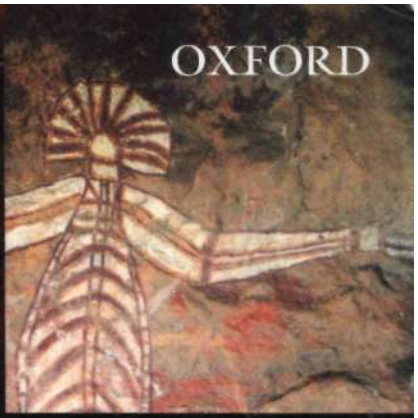


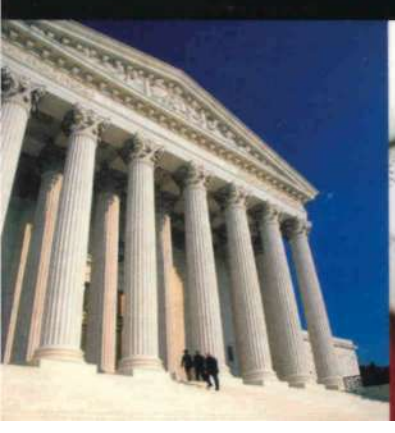


OXFORD

LEGAL TRADITIONS *of the* WORLD

SECOND EDITION

H. PATRICK GLENN



LEGAL TRADITIONS OF THE WORLD

SUSTAINABLE DIVERSITY IN LAW

Second Edition

H. Patrick Glenn

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A CIVIL LAW TRADITION: THE CENTRALITY OF THE PERSON

Chthonic and talmudic traditions offer constants, which have served to give them definition and identity throughout their existence. The constants—the sacred character of the cosmos, the Torah—reduce other circumstances of life to the status of the non-consequential, or to that of object of obligation. A civil law tradition had to grow out of all of this, and it was not an easy thing to bring about. There was ferocious resistance to the creation of something new, and above all to the *idea* of creating something new. And since the civil law tradition is not one which is rooted in a single, revelatory, text, there could be no immediate point of departure, no jump start which would mean that suddenly, a new tradition had arrived, displacing others and creating a space (space is important to the civilian tradition) of its own. European people have been chthonic people for most of the existence of what we know as Europe.' If they were to have a particular legal tradition they could not adhere to the talmudic one, nor remain chthonic. A tradition would have to be constructed. The process, and struggle, lasted more than two millennia, and isn't over yet.

We know the history of continental or civil law largely as a history of two periods, that of roman law and that of modern continental law, beginning with the 're-discovery' of roman law in the eleventh century AD. Things didn't, however, happen like this. There wasn't somehow a break, a 'dark' age (as the still unavoidable western language puts it).[2] From whenever roman law began, to

[1] For all 'non-Romans' of Europe being people of 'primary orality' in the 4th and 5th centuries, Lupoi, *Origins European Legal Order* (Cambridge: Cambridge Univ. Press, 2000) at 24, 25 (though oral culture 'moving towards writing').

[2] For the mildly less pejorative notion of the 'Middle' ages, see J. Roberts, *History of the World* (London/ New York: Penguin, 1995) at 472 ('wholly Eurocentric usage, meaning nothing in the history of other traditions. .. embodies the negative idea that no interest attaches to certain centuries except their position in time … first singled out and labelled by men in the fifteenth and sixteenth centuries'); and see, for the view that 'the traditional picture of early medieval law, as presented in the early 20th-century legal histories, and indeed still accepted by many modern experts on the legal changes of the 12th and 13th centuries, cannot be maintained', W. Davies and P. Fouracre, *The Settlement of Disputes in Early Medieval Europe* (Cambridge:

the present, there has been a major, and ongoing, discussion (maybe argument would here be more appropriate) as to what European law should be. The argument didn't stop when roman law became less visible; it was simply that other conceptions of law became more ascendant with the decline in Roman authority. Roman law was always there. It was not a ghost, which implies a death;[3] it had simply lost a lot of its re-creative ability and resonance. It had lost, for a while, its ability to convince people. So if we are to try and find a civil law tradition, we have to be aware of all the arguments, of everything in the bran-tub. There are leading characteristics today of a civil law tradition—codification is the most obvious of them—but these are present characteristics, and we cannot cast them backwards as having always constituted the leading version of the tradition. There have been too many stops and starts, too many reversals and recommencements, to conclude as to an entirely constant tradition. This tells us already something about change in continental law. Maybe change *is* the tradition; but then many wouldn't agree with that.

CONSTRUCTING A TRADITION

Just 3,000 years ago Europe was a very chthonic place. The population density was greater than it was, say, in the Americas, but ways of life were probably not much different. The action (to be western about it) wasn't in Europe, it was further south and east. The Egyptians had already built the pyramids; Babylon was becoming one of the seven wonders of the world. So there were models down there of how you could build some thing out of no thing (didn't they need the idea of zero to do all that?). The Greeks must have known about these efforts, hence the great argument today about whether Greek philosophy was all Greek or whether it too built on

Cambridge Univ. Press, 1986) at 228, defending supporting views, at 214 (that medieval dispute resolution not arbitrary but historically comprehensible), 222 ('irrational' means of proof only used in last resort and usually as ritualized version of community decisions), 228 ('procedures, however rough, were workable, and made some sense to the people that used them'), and 240 C[b]y the standards of most of the world, all European societies are violent' and medieval procedures 'only way for legal institutions to make an impact on societies perpetually riven by antagonism and oppression').

[3] Cf., on the 'ghost story' of roman law, Vinogradoff, *Roman Law in Medieval Europe* (1968) at 13. The controversy has been ferocious, however, between proponents of continuity (Roman law still known in Italy, found in the codes of Roman law created for northern peoples (e.g., the Lex Romana Burgundorium or the Lex Romana Visigothorum), copies of Digest 'lurking' in libraries, and existing, in Greek, in Byzantium) and discontinuity (only Pisa manuscript extant in Latin—now in Laurentian Library in Florence (just try and see it), no references to Digest in literature after 7th century, little available knowledge of Greek). For an overview ('neither side . . . behaved impeccably'), C. Radding, *The Origins of Medieval Jurisprudence* (New Haven/London: Yale Univ. Press, 1988) at 8 ff; and on the importance of discontinuity for the tradition of modernity, above, Ch. 1, in introductory text.

things already known.[4] Eventually some people in Europe, more particularly in Rome, began to think that all this fancy thinking had consequences for law (lawyers have always had to adjust their law to the societies they live in). So things began to happen in Rome which were identifiable as legal. But they didn't write a civil code; they did things very slowly (again, there is no clear line between the chthonic and the non-chthonic).

There was a lot of internal debate in Rome (from its founding in the eighth century BC) between those of high rank and those of lower rank. So eventually they tried to placate people by writing down on tablets (after a formal type of deliberative process and a law-finding expedition to Greece[3]) some very elementary principles of how to resolve disputes. These Twelve Tables (around 450 BC, or after the fall of the First Temple, the time of the unwritten lofah) are often seen as the beginning of roman law and the beginning of civil law (a first 'confiscation' of law by legislation), but they were really just a peace-making endeavour, in a given city at a given time.[6] A lot of important things had already happened (like pre-Socratic philosophy) and a lot more had to follow, if any distinct tradition was to emerge. It was just work, work, work, over centuries, and no prospect of overall consensus.

SOURCES AND INSTITUTIONS

There were no sources of law in the chthonic tradition. What would a source of law be? If there was to be a source, in the present, there would be a legitimate means of change or destabilization, a threat to the world which had to be re-born. So first you have to insinuate the idea of a source of law into the way people think about how their lives should be governed. This means a gradual process; you *could not* simply create sources of law, as such. They would be seen as illegitimate. So the tradition of roman law does not grow out of something called legislation, still less codification.

[4] M. Bernal, *Black Athena: The Afroasiatic Roots of Classical Civilization,* vol. I, *The Fabrication of Ancient Greece 1/85-1381* and vol. II, *The Archaeological and Documentary Evidence* (New Brunswick, NJ: Rutgers Univ. Press, 1987, 1991); H. Olela, 'The African Foundations of Greek Philosophy' in E. C. Eze, *African Philosophy: An Anthology* (Oxford: Blackwells, 1998) at 43 (Crete populated by people of western Ethiopia, Plato and Aristotle studied in Egypt); cf. R. Lefkowitz and G. M. Rogers, *Black Athena Revisited* (Chapel Hill, NC: Univ. of North Carolina Press, 1996); and for the debate in law, which would see roman law as derived from prior, and more sophisticated, Egyptian or Middle Eastern models, R. Yaron, 'Semitic Elements in Early Rome' in A. Watson (ed.), *Daube Noster: Essays in Legal History for David Daube* (Edinburgh/London: Scottish Academic Press, 1974) at 343; J. Gaudemet, *Les naissances du droit* (Paris: Montchrestien, 1997); P. G. Monateri, 'Black Gaius: a Quest for the Multicultural Origins of the "Western Legal Tradition" (2000) 51 Hastings L. |. 479; above, Ch. 4, *Jewish example?,* for Talmudic influence; and for such early influence in literature, M. West, *The East Face of Helicon* (Oxford: Oxford Univ. Press, 1997).

[5] M. Voigt, *Die XII Tafeln [:] Geschichte und System* (Aalen: Scientia Verlag, 1966) at 10-16 (Greek translator even used in drafting Tables, some borrowing of individual texts). The Tables would have perished some 60 years after their creation, and Roman historical writing began only in the 2nd century B.C.ySo efforts to fill in the 'gap in tradition' have been onerous and controversial; M. T. Fogen, *Romisches Refkisgeschichten,* 2nd edn. (Gottingen: Vandenhoeck & Ruprecht, 2003) at 63-74 ('A virtual text').

[6] For 'confiscation', M. Humbert, 'Les XII Tables, une codification?' (1998) 27 Droits 87 at 109.

There was occasional legislation, as there was in other communities which retained their chthonic character, but it was for exceptional questions, of general importance. Today we would call it public law, but it was a very limited form of public law, one with little or no impact on the lives of individual people. The law of the people had to grow rather out of institutions in which people somehow participated themselves, conferring legitimacy by the participatory character of the process. This is what the chthonic tradition did, though in the weakest form of institutional framework.

I.There have been two major instances in the world of creating institutions to facilitate the growth of legal tradition through widespread public participation. One instance was that of roman law; the other was that of the common law. They both did it differently, but they both looked to public participation in an institutional framework to develop law. You couldn't just do it; all you could do was provide a possible point of departure, and watch for a few centuries.

Even then, the Romans didn't just create a system of courts, and invite people to go to them. Their initiatives were much more limited, and cautious. They didn't create a (potentially disruptive) group of professional judges; they simply let one of their nobles or patricians (the iudex) decide an individual case, in a kind of benevolently amateur way. By the late empire this led to many (justified) charges of corruption; and only then did appeals emerge.[7] And since these were patricians, not just anyone could get access to them, as judges. Access had to be controlled by an official, the praetor[8] (initially another patrician), who on assuming office each year could set out, in an edict, the kind of cases which could properly be heard And for most of roman legal history when someone complained legitimately to the praetor, the praetor would formulate the case the iudex had to decide. This was known as formulary procedure, and if you are a common law lawyer and it sounds something like the writ system, you are right (more later). Only at the end of the period of Roman authority, in the fifth century AD (when nobody was really minding the store) were the courts opened up; what was previously an extraordinary procedure of directly seizing the iudex became the rule. Just getting in front of a judge, directly and with no official screening, took a thousand years.

So there was no (or little) legislation and the judges were rank amateurs. Even if the question to be decided got set up for them (by the praetor), how could they be expected to decide it? The help had to come from somewhere, and it had to be loyal and reliableASo a monopoly was created in interpreting the law (determining true meaning) in the hands of the College of Pontiffs, the priests. Alan Watson has recently said that '[O]ne cannot exaggerate the importance for subsequent

[7] J. Harries, *Law and Empire in Late Antiquity* (Cambridge: Cambridge Univ. Press, 1999) at no-113 ('Appellatio'), 153 ff. ('loathsome greed' of iudices, efforts of control, including personal liability).

[8] The word appears to be derived from prae, before, as a prior control, and some have seen the office as an attempt to maintain patrician control of the law, in spite of the Twelve Tables; T. C. Brennan, *The Praetorship in the Roman Republic* (Oxford: Oxford Univ. Press, 2000) at 62. On roman procedures, see lolowicz, *Historical Introduction to Study Roman Law* (1972), chs. 13 and 23; Buckland, *Text-Book Roman Law* (1963), chs. 13-15; Kaser, *Roman Private Law*, (1968), Pt Seven.

legal development in the whole of the Western world' of this decision.[9] From the developing expertise of the pontiffs and their successors, the jurisconsults (they were only consultants and couldn't decide anything), comes the entire idea of law as learning, in written form and according to rigorous requirements of reasoning. The writing started on papyrus rolls, during the time of the empire; the rolls then became leaves, eventually bound into volume (codex) form.[10]

SUBSTANTIVE, SECULAR LAW

(Roman law thus found its origins in advice given (or 'responsa', again), by jurisconsults, with respect to particular cases or disputes. The law which emerged looks very much like life, as did the law of the Talmud. There is a law of persons, or the family, which reflects Roman family life, with the paterfamilias, the wife and children, and the slaves. Marriage is constituted by present intent to live as man and wife, though became the object of various forms of celebration. It was rigorously monogamous; concubinage existed but its offspring was not legitimate, following the maternal line and not entering the family of the father. Legitimation was possible, notably through subsequent marriage. Adoption too was possible and various forms of tutelage or guardianship existed. Since marriage was consensual so, in general, was divorce, on the part of husband or wife.[11]

As with the Talmud, things could be owned, and we now see multiplication of criteria for organizing the world of things. They could be patrimonial things or extra-patrimonial things; common things or sacred things; principal things or accessorial things; corporeal things or incorporeal things. The categorizations went on and on.[12] Ownership was essentially private, though there were things that looked like trusts, in which someone had to look after the property of another.[13]

[9] A. Watson, 'From Legal Transplants to Legal Formants' (1995) 43 Am. J. Comp. Law 469 at 472 (importance of concept of interpretation, exclusion of 'foreign' arguments (as from foreign religion), exclusion of economic considerations and well-being of parties).

[10] Honore, 'Justinian's Codification' (1974) at 859; 'codex' (tree trunk or block of wood in Latin) because original volumes were bound in wood, more convenient to open and, for Christians, easier to conceal than rolls.

[11] Jolowicz, *Historical Introduction to Study Roman Law* (1972) at 235 (with indications of efforts by Augustus to remedy high rates of divorce, largely unsuccessful); D. Johnston, *Roman Law in Context* (Cambridge: Cambridge Univ. Press, 1999) at 36 (no stigma attaching to divorce; western laws now moving towards Roman model). Women were subject to various forms of guardianship, but the reasons for this were characterized by Gaius as 'specious' and it has been said that 'women were not necessarily so gravely disadvantaged in comparison with men'. See J. Gardner, *Women in Roman Law and Society* (Bloomington: Indiana Univ. Press, 1986) at 5, 21, 263—4; A. Arjava, *Women and Law in Late Antiquity* (Oxford: Oxford Univ. Press, 1996) at 113 (little de facto power of guardians) and 70,71,129 (on wealth of women, wives, male fear of 'rich wife'); Johnston, above, at 40 (guardianship 'pure formality', roman women 'unusually financially independent'); U. Wesel, *Geschichte des Rechts* (Munich: C. H. Beck, 1997) 204 (situation of women 'better than in Greek law').

[12] See Buckland, *Text-Book Roman Law* (1963) ch. 5; Kaser, *Rotnan Private Law* (1968) Pt Three, §18.

[13] Giving rise to the classic thesis, notably of Bacon and Blackstone, that the trust had roman origins. See D. Johnston, *The Roman Law of Trusts* (Oxford: Oxford Univ. Press, 1988). For other explanations, see below, Ch. 7, *The practice of comparison.*

Many forms of ius existed short of ownership, notably the hypothec, the civilian equivalent of the mortgage.[14] Deposit existed, and has given its content to the common law of bailment.[15] Contracts, again, were contracts (in the plural) and there was no general, consensual concept.[16] So there are real contracts (requiring transfer of the thing); verbal contracts (solemn words); literal contracts (in writing); and, in certain instances, consensual contracts (sale, lease, partnership, mandate (agency)).Delictual conduct is sanctioned, though there is no general principle of liability, whether of fault or negligence or some stricter form. Liability exists when the conditions of liability are met, according to the objective descriptions of how damage is caused (burning, breaking or rendering property, disabling a limb, etc).[17] Liability can only be described as objective. There is also a law of quasi-contract, recognized as such, and this more than two millennia ago.

So roman law became an object of admiration, because the jurisconsults were able, so convincingly, to state conditions for governance of complex personal relationships. There were highs and lows in roman legal history; the period of the classical jurists, those whose opinions have lasted longest, ran from the first century BC to the middle of the third century AD. Gaius wrote his famous Institutes, or hornbook, near the end of this time. From then on things ran down; by the middle of the fifth century AD there was such a mass of opinion that a law of citations was passed (to *create* order): Papinian, Paul, Gaius, Ulpian and Modestinus were to be treated as authoritative; in case of conflict the majority would prevail; Papinian would prevail in the event of a tie.[18] Later in the century Rome had fallen; Justininan, presiding in the eastern remains a half-century later, ordered a compilation of laws. It was pulled together in three or four years, finishing in 533 AD, paralleling in time the Babylonian Talmud.[19] This main compilation of Justinian was called the Digest or the Pandects (from Greek, meaning all is included), yet it left out a lot. If it consisted only of opinions of jurists, gathered together with no systematic design, it also represented a choice of opinions. There was inclusion, and also much exclusion.[20] When it was finished, it was very finished. [Justinian

[14] While the mortgage is traditionally constituted by transfer of ownership of the property to the creditor, with a guaranteed right of redemption on payment, the hypothec is a pure security device and does not require transfer of ownership in its entirety.

[15] Largely through the decision of Holt C. J. in *Coggsv. Bernard (Barnard)* (1703) 2Ld. Raym. 909.

[16] W. Buckland and A. McNair, *Roman Law and Common Law: a Comparison in Outline,* 2nd edn. by F. H. Lawson (Cambridge: Cambridge Univ. Press, 1965) at 265.

[17] See Kaser, *Roman Private Law* (1968) at 214,215.

[18] Prof. Honore describes this, however, as a reflection of Latin revival in the 4th century, along with establishment of a new university in Constantinople, where law had its place. Honore, 'Justinian's Codification' (1974) at 862. See generally, on the jurists, Dawson, *Oracles of Law* (1968), ch. 2 ('The Heritage from Roman Law'), §§ 3 and 4; Jolowicz, *Historical Introduction to Study Roman Law* (1972) at 374-94,451-3.

[19] The authoritative study is Bluhme, 'Die Ordnung der Fragmenten in der Pandektentiteln' (1820) 4 ZRG 257.

[20] 1,528 books of classical authors were reduced to approximately i/20th of their volume. Honore, 'Justinian's Codification' (1974) at 877,878.

prohibited all further comment on it;[21] it was a very different book from the Talmud.l

ROMAN LAW AND LAW IN EUROPE

The Romans took their law with them, all over Europe, as far north as what we now know as Germany and as far west as the British Isles. So a lot of people knew about roman law in Europe, but it was the law of the conqueror and not always loved as such. (When the Romans were eventually driven out they essentially took their law with them, and the old chthonic law, which everyone still remembered, became once again the law of the lands. So there is here a re-assertion of a different tradition in law, taken with full knowledge of the alternatives. The re-assertion was not a fleeting thing; it essentially drove roman law off the European territorial map for centuries, except for some rudimentary versions of it in Italy and the south of France. (Even when roman law was 're-discovered' in the eleventh century, the opposition went on for more centuries and has not disappeared today.

We already know a lot about the chthonic law that prevailed over roman law at this time. It was mostly unwritten; it didn't say much about contracts or obligations; its family and succession law kept large families together, since many members were necessary for many tasks; its property law looked mostly to communal use rather than any formal or individual concept of ownership.[22] The legal notion was seisin (saisine, gewehr) and this was often joint or collective in nature ('le foin a l'un, le regain a l'autre, ou les arbres a Tun, l'herbe a l'autre').[25]The Allmend of contemporary Swiss law was a kind of general, European model.[24]

[21] See S. P. Scott, *The Civil Law*, vol. II (Cincinatti: The Central Trust Co., 1932), Second Preface to the Digest or Pandects, para. 21, at 196; *The Digest of Justinian*, trans. A. Watson, vol. I (Philadelphia: Univ. of Pennsylvania Press, 1985), xlix. Justinian also solemnly prohibited making jokes about the law professors who would come to teach it, though sanctions were not set out. Scott, above, this note, First Preface to the Digest or Pandects, para. 9, at 188; *Digest of Justinian*, above, this note, liii, liv. There was also a short textbook for law students, *Justinian's Institutes*, trans. P. Birks and G. McLeod, with Latin text of P. Krueger (Ithaca, NY: Cornell Univ. Press, 1987); and E. Metzger, *A Companion to Justinian's* Institutes (London: Duckworth, 1998) (a textbook on the textbook).

[22] See above, Ch. 3, and for a new review on the age (in law, ethnicity and other matters), *Early Medieval Europe*, first vol.: Longman, 1992, containing articles such as P. Amory, 'The meaning and purpose of ethnic terminology in the Burgundian laws' (1993) 2 *Early Med. Eur.* 1. Under Roman influence, continental chthonic law also came to be written, from the 5th or 6th century; see *The Laws of the Salian Franks*, trans. K. F. Drew (Philadelphia: Univ. of Pennsylvania Press, 1991), and for similar developments in England, below, Ch. 7, n. 1.

[21] A.-M. Patault, *Introduction historique au droit des biens* (Paris: Presses universitaires de France, 1989) at 134; and see, more generally, for the commonality of European concepts of seisin, F. Jouon des Longrais, *La conception anglaise de la saisine du xiie au xive siecle* (Paris: Jouve, 1924), notably at 43. Teutonic forms of landholding, prevailing in England prior to the Norman conquest, included folcland, the land of the people; see K. Digby, *An Introduction to the History of the Law of Real Property with Original Authorities* (Oxford: Clarendon Press, 1875) at 3.

[24] See above, Ch. 3, *On ways of life*.

Feudalism bound the law, and its people, to the soil; it also allowed elites to develop and social inequality to become flagrant. Christianity had spread throughout Europe by now; Augustine in the sixth century had begun to teach the necessity of inner reflection and spirituality; Aquinas in the twelfth was to allow for a certain measure of human flowering and creation, linking Christianity to Greek philosophy, j /Roman law came crashing back in the tumultuous events of the eleventh to thirteenth centuries in Europe. In a very short space of time, the state and the church were separated, universities begun, legal professions created, legal proof radically reformed, roman law revitalized and Greek philosophy unearthed; the common law began its own, particular, uncommon history. Maimonides also wrote his reforming version of the Talmud. Why this all happened so fast had much to do with the Arabs, who were already occupying a large part of the Mediterranean basin, including Spain. They too had certain (influential) ideas about law.[25] Whatever the ultimate reasons, this first European renaissance marked a further challenge to the primacy of chthonic law and very interesting things then took place, a rare combination of different traditions.

^Recall that legal procedures of the chthonic tradition were essentially open ones; there were no barriers such as the praetor of roman law or (later) the chancellor (keeper of the writs) of the common law. Recall also that roman law had abandoned such barriers with the adoption of the so-called extraordinary procedure around the end of its reign (C450 AD). Both traditions therefore had notions ot what could be called substantive law; whether written or unwritten it addressed substantive obligations, and perhaps even rights. And since substantive law existed, there was general agreement that judges had to get the facts right, so the substantive law would be applied where it was meant to be applied. Procedure had to be investigative (which is not what the common lawyers call it).[26] There also had to be courts of appeal, since a substantively erroneous decision was illegal, according to criteria external to the decision itself. It *had* to be quashed.[27] So there was a certain underlying harmony in continental Europe in the eleventh century. If the time had come to engage in a major debate on the type of law to have, everyone agreed that the debate should be about the type of *substantive* law to have, given that procedures or courts or institutions should be open.[28] In common law language, there was

[25] For European law at this point experiencing a 'reception' of islamic law, today 'scarcely recognized let alone researched', H. Hattenhauer, *Europaische Rechtsgeschichte,* 2nd edn. (Heidelberg: C.F. Miiller, 1994) at 160; and for the islamic phenomenon in both civil and common law, Ch. 7. below, *Of judges and judging.*

[26] On continental civil procedure, using the German model, see B. Kaplan, A. von Mehren and R. Schaefer, 'German Civil Procedure' (1958); J. Langbein, 'German Advantage in Civil Procedure' (1985); and on the designation of different types of procedure, see below, this Chapter *Constructing national law.*

[27] The expression is that of A. Tunc, in 'La Cour judiciaire supreme: Enquete comparative; Synthese' Rev. int. dr. comp. 1978. 5 at 23 ('Une decision est conforme a la loi, et elle doit gtre maintenue, ou contraire a la loi, et elle doit etre cassee. EUe *doit* etre cassee: il serait choquant qu'elle subsiste').

[28] Lupoi, *Origins European Legal Order* (2000) at 197 on right to apply to a judge at any time and without delay as historical characteristic of European continental law.

never any real question of a closed writ system. In modern language, nobody could raise issues of alleged incommensurability between European chthonic and roman law. In the absence of conceptual or institutional barriers, and under immediate external challenge by a highly civilized Arab world, Europe had to get its legal act together. [Christianity no longer appeared as a major obstacle to this; since the fourth century it had been developing its own form of legality within the church (later known as canon law)[29] and by the twelfth century major legal works were being written by canonists, notably Gratian.[30] Canon law was to take its place beside roman law (as 'the two laws', the utrumque ius), exercising great influence in the slow overturning of the chthonic tradition in Europe.[31]

This did, however, take a long time, since if roman law could be looked at as a base of legal learning, much of it had a peculiarly Roman look, requiring recasting for the modern Europe. So the great, new universities, with law and theology as their primary disciplines, took on the tasks of adapting roman law to the new ways. Roman law eventually served as the base for the construction of European, continental law. This process took centuries, and there is much intellectual ambiguity in the process or centuries, those who wrote the glosses on roman law seemed more talmudic than civilian. They were more interested in questions (quaestiones) than answers; more interested in accumulating opinions than choosing among them; more interested in debate than action. They may have seen themselves as reviving a more ancient tradition, that of rhetoric.[32] Their intellectual leader, in Italy, was Bartolus, and for centuries it could be said 'siamo tutti Bartolisti'

[29] The word 'canon' is from the greek 'kanon', meaning measuring rod or rule.

[30] Whose *Concordance of Discordant Canons*, written around the 1140's, has been described as 'the first comprehensive and systematic legal treatise in the history of the West'; Berman, *Law and Revolution* (1983) at 143. For computer-assisted detective work on its origins, which were closely related to growing awareness of roman law, see A. Winroth, *The Making of Gratian's Decretum* (Cambridge: Cambridge Univ. Press, 2000), noting at 1 that Gratian 'only lawyer authoritatively known to be in Paradise'. Canon law has now become the internal law of the roman catholic church, paralleled by the 'ecclesiastical' law of the Church of England and the varying forms of internal ordering of other churches. On the processes of successive codifications of canon law (1500,1917,1983) and the formal structure of the catholic church (thus replicating much secular, western law), see J. Gaudemet, *Le droit canonique* (Paris: Cerf/fides, 1989); P. Valdrini (ed.), *Droit canonique* (Paris: Dalloz, 1989); J. Hite and D. Ward, *Readings, Cases, Materials in Canon Law* (CoUegeville, Minn.: The Liturgical Press, 1990), Pt IB (citing notably J. Taylor, 'Canon Law in the Age of the Fathers' at 43, 'a law, and a true law at that, comparable to the legal system of any nation', and 48, on the development of 'Christian Halakhah' as christian teaching moved away from the talmudic); R. Helmholz, *The Spirit of Canon Law* (Athens, Ga.: Univ. of Georgia Press, 1996); Ius ecclesiae: Revista internazionale di diritto canonico.

[31] Wieacker, *Private Law in Europe* (1995), ch. 4 ('Canon Law and its Influence on Secular Law').

[32] For the rhetorical tradition, and for parallels with the mos italicus, T. Viehweg, *Topics and the Law*, 5th edn., trans. W. Cole Durham Ir. (Frankfurt: Peter Lang, 1993) notably at 53, 54; for parallel with the talmudic page, glosses developing around the central text, as the Talmud on the Mishnah, van Caenegem, *Historical Introduction to Private Law* (1992) at 51; and for the talmudic page, above, Ch. 4, *The style of the text.*

[33] See W. Rattigan, 'Bartolus' in J. MacDonell and E. Manson, *Great jurists of the World* (London: John Murray, 1913) at 45, with refs.

A new substantive law was being created, however, in general language which could be applied anywhere inEurope. It became known as a common law or ius commune, (there have been at least two of them in Europe, both particular in themselves, this one based on 'the two laws'); it slowly began to exercise influence, in a persuasive manner, in the different parts of Europe.[34] The Christian Church played a major, unifying role in the process.[35] This process of reception, like that of the concept of the state later in the world, varied according to the locale. It was most influential in germanic countries, understanding themselves as descendants of the first Roman empire and the second (Holy) Roman empire (that of Charlemagne). It met resistance from the kings of France, who didn't quite see themselves in the same new empire as the German princes. It was resisted everywhere in the name of the old law, the chthonic law, itself often seen as inspired by God. 'Juristen, bose Christen' went the germanic, religious, and customary denigration of the new, rationalizing, roman lawyers.[36] In seeking to take the church back to its roots, a revolving, Luther also attacked the lawyers. 'The real reason you want to be lawyers', he said, 'is money. You want to be rich.'[37] This theme too is still with us.

CONSTRUCTING NATIONAL LAW

The tradition of rationality in law, however, was on a roll. There was so much good thinking going on, such a 'chaos of clear ideas', that more had to be begotten. Those exercising political power were not insensitive to certain features of the new thought. The royal ordonnances of Louis XIV in the seventeenth century were the first indications of a centrally directed, national law on the continent. The notion of teaching French law, as French law, had emerged already in the sixteenth century,[38] and in the same century legislation was used to create French as a national language in France, even though it was then spoken by only a minority of the population. France's codification of private law. under Napoleon in 1804, was the world's first

[34] On the slow and massive growth of the literature of a continental common law, see Coing (ed.), *Handbuch der Quellen* (1973-7).

[35] Bellomo, *Common Legal Past* (1995), notably at 101 (concept of'a unified and Christian empire').

[36] See generally Strauss, *Law, Resistance and State* (1986); J. Whitman, 'Long Live the Hatred of Roman Law!' Rechtsgeschichte 2003.40 (on contemporary need to recall criticism of narrowly defined, materialist roman law as inadequately reflecting roman ritual, loyalties, morality, enabling response to non-western legal traditions); and more generally on dissent in Europe, R. Moore, *The Origins of European Dissent* (Oxford: Basil Blackwell, 1985); J. Scott, *Domination and the Arts of Resistance* (New Haven, Conn.: Yale Univ. Press, 1990) (resistance and domination as inseparable companions, citing Ethiopian proverb, at v, that '[w]hen the great lord passes the wise peasant bows deeply and silently farts'); E. P. Thompson, *Customs in Common* (New York: The New Press, 1993) at 102 (agrarian custom never 'fact', but lived environment of practices, inherited expectations, rules).

[37] Strauss, *Law, Resistance and State* (1986) at 183.

[38] T. Carbonneau, 'The French Legal Studies Curriculum: Its History and Relevance as a Model for Reform' (1979-80) 25 McGill L. J. 445 at 448-52 ('Louis XIV's reform of legal education').

national, systemic and rational codification of law.[39] It was seen as bringing together the state of France as it came into force, by virtue of its own article 1, on successive days in a series ofconcentric circles radiating out from Paris, each a day's ride further than the last.lThe Civil Code of Germany, of 1900, advanced systemic legal thought still further. Then all of Europe, including eastern Europe and Russia, had to have their codes. It was an idea whose time had come, the culmination of a long struggle, a long tradition.

Today chthonic law hard to find in Europe, though the tradition is maintained in some measure by the Saami in northern Scandinavia and Russia.[40] When Sayigny became famous in Germanyfor defending an 'historical school' of jurisprudence, he meant, not the old chthonic (volk) law, but the old roman law—the old, roman, common law of Europe as opposed to new national codifications.[41] Moreover, the procedures and institutions of continental Europe, and latin America, all reflect the existence of written law. JSince it exists it must be enforced, and judges have to actively establish the facts which justify its application. Common lawyers call this, pejoratively, an 'inquisitorial' type of procedure.[42] It really isn't called anything in the civil law world; it's just the type of procedure you have to have, given everything else. The judge is presumed to know the law (jura novit curia) and has to apply it,

[39] On the French codification, and codes in general, see J. Vanderlinden, *Le concept de code en Europe occidental du Xllle siecle au XIXe siecle* (Brussels: Institut de sociologie, 1967) (concept of code that of an ensemble, containing all or most binding law, facilitating legal understanding); C. Szladits, 'Civil Law System' (1974) 15 at 67 ff.; Herman and Hoskins, 'Perspectives on Code Structure' (1980); R. Batiza, 'Origins of Modern Codification of the Civil Law: The French Experience and its Implications for Louisiana Law' (1982) 56 Tulane L. Rev. 477; C. Varga, *Codification as a Socio-Historical Phenomenon* (Budapest: Akademiai Kiado, 1991) (codes in service of'bourgeois transformation', now no longer sharp opposition between code-law and judge-made law); Wieacker, *Private Law in Europe* (1995) at 257 ff. (the 'Natural Law Codes'); R. Zimmermann, 'Codification: history and present significance of an idea' (1995) 3 E.R.P.L. 95 (overview of codification experience as 'specific historical phenomenon'); H. P. Glenn, 'The Grounding of Codification' (1998) 31 Univ. Calif. Davis L. Rev. 765 (codes now responding to local circumstances, no longer 'natural law codes', examples from Quebec, Russia, Vietnam).

[40] T. G. Svensson (ed.), *On Customary Law and the Saami Riglits Process in Norway* (Tromso: Centre for Saami Studies, 1999).

[41] Which he defended as contemporary, modern, roman law, in his 8-vol. treatise, *System des heutigen romischen Rechts*, published 1840-49. Savigny was, however, a pandectist, and himself did much to prepare the ground for codification, in spite of his opposition to it. Traditions pick and choose where they will, and even over the opposition of those they choose. More recently, on the roman tradition, see Zimmerman, *Law of Obligations* (1990); Zimmermann, *Roman Law, Contemporary Law* (2001), notably at 100 for German Civil Code 'anchored in the ius commune', itself a 'transitional stage within an ongoing tradition'; and for roman law's continuing influence in contemporary codifications, H. Ankum, 'Principles of Roman Law Absorbed in the New Dutch Civil Code' in A. Rabello (ed.), *Essays on European Law and Israel* (Jerusalem: The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, 5757-1996) at 33.

[42] And civilians, correspondingly, tend to see 'adversarial' procedure of the common law as 'accusatorial'. The neutral, non-pejorative expressions would be 'investigative' and 'adversarial'. On changes in the procedure of the common law world, enhancing the role of the judge and bringing it closer to the civilian model, see below, Ch. 7, *Common law and nation-states.*

where it should be applied.[43] The judges also have to be president judges; written law will not wait for judges riding (or even flying) on circuit. The courts, which could reflect chthonic law or, if you will, custom, are not formally recognized as sources of law, though this appears to be changing, once again. So chthonic law is now thought of, in Europe, largely as existing elsewhere in the world, and debate with it is in terms of debate with another tradition, one which has essentially lost its grip in Europe, but which now re-enters from without. The opposition to the rational tradition in law is today found in opposition to its further expansion, to the European level. This raises very large questions of legal identity, and the relation of still differing traditions in Europe; are there to be others in law in Europe, or only others in law outside of Europe?[44]

THE RATIONALITY OF THE CODES

So we now have in place the visible elements of what we know as a civil law tradition—codes of law, large resident judiciaries, procedure which is controlled by the judge (let's call it investigative), denial of judicial law-making, historical prestige of law professors (pace Jesus, on the 'teachers of the law'.)[45] Some of this is relatively old, say a thousand years (resident judges, investigative procedure, law professors); some of it is quite recent (codes, denial of judicial law-making).[46] There has therefore been a lot of movement even in the fundamentals of the tradition. The movement is even larger if we consider the whole sweep of the tradition, from the Twelve Tables to the present. What can we say about underlying features of the tradition, given all the diversity it presents?

LAW'S EXPANSION

Most of the history of civil law tradition is inextricably linked with that of chthonic legal tradition. The history, however, is one of expansion of the civil law, with the notable exception of the five hundred years or so following the fall of Rome, when chthonic law re-asserted itself. The role of civil law expanded first in Rome. From a time of very rigid and formalistic procedures in the early empire, with essentially

[13] See J. A. Jolowicz, 'Da mihi factum dabo tibi jus: A problem of demarcation in English and French law' in *Multum Non Multa: Festschrift fiir Kurt Lipstein* (Heidelberg/Karlsruhe: C. F. Miiller, 1980) at 79.

[44] See below, *European identities.*

[45] Above, Ch. 4, *Talmud and corruption.*

[46] For the use of case law throughout French legal history, until the revolution, Dawson, *Oracles of Law* (1968) ch. 4 ('The French Deviation'), notably at 337 ('a tabulation would surely show that beween 1600 and 1750 France had far outstripped England in the use of case law'); and for French administrative law as 'judge-made', Bell, *French Legal Cultures* (2001), ch. 5, and 256.

only chthonic law to be applied, the civil law grew and grew, both substantively and procedurally. It became substantively adequate to deal with an entire range of societal problems, and eventually, after a thousand years, the courts were simply thrown open to everyone. A formulary system of procedure had become too restrictive for an expansive substantive law.

From the time of its rediscovery, roman law continued to expand, though once again it had to prevail over persistent adherents to chthonic ways. It did so from its established positions in universities and in central political authority. Part of its success came from co-opting chthonic law. The so-called customs of the regions (notably the Custom of Paris) were written down; their content could then be found in writing; if the writing was changed, the content was changed.[47] When the writings came to be called ordonnances or codes, the creative power of the writer, or legislature, became more evident. The law could expand to the extent of the creative power. The most striking example is article 1382 of the French civil code, which simply says that anyone causing damage to another by their fault must compensate for the damage. Gone are the particular wrongs of roman law, gone the notions of objective liability born out of particular cases of damage. In their place is a principle of stoic philosophy, of enormous explanatory power and capable of reaching to all features of social life. In Germany the law of delict under the 1900 civil code was more particularized, notably in refusing liability for so-called moral or non-patrimonial damage. Savigny rob ably had something to do with this, arguing that law should not be extended to human sentiment. Yet case law has subsequently recognized a right to privacy, and deliktsrecht has as much potential reach in Germany now as in France.[48]

The growth of the formal law ofthe state necessarily implies a decline in other forms of social cohesion, or glue. The chthonic tradition is largely eliminated; religion and religious morality have tneir place, but not in public life (so separation of church and state becomes formally recognized in some, though not all, jurisdictions); the small, local ways of life—of community, work and play—become subject to legal control and inevitably wither, though contemporary sociology of law has done much to bring them back to legal life. In the absence of institutional barriers (formulary procedure), law can go essentially where it wants to go, so the texts multiply. There are not only civil codes; there are penal codes, commercial codes, urban codes, codes of administration, of forestry, of taxation, of *sport*, and they all have their implementing regulation, spiralling deductively down and down and down.. The state, once conceptualized and given a name in the

[47] On the process, see H. P. Glenn, 'The Capture, Reconstruction and Marginalization of "Custom"' (1997) 45 Am. J. Comp. Law 613; and more generally, }. Gilissen, *La Coutume* (Turnhout, Belgium: Brepols, 1982), with references; van Caenegem, *Historical Introduction to Private law* (1992) at 35-45, 68; and on early European views of legislation as simply the statement of that which already bound, susceptible to recall by change in 'custom', J. Kelly, *A Short History of Western Legal Theory* (Oxford: Clarendon Press, 1992) at 139, 185,186.

[48] Since a 1954 decision ofthe Federal Supreme Court (Bundesgerichtshof) reported at BGHZ13,334.

seventeenth century, was seen as capable of doing *'anything.* The law becomes specialized;[50] in its reach it becomes nearly talmudic, though there are major differences in its expressicon.

LAW S EXPRESSION

As secular, civil law expands, its language changes. This has something to do with humanism, and humanist (or explicit) rationality. The Talmud governs nearly everything, yet never abandons its technical models drawn from everyday life, its almost folksy intricacy. For reasons still to be guessed at, this style ultimately became unsatisfactory for a civil law tradition. It was not that the Romans had problems with it; their law was, to use a tricky word, casuistic,[51] and in the extreme. It was formulated at a very low level of abstraction, close to the level of daily events. This explains why the law of contracts was in plural form; there were many kinds of deals, and the law had to follow the deals, not vice versa. The same could be said of the law of delicts (plural again) and family relations. Chthonic ways are here hanging on, in Rome; the ways of life are making their imprint on the law, even if it is now being expressed by experts. We are in a middle ground again. In the questioning style of the Bartolists, now developing roman law once again, there remains some of this stylistic modesty. Ouestions are more important than answers (which may change); understanding is more important than coherence; social contact is more important than precision. Yet the Bartolist style, or tradition, did not maintain itself; it became unconvincing over time, and yielded, as has been noted,[52] to declaratory or imperative styles ('La propriete est.. .'; 'It is forbidden to

[49] M. van Creveld, *The Rise and Decline of the State* (Cambridge: Cambridge Univ. Press, 1999) at 183 (emphasis in original) and 126 for word 'state' coming into use only in 17th century. Cf., for a recent declaration of the failure of the idea of codes of exclusive application, and on the need to regenerate historical sources of legal tradition, E. Bucher, 'Rechtstiberlieferung und heutiges Recht' ZeuP 2000.394.

[50] For the allegedly regressive character of modern civil law, abandoning general norms in favour of regulation of particular classes, groups and interests, in specialized form, see B. Oppetit, 'Les tendances regressives dans revolution du droit contemporain' in *Melanges Holleaux* (Paris: Litee, 1990) 317; and for the same tendency more generally in western law, B. Rudden, 'Civil Law, Civil Society, and the Russian Constitution' (1994) 110 LQR 56 at 67 ('It is the case that in many countries the law is to some extent returning from contract to status where, for reasons of public policy, certain classes are singled out and protected from themselves as well as from others: for instance, residential tenants, borrowers who use their homes as security, workers and consumers).

[51] Casuistry (from the latin casu, or case) was originally the theological discipline of resolution of individual or particular cases, and was certainly inherent in talmudic learning, though there largely taken for granted. *It acquired a more distinct profile in the christian nest, often with a sinister application' (Oxford) English Dictionary),* as *being opposed to reasoning from 'first principles'. See A. /onsen and S. Toulmin, The Abuse of Casuistry* (Berkeley/Los Angeles/London: Univ. of California Press, 1988), and the discussion below, Ch. ro, *Bivalence and multivalence.* On the shift hi style of expression of law, from the conditional, story-telling ('If someone steals a sheep . ..') to the relative, categorical ('Whoever steals a sheep …'), as indicating a 'generalizing, systematizing thrust', see D. Daube, *Ancient Jewish Law: Three Inaugural Lectures* (Leiden: E. J. Brill, 198O, Lecture III ('The Form is the Message'), notably at 73.

[52] - See above, Ch. 4, *The style of the text.*

...'). In the thinking which in the west has become known as the philosophy of law, there is a philosophy which says that law is command, of a sovereign. Most people now think this is rather simple and inadequate as a philosophy of law, but it may not really have been a philosophy, just observation of what law was becoming, in expression. Joseph Caro's talmudic code, in the sixteenth century, also left out much law no longer applied, going, in this, even beyond Maimonides.[53]

In the world of the civil law, however, there are still many forms of expression of law. [The French civil code is relatively untechnical; its language is not far from everyday life, its structure not complex. It was drafted largely by practitioners, with a sense of the literary. In its combination of simplicity and beauty of language with conceptual reach, it has been widely emulated in the world. Some say that it had to realize a compromise between the more roman south of France and the more chthonic north of France. The German civil code was later; the pandectists, including Savigny, had had another century to refine their ideas. It is probably the most abstract of the civil codes, with a general, introductory part applicable to all else, which seeks to explain basic concepts such as capacity, consent or declarations of will, for later application. Nobody reads this for the fun of it. It has been called, in an uncomplimentary way, 'professors' law' (Professorenrecht) and viciously parodied within Germany. [54] too, however, has its attractions and virtues and has been much emulated, notably outside of the civil law world and in the United States.[55] There was resistance, however, in Scandinavia, the enlightenment idea losing some of its allure on entering 'the cooler climate of the North.'[56]

In abandoning casuistic expression, in favour of technical and abstract expression, law became difficult to learn. So the people who brought the change about, the university professors, were not free of self-interest. Yet the civil law cannot be explained in terms of a conspiracy of self-interest. There were more profound reasons for developing the codes, and their rationality of expression. They relate to the value of the human person, and the need for extricating the human person from much of the social fabric which had come to envelop the human person. There were reasons for overcoming the chthonic tradition, in Europe.

[55] On these talmudic codifications, see above, Ch. 4, *The written words proliferate.*

[54] See, in English translation, R. von (hering, 'In the Heaven of Legal Concepts' in M. Cohen and F. Cohen, *Readings in jurisprudence and Legal Philosophy* (New York: Prentice Hall, 1951) at 678-89 (heaven of juridical concepts difficult to enter, Savigny nearly refused entry; heaven filled with living juridical concepts and machines—hair-splitting machine, fiction machine, dialectic-hydraulic interpretation press, dialectic drill for getting to bottom of things, dizzying path of dialectical deduction).

[55] See S. Riesenfeld, 'The Influence of German Legal Theory on American Law: The Heritage of Savigny and His Disciples' (1987) 37 Am. J. Comp. Law 1, notably at 6 ('The thought pattern of the modern common law legal architects and that of the modern Pandectists merge in Llewelyn; that is all that can be said, but it says a lot').

[56] Zweigert and Kotz, *Introduction Comparative Law* (1998) at 295; and for earlier resistance of Scandinavian lands to Roman influence, D. Tamm, *Roman Law and European Legal History* (Copenhagen: DJ0F, 1997) at 218 (not recognized as subsidiary ius commune)

THE CENTRALITY OF THE PERSON AND THE GROWTH OF RIGHTS

If you were born into the fourteenth or fifteenth centuries in Europe the mathematical chances were very good that you would be a kind of slave. You probably wouldn't be called a slave (there were many other expressions),[57] but your life would be one of obligation, not to a cosmos you loved but to a lord you might not. In short, the chthonic tradition had become one in which the cosmos was preserved, but some people did most of the work and for the advantage of a few. There was even a great deal of advantage. In this situation of gross social inequality, some people felt aggrieved, and did not feel there was anything universal or necessary about the state of things. If it was the chthonic tradition, it had become corrupt, stratified and hierarchical. From within the tradition, living within it, people became convinced of this, and reached out to another tradition to improve their lot.

Enlightenment thinking portrayed traditional thought as constraining and necessarily immutable. Yet the inherent vulnerability of the chthonic tradition is best demonstrated by the success of enlightenment thinking itself. Traditions don't have any grip in and of themselves; they persuade or don't, depending on current efforts of persuasion. In Europe there was increasingly little to be said in favour of the ancien regime; even the judges (and there were large numbers of them) were corrupt. If they didn't buy their offices to make money from them, they sold sub-offices, to make money from them. In Bordeaux, when the revolution came, they guillotined about half the judges of the great court, or Parlement, of the region.[58] There was corruption in the single, great church.[59] The social fabric was one which people wanted to tear up. They wanted to tear themselves away from it, s'arracher.[60]

[57] As, in English, 'serf, from the Latin 'servus' (or slave), or 'villein', and in German 'Knecht' or being 'unfrei' or in 'estate bondage' ('Gutsuntertanigkeit'). For the reality of slavery in Europe, though reluctance to use the explicit languge, U. Wesel, *Geschichte des Rechts,* above, at 286,308. It persisted in Europe into the 19th century, ending elsewhere in Russia in 1861, the United States in 1865 and Brazil in 1888. J. M. Roberts, *A History of Europe* (New York/London: Allen Lane/Penguin, 1996) at 130,220,325.

[58] Dawson, *Oracles of Law* (1968) at 370, n. 22; and for the many ways in which judicial systems can become prey to the 'logic of maintenance' (above, Ch. 1, *Tradition and corruption),* see J. Sawyer, 'Judicial Corruption and Legal Reform in Early 17th-century France' (1988) 6 L. & Hist. Rev. 95. In 1573 the Duke of Alva wrote from Flanders that '[t]here is no case before a court, whether civil or criminal, which is not sold like meat in the butcher's shop'; F. Braudel, *The Mediterranean,* trans. S. Reynolds (New York: HarperCollins, 1992) at 494. There were therefore reasons for the savage lawyer-lithographs of Daumier in mid-i9th century ('Le defenseur', with his 'professionally moist eyes').

[59] For the variety of 'secondary functions' in the church (the logic of maintenance, again) and opportunites for careerism on the part of 'lawyers, pen-pushers and politicians', E. Cameron, *The European Reformation* (Oxford/New York: Clarendon Press/Oxford Univ. Press, 1991) at 21,30 (LufJier's view of'swarm of parasites' in Church, 'as the wolves he in wait for the sheep') and 36 (heretical 1539 view that 'better that priests should marry than go after other men's wives').

[60] On the human talent being that of tearing oneself out of patterns and instinctive behaviour (s'arracher), see L. Ferre, *Le nouvel ordre ecologique: Varbre, Vanimal et I'homme* (Paris: Grasset, 1992) at 49. It is another thing to say, however, that there is a human talent for tearing oneself out of tradition. It didn't happen in the enlightenment and never has, though humans have options as to the traditions they chose, and some are more flexible than others. On the ancestry of the tradition which came to prevail at the time of the enlightenment, see below, *Law as reason's instrument.*

This enormous project required a larger one in its place. The existing law was relational and obligational. People were stuck in their existing relations to one another, often hierarchical, and that's where the law said they had to stay. So not only did the law have to be changed, there had to be overpowering reasons to change it. These reasons were found, not only negatively in the charges of corruption, but positively, in human nature and the divine recognition of it given by the judaeo-christian tradition. Working this out is a very long story, reaching back to the idea of the Old Testament (as it is now known in the west) that individuals are created in the image of God[61] and to the philosophical idea of nominalism, that individual things, and hence individuals, may be all that the world is composed of. |Since human beings (unlike animals, or trees) are created in the image of God, and possess powers of reason which are a reflection of God's, they may act in the world as delegates or lieutenants of God. They may exercise dominion over things, as does God over the world,[63] and they have the power (or potestas) to ensure they receive their due. The ius of roman law, which could be seen as a bilateral statement of legal relation,[64] now becomes formulated as unilateral entitlement, and law becomes the earthly sanction to ensure that such entitlements are respected. Law becomes subjective and in becoming subjective it generates rights. Le droit (or law) in French gives rise to le droit subjectif (or rights) In property law this meant the individual ownership of roman law had to become an exclusive form of ownership, so communal forms of ownership were prohibited and the trust was essentially rendered impossible in continental

[61] See above, Ch. 4, *The individual in the Talmud.*

[62] The history of the debate has been set out at length by M. Villey. See M. Villey, 'La genese du droit subjectif chez Guillaume d'Occam' (1964) 9 Arch. phil. dr. 97; and more generally Villey, *Pensee juridique moderne* (1975); Villey, *Droit et droits de l'homrne* (1983); cf. B. Tierney, 'Villey, Ockham and the Origin of Individual Rights' in J. Witte Jr. and F. Alexander, *The Weightier Matters of the Law: Essays on Law and Religion* (Atlanta, Ga.: Scholars Press, 1988) at 1; B. Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law* (Atlanta, Ga.: Scholars Press, 1997) (identifying notions of subjective right in 12th century commentaries on Gratian); and on the parallel development of notions of rights and revolution, see Glenn, 'Revolution and Rights' (1990) at 9.

[63] And so Locke in the English-speaking world was careful to point out, continuing the tradition, that human property is essentially given to humanity by God. He then got to the important part (or so the subsequent version of the tradition has had it), that humans were also commanded 'to subdue the earth', f. Locke, *Two Treatises of Government,* ed. M. Goldie (London: J. M. Dent, 1993) at 130; and for the prior historical development of the notion of the human person as delegate of God, M.-F. Renoux-Zagame, *Origines theologiques* (1987) notably at 109, 191-5; and a partial English version in M.-F. Renoux-Zagame, 'Scholastic Forms of Human Rights' in W. Schmale, *Human Rights and Cultural Diversity* (Goldbach, Germany: Keip Publishing, 1993) 121; W. Pannenberg, 'Christliche Wurzeln des Gedankens der Menschenwurde' in W. Kerber (ed.), *Menschenrechte und kulturelle Identitat* (Munich: Kindt, 1991) at 6i.

[64] See Villey, 'Genese du droit subjectif (1964), above, at 106; Tuck, *Natural Rights Theories* (1971) at 7-9 (notably with respect to the ius of having to receive water from a neighbour's land); cf., however, for a more subjective view of roman law, G. Pugliese,' "Res corporales", "res incorporales" e il problema de diritto soggettivo' in *Studi in onore di Vincenzo Arangio-Ruiz,* vol. Ill (Naples: Jovene, 1953) at 223.

law (though some limited forms persist in germanic jurisdictions).[65] Contract becomes the result of the meeting of autonomous wills;[66] if nominate or particular contracts persist they are all now consensual in origin. There can be no notion of consideration, or bargain, as the basis of contract. Delictial obligation becomes fault-based (as in France) or right-based (as in Germany); gone are the old, specific cases of liability. There is no ox-which-is-not-an-ox to be found.[67] The law of the family will eventually become more consensual, more private.[68] Rights of course are not absolute.)This is official teaching; law controls the conditions of their exercise and the manner of their exercise.[69] They may be seen as general standards, the content of which is always to be defined.[70] They are, however, a powerful instrument for bringing about basic conditions of human dignity. In the context of Europe, they unquestionably did a great deal. Their development is also very specific to the conditions of Europe and to the religion which prevailed, and largely continues to prevail, in Europe. This part of the tradition may not, however, always be remembered. There is nothing illogical about forgetting the reasons for reaching a conclusion, and then arguing from the conclusion. You are just choosing what to take out of the bran-tub.

Once rights exist, and everyone has them without regard to birth or race or wealth (which were the things which then most concerned people), then there is also a notion of social equality which is afoot. And since people have the power, in rights, to resist oppression, there is also a guarantee of human liberty. So all the great concepts of western civilization come together in a kind of package and at the base is the centrality of the person, now a rather abstract concept -even if seen

[5S] On property law developments, which reach back to papal bulls of the 12th century, see Renoux-Zagame, *Origines Theologiques* (1987), above; Renoux-Zagame, 'Scholastic Forms of Human Rights' (1993); and for the impact of the property debate on the notion of trusts, below, Ch. 7, *The practice of comparison.* The trust may be re-appearing, however, in continental law, given back by the common law in spite of difficulties in reconciling underlying property concepts. See A. Gambaro, 'Trust in Continental Europe' in A. Rabello (ed.), *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (Jerusalem: The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, Hebrew Univ. of Jerusalem, 1997) at 777, notably at 787 ('trust rush'); M. Cantin Cumyn, 'L'avant-projet de loi relatif a la fiducie, un point de vue civiliste d'outre-atlantique' Dalloz 1992. 1.117; C. Larroumet, 'La fiducie inspiree du *trust'* Dalloz t990.1.119; and on the historical differences, V. de Wulf, *The Trust and Corresponding Institutions in the Civil Law* (Brussels: Bruylant, 1965); C. Witz, *La fiducie en droit prive francais* (Paris: Economica, 1981).

[66] A. Rieg, *Le role de la volonte dans Vacte juridique en droit civil francais et allemand* (Paris: LGDJ, 1961).

[67] On the ox in talmudic obligational law, see above, Ch. 4, *The divine law applied* and *the style of the text.*

[68] See V. Frosini, *II diritto nella societa tecnologica* (Milan: Giuffre, 1981) at 126-31; and for convergence of national family laws in this direction, F. Rigaux, 'Le droit comparee comme science appliquee' Rev. dr. int. et dr. comp. 1978.65 at 65; J. B. D'Onorio, 'La protection constitutionneUe du manage et de la famille en Europe' Rev. trim. dr. civ. 1988.27; and for broader comparison, Glendon, *State, Law and Family* (1977).

[69] For inter-dependency of rights and obligations in medieval thought, J. Coleman, 'Medieval Discussion of Human Rights' in Schmale, *Human Rights and Cultural Diversity* (1993), above, 103, notably at 110; also tracing origins of rights theories from John of Paris in the 12th century and Ockham in the 14th, as predecessors to Locke and Hobbes in the 17th (at 115-18).

[70] M. Delmas-Marty, *Towards a Truly Common Law,* trans. N. Norberg (Cambridge: Cambridge Univ. Press, 2002) at 79,80 (rights as resting on notions 'weakly determined').

originally as a divine representative of the Jewish and christian God. And then, once the theoretical package is in place, you have to look around and see if it is being applied properly, or whether the tradition is neglecting someone or something. If it is, someone will point it out, either from within the tradition, or from without, or both. To make sure the theoretical package is doing what it should, however, you need means of implementation, and you have to be very rational about such a large undertaking.

LAW AS REASON'S INSTRUMENT

The consequences of the judaeo-christian tradition, for law, were enormous, only, in the christian version, was the human person the centre of the world, as God's delegate and because of the sharing in God's power of reason,[71] but this could itself be known because of human reason, with the aid of revelation, and human reason could be put to work to fulfil God's instructions. The religious rationalists, such as Descartes, Grotius, Pufendorf and Locke, developed from this the foundations for human law which were lacking in the chthonic traditionl The Bible also said 'Give to Caesar what is Caesar's, and to God what is God's',[72] so there was explicit authorization in the scriptures for the construction of human law which could exist as human law.[73] Its inspiration and authorization were religious, but its development was a matter of human reason (as defined somewhere). The change in the expression of law thus follows from the necessity of placing explicit human rationality above the interstitial rationality of the chthonic or talmudic traditions. And this place for explicit rationality follows from the necessity of ensuring that humanity would subdue the world and not be subdued by it. Boraw, after about a millennium and a half of discussion, comes to be recognized as having a human goal, a human instrumentality. There had to be rights, and there had to be codes to ensure their respect.

What does it mean to be rational in law? The lawyers of the enlightenment did not simply invent contemporary legal rationality. They went, or revolved, a long way back, to the Greek (or maybe Egyptian) tradition of rational enquiry and 'natural' law (found in the nature of the world).[74] What did this mean, and what are

[71] M.-F. Renoux-Zagame, 'Scholastic Forms of Human Rights' in Schmale, *Human Rights and Cultural Diversity* (1993), above, 121 at 134,135.

[72] Matt. 22: 21.

[73] See generally F. Braudel, *A History of Civilizations*, trans. R. Mayne (New York: Penguin, 1993) at 333,334: 'Western Christianity was and remains the main constituent element in European thought—including rationalist thought, which although it attacked Christianity was also derivative from it'; yet for the ongoing, perceived separation of christian and legal thought, M. McConnell, R. Cochran, A. Carmella (eds.), *Christian Perspectives on Legal Thought* (New Haven/London: Yale Univ. Press, 2001) (the operative word in the title here is 'on', as opposed to 'in').

[74] Wieacker, *Private Law in Europe* (1995) at 205 ff. (law of reason in Europe a 'revolution' but 'like all radical changes it was presaged in every detail by a coherent tradition' here extending to Hellenistic Greece).

its consequences today for legal traditions? It appears to mean essentially two things. The first is that human construction is possible; from no thing can be developed some thing.[75] So if religion authorized human creation, Greek thought said that it was also possible. Second, the means of creation is through logical thought, and logic is embodied in that which, since Aristotle, is known as the law of non-contradiction, or sometimes the law of the excluded middle. This is not really complicated, though sometimes it is made to appear so. Aristotle said that what you really can't do, what nobody will let you get away with in argument, is affirming at the same time two things which contradict themselves. Put the other way, between two contradictory things there is no middle (it's excluded). You heard this as a child—you can't have your cake and eat it too. And everbody now knows this. There is no middle ground, between contradictory things.[76] If you want to put it in a formula you can put it as '[A] or [not A]'. '[A] *and* [not A]' would be having your cake and eating it too. So once you know that two things are contradictory, once they have been defined and boundaried so that you know they are contradictory, that's it. You have irreconcilable difference, or separation, or possibly incommensurability, or quite possibly conflict (the reason we have a notion of conflicts of law is because laws defined as different are seen as conflicting). But what you do now have is precision, since you have a notion of consistency, and consistency is what allows you to build, as opposed to simply wandering around amongst the differences.

Deductive thought follows from this form of logic; given a point of departure, you can reach further conclusions which are derivable from it (or entailed by it, some might say), in a consistent manner. So by the time of the pandectists, this manner of thought had become highly developed, and the pandectists developed it still further in law.[77]) This is why the German civil code is the way it is. It is a very logical construction, according to certain principles of logic. The German civil code is very Greek, which may also be why it has been very influential in Greece. So

[7,] See, on this as a fundamental, though ancient, feature of contemporary life, E. Severino, *La terulenza fondamentale del nostra tempo* (Milan: Adelphi,1988). And on the continuing reception of Greek thought into European thought, through the Roman, itself seen as a means of renewal rather than an original contributor, R. Brague, *Europe: La voie rotnaine*, 2nd edn. (Paris: Criterion, 1993) at 36—40, 97-112 (notion of multiple re-naissances), 114,123-5,142 (content of Europe to be that of being a container, open to that outside itself); and on the Greek concept of expanding knowledge, K. Popper, 'Back to the Presocratics' in K. Popper, *Conjectures and Refutations*, 3rd edn. (London: Routledge & Kegan Paul, 1969) at 151. For the specific influence of Greek and notably stoic thought on Roman lawyers, Kelly, *Short History of Western Legal Theory* (1992), above, at 45-52.

[76] On the serious problem, however, of someone eating half their cake, see below, Ch. to, *Bivalence and multivalence.*

[77] On the logical structure of what would become pandectist thought, initiated by Christian Wolff in the early 18th century, see Herman and Hoskins 'Perspectives on Code Structure' (1980) at 1019, also giving examples, at 999, 1000 of deductive method employed (if right to private property axiomatic, servitude strictly construed against owner of dominant land); Wieacker, *Private [aw in Europe* (1995) at 218, 253-5, 296; and for laws of non-contradiction, excluded middle as fundamental properties of French codification, D. De Bechillon, 'L'imaginaire d'un Code' (1998) 27 Droits 173 at 182.

rationality in law is very logical, according to the logic of having to choose between contradictory things. Does this means it's universal? Well, it doesn't sound quite compatible with the These and these' of the talmudic tradition [78] and the chthonic tradition is able to tolerate a lot of different ways of life. So we seem to have come back to a notion of toleration again, and its relation to different ways of thinking about the world. Western logic does not appear to be the only way of thinking about it, in law or in anything else.

Once you are thinking logically, however, in the Greek (or Egyptian) way, you can build things, from pyramids to temples to large philosophic or legal constructions. Using law as the instrument of reason, you can also construct a modern state, which 'is essentially created out of formal, written law, though resting on a transnational legal tradition supporting its existence in multiple, national forms.[79] So in some places in the civilian tradition people speak about the 'State of law' rather than the rule of law, since law is inextricably linked with the modern state: it created the state; it depends on it for its enforcement; it guarantees, as best it can, its continuing efficacy and integrity. The formal construction of the state is very important for the ongoing development of legal institutions. As states develop, and develop into democratic institutions, functions of legislation and execution develop, and separate themselves from the more rudimentary form of government which is dispute settlement. So we now have the separation of the state from the church, and the separation of distinct powers within the state.[80] If the judiciary is well thought of, and protected, it may achieve independence in this process. There are problems, however, with the notion of judicial independence in the civilian tradition. Given

[78] See above, Ch. 4, *Of schools, traditions and movements* (These and these' contradictory statements of schools of Hillel and Shammai both representing Talmud). The position of the talmudic tradition was reached in part because of its refusal to accept definitive proofs (above, Ch. 4, *The style of reason);* on European acceptance of forms of proof, allowing further deduction, see Herman and Hoskins, 'Perspectives on Code Structure' (1980), at 998,999.

[79] H. P. Glenn, 'The National Heritage' in R. Munday and P. Legrand, *Comparative Legal Studies: Traditions **ami** Transitions* (Cambridge: Cambridge Univ. Press, 2003) at 76; H. F. Dyson, *The State Tradition in Western Europe: A Study of an Idea and Institution* (Oxford: Marton Robertson, 1980); A. Harding, *Medieval Law and the Foundations of the State* (Oxford: Oxford Univ. Press, 2002). It is this deep-rooted tradition which prevents, in short order and at least in western lands, the end of the state, though 'failed states' are now emerging elsewhere; see Glenn, above, this note, and Ch. 7, below, *Western law in the world.*

[80] The separation of powers is generally more thorough in civilian jurisdictions than in common law ones, and this has much to do with the place of the judiciary. The civilian teaching would have the executive fulfilling its functions in a separate and independent manner, and the judiciary could not reach beyond its own separate powers to impede those of the executive. There are still larger problems with judicial control of legislation. So generally the private law courts do not exercise administrative law functions; these are the domain of specialized courts of the executive (the French tradition) or of an entirely separate structure of purely administrative courts, separate both from private law courts and from the executive (the later, German tradition). Yet in some parts of the civil law world, the teaching has yet to be followed (it requires expenditure, for a new institution), so traditional courts continue to do much of the work of judicial control (Denmark, Mexico, others). Yet the institutional distinction between public and private law has now made its appearance in English law; see below, Ch. 7, *Formal limits and informal accommodation.* Thus the notion of the state is differently received, even in the tradition of its creation.

the ancien regime, nobody wants a 'gouvernement des juges', so the primacy of the codes, and legislation in general, is reinforced by ongoing scepticism towards, and even surveillance of (through control of the career structure) the civilian judiciary. It's also hard to even see the judiciary, behind the mountain of cases. If everyone has pre-defined rights (which do not in any way depend on judicial determination), then their violation may exist prior to judgment, and the judicial function is largely one of verification of claims of violation of pre-existing rights, and remedying the violations. Given a world of pre-existing rights, there is no judiciary in the world which can catch up with the claims, and the backlog of cases in the civil law world rises with even more regularity than it does in the common law world.[81] Rights brought people out of the ancien regime; the problem now is where to go with them, and finding a vehicle to do it with.

So we find a civilian tradition of explicit rationality in law. It's been developing for a very long time and its greatest moments may now be over (those of the great codifications). There are now a lot of problems close to the ground, which the great theory does not specifically address. There are evident points of vulnerability in the civil tradition, which are attracting criticism from within (those standing in line in the courts) and from without. Some speak, a little dramatically, of the end of the state.[82] Yet the civilian tradition has immense resources; its constructions are truly remarkable for their normative and explanatory force. It has rendered possible a remarkable flowering of human activity. Can it continue to change the world? Can it change itself to renew itself?

CHANGING THE WORLD AND CHANGING THE LAW

Chthonic law didn't really talk about change; it could happen, on the ground, but that was just the life of the world. Talmudic law explicitly contemplated it, as well as ongoing human creation, but wrapped it in the blanket of God's love, and his ultimate authority. The Roman lawyers had behind them Greek thinking, which looked at change as a process of transformation of things, which could or could not happen, depending on one's philosophy and the actual conditions of the world. So change is now coming closer to you and me; we can understand it, all of it, and

[81] For the growth of the case-load in France, see E. Tailhades, *La modernisation de la justice: rapport au premier ministre* (Paris: La documentation francaise, 1985), notably at 36 (deficit of cases before French courts of appeal increasing from 100,000 in 1971 to more than 300,000 in 1983); and more recently J.-M. Coulon, 'Reflexions et propositions sur la procedure civile: Rapport a M. le Garde des Sceaux' Gaz. Pal. 17-18 Jan. 1997, at 2, notably at 3 (volume of cases such that administration of justice in France predicted to be paralysed, at level of courts of appeal, by 2000).

[82] J.-M. Ghehenno, *La fin de la democratic* (Paris: Flammarion, 1995), ch. 1 ('La fin des nations').

have a part in it. In roman law there is a controlled notion of changing the law; there does not yet appear to be a notion of changing the world through law. Yet since law is now separating itself from the world, this is becoming a conceptual possibility.

THE SELF-DENIAL OF ROMAN LAW

How do you make law but not allow law to change the world, given that these are now becoming separate things? There doesn't seem to be much doubt that the Romans made their law, and knew they were making law.[83] They also made very good law, which lasted a long time. In method, structure and philosophy, however, the Roman lawyers turned away from changing the world; their making of law was only in the form of human intelligence applied to its formulation; essentially it remained a product of the world and its activities. So roman law was casuistic in expression; it was limited by formulary procedure for almost all of its history; there was no organized legal profession and legal fees were first unthought of, then prohibited, then limited[84]; a large place was given to interpretation and the art of the controversia; the structure of the praetor's edict was chaotic, as was that of the Digest of Justinian;[85] there was no articulated, or applied concept, of system.[86] In short there was no machinery[87] or tradition for effecting major and radical change in law, and therefore none for transforming the world. Yet the Romans left a notion of changing the law; the praetor could change the edict; the procedure of the legis actio changed to that of formulary procedure, which itself gave way to extra-ordinary procedure; the jurists re-worked the substantive law; there were legal fictions to disguise the changes going on.[88] That was all the change there was, however; law did not expand any further.

[83] Watson, *Law Making in Later Roman Republic* (1974); W. Gordon, 'Legal Tradition, with particular reference to Roman Law' in N. MacCormick and P. Birks, *The Legal Mind: Essays for Tony Honore* (Oxford: Clarendon Press, 1986) 279 at 282; M. Humbert, 'Droit et religion dans la Rome antique' in *Melanges Felix Wubbe* (Fribourg: Editions de l'Universite de Fribourg, 1993) 191 at 199 (law created by 'professionals') and 192 (profound division separating 'predroit' or chthonic law, prior to Twelve Tables, and subsequent formalist law, or ius humanum; traditional view also that religion and law kept separate in Rome, though this questioned).

[84] R. Pound, 'What is a Profession? The Rise of the Legal Profession in Antiquity' (1949) 19 Notre Dame Lawyer 203 at 224, 225; Zimmermann, *Law of Obligations* (1990) at 415 (lawyer's mandate gratuitous, hence not regarded as a profession). Nor did law schools emerge until the late Empire, notably that of Beirut; L. Maruoti, *La tradizione romanistica neldiritto europeo,vol.* I (Torino: G. Giappichelli Editore, 2001) at 57.

[85] Watson, *Spirit of Roman Law* (1995) 472.

[86] J. Gaudemet, 'Tentatives de systematisation du droit a Rome' (1986) 31 Arch. phil. dr. 11, notably at 15, 28 (by 1st century BC transition to works more 'constructed' than previously, due to discovery of Greek thinking, with refs; yet ultimately unsystematic throughout history); A. Cock Arango, 'El Derecho Romano se formo a base de realidades objetivas no por teorias 0 sistemas' in *Studi in onore di Vincenzo Arangio-Ruiz* (Naples: Jovene, 1953) at 31.

[87] Gordon, 'Legal Tradition' (1986), above, at 283.

[88] On the fictions of roman law, see J. Hadley, *Introduction to Roman Law* (New York: Appleton, 1907) at 94-6.

CHANGING THE IDEA OF CHANGE

The changes of the first western renaissance (of the eleventh to thirteenth centuries) arguably did not go beyond the Roman limits of legal change. They took place in a context of chthonic law and were major in that context, but they remained within the Roman cadre. Forms of proof could be changed; roman law itself could be used, in written form, to generate further writing; specialists in law could emerge (though with the idea of 'professing' law, for formal and systematic remuneration, we are already moving beyond the Romans); courts could be opened to all comers (though not yet in the British Isles, with its uncommon law). These changes exhausted everyone for centuries. Half a millennium later it was time to test the limits of change, through reason, using law as instrument.

To change something you first have to isolate or separate it from everything else, so you can work on it (and this includes the state, which needs precise boundaries) and you need a concept of historical time in which this can happen (change from then to now). The time part seems to have come both from the Greeks[89] and from Christianity; in the resurrection of Christ Christianity began its separation from the Jewish tradition,[90] and in life after death it created a point of future salvation, something towards which life and time could be directed. So now was different from the state of salvation, which came later, in a discernible future, and what we do now will affect that future state. In deferred gratification there is a notion of the future, and contingent time; St. Augustine was very critical of the notion of cycles. The remaining problem was with respect to the objects of change, which had to be separated out from the sacred matrix in which the chthonic and talmudic worlds had embedded them. This large task appears to have been effected by the discovery of facts, and law played a major part in this, according at least to a non-lawyer, who appears not very happy about it.Alisdair MacIntyre tells us that the notion of a fact

[89] See L. Schulz, 'Time and Law. How the Life-World Acceleration Affects Imputation in Criminal Law' in (1998) Rechtstheorie, Beiheft 18, 405 at 410 (at beginning of Attic philosophy, concept of repetition of time replaced by concept of linear, unlimited stream of time in which given possibilities to be realized); C. Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, Mass.: Harvard Univ. Press, 1989) at 463 (objectified view of world produced by disengaged reason involves a spatialization of time, seen as a series of discrete moments, between which certain causal chains can be traced). For the manner in which linear, temporal legal systems use time for allocation of rights (e.g., in registration of security interests), J.-L. Bergel, *Theorie generate du droit*, 2nd edn. (Paris: Dalloz, 1989) 122 ff. ('Le temps dans le droit'); and more generally P.-A. Cote and f. Fremont, *Le temps et le droit* (Cowansville, Quebec: Yvon Blais, 1996); G. Winkler, *Zeit und Recht* (Vienna/New York: Springer-Verlag, 1995) (emphasizing public law). On the compatibility of this western tradition of time with the views of contemporary science, however, see above, Ch. 1, The Changing Presence of the Past.

[90] On the movement of talmudic tradition towards historical, contingent, time, commencing with the notion of Creation yet hesitant over salvation, see above, Ch. 4, Talmud, the Divine Will and Change; and for European law expressing christian concept of time, B. Grossfeld, *Kernfragen der Rechtsvergleichung* (Tubingen: J.C.B. Mohr, 1996) at 246-47.

was invented in the seventeenth century, and is derived from the legal and Roman notion of the factum (as in non est), the formal document in law representing solemnized reality, that which the law would presume to be true (at least for the limited purposes of law).[91] Once you let loose the notion of verifiable reality, however, outside of law, you have facts, and they exist simply as observable phenomena, outside of any matrix in which they might arguably exist according to non-factual (non-observable or, to be fancy again, metaphysical) assertions.[92] The idea of facts is now challenged, however, not only from outside of western thought, but from within.[93]

We can talk about the role of lawyers in this. You can make a good argument

they did with law simply provided a model for what could be done with the rest of the world. They did turn law into fact, and dead fact at that, with the notion that roman law wasn't really normative for Europe but was only the law of the Romans, a particular people at a particular time who made their particular law. This legal development occurred in France, notably through the work of Cujas in the sixteenth century, and it is important that the French at this time were concerned with getting out from under the re-generated roman law (those German princes again).[94] So from precise political circumstances we see a major philosophical shift emerging (or at least one taken later to be a major philosophical shift; perhaps at the time Cujas just didn't like German princes).With Cujas, as they say, the mos italicus (the Bartolists) gave way to the mos gallicus (the Cujadists), and the entire idea of the past, even the legal past, having no normativity, is articulated.[95] So with the objectivization of law, the extracting of it from any natural,

[91] A. Maclntyre, *Whose Justice? Which Rationality?* (Notre Dame, Notre Dame Univ. Press, 1988) at 357; and for tracking of the idea of fact from law to history to science, in the Anglo-American tradition, B.Shapiro, *The Culture of Fact* (Ithaca/London: Cornell Univ. Press, 2000), notably at 11 ('matter of fact' an *issue* placed before jury, not established truth) and for the same idea behind the Roman action *in factum,* R. Dekkers, 'Le fait et le droit. Problemes qu'ils posent' in Centre national de recherches de logique, *Le fait et le droit* (Brussels: Bruylant, 1961) 7 at 8.

[92] On western science not simply as a neutral method of acquiring knowledge but as a distinctive metaphysics, constructing a view of the world *'as if we were not here'* (itals in orig.) yet not contradicting religion since growing out of it, see B. Appleyard, *Understanding the Present: Science and the Soul of Modern Man* (New York: Doubleday, 1993) at 191; and on traditional styles of scientific thinking, A. Crombie, *Styles of Scientific Thinking in the European Tradition* (London: Duckworth, 1994). For the importance of scholastic, abstract Latin in the development of western science, see W. Ong, *Orality and Literacy: The Technologizing of the Word* (London/New York: Methuen, 1982) at 113, ri4.

[93] H. Putnam, *The Collapse of the Fact/Value Dichotomy* (Cambridge, MA: Harvard Univ. Press, 2002), notably on nature of statement that someone is cruel, though admitting, at 31, differences between 'epistemic and ethical values'.

[94] See C. Phillipson, 'Cujas' in MacDonnell and Manson, *Great Jurists of World* (1913), above, 45 at 83, with refs.

[95] See van Caenegem, *Historical Introdution to Private Law* (1992) at 56 (roman law reduced to 'the state of an academic relic, a historical monument, a dead law for scholarly study only').

religious or even societally relevant background,[96] law can become an object of major change and creation. There are no restraints any more, nothing beyond human law which can limit its development, or limit its growth. It is simply the product of human creativity, a fact of human invention. So you can say that it must have been the scientists who turned the rest of the natural world into facts, the lawyers being only interested in law. The problem with this is Francis Bacon, generally thought to be the main impetus in the development of modern science, who was also, of course, a lawyer (sympathetic to the Crown and, in England, to the civilians).[97] He was also, apparently, a corrupt lawyer, someone who didn't really understand the idea of law as limit (all those gifts of silver that didn't affect his judgment), so it is possible to conclude that the modern world of science is really the work of a corrupt lawyer. Which is perhaps why they say that when the world comes to an end, there'll be a lawyer at the closing.

So what the French lawyers and the scientifically inclined meant to bring about was the separation of mind from matter. Matter was just matter, and so we, in the west, have all learned that it is mind over matter (though some are now teaching that mind too is only matter).[98] And law too is only matter, that thrown up by each particular society. The efforts of Bartolus and Baldus to overcome the 'separatorum separata ratio'[99] take a real beating, which is to go on for centuries, so that Carlos Fuentes can be complaining about it today.[100] Carlos Fuentes, it turns out, is a Bartolisti, one of the twenty-first century.[101] With the separation of mind and matter, you have not only the possibility of separate laws, but also the possibility of separate disciplines of philosophy of law and sociology of law, neither of which exist in the other legal traditions of the world, at least not as separate disciplines, based on the idea that you can be legal by just thinking, with no factual base, and that you can be legal by just looking at facts, with no normative base. We have here the ideas that law needn't have anything to do with life, and that life

[96] Thus the need to develop 'a mode of authority independent of social continuity'. J. Pocock, 'Time, Institutions and Action: An Essay on Traditions and their Understanding' in P. King and B. Parekh (eds.), *Politics and Experience: Essays Presented to Professor Michael Oakeshott* (Cambridge: Cambridge Univ. Press, 1968) 209 at 229; and see Roberts, *History of World* (Penguin, 1995), above, at 550 (emergence of 'the idea that a sovereign, legally unrestrained lawmaking power was the characteristic mark of the state').

[97] See D. Coquillette, *Francis Bacon* (Stanford: Stanford Univ. Press, 1992), notably at 12, 38, 39, 75, 239 (on familiarity with civil law, including English civilian writing, views on universal law), 222 (on modern research confirming Bacon's confession to taking of bribes); J. de Montgomery, 'Francis Bacon' in MacDonnell and Manson, *Great Jurists of World* (1913), above, 144, notably at 145 (first three years of study in France, returning to Gray's Inn), 158 (pleader for codification), 148-51 (drawn into 'network of corruption that surrounded the whole judicial system' in England).

[98] See above, Ch. 2, *The view from somewhere else*.

[99] F. Calasso, *Introduzione al diritto commune* (Milan: Giuffre, 1970) at 73, cited by M.-F. Renoux-Zagame, 'La methode du droit commun: Reflexions sur la logique des droits non codifies' Rev. hist. fac. dr. 1990.133, at 148.

[100] See above, Preface.

[101] Ibid.

needn't have anything to do with law (or normativity). We have moved some way from the chthonic and talmudic worlds,[102] though there has never been a moment of total rupture or transition, only ongoing shifts in perspective, each building on the earlier. Nor has the newer tradition succeeded in eliminating the older ones, which keep watch on the new ways, always ready to provide advice, if any problems crop up. They can provide advice since communication is assured, by the incremental, dialogical character of the development of one tradition from others.

POSITIVE LAW AND POSITIVE SCIENCE

Much of what has occurred in western science and law in the last three centuries or so has been the working out of the idea that you can change both the world and the law, since they are simply positive objects or constructions. The two ideas are very closely related to one another, and their interdependence is perhaps most evident in the idea that you cannot use the law to prevent changing the world. You can't prevent scientists from changing the world since it's just a fact, with no normative significance, though we now may be seeing some changes in this idea, partly from the ongoing influence of the chthonic tradition. The underlying position is still strong, however; so long as law is just positive (or posited, or made) law, then it can't really have any hold on people engaged in other, similarly positive, activities. You can't really think of the work of scientists as a challenge to lawyers to do something about it; there is a real unity in the basic perspectives of both groups. So while the scientists construct a newer positive world, while observing and learning from the actual one, the lawyers construct newer positive law, as the instrument of human rationality. The idea of law as command was perhaps the first abstract formulation of this idea,[103] but the idea of positive law has subsequently been the object of profound and sympathetic development, remarkably also in the common law tradition, which thus is becoming more common. Posited law would be ultimately grounded in a presumed basic norm,[104] authorizing present

[102] The fusing of law and the world is implicit in the entire chthonic tradition; with talmudic law the union is brought about, at least in large measure, by talmudic law's expression, making it look and sound like life, above, Ch. 4, *The style of the text*. In both cases, acting according to law is therefore just living naturally. Why ask people whether they want to obey the law, or not, when you can just presume that they will, since it's their law? Nor did talmudic thinking really encourage scientific development. See above, Ch. 4, Talmud, the Divine Will and Change.

[103] Formulated in England in the mid-i9th century by John Austin, though after extended immersion in German legal theory and preceded in formulation, if not publication, by the work of Jeremy Bentham. See J. Austin, *The Province of Jurisprudence Determined* (New York/Cambridge: Cambridge Univ. Press, 1995); and for Austin's immediate departure for Bonn on nomination to his position at the University of London, J. Austin, *Lectures on Jurisprudence*, 5th edn., ed. R. Campbell (New York: James Cockcroft, 1875) at vi, vii (Austin already had conceived a 'profound admiration' for great jurists of Germany).

[104] H. Kelsen, *Pure Theory of Law*, trans. M. Knight, from 2nd German edn. (Gloucester, Mass.: Peter Smith, 1989) notably ch. 5 ('The Dynamic Aspect of Law', s. 34 ('The Reason for the Validity of a Normative Order:

institutions to formally create law, and masking contact with other traditions or historical origins (and continuity). Roman law could thus be 'decanted' into the French civil code and essentially lose its identity as roman law, and French law thereby would lose its recognizable affiliation with roman law.[103] Or positive, formally created law would be ultimately based on its social acceptance, itself a fact, so as to not depend entirely and exclusively on formal utterance. This subtle joinder of formal and informal positivism, which is that of H. L. A. Hart, has given still more bite to the idea of positive law—it even has a faint whiff of the chthonic and talmudic in it, in the necessarily social character of law.[106] Yet here law comes from fact, it has lost its inherent normativity, from nature or divinity. So if the facts change, and people start disobeying the law, in a large and regular manner, there are some major problems in bringing them back under it. The teaching of present sociology, as simple fact,[107] has some disturbing implications for law as simple fact. One response to this is to create more law, and there is much evidence today of an acceleration in legal production.[108] We do not know what the eventual effect of this will be.

REVOLUTIONS, SYSTEMS, LANGUAGE AND INTERPRETATION

The contemporary civil law tradition manifests itself in many ways, and the idea of positive law is only one of them, though all are related. French law, as a major contributor to the tradition, has also given to the world the notion of revolution, now not as a revolving to an earlier, presently disruptive tradition, as it was originally thought to be, but as a sharp and creative break with the past. We know from historical research on the origins of the French civil code that much of it was not at all new, and it is probably impossible to think of a radically new departure in

the Basic Norm') and s. 35 ('The Hierarchical Structure of the Legal Order'), constituting the Kelsenian pyramid of norms. On the inverted pyramids of talmudic and islamic tradition, see above, Ch. 4, *The written words proliferate*, and below, Ch. 6, *The shari'a: sources*, and on the history of pyramidical concepts of law in western legal thought, J. Vanderlinden, *Comparer les droits* (Diegem, Belgium: Kluwer/Story-Scientia, 1995) at 260.

[105] See Carbonnier, 'Usus hodiernus pandectarum' (1982) at no (roman laws 'transvasees dans des articles de la codification') and 107 (current need for more direct form of reception, of limited nature, 'des gorgees de droit prises de temps en temps, selon la soif, a l'antique fontaine').

[106] H. L. A. Hart, *The Concept of Law*, 2nd edn. (Oxford: Clarendon Press, 1994), notably at 116 ('There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials').

[107] On present adherence to rational-legal authority, R. Inglehart, 'Changing values, economic development and political change' (1995) 47 *Int. Soc. Sci. J.* 379, discussed above, Preface to the First Edition.

[108] On inflation of norms, B. Oppetit, 'L'eurocratie ou le mythe du legislateur supreme' Dalloz 1990.1.73.

law,[109] yet the word 'revolution' has now become one of the most over-used words in the western world and in all western languages, and law has some part in this. A revolutionary tradition has come to exist, and this is not an oxymoron.

Contemporary positive law has also been thought of as systemic law and, since it can be changed so easily, even as multiple, successive systems, each new one replacing the previous one as changes occur.[110] This tells us already that the notion of system, as a unity of presently interacting elements, is undergoing strain. It is still used in other disciplines, notably in biological ones, where it arguably had its scientific beginnings,"[1] yet recently it has become highly elastic in character,[112] given emerging scientific views of a fundamentally chaotic or non-linear physical world. In concentrating our attention on current elements of a system, systemic thought concurs with positive law in declaring social continuity as largely irrelevant to normativity. Yet if you say that the system can tolerate catastrophe, in the form of widespread non-conformity, the notion of system here fulfils no evident function or utility, other than a purely formal one. There are however, denials of the systemic

[109] For a detailed argument, rejecting the possibility of intellectual disentanglement from previous law, Glenn,'Law, Revolution and Rights' (1990) at 9 (idea of revolution only possible with notions of fixed positive law and institutions, which are capable of being target of revolution, impossibility of revolting against a milieu); and on the idea of revolution representing the 'fallacy of mistaking the part for the whole', K. Minogue, 'Revolution, Tradition and Political Continuity' in King and Parekh (eds.), *Politics and Experience* (1968), above, 283 at 305; or as 'depending on the extent of the field that we take in at a single view', P. Shrecker, 'Revolution as a Problem in the Philosophy of History' (1969) 8 *Nomos (Revolution)* 33 at 49 (storming of Bastille illegal change under fundamental law of French monarchy, legitimate and legal action under the fundamental law of France); and for the failure of the Soviet revolution to eliminate civil law, M. Jankowski, 'Le droit romain en Union sovietique' Rev. his. dr. fr. et etr. 1990.43.

[110] J. Raz, *The Concept of a Legal System: an Introduction to the Theory of Legal System,* 2nd edn. (Oxford/ New York: Clarendon Press/Oxford Univ. Press, 1980); and for the origins and development of legal system building, W. Krawietz, *Recht als Regelsystem* (Wiesbaden: Franz Steiner Verlag, 1984), notably at 65 ff. Systemic thought is highly dependent on aristotelian or binary logic and notions of consistency, since a system is thought of as inherently coherent, to function as a system. Contradictory elements are those without the system, which defines itself by exclusion of contradictory elements. On the relation of different 'legal systems', including those said to be 'open' ones, to one another, see below, this Chapter *European identities.* On systems thought generally, in law and science, T. Barton, 'The Structure of Legal Systems' (1992) 37 Am. J. Juris. 291 (notably for history of concept of system); C. Grzegorczyk, 'Evaluation critique du paradigme systemique dans la science du droit' (1986) 31 Arch. phil. dr. 281, notably at 301 (idea of system finally not very rich or productive (not 'feconde') but necessary if law positive and rational).

[111] C. von Linne (Linnaeus), *Systema naturae* (London: Trustees of the British Museum, 1956) (rst edn. 1735, founding taxonomic methodology) and on contemporary autopoietic (self-referential or self-reproducing) systems in biology, yielding an autopoietic theory of law, H. Rottleuthner, 'Les metaphores biologiques dans la pensee juridique' (1986) 31 Arch. phil. dr. 215, explaining biological background to autopoietic theory of law, as developed notably by N. Luhmann. See G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (Berlin: Walter de Gruyter, 1988); G. Teubner, *Law as an Autopoietic System* (Oxford/Cambridge Mass.: Blackwell, 1993).

[112] For concepts of systems which would accommodate even catastrophe, I. Ekeland, *Mathematics and the Unexpected* (Chicago: Univ. of Chicago Press, 1988) at 88-90, 106; and for system in the social sciences which would tolerate even the most 'strategic, innovative or rebellious choice-making,' S. F. Moore, 'History and the Redefinition of Custom on Kilimanjaro' in J. Starr and J. Collier, *History and Power in the Study of Law: New Directions in Legal Anthropology* (Ithaca NY/London: Cornell Univ. Press, 1989) 277 at 287, 288, with further refs.

character of western thought, most notably by the French codifiers, who insisted that their code, particularly in its simplicity and its retention of non-roman French law, avoided systematic thinking.[113] Even those who advance a tradition are not convinced, entirely, how far they advance it, or should advance it.

Contemporary informal positivists, those who practise the sociology of law, have put forward the notion of culture as a substitute for that of system. Culture appears to be a present, ill-defined, all-inclusive system, which may present some advantages over the notion of system, but again appears as a particularly western construction which in no way advances any idea of normativity.[114]

With law expressed formally, in formal language, it is also natural to conclude that law is language. In this, some western and civilian theories of law have followed other western intellectual trends, which have given major importance to language as a controlling element in individual and societal development.[115] Interpretation

[113] R. Seve, 'Systeme et Code' (1986) 31 Arch. phil. dr. 77 at 82 (Thus Cambacereces: loin de nous la presomption d'avoir invente une theorie ou un systeme. Un systeme! Nous n'en avons point.. . la nature est le seul oracle que nous ayons envisage'). In *Les grands systemes de droit contemporain,* 11th edn. (Paris: Dalloz, 2002) with C. Jauffret-Spinosi (English-language 3rd edn. (London: Stevens, 1985) with J. E. C. Brierley), to which this volume owes a great deal, Prof. David thus used the notion of'legal systems' sparingly and more as a didactic device to underscore similarities and differences (at 20, 21, of the English edn.), in spite of the title of the book. The notion of a 'major legal system' appears limited to the civil law, the common law, and socialist law, and it is true that the notion of system has played, or did play, an important role in all three of these. Other laws are described under the heading 'Other Conceptions of Law and the Social Order'. Throughout, the notion of 'legal family' is used more frequently than that of 'legal system'. The notion of 'legal family' is also used in Weir's translation of Zweigert and Kotz, *Introduction to Comparative Law* (1998), in rendering the original German 'Rechtskreis', literally 'law circle'. Cf. U. Mattei, 'Three Patterns of Law: Taxonomy and Change in the World's Legal Systems' (1997) 45 Am. J. Comp. Law 5 at 14 ('legal systems never *are*. They always *become');* and for increasing reluctance to speak of a legal system in France, where law is increasingly perceived as a method of dispute resolution or a juxtaposition of solutions, see B. Oppetit, *Droit et modernite* (Paris: Presses universitaires de France, 1998) at 113, n. 1.

[114] For 'culture' as a German response to French 'universalism' see M. Sahlins, *How Natives Think: About Captain Cook, for example* (Chicago/London: Univ. of Chicago Press, 1995) at 10-14, with refs (though now'in vilight of its career, and anthropology with it'); also at 10 on coining in France in 1750s of expression 'civilization'; and more generally F. Barnard, 'Culture and Civilization in Modern Times' in P. Wiener (ed.), *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas,* vol. 1 (New York: Charles Scribner's Sons, 1973) at 613, notably at 613, 614 (notions of both 'culture' and 'civilization' gaining currency in 18th century Europe, by mid-20th century 164 definitions of'culture' catalogued); for protest against the notion of culture as 'no matter what manner of acting' see Brague, *Europe* (1993), above, at 133; and as 'failing to identify any particular factors that can be seen to be making a difference' R. Cotterell, 'The Concept of Legal Culture' in D. Nelken (ed.), *Comparing Legal Cultures* (Aldershot/Brookfield, Vt./Singapore/Sydney: Dartmouth, 1997) 13 at 20; H. P. Glenn, 'Legal Cultures and Legal Traditions' forthcoming in M. Van Hoecke (ed.), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) ('culture' as means of essentialising peoples, conflictualizing relations); M. Chanock, 'Human Rights and Cultural Branding: Who Speaks and How?' in A. An-Na'im, *Cultural Transformation and Human Rights in Africa* (London/New York: Zed Books, 2002) 38 at 41 ('tendency to posit a concept of cultures as unities . . . opposable to each other .. . has involved essentializing cultures and quieting the diversity of voices so that only the dominant are heard'); and for 'civilization' as a concept of universal history developed during western colonialism, see below, Ch. 7, *Western law in the world.*

[115] Above, Ch. 2, Commensurability: Of Apples and Oranges; and on civilian discussion of law and language, see *Le langage du droit* (1974) 19 Arch. phil. dr.; J.-L Sourioux and P. Lerat, *Le langage du droit* (Paris: Presses universitaires de France, 1975).

could then become subjective, less the collective search for a meaning taken to be true than imposition of meaning by the recipient of the texi Yet here too there is ongoing challenge, notably in cognitive science affirming the primacy of human thought (we always have still to decide what to do, in a way uncontrolled by language)[116] and in the idea that the civil law is the result of a process of collective, and learned, deliberation] If there is no Perfect Author, there are at least authors, whose ongoing arguments require ongoing response.[117] The notion that legislation and its interpretation are simply means of continuing the discussion, and not in any way means of bringing it to an end or limiting its breadth, is brilliantly represented in recent continental writing."[8] Interpretation, in the sense of search for the truest of meanings, would thus remain at the heart of the civilian tradition, as it was in the time of Rome. This would explain the enduring quality of much of the civil law. It is difficult to improve on it, and all its implications have yet to be discovered. [119] So if the civil law retains a large interpretative, as opposed to creative, dimension, what is the effect of this on its relations with other legal traditions?

CIVIL LAW AND COMPARATIVE LAW

Identities have always been problematical in Europe. There have been lots of them, and we see here the importance of the chthonic in grouping people according to their local ways. Think of all those tribes with odd names that somehow brought down the Romans. Yet all of them were chthonic, and all were European, and most eventually came to be followers of a single church. So we seem to have people adhering at the same time to small and larger groupings, adhering both to particular and more universal types of information, and being both Burgundian and catholic, or Bavarian and germanic, or Roman and pan-European. Prior to the state we seem to be faced with this interplay between the particular and the general, so chthonic ways engaged first with roman law, then with canon law, then with the

[116] Above, Ch. *2,* Commensurability: Of Apples and Oranges.

[117] On the Perfect Author of talmudic tradition, and the resulting interpretive process, see above, Ch. 4, *Talmud and Torah,* and *The style of the text.*

[118] See Atias, *Epistemologie juridique* (1985); Remy, 'Eloge de l'exegese' (1982); and for the idea that legal bilingualism (as in Canada) or multilingualism (as in the European Union, Switzerland) reveals the 'meta-linguistic' character of law, D. Jutras, 'Enoncer 1'indicible: le droit entre langues et traditions' R.I.D.C. 2000.781 (norms only partially rendered by different linguistic efforts to express them).

[119] On the adages of French law, see H. Roland, *Adages du droit francais,* 3rd edn. (Paris: Litec, 1992); and on the continuing validity of particular adages or maxims, E. Putman, 'Sur 1'origine de la regie: "Meubles n'ont point de suite par hypotheque"' Rev. trim. dr. civ. 1994. 543: H. P. Glenn, 'A propos de la maxime "Nul ne plaide par procureur"' Rev. trim. dr. civ. 1988. 59. The notion of a tradition of jurists (Juristentradition), distinct from the legal tradition itself and acting as a means of traditio, is defended in H. Izdebski, 'La tradition et le changement en droit: l'exemple des pays socialistes' Rev. int. dr. comp. 1987. 839 at 879.

renewed roman law. Historically Europe seems to say you can have more than one identity. Then we had the state, but now European states and the people in them are interacting with a new type of pan-European law. So in the complexity of European society, all packed into a relatively small space, we have a remarkable and ongoing process of exchange between traditions, and many demonstrations of the inter-dependency of identities. The process began, as a recognizable one, even before the Romans. Then it accelerated.

EUROPEAN IDENTITIES

Knowing who you were in Europe used to be relatively simple, say 3,000 years ago. Being European didn't matter much, because if you travelled by foot it was a pretty big place and you didn't meet many people who weren't European. There wasn't much that could be looked to in a formal way which was pan-European either, and there was notably no European church. So identity was created, as it was elsewhere in the chthonic world, initially by a combination of birth and residence,[120] then by ongoing adherence to the ways of the community into which one had initial entry. In Europe the number and proximity of these peoples was such, however, that they may have worked out ways of regulating legal relations between them, in the form of a rough choice of law rule which said that the personal law of people went with them wherever they went.[121] At least we know that this existed during the time of the Romans, when chthonic people became subjugated to them; it is not clear when it may have begun. So the unwritten traditions had regular contact with one another, but they had so much in common that there was no major problem of conflict,[122] and any influence of one on another would remain well within the range of chthonic options.

The relations between traditions become more complex, and recognizable as such, with the growth of roman law. Roman law was actually composed of two kinds-of law, and the law we have been discussing to date was only one of them, the civil law (ius civile) applicable to Romans themselves (who of course knew who they were, since roman law said a lot about it, without excluding change in identity). There was another law, though it was still under the umbrella of Rome and its empire, for people who were not Roman—the ius gentium, or the law of people generally. So what the Romans did was to simplify their legal relations with other people. They didn't try to track any diversity of local law; they just said, 'Other people are different from us so they will all be governed by non-roman law,

[120] See above, Ch. 3, Chthonic Ways and Other Ways.

[121] H. Batiffol and P. Lagarde, *Droit international prive*, 7th edn., vol. I (Paris: LGDJ, 1981) at 10; and on the continuing application of personal laws, see L. Stouff, 'Etude sur le principe de la personnalite des lois depuis les invasions barbares jusqu'au XJle siecle' (1894) Revue bourguignonne 1-65, 273-310.

[122] See Vinogradoff, *Roman law in Medieval Europe* (1968) at 126 ('Medieval people had no strong sense of historical diversities').

which we say has the following characteristics.' In doing this, the Romans didn't simply impose the civil law on the rest of the world; they actually appear to have synthesized in a very interesting way the law they met in different parts of Europe and the Mediterranean. So we have here a form of what later came to be called comparative law, though it was really not then recognized as such and didn't have any formal method. The lawyers dealing with inter-traditional problems just used the law that seemed appropriate,[123] and the law that slowly developed this way began to exercise a certain influence on the civil law itself, again in an entirely informal manner. To put it in modern terms, roman law didn't recognize any real problem of conflicts of laws, and didn't develop any law for dealing with them. They just used the law that was available, in a very rough way, admitting two general kinds of law, each open to the other. They had to be open to the other since there was no way of effecting closure. Chthonic law can't be closed; the roman law of the jurists had no mechanism for radical change; hence no mechanism for anything as radical as closure. The Roman notion of the ius gentium didn't eliminate particular identities, however. People said, 'If the Romans want to build a general law for non-Roman people, they are free to do so, but I'm still a Burgundian. So we now have three types of legal tradition to deal with—the chthonic, the ius gentium and the ius civile—and three types of identity, though some operative only according to the context.

In a way, things got simpler with the end of Roman authority and even with the re-emergence of roman law. People thought of themselves, as before, as Burgundians or Bavarians, but there wasn't any alternative. And when roman law began its growth into a common law of Europe it did provide a larger notion of European identity (so the contemporary European student exchange programme could be named Erasmus, after the pan-European, conciliatory humanist of the sixteenth century),

we now are back to only two identities, the local and the European, not the three which existed in Roman time. We already know that there was a lot of toing and froing between local law and modern, Europeanized, roman law, a lot of resistance by chthonic tradition to modernization by rational, roman tradition; and we already largely know which tradition prevailed.fThe result of this process, the adhering of people to modern, rational law, was the creation of new identities in Europe, those of nation-states, the people of which could be identified by their citizenship. The people became neither local, nor European, but somewhere in between.

The construction of states, and citizenship as a means of adherence to them, implied the disappearance of other forms of identity, at least as defined by

[123] In doing this they may have been emulating Greek practice, in which use was made of the law of another city, where appropriate, and with no great ado. See R. Bauman, 'Comparative Law in Ancient Times' in A. Tay (ed.), *Law and Australian Thinking in the 1980s* (Sydney: Organizing Committee of the 12th International Congress of Comparative Law, 1986) 99; K. Assimakopoulou, 'Comparative Law in the History of Greek Law' (1986) 39 Rev. hell. dr. int. 323 at 325.

law.[124] So law as reason's instrument now becomes very instrumental. Not only is it formally defined to exclude other solutions, other voices, in terms of substantive solutions, but it also now has the function of binding people together within a single territory, creating an identity which previously did not exist. It no longer is possible to be citizen of a city; attachment to a region, to a former area of chthonic law, could retain only nostalgic importance. The domicile of origin retained some importance in Swiss law, though now in terms of a canton of origin, and there were areas of derecho foral or chthonic law in Spain, but the state set out to eliminate legal particularity and made a very good job of it.[125] It unified the law of the peoples and lands falling within its defined territory (how this was done also had implications for comparative law, which we're getting to). The result of this process of unifying law, which swept through all of Europe, was a new phenomenon of legal disunity in Europe. Law becomes 'territorial zersplittert'.[126] While there had usually been some form of legal commonality in Europe in the past (chthonic, canon, roman—old or new), each state now purported to occupy the legal field. Each created its own unity (with codes tending to universal expression) but the combination was destructive of any larger unity. So we see here the general effect of systemic thinking in law. Systems require boundaries; these are the boundaries of the states. Systems require consistency; this is provided by exclusivity of sources. Systems conflict; the science of European private international law comes into being, a formal law of all formal laws which is also, necessarily, national in character. Some states even require that it be mandatorily applicable by the judge, so that in inter-state relations the parties are not free to submerge differences in formal law by common accord.[127]

(This era of radical separation of European laws and European identities was, however, of relatively short duration, no more than a century and a half, if we take the French civil code of 1804 as its origin. By the mid-twentieth century the European Community was under way, as was the construction of a new European law. This began in terms of formal law, the construction of a new and larger European legal rationality. It is evident that there are now limits to this process, even with the enormous legislative production of Brussels. Legislative unification in Europe was successful in the eighteenth and nineteenth centuries because the

[124] Even here, however, as catholics, most Europeans remained subject to canon law as the law of their church. This had become, however, a private matter, largely separate from the formal world of state law.

[125] Though the instability of states gave rise to a new type of particularity, that resulting from the overlapping of state laws, itself contributing to local forms of identity, as in Alsace-Lorraine; see H. P. Glenn, 'The Local Law of Alsace-Lorraine: A Half Century of Survival' (1974) 23 Int. & Comp. Law Q. 769.

[126] H. Coing, 'Die Bedeutung des Rechts in der neureren Geschichte Europas' in W. Fikentscher, H. Franke and O. Kohler (eds.), *Entstehung unci Wandel rechtlkher Traditionen* (Freiburg/Munich: Verlag Karl Alber, 1980) 755 at 760.

[127] On the obligatory character of private international law rules and the current process of harmonization of European law see, however, Glenn, 'Harmonization' (1993) 1, arguing for a presumption of harmony, rather than of conflict, of European laws.

new rationality was overtaking the residues of the chthonic world in law. Now a new unification, a new rationality, must overcome existing unifications, existing rationalities.[128] Already the process of European legal unification has given way to European harmonization, which accords some measure of autonomy in implementation of European directives. The process of *informal* harmonization, the informal generation of a new ius commune, proceeds even more rapidly.[129] The legal professions have been released from narrow, territorial anchors, to float more freely over Europe;[130] private international law has already lost its primacy of

[128] For the immense literature on European legal unification and harmonization, see G. Kegel and K. Schurig, *Internationales Privatrecht*, 8th edn. (Munich: C. H. Beck, 2000) at 97 (for bibliography); De Witte and Forder (eds.), *Common law of Europe and future of legal education* (1992); R. Schulze, 'Le droit prive commun europeen' Rev. int. dr. comp. 1995. 7, notably at 10, 11, on 'general principles of law' and 'common traditions'; I. Taupitz, *Europdische Privatrechtsvereinheitlichung heute und morgen* (Tubingen: f. C. B. Mohr (Paul Siebeck), 1993); A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra and E. du Perron *Towards A European Civil Code*, 2nd edn. (Nijmegen/The Hague: Ars Aequi Libri/Kluwer, 1998); P. Legrand Jr., 'Against a European Civil Code' (1997) 60 MLR 44; J. Basedow, 'The renascence of uniform law: European contract law and its components' (1998) 18 Legal St. 121, with further refs at n. 14; P. de Vareilles-Sommieres, *Le droit prive europeen* (Paris: Economica, 1998); F. Werro (ed.), *New Perspectives on European Private Law* (Fribourg: Editions Universitaires Fribourg, 1998); W. Van Gerven, 'A Common Law for Europe: The Future Meeting the Past?' (2001) 4 Eur. Rev. Private L. 485; L. Niglia, 'The Non-Europeanisation of Private Law" (2001) 4 Eur. Rev. Private L. 575. It has been said recently that 'the focus of attention is shifting from drafting a comprehensive [European] code to drafting framework directives, an optional code, restatements and principles; S. van Erp, 'Editorial' (2003) 7.1 E.J.C.L., http://www.ejcl.org/71/editor71.html (with links to E.U. documentation). On the limits and extent of formal legal unification generally, see H. Kotz, 'Rechtsvereinheitlkhung—Nutzen, Kosten, Methoden, Ziele' RabelsZ 1986. 1; P. Behrens, 'Voraussetzungen und Grenzen der Rechtsfortbildung durch Rechtsvereinheitlichung' RabelsZ. 1986.19; R. David, 'The International Unification of Private Law' in International Association of Legal Sciences (K. Zweigert and U. Drobnig, eds.), *International Encyclopedia of Comparative Law*, vol. II, (Tubingen/The Hague/Paris: J. C. B. Mohr (Paul Siebeck)/Mouton, 1971), ch. 2, at 5: H. P. Glenn, 'Harmonization of Private Law Rules Between Civil and Common Law Jurisdictions' in International Academy of Comparative Law, Xlllth International Congress General Reports (Cowansville, Quebec: Yvon Blais, 1992) at 79.

[129] For the emergence of pan-European, civil law-common law treatises, H. Kotz, *European Contract Law*, trans. T. Weir, vol. 1 (Oxford: Clarendon Press, 1998); C. von Bar, *The Common European Law of Torts* (Oxford: Oxford Univ. Press, vol. 1,1998, vol. 2,2000), and casebooks, W. Van Gerven, J. Lever and P. Larouche, *Tort Law* (Oxford/Portland: Hart Publishing, 2000). A non-legislative, persuasive, statement of principles of European contract law has also been formulated; see O. Lando and H. Beale (eds.), *Principles of European Contract Law Parts I & 2* (The Hague: Kluwer, 2000), O. Lando, E. Clive, A. Priim and R. Zimmermann, *PECL Part*3 (The Hague: Kluwer, 2003); and for the work of the Trento project to unearth a 'common core' of European private law, M. Bussani and U. Mattei, *The Common Core of European Private Law* (The Hague: Kluwer International, 2003).

[130] See generally R. Goebel, 'Professional Qualifications and Education Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap' (1989) Tulane L. Rev. 443; R. Bain, G. Endreo and J. Simpson, 'Le libre etablissement des juristes en Europe (mythes et realites)' JCP 1988. I. 3324; G. Gornig, 'Probleme der Niederlassungsfreiheit und Dienstleistungsfreiheit fur Rechtsanwalte in den Europais chen Gemeinschaften' NJW 1989. 1120; H. P. Glenn, 'Private International Law and the New International Legal Professions' in *Melanges von Overbeck* (Fribourg: Presses de l'Universite de Fribourg Suisse, 1990) at 31; the European Union has now also legislated to facilitate permanent movement of a lawyer to another member state. The professional organizations have followed, creating a new code of conduct for cross-border activities of the lawyer. See Council of the Bars and Law Societies of the European Community (CCBE), *Cross Border Practice Compendium* (Deventer, Netherlands: Kluwer, 1991).

place in the rational ordering of laws.[131] There is also the work of the European courts, those of the European Union and of the European Convention on Human Rights. They are generating a European jurisprudence (the return of the judges). There is also talk of a different form of legal logic, one more tolerant of difference, more 'fuzzy' (non-aristotelian) and capable of conciliating different particular European laws in a larger European cadre.[132] The European activity has led to a new, European identity or citizenship,[133] alongside that of states (putting the rest of us into the long line in the airports). The city has also emerged as a new field of inter-traditional activity, the result of massive population movement in the world, having possibly its greatest effect in Europe. Islam is back.[134] So we see the people of Europe identifying themselves with their large cities, which have their own intricate law; with their states, which increasingly play a kind of mediating role between the local and the continental; and with their Europe, which is Europe because it cannot eliminate all the others.[135] They are torn between these identities, though will defend any of them against external challenge. There is also a resurgence of local regional identity—the Basques, the Corsicans, the Flemish, the peoples of eastern Europe, who have no recent memory of a modest state—insisting that states justify themselves, resisting application to them of the tradition of constructive rationality in law, resisting tradition from within. Outside Europe, in the newer civil law world, the regional claims are more

[131] The role of private international law depended on the existence of complete and systemic national legal orders. See H. Batiffol, *Aspects philosophiques du droit international prive* (Paris: Dalloz, 1956) at 16, 24; Krawietz, *Recht als Regelsystem* (1984), above, at 51 (on notion of legal system of legal systems, System von Rechtssystemen). Even in public law, however, the national has now become blurred with the European. See notably X. Pretot, commenting on C. E. 19 Apr. 1991, Dalloz 1991. II. 399 ('Cette double decision illustre, si besoin etait, la permeabilite, on ne peut plus nette depuis quelques annees, de la jurisprudence administrative a la norme internationale').

[132] Delmas-Marty, *Truly Common Law* (2002), above, at 73 (on 'controlled sovereignty', 'relative European primacy' and 59, 66 (on relations between non-hierarchical systems); M. Delmas-Marty, *Le flou du droit* (Paris: Presses universitaires de France, 1986); F. Ost, 'La jurisprudence de la Cour europeenne des droits de rhomme: amorce d'un nouveau "jus commune"?' in De Witte and Forder, *Common taw of Europe and future of legal education* (1992) at 683. On fuzzy or multivalent logic, see the discussion below, Ch. 10, *Bivalence and multivalence.*

[133] C. Closa, 'The Concept of Citizenship in the Treaty of European Union' (1992) 29 CMLR 1137; and for the theoretical debate, D. Zolo, *La cittadinanza: Appartenenza, identita, diritti* (Rome/Bari: Editori Laterza, 1994)-

[134] J.-Y. Carlier and M. Verwilghen, *Le statut personnel des musulmans: droit compare et droit international prive* (Brussels: Bruylant, 1992).

[135] E. Morin, *Penser I'Europe* (Paris: Gallimard, 1987) at 48, 49 ('L'Europe n'est en fait l'Europe que parce qu'il n'y a pas d'Europe en droit'); C. Varga, 'European Integration and the Uniqueness of National Legal Cultures' in de Witte and Forder (eds.) *Common law of Europe and future of legal education* (1992) at 721; and on the emerging European principle of subsidiarity—of leaving regulation to the lowest possible level—G. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 Col. L. Rev. 331.

clearly related to chthonic law as, again, in Chiapas,[136] though there is little sentiment in favour of unification of law or identity, in either civil or common law jurisdictions, in the free trade areas of the Americas.[137] There,is thus more and more occasion for conversation, and the occasional argument. This is inevitable in convincing people that they have more than one identity, but Europe may be (again) leading the world in this. It may be a little confusing, but it's way ahead of ethnic cleansing.

PROTECTING IDENTITY

Chthonic law did little to protect the identity of its groups. People could come and go, but there were lots of reasons out there for not going very far. Talmudic law had concepts of both treason and heresy but they were of limited application, given the riot of opinion the tradition expressly authorized (and they were used chiefly at the level of disobedience to decision, rather than at that of doctrinal dissent). Both traditions would let their people go, or exit, and in the contemporary world this has happened to a considerable degree. There are variations in this according to the practices of states, and some have made it difficult for chthonic peoples to escape a chthonic identity.[138] Yet the mixite of the populations of latin America shows the absence of internal restraint on exit. The civil law world also has known heresy, treason and sedition, though the first has disappeared with the rights of expression born of the enlightenment. Scientists can no longer be killed for their pursuit of science.[139] The inquisition lasted longest in Mexico, until the nineteenth century, but charges of heresy were not made against chthonic peoples (at least from the

[136] Where the Mexican government has resisted the idea of 2 'systems' of law within the Mexican state. Here we have some real difficulties of communication, and the notion of system has a lot to do with it. In particular, we appear to have a corrupt, formal system (according to the current President of Mexico, who seems to be trying to do something about it) refusing to recognize or deal with an honest, informal system. Then again, it may be that the informal system is being used as a front by marxists, who would establish a corrupt, marxist system of their own (on corruption in socialist law, see below, Ch. 9, *Asian corruption).* Theory will only take you so far; then you have to get a closer look at what's really going on.

[137] H. P. Glenn, 'North America as a Medieval Legal Construction' (2002) Global Jurist, vol. 2, Issue 1, Article 1 (http://www.bepress.com/gj), repr. in Bussani and Mattei, *Common Core*, above, at 49 (North American experience indicating common market in itself requires no formal harmonization of laws); H. P. Glenn, 'Harmony of Laws in the Americas' (2003) 34 U. Miami Inter-Am. L. Rev. 223 (on techniques of informal harmonization).

[138] See above, Ch. 3, *The state as middle ground*, on the notion of 'reservations' for chthonic peoples.

[139] See, for the last public hanging for heresy in Scotland in 1697, subsequent unsuccessful heresy trials, and 'target' of Archibald Pitcairn, physician and teacher of medicine, Maclntyre, *Whose Justice? Which Rationality?* (1988), above, at 243-5; for torture in Holland as late as the mid-i8th century see M.-S. Dupont-Bouchard, 'Criminal Law and Human Rights in Western Europe (i4th-i8th Centuries). The Example of Torture and Punishment. Theory and Practice' in Schmale, *Human Rights and Cultural Diversity* (1993), above, 183 at 186,187; and for burning of the 'last heretic' in Poland in late 18th century, see Roberts, *History of World* (1995), above, at 649.

sixteenth century). Jews and foreigners enjoyed no immunity.[140] Treason and sedition are still with us, however, and there is no requirement of war for their invocation.

The state in the tradition of the civil law will also allow its people to leave and many have, to the benefit of newer worlds.[141] Whether they are allowed to lose their citizenship, by simple choice, is a little trickier. Some states have no general provision for loss of nationality, though don't appear to punish the attempt.[142] There would therefore be no civil apostasy.[143] Protection of identity is accomplished rather by keeping people out. Since the state is territorial, and Pawls territorial, people can become subject to state law, and benefit from it at least to some extent, just by getting in. So, in the face of state-generated means of mass transport, we now see contemporary civil law states erecting enormous and vastly efficient barriers to access to national territory on the part of others.[144] In Europe there is also collaboration amongst states in doing so; the wagons are gathered round. Here the state, constructed as an instrument for advancing human liberty and choice, becomes a suppressor of both, in terms of movement of people. Constitutional guarantees of people are not interpreted as being of universal application; only people on the inside benefit from them. There is a lot of complicated debate about whether airports are inside or outside. This is a vulnerable area for the tradition of states; there may even be some incoherence, some slip between the philosophy and the practice. Much criticism is generated, and not only from the outside. The territorial barriers mean that rules for acquisition of nationality have become less consequential. They differ considerably from state to state (different local traditions again) and the usual contrast is between France (citizenship by choice) and Germany (citizenship by birth). This is too simple a comparison, however. To exercise your choice to become French you first have to get in; if you get into Germany they have made it easier, recently, to become German. And in both places so many do get in that there are long-standing, foreign, resident populations, generating a language of necessary 'integration'. So we seem to be dealing with an idea of the integrated other—the neighbour still kept at arm's length. European state identities are now also subject to intermingling, given European citizenship

[140] G. F. Margadant S., *Introduction a la historia de derecho mexicano,* 10th edn. (Naucalpan: Editorial Esfinge, 1994) at 126-8.

[141] Restrictions on movement were imposed by socialist civilian jurisdictions, however. See A. Dowty, *Closed Borders: the Contemporary Assault on Freedom of Movement* (New Haven/London: Yale Univ. Press, 1987).

[42] R. Baubock, *Transnational Citizenship: Membership and Rights in International Migration* (Aldershot/ Brookfield, Vt.: Edward Elgar, 1994) at 123; and for historical inability to abandon one's citizenship in France, see C. Wells, *Law and Citizenship in Early Modern France* (Baltimore/London: Johns Hopkins Univ. Press, 1995) at 97-

[143] On this concept, see below, Ch. 6, *The umma and its protection.*

[144] On the complexity of these national regimes, see H. P. Glenn, *Strangers at the Gate: Refugees, Illegal Entrants and Procedural Justice* (Cowansville, Quebec: Yvon Blais, 1992), notably at 12, 13 on the relation between complexity and admissibility.

and freedom of movement within Europe, for Europeans. Bo identities do get a lot of protection in the civil law world, particularly the constructed ones. They're the most fragile. They depend on formal law, and have to be protected by formal law. \

THE SCIENCE OF COMPARISON

Comparison is at the heart of the relations of traditions to one another. So in chthonic times, and roman times, a lot of it went on. There was, literally, no avoiding it. There was also a lot of contact between the civil and canon laws, given that both were studied in the universities at the same time, such that you became (and often still do, if you want to get that far) a doctor of laws (both of them). They even published student textbooks on how to study the two together.[145] With the growth of systematic thinking, however, the idea began to take hold that comparison also had to be systematic. If systems were to be built, systematic comparison was essential to the construction, and thereafter to their refinement. So the process of comparison, the intellectual process of keeping traditions in touch with one another, itself became subject within the civil law tradition to the characteristics of the tradition itself. If the civil law was to be rational and systematic, things could get all mixed up again by just allowing other ideas or concepts to wander in. The tradition's definition of system could be called an open one, but it had to be a controlled openness.

The first instances in the world of forced or hyper-comparison come in the sixteenth century, when the ideas of Cujas take hold. Other legal systems (and particularly past ones) have no inherent normativity, or immediate lessons to provide, but they can be mined for good ideas in the construction of the present one. So the Cujadists were intensely interested in roman law, but were perhaps most interested in what could be taken over from it, in the form of formally sanctioned French law. Soon the 'customary' law of France also came to be mined, as an alternative to roman law (the notion of a common law of France emerges, as one of a necessary synthesis of the various 'customs').[146] Bodin caressed the idea of constructing a universal law, based on comparison, but what he really meant was informed rationality.[141] So we end up with what might otherwise appear to be a perverse idea, that of comparing laws on the assumption that each people has a

[145] On a 1491 student guide to the utriusque iuris methodus, see Coing (ed.), *Handbuch der Quellen*, vol. I (1973) at 352.

[146] J.-L. Thireau, 'Le comparatisme et la naissance du droit francais' Rev. hist. fac. dr. 1990.153 at 160,177 ('pour degager un droit commun coutumier que Foil substituerait au droit romain'), though roman law's good parts could be retained (at 188, 189); more generally, for the phenomenon as one of 16th-century humanism in Europe, see A. Wijffels, 'Arthur Duck et le *ius commune* europeen' Rev. hist. fac. dr. 1990. 193 (including also the English romanists).

[147] J.-L. Thireau, 'comparatisme et naissance du droit francais' (1990), above, at 169; J. Franklin, *Jean Bodin and the 16th-century Revolution in The Methodology of Law and History* (New York: Columbia Univ. Press, 1963) at 37,69 ff.; and for use of TaLmudic law, above, Ch. 4, *Talmudic example?*.

particular law and that particularity can be better constructed through comparison. Comparison here has been co-opted to the rationalist effort. The tradition is being consistent with itself.

So thereafter comparative law has a formal, structured place in civil law thinking. Since its uninhibited practice can be destabilizing, there are prohibitions on certain uses of it. Even roman law suffers this ignominy. In Spain roman law is formally prohibited; in France claims of illegality can no longer be based upon it.[148] The practice necessarily develops of exclusion of foreign sources in judicial practice; this follows almost necessarily from the restriction of local sources to legislative ones, though there are some variations in national practice. The positive side of ongoing comparative law is as an aide in legislative reform, but since this suppletive function isn't always invoked, and often depends more on politics than on law, the comparativists take refuge in science. They raise their discipline to an autonomous one, beyond even legislatures, by taking on the task of studying the positive laws of the world and, scientifically, almost biologically, categorizing them. Comparative law becomes taxonomic, and large volumes are written with the purpose of classifying the laws of the world, and developing criteria of classification, of separate and distinct existence.[149] However removed this exercise was from the practice of law, and the ongoing justification of tradition, it did make available to the civil law world information on other legal worlds. It was a kind of bottled-up information, as though it were in a contemporary museum of modern law, but it was available. So there was a kind of lurking threat to the rationalist tradition in the growth of the nineteenth-century scientific tradition of comparative law, when most of the current societies and associations of comparative law were born. The information and thought of the other just wouldn't go away. And while the formal restrictions on the use of foreign sources continue largely to prevail in Europe, notably in France, recent detective work has shown that the comparisons are made anyway, behind the scenes.[150] So the traditions just do go on

[148] Carbonnier, 'Usus hodiernus pandectarum' (1982) at 109,110.

[149] See, most recently, L.-J. Constantinesco, *Traiti de droit compare*, 3 vols. (Paris: LGDJ/Economica, 1972, J974,1983); for a tabulation of taxonomic efforts, concluding that western comparison too limited by a single manner of conceiving law, Vanderlinden, *Comparer les droits* (1995), above, at 328, 417; and for recent criticism of the static character of the taxonomic effort, Mattei, 'Three Patterns of Law' (1997), above; B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York/London: Routledge, 1995) at 273 (classifications 'tell us more about the ideology of Euro-centred comparative law than about the ideology of the different legal families', yet given present 'intense legal transnationalization' enterprise of legal comparison 'more relevant and urgent' than ever, wealth of knowledge of comparatists 'cannot be dismissed out of hand'), 325 (indigenous struggles for legal autonomy illustrate extent to which comparative law has 'ignored deep-rooted legal traditions and legal cultures governing the social life of millions of people throughout the world').

[150] M. Lasser, 'Judicial (Self-) Portraits: Judicial Discourse in the French Legal System' (1995) 104 Yale L. J. 1325 at 1370 (work of judges of French Cour de cassation including search for 'any appropriate foreign (usually European) legislative norms or judicial solutions'); and for more open use of persuasive authority across states of civil law tradition, see H. P. Glenn, *Droit quebecois et droit francais: communaute, autonomic, concordance* (Cowansville, Quebec: Yvon Blais, 1993); Glenn, 'Persuasive Authority' (1987).

talking to one another, however you try to limit the process.[151] It's tough to control information.

What is going on in terms of present exchange of information? The civil law is taking a beating in terms of ecology (absolute rights of property are incompatible with it), animals (Descartes has been said to describe them—there is debate as to what he said—as soulless machines, but people tend to find them warm and beautiful and make them members of their families[152]), economic inequality (possessive individualism, and growing percentages of wealth in decreasing percentages of people,[133] the islamic tradition often providing comparative comment on this feature of the western world) and refugees (islam once again). Yet the historical influence of the civil law in the world has been unmistakable, and much of the emulation has taken place out of simple admiration, notably that which took place in the common law world. On the other hand, much of the influence flowed from the colonization process, which raises the delicate issue of the relation of law to political dominance.

CIVIL LAW IN THE WORLD

You really can't get away from the idea that the civil law tradition is somehow associated with dominance. The romans dominated, then the national civilians dominated (so out went the chthonic ways), then the world became a zone of influence of civil laws, as the colonization process occurred. [15]\The western religions appear to be clearly proselytizing ones, but is the same true for western laws, notably of the civilian tradition? Is their rationality necessarily universal in ambition, in spite of the lack of universality in Europe itself? Are westerners essentially fundamentalists, such that their ways are so true that they have to be followed elsewhere? These seem like questions which are worth pursuing, if we are to understand the relations of traditions to one another, but it is difficult here to avoid talking about

[151] And for non-taxonomic, issue-specific comparative law, see the major undertaking of the International Association of Legal Science, the *International Encyclopedia of Comparative Law*, under the successive direction of K. Zweigert and U. Drobnig, of the Max-Planck-Institut fur auslandisches und Internationales Privatrecht in Hamburg, Germany.

[152] So the German Basic Law or Constitution was amended in 2002 to create a state obligation of protection of animals, though in ch. 2 ('Federation and States') and not in ch. 1 ('Basic Rights').

[153] See *Die Zeit*, 31 Oct. 1997, 8, 9 ('The Unjust Society', with statistics); 21 September 2000, 17-23; U.N. Population Fund, *State of World Population 2002 [:] people poverty and possibilities* (New York: United . Nations Publications, 2002) at 14 (gap between rich and poor, globally and within countries, has been growing); T. Pogge, *World Poverty and Human Rights* (Cambridge: Polity, 2002) at 99,100.

[154] So the civil laws of Europe became dominant, or extremely influential, in all of latin America, Africa, eastern Europe and Russia (before, and even during, socialist law) and exercised more limited but still important influence in Japan, China, and south-east Asia. Yet today there is a relative decline in influence, as other traditions criticize, and re-generate themselves. For the Russian case, W. Butler, *Russian Law* (Oxford: Oxford Univ. Press, 1999), ch. 2 ('The Pre-Revolutionary Heritage') yet acknowledging a 'multiplicity of legal orders' (at 29) and 'peasant customary law' (at 30).

western law in general. The common law tradition is also present in many parts of the world, and that also came about largely through colonization./So we should probably, for this reason alone, start thinking about the common law and the civil law as representing some of the same ideas, compared with other traditions. We can then talk about a universalizing western law (don't forget about human rights) once we've brought the common law tradition into the discussrea\ Before the common law got under way, however, islamic law began its accumulation of information.

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http://argentoratum.u-strasbg.fr/basesweb/DRANT/htm/RECHEMMENU.htm (research engine)
http://home.hetnet.nl/~otto.vervaart/canon_law.htm (canon law overview, literature, links)
http://home.hetnet.nl/~otto.vervaart/medieval_law.htm (roman law in Europe, links)

http://home.hetnet.nl/~otto.vervaart/roman_law.htm (roman law history, sources, links)
http://www.fordham.edU/halsall/sbook-law.html#index (roman law in Europe, germanic law)
http://www.iuscivile.com (roman law sources, literature, current teaching, research, links)
http://www.jura.uni-sb.de/Rechtsgeschicte/Ius.Romanum/english.html (texts, discussion, links)
http://www.jura.uni-tuebingen.de/kaiser/links.htm (only links)
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http://www.lgu.ac.uk/lawlinks/roman.htm (roman law texts, links)
http://www.netserf.org ('barbarian', canon, roman law)
http://www.pantheon.yale.edu/~haw6/gratian.html (Gratian scholars, links to texts, translations)
http://www.ucl.ac.uk/history/volterra/resource.htm (on line resources for roman law)

7

A COMMON LAW TRADITION: THE ETHIC OF ADJUDICATION

If islamic law entered a crowded field, in the first/seventh century, there was even more law, including islamic law, four centuries later, when the Normans set out across the channel, with territory in mind. The British Isles had known chthonic law, then roman law, then chthonic law again[1] (repeating in this the model of much of the continent), while the law of the christian church was increasingly present in civil life.[2] The commercial law of Europe was also emerging, in the (then) borderless world of trade,[3] while roman law (later described by Goethe as a 'diving duck'[4]) was re-surfacing. So there was no absence of law for the regulation of civil life in England, and no evident space for the emergence, still less creation, of a new and particular legal tradition.[5]

R. C. van Caenegem has therefore concluded that the best explanation for the existence of a common law tradition is the historical accident, or chance, of the military conquest of England by the Normansl By 'chance' he means simply circumstances for which we can give no adequate explanation, and certainly no legal explanation.[6] As a result of this historical accident, the first identifiable, modern state came into being in Europe, with defined (though largely geographical) boundaries and a central government. Given all of this, the Normans came to the conclusion that something could be *done* in the sense of developing a legal order responsive to Norman, as well as local, needs. Surrounded by animosity and strange languages, however, there were evident limits on what they could bring about. So, again, it does not appear possible here to speak of the creation of a tradition, but only of a birth, a small but important event, which would allow subsequent development to occur. The development was of a tradition we now know as that of the common law, but it was also, from a larger, European perspective, the development of a particular law, particular from the European circumstances from which it developed.

BIRTH AND DEVELOPMENT

The Norman, francophone heads of state of England put together the basic ingredients of the common law in about a century and a half after the conquest of 1066. If you put yourself in their place, and think what you would have done in the circumstances, you might have brought about the same results. There were obvious limits on what any clear-headed monarch might then do. On the other hand, in the eleventh and twelfth centuries many avenues were opening up in European law, and there were intellectual temptations to be enjoyed, or avoided. The result, we now know, was a cautious sampling of the new ideas (from the continent) while adapting them to the necessities of legal, political and social life among the franci and the anglici of England. The most famous analogy is that of an inoculation with roman law, generating immunity to it thereafter.[7] It might be just as accurate to think of a jump start, or a booting-up.

[1] Perhaps in slightly romanized form, since the Roman example has been seen as influential in the writing of the laws of Aethelberht, in the 7th century. Baker, *Introduction to English Legal History* (2002) at 2 (citing Bede). The Roman occupation had lasted for nearly the first 4 centuries AD. See W. Senior, 'Roman Law in England before Vacarius' (1930) 46 LQR 191. For the intervening 'pagan' legislation ('if an offensive word can be used inoffensively') in the Kingdom of Kent, H. Richardson and G. Sayles, *Law and Legislation from Aethelberht to Magna Carta* (Edinburgh: Edinburgh Univ. Press, 1966) (quotation at 1; arguing against Roman influence). Yet see, for the importance of pre-Conquest legislation, and existence of system of royal justice, though 'odds were stacked' against survival, given 'hazards of damp, fire or bookworm', P. Wormald, *The Making of English Law: King Alfred to the nth Century* (Oxford: Blackwell, 1999), citation at 479.

[2] Largely in the form of roman law prior to the emergence of a distinct body of canon law, but discernible in its use by the church in England prior to the arrival of the Normans. See Senior, 'Roman Law in England' (1930), above, at 193-6 (also for Anglo-Saxon bishops sitting as members of local courts prior to creation of separate ecclesiastical tribunals by Normans, fulfilling promise to papal authority). Early jurisdiction of ecclesiastical courts extended to matters of family law and succession, but also to more general forms of conscience-based, ecclesiastical remedy. See R. Helmholz, 'The Early Enforcement of Uses' (1979) 79 Col. L. Rev. 1503; S. Devine, 'Ecclesiastical Antecedents to Secular Jurisdiction over the Feoffment to the Uses to be Declared in Testamentary Instructions' (1986) 30 Am. J. Legal Hist. 295; H. Coing, 'English Equity and the Denunciatio Evangelica of the Canon Law' (1955) 71 LQR 223; and for Norman initiation of eccelesiastical courts, Hudson, *Formation of English Common Law* (1996) at 48-50 (noting much evidence of co-operation between ecclesiastical and lay courts).

[3] R. van Caenegem, *An Historical Introduction to Private Law*, trans. D. Johnston (Cambridge: Cambridge Univ. Press, 1992) at 83, 84 (commercial law constructed I2th-i5th centuries; written compilations emerging by 1150s); though for borough commercial fairs held in boroughs in Anglo-Saxon times, see Kiralfy, *Potter's Historical Introduction to English Law*, (1958) at 187.

[4] P. Stein, *Roman Law and English Jurisprudence Yesterday and Today* (Cambridge: Cambridge Univ. Press, 1969) at 3, citing J. P. Eckermann, *Conversations with Goethe*, trans. J. Oxenford (London: Everyman's Library, 1930) at 313.

[5] For the lack of specificity of English law prior to Norman development of it, van Caenegem, *Birth of English Common Law*, (1988) at 89,110; and on the variants of seisin, saisine and gewere prevalent both in the British Isles and on the continent, F. Joiion des Longrais, *La conception anglaise de la saisine du Xlle au XlVe siecle* (Paris: Jouve, 1924) at 43, Debate thus turned on whether the law was more roman or germanic. See Kiralfy, *Potter's Historical Introduction to English Law* (1958) at 631, with refs.

[6] van Caenegem, *Birth of English Common Law* (r988) at 106,107.

[7] H. Brunner, 'The Sources of English Law' in *Select Essays in Anglo-American History*, vol. II (Boston: Little, Brown, 1908) 7 at 42 (rendering the national law immune against 'destructive infection' of roman law).

only avenue for a Norman legal order, common to the realm, was through a loyal judiciary. This immediately marks off a common law tradition from all others. There was here no loyal chthonic people, no available revelation, no corpus of learned, indigenous doctrine. So, as monarch, you could not rely on God, the people, or your own legislation. You needed a corps of loyal adjudicators, able to bring a newer, more efficient and modern king's peace to the different parts of the realm. Of course, you couldn't name patricians, or nobles, to the judicial task, as did the Romans. Your nobility could only speak French; their's, of England, couldn't be trusted (to the extent they had survived). So some kind of permanent judicial officer was required, who could work in a controlled and efficient manner. The only choice for filling such an office, moreover, was that of priests, who could read and write and who were often already trained in canon (and civil) law.[8] Given that they could read and write, they could be given precise written instructions for the particular case (a paper trail), such that a priori and, if necessary, a posteriori control could be exercised over their activities. There couldn't be many of them, or they would cost too much (to the royal purse or to hapless litigants). And it would be wise to co-opt the population into their work, so if actual decisions were left to the local folks (they could be sworn, or jures) then the judges could just get the right questions asked in a number of cases, and be off to another town. Nor would there be, in principle, anything obligatory about proceeding in a royal court, as opposed to all the others, thick on the ground and often still using older means of proof (fire, water and all that).[9] So the faster, more efficient, more rational royal courts, using local knowledge, could just quietly insinuate themselves into the landscape, without costing too much, and subject (in the beginning at least) to some form of royal audit, just to know what was going on.

[8] See H. Cohen, *History of the English Bar and* Attorrlatus *to 1450* (London/Toronto: Sweet and Maxwell/ Carswell, 1929) at 151; R. Turner, *The English Judiciary in the Age of Glanvill and Bracton, c.* 1176-1239 (Cambridge/New York: Cambridge Univ. Press, 1985) at 88-107: Plucknett, *Concise History of Common Law* (1956) at 232-6 (cautioning, however, that not all clerical judges were canonists); Hudson, *Formation of English Common Law* (1996) at 133,134 (noting 'constant rearrangement'), 150,229.

[9] Cf., however, for defence of these techniques in the context in which they were used, above, Ch. 5, in introductory text; and for explanation of their use in English context, Hudson, *Formation of English Common Law* (1996) at 72, 77 ('no headlong rush for the supernatural', overall use 'seems to have been acceptable'); R. Bartlett, *Trial by Fire and Water [:} The Medieval Judicial Ordeal* (Oxford: Clarendon Press, 1986), notably at 26 (only employed absent other means) 139 (jury also thought of as a kind of ordeal); and for the entire importance of the judiciary in western traditions (unlike all other traditions) as derived from the christian idea that God could act directly in the administration of justice, R. Jacob, 'Le jugement de Dieu et la formation de la fonction de juger dans 1'histoire europeenne' (1995) 39 Arch, philos.dr. 87. Thus the German word for judgment, Urteil, remains directly derived today from the germanic ordal or ordeal. For the optional jurisdiction of the royal courts see Hudson, *Formation of English Common Law* (1996) at 116,139,140 (though King 'inviting claimants to come to him'); D. Stenton, *English Justice between the Norman Conquest and the Great Charter 1066-1215* (Philadelphia: American Philosophical Society, 1964) at 78 ('feudal justice should be good and the lords . . . responsible').

One can look at the development of this judiciary, and this judicial process, in two ways. The usual way is to look at what actually happened, and the best version of this holds that a process of 'judicialization' of royal disposition of complaints to the crown occurred.[10] First everyone came to the king, and his council, who then began referring things to the chancellor, who then began to ensure that things were properly looked at by some type of judge. The judges had to be who they were, since there wasn't anybody else, and the procedure was just right, for post-conquest circumstances. So local circumstances (even if accidental in origin) and intelligent local response seem essential in the birth of a common law tradition. Yet if you step back a little, and consider that all of this was going on while many of the same things were going on all over Europe, it also seems inspired by some larger patterns of western thought. There was a renaissance at this time throughout Europe (and the growth of islamic faith and science seem responsible in some measure for it).[11] Everywhere written forms of law were gaining ascendancy over chthonic ones; everywhere legal professions were being developed; everywhere there was abandonment of 'non-rational' forms of proof; everywhere there was the new teaching that human intelligence and law were compatible with one another, most evidently in the teaching of roman law. So the common law seems to emerge as both common and particular to England, and common and particular to Europe.

[10] van Caenegem, *Birth of English Common Law* (1988) at 34.

[11] See, for islam as the 'great threat of the age', leading to western Christianity developing 'an aggressive intransigence almost as a defensive reflex; it was a sign of its insecurities', J. M. Roberts, *A History of Europe* (New York: Allen Lane/Penguin, 1996) at 105-7,H9>145» 146, 160; and for islam providing 'the single greatest stimulus to what was eventually called "Europe"', all christians living earlier 'in Islam's shade', N. Davies, *Europe: a History* (London: Pimlico, 1997) at 266; on the general influence of the Crusades, and islamic influence through Spam and Sicily, see E. J. Passant, 'The Effects of the Crusades upon Western Europe' in J. Tanner, C. Previte-Orton and Z. Brooke, *The Cambridge Medieval History,* vol. V (Cambridge: Cambridge Univ. Press, 1926) 320, notably at 331 (for influence of muslim scholars of Spain, translations from Arabic of Greek philosophy); W. Watt, *The Influence of Islam on Medieval Europe* (Islamic Surveys, No. 9) (Edinburgh: Edinburgh Univ. Press, 1972), notably at 29 (most Europeans not aware of islamic character of what they were adopting), 60, 61 (by 12th century most Arab works of merit translated into Latin), 79 (turn to Greek philosophy partly inspired by European assertion of distinction from islam), 85 ff. (list of English words derived from Arabic, e.g., admiral, alcohol, alcove, banana, coffee, cotton, etc.); for the existence of muslim centres of higher education in the 3id/9th and 4th/ioth centuries, prior to the founding of western universities, B. Lewis, *The Middle East: 2000 years of History from the Rise of Christianity to the Present Day* (London: Weidenfeld and Nicolson, 1995) at 190,191; and for still earlier Chinese centres of higher learning, see below, Ch. 9, *Asian time and space.* Transmission of Greek learning to the west occurred largely through translation from the Arabic, facilitated in large measure by Jewish translators, as to which see R. Brague, *Europe, la voie romaine,* 2nd edn. (Paris: Criterion, 1993) at 55, 56, 87-91. For islamic legal texts included in these 12-century translations, M.-T. d'Alverny, *La connaissance de ITslam dans I'Occident medieval* (Aldershot/ Brookfield Vt: Variorum, 1994) at V 591-600, VI 238-45; and for arabic influence on Henry II (principal architect of common law institutions) and in the creation of Oxford University, C. Burnett, *The Introduction of Arabic Learning into England* (London: British Library, 1997), at 31-35,58-60, 61 ff. Thus the black academic gown, of Oxford and beyond, would be derived from those of Qum; V. S. Naipaul, *Beyond Belief [:] Islamic Excursions Among the Converted Peoples* (London: Abacus, 1999) at 217.

If 'modernization' is a European process, the common law was the first to do it, in its own way, but as part of a larger process.

English judges, as professional judges, were different from the amateur Roman ones^Yet the manner of judging was eerily similar to that of Rome.[12] In both cases the actual decision, the law-finding, was the work of amateurs: the judge or iudex in Rome, the jury in England. In both cases they acted on the basis of instructions, from the praetor in Rome, from the judge in England. And in both cases the complaint had to go through a process of screening: to conform to the praetor's edict in Rome, to be within the categories of written royal commands or writs which could be used to start up the royal procedures in England. The English judicial process, based on writs, may well have been an original construction.[13] The roman-continental procedure being used in the eleventh and twelfth centuries was the later, extraordinary procedure, in which open courts were simply seised of complaints and applied substantive law. English lawyers knew of this procedure, and one even wrote a book on it,[14] but there is no written trace of English legal knowledge, at this time, of the earlier roman formulary procedure. Either it was known, and influenced the English procedure, or this Roman/English way is just the only way to do it, the only way to set up institutions which will, over time, generate a tradition in law.

The other major influence on English legal institutions in these formative years appears to be islamic.[15] To develop the teaching necessary for the new legal professions, working in the royal courts, English lawyers eventually developed the Inns of Court, for centuries charged with instruction in the common law while legal instruction in Oxford and Cambridge was limited to roman law. The earliest inns, however, were attached to churches, as the madhahib were attached to mosques. The madhahib reached the height of their development, physical and intellectual, in the fifth/eleventh century, that of the Norman conquest of England. The first Crusade began in 1095; by the middle of the next century there were three famous schools or inns in London, attached to churches, pre-dating the Inns of Court, the Inns of Chancery and the earliest colleges in Oxford.'[6] Two of the surviving Inns of Court, moreover, the Inner Temple and the Middle Temple, were, according to tradition, closely associated with the Order of the Knights Templar, founded in Jerusalem in 1120. There they had quarters near the Aqsa Mosque near the site of the (destroyed) Temple of Solomon, hence their fuller name of the Poor Knights of Christ and the Temple of Solomon.[17] They established themselves in England in 1128, and not long after their property came to the lawyers. Thus, '[t]he origin of the inn as an institution of learning in the Christian West is historically connected with London and Paris; the inns of these two cities are in turn connected historically with the Holy City of Jerusalem. This type of inn, born in Baghdad and the eastern Caliphate, had moved westward to other great cities, including Jerusalem and cities throughout Spain and Sicily."[8] The Normans were also in Sicily, conquering Palermo in 1072 and governing this 'brilliant civilization ... [which] combined the best of the Latin, Arabic and Greek traditions'[19] until the end of the next century. They allowed islamic law to continue to be applied under their rule, and could not have been ignorant of its institutions. Norman exchange between Sicily and England, moreover, was intense.[20]

[12] Pringsheim, 'Inner Relationship between English and Roman Law' (1935).

[13] Yet see, for prior development of Anglo-Saxon royal writs, and for parallel Norman procedures of requenoissants, van Caenegem, *Birth of English Common Law* (1988) at 31, 82, 97; and on the English notion of'recognitions' (formal answers given by sworn jury to question of fact), R. C. van Caenegem, *Royal Writs in England from the Conquest to Glanvill: Studies in the Early History of the Common Law* (London: Selden Soc/ Professional Books, 1972) at 51. On the procedure of the writs, the forms of action, see below, *Lawyers' law: pleading to issue.*

[14] See the reference to the work on roman procedure by William Longchamp, 'King Richard's viceroy and the true rule of England' in G. Woodbine, 'The Origins of the Action of Trespass' (1924) 33 Yale L. J. 799 at 813.

[15] On the following, see G. Makdisi, 'The Guilds of Law in Medieval Legal History: An Inquiry into the Origins of the Inns of Court' (1985-6) 34 Clevel. St. L. Rev. 3; and more generally G. Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh: Edinburgh Univ. Press, 1981), notably at 287 (western developments roughly a century after those of islamic world, 'to resist admitting influence would be to continue the medieval attitude toward Islam').

[16] Makdisi, 'Guilds of Law' (1985-6), above, with references. The origins of the Inns of Court themselves have been traced to the 1340s; see J. H. Baker, *The Third University of England: the inns of court and the common-law tradition* (London: Selden Soc, 1990) at 7, 9, and there is widespread agreement on the existence of prior inns. See R. Roxburgh, *The Origins of Lincoln's Inn* (Cambridge: Cambridge Univ. Press, 1963) (origins of Inns of Court themselves may be associated with reforms of legal education of Edward I, notably Order in Council of 1292); H. Ringrose, *The Inns of Court* (London: Paul Musson, 1909) at 2 (prohibition of clergy acting in temporal courts led to settling of students in hostels or inns in 1207); D. Barton, C. Benham and E Watt, *The Story of Our Inns of Court* (London: G. T. Foulis and Co., 1924) at 4,7 (in 12th and 13th centuries schools of law in London under clerical control, extant records inadequate to trace development to organized institutions); R. Pearce, *A LListory of the Inns of Court and Chancery* (Littleton, Colo.: Fred B. Rothman, 1987) at l (seminaries for study of law in time of Stephen, 1135-54); P. Brand, 'Legal Education in England before the Inns of Court' in J. Bush and A. Wijffels, *Learning the Law: Teaching and Transmission of Law in England 1150-1900* (London/Rio Grande, Ohio.: Hambledon Press, 1999) 51, notably at 57 (for prohibition in 1234 of teaching of laws' in London).

On the Temples of Jerusalem, see above, Ch. 4, A Tradition Rooted in Revelation.

Makdisi, 'Guilds of Law' (1985-6), above, at 14, and making the larger claim, at 9, that the islamic schools developed the medieval scholastic method (sic et non, dialectic and disputation, generally attributed to Abelard in the 12th century).

Berman, *Law and Revolution* (1983) at 410,413 and 415 (for Norman creation in Sicily of competitive civil service examinations, possibly inspired by Chinese example, reported by muslim or Jewish travellers); Watt, *Influence of Islam* (1972), above, at 21, 25 (Roger of Sicily bringing islamic knowledge of world geography to west; also initiating use of paper to replace Egyptian papyrus, relying on Arabian refinement of Chinese techniques); and for the full, swashbuckling story, J.]. Norwich, *The Normans in Sicily: the magnificent story of the 'other Norman Conquest'* (London: Penguin, 1992), notably at 7 (importance given by nordic Normans to law), 52, 53 (islamic control of Sicily from 9th century tolerant of other religious traditions), 190-3, 442 (islamic law continued to be applied by islamic courts during reign of Roger II, Norman king of Sicily, in multiracial, polyglot, harmonious society; Roger 'genuinely admired' muslim civilization), 364 (Roger taught by Greek and Arab tutors), 464,518 (Roger surrounding himself with leading scientific advisers of Europe and Arab world, personally spoke Arabic; Arab group largest of advisers; Sicily then the 'cultural clearing-house of three continents'); P. Aube, *Les Empires normands d'Orient* (Paris: Perrin, 1991), notably at 167, 168 (on Norman respect for existing laws, particular respect for muslims).

[21] J. Makdisi, 'The Islamic Origins of the Common Law' (1999) 77 N. Car. L. Rev. 1635, notably at 1717 ff. (many Norman officials having homes in both England and Sicily, though voyage took 7 weeks).

The common law grew slowly in the plenitude of laws and legal institutions of medieval England. It did so by the accretion of learning around the royal commands, given by the chancellor, for the resolution of individual disputes. Each writ gave rise to a particular procedure to be followed, appropriate for the type of dispute. If you are not a common law lawyer, and even for many who are, the writs and forms of action are a world filled with darkness, complexity and, more recently, boredom. They are slowly losing their grip. But you can't really understand a common law tradition without understanding their broad outlines and function. They were all there was; outside the writs, there was no common law, no way to state a case or get before a judge. They also allowed the judge to attain, and maintain, priority of place in the hierarchy of common law institutions.

A writ took the form of instructions from the Crown to a royal officer (usually the sheriff, hence the classic expression, 'The King to the sheriff, greetings . ..') indicating what the sheriff had to do to advance investigation of a dispute. It might command the sheriff to require a defendant to appear and show cause; to seize properly unless a defendant justified the keeping of it; to empanel a jury; and so on. Maitland described each writ, with its accompanying form of action, as a 'pigeon-hole'. A plaintiff had to choose amongst them; there was no changing in mid-litigation (even if the case was filled with surprises) and it might well be that no writ was available. 'Where there is no remedy there is no wrong.'[21] So the common law came to be composed of a series of procedural routes (usually referred to as remedies) to get before a jury and state one's case. The jury enjoyed a monopoly on what we today call substantive decision-making. The system of writs (there were about 50 of them by the middle of the thirteenth century; six centuries later only another 25 or so had been added) profoundly influenced contemporary common law procedure and the judicial role, as well as substantive law.

In contemporary language the common law was therefore a law of procedure; whatever substantive law existed was hidden by it, 'secreted' in its 'interstices', in the language of Maine.[22] The procedure was, and is, unique in the world and may be today the most distinctive feature of the common lawJChthonic law had no trials, and little procedure; roman law used no jury; neither talmudic nor islamic law used (much) representation, and parties were expected to collaborate more than contest; in contemporary civil law it is the judge who investigates. In the common law world all came together to produce something radically differentjThe judge's function was not to decide the case; that was left to the jury. Yet the judge had things to decide, notably whether the case which emerged fell within the chosen writ; otherwise the court was without jurisdiction (choice of writ was not only binding, it contained all the royal authority which had been granted), Originally the jury knew all about the case (local knowledge, local law), so the task of lawyers was to argue about whether the verdict they wanted from the jury fell within the writ ('pleading to issue'). When witnesses eventually came to be necessary, the lawyers continued to plead to issue, and now brought forth the facts they needed, within the writ. The judge had no responsibility of finding 'objective' fact; nor did the lawyers.[2]? There was no external law stating with precision the facts to which it applied.lSirice the members of the jury had day jobs, and were usually illiterate, the argument and proof had to be made orally, in what came to be known as a trial\(as in the old trial by ordeal, but now radically made over). The trial is a dramatic event, and one in which the judge plays a commanding, but distant, role, as befitting a source of law. Freed from the burden of finding fact, advised on law and fact by the barristers (themselves historically benefiting from judge-like treatment, long enjoying immunity of function), the judge could concentrate on the general contours of the writs, the general contours of the law. Judicial rulings, by a very small number of royal judges working out of Westminster on circuit,[24] eventually came to define the ambit of the writs, encrusting themselves slowly, with no notion of stare decisis, on the skeletal language of the royal commands. tTEefe were only first-instance judges, no courts of appeal. The judges worked out themselves what was to be allowed. It was better not to suggest that they had erred.[25] And the jury, of course, could not.)

[21] Maitland, *Forms of Action* (1954) at 4, 5. Writs could also be addressed to feudal lords, requiring that justice be done in the feudal court (the writ of right). Ibid, at 6.

[22] H. S. Maine, *Dissertations on Early Law and Custom: lectures delivered at Oxford* (London: John Murray, 1883) at 389.

[23] Today the adversarial form of procedure is defended as the best means of ascertaining fact, though it never had this function originally. The argument is an indication of how far the common law has moved towards civilian thinking, in the sense of having to get the facts right in order to apply pre-existing law correctly. The civil law world has long accepted the necessity of getting the facts right, and has never allowed party presentation of them. Now both traditions are asking the same question, but there is a lot of conflictual rhetoric (e.g., 'inquisitorial' vs. 'accusatorial' procedures; cf. 'adversarial' and 'investigative'), discussed above, Ch. 5, *Constructing national law*.

[24] The technical expression is that of nisi prius. The case would be heard at Westminster, unless before (nisi prius) the royal judge came to the local assizes (sittings, as in assises) on the regular judicial itinerary or circuit.

[25] Notably because there were few criteria external to them to conclude that they had. There were, of course, exceptional possibilities for doing so, notably by alleging error of law on the face of the record (of the trial), such that subsequent review (by a group of first-instance judges sitting together—the Court of Exchequer Chamber—was possible. But since there was no written substantive law, there could be no error in its application. The jury, then as now, worked m strange and wondrous ways. The absence of courts of appeal in the common law, talmudic law and islamic law is therefore founded on quite different reasons. In religious traditions, there is law beyond the judges, but no judges with a final say, so the only remedy is to return to your judge, to ask for correction of error. In the common law there is no (written) law beyond the judges, so those (even) of first instance have a final say, and along with the jury on the merits. Given the prominence of the judge in the common law, the finality of their decision came to have fundamental importance in the emergence of common law conceptions of positive law, in spite of the judge's protests. See the discussion below, this Chapter, *Right reason*, and *Changing thought*.

If you made it through all that your writ required, and the jury believed you, you would win your easel So it is possible to say that the procedure implied a substantive law, on the merits; it was simply that no one other than the jury knew what it was. They were the law-finders. The writs were fundamental, however, since they determined when you could get to the jury, and they became the best available indicators of a secreted, substantive law. They indicated when a truthful, aggrieved party might obtain relief; they intimated obligation. Gradually, the great writs began to fill entire fields of human activity, which other lawyers (civilian, islamic, talmudic, hindu) recognized as fields of substantive law. There was a writ of novel disseisin (you have to get used to the old, now distorted, law French[26]—it means nouvelle dissaisine, for protection of those recently dispossessed of their land). It came to be supplemented, and even largely displaced, by a writ of ejectment (here, later, from the Latin), available for those not seised of land but having a contract of lease. There were no writs of family law; this was the domain of ecclesiastical law (and there was no divorce, adoption or legitimation until their legislative adoption in the nineteenth and twentieth centuries). There were writs for the control of other courts, a precursor of modern administrative law (more later).[27] There were particular writs of debt and covenant (both for liquidated sums of money, the latter available only in case of covenant under seal), which was about all the potential for commercial law there originally was. And there was the mother of all writs, trespass, originally for assault (un assaut) or battery (une batterie) involving direct application of force. It would gradually extend to the entire field of obligations, still showing the signs of its original compass.[28]

The writs thus reflected, above all, an agrarian, non-commercial, even chthonic society. The society would take on feudal structures, but this only meant giving structure to chthonic ways of life and not providing great impetus for legal change. The writs were indigenous creations, and the scholarship eventually devoted to them was complex and original, another form of interstitial rationality. Its complexity, and particular vernacular, provided a certain impermeability to exchange with other legal traditions, notably the roman and civilian. Yet the 'immunity' of the common law from civilian (and other) influence has been exaggerated (the later insular character of national law being early demonstrated in this first prototype).

[26] As to which, see J. H. Baker, *Manual of law French*, 2nd edn. (Aldershot: Scolar Press, 1990); J. H. Baker, 'The Three Languages of the Common Law' (1998) 43 McGill L. J. 5 (of three languages of French, Latin, English, during formative period of common law, English 'not the primary or even the secondary'); and for French first becoming written language in England and not in France), M. T. Clanchy, *From Memory to Written Record [:] England 1066-130/*, 2nd edn. (Oxford: Blackwell, 1993) at 18.

See infra, *Formal limits and informal accommodation.*

[28] See the discussion of various forms of trespass on the case, infra, *Changing secreted law,* and for initial 'murkiness' of trespass crystallizing into a formal requirement of directness by 1700, D. J. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: Oxford Univ. Press, 1999) at 14-17,159-

There were lots of other laws in England, and they influenced the common law both in its creation and thereafter. So the old, chthonic law got a new and vigorous means of enforcement and the re-surfaced roman law made perhaps its first real conquests in the new Europe. As revelation provided new garb for old law in other traditions, so the common law lawyers approved other ideas in limited and qualified form. Roman law was widely known. Lanffanc of Pavia, William the Conqueror's 'right-hand man', argued for the compatibility of roman and pre-conquest law.[29] A Lombard civilian, Vacarius, taught roman law extensively in the twelfth century.[30] Bracton used roman notions of real and personal actions to create notions of real and personal property, concepts unique to the common law.[3'] Old, shared concepts of seisin were rejected as common law courts individualized relations between land and its masters, in keeping with new civilian and canonical teaching.[32] The writ of novel disseisin would have its origins, for some, in the actio spolii of canon law, itself derived from the Roman interdict unde vi.[33] Until the end of the thirteenth century efforts were made to link the writ of right to the notion of proprietas and the possessory assizes to that of possession.[34] So there was never a reception of roman law in England, in the sense of an incorporation en bloc

[25] Pollock and Maitland, *History of English Law* (1898) at 77.

[30] F. de Zulueta and P. Stein, *The Teaching of Roman Law in England around 1200* (London: Selden Soc, 1990), notably at xxiii (Vacarius' main text, the Liber Pauperum, designed for those, still with us today, who 'could not face, or could not afford, the full texts'). On the influence of Vacarius and the role of roman law between 1150 and 1250, notably in relation to the works of Glanvill and Bracton, see W. Holdsworth, *Some Makers of English Law* (Cambridge: Cambridge Univ. Press, 1966) at 20, 21 (roman law as *ratio scripta* and not *jus scriptum;* decline of the influence of Bracton from the 14th century because practitioners became incapable of understanding roman law); G. Keeton, T/ie *Norman Conquest and the Common Law* (London: Ben, 1966) at 71 ff.; P. Vinogradoff, *Roman Law in Medieval Europe* (Cambridge/New York: Speculum Historiale/Barnes & Noble, 1968) at 97; P. Stein, *The Character and Influence of the Roman Civil Law* (London/Ronceverte, W. Va.: Hambledon Press, 1988) at 167-85; Kiralfy, *Potter's Flistorical Introduction to English Law* (1958) at 632-5; van Caenegem, *Birth of English Common Law* (1988) at 101 (notably on the 'non-automatic' character of the use of roman law); Q. Breen, 'The Twelfth Century Revival of the Roman Law' (1945) 24 Or. L. Rev. 244 at 282 ff.; Woodbine, 'Origins of Action of Trespass' (1924), above, at 812-15; F. Wieacker, 'The Importance of Roman Law for Western Civilization and Western Legal Thought' (1981) 4 Boston Coll. Int. and Comp. L. Rev. 257 at 260; H. Berman, 'The Origins of Western Legal Science' (1977) 90 Harv. L. Rev. 894 at 899.

Vinogradoff, *Roman Law in Medieval Europe* (1968), above, at 14,15; and see D. Seipp, 'Bracton, the Year Books, and the "Transformation of Elementary Legal Ideas" in the Early Common Law' (1989) 7 Law and Hist. Rev. 175. Glanvill's earlier treatise has recently been described, in thought and form, as 'more in accord with the sensibilities of Angevin-age continentals and continentally trained Englishmen than with native forms': B. O'Brien, 'The Becket Conflict and the Invention of the Myth of Lex Non Scripta' in Bush and Wijffels, *Learning the Law* (1999), above, 1 at 15.

The result left the way open for Equity's intervention and creation of the trust. See the discussion below, this Chapter, *The practice of comparison.*

Vinogradoff, *Roman Law in Medieval Europe* (1968), above, at 98, 99; Woodbine, 'Origins of Action of trespass' (1924), above, at 807. Prof, van Caenegem does not agree, for chronological reasons, but admits that the roman law of property would have influenced the development of basic concepts, van Caenegem, *Birth of English Common Law* (1988) at 387-90; and on the debate, J. Martinez-Torron, *Anglo-American Law and Canon Law [;] Canonical Roots of the Common Law Tradition* (Berlin: Duncker & Humblot, 1998) at 175-177 (withrefs).

See van Caenegem, *Royal Writs* (1972), above, at 311.

of roman rules, as occurred in Germany. Yet there are many identifiable Roman ideas in the common law, worked over, massaged and put to work in different ways and in different language. Once this process has started, there is a certain, underlying compatibility, in spite of differences. Between a writ system and continental, substantive law, there is no fundamental incommensurability. Nor is there incommensurability between a writ system and revealed law. So talmudic law in turn exercised great influence on the development of the common law from the eleventh century. The common law was, in its origins, largely a law of land. Excluded, however, from farming and land-holding, Jewish people had turned to commerce, and the resulting, talmudic, commercial law was highly developed. When English commerce began to emerge, talmudic practices, known because of jewish-gentile commercial relations, were a natural model for common law development.[35] Islamic law too, given the place of islamic learning in the then world, is now seen as having contributed substantially to the law which common law judges were beginning to develop.[36] It was a busy time.

A COMMUNAL LAW

A country can be conquered militarily but should not be governed militarily, bo the Normans incorporated the local jury into the working of their new, modern, royal courts. Yet the common law they set in motion was communal in many other ways. Even given military conquest (some were to say legal conquest is another thing)," it was not a brutal case of imposition of a conqueror's law. This came to be thought of as a possibility in later times, when law was only writing, but in the eleventh century you just couldn't think in terms of creating a new 'system' of law, or effecting legal change in large batches. How could you get rid of all the local, informal traditions, nesting here and there in the countryside? And with what? The process of insinuating a common law into a vigorous, and not very friendly, society, was a major undertaking, to be pursued on many fronts.

FORMAL LIMITS AND INFORMAL ACCOMMODATION

The common law was very much held in check by its originators. Its courts did not lay claim to large areas of exclusive jurisdiction, though they were available if people chose to use them. More obviously, the writ system limited the reach of the common law to that which received royal approval. So other sensibilities could be protected by the old and always useful technique of inertia, and there is much evidence that the congealing of the process of granting writs was due to pressure by feudal lords, who had their own courts to protect. So like roman law, but unlike all the others, there were formal, internal limits on the growth and reach of the common law, limits which its judges rightly felt incapable of overcoming. They had authority which was royal, beyond it they had nothing, and there was much which was evidently beyond it. Like the ius commune of Europe the common law of England was therefore suppletive law and not binding law. Its judgments were of course binding, once jurisdiction had been invoked, but there was no sense of binding everyone in the kingdom with a corpus of fixed rules. This would have obvious consequences for any identity to be derived frorn the existence of a common law.

Since the common law was necessarily and formally limited, it left much room for other types of law and other types of social glue. In this it had little in common with talmudic law or islamic law, nor for that matter with chthonic law.' So the separation of lawand morals is not simply a philosophical construction in common law history; it was just the way things were and in large measure had to be. Nor could morality inform and flesh out the common law once it came into being, as it was arguably to do in the civil law; the procedural thicket was protection not only against roman law but against invocation of higher orders. There wasn't even much place for law professors. Jesus would have approved.[38]

So the old chthonic law continued to be applied as in the old pre-conquest Hundred Courts, now in the local, feudal courts and by juries in the royal courts. Local people couldn't object much to royal justice if they themselves controlled the

[J5] See generally J. Rabinowitz, 'The Influence of Jewish Law on the Development of the Common Law' in L. Finkelstein, *The Jews: Their History, Culture and Religion,* 3rd edn., vol. I (New York: Harper and Row, i960) at 823, detailing reliance on talmudic models in matters of execution against land (the statute of elegit), recognizance, general release ('from the beginning of the world', reflecting the Jewish calendar), warranty of real property, dower, mortgage, conditional or penal bonds, trial by jury (initially by consent, as with the talmudic lay tribunal; language of'putting oneself on the jury found in talmudic records) and possibly even in the notion of the supremacy of the 'law of the land'; J. Rabinowitz, *Jewish Law [:J Its Influence on the Development of Legal Institutions* (New York: Block Publishing, 1956, ch's 18-22; J. Shapiro, 'The Shetar's Effect on English Law—A Law of the Jews Becomes the Law of the Land' (1983) 71 Georgetown L. J. 1179 (on Jewish gage, as source of mortgage). Jewish influence existed, moreover, prior to the Conquest and the arrival of Jews in England; Wormald, *Making of English Law* (1999), above, at 416 ('King Alfred and the Mosaic Tradition'). For acknowledgment of talmudic influence, see E. H. Burn, *Cheshire's Modern Law of Real Property,* 12th edn. (London: Butterworths, 1976) at 804, n. 2 (chapter omitted in subsequent edns.); and for John Selden (of the Selden Society, http://www. selden-society.qmw.ac.uk) as 'easily the greatest scholar in Jewish law among non-Jews', B. Cohen, *Jewish and Roman Law* (New York: Jewish Theological Seminary of America, 1966) at xxv. The influence of Talmudic law was, however, in some measure fragile. The early English law of assignment of claims, developed in first two centuries following the Conquest, essentially disappeared with banishment of Jews in late 13th century, re-emerging only in the 19th and 20th centuries. R. Zimmermann, *The Law of Obligations* (Cape Town: Juta, 1990) at 67.

[16] For Sicily as conduit for legal ideas from the islamic world to England, notably ideas of an action for debt, a possessory remedy for land, and trial by jury, demonstrating 'remarkable resemblance' between islamic and common law, Makdisi, 'Islamic Origins of Common Law' (1999), above; and for general influence of islamic learning, notably on Henry II, and the Sicilian connection, see above, this Chapter, *Of judges and judging.*

[37] See below, this Chapter, *Right reason.*

[38] On Jesus and the teachers of the law, see above, Ch. 4, *Talmud and corruption.*

decisions, and reliance on local ways gave needed legitimacy to the royal process. With the new relations between popes and kings extending throughout Europe from the eleventh century, formal ecclesiastical courts assumed jurisdiction over matters of family law, successions, even defamation, without transgressing any necessary jurisdiction of royal courts. Thereafter relations between ecclesiastical and common law courts were remarkably amiable, a process facilitated by clerics sitting as common law judges.[39]

Royal courts did, however, throw a web of 'natural' justice over the assembly of courts and institutions of the realm. Since they were available, they could be approached in the event of miscarriage of justice, or excess of jurisdiction, elsewhere. Their intervention in such cases would present no threat, however, to the competence of the other tribunal, nor to the law it applied. Indeed, supervision can be seen as reinforcing the true law and the true jurisdiction of the supervised court. The foundations of the present administrative law jurisdiction of common law courts is found in this process. As a result the common law courts still remain more distant from the merits than the administrative law courts of continental jurisdictions. The supervisory power was eventually to extend far beyond occasional prohibitions addressed to ecclesiastical authority, and to the full range of state agencies, but there remains a healthy respect for first-instance adjudication in the entire process of common law review ('deference' is what they now call it).[40] Much of the

[39] On the level of civility and mutual respect, see W. R. Jones, 'Relations of the Two Jurisdictions: Conflict and Cooperation in England during the Thirteenth and Fourteenth Centuries' (1970) 7 St. Med, & Renais. Hist. (0. S.) 77; W. Bassett, 'Canon Law and the Common Law' (1978) 29 Hastings L. J. 1383 at 1407 ff.; and on the process of 'compromise' in tricky situations, such as clerical common law judges having to participate in condemnations to death, see R. H. Helmholz, 'Conflicts between Religious and Secular Law: Common Themes in the English Experience, 1250-1640' (1991) 12 Cardozo L. Rev. 707, notably at 718 (the clerics simply withdrew; judges can always recuse themselves). Relations were also facilitated by frequent appearance by ecclesiastical lawyers in common law courts, acting as witnesses on points of spiritual law (ibid., at 723) and by the general type of process followed in ecclesiastical courts, which placed great emphasis on conciliation and particularity of cases, submerging any notion of formal rules (which could conflict with other formal rules) in the endless possibilities of 'factual' resolution of cases, recalling the islamic process (see above, Ch. 6, *Qadi justice and mufti learning),* as well as that of the common law itself (see below, this Chapter, *Right reason).* On the ecclesiastical procedure, see C. Donahue, 'Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-Examined After 75 Years in the Light of Some Records from the Church Courts' (1974) 72 Mich. L. Rev. 647 at 705. Ecclesiastical adjudicators, of course, had the same problems of mutual accommodation as common law judges, notably with local, chthonic law. See, e.g., H. Pryce, *Native Law and the Church in Medieval Wales* (Oxford: Clarendon Press, 1993).

[40] On review of ecclesiastical courts see Helmholz, 'Early Enforcement of Uses' (1979), above; R. H. Helmholz, 'The Writ of Prohibition to Court Christian before 1500' (1981) 43 *Med. St.* 297; G. B. Flahiff, 'The Writ of Prohibition to Court Christian in the 13th Century' (1944, 1945) 6, 7 *Med. St.* 261, 229; for expansion of the review power to state agencies, notably and initially over sewer commissions, see L. Jaffe and E. Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 LQR 345; and for the emergence of a continental private law/public law distinction in English law, see J. Allison, *A Continental Distinction in the Common Law: an Historical and Comparative Perspective on English Public Law* (Oxford: Clarendon Press, 1996) (distinction argued as inappropriate for traditional common law jurisdiction, lacking developed theory of state, systemic sense of law, separation of judiciary from administration, and investigative procedure).

reserve of common law judges may have been due to the paucity of their ranks; but then this itself may have been due to a larger vision of the necessity of common law reserve. For whatever reason, there was great reserve, even to the extent of leaving room for the emergence of still further courts, notably those of Admiralty and Equity. Their later emergence is profoundly related to the notion of change in a common law tradition.[41]

COMMUNAL RELATIONS

The communal character of the common law manifested itself in ways other than use of the jury and accommodation with other institutions. It reached into the manner of expression and functioning of the common law itself. Since the common law was limited and distinct from morality, its limits were in large measure societal limits, though formally (and negatively) expressed by the lacunae of the writsjThe common law, and the other laws, had their place, and while it could not be said that this flowed from some explicitly recognized principle, it worked itself out in the play of different institutions and in relations with the chthonic, feudal world. Briecommon law therefore had to express itself in terms of its surrounding society. To do otherwise would be to risk non-recognition, and non-acceptance. It had to reflect the society to be recognized as a part of it. Expressed otherwise, expressed in autonomous terms or roman terms, it would fail the test of discreet insinuation. So, even today, the common law is often expressed in language so historical in character as to be closer to talmudic or islamic law than to civil law.It could not, and did not, subsequently modernize itself, in terms of overall expression.

So there is still a law of torts (the plural is important) since there were no general principles of liability in England, only given wrongs, as in talmudic, roman and islamic law. The writ of trespass covered harm *directly* caused, which is different from harm *intentionally* caused, since there is immediate communal sense of directness, though little of intention. Other torts concerned fire, or trespass by cattle (direct enough, if you know cattle) or escape from land of dangerous commodities. It has subsequently proven difficult in the extreme to push the law of torts to the fields of non-patrimonial or purely economic damage. To the extent a law of contract developed,[42] it had to emerge *from* the facts it had to regulate, a natural conclusion from what had actually happened, so if the parties had paid for something, provided consideration, it followed they should have it. Juries could work with these ideas; they already knew them. They couldn't be given instruction in the normative effect of acts of will.

Land was not owned in the common law, but held and enjoyed. It still is, at least in formal expression. So there has never been, in the common law, an absolutist, legal concept of human mastery over land, no notion of dominium or ownership.

[41] See below, this Chapter, *Changing secreted law.*

[42] On the process, see below, ibid.

Use of land is defined in relational terms, all land being 'held' from the initial grantor, the Crown, in a way permitting indefinite enjoyment and succession. If you buy a house m the common law world today (unbelievable though this is to civilian lawyers) you become, not the owner, but the holder of a fee simple (fief simple), the highest form of free holding of land the feudal system allowed. It defined your *relations* with others in holding land. And the notion of seisin is still alive, the old, direct, God-given form of enjoyment and use, long after its disappearance (as saisine, gewere) in the romanized world. Common law judges thus took the common law along paths readily recognizable. If they could not find the way, they would not decide. Absent clear enough law, beyond themselves, there was no obligation to decide, so they didn't.[43]

RIGHT REASON

Juries didn't leave any record of how they thought, but there is written evidence of the judicial rationality used in the common law, in the process of defining the boundaries of the writs. Coke, in his struggle with the Crown in the seventeenth century (and Francis Bacon appears here again) spoke of 'the right reason of the law"[44] and by this did not mean the emergent legal rationality of Bacon and the Cujadists,[45] but an 'artificial perfection of reason,' one 'gotten by long study, observation and experience' and derived 'from many succession of ages', such that no one should presume out of 'private reason . .. to be wiser than the law, which is the perfection of reason'.[46] So right reason is rooted in a contextual tradition, an interstitial rationality, which moves within existing principles and categories and without imposing conclusions broader than those already, and explicitly, authorized. It is qiyas, analogical reasoning,[47] legitimated by consensus, or ijma,[48] as in islamic law (though here in no way conclusive, or definite). There were obvious reasons for this rationality being that of the common law. It flowed from its own manner of expression, necessarily rooted in societal phenomena, and from the absence of any higher authority (intellectual or positive) justifying more far-reaching forms of deduction and construction. There were only the judges, law-seekers and law-finders themselves, but whose decisions could not bind, could not serve as points of departure, since there were so few of them, and all were colleagues. Who could 'bind' a colleague, of equal talent, equal authority?

So the common law grew through the accumulation of precedent, though no concept of stare decisis—binding authority attaching formally to each decision-could possibly have existed throughout most of its history.[49] Cases were part of a body of common experience, to be used in further reasoning, but in no way constituting unalterable law.There was a notion of res judicata, once the jury had spoken, but not much more. The common law process, and common law rationality, had much in common with the ecclesiastical process, and the commonality of their processes facilitated relations one with the other. Neither set of judges elevated their work to the level of fixed rule; neither proceeded thereafter by way of ineluctable deduction from their own previous work; neither placed much premium on uniformity of result. Case reporting in the common law world reflected this situation; it was haphazard in the extreme (leaving much room for memory), and the expression 'chaos with an index' has been used.[50] If cases were reported, the reports usually ended with ' … and so to judgment'. Nobody, beyond the parties, cared who won." Nor did the judge's rationality impinge on local, chthonic law. It even served to perpetuate it, in the forrn of jury verdicts, and ran with it in the societal formulation of the writs. So the common law set itself up as the law of the realm, pre-dating even the conquest (which was only military) and re-inforced itself by this process of intellectual self-denial. [52]

A law of relations, of mutual obligations, is not a law which concentrates its

[43] See, on the judicial non-decision, Baker, 'English Law and Renaissance' (1985) at 58 ('If, after all that, they still had qualms—they did nothing. Judicial inaction was not seen as a dereliction of duty, as it would be today, because it encouraged and helped parties to settle their differences when the merits were balanced').

[44] Co. Litt., f. 183b. Coke borrowed the expression from Cicero, while bending it to his purpose. For Cicero, 'a true law namely right reason .. . is in accordance with nature, applies to all men and is unchangeable and eternal.' *De Republica* III, xxii.

[45] On the role of the continental-trained Bacon in advancing both science and civilian thinking, see above, Ch. 5, *Changing the idea of change.* Bacon sided with the Crown and civilian thinking, and said that the judges of the common law should be 'lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty.' Coke was not impressed. On the drama of the times see C. D. Bowen, *The Lion and the Throne: the Life and Times of Sir Edward Coke (1552-1634)* (Boston: Little, Brown, 1957); D. Coquillette, *Francis Bacon* (Stanford: Stanford Univ. Press, 1992), notably at 195 for Bacon's use of the lions metaphor and for the famous passage cited above as an addition in 1625 to earlier work; for continuing efforts of rational deduction of law, from basic features of human life, J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), and for the tradition of natural law in which this writing is situate, Ch. 5, above, *Law as reason's instrument.*

[46] Co. Litt., f. 97b.

[47] G. Postema, 'Philosophy of the Common Law' in J. Coleman and S. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford Univ. Press, 2002) 588 at 594 ('neither deductive nor inductive, but *analogical).*

[48] See above, Ch. 6, *The shari'a: sources* and *Subtle change;* J. Baker, *The Law's Two Bodies* (Oxford: Oxford Univ. Press, 2001) (notably at 4 ff. ('Common law as professional consensus') and passim for co-existence of formal sources of law with informal, oral tradition, notably of Inns of Court).

[49] See G. J. Postema, 'Roots of our Notion of Precedent' in Goldstein (ed.), *Precedent in Law* (1987) at 22; more generally, with rets, M. Lobban, *Common Law and English Jurisprudence* (1991); Lieberman, *Province of Legislation Determined* (1989).

[50] The expression is that of Sir Thomas Holland, cited by N. Marsh, Review (1981) 30 Int. & Comp. Law Q. 486 at 488. The remark parallels Alan Watson's description of the praetor's edict and the Digest of Justinian as chaotic'.. See above, Ch. 5, *The self-denial of roman law.* For recording of decisions, first and formally on parchment of the 'plea rolls' (costing the lives of over a million sheep, over six centuries), then informally of the judicial debate, in the Year Books, Baker, *Common Law Tradition* (2000) at 135 ff.; and for the rolls as derived from 'Arabic practice', Clanchy, *Memory to Written Record* (1993), above, at 140.

[51] See T F. T. Plucknett, *Early English Legal Literature* (Cambridge: Cambridge Univ. Press, 1958) at 103, 104 ('What the judgment was, nobody knew and nobody cared').

[52] On denial of conquest in law (and change only in the person of the king) as a doctrine of the common aw, see J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: a Study of English Historical Tliought in the l/th Century,* 1st edn. (Cambridge: Cambridge Univ. Press, 1957) at 16,17,68,69,126.

attention on the legal powers or interests of the individual. It is not a law of rights, and the notion of the subjective right (as they say in civilian language) played little or no role in the history of the common law in England. The existence of rights in English law has been denied well into the twentieth century,[33] and resistance in contemporary England to a bill of rights, or a right to privacy, is explained as much by unease with rights in general as it is to unease about their entrenchment or love of the reporting habits of the English press. Even with the incorporation of the European Convention on Human Rights into English law, the courts will not be able to strike down primary legislation, being authorized only to issue declarations of incompatibility between particular laws and Convention rights.[54] The English experience thus did not parallel the continental one, in which rights were developed as an important instrument in overcoming feudal hierarchy. The English judiciary might have had something to do with this, since they were never the object of physical attack (except for the odd brickbat, which the contempt power expeditiously dealt with). They were never seen as part of a hostile and distant autocracy in the way, say, the French judiciary was.[33] It was not a perfect judiciary, and its status was to change, but it had done a remarkable job of staying out oi trouble, and advancing the idea of a common law. Rights were not necessary in doing this, and would even have presented a jarring, discordant note in the process of faithfully reflecting the society. There was inequality in all of this, and in the beginning villeiny (another word for another kind of slavery), but the society had lots of instruments other than law to bring about change in itself. And the common law could itself be altered in ways contributing to equality, liberty and right, without renouncing its explicitly communal character.

INCREMENTAL CHANGE

A common law tradition, with the judge as its leading figure, thus emerged in the first century and a half following the Norman conquest. It is a tradition still recognizable today, at least in terms of the ongoing importance of the judge and judicial decisions. Yet like the ship of the Argonauts rebuilt in its entirety, there are few constituent parts of the original structure still remaining.[56] It's still the same ship and it's still the common law, but a twelfth-century English lawyer would find many surprises in the contemporary world of the common law, both in its society of origin, and beyond.

CHANGING SECRETED LAW

Both roman law and twelfth century continental law were accustomed to a limited concept of change. Roman law had changed, more precisely it had *been* changed, by Roman lawyers, and in the pan-European renaissance of the eleventh and twelfth centuries much of the old, chthonic law had also been changed. The common law took part in this process, and the Normans must have had a sense they were changing things in their reforms of the administration of justice. There was as yet no concept of changing the world, of the world as inanimate fact awaiting re-shaping, but law at least was amenable to some measure of re-forming. So we are again some distance from the chthonic world, while in the idea of a common law somehow autonomous, unto itself, any restraints of religion became rather marginalized. Lawyers were likely to be religious people, but they practised religious law in the ecclesiastical courts, not in those of the Crown. Still, the chthonic world was very much present in the common law mind (which had to worry about local juries and occasionally about local courts). And there were all those other jurisdictions to keep in mind—nice people in all of them but not likely to disappear by the stroke of a pen. So while the Roman lawyers exercised a kind of self-denial in the extent of change they wrought, the common lawyers exercised a kind of necessary self-denial. The place they had was one of many, and it might take, say, eight hundred years to bring about a unified court system.[57] Inertia is not the best way to describe this state of affairs; it has more to do with equilibrium. And while the common law judges, with the prestige, wealth and cunning of the national government behind them, were ascendant forces, they had to tread rather softly. So change in the law could occur, recognized as such and brought about from within by the lawyers and judges, but it was necessarily incremental change.

Internal incremental change came about in the expression of the law and in its avoidance. There were many tricks and fictions, in the islamic manner. To avoid the (then) prohibition of interest, living security (le gage vivant) was used (the lender kept the land used as security, and the profit from it). The dead security (mortgage) came later, with the allowance of interest, such that borrowers could just pay the interest and keep the fruits of the land for themselves. Fictions were many; they overcame territorial limitations of the court (so Harfleur, in France, became

[53] F. H. Lawson, '"Das subjektive Recht" in the English Law of Torts' in *Selected Essays*, vol. I (Amsterdam/ New York: North-Holland, 1977) 176 at 179, 182; G. Samuel, '"Le droit subjectif and English Law' (1987) 46 Cambr. L.). 264 at 267,286. This all in spite of the political declarations of the Bill of Rights of 1689.

[54] Human Rights Act, 1998, c. 42 (Eng.) (http://www.hmso.gov.uk/acts/acts1998/19980042.htm); Lord Irvine of Lairg, 'The Development of Human Rights in Britain under an Incorporated Convention on Human Rights' [1998] P. L. 221 at 225. Cf., however, indicating the contemporary importance of international and European human rights instruments, C. McCrudden and G. Chambers, *Individual Rights and the Law in Britain* (Oxford: Clarendon Press, 1994).

[55] On violence against the French judiciary during and following the French revolution, and the entire (abhorrent) notion of a 'gouvernement des juges' see above, Ch. 5, *The centrality of the person and the growth of rights* and *Law as reason's instrument.*

The analogy is that of Sir Matthew Hale, who insisted, unlike Coke, on the ability of the common law to change and adapt. See P. Stein, 'Legal History: The British Perspective' Rev. hist. dr. fir. etr. 1994.71 at 74.

See below, this Chapter, *Changing fundamentals: procedure*.

notionally situate in the county of Kent) as well as the rigidity of the writs (to sue with the newer and more flexible writ of ejectment, confined to leasehold relations, a disseised owner could invent a lease, and bring action in the name of the famous tenant, John Doe). The fictions maintained existing law (which must be a good thing), yet let everyone avoid it, for reasons considered entirely acceptable by everyone, including the judges. There were no more rigorous schools around to criticize them.[58] Categories of law were also recognized as of variable content. The fee simple of today is far from what it originally was, and now in effect is hard to distinguish from civilian ownership. And within the writs there was case, more precisely the action on the case, the action brought using the writ of trespass, alleging trespass, but alleging also that the circumstances of the particular case constituted a trespass, of sorts, so that trespass could extend to such civil wrongs as common law judges thought the common law should extend to. First, there was simple trespass, for direct infliction of damage (delict, if you wish to think civilly and in terms of intention), then trespass on the case for damage inflicted indirectly (the tree left on the road struck by the carriage, quasi-delict), then trespass on the case for an obligation assumed (indebitus assumpsit), such that by the sixteenth century the common law had gotten around to contractual obligation, at least where consideration existed, though breach of contract still exists as a kind of tort and lacks the independence of civilian notions of contract.[59] What the common law refused, or could not countenance, other courts would often pick up. If they responded to a petition for change, the common law did not have to. This too was a manner of change of the common law—contemplated by it, but left to others.

CHANGING FUNDAMENTALS: PROCEDURE

Roman formulary procedure survived for about eight centuries; so did the writs and forms of action. If you have formal law, that people know they can get to, with formal sanctions, maybe this is the length of time which limited or restricted institutions can last. By then the differential in treatment—some get in, some don't, which is not the same thing as winners and losers—becomes too abrasive a phenomenon in society. Someone will start complaining in intelligent fashion, not about particular cases, but about general inadequacies. If the institutions outside the law are not capable of bearing the load they used to, law has to become open, neutral in access (at least formally) so old privileges are not automatically perpeiuated.(We don't seem to know who did the complaining in Rome; maybe the switch to open courts (extraordinary procedure becoming ordinary) was just somebody's pet project. In England the complainer was Jeremy Bentham, who complained about almost everything in England, and particularly about the courts. He even wanted to codify the common law, overstating, like all good reformers, the possible objectives of reform. If you couldn't codify the substantive law, as they did in France, because there wasn't any, the only thing left was the procedure. This was the heart of the common law and if there were problems they were necessarily here. So the idea of changing the law, in some kind of fundamental way, necessarily meant changing the procedure, changing the writs and forms of action. This was done, of course, incrementally, over a half century, and in the dry, neutral-sounding language of procedure. Nobody would dream of talking about a revolution here, yet the effect on the common law was far greater than the effect of the political revolutions of France and the United States on the laws of those countries.[60]

The reforms essentially did three things. The first, in 1832, was to eliminate the requirement of a formal grant of a writ by the chancellor's office to inititate an action. Since the chancellor's office by now gave out writs almost as a matter of course, this really meant that action was conceptually freed from existing law. Whatever the possibilities of winning or losing, on whatever claim, suit could be brought. So the courts of the common law became open for the first time, as those of the continent had been for centuries and where it had become common practice to speak of a *right* of action. The substance of the right now existed in England, though nobody talked about it in these terms. After the practice of private issuance of writs (now just summonses to a defendant to appear, in standard form) had become established, the next step, in the mid-nineteenth century, was to tidy up. In the old pleadings you always had to state your writ and your form of action, that in which the action 'sounded', and the formal necessity of stating one's form of action had not been abolished by the new accessibility of the courts. People could sue, but their counsel still had to say, in writing and up front, before all the facts were known, on what ground they would eventually win. This was difficult, often impossible, and amendment a strange and mistrusted concept. So after open courts we got open pleading, or fact pleading ('code pleading' in the US, where by now there were codes of civil procedure), so people could just state their case (as in the old action on the case) and expect the law (now necessarily substantive, awaiting application, and no longer secreted) to be applied. And since now all manner of fact could be pleaded, in search of law, the jury could not really be expected to handle everything and became optional. It also became, very rapidly, highly exceptional in civil cases (except, again, in the US, where it had been constitutionally protected).

Thus, in the US, the forms of action survived well into the 19th century and began to be abolished only from the New York Field Code of 1848.

[58] On the fictions see L. Fuller, *Legal Fictions* (Stanford: Stanford Univ. Press, 1967).

[58] So in principle you could always allege tortious grounds of liability in case of breach of contract (choice of writ is the plaintiffs; breach of contract is a tort), as well as contractual grounds, though this is now beginning to be questioned, as it long has been in the civil law world (option or cumul). On the growth of assumpsit, see A. W. B. Simpson, *A History of the Common Law of Contract: the Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1975); for the underlying common law concept of contract being that of reciprocity, from which a notion of consideration was eventually developed (a narrowing), Ibbetson, *Historical Introduction Obligations* (1999) at 19-20,74, 80-83. This may have been 'germanic'; it also echos the islamic notion of mutuality, above, Ch. 6, *Substantive shari'a*, and for islamic influence in English law, above, this Chapter, *Of judges and judging, The secreted law*.

So from the mid-nineteenth century, common law judges had to decide cases, that is, decide cases on the merits (as we can now say) and by application of substantive law. Where they got the law from, and how they did it, is the whole story of the emergence of substantive common law. Part of the story is borrowing law from elsewhere (even God did this)[61] but another part is the famous process of converting old procedural rules into new substantive law. In Maitland's wonderful language, 'The forms of action we have buried, but they still rule us from their graves.'[62] This wasn't just sleight of hand. If you think of the writs and forms of action as a kind of visible mould, shaping though concealing the secreted law, removal of the mould leaves the revealed substance beneath, where you could previously get to the jury, and win if they believed you, it can now be said that you are entitled as a matter of substantive law (or more probably, that the defendant is obliged towards you as a matter of substantive law). So though the procedural reforms are fundamental in the history of the common law, they also provided a bridge between the old processual world and the new substantive world. The new substantive law bears all the marks, and uses much of the language, of the old writs. The judges still needed to borrow, however, because the writs only went so far. And siace judges were now deciding cases, the possibility of judicial error had become possible on the merits, in the process of matching now distinct concepts of fact and substantive law. So a court of appeal, like those of the continent, was required, and created in 1875. You even had two levels of appeal, again as on the continent, since, with permission you could go beyond the Court of Appeal to the House of Lords.) Not only were the relations between law and procedure essentially those of the civil law world, so now the structure of courts of general jurisdiction assumed the same three-level structure as that of continental courts (with the old, lush jungle of first-instance courts being largely fused as well).

These fundamental, incremental reforms did not otherwise affect the role of the judge or the role of the barrister in the litigation process, procedure remained adversarial, with the barrister enjoying great latitude in the conduct of litigation] While the judge now had to pronounce on the totality of a case, it remained true that the judge assumed no immediate responsibility for the adducing of evidence, nor for the overall management of litigation. So the judicial role was essentially limited to the trial process, and any incidental preliminary motions, and did not involve any more active participation in a case. Some now justify this in terms of judicial objectivity and impartiality, but the need for justification has emerged only since the nineteenth century reforms. Some century and a half after the reforms, their full effect has not yet been felt, and the role of the judge and counsel in litigation is now the object of profound debate, and further reform.[63]

[61] See, for islamic revelation of law previously known, above, Ch. 6, *The umma and its protection;* and for the common law process, below, this Chapter, *The practice of comparison.*

[62] Maitland, *Forms of Action* (1954) at 2.

[63] See below, this Chapter, *Common law and nation-states.*

Through all of this, however, the formal status of the judge remained what it had been since the Act of Settlement of 1701, when judicial nominations ceased to be made at the pleasure of the Crown and became quam diu se bene gesserint or during good behavioral. This is perhaps the single most important element of the common law tradition, towards which it built in the first six centuries, and which has sustained it thereafter. Nomination quam diu se bene gesserint means that a judge cannot be dismissed except by nearly impossible procedures (joint addresses to the two legislative Houses) and this has never occurred in England, nor indeed in much of the common law world. With judicial nomination coming closer to the end of a legal career than its beginning, there is no control of the career of a judge (as on the continent) and no effective means of dismissal. There are further elaborate guarantees of maintenance of salary, depending on the common law jurisdiction. In England there is also no present means of discipline of superior court judges, who also enjoy civil immunity in the exercise of their functions.[63] There is no prise a partie in the common law.

Why a common law tradition came to incorporate a formal principle of the independence of its judges is a large and interesting question. The principle exists, in such form, in no other tradition, so it is very much the product of everything in the history of the common law, which singled out the judge and the judge's decision as of fundamental importance, and this since the arrival of the Normans. There were also immediate political reasons, and the independence of the judiciary was clearly part of the overall constitutional struggle, and negotiations, of the seventeenth century, when the judges allied themselves with Parliament against royal executive authority. Beyond the historical reasons, however, it should be pointed out that the independence of the common law judiciary was acquired at an interesting time. It was the time of the enlightenment, a time of unleashing of all the forces of human creativity, imagination and talent. In the social and political world this meant giving direction to all things, yet here, in the common law judiciary, was creation of an institution incapable of direction (even higher judges could do nothing with lower, tenured judges). Moreover, in enlightenment thought, enlightened debate could yield consensus, and the judge could be part of this (largely political) process and need not enjoy any particular status. This is largely the position of judges elsewhere in the world, even in parts of the common law world, yet ultimately the common law, in creating an independent judiciary, hedged its bets on the enlightenment and on the prospects for rational consensus. Judges beyond the process of reasoned debate might still be necessary; if this turned out to be so, there would be still greater need for their independence, since in an enlightened, less contextual world, there would be still greater pressure for particular decisions to be made, vital interests to be protected. Yet the independent judge

See Lederman, 'Independence of Judiciary' (1956); S. Shetreet, *Judges on Trial: a Study of the Appointment and Accountability of the English Judiciary* (Amsterdam: North-Holland, 1976).

For variations in the common law world, however, see below, *Common law and nation-states.*

is free to pursue the law, and need enforce, as enforcer, no one else's law./ So independent judges come to apply the law, not because they are bound to, in any positive, legal sense (they are not bound to do anything, including the deciding of cases) but because they commit themselves to an ethic of independently administering justice, within the cadre of the law. They are freed to be law-seekers, and not law-appliers. They are self-disciplining loose cannons, dangerous for systems.

CHANGING THOUGHT

Legal thought in the common law world was profoundly impressed with the need for integration with society, so doctrinal initiatives were few and the more impressive when they existed, as in the case of Bracton and Littleton in the thirteenth and fifteenth centuries, then Coke again in the seventeenth century and Blackstone in the eighteenth. This judicial and doctrinal restraint was entirely compatible with chthonic and religious thought, so necessity also had the advantage of virtue. The internal growth of the common law, however, and the upheaval of the nineteenth century, could not have occurred without important intellectual shifts. On the continent, the major shift which occurred was that of the enlightenment, best typified by Cujas in the sixteenth century (roman law as fact, to be mined in constructing law of France, using comparative law as instrument)[66] and this was also, by and large, the century of the extension of the common law writ of trespass to contractual obligation, so a lot of thinking was going on in the world of writs. Professor Baker situates the source of English innovative thinking in the Inns of Court, from the period between 1490 to 1540 (even just a bit ahead of Cujas) and the process was one of a 'seemingly universal desire for more detailed law', which 'may have something to do with Renaissance humanism'.[61] Coke thereafter wrote *on* Littleton, and the shift is one towards the deductive, the filling out in more systematic manner of the implications of the old law. Comparative law also was taking place in England, with extensive research and writing on relations between common, civil and ecclesiastical law.[68] A lot of information was floating around for potential use. By the eighteenth century Blackstone's full statement of the common law purported to reproduce much of the old law, much of the inherently legitimate 'custom of the realm', but the enterprise was profoundly marked by systematization, roman classifications and a sense of law being national.[69] Blackstone was ambiguous about many things, but not about the idea of setting out the law.[70]

By the nineteenth century English thought had developed a large measure of compatibility with that of the continent. If Bentham's project of codification was simply an impossibility, the *general* idea of national, positive, constructed law now received a great deal of support subject to ongoing resistance to the role of logic as a common law instrument.The common law itself, however, could develop its own form of logic—a type of compromise—notably through the emergence of stare decisis, the idea that each decision of the court would represent a rule of law, somewhat similar to an article of a code, such that a system of positive rules could exist in England, the faithful, indigenous counterpart of the continental versions of the same underlying idea. So the nineteenth century saw two important ideas emerge, that of judges actually making law (and binding law at that)[71] and systematic, doctrinal treatises explicating the law of the judges.[72] There was a lot of ambiguity in this, since if judges are free and make law there are some problems with them being bound by pre-existing law. Yet there was enough coherence for people to begin to think of a common law, or at least English, 'legal system'[73] and English legal philosophy, which had come to exist, arguably made advances on continental theories of pure and positive law.[74] Case law could be shown to be every bit as systematic as legislation. Yet there have been many changes in common law theory and practice since the nineteenth century peak of positive, legal construction, and older, persistent notions of common law tradition are being sustained. The common law would thus not be a set of rules or laws but a 'practised framework of practical reasoning' in which 'no .. . formulation is conclusively authoritative."[5] It follows from this current formulation that stare decisis, notably,

[66] See above, Ch. 5, *Changing the idea of change.*

[67] Baker, 'English Law and Renaissance' (1985) at 46.

[68] See generally D. Coquillette, *The Civilian Writers of Doctors' Commons: Three Centuries of Juristic Innovation in Comparative, Commercial and International Law* (Berlin: Duncker & Humblot, 1988); B. Levack, *The Civil Lawyers in England, 1603-1641: a Political Study* (Oxford: Clarendon Press, 1973); on the influence of Henry Spelman and John Selden on the 'flowering' of 17th-century literature, 'under the belated influence of continental humanism', Stein, 'Legal History', above, at 73; and for ongoing influence of continental university training on English lawyers, J. Woolfson, *Padua and the Tudors: English Students in Italy 1485-1603* (Toronto/Buffalo: Univ. of Toronto Press, 1998), ch. 2 ('Students of Law').

[69] On subsequent autonomous statements of English law by writers avoiding 'incursions into both history and other legal traditions' and concealing 'the historical origin of much of what they transmit as homespun law', A. W. B. Simpson, 'Innovation in 19th Century Contract Law' (1975) 91 LQR 247 at 256,257.

[70] Cairns, 'Blackstone' (1984), notably at 350-1, on Roman influence; yet on the subtlety of Blackstone's writing, see A. Alschuler, 'Rediscovering Blackstone' (1996) 145 U. Pa L. Rev. 1.

[71] For stages in the growth of stare decisis, including the notion of'binding' law, through the 19th century, see J. Evans, 'Change in the Doctrine of Precedent during the 19th Century' in Goldstein (ed.), *Precedent in Law* (1991), above, at 45-54, 68; and more generally R. Cross and J. W. Harris, *Precedent in English Law,* 4th edn. (Oxford: Clarendon Press, 1991), notably at 24, 25 (precedents not being followed as late as 1869). At the same time, the judgments of the courts lengthened conside rably; J. L. Goutal, 'Characteristics of Judicial Style in France, Britain and the USA' (1976) 24 Am. J. Comp. Law 43 at 58,61-5.

[72] A. W. B. Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 U Chi. L. Rev. 632.

[73] I. Raz, *The Concept of a Legal System: an Introduction to the Theory of Legal System,* 2nd edn. (Oxford/ New York: Clarendon Press/Oxford Univ. Press, 1980), contributing equally to the civilian debate on the same theme, discussed above, Ch. 5, *Revolutions, systems, language and interpretation.*

[74] See notably Hart, *Concept of Law,* (1994), also discussed in the context of civilian theory of positive law, above, Ch. 5, *Positive law and positive science.*

[75] Postema, *Philosophy of Common Law,* above, at 597; and see J. Bell, 'Sources of Law' in P. Birks (ed.), *English Private Law* (Oxford: Oxford Univ. Press, 2000) 3 at 13 (common law decisions 'provisional statements of fundamental common law principles' which 'cross national boundaries').

is not what it was.[76] Yet the rationalist tradition achieved a more secure anchor in the common law in the nineteenth century, if not earlier in the sixteenth. The last (twentieth) century has thus been defined as 'a century of change', the change being an 'intellectual transformation' resulting from 'an interaction between the literature of the law and legal education' such that the 'paradigm of the common law as solely judge-made, so far as it survives, has become grossly misleading'.[77] The emphasis is here on doctrinal contribution to the law; there is now also legislation, as to which more must be said.[78]

Seen as a positive system, however, the common law, like the civil law, would have been broadly compatible with contemporary science. Both would be seen as positive endeavours, and the physical world has lost much of its sacred character. Francis Bacon may have been continental-trained, but he was an English lawyer.[79] So too is there a current idea of the law as language, and vast attention given to the impact of this idea on the process of interpretation.[80] And since the common law came to be thought of systematically, revolution against the definable system became a conceptual possibility. The common law has therefore known revolution, which brings us to relations within the larger world of the common law, and with the larger world.

COMMON LAW AND UNCOMMON LAW

A common law tradition must today be highly flexible and accommodating if it is to continue to provide some measure of commonality to the diverse legal orders which have been associated with it, at one time or another. From an islamic or talmudic perspective, there may appear to be schools of common law scattered about the world and, as in other complex, major traditions, some measure of internal tolerance is necessary to maintain an overarching tradition. So, as there

[76] See below, this Chapter, *Common law and nation-states*,

[77] Birks, 'Adjudication and interpretation in common law' (1994) at 159.

[78] See below, this Chapter, *Common law and nation-states.*

[79] See above, Ch. 5, *Positive law and positive science.*

[80] See P. Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (Oxford/New York: Blackwell, 1986); S. Fish, *Is there a Text in this Class? The Authority of Interpretive Communities* (Cambridge, Mass.: Harvard Univ. Press, 1980); J. B. White, *Heracles' Bow: Essays on the Rhetoric and Poetics of Law* (Madison, Wis: Univ. of Wisconsin Press, 1985); D. Klinck, *Tire Word of the Law: Approaches to Legal Discourse* (Ottawa: Carleton Univ. Press, 1992); O. Fiss, 'Objectivity and Interpretation' (1981-2) 34 Stan. L. Rev. 739; and for common foundations of civil and common law attitudes towards interpretation of legislation, P.-A. Cote, 'L'interpretation de la loi en droit civil et en droit statutaire: communaute de langue et differences d'accents (1997) 31 Rev. jur. Themis 45 (both civil and common law adopting principle of strict interpretation of texts derogating from a ius commune); R. Zimmermann, *'Statuta sunt stride interpretanda?* Statutes and the Common Law: A Continental Perspective' (1997) Cambr. L. J. 315 (arguing for more liberal, collaborative principles of interpretation, as prevailing in contemporary German law).

may be islams, so there may be common laws, though neither idea is uncontroversial. And since a common law tradition has diversified internally, its relations with other legal traditions have also intensified. There are therefore the ever-present questions of identity and exchange, though there are also major questions of domination and corruption, which coincide with similar questions concerning the civil law and its relations with the world.

COMMON LAW AND NATION-STATES

The common law expanded throughout much of the world as a result of the British empire, and this process of military, economic and legal domination must be returned to. The result, however, was a kind of embedding of common law thinking in a large number of diverse societies around the world, many of whom are now loosely knit together in the Commonwealth and the Commonwealth Lawyers' Association, neither of which, however, is co-extensive with the common law world. What has happened, generally, is the marriage of the idea of a common law with that of multiple nation-states, and the marriage has been at times a difficult one. Yet a common law tradition lived with many legal orders during its development in England, so it may still be possible to speak of a single common law tradition, since the tradition demands far less in terms of compliance than do other traditions, notably islamic.(So one can speak of islams, since deviations from such a demanding tradition are so important, yet a single common law tradition, since deviations don't matter much. The demands of the state may fit within a common law environment; they are much more difficult to square with the breadth and sanctity of islamic law. Yet the idea of a single common law tradition has been sorely tried, by national affirmation and national identities.

The diversity of opinion on the nature of a common law tradition in the world may be rooted in the ambiguity of the position of the common law in England. At some point an identifiable common law tradition had developed, though its relation with an English identity is far from clear. R. C. van Caenegem has concluded that 'because the Common Law had become part and parcel of her political constitution, an element of her national conscience and the foundation of her social order, England became an island in the Romanist sea'.[81] England, of course, with Scotland and Wales, was already an island, and the statement falls short of concluding that the common law was constitutive of English identity. Moreover, a common law tradition, with all those judicial loose cannons, could not play the same identifying role as other legal traditions, which extended to much more of life and often by way of previously given rules or principles. If you adhere to chthonic, talmudic, islamic or civil law, you have a pretty good idea of what this means, substantively. Adhering to a common law tradition was more difficult to do, if only

[81] van Caenegem, *Birth of English Common Law* (1988) at 105.

because the common law was so wraith-like for much of its existence. And today the idea of British nationality is much more amorphous and diverse than that of European civil law countries,[82] and much less important for resolution of private law problems, domicile being the preferred criteria for application of different national laws in matters of personal status, family law, matrimonial property law and successions. The common law, though identifiable, is a weak identifier. It can float around the world, but in so doing it provides little reinforcement for national identities. There is therefore the same tendency as has existed in the civil law world (there in terms of the ius commune) for the common law to be nationalized for purposes of national identify. Unlike chthonic, talmudic or islamic law, western law is controllable and may be given national direction. This is what makes it what it is. Controlling judges, however, is a more difficult process than controlling legislation. Nationalizing the common law means doing something with common law judges, doing something to the tradition itself.

This has happened most evidently, and deliberately, in the United States of America. Law in the United States is generally seen as adhering to a common law 'family',[83] but today this is far from obvious. In many respects US law represents a deliberate rejection of common law principle, with preference being given to more affirmative ideas clearly derived from civil law. These were not somehow reinvented in the United States but taken over directly from civilian sources in a massive process of change in adherence to legal information in the nineteenth century.[84] The entire process replicated the use of comparative law and foreign law which occurred in the process of national legal construction in continental Europe—Cujas in the new world. This was evident in substantive law, most particularly in the reception of the idea of rights, but still more evident in terms of structures and sources of law. Thus the common law was reconceptualized as a local, official product, as a 'means of fitting the common law into an emerging system of popular sovereignty'.[85] State judges could therefore not be independent, in the English sense (a denial of the claims of popular sovereignty), and a general pattern of judicial election emerged (though now reduced considerably in importance by subsequent reforms). State court citation patterns subsequently show a concentration on local law which closely parallels continental concepts of exclusivity of local sources.[86] And since each state had their judges and their common law, it followed in a federal structure that the federal government should also have its judges, and even its own common law. Madison's argument prevailed that '[a] government without a proper executive and judiciary would be the mere trunk of a body, without arms and legs to act or move'.[87] Judges thus became seen both as formal participants in government and as necessarily attached to legislative authority. A federal common law is not seen as a conceptual problem, and for much of the history of US law it was seen to exist even in so-called diversity cases, involving citizens of different states, which could be removed from state courts and given to federal judges for decision.[88]

Legislation in the United States has also assumed civilian proportions and often receives civilian treatment. Codes of civil procedure and criminal law exist in many states; California, the largest state, has a civil code. Legislation, moreover, receives a broad, liberal interpretation, in keeping with civilian doctrine, and this purposive form of interpretation has now returned to English law.[89] Even adversarial procedure is now declining in importance. Under the massive, civilian-style case-load,

[82] L. Fransman, *British Nationality Law and the 1981 Act*, 2nd edn. (London: Fourmat, 1998).

[83] David and Brierley, *Major Legal Systems* (1985) at 397 ff.; cf. A. von Mehren, *The US Legal System: Between the Common Law and Civil Law Legal Traditions* (Rome: Centro de studi e ricerche di diritto comparato e straniero, 2000). Useful overviews of US law are found in Morrison (ed.), *Fundamentals of American Law* (1996); Levasseur, *droit des etats-unis* (1994); A. E. Farnsworth, *An Introduction to the Legal System of the United States*, 3rd edn. (Dobbs Ferry, NY: Oceana 1996).

[84] See, as part of the expanding literature on the subject, P. Stein, 'The Attraction of the Civil Law in Post-Revolutionary America' (1966) 52 Va L. Rev. 403; W. Brison, 'The Use of Roman Law in Virginia Courts' (1984) 28 Am. J Legal Hist. 135; M. Hoeflich, *Roman and Civil Law and the Development of Anglo-American Jurisprudence in the 19th Century* (Athens, Ga.: Univ. of Georgia Press, 1997); M. Hoeflich, 'John Austin and Joseph Story: Two 19th Century Perspectives on the Utility of the Civil Law for the Common Lawyer' (1985) 29 Am. J. Legal Hist. 36; M. Hoeflich, 'Roman Law in American Legal Culture' (1992) 66 Tulane L. Rev. 1723; R. Helmholz, 'Use of the Civil Law in Post-Revolutionary American Jurisprudence' (1992) 66 Tulane L. Rev. 1649; J. Stychin, 'The Commentaries of Chancellor James Kent and the Development of an American Common Law' (1993) 37 Am. J Legal Hist. 440; J. Langbein, 'Chancellor Kent and the History of Legal Literature (1993) 93 Col. L. Rev. 547; M. Reimann (ed.), *The Reception of Continental Ideas in the Common Law World* (Berlin: Duncker & Humblot, 1993); E. Wise, 'The Transplant of Legal Patterns' (1990) 38 Am. J. Comp. Law (Suppl.) 1. For continuation of the process well into the 20th century, S. Riesenfeld, 'The Influence of German Legal Theory on American Law: The Heritage of Savigny and His Disciples' (1989) 37 Am. J. Comp. Law 1 (notably on highly abstract notion of'secured transactions', alien to prior common law thinking).

[85] Horowitz, *Transformation of American Law* (1992) at 20, citing the 1798 essay of J. Root, *On the Common Law of Connecticut.* State law reports also emerged at the same time, as official repositories of state common law. On the process of'Americanization' of the common law, Nelson, *Americanization of Common Law* (1975) and on its 'instrumentalization', Horowitz, *Transformation of American Law* (1992).

[86] J. Merryman, 'Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950,1960, and 1970' (1977) 50 Calif. Law Rev. 381, notably at 394-400 (citations to other state courts only some 10% of all citations; non-US citations less than 1%); L. M. Friedmann, R. A. Kagan, B. Cartwright and S. Wheeler, 'State Supreme Courts: A Century of Style and Citation' (1981) 33 Stan. L. Rev. 773; W. Manz, 'The Citation Practices of the New York Court of Appeals, 1850-1993' (1995) 43 Buff. L. Rev. in, notably at 153 (citations to foreign authority 25. 7% of citations in 1850, less than 1% in 1950, 0% by 1993).

[87] See J. Elliot (ed.), *Debates on the Adoption of the Federal Constitution at the Convention held in Philadelphia* (1907) at 158, 159, as cited in H. A. Johnson, 'Historical and Constitutional Perspectives on Cross-Vesting of Court Jurisdiction' (1993), 19 Melb. U. L. Rev. 45 at 51, n. 32.

[88] *Swift* v. *Tyson*, 41 US (16 Pet.) 1 (1842). The decision was later reversed, in *Erie R. R. Co.* v. *Tompkins*, 304 US 64 (1938), not so much on the ground of the irreducibility of the common law, but so as not to impinge on state sovereignty, and state control of common law in state matters. On federal common law beyond the context of diversity cases, M. A. Field, 'Sources of Law: The Scope of Federal Common Law' (1986) 99 Harv. L. Rev. 883 (though restraint exercised in its development). For the resistance of other common law jurisdictions to the idea of a federal common law, see below, this section. Cf, for a civilian jurisdiction's codification of it, the Mexican Codigo civil para el Distrito Federal en materia Comiin y para toda la Repiiblica en materia Federal.

[89] Pepper v. *Hart* [1992] 3 WLR 1032 (HL) (allowing reference to Hansard record of Parliamentary debate). Simply giving legislation its 'plain meaning'—the historical attitude of the common law—has therefore become highly controversial in the US, in spite of its recent re-appearance in certain judgments of the US Supreme Court.

leaving the conduct of litigation in private hands is seen as creating unnecessary delay and expense, so the 'case management' judge has emerged, drawing closer to the civilian judge's management of procedure (le juge de la mise en etat). 'Case management' is now also being implemented elsewhere, notably in common law Canada and, most recently, England.[90] The case-load is also the malady which has most affected the notion of stare decisis. Given open courts, and millions of decisions, it turns out to be very difficult to say that each represents a rule of law. The same problem has also surfaced in England, where it has been said that the notion is finally self-destructing, since all decisions must be reconciled in attempting harmonious statements of law.[91] Decisions must be batched, to ascertain their drift, to see if there is a jurisprudence constante.[92] Efforts are made to *prevent* citation of cases, or at least 'unreported' ones, though this encounters resistance.[93] Stare decisis appears now, with hindsight, as a quick fix, the starch necessary to make the new substantive common law take hold. The actual cases, the decisions, now fade, necessarily, in importance. So the problems of the civil law are also becoming the problems of the common law, and there is much greater room for collaboration and mutual understanding, even given the magnitude of the problems.

Still, common law thinking retains a vital place in US law. Federal judges are independent; and federal courts exercise major powers of supervision and control over state courts (diversity jurisdiction, removal by defendants of cases involving diversity or federal questions to federal courts, Supreme Court review on constitutional grounds, necessary adherence by state court judges to guarantees of Bill of Rights, as federally interpreted). So the concept of the common law as state politics, as local, political consensus, is hedged. There is still a distant judiciary to call in aid, as in the old practice. And cases are thought to be important, subject to systematic reporting (now by computer, and including first-instance decisions) in a way historically unthinkable in the civil law world. And the old idea of a trans-national 'Anglo-American' law is not dead, and may even be reviving, though its practice at the judicial level has been faint indeed.[94] So to the extent that a common law tradition is best represented by the place given to independent adjudication, it is still present in the United States

The particular genius of US law, however, has been its constructive combination of elements of both civil and common law. Grant Gilmore observed that US lawyers were 'convinced eighteenth-century rationalists', in the French tradition, while at the same time, US law would represent 'the arrogation of unlimited power by the judges'.[95] This is most evident in US constitutional law, where individual rights and judicial power have become the major and distinctive features of US government, though now often emulated abroad. Rights have changed in this process. From individual powers or potestas of private law they are now generalized, as simple 'interests' or political claims protected by law, capable of protection by the broad sweep of constitutional decision.[96] How this all came about is not entirely clear. From a legal perspective the US revolution is another historical accident, or chance, the precise explanation for which may always escape us. Some, running against the traditional 'nation-building' explanation, simply ascribe it to the stupidity of the English Colonial Office.[97] Yet the affirmative construction of US law seems more amenable to legal understanding. Compared to the Normans, US lawyers had an open field—or conceptually created one by marginalization of

[90] See the report of Lord Woolf, *Access to Justice, Final Report* (London: HMSO, 1996), yielding new Civil Procedure Rules in 1999; commented on critically by A. Zuckerman, 'Lord Woolf s Access to Justice: Plus ca change…' (1996) 59 MLR 773 (underlying problem of cost and delay caused by financial incentives to lawyers to complicate litigation; case management inadequate to entirely remove such incentives; German model of fixed fees according to value of litigation proposed); and on the relation of case management to the adversarial system, contrasting 'procedural justice' (dispute resolution) with 'substantive justice' (ascertaining truth), see J. A. Jolowicz, 'The Woolf Report and the Adversary System' (1996) 15 CJQ198.

" J. A. Jolowicz, 'Decisions de la Chambre des Lords' (1979) at 525 (law thus found not in single decison but in many); Atiyah and Summers, *Form and Substance in Anglo-American Law* (1987) at 121,122 (asking 'what is left of *stare decisis?).* The formal weakening of stare decisis occurred in England in 1966, with the Practice Statement of the House of Lords that it would no longer be bound by its own decisions, the practice followed since 1898. See Practice Statement (Judicial Precedent), [1966] 1WLR1234; [1966] 3 All ER 77; and for the prior practice, *London Street Tramways Co.* v. *London County Council* [1898] AC 375. Yet the real decline of the concept is in its practice, in the reduced normative force of first instance courts, courts of appeal and supreme courts. A Commonwealth judge has written that '[t]he attraction of precedent is waning in common law Canada probably even faster than in England': K. Mackenzie, 'Back to the Future: The Common Law and the *Charter'* (1993) 51 Advocate 927 at 929, 930. The US Supreme Court has never considered itself bound by its own decisions, though an initially rigorous concept of stare decisis for lower courts dictated the practice of per curiam decisions, in the name simply of the court. See, with further ref., H. P. Glenn, 'Sur 1'impossibilite d'un concept de stare decisis' Rev. rech. jur. Droit prospectif 1993.1073.

"[2] Goutal, 'Characteristics of Judicial Style' (1976), above, at 52, on computer search of case law in the US ('nothing normative in this process, no appeal to hierarchy or formal authority … without any hint 01 anything binding'); and for further destabilisation in the US through electronic case retrieval, R. C. Bernng, 'Legal Information and the Search for Cognitive Authority' (2000) 88 Cal. L. Rev. 1675, notably at i693 (admitting that 'few people ever truly mastered the Digest System . .. staggeringly complex … soon was understandable only to its makers'). For the common law consisting of'rules that *would be* generated at the present moment by application of the institutional principle of adjudication', see Eisenberg, *Nature of Common Law* (1988) at 143 (emphasis added).

[53] H. P. Glenn, 'On the Reciprocating Ethics of Jurist and Judge', forthcoming (2004) Int. & Comp. L. Q.

See Langbein, 'Chancellor Kent and History of Legal Literature' (1993), above, at 567 ('we still for many purposes think of the English and American legal systems as comprising an inseparable entity called Anglo-American law'); Atiyah and Sommers, *Form and Substance* (1987) (commensurability of English and American law though profound differences); A. M. Kennedy, 'Our Shared Legal Tradition' in American Bar Association, *Common Law, Common Values, Common Rights* (San Francisco: West, 2000) at xxi; for the United States Supreme Court recently opening itself to foreign authority, *Lawrence* v. *Texas,* 539 US _ (2003), and on background of the decision, J. Nafziger, 'International Law and Foreign Law Right Here in River City' (1998) 34 Willamette L. Rev. 4 at 19 ft.

Gilmore, Ages *of American Law* (1977) at 10,35.

For the breadth of rights, R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard Univ. Press, 1978).

See, e.g., D. Cook, *The Long Fuse: England and America, 1760-178$: a British Perspective on the American Revolution* (New York: Atlantic Monthly Press, 1995); and on the US revolution as 'one more English revolution', with the 'rhetoric of the revolution . .. borrowed from Europe and … [its] leaders .. . pursuing an old-world image of themselves', E Fernandez-Armesto, *Millennium* (London/New York: Bantam, 1995) at 3[2]5 (thus foreshadowing the derivative nature of many contemporary movements towards national statehood).

chthonic American law. So there was no need for restraint, to protect local sensibilities, no need to reflect local patterns of life, to legitimize a novel undertaking. Local patterns of life were to be created, and law was the instrument for doing so, according even to much (civil) law in the old world. The frontier was not only physical; it was also legal—uncharted legal land. To create the new national identity, the common law could not simply amble on; it had to be harnessed in much the same way law had been harnessed by the French kings. Law here fulfils a function of identifying people in the same way that it historically did for Jewish and islamic people, though the identity is a new and secular one. The law may not be the common law as it has been, but the common law has always known a concept of change.

Elsewhere in the world a common law tradition continues to be shared amongst different countries, whose identities in law are thereby diluted, though without apparent prejudice to nation-state existence. Citation patterns indicate a high level of inter-jurisdictional use of precedent, of persuasive authority;[98] a shared notion of a common law has impeded federalization of court structures, either through maintenance in principle of a unitary court system, as in Canada, or through an 'autochthonous expedient' of leaving much federal-matter litigation to state courts, as in Australia.[99] There is in principle no federal common law in these countries, nor even state or provincial common law. The common law keeps on floating. It does so in spite of some formal recognition of the idea of separate and distinct common laws in the Commonwealth,[100] so a common law tradition also has its 'these and these' logic,[101] its doctrine of ikhtilaf.[102] There is something beyond positive decisions which is constitutive of the common law.[103] Yet geography and professionalization of the judiciary have affected the status of the judges. Judicial discipline is now known in the common law world, both in the United States and elsewhere, and the notion of holding office during good behaviour has slowly become compatible with official reprimand.[104] The discipline of judges, however, is an affair of judges.

The identities of those who adhere to the common law are not well protected by it, though a concept of blasphemy has traditionally formed a part of the common law, protecting Christianity in some measure though not other religions, or at least not islam.[105] Otherwise identity is protected only by national concepts of treason and sedition, as in the civil law world, while exit through change of nationality or, more easily, domicile (which attracts private law), is now commonplace, in spite of earlier common law notions of indefeasible allegiance (at least for purposes of military service). As in civil law countries, identity is now protected mostly by protection of national borders, and the state is as much an obstacle to liberty of movement in the common law world as in that of the civil law. Though the common law may float, statutory law does not, and access to it is stricly controlled. Human rights here do not prevail over their national, positive and territorial articulation. And as in states of the civil law tradition, recognition of distinct legal identities within national territory is problematical, except with respect to chthonic populations (in some instances) and through the operation of formal rules of private international law (which accommodate foreign status and foreign law only in cases of a significant 'foreign' connection).[106]

THE PRACTICE OF COMPARISON

For most of its history the common law was in the *process* of becoming a common law, and its history is above all one of relations with other laws, themselves also common in considerable measure, both in England and in Europe. This was the case with chthonic law, its earliest and most significant interlocutor, and then with ecclesiastical law, once the ecclesiastical courts were up and running. In examining the growth of the common law we have necessarily spoken of unavoidable reciprocal influences and also, more interestingly, of the underlying harmony of

[98] See, with refs, Glenn, 'Common Law in Canada' (1995) at 283 ff. ('Patterns of common authority'); and more generally Glenn, 'Persuasive Authority' (1987).

[99] H. P. Glenn, 'Divided Justice? Judicial Structures in Federal and Confederal States' (1995) 46 S. C. L. Rev. 819; and for recent Australian developments, B. Opeskin and F. Wheeler (eds.), *The Australian Federal Judicial System* (Melbourne: Melbourne Univ. Press, 2000), notably on refusal of Australian High Court to allow further transfer of jurisdiction from state to federal courts).

[100] See H. Marshall, 'The Binding Effect of Decisions of the Judicial Committee of the Privy Council' (1968) 17 Int. & Comp. Law Q. 60; J. Crawford, *Australian Courts of law* (Melbourne: Oxford Univ. Press, 1982) at t7i ('The common law become not one but many'); Laskin, *British Tradition in Canadian Law* (1969) at 60.

[101] See above, Ch. 4, *Of schools, traditions and movements.*

[102] See above, Ch. 6, *Of schools and schism.*

[103] See, e.g., K. M. Hogg, 'Negligence and Economic Loss in England, Australia, Canada and New Zealand (1994) 43 Int. & Comp. Law Q. 116, notably at 117 ('divergence *in* the common law' [emphasis added]); A. Watson, 'The Future of the Common Law Tradition' (1984) 9 Dalhousie L. J. 67 at 84 ('many of the rules have a common origin which still influences the understanding of them, even if they have come to diverge from one another in the different jurisdictions'); and more generally Matson, 'The Common Law Abroad (1993) notably at 754 (date of formal reception of English law largely irrelevant); Harding (ed.), *Common Law in Singapore and Malaysia* (1985); yet for the inevitable particularity in the process, see, e.g., P. Girard, 'Themes and Variations in Early Canadian Legal Culture: Beamish Murdoch and his *Epitome of the Laws of Nova Scotia* (1993) 11 Law & Hist. Rev. 101; and for reception of the common law in the South Pacific, in Somea, without a 'cut-off date' and as it exists 'from time to time,' J. Care, T Newton & D. Paterson, *Introduction to South Pacific Law* (London/Sydney: Cavendish, 1999) at 72.

[104] See, for a case of judicial discipline by way of criticism or reprimand of a high court judge, resulting in his resignation, 'Report and Record of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger and Resolution of the Canadian Judicial Council' (1983) 28 McGill L. J. 378; and for the growth of judicial disciplinary agencies, H. P. Glenn, 'La responsabilite des juges' (1983) 28 McGill L. J. 228, at 244 ff.

[105] *R.* v. *Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 QB 429 (common law offence of blasphemy for historical reasons restricted to scurrilous vilification of christian religion; *The Satanic Verses* of S. Rushdie therefore not blasphemous); for the 'fading away' of the the idea in the process of reception of the common law in the USA, however, see S. Banner, 'When Christianity Was Part of the Common Law' (1998) 16 Law & Hist. Rev. 27.

[106] On the debate concerning treatment of minorities adhering to other legal traditions, in both civil and common law traditions, see above, Ch. 3, *The state as middle ground* (chthonic), Ch. 4, *Talmudic retreat?*, Ch. 6, *The islamic diaspora*, and below Ch. 8, *Universal tolerance?* (hindu).

this process. This came about because of common law judges coming from an ecclesiastical background, and exercising powers of review over feudal courts, and also because of shared perspectives on procedure and a refusal to give priority to fixed abstract rules or to uniformity of result. Rules are not seen as being in conflict if the rules count for less than the facts. And while roman law was not represented in England by means of particular courts, the same intellectual perspective has been found to exist towards roman law. Vinogradoff thus remarked that there can be no question of *measuring* the influence of roman law, institution by institution and reference by reference, on English law, but only of examining in a general manner the development of legal ideas.[107] Since the ideas floated, the law floated, and no one was very interested in tracking precise results (within certain pre-determined boundaries). The process was necessarily casuistic, since it disposed of cases, but cases did not make law and cases were therefore not in conflict. Beyond the common law, the same attitude appears to have prevailed in ecclesiastical law, and Maitland severely criticized the thesis of Stubbs that English ecclesiastical courts were best seen as acting in a manner which was formally independent from the ecclesiastical courts of the continent.[108]

The process of nesting of general legal ideas in particular institutional and historical contexts is perhaps best seen in the development of the trust. Much effort has been expended in attempting to ascertain a precise antecedent to the trust in other laws. So it has been seen as specifically derived from the roman fideicommissum, the germanic Salmann, and the islamic waqf (the Crusades again, reinforced by St Francis' visit to Egypt prior to the growth in England of gifts for pious purposes).[109] Yet all these arguments suppose the existence of rules of law as they are thought of

[107] Vinogradoff, *Roman Law in Medieval Europe* (1968), above, at 117,118.

[108] F. W. Maitland, 'Church, State and Decretals' in F. Maitland, *Roman Canon Law in the Church of England* (London: Methuen, 1898) at 51; van Caenegem, *Royal Writs* (1972), above, at 361, n. 2, with refs; C. Donahue, 'Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-Examined After 75 Years in the Light of Some Records from the Church Courts' (1974) 72 Mich. L. Rev. 647 at 700; S. Whittaker, 'An Historical Perspective to the "Special Equitable Action" in *Re Diplock*' (1983) 4 J. Legal Hist. 3 at 21-3; and more particularly on the influence of papal bulls in England, C. Duggan, *Canon Law in Medieval England* (London: Valorium Reprints, 1982) at 365 ff.; C. Duggan, *nth-Century Decretal Collections and their Importance in English Legal History* (London: Athlone Press, 1963), notably at 146-55.

[109] For the fideicommissum, D. Johnston, *The Roman Law of Trusts* (Oxford: Oxford Univ. Press, 1988). The romanist thesis was opposed by Holmes, who saw germanic origins, in the Salmann or Treuhand; O. W. Holmes, 'Early English Equity' (1885) 1 LQR 162; and for the debate, H. P. Glenn, 'Le *trust* et le *jus commune*' in P. Legrand (ed.), *Common Law d'un siecle I'autre* (Cowansville, Quebec: Yvon Blais, 1993) at 87, repr. in English as 'The Historical Origins of the Trust' in A. Rabello (ed.), *Aequitas and Equity: Equity in Civil Law and Mixed jurisdictions* (Jerusalem: The Harry and Michael Sacher Institute for Legislative Research and Comparative Law, The Hebrew University of Jerusalem, 1997) at 749; R. Helmholz and R. Zimmermana (eds.), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (Berlin: Duncker & Humblot, 1998). For the waqf, H. Cattan, 'The Law of Waqf in M. Khadduri and H. Liebesny, *Law in the Middle East*, vol. I, *Origin and Development of Islamic Law* (Washington, DC: The Middle East Institute, 1955) at 203, notably at 214, [21]5 (chronology 'favorable in support of the derivation of uses [and later trusts] from waqf); for St Francis in Egypt, see Passant, 'Effects of Crusades' (1926), above, at 325; and for traces of him also in Sicily, where Arab thought contributed to a brilliant civilization, Norwich, *Normans in Sicily* (1992), above, at 5.

today, and precise legal institutions, such as the trust, such that some kind of precise transfer could take place from one bounded legal 'system' to another. Earlier lawyers didn't, however, appear to think that way. So the trust may be seen as simply the crystallization of some rather large, legal ideas in the English context. The common law courts individualized the concept of property (in individualizing seisin, following the emerging civil and canon law teaching); the ecclesiastical courts, later followed by the Court of Equity, enforced chthonic and christian obligations which said that property is a shared concept, such that a legal owner can be obliged to an equitable owner.[110] The trust was patched together from a mix of legal ideas. It resulted from the practice of comparison.

Common law courts were so laid back in this process of reciprocal influence that after their creation other courts emerged in England, with deleterious effects on their jurisdiction. Commercial courts came to thrive, applying a borderless law merchant which included islamic notions of the cheque (sakk) and its endorsement (aval in French, from hawala)[111] and a range of security devices to which talmudic law greatly contributed.[112] The large and lucrative maritime practice was taken over by the Court of Admiralty, also applying a law drawn from largely continental sources and providing great advantages to the maritime community, beyond anything the common law could offer.[113] More generally, the common law in its entirety became subject to an institutionalized, equitable shadow, in the Court of Equity (or Court of Chancery). This came to exist only because of the limited character of the conimon law, as a result of seekers of justice returning to its source, the Crown, and seeing their complaints referred to the chancellor. The chancellor, a cleric and civilian by training, investigated complaints in the civilian, roman manner (using written pleadings and no jury) and decided them on the basis of general, substantive principles of law infused with morality, as in the civilian mode. Thus the chancellor, and the Court of Equity, came to enforce trust obligations on legal owners of land, to grant specific performance of contracts (under the writ of

[110] For a detailed argument, Glenn, *'Trust* et jus *commune'* (1993), above, and for the early work of the ecclesiastical courts in enforcing uses, R. Helmolz, 'Trusts in the English Ecclesiastical Courts 1300-1640' in Helmholz and Zimmermann (eds.), *Itinera Fiduciae* (1998), above, notably at 171 ('it *is* right to think that some of the elements of trust law in England were shaped by the *ius commune*. The process happened gradually and without much notice being taken of it').

[111] I. Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964) at 78.

[112] Rabinowitz, 'Influence of Jewish Law on Common Law' (i960), above, at 823; and above, this Chapter, *The secreted law*.

[113] Such as in rem proceedings, hypothecation of vessels and negotiable bills of exchange, as well as broad, civil law principles of contractual and delictual liability. For the early and full reception of the law merchant in Admiralty, contrasted with the common law courts, see *Select Pleas in the Court of Admiralty* (London: Selden Soc, 1894) at lxvii. As late as 1641 the complaint was heard that 'the common law doth not provide in all causes concerning maritime affairs'; see G. F. Steckley, 'Merchants and the Admiralty Court During the English Revolution' (1978) 22 Am. J. Legal Hist. 137 at 151; the 'imperfection of the common law system' was [s]till the object of Admiralty complaint in the 19th century; see F. L. Wiswall, *The Development of Admiralty lurisdiction and Practice since 1800: an English Study with American Comparisons* (Cambridge: Cambridge University Press, 1970) at 101.

trespass, enlarged to contract, only damages could be given), to allow borrowers under a mortgage to recover their property even though the time for redemption had passed (the equitable right of redemption), to grant injunctions to prevent infliction of unjustifiable harm (Equity acts on the conscience, in personam) and to allow discovery as a means of investigation of fact.[114] In all of this, Equity 'followed the law' in the sense of acting only upon the conscience of a defendant and not replicating any of the remedies of the common law. Yet in following the common law, the chancellor necessarily knew the common law and the common lawyers eventually came to know very well the equitable principles being grafted upon their own law. Relations between the common law courts and the Court of Equity were the most stormy of those of the jurisdictions of England, but compromise, of sorts, was eventually reached in the seventeenth century.

For centuries, therefore, the common law existed in a kind of perpetual, institutional debate with other laws. The debate was facilitated by the practice of civilian lawyers testifying in common law courts as to civilian practice, and by the existence of a formal, civilian bar practising in the other courts, with a magnificent library in Doctors' Common, open to all.[11'] It can therefore be said that the barristers of the common law were very open to the civil law and 'not at all unfamiliar' with it, though not at the level of actual practice.[116] What may therefore have been a (relatively) harmonious and floating series of relationships between different laws began to change, however, apparently around the sixteenth century. This is the time, you may recall, when the Inns of Court began to think and teach law in a more detailed and even systematic manner.[11^] From the sixteenth to the nineteenth centuries the common law moves into an aggressive mode, taking over defamation and bankruptcy from the ecclesiastical courts in the sixteenth century,[118] driving Admiralty jurisdiction back to the high seas, stopping Equity's expansion, and absorbing commercial law into itself in the eighteenth century, under the guidance of Lord Mansfield/^ With the fundamental reforms of the common law in the nineteenth century, relations with other laws necessarily change, to their detriment. All the courts are fused; Equity and Admiralty disappear as such (though their law is retained, in priority to that of the common law), while ecclesiastical jurisdiction over civil law matters disappears. Doctors' Common is closed in 1858, its library dispersed. Yet given the new imperium of the common law, its old writs, recast substantively, cover relatively little ground. They notably provide few reasons for (substantive) judgment. So the successors of Cujas are prayed in aid; Pothier becomes a formal authority in the common law, 'the highest that can be had, next to a decision of a court of justice in this country',[120] and the process is replicated outside of the field of obligations.[121] There's lots of civil law information contained within common law information, if you look carefully, though it is often exported abroad in decanted, common law form. In England, however, they are now writing on the law of'obligations'.[122]

This transfusion of foreign law into the common law occurred from the early nineteenth century. It was happening at the same time in US law, so there is a curious tracking of legal events beneath the creation of different (though parallel) political identities. By the late nineteenth century, however, stare decisis had set in, so the common law closed into itself, though now in its larger, Commonwealth existence.]Comparative law came also to be recognized in more scientific form, though never acquiring the scientific character of its continental version.[123] The practice of comparison had been different from the science of comparison, at least for several centuries. Yet when the positive, systemic construction of English common law began, from the sixteenth century, the English practice differed from the continental only in its means and not in its end result. Comparative law in both cases had become constructive, an instrument for mining other law in the process of systematizing one's own. The process finished, closure followed, and comparativists began the often thankless task of attempting to illuminate the pools of national introspection. The closures of the nineteenth and twentieth centuries are now clearly drawing to an end, however, and the underlying commonalities becoming of prime importance. This is most evident in Europe, where civil and common laws now often work in tandem at the European level,[124] but also beyond

[114] Later privatized, in its oral form, and entrusted to private counsel in the US, an essentially civilian investigative technique being used in support of deficient common law procedural method.

[115] See D. Coquillette, *Civilian Writers of Doctors' Commons* (1988), above; Levack, *Civil Lawyers in England* (1973), above.

[116] W. R. Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640* (Oxford/New York: Clarendon Press/Oxford Univ. Press, 1986) at 191; and see R. Helmholz, 'Continental Law and Common Law: Historical Strangers or Companions' [1990] Duke L. J. 1207 at 1215 (libraries of common law lawyers showing large numbers of continental law books; also evidence of use in practice).

[117] See above, this Chapter, *Changing thought.*

[118] R. H. Helmholz, *Canon Law and English Common Law* (London: Selden Soc, 1983) at 8-15.

[119] On an earlier, 15th century 'reception' of Italian mercantile law, however, see Plucknett, *Concise History of Common Law* (1956) at 663.

[120] Best J. in *COXY. Troy* (1822), 5 B. and All. 474 at 481,106 E. R. 1264 at 1266.

See generally Simpson, 'Innovation in 19th Century Contract Law' (1975), above; J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991) at 134 ff.; P. Birks, 'English and Roman Learning in *Moses* v. *Macferlan* (1984) Curr. Legal Problems 1 (restitution); P. Birks and G. McLeod, 'The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone' (1986) 6 OILS 46; B. Rudden, 'Comparative Law in England' in W. E. Butler and V. N. Kudriavtsev (eds.), *Comparative Law and Legal Systems: Historical and Socio-Legal Perspectives* (New York: Oceana, 1985) 79 at 81-3 (property).

P. J. Cooke and D. W. Oughton, *The Common Law of Obligations* (London: Butterworths, 1989); A. Tettenborn, *An Introduction to the Law of Obligations* (London/Toronto: Butterworths, 1984).

H. C. Gutteridge, *Comparative Law: an Introduction to the Comparative Method of Legal Study and Research*, 2nd edn. (Cambridge: Cambridge Univ. Press, 1949).

Stein, 'Legal History', above, at 79 ('English developments are beginning to be seen, as Maitland suggested, in the light of contemporary movements in continental laws. Thus, in legal history at least, the splended isolation of the common law is beginning to disappear'); M. Delmas-Marty, *Towards a Truly Common Law* (Cambridge: Cambridge Univ. Press, 2002) at 52 (error to force distinction between common law and continental laws at level of European Court of Human Rights); Glenn, 'Civilization de common law' ('993) (with reservations, however, for differences in substantive law and role of judge); Lord Oliver of

the regional level, such that US law, which took so much from Europe, can now re-pay the compliment.[125] Commensurability is respectable again.

WESTERN LAW IN THE WORLD

Western people have a tendency to think that colonialism is something which occurred in the eighteenth and nineteenth centuries and is now over. The rest of the world doesn't see things quite the same way. The Greeks went east; the Romans went in all directions;[126] the 'dark ages' were happy times for everybody else; it all started again with the Crusades, which went on for centuries in a highly military mode; then western expansion began on a more world-wide basis once the means existed, and continues today. Islam, as has been said, makes much of this, as did Lenin.[127] The Greek and Roman expansions were clearly military, as were the Crusades, even with their religious justification. Since then expansion of western people, and western tradition, has been much more subtle, overall, bringing many different types of actors into play. There is a large question of the role of law in this, though lawyers could hardly be said to be on the leading edge of western exploration of the world.

On the other hand, western lawyers and western people in general see western thought and western law as essentially liberating and beneficial, capable of bringing about 'development' and well-being while overcoming oppression, discrimination and prejudice. It is not imposed but is simply there, as were the common laws of Europe, available by free choice as a means of liberation and relief.[128] This should not been seen as expansion, still less as imperialism, but rather as consensus on universally valid objectives. These may be good arguments, and there may never be a winner. But there may be more to be said on both sides.

Western expansion, whether rooted in common or civil law (which we have here to return to),[129] has come about through three essential techniques or concepts. Military means have supplemented them in case of need, but often there has been surprisingly little use of military force. The first is physical presence of western settlers, that is, private, non-governmental means of expansion of western people and western thought. Since the western churches are now seen as institutions functioning in the private sphere, missionary activities of the churches must also be seen as private. This is not to say that private settlers did not have government support; they often received substantial aid from the state, particularly when companies were given monopolies of settlement of new areas, as occurred under both British and French regimes in North America. When western settlement occurred in an area which had been previously settled, existing law was held to remain in force, though there were different techniques, as has been noted, for co-ordinating existing law and the law of the new settlers.[130] English technique generally involved a more hands-off approach, leaving existing law for existing people, new law for new people (and there were exceptions even to this). The French saw a more universal role for a more universal French law, so local people could opt for the new law. In both cases, however, western law could become clearly dominant, depending on the rate of western settlement (hindu and muslim law remained in force in India, but both have been profoundly affected by English law).[131] Otherwise, where settlement occurred in lands of no previous settlement (an interesting concept), western law was taken to be imported with the settlers themselves. This appears to have occurred throughout the Americas, so chthonic populations and chthonic law were essentially ignored, for purposes of creating a territorial law, by almost all European powers (including Spain, Portugal, Holland, France and England). The western law of 'reception' was profoundly rooted in western legal and political philosophy. If the human person exercised, as delegate, the dominium of God on earth, the earth was to be subdued. In the English-speaking world Locke said this

Aylmerton, 'Requiem for Common Law?' (1993) at 679-83 (relations with Europe 'a revolutionary change in the law and the legal system'); Irvine, 'Development of Human Rights', above, at 231 (in administrative law, 'it seems undeniable that the traditional common law concepts converge with their continental cousins'); J. Levitsky, 'The Europeanization of the British Legal Style' (1994) 42 Am. J. Comp. Law 347; Markesinis (ed.), *Gradual Convergence* (1994); and for the views of a contemporary English solicitor and a French avocat, both in active practice, F. Neate, 'Mystification of the Law' (1997) 25, No. 1, Int. Bus. Lawyer 5 ('There is no difference between civil law and common law which matters'); A. de Foucaud, 'Civil Law and Common Law in Paris as in New York' (1997) 25, No. 1, Int. Bus. Lawyer 15 ('The differences of common law and civil law no longer create communication problems which are detrimental to the effectiveness of our representation of clients').

[125] V. W. Wiegand, 'The Reception of American Law in Europe' (1991) 39 Am. *J.* Comp. Law 229.

[126] On the influence of Roman notions of empire in subsequent western notions of expansion, A. Pagden, *Lords of all the World: Ideologies of Empire in Spain, Britain and France C.1500-C.1800* (New Haven/London: Yale Univ. Press, 1995), ch. 1 ('The Legacy of Rome').

[127] See above, Ch. 6, *Jihad;* and for the notion of legal imperialism, J. Schmidhauser, 'Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial System' (1992) 13 *Int. Pol. Sci. Rev.* 321.

[128] On the 'voluntary' character of much current legal development work, often tied to financing by western or international financial institutions, J. Reitz, 'Systems Mixing and in Transition: Import and Export of Legal Models' in J. Bridge (ed.), *Comparative Law Facing the 21st Century* (London: British Institute or International and Comparative Law, 2001) at **59.**

From the brief discussion at the conclusion of Ch. 5, above, *Civil law in the world.*

See above, Ch. 3, *The state as middle ground.*

[31] See above, Ch. 8, *Hindu law in India.* The Indian experience indicates that common law methods of cases (supported by stare decisis) and occasional legislation can be as effective a means of legal influence as flat-out legislation in the civilian manner. For one instance of reaction, see H. Pawlisch, *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism* (Cambridge/New York: Cambridge Univ. Press, 1985). Historical overviews of the process of western legal expansion are provided in W. J. Mommsen and J A. de Moor (eds.), *European Expansion and Law: the Encounter of European and Indigenous Law in igth-and 20th-century Africa and Asia* (Oxford/New York: Berg Publishers, 1992) and L. Benton, *Law and Colonial Cultures* (Cambridge: Cambridge Univ. Press, 2002); and for a marxist perspective on the entire process, A. Papachristos, *La reception des droits prives etrangers comme phenomene de sociologie juridique* (Paris: LGDJ, 1975). For the significance of implantation of western methods of education in this process, displacing Athonic ways, E. Goldsmith, *The Way* (London: Rider, 1992) at 284,285.

most clearly, though he was clearly echoing civilian concepts of individualized property, which had since the fourteenth century been moving beyond chthonic concepts of sharing. Subduing the earth, for Locke, meant to 'improve it for the benefit of life and therein lay out something upon it that was his [the settler's] own, his labour'.[132] If there was resistance to this process, the military could be used (and was, perhaps most widely by Spain) but the principal means of lasting expansion were private.[133] So imperialism is not necessarily governmental in character and method; governments may sponsor and aid, and hold underlying title, but lasting impact is a matter of private enterprise. This has become more evident in recent times, as the process of western 'globalization'[134] depends largely on corporate activities, technological support and the development of an informal and supra-national lex mercatoria to which both civil and common law traditions have contributed.[133] The latter process is a major challenge to state-centered notions of western law, as ancient commercial tradition is revived and rejuvenated. It is part of still larger process of (re-)development of a transnational concept of law, in which law is not laid down but rather taken up, from past authority, best practices and the workings of 'epistemic communities."[36] This now occurs in many areas of western law and facilitates collaboration across borders of the work of mdiy western non-governmental actors. It may not be seen with enthusiasm by adherents to other, non-western legal traditions, yet may eventually facilitate recognition of these traditions as non-state, transnational law within western jurisdictions.

The second concept underlying western expansion has been that of the state. The age of western imperialism coincided with that of the emergence of the nation-state, and it has been said that the 'building of nations was seen inevitably as a process of expansion'.[137] The process occurred both 'internally' as the states, in Europe, took into themselves diverse nations, with their own traditions, to be submerged, successfully or less successfully, into that of the particular state. It also occurred 'externally', first by Spain, then France, then the others, as the age of imperialism unfolded and foreign territory was acquired, as source of wealth and zone of expansion, through enlisting of private effort in the larger cause.[138] The process then replicated itself, as new states, themselves often the result of reaction to the old, imperial ones, themselves expanded, to carve out as much territory for themselves as possible. The 'frontier' is thus a national, not colonial phenomenon, but represents the same process at work.[139] The present division of most of the surface of the world into state territories (Antarctica has a particular status) is an indication of how powerful these ideas of formal organization and territorial control have been. The existence of states everywhere (except where they are now failing[140]) comes to be an argument, a beach-head, for the advancement of other western concepts of social organization. These represent the third technique of western expansion.

[132] J. Locke, *Two Treatises of Government*, ed. M. Goldie (London: J. M. Dent, 1993) at 130; for corresponding 'ceremonies of possesion' (gardens, fences), Benton, *Law and Colonial Cultures* (2002), above, at 168; and see J. Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge Univ. Press, 1995) at 73-5 (hunting and gathering lands considered vacant, since title derived exclusively from labour in form of tilling, cultivating, improving; chthonic peoples will be better off as a result of assimilation since will share in greater abundance of commodities and employment). On the civilian move from chthonic to individual concepts of property, see above, Ch. 5, *The centrality of the person and the growth of rights.*

[133] For the inherently private character even of the Spanish conquista, the state essentially granting concessions, N. Rouland, S. Pierre-Caps and J. Poumarede, *Droit des minorities et des peuples autochtones* (Paris: Presses universitaires de France, 1996) at 106.

[134] The extent of this globalization should not be exaggerated. The World Bank has concluded that the process of globalization 'has yet to touch a large chunk of the world economy. Roughly half of the developing world's people have been left out of the much-discussed rise in the volume of international trade and capital flows since the early t98o's.' See The World Bank, *World Development Report 1997: the State in a Changing World* (Oxford: Oxford Univ. Press, 1997) at 12; for criticism of the globalization process, P. Hirst and G. Thompson, *Globalization in Question* (Cambridge: Polity Press, 1996); D. Rodrik, *Has Globalization Gone Too Far?* (Washington DC: Institute for International Economics, 1997); Z. Bauman, *Globalization: The Human Consequences* (New York: Columbia Univ. Press, 1998); and for different forms of'globalization' in the world, above, Ch. 2, *Globalizations.*

[135] The lex mercatoria remains controversial. It would represent not a truly cosmopolitan legal development but a form of'globalized localism', a creation of civilian theory and common law practice (though often resisted by common law practitioners, and lawyers from 'developing' countries). B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York/London: Routledge, 1995) at 293; and see L. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Boulder, Col.: Fred B. Rothman, 1983, notably at 23 (medieval law merchant 'did not die', as tradition, in post-medieval times); O. Lando, 'The Lex Mercatoria in International Commercial Arbitration' (1985) 34 Int. & Comp. Law Q- 747; R- Goode, 'Usage and its Reception in Transnational Commercial Law' (1997) 46 Int. & Comp. Law Q. 1; B. Goldman, 'La lex mercatoria dans les contrats et I'arbitrage international: realites et perspectives' J- dr. int., 1979. 475; J. H. Dalhuisen, *Dalhuisen on International Commercial, Financial and Trade Law* (Oxford/ Portland: Hart, 2000), notably at vi (state law now only of residual application in international commerce) and vii (19th century continental European nationalization of private law an 'aberration').

[136] For 'epistemic communities', and their relation to tradition, above, Ch. 2, *Persuasive Authority: Creating New (and Old) Epistemic Communities;* more generally H. P. Glenn, 'A Transnational Concept of Law' in P. Cane and M. Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford: Oxford Univ. Press, 2003) 839; H. P. Glenn, 'Comparative Law and Legal Practice. On Removing the Borders (2001) 75 Tulane L. Rev. 977; M. Likosky (ed.), *Transnational Legal Processes* (London: Butterworths/LexisNexis, 2002); K. P. Berger, *The Practice of Transnational Law* (The Hague/London/Boston: Kluwer Law International, 2001); and for a contemporary 'rise of persuasive authority', A.-M. Slaughter, 'A Global Community of Courts' (2003) 44 Harv. Int'l. L. J. 191 at 199 ff.

[137] E. Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (Cambridge/New York: Cambridge Univ. Press, 1990) at 32; and for the simultaneous process of expansion in Europe and overseas, and the conceptualization of space it implied (Mercator's maps were not neutral depictions), H. P. Glenn, The National Lleritage' in R. Munday and P. Legrand (eds.) *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003) 76.

[138] P. McAuslan, 'Land Policy: A Framework for Analysis and Action' [1988] J. African Law 185 at 185 ('The scramble for Africa, the carve up of the Pacific, the settlement of Australasia were, at bottom, organized, governmentally sanctioned and ultimately directed, land grabbing exercises').

[139] See, e.g., R. Williams Jr., *The American Indian in Western Legal Thought: the Discourses of Conquest* (New York/Oxford: Oxford Univ. Press, 1990) at 249 ('Locke's Theory Applied: the Colonial Radicals' Praxis on the Indian Frontier').

[140] M. van Creveld, *The Rise and Decline of the State* (Cambridge: Cambridge Univ. Press, 1999), notably at 314 (states in Latin America succeeded 'only up to a point') and 331 (elsewhere state may be only 'empty title'); R. Gordon, 'Saving Failed States: Sometimes a Neocolonialist Notion' (1997) 12 Am. U.J. Int'l. L. & Pol'y. 903.

States themselves are the product of constructive human rationality, and rights are the ci owning expression of the unique and God-given character of human rationality. Rights are instruments of liberty, so the process of improving the human condition in the world can easily be seen as necessarily following the European pattern, and necessarily taking up the European instruments. These are now those of the western world as a whole, as the new nations of America and Australasia add their great influence to those of Europe. To western people all of this has a certain self-evident character, and movement towards a western way of life is seen as an immense and largely irreversible process, which suffers occasional setbacks but which can probably only be stopped by some kind of global catastrophe. This was also the way things were seen in the nineteenth century, however, and colonialism and subjection of other peoples occurred during the time when European peoples themselves were beginning to enjoy the fruits of self-determination, liberty and, in some cases at least (England dissenting, as a matter of doctrine), rights.[141] So there were major discrepancies in the way in which western, liberal legal theory was applied in the world.[142] This was not entirely oversight or slippage; there were very clear doctrines of inherent human superiority reaching back (if perhaps not entirely faithfully) to Aquinas' notions of practical reason and some people enjoying 'superior intellect',[143] which gave rise to 'degrees of humanity' being enjoyed by different peoples.[144] The concept of 'civilization' was one of French procedure (moving from criminal to civil courts) until the mid-eighteenth century when it emerged as a process of universal history.[145] So liberalism *was* developing at the same time as colonialism (Lenin quietly nodding) and there really *was* a notion of the white man's (not woman's) burden.[146] J. S. Mill was 'pretty close to sharing the crude racism of his time',[147] and western anthropology carried the notion of 'primitive peoples' well into the twentieth century.[148] The legal reaction to all of this had occurred as early as the mid-sixteenth century in the writings of Francisco de Vitoria in Spain, for whom 'no business shocks me or embarrasses me more than the corrupt profits and affairs of the Indies. Their very mention freezes the blood in my veins."[49] De Vitoria's writing is still the theoretical foundation of many chthonic legal claims in the world today,[150] and takes the difference between European and chthonic American people as due mainly to 'evil and barbarous education' which could in no way justify then current colonial practices.[1"11] De Vitoria's argument was taken up by Bartolome de las Casas, for whom differences were due not to biological factors but to, among other things, 'adherence to different customs'.[152]

If the writings of de Vitoria and de las Casas did not markedly slow imperial expansion, they have, however, become fundamental in contemporary arguments in favour of universal human rights.[153] From a perspective internal to the western world, once the distinctions between peoples (long present in western thought) are eliminated, rights and human liberty become universal concepts, as they were originally conceived to be. As universal concepts, they prevail both within states and between them, such that national barriers to enforcement cannot be allowed to prevail. There are, of course, few effective means of international enforcement of human rights (the regional European Court of Human Rights being an exception, though constituting a form of collaborative, supra-national positivization of human rights standards), though the background human rights

[141] See H. von Senger, 'From the Limited to the Universal Concept of Human Rights: Two Periods of Human Rights' in W. Schmale (ed.), *Human Rights and Cultural Diversity* (Goldbach, Germany: Keip Publishing, 1993) 47 at 50-2.

[142] There were also discrepancies within western states, since women were consistently excluded from the ambit of rights declarations, both in formal enunciation and in actual entitlement, von Senger, 'From Limited to Universal Concept of Human Rights', above, at 53-5, on the 'patriarchal Enlightenment' and detailing 'meristic' manner of inclusion, reaching back to the Greek polity ('meros' meaning 'part'), according to which a definition includes one part defined as the whole, hypertrophied, while the other part is tacitly extirpated from the definition, thus disappearing. For the 18th-century struggle of French women against their exclusion from concepts of citizenship and human rights, see von Senger, above, this note; J. Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Cambridge, Mass./London: Harvard Univ. Press, 1996), notably at 19 ff. on drafting by Olympe de Gouges of a Declaration of the Rights of Women and Citizen.

[143] M. van Gelderen, 'Vitoria, Grotius and Human Rights. The Early Experience of Colonialism in Spanish and Dutch Political Thought' in Schmale (ed.), *Human Rights and Cultural Diversity* (1993), above, 215 at 217.

[144] Ibid., at 218; R. Ben-Shalom, 'Medieval Jewry in Christendom' in M. Goodman (ed.), *The Oxford Handbook of Jewish Studies* (Oxford: Oxford Univ. Press, 2002) 153 at 163 ('since Christianity was a rational religion, everyone should be a Christian. Those who were not . .. were not .. . entirely human'); and for essentially Darwinian notion of unoccupied lands or terra nullius, chthonic society and occupation being too low in that scale of social organization for recognition by western law, R. French and P. Lane, 'The Common Law of Native Title in Australia' (2002) 2 OUCLJ15 at 16.

F. Braudel, *A History of Civilizations*, trans. R. Mayne (New York: Penguin, 1993) at 3.

[1,6] See von Senger, 'From Limited to Universal Concept of Human Rights' (1993)» above, at 65, 66, on the 'civilising mission' of'superior races'.

[47] B. Parekh, 'Superior People: the narrowness of liberalism from Mill to Rawls' *TLS*, 25 Feb. 1994, at 11.

[48] For the history of the development and decline of the idea, see A. Kuper, *The Invention of Primitive Society: Transformations of an Illusion* (London/New York: Routledge, 1988); A. Pagden, *The Fall of Natural Man. The American Indian and the Origins of Comparative Ethnology* (Cambridge: Cambridge Univ. Press, 1986); and for current reaction, above, Ch. 2, in introductory text.

[149] F. de Vitoria, *Political Writings*, ed. A. Pagden (Cambridge: Cambridge Univ. Press, 1991) at 331; cited in M. van Gelderen, "Vitoria, Grotius and Human Rights' (1993), above, 215 at 219.

[50] See, e.g., P. Camming and N. Mickenberg, *Native Rights in Canada*, 2nd edn. (Toronto: General Publish-[ln]g> 197¾) at 14; and generally, above, Ch. 3, *The state as middle ground.*

[′] de Vitoria, *Political Writings* (1991), above, at 290, cited in van Gelderen, 'Vitoria, Grotius and Human Rights' (1993), above, at 220.

Ibid., at 221.

For partial treatment of this well-rehearsed subject, see Schmale (ed.), *Human Rights and Cultural Diversity* (1993), above, with extensive bibliography at 334 ff.; J. Waldron (ed.), *Theories of Rights* (Oxford: Oxford Univ. Press, 1984); A. A. An' Na'im and F. M. Deng (eds.), *Human Rights in Africa: Cross-Cidtural Perspectives* (Washington, DC: Brookings Institution, 1990), with refs; D Little (ed.), *Human Rights and the Conflict of Cultures: Western and Islamic Perspectives on Religious Liberty* (Columbia, SC: Univ. of South Carolina Press, 1988); C. Welch Jr., and V. A. Leary, *Asian Perspectives on Human Rights* (Boulder, Colo./San Francisco: Westview Press, 1990); L. S. Rouner, *Human Rights and the World's Religions* (Notre Dame: Univ. of Notre Dame Press, 1988).

debate is of great importance for potentially shaping future institutions. Are human rights universal?

They are clearly not, though this should in no way stop the argument. Human rights are inextricably bound up with the western legal tradition and exist as such only within it. They exist because of two broad streams of western legal thought. One is derived from judaeo-christian-islamic religious tradition, which sees the human person in the image of God and as God's delegate on earth.[154] The other is derived from Greek (or Egyptian) rationality—not accepted, or not entirely accepted, by either talmudic or islamic legal thought—which allows the construction of legal systems, and concepts, required for the enforcement of rights.[135] Human rights are a very particular concept in the world, a 'contingent, mutable truth and not an eternal one',[156] and 'exist' only because of an extra-ordinary congruence of traditions, which occurred nowhere else in the world. They may also be seen as reactions within the west: reactions to medieval feudalism, to imperial racism, and more recently to precise national and international circumstances since World War II.[157]

This should not stop the argument, however, about application of notions of human rights outside western legal tradition. Traditions exchange information. The particular and contingent origin of human rights teaching should, however, inform the discussion. It may be that rights can be useful elsewhere. It may be, as well, that they are useless and even prejudicial elsewhere, notably if there is no legal structure and no (uncorrupted) judiciary capable of giving effect to them. It may be that peoples adhering to traditions which have explicitly rejected subjective definitions of law can rework their own traditions so as to provide results superior to those which any superficial grafting of rights doctrine might yield. The *results* of rights doctrines can be held up as examples; if other doctrines fall short of them they will be challenged, even internally. Insisting on the necessarily universal character of rights, however, is seen and will continue to be seen as a modern form of imperialism, using the same old private means. Universal rights are simply another form of universalizing the truths of a particular tradition. It is being illiberal about being liberal, forcing people to be free. Yet if people are all of equal potential, if all exercise human rationality (of one type or another) and if all, as human beings, are entitled to choose how they will live their lives, their choice must count. So rights doctrines eventually end up, as they should, being evaluated against other doctrines, in particular circumstances by particular people. More will have to be said about how such evaluations can be made.

WESTERN LAW AND CORRUPTION

If rights talk is the sunny side of western law, corruption is the dark side. There is no other tradition—outside that of the civil and common laws, now together looking out over the world—which so lends itself to corruption. There is not much to be corrupt about in the chthonic world; the rabbis were seen as corrupt, but mostly by the christians, who had other objectives than internal reform; islam provides few occasions for pecuniary or institutional corruption, though some, even within islams, would say that doctrinal non-endeavour is a form of corruption. Yet western legal tradition offers all of the prerequisites for all of the corruptions. The situation is probably the least worrisome in matters of doctrinal corruption. Free doctrine is generally not corrupt, though it may be highly undisciplined.[159] Yet in creating large states, large corporate structures, large labour organizations, large legal professions—in short, large institutionalized elites in all directions, western law provides all the disadvantages of a large, wooden house in a warm, humid climate. It may be beautiful, and well-designed, but be subject to many forms of internal rot. To survive, it requires protection beyond the structure itself and if this is neglected, or impossible, the structure will not last.

Some forms of traditional corruption have been dealt with effectively in western law. The doctrinal corruption of racism, bereft of any scientific foundation, has now been at least marginalized in legal thought, though it remains still vigorous outside it. Judges who once bought their positions (as in France) or who sold minor positions and collected fees from litigants (as in England) have now been assured the means of financial security. Indeed, in some countries even a relatively under-paid judiciary has undertaken heroic and life-threatening work against combined traditions of governmental corruption and organized crime (as in Italy). So law can do much to prevent corruption in non-legal institutions, if legal institutions

[154] See above, Ch. 5, *The centrality of the person and the growth of rights.*

See above, Ch. 5, *Law as reason's instrument.*

[156] R. Blickle, 'Appetitus Libertatis. A Social Historical Approach to the Development of the Earliest Human Rights: The Example of Bavaria' in Schmale (ed.), *Human Rights and Cultural Diversity* (1993), above, 143 at 144; and see D. Lai, *Unintended Consequences: the Impact of Factor Endowment, Culture and Politics on Long-Run Economic Performance* (Cambridge, Mass./London: MIT Press, 1998) at 177 (contemporary notion of rights latecomer even in Western cosmology, 'nothing universal about the notion'); B. de Sousa Santos, *Toward New Common Sense* (1995), above, at 337 ('human rights are universal only when they are viewed from a Western standpoint'); R. Pannikar, 'Is the Notion of Human Rights a Western Concept' (1982 120 Diogenes 75 (yes); the conclusion parallels that of important representatives of contemporary moral philosophy, which reject notions of final justice. See above, Ch. 2, Commensurability: Of Apples and Oranges.

[157] W. Kymlicka, *Liberalism, Community and Culture* (Oxford: Oxford Univ. Press, 1989) at 213-15 (liberal theory compatible with variable treatment for national minorities until World War II; major effect on future UN policy of Nazi abuse of Minority Protection scheme, state of black-white race relations in USA in 1950S and 1960s). The human rights debate is thus of importance not only in terms of international relations, but for the possibility of differential treatment within states. See above, Ch. 2, *The view from somewhere else*, and the 4th section of each of the chapters on individual traditions, dealing with their relations with other traditions.

[58] See below, Ch. 10, Reconciling Traditions; and for alleged 'discordance between the West's—particularly America's—efforts to promote a universal Western culture and its declining ability to do so', describing the 1993 Vienna Human Rights Conference as a 'defeat for the West', S. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster, 1996) at 183,196.

[159] See, on the multiplicity of traditions, below, Ch. 10.

themselves remain free of corruption. The problem with this is that it is well known to forces of corruption, which often concentrate as much on legal institutions as on others.[160] And when the external forces of corruption are not at work, there remain the internal ones, the inherent pressure, on tfiose in positions to profit, towards unjustifiable personal advantage. The problems of corruption are somewhat different in the countries of origin of western law from those which exist in the countries to which western law has been exported.

Within western countries, the problems are the (relatively) limited ones of maintaining the underlying ethic of the legal professions, the underlying ethic of other institutions, and having the legal professions (lawyers and judges) control the breakdowns. Generalized corruption is not encountered as much as it is elsewhere though to the extent organized crime is more influential than in the past, this conclusion is a fragile one. Within the legal professions, there are differences within traditions. European professions (of both civil and common law varieties) were traditionally divided ones, and in the limitations of activity there were inherent ethical restraints.[161] The conceptual notion is that of incompatibilities, activities incompatible with the status of being a member of a particular profession. Acting as a notary or solicitor has been incompatible with acting as an advocate or barrister; acting as a barrister has been incompatible with other forms of commercial activity, or even entering into partnership; acting as an avocat, until very recently, was incompatible with salaried employment, even by other avocats. There were limits on the trouble lawyers could get into, and structures of practice remained of limited size, and often purely individual, as with the barrister. North American professions have been less strictly defined (something about the needs of the frontier, most explanations go) and the notion of incompatibility is almost entirely unknown. No structural concepts exist to keep lawyers out of trouble. North American lawyers therefore exercise in a single, broad profession, as in the United States, or in fused (though still identifiable) professions, as in Canada. The result has been growth in firm size to meet the demands of corporate and large scale litigation practice, with the result that the lawyer in North America is now subject to structural loyalties (those of the large firm) which are not always consistent with the obligation of loyalty to the client. Many maintain in North America that the practice of law is a business, as such freed from any single and dominant obligation to come to the aid of those in need (advocare). There has been discussion of 'the lost lawyer', and by this is meant the lawyer who has lost sight of the primary obligation of service.'[162] The growth of very large firms and internal work standards is now occurring in Europe as well, most notably in firms of solicitors in England, but also in large firms of Advokates and Rechtsanwalte in Holland and Germany.[163] Accompanying this process comes a necessary judicial control of conflicts of interest, as large firms act for innumerable clients whose relations may become conflictual, or as lawyers move from firm to firm in the course of particular law suits. This type of 'satellite litigation' has become a costly adjunct to litigation in much of the western world. To the extent the large firms become international in character, the control of ethical conduct is exacerbated. In Europe, as in the federations of the United States and Canada, trans-border codes of ethics have emerged, though often they have adopted the (ethically interesting) technique of choice-of-ethics rules, the submission of ethical problems to ethics rules of a particular jurisdiction on the basis of primarily geographical considerations. The juridification of professional ethics presents its own problems.

Where western law has been exported beyond its host jurisdictions, or those which have developed in close tandem with them, the problem of corruption has assumed massive proportions. There is above all no positive phenomenon of obedience to positive law, so one of the current doctrinal foundations for positive law in western thought is brutally removed (as it may now slowly be dissolving in the west).[164] It is simply thin, written law, controlled immediately by whoever is in authority in a particular state, having no greater social embedding. Its institutions rest on no particular ethical tradition, and whatever ethical claims they may make may well conflict with others, such as loyalty to family or tribe.[163] The result is generalized corruption, 'ant' (hormiga) corruption as it is called in some countries, since all the ants in the pile are busily engaged in it, including, most importantly, all agents of police, who become often more feared and avoided than those whom they are meant to police. Judges and lawyers who dare to attempt to do something in such circumstances are often subject to fearful reprisals; the state itself will provide no protection to them.[166] Western development work has thus far been unable to overcome the problem of widespread corruption of western institutions

[160] For the narco project of taking over the administration of justice in latin America, J. Witke, 'Globalizacion, Estado y Derecho' (1995) 28 Bol. mex. der. comp. 341 at 350 fun NarcoEstado') and 353 (emergence of informal, extra-constitutional law as means of dealing with corrupt state structures).

[161] H. P. Glenn, 'Professional Structures and Professional Ethics' (1990) 35 McGill L. J. 424; though for criticism of the English barrister as preoccupied with 'narrow pursuit of personal advantage amidst the rarefied milieu of Westminster,' having 'acquiesced in the creation of what was in fact an imperial state, D. Lemmings, *Professors of the Law [:] Barristers and English Legal Culture in the lSth Century* (Oxford: Oxlorc Univ. Press, 2000) at 247, 291.

A. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass./London: Belknap Press 1993); and see N. Bowie, 'The Law: From a Profession to a Business' (1988) 41 Vanderb. L. Rev. 741. The problems of ethical commitment would then be replicated within the firms themselves (the 'grabbing and leaving'problem).

See Y. Dezalay, *Marchands de droit* (Paris: Fayad, 1992).

See, for the basis of positive law being positive obedience, as simple fact, above, Ch. 5, *Positive law and positive science*, and for world decline in adherence to 'rational-legal authority,' above, Preface.

See, above, Ch. 3, *Chthonic peoples, states and human rights*, on conflicts between institutional loyalty and societal loyalties in so-called developing countries; and on the problem of corruption generally, above, Ch. 1, Tradition and Corruption. The state may thus be seen as a 'poisoned gift', a powerful structure of internal and abusive dominance; M. Hardt and A. Negir, *Empire* (Cambridge, MA/London: Harvard University Press, 2000) at 132-4.

See the valuable and chilling publications of the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists, on *The Harassment and Persecution of Judges and Lawyers.*

and western law when it has been transplanted abroad, since there is no immediate way of reconstructing western ethical and intellectual supports for such a type of law abroad. There appears to be little difference between civil and common law traditions in this regard. So western doctrine often claims for itself a universal role; it is another thing to universalize the institutions needed for its effective implementation.

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