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EXPLORING THE JURIST'S FRAME OF MIND

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Professor of the Methodology of Private Law

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CONSTRAINTS AND PRECONCEPTIONS IN CIVIL LAW ARGUMENTATION

by

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PREFACE

The Dutch edition of this book was published in 2005 as *General Introduction. Second Part* to the Commentary on Dutch Private Law Asser series.[1] It was added to the *General Introduction* I wrote in 1995, in which I discussed the methods of legal reasoning when applying the law to concrete cases, and the importance of judge-made law. In this *Second Part* , I have chosen a different perspective. I have taken the position of a committed spectator who is sometimes astonished and sometimes amused when observing lawyers dealing with private law. Hereinafter, I show what this means and what the reader may expect.

The book reflects the research I conducted as professor in the methodology of private law at the Law Faculty of Tilburg University. I owe my thanks to the Faculty and the University for the many, many hours they granted me to study, think, and listen. Without this generosity, I would not have been able to write the book. I feel enormously honoured and grateful for this privilege.

I also owe my thanks to the numerous students and researchers within and outside the Law Faculty and the University, who were willing to discuss my preliminary insights with them and to read the book at earlier stages of draft. As Ian McEwan put it in his novel *Saturday*: "I am the lucky beneficiary of their helpful comments and kind encouragement."

Thanks to a subsidy from the Netherlands Organisation for Scientific Research (NOW), the Dutch edition of the book has been translated into English. I heartily thank the translators, Friso Holtkamp and Gerhard van der Schyff, for their care of the manuscript, and Stéphanie van Gulijk and Ineke Sijtsma for their amicable support.

In order to make the English edition accessible to readers not familiar with the Dutch legal system, I have rewritten about one third of the Dutch edition and adapted the Bibliography almost completely. I have tried to incorporate the most important materials available to me up to 1 February 2006.

Jan Vranken
Tilburg, March 2006

1. In Dutch: Mr. C. Asser's *Handleiding tot de beoefening van het Nederlands burgerlijk recht*, founded in 1878. The publisher is Kluwer, Deventer.

LIST OF ABBREVIATIONS

ABA	American Bar Association
AC	Appeal Cases
ADR	Alternative Dispute Resolution
All ER	All England Reports
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BJu	Boom Juridische uitgevers (Boom Legal Publishers)
Bull. Ass. Plèn.	Bulletin Assemblée Plenière
BW	Burgerlijk Wetboek (Dutch Civil Code)
Cc	Code Civil
CH	Chancery
CLJ	Cambridge Law Journal
CLR	California Law Review
DLR	Dominion Law Reports
ECC	European Civil Code
ECHR	European Court of Human Rights
ed.	editor
EHRR	European Human Rights Reports
EJCL	Electronic Journal of Comparative Law
ERPL	European Review of Private Law
HR	Hoge Raad (Dutch Supreme Court)
Hrsg	Herausgeber (editor)

JLS	Journal of Legal Studies
JZ	Juristenzeitung
MLR	Modern Law Review
NJ	Nederlandse Jurisprudentie (Dutch Law Reports)
NJB	Nederlands Juristenblad (Dutch Legal Journal)
NJW	Neue Juristische Wochenschrift
no.	number(s)
OJLS	Oxford Journal of Legal Studies
para.	paragraph
UP	Unidroit Principles of International Commercial Contracts
PECL	Principles of European Contract Law
pp.	page(s)
QB	Queen's Bench
RabelsZ	Rabels Zeitschrift für Ausländisches und Internationales Privatrecht
RAE	Research Assessement Exercise
RvdW	Rechtspraak van de Week (Weekly Law Reports)
SCR	Supreme Court Reports
VersR	Versicherungsrecht
WLR	Weekly Law Reports
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie (Weekly on Civil Law and Notary)
ZEuP	Zeitschrift für Europäisches Privatrecht
ZZPInt	Zeitschrift für Zivilprozess International

TABLE OF CONTENTS

INTRODUCTION

1. Argumentation in private law,[1] which is the subject of this book, is often described in terms of legal skills: determining the meaning and interaction of, for example, legal history, legal principles, the legal system, precedents, and numerous other instruments which fill the lawyer's tool kit so richly. Much can be said about the meaning of each of these tools, and even more about their interaction, for the number of potential clashes is great. A mathematical calculation once showed that if four out of fifteen tools may clash, almost two thousand variants result.

2. Legal skills are beyond the scope of this book. Neither will I discuss theoretical views on, among other things, legal reasoning, the justification of legal judgments, or the position of rhetoric and logic in law. The perspective I have chosen is that of a committed spectator, who is sometimes astonished and sometimes amused, when observing lawyers dealing with private law. Criticism, sharp criticism too, cannot be avoided, but poisoned arrows are not to be fired. I am too much a private law enthusiast for that.[2] However, at some point, I came to realise that my colleagues and I use a way of argument and reasoning which, after some thought, is not as compelling and convincing as we take for granted. "Lawyers, like artists, tend to become prisoners of their own creations." This made me aware of what Edward de Bono called "the furrow of thought".[3] Formally speaking, he was referring to basic assumptions ingrained by training and experience, presuppositions and ideas of which we are hardly aware, but which nonetheless almost completely determine our way of thinking and acting. Certain arguments and approaches are accepted and reproduced, others rarely or not at all. Why is that? What processes are at work here?

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1. The context I have in mind here is principally, but not exclusively, private property law, the law of obligations and civil procedure.
2. This choice of perspective, of device, if you like, is not unusual. A famous example is Montesquieu's *Lettres Persanes* (first published in 1721), in which he uses the perspective of Persian visitors to describe the French culture with critical admiration.
3. De Bono 1971, pp. 137ff, pp. 221ff (lateral thinking).

3. Of course, the phenomenon is not unique, nor is it typically juridical. It happens to every professional and in every branch of science. It used to be called the "paradigm" or *Vorverständnis*, sometimes also simply "interpretive framework". In the *lingua franca* of current times, it is referred to as "frame of mind". This frame of mind has two important functions, a stimulating and an obstructing one. The stimulating function pertains to common ground, recognition, and understanding. The observation of facts and events, the approach, the reasoning and argumentation is familiar to fellow professionals or scientists. They are on the same wavelength and speak the same language, which facilitates the dialogue. The obstructing function means that this result can only be achieved because the frame of mind cuts off other ways of observation, reasoning, and argumentation. The frame of mind thus channels the stream of thoughts and ideas in a sometimes meandering but always clearly demarcated course. Everything running counter to this stream, or falling outside its scope, does not count, at least, not until the opposite has been proven. This implies a substantial reduction of reality, a selective frame. It is this frame of mind that fascinates me. What are the unspoken premises of lawyers when they argue in private law? What characteristics and what idiosyncrasies do they give rise to? Quick answers or hasty conclusions are inappropriate here. Insight into this frame of mind should be gained, but this will be hard-won as we must withdraw ourselves into the back office of our minds, where opinions have not yet taken shape or been stored and neatly pigeon-holed for easy retrieval. In this back office, it is still dark and uncertain. The illumination of self-insight is rare. I realise this, but this is precisely the reason why this subject is so interesting. In this book, I will explore manners to penetrate this frame of mind in order to try to reveal something of its enigma. This will not be done through a step-by-step deduction. That is simply impossible. The pictures I will sketch in the next nine chapters will be experiments of an intuitive, exploratory, or even cubist nature.[4] The fact that there are nine chapters is pure coincidence. There could have been ten, twelve, or fifteen, but these nine chapters contain the most important characteristics and idiosyncrasies. Adding information would only increase the risk of repetition.

4. Most chapters can be read separately. There is some overlap and sometimes one chapter builds upon another, maybe even more often than I am aware of. Readers should not expect a comprehensively composed argument that will guide them from a problem through an analysis and a theory to a conclusion. On the contrary, they will have to begin again and again, to a certain extent. If there are readers who reproach me with a charge of one-sidedness, especially in the first five chapters, and the fact that, more often than not, I fail to suggest any solutions, my answer would be a quote from Heinrich Böll's preface to *Die*

4. I mention cubism here because of its richness of perspective. Everything is turned inside out to reach the core. The almost unlimited openness to new ideas it suggests is what fascinates me.

verlorene Ehre von Katharina Blum: it is not a coincidence or a flaw, but an inevitability in the design chosen for this book. Nuance will not appear until the sixth chapter, in the second half of the book. From that chapter onwards, I will also make it clearer where I stand. In the concluding chapter, I will distinguish three themes, which I think form the basis of what I try to argue in this book.

CHAPTER 1

THE ART OF HANDLING CASES

§ 1. Education[1]

5. A striking characteristic of lawyers when arguing is that they often begin by referring to a specific case. It would seem as if only that really gets the juices flowing. Anthony Kronman, in his book *The Lost Lawyer*, puts it even more strongly. To him, the skill of a lawyer is not dependent on his knowledge of the law, but on his ability to deal with cases. "What lawyers are particularly trained to do and can generally do better than philosophers and economists is think about cases (...). It is what his case-centred education and experience give him special competence at doing – unlike philosophers and economists, whose disciplines are on the whole more concerned with the construction of abstract systems of thought (...)." He closes with the characteristic sentence which inspired the title of this chapter: "If lawyers have a distinctive expertise of their own, it thus consists in the art of handling cases."[2] This strikes me as an apt description. It may be a bit disappointing that this is all there is, but it does reflect the truth.

6. The truth of Kronman's statement is already evident during education. From the first moment law students enter university until the day they leave, their training is focused on solving cases and almost everything they do is aimed at acquiring this skill. It is the alpha and omega of reading law. Students learn how a lawyer is supposed to solve cases in much the same way as crafts used to be taught: by copying and following others. Teachers review cases, and demonstrate the proper way of solving them. They show which arguments are valid and which choices need to be made. Important guidelines they use

1. Christopher Columbus Langdell introduced the case method in the United States in the second half of the nineteenth century, positioning it as a prerequisite for the scientific teaching of law, as is concisely described in Mercuro/Medema 1997, pp. 6-9; Jestaz/Jamin 2004, pp. 265-273; Hesselink 2001, pp. 17-21; Appleman 2005. Each of these provides numerous references.
2. Kronman 1993, p. 362. See also Markesinis 2003a on the advantages of a case-centred approach in legal education.

in doing so are judicial decisions, because judicial decisions, especially those of the highest courts of law, enjoy the power of precedent, *de iure* power in common law systems and *de facto* power in civil law systems.[3] Students study these decisions and learn how to apply them to the cases they are presented with. Their feeling for nuance is developed through small variations in existing cases, sowing the seeds of what will hopefully grow into "practical wisdom".

The literature that students have to study when preparing for their exams also supports this case-centred approach. Textbooks make no effort beyond an organised, rather superficial representation of the law "as it stands", without showing what problems might be tied to it. Without exception, these textbooks take the conceptual-analytic approach, which means that private law is described using legal rules, principles, doctrines and concepts, explained by means of cases and case law. Their main purpose is the transmission of factual knowledge and a strong emphasis on the training of legal skills. Considerations on background and tendencies, on the importance of changes in society, on engagement in critical thinking,[4] on moral values and choices, on how ideas and theories are formed, and on inter- and multidisciplinary approaches to private law are not to be found in textbooks nor in handbooks. The only area where handbooks are more thorough than textbooks is on the conceptual-analytic level.

All the above, combined with lack of reflection and methodological schooling, ensures that the study of law is a training geared almost exclusively towards legal practice. Students who would like a deeper theoretical framework or a broader inter- and multidisciplinary scope are directed towards metajuridical subjects, but these often enter the curriculum at a stage where practical thinking has firmly taken root in the heads of the students. Despite good intentions, most students are then no longer able to bridge the gap between practice and theory. The character of the study of law is quite evident in the graduation theses students write, which are for the most part structured and completed as copies of text- and handbooks.

§ 2. Legal Practice

7. The primary role that cases play in the study of law is continued in legal practice, at least for those students who embark on the traditional careers for lawyers, such as judges, corporate lawyers, trial lawyers and legal consultants. For these people, solving cases becomes their job. If they perform well, their skill will increase. They do need to keep up with the state of the art in their field. While doing so they are again confronted with cases, for instance when

3. An overview of the situation in eleven systems – Germany, Finland, France, Italy, Norway, Poland, Spain, Sweden, England, the United States and the European Union – can be found in MacCormick/Summers 1997.

4. Bell 2003, pp. 901-919 describes three models of legal education: Knowledge Transmission, Skills and Techniques, Super Complexity ("engagement in critical thinking").

reading up on new developments in judicial decisions or while attending refresher courses, which also mainly deal with recent case law. This new case law is reviewed, discussed, explained, analysed, examined for new elements and then connected to questions that need to be answered in day-to-day practice. The question lawyers keep asking themselves is whether the new case law has an effect on the way they solve cases so far. Does it cut corners? Does it open up new approaches? Does it lead to new doctrines? This is what the attendees want to be taught. As such, they show themselves as good students of their universities, because what they want to know during their refresher courses bears a close resemblance to what teachers at university wanted them to know. The only difference is that the cases they run into in their jobs are now real instead of just make-believe.

The preceding does not challenge the idea that lawyers merely jump from one case to the next. The focus on cases is so pervasive, that they will make up cases when no real ones are available. "So strong is the pull of cases (...) that judges and lawyers often create 'ghost' cases from which to argue."[5] The aim is to compare the case to similar, imaginary cases to achieve a clearer picture of the conflict. Case comparison, this process is referred to. Lawyers working in the realm of civil law often utilise case comparison, even though the results of their mental process cannot be found in written form. This observation supports and confirms Kronman's description of lawyers, in that cases form the basis for their thought, reason and argumentation.

§ 3. Legislation[6]

8. Legal cases are often stories filled with agony and suffering. The interest of lawyers is only piqued when something goes wrong. Death, injury, passion, love, infidelity, grudge, misfortune, deceit, mistrust and abuse are all part and parcel of their everyday life. In that sense, lawyers in a way provide disaster relief. Even then, I would not call these things typically legal, because the same can be said for doctors, psychiatrists and other aid workers, who also see their share of human greed and misery. Something which I consider typical for lawyers is that they belong to the sort of people who have the talent to vividly imagine the most severe outcome possible for future events. A lawyer drawing up a contract or making arrangements for the future needs to think: what can go wrong, and who would be held responsible? Normally, one might well end up in mental care with this characteristic. In legal circles, however, the degree of hypochondria is directly tied to one's ability as a lawyer – the worse, the better.

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5. More on this aspect of American law: W. Burnham 1999, p. 70.
6. I choose "legislation" here because the word is quite evocative, even though there are many other forms of regulation. Compare Chapter 6, where I make a distinction between legislation and private regulation (self-regulation). The latter is even closer linked to concrete cases.

Obviously, the ability to think ahead is especially important for lawyers working in the legislature, because their task is the development of general rules for future events. Insofar as this legislation concerns the codification of legal decisions, the link with cases is self-evident. MacCormick and Summers show that this also holds for common law countries: "Although much law in common law countries is statutory, the statutes are usually built on a foundation of case law, rather than the cases being of significance only as a commentary on the code in which all fundamentals are determined."[7] In other areas, cases are often used as a guide and touchstone. While the new legislation is still on the drawing board, legislative lawyers try to imagine the situations that might occur, what legal chicanery would be possible and what rules would fit these best. They will return to previous cases time and again, or will try to imagine what future cases would be possible, to test whether the proposed rule is the right solution for the problem at hand. At the same time, the new rule is tested for unwanted consequences and side-effects. If these are found, the proposed rule needs to be amended. This process can be called "falsification through cases": possible future conflicts are used to ascertain the longevity of a proposed new rule.[8] The legal literature which concerns itself with legislation generally uses this method as well.

Even more remarkable is that cases are used by a number of study groups concerned with harmonising European private law, especially contract law, tort law and unjust enrichment. Two good examples of these study groups are the Trento group on the Common Core of European Private Law and the Ius Commune group. The latter prepares *Casebooks for the Common Law of Europe*. Both groups explore the opaque and pluriform civil law of the different European member states with the help of cases. Without paying too much attention to the finer details,[9] they differ from other European study groups because their aim is not to create new rules,[10] but to find viewpoints and concepts, which together should eventually provide a consistent framework for common solutions. What makes them special is that they use cases first and foremost as a diagnostic tool, as opposed to an instrument for falsification.[11]

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7. MacCormick/Summers 1997, pp. 4-5.
8. Of course, when it comes to systematising and editing, cases are less important.
9. More nuances and more information on these and other study groups can be found in Smits 2002 and Hartkamp 2000.
10. Important examples are the Lando Commission with its Principles of European Contract Law (PECL) Parts I-III, and the Study group on a European Civil Code (ECC), which will publish its findings autumn 2006 or spring 2007. The Unidroit Principles of International Commercial Contracts (PICC) does not limit itself to Europe, but does reach conclusions similar to those of the PECL.
11. The fact that these groups make no attempt to create something new, but instead try to discover that which already is – both that which already belongs to the common core of national bodies of law and the ways in which they differ in content, methods, reasoning and argument – is not significant. Had these groups been striving for something new, the case method would also have been of use.

§ 4. Judge-Made Law

9. The focus on cases also has a large effect on the debate about judge-made law. Judges decide in concrete cases. They lay down the individual obligations of the parties in those conflicts. However, sometimes decisions have a significance that surpasses the limit of the concrete case, in that they have value as sources of law. Most continental European systems nowadays openly accept that the judiciary has a role in the creation of law, especially the highest national courts and inter- and supranational courts. Although the way and extent in which courts fulfil this role differs from country to country, the fact that they have this role is no longer in debate. Judge-made law is now seen as an absolute must. Its contribution to the development of law in civil law countries is now regarded as indispensable. As far as can be ascertained, this opinion is widely shared by lawyers, legal scholars, the legislative branch and in society as well. All recognise that legislation and judge-made law have become "partners in the business of law", which is as it should be.[12]

No great investigations are needed to become convinced of the validity of this opinion. The European Court of Human Rights (ECHR) and the European Court of Justice, for instance, exert a large influence on the "Europeanisation" of law. For example, the ECHR case law on article 6 and article 8 of the European Convention of Human Rights brought about fundamental changes to procedural law and family law. These two areas of law were long thought to be so tied to the culture of a country that they should remain national issues. The ECHR changed that thought, proving that judge-made law can be successful even in areas where this was not thought possible. Without judge-made law, it certainly would not have succeeded.[13] The last observation comes as bad news to some of the study groups mentioned above, who work on harmonising European private law without the benefit of a judicial branch. I, for one, cannot see how the situation on a European level could be any different from a national level, where the development of civil law largely rests on case law. Whole doctrines are composed primarily or entirely of case law. Examples from Dutch law include among others, torts, government financial law, accountability of civil servants and legal entities, discontinued negotiations, the doctrines of privity of contract, breach of contract and unjust enrichment. None of these areas of law can be discussed without studying the copious amounts of case law available. The same can be said about any other area of civil law: knowledge of the relevant case law (and of the relevant literature, to which we will return later)

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12. For a more extensive analysis of the position that judge-made law is indispensable, covering forty countries, I refer to Yessiou-Faltsi 1999. MacCormick/Summers 1997, passim; Vogenauer 2001, vol. I, pp. 141-151 and pp. 180-181 (Germany); pp. 289-294 and pp. 309-310 (France); pp. 394-400 and pp. 417 (European law); vol. II, p. 736 and pp. 1193-1196 (England) are less wide-reaching but more thorough.

13. More on the need for a judicial branch in the harmonisation of European civil law can be found, among others, in Snijders 2003, pp. 12-13.