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## Private Laws of Western Civilization

Ernst Rabel\*

*I. Roman Law Significance*

Human history has entered a new phase. That it should have produced "one world" we cannot very well see. But that the countries of western civilization have awakened to a better consciousness of their historical relations and the immense stock of their common vital beliefs, endeavors, and cultural resources—this is an overwhelming event that should never again be obliterated. The lawyers have compelling reasons and magnificent opportunities of sharing the great work of consolidation, cooperation, mutual understanding, reciprocal aid, universal progress, and international scientific development. Our foremost task is to bridge the age-old cleft that runs through the western laws, separating the Anglo-American "common law" from the "civil law."

"Common law" is a popular term denoting the law of England and the United States as a whole, or at least inasmuch as it is not changed by statutes or special doctrines. "Civil law" indicates the law of all the countries in which Roman law was, at one time, received or one of the romanistic codes has been imitated. Their territories include all of Western, South and Central Europe, Louisiana, Quebec, Puerto Rico and all countries of Central and South America, the Philippines, Egypt, South Africa, Ceylon, Japan, China and Siam. Moreover, the law of several states of the United States has been considerably influenced either by French or Spanish law.

Study of foreign laws and comprehensive comparison of purposes and effects of the various legal systems affords the answer to many of our gravest problems.

In the United States, comparative legal research has been

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The other papers in this series, "The French Civil Code," "The German and Swiss Codes," "The Civil Law and the Common Law" and "Our Laws and the World" will be published in the following issues of this volume. The Louisiana Law Review will also republish the entire series of papers on "Private Laws of Western Civilization" in booklet form.

cultivated in an extremely useful judicial and literary work, because of the coexistence of the several states of the United States, all legislating in sovereignty. Out of disparate rules, principles of American law are crystallized and through restatements and uniform state laws uniformity is growing, in better harmony with the standardized habits of American life and business. But everywhere in the states with the only exception of Louisiana, the Anglo-American law is the basis. Here, a French code with Spanish elements is posited against the background of the Anglo-American surroundings. In this state, civil law and common law, these allegedly irreconcilable antagonists, are parents to the actual law. This, indeed, is an ideal place where the two halves of our juristic heritage may be examined and judged.

Many avenues are available to approach the foreign and international legal phenomena. But an American student leaving the familiar scene of his domestic law may prefer to look first of all on the most outstanding phenomena of the civil law: the Roman law whose body and soul migrated through so many transformations, and the civil codes of France, Germany and Switzerland. Hereafter we shall examine the famous antithesis between civil law and common law. Finally, we ought to raise the question whether the present condition of our laws satisfies the requirements of the contemporary international life.

#### PART I. THE SIGNIFICANCE OF ROMAN LAW<sup>1</sup>

On the main gate of the Imperial Palace of Vienna, the seat of the House of Hapsburg who ruled the core of Europe for six hundred years, the inscription reads: *Justitia Fundamentum Reg-*

(1) Introductory Note. The Periods of Roman and Romanistic Law.

The Twelve Tables (450 B.C.) reflected the law of a small patriarchal community. But the jurists from about 100 B.C. to the end of the Republic (28 B.C.) and subsequently, those of the "classical jurisprudence" (until about 250 A.D.) reached a height unrivalled in antiquity and middle ages. In the early Byzantine period (from Constantine, 300 A.D.) the Roman legal conceptions and rules to a certain extent were mixed with Oriental, Greek, and Christian elements in practice and in the law schools of the Orient. On the order of the Emperor Justinianus, the (later so-called) *Corpus Juris* was compiled, consisting of the *Institutiones*, the *Digest* and the *Code* (A.D. 529-534). This work was taken as basis for the law of the Church (Canon law) and was most thoroughly but uncritically studied in Bologna and other universities by enthusiastic scholars, the "Glossators" (1080-1250 A.D.). One of them, Vacarius, was the first to teach Roman law in Oxford, England (from 1149 or a little later). The subsequent school of "Legists" or "Postglossators" adjusted the "Glossa" to the practical needs of the Italian cities and obtained a comprehensive legal system (1250-1400 A.D.), which in the course of several centuries was adopted in most parts of the European Continent, not only as a scientific model but as the law in actual force, though blended in very different dosages with Germanic conceptions. This system was the object of all the following juristic efforts inspired by such

*normum*. In these three words, justice is the fundament of government, which have significance for international life as well as internal administration, the function of law was summarized exactly as under the Roman emperors. It was not by accident that the motto was in Latin. In the origin and the consolidation of the European monarchies at the dawn of the modern state, Roman law was an essential factor.

#### I. THE CAUSES FOR ITS SURVIVAL

But this is only a part of the answer to the question what Roman law has meant to the Occident. Another part is in the words of a Canadian writer of 1907, that "the Roman law is a great step toward the growth of the human mind, although one which has been strangely neglected in professed histories of civilization."<sup>2</sup>

Roman law, the law of ancient republican and imperial Rome, was essentially developed by a class of professional lawyers, similarly as was its counterpart, the English law. In the Roman republic, the lawyers were originally high priests, but relatively early, from about 300 B.C., were followed by laymen belonging to the same aristocratic ruling class as the pontifices. During the following period of the *principate*, that is, the early or *Roman Empire* (from 28 B.C. to 250 A.D.) the lawyers were high functionaries including former *consuls* and governors. The last great jurists were prime ministers. They were not judges as were the English leading jurists. Only their personal reputation supported

great currents of mind as the earlier and later humanism, moral theology, the reformation, the philosophy of natural law, and furnished in its latest aspect much of the materials of which the European codifications were composed. Around 1800 A.D. the immensely scattered laws of Prussia, France, and Austria were unified in codes. In a third of Germany, "Roman" law remained in force until the Civil Code (1900). These and similar codes in Italy, Spain, et cetera, have been highly influential in most countries of the world. These laws are called "romanistic" to the extent that their content goes back to the teaching of the Italian doctors.

#### Literature:

- Wigmore, *A Panorama of the World's Legal Systems* (St. Paul, 1928) 3 vols.  
 Sherman, *Roman Law in the Modern World* (3 ed., New York, 1917) 3 vols.  
 Vinogradoff, *Roman Law in Medieval Europe* (2 ed., Oxford, 1929).  
 Buckland and McNair, *Roman Law and Common Law* (Cambridge, 1936).  
 Articles (in English) on Roman law in the British Empire and in the United States, by Lee, Sherman, and Radin in (1934) 2 *Atti del Congresso Internazionale di Diritto Romano*.  
 Schulz, *Principles of Roman Law* (Oxford, 1936).  
 Koschaker, *Europa und das Römische Recht* (Muenchen, 1947).  
 Stintzing and Landsberg, *Geschichte der deutschen Rechtswissenschaft* (1880-1910).  
 2. Lefroy, *Rome and Law* (1907) 20 *Harv. L. Rev.* 606.

them when they gave unofficial consultations, drafted contracts, taught and wrote, and in a continuous vivid forensic debate counseled prudent little changes in the law, which accumulated to a soberly practical, all-inclusive transformation of a small town's law into the richest and most effective set of legal thinking the world ever knew before and for a millenium thereafter. On the background of an empire expanding to the borders of the known world, legal art grew in periods, comparable to the stages of painting from Giotto's stiff beauty to the faultless perfection of Leonardo and Raphael. The terse responses of Papinianus have been reputed in subsequent times as enigmatic and our eager text critics have impugned quite a number of them as spurious. Not at all. It needs a highly equipped modern jurisconsult to comprehend the wisdom and concentrated thinking of this classic prince of jurisprudence, as he was called in the fourth century.

Of course, it did not yet amount to what we call legal science. The discussion was primarily concerned with cases, quite as in English common law, originating in the tribunals. And again, as in common law, the case was envisaged as a problem of court proceedings rather than in the terms of right and duty among citizens outside litigation. But if we turn over the pages of English legal history, we sometimes wait breathlessly: will finally the same result be reached as once in Rome? Titus has sold by mouth a slave to Gaius for 100,000 HS., or stated in the English manner, Brown has orally sold four horses to Jones for 200 pounds. Can the seller sue the buyer? Yes, said the Romans from times before Christ; the answer in England was no, as late as in sixteenth century, and has been no again from the year 1677 A.D. On to this day, in England and the United States, when there is a memorandum in writing, the seller may sue in our courts for damages for nonacceptance just as in classical times, but not always for the price as under Justinian, and as it will be the rule in the future American sales law.

The jurists in Rome thought in terms of cases of litigation but each of their solutions fitted into the pattern of a growing body of categories and rules. They were eminently conscious of the main purpose of law, namely, that of creating peace and order. Without formulating a system, they created the materials for building one. And this is what in an awkward and hesitating manner the Byzantine epigones of the great masters gradually attempted to do; and what the Postglossators many centuries

later achieved, brilliantly in the opinion of their successors, although our own ambitions go higher.

Thus it happened that the Corpus Juris, as elaborated by the medieval scholars of Bologna, presented itself to the educated classes of the European continent as an enormous collection of gnomic wisdom plastically manifested in a mosaic of single decisions, but for the first time clothed in persuasive theoretical language.

There was much more to it, however. The most important portion of the Roman law in the third century A.D. had been freed from its archaic and national formalities and limitations. A business law was established suitable for every one of the multitudes of peoples living in the Empire. Subsequently, the center of this world shifted to the East—where from time immemorial deep thought and legal custom and thriving trade were flowing in mysterious richness; where the most ancient laws mingled with Greek city laws and the governmental ordinances of the kings, the successors of Alexander the Great; and the Roman rule superimposed new elements upon this baffling fusion. This Byzantine period, the period between the great classics (250 A.D.) and Justinian's compilation (533 A.D.) was fertile not only in academic studies but changed the spirit of the Roman institutions. We have learned to recognize many Greek and important Christian innovations, and modern scholars are hoping to diagnose more exactly the measure of the various Oriental influences. We may say that much of the oldest and best proved social experiences of mankind is laid down in the so-called Roman law.

In the Middle Ages, however, this inheritance was treasured as something more than the product of learned jurisprudence. The German emperors of the Middle Ages considered themselves as the legitimate successors of the Roman emperors. Justinian, the sponsor of the Corpus Juris, was their vaunted predecessor. The Corpus Juris was a symbol of the continuous empire, its law book. At the same time, the Roman church based its own law on the Roman traditions. Empire, Papacy, and Roman law were the three great pillars remaining upright in the collapse of the ancient world, all three of universal significance "for all peoples,"<sup>3</sup> the pillars on which the medieval civilization rested; and the Roman law was the only secular cultural possession secured by the authority of both the church and the emperor.

3. Justinian addressed his "Constitutio Tanta" introducing the Digest to the Senate and all peoples ("ad Senatam et omnes populos"), the Greek version adds "of our oecumenicity."

All this must explain the firm conviction prevailing from the eleventh until far into the fifteenth century that there was only one law, the authoritative, written, wise and eternal law of Bologna, the *ratio scripta*—the embodied legal reason. The most astonishing in this sequence of events is the so-called reception of the Roman law in Germany, in the course of several centuries, from the fourteenth to the eighteenth, without any historical preparation, as was the case in South France, without any legislative act, a book in a foreign dead language.

To gain such a conquest, Roman law had developed new attractions. Two only may be mentioned. The law of the ancient world offered a system of commercial institutions, which after successive adjustments could support the very considerable business life of the many flourishing Italian cities such as Florence, Pisa, Genoa, and Venice, as well as of all the trading centers such as Marseilles and Paris, Bruges and Ghent, Augsburg and Hamburg and Novgorod. Maritime law can trace its evolution directly back to the Rhodian Sea law; the "general maritime law" (in the parlance of English and American courts) has been strikingly uniform throughout the seafaring nations. On the other hand, the states emerging from the decay of the feudal system needed and used the lawyers trained in Roman law as administrators, judges, notaries and advocates. The consolidation of the modern European state was intimately connected with the birth of bureaucracy—the civil servants being selected from the ranks of the lawyers. The Hanseatic league chose its office heads not otherwise: the secretary of the "factory" in Bergen (Norway) was always a doctor of laws and in the great steelyard in London ultimately the most influential representative was regularly a

with their eyes on the Roman law or what was so called at the time. It is curious to read Christian Wolff and his deductions from the postulates of *Natural Law*. Almost invariably, his conclusions end in a Roman rule of law.

At present there are not many law courts left in the world where the *Corpus Juris* is applied as a living statute. It is still in force in *South Africa* and *Ceylon*. Even there, as soon as the South African Supreme Court has decided a problem, this decision becomes a source of law, and makes the Roman law obsolete. Yet the innumerable transformations, through which the Roman law has gone during the thousands of years in the distant places of the earth, are the object of continued passionate studies conducted by scholars of all nations. The fragmentary monuments of this antique legal world still appear as an inexhaustible storehouse for the most diverse subjects. A learned American lady, Mrs. Mary Brown Pharr, confirmed this in *The Classical Journal* of April 1947 by an article on *The Kiss in Roman Law*.

## II. SIGNIFICANT FEATURES

1. Roman law in all its stages has increasingly abandoned its national character; it was the *common law* of the Roman empire, pagan and Christian, of northern Italy, of the European continent. In all these periods many local customs and laws changed the picture from people to people, from region to region, from town to town. Even at the time of the *Imperium Romanum* after the *Constitutio Antoniniana* which conferred citizenship on broad classes of inhabitants, many other laws remained alive. And the "Roman" code, in substance, was less Latin than an average American Statute book is English.

It is this peculiar ability of the Roman law of living in sym-

Coke

ing law in the exegetic manner of Bologna) into Oxford, King Stephen was induced to prohibit his lectures. And the Barons at Merton, A.D. 1236, declared, "*Nolumus leges Angliae mutare,*" marking the divorce of English law from Canonistic and Roman legal thought. In the sixteenth century the acute rivalry between the ecclesiastical and civilian jurists—the Doctor's Commons—and the common law courts was won by the latter under the mighty leadership of Sir Edward Coke. Now, strong particularistic feeling is a natural phenomenon, and the British Isles and remote Scandinavia were fortunate in being spared the continental turmoil. What the English lawyers achieved by themselves is extraordinary. But if we look to the beginnings, we see that old customs could not provide the logical definiteness, the generalizations and abstractions needed for legal system building. When Glanville (1187) and Bracton (1250), the founders of the English law, attempted to bring order into the mass of decisions, they simply resorted to the Glossa. The Glossator Azo prepared the ground on which Bracton discussed law and justice, king and people, the binding force of judgments, usage, and sovereignty. Of course, he took "logic, method, spirit rather than matter."<sup>6</sup> Again, the modern evolution of Anglo-American theory started with John Austin's analytical jurisprudence under the influence of the German Pandectists; and the highest achievements have been due to such scholars as Sir Frederick Pollock and Roscoe Pound whose broader and superior knowledge of the outside world revealed the "spirit of the common law." Roman law has encountered in both hemispheres as much enmity as enthusiasm. It is well recognized that "the true grounds and reasons of law were so well delivered in the Digest that a man could never understand law as a science so well as by seeking it there."<sup>7</sup> Everywhere, the transition to a new era of civilization required essentially more and better coordinated thought on the relations between man and man and on the function of legal rules than the original development could afford.

2. Conceptions of state constitution and administration have changed so much in the course of history that the ancient methods of governmental organization are inapplicable. Only by specious arguments, the doctors of Roman law bolstered the claims of their masters, emperors and kings, through quotations from the

6. Maitland, *A Sketch of English Legal History* (1915) 42, 44.

7. Hale, quoted after Bishop Burnet by James Bryce (1901) 2 *Studies in History and Jurisprudence* 477. See also Buckland, *Equity in Roman Law* (1912) 131; Lefroy, loc. cit. supra note 2.

Corpus Juris. A favorite device was to invoke the fragments that in Justinian's meaning elevated him over mankind and human law, as the mediator between God and men. We may, however, note the legend about the Glossator Bulgarus, riding on the right hand of the Emperor Frederic Barbarossa, while Martinus rode on his left. Barbarossa asked them whether the emperor was not by right Dominus, lord, of everything held by his subjects. Bulgarus replied that he was lord politically but not the owner.<sup>8</sup> And when Thomas Cromwell quoted to Henry VIII the sentence that all was law what pleased the emperor, and turned to the "civilian," that is Romanist, Stephen Gardiner for support, Gardiner told the king that it were better the king make the law his will than make his will the law.<sup>9</sup>

3. The most lasting and intensive Roman influence has been exercised on private law. The Romanistic doctrine offered adequate basic concepts, sharply defined in concise and consistent terminology; mature rules; a complete system; logical firmness tempered by a high sense of equity—all this stabilized by the principle of civic equality. It was a law designed for maintaining justice in the social intercourse of free individuals. Modern international law, in its efforts for peaceful coordination of sovereign states, has never found a better model.

The institutions of Roman private law, so smoothly practicable and easily adjusted to new purposes, were capable also of a sort of transmutation. Out of the materials furnished them by history, the Postglossators developed maritime insurance, negotiable instruments and the first doctrine for the conflict of laws. In the sixteenth and seventeenth centuries such basic legal subjects as contracting by consent, agency, assignment of debts, and contracts in favor of third persons were brought to their simple completion on the lines of their ancient evolution, an achievement that Justinian's compilers had been unable to perform.

4. We should stress the social purposes more than technical qualities of the law.

Germanic judicial contests were often decided through battle. Church and Roman law united against this deeply rooted custom. In a long struggle, the medieval ordeals were replaced by the modern principle that litigation is decided by production of evidence. It has taken even longer, however, to regain the prin-

8. Bryce, supra note 7, at 95.

9. Plucknett, *The Relations between Roman Law and English Common Law Down to the Sixteenth Century* (1940) 3 U. of Toronto L. J. 24, 46.

principle natural to the classical Roman procedure that the judge should evaluate evidence brought before him according to his own conscientious conviction, and not bound by formalized legal rules determining what this or that document is worth, how many witnesses are needed, of what kind, et cetera. Common law lawyers, it is true, have never adhered to this Romanistic view. To weigh the merits of the excellent big American compendiums of rules on evidence against the continental systems may well be one of the many topics for which comparative research is desirable, with due appraisal of jury procedure.

That men are free and equal, in antiquity, was a principle restricted to the citizens, but philosophers and jurists expressed views that inspired the modern school of natural law in its successful fight to free the serfs, the peasants attached to the lord's land—the persons of the serfs as well as their land. "Nothing is sweeter than freedom," said Cicero; "other nations may endure servitude, our nation cannot." Lawsuits were decided, wills construed "in favor of freedom." Divorce was permitted because marriage must be free. And under Justinian freedom is declared "inestimable" in money. Freedom of speech under the most ill-famed emperors shames many modern states. And it was a firm axiom respected throughout the old empire that the Italian soil was free. Free ownership was incompatible with tributes and stipends and forced labor, in strict contrast with the situations in the Roman provinces, the Middle Ages, and all the manifold English tenures up to 1925. America has returned to these simple ideals.

In the Spanish Siete Partidas, most influential on Spanish and Latin-American laws, you may find quoted the Supreme Commands of Law,<sup>10</sup> which Justinian took from the classics.<sup>11</sup> They illustrate what Dean Roscoe Pound has called the Roman idea of a moral rule of conduct backed by the authority of the state.<sup>12</sup>

*Jus est ars boni et aequi.* Law is the art of finding the good and the equitable. *Cuius merito quis nos sacerdotes appellet*—of which rightly we may be called the priests, and so on. *Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*—The commands of law are three: to live honestly; not to wrong another; and to attribute *suum cuique*. To each his own! This was not just a high-sounding phrase; the

10. Siete Partidas, Part. III, tit. 1, c. 3.

11. Ulp. Digest 1, 1, 1.1 pr. § 1; 1.10, § 1.

12. Pound, *The Task of Law* (1944) 50.

sources bear overwhelming testimony to the serious effort made to bring reliable and equitable justice into the social relations. Man is an individual with his clear cut rights in his own sphere, which the state respects and impartially guarantees. Man is protected as an individual, not as the member of a group or class,<sup>13</sup> a guild or inn, lord or vassal, knight or burgher, squire or serf. What it means, that public and private spheres are neatly distinguished, we could recognize in observing the increasing worship of the state in the totalitarian absorption of the individual. No wonder that the Nazis hated Roman law. If the citizen from his cradle to his grave is merely the leader's soldier, he has no right of his own, and no private law is left indeed. *Alterum non laedere*. Do not violate the right of others. The Romans knew the conflict hidden in this maxim. Asking when does one injure another, they were the first to crystallize the profound Greek ideas of volition and action into a foundation of legal responsibility. The thought process of more primitive nations resembles the story told in the Arabian Nights: A traveller lost in a lonely place finds a few dates and after eating them throws the stones of the dates away. Suddenly a demon appears and accuses him of having murdered by a stone the ghost's invisible son. Such is archaic law. The deed makes one liable, not evil intention nor negligence. The Romans gradually refined their concepts of *dolus*, *culpa*, *factum*, *imperitia*, *neglegentia* and so forth. On the basis of their doctrine of fault, an immense discussion by canonists, criminalists, and philosophers has since turned the problem of responsibility over and over. As early as in the Twelve Tables, the universal ancient right of blood vengeance was, for minor crimes, replaced by fines. The state already was well on its way to a monopoly of penal jurisdiction.

*Qui suo iure utitur neminem laedit*, use of my right cannot be taken from me because it injures another. As a consequence of individual property, you may dig in the ground all the water or build a high wall near the boundary of your land, depriving your neighbor of his water or light;<sup>14</sup> or you may blast your rocks and undermine thereby the neighbor's house. But the Roman rule was restricted more and more; "for we ought not to use our right badly"<sup>15</sup> and after a long evolution it finally yielded to a doctrine of forbidden misuse of right. In contrast, as late as in

13. Pincoffs, *The Object and Value of the Study of Roman Law* (1881)

14. *Am. L. Rev.* 555, 570.

14. *Marc-Ulp. Dig.* 39, 3, 1, 12.

15. *Gai. Inst.* 1.53.

1895, Lord Halsbury held that where my neighbor diverts or appropriates water within his own land so as to deprive me of it, nothing can be done; it is a lawful act, however ill the motive might be.<sup>16</sup> Again, American decisions disapprove an unnatural, unusual or spiteful exercise of land ownership.

*Honeste vivere.* Pandectists have said that this precept prohibits not only what is penalized by express provision but also whatever is contrary to good customs, all that offends morals and decency. Equity and honesty in the Romanistic tradition permeate the entire law; no barrier is erected dividing law and equity. The Christian Byzantine sources abound with such terms as *pietas*, *fides*, *humanitas*, *aequitas*, *officium*.

This is another remarkable contrast with the harshness of English common law from which, however, American courts have in almost every instance emancipated themselves—in fact though not in theory. Take the right of a voluntary agent to be compensated for expenses. This goes back into the earliest known phase of Roman law. When the owner of a place went abroad, it was customary that a neighbor intervened for his interest, and according to his presumable intention, defended him in a lawsuit, repaired his fence or healed his horse. The civil law codes have inherited an elaborate institution of *negotiorum gestio* starting from the rational idea that, as Ulpian said, it is in the public interest that absentees should be defended, and influenced by the Christian idea that altruistic action is laudable. In England, as late as in 1911 a judge refused any claim for expenses of a voluntary agent, because "according to English law liabilities are not to be forced on people behind their backs."<sup>17</sup> Yet American courts will grant recovery of money spent by a neighbor who supports another's house threatened by collapse, or the fee of a doctor who treats an unconscious man. Recovery for salvage at sea has always been an exception simply because it belongs to the general maritime law, also recognized in England.

Also the history of the so called action for unjust enrichment is characteristic. The Romans perceived the force of the idea that transaction made in perfectly legal forms may offend the sense of justice, and framed conditions for allowing a plaintiff to recover where his property is retained by the defendant without just ground. The rules of the classical period were much enlarged by the *Corpus Juris* and certainly too much in the eigh-

16. *Mayor of Bradford v. Pickles* [1895] A.C. 587, 594.

17. *Lord Bowen in Falcke v. Scottish Imperial Ins. Co.* [1886] 34 Ch. D. 234, 248.

teenth century where the maxim prevailed: no one shall be made richer to the detriment of another—a dangerous principle which Lord Mansfield used with prudence. But whereas the German doctrine progressed on the rediscovered Roman lines to genuine rules, to a definite doctrine of unjust enrichment, the English courts disapproved Mansfield's principle as "vague jurisprudence"<sup>18</sup> and "well-meaning sloppiness of thought"<sup>19</sup> with the result that English law now lacks a firm theory in this field, although it once had the same conceptions as the classical jurists. Anglo-American law has not yet a sure foundation, but it has developed a great mass of decisions, rich in ideas, rivalling the German practice.

### III. ROMAN LAW AND COMMON LAW

I certainly do not wish to imply that everything in the Romanistic system is blameless, or that the long after effect of ancient and fragmentary sources of law always worked as a blessing. By no means! I only want to convey to you the feeling of its significance in human history. In comparing Roman law with its only true rival, the Anglo-American law, which looks back to a proud and unbroken evolution of eight hundred years, we should hesitate to pronounce any general judgment. Their formative stages contain striking similarities, as also in the organization of both the English and Roman empires parallels are manifest. Why Romans and Britons knew at the same time how to build durable reigns over other nations and how to promote private law may be conjectured.<sup>20</sup> Not only were both peoples successful also in business, industry, commerce and agriculture,<sup>21</sup> but above all both respected, in the limits of their situations, the personality of individuals and the autonomy of nations.

Nevertheless, we perceive that the influence of Canon and Roman law upon England was limited to two fields: an often repeated inspiration to scientific efforts, and a direct incorporation of rules into some special branches of law administered by special courts: ecclesiastical, chancery, admiralty, and probate courts, and the law merchant. The true common law as pronounced by the Kings Bench impresses foreign jurists as entirely peculiar because of its quaint Norman-Latin-French terminology, vener-

18. Lord Sumner in *Sinclair v. Brougham* [1914] A.C. 398. Cf. Lord Wright, *Legal Essays and Addresses* 1.

19. Lord Scrutton in *Holt v. Markham* [1923] 1 K.B. 504, 513.

20. No explanation seems possible to Koschaker, *supra* note 1, at 82.

21. William H. Page, *Statutes as Common Law Principles* (1944) Wis. L. Rev. 175.

able formulas, remainders of feudalism, a law made by great judges rather than codes, the inductive approach and pragmatic outlook, a very special atmosphere. It is a most imposing, mature product grown by an indigenous, continuous discipline.

However, by indirect radiation from the science of Roman, Byzantine, Italian, French, Dutch and German scholars, incessant work went on through the centuries. This source of inspiration has been attested by the *regii professores* in Oxford and Cambridge who have been teaching "civil law" from Henry VIII to this day. Roman law, strong in Scotland, has made itself felt also in the United States. No doubt, teaching and studying of Roman sources is not usual in many American law schools and is in eclipse also in most other countries. Its value, however, is not exhausted, either as a unique history of legal thought, or as an immensely suggestive object of comparative research.

This should be recognized in this country even more readily than in England. The United States has undergone a radical development toward a more universal legal pattern. From the beginning, English feudalism could not root here. The great variety of conditions in the vast and expanding country and the amalgamation of French and Spanish elements favored the same trend away from old English law. The tremendous effects of the machine age continued this approach to the outer world. We may think of one particularly attractive illustration: The "Nolumus" of the Barons in Merton was occasioned by the desire of the church to achieve recognition of the legitimation of children born out of wedlock through subsequent marriage of the parents, an institution of imperial Roman law. England denied it until 1926 A.D. But in the United States, all but three state statutes have successively adopted such legitimation, since Virginia introduced it in 1785.

## Prospects of International Unification of Law from a European Viewpoint

Mario Matteucci\*

The inclusion of a special item in the agenda of the European Consultative Assembly, devoted to the tentative unification of the law of contracts among the states members of the European Union, is new evidence of the importance of the problem of coordinating and amending the legislations of the several countries in the effort to develop international commercial relations.

The unificatory activity is not new in Europe. The second part of the nineteenth century and the first quarter of the twentieth century have shown an increasing interest on the part of private and public organizations in the preparation of draft uniform laws and conventions to secure the certainty of law, a preliminary condition for a sound international trade. The utility of such uniformity is clearly proved by the conflicting rules of private international law, a source of permanent disputes. Professor Gutteridge in his recent book, "Comparative Law," has quoted a typical case decided by the English courts. A ship flying the French flag was chartered at a Danish West Indian port to proceed to Haiti and there load a cargo to be carried to England or France at the charterer's option. The ship was damaged on the voyage and put into a Portuguese port of refuge, where the master borrowed money on a bottomry bond in order to enable him to complete the voyage. The ship ultimately arrived in Liverpool. The plaintiff was compelled to pay off the bond in order to gain possession of the cargo and he sought to recover the amount so paid from the shipowner. Five systems of law were potentially applicable to the transaction.

The above remarks apply to cases of unification of already existing laws. But new laws on the same subject and of international relevance (air legislation, for instance) may be in preparation in several countries. In such instances common sense suggests the coordination of the different legislative activities. Here

\*Secretary General of the International Institute for the Unification of Private Law, in Rome. This Institute was created in 1926 by an agreement between the Italian government and the League of Nations. Its charter was amended in 1939. Actually thirty governments are members of the Institute.

though the court finds some moral justification for its refusal in denying recovery to an unfaithful spouse, in view of the protection that is afforded the wealthy spouse through due procedure and the legislative policy of making divorce possible without considering the question of fault, the best approach that taken in the *Veillon* case, wherein the court said (widow's homestead article) makes no distinction between faithful and unfaithful wife. The husband, who is the sole provider of his feelings and of his honor, is the one to do this by taking appropriate legal action to sever the matrimonial tie if he is not satisfied therewith."<sup>39</sup>

WILLIAM R. VEAL

39. *Veillon v. Lafleur's Estate*, 162 La. 214, 222, 110 So. 328, 329 (1927), discussed supra note 27.

## Private Laws of Western Civilization †

ERNST RABEL\*

### PART III. THE GERMAN AND THE SWISS CIVIL CODES<sup>1</sup>

#### THE GERMAN CODE<sup>2</sup>

The Bürgerliches Gesetzbuch of August 18, 1896—commonly known as "Begebe"—came into force on January 1, 1900. Before this codification created a unified private law, the map of the country showing the laws of the several territories was like a mosaic of infinite variety transcending the distinction of states. Common law, mixed out of Roman-Byzantine, Canon, and Germanic elements often transformed, the Prussian Landrecht, and the French law were noticeable in larger parts of the Reich, but all were partially superseded by a multitude of local statutes and customs having precedence over the common law. Nevertheless, unification caused less difficulty than in other countries. The reason was evidently the scientific prevalence of the Roman-German law, which during the nineteenth century occupied the first place in the law schools and the learned literature, to the damage of what could have been learned from the Prussian code and practice. This erudite evolution, based on the Pandectist doctrines, reshaped by Savigny and his many-sided school, and continued in an intense, sometimes vehement, dispute between Romanists and

† This is the third in a series of papers by the author. The final part will be published in the May issue of the Louisiana Law Review. The Louisiana Law Review will also republish the entire series of papers on "Private Laws of Western Civilization" in booklet form.

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1. The Progress of Continental Law, supra p. 107, n. 1.

2. The German Civil Code, translated and annotated by Chung Hui Wang (London, 1907). Recent German editions must be consulted for the amendments.

Ernest J. Schuster, *The Principles of German Civil Law* (Oxford, 1907). Enneccerus, Kipp and Wolff, *Lehrbuch des Bürgerlichen Rechts*, in many editions; Spanish translation with comparative annotations by Gonzales and Alguer, 8 vols. (Barcelona, 1934-1946). E. M. Borchard, *Guide to the Law and Legal Literature of Germany* (The Hague, 1912). Information on German law is frequent in Italian and Spanish law reviews. Notably, reports on German decisions and theory are furnished by the important periodicals of the Instituto Italiano di Studi Legislativi, edited by S. Galgano in various languages, with English summaries; for an introduction the "Vicissitudes of the German Civil Code, 1900 to 1925," were surveyed in *Annuario del diritto comparato*, vols. 1-5, 1927-1930.

Germanists—that is, the scholars of old Germanic law—was further influenced by the rich German philosophy and finally strongly inspired by the incipient economic and sociological movements which started in the last century.

The code had to say the last word on all the problems concerning private law and express a stand on law in general. Twenty years of the most elaborate studies of drafting and debating, methodical attention was given to the enormous wealth of accumulated learned tradition and to the available German and foreign sources of law, although no one thought of English, Scandinavian or American materials. Practical experience was missing in the serious and industrious authors of the code. The first draft was censured by Otto Gierke,<sup>3</sup> the Germanist, as leaning too much to the Romanistic ideas, and by Anton Menger,<sup>4</sup> the socialist, as too favorable to the propertied classes. But a second commission satisfied the critics as far as appeared feasible at that time. Assuredly, separate enactments on such matters as labor law and juvenile welfare had to follow in subsequent periods.

Almost every problem was minutely examined with respect to its correct statement, its solutions in the preceding codes, its relationship to other legal problems, its just solution, and the best formulation of the rule to be established. The ambition was to cover all worthwhile questions, or expressed in more modern jargon, all foreseeable conflicts of interests, without committing the mistake of the Prussian code which in 28,000 sections tackled every possible question separately. Abstraction, generalization, therefore, seemed required. To obtain so wide a range of accurately visualized particular situations, language and systems had to be treated in a new technique, a refined, though artificial, manner. Usual expressions were polished and converted into firmly and consistently used technical terms. Every rule became an integrated part of a closely knit system. The rules in their meaningful connections would take care of practically all major doubts that might arise so long as the essential social, economic, and moral conceptions of the time remained in existence.

In their conscientious thoroughness, these codifiers were not afraid of difficult questions. They rather took delight in such puzzling situations that turn up if several immovables belonging

3. Otto Gierke, *Der Entwurf eines Bürgerlichen Gesetzbuchs und das deutsche Recht* (1889).

4. Anton Menger, *Das bürgerliche Recht und die besitzlosen Volksklassen* (3 ed. 1904).

different owners are found to be mortgaged for the debt of one of them; or if forced inheritance shares are to be allocated among children, some of whom have received gifts from the parent while still living; or if a succession is overburdened by legacies and debts.

The legislative decisions are intended to achieve justice and fairness in the midst of the conflicting interests of the parties and the clashing conceptions of right and wrong. The old institutions of family, property, and inheritance are maintained with modifications intended to delimit their social functions. Protections for the weaker members of family and society are considered at length; for the first time a code provided that an employer has to maintain sanitary, decent rooms and safe tools (Section 618) and has to pay six weeks' wages to a sick employee living in his home (Section 617). Pro and contra are studied and impartially weighed. This code is neutral, objective, tolerant, and imbued with the desire for justice. It is the product, not of one genius, but of impersonal, though inventive, committee work. With this end and this temperament, it is the most authoritative and most effective creation of the European legal mind that had been achieved at the turn of the century.

This learned and sober character aroused curious reproaches. Some romantic critics complained about the prosaic impersonality pervading the rules. Often has it been criticized that individual freedom and property rights still prevailed. Some were disgusted by the logical structure. We have evidently to conclude that the ideal law of the future must be subjective, impulsively capricious and totalitarian. In fact, the National Socialists directed their hostility against the very name of the *Bürgerliches Gesetzbuch*, the code of citizens, and prepared a code for "the people," a "*Volksgesetzbuch*."

More consequentially, the method of "abstract casuistry," intended to guarantee exactness and completeness by systematic generalizations of fact situations, has been attacked. One of the code's characteristic methods to achieve this end consists in the gradual descent of the rules from a general part, the first book, containing the rules common to all private law questions, to more specific topics, such as to obligations in general (Book 2, Part 1), then to the individual sources of obligations, and finally when sales are treated, to special kinds of sales. For the individual topic, moreover, the code first establishes a normal pattern of operative facts, for instance, the case where a lunatic or

small child incapable of discernment causes damage to (for example, throws stones into a car). Section 827, which is a usual generalization speaking of a person unconscious, mental disturbance, et cetera, says: the damaging person is responsible for the damage. But immediately the section refers to the case where this person has brought himself into a temporary disabled condition by intoxicating liquor or similar (thinking of drugs): he is responsible. That this forms a separate sentence hints to the courts that the plaintiff should prove the predicament is self-inflicted. Yet, there is a third consideration: the liability does not arise if he has come into this condition through no fault of his own. Thus, he may prove that someone has poured more rum into his glass. And to crown the sequence, another section, under cautious conditions, allows a damaged party nevertheless an equitable indemnization for the act of an incompetent person, for instance if the drunkard is rich and the injured is poor. Other codes have one or the other of these rules, but no other has all these distinctions, which lead to fair decisions.

As an example of the artful terminology, the auxiliary words *darf, darf nicht, muss, kann, kann nicht*, are used with the special meaning of distinguishing mandatory and directory requirements.

- § 1303: A man cannot (*darf nicht*) marry before full age.
- § 1316: A marriage celebration should (*soll*) be preceded by bans.
- § 2234: The spouse of the testator cannot (*kann nicht*) be a witness even though the marriage is dissolved.
- § 2237: A minor should (*soll*) not be a witness.
- § 2239: The persons assisting in the making of a will must (*müssen*) be present during the entire act.

If "elastic" words are chosen, the terms intentionally indicate that the court should use discretion, as when a penalty in a contract should be examined as to whether it is "adequate"; when damage should be "equitable," instead of covering all damage; or when "disruption" of the marriage is a requisite of divorce.

The language of the code is its strangest aspect for foreign readers and has immeasurably contributed to widespread ignorance of its merits. The German lawyers had to work very hard for some years to accustom themselves to this apparatus. And any freshman again will still be puzzled in reading Section 164, Paragraph 2, the requirement for representation of a principal by an agent:

if the intention to act in the name of another does not appear in a perceptible manner, the absence of the agent's intention to act in his own name is not to be considered. More simply: an agent must make it clear to the other party that he acts as an agent; otherwise he himself is the party.

However, it must also be borne in mind what intensive and extensive elaboration is contained in the terse formulations of the code. Compare, for instance, the following paragraphs of the code with its German predecessors and study the scope of the problems covered as well as the exactitude of the language.

Swiss C. C., Article 801, Paragraph 1: An immovable mortgage is extinguished by the cancellation of its entry. . . .

German C. C., Section 875, Paragraph 1: For the release of a right in land, unless the law provides otherwise, it is required that the person entitled declare that he surrenders the right and that the right be cancelled in the land register. The declaration shall be communicated to the land registry office or to the person in whose favor it is made.

Swiss C. C., Article 827 (mortgage): The land owner who is not personally liable on the debt secured by the mortgage, may redeem the mortgage under the same conditions as those required of the debtor to discharge the debt. If he satisfies the creditor, the claim is transferred upon him.

German C. C., Section 1143, Paragraph 1 (among the cases where the owner may be mortgagee): If the owner is not the personal debtor, the claim passes upon him to the extent that he satisfies the creditor. The provisions of Section 774, Paragraph 1, concerning a surety are applicable by analogy.

Section 1163, Paragraph 1, Sentence 2: If the personal debt is extinguished, the owner acquires the mortgage.

Swiss C. C., Article 973: A person who has relied in good faith on an entry in the land register and thereupon has acquired property or other real rights, is protected in this acquisition.

German C. C., Section 892, Paragraph 1, Sentence 1: In favor of a person who acquires a right in land or a right in such a right by legal transaction, the entries of the land register are deemed to be correct, unless an opposition to their correctness has been registered or their incorrectness is known to the acquirer. . . .

Paragraph 2: If registration is necessary for the acquisition of the right, the decisive time for the knowledge of the acquirer is that when the application for registration is filed, or if . . .

Finally, general rules were introduced to secure equity and morality. The courts have subsequently generalized and very

largely employed the fundamental maxims that contracts be construed and performed according to good faith with reference to common usage (Sections 157, 242) and that contracts violating good morals are void (Section 138).

Can a code satisfy everybody? The law of immovables had been developed in Austria and Germany on the ground of more and more perfect land register books (that is, public titles), and not to be confused with geodetic and tax surveys). The division in the code is a marvelous system of principles determining the exact effect of registration and nonregistration of real rights. In Louisiana, a self-sufficient act. As a result, transfers of land and mortgaging have become smooth and secure operations, without benefiting bad faith. Certificates of mortgage may circulate as negotiable instruments. Because, however, credit was so much facilitated, agrarian reformers soon complained that pledging land was made too easy and owners overburdened their property with charges. There is something to this reproach. In homespun legislation, mortgaging is generally prohibited. Nevertheless, we had to ask: Must we blame a cook for giving us food so good as to cause us to overeat?

The ponderous code found a congenial legal profession unfolding its capacity. In the short space of time from 1897 to the outbreak of the First World War in 1914, the German writers and law schools devoted themselves almost exclusively to exploring and learning to operate this huge apparatus. They experienced the biggest event in centuries, exchanging their fragmentary and turbid legal tradition for one solid, bright manifestation of law; turning, from painful attempts to make ancient sources decide modern problems, to separate scholarly inquiries in the actual law and in the history of law; and immediately proceeding towards a reborn audaciously progressive theory. By its over-accurate pedantry, the code educated the lawyers to maximum efforts. Its innumerable wheels and gadgets invited expert handling and produced a formerly unknown resourcefulness.

The courts participated. They approached their task with intelligence and ability, and, to their own surprise, with a creative spirit of which no one had suspected the German tribunals. Sometimes, they went much further than the envied French judges in free constructions and judge-made law. In those very years the spirit of the time changed. Public law increased its

into private relations. Freedom of contracting encountered the objection that it was one-sided. Everyone now knows of standard forms and general conditions issued by car-garages, banks, insurers, manufacturers, landlords, which the single party to the contract has simply to sign; the German courts have filled many gaps left by the code. To name at random a few examples of the various progresses, judicial authority improved the protection of personality; established a sound criterion for the question whether machines are a part of a factory (immovable fixtures); recognized conditional sales and fiduciary assignments; invented actions for injunction; and created a new class of quasi corporations allowing adequate functions without undesired registration to political, religious, benevolent, scientific, sport, and labor associations.

All this was substantially achieved in those short years—a memorable refutation of the fears that a new codification necessarily leads to half a century wasted with sterile exegesis, as happened in France and in Austria.

The German legal system, of which the private law is the centerpiece, is not as well known in the world as it should be. With its historical background reaching into primordial wisdom, with its refined erudition, its enlightened approach and its unique technique, it is the most important single piece of legal achievement in the world. Much of its particulars may be disapproved after half a century of radical changes; it has never inspired any great love. However, I dare say, after life-long observation, that the methods used in the legal science of the United States would gain by a thorough appraisal of German private law. Appropriate books to introduce American lawyers to the civil law are urgently needed; a special role is due to a comparative exposition of the German system.

#### THE SWISS CODE<sup>5</sup>

The Swiss Civil Code—"Zivilgesetzbuch"—of 1907, in force from January 1, 1912, and the re-enactment of the largely mod-

5. Robert P. Schick, *The Swiss Civil Code of December 10, 1907*, annotated by Charles Wetherill (Boston, 1915); Joy Williams, *The Swiss Civil Code, English Version* (Oxford, 1925). Georg Wettstein, *The Swiss Federal Code of Obligations* (English, Spanish, and French), 2 vols. (Zürich, 1928 and 1930). (Zürcher) *Kommentar zum Schweizerischen Zivilgesetzbuch*, von Egger, Escher, u. a. [see esp. Vol. 1 (2 ed. Zürich, 1930) with bibliography, p. 35 ff.]; (Gmür's) *Kommentar zum Schweizerischen Zivilgesetzbuch*, see Vol. 1 (2 ed., Bern, 1919) bibliography 27 ff.

ernized Code of Obligations, originally of 1881, present masterpiece. The law of Switzerland was enormously equal in law and social standing, were reared in considerably different legal conceptions. The arch-conservative inner the agricultural and Protestant regions, and the industrial trade centers of Zürich, Basle and Geneva represented conflicts of interests which legislators have to consider.

For a long time, all these diversities seemed to frustrate plans for unifying the private law; there was no Napoleon to enforce it. However, Eugen Huber, in an excellent historical-critical survey of the territorial laws, prepared the legal work, which then was entrusted to him. This great scholar fact included a number of the surprisingly well-preserved Swiss institutions in the code. The French and Swiss codes are essentially more medieval Germanic influences than the German Code! Also for legislative technique Zürich and Basle had remarkable examples.

Huber's ability has finally overcome the disparate elements but for a few exceptions. Thus, the code declared that brothers and sisters of a deceased, in the absence of heirs of the first class have legitimate portions in the succession and that the children, brothers and sisters have no forced shares. But the federal legislation had to leave the cantons the faculty of legislating inversely in both respects.

The codification was greeted with enthusiasm not only in its own country but by many people outside. In Germany those who felt oppressed by the weight of their code were in raptures over the two principal features of Huber's technique: simple language and loose structure—an antithesis to the northern neighbor.

The language is, indeed, natural and attractive, something between solemnity and colloquialism. Proverbs and slogans are interspersed, and you may find a saying such as: Marriage gives full age.

The light tone of the law was possible because the legislator strongly reduced his task. Huber was satisfied with broad outlines of the legal institutions, with principles to guide the courts rather than detailed regulations to bind them. Hence, an elegant arrangement of the topics was preferred to a tightly woven system:

Radicals in Germany hailed just this aspect. Self-restriction of law, a half-way compromise with case law, seemed to them answer to the lawyer's prayer. And we all felt relief in stating after all, it was possible to codify without the most ambiguous precision and cleverness, in simple language not requiring a machinery dictating his every move.

Indeed, considering after four decades the results reached by a highly competent legal profession under the guidance of the admirable Swiss Federal Tribunal, we understand fully the satisfaction and pride with which Switzerland views her code.

Another point of view, of course, is needed for a just estimation of such a code in comparison with its more particularized others, either German or American, or the recent codifications which we cannot discuss here.<sup>6</sup>

In the first place, the Swiss conditions have determined the character of the code, although a last technical revision of the text for assuring more precision, much desired by the best jurists, would not have harmed the work. The task was fixed from the beginning as the unification and redrafting and development of the traditional law by the accustomed methods. Switzerland had many courts with a large participation of laymen on the bench. The referendum threatened a crucial test. The language had to appear understandable to the common man, even though it may sometimes puzzle the lawyer by its emptiness. Popular votes on any new law were known to be risky. Finally, the country was always accustomed to a large discretion by the judges. It seemed natural to leave them a conspicuous part in forming the new law.

Consequently, in the choice between completeness or smoothness, exactitude or elegance, advice to the lawyer in difficult problems or information to the intelligent common man,—where the Germans selected the first, the Swiss decided for the second method. And no hard and fast conclusion is valid for the rest of the world.

In the second place, the code would not have succeeded so well in any country not so highly cultured and not so greatly favored by its continuous contacts with German, French, and Italian legal sciences.

6. Particulars were mentioned in my articles, *Streifgänge im Schweizerischen Zivilgesetzbuch*, *Rheinische Zeitschrift für Zivilrecht und Prozess*, Vol. II (1910) 308; Vol. IV (1912) 135.

A characteristic example is the question whether there be a general part of the code. The German code has 240 of general rules; among them 82 sections deal with jurisdiction including contracts and unilateral declarations not only modifying or terminating obligations, but also involving procedure, succession and family law transactions such as legitimation and adoption. This was a novel work of abstraction, difficult to publish, but subsequent criticism has demonstrated that the generalizations should rather be complemented than abolished. The French Reform Commission, as mentioned earlier, has decided on an analogous undertaking. The Swiss legislator has contented himself with an emergency solution. The Code of Obligations retained certain rules on offer and acceptance, error and fraud, and provides that the general provisions of the law of obligations in the event of the conclusion, fulfilment and rescission of contracts apply also to other civil relations. This leaves a great deal of problems to judicial decision.

The substantial differences between the two codes have been unreasonably exaggerated. In particular, it is simply not true that the Swiss code is infinitely more advanced in social progress as we hear so often. This assertion with its ambiguous wording would certainly not have pleased all the authors of the codes. Despite important changes in the political climate between the dates of the codes, problems and solutions are closely related. Both codes allow a wife to take a separate domicile but under restrictive conditions unknown to American law, relying again on the judge (Article 170). In the absence of a marriage settlement the administration of the matrimonial property (except that reserved to the wife) is left to the husband in both codes; the Swiss admirably improves this system by dividing the holdings at the end of the marriage (Article 214). On the other hand, after varying proposals a wife needs consent of her husband for carrying on a profession or a trade (Article 167); her position in this regard is slightly worse, at least in theory. But the Swiss wanted sound marriages rather than unlimited women's emancipation. Switzerland improved the position of certain classes of illegitimate children (Article 323). But if the German code deprives a natural child of alimony from a defendant when there was another incumbent, the Swiss code recognizes a similar defense (Article 315). Moreover, it follows the French rather than the German lead in excluding adulterous and incestuous children from recog-

(Article 304). There is no ground for different conclusions on other matters. The Swiss code and the Revised Code of Obligations, of course, have contributed a great number of valuable additions to the supply of solutions. For instance, the rights of individuals, including the privileges concerning one's own picture, unpublished letters, and reputation, have obtained a clearer and firmer enforcement than in any previous enactment and rival the French *jurisprudence*. But that a husband may claim damages from a defendant for having alienated the wife's affections, as in the United States, is a peculiar feature of the Swiss Code. Civil law has disapproved a husband to whom his wife becomes pregnant on the occasion of such a suit. Associations without economic purpose receive personality as soon as their intention to become a corporation is declared in written articles of association—a full return to an old principle and a highly modern step.

#### Conclusion

The German Civil Code has exercised considerable influence on every one of the more recent enactments of private law in Europe and has been adopted in Japan except for the ancient institutes of family and succession (connected with the "house"). The Swiss code has been adopted in Turkey—because a new generation of lawyers had to grow up until a code of their own was possible—and has been a popular model for many legislators. Legal science has received a tremendous lift from the literature occasioned by both codes.

For legislative purposes and technique the lesson is clear. That very heavy, very potent locomotive of the Germans is ugly and efficient; it takes us to any place where tracks go. That other graceful automobile is useful so long as a driver such as the Federal Tribunal sits at the wheel; it may easily be overloaded. Can their virtues be combined? This has not yet been demonstrated. Certainty of what written law can work in society and state and what it should not try, is by no means definitively acquired. It may be an insoluble question in our disturbed century. The art of preparing and formulating laws can be learned and ought to be cultivated. The contents of these two codes has largely enriched the substance of the private law. Sound social progress is slow. Private law develops even more slowly. It does not carry a blazing torch into darkness. But it follows and assures the forward movement of civilization.

political considerations to which previous reference was made. At the outset of this article, the writer foreswore any consideration of the merits of the exemption, but if that issue is to be re-examined, either in isolation or as part of the larger question current among fiscal planners—total abandonment of the property tax—this might be food for thought.

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## Private Laws of Western Civilization †

Ernst Rabel\*

### PART IV. CIVIL LAW AND COMMON LAW<sup>1</sup>

Common law and civil law are generally believed to be different, like oil and water, which do not mix. A sweeping assertion that English and North American law does not present the slightest analogy with that of Continental Europe was expressed as late as 1930. Not until the 1920's did Continental lawyers have any clear conception of American law, and knowledge of English institutions was a monopoly of a handful of scholars writing on legal history, local government, or commercial law. Some English scholars considered parts of French and German legal history and, following Austin, extended the new "jurisprudence" to Roman law and its aftermath. A new period was heralded by such leaders as Roscoe Pound, Ernest Lorenzen, and Edwin Borchard in the United States, Josef Kohler in Germany, and Edouard Lambert in France. Nevertheless, in the general opinion of lawyers on both sides of the North Sea and the Atlantic, to venture a study in the other half of the legal world was believed a hazardous excursion into a dark continent. Many may think so even today. "Civil" law is considered by others to be uncommon, and "common" law appears somewhat uncivil.

No doubt, a long history has impregnated the nature of both civil and common law. The divergence reaches into the basic conceptions and affects innumerable particulars; it concerns mentality, habits, methods, systems, sources, and results. However, paramount questions arise: Just what are the main structural differences? What is their present scope and significance? And to what shape will they be molded in the unceasing stream of evolution?

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1. Friedman, *A Re-Examination of the Relations Between English, American and Continental Jurisprudence* (1942) 20 *Can. Bar Rev.* 175; Pound, *The Spirit of the Common Law* (1921); Gutteridge, *Comparative Law* (Cambridge, 1946) 88 et seq.; Radbruch, *Der Geist des englischen Rechts* (Heidelberg, 1947); Eder, *Ciertos principios característicos del Common Law*, in *Academia Interamericana del derecho comparado e internacional* (Cursos Monográficos, La Habana, 1948) 253; David, *Traité élémentaire de Droit Civil Comparé* (Paris, 1950) 269-311; Cooper, *The Common and the Civil Law—A Scot's View* (1950) 63 *Harv. L. Rev.* 468.

These questions indicate some objects of the all-comprehensive comparative studies which are the most important task of present legal science. I have urged such researches for many years, and after they were started successfully in Europe between the great wars, I have been asking for them in this country. At this moment, our knowledge has not matured enough to meet those questions throughout with assurance. In part, mere impressions must suffice. Nevertheless, one conclusion is safe. Common law and civil law are quite comparable entities. More than that, they are relatives not too remote, and they move steadily nearer to each other.

Let us see first what are the main phases of the two groups that have caused the belief in their unqualified contrariety. If we want to get the full impact of the principles, the sharpest profiles of the contrasts, we ought to look to England rather than to the United States. When the common law traveled with the colonists to British possessions overseas, it split into many varieties and underwent modifications. In the United States the mere fact of application in the several jurisdictions, the overriding constitutional control, and the federal legislation have produced a climate very different from the unity of the British Kingdom, its homogeneous class of traditionally trained lawyers and its ordinary courts ruling over the entire territory of England or the Kingdom.<sup>2</sup>

#### I. THE MAIN DIFFERENCES

##### *Historic Separation*

The peculiar nature of common law has been designed by history. English law has had a continuous, almost uninterrupted, development by English lawyers, kings and parliament from the coronation of Richard I on September 3, 1189, that is, now for 760 years. Whilst the European continent went from medieval society to the Renaissance, Humanism, Reformation, Thirty Years' War, stagnation, revolutions, and through the crises, wars, and social upheavals of the last century, Great Britain, on its isles, had a revolution and a restoration, and several great wars, but the law was never more than mildly affected. The violent currents of thought stirred up on the Continent came as gentle waves slapping on her shores. British character was more of a barrier than the Channel. That country is still a hereditary

<sup>2</sup> Goodhart, *Essays in Jurisprudence and the Common Law* (1931) 55 et seq.

kingdom, the governing law is still the direct descendant from Richard I's law. This is a very great fact.

##### *Sources of Law*

British common law has developed by steady tradition in the decisions of the courts, whereas the Continental legal systems rested prevailingly on Justinian's codification and rests now on national codes. Common law learning, said Sir Frederick Pollock, is forensic in its origin, civilian learning is scholastic. Indeed, our heroes, such as Sir Edward Coke, Lord Chancellor Hardwicke, Lord Mansfield, or Chief Justice Marshall, Story, and Holmes, were judges, and Azo, Bartolus, Donellus, Dumoulin, Savigny, and Jhering were professors.

This contrast opposes the sources of law: the judge-made law and the enacted law, with ever-repeated emphasis on the prerogative, or even monopoly, of the English judges in making law, statutes in principle being of inferior force, declaratory of the common law, intended to clarify and simplify the case-law. Even if the statute is reformatory, derogatory to the common law, it is to be construed narrowly as an exception to the great dominating bulk of the previous decisions persistently forming the common law. A number of rules for interpreting statutes insist on the literal sense of the words, and have such quaint flavor as "*contemporanea expositio*," "*eiusdem generis doctrine*," or "*rule noscitur a sociis*."

The contrast, thus, extends to construction and application of the law. It concerns the relationship between law and legal theory. The traditional conception holds judicial decisions superior to both statutes and doctrine. The training of the lawyers has been characteristically influenced. English jurists have been trained by the inns of the court, practically, empirically, in the autonomous continuity of the profession. Continental lawyers have been educated at the universities and taught history and theory. Accordingly, English lawyers have never been interested in legal history, not even in their own, despite its magnificence and the abundance of well-preserved historical sources. (A treasure largely not even printed and neglected, while we busied ourselves reverently with the remainders of the Egyptian papyri, described by sarcastic Romanists as holes with something illegible around.) Maitland has bitterly complained about this defect and thereby also explained the sorry disregard for comparative law:

"History involves comparison and the English lawyer who knew nothing and cared nothing for any system but his own hardly came in sight of the idea of legal history."

The admirable history of English law, written by Maitland in collaboration with Pollock, has stopped in the Middle Ages and few people seem prepared to supply the special studies for complementing Holdsworth's history and the handbook by Plucknett.

On the other side, time and again Continental practice and theory have worked at cross purposes. The great humanists of the sixteenth century, Cuiacius and Donellus, wrote for the German Romanists of the nineteenth century rather than for the contemporary judges who remained unimpressed. Savigny's historical school has immensely influenced the march of scientific progress, but not the courts of their time. When I first entered judicial practice, my superior, an old judge, warned me that I must thoroughly forget my university learning, and as confirmation showed me every week the entirely useless exertions of the current law journals. But the experiences of the twentieth century are entirely different.

#### Precedents

Established upon decisions, the formation of common law has sought stability by the principle of *stare decisis*. A judgment of an ordinary court is binding on this court itself and all coordinated and lower tribunals. A judgment of the House of Lords is binding on all courts, now including the House itself. It can only be changed by an act of Parliament.

This unique doctrine, a consequence of the lack of written rules, has produced, in its turn, a very subtle art of analyzing and distinguishing the operative facts supporting the individual actions and defenses. It has also promoted a basic tendency toward conservatism, of slow and cautious progress from one case to the next one. Many centuries could continue this unhurried advance which, viewed in retrospect, almost appears infallibly purposeful. But the United States has not been able to stand this measure of movement for a long time. The civil law has never known the principle of *stare decisis* nor needed it.

The common law method so acquired is naturally inductive. The cases involving a certain situation are collected and com-

3. Maitland, Collected Papers, 188.

pared as to facts and decisions, and by timidly progressing generalization, in the course of time, rules are reached or something similar to rules. After seven hundred years, a considerable stock of true rules has been accumulated, although prudence is never forgotten. When the members of an international committee report how some problem is treated in their respective countries, a British jurist may state that there is no law on this question, since it has not been decided in court. When, on urgent demand by German and French professors, Jenks published a systematic Digest of English law, some of his colleagues seemed apprehensive. It is a comfort now to exclude any doubt that the use of this book is legitimate, since the last edition has been edited by Professor Winfield.

In theoretical language, Mr. Justice Holmes has formulated correspondingly the essence of judge-made American law, in his famous definition of law as a prediction of what judges will actually do.

No civilian will ever agree with this definition. Law for a Continental lawyer exists irrespective of judges, whether its source may be construed as divine or man-made, and be old custom, judicial decision, or parliamentary enactment. The law is not identical with the code, but it is in being before a lawsuit is brought, and the judgment will state whether or not the right sued upon exists—not whether the court makes this right. It is the oldest and a permanent idea: the judge "finds" the law, and does not make it. The laws, the rights, the duties are the order and guides of the population; they ought to be known to everyone, and at least be ascertainable to counsel giving advice to the public.

This divergence would be formidable, indeed, if Holmes' dictum were the expression of a dogma, as it is taken so often—and not only a paradox of a skeptic, or if a civil law judge were to read every decision in the statute, as some people believe.

#### Equity

The rigidity of the law obtaining in the law courts necessitated the development of equitable remedies in the Chancellor's court. A new branch of law developed in the new jurisdiction, a dualism comparable to the competition of legal principles which the Roman pretor gradually established at the side of the old *ius civile*, or to the practice by which the royal officers in the Frankish Kingdom corrected the ancient customary law. But

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English equity in the course of time became a second set of formal rules.

Equity in civil laws, including Louisiana's,<sup>4</sup> as in the *Corpus Juris*, is not a branch of law but an inherent element of legal thought, present in the great majority of legislative solutions and judicial decisions. *Aequum et justum*, law and equity, is a compound expressing one thing, not two. Only in a part of the system, *jus strictum*, rigid law, unmitigated formal law prevails. The text of a negotiable instrument must hold firm for the benefit of innocent holders; formalities of marriage or wills must be observed—although even in this matter European courts have tended to leniency; the rules on land register entries must be complied with to the letter.

Formalism, or more politely expressed, a literal approach to statutes and contracts has maintained a much broader sphere in English courts, at law as well as in equity. Its removal is slow. Very recently it has been conceived that a legacy of "my money" may be construed as meaning: my money and my securities.<sup>5</sup> Of a case where the High Court and the Court of Appeal held to the contrary, I privately know that the narrow interpretation manifestly violated the intention of the testatrix.

#### Other General Contrasts

Among the peculiar rules of statutory construction traditional in English law, it has been emphasized that an ambiguous statutory text must be strictly construed under English rules and not elucidated with the help of drafts, governmental papers, or parliamentary debates. Continental courts do just this, sometimes digging deep into yellowed archives.

Others have contrasted the utilitarian or pragmatic philosophy favored by English lawyers with the multitude of philosophical systems to which French, German, or Italian writers have adhered.

A group of typical divergences concerns the fundamentals of government. Latin American scholars, for instance, seem greatly interested in the American "rule of law," authorizing judicial control of constitutionality of enactments and the administrative tribunals of the French type mentioned earlier.

4. Art. 21, La. Civil Code of 1870.

5. Paton, *A Textbook of Jurisprudence* (Oxford, 1946) 189.

6. *Perrin v. Morgan* [1943] A.C. 399, 410 H.L.

#### Specific Differences

A few examples may substitute for the mass of big and small differences of institutions, rules, and conceptions. The excellent land register books of Central Europe have no parallel in England and the Americas. The Anglo-American trust is a subject of high interest for Continental lawyers who feel increasingly the need for this greatest of all individual common law achievements. In more or less extensive scope, an increasing number of American states have adopted this institution, with Panama as pathfinder, thanks to Ricardo Alfaro, and Louisiana as possessing the most complete statute.<sup>7</sup>

Civil law, as is well known in Louisiana, does not recognize the particular distinction between realty and personalty, nor the necessary transfer of an inheritance to an executor or administrator, the "personal representative" of a deceased.

Where the common law has not been reformed by statute, it is inclined, more than the civil laws, to lag behind the developments, and this is its greatest disadvantage in our fast living time. Antiquity appears in the law of "bastards," the "local actions," a theory that corporations "exist" only in the state of their incorporation, a procedure relying on the hazard of personal service of process; here, the theory of consideration and that of *ultra vires* still survive in shattered ruins—while behind the facade all these doctrines are ripe for demolition in the jurisdictions that have not yet discarded them entirely.

The sins of the civil laws are different but by no means less regrettable. Instability of political and legal orders have produced an overwhelming sense of insecurity. Although European judges have been good and in many cases excellent, the wisdom that common law seems to have infused into judicial rulings is not commonly paralleled. But the main trouble is caused, in striking contrast to the German Civil Code, by hasty, confused, superficial, and contradictory legislation.

#### II. THE RAPPROCHEMENT

Must we take this suggested antithesis as entirely true? as fully effective still at present? and as significant with respect to the United States?

7. Ricardo J. Alfaro, *Adaptación del trust del derecho anglo-sajón al derecho civil*, in *Cursos Monográficos*, cited supra note 1, at 63 et seq.

*Unwritten Law and Codification*

In the United States, a country of "unwritten law," there existed in 1947 "274 bulky volumes aggregating 267,777 pages of statutes, supplemented by 56,701 pages of statutes enacted in two years, 1946-1947, according to Dean, now Chief Justice, Vanderbilt.<sup>8</sup> Of course, the yearly publication of 500 volumes of court reports competes with the statutes for production records.

While organizational and administrative legislation absorbs the greatest part, as in all other modern countries, private law has been advanced by American state statutes in many fields, domestic relations and tort liabilities being merely examples. Even in England the Law Reform Committee of the Lord Chancellor has sponsored drafts to abolish the Statute of Frauds and the fellow servant doctrine, to change the doctrines of contributory negligence and of consideration; and the statute book has incorporated acts on legitimation and adoption, divorce, family provision in wills, the Law Reform Acts on married women and tortfeasors, 1935; frustrated contracts, 1943; contributing negligence, 1945; and personal injuries, 1948. One may say, every one of these acts is a step in the direction of the civil law.

In the contemporary ocean of statutes much confusion and deficiency are due to the pressure of wars and crises. Yet this alone does not explain the shortcomings of many legislative products. It ought to be perceived that law making is a difficult art and that, although not requiring a genius, it must be learned.

With our abundance of written law, enactments, ordinances, and regulations, what becomes of the common law distinctions between statutes declaratory of the common law and derogatory statutes and the subordination of enactments to decisions?

The answer lies in the indifference shown by the American courts. The British Sales of Goods Act is known as a typical "codifying" statute, merely laying down the common law and giving it a firmer expression, but not touching its great body. Reading American decisions, you may find sometimes the statute ignored, particularly where it affords an identical solution, but never expressly set aside<sup>9</sup> and, when appropriately pleaded, used as the main directive, though not as the only one.

The attitude of the courts toward the Uniform Sales Act is

8. See Stason, *The Cook Lectures: Men and Measures in the Law—Arthur T. Vanderbilt* (1949) 24 N.Y.U.L. Rev. 22.  
9. Radin, *A Short Way with Statutes* (1942) 56 Harv. L. Rev. 388, 395.

not in the least different from the methods of a Swiss or Swedish court. The new draft of a Commercial Code attempts to accumulate a great mass of specific solutions and to ensure the primacy of written law in this area. If monumental American codes were openly to declare their rank superior to judicial decisions,<sup>10</sup> statutory drafting should finally free itself from the complicated, clumsily cautious style intended to overcome judicial hostility to statute law.

The English rules of statutory interpretation have been thoughtfully criticized by leading American authors as artificial canons and limitations<sup>11</sup> and as a stultifying technique disguising rational and useful judicial activity.<sup>12</sup> They enjoy so little popularity in this country that their disintegration has been recently demonstrated.<sup>13</sup>

There is no difference, again, in the application of American interstate commerce legislation on carriage or in the construction of insurance statutes, and the corresponding European practices. It should be clear by now that the true intention of a law or of a contract may be discovered without any presumptions fixed by a national law.

The case for true codification not of the judicial cases but of the American law has been convincingly made.<sup>14</sup>

After resolutely abandoning the circuitous style and the massed cases of traditional Anglo-American statutes, what type will future American codification prefer? It is not exact that the present statutes leave more discretion to the courts than European codes.<sup>15</sup> We have noted the opposition between Ger-

10. See Pound, *Common Law and Legislation* (1908) 21 Harv. L. Rev. 383, 385.

11. Frankfurter, *Some Reflections on the Reading of Statutes* (1947) 47 Col. L. Rev. 527, 541.

12. Radin, *Statutory Interpretation* (1930) 43 Harv. L. Rev. 863, 885.

13. Horack, *The Disintegration of Statutory Construction* (1950) 24 Ind. L.J. 335.

14. Yntema, *The Jurisprudence of Codification*, in David Dudley Field, 251-264.

15. The creative work of the French and German courts has been mentioned earlier. For new Swiss achievements see, for instance, Guhl in (1948) 84 *Zeitschrift des Bernischen Juristenvereins* 524 et seq., note to Federal Tribunal, 73 Off. Coll. II 140; the federal tribunal continues its work of extending the scope of the action against the illegitimate father for recognition of legitimate status on the expense of the ordinary paternity action for alimony. Identical statutory texts are construed to opposite effect in France and Belgium, Germany and Switzerland.

Ernst Wolff, Chief Justice in the British Zone in Germany, in an article, *Freiheit und Gebundenheit des englischen Richters*, in *Festschrift für Wilhelm Kieselbach* (Hamburg, 1947) 280, recommends, under the present ideological battles, that the discretion of German courts should be restricted according to the English experiences.

man massive written rules and Swiss looseness of principle. The first method is exaggerated. The second, after almost four decades, has left gaps still unfilled by an excellent judiciary. Much legal progress is likewise due to the courts of both these countries. Hence, the field is open for reciprocal information and a united effort to improve legislative technique.

#### Stare Decisis

The much advertised difference in the force of precedent has been greatly reduced. The English professor, Goodhart, has recognized in the United States a system so much looser and freer than the British that he assumes the existence of three modes of evaluating previous decisions, a British, an American, and a civilian. The Supreme Court of the United States and the highest state courts have conquered freedom in overruling themselves. The special situation of this country is commonly explained by the existence of many courts, large and rapid economic development, and the dedication of the federal judiciary to constitutional adjustment rather than to immutable standards.<sup>17</sup>

But what is the practical difference between the American method and the French or German? Anglo-American writers are greatly impressed with the assertion sometimes occurring in France that a single judicial decision is immaterial, while a line of equally construed judgments, a *jurisprudence constante*, "has a conclusive force of persuasion."<sup>18</sup> The Louisiana Supreme Court has borrowed this principle that "more than one decision is necessary" for forming a jurisprudence, apparently, however, for the purpose of a doctrine of *stare decisis*, adopted from common law.<sup>19</sup> But the whole idea reflects a misunderstanding. French judges know as well as those in the entire civil law

16. See, for instance, Guhl, 83 Zeitschrift des Bernischen Juristenvereins (1947) 490: the code has introduced but not implemented the right in the surface, and the courts have not been able to fill this gap.

17. Goodhart, Precedent in English, American and Continental Law (1934) 50 L.Q.R. 40. On the American practice, see Llewellyn, Präjudizienrecht und Rechtsprechung in Amerika (1933); Radin, Case Law and Stare Decisis (1933) 33 Col. L. Rev. 199. On the constitutional aspect, the articles by Reed, Stare Decisis and Constitutional Law (1938) 35 Pa. Bar. Assn. Q. 131; Douglas, Stare Decisis (1949) 49 Col. L. Rev. 735. On Puerto Rico, see Rodriguez Ramos, Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico, III, Stare Decisis? (1949) 23 Tulane L. Rev. 345.

18. This formulation by Lambert and Wasserman, The Case Method in Canada (1930) 39 Yale L.J. 1, 15, has been relied upon by Goodhart and many other writers.

19. Martin, J., in Smith v. Smith, 13 La. 441 (1839); Lagrange v. Barre, 11 Rob. 302, 310 (La. 1845). Cf. Note (1933) 7 Tulane L. Rev. 100.

sphere that decisions are never a source of law, but only may help customary law to crystallize, and that their own force remains solely in their "mérite intrinsèque," not in their form—"rationis imperio, non ratione imperii," as Gény has expressed it.<sup>20</sup> One decision may be discarded, if tentative or ill considered, but otherwise it may exercise exactly as much persuasive power as a string of judgments.<sup>21</sup> Persuasion, moreover, is reinforced by the desire to preserve judicial prestige and a stable system. The authority so carried is entirely comparable to the remaining force of *stare decisis* in the United States. There is more to the comparison. A decision by the supreme court of the country has the practical effect that a lower court in cases open to appeal does not like to risk reversal by deviating; sometimes, a wanton rebellion may result in a black mark in the personal record of a censured judge. Judges are traditionally unremovable but their promotion to higher positions depends on various circumstances. A good craftsman tries to make his decision appeal-proof. And if lower courts in the United States are bound to the precedents of their highest instance, it may be noted that in Germany, the Supreme Court has established the rule that any counsel, attorney or notary, disregarding a decision published in the quasi-official reports of that court makes himself liable to his clients for the consequences.<sup>22</sup> One has to look with a magnifying glass at the real differences in the American and German practice, in order to continue this opposition of principles.

In England, it is true, for a free construction of what the law is, created by statutes and decisions, to use the words of one English author, the judges would have to admit that social needs must be fulfilled by new interpretation. He seemed to believe that just this was in the making.<sup>23</sup> Scottish lawyers certainly feel binding precedent which "crept in unobserved some one hundred fifty years ago" as a "superstitious fetish of ancestor worship" and want an end to its "suffocating grip."<sup>24</sup>

#### Theory

No writer in this country would repeat the dictum I believe I read in a paper of Sir Frederick Pollock: Thank God, we have

20. Gény, Méthode d'interprétation et sources en droit privé positif (1919) 407.

21. Goldschmidt, English Law from the Foreign Standpoint 39; Guttridge, Comparative Law (1946) 90.

22. Reichsgericht, J. W. 1937, 1633 No. 4 (March 2, 1937).

23. Wortley, La théorie des sources in Etudes en l'honneur de Gény at 27.

24. Lord Cooper, Lord Justice General and Lord President of the Court of Sessions, in his important address, cited supra note 1, at 472, 473.

no legal theory in England—this is better than having wrong theories as on the Continent. I do not think that there is no theory in England and I doubt strongly that there is no wrong theory. English judges like all good judges do not like to consider a problem at the bar in terms of large implications. It is the character of the literature during many centuries which failed to organize critical and systematic spirit. Also in the recent past there were not enough Frederick Pollocks. The American scene, again, is quite different.

It is true that the really fundamental contrast of mentality and method persists, particularly in the ways of the judges, and is strongly sensed by the courts working with such mixed systems as those of Louisiana, Scotland, and Quebec. But the learned literature of the western world, in a process of mutual interaction, clearly moves toward an eventual assimilation of purposes and means of legal thought. Already, the controversial problems, similar throughout our countries, are debated not so much between the nations as between the views recurring within every individual country. No one should fear, however, the coming of an era of international monotony. Fortunately, national virtues of theoretical apperception and creation will always be magnificently different.

#### Basic Concepts

Many rules of English coinage have been produced by scholastic method from the fourteenth to the seventeenth century and have been petrified. Such a rule was once the naïve expression of a seemingly obvious observation, then began to unfold its independent life and now lasts apparently forever as dead but cumbersome dogma. This has happened in Rome, in the Mohammedan legal theory, and this is also the explanation of, let us cite as an instance, the doctrine of contributory negligence.

Corporal injury to a person creates liability. But: *Quod quisque ex sua culpa damnum sentit non intellegitur damnum sentire.*<sup>25</sup> Liability does not exist, when the injured person contributed to the harm. The tort rule is not designed for such a case. This was also the English idea at one period. But while probably the Romans and certainly later Romanistic laws progressed to the consideration that both parties may be imprudent and it is just that they should divide the damage in some pro-

25. Pomponius, D.50.17.203, originally speaking of legacies, Lenei, Pallin-genesia, Pomp. 260.

portion, the English rule froze prematurely, resting on the alternative of burdening either the plaintiff or the defendant. (In the transition to the modern epoch, where such accidents became frequent, other considerations may have upheld the old principle.) This phenomenon is typical for many others in the history of legal dogma; it is only more habitual in common law, that professional product of long standing.

Another example. The Roman doctrine in the first century A. D. contemplated the case where A promises to B an individual slave, Stichus, not knowing that Stichus had just died, and concluded *impossibilium nulla obligatio*; no obligation for an impossible feat, whenever the object of the contract did not exist at the time of contracting. The same rule appears in the Sales Acts<sup>26</sup> and in the German Civil Code of 1896, Section 306. Now, the contract may rightly be deemed to be without content (*inutilis*) and the promisor be free because of his excusable error, or the transaction may be fraudulent (selling the Brooklyn bridge), or just stupid (selling a magic drink). But in many cases the seller must be made liable for damages instead of getting rid of the contract as void.

Thus, an awkward or wrong generalization devised by primitive legal art is dragged along until it acquires the dignity of uncontroversial truth. This is the greatest disadvantage of a continuous legal profession. Progress sweeping away such remnants, also eliminates the most unpleasant differences of legal doctrine.

Even doctrines deeply rooted in the judicial machinery must not be fatalistically continued. At any rate, the traditional contrasts of systems must not be overrated. Consider the following example.

The seller of a horse, instead of delivering it, retains it in his own stable. The buyer wants to sue for delivery. He is allowed to in civil law. The court will adjudge his claim, based on the obligation of the seller to deliver; the judgment commands the seller he must deliver. Under Anglo-American law, in an action at law, no such claim is recognized. Breach of contract leads only to an action for damages. Classical Roman procedure was similar. The historical reasons for both principles of "money estimation" have presumably also been the same: origin from ancient penal action, simplicity of enforcement of

26. British Sale of Goods Act (1893) § 6; American Uniform Sales Act, § 7, 1 U.L.A. 4 (1950).



money claims, and others. Acknowledging this difference, it is correct to proclaim, with eminent authors, that breach of contract at common law is identical with tort, or, less sweepingly, that at common law there is no obligation for the debtor to perform, as at civil law—that is, to give or do or omit something—but only to pay damages for nonperformance, for not giving, etc. cetera?

What a historian should answer to these bizarre constructions, has been said by the late Professor Buckland,<sup>27</sup> but has apparently not interested the routine writers. If a seller promises a horse and retains ownership and possession of it, and if the horse perishes by accident, the obligation of the seller is admittedly extinguished. This means, he owed the horse, not money. In Rome the classical formula of action for a promisee on the ground of a stipulation or a sales contract expressly made the existence of the obligation to perform specifically, the *dare facere praestare oportere*, the condition for awarding the interest in money. This is also the common law, whose wonderland we should not exaggerate.

How the two systems work in practice is no less instructive. Common law courts are not permitted to grant specific performance in an action at law. But equity does accord it, hesitantly in England, more freely in the United States. A Continental buyer may sue for delivery of ten tons of steel, but normally—that is, if there is no shortage in steel—will be satisfied with damages in money. A need for specific performance in business is an exception, and where such need is proved, an American and a German court will recognize it practically to the same effect, though in different procedures.

Observant Louisiana professors have declared that Romanistic training has achieved a much superior supply of technical tools and a revolution of concepts is needed in Anglo-American law.<sup>28</sup> While this is undeniable respecting many basic concepts of general nature and their systematic organization, common law has produced a wealth of commercial, maritime, and specialized notions of inspiring force. By a give and take method, again, prejudices are eliminated, concepts remodeled and a coherent legal system established.

27. Buckland, *The Nature of Contractual Obligation* (1947) 8 Cambridge L.J. 247.

28. Franklin, *The Historic Function of the American Law Institute* (1934) 47 Harv. L. Rev. 1367, 1391; Morrow, *An Approach to the Revision of the Louisiana Civil Code* (1950) LOUISIANA LAW REVIEW 59, 63, (1949) 23 Tulane Law Review 478.

### *Contrasts between Legal Systems*

It should finally be borne in mind that all the significant contrasts are by no means to be found in the opposition of Anglo-American and Continental laws. The statutes of the American states and the highly differentiated statutes of the European Continent and Latin America embody rules of every kind. To recall just a few notable matters, common law has accepted a West-European doctrine that ownership may be transferred by consent, forming a group (in which Louisiana especially accentuates the transfer of immovables by consent), while the Central-European countries, Argentina, and others require delivery of movables for the passing of the title. Likewise, the English Statute of Frauds with its American following stands with the French group against German and Scandinavian formlessness of obligatory contracts. But common law and the German-Scandinavian group recognize rescission of contracts by formless declaration, dispensing with those constitutive court decisions such as the French group prescribes with judicial power to grant the debtor days of grace, or, as in Louisiana, without such faculty.

Recognition of illegitimate children by the father is a requirement for their legitimation and for certain, or all, alimony suits in some American states, following the French model, while others base these children's position with the Germanic systems, on the blood relationship.

Dowry, once a universal institution, persists in most codes, but in Louisiana and other jurisdictions rather on the paper only, and has been omitted in the Code of Peru, although the French draft proposes an extensive regulation.

The common law doctrine of consideration as a general requirement of contracts is reduced in progressive statutes such as in New York and the English Reform proposal.<sup>29</sup> The requirement of a "cause" of obligation in the French law, so influential on innumerable codes, has been maintained in the French Reform work for the exclusive reason that it has become a "classical theory" of French law.<sup>30</sup> The Louisiana Supreme Court, it is true,

29. Report of the Law Revision Committee upon the Doctrine of Consideration (1937). Cf. Cheshire and Fifoot, *The Law of Contract* (1945) 69 et seq. New York: see the New York statutes listed by Lloyd, *Consideration and the Seal in New York* (1946) 46 Col. L. Rev. 1, at 16, n. 73; and id. at 10 on the bill of 1937 abolishing the doctrine of consideration but vetoed by Governor Lehman. Cf. the articles collected in (1941) 41 Col. L. Rev. 777-876.

30. Commission de Réforme du Code Civil, 2 Travaux 196, 197.

nexations to cities. In addition, legal material has been included from statutes and constitutional provisions, as well as cases, and some material from law reviews.

Finally, the typographical arrangement deserves high praise—the text and notes are printed in the same size type as the cases. Too many good casebooks have been ruined by printing some of the best material in unreadably small type, and this volume is a welcome exception.

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## Private Laws of Western Civilization†

Ernst Rabel\*

### PART II. THE FRENCH CIVIL CODE<sup>1</sup>

#### I. The Code Napoléon

At the eve of the French Revolution in 1789, France had the most centralized government of all large countries, but its law was divided. Voltaire has said that a traveler through France had to change law more often than horses. There were royal ordinances, canon law, statutes of big and small counties and towns, and the bulk of Roman law tradition. Roman law was so important in the Southern provinces that they were called the *pays de droit écrit*—regions of written, namely Roman, law. In the North sixty "great coutumes," like that of Paris and Orléans, and three hundred local coutumes (books of usages) obtained. By a stormy but expert work, the revolutionary assemblies, inspired by the ideals of the philosophy of rationalism, swept the entire maze away. Significant was the famous night of August 4, 1789 when in the National Assembly the nobles, the bishops, the representatives of the privileged cities and corporations solemnly declared that they renounced all their rights arising out of feudal tenure or socage rights in peasant land, a system settled for centuries. Liberty and equality were not only proclaimed but the principles were imbued into a rapid sequence of laws which you may see cited frequently today with their picturesque dates of *nivôse* or *ventôse*.

When Napoleon became first Consul, on December 15, 1799,

† This is the second in a series of six papers by the author.

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1. Recommended reading:

Amos and Walton, *Introduction to French Law* (Oxford, 1935)

Briassaud, *A History of French Private Law*, translated by E. Howell from the second French edition, with introduction by Holdsworth and Wigmore (Boston, 1912)

1 Collin et Capitain, *Cours élémentaire du droit civil*, refondue par L. Julliot de la Morandière (11 ed. 1947)

3 *La vie juridique des peuples* (La France, Paris, 1933) (excellent introduction with select bibliography)

Le Code Civil, *livre du Centenaire* (Paris, 1904)

10 The Continental Legal History Series, *The Progress of Continental Law in the Nineteenth Century*, by various authors (Boston, 1918)

he at once interested himself in the revision of the law, and participated in it; out of the one hundred and two committee meetings from 1801 to 1804 in which the civil code was deliberated, Bonaparte presided at twenty-seven meetings. The codifiers were great jurists, and Napoleon gave them the certainty of their hundred years' task. He told them: we have finished the romance of the revolution, there is history to be started. Govern and do not philosophize. He used to ask them: how was it once, how is it today, how is it ahead? Is it just, is it useful? In short, a realist. From 1801 to 1811, almost the entire field of law was covered by legislation, mainly in the *Cinq Codes*.

All these codes brought epochal progress to half the world. But the civil code has been the center piece and the moving ground of the various branches of administrative law which have since achieved independent existence.

In effect, the prerevolutionary law—*Ancien Droit*—was radically changed and unified by the Intermediate Law of the storm period, and finally the *Droit Intermédiaire* was replaced by the codes. The codes brought conciliation between the old custom and the new postulates; they returned consciously to the French traditions; but they maintained unification of the law for all persons and for the whole territory, and, in this one law, established individual freedom, equality of the citizens, and emancipation of the law from the Church. Law is compromise. The golden mean was most often observed—which explains that the codes still dominate the law of 1949. Often, not always.

A few examples. The feudal elements of the judicial organization and legislative systems remained abolished; no privilege was allowed to any individual. No property should be tied up with future interests, as had been done in the noble families; hence, a good part of the testamentary trusts, usual in this country, are prohibited. Peasant estates too are not reserved for the eldest son. Great domains seemed to cause a greater danger than the partitioning of small estates.

Marriage and family law was taken out of the hands of the Catholic Church and made a purely temporal matter (September 3, 1791). Divorce was permitted, Bonaparte being personally interested. (When the Bourbons came back, divorce was abolished in 1816; after a long and bitter fight, in which novels and stage participated, divorce was re-introduced by the *loi Naquet*, 1884.) Napoleon insisted that the wife owed obedience to the husband and her legal acts needed the latter's consent. But by the leg-

community property system the wife shares in the acquets and a resulting during the marital life. The state took over the administration of the civil status which has become a great institution in the Latin countries.

But a few rules drove the pendulum from the extreme left to the right. After a law of 12 brumaire an II (April 8, 1791) had assured to illegitimate children equality with the legitimate, particularly in inheritance—few laws go so far even at present—the Civil Code, Article 340, outlawed the natural children in its ill-famed declaration: *La recherche de la paternité est interdite*, paternity actions are prohibited. Foreigners were treated with excessive generosity in revolutionary times; yet the Code, Article 8, confined the "civil rights" to French citizens, depriving foreigners even of the right to inherit or to receive gifts.

As a whole, however, the flaming spirit that had created the Rights of Man filled the codes, moderated by a clear consciousness of the collective needs such as they could be understood at the time.

Since Emperor Justinian's compilation of 534 A. D., only the Prussian Code of 1794 could be called a comprehensive codification. The Codes of Napoleon were enormously superior to both.

Measured with the standards of its own period, and of at least half a century afterwards, the civil code has been justly praised with respect to modern thought, somewhat improved systematic order and elaborate rules. The language, crystalline and beautiful, has not had its equal before or afterward; there have been celebrated French poets who liked to read some chapters for encouragement in prose. The Austrian Code of 1811 has been loved for similar reasons. It seems that at that time legislators knew how to write for the pleasure of the people. The law schools were profoundly reorganized. The courts took another aspect. The literature, for more than half a century, devoted itself prevalently to commentaries on the codes, although in a dialectic interpretation directly continuing the exegetic methods by which the Digest and the code had been treated in the long file of the "Legists."

These codes have acquired not only the respect but also the affection of the French people. More than once in this almost a century and a half, a discussion has flared up about a totally new codification. However, it was never seriously contemplated, until a move was made and not pursued at the occasion of the centenary of the civil code and now after the second world war

revision came into full swing. To this date, with innumerable modifications and amendments, a gigantic patchwork of reforms in the codes survive and are, today as formerly, an object of the highest national pride.

The civil code was promulgated in annexed Belgian, Rhine and other countries, and thanks to its innate qualities the code remained in force in most of them, after Napoleon's fall. Many countries have voluntarily adopted it, as it stood, or with changes. During the nineteenth century the French codes vigorously influenced the law of the whole world outside of the Anglo-American orbit. Even at present, after many events which have puzzled the French predominance, the family of laws centered around the French codes still exists, including Belgium, Netherlands, Luxemburg, Italy, Rumania, Spain, Portugal, and all the Latin-American countries. Those latter have formed their own codes either after the pattern of the Spanish or the Italian laws, and hence indirectly under French inspiration, or by direct loans from France. Louisiana and, in Canada, Quebec have belonged to the center of this group; at present one speaks of the interpenetration of French and common law in Louisiana, and of their co-existence in Quebec.

Only at the end of the nineteenth century, a mighty competitor to the French Civil Code has sprung from the massive and highly refined German Civil Code. There, for a time, the German legal theory which had received a multitude of ideas and suggestions from its Western neighbors, at its turn, vastly influenced and inspired the French legal literature.

## II. CHARACTER OF FRENCH PRIVATE LAW

If you consider that the Codes of Napoleon, aside from certain laws of brumaire and ventôse memory, are in force, and that the courts, *ministère public*, *avocats*, *avoués* and *huissiers*, seem to work not very much differently from what they did at the time of Balzac, that greatest novelist, you guess that the outstanding trait of French legal habits is conservatism, although you will be aware of the danger of exaggeration inherent in any such generalization, and although, undoubtedly, French traditionalism is entirely different from the English tenacious perseverance.

In fact, when the core of the French codifications, the civil code, has been briefly characterized, [—at the centenary of the code in 1904, or as it was done in 1933 by my late friend Henri Capitant, the finest of all interpreters—] the main topics are per-

liberty, family, and property including inheritance. Family property had been the cornerstones of the upper classes in the ancient regime, and were carefully protected by the code as bulwark of the Third Order, the ordinary citizen of the middle class.

As a matter of fact, the small farmers still make up more than a third of the French population, fifteen millions out of forty-two in 1940, and the average farm has not more than twenty-four acres. The other part of the bulk of the population are professionals, craftsmen and workers. Formerly, it was said the Frenchman's dream was to retire in his fifties to a small country house and cultivate roses. These hard working people, living without much luxury, modest in all respects, do not resemble the smart heroes of the yellow-bound Parisian novels, although they know art and they get inexpensive but very well prepared meals. By the way, an opulent dinner in the province is called a *dîner d'avocat*—it is not the judge who has it. The middle class men and housewives are the types for which French legislation has prepared all the time. Their property is what has been named in the *Déclaration de droits des hommes* inviolable and sacred—with all the beauty of superlatives. Indemnification—carefully regulated for the exercise of eminent domain such as expropriation for public use, for railway construction—has been accompanied by remedies in other cases of public encroachments on private property more conscientiously than elsewhere.

However, that the code should stand up through the age of industrialism, the predominance of shares and bonds over land, the overwhelming importance of social problems, has been made possible by the continuous minute work of the courts and writers. Also writers! Theorists in continental Europe have traditionally had a role superior by far to the attention given to learned books and opinions in common law countries, and that they know it helps to increase their feeling of responsibility.

The modern questions of labor, for instance, were of course not foreseen in the codes. But the Court of Cassation granted damage for arbitrary termination of employment in 1859, thirty years before the result was sanctioned by a law. Exemption of wages and pensions from attachment or garnishment, enforcement of specific performance, workmen's compensation, the entire doctrine of unfair competition were developed by the courts, to the envy of German observers during the nineteenth century.

The contract of life insurance considered by great jurists, in-

cluding Pothier, as an immoral gamble, was recognized by the Conseil d'Etat in 1818.<sup>2</sup> The harsh treatment of illegitimate children has been mitigated by a court practice granting the mother support for herself and the child by an action against the father in the nature of a tort action. The old practice of the magistrate, enforcement by "astreintes" was reestablished. The daring recent judicial innovation used the harmless text of Article 1384 to state liability for inanimated things such as automobiles, directly contradicting the principle of Article 1382.<sup>3</sup>

Enacted laws have followed in many such instances, but hesitatingly. For instance, a law to improve the status of illegitimate children was enacted as late as 1912 and has considerably limited the cases admitted to litigation. The numerous amendments to the antiquated family law very lately accelerated their pace.

The provision of Article 151 prescribing "actes respectueux" by which parents or grandparents had to be given notice of marriage, if the bridegroom or the bride, though of full age, had not completed the twenty-fifth year, was modified in 1896, 1919 and 1924, until it disappeared in 1933. Article 214 regulating the marital duty of support was amended in 1938 and 1942; Article 331 on the legitimation of natural children was modified in 1915 and 1924, and later was changed by Vichy legislation in 1941 and (with many other Vichy acts) reestablished in 1945.

Certain problems of marriage and divorce were at last approached in 1937, when, as the most important modernization, married women were finally declared capable of contracting with third persons without the consent of their husbands. Such women's emancipation was started in the United States in 1870 and in 1870 an American judge sadly stated that the husband's legal supremacy is gone and the scepter has departed from him.

So deep rooted is the patriarchal conception of the family in France that Pétain shrewdly chose the slogan: *Patrie, famille, travail*. Similar has been the slowness to change the old-fashioned character, say, of the rules concerning the subscription of shares in creating a business corporation. In 1937 and 1938 a huge flood of small decrees was rushed through on the basis of emergency powers to modernize the law by many piecemeal reforms which have continued since.

2. Avis du Conseil d'Etat, Mars 23, 1818. See 1 Hémar, *Théorie et Pratique des Assurances Terrestres* (1924) 430.

3. Cass., Chambres Réunies (Feb. 13, 1930) *Dall. Pér.* 1930.157.

A foreign observer may also state certain characteristic remnants of old organization and of bureaucratic supervision in the present French law. For instance, the *conseil de famille*, including the famous uncles and aunts of the older novels, appears in the appointment of guardians and interdiction of lunatics and spendthrifts, not only on paper as in Louisiana. A party to a contract wishing to be freed from his obligation because of breach of contract by the other party, if the contract does not grant him rescission by an appropriate clause, has to sue in court, and the court has discretion in admitting the "résolution" and according days of grace (Article 1184). The normal way for a buyer to ascertain defectiveness of goods is by examination by court order. Resale and cover, as remedies available to seller or buyer respectively, are also ordered by the tribunal, although commercial law makes important exceptions. An assignment of debts as a rule must be notified by *huissier* to the debtor (Article 1690); the practice allows other "precise and authentic" communication, but this means judicial proceedings. Notaries, and *huissiers*, play a much bigger role than in this country. And generally, I think, we may state that the civil code determines the mentality of legislators and judges much more than the code of commerce and its development have done, in contrast to the English emphasis on the commercial life.

At the same time, original reformatory ideas have time and again come from France. The extraordinary richness of the French mind, its vast culture, deep intelligence and clear reasoning, its sensitiveness, tact and moderation, have always found expression in the legal literature, whether the scholars were exponents of the old school, "arrétistes" of the style of Labbé, or modern systematic workers. The French lawyer disposes of an abundant mass of commentaries on the codes, learned and informative annotations of the court decisions, which are almost as apparent as in this country, great systematic treatises and smaller textbooks, dictionaries, encyclopedias, repertories and a never ceasing stream of monographs—in the average a less technically disciplined and profound production than the German was until 1933, but highly attractive by clarity and brilliance. Codes, courts and writers participate in the glory of the very old and permanent French legal culture.

### III. THE PRINCIPLE OF LEGALITY

However sketchy our picture of the French private law may be allowed to remain, it has to hint at a fundamental conception

giving meaning and color to a great deal of particulars, namely the principle of legality.

The ten first amendments to the American Constitution including the famous Bill of Rights have been contemporary and closely related to the *Déclaration des droits de l'homme et du citoyen*, and both breathe the same spirit. But there has developed in the repeated French constitutions a marked difference from the American basic institutions. If any individual in the United States is requested to obey some law enacted by Congress or a state legislature, he may challenge, in an ordinary court, the validity of that law by the contention that it illicitly restricts personal liberty, or his freedom of opinion, or freedom of religion, and so forth, guaranteed by the constitution. The court examines whether the restriction imposed upon the individual is a reasonable exercise of police power which violates the free sphere guaranteed to the person. Such judicial review of the acts of legislature is absolutely alien to French thought. The Conseil d'Etat frankly declared that France does not want a "gouvernement des juges," a government by judges, as in America. The revolutionary leaders were keen followers of Montesquieu's celebrated principle of division of powers; legislative, executive and judicial branches of government must be sharply separated from each other. Large parts of the doctrine have survived up to the present time in France. Hence, a law enacted by the French parliament and promulgated by the President of the Republic must be applied by any court without raising questions.

In the course of the constitutional revision of 1946, however, an important qualification was added. Under Articles 91 through 93 of the new constitution, the unconstitutionality of a law may be stated within the time for its promulgation by the newly established Comité Constitutionnel whose thirteen members, including the President of the Republic, are not members of the parliament but prevailingly elected by it. Otherwise, the act of the legislature remains not-reviewable.

The principle, however, does include control over the executive branch. As in the United States, all administrative agencies must strictly confine their activities within the power conferred upon them by law. An administrative act exceeding this power is *excès de pouvoir*, and a wrong exercise of power is *détournement de pouvoir*, and is annulled. Not by an ordinary court! The judges, in view of their traditional training, are not

considered competent in matters of administration. The French administrative courts with the Conseil d'Etat at their head, their procedure and their practice, have been a precious model for the development of civil law. This principle of legality has been particularly expounded in the French doctrine and has attracted a wide following.

Judgments of courts may be attacked on the ground that the court has exceeded its judicial power or jurisdiction. The Court of Cassation, as has been repeated time and again, is not a court of appeals; it has merely to reverse a judgment when it violates the law, that is, in this case, a written law enacted by the parliament—not customary law, not foreign law, which is a narrow interpretation. The idea is clearly that a decision contrary to such law ought to be declared null. The suit then goes back to a lower court.

The attorney general, at the cassation court, has the right and duty of bringing to this august tribunal any case decided in any instance against the law—an extraordinary revision "in the interest of the law," without regard to the profit of the parties, in order to maintain the pure and uniform law in the country—an admirable institution. The state's attorneys, all over the country, have to watch continuously all penal as well as civil cases, and to intervene spontaneously or on instruction by their superior in the *ministère public*, whenever they think that a public interest is in question, to save the law. In criminal proceedings, the *magistrate*, who is called the *juge d'instruction* and who dominates the preliminary investigation, has to observe the interest of the defendant quite as much as that of the state.

Still along this line, only learned lawyers are sitting on the bench, except the old commercial tribunals and the *prud'hommes* and the recent mixed tribunals for rural leases (Law of April 13, 1945). The justices of the peace who were only distinguished gentlemen with intimate knowledge of their boroughs, were subjected to juristic standards in 1926. Nowhere is a jury called in private matters.

Finally, France wants to entrust justice, the application of law in substantial regard, merely to collegial courts—the principle of plurality of judges. A single judge is not believed to enjoy the perfect confidence of the people. An emergency law after the last war allowed such judges, but most have quickly disappeared.

The judges, in fact, are sometimes outstanding scholars.

Nevertheless it is not the individuality of a presiding or retiring judge—or attorney of the Republic—that fascinates the popular imagination: scarcely any names of the high-placed magistrates are so well known to the public as the personalities of the *membres de l'Institut*.

It is rather the spiritual and professional level of the average judges and the glorious and unbroken tradition of independence which make the French as also the Belgian magistrature so proud and the nation so proud of its courts. Already in the royal epoch the *Garde des sceaux* (Lord of the Privy Seal) refused to deal with the courtiers of Versailles and held office in Paris. When the German occupation authorities had full opportunity in 1940 to Belgium to grow aware of the uncompromising attitude of the courts which until then had been functioning; when the country thought the Germans were interfering, they went on strike. I have read what happened in the court of *Riom*, a high tribunal especially composed by the Vichy Government in order to condemn publicly republican ministers for having gone to war against Germany, and which turned out to furnish a powerful accusation against Marshal Pétain.

#### IV. PREPARATION FOR A NEW CIVIL CODE

On the occasion of the centenary jubilee of the Civil Code in 1904, the dispute was renewed with force whether the obsolete or inadequate ideas of the Civil Code should be remedied by substituting an entirely new codification, or whether the palliatives used through a century should suffice: ever again new constructions of the old text by writers and courts; borrowing by comparative methods from specific foreign models; ingenious inventions by judicial and extrajudicial practice; and the unceasing modernization of individual sections by legislative amendments. Almost all leading scholars expressed their opinions; they were equally divided. The result was no new code. After the last war, however, the controversy returned with reinforced emphasis on the harm done to social life by a superannuated law, the enormous changes that have occurred from Napoleon's height to Pétain's fall (and now the Marshall Plan), and the fact that French prestige in the world so long supported by the Code was now gradually lessened by the superiority of foreign codes. Although adversaries still insisted that ancient palaces are rendered more venerable by the additions and alterations worked through many generations, all signs indicate that this time there

really originate a new, elaborate, though conservative, legis-

Immediately after the birth of the Fourth Republic, a Commission for the Reform of the Civil Code was appointed. Although its members, well-known professors, judges, and lawyers under the admirable chairmanship of Dean Julliot de la Morandière, have not been relieved from their manifold other occupations—this fact widely regretted—they have advanced a good deal and have already published the first two volumes of minutes and partial drafts.<sup>4</sup>

It is the ambition of the committee to give the French people a code perfectly suitable to its present life and at the same time a code which would reestablish French international leadership such as it once was manifest. No known defect of the old text should be continued. If I understand well, practicality and modernity seem not to suffice; although the new rules ought not to be didactic, they should respond to the postulates of contemporary legal science.

This is a big and difficult program. Obviously, of course, the present rules and formulations enjoy some presumption of correctness. For French lawyers' respect for tradition is natural. However, the discussion does not refrain from challenging the fundamental premises of any rule, if a doubt arises. Certain radical reforms are considered urgent for the reconstruction of the population—such as the facilitation of adoption<sup>5</sup>—or of the economy.

For comparative studies, these alert and minacious debates among expert jurists, who are able draftsmen, have a particular interest. Not that the debaters themselves would display much care for foreign laws. The commission works mainly with French materials: the code and its amendments, the court decisions, the local relations between private and public law and the distribution of judicial jurisdiction between the judiciary and other authorities, and the suggestions advanced by various state agencies. Only occasionally such texts are mentioned as the French-Italian draft of a law of obligations, the Swiss codes, some Polish or Italian provisions and a Libanian draft unknown to me. German institutions, such as the land register, and the equality of

4. France Commission de Réforme du Code Civil Travaux (1947 and 1948) 2 vols.

5. According to newspaper reports of August 25, 1949, a committee of cabinet ministers has been appointed for submitting a bill of which it is hoped that it "will increase adoptions 10,000 a year."

adulterous with other illegitimate children, are touched in the function as Alsatian local law, for the purpose of unification. Yet, with their domestic sources of law and of factual information these subtle jurists arrive at a great number of solutions new in France but not for all other countries. It even so happens that in deciding the apparently interminable international controversies of the time and place when and where a contract by correspondence is completed, all the civil law propositions are defied and the solution of the Anglo-American common law is accepted: if a contract is perfected by the dispatch of the acceptance.<sup>7</sup>

The common law is not even mentioned at this occasion anywhere else so far as I could see, nor are the questions inherent in this theory considered in the published volume. Most interesting, the old problem whether there should be a general part, after having been negatived in most recent codes, has this time after very long disputes found a different answer. The first book of the German Civil Code is regarded as too heavy, but general rules on persons, property and legal acts will be inserted into separate books. The doctrine of legal acts, a broader notion than contracts, will seemingly be elaborated without using the vast German doctrine, but great difficulties are expected to arise.

If the results will often, perhaps most frequently, resemble the parallel provisions of other countries, minor differences will be a regular feature, including improvements and local conveniences as well as unnecessary particularism. I cannot suppress the observation that the great task of new codifiers should be alleviated by really effective comparative research. The clarification of problems and solutions is speedier and surer, when the foreign experiences and achievements are put to use — as materials, though, not as models. The natural filiation, even not "legally acknowledged," must be a marriage impediment, irrespective of its characterization as a family relationship, has been perceived by the commission; but a contrary tentative draft and discussion could have been spared.<sup>8</sup> And that a possessor in good faith should be liable for all damage suffered by the chattel or land during his possession, unless he proves that he has not committed any fault, is an untenable proposal by the full committee.<sup>9</sup> Rom-

6. *Op. cit. supra* note 4, at Vol. I, 424 ff., 653 ff.

7. *Id.* at Vol. II, 146, Art. 21 (preliminary draft); 220, Art. 18 and 20 (sub-committee).

8. It is true that this draft (*id.* at 429, Art. 20, Par. 6) was intended to decide a controversy. *Cf. id.* at 507, 510.

9. *Id.* at 1002, Art. 29, with the justification by Mazeau at 997 that the general theory of liability requires this solution.

atic tradition and the German code consider it justly elementary equity that who possesses a thing in "good faith" has no duty of care which the true owner would not have, and therefore cannot be in fault before suit is brought against him. However, we shall feel the richer by seeing our research materials increased by the independent work of so privileged a group. The future work of revising the Louisiana code, this dear relative of the Code Napoléon, is assured of a particularly advantageous source of inspiration.

has proclaimed both requisites, cause and consideration.<sup>31</sup> We can do without both of them.

Absolute liberty of testators, a dogma of the common law, forced heirship, or other forms of restrictions on wills are no longer characteristic of any family of legal systems.

#### Conclusion

Thus, it may be understood that, as I have always maintained, common law and civil law are not compact masses of opposite institutions. After appropriate initiation, a scholar may carry on comparative research on all eminent members of the Western legal family with not more strain—though more industry—than when he compares closely related systems and with infinitely more reward in stimulating results. Certainly, comparative common law,<sup>32</sup> or comparison of Louisiana, French, Italian, and Spanish laws, is a highly desirable class lecture. Nevertheless, the former advocates of such restrictions as methodically imperative, may have learned their lesson by now. The literature begins to seek the true contrast between common and civil laws less in the antiquated historic structures than in various characteristics of the judicial organization, traditional concepts, habits of legislators and lawyers, and methods of fact-finding and enforcement.<sup>33</sup> I think, wherever we look, we shall easily find innumerable large and small divergencies, yet none excluding fruitful critical analysis, and, I dare say, none incapable of reconciliation, as distinguished from unification.

#### IV. THE PROGRESS OF PRIVATE LAW

The subject matter of law-making has become increasingly similar. The results in deciding doubtful conflicts of interests have been strikingly analogous in the majority of cases. And the methods of reaching these results begin to resemble each other.

31. See Snellinger, *Cause and Consideration* (1934) 8 Tulane L. Rev. 178.

32. Graveson, *The Frontiers of Common Law* (London, 1949) Current Legal Problems 1948, 30-46.

33. This trend is visible in the most recent writings, published after these lectures were held, by Sereni, *Book Review* (1950) 24 Tulane L. Rev. 263, and David, *op. cit. supra* note 1. Sereni approves the conclusion by Eder, *supra* note 1, that common law is superior in ascertaining facts and means of enforcing court orders, but attributes to the common law "much more law" than facts and states that in truth judicial discretion is more favored in civil law (as also observed above note 15, *supra*). David notes a series of differences, and especially that French lawyers look to the law, the English to decisions, and that in England tradition is stronger than the spirit of the legal system.

That the discoveries and inventions of the technological era and the social effects of industrialization have produced similar problems in the various countries and led to a partial unification in restricted modern fields, such as communications, transportation, and industrial property, has enlarged the area of universal legal thinking accustomed to the law merchant. The center of isolationism is the private law in the narrowest sense, including the law of family relations, successions, and, surprisingly, contracts and torts. To these we had to call primary attention in the resurgence of international studies. The scientific investigations are still inchoate, but of the highest importance. However, by a remarkable fact to be observed in the recent legislation, even before a comparative research has reached its fully productive stage, the codes of civil law and American statutes show a very great similarity in their choice of subject matters, and certain common features in the solutions. Case law may easily be included in this picture. On one hand, we encounter the old familiar topics in ever renewed discussion, with mere variants in the search for a fair or logically preferable rule. There is an almost constant stock of ancient human achievements which we cannot afford to miss, such as monogamous marriage, common life of spouses and parents and children, inheritance by descendants, binding force of the usual contracts, liability for certain torts. Modern development, of course, has enriched this inventory and shifted emphasis on various points. On the other hand, in advanced society, with a growing mass of varied interests, equalization and standardization as well as differentiation occur without much reference to national particularities. Since the German Civil Code was prepared, the old habit of legislators, of borrowing rules and institutions, has been revived at the occasion of every new code. American courts do likewise among themselves and the English leading authors assert that, for the sake of a common common law with the United States, "English courts always aim as far as possible at securing uniformity in regard to the law of contract between the two countries,"<sup>34</sup> and "that a rule of general law which has been laid down, or approved, to substantially the same effect, in the House of Lords and in the Supreme Court of the United States is the law of the English speaking world wherever it has not been excluded or varied by express legislation."<sup>35</sup>

34. Lord Wright, *of Durley, Legal Essays and Addresses* (Cambridge, 1939) 88.

35. Pollock, *First Book on Jurisprudence* (6 ed. 1937) 347.

Courts throughout the world must learn to use foreign experiences. The civil codes of the twentieth century, such as those of Switzerland, Mexico, Italy, Greece, Peru, Venezuela, and the Polish Code of Obligations, follow a very similar pattern of arrangement, choice of topics and basic position of the problems. They agree on an immense number of points, and they disagree in limited areas, which tend to shrink.

All of them discuss the same social problems respecting the conditions for marriage and for divorce, the powers of the husbands, the measure of protection accorded to illegitimate children, tutorship by public agencies, individual and collective labor contracts, and so forth. The technical problems coming up everywhere for legislative decision, as, for instance, the binding force of offers, contracting by agents, liability of heirs for debts, are extremely numerous.

It seems to me a most remarkable result of any comparative survey that may be made in the central parts of modern private laws that if recurring problems are differently solved, the area of difference is more and more restricted. The doctrine of misuse of a right, confined in all history to particular situations, was modelled into a general rule by the German Civil Code, Section 226, which declares unlawful the exercise of a right for the exclusive purpose of damaging another person. But who can prove that his neighbor has dug a water well exclusively in order to dry up the plaintiff's well? The French literature, however, went much farther with a theory that no right should be used beyond the scope within which it serves the intended social purposes. Some authors considered a right enforceable only when the plaintiff proves that he sues for a socially *desirable* purpose. Then, the Swiss Civil Code, Article 2, stated that "The manifest misuse of a right finds no protection in the law." This could mean anything, but the Swiss courts have interpreted the provision with the most sensible restraint. Like the French courts they act in extreme cases, such as when a strike or lockout are conducted with the purpose of ruining the other party. The Italian codifiers have expressly refused the general rule as too much extending judicial powers. This is the present alternative for legislators.

Acquisition of ownership by a purchaser in good faith was energetically opposed in common law. The present laws show a great variety of views. But the most recent codifications tend either to reduce the preference for the legitimate owner to goods stolen from him and assimilated losses, or to grant good title to

any innocent acquirer of possession for value. The American draft of a Commercial Code accepts the latter solution.

Great controversies have raged around the marital property systems. Historic merger of personalities of husband and wife during coverture on one hand, with the effect of gradually limited prevalence of the husband, was opposed by the feminist propaganda for radical separation of property, victorious in most states of the United States. But the systems of community property on one hand, and administration of the wife's not-reserved property by the husband with a half-share for the wife in the surplus—the Swiss solution—have obtained such a respected place that the new Venezuelan Code (Article 148 and following) contains a very detailed regulation of community of acquets and profits, retained as a matter of course in the Italian Code and the French draft. Louisiana will certainly remain in the same camp, although recent privileges of the wife seem not to fit into a balanced system. The Swiss consideration that their middle class handicraft and tradesmen needed the capital contribution usually brought by brides illustrates at the same time the part to be reserved to the local social requirements.

We are able, indeed, to write a table of the usual legislative problems and to categorize their usual solutions. Social organizations and moral convictions have become amazingly similar. Legal technique has still to be freed from local ineptitudes.

Such a study of the recent legislative movements, even a summary survey, would be greatly helpful for the drafting of a new Civil Code in Louisiana. Its legislators cannot wait until comparative research will have accomplished its huge program. But they, more than any other draftsmen, will be forced and eager to adjust the law of Louisiana to the needs of our time, mirrored in the common aspects of the Western laws.

## PART V. THE LAW IN THE WORLD

### THE ISOLATION OF STATE LAWS

Law is order; law means peace and seeks peace with justice. As human organizations develop, human activities grow in number and kind, and relationships become complicated—the task of law raises myriads of exigencies. Through hundreds and thousands of years, ancient and modern thinkers on state and society, and many generations of professional men, devoted to formulating, applying, and teaching the rules of law, have accumulated an

enormous wealth of knowledge, speculative theory, and technical art.

Law and lawyers, however, are integrated with the life, history, and culture of a sociopolitical unit—of the old Egyptians, of the Chatcha-Indians, of Bolivia. Certain units may embrace empires where one law is influential on the others, such as in the Roman, the Roman-German, and the British Empires. At the end of the eighteenth century, when the codes were formed of which the Civil Code of Louisiana is a descendant, the great enlightenment of the natural law united the nations in a deep conviction. Under its strong impulse, the laws of the sovereign states were thought to be imperfect efforts to approach the constant, ideal, divine law; and the Constitution of the United States, with the Bill of Rights, has remained a permanent monument to a related and profound idea: that principles and rights are stabilized by a higher order that cannot be affected by the ordinary processes of state legislatures or federal enactments.

But where no supreme law or constitutional restriction imposes exceptions, every tribe, people or state has its own law, native or borrowed. Thus, the Greeks, who were not a nation but a plurality of cities, *poleis*, had distinguishable laws in every one of them. When a citizen from Thebes came to Athens, he was not a participant in the Athenian law, which meant that any Athenian was entitled to seize him as a slave—unless the stranger was protected by a host or proxenos. Later a treaty between the two city-states proclaimed that he should be free of seizure, *dsylos esto*—the right of asylum. The Greeks were a free people, they founded the idea of democracy, but for them as well as for the Romans, a *polis* as a matter of course consisted only of the citizens; in the people's meetings, the citizens voted laws for citizens only. A foreigner had no right, no law. Only by concessions and finally by the great principle of the personal law, he enjoyed treatment according to the law of his own city, the "origo" of the Romans. Barbarians seize foreigners and kill them in honor of their gods, or eat them without ceremony. It is a long way from there to the Judgment (Series A, No. 7) of the World Court in 1926, stating that in the community of nations any state is obligated to grant any foreign national due process of law and refrain from confiscation, even though this state would not accord this minimum of rights to its own subjects.

However, a time came after Alexander the Great, when the Greek dialects merged into a common Greek language and a

rudimentary Hellenistic law could be sensed. The Greek philosophers had not waited so long to speak of law and judges, of Themis and Dike, *dikastai* and *kritai*, in a general manner and to develop the eternal idea of justice.

In a comparable evolution, the present leading European nations have formed national units in states, each having its own law. This natural and healthful development, however, suffered a distorted exaggeration just when the industrial and technical age demanded a new regard for international needs.

In the last hundred years, the lawyers of all countries have sat in airtight national compartments, always breathing the same air and highly afraid of a draft from outside. English insularity is the best known; it has lasted for more than seven hundred years; it is monumental and proverbial. When Lord Mansfield, one of the exceptional figures in English legal history, took inspiration from Continental literature and created modern Anglo-American commercial law, Junius in his famous letters bitterly deplored the treason committed by Lord Mansfield who had corrupted the noble simplicity and free spirit of our Saxon laws by importing into the court over which he presided such elements of pollution as the Roman Code, the laws of nations and the opinions of foreign civilians. And an English comparatist finds the English lawyer still in full agreement with these feelings.<sup>1</sup> However, the great majority of the Continental lawyers from the early nineteenth century until the 1920's have by no means excelled in cosmopolitan broad-mindedness. On the contrary, lacking the wide horizon of the British oceangoing commerce, Frenchmen, Germans, and the other Europeans have during a century achieved a plurality of national laws, a conglomeration of secluded legal bodies, living separately and increasingly estranged. Each of these legal organisms thinks of itself as "the law." There is no "law," but only laws in the plural; consequently, it has seemed natural that there is no legal science—apart from a few international branches of law—in the sense of one anthropology, chemistry, or architecture.

This basic idea is intimately connected with the history of modern states, and with the weighty theory of territorialism, still much in vogue in Anglo-American law, as well as with the theory of legal positivism which dominated the nineteenth century on the European continent. It has remained an all pervading conception, formally supported by the prevalence of statutory legis-

1. Gutteridge, *Comparative Law* (1946) 24.

lation by sovereign legislatures. Louisiana statutes make law exclusively within Louisiana. Texas law is a foreign law, and for many purposes deemed to be a mere fact, not a law. Even our ignorance of foreign laws should not necessarily follow—but it does! Cicero called foreign laws almost *ridiculous*. We lawyers are outstanding examples of conservatism. We are hurt if we are asked to change a word of our language; we are not enthusiastic about suggestions to change a rule or a code.

Division is most striking on the European Continent. France, Spain, Italy, Germany, Switzerland, and Greece have achieved national codifications which unify their former innumerable statutes and usages, but which seal their countries off from each other. The effect of this, probably inevitable, disjunction has been constantly increased by acute nationalistic feelings. And when the twentieth century accumulated the interferences by states in the relations of individuals, the peculiarity of every public policy was so eagerly urged as to oppose an ever present obstacle to international harmony of law.

In the United States, thus far, methods and purposes of foreign law studies are just beginning to become known, although comparative research should by no means be regarded as alien. The coexistence of the several states and of the Federation, all legislating in sovereignty, has resulted in a broad and extremely useful judicial and literary national work. The Federal Constitution and the federal administration represent a measure of unity. Technique and ideals of the common law still form the strongest link of the lawyers. The law schools and the legal literature overcome the diversity of the state laws by crystallizing principles of American law out of disparate rules, adjusting to the national pattern of society and economy. Restatements and uniform state laws purposefully, though tardively and hesitatingly, approach the standardization of American business and living habits. The trend has gone from unification of mentality to unification of rules of law. At this moment, a voluminous and substantial draft of a commercial code opens a new vista. Simultaneously, this country has reached a position in the world which distinctly points to a further enlargement of its legal outlook.

Among all states of the Union, Louisiana stands in a special situation. Common law has made big inroads against which a vigorous reaction has started during the last two decades under the leadership of the two great law schools. A most exciting exchange of ideas is in the making which will find its climax when

the prospective new civil code is debated and the discussion will stimulate interest throughout the country.

You live in Baton Rouge, but also in Louisiana, in the United States, in the American Hemisphere. We do live in larger communities than states. For the first time, it is imperative that we change our outlook from provincialism to larger horizons, to embrace the world. Legal science, indeed, should not have been so content with its departmental successes. Comparative research in foreign laws should not have been so slow and so absurdly neglected, especially in the common law jurisdictions of the United States.

What are in the roughest outlines the international aspects of the present organization of law?

#### INTERNATIONAL PUBLIC LAW

The civilized states of the earth form a community of states governed by the rules of customary international law—so far as they reach. These rules for war and peace have emerged in the course of milleniums, producing a growing body of rights and duties of sovereign states against one another. On the fundamental thesis that agreements must be performed—*pacta sunt servanda*—treaties between two states, or multiple treaties, conventions, or unions have expanded to a considerable volume. Certainly, the last two wars, pervading and devastating the globe, have shattered in many honest minds the belief in any law of nations. Skeptics, by their intellectualism, and advocates of unlimited state sovereignty, by their nationalism, reinforce the influence of the doubters; the dreamers and utopians are even more harmful to sober development.

International law is not less necessary when it is more frequently violated. It needs only to be better impregnated upon the consciousness of the peoples. With all crises and reverses, we are irresistibly led to a supranational order, which does not mean a world government. There was a time when the families or clans fought violently for their independence from king or state. Management and labor, in the United States, seem united in the forceful refusal to submit to compulsory arbitration; they want the right to wage war. But since the United States has helped create the Pan-American Union, the United Nations, the Atlantic Pact, and accepted the compulsory jurisdiction of the International Court at least in principle, there can be no doubt of

the final victory of law over force—although we have no illusions that its day can be reached easily or quickly.

#### UNIFICATION<sup>2</sup>

Public interational law is a true law in force among the states, deserving the qualification as international. We may term likewise *suprastatual* those legal rules that by agreement among states are identical. The modern movement for internationally uniform rules originated in the latter part of the nineteenth century, as a reaction against the exaggerated segregation and succeeded in matters of maritime law, cables, railway carriage, copyright, negotiable instruments, radio, and air transportation. But usually either the territorial scope does not include all states of the earth, or the regulation comprehends merely segments of the matter. For copyright two groups exist: the convention of Bern and the Pan-American Convention, which the UNESCO is attempting to merge. The Geneva Conventions on bills and notes and on checks of 1930, the C.I.F. rules of the International Law Association and an international draft for sales of goods have not had, so far, a chance to be accepted by Great Britain and the United States, although eminent "common lawyers" participated in their elaboration.

The International Labor Office has worked with extraordinary zeal and has offered numerous proposals for conventions, a part of which has been carried over into important treaties on conditions of employment; employment of women and children; industrial health, safety and welfare; social insurance; and the protection of emigrants.

The slow satisfaction of the undeniable need for unified law on certain subjects is understandable. Not only are judges and attorneys very reluctant to sacrifice their familiar rules but also national habits, prejudices, and natural sentiments are hostile to alien suggestions; and common law mentality refuses to yield quickly to Continental methods. In the United States, the Constitution makes it difficult, though by no means impossible, to adhere to international conventions on private law. Occasionally, when a treaty such as the Brussels Convention on bills of lading, sanctioning the "Hague Rules," is styled in American business

2. "Unification of Law," by the International Institute for the Unification of Private Law, French and English (Rome, 1948); Demogue, *L'unification internationale du droit privé* (Paris, 1927); Schnitzer, *De la diversité et de l'unification du droit* (Bale, 1946).

language, resentment in France and Italy smolders against this indigestible addition to Latin prose. This is a counterpart to that bitter complaint of Junius.

The truth is that most diplomatic conventions have been inadequately prepared. We cannot understand each other, and still less agree with each other, if each partner insists on speaking his particular mind in his own idiom. The diplomats have not known and even few lawyers have clearly perceived what thorough comparative work has to be done before convincing proposals can be submitted. While the laws on bills and notes were thoroughly examined in the long preparation of unification, the "Hague Rules" were worked out in a naïve language by eminent experts of maritime carriage, maritime insurance and finance, and were such a delicate compromise that the state conference did not dare to disturb the diction in a professional arrangement. On the other hand, the Continental drafts are usually unacceptable to Americans simply because of their terminology. To breach the isolationist walls, great and worldwide scientific effort is required. The movement in the United States that has engineered the unifying works of the Uniform Laws and the Restatements, in the present epoch has the natural impulse to enlarge unification beyond the geographical frontiers.<sup>3</sup>

#### INTERNATIONAL LIFE

In contrast to international public law—fragmentary and contested but at least supranational—constitutional, private, criminal, procedural, and administrative laws are eminently national. But in our epoch we have witnessed a rapidly and largely expanding sphere of international life of individuals and corporations. Families are dispersed over the globe. Emigration creates problems of various kinds. Associations for religious, educational, professional or charitable purposes embrace many countries, without having an international status which the International Law Association and the International Chamber of Commerce without success demanded to acquire. Business corporations operate in foreign countries. Loans are given to foreign governments, cities, and companies. Carriage by rail, water, and air; selling and buying of goods; insurance, bills of exchange, securities and financial transactions circle the globe.

How does our congeries of national laws and sporadic uniform laws cope with the problems of family relations and in-

3. Yntema, *Unification of Law in the United States*, in "Unification of Law," supra note 2, at 301.

heritance, making and enforcing of contracts, and all arising out of this multitude of activities and mass of transactions? To my knowledge, this crucial question has not even been raised in general form, so deeply have we been entrenched in our own national valleys.

The answer is unfortunately obvious. Exceptions notwithstanding, any misdeed, contract or relationship crossing the state borders is something extravagant, unfitted for the scheme, and not often covered by one easily ascertainable and suitable law. Foreigners are no longer broiled on a stake, but what the ancient principle of personal law guaranteed to the person, beyond the law of the forum, is now in doubt.

Allow me to point out four phases of this phenomenon: the legal position of corporations doing business in a foreign country; the actual system used by the merchants in order to take the law into their own hands; the branch of law called conflicts law; and the problem of international tribunals.

*Foreign corporations.*<sup>4</sup> If an American-incorporated company wants to sell machines in a Latin-American country, it has usually to file a petition for a license to do business with the respective government, present a number of documents, pay certain taxes, promise to observe certain or all laws of that state, and to submit subsequently current reports and balance sheets. Many of the duties included are fair. The establishment of a foreigner cannot be privileged in matters of public trustworthiness, labor regulations, workmen's compensation, accounting and other matters of administrative organization.

However, many states grant permission to do business according to the pleasure of the government. Some try to control by their own laws the capital structure or voting method or the business done outside the state and have strangely harsh rules against companies not registered in the country. (Mexico's Supreme Court has denied the right to sue for violation of a trademark to an American company though it had no reason to register there.) Vexatious bureaucratic procedures are added. Of Panama, an excellent expert, Phanor Eder, has collected a long list of sins, including taxation policies deliberately intended to close the country to capital unless it submits to complete domination.<sup>5</sup>

4. 2 Rabel, *Conflict of Laws* (1947) 220-225.

5. Eder, *The Judicial status of Non-Registered Foreign Corporations in Panama* (1941) 15 *Tulane L. Rev.* 521.

There have been companies that ruthlessly exploited their opportunities in backward countries. There have also been countries inviting foreign capital to come in and build up an industry, and finally confiscating the business. Against such unjust or unreasonable treatment of investors the Habana Charter for an International Trade Organization of March 24, 1948,<sup>6</sup> contains the general and vague promises that at present can be reached in multilateral, international treaties.

I had suggested that an international model statute should be drafted to formulate more specific rules reconciling the legitimate interests of a country admitting foreigners to use its resources and labor, and the well understood interests of the companies bringing in the much needed capital, managerial skill and technical talent. The Habana Charter has since intervened, but it patently needs such an implementation.

*Trade.* It is a striking fact that international trade has established an awe-inspiring network of standard forms regulating the points of characteristic interest<sup>7</sup> for every considerable branch of trade, according to the special kinds of merchandise and the typical habits of carriage or financing. The facts of the transactions, the customary considerations of a seller or buyer, the local facilities and the personal connections are much more weighty than nationality and national law. Only when the enforcement of the contractual rights is envisaged, there has been a tendency in the many commercial transactions influenced by the British models to submit to the English courts, or to arbitration in London, which implied, in the English conception, application of English law.

Recently a mighty wave of commercial arbitration has run over the business world, in domestic as well as international commerce. In addition to London arbitration, the great arbitration courts of the International Chamber of Commerce in Paris and of the American Arbitration Association in New York, as well as a number of minor commercial arbitration centers have acquired an immense field of operation. The American method excluding the courts from any control of the merits of the award prevails in the world. An award cannot be challenged because of any

6. Habana Charter for an International Trade Organization, March 24, 1948 (Washington, 1948) Arts. 11, 12.

7. Grossmann Doerth, *Das Recht des Ueberseekaufs* (Mannheim, 1930); Raiser, *Das Recht der allgemeinen Geschäftsbedingungen* (Hamburg, 1935); Di Pace, *Il negozio de adesione nel diritto privato* (1941) 39 *Rivista di diritto commerciale* (1941) 34.

legal mistake or failure to apply a law, or for the failure to mention any grounds for the decision. Hence, the departure from the judicial process is complete.<sup>8</sup> In international matters, this unchecked autonomy of the arbitrators, on one hand, and the standard forms, on the other hand, have accomplished a startling emancipation from all national laws, including the conflicts laws. Their application practically depends on the discretion of the arbitrators. International business, so to speak, floats in the sky on self-made clouds, aloof from the earth—and state-bound legal systems.

*Courts.*<sup>9</sup> Arbitration is secret. The decisions are presumably excellent and justify the claim that they provide speedy, inexpensive, and fair justice. But we do not know exactly what these tribunals, not bound to law, working in silence and free from our criticism, contribute to the development of commercial law. This by itself is a serious reason for postulating the establishment of international courts which would decide, upon the authority of treaties, litigation in private matters. We need a judiciary of recognized impartiality and objectivity, as familiar with the international business of traders, banks, carriers and insurers as only the privileged courts of a few great centers are. This postulate has been based on the cost and slowness of the national courts, and a certain mutual distrust. But much more important for the general progress of the law than any improvement of the enforcement of the individual rights is the activity of judicial bodies working in contact with international analytical and critical studies. Great learned achievement and high judicial accomplishment have to be joined for balancing experience and theory. They are the primary forces of any legal development, preparatory to treaties and uniform statutes.<sup>10</sup>

*Conflict of Laws.* Facing any ordinary case of private relations, connected with more than one state, we have to know which of the states involved is competent to govern this case by its law. This question of a choice where there is a conflict of laws,

8. E. Cohn, *Commercial Arbitration and the Rules of Law: A Comparative Study* (1941) 4 U. of Toronto L.J. 1; and the articles in *The Arbitration Journal*, published by the American Arbitration Association, in New York.

9. Ch. Carabier, *Les juridictions internationales de droit privé* (Neuchâtel, 1947).

10. This idea has been expounded in my paper, *International Tribunals for Private Matters* (1948) 3 Arb. J. (N. S.) 209. As reported in *Sanders, Arbitration at Two International Law Conferences* (1948) 3 Arb. J. (N.S.) 213, the International Bar Association at The Hague, 1948, accepted the excellent proposal of the Leyden professor Cleveringa that an International Maritime and Aeronautic Law Court should be established.

again, is answered by every state as it pleases. Three states may all claim to have their respective law applied to the same marriage, will, or sales contract; or no state may want it, which is much rarer. Of course, a large theoretical effort in the leading nations and the instinct and fairness of the judges have reduced the inconveniences to a moderate measure. But frictions and doubts occur throughout the entire field of international intercourse.<sup>11</sup>

A man and a girl arrive from Venezuela and get immediately married, although their home law prohibits their copulation. After a year in New York, the wife goes to Reno and after staying six weeks in an auto court is divorced. In Venezuela they are considered as living in a void marriage, in Nevada as divorced, in New York as married, at least if the man protests. A child born in the meantime may search for his family and inheritance rights. The wife may remarry and some lawyers will have a good time disentangling the legal mess ensuing. A couple has recently become famous in American constitutional law because they were declared married in Nevada and jailed for criminal bigamy in North Carolina. But we think nothing of a child having two legitimate fathers in different jurisdictions.

A manufacturer in Columbus sells by correspondence products to a purchaser in Guatemala. The buyer refuses acceptance and while an American court would adjudge the seller's action on the ground of the Uniform Sales Act, the Guatemalan court dismisses it, applying its own law or practice.

Jute bags are loaded in New Orleans to Rio de Janeiro on an Italian vessel. Half of the goods are stolen. Is the ship company liable? If not prepaid, at what time is freight payable? Louisiana, Italy, and Brazil, under divergent conflicts rules, applies each its own law.

So far, we assumed that the court knows what law it has to apply; often it does not. And the parties, before contracting, do not know what court will be the forum.

We are not accustomed in other branches of law to such a degree of uncertainty, contradictions, and awkwardness. Historical and theoretical particularism has necessarily been damaging to a field where the interdependence of the countries and the significance of private interests require harmony. If the national

11. The problem is summarized in the articles, Rabel, *An Interim Account on Comparative Conflicts Law* (1948) 46 Mich. L. Rev. 625, and Rabel, *Comparative Conflicts Law* (1949) 24 Ind. L. Rev. 353.

interest, or what is understood as such, and the national brand of legal tradition and habit, are allowed free extension beyond the domestic affairs, harmony is unobtainable. The community of states, then—if I may quote myself—is an orchestra where every instrument is tuned to a different key.

## COMPARATIVE LAW

The primordial steps leading us from isolation to community, in the legal field, are in comparative research. In Europe, this has been perceived in the difficult time after the First World War. We have created institutes for comparative law, at least one of them with full equipment of books and a strong staff. We have studied English law and for the first time American law, discovered suggestions for improving our domestic legislation and jurisprudence, advised business and government on foreign laws, begun to form conclusions about the validity of legal theories and prepared for legal philosophy.<sup>12</sup>

The United States, if it only chose to attend to an analogous task, could avail itself of incomparable resources, personnel and material. A small but far-seeing group of scholars in this country now postulates assumption by the United States of such full responsibility in the promotion of law as would match the political and economic leadership that has fallen to the United States, almost against its will. What Wigmore postulated in 1920, that American ideas should impress some of their features upon international legislation, while they have remained behind on the highway of international unity,<sup>13</sup> ought finally to be fulfilled by hard work.

Quite recently the UNESCO has taken sponsorship of an international organization for cultivating comparative law.<sup>14</sup>

The law schools of Louisiana have recognized the value of comparative studies for two decades and furnished the most important contributions in this country. After having seen Louisiana State and Tulane at work, I am hopeful that they will go further ahead and afford a particularly substantial cooperation in the great task leading the science of law, after thousands of years, to a new, a worldwide destination.

12. Rheinstein, *Comparative Law and Conflict of Laws in Germany* (1935) 2 U. of Chi. L. Rev. 232; my article, *On Institutes for Comparative Law* (1947) 47 Col. L. Rev. 227; David, *Traité élémentaire de droit civil comparé* (1950) 395 et seq.

13. Wigmore, *Problems of Law* (1920) 131.

14. Hazard, *UNESCO and the Law* (1949) 4 *The Record of the Association of the Bar of the City of New York* 291.

## Forum Juridicum

## THE PROCESS OF DECISION—A LITIGANT'S CASE FROM ARGUMENT TO FINAL DECISION IN THE LOUISIANA SUPREME COURT†

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Baton Rouge, Louisiana  
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I want to talk to you today about the consideration of cases after submission to the Supreme Court of Louisiana, or what goes on behind the scenes in the Supreme Court, and also about the work of the court. I chose this subject, believing that it would be of interest to all of you to hear about the inner workings of the Supreme Court, which I understand are not generally known to all the lawyers in the state.

You are familiar with the provisions of the Constitution, the laws, and the rules governing cases in the court. However, from the inquiries which are constantly being made, it would seem that there are very few lawyers who know just how the judges handle the cases which are placed in their hands for consideration.

Let us assume that the judges have handed down all of their opinions and are starting their work anew on a Monday morning, at an opening session of the court.

The hearing of cases in open court continues for two weeks, and the court then recesses for three weeks in order that the opinions may be written and the applications for rehearing considered. For the purpose of writing the opinions of the court, the cases are allotted in rotation—to the Chief Justice first and then to each succeeding associate justice in rank according to length of time he has served on the court. For example, if at the prior sitting the last case was allotted to the Chief Justice, the first case argued or submitted would fall to the Senior Associate Justice, and so on.

† An address delivered before the Baton Rouge Bar Association at Baton Rouge, on February 28, 1950.

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