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# THE FUTURE OF THE CIVIL LAW\*

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## I. TERMINOLOGICAL CLARIFICATION

The expression "Civil Law" is rather ambiguous. It may refer at least, to three different objects: (a) a *general system of law* as distinguished from other law systems, like the Common Law, Islamic law, primitive law; (b) the *private law* which prevails in countries which have inherited the Roman law tradition, as distinguished from public law; (c) that *part of the local private law* applicable to persons in general, whether individual or collective, national or foreign, regardless of status or professional calling, in matters of capacity, property, obligations, contracts, family, succession, and related subjects. In this latter sense, Civil Law is distinguished from commercial law, and other specialized areas of the law (mineral law, rural law, trademark and patents law, etc.).

The expression "Civil Law," unless there is a clear indication of a different meaning, will be used in this paper to refer to the private law which prevails in the countries which have inherited or followed the Roman tradition.<sup>1</sup>

## II. THE CIVIL LAW AND THE JURIST

The Civil Law, as it is known, applied and taught today, is an admirable synthesis of cultural, ideological, technical, political, economic and scientific elements. This process of growth and synthesis, begun in Rome some 2500 years ago, has been closely connected, from early times, with the activities of a very unique type of learned man, the jurist, the professor of law.<sup>2</sup> Because of the nature and depth of his influence in the development and application of the Civil Law, it is almost impossible to separate the one from the other, as if they were two different and independent entities. Unless the teachings and doctrines of the jurists are taken into account, civil law creation and civil law application may be easily misun-

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1. This statement should not be construed in absolute terms, as if the Civil Law today were a law system based purely on Roman materials. That is not the case. The Civil Law has received the influence of germanic law, and ideological elements which were alien to Roman law. See Parker, *The Criteria of the Civil Law*, 7 THE JURIST 140 (1947).

2. Schulz is of the opinion that Roman jurisprudence started its development in the period following the Twelve Tables, during the fifth or the fourth century B.C. See F. SCHULZ, *HISTORY OF ROMAN LEGAL SCIENCE* 5 (1946) [hereinafter cited as SCHULZ].

derstood. For historical, philosophical and technical reasons, the future of the Civil Law is tied to the future of the doctrines of the jurists. Without the theoretical components and the systems of scientific concepts which come with the contributions of the civilian jurists, the law of the future would not be the same type of law which has come to us, is applied, and is known, as Civil Law. One of the distinguishing features of the Civil Law is to be found in its rational and systematic character.<sup>3</sup> The Civil Law codes are, perhaps, the best instance of these traits. Codification is a technique which facilitates the achievement of a high degree of consistency<sup>4</sup> and the enactment of broad, logically unifying, general propositions.

Puig Brutau used to say that the Civil Law is jurist-made-law, law made, applied and taught by professional people, persons specially trained to perform that important social function,<sup>5</sup> in accordance with scientific criteria. The underlying beliefs of the Civil Law jurists and professors of law, and of the lawyers, judges, and public officers whom they train, is that law is "scientific law" because: (a) law is an object susceptible of scientific knowledge; it constitutes the proper object of the so-called science of positive law; (b) law is created by means of technical procedures based on scientific knowledge; (c) law is taught by means of scientific concepts and propositions.

The civilian jurist is interested in the intellectual mastery of legal phenomena. For him, every case should be considered as an example of a class; the class, species of a genus; the genus as species of another genus of a higher degree of generality; and so on, until very general and basic concepts

3. GAIUS' INSTITUTES already had a basically clear and adequate classification of legal materials: *Jus personarum*, *Jus rerum*, and *Jus actionum*. One of the most comprehensive, logically consistent and convenient classification is to be found in A.F.J. THIBAUT'S, *SYSTEM DES PANDEKTEN RECHTS* (1823); see the English translation of the General Part in N. LINDLEY, *AN INTRODUCTION TO THE STUDY OF JURISPRUDENCE* 19-22 (T. & J.W. Johnson, Philadelphia 1855). Thibaut's arrangement of materials had a direct influence on HEISE'S *GRUNDRISS EINES SYSTEM DES GEMEINEN ZIVILRECHTS ZUM BEHUF VON PANDEKTENVORLESUNGEN* (3d ed. 1819), which has been generally accepted in the Civil Law world.

4. Justinian had said in CODE, I, XVII, 3.15 (English translation in S. SCOTT, *12 THE CIVIL LAW* 106 (1932)); "Nothing which is contradictory can claim a place for itself or be found in this Code, for if anyone should, with careful reflection, seek out the reason for a seeming discrepancy, while doing so something new will be found, or a clause with a hidden meaning will dispose of the complaint of contradiction, and put an end to the apparent discord." This statement, perhaps in less sharp terms, could be subscribed by many civilians of our days.

5. Puig Brutau quotes with approval the following statement made by Koschaker in *EUROPA UND DAS RÖMISCHE RECHT* 165 (Munich 1947): "We may speak of jurist-made law (*Juristenrecht*) when the development of the law is in the hands of a group of persons who deal with it on a professional basis." J. PUIG BRUTAU, *LA JURISPRUDENCIA COMO FUENTE DEL DERECHO* 17 (Barcelona 1951).

are finally defined.<sup>6</sup> These are the concepts which shed light over the apparently heterogeneous and changing pattern of human events, and which make them rational and understandable from a juridical standpoint.

Logic and reason were never divorced, however, from social reality. Even at the zenith of the natural law theories, during the XVII and XVIII centuries, the ideals of the natural law lawyers were a part of the European social, political and economic life. Thus, their aspirations were not alien to the spirit of the times, nor to the specific claims of the people, nor to the main features of their lives. Had the teachings of those jurists been purely abstract propositions, incapable of practical application, then codification, at the end of the XVIII Century, would not have taken place. The way in which natural law doctrine merged with the historical and pragmatic elements of the law in force in Western Europe was another instance of ability of the Civil Law to absorb rational and ideological elements,<sup>7</sup> without detriment to the practical needs of society. This process had some important precedents. Platonic and Aristotelian thought influenced the Roman jurists during the classical period;<sup>8</sup> scholasticism, the contributions of the early Glossators;<sup>9</sup> Canon law, the efforts of the great Commentators during the XIV and XV centuries.<sup>10</sup> The "social idea," in the words of

6. George Long, a distinguished British barrister, summarized very well the typical relationship between the abstract principle and the particular case, which is characteristic of any good Civil Law work. Speaking of two classical treatises of the Civil Law, F. SAVIGNY'S *SYSTEM DES HEUTIGEN ROMISCHEN RECHTS* (1847) and A. THIBAUT'S *SYSTEM DES PANDEKTEN RECHTS* (1823), he had this to say: "The general is never conceived without an adaption to the particular, and the particular is always in its proper place, subordinate to the general." G. Long, *Two Discourses delivered in the Middle Temple Hall* 40 (London 1847), in N. LINDLEY, *AN INTRODUCTION TO THE STUDY OF JURISPRUDENCE* IV (1855).

7. G. SOLARI, *I FILOSOFIA DEL DIRITTO PRIVATO* 336 (1959) [hereinafter cited as I SOLARI].

8. There is sufficient historical evidence of the use of the dialectical method by jurists of the late republican period. For instance, the DIGEST and GAIUS' INSTITUTES provide several examples of "distinctio" employed after platonic and aristotelian fashion by Q. Mucius (D. 1.2.2.41; 24.3.66; 47.2.55.1) and by Servius (GAIUS, 1.188; 3.183). At the beginning of the classical period, the use of the dialectical method was widespread. Its importance for Roman law is emphasized by Schulz: "The importation of dialectic was a matter of extreme significance in the history of Roman jurisprudence and therefore of jurisprudence generally. It introduced Roman jurisprudence into the circle of the Hellenistic professional sciences and turned it into a science in the sense in which that term is used by Plato and Aristotle no less than by Kant. It is only systematic research and organized knowledge that can properly be so called and these are attainable only by the dialectical method." SCHULTZ, *supra* note 2, at 67.

9. See P. VINOGRADOFF, *ROMAN LAW IN MEDIEVAL EUROPE* 44 *et seq.* (1909).

10. See J. DAWSON, *THE ORACLES OF THE LAW* 142-45 (1968) [hereinafter cited as DAWSON].

Gioele Solari, gained recognition, and acceptance since the last quarter of the XIX Century.<sup>11</sup> This resiliency and adaptability of the Civil Law goes back to its early origins. Contrary to what is a rather widespread belief among practitioners of the law in non-civilian jurisdictions, the Civil Law has always shown primary concern with the practical problems of everyday life. The successful solution by Roman civil law of the manifold problems created by the rapid growth of Rome, from its humble origins as a small rural community, to its becoming a military, political and commercial world power, is but one example of the subtle pragmatism of the civilian magistrates and the civilian jurists.

### III. THE FUSION OF LOGIC, EXPERIENCE AND VALUES IN THE GREAT CODES

Justice Holmes used to say that the life of the law is not logic but experience.<sup>12</sup> Paraphrasing Holmes we may say, speaking of the Civil Law, that its life is not only experience, but logic as well. This paraphrase, however, is not entirely satisfactory. It disregards a third element, intimately fused with logical principles and with empirical data. I refer to legal values, to the axiological meaning of social behavior, to the Law as Justice.<sup>13</sup>

The Civil Law is, certainly, an instrument for the settlement of disputes and a system of remedies for parties unjustly aggrieved. But it is more than that. It is a way of life, a type of social behavior which facilitates understanding, trade and exchanges among peoples of different languages, interests, and customs.<sup>14</sup> The Civil Law became an across-the-borders

11. G. SOLARI, 2 *FILOSOFIA DEL DIRITTO PRIVATO* 7 (1939).

12. O.W. HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 180 (1952).

13. The essential relationship between Law and Justice was clearly seen by the great Roman jurists. Ulpianus recalls the celebrated definition of *Celsus Ius est ars boni et aequi* (D.1.1.1). Cicero, following platonic teachings, writes: *Iustitia est habitus animi . . . suam cuique tribuens dignitatem* (DE INV. 2.53.160). Modern legal theory, particularly legal positivism, has attempted to eliminate values as a proper subject of theoretical concern. The question has been hotly debated in the Civil Law. But even if it were alleged that scientific knowledge of values is impossible, the crucial fact remains that legal experience is not neutral to values. Therefore, any description of the law which omits them is objectionable because it is not a fair and adequate description of its subject.

14. The Civil Law is referred to in this paper as being a system of law, *i.e.*, a system of legal rules, as well as being a specific type of *human and social behavior* which can be known and understood, from a juridical standpoint, by reference to a complex of juridical *rules* and *values* (justice, peace, power, solidarity, cooperation, security and order). These two different ways of making reference to the Civil Law do not imply reference to two different objects, nor do they imply contradictory

civilizing and unifying political, social and cultural factor.<sup>15</sup> This noble task was possible in the Western World because human beings and communities shared a set of certain basic values: justice, following Platonic, Aristotelian, and Thomist philosophies; solidarity and cooperation, as required by the Christian Church; peace of mind and friendship among men, as expressed by Socratic and stoic teachings; and the acceptance of the Roman tradition which saw in the power of the State an adequate guaranty of order, security and peace.

statements as to the nature of the Civil Law. I have followed the basic propositions of Carlos Cossio's theory on the nature of the law, which he has developed by the masterful use of the main contributions of general philosophy and legal theory (Plato, Aristotle, Kant, Husserl, Heidegger, Dilthey, Rickert, in general philosophy; Savigny, Kelsen, Del Vecchio, in legal theory). Cossio's theory is so complex and articulate that it defies description in few lines. For the purposes of this paper, and to make understandable the use of different concepts to refer to the Civil Law, perhaps it may be sufficient to say that Cossio considers the law to be human behavior in social interaction, or, better, human behavior which interferes with the behavior of another human being, where we find three elements united in the dialectical synthesis of the behavior of the individual, to wit: (a) the *juridical norm*, *i.e.*, a logical element whereby the subject of the action thinks his proper conduct in normative terms (as it ought to be); (b) the *empirical element*, *i.e.*, action which takes place in time and space, and which is subject to empirical intuition; (c) *juridical values* which make meaningful and understandable the behavior of the human being, a human being who is just or unjust, peaceful or conflictual, orderly or disorderly, secure or insecure, etc.

Therefore, one may refer to the law as a social phenomenon by its concepts. These concepts, which are a dialectical part of the social phenomenon known as law, are norms. They constitute a logical system which describes the behavior owed by all of the members of the legal community (whether a centralized legal community, as in the case of the modern State, or decentralized, as in the cases of international community or of the primitive tribes). Consequently, in this paper I refer sometimes to the Civil Law by making references to the whole set of rules and propositions (Civil Law as a system of rules) while other times, depending on the requirements of the text, I refer to the object or content of the system of rules, *i.e.*, the juridical behavior, the "way of life," the instrumentalities of social life, of *all of the members of the community*. See the following works by C. COSSIO, *LA TEORIA EGOLÓGICA DEL DERECHO Y EL CONCEPTO JURÍDICO DE LIBERTAD* (2d ed. 1964); *LA PLENITUD DEL ORDEN JURÍDICO Y LA INTERPRETACIÓN JUDICIAL DE LEY* (1939); *EL DERECHO EN EL DERECHO JUDICIAL* (1959); *TEORÍA DE LA VERDAD JURÍDICA* (1954); *LA VALORACIÓN JURÍDICA Y LA CIENCIA DEL DERECHO* (1941); *LA "CAUSA" Y LA COMPRENSIÓN EN EL DERECHO* (1969); *El Derecho y sus valores parcelarios*, 126 *REVISTA LA LEY* 934 (1967); *La Justicia*, 126 *REVISTA LA LEY* 1037 (1967); *La Filosofía de la Filosofía en el Derecho Natural*, 127 *REVISTA LA LEY* 1310 (1967); *La Egoología y el Derecho Natural*, 127 *REVISTA LA LEY* 1413 (1967); *El Derecho Natural y la Norma Fundamental*, 128 *REVISTA LA LEY* 1067 (1967); *Los Valores Jurídicos*, 4 *ANUARIO DE FILOSOFÍA DEL DERECHO* 27 (Madrid 1956); *LA TEORÍA EGOLÓGICA DEL DERECHO: SU PROBLEMA Y SUS PROBLEMAS* (1963); *La Lógica Jurídica Formal en la Concepción Egoológica*, 93 *REVISTA LA LEY* 917 (1959).

15. Zepos, *The Legacy of Civil Law*, 34 *LA. L. REV.* 897 (1974).

Therefore, any description of the Civil Law system circumscribed to its abstract principles and concepts, and to its solutions, is insufficient. It leaves out of the picture the set of legal values which makes meaningful and understandable the behavior of the members of the civilian communities.

In traditional Roman law, the individual was seen and understood in his relationship with other individuals, and with the State. During the Middle Ages, the individual was understood as a member of a group, corporation, town, or church. The possibility of a basic or a permanent conflict between the State and the citizen, or between the individual and the group, society, or church to which he belonged, was not a matter of specific concern for lawyers and jurists.

Homogeneity and harmony of interests among all of the interested parties was presumed or accepted without too much discussion. It was something presupposed by the law. With the Renaissance some change started to take place. The great Humanists began to question the traditional and accepted views of glossators and commentators.<sup>16</sup> The challenge became general with the natural law writers. With Kant, Locke and Bentham, individualism reached its most developed philosophical and doctrinal expression. There is really only one justification for the State: the protection of the rights of the individual.<sup>17</sup> The free will of a competent person as a source of rights and duties, was to be recognized and protected by the organs of the State. The freedom of the individual had no other limitation than the freedom of other individuals. At the very basis of this legal and political conception was the recognition of the eminent value of the personality of the individual. With Kant, the human being becomes an end in himself. He ceases to be considered a means for the achievements of other ends or objectives, regardless of how worthy these might be.<sup>18</sup>

The Civil Law gave full recognition to this basic philosophy in the three great civil codes enacted at the end of the XVIII Century and the beginning of the XIX Century: the Code Napoleon in France, the Civil Code for the Kingdom of Prussia, and the Austrian Civil Code.

The Code Napoleon was the codified expression of the ideals which inspired the Declaration of Human Rights made by the 1789 Convention. Two concepts were basic: liberty and property. Both were considered as being in the nature of ethical principles, in accordance with Locke's ideas.

16. M. GILMORE, HUMANISTS AND JURISTS 63 *et seq.* (1963).

17. See J. LOCKE, TWO TREATISES OF GOVERNMENT 368 *et seq.* (Laslett ed. 1963).

18. I. KANT, THE PHILOSOPHY OF LAW, Introduction 43-60 Private Right 61-157 (W. Hastie transl. Edinburgh 1887, reprinted 1974). An excellent discussion of Kant's approach to law can be found in 1 SOLARI, *supra* note 7, at 202-39.

The meaning of the Code Napoleon is closely related to these two natural law concepts.<sup>19</sup> The traditional Roman law institutions (dominium, contracts, obligations, persons) were technical instruments endowed with an admirable logical consistency which permitted an adequate jural expression of the values and principles of the French legislators. Said Portalis, in his *Discours Préliminaire* of the projet of the Civil Code: "*le droit de propriété, en soi, est donc une institution directe de la nature*"<sup>20</sup> (ownership is in itself a natural law institution). The Code Napoleon, under the overriding influence of the individualistic principles of the Enlightenment, received, synthesized and reformulated traditional Roman law elements, Christian ideas, and generally accepted customary practices. This task was performed by the French starting from the doctrinal contributions of the great lawyers and jurists of the Renaissance and the Enlightenment: Dumoulin, Domat and Pothier, among others.

The Prussian Code (1796) was an attempt to reconcile the philosophy of the Enlightenment and the recognition of the paramount rights of the individual, under the inspiration of the teachings of Leibniz and Wolff, on the one hand, with the aspirations and trappings of a monarchy still devoted to the privileges and priorities of medieval Kingdoms, on the other hand. Institutions and concepts were taken from traditional customary German law, and from Roman law, as received in Germany, attempting to achieve the almost impossible task of opening the doors to modernity, while preserving at the same time, the privileges of feudalism.

The Austrian Code (1811) was the formal expression of Kantian philosophy: the supreme value of equality closely linked to the rational duty of respecting human personality, the distinction between *a priori* propositions, typical of legal philosophy, and positive law, the product of the will of the legislator, determined on the basis of empirical knowledge. The Austrian Codification was a magnificent effort, under the guidance of Franz Zeiller, to achieve justice, understood by Kantian legal philosophers as the

19. 1 SOLARI, *supra* note 7, at 183.

20. J. PORTALIS, *Discours Préliminaire sur le Projet de Code Civil*, in DISCOURS RAPPORTS ET TRAVAUX INEDITS 57 (1844) [hereinafter cited as PORTALIS]; also in J. LOCRÉ, 1 LA LÉGISLATION CIVILE, COMMERCIALE ET CRIMINELLE DE LA FRANCE 251 (1827) [hereinafter cited as LOCRÉ]; and P. FENET, 1 RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 463 (1836) [hereinafter cited as FENET]. It is interesting to recall in this connection the definition of the law made by Portalis, almost at the very outset of his "*Discours . . .*": "Law is the universal reason, the supreme reason, based on the very nature of things" (*id.* at 15). Portalis was a lawyer, a very good practitioner, experienced and prudent. He knew the ways of the courts, the needs of every day life, the keen competition between conflicting claims. This pragmatic understanding of life was not in opposition to his belief in the overriding importance of intellectual principles and legal values.

limitation of the freedom of the individual insofar as needed to guarantee the external freedom of others.

#### IV. THE SOCIAL IDEA

The XVIII Century and the early years of the XIX Century saw the triumph of the individual idea, in accordance to the basic tenets of rationalism, individualism, and Natural Law doctrine. However, since the second half of the XIX Century the center of the stage was taken by the social idea, that is to say, the conception of human life as being, by its very nature, social life, life shaped by the needs and interests of the community; the conception which saw in the law the expression of feelings and wishes of the people, or the manifestation of the will of the State, the entity where the spirit made itself manifest, as taught by German metaphysical idealism.

These new ideas were the expression of a powerful reaction against the individualism of the redactors of the Code Napoleon, which began to take place in Europe shortly after the fall of Napoleon, under the influences of British conservatism, German historicism and French socialism. Later on, new social elements entered into the picture: dialectical materialism; the teachings of the Catholic Church in "*Rerum Novarum*"; new ideas of social organization; and the critical revision of juridical methods, inspired by Gény, Ihering, Ehrlich, Wurzel and others.

All of these factors had an immediate impact in the Civil Law. They influenced the German Civil Code, the Swiss Code of Obligations, and, indirectly, the numerous codifications and revisions of codes and statutes which took place in Europe, Latin America and Japan, following the innovations of the German and Swiss Codes.

The influence was felt, although in a different manner, by the great Codes of the age of reason, of which the Code Napoleon was the best example. They were not subject to extensive legislative revision. Enactment of new Codes did not take place. Instead, the old rules remained, but a new spirit, a spirit attuned to the social mood of the times, was instilled in them by the parallel activities of the jurists and the judges. New meanings were found in their traditional provisions; new problems and new expectations were dealt with by means of new methods and new principles.

During one hundred years, jurists and judges developed new solutions, preserving, by superb analysis and careful construction, the basic features of abstraction, consistency, and systematic organization which had made of the Civil Law such a unique instance of reason allied to human experience and juridical values.

Thus, the Civil Law, by the creative activity of the jurists and the legislators, as in Germany, and of the jurists and the judges, as in France, was updated, enriched and developed, to meet the new aspirations of the people and to satisfy the growing demands of social groups and social classes, without detriment to its logical consistency, to its systematic nature, to its recognition of the Kantian principle, and to its unique technical precision.

#### V. IDEOLOGICAL ELEMENTS

The Civil Law still operates under certain presuppositions of far-reaching consequences. This is not the place, nor the opportunity, certainly, to make a critical examination of those presuppositions; but it is indispensable to take them into account in any impartial description of the way in which the system works, its limitations, and its potentialities. This need becomes more obvious if an attempt is made to predict the future of the Civil Law, or venture a judgment about it.

Insofar as the public at large is concerned, we may call those presuppositions, "beliefs," in the very specific sense employed by Ortega y Gasset while discussing the dialectical relationship between the beliefs on which we rely, and the ideas with which we think. Beliefs, says Ortega, are some kind of certainties, or assumptions so taken for granted, that the individual usually does not think about them; rather, he "lives" by them.<sup>21</sup> Of these presuppositions, three have a direct bearing on the subject of our discussion today. They are at the very basis of popular interpretations about the nature and the workings of the law.<sup>22</sup> They are active and operative in what we may call the nonsophisticated sector of the community.

The first of those presuppositions or "beliefs" is that the law is created by the State through its specialized law-making organs, usually the Legislature. It is accepted, though, that under very specific circumstances, law may also be created by the Executive or its organs. Law as created by the State, takes the form of statutes. The most perfect expression of a statute is a Code.

The second presupposition or belief is that the process of creating the law is quite separate from the process of applying the law. The first is under

21. Says Ortega: "Beliefs are the foundations of our life; the ground on which it takes place . . . All our behavior, including intellectual activities, are conditioned by the system of our real beliefs." See ORTEGA Y GASSET, *IDEAS Y CREENCIAS* 22-23 (1945).

22. Merryman, *The Italian Legal Style III: Interpretation*, in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS* 167 (Dainow ed. 1974) [hereinafter cited as Merryman], calls some of these presuppositions, "folklore."

the control of the legislator. The second is a technical function entrusted to impartial persons: the members of the judiciary.

The third presupposition or belief is that the members of the judiciary, through a purely logical process, are able to determine the meaning of the Codes or statutes so much so that by the application of the rules of deductive reasoning, they are capable of rendering objective judgments.

Important historical reasons explain the survival of these presuppositions, and their continuing and strong influence in the political, cultural, and judicial life of the Civil Law countries. The Codex and the Novellas of Justinian were compilations of *edicta, decreta, rescripta* and other enactments of the Emperors. The Digest, the compilation of the opinions of the Roman jurists, was rediscovered in Pisa, at the end of the XI Century, at a time characterized by an acute lack of historical perspective and knowledge. Although the Digest was the highest expression of Roman doctrine, it was seen as a part of the *Corpus Juris Civilis enacted by the Emperor*.<sup>23</sup> Something similar happened with the Institutes of Gaius. Codified Roman law was an important source of law for the emerging European states because it was a highly consistent expression of the will of the State, destined to regulate the activities of the subjects with the help of traditional legal concepts. With the great Codes of the XVIII and XIX centuries, the rule of law became written rule of law.<sup>24</sup> The official seal of the State

23. "The glossators of Bologna revived the study of Roman law shortly before 1100 A.D. Their work was based on the Pisa manuscript of the *Corpus Juris*, on which modern scholarship has mainly relied in reconstructing our knowledge of Roman law. The glossators assumed that the whole of the *Corpus Juris* was still valid law in medieval Italy. Their duty was to explain and expound it, for it was a Code issued by a Roman Emperor and Italy was still conceived to be a part of the Emperor's dominion . . . . The task that confronted them was extraordinarily difficult . . . . The glossators lacked almost altogether any sense of the time dimension." DAWSON, *supra* note 10, at 124, 127.

24. Dean Roscoe Pound summarized the process with his usual accuracy: "The formulas in the *Corpus Juris*, taught as authoritative legislation in the medieval universities and so giving rise to a tough taught Byzantine tradition, lent themselves to such a doctrine. This was abetted by the rationalism of the era of the Reformation. Law was taken to be a body of laws prescribed by a political sovereign and expressing his will as to human conduct." Pound, *Introduction* to E. EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* XXX (1962). In a different context, but pointing to the same aspect of the development of civilian doctrine, Prigsheim says: "We have learned to separate clearly from this [Roman] classic law, the law of the *Corpus Juris*, which was collected by the Byzantine emperor Justinian about 300 years after the classical epoch . . . . Continental law, with which is usually contrasted the English Common law, is influenced by the law of Justinian, and the classical law has influenced it only indirectly." Prigsheim, *The Inner Relationship Between English and Roman Law*, 5 *CAMBRIDGE L.J.* 347, 350 (1935).

guaranteed its authenticity. The judges, who were officers of the State, had the primary duty of obeying what had been commanded by the legislature by means of legislative enactments. The most extreme form of this subordination was to be found in the 1788 Prussian Project of a civil code: the judge was not to undertake any kind of interpretation of the Code; if a gap were to be found or an ambiguity detected, then the judge was obliged to resort to the Legislative Commission, in order to have the "gap" filled or the ambiguity eliminated.<sup>25</sup>

It is true that natural law, particularly as taught by Locke in England, Leibniz, Wolff and Thomasius in Germany, Suarez and Mariana in Spain, appeared to have a validity of its own, independent of and apart from the formal seal of approval by the State. But the drafters of the great new codes were practical men interested in the achievement of harmony and synthesis. They did not see an insurmountable contradiction between positive law and natural law—rather, a logical development of one into the other, as had been taught by Pufendorf.<sup>26</sup> Thus, Portalis, Bigot-Prémeneu, Tronchet, and Malleville in France, von Carmer, Suarez, Klein, Baumgarter, Gossler and Grolman in Prussia, and Zeiller in Austria, while acknowledging natural rights, the law of nature and the paramount value of human personality, were common-sensical enough to understand that the efficacy of the codes in their respective countries was closely related to their enactment and enforcement by the Sovereign of the State, whether popular assembly, as in France, or enlightened Kings, as in Prussia and in Austria, and their subordinate organs. There was then and there is still today, a dialectical tension between Positive Law, the law enacted, *posit*, by the State, and Natural Law, the Law based on human reason, or in the nature of things, or revealed to men by God. That dialectical tension is to remain forever. Values in law, after all, are not dependent on the will of the organs of the State.

But to be and to remain aware of the ever present ethical considerations, does not require, certainly, the denial of the essential role of the State in the creation and the application of the Law.

25. The French had followed during the early times of the Revolution the technique of the "*référé législative*" which offered some resemblance to the Prussian proposal. The Statute of August 24, 1790, title 2, art. 12, made it a duty of the judges to request the opinions of the legislative body if the meaning of the legal rule was doubtful. *Ils s'adresseront au corp législatif, toutes les fois qu'ils croiront nécessaire d'interpréter une loi.* See P. MERLIN, 27 *RÉPERTOIRE UNIVERSEL ET RAISONNÉ DE JURISPRUDENCE*, v "Référé au législateur," 291 (5th ed. 1828).

26. S. PUFENDORF, *DE JURE NATURAE ET GENTIUM*, lib. I, cap. I, par. 19; cap. VII, pars. 7, 11 (1672).

Closely related to the considerations just mentioned is the prevailing conception as to the nature of the process whereby Law is applied by the judges. Law in the Civil Law assumes a highly formal, conceptual and abstract character. Said Portalis in his *Discours Préliminaire*: "the statute is a solemn declaration of the will of the Sovereign on a matter of general interest."<sup>27</sup> A few lines earlier, he had said: "the statute rules for all persons; it considers men in general, never as particular human beings."<sup>28</sup> Those statements are fresh and up-to-date. They mirror a view still dominant in the Civil Law tradition: The law is general; the law is formal; the law is enacted by the Sovereign.

In accordance with this basic conception, when the judge is called to apply the law for the decision of a particular controversy he has to take into account, as his starting point, general rules of law, given to him by the legislator. The Civil Law eliminates the need of determining the *ratio decidendi* of a controlling case,<sup>29</sup> a judicial task which is at the very core of the Common Law process of adjudicating cases. The civilian judge does not have to distinguish between holdings and dicta. He does not have to look for analogous cases. Instead, he has to choose, among the many general rules he finds in the Statute books and in the Codes, the ones which should be applied to the pending case. Therefore, the civilian judge has to look first at the legislator, and then he may, if he so thinks proper or convenient, look at his colleagues' decisions. The legislator is the only one who really speaks with binding authority, because he is the one who, under the Constitution, has the sole power of limiting the freedom of the individuals by means of the enactments of general rules of law.

## VI. THE TECHNICAL ELEMENT

The development of the Civil Law in Europe was not conditioned, certainly, by the growth of only one source of law, legislation. Customary law, which was the expression of the spontaneous will of the people; canon law, based on the teachings and the authority of the Church; and juridical principles, grounded on their own inherent values, played an important role. But all of those were sources which finally led, consistently, to the enunciations of formal, general, and abstract propositions of law. Even

27. "[l]a loi est une déclaration solennelle de la volonté du souverain sur un objet d'intérêt commun." PORTALIS, *supra* note 20, at 16; FENET, *supra* note 20, at 477; LOCRÉ, *supra* note 20, at 266.

28. "la loi statute sur tous: elle considère les hommes en masse, jamais comme particuliers . . ." *Id.* at 14; LOCRÉ, *supra* note 27, at 264.

29. J. CUETO-RUA, *EL 'COMMON LAW' 225* (1957).

customary law came to be recognized and stated in written, rigid form.<sup>30</sup> Therefore, the very nature of the historical growth of the Civil Law, its systematic form, its rational ingredient, and its close connection with the legislative machinery of the State, caused the need of handling properly the written rules of law to be of the greatest importance.

The interpretation and the exposition of the modern Civil Law, as a coherent and integral system of legal rules sanctioned by the legislative organs of the State, together with the development of the doctrine of the sources of the law, is a magnificent achievement of the Western human mind. The civilians, who were enclosed within the narrow limits defined by the three presuppositions or beliefs already mentioned, were called to solve new problems, unexpected situations, changes in mores and emerging claims. It was not sufficient for them to look at the past, nor to pay exclusive attention to what the legislator had said or had intended to say.<sup>31</sup> New sources, new methods were needed. The civilians succeeded. They were able to avoid the dangers of too rigid and inflexible an approach to law, without putting in jeopardy the basic tenets of the Civil Law. They provided, within the context of a logical system of written rules of law, adequate techniques for the application of the law to new phenomena, achieving an outstanding degree of flexibility.<sup>32</sup> They became masters of the written words. They supplied a workable, consistent set of principles and rules for the solution of the new problems and conflicts of modern social and economic life. The changes and innovations of the Civil Law were so deep

30. By royal ordinance signed at Montils-les-Tours, in April 1454, amended by royal letters signed at Moulins, on September 2, 1497, the King of France ordered that local customs be formally stated in written form, to facilitate their proof before the judges and to gain certainty in law. The CUSTOM OF ORLEANS was written and approved in 1509; THE CUSTOM OF PARIS in 1510; THE CUSTOM OF BRITTANY in 1539; THE CUSTOM OF NORMANDY in 1583. See H. REGNAULT, *MANUEL D'HISTOIRE DU DROIT FRANÇAIS 172-75* (5th ed. 1947).

31. F. GÉNY, *1 MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 61 et seq.* (2d ed. 1932); English translation by J. Mayda, under the title of *METHOD OF INTERPRETATION AND SOURCES OF PRIVATE POSITIVE LAW* (La. St. L. Inst. transl. 1963).

32. "It remains to inquire by what means the new phenomenon and the original concepts may be cemented together . . . I shall call this process projection, meaning the projection of a concept found in formulated law into the world of actual phenomena, and place it in the middle between subsumption proper, and analogy . . . Projection is the extension of a concept found in formulated law to phenomena which were not originally contained in the concept, or at least were not demonstrably a part of the group of images forming the concept, without at the same time changing the nature of the concept as such." Wurzel, *Methods of Judicial Thinking*, in *SELECTED ESSAYS, MODERN LEGAL PHILOSOPHY SERIES 345* (1921).

and, at the same time, so subtle, that a keen understanding of the role played by the use of the civilian methods of interpretation is needed in order to understand the Civil Law as it stands today.<sup>33</sup>

The civilian method is rich and varied. It is not circumscribed, certainly, by the traditional dogma which reduces interpretation to the discovery of the "real" intent of the legislator. Such a discovery, if possible at all, may help. But it is not decisive. The Civil Law method is not reduced, either, to the definition of the concepts of the law which will provide the premises for logical deductions. These are useful. They provide some degree of certainty and facilitate prediction of judicial behavior. But deduction is not the essential logical process in the application of the Civil Law.

The field of methodology is, indeed, one of the most innovative areas of the Civil Law. The history of its institutions has been carefully examined. The role of statutes, customs, decisions and doctrine in the interpretation and application of the law has been subject to detailed studies by the best civilian minds. Since Ihering's time, enlightened civilian legal literature has shown the great achievements of the various procedures whereby the meanings of codes and statutes are determined and the rules applied to cases.

Due to their deep cultural roots, their intellectual gifts, and their achievements, the contributions of civilian methodology will have, probably, a long life. Its future may not be limited to the Civil Law. It looks as if it could be extremely useful in every country, whether Civil Law or otherwise, where the process of creation of the law is being concentrated in the hands of specialized legislative organs.

#### VII. THE CHALLENGE OF OUR TIMES

The Civil Law is a particular way of thinking about human behavior, the behavior of individuals in their mutual relationships, either as individual persons or as members of collective persons, including the State. This thinking is normative thinking, thinking in terms of what ought to be. It constitutes a normative system. Those norms are meaningful. They express value-preferences rooted in Greek philosophy, Christian tradition, individualistic Rationalism and social Romanticism.

The Civil Law in its quest for justice combines intellectual grasp of

33. See, e.g., Larenz, *The Open Legal Development*, in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS* 133 (Dainow ed. 1974), and David, *The Civil Code in France Today*, 34 *LA. L. REV.* 910 *et seq.* (1974).

reality, with apprehension of facts and comprehension of values, in such a way that every phenomenon is seen as a part of the whole of social reality; every rule of law, as a part of a logical and consistent system; and every value, as a part of an articulate set of values.

The conceptual mastery of reality is achieved by the use of highly technical concepts, and by the employment of systematic ideas which can be traced back to Roman law.<sup>34</sup>

The empirical factors have undergone tremendous changes. Modern industrialized and urban societies keep very little resemblance, if any at all, with the small rural communities envisioned by early Roman law. Urban concentration, population growth, air travel, space exploration, underwater activities, atomic energy, transplants of human organs, computer technology, mass marketing, have altered every aspect of human life. The perception of these new phenomena, including their identification and proper evaluation, has been performed by the modern civilian in a manner which is consistent with the great traditions and achievements of which he is an heir.

No less important has been the change in the realm of values. The individual was the subject of the particular concern of the jurists of the XVII and XVIII centuries. By the middle of the XIX Century, the social group, and class, and society as a whole, made their way up to the center of the stage. That process is still going on. The relationships between the State, the

34. The exceptional importance of an adequate mastery of Roman Law for the understanding of modern western private law, and, in particular, of the Civil Law, has been underscored by thinkers from very different schools of thought. Leibniz was of the opinion that Roman law provided the materials needed for the discovery and statement of the basic, general principles of the law. He was very much impressed by the geometrical method and by the consistency of the logical constructs of the Roman jurists and by their ability to discover in social facts, their ideal elements. 1 SOLARI, *supra* note 7, at 68.

Adds Solari: "The brilliant idea of Leibniz of fusing Roman law and Civil Law in accordance to a systematic plan, of creating a universal civil law—an idea which was considered bold and premature at that time—was accepted by the Natural law lawyers of the eighteenth century; it was translated into action in the Codes which closed the period of speculative thinking and which regulated in a definitive manner the relations of the individuals in accordance to the requirements of modern times." *Id.* at 68.

Savigny, the founder of the historical school of law, who was in direct opposition to the theoretical conceptions of Leibniz, indicated in his *Preface* to his celebrated book on modern Roman law, that the study of Roman law was indispensable for the proper understanding and the improvement of the Civil Law. See F. SAVIGNY, *Preface* to 1 *SYSTEM OF THE MODERN ROMAN LAW VII et seq.* (W. Holloway transl. 1867).

social groups, the social classes, and other collective entities, came into conflict and became uncertain. The claim was made that cooperation and solidarity were more valuable than order and security,<sup>35</sup> and that justice was not only rational justice, as taught by Aristotle and Kant, but also social justice. The Civil Law was not alien to this trend. A process of evolutive change began. Illustrious names pointed the way: Del Vecchio<sup>36</sup> and Solari<sup>37</sup> in Italy; Hauriou,<sup>38</sup> Duguit<sup>39</sup> and Josserand<sup>40</sup> in France; Ihering,<sup>41</sup> Ehrlich,<sup>42</sup> Menger,<sup>43</sup> Lask<sup>44</sup> and Radbruch<sup>45</sup> in Germany; among others.

35. Perhaps the most striking expression of this new attitude can be found in L. DUGUIT, *LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON* (1912), particularly the second and sixth conferences. Although some of Duguit's most important theses were not accepted by jurists nor confirmed by experience, his observations concerning changes in the nature and scope of contractual and property relations are good evidence of his keen perception of the social changes under way and their impact in legal theory.

36. G. DEL VECCHIO, *PHILOSOPHY OF LAW* 444 (1953): "[i]n defending the integrity of this Nation, the individual not only avails himself of a right, insofar as he demands respect for an element pertaining to his person, but at the same time he fulfills an obligation from which there can be no derogation, which arises from the very idea of justice. Correctly, in the sentiment common to all peoples which is reflected in the customs and the Codes of every period, this obligation toward the fatherland or nation is placed alongside that which concerns respect for parents, for it has in reality an identical foundation, and for the fulfillment thereof one considers necessary the sacrifice of one's life, where necessary, as it were in recompense or restitution for the life itself which one has received."

37. G. SOLARI, *FILOSOFIA DEL DIRITTO PRIVATO: Vol. I, INDIVIDUALISMO E DIRITTO PRIVATO* (1959), Vol. II, *STORICISMO E DIRITTO PRIVATO* (1939).

38. A. Hauriou, *L'Ordre Social, la Justice et le Droit*, 1927 *REVUE TRIMESTRIELLE DE DROIT CIVIL* 795; A. Hauriou, J. GICQUEL, P. GÉLARD, *DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES* (6th ed. 1975); for an analysis of Hauriou's influence in General Theory of Law and in Public and Private Law, see also *La Pensée du Doyen Maurice Hauriou et son influence*, 3 *ANNALES DE LA FACULTE DE DROIT ET DES SCIENCES ECONOMIQUES DE TOULOUSE* (Pédone ed. 1969).

39. L. DUGUIT, *LE DROIT SOCIAL, LE DROIT INDIVIDUEL ET LA TRANSFORMATION DE L'ÉTAT* (2d ed. 1916); *LES TRANSFORMATIONS GÉNÉRALES DU DROIT PRIVÉ DEPUIS LE CODE NAPOLÉON* (1912).

40. L. JOSSERAND, *DE L'ESPRIT DES DROITS ET DE LEUR RELATIVITÉ; THÉORIE DITE DE L'ABUS DES DROITS* (2d ed. 1939).

41. R. VON IHERING, *2 DER ZWECK IM RECHT* (1883); English translation in HUSIK, *LAW AS A MEANS TO AN END* (1924).

42. E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Moll transl. 1962).

43. Menger, *DAS BÜRGERLICHE RECHT UND DIE BESITZLOSEN VOL KLASSEN* (1890); Spanish translation under the title of *EL DERECHO CIVIL Y LOS POBRES*.

44. E. LASK, *Legal Philosophy*, in *THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DABIN* 13 (K. Wilk transl. 1950). Lask points out the trying nature of the dialectical tensions which arise between the individual and the community. Says Lask: "The entire legal philosophy of the nineteenth century has exerted itself to

The innovations brought about during the last century have been general and deep. Their impact in the functioning of traditional institutions, on the operation of the machinery of the State, on the process of identification and choice of the proper goals of human life, has been such that the question has properly arisen as to the future of the Civil Law in the new world which we have begun to live.

The Civil Law is now almost two thousand and five hundred years old. It survived the destruction of the Roman Empire. It adapted itself to the world of Christianity. It made comfortable room for the new man of the Renaissance and of the Enlightenment. It welcomed the rediscovery of social classes and social groups, and acknowledged the high dignity of social values. In the process, it tried to translate into reality the Aristotelian notion of justice and the Kantian ideal of the supreme value of the individual, while, at the same time, protecting the common good and the public interest.

The Civil Law is aware of the ever-present dialectical tension between the individual and the State. It had been already the center of the preoccupations of the great philosophers and jurists of the Renaissance and the Enlightenment. As said above, that tension became critical during the second half of the XVIII Century, leading finally to the French Revolution where the "individual idea" triumphed. The victory was not total, nor did it last very long. By the end of the XIX Century, the claims of the State and the demands of social classes and social groups were strong enough to lead to a re-evaluation of the position of the individual *vis-à-vis* the State. A new chapter of the dialectical relation between the State and the individual thus began. Its impact was immediately felt in the Civil Law.

In our days, the tension is becoming more acute, more dramatic. It is a consequence, among other factors, of the concentration of huge growing populations in reduced urban areas, of their close dependence on advanced technology, and of increased external perils. The efficacy of general rules of law for the solution of contemporary conflicts is being questioned. Groups and social classes are becoming restless and impatient. There is an increasing tendency to rely on direct action instead of the rather slow, deliberate, orderly processes of Parliaments and Courts.

maintain a distinct absolute meaning of social relations without having to give up the recognition of the individual as an absolute end in himself, which has been fought for and won by the eighteenth century. At present, this philosophical struggle has not been brought one step nearer to its conclusion." *Id.* at 13.

45. G. RADBRUCH, *Outlines Of Legal Philosophy*, in *THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DABIN* 47 (K. Wilk transl. 1950).

Will the Civil Law, as a highly civilized and rational process of solving human conflicts, be able to survive the challenges of this new age?

### VIII. MANIFESTATIONS OF THE CHALLENGE

In the search for an answer to the preceding question, the following factors should be considered:

- (a) the growth of public law;
- (b) the enactment of binding general rules by bodies which are not official legislative organs of the State;
- (c) the loss of prestige and efficacy by Parliament, Congress and other official legislative organs;
- (d) the exceptional proliferation of written rules of law, whether of legislative origin, or otherwise;
- (e) the emergency of highly specialized fields of the law, characterized by concepts which appear to be alien to the basic principles of the Civilian codes;
- (f) the multiplication of case-law;
- (g) the crisis of the traditional methods of political representation, and of their ideological justifications;
- (h) the consideration of conflicts by executive or administrative organs, under the pressure of direct means of actions.

All of these factors appear to be the manifestation, in the field of law, of changes in the basic structure of Western societies. These changes have a direct bearing on the future of the Civil Law. The question is whether the Civil Law will be able to adjust its concepts, its system, its methods, and its values, to the new realities of human life. The Civil Law has shown, throughout its history, remarkable resiliency and capacity to adjust to societal modifications. But qualities found in the past may be lacking in the future.

The questions posed by the impact and challenge of the new factors may be reduced, essentially to the following ones:

*First:* can the Civil Law, as a system of coherent and homogeneous rules, overcome the difficulties caused by the proliferation of law-making bodies, the growth of Public Law and the unparalleled multiplication of written rules?

*Second:* can the Civil Law operate its traditional methods of interpretation when the Legislator has lost political prestige and is no more the exclusive source of binding, general, written rules of law, and when the jurisdictional organs of the State appear to be losing some degree of

effectiveness in the weighing and adjudication of conflicting interests in a rational and orderly manner?

*Third:* can the Civil Law keep its outstanding balance between the rights of the individual and the claims of the State, at a time when the individual seems to be powerless as against the tremendous impersonal machinery of the State?

*Fourth:* can the Civil Law maintain its ability to provide the individuals, and the collective persons, whether private or public, with the concepts, the institutions, and the juridical techniques, they need for the full development and advancement of their respective objectives?

*Fifth:* can the Civil Law keep the intellectual and rational elements which have played such a fundamental function in its development— notwithstanding the social tendencies towards direct, often-times irrational action for the settlement of conflicts, and for the recognition of particular interests?

### IX. THE THREAT TO THE SYSTEMATIC CHARACTER OF THE CIVIL LAW

Its ability to reduce multiplicity to unity, to eliminate redundancies, to prevent contradictions, and to coordinate and synthesize, is one of the striking and distinguishing characteristics of the Civil Law. Already at the time of Gaius, Roman jurists had been able to develop some basic lines of classification of materials.<sup>46</sup> Three centuries later, Justinian undertook the enormous task of selecting, coordinating, and organizing hundreds of thousands of *responsa*, *leges*, *senatus-consulta*, constitutions and other jural materials, trying, at the same time, to preserve a proud heritage, and to bring Roman law up-to-date, without contradictions.<sup>47</sup> The sheer weight of so many written rules of law, either enacted by legislative organs of the State, or stated by the Roman magistrates, had complicated the application of Roman Law, created uncertainty, and generated confusion. Nevertheless, the whole heterogenous mass of materials was handled with consistency and dexterity by the Justinian jurists, and out of the welter of rules came forth an articulate and organized set of propositions.

Situations somewhat similar to that faced by Justinian during the VI Century have arisen in the long history of the Civil Law. In France, in Italy, in Germany, in Spain, in Greece, in Holland and in Latin America, the

46. H. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 394 (1932); See also reference in note 3, *supra*.

47. See H. WOLFF, ROMAN LAW, AN HISTORICAL INTRODUCTION 172 (1951).

multiplicity, variety and diversity of sources and rules caused disorder, insecurity and confusion at different historical epochs. The peculiar customs of cities, and baronies, and counties, and provinces, the enactments of local parliaments, the commands of the kings, lords and local rulers, and the laws of the Church, introduced so many contradictory and multiple law elements, that it became increasingly difficult to identify with reasonable certainty, what the law was.

In each one and all of those cases, the jurists, inspired by the Roman tradition, were able to overcome diversity and to preserve and develop a system of law, capping their efforts with the enactment of codes, and the publishing of learned treatises to expound their content in a highly coherent manner.

Nothing indicates today that the civilian jurist has lost his ability to keep and develop the systematic character of the Civil Law. The threat which comes from the tremendous growth of public law, administrative law, labor law, among others, signifies a powerful challenge to the classical systematic nature of the Civil Law. The question is, simply, how to keep the unity of the system, how to maintain its logical consistency. Since the beginning of the present century, it became obvious that a new theoretical effort was needed to save the Civil Law from being fragmented, dislocated and disorganized by the new social and political forces at work. The civilians, working at the same time in the private and the public areas of the law, have been providing criteria of unification and generalization. The prospects are encouraging. In such countries as France, Germany, Belgium, Italy, Switzerland, Portugal, Spain, Argentina, Uruguay, Chile, Brazil, Mexico, among others, jurists have undertaken the task of reducing the vast number of Public Law materials to basic principles concerning administrative acts, administrative jurisdictions, public patrimony, public utilities, and the no less difficult task of coordinating those principles with the typical concepts of the Civil Law.<sup>48</sup>

The elaboration of general theories in administrative law and related fields, consistent with the general principles of the Civil Law, has been so successful, that it is not an expression of unrealistic optimism to predict that the civilian will be able to preserve its systematic character and to cooperate actively in the development of the new ideas (in the Kantian sense) required

48. See the comments by De Laubadère, concerning the contributions of Hauriou and Duguit in France, and their efforts to correlate Administrative Law and Civil Law in *La pensée du Doyen Maurice Hauriou et son influence*, 3 ANNALES DE LA FACULTÉ DE DROIT ET DES SCIENCES ECONOMIQUES DE TOULOUSE 209, 227 (Pédone ed. 1969).

to handle in a scientific way, the large quantities of materials which are presently crowding every area of the law, both private and public.

Similarly, the Civil Law may provide conceptual assistance to other systems of law afflicted by difficulties of the same nature: unwieldy growth of case law, multiplication of legislative enactments, self-regulation of specific activities, law-making powers of private and semi-private entities.

As it is well known, Common Law jurisdictions are facing increasing problems caused by the simultaneous explosive growth of case law, and of statutory, written law and by the shifting of the center of gravity from the first to the second.<sup>49</sup> The Common Law has been highly successful in the interpretation, development, classification, and restatement of case law. The result has not been so good in the areas of legislation, administrative regulations and codal law.

Both types of law, case law and statutory law, are present in all of the Common Law jurisdictions. Each one of those types of law requires peculiar mental and technical tools for their study, understanding, and application, and a more elaborate methodology for their coordination and integration.

The greater the number of new decisions, the greater the quantity of statutes, administrative regulations, executive proclamations, and similar materials, the more urgent the search for ideas, concepts, theories and procedures in order to synthesize materials and to avoid thereby the chaotic accumulation of rules and precedents.

Very wide fields of human activity are being subjected to new specialized rules and regulations (as, for instance, in the areas of satellite communications, electronic-data gathering, exploitation of the sea-bed, use

49. See F. Frankfurter, *Some Reflections on the Reading of Statutes*, Sixth Annual Benjamin N. Cardozo Lecture, Association of the Bar of the City of New York, 2 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 6 (1947) where he says: "Inevitably, the work of the Supreme Court reflects the great shift in the center of gravity of law-making. Broadly speaking, the number of cases disposed of by opinions has not changed from term to term. But even as late as 1875 more than 40% of the controversies before the Court were common-law litigation; fifty years later, only 5%, while today cases not resting on statutes are reduced almost to zero."

In a similar vein, Presiding Justice David W. Peck, of the First Department of the Appellate Division of the New York Supreme Court in Peck, *Our Changing Law*, 43 CORNELL L.Q. 27, 31 (1957) stated: "In these thirty-six years, between 1921 and 1957, there have been significant changes in the substantive law and in the nature of litigation work in the courts. . . . The present legal age is one of statutory law. The tendency is to codify the common law and meet all the new problems that arise by legislation. This development has been a natural one, apiece with the every changing complex of today's society."

of radioactive materials, race integration, protection of the environment, control of pollutants, equal labor opportunities). The State (federal, local, municipal) is playing a larger role in the economic, cultural and social areas. International interdependence is greater than ever, bringing different legal systems in closer contact, multiplying the need of mutual knowledge, better understanding and more refined methods of intellectual communication. All of these factors point in the same direction: the importance of achieving a higher degree of certainty and order in law.

In the United States, some fifty years ago, Professor Oliphant praised the narrow construction of individual decisions as precedents for the adjudication of cases and denounced the risk of abstraction and generalization. He argued for a return to *stare decisis*.<sup>50</sup> Perhaps some reason could be found for that claim fifty years ago. Could it be found today? Could the law now provide predictability and security; could it make social cooperation possible, if individuals and collective persons, public officers and private citizens, were bound to analyze, to interpret and to apply only individual rulings and judgments as sources of the Law?

Could a system of law function properly in our times if jural abstractions were to be disregarded, in order to concentrate attention in individual situations?<sup>51</sup>

The growth of legislation, the enactment of codes and uniform laws, the development of doctrinal materials, are clear evidence in the United States, of the need to study and define general, clear and consistent legal propositions. The enactment of extremely detailed rules, difficult to understand, and the practice of accepting, with little discussion, the meaning

50. Oliphant, *A Return to Stare Decisis*, HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 61-83 (3rd Session of the 25th annual meeting 1927).

51. See Pound, *Sources and Forms of Law*, 22 NOTRE DAME LAWYER 1, 71-79 (1946). Discussing the need to achieve some degree of unification of the law in the United States through codification, Dean Pound makes the following comment: "It is suggestive that with the economic unification of the country conflict of laws is becoming one of the most important everyday subjects in the average American practice. The demand for one law was behind the growth of the Common Law. Prior to the Conquest there was no one law of England. Local customary law differed greatly. As one of the demands in Magna Carta was for one measure of corn and one measure of ale for all England, so another demand of the time was for one measure of law. Such a demand may some day lead to codification of the common law in the United States."

Our condition is much worse than that of England in respect of uncertainty, unwieldy bulk, and need of unification.

Attempt to reshape the law by judicial overruling of leading cases is no substitute for well drawn, comprehensive legislation" (*id.* at 79-80).

given to statutes by judicial precedents, are not, certainly, adequate procedures for the expansion of statutory law.

In this area, the Civil Law may provide good help to the Common Law.

The handling of statutes and codes, their construction, the classification of written materials, the organization of an integrated system, the achievement of logical order, is what the civilians have learned to do very well. After all, they enjoy, in the performance of this task, the advantages provided by 2,000 years of experience.

In conclusion, it is my impression that it is not likely that the Civil Law will be deprived of its highly systematic character.

#### X. THE THREAT TO CIVILIAN METHODOLOGY

The wealth of its techniques for the determination of the meaning of general written rules has been a distinctive contribution of civilian methodology.

Modern Civil Law theory has accepted, as its starting point, the binding character of rules enacted by persons who are identified as legislative organs of the State.

Civilians have been able to identify, without too many difficulties, who are those organs. As to the questions concerning the meaning of those rules or statements they were answered in different ways: (1) by reference to the will of the legislator, considered as a psychological and political fact, taking place within a given historical context; or (2) by the determination of the logical relationship existing between the legal concepts and propositions subject to construction, and the principles, definitions, concepts, and logical constructs of the legal system as a whole; or (3) by the identification of certain worthy social, cultural, economic or political objectives which were to be achieved by the use of the law as a means to that effect. Now, the process is much more complicated. For one thing, it is not so easy any more to identify who are the organs properly empowered to issue binding rules. Should collective agreements entered into between unions and employers' associations be binding on laborers who are not members of the union, or on employers who did not participate in the collective bargaining, as if those collective agreements had the validity of state-sanctioned rules of law? Should covenants introduced by landowners while developing their lands, operate as to subsequent vendees of those lands, as if they were like valid municipal restrictions limiting the use of land, buildings, and open spaces? Should private organizations regulate the access of laborers to labor markets? Should individuals be bound to pay fees or contributions, required by charters and by-laws of entities of which they are not members?

There are law-making activities by private and by quasi-public entities; there are general regulations issued by non-official entities. Being written and being general, those regulations create problems of interpretation. Is the civilian method adequate to construe them?

Civilian methodology in the interpretation of written general rules of law is not limited to a process of identification of the will of the legislator, nor is it bound by a strict theory of the sources of the law, which will restrict the jurist, and the judge, in their quest for the law applicable to a case, to codes or statutes as if they were the only available sources on which to rely, in order to show the objectivity of the adopted solution.<sup>52</sup>

In fact, since Ihering, in Germany, and Géný, in France, started the process of critical revision of methods and presuppositions of legal theory, the civilians have developed a variety of techniques and procedures in order to interpret codes and statutes, to "fill the gaps in the law," and to distribute justice between the parties.<sup>53</sup> These techniques have shown their adequacy to solve the problems created by the accelerated process of social and political change.<sup>54</sup>

The civilian method has not discarded the search for the will of the legislator, nor the identification of the general concepts of the system, in order to resort to them as logical premises for the coherent application of the law, nor the use of the rules as instruments for the achievements of certain purposes, if they lead to just results. But other methods are being used, as well, either separately or simultaneously: the setting of a legal problem within the wider context of the social structure as a whole, the legal problem being simply the individual expression of a historical process illumined by a spiritual element; or the consideration of the case of which the rule subject to interpretation appears to be just one partial element, as being a case of human behavior linked to the behavior of another human being which demands understanding of the legal values involved, and a decision, fair and just. Modern civilian methodology may show with pride that those achieve-

52. A synthetic and illuminating description of theories concerning the sources of the law, and of the several methods of interpretations which have been developed by civilian jurists can be found in A. ROSS, *ON LAW AND JUSTICE* 75-157 (1959). In Spanish, perhaps the deepest analysis of methods of interpretation can be found in C. COSSIO, *EL DERECHO EN EL DERECHO JUDICIAL* (1959); C. COSSIO, *TEORÍA DE LA VERDAD JURÍDICA* (1950).

53. A very detailed description of the main methods, their potentialities and their limitations in the Civil Law can be found in A. HERNÁNDEZ GIL, *METODOLOGÍA DEL DERECHO* (1945).

54. See the evaluation made by John D. Dawson of the achievements of modern French and German doctrine and jurisprudence in DAWSON, *supra* note 10, at 374, 432; and Merryman, *supra* note 22, at 163 (Dainow ed. 1974).

ments occurred in the middle of a process of rapid change, without having placed in jeopardy the rational and the systematic features of the Civil Law.

Looking back one hundred years, to the times when the exegetical techniques of Toullier, Marcadé, Troplong, Aubry & Rau, and Demolombe, and the logical procedures of Dernburg and Windscheid, Heise and Savigny, appeared to dominate, unchallenged, the learning and the teaching of the law, we may realize today how innovative and successful has been the expansion of civilian legal methodology.

I am inclined to think therefore, that there is no reason to fear that the advanced methods of today's Civil Law will not be able to overcome the problems of interpretation looming in the future.

#### XI. THE THREAT TO THE BALANCED RELATIONSHIP OF THE INDIVIDUAL WITH THE STATE

The Civil Law has been mainly concerned with the individual. From early Roman times, up to the present, the Civil Law has attempted to deal in a rational and just manner, with his activities, his rights, his obligations, his status as member of a family, his relations with others, his use or enjoyment of things, and the conveyance of his properties. The great civil codes provide full normative coverage for those activities. A basic assumption has been at work: that the individual should have a certain minimum of freedom to take care of his own needs as he sees fit, to undertake whatever action he deems appropriate, and to commit his patrimony as he wishes in his dealings with others.

The Civil Law, as a system of rights and duties, liabilities and sanctions, has found in its history, *that* minimum of freedom needed to justify its solutions. There was, of course, more or less satisfaction with the various political, economic and social realities, and their respective spheres of human freedom of which the Civil Law was its normative element. In this respect, the position of the individual was of one kind *vis-à-vis* the Roman Imperial State, but it was of another kind in the early Middle Ages, or in the Renaissance. In all of those cases, however, the room left to the individual for the autonomous determination of his relations with other individuals was the minimum required to justify the answers provided by the Civil Law to the questions raised by human existence.

A certain uneasy link was established between the individual and the national State. Both learned to live with each other. During the XVIII Century, under the influence of the philosophy of the Enlightenment, and because of social and economic pressures, the need was felt of expanding substantially the area reserved for the operation of the free will of the

individual. Taking their clues from Descartes, Bacon, Kant and Leibniz, the natural law lawyers proclaimed the paramount validity of human rights and the secondary position of the State, limited in its function to that of a guarantor bound to protect the individuals in the exercise of their rights. At the time of the French Revolution, the pendulum swung decidedly in the direction of the individual, reaching its farthest point with the enactment of the Code Napoleon and the Austrian Civil Code.

Soon afterward, however, the pendulum began to move in the opposite direction. The process became explicit with the teachings of the historical and romantic schools of jurisprudence. It continued during the second half of the XIX Century with the various doctrines of social and legal philosophy which proclaimed the higher value of social justice and solidarity, the prevalence of the common good, and the overriding validity of the rights of society.

Thus, the last fifty years have seen the gradual erosion of the rights of the individual, the progressive participation of the State in almost every area of activity, and the continuous reduction of the ambit of operation of the principle of the autonomy of the will.

The risk, and it is a very real one, is that the delicate and unstable balance between the rights of the individual and the power of the State, which has been the foundation on which the Civil Law has constructed its magnificent building may be altered to the substantial detriment of the individual.

Certainly, the battleground for this dramatic confrontation will not be found solely in the restricted area of civilian theory, nor in the sphere of judicial practice in civil law matters. The dispute has a larger dimension and involves many other factors.<sup>55</sup>

However, the Civil Law will have a role to play. Judges, lawyers and professors of law are already participating in the struggle, from their influential positions in the structure of society.

Civilian doctrines, deeply ingrained in the soul of the citizens and of

55. The threats to individual freedoms brought about by the growth of the State and the social and economic forces at work today is being felt not only by the Civil Law. The Common Law is facing the same problem. The Common Law judges have undertaken a dedicated task of extending effective protection to their citizens but there are some apparent limitations. In order to overcome them, the United States Congress and many of the State Legislatures have provided statutory remedies. This is a healthy sign of the strength of a democracy and of its ability to preserve the rights of its citizens. But the final outcome of the struggle for the defense and development of individual rights in the new world which is coming into being before us, is difficult to predict.

the lawyers, like the ones relative to subjective rights, non-retroactivity of statutes, recognition of the will of the individual as a proper source of obligations, testamentary and intestate successions, ownership rights, and specific performance of contracts, are instances of the armory of legal institutions and jural concepts, which are alive and active, in the fight for the preservation of human rights.<sup>56</sup>

Insofar as the people, in their daily lives, the jurists, the judges, and the lawyers, continue to operate on the assumption that a minimum of liberty, similar to the basic freedoms gained by Western man in his long history up to the present day, is an indispensable foundation for the organization and development of private activities, it seems probable that the Civil Law will help materially to keep that delicate and unstable balance between the rights of the individual and the powers of the State, without which the Civil Law, as a system of rules and propositions dealing with the private activities of the individual, loses its historical meaning and value.

## XII. THE THREAT TO THE TECHNICAL EFFICACY OF THE CIVIL LAW

One of the most important contributions of Roman law, expanded by subsequent civilian doctrine, has been the clarity and adequacy of its concepts, propositions and definitions. They became so useful that they were accepted and received by other jural systems.<sup>57</sup> It is sufficient here to

56. Del Vecchio, after listing the principles which provide the basis for the assertion of human rights adds: "The deontological value of those maxims, that is, of the series of the natural rights of the individual considered not separately but as a organic whole, is derived precisely and exclusively from the intrinsic essence of the person. To discern and declare such rights belongs to pure reason, to realize them and guarantee them by rules and decisions adequate to changing circumstances belongs to the art of the politician and to the technique of the jurists." G. DEL VECCHIO, JUSTICE, AN HISTORICAL AND PHILOSOPHICAL ESSAY 118 (Guthrie transl. 1952) [hereinafter cited as DEL VECCHIO]. Del Vecchio goes on to distinguish the ideal validity of the principles of justice, including the recognition of human rights, and their historical realization, and their application to the State and then he adds: "The State too is subordinated to the same idea, and therefore, insofar as it conforms to its mission, can properly be called the *just state* or *justice state*. To the State as centre and subject of the positive juridical order, from which emanate formally all the rules of which this is composed, it belongs to recognize, confirm and protect the validity of the rights we have mentioned, as undeniable underlying assumptions of its own very existence, prime and inherent reason of its activity, limit and essential condition of its legitimate authority over individuals." *Id.* at 119.

57. The Civil Law has exercised some degree of influence over the Common Law, notwithstanding the strong national character and peculiarities of the latter. David Oliver is of the opinion that, although a full estimate of Roman influence cannot be made until the earlier Common Law authorities and reports have been

recall the notions of ownership, servitudes, obligations, transfer of rights, legal personality, patrimony, payment of debts, among others, to understand to what extent the Civil Law has supplied a common fund of concepts to different legal systems, facilitating thereby understanding, and communication in law matters.

However, those clear and logical schemes of the Civil Law could be affected by the new realities before us, and those expected to come. Traditional doctrines like the ones relative to ownership, vicinage, servitudes, marriage, leases, security transactions, and torts, have felt already the impact of the process of change presently under way. Therefore, the significant technical advantages provided by a system of law which had elaborated its terminology and concepts to such a high degree of perfection, could be lost. The risk should not be minimized, particularly if one takes into account that confusion in this area may ruin the existing channels of communication and understanding.

Nevertheless, there are good reasons to look with confidence to the future. In law schools and courthouses, throughout the Civil Law world, the task of perfecting concepts, of introducing distinctions, of expanding definitions, of elaborating new doctrines, has gained added impetus.

Doctrines like the ones relative to "abuse of rights," unilateral juridical acts, unilateral declaration of the will, sources of obligations, formal acts, publicity and registration of legal transactions, good faith in

subjected to a detailed and critical examination, the statement may be advanced that much Roman law is "secreted in the interstices of procedure," in the Common Law system. Oliver, *Roman Law in Modern cases in English Courts*, in CAMBRIDGE LEGAL ESSAYS 243 (1926).

According to Maine, "The early ecclesiastical chancellors contributed to it [the Court of Chancery] from the Canon Law, many of the principles which lie deepest in its structure. The Roman law, more fertile than the Canon Law in rules applicable to secular disputes, was not seldom resorted to by a later generation of Chancery judges, amid whose recorded dicta we often find entire texts from the *Corpus Juris Civilis* imbedded, with their terms unaltered, though their origin is never acknowledged. Still more recently, and particularly at the middle and during the latter half of the eighteenth century, the mixed systems of jurisprudence and morals constructed by the publicists of the Low Countries appear to have been studied by English lawyers, and from the chancellorship of Lord Talbot to the commencement of Lord Eldon's chancellorship these works had considerable effect on the rulings of the Court of Chancery." H. MAINE, ANCIENT LAW 44 (10th ed. 1885).

A striking instance of the influence of Civil Law doctrine on Common Law developments in the field of contractual damages has been shown recently in a heavily documented article on the rule of *Hadley v. Baxendale* (156 Eng. Rep. 145 [1854]). Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUDIES 249 (1975).

contractual relations, limitation of liability, division of patrimonies, nullity and lack of existence of juridical acts, "notorious acts," juridical personality, "law of international trade," liability without fault, duties of parenthood, responsibility of the State, are but few instances of the speed and efficacy with which the Civil Law is attempting to maintain and to further the technical excellence of its concepts and institutions.

There may be problems in the future. The efforts to reconcile the conflicting demands of our time may require deep changes in concepts and terminology. However, it seems unlikely that any defeat or setback in this area could be attributed to technical shortcomings of the Civil Law. In this respect, its achievements remain unparalleled in the history of juridical thinking. The fact that the process of development and updating has not diminished at all, seems to be a good indication that the years to come will not see the end of its great technical contributions.

### XIII. THE THREAT TO THE RATIONAL ELEMENT IN LAW

The Civil Law is a cultural reality, the result of a long history. A careful scrutiny of its content, its structure, its systematic ideas, will show the everlasting contributions of the Romans, the Greeks, the Italians, the Spaniards, the Germans, the French, the Dutch, the Latin Americans, in its ever present process of answering the challenges of life.

That historical growth followed a pattern. It was not erratic, or indefinite, as brought about by sheer chance. It was a process with a direction.<sup>58</sup> It was an enlightened instrument of social intercourse. It survived revolutions, drastic changes in forms of government, deep modifications in the techniques of production, and in their related social, economic and financial relations.

Divergent philosophies of history have been advanced to interpret that historical development. We do not need, however, to dwell in some highly abstract and metaphysical exercise, in order to show that the Civil Law, as a historical institution, as a long human process, was always something else than the chance product of empirical and changing factors. An internal element of rationality was always present. Its roots can be found in Greek

58. Speaking of the Western Legal Tradition, Professor Berman, among others, mentioned the two following characteristics: "[s]ixth, that the body or system of law is conceived as developing in time over generations and centuries. The concept of the development of law, its ongoing character, its capacity for growth over generations and centuries, carries the implication of a seventh characteristic, namely, that the changes which take place in the structure of the law follow a certain pattern. The growth of the law is thought to have an organic character, an internal logic." Berman, *The Crisis of the Western Legal Tradition*, 9 CREIGHTON L. REV. 253 (1975).

teachings of Plato and Aristotle, and their reception in Rome, the Western man knows that justice presents essential elements of rationality: equilibrium, equality, proportionality, and recognition of the rights due to every person by the simple reason of his being a human being.<sup>59</sup>

Law which is the expression of passions and whims, or which obeys fleeting inspirations, or sudden impulses, is incapable of providing intelligent solutions to the problems of society. The citizens lack an understandable frame of reference, provided by rules and objective criteria, on the basis of which it is possible to foresee the consequences of human behavior, and to organize long range efforts.

Nations ruled by ephemeral feelings, acting and reacting in multiple directions, become an incoherent aggregate of human beings, tempted to take justice in their own hands, to the detriment of peace and order. Deprived of the stabilizing influence of reason, they become unstable societies dominated by fear and open to constant disorder.<sup>60</sup>

59. "Few things are more remarkable than the convergence which was realized in history between Greek speculation and Roman experience in the subject of law. The basic idea of justice was accepted by the Romans as it was offered to them by the Greek schools of philosophy; it was accepted, and at the same time enhanced in value through the greater precision which resulted from their technical elaborations of particular concepts, that is, from the analytic insight of the *ratio juris*. The two traditions, Greek and Roman, thus were fused into one which came to rule and still rules unchallenged the juridical thought of the whole civilized world." DEL VECCHIO, *supra* note 56, at 56.

60. Professor Berman appears to charge some of the most distinguished Natural Law philosophers and jurists of the Enlightenment as responsible for the negative aspects which can be perceived in law practice and theory today. He says: "It is sometimes argued that this uprooting of law is a result of modern liberalism starting in the seventeenth century. Thinkers such as Hobbes, Kant, Bentham, Rousseau, and other leading representatives of various schools of thought are charged with various philosophical fallacies which have led ultimately to the alienation of the individual, to anomie, to the kind of distrust of history and of social institutions which characterizes our time. The separation of the individual from society, the separation of morality from faith and of law from morality, the emphasis on reason at the expense of intuition and passion, the rejection of tradition and of authority, the instrumental theory of values—these are the hallmarks of modern social and political and legal theory." Berman, *The Crisis of the Western Legal Tradition*, 9 CREIGHTON L. REV. 252, 262 (1975).

However, what here appears to be a strong denunciation of rationalism, and advocacy of emotions, intuition and passions (*i.e.*, non-intellectual elements) by Berman is attenuated a few lines afterwards, where he praises the rational deductions of other Natural Law philosophers and jurists: "Gratian said that divine law was supreme; that natural law, which can be known by reason, is a reflection of divine law; that the laws of ecclesiastical and secular authorities are to be tested by, and should yield to, natural law and divine law; and that customs must yield to statutes. For the first time in legal history, by establishing a hierarchy of sources of law, jurists

What will be the situation in the Civil Law countries of the future?

Will they be able to keep a rational system of law? Or will the irrational forces which appear to be active in the world today, become so strong, so pervading, that the Civil Law will cease to be a rational living institution?

Those irrational forces are threatening Western societies as a whole, not only their Civil Law. The nature and the extent of that threat demands, if it is to be met and neutralized, much more than the type of action which can be expected from the law and its oracles and makers. Therefore, the questions which have been raised cannot be answered properly, from the rather narrow and limited standpoint of the Civil Law. The Western man will have to take a stand. He will have to produce adequate answers, to determine the aims and purposes of his life, the sphere of freedom he wants to preserve and to fight for, and the type of society in which he wishes to live.

This is not the opportunity to discuss the fate of Western civilization and of its main institutions, nor do I have the knowledge, perspective and capacity required to cope with such an extremely difficult question. What I can do, as a lawyer, is to recall the nature of the relationship which exists between the law, as an aspect of social life, and culture as a whole. This relationship is such that any basic cultural alteration will bring about similarly basic modifications in the law. If reason in society is threatened, reason in law is equally threatened.

Law is inherent to human society: decentralized law or centralized law;

were able to systematize the law and to weed out the irrational customs from the rational, the just from the unjust." *Id.* at 263.

There seems to be some kind of inconsistency in Professor Berman's thought. Tradition and customs are closely related. Society does not reason; individuals do. Statutes are rational, deliberate expressions of individuals, the legislators. Customs are the spontaneous, non-intellectual way of being of social groups, under the influence of their emotions, intuitions and passions. What, then, is to be preferred: statutes or customs; reason or emotions; rationality or irrationality?

Professor Berman praises the French and the American Revolutions, which challenged, transformed and renewed the Western legal tradition. *Id.* at 261. But these revolutions were inspired by some of those liberal-rationalist philosophers and jurists who appear to be criticized and made responsible for the ills of the law of our times by Professor Berman. There is no question that Western law faces a very serious threat. Where does it come from? It is my opinion that it comes from strong irrational forces unleashed in our times; it comes from the explosion of passions and from the growing social pressures fostered by emotions and by unrestricted feelings; it comes from the encirclement of the individual by impersonal, collective forces; it comes from the generalized attitude of disdain for the rational elements of justice (equilibrium, equality, proportionality) and of preference for the spontaneous activities of the people, fueled by their passions and intuitions.

customary law or statutory law; primitive law or highly technical law; rational law or irrational law. The countries which inherited the Roman law tradition have enjoyed the benefits of a rational, centralized, written, highly technical system of law, inspired by some essential notions of justice and related values.

As I look to the history of the Civil Law, to its present achievements, to its presuppositions, to its inner forces, I can see that the Civil Law itself, as a specific way of social life, may take care of most of the threats which seem to be looming in the decades ahead.

The preservation of its systematic character, the refinement of its methodology, the adjustment of the private law claims of the individual *vis-à-vis* the State, the maintenance of its technical excellence, are aims which the Civil Law can achieve. The history of the Civil Law is, to a great extent, the history of its successful efforts to gain logical consistency and an adequate systematic structure, to establish a workable relationship between the citizen and the State in the realm of private activities, and to provide mental tools whereby the citizens, the lawyers, and the judges, can think with clarity about their own behavior, as members of the community.

All of these prospects, however, have become conditioned by a big existential question, a question which is at the very root of today's human and social life. It is, as I said before, the question of the future of rationality, as rationality was understood by Plato, by Aristotle, by Saint Thomas Aquinas, by Descartes, by Leibniz, by Kant, by Locke, by Bentham, by Husserl, and by the great civilians of all ages; that rationality which led Ulpianus to his famous definition: "*Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*," that is to say, to live honorably, not to injure others, to render to every man his due.

Therefore, the question relative to the future of the Civil Law as rational law is a question which, really, should be addressed more to the citizen than to the lawyer, more to the philosopher than to the jurist, more to the statesman than to the legislator.

Although the magnitude of the problem clearly exceeds the sphere where the action of the lawyer, the judge and the jurist, is effective, perhaps those who are devoted to the study, the teachings and the application of the law could do something, could perform some service, could become more active components of the forces which are being mobilized to protect the rational nature of human life.

*First of all, they should become aware of the danger of irrationality.* Being alert, it will be easier for judges, lawyers and jurists, to suggest preventive action, to control excesses, to discuss better solutions for the

troubles ahead: the "rebellion of the masses" announced by Ortega; the proliferation of the impersonal man, described by Heidegger; the stifling effect of uniformity and ritualism; the loss of compassion for the fellow man; the manipulation of the minds and the 'engineering of life' anticipated by Huxley. The men of the law may not have the remedies for all these ills, but they do have the experience and wisdom, acquired after years of handling flesh-and-blood human conflicts, of determining their scope and impact, and identifying some of the needed remedies.

*Second, they should undertake a critical examination of the shortcomings of the law system in force*, in order to eliminate, insofar as it is within their powers, those legal practices, customs, and attitudes which breed rancor, hatred or despair, either because the law is not understood by the citizens, or because the law is not just to the citizens.

*Third, they should gain an enlightened perception of the general element which can be identified in every particular, individual case.* Judges, jurists and lawyers in the Civil Law, have a spontaneous and keen understanding of the dialectical tension between the individual and general elements in law. They realize that, from the standpoint of empirical existence, there are only individual cases, concrete manifestations of historical life. But they also know that each case is an instance of a general proposition, and that general legal propositions are effective guidelines for their conduct. This is why in the analysis and the decision of each case, it never suffices to take into account its unique, peculiar aspects. The general element has to be considered. In this sense, judges, lawyers and jurists alike, are parties of the never-ending process whereby the general achieves expression in the individual, and the law becomes an intelligible process, an "opus" of Reason, an expression of intelligent human beings.

It is clear, then, that the future of the Civil Law is closely related, essentially linked, to the future of the civilian. The civilian jurist is the main creator of the Civil Law. The Civil Law is, to use the expression of Koschaker, "*Juristenrecht*," law made by the jurist. The great responsibility of keeping the Civil Law as a civilizing, enlightening and just way of living in society is still on his shoulder, as it was at the height of the Roman Empire, or at its last stage; as it was at the revival of Europe or at its renaissance; as it was at the hour of liberty, equality and fraternity; as it was at the hour of the social idea.

The training and formation of jurists, then, becomes a condition for the survival of the Civil Law system. The Law School and the Law Library are citadels where law professors, surrounded by their students, evaluate social mores, identify conflicts, and make long-rangt projections, trying to

anticipate difficulties and to provide peaceful and just solutions for the settlement of human disputes.

To identify and to recognize a challenge to the Civil Law is similar to identifying and recognizing a challenge to the civilian Law School. As was the case with the Proculeians and the Sabinians, in Rome, with the professor of law in the European medieval and renaissance universities and with the professors of the great Law Schools of the last two hundred years, today's professor of law is called to blend, to fuse, to synthesize reason, value and fact. Around his success in the achievement of this goal, hinges, in a significant manner, the future of the Civil Law.

It is rewarding and promising to see the professor of law aware of the danger posed by the explosion of irrationality; critical of the merits and demerits of his system of law; willing to go beyond the words used by the Judges in their judgments, strong enough to overcome the noises and the changing colors of daily events, and willing to identify the rational component parts of the struggle of the individual for the defense and the development of his personality.

I know, this is not sufficient to venture a well founded prediction as to the future of Reason in the Western world, nor in particular, as to the fate of the rational element in the Civil Law.

But it does allow us to look in a rather hopeful mood to the years ahead.