

Chapter 2

Codification in the 21st Century—A View from Korea

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2.1 A Brief Overview of the Birth of the Korean Civil Code

When the Japanese colonial rule of the Korean peninsula ended with the Second World War in 1945, South Korea was placed under the military government of the US for three years (1945–1948). During that period, there was an interesting project pursued more or less singlehandedly by Dr Charles Lobingier, who was an advisor to the Department of Justice of the US military government in Korea.¹

Dr Lobingier's Proposed Civil Code of Korea was inspired by the Civil Code of the State of California (1872). But it was equally heavily influenced by the French Civil Code, as is apparent from the following format of Dr Lobingier's proposal:

Part I (Persons)

Natural: This section deals with topics such as legal capacity, matrimony, parental authority and guardianship, among others.

Juristic Persons: This section contains provisions dealing with registration, management and liabilities of corporations, which are divided into: (1) domestic corporations, which cover the ground of company law; (2) foreign corporations; (3) agricultural cooperative associations; and (4) foundations/endowments.

Part II (Obligations)

'Provisions Common to All' are set out first. They include the nature, parties, assignment, performance and discharge of obligations.

'Kinds of Obligations' are divided into (1) Contracts, (2) Quasi-contracts, (3) Delicts and (4) Quasi-delicts. Contractual obligations deal with sale, lease, employment, mandate/agency, partnership, negotiable instruments, guarantee contracts and insurance. 'Particular Forms of Contracts' are also included in this section. They list donations, exchange, deposit, carriage of goods, warehouse and other kinds of commercial contracts.

¹ Yoon Dae Seong, "A study of Korean Civil Code compilation project during the American military government (1945–1948) and Dr Lobingier's 'Proposed Civil Code of Korea'", *Comparative Private Law* (in Korean), Vol. 4, Nos. 1 and 2 (1997).

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Part III (Property)

In this part, the proposed code deals with various ways of acquiring ownership, co-ownership and limited dominium such as usufructs, servitudes, superficies, emphyteusis, etc.

Copyright, patent and trademark are also dealt with in this section as 'intangible property'.

Part IV (Succession to Property)

Provisions on intestate succession and testamentary succession are included in this section.

On a number of occasions, Dr Lobingier revealed his expertise in Roman law. This is illustrated by his choice of terminology such as *mutuum*, *usufruct*, *emphyteus*, and also by his manner of categorising certain types of 'rights' as 'incorporeal property (*res incorporales*).² Most of all, however, Dr Lobingier's Proposed Civil Code of Korea relied heavily on the Chinese Civil Code (1929–1931).³

As the guiding principles of a modern civil code, Dr Lobingier set out the following:⁴

Principle 1. A civil code should have a complete and comprehensive coverage of the topics in the relevant sections.

Dr Lobingier took the position that there was no longer any reason to have a separate code for commercial transactions. Historically, *Law Merchant* had an independent existence and merchant courts had exclusive jurisdiction over disputes involving merchants, who were perceived as a somewhat distinct class of people.⁵ No such distinction is maintained any more. Merchants are no longer a separate class of citizens. Ordinary courts now deal with disputes between private persons regardless of whether they are merchants or not. Dr Lobingier concluded that a separate commercial code was no longer needed.

Principle 2. Presentation and organisation of provisions should be logical, scientific and convenient.

Principle 3. A civil code should avoid unnecessary details or ambiguity. It should adopt a clear and concise style.

Dr Lobingier cites Portalis—the leading figure among the drafters of the French Civil Code. Portalis set out in his *Discours préliminaire du premier projet du Code Civil*

² Dr Lobingier's publications include: Lobingier, *The Evolution of the Roman Law: from before the Twelve Tables to Corpus Juris* (1923) Fred B. Rothman Publications: USA. Also see Choi Jong Ko, *Korean legal tradition viewed by Westerners* (Seoul, 1989), p. 205.

³ On the Chinese Civil Code of 1930, see generally Pound, 'The Chinese Civil Code in Action' (1955) 29 *Tulane Law Review* 277; The Chinese Civil Code is available at: <http://law.moj.gov.tw/Eng/LawClass/LawContent.aspx?PCODE=B0000001>.

⁴ Lobingier (in Korean) 'A Personal View on the Reform of Japanese Civil Code' (1947) 2 *Law and Administration* (in Korean) 2 at 8. In this article Lobingier referred to the 'Japanese Civil Code' which still applied in Korea at the time and proposed his views on how the 'Korean Civil Code' could be structured to replace it.

⁵ John Baker, 'The Law Merchant and the Common Law' (1979) 38 *Cambridge Law Journal* 295; In relation to the development of merchant court jurisdiction in the sixteenth and seventeenth Century see: Kessler, 'A Question of Name: Merchant-Court Jurisdiction and the Origins of the Noblesse Commercante' available at: http://www.sul.stanford.edu/depts/hasrg/frnit/pdfs_gimon/kessler1.pdf.

that a civil code should aim to lay down clear and concise principles whose actual application will, in time, be elaborated on by judges in detail.⁶

Dr Lobingier recommended that, in preparing the Korean Civil Code, "... attention must be given to the closest and the longest-standing teacher of Korea, the 'Rome' of the Far East, namely, China."⁷

However, Korean jurists who participated in the codification commission during the US military rule felt that Dr Lobingier's proposed Code was overly influenced by American law. They drafted the 'Outlines of the Provisional Civil Code of Korea' which largely adopted the structure of the German Civil Code. They proposed, for example, that the Civil Code should begin with general provisions. The notions of 'juridical act (*Rechtsgeschäft*)' and 'declaration of intent (*Willenserklärung*)' featured prominently in their Outlines.⁸

After the Korean Civil War (1950–1953), the South Korean Civil Code (1958) was prepared and compiled in a very short span of time in the late 1950s. It was a time when the country was still recovering from the terrible destruction of the civil war. The preparation was led by Kim Byung Ro, who openly admitted that the Korean Civil Code was largely a 'revised translation' of the Japanese Civil Code (1896). Although the Swiss Civil Code (on obligations), Chinese Civil Code and Manchurian Civil Code (1937)⁹ were all extensively consulted, the overall structure of the Korean Civil Code followed that of the Japanese Civil Code.¹⁰

2.2 Traditions of Civil Codes

To prepare a ground for my argument in this paper, I shall set out a brief sketch of three distinct types of civil code. In chronological order, they are the French Civil Code (1804), the California Civil Code (1872) and the German Civil Code (1900).

2.2.1 French Civil Code (1804)

The French Civil Code's manner and order of presenting the subject matter (divided into, roughly speaking, persons, things and obligations) is often explained with reference to *Institutes*, probably the most influential legal textbook written by the

⁶ Keechang Kim, 'Les différents techniques de l'élaboration de la loi: le code et les 'cases'' (2005) *Droits privés en cours de globalisation: perspectives coréano-français, Colloque International du Centenaire de la Faculté de Droit de la Korea University et du Bicentenaire du Code Civil Français*, 2005.12.3.

⁷ Lobingier, above n 4 at 11.

⁸ Yoon, above n 1 at 409–412.

⁹ See generally: Kokuchi Hiroda (trans. by Lim Sang Hyuk), 'The law of 'Manchu Guo' during the Japanese rule' (2003) 27 *Studies in Legal History*; Dubois, 'Rule of Law in a Brave new Empire' (2008) 26 *Law and History Review* 2.

¹⁰ For a detailed analysis of the drafting of the Korean Civil Code, see: Jeong Jong Hue (in Korean), 'Comparative Lineage of Korean Civil Code' (1990) 8 *Studies of Civil Law* at 75.

Roman jurist, Gaius.¹¹ By far the most important driving force for the French Civil Code was the perceived need to ‘unify’ the law.¹² For many centuries, the legal landscape in France had been rather fragmented. Different regions of France had different set of legal rules applicable within each region.

Such a state of affairs was in marked contrast with England where the King’s judges had achieved a unified body of law ‘common’ to the entire kingdom (the Common Law) since the late Middle Ages as the significance of local courts diminished. French jurists wanted a homogeneous legal landscape (how and why, throughout the Middle Ages, the fragmented legal environment had been regarded as anything but problematic is another matter). The French Civil Code provided the means of ‘unifying’ the legal landscape of France.¹³

According to the well-known and elegant remarks of Portalis, the drafters of the French Civil Code attempted an ‘... intercourse between written law and the customary law (*transaction entre le droit écrit et les coutumes*)’.¹⁴ In some sense, this was also an effort to obtain systemic unity (*l’unité du système*) of the French law by reconciling the laws of the South of France (*pays de droit écrit*, where the Roman legal texts and written codes played an important role) and the laws of the North of France (*pays de droit coutumier*, where customary law and cases—*jurisprudence*—were the principal sources of law).

At the time when the French Civil Code was adopted, the legislature and the judiciary were expected to play mutually complementary roles in the development of law. Portalis expressed the idea as follows:

There is a science of legislation just as there is a science of adjudication. These two are different. Legislative science consists in finding in each subject matter the principles which are most conducive to the common weal: the adjudicative science aims to put these principles into practice, to ramify and to extend them through a wise and reasoned application in private disputes; and to study spirit of the law when letter of the law is inadequate to express it; and not to allow oneself to become now a slave, now a rebel *vis-à-vis* the code and to disobey it by slavishly applying it.¹⁵

As it is impossible to stipulate every possible detail in the code, judges are entrusted to develop and to enrich the content of the code. The code itself merely aims to set out broad principles only. Hence,

It is through accumulation of experiences that the lacunae left by us will be filled. It takes time to make the code of a nation. Properly speaking, however, it gradually *makes itself*.¹⁶

¹¹ De Cruz, *Comparative Law in a Changing World* (1995) Cavendish Publishing Limited: United Kingdom at 64.

¹² Levasseur, ‘Code Napoleon or Code Portalis’ (1969) 43 *Tulane Law Review* 762 at 762–763.

¹³ Ibid.

¹⁴ Portalis, *Discours préliminaire du premier projet du Code Civil* (1801) at 29. Full text available at: http://classiques.uqac.ca/collection_documents/portalis/discours_1er_code_civil/discours_1er_code_civil.pdf.

¹⁵ Id at 23.

¹⁶ Id at 24; “C’est à l’expérience à combler successivement les vides que nous laissons. Les codes des peuples *se font avec le temps*; mais, à proprement parler, on ne les fait pas.”

It was a time when the code and the legislator did not yet claim a monopoly on law-making. Nor was there a sharp or prominently visible distinction between law-making and law-finding. Adjudication and legislation (such as codification) were expected to cooperate in shaping the law (*l'élaboration de la loi*).¹⁷

2.2.2 *California Civil Code (1872)*

The Civil Code of the State of California (1872) was based on a code prepared by David D Field. Field's code was originally presented to the State of New York's legislature (which ultimately rejected it in 1887). However, it was received more favourably in other States. North Dakota and South Dakota (1872), California (1872), Idaho (1887) and Montana (1895) adopted it.

The common law world also had a tireless advocate for codification, Jeremy Bentham. His ideas about codification were based on a 'utilitarian' understanding of human behaviour (similar to the Legalist—*fajia*, 法家—approach in the ancient Chinese tradition) and propelled by his overt hostility to, and distrust of, case law and the discretionary power of judges.¹⁸

However, Bentham seems to have left little impact on Field's California Civil Code. Field's Civil Code mainly aimed at remedying what American lawyers of the time perceived as the confusing, conflicting and at times anachronistic state of case law. It was '... to restate in systematic and accessible form the common law as it had been modified to suit American conditions, to settle questions upon which disputes had arisen and to introduce such reforms as might seem necessary to make the legal system harmonious and free from anachronism.' In short, it was a '... legislative summary of the experience [...] in reconciling the rules of the English common law to American conditions.'¹⁹

To some extent, the Court's role in the application and interpretation of the California Civil Code was similar to what Portalis envisaged: Neither the Code (or the

¹⁷ However, a very different view emerged in the nineteenth century. On the rise of exegetical positivism in France, see: Halpérin, *Histoire du droit privé français depuis 1804* (1996) Presses Universitaires de France: France at 45–81. More detailed accounts can be found in Bonnet, *L'Ecole de l'Exégèse en droit civil* (1924) Bibliothèque de l'histoire du droit et des institutions: France. Also see: Xifaras, *L'École de l'Exégèse était-elle historique?* in Kervégan & Mohnhaupt *Influences Et Réceptions Mutuelles du droit et de la Philosophie en France et en Allemagne* (2001) V. Klostermann: Germany at 177–209.

¹⁸ On Bentham's advocacy of legislation (including codification), see generally: Bentham, Schofield & Harris, *Legislator of the World: Writings on Codification, Law, and Education* (1998, Vol. 13) Oxford University Press: United States of America; Alfange Jr, 'Jeremy Bentham and the Codification of Law' (1969) 55 *Cornell Law Review* at 58.

¹⁹ Harrison, 'First Half-Century of the California Civil Code', (1921) 10 *California Law Review* 186 at 186–187.

legislator) nor the cases (or the judiciary) had decisive or exclusive authority.²⁰ According to Professor John Norton Pomeroy (1828–1885), the Code ‘... does not embody the whole law concerning private relations, rights and duties; it is incomplete, imperfect and partial.’ The judiciary would have to fill the gap. But Professor Pomeroy was keen to reduce the role of the Code and the legislator. He went on to assert as follows (*underline is mine*):²¹

except in the comparatively few instances where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter or abrogate the common-law rule concerning the subject-matter, the courts should avowedly adopt and follow without deviation the uniform principles of interpreting all the definitions, statements of doctrines and rules contained in the code *in complete conformity with the common-law definitions, doctrines and rules*, and as to all the subordinate effects resulting from this interpretation.

Accordingly, the Californian Courts often gave a very restrictive and narrow reading of the Code so as to give effect to the common law. It is hardly surprising that Professor Pomeroy was reputed as ‘the man who killed the California Civil Code’ through his influential view that the Code is not the sole source of law.²² In 1901, the California Civil Code itself began to recognise this point in an explicit manner by adding the following provision in § 5:

provisions of this code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments.

The role of the Civil Code in shaping the law of California was thus kept at a minimum. Meanwhile, in France, the *Code Civil*’s victory was near complete in the nineteenth century. The world envisaged by Portalis where the legislator and the judiciary shoulder together the task of shaping the Code through its application, was largely forgotten. By all appearances, the Code became the law, the sole source of civil law in France.²³

2.2.3 German Civil Code (1900)

More than 20 years of scholarly efforts were devoted to the preparation of the German Civil Code (from 1874 when the first drafting commission was set up until 1896 when the third draft was finally passed by the German Federal Assembly). While the French Civil Code was prepared by practitioners, the drafters of the German Civil Code were predominantly academics. The need to ‘unify’ the law was, by then,

²⁰ For a discussion of competing views in the nineteenth Century, see: Morris, ‘Codification and Right Answers’ (1999) 74 *Chicago-Kent Law Review* 355.

²¹ Harrison, above n 19 at 189–190. Professor Pomeroy’s paper was originally published as ‘The True Method of Interpreting the Civil Code’ in the *West Coast Reporter* (1884) and was later published as a pamphlet in Pomeroy, ‘The Civil Code in California’ (1985).

²² Grossman, ‘Codification and the California Mentality’ (1993) 45 *Hastings law Journal* at 619.

²³ See references in footnote 17 above.

no longer a central concern simply because no one doubted or challenged it. Legal ‘nationalism’ was all the rage.²⁴

Although the historical school’s opposition to codification emphasised the importance of custom, it was not *local* customs or *regional legal diversity* that they were advocating. When Savigny was arguing that the law must be an expression of the ‘common consciousness of the people (*Volksgeist*)’, the people (*Volk*) meant the German nation *as a whole*, rather than regional or local inhabitants.²⁵ Compared to Montesquieu, who was *opposed to* ‘the idea of legal uniformity’, Savigny was incomparably ‘nationalistic’.²⁶ That was the *Zeitgeist*.

Perhaps the most important aim of the drafters of the German Civil Code was to create a code that was theoretically coherent and sophisticated. The content and order of presentation of the French Civil Code must have appeared to German drafters as less than satisfactory. To learned professors of law, it may have even seemed a somewhat amateurish and hasty job of practitioners who (1) copied a number of passages from the widely acclaimed works of Robert Pothier on Roman law; (2) added many rules of Parisian customary law; and (3) presented them all in the order which was made familiar by the monumental works of Jean Domat, *Lois civiles dans leur ordre naturel*, which were published in 1689–1694. German law professors, who were drafting their Civil Code one century later, could surely do better!

The German Civil Code which was passed by the *Reichstag* in 1896 was a demonstration of sophisticated learning and the scholarly tendency to theorising. Abstract notions of right, obligation and juridical act occupy the central position. The intricate mechanism of cross-references between general parts and special parts is another well-known characteristic of the German Civil Code which faithfully reflected the academic achievements of German scholarship of the nineteenth century.

2.3 Codification in the Twenty-First Century in the Area of Contract Law

South Korea largely adopted the Japanese Civil Code, which was predominantly influenced by the First Draft (championed by B Windscheid and published in 1888) of the German Civil Code. The discussion in this paper is based on my understanding of the Korean experience of using a Civil Code which basically follows the German model.

²⁴ Nathans, *The Politics of Citizenship in Germany: Ethnicity, Utility and Nationalism* (2004) Berg Publishers: United Kingdom.

²⁵ Gale, ‘Very German Legal Science: Savigny and the Historical School’ (1982) 18 *Stanford Journal of International Law* at 123; Nathans, above n 24.

²⁶ Montesquieu, *Oeuvres complètes de Montesquieu* (1838) Firmin Didot Frères: France at 478: De l’esprit des lois, Liv. 29, Ch. 18 (*Lorsque les citoyens suivent les lois, qu’importe qu’ils suivent la même?* When citizens follow the laws, does it matter that they follow the same law?).

2.3.1 ‘Juridical Act’ and ‘Declaration of Intent’

Although the notions of ‘juridical act’ and ‘declaration of intent’ occupy a central position in the Korean Civil Code, these concepts and the legal scholarship surrounding them are less than helpful. Not only are they esoteric, but they produce a highly artificial portrayal of reality. Students who learn these concepts leave school with an unfortunate assumption that legal relationships are created *in a vacuum*, where each isolated individual operates as a free agent declaring his/her intent and the legal system provides the means of enforcing those ‘declarations’ of intent.

However, in reality, an individual’s ‘free will’ is never free from the matrix of economic, social, political and psychological forces which all exert influence in infinitely complex ways. Above all, an individual’s legal relationship is, in most cases, created or altered through negotiations and compromises. To describe or to analyse the outcome of a negotiation by resorting to a conceptual tool which is designed to explain a ‘single’ free agent’s expression of intent (*Willenserklärung*) is bound to be inadequate. Whether two people concluding a contract have a *single* intent or *two* identical/different instances of *Willenserklärung*, is obviously a rather pointless theoretical exercise. However, the notions of ‘declaration of intent’ and ‘juridical act’, invite such unfortunate and wasteful exercises of intellect which are unhelpful in resolving the dispute at hand.

The scholarly choice to adopt an abstract notion such as ‘juridical act’ (rather than a more concrete concept such as ‘contract’) was motivated partly because it was hoped that a highly abstract concept could perhaps have a broader, near universal scope of application. In reality, however, the concept of ‘juridical act’ has a surprisingly narrow scope of application or relevance.

Irrelevant to Tort

The concept of ‘juridical act’ has no role to play in an analysis of tortious liability. Not only is it irrelevant to tort, but it causes confusion because deliberately committed wrongful conduct may sometimes appear to take the form of a single ‘juridical act’ or multiple ‘juridical acts’ calculated to cause wrongful damage to the victim. The concept of ‘declaration of intent’ is even more confusing. For example, *deliberately* hitting someone is certainly a way of *declaring* one’s intent—albeit an evil intent—which creates a legal relationship of some sort ‘as intended’ by the aggressor. Often, actions speak louder than words. It is puzzling at best why such deliberate conduct must not be analysed as a unilateral ‘declaration of intent’ aimed at assuming legal liability.

The concept of ‘obligation’, on the other hand, has relevance in a much wider range of contexts. As famously explained by Gaius, ‘all obligations arise either from contract or from wrongful conduct or by virtue of law from various causes.’²⁷ If

²⁷ Dig.44.7.1pr. (Gaius 2 aur.) Obligationes aut ex contractu nascuntur aut ex maleficio aut proprio quodam iure ex variis causarum figuris.

usefulness of a legal concept is to be judged by its versatility, ‘obligation’ is more useful than ‘juridical act’ because the concept of ‘obligation’ retains relevance not only in contract, but also in tort.

Inapplicable to Termination or Rescission of a Contract

Even for a contract, the usefulness of the concept of ‘juridical act’ is far more limited than one would suppose. Apart from contract formation, the concept of ‘juridical act’ creates more difficulties than it can solve even in a contractual context. Jurists who are familiar with the concept of ‘juridical act’ would, without much critical reflection, regard a party’s *unilateral* measure such as the termination or rescission of a contract as a ‘juridical act’. Under the Korean Civil Code, a unilateral measure to end a contractual bond would *have to* be analysed as a ‘juridical act’. Practitioners as well as law students seem to think that it is perhaps an advantage of the concept of ‘juridical act’ that it can be utilised to explain the conclusion of a contract as well as the severing of contractual bonds. They might be thinking that using one and the same concept to explain diverse situations would enhance the systemic coherence of legal analysis.

In my view, however, an attempt to explain the creation of a contractual relationship and the severing of a contractual relationship with one and the same concept (‘juridical act’) is bound to fail. If there were valid grounds to terminate or rescind a contract *and* if a party notified termination or rescission to the other party, would it serve any useful purpose to allow ‘undoing’ of the termination/rescission on the ground that it was induced by deceptive conduct, mistake or duress? Would it not be better for the courts to decide whether to allow or deny undoing of the termination/rescission from an entirely different perspective? Rather than focusing on whether the intent (to terminate or to rescind a contract) was ‘freely formed’, shouldn’t the courts instead scrutinise the consequences of undoing or affirming the termination or rescission of the contract?

Set Off

The concept of ‘set off’ is also analysed as a ‘juridical act’ under the Korean Civil Code. However, little can be gained by presenting it as a ‘juridical act’. Set off serves as a means of *discharging* an obligation, rather than creating an obligation. If the obligation (to be extinguished by set off) turns out to be invalid, then the validity of the set-off need not *separately* be examined. It will simply have no effect.

If, on the other hand, the obligation was valid and due, is it wise to ‘undo’ the set off simply because mistake, duress or deception affected the decision to set off? Here again, it would be better for the courts to pay attention to the *consequences* of undoing or affirming the set off, rather than scrutinising the process through which the decision to set off was arrived at. If an obligation was valid and due, discharging it by setting it off with an unsecured claim which is also valid and due can rarely

be detrimental to the party resorting to set off even if the decision to set off was induced by mistake, duress or deception. There is little point in undoing it because the party's obligation would have to be discharged anyway and the party's unsecured claim would not thereby become any easier to enforce.

On the other hand, one may pose an academic question as to whether the party ("A") who discharged an unsecured obligation by setting it off with a secured claim against the other party ("B") should be allowed to undo the decision to set off if the decision was induced by mistake, duress or deception. In practice, however, it would be a pointless question because even if "A" was allowed to undo the decision to set off, "B" can set off.

Ratification, Testament

Ratification of a contract tainted with a lack of capacity or other vitiating circumstances (such as mistake, duress or deception) is also classified as a unilateral 'juridical act' under the Korean Civil Code. However, the Korean Civil Code recognises that it is inappropriate to treat ratification in the same manner as other kinds of juridical acts (such as contracts). Separate and additional provisions (Arts. 139, 143–145) are needed to deal with the validity of ratification. For example, Article 144(1) provides that "ratification shall not be valid unless it is done when the party is no longer affected by the grounds giving rise to the right to cancel the juridical act". If a party to a contract is still operating under the mistake, duress, deception or lack of capacity (they are the 'grounds giving rise to the right to cancel the juridical act'), the ratification by such a party is without effect in the first place. Assuming, however, that a party was not under any mistake, duress or deception when it concluded a contract while under age, the party would not be allowed to 'undo' ratification if it was done after the party became full age even if the ratification (not the contract) was induced by deception. Article 143(1), in particular, stipulates that "once a juridical act is ratified, it may not be cancelled". This simply goes to show that the concept of 'juridical act' cannot be applied to ratification.

One might hold an optimistic belief that choosing a highly abstract notion such as 'juridical act' would have the advantage of coherently covering a wider ground with one all encompassing concept. In truth, however, the meaningful coverage of the concept of 'juridical act' can hardly extend beyond contract formation. Testament is another example where the notions of 'juridical act' or 'declaration of intent' cannot usefully be applied.

In short, the concept of 'juridical act' can only be useful when it is applied to an analysis of contract formation. But then, as indicated earlier, the notion of 'declaration of intent' poses an embarrassing and useless theoretical conundrum: does a contract contain a single declaration of intent or two identical/different instances of declaration of intent? Furthermore, in concluding a contract, the parties usually exchange a great deal of correspondence ('battle of forms'). Among those numerous 'declarations of intent', which one(s) will ultimately be chosen as 'the' declaration of intent (which constitutes the juridical act) is a matter entirely left to the Court's exercise of interpretative power. There is nothing 'scientific' about it.

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