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GRADUATION ADDRESS MCGILL UNIVERSITY

Reinhard Zimmermann[*]

EDITOR'S NOTE

Professor Reinhard Zimmermann is currently the Director of the Max Planck Institute for Comparative and International Private Law in Hamburg, Germany. In 2010 he received an Honorary Doctorate of Law from McGill University, and the following text is transcribed from his speech to the graduating class. Professor Zimmermann is a leading expert in both the common law and civil law traditions, and has taught at many of the world's finest law schools throughout his career. His position as one of the world's leading figures in comparative law gives his words much weight, and this speech represents the spirit that has evolved within the *McGill Law Journal*, especially since the inception of the McGill Law transsystemic program a decade ago.

MOT DE LA RÉDACTRICE

Le professeur Reinhard Zimmermann est actuellement directeur du *Max Planck Institute for Comparative and International Private Law* à Hambourg, en Allemagne. En 2010, il a reçu un doctorat honorifique en droit de l'Université McGill. Ce texte est la transcription du discours qu'il a prononcé devant la cohorte de finissants. Le professeur Zimmermann est un expert éminent de la *common law* et du droit civil. Tout au long de sa carrière, il a enseigné dans de nombreuses écoles de droit qui figurent parmi les meilleures au monde. Sa notoriété mondiale en tant qu'expert du droit comparé donne un gage de crédibilité à ses paroles. Ce discours représente l'esprit qui a évolué au sein de la *Revue de droit de McGill*, et ce, surtout depuis la création, il y une décennie, du programme transsystémique au sein de la Faculté de droit.

* Director, Max Planck Institute for Comparative and International Private Law. Hamburg, Germany. On 4 June 2010, McGill University awarded Professor Zimmermann the degree of Doctor of Laws, *honoris causa*.

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Chancellor Arnold Steinberg, Principal Heather Munroe Blum, Chair of the Board Kip Cobbett, Dean Daniel Jutras, Mr. Justice Nicholas Kasirer, distinguished faculty members, parents, friends, and most of all fellow graduates.

The theme of my graduation address is legal history and comparative law. Let me very briefly confront you with three characteristic texts and their impact.

Some grain merchants sail from Alexandria to the famine-stricken island of Rhodes, where grain has become a very precious commodity. May the merchant whose vessel arrives first sell his grain to the starving Rhodians without indicating that various other vessels are about to arrive with the result that the price of grain will drop dramatically? Or is he under a duty of disclosure? This is a problem raised by Marcus Tullius Cicero in his work *De officiis* and it has been discussed, over the centuries, by generations of lawyers. Today it is as relevant as it was in Roman times, in France or Germany as much as in England or Canada. Situations where we have an asymmetrical distribution of information occur particularly frequently in business-to-consumer relations. And European Union legislation has thus established a comprehensive system of duties to inform in order to redress that imbalance. The extent of such duties, and whether they also exist in business-to-business relations remains subject to considerable dispute.

Passons au deuxième texte. Une personne dépose une épée chez un ami. Quand elle revient trouver son ami après quelques semaines, elle est devenue folle. Ce cas a été discuté, lui aussi, par Cicero. Selon Cicero, l'ami n'est pas obligé de rendre l'épée. C'est un texte étudié avec la même intensité à travers les siècles que mon premier exemple. Le texte de Cicero constitue l'un des points de départ de la doctrine de la *clausula rebus sic stantibus*. Celle-ci prévoit que tout contrat conclu est sujet à une condition tacite selon laquelle les circonstances fondamentales, à base desquelles le contrat a été conclu, n'auront pas changé. Cette doctrine a été renforcée par St. Thomas d'Aquin d'un point de vue de la philosophie morale. En effet, St. Thomas d'Aquin ne considérait pas comme pêcher l'inexécution d'un contrat lorsque les circonstances avaient changé. Les rédacteurs du code civil allemand avaient rejeté la doctrine de la *clausula rebus sic stantibus*. Tout de même, ce concept a trouvé sa place dans le droit allemand grâce à la jurisprudence et basé sur le concept général de la bonne foi. Les systèmes plus modernes comme les *Principles of European Contract Law* proposent des versions intitulées « *change of circumstances* ».

The next case is from a fifteenth century treatise from Naples. A husband secretly enters the room where his dying wife is engaged in making her will. He bends his face over hers and entreats and flatters her into making a legacy of immovable property to him. This legacy was subsequently held to be invalid, and the Neapolitan jurists, in this context, resorted to the notion of *metus reverentialis*, reverential fear, which had been established in medieval law on the basis of individual points of departure from the Roman sources. In English law, the doctrine of undue influence was developed to cope with this type of situation. In continental legal systems, however, *metus reverentialis* was forgotten. Courts and legal writers in Germany were thus confronted with a difficulty when they had to deal with cases where a husband persuades his wife to act as surety for his debts vis-à-vis a bank. A decision by the Federal Constitutional Court was required to induce the Federal Supreme Court to invalidate contracts of suretyship far exceeding the means of the surety, and concluded under the influence of an emotional attachment. Effectively, therefore, the courts have reintroduced the notion of undue influence, or *metus reverentialis*, into German law under cover of the *boni mores* provision contained in the Code.

What do these three case studies have to tell us? They all lie at the intersection of legal history, comparative law, and modern legal doctrine; that is, of what are usually taken to be three distinct disciplines within the field of legal scholarship.

Today, particularly in codified legal systems, we are used to regarding our private laws as comprehensive and closed systems of legal rules constituting an autonomous interpretational space. Thus, in Germany as much as in France or Spain, the intellectual horizon of lawyers was limited by the rules and principles contained in the respective codes. This is an ideology that has also shaped the research programme of legal history, for scholarship in legal history has thoroughly historicized itself. It aims to discover the past purely for its own sake.

Ever since I studied law at the University of Hamburg I have found this separation of legal history, comparative law, and doctrinal scholarship unsatisfactory; and one of the central aims of my work is to overcome what I regard as an unfortunate narrowing of the perspective. A study merely of the modern legal systems as we find them today will reveal a long list of commonalities and differences. If one wants to know how these differences and commonalities can be explained, one has to adopt, in addition, a historical approach. There may be cultural, social, or economic differences; there may be historical accidents and misunderstanding; lawyers may have latched on to different layers, or sources, within one and the same tradition; and so on. It is this kind of comprehension that paves the way for rational criticism and organic

development of the law. The past, of course, does not justify itself; nor does it necessarily contain the solutions for present day problems. But the law constitutes a tradition, and an appreciation of that fact is the first and essential prerequisite for devising appropriate solutions for the present day. Duties to disclose and dealing in good faith, change of circumstances, and the effect of undue influence on wills and contracts: these are all issues that every modern legal system in the Western world has to grapple with. We can all learn from each other but we can do this so much better when we understand how we got where we are now; how, in other words, the tapestry of our modern legal systems has been created.

At the McGill Faculty of Law you have decided to pull down the walls that still prevent lawyers in Europe from considering themselves European lawyers. I think we can learn very much from this encouraging experience of a legal education that is not essentially tied to the sources of one legal system only. It widens the perspective horizontally and, at the same time, provides an ideal opportunity for extending it also vertically: to look at the common law and the civil law as two traditions and, partly at least, as two modern manifestations of one and the same, a Western legal tradition. It is, therefore, a great honour and pleasure for me to accept an honourary degree from a law faculty with whose approach I feel so much in harmony. I am profoundly grateful to become an alumnus of this centre of excellence and I thank you very much, Dean Jutras, for your exceedingly kind and generous words of introduction. Finally I wish you, the graduates of this law faculty, well in whatever professional career you decide to pursue and wherever you decide to pursue it. You are particularly well equipped to face the challenges of a world whose laws are no longer kept in neatly isolated national boxes.