CHAPTER X

SUMMING-UP

1. Roman Law

CICERO proves best that principles and cases are the two most important things we can learn and use from Roman law. Thanks to them, the formalized absurdities of law were abandoned, and a great part of that legacy remains today. Although, not all the formalisms died: We lawyers still use Latin expressions because we like them, and new principles of law have been baptized in contemporary Latin - *male captus, bene detentus*[1].

2. Due Process

As time passed, humanity re-introduced due process into the law, after having seen it previously dishonored. It is possible that this is one of the first great recoveries from the pre-Roman time during the post-Roman period. From due process, we re-learned that we cannot be the accuser and the judge, nor the judge and a party (*nemo iudex in causa sua*). The judge must be a third party disinterested in the proceedings (CARNELLUTTI). This criterion does not imply distance or coldness; on the contrary, it requires heart and sensitivity.

However, the fact that the judge is unrelated to the dispute is not enough. The judge must also be independent, in the sense that he must not be under orders from anybody. The judge needs to be courageous in this way in order to uphold the equality of the parties in the procedure.

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[1] USSC, *Alvarez Machaín*, 1992, *www.supremecourtus.gov*, Beyond legal dogmatism, it is necessary to notice how important the facts mentioned in note 1 of the judgment and in its first paragraph (the synergic group of drug-trafficking, corruption, organized crime, torture and death, etc., all in one case) are for the USA, and then compare the case with *Noriega* in Panama, *Eichmann* for Israel, *Argoud* for Israel and Germany, etc. Anyway, the Argentine Republic does the same thing: *Gorriarán Merlo* in Mexico, *Pico* and *Trovato* in Brazil, etc.

3. The First jus gentium *and the Law of the Sea*

Jus gentium arose from the increasing maritime activity of the big countries in order to combat piracy (by issuing letters of marque)[2] and fight slavery.

During the XIXth century, all that seemed to have become nothing more than an interesting chapter in legal history books, and, in fact, it was often taught that way in the XXth century.

4. Legal Dogma

By the end of the XIXth century and beginning of the XXth, legal dogma started to flourish with the rendering of the various civil codes. Criminal codes, in fact, actually began as an ode to legal dogma, guaranteeing against the old, excessive, irrational punishments that led to the rebirth of an improved due process of law.

5. Researching Language

At approximately the same time, the study of the philosophy of language started to blossom. Over time, this philosophy came to demonstrate the fallacy of a legal dogma built on words: a *contradictio in terminis.* We cannot create a dogma by using words, because words are one of the least accurate instruments mankind uses and possesses.

6. The Common Law

The *common law* of those days seems to be different from continental law, because it emphasized cases and values, and not dogmatic construction and rules. In contrast, during the same period in Europe, continental law spawned considerable codes, systems, and dogma.

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[2] It is easy to prove that the international order was not established between equals, even at its genesis. ALLOT, PHILIP, Mare Nostrum: A New International Law of the Sea, *in*: *American Journal of International Law*, 86: 764 (October 1992). See also the following note.

7. The Holocaust

The Holocaust taught us that the *jus gentium* must address the times in which we live. Towards this end, genocide is now a part of the list of old *jus gentium* crimes against humanity. While cases brought forth under the aegis of "crimes against humanity" lack the usual procedural safeguards and, instead, include *ad hoc* and *ex post facto*[3] rules and *ad hoc* judges, this provides the only way to find a fair solution to the most dreadful crimes known to mankind. The new International Criminal Court does not really change that. International law is still above national law.

RADBRUCH addresses the philosophical implications of this when he teaches that there is a right above the law and, for this reason, that a given "law" can be "unlawful."[4] RADBRUCH does not provide us with any constitutional hierarchies or imperative international law (*jus cogens*) to justify his reasoning[5], because his is a philosophical stance, starting with the premise that, in general, security precedes justice in the order of preference of values.

8. International Piracy, Taking of Hostages, etc.

The Holocaust is not a specific case in history in terms of advancing the *jus gentium*. Contemporary piracy, in the form of international terrorism, is giving birth to a new "law of the people." *Entebbe*, *Eichmann*, and *apartheid* are showing that the *jus gentium* is in force and evolving, as well. There is a law above the national territories and, moreover, it is applied. History shows that that law cannot be forgotten, because the past is also the present as September 11 dramatically reminded us all.

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[3] See ZUPPI, La prohibición "ex post facto" y los crímenes contra la humanidad, *ED*, 131: 765.

[4] RADBRUCH, GUSTAV, *Arbitrariedad legal y derecho supralegal*, Buenos Aires, Abeledo-Perrot, 1962, p. 36, translation by M. I. AZARETTO of *Gesetzliches Unrecht und übergesetzliches Recht.*

[5] See ZUPPI, El derecho imperativo ("jus cogens") en el nuevo orden internacional, *ED*, 147: 863; La noción de soberanía en el nuevo orden internacional, *ED*, 151: 781.

9. Genocide, Torture, Forced Disappearance of People, Apartheid, etc.

International treaties add to the *jus gentium* provisions against white slavery, genocide (now expressly), government-organized disappearance of people (*e.g.*, in the form of kidnapping and murder), terrorism and torture. Drug trafficking[6] and corruption are on the same track. We could say cynically that all this is just for the interest of dominant States, like the old maritime law that gave rise to the first *jus gentium*. However, that explanation does not change the fact that solutions need to be found to solve the problems that threaten man's well-being.

10. Towards a Synthesis of Philosophical Conflicts

What follows is a strong confrontation between the commentators of legal dogma - and any form of literal interpretation - the iusnaturalists, the positivists, and their variants. The authors in each of these camps strongly differ with each other. Some resent the fact that language was stripped of its power. Others resent that POPPER opined that man does not have the use of *Truth*, because it follows that it belongs to God and to religion, and not to the men of law. It also follows that human beings of Christian humility, aside from their faith, only have the use of supposition and hypothesis, and, in turn, of refuting them. Contending more than this is the sin of pride, or, at least, wrong use of language. Some criticize iusnaturalists for trying to transmit a religious concept of the world and a series of religious values above the law. Certainly, there are societies in which religion and positive law coincide to some degree, but they are not usually presented as Western models of how law should work in a contemporary society. For those that are democratic and modern societies with a point in common between religion and law, they are not the general rule and cannot be represented as an established *system* of relationships between religion and law[7].

Beyond the perceptions of every author, though, it seems that humanity, for whatever reason, has agreed with the idea that there exists a series of

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[6] JIMÉNEZ DE ARÉCHAGA, EDUARDO, *El derecho internacional contemporáneo*, Madrid, Tecnos, 1980, p. 84: *jus cogens superveniens*; BARBERIS, JULIO A., *Formación del derecho internacional*, Buenos Aires, Ábaco, 1994.

[7] There are certainly distinguished authors who are trying to build that system by starting from the doctrine of the Catholic Church. BIDEGAIN, BARRA, COVIELLO, etc. A parallel has been growing in Islam, as we all know.

legal values that are superior to the national codes. This is a sort of iusnaturalism, even though the ecclesiastic origin of public law is accepted mainly as a historical element of it and not a current component[8].

The old *jus gentium* has become the new imperative international law, with extraterritorial jurisdiction and sources of law that go beyond local criminal codes. Its custom, jurisprudence, and doctrine go against the criminal law we learned in Law School, as do its treaties. At least treaties comply, strictly speaking, with the function of putting in writing what was agreed to and applied by the concert of nations in the first place.

This phenomenon of international criminal law can be found elsewhere, albeit not to the same degree. As of now, the growing number of international tribunals (such as the European Court of Justice, the European and Inter-American Courts of Human Rights, international administrative tribunals, and international arbitration tribunals), due to their diverse composition, must somehow agree on fundamental questions of law. Agreement is indeed found, on *the overarching principles and values of law.*

International treaties do not only deal with crimes against humanity. Human rights conventions, for instance, detail an array of individual fundamental rights superior to the rights of States. Other texts have started to include values like equity, justice, and efficiency as supranational principles (The Inter-American Convention against Corruption), and have even established sound supranational accounting practices (the International Convention against Transnational Bribery). It has been warned that taking such measures could further erode national sovereignty[9], and the rules so far established seem to confirm this assumption.

It was impossible for international procedure not to have an internal reception. At that point, countries were forced to take notice of the primacy of principles and values above rules, and to acknowledge that there is no profound difference between the working of common law and contemporary European continental law: all tribunals employ the same method of

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[8] STARCK, CHRISTIAN, The Religious Origins of Public Law, *European Review of Public Law*, vol. 10, n° 3, London, Esperia, 1998, pp. 621 et seq.; Das Christentum und die Kirchen in ihrer Bedeutung für die Identität der Europäischen Union und ihrer Mitgliedstaaten, 1997, 31, *Essener Gespräche*, 5 to 30; Le christianisme et les Eglises dans leur signification pour l'Union Européenne et ses Etats membres, *in*: JORGE MIRANDA, publisher, *Perspectivas constitucionais*, vol. 1, Coimbra, Coimbra Editora, 1996, pp. 737-768.

[9] PEDRIERI, ALBERTO, Le norme tecniche come fattore di erosione e di transferimento di sovranità, *in*: UNIVERSITÀ DI VENEZIA, *Studi in onore di Feliciano Benvenuti*, vol. IV, Mucchi Editores, Modena, 1996, pp. 1413 et seq.

approach to a case of law. Both "systems" of law have always been and will always be nothing other than solutions to definite and individual cases, solutions that, in every litigation, will be final thanks to *res iudicata*, but will never contain the value of Truth[10].

[10] Judges are men, so they are fallible. Many people do not agree with the decision of the Supreme Court of the United States to favor BUSH instead of GORE. The court (beyond its arguments - we are reasoning as suggested in Chapter V) clearly privileged security (by putting an end to a foreseeably long recount of votes that would delay the formal decision about the presidential elections) over justice (it then seemed "obvious" that GORE would have been the winner if the mistakes incorporated to the system were corrected). That is what is dealt with in justice: a process of making decisions that, in a definite moment, will be final, although they will not, and cannot, have the value of Truth. The key to judicial order is that judicial resolutions that close cases are complied with. All Americans are together on that point, and the ones who are not, do not understand what law is.