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Ratio Decidendi: Guiding Principles of Judicial Decisions, Vol. 1

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Ratio decidendi

Guiding Principles of Judicial Decisions

Volume 1: Case Law

Edited by

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Although the problem of *ratio decidendi*, very little comparative work on legal systems has been done on one of the sharpest points of contrast between the English speaking legal system, which prevail where dissent among the published decision indeed is the opinion of the whole court. History that contrast. Where in the Anglo-American system – and always have been the courts which they based their judicial decisions was not considered necessary to the courts of the European Continent until the end of the eighteenth century “the secrets of their discussions

To comparatists, this reveals a stark contrast. In Continental Europe there is a tradition which can be learned and reproduced. The American judge is not considered to be a craftsman. Can the history of the Anglo-American justice from the Middle Ages to the present be a total contradiction between two systems? As well in the Continental as in the Anglo-American have been presented and argued. The reasons they put forward have always been used

As it is the purpose of the *Continental Legal History*, we thought of the *ratio decidendi* by studying the Anglo-American not only to understand the guiding principles of the Continental and the Anglo-American legal systems, but why both systems have known to be based on the history of court records rather than the jurisprudential principles. Our publication is accompanied by reasons. Our publication – through the study of the

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Preface

Although the problem of *ratio decidendi* concerns the essence of law and justice, very little comparative work between the Continental and Anglo-American legal systems has been done on the topic. Legal literature often repeats that it is one of the sharpest points of contrast between the two legal cultures. Within the English speaking legal system, multiple opinions, both concurring and dissenting, prevail where dissent among Continental judges only occurs behind closed doors: the published decision indeed is always presented as the single and incontestable opinion of the whole court. Historical reasons are generally put forward to explain that contrast. Where in the Anglo-American Common Law system judges are asked – and always have been asked – to present the materials and reasons upon which they based their judicial opinions, in Ancien Régime continental Europe it was not considered necessary to formulate the reasons of a decision and in most courts of the European Continent it was even formally forbidden to the judges, until the end of the eighteenth century, to write down or even communicate orally “the secrets of their discussions and deliberations”.

To comparatists, this reveals two different cultures among judges and lawyers. In Continental Europe there is much emphasis on the idea of judging as a science which can be learned and reproduced with an impersonal rigour. The Anglo-American judge is not considered to be such a trained scientist, he is merely a practised craftsman. Can the history of *ratio decidendi* – but also the history of law and justice from the Middle Ages to the nineteenth century – therefore be reduced to a total contradiction between two legal cultures? Is there no possible comparison? As well in the Continental as in the Anglo-American legal system materials always have been presented and argued to the judges by the lawyers in order to persuade them to rule in favor of their clients and, exposed in public or not, the authorities put forward have always been used and discussed by those judges.

As it is the purpose of the *Comparative Studies in Continental and Anglo-American Legal History*, we thought one would gain new insight into the problem of *ratio decidendi* by studying the question in a historical comparative way in order not only to understand the guiding principles of judicial decisions in the Continental and the Anglo-American legal systems but also to search in their legal history why both systems have known separate evolutions. Studies are, of course, in hand on the history of court records, though these address the nature of the records rather than the jurisprudential problem of how and why decisions came to be accompanied by reasons. Our purpose is therefore to compare the Continental tradition – through the study of the Roman and Canonical doctrine, the commentaries

of Ancien Régime jurists and in particular the practice of the continental superior courts – with England and the American colonies and, after 1776, also with the federal courts and the states of the United States in order to search for an answer to some more particular questions including: the emergence of the practice of giving or recording reasons for judicial decisions, the forms which such records take, and the problem about their accuracy and the interaction between respect for rules (*stare decisis* or *non quia movere*) and the critical re-examination of reasons for past decisions when put to a later court. Our focus in this first volume is to study the particular reliance on “Case Law Jurisprudence” through examples of constitutional, national, regional and local law.

Lille, 2005

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