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Old Issues New Perspectives

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Old Issues – New Perspectives

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Introduction

David A. Frenkel

This book offers a selection of essays which shed new light on issues in various fields of law which are of current significance.

According to Salmond[1], philosophy of law may be divided into three main branches:

1. The Dogmatic branch which is to analyse the principles of the law, with no references to historical origin, development, validity or ethical significance,
2. The Historical branch which deals with general principles covering the origin of law and its development, and
3. The Ethical branch which examine theethical significance of the law. It is concerned with the theory of justice and its relation to law.

The French philosopher August Comte invented the term "*sociologie*" at the beginning of the 19th century. Sociology is the study of man in society[2]. When started, the attitudes of sociologist's studies of law were different from the lawyer's. However, today a good practice of law should encompass sociology of law. Neither law nor Human Nature is an exact science. Nonetheless, a good understanding of the law means the use of both in combination is a surer guide.

Article 39 of the Ottoman Law of 1876 ("the Mejelle") stated that "it is an accepted fact that the terms of law vary with the change of time". A good example can be see in the application of the European Convention of Human Rights in the European Union Member States which caused radical changes in the practice of law. Lawyers have started to seek solutions even to common and regular cases in raising new conceptions. Philosophy of Law – Jurisprudence – has become again an integral part of practising law. Let's take the example of the traditional distinction between proprietary and personal rights. Following rulings of the European Court of Human Rights, that distinction, which was very fundamental in the English Legal System, takes no account of the modern phenomenon of human rights jurisprudence. A key question concerns the degree to which certain human rights bridge the divide between personal and proprietary rights. The concept and attitude of rights in respect of land have changed. Personal rights in respect of land are no longer only a matter of contract law. They have become a part of land law.

We see another change of conception regarding mortgages, and the use of the concept of "constructive notice". A new way of thinking, a new philosophical concept was introduced by the House of Lords in the UK in the *Etridge* case[3]. The Court discouraged the use of the concept of "constructive notice". Instead, the test is whether the Bank is "put on inquiry". Although

[1]Salmond, J. (1947) 10th ed. by Glanville K. Williams. London: Sweet & Maxwell, §§ 1-4.
[2]Ibid, at § 5.
[3]*Royal Bank of Scotland v Etridge(No 2)* [2001] 3 WLR 1021; [2001] UKHL 44.

English law, and particularly the jurisdiction of equity, have always demonstrated a concern for the vulnerability of mortgagors, equally important policy considerations underline the counter-balancing protection conferred on mortgagees. There is a substantial public interest in safeguarding the flow of mortgage finance.

This change of concept is a result of applying philosophy and new thoughts in practising law. Another example can be seen in the change of concept of the meaning of "family" including division of functions and responsibilities inside the family. Until 2004 "couples" did not,in the view of the UK courts, include same-sex couples. The case of*Fitzpatrick*[4]dealt with spouses' rights in Rent and Housing Acts. In 1999, the House of Lords held that spouses did not include same-sex couples. However, the House of Lords in *Ghaiden*[5] held, in 2004, that the meaning of spouse in the Rent Act and Housing Act should be extended to same-sex couples in order to eliminate the discriminating effect as demanded by the European Convention on Human Rights. The same approach may be applied to any restrictions based on any form of discrimination, be it on religious belief, personal status, or on any other ground. Another outcome of this new concept is the freedom of the family members to decide on sharing duties and responsibilities which led, inter alia, to paternity leaves as an equal right to maternity leave. Here again we see how new approach, new philosophical concept, has been introduced by the advocates who practise law. Their strength of advocacy lay in the adaption of philosophy and ability to think of and bring out new concepts to the end designed.

The issues are old, but the perspectives are new.

The authors of the collection of essays offered in this book seek to analyse some of the challenges that society faces in addressing old issues from new perspectives.

The essays are revised versions based on presentations at the International Conferences on Law organised by the Athens Institute for Education and Research (ATINER) held in Athens, Greece. They were peer-reviewed and selected on the basis of the reviewers' comments and their contribution to the ongoing discussion of the respective issues. As diverse as the essays may look, they all deal with issues that are current significance.

The book commences with Ronald C. Griffin's essay *Ghost Town: The Death of Marriage, the Birth of Cohabitation, and the Emergence of the Single Woman*. In his essay he revisits the history of marriage, the economics of marriage, the rise and demise of childhood, the emergence of new couplings and the social traumas that come with them.

Molly Townes O'Brienand Charles H. Lineweaver are the authors of the second essay*Achieving the Sustainable Development Goals: Promoting Cooperation and Sustainability*. They comment of the UN's way to combat the complex problem of world poverty, first by setting out eight millennium development goals (MDGs), but as poverty decreased, energy consumption and pollution increased. Largely due to this complication, the MDGs were replaced with the Sustainable Development Goals (SDGs). The SDGs include new priorities such as climate change, economic inequality, innovation, sustainable

[4]*Fitzpatrick v Sterling Housing Association* [1999] 4 All ER 705.
[5]*Ghaidan v Godin-Mendoza* [2004] 3 All ER 411.

consumption, and peace and justice. They point out that successful development involves more than avoiding poverty. In order to achieve the sustainable development goals, we have to know what they are and why they were introduced. We also need to teach them to our students, who will carry the goals into their future work places.

In the third essay, *Impact of the Binominal Computer-Internet on Teaching Law in Romania***,** Lavinia-Olivia Iancu points out that the Revolution of 1989 in Romania brought Romanians not only democracy, freedom, but also access to higher education. The development of the market economy compelled the universities to react to the market demands so as to offer valuable creative human resources with a decisive role in the labour process. Within the last decade technology has become ever more present in all the fields, educational institutions shyly providing computer-aided training and education in basic IT and Internet use. Reality proves that this field was also profoundly affected by the computer-internet binomial. Moreover, law fields such as the insolvency law, increasingly employ the virtual environment against a background where less than half of Romanians use the internet. Though the technological evolution cannot be halted, the use of the virtual environment by the legislator should be rationed by monitoring the access of the population to virtual information.

The next essay is *Legitimate Expectation and Good Faith in Public Contracts*, written by Maria Luisa Chiarella**.** Chiarella examines thedealing of public powers in public contracts in the light of the contractual asymmetric profiles that characterise commercial transactions between private subjects and public authorities. Private parties and public powers are linked by an unequal contractual relation. The public evidence procedure cannot be reconstructed in terms of negotiating parity (i.e., between equal subjects), being mainly managed by public powers or *jure imperii*. For this reason, it is required to investigate which tools may guarantee the company in case of "awe" and, at the same time, the proper functioning of the internal market.

Changing the Rules for Receivers and Stockholders in Quasi-Derivative Actions Case Study: Coppola v. Manning, 2015 Mich App LEXIS 2152 (November 17, 2015) is the fifth essay in this book. Its author, Thomas P. Corbin Jr., states that, traditionally, only shareholders of a corporation were able to file “derivative” style actions against current and former board members for breach of fiduciary duties. However, a new Michigan Court of Appeals case indicates that for at least the parties in that case, a court-stipulated receiver reviewing the corporate books for an entity in financial trouble, may now have similar rights and responsibilities to sue current and former agents of a corporation for breaches of fiduciary conduct. The point of this essay is to review the implications of *Coppola v. Manning*for current Michigan Law and what may be of concern to other jurisdictions. It should also suggest client-counselling steps for attorneys dealing with clients who may be having financial trouble and the drafting of stipulating agreements with opposing counsels.

Anna Chronopoulou and Adriana Nogueira Tôrres are the authors of the sixth essay *Taxation on Consumption in Brazil and Gendered Aspects.* They examine the reflections of taxation on consumption in lieu of taxation of income in underdeveloped countries. For this purpose, they take Brazil, a country still plagued by great social and economic inequality, as an example. The first aspect

examined is that tax on income in Brazil, as is the case in most countries, is progressive, with higher tax rates as income level increases and exemption for those in the lowest bracket. In contrat tax on consumption occurs indiscriminately, on all individuals, regardless of their ability to pay, making it regressive in nature. Another aspect examined is the gender-related aspect oftaxation on consumption. From this perspective, this paper exposes the juxtaposition between the gender-related nature of taxation on consumption and the general principles of social justice.

That leads us to the seventh essay *Charities in Australia: An Abrogation of Government's Responsibility,* whose author is Elfriede Sangkuhl. Major charitable institutions in Australia are run as businesses. The charity sector in Australia is also called the Not for Profit (NFP) sector and referred to as the 'third sector' of the economy. That is, the sector in addition to the government sector and private enterprise. The authoress demonstrates that the use of the NFP sector by government to provide government services has turned that sector into a non-transparent arm of government which allows abuses to occur with victims unable to obtain redress. This essay concludes that the use of charities to deliver government services to some of Australia's most vulnerable citizens is an abrogation of government's duty of care and a distortion of democracy. Allowing charities/philanthropists to use their financial influence to divert government moneys to subsidise philanthropists' causes and passions is 'inherently undemocratic'. Government funds need to be spent on priorities determined by the democratically elected government of the day not by philanthropists, however well meaning. Government policies need to be determined by 'evidence-based policy formulation' determined by the democratically elected government of the day.

The next essay is *Patents on Pharmaceutical Active Ingredients and other Active Substances from Plants and the value of Indigenous Knowledge on XXI Century in the light of Nagoya Protocol to CBD and the WTO-TRIPS Framework:Patent Related-Challenges Case Studies,* written by Cláudia Ribeiro Pereira Nunes, Fernando González Botija and Pedro Diaz Peralta. The application of Convention of Biological Diversity (CBD) and in particular its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation, in the protection of Traditional Knowledge (TK) and its fair bioprospection, is challenged by different ways. The authors address the problem arising from existing regulations on protection of Traditional Knowledge and the lack of uniform implementation, which causes significant legal uncertainty. Their research explores the need, from Brazilian and other biodiversity-rich areas, for the promotion a set of specific laws to regulate the patent granting regime and other equivalent rights arising from Traditional Knowledge, according to international recognised principles of Sustainable Development and Good Governance Practices. On the other hand, the EU has endorsed the Nagoya Protocol with the aim of safeguarding the legitimate rights of traditional societies of origin through the obligation of guarantee its fair use. The paper essay examines, inter alia, the leading objective of highlighting the value of Indigenous Knowledge to the Sustainable Development. The essay then briefly examines examples of comparative law and exposes the legal analysis of patent legal regimes, particularly by studying legal

tools and introducing some proposals to improve the current regulatory system in the light of the discussion on the role of Traditional Knowledge as source of international obligations.

The final essay in this book is *Building Peace over Water in South Asia: The Watercourses Convention and SAARC* by Ravindra Pratap.South Asia is one of the most water-stressed regions in the world and home to the Earth's largest number of poor. Water problems of South Asia come from a welter of complex sources. The lack of a desirable normative framework in that region for transboundary water sharing adds to the problem of water sharing. The existence in South Asia of the two declared nuclear weapon states of India and Pakistan means that water remains one of the key unresolved problems between these two South Asian countries. Although the South Asian region is not without water sharing arrangements, including treaties, there are no effective practices of water sharing. Pratap therefore suggests that the members of the South Asian Association for Regional Cooperation (SAARC) become parties to the 1997 Watercourses Convention with any appropriate reservations or declarations. In this way, they might establish a SAARC cooperation mechanism for a necessary effectuation and institutional monitoring of equity, reasonableness, flexibility and adaptation in the South Asian water sharing.

Many of the debates analysed are ongoing and the policy, ideas and interpretations brought up in the essays will undoubtedly contribute to the course of future debates. I hope the reader will find this collection of essays stimulating and insightful reading not only for those who are interested in the particular topics discussed but also to acquaint themselves with current issues.

The views expressed in the essays in this book are those of the authors and do not represent nor are they intended to represent the views of any other individual or body.