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CHAPTER 4

Enlightenment, natural law and the modern codes: from the mid-eighteenth to the early nineteenth centuries

CHARACTERISTICS

61 This short period was exceptionally important. It saw the abolition of old legal traditions, the short-lived triumph of natural law, and the more lasting emergence of a belief in codes. The period began around the middle of the eighteenth century, when criticism of Roman law and the rise of natural law began to be reflected in important codifications. By the beginning of the nineteenth century it had already ended; natural law had lost its power to inspire, and was overshadowed by positivism and the Historical School of law. None the less the legacy of this relatively brief period was lasting: faith in codes persists (albeit less fervently) to this day, and their practical importance is still considerable. In the space of a few decades, concepts and institutions which had taken shape gradually over the centuries were abolished and replaced. This was the result of a policy guided by new principles and new structures, some of which are still employed.

THE ENLIGHTENMENT

62 The renewal of the law has to be seen in the context of the Enlightenment, a European-wide movement which took a critical attitude towards the ideas and the society of the *ancien régime* in general. There was criticism especially of the following points. First, of inequality before the law, which was entrenched by the political system of Estates, with its fiscal privileges for the orders of nobility and clergy, and limited access to public office. Second, of the restraints on people and property: serfdom still existed, while various feudal and corporatist restrictions dampened down economic activity. 'Liberty' and 'equality' were therefore essential demands as

much in the political programmes of enlightened despots[1] as in the French Revolution. Third, there was criticism of unpredictable and arbitrary intervention by the Crown, and the exclusion of popular participation (in particular by the Third Estate) in political affairs. Next, there was criticism of the predominance of the church and of the religious intolerance which many considered a relic of an obsolete past. Christian revelation, through the divergent interpretations of its doctrine, had plunged Europe into religious wars, and its absolute authority was now fiercely contested. The hope – in the spirit of the Enlightenment – was that logic and science would form the new foundation of a secure learning throughout civilized Europe.

Official links between church and state were criticized. They meant that the order and government of society were subordinated to transcendental values and priorities. The new theories affirmed that the life of a society ought not to be divorced from reality, but to tend to assure the greatest (worldly) good of the greatest number of citizens. The inhumane character of many aspects of public life was criticized. Criminal law provided for the infliction of appalling capital and corporal punishments and mutilations; criminal procedure still made use of torture: these were the particular object of criticism. Argument from authority, which had dominated thinking for centuries, was now rejected. Previously an absolute value had been attributed to sacred books in different areas – religion, learning, law. The conviction was that what was old was therefore good and respectable. Now the belief was in the need for freedom from the past in order to assure a better future. Faith in progress now replaced faith in tradition.

To sum up: the old world underwent a radical renewal, which was guided by the principles of human reason and by the aim of achieving the happiness of man. The achievement of this aim now seemed to demand that the burden of preceding centuries be cast down. Applied to law, this programme meant that the proliferation of legal rules must be sharply reduced, that the gradual development of law ought to be replaced with a plan of reform and a systematic approach, and finally that absolute authority ought to be claimed

[1] This is stated expressly (e.g.) in the *Allgemeines Bürgerliches Gesetzbuch* (*ABGB*) of Joseph II from 1786 (this is the first part, known as the *Josephinisches Gesetzbuch*, of the Austrian *ABGB*: see below).

neither for traditional values such as Roman law, nor by the learned lawyers and judges who had appointed themselves 'oracles' of the law.[2] Old customs and books of authority must be replaced by new law freely conceived by modern man, and whose sole directing principle was reason. This new law would be free of all obscurantism. It would constitute a clear and certain system, comprehensible to the people, for the law from now on would also be at the service of the people. To realize this objective two conditions had to be fulfilled. The first was material: the creation of a new legal system based on a new body of sources; the second was formal: a new technique must be developed to ensure that the new law was applied in practice. The first condition was fulfilled by natural law, the second by legislation, and in particular by the national codes introduced throughout the European continent. These two aspects now demand more detailed examination.

NATURAL LAW

63 The idea of a law based on human nature is very ancient, and appears in two forms. In ancient Greece, natural law was the body of ideal unwritten norms, as opposed to the actual and very imperfect statutes of everyday life. In Rome, positive law was presented as a distortion of a primitive natural order: slavery therefore did not belong to natural law but to the *ius gentium*, as it was the consequence of wars. For the Romans, natural law corresponded to the law of nature: the coupling of animals and the marriage of human beings, for example, expressed a universal law to which men as well as animals were subject. In the Christian Middle Ages natural law had religious connotations and was identified with a divine law distinct from human laws (and which those laws could not transgress). Yet, on the other hand, many lawyers were convinced that natural law, conceived as a perfect and eternal guiding principle, was identical with Roman law, with *ratio scripta* ('written reason'). Other lawyers disagreed. They regarded the *Corpus iuris*, like other legal systems, merely as a historical product without eternal value, imperfect and capable of improvement.

So in modern times a new conception of natural law was formed.

[2] The expression is taken from J. P. Dawson, *The oracles of the law* (Michigan, 1968). It is to be found in older authors too, such as Blackstone (see below, section 68).

It still made reference to the nature of man and society, but it differed from the earlier conceptions in several respects. It rejected the conception of natural law as an ideal of justice with a significance greater than the positive legal order. On the contrary, it conceived natural law as a body of basic principles from which positive law ought to be directly derived: it was an applied natural law. The modern School of Natural Law refused to derive its principles from external systems such as divine law or the *Corpus iuris*. By means of rational study and criticism of human nature, the authors of this school searched for the self-evident and axiomatic principles from which they could deduce all other rules *more geometrico*. The title 'law of reason' (*Vernunftrecht*) is therefore more accurate than 'natural law', which has other connotations.

The first great exponent of the modern School of Natural Law was Hugo Grotius (*d.* 1645), author of *Mare liberum* (1609) and *De iure belli ac pacis libri tres* (1623). In these works Grotius attempted to find a foundation of the law of nations which would be universally recognized. He discovered it in the indispensable notion of natural law: certain basic rules had necessarily to be accepted by all men and civilized states, for those rules corresponded to principles of human nature and therefore constituted the common base shared by all men. These rules existed independently of *ius divinum* (divine law), for they were valid even if it were admitted that God did not exist. This argument enabled Grotius to defeat his religious opponents, because natural law could unite Catholics, protestants and even the devotees of a 'natural religion'. These rules were also independent of Roman law (Grotius sharply distinguished this system from Roman law) for the *Corpus iuris* recognized only the universal authority of the emperor and so could not supply the basis needed to regulate relations between sovereign states. Furthermore, these rules were independent of any legislator, for no supra-national authority could now claim to impose positive norms of law on the states of modern Europe. This formulation of the principles of a law of nations based on human wisdom and understanding already made Grotius a member of the School of Natural Law (although in the area of private law it was later authors who would develop his ideas).[3] He

[3] Grotius nonetheless did pay attention to theories of private law, in particular in property, obligations and marriage (see below, section 72).

cannot, however, be considered a true philosopher of natural law, for he was still influenced by such sources as the Bible, and various ancient texts (as a humanist he had an excellent knowledge of Latin literature), including the texts of Roman law.[4]

A decisive step was taken by Samuel Pufendorf (*d.* 1694). A chair of natural law and the law of nations was created for him at Heidelberg. Pufendorf wrote *De iure naturae et gentium libri VIII* (1672), of which he also published an abbreviated version, *De officio hominis et civis iuxta legem naturalem libri II* (1673). In these works he expounded a system which was rational and independent of all religious dogma, and which was based on deduction and observation. His works plainly show the influence of contemporary scientific thought, particularly that of Descartes and Galileo: it is necessary to set out from self-evident truths and to proceed by rigorous scientific observation. Pufendorf's general theory exerted a very powerful influence on the General Parts (*Allgemeine Teile*) which are characteristic of the modern European codes. He developed his theories above all in relation to contract and property, often taking up and building on the work of Grotius.

Christian Thomasius (*d.* 1728), a pupil of Pufendorf, continued the work of his teacher and developed his theories in a pragmatic direction, so that they could be put into practice by the legislator. He had already shown his practical sense at Leipzig, where he was the first to abandon teaching in Latin for German. He was entrusted with some of the work preparatory to Prussian legislation. Thomasius published the *Fundamenta juris naturae et gentium* (1705) whose title again asserts the link between natural law and the law of nations. He was also the author of popular works which argued that the law must be modernized. In these he criticized obscurantism, and the inhumanity of judicial torture and witch-hunts.[5] He pronounced himself resolutely in favour of new, rational legislation freed from the absolute authority of ancient (particularly Roman) law.

Christian Wolff (*d.* 1754) was a polymath who taught, among other things, philosophy, theology and mathematics. His main legal

[4] Not until the eighteenth century did respect for Roman law decline and even turn to open criticism. Leibniz (*d.* 1716), for instance, still treated the *Corpus iuris* as the basis for his projects of codification.

[5] *Dissertatio de tortura e foris christianis proscribenda* (1705); *Dissertatio de crimine magiae* (1701).

work was entitled *Jus naturae methodo scientifica pertractatum* (8 volumes, published between 1740 and 1748). The title declares a programme, for Wolff had already advanced the view that the principles of law must be established by modern scientific method.[6] It is characteristic of Wolff's work that axioms of natural law are elaborated by means of detailed concrete examples, and that scientific method is used to deduce all rules of law strictly according to the principles of geometric proof (Spinoza had provided the model for this). As the author himself put it in 1754, 'all obligations are deduced from human nature in a universal system'.[7] It was Wolff's work which served as the point of orientation for later authors of the School of Natural Law. It was his method which influenced the judgments of courts into employing logical deduction from fundamental norms and general concepts, rather than the example of precedents. The practice of law in continental Europe today is still shaped by Wolff's conception of law as a discipline and as a closed logical system.[8]

The work of these German lawyers was known throughout Europe. Their works were regarded as authoritative particularly in France, although the School of Natural Law produced few French authors. The most important was Jean Domat (*d.* 1696), nephew of the philosopher, mathematician and physician Pascal. His work is an ambitious attempt to structure the law according to Christian principles as well as rational criteria, and so to achieve a system valid for all time and all peoples. In fact his work *Les lois civiles dans leur ordre naturel* was original in form (a new organization and new system) but not in substance, for the substance remained that of Roman law, although the order was different from that of the *Corpus*.[9] Broadly speaking, the authors of the School of Natural Law borrowed from the principles of Roman law whenever they needed to formulate concrete rules for specific questions.[10] Their intention was not to reject the traditional rules of law as a whole. That would hardly have been realistic. It was instead to modernize

[6] An abridged version, *Institutiones juris naturae et gentium*, appeared in 1750 and was translated into German in 1754.

[7] Cited by Wieacker, *Privatrechtsgeschichte*, 319–20.

[8] Especially in Germany, where the expression *Begriffsjurisprudenz* was actually used in the nineteenth century.

[9] M. F. Renoux-Zagame, 'Domat, le salut et le droit', *Revue d'histoire des facultés de droit et de la science juridique* 8 (1989), 69–111.

[10] See below, section 71.

legal method and to free jurisprudence from the restrictions imposed by ancient authority.

Montesquieu's *Esprit des lois* was not a treatise on natural law, but a philosphical and comparative study of the role of legislation and types of public institutions. Montesquieu attached particular importance to national character, and to climate and geography as factors determining the diversity of legal systems.

In the Republic of the United Provinces there were also lawyers who reacted against the absolute authority of the *Corpus iuris*. Their concern was largely with the contradictions and excessive subtleties of the civilians, and with the consequent lack of legal clarity and security: there was no longer a Roman legislator in a position to promulgate binding norms, and even the *communis opinio* of scholars (so far as it existed) had no binding force. Thus, Willem Schorer (*d.* 1800), who was in favour of a codification of the law of the provinces of the Netherlands, and wrote annotations to, and produced a new edition of, Grotius' *Inleidinghe*, made violent criticisms of the traditional learning of Roman law, especially in his treatise 'on the absurdity of our current system of legal doctrine and practice' (1777), which caused an animated controversy.[11] The jurist himself, who was president of the Council of Flanders at Middelburg in Zeeland, did not mince his words: according to him, Roman law was packed with 'insipid subtleties, unwarranted cavillations and useless fictions'; its sources were 'a *corpus ineptiarum*, commonly known as a *corpus iuris*'; and the author regretted that the 'written law', which he described as a wandering star, had struck Europe like a bolt from the blue.[12]

In the Austrian Netherlands a typical representative of the law of the Enlightenment was Goswin de Fierlant (*d.* 1804), who campaigned in particular for a more humane criminal law. J. B. C. Verlooy (*d.* 1797) should also be mentioned among the partisans of the Enlightenment and social progress (which led him to collaborate with the French occupying forces), although he was first and foremost a specialist in old Brabancon law.[13]

[11] *Vertoog over de ongerijmdheid van het samenstel onzer hedendaagsche regtsgeleerdheid en praktijk.*

[12] L. P. van de Spiegel, *Verhandeling over den oorsprong en de historie der Vaderlandsche Rechten* (Goes, 1769), and H. Cohen Jehoram, *Over codificatie. Van Portalis tot na Meijers* (Deventer, 1968), 2.

[13] See Jan van den Broeck, *J. B. C. Verlooy, vooruitstrevend jurist en politicus uit de 18e eeuw* (Antwerp and Amsterdam, 1980).

THE CODES OF THE ENLIGHTENMENT

64 Legislation, and national codes in particular, were the means of putting the conceptions of the law of reason into practice.[14] Two different political regimes were responsible for promulgating modern codes: government by enlightened despots, and the French Revolution. For the first, modernization was the deliberate policy of emperors, kings, and high officials won over to new ideas. From time to time their policy of modernization came up against the conservatism of the people, and prevailed only through the efforts of a cultivated and progressive official elite. In the Austrian Netherlands, the rational reforms of Joseph II actually provoked a national conservative uprising, known as the Brabançon Revolution. Policies of modernization were conducted in Germany, Austria, Tuscany, in Naples, Russia, Portugal, and in the Scandinavian countries, as well as in the southern Netherlands. Yet in France the Enlightenment produced philosophers, but it did not produce any enlightened kings. There it was a revolutionary people which broke with the *ancien régime*, and it was with popular support that modern ideas were imposed. In either case the result was the same: the promulgation of great codes composed by small groups of eminent lawyers. They would dominate the middle-class society of the nineteenth century.[15]

Like Pope Gregory VII in the eleventh century, the modern reformers counted on legislation to achieve their political ends; and they were hostile to rival sources of law, such as custom and case law. In their view the public good depended entirely on codes, and reliance on custom betrayed a lack of confidence in social progress. Judges, they believed, ought not to compete with the legislator, and ought not to apply statutes restrictively on the pretext of respecting fundamental unwritten principles. The role of the judge was deliberately reduced to acting as the 'mouth of the law'. Otherwise all efforts at codification would have been in vain; and the aim of legal certainty would have been endangered by judges making decisions

[14] Case law played a very small part, since the courts followed a very conservative line. As we shall see (section 65), the role of universities was also limited.

[15] This is clear for the codes of absolutism, although the people were sometimes consulted, but also for the *Code civil* of 1804. It was the work of a general who had dictatorial power, and a small group of experienced and learned lawyers; institutions representative of the nation had no real opportunity to contribute or participate in its composition.

according to personal convictions.[16] Competition from jurisprudence was also not tolerated: there must be an end to subtleties and quibbles, which could only confuse the perfect clarity of the codes and make them, in the end, incomprehensible to the citizens. Emperors and kings were happy to pronounce prohibitions on commentaries on the codes, or other restrictive measures. Legislation, on the other hand, was elevated to the rank of 'science'.[17]

The first important code of the period was the *Codex Bavaricus civilis* of the Elector Max Joseph III of Bavaria, which was promulgated in German in 1756. It was the work of W. A. von Kreittmayr (*d.* 1790), who had studied in Germany and the Netherlands and had practised in the imperial chamber of justice. The Bavarian code was a substantial codification, but still followed the tradition of according a supplementary role to the *ius commune*. Codifications in Prussia and Austria went further: every disposition outside the codes was abrogated, and conversely judges could not refuse to apply new dispositions on the ground that they had not previously been in force. (This was stated expressly in the letters patent which ordered the publication in 1721 of a revised version of the old Prussian law, entitled *Verbessertes Landrecht des Königreiches Preussen.*)

In 1738 Frederick William I had ordered the preparation of a general book of laws for Prussia. It was to be based on Roman law (*Allgemeines Gesetzbuch gegründet auf das römische Recht*). In 1746, however, Samuel von Cocceji (*d.* 1755) was entrusted by Frederick II the Great, a friend of Voltaire, with compiling 'a general codification of German law based solely on reason and on national laws' (*bloss auf die Vernunfft und Landesverfassungen gegründetes Teutsches Allgemeines Landrecht*). This was a fundamental change of direction, as is confirmed by a pejorative reference to 'uncertain Latin-Roman law' and by an express prohibition on all commentaries, in order to prevent any interpretation by professors or advocates.[18] Cocceji was

[16] Francis Bacon (*d.* 1626), who in the early seventeenth century had declared himself in favour of a codification of English law, foresaw that the judge must not become a legislator, for *si iudex transiret in legislatorem, omnia ex arbitrio penderent* (quoted in *Handwörterbuch zur deutschen Rechtsgeschichte* II, col. 915). The famous expression 'mouth of the law' is from Montesquieu's *Esprit des lois* XI.6: 'the judges of the nation are merely the mouth which pronounces the words of the law, inanimate beings who cannot moderate either its force or rigour'.

[17] G. Filangieri, *La scienza della legislazione* (Florence, 1764; French trans., Paris, 1821).

[18] In the *Vorrede* (foreword) to the project of the *Corpus Juris Fridericiani* of 1749–51 entrusted to Cocceji, it is stated that 'all doubtful points of law which arise in Roman law or have been found by the doctors' must be decided once and for all, and a *Jus certum et universale* must be promulgated for all Crown provinces.

unable to fulfil his task,[19] but his work was continued by J. H. C. von Carmer (*d.* 1801) and C. G. Svarez (*d.* 1796), lawyers whose views were still closer to natural law and all the more remote from Roman law. Their labours finally culminated in the promulgation of the Prussian *Allgemeine Landrecht* in 1794. This massive and exhaustive code covered not only civil law, but also commercial and public law, church law, and criminal and feudal law. The code went into (or lost itself in) cases in extraordinary detail, in the vain hope of foreseeing and regulating all possible cases. Every extension or even interpretation of law by precedent, commentary or learned distinction was forbidden; in case of doubt clarification was to be sought from an official *Gesetzcommission* (legislative commission). The influence of Wolff, and through him Pufendorf, on the system of this code is obvious.

In Habsburg territory, important and progressive work towards codification was able to commence, since the Empress Maria Theresa and in particular her son Joseph II (a true reformer) were favourable towards the Enlightenment. A commission was appointed in 1753 to produce a draft based on common law (in order to correct and supplement it) and on the law of reason. The draft was completed in 1766 but was rejected by the Council of State, which thought it had its merits as a collection of rules, but that it was incomprehensible and too vast to be used as a code (it consisted of eight folio volumes). A new text was to be drawn up which was to aim at simplicity and natural equity; it was not to be a textbook, but concise, clear, free from the absolute authority of Roman law, and based on natural law. The first part of this code was promulgated under Joseph II in 1786 (*Josephinisches Gesetzbuch*), but it was not until 1806 that F. von Zeiller (*d.* 1828), a professor of natural law and one of the leading figures of the Austrian *Aufklärung*, completed the project. The *Allgemeines Bürgerliches Gesetzbuch* was therefore promulgated in 1811, initially for the old hereditary German lands of the Habsburg empire, and later for other lands under their rule. It was of course more modern than the Prussian code, which, for example, still attached much importance to the inequality of subjects before the law, and which still respected in full the privileges of the nobility. The Austrian code excluded all existing

[19] Only a fragment, known as the 'Projekt des Corpus Juris Fridericianum' was completed and published in 1749, according to Cocceji a *jus naturae privatum*.

and even future customary law (art. 10). Analogy or, failing that, natural principles were to be used to fill potential gaps.

The Prussian and Austrian codes remained in force for a long period. Only in 1900 was the former replaced, by the *Bürgerliches Gesetzbuch*; the Austrian Code, with the exception of some pandectist modifications in 1914–16, remains in force to the present day. Each of these codes subjected different peoples to a uniform law: the political aim was to promote the cohesion of the scattered, disparate territories united under the Crowns of the king of Prussia and the Austrian emperors.

The circumstances of the codification of French law have already been outlined. During the years of intermediate law, codes were not the work of enlightened sovereigns but expressed the will of a revolutionary people. Yet the contrast between legal development under monarchic and under revolutionary regimes should not be exaggerated. The codes of intermediate law got no further than drafts; and the Napoleonic codes reflect above all the political will of a powerful statesman and the work of educated, philosophically cultivated legal officials. They belonged to just the same social classes as the professors, magistrates and officials who were members of the codification commissions in Prussia and Austria.

FACTORS

65 The codification movement was carried along by strong social currents. First, there was the political factor. Sovereigns regarded the promulgation of national codes as an essential component of their policies of unification. The principle 'one state, one code' fitted perfectly with such policies. This was particularly clear in the case of the Danubian monarchy, which ruled a state made up of heterogeneous ethnic groups; but in France too the 'single and indivisible Republic' had every interest in establishing a single code for the whole country. The nationalization of law was at the expense both of the cosmopolitan *ius commune* and of particular local customs.

National codifications have had their place in a general evolution of law since the Middle Ages: the universal authority of the pope and the emperor was now replaced by the sovereignty of nation states which, large or small, set out their own legal order in national codes. Countries whose political unity came late were also the last to acquire their national codes: Italy acquired its *Codice civile* only in

1865, and Germany its *BGB* in 1900. National governments hoped that national codes would give them firm control on legal development: that had always been obscure and elusive, but central authorities were now in a position to take charge. The new legal order spelt the end for the diverse sources of law as well as for the various jurisdictions (the special competence of the church courts, for instance, which had been recognized in certain cases by the secular authorities).

Another significant political development was that the task of the state was now regarded as being to ensure the common good of its citizens, not the glory of God, the protection of the church or the power of dynasties. In countries governed by enlightened despots, this task was reserved to the sovereign (hence the adage 'everything for the people, nothing by the people'). This conception stands out particularly clearly in the *Josephinisches Gesetzbuch* of 1786 (1.1): 'Every subject expects that his sovereign will assure him security and protection. It is thus the duty of the sovereign to lay down the rights of his subjects clearly, and to order their actions for the sake of the common and the individual good.' So in Germanic lands the citizens were the product of the law, whereas in France the law was the product of the citizens, for there the law derived not from a sovereign but from the *volonté générale* ('common will').[20] The authorities now had the political will to give the people the rights which it had lost through the intervention of learned lawyers and their proclivity for treating legal affairs *in camera*.

Economic considerations also played an important part. Modern codes responded to the demands of a confident and enterprising middle class: demands such as individual freedom and responsibility, the abolition of feudal barriers and discrimination (restrictions on alienation of land, corporatism, privileges of the 'orders', mortmain). The economic premisses of some legal arguments can also be easily identified. So, for instance, Holland in the seventeenth century was a small nation whose prosperity depended above all on commerce with overseas countries. It was no coincidence, then, if Grotius concluded that freedom of the seas was a principle of natural law.[21]

[20] 'La loi est l'expression de la volonté générale': *Déclaration des droits de l'homme et du citoyen* of 1789, repeated in art. 6 of the Constitution of 1791. See also t. III art. 2 of this Constitution, 'The State, from which alone all powers derive, cannot exercise them by delegation' and art. 3 'There is no authority in France above that of the law.'

[21] Grotius was prompted to write his *Mare liberum* (1609) by Spanish and Portuguese claims to a monopoly of colonial commerce. Portugal was from 1581 to 1640 a dependency of Spain.

John Selden (*d.* 1654), an English lawyer at a time when England was beginning to assert its maritime hegemony, defended the opposite thesis in his *Mare clausum* of 1653. This was two years after Cromwell's Act of Navigation, which restricted commercial traffic to England to the English fleet. Another example is the abundant legislation on land and mortgages which was introduced at the instance of the Third Estate during the first years of the French Revolution, and aimed to free feudal and church land and so permit its use within the system of credit.[22] It would, however, be inaccurate to suggest a direct link between the great French codes and the Industrial Revolution, since that reached the continent long after the first attempts at codification, and even after the codes had already been promulgated. None the less, the law of these modern codifications proved itself to be perfectly adapted to the needs of the capitalist, middle-class economy of the nineteenth century.

Finally, it is worth noting the importance of intellectual factors. The philosophy of the Enlightenment rejected old dogmas and traditions (especially religious ones) and placed man and his well-being at the centre of its concerns. The change of attitude was partly caused by the influence of modern science: its new conception of a universe dominated by measurable elements, and laws of physics which could be logically proved, had replaced the old cosmology with its spirits and celestial circles. The eighteenth-century method of natural law is characterized by precise and exact deduction from set axioms, just like mathematics. The approach was clearly inspired by Descartes's *Discours de la méthode* (1637), the *Philosophiae naturalis principia mathematica* of Newton (1687) and Spinoza's *Ethica more geometrico demonstrata* (published posthumously in 1677).[23] According to the new conceptions, man and society were part of an intelligible universe ruled by the laws of nature. The idea of a being created in the image of God and placed above nature was now excluded from scientific discourse.

The universities played only a secondary role in this period,

[22] In the Decree of 5–12 June 1791, art. 1 of the *Code rural*, t.1 s.1 states that 'the territory of France in its entire extent is free like the people who inhabit it'. See the volume *La Révolution et la propriété foncière* (Paris, 1958) in M. Garaud, *Histoire générale du droit privé français* (from 1789 to 1804).

[23] D. von Stephanitz, *Exakte Wissenschaft und Recht. Der Einfluss von Naturwissenschaft und Mathematik auf Rechtsdenken und Rechtswissenschaft in zweieinhalb Jahrtausenden. Ein historischer Grundriss* (Berlin, 1970; Münsterische Beiträge zur Rechts- und Staatswissenschaft, 15), 52–100, 120–33.

except in Germany, where some were specially founded in the spirit of the *Aufklärung* (Halle in 1694, Göttingen in 1737), and where natural law was taught with enthusiasm. In France in particular the faculties of law made virtually no contribution to the legal developments of the eighteenth century. Of course, some lawyers knew the doctrines of Pufendorf, Thomasius and Wolff, and some professors exerted a considerable influence on the codification, but the decline of the universities continued. The case of Orléans is typical: one of the most influential jurists of the time, Pothier, taught there; but the university (which was in any case no more than the pale shadow of the brilliant school it had once been) was obliged to close its doors in 1793 for want of students. In the eighteenth century universities were also in decline in many other countries, and their suppression at the time of the French Revolution hardly took contemporaries by surprise. Science and modern philosophy had taken shape outside university institutions; and the universities had been discredited by granting degrees to candidates without serious examination, or even simply selling them to those whose only merit was to have taken the trouble to make the journey to the university city. The fate of university reputations and the value of their degrees can readily be imagined.[24]

THE COURTS AND PROCEDURE

General aspects

66 The courts and their procedure did not escape the criticism levelled at the learned law of the *ancien régime*. It was directed mainly at the random confusion of courts which had grown up. It also struck out at the role of the judges in developing the law, which sometimes tended to shade into true legislative power, as in the case of the *arrêts de règlement*.[25] Particular exception was taken to the learned Roman-canonical procedure: it was incomprehensible for the vast majority of the people; it was written, and therefore long and costly; and it caused still greater offence because it was secret and bureaucratic. The general trend of reforms proposed by partisans of the Enlighten-

[24] The following anecdote of the university of Pont-à-Mousson shows that the professors had at least their sense of irony, if not learning. A student who had acquired a law degree wanted to buy one for his horse too; to which the Faculty replied that 'it could grant degrees to asses but not to horses'.

[25] See above, section 51.

ment is therefore easy to imagine. They were driven by revolutionary zeal and inspired by their confidence in the natural goodness of man (under the influence especially of Rousseau). Some actually went so far as to advocate the abolition of all formal judicial procedure: the good citizens estranged by a dispute would be reconciled by arbiters or justices of the peace, without any of the formalities and rigorous procedural rules of the *ancien régime*. Various experiments were undertaken in the regime of intermediate law, but of these only the preliminary of conciliation survived,[26] and even it turned out to be a mere formality without much practical value, since in practice people turned to the courts only when their disputes could not be resolved amicably. Most of the reformers took the view that courts and the administration of justice were indispensable, but that they had to be fundamentally modernized. Their proposals for reorganization of the courts were these.

The labyrinth of tribunals, courts of justice and *parlements* with their overlapping jurisdictions had to be abolished and replaced nationally and for the citizens as a whole by a rational and uniform hierarchy of courts. This was what Joseph II attempted in the Austrian Netherlands: the abolition of a situation inherited from the Middle Ages and its replacement with a new 'pyramidal' system of courts.[27] Similarly the whole court structure was abolished at the beginning of the Revolution in 1790–1 and replaced with one which has constituted the basis of court organization in France and Belgium to the present day. In private law jurisdictions (apart from the commercial courts) the system provided for one justice of the peace for each canton; one court of first instance for each *arrondissement*; a court of appeal for each of twenty-seven jurisdictions; a single Cour de Cassation, to see that the laws were uniformly applied. No international, European or universal authority superior to the system of national courts was envisaged.

Legal practice had to become more democratic: if justice was not to be entrusted to the people, it must at least be brought closer to them. The most radical method was to elect judges under a temporary mandate (a system still in use in some states of the United States of America) and to abandon all qualifications for judicial office, in particular the requirement for a law degree. For a very short period, the French Revolution employed such a system (Con-

[26] Code de Proc. civ. II.i, arts. 48–50.

[27] See below, Section 68.

stitution of 1791, III, 2 and 5) but the popular courts were suppressed under Napoleon. The Constitution of Year VIII (13 December 1799) readopted the traditional conservative system of professional judges, who had been educated in law and appointed for life by the first consul. The unpopular system of selling judicial appointments had evidently been abandoned earlier.[28]

Statute: the sole source of law

67 The monopoly of statute as a source of law had to be ensured: judges were given instructions to keep strictly to their task and to refrain from all legislative intervention. This is to be understood in connexion with the doctrine of separation of powers, as defended by Montesquieu.[29] Robespierre would actually have been happy to see the term 'case law' disappear from the French language, since 'in a state having a constitution and legislation, the case law of courts is nothing other than statute'. Article 5 of the *Code civil* of 1804 provides: 'Judges are prohibited from pronouncing general regulatory dispositions in cases submitted to them.' The subordination of judges to statute can also be seen in the requirement that they give reasons for, and the statutory basis of, their decisions.[30] In the old law, by contrast, the judge who gave reasons for his decisions (as Wielant had observed) was considered a fool. But what if the text of a statute was obscure? Was each judge to be left the freedom to interpret the statute according to taste? The reformers thought not: their preferred solution would have been to reserve necessary interpretation to the legislator himself.[31] But the procedure adopted by the Constituante of 1790, *référé au législatif* ('referral to the

[28] Statute of 16–24 August 1790 on the court system, t.II art. 2, 'The sale of judicial office is abolished for ever, judges shall do justice freely and shall be paid by the state.'

[29] Art. 16 of the *Déclaration des droits de l'homme et du citoyen* of 26 August 1789 reads, 'Any society in which there is no guarantee of rights and no separation of powers has no Constitution.' The separation of powers has also to ensure the independence of the judiciary from the executive. J. P. A. Coopmans, 'Vrijheid en gebondenheid van de rechter voor de codificatie', *Rechtsvinding. Opstellen aangeboden aan prof. dr. J. M. Pieters* (Deventer, 1970), 71–109; K. M. Schönfeld, 'Montesquieu en "la bouche de la loi"' (Leiden, 1979; doctoral thesis); H. Hübner, *Kodifikation und Entscheidungsfreiheit des Richters in der Geschichte des Privatrechts* (Königstein, 1980; Beiträge zur neueren Privatrechtsgeschichte der Universität Köln, 8).

[30] Constitution of Year III, art. 208; Belgian Constitution of 1831, art. 97.

[31] The statute of 16–24 August 1790 required the courts to approach the legislature at any time when they thought it necessary to interpret a statute.

legislature'), was less radical. A single Tribunal de Cassation[32] was created, to nullify judgments which had misapplied the law and remit them to another court of the same instance. Where three tribunals persisted in judging to the same effect, the Tribunal de Cassation had to submit the question to the legislative assembly to obtain a legislative statute, which was then imposed on the judiciary at large. This system was also introduced into Belgium, and was confirmed after the revolution of 1830 by the organic law of 1832 which created the Belgian Cour de Cassation. Referral to the legislature was abolished only in 1865, when it was replaced by the current system under which, when two lower courts have given judgments to the same effect but their judgment has each time been annulled, the lower court to which the case is then remitted must follow the decision in law of the Cour de Cassation. This system finally brought judicial powers of statutory interpretation under control.

The modern codes

68 Reforms were also advocated in civil procedure. The rules of procedure were to be codified to ensure certainty and clarity, qualities which were completely lacking in the weighty and obscure volumes of Roman-canonical procedural jurisprudence.[33] The new codes made substantial changes in procedure, which brought justice closer to the citizens or, in other words, gave the administration of justice a more humane appearance. Procedure had to be public (apart from the judge's deliberations) and oral, which reduced both length and costs. Secret examination of witnesses was to be abolished. The excessively theoretical and complicated system of legal proofs was abolished, at least in criminal cases; now the judge decided according to his own conviction, reasonably based on the evidence before him (*conviction intime*). Justice was to be made democratic by abolishing the profession of advocate, since the citizen, properly informed by the codes, would from now on be

[32] This court, which was set up by decree dated 27 November – 1 December 1790 to annul all formally defective procedure and all judgments contrary to the law, had antecedents in the *ancien régime* in the case law of the Conseil du Roi for which rules had already been made in 1738.

[33] The 'Code Louis' (see above, section 49) was a notable exception in the European law of procedure.

perfectly capable of defending his own interests.[34] Juries on the English model were to be introduced, so that every citizen would be judged by his fellow citizens.[35]

The abolition of advocates was very short-lived. The proposal for a jury in civil cases was rejected by the Constituante after intervention by Tronchet, who maintained that in civil cases questions of fact could not be distinguished from questions of law. But the reformers were almost unanimous in defending the old *Verhandlungsmaxime*.[36] The exception to the rule was Frederick the Great who, as an enlightened despot, thought it the duty of the court to seek out the truth, even if this involved the judge in investigation beyond the submissions made by the parties. His divergent view of procedure rested on the principles of the *Instruktionsmaxime* and the *Offizialmaxime*, in which the *officium iudicis* is the guiding principle of civil procedure. The task of the judge is to protect the citizen, and to convince himself on the merits of the case, independently of the allegations of parties, even if they say nothing or make mistakes. Cases are investigated by an *Instruent* appointed by the court, who may be compared with the *juge d'instruction* of criminal law. These principles are set out in book I (*Von der Processordnung*) of the *Corpus Juris Fridericianum* (1781), which also abolished advocates chosen and paid by the parties and replaced them with officials attached to the courts (*Assistenzräte*).[37] As in France, however, so in Prussia: the profession of advocates rapidly re-established itself, and the experiment undertaken by Frederick the Great was transitory. Yet in the twentieth century similar notions about the role of the judge and judicial assistance have again attracted attention.

The principal codes of civil procedure of the time were the code of

[34] This was one of the reforms of the *Déclaration des droits de l'homme* as well as of the Constitutions of 1791 and 1795. The abolition of advocates was part of the struggle against the revival of the privileges of the *ancien régime*. It did not last long: the Ordre des Avocats was re-established by Napoleon in 1804, with the requirement that its members be graduates in law.

[35] In 1790 E.-J. Sieyès had already proposed to the Constituante that all civil and criminal cases should be decided by jury. His proposal had met with results in practice only in criminal law. As Robespierre observed to the Convention in 1793, the difference between juries and non-professional judges was merely one of name.

[36] i.e. where procedure is in the hands of the parties, and the decision of the court is based on the submissions of the parties and the witnesses they have cited.

[37] Traditional advocates were regarded as mercenaries.

Frederick II in Prussia,[38] that of Napoleon in France, and in Austria the *Allgemeine Gerichtsordnung* of Joseph II, which was promulgated in 1781 for the territories of central Europe under Habsburg rule and was also important for the Austrian Netherlands. The *Gerichtsordnung* was a systematic and comprehensive codification of procedural law. It was also a statutory modernization of the law in the spirit of the Enlightenment. Where it preserved traditional procedures, the *Gerichtsordnung* was a codification of Roman-canonical procedure, while its modern characteristics derived from comparison with other European systems, from the ideas of the authors of the Enlightenment, and from the work of Montesquieu, who was often quoted by the codification commission. Some of the new experiments with oral procedure were developed more systematically in later legislation. But radical reform of the Austrian law of procedure came only around 1895, with the introduction of the *Zivilprozessordnung* prepared by Professor F. Klein. In the Netherlands, Joseph II attempted a complete reform of the court system, by abolishing the existing courts in 1787 and replacing them with a single pyramidal court structure. His reform envisaged sixty-three regional courts of first instance, two courts of appeal, at Brussels and Luxembourg, and a single sovereign council sitting at Brussels. The courts of appeal were to hear appeals, while the sovereign council would be competent to review judgments. This system already foreshadowed the contemporary one. In the time of Joseph II, however, this direct assault on tradition and vested interests provoked the Brabançon revolution in October 1789, and the authorities found themselves compelled to reinstate the old jurisdictions, which survived until the French occupation in 1794.

As part of his policy, Joseph II had in Brussels in 1786 promulgated a *Règlement de procédure civile*. This contained 451 articles and was close to the Austrian model. It provided in particular that only graduates in law could practise as advocates. Judges were to apply the dispositions of the *Règlement* strictly: they were prohibited from diverting from it by appealing to the 'spirit of the law', 'praetorian equity', 'contrary custom' or 'any other pretext whatsoever'. A judge who allowed a case to languish for long had to pay damages and

[38] This was largely composed by von Carmer and Svarez, who have already been mentioned. It was revised by the *Allgemeine Gerichtsordnung für die preussischen Staaten* (1793) of Frederick-William II and an ordinance of 1799. Ordinances of 1843 and 1846 took up again with traditional practice.

interest. Where there was a gap in a statute, the court was to judge by analogy or, failing that, to address itself to the sovereign council of justice which was to be set up in Brussels. The preparatory work for the *Règlement* had been done in Brussels from 1782, but the draft worked out in the Netherlands was rejected by the Viennese authorities and replaced by a more 'enlightened' code, which was already in use in the Habsburg territories in North Italy. To the government of Joseph II, the draft which was rejected was too traditional and still too attached to local customs.[39]

In conclusion it should be recalled that the procedural codes of the Enlightenment, or at least those which lasted some time, were decidedly conservative. In France the codification reiterated the essential elements of the *Ordonnance* of 1667, which had shown itself to be practical and had managed to avoid the excesses of Roman-canonical doctrine. The *Gerichtsordnung* of 1781 preserved the essence of 'common procedure' (*gemeiner Prozess*), although it revised some aspects in a modern light. Yet in some regions new ideas initially had no effect on procedure. In Spain, justice continued to be administered according to the medieval learned procedure; and England maintained its medieval common-law procedure.

ENGLISH LAW IN THE ENLIGHTENMENT

Lord Mansfield and William Blackstone

69 On the European continent the legal world was face to face with a series of upheavals, or at least a wide-ranging movement of new ideas and reform. But English law steadfastly steered its traditional course. The best expression to sum up the history of English law in the second half of the eighteenth and the beginning of the nineteenth centuries is 'all quiet on the English front'. There was no modernization, revolutionary or otherwise. Far from it: in this period of extreme conservatism the existing system was actually consolidated. The Common Law was, and it remained, the basis of

[39] Joseph II's reforming zeal can be observed, among other things, in nearly a thousand ordinances which he promulgated in the Austrian Netherlands in the course of his ten-year reign. See R. Warlomont, 'Les idées modernes de Joseph II sur l'organisation judiciaire dans les Pays-Bas autrichiens', *Revue d'histoire du droit* 27 (1959), 269–89; P. van Hille, *De gerechtelijke hervorming van Keizer Jozef II* (Tielt, 1972). Joseph II also upset Belgian legal circles by abolishing torture: E. Hubert, *La torture aux Pays-Bas autrichiens pendant le XVIII^e siècle* (Brussels, 1896).

English law. Equity, the case law of the Court of Chancery, was more restrictive than ever and had degenerated into a mass of rules of positive law which bore no relation to the natural equity from which, some centuries earlier, it had arisen. The powerful 'Prerogative Courts'[40] had collapsed in the course of the Puritan revolution, and the courts which applied Roman or canon law were only marginal. So the Common Law remained what it had always been: a body of unwritten rules, thought to be based on ancient customary law, whose definition and interpretation was in the hands of the judges, in particular the twelve judges who sat in Westminster Hall. Legislation, especially private-law legislation, was not significant. Statutes were rare and, even if the courts did not adopt the extreme position of Sir Edward Coke,[41] they still allowed themselves great latitude in interpreting statutes. At times this came close to judicial control of statutes according to the fundamental principles of the Common Law.[42]

Judges were not just the (conservative) guarantors of the law in force.[43] They could also contribute actively, by means of constructive precedents, to the development of English law. William Murray, Earl of Mansfield (*d.* 1793) was notable in this respect. Lord Mansfield was of Scottish descent (hence his familiarity with continental and Roman law), and after a political career in the House of Commons, from 1756 to 1784 he occupied the position of Lord Chief Justice in King's Bench, one of the Common Law courts at Westminster. At the same time he still sat in the House of Lords and took part in political affairs. His fundamental lasting contribution was to integrate English commercial law firmly into the system of Common Law. The antecedents of commercial law were in continental, especially Mediterranean, practice. In constructive, sometimes bold

[40] These were courts based on the royal prerogative, and of an absolutist character; the most important was the Star Chamber.

[41] In *Bonham's Case* in 1610 it was maintained by Coke (*d.* 1634) that old law books showed that 'in many cases the Common Law will control Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason or repugnant, or impossible to be performed, the Common Law will control it and adjudge such Act to be void'.

[42] Only in 1871 did the Bench expressly reject this notion and declare that the judges as 'servants of the Queen and the legislature' had to accept the authority of Parliament, for 'the proceedings here are judicial, not autocratic, which they would be if we could make the laws instead of administering them', *Lee* v. *Bude* L. R. 6 C. P. 576, 582 *per* Willes J.

[43] At the beginning of the nineteenth century, two judges in particular were notoriously conservative, Lord Ellenborough in the King's Bench (1802–18) and Lord Eldon in Chancery (1801–6, 1807–27).

judicial opinions, Lord Mansfield developed this commercial law into an instrument suited to modern commercial and financial demands (credit, bills of exchange, insurance, banking), and is therefore regarded as the founding father of English commercial law. The development of the law was accomplished in collaboration with London merchants: they sat in the civil juries, and were asked detailed questions about the scope and meaning of their professional practices.

The role of legislation was merely ancillary. According to Blackstone (see below), *lex non scripta* (the uncodified Common Law) had to be distinguished from *lex scripta* (Acts of Parliament or – strictly speaking – of the Crown and the Houses of Lords and Commons). Statutes were merely complementary to the Common Law. They were declaratory, since they made explicit a particular point of Common Law, and they were remedial, since they were intended to correct deficiencies in the Common Law. Furthermore, there was a presumption that the intention of the legislator was never to modify or abrogate a rule of the Common Law, unless this intention was expressly declared. According to Blackstone, where there was no statute the task of the judges, who were regarded as living oracles and repositories of the laws, was to resolve all doubtful cases, and thus the Common Law was and remained a creation of case law.

Scholarship played an even more modest part than legislation. Law faculties and the teaching of law in general had lost all importance. The Inns of Court completely abandoned teaching and became purely social clubs for lawyers. At Oxford the creation of the Vinerian Chair of English Law was the first tentative step in university teaching of law. Blackstone was the first to occupy it, from 1758, and he did so with distinction. After him, it deteriorated into mediocrity and became a sinecure.[44] The legal system and procedure remained trapped in their medieval moulds.

Such inertia seems surprising against the background of the continental Enlightenment, whose inspiration – paradoxically – was largely British. It is even more surprising in the perspective of the Industrial Revolution, which reached its high point at precisely the time when the English legal world was at its most lethargic. It is a paradox of English legal history that this social and economic upheaval could take place under a legal system which came straight

[44] H. G. Hanbury, *The Vinerian Chair and legal education* (Oxford, 1958).

from the Middle Ages, as if the nation's entire energy had been mobilized for the economic miracle, and the institutional framework had been totally ignored.

The age of reason, however, was not wholly without influence on English law, or at least English legal thought (which was in any event far removed from practice). Two eminent but very different jurists stand out at this time: one as the last great author of the classical Common Law, the other the critic of that same Common Law and the initiator of the reforms of the nineteenth century. Sir William Blackstone (*d.* 1780) was the author of the *Commentaries on the laws of England* (1765–8; several editions and adaptations), a comprehensive account and analysis of English law. Although he has his critical observations to make, his general appraisal of English law is positive. His aim was to consolidate the English legal system and, in the spirit of the Enlightenment, to demonstrate its rational character and reveal its fundamental principles. The elegant language and style of the author favourably surprised his public, since most authors wrote in unintelligible and rebarbative jargon. Proper English replaced Law French and Latin only from 1731.

Jeremy Bentham

70 Jeremy Bentham (*d.* 1832) was quite a different matter. He confronted the status quo directly, and throughout his lifetime was a vigorous and eloquent apologist for the principle of codification. The point of departure for Bentham's critique of the English system (which in his day was still substantially medieval) was not continental natural law[45] but instead an entirely original idea: the principle of utility. Bentham did not formulate axioms and deduce rules of law from them; instead he questioned the utility of each legal rule and concept, and the practical purpose it served for contemporary man and society. Many traditional values failed this test, and so had to be replaced by new ones. In particular they had to be replaced by a codification compiled under the watchword 'utility': Bentham called his doctrine 'utilitarianism'. In his view, codes had to ensure the 'cognoscibility' and the certainty of law, and legislation and case law

[45] 'Continental' in the sense that it was there that natural law had particular success and a marked influence on legal practice. This does not mean that English thought made no contribution to natural law; think of Hobbes.

must aim at the 'greatest happiness for the greatest number' (the slogan was J. Priestley's, *d.* 1804).

Among Bentham's works are *A Fragment on government* (1776), which attacked Blackstone's *Commentaries*; *Principles of morals and legislation* (printed in 1780, published in 1789), which was a plea for radical legislation as the source of modern law, and *Codification proposals* (1823). He also wrote a *Theory of legislation* (which appeared only in 1931).[46] Bentham's time was dominated by conservative ideas; any call for change at that time summoned up the spectre of the French Revolution and the Terror. As a result Bentham's work, which advocated fundamental reform of the existing system, did not meet with success. After his death, however, Parliament, which had been substantially modernized by the Reform Act of 1832, did begin to carry out his programme, owing largely to the efforts of Lord Brougham, a fervent reformer and, as a politician, more adept than Bentham.[47]

It is a paradox that the greatest European theoretician and exponent of codification – who actually coined the expression 'codification' – came from England. Right to the present day England has kept its distance from codification; its legal system is still based partly on the unwritten customary law of thousands of precedents, and partly on a vast collection of statutes which are chronologically ordered in imposing volumes and range from the Middle Ages to the present. The greatest prophet of codification was rejected in his own land.[48]

There are several reasons for these divergent developments in England and continental Europe, and for the astonishing sterility of English law during this period. On the continent, the great codes were the work of enlightened despots or generals who had dictatorial powers. But England experienced neither of these regimes. The continental codes aimed particularly to reinforce the unity of the nation state, but there was no such need in England, where local legal peculiarities were unknown and the Common Law was the

[46] Many of Bentham's works were translated into French by his pupil E. Dumont, and read assiduously on the continent.

[47] The signal for fundamental reform was given in 1828, when Brougham made a six-hour speech in the House of Commons on the Common Law, and two Royal Commissions were appointed. As Lord Chancellor from 1830 to 1834 Brougham was in a position to urge reform. He was one of the founders of the Law Amendment Society in 1844.

[48] As an exponent of codification, Bentham had a brilliant but equally unfortunate precursor in Francis Bacon (*d.* 1626), the lawyer, politician and philosopher of science.

oldest national law of Europe. The very fervour with which codification was carried out on the continent aroused the mistrust of many of the English. For them the continent evoked the political regimes which they most abhorred: absolutism and revolutionary radicalism. In addition, the objectives of the continental reformers had partly been achieved in England already. For instance, in France land was still held by religious establishments in mortmain, or kept off the market by medieval customs; but in England the monasteries had been dissolved and their lands confiscated under Henry VIII (1509–47), and vast tracts of land had re-entered the economic system. The numerous Enclosure Acts of the eighteenth century had also lifted medieval restrictions on common lands and property rights. Consequently large areas of agricultural land were now open for economic exploitation.

EVALUATION OF THE LAW OF REASON

71 A balance sheet of the successes and failures of the law of reason may be helpful. Some of its basic objectives were achieved. It had a liberating effect, since it led to the abandonment of the constricting system of the *auctoritas* of ancient texts. Admittedly, even in medieval thought *auctoritas* (authority) had to be subject to *ratio* (reason), but of the two it had been *auctoritas* which prevailed. Now *ratio* had become the guiding principle. The antiquity of a rule of law was no longer thought to guarantee its superiority. Some authors even adopted the opposite thesis and affirmed that each legal innovation necessarily represented progress.

The primacy of statute (especially codified statute) was now accepted. On the continent this was hardly challenged again, while some of the earlier extremism had now been abandoned, such as the statement by J.-J. Bugnet (*d.* 1866) that 'I do not know the civil law, I teach the Code Napoléon alone.' Since their homologation, customs had in any case come close to being statute in disguise, but were now relegated to a marginal role. Legal scholarship had no binding authority. Only case law maintained an important place in legal practice. The result, however, was much less radical than the supporters of statute as the unique source of law had (somewhat naively) imagined, and the attempt to prevent lawyers writing doctrinal commentaries was as vain as the hope of providing for every case in the codes. Yet the priority of statute over all other

sources of law did bring about a marked simplification: henceforth, knowledge and application of the law were incontestably clearer and more certain. Natural law was an essential element in the triumph over old customary law and the (still prestigious) Roman law. Only a still more universal law, or rather a truly universal law, was in a position to mount a challenge to the quasi-universal authority of Roman law. If the *Corpus iuris* was the law of the Roman empire and of the western world, natural law was that of all humanity; if Roman law was the work of the greatest people of lawyers in history, then natural law was the very expression of reason. So at the beginning of the eighteenth century it was possible to argue that the Roman rule *alteri stipulari nemo potest* was obsolete, since by virtue of natural law principles every agreement could give rise to a legal action. According to one author of the period 'most, or at least the better, lawyers recognize that on this question it is proper to follow not the subtleties of the Romans but the simplicity of natural law'.[49]

The natural law method was to deduce concrete rules of positive law from general concepts and axioms. This systematic approach (*Begriffsjurisprudenz*) still exercises an influence today. It replaced the old method, the principal task of which had been exegesis of individual texts of the *Corpus iuris* in order to harmonize them. The modern, more abstract method deliberately followed that of the exact sciences, for the aim of the lawyers was to realize a universal science based on demonstrable propositions. Even today this aim represents an insuperable obstacle to all attempts to reconcile English and continental legal thought. The conviction and the ambition were trenchantly expressed by the civilian Fr. Laurent, professor at the University of Ghent (*d.* 1887): 'Law is a rational science.' The notion that law is purposive, that it can be used to direct social policy or even to bring about a certain kind of society, is also part of the legacy of the age of reason. The law of reason saw law in a political context, utilitarian or philosophical. This led to law becoming ideological, and it allowed governments to tighten their control on their peoples. This had previously been unthinkable. The eighteenth century also made a start on

[49] Augustin Leyser (*d.* 1752), an important figure of the *Usus modernus*; see K. Luig, 'Der Einfluss des Naturrechts auf das positive Privatrecht im 18. Jahrhundert', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (G. A.) 96 (1979), 41.

humanizing the law, mainly, although not exclusively, the criminal law.[50]

The secularization of the law, its removal from the authority of theology and divine laws, was an objective of the Enlightenment which was largely attained. Civil marriage and divorce were introduced, and religious discrimination, especially against 'dissident' Christian sects and Jews, was abolished. At one time a distinction had been made between the *civitas Dei* and the *civitas terrena*, the superior divine order and the temporal order subject to it. Now the temporal order was emancipated. It could set its own goals, and means to achieve them.

In several respects, however, the ambitions of the law of reason were frustrated. Natural law itself, although it was greatly in vogue in the Enlightenment, had only a short life ahead of it. By the beginning of the nineteenth century, it had lost all real importance as a guiding principle and source of inspiration for the law. It had completed its task of mounting a challenge to the ancient order and inspiring the codes. It could disappear, like the revolutionary masses, with which nineteenth-century generals and citizens had nothing to do. Once the revolutionary codes were promulgated and the civil order of the nineteenth century was established, natural law amounted to no more than a suspect source of criticism and opposition. In the Constitution of the Year VIII, the consuls, the senior of whom was Bonaparte, had proclaimed that the Revolution had ended. Natural law as a discipline in the syllabuses of the law faculties crumbled away without any proper scholarly discussion. It was not conquered or exiled, but merely faded away. Although the term 'natural law' was retained in several syllabuses, the material taught covered everything but natural law (legal theory, sociology of law, legal statistics, philosophy and so on). In the middle of the nineteenth century, Windscheid observed 'Der Traum des Naturrechts ist ausgeträumt' ('The dream of natural law is at an end'). Natural law was now no more than a purely academic subject without practical significance. For an advocate to resort to natural law, his case must already be desperate.

[50] Imprisonment for debt was abolished by a decree of 12 March 1793 which stated that 'it is not even permitted to contract for it'. None the less it reappeared in the *Code civil*; it had already been revived by a law of 14 March 1797 on the basis that the purpose of its abolition had been merely 'an attack on property'. Only in 1867 in France, and in 1871 in Belgium, was it abolished (in 1980 in criminal cases).

THE LAW OF REASON AND THE HISTORICAL SCHOOL

72 The two great schools of thought which took over from natural law at the beginning of the nineteenth century were the Exegetical School and the Historical School. Members of the Exegetical School believed that law was identical with the codes and that, since statute was now the sole source of law, scholarship had to confine itself to the exact interpretation (or 'exegesis', the term used for interpretation of biblical texts by theologians) of statutes in general, and above all the codes. Such an approach inevitably excluded any philosophical system such as natural law.[51] The Historical School was launched by the work of its founder, F. C. von Savigny (*d.* 1861), *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (1814), and had its own periodical, the *Zeitschrift für geschichtliche Rechtswissenschaft* founded in 1815. The name ('Journal for Historical Jurisprudence') proclaimed the programme: jurisprudence should be historical, and the historical experience of a people ought to be the true source of inspiration for its legal practice.[52] This school believed that law was a natural, organic expression of the life of a people. It could not be codified at a given stage of development, any more than a language could.[53]

At first sight the complete failure of natural law is surprising. Yet it is connected with the great political and social changes of the time (which will be examined at length), and also with its intrinsic impotence as a school of thought. Its claim was to establish objective and universal certainties, which were valid for humanity at large. But these ambitions were not realized. What seemed just in all the circumstances to one scholar, people, age or civilization did not seem so to others. The axioms of natural law were in fact subjective, and so they had no value as the basis of a universal human system. The few general principles on which unanimity could be achieved (such as the duty to be honest and sincere, to keep promises and respect agreements) were so vague that they could scarcely solve the real problems of daily life. Natural law was too often inadequate

[51] The Exegetical School (see also the following chapter) in fact dealt with the *Code civil* as the glossators had in their day dealt with the *Corpus iuris*.

[52] Savigny's *Vom Beruf* was a polemical work aimed at A. F. Thibaut (*d.* 1840), the exponent of codification. The polemic between the two was one of the most celebrated of the nineteenth century.

[53] Like Savigny, who was mainly interested in ancient and medieval Roman law, the scholars K. Eichhorn (*d.* 1854) and J. Grimm (*d.* 1863), who were both interested in the Germanic and German past, belonged to the historical movement.

precisely where a legal rule was most needed. Grotius' views on family law illustrate how unfocused and non-universal the 'certain' principles of natural law could be: he states that polygamy is not incompatible with natural law, whereas polyandry and marriage between ascendant and descendant are contrary to it. This doctrine is shored up by very dubious propositions.[54] Grotius also believed that natural law supported his very traditional views on the legal status of women. These views – especially that the husband is the natural head of family, and his wife submits to him by marriage – nowadays appear totally illegitimate. The partisans of natural law inevitably had to turn in large part to Roman law, in order to be able to state the rules required by practice in more precise and concrete terms. It is also significant that the codes of intermediate law, which were inspired by natural law, were a failure and had to be replaced by the Napoleonic codification, whose authors drew largely on ancient law.[55]

Savigny and the Historical School had a similar experience. Although they declared that the *Volksgeist* and the traditions of a nation were the sources of law *par excellence*, it very soon became clear (in particular in Savigny's own work) that their formulation of concrete, practical rules derived to a large extent from the *Corpus iuris*. The paradoxical result was that Savigny was the leader of the Historical School and at the same time the precursor of the German study of the Pandects (*Pandektistik*), a nineteenth-century doctrine wholly based on Roman law and entirely unconnected with the German *Volksgeist*.

It was, therefore, only in times of crisis that discontent with, and criticism of, positive law crystallized around natural law. Once the crisis was over and a new equilibrium had been established, natural law had played its part, and the new system (the *Code civil* or the *Pandektenrecht* of the nineteenth century) could claim that it represented the desired legal order and the ideal law. The School of Natural Law was equally unable to realize its universal vocation. The hope had been to set out from reason, and so to work out a universal (or at least a European) law which would put an end to the

[54] Marriage between ascendant and descendant was ruled out, as the intimate relations between spouses are incompatible with the respect due by a child to a parent. There was disagreement even on the question of the legal nature of marriage: for Grotius it was a corporation, while for many others (including Roman law) it was a contract.

[55] See above, section 4.

absurdity denounced by Pascal: 'Three degrees of latitude overturn all case law, a meridian decides the truth; it is a strange justice which stops at the first river!'[56]

In reality the triumph of national codes brought about the nationalization of legal systems which was characteristic of nineteenth-century legal development. The law of reason and the cosmopolitan Roman law had to give way to different national legal orders based on national codes and national administration of justice. The development went along with that of sovereign states in the same period, as well as with various intellectual currents. In France, Montesquieu had already emphasized the necessity of adapting the law to the 'spirit' of peoples, and numerous German jurists of the late eighteenth and nineteenth centuries were convinced that each people must live by its own laws, adapted to its particular needs. So the School of Germanists (which opposed that of Romanists) looked in ancient law for elements which could shape a Germanic law adapted to the needs of the German people.[57] It was not a question of raising legal barriers between peoples, but at least legal unity had been achieved within states. The geographical frontiers of customary regions had disappeared, or would do in the course of the nineteenth century, and many old corporatist and social barriers (such as the 'Estates') had been suppressed.

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[56] *Pensées*, II, 3, 1. The author continues, 'The brilliance of true equity would have subdued all peoples, and legislators would not have taken as a model the fantasies and caprices of the Persians and the Germans instead of this constant justice ... It would be implanted in all States of the world and in all times, instead of which there is nothing just or unjust which does not change its quality when the climate changes.' And Pascal concludes, 'Truth this side of the Pyrenees, error on the other side ... nothing, following reason alone, is just in itself; everything changes with time.'

[57] G. Beseler (*d.* 1888) was the most prominent representative of the Germanist school and at the same time very active in national politics. His most important work was *System des gemeinen deutschen Privatrechts* (1847–55). His *Volksrecht und Juristenrecht* (1843) was a fundamental assault on the *Corpus iuris*, which he denounced as a foreign body parasitic on the German nation; the reception was described as a national disaster, the blame for which fell squarely on the learned jurists.

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CHAPTER 5

The nineteenth century: the interpretation of the Code civil and the struggle for the law

FRANCE

74 The years from 1789 to 1804 had been troubled but also very creative: suddenly everything – even the boldest and most improbable innovations – seemed possible. The Napoleonic codes brought this brief period to an end and inaugurated a century of stability. From a legal point of view, it was also a century of sterility. The codes now existed; they suited the mentality and the interests of the citizens, and there was no reason to question them. Judges had only to respect them and apply them strictly; authors had merely to interpret the articles of the codes faithfully. It was out of the question now for case law or scholarship to attempt to innovate or play a creative role. Law had merged with statute, the statute was the work not of professors or magistrates, who had no mandate to act in the name of the nation, but of the legislator, the sole representative of the sovereign people.

During the Revolution the universities of the *ancien régime*, and their law faculties in particular, had been abolished. Some years later, schools of law were founded again, and in 1808 university teaching of law recommenced, although on a very different basis. The new system provided for a single Imperial University comprising twelve faculties of law, which were of identical standing and were under the direction of a central administration. Teaching and the subjects taught were strictly supervised by five inspectors-general. In 1809 a vice-rector was actually appointed in order to oversee the dean of the Paris faculty. This system was not operated in its full rigour,[1] but it did for long influence the French university world profoundly. It is scarcely surprising, in an atmosphere of extreme

[1] There are cases of professors who had criticized statutes being accused of inciting disobedience; even a Roman law textbook was impounded by the censor.

subordination to statute, and mistrust of both case law and scholarship, that what the dominant school of thought practised was literal interpretation of the codes; it is for that reason known as the Exegetical School.[2] Rarely in history has a single movement been predominant for so long and so totally as was this school in nineteenth-century France and Belgium. That was in part because of the stability of the legislative texts commented on: for, while the Constitutions of France rapidly succeeded each other, the *Code civil*, like a rock in a tempest, remained immovable.

At the beginning of the nineteenth century, however, there were still some lawyers educated under the *ancien régime* who devoted their studies to the new codes, but continued to make use of the sources from which the *Code civil* had drawn so much, Roman and customary law. Philippe Antoine, count Merlin de Douai (*d.* 1838), was certainly among the most learned lawyers of his day and, as political circumstances changed, he pursued a turbulent political career, during which he made an important contribution to the development of intermediate law, and acted as Napoleon's personal adviser at the time of the compilation of the *Code civil*. His works amount virtually to an encyclopaedia of French law ancient and modern, whose aim was to explain the new legislation with the aid of the old law. He published a *Répertoire universel et raisonné de jurisprudence*[3] and a complementary *Recueil alphabétique des questions de droit*.[4] Jacques de Maleville (*d.* 1824), who has already been mentioned as one of the compilers of the *Code civil*,[5] from 1805 published an *Analyse raisonnée de la discussion du Code civil au Conseil d'Etat*, which is both an account of the works preliminary to the codification and a doctrinal commentary. The German jurist, K. S. Zachariae (*d.* 1842), who was a professor in Heidelberg, is a special case. He came from the Rhineland, which at that time was under French rule, and in 1808 published the first proper commentary on the *Code civil*. His *Handbuch des französischen Civilrechts* (2 vols., Heidelberg, 1808, 2nd edn 1811–12) is a treatise on the *Code civil* which follows the order and method of *gemeines Recht* (that is, Roman law as applied in Germany). It had

[2] The name was suggested by E. Glasson who, on the occasion of the centenary of the *Code civil*, spoke of 'civil lawyers who have formed a sort of school which might be called the School of Exegesis'.

[3] Paris, 1807–8, 4 vols. (the 3rd edn is in fact a revised version of an older work; 4th edn, 1812–25, 17 vols.; 5th edn, 1827–8, 15 vols.).

[4] Paris, Year XI–XII, 7 vols.; 4th edn, 1827–30.

[5] See above, section 4.

a great influence in France, since it was the model for a celebrated and authoritative commentary (on which see below) by two professors of the university of Strasbourg, C. Aubry (*d.* 1883) and F.- C. Rau (*d.* 1877).

These lawyers, who had been educated and had sometimes practised in the eighteenth century, represent a transitional phase. After them, the legal scene was dominated by true exegetes, to whom ancient law was no more than an object for historical study. Among the major jurists of this new generation pride of place must go to A. Duranton (*d.* 1866), professor in Paris and the first French author of a complete commentary on the *Code civil* (*Cours de droit français suivant le Code civil*, 21 vols., 1825–37). The career of this first 'pure exegete' was also characteristic of the new generation: by contrast with the sometimes dangerous professional quarrels of his predecessors of the revolutionary period, Duranton managed to occupy his university chair without incident for thirty-six years, which enabled him to publish regular successive volumes of his *Cours*. Another exegete was R. Troplong (*d.* 1869), who was a magistrate and president of the Cour de Cassation. He started to publish his work *Le droit civil expliqué suivant les articles du Code* in 1836. It finally reached twenty-seven volumes. A third influential jurist was J.- C.- F. Demolombe (*d.* 1887), who taught civil law for half a century (which itself testifies, and contributed, to the great legal stability of the period). His *Cours du Code Napoléon* in thirty-one volumes was published between 1841 and 1876.[6] Finally, G. Baudry-Lacantinerie should be mentioned. Some of his works were of high authority: *Précis de droit civil* (3 vols., Paris 1882–4, 1889–92) and *Traité théorique et pratique de droit civil* (Paris, 1895 and many editions).

The Strasbourg professors Aubry and Rau, who have already been mentioned, occupy a special place in the French School of Exegesis. They were familiar with German systematic jurisprudence in general and the work of Zachariae in particular. Initially, their commentary on the *Code civil* was so close to Zachariae's *Handbuch* that they published their own work as an adaptation of it: *Cours de droit civil français traduit de l'allemand de C. S. Zachariae ... revu et augmenté* (1838). In the third and fourth editions of 1869 and 1879, however, the commentary is no longer presented as a translation. While the *Cours* was (or at least became) a complete and original

[6] The many editions of these classic works also show the stability of the regime. Demolombe's *Cours*, for instance, reached its fifth edition in 1874–9.

French work, owing to German influence it occupies a place apart in legal literature. The subject-matter was not in the order of the code, but arranged according to a system of general concepts which had been particularly popular in Germany since the days of the School of Natural Law.[7] German influence also explains why the authors make a distinction (unusual in France) between theoretical and practical civil law. Although this idiosyncratic approach was criticized and was not followed, numerous lawyers have recognized the work as one of the masterpieces of French scholarship.

Criticism of the School of Exegesis made little headway before the end of the nineteenth century. At that time criticism was directed not just at the method followed by the school and at its positivistic concept of law, but also at some of the principles of the *Code civil*: excessive individualism, the lack of an adequate regulation of employment, exaggerated respect for freedom of contract, absolute rights of property, the role of the paterfamilias, and so forth. All these themes have taken on still greater importance in the course of the twentieth century. Here the following names deserve mention: Fr Geny (*d.* 1959), author of a *Méthode d'interprétation et sources du droit privé français* (1899); M. Planiol (*d.* 1931), who in 1899 published the first volume of his *Traité élémentaire de droit civil*; and A. Esmein (*d.* 1913), founder in 1902 of the *Revue trimestrielle de droit civil*.

The essential theses of the School of Exegesis were that law and statute were identical, and the other sources of law – custom, scholarship, case law, natural law – had only secondary importance. To understand the exact meaning of the codes, it was necessary to set out from the text, from the text alone, and not from its sources. Scholarship and case law had therefore to resist going back beyond the codes, for that would inexorably lead to uncertainty. The legislator had chosen between different possibilities ancient and modern and, if his choice was not observed, the law would sink back into the diversity and uncertainty of the old sources, and so into the very faults for which the old law had been criticized. This approach (fairly described as 'fetishism for written statute') also ruled out any recourse to natural law or 'general principles of law'. Demolombe asserted that 'clear law' required no commentary, and that the law 'ought to be applied even when it does not appear to conform to general principles of law or equity'.[8]

[7] See above, sections 63 and 65.

[8] The same is said by many others, Cf. Bouckaert, *Exegetische school*, 124, 454 n. 104.

According to Laurent, authors who invoked the 'spirit of the statute' to mitigate its literal meaning were guilty of trying to revive the ancient supremacy of scholarship and to seize a creative role in the development of law; guilty, in other words, of usurping the function of the legislator. The task of scholarship was 'not to reform but to explain statute'; it was equally irrelevant to invoke the need to adapt the law in line with social development. Laurent did not hesitate to take his thesis to extremes: 'Statute', he claimed, 'even if it were a thousand times absurd, would still have to be followed to the letter, because the text is clear and formal.'[9]

Considerations of equity were also irrelevant, since they were individual and subjective. The situation where a judge might be called on to make a ruling as a 'minister of equity', owing to the silence of statute, 'was so rare that it may be left aside for the purposes of our discussion'.[10] The right of disobedience also had to be rejected, since even an unjust statute must be observed. It would be for the lawyers to point to unjust measures, in the hope that the legislator would wish to remedy them. In any case, unjust statutes would be rare because the codes, the nineteenth-century lawyers believed, would correspond to the ideal image of law, for they fused statute, law, and natural equity. This general complacency is one of the most striking characteristics of the School of Exegesis.

Some authors so resolutely refused to recognize custom as a source of law that they would not even admit its existence and applicability when statute referred to it expressly. And the obsession with the statutory text led scholarship to invent purely hypothetical situations which might fall under one article of the code or another, instead of considering the real cases encountered in case law. It was an attitude which led to abstract theoretical discussion, and which alienated jurisprudence from case law.

BELGIUM AND THE NETHERLANDS

75 In 1795 the French Republic annexed the Austrian Netherlands and the principality of Liège, which as a result became subject to French law and to the Napoleonic codes in particular. The

[9] Cited by Bouckaert, *ibid.*, 127.

[10] Again, according to Laurent (Bouckaert, *ibid.*, 159), who asks himself 'where will the judge find the rules of natural law which are completely unwritten?' (185). Hence a vicious circle, since natural law is precisely the eternal and supreme *agraphoi nomoi*.

Republic of the United Provinces (from 1795 the Batavian Republic) initially went through several different legal systems: the French occupiers made the country into a satellite kingdom, and Louis Napoleon, the emperor's younger brother, was imposed on it as sovereign (1806–10). In 1810 France also annexed the kingdom of Holland, which briefly formed part of French territory. Under Louis Napoleon, a *Wetboek Napoleon ingerigt voor het Koningrijk Holland* (Napoleonic code for the kingdom of Holland) was introduced on 1 May 1809. It was an adaptation of the *Code civil* which incorporated elements of old Dutch law. The code was extremely short-lived, since on 1 March 1811 the French codes, including the *Code civil* of 1804, came into force in Holland. Shortly afterwards, the French withdrew, and in 1815 Belgium and the Netherlands were amalgamated into the kingdom of the Netherlands under William I.

One of the first questions for the new state to answer was what to do about the existing French codes. A solution was swiftly reached in principle, although in practice it required time to implement: the new kingdom would have new national codes. The decision was only to be expected, since codifications were *à la mode*, and each sovereign state was supposed to have its own codified national law. In April 1814, even before the union of Belgium and the Netherlands, William I set up a commission for national legislation (*Commisie tot de nationale wetgeving*) to prepare new codes appropriate to the customs of the people of the Netherlands, and inspired by the traditional doctrine of the Netherlands. After 1815 efforts were made in Belgium as well as Holland to carry out the project. For various reasons, however, the compilation of a common civil code for the north and south proved extremely problematic: French law had established itself better in Belgium than in the Netherlands, and many Belgians preferred to retain the French codes; nationalistic enthusiasm for having a Netherlandish codification was scarcely felt in Belgian circles favourable to the French regime; and, from the seventeenth century, the development of the law in the northern and southern Netherlands had been very different. In the southern provinces (homologated) customary law prevailed, while in the northern provinces Roman or Roman-Dutch law was more important; in the north jurisprudence was also closer to German legal science and political philosophy.

In spite of these difficulties, and in spite of personal opposition between the rather doctrinaire Dutch jurist Johan Melchior Kemper

(*d.* 1824) and the Belgian magistrate and practitioner Pierre Thomas Nicolaï (*d.* 1836), the preparatory works did manage to arrive at acceptable results, and by 1829 four codes were complete, including the *Code civil*, which was a decided compromise between north and south.[11] They were intended to come into force on 1 February 1831, but the Belgian revolution disrupted the plan. Its result was that in Belgium the Napoleonic codes were maintained, and in 1838 the Netherlands promulgated their own civil code, which was essentially the 1804 *Code civil* adapted on the basis of the work done by Kemper and Nicolaï.

The new kingdom of Belgium felt obliged, however, like all other kingdoms, to promulgate its own codes, and this was actually set down as a principle in the Constitution (art. 139). But a new Belgian civil code was never realized, all the attempts at wholesale revision of the French *Code civil* having failed. This is why five-sixths of the original *Code civil* are still in force in Belgium.[12] In spite of frequent recent changes to the *Code*, particularly in the areas of family law, matrimonial regimes and succession, there is no such thing as a new Belgian civil code.[13] In the Netherlands, on the other hand, it was decided after the Second World War to introduce a new civil code. The drafting of a new code in outline was entrusted to the civilian and legal historian E. M. Meijers (*d.* 1954), professor at the university of Leiden. Meijers' draft comprised an introductory title and nine books, the first four of which he completed; he also completed a large part of book V and set out the broad lines of books VI and VII.[14] Books I and II were promulgated on 1 October 1971 and came into force on 26 July 1976; the introduction of the new civil code as a whole has not yet been completed.

For Belgium, the effect of this development on legal scholarship can easily be summed up: Belgium was a colony of the French School of Exegesis. The Belgian exegetes are distinguished only by their extremism, and by the fact that they adhered to the exegetical method much longer than the French themselves. The dominant

[11] The other codes were of commerce, civil procedure, and criminal procedure.
[12] By 1976 about 400 of the 2,281 articles of the 1804 *Code civil* had been changed.
[13] In 1976 more than 200 new articles were introduced by the statute of 14 July on the rights and duties of spouses and on matrimonial regimes. New criminal (1867) and judicial (1967) codes have, however, been produced.
[14] The nine books deal with: I, the law of persons and the family; II, legal persons; III, the law of property in general; IV, succession; V, real rights; VI, obligations in general; VII, particular contracts; VIII, sea, river and air rights; IX, intellectual property.

figure in nineteenth-century Belgian jurisprudence, and the only Belgian jurist of repute in France and internationally, was François Laurent (*d.* 1887), a professor at Ghent. As a lawyer, historian and politician, he was deeply involved in the problems of his time. Politically, he was a liberal and fiercely anti-clerical.[15] In 1836 he was appointed to the chair at Ghent, where he taught a remarkable range of legal subjects for forty years. His principal work, *Principes de droit civil*, appeared in thirty-two volumes between 1869 and 1879; an abridged version for the use of students was published under the title *Cours élémentaire de droit civil* (1878). The introductions to these works set out the programme of the School of Exegesis in all its vigour. Laurent completed a draft Belgian *Code civil* in 1883 but, owing to a change in the political climate, it was not adopted.

It was also in Belgium, and in Ghent in particular, that the School of Exegesis survived the longest. Thus the very successful *Beginselen van Burgerlijk Recht* ('Principles of civil law') by the Ghent professor A. Kluyskens (*d.* 1956) still bears the clear stamp of exegesis,[16] which is all the more remarkable as a new method (the 'Scientific School') had grown up in France around 1900 and had also spread into Belgium. This was largely due to the work of the Brussels professor H. de Page (*d.* 1969) who wrote a very influential *Traité élémentaire de droit civil*, which appeared from 1933, latterly in collaboration with R. Dekkers (*d.* 1976), a professor in Brussels and Ghent. One of the first Belgian authors to attack the exegetical method was Edmond Picard (*d.* 1924), a progressive advocate and socialist senator who regarded law as a 'social phenomenon' which must be studied without 'pedantic erudition' (*Le Droit pur. Cours d'encyclopédie du droit*, 1899). Professor Jean Dabin (*d.* 1971) was another lawyer who reacted against the School of Exegesis, more on ideological than sociological grounds.[17]

In the Netherlands, the School of Exegesis never acquired the

[15] His *Histoire du droit des gens*, later entitled *Histoire de l'humanité* (18 vols., 1850–70), was so anti-Catholic that it was put on the *Index librorum prohibitorum* in 1857.

[16] I, *De Verbintenissen* ('obligations'; 1925, 5th edn 1948); II, *De Erfenissen* ('succession'; 1927, 5th edn 1954); III, *De Schenkingen en Testamenten* ('gifts and wills'; 1930, 4th edn 1955); IV, *De Contracten* ('contracts'; 1934, 2nd edn 1952); V, *Zakenrecht* ('property'; 1936, 4th edn 1953); VI, *Voorrechten en Hypotheken* ('ranking and securities'; 1939, 2nd edn 1951); VII, *Personen- en Familierecht* ('persons and family law'; 1942, 2nd edn 1950); VIII, *Het huwelijkscontract* ('the contract of marriage'; 1945, 2nd edn 1950).

[17] See his *Philosophie de l'ordre juridique positif* (1929) and *Technique de l'élaboration du droit positif* (1935).

doctrinal near-monopoly which it had had in Belgium. In any case, jurisprudence in the Netherlands was not influenced exclusively by French thought: German thought, especially the Pandectist and Historical Schools (which went more or less unnoticed in Belgium), had a greater influence there.

GERMANY

76 The German empire acquired its code only in 1900. There were various reasons for the delay. Political events were of course decisive: the political conditions necessary for the introduction of a national code were not satisfied while Germany remained fragmented into kingdoms, principalities and free cities. Some regions – such as the kingdom of Saxony in 1863 – promulgated their own codes. Other, more westerly, regions retained the French codes. There were those in favour of introducing the French codes throughout German territory, in order to provide a modern, common law. (This had been done in Russia, where the *Code de procédure civile* of 1806 was introduced.) Yet political objections prevailed against the introduction of the codes of France, the old enemy and occupier, against which the whole German nation had so patriotically conducted its war of independence.[18] When Germany was unified in 1871, although the old states did not disappear, political circumstances were distinctly more favourable, and there was a pronounced feeling that the new empire should have its own codes. In 1877 a code of civil procedure (*Reichscivilprocessordnung*) was completed, and came into force on 1 January 1879. It took longer to work out a civil code: that was promulgated in 1896 and came into force in 1900. For economic reasons it had already been necessary to unify commercial law: in 1862 the principal states had adopted a general statute on German commerce, which was extended to the union of northern Germany in 1869, and in 1871 became general to the German empire.

The problems were not only political. There were ideological problems too, especially the objections of principle raised by

[18] Savigny had stipulated that, if a German code was to be compiled, it must originate from the German people, and not be adopted from a nation which had shortly before threatened the ruin of Germany. For similar national and political reasons, the intended adoption of the *Code civil* in Russia was prevented by the Tsar.

Savigny's Historical School.[19] The polemic between the proponents and opponents of codification (like that between Romanists and Germanists) divided German legal practice throughout the nineteenth century. Even if the principle of German codification was accepted, the question still remained what sources should be employed in such a codification. It immediately became clear that the codes of the new German empire would not be innovative, let alone revolutionary: they would be traditional, and not much orientated towards the future. The next question was on what past and what tradition they should be based. The influence of the Historical School managed to rule natural law out of order, and only a legal system which had actually been in force in Germany came into consideration. There were two possibilities. The first was the learned law as 'received' in Germany from around 1500: this was Savigny's choice. It had been greatly developed and systematized by the School of Pandectists under Bernhard Windscheid, which could point to the facts that over the centuries *gemeines Recht* had become completely integrated into Germany, and that its system was intrinsically superior.

The second possibility was ancient Germanic or German law. In the nationalistic spirit of the time, this had been rediscovered and had been the object of important scholarly studies. K. F. Eichhorn (*d.* 1854)[20] and J. Grimm (*d.* 1863)[21] were the leaders of the Germanists. They regarded old Germanic law as the only possible basis for a true national law of the German people (a *Volksrecht* rather than a *Professorenrecht*). The dispute was essentially a political one which, in the face of any academic rationality, divided German legal historians in the nineteenth century into two opposed camps. German public opinion was nationalistic or even xenophobic: it favoured the Germanists. But the Romanists could plead that *Pandektenrecht* was much more sophisticated and more modern than the law of Germanic antiquity or the Middle Ages.

It is not altogether surprising that the code which eventually resulted bore clear signs of pandectist method, although these had been even more marked in the first draft. It is unnecessary to enter

[19] See above, section 72.

[20] Author of a *Deutsche Rechts- und Staatsgeschichte* (1808) and of an *Einleitung in das deutsche Privatrecht* (1823).

[21] Author of *Deutsche Rechtsalterthümer* (from 1823). He was a distinguished linguist and one of the founders of German philology.

the labyrinth of all the commissions whose works from 1873 onwards contributed to compilation of the *Bürgerliches Gesetzbuch*. Suffice it to note that the final text was adopted by the *Reichstag* and promulgated in 1896, and that it came into force on 1 January 1900. Some non-lawyers, people of distinction in politics and economics, had been asked to join the commissions, but the *BGB* was above all the work of professional lawyers (their views readily prevailed over those of the lay members), and still more the work of academic lawyers rather than judges. The main academic contributor to the preparatory works to the *BGB* was the eminent pandectist Bernhard Windscheid.[22]

The *BGB* is a very systematic and theoretically coherent code, entirely in the spirit of the pandectists, as its important *Allgemeiner Teil* ('General Part') shows. It was the work of academic lawyers addressing themselves to learned judges; their aim was not to disseminate knowledge of the law among the people, although that did not prevent a lively popular interest in the code. An example of the systematic structure of the *BGB*, and the manner in which it moves from general principles to specific rules, is provided by the contract of sale. First it is necessary to consult the *Allgemeiner Teil* (art. 116 and following, art. 145 and following), then the articles on the general principles of obligations (art. 275 and following), next the general principles of contractual obligations (art. 305 and following), and finally the articles on the contract of sale in particular (art. 433 and following).

The *BGB* is typical of the nineteenth century; the fact that it came into force in the last year of that century is symbolic. It is a code which bears the stamp of individualism: its family law is patriarchal (the husband is head of the family including his wife, and he alone is responsible for administering family property); freedom of contract is absolute,[23] and so is the right to private property.[24] In spite of that, and in spite of Nazi intentions of introducing a *Volksgesetz-*

[22] Windscheid was the lynch-pin of the first commission (1881), which published a first draft in 1887. It aroused vigorous criticism from O. von Gierke among others, who published an *Entwurf eines bürgerlichen Gesetzbuchs und das deutsche Recht* in 1888–9. Gierke is best known for his *Das deutsche Genossenschaftsrecht* (4 vols., Berlin, 1868–1913).

[23] N.B. the omission of the *laesio enormis* of Roman and (continental) common law.

[24] The socially conservative tendency of the civil law aroused protest from the Viennese professor of civil procedure A. Menger (*d.* 1906), among others, in his *Das bürgerliche Recht und die besitzlosen Volksklassen* (1890); cf. his *Uber die sozialen Aufgaben der Rechtswissenschaft* (1895).

buch,[25] the *BGB* has proved to be a stable code, and its outstanding professional craftsmanship has secured it great influence abroad.[26]

In the nineteenth century German jurisprudence reached its zenith, both in the development of legal doctrine and in the history and philosophy of law. Its influence was felt in all countries and all areas of law. The technical quality and range of German learning were admired: the advances made by Romanists in the nineteenth century completely transformed understanding of ancient law; the pandectists developed *gemeines Recht* to an unequalled degree of systematization; at the same time pioneering work in medieval Germanic law was carried out, which is still of value today. Legal scholarship had a profound influence on the practice of law. Since no single code applied throughout German territory, scholarship was the principal means of interpreting the learned law, mainly by the issue of binding opinions (*Gutachten*) by the faculties of law to the courts.[27]

German civilian doctrine was fundamentally different from the French School of Exegesis in substance as well as method. But the traditional middle-class lawyers of the two countries shared an essentially conservative and text-orientated approach. It was precisely this which provoked a violent reaction in Germany in the second half of the nineteenth century. The revolutionaries who called the prevailing doctrine into question did not see law as an academic exercise consisting of elaborating and refining legal concepts. They saw it as a struggle between opposing forces and interests. For them, law was above all a social product and a tool for

[25] On this see J. W. Hedemann, *Das Volksgesetzbuch der Deutschen. Ein Bericht* (Berlin, 1941); *Volksgesetzbuch. Grundregeln und Buch I. Entwurf und Erläuterungen*, edited by J. W. Hedemann, H. Lehmann and W. Siebert (Munich and Berlin, 1942); *Zur Erneuerung des bürgerlichen Rechts* (Munich and Berlin, 1944; Schriften der Akademie für deutsches Recht. Gruppe Rechtsgrundlagen und Rechtsphilosophie, 7); H.-R. Pichinot, *Die Akademie für deutsches Recht. Aufbau und Entwicklung einer öffentlich-rechtlichen Körperschaft des dritten Reiches* (Kiel, 1981); H. Hattenhauer, 'Das NS-Volksgesetzbuch', *Festschrift R. Gmür* (Cologne, 1983), 255–79; W. Schubert, W. Schmid and J. Regge (eds.), *Akademie für deutsches Recht. Protokolle der Ausschüsse 1934–44* (Berlin, from 1986); D. le Roy Anderson, *The academy of German law* (London, 1987); M. Stolleis and D. Simon (eds.), *Rechtsgeschichte im Nationalsozialismus. Beiträge zur Geschichte einer Disziplin* (Tübingen, 1989; Beiträge zur deutschen Rechtsgeschichte des 20. Jts., 2).

[26] The Swiss code of 1907, which was mainly the work of Eugen Huber (*d.* 1922), is clearly influenced by the *BGB*. Further afield, the main follower of the *BGB* was Japan, which hesitated for years between the French and German codes but finally adopted the *BGB* in 1898, before it had even come into force in Germany. The *BGB* also influenced the Chinese code of 1929, and others too numerous to mention. The ascendancy of the *BGB* brought an end to the monopoly of the *Code civil*, which until then had served as the international model.

[27] See above, section 31.

social action, rather than the privileged domain of learned jurists; their doctrine is known as *Interessenjurisprudenz*, as opposed to the traditional *Begriffsjurisprudenz*.[28] It was necessary therefore to establish what social objectives were to be achieved with the aid of the law: hence the title of the radical work by Rudolf von Jhering (*d.* 1892), *Der Zweck im Recht* (1877)[29] and its motto 'Purpose is the creator of all law.' Von Jhering had himself begun as a traditional Romanist, but he became dissatisfied with abstract logical reasoning and involved in the social problems of his time, and this led him to develop his own concept of law. His evolution can be followed through the various editions of his outstanding *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (1852–65),[30] in which a sociological approach to ancient law becomes increasingly prominent. His *Der Kampf ums Recht* (1872)[31] caused a sensation by presenting law explicitly as the object of a struggle for collective interests and for power, and so, ultimately, as the result of political forces. This analysis was an inevitable conclusion from legal positivism: for, if statute was the sole source of law (and all reference to a superior order such as natural law had been disposed of), it necessarily followed that law was the instrument of the forces which dominated the state and its legislative organs.[32]

CONSERVATIVE ENGLAND

77 A continental lawyer who crosses the Channel enters another world. Exegesis of a civil code is unknown, since English law is not codified. Academic *Begriffsjurisprudenz* is also unknown, since until recently there were no law faculties and even nowadays the role of scholarship in legal practice is very modest. As a result, case law is the main source of law, closely followed by legislation, which has steadily gained ground over the years. At the beginning of the nineteenth century, English law was old and out of date, and many of its basic structures and concepts went straight back to the Middle

[28] P. Heck, 'Interessenjurisprudenz und Gesetztreue', *Deutsche Juristenzeitung* (1905), col. 1140–2; *idem.*, 'Was ist diejenige Begriffsjurisprudenz die wir bekämpfen?', *ibid.* (1909), col. 1019–24.

[29] 'The purpose of law.' Jhering's work was translated into French by O. de Meulenare, this particular work as *L'évolution du droit* (Paris, 1901).

[30] 'The spirit of Roman law at different stages of its development.'

[31] 'The struggle for law.'

[32] Here the influence of the sociologist Auguste Comte is clear, and his rejection of any metaphysical principle in favour of observation and experience.

Ages. It is a paradox that the most economically and socially advanced nation in the world had only a medieval legal system. Modernization of the law came late and did not alter the basic characteristics of the Common Law, in spite of Jeremy Bentham's virulent attacks on it. So civil law was not codified, but remained what it had been for centuries, a system based on custom and thousands of cases, and progressively developed by case law. The dichotomy between Common Law and statute was maintained.

The role and prestige of judges remained very significant, and the authority of their judgments considerable. It even came – temporarily – to the absurd point that the supreme court declared itself bound by its own precedents, an effective recipe for fatal immobility.[33] But this has now been abandoned. The judiciary has also recognized the primacy of statute and expressly abandoned any pretensions to controlling the validity of statute by reference to the general principles of the Common Law. Yet case law has taken sometimes surprising liberties in the application of statutes whose text seemed clear.[34] It is still a widely held view that statute constitutes a sort of derogation from the Common Law and ought therefore to be interpreted restrictively, as if the Common Law were the rule and statute the exception. A remark by Stallybrass, who taught law at Oxford, on the law syllabus at that university is typical: he congratulated the Oxford law school for having the good sense to exclude 'those branches of the Law which depend on Statute and not on precedent'.[35]

Universities and law professors played a modest part, and their prestige was low. Although they have now risen from a low point in the nineteenth century, the secondary importance of universities is characteristic of the English legal world. University teaching of law (at least English law) began late, at Oxford, Cambridge and London in the second half of the nineteenth century, and in the provincial universities only after the First World War. The delay was partly due to the attitude of the universities, which considered the teaching of law barely respectable, and thought its place was not in an

[33] The House of Lords in *London Street Tramways* v. *LCC* (1898).

[34] e.g. the judgment of the House of Lords in *Roberts* v. *Hopwood* (1925): the statute allowed local authorities to fix the salaries of their staff as they thought appropriate, yet when a local authority fixed a minimum weekly salary of £4 this was held by the House of Lords to be unreasonable and inspired by 'eccentric principles of socialistic philanthropy'.

[35] W. T. S. Stallybrass, 'Law in the universities', *Journal of the Society of Public Teachers of Law*, n.s. 1 (1948), 163.

academic context but in professional or technical education. The professional organizations too were partly responsible for the delay, since their preference was to found practical law schools, and they did in fact found several. Finally, in the courts there was a deep-seated mistrust of academic and theoretical legal education. Traditional judges favoured a general university education, for instance in history or politics, followed by a professional education in the Inns of Court or the schools of the Law Society. Talented young people who wanted to embark on a legal career were therefore advised to study a more 'respectable' discipline at university: anything but law.[36] Leading figures openly expressed their doubts about the appropriateness of university teaching of law. Professor A. V. Dicey (*d.* 1922) even devoted his inaugural lecture at Oxford to the (unrhetorical) question, 'Can English law be taught at the universities?' (1883), fully expecting that lawyers would at once answer, 'no'. It is therefore hardly surprising that university teaching and university degrees in law began only cautiously during the second half of the last century.

The role of scholarship was (and still is) of little importance. In 1846 Brougham summed up this trait of English law in the caustic remark that 'not only does it have no professors, but it does not even have books to replace them with'. Yet England did produce authors of international distinction, particularly in the nineteenth century and in the areas of legal philosophy and international law. The following deserve mention: John Austin (*d.* 1859), the positivist author of *The province of jurisprudence determined* (1832) and *Lectures on jurisprudence* (posthumous edition, 1863); Sir Henry Sumner Maine (*d.* 1888), *Ancient law* (1861); F. W. Maitland (*d.* 1906), author, with F. Pollock, of *History of English law before the time of Edward I* (1895); A. V. Dicey (*d.* 1922), *Introduction to the study of the law of the Constitution* (1885) and *Digest of the law of England with reference to the conflict of laws* (1896); Sir Thomas Erskine Holland (*d.* 1926), *Elements of jurisprudence* (1895–1924) and *Studies on international law* (1898). But there were no great commentaries on English civil law in the manner of the great continental *traités*, *cours* and *Lehrbücher*; and the great names

[36] See A. Philips, *The credentials of a law faculty* (Southampton, 1958). Most judges were students at Oxford or Cambridge but virtually none had studied law. Even in 1963 a prominent figure such as Lord Shawcross, who had taught law at Liverpool, could advise intending lawyers not to study law at university; and Lord Cross, who had been a professor at one of the Law Society's schools, praised judges who had taken degrees in subjects other than law.

of English law are not those of scholars or professors, but of celebrated judges such as Lord Denning, Lord Shawcross, Lord Gardiner or Lord Devlin.

INNOVATION IN ENGLAND

78 For the time being, the basic structures of English law had been preserved, but from the early nineteenth century the system underwent several important transformations. Most were due to the legislature taking a grip on the old and often elusive Common Law and replacing it with clear and precise statutes. In England, to do this was to explode the myth of the traditional law.

In the first instance, the legislature attempted to extricate itself from the extraordinary profusion of statutes, which had been promulgated without any coordination since the Middle Ages; they sometimes contradicted one another, and a clear overview of them was impossible. A commission of the House of Commons calculated in 1796 that a thousand statutes which were no longer applied were still officially in force.[37] In the nineteenth century, above all after Brougham's speech to the House of Commons in 1828 and the relative democratization of the House by the Reform Act of 1832, a considerable effort was made to abolish many statutes and institutions which were either feudal or simply out of date (e.g. the judicial ordeal) and to establish an authentic modern collection of statutes in force. For this purpose Parliament published lists of obsolete statutes and promulgated Repeal Acts. Even Magna Carta was sacrificed on the altar of modernization,[38] although some conservative authors maintained that ancient statutes could not be abrogated, even if their actual or potential utility could be neither demonstrated nor even guessed at.[39] This modernization, pursued in accordance with the principles of utilitarianism, represented Bentham's posthumous revenge.

The abolition of obsolete texts was a substantial project, but it did not involve codification; it merely allowed the compilation of a vast

[37] One of the results was the publication between 1810 and 1822 of nine folio volumes of statutes going back to 1713. This was at the same time a practical collection, an edition of historical sources, and the point of departure for the nineteenth-century reform movement.

[38] A. Pallister, *Magna Carta. The heritage of liberty* (Oxford, 1971), examines this point in detail.

[39] G. Sharp, *A declaration of the people's natural right to a share in the legislature* (London, 1774), 202–3: 'This glorious charter must ever continue unrepealed and even the articles which seem at present useless must ever remain in force.'

repertory of the statutes still in force. The great volume of the Acts could be appreciated when they were brought together in 1870 in an official collection of no fewer than eighteen volumes.[40] Many ancient statutes had been abrogated, but many had been preserved, and the 'old law' as such was never abolished, as it had been in France at the time of the Revolution. In any case, the notion of 'old law' is quite meaningless for English law, which is characterized precisely by its continuity. Old statutes and cases are to be found side by side with recent statutes and precedents, as the index of sources at the beginning of any English legal work will show.

The work of Parliament was not limited to abrogation of antiquated statutes; it also produced positive results. In no area was this more spectacular than in the court system and in civil procedure. It must be emphasized that in Common Law any important modification in procedure inevitably involved a change in substantive law. The Common Law had developed as a system based on the 'forms of action', each form being initiated by a particular writ and each following its own rules. This system remained essentially in place until the nineteenth century so that an action, like a Roman *actio*, could not be initiated unless the appropriate writ existed. Over the centuries, new writs had been created and others had fallen into disuse, giving a total, around 1830, of nearly seventy writs. When the legislature abolished the forms of action, it therefore overturned the procedural basis of Common Law. At the same time the rather disorderly system of courts and tribunals which had developed since the Middle Ages was replaced by a more systematic hierarchy of higher and lower courts. The main elements of the court reform were the following.

In 1846 county courts were created for minor cases. For the more important cases, the various courts of medieval origin (including the church courts) were replaced by a central High Court of Justice sitting at first instance, and a Court of Appeal. Both courts were in London. The old distinction between Common Law and Equity and their separate courts were abolished. It was also intended that the jurisdiction of the House of Lords should be abolished, and in fact the Judicature Act 1873 provided for its abolition. That provision, however, was repealed in 1875, and so the Court of Appeal is still

[40] This was the starting-point for further revision, which continued into the twentieth century. But revision does not mean reduction: the third edition of *Statutes revised* (1950) is in thirty-two volumes.

subordinate to the House of Lords, which operates not as a *cour de cassation* but instead as a second court of appeal (this double appeal is a peculiarity of the English legal system). By the Appellate Jurisdiction Act 1876 the judicial activity of the House of Lords was restricted to those members who were professional lawyers (Law Lords). There was a fundamental modernization of the law of procedure. The old forms of action were abolished,[41] and replaced by a single, less formal, procedure. Henceforth process was initiated by a uniform writ, which stated the claim simply, in terms which were neither prescribed nor technical. The difference between the procedures in Equity and in Common Law also disappeared. The new procedure made use of elements of both systems, but the principles of Equity were decisive. It is true that the jury in civil cases was taken from the Common Law, but its role was sharply reduced until it eventually became non-existent in practice. The 1875 Act also made it possible to codify the rules of procedure, by means of detailed regulations made by the courts themselves (*Rules of Court*).

The democratic significance of these reforms is obvious, since the procedural rules were extremely technical and one of the areas of English law least accessible to the public. Intellectual democratization, however, was not accompanied by any financial democratization, and the expenses of process remain exorbitant. This is why many cases go to arbitration or conciliation. Only litigants of great means (in particular large companies) can pursue their cases to the very end, in the hope of obtaining a precedent. The result is that a very small number of cases is dealt with by a very small number of highly qualified and highly authoritative judges in the central courts in London.

The great reforms of the nineteenth century also introduced a modern appeal procedure for the first time. This was of the Roman and continental type, which allowed a new inquiry into the facts. Prior to this Common Law had provided only a restricted procedure for revision of an error committed at first instance.

Reform of the civil law also began, but on a much more modest scale. The new legislation dealt only with specific areas which had somehow engaged public attention. One example is the statutes of 1870 and 1882 providing that the income and personal property of a

[41] The main steps were the Uniformity of Process Act 1832, the Civil Procedure Act 1833, the Real Property Limitation Act 1833, which reduced the sixty real and mixed actions to four, and the Common Law Procedure Acts 1842, 1854 and 1860.

woman acquired before or during her marriage should revert to her personally. Another is divorce, which had previously been possible only by virtue of an extremely costly private Act, but which was now within reach of everyone and followed the rules of ordinary procedure.[42] Debtors' prison for the insolvent was abolished in 1869. Few areas of civil and commercial law were codified.[43] Until the creation of the Law Commission in 1965, no official initiative was taken towards codification of the civil law.[44] The only branch of the law which was to be codified in the nineteenth century was criminal law, but a draft prepared by Sir James Fitzjames Stephen, author of the *Digest of criminal law* of 1877 was abandoned, even though codification had been announced in 1882 as one of the government's projected reforms. The practice of law in England today is of course affected by the lack of any significant codification. The rules and principles of English law are still to be found in more than 3,000 Acts of Parliament going back to the first half of the thirteenth century and in some 350,000 reported cases.[45]

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[42] For the time being divorce was available only for adultery, desertion or cruelty (although the last of these was interpreted rather broadly). Only in 1969 did the Divorce Reform Act introduce divorce by consent.

[43] Bills of Exchange Act 1882, Partnership Act 1890, Sale of Goods Act 1893.

[44] The parliamentary brief for the Commission states expressly 'all the law . . . with a view to its systematic development and reform, including in particular the codification of such law . . .'.

[45] G. Wilson, *Cases and materials on the English legal system* (London, 1973), 271.

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