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Editorial

This new issue of the Kuwait International Law School Journal is full of academic legal research papers and studies covering various fields. It follows two special issues consecrated to the papers that were discussed in KILAW's second annual conference on the right to privacy in light of current challenges. In addition to the importance of this evolving topic that interests individuals, communities and States, the wide participation of Arab and foreign legal professors and thinkers and the extreme value of their researches, were a major factor to allocate two special issues for these researches. This was an added value offered by the Journal within its mission to encourage legal thinking and positive interaction with legal challenges faced by Arab and Muslim societies or relevant specific categories or sectors.

Therefore, in the framework of this interactive and innovative spirit, the issue number 11 of Kuwait International Law School Journal is published including new sections and covering important topics in the economic and sharia fields, mainly two comments written respectively by dr. Ali AlDhofairi and dr. Yousef AlHarbash on two new Kuwaiti judicial decisions. The first one is issued of the Cassation Court and recognizes a new principle in the relationship between the Kuwaiti Oil Company and its leading personnel based on the contractual relationship between the two parties, and the second is issued of the Commercial Appeal Court and concerns the scope of the judicial license upon Article 8/1 of the law of real estate leasing. In this second article the researcher concluded that the judgement does not comply with the provisions of the leasing law nor with the general rules.

Moreover the issue includes as well, and in the same context, a research for dr. Saleh AlOtaibi on the "Court of Cassation's Review on the Element of Fault in Torts", through successive jurispru-

dence where he concluded that the judiciary, especially the Court of Cassation, is required to define the principle of fault according to social changes upon its legislative description in Article 227 of the civil code, where the fault is considered as a wrongful act and where there is no mention of what is really meant by the wrongful act or of the criteria that would lead to such specification.

On the other hand, the issue included a study for Professor Ali ElKahwaji on **"The Permissibility Causes in International Criminal Law"** where he discussed the status of the right to defense in sharia law and the right to equal treatment in the international laws, principles and customs, and where he covered various texts and facts concluding that the relevant rights are considered as permissibility causes in International Criminal Law.

As for the important topics in the economic and sharia fields, the issue includes a study for dr. Adnan AlMulla on the **"Sharia-based Entity in Islamic Financial Institutions between real and virtual independence- Kuwait as an example".** This article tackles the role of Fatwa institutions and sharia-based supervision regarding the orientation of Islamic financial institutions towards working according to sharia rules, through religious positions about activities, products and services that are provided in the banking and capital markets, knowing that these religious institutions face obstacles, mainly the dominance of administrative boards directly or indirectly which affects negatively their impartiality and independence while assuming their allocated functions.

The researcher assessed the current status of sharia in the Islamic financial institutions suggesting some solutions for the weaknesses and shortcomings in making this entity fully independent. He also focused on some specific conditions and requirements regarding the members of this sharia-based entity and its posi-

tion concerning the breaches of the administrative board of its decisions and its misuse of power. And the researcher suggested to establish a new sharia-based entity in the Islamic financial institutions considering that this would be in compliance with the required conditions in order to achieve objectivity and independence of sharia-based institutions.

The issue included as well a report on a conference held in France in the current academic year on the Constitution and social protection in addition to some Master's thesis abstracts on many customs followed in the Kuwaiti Parliament. These are sections that inform researchers about the orientations of legal thinking in international conferences and about the recommendations of Masters' and PhD's thesis that are significant and distinguished when it comes to their topics and their elaboration methods.

We hope that the legal research materials will impress our readers and we confirm that we will make sure to render this variety and innovation a permanent path to be followed in our Journal through further legal thinking, openness and expansion. In this perspective, we invite thinkers, researchers, experts and legal specialists in the Arab world to contribute to our Journal with their researches, studies and comments, and we guarantee that their research will be valued and appreciated and will reach relevant interested parties in the Arab societies.

Prof. Badria A. Al-Awadhi

Editor – in – Chief

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English Abstracts of Published Articles

Permissibility Causes in International Criminal Law

Prof. Ali AlKahwaji*

The occurrence of a crime with its full elements and the proof of its commission by its perpetrators does not necessarily mean imposing a penalty on them, since a penalty preventive may exist for all or some of them such as infancy, mental disability, moral duress, or a case of necessity. In such cases, no penalty shall be imposed, however, the act remains illegal. It follows that the criminal liability in these cases is suspended but the civil liability remains. Also, there may be a permissibility cause that turns the wrongdoing into a legal act that exempt its doer from both criminal and civil liabilities, i.e. no penalty and no indemnity. These include defending oneself, performing a duty such as executing a provision of law or an order from one's chief that must be obeyed.

The international custom and general principles of law recognize such permissibility causes including lawful defense, reciprocity, performance of duty. Some treaties expressly provide for such causes as in the case of the UN Charter stipulating the case of lawful defense, whereas the Rome Statute of the International Criminal Court does not expressly state the permissibility causes. Article 31 of Rome Statute states the penalty preventive including lawful defense, and article 33 mentioned the performance of duty. There is no mention of reciprocity.

* Criminal Law Professor at KILAW

Since lawful defense is considered a permissibility cause in domestic laws, international custom, the UN Charter, and other international treaties, the author believes it should also be considered as such for the purposes of international criminal law. Also, there has not developed a new international custom or a treaty that completely excludes reciprocity from the permissibility causes in international criminal law.

And since the performance of duty does not need a special analysis or an further elaboration in the field of international criminal law as it is well explained in domestic criminal law, the paper's investigation will be limited to the causes of lawful defense and reciprocity as permissibility causes in international criminal law.

Court of Cassation's Review on the Element of Fault in Torts

Dr. Saleh AlOtaibi*

Fault has been the center of civil liability. Whenever fault is proven, tortfeasor is obliged to indemnify the harmed person; and vice versa, no liability occurs without a fault even if an act causes harm to a third party so long as the act does not amount to a fault. This provision is provided in article 227 of the Kuwaiti civil law, which sets forth the scope of tortious liability that is broader than that of contractual liability. Liability in torts does not require the existence of a contract. Any act that is described as a wrongdoing may cause tort liability.

The Kuwaiti civil law does not define fault, leaving it, as stipulated by the explanatory note, to the legal scholarship to make its scope flexible and to be able to cope with social developments and changes. Thus, the Kuwaiti legislature has attributed the judiciary, especially the court of cassation as a court of law, with the task of determining whether a certain behavior amounts to a fault or not. Such a task was not an easy one because the law only includes the material element of fault which is the infringement, but does not include the moral element which is the perception and discretion, distinguishing between legal fault and ethical one.

* Associate Professor of civil law at KILAW.

Determining the occurrence of a fault differs in cases when there is a criminal verdict convicting the tortfeasor. In such a case the fault exists, while innocence does not necessarily mean the nonexistence of fault. This depends on the reason of the innocence decision. It is also dependent on whether the act violates a certain legal provision and hence is considered a tort, or it does not, in which case the court will consider the regular person standard to determine if the act is a fault.

Sharia-based Entity in Islamic Financial Institutions between Real and Virtual Independence - Kuwait as an Example

Dr. Adnan Ali Amulla*

Abstract:

The Fatwa and Sharia-based censorship plays an important role in guiding Islamic financial institutions to work according to Sharia law through providing Sharia-based directions and opinions about the activities, products, and services offered by Islamic banking and capital markets. However, this study tackles many obstacles that obstruct the work of Sharia-based institutions - such as the direct and indirect dominance of the boards of directors - leaving negative impact on the independence and neutrality of these entities.

To solve the problems, this study both assesses the current status of the Sharia-based entity in Islamic financial institutions and recommends some solutions to bridge the gap in achieving the independence of such entities. Moreover, the study proposes some peculiar requirements and conditions related to the members of the Sharia-based entity as well as the violations and abuse of power of the boards of directors.

The study also recommends establishing a new Sharia-based entity in Islamic financial institutions. If adopted, the new Sharia-based entity will, hopefully, fulfill the conditions required for the independence and objectivity of Sharia-based entities.

* Assistant Professor - Kuwait International Law School

The relationship between Kuwait Oil Company and its leading personnel is a contractual relationship- Comments on the decision of the Court of Cassation number 872/2013 administrative/2 dated 19/5/2015

Dr. Ali AlDhofairi*

On 19/5/2015 the Kuwaiti Court of Cassation- second administrative section- issued its decision number 872 for the year 2014 administrative /2 stating that the cases raised by the employees of Kuwait Oil Company (KOC) will be rejected for not being based on administrative decisions. In fact the decision to end a contractual relationship falls upon the cancellation jurisdiction because it is issued in pursuance of the employment contract which is an administrative contract. Therefore the decisions that are issued accordingly will be subjected to the authority of the full jurisdiction and not to the authority of the cancellation jurisdiction.

We have convened to study this decision critically and genuinely for its effects on the employees of KOC and other governmental institutions that use employment contracts and because of its legal importance, since it recognizes the higher administration's dominance and capacity to use the power to end employment contracts at any time and through cancellation cases, far from the administrative judiciary's supervision.

* Assistant Professor of Public Law - Kuwait International Law School

We concluded in our comments that even if the decisions to end KOC's employees' contractual relationships are not in principle subjected to the authority of the cancellation jurisdiction, this does not mean that such employees cannot have recourse to the administrative judge in view of the illegal abuse of power and in order to cancel the act and reclaim compensation, upon the authority of the full jurisdiction as per the general theory of misuse of rights in Civil Law.

Otherwise the terms of this decision cannot be applied to KOC's employees or the employees of other governmental institutions that are appointed through employment contracts unless their contracts or the regulations include a provision prohibiting to end the contract unilaterally by the administrative authority. This would give rise to the authority of the cancellation jurisdiction.

Therefore the decision of end of service in this case is outside the scope of the contract and will be then subjected to the authority of the cancellation jurisdiction.

The scope of the judicial authorization according to Article 8/1 of the real estate leasing law number 35/1978- Comments on the decision number 212/2013 appeal leasing (1)- (unpublished)

Dr. Youssef AlHarbash*

The scope of study is the concept of judicial authorization according to Article 8/1 of the real estate leasing law number 35 for the year 1978 concerning the lessee's right to ask the judiciary to deduct from the rent the money he spent on necessary repairs in the rented property. The researcher discussed this concept by commenting the decision of the Appeal Court number 212/2013 leasing, knowing that the sections of the leasing appeal court are courts of law (similar to cassation court's sections) when it comes to leasing rules.

The researcher noticed that the studied decision considered that the authorization mentioned in Article 8/1 of the real estate leasing law is for the prior deduction from the rent. However if the lessee paid the whole amount of the rent his right is maintained to reclaim from the lesser, and as per the general rules, the payment of necessary repairs that are needed to continue using the real estate property considering that this kind of repairs is a main obligation that falls upon the lesser.

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Research and Studies

THE MIGRATION OF PRECEDENT IN CIVIL LAW COUNTRIES: AN EU PERSPECTIVE

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ABSTRACT

Especially with the increase in transnational and international law, that quintessential feature of the common law, the precedent doctrine, is becoming an unexpectedly successful export model to civil law jurisdictions.

This paper will address the influence of precedent in civil law countries by primarily focusing on European Union Law and to a lesser extent, in International Law and the European Convention on Human Rights. This practice is increasing, despite the fact that in the European Union only two out of the 28 Member States are common law jurisdictions.

Key terms: precedent, sources of law, civil law, common law, transnational law, International Law, European Union Law, European Convention on Human Rights.

PART 1: INTRODUCTION

It is said, rather fancifully, that one may be a horse, even without being born in a stable. And, somewhat similarly, with the increase in transnational and international law, that quintessential feature of the common law, the precedent doctrine, is becoming an unexpectedly successful export model. To elaborate, it is true that the doctrine of precedent is one of the many rather distinctive features that make up the so-called common law, which originated in England and was transferred to most of the countries that were once part of the British Empire.

Even more important, when we speak of precedent, we are not taking the inflexible binding form, with all its quirks, developed in England. Rather, what we have in mind for discussion purposes is a simple Platonic form, without detailed specifications. There is

however, the following terminological (or vocabulary) point. After some thought, in this paper we are going to use the term 'precedent', as opposed to paler expressions used elsewhere, like 'case-law' or 'judicial decisions'.(1) Accordingly, our focus in this paper is the impact of precedent through international and transnational law in the civil law world.

It is a major assumption underlying this paper that precedent is both a good and inherently simple, principle that, since it is based on the idea that, other things being equal, 'like cases must be decided alike'. Thus, for instance,quite outside the courts and the legal system, in many areas (often unsophisticated of human organization), some sense of precedent has emerged almost spontaneously. To take some examples, at random: within the family, if one child is allowed to drive the parents' car, on achieving the age 18, then so must the other children; if Developer A gets a building license to construct a three story building, then so must Developer B, for the next-door site.

Despite this excursion, we should emphasize that, throughout this Paper, we are contemplating a senior court addressing a dispute on a point of law, not fact: we assume that the facts were either not in dispute or, if they were, have been settled by a lower court or in an earlier part of the judgment. In other words, we are examining precedent in the context in which it seems to be moving fitfully towards achievement in many civil law jurisdic-

(1) For example, Article 38 (1) (d) of the ICJ Statute places 'judicial decisions' as subsidiary means for the determination of rules of law. To clarify that 'judicial decisions' are not to be considered as precedents, Article 59 of the Statute of I.C.J. clearly states that the 'decision of the Court has no binding force except between the parties and in respect of that particular case'. Therefore, strictly speaking ICJ does not observe a doctrine of precedent, but strives to maintain judicial consistency. See James Crawford, "Brownlie's Principles of Public International Law", 8th Ed., (Oxford UP, 2012),pg. 37-39.

tions, as a significant source of law. Thus, for example, dealing mainly with France and Germany, an authoritative text makes the following strong statement:

"…a quick look round the Continent shows that matters are not really very different[from the common law world]. There it is true that there is never any rule which compels a judge to follow the decisions of a higher court, but the reality is different…It is hardly an exaggeration to say that the doctrine of *staredecisis* in the Common Law and the practice of the Continental courts generally lead to the same results… "(1)

Another authority after confirming this, so far as Western European jurisdictions are concerned, then goes on to add the following gloss:

'Where does this leave the legal systems of Central and Eastern Europe, and perhaps more in general the former socialist nations? The answer can be short and succinct: way back where all the civil law countries stood some fifty years ago: "the post-communist judicial methodology is much closer to the narratives of the European legal culture that prevailed in the nineteenth century." One of the reasons for this can be found in the writings of communist writers. In the former Czechoslovakia, the role of precedent was denied on the ground that precedent as a source of socialist law would go against the principle of democratic centralism. In this view, judge-made law is incomprehensible, beyond the reach of the vast masses of the population.'(2)

(1) Zweigert & Kötz, Introduction to Comparative Law, (0xford UP, 1998) pg. 262-263.

(2) Hondius, 'Precedent and the Law', in (eds.) Boele-Woelki & van Erp, General Report of the XV11th Congress of the International Academy of Comparative Law (2006), p. 42. Professor Hondius was writing a commentary on a survey of six common law and 15 civil law jurisdictions (not including Africa, most of Asia or most of Latin America), whose Rapporteurs had responded to a questionnaire issued by the Congress. The quotation within a quotation is from the national report of the Czech Rapporteur (Prof. Kühn).

Bearing in mind these statements, which we accept, we would elaborate as follows. First, in practice,the onward march of precedent has been a patchy development with change in some jurisdictions and not others, for instance there has been much less of a move in a precedent-direction in the Balkans or the Middle East. In such jurisdictions, the point is made that each individual judge has to adjudicate based on the specific legal sources identified in the national constitution and these do not include precedent.(1) And by legal sources, the focus here is on legal sources that are binding.(2) Accordingly, strictly speaking, if the judge follows a precedent they violate their constitution. By contrast, what the common law has to say is that, while the judge must be 'independent', meaning independent of pressure from government or other powerful bodies, the judge is subject to the law. The judicial oath is 'to do justice according to the law' and, importantly, 'law' includes the doctrine of precedent. This ideal is contrasted with the (mis)conduct of a judge who feels compelled to follow his own ideas and do 'palm tree (in)justice'.

(1) See for example, Article 98 of the Constitution of R. of Macedonia determining the sources of law of the Judiciary by stating that "Courts judge on the basis of the Constitution and laws and international agreements"; Article 116 of the Constitution of R. of Albania determines "the normative acts that are effective in the entire territory" by referring to the Constitution, ratified international agreements, laws and normative acts of the Council of Ministers"; Article 102 of the Constitution of Kosovo states that the Courts adjudicate based on the Constitution and the Law; Article 118 of the Croatian Constitution states that the Courts administer justice based on the Constitution, law, international treaties and others sources of law. As there is no mention of case law or precedent as a valid source of law to be used by the judiciary, their use would be unconstitutional, to say the least.

(2) For a discussion on sources of law in comparative law, see Stefan Vogenauer, 'Sources of Law and Legal Method in Comparative Law', in Mathias Reimann, Reinhard Zimmermann, Editors, The Oxford Handbook of Comparative Law, (Oxford UP, 2006), pg. 866-898.

There is more to be said about theory. Even in jurisdictions, where in practice there has been movement in the direction of precedent, this has not affected the underlying theory and dogma. The significance of a change in practice, which is not reflected in theory, is problematic and hard to define, especially across several jurisdictions. But one can say, as a generalization, that long-term it is well for legal system's theory and practice to be in alignment. Here, we consider briefly why it is that the precedent doctrine has for many centuries not been a central plank of the theory underpinning civil law system? Two features need to be briefly mentioned.

The first point, which is historical, is that, in the civil law tradition, following nineteenth century codification, the 'codes' form the heart of the laws.(1) They are comprehensive, for there are separate codes for most private law issues – persons, ownership of land and things, conflict of laws; children; evidence; civil procedure; criminal procedure. Taken together, they range over most of the field of human activity governed by the law. By contrast, in the common law a good deal of the heartland of the law just mentioned was first established by the common law, not statute. Given this difference, it seemed natural in the common law jurisdictions to develop a precedent system, as a necessary discipline to assist in the organisation and transmission of what was largely judge-made law.

By today, the second point, which is based on the different intellectual traditions and styles of the common and civil law systems, is probably stronger. The style of deductive reasoning used in the civil law has been characterized as: "The old positivistic

(1) See for example the French Civil Code of 1804, the German BGB of 1900, the Austrian ABGB of 1811, and the Swiss Civil Code of 1912.

idea that deciding a case involves nothing more than 'applying' a particular given rule of law to the facts in issue by means of an act of categorization …"[1] But this use of logic as a basis for reasoning from a general principle to a conclusion makes a major assumption. This is that logic is objective and so any subjectivity on the part of the judge is excluded. But our response to this is that the civilian judge who has to answer the subjective question ‹what should we do this time...› is, in principle, at least, taking on his shoulders a great weight of value judgment. The common law judge, asks only the (relatively) factual query, ‹what did we do last time?[2] By contrast, the civil law question: 'what should we do?' depends on values, some of which will be personal to the particular judge.This greater reliance on the subjective opinion of the judge inevitably draws with it a loss of consistency and certainty, in comparison with a system in which precedents are followed. This is because, in that system, the foundation from which a judge is beginning their reasoning is a published precedent; whereas in the traditional civil law court the judge has to move all the wayfrom the abstract text of the governing instrument and interpret it directly to the result. In general, the common law judge usually has to make a narrower jump in their reasoning than their civil law counterparts.

As a supporting point, we suggest that what may be called 'the civil law assumption' would be more likely to be correct, if the instrument which supplies the general principle, for example an EU

(1) See Zweigert & Kötz, pg. 264.

(2) ‹The civilian naturally reasons from principles, the common lawyer from instances to principles. The civilian puts his faith in syllogisms, the common lawyer in precedents; the first silently asking himself as each new problem arises, ‹What should we do this time?› And the second asking aloud in the same situation, ‹What did we do last time?››. This contrast is from Lord Cooper, (an eminent Scottish judge) in ‹The Common Law and the Civil Law - A Scot›s View›, 63 Harv. L. Rev. 468, 470 (1950).

Directive, provides a single, precise message.(1) But, as it happens, EU law is customarily drafted in very general terms such that the text is able to last through time and be applied to changing circumstances. In addition, most Directives, serve a number of diverse policies, because they are usually the outcome of political compromises (resulting in voluminous preambles). The judge thus has a large number of choices, among which he or she may favor his personal preference. And in that way reach a subjective result. In Part 2 we give some more detailed examples as to why precedents are needed in European UnionLaw.

Moreover, the jurisprudence of the European Court of Justice (ECJ) prides a number of major examples of judicial activism, going way beyond interpretation, for instance: Direct Effect of Treaties or Directives;State Liability;or the Supremacy of EU law.(2) We are commenting on this only in relation to precedent and merely remark that, if there is to be judicial activism, involving, a substantial glossing of a balance deliberately drawn by the Founding Fathers of the EU, then one can surely expect that all judges should follow the same line: otherwise, the change goes beyond judicial activism to 'judicial anarchy'.

Another and broader point is that the precedent doctrine may be regarded as being connected with a difference in the constitutional, historical and political positions of civil and common law judges. Put simply, common law judges are regarded by ordinary

(1) There is a further point. 'In the European communities, the legislation is often new and incomplete, with the result that the case-law of the Court of Justice is more important than in most other legal orders. This case-law – though in theory not formally binding – is often the most important source of law.' Schermers and Waelbroeck, *Judicial Protection in the European Union*, 6th Ed., (Kluwer Law International, 2001), pg. 260.

(2) For a discussion on the status of case law in the ECJ see for example, Anthony Arnull, The European Union and its Court of Justice, 2nd Ed., (Oxford UP, 2006), pg. 622-638.

citizens, politicians, and, not least, themselves as occupying a higher status in their constitution and social hierarchy than is the case with civilian judges. In the eyes of the common law, the status and legitimacy of precedents depends, to a large extent, upon the fact that, following thorough argument in open court, they have been adopted and articulated by the senior and independent personages, who delight in being called 'the Queen's judges'.

This difference in the positions of the common and civil law judiciaries does raise a possible objection to the thesis of this paper, which we briefly address here. This objection starts from the assumption that in many civil jurisdictions, senior judges do not have (or believe themselves not to have, as is also relevant) quite the same independence from government or vested interests, as their equivalents in common law countries. Underlying this is the fact that, in the common law jurisdictions, judges are selected from among senior practitioners rather than being members of a career judiciary. Does this major structural difference mean that civil law judges should not be entrusted with the same degree of power to make precedents?

This is by no means a negligible objection. It could indeed lead on to the deep waters of constitutional law and history of particular jurisdictions. Here we have no space available to voyage in such uncharted seas. We merely flag it as requiring more attention and go on to suggest however that in general, there are two substantial contra-arguments, against its objection.

The first counter argument is that preventing earlier judgments from having precedential force over later judgments (in other words, the classic civil law position) means that later judges have the freedom to decide the same points subjectively. In particular, the judge in the later case is allowed greater freedom to decide

the case in a way which may suit the Government interest (assuming this interest is involved in the case).

At a broad level, one can say that the doctrine of precedent bands the judges together. This gives them a corporate identity and reputation, with the public, and increases their authority as against, say, the Government. To speak plainly, if a Government wishes to coerce a judge, as a matter of practice it is usually easier to do so in relation to one judge who is deciding a sensitive case rather than a cohesive band of judges. To put the same point another way, a judge is less isolated if they can be understood as saying to the Government: 'I am not deciding this in isolation but as a member of a group, applying their collective wisdom, worked out in public over many centuries.'

The second counter-argument is that, quite apart from precedent, there is an international movement to establish and fortify the Rule of Law, including the independence of the judiciary, and making judges accountable. And this is true even, or perhaps especially, in jurisdictions where traditionally, these desirable conditions have not existed. Now making judges accountable is of course, a full subject by itself, with which we are not dealing. But here is an important, incidental point: one of the best ways (in that it is relatively inoffensive to the Independence of the Judiciary, which is the usual danger, thought to come with judicial accountability) of making a judge accountable is to require them to publish reasons. A good, practical way of doing this is to ground judgments, in whole or in part, on precedents. For this means that a judgment must demonstrate a link between the current judge›s decision and those taken on the same point, by other judges.. The reader of the later judgment is thus enabled to check whether there is a consistency between the current and earlier

judgments. The judgment should be able to demonstrate either such consistency or, alternatively, that there are exceptional facts or changed circumstances, which justify lack of consistency. But what if the judge can demonstrate no such consistency or exceptional facts and circumstances? In that case, his or her judgment is shown up as suspicious. This is a form of accountability.

A very practical point worth noting is that in many civil law countries, with career judiciaries, promotion of a judge from a lower court is hampered if that judge has been often reversed by a higher court. Naturally, one of the most frequent ways in which this can come about would be because that judge had failed to follow a higher court›s precedent. In short, this does some form of pressure in favor of following precedents. But this seems a way of inculcating respect for precedent, which is haphazard and otherwise undesirable, because of its implications for judicial independence.

To return to the main theme of this paper: within the civil law system, our particular focus is the impact of precedent as regards International and transnational law. This type of law has increased exponentially in international law through the case law of the International Court of Justice (ICJ)[(1)]; in international criminal law through the International Criminal Court (ICC), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR)[(2)]; in

(1) In discussing precedent in the ICJ, Mohamed Shahabuddeen, a judge in the ICJ, states: 'the fact that the doctrine of binding precedent does not apply means that decisions of the Court are not binding precedents; it does not mean that they are not 'precedents'. The term occurs in the jurisprudence of the Court; it occurs also in the pleadings of counsel and in the writings of publicists.", see Mohamed Shahabuddeen, *Precedent in the World Court*, (Cambridge UP, 2007), pg. 2.

(2) On the role of 'precedent' in international criminal tribunals see Aldo Zammit Borda (2013), 'The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals', 14 Melb. J. pp. 608-642.

international trade law through the World Trade Organization (WTO) Panel and Appellate Body Reports[1]etc.[2] If this is to operate fairly and effectively, naturally, Governments, businesses and private persons would expect common standards. Some of these will come from the conventional or other instruments which have been agreed. But, as argued earlier, this will usually not be enough to provide consistency in every instance. We shall test this contention in relation to EU law, in Part 2. But given space, similar points could be made in a number of different areas of international law with the proliferation of many international tribunals.

In relation to this transnational environment, there would seem to be at least two particular reasons why some sort of precedent system is likely to grow up.

First, if one were dealing with an exclusively national milieu, there would be some differences in subjective, individual views, between Judge A and B, even coming from the same national and legal culture and class. But, in general, this could be expected to be not as great as those between two judges coming from very different jurisdictions. In short, where one is dealing with transnational or international law, being interpreted, whether by the ICJ or the ECJ with varying national composition, or by

(1) For a discussion on WTO dispute settlement reports and their relevance for subsequent cases see Peter Van den Bossche, Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 3rd Ed., (Cambridge UP, 2013), pg. 51-53.

(2) For a more general discussion on the influence of 'precedent' among different tribunals see Nathan Miller (2002), 'An International Jurisprudence? The Operation of "Precedent" Across International Tribunals', 15 Leiden J. Int'l L., pp. 483-526.

different national courts, the need for precedent is greater than in the national milieu.(1)

There is a second reason why precedent is especially important in the transnational or international field. At a basic level, most international agreements or arrangements engage, directly or indirectly, the question of sovereignty. Necessarily, in ratifying the agreement, a state must give up some level of sovereign authority. And it does so on the basis that it is giving up only the same amount as is sacrificed by the other member states. Take, as an example, a major plank in the framework of EU Law. Assume that a Directive has not been implemented in domestic law and the question arises as to whether, nonetheless, that Directive has ‹Direct Effect› or engages ‹›State Liability›, in a national court. It will naturally be expected that, whatever is the answer,*the same answer* will be given to that question, whichever state has failed to implement the Directive. To make this happen, some sort of effective precedent system, is, we believe, required.

A Serbian episode dealing with adherence to European Court of Human Rights case law[2], provides a case study of these difficulties and of how the idea of precedent provides what may be found to be the best practical solution on offer.An editorial published by the Serbian State Television titled “The roads to justice lead to Strasbourg” analyzes the problem of having complaints

(1) Some treaties specifically require for uniformity of interpretation in their text, for example, Article 7 (1) of the UN Convention on Contracts for the International Sale of Goods (CISG) states that “in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application…”. For a discussion on uniformity of CISG interpretation see Vivian Grosswald Curran, Ed., Comparative Law: An Introduction, (Carolina Academic Press, 2002), pg. 113-117.

(2) The European Court of Human Rights is a court based in Strasbourg, France, and rules on alleged violations of the European Convention of Human Rights. The Court has delivered more than 10 000 judgments that are binding on countries concerned.

by citizens that different judges in different courts on similar cases adopt different decisions in respect of issues which have been settled by the European Court of Human Rights.(1)In dealing with the problem, the then Minister of Justice of Serbia states "it is clear now that it is actually up to the Appeal Courts deciding on appeals from Basic and Higher Courts to establish legal certainty by having unified decisions of courts". However, in addressing the problem, the President of the Supreme Cassation Court considers this to be a "practical issue" and thus again illustrating the different approach that civil lawyers have on the issue of "admitting the existence of precedent or case law" in their legal system. Such recognition, at least in theory, in some legal circles would amount to "blasphemy".

The Serbian example brings out an inevitable difficulty. At one extreme, one may have the traditional English style doctrine, by which, for instance until 1966, the House of Lords could not go against its own precedent, however out of date or wrong-headed; the law was trapped in a kind of Sisyphus-cycle, condemned to repeat its mistake endlessly, unless released by legislation. This led to some anomalies in the law which at some points were sorely in need of law reform. Against this, the advantage of precedent is consistency and predictability which may have to be purchased at the price of some injustice and inflexibility in unexpected individual cases. Plainly, there is a balance here to be drawn which brings the maximum of predictability with the minimum of injustice.

(1) See "The road to justice leads to Strasbourg", Serbian State Television, November 22, 2013, available online at: http://www.rts.rs/page/stories/sr/story/125/Društvo/1451866/Putevi+pravde+vode+u+Strazbur!.html, accessed July 2015.

PART 2: EUROPEAN UNION LAW

This is a big subject. Given time and material, one could consider at least the following four situations:

a) Does the ECJ follow its own previous decisions?

b) Do national courts follow ECJ's rulings?

c) Do national courts follow their own previous rulings on EU points?

d) Do national courts follow the rulings of other national courts, on EU points?

Beyond these major questions, second order issues beckon, especially because of the existence of multi-tiered hierarchies of courts. For instance, as regards *a)* what is the position if one is asking whether the General Court follows its own rulings or those of the ECJ.(1) Next, within member states national court hierarchies, is the position regarding the following precedent different from that where purely domestic law points are involved? We are not getting into these second order questions, nor into issues *c)* and *d)*, identified above, but are confining ourselves to *a)* and *b)*.

As a general observation, it is worthnoting that the amount of legal originality, which went into the institutional architecture of the EU, has probably not received sufficient study or praise(2) The example which is relevant here is the Preliminary Ruling

(1) But see, for example, Case T-85/09 Kadi v Commission (Kadi III) [2010] ECR II-5177, at paras 121, 123: 'The General Court … takes the view that … the appellate principle itself and the hierarchical judicial structure which is its corollary generally advise against the General Court revisiting points of law which have been decided by the Court of Justice... The General Court considers that in principle it falls not to it but to the Court of Justice to reverse precedent in that way.'

(2) It is true that there were ideas swirling around within the community of 'international association' thinkers, during the idealistic period before World War I. But the point is that the EU actually made it happen and made it work.

(commonly referred to as Article 267[1] by which a domestic court faced with a difficult point of EU law interpretation may or, in some cases, must refer it to the ECJ for its ruling, on that point only. The ECJ decisions springing from this jurisdiction by far outnumber and probably exceed in influence, those decisions which emanate from its Direct Jurisdiction. Partly for this reason, we are concentrating on the Preliminary ruling jurisdiction.

The essential idea underlying Article 267 is that the EU requires uniform legal conditions, throughout the 28 Member States: this is the law's contribution to the idea that there should be a 'level playing pitch'.

In a transnational legal order, the basic method in which the objective of consistency from the court is to put into effect is usually that there is, at the head of the system of legal interpretation, a transnational court (in the EU, this is the European Court of Justice), whose judges are appointed by each of the member states. The administration of the specific legal order is shared between this transnational court and the national courts of each member state.

Working from first principles, in the interests of consistency one would anticipate some form of precedent system, by which the rulings of the ECJ would be followed not alone in the instant case but in all other similar cases, whether before the ECJ or in all national courts.

When one looks to the law, one finds that this expectation is confirmed. The firmest ground, as one might expect, is to be found in the UK where the relevant statute states: '…the courts are directed by statute to determine any EU law point 'in accor-

(1) Art. 267 of the Treaty on the Functioning of the European Union. The provision was originally Art. 177, and subsequently 234, of the Treaty of Rome, 1957.

dance with the principles laid down by and any relevant decision of the European Court'[1], though with nothing said about any other court.

But what of the ECJ itself and of the mainstream civil, national courts? While there is no equivalent statutory instruction to that in the UK, according to two civil law writers:

'Normally, it is taken for granted that the Court of Justice will follow the precedents it has established. … References to previous cases have become very frequent, which is probably not only due to the fact that there is more previous case law to refer to but also to the fact that since 1973 some of the Courts' judges come from a legal system in which the binding force of previous cases is accepted. In a number of cases, the Court will simply refer to previous judgments and then rule that: 'since there is nothing in the present case capable of leading to a different conclusion, it is proper to reply to the same effect.'[2]

And in the case of national courts, it is also the expected practice to follow the rulings of the ECJ, in earlier, relevant cases: 'In some preliminary rulings, the Court has even sent a copy of a previous decision to a national court which had asked a similar question, or it may, by reasoned order, simply refer to that previous decision in conformity with Article 10(43) of its Rules of Procedure.'[3]

(1) European Communities Act, 1972, s. 3(1). Nothing on the point is said in the (equivalent) Ireland European Communities Act, 1972.

(2) Schermers and Waelbroeck, op. cit.Judicial Protection in the European Union, 6th Ed., (Kluwer Law International, 2001), para. 263. See, also Lenaerts, Van Nuffel et al, European Union Law, 3rd Ed., (Sweet & Maxwell, 2011); para 6.25, p 311: 'This (tacit) recognition of precedent goes to the creation of a hierarchical relationship between the Court of Justice and national court which was not necessarily created by the treaties, and an entrenchment of the place of the Court as a 'constitutional' court of the Union.'

(3) Schermers and Waelbroeck, para 263.

a. Practical Operation: 'Extracting the Precedent'

In this field, many substantive questions come disguised as issues of practical organization,. Among these are:how to 'extract the precedent'; meaning of 'persuasive'; reliable system of law-reporting, agreement on which are the courts whose judgment may be adopted as precedents.

Let us elaborate on the first item on this list.This refers to the fact that the critical part of the process is determining what was the character and width of the rule, which was established in the earlier case. The difficulty here arises from the fact that two cases never have exactly identical facts so that the judge in the case before the court (usually called the 'present' case) has to reach a decision as to how the facts in an earlier case compare with the facts of the present case. The judgment needs to carry out this exercise in order to decide whether the facts of an earlier case are sufficiently similar to those of the present case to be regarded as a precedent.

In the average common law hearing and judgment, probably too much time goes into the exercise of dissecting out the precedent. In part, it is an attempt, by a virtuoso display of unrealistically fine line-drawing, to conceal the fact that subjective decision-making is going on. In addition, the fact that lawyers are paid by the day prolongs the proceedings. Worst of all is the almost incredible fact that, in multi-member courts, not only are dissenting judgments, but even separate assenting judgments allowed.

But this does not justify the rush to the other extreme, which has occurred in civil law courts. Most common law text books on EU Law, written by common law authors, comment dismis-

sively on the 'formalistic' way (referring mainly to their treatment of precedents) in which ECJ civil law judgmentsare written. A typical comment is that of Professor Hartley:

'.... The [ECJ] does follow its previous decisions in almost all cases. The case-law of the European Court is just as important for the development of Union law as that of English courts is for modern English law...However, though lawyers and Advocates General have always cited copious precedents, the Court itself used to refer to its previous decisions only in rare instances.One almost got the impression that it was trying to disguise the extent to which it followed precedent: sometimes it would reproduce sentences, or even whole paragraphs from previous judgments, without quotation marks or any acknowledgement of source. Today, the position has changed though the Court cites precedents only if they support its reasoning: it does not normally cite them in order to distinguish them.'(1)

It was even said, at one time that, an earlier case which went in the opposite direction from the law which the court was adopting, was often included in the list of precedents as if it supported the court's decision; or was simply not mentioned.(2) Because of such casual and covert practices, there is generally no indication of whether the court in the present case has or has not adopted the earlier case as a precedent.The evil of such practices is that they leave future courts and lawyers, trying to get guidance from a judgment, in doubt as to whether to prefer the law in the present or the earlier case. If the earlier case, was not mentioned in the present case, does this amount to 'implicit overruling' or, al-

(1) Trevor C. Hartley, *The Foundations of European Union Law*, (Oxford UP, 7th ed, 2010), pg. 80-81.

(2) See, to the same effect, A. Arnull, 'Owning up to fallibility: precedent and the Court of Justice'. C M L Rev 30 247, 1993.

ternatively, should it be said that the instant case misunderstood or neglected the earlier case. If the second analysis is the one to be adopted,does it follow that the law laid down in the earlier case continues in existence,as a rival to the law in the present case? Either way, the outcome of the most recent court's cavalier treatment of the earlier authority is doubt in the law. And doubt is pretty well the worst thing which can be said about law. A second criticism focuses on the fact that if the judge in the present case in fact relies an earlier case, but does so silently, then the party who has lost because of thisreliance can reasonably claim that they had no opportunity to argue before the judge, that the rule ought not to have been followed, for instance because it was not relevant or the law was out of date. This is a significant erosion of the 'legitimacy' of the judgment and, thus, is a departure from the Rule of Law.

Now,the civil lawyer's response to these lines of criticism may be to say that the decision of a judge is not *the law*. This takes us back to the heart of this paper: we believe that, by now, even in civil law courts, at least where EU law is concerned, previous decisions should be takenas a source of law. If this view be fully accepted, then, as we elaborate in Part 3, there are certain implications for the way in which courts write their judgments on points of law. In this particular instance, if a court wishes to overrule a previous precedent or has to choose between divergent lines of precedent, then it should expressly say which line it is accepting and whether any previous authority is being overruled.[1]

(1)Hartley op cit, 81-82 gives a graphic example.

b. Other Pressure Points

A good deal of attention has been given to the distinction between a 'binding precedent' and a 'persuasive precedent', the first term meaning that a later court *must* follow the earlier precedent, whilst the other term means only that a later court would have to have a good reason not to follow the precedent. For a number of reasons, we respectfully differ and take the view that this categorisation merely adds extra terminology, but no useful substance, to the law. In the first place, one of the last champions of 'binding precedent', raised the white flag 50 years ago(1), when the (UK) House of Lords' acknowledged that it was no longer 'bound' to follow its own previous decisions.So, by today almost all precedent systems are 'persuasive', though no doubt, some are more persuasive than others.

More important, the distinction between a 'binding' and a 'persuasive' was always a rather 'academic' distinction. Our reason for this rather *realpolitik* remark is that, even in its rigorous common law form, there were many ways in which a judge could and sometimes did, manipulate the precedents in earlier decisions and, so, reach the conclusion, based on personal preference. One example, just given, is the distinction between 'binding' and 'persuasive precedents'. Other examples include: the recognition of a court as one whose rulings are of persuasive authority; or distinction between '*res judicata*' and '*obiter dictum*'; ignoring a precedent as unreliable because the judge had not had earlier precedents presented by the advocate ('*per incuriam*'). We need not go into these matters in further detail. The essential point here is that they may be used as 'Trojan horses', to admit judicial subjectivity and lose consistency and predictability, in the other

(1) The historic 'Practice Statement' is quoted in Zweiger and Kötz, *op. cit.*, pg. 261.

words, the very outcome which the precedent system, operated properly, is designed to avoid. They amount to pressure points in the precedent system, which, need to be carefully policed.

These are difficult matters to get right. And, in order to do so, the type of criticism mentioned in the previous paragraphs need to be taken into account. This is something which should be called to mind when considering the type of education considered in Part 3. One should add that, despite its centuries of experience, the common law has by no means resolved perfectly the sort of problems mentioned. Perhaps the migration of precedent to the civil law jurisdictions which are not weighed down by centuries of tradition, will provide an opportunity, for improvement at these points. Perhaps, too go back to the problem of 'extracting the precedent',civil law judges would feel able to experiment with one obvious, but curiously neglected, solution. This is for any higher court writing a judgement, itselfto provide an authoritative summary to guide later courts as to what precedent it considers it has laid down.

PART 3: CONCLUSION

Voltaire in an uncharacteristically blood thirsty passage, remarked that the second edition of his book would be bound in the hide of those who did not accept the first edition. But we are more temperate and make, for the precedent principle, merely Victor Hugo's claim that, there is nothing as powerful as an idea whose time has come.(1) In a transnational world, it is a simple way of implementing the basic policy that justice must not only be done; it must be seen to be done. It is too protean an idea to be dismissed as a trespasser from the common law world.

Roman law, which is considered to be the basis of the civil law tradition, was based on case law; so there is an element here of the return of a long-lost relative and it is likely, that in the civil law jurisdictions, precedent will soon spread into exclusively domestic law territory. The challenge for civil law scholars is to develop a form of precedent, stripped of common law excesses, which is fit for purpose, in the modern and increasingly transnational legal world.

Nowhere is this more important than in legal education. One can say that the development of a rigorous focus on precedent, in its various form, provides a most useful focal point in legal education. In the first place, precedent is system which varies from one jurisdiction to another and from one historical era to another. Thus it affords a useful basis for comparison. Most important of all, it is useful for a student to fasten on to how precedents occur in one case and how they develop or fail to do so, in later cases. This is an excellent way of focusing a law student's attention on a number of features. The first of these is that the operation of a

(1) V. Hugo, *Histoire d'un Crime* (The History of a Crime) [written 1852, published 1877], Conclusion, ch. X. Trans. T.H. Joyce and Arthur Locker [1].

legal rule has to be observed in relation to the facts thrown up by society and its characteristic situations as these changes. An incidental advantage here is that, especially at the start, some students find law a rather dry subject. Case law brings in a dimension of human interest, readily capturing attention which might otherwise be tempted to stray. Next, a keen focus on the facts which either distinguish one case from another or alternatively make them similar, is a convincing way of drawing out the factors which fix the scope and character of the law. Finally, determining exactly is the rule established by the precedent and tracing its development through later cases offers an exercise in close legal reasoning which is good intellectual training for the young lawyer.

May we suggest, as a summary of the earlier Parts, that there have already been developments in law and legal systems, which have increased the use of precedents in civil law jurisdictions. Over the practicing life-time of the present cohort of students, this change is likely to increase and needs to be made more systematic. This development probably calls for some reform of university legal education in many civil law jurisdictions.

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Table of Contents

New path for teaching law: Non-formal education

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Introduction

Law is a discipline that changes constantly with societies and follows closely its development. Therefore it should reflect social changes that are nowadays very hard to track. Law is evolving with societies and teaching law should be evolving two. Such evolution canberealized through different ways and many possibilities can be suggested. But basically the shift from pure theory to a more practical approach would be a potential technique to move towards a more modern method of teaching law.

A closer look to the relationship between theory and practice shows that pure theory could not possibly be the only method of teaching. However when teaching law one cannot escape entirely from theoretical teaching methods. Otherwise how can law professors transmit the information to their students? Indeed how can their students acquire the legal knowledge without a theoretical study of the main legal concepts and doctrines? In the same time theory is not enough because it may provide the information but does not create a good jurist. Law graduates are not all jurists. A law graduate might have the information but without the appropriate tools he cannot become a real jurist. The latter is a person who masters the knowledge while having the necessary personal skills. This becomes like a definite attitude towards law and legal issues, because law is one of the few fields that have impact on the personality and attitude of the student, and afterwards on the legal practitioner that he might become.

Difference should be made between a person who knows the law and a jurist. The latter is the one who can think, analyze, and who dares to agree or disagree with the legal theories that he learned or he is still learning. A successful legal practitioner is a person who can think clearly and objectively while being in the

skin of the other party whether it was the victim or the prosecutor. A successful legal practitioner is a person who was able to integrate the values, standards, ethics and beliefs associated to law and legal practice. He is a person who acquired a certain "law identity". In reality if studying law does not affect the personality of the law student, he cannot become a jurist. The aim of teaching law should be to help a student to become this kind of person. This certainly cannot be achieved through traditional learning, or formal learning.

The selected approach for teaching law should combine theory and practice. It should work on the knowledge of the student together with his personality. Stepping away from the exclusive recourse to formal teaching methods is the first requirement to succeed in this approach. Several techniques can be used in order to transmit the information to the students through different means that are mostly innovative, modern and evolving. Some means are already followed in several law schools mainly as alternatives to traditional techniques that could be called "formal education". On the other hand, non-formal education is a method that takes into account the input of students where they get to participate to the education process. It is an interactive, integrative and collaborative method that gives high value to what students have to say and how they truly think about legal doctrines and concepts. The suggested approach provides sufficient space to the students' ideas and thinking. Being a faculty member at a law school that highly promotes critical thinking, I could not but give preference to non-formal education which is a new, modern and innovative path for teaching law.

Non-formal education does not exclude completely theoretical learning but is mainly based on alternative methods that will

be developed below. Such methods are not all new but most of them are individually followed by some faculty members. Indeed the objective of this paper is to gather many techniques related to non-formal education in one document where such education is explained through examples and specific information. The concept of non-formal education is already promoted and studied in many fields but it is important to look deeper into its implementation in the legal field. Since this can hardly be done when it comes to all legal disciplines, the scope of the present paper is limited to a specific branch of law where it has already been partially tested, public international law.

To outline further the framework of this study, an example of non-formal education is worth mentioning: Compass, which is a manual on human rights education with young people launched by the Council of Europe in 2002.(1) This document suggests a list of techniques of non-formal education in the field of human rights. The ultimate objective is to make as many young people as possible aware of the basic human rights. In the same time these people will be able to use the same techniques to train other people on human rights education. Basically such techniques are based on the training of trainers' method. This will eventually lead to a wide network of trainers on human rights and more generally of people who are familiar with the main human rights concepts and who can contribute to the monitoring and advocacy of the related theories. The main idea is to shift from

(1) See Training trainers for human rights education with young people, European Youth Center, 30 March- April 2009, Budapest, Hungary, edited by Petra Erkkilä and Sabine Klocker on the basis of texts submitted by the organizers, trainers and participants of the course, DJS/EYCB/TOTHRE./2010/47, Budapest, 28 June 2010, p.7: "Compass is now available in 27 languages and has served as the basis for countless youth-centered activities with a human rights education dimension. Its online version (www.coe.int/compass)".

the word “teaching” to the word “education”. In our context the shift should be from law teaching to law education. The purpose of this approach would be then to be able to educate people on human rights and to spread the relevant culture.

Ever since I participated to the training of trainers on human rights education I have been thinking about extending the concept of non-formal education to broader fields, and not only to human rights. As an international law specialist, my first interest was to try to apply the techniques related to non-formal education to this branch of law. This would be the main purpose of this paper knowing that these techniques are a collection of some existing methods but which will be presented in a practical and experimental approach focusing on the implementation of the said techniques in the specific field of public international law.

The paper will suggest some methods which are linked to certain activities that could be applied as a part of the non-formal education process. These are mainly some interactive activities that could be selected by the faculty member upon the nature of his audience and the topic to be covered. Some overlaps could be seen between the activities that will be listed below. In fact it is possible to combine different techniques by integrating two or more categories of activities in the same class session. The suggested activities can be modified to fit the topic that will be covered, and a lot of space is left to the full imagination of faculty members. Further details about this matter will be given in the next paragraphs that will start with the methodology and evaluation process followed by the list of proposed activities.

I- Methodology and evaluation process

The suggested method requires preparations. These are part of the course and class planning. In this context, the faculty member should build up his syllabus upon the selected activities from the beginning. His selection of activities are often based on the topic to be covered in addition to the targeted category, which is in our case, a group of young students eager to learn or may be not in all circumstances. We all have dealt with students whose attention is hard to keep and who require further effort to stop them from being distracted. These elements should be taken into consideration while preparing the syllabus and the activities in general. A space should be left also for theoretical explanation that cannot be avoided. At the end of the day students should get the knowledge as well.

For each topic a certain activity will be defined with expected outcomes, specific outputs and method. Students are required before every session to read some materials that are related to the topic to be covered in class. The first session can begin with some activities where the faculty member gets to know students and where students get to know each other. These ice-breaking activities are not necessarily linked to public international law.

Every session starts with a general explanation for no longer than twenty minutes where faculty members get to broadlycover the topic and to explain the activity that will take place without mentioning the outcomes and outputs. He will keep these elements to himself or he might choose to reveal them generally at the end of the session. Then the activity can begin. After each activity, there will be a debriefing on the learned lessons where the faculty member highlights the key elements that students need to learn. This step is very important because this is when faculty

members are able to repeat and underline the information and the skills to be gained by students. It is very sensitive as well because it aims to make sure that a certain skill is passed to students, a skill that will be added to other skills in order to build up the desired attitude. This will influence also the personality of the student. At this stage students will be able to question the information taught or the discussed theories. It is the most important step where the legal concepts are integrated together with adequate skills. It is also the opportunity for faculty members to check out who mastered the information and the skill and who did not. Improvisation is also needed for faculty members to guarantee a wider assimilation of the main key concepts.

Sessions are progressive and interrelated. They progress in terms of difficulty and sensitivity of the topics, but also in terms of the nature of each activity to be carried out. This is why it is important from day one to organize the schedule upon these elements and these criteria. Sessions complete each other in an evolving manner and in a way that would help accumulate supplementing skills. At the end of each semester once all the topics are covered, accumulated skills should be able to make students closer to the required identity and attitude as a legal practitioner. Each session is seen as a further step in the long path of law education aiming to create a true jurist.

Evaluation tools are used on a permanent basis throughout the semester and at the end of the semester as well. They are of various types. A long margin is left for oral evaluation, like participation to discussions, students' progress, openness to new topics or new theories, ability to apply theory to practice, ability to understand and analyze legal doctrines, critical thinking and any other skills that can help to evaluate students permanently and

progressively. Such elements should be regarded differently with time. At the beginning, some skills could be selected, leaving the others for a later stage. Or the same criteria could be applied from the beginning but are given different importance or impact with time. Faculty members may choose to be stricter with time or they might prefer some criteria over others. Such step can be accompanied with appropriate forms showing the evaluation scales and criteria varying upon timely objectives and work advancement. Such forms can be of two kinds: general and specific. The first ones evaluate the class progress and level as a whole, while the second one evaluates the same but on individual basis.

Some written tasks can be added to the evaluation process. They aim to identify to what extent they have acquired these skills.Written assignments provide more transparency to the evaluation scheme. However evaluating practical activities is not at all an easy task, if not the hardest element of non-formal education. To make this process more objective and more transparent, it should involve some written elements. They could be assignments to be submitted right after the session on the lessons that were learned from each activity, and or on the theoretical overview presented by faculty members. These assignments can be done few times for each course and can be added to the oral evaluation of students. Such evaluation will figure on the progress reports which are to be kept by faculty members taking into account the above mentioned criteria. Such reports could be supervised by the dean or department's head for advice and follow-up. This will also contribute to the purpose of clarity, precision, transparency and objectiveness of the grading process. It also contributes to the unification of law education in the law school within the general vision, mission, and objectives of the university.

It is an efficient way to track the work advancement of faculty members in the law school. This is also a chance for the deanship to contribute to the teaching scheme and methods. The reports kept by faculty members contain the work progress of students, in addition to other components such as, study plan and syllabus, course content, specified objectives and outcomes, teaching method including the scope of each lecture with details on every attributed activity divided upon the topics of public international law that need to be covered.

At the end of the semester a more comprehensive evaluation should be undertaken as an equivalent to the final exam. It should combine theory and practice, such as an activity organized and carried out entirely by the student, with all necessary planning and documentation. The latter starts with the written plan and ends with post activity discussion and evaluation. It includes a theoretical overview of some legal concepts that need to be learned and studied by students. Here students' evaluation and grade will be based on the oral and written elements submitted in their final project which is taking the form of a complete activity. Such activity will be chosen conveniently from the below categories that are suggested in a non-exclusive manner.

II- Adversary and simulation activities

This is definitely the first category of activities that can cross one's mind when it comes to teaching law. This type of activity is already practiced in the area of public international law. But it is often done as a sort of competition on the local or international levels. The purpose of this activity would be to create within the classroom or school's facilities the atmosphere of a court or

of an international institution or organization. These techniques exist already and are carried out by some institutions, like the model United Nations or some international competitions where students get to participate to international forums or to discuss certain topics related to public international law, such as JES-SUP competition, to which my school always participates. Moreover Kuwait International Law School has within its premises a simulative court. This shows definitely the importance given to practical approaches in my school, and encourages me to promote further these approaches when teaching law on daily basis.

The hardest task would be to adopt this method and to adapt it to the context of teaching public international law as a study course. The best way to explain how adversary and simulation activities can be undertaken within the framework of non-formal education is to do use an example that can also shed light on the above described methodology. Let us take the example of recognition of States considering that the faculty member chooses to cover it following the adversary and simulation techniques. First the topic should figure in the syllabus in association with this technique. And then the faculty member should plan the session with its expected outcomes and all the details of the activity in addition to the elements to be covered in the following discussion and evaluation.

It should be noted that this israther an advanced type of activities that cannot be given at the beginning of the semester. Students should have already been formed to be able to participate to this type of activities. Some previous activities could be done before in order to prepare them for such techniques.

Before the session, students are asked to read about the principle of recognition of States from their course materials. Then at

the beginning of the session, the faculty member gives a general overview of the principle of recognition and its implementation in public international law using some examples and real cases. Since it is a court simulation activity, the preceding overview can include some information on the legal procedures in international courts. This would help students in their pleadings and will help virtual judges in running the court hearing and organizing the session as a whole. Students will be taking notes during this overview in order to be able to participate to the activity that will follow.

After the general explanation of the topic, the faculty member states briefly that the activity will involve a simulation of a court room where two groups of students represent the different parties in the virtual case and a third group represents the panel of judges. All groups will be given some minutes for preparation. The parties will prepare their pleadings, and the judges will write down some elements that can help them understand the position and the arguments of each party.After the preparation,students will present their pleadings and the judges will run the session. Sometimes the faculty member can intervene to organize the course of the session. Questions can be asked for each party and they can use any convenient legal procedure. Then the judges will be given some time for deliberation, and will give their decision with motivation and following a certain reasoning based on the discussed theories and the elements suggested by each party. The court decision can be written or the students will be given the assignment to write it forthe next session, and they can use all their course materials to develop the court's final decision. This would be taken into account for evaluation as a part of the permanent evaluation process.

At the end of the activity, students will discuss what they have learned from the activity. This discussion covers the theoretical information that was studied, the different thesis that were suggested and the activity itself, such as how it helped then understand better the concept of States' recognition. The input of the faculty member is very important in this stage for filtering and canalizing the information and the discussion. He will use this phase to add all the explanation of the topic that was not mentioned so far. Students will take notes during this stage and they get to discuss everything regarding the topic and the general course of activity. They can even give their opinion about the activity, which means that they can say for example if they like it or not and what can be done to improve it in the future. During all the activity, the faculty member writes down his notes about the students' participation and all the criteria that are listed in his evaluation forms, the general and the specific one.After each session, the faculty member writes about the activity in his progress report and explains how it went and mentions the main input of students. He can also add some notes for follow-up and improvement and some evaluation comments.

III- Brainstorming, questioning and discussion activities

The different activities that could be listed in this category are usually based on students' inputs and contribution. These activities do not generally require a theoretical overview at the beginning of the session. Such overview would take place at the end of the session after the questioning and discussion. A relevant activity can start with the faculty member entering the classroom and suggesting very quickly a topic; for example he can come to the class and say "treaty". Then he would ask

students to say the first thing that comes to their mind when he says this word. This activity can be done differently. Students can write down on the board their potential answers, or on their notebook, or the faculty member can write their answers on the board after selecting the most relevant ones. The first method is more commonly used, so let us explain another scenario where each group of students writes the answers on a paper. There is a turn within each group for every student to suggest a word or expression related to the topic.

Students' papers are collected and hung on the board or on the wall. Groups'suggestions will be compared in an analytical manner. Overlaps will be discussed and differences or odd answers will be highlighted by students. Then one list will be developed on the basis of the different lists that are suggested by students. This is done by narrowing down the answers and removing repetitions and irrelevant answers. The modified list of answers will be then written on the board. And each group of words will be gathered under one category. Here the faculty member tries to bring out the main concepts related to the topic. In our example the main concepts to be mentioned can be the formation of treaties, interpretation, reservations to treaties, termination, elements of treaties or any other related notions. The wording should be one of the planning requirements for this activity, because the main words need to be identified by students with the help of the faculty member. Such activity could be allocated to some topics that require specific wording, such as the law of treaties or the sources of public international law more generally. Indeed this activity can be applied to customs where the elements of customs areidentified by students following a certain canalization of the discussion by the faculty member.

Once the main concepts are specified, the faculty member develops these key concepts together with his students. He will be guiding them to some words and theories while using the techniques of questioning and discussing. After the clarification of the topic, analysis starts. The analytical approach follows the explanation of the main theories. Such approach can be implemented through different means. There is the possibility to combine more than one technique. For instance adversary method can be called upon. The faculty member can select few students and each one of them should defend a certain position towards the legal theory to be analyzed or criticized. Or students can be split into different groups and each group will take a different legal opinion. All opinions should be motivated and structured upon a specific logical order. The relevant techniques are to be explained at the beginning of the activity or earlier if they have been already used in other activities.

At the end of the activity the debriefing can include some additional information that the faculty member wants to transmit to students. And he can ask them for a written or oral test. The type of graded evaluation for such activity can be a written summary of all information regarding the law of the treaties for example. It is a way to figure out the elements that the students were able to get from the whole activity about the topic that was developed. And the defended positions and arguments can also be taken into account for grading purposes. Questioning and discussion activities improve the critical thinking of students and if they are used more than once, they can build up the analytical logic of students. This skill should figure as a priority in the check list of faculty members within all required skills. Attention should be made to the progress of work in the semester. With time, and by

using the adequate sequence of activities, the progress of students' skills should lead to the true attitude of a jurist.

IV- Experimental activities

This category includes many types of activities. Some simple means would be to use some real legal cases or articles. For example, if the topic is about the Montevideo criteria for Statehood, the faculty member can ask students to collect some specific information about an entity or a State. Attention should be made to the type of information that is required. Further details should be provided by faculty members. At the beginning of the session he can explain briefly what is required to be a State in public international law. Then he can write every criterion for statehood separately on the board. And all the collected information can be hung on the board under the relevant criterion. A discussion will follow on the relevancy of the criteria and whether or not they are fulfilled in the case.

Other experimental means can consist of some visits to the courts, law cabinets, international organizations or NGO's where students get to meet stakeholders and discuss with them their experience in the field. They can be asked to write some reports in order to prepare presentations about these visits. Such field trips can also take the form of a short training where students have the chance to get a real experience about applying what they have been learning. This experience should not benefit only the student who was on training. He should benefit his colleagues from the same experience. For example if some students are sent to an international organization, and others are sent to an international, regional or local court, every group of students will share their experience with their colleagues.

They can write a report or make an oral presentation about their training and share it with the rest of students. This is a chance where all students can share experiences and discuss what they have learned from their respective trainings. The faculty member can be very innovative in the way this activity is undertaken. For example, he can ask his students to make a research about a certain court or tribunal or about an international organization such as the United Nations or more generally about international legal subjects. Then each student or each group of students is sent to spend some time in the premises of an international organization or court. In this case their training will not be global but will be like an investigation to find out about the given topic. It is more original if the faculty member suggests his topic in the form of a question. Then students will be inquiring to find an answer to the question. This technique improves the legal curiosity of students, which is a necessary tool for any legal practitioner. It could make the difference between a real jurist and any other law-graduate.

The in-class follow-up of such activities is really important. In the debriefing, after students got the opportunity to share real-life experiences while explaining some legal concepts, the role of the faculty member is decisive. He should make sure that only the correct information is passed to the students. He can use the debriefing stage to highlight the key points and to shed light on some concepts that were not sufficiently covered by students. Hand-outs can be distributed to students as well. They can be collected by some students during their visits or trainings. Additional materials can be given by the faculty member to develop certain concepts. In this activity and like in any other activity, preference is given to visual tools. They can contribute to a faster and more efficient assimilation of information.

V- Role playing and story-telling

This category of activities is more specific to groups that already know each other and where confidence exists between the group members. Role playing can fit more easily various legal concepts. Story telling is more limited and more adaptable to certain branches of public international law. It can be used for example to explain the concept of peremptory norms. Faculty members or students can invite to the classroom a person who was victim of torture to talk about his experience. Such testimonials can show students what happens when international norms are not respected, especially when they aim to provide individual rights to human beings. Story telling is more about sharing some experiences about abuses to shed light on the situations relating to violations of the law. The related discussion can tackle also the legal remedies and reparations. Another example of story-telling is when students tell their own stories but the scope of such activities is really limited to the human rights field. Otherwise it is possible to tell stories that they witnessed or the stories of States where the activity would be closer to a case study.

Role playing activities are more flexible. Students can be in the skin of a party in the case including the victim and the perpetrator. They can also be given certain characters that they should feel like them, think like them and act like them in order to imagine their own situations. This activity is not about acting, but it is about answering some questions while being in the skin of these characters. For example, if the discussion's topic is about the peremptory norm of prohibition of racial discrimination, a student can be in the skin of a migrant domestic worker while another one would be his employer. And a set of questions is asked to each student about how they would react if they were

in a certain situation. The difference of attitudes could reveal the impact of breaching some international norms on the life and the well-being of people. Another option would be to represent two States, an occupier and an occupied State. Some nuances can be added, for example one State is using force against another State, and some students will be in the skin of civilians or other involved parties. In this case the activity can take the form of a discussion between all the parties including the identification of the international norms that are breached. All these activities should be preceded by a theoretical overview on the theories and concepts that might be invoked in the activity. They should be followed by an evaluation of all the components of the activity and of its impact on the students.

VI- Real examples and case studies

This category is very common and is already widely applied to all branches of law. It fits perfectly the context of public international law. Faculty members use cases or situations relating to existing or solved international conflicts, legal disputes, and examples of States and other actors on the international scene. The facts are given to students about the cases accompanied with a briefing on the relevant legal concepts. Students have to apply the theories to the facts in writing or orally. To add more originality the faculty member can ask different students to work on the same case study. For example, in the context of the relationship between international law and domestic law, students should discuss the differences between national legal systems concerning this issue. In this case, each student or group of students will study the importance given to public international law in a specific legal system. The same question would be answered differently

upon the concerned legal system. A general discussion will follow between the students and the faculty member on the similarities or differences between national systems when it comes to the relationship between international law and domestic law.

Conclusion

The list of suggested activities is far from being exhaustive. It shows only some models of practical teaching methods that could be applied to public international law. Many of these activities are already discussed by the manual Compass that is mentioned above.(1) But Compass was limited to the scope of human rights and its activities were presented as a part of a training of trainers. This paper undertakes to develop these activities and to bring them to the scope of university teaching, and more precisely to the area of public international law. This shift required many modifications, such as working on a grading system to accompany the suggested activities, to select few of them that fit better the chosen area, in addition to the presentation of all the elements as a part of one complete method: the non-formal approach for teaching law, and more precisely public international law.

This paper proposes a more practical system of education on the basis of the Compass manual that focuses also on the importance of non-formal education. However the ultimate objective of the current project is to promote practical learning since we believe that this approach will lead to the creation of a jurist and not of a mere law-graduate. Preferring educating people to the concept of teaching them is the main purpose of this paper

(1) See supra, p.2 note number 1.

because learning theories was never the only key for succeeding in a legal career. Theories with accumulated skills can lead to the formation of a successful legal practitioner. And once the appropriate skills are acquired, students will be well equipped to benefit others from them.

Despite all the advantages of the practical approach, implementation is not as easy as setting out its general framework. Faculty members following the non-formal education method should be aware of the difficulties and obstacles they might face. It is definitely a very interactive learning method but this level of interaction is not always easy to attain. Many students tend not to participate to all in-class activities for many reasons. Faculty members should know how to gently motivate them and encourage them to contribute further to the activities. This is why the order of the implemented activities is very important. First activities could be those that are carried out individually or in small groups and not on the level of all the class together. There might be some introductory activities or written tasks. Other activities requiring a lot of interaction with all students such as oral presentations and pleadings could be left to a later stage.

Other difficulties might arise when some sensitive discussions are started and students do not have all the same tolerance level. Faculty members should always think about preventing some conflicts between students, and about conflict resolution means if the clashes could not be prevented. The faculty member should think as a teacher, moderator, trainer and manager in the same time. He should be able to provide students with the knowledge and skills simultaneously. Non-formal education requires a lot of efforts from the students and faculty members. But eventually its advantages are countless.

It shapes the personality of students and improves their personal skills. It transmits the information faster and more efficiently so that average students can get it more easily. The interactive method of learning encourages students to attend further class sessions. They are aware that their participation counts a lot to get the knowledge and to pass the course. Indeed the evaluation scheme takes into account in-class activities and students' participation. Moreover the practical approach is more adapted to the modern method of teaching and to technical improvement in general. Nowadays practicality is a way of living and a way of thinking. Law should follow the social evolution and reflect its progress. Non-formal education is the way to reach this goal. It gives a lot of importance to modern techniques such as visual and auditory tools.

Non-formal education and practical methods educate students by improving their knowledge of the current situations and cases. They will be aware of what is going on around them, internationally and locally. A law student does not often look for information and updates. This is why the suggested approach will fill this gap by stimulating their curiosity and motivating them to track all updates and recent issues. All these advantages make non-formal education the new modern path for teaching law. It would promote as well a more global law education by unifying teaching tools and techniques and involving students more effectively in the teaching process, so that teaching and learning can become two facets of the same process.