outcomes will have the legitimacy as coming from the right way of channeling the political power that resides in individuals. Thus participation has the potential, although not exclusively, to become a criterion of a legitimacy process. Lawmaking can no longer be confined exclusively to the domain of “high politics” and negotiations among elites. What needs to be avoided is exactly the tendency to favor legality over legitimacy.

128. See GLYN MORGAN, *THE IDEA OF A EUROPEAN SUPERSTATE: PUBLIC JUSTIFICATION AND EUROPEAN INTEGRATION* (2005). Morgan discusses the Europeanization process as one in which the periphery transform itself following the conditions of the center, while simultaneously the center is transformed by the periphery.

129. See Galligan, *supra* note 32, at 23.

INTERSPOUSAL CLAIMS AT THE CROSSROADS OF TORT LAW AND FAMILY LAW: THE DELICATE BALANCE BETWEEN FAMILY AND INDIVIDUAL

Biagio Andò*

Abstract	113
I. Introduction.....	114
II. Tort Liability Rules and Family between Immunity and Privilege	118
III. The Overcoming of Immunity Rule through the Social Changes Concerning Family	125
IV. From the Protection of the Family Unity to the Defense of Inviolable Rights of Single Family Members	135
V. Conclusion	144

ABSTRACT

This paper discusses the solutions adopted by Italian law (on which this study is mainly focused) and U.S. law as to the issue of recoverability of non-monetary damages suffered by one spouse for the intentional tortious conduct of the other. These suits are usually raised within the divorce proceeding and are grounded in the Italian law on the breach of conjugal duties.

In Italian law, notwithstanding the absence of specific provisions ruling this issue, and therefore the application of the general provisions on tort law not being barred, there was in the past a sort of immunity of family from the operation of tort law

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rules, resulting from the almost total absence of lawsuits in this field.

The unfavourable Italian approach towards admitting marital torts had its background in custom, and could be easily explained through the proverb “you shouldn’t wash your dirty linen in public.”

The immunity rule was not only typical to the Italian legal tradition, but was present also in American law. Unlike Italian law, in U.S. the immunity rule was rooted in common law (in accordance with the English legal tradition).

The transformation of the traditional family model occurred in the western world, characterized by a shift from the primacy of the family unit upon the single member to the primary relevance of the individuals within the family, together with a wider recoverability of non-pecuniary losses, paved the way for the acknowledgement of interspousal torts in both the legal systems.

The modern approach to the issue adopted in the Italian legal system will be illustrated mainly through judgments, while in U.S. the overcoming in most states of the traditional immunity rule (occurred through judicial rulings or by legislation) will be explained mainly through references to scholarship.

This survey, rather than suggesting new approaches to interspousal tort liability aims at assessing differences and similarities on the ground of operational rules used in a field—that of family law—which in the past comparative law enquiries did not delve into because of its alleged ‘exceptionalism.’

I. INTRODUCTION

Family law for long time has been placed at the margin by comparative lawyers interested in the processes of unification and harmonization of legal rules aimed at ensuring the functioning of market. It was ‘commonly thought that family law was too much the product of each nation’s distinctive culture and history to be a promising subject for comparison.’¹ Since family was conceived

1. M.A. GLENDON, Introduction: *Family Law in a Time of Turbulence*, in 4 *Int. Enc. Comp. Law*, Tubingen-Leiden-Boston, 2006, at pp. 6-7. On the possibility of comparison of family law regimes, see also H.D. KRAUSE, *Comparative Family Law. Past Traditions Battle Future Trends—and vice versa*, in *The Oxford Handbook of Comparative Law* 1099, 1101 (M. REIMANN & R.

outside the area of 'patrimonial law' grounded on law of the market, family law was considered as 'exceptional,' and not harmonizable. The rise in western legal systems of the ideologies about gender equality and individual rights in family law matters made possible a gradual convergence of family law regimes, and the overcoming of the idea of family as 'exceptional.'²

The operation of tort law in the realm of family may be considered as a significant example of the emergence of the individual within this ambit. Tort law rules may arise within family in different ways: a) the harmful act can be committed within family, but the effects can be suffered at the hands of a third person not belonging to family; b) the act can be committed by a third and fall on a person belonging to the family (in this case, two different specific damages may occur, one suffered by the victim and one by his/her family); c) or it can be committed by a family member against another family member.

In this last group of cases we find: 1) torts committed by parents towards children; 2) torts committed by children towards parents; 3) interspousal torts. In this third case an issue arises as to if and when a spouse should be held liable in tort for conduct that simultaneously constitutes both an infringement of spousal duties³ (with the consequent operation of specific family law remedies)⁴

ZIMMERMANN eds., Oxford, 2006).

2. F.G. NICOLA. *Family Law Exceptionalism in Comparative Law*, 58 *Am. J. Comp. L.* 777 (2010).

3. In this regard it is worth mentioning sec.143, subsec. 2, of the Italian Civil Code (hereinafter, c.c.) which states the spousal duties of fidelity, of moral support and financial aid, cooperation in the interest of family, cohabitation: "dal matrimonio deriva l'obbligo reciproco alla fedeltà, all'assistenza morale e materiale, alla collaborazione nell'interesse della famiglia e alla coabitazione."

4. Sec. 151 subs. 2 c.c. allows separation when living together is unbearable or can cause a prejudice to the bringing up of children ("la separazione può essere chiesta quando si verificano, anche indipendentemente dalla volontà di uno o entrambi i coniugi, fatti tali da rendere intollerabile la prosecuzione della convivenza o da recare grave pregiudizio alla educazione della prole"), and empowers the judge to state if separation can be ascribed to the conduct of one of the spouses ("il giudice, pronunciando la separazione, dichiara, ove ne ricorrano le circostanze, e ne sia richiesto, a quale dei coniugi sia addebitabile la separazione, in considerazione del suo comportamento contrario ai doveri che derivano dal matrimonio"). In this latter case there are two consequences: one, the loss of rights of succession; the other, the loss of the right to maintenance by the spouse to whose fault separation can be ascribed. He (or she) has the only right to alimony when there are the conditions fixed by sec. 439 c.c. There is no express mention in those provisions to the possibility of tort claims for the spouse who had suffered damage for the infringement of the

and a civil wrong. In the Italian legal system, one has to consider the general clause of sec. 2043 c.c., the most important provision among those of Civil Code dealing with tort law, which allows damages when the victim suffers an “unjust damage” from an “intentional or negligent fact” of the wrong-doer.⁵

The cases under c) can be labelled as “intra-family torts.”⁶ In contradistinction to other torts, in which the wrongdoer and the victim have no relationship (prior to damage committal), in the “intra-family torts” damage is strictly tied to family relationship and occurs because there is this kind of relationship.⁷

Also if the topic of marital torts has been tackled in the past,⁸ nowadays it assumes a greater relevance in Italian law for many reasons. Firstly, the area of relevance of non-monetary damages (connected to the subject matter under consideration) has significantly grown;⁹ secondly, statutory hypotheses of tort law

spousal duties by the other.

5. Sec. 2043 c.c. provides that “qualunque fatto doloso o colposo che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno” (“a fact committed with bad faith or negligence producing to someone an unjust damage, obliges the damaging person to compensate the victim for the loss”). Within this general provision, the most significant element is definitely that of unjustness of damage, which in fact can be considered the “architrave” of tortious liability: it is not sufficient that a damage occurs, but it has also to be acknowledged as unjust. This element therefore has the function of “filter” among those damage claims that can be allowed and those that cannot; the meaning of “unjust” is not cleared by the Civil Code, which does not provide a definition of it. The issue of ‘unjustness’ is one of the most controversial since the Italian Civil Code has been enacted. Literature on the topic is immense. A thorough analysis of the issue is not possible in this paper. I will confine myself to remind the two main positions as to the meaning of unjustness of the damage supported by scholars and courts. The first, rooted in the tradition, interprets art. 2043 as a “secondary” provision, in the sense that a damage can be qualified “unjust” only when a provision (other than sec. 2043) acknowledges the right or interest infringed as relevant for law; the second interprets the provision as a primary one (or “general clause”) in the sense that the same sec. 2043 directly selects interests and rights relevant at law (a clear and concise explanation of the differences between these two opinions can be found in C. SCOGNAMIGLIO, *Illecito e responsabilità civile*, I, in *Tratt. dir. priv.*, vol. X, Torino, 2005, pp.1-76).

6. See S. PATTI, “Intra-family torts,” in *Int. Enc. Comp. law*, vol. IV, ch. 9, Tubingen-Leiden-Boston, 3 (1998).

7. G. FERRANDO, *Rapporti familiari e responsabilità civile*, in P. CENDON (ed.), *Persona e danno*, Milano, 2004, 3 at 2780, 2788.

8. *Ex multis*, P. RESCIGNO, *Immunità e privilegio*, in *Riv. dir. civ.*, 1961, 1, p. 415, published also in *Persona e comunità*, Bologna, 1966, p. 414; S. PATTI, *Famiglia e responsabilità civile*, Milano, 1984.

9. I will come back to this topic *infra*.

have been introduced in the field of family law;¹⁰ finally, changes in family behaviour and new ideas about family life have brought about an evolutionary process of “privatization” concerning the interests of the single family member.¹¹

All these factors have played an important role in the upheaval of the traditional opinion¹² which was unfavourable towards admitting the enforcement of tort liability rules in the realm of

10. A clear example of that is the new provision of sec.709ter of the Italian Code of Civil Procedure (c.p.c.) in which it is written that in case of serious breaches or acts causing prejudice to the minor or interfere with the correct performance of the foster care (“in caso di gravi inadempienze o di atti che comunque arrechino pregiudizio al minore od ostacolino il corretto svolgimento delle modalità dell’affidamento”), the judge can admit compensation of damage suffered by children under age and caused by one of their parents, or from one spouse towards the other. The meaning of this statutory hypothesis within the tortious liability system is discussed: according to one opinion, art.709ter can be drawn within the framework of art. 2043 and 2059 of the Italian Civil Code, in the sense that the damage dealt with in the provision of the Code of Civil Procedure has to be treated in the light of the general principles of tort law, whereas according to a different opinion it should be treated as a case in which there is exceptional ground for the relevance of punitive damages (which are not generally acknowledged in Italian law). The difference among these two positions is perceivable on the ground of the conditions for the recoverability of the damage (the first position provides for damage relevant under art.709ter much stricter bounds of relevance of damage than those created by the second one). On the issue of the relationship between of art. 709ter c.p.c. and the general rules of tort liability, see, among many judgements, Trib. Messina, April 5, 2007 in *Fam. dir.*, 2008, I, 60 with a comment of E. LA ROSA; App. Firenze, Aug. 29, 2007 Decr., in *Danno e resp.*, 2008, 7, 799, with a comment of A. FIGONE; Cass. civ., Oct. 21, 2009, n. 22238; Trib. Varese, May 7, 2010, Ord., in www.personaedanno.it/cms/data/articoli/018114.aspx; further informations on the issues raised by this provision can be found in A. GRECO, *Affido condiviso (L. n. 54/2006) e ipotesi di responsabilità civile*, in *Resp. civ. prev.*, 2006, 6, p. 1178; A. D’ANGELO, *Il risarcimento del danno come sanzione? Alcune riflessioni sul nuovo art.709-ter c.p.c.*, in *Famiglia*, 2006, I, p. 1031; G. FERRANDO, *Responsabilità civile e rapporti familiari alla luce della l. n.54/2006*, in *Fam. pers. succ.*, 2007, 7, p. 590; M. PALADINI, *Responsabilità civile nella famiglia: verso i danni punitivi*, *Resp. civ. prev.*, 2007, 10, p. 2005; G. CASABURI, *Art. 709ter c.p.c.: una prima applicazione giurisprudenziale*, in *Giur. merito*, 2007, 10, p. 2528; G. FREZZA, *Appunti e spunti sull’art. 709-ter c.p.c.*, in *Giust. civ.*, 2009, 1, p. 29; G. SPOTO, *Dalla responsabilità civile alle misure coercitive indirette per adempiere agli obblighi familiari*, in *Dir. fam.*, 2010, 2, p. 910; C. MIGHELA, *Il risarcimento del danno derivante dal cd. illecito endofamiliare*, in *Resp. civ. prev.*, 2010, 1, p. 44.

11. In the past a well-established opinion was that family cannot be ruled from law (according to A.C. JEMOLO, *La famiglia e il diritto*, in *Ann. Fac. Giur. Catania*, 1948, 2, at p. 38, “family is an island which the ocean of the law barely touches;” in this sense, P. STEIN–J. SHAND, *Legal values in Western society* Edinburgh, 1974, p. 23.

12. On this issue I will come back *infra*.

family.¹³

This study is organised as follows: chapter 2 analyses the traditional approach followed in Italy and England unfavourable to the protection in tort of the spouse for the wrongful conduct of the other due to the existence of an 'immunity' rule; chapter 3 examines the progressive relinquishment of this immunity rule under Italian and U.S. law; chapter 4 focuses on the current approach to interspousal torts adopted in some recent Italian cases urged by the application of the doctrine of fundamental rights of the individual in the realm of family. In chapter 5, some conclusions will be outlined with reference to the respective ambits of operation of family law remedies and tort law rules. Furthermore, on public policy ground, the suitability of tort law as a general remedy for the protection of individuals within the family unit will be discussed.

II. TORT LIABILITY RULES AND FAMILY BETWEEN IMMUNITY AND PRIVILEGE. THE TRADITIONAL RATIONALE IN CASE OF INFRINGEMENT OF INTERSPOUSAL DUTIES: COMPARISON OF ITALIAN AND AMERICAN SOLUTIONS

According to the traditional view, the family and liability in tort cannot be intermingled. The family was to be considered a separate area characterized by immunity and privilege and dominated by *pater familias*, who was the guardian of family unity. The background to this view is to be found in the traditional conception of the family. Notwithstanding the absence of special rules or of a different *modus operandi* of the rules in tort liability, tort law was simply not applied because lawsuits were not even started when the damaging and the damaged persons were part of the same family unit. This was because there was widespread resistance to the penetration of tort law general rules within the realm of the family, whose harmony would have been put at risk by the Courts. The unity of the family was valued higher than the interests of the single members of the family and was to be protected from intra-

13. See P. MOROZZO DELLA ROCCA, *Violazione dei doveri coniugali: immunità o responsabilità?*, in *Riv. crit. dir. priv.*, 1988, at 605, who placed family "tra il pubblico ed il privato, tra la sfera della morale e quella del diritto, tra la spontaneità dei sentimenti e la giuridificazione dei rapporti."

family law suits.¹⁴ Therefore the immunity operated *de facto*, not being provided for *de iure*.

Some scholars did not find persuasive this explanation of the reasons of the immunity of family from tort liability rules rooted on social culture.¹⁵ The operation of an immunity rule in the case of harmful conduct producing financial harm could be explained with the fact that the victim was otherwise protected.

The duty of the husband to maintain his wife was, in the past, wide enough to cover every financial need of the latter and included all the costs, such as medical expenses, of a damage caused by his wrongful conduct. Compensation was thereby unnecessary. Furthermore, it was stressed that holding the wrongdoer liable for a sum of money would not make sense since the wrongful conduct did not cause damage only to the person directly affected, but also to the whole family including the wrongdoer when the victim of the tort could not work within the family because of the harmful conduct.¹⁶

The 'hierarchical' model lay at the basis of this approach.

For this model (that has been called 'institutional'),¹⁷ the family was the basic "cell" of society, based on the status of its

14. D. BARBERO, *Sistema del diritto privato italiano*, Torino, 1962, at p.566, supports this position when he states that family law has "una funzione ultraindividuale, ultraegoistica ed eminentemente sociale, in cui lo stesso dato egoistico viene assunto e tutelato non per sé, ma per essere elevato a strumento di utilità e di benessere per tutti." According to this author, however, Family law is not "una branca dello stesso *diritto pubblico*, ma tutt'al più, e questo sì, un sistema di norme preminentemente *di ordine pubblico*" (at 568).

15. See P. RESCIGNO, *Immunità e privilegio*, *supra* note 8, at 415: "l'esigenza di non turbare la pace familiare non giustifica il rifiuto dell'azione proposta dopo il divorzio per un danno subito durante il matrimonio."

16. *Id.* at 416-417.

17. This model lies at the basis of the Italian Civil Code of '42. These provisions are the same of those included in Civil Code of 1865, notwithstanding the relevant social changes occurred between the two codes. Infact, the "Relazione sul progetto preliminare" admits that "pur modificati in certa misura i costumi e mutate le condizioni sociali, non si è ravvisata l'opportunità di modificare in alcuna guisa la fondamentale disciplina dei rapporti fra coniugi [...]. Ogni particolare atteggiamento che sia più confacente ai bisogni ed ai costumi dei tempi, e soprattutto le conseguenze del fenomeno del lavoro della donna, è perfettamente compatibile con questa fondamentale disciplina della famiglia, e senza una precisa necessità non sono da modificare le formule che hanno ormai il prestigio e la forza di una tradizione" (this passage is quoted in A. SPANGARO, *La responsabilità per violazione dei doveri coniugali*, in M. SESTA ed., *La responsabilità nelle relazioni familiari*, Torino, 2008, p. 81 fn. 17).

members.¹⁸ This latter served as a link between the family and the legal system, in that it had the function to govern rights and duties among family members. From this premise many corollaries follow.¹⁹ Family bonds could not be ruled through agreements, the only cause of marital dissolution could be death and the interests of single family members were considered as subordinate to the “public” interest of the unity of family.²⁰ The principle of the unity of the family and the dominance of the *pater familias* aimed at satisfying the need of protection of family patrimony.

This immunity rule historically represented an obstacle to the enforcement of general principles of law, or rather private law,²¹ while the operation of criminal law rules was admitted,²² and, consequently, of tort liability rules.

Scholars have looked for some theoretical arguments appropriate to lending a somewhat legal grounding to the immunity rule.²³ It has been said that family and liability in tort have two

18. M.R. MARELLA, *La contrattualizzazione delle relazioni di coppia. Appunti per una rilettura*, in *Riv. crit. dir. priv.*, 2003, 1, p. 57: “lo status costituiva una cerniera fondamentale fra famiglia ed ordinamento, assicurando a quest’ultimo lo strumento attraverso il quale modellare la struttura della prima. Nella logica dello status diventava centrale la posizione di un soggetto nei confronti di altri soggetti considerati non come singoli, ma come appartenenti ad una collettività organizzata, una posizione che viene intesa non tanto come somma di poteri che l’ordinamento riconosce al singolo, ma come presupposto di tutta una serie di diritti, obblighi e rapporti che possono crearsi fra i componenti della collettività” (at 74, fn. 16).

19. See A. ZOPPINI, *L’autonomia privata nel diritto di famiglia. Sessanta anni dopo*, in *Riv. dir. civ.*, 2002, 2, at p. 215.

20. A. CICU, *Principii generali del diritto di famiglia*, in *Riv. trim. dir. proc. civ.*, 1955, p. 1. For a different view on these issues, P. BARCELLONA, *Famiglia* (dir. civ.), in *Enc. dir.*, XVI, 1967, at pp. 785-86.

21. A. CICU *supra* note 20, at 12; P. POLLICE, *Il difficile rapporto nel diritto di famiglia tra istanza individuale e interesse “pubblico”*, in *Riv. dir. pubbl. sc. pol.*, 2000, 2, p. 203; S. PATTI, *Famiglia e responsabilità civile*, *supra* note 8, at 3, observes that the existence of a family bond has been seen as a hurdle to the enforcement of commonly applied rules and an incentive to the creation of specific rules: “tenui dati normativi e, soprattutto, decisioni più o meno numerose [...] inducono [...] a pensare che l’appartenenza dei protagonisti dell’illecito ad un gruppo familiare determini un diverso modo di operare delle regole sulla responsabilità civile, o la disapplicazione delle regole stesse o, ancora, l’applicazione di una regola particolare.”

22. S. PATTI, *Famiglia e responsabilità civile*, *supra* note 8, at 32 remembers that criminal law applied to family when “la gravità del fatto faceva prevalere l’interesse pubblicistico alla repressione ed alla punizione del responsabile rispetto all’interesse [...] alla tutela della sfera privata della famiglia.”

23. On this issue, see P. CENDON, *Profili generali degli illeciti tra familiari: famiglia e responsabilità*, in R. TORINO (ed.), *Illeciti tra familiari*,

distinct languages;²⁴ that family law remedies do not admit the enforcement of tort liability rules, since the first are alternative to the second according to the Roman law principle ‘*inclusio unius, exclusio alterius*’; that spousal duties do not have the nature of legal obligations; that liability would be an incentive to actual family breakdown. However, these arguments look like attempts to find *ex post* a rationale to immunity rule.

The unfavourable approach towards the operation of tort law in this field, and in particular within the marital relationship, adopted in the past times is not an Italian peculiarity. To realise that, it is sufficient to compare the restrictive solutions adopted in past times in Italy as to the operation of tort law rules in the field of family with the very similar ones experienced in legal traditions under many aspects significantly different, such as the English and the American one.²⁵

This similarity among legal systems that are deeply different could find an easy explanation in the fact that they share the same social model of family. Although it could be true, this apparent similarity, however, needs to be more carefully considered.

If an immunity rule could be found in common law systems, the rationale for it in these latter seems to be different from that lying at the basis of the Italian rule.

It was in fact rooted in law, rather than in social culture.²⁶ There were several legal hurdles to the the operation of tort liability in the domain of the ‘interspousal’ relationship, flowing, as it will be clarified, by the special regime concerning property and legal capacity of married women.²⁷ In the common-law systems, in fact, in the past a spouse could not seek reparation for the prejudice suffered as a result of the illegal acts of the other because of the

violenza domestica e risarcimento del danno, 6-8, Milano, 2006.

24. *Id.* at 6: “refrattaria già di suo al tocco spigoloso del diritto, la famiglia costituirebbe [...] una sorta di isola nel mare, poco adatta a sopportare il contatto con presenze invasive come quella dell’illecito. Troppo grande la distanza fra il carattere (lieve, vaporoso) degli intrecci domestici e il taglio (pragmatico, semplificatorio) della responsabilità civile.”

25. References to English law will be limited as to the origins of the immunity rule.

26. On this point, see S. PATTI, *supra* note 6.

27. In this regard, for references in Italian literature, see S. PATTI, *supra* note 9 at 26-30; S. PATTI, *supra* note 8; R. TORINO, *Responsabilità per illeciti tra familiari e rimedi contro la violenza domestica in Inghilterra*, in *Illeciti tra familiari*, cit., 151; CLERK & LINDSELL, *On Torts*, London, 2000, p. 187.

doctrine of *unity of spouses*. According to this doctrine, marriage produced a merger of the legal identity of spouses, who were considered at law as one entity, “and that ‘one’ was the husband who acted as ‘guardian’ for the wife.”²⁸ Since the doctrine of unity is of the highest importance for the understanding of the rationale of the immunity from tortious conducts perpetrated against the spouse, brief considerations have to be done as to it.²⁹ With marriage, women lost their legal capacity to act,³⁰ and their properties in favour of the husband. This means that neither could wives sell their properties, nor could they sue, or be sued.³¹

Consequently, women could not claim damages deriving from any wrongful conduct on the part of their husband. Since a married woman could not act on her own, in a tort suit the husband would have been simultaneously plaintiff and defendant (with the paradoxical consequence that he could have been condemned to

28. J. DE WITT GREGORY-P. N. SWISHER-S.L. SCHEIBLE, *Understanding Family Law*, Matthew Bender, 1995, p. 55.

29. This doctrine has been clearly framed in the famous passage by W. Blackstone, who in his *Commentaries on the Laws of England*, 1770, Vol.I, p.442 (quoted by S.CRETNEY, *Family law in the twentieth century. A history*, 2005, p. 91, wrote: “the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-french a *feme-covert*, *femina viro co-operta*; is said to be covert-baron or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.”).

30. For a detailed analysis of the issue of womens’ capacity during marriage. W. MC CURDY, *Torts Between Persons in Domestic Relations*, 43 *Harvard L. Rev.*, 1030, 1031-1035 (1930).

31. According to O. KAHN FREUND, *Inconsistencies and injustices in the law of husband and wife*, 15 *Mod. L. Rev.*, 133, 137 (1952).

This rule belonged to the law of procedure, not to the substantive law. It followed not only from the general doctrine of unity, but also from the more special doctrine that a married woman could, exceptions apart, neither sue nor be sued without the husband being made joint plaintiff or joint defendant.

See also *Phillips v. Barnes* [1876] 1 Q.B.D. 436, per Lord BLACKBURN: “the objection to the action [among spouses] is [...] founded upon the principle that husband and wife are one person [...] the objection to the action is [...] because husband and wife cannot contract with or convey to each other;” in a later case of 1877, *Abbot v. Abbot*, the Court followed the solution adopted in *Phillips*, but it added that the bar to the recourse to the private law remedies is justified by the fact that it was possible to enjoy of protection afforded by criminal law, and that damages suffered during marriage can be compensated through alimony in a divorce proceeding.

award damages to himself!). The fact that law considered spouses as one entity did not make possible any distinction, in the case of intra-family torts, between the wrongdoer and the victim. It is also true that these common law disabilities concerning married women were ameliorated by Courts of Equity, during the eighteenth century, which allowed specific property to be held in trust (usually created by the wife's father) for the wife's 'sole and separate use.' This case of trust was known as the '*feme sole* estate.' This doctrine began to be accepted by American Courts later and gained considerable popularity in statutory law by the mid-nineteenth century with the enactment in several states of Married Women's Property Acts.³²

Furthermore, the victim could not sue the husband/tortfeasor not even after dissolution of the spousal bond. The English *Matrimonial Causes Act* 1857 ruled only that a judicially separated woman should be considered a *feme sole* in relation to any property she bought subsequently to the marriage, and also for the purposes of contracts, torts, and legal actions against third parties, but it did not allow the possibility for women to sue the husband in tort. It seemed that women did not have the possibility to sue even if the tortfeasor and the victim married after the tort had been committed.³³ The doctrine of unity of spouses was so embedded in the English system as to resist legal reforms introduced at the end of nineteenth century³⁴ with the aim of allowing the retention of a woman's property after marriage and the possibility to keep her own earnings. The *Married Women's Property Act* 1870

32. See J. DE WITT GREGORY-P. N. SWISHER-S.L. SCHEIBLE, *supra* note 28, at 56:

Although the Married Women's Property Acts varied in detail from one state to another, in general, they extended further than the *feme sole* estate. The Acts not only granted wives the rights to acquire, own, and transfer all types of real and personal property to the same extent as unmarried women, but many Acts further allowed married women to enter into contracts in their own names, to engage in business or employment and retain their own earnings, to make wills, to sue and be sued, and to be fully responsible for their own tortuous and criminal conduct. Typically, the married women's Property Acts shielded the woman's assets from the creditors of the husband.

33. On this issue, see E. HALL WILLIAMS, *Wife Suing Husband For Antenuptial Tort*, 12 *Mod. L. Rev.*, 93-95 (1949).

34. See *Married Women's Property Acts* enacted between 1870 and 1893, and modified during the twentieth century from the *Bankruptcy Act* of 1914, *Law of property Act* of 1925, and the *Law Reform Act* of 1935.

acknowledged to “married women the legal right to property earned and to keep sums received on intestacy, small legacies, and saving deposits,” while that of 1882 gave “the right to hold all the property belonging to her at the time of the marriage or acquired by her thereafter as her *separate property*.”³⁵ Therefore, the common law rules as to women’s incapacity were not reversed, but to some extent limited, in the sense that they did not operate for the case of women’s separate property being considered. While, however, the spousal immunity doctrine was overcome for property torts, it was not for personal torts.³⁶

However, one can find, as early as the first decade of last century, some exceptions to the immunity principle, as in the case of car accidents which occurred among spouses, that *ex post* have to be considered relevant in promoting the trend towards the abrogation of immunity.

The breaches into the wall of the immunity rule were aimed at making possible that a married woman could sue her husband for the protection of her property. In this period, personal injuries and damages for emotional distress (that have become common in the United States) were not considered.

The doctrine of unity will be overtly overruled in England only after 1962, when the *Law Reform (Husband and wife) Act* provided wives with the power to sue the other “as if they were not married.” This power could be limited from Courts if “no substantial benefit would accrue to either party from the

35. S. CRETNEY, *Supra* note 29, at 97. The concept of ‘separate property’ of husbands and wives will be removed by *Married Women and Tortfeasors Act* 1935.

36. In this regard, see J. SINGER, *The Privatization of Family Law*, *Wis. L. Rev.* 1444, 1463 (1992), who, towards the U.S writes that: “interspousal tort immunity persisted in a majority of states until mid-1970s [...] Since 1971, at least twenty-five states have abolished interspousal tort immunity, thus allowing spouses to sue each other for negligent and other tortuous behavior.” According to this author, the overcoming of this immunity is the result of the fact that married persons are seen as individuals, and represents a significant example of the privatization of family law, which produced a shift from public to private control over the definition and structure of family relationships. On the shift from public to private choice, and the progressive disappearance of morals from the field of family law (due to several legal and cultural factors, such as the ‘legal tradition of noninterference in family affairs’, the ‘ideology of liberal individualism’, ‘American society’s changing moral beliefs, and the ‘rise of “psychologic man”’), see C.E. SCHNEIDER, *Moral Discourse and the Transformation of American Family Law*, 83 *Mich. L. Rev.* 1803 (1985).

continuation of the proceedings.” However, also after this important legal change, the Courts showed a certain degree of resistance in leaving aside the ‘interspousal’ immunity doctrine and continued to stress the importance of protecting family harmony and domestic peace.³⁷ The operation of the immunity rule was made possible by a narrow construction of statutes by courts. While laws removed women’s incapacity of concluding contracts and of suing, they did not provide anything as to the possibility for spouses to sue in tort.³⁸

The immunity rule kept a very strong influence also when divorce was introduced, notwithstanding the fact that divorce was based on fault, and this latter is the natural ground on which tortious conducts can be evaluated.

In case of dissolution of the spousal bond, the damages suffered from one spouse during the marriage were not taken in account on the ground of liability in tort, but on that of distribution of property and of alimony.

III. THE OVERCOMING OF IMMUNITY RULE THROUGH THE SOCIAL CHANGES CONCERNING FAMILY

With time, the model on which the family unit is based has transformed itself radically from an authoritarian model, characterized by the predominance of the *pater familias* over the other family members and therefore linked to the notion of *status*, to a more flexible model in which the other individuals in the family unit are no longer annihilated in the superior interests of the family group.³⁹ The family becomes, therefore, a place in which the personality—or subjectivity—of each individual member is completed and enriched. The emancipation and economic independence of women has significantly influenced this evolution.⁴⁰ This evolution produced as a result an increase under

37. S. PATTI, *supra* note 6, at 9.

38. In this regard, among U.S. scholars, M. L. EVANS, *Wrongs Committed During a Marriage: The Child that no Area of the Law Wants to Adopt*, 66 Wash. & Lee L. Rev. 465, 478 (2009).

39. D. MESSINETTI, *Diritti della famiglia e identità della persona*, in Riv. dir. civ., 2005, 2, at p. 146.

40. In the Italian legal system, scholarship stressed the transition from *family-institution* (which was the kind of family ruled by Civil Code of 1942), to

Italian law in the search for judicial relief in the case of intra-family damages, without, however, bringing about any significant growth as to the recoverability of intra-family damages. Consider that as late as the 1990s the Italian highest court did not recognise liability in tort for damage suffered within the family.⁴¹ An important distinction has to be made between cases involving the award of monetary damages and those concerning non-monetary damages. I will start dealing with the first group.

In one case, the Court declared that the damage suffered by the family member could not be considered unjust, since the infringed interest could not be described properly as a right.⁴² In another, the personal separation of the spouses was considered a “fundamental” right, in the sense that it can be considered among those aimed at protecting the liberty of the person, and “autonomous,” in the sense that family law did not provide in this regard the enforcement of tort law. The lack of an express provision, allowing tort claims in that field, would lead, inevitably, to the exclusion of this remedy.⁴³

The rationale of those pronouncements has to be searched for beyond the statements of Court, focusing on the specific kind of damage suffered from the plaintiff. In both cases, the damage suffered was an economic loss consequent to the separation (the diminution of value of the house where the spouses lived; loss of economic advantages flowing from the sharing of incomes and expenses), and not in an autonomous loss distinguishable from those closely connected to separation. The actual principle of law fixed by Court seemed to be that economic losses consequent to

family - community, in which the interests of single members have relevance and protection. In 1984 S. PATTI, *supra* note 9, at 10 pointed out relevant changes in family consisting in a “minore enfasi nell’identificazione della famiglia come struttura unitaria,” and in the acknowledgement of the “autonoma individualità di ciascun familiare all’interno del gruppo” (at 10). On the issue of damage to person within family, A. QUERCI, *Responsabilità per violazione dei doveri familiari*, in *Danno e resp.*, 2007, 1, p. 13; V. PILLA, *La responsabilità civile nella famiglia*, Bologna, 2006, at pp. 175-196; M. SESTA, *L’evoluzione delle relazioni familiari e l’emersione di nuovi danni*, in *La responsabilità nelle relazioni familiari*, cit., at XXI.

41. Cass. Civ., March 22, 1993, n.3367; Cass. Civ., April 6, 1993, n.4108, in *Mass. giust. civ.*, 1993, at 624.

42. Cass. Civ., March 22, 1993, n. 3367 *supra* note 41.

43. Cass. Civ., April 6, 1993, n. 4108, *supra* note 41: “dalla separazione personale dei coniugi può nascere [...] solo un diritto ad un assegno di mantenimento [...]. Tale diritto esclude la possibilità di richiedere, ancorché la separazione sia addebitabile all’altro, anche il risarcimento dei danni a qualsiasi titolo risentiti a causa della separazione stessa.”

marriage dissolution were not recoverable.⁴⁴ But this did not mean that one spouse can never sue in tort the other for damages incurred before the dissolution of marriage and different from those caused by dissolution. One senses the chasm existing between the apparent breadth of maxims of Court (the rule seems to be that liability in general is never admitted within family) and the actual rule embedded in them, according to which one spouse can sue in tort but only in certain cases and for specific kinds of damage. It is necessary to verify if this operational rule is or is not generally applied. Therefore I will consider some judgements pronouncing on the possibility of awarding pecuniary and non-pecuniary losses related to the infringement of spousal duties.

In a case of 1975, the *Corte di Cassazione* stated that the spouse who violates the duty of fidelity may cause a pecuniary loss to the other, implicitly admitting for the victim a remedy in tort against the disloyal spouse.⁴⁵ The view that the infringement of marriage duties can be relevant in tort was followed by lower courts.

In a case in the late eighties, the Tribunal of Rome dealt with a lawsuit filed by a husband, after legal separation, from his wife against wife's lover for compensation of two kinds of damage: moral damage, flowing from the fact that the defendant took part in the adultery committed by the plaintiff's wife and therefore caused to him the loss of social respect, and financial damage, resulting from loss of income allegedly consequential to the negligent conduct at work of the wife's lover who was the plaintiff's employee.⁴⁶ Although the facts of this judgement differ from those

44. See Cass. Civ., May 26, 1995, n.5866, in *Giur. it.*, 1997, 1, 843, with a comment by A. AMATO, *Giudizio di separazione: l'addebito; il tenore di vita; l'indennità per le opere di miglioramento dell'immobile in cui è stabilita la residenza familiare; il diritto di ritenzione*. In this case, the damage suffered after the dissolution of the marriage by a wife was the cost of the rent of a new house. The Supreme Court requires for tort liability to be acknowledged a damage different from the one consequent to separation. Therefore, the damage suffered from the wife has not been awarded.

45. Cass. Civ., June 19, 1975, n. 2468, in *Mass. Foro it.*, 1975, at 591: "la violazione da parte del coniuge dell'obbligo di fedeltà, a parte le conseguenze sui rapporti di natura personale, può anche costituire, in concorso di determinate circostanze, fonte di danno patrimoniale per l'altro coniuge."

46. Trib. Roma, Sept. 17, 1988, in *Giur. Merito*, 1991, 754, with a comment by F. LATTANZI, *Dovere di fedeltà e responsabilità civile e coniugale*, in *Nuova giur. civ. comm.*, 1989, 1, at p. 559, with a comment by V. PALETTO.

of the cases considered above, in that the liability of a third was invoked, the liability of the defendant is claimed under the heading of the infringement of conjugal duties, or more precisely of the complicity in their violation.

The Court rejected the claim for moral damage since adultery was no longer a crime. Therefore, it did not find in favour of the plaintiff on the basis of sec. 2059 of the Italian Civil Code, ruling the matter of non-monetary losses resulting from a tortious conduct. The solution adopted by the court can be understood only if one bears in mind that until recent times recovery of moral damages was awarded only when these were consequent to crimes. This narrow interpretation of this provision was the result of the strict wording of it, stating that non-pecuniary losses have to be compensated only in cases fixed by law, and of the fact that when the Civil Code was enacted in 1942, the only instance in which law expressly provided the compensation of non-pecuniary loss was that of art. 185 of the Criminal Code, providing the duty for the persons who are guilty for a crime to compensate monetary and non-monetary damages.⁴⁷

The court then went on to consider the main problem of compensation of pecuniary losses which the plaintiff allegedly suffered at the hands of the defendant.

The plaintiff complained that his company, during his absence for other work commitments and temporarily managed by the defendant, had an unjustified loss of income.

The court decided the case on the ground of violation of conjugal duties. First, the court considered if the duties cited in sec. 143 C.C. were relevant merely on the ground of morals (in the sense that their infringement does not give remedies at law) or of law; secondly, if damages provoked by a third extraneous to the family unit can be awarded under the heading of the infringement of conjugal duties.

As to the first issue, the court recognised that conjugal duties are legally binding as they have the nature of obligations.⁴⁸ The court asked itself if the conduct that has to be taken in the

47. The Italian text of sec. 2059 reads: "Il danno non patrimoniale deve essere risarcito solo nei casi determinati dalla legge." For an in-depth analysis of the issue of the construction of this provision, see next chapter.

48. Sec. 1174 c.c. requires for the existence of a legal obligation that the act of the obliged must have an economic value.

fulfilment of these duties has an intrinsically economic value.

The court stated that since the duty of fidelity has the substance of an obligation (therefore, it is enforceable), its infringement can give rise to a pecuniary loss. The court however rejected the claim because the plaintiff was not able to give evidence of the damage suffered.

As to the issue of whether a third person can be held liable for having concurred in a violation of a spousal duty, the Court went through the issue of whether the requirements of the so-called “wrongful inducement (by a third person) to the breach of an obligation” were or not satisfied.⁴⁹ According to Tribunal of Rome, the wife’s lover would have been liable for inducement to the infringement of the duty of fidelity, only if evidence could be given that his conduct increased the probability that such an infringement can occur.⁵⁰ In this case, the judge rejected the claim because the plaintiff was not able to give evidence of the causal link between the third party’s conduct and the adultery of his wife.

This judgement is relevant because the court admitting the evidence of the inducement of the third to the infringement of the spousal duties implicitly acknowledges the enforceability of tort liability rules in the case of violation of spousal duties.

More recently, in 2002, the Tribunal of Milan, pronouncing on a case very similar to that decided from Tribunal of Rome (also in this case the plaintiff claimed the liability of a third person),⁵¹

49. The ‘wrongful inducement (by a third person) to the breach of an obligation’ (in Italian, ‘*induzione all’inadempimento*’) is a doctrinal framework set to deal with the issue as to if a third party can be held liable in tort for having wrongfully driven the debtor to the breach of an obligation arising from contract.

50. The Tribunal of Rome requires for third’s liability a conduct “che determini un ampliamento delle probabilità che si verifichi violazione dell’obbligo di fedeltà.” Among the scholars, against the possibility for the third to be held liable for having induced a married person to the infringement of spousal duties, G. FACCI, *I nuovi danni nella famiglia che cambia*, Milano, 2004, at p. 28.

51. Trib. Milano, Sept. 24-Nov. 22, 2002, in *Resp. civ. prev.*, 2003, at p. 465, with a comment by G. FACCI, *L’infedeltà coniugale e l’ingiustizia del danno*; in NGCC, 2003, 1, 761, with a comment by D. CHINDEMI, *Il tradimento del coniuge non è fonte di responsabilità extracontrattuale per l’amante, ma può esserlo per il coniuge infedele*. There is an important difference between the pronouncements of the Tribunal of Rome and the Tribunal of Milan, as to the possibility for the third party to be held liable for the violation of the duty of fidelity, which was excluded by the Tribunal of Milan on the grounds that this duty only concerns spouses.

recognized that the breach of spousal duties can give rise to tort liability.⁵²

The two decisions state the principle that the violation of a conjugal duty may be relevant in tort, but this effect is not automatic.⁵³ If the recovery of monetary damages is admitted in marital torts, the award of non-monetary damages is more difficult.

In another case the Tribunal of Milan ruled on a claim following separation due to the conduct of the husband (“*separazione con addebito*”).⁵⁴ Namely, the wife claimed to have suffered a moral damage because her husband neglected her during pregnancy,⁵⁵ was involved in a love affair and finally definitively abandoned the matrimonial domicile (after repeated absences during the period of gestation). In addition to the quantification of money for maintenance, the Tribunal of Milan had to decide the issue of compensation for moral damage claimed by the wife for the misconduct of the husband. The Tribunal, as in the previous cases discussed, based the judgement on two preliminary issues: a) the judicial or merely moral nature of marital duties;⁵⁶ b) the possibility of an action in damage in addition to family law remedies.

It is worth considering at first the preliminary question under b). At the outset, the court emphasised the low efficiency of remedies provided for by family law. Second, the court underlined that family law is a set of rules open to the enforcement of liability in tort; the construction of family law as an exhaustive and self-sufficient system would infringe upon sec. 2 of the Italian

52. In this case, however, the Tribunal of Milan required for liability in tort of the wife the evidence of a “serious” breach of the duty of fidelity, whilst a simple breach is not enough. The rejection of the tort liability claim towards the unfaithful spouse certainly influenced the rejection of the claim towards the wife’s lover.

53. For this position see also Cass. Civ., May 26, 1995, n.5866 *supra* note 44.

54. Trib. Milano, June 4, 2002, in *Giur. it.*, 2002, at p. 2291, with a critical comment by O.B. CASTAGNARO, *Osservazioni sul tema della responsabilità civile da violazione di doveri coniugali*; in *Guida al diritto*, 2002, 24, p. 40, with a critical comment by M. FINOCCHIARO, *La ricerca di tutela per la parte più debole non deve “generare” diritti al di là della legge*.

55. On the infringement of the duties of moral support and financial aid in a case of a serious illness of the spouse, see Trib. Firenze, June 13, 2000, in *Fam. dir.*, 2001, 2, p. 161, with a comment by M. DOGLIOTTI.

56. On the issue of the nature of marital duties see V. PILLA, *La responsabilità civile nella famiglia*, *supra* note 40, at 10-12.

Constitution, which provides the protection of “inviolable rights” of the individual within the social bodies (like family) to which he or she takes part.⁵⁷ However, this does not mean that responsibility will be enacted for every infringement of spousal duties, but only when infringement is serious.⁵⁸

The seriousness has to be evaluated at the light of the conduct of both the spouses, and secondly of the causal link between the violation of spousal duties and the crisis of marriage.

The first criterion has been particularly significant in directing some other decisions.

A decision of the Tribunal of Milan rejected the claim for compensation of a damage suffered by the wife/plaintiff (‘biological damage and damage to social life’) for alleged violation of spousal duties affecting the sphere of “affection and sexual relation.”⁵⁹ The rejection of claim was based on the circumstance that the impotence of the husband was well known since the beginning of the marriage—which lasted for twenty years—and therefore had to be regarded as accepted by the wife. The court did not accept wife’s claim that she tolerated the impotence of the husband because of pressure put on her by her mother and mother-in-law while these latter were alive.

On the same basis, a judgement pronounced by the Tribunal of Savona.⁶⁰ A wife complained of the fact that the husband, after having refused to have children, broke the spousal bond and started another relationship with a woman with whom he, in fact, had a child. The Tribunal of Savona rejected the claim of the wife because the marriage went on for many years during which the wife failed to lodge a complaint, and during which she could have

57. Sec. 2 Constitution reads: “La Repubblica riconosce e garantisce i diritti inviolabili dell’uomo sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità.” This provision is the cornerstone of the recent debate concerning non pecuniary damage in tort. On this issue, see next chapter.

58. Among scholars, A. ZACCARRIA, *L’infedeltà: quanto può costare? Ovvero, è lecito tradire solo per amore*, in *Studium iuris*, 2000, 5, 524, thinks that tort liability rules are not enforceable in case of infringement of spousal duties (except when it has been committed fraudulently).

59. Trib. Milano, Feb. 10, 1999, in *Dir. Fam.*, 2001, 988; in *Fam. dir.*, 2001, p.185, with a comment by M. BONA, *Violazione dei doveri genitoriali e coniugali: una nuova frontiera della responsabilità civile?*.

60. Trib. Savona, Dec. 5, 2002, in *Fam. dir.*, 2003, 3, 248, with a comment by F. LONGO, *Famiglia e responsabilità civile: rapporti tra i coniugi e danno risarcibile*.

indeed chosen to break the bond herself. In addition to this, she failed to inform the court that she had suffered from a psychopathological state which rendered her dependant on the will of her husband.

The criteria which oriented the two decisions unfavourable to the plaintiff were the acquiescence of the wives to the misconduct of husbands. For that reason the conduct of the defendants cannot be qualified as serious violation of spousal duties.

From the Italian decisions considered above, several rules can be inferred. Tort liability, in the family sphere, is, in abstract, possible. However, not only does recovery of damages require a particularly serious violation of conjugal duties (especially when non-monetary damages are involved),⁶¹ but also the damage must be autonomous and distinct from the one that derives from dissolution of marriage. These statements are generally accepted by scholars.⁶²

It has to be clarified however that in Italian law the overcoming of the immunity of spouses from the operation of tort law has not lead to the opposite situation of making relevant in tort conducts that are not ordinarily relevant under this heading. It just means that conducts that are relevant *outside* the family under a tortious liability heading can now be relevant also if they occur within the family unit.

Also in common-law systems the immunity rule has been overcome and the admissibility of tort law rules within the field of

61. A violation 'una tantum' is not enough. The case dealt by App. Brescia, March 7, 2007, in *Resp. civ. prev.*, 2008, p. 2073, with a comment by S. CATERBI, *Infedeltà coniugale e responsabilità civile*, is interesting. In this judgement it is discussed if a homosexual relation is a serious breach of the duty of fidelity *per se*. The answer is negative: "la particolarità dell'infedeltà, concretatasi in una relazione di tipo omosessuale, non può considerarsi intrinsecamente grave e tale da far ritenere presunta la lesione del diritto all'integrità personale dell'altro coniuge [...] il parametro di valutazione risulta estremamente soggettivo e può portare a valutazioni [...] tali da far ritenere che una relazione omosessuale possa rivelarsi anche meno dolorosa e dannosa dell'altra." This position has been confirmed by the same Court some months later: App. Brescia, June 5, 2007, in *Resp. civ.*, 2008, 8, p. 616 with a comment by L. BOCCADAMO, *Torto endofamiliare e risarcibilità del danno esistenziale per violazione di doveri coniugali: una duplice conferma*.

62. Adverse to that position is M. FINOCCHIARO, *supra* note 54, who thinks that violation of spousal duties "trova la propria disciplina in via esclusiva negli articoli 84 e seguenti del c.c. dedicati al matrimonio" (at 52).

family is nowadays a widely accepted general principle.⁶³ This evolution was influenced by the shift from a fault-based divorce to a non-fault based divorce. Tort law plays the role of giving relevance to faulty conduct held during the marriage which cannot give grounds to divorce. In the past, the harmfulness of some marital conduct were relevant as statutory grounds for divorce and were used, once that interspousal immunity doctrine had been abolished, to affect the distribution of the property or the alimony award.⁶⁴

This, however, does not mean that at present the gates of extracontractual liability in the family ambit are open without restrictions. In the U.S., for example, the *Restatement (Second) of Torts* of 1977 provides that “a husband or wife is not immune from tort liability to the other solely by reason of that relationship.” However, the *Restatement* does not make clear which requirements have to be proved for the tortious liability to be enacted. In fact, if it is clear that the overcoming of the immunity does not mean *ipso facto* that a ‘interspousal’ conduct is relevant in tort law, when it is not if occurring among strangers; things become less clear when one asks himself which are the conditions to be met for a tort lawsuit among spouses to be upheld. It is evident that not all the possible harms can be considered relevant. Courts have to ascertain if they are or are not the normal result of “the ebb and flow of

63. One of the the U.S. landmark cases in which the overcoming of immune rule is tied to the enactment of womens’ emancipation Acts is *Self v. Self*, 58 Cal. 2d 683 (Cal. 1962).

64. Even nowadays this approach is followed by some scholars. Among the others, Harry D. KRAUSE, *Propter Honoris Respectum: On the Danger of Allowing Marital Fault to Re-Emerge in the Guise of Torts*, 73 *Notre Dame L. Rev.* 1355 (1998).

Among the recent judgments following this approach, *Leskun v. Leskun* [2006] S.C.J. n. 25. The court looked at the emotional distress suffered by the wife for the infidelity of the husband as a cause for her incapacity after the breakdown of the marriage to achieve post-separation economic sufficiency and on this basis found the plaintiff to be entitled to economic support. The interesting point raised by this judgement is that the emotional trauma was considered as a relevant ground (although it was not the only one: also her advanced age, her health problems, and her limited skill set were considered) for the economic support order on behalf of the husband. On this judgement and other previous decisions sharing the same approach, F. Kelly, *Private Law Responses to Domestic Violence: The Intersection of Family Law and Tort*, (2009) 44 S.C.L.R. 321, where the focus is on the economic effects of domestic violence, i.e. affecting the earning capacity of the victim).

married life.”⁶⁵

The most frequent cases in which the issue of tortious liability among spouses arises are assault and battery, infliction of venereal disease, interference with child custody, fraud, and emotional distress.⁶⁶

Whereas tortious liability is more easily accepted in the cases of physical injury, the case of emotional distress is much more controversial.⁶⁷

Among the elements necessary for emotional distress, the *Restatement* provides that the conduct has to be ‘outrageous,’ but it does not provide any standard for the courts to state the presence or not of this requisite.⁶⁸

Notwithstanding whether the relevance of tort law rules in the field of family law is admitted as a general principle, the practical operation of tort law rules can be made difficult by the existence of procedural and substantive hurdles, such as in the United States,⁶⁹

65. Leonard KARP & Cheryl L. KARP, *Beyond the Normal Ebb and Flow... Infliction of Emotional Distress in Domestic Violence Cases*, 28 *Fam. L. Q.* 389 (1994-95).

66. On this point, J. KRISTYN KROHSE, *No Longer Following the Rule of Thumb—What to Do with Domestic Torts and Divorce Claims*, 1997 *U. Ill. L. Rev.* 923 (1997).

67. Among U.S. scholars critical towards the relevance in tort of emotional distress in the marriage, H. KRAUSA, *On the Danger of Allowing Marital Fault*, *supra* note 64. According to this writer, allowing tort claims may lead to seriously unfair financial distribution of the assets among the spouses.

68. Unfavorable towards admitting the protection in tort for intentional or negligent emotional distress are Ira Mark ELLMAN & Stephen D. SUGARMAN, *Spousal Emotional Abuse a Tort*, 55 *Md. L. Rev.* 1268, 1280-84 (1996). They endorse the restrictive approach followed by courts in some states awarding emotional distress only in some specific cases.

As to the approach to ‘outrageousness’ set by courts, a fixed standard for the evaluation of marital conduct does not seem to have been reached. In two cases, in which facts were very similar regarding physical and moral violence to wives, the judgements given by the courts were completely opposite because of the different meaning given to ‘outrageous.’ See *Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1988); *Hakkila v. Hakkila*, 812 P.2d 1320 (N.M. Ct. App. 1991). For an in-depth analysis on these cases, see Robert G. SPECTOR, *Marital Torts: The Current Legal Landscape*, 33 *Fam. L. Q.* 745 (1999-2000). In some cases, courts considered physical injuries and emotional distress on the grounds of the distribution of marital property. This way of deciding was typical to the regime of divorce based on fault: see in this regard, *Havell v. Islam*, 751 N.Y. S.2d 449, 455 (App. Div. 2002).

69. According to M.L. EVANS, *Wrongs Committed During a Marriage*, *supra* note 38, at 481-489, examples of procedural hurdles can be found on the ground of statutes of limitations, joinder of the claims (of tort and divorce), and *res judicata*. As to joinder, an issue could rise when specialised family law courts handle divorce claims. This occurs when a legal system acknowledges the

or by the dearth of cases of tort law suits brought by one spouse against the other, such as in England. The possible reasons for this latter situation could be the length of civil cases, the knowledge that the defendant is not able to pay damages, and/or the inexperience of family law barristers in the personal injury area.⁷⁰

In Italian law the main hurdle to the development of interspousal claims nowadays regards non-monetary damages. Therefore general conditions for recovery of these latter will be focused in the next chapter to understand the most recent developments in the field of marital torts.

IV. FROM THE PROTECTION OF THE FAMILY UNITY TO THE DEFENSE OF INVIOABLE RIGHTS OF SINGLE FAMILY MEMBERS

The issue of the conditions of relevance of damage to person has therefore to be examined to better understand the Italian situation. This is the last step of a process that produced as a result a wider protection of non-financial interest of the individual. In Italian law, the protection of each individual is no more limited to pecuniary losses than in the past when infringements upon the private sphere not causing either bodily or pecuniary harm were in general not relevant.⁷¹

Due to restrictions to the compensation of non-monetary damages fixed by sec. 2059, recovery was admitted only in a few cases; among them, the most significant was that of moral damage suffered from the victim of a crime. These limits, concerning the

dichotomy between courts of equity and courts of law. In this case, against the possibility of joinder three main arguments are used: 1) joinder among these claims would be contrary to the legislative intent for the evident inconsistency of 'tort action' (based on fault) and 'no-fault divorce'; 2) joinder would be not possible because of the different aims lying at the basis of the two actions. This conclusion does not seem to be accepted by Benjamin SHMUELI, *Tort Litigation between Spouses: Let's Meet Somewhere in the Middle*, 15 *Harv. Negot. L. Rev.* 195, 206-08 (2010), according to whom the goals of family law and tort law being different, tort suits would allow a more effective protection to the weaker spouse; 3) joinder would be a disadvantage for the claimant because this latter would be deprived of the right to a jury trial (allowed for tort claims, but not for divorce actions).

70. See SPECTOR, *supra* note 68, at 761-763.

71. A thorough analysis of the issues related to non pecuniary losses can be found in the book by M. BARCELLONA, *Il danno non patrimoniale*, Milano (2008).

recoverability of damage to person, were loosened in 1986. The Constitutional Court admitted, taking conjointly into account the general clause of sec. 2043, that requires for compensation, as we have already seen, unjustness of damage and sec. 32 of the Italian Constitution which recognizes in health the nature of inviolable right of the individual,⁷² the compensation of damage to health (“*danno biologico*”), notwithstanding its nature of non-pecuniary loss.⁷³

In this judgement the fundamental distinction is between damage as wrongful event (the so called “*danno-evento*”) and damage as negative economic effect flowing from the wrongful action (the so called “*danno-conseguenza*”). Damage to health is a “*danno-evento*,” because it is an injury to an interest relevant to the Constitution, and is recoverable *per se*; that means that the plaintiff does not have the burden of proving that he suffered an economic loss, or anguish. Moreover, damage does not need to be committed through a crime to be recoverable. Therefore, the strictures provided by sec. 2059 can apply to injury to psycho-physical integrity only in the case in which evidence of a moral damage consisting in pain or anguish due to injury to psycho-physical integrity is admitted.

Since 1986, damage to person was compensated in the cases of injury to psycho-physical integrity (recoverable under sec. 2043) or anguish suffered by victims of a crime (recoverable under sec. 2059). This approach is called ‘dualistic,’ because the compensation of the damage to person is drawn from two different sections among those that regulate tort liability depending on the kind of harm suffered.

In the above-cited decision of the Tribunal of Milan of 2002,⁷⁴ the judge of first instance identified damage suffered by the defendant wife in that her own ‘personal sphere’ had deteriorated. The ‘personal sphere’ consists of the “complex of activities, but

72. Sec. 32 of the Constitution provides that “la Repubblica tutela la salute come fondamentale diritto dell’individuo e interesse della collettività.”

73. Corte Cost., June 30, 1986 n.184, in *Foro it.*, 1986, I, cc. 2976 (see also, Corte Cost., July 12, 1979 n. 88, that qualified right to health “come un diritto primario ed assoluto [...] da ricomprendere tra le posizioni soggettive direttamente tutelate dalla Costituzione”). The issue was if injury to health not affecting the capacity of working (and earning money), i.e. not causing pecuniary losses for the victim, could be redressed.

74. Trib. Milano, June 4, 2002, *supra* note 54.

also of affective, emotional experiences, in which the individual expresses personality;" the injury to the personal sphere is "more serious than the mere damage caused by the marriage breakdown itself."⁷⁵ The plaintiff alleges the violation of sec. 29, subsec. I and II,⁷⁶ and sec. 31 subsec. II of the Constitution,⁷⁷ in that the conduct of the husband constitutes the violation of the 'legitimate expectations' of the wife to "equal well-being and equal personal realisation in conjugal life, also in relation to various privileges and experiences linked to the role of each spouse, and the indispensable protection of maternity."

According to the Tribunal of Milan, the damage claimed by the defendant wife should be covered by sec. 2043 of the Civil Code, the application of which is not limited to financial loss, while—according to the court—sec. 2059 applies only to moral damage. Sec. 2043 covers, however, all the injuries to the person different from moral damages.⁷⁸ This judgement is directly affected by the decision handed down in 1986 by the Constitutional Court.

A further step towards the general relevance of damage to person was done in 2003 through a wider interpretation of sec. 2059 given in the judgments handed down by the Supreme Court via the so-called "twin decisions" no. 8827 and 8828.⁷⁹ With these

75. The passages cited between inverted commas are an abridged translation of the Italian version. The definition of 'personal sphere' given from the Court must be also cited in Italian: "complesso di attività, ma anche di vissuti affettivi, emozionali e relazionali, in cui il soggetto esplica la sua personalità, ben più grave del mero disagio comunque conseguente alla frattura dell'unione coniugale."

76. Sec. 29 provides that: "1. La Repubblica riconosce i diritti della famiglia come società naturale fondata sul matrimonio. 2. Il matrimonio è ordinato sulla eguaglianza morale e giuridica dei coniugi, con i limiti stabiliti dalla legge a garanzia dell'unità familiare."

77. Sec. 31 provides that: "la Repubblica [...] protegge la maternità, l'infanzia e la gioventù, favorendo gli istituti necessari a tale scopo."

78. According to the Court, sec. 2043 would provide protection to the person not only "nella sua proiezione economica, ma anche soggettiva, e, quindi, della lesione di diritti primari."

79. Cass. Civ., May 31, 2003 n. 8827; Cass. Civ., May 31, 2003 n. 8828 (in these cases the tortfeasor caused the death of a person, and was sued by the relatives of the victim: these latter suffered a moral damage flowing from the death of victim, in Italy called 'da perdita del congiunto'). These judgments have been commented in all the most important law journals. See among others, *Danno e resp.*, 2003, 8-9, 816, with a comment by F. D. BUSNELLI, *Chiaroscuri d'estate. La Corte di Cassazione e il danno alla persona*, and by G. PONZANELLI, *Ricomposizione dell'universo non patrimoniale: le scelte della Corte di cassazione*.

two decisions the Supreme Court reconstructed in a different way the respective ambits of application of sec. 2043 and 2059. According to the previous approach, the first provision (sec. 2043) would concern financial harm, the second (sec. 2059) non-pecuniary losses. This dualistic approach was set aside in favour of a new one, that we could call, in contradistinction to the former, “unitary.” According to the latter, sec. 2059 rules all the cases of non-pecuniary loss.

In accordance with the “twin decisions,” sec. 2059 operates not only in the presence of moral damage suffered, but also in the presence of violation of constitutional rights, causing a non-financial damage.

The Court of Cassation interprets the sentence of sec. 2059 “in the cases in which [the compensation of non-financial losses] is provided by law,” from which depends the possibility to recover a non-financial loss, in a meaning wider than that obtained through literal interpretation. Compensation is admitted not only when law expressly provides this result, but also when, notwithstanding the lack of an express provision, the judge can infer from the Constitution that the right injured was “inviolable” in the sense of sec. 2 of the Constitution. It is worth noting not only that, since sec. 2 does not include a catalogue of inviolable rights, it is the duty of Courts to decide if a right is or is not inviolable, but also that sec. 2 does not provide the remedy of compensation in case of injury to inviolable rights. The argument used by the Court to give grounds to the remedy of compensation for the infringement of inviolable rights is that insofar as the Constitution recognizes inviolable rights (not having economic value), it implicitly also allows their protection. Since compensation represents the essential way of protecting rights, this protection is not to be limited, otherwise a refusal of protection would occur in cases where recovery is not expressly provided by law.⁸⁰ Furthermore, as an

80. The passage sketched in the text reads: “ritiene il Collegio che, venendo in considerazione valori personali di rilievo costituzionale, deve escludersi che il risarcimento del danno non patrimoniale che ne consegue sia soggetto al limite derivante dalla riserva di legge correlata all’art.185 c.p. Una lettura della norma costituzionalmente orientata impone di ritenere inoperante il detto limite se la lesione ha riguardato valori della persona costituzionalmente garantiti. Occorre considerare [...] che nel caso in cui la lesione abbia inciso su un interesse costituzionalmente protetto la riparazione mediante indennizzo [...] costituisce la forma minima di tutela, ed una tutela minima non è assoggettabile a

additional argument the Court states that in case of harm to interests enjoying a constitutional rank, recovery has to be admitted because the reference made from sec. 2059 to the ‘cases provided by law’ must be interpreted, after the enforcement of the Constitution, also in light of its provisions, since the acknowledgement of ‘inviolable rights’ inherent to the person implicitly, and necessarily, calls for their protection, and in this way represents a case provided by law, at the highest level, of recovery of non-pecuniary loss.

Non-pecuniary loss, however, does not constitute an autonomous category of damage in itself (that is an autonomous injury compensable *per se*), but, as it is consequential damage, can be recovered only if the victim gives adequate evidence of it.

This means that the violation of personal rights is not enough for the victim to enjoy compensation (in contradistinction to the finding of the Constitutional Court in 1986), but the offended party must indeed prove the negative effects suffered as a consequence of the violation.

In the footsteps of the judgements of 2003, it is worth mentioning a decision of the Court of Cassation of 2005.⁸¹ The circumstances regard a case in which the wife, after having already been granted the divorce for the omitted consummation of marriage, claimed damage for the fact that she was not informed prior to marriage of her husband’s ‘*impotentia coeundi*,’ and in addition that her husband had refused, after the wedding, to seek a cure for his pathology.

The damage alleged by the plaintiff concerns the loss of a chance to express her sexuality and her wish to be a mother. The Supreme Court incorporated this chance within the inviolable rights guaranteed under sec. 2 of the Constitution, and found in favour of compensation of this type of damage under sec. 2059.⁸²

specifici limiti, poiché ciò si risolve in rifiuto di tutela nei casi esclusi” (Cass. Civ., May 31, 2003, n.8828, *supra* note 79, at 817).

81. Cass. Civ., May 10, 2005, n. 9801, in *Fam. dir.*, 2005, 4, p. 365, with a comment by M. SESTA, *Diritti inviolabili della persona e rapporti familiari: la privatizzazione “arriva” in Cassazione*, and by G. FACCI, *L’illecito endofamiliare al vaglio della Cassazione.*; in *Corr. giur.*, 2005, 7, p. 928, with a comment by G. DEMARZO.

82. The Court describes the damage suffered by the plaintiff as a “violazione della persona umana intesa nella sua totalità, nella sua libertà-dignità, nella sua autonoma determinazione al matrimonio, nelle sue aspettative

Sec. 2059 of the Civil Code could be invoked—according to the Supreme Court—not only in the case of moral damage consequential to a crime, but also in the hypothesis in which the fundamental rights of the personality have been harmed, and would apply also in the specific context of the family when a duty related to the position of spouse has been seriously infringed. The character of the seriousness of the infringement has to be referred to those conducts whose harmfulness cannot be tolerated within family. The fundamental passages of the reasoning of the Court are the following: a) the shift from the ‘family-institution’ model to the ‘family-community’ one;⁸³ b) the recent enforcement of laws that emphasize the relevance of the individual within family (such as Law no. 154/ 2001, dealing with violent conducts within family); c) the operation within the family unit of sec. 3 and 29 of the Italian Constitution, dealing respectively with the principle of equality of all individuals in general and, with specific reference to family, with the ethical and legal equality of spouses. On the basis of the principle of equality, spouses—as all the other members of the family—have to enjoy protection in respect to every harm to their dignity and the personality, since these have the status of

di armonica vita sessuale, nei suoi progetti di maternità, nella sua fiducia in una vita coniugale fondata sulla comunità, sulla solidarietà e sulla piena esplicazione delle proprie potenzialità nell’ambito di quella peculiare formazione sociale costituita dalla famiglia, la cui tutela risiede negli artt. 2, 3, 29 e 30 Cost.” This passage is worth being translated: “violation of the person wholly considered, in her freedom-dignity, in her autonomous decision of marrying, in her expectations of harmonious sexual life, in her plans of being mother, in her trust on a conjugal life founded on community, on support and on the full development of her potential within that peculiar social group called family, protected by sec. 2, 3, 29, 30 of the Italian Constitution.”

83. The ‘family-community’ model is clearly explained by the Court in this way: “la famiglia si configura quindi non già come un luogo di compressione e di mortificazione di diritti irrinunciabili, ma come sede di autorealizzazione e di crescita, segnata dal reciproco rispetto ed immune da ogni distinzione di ruoli, nell’ambito della quale i singoli componenti conservano le loro essenziali connotazioni e ricevono riconoscimento e tutela, prima ancora che come coniugi, come persone, in adesione al disposto dell’art. 2 Cost.” On this issue, see G. FACCI, *I nuovi danni*, *supra* note 50, at 91. The protection of the individual within family is the main theme in App. Torino, 21 febbraio 2000, in (2000) 5 *Fam. dir.*, 475, with a comment by R. C. DELCONTE ed. in (2000) I *Foro it.*, 1555, with a comment by L. DE ANGELIS. In this case the spouse – victim does not sue the other in damages, but claims only separation. The judgement is interesting because the Court of Torino applies the concept of mobbing used in work claims. In this case, infact, there was evidence that the husband , among the other conducts, made pressures on his wife to go away from their house (this conduct has been characterized as mobbing).

‘inviolable rights’ by the effect of sec. 2 of the Italian Constitution, regardless of the facts that infringement is made by family members or third parties; d) family law remedies enforceable in case of the breach of spousal duties do not bar *a priori* the recourse to the protection afforded by tort law, since family law cannot be considered as a closed and thorough system. The same conduct can give rise, when seriously harmful and affecting inviolable rights of the person, to the operation of both remedies.

However, the plaintiff has to give specific evidence of the prejudice coming from the injury to her fundamental rights in accordance with the principles laid down by the twin judgments of 2003.

The repercussions of this favourable orientation toward compensation for damage to person in the family sphere, under sec. 2043 of the Civil Code, are evidenced in a decision of the Court of Appeal of Milan,⁸⁴ in which the qualification ‘*danno esistenziale*’ is explicitly used. It granted the claim for damages submitted by the husband (plaintiff) who found that he was not, in fact, the father of a child born to his wife within their marriage (marriage subsequently declared null and void on the basis of sec. 122, subsec. 3, no. 5 Civil Code). The claim was based on the pain and suffering caused by the wife who lied to him as to paternity of her child in order to marry the plaintiff. The damage suffered was considered “*danno-evento*,” and for this reason recoverable without requiring any evidence (the Court does not follow the principles stated by the Supreme Court in 2003 as to the recoverability of damage to person).

The Constitution-oriented interpretation of sec. 2059 adopted in 2003 by the *Corte di Cassazione* found further confirmation in four important decisions given by its United Chambers on November 11, 2008, that extended the principles laid down by the former sentences of 2003 to the case of non-financial damage consequent to a breach of contractual duties.⁸⁵ According to the

84. App. Milano, Apr. 12, 2006, in *Fam. Dir.*, 2006, 5, p. 509, with a comment by G. FACCI, *L'illecito endofamiliare tra danno in re ipsa e risarcimenti ultramilionari*.

85. Cass. Civ., United Chambers, November 11, 2008 n. 26972-26973-26974-26975. These judgments have been analysed by many scholars; among others, see P. G. MONATERI, *Il pregiudizio esistenziale come voce del danno non patrimoniale*, E. NAVARRETTA, *Il valore della persona nei diritti inviolabili e la*

United Chambers, the recoverability of non-pecuniary damage to be recoverable depends on the infringement of an interest relevant on the grounds of the Italian Constitution. The list of interests which can be qualified 'inviolable' is not closed. The Court states that due to the 'open text' of sec. 2 of the Constitution, protection is not limited to those inviolable rights expressly acknowledged at the present, but also to other interests surfacing in the social situation and to be considered in the light of indications which can be found in the Constitution, related to inviolable aspects of human person.⁸⁶ The judgement no. 26972 considers among the examples of non-pecuniary damages whose recoverability has to be admitted, besides the case of loss of a relative, the harm of the inviolable rights (art. 2-3 of the Constitution) of the individual within the family.⁸⁷ These examples show that a right to be considered 'inviolable,' must be strictly inherent to the person.

The difficult theoretical issue dealt with by Court of Cassation is whether the requirement of unjustness provided by sec. 2043

complessità dei danni non patrimoniali, in *Resp. civ. prev.*, 2009, 1, p. 56; C. CASTRONOVO, *Danno esistenziale: il lungo addio*, M. FRANZONI, *Il danno non patrimoniale del diritto vivente*, A. PROCIDA MIRABELLO DI LAURO, *Il danno non patrimoniale secondo le Sezioni Unite. Un "de profundis" per il danno esistenziale*, S. LANDINI, *Danno biologico e danno morale soggettivo nelle sentenze della Cass.Sez.Un. 26972, 26973, 26974, 26975/2008*, C. SGANGA, *Le sezioni unite e l'art. 2059 c.c.: censure, riordini e innovazioni del dopo principio*, in *Danno e resp.*, 2009, 1, p. 5. On the way marked out by the United Chambers of the Corte di Cassazione, it is worth citing Trib Venezia, May 14, 2009, in *Danno e resp.*, 2010, 2, p. 187, with a comment of A. D'ANGELO, *Un'infedeltà coniugale oltraggiosa della dignità della persona ed i suoi risvolti aquiliani all'indomani delle sezioni Unite del 2008*. Trib Prato, Febr. 18, 2010, in *Dir. Fam. Pers.*, 2010, 3, p. 1269, with a comment of A. LOMBARDOA, *L'illecito endofamiliare trova un ulteriore riconoscimento nella giurisprudenza*.

86. The passage reads in Italian: "Il catalogo dei casi in tal modo determinati non costituisce numero chiuso.

La tutela non è ristretta ai casi di diritti inviolabili della persona espressamente riconosciuti dalla Costituzione nel presente momento storico, ma, in virtù dell'apertura dell'art. 2 Cost., ad un processo evolutivo, deve ritenersi consentito all'interprete rinvenire nel complessivo sistema costituzionale indici che siano idonei a valutare se nuovi interessi emersi nella realtà sociale siano, non genericamente rilevanti per l'ordinamento, ma di rango costituzionale attenendo a posizioni inviolabili della persona umana."

87. The passage summarized in the text from the judgment no. 26.972 reads: "in assenza di reato, e al di fuori dei casi determinati dalla legge, pregiudizi di tipo esistenziale sono risarcibili purchè conseguenti alla lesione di un diritto inviolabile della persona. Ipotesi che si realizza, ad esempio, nel caso dello sconvolgimento della vita familiare provocato dalla perdita di congiunto (c.d. danno da perdita del rapporto parentale), poichè il pregiudizio di tipo esistenziale consegue alla lesione dei diritti inviolabili della famiglia (artt. 2, 29, 30 Cost.)."

regards only pecuniary losses or also non-pecuniary ones. The answer is that the requirement of unjustness covers also non-pecuniary losses. In the case of non-pecuniary losses, damage is unjust when there is harm to inviolable rights according to Constitution. If this kind of harm is lacking, there is no way to compensation.

The harm of inviolable rights is not sufficient *per se* to uphold the claim for the recovery of non-pecuniary loss. As this latter has to be seen as a result of the infringement of the right, it has to be specifically proved. In particular, the victim has to give objective elements in support of the claim for the recovery. On the basis of these elements, the Court may resort to presumptions for the quantification of the sum because it also has to take account of any future repercussion of the infringement.

The discussion concerning the issue of non-pecuniary losses has to be linked with that of the breach of spousal duties. According to one approach recently suggested, the harmful conduct of one spouse against the other should be ordered in three concentric circles.

Within the inner circle, there would be conduct which, though harmful, do not produce liability, because they represent the ordinary risk in a marriage (for example, non-serious quarrelling); in the intermediate circle, conduct that could legitimate the recourse to family remedies (for example, an isolated infidelity); in the external circle, conduct that is so seriously harmful that they could give rise to actions in tort (for example, reiterated infidelities).

There has been objection to this opinion in that the second and the third hypothesis are not clearly distinguishable.⁸⁸ A different criterion has been proposed to separate conducts that are not relevant for the enforcement of legal remedies from those which are relevant only for the application of family law remedies and those which are relevant not only on the ground of family law remedies, but also in tort. The criterion is that of 'accepted risk,' used also in the case of damages incurred in the sporting

88. GAUDINO, *La responsabilità civile endofamiliare*, in *Resp. civ. prev.*, 2008, 6, 1238, at 1262-1264.

practice.⁸⁹

This criterion does not seem however to be able to give more certain solutions than the other.⁹⁰

It is, however, evident, notwithstanding the fact that at present liability in tort between spouses is admitted, that its constituents are not sufficiently clear.

V. CONCLUSION

The process above summarised concerning interspousal torts in Italian and American legal systems may be described as an evolution. This evolution has in part followed similar paths, and in part was different. In the past, in all the legal systems considered there was an immunity rule which barred the operation of tort law among spouses. However, this rule was grounded on a different rationale. In the common law systems, the immunity rule was rooted in the doctrine of the unity of spouses, from which the status of legal incapacity of married women stemmed.

In Italy the immunity rule was grounded on custom. Notwithstanding the absence of provisions stating marital immunity, tort claims within the family were not even started because of the conception, which was deeply rooted within society, of the family as an environment extraneous to law. In the superseding of this rule a major role was played by the profound social transformation of the family, with the replacement of the model based on *pater familias* authority with one based on the

89. *Id.* at 1264-65.

90. Recently, P. VIRGADAMO, *Rapporti familiari e danno non patrimoniale: la tutela dell'individuo tra diritti personali a inviolabilità strutturale e interessi familiari a inviolabilità dinamica*, in *Dir. fam. pers.*, 2006, 4, 1894 as to the relevance of tortious liability in the field of family has proposed to distinguish three hypothesis. The first would deal with pecuniary losses consequent to breaches of spousal duties recoverable under the heading of art. 2043, the second, with non pecuniary losses flowing from the infringement of inviolable rights relevant also outside the family unit, and that for this characteristic are defined "rights inviolable as to their structure" ("diritti a struttura inviolabile"), while the third with non pecuniary losses suffered as a result of serious violations of familial interests protected by spousal duties. In this case the interests infringed cannot be qualified as 'inviolable rights,' because their ambit of relevance is within family, but recovery would be admissible for the special seriousness of the infringement (for this reason they are qualified by the author as 'interessi a inviolabilità dinamica,' i.e. 'interest prospectively inviolable').

acknowledgement of the equality of spouses, which paved the way for the central role of individuals within the family. Given that the family is now recognised as a place of self-realisation and enrichment of individuals, there is no *a priori* hurdle to the compensation of damage consequent to wrongful conducts hampering the individual's self-realisation, notwithstanding the fact that the damaging person is or is not a family member.

In all the systems considered, however, some limits are put to the possibility of making recourse to tort liability within the area of the family. In the United States, procedural and substantive hurdles have set strict boundaries to tort claims. *Res judicata* can be considered a good example for the first since, according to one opinion, the facts alleged in tort claims and in divorce claims are the same. The two claims, then, should be joined in one suit. Tort suits could not then be filed separately after the divorce proceeding has been concluded.⁹¹

The case of emotional distress may be taken as a significant example of hurdles set by substantive law. Damages flowing from emotional distress are recoverable only if the conduct of the wrongdoer may be qualified as 'outrageous.' On a practical ground, protection against emotional distress is made difficult from the fact that for courts the meaning of this requirement is still highly controversial. It is therefore easy to understand why, whereas courts are more willing to uphold interspousal tort claims as to monetary damages, they are much less willing to do so when non-monetary damages are involved. Lastly, possible financial limitations of the tortfeasor have to be considered as they may render useless the recourse to tort law suits.

In Italy, the upholding of interspousal tort claims depends on the preliminary issue as to if the breach of spousal duties could be relevant not only on the ground of specific family law remedies, but also on that of the recovery of damages. The award of non-pecuniary damages is difficult because of the express provision of sec. 2059 Civil Code, which admits recoverability of them only in the cases expressly provided by law. Courts however went beyond this textual stricture in the case of the infringement of the

91. Andrew SCHEPARD, *Divorce, Interspousal Torts, and Res Judicata*, 24 *Fam. L. Q.* 127 (1990-1991).

fundamental rights of the individual, acknowledging the possibility to the victim of harmful conduct to claim for damages notwithstanding the lack of an express provision.⁹² The current trend sketched above as to interspousal torts has to be commended in so far individuals are more protected within the family unit than they were in the past.

However, several reasons militate for clear boundaries to liability in tort to be set in the realm of family. Firstly, the remedy of damages, whose main aim is of restoring the economic resources destroyed by the harmful conduct and whose general field of operation is the suit involving two strangers, are not always the most appropriate instrument to deal with the infringement of non-patrimonial interests. Secondly, tortious liability is focused on the protection of individuals, whereas family has a kernel that cannot be reduced to the individuals who form it. Moreover, since the intimate relationship created by marriage increases the risk for the spouses of reciprocal harmful conduct in everyday life, a higher degree of tolerance has to be expected by them than in the case in which damage flows from the wrongful conduct of a stranger. Interspousal tort law suits have to be admitted, but they have to be assessed in the broader context of family. Therefore, a set of criteria must be still found which can achieve a balance between the protection of the interests of the individual (an area developing under a flow of judgements as to non-monetary damages) and that of the family as a whole. The history of conjugal tort has still a long way to go before reaching a satisfactory conclusion.

92. In this sense, Cass. Civ, May 10, 2005, n. 9801, *supra* note 81, at 368, which excludes that 'diritti definiti come inviolabili ricevano diversa tutela a seconda che i loro titolari si pongano o meno all'interno di un contesto familiare.'

LEGAL PROTECTION OF MINORITY SHAREHOLDERS OF LISTED CORPORATIONS IN BRAZIL: BRIEF HISTORY, LEGAL STRUCTURE AND EMPIRICAL EVIDENCE

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I. Introduction	147
II. The Protection of Minority Shareholders in Historical Perspective	149
III. The Legal Framework Protecting Minority Shareholders	159
A. Political Rights	160
B. Economic Rights.....	165
C. Oversight and Information Rights	170
D. Procedural Rights	174
E. Indirect Protection.....	175
IV. The Enforcement of Protective Mechanisms.....	179
V. Conclusion	185

I. INTRODUCTION

“Shareholders are stupid and impertinent: stupid, because they buy shares, and impertinent, because they demand a return.”¹ This is how Carl Fuerstenberg, a high profile German banker of the between-wars period once referred to minority shareholders. Today, the argument that minority shareholders are mere

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1. Theodor Baums & Kenneth Scott, *Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany*, 53 AM. J. COMP. L. 31 (2005) (quoting Carl Fuerstenberg).

opportunists lacks foundation.² It is now well established that the existence of vibrant stock markets with ample participation by minority shareholders is an important vehicle for savings mobilization, financial development and economic growth.³ In recent years a number of studies have shown that enhanced minority shareholder protection is associated with higher valuation of corporate assets and with more developed and valuable capital markets.⁴ Because of this, in the past decade a consensus emerged in academic circles suggesting that minority shareholders deserve legal protection not only for equitable reasons, but for efficiency considerations as well.

This article examines key elements in the history, structure, and application of the legal framework offering protection to minority shareholders in Brazilian listed corporations. Such an examination is particularly timely. *The Economist* recently predicted that in the next 10-15 years, Brazil shall become the world's fifth-largest economy, surpassing both France and Britain.⁵ As an increasing number of Brazilian corporations become publicly traded, and stock ownership becomes dispersed, international companies seeking to acquire Brazilian assets will

2. In older texts, it is common to find minority shareholders portrayed on a negative light. See, e.g. Walter Rathenau, *Vom Aktienwesen*, 128 REVISTA DE DIREITO MERCANTIL 202 (2002) (translated into Portuguese).

3. See e.g., Asli Demirgüç-Kunt & Vojislav Maksimovic, *Law, Finance and Firm Growth*, 53 J. FIN. 2107 (1998) (showing that in countries with active stock markets firms were able to obtain larger funding); Ross Levine & Sara Zervos, *Stock Markets, Banks, and Economic Growth*, 88 AM. ECON. REV. 537 (1998) (relating financial development to economic growth); Maurice Obstfeld, *Risk-Taking, Global Diversification and Growth*, 84 AM. ECON. REV. 1310 (1994) (showing that growth is encouraged by the ability of investors to diversify investments through markets); Raghuram G. Rajan & Luigi Zingales, *Financial Dependence and Growth*, 88 AM. ECON. REV. 559 (1998) (showing that in countries with better protection of external investors the industries dependent on external finance are more developed); see also Hal S. Scott, *International Finance: Rule Choices for Global Financial Markets*, in RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW, (A. Guzman & A. Sykes eds. 2007).

4. Rafael La Porta et al., *Corporate Ownership around the World*, 54 J. OF FIN. 471 (1999); Rafael La Porta et al., *Investor Protection: Origins, Consequences and Reform*, NBER WORKING PAPER, n. W4728 (1999); Edward Glaeser et al., *Coase versus the Coasians*, 116:3 QUARTERLY J. OF ECON. 853-899 (2001); Andrei Shleifer & Daniel Wolfenzon, *Investor Protection and Equity Markets*, HARVARD INSTITUTE OF ECONOMIC RESEARCH PAPER NO. 1906 (2000); Robert D. Cooter, *Innovation, Information and the Poverty of Nations*, 33 FLA. ST. U. L. REV. 373 (2005).

5. *Brazil Takes-Off*, THE ECONOMIST MAGAZINE, Nov. 12, 2009, at 15.

have to deal with Brazilian regulations governing tender offers, minority shareholder rights, and fairness opinions and valuations.

This paper proceeds in Section II by examining the history of minority shareholders protection in Brazil. This will give some context to the main reformatations to the Brazilian Corporations Law of 1976.⁶ It will also highlight recent developments in the Brazilian stock markets, particularly the fact that dispersed ownership can for the first time in Brazilian history be found in a few listed corporations. Section III presents the main features of the current legal framework for the protection of minority shareholders. It analyzes the most important provisions under the Brazilian Corporations Law, as well as the most relevant regulations issued by the São Paulo Stock Exchange (BM&FBovespa). Section IV presents the results of an empirical study of the degree of enforcement of laws and regulations protecting minority shareholders. The data shows that judicial and administrative application of such legal provisions is still relatively unpredictable and time consuming. Section V concludes.

II. THE PROTECTION OF MINORITY SHAREHOLDERS IN HISTORICAL PERSPECTIVE

The Corporations Law in Brazil governs joint stock companies and contains the most important legal provisions dealing with the protection of minority shareholders in Brazil. Its intellectual foundations can be traced to the Second Plan of National Development (“PND II”), a set of guidelines for national industrial policies that were put in place during the 1970s.⁷ At that time, the formation of large national economic groups was viewed as a central component of development strategies across the developing world. Inspired by a similar law in South Korea, the Corporations Law was conceived as a vehicle that would foster the creation of

6. Federal Law No. 6,404 of 1976.

7. See IV SECOND PLAN OF NATIONAL DEVELOPMENT CHAPTER (ECONOMIC STRATEGIES: BASIC OPTIONS. STRENGTHENING OF THE NATIONAL COMPANY AND FOREIGN CAPITAL); see also 1 ALFREDO LAMY FILHO & JOSÉ LUIZ BULHÕES PEDREIRA, *A LEI DAS S.A.: PRESSUPOSTOS, ELABORAÇÃO E MODIFICAÇÕES* (3d ed., Rio de Janeiro, Renovar, 1997); EGBERTO LACERDA TEIXEIRA & JOSÉ ALEXANDRE TAVARES GUERREIRO, *DAS SOCIEDADES ANÔNIMAS NO DIREITO BRASILEIRO* 3-12 (São Paulo 1979); Orlando Gomes, *Fontes e Significado das Inovações da L. n. 6.404*, 275 *REVISTA FORENSE* (1981).

national “champions”—that is, large conglomerates controlled by Brazilian groups.⁸

The Corporations Law of 1976 reflected the political dynamics of the time. The then-incumbent military regime was striving to develop the economy while keeping political power concentrated.⁹ Similarly, the Corporations Law intended to spread capital ownership of listed corporations without democratizing the political power within them. According to most Brazilian legal scholars, the Corporation Law’s central objective was the preservation of the interests of large business groups.¹⁰ At the same time, and sometimes in tension with the goal of protecting controlling shareholders, the Corporations Law sought to extend enough protection to minority shareholders, so as to entice investors to voluntarily turn to the stock market.¹¹

In order to maintain the power structure within the Brazilian corporations that decided to go public, the Corporations Law of 1976 allowed corporations to issue preferred shares. Originally, up to 2/3 of the total capital stock could be comprised of preferred, nonvoting stock.¹² At the same time, the Corporations Law

8. See DAVID TRUBEK ET AL., *O MERCADO DE CAPITAIS E OS INCENTIVOS FISCAIS* (Rio de Janeiro, TN-APEC 1971); see also MÁRIO HENRIQUE SIMONSEN & ROBERTO DE OLIVEIRA CAMPOS, *A NOVA ECONOMIA BRASILEIRA* 206-207 (3d ed., Rio de Janeiro, José Olympio, 1979) (discussing how the enactment of the Corporations Law was part of a broad set of complementary measures designed to develop the Brazilian stock markets, including the granting of tax benefits for both companies that decided to go public and minority investors in the stock market.).

9. A military *coup* set the military forces in power in Brazil in 1964. The country remained under a military regime until 1985, when civil government was reinstated. A new Federal Constitution was enacted in 1988 and has been in full force ever since.

10. See e.g. MODESTO CARVALHOSA, *A NOVA LEI DAS SOCIEDADES ANÔNIMAS. SEU MODELO ECONÔMICO* (Rio de Janeiro, Paz e Terra, 1976).

11. This dual concern for strengthening of the Brazilian conglomerates and protecting minority shareholders can be found in the Motives (“*Exposição de Motivos*”) of the Corporations Law (EM No. 196/76) written by Mário Henrique Simonsen, then Minister of Finance:

4. The project basically aims at creating the legal structure necessary for strengthening of the country’s capital markets, which in the current stage of the development of the Brazilian economy is indispensable for the survival of private companies. The voluntary mobilization of savings toward the productive sector requires the establishment of a system that ensures minority shareholders the observance of clear and equitable rules that are appealing in terms of security and profitability without paralyzing the business community. MÁRIO HENRIQUE SIMONSEN, *EXPOSIÇÃO DE MOTIVOS*.

12. The permission to issue up to 2/3 of nonvoting stocks means that in the simplest ownership structure a company could be controlled with just one

required that such preferred nonvoting shares were granted some economic advantages over voting shares. It thus became common for listed corporations to establish a very narrow economic advantage for nonvoting stock only for the purposes of fulfilling this legal requirement. Listed corporations usually had bylaws establishing that nonvoting shares had a priority over voting shares upon liquidation. In practice, however, bankruptcy proceedings were such that shareholders (both voting and nonvoting) were left with hardly any value upon conclusion of the liquidation. The Corporations Law awarded minority shareholders a set of individual rights and established fiduciary duties and obligations for the corporation's administrators and controlling shareholders. Furthermore, the government created the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários* - CVM) which was, and still is, in charge of regulating and supervising securities markets.¹³

The Brazilian Corporations Law was basically in line with the state-led, import substitutions industrialization models of development prevailing in the mid-1970s.¹⁴ This largely explains why the law was not substantially amended until those models lost their supremacy in the policy debate. In Brazil, the shift between economic models gained momentum with the country's democratization and the economic reforms championed by President Fernando Collor (1990-1992), and consolidated by presidents Itamar Franco (1992-1994) and Fernando Henrique Cardoso (1995-2003). As a result, the Corporations Law was twice reformed, first in 1997¹⁵ and later in 2001.¹⁶

The 1997 reform of the Corporations Law aimed at facilitating the ongoing Brazilian privatizations program that was occurring at that time.¹⁷ The most relevant, and most polemic, change brought

sixth of its capital. Moreover, with additional layered structures control could in theory be exercised with an insignificant capital stake.

13. The CVM was created by Federal Law No. 6,385 of 1976. It is a federal agency linked to the Ministry of Finance.

14. Jeswald W. Salacuse, *From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World*, 33 INT'L LAW 875 (1999).

15. Federal Law No. 9.457, of 1997.

16. Law No. 10.303, of 2001. In addition, the sections of the Corporations Law establishing account rules were amended in 2007. See *infra* note 106.

17. The National Program of Privatizations (Programa Nacional de Desestatização-PND) was created in 1990 under Law No. 8.031. This law was later revoked by Law No. 9.491, of 1997, which revamped the program.

about was the elimination of tag along rights for minority voting shareholders.¹⁸ As originally enacted in 1976, the Corporations Law had provided for a mandatory tender offer for all of the outstanding voting stocks in case of a control transfer.¹⁹ The tender offer was required to be made for a price equal to that paid for the controlling block. Tag along rights compelled controlling shareholders to include the holdings of voting minorities in sale negotiations. In practice, controlling shareholders were then forced to share the control premium with all of the remaining voting shareholders. This framework placed an important check on the controlling groups' actions to capture private benefits of control.

Many of the state-controlled companies that were privatized by the end of the 1990s had minority voting shareholders. The removal of tag along rights meant that new owners could buy the controlling block without having to make tender offers for the shares of any minority groups. As a result, the government managed to capture the entire control premium paid by acquirers. The 1997 reform also abolished other minority protection mechanisms. Most noticeably, it eliminated shareholder withdrawal rights in mergers and spin-offs, and it lowered the price at which shareholders could withdraw in the cases where that right continued to be effective.²⁰

In Brazil, the immediate impact of the privatization program on the development of the local stock market was at best discrete, if

18. It has never been a mandatory requirement that the holders of non-voting shares receive tender offers directly.

19. Corporations Law, article 254:

The transfer of the control of a listed company shall be subject to the prior authorization of the Securities Commission. Paragraph 1-The Securities Commission shall ensure that the minority shareholders receive equitable treatment by means of a simultaneous public offer for acquisition of stocks. Paragraph 2.-If the number of stocks being offered, including those belonging to the controlling or majority shareholders, exceeds the limit set forth under the public offer, an apportionment as provided for in the instrument of offer shall be made.

(As of 1997, this provision is no longer in force.)

20. Before the 1997 reform, dissenting shareholders had the right to withdraw at a price equal to the book value of their stocks. The reform allowed the bylaws to establish that the redemption amount could be lower than book value if such redemption amount were calculated based on the economic value of the company, which would be based on forecast profits assessed through a discounted cash flow valuation or other criteria as set forth under the bylaws.

not negative.²¹ Accordingly, the 1997 reforms are now believed to have generally reduced minority investors' confidence.²² In fact, by the end of the 1990s the Brazilian stock market was facing a serious crisis. The number of corporations listed on BM&FBovespa had dropped from 550 in 1996 to 440 in 2001. The trade volume dropped from US\$ 191 billion in 1997 to US\$ 101 billion in 2000 and US\$ 65 billion in 2001.

This plunge in the Brazilian stock market was hastened by several additional factors. First, Brazil and a number of other countries (Mexico in 1995, South Korea and Thailand in 1997, Russia in 1998, Brazil in 1999, Turkey in 2000-2001 and Argentina in 2001-2002) faced a serious liquidity crisis.²³ In all of these countries, a combination of large short-term liabilities and relatively scarce internationally liquid assets resulted in extreme vulnerability and eventually in a confidence crisis and a reversal of capital flow. As international financial conditions worsened, Brazil experienced a recession and its currency devalued rapidly. In 1998-99, the average annual growth rate fell to 0.5%, the Brazilian currency lost approximately one-third of its purchasing power from April 1998 to April 1999, and fiscal deficits skyrocketed. Second, distortionary taxation contributed to further depress the local stock markets. In particular, fiscal deficits prompted the government to levy a tax on every financial transaction, including on every purchase and sale of stocks.²⁴ Finally, Brazilian corporations were

21. Érica Rocha Gorga, *Direito Societário Brasileiro e Desenvolvimento do Mercado de Capitais: Uma Perspectiva de "Direito e Economia"*, 93, Doctoral Thesis, Law School, University of São Paulo, 2005. ("the Brazilian privatization program, [contrary] to similar programs in other parts of the world, did not result in the consistent development of the national capital markets").

22. In early 1999, the CVM issued Ordinance No. 299 partially in an attempt to remedy the deleterious effects of the 1997 reform on the Brazilian stock market. In 2002, Ordinance No. 299 was partially revoked by Ordinance No. 358, which in turn was amended by Ordinances No. 369 in 2006, and 449 in 2007. The requirement to disclose the price of sales of 5% blocks of voting stock was maintained (in fact, enhanced) throughout all of this process.

23. Nelson H. Barbosa Filho, *International Liquidity and Growth in Brazil*, Center for Economic Policy Analysis Working Paper, 2001, <http://newschool.edu/cepa/publications/workingpapers/archive/cepa200104.pdf> (last visited April 21, 2011).

24. The tax on financial transactions (named CPMF) was levied on every debit (withdrawals and transfers of cash) made in bank account. It was originally charged at 0.2% but with time that rate went up to 0.38%. It was created in 1997 as a temporary tax and remained in force and effect until 2007. An exemption for investments in the stock markets was in place from 2004 to 2007.

given the option to negotiate their stock in the American market using American Depositary Receipts (ADRs), thus reducing even further the liquidity of the Brazilian stock market.²⁵

In reaction to this series of events, the Brazilian Congress started to debate a new round of reforms to the Brazilian Corporations Law. At first, Congress seemed to aim at eliminating nonvoting stock altogether and at reinstating full-fledged tag along rights. Political pressure from controlling groups however led the reformation to accomplish much less.²⁶ Instead of eliminating nonvoting stocks, as originally intended, the reform finally enacted in 2001 only reduced the limit for nonvoting stocks from 2/3 to 50% of the total capital stock.²⁷ Most importantly, existing listed corporations were exempted from the new limits. Furthermore, tag along rights were reinstated, but only for holders of voting shares and were limited to 80% of the price paid for the controlling stock.²⁸

To compensate for not eliminating the existence of preferred stocks, the 2001 reforms tried to give more palpable advantages for preferred shareholders. As detailed later on in this paper, this was done by giving the corporation the option to choose among establishing certain mandatory minimum dividends for preferred

25. In July of 2002, *The New York Times* wrote that the CPMF had made BM&FBovespa's transaction costs as much as 165% higher than those of The New York Stock Exchange. Between 1997 and 2002, about 40% of BM&FBovespa investors migrated to American Depositary Receipts of blue-chip Brazilian corporations. See Tony Smith, *Stoking a Stock Market 'Revolution'*, THE NEW YORK TIMES, July 30, 2002 available at <http://www.nytimes.com/2002/07/30/business/stoking-a-stock-market-revolution.html> (last visited April 21, 2011).

26. See Érica Rocha Gorga, *Culture and Corporate Law Reform: A Case Study of Brazil*, 27 U. PA. J. INT'L ECON. L. 803 (2006) (arguing that in the 2001 reformation "controllers' interest groups were able to 'capture' the legislation both directly and indirectly. Directly, and most effectively, the interest groups exerted pressure on legislators and the President to drop amendments aimed at increasing minority shareholders' rights. . . The interest groups were also able to indirectly influence the proposed reforms by adding several amendments to the text of the law. These amendments reduced the effectiveness of minority rights.").

27. Corporations Law, art. 15.

28. See *id.* at art. 254A ("The direct or indirect transfer of control of a listed corporation can only be effected under the condition that the purchaser agrees to conduct a public offer to acquire the voting stocks owned by the remaining shareholders. The offer price for such stocks shall be at least 80% of the amount paid for the voting stocks comprising the controlling block"); see also *id.* at art. 17, §7 (The 2001 reform also created the possibility that the government could have a golden share [giving special veto powers] in the corporations being privatized.).

stocks, establishing dividends for preferred stocks higher than those applying to voting stocks, or establishing limited tag along rights for preferred shareholders upon sale of the controlling interest.²⁹

It is fair to say that the 2001 reformation of the Corporations Law increased the overall level of protection of minority shareholders. Improvements included a requirement for making a tender offer to minority shareholders in case of delisting,³⁰ the enactment of provisions expressly prohibiting and criminalizing the practice of insider trading,³¹ and increased representation of minority shareholders in the board of directors of listed corporations.³² At the same time, the preservation of nonvoting stocks and the limitations in tag along rights meant that the improvements to the position of minority shareholders were less significant than what was boasted by numerous politicians of the time.

It was self-regulation—rather than state regulation—that created the conditions for truly enhanced corporate governance practices and higher protections for minority shareholders in Brazil. In December of 2000, just before the enactment of the 2001 reform of the Corporations Law by Congress, BM&FBovespa created three special corporate governance listing segments.³³ In

29. *Id.* at art. 17. *See infra* notes 72-74.

30. *Id.* at art. 4 (“The public listing of a corporation may only be canceled if the corporation that issued the stocks, the majority shareholder or the controlling corporation directly or indirectly makes a tender offer to acquire all of the outstanding stocks for a fair price, at least equal to the appraised equity value of the corporation, calculated based on one or more of the following criteria: accounting net worth, equity value calculated at market value, discounted cash flow, multiples comparison, market value, or another criterion adopted by the Brazilian Securities Commission.” . . . Shareholders holding at least 10% of outstanding stocks of a listed corporation may request the officers to call a special shareholders’ meeting with holders of outstanding stocks in order to determine a new appraisal, based on the same or different criteria from those originally adopted, for purposes of determining the valuation of the corporation as provided for [above]”).

31. *Id.* at art. 155; *see infra* notes 127-130.

32. *Id.* at art. 141.

33. The rules enacted by BM&FBovespa governing the new listing segments are currently being revised. The main topics being debated involve a requirement for the election of independent directors, the extension of arbitration to all shareholders, and the definition of “diffuse control.” The amended version of current rules is expected to be published still in 2010. Under the deliberation procedures presently in place, a proposed amendment must be previously presented in a closed hearing to the corporations listed in each segment. The proposition can be blocked by a formal rejection of at least 1/3 of

these new listing segments, corporations could voluntarily agree to adopt governance practices that went far beyond the minimum standards established under the Brazilian Corporations Law, arguably providing much greater transparency and strengthening the rights and protections of minority shareholders.³⁴

The three listing segments were named *Novo Mercado* (literally, “new market”), Level 2 and Level 1. Novo Mercado’s biggest advance was to do away with the nonvoting stock that had caused so much political controversy in the past.³⁵ Corporations listed in the Novo Mercado were also required to grant unrestricted tag along rights to all of their shareholders.³⁶ In addition, they were required to fulfill a number of additional obligations, for example:

the corporations listed in each such segment. Moreover, before coming into force, the amended regulations must be approved by the CVM. See Novo Mercado Listing Rules, item 14.2 available at www.bmfbovespa.com.br/en-us/markets/download/regulamento.pdf; Corporate Governance Level 1 Listing Rules, item 9.2 available at www.bmfbovespa.com.br/en-us/markets/download/regulamento_niveis1_ingles.pdf; Corporate Governance Level 2 Listing Rules, item 14.2 available at www.bmfbovespa.com.br/en-us/markets/download/regulamento_niveis_ingles.pdf (last visited April 21, 2011).

34. The creation of these special listing segments was partly inspired by the Germany’s *Neuer Markt*. See Jose Roberto Menconca de Barros et al., *Desafios e Oportunidades para o Mercado de Capitais Brasileiro*, MB Associados, June 2000 available at http://www.bmfbovespa.com.br/pt-br/a-bmfbovespa/download/mercado_capitaisdesafios.pdf. Notice that special European listing segments, such as Germany’s *Neuer Markt*, were generally designed to attract companies from fast-growing markets and high tech, especially in areas such as internet, telecommunications, media, and biotechnology. Conversely, BM&FBovespa’s special listing segments place no restriction on fields of activities, nor are they reserved for small companies. See Stijn Claessens et al., *Corporate Governance Reform Issues in Brazilian Equity Markets*, available at [www.ifc.org/ifcext/corporategovernance.nsf/AttachmentsByTitle/Brazil-CG%2BReform%2BIssues%2B\(2001\).pdf](http://www.ifc.org/ifcext/corporategovernance.nsf/AttachmentsByTitle/Brazil-CG%2BReform%2BIssues%2B(2001).pdf) (surveying the studies that led to the creation of the Novo Mercado); Maria Helena Santana et al., *Global Corporate Governance Forum, Novo Mercado and its followers: Case Studies in Corporate Governance Reform*, FOCUS 5 (2008), available at [http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/Focus+5/\\$FILE/Novo+Mercado+text+screen+4-21-08.pdf](http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/Focus+5/$FILE/Novo+Mercado+text+screen+4-21-08.pdf) (describing the history of the creation, implementation and assessing the concrete results within each listing segment); see also Ronald Gilson et al., *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the U.S. and the EU*, SOCIAL SCIENCE RESEARCH NETWORK, March 1, 2010 available at <http://ssrn.com/abstract=1541226> (using Brazil’s special listing segments as a case study for a theory of non-state, parallel securities regulation) (last visited April 21, 2011).

35. Novo Mercado Listing Rules, item 3.1, VI.

36. *Id.* at item 8.1 (providing that in the event of sale of control the buyer must make a tender offer to buy all outstanding stocks under equal terms, with no 80% ceiling).

(1) maintaining a minimum of 25% of capital stock in free float,³⁷ (2) establishing a unified maximum two-year term for the entire board of directors with at least five directors,³⁸ (3) submitting yearly financial statements pursuant to US GAAP or IRFS norms, improving the disclosure of information in the quarterly financial statements,³⁹ and (4) making tender offers based on economic value to holders of stock in free float both in case of delisting and of withdrawal from the Novo Mercado.⁴⁰ Moreover, any disputes between corporation and shareholders would be solved by binding arbitration.⁴¹

The key distinction between the Novo Mercado and Level 2 is that the latter allows the corporations to have nonvoting shares, while the former does not.⁴² Still, holders of preferred stock of corporations listed in Level 2 must be granted the right to vote in certain matters such as incorporation, merger, spin-off, the approval of contracts entered into between the corporation and firms of the same holding group, appraisal of assets contributed to pay up capital increases, the choice of the independent expert in charge of valuating the corporation, and the amendment to the corporation's bylaws, including with respect to its rules of corporate governance.⁴³ Moreover, in case controlling shareholders sell their stake, a tender offer must be presented to the preferred shareholders in the amount of at least 80% of the value/conditions paid to the controlling group (remember that under the Corporations Law, preferred shareholders have no tag along rights).⁴⁴ As to Level 1, which is the less stringent of the special listing segments, the adhering corporations have to fulfill less rigorous variations of obligations that apply to the Novo Mercado and to Level 2. Although Level 1 also requires corporations to maintain a minimum of 25% of capital stock in free float, most of

37. *Id.* at item 7.3 and item 2.1 (defining "Minimum Free Float").

38. *Id.* at items 4.3 and 4.4.

39. *Id.* at items 6.1 e 6.2.

40. *Id.* at item 10.2; and, *see also, id.* at item 11.7 (providing that the corporations' securities cannot be traded on the Novo Mercado for at least 2 years after the delisting is formalized).

41. *Id.* at item 13.1.

42. Corporate Governance Level 2 Listing Rules, item 3.1, (i).

43. *Id.* at item 4.1.

44. *Id.* at item 8.1.3. *See* RICARDO LEAL & ANDRÉ CARVALHAL DA SILVA, PRÊMIO IBGC DE GOVERNANÇA CORPORATIVA(2007) (noting that the percentage of corporations where nonvoting preferred stocks represents less than 20% sharply increased from 17.9% in 1998, to 39.6% in 2007).

its provisions deal with mechanisms that enhance transparency and disclosure requirements.⁴⁵ In any case, corporations listed in any of the special listing segments will always have to abide by the minimum standards set forth under the Corporations Law.

After a slow start, BM&FBovespa's new listing segments eventually took off. In November of 2007, the Financial Times wrote: "Not long ago the São Paulo Stock Exchange was a sleepy backwater, much like any other stock exchanges in Latin America . . . Since then, things have changed. By 2006, average daily trading had risen to R\$2.4bn (\$1.1bn). The [BM&FBovespa]'s extraordinary initial public offering on October 26 shot it into the top rank of world capital markets." BM&FBovespa closed 2007 with an accumulated rise of 72% (measured in U.S. dollars), the third biggest rise among the world's stock exchanges.⁴⁶ It should also be noted that the effects of the most recent international financial crisis on the Brazilian stock exchange have so far been mild. In truth, 2008 witnessed a reduction both in the number of corporations listed at the BM&FBovespa, as well as in total market capitalization.⁴⁷ However, this trend was soon reversed, as BM&FBovespa's market capitalization in 2009 ended 82.5% higher than that of 2008.⁴⁸

In the beginning of 2010, almost half of BM&FBovespa's 433 corporations were listed in a special segment: 106 corporations were listed in the Novo Mercado, 19 in Level 2, and 35 in Level 1.⁴⁹ The remaining 273 corporations are still listed at BM&FBovespa pursuant to traditional, legally required levels of corporate governance, but most of them had previously gone public. In fact, voluntarily adherence to one of the special listing segments has now become standard practice for the numerous

45. Corporate Governance Level 1 Listing Rules, Part IV, item 5.2.

46. *Bovespa fecha o ano como 3ª mais rentável do mundo, com alta de 72% em dólar*, O GLOBO ONLINE, (December 28, 2007) (The annual rise was overcome only by Shenzhen (180.84%) and Shanghai (110.15%) stock exchanges, both located in China. BOVESPA's main competitor in Latin America, Mexico's BMV accumulated a rise of 11.32% in 2007).

47. BM&FBovespa 2008 Annual Report, available at www.bmfbovespa.com.br/Relatorio2008/english/index_Anual.pdf (last visited April 21, 2011).

48. BM&FBovespa, Boletim Empresas, Edition 12, Year 2, available at www.bmfbovespa.com.br/empresas/boletim_empresas.asp (last visited April 21, 2011).

49. *Id.*

IPOs that took place through BM&FBovespa during the last decade.

While the link between law and economic development remains a theoretical quagmire,⁵⁰ academics debate about whether improved corporate governance was a cause or a consequence of economic improvements in Brazil.⁵¹ There is no doubt that the protective framework for minority shareholders that emerged from the crisis of 2001 was the product of institutional fiat. However, it cannot be ignored that Brazil's robust economic cycle reinforced the effectiveness and stability of such a legal design. Be that as it may, the fact remains that the protection of minority shareholders is now substantially higher than when the Corporations Law was originally enacted.

III. THE LEGAL FRAMEWORK PROTECTING MINORITY SHAREHOLDERS

The legal framework pertaining to the protection of minority shareholders of listed corporations is fragmented and contained in essentially two, and in some cases three, statutory bodies. First, the Corporations Law itself;⁵² second, the myriad of instructions enacted by the supervising authority, the CVM; and third, in the special regulations enacted by the BM&FBovespa that apply to corporations listed in the special listing segments, as the case may be.

The starting point for an examination of the legal framework protecting minority shareholders of listed corporations should be the "essential" rights specified in the Corporations Law.⁵³ These

50. See e.g. Michael Trebilcock & Kevin Davis, *The Relationship Between Law and Development: Optimists Versus Skeptics* 56 AM. J. COMP. L. 895 (2008) (surveying the literature on the topic).

51. See Érica Gorga, *Changing The Paradigm of Stock Ownership from Concentrated Towards Dispersed Ownership? Evidence from Brazil and Consequences for Emerging Countries*, 29 NW. J. INT'L L. & BUS. 439, 444 (2009). See generally Brian R. Cheffins, *Does Law Matter? The Separation of Ownership and Control in the United Kingdom*, 30 J. LEGAL STUD. 459, 469 (2001); John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L. J. 76 (2001).

52. In Brazil, securities and corporations are governed by federal legislation.

53. See WALDÍRIO BULGARELLI, *REGIME JURÍDICO DA PROTEÇÃO ÀS MINORIAS NAS S/A (DE ACORDO COM A REFORMA DA LEI N.º 6.404/76)* (Rio de Janeiro, Renovar, 1998) (with an overview of the protection of minorities

rights are established by Congress and they cannot be suppressed by the corporation's bylaws, or by a resolution of a shareholders meeting. There are five essential rights: (1) the right to receive dividends, (2) the right to participate in the sale of the corporation's assets upon liquidation, (3) the right to supervise the corporation's bodies, (4) the right of first refusal that arises upon the subscription of shares, founders' shares convertible into shares, debentures convertible into shares and subscription bonuses, and (5) the right to withdraw from the corporation in specific instances set forth under the Corporations Law.⁵⁴

These and other rights gain clearer focus through examination of various instances of Brazilian legislation. A more systematic description based on state and non-state law can be observed by categorizing minority shareholder rights based on their nature. Accordingly, they can be divided into political rights, economic rights, oversight and information rights and procedural rights, as follows.

A. Political Rights

Political rights allow shareholders to participate in the corporate bodies that make decisions on behalf of the corporation, particularly the shareholders' meeting ("*assembléia geral*") and the board of directors ("*conselho de administração*").

The most important political right set forth under the Corporations Law is the right to vote at shareholders' meetings. The law establishes certain formalities that have to be followed in order to safeguard the participation of voting minority shareholders in these meetings. These formalities include giving prior public notice of the meetings, having a minimum quorum for the holding of valid shareholders' meetings, and having the minimum percentage of votes for the approval of certain topics. Lack of observation of such formalities may cause the resolutions to be declared void by courts.⁵⁵

shareholders in Brazil); see also José Alexandre Tavares Guerreiro, *Direito das Minorias na Sociedade Anônima*, 63 REVISTA DE DIREITO MERCANTIL 106-111 (1986); and Tullio Ascarelli, *Usos e Abusos das Sociedades Anônimas*, 88 REVISTA FORENSE 5-33 (1941); TULLIO ASCARELLI, *PROBLEMAS DAS SOCIEDADES ANÔNIMAS E DIREITO COMPARADO* (2d ed. 1969).

54. Corporations Law, art. 109.

55. *Id.* at arts. 121-137. See LUIZ GASTÃO PAES DE BARROS LEÃES, *VÍCIOS EM ASSEMBLÉIA-GERAL ORDINÁRIA. ESTUDOS E PARECERES SOBRE*

Historically, the notice requirements for listed corporations before the valid holding of a shareholders' meeting was not a major concern of regulators, and for understandable reasons. Where there is a clear block of controlling shareholders, shareholder meetings are themselves oftentimes just a formality. Recently, however, the emergence of corporations with dispersed ownership led the CVM to start paying closer attention to formalities in shareholder meetings. Accordingly, the CVM established a detailed list of information to be provided to shareholders before a shareholder meeting can validly take place. In addition, the CVM finally allowed and regulated the exercise of proxy voting in shareholders' meetings.⁵⁶ It is notable that as of March of 2010, BM&FBovespa had five corporations in which the three largest shareholders jointly held less than 25% of total voting capital.⁵⁷ Furthermore, there were over a dozen corporations in which the three largest shareholders held between 25% and 49.9% of total voting capital.⁵⁸

Although there are now a few corporations with dispersed ownership in Brazil, a cautionary note still applies to the topic of political control in listed corporations. The general pattern of corporate control within Brazilian listed corporations is one of high political concentration.⁵⁹ The block of controlling shareholders systematically holds the majority vote in shareholder meetings, being able to solely adopt resolutions and to elect the

SOCIEDADES ANÔNIMAS 154-166 (1989) (discussing the legal requirements generally applicable to the adoption of valid resolutions in shareholders' meetings).

56. CVM Ordinance No. 481 of 2009.

57. BM&FBovespa; Gafisa, Lojas Renner, Ideiasnet, and Dimed. available at www.bmfbovespa.com.br/cias-listadas/empresas-listadas/BuscaEmpresaListada.aspx?idioma=en-us (last visited April 21, 2011).

58. Eternit, Tecnosolo, Bematech, Embraer, Tovs, Cia Hering, BR Brokers, Dasa, Odontoprev, ALL Amer Lat, Itaúsa, Mont Aranha, Agra Incorp, Tempo Part, Cremer, São Carlos, among others, available at: www.bmfbovespa.com.br/cias-listadas/empresas-listadas/BuscaEmpresaListada.aspx?idioma=en-us. (last visited April 21, 2011).

59. See Alexandre di Micelli da Silveira et al., *Evolution and Determinants of Firm-Level Corporate Governance Quality in Brazil*, June 2007, available at <http://ssrn.com/abstract=995764> (last visited April 21, 2011) (as of 2004, the three largest shareholders of Brazilian corporations held, on average, 79.3% of voting capital). See also Eduardo Secchi Munhoz, *Desafios do Direito Societário Brasileiro na Disciplina da Companhia Aberta: Avaliação dos Sistemas de Controle Diluído e Concentrado*, in 1 DIREITO SOCIETÁRIO: DESAFIOS ATUAIS 119-155 (Monteiro de Castro & Santos de Aragão eds. 2009) (discussing the optimal legal regime for corporations with concentrated control in Brazil).

administrators. Therefore, minority shareholders seldom take an active role in corporate matters. This is true notwithstanding the existence of voting rights that are strictly protected as a matter of law. In practice, minority shareholders tend to exercise their voting rights more often while supervising the actions of controlling shareholders. This commonly arises when certain matters must be made public and approved by the shareholder regardless of whether there is a controlling block at the meeting or not. These matters include the distribution of dividends, the approval of financial statements, and the election of administrators. Publicity of such information opens the possibility of questioning by minority shareholders in court or through the CVM.

The right to vote can be restricted by the corporations' bylaws, giving rise, as is common, to preferred shares with limited, or no voting rights. A longstanding debate surrounds the existence of nonvoting preferred stocks in Brazil. In line with the original justification for their creation in the 1970s, some authors hold that preferred stock is a practical and effective alternative for corporations to raise capital.⁶⁰ Accordingly, the market itself would determine the value of non-voting stock, while allowing business groups to reach the stock markets without having to share control. Other authors believe that lack of voting rights is intrinsically detrimental to minorities and to the development of the stock markets more broadly.⁶¹ As previously mentioned, the Corporations Law currently allows listed corporations to issue nonvoting preferred stock corresponding to up to 50% of the total

60. See 1 ALFREDO LAMY FILHO & JOSÉ LUIZ BULHÕES PEDREIRA, *A LEI DAS S.A.: PRESSUPOSTOS, ELABORAÇÃO, APLICAÇÃO* 182-197 (3d ed. 1997) (examining the historical debates surrounding the enactment of the Corporations Law in the 70s decade); see also Arnaldo Wald, *Em Defesa das Ações Preferenciais*, 78 REVISTA DE DIREITO MERCANTIL 19-23 (1990); Mauro Rodrigues Penteado, *Ações Preferenciais*, in JORGE LOBO, *REFORMA DA LEI DAS SOCIEDADES ANÔNIMAS: INOVAÇÕES E QUESTÕES CONTROVERTIDAS DA LEI n. 10.303, de 31.10.2001* (2002); NELSON EIZIRIK, *REFORMA DAS S.A. E DO MERCADO DE CAPITAIS* 29-52 (2d ed. 1998).

61. That was the official opinion held by the Rio de Janeiro Stock Exchange in the course of the debated surrounding the Corporations Law in the 70; See ALFREDO LAMY FILHO & JOSÉ LUIZ BULHÕES PEDREIRA, *A LEI DAS S.A.* 190-205 (1992); See also Érica Gorga, *Análise da Eficiência de Normas Societárias: Emissão de Preferenciais, Tag Along e Composição do Conselho Fiscal*, Berkley Program in Law & Economics, Latin American and Caribbean Law and Economics Association (ALACDE), Annual Paper 050307-01, available at <http://escholarship.org/uc/item/6xd441jc> (last visited April 21, 2011).

capital stock.⁶² It must be noted, moreover, that nonvoting preferred shares automatically acquire voting rights when the corporation fails to pay the fixed or minimum dividend to which a certain stock is entitled; and such rights to vote endure until payment has been made, if the dividend is not cumulative, or until all cumulative dividends in arrears have been paid.⁶³

Minority shareholders can also supervise the actions of controlling groups by appointing members to the board of directors.⁶⁴ Minority shareholders representing at least 10% of the voting capital have the right to request a multiple voting (“*voto múltiplo*”) for the election of the members of the board of directors.⁶⁵ Multiple voting is a mechanism whereby each voting stock is given the right to make as many votes as the number of vacant positions in the board of directors. For instance, if the shareholders are electing five board members, each voting stock will cast five votes. By concentrating all votes in one or two candidates, this procedure empowers minorities to elect at least a small number of board members.⁶⁶

It should also be noted that the 2001 reform to the Corporations Law established other means for the participation of minority shareholders in electing the Board of Directors. Minority shareholders representing 15% of the voting stocks can elect a member for the board of directors.⁶⁷ This same right was extended to shareholders having nonvoting preferred stocks that represent at least 10% of the corporation’s total stock capital.⁶⁸ In addition, corporations listed in the special listing segments follow more stringent rules: the board of directors of corporations listed in the

62. See *supra* note 28.

63. Corporations Law, art. 111; see also ERASMO VALLADÃO AZEVEDO E NOVAES FRANÇA, TEMAS DE DIREITO SOCIETÁRIO, FALIMENTAR E TEORIA DA EMPRESA 483-508 (2009).

64. See Nelson Eizirik, *Ações preferenciais, Não pagamento de dividendos. Aquisição do direito de voto*, 146 REVISTA DE DIREITO MERCANTIL 23-29 (2007) (arguing that the right to appoint members of the board of directors only applies to shareholders having right to fixed or minimum dividends).

65. Corporations Law, art. 141.

66. *Id.* at art. 141 (providing that even if the election of the Board of Directors is conducted through multiple voting, the shareholders bound by voting agreements representing more than 50% of voting stocks will have the right to appoint the same number of members appointed by the remaining shareholders plus one, regardless of the number of board members specified in the bylaws).

67. *Id.* at art. 141, §4, I.

68. *Id.* at art. 141, §4, II.

Novo Mercado and in Level 2 must be composed of at least five members, 20% of which must be independent directors.⁶⁹ However, controlling shareholders retain the right to appoint the majority of the members of the board of directors in any case.⁷⁰ Because of this, the right to be represented within the board of directors does not necessarily cause minority shareholders to have the power to actively influence decision-making within the board of directors. Nevertheless, representation within the board of directors creates at least an additional instance where minorities can obtain information about the corporations' business and sometimes oppose or question resolutions.

69. Novo Mercado Listing Rules, item 4.3 & Corporate Governance Level 2 Listing Rules, item 5.3. (An "Independent Member" is defined as "a member of the Board of Directors who: (i) has no ties to the Company except for owning an equity share of its capital stock; (ii) is not a Controlling Shareholder, the Controlling Shareholder's spouse or a relative to the second degree, is not or has not been linked in the last 3 (three) years to a company or entity with ties to the Controlling Shareholder (this restriction does not apply to people linked to governmental institutions of education and research); (iii) has not been a Senior Manager of the Company or employed by or worked for the Company, the Controlling Shareholder or any other company controlled by the Company; (iv) is not a direct or indirect supplier or purchaser of the Company's services or products or both, to a degree that results in loss of independency; (v) is not an employee or manager of a company or entity that supplies services or products or both to, or buys these from, the Company; (vi) is not a spouse or a relative to the second degree of any Senior Manager of the Company; (vii) does not receive any compensation from the Company except for that related to its activities as member of the Board of Directors (this restriction does not apply to cash from equity interests in the capital stock.)"); see Rafael Liza Santos, Alexandre di Miceli da Silveira & Lucas Ayres B. de C. Barros, *Board Interlocking in Brazil: Directors' Participation in Multiple Companies and its Effect on Firm Value*, Jan. 2009, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1018796 (last visited April 21, 2011) (showing that having interlocking directorates is a common practice in Brazilian corporations, and also that larger boards, dispersed ownership, and larger corporation size are associated with higher levels of board interlocking and lower stock value).

70. The legal regime governing the participation of minority shareholders in the Board of Directors has been the subject of much legal controversy. The CVM has twice ruled on the subject. Firstly, it decided that, if the corporation has no preferred stocks, voting shareholders owning 10% of the total capital can appoint a member to the Board of Directors (even though the Corporations Law establishes a 15% requirement). See CVM/RJ Administrative Procedure 2005/5564 ("Processo Administrativo Sancionador 2005/5564"), available at www.cvm.gov.br/port/descol/respdecis.asp?File=4846-2.HTM. Secondly, upon a formal consultation, the CVM decided that if a shareholders exercises its right to appoint a member to the Board of Directors in a separate election at the general meeting, it cannot make use of multiple voting. See "Consulta de Ultrapar Participações S.A. sobre Eleição de Conselheiros, Reg. 3649/02," available at www.cvm.gov.br/port/descol/resp.asp?File=2002-016D16042002.htm (last visited April 21, 2011).

B. Economic Rights

Stock value is a function of the bundle of rights contained in each stock. Thus, most (if not all) of the individual rights contained in the Corporations Law are in some sense “economic” rights, because the stock valuation presumably reflects the present value of these rights—even if imperfectly so. Here, however, the expression “economic rights” is employed in the narrower sense typically used in doctrinal studies of Brazilian corporate law.⁷¹ From this perspective, the basic economic rights are the right to receive dividends, tag along rights, dissent and appraisal rights, and rights of first refusal.

To begin with, in principle, at least 25% of the corporation’s yearly net profits must be paid as dividends. The corporation’s bylaws can however establish a lower percentage.⁷² In addition, the percentage of the net profits that have to be paid out as dividends for the different types of stocks is flexible.⁷³ Nonvoting preferred stock can only be accepted for trading in the stock market if they are afforded at least one of three advantages: a priority in the receipt of dividends corresponding to at least 3% of the stock’s net worth, dividends at least 10% higher than the dividend assigned to the voting stocks, or the same tag along rights as those held by voting shareholders (that is, tag along rights with tender offer value based on 80% of the price paid to controlling shareholders).⁷⁴

Tag along rights have also been dealt with under the rubric of “economic rights.” The existence of tag along means that the purchaser of a controlling stake of a corporation must make a tender offer to holders of minority shares.⁷⁵ As previously

71. See LUIZ GASTÃO PAES DE BARROS LEÃES, *DO DIREITO DO AÇIONISTA AO DIVIDENDO* (1969); *DIVIDENDO OBRIGATÓRIO E PARTICIPAÇÃO DOS ADMINISTRADORES NOS LUCROS DA COMPANHIA. ESTUDOS E PARECERES SOBRE SOCIEDADES ANÔNIMAS* (Revista dos Tribunais 1989) (examining the right to receive dividends).

72. Corporations Law, art. 17. (announcing that the yearly net income should be calculated as set forth under article 202 of the Corporations Law and according to the following criteria: (i) a priority in the receipt of dividends corresponding to at least 3% of the stock’s equity value; and (ii) the right to have interest in the profit distributed in conditions equal to the common stocks, after a dividend equal to the minimum priority as set forth in item a is assured.).

73. *Id.* at art. 202, § 2d.

74. *Id.* at art. 17.

75. The Corporations Law defines a transfer of control as “transfer, whether direct or indirect, of stocks comprising the controlling block, of stocks bound by shareholders’ agreements and of securities convertible into voting

mentioned, the 2001 reforms of the Corporations Law reinstated tag along rights, albeit in a limited fashion. Mandatory tag along rights were made applicable only to bearers of voting shares, and tender offers can be limited to 80% of the price paid for the block of controlling shares.⁷⁶ In addition, the 2001 reformation also established an alternative mechanism for companies seeking to acquire control of listed corporations to remunerate minority shareholders. As currently set forth under the Corporations Law, purchasers can decide to offer minority shareholders the option to keep their holdings in the corporation in exchange for payment of a premium.⁷⁷ This premium should be equivalent to the difference between the market value of the stocks and the amount paid for shares comprising the controlling block.

The special listing segments establish more stringent rules. In the Novo Mercado, where nonvoting preferred stocks are forbidden, full tag along rights apply to all minority stocks.⁷⁸ The

stocks, assignment of stock subscription rights and other rights related to securities convertible into stocks which may result in the transfer of corporate control.” (art. 254, § 1st). In addition, CVM Ordinance No. 361 of 2002 defines transfer of control as the “operation, or a set of operations, of securities alienation with voting rights, or to which are convertible, or of onerous assignment of subscription rights to these securities, performed by the controlling shareholder or by people which are partners of the control group, by which a third party or a group of third parties representing same interests acquire the corporation control power, as defined in the art. 116 of the [Corporations Law].” The aforementioned art. 116 of the Corporations Law defines controlling shareholder as “an individual or a legal entity, or a group of individuals or legal entities by a voting agreement or under common control, which: (a) possesses rights which permanently assure it a majority of votes in resolutions of general meetings and the power to elect a majority of the corporation officers; and (b) in practice uses its power to direct the corporate activities and to guide the operations of the departments of the corporation.”

76. In practice, the debates over the exact events that trigger a transfer of control tend to end in controversy. A famous case involving this topic was the sale of Telecom Italia, which is the indirect controller of TIM, which provides cell phone services in Brazil. In a non-unanimous decision, the CVM ruled that a tender offer was mandatory. However, each member of CVM’s decisions body justified his vote on different grounds available at: www.cvm.gov.br/port/descol/resp.asp?File=2009-026ED15072009.htm (last visited April 21, 2011). See also GUILHERME DÖRING CUNHA PEREIRA, *ALIENAÇÃO DO PODER DE CONTROLE ACIONÁRIO* (1995); ROBERTA NIOAC PRADO, *OFERTA PÚBLICA DE AÇÕES OBRIGATÓRIA NAS S.A.: TAG ALONG* (2005); CALIXTO SALOMÃO FILHO, *Alienação de Controle: O Vaivém da Disciplina e seus Problemas*, in *O NOVO DIREITO SOCIETÁRIO* 117-140 (2d. ed. 2002).

77. Corporations Law, art. 254, § 4th.

78. Novo Mercado Listing Rules, item 8.1.

same rule applies to the voting common stocks traded at Level 2.⁷⁹ This listing segment allows corporations to issue nonvoting preferred stocks, but the latter must be granted tag along rights corresponding to least 80% of the value/conditions applicable to the controlling group.⁸⁰

The Corporations Law also establishes an appraisal right (“*direito de recesso*”) for shareholders dissenting from certain corporate resolutions. Appraisal rights can be triggered by the following events: a change in the proportion of classes of stock that causes a loss to the dissenting shareholder (unless this is expressly allowed for in the bylaws), a change in the redemption or amortization terms of one or more classes of preferred shares, or the creation of a new, more favored class that causes a loss to the dissenting shareholders.⁸¹ The dissent and appraisal right will also be triggered by a reduction of the compulsory dividend or a change in the corporate purpose.⁸² Dissenting shareholders of listed corporations that own illiquid stocks can also request the appraisal of their stocks in case of merger or incorporation by another company or participation in a “group of corporations.”⁸³ The same appraisal rights also apply in case of a spin-off of the corporation, but only if the spin-off results in a change in the corporate purposes (except when the spun-off assets are transferred to a company with a main line of business that coincides with that of the corporation originally spun-off), if there is a reduction in the mandatory dividend, or if the spin-off causes shareholders to join a group of corporations.⁸⁴

The bylaws can establish the criteria for appraisal of the stocks of dissenting shareholders, subject to a minimum value based on the book value of the corporation as recorded in the latest financial

79. Corporate Governance Level 2 Listing Rules, item 8.1.

80. *Id.* at item 8.1.3.

81. Corporations Law, art. 137, I, & art. 136, I and II (providing that in these cases, appraisal rights will apply only if the shareholder was harmed by the transaction).

82. *Id.* at art. 137, main provision, & art. 136, III and VI.

83. *Id.* at art. 137, II & art. 136, IV and V. The Corporations Law states that in these cases, the holders of stocks of a class or type that have market liquidity and dispersion shall not have the right to withdraw, provided that: liquidity is evidenced when the type or class of stock, or the certificate that represents it, is part of a general index representing a portfolio of securities in Brazil or abroad, defined by the CVM; and dispersion is evidenced when the majority shareholder, the controlling corporation or other corporations under their control hold less than half of issued stocks of the applicable type or class.

84. *Id.* at art. 137, III & art. 136, IX.

statements.⁸⁵ That said, appraising stock in concrete cases often gives rise to controversies and lawsuits.⁸⁶ In Brazil, this is particularly common in transactions involving the incorporation of a controlled company.⁸⁷ The Corporations Law establishes that in these cases the exchange ratio of stock shall be based on the net worth value of the shares of both controlling and controlled companies, the assets and liabilities (of both of them) valued pursuant to the same criteria and on the same date, at market prices, or according to another criteria indicated by the CVM.⁸⁸ However, if the conditions for the exchange of the stock of the non-controlling shareholders are considered less advantageous than those resulting from such criteria, dissenting shareholders have the right to choose between having the exchange ratio adjusted or having their stock appraised and refunded.⁸⁹ To mitigate the problems associated with conflicting of interests that inevitable arise in these kinds of transactions, in 2008 the CVM enacted a Guideline Opinion (“*Parecer Orientação* No. 35/2008”) containing a number of procedures to be followed during the negotiation of the merger protocol (including those involving downstream mergers). These procedures include the creation of an independent committee to opine on the fairness of the merger.

As of 2001, delisting is only possible if the corporation that issued the stock, the majority shareholders, or the controlling corporation makes a tender offer to acquire the outstanding shares.⁹⁰ The price of the tender offer will be calculated based on

85. *Id.* at art. 45, § 1st.

86. See Mary Siegel, *Back To The Future: Appraisal Rights In The Twenty-First Century*, 32 HARV. J. ON LEGIS. 79 (1995) (surveying the history of the remedy in the United States).

87. A leading case on this topic involves VASP, formerly a Brazilian airline corporation which went out of business after bankruptcy. The CVM examined the exchange ratio of stocks and ruled in favor of the minority shareholders. See CVM Administrative Procedure 23/99 (“*Processo Administrativo Sancionador 23/99*”). Another leading case was the incorporation of Banco Santander Noroeste S.A. by its controlling company, Banco Santander Brasil S.A. After the CVM ruled in favor of minority shareholders, Banco Santander appealed in court, but the CVM decision was ratified. See CVM Administrative Procedure 24/04 (“*Processo Administrativo Sancionador 24/04*”) and decisions by the São Paulo Appeal Court (“*Tribunal de Justiça de São Paulo*”) Nos. 510.984-4/8, 219.385-4/2, and 516.357-4/0.

88. Corporations Law, art. 264.

89. *Id.* at art. 264, § 3d.

90. In Brazil, there is no distinction between admission to listing and admission to trading. Once a corporation goes public, all of its securities may be negotiated on a stock exchange (or on the OTC market) as long as the more

one or more of the following criteria: net assets appraised at market value, discounted cash flow, comparison by multiples, share quotation in the securities market, or other criteria adopted by the CVM.⁹¹ If less than 5% of all stocks issued by the corporation are outstanding after the expiration of the tender offer, the corporation can unilaterally decide to redeem these outstanding shares (squeeze out).⁹² For corporations listed in the Novo Mercado or in Level 2, the valuation for the tender offer cannot be lower than the economic stock value.⁹³

Finally, shareholders have a right of first refusal for the subscription of a capital increase in proportion to the number of shares they currently own.⁹⁴ In order to avoid capital increases made only for the purpose of diluting minority holders, the Corporations Law requires that every proposal to increase the corporation's capital contain a detailed explanation of why the capital increase is necessary and the criteria used for the calculation of the price of the stocks being issued.⁹⁵

specific trading requirements are complied with. Currently, the only Brazilian stock exchange trading stocks is BM&FBovespa. To be admitted to listing and, consequently, to have its securities admitted to trading, a corporation must also be registered with the CVM.

91. Corporations Law, art. 4, § 4th.

92. *Id.* at art. 4, § 5th.

93. Novo Mercado Listing Rules, item 10.1 and Corporate Governance Level 1 Listing Rules, item 10.1. The 2001 reform to the Corporations Law also established that if the controlling shareholder acquires stocks of a listed corporation that is already under his control, and these stocks increase his interest in a certain class of stocks in a way that reduces the market liquidity of the remaining stocks, the controlling shareholder must make a tender offer for such remaining stocks (Corporations Law, art. 4, § 6th). CVM Ordinance No. 361 of 2002, art. 26, established that such tender offer should be performed whenever the controlling shareholder acquires directly or indirectly, other than through an IPO, stocks which represent more than a 1/3 of the total stocks of each type or class of stocks of the corporation.

94. Corporations Law, art. 171. The message from the house ("*exposição de motivos*") grounding the Corporations Law contended that the "the elimination [of the right of first refusal] in listed companies is permitted only where the right of first refusal, besides rendering it difficult the organization and distribution of the issued stocks in the market, has no importance as an instrument for the protection of shareholders against the change of their capital stake, because anyone can acquire stocks in the market." See Erasmo Valladão Azevedo & Novaes França, *A Proteção dos Credores e Acionistas nos Aumentos de Capital Social*, in TEMAS DE DIREITO SOCIETÁRIO, FALIMENTAR E TEORIA DA EMPRESA 230-252 (São Paulo, Malheiros 2009); 2 MODESTO CARVALHOSA, COMENTÁRIOS À LEI DAS SOCIEDADES ANÔNIMAS 290 (São Paulo, Saraiva 1997).

95. Corporations Law, art. 170. The criteria for calculation of issuance price can only be the expected profitability of the corporation, the equity value,

C. Oversight and Information Rights

Minority shareholders typically exercise their oversight and information rights through the statutory audit committee (“*conselho fiscal*”). The corporation’s bylaws can, but need not, require the audit committee to function indefinitely.⁹⁶ When the audit committee is not permanent, it can be brought to act upon the request of shareholders representing 10% of the corporation’s voting stocks or 5% of the corporation’s nonvoting stocks.⁹⁷ All of the preferred shareholders holding nonvoting or restricted voting shares can jointly appoint a member of the audit committee in a separate voting session, and that same right is granted to minority shareholders who own at least 10% of the voting capital.⁹⁸ However, the ability of minority shareholders to restrict the controlling group of shareholders by means of the audit committee is limited because the law guarantees the right of the controlling group to appoint the majority of the members of the audit committee.⁹⁹

or market value. *See* MAURO RODRIGUES PENTEADO, AUMENTO DE CAPITAL DAS SOCIEDADES ANÔNIMAS (1988).

96. Corporations Law, art. 161.

97. *Id.* CVM Instruction No. 324 reduces the percentages of votes necessary to bring audit committees into action proportionally to the corporation’s capital.

98. The CVM recently issued a formal warning against the chairman of a shareholders’ meeting for him having blocked the attempt of a minority shareholder to appoint a member to the audit committee based merely on formal considerations. *See* CVM/RJ Administrative Procedure 2008/12062 (“Processo Administrativo Sancionador 2008/12062”), available at www.cvm.gov.br/port/inqueritos/2009/rordinario/inqueritos/TA%20RJ2008-12062%20Telebr%C3%A1s (last visited April 21, 2011).

99. Corporations Law, art. 161, § 4th. *See also* CVM Guideline Opinion No. 19/1990 (“Parecer Orientação No. 19/1990”) establishing that the controlling shareholder cannot appoint members to the audit committee using its preferred, nonvoting stocks. Recently there have been cases where controlling shareholders acted contrarily to this CVM guideline, and the CVM ruled such appointments illegal. *See* CVM Administrative Procedure 02/07 (“Processo Administrativo Sancionador 02/07”), where the CVM found abusive the appointment to the audit committee of persons connected to the controlling shareholder, where such appointment was made in a separate voting available at www.cvm.gov.br/port/inqueritos/2009/rordinario/inqueritos/IA%202002-07%20T%C3%A1xil%20Renaux%20SA.asp. Other cases on this topic include CVM Administrative Procedure 20/04 (“Processo Administrativo Sancionador 20/04”), available at www.cvm.gov.br/port/inqueritos/2008/rordinario/inqueritos/IA%2020-04%20Springer.asp; CVM Administrative Procedure 07/05 (“Processo Administrativo Sancionador 07/05”), available at www.cvm.gov.br/port/inqueritos/2007/rordinario/inqueritos/04_24_07-05.asp; and CVM Administrative Procedure 2002/4985 (“Processo Administrativo

The audit committee does not have powers to make corporate resolutions. Nevertheless, its members can individually give an opinion about certain topics, particularly as regards the integrity of the management's actions and the fulfillment by the officers of their legal duties.¹⁰⁰ Upon the request of any of its members, the audit committee can also request information from the administrative bodies, as well as require the preparation of special financial or accounting statements.¹⁰¹ In addition, the audit committee opines on the management's annual report and on the management's proposals and plans to increase corporate capital, to make new investments, to distribute dividends and to undergo incorporations, mergers or spin-off transactions.¹⁰² Moreover, it is in charge of calling shareholders' meeting if the officers fail to timely do so, and of examining the corporation's books on a quarterly basis.¹⁰³

Minority shareholders can also act independently of the audit committee. At the request of shareholders representing at least 5% of the total stock capital, a complete inspection of the books of the corporation may be ordered by the court, whenever acts contrary to the law or to the bylaws occur, or there are grounds to suspect that serious irregularities may be present.¹⁰⁴

Brazilian listed corporations must publish annual financial statements that should include a balance sheet, a statement of retained earnings, a statement of income and a statement of changes in financial position.¹⁰⁵ In December of 2007, the section of the Corporations Law dealing with financial statements was amended with a view toward bringing Brazilian GAAP closer to international accounting standards.¹⁰⁶ These amendments created

Sancionador 2002/4985”), available at www.cvm.gov.br/port/inqueritos/2005/ordinario/inqueritos/11_08_RJ2002-4985.asp (last visited April 21, 2011).

100. Corporations Law, art. 163.

101. *Id.* at art. 163, § 2d.

102. *Id.* at art. 163, III.

103. *Id.* at art. 163 V & VI.

104. *Id.* at art. 105.

105. *Id.* at art. 176.

106. Federal Law No. 11,638 of 2007. Furthermore, CVM Ordinance No. 457 of 2007 has established that “listed companies shall, starting from reporting periods ending in 2010, present their consolidated financial statements according to International Financial Reporting Standards-IFRS, as issued by the International Accounting Standards Board-IASB . . . Until the reporting period ending in 2009, public corporations may, optionally, present their consolidated

the statement of cash flows and the value added statement, changed rules concerning accounting criteria and methods, classification of assets, restrictions for the use of deferred asset accounts, established criteria for valuation of cash equivalents, intangible assets and assets allocated to long-term operations and long-term liabilities. In addition, a few regulations have been issued more recently with to the goal of standardizing information available to regulators and investors. Under CVM Ordinance n. 480, of 2009, issuers are required to send periodical information to CVM according to a new format and to keep the data available for investors (including on their webpage) for three years.¹⁰⁷ Chiefly among such information to be disclosed is that involving transactions with related parties and the remuneration of officers and directors.¹⁰⁸

Corporations listed at BM&FBovespa's special segments face higher disclosure requirements. At the Novo Mercado and at Level 2, corporations must prepare annual balance sheets pursuant to international accounting standards (US GAAP or IFRS), thereby improving the quality (and quantity) of information that is publicly available.¹⁰⁹ These corporations must disclose the existence of their securities that are held by controlling shareholders.¹¹⁰ They also hold public meetings with analysts and investors at least once a year, present an annual calendar with the relevant events for the forthcoming year (such as the dates of shareholder meetings,

financial statements in accordance with IFRS as issued by IASB, in lieu of Brazilian accounting standards.”

107. CVM Ordinance No. 480 of 2009, art. 13, §§ 1st and 2d.

108. Under the argument that it violated a constitutional right to privacy, the Brazilian Institute of Finance Executives of Rio de Janeiro (IBEF-Instituto Brasileiro dos Executivos de Finanças do Rio de Janeiro) questioned in court the constitutionality of the requirement on the remuneration of administrators. The CVM wants listed corporations to disclose the maximum, average, and minimum remuneration of the members of the board of officers and board of directors. The IBEF accepts the disclosure of global amounts, but contends that the illegality lies in that the proposed scheme allows the public to identify the CEO's compensation. The IBEF obtained a provisional remedy (“*medida cautelar*”) allowing its members not to disclose information on remuneration. See SLS 1.210-RJ, Justice Cesar Asfor Rocha, April 13, 2010 *available at* www.stj.gov.br (last visited April 21, 2011).

109. Novo Mercado Listing Rules, item 6.2 and Corporate Governance Level 2 Listing Rules, item 6.2.

110. Novo Mercado Listing Rules, item 9.1; Corporate Governance Level 2 Listing Rules, item 9.1; and Corporate Governance Level 1 Listing Rules, item 6.1.

release of financial results, etc.),¹¹¹ present detailed information about related party transactions,¹¹² and disclose on a monthly basis a summary of the transactions with derivatives and securities of the corporation that were carried out by the controlling shareholders.¹¹³

Officers of listed corporations have to inform the stock exchange, as well as publish in the press, any resolution of a general meeting or of the corporation's managing bodies. Further, they must disclose any material events which occur in the course of business that may substantially influence the market price of the securities issued by the corporation, or the decision of investors to sell, buy, or exercise any right pertaining to the corporation's securities.¹¹⁴ Under current CVM regulations, material events include the signing of contracts for the transfer of control of the corporation (even if under conditional provisions), changes in the control of the corporation (including through the execution, or amendments to a shareholder agreement), the authorization for listing securities issued by the corporation (in any domestic or foreign markets), changes in accounting criteria, and approval of stock options plans, among others.¹¹⁵ Furthermore, CVM regulations require the disclosure of information about sales of 5% blocks of voting stock or more. Disclosure is also necessary when the ownership of a type or class of stocks reaches 5% (or is reduced by 5%) of the total of such type or class.¹¹⁶

111. Novo Mercado Listing Rules, items 6.6 and 6.7; Corporate Governance Level 2 Listing Rules, items 6.6 and 6.7; and Corporate Governance Level 1 Listing Rules, items 4.4 and 4.5.

112. Novo Mercado Listing Rules, item 6.8; Corporate Governance Level 2 Listing Rules, item 6.8; and Corporate Governance Level 1 Listing Rules, item 4.6.

113. Novo Mercado Listing Rules, items 9.1.1 and 9.1.2; Corporate Governance Level 2 Listing Rules, items 9.1.1 and 9.1.2; and Corporate Governance Level 1 Listing Rules, items 6.1.1 and 6.1.2.

114. Corporations Law, art. 157 (Officers may however refuse to disclose such information when they feel that such disclosure would subject a legitimate interest of the corporation to risk (CVM Ordinance No. 258 of 2002)).

115. CVM Ordinance No. 358 of 2002.

116. CVM Ordinance No. 299 of 1999, art. 6; and CVM Ordinance No. 358 of 2002, art. 11 (administrators) and art. 12 (shareholders). (providing that corporations listed in BM&FBovespa's special listing segments must also disclose any direct or indirect ownership interest exceeding 5% of the corporation's capital stock, up to the level of individual shareholders (Novo Mercado Listing Rules, item 7.2, XV; Corporate Governance Level 2 Listing Rules, item 7.2, (XV); Corporate Governance Level 1 Listing Rules, item 5.2, (XV)).

D. Procedural Rights

Procedural rights are the inherent abilities to litigate and to demand legal remedies in court. Lawsuits against officers can be brought to court by the corporation upon the request of the minority shareholders, similarly to American-style derivative lawsuits.¹¹⁷ However, the effectiveness of these lawsuits is impaired by the fact that the shareholders' meeting (and not the board of directors, as typically occurs in the United States) has to approve them; and controlling shareholders have historically disfavored such lawsuits.¹¹⁸ These efforts are further hampered by the fact that in Brazil it is still common for officers to have close personal ties (often family ties) with the controlling group.

If the shareholders' meeting fails to approve the filing of derivative lawsuits, minority shareholders representing at least 5% of the corporation's aggregate stock capital may still file the claim.¹¹⁹ But the incentives for minority shareholders to file such claims are low, because they will bear the initial costs of the lawsuit and the verdict—which is somewhat uncertain and typically takes a long time—will go to the corporation. Hence, derivative lawsuits against officers are rare. Arguably, the procedural mechanism that could really protect minority shareholders is class action lawsuits. However, Brazilian procedural laws do not make room for them. The result is that minority shareholders remain more likely than controlling shareholders to be hurt by actions of the officers. After all, if officers hurt the controlling group they can be easily dismissed; yet if they hurt only the minorities, they remain unlikely to be sued.

117. A shareholder derivative suit is a lawsuit instigated by a shareholder of a corporation, not on the shareholder's own behalf, but on behalf of the corporation. The shareholder brings an action in the name of the corporation against the parties allegedly causing harm to the corporation. Often derivative suits are brought against officers or directors of a corporation for violations of fiduciary duties owed to the shareholders *vis-à-vis* the corporation. Any proceeds of a successful action are rewarded to the corporation.

118. Any shareholder may bring the action if proceedings are not instituted within three months from the date of the resolution of the shareholders' meeting approving the lawsuit. Corporations Law, art. 159.

119. *Id.* at art. 159.

E. Indirect Protection

Minority shareholders may also be indirectly protected through a number of legal remedies that aim at safeguarding the corporation from value-destructing actions of its controlling shareholders and officers. These are means of “indirect” protection because the immediate focus is on the protection of the corporation, and the minority shareholders only benefit from such actions to the extent that the improvement of the corporation’s state of affairs enhances their stock value and dividends payments.

The Corporations Law rules the exercise of voting in shareholder meetings and the exercise of controlling power in the course of the corporation’s businesses. Accordingly, each shareholder has a legal duty to vote in the corporation’s interest.¹²⁰ In practice, a vote will be deemed “abusive” if it is exercised with the intent to cause damage to the corporation or to other shareholders, or of obtaining an advantage for the shareholder or for a third party to which neither is entitled, and which results or may result in damage to the corporation or to other shareholders.¹²¹ In addition, each shareholder is barred from voting on any corporate resolutions dealing with the evaluation report on the property which he contributed to form the corporation’s capital, or on the approval of his own accounts as officer, or on any other resolution which may benefit him personally or in which he and the corporation may have conflicting interests.¹²²

120. *Id.* at art. 115.

121. *Id.*

122. *See id.*; Carvalhosa *supra* note 95, at 264 (both contending that the verification of the conflict of interests require a formal, abstract and *a priori* examination of the position of each shareholder in face of the corporation and the law). *But see* FÁBIO KONDER COMPARATO, CONTROLE CONJUNTO, ABUSO NO EXERCÍCIO DO VOTO ACIONÁRIO E ALIENAÇÃO INDIRETA DE CONTROLE EMPRESARIAL, DIREITO EMPRESARIAL, ESTUDOS E PARECERES 89 (1995) (arguing that the prohibition for voting under certain circumstances should be interpreted in such way that no shareholder shall obtain an advantage at the expense of other shareholders). *See also* LUIZ GASTÃO PAES DE BARROS LEÃES, CONFLITO DE INTERESSES, ESTUDOS E PARECERES SOBRE SOCIEDADES ANÔNIMAS 9-27 (1989); ERASMO VALLADÃO AZEVEDO E NOVAES FRANÇA, CONFLITO DE INTERESSES NAS ASSEMBLÉIAS DE S.A. 91 (1993); José Alexandre Tavares Guerreiro, *Conflito entre Sociedade Controladora e Controlada e entre Coligadas, No Exercício do Voto em Assembléias Gerais e Reuniões Sociais*, in 51 REVISTA DE DIREITO MERCANTIL 30 (1983) (all arguing that issues of conflicts of interest should be approached *a posteriori* and on a case-by-case basis). The CVM decisions do not follow a clear pattern. *See* Administrative Probe (“*Inquérito Administrativo*”) RJ 2001/4977 (deciding that a controlling

Controlling shareholders are required to use their controlling powers in order to make the corporation accomplish its purpose and perform its “social function,”¹²³ and have duties and responsibilities to the other shareholders of the corporation, to those who work for the corporation and to the community in which it operates, the rights and interests of which the controlling shareholder must loyally respect and heed.¹²⁴ The Corporations Law also contains a detailed description of the duties and responsibilities of the corporation’s officers.¹²⁵ Officers generally have fiduciary duties of diligence¹²⁶ and loyalty, as is common in

shareholder is *a priori* prevented from approving the payment of royalties under a contract to be entered into with the indirect controlling company). For a comment on this decision, see Erasmo Valadão Azevedo e Novaes França in 125 REVISTA DE DIREITO MERCANTIL 140-170 (2002). *But see* Administrative Probe (“*Inquérito Administrativo*”) CVM 2002/1153 (deciding that conflicts of interest should be analyzed *a posteriori* and on a case-by-case basis in order to verify whether there is an actual loss for the corporation).

123. See Fábio Konder Comparato, *A Reforma da Empresa*, in DIREITO EMPRESARIAL. ESTUDOS E PARECERES (1995) (examining the so-called “social function” of corporations).

124. Corporations Law, article 117, § 1st contains a non-exhaustive list of “abusive” actions which includes those circumstances where controlling shareholders (i) guide the corporation towards an objective other than in accordance with its corporate purposes clause or harmful to national interest, (ii) provide for the liquidation of a viable corporation or for the transformation, merger or spin-off of a corporation in order to obtain, for itself or for a third party, any undue advantage to the detriment of the other shareholders, of those working for the corporation or of investors in securities issued by the corporation, (iii) to provide for a statutory amendment, an issue of securities or an adoption of policies or decisions which are not in the best interests of the corporation but are intended to cause damage to the minority shareholders, to those working for the corporation or to investors in securities issued by the corporation, (iv) elect a corporation officer or audit committee member known to be unfit for the position or unqualified, (v) induce, or attempt to induce, any officer or audit committee member to take any unlawful action, or, contrary to their duties under this Law and under the bylaws, and contrary to the interest of the corporation, to ratify any such action in a general meeting, (vi) sign contracts with the corporation directly, through a third party or through a business in which the controlling shareholder has an interest, incorporating unduly favorable or inequitable terms, (vii) approve, or cause to be approved, irregular accounts rendered by corporation officers as a personal favor, or to fail to verify a complaint which he knows, or should know, to be well founded, or which gives grounds for a reasonable suspicion of irregularity, and (viii) subscribe stocks with the contribution of property unrelated to the purpose of the corporation. See also FÁBIO KONDER COMPARATO & CALIXTO SALOMÃO FILHO, O PODER DE CONTROLE NA SOCIEDADE ANÔNIMA (4th ed. 2005).

125. Corporations Law, arts. 153-160.

126. Brazilian case law on the duty of diligence is murky and offers no clear articulation of a “Business Judgment Rule” or similar doctrine. The Corporations Law states that the “officer shall not be personally liable for the commitments he undertakes on behalf of the corporation and by virtue of action

modern corporate legislation around the world.¹²⁷ There are also responsibilities that apply to the corporation itself. For instance, the corporation is liable for any loss caused to interested parties by errors or irregularities found in its corporate books.¹²⁸

The restrictions against trading stocks based on privileged information held by officers and controlling shareholders is another form of indirect protection of minority shareholders. The prohibition against insider trading had been inserted in the Corporations Law since its inception in 1976, but until recently enforcement was rare. It was only with the 2001 reform to the Corporations Law that the practice of insider trading was classified as a criminal offense.¹²⁹ However, it was not until 2009 that the

taken in the ordinary course of business; he shall, however, be liable for any loss caused when he acts: (i) within the scope of his authority, with fault or fraud; (ii) contrary to the provisions of the law or of the bylaws.” Corporations Law, art. 158. The 2008 financial crisis led to large losses to some listed corporations exposed to foreign exchange fluctuation in derivatives markets. Noteworthy cases include those of Sadia and Aracruz. In these cases, the corporations sued some of their officers, particularly their chief financial officers (source: Sadia’s minutes of shareholders meeting (“*assembléia geral extraordinária*”) dated as of April 6, 2009, and Aracruz’ minutes of shareholders meeting dated as of November 24, 2008, both available at www.cvm.gov.br (last visited April 21, 2011)). Completion of these lawsuits is expected to still take many years.

127. Under Brazilian Law, each officer is prohibited from performing any acts of generosity to the detriment of the corporation; borrowing money or property from the corporation or using its property, services or taking advantage of its standing for his own benefit or for the benefit of a corporation in which he has an interest or of a third party, without the prior approval of a general meeting or the administrative council; by virtue of his position, receiving any type of direct, or indirect, personal advantage from third parties, without authorization in the bylaws or from a general meeting; usurping a commercial opportunity which may come to his knowledge, by virtue of his position, for his own benefit or that of a third party (even if this is not harmful to the corporation); failing to exercise or protect corporation rights or, in seeking to obtain advantages for himself or for a third party, failing to make use of a commercial opportunity which he knows to be of interest to the corporation (although the law allows officers to contract with the corporation on arm-length basis); acquiring for resale at a profit property or rights which he knows the corporation needs or which the corporation intends to acquire. Corporations Law, arts. 154 and 155. The 2001 reform to the Corporations Law also included an express prohibition against insider trading. Art. 155 of the Corporations Law now states that “any officer who may receive any confidential information not yet revealed to the public shall not make use of such information to obtain any advantages for himself or for third parties by purchasing or selling securities.”

128. Corporations Law, art. 104.

129. *Id.* at art. 155, § 4t and art. 117. CVM Ordinance No. 31 of 1984 reinforced the prohibition to administrators and controlling shareholders to use privileged information for the obtainment of personal advantages while trading with securities. In fact, CVM Ordinance No. 31 of 1984 extended such prohibition to any person that could gain access to privileged information due to

public prosecution and the CVM filed the first lawsuit based on charges of insider trading. Charges were brought against persons involved in the merger of Perdigão and Sadia that occurred in 2006.¹³⁰

In spite of the myriad of regulations on the topic, the effective protection of minorities in Brazilian stock markets still hinges on at least two factors. First, on the improvement of the formal regulation itself. Sensitive issues include the quality, quantity and standardization of the information that is publicly disclosed, the use of poison pills by corporations with concentrated ownership, and the use of Brazilian Depositary Receipts by corporations with large operations in Brazil, among others.¹³¹

Second, in developing countries it is not uncommon to find fairly modern legislation that does not work well in practice. To a large extent, this depressing note applies to Brazil. In particular, Brazilian courts are largely deemed by corporate lawyers and other market players to lack the necessary expertise to delve into the intricacies of securities laws and the economic dynamics of securities transactions. This trait can be partly attributed to the absence of courts and judges specialized in corporate and securities transactions. In fact, Brazilian courts are remarkably slow and their decisions on corporate matters are somewhat unpredictable.¹³² As so, the interpretation and doctrinal analysis of corporate law is

her function or position. In 2002, CVM Ordinance No. 358 of 2002 objectively prohibited broader forms of insider trading. Accordingly, controlling shareholders, administrators, members of the audit committee, members of the board of directors, and members of any other statutory or advisory bodies to trade securities before the formal release by the corporation of notices required under the law in specific cases (“*fatos relevantes*”), or before the release of financial statements or of information on mergers and acquisitions involving the issuing corporation (art. 13). At the same time, the Capital Markets Law (Law No. 6,385 of 1976) was amended in order to criminalize the practice of insider trading (art. 27-D).

130. See LUIZ GASTÃO PAES DE BARROS LEÃES, *MERCADO DE CAPITAIS E INSIDER TRADING* (1982); JOSÉ MARCELO MARTINS PROENÇA, *INSIDER TRADING: REGIME JURÍDICO DO USO DE INFORMAÇÕES PRIVILEGIADAS NO MERCADO DE CAPITAIS* (2005).

131. See generally, Alexandre di Micelli da Silveira & Sete Erros, *Os Equívocos Cometidos pelas Companhias que Aproveitaram o Boom de IPOs* CAPITAL ABERTO, Jul. 2009, at 62-63 (Part I) and Aug. 2009, at 58-59 (Part II).

132. See Luciana Gross Cunha et al, 2010, Relatório ICJBrasil, fourth quarter 2009, available at www.direitogv.com.br/subportais/RelICJBrasil4TRI2009.pdf (last visited April 21, 2011) (with a broad empirical research showing that the Brazilian Judiciary Power is perceived by the Brazilian population as relatively slow, partial, dishonest, and difficult to reach).

insufficient to reflect the reality of the standards of protection of minority shareholders. The most sophisticated debates within securities litigation take place in the course of administrative disputes at the CVM. To understand the big picture, however, one should also examine the actual enforcement of laws and regulations, both in court and at the administrative level by the CVM. This exercise is touched upon in the next section.

IV. THE ENFORCEMENT OF PROTECTIVE MECHANISMS

Analyzing trends and identifying patterns in Brazilian case law is not an easy task.¹³³ First, the country does not adhere to principles of *stare decisis*, and inconsistency in case law over corporate matters is legendary. Second, the country adopts a diffuse system of judicial review (meaning that any judge can declare a law unconstitutional), making it harder to identify the predominant judicial opinions.¹³⁴ Finally, the degree to which judicial decisions are available for consultation over the internet varies depending on the topic and the state.

This situation reinforces the usefulness of conducting statistical analysis to understand Brazilian case law. In a recent study, Viviane Muller Prado and Vinícius Buranelli analyzed a sample of

133. Luciana Luk-Tai Yeung & Paulo Furquim Azevedo, Beyond Conventional Wisdom and Anecdotal Evidence: Measuring Efficiency of Brazilian Courts, *available at* www.anpec.org.br/encontro2009/inscricao.on/arquivos/000-84cae2373a83e83852e80f24733f709e.pdf (arguing that “little effort has been made to objectively measure the efficiency in Brazilian courts. Studies that combine quantitative and qualitative analysis are even harder to find”). *See also* José Marcelo Maia Nogueira & Regina Silvia Pacheco, A Gestão do Poder Judiciário nos Estudos de Administração Pública, *available at* www.consad.org.br/sites/1500/1504/00000091.pdf (last visited April 21, 2011).

134. The Brazilian judicial review system is based on the coexistence of centralized and decentralized judicial review. It is partly inspired by the American model, in the sense that private parties bring constitutional issues before ordinary courts in regular judicial proceedings. At the same time, it is also possible to bring actions in relation to constitutional matters directly to the Federal Supreme Court (Supremo Tribunal Federal, STF). The Federal Supreme Court also has jurisdiction to examine the constitutionality of statutes *in abstracto*. *See*, Miyuki Sato, *Judicial Review in Brazil. Nominal and Real*, 3:1 GLOBAL JURIST ADVANCES, art. 4 (2003) *available at* www.bepress.com/gj/advances/vol3/iss1/art4 (last visited April 21, 2011); *see also* Joaquim Barbosa, *Reflections on Brazilian Constitutionalism*, 12 UCLA J. INT'L L. & FOR. AFF. 181 (2007).

50 cases and 92 appeals¹³⁵ ruling on the protection of minority shareholders. This sample was comprised only of decisions given between 1998 and 2005 by the Superior Court of the State of São Paulo.¹³⁶ This is the state where the BM&FBovespa is located, and also the state where most listed corporations have their headquarters.

As illustrated in Table 1, most of the cases (66%) were brought to court by individuals, and institutional investors were the plaintiffs in only 18% of the cases. This finding contradicted the expectations of the researchers because the absence of class action mechanisms and problems of “rational ignorance”¹³⁷ would suggest that the institutional investors—who have higher stakes and are more sophisticated than the individuals—would be the plaintiffs in most cases. The explanation could be that institutional investors have enough powers to engender political arrangements with the controlling groups that avoid the need of going to court, or perhaps it has to do with the nature of the issues being litigated.

The corporations that issued the stocks were the defendants in most cases (88%). Controlling shareholders were the defendants in only 10% of the cases and the corporate officers in only 2%. In an environment where private benefits of control have historically been deemed to be high, the small amount of lawsuits against controlling shareholders may suggest that the regulations are lax on restricting controlling shareholders, and/or that proving a case against controlling shareholders is very difficult.

135. Different aspects of a case can be appealed many times, explaining why there are more appeals than cases in the sample. For methodological details on this research see Viviane Muller Prado & Vinícius Correa Buranelli, *Relatório da Pesquisa de Jurisprudência sobre Direito Societário e Mercado de Capitais no Tribunal de Justiça de São Paulo*, Cadernos Direito GV. Relatório de Pesquisa, no. 9, São Paulo, January 2006, available at www.direitogv.com.br/interna.aspx?PagId=HTKCNKWI&IDCategory=4&IDSubCategory=68 (last visited April 21, 2011).

136. Tribunal de Justiça do Estado de São Paulo (TJSP).

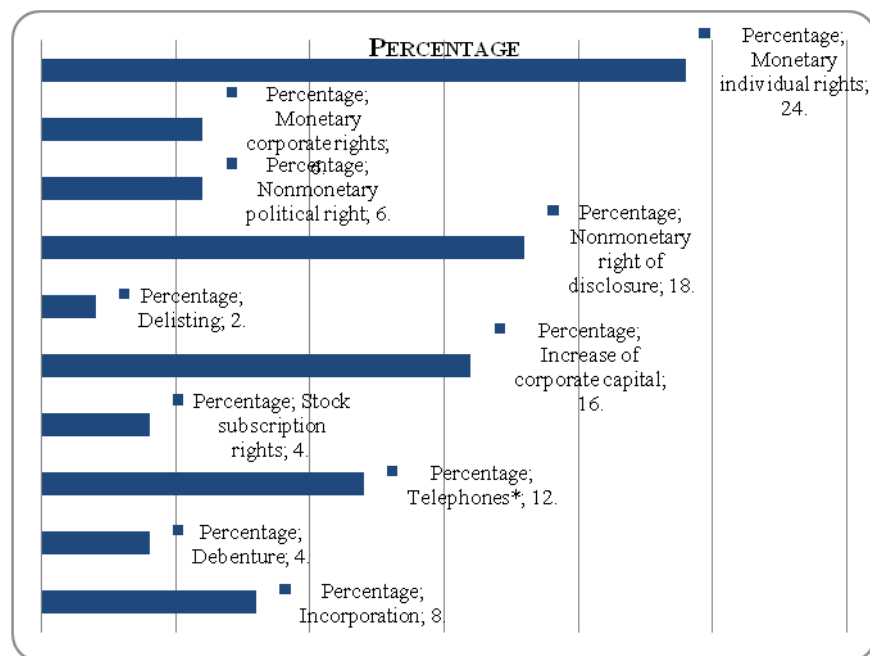
137. Ignorance about an issue is said to be “rational” when the cost of educating oneself about the issue sufficiently to make an informed decision can outweigh any potential benefit one could reasonably expect to gain from that decision, and so it would be irrational to waste time doing so.

PLAINTIFFS	PERCENTAGE
Institutional investors	18
Legal entities	14
Individuals	66
Public Prosecutor's Office	2
<i>Total</i>	<i>100</i>

DEFENDANT	PERCENTAGE
Corporation	88
Controlling shareholder	10
Officer	2
<i>Total</i>	<i>100</i>

The research also tried to identify the specific questions that were being litigated. As expected, the sample showed a larger proportion of lawsuits where shareholders tried to enforce their own direct interests and a lower proportion of lawsuits trying to hold officers or controlling shareholders liable.¹³⁸ Common topics included the request for recognition of dissent and appraisal, request for higher dividends payments, and the request for the exhibition of corporation's documents, etc.

138. See *supra* notes 117-118.



* Legal disputes with shareholders who received stocks of telecom public utilities upon the purchase of new telephone lines in past decades.

The CVM is in charge of supervising, investigating and punishing irregular acts that occur in the Brazilian capital market. In a recent study, Maria Cecília Rossi, Viviane Muller Prado and Alexandre Di Miceli have analyzed one hundred and one CVM decisions dealing with corporate law issues in the period between 2000 and 2006.¹³⁹ Approximately one in every four investors in the Brazilian market is an individual,¹⁴⁰ which highlights the importance of the CVM because individual shareholders tend to be less sophisticated and less powerful than corporate shareholders.

The CVM is in most cases responsible for initiating the investigations that eventually lead to an administrative proceedings seeking to punish some player in the capital market. In 61 of the cases (around 60% of the sample), the CVM became aware of some alleged wrongdoing by means of its own initiatives. Only in 29 cases (29%) did the CVM initiate the investigation after it was

139. Maria Cecília Rossi et al., *Decisões da CVM em Matéria Societária no Período de 2000 a 2006*, 37 REVISTA DE DIREITO BANCÁRIO E DE MERCADO DE CAPITAIS 88-106 (2007).

140. NATIONAL INSTITUTE OF INVESTORS HOME PAGE, http://www.ini.org.br/ini/site/informativo/Informativo_janeiro_2006_.pdf (last visited April 21, 2011).

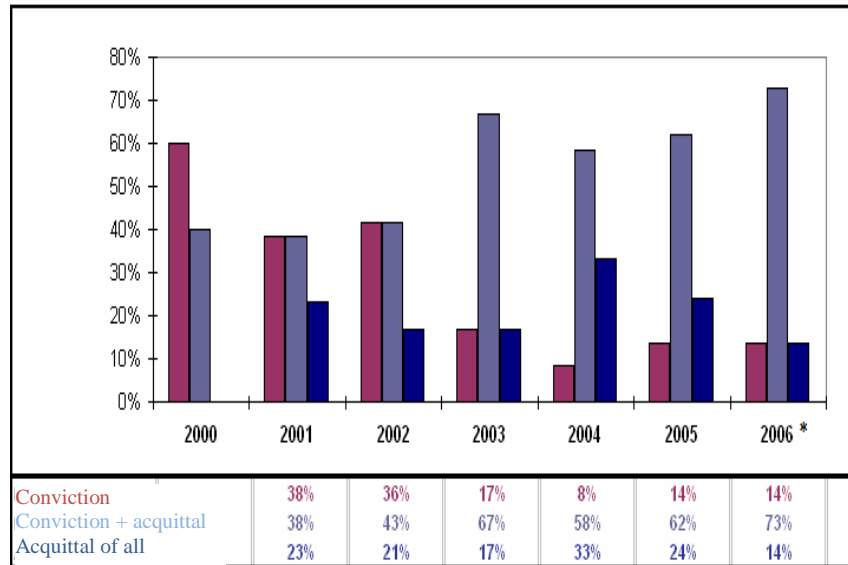
notified by minority shareholders, by investors in securities other than stocks, or by associations representing minority shareholders. Moreover, in four cases the CVM acted upon a notification by the Central Bank of Brazil, in three cases upon a notification of a member of an audit committee, and in one case the CVM acted upon a joint notification given by a member of the board of directors together with the corporation. In the remaining seven cases, the CVM acted because of other unrelated reasons.

Officers, directors, controlling shareholders were the main targets of the CVM's administrative processes. Here there is a sharp distinction with the judicial proceedings, in which the corporation itself was most often the defendant. The CVM filed 80 proceedings against officers, 66 against directors, 40 against the controlling shareholders, 11 against auditors, and 27 proceedings were filed against members that are not in any of these categories.

The length of time between the date of the infraction and the conclusion of the administrative proceeding lasted on average six years. In spite of some investments that had been made by the government to strengthen the CVM, the study could not identify any trend demonstrating a decrease in the duration of the proceedings.

Alleged infractions to disclosure requirements, abuse of controlling powers and wrongdoings by officers were the themes that appeared most frequently in the administrative proceedings. The high number of disclosure issues being litigated can be partially explained by the fact that these kinds of infraction are the easiest detected by the CVM, yet that does not mean that disclosure problems are the most relevant ones. Moreover, the degree of acquittal of the individuals being prosecuted for disclosure mistakes is rather high.

Table 2 below shows that the proportion of convictions over time had increased for certain groups and decreased for others. This is due to a change in the pattern of issuances of subpoenas by the CVM, because in recent times the CVM has been adopting a strategy of issuing subpoenas to a large number of individuals who may be potentially involved in wrongdoing, even if there is not clear evidence against any one of them individually sufficient to initiate a proceeding.



*Updated as of June 2006.

The main reasons for acquittal of the defendants were the inapplicability of the specific legal provision to the conduct that gave rise to the investigation, the absence of responsibility of the defendant for the specific conduct being prosecuted, and the absence of sufficient evidence. The cases of insider trading presented higher levels of acquittals, and this is probably due to the fact that they are harder to prove. In the cases where there was a conviction, the penalties most commonly applied were fines.

The relatively low levels of enforcement of the law and the legal uncertainties prevailing in Brazil with respect to corporate matters have contributed to the expansion of alternative dispute resolution methods, particularly through arbitration proceedings. Historically, Brazilian courts have been refractory to arbitration. Because of this, the 2001 amendment to the Corporations Law has expressly permitted the corporation's bylaws to specify arbitration as a means to resolve disputes involving shareholders. Moreover, BM&FBovespa has made the use of arbitration mandatory for corporations listed in the Novo Mercado and Level 2.

While the study found no statistical evidence on effectiveness and frequency of arbitration proceedings, anecdotal evidence shows that the use of arbitration in corporate matters involving

minority shareholders remains problematic.¹⁴¹ The election to use arbitration does not preclude the parties from requesting precautionary injunctions in court. Such precautionary injunctions can be appealed, often leading to time consuming court battles that can paralyze arbitration proceedings for a long time. Further and more importantly, court enforcement of arbitration awards can itself lead to lengthy court proceedings. This is particularly problematic because it is not uncommon to find cases where judges reopen the merits of the arbiter's decision. All of that suggest that the improvement of Brazilian courts should remain an important concern for investors, lawyers and policymakers in the years to come.

V. CONCLUSION

The protection of minority shareholders in Brazilian listed corporations is subject to a dual legal framework. The relative laxity of the Corporations Law lies in direct contrast with the much greater stringency of the rules established by BM&FBovespa for stocks traded in its Novo Mercado. In any case, the effectiveness of either framework is hampered by procedural problems both at the judicial and administrative levels. However, the existence of these problems should not obscure the fact that corporate governance practices have dramatically improved in Brazil over the past decade. BM&FBovespa would probably not have advanced so dramatically had it not been for a major change in the attitude toward corporate governance. A static approach leaves some questions as to the quality of the legal protection currently available to minority shareholders. Yet, examining a more dynamic, or historical approach, suggests a promising trend.

141. See Adriana Braghetta et al, *Arbitragem e Poder Judiciário: Uma Radiografia dos Casos de Arbitragem que Chegam ao Judiciário Brasileiro*, 6:6 CADERNOS DIREITO GV (Nov. 2009) (generally surveying arbitration proceedings in Brazil).

THE SLAVES AND SLAVERY OF MARIE CLAIRE CHABERT: FAMILIAL BLACK SLAVEHOLDING IN ANTEBELLUM LOUISIANA

Mitra Sharafi*

I. Introduction	188
II. Black Slaveholding and Manumission	193
III. The Legal Life of Marie Claire Chabert	196
IV. Threats to Familial Black Slaveholding	206
A. Debts	206
B. Wills	210
V. Conclusion	214

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I. INTRODUCTION

Black slaveholding was not unusual in antebellum America.¹ In 1830, one in seven slaves in New Orleans had a black master.² A quarter of all free black families in many Louisiana parishes held slaves.³ For over eighty years, scholars have disagreed over the nature of this type of slavery. Was it “real” and primarily profit-driven, like its white-master prototype? Or was black slaveholding an ingenious use of law that kept families and couples together, using nominal slavery to protect individuals from the dangers accompanying freedom? In 1924, African American historian Carter G. Woodson argued that black slaveholding was predominantly non-commercial in aim.⁴ The Woodson thesis was countered by a wave of literature asserting that most black slaveholding was primarily for profit. Both flavors of black slaveholding certainly existed. Since Woodson, however, the commercial variety has received greater attention.⁵ As Ariela

1. The device had a long history in Louisiana: black slaveholding had been permitted by law since the period of Spanish rule. J.P. Benjamin & T. Slidell, *Valsain v. Cloutier*, in DIGEST OF THE REPORTED DECISIONS OF THE SUPERIOR COURT OF THE LATE TERRITORY OF ORLEANS, AND OF THE SUPREME COURT OF THE STATE OF LOUISIANA 383 (New Orleans, John F. Carter 1834). On black slaveholding in Spanish Louisiana, see KIMBERLY S. HANGER, *BOUNDED LIVES, BOUNDED PLACES: FREE BLACK SOCIETY IN COLONIAL NEW ORLEANS, 1769-1803*, at 70-77 (1997); GARY B. MILLS, *THE FORGOTTEN PEOPLE: CANE RIVER'S CREOLES OF COLOR* 23-49 (1977).

2. Laurence J. Kotlikoff & Anton J. Rupert, *The Manumission of Slaves in New Orleans, 1827-1846*, *SOUTHERN STUD.* 177 (1980).

3. LOREN SCHWENINGER, *BLACK PROPERTY OWNERS IN THE SOUTH 1790-1915* 105 (1990).

4. Carter G. Woodson, *Free Negro Owners of Slaves in the United States in 1830*, *THE J. OF NEGRO HIST.* 41 (1924). On the work of black historians between 1913 and the 1940s, see Philip J. Schwarz, *Emancipators, Protectors, and Anomalies: Free Black Slaveowners in Virginia*, 95 *VA. MAG. OF HIST. AND BIOGRAPHY* 317, 319-320 (1987).

5. See e.g., *Diary of William Johnson*, in 1 WILLIAM JOHNSON'S NATCHEZ: THE ANTEBELLUM DIARY OF A FREE NEGRO 34-35 (William R. Hogan & Edwin A. Davis eds., 1968) (1951); R. Halliburton, Jr., *Free Black Owners of Slaves: A Reappraisal of the Woodson Thesis*, *S.C. HIST. MAG.* 129 (July 1975); MICHAEL P. JOHNSON & JAMES L. ROARK, *BLACK MASTERS: A FREE FAMILY OF COLOR IN THE OLD SOUTH* 141 (1984); *NO CHARIOT LET DOWN: CHARLESTON'S FREE PEOPLE OF COLOR ON THE EVE OF THE CIVIL WAR* 3 (Michael P. Johnson & James L. Roark eds., 1984); LARRY KOGER, *BLACK SLAVEOWNERS: FREE BLACK SLAVE MASTERS IN SOUTH CAROLINA, 1790-1860* 80-101 (1985); SCHWENINGER, *supra* note 3, at 22-25, 104-108 (1990); DAVID O. WHITTEN, *ANDREW DURNFORD: A BLACK SUGAR PLANTER IN ANTEBELLUM LOUISIANA* 57-67, 119-20 (1995). See also IRA BERLIN, *SLAVES WITHOUT*

Gross reminds us, conservative opponents of reparations for slavery stress profit-driven black slaveholding. For them, such emphasis assuages white guilt.⁶ A handful of scholars have swum against this current, continuing to focus on other strain of black slaveholding.⁷ This article joins their work, reinvigorating the Woodson perspective through an analysis of the previously unexamined legal papers of one familial black slaveholder in newly American New Orleans.⁸ Marie Claire Chabert (1769-1847) was a former slave who held her nieces and future husband in slavery.

MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 274-76 (1974); H.E. STERKX, THE FREE NEGRO IN ANTE-BELLUM LOUISIANA 202-220 (1972); FRANCES JEROME WOODS, MARGINALITY AND IDENTITY: A COLORED CREOLE FAMILY THROUGH TEN GENERATIONS 35-36 (1972); ARIELA J. GROSS, DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM 65 (2000). The same point has been made for Barbados and the Danish West Indies. See JEROME S. HANDLER, THE UNAPPROPRIATED PEOPLE: FREEDMEN IN THE SLAVE SOCIETY OF BARBADOS 146-153 (1974); NEVILLE A. T. HALL, SLAVE SOCIETY IN THE DANISH WEST INDIES: ST. THOMAS, ST. JOHN, & ST. CROIX 163 (1992).

6. Ariela Gross, *When is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CAL. L. REV. 283, 302 (2008).

7. Among these are LUTHER PORTER JACKSON, FREE NEGRO LABOR AND PROPERTY HOLDING IN VIRGINIA, 1830-1860 200-229 (1969); Schwarz, *supra* note 4, at 317-338; REBECCA J. SCOTT, DEGREES OF FREEDOM: LOUISIANA AND CUBA AFTER SLAVERY 27 (2005).

8. Papers Relating to the Estate of Marie Claire Chabert, Manumitted Slave (1805-64) (on file with the Princeton University Library, Louisiana Slavery and Civil War Collection, Manuscripts Division, Department of Rare Books and Special Collections) [hereinafter the Chabert Papers]. Translations from the French are my own. I am grateful to Jose-Luis Gastanaga for translating the one Spanish document in the Chabert Papers: Untitled Act of Sale (Feb. 7, 1805), *in* the Chabert Papers, folder 2. The Chabert Papers were compiled by Felix Limonge, who came upon them while collecting postage stamps some time before March 1926. He commented that “[a]mong this mass of papers, I have always prized very highly an account of its entirety and its uniqueness, the papers concerning Jacques Tisserand and his slave for life Marie Claire: in the hands of a fluent and competent writer, properly handled, they will furnish the theme for a capital historical novel showing the institution of slavery in a new light, never before attempted.” Felix Limonge, *Account of the Life of Marie Claire and Description of Documents* (typescript) *in* the Chabert Papers, folder 1, 1 recto. Limonge was probably a lawyer himself, possibly at Durant and Homer, the New Orleans firm involved in litigation relating to Chabert’s estate after her death. The firm was the law firm of republican politician and lawyer T. J. Durant, best known for his role as counsel in the Slaughterhouse Cases. The Slaughterhouse Cases, 83 U.S. 36 (1872). I have supplemented Chabert’s estate papers with death and notarial records from the Louisiana State Archives [hereinafter LSA] and the New Orleans Notarial Archives Research Center [hereinafter NONARC].

Familial black slaveholding was widespread in antebellum New Orleans.⁹ Louisiana case law is rich in examples of free parents owning their slave children, and free lovers owning their enslaved partners.¹⁰ At least 63 percent of the slaves emancipated by free blacks in Louisiana were family members.¹¹ Marie Claire Chabert was not unusual, then, in privileging the integrity and safety of her kin over their freedom. As an illiterate black woman, she maneuvered the trilingual legal rapids of newly American Louisiana by buying family members and a romantic partner, owning real estate, obtaining loans, creating wills, and engaging in litigation.¹² The Chabert papers illuminate a remarkable vein of African American involvement with the formal legal system.¹³

9. Sumner Eliot Matison, *Manumission by Purchase*, 33 J. OF NEGRO HIST. 153 (1948).

10. For parent-child slaveholding, see *Valsain v. Cloutier*, 3 La. 170 (1831); *Fuselier v. Masse*, 4 La. 423 (1832); *Mazerolle v. Françoise*, in 3 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 564 (Helen Tunncliffe Catterall ed., 1932). For slaveholding between lovers, see *Mingo v. Darby*, *Negro Diocou (Tiocou) v. D'Auseville*, and *Lange v. Richoux*, *Id.* at 407, 410, 500. In *Lange*, a free husband agreed to work for seven years without pay to buy his enslaved wife. See also *Succession of Marie Eva La Branche*, *Id.* at 441.

11. Kotlikoff & Rupert, *supra* note 2, at 180. For an example, see Rebecca J. Scott, *Public Rights and Private Commerce: A Nineteenth-Century Atlantic Creole Itinerary*, 48 CURRENT ANTHROPOLOGY 237, 241 (Apr. 2007).

12. Dating from between 1805 and 1864, Chabert's estate papers span an intriguing period in the legal history of Louisiana: the beginning of American rule after a century of oscillation between French and Spanish control. In 1712, Louis XIV issued a charter for the development of the Louisiana territory. Under the Treaty of Fontainebleau, the French king placed Louisiana under Spanish control in 1769. The French regained Louisiana under Napoleon in 1800, but actual possession did not occur until 1803, then lasting only three weeks (November 30-December 20 1803). The United States purchased Louisiana from the French and took control of the territory in 1803. JUDITH KELLEHER SCHAFFER, *SLAVERY, THE CIVIL LAW, AND THE SUPREME COURT OF LOUISIANA* 3 (1994). See also *LOUISIANA UNDER THE RULE OF SPAIN, FRANCE AND THE UNITED STATES, 1785-1807* (James A. Robertson ed., 1911).

13. Similarly, Judith Kelleher Schafer and Kelly Kennington have unearthed a rich body of case records attesting to slaves' freedom suits in the Louisiana and Missouri courts, respectively. JUDITH KELLEHER SCHAFFER, *BECOMING FREE, REMAINING FREE: MANUMISSION AND ENSLAVEMENT IN NEW ORLEANS, 1846-1862* 15-33 (2003); Kelly Marie Kennington, *River of Injustice: St. Louis's Freedom Suits and the Changing Nature of Legal Slavery in Antebellum America* (2009) (unpublished Ph.D. dissertation, Duke University) (on file with author). On suits involving self-purchase contracts, see also SCHAFFER, (2003) *supra* at 45-58.

Marie Claire Chabert was born into slavery in Louisiana in 1769.¹⁴ In her first will, she declared herself to be the legitimate daughter of Stanislas and Marie-Louise.¹⁵ Unlike southern common law, Louisiana's European civil law legacy allowed slaves to marry (with their masters' consent), although notably denying them any of the "civil effects which result from such contract."¹⁶ Louisiana had a formalized system of concubinage known as *plaçage*, and many of the slaves who went on to be manumitted were tied to white slave-owners through such relationships—whether as the children or mistresses of white slave-owners.¹⁷ Marie Claire Chabert was unusual in being neither daughter nor concubine of a white man.¹⁸ When she was 26, Chabert was purchased by Jacques Tisserand, a free black carpenter. Marie Claire and Jacques had been slaves on the same plantation before Jacques bought his own freedom.¹⁹ His will ordered the manumission of Chabert. As a result, upon his death Marie Claire became Marie Claire, "free woman of color" (f.w.c.), an epithet that would accompany her name from then on. The label

14. Death Record for Marie Claire Chabert (died Apr. 2, 1847). LSA, *supra* note 8.

15. "Je me nomme Marie Claire, Je suis créole de la Louisiane, fille légitime de Stanislas et de Marie-Louise, tous deux décédés." Testament de Marie Claire, Veuve Michel, Nègresse libre (Nov. 5, 1845) in the Chabert Papers, *supra* note 8, folder 20, 1 recto. See ROBERT CHESNAIS, LE CODE NOIR 44, Art. 7 (1998).

16. CHESNAIS, *supra* note 16, at 44, Art. 7. On the other consequences of slave status in Louisiana law, see also SCHAFFER (2003), *supra* note 13, at 153-154. MORGAN, *supra* author's note, (Art. 182).

17. Joan M. Martin, *Plaçage and the Louisiana Gens de Couleur Libre: How Race and Sex Defined the Lifestyles of Free Women of Color*, in CREOLE: THE HISTORY AND LEGACY OF LOUISIANA'S FREE PEOPLE OF COLOR 57-70 (Sybil Kein ed., 2000).

18. Kotlikoff & Rupert, *supra* note 2, at 176, 180-181; David C. Rankin, *The Tannenbaum Thesis Reconsidered: Slavery and Race Relations in Antebellum Louisiana*, SOUTHERN STUD. 18, 23 (Spring 1979); SCHAFFER, (1994), *supra* note 8, at 180-200. Marriage between whites and blacks was prohibited by the *Code Noir* of 1724. Chesnais *supra* note 15, at 43-34, Art. 6. See Dupré v. Boulard, 10 La. Ann. 411 (1855). Presumably the same prohibition applied to marriage between whites and people of mixed race.

19. During the Spanish period of Louisiana's history, slaves had the right of self-purchase. In the American period, slaves sometimes sued to have self-purchase contracts upheld, but they more commonly sought freedom through purchase (and eventual manumission) by a third party. See SCHAFFER, (1994), *supra* note 12, at 2-6; SCHAFFER, (2003), *supra* note 13, at 45-58; and THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619-1860 384-385 (1996).

was designed to separate free blacks from whites in all acts of legal record.²⁰

Between her manumission and death, Marie Claire purchased and held four of her nieces as slaves. She also bought an older male slave named Michel Bouligny, whom she later manumitted and married. Michel was 66 years old when he married Marie Claire. He died just a year later. Widowed, Marie Claire continued to purchase her nieces from their white owners, and acquired several lots of New Orleans property during the same period.²¹ In her will, she bequeathed her estate to her nieces, having ordered her executor to free them. She also ordered these nieces to buy and free another niece. Marie Claire Chabert died at the age of 78 on April 2, 1847.²²

This article begins with a discussion of the black slaveholding debate and the constant alternative against which familial black slavery defined itself: the law of manumission. At times when manumission was more difficult—and being free, more hazardous—familial black slaveholding was a pragmatic alternative. I next give an overview of Chabert's legal life as chronicled by her papers. Finally, the article focuses upon two specific features of the Chabert Papers that reflect the legal obstacle course through which a familial black slaveholder had to

20. Ellen Holmes Pearson, *Imperfect Equality: The Legal Status of Free People of Color in New Orleans, 1803-1860*, in *A LAW UNTO ITSELF? ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY 193-194* (Warren M. Billings & Mark F. Fernandez eds., 2001).

21. Marie Claire owned two lots in the Quartier du faubourg Ste Marie, Compté d'Orléans. See map in Plan, Survey and Examination of Title of two lots sold to Marie Claire Chabert by J. Bocage for \$650 (Sept. 14, 1810) in the Chabert Papers, *supra* note 8, folder 8, 1 recto. Around the same time, Marie Claire also seems to have held property outside of New Orleans. I am grateful to Trish Nugent at the New Orleans Notarial Archives Research Center for drawing my attention to the Act of Oct. 20, 1810. De Armas notarial volume (1810), NONARC, *supra* note 8. At the time of Marie Claire's second and final will, she bequeathed property on faubourg Ste Marie and rue St Jean. Testament de Marie Claire (Nov. 12, 1846) in the Chabert Papers, *supra* note 8, folder 23, 1 verso. Marie Claire died in a house on this property; it was probably her home. Death Record for Marie Claire Chabert. LSA, *supra* note 8. The faubourg Ste Marie property appears to have been prime real estate in the commercial center of New Orleans. Samuel Wilson, Jr., *Early History of Faubourg St. Mary*, in 2 *NEW ORLEANS ARCHITECTURE: THE AMERICAN SECTOR* 3-48 (Mary Louise Christovich et al. eds., 1972). Marie Claire's property tax receipts are also among her papers: Tax Receipts (1811-1845) for the City of New Orleans, Parish of Orleans, Territory of Orleans, and State of Louisiana in the Chabert Papers, *supra* note 8, at folder 24.

22. Death Record for Marie Claire Chabert. LSA, *supra* note 8.

navigate. First, I analyze clauses in the documents that underscore the threat that banks and white wives posed to Chabert's slave ownership. Second, I look at the careful drafting of Chabert's wills, an acknowledgment of the risk of testamentary invalidation under the law of slavery. By dissecting these legal features of the Chabert Papers, the article offers a more textured picture of how this alternative legal regime worked. In offering a microhistorical approach to non-white Atlantic Creole family history, it joins a body of work most recently exemplified by Rebecca Scott's masterful study of the Tinchant family.²³

II. BLACK SLAVEHOLDING AND MANUMISSION

I adopt the term *familial* to describe one type of black slaveholding because it is more apt than terms like *benevolent* or *protective*. Families, like slavery itself, could be exploitative in certain ways and protective in others. Familial black slaveholding was protective in a narrow, legal sense. It protected the slave from being forced to leave the state through removal laws or African resettlement schemes. It protected him or her from being kidnapped and sold back into "real"—or commercial—slavery. However, these slaves were not protected against other forms of exploitation. For instance, the fact that a person was held in slavery by a friend, relative or spouse did not prevent profit-driven elements from creeping into the relationship.²⁴ The black

23. Scott, *supra* note 11, at 237-256. See also comments by Cécile Vidale in Scott, *supra* note 11, at 252.

24. In the Louisiana case of Mathurin v. Livaudais, the free brother of a slave opposed the slave's manumission. Mathurin v. Livaudais, 5 Mart. (n.s.) 301 (1827). The free brother probably wanted to exclude the slave from inheriting their father's money. The judge called the free brother's demand "one of the harshest . . . and the most revolting to every principle of equity and justice, that has, as yet, fallen under our consideration." *Id.* See also SCHAFER (1994), *supra* note 12, at 216-217; SCHWENINGER, *supra* note 3, at 24-25. In an 1835 case, a mother bought her son then attempted to claim his property as her own at the expense of her son's widow on the basis of his slave status. The judge called her claim "novel and repulsive," and rejected it: "[a] mother. . . comes forward, after his death, to claim the fruits of his industry, on the allegation that her son lived and died her slave; that he was a mere thing." Montreuil v. Pierre, in JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, *supra* note 10, at 508. In a case heard in 1854 and 1856, a free woman of color inherited her brother's estate then tried to sell her sister-in-law and seven nieces and nephews, all of whom had lived as if free for over twenty years. She was unsuccessful. Eulalie v. Long and Mabry, 9 La. Ann. 9 (1854);

slaveholding at the heart of this article was familial in the widest sense of the term: I include romantic partners and even friends who were treated like kin.²⁵

The law of manumission was the process against which familial black slaveholding defined itself.²⁶ Familial black slaveholding linked itself to manumission law in a relationship of inverse proportionality: the less manumission was feasible, the more familial black slaveholding was sustained. To begin with, behavior-based requirements for manumission in Louisiana limited the number of slaves deemed eligible for manumission. Before a manumission could be granted, a declaration of the intention to manumit had to be posted on the courthouse door for forty days so that any public opposition could be filed.²⁷ To be eligible for manumission, a slave had to be at least thirty years old and must have “behaved well at least for four years preceding his emancipation.”²⁸ Michel’s petition of manumission to the police jury attested to “his good morals and character,” but not all slaves would have fallen into the same non-subversive category.²⁹

Even for those who were eligible for manumission, freedom was a risky business. The assumption that liberty trumped safety and family integrity ignores the many hazards of emancipation. In many states, removal laws required freed slaves to leave the state soon after being manumitted, forcing them to choose between

Eulalie v. Long and Mabry, 11 La. Ann. 463 (1856); SCHAFER (1994), *supra* note 12, at 234-236. *See also* Jackson, *supra* note 7, at 213; Kennington, *supra* note 13.

25. It should also be noted that people of color who were unconnected by blood, intimacy or friendship sometimes entered into master-slave relationships. These slaves paid back their new master through their labor, after which point the master emancipated them. *See, e.g.*, the complex case of John Berry Meachum, *infra* note 44. This genre of black slaveholding, which arguably falls between commercial and familial varieties, sits beyond the scope of this article. It deserves further scholarly attention.

26. On Louisiana manumission law, *see* Ariela J. Gross, *Legal Transplants: Slavery and the Civil Law in Louisiana*, SOC. SCI. RES. NETWORK, May 18, 2009, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1403422 (last visited April 21, 2011). For the later period of 1855-1857, *see* SCHAFER (2003), *supra* note 14, at 71-96.

27. MORGAN, *supra* author’s note, at Art. 187.

28. *Id.* at Art. 185. Nolé v. de St. Romes and wife, in JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, *supra* note 10, at 549; SCHAFER (1994), *supra* note 12, at 237-241.

29. Police Jury Petition (Apr. 6, 1835) in the Chabert Papers, *supra* note 8, folder 12, 1 recto.

freedom, on the one hand, and friends and family, on the other.³⁰ As intended, removal laws gave slaves one more reason to remain slaves.³¹ Judith Kelleher Schafer notes cases in which freed people of color sold themselves back into slavery to avoid being forced to leave.³² Here was one place where familial black slaveholding did its work: being a nominal slave owned by a loved one could be preferable to *de jure* freedom in some unknown setting. This function of familial black slaveholding may have been less critical in Marie Claire's state than elsewhere. In Louisiana, an Act of 1830 required freed slaves to leave the state within 30 days, their former masters posting \$1,000 security bonds to ensure their departure.³³ However, local manumission juries could permit freed slaves to remain in the state—and they did. Virtually all freed slaves in Louisiana were allowed to stay.³⁴ Chabert's manumitted slaves were no exception.

Even with the removal laws softened, there were other dangers to consider. Owning one's loved ones could prevent them from being kidnapped and re-enslaved by profit-driven masters.³⁵ Equally, it could prevent them from being sent "back" to the African resettlement colony of Liberia, a process that was made mandatory for all Louisiana manumissions within a decade of

30. On the case of Baltimore, see RALPH CLAYTON, SLAVERY, SLAVEHOLDING, AND THE FREE BLACK POPULATION OF ANTEBELLUM BALTIMORE 9-11 (1993). On petitions from free people of color requesting permission to remain in the state, contrary to the removal laws, see The Race to Slavery Petitions Project (under "Right to reside in state") (2009), http://library.uncg.edu/slavery_petitions (last visited April 21, 2011).

31. For a case of a woman who returned to slavery in order to remain with her husband, see HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925 35 (1976). For cases of freed people of color who chose to return to slavery, see SCHAFFER (2003), *supra* note 13, at 152-162.

32. SCHAFFER (2003), *supra* note 13, at 145-162.

33. SCHAFFER (1994), *supra* note 12, at 181-182.

34. Kotlikoff & Rupert, *supra* note 2, at 173; Judith Kelleher Schafer, *Forever Free from the Bonds of Slavery: Emancipation in New Orleans, 1855-1857*, in A LAW UNTO ITSELF? ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY, *supra* note 20, at 164.

35. Writing on a slightly later period, Judith Kelleher Schafer notes that "[f]ree people of color in the North and the South always lived in fear of being abducted and sold as slaves for life." SCHAFFER (1994), *supra* note 12, at 128. See also *Id.* at 103, 106-108; TOMMY L. BOGGER, FREE BLACKS IN NORFOLK VIRGINIA 1790-1860: THE DARKER SIDE OF FREEDOM 99-101 (1997); CAROL WILSON, FREEDOM AT RISK: THE KIDNAPPING OF FREE BLACKS IN AMERICA, 1780-1865- (1994); CLAYTON, *supra* note 29, at 45-50.

Marie Claire's death.³⁶ In places like the French Antilles, Barbados, and Jamaica, free people of color held their relatives as slaves because they could not afford to pay the heavy emancipation taxes introduced in the late eighteenth century.³⁷ The duties and risks associated with exiting slavery made freedom frightening. It should come as no surprise that many preferred to structure their lives through familial black slaveholding.

III. THE LEGAL LIFE OF MARIE CLAIRE CHABERT

Sometime before 1799, Jacques Tisserand bought his freedom from his New Orleans master, Don Bartolomeo Le Breton.³⁸ Jacques was a carpenter. Like most slaves who freed themselves by self-purchase, he did so through the extra earnings of his trade.³⁹ After Le Breton died in 1799, Jacques Tisserand bought "Maria Clara, negra," from the Le Breton estate for \$930 (930 piastres). This was a high price to pay, but it is possible that being of child-bearing age increased Marie Claire's value. It is also possible that Marie Claire was attractive, and commanded a price on par with other pretty young women sold in the "fancy" trade.⁴⁰ According to the Spanish Act of Sale, Marie Claire was a healthy 26-year-old woman "with no visible defects." She was a vendor

36. SCHAFFER (1994), *supra* note 12, at 8-12; Schafer, *Forever Free from the Bonds of Slavery: Emancipation in New Orleans, 1855-1857*, in *A LAW UNTO ITSELF? ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY*, *supra* note 20, at 149-151, 156. *See also* AFRICAN-AMERICAN EXPLORATION IN WEST AFRICA: FOUR NINETEENTH-CENTURY DIARIES 9-10 (James Fairhead et al. eds., 2003); MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATION OF HUMANITY AND INTEREST* 202-204 (1981); *Heirs of Henderson v. Executors*, in *JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO*, *supra* note 10, at 647. On the African colonization movement generally, *see* P. J. STAUDENRAUS, *THE AFRICAN COLONIZATION MOVEMENT 1816-1865* (1961); CLAUDE A. CLEGG III, *THE PRICE OF LIBERTY: AFRICAN AMERICANS AND THE MAKING OF LIBERIA* (2004).

37. HANGER, *supra* note 1, at 71.

38. On the right of self-purchase in Louisiana law, *see supra* note 19.

39. Matison, *supra* note 9, at 156. *See also* DYLAN C. PENNINGROTH, *THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH* 51 (2003); Alison Carll-White, *South Carolina's Forgotten Craftsman*, 86 S.C. HIST. MAG. 32-38 (1985); Laura Foner, *The Free People of Color in Louisiana and St. Domingue: A Comparative Portrait of Two Three-Caste Slave Societies*, 3 J. OF SOCIAL HIST. 407 (1969).

40. *See* WALTER JOHNSON, *SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET* 113-115, 155 (1999); DEBORAH GRAY WHITE, *AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH* 37 (1999).

and domestic slave.⁴¹ After many offers and counter-offers, she was sold to her friend, “Santiago Tixerand” (Jacques Tisserand), the highest bidder.⁴²

Jacques’ will was taken in 1808 on the plantation of Mr. I. Pé. The former slave died soon after. In his will, Jacques revealed that his ownership of Marie Claire was a means of emancipation: “I declare that I bought the negress Marie Claire with the intention of giving her freedom, and that from then on I considered her to be treated as free.”⁴³ Black slaveholding often functioned as a temporary holding station, rather than a final destination. Enslaved loved ones commonly waited in this intermediate state until official manumission became practicable.⁴⁴

The nature of Jacques and Marie Claire’s relationship was left vague in the will. The sum of \$930 would be a huge amount to pay for a friend, but it is also possible that Marie Claire promised to pay Jacques back.⁴⁵ Jacques’ will named Marie Claire as his universal heir and bequeathed to her his entire estate “in consideration for her good service and for the friendship that I had

41. On urban peddling among slave women in Louisiana, see Lois Virginia Meacham Gould, *In Full Enjoyment of their Liberty: The Free Women of Color of the Gulf Ports of New Orleans, Mobile, and Pensacola, 1769-1860* 58 (1991) (unpublished Ph.D. dissertation, Emory University) (on file with author).

42. “. . . se puso en Venta otra Negra de la dicha sucecion nombrada Maria Clara, como de Veinte y seis años, sana, y sin tachas, Vendedora y Doméstica, rematada despues de varias pujas y repujas, a favor del Negro libre nombrado Santiago Tixerand por la Cantidad de nueve cientos y treinta ps. como mayor postor.” Untitled Act of Sale (Feb. 7, 1805) (in Spanish) in the Chabert Papers, *supra* note 8, folder 2, 2 recto. Many thanks to Jose-Luis Gastanaga for his translation.

43. “Je déclare que j’avois acheté la négresse Marie Claire dans l’intention de lui donner la liberté, et que je l’ai dès lors considérée traitée comme libre.” Will of Jacques Tisserand (1808), in the Chabert Papers, *supra* note 8, folder 3, 1 verso.

44. See Rebecca Scott, Presentation at the Conference on “L’Expérience Coloniale Dynamiques des Echanges dans les Espaces Atlantiques à l’Epoque de l’Esclavage (XVe-XIXe siècles)”: Public Rights and Private Commerce: A Nineteenth-century Atlantic Creole Itinerary (June 22, 2005).

45. The use of black intermediary purchasers was a common practice. An example was John Berry Meachum, a slave who freed himself and his family through self-purchase, then bought twenty slaves over his lifetime, encouraging them to buy themselves from him through reasonable repayment schemes. Matison, *supra* note 9, at 166. For a more ambiguous interpretation of Meachum, see Kennington, *supra* note 44, at 185-192.

with her.”⁴⁶ His estate was worth about \$600 before payment of his bills for carpentry tools. He declared that he had never been married but had one daughter named Manon. Jacques requested that Marie Claire give \$200 to his daughter. Manon was the slave of her aunt, Constance Tisserand, Jacques’ then unmarried sister.

Marie Claire’s notice of manumission was issued on October 18, 1808.⁴⁷ It was accompanied by certification that no opposition to her manumission had been filed by any member of the public.⁴⁸ Marie Claire was about forty years old when she became a free woman of color.⁴⁹

In the spring and summer of 1809, Marie Claire tried to give \$200 to Manon, as required by Jacques’ will. However, Manon’s owner and aunt, now married to a Mr. Darreah, objected. In a move that reminds us that familial slavery could be exploitative, Jacques’ sister claimed the money for herself and her new husband. She argued that because a slave could not hold property by law, all property accruing to Manon passed automatically to herself (Mrs. Darreah). Marie Claire eventually gave up. Her Act of Payment of \$200 to the couple acknowledged that, by law, Manon could not possess property in her own right.⁵⁰

Among Chabert’s papers are court-related documents probably pertaining to the distribution of Jacques Tisserand’s estate.⁵¹ The

46. “. . . en considération de ses bons services et de l’amitié que je lui ai portée.” Will of Jacques Tisserand (1808), in the Chabert Papers, *supra* note 8, folder 3, 1 verso.

47. Act of Manumission of Marie Claire (Nov. 18, 1808), in the Chabert Papers, *supra* note 8, folder 4.

48. Notice (Oct. 7, 1808), in the Chabert Papers, *supra* note 8, folder 4.

49. “[B]y virtue of a decree issued by the judge of the Parish and City of New Orleans, His Honour Moreau Lislet . . . and by consequence of a declaration of will by the said deceased Negro, [he declares] that he frees and freely gives full and complete liberty to no longer be subjected to slavery to the named Marie Claire, negress of about forty years of age, slave of this succession . . . from this day on.” (“. . . [E]n vertu d’un décret rendu par le juge de la Paroisse et Cité de la Nlle Orléans le Se Moreau Lislet . . . et en conséquence d’une déclaration du testament du dit nègre décédé declare par [se] presenter qu’il affranchit et donne liberté pleine et entière et gratuitement pour n’être plus sujete à l’esclavage à la nommée Marie Claire négresse d’environ quarante ans esclave de cette succession . . . à compter de ce jour.”) Act of Manumission of Marie Claire (Nov. 18, 1808), in the Chabert Papers, *supra* note 8, folder 4, 1 recto.

50. Act of Payment (July 29, 1809), in the Chabert Papers, *supra* note 8, folder 5, 1 recto.

51. Bills for Court Expenses (for \$75 on Apr. 19, 1809, and for \$12, undated), in the Chabert Papers, *supra* note 8, folder 6.

cataloguer noted the large number of legal services provided to Marie Claire for free, she being of meager means.⁵² The next year (1810), Marie Claire bought land from Joseph Bocage for \$650, a sum roughly equivalent to the money she inherited from Jacques Tisserand.⁵³ Marie Claire seems to have invested Jacques' money in real estate. This leaves unanswered the question of how Marie Claire supported herself. Marie Claire may have learned to be a good businesswoman while she was a vendor during her years as a slave.⁵⁴ Equally though, Marie Claire may have specialized in any of a range of semi-skilled trades. She may have worked as a seamstress, hairdresser, nurse, or midwife.⁵⁵ There was also the business of inn-keeping, an enterprise undertaken almost exclusively by free women of color in port cities of the Gulf of Mexico and the Caribbean. Innkeepers often doubled as brothel madames. The joint trade allowed them to raise the capital needed to launch other business ventures.⁵⁶ Marie Claire Chabert owned property in a neighborhood that suggests that she may have owned a brothel. Her three lots were situated in an area where prosecutions for brothel-keeping occurred.⁵⁷ Most brothels in New Orleans were run by free women of color in Marie Claire's period, and were generally tolerated by the authorities.⁵⁸

In 1827, Marie Claire bought her niece, Marie Jeanne, from Jean François Laville for \$180.⁵⁹ Marie Jeanne was about 55 years old. The compiler of the Chabert papers stated that Marie Claire

52. Limonge, Account of the Life of Marie Claire (typescript), in the Chabert Papers, *supra* note 8, folder 1, 5 recto.

53. Act of Sale (August 11, 1810), in the Chabert Papers, *supra* note 8, folder 8, 1 verso.

54. Untitled Act of Sale (Feb. 7, 1805) (in Spanish), in the Chabert Papers, *supra* note 8, folder 2, 2 recto.

55. STERKX, *supra* note 5, at 231-232.

56. *Id.* at 229-231; Annie Lee West Stahl, *The Free Negro in Antebellum Louisiana*, 25:2 *LA. HIST. Q.* 372-373 (1942). On Bridgetown, Barbados, see JEROME HANDLER, *THE UNAPPROPRIATED PEOPLE: FREEDMEN IN THE SLAVE SOCIETY OF BARBADOS* 133-138 (1974).

57. On Chabert's property, see *supra* note 21. Schafer notes six brothel-keeping cases in 1853 from the same neighborhood (*i.e.*, the Phillippa-Gravier-Perdido area). JUDITH KELLEHER SCHAFFER, *BROTHELS, DEPRAVITY, AND ABANDONED WOMEN: ILLEGAL SEX IN ANTEBELLUM NEW ORLEANS* 139 (2009).

58. Judith Kelleher Schafer's study of brothel-owner prosecutions suggests that New Orleans authorities tolerated prostitution: there was "almost no effort to restrain prostitution in antebellum New Orleans." SCHAFFER (2009), *supra* note 56, at 144.

59. Act of Purchase (Apr. 14, 1827), in the Chabert Papers, *supra* note 8, folder 9, 1 recto-verso.

also bought another niece and manumitted the two women around the same time.⁶⁰ The second niece may have been Louise Jarreau, a free woman of color who was treated generously in Marie Claire's last will. It is impossible to know whether Marie Claire or her nieces provided the purchase money.

Five years later, in December 1832, Marie Claire bought a 63-year old male slave named Michel from the widow of Francisco Bouligny, Madame Louise d'Auberville. During Spanish rule, Francisco Bouligny had been Lieutenant-Governor of Louisiana, and had fought the British in the colony in the 1770s and 80s.⁶¹ Three years passed, then the files contain Marie Claire's Police Jury Petition for manumission of her slave Michel (April 6, 1835). The petition was signed by Marie Claire's attorney and notary public Louis T. Caire, two men by the names of Monsieurs Garnier and Strawbridge, and by Marie Claire. Marie Claire was illiterate; she signed all legal documents with an X. The manuscripts do not reveal how she obtained expert legal advice, nor how she did so for free. However, particular notary publics in New Orleans specialized in providing legal services for free people of color; Louis R. Caire was one.⁶² The petition declared that Michel was "a good and faithful servant of good morals and character and that he may be very easily maintain himself by his labor and industry."⁶³ The police jury was a panel of six local government members who exercised the police power to regulate everything from road maintenance and poor relief to the manumission of slaves.⁶⁴ They considered Michel's case in two sittings, ultimately manumitting him with permission to remain in the state. It was standard to grant permission during this period in New Orleans.⁶⁵ Michel's deed of manumission followed on 12 June 1835.⁶⁶

60. Limonge, Compiler's Account of the Life of Marie Claire (typescript), in the Chabert Papers, *supra* note 8, folder 1, 2 recto.

61. See GILBERT C. DIN, FRANCISCO BOULIGNY: A BOURBON SOLDIER IN SPANISH LOUISIANA (William J. Cooper ed. 1993).

62. Sally Kittredge Evans, *Free People of Color*, in IV NEW ORLEANS ARCHITECTURE: THE CREOLE FAUBOURGS 26-27 (Roulhac Toledano et al. eds., 1974).

63. Police Jury Petition (Apr. 6, 1835), in the Chabert Papers, *supra* note 8, folder 12, 1 verso.

64. See JOHN R. FICKLEN, HISTORY AND CIVIL GOVERNMENT OF LOUISIANA 160-162 (1901).

65. Extract from Proceedings of Police Jury (Apr. 25, 1835, June 1, 1835), in the Chabert Papers, *supra* note 8, folder 12, 1 recto. See Schafer, *Forever Free from the Bonds of Slavery: 'Emancipation in New Orleans, 1855-*

Later that year, Marie Claire married Michel. She was about 61 years old. He was about 66. Marie Claire and Michel had little more than a year of married life together; Michel died late in 1836. Marie Claire's papers include a special permit from the night watch to allow some friends to visit her home for Michel's wake.⁶⁷ Night assemblies for free blacks were generally forbidden.⁶⁸ There is also a bill for \$30.25 from Fernandez, the undertaker, for burying Michel.⁶⁹

Marie Claire borrowed money from the Honoré family, in part for Michel's tomb and funeral expenses. Her files contain papers relating to two loans of roughly \$500, one in 1836 and the other two years later.⁷⁰ The Honorés charged 10% interest on the loan, a rate of interest that, at least in the following decade, would be considered so high as to constitute usury, forfeiting the creditor's claim to any interest at all.⁷¹ The compiler Limonge noted that the

1857, in *A LAW UNTO ITSELF? ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY*, *supra* note 20, at 146.

66. "There was no opposition to the manumission of the said slave . . . Consequently, the said Marie Claire declares free and frees genuinely before those present the said Michel to enjoy all the rights, advantages, and prerogatives that freemen enjoy, to relinquish generally in favor of the said Michel all property rights whatsoever which she may hold over him." (" . . . [I]l n'y a pas eu d'opposition à l'affranchissement du dit esclave... En conséquence la dite Marie Claire déclare affranchie et affranchit réellement par les présentes le dit Michel pour par lui jouir de tous les droits, avantages et prérogatives dont jouissent les personnes libres, de dessaisissant en faveur du dit Michel de tous les droits de propriété généralement quelconques qu'elle peut avoir sur lui.") *Affranchissement Marie Claire à Michel* (June 12, 1835), in the Chabert Papers, *supra* note 8, folder 12, 1 recto.

67. Night Watch Permit (Nov. 18, 1836), in the Chabert Papers, *supra* note 8, folder 13, 1 recto.

68. Rankin, *supra* note 18, at 28.

69. Undertaker's Bill (Nov. 28, 1836), in the Chabert Papers, *supra* note 8, folder 14, 1 recto.

70. Notes Acknowledging Loans (June 10, 1836) in the Chabert Papers, *supra* note 8, folder 15, 1 recto; *Règlement de Compte entre Marie Claire et Isidore Honoré* (Jan. 19, 1838), in the Chabert Papers, *supra* note 8, folder 15, 1 recto. On freedwomen borrowing from white creditors in the French Caribbean, see Susan M. Socolow, *Economic Roles of the Free Women of Color of Cap Français*, in *MORE THAN CHATTEL: BLACK WOMEN AND SLAVERY IN THE AMERICAS* 285 (David Barry Gaspar & Darlene Clark Hine eds., 1996).

71. "Five per cent per annum is the rate of legal interest that is the interest allowed in the absence of any special agreement on the subject; and eight per cent is the highest rate of conventional interest now permitted to be stipulated for. If more than eight per cent be agreed for, it is usury, the penalty of which is a forfeiture of all the interest attempted to be made." CHARLES S. POMEROY, *THE PEOPLE'S LAW BOOK: AN INDISPENSABLE ASSISTANT TO BUSINESS MEN, DESIGNED PARTICULARLY FOR THE STATES OF PENNSYLVANIA*,

money was originally borrowed for Michel. When Michel died, the Honorés advanced money for the purchase of his coffin and all funeral expenses.⁷² Chabert also hired out the unidentified services of her niece Rosalie (aged 49 at the time) in part payment of this loan.⁷³ Both the free legal services provided to Marie Claire, and the unfair rate of interest charged by the Honorés probably stemmed from the same fact: Marie Claire's vulnerability as a single and illiterate free woman of color.⁷⁴

Marie Claire bought Rosalie around 1827. She manumitted this niece on March 6, 1839. The police jury accepted that "there was no opposition to the freeing of the said slave, Rosalie."⁷⁵ Rosalie was granted permission to remain in the state.⁷⁶ The police jury also accepted that Rosalie was not acting as security on any loans or mortgages taken out by Marie Claire, a point to which I return below.⁷⁷ Rosalie died five years after manumission. Marie Claire held Rosalie's funeral in St. Louis Cathedral, New Orleans. The bill is among her papers.⁷⁸ Marie Claire's use of St. Louis Cathedral on repeated occasions is significant. David C. Rankin characterizes this church as particularly racist on the eve of the Civil War. *The Tribune*, a paper owned by free black Catholics, noted in 1862 that New Orleans's St. Louis Cathedral "was only a

OHIO, KENTUCKY, TENNESSEE, INDIANA, ILLINOIS, MISSOURI, MICHIGAN, IOWA, AND LOUISIANA 109 (1849).

72. Limonge, Account of the Life of Marie Claire (typescript), in the Chabert Papers, *supra* note 8, folder 1, 7 recto.

73. Other cases of slaves being leased out by their black owners are *Tonnellier v. Maurin*, 2 Mart. (o.s.) 206 (La. 1812) and *Burke v. Clarke*, 11 La. 206 (1837). See also Susan M. Socolow, *Economic Roles of the Free Women of Color of Cap Français*, in MORE THAN CHATTEL: BLACK WOMEN AND SLAVERY IN THE AMERICAS, *supra* note 69, at 289.

74. That said, a number of other single illiterate free women of color came to be successful property owners in New Orleans. Kittredge Evans, *supra* note 61, at 27-31.

75. "... il n'y a pas eu d'opposition à l'affranchissement de la dite esclave Rosalie." Affranchissement par Marie Claire de l'esclave Rosalie (Mar. 6, 1839), in the Chabert Papers, *supra* note 8, folder 17, 1 recto.

76. "... sans être tenue de quitter l'Etat." Affranchissement par Marie Claire de l'esclave Rosalie (Mar. 6, 1839), in the Chabert Papers, *supra* note 8, folder 17, 1 verso.

77. "... il appert qu'il n'y a pas d'hypothèque enregistrée contre la dite Marie Claire sur l'esclave Rosalie." Affranchissement par Marie Claire de l'esclave Rosalie (Mar. 6, 1839), in the Chabert Papers, *supra* note 8, folder 17, 1 verso.

78. Untitled Funeral Bill (Dec. 21, 1844) in the Chabert Papers, *supra* note 9, folder 19, 1 recto.

place where incense is burned in honor of the god of prejudice.”⁷⁹ Nevertheless, two decades earlier, Marie Claire Chabert was allowed to hold both Michel’s and Rosalie’s funerals in the cathedral.⁸⁰ According to H. E. Sterkx, many of the freed elite of New Orleans were also married in St. Louis’ Cathedral.⁸¹

In November 1845, Marie Claire wrote her first will.⁸² She named her freed niece Louise as her universal legatee, on condition that Louise buy two of Marie Claire’s other nieces, namely Martine (owned by Gabriel Villeré) and Adélaïde (owned by Hughes de Lavergne), with the proceeds of sale of Marie Claire’s property. Adélaïde’s former master had been private secretary to the governor of Louisiana, and, later, became the president of the City Bank of New Orleans. His father-in-law was governor of Louisiana between 1816 and 1820.⁸³ Less than one year later, Marie Claire was able to buy Martine from her master for \$600. As the compiler of Marie Claire’s papers noted, this was a surprisingly high price for a 46 year-old female slave.⁸⁴ Martine’s price may have reflected the growing influence of the abolitionist movement. As anti-slavery gained momentum, slaves became a more contested—and more expensive—form of property. The Act of Sale contained two interesting parts. First, Gabriel Villeré, Martine’s owner, informed the buyer that Martine was the subject of an “hypothèque” or mortgage by the Banque de l’Union de la Louisiane.⁸⁵ Having used Martine as security for a loan from the

79. Rankin, *supra* note 18, at 14.

80. The father-in-law (Jacques Philippe de Villeré) of the owner (Hughes de Lavergne) of Marie Claire’s niece Adélaïde was married at St. Louis Cathedral. Michel’s former owner (Francisco Bouligny) was buried there, too. DICTIONARY OF LOUISIANA BIOGRAPHY 95-96, 490 (Glenn R. Conrad ed., 1988). For a history of the cathedral, see Rev. C. M. Chambon, IN AND AROUND THE OLD ST. LOUIS CATHEDRAL OF NEW ORLEANS (1908). For an image, see SCHAFFER (2003), *supra* note 13, at 91.

81. STERKX, *supra* note 5, at 14; see also JOHN W. BLASSINGAME, BLACK NEW ORLEANS 1860-1880 14 (1973).

82. Testament de Marie Claire, Veuve Michel, Négresse libre (Nov. 5, 1845), in the Chabert Papers, *supra* note 8, folder 20, 1 recto-2 recto.

83. Carolyn E. DeLatte, *Jacques Philippe Villeré*, in THE LOUISIANA GOVERNORS 86-90 (Joseph G. Dawson III ed., 1990).

84. Limonge, Account of the Life of Marie Claire (typescript), in the Chabert Papers, *supra* note 8, folder 1, 8 recto.

85. An Act of 1855 required the recorder of mortgages to produce a certificate attesting to the mortgage-free status of slaves seeking manumission. Schaffer, *Forever Free from the Bonds of Slavery: Emancipation in New Orleans, 1855-1857*, in A LAW UNTO ITSELF? ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY, *supra* note 20, at 153.

bank, Villeré promised to pay back the borrowed money as soon as possible. The Act refers to the mortgage “which . . . he shall oblige himself to eliminate as soon as possible, with which the said Marie Claire Chabert declares herself satisfied.”⁸⁶ Secondly, the back page of the Act contained a standardized printed form to be filled in by the seller’s wife (here, Eulalie de Laronde). The statement declared that the seller’s wife understood fully the nature of the sale and consented to it, and that she was neither in the presence nor under the influence of her husband.⁸⁷ I will return to both features shortly.

Probably because of the purchase of Martine, Marie Claire rewrote her will. This time, she ordered her executor, a free blacksmith named Antoine Remy,⁸⁸ to use half the proceeds of sale of her real estate to buy her niece Adélaïde from Madame Veuve Lavergne, “intending that immediately following acquisition she be liberated from the bonds of slavery.”⁸⁹ Assuming that this transaction would proceed as planned, she then named her two nieces Martine and Adélaïde her universal legatees, giving her free niece Louise Jarreau “for use only” one third of the remaining half of her real estate during her lifetime.⁹⁰ By 1850, free people of color owned large amounts of real estate in the center of New Orleans.⁹¹ Marie Claire’s will was shrewdly drafted because it contained two saving clauses that would prevent the entire will from being declared void if Adélaïde’s manumission failed. I will also return to this feature below.

Marie Claire died the year after her last will was written, on April 2, 1847.⁹² Many of the documents in her files are annotated

86. “. . . laquelle hypothèque il s’oblige à faire radier dans le plus bref délais de laquelle déclaration la dite Marie Claire Chabert se reconnait satisfait.” Vente d’esclave de M. Gabriel Villeré à Marie Claire Chabert (Aug. 28, 1846), in the Chabert Papers, *supra* note 8, folder 22, 2 verso.

87. *Id.*, folder 22, 3 verso.

88. Remy was also the chief witness to Marie Claire’s death certificate. Death Record for Marie Claire Chabert, LSA, *supra* note 8.

89. “[V]oulant qu’aussitôt après cette acquisition elle soit afranchie des liens de l’Esclavage.” Testament de Marie Claire (Nov. 12, 1846), in the Chabert Papers, *supra* note 8, folder 23, 1 verso.

90. “[E]n usufruit seulement.” *Id.*

91. JOHN W. BLASSINGAME, BLACK NEW ORLEANS 1860-1880 11 (1973); Schafer, *Forever Free from the Bonds of Slavery: Emancipation in New Orleans, 1855-1857*, in A LAW UNTO ITSELF? ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY, *supra* note 20, at 159.

92. Death Record for Marie Claire Chabert. LSA, *supra* note 8.

in burgundy ink dated 1847—possibly the notary’s confirmation that her papers were in order after her death. The papers relating to Marie Claire’s estate were compiled by the New Orleans law firm, Durant and Horner.⁹³ The firm appears to have organized the documents for the purposes of litigation in the 1860s.⁹⁴ New Orleans fell to Unionist forces in April 1862, and they occupied the city until 1877. Daily legal business would have been resumed by early 1864, when a relatively stable provisional system of courts was functioning.⁹⁵ The litigation may have related to Marie Claire’s will, but its exact nature is not described in Marie Claire’s papers. Similarly, there is no information on the effect of the Confederacy’s Civil War defeat upon this litigation.⁹⁶

The mix of slaveholding arrangements in Marie Claire’s papers illustrates the many factors that would have informed the decision to sustain or terminate familial slavery. In the earlier period of her free life, Marie Claire used the device to its fullest, holding her nieces and future mate in slavery for significant periods of time before freeing them. She probably bought Rosalie in 1827, but did not free her officially until twelve years later, in 1839. In the interim, Marie Claire hired out the services of her niece, as already noted. The passage of the 1830 Removal Act in Louisiana may partly explain the delay—Marie Claire may have wanted to wait to see how often emancipated slaves were granted permission to remain in the state before risking removal for Rosalie.

Marie Claire manumitted her later slaves more quickly. She bought Michel in 1832, kept him a slave for 2.5 years, then freed him in June 1835. She married him shortly afterwards: the Louisiana Civil Code (1825) prohibited marriage between a slave and a free person of color.⁹⁷ Marie Claire manumitted others

93. Princeton also holds miscellaneous papers of Durant and Hornor (1854-1872) concerning Civil War claims by civilians against the Union Army for the recovery of property and compensation. Louisiana Slavery and Civil War Collection, Manuscripts Division, Department of Rare Books and Special Collections, Princeton University Library.

94. Handwritten notes confirming the authenticity of copies are dated January 13, 1864. See Will of November 12, 1846. Chabert Papers, *supra* note 8, folder 23.

95. Thomas W. Helis, *Of Generals and Jurists: The Judicial System of New Orleans Under Union Occupation, May 1862-April 1865*, 29 LA. HIST. 143, 160-161 (1988).

96. On slave-related litigation in Louisiana after the Civil War, see SCHAFER (1994), *supra* note 12, at 289-304.

97. See MORGAN, *supra* author’s note, (Art. 95).

almost immediately. The cataloguer Limonge noted that she bought and emancipated two nieces, Marie Jeanne and another (possibly Louise Jarreau) in 1827.⁹⁸ Chabert's papers indicate that in 1846, she purchased one of her nieces, Martine, and freed her within the next few months. Chabert also requested the purchase and immediate manumission of her niece Adélaïde in both her wills of the same period.⁹⁹

It is likely that growing restrictions on manumission added an element of urgency, making Marie Claire opt for immediate emancipation while it was still available. Marie Claire may also have been anticipating her own death as she grew older. She made her first will in 1845, at the age of 66, nine months before buying Martine. By the time Chabert wrote her second and final will, three and a half months after the purchase, Martine was legally free. Chabert must have realized that if she died while Martine was her slave, Martine could inherit nothing. In the words of the Louisiana Civil Code, "[a]ll that a slave possesses belongs to his master; he possesses nothing of his own, except . . . the sum of money or movable estate which his master chooses he should possess."¹⁰⁰

IV. THREATS TO FAMILIAL BLACK SLAVEHOLDING

A. Debts

The Chabert papers offer a sample of factors that could threaten the security of the slaves held by familial black masters. This article focuses on three. The first two consist of clauses in the Act of Sale for Marie Claire's niece, Martine. The clauses served as a reminder of the ominous presence of banks and white masters' wives in the background of Marie Claire's slave transactions. Both posed a potential threat to the security of familial black slaveholders' claims to own their slaves. The third feature I consider is the careful phraseology of Marie Claire's wills. Marie Claire's lawyers' pragmatic drafting reflects the myriad ways wills could be invalidated under Louisiana's law of slavery. If Marie

98. Limonge, Account of the Life of Marie Claire (typescript), in the Chabert Papers, *supra* note 8, folder 1, 2 recto.

99. These wills are dated November 5, 1845 and November 12, 1846. Chabert Papers, *supra* note 8, folders 20 and 23 (respectively).

100. MORGAN, *supra* author's note, (Art. 175).

Claire's will had been declared void, her nieces' status as protected slaves would be endangered.

Those engaged in familial black slaveholding must have felt ill at ease whenever white creditors and wives appeared in the background of a slave transaction. Creditors and planters' wives had claims on slaves that could defeat the claim of a new black master. The most common scenario would have involved a loan taken out by the new black master. If the master used his or her slave as security for the loan, that slave would become the property of the creditor—typically, a bank—if the loan was not repaid. Familial black slaveholding could slide into “real” slavery due to the master's unpaid debt. When Marie Claire bought her niece Martine in 1846, she did so subject to the knowledge that the prior owner had used Martine as security for a bank loan. In the deed of sale, Gabriel Villeré promised to discharge the debt as soon as possible.¹⁰¹ Marie Claire bought Martine even so, risking the possibility that Villeré would default on his loan, and that the Banque de l'Union de la Louisiane would become Martine's new owner.

Martine's legal situation was particularly fragile because repayment of the loan was out of Marie Claire's hands. The purchase of mortgaged property normally involved paying a reduced sum, with the new purchaser or “third possessor” agreeing to pay the seller's remaining mortgage payments to the original creditor.¹⁰² But upon the sale of Martine, the duty to repay the rest of the loan stayed with Villeré. Marie Claire paid full price (600 piastres or \$600) for Martine, and Villeré's loan did not transfer to Marie Claire.¹⁰³ In other words, Marie Claire had no control over the repayment of the loan upon which Martine's *de facto* freedom depended. Furthermore, the Louisiana Civil Code clearly favored creditors over “third possessors” where the mortgage was undertaken in the state.¹⁰⁴ According to the Civil Code, the bank would have the right to sue Marie Claire for possession of Martine if Villeré did not repay the loan.¹⁰⁵ Marie Claire would then be left to sue Villeré for the value of Martine; small comfort when it was

101. “[D]ans le plus bref delais.” Vente d'esclave (Aug. 28, 1846), *in* the Chabert Papers, *supra* note 8, folder 22, 2 verso.

102. Balfour v. Chew, 4 Mart. (n.s.) 154 (1826).

103. See text accompanying note 86, *supra*.

104. MORGAN, *supra* author's note, (Art. 3362-3373).

105. *Id.* at Art. 3362-3364.

possession of Martine, not her monetary value, that Marie Claire wanted.¹⁰⁶ The bank would recover the debt by selling Martine back into “real” slavery. If ever slaves were treated as pawns, it was in mortgage transactions like these.

There was also the question of Villeré’s wife, Eulalie de Laronde: could she have a property claim to Martine even after Marie Claire had purchased her own niece? The answer was no, but only because the bank made sure of it. Martine’s Act of Sale included a section signed by Eulalie. In it, Eulalie acknowledged that the notary had informed her that according to the laws of the state, she had a tacit mortgage upon the immovables of her husband.¹⁰⁷ Under the Civil Code, slaves were considered immovables, “though movables by their nature.”¹⁰⁸ Eulalie also agreed that she consented to the sale outside of her husband’s presence and free of his influence.¹⁰⁹ Here, common-law influences seem to have been absorbed into the Roman law-based substrate of Louisiana law.¹¹⁰ Louisiana’s Civil Code was silent on

106. *Id.* at Art. 3373.

107. “[D]’après les lois de cet état, la femme a une hypothèque tacite sur les biens immeubles de son mari.” Vente d’esclave (Aug. 28, 1846), in the Chabert Papers, *supra* note 8, folder 22, 3 verso. See MORGAN, *supra* author’s note, (Arts. 2355-2368).

108. See MORGAN, *supra* author’s note, (Art. 461).

109. “[L]aquelle étant hors de la présence et de l’influence de son dit époux.” Vente d’esclave (Aug. 28, 1846), in the Chabert Papers, *supra* note 8, folder 22, 2 verso.

110. Hybrid jurisdictions like Louisiana, Quebec, Mauritius, Sri Lanka and South Africa are all the products of colonization by multiple European nationalities. Despite Anglophone promises to continue applying earlier Roman-based law, common-law influences seeped into the law of these jurisdictions. See, e.g., L. J. M. COORAY, THE RECEPTION IN CEYLON OF THE ENGLISH TRUST: AN ANALYSIS OF THE CASE LAW AND STATUTORY PRINCIPLES RELATING TO TRUSTS AND TRUSTEES IN CEYLON IN LIGHT OF THE RELEVANT FOREIGN CASES AND AUTHORITIES 22-24 (1971). On such doubly (or triply) colonized jurisdictions, see William Tetley, *Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 677-728 (2000). There is debate over whether Louisiana leaned more toward its civilian past or common-law present after 1803. The New Louisiana legal historians argue for the latter. See A LAW UNTO ITSELF? ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY, *supra* note 20. On Louisiana and the law of slavery specifically, see Ariela Gross, Legal Transplants: Slavery and the Civil Law of Louisiana (May 12, 2009)(USC Law, Legal Studies Working Paper No. 09-16), available at: <http://ssrn.com/abstract=1403422> (last visited April 21, 2011). Gross’s work is the latest contribution to the Tannenbaum debate, a discussion that asks whether common-law systems were less humane than slave systems based upon Roman law. See FRANK TANNENBAUM, SLAVE AND CITIZEN(Beacon Press 1992); ALAN WATSON, SLAVE LAW IN THE AMERICAS (1989); Alejandro de la Fuente, *Slave*

the situation in which a husband might use his coercive influence to secure his wife's consent to mortgage a portion of their shared property, which included slaves.¹¹¹ He had the power to dispose of joint property without his wife's consent, except where he had used fraud.¹¹² In common-law systems, on the other hand, the doctrine of undue influence was a well-developed part of equity by this time, operating to invalidate coerced contracts and wills, and to create constructive trusts in favor of the weaker party.¹¹³

The standardized form in Marie Claire's papers was an attempt to protect the bank against a claim of undue influence by the white seller's wife. The doctrine of undue influence grew out of the equitable tradition of Anglo-American law, and talk of equity seeped into Louisiana case law in the early American period.¹¹⁴ Both historically and today, undue influence cases arose in jurisdictions under English-speaking rule where a husband defaulted on a mortgage.¹¹⁵ When the bank tried to collect the property that secured the loan, the wife would argue that her claim to the property should defeat the bank's because she had only consented to the mortgage under the coercive pressure—or undue influence—of her husband.¹¹⁶ Such cases existed in American Louisiana, and with slaves as security.¹¹⁷ White wives enjoyed considerable power in Louisiana's slave-law regime, as they did in Caribbean jurisdictions like Jamaica and Barbados.¹¹⁸ The special clause pertaining to the wife's situation in Martine's Act of Sale was intended to protect the bank against the wife's claim. Its

Law and Claims-Making in Cuba: The Tannenbaum Debate Revisited, 22 L. AND HIST. REV. 339, 340-353 (2004).

111. MORGAN, *supra* author's note, (Arts. 2369-2392) The "community of gains" applied to property gained during the marriage.

112. MORGAN, *supra* author's note, (Art. 2373).

113. See, e.g., COMMENTARIES ON EQUITY JURISPRUDENCE BY HON. MR. JUSTICE STORY 98-99 (A. E. Randall ed., 1920); ALFRED G. REEVES, A TREATISE ON THE LAW OF REAL PROPERTY 544, 1548 (1909).

114. See JOSEPH STORY, COMMENTARIES ON EQUITABLE JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA I, 243-244 (1836); *Bourcier v Lanusse* 3 Mart.(o.s.) 581, 1815 WL 794 (La.).

115. See Christine N. Booth, *Undue Influence and Triangular Situations: The Husband, the Wife, and the Bank*, 26 HONG KONG L. J. 58 (1996).

116. For a leading British imperial case, see *Turnbull and Co. v. Duval* [1902] A.C. 429.

117. See *Webb v. Union Bank of Louisiana* 2 La. Ann. 585, 1847 WL 3172 (La.). For a non-slave case, see *Beatty v Tete* 9 La. Ann. 131, 1854 WL 4029 (La.).

118. KATHLEEN MARY BUTLER, *THE ECONOMICS OF EMANCIPATION: JAMAICA AND BARBADOS, 1823-1843* 92-97 (1995).

presence underscores the vulnerability of mortgaged slaves, even while held within the familial black regime.¹¹⁹

B. Wills

The careful phraseology of Marie Claire's wills is a third feature to note. In the construction of wills, the intention of the testator was "the first and great object of inquiry," wrote James Kent, paying homage to the rights of property owners in his *Commentaries on American Law*.¹²⁰ Nevertheless, courts intervened often in deciding what property owners could do with their property after death: "To allow the testator to interfere with the established rules of the law, would be to permit every man to make a law for himself, and disturb the metes and bounds of property."¹²¹ In passing from the world of the living to that of the dead, the property owner ceded "despotic dominion" over personal property to the greater public interest.¹²²

A careful choice of words was critical to the writing of valid wills.¹²³ An imprudent comma or a polite use of the conditional instead of the present indicative had the potential to invalidate a clause in a will.¹²⁴ A charitable judge might have minimized the damage by performing a tidy surgical excision of the offending line. A less generous judge could void the entire will. Imprudent grammar and unsympathetic judges (often slaveholders themselves) made for dire consequences.¹²⁵

119. Some black slave-owners also mortgaged their slave property to further other financial ventures. See HANGER, *supra* note 1, at 75.

120. JAMES KENT, COMMENTARIES ON AMERICAN LAW 534 (1832).

121. *Id.* at 535.

122. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 17 (1803).

123. In the context of slavery, see BERNIE D. JONES, FATHERS OF CONSCIENCE: MIXED-RACE INHERITANCE IN THE ANTEBELLUM SOUTH (2009).

124. For instance, southern common-law courts distinguished between a declaration of *intention* to manumit (e.g. "I would like my slaves to be free") and an *actual declaration* of manumission (e.g. "I hereby declare my slaves free"). Thomas R. R. Cobb, *An Inquiry into the Law of Negro Slavery in the United States of America to which is Prefixed an Historical Sketch of Slavery* 286 (1858). The former was void. *Id.*

125. Executors of Henderson v. Heirs (1846) and Rost and Montgomery v. Heirs of Doyle (1860), in JUDICIAL CASES CONCERNING AMERICAN SLAVERY, *supra* note 10, at 575, 668 (respectively). Also available as Rost v Henderson 12 Rob. (LA) 549; Rost v Doyal's Heirs 15 La. Ann. 256 (respectively). See also Bailey v. Poindexter's Executor, 14 Gratten (Va.) 132, 428-455 (1858). In

Not surprisingly, southern judges voided wills for being contrary to the spirit of slave law. As Mark Tushnet observes, “[a] master might find his or her most carefully structured will destroyed by the use of one of the doctrines floating throughout the South.”¹²⁶ A will that gave a slave freedom—or, “in the event of a change in the law,” a right of action for his or her freedom—was declared void for attempting to navigate around a future change in the law.¹²⁷ Where a state prohibited the testamentary manumission of slaves, any attempt to circumvent the law in one’s will by creating a trust for the benefit of slaves was void.¹²⁸ The testator might order that his slaves be taken to another state and manumitted there. If that state subsequently passed a law forbidding the entry of new free people of color into the state, the manumission order would be declared void.¹²⁹

Judges took the liberty of voiding wills for uncertainty or vagueness, and for offending against public policy. A will in North Carolina was struck down because the request to emancipate the slave “when the owner thinks proper” was too vague to be enforced by a court at any given time.¹³⁰ A prime example of public policy violations related to *statu liberi*, slaves set by contract to be emancipated at a future date. Most states had the policy of discouraging *statu liberi* in the belief that the status undermined the current authority of a master over his or her slave. Testators in a state that prohibited manumission could order the immediate removal of their slaves upon their death to another state where the slaves would be manumitted. However, should they use a phrase that implied a slightly more delayed reaction (e.g. “for future transfer there” as opposed to “immediate removal”), the will

common-law jurisdictions, the doctrine of *cy pres* (old legal French related to the modern French *près d’ici* or “near here”) allowed the judge to adjust a trust to the new conditions that threatened to invalidate it, in the spirit of the testator’s original wishes. BLACK’S LAW DICTIONARY (8th ed. 2004). On southern judges’ hostility to the doctrine’s use in slave cases, see the Georgian joined cases of *Hunter v. Bass* and *American Colonization Society v. Bass* (1855), in JUDICIAL CASES CONCERNING AMERICAN SLAVERY, *supra* note 10, at 42; MORRIS, *supra* note 19, at 376-377.

126. TUSHNET, *supra* note 35, at 228.

127. *Jamison v. Bridge*, 14 La. Ann. 31 (1859).

128. MORRIS, *supra* note 16, at 379; COBB, *supra* note 112, at 291-292, 296.

129. Theoretically, judges could rescue the order through the doctrine of *cy pres*. COBB, *supra* note 112, at 302. *But see supra* note 113.

130. *Bryan v. Wadsworth*, in COBB, *supra* note 112, at 295. Also available at 18 N.C. 384 (1835).

could be voided for increasing the number of *statu liberi* in the state, working against public policy.¹³¹ According to Justice Lumpkin in the Georgia case of *Vance v Crawford* (1848), it had been the constant project of the state to prevent the increase of freed slaves: “[n]either humanity, nor religion, nor common justice, requires us to sanction domestic emancipation.”¹³²

Writing a valid will with respect to slaves was no easier in Louisiana than in common-law jurisdictions.¹³³ A slave-owner could not free a slave whose value represented more than ten percent of his estate.¹³⁴ If he had lived with a slave mistress in “open concubinage,” he could not leave her any immovable property even if he did succeed in freeing her.¹³⁵ Nor could he leave her movables representing over ten percent of his estate.¹³⁶ Perhaps worse still was the general uncertainty surrounding the invalidation of wills in Louisiana and French law alike. Even in the late nineteenth century, textbooks on Louisiana succession law expressed frustration over the vagueness of both bodies of law.¹³⁷ The only general principles that offered guidance were those with which the Civil Code opened. Individuals could not by their conventions derogate from the force of laws made “for the preservation of public order or good morals.”¹³⁸ Whatever was done in contravention of a prohibitory law would be void.¹³⁹ This included orders prohibited only indirectly by the intent and policy of the law.¹⁴⁰ Further, the Code made testamentary manumission valid only when ordered in express and formal terms. It would not be implied by any other circumstances of a will.¹⁴¹ Given this

131. COBB, *supra* note 112, at 290-291.

132. 4 Ga. 445 (1848); JUDICIAL CASES CONCERNING AMERICAN SLAVERY, *supra* note 9, at 19. On Lumpkin, see PAUL DEFOREST HICKS, JOSEPH HENRY LUMPKIN: GEORGIA'S FIRST CHIEF JUSTICE (2002); TUSHNET, *supra* note 35, at 218-227.

133. On freeing slaves by will in Louisiana in a slightly later period (1846-1862), see SCHAFER (2003), *supra* note 13, at 59-70.

134. SCHAFER (1994), *supra* note 12, at 185-187.

135. *Id.*, at 185.

136. *Id.* at 199.

137. K. A. CROSS, A TREATISE, ANALYTICAL, CRITICAL AND HISTORICAL ON SUCCESSIONS 105 (1891).

138. MORGAN, *supra* author's note, (Art. 11).

139. *Id.*

140. CROSS (1891), *supra* note 137 at 108.

141. MORGAN, *supra* author's note, (Art. 184) Testamentary manumissions had to be carried out by executors, many of whom neglected their duty. See SCHAFER, *supra* note 13, at 59-70. Manumission of all kinds was

generally strict approach to testamentary manumission, Louisiana courts may have looked to other southern states for guidance, reflecting the model suggested by the new Louisiana legal historians.¹⁴² The common law offered a number of specific doctrines that put the more general civilian principles into action.

Given that so many wills were “wrecked on the shoals of legal technicalities, greed, or racial prejudice,” Chabert’s will reflected shrewd and careful draftsmanship by her lawyer.¹⁴³ Crucially, he included two provisions to save her final will from invalidation in the event that her niece, Adélaïde, could not be manumitted. The first read: “I name and institute as my universal legatees my two nieces Martine and Adélaïde, and in the event that half of the property designated below is insufficient for the acquisition of my said niece Adélaïde, Martine shall be my sole universal legatee.”¹⁴⁴ In the second security clause, Marie Claire’s free niece Louise was given one sixth of Marie Claire’s land for use during her lifetime only. After Louise’s death, the land was to return to Martine and Adélaïde. If Adélaïde could not be purchased due to lack of funds or because her mistress did not consent, the land would go to Martine alone.¹⁴⁵ As the compiler Limonge advised his reader, “[p]lease do not forget that slaves could not inherit, that Marie Claire knew it and was careful that her legacy to Adelaide would not revert to Madame Lavergne.”¹⁴⁶ Furthermore, Marie Claire’s lawyers could have been tempted to use less specific terms in order to ensure the purchase of Adélaïde. Marie Claire could have left the maximum amount of money available more open-ended than she did when she specified that half of her property was to be sold. But this could have put the clause—and possibly the entire will—

prohibited by legislation in Louisiana in 1857. See SCHAFER, *supra* note 12, at 183-184.

142. A LAW UNTO ITSELF? ESSAYS IN THE NEW LOUISIANA LEGAL HISTORY (Warren M. Billings & Mark F. Fernandez eds., 2001).

143. Frank Mathias, *Manumission*, in THE ENCYCLOPEDIA OF SOUTHERN HISTORY: LOUISIANA 778 (David C. Roller & Robert W. Twyman eds., 1979).

144. “Je nomme et institue pour mes légataires universelles mes deux nièces Martine et Adélaïde, et dans le cas où la moitié du terrain susdésigné ne suffirait pas à l’acquisition de ma dite nièce Adélaïde, Martine sera seule légataire universelle.” Testament de Marie Claire Chabert (Nov. 12, 1846), in the Chabert Papers, *supra* note 8, folder 23, 1 verso.

145. “[O]u de Martine seule, dans le cas où l’on ne pourrait faire l’acquisition d’Adélaïde ainsi qu’il a été dit ci-dessous, faute de moyens ou faute de consentement de sa maitresse.” *Id.*

146. Limonge, Account of the Life of Marie Claire (typescript), in the Chabert Papers, *supra* note 8, folder 1, 9 recto.

in jeopardy of being void for vagueness. Had Marie Claire attempted to ensure the purchase even despite future frustrating laws, the will could have been declared contrary to law. The shrewdest strategy was a simple, specific set of clauses that prepared for the possible failure of the purchase of Adélaïde. Marie Claire's lawyer was well aware of the delicate and insecure nature of slave-related testamentary dispositions. He adjusted the will's text—and perhaps Marie Claire's expectations—accordingly.

V. CONCLUSION

Marie Claire exhibited a striking degree of legal agility in her dealings. She did so as a woman who was unmarried for most of her life, and who forged no close alliances with white men. She signed her documents with an X, preceded by the note, “[t]he said Marie Claire having declared not to know how to write or sign has made her usual mark after having [had the document] read.”¹⁴⁷ Remarkably, this illiterate woman of color was a party to five slave purchases, six manumissions, two major loans, court proceedings over Jacques Tisserand's estate, the legal dispute over Jacques' enslaved daughter Manon, the purchase of real estate, a marriage, two deaths, and the creation of two wills.¹⁴⁸ Lois V. M. Gould observes that free women of color generally went unnoticed in most of the antebellum South. They owned little property and rarely participated in court cases.¹⁴⁹ Marie Claire Chabert was a notable exception. Her manumission created the possibility for a chain of familial black slaveholding that would draw five others into this strategic legal regime.

Woodson's critics argue that most black slaveholders, like their white counterparts, were primarily profit-driven. They downplay or ignore familial black slaveholders like Marie Claire Chabert.

147. “[L]a dite Marie Claire ayant déclaré ne savoir écrire ni signer a fait sa marque ordinaire après lecture faite.” Affranchissement Marie Claire à Michel (June 12, 1835), in the Chabert Papers, folder 12, 1 verso. Literacy rates amongst freedwomen using notarial services in French Saint Domingue were about 25% between 1775 and 1789. David P. Geggus, *Slave and Free Colored Women in Saint Domingue*, in MORE THAN CHATTEL: BLACK WOMEN AND SLAVERY IN THE AMERICAS, *supra* note 69, at 271.

148. Davis notes that it was common for free people of color not to leave wills at all. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 238 (Jan. 1999).

149. Gould, *supra* note 40, at 20-22.

Familial slaveholding did not by definition exclude a profit motive. Families can be both protective *and* exploitative, and Marie Claire's slaves occasionally generated income for her. It is equally important to note that as a legal device, familial black slaveholding was not unassailable. Marie Claire's papers reveal mortgage and inheritance-related vulnerabilities. They reflect her purchase of a niece on precarious terms. The niece would return to "real" slavery if her former white owner defaulted on a loan. The Chabert papers also exhibit the forced modesty of manumission provisions that Marie Claire's legal adviser wrote into her will: he was trying to ensure the will's validity.

Familial black slaveholding was legally fragile and had profit-generating potential. But it also offered protection of a particular type. Familial black slaveholding shielded kin from the risks of being kidnapped and re-enslaved. It prevented them from being sent to Liberia through African recolonization schemes. And in many parts of the American South, it kept newly freed people of color from being expelled from the state through removal laws. It is a type of black slaveholding that deserves greater acknowledgment and attention, not just from historians of slave law, but equally on the politically charged stage of the reparations debate.

BOOK REVIEW

RIGHTS OF PERSONALITY IN SCOTS LAW:
A COMPARATIVE PERSPECTIVE
(Niall R. Whitty and Reinhard Zimmermann eds., Dundee
University Press, 2009)
Reviewed by Olivier Moréteau*

This book features a collection of papers presented at a Conference organized on May 5 and 6, 2006, at the University of Strathclyde in Glasgow. The Conference aimed at giving an overview of issues and options available in Scots law regarding the protection of personality rights. The perspective was comparative, covering various civil law and common jurisdictions and other mixed jurisdictions. The concept of personality right is of civil law fabric. Rooted in Roman law, the term ‘rights of the personality’ was coined by 20th century civilian doctrine to describe the protection of non-patrimonial aspects of the human person, such as life, bodily integrity, personal security, physical liberty, reputation, dignity, privacy, image, moral right to copyright, family relationships, rights of deceased’s relatives. The essays gathered in the book tend to prove however that the Scottish approach is more remedy-based than right-based, the focus being on the tort action and its conditions. Personality rights are all too often entangled with patrimonial rights, and the identification of a personality rights will at most help identify a primary right that deserves protection even where the loss is entirely non-pecuniary.

There is much focus on the taxonomy of personality rights, checking what is included here and excluded there. It is common knowledge, at least in civil law jurisdictions, that personality rights are inalienable, imprescriptible, and cannot be abandoned. The book offers little discussion however of what personality rights are in essence. Such rights can indeed be monetized, and the

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borderline between the extra-patrimonial and the patrimonial rights is not always an easy one to draw, as some cases discussed in the book may show. The right an actress has on her image under French law may serve as an example. A case decided in Paris in 1975 featured French superstar Catherine Deneuve.¹ She had consented to the publication of photos taken at a time when she was acting as a professional model, occasionally posing in the nude. The magazine who had published such photos sold them to another magazine that republished those years later, at a time when Catherine Deneuve had become an iconic and highly respected actress. Though the magazine owned the pictures, Catherine Deneuve was allowed to object to the publication and argue that her personality right to her image had been invaded. The court held that the magazine was supposed to request her consent prior to publication. Any attorney or scholar familiar with French cases knows that the more a person protects her privacy or image rights, the more likely she is of being awarded higher damages in case of infringement of such rights. On the contrary, famous people who usually tolerate the publication of gossip and photos taken within the realm of their private life, though not losing the right to protection—after all it is inalienable and may not be abandoned—are more likely than not to get minimal or nominal damages. Given the fact that tabloids will anyway publish gossip to maximize their sales, celebrities, by choosing not to tolerate any infringement, can monetize their private life and image by selling *ex ante* the right to publish under pre-determined conditions, or collecting *ex post* in the form of damages that French courts try to keep sufficiently high to serve as deterrent. That point is strongly criticized by both editors of the book: Niall Whitty in his essay in the book² and Reinhard Zimmermann in his major book on the law of obligations.³ The reading of the book shows that Scotland looks at personality rights with tort law lenses rather than with over-permissive subjective rights lenses, thereby limiting the risk of commodification of extra-patrimonial rights, all too real in French

1. Dame Dorléac dite Catherine Deneuve v. Société anonyme Presse-Office, Dalloz 1976, 291, note R. Lindon (Court of Appeal of Paris, judgment of May 14, 1975).

2. At 197.

3. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 1089 (1990).

jurisprudence, where the right to respect of one's image was once based on property rights.⁴

One may compare this with the moral right of the author or artist under copyright law. In most civil law jurisdictions and under the Bern Convention, the artist or author of copyrighted work may sell the copyright, which is intellectual property and therefore patrimonial, yet keeping at all times a moral right allowing her to object to a use of the work that in the opinion of the author would distort the artistic value of the work. This moral right being attached to the personality of the creator is inalienable and cannot be abandoned, and is therefore a personality right. The study by David Vaver (Chapter 8)⁵ shows that the moral right is much weaker at English law where it may be waived. In jurisdictions where it is stronger, it may be monetized much like the right to one's image in the example above.

Born and developed in the matrix of private law, the concept of personality right has grown a constitutional dimension, which is not surprising given the fact that it enshrines personal freedom and human dignity. This constitutional dimension is a central feature of several of the papers gathered in the book. The European Convention on Human Rights (ECHR) indeed strengthens the fundamental rights dimension with Article 8(1) that provides: "Everyone has the right to respect for his private and family life, his home and his correspondence," the same Convention protecting liberty of expression and freedom of the press in its Article 10. It was not until the year 2000 that the ECHR was to acquire the force of law in the United Kingdom and therefore in Scotland, by the effect of the Human Rights Act 1998. The impact of the ECHR in Scotland is carefully researched by Elspeth Reid (Chapter 4),⁶ who investigates to what extent Convention rights, in so far as they address rights of personality, already find protection in Scots law. She uses comparative law to identify possible gaps and

4. Karine Anterion & Olivier Moréteau, *The Protection of Personality Rights Against Invasions by Mass Media in France*, in *THE PROTECTION OF PERSONALITY RIGHTS AGAINST INVASIONS BY MASS MEDIA* 124, (Helmut Koziol & Alexander Warzilek eds. 2005).

5. *Does Intellectual Property Have Personality?*, 403.

6. *Protection of Personality Rights in the Modern Scots Law of Delict*, 247.

developments that may be needed. She clearly indicates that one has to look beyond England, and points out to South Africa, another mixed jurisdiction, and countries of continental Europe.

South Africa is ubiquitous in the volume, which is not surprising, since much like Scotland, it is a mixed jurisdiction without a civil code. Jonathan Burchell offers a detailed presentation in Chapter 6, with a focus on human dignity.⁷ He shows the use of the *actio iniuriarum*, “the general Roman remedy for impairments of personality rights to physical integrity, reputation, and dignity”⁸ as a basis of the protection of personality rights in South Africa before and after the Constitution of 1996. Post-apartheid developments include the right to housing, the right to social security and appropriate social assistance for those unable to support themselves,⁹ the right to family life, due process rights, showing flexible adjustments. The Roman law concept of *iniuria* indeed easily adjusts to the new constitutional and legislative requirements to favor the enforcement of human rights. Professor Burchell’s contribution is a plea in favor of the delictual *actio iniuriarum*: “The objective criterion will allow a court to balance the interests involved, engage in a proportionality inquiry weighing issues such as need, available resources, degree of harm, urgency of relief, including availability of alternative remedies, and recognize those defences that reflect reasonable behavior.”¹⁰ He shows “the pivotal nature of dignity” as a right and not just a value. He reminds the Scots that T.B. Smith was in favor of a rejuvenated *actio iniuriarum* focused on the concept of “affront” (*contumelia*).¹¹ Much in this contribution is of great interest for Scotland as well as other mixed jurisdictions such as Louisiana.

The laws of Continental Europe are explored in Chapter 5, written by Gert Brüggemeier, covering France, Germany, and Italy.¹² Professor Brüggemeier rightly points to the hybrid nature of personality rights, which constitute in his opinion a sort of

7. *Personality Rights in South Africa: Re-Affirming Dignity*, 349.

8. At 351.

9. At 367.

10. At 377.

11. At 381. See T.B. SMITH, A SHORT COMMENTARY ON THE LAW OF SCOTLAND 653-654 (1962).

12. *Protection of Personality Interests in Continental Europe: The Examples of France, Germany and Italy, and a European Perspective*, at 313.

“private human rights.”¹³ Born in the realm of private law from the Roman law of injuries (*actio iniuriarum*), it was given constitutional protection after World War II, in national constitutions and also in the ECHR. He concludes his survey of the law in the three countries by a section on the ECHR and an analysis of the *Caroline von Hannover v. Germany* case, decided by the European Court of Human Rights in 2004. The case shows how difficult it is to balance the protection of private life (Art. 8 ECHR) with freedom of expression and of the press, also protected by the Convention (Art. 10 ECHR), an issue that has been carefully studied in the context of European tort law.¹⁴ It also indicates a possible diversity of approach regarding the protection of the private life of celebrities. French courts insist that everyone, including celebrities, is entitled to the protection of one’s private life on the basis of the overreaching provision of Civil Code, Art. 9. This places the burden on journalists to prove that they have obtained prior consent before publishing stories or pictures featuring celebrities in their private life, even when the story takes place outside private walls, in the eye of the public. Neglecting these details, the author rightly insists on the somehow constitutional nature of Art. 9.¹⁵

Germany has a different approach in the sense that courts, following a law enacted in 1907, accept that pictures of public figures can be taken and published without their express consent except where taken within their residential areas.¹⁶ In *Caroline von Hannover v. Germany*, the European Court held that even pictures taken outside the private residence had to be authorized, Art. 8 extending the protection to everyone, including celebrities. It is only when public figures perform in an “official function,” that the right to privacy is not to be applied, a position long adopted by French law, which is in compliance with Art. 8 ECHR. Regarding the right to informational privacy, Scots law had a restrictive

13. At 317.

14. The Protection of Personality Rights against Invasions by Mass Media, *supra* note 4.

15. At 322. After all, the French Civil Code has been represented to be the “civil constitution” of the country: see Olivier Moréteau, *The Future of Civil Codes in France and Louisiana*, 2 JCLS 39, 44 (2009).

16. Details at 342.

approach in the sense that protection was only afforded when the information was wrong or malicious (malicious falsehood). The scope is considerably enlarged with the implementation of ECHR, Art. 8.

Whether they are familiar with Scots law or not, readers will learn a lot reading the first chapters of the book. Issues and options are clearly exposed by the editors in Chapter 1, which gives an overview of the subject insisting on the historical and political background that makes Scotland such a unique place before and after devolution.¹⁷ The editors then focus on what they view as the key issues, and not surprisingly these include the integration of the ECHR right to privacy. Other questions pop up such as how to protect rights of personality, whether a right to publicity should be introduced, and whether personality rights should be codified, a question that in their opinion deserves a negative answer.

Following chapters address these questions. In what appears to be the longest contribution in the book (Chapter 2 counts over 110 pages), John Blackie gives a rich and detailed overview of the history of personality rights in Scots law, from the 16th century to the mid-19th century,¹⁸ looking backwards (doctrinal history), sideways (comparative law), and forward (law reform proposals) to make informed decision as to where to go.¹⁹ Readers having a lesser interest in legal history will value the Editors' summary of John Blackie's findings.²⁰ His well-documented exploration shows how much Scots law was based on the *ius commune* until it received English influence during the 19th century. Real injury (*iniuria realis*) and verbal injury (*iniuria verbalis*) evolved and developed as sub-categories of *iniuria*, generating a complex and confusing taxonomy. The full page figures at p. 38 (the delict of *iniuria* in Scotland in 1700) and 103 (the delict of injury in 1850) give a fascinating overview of shifting categories and the text reveals the fertility and flexibility of the delict of injury to cover new situations, such as invasions of privacy once people's sphere of privacy started to expand.

17. *Rights of Personality in Scots Law: Issues and Options*, at 1.

18. *Unity in Diversity: The History of Personality Rights in Scots Law*, at 31.

19. See the Editors comment, at 24.

20. At 10-12.

Niall Whitty, co-editor of the book, gives a full overview of rights of privacy in Scots law (Chapter 3).²¹ His hundred-page long chapter insists on categories that vary from one system to another. After defining the fundamental concepts, and particularly those of real and verbal injury derived from Roman law, but also those of dignity, autonomy, and privacy, he ventures into categorizing, using Johan Neethling's typology as a starting point.²² Such personality rights are primary rights and their infringement is a delict, imposing a secondary obligation on the wrongdoer to repair or remedy. The primary right might be imprescriptible, the secondary one is not and may be extinguished by prescription. He then describes the thirteen personality rights identified by Neethling: right to life, the rights to bodily integrity and to personal security, the right to physical liberty, the right to honor and reputation, the right to dignity in the narrow sense (self-esteem; honor; and freedom from insult), the right to privacy (seclusion from intrusion), the right to informational privacy (non-disclosure of private information), the right to identity or image, the right to publicity (appropriation of image and reification of right to privacy and image), the moral right to copyright, the right to autonomy (still debated in Scotland), personality rights in family relationships, personality rights after death. Professor Whitty's treatment of the elements of liability for infringing rights of personality shows the paramount importance of tort law concepts in this area and as everywhere in his essay the approach is comparative, showing familiarity with European projects such as the *Principles of European Tort Law*. Transmissibility of the action and remedies are also discussed in this very rich essay.

There is much more in the book, including the already mentioned Continental European and South African perspectives to which one must add a very informative discussion of English law perspectives, by Hazel Carty, showing how English law remains "mistrustful of generalised rights" (Chapter 7).²³ The final

21. *Overview of Rights of Personality in Scots Law*, at 147.

22. At. 164. Reference is made to JOHAN NEETHLING, J.M. POTGIETER & P.J. VISSER, *NEETHLING'S LAW OF PERSONALITY* (2d ed. 2005). See also J. Neethling, *Personality Rights*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW (J. Smits ed. 2006), at Chapter 48.

23. *Personality Rights and English Law* 383, at 384.

chapters cover defamation,²⁴ autonomy in medical law,²⁵ and a presentation of the very impressive personality database covering a number of significant legal systems, that has fed a comparative survey, discussed by Charlotte Waelde and Niall Whitty.²⁶ Hector McQueen's Hitchhiker's guide to personality rights in Scots law concludes the volume, road mapping the complex personality rights galaxy in Scots law.²⁷ May be for the reason that it primarily addresses privacy, it has not been placed at the beginning of the volume, where the reader would be happy to find a road map. It inevitably repeats some information available elsewhere in the book but offers a most valuable guide, starting with the impact of the Human Rights Act 1998 and ending with a survey of other relevant statutes, also promenading through English cases on breach of confidence and the *actio iniuriarum* of Scots law.

Altogether, this is a remarkable and most informative comparative law book that every scholar interested in personality rights in Scotland, Europe, or in any other jurisdiction must read or consult. More generally, the book shows the great vitality of the civil law tradition of Scotland and the many ways it interacts both with English law and European law and keeps developing as a very dynamic mixed jurisdiction, connected to so many others. In the reviewer's opinion, there is no better place than mixed jurisdictions to test legal theories and doctrines, see how they interact and identify what is working best. Scotland has developed a pragmatic view of what personality rights are, half way between the generalization of the French and the casuistic approach of the English, proving in this field as in others that Scots law is a modern continuation of Roman law. A French scholar trained in France and having migrated to another mixed jurisdiction, the reviewer cannot help thinking that the late Hélène David²⁸ and

24. Kenneth Norrie, *The Scots Law of Defamation: Is there a Need for Reform?*, at 433.

25. Graeme Laurie, *Personality, Privacy and Autonomy in Medical Law*, at 453.

26. This is a major project conducted at the University of Edinburgh: *A Right of Personality Database*, at 485.

27. *A Hitchhiker's Guide to Personality Rights in Scots Law, Mainly with Regards to Privacy*, at 549.

28. HELENE DAVID, *INTRODUCTION A L'ETUDE DU DROIT ECOSSAIS* (Paris, 1972).

T.B. Smith²⁹ would have liked and valued this book, much as they would also have enjoyed *Mixed Jurisdictions Compared, Private Law in Louisiana and Scotland*, edited by Vernon Palmer and Elspeth Reid,³⁰ published that very same year, also containing an essay on personality rights.³¹

Together with the Dundee University Press, the editors have done a great job making the book easy to read and navigate, with a sequential numbering of chapters and sections, detailed tables of content at the beginning of every chapter, and useful indexes and tables. This review will end where the book starts: the short foreword by Lord Hope is a must read. It offers insightful thoughts on the impact of academic work on the judiciary and the vital importance of comparative law on the development of Scots law, of which the book is a brilliant demonstration.

29. See A MIXED LEGAL SYSTEM IN TRANSITION, T. B. SMITH AND THE PROGRESS OF SCOTS LAW, (Elspeth Reid & David Miller eds. 2005).

30. Edinburgh University Press, 2009.

31. Elspeth Christie Reid, *Personality Rights: A Study in Difference*, at 387.