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HIGHLIGHTS OF A COMPARATIVE STUDY OF THE COMMON AND CIVIL LAW SYSTEMS

EDMUND H. SCHWENK*

I. INTRODUCTION

One hundred and twenty years have passed since Justice Story made use of the comparative method in his treatise on conflict of laws.¹ During those years, the importance of comparative law has grown considerably.² In fact, it is no longer a luxury but a very pragmatic ingredient of contemporary legal education.³ No wonder that numerous sources for the study of comparative law have already been made available.⁴ The reasons for this development are multiple. From an academic point of view, a comparative approach contributes to the understanding and the appreciation or criticism of one's own legal system.⁵ There are, however, more important practical reasons that make it desirable, if not necessary, for lawyers as well as others to become familiar with basic principles of foreign law. In solving legislative problems, legislators frequently face questions which have been the subject of

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¹ Nadelmann, *Joseph Story's Sketch of American Law*, 3 AM. J. COMP. LAW 3 (1954); Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15 (1934); 30 REVUE CRITIQUE DE DROIT INTERNATIONAL 295 (1935).

² Stone, *The End to Be Served by Comparative Law*, 25 TULANE L. REV. 325 (1951); La Paulle, *The Functions of Comparative Law*, 35 HARV. L. REV. 838 (1922).

³ Mayda, *The Value of Studying Foreign Law*, 1953 WIS. L. REV. 635-656 (1953); Hazard, *Comparative Law in Legal Education*, 18 U. OF CHI. L. REV. 264 (1951); Re, *Comparative Law Course in the Law School Curriculum*, 1 AM. J. COMP. LAW 232 (1952); Stevenson, *Comparative and Foreign Law in American Law Schools*, 50 COL. L. REV. 613 (1950); Thayer, *Re-Teaching of International and Comparative Law*, 1 J. LEGAL EDUC. 449 (1950); Rheinstein, *Teaching Comparative Law*, 5 U. OF CHI. L. REV. 615 (1938); Pound, *The Place of Comparative Law in the American Law School Curriculum*, 8 TULANE L. REV. 161 (1934).

⁴ Szladitz, *Note on Translations of Foreign Civil and Commercial Codes*, 3 AM. J. COMP. LAW 67-72 (1954); Rheinstein, *Teaching Tools in Comparative Law*, 1 AM. J. COMP. LAW 95-114 (1952).

⁵ Rheinstein, *Teaching Tools in Comparative Law*, 1 AM. J. COMP. LAW 104 (1952); McDougal, *Conservative Study of Law for Policy Purposes*, 1 AM. J. COMP. LAW 34 (1952).

legislation in other countries.⁶ Even though such legislation may not be readily adaptable, acquaintance with other solutions is certainly useful.

For the judicial branch, the importance of knowledge of basic principles of foreign law has existed since the time when American courts first applied foreign law as a result of pertinent principles of conflict of laws. True, under the common law rules of evidence the party having the burden of proof must assert and prove foreign law like any other facts constituting a cause of action.⁷ However, aside from the fact that this rule has been recently relaxed in several states,⁸ the ultimate task of applying and interpreting foreign law rests with the courts, even though they may be aided by experts.⁹ That such aid may actually result in confusion is best illustrated by the case of *Usatorre et al. v. The Victoria et al.*¹⁰ This case involved a salvage claim by Claudio Rodriguez and others against the motor vessel *Victoria* which was operated under the flag of Argentina. The salvage was carried out by the plaintiffs, the ship's own crew, after they had abandoned the ship upon the captain's orders and without any hope of recovery. The defense was that the plaintiffs were not entitled to an award for salvage, because the ship ultimately was not wrecked, and, under Argentine law, the voyage and employment contract had not been terminated. The United States District Court for the Southern District of New York did not make a finding as to Argentine law because it thought that *jus gentium* applied to salvage claims. The Court of Appeals, however, reversed the decision of the District Court, expressing the view "that whether, on the facts as found, the crew were 'released from any obligation to exert themselves for the benefit of the vessel,' must be determined as a matter of the 'internal economy' of the ship, by the Argentine law, the 'law of the flag.'"^{10a} Before the trial court the expert witness, an American citizen and a member of the New York Bar and of the Bars of Cuba and Puerto Rico, had testified that the provision of the Argentine law that contracts between seamen and ships are terminated by any disaster

⁶ McDougal, *Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 1 AM. J. COMP. LAW 34 (1952).

⁷ Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L. J. 1018 ff. (1941); Nussbaum, *Proving the Law of Foreign Countries*, 3 AM. J. COMP. LAW 60 (1954).

⁸ Nussbaum, *Proving the Law of Foreign Countries*, 3 AM. J. COMP. LAW 60 (1954); Schlesinger, *Neuere amerikanische Gerichtsentscheidungen*, NEUE JURISTISCHE WOCHENSCHRIFT 54, 828-829.

⁹ Sommerich and Busch, *The Expert Witness and the Proof of Foreign Law*, 38 CORNELL L. Q. 125 (1953).

¹⁰ *Usatorre et al. v. The Victoria et al.*, 172 F. 2d 434 (2d Cir. 1949). See comments by Nussbaum, *Proving the Law of Foreign Countries*, 3 AM. J. COMP. LAW 60-67 (1954).

^{10a} *Id.* at 438.

rendering the vessel incapable of navigation must be interpreted literally and that, therefore, the question, whether the vessel was incapable of navigation depended on the actual facts and not on the captain's judgment. In presenting his opinion, the witness gave little or no attention to Argentine decisional material. For this reason, the Court of Appeals questioned the accuracy of the expert's opinion:

"We have no knowledge of Argentine 'law,' nor more than a vague acquaintance with the judicial methods there prevailing. But casual readings of readily available material clearly indicate that, in all civil-law countries, despite conventional protestations to the contrary, much law is judge-made, and the courts are by no means unaffected by judicial precedents or 'case law' (which the civilians call 'jurisprudence,' as distinguished from the interpretation of text-writers or commentators, called 'doctrine'). Recaséns Siches, a widely respected professor of law in Spain for many years, now in Mexico, recently wrote: 'Now jurisprudence, that is, the decision of the courts, has had the part of greatest protagonist in the formation of the law; and, although in much less volume, it continues today of great importance.' 'Both the slavish obedience of [civilian] judges to codes, and their freedom from precedent are largely a myth,' writes Friedman. 'In truth, while there is greater freedom towards the provisions of codes, there is also much greater respect for judicial authority than imagined by most Anglo-American lawyers.' A recent treatise by Cossio, a distinguished Argentine lawyer, shows that this attitude prevails in the Argentine.

"The expert witness' adherence to the literal words of the code may have caused the trial judge to question his conclusions. For, we are told, the civilians, influenced by an interpretative theory which derives from Aristotle (and which has affected Anglo-American practice as well) are accustomed to interpret their statutory enactments 'equitably,' i.e., to fill in gaps, arising necessarily from the generalized terms of many statutes, by asking how the legislature would have dealt with the 'unprovided case.' In civil-law countries, 'there are countless examples of judicial interpretation of statutes * * * which gave the statutory interpretation a meaning either not foreseen by or openly antagonistic to the opinions prevailing at the time of the Code, but in accordance with modern social development of trends of public opinion. This attitude finds expression in Art. I of the Swiss Civil Code [of 1907] which directs the judge to decide as if he

were a legislator, when he finds himself faced with a definite gap in the statute.'"^{10b}

In addition to the legislators and judges, the *administrative* branch of the government is faced, more than ever before, with legal issues which may be determined by the legal systems of foreign countries. It is no novelty that an "income tax" in a foreign country is not necessarily an "income tax" within the meaning of Sections 164 and 907 of the Internal Revenue Code of 1954, and, therefore, not subject to credit or deduction.¹¹

Another example of the classification problem is furnished by Article X of the Agreement regarding the Status of the Forces of Parties to the North Atlantic Treaty. Article X provides that, where the legal incidence of any form of taxation in the receiving State depends upon residence or domicile, periods during which a member of a Force or civilian component is in the territory of that State by reason solely of his being a member of such Force or civilian component shall not be considered as periods of residence therein, or as creating a change of residence or domicile for the purpose of such taxation. No doubt, Article X is designed to exempt all members of the Forces in NATO countries from "taxation" based upon residence or domicile. However, the concept of "taxation" in the United States is not identical with that in other NATO countries. Thus, for example, while contributions to social security (*e.g.*, contributions for unemployment benefits) are considered taxes in the United States, they are regarded as "contributions" as distinguished from "taxes" in European countries on the ground that they are paid in consideration of contingent payments to be made by the social insurance carrier to the unemployed.

A special impetus has been given to foreign law as a result of the off-shore procurement program of the United States. Even though the United States may be exempt from court jurisdiction in regard to off-shore procurement contracts—either by explicit provision of "Memoranda of Understanding"¹² or by principles of sovereign immunity,¹³

^{10b} *Id.* at 439.

¹¹ *Biddle v. Commissioner of Internal Revenue*, 302 U. S. 573 (1938); *New York & Honduras Rosalia Min. Co. v. Commissioner of Internal Revenue*, 168 F. 2d 745 (1948); *Keen v. Commissioner of Internal Revenue*, 15 B. T. A. 1243 (1929); *Eitington-Schild Co., Inc. v. Commissioner of Internal Revenue*, 21 B. T. A. 1163 (1931); *Schlesinger, Comparative Law Cases and Materials*, 364-380 (1950).

¹² Memoranda of Understanding exist between the U. S. and the following countries: Spain—30 July 1954; United Kingdom—30 October 1952; France—13 May 1952, 8 April 1953, 12 June 1953; Belgium—2 September 1953; Netherlands—7 May 1954; Italy—31 March 1954; Denmark—8 June 1954; Norway—10 March 1954; Yugoslavia—18 October 1954.

¹³ As to the United States, see Bishop, *New United States Policy Limiting and Sovereign Immunity*, 47 AM. J. INT'L. L. 93 (1953); as to Great Britain, see Lauterpacht, *The Problem of Jurisdiction at Immunities of Foreign States*, 1951 British Year Book of International Law 220; as to Germany, see Schwenk,

as applied in the country in which suit is brought—it does not follow that the United States is exempt from the applicability of foreign law where applicable rules of conflict of laws require the application of foreign law in the absence of specific stipulations to the contrary.¹⁴ Similar difficulties exist in interpreting Treaties of Friendship, Commerce and Navigation, Agreements to Avoid Double Taxation, etc.

Finally, a great number of United States military personnel and dependents are stationed in foreign countries, either as occupation forces or for defense purposes. Legal problems of a civil nature involving the law of contracts, torts, property, and domestic relations arise under the law of the country in which they are stationed and frequently in the courts of that country. Until recently, Occupation Courts in Germany, staffed with American judges, applied German civil and criminal law in cases of which the court had jurisdiction.¹⁵ Frequently the parties involved in such cases before these courts, whether American or German, were represented by American attorneys who had been admitted by the United States High Commissioner for Germany and by Headquarters, United States Army, Europe, to practice law in Occupation Courts in Germany. Now, such civil litigation is conducted almost exclusively in the German courts.¹⁶

II. GENERAL FEATURES DISTINGUISHING COMMON AND CIVIL LAW

a. Judge-made law in civil law countries

While it is true that in civil law countries all law is statutory, the most authoritative interpretation and construction is furnished by the courts.¹⁷ In this respect, the opinion of the Louisiana Supreme Court in the case of *Breedlove v. Turner*¹⁸ appears to characterize most aptly the situation prevailing not only in Louisiana but also in other civil-law states. In this case, the defendant, an attorney-at-law, based his defense against an action for damages for malpractice on the ground that he was not required to know the decisions of the Louisiana Supreme Court,

Ausschluss fremder Staaten von den deutschen Gerichtsbarkeit, NEUE JURISTISCHE WOCHENSCHRIFT 55, 1596 (1955) and Domcke, *Immunity of Foreign States from German Jurisdiction*, 48 AM. J. INT'L. L. 302 (1954).

¹⁴ This becomes particularly evident when the United States must bring suit in foreign courts in order to enforce contractual rights.

¹⁵ McCauley, *American Courts in Germany*, 40 A. B. A. J. 1041-1045 (1954); Clark and Goodman, *American Justice in Occupied Germany*, 36 A. B. A. J. 443 (1950); Nobleman, *Military Government Courts; Law and Order in the American Zone of Germany*, 33 A. B. A. J. 777 (1947).

¹⁶ U. S. High Commissioner Laws Nos. 38 and 40, amending U. S. High Commissioner Law No. 20.

¹⁷ See Lobingier, *Precedent in Past and Present Legal Systems*, 44 MICH. L. REV. 955 (1946); 40 C. J., *Modern Civil Law* § 6 (1926). Rodin, *Case Law and Stare Decisis*, 33 COL. L. REV. 199 (1933); Pound, *Theory of Judicial Decisions*, 36 HARV. L. REV. 641-649 (1923).

¹⁸ *Breedlove v. Turner*, 9 Mart. (Old Ser.) 353 (La. 1821); Schlesinger, *Comparative Law Cases and Materials*, p. 265 (1950).

since they did not constitute the law of the state. To this the Louisiana Supreme Court replied :

"The next objection, that the lawyers practising in this state are not under any necessity of noticing the judgments given by the Supreme Court, has certainly the merit of novelty, to justify an examination of its correctness.

In support of this position, a great deal of time was occupied in showing, that the decisions were not law; that nothing could be properly called so, but those acts passed by that branch of our government, in whom the power of legislation is vested by the constitution. This is true, and we never before supposed that they were so considered. But as we are obliged, by our duty, to decide on every question that is brought before us, and, as many of these questions turn on ascertaining the true meaning of the lawmaker, when the expressions used are ambiguous, whether that ambiguity be considered in relation to the language used in the act, or the applicability of the provision to particular cases; I had supposed it not doubted, that the decisions of this tribunal were to be regarded as the interpretation of the legislative will; as an exposition of its meaning and intention. And that, until the legislative authority, by subsequent acts, chose to make different provisions on the subject, that it is an acquiescence on their part, that the court fairly understood their meaning, and wisely and faithfully expounded it. There is, also, a variety of questions presented for decision, where positive law is silent, and where recourse must be had to legal analogies, to arrive at truth. Are not the decisions which this court makes, amid the frequent conflicting opinions of foreign jurists, to be received as determining which doctrine is in force here? We are told not; that recourse must be had to the law itself, and that law is found where? In some obscure commentator, who lived, perhaps, some centuries ago, and who is quoted, triumphantly, as better evidence of what is a rule of action for the people of Louisiana, than the decisions of men, who, whatever in other respects be their abilities, have at least the advantage of using the knowledge and the learning that latter times have produced—who enjoy the light of the age in which they live, and who have the aid of able counsel, discussing every subject on which they are called to pronounce an opinion.

This, then, is the fair extent to which the authority of the decisions of this tribunal may be carried. They are evidence of what the law is, under such circumstances, as has just been stated, and as is the duty of the court to see that they are correct, and

that they are uniform; so, also, it is important, that society should know, that we feel ourselves bound by them, unless we are clearly, and beyond doubt, satisfied that they are contrary to law or the constitution, and that we never can consider it a proper discharge of duty in any member of the bar, who pursues his profession with an avowed determination to disregard them."^{18a}

There exists judge-made law in every civil law country, even though its civil code may not contain an explicit authorization, such as Article I of the Swiss Civil Code.¹⁹ Thus, for example, in France and in the Scandinavian countries, the principle of strict liability of owners of motor vehicles is a judge-made product.²⁰ German courts established judge-made law, such as the theory of *culpa in contrahendo*,²¹ anticipatory breach of contract,²² *clausula rebus sic stantibus*,²³ mitiga-

^{18a} *Ibid.*

¹⁹ Article I of the Swiss Civil Code reads as follows:

"The statute governs all matter within the letter of spirit of any of its mandates. In default of an applicable statute, the judge is to pronounce judgment according to the customary law, and in default of custom according to the rules which he would establish if he were to assume the part of a legislator. He is to draw his inspiration, however, from the solutions of the learned (*la doctrine*) and the jurisprudence of the courts (*la jurisprudence*)."

This provision has been made the subject of study by WILLIAMS, *THE SOURCES OF LAW IN THE SWISS CIVIL CODE* (1923).

²⁰ Ussing, *The Scandinavian Law of Torts*, 1 AM. J. COMP. LAW 359 (1952); Esmein, *Liability in French Law for Damage Caused by Motor Vehicle Accidents*, 2 AM. J. COMP. LAW 156 (1953). See also Deak, *Automobile Accidents: A Comparative Study of the Law of Liability in Europe*, 79 U. OF PA. L. REV. 271 (1931); as to trends in U. S. A., see Grad, *Recent Developments in Auto Accident Compensation*, 50 COL. L. REV. 300 (1950).

²¹ Under the theory of *culpa in contrahendo* the entertainment of negotiations results in contractual obligations of the parties to tell each other the truth, to protect each other's physical integrity, etc. See Schwenk, *Culpa in Contrahendo in German, French and Louisiana Law*, 15 TULANE L. REV. 87 (1940).

²² Under this theory, an action for damages exists in instances similar to those of anticipatory breach of contract in American law. See decisions of the former German Supreme Court in R.G.Z. 54, 102; 63, 423; 67, 7; 111, 303; 129, 282; 130, 301; 131, 358; 161, 338; 134, 87; 106, 25.

²³ Under the theory of *clausula rebus sic stantibus* every contract contains the condition precedent that the facts existing at the time when the contract is entered into remain the same. Later the theory was changed to the effect that a contract remains effective only as long as there is no change of the basic facts existing at the time when the contract is concluded. The theory of *clausula rebus sic stantibus* was embodied in the Prussian Law (*Allgemeine Landrecht*, para. 377, I, 5). However, when the German Civil Code took the place of that Law, it was not incorporated in the Code (See Motives relating to the German Civil Code, II, 199, 315). As a result, the German Supreme Court first refused to apply the theory of *clausula rebus sic stantibus* (R. G. Z. 550-57). In fact, the theory that a contract is valid only as long as the surrounding facts remain the same, was never fully recognized (R. G. Z. 147, 56; J. W. 38, 862). Nevertheless, the theory was applied in Germany in instances in which changes occurred as a result of World War I, revolution and inflation (R.G.J.W. 37, 2036; R. G. Z. 100, 130). Finally, it was applied in cases in which circumstances existing at the time, when the contract came into existence, changed to such an extent that performance of the contract cannot be reasonably expected from one or another party (R. G. Z.

tion of damages,²⁴ etc. Furthermore, they adjusted provisions of a copyright statute enacted in 1901 by judicial process to the modern needs brought about by radio and record players.²⁵ Finally, in connection with the provision²⁶ of the new German constitution providing for equal rights for men and women, German courts must not only invalidate numerous provisions of the German Civil Code, Code of Civil Procedure and Statutes inconsistent with it, but also determine the law which takes the place of the invalidated provisions.²⁷ The German Federal Constitutional Court—supreme court in constitutional matters—held that this function of the German courts is judicial and not legislative and that it is, therefore, not repugnant to the doctrine of separation of powers, as laid down in the German constitution.²⁸

b. Stare decisis in civil law countries

It is frequently said that the common law may be distinguished from the civil law by the rule of *stare decisis*. In the Anglo-American system this rule does not necessarily mean that courts may not depart from precedent in order to vindicate plain and obvious principles of law and to remedy injustice or to keep up with social evolution.²⁹ The doctrine also exists, with varying degrees of elasticity, in civil law countries. In fact, some civil law countries such as Germany have put teeth in the doctrine of *stare decisis*. Thus, if the civil panel (*i.e.*, the panel for civil cases) of the German Supreme Court wishes to depart from precedent set by another civil panel, the case must be submitted for determination to the Grand Senate, consisting of the President and eight

152, 403; 153, 358; 160, 256; B. G. H. 2, 188). As to the *clausula rebus sic stantibus* under the Swiss Civil Code, see SCHLESINGER, *COMPARATIVE LAW*, 324-332 (1950).

²⁴ Under the theory of mitigation of damages (*compensatio lucri cum damno*) a person who is entitled to damages must reduce them to the extent to which he obtained a gain from the event causing the damages (breach of contract, tort). See Decisions of the former German Supreme Court in R. G. Z. 554, 141; 80, 154; 84, 389; 146, 278; 152, 401; 153, 265.

²⁵ G. and D. Reinicke, *Die Fortbildung des Rechts durch den Richter*, NEUE JURISTISCHE WOCHENSCHRIFT 54, 1217-1222.

²⁶ Article 3 of the German Basic Law (Constitution) provides:

"1. All men shall be equal before the law.

2. Men and women shall have equal rights.

3. No one may be prejudiced or privileged because of his sex, descent, race, language, homeland and origin, faith or his religion and political opinions."

²⁷ See NEUE JURISTISCHE WOCHENSCHRIFT 53, 903, 984, 1104, 1222, 1351, 1538, 1772; 54, 76, 145, 151, 159, 349, 837, 839, 840, 1161, 1301, 1522; DEUTSCHE RICHERZEITUNG 53, 169; DEUTSCHE OEFFENTLICHE VERWALTUNG 53, 456.

²⁸ Decision of 18 December 1953 published in NEUE JURISTISCHE WOCHENSCHRIFT 53, 65. In an advisory opinion of 6 September 1953 the German Supreme Court has reached the same conclusion, NEUE JURISTISCHE WOCHENSCHRIFT 54, 347.

²⁹ *State v. Aiken*, 42 S. C. 222, 20 S.E. 221 (1894); *Carroll v. Local No. 269 International Brotherhood of Electrical Workers*, 133 N. J. Eq. 144, 31 A. 2d 223 (Ch. 1943); *McKenna v. Austin*, 134 F. 2d 659, 666 (1943); *United States v. State of Minnesota*, 113 F. 2d 770, 774 (1940).

judges.³⁰ The same is true in criminal cases.³¹ Moreover, if a civil panel desires to depart from a precedent set by a criminal panel (*i.e.*, a panel in criminal cases) and vice versa, the so-called Combined Grand Senate, consisting of the President of the court and all members of the Grand Senate, must hear and decide the case.³² Finally, many decisions of the Federal Constitutional Court are binding upon constitutional organs, courts, and government agencies.³³ Others have the force of law.³⁴

III. THE LAW OF EQUITY AND TRUSTS IN CIVIL LAW COUNTRIES

In the Anglo-American system the law of equity has been developed by equity courts. To a substantial degree these courts owe their existence to the fact that the common law judges set themselves with an iron determination against any modification of the doctrine and rules established by precedent.³⁵ In civil law countries equity is not known as a special branch of law. However, such concepts as estoppel, the doctrine of clean hands, rescission of contracts for mistake, fraud and duress, reformation, assignments, relief from contractual forfeitures and penalties, suits for accounting, enforcement of arbitration awards, and writs of injunction have either been incorporated as specific legal provisions into the substantive or adjective law of civil law countries or developed by the courts.³⁶ In addition, civil codes contain general provisions requiring equitable considerations in regard to interpretation of contracts,³⁷ performance of obligations³⁸ and exercise of rights.³⁹ Consequently, while the results obtained by the civil law concept of equity and the Anglo-American law of equity are similar, they are not identical. Thus, while under the Anglo-American law of equity specific performance may be

³⁰ Section 136 I of the German Court Organisation Law (Gerichtsverfassungsgesetz).

³¹ *Ibid.*

³² Section 136 II of the German Court Organisation Law (Gerichtsverfassungsgesetz).

³³ Section 31 I Federal Constitutional Court Law (Bundesverfassungsgerichtsgesetz). See also Schaefer, *Gesetzeskraft und bindende Wirkung der Entscheidungen des Bundesverfassungsgerichtes*, NEUE JURISTISCHE WOCHENSCHRIFT 54, 1465-1469 (1954).

³⁴ Section 31 II Federal Constitutional Court Law (Bundesverfassungsgerichtsgesetz). See Schaefer, *op. cit. supra* note 33.

³⁵ 1 POMEROY, EQUITY JURISPRUDENCE § 16 (5th ed. 1941).

³⁶ See, for example, Sections 119-123, 157, 226, 242, 398-413, German Civil Code. See also Sections 935-945, German Code of Civil Procedure.

³⁷ Section 157 of the German Civil Code provides that contracts shall be interpreted in a reasonable way with due regard to customs.

³⁸ Section 242 of the German Civil Code provides that the debtor shall perform in a reasonable way with due regard to customs.

³⁹ Section 226 of the German Civil Code provides that the exercise of a right is not permissible if it serves only the purpose of inflicting damage upon another person. On this provision, see Gutteridge, *Abuse of Rights*, 5 CAMB. L. J. 22, 32-39 (1933); SCHLESINGER, COMPARATIVE LAW 333-341 (1950).

obtained only where damages are inadequate or impracticable,⁴⁰ the civil law, as a rule, recognizes the right to specific performance of all contractual obligations.⁴¹ They may be enforced by contempt of court process or by third parties at the debtor's expense.⁴²

Similarly, civil law countries have no equivalent to the Anglo-American law of trusts.⁴³ This appears to be strange, since Roman law developed the *fidei commissum*,⁴⁴ a trust device, and Germanic law the "Salman" or "Treuhand,"⁴⁵ a similar trust device, both historical antecedents of the English uses and the modern Anglo-American trust. The first English trusts were created to evade the Statute of Mortmain, forbidding religious groups to hold land. Although similar prohibitions are known in civil law countries, the law of trusts did not develop as a special branch. It has been said that objectives accomplished by the Anglo-American law of trusts have been obtained in civil law countries by substitute devices, such as grant of unlimited power of attorney, foundation, usufruct, *fidei commissum*, and others.⁴⁶ However, these devices cannot be compared with the Anglo-American law of trusts.⁴⁷ While the law of trusts itself determines the liability of the settlor, trustee, and cestui que trust, a stipulation by the parties in civil law countries is required to reach similar results. The difference is manifest. For instance, where under the Anglo-American law of trusts a constructive trust comes into existence, the civil law system remains helpless. Thus, if property is conveyed from *A* to *B* in trust for *A*, and *B* sells the property to *C* in violation of the trust, *A*'s equities are cut off under the civil law system, even though *C* may not be a bona fide purchaser for value. As a result, in the civil law system *A*'s only remedy is a cause of action against *B* for damages upon breach of contract,⁴⁸ while under the Anglo-American rule of trust pursuit a constructive trust results in favor of *A*.⁴⁹

⁴⁰ 4 POMEROY, EQUITY JURISPRUDENCE §§ 1401-1403 (5th ed. 1941).

⁴¹ Section 362 I, German Civil Code.

⁴² Sections 887 and 888, German Code of Civil Procedure.

⁴³ Garrigues, *Law of Trusts*, 2 AM. J. COMP. LAW 25-35 (1953); Bolgar, *Why No Trusts in the Civil Law?*, 2 AM. J. COMP. LAW 204 (1953).

⁴⁴ See McDonogh's Executors v. Murdoch, 15 How. (U. S.) 367, 14 L. Ed. 732 (1853), discussing the Roman *fidei commissum* and the *fidei commissum* of the Louisiana Code, and of the Spanish and French Law.

⁴⁵ See Ames, *The Origin of Uses and Trusts*, 21 HARV. L. REV. 261, 265 (1908).

⁴⁶ Nussbaum, *Sociological and Comparative Aspects of the Trust*, 38 COL. L. REV. 416 (1938); Batiffol, *The Trust Problem as Seen by a French Lawyer*, 33 JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW 24 (1951); Huber, *Trust and Treuhand in Swiss Law*, 1 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 66 (1952); Meyer, *Trusts and Swiss Law*, 1 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 379 (1952).

⁴⁷ Garrigues, *Law of Trusts*, 2 AM. J. COMP. LAW 35 (1953).

⁴⁸ This follows from the relationship "in personam" as compared with that "in rem." On the distinction between rights in rem and in personam, see Bolgar, *Why No Trusts in the Civil Law?*, 1 AM. J. COMP. LAW 218 (1952).

⁴⁹ 54 AM. JUR., *Trusts* §§ 248, 266 (1945).

IV. THE LAW OF CONTRACTS

One might assume that in times in which trade and commerce are carried on upon a world-wide basis, the principles of formation of contracts would be identical in all countries. Unfortunately, this is not the case. Thus, while under common law an offer is not binding and may be made binding only if made under seal or for a consideration,⁵⁰ in the civil law an offer is binding for a reasonable period of time, or if it is not so binding, it may be made so without any consideration.⁵¹

While consideration is an essential requirement for a legally enforceable promise in the common law,⁵² it is not so required in the civil law. The reasons therefor are historical. While in the common law the enforcement of contractual obligations has grown out of the action for *assumpsit*—which includes consideration as an essential element—enforcement of contracts in civil law countries originated from the Roman law of contracts under which the doctrine of consideration is unknown. Nevertheless, consideration is not an entirely foreign concept in the civil law: as in the common law, it furnishes the test for the distinction between gift promises and others.⁵³ In the civil law a gift promise requires compliance with certain form requirements,⁵⁴ unless it is actually performed.

While common law contracts must be in writing under the circumstances set forth by the Statute of Frauds and while compliance with the Statute of Frauds is a matter of procedural rather than substantive law,⁵⁵ the codes in civil law countries prescribe various form requirements for various contracts. In some instances contracts must be in writing,⁵⁶ in others they must be made before a notary public or a court.⁵⁷ The purpose of these attestations is to force the parties to consider carefully the consequences of their stipulations before they affix their signature to the contract. As a result, by judicial determination, these form requirements have been extended to preliminary contracts by

⁵⁰ RESTATEMENT, CONTRACTS § 35(e) (1932); *Hargrove v. Crawford*, 159 Iowa 522, 141 N. W. 423 (1913); *Night Co. v. Brown*, 213 Mich. 214, 181 N. W. 979 (1921).

⁵¹ See, e.g., Section 145, German Civil Code. See also CORBIN, CONTRACTS § 38 (1950); SCHLESINGER, COMPARATIVE LAW 294 (1950).

⁵² RESTATEMENT, CONTRACTS § 75 (1932); 1 CORBIN, CONTRACTS §§ 110, 111 (1950).

⁵³ For the common law, this idea was spelled out in *Stonestreet v. Southern Oil Co.*, 226 N. C. 261, 37 S. E. 2d 676 (1946) as follows: "He gave nothing for it, loses nothing by it, and upon its breach he suffers no recoverable damages."

⁵⁴ Pursuant to Section 518, German Civil Code, a gift promise must be made before a notary public or court.

⁵⁵ SIMPSON, CONTRACTS § 62 (1954).

⁵⁶ E.g., the German Civil Code prescribes writing for suretyship (Section 766), assignment of mortgages (Section 1154), leases covering a period of more than one year (Section 566), promise or recognizance of a debt (Sections 780 and 781).

⁵⁷ E.g., The German Civil Code prescribes recording before a notary public or court in case of sale of property (Section 313), gift promises (Section 518), etc.

which the parties bind themselves to enter into main contracts for which compliance with formal requirements is required.⁵⁸

In the common law system contracts are not enforceable if they are made illegal by statute or violate public policy, as declared by the courts.⁵⁹ Civil law countries impose similar restrictions on the freedom of contract.⁶⁰ Thus, in the German Civil Code contracts are null and void if they violate statutory provisions, unless such provisions are not directed against their validity.⁶¹ Furthermore, contracts are null and void if they violate good morals.⁶²

V. THE LAW OF TORTS

As in Anglo-American common law, actions for negligence constitute the bulk of the law of torts in civil law countries.⁶³ However, actions for negligence may be confined in civil law countries to instances in which damage has been inflicted upon specific objects, such as life, body, health, freedom, and property.⁶⁴ A general clause such as "other rights of another person" may or may not extend the list of protected values.

As a general rule, actions for negligence require either intent or negligence. While under both systems the concept of "intent" is well settled, there exists a diversity of opinion in the civil law countries as to whether the test for negligence is objective (*i.e.*, conduct of a reasonable person) or subjective (*i.e.*, conduct of the tortfeasor). It would seem that the objective theory is prevailing in civil law countries.⁶⁵

Under both the Anglo-American and the civil law systems, the theory of "res ipsa loquitur"⁶⁶ has relieved the plaintiff in certain tort actions

⁵⁸ See decision of the former German Supreme Court in R. G. Z. 104, 132.

⁵⁹ SIMPSON, *CONTRACTS* § 175 (1954).

⁶⁰ See, *e.g.*, Sections 134 and 138, German Civil Code.

⁶¹ Section 134, German Civil Code.

⁶² The concept of "good morals" is as sweeping as "public policy." See SCHLESINGER, *COMPARATIVE LAW* 307-324 (1950).

⁶³ See Section 823, German Civil Code; Article 1382, French Civil Code.

⁶⁴ Section 823, German Civil Code. See, however, Articles 1382 and 1383, French Civil Code.

⁶⁵ Decision of the former and present German Supreme Court in R. G. Z. 119, 397; 152, 140; B.G.H. 8, 141. However, the views of the groups of persons to whom the tortfeasor belongs, should be taken into account, R. G. Z. 113, 426; 126, 331; 152, 140.

⁶⁶ Braun, *Res Ipsa Loquitur in the District of Columbia*, 20 JOURNAL OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, 157-165, 218-225 (1953); Note, 52 COL. L. REV. 551 (1952); Baker, *An Eclipse of Fault Liability*, 40 VA. L. REV. 276 (1951); McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation*, 35 VA. L. REV. 55 (1951); Jaffe, *Res Ipsa Loquitur Vindicated*, 1 BUFFALO L. REV. 1-15 (1951); Dewey, *A Tare in the Field of Res Ipsa Loquitur*, 19 U. OF CIN. L. REV. 415-459 (1950); Seavey, *Res Ipsa Loquitur: Tabula in Naufragio*, 63 HARV. L. REV. 643 (1950); Shain, *Presumptions Under the Common and Civil Law*, 18 SO. CALIF. L. REV. 91 (1944); Shain, *Res Ipsa Loquitur*, 17 SO. CALIF. L. REV. 187 (1944); Arthur, *Res Ipsa Loquitur as Applied in Dental Cases*, 15 ROCKY MT. L. REV. 220 (1943); 9 WIGMORE, EVIDENCE § 2509 (1940).

from the burden of proof for negligence. However, the effect of that theory is not comparable with that of the principle of liability without fault, since it permits only the inference that the defendant's neglect caused the injury complained of. While in the Anglo-American law under the doctrine of *Rylands v. Fletcher*⁶⁷ only a limited number of instances of liability without fault for "ultra-hazardous activities" has been recognized,⁶⁸ the civil law has extended the doctrine to all cases in which persons own, keep or operate dangerous instrumentalities.⁶⁹ Thus, by explicit provisions of the German Civil Code, the keepers of animals, domestic or wild, are liable for the mischief done by the animals regardless of whether their keepers know of their viciousness.⁷⁰ Furthermore, the owners of buildings are liable for damages if damage to property or injury to person is caused by the collapse of building or scaffold or by the separation of parts of a building or scaffold.⁷¹

It is due to the principle of equity rather than the doctrine of dangerous instrumentalities that under German law tort liability of insane persons or children exists if, in the view of the circumstances—particularly in view of conditions regarding the parties—equity requires the payment of damages and if the defendant's own support or compliance with legal obligations to support others is not affected by such payment.⁷² Inasmuch as this provision ultimately hinges upon the wealth of insane persons or children, it is doubtful whether it would be consistent with the equal rights provision of the Constitution of the United States.

In Germany, liability without fault has been extended by legislation to owners of automobiles⁷³ and railroads.⁷⁴ However, this liability is not unqualified. It may be defeated by showing that the most careful person could not have avoided the accident.⁷⁵ Other civil law countries

⁶⁷ *Rylands v. Fletcher*, L. R. 1 Ex. 265, *aff'd*, L. R. 3 H. L. 330 (1868).

⁶⁸ RESTATEMENT, TORTS §§ 519-524 (1938). McBratney, *New Trends Toward Liability without Fault*, 26 ROCKY MT. L. REV. 140-153 (1954); Leflar, *Negligence in Name Only*, 27 N. Y. U. L. REV. 564-584 (1952); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359-397 (1951).

⁶⁹ Bolgar, *Motor Vehicle Accident Compensation: Types and Trends*, 2 AM. J. COMP. LAW 516 (1953); Ussing, *The Scandinavian Law of Torts*, 1 AM. J. COMP. LAW 362 (1952); Esmein, *Liability in French Law for Damages Caused by Motor Vehicle Accidents*, 2 AM. J. COMP. LAW 156 (1953). As to the United States, see Grad, *Recent Developments in Auto Accident Compensation*, 50 COL. L. REV. 300 (1950).

⁷⁰ Section 833, German Civil Code.

⁷¹ Section 836, German Civil Code.

⁷² Section 829, German Civil Code. See Stone, *Liability for Damage Caused by Minors: A Comparative Study*, 5 ALA. L. REV. 1-35 (1952).

⁷³ Strassenverkehrsgesetz of 19 December 1952 (B. G. Bl. I 837).

⁷⁴ Gesetz betr. die Verbindlichkeit zum Schadensersatz fuer die bei dem Betriebe von Eisenbahnen, Bergwerken usw. herbeigefuehrten Toetungen und Koerperverletzungen (Reichshaftpflichtgesetz) of 7 June 1871 (R. G. Bl. 207), as amended; Gesetz ueber die Haftpflicht der Eisenbahnen und Strassenbahnen fuer Sachschaeden of 29 April 1940 (R. G. Bl. I 691).

⁷⁵ Section 7 II, Strassenverkehrsgesetz; Section 1, Reichshaftpflichtgesetz.

apply the doctrine of liability without fault to owners of automobiles, railroads, and airplanes as a result of judicial determination.⁷⁶ On the other hand, the doctrine of respondeat superior may be qualified in the civil law by the proviso that superiors may exonerate themselves from liability by showing that they exercised due care in selecting and supervising the tortfeasor.⁷⁷

The question as to whether damage to property or injury to person has been "caused" by the defendant to the plaintiff has vexed the courts in civil law countries as much as it has under the Anglo-American system.⁷⁸ A specific provision⁷⁹ in the civil law prescribing that the tortfeasor must restore, either in fact or by payment of damages, the condition which would exist in the absence of the commission of the tort, has not resulted in any solution of the problem. While in the field of criminal law the theory of the "but for" or "sine qua non" rule—the most logical doctrine of causation⁸⁰—was declared to be applicable,⁸¹ it yielded to the theory of proximate cause in torts law, on the ground that it would extend liability beyond the scope determined by the objective standard for negligence and by numerous instances of liability without fault.⁸²

In addition to the general provision on negligence, Civil Codes provide for specific torts. The most interesting provision appears to be the liability of the government for acts of its officials. The doctrine that "the king can do no wrong" is unknown even in those civil law countries in which absolute or constitutional monarchy prevailed.⁸³ As a result, governments are liable for torts committed by their officials in

⁷⁶ Bolgar, *Motor Vehicle Accident Compensation: Types and Trends*, 2 AM. J. COMP. LAW 515 (1953); Esmein, *Liability in French Law for Damages Caused by Motor Vehicle Accidents*, 2 AM. J. COMP. LAW 156 (1953); LAWSON, NEGLIGENCE IN THE CIVIL LAW 43, 44 (Oxford, 1950); Deak, *Automobile Accidents: A Comparative Study of the Law of Liability in Europe*, 79 U. OF PA. L. REV. 271 (1931); Heuberger, *Der Tier-, Automobil- und Flugzeughalter im schweizerischen Haftpflichtrecht*, 101 ABHANDLUNGEN ZUM SCHWEIZERISCHEN RECHT, N. F. 1935, 58, 59.

⁷⁷ See Section 831, German Civil Code.

⁷⁸ James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 MISS. L. REV. 1-26 (1951); Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369-425 (1950); PROSSER, TORTS § 45 (1941).

⁷⁹ See Section 249, German Civil Code.

⁸⁰ The former German Supreme Court expressed the opinion in R. G. Z. 81, 360 that from a philosophical-logical and scientific point of view the "but for" or "condicio sine qua non" rule is the most logical theory of causation.

⁸¹ See the decisions of the former German Supreme Court in R. G. St. 63, 213; 61, 319; 44, 244.

⁸² See Decisions of the former and present German Supreme Court in R. G. Z. 81, 361; 104, 143; 133, 27; 148, 165; 152, 401; 155, 41; 158, 38; 168, 88; 169, 91; NEUE JURISTISCHE WOCHENSCHRIFT 52, 1010; B. G. H. 2, 138; 3, 267; 7, 204.

⁸³ Thus in Germany, government liability for government officials was created prior to the establishment of the Weimar Republic (1918) by the Prussian Law of August 1, 1909 (GS 691), Reich Law of May 22, 1910 (R. G. B1. 798), and Section 12, Grundbuchordnung of 24 March 1897 (R. G. B1. 139), as amended.

the exercise of governmental functions.⁸⁴ In fact, the law protects government officials by prohibiting tort suits by third persons against them for official action taken.⁸⁵ Whether the government may take recourse against negligent officials, is, of course, another question.⁸⁶

VI. THE CRIMINAL LAW

Comparative law is not confined to civil litigation. A comparative study of criminal law would certainly be a valuable contribution to legislative policy considerations, particularly since—contrary to the modernization of civil law—criminal law has not undergone substantive changes. Take, for example, the case in which a person attempts an offense and then withdraws voluntarily. Under the common law such a person is guilty of the crime of attempt to commit an offense, although his voluntary withdrawal might be considered a mitigating circumstance.⁸⁷ Under many civil law systems such a person has not committed an offense,⁸⁸ the policy consideration being that the criminal offender who has not progressed beyond the stage of an attempt should be encouraged to abandon it voluntarily. It is doubtful whether under these systems the commission of an included completed offense is still punishable.⁸⁹

At the time when the United States ratified the NATO Status of Forces Agreement, it passed a resolution which provides, among other things:

"In giving its advice and consent to ratification, it is the sense of the Senate that:

1. The criminal jurisdiction provisions of Article VII do not constitute a precedent for future agreements;

2. Where a person subject to military jurisdiction of the United States is to be tried by the authorities of a receiving state, under the treaty the Commanding Officer of the armed forces of the United States in such state shall examine the laws of such

⁸⁴ See Article 34, German Basic Law (Constitution).

⁸⁵ See decision of the former German Supreme Court in R. G. Z. 163, 89.

⁸⁶ Article 34, Basic Law (Constitution) provides that the Government *may* take recourse against the official, if he acted intentionally or with gross negligence. With regard to the right of the United States to recover damages from employees for which it is liable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 *et seq.* (1952), see *U. S. v. Gilman*, 347 U. S. 507 (1954).

⁸⁷ *People v. Marrs*, 125 Mich. 376, 84 N. W. 284 (1900); *Glover v. Comm.*, 86 Va. 382, 10 S. E. 420 (1889). See also *State v. McCarthy*, 115 Kan. 583, 224 Pac. 44 (1924); *Comm. v. Eagan*, 190 Pa. 10, 42 Atl. 374 (1899); *Comm. v. Lessner*, 274 Pa. 108, 118 Atl. 24 (1922). CLARK & MARSHALL, CRIMES § 121 (1952). To the contrary, 1 WHARTON, CRIMINAL LAW § 226 (1932).

⁸⁸ See, *e.g.*, Section 46, German Criminal Code.

⁸⁹ See Decision of the former German Supreme Court in R. G. St. 15, 12; 23, 225.

state with particular reference to the procedural safeguards contained in the Constitution of the United States;

3. If, in the opinion of such commanding officer, under all the circumstances of the case, there is danger that the accused will not be protected because of the absence or denial of constitutional rights he would enjoy in the United States, the commanding officer shall request the authorities of the receiving state to waive jurisdiction in accordance with the provisions of paragraph 3 (c) of Article VII (which requires the receiving state to give 'sympathetic consideration' to such request) and if such authorities refuse to waive jurisdiction, the commanding officer shall request the Department of State to press such request through diplomatic channels and notification shall be given by the Executive Branch to the Armed Services Committees of the Senate and House of Representatives."

By its terms the aforementioned resolution places a duty on the military authorities of the United States in the receiving state to examine the law of all NATO countries from the viewpoint of and with particular reference to the procedural safeguards guaranteed by the Constitution of the United States. If, in a particular case, there is any danger that the accused, who is subject to the military law of the sending state, will not be protected because of the absence or denial of a constitutional right he would have enjoyed in the United States, a request for a waiver of the receiving state's primary jurisdiction will be made by the commanding officer of the Armed Forces of the United States in such state. Any refusal to waive jurisdiction is to be disposed of by intergovernmental communications on the diplomatic level, and a report thereof is to be made to the Senate and House Armed Services Committee.

As a result of this Resolution, comparative studies have been made to determine whether there is danger that the accused will not be protected because of the absence or denial, by the laws of the receiving state, of constitutional rights which he would enjoy in the United States.⁹⁰ Such studies require a thorough examination of the laws of criminal procedure in all NATO countries in which United States Forces are stationed.⁹¹ This appears to be the first instance of the study of com-

⁹⁰ It is obvious that the constitutional safeguards to which the Senate referred are not co-extensive with the limitations placed on the Federal Government in civilian courts, since many of these limitations are not applicable in state courts or military tribunals. A reasonable interpretation of the Senate Resolution indicates that a foreign government should not be required to extend rights to persons to which they would not be entitled in the country of their origin. It follows that the constitutional safeguards referred to in the Resolution are those minimal rights which apply in all state courts in the United States.

⁹¹ Criminal procedure in all NATO countries other than Great Britain differs greatly from that in the United States. Whereas trials in the United States con-

parative law being required by a legislative body of the United States. It is a significant indication that in these days a knowledge of domestic law alone is not sufficient.

VII. CONCLUSION

The study of comparative law has emerged from the era of academic luxury into the arena of practical necessity. As a consequence, comparative law should be taught not only in a few law schools, as is the case at present, but as a regular course of the law school curriculum. If this development takes place on an international scale—and there is some indication that it may—it can be hoped that some day all citizens will be governed by substantially the same rules of civil and criminal law. Perhaps at the end of this development there will be one law for one world.⁹²

stitute adversary proceedings in which each party is charged by law and custom with specific responsibilities and specific rights and, at least in jury trials, the judge is confined to rulings on questions of law, criminal procedure in European countries imposes upon the judge the duty to examine the defendant as well as the witnesses during the trial, and thus to restrict the role of the prosecuting attorney and defense counsel in a manner unknown in the United States.

⁹² McDougal, *Comparative Study of Law for Policy Purposes*, 1 AM. J. COMP. LAW 34 (1952); Sturges, *The Quest for World Law and Order*, 22 TULANE L. REV. 558 (1948); Riesenfeld, Review, 3 J. LEGAL EDUC. 620 (1951); Soyre, Review, 36 IOWA L. REV. 585 (1951); Hazard, *Comparative Law in Legal Education*, 18 U. OF CHI. L. REV. 264 (1951).