CURRENT PROBLEMS
OF THE PENAL LAW
AND CRIMINOLOGY

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DES STRAFRECHTS
UND DER KRIMINOLOGIE

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The limits of the law and the future of compliance

ABSTRACT

Compliance in an extremely general way means conforming with stated requirements, rules or standards. The core of the question is how we have to comply and to what extent. Should we obey in a “blind way” to (statutory) law or should we blur the lines between experience and prudence, legality and reason? After a description of the principal aspects of compliance (looking at the model of Bribery Act) this paper tries to outline the concrete difficulties of complying with compliance. Compliance is a general phenomenon not only or prevalently confined to bribery, corruption, fraud to public administration and institution, etc., but diffused in all fields of modern human activities so that it is interesting also to the small firm and even each professional or a “ordinary man” during his “fight” to comply with the “jungle” of rules. Too many complex rules mean growing and growing risks of involuntary breach and/or incurring in liability. This means higher cost (of transactions): in a simple cost and benefit analysis no one will respect a law if it is more convenient to break it. The collaborative and mediative approach and dialogue between Law and Institutions and private subjects seem to be better than the traditional punitive approach. This means that the legislator should understand that sometimes it is better to mediate a concrete solution instead of insisting on a difficult application of useless criminal or strict rules.

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2 This paper reproduces, with some improvements, the presentation given at the XXXIII Cambridge International Symposium on Economic Crimes 2015.
1. INTRODUCTION

As most part of my generation I rarely went to the cinema. Of course I am very fond of (action) pictures but framed between television and internet, it is so easy to find an alternative, and being lazy I go out only if the movie is interesting to my wife. Anyway some time ago one of the movies chosen by my wife grabbed my attention. First of all by the title “Compliance” and, secondly for the interesting plot-line even from a juridical point of view. The story is simple in appearance: Sandra is a middle-aged manager at a fast-food restaurant; Becky is a teenaged counter girl who really needs the job. One stressful day (too many customers), a self declared police officer calls, accusing Becky of stealing money from a customer’s purse, which she vehemently denies. Sandra, overwhelmed by her managerial responsibilities, complies with the officer’s orders to detain Becky. This choice begins a nightmare that tragically “blurs the lines between experience and prudence, legality and reason”. The movie is based on a real story and is about how unreasonable obedience to authority may sometimes be dangerous.

In my opinion this is just a starting point for a general discussion on the respect of the rules and the risk that a blind and narrow submission to rules (sectorial and too much self-confident) may create more troubles than the ones it would eradicate.

This is, I believe, the case of “Compliance” that today is one of the most complex aspects of law, so much complex to be sometimes out of control.

Compliance is also a global phenomenon: the majority of countries had some rules on compliance and some “book of good intentions” is almost ongoing by the legislator and ready for any occasion.

But could we define compliance in a common way? Could we have a common standard of compliance?

2. THE MEANING OF THE TERM “COMPLIANCE”

Even if I am not a “digital native” I understand the powerful power of the Web and its unbeatable mass of mass information and also the fascinating and “fatal attraction” for common people. Like the majority of my students I searched the web for the word “compliance” getting back the reference to 360 000 000 web pages.

If you refine the research on “regulatory compliance” the feedback is of “only” 160 000 000 web pages while “legal compliance” score 330 000 000 web pages, “risks assessment” 170 000 000 web pages and “governance” 462 000 000 web pages.

Of course, it is almost impossible to extract from this mass of information a unique meaning of compliance even if in an extremely general way compliance means conforming with stated requirements, rules or standards.
At an organizational level, it is accomplished through processes of management which ascertain the appropriate requirements (as defined in laws, regulations, contracts, strategies, policies, best practices, etc.), evaluate the state of compliance, assess the risks and potential costs of non-compliance against the probable expenses to achieve compliance, and therefore select, fund and initiate any corrective actions that seem to be necessary.

However, in my opinion, this is obviously a general and basic characteristic of legal rules and of legal governance: according to the Italian legal system— but this is absolutely the same in each civil law system—we all should obey and comply with the legal rules (ignorantia legis non excusat).

Each legislator, unsurprisingly, wants his rules to be complied with and no legislator (usually) thinks they are useless.

Legal compliance is the process to guarantee that an organization follows the laws, regulations, standards and business rules. The definition of legal compliance includes understanding and adhering to ethical codes within entire professions or activities so that it is, as I’ll say later, almost impossible to act or work without the risk of making something wrong or “incorrect”.

To be compliant with the law the “complier” should manage its policies so that those will be: i) consistent with the law, and ii) complete with respect to the law.

The role of legal compliance has also been expanded to include self-monitoring the non-governed behavior with industries and corporations that could lead to workplace indiscretions: “It is important to keep in mind that if a strong legal governance component is in place, risk can be accurately assessed and the monitoring of legal compliance be carried out efficiently”.

In conclusion we can say that compliance has two meanings: 1) the everyday round to comply with a set of rules and 2) the procedures adopted to prove that an organization is compliant with a set of rules when the failure in adopting these protocols is blameworthy. The point is that looking for the rules on compliance and their reconstruction it seems that they have been shifting progressively to the meaning of a generic but strict compliance with the rules.

3. LOOKING FOR A “COMMON STANDARD” OF COMPLIANCE

We may be inspired by the guidance rules suggested within the English Bribery Act 2010 (a good example for the general and speculative civil law systems too).

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This act and the guidance rules are clear and precise and, *prima facie*, it seems to be a very helpful tool to avoid the risks of non-complying with the rules.

Thus for efficient compliance we need to follow at least these topics:

1. Proportionate procedures.
2. Involvement of the organization’s top management.
4. Due diligence of existing or prospective associated persons.
5. Communication of the organization’s policies and procedures, and training in their application.
6. Monitoring, review and evaluation of misconduct and/or bribery prevention procedures.

More topics to follow are:

7. Provision of gifts, hospitality and promotional expenditures; charitable and political donations; or demands for facilitation payments.
8. Direct and indirect employment, including recruitment, terms and conditions, disciplinary actions and remuneration.
9. Governance of business relationships with all other associated persons including pre and post contractual agreements.
10. Financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditures.
11. Transparency of transactions and disclosure of information.
12. Decision making, such as delegation of authority procedures, separation of functions and avoidance of conflicts of interest.
13. Enforcement, detailing discipline processes and sanctions for breaches of the organisation’s compliance (e.g. anti-bribery) rules.
14. Reporting of irregular or illegal procedures including “speak up” or “whistle blowing”.
15. Detailed process of implementing (negligent or intentional) misconduct prevention procedures, for example, how policy of the given organisation will be applied to individual projects and to different parts of the organisation.

Let me present a brief description, according to the Bribery Act, of the meaning and content of each major topic.

As to the proportionate procedures, the Bribery Act suggest that the organisation’s procedures to prevent even involuntary violation of the law by persons associated with it, should be proportionate to the risks it faces and to the nature, scale and complexity of the organisation’s activities; they should be also clear, practical, accessible, effectively implemented and enforced. This suggestion may be accurate but how it is really possible to follow and what are the costs of the implementation of those procedures, this is not only unclear but also unforeseen.

As to the involvement of top management these are the ones who are in the best position to foster a culture of integrity where violation of legal rules and/or bribery is unacceptable. The purpose of this principle is to encourage
their engagement in the determination of misconduct and/or bribery prevention procedures.

Whatever the size, structure or market of an organization, the commitment of top management to misconduct and/or bribery prevention is likely to include communication of the organization’s anti-misconduct attitude, and an appropriate degree of involvement in developing non-compliance prevention procedures. In my opinion notwithstanding the clear word of the law this is a very weak point because it is self-evident that there is a great difference between the organisational structure of big enterprises such as Fiat Chrysler Automobiles and small companies such as local greengrocer’s shops.

As to risk assessment, the purpose of this topic is to promote the adoption of risk assessment procedures that are proportionate to the organisation’s size and structure and to the nature, scale and location of its activities. The organization assesses the nature and extent of its exposure to potential external and internal risks of infringement of the rules on its behalf by persons associated with it. The assessment should be periodic, informed and documented.

Risk Assessment procedures that allow the business organisation to accurately recognize and highlight the risks it faces will, whatsoever its dimension, activities, customers or markets, usually reflect a few basic characteristics. These are:

1. Oversight of the risk assessment by top management.
2. Appropriate resourcing – this should reflect the scale of the organisation’s business and the need to identify and prioritise all relevant risks.
3. Identification of the internal and external information sources that will enable risk to be assessed and reviewed.
4. Due diligence enquiries.
5. Accurate and appropriate documentation of the risk assessment and its conclusions.

Again it is clear that there is a difference depending on the size and market of the company: I mean, for instance, that there is an obvious difference if I am a local market small firm or I am a large scale producer operating in the international market. And of course the costs of risk assessment are different even according to the size and the target market of the firm.

During the assessment phase commonly encountered risks are:

i) Country Risk; ii) Sectoral Risk; iii) Transaction Risk; iv) Business Opportunity Risk; v) Business Partnership Risk; and some internal factors as: deficiencies in employee training, skills and knowledge; bonus culture that rewards excessive risk taking; lack of clear financial controls; lack of a clear message from the top management (if any – it seems that the law was thought for the big enterprises but not for the small ones that are, in the most Countries of Europe and even in England, the great majority).

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Country risk is very important but mostly underestimated by small business: I think, for instance, about the actual situation in Sicily where a certain number of small firms thought to “delocalize” part of their activities in Northern African Countries just before the blowing of the Arab Spring or the fall of the Libyan regime: the entrepreneurs, generally speaking in this case think that all is simple and that a personal knowledge and the advice of a friend is the right key to start an activity, saving money for the consultant and the lawyer; they don’t think about the need of a good (but costly) expertise over the risks connected with (foreign) investments.

In reality operating on external markets (but sometimes also operating on the internal market) requires being aware at least of the perceived high levels of corruption, absence of effectively implemented anti-bribery legislation, failure of the foreign government, media, local business community and civil society to effectively promote transparent procurement and investment policies and in some cases a somehow diffused idea that complying with the law may be useless and/or not convenient.

Of course and again the prevention of this risk is a cost that should be calculated and maybe decisive according to the dimension of the firm (I mean that a small business can not face large costs that instead a larger company can do).

Sectorial risk: naturally some areas are of higher risk than others. High risk sectors include the extractive and power industries and the large scale infrastructure sector, as e.g. in Italy, especially the construction companies, transport or motorway building and maintenance contractors and generally all the “mixed” activities that involve a private enterprise functioning in accordance with the public administration. In Italy, until recently there has been a great risk of corruption and no-compliance and a new law was enacted to fight the phenomenon: according to Art. 319-quater of Criminal Code titled “Indebita induzione a dare o promettere utilità” i.e. “Undue pressure to give or to do a profit”, the public officer or who is appointed of a public service, abusing of his position or his powers, induces someone to give or to promise illegally money or other kind of vantage, to him or to a third party, may be jailed from one up to three years” (of course it is the same on the contrary i.e. if a person corrupts a public officer to act illegally with the promise or the give of money or other utilities). Notwithstanding the appearance of this rule, as the others in the area of compliance, if “strictly” applied may be a cure worse than the disease. It is difficult to understand what exactly the term “other utilities” means and it is really difficult to separate the normal discretionary activity of a public administrator from “undue influence or pressure”; furthermore what kind of “undue influence” there is? If I am a public administrator and I have a close friend who is the CEO of an excellent construction company and if I have just chosen as contractor for a major public contract my friend’s company which offers the best price and the best warranties and the best work, I may be guilty for “undue influence” if I spent my holidays on board of the yacht

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8 Act 6 Nov 2012, No. 190 so called “anticorruption statute”.
of my friend? And if in this case I, in order to avoid any "judiciary problem", prefer choosing a different company that is worse and less affordable than that of my friend, I am acting in the best interest of people and of the State administration as should be the rule? A concrete risk is self-evident here.

Transaction risk: as for the sectorial risks it is clear that certain types of transactions give rise to higher risks, for example, charitable or political contributions, licenses and permits, and transactions relating to public procurement. Again it depends on the situation: I understand that the rules against bribery or against corruption are applicable to all and for all but there is a difference between large businesses which give "in black" a great sum of money to support the electoral campaign for a candidate to be elected as Mayor of Rome and the ticket for the soccer match in a third division or a bottle of (local) wine offered as a gift by a grocer to the candidate as major of the very small parish of "Castlerock".

Business Opportunity risk: such risks might arise in high value projects or with projects involving many contractors or intermediaries; or with projects which are not apparently undertaken at market prices, or which do not have a clear legitimate objective.

Business Partnership risk: certain relationships may involve higher risk, for example, the use of intermediaries in transactions with foreign public officials; consortia or joint venture partners; and relationships with politically exposed persons where the proposed business relationship involves, or is linked to, a prominent public official.

Due Diligence: the organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified misconduct or bribery risks.

Due diligence procedures are both a form of bribery risk assessment and a means of mitigating a risk. Indeed the purpose is to encourage organizations to put in place due diligence procedures that adequately inform the application of proportionate measures designed to prevent persons associated with them from bribing or misconduct on their behalf.

A high grade of caring should be put where local law or convention orders the use of local agents in circumstances where it may be difficult for a commercial organisation to extricate itself from a business relationship once established. The importance of thorough due diligence and risk mitigation prior to any commitment are paramount in such circumstances. Another relationship that carries particularly important due diligence implications is a merger of commercial organisations or an acquisition of one by another.

Communication: the organization should seek to ensure that its misconduct prevention policies and procedures are embedded and understood.

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10 Ibidem.
11 Ibidem.
throughout the organization through internal and external communication, including training, that is proportionate to the risks it faces. According to the guidance of the Bribery Act, “communication and training deters bribery by associated persons by enhancing awareness and understanding of a commercial organisation’s procedures and to the organisation’s commitment to their proper application. Making information available assists in more effective monitoring, evaluation and review of bribery prevention procedures. Training provides the knowledge and skills needed to employ the organisation’s procedures and deal with any bribery related problems or issues that may arise." Of course “content, language and tone of communications for internal consumption may vary from that for external use in response to the different relationship the audience has with the commercial organisation. The nature of communication will vary enormously between commercial organisations in accordance with the different bribery risks faced, the size of the organisation and the scale and nature of its activities”.

Codes of conduct and participation in activities pro-compliance may reassure existing and prospective associated persons and even customers and can act from one side as deterrent of misconduct and bribery and from the other as added value for the organization itself. Training should be tailored to the specific risks associated with specific posts (e.g.: higher risk functions such as purchasing, contracting, marketing and distribution, working in high risk countries).

4. THE LIMITS OF THE COMPLIANCE

From a realistic point of view, notwithstanding the sharpness of the anti corruption rules and their strict application, even following perfectly all the standards. compliance alone won’t make the company safe. But why? There are several answers.

1. Research in the area of behavioural business ethics has demonstrated that most of the initial ethical transgressions in business go unnoticed, even for those committing the transgression. We rationalize our bad behaviours to such an extent that we do not realize we are crossing ethical boundaries until it is too late.

2. Compliance relies primarily on controlling employees’ behaviours and decisions through a strict set of rules and laws, like “a policeman culture”: too much control can actually backfire and important information may be concealed. One shortcoming of compliance programs is that they assume misconduct comes from bad people,

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15 Ibidem.
rather than good people doing bad things. Furthermore as it has been criticised, "the question remains though: how should leaders react to lawsuits? Hiring compliance officers might look good for PR, but does that actually address the real problem? If we look at this through the lens of a company fresh off a TCPA violation, they don't need compliance officers, but rather a way to prevent non-compliant leads from entering their system in the first place." Far more sense makes investing in prevention so that your sales representatives are only calling consumers who have given consent, rather than compliance officers who can only react when problems occur. But, again, even the prevention is not sufficient to avoid bad consequences and, of course, it is a cost to be sustained.

3. Are we sure that companies (and people) are really interested in following the rules? And are we sure that all the rules are fair, good and really efficient?

4. Even the Racial Laws were enacted (in Italy and in Germany) by Parliament so that are "legally in force" but I don't think that no one of us thinks that who did not comply with those laws is a "criminal"... In my opinion, (I am not a politician but I am not so naïf to ignore that statutory law should obey to politics and not the contrary) it is necessary that people and society perceive the rules as efficient and convenient to follow. But I come back on this later.

5. Furthermore, even if a law is enacted with the best intention there is always a "dark side of the law" and sometimes (especially for criminal rules) too much laws and strict interpretation may be, as I said, a remedy worse than the disease. In Sicily there is a proverb, which says: "we love wind in church but not so much to put out the candles". This is the "paradox of the Google car" that respects all the rules of the Highway Code but when interacting with people crashes because the follower may don't understand the rationale behind the decision of the computer driver.

6. Compliance is not more confined into the narrow economic or commercial ground or to the fight of bribery. Compliance with the rules is a great and general phenomenon involving all the people in a modern society. Labour law, individual rights, civil liability, professional duties and responsibilities, environmental law, even the new and dramatics human migration with the problems of respect of human rights and the problems of labor exploitation, face with the needs to comply reasonably with rules that are too sectorial and sometimes without a systematic approach.

\[^{16}\text{See: http://leadid.com/blog/answering-the-compliance-question.}\]
5. THE FUTURE OF COMPLIANCE: REMEDIES AND DEVELOPMENTS

Compliance is a general phenomenon not only or prevalently confined to bribery, corruption, fraud to public administration and institution, money laundering, insider dealing and trading, etc.

Compliance is a general phenomenon diffused in all fields of modern human activities so it concerns not only great or large business enterprises but it is nowadays a phenomenon interesting also small firms and even each professional or a "ordinary man" during his "fight" to comply with the "jungle" of rules.

In my opinion too many complex "single" rules to comply with (as consequence of the so called statutorificazione i.e. the over production of rules or "the orgy of statutory making") mean growing and growing risks of involuntary breach and/or incurring in liability. As consequence professions like doctor, dentist, accountant, biologist, researcher, but even traditional activities as farmers, food producers, manufacturers, resellers, small commercial activities, etc. may be under the blue sky of the law and regulations (only partly against mafia, corruption, terrorism, etc.). This means also higher cost (of transactions) that in wealthy times are shifted on the final consumer but in meager times should be sustained by the single professional. In this case higher costs mean sometimes to choose between the bankruptcy and the "elusion" of the rules. From this point of view, in my opinion, it is interesting to note that the great economic crisis, at least in Italy and in Sicily, produced a "virtuous" effect pressing small enterprises and small professionals to denounce the blackmail by Mafia. Of course it is impossible that suddenly they become brave; the point is that they have been squashed between the impossibility to earn from their job and the need to pay tax, insurance, etc. and moreover the "pizzo" (the threat request of money) by the Mafia. In this case, choice is between the bankruptcy and the alleging of the extortion.

All people are subject to sometimes "crazy" European and national rules. It is not unusual to find rules like this: "In the Nuts (unground)(other than ground-nuts) Order, the expression nuts shall have reference to such nuts, other than ground nuts, as would but this amending Order not qualifying as nut (unground) (other than ground-nuts) by reason of their being nuts (unground)". Who knows the European Directives can easily agree with me.

In Italy (but it seems to be the same in the majority of European countries) the overproduction of rules and the "net" of the "alternative" administrative

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17 A. Miranda, A Short Introduction to the Italian Legal Systems, op. cit., p. 90, "A consequence of this overproduction of statutes, that sometimes appear inconsistent with the system of the civil code, was the need for studies related to each single rule, each particular problem arising from the living appliance of statutory provisions.

This kind of "statutorification", by Iriti suggestively named "de-codificacione" [decodification], depriving the civil code of its primary systematic and central role in the legal order 39, first of all asks for a "new exegetic" analysis of each positive rule, starting from "its naked historic significance (...) absolutely independent in its singularity".

court decisions\textsuperscript{19} overlapping the decision of ordinary courts, are making every
day extremely difficult to respect all the rules even if a subject is correct and
honest; thus, for instance, there is no “public selection” or “contract with the
public administration” that is not doubted and scrutinised by the administra-
tive tribunal with the logic consequence of waiting years and years for the
decision.

The recent rule on compliance (legislative decree no 231/2001) is inspired
to the right principle to stop the breach of rules for bribery, fraud to public
authority, health and safety, environmental law, money laundering, organized
crime offences and product and food safety offences; but the “criminal model”,
i.e. only punitive was weak (even if necessary, of course) so that the legislator
provided for a “collaborative model” discussing with the interested subjects
to “collaborate” with the authorities to prevent the possible breach of rules.
In other words there is a possibility, for instance, for a contractor to discuss
the risks of breaching rules and, after adoption of the suggested measures, to
be awarded of a “legality rating” (rating di legalità) i.e. a document certifying
that the contractor made all the effort to respect the law. The procedure, not-
withstanding the good intentions, of course is not simple\textsuperscript{20} but actually there is
a strong increase in requests for “rating”; this is a clear demonstration that the
collaborative approach may be better than the only “punitive” ones.

6. CONCLUSIONS

We may now try to fix, if any, remedies and look for developments.

As to the remedies, in my opinion we should look for:

1. New policies and new politics making it more “convenient” to fol-
   low the law.
2. Collaboration (better than only criminal and punitive approach).
3. Mediation (the culture of mediation is fundamental especially when
   there is a transnational matter or people of different cultures are
   involved).
4. Information/Formation – the formation of expert in compliance is
   today a need due to the complexity of the compliance in every dif-
   ferent system and also for the topics that are considered sensitive by

\textsuperscript{19} In Italy we have two different “judicial systems”: from the one side there is the “ordinary”
judicial courts for criminal and civil matters, from the other side there is the “administrative
tribunal” for the question relating to “public” matters. In reality as it is someway difficult to
establish a real border or difference especially between civil and administrative questions, as
a consequence of the over production of new rules and the overlapping of matters, today there is
a growth of decisions that make it really complex to “guess” in advance if a person is “complying”
with the rules or not. Practically, we passed from a system based in theory on “certainty of the
law” to the ones based on the uncertainty of the law.

\textsuperscript{20} The model to be awarded of a legality rating is very “complex” but complete. It is freely
download.html.
the national, European and international rules (I think, for instance about the complexity of Islamic Finance and so on). In the same way extremely important is the diffusion of information in all the aspects of compliance and related topics: if the procedures and controls are clear, ascertained and known of course this allows better compliance.

In conclusion there is a need for diffusing the culture of legality but at the same time the rules must be clear, simple, fit for the scope, easy-going, concrete but first of all convenient to follow.

In a simple costs and benefits analysis no one will respect a law if it is more convenient to breach it. This is not a criminal risk but an economic one: a criminal calculates the risk to be jailed and it is part of the “costs” – a Mafioso knows that he will probably be killed but he is very aware if he cannot earn from his criminal activity and if he cannot take any economic advantage. An ordinary man (the Clapham common man) obeys and respects the law until it is convenient or at least is a “zero game”.

The collaborative and mediative approach and dialogue between Law and Institutions and private subjects seems to be better than the traditional “punitive approach”.

We should increase the benefits for those who follow the rules to make being complaint more “convenient” and “rewarding”. In this field there is, in my opinion, room for an “alternative use of private rules” instead of the “usual penal rules”, i.e. using the “ordinary” civil rules on civil liability, antitrust, competition law, etc. to “hit” who get an economic advantage against who, on the contrary, is fair, honest, and accurate. For example if there is a firm that “wash” Mafia’s money and “irregularly” employs its workers it is clear that it may sell its products at a lower price of the honest competitor: competition law and the European rules on protection of consumers and against unfair competition may be in this case more simple and more efficient.

This means that the legislator (and the jurist) should understand that sometimes it is better to “mediate” a concrete solution instead of insisting on a “difficult” application of useless criminal or “strict” rules.

Of course we cannot generalize but this is the “mastery” of politic over the legislation.

My father who was a professor of mathematics told me that: “a railway station for an engineer is the place where trains leave; for an architect is the place where people leave”. As a jurist I believe that we should think less about the (strict application and reconstruction of) rules and more about the real needs of people!

Only this way we may avoid a gap between the law and the reality, blurring the lines between experience and prudence, legality and reason.