SUMMARY

Obligation

François Terré, *Presentation* 9

Jean Gaudemet, *Birth of a Juridical Notion. The Beginnings of* "Obligatio" *in the Law of Ancient Rome* 19
An introduction tells about the silences of the East and the hesitations of Greece. For Rome the mysteries of ancient times are considered, as well as the upcoming of the notion of obligation and of the notion of "legal link". *Vinculum iuris* will run through the centuries.

Rodolfo Sacco, *Looking for the Origin of Obligation* 33
1 A definition. 2. Criminal obligation. 3. Exchange and convention. 4. Ceremony. 5. Collective work. 6. An injustice to redress. 7. Collective hunting. 8. Results.

Roland Drago, *The Notion of Obligation: Public Law and Private Law* 43
The notion of obligation stands in a central place when private law is concerned. Is it also true with public law? In the latter case, case law takes too much importance for the civilist notion of obligation to be able to impose itself. However it takes over because the nature of things is stronger in contract or quasi contract matters. But the principles of public law in practice prevent its use in other fields, even that of responsibility.

René-Marie Rampelberg, *Roman* Obligatio: *Perspective on an Evolution* 51
The Roman conception of obligatio constitutes the jewel of the unavoidable contribution of Roman private law to our contemporary eastern legal systems. The Romans, even if they never knew any thing like the principle of autonomy of will, have however, in the field of contractual obligations, got past the reference to standard contracts by contriving through the ages the mechanism of so-called "unnamed" contracts. Yet these may present more interest than the Roman classification of obligations we are still living on.

Luca Parisoli, *Natural Obligation and Positive Obligation: Normative Science and Spiritual Perfection in the Franciscan School* 69

After the *Summa fratris Alexandris,* the Franciscan School offers us a new reading of the patristic idea illustrated by Gratian's *Decretum* according to which yours and mine have been introduced by original sin. The canon *Dilectissimis* is interpreted as the affirmation of a breach in the building of natural law; from there stems the idea of an autonomy between natural obligation and the positive obligation where the will of the legislator is allowed to create norms owing to the damages the original sin introduced into the human soul. Authors such as Olivi, Scot and Ockham suggest us: a voluntarist ontology of obligation, the anthropological and normative primacy of freedom, the limitation of absolute power, a new theory of natural normativity.

René Sève, *Obligation and Modern Philosophy of Law* 87

The author reminds us what central role the notion of obligation has been playing in modern jusnaturalism and shows its developments in contemporary doctrine, in its deontological as well as teleological side.

Alban Bouvier, *Obligation, Rationality and Sacred Quality. Paradigmatic Locations in Social Sciences* 93

The absolute, if not sacred, character of some obligations, maybe of all obligations, challenges the analyses of rational type, whatever the nature of these may be. For is it really possible to *reduce* this emotional effect? And up to what point can, or must, one do it when wishing to protect the empirical relevance of the analysis? In order to solve these questions, the author differentiates, beside notions of economic rationality and pragmatic rationality, two more notions: that of an intrinsic rationality and that of a rationality in accordance with religious values that cannot be identified by simply referring to the Weberian notion of axiological rationality (*Wertrationalität*).

Gérard Lyon-Caen, *The Implicit Obligation* 109

On the basis of article 1134-3 of the French Civil Code, judges are discovering new obligations they impose on the parties to the contract. It is specially the case in the field of labor law, where the employer's firm must for example adapt and find new placement for its employees.

Daniel Gutmann, *Deontological Obligation between Moral Obligation and Juridical Obligation* 115

The deontological obligation may not be systematically described as a moral or juridical obligation. A qualified approach is required that takes into account the rate of structural evolution of the system into which it fits, as well as the substantial objectives it pursues.

Marie-Anne Frison-Roche, *Will and Obligation* 129

Because law considers man as free, it set the human will as the source of the obligation he is subjected to. French law is especially marked by this link and often forgets the obligation as object. But law has also restricted the power of will, which cannot express itself purely without risking being immoderate and in principle allows it to create the obligation only after meeting another will, from which the contract is born. This link between will and obligation is not questioned by the evolution which consists in mediating their relation, through the situation will constituted or in which it moves, like a market for example.

Questioning their link is more radical when one thinks will is the only measure of the interest of the one that commits himself. Then it is the obligation that is denied because one executes the norm one is interested in without the need of being obliged. Obligation would be useless to the agent as described by economic theory or the game theory. But it may be in the interest of the agent to extract himself from the variation of his interest : then it is the juridical obligation which, via the play of its will, will be the only one in a position to serve this interest. Another sign that economy cannot do anything without the law.

J.-H. Robert, *The Obligation to Do Penally Punished* 153

The writers of the French Code Pénal, when describing the material element in crimes and offenses, took great care to distinguish between punishable omission and commission and judges scrupulously refrain from mistake them, even when they end with the same prejudicial result. However persons vested with a private or public authority are, through precedents, made responsible for a great number of offenses committed under their authority for the one motive they did not implement everything to prevent them.

This paper explains the historical origin of this paradox. The responsibility of decisionmakers was primitively confined to the field of contravention, conceived as violation of the rules of administrative police and punished with mild fines, precisely called "police" ones. Modern laws have slowly destroyed the specificity of contravention and its link with administrative police. The mode of charging that was formerly typical of contravention has shifted into the field of offenses and concerns all those where the moral element is made of a feebly characterized intention or of a negligence.

Pierre Livet, *Obligation and Game Theory* 163

Is the game theory able to tell which are the contracts to whose obligations it is rational to comply? Anyway it cannot justify collaborations which appear to us as fruitful even if risky (the dilemma of the prisoner, the dilemma of public goods). It is because this theory intends to reason by considering the moves of other players as data, whereas they are nothing but suppositions, which may depend on other suppositions on the moves of the other players. When explaining this type of conditional, interconnected reasoning, one comes quite close to contract. They then play, on the background of the uncertainty inbred into these intertwined hypothesis, the role of signaling the type of interaction chosen by the partners.

Jacques Chevallier, *Obligation in Public Law* 179

The issue of obligation constitutes an excellent leading strand to bring out the structuring logic and the dynamic of the evolution of public law. Public law was build on the fundamental principle of unilaterality and of nonreciprocating in the obligation relationship: the sovereign State is given as the source and the center of obligation for citizens; when the State is subject to an obligation, it is only under the conditions and terms it set itself. This alone prevents from transposing the obligation relationship from private law where the State only acts as a third party or a guarantor, in a relationship working fundamentally on a reciprocal basis. Therefore the concept of obligation is unusual in public law. However the State is a dynamic and evolutive reality: its building up as a subject of law, through the theory of moral personality and the promotion of the theme of civil service had already, at the turn of the century, allowed to underline the dialectic of relations which are at the very beginning of the State institution and which had already been brought to the fore by the theories of the "contrat social". The decline suffered today by the absolutist conception of sovereignty helps more balanced relationships between the State and its citizens to arise, by a lessening of the most dispensatory points of the administrative system, thus at the same time easing the transposition of the general principles of the theory of obligations. However

this coming closer to private law knows a breaking point: there the State is not merely a third party or guarantor but also takes part into the obligation relation. This is the reason why any pure and simple assimilation is out of the question, as witnessed by the existence of special rules to be applied to the public power in countries who do not have, strictly speaking, any administrative law.

Laurent Aynès, *The Obligation of Loyalty* 195

The obligation of loyalty has been present in human relations from the times of chivalry until today, in individual relations as well as relations with the authorities. Negative side: the duty of loyalty prevents or hinders exercising one's rights. Loyalty and transparency; loyalty and sincerity. Loyalty can only be conceived in a relation. Loyalty and appearance. Duty of conscience or legal obligation? Loyalty is fundamental to ensure the consistency of the legal order. Essential technical rule.

Permanence and variation of the obligation of loyalty in three types of legal relations, from the smallest to the greatest alterity:

I. — Relations of confidence: the obligation of loyalty identifies with the duty to protect the interest of the other, even against one's interest (trust, society, publishing, surety bond...)

II. — Relations of distrust: each partner protects its own interest. The loyalty identifies with the predictability of the behavior (negotiation, execution, breach of contract)

III. — Conflicting relations (trade, financial markets, civil or criminal trial): the duty of loyalty, far from disappearing, identifies with the respect of the game rule, previsibility instrument for the actors.

Conclusion : the common element, beyond from the down-to-earth content which varies according to the situation, is the search for previsibility: each actor behaves according to the signals sent by the other actor. Disloyalty consists in sending deceptive signals, thereby ruining the confidence based on them. The remedy is not only to impose a compensation but also to neutralize the legal prerogative disloyally exerted.

Christoph Krampe, *The Obligation as an Asset* 205

The obligation as an asset is considered by the French jurisprudence under the aspect which a claim shares with the property of things. German law of property (*Vermögensrecht*) is characterized by a strict distinction between the law of obligations and the law of things. In principle, German law acknowledges the French maxim according to which the individuals have the power of disposition of their assets (Art. 537 French Civil Code). In contrast to French law the assignment of a claim can be excluded by means of convention between creditor and debtor, and this towards the third person as well, as the claim is taken as a personal bond between creditor and debtor. On the other hand, German law approached the French in 1994 with the new article 354a of the Commercial Code being passed, whereas French law of assignment approached the German by the enactment of the loi Dailly in 1981. The basic problem requires a solution in a European perspective.

Pierre-Marie Dupuy, *Obligation in International Law* 217

Today like yesterday, obligation in international law rests on consent, because it is based on the agreement concluded by its formally equal, primary subjects, States. However, since the universal affirmation, after 1945, of the international rights of the human person, a new type of international obligations has made its appearance. These obligations have to be fulfilled by the States on the account of the affirmation - even partially fictitious - of values said to be common to everyone. This however does not mean that all consensual element has disappeared from this new type of obligation, their effectiveness remaining conditioned to their acceptance, even when not formalized. But the fact remains that a truly positivist

process is not to deny the existence of conflicting strains between agreed upon and assumed obligations; on the contrary positivism requires one to acknowledge such a phenomenon because its constitutes a large part of the dynamic which is specific to today's international law and, probably, to tomorrow's.

Jean-Yves Goffi, *The Addressee of the Obligation: the Case of Future Generations* 233

After recalling, in the light of W. N. Hohfled's analysis, what the concept of rights may mean, it is shown that the notion of obligations towards future generations is more understandable in a theory basing rights on the ownership of interests than in a theory tracing them up to the expression of a will. Yet approaching the issue from this point of view brings up the following paradox: today's generation has the obligation to take into account the interests of future generations without, for that matter, being under the obligation to see to it that future generations come into existence. One concludes that the obligation towards future generations can only be conditional.

Miscellaneous Studies

Nicolas Grimaldi, *Tolerance and Intolerance of Reason at the Time of French Lumières* 243

What are the Lumières? How could the same requirements of reason inspire at the same time Voltaire and Robespierre? How can one so vehemently criticize religion in the name of reason and 30 years later originate a religion of reason? How could reason inspire Voltaire in 1763 his *Traité de la tolerance* and vindicate in 1793 the intolerance of the "law about suspects"? Is it a matter of adverse circumstances, of deviations? Or are we not rather confronted withan amphiboly of reason as unavoidable as insuperable? Now an humble reason beseech error the right for truth to take place in the public trail of other opinions : it claims tolerance. Now a triumphant reason forbids any right to injustice or error : it is the intolerance of truth. If it was the case, one would understand history since has done nothing but repeat itself.

Xavier Martin, *French Lumières and Human Interiority* 273

The sensationist empiricism which governed the French Lumières, led them to consider human interiority as open without restraint, morally as well as technically, to investigations and manipulations. The totalitarian aspect of the French Revolution will fall directly in line with the logic of this postulate.

Christophe Jamin, *Boissonade and his Time* 285

Who was Gustave Boissonade, today admittedly the "French father of modern Japanese law", and what is his philosophy ? Doctor in law in 1852, he graduated at the concours d'agrégation des Facultés de droit in 1864 at the age of 39, andwas called as an agrégé to the Faculté de droit de Paris as early as 1867, he was send on a mission to Japan between 1874 and 1895, when he came back to France and ceased all intellectual activity after realizing his project of a civil code was rejected by the Japanese society. Boissonade is then completely a lawyer of the second half of the 19th century. On this behalf, he seems to have come too early and at the same time too late on the legal French scene, which turns him into an heir and a precursor. Heir because if he did not participate in introducing the ideas of the German historical school in France, he takes them on, at least as they were perceived by

French lawyers who adhere to a jusnaturalist and spiritualist philosophy he also wants to [illegible] promote. Heir also by linking himself to the exegetic doctrine, of which he uses the rationa[illegible] list postulate powdered with christian spirit as well as the method to analyze texts. Bu[illegible] Boissonade is also a precursor, even if he does not at all anticipate the sociological revolution [illegible] of the turn of the century. In a time when political economy is not yet well perceived by the [illegible] French law faculties, he forcefully defended their teaching. Moreover, his jusnaturalism [illegible] brings him near liberal economists then domineering who defend the idea of a natural order [illegible] which he intends to translate on the juridical level. The same jusnaturalism also allows him [illegible] to be one of the first, if not the best known, philosopher to defend a universalist conception of comparative law. One must however think this conception sunk his project of civil code [illegible] when it appeared to him as a mere technical expression of natural law. Boissonade is ultimately a author emblematic of his time : eclectic and liberal, he shares at the same time the promises, the contradictions and perhaps its shortcomings.

Serge Boriani, *The Essence of Technique and the Essence of Casuistry* 313

From Heidegger's conference, *The Question of Technique*, the author wishes to show how the duality antique technique/modern technique finds its symmetry in ethics. Christian casuistry is an ethic of provocation whereas casuistry understood as practical hermeneutic is a matter for an ethic of unveiling.

Jean-Guy Belley, *A Philosophy of Juridical Longing: the Art of Self-Restraint* 317

In the traditional philosophy of law, obligation is conceived according to the logic of duty. In the world of business and contemporary culture, il is better conceived according to the logic of longing. Referring to an empirical research on the activities of a Canadian multinational firm, the author shows that the constraints associated with organizational forms chosen by the firm, with its many economic citizenships and with the confidence relation with its partners are the counterpart of the resources it intends to use to realize its longings. The art of self-restraint is one of the capabilities that guarantee a successful business.

The Theory of Law in the USA

Pierre Maclouf, *The Common Law Tradition's Crisis and New Legal Regulation's Problems* 333

The paper relies upon American legal scholar Mary Ann Glendon's book *A Nation Under Lawyers*. It analyzes the crisis of the legal system in the USA with a twofold argument:–(a) it is the crisis of a tradition (the Common law's): what is at stake here is a mistaken perspective consisting in confusing the decay of the Common law institutions with its very substance ; (b) this crisis is itself embedded within the more global legal issue which arises from the current problems of regulation, whatever its traditional regime. At this stage, a kind of programmatic failure consists in the attempt to face these problems by borrowing to the American legal system, this latter being then considered without regard to its tradition's crisis. The paper first pinpoints the basic elements of the Common law ; then it shows how the various factors that undermine them are changing and weakening, beyond the Common law tradition itself, the nature, the function and the sources of law as such. It stresses phenomena such as (i) the instrumentalization of law, and (ii) the way everyone's (or every single group's) rights are being substituted for law for all, both phenomena being seen as a "democratization" of law. Similarly, what is described as bold, assertive and thus

more "democratic" judging, has often resulted in slowing political and legal processes that were moving in reform directions, thus deferring stable settlements of the issues. So, although law as such is designed to create order, a number of legal practices may end in disorder.Nevertheless, if one takes a critical view of these trends, the Common law tradition may avail most valuable resources to define a new paradigm for regulation.

I. Papadopoulos, *Phylosophy of Law in the USA in the Light of Several Recent Books* 359

Mark Tushnet, *Critical Legal Studies in the United States Today* 419

The American movement of critical legal studies remains alive as a form of legal theory, even if other organizational instances have taken it over. The present study retraces the course of this legal theory by taking a close look at its main thesis on the indeterminability of law and the recent evolution of American constitutionalist thinking. The analytical impossibility to come to a single correct solution to legal issues does not come from the language indeterminability, but from the experience of jurists - scholars, lawyers or judges. their experience stresses the difficulty of handling legal material according to rules, but also confirms the significance of sociological processes in consolidating legal interpretations. The contradictions inherent in law, the very root of its indeterminability, come from conflicting psychological and sociological components - sometimes individualistic, sometimes collectivist - which are embedded in legal concepts. The philosophy of civic republicanism attempted, despite the criticisms of conservative lawyers, to impose a coherent historical justification of constitutional justice and of judicial activism favoring collective aims, but this philosophy was also finally overcome by the critical thesis of the indeterminability of law.

Serge Boarini, *Jonsen's Casuistry* 427

Usually associated with Stephen Toulmin's name, Albert Jonsen's name is less familiar to the French public. The book, which marks the first steps of casuistry into the scope of moral thought, *The Abuse of Casuistry* (1988), bears the signature of both writers. But, oddly enough, Jonsen's thought seems to have faded behind philosopher Toulmin's aura. This paper sets out the casuistical pattern as defined by Jonsen from 1980 to 1997. However the casuistical project which rests upon this argumentative pattern cannot be consistent unless it is founded on practical hermeneutics including the actual moral practices of a culture in its approach.

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