International Uniform Commercial Law

Toward a Progressive Consciousness

Louis Marquis

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INTERNATIONAL UNIFORM COMMERCIAL LAW

To Geneviève, Marc-Antoine, Vincent, Félix, and Andréanne

Series Preface

The principal objective of this series is to encourage the publication of books which adopt a theoretical approach to the study of particular areas or aspects of law, or deal with general theories of law in a way which is directed at issues of practical, moral and political concern in specific legal contexts. The general approach is both analytical and critical and relates to the socio-political background of law reform issues.

The series includes studies of all the main areas of law, presented in a manner which relates to the concerns of specialist legal academics and practitioners. Each book makes an original contribution to an area of legal study while being comprehensible to those engaged in a wide variety of disciplines. Their legal content is principally Anglo-American, but a wide-ranging comparative approach is encouraged and authors are drawn from a variety of jurisdictions.

Tom D. Campbell
Series Editor
Centre for Applied Philosophy and Public Ethics,
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Preamble

As a child, I was troubled by the mysteriousness of things, beginning with my own presence in the world. True, the answers I was given by family and friends, as well as those I found on my own, helped guide and reassure me. But this effect was never more than transitory: fresh questions arose with each new day. Little by little, I learned that many things are either impossible or useless to explain – for example, what we call tastes. Other things, on the other hand, seemed already to have been fully if not very deeply explained, as if by magic. Often, these things were the domain of people the encyclopedias designated as erudite, the experts. As my knowledge about my own tastes and those of others increased, and with the help of the teaching of experts, I acquired a maturity that tended to dissipate the mysteriousness of things. Paradoxically, though, it became more and more important to me to test the depths of this mystery. At the same time, the frontier between tastes and intellectual knowledge sometimes blurred. Would the questions never end?

In hindsight, I realize the troubling quality of this constant confrontation with the inexplicable was a small price to pay for what I learned from it. In fact, it catalysed everything that fascinated me most, and I now see that the question I took so much pleasure in asking in my youth is one I still ask today. 'Why are things this way?' still rings in my mind when I wonder about the best way to understand and change some aspect of the world we live in. And asking it is just as satisfying as ever. 'Why are things this way?' As P. Amselek writes, 'To ask this question is to be conscious of the arbitrariness of the world, its contingency; it is to realize that it might have been or could be otherwise and experience how singular it is.'[1]

Many things could explain how I came to choose international commercial uniform law[2] as the focal point of the reflection conducted in this book. They include affinities, tastes, opinions and certain intellectual considerations. One factor seems to me fundamental: the flourishing legal scholarship that gives the field of uniform law confidence and breadth currently makes of it an obligatory

1 P. Amselek, 'L'étonnement devant le droit' (1964) 13 Archives de philosophie du droit 163 at 165-166.

2 Hereafter, 'uniform law'.

reference point. Uniform law is like the realization of a global dream.[3] To cite just one example, some people view the *Vienna Convention on Contracts for the International Sale of Goods*[4] as the cornerstone for the creation of an international private law.[5] Others invoke Thomas Kuhn's concept of paradigm shift[6] and interpret the Vienna Convention as a sign of the birth of a new paradigm for international commercial transactions.[7] It has been described as the germ of a future amalgamation of all sales laws[8] and said to constitute remarkable progress.[9] The defenders of unification view the Vienna Convention as unification's most fully worked out form. It is not merely a model law that can serve to provide varying degrees of inspiration; nor is it a simple unification of the rules of conflict of laws. Rather, it is an international convention that features a full set of substantive provisions regarding sale.

Faced with a strike force of this intensity, I wished to undertake the intellectual act that will reintroduce to uniform law the mystery it has lost and has a right to, like all other things in life. And so I came to ask myself, 'Why is there uniform international commercial law rather than nothing?' This fundamental metaphysical question[10] underlies my entire reflection in this book. It expresses the intrinsic but unacknowledged strangeness of uniform law and the corresponding posture of astonishment that should be adopted before it.

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3 See, for example, the authors' preamble in P. A. Crépeau & É. M. Charpentier, *The UNIDROIT Principles and the Civil Code of Québec: Shared Values?* (Toronto: Carswell, 1998), which declares, 'The International Institute for the Unification of Private Law (known as UNIDROIT) strives to make the dream of a *jus commune* a reality.' For a more general commentary on the idea of the dream, see R. J. Barnet & J. Cavanaugh, *Global Dreams: Imperial Corporations of the New World Order* (New York: Simon and Schuster, 1995).

4 April 11, 1980, UN Doc. A/CONF.97/18, Annex I (1980). Hereafter, 'Vienna Convention' or 'CISG'.

5 J. A. Spanogle, 'The Arrival of International Private Law' (1991) 25 Geo. Wash. J. Int'l L. & Econ. 447.

6 (Chicago: Univ. of Chicago Press, 1962).

7 K. C. Randall & J. E. Norris, 'A New Paradigm for International Business Transactions' (1993) 71 Wash. U. L. Q. 599.

8 A. Kassis, *Le nouveau droit européen des contrats internationaux* (Paris: L.G.D.J., 1993) at 559ff.

9 V. Heuzé, *La vente internationale de marchandises. Droit uniforme* (Paris: GLN Joly, 1992) at 367.

10 M. Heidegger frames the fundamental metaphysical question as 'Why are there beings rather than nothing?' (*Qu'est-ce que la métaphysique?* Paris: Gallimard, 1951, at 44.)

Introduction

In a book called *Un café pour Socrate*, M. Sautet asks the question, 'What are we aiming for?' and answers as follows:

> The fact that pessimists are wrong does not prove that optimists are right. To describe the future of our civilization as a return to barbarity could be nonsense. However, that does not at all justify the undisputed reign of market laws over the destiny of humanity.[1]

Sautet thus summarizes the contradictory feelings of disenchantment, disillusion, unconsciousness and uneasiness on the one hand and enchantment, charm, continuity and progress on the other hand that are prompted by the era we live in.[2] For Sautet, knowing what we are aiming at requires that we 'suspend judgement for an instant'[3] while we review what we have been and where we are. In short, it requires that we take the time to conduct an in-depth examination and reconsideration of our epistemology and our values. In this regard, he is in harmony with the movement that seeks to combine acknowledgement of the end of certainty with a renewed search for the right and the good and to face the challenge of making that combination work for the best.[4] This appeal for a return by thought upon itself is echoed in the juridical field constituted by the junction of law and development, the field that provides the backdrop to the present reflection. Currently, the law and development movement is responding to a foundational problematic that I would illustrate with this question: 'What, if anything, does law

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1 (Paris: Robert Laffont, 1995) at 15.

2 See, for example, R. Aron, *Les désillusions du progrès: essai sur la dialectique de la modernité* (Paris: Calmann-Lévy, 1969); P. Collin & O. Mongin, *Un monde désenchanté? Débat avec Marcel Gauchet sur le 'Désenchantement du monde'* (Paris: Éditions du Cerf, 1998); A. Seminatore, 'De la crise des fondements au choc des civilisations' (1995) 31 Études internationales 32. For an analysis focused on the American situation, see H. Johnson, 'America and the Crisis of Change' (1996) 39 Saint Louis University Law Journal 1143.

3 Sautet, *supra*, note 1; at 15.

4 See, for example, I. Wallerstein, 'Social Sciences and the Quest for a Just Society' (1997) 102 American Journal of Sociology 1241; C. Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Harvard University Press, 1989); J. Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971); B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995).

have to say to economic, sociocultural, and political development, and vice versa?'[5]

The orthodox answer to this fundamental question is based on four ideas. First, the conception of law that underlies it derives from *positivism*. This means it presumes that law must be based on real and observable facts and that any legal theoretical construct must be established by induction from ascertained facts that are empirically confirmed. More specifically, positivism assumes the jurist must observe the facts of the law, that is, its formally acknowledged sources and institutions (governments, courts, laws, regulations and so on) in order to frame reasoning that will correctly account for legal reality. Then, the orthodox answer views the law so conceived as intrinsically possessing the constituents likely to ensure development. In other words, the relationship of law to development is *unilinear*, a view that understands the law as a necessity and attribute to it a direct, if not exclusive, role in every prospect for development. Third, the notion of the *transplantation* of law unifies these statements. It takes for granted that it is possible to identify and conceptualize the juridical factors that explain a society's progress and, with certain adjustments, export them to another society. Fourth and last, orthodoxy relates both the appropriateness and the usefulness of law to its capacity to influence development effectively. It thus seeks to establish a *cause-and-effect relationship*, marked by certainty and predictability, between law and development. Overall, these precepts promote universalist perspectives on the relationship between law and development. This tendency is inherent in the approach adopted from these perspectives, one that consists of seeking to grasp reality objectively, rationalize it according to abstract legal categories, and act on it through general commandments and principles.

Another, emergent, answer to this problematic proposes both a vision and an approach that are essentially different from those underlying the orthodox response. In this emergent answer, the nature and the meaning of law are not linked to observation of facts that are foreign to thought and deemed to constitute a neutral, objective, consistent reference point. Rather, they derive from an *internal* reality, a vision Amselek designates with the phrase 'the law in minds'[6] that extends legal frontiers beyond the positive framework constituted by the State and its legislative and regulatory actions. What the law is comes to be bound up with a given context of human life, as comprised of attitudes, experiences, and hopes. As well, this internal reality turns law into a permeable and permeating entity:[7] juridical facts navigate among other kinds of facts (economical, political and so on), thereby creating reciprocal zones of contact and influence whose manifestations and results are manifold and often indeterminate. The emergent

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5 M. O. Chibundu, 'Law in Development: On Tapping, Gourding and Serving Palm-Wine' (1997) 29 Case W. Res. J. Int'l L. 167 at 213.

6 P. Amselek, 'Le droit dans les esprits', in P. Amselek & C. Grzegorczyk, eds., *Controverses autour de l'ontologie du droit* (Paris, P.U.F., 1989) at 46.

7 J. G. Belley, *Le droit soluble: contributions québécoises à l'étude de l'internormativité* (Paris: L.G.D.J., 1996).

answer thus tackles the law-development equation from the perspective of *complexity*. Further, it replaces the idea of transplantation with the idea of *interaction*. In so doing, it manifests a twofold concern: first, to understand the way one or several aspects of the law-development relationship are diffused and transformed from one human site to another, and second, to grasp what a given human site has been able to do (in terms of innovation, consolidation and so on) with a given aspect. Finally, these concerns in turn are allied to an approach that views the law-development relationship as a web that can be disentangled through *interpretation*.[8] Hence, whereas the orthodox response has been concerned with establishing sure links with predictable repercussions, the emergent answer demonstrates willingness to emphasize the web of significations[9] linking law and development.

In my opinion the emergent answer strikes out in new directions that may help us better understand *what we are aiming for*. Put differently, 'It is these considerations [those of the emergent answer] that ought to dictate the nature and direction of future inquiries into law and development.'[10] How, then, are we to act upon this by using uniform law? The sense of transformation found at the heart of the shift that Sautet is associated with provides more than one right answer to this question. As I. Wallerstein writes, 'It must be recognized that our truths are not universal truths and if there exist universal truths they are complex, contradictory and plural.'[11] For the purposes of the present reflection, I would submit one of these right answers resides in the pursuit of two objectives. The first objective consists of putting forward and justifying the constituents of a progressive consciousness for uniform law. The premise underlying this objective is that the call to better know what we are aiming at, as manifested in the emergent answer to the problematic of law and development, constitutes a significant index of the present-day shift from modernity to postmodernity. As A. Huyssen writes:

> What appears on one level as the latest fad, advertising pitch and hollow spectacle is part of a slowly emerging cultural transformation in Western societies, a change in sensibility for which the term postmodern is actually, at least for now, wholly adequate. The nature and depth of that transformation is debatable, but transformation it is.[12]

While agreeing with Huyssen in essence, I prefer not to use the word 'postmodern' for the transformation that is under way. In my view, to speak of

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8 D. E. Apter, *Rethinking Development: Modernization, Dependency, and Post Modern Politics* (New York: Sage, 1987).

9 C. Geertz, *Local Knowledge* (New York: Basic Books, 1983); also, *The Interpretation of Cultures* (New York: Basic Books, 1973).

10 Chibundu, *supra*, note 5; at 228.

11 I. Wallerstein, 'Social Science and Contemporary Society' (1996) 11 International Sociology 7 at 24.

12 A. Huyssen, 'Mapping the Postmodern' (1984) 33 New German Critique 5 at 8. See also N. Rouland, 'Les fondements anthropologiques des droits de l'Homme' (1994) 25 R.G.D. 5 at 7ff.

*post*modernity implies a kind of break between modernity and a new age. I believe that, though it may appear desirable for something to succeed modernity, we must privilege a vision that will allow us to keep the soundest components of the legacy of the past. I would propose this vision be called a second modernity. Although the vision of a second modernity would remain open to critiques of modernity that include those articulated by postmodernism, I conceive of it as a vision connected with the past and strongly committed to both a better present and a better future.

In a second modernity of this kind, 'it is no longer more facts that we need, it is more thought.'[13] Therefore, to work on conceiving a type of reasoning – a consciousness – that lends a progressive direction to uniform law does not consist of pure evasion or artifice. Rather, it is in the first instance a way to make uniform law congruent with an ever evolving, urgently sought after reality, that of a second modernity. As I intend to show, the present consciousness associated with uniform law does not match this reality,[14] rendering its ability 'to guide self-directed social interaction'[15] precarious. Progressive consciousness would thus be a way to make uniform law a teleological juridical phenomenon – one tending toward a goal, as opposed to a legal metaphenomenon[16] – capable of inspiring as many practical applications as necessary. This brings us to the second objective, that of developing two such applications. One will consist of an interpretive schema of uniform law and the other of a *uniformist* reading of the Quebec world.[17]

In a famous address, J. P. Sartre wrote of the writer's responsibility.[18] One must recognize that words contain attitudes and gazes; they convey ideas, 'universes of knowledge, consciousness, and culture' that run through things and beings.[19] The very fact of living begins with, or depends on, the words we assemble: 'In speaking, I know that I effect change. It is not possible for me to speak if it is not to effect change, unless I speak to say nothing; but to utter is to effect change and to be conscious that one effects change.'[20] From this perspective, to work on the design of a progressive consciousness for uniform law is an interested act which yields concrete achievements. To this end, appropriate methodology must be used.

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13 The idea of second modernity is borrowed from J.-G. Belley, 'Une justice de la seconde modernité' (2000) 46 McGill L. J. 317; T. Todorov, *Critique de la critique: un roman d'apprentissage* (Paris: Seuil, 1984) at 15.

14 See Part I, below.

15 G. Postema, 'Implicit Law' (1994) 13 Law & Phil. 361 at 374.

16 R. A. Samek, *The Meta Phenomenon* (New York: The Philosophical Library, 1981) at 4 and 206: 'The meta-phenomenon is the human propensity to displace "primary" with "secondary" concerns, that is, concerns about ends with concerns about means. . . . The legal system is a meta system *par excellence*. In separating social problems from the human condition, and converting them into legal issues, they serve the cause of the meta-system.'

17 See Chapter 9, below.

18 J. P. Sartre, *La responsabilité de l'écrivain* (Paris: Verdier, 1998).

19 *Ibid.* at 30.

20 *Ibid.* at 32.

Methodology

My method of pursuing my two objectives consists of three distinct processes.

The first, related more specifically to the first objective, is inspired by the approach used by M. Koskenniemi in *From Apology to Utopia: The Structure of International Argument.*[21] Koskenniemi writes that he wishes to conduct 'an exposition and discussion of the assumptions which control modern discourse about international law,'[22] assumptions that derive from liberal political theory. As he writes, 'it is neither useful nor ultimately possible to work with international law in abstraction from descriptive theories about the . . . character of social life among States and on the desirable forms of such life.'[23] Koskenniemi employs a method he summarizes thus:

> The approach followed here is one of 'regressive analysis'. I shall attempt to investigate discourse about international law by arguing back to the existence of certain conditions without which this discourse could not possess the kind of self-evidence for professional lawyers which it has. In other words, I shall argue, as it were, 'backwards' from explicit arguments to their 'deep-structure', the assumptions within which the problems which modern lawyers face, either in theory or in doctrine, are constituted.[24]

According to Koskenniemi, then, it is important to unravel the explicit arguments in order to access deep structure – the assumptions – , since these determine '*the conditions of what can acceptably be said* within [the arguments], or what it is possible to think or believe [within them].'[25] This operation is combined with critical insight, because, in arriving at the essential considerations 'which control the production of particular agreements within discourse,'[26] it becomes possible to better understand why these arguments produce a given result. Similarly, 'it opens up a possibility for alternative descriptive – and simultaneously normative – characterizations of the world'[27] we live in and would like to live in. If they do not act this way, jurists will be condemned to live 'with the prevalent routine of interpretative intuitionism'[28] and thus experience difficulty 'in integrating their descriptive and normative commitments into analytical studies about the content of the law.'[29] Consequently, the process of analysis as a whole consists of a three-part sequence: unravelling (regressive analysis), critique, reformulation.

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21 (Helsinki: Lakimiesliiton Kustannus, 1989).
22 *Ibid.* at xvi.
23 *Ibid.* at xiii.
24 *Ibid.* at xvii.
25 *Ibid.* at xxi–xxii.
26 *Ibid.* at xxii.
27 *Ibid.* at xxiii.
28 *Ibid.* at xxiv.
29 *Ibid.* at xiii.

In putting forward the constituents of a progressive consciousness, I shall adapt and condense this threefold process as follows:

- I will examine uniform law as discourse, that is, as a web incorporating various means of expression and persuasion.
- These means will be represented by arguments or concepts that, if viewed in perspective, form the surface or primary level of uniform law.
- The meaning of these arguments is bound up with a background picture of uniform law consisting of principles of thought – ways of seeing things and encompassing reality – and a normative content – values – that permit one to grasp this reality. I will be interested in the philosophical turn taken by these principles of thought and these values.
- The background of uniform law forms a whole that cannot be divided up and apportioned among various arguments in an exclusive and definitive way. This implies that the meaning of a given argument is bound up with, or depends on, that found in the other, coexisting, arguments; that it is not predetermined nor definitively granted; and that it is possible to use different arguments to arrive at the same result.[30]

Arriving at the background of uniform law through regressive analysis or unravelling will take up Part I of this reflection. It will uncover the kind of consciousness that dominates uniform law at the present time, a consciousness I will call conservative. On completion of this stage, Part II, working with the premise of a shift to a second modernity, will proceed to a critique of conservative consciousness. This will pave the way for the stage called reformulation, to be conducted in Part III, which will put forward a progressive consciousness for uniform law. The first three parts will not take the form of clause-by-clause analysis of the various sources of uniform law. Rather, they will take the form of a philosophical, conceptual and doctrinal discussion centred on various arguments. This discussion is likely to appear very distant from the usual mode of analysis of uniform law; it is likely many scholars and jurists would disapprove of it. We should not be troubled by this. For now, I wish to stress only that the method is strictly and rigorously consistent with Koskenniemi's approach. Indeed, to adopt a method such as clause-by-clause analysis would amount to misapprehending Koskenniemi's approach. It is my belief that we must follow this unorthodox course in order to address what appear to be broader issues surrounding the efforts to unify international commercial law. One of the most representative of these broader issues is globalization, a topic that is the site of lively debate about what awaits our world in the near and distant future and that, among other currents of thought and action, contributes to the climate of ambivalence described by Sautet. A notion commonly associated with the issues of globalization is that megaforces are giving birth to systems and frames of reference of unparalleled magnitude, one

30 J. C. Smith, 'Action Theory and Legal Reasoning' in K. Cooper-Stephensen & Elaine Gibson, eds., *Tort Theory* (North York: Captus U. P., 1993) at 56.