EPILOGUE

1. The Premises

1.1. Sapere vedere

I TOOK the idea of giving testimony to what I have taught and learned throughout my academic life from ATALIBA NOGUEIRA, whose provocative and prophetic *O perecimiento do Estado* (1966) was his farewell lecture as a professor of State Theory in São Paulo. This work addressed the death of the State, such as it was known at that time, and anticipated the birth of the State as it is known today; the work did not actually deal so much with the disappearance of the State, but rather suggested seeing the State as already shaping its own future. This was *sapere vedere*, the difficult task proposed by MICHELANGELO.

Also, I have copied the testimonial style and some words from CARDOZO, as well as several others, as a way of paying tribute to those great minds. For this reason, I encourage the reader to try to recognize which words are not my own, and to identify their original author.

All in all, I had to put my name at the end of a long list of men of law, who, across the globe, questioned preconceived, abstract, and voluntary notions of seeing law as detached from reality.

1.2. The Equality of the Common Law, the European Continental Law and Ours

I would like to add another idea that is not my own, which is that the *common law* works in exactly the same way as European continental law, which, in turn, works the same way as our law in Argentina. This concept was explained to me by CHARLES BREITEL, my mentor and teacher at the Administrative Tribunal at the IDB. In my opinion, the works of JULIO C. CUETO RÚA, another great jurist of our time, can also be read as supporting this vision.

1.3. Short Bibliography

We need to start studying the law somewhere, so, along with this book, I suggest starting with my own *El método en Derecho. Aprender, enseñar, escribir, crear, hacer*[1] and *La Administración Paralela. El parasistema jurídico-administrativo*[2], which was translated by the Administrative Law Professor at the Università di Bologna Dr. LUCIANO VANDELLI and published under the title *L'Amministrazione parallela. II "parasistema" giuridico-amministrativo*[3], with an introduction by FELICIANO BENVENUTI[4].

I have included chapter I of v. 1 and 2 of my *Tratado de derecho administrativo* with some additions and modifications. I think that re-reading these pages will be useful to those versed in administrative law[5], but its current formulation may be equally appealing to those interested in other branches of law, or even for those without a background in it.

In addition, I would propose reading JHERING - his witty notes, using pseudonyms and other works gathered under the title *Bromas y veras en la ciencia jurídica*[6] - as well as CUETO RÚA[7] and GENARO CARRIÓ[8]. These are essential, but, admittedly, not sufficient, for anyone who would like to know what law is (not excluding, of course, lawyers themselves).

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[1] Published in Madrid, 1988, by Civitas, 2nd reprint 1997. Also available for free at the website www.gordillo.com

[2] Published in Madrid, 1982, by Civitas, reprint 1995. Also available for free at the website www.gordillo.com

[3] Ed. Giuffrè, Milan, 1987.

[4] I admit, I recommend these works somewhat immodestly.

[5] In fact, now we are starting with postgraduate courses using this work as a basis.

[6] Subtitled *Ridendo dicere verum*, Civitas, Madrid, 1987. The main title is a translation from the German original *Scherz und Ernst in der Jurisprudenz*.

[7] I recommend at a minimum *Una visión realista del derecho, los jueces y los abogados*, Buenos Aires, Abeledo-Perrot, 2000 and *El "common law"*, Buenos Aires, Abeledo-Perrot, 1997.

[8] Throughout this little book the reader will find his works sparsely quoted, because here I did not deal with all the subjects he contemplates. He was a master of legal thought and an exemplary human being. I was not personally close to him, although I even worked with him on some cases in private practice. My admiration and recognition for him is as high as it is for Judge BREITEL, and that is why the Spanish and English editions of this book are dedicated to the memory of them both. The French edition will be dedicated to GUY BRAIBANT, for further reasons that I explained in my laudatio to him at Spetses, in September 2002 (also to be published by the ERPL/EPLC).

2. My First Steps

2.1. The Hypothesis of a Future Law Student

I was born on October 22, 1938, in a little town called Ascensión, in the General Arenales District, Province of Buenos Aires. When I was in third grade, we moved to Avellaneda, a town in Greater Buenos Aires. Today I live in the center of Buenos Aires, but these successive moves led me to enjoy a rather nomadic lifestyle - I love to travel.

In 1955, I was 17 years old and was about to finish secondary school[9]. In preparation for my upcoming studies at the Law School of the University of Buenos Aires, I read *La lucha por el derecho* by JHERING and many pages of a classic *Introducción al Derecho*. Afterwards, I was under a youthful illusion that my legal education would teach me how to discern, in every situation, whether someone had a particular right to a particular thing. How wrong I was!

2.2. Studying and Teaching Law

In December of 1958, I received credit for my last subject and, in 1959, took my practical courses and got my diploma. Over the course of those two years, under the guidance of RAFAEL BIELSA I did what was then called the "Free Teaching in Administrative Law," which consisted of a training course in teaching and research. After that, in 1959, I started with my formal doctorate, and, in 1960, I got my doctorate degree and became an associate professor to MANUEL MARIA DIEZ, where JORGE TRISTAN BOSCH and MIGUEL S. MARIENHOFF also taught.

I was the first of a new generation to be incorporated into that group, with HECTOR A. MAIRAL, JORGE A. SAENZ, GRACIELA REIRZ, and other future tenured professors of administrative law to follow. After ten years in this research and teaching environment, I became, in 1969, a full pro-

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[9] Since childhood, I have had a libertarian tendency. I always *devoted much more effort to study on my own* than in systematic courses. I have always tried to learn under any circumstances and in every moment of my life - even when resting and travelling. I started to study, by my own volition, before entering primary school (because there was no kindergarten at that time, and I wanted to read the comic strips of magazines and newspapers. That was the reason I had my first private teacher). I emphasize this, because I am frequently attributed with suggesting not studying, which is something I do not understand. See the following note.

fessor through a competitive process, and the same went for all the rest a bit later.

Taking a step back again, in 1961 - the year after I rose to associate professor in Buenos Aires - I became, again through a selection process, an associate professor of law to MIGUEL S. MARIENHOFF at the National University of La Plata. I was at his side until he reached his statutory-imposed age limit in 1968, and, when I was promoted to Dean in 1969, my first act was to bestow him with the honor of *Professor Emeritus*.

2.3. The Answer to the Youthful Question. The First Lesson of Life

In these early years, while I had never stopped studying, I only started to work upon entering the Treasury Attorney's Office of the Argentine Republic in 1961. I really started to learn there because, in all truthfulness, we can only learn by *doing*.

It was in this office where, a few years later, I came to understand that my youthful hypothesis was false and backwards. "Knowing" the law meant, in actuality, that *I was never sure of anything,* and that I never knew whether people had rights in a particular situation, except in cases that were so obvious that having studied law was not really needed.

As time went by, I came to accept that this initial lack of certainty was normal, perpetual, unchangeable and even desirable. It was really the overarching values and principles of the law that were the most important because, while they do not provide concrete rules, they do orient us in an invaluable way. In brief, I realized that the law was for thinking beings, not for automatons.

2.4. Studying Always Studying. But it is Not Enough

I remember a piece of advice given to me by a senior lawyer back in 1955: Upon noticing that I was studying for my courses, he told me that, in reality, it was more important to study *after* graduation, and that during my university years, I should keep my studying to a minimum. He added that I should not rely on what I was taught at the University, because it had nothing to do with actually being a lawyer.

Nowadays, when, upon the request of parents who want to guide their children, I give students those same two pieces of advice, the feedback

from the parents is that I said that *studying was not necessary*[10]. Obviously, studying *is* necessary, a lot and *forever*, although it is, rather, because one learns only through practice and experience and also because of the constant changes in law and the environment (political, economic, factual). The facts in each case are forever new; so is the context. How can anyone manage to be a good lawyer but by thoroughly studying everything, all the time, and in each and all cases? There are always new treaties, new laws and by-laws, new case law, and new realities in which to insert the legal system, and ignoring them is assuring the law's eventual failure. One's own, at least, for sure.

Clearly, nobody can be a good lawyer without studying, constantly, the entirety of the legal system, including its rules, its judgments, and its doctrine. Although this task is a *sine qua non*, it is not enough. We also have to study the reality of law and how to approach it. While this is also *sine qua non*, it is materially impossible, because men cannot determine the truth in reality. In fact, this is the point where the great failures of lawyers begin. It is also, unfortunately, an inevitable part of their professional lives.

In this sense, studying and teaching law should merely impart how to avoid errors, and should help students understand how to *work*.

2.5. The Second Lesson: Trying to See Reality

I have learned throughout my career that it is impossible to see reality clearly, that we are constantly wrong, and that errors can be terrible and apparently unforgivable. This must be taught - and learned - in order to improve our general understanding.

With intelligence, though, we can learn from our own errors. With even more intelligence, we can learn from other people's errors. To err is simply human, and should not be construed as a personal failure, or be seen with censure or shame. Of course, we should try not to repeat the same mistake twice, but committing a new error is part of the learning process.

As an example of this, let us take a look at the rule that requires imported products to have a label indicating their country of origin. On the face of it, this seems to be a clear rule with little room for confusion. However, the administration fined an importer because his label was not in compliance. The importer then sued, but the judge of first instance verified

[10] No student who has taken an exam with me would say that such thing could be true, but I definitely do not test my students on their knowledge of my books.

that the label did not indicate the country of origin, confirmed the fine, and denied the action. The appellate court reversed the judgment by saying that, as the label indicated the product's origin as coming from the European Union, there was sufficient identification. The appellate court developed a series of good arguments to remove this case from the ambit of the rule demanding precise identification of the country of origin. This was a laborious but good legal solution, which understood well that the *rule* itself was not unfair and arbitrary, just its application.

Up to there, everything seems to make sense. Things start to unravel, however, upon noting that the judgment itself transcribed the entire label, which read: "A product elaborated in the European Economic Community [there are two or three lines more of text], Toledo, Spain."[11] In the end, the label did indicate the country of origin! Yet the administration that fined the importer, the judge who ratified the fine, the appellate court that reversed it, and the lawyers who dealt with the case did not notice this detail. If the lawyer for the claimant had noticed - and stressed - the salient text of the label, he would have won on those grounds, rather than because of unnecessary and complicated proceedings of normative reinterpretation.

All this to say that the lawyer in this case does not only have to train himself to read and understand the possible reinterpretations of the rule in question in an unfair case, but *he must train himself to read labels*. This is not a joke, and anyone who thinks it is, is not reading this book well. If the label is read incorrectly, all that follows is useless and, what is more, wrong[12].

Regardless, the reader should not denounce the lawyer, the parties or the judges of the proceedings. The reader should learn that error, even a manifest one, is normal, because *sapere vedere* is *intricately difficult* for human beings. *Perfection* in *sapere vedere* is even more impossible. As LEIBNIZ said, the data of our reality are infinite; it is just our capacity that is finite.

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[11] CNCom. [Commercial National Court], Chamber E, *Plan Rombo*, *ED*, 8-II-2000, p. 7, chapter II.

[12] There is another excellent case, for many reasons that will be explained, which also deals with the reading of labels. See *The Scotch Whisky Association Ltd.*, CNFed. Civ. y Com. [Civil and Commercial National Federal Court], Chamber II, 2000, *LL*, 2000-C, 696.

3. My Legal Learning

3.1. The Public Function

At this point, I would like to reiterate something that I truly believe: that the first and best times of my professional life were at the Treasury Attorney's Office of the Argentine Republic from 1961 to 1968. There, I *learned law* (please read: I did not learn it in Law School)[13] by drafting advisory opinions, and, at the same time, was taught by a superb lawyer, RAFAEL CASTRO VIDELA.

After my time with the Treasury Attorney's Office, life took me to places I had not expected, and I wound up as Dean of the Law School in La Plata in 1969, and of Buenos Aires in 1973. Later, it was in 1983-84 that I was briefly at the Board of the National Institute of Public Administration.

3.2. Legal Representation and Advice to the Public and Private Sector

At the international level, I have, for many years, given advice to the public sector. At the national level, for more than four decades, I have alternated between advising and legally representing clients in the public and private sectors. I know "both sides of the coin," so to speak, and I always try to keep that double approach to things, because, in order to work as a lawyer, it is *essential* to understand the scope of a given situation and the strategy of the other party.

3.3. Stage *at the French* Conseil d'Etat

In 1984 I did a *stage* at the French *Conseil d'Etat*, where, together with GUY BRAIBANT, I had the unusual privilege of being present in the debates of an *Assemblée Restreinte* and in some other internal committees. That

[13] It is not because there were no professors to teach us how to work, but because I wrongly "learned" from my friends that it was better to avoid them. Too much work, too much insecurity. The situation is repeating itself nowadays, but with an aggravating factor: the job market is tighter, and in order to improve their opportunities, students have to do postgraduate and/or master's degree abroad. This process is more expensive, and it takes much more time than studying the subject well from the beginning.

experience confirmed for me once more *that law, in its specific exercise, is a universal experience*.

It is a mistake to think that practical thinking only occurs in the world of the *common law*. In fact, it is at a person's own expense, at its own intellectual prejudice, that certain people are of the opposite opinion. I have spoken everywhere with pundit litigant lawyers and have given seminars exclusively for magistrates, and these people, no matter which legal system they were from, analyzed problems using similar methodologies and reached similar conclusions therefrom.

3.4. Member of International Administrative Tribunals

One of my most enriching experiences was to be a part of several international administrative tribunals: I was for six years in the Administrative Tribunal of the IDB, where I finished as Chairman, and nine years in the Administrative Tribunal of the IMF. As of 2002 I am also a Judge of the OAS' Administrative Tribunal.

In the international tribunals (obviously made up of magistrates of different nationalities, and, as such, of different cultures and legal systems)[14], I verified that, as is always found in the by-laws, every judge *shall not and may not apply or refer to his own national law.*

If a judge cannot refer to his own national law (constitutions, laws, case law, doctrine), the only common field of thought and action are the few

[14] In these tribunals, I had the great honor and privilege of working, obviously at different times, together with an American and lifetime magistrate; an American distinguished jurisconsult of human rights; a Swiss professor, who nowadays is the president of the European Court of Human Rights; the then president of the Supreme Court of Barbados; the then president of the Supreme Court of Jamaica; the then president of the International Court of Justice; a magistrate of the French *Conseil d'Etat*; a Japanese lecturer; an Egyptian lecturer; magistrates of our field: one Costa Rican, two Brazilians, one Mexican, one from San Salvador, and one Venezuelan. Apart from constant conversations with local professors and magistrates, I have had brilliant, informal talks with a member of the Italian Constitutional Court, the US Supreme Court, the Supreme Court of Brazil, and the Chilean Constitutional Court. It would be absurd to pretend they would say the same, but it would be unfair not to recognize that we owe them much. In our profession, when we work together with other experienced professionals, we learn the same vital lessons. Nobody who actively works in our profession as an attorney, for the State, or as a judge has ever taught us anything in disagreement with what we are explaining here. Academic colleagues, on the other hand, do not always think the same.

express rules he has to observe and, otherwise, those overarching legal principles and values that he commonly accepts. This latter list repeats itself across the globe, with only occasional changes according to the period or the country: reasonability, proportionality, due process, good faith, prudence, not to harm others, etc.

Other international tribunals are in the same situation: International Court of Justice, European Court of Justice, European Court of Human Rights, Inter-American Court of Human Rights. The same goes for international arbitration tribunals, although treaties or arbitral commitments require them to decide according to national law. Nonetheless, in their case, too, we will see that the body of magistrates will work the same way[15]. The International Criminal Court, too, fits into this mold.

3.5. Teaching and Research

I have been diligently working as a teacher for more than forty years, part-time, but continuously. I was devoted and devote the best of my efforts to researching[16], to writing and publishing, to traveling, to attending international congresses and conferences (because diversity enriches oneself, homogeneity does not), and to listening to colleagues (magistrates, professors, lawyers, officers) of different backgrounds and countries. I have heard magistrates telling things in private that they dare not in public, because announcing things publicly is not typical of their profession. (The judge speaks through his decisions, he does not explain them orally.) In a different vein, I always listen to colleagues from the academic world - from Argentina or from different European countries - to see if any magistrate has ever explained the simple reality of how and why a case has been decided the way it has.

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[15] Sometimes the rule indicates that the tribunal will also apply the principles of the international law as it is the case of the bilateral treaty between The Argentine Republic and The Republic of South Africa (Law 23.352), Art. 9.4 *in fine*.

[16] Except for my doctoral thesis, which I did in 1958-1959 with a scholarship for scientific initiation, by a State entity now known as CONICET. Doing research and having to account for it is not the best thing. At least, I was not satisfied with and never published the result, which was an unnecessarily voluminous work of 558 pages. (I wanted to *demonstrate* my *material* work; I neglected the *quality* of the *intellectual* result.) That is why I prefer to research freely and chaotically. I start with projects, and as long as I am busy, it does not matter to me whether I keep on working on them or not, and whether I finish them or not. I prefer to research without accounting to anyone but myself and, of course, my readers.

3.6. The Lessons of Experience

I have read that democracy or the State of Law is not a government of men, but of laws. I have also read the opposite: that democracy needs judges to control the powerful and society to oversee the judges, because men always make mistakes and do not always obey the law, even when it is clear.

I have learned that it is fundamental for those in power to be divided, fractured and controlled by: *a)* magistrates *alien to the dispute* (third party who is not interested in the proceeding), *b) independent parties* (not subjected to orders or instructions from anybody regarding the way of deciding), *c)* revising instances (*double full instance* at least, plus any other *extraordinary* instance) and *d) social control* (we must watch what they are doing). A good Senate, an independent body for the control of magistrates, and a judicial *ombudsman* are of help.

I have realized that although we have to work with definite cases, it is wrong to look for predetermined solutions, let alone those that are *ex post* certain. On my way to these conclusions, I again met JHERING, this time in his vital controversy with SAVIGNY (*Scherz und Ernst in der Jurisprudenz).*

4. The Essays. The Times

After using a kelsenian-axiological-empirical starting point in my *Introducción al derecho administrativo* of 1962, I started to expound upon these new explanations, first in the second edition of *El acto administrativo* in 1969; then, from 1974 on, in the successive editions of volume I of my *Tratado*. In 1984, I further elaborated on the subject-matter in my *Teoría general del derecho administrativo*, published in Madrid in 1984. I continued with a work I did during my *stage* at the French *Conseil d'Etat*, which was unpublished, but which I presented in 1985 to the doctoral candidates of Administrative Law at the University of Paris II thanks to a kind invitation of YVES GAUDEMET. I found a new balance in 1988 in *El método en Derecho. Aprender, enseñar, escribir, crear, hacer*, and, after I continued reflecting, I added a first chapter about proof in the second volume of my treatise, *i.e.* without proof there is no law in *La defensa del usuario y del administrado*.

I furter updated and extended that new balance when, last year at the *Academy of European Public Law* in Greece, I gave a lecture on *Common Law and European Continental Law*, thanks to an invitation of a friend of

mine and distinguished colleague SPYRIDON FLOGAÏTIS. I made a collaborative effort making notes to ALEJANDRO NIETO's *Los límites del conocimiento jurídico*[17].

I think this book *An Introduction to Law* is ready to be published, not because it is good, but rather because it is time we heard more opinions and experiences, and because it is time for sharing reflections in a broader environment.

[17] Madrid, Trotta, 2003 (in preparation), where I further elaborate on the ways law is really made everywhere in the world.