SOME COMPARISONS BETWEEN ANGLO-AMERICAN COMMON LAW AND DUTCH CIVIL LAW

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In a talk given May 2, 1958, as Director of the Ford Foundation Study of Business Education, at the Annual Meeting of the American Association of Collegiate Schools of Business, Professor R. A. Gordon (Professor of Economics, University of California at Berkeley) stated that it is hard to think of any other form of professional training "which has to contend with as much heterogeneity in occupation and career as does business education."[1]

One of the ways in which business men may differ is in regard to the functions they perform. Since, by and large, business firms are engaged in buying and selling, we may, on special occasions, focus on the international dimension of buying and selling. And as regards international business transactions, the necessity of studying the legal environment in which such business transactions take place should be obvious. And here is where the heterogeneity of our profession may find expression through a discussion of the comparison of two legal systems which seem mutually remote. For us who are also members of the legal profession—besides being engaged in training the business managers of tomorrow—this discussion should further serve to illustrate how the horizons of law are, by necessity, gradually widening. Members of the legal profession are increasingly being called upon to advise business men who are engaged in international trade or finance.[2] This requires, by necessity, that "business lawyers" acquire an understanding—at least an awareness—of other legal systems. This goal can best be achieved by undertaking comparative studies.

In an address which Lord Macmillan delivered at the International Congress of Comparative Law, at The Hague, The Netherlands, in August, 1932 (28 years ago), on the topic of "Scots Law as a Subject of Comparative Study"[3] he quoted the statement of that illustrious Scottish lawyer, Viscount Stair, in his famous work "The Institutions of the Law of Scotland:" "No man can be a knowing lawyer in any nation who hath not well pondered and digested in his mind the common law of the world." This quotation seems to be *apropos* in dealing with our topic of today, in view of Viscount Stair's formulation of

[1]Gordon, "Some Current Issues in Business Administration," 1 *Cal. Mgt. Rev.* at 56 (1958).
[2]Yntema, Foreword to Lawson, *A Common Lawyer Looks at the Civil Law,* at xiii (1953).
[3]Macmillan, *Law and Other Things* 102 (1937).

Scots (civil) law by deriving it "from that common law that rules the world," and subsequently, by comparing it with the laws and customs of neighboring nations. So, too, will we find that much of the law of this country, and of the Netherlands, is based on that kind of "common law." In fact, it seems that no matter where we live, much of the law of any given society is derived from that kind of "common law" referred to by Viscount Stair.

To the mind conditioned to "legal thinking" this statement may evoke a question as to the precise meaning of the term "law" as used in this context. Although I do not want to hide behind the shield of Kantorowicz, who states that persons who think that they can define law are still influenced by a prehistoric belief in verbal magic,[4] I feel that it is important to point at this difficulty of definition.

In broad lines we will define our concept of law as ". . . a body of rules aiming at the prevention or the orderly settlement of conflicts."[5] Now, how do these concatenations of rules respectively making up the American Common Law and the Dutch Civil Law compare?

When, a few years ago, the editor of the Wayne Law Review asked me to review F. H. Lawson's "A Common Lawyer Looks at the Civil Law,"[6] I was very much tempted to give this book review the sub-title, "How it Feels to be Looked At." Of course, such a course of action would only have been facetious, and nothing would have been accomplished. At the same time, Lawson's title tempts me to suggest that I present at this time a sequel to his study and call it, "A Civil Lawyer Looks at the Common Law." However, such a title would be far too presumptuous for the purpose here undertaken. Furthermore, it should be emphasized at the outset that no global look at the entire American Common Law system is even contemplated; merely some comparative aspects are being discussed and, even then, not with the depth that this topic rightly deserves. Finally, if Lawson is correct in his final conclusion,[7] namely that one would have to go "inside" the Civil Law systems (whatever may be meant by this expression) in order to understand these systems and "learn their tunes," it is obvious that even the most lucid clarification of the peculiarities of one of the Civil Law systems still would fall short of achieving, to a reasonable degree, an understanding of the particular system. Yet, I hope to succeed in depicting some aspects worthy of consideration.

[4]Kantorowicz, *The Definition of Law* 3 (1958). See also id. at 7 where he states: "The word 'law' is itself a technical term in such phrases as 'due process of law,' 'courts of law' (as opposed to courts of equity), or 'error of law' (as opposed to error of fact) and in each case its definition may be different."

[5]Id. at 12. See also "Legal Science—A Summary of its Methodology," 28 *Col. L. Rev.* at 679 (1928) for Kantorowicz' earlier definition of law as " . . . the totality of those rules of external conduct, to whose application a judge is appropriate." The latter definition comes close to Gray's definition of law as " . . . the general rules which are followed by (the) judicial department in establishing legal rights and duties." Gray, *The Nature and Sources of the Law* at 1 (1948). See also *id.* at 84 for a similar definition. That these rules must be interconnected speaks for itself; therefore Gray's remark that "The law is so closely concatenated that it is hard to determine where to approach it" should not come as a surprise.

[6]2 *Wayne L. Rev.* 163 (1956).

[7]Lawson, *A Common Lawyer Looks at the Civil Law* 210 (1953) (hereinafter referred to as Lawson).

What, then, are the main differences between American Common Law and Dutch Civil Law? Assuming that we all understand what is meant by Common Law (and I suggest that the definition which attributes the binding power and the force of laws to long and immemorial usage and to universal reception—much the same way as defined by Blackstone in his Commentaries[8]—is still a very useful definition), we will have to define Civil Law in a way which is acceptable even if superficial. Lawson has justly stated that the term is subject to different interpretations,[9] which caused him to point at the necessity of explaining it in terms "familiar only to common lawyers": those legal systems which throughout the ages—because of the Roman Law influence—have been studied by an approach through Roman Law. The weakness of this identification is admitted by Lawson when he makes the statement that "there are many systems, some of considerable importance, which are hybrids,"[10] because they have the characteristics of both the Common Law and the Roman Law.

It so happens that the Dutch Civil Law may be characterized as one of those hybrids, although, on the basis of historical development, one may well wonder what came first. It may be safely assumed that in the historical development of the Dutch Law there is little that was inherited from across the English Channel; to hold the opposite would be to ignore the mass movements of the early tribal groups that came from Eastern Europe via the Low Countries to the British Isles. I would rather make the statement that until the 16th century many of the laws in England and The Netherlands were similar. The *"Leges Barbarorum"* of the Franconian period (commencing around 400 A.D. and ending about 800 A.D., under Charlemagne) were to all intents and purposes compilations of unwritten customs.[11]

These *"Leges Barbarorum"* were also known in England. The writings of Maitland and Pollock display many instances in which not only "Germanic Law" was applied but even the same terminology was used.[12] And up until around 1600, the standing rule for adjudicating law in The Netherlands was: "in case of legal disputes, local custom has to be applied in deciding the case; if there is no local custom, then the custom of the nearby regions will count; and only if there is no local or regional custom to refer to, only then will Roman Law decide the issue at bar."[13] That does not mean that no Roman Law infiltrated the Dutch legal system prior to 1600; such a claim would be utterly devoid of truth. But "infiltration" is different from "reception."[14] And the Roman Law as such has never been wholly received in The Netherlands.

On the other hand, the influence of one Irnerius, of the University of

[8]1 Blackstone, *Commentaries* 63 (8th ed. 1778).

[9]Lawson at 2.

[10]Lawson at 3.

[11]de Blecourt, *Kort Begrip van het Oud-Vaderlandsch Burgerlijk Recht* 3 (2d ed. 1924).

[12]2 Pollock & Maitland, *The History of English Law* 185 (2d ed. 1898). See also 1 *id.* at 7: " . . . let us remember that, by virtue of the Norman Conquest, the Lex Salica is one of the ancestors of English law."

[13]de Blecourt, op. cit. supra note 11 at 7.

[14]Lawson at 25: "Infiltration means an occupation of the gaps in the law . . . In a sudden reception . . . the old law is, over great parts or the whole field, simply thrown out and replaced by Roman law."

Bologna, Italy, around the year 1100 should not be underestimated as to its impact on the English Common Law.[15] In other words, the early body of customs was—if not identical—at least similar in origin, both in the Lowlands (Holland) and on the Anglo-Saxon isles. The fact that in Holland sooner than in Great Britain a tendency developed to make formally drawn statements of the law from this body of customs is no ground for saying that there is a vast difference between the two legal systems . . . at least, not *ab origine.*

If there is to be a distinction (and nobody will be so stubbornly Dutch as to deny any discrepancy), then this discrepancy is more a matter of gradation than essential. I find support for this suggestion in an address given by Dean Roscoe Pound at the dedication of the new building of the Brooklyn Law School in 1928:[16] "In England, the law (apart from statute law) is exclusively judge made. No writing by a person not a judge is regarded as of any authority. As a result of this philosophy, the writings of academic scholars are commonly of very little interest or use in the law courts. On the other hand, we find the system on the continent of Europe, where the law is very largely made in the Universities, by scholars carrying on the tradition of the Roman Law. In this country we find something of a synthesis of the two. For American Law has been by courts guided and inspired by jurists who worked scientifically upon a proved body of judicial experience in the administration of justice . . . . In the development of American Law judges and teachers have each had a part. Along with the decisions of Marshall and Kent and Shaw and Gibson and Ruffin, the teaching of Story and his successors has given content to abstract formulas, and determined the distinctive features of our law."[17]

Such has been precisely the way the legal system developed in The Netherlands. And inasmuch as I do not think that many among us will try to find principal differences between English and American Law, I feel that the same can be stated as to the difference between the Law of England, America and The Netherlands.

On the other hand, Lawson sees distinctly principal differences. These appear as soon as the field of customs is insufficient to cover the entire field of law. In other words, in a developing society one will discover gaps which have to be filled. And according to Lawson, it is precisely here (in the filling of the gaps) where we find the principal difference between the Civil Law and the Common Law.

Whereas he observes in the Civil Law countries a reception of Roman Law for the filling of the gaps, Lawson finds that "in England the solutions had to be worked out on the spot, partly, no doubt, by applying customary ideas, but much more by hardy invention and by the gradual elaboration of a legal gram-

[15]1 Pollock & Maitland, op. cit. supra note 12 at 24: " . . . All important was the influence of the Bologna of Irnerius . . . upon the form and therefore upon the substance of our English law." See also Lusk, *Legal Aspects of Business* 9 (1949): " . . . (S)tudents from all of Europe crowded to Bologna to study law under this great teacher."

[16]See Address by Dean Roscoe Pound, cited in Griswold, "Law Schools and the Legal Profession," 7 J. Legal Ed. 305 (1955).

[17]Id. at 309.

mar of independent origin."[18] This process of the filling of the gaps with Roman Law had gradually produced a conceptual kind of thinking.[19] Consequently, one can say that the main distinction between the Common Law and the Civil Law is one of conceptual thinking; hence, of substance. Here we find the opinion of two distinguished scholars, one (Pound) emphatically stating that the main distinction between the two legal systems is one of method—judge-made law as opposed to jurist-made law; the other (Lawson) just as unequivocally stating that the two systems differ as to the concepts themselves.

It is interesting to note how many different opinions one can find, all focusing on some apparently salient point of distinction. Let us note a few.

There is the statement of Lorenzen: "One of the most fundamental differences between the Common Law and the Civil Law which is of special importance from the standpoint of business, is presented by the question of *causa* and *consideration* in the law of Contracts."[20] And Lord Macmillan—in his Rede lecture, "Two Ways of Thinking," delivered at the University of Cambridge in May, 1934, found a major distinction between the Common Law and the Civil Law caused by two ways of thinking: a predilection for the case law system (proceeding from instance to principle—or even not proceeding beyond instances) in the English mind; and a predilection for the code law system (proceeding from principle to instance) in the continental mind.[21]

This is, in other words, a contrast between the philosophical mind of the civil lawyer and the procedural mind of the common lawyer, rather concerned with precedents than principle. I should like to refer, parenthetically, to one of Macmillan's beginning remarks in his talk, "Two Ways of Thinking," in which

[18]Lawson at 18.

[19]Lawson at 66, 209. According to Lawson, the "civilian" needs to have a picture of the legal concepts and the doctrine which he uses in his work; he wants, so to speak, an inventory of the tools of his vocation. This description is used in contrast to the common lawyer who works with half-known concepts; he hopes to get to know these concepts better by experience, even accepting the possibility of change.

[20]Lorenzen, "Causa and Consideration in the Law of Contracts," 28 *Yale L. J.* 621 (1919). It is noteworthy, however, to state that Lorenzen's view is not supported by many of the legal practitioners in countries where Dutch-Roman law is practiced, particularly South Africa. Chief Justice de Villiers, of the Supreme Court of the Colony of the Cape of Good Hope, in Mtembu v. Webster, 23 Sup. Ct. 323 (1904) affirmed the doctrine that—as to the legal aspects of causa and consideration—" . . . (T)he two requirements were in effect the same" (except as regards donations). In Drake, "Consideration v. Causa in Roman-American Law," 4 Mich. L. Rev. 19, 20 (1905), we find the statement that the civil code of the province of Quebec (Canada) mentions causa and consideration as if they were identical. And Lord Mansfield, in Pillans v. Van Mierop, 3 Burr 1663 (1765), openly declared that consideration and causa were identical. In all fairness, however, one should add the opinion the historian Holdsworth held of Mansfield: " . . . (H)e was widely read in other systems of law than the common law . . . . He was not so widely or accurately read in the technical doctrines and technical history of the common law . . . . " (Holdsworth, *A History of English Law* 29 (1930). On the other hand, in the same case of Pillans v. Van Mierop, supra, Wilmot, J., too, based to a large extent his judgment on the identification of the civilian causa with English consideration. Worthwhile is the analysis given by Lawson; although the usual approach to the problem has been via the Roman Law stipulatio, Lawson goes beyond this approach and suggests that the test case should be found in mandate. (Lawson at 118.)

[21]Macmillan, *Law and Other Things* 84 (1937). Lawson doubts the validity of this distinction (Lawson at 65); yet, elsewhere, he seems to refer approvingly to the distinction (Lawson at 141).

he specifically warned "against the deceitfulness which lurks in generalities."[22] Lawson makes it very clear that one of the great differences between the German and the French Codes is that the former was very much the result of the drafting efforts of professors, whereas the latter was made by practitioners.[23] Yet Macmillan asserts just as firmly that "the law of England was the product of the work of practitioners, not of professors."[24] On the other hand, one has to give full credit to Lawson's statement that "the more one studies French law, the more one realizes that in many ways it greatly resembles the Common Law, and serves as a bridge between it and the more remote of the Civil Law systems."[25]

The only way that I can interpret the last statement is, as I have suggested earlier,[26] that the differences between the Common Law and the Civil Law are rather a matter of gradation than essentiality. So far as The Netherlands is concerned, the situation seems to fit the position taken by Dean Griswold with regard to the development of the law in this country when he offered the following suggestion in answer to Roscoe Pound's observation:[27] ". . . the direct influence . . . of the law schools in this country on the development of the law and the administration has been considerable."[28]

A similar position may be attributed to the influence of the legal scholars in The Netherlands: Ulrich Huber, Jan Voet, Paul Voet, Grotius (Hugo de Groot), Simon Bynkershoek van Leeuwen, Tobias Asser, Paul Scholten, E. M. Meijers are certainly great academic scholars whose theoretical concepts have had great influence on the development of the law in The Netherlands. But the influence of the Netherlands Supreme Court has been—and undeniably so—about as great, if not greater. For one thing, the word of the Supreme Court is the final word in a case. And with the rigidity which seems to be peculiar to the tradition of the Judiciary in most civilized nations, the Supreme Court will not easily reverse its opinion. The result is that trial and intermediate courts will not declare themselves against the firmly expressed position of the Supreme Court on particular points of law; for the effect of such aberrant behavior would be to provoke an appeal to the Supreme Court, followed by a reversal of the decision rendered below (and what judge likes to get his hand slapped by his big brother?).

On the basis of the preceding remarks, I believe it fair to say that in both legal systems (the Anglo-Saxon Common Law and the Dutch Civil Law) custom (tradition) was the basis for reaching a decision in legal disputes during the early stages of national development.

In The Netherlands—at an earlier stage than across the English Channel—

[22]Macmillian, op. cit. supra note 21 at 76.
[23]Lawson at 53-54.
[24]Lawson at 80. The context in which Lawson makes the observation is to illustrate that both codes display a conceptualism. The context in which Macmillan uses the terminology seems to illustrate that the work of practitioners lacks conceptualism.
[25]Lawson at 55.
[26]See p. 85 supra.
[27]Ibid.
[28]Grisworld, op. cit. supra note 16 at 309.

these customs were compiled and, eventually, converted into "written law."[29] This process was accelerated as a result of the Napoleonic occupation. In England, the English Sale of Goods Act of 1893 may be cited as an illustrative example of a (belated) compilation of "the law." Of course, once a body of written law exists, there follows a need to interpret the law; this is done by the courts, and this in turn leads to the practice of *stare decisis*—even if the practice does not go by that name tag. Once there are so many legal decisions that there is no longer certainty as to what the court's interpretation of the particular written law is, we may get a "re-statement," or a new codification. Here in our country, the new Uniform Commercial Code may be cited as an illustration. This phenomenon has led some scholars to talk about the "cycle" in the law.[30]

The introduction of the new Uniform Commercial Code brings to mind the discussion of one other point: In the application of our Uniform Sales Act of 1906, which was patterned after the English Sale of Goods Act, we find the *caveat emptor* principle prevails. In the new Uniform Commercial Code a switch toward the *caveat venditor* principle is indicated, at least to the extent that the purchase is considered a joint venture of buyer and seller, who should, therefore, not be compelled to deal with one another at arm's length.[31]

According to authors more qualified than I, *caveat emptor* is a common law principle, whereas *caveat venditor* is a civil law principle.[32] Assuming that this observation is a correct one, do we not now have signs that the common law system, given time and opportunity, will have a tendency in the direction of the civil law?[33] If this trend develops, in what areas may we expect the

[29]We should not overlook the codifying efforts of Sir Thomas De Littleton, Ranulf De Glanvill, Henry De Bracton, who published their works in the 15th and 16th centuries. See also 1 Pollock & Maitland, op. cit. supra. note 12 at 19 (discussing the emperors' legislation during the Franconian period, the so-called capitularia): "The age of the capitularias . . . begins with us just when it has come to an end upon the Continent." Therefore, one wonders whether the following suggestion would be too facetious: the distinction between the common law and the civil law is that in the common law countries the urge for written law comes approximately 100 years after the urge in the civil law countries.

[30]Stone, *The Province and Function of Law* 38 (2d ed. 1950). In discussing his Cycle Theories of Law, Stone discerns a Stage of Codification, a Stage of Glossation, a Stage of Commentation, a Stage of Conscious Modification, and then back to a Stage of Codification. In this respect, it is interesting to bring back to memory the sage words of Chief Justice John Marshall in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819): "Such is the character of human language that no word conveys to the mind, in all situations, one single definite idea. Almost all compositions contain words, which taken in their rigorous sense, would convey a meaning different from that which is obviously intended . . . ."

[31]Lavine, *Modern Business Law* 895 (1954). A different historical explanation can be found in an important recent article: Gillam, "Products Liability in a Nutshell," 37 *Ore. L. Rev.* 119 (1958).

[32]Lavine, op. cit. supra note 31 at 249.

[33]Personally, I believe that the concept as given here is somewhat confusing: If—as usually is claimed—the Law of Sales, as emanating from the Law Merchant, is of continental origin, then it follows that the *caveat emptor* principle is also of continental (i.e. civil law, though not necessarily of Roman law) origin. It may be true that the old Roman law, according to *ius honorarium,* compelled the vendor to *palam pronuntiare* all the hidden defects, and to stipulate that the merchandise *sanum esse* (van Oven, *Overzicht van het Romeinsch Privaatrecht* 56 (2d ed. 1938); but that still leaves room for the Germanic origin of the *caveat emptor* principle, for *palam pronuntiare* refers to what we would consider an express warranty. It might be that we could state it this way: that on the con-

development to occur? If we accept Lawson's analysis of the differences between the Common Law and the Civil Law as one of substance rather than method, we will have to look on one hand (in the Common Law area) for those parts of the law which are more or less unchanged by statute, whereas on the other hand (in the Civil Law area) we will have to look for those parts of the law where the gaps have been filled with Roman Law.

As it turns out, these areas are found in both systems: the law of contracts, the law of torts, and the law of personal property.[34] The laws of real property, of succession on death, and of matrimonial regimes are not considered, inasmuch as even within the Common Law area "tremendous differences" exist between the various jurisdictions.[35] As to contracts, we have already indicated that the distinction between *causa* and *consideration* is generally held to be the basic difference.[36]

As to the law of torts, we find that the Civil Law has classified part of it in the law of obligations and part of it in the law of property.[37] Whether one finds a right of action under the law of obligations or under the law of property depends on what interest is sought to be protected.

For instance, the Dutch civil code states specifically that each wrongful act which causes damage to another person imposes a liability for damages on the persons to whose fault the damages can be ascribed.[38] This is clearly an obligation incurred by the operation of law, and hence classified under the law of obligations. On the other hand, trespass to land is in the Dutch civil law actionable under the law of property,[39] because of the aspect of possession. But apart from the classification, I do not see too much difference in the practical application of the law of torts. And finally, as to the law of personal property, the distinctions are of a different nature. For one thing, the classification into movables and immovables[40] is different from our concept. Furthermore, the interests that attach to movables are different. This is particularly true when it comes to the possession of movable property: possession amounts to title (ownership), says the law.[41] The remarkable thing about this provision of the law is that we do not find this article under the category of possession but under the category of the statute of limitations. Yet, the importance of the provision is not affected by this classification. The implication of this legal provision is that

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tinent, at a much earlier stage than in Great Britain, the switch from *caveat emptor* to *caveat venditor* was accomplished. In that case, we are within our suggestion that the Anglo-Saxon common law system follows the continental civil law system.

[34]Lawson at 6,7.

[35]Ibid.

[36]See note 20 supra and the accompanying text.

[37]Lawson at 1943 et seq.

[38]Burgerlijk Wetboek, art. 1401 (Dut. Fruin 1936) (hereinafter cited as Burg. Wet.): "Elke onregtmatige daad, waardoor aan een ander schade wordt toegebracht, stelt dengenen door wiens schuld die schade veroorzaakt is in de verpligting om dezelve te vergoeden." This is directly copied from Code Civil, art. 1382 (Fr. Dalloz 1933): "Tout fait quelconque de l'homme, qui cause a autrui un dommage, oblige celui par la faute duquel il est arrive, a le reparer." And Bur. Wet., art. 1403 prescribes the vicarious liability much the same strict way as we know it in the common law.

[39]Burg. Wet., 604, §4; art. 606.

[40]Burg. Wet., art. 560, 562, 565.

[41]Burg. Wet., art. 2014.

possession of movables is regarded as the equivalent of ownership. In one of the well known textbooks in the field of Business Law I found the following statement: "In any primitive society possession is the equivalent of ownership."[42] Although his latest text does not explain the reason for this phenomenon, the author made an attempt to interpret the habit in a prior edition by stating: "A primitive people do not recognize abstract rights."[43] In other words, primitive people tend to confound physical possession with the abstract legal rights that can be derived from personal property. Let us for a moment explore whether these primitive tribes still can be found in our present-day society.

Having already mentioned the Dutch Civil Code, let us turn to the French Civil Code where it is emphatically stated that possession of movable property amounts to ownership.[44] We will find similar provisions in the civil codes of the other continental European countries. I hope that I will be forgiven when I confess that I could not help but grin when I drew a mental picture of boatloads of tourists coming over to continental Europe and observing the primitive Frenchmen performing their ritual tribal dances in the Ballets de Paris, exhibiting their primitive art in the Louvre, trying to induce American dressmakers to adopt the designs of primitive Christian Dior. I realize how facetiously artificial these remarks must sound, yet they may find their place in an analysis of different legal systems.

Important to the property aspect is the way in which transfer of ownership takes place; for personal property, this occurs by actual or constructive delivery.[45]

If the basic differences between the Common Law and the Civil Law are to be found in the law of contract, the law of torts and the law of personal property, then, I submit once more, the differences between the two legal systems are not as great as we are generally led to believe; at least, this is true when we compare the Anglo-American Common Law with the Dutch Civil Law, and more particularly so, when we look at the substantive side of the law.

I believe that one of the reasons why so often the suggestion is advanced that there is a vast difference between the Common Law and the Civil Law is that most authors point—for the Civil Law—to German law. But German law is, in the minds of continental European jurists, to a great extent Roman law. And there is without much doubt a great difference between French law and German law (and by this I mean a basic difference, historically and developmentally.). Dutch law, which had until the Napoleonic regime a historical development and character of its own, has since the Napoleonic era been influenced heavily by the French Civil Code. In fact until 1829 the applicable civil law of The Netherlands *was* the French Civil Code. It is only after 1829 that the Dutch Civil Code came into existence; in it, we will find many legal provisions copied from the French Civil Code; but we will also find a number of provisions in which the French system was not followed (for instance, in the area of real property, in succession upon death, and in family law.)[46] If

[42]Lusk, *Business Law, Principles and Cases* 597 (5th ed. 1955).
[43]Lusk, op. cit. supra note 42 at 615 (4th ed.).
[44]Code Civil, art. 2279 (Fr. Dalloz 1933): "En fait de meubles, las possession vaut titre."
[45]Burg. Wet., art. 667.
[46]And as to criminal law, the French Criminal Code remained in force until 1881; it

was in that year—in other words, 66 years after Dutch independence from the Napoleonic regime—that a Dutch Criminal Code was adopted by the Dutch Parliament.

then the discrepancies between the Anglo-American and the Dutch legal systems are not of the magnitude generally surmised, where do we find points of important distinction? Although by no means an exhaustive listing of even the most salient points of difference, I would list:—

(1) The *application of the law* is such that in America a professor of law—if he is a good jurist—may end up as a judge; in The Netherlands a good judge may end up as a professor! I admit that this sounds rather superficial, but it is, I believe, a matter for contemplation.

(2) The *absence of a dual court system* in The Netherlands. Of course, in a country that is politically an entity in itself, there is no division between state and federal matters. Consequently, there is no need for differentiation in the adjudication of controversies under separate judicial systems.
The court system is uniform for the entire country; its functioning can be summed up as follows:
   (a) simple cases go to the Justice of the Peace;
   (b) all other cases (with the exception of matters involving administrative law) go to the District Court, with a possibility of appeal to the Appellate Court, and finally, for certiorari or revision, to the Supreme Court.[47]

(3) The *absence of equity jurisdiction.* Although today, in many jurisdictions the distinction between courts-at-law and equity courts is virtually unimportant,[48] in The Netherlands there is not even a formal distinction between the two kinds of adjudication. If for some reason the law would work a hardship, then one often finds the Latin adage invoked, *"lex dura sed lex"*; although the legal profession is very much aware of the importance of Gaius' teaching that, *"Ius est ars boni et aequi."*

(4) The *absence of a jury system,* both in civil and in criminal matters. Before the year 1600 there used to be an institution comparable to our idea of a jury, often referred to as "turbes," or "witan." These "witan" declared in civil matters what the custom was, i.e., what the law was; the "turbes" did the fact finding. But as The Netherlands developed, the system of administering justice with the assistance of a jury was done away with. This is to a great extent based on the fact that the Code emphatically prescribes that "the judge must adjudicate the law according to the Code."[49] And inasmuch as the rules of evidence are also very clearly stated in the Code, it is felt that there is no reason to assume that a housewife, or a car-

[47]It may be of interest to mention that there are presently 65 Justice of the Peace Courts, 20 District Courts, 5 Appellate Courts and one Supreme Court in the Netherlands (population slightly over 10 million people). Michigan (population of about 7 million people) has approximately 1200 Justice of the Peace Courts, 50 Municipal Courts, two Federal District Courts and 41 Circuit Courts, no appellate court, and one Supreme Court.

[48]Spencer & Gillam, *A Textbook of Law and Business* 29 (3d ed. 1952) points out the fusion of law and equity which began in this country in 1848 with the adoption of the New York Civil Code.

[49]Wet houdende Algemeene Bepalingen der Wetgeving van het Koningrijk, art. 11 (Dut. Fruin 1936).

penter, or any other "reasonable person of average intelligence" has a clearer understanding of what ought to be done in the courtroom than a person who has made law the center of his devoted and avowed study, and who, therefore, is fully capable of handling the vagaries of the Code. Particularly in criminal matters, where hereditary factors, emotional disturbances, environmental conditions, or even constitutional (i.e. physical) deficiencies are often the underlying causes for criminal behavior, there is no reason to assume that the housewife (or the "reasonable person of average intelligence") is better qualified to evaluate the psychological structure of the situation, in order to arrive at the finding of the facts, than are the learned justices.

Lest I be misunderstood, I should point out that with regard to fact finding, in both countries, by and large, the same principles of "evidence" guide the courts: a judge may not use his own special knowledge in deciding a case. Apparently, judges are universally presumed to be people who know nothing, see nothing, hear nothing, read nothing, yet nevertheless, are capable of handing down the proper decision concerning every matter submitted to their adjudication. The fact that in this country (in civil matters) parties often waive a jury makes one wonder whether the judge should not be considered equally capable of ascertaining the facts in criminal matters.

(5) The *absence of an elective office* for the judiciary. This point is closely related to the organization of the legal profession in The Netherlands. Before one can join the legal profession, one must have satisfactorily completed the requirements for the doctoral degree in law.[50] In other words, the bachelor's degree does not qualify one to practice law: three more years beyond the bachelor's degree are required before one can be admitted to the bar. On the other hand, no additional bar entrance examination is required; the doctoral degree is held to be a sufficient guarantee of proficiency and ethical standards that go with the practice of law. The legal profession itself is organized as follows:

(a) The *magistracy*: This is a career rather than an elective office. In other words, one does not campaign in order to be elected. A distinction is made between the "seated" and the "standing" magistracy:

(1st) The *seated magistracy*: the judges. One who wants to become a judge usually starts out as a young "scriba" (recorder) at one of the courts. After a few years, a promotion may be had to substitute judge, and subsequently to judge. This process of promotion often begins in a Justice-of-the-Peace-Court, and from there, via the District Court and the Appellate Court, up to the Supreme Court. All appointments are for life, made by the Queen, upon the recommendation of Parliament (parliament acts upon the advice and recommendation of the Minister of Jus-

[50]This can be done at any one of the six law schools, four of which are located in the State Universities, one in the Protestant University at Amsterdam, and one in the Catholic University at Nymegen.

tice). The process of promotion is based upon merit, not seniority.

The Justice of the Peace hears cases by himself; the District Court and the Appellate Court hear cases in panels of three; the Supreme Court hears cases as a panel of seven. The District Courts have specially assigned single judges for specific categories of litigation.

(2nd) The *standing magistracy*: the prosecution, called "standing" because the prosecuting attorney has to stand when making his charges and when asking for a specific penalty. One starts out as an assistant-substitute prosecuting attorney, followed by appointment as substitute prosecutor, and subsequently as prosecutor; the highest attainable position is that of prosecutor-general with the Supreme Court. The process usually commences in the lower courts and goes from there up via the other courts to the Supreme Court. Appointments are for life, but the organization is hierarchically submitted to the Minister of Justice, assisted by the "Director-General of Justice."

(b) The *Bar*: the practicing attorneys. A person with a law degree, but working for a municipality, or even a member of the magistracy, is not a member of the Bar. Admission is gained by submitting to the Court where one wants to practice the diploma of the doctoral degree of law and then taking the oath of office. Attorneys are professional men, but the Dean of the Bar (usually one of the older experienced attorneys, chosen because of his excellent reputation) exercises some authority, somewhat like the Master in the time of the Merchant Guilds. Strict ethical rules are in force for the members of the group. For instance, no attorney may go to the house of his client to discuss business; all business matters must be taken care of in the attorney's office.

(6) The *absence of a bail system.* This means that a person suspected of having committed a crime remains free or goes to the House of Detention, depending on the applicable facts. A suspect can be "detained" only if all three of the following conditions are met:

(a) if there is a *serious* suspicion that the suspect has committed the crime;
(b) if there is danger of his escape, or if there are important security reasons (safety and security of the community, for instance); and
(c) if the applicable section of the Criminal Code holds out the possibility of a jail sentence of four years or more upon conviction.

The police can arrest a man for examination for a maximum of six hours; thereafter, the prosecuting attorney is given the authority to hold the suspect for a maximum of four days. Thereafter, the man can be held only by one of the "investigating judges" for a maximum of 12 days. Thereafter, it is only the District Court, sitting in panels of three, that can hold the person, for a maximum of 30 days at a time, after having heard the suspect and his counsel. Therefore, rare is the case where a suspect would

have to wait a long time before his case comes to trial. And incidentally, at the trial, the suspect is technically not a witness; in other words, he may lie, or not speak at all, if he so desires.[51] It is up to the prosecution to prove the suspect's guilt.

(7) *The absence of judicial checks on the constitutionality of legislative acts.* Although both here and in The Netherlands an adherence to the "separation of powers" doctrine is professed, the identical terminology is not given the same interpretation. In both countries the basis for the doctrine can be found on Chapter XII of the second of Locke's *Two Treatises on Government* (written to argue the legal precepts of Sir Robert Filmer), in which Locke construes the state as a natural law on the basis of a social contract (although this concept has a meaning different from that which Jean Jacques Rousseau gave to it). Locke's views were later made the subject of a study by the presiding judge of the District Court of Paris, Charles de Secondat Baron de Montesquieu, in the sixth chapter of Volume IX of his work *"L'Esprit des Lois"* (The Spirit of the Laws), dealing with the Constitution of England. Here Locke seems to *clarify* the requirements for each of the branches of government in a functional classification.[52] According to Locke (in his chapter XII, "Of Civil Government: of the Legislative, Executive and Federative Power of the Common Wealth") it is the natural, or federative power which has been committed to those who have to manage the laws "by the best of their skill, for the advantage of the commonwealth." Judicial power is a form of executive power, according to Locke, possibly because he is influenced by the old adage that, "The King is the Fountain of Justice." Locke's views and, subsequently, Chief Justice Marshall's words in *Marbury v. Madison* (1803), that "it is emphatically the province and duty of the judicial department to say what the law is," have given a ranking position to the judiciary in this country. In The Netherlands, a strict adherence to the philosophy of Montesquieu is sought.[53] He leaves no room for the Supreme Court to question the constitutionality of the Acts of Parliament. The only faith that exists in a country such as The Netherlands is that the members Parliament will not pass any legislation which would violate the Constitution because of the Oath of Office taken (solemnly swearing to uphold and defend the Constitution). The experience of the last 35 years in countries such as Italy, Germany, and Spain makes one rather skeptical as to the intrinsic validity of this faith.

Incidentally, although the Acts of Parliament cannot be examined by the Supreme Court on grounds of constitutionality, the provincial and municipal ordinances can (and often are) reviewed by the judiciary on constitutional grounds.

[51]Wetboek van Strafvordering, art. 29 (Dut. Fruin 1936) provides specifically that the suspect should be informed that he is not compelled to answer.

[52]1 Kranenburg, *Hat Nederlandsche Staatrecht* 66 (1933).

[53]Id. at 23, distinguishing between "la puissance legislative, la puissance executrice des choses qui dependent du droit des gens, la puissance executrice des choses qui dependent du droit civil."

(8) The *presence of a special Commercial Code.*
In 1934 the distinction between "gentlemen" and "merchants"[54] was taken out of the Dutch Code. Up till that year, only merchants were compelled to keep books; since 1934, everybody who engages in commercial or professional activities for monetary gain must keep records of his income and expenditures. The only current reason for mentioning the existence of a Commercial Code is to provide a guide to students of comparative law as to the parts of the law which deal with certain topics. For instance, where the Civil Code deals (aside from family law and succession upon death) with property, contracts and special contract (such as agency, partnerships, trusts, purchase and sale, hire, donations), and evidence, the Commercial Code deals with such topics as bookkeeping, corporations, brokers, carriers, negotiable instruments, insurance, maritime law and bankruptcy.

Despite the distinctions noted in the foregoing outline, I still maintain that the differences between the two legal systems—aside from points of a procedural nature—are far less than is generally surmised. For us who are teaching in the schools of business administration this statement should not come as a surprise. After all, we are aware that there is an interdependence between the legal, the economic and the political (and the religious) spheres of a country. Assuming the validity of this statement, the differences between The Netherlands and this country should not be too great. In a world which seems to thrive on differences between nations, it is becoming increasingly important to emphasize what *unites* us rather than to focus on what *separates* us from others.

[54]Lawson at 90 points out that in the common law at an early stage the distinction between citizens and merchants was abolished: " . . . (T)he whole atmosphere of civil contracts on the continent has differed from that of commercial contracts, and the law of bankruptcy applies only to merchants . . . . (F)or most legal purposes all Englishmen were turned into gentlemen centuries ago. For the purpose of bankruptcy, we long ago lost that character and all became merchants."