

**PRACTICAL GLOBAL
CRIMINAL PROCEDURE**

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PRACTICAL GLOBAL CRIMINAL PROCEDURE

UNITED STATES, ARGENTINA,
AND THE NETHERLANDS

Aya Gruber

Vicente de Palacios

Piet Hein van Kempen

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To Misa Nui Fisher-Gruber

To Mercedes, Vicente, Lucila, and Elena

To Splinter, Belle, and Pascale

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SERIES EDITOR'S PREFACE

The Contextual Approach Series (CAS) had its genesis at the Florida International University College of Law, South Florida's public law school, where I taught as a member of the founding faculty from 2002–06. The FIU College of Law is one of the most international of all U.S. law schools, drawing its students from many diverse cultures and nations. Uniquely, the FIU College of Law curriculum requires that all courses, including domestic law courses, include a comparative and/or international law component. Comparative law is the study of similarities and differences in the law and legal traditions of different nations. International law is the “law of nations.” It covers the entire field of both public and private transnational relationships.

To satisfy the comparative/international law requirement in my Torts and Products Liability courses, I searched long and hard for manageable, self-contained materials comparing the U.S. common law tort litigation system with tort systems of other countries. While the search turned up a large body of outstanding comparative law scholarship, only a sliver of it addressed tort law and litigation. A wider discovery was that most comparative law literature is historical, theoretical, or thematic in nature. Not many materials attempt to explain how law “really works” in other countries as compared to the U.S. common law system.

One obvious explanation for this gap is the sheer enormity of the task. To say that comparing legal systems is difficult is euphemistic. Think how impossible it would be, for example, to “compare the law” of New York and Texas, then consider the proportions of comparing different legal systems of different countries. As a byproduct of this obstacle, comparative law coverage tends to be either very broad or very narrow. Survey-type materials offer wide geographic and subject matter coverage, but do not convey any sense of how law really functions in other countries. Analyses of specific topics give much greater depth, but the subject matter often has only narrow application.

Like many faculty members at the FIU College of Law, I tried both the macro and micro approaches to teaching comparative/international law in Torts and Products Liability, with underwhelming success. In Torts, I distrib-

uted a nifty chart attempting to compare common law and civil law systems in six pages, assigned a lengthy law review article about the Alien Tort Claims Act, and invited guest speakers such as the Chief Justice of the Costa Rica Supreme Court and a distinguished lawyer from Argentina. I made my Products Liability students do presentations about Latin American products liability law. All of these endeavors were interesting, but my students weren't learning much about comparative or international law. There had to be a balance between "Today we're going to compare the law of the entire world," and "Today we're going to explore interpretations of Article 1(c)(ii) of the Convention on International Liability for Damage Caused by Space Objects." Feedback from students at FIU confirmed that my difficulties in trying to integrate comparative and international law were not unique.

It occurred to me that one way to strike a breadth-depth equilibrium and also help bring comparative law to life would be to *contextualize* it by applying the substantive and procedural law of different nations to the same set of case facts. A case-based approach offers unique advantages. Foremost, it gives students a contextual foundation to which they can attach what they're learning. Legal principles mean little in isolation from facts, which is a principal reason U.S. law students learn most subject matter by the "case method." Applying law to facts promotes analysis that is not only more focused, precise, and accurate, but more accessible and retainable. It is one thing to recite a general rule about, for example, the burden of proof in a given legal system, and quite another to unweave the intricacies of how proof burdens apply to a concrete set of facts.

Applying the law of different nations to a consistent fact pattern also serves to highlight both similarities and differences more dramatically than a purely expository approach. A case approach would not intuitively occur to lawyers in other legal systems, such as those following the civil law tradition, where lawyers are trained to think in terms of codes rather than cases, but a "problem approach"—essentially the same thing—probably would. Regardless of the system, lawyers around the world are engaged in the same task: solving legal problems, many of them universal in nature.

Thus, I came up with the idea for a series of comparative law books in different subject areas based on sets of problem facts designed to raise fundamental issues of law and policy at the heart of each respective subject—issues that all peoples in all nations and legal systems must face. Each book in the CAS compares how these issues would be addressed by the law of the U.S. and two other nations representing different legal systems and different regions of the world. To enhance the "on the ground" accuracy and perspective of the

books, each series entry relies on “inside” experts in the particular subject area from each of the three countries rather than on U.S.-trained comparative law experts. “As every comparatist knows,” writes Mathias Reimann, “it is difficult, and sometimes outright impossible, for an outsider fully to understand the law of a foreign country.” Mathias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard*, 51 AM. J. COMP. L. 751, 755 (2003).

The first entry in the CAS was *Practical Global Tort Litigation: U.S., Germany, and Argentina* (2007), which I co-authored with Adem Koyuncu (Cologne, Germany) and Luis Sprovieri (Buenos Aires, Argentina). Currently, books are underway in a variety of subject areas involving many different countries.

Accessibility is a guiding principle of the CAS. The goal is to craft texts accessible to people without a prior background or expertise in comparative law, and which can be understood by readers lacking knowledge of any of the three legal systems discussed, including the U.S. CAS books are designed for any reader, in or outside the U.S., interested in learning about how the legal systems of different nations would attack, both procedurally and substantively, the same set of universal legal issues in a subject area as raised by the problem facts of the particular book. The books are structured to provide a true side-by-side comparison of the law, as applied, in the three countries.

The primary utilities of CAS books in law school are as supplemental texts in domestic law courses for professors who want to expose their students to a comparative legal perspective, or as primary or supplemental texts in comparative law courses or advanced courses in the particular subject.

The CAS is offered as a contribution to what should become a growing body of “contextual comparative law.”

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PRACTICAL GLOBAL CRIMINAL PROCEDURE EDITOR'S PREFACE

“Why do we need to know foreign law?” I often hear from my students when they notice the comparative elements in their Criminal Law and Criminal Procedure syllabi. For years, I taught at a law school that required all basic domestic law courses to incorporate an international or comparative law component. So why do we need to know foreign law? Comparative forays allow us to look at our domestic laws from multiple historical, sociological, and political perspectives. In addition, understanding the successes and failures of foreign systems may prove immeasurably beneficial in implementing domestic law and policy. Especially in an area like criminal procedure, where law stands at the crossroads of policy and practice, it is important to understand a multitude of approaches to enforcing the criminal statutes within a procedurally ordered system. To bring the essential comparative perspectives to this project, I was incredibly fortunate to find two outstanding co-authors, Vicente de Palacios in Buenos Aires, Argentina and Dr. Piet Hein van Kempen in Nijmegen, the Netherlands. They are not only preeminent lawyers and scholars, but they are also particular experts in the area of criminal procedure (see “About the Authors” at the end of the book).

This book follows what has become the general framework for all the books in the Contextual Approach Series. Unlike a classic “casebook,” which is typically a collection of appellate decisions with limited commentary, this book adopts a “problem approach” to the study of criminal procedure. This is not only advantageous from a practical perspective, but it is also the best way to engage in comparisons with Argentine and Dutch law, which are not as reliant on common law cases. While criminal procedure encompasses much more than just police procedure, this particular book concentrates on the subjects generally covered by a basic American criminal procedure course—investiga-

tions, seizures, searches, interrogations, and identifications. Accordingly, there will be only very limited mention of substantive criminal law and post-investigation trial procedures.

After a general introduction to all three countries' demographics, legal systems in general, and criminal systems in particular, the book proceeds to the case of a fictional criminal defendant, "Nicolas ('Nico') Jansen." Nico is a regular kid who gets caught up in quite a wild and unfortunate series of events involving a homicide and culminating in his arrest and prosecution. The set of facts surrounding Nico's case will primarily regard his interactions with police and will not proceed farther than the inception of his criminal case. After the facts, the book will discuss the legal implications of the various police actors' treatment of Nico, under the law of each country. For ease of analysis, we will assume that Nico's case alternatively takes place in Miami, Florida, U.S.A.; Buenos Aires, Argentina; and The Hague, the Netherlands. Our emphasis is on clarity so that the reader can see in a precise manner how a particular criminal procedural issue is resolved in each of the countries. Because this book is not about the mechanics of court proceedings, it does not proceed in chronological order, that is, it does not trace the case from inception to conviction. Rather, the book is organized around the different types of police-citizen interactions presented. This book is intended to be a general "primer" on criminal procedure in the United States, Argentina, and the Netherlands and will explore the following topics:

- Introduction to the Criminal Process (Chapters 1–3)
- Nico's Case (Chapter 4)
- Seizures (Chapters 5–6)
- Searches (Chapters 7–9)
- Interrogations (Chapters 10–11)
- Identifications (Chapter 12)
- Remedies for Procedural Violations (Chapter 13)

This book is neither a comprehensive collection of criminal procedural laws of the United States, Argentina, and the Netherlands, nor a dissertation on the comparative social realities of the countries. Because of the "problem method" nature of the book, there will be less of an emphasis on comparing the historical, social, and political antecedents to the procedural regimes in each country. Although the issue of police power and enforcement is undeniably rooted in a myriad of interesting and complex social phenomena, this book will only be able to scratch the surface of such study because of its primary emphasis on working out fact-specific issues. In addition, an in-depth analy-

sis of just one of the countries' laws regarding any of the topics would likely fill up a whole shelf in the library. The United States itself has fifty-one distinct legal systems (more if one counts Puerto Rico and other dependent territories), each with their own set of criminal procedural traditions. Similarly, a multitude of legal systems operate in Argentina, and the Netherlands, although it has one primary system of criminal law, incorporates international legal systems. While the book strives to provide a comprehensive overview of the law regarding each issue, a reader wishing for a more comprehensive treatment of the areas discussed or of the philosophical, social, historical, or political issues associated with them should consult texts on those particular topics, many of which are referenced in the bibliography.

For ease of reading and to be consistent with other books in the series, the book generally separates the discussion of each country's approach to the topic. The respective approaches are set forth under separate subheadings, starting with the United States, followed by Argentina and the Netherlands. There is no particular reason for this order, and it is certainly not meant to signify a preference for one system over another. Indeed, while recognizing the impossibility of true neutrality in any text, this book does not seek to be a persuasive exposition in favor or against any particular law or system. The main aim of the book is to be an informative resource for students, academics, and practitioners for learning the practical mechanics of criminal procedure litigation in each country and to show that criminal procedural systems can be set up in different ways.

Below is some general information about the book.

Abbreviations

The sources listed below are often abbreviated in the text. However, occasionally full titles will be used to refresh the reader's memory regarding the legal source.

U.S. Federal Rules of Criminal Procedure—FRCP
 Argentine National Criminal Code—NCC
 Argentine National Criminal Procedural Code—NCPC
 Dutch Criminal Code—CC
 Dutch Code of Criminal Procedure—CCP
 European Convention on Human Rights—European Convention
 or ECHR

European Court of Human Rights—European Court or ECtHR

Translations

Quotations from Argentine and Dutch text were translated by authors de Palacios and van Kempen. The translations were double checked by a translator where feasible. The authors further edited the translations to make them easily understandable to an American English-speaking audience.

Summary Charts

After the introductory chapters and beginning with Chapter 5 (Introduction to Seizure Law), each chapter will contain a summary comparison chart at the end. These charts will highlight the key similarities and differences between each country's criminal procedural laws on the topic of the chapter. The charts are intended to serve just as quick comparative reference. Thus, they will only contain brief answers to discrete questions about the foregoing chapter.

Case Citation Format

The United States

In the United States, all case citations follow the same basic format:

- The name of the parties: Party v. Party,
- The volume number followed by an abbreviation of the reporter: Volume Reporter
- The first page of the case and sometimes followed by the page of a specific proposition in the case: First page, Specific page
- The abbreviation of the court followed by the year of the decision in parentheses: (Court Year)

An example of the basic case format is: *United States v. Jaquez*, 421 F.3d 338, 340 (5th Cir. 2005). In both the federal and state systems there are several reporters for each court. In this book, we use the United States reporter, abbreviated as U.S., for all federal Supreme Court cases. Because there is only one Supreme Court, there is no need to designate the court next to the date (i.e. *Terry v. Ohio*, 392 U.S. 1 (1968)). For federal appellate cases, we refer to the

federal reporter or its second or third addition, abbreviated as F, F.2d, or F.3d respectively. For federal trial court cases, the reporter is the federal supplement or its second edition, abbreviated as F. Supp. or F. Supp. 2d. There are also a variety of state reporters. We use the main regional reporters: Atlantic, Southern, Southwestern, Southeastern, Northeastern, Northwestern, and Pacific, and their second editions, abbreviated as A., A.2d, So., So.2d, S.W., S.W.2d, S.E., S.E.2d, N.E., N.E.2d, N.W., N.W.2d, P., and P.2d. A typical state appellate case would be cited as follows: *State v. Reyes*, 680 So.2d 1092 (Fla. Dist. Ct. App. 1996). Note that some state case cites refer to state reporters. This is likely because they were not reported in the regional reporters.

Argentina

In Argentina, there is no uniform method of citing cases, even those rendered by the same court. As a consequence, the way both Argentine Supreme Court and lower court decisions are cited varies widely in the legal literature. For the purposes of this book, we patterned citation format roughly on the format prescribed by *The Bluebook: A Uniform System of Citation* (19th ed. 2010). While the format is certainly longer than that of the United States and the Netherlands, we thought it best to err on the side of more information. The basic format for citations to Argentine case law is:

- The name of the deciding court followed by the abbreviation in brackets: Name of Court [abbreviation],
- The full date of the decision: i.e. 31/1/2011,
- The name of one or more of the parties and sometimes a reference to the type of case, in quotations: i.e. “Vicente S. Ventura y otro s/ contrabando,”
- The full name of the reporter followed by the abbreviation (if one exists) in brackets: Name of Reporter [abbreviation]
- The year of publication, volume in which the decision appears, and page number, in parentheses and divided by dashes: (year-volume-page)

For example, Corte Suprema de Justicia de la Nación [CSJN], 23/12/2004, “Edgardo Oscar Quiroga s/causa no. 4302,” Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2004-327-5863). Nearly all the Supreme Court (*Corte Suprema de Justicia de la Nación*) cases in the book follow this format. In addition, most of the Supreme Court cases used in the book are reported in the *Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación* reporter, abbreviated as Fallos, although some of them are reported in *Jurisprudencia Argentina*, abbreviated as JA. Fallos, which pub-

lishes select Supreme Court cases, is the only official governmental reporter, but there are three main private reporters that publish both Supreme Court and lower cases in Argentina: *La Ley* (LL), *El Derecho*, and *Jurisprudencia Argentina* (JA) (Technically, *Abeledo Perrot* [AP] is the continuing company name for *Jurisprudencia Argentina* and LexisNexis. However, we continue to cite to *Jurisprudencia Argentina* and Lexis where possible). These three private reporters only publish cases decided in large judicial districts like Buenos Aires, Mendoza, Rosario, Córdoba, and La Plata. Finding reports of cases decided in other parts of the country can be difficult even for Argentine lawyers. Some Argentine case law that is not published in hard copy may be accessed through online databases and reporters, such as *La Ley* online, *ElDial*, and Lexis. Cases that cannot be accessed through written or online reporters may sometimes be found on government and court websites. For example, the website of the Supreme Court, www.csjn.gov.ar, allows one to search for select Supreme Court cases. The official website of the federal judicial branch, www.pjn.gov.ar, also provides a search engine for finding federal cases.

In addition to Supreme Court cases, this book cites to cases from the following lower courts: *Cámara Nacional de Casación Penal* (National Criminal Cassation Court), abbreviated as CNCP; *Cámara Nacional en lo Criminal y Correccional Federal* (Federal Criminal Court of Appeals), abbreviated as CCCFed; *Cámara Nacional en lo Criminal y Correccional* (National Criminal Court of Appeals), abbreviated as CCC; *Cámara de Apelaciones en lo Criminal Federal de San Martín* (Federal Criminal Court of Appeals of San Martín), abbreviated as CFed San Martín; *Cámara Federal de Apelaciones de La Plata* (Federal Criminal Court of Appeal of La Plata), abbreviated as CCCFed La Plata; and *Cámara Nacional de Apelaciones en lo Penal Económico* (National Court of Appeals for Economic Crimes), abbreviated as CNPE. Because of the lack of availability of information on some of the lower court cases and the diversity in reporting methods, the citation format we used for lower court cases is somewhat variable. The basic citation format for lower court cases is:

- The name of the deciding court followed by the abbreviation in brackets: Name of Court [abbreviation],
- Court chamber (where available): i.e. Sala IV,
- The full date of the decision: i.e. 31/1/2011,
- The name of one or more of the parties and sometimes a reference to the type of case, in quotations: i.e. “Toranzo, Juan Sabino s/nulidad,”

- The case number, where available and useful as a substitute for or supplement to a reporter citation: i.e. caso no. 34.225,
- Where available, the full name of the written reporter followed by the abbreviation (if one exists) in brackets *or* the name of the online reporter or database: Name of Reporter [abbreviation] *or* Online Reporter
- For written reporters, the year of publication, volume in which the decision appears, and page number, in parentheses and divided by dashes *or* for online reporters and other databases, the case's database identifiers in parentheses: i.e. (1998-B-353) *or* (AR/JUR/3909/1997).

As is evident from the above, lower court citations may contain substantially the same information as Supreme Court cases or less information, depending on what was available. An example of a lower court citation that mirrors a Supreme Court citation is: Cámara Nacional en lo Criminal y Correccional [CCC], Sala I, 18/5/2005, "Calleja, Marta," Jurisprudencia Argentina [JA] (2005-IV-707). A case from that same court may contain less information, for example, Cámara Nacional en lo Criminal y Correccional [CCC], Sala I, 27/6/2005, "Trucco," caso no. 26.363. An example of a case reported in an online reporter is: Cámara Nacional de Casación Penal [CNCP], Sala I, 4/4/2003, "Barrios," La Ley Online (AR/JUR/4340/2003).

The Netherlands

In the Netherlands, the format for case citations varies depending on the court that renders the decision. The basic format for citations to the European Court of Human Rights is:

- The abbreviation for the European Court of Human rights: ECtHR,
- The full date of the decision: i.e. 1 January 2011,
- The name of the parties italicized: *Party v. State Party*
- The application number of the case: Appl. Number
- The number of the first paragraph of the case: para. number

For example, ECtHR, 25 May 1993, *Kokkinakis v. Greece*, Appl. 14307/88, para. 52. All cases of the European Court are freely available through the "HUDOC database" (<http://www.echr.coe.int/echr/en/hudoc/>). In the Netherlands, cases are mainly published in one of two journals: *Nederlandse Jurisprudentie* ("Dutch Jurisprudence"), abbreviated as "NJ," which is a case law reporter, and *Landelijk Jurisprudentie Nummer* ("National Jurisprudence Number") abbreviated

as "LJN," which is a free online case law database, available at <http://www.rechtspraak.nl>.

Aside from European court cases, in this book, we primarily cite to Dutch Supreme Court cases. In case citations, the Supreme Court (*Hoge Raad*) is abbreviated as "HR." There are also occasional citations to decisions of the Appeal Court of Hertogenbosch. When these cases are cited, we use the full name of the court. The basic format for citations to cases in the Netherlands is:

- The name deciding court (abbreviated if it is the Supreme Court): i.e. HR,
- The full date of the decision: i.e. 1 January 2011,
- The abbreviated reporter italicized: *NJ* or *LJN*
- The year of the reporter volume followed by the number of the decision for NJ cases: Year, Number *or*
- The database number for LJN decisions.

An example of a citation to a case in *Nederlandse Jurisprudentie* is HR, 17 May 1944, *NJ* 1944, 553. An example of a citation to a case in *Landelijk Jurisprudentie Nummer* is HR, 25 September 2001, *LJN* ZD1858. The basic format for citations of reports of the National Ombudsman, which is not a court, is:

- National Ombudsman, report
- Year of the report/number of the report

For example, National Ombudsman, report 2002/215. Reports of the National Ombudsman are freely available through an online database (<http://www.ombudsman.nl>). Judgments and decisions of Dutch Courts in criminal cases and reports of the National Ombudsman do not usually have public case names. However, occasionally, more famous cases will be given an informal name, relating to some notable aspect of the case. For example, *Plastic Shopping Bag*, HR, 29 September 1981, *NJ* 1982, 258. Citations to such cases will include the informal name.

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The United States

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Argentina

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