Verwirkung versus Laches: A Tale of Two Legal Transplants

Antoni Vaquer*

Dedicated to Shael Herman, of whom one may say
"On pus perfeta es la obra, major significança dona de la sauiesa del maestre qui la ha feyta."
["The more perfect the work, the more significant the wisdom of the master who has made it."]
(Ramon Llull, Llibre del Gentil e Los Tres Savis [ca. 1274-1276])

I. A QUIZ

I would like to begin this essay with a simple quiz. The reader is invited to identify the legal institutions defined below:

> [X] is the failure or neglect, for an unreasonable length of time, to that which, by exercising due diligence, could or should have been done earlier.

* Professor of Civil Law, University of Lleida.

> [Y] a, category of prohibition of contradictory behaviour (. . .) which entails the rejection of a delayed and thus disloyal exercise of a right that could no longer have been expected to be exercised.

Now a second quiz: Can the reader guess the courts that made these statements?

The reader has probably identified correctly [X] as laches. But she may be surprised to learn that the judgment in which [X] appeared was handed down by the Philippine Supreme Court.[1] [Y] describes the German institution known as *Verwirkung*, but this definition appears in a Portuguese opinion[2]. Different legal institutions with similar functions, laches and *Verwirkung* originated in very different traditions, and they now appear in the opinions of tribunals 7,600 miles apart. This Article sketches the two institutions in their original habitats, and then examines their successful careers in jurisdictions beyond their native ones.[3]

II. LACHES

A. England

Originating in English equity, the doctrine of laches holds that one who seeks judicial relief must act rapidly and diligently. If a claimant sleeps on his rights when he could have moved promptly to protect them, the defendant may successfully invoke the defense of laches. In contrast, however, when a claimant has allowed unreasonable time to elapse before pursuing her claim, the court may not protect her rights. In a well-known case, *Lindsay Petroleum Co. v. Hurd*,[4] Sir Barnes Peacock captured the essence of laches:

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1. Far East Bank v. Estrella O. Querimit, Supreme Court of the Philippines G.R. No. 148582, Jan. 16, 2002, *available at* http://www.supremecourt.gov.ph/jurisprudence/2002/jan2002/148582.htm.

2. Decision of the Supremo Tribunal de Justiça of 16 October 2001, *available at* http://www.dgsi.pt/jstj.nsf/0/1d28574abbdc430780256bb2004be06d?OpenDocument (author's translation).

3. For further background on *Verwirkung* and laches, see A. Vaquer, *El retraso desleal en el ejercicio de los derechos. La recepción de la doctrina de la Verwirkung en la jurisprudencia española*," 2 REVISTA DE DERECHO PATRIMONIAL 89 (1999); *id.* ("Importing foreign doctrines: Yet another approach to the Unification of European Private Law? Incorporation of the *Verwirkung* doctrine into Spanish case law," (2000) *Zeitschrift für Europäisches Privatrecht* 301; *Id.*, "¿Solvencia recuperada en buen momento? Aplicaciones jurisprudenciales de la *Verwirkung* en el juicio ejecutivo," (2005) *Indret* (http://www.indret.com) (jointly with Núria Cucurull).

4. (1874) LR 5 Privy Council 221, at 239-40. This has been considered the best definition: Lord Blackburn in *Erlanger v. The New Sombrero Phosphate Co.*, (1878) 3 App. Cas. 1218, 1279 ("I have looked in vain for any authority which gives a more distinct and definite rule than this") and Viscount Radcliffe in *Nwakobi v. Nzekwu*, [1964] WLR 1019, 1026 ("In their Lordships' opinion there is no better description of laches than that given by Sir Barnes Peacock in *Lindsay Petroleum*"). Two centuries earlier, Lord Coke pointed out that "[l]aches, or lasches, is

> Now the doctrine of laches in Courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy was afterwards to be asserted.
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> Or, in the words of Lord Camden,
>
> [A] Court of equity which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction, there was always a limitation to suits in this Court.[5]

The doctrine of laches is much older than Lord Camden's pronouncement. The earliest source in which laches seems to have occurred dates back to 1311: "n'est nie mervaile, qu'il put aver recoverer s'il ust usé sa accioun vivant son piere, issi que la lachesse e sa negligence demene ly turnera en prejudice (That is not wonderful, for he could have recovered if he had used his action in the lifetime of his father; so that the laches and his own negligence will turn to his disadvantage)."[6]

According to a corollary of the laches doctrine, a claimant's mere delay, however long, does not in itself justify upholding the defense. The claimant's awareness of her right also figures in the application of the doctrine in the sense that she either knew or should have known of her possible claim.[7] Furthermore, a court should take into account all the circumstances surrounding the claim.[8] "Mere lapse of time does not bar

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an old french word for slacknesse or negligence, or not doing." EDWARD COKE, I, THE INSTITUTES OF THE LAWS OF ENGLAND, OR A COMMENTARY UPON LITTLETON § 726, at 380.b, § 403. at 246.b. Similarly, Sir William Blackstone equated laches with "negligence" and "delay." W. BLACKSTONE, I COMMENTARIES ON THE LAWS OF ENGLAND 247, 465 (1791). The word *Laches* derives from medieval *French Law*; *see* J.H. BAKER, MANUAL OF FRENCH LAW 129 (1979); 3 JOHN S. JAMES, STROUDS JUDICIAL DICTIONARY, *laches* (4th ed. 1973); KARSTEN KERBER, SPRACHWANDEL IM ENGLISCHEN RECHT. VON LAW FRENCH ZUM ENGLISCHEN (1997).

5. Smith v. Clay, (1767) Brown's Chancery Reports 638, n. †.

6. Year Books of Edward II, 4 Edward II (1311), Selden Society, vol. 42 (Year Book series, vol. 18), (1926), at 54.

7. TERENCE PRIME & GARY P. SCANLAN, THE MODERN LAW OF LIMITATION 306-07 (2d ed. 2001); SNELL'S EQUITY 5-19 (John McGhee ed., 31st ed. 2005).

8. Nwakobi v. Nzekwu, *cited in* n.5, at 1024 ("[Laches] can be relied on only when account has been taken of all the circumstances that affect both."); *see also* Albeyegbe v. Ikomi,

a claim in equity any more than at law: . . . with other circumstances, however, [such a lapse] may lead a Court to draw inferences unfavourable to the claim of a party who has let twenty or nearly twenty years elapse without asserting his right."[9] Obviously, a court must first evaluate the time that has elapsed since the moment the right arose and could have been asserted, but laches does not contemplate a fixed period such as those provided in a prescriptive rule or a statute of limitations. For example, family ties between the parties may occasionally justify a claimant's tardy commencement of a claim.[10] In addition to evaluating the circumstances surrounding the delay, a court, in considering the wisdom of applying laches, should inquire about the impairment of the defendant's position. In the familiar English turn of phrase, the claimant's delay must have caused the defendant some detriment.[11] As Peter Birks has masterfully put the issue, "The judge has to ask himself whether the staleness of the claim seriously disadvantages the defendant to a degree which, weighed in the balance against the claimant's entitlement to justice, requires the action to be discontinued."[12]

[1953] 1 WLR 263, 267; Nelson v. Rye, [1996] 2 All E.R. 186, *per* Laddie J., at 204; MICHAEL FURMSTON, CHESHIRE, FIFOOT & FURMSTON'S LAW OF CONTRACT 714 (14th ed. 2001).

9. Penny v. Allen, (1857) 44 E.R. 160, 166; *see also* Archbold v. Scully, [1861] 11 E.R. 769, *per* Lord Wensleydale, at 778 ("[T]he fact, of simply neglecting to enforce a claim for the period during which the law permits him to delay, without loosing his right, I conceive cannot be any equitable bar."); Lamshed v. Lamshed, (1963) Commonwealth Law Reports 441, 453, *per* Kitto J. ("The bare fact of delay is not enough."); I.C.F. SPRY, THE PRINCIPLES OF EQUITABLE REMEDIES 227, 425 (1990); SARAH WORTHINGTON, EQUITY 33 (2003); SNELL'S EQUITY, *supra* note 7, at 5-19.

10. Laver v. Fielder, (1862) 55 E.R. 1, 5.

11. Lindsay Petroleum Co. v. Hurd, *per* Lord Barnes Peacock, at 240 ("The situation of the parties having, therefore, in no substantial way been altered, either by the delay or by anything done during the interval, there is in this circumstances nothing to give special importance to the defence founded on time"); Weld v. Petre, [1929] 1 Ch. 33, 65, *per* Sankey L.J. ("[A]ll the circumstances of the case . . . length of the time . . . any change in the position of the mortgage."); Tottenham Hotspur Football & Athletics Co. v. Princegrove Publishers Ltd., [1974] 1 WLR 113, 122 ("[T]the doctrine of laches is not operated unless one is satisfied that, to put it at the lowest, there is some prejudice to the party who is suffering from laches at the hands of the other."); Verrall v. Great Yarmouth Borough Council, [1981] Q.B. 202, 205 ("It's quite clear that there has been no inconvenience caused to the council by such delay as there has been. The delay is in no sense unreasonable."); Nelson v. Rye, [1996] 2 All E.R. at 201 ("The Courts have indicated over the years some of the factors which must be taken into consideration in deciding whether the defence runs. Those factors include the period of the delay, the extent to which the defendant's position has been prejudiced by the delay, and the extent to which that prejudice was caused by the actions of the plaintiff."); Patel v. Shah, [2004] All E.R. (D) 250, para. 81-91; PRIME & SCANLAN, *supra* note 8, at 307-08.

12. PETER BIRKS, UNJUST ENRICHMENT 239 (2d ed. 2005).

B. United States

Predictably, the doctrine of laches has been widely recognized in United States courts. A recent decision summarizes the requirements of its application and adds a perhaps unexpected reference to the principle of good faith:

> Laches is an equitable remedy that prevents a plaintiff from asserting a claim due to a lapse of time. In order to prevail on a claim of laches, a party must show (1) an unreasonable delay by the other party in asserting a legal or equitable right (2) a good faith change in position to his detriment by the party asserting laches due to the delay. Extraordinary circumstances which would work a grave injustice must exist before laches bars a suit filed within the limitation period.[13]

C. The Philippines

Five decades of American influence over the Philippines have assured the vitality of the doctrine of laches in Philippine law.[14] "As for laches," writes Professor Agabin, "we follow the rule that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant."[15] Applicable to specific circumstances, laches is now enshrined in the Philippine Constitution. According to Article XI, section 15, of the Constitution of the Republic of the Philippines [1987]: "The right of the State to recover properties unlawfully acquired by public officials and employees, from them or from their nominees or transferees, shall not be barred by prescription, laches, or estoppel."

The distinction between prescription and laches was well established in the Philippines decision, *Maneclang v. Baun*.[16]

> Prescription is a matter of time; laches is principally a question of inequity of permitting a claim to be enforced, this inequity being founded on some change in the condition of the property or the relation of the parties. Prescription is statutory; laches is not. Laches applies in equity, whereas

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13. Davis v. Mangan, Tex. App.-Houston [14 Dist] 2005 (source: Westlaw databases).

14. The mixed character of Philippine law is due to the coexistence of Spanish law and American law after the defeat of the Spanish army and the subsequent acquisition of sovereignty by the United States. *See Pacifico Agabin*, *in* VERNON V. PALMER, MIXED JURISDICTIONS WORLDWIDE 425 ff (2001); RENÉ DAVID & CAMILLE JAUFFRET-SPINOSI, LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS 59 (11th ed. 2002).

15. *Pacifico Agabin*, *supra* note 14, at 441.

16. 208 SCRA 179, 183 (1992), *cited in* Cutanda et al. v. Heirs of Roberto Cutanda et al., Supreme Court G.R. No. 109215, July 11, 2000, *available at* http://www.supremecourt.gov.ph/jurisprudence/2000/july2000/109215.htm.

> prescription applies at law. Prescription is based on fixed time, laches is not.

It has been stressed that "the fact of delay, standing alone, is insufficient to constitute laches."[17] "Each case is to be determined according to its particular circumstances."[18] Among the circumstances relevant to a court's inquiry is the justifiable and reasonable detriment to the defendant's position caused by a claimant's delayed commencement of her claim.

In *Far East Bank v. Querimit*, the defendant, Ms. Querimit, had opened a dollar savings account in one of the petitioner's branch banks. She received four certificates of deposit that were to mature in 60 days (1987). The certificates bore the word *accrued*, that is, if Ms. Querimit did not present the certificates for cashing or surrender before their maturity, the deposits, along with accrued interest, would be *rolled over [i.e. extended]* by the bank and annual interest borne by the deposits would accumulate automatically. After her husband's death (1993), Ms. Querimit tried to withdraw her deposit, but she was told that her husband had already withdrawn it. The bank alleged that it had given respondent's late husband an "accommodation" to allow him to withdraw Ms. Querimit's deposit, who was the bearer and lawful holder of the subject certificates of deposit. Additionally, the bank unsuccessfully urged a defense of laches. According to the Philippine Supreme Court, "it would be unjust to allow the doctrine of laches", for Ms. Querimit "relied on the bank's assurance (. . .) that interest would 'accrue' or accumulate annually even after maturity [of the certificates]".

D. Two Failed Transplants? The Cases of South Africa and Louisiana

1. South Africa

It is accepted that laches became part of South African law under the influence of English law and the *exceptio doli*; in fact, laches and the *exceptio doli* came to be understood as much the same things[19]. By the 1950s, however, this understanding was sharply modified. The decision in *Zuurbekom Ltd. v. Union Corp. Ltd.* held that laches did not form part

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17. Esalyn Sanchez v. Edna Bonto-Perez et al., Supreme Court G.R. No. 109808, Mar. 1, 1995, *available at* http://www.lawphil.net/judjuris/juri1995/mar1995/gr_109808_1995.html.

18. Far East Bank v. Estrella O. Querimit, Supreme Court of the Philippines G.R. No. 148582, Jan. 16, 2002, *available at* http://www.supremecourt.gov.ph/jurisprudence/2002/jan2002/148582.htm.

19. For background, see Reinhard Zimmermann, *Good faith and equity*, *in* REINHARD ZIMMERMANN & DANIEL VISSER, SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 232-33 (1996).

of South African Law.[20] According to later decisions, the *exceptio doli generalis* did not figure in Roman Dutch law either.[21] The *Zuurbekom* and the *Bank of Lisbon* cases were recalled in the recent decision in *New Media Publishing v. Eating Out Web Services* (4 April 2005).[22] In *New Media*, the defendant company argued that the plaintiff—publisher of a guide to restaurants throughout South Africa, also having an Internet website known as www.eat-out.co.za, and proprietor of a registered trade mark which consists of the words "Eat Out Guide"—first became aware of its competing activity—a web page offering similar information under a very similar commercial name—and nonetheless waited two years to launch proceedings against it. Though Thring J. refused to apply laches and the *exceptio doli generalis*, he deemed valid a defense of acquiescence, which entailed a tacit consent resulting from an unequivocal inactivity. But according to Thring J., the defendant, "*inter alia*, at the very least, [has to] show that, as a consequence of the applicant's representation or conduct, the respondent altered its position to its detriment"; that is, acquiescence is deemed to operate an estoppel.[23] Regardless of labels and of the historical pedigree and legitimacy of the institutions of laches and acquiescence, they seem to play the same role—that of characterizing a plaintiff's conduct. Furthermore, the institutions share at least two requirements, namely, detriment to a defendant's position as well as a significant period of inactivity on the plaintiff's part—although mere inactivity is not enough to warrant application of the institutions.[24]

2. Louisiana

In the nineteenth century, Louisiana law received the doctrine of laches; its main requirements were also a period of inactivity—generally shorter than the relevant prescriptive period—and some detriment to the

20. 1947(1) SA 514, 534-35.

21. Bank of Lisbon & S. Afr. v. De Ornelas, 1988(3) SA 580 (A).

22. *Available at* http://law.sun.ac.za/data/New%20Media%20Publishing%20v%20Eating%20Out%20Web%20Services%20%20Ano.wgt.htm.

23. See on the reception of estoppel, ZIMMERMANN, *supra* note 19, at 221 ff; *see also* JAN SMITS, THE MAKING OF A EUROPEAN PRIVATE LAW 195 ff (2002).

24. See R.H. CHRISTIE, THE LAW OF CONTRACT IN SOUTH AFRICA 514-15 (4th ed. 2001), who citing the *Zuurbekom* case, considers that although mere delay is not necessarily a waiver of rights, an unreasonable delay may be estopped. On the role of good faith in South African and Scots law, Fritz Brand & Douglas Brondie, *Good Faith in Contract Law*, *in* MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE 94 (Reinhard Zimmermann, Daniel Visser & Kenneth Reid eds., 2004).

adverse party caused by the claimant's delay.[25] In the 1980s, the Louisiana Supreme Court stated that laches was inapplicable in a case, on the basis of a new article 3457 of the Louisiana Civil Code ("There is no prescription other than that established by legislation.") and an unenacted official comment prepared by the codifiers.[26] However, the comment did not expressly overrule earlier jurisprudence that had recognized the doctrine. Subsequent Louisiana decisions have recalled the inapplicability of laches. But, using a more nuanced approach, some judges have left the door open to a defense based upon laches:

> we note that the common law doctrine of laches does not prevail in Louisiana (. . .). It is to be applied in "rare and extraordinary cases". The purpose of this rarely applied doctrine is to prevent injustice which might occur from the enforcement of long neglected rights.[27]

In a protracted legal battle for back pay between New Orleans Fire Fighters and the City of New Orleans, the City, as defendant, raised the defense of laches. Commenced in 1981, the litigation ended in 2004. Stating that the doctrine of laches did not prevail in Louisiana, citing *Picone v. Lyons*[28] the court rejected the defense of laches because the firefighters had filed suit almost two decades earlier. Thus there was no delay at issue.

To sum up, although Louisiana courts have not declared laches to be alive and well in the Louisiana mixed jurisdiction, it has not been completely buried either.

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25. Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 61 (1994). In *Noel v. Landry*, 531 So. 2d 570 (La. App. 2 Cir. 1998), the Court gave this precise definition: "Laches is an equitable defense which requires the party pleading it to prove (1) unreasonable delay on the part of the one filling suit and (2) harm that would be suffered by the defendant or a third party since the defendant or a third party has relied on the reasonable assumption, occasioned by the delay, that the plaintiff would not seek further legal remedies."

26. Palmer, *supra* note 25.

27. New Orleans Firefighters Local 632 v. City of New Orleans, 767 So. 2d 112 (La. App. 4 Cir. 2000).

28. 601 So. 2d 1375 (La. 1992). Nevertheless, I think that the seriousness of the facts in the *Picone* case must be taken into account. The plaintiff claimed silicosis damages and the court reversed the previous judgment on the basis that neither prescription nor laches applies. In the Netherlands, the *Hoge Raad* has deviated from the applicable thirty-year period of prescription in cases that dealt with asbestos mesothelioma because the period of incubation is longer than thirty years. See for a discussion Jan M. Smits, *The Principles of European Contract Law and the Harmonisation of Private Law in Europe*, *in* LA TERCERA PARTE DE LOS PRINCIPIOS DE DERECHO CONTRACTUAL EUROPEO/THE PRINCIPLES OF EUROPEAN CONTRACT LAW, pt. III, at 589-90 (Antoni Vaquer ed., 2005).

III. *VERWIRKUNG*

A. Germany

During the second half of the nineteenth century, the expression *Verwirkung* made its appearance in the language of German commercial law. Initially designating a delayed exercise of a right contrary to an ideal of contractual equity, this early invocation of the doctrine appeared in a judgment handed down by the *Reichsoberhandelsgericht* on 20 October 1877.[29] Wieacker[30] traced the origins of *Verwirkung* back to Grotius's comparison of a claimant's persistent inactivity with waiver of a right; other scholars linked *Verwirkung* to the Roman *exceptio doli*.[31] From the 1930s onward, the foundation of *Verwirkung* has been embedded in the general principle of good faith articulated in BGB § 242.

Verwirkung occurs when the plaintiff has not exercised a right during a significant period of time. Consequently the defendant has justifiably supposed that the plaintiff no longer planned to exercise her right in the future.[32] In German law, *Verwirkung* is not a legal institution but a procedural effect, namely the inadmissibility of the exercise of a right under circumstances that would violate the principle of good faith.[33]

Under German law, the requirements for *Verwirkung* of a right are:

a. The running of time. Like prescription, *Verwirkung* requires lapse of a period of time. But *Verwirkung* does not contemplate fixed periods

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29. Entscheidungen des Reichs-Oberhandelsgerichts, XXI Band, at 83 ff; *see* WOLFGANG SIEBERT, VERWIRKUNG UND UNZULÄSSIGKEIT DER RECHTSAUSÜBUNG 1 ff, 53 (1934); ENNO BOMMEL, DIE ENTSTEHUNG DER VERWIRKUNGSLEHRE IN DER KRISE DES POSITIVISMUS 7-9 (1992).

30. FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE 232 (Tony Weir, trans., with a foreword by Reinhard Zimmermann 1995) ("The moral basis suggested by Grotius has proved fertile in the modern idea of *Verwirkung* or estoppel."). Nevertheless, HUGO GROTIUS, DE IURE BELLI AC PACIS LIBRI TRES II, 4, 3 ff (ed. 1719), refers to the presumption that the lack of exercise of a right entails its abandonment, thus he admits a remote kinship with the current idea of *Verwirkung*.

31. Andreas Wacke, *La «exceptio doli» en el derecho romano clásico y la «Verwirkung» en el derecho alemán moderno*, *in* ESTUDIOS DE DERECHO ROMANO Y MODERNO EN CUATRO IDIOMAS 313 (1996); *see also* Günther H. Roth, *in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, Band 2a, § 242, Rn. 184, 211 (4th ed. 2004); TOBIAS STAUDER, DIE VERWIRKUNG ZIVILRECHTLICHER RECHTSPOSITIONEN 31-33 (1995); Gerhard Kegel, *Verwirkung, Vertrag und Vertrauen*, *in* FESTSCHRIFT FÜR KLEMENS PLEYER ZUM 65; GEBURSTAG 520 (1986). Much more cautious was SIEBERT, *supra* note 29, at 56-57, 151 and especially 179. More opinions in BOMMEL, *supra* note 29, at 80-86. Remember the South African experience outlined *supra* Part II.D.1.

32. HELMUT HEINRICHS/PALANDT, BÜRGERLICHES GESETZBUCH § 242, Rn. 87 (62d ed. 2003); KARL LARENZ & MANFRED WOLF, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS 330 (1997); CHRISTIANE BIRR, VERJÄHRUNG UND VERWIRKUNG 165 ff (2003).

33. SIEBERT, *supra* note 29, at 172, 175; STAUDER, *supra* note 31, at 212; WERNER FLUME, ALLGEMEINER TEIL DES BÜRGERLICHEN RECHTS. ZWEITER BAND. DAS RECHTSGESCHÄFT 122 (1979).

of time, unlike prescription. Recognition of *Verwirkung* depends on all the surrounding circumstances of the case: the more the plaintiff's behavior offends good faith, the less the time needed for successful invocation of *Verwirkung*, and conversely. Mere lapse of time does not lead to *Verwirkung*, although it can bar the claim if the period legally established for prescription has expired. Obviously, periods for *Verwirkung* are shorter than prescriptive periods; a claimant would routinely have the benefit of the prescriptive period in which to sue, and thus the contravention of good faith would not be an issue.[34] An implication of this last remark is that the reduction of the prescriptive periods effected by the modernization of the German law of obligations has reduced the possible scope for the operation of *Verwirkung*.[35]

b. The plaintiff's inactivity. During the period of time at issue, the plaintiff must not exercise her right, nor must the defendant voluntarily fulfil his obligation. The inactivity must be attributable to the plaintiff, although fault is not required.[36]

c. Justified reliance on the non-exercise of the claim. The period of time that has elapsed, coupled with a plaintiff's inactivity, must have induced the defendant's reasonable belief that the plaintiff does not intend to enforce the right in the future. In other words, *Verwirkung* protects the defendant's legitimate reliance. Reliance is deemed legitimate in the sense that the defendant must not have contributed to the plaintiff's inactivity and must have manifested such reliance.[37] Consequently, the tardy exercise of the right causes some detriment to the defendant's position, for he could not have expected in good faith that the right would be asserted.

B. Spain

Spanish jurists have traditionally admired German legal doctrine, and this admiration may be seen in their adoption of *Verwirkung*. Although the structure of the Spanish Civil Code is like that of its counterpart French, the Spanish law degree program is informed by a German model that includes a general part, the law of obligations, the law of things, family law and succession law. Moreover, the theory of

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34. Christian Grüneberg, *in* HEIN GEORG BAMBERGER & HERBERT ROTH, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, Band I, § 242, Rn. 136-37 (2003); HEINRICHS/PALANDT, *supra* note 32, Rn. 93; MÜNCHENER KOMMENTAR/ROTH, *supra* note 31, Rn. 301.

35. HEINRICHS/PALANDT, *supra* note 32, Rn. 97.

36. *Id.* Rn. 94; Grüneberg, *supra* note 34, Rn. 138.

37. STAUDER, *supra* note 31, at 177; HEINRICHS/PALANDT, *supra* note 32, Rn. 95; MÜNCHENER KOMMENTAR/ROTH, *supra* note 31, Rn. 392.

Rechtsgeschäft, either directly or through Italian doctrine,[38] is also part of Spanish private law. In the 1930s, Ludwig Ennecerus, Theodor Kipp, and Martin Wolf's *Lehrbuch des Bürgerlichen Rechts* was translated into Spanish.[39] This treatise influenced Spanish doctrine, making it possible to read about *Verwirkung* for the first time in Spanish, although it had no practical impact in Spanish case law.[40] The second extensive reference work in Spanish, appearing some twenty years later, was José Puig Brutau's translation of a book written by the German scholar, Gustav Boehmer.[41] On this occasion, the translator made an effort to defend the utility of the *Verwirkung* doctrine to Spanish law, and reported some cases from the *Tribunal Supremo* to demonstrate how the use of the doctrine could have made court decisions easier to reach. The publication three years later of Luis Díez-Picazo's fundamental monograph on *venire contra factum proprium*[42] marked definitive acceptance of *Verwirkung* in Spanish legal literature.

The *Tribunal Supremo* first applied the doctrine of "illoyale Verspätung" [disloyal delay] in a decision of 21 May 1982.[43] The

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38. For example, Emilio Betti's *Teoria generale del negozio giuridico* was translated into Spanish by A. Martín Pérez (2d ed. 1959) (1943); Luigi Cariota Ferrara's *Il negozio giuridico* by Manuel Albaladejo (1956); Giuseppe Stolfi's *Teoria del negozio giuridico* by Jaime Santos Briz (1959). See, for the importance of Italian doctrine in Spain after the civil war, Luis Díez-Picazo, *Codificación, descodificación y recodificación*, (1992) ANUARIO DE DERECHO CIVIL 473, 473-74.

39. Ludwig Ennecerus, *Derecho civil (Parte general.* Decimoquinta revisión por Hans Carl Nipperdey. Traducción de la 39ª edición alemana con estudios de comparación y adaptación a la legislación y jurisprudencia españolas por Blas Pérez González y José Alguer. Tercera edición al cuidado de A. Hernández Moreno y Mª del Carmen Gete-Alonso. Volumen segundo, segunda parte (2 LUDWIG ENNECERUS, THEODOR KIPP & MARTIN WOLFF, TRATADO DE DERECHO CIVIL, TOMO PRIMERO, segunda parte, 1002 ff (3d ed. 1981) (1st ed. Barcelona 1933 and forward). It has to be pointed out that the translators, in their notes, do not give any indication of the possible application of the *Verwirkung* doctrine in Spanish law.

40. In the first years of General Franco's dictatorship, one of the most influential scholars defended a sort of juristic autarchy free from foreign influences. According to 1 FEDERICO DE CASTRO, DERECHO CIVIL DE ESPAÑA 308 (1984) (1949), although the knowledge of foreign legal science could be useful to the progress of a country's own legislation and science, it carried the danger of a passive incorporation, the mimicry of those who, because of weakness, fashion or laziness, surrender to the servile imitation of foreign models. Therefore, the mission of Spanish legal science consisted in "arrojar fuera influencias y modas extrañas. Que el Derecho de España sea derecho español" (throwing out extraneous influences and fashions. The law of Spain must be Spanish law) (1 DE CASTRO, *supra*, at 296).

41. GUSTAV BOEHMER, PRAXIS DER RICHTERLICHEN RECHTSSCHÖPFUNG (1952), *translated as* EL DERECHO A TRAVÉS DE LA JURISPRUDENCIA. SU APLICACIÓN Y CREACIÓN (1959), annotations at 279-93. A few years earlier, José Puig Brutau, *La doctrina de los propios actos*, *in* ESTUDIOS DE DERECHO COMPARADO (1951) (now *republished in* MEDIO SIGLO DE ESTUDIOS JURÍDICOS 91 ff (1997)), wrote the first pages in Spanish on the common law *laches* doctrine, *supra* at 107-12.

42. LUIS DÍEZ-PICAZO PONCE DE LEÓN, LA DOCTRINA DE LOS PROPIOS ACTOS (1962), dealing with *Verwirkung* at 93-101.

43. Database Westlaw-aranzadi RJ 2588.

German term *Verwirkung* appeared for the first time in Spanish jurisprudence in a judgment of 24 June 1996,[44] which states: "*Lo que aquí intenta la parte recurrente con este motivo, lo cual es inadmisible, es el retraso desleal, denominado por la doctrina germánica «Verwirkung»*."[45] There are perhaps two explanations for this belated incorporation of *Verwirkung* into Spanish case law. First, an overriding duty of good faith was codified rather recently in a new article 7 that figured in the reform of the *Título preliminar del Código civil* (1974). Second, there appeared in 1977 a translation of a short, stimulating work by Franz Wieacker concerning *Verwirkung*.[46] The translation was reprinted in 1982, the year of the key judgment relying upon *Verwirkung*. Spanish case law has established essentially the same requirements for operation of *Verwirkung* as appear in German case law and scholarship, although Spanish courts seem to stress prejudice to the defendant's position more frequently than their German counterparts.[47]

Sometimes, however, the distinction in Spanish cases between *Verwirkung* and tacit renunciation can be elusive. A number of decisions finding "disloyal delay" have also noted a plaintiff's tacit consent to the defendant's conduct. Her conscious passivity or acquiescence is the best proof of this consent. Sidestepping the *Verwirkung* doctrine, some rulings take into account only the plaintiff's acquiescence. According to the key judgment of 21 May 1982,[48] a medical doctor had failed to claim from a patient unpaid medical fees he did not initially want to collect. The services for these fees had been rendered from 1966 to 1975. When the former patient completed a work ordered by the doctor in 1978, the doctor tried to set off the uncollected fees against the price of the work. The court found that the doctor's attitude "made the intention of waiving the debt evident, so the builder could rely on remission." The court's reasoning, in my view, was mistaken. If the plaintiff's inactivity for that length of time constituted a real waiver of the right, then the right, according to Spanish law, had expired. Furthermore, if the right had

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44. RJ 4846. Just before this ruling, the decision handed down by the High Court of Justice of Catalonia on 2 October 1995 (RJ 8180) in a Catalan law case: "[T]he German doctrine and case law in relation to the «disloyal delay» of the plaintiff in using his own rights («Verwirkung»)."

45. "What the appellant is trying to claim here, which is inadmissible, is disloyal delay, or 'Verwirkung' to use the term coined by the German doctrine" (author's translation).

46. FRANZ WIEACKER, ZUR RECHTSTHEORETISCHEN PRÄZISIERUNG DES PARAGRAPHEN 242 BGB (1956), *translated as* EL PRINCIPIO GENERAL DE LA BUENA FE (foreword by Luis Díez-Picazo (1977)).

47. See the details in the author's essays cited *supra* note 3.

48. Similar arguments can be found in decisions by the *Tribunal Supremo* handed down on 19 June 1985 (RJ 1985/3298), 16 Oct. 1992 (RJ 1992/7829) and 13 July 1995 (RJ 1995/5963).

been extinguished, then its exercise could not have been contrary to good faith. Indeed, its exercise was impossible. If the *Tribunal Supremo* thought that there was an unquestionable intention to remit fees and that the remission effectively had taken place, the debt owed to the doctor would have been extinguished. The doctor could not have delayed in exercising the right because his right no longer existed.

Verwirkung has travelled along its own paths in Spanish law.[49] The best examples of *Verwirkung* appear in cases involving delay in claiming loan arrears. During the economic crisis of the 1990s, many borrowers fell behind on their loan payments, but the banks often decided not to sue because their delinquent borrowers were insolvent. Since the year 2000, broad prosperity in Spain has prompted banks to reconsider their forbearance, and some have sued for their delinquent loans. There are no unanimously embraced solutions in lower courts. But according to one solution that is gaining approval, it is necessary to distinguish a claim for restitution of capital and conventional interest, on one hand, from moratory interest, on the other. The first sums are recoverable, since every borrower is deemed to be aware that he will owe reimbursement of the capital and an ordinary charge for its use. The second claim for moratory damages is normally dismissed on the grounds of *Verwirkung*, since the moratory amount owed usually exceeds, perhaps by a factor of two, the sum of capital and conventional interest together. According to prevalent reasoning, a borrower would be seriously harmed if the bank's delay of more than ten years (fifteen years being the period of prescription of the claim) turned into the payment of more than double the arrears.[50]

> Exceptionally, in compelling circumstances, a Spanish court may be ready to go a step further and extend *Verwirkung* also to capital and conventional interest. For example, where a public bank loaned funds—notwithstanding the fact that afterward the bank has been privatised—on the occasion of a devastating flood under especially favourable conditions, the court considered that the circumstances—very low rates and long-term loans—under which the loan was granted and the period elapsed without

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49. Jan Smits, *On Successful Legal Transplants in a Future* Ius Commune Europaeum, *in* COMPARATIVE LAW IN THE 21ST CENTURY 142 (Andrew Harding & Esin Örücü eds., 2002), has accepted that the incorporation of *Verwirkung* into Spanish law is a typical example of successful legal borrowing in Europe.

50. For all, Court of Appeal Barcelona 11 November 2004 (Database Westlaw-aranzadi JUR 2005/53298), Lleida 20 June 2002 (JUR 2004/202847), Lugo 28 Jan. 2004 (JUR 2004/53298), Murcia 27 May 2005 (JUR 2005/137561), Murcia 13 Sept. 2005 (JUR 2005/233122, 233123). But see Court of Appeal Alicante 4 May 2005 (JUR 2005/163911), 20 June 2005 (Database Westlaw-aranzadi AC 2005/1424, 1425).

being sued—more than ten years—prompted in the borrowers a reasonable hope that restitution of the loan was forgiven.[51]

C. Portugal, Greece, Estonia, Latvia

Transplants should be more readily accomplished when the exporting legal system has exercised considerable influence upon the importing one. This is the case of Portugal and Greece,[52] whose Civil Codes are indebted to the German BGB.[53] In Portugal, because the *Verwirkung* doctrine is widely accepted,[54] the debate seems mainly focused on the search for a Portuguese word for *Verwirkung*, Two terms, *preclusão*[55] and *suppression*,[56] have been proposed by the legal community.

The plaintiff filed a suit against her debtor's surety, claiming unpaid rentals for a rental car. The basis for urging *suppressio* was that plaintiff had waited six years to bring the action. As this was the only foundation of the defense and no objective facts showing bad faith behaviour were mentioned, the Portuguese *Tribunal Supremo de Justiça*, after summarising the requirements for *suppressio*, concluded that the "ausência de quaisquer indícios objectivos de que os direitos da Autora não mais seriam ejercidos."[57]

Newly independent countries whose law has developed under German influence such as Latvia[58] and Estonia[59] have also received the doctrine of *Verwirkung*.

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51. Court of Appeal Lleida 4 Apr. 2003 (JUR 2003/131766), 12 Nov. 2004 (JUR 2004/108764).

52. The decision of the *Areios Pagos* of 15 October 2004 considered that the proscription of abuse of rights set out in article 281 *Astikos Kodikas* (Greek Civil Code) is applicable when the party has omitted to exercise her right for a long period of time in contradiction to *bona fides* and *boni mores*. See Eugenia Dacoronia, *Recent case law*, (2005) ERPL 225, 230. Dr. Dacoronia kindly explained me that the Greek Supreme Court followed the *Verwirkung* doctrine without significant amendments.

53. See, for Portugal, KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 112 (Tony Weir trans., 2d ed. 1992); for Greece, Eugenia Dacoronia, *The Evolution of the Greek Civil Law from Its Roman-Byzantine Origins to Its Contemporary European Orientation*, *in* REGIONAL PRIVATE LAWS AND CODIFICATION IN EUROPE 288 ff (Hector MacQueen, Antoni Vaquer & Santiago Espiau eds., 2003); ZWEIGERT & KÖTZ, *supra*, at 160-62.

54. This becomes evident looking at the extensive citations of German literature especially made by Menezes (Fn. 56) and J. Baptista Machado, "Tutela da confiança e 'venire contra factum proprium,'" in *Obra dispersa*, vol. I (1991), p. 421 ff.

55. 3 JOSÉ DE OLIVEIRA ASCENSÃO, DIREITO CIVIL. TEORIA GERAL 290-92 (2002).

56. ANTONIO MANUEL DE ROCHA E MENEZES CORDEIRO, DA BOA FÉ NO DIREITO CIVIL 797 ff (2001).

57. Decision of 12 December 2002, *available at* http://www.stj.pt (lack of any objective trace that the plaintiff's rights would no longer be exercised).

58. Kaspars Balodis, *The Role of the Good Faith Principle in the Contemporary Civil Law of Latvia*, *sub* V.3, *available at* http://www.ius.lv/article_Balodis.doc.

D. Italy

Italian law has witnessed doctrinal reception of *Verwirkung*[60] without judicial implementation.[61] Filippo Ranieri has showed how the practical results of *Verwirkung* were achieved by means of tacit renunciation: according to the Italian courts reasoning, where the plaintiff had for a significant period of time remained inactive under circumstances that lulled the defendant into reasonably believing that the right would not later be claimed, then she had in fact renounced the right. According to Ranieri, the *rinunzia tacita* and *Verwirkung* were based upon a common principle, and both shared identical aims.[62]

E. Verwirkung in South America: Brazil and Argentina

The new Brazilian Civil Code [2002] seems to have encouraged the application of *Verwirkung*. Although the doctrine was already known under the prior Civil Code [1916],[63] the general clause prohibiting abuse of rights (art. 187)—as well as the role of good faith in relation to the interpretation (art. 113), the conclusion, and the performance of contracts (art. 422)—have reinforced the position of *Verwirkung* in specific cases where barring the claim is the most efficient solution.[64] Influences have come from both Portugal and Germany. Menezes Cordeiro is the most

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59. Irene Kull & Ave Hussar, *Codification of Civil Law in Estonia—Process and Experience in Applying the New Law*, REVISTA CATALANA DE DRET PRIVAT (forthcoming 2006) (speaking of a transposition from German law in full).

60. This may be a consequence of the impact of German doctrine on Italian scholars from 1870 onwards. See ANTONIO GAMBARO & RODOLFO SACCO, SISTEMI GIURIDICI COMPARATI 383 ff (2d ed. 2002); Pier Giuseppe Monateri, *The "weak law": Contaminations and Legal Cultures*, 1.3 GLOBAL JURIST ADVANCES 17 ff (2001).

61. *See* Domitilla Galli, *Le nuove frontiere della prescrizione: Verwirkung, abuso del diritto e buona fède*, IL CORRIERE GIURIDICO 928, 932 (1998); *see also* PAOLO GALLO, ISTITUZIONI DI DIRITTO PRIVATO 342, 648 (2000); PIETRO RESCIGNO, MANUALE DI DIRITTO PRIVATO 228 (2000); ALBERTO TRABUCCHI, ISTITUZIONI DI DIRITTO CIVILE 237 n.1 (41st ed. 2004).

62. Filippo Ranieri, *Verwirkung et renonciation tacite. Quelques remarques de droit compare*, *in* MÉLANGES EN L'HONNEUR DE DANIEL BASTIAN. I. DROIT DES SOCIÉTÉS 427 ff (1974). See also his more extensive contributions RINUNZIA TACITA E VERWIRKUNG (1971) and *Eccezione di dolo generale*, *in* DIGESTO DELLE DISCIPLINE PRIVATISTICHE, SEZ. CIV., V (1990), where he emphasises that *rinunzia tacita* and *Verwirkung* share the same *ratio decidendi*. But see Salvatore Patti, *Verwirkung*, *in* DIGESTO DELLE DISCIPLINE PRIVATISTICHE, SEZ. CIVILE, t. XIX, at 729-30 (1999), who refuses Ranieri's approach.

63. Which was much influenced by the German BGB. *See* María Luisa Murillo, *The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification*, 1 J. TRANSNAT'L LAW & POL'Y 10 (2001).

64. The author is much indebted to Ms. Elena de Carvalho Gomes (University of Minas Gerais, Brazil) for providing him with her paper *Abuso de direito, Verwirkung e direito das obrigações: Reflexões a propósito de um studio de caso*, delivered at the "I Congresso Italo-Luso-Brasileiro" on the law of obligations (2005), as well as with valuable materials on Brazilian and Argentine law.

often cited author in the literature, but his inspiration has come from Germany, as I have already mentioned. The Portuguese courts, like their Brazilian counterparts, also use the term *suppressio*, that Menezes Cordeiro coined. For example, the Brazilian *Superior Tribunal de Justiça* had to deal with owners of an apartment building who had occupied a lobby for more than twenty years for their exclusive use. The Court ruled that the *status quo* had to be maintained on the basis of *suppressio*. "Suppressio, based on objective good faith, [inhibits] claims that could have been brought into court years ago and they were not, prompting the expectation, justified by the surrounding circumstances, that the right would not be claimed."[65]

Argentine scholars are also familiar with the *Verwirkung* doctrine; and Argentine case law has occasionally taken it into account.[66] Originating in Germany, the inspiration for *Verwirkung* has then passed into Spanish doctrine via the translation of Boehmer's study made by Puig Brutau and Díez-Picazo.[67] *Verwirkung* is said to cause the lapse of the claim.[68] Nevertheless, there is strong resistance to its general application, on the basis that Argentina's Civil Code authorizes only a lapse of rights (*caducidad*) and prescription (Argentine Civil Code art. 27). It is also argued that *Verwirkung* collides with the principle of legal certainty, since the period required for the claim to be barred depends upon subjective criteria established by the courts.[69]

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65. Judgment of 10 Aug. 1999, 139 (2000) *Revista do Superior Tribunal de Justiça (RSTJ)* 366. A very similar case was decided on 23 April 2002, 149 (2002) RSTJ 366. *But see* José L. Corrêa de Oliveira, *Verwirkung, a renúncia tácita e o direito brasileiro*, *in* ADAHYL L. DIAS ET AL., ESTUDIOS EN HOMENAGEM AO PROFESSOR WASHINGTON DE BARROS MONTEIRO 269-92 (1982), who quotes several times Filippo Ranieri's paper on "rinuzia tacita." The judgment of the Brazilian Supreme Court of 3 September 1996 [93 (1997) RSTJ 314] seems to run along these lines, seeking a tacit consent in the fact that the party remained silent for many years and resorting also to the *venire contra factum proprium* doctrine.

66. For example, proceedings for the support of a minor child instituted four years after reaching majority of age, although the limitation period is five years according to article 4027(1) Argentine Civil Code.

67. OSVALDO ALFREDO GOZAÍNI, TEMERIDAD Y MALICIA EN EL PROCESO 236 ff, 287-88 (2002), quotes only Spanish doctrine and the Spanish translation of the German author, Boehmer. Gozaíni, however, confuses *Verwirkung* as a consequence of a defendant's good faith with a claimant's bad faith. *Verwirkung* is not a sanction for bad faith, but a defense available to a defendant in good faith who could reasonably believe that the claim would not be prosecuted any longer.

68. Osvaldo Alfredo Gozaíni, *Caducidad de la pretensión por retraso desleal en su ejercicio*, (1987-C) LA LEY (ARGENTINA) 989. Thus, on Verwirkung, Puig Brutau has turned out to be more influential in Argentina than in Spain.

69. ALEJANDRO BORDA, LA TEORÍA DE LOS ACTOS PROPIOS 108-10 (3d ed. 2000); MARCELO J. LÓPEZ MESA & CARLOS ROGEL VIDE, LA DOCTRINA DE LOS ACTOS PROPIOS. DOCTRINA Y JURISPRUDENCIA 82-87 (2005).

IV. SCOTLAND

Finally, the mixed system of Scotland deserves attention. Despite the influence of English law in many areas of Scots law, laches is not part of the latter. Nor is *Verwirkung*. However, laches and *Verwirkung* have their counterparts in Scots doctrines of mora, taciturnity and acquiescence. The Scots situation has been described in the following way: "Delay short of the prescriptive period is . . . properly invoked in circumstances where a person has so delayed to press a claim or to seek to enforce a right as to give rise to the reasonable inference that he has abandoned the right or claim; he may then be debarred from pressing it."[70] According to In *Re Singh*,[71] a case of judicial review related to immigration—thus, to public law—Lord Nimmo Smith cited first Lord President Kinross in *Assets Co. Ltd. v. Bain's Trustees*: "[I]n order to lead to such a plea receiving effect, there must, in my judgment, have been excessive or unreasonable delay in asserting a known right, coupled with a material alteration of circumstances, to the detriment of the other party." Lord Smith then added:

> There may be cases where the passage of time, as related to the surrounding circumstances, may be such as to yield the inference of acquiescence in the decision in question. Usually, there will have been such alteration of position on the part of one of the parties, or of third parties, as, together with the passage of time, to yield the inference of acquiescence. The petitioner may, however, be in a position to put forward an explanation for the delay sufficient to rebut the inference.

In Smith's words appear the familiar requirements for laches or *Verwirkung*: passage of time, detriment to the other party, and lack of justification.

Notably, in the Scots categories of "mora, taciturnity and acquiescence," the word "acquiescence" bears a close relationship to tacit renunciation. Certainly, the common law knows acquiescence, another equitable remedy whose contrast with *laches* is elusive.[72] From a

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70. DAVID M. WALKER, THE LAW OF PRESCRIPTION AND LIMITATION OF ACTIONS IN SCOTLAND 139 (5th ed. 1996).

71. Court of Session [2000] SCLR 655, approved by Lord Hope of Craighead in *R v. Hammersmith and Fulham London Borough Council*, [2002] All E.R. 97, para. 63.

72. Therefore the complaint of Nourse L.J. in *Goldsworthy v. Brickell*, [1987] Ch. 378, 410:

> [T]hese expressions are not uniformly used. Sometimes laches is taken to mean undue delay on the part of the plaintiff in prosecuting his claim and no more. Sometimes acquiescence is used to mean laches in this sense. And sometimes laches is used to mean acquiescence in its proper sense, which involves a standing by so as to induce the other party to believe that the wrong is assented to.

theoretical point of view, *acquiescence* can result from a lapse of time due to a claimant's inactivity, though the intention to accept something does not need a period of inactivity. That is, a passage of time does not determine *acquiescence*, though it could lead to this, but passage of time is essential for laches.[73]

V. CONCLUDING REMARKS

The conclusion of this essay has been partly anticipated by General Advocate Warner at the European Court of Justice:[74]

> [T]his Court, in developing the general principles of Community law, draws on what has been termed "the legal heritage" of all the Member States. It seems to me that, if one considers, for instance, the Danish law as to "*stiltiende afkald*", the English law as to estoppel, the German law as to "*Rechtsverwirkung*", the Italian law as to "*legittimo affidamento*" and the Scots law as to personal bar, as well as the French law as to "*renonciation implicite*", there emerges a general principle (. . .) that one who, having legal relations with another, by his conduct misleads that other as to a material fact (. . .) cannot thereafter base on that fact a claim against him if he (that other) has acted in a relevant way in reliance on what he was led by that conduct to believe. What matters here, of course, is the existence of the principle, not the scope or mode of its application in the law of any particular Member State.

The geographical reach of laches and *Verwirkung*, should be broadened beyond the European states noted by Advocate Warner; both doctrines have been successfully transplanted to other legal systems beyond Europe. One might conclude that the transplants are due to the general influence of the exporting legal system upon the importing one. That is certainly true, but it is not the whole explanation. The two institutions have developed independently and have been transplanted without any apparent relationship between them. Once transplanted, the doctrines have followed their own paths according to principles and idiosyncrasies of the adopting system. Even countries to which *Verwirkung* has been successfully exported have later become exporters of the doctrine. Spain best exemplifies this point. *Verwirkung* has a restrictive application; only claims that gravely offend good faith or

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73. H.M. McLean, *Limitation of Actions in Restitution*, (1989) CAMBRIDGE L.J. 472, 489; PRIME & SCANLAN, *supra* note 8, at 311; SNELL'S EQUITY, *supra* note 7, 16-16, at 403.

74. Opinion delivered on 10 July 1980 joined cases 63/79 and 64/79 Liselotte Boizard, née Herber, and Martine Boizard v. Commission of the European Communities [1980] ECR 2975, quoted by Esin Örücü, Looking at Convergence Through the Eyes of a Comparative Lawyer, 9.2 ELEC. J. COMP. L. (2005).

equitable principles can be barred. Perhaps the success[75] of the transplants is due to the fact that both laches and *Verwirkung*—like mora, taciturnity and acquiescence in Scots law, or *rinuncia tacita* in Italian law—serve the idea of distributive justice. A creditor should not claim the enforcement of a right after lulling a debtor into a reasonable belief that the right will not be exercised. Whether this is a manifestation of the principle of good faith—as is generally asserted in civil law jurisdictions and exceptionally in common law jurisdictions—is of little practical significance;[76] it has been rightly pointed out that good faith does not differ much from equitable doctrines in English law.[77] The dichotomy *Verwirkung*/laches illustrates this last point. Ethical arguments[78] have reached equivalent legal solutions[79] and placed them under different labels.

Laches and *Verwirkung* have perhaps succeeded as transplants because they are efficient; they provide flexible solutions for a practical problem.[80] Once their common requirements of a significant period of inactivity and reasonable reliance on future non-enforcement of a right are met, the legal answer is quite simple: the exercise of the right is procedurally barred. Both laches and *Verwirkung* are "undraconian" legal correctives for unfair exercise of a right, namely giving a defendant a procedural bar to a claim. This approach is simpler[81] than declaring the right extinguished—for then a legally adequate basis for the extinction must be found. The approach is also simpler than inferring a tacit waiver of a right.

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75. For Smits, *supra* note 49, at 140, legal transplants are successful if they create some degree of uniformity between the laws of the importing and the exporting country; therefore, Verwirkung and laches have been successful legal transplants.

76. See REINHARD ZIMMERMANN & SIMON WHITTAKER, GOOD FAITH IN EUROPEAN CONTRACT LAW case 22, at 515 ff (2000), to check how different European legal systems give similar solutions to a German case of *Verwirkung* by means of diverse legal techniques.

77. Martijn W. Hesselink, *The Concept of Good Faith*, *in* TOWARDS A EUROPEAN CIVIL CODE 498 (3d ed. 2004).

78. On the role of morality, see Smits, *supra* note 49, at 146.

79. *See* BASIL MARKESINIS, COMPARATIVE LAW IN THE COURTROOM AND CLASSROOM 194-95, 198-99 (2003).

80. From different approaches, see Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*," 14 INT'L REV. LAW & ECONS. 3 (1994); Jan M. Smits, *A European Private Law as a Mixed Legal System*, MAASTRICHT J. EUR. & COMP. L. 328, 336-37 (1998), and *The Harmonisation of Private Law in Europe: Some Insights from Evolutionary Theory*, 31 GA. J. INT'L & COMP. L. 79, 81 (2003).

81. On the role of simplicity, see Smits, *supra* note 80, at 84.

Both laches and *Verwirkung* complement the regulation of prescription,[82] which is based on the mere running of time without regard to the fairness of the parties' behavior. Perhaps the success of the doctrines is partly due to the prestige[83] of the exporting legal systems and to the enthusiastic support of a scholar's eagerness to importing foreign doctrines.[84] The most likely explanation for the doctrines' success probably combines a number of these factors. Above all, however, the two doctrines provide practical solutions for upholding a widely held essential legal principle.

82. Werner Taubner, *in* REIHE ALTERNATIV KOMMENTARE ZUM BÜRGERLICHEN GESETZBUCH § 242, Rn 34 (1980), considers *Verwirkung* a teleological reduction of prescription periods.

83. Rodolfo Sacco, 39 (1991) "Legal formants: A dynamic approach to comparative law (II)" 343, 398-99; Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 115 (1995); ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 57, 88, 345 ff (2d ed. 1993). Of prestige and efficiency writes Esin Örücü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition*, 4.1 ELEC. J. COMP. L. 7.3.3 (2000); Jan M. Smits, *Import and Export of Legal Models: The Dutch Experience*, (2003) TRANSNAT'L LAW & CONT. PROBS. 551, 553.

84. Monateri, *supra* note 60, at 11 ("legal elites").