CHAPTER 6

Statute, case law and scholarship

THE QUESTION

80 The preceding chapters have said a good deal about the various sources of law, especially statute, case law (which is often closely associated with custom) and scholarship (which can be regarded as the creator of natural law). What is needed now is a systematic examination of the role and significance of each of these three great creative forces. What are the merits of each source? What social forces make use of which source? The aim of the chapter is to demonstrate historically that the use of these sources is not random or accidental; they are the basic options open to society when faced with the phenomenon of law. And if law is an instrument of social control, then it matters who controls the sources of law; this fundamental question is far more important than technical or scholarly problems. The origins of legislation and case law are very different: but with what interest groups in society are they associated? And what views of society are expressed by legislator, judge and scholar?

ADVANTAGES AND DISADVANTAGES

81 Each of the three sources of law and legal development has its own advantages and disadvantages. Legislation has the advantage of being able to set out clear rules, and the authority necessary to ensure that they are respected. It is true that case law and scholarship have sometimes gone to extreme lengths to adapt, or even through interpretation to nullify, statutes which they considered outdated or unjust. None the less there is a limit to what free interpretation can do, and it does appear that no other source is as well able to assure legal certainty as the clear and express rule of the

legislator. When statutes have been codified, there is the additional advantage of a coherent, accessible and also limited body of legislative material.

But legislation has its defects too. A statute cannot provide for or regulate all the cases which might arise in practice; the German codes which aimed at exhaustive regulation soon lost themselves in endless enumerations of cases. Individual statutes (not codes) can be promulgated or abrogated quickly and easily, more or less according to the will of the legislator in power, in order to seize opportunities or make temporary provisions. Such manipulation inevitably affects the legal stability essential to the good working of society,[1] and in excess can even lead to lawlessness. But the idea that the authorities can decide that what was at one point law is now no longer so (or vice versa) is relatively recent, and quite unknown in many civilizations. It gives rise to the idea that there must be a counterpart to excessive or arbitrary legislation, a body of superior, unwritten and eternal rules – 'natural' or 'divine' law – independent of positive law and sometimes in opposition to it. The difficulty with codes, however, is quite the opposite: a well-conceived codification makes such great claims to permanence and to logical coherence that it tends to resist change and to lose its normative significance only very gradually. Historical instances of the complete abrogation or replacement of a code are in fact very rare.

Jurisprudence has the ability to explain statutes and judgments, to make criticisms which may lead to reforming legislation, and above all to give a rational basis to the study of law. This demands theoretical reflection, close attention to general principles and the coherence of the system as a whole, as well as an interest in legal philosophy and the purpose of law. But scholarship too has its difficulties. It often has a tendency to become lost in formulating abstract concepts or working out systems which have nothing to do with legal practice. Authors often contradict one another, and contradictory opinions threaten the certainty of the law. In any case scholarly opinions always remain private opinions without power to bind the courts, unless (exceptionally) they have been collected in a

[1] Promulgation and abrogation of statutes was sometimes so casual that judges, and even the legislator, could not be sure what was currently in force. Thus, under Queen Victoria an Act was passed to repeal statutes of Queen Anne and George II which had already been repealed at the beginning of Victoria's reign; and in *Reg. v. Great Western Railway* (1842) the court of Queen's Bench considered a statute of Edward VI which had been repealed fourteen years earlier; C. K. Allen, *Law in the making*, 442.

code and promulgated as statute, or a law of citations has given the opinions of one author or another the force of law.

The advantage of case law is that it remains in close touch with reality. Judges invariably give their opinions in concrete cases. As society progresses and is confronted with new situations and new problems, case law has to resolve the questions which arise. As a result the courts cannot afford to develop theories which disregard everyday reality. Precedents do not, admittedly, have the authority of statute, but they have greater weight than scholarly opinions and can therefore offer greater legal certainty. The main disadvantage of case law is that it is made from case to case: it therefore never formulates a general theory which would give an overview of the structure and purpose of the law. In addition, when judges do not give reasons for their decisions, it becomes practically impossible to retrieve rules of law from a mass of specific judgments.[2] The flexibility of judge-made law contrasts with academic or official law, since academics aim precisely to give general accounts and set out basic principles in detail.

A weakness of case law is that it runs the risk of stagnation, particularly when it has excessive regard for its own precedents. A striking example of this is to be found at the beginning of the French Revolution, when the Parlement de Paris was required to decide on the voting method of the newly elected Estates General. The question was whether voting should be by counting heads or by Estates. It was a question which had enormous political significance, since the Third Estate was numerically superior, and would have dominated the assembly in the event of voting by counting heads; indeed, its claim to do so was not unfounded, given its qualitative and quantitative importance within French society. On the other hand, voting by Estates (that is, one vote for the Third Estate, one for the nobility and one for the clergy) would have allowed the two old classes of privilege to predominate, even though their sociological importance was far less than that of the Third Estate: this solution would therefore have given preference to the minority. The question was apparently just a procedural one, but it in fact concealed a crucial political problem. The Parlement de Paris,

[2] See the blunt statement of Chief Justice Fortescue in 1458 (Year Book 36 Henry VI, folio 35 verso to 36): 'The law is what I say it is, and it has been since law existed, and we have a system of procedural forms which are regarded as law and applied for good reasons, although we may not know what those good reasons are.'

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however, ignored the political aspect (perhaps in a deliberate attempt to evade the contemporary political trend) and dealt with the question from a purely technical point of view. In its judgment, the Parlement simply followed the precedent of the previous meeting of the Estates General in 1614. The Third Estate revolted against this attempt in 1789 to follow the principles of 1614 without further ado, and proclaimed itself an Assemblée Nationale. The days of the Parlement de Paris were numbered.

LEGISLATORS, JUDGES AND PROFESSORS: COMPETITION

82 Historically, it is clear that representatives of each source of law were firmly convinced of the importance of their own contribution compared with other sources. Some examples will illustrate the point. Savigny's attitude towards statute is instructive. He remarked disdainfully of the Prussian *Allgemeines Landrecht* that it would have to be 'ennobled' by jurisprudence based on Roman law.[3] Although he was not in favour of natural law, Savigny did not go so far as to advocate repeal of the codes inspired by the School of Natural Law. But he did think that they ought to be subject to a jurisprudential revision which would have sharply curtailed their practical importance. He regarded the codes simply as elements of *gemeines Recht*, and thought that the task of jurisprudence was, by appropriate interpretation and correction, to eliminate codified principles which were contrary to Roman law ('pandectization' of the codes). Savigny, who belonged to a family of the old nobility, was frankly hostile to the French revolutionary codes, and feared that the new legislation was the death-knell for the social standing of the upper classes in general and lawyers in particular.

According to Savigny's theory, law develops from a nation's innate sense of justice and from a people's historical and traditional attitudes and values; law is therefore the result of a nation's entire past, and cannot arbitrarily be imposed by the authorities of the present day. Thus to the crucial question: who was qualified to discover and expound the rules of law which the people had developed? Savigny's answer was quite clear: this was a task neither for legislators nor politicians, but for lawyers. They were the legitimate representatives and spokesmen of the people and of the

[3] For this purpose Savigny held five lectures on the *Allgemeines Landrecht* in Berlin between 1819 and 1832.

Volksgeist (the same *Volksgeist* which restricted the freedom of the legislator).[4] In Savigny's view, it was the professional class of lawyers which could best secure the development of living customary law, which was the true agent of progress. Resort should therefore not be had to codification, which was the fashion of an age of declining moral standards, but instead to the sound law of the people, expounded with the aid of 'professors, faculties of law, courts, scholarly commissions and judges of the higher courts'.[5] The hostility of the scholar towards the legislator, who with a stroke of the pen could sweep away the most cherished doctrinal constructions, is not at all difficult to understand.[6]

In countries in which case law was of high authority, there was no shortage of judges who took a critical approach towards legal doctrine, including professors and law faculties. The acerbic remarks of some eminent English judges with regard to academic lawyers have already been mentioned. This situation was exactly the opposite of that obtaining in nineteenth-century Germany. The origin of the *BGB* is in fact a case study in the power of legal doctrine, both in the sense that judges remained under the influence of their university education throughout their careers, and in the sense that the non-legal members of the parliamentary codification commissions deferred to the views of the scholars and so made few original contributions to the preparatory works.[7]

The legislator himself was not immune from judicial criticism, even when his projects of reform were both obvious and reasonable. A clear instance is the case of Lord Raymond, Chief Justice of England (*d.* 1733), who in the House of Lords forcefully opposed the plans of the House of Commons to replace Law French with the

4 Since it was lawyers who had accomplished the *Rezeption*, Savigny acquitted it of the charge of being a foreign product foisted on the German national spirit; cf. 'Atti del seminario internazionale su Federico Carlo di Savigny, Firenze 27–28 ott. 1980', *Quaderni Fiorentini* 9 (1980)); G. C. J. J. van den Bergh, *Wet en gewoonte. Historische grondslagen van een dogmatisch geding* (Deventer, 1982; Rechtshistorische cahiers, 5).

5 See Wesenberg, *Neuere deutsche Privatrechtsgeschichte*, 142–3; Gerbenzon and Algra, *Voortgangh*, 257.

6 See the sarcastic remark of Julius von Kirchmann (*d.* 1884) in his lecture of 1848 entitled *Die Werthlosigkeit der Jurisprudenz als Wissenschaft* ('the worthlessness of jurisprudence as a discipline'): 'three correcting words by the legislator, and whole jurisprudential libraries become waste-paper'; quoted by Wieacker, *Privatrechtsgeschichte*, 415.

7 See Wieacker, *Privatrechtsgeschichte*, 473, who observes that the chairs of law never exercised such great influence on the higher judiciary as in the first half of the nineteenth century, during which most of the lawyers of the *BGB* commissions studied: these conscientious practitioners were not bold or presumptuous enough to free themselves from their teachers.

obligatory use of English in the practice of law and in the courts. In his eyes, the abandonment of the traditional language of the law opened the way to the most capricious innovations; this policy might even lead to the Welsh demanding the power to proceed in Welsh. In spite of his speech, a statute of 1731, which came into force on 25 March 1733, permitted the anglicization of justice.[8]

It is not surprising that politicians confronted with such undemocratic and reactionary obstructions did not allow themselves to be influenced by the 'oracles of the law' of the superior courts. Instead, so far as it seemed necessary, they devoted all their energies to binding the courts to strict observance of the statutes promulgated by the political assemblies.[9] A striking example of the latent opposition between legislative and judicial powers is the judicial control of statutes, in particular in the United States. Judicial review is one of the fundamental institutions of the United States, although it is not a principle expressly recognized by the Constitution, but was introduced and developed by the case law of the Supreme Court from 1803. As a result the American judiciary, and in particular the Supreme Court, has the power to declare a statute promulgated by the legislative bodies (Congress and the President) unconstitutional and to prevent it from being applied.

In Great Britain, on the other hand, where there is no written constitution and where the sovereignty of Parliament is a fundamental principle, judicial review is unknown. The Belgian Constitution makes no mention of it, and the Cour de Cassation has to the present day held firm to its case law going back more than a hundred years and refused to control the constitutionality of statutes. Judicial control exists only in a few legal systems.[10] The principle of a control on the constitutionality of statutes can scarcely be challenged, and if it is accepted that Parliament is bound to respect the Constitution, and that in doubtful cases the judiciary is the power most competent to pronounce on the constitutionality of a statute, then judicial review is the most logical solution. There is, however, the legal objection that the representative assembly of the people expresses the will of the sovereign nation 'from which all powers derive' and so

8 D. Mellinkoff, *The language of the law* (Boston and Toronto, 1963), 133.

9 Recall Robespierre's remarks: above, section 67.

10 See M. Cappelletti, *Processo e ideologie* (Bologna, 1969), 477–510; *idem.*, 'Quelques précédents historiques du contrôle judiciaire de la constitutionnalité des lois', *Studi in memoria di Tullio Ascarelli*, v (Milan, 1969), 2,781–97; *idem.*, *Judicial review in the contemporary world* (Indianapolis and New York, 1971).

cannot be subordinate to the will of another institution; the corollary of this is that, if Parliament violates the Constitution, there is no sanction, but this is generally accepted as a necessary consequence. In Belgium the refusal of the Cour de Cassation, even in its recent case law, to run the risk of judicial review is no doubt partly to be explained by a concern that this would involve the judiciary in political and social conflict. Yet now that the problem of judicial control and the role of the Cour de Cassation has arisen, it is a topical issue in legal and political circles in Belgium.[11]

In France the sovereignty of the legislature is firmly established, and judicial control of the constitutionality of statutes is a recent development. There is a long tradition of administrative law, which is applied by the *Conseil d'Etat*, but constitutional law, which is the province of the *Conseil Constitutionnel*, is a more recent innovation. Since the creation of the *Conseil Constitutionnel* by the Constitution of the Fifth Republic in 1958, development has proceeded apace; and since 1971 the *Conseil Constitutionnel* has assumed responsibility for handing down completely impartial judgments on the constitutionality of statutes, and for supervising parliamentary legislation which might infringe fundamental rights. This trend was reinforced by a constitutional statute of October 1974, which allowed parliamentary minorities to attack legislation before the *Conseil Constitutionnel*. The situation in France has therefore now come close to that in other European countries. Yet, although judicial control is obligatory for organic laws (as defined by the Constitution) and optional for ordinary laws, it is still subject to important restrictions. Individuals cannot address the *Conseil*, as only groups of at least sixty deputies or senators and a small number of the highest political officials have any standing to do so. And a statute can be attacked only in the short period between adoption of its text by Parliament and promulgation. Once a statute is in force, no judge can abrogate it by declaring it contrary to the Constitution.[12]

Legal scholars in favour of law reform also attacked the 'tyranny of judges'. Bentham, for instance, was violently critical of a judiciary which on its own authority decided what was the law, referred only to precedents and a vague body of customary rules, and was guided only by unwritten tradition. According to Bentham, lawyers would always defend unwritten law, since it was the source of their power; only the primacy of statute and the power of Parliament to legislate freely would put an end to the despotism of the lawyers.[13] Laurent fulminated just as fiercely against judges (although for quite different reasons) and reproached them for not recognizing the supremacy of the code and for usurping the prerogatives of the legislature. In this dispute, advocates were not lined up on one side or the other. On the European continent they were independent of the legislature, the courts and the universities. In England they had traditional links with the judiciary which were formed at the beginning of their professional lives, when they learned their law as apprentices in the courts. The judges themselves were recruited from among the most successful barristers; a seat on the Bench was an honourable end to a career at the Bar. In England it sometimes also seems that judges and barristers have a common sense of belonging to a group initiated into a rather mysterious, almost religious heritage, which is inaccessible to other men.

[11] The question whether statute was to be interpreted by the legislature or the judiciary has already been dealt with in connexion with the founding of the Cour de Cassation.

[12] M. Cappelletti, 'Repudiating Montesquieu? The expansion and legitimacy of "constitutional justice"', *Catholic University Law Review* 35 (1985), 17–18; L. Favoreu, 'Actualité et légitimité du contrôle des lois en Europe occidentale', *Revue du droit public et de la science politique en France et a l'étranger* 5 (1984), 1,147–201; C. Debbasch, *Droit constitutionnel et institutions politiques*, 2nd edn (Paris, 1986), 503; J. Gicquel and A. Hauriou, *Droit constitutionnel et institutions politiques*, 8th edn (Paris, 1985), 910.

LAW AND THE *VOLKSGEIST*

83 From time to time, especially in connexion with Montesquieu and Savigny, reference has been made to theories that law is a product of the life of a nation, and the expression of the national spirit. On the other hand there are the theories that law is or ought to be supra-national and related to human nature, and that a law confined within national frontiers is scandalous or even absurd (Pascal). What can legal history teach us about these two contrasting conceptions?

The classic philosophical discussion of the *Volksgeist* is to be found in Hegel. For him, all the cultural manifestations of a people – its religion, institutions, morality, law, customs, science, art and crafts – are merely visible expressions of a central reality, the *Volksgeist*. Any serious study in any area will sooner or later reveal this central element of the national nature. In the nineteenth century this

[13] See his *General view of a complete code of laws* and his *Book of fallacies*, in *Works*, ed. J. Bowring, II, III (New York, 1962).

conception was very popular, and it is clearly linked with the rise of the nation state, especially in Germany where, under French occupation, nationalistic sentiments developed rapidly. Yet theories about the national character of law are open to criticism. In the Middle Ages and early modern times, the idea that law had a national aspect was virtually unknown. The Roman and canonical models of law were supra-national or even universal; and, in spite of many local variations, the feudal law of all western countries also had a common basis. The prevailing view was therefore of a common law subject to local variation. In practice, national legal systems hardly existed in the Middle Ages, although they are to be found in England and Hungary. In early modern times there was a trend towards national laws, but its results were very incomplete, as is shown in particular by the case of France. The correlation between nation and law was so undeveloped that at the end of the *ancien régime* France still had two great legal zones which were fundamentally different. From the time of the homologation of customs onwards, it was clear that in law the geographical unit was the region rather than the nation.

The speed with which national law developed depended on the individual political circumstances of each country. The strong monarchy in England favoured the very early development of a national law. By contrast Germany, which was divided from the thirteenth century, arrived at a national code only with unification at the end of the nineteenth century. France lies between these two extremes, since it was unified later than England, but earlier than Germany; still, the development of a national French law was slow and halting. A closer inspection of England reveals that the Common Law which developed so early has little to do with a *Volksgeist*, a 'national spirit' or whatever it may be called. The 'typically English' system is in fact nothing other than a continental feudal law, which was imported by the Norman conquerors, and has nothing to do with ancient traditions of the English people or Anglo-Saxon law. The developments in Germany and in Scotland in the sixteenth century also show how little the national law need have to do with the customs of a nation: both of these countries introduced the *ius commune* as their national law in order to make up for the deficiencies of custom.

Here it is also appropriate to consider the development of law in France and in Belgium. The *Code civil* of 1804 was a French code

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through and through, so the question arises whether, in the Belgian regions in which it was introduced, it represented a foreign element and a break with the national past.[14] The answer is quite clearly no: French law (especially in the north) and 'Belgian' law had developed from common origins and over the centuries had followed parallel courses. Until the sixteenth century most of the county of Flanders was legally part of France. All the essential (Germanic and Roman) ingredients – local and regional customs whether homologated or not, canon law, Roman law, the 'books of law' – were part of a common patrimony. The same applies to the political structures, which in both countries developed from the same feudal, urban and monarchical institutions. The introduction of the *Code civil* into Belgium was therefore not the abrupt imposition of a completely foreign legal system; Belgium was at the same stage of development, and codification was among the ideas of the Enlightenment which were being diffused throughout Europe.[15] Of course, not all rules of the *Code civil* corresponded to old Belgian customs, and it is interesting to note that recently in Belgium there have been occasional steps back to the customary law which the *Code* supplanted. The rights of the surviving spouse, for example, were much more extensive in the old law than under the *Code civil*, and modern Belgian legislation in this area represents a return to ancient custom.[16]

[14] See the commentary in van Dievoet, *Burgerlijk recht in België en Nederland*, 8–11.

[15] See the similar conclusion for the Netherlands in J. van Kan, 'Het burgerlijk wetboek en de Code civil', *Gedenkboek burgerlijk wetboek 1838–1938*, ed. P. Scholten and E. M. Meijers (Zwolle, 1938), 276.

[16] P. Godding, 'Lignage et ménage. Les droits du conjoint survivant dans l'ancien droit belge', *Famille, droit et changement social dans les sociétés contemporaines* (Brussels, 1978; Bibliothèque de la Faculté de droit de l'Université catholique de Louvain, XI), 296; J. P. Levy, 'Coup d'œil historique d'ensemble sur la situation patrimoniale du conjoint survivant', *Etudes offertes à René Rodière* (Paris, 1982), 177–96.

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CHAPTER 7

Factors

INTRODUCTION

84 There are two kinds of factor in legal history. The main legal traditions and methods of formation of the law are one kind of factor which has affected the development of law in Europe. This is the sense in which T. F. T. Plucknett used the term in discussing the theme of 'some factors in legal history',[1] where he dealt with five elements: Roman law, canon law, custom, legislation, and precedent. All these can be called 'technical' factors, since they are sources of law in the strict sense, sources of the rules formulated and laid down by lawyers. There are other kinds of factor, however, which may be called 'social'; they encompass broad political, socio-economic and intellectual developments and disputes. These affect society as a whole, and through it the law. Although it is plain that social factors do have an impact on the evolution of law, their influence is much harder to trace than that of technical factors, which can sometimes be identified in the sources themselves, for instance when a text states expressly that a rule is adopted from Roman law or refers to the *ratio scripta*;[2] or where the part played by a particular source is easily identified because – to take the example of Roman law again – the terminology has clearly been lifted from the *Corpus iuris*.

The situation is more complicated if a Roman legal principle is found in a medieval text, but the text does not make use of the Roman terminology. This applies, for instance, to article 9 of Magna Carta of 1215, which provides that the guarantors of a debtor cannot

[1] In Part 3 of the first book of his fundamental work on the Common Law, *A general survey of legal history*.

[2] On this term, which first appeared in the form *razons escricha* in the custom of Alais of 1216–22, and the shifts in its meaning in the following centuries, see A. Guzman, *Ratio scripta* (Frankfurt, 1981; Ius commune Sonderhefte, Texte und Monographien, 14).

be pursued so long as the principal debtor is solvent and in a position to pay his debts. The rule corresponds to the Roman *beneficium excussionis*, but is it a borrowing from Roman law? The timing makes this possible since, in the time of King John, English legal, and particularly church, circles were acquainted with the new learning of Bologna.[3] The example of Archbishop Stephen Langton, who played an important part in Magna Carta, makes this especially clear. But it is also possible that the same measures were taken in different times and places, for equitable or practical reasons, without there necessarily being any direct influence. Thus, the barons in 1215 may well on their own account have eliminated a practice which was not favourable to them, without being aware of Justinian's law. It is a difficult question, which has hardly been studied; yet it is no doubt significant that Magna Carta, unlike other old English legal texts, contains no Roman terminology.[4]

It is clear that a legal historian has to consider what factors have influenced his area of research, and this means not merely technical factors, but social factors too. After all, the small world of lawyers, courts, faculties and government advisers is only a microcosm of the diverse interests and ideas in the world at large.[5]

CHANGE IN LAW

85 The shifting of these interests and ideas means that society, and as a result the law as well, is constantly changing. The appearance at certain historical periods of a stable and immutable law is misleading; and so are the beliefs held by the people of the time. Even in the early Middle Ages, when the predominant view was that the law was unchanging, and when there were in fact fewer attempts at deliberate manipulation of the law than in later periods, pressure groups were still active, and still managed to turn to their own account institutional structures which had been set up for other purposes. Take an example from feudal law: originally the basic principles of the feudal bond, and the interests of the lord, prevented fiefs from being inherited: the fief was granted as the counterpart of personal

[3] R. C. van Caenegem, *Royal writs in England from the conquest to Glanvill. Studies in the early history of the common law* (London, 1959; Selden society, 77), 360–90.

[4] e.g. Glanvill's *Tractatus de legibus et consuetudinibus regni Angliae* of 1187–9, ed. G. D. G. Hall (London, 1965; Medieval texts).

[5] Cf. S. Reynolds, 'Law and communities in western Christendom c. 900–1140', *American Journal of Legal History* 25 (1981), 205–25.

military service which the vassal had to offer; when he died the contract was dissolved and the fief returned to the lord, who could again feu the same property to another vassal (without any obligation to choose the son of the deceased, who might not be so talented or so trustworthy). Vassals, however, were eager to provide for the material well-being of their own line of descendants and, under pressure from them, the principle of inheriting fiefs was recognized in the Frankish kingdom during the ninth century. This is a very clear example of the evolution of customary feudal law.[6] The lords at least managed to preserve their entitlement to *relevium*, the tax due to the feudal lord by the heir when he took possession of the fief. Yet this again aroused a conflict of interests which was to have legal repercussions. Lords were themselves eager to determine the amount of reliefs, according to the heir's circumstances and financial means. But vassals were anxious to avoid arbitrary impositions and called for a fixed scale for reliefs. In England they obtained this scale in article 2 of Magna Carta. This was a reversal of the policy of King John, who had been guilty of imposing arbitrary and exorbitant *relevia*.

Although law is constantly changing, the rate of change varies from one period to another, and periods of stagnation alternate with periods of rapid change. This constant movement occurs whatever the predominant source of the law may be, whether custom, precedent, legislation or scholarship. The shifts in customary feudal law have just been illustrated, and earlier an account was given of the creation of English commercial law through the bold case law of Lord Mansfield.[7] Likewise, several illustrations of the influence of scholarship have been given, while that of legislation is obvious. Yet whatever the means of change in the law, innovation is usually the result of the collective pressure of interests or ideas, and the efforts of groups in society aiming at emancipation or power. For centuries it was possible to justify (and to impose) one particular conception of the law by appealing to the notion of a return to the 'golden age'. During the *ancien régime*, however, opposition to the established order was rife, and argument in favour of a new order widespread; return to the 'good old days' was treated as a notion which had been corrupted by certain self-seeking social groups. But until the seventeenth century, innumerable insurrections and peasant revolts

[6] F. L. Ganshof, *Qu'est-ce que la féodalité?*, 5th edn (Brussels, 1982), 218.
[7] See above, section 69.

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marched under the banner of a return to the past. In seventeenth-century England, nationalistic motives provided another reason for this; there the good old law was Anglo-Saxon law, which had been corrupted by the continental law imposed by the Normans under the tyrannical William the Conqueror (the 'Norman yoke'). Only in the eighteenth century did reformers have their eyes fixed resolutely on the future. The old law had lost its prestige as 'good' law.

IDEAS AND POLITICAL POWER

86 To emphasize the role of social movements and conflicts of powers and interests is not to misunderstand the influence of ideas, which are themselves historical facts. Even the best and the most just of ideas, however, can assert itself only when social forces are disposed to adopt it. Without the political will, legal principle has little prospect of success. From the Middle Ages onwards, numerous projects for a supra-national order in Europe were drawn up, among others by brilliant scholars such as Leibniz. Up until the time of Boniface VIII, the papacy had been recognized as having international authority, above states and sovereigns, but this had come to an end at the time of the papal exile in Avignon and had completely disappeared by early modern times, when it was clear that Christianity had become definitively divided. The new situation prompted lawyers and philosophers to make various attempts to create an international legal order, founded by the states themselves, to which national governments would be subordinate. This legal order would ensure internal peace and external security (especially against the Turks). Yet none of the projects came to fruition, and the sovereign states followed their own destinies. In the twentieth century this scene was replayed on the global scale. It is now clear that a world organization with effective power over all nations, including the super-powers, is an impossible dream; the best proof of that is the right of veto of the permanent members of the Security Council of the United Nations.

Still, in legal history when an idea has actually managed to establish a central role for itself, it tends to be pushed to its most extreme logical consequences. Some legal concepts therefore end up virtually as obsessions. Here are two examples. The first is the rise of pontifical theocracy, which is certainly the most striking model of an ideology taken to extremes. From the eleventh century onwards, this

theory, which is alien to the original message of Christianity, developed and came to influence every aspect of the institutions of the church until the crisis of the fourteenth century. In turn, church practice and legislation decisively affected European legal systems, both in public and private law. A second example is provided by the aspirations of the monarchy to order and to structure society as a whole. This led to the absolutist state of early modern times. Here too an embryonic idea, that a monarch designated by God was destined to govern an entire society, was developed at all levels of social organization. In practice the idea was sometimes pursued to excess, and only later were the excesses moderated. Suffice it to mention torture in the criminal courts: it was the task of the sovereign to guarantee peace and so to repress crime. In order to ensure convictions, there was no hesitation in permitting witnesses to be examined secretly (already a restriction on the rights of the defence) and allowing confessions to be obtained under torture (which eliminates those rights entirely).

SOCIAL GROUPS AND PRIVATE LAW

87 The survival of man depends on his belonging to, and being protected by, a social group whose members support one another and make their own individual contributions to the group. Over the centuries various types of social group have played this part with consequences for the development of private law, which some examples can illustrate. At first, bonds of kinship constituted the most important social group (the family in the strict sense, the tribe in the broader sense). The individual had duties towards his *parentela*, and when in difficulty he could appeal to it himself. At a later stage feudal solidarity, which united the vassals of a single lord in relation both to him and to one another, became fundamental. The feudal bond entailed both rights and obligations, especially in private law. Finally, from about the twelfth century the city and the state became the basic forms of organization: from now on, belonging to a city or a kingdom took precedence over all other forms of solidarity and loyalty. The general development (as well as the integration of the church into society) can be illustrated by examples.

The law of succession is one reflection of this social development, since devolution of the property of a deceased person has been

governed by very diverse legal regimes. Primitive tribes had a relatively simple scheme: the moveable property was burned or buried with the corpse, while the real property (the land) remained in the possession of the familial clan. There was therefore no problem of fragmentation on succession. When this archaic situation changed, the question arose what should happen to the estate. In the early Middle Ages, the importance of the family was still such that the property of the deceased had to remain in its possession, and the estate was divided between the children. Testamentary succession was virtually unknown, although some special forms had developed, such as donations *post obitum* or *pro anima* in favour of the church.[8] The church was disadvantaged by the exclusive devolution of estates to family members, and so encouraged a revival in the making of wills (which had been common in Roman law), at least in favour of church institutions. Its efforts were successful and, even before the renaissance of Roman law, it became customary to make a bequest in favour of ecclesiastical legatees. Meanwhile, the law of intestate succession had undergone another development, dictated by the nature and purpose of feudal law: the law of primogeniture had made its appearance. The exclusion of the younger son is to be explained by the desire to maintain the fief in its entirety, in order to ensure revenues sufficient to allow a knight to discharge his military obligations towards his lord. Fragmentation of a fief among several children would have made this impossible. Now an estate could be made up of a partible mass (*alodia*, to which the old law of succession still applied) and also an impartible mass (*feoda* or fiefs, to which the feudal principle of primogeniture applied). The Roman system of unitary succession was revived only with the *Code civil*.

The development of towns, which applied their own specific rules, also had an impact on the law of succession. Municipalities were anxious that the riches of their citizens should remain within the general economy of the town, and so they levied a special tax on property which left the town by inheritance, the *droit d'issue*. It applied whenever a foreigner acquired the property of a citizen by way of succession or otherwise, and the rate of the levy ranged from 10 to 20 per cent.[9] It was the part taken by the state which was to

[8] P. Jobert, *La notion de donation. Convergences: 630–750* (Paris, 1977; Publications de l'Université de Dijon).

[9] In Flanders it is found already in the thirteenth century, e.g. in an ordinance of Ghent dating from 1286.

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end up weighing most heavily on estates, yet apart from practices such as those of King John, who demanded exorbitant *relevia* from the successors of his vassals, it is only recently that rights of succession have become fiscally significant. This trend has become more marked in our day (partly for ideological reasons), so much so that succession to relatives in some degrees is tantamount to confiscation. The burden of tax has practically nullified the legal and economic significance of the system of succession set up by the *Code civil*.

Freedom to dispose of personal landed property is another revealing social indicator. Originally, collective landed property scarcely made sense, since many tribes led a nomadic existence and left their cultivated lands as soon as they were exhausted. Later, forms of family and even individual possession of land developed, but they were still subject to collective restrictions. So far as the family was concerned, this manifested itself in a prohibition on alienating landed property without the consent of the clan. The right of recovery (*droit de retrait*) is one of the collective restrictions which survived into the *ancien régime*: when a piece of land had been sold to a third party (that is, someone who was not a member of the family), members of the seller's family had the opportunity to exercise their right of recovery and buy the property back, so reintegrating the family patrimony. Similarly, feudal lands were long considered inalienable, because they were thought to attach directly to the person (and the personal qualities) of the vassal. This principle was later attenuated, although alienation could still not take place without the consent of the feudal lord. Ultimately, fiefs became freely alienable.[10] It is obvious that restrictions on the sale of land constituted an obstacle to the economic growth of cities, at a time when the need for credit and capitalization of rents demanded that land should be marketable. The towns therefore encouraged the individualism of entrepreneurs, to the detriment of ancient family control of land. Thus, article 19 of the Charter of Ghent of 1191 authorizes the free sale of land. The charter was promulgated by the

[10] The English statute *Quia emptores* of 1290 expressly gave vassals the right to alienate: J. M. W. Bean, *The decline of English feudalism* (Manchester, 1968), 79–103. The freeing of land from all collective restrictions (whether family, feudal, religious or the communal ones of primitive agrarian communities) was one of the main trends in European legal development, which led to individual ownership of land and to the integration of land into the ordinary economic system.

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countess of Flanders, who had legislative power permitting her to implement such a change in the law.[11]

In the Middle Ages and the *ancien régime* society was made up of orders and guilds. They had their own administration, rules and jurisdictions.[12] They also had their own legal status: the clergy and nobility not merely enjoyed the usual fiscal privileges, but also benefited from privileges in criminal law (such as an exemption from torture).[13] This social organization under the *ancien régime* had its implications for private law: often only the great landowners had the right to sit in the courts (this was already the case for the Frankish *mallus*). Similarly, there was discrimination in favour of the landed proprietors or *viri hereditarii* of the towns; their evidence and their declarations before a court had greater weight than those of their fellow citizens. Privileges were the order of the day under oligarchic regimes, but the democratization of political institutions, especially in the Italian towns, brought about a development towards the other extreme: the evidence of a nobleman was then given less weight than that of another citizen. The privileged position of the *viri hereditarii* (whose words or oath were probative and prevailed over the evidence of any other person) none the less appears once more in an entirely different context: article 1781 of the 1804 *Code civil* makes a distinction between declarations by employer and by employee: 'the master is believed on his affirmation'.[14]

THE INTELLECTUAL AND MORAL CLIMATE

The law of evidence

88 Law adapts to intellectual developments (or *mentalités*). In some periods, man has felt keenly that he was subordinate to transcendental forces or supernatural beings, and that he was part of a cosmic universe beyond his observation, knowledge and comprehension. At other times, logical and rational thought – exemplified by

[11] The text is in W. Prevenier, *De oorkonden der graven van Vlaanderen (1191-aanvang 1206)* II: *Uitgave* (Brussels, 1964; Commission royale d'histoire. Actes des princes Belges, 5), 15: 'There is such freedom in the city of Ghent that, if somebody desired to sell or mortgage property within the jurisdiction of the city, he was allowed to, whether foreigner or citizen, and nobody could contest it on the ground of any relationship by blood or marriage.'

[12] The numerous extant rules of the guilds and corporations have scarcely yet been studied.

[13] As a corollary, in criminal law the higher classes were sometimes subject to more severe penalties than the lower.

[14] See above, section 6.

empirical scientific and mathematical research – has been predominant. The transition from one *mentalité* to another – from a Platonic to an Aristotelian cosmology – has its repercussions for the law of evidence. Nor should it be forgotten that some peoples have at some stage lived under a religious governing class, which demanded that individuals and the community should respect and observe religious precepts (often enshrined in sacred texts). Such clerical dominance has in several cases been extremely important for the history of European private law.

During the twelfth and thirteenth centuries, the law of evidence underwent a fundamental transformation from a primitive and irrational system to an advanced rational system.[15] Under the old system, even in civil matters (especially in cases about landed property) the courts relied for proof on divine signals in the shape of ordeals. This might take the brutal form of the judicial duel, or the subtler form of the oath supported by oath-helpers. In the first, the party or champion who managed, with a blow of the sword or club,[16] to triumph over his adversary was thought to have had divine assistance in order to achieve victory, which implied that his cause was just. In the second case, it was presumed that possible perjurers would unfailingly meet with divine retribution, and that the fear of celestial wrath would dissuade most people from swearing a false oath.[17] Of course there was awareness in the early Middle Ages of proof by documents and witnesses, but these methods could readily be challenged or neutralized, for instance, if two opposed groups of witnesses insisted on their conflicting evidence. To escape from the impasse, it was then necessary to resort to the judicial duel and an appeal to the divinity.

The whole question, however, was entirely transformed by a profound change in European *mentalités*. A new law of evidence, essentially the one which is still in use, was worked out. It was based on critical and rational evaluation of documents, testimony and real evidence. To establish the reasons for this transition from a magical conception of the universe to a more rational conception is a historical problem which has not yet been resolved; but it is clear that the

[15] See *inter alia* the volumes *La Preuve* in the *Recueils de la société Jean Bodin* XVI (1965–).
[16] Here too class differences played their part, for in a duel a knight used his sword and the peasants their clubs.
[17] Even nowadays the law of civil procedure provides for oaths, whether supplementary or determinative of the action.

transition had implications for the law of evidence. The archaic system, introduced under Germanic influence, had to be abandoned, although it was difficult to decide with what to replace it. In Europe experiments were made with various systems, some derived from the *Corpus iuris*, others (such as the jury) inspired by existing, rudimentary methods which were then developed into a true system of evidence.

One aspect of the modernization of the law of evidence was the increased use of writing. After a period in which writing was virtually unknown, from the twelfth century onwards written proof became widespread, even in agreements between ordinary people. Particularly remarkable is the use of 'authentic' documents – that is, documents 'authenticated', declared worthy of faith, by people or institutions who had public authority to do so. There was a good deal of variety in the form of documents, and in the authorities responsible for their composition or authentication, and this depended in particular on the importance of learned law in the region. In the south, a profession of notaries developed, following on from the Bolognese School of Law. They were invested with public authority by the pope or emperor, prepared by elementary studies in law, and could then establish themselves in the towns and compose and produce authentic documents.

Notaries progressively spread into the northern regions, but in the Netherlands there was no standard notarial practice until the sixteenth century. In the north a quite different means of authenticating documents was evolved, the *œuvres de lois*: the contracting parties went before a court and presented their agreement to it; it was then entered in judicial records, and an extract could be delivered to the parties, although this was not an essential formality. Voluntary jurisdiction was exercised by the ordinary or feudal courts, or by the tribunals of aldermen, together with their other judicial activities. During the later Middle Ages this system became extremely important, and even in early modern times it survived against the competition of notaries. The church courts, especially the officialities[18] also exercised this non-contentious jurisdiction.

Originally, written (and *a fortiori* authenticated) evidence was optional and did not take precedence over proof by witnesses. But the point was highly controversial. A lawyer as distinguished as Pope

[18] See above, esp. section 52.

Innocent III could still declare himself firmly in favour of proof by witnesses: 'the word of a living man prevails over the skin of a dead ass' (i.e. a parchment). Customary law had sayings such as 'witnesses prevail over letters' or 'viva voce witnesses overcome letters'. But it was inevitable that authentic documentary proof should become the standard. The legislation of the Italian towns had moved in this direction even in the fourteenth century (Naples in 1306, Bologna in 1454 and Milan in 1498). In France the main steps in the development were the *Ordonnance* of Moulins of 1566,[19] which provided that, for a transaction in excess of 100 pounds, only written proof would be admissible, and also article 1341 of the *Code civil* of 1804.[20] In Belgium the principle is to be found in the *Edictum Perpetuum* of 1611. In England it was accepted in the eighteenth century that a document could not be challenged purely on the basis of oral evidence.[21] And in some contracts, particularly those concerning land, the law was not satisfied with mere written evidence but required an authentic notarial document.[22]

Lending

89 Changing conceptions of morality, and religious authorities and doctrines, also had important consequences for private law. It is not surprising that they often collided with the policy of the secular authorities. Two illustrations will suffice: lending and marriage.

The economic expansion of the West during the later Middle Ages led to a resurgence in lending. Methods of credit had already been developed and legally recognized in Roman antiquity, but had

[19] See above, section 48.

[20] 'Any matter exceeding the sum or value of 150 francs must be documented before notaries or under private signature, even in the case of voluntary deposits, and proof by witnesses is not admissible as to the content of the documents, or as to what was said before, at the time or since they were written, even if that relates to a sum or value of less than 150 francs. This is without prejudice to what is prescribed in statutes relating to commerce.'

[21] Cf. J. Gilissen, 'Individualisme et sécurité juridique: la prépondérance de la loi et l'acte écrit au XVIe siècle dans l'ancien droit belge', *Individualisme et société à la renaissance* (Brussels, 1967), 35–57; G. Verneillen and G. van de Perre, 'De historiek van de beperking van het bewijs van verbintenissen door getuigen', *Rechtskundig weekblad* 32 (1968–9), col. 817–50.

[22] The requirement of writing was also extended to areas other than evidence. Nowadays it is impossible to imagine a statute which is not printed and published; earlier, matters were otherwise, and it was only the word of the king which had any legal weight. On the learned law, see G. Dolezalek, 'Scriptura non est de substantia legis. A propos d'une décision de la Rote romaine de l'an 1378 environ', *Diritto comune e diritti locali nella storia dell'Europa* (Milan, 1980), 51–70.

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disappeared during the first centuries of the Middle Ages. It is extremely difficult to launch a private commercial or industrial enterprise unless at least part of the necessary funds can be borrowed, and, since the temporary use of capital is advantageous, it is normal that it, like materials and labour, should be rewarded. In other words, loans are repaid with interest. Here, however, the needs of economic development collided with religious precepts, for ever since Christian antiquity the church had prohibited lending at interest (*usura*). The prohibition had not only been maintained by the fathers of the church, but had also been enshrined in church law. The ecumenical council of Nicaea of AD 325 prohibited the clergy from agreeing to loans at interest; lay people were initially merely advised by the church against this practice, but the prohibition was subsequently extended to them. A capitulary of Charlemagne of AD 789 unequivocally set out the prohibition: 'it is absolutely forbidden to everyone to lend anything against interest'. Any form of interest, that is any case in which the lender received more than he had lent, was treated as usury and so as a sin. The general condemnation therefore did not apply only to exorbitant rates of interest ('usury' proper), which had been obtained by exploiting a position of strength against the debtor.

This moral attitude corresponded to the mentality of the feudal world, for which any gain, even if it arose from perfectly legitimate commercial operations, represented sin and conduct contrary to social mores. Although in the West this conception is nowadays hard to comprehend, it is still to be found in Islamic countries where religious objections to interest (i.e. usury) still apply. During the last centuries of the Middle Ages, European man had to live in a dilemma: lending at interest had become common in practice, but the church refused to withdraw its prohibition.[23] Secular legislation sometimes reinforced ecclesiastical principles, as for instance an ordinance of 1199 pronounced by Baldwin IX, count of Hainaut and Flanders.[24] As a result medieval commerce had to resort to a series of subterfuges and fictions which allowed it to develop a

[23] Texts could be prayed in aid not merely from the Bible ('lend without hoping for anything in return') but also from Greek philosophy ('money does not create money').

[24] W. Prevenier, 'Een economische maatregel van de Vlaamse graf in 1199: het verbod der leningen tegen interest', *Tijdschrift voor geschiedenis* 78 (1965), 389–401. The text of the ordinance is published in W. Prevenier, *De oorkonden der graven van Vlaanderen (1191 – aanvang 1206)* II (Brussels, 1964), no. 124, 276–8 (Comm. royale d'histoire. Actes des princes belges, 5). On Baudouin IX: *Nat. biografisch woordenboek* I (Brussels, 1964), col. 225–38.

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flourishing and indispensable system of credit, while at least formally respecting religious restrictions: sale on condition of repurchase, mortgage (*mortuum vadium*, where the creditor enjoyed the fruits of the property given in security), bills of exchange, interest on arrears (which was allowed by the canonists in certain circumstances). Little by little, moral theology agreed to recognize interest as the price of credit, and to authorize it so far as equitable. This reasoning could be reconciled with the theological theory of the 'just price', according to which each economic good had a *iustum pretium* which ought – especially in credit agreements – to be adhered to.

In spite of this, objections of principle to interest as usury survived in Catholic countries to the end of the *ancien régime*. The highest judges and numerous distinguished authors maintained that interest clauses in contracts were completely void.[25] The French Revolution, which was little disposed to respect religious taboos and was in favour of free commerce, very early proclaimed that lending at interest was legitimate, at a rate fixed by statute.[26] A statute of 1796, authorizing citizens to conclude contracts to their own liking, had anyway been interpreted to mean that the parties themselves could fix their own rate of interest. This position was adopted by the *Code civil* (articles 1905 and 1907), although shortly afterwards the freedom of parties to set rates of interest was again restricted. Later still the freedom of contracting parties was reaffirmed,[27] but unjustified and exorbitant interest (usury) now constituted a crime punished by the criminal law. In protestant countries the doctrines of the reformers had opened the way to permitting interest. Calvin, for example, maintained that interest was admissible: according to him, it was not prohibited by the Bible, where the only prohibition was against lending at disproportionate interest, which was the sin of usury.[28] Many lawyers of the School of Natural Law and authors of the Enlightenment (Grotius, Montesquieu and Voltaire among others) were in favour of freedom of contract, including lending at interest.[29]

[25] D'Argentré, Jean Bodin, Domat, Pothier and the case law of the Parlement de Paris.
[26] Decree of the Constituante of 3–12 December 1789.
[27] In Belgium in 1865, under Rogier and Frère-Orban.
[28] His thesis was, exceptionally, followed by a non-Calvinist author: C. du Moulin's *De usuris*.
[29] Cf. J. Favre, *Le prêt à intérêt dans l'ancienne France* (Paris, 1900); V. Brants, *La lutte contre l'usure dans le droit moderne* (Louvain, 1906); J. Lameere, 'Un chapitre de l'histoire du prêt à intérêt dans le droit belge', *Bull. Acad. roy. sciences de Belgique*, classe des lettres (1920), 77–104; G. Bigwood, *Le régime juridique et économique du commerce de l'argent dans la Belgique du moyen âge* (2 vols., Brussels, 1921–2); G. Le Bras, 'Usure', *Dictionnaire de théologie catholique* xv, 2 (Paris, 1950), 2,336–72; B. N. Nelson, *The idea of usury* (Princeton, 1949); J. T. Noonan, *The scholastic analysis of usury* (Cambridge, Mass., 1957); B. Clavero, 'The jurisprudence on usury as a social paradigm in the history of Europe' in E. V. Heyen (ed.), *Historische Soziologie der Rechtswissenschaft* (Frankfurt, 1986), 23–36 (Ius commune, 26).

The law of marriage

90 Both secular and church authorities legislated intensively on the subject of the family, which was the basic social unit. Particularly in the Middle Ages, family law was without doubt a matter largely of church competence, but its implications for society in general and the family patrimony in particular were such that secular authorities could not entirely abstain from regulation. The divergent approaches to marriage[30] taken by the secular and church authorities in fact make up one of the most interesting chapters in the history of law in Europe. The divergence also shows how a matter of private law could be a prize at stake between authorities whose systems of values and conceptions of society differed. Certainly no other institution was so much at the mercy of opposed trends and ideologies. This account does no more than trace the broad lines of development, and neglects the primitive forms still known in the early Middle Ages, such as marriage by abduction or sale.

It is absolutely fundamental to distinguish between marriage as a secular institution (a contract which affects society at large, and the particular families and their fortunes) and marriage as a sacrament (a means of grace which has a religious meaning, and symbolizes the mystic bond between Christ and his church). These conceptions of marriage relate to secular and church jurisdiction respectively, and as they evolved played a significant part in the history of the West. In the Middle Ages, the sacramental concept of the church and its courts prevailed, whereas in early modern times, and above all in the contemporary period, the secular element has become increasingly important.

According to the teaching of the church, marriage concerned only the spouses personally. Only their free will and decision counted. All interference by their family or parents was excluded, and any question of a patrimonial or dynastic nature was irrelevant. The matrimonial bond was declared indissoluble, on the faith of Scripture. Divorce, which had been admitted in Roman law, was from now on excluded. Within this basic framework, the law of marriage

[30] There are numerous studies on marriage. A recent, lucid and magisterial study is J. Gaudemet, *Le mariage en Occident. Les mœurs et le droit* (Paris, 1987; Cerf-Histoire).

none the less evolved. The purely consensual character of marriage recognized in the Middle Ages (that is, that marriage was formed by the free consent of the intending spouses without formalities or the intervention of a priest) was abandoned by the Council of Trent (by the decree *Tametsi* of 1563). It imposed formalities of marriage (witnesses, publicity, celebration by a priest) mainly with the aim of preventing clandestine marriages.[31] The church also developed a theory that mere consent without consummation (*copula carnalis*) constituted an imperfect marriage (*matrimonium initiatum*), which could be dissolved, by contrast with marriage where consent had been followed by sexual relations (*matrimonium ratum*). *Divortium* (after the Council of Trent: *separatio*) *quoad torum et mensam* was also introduced, that is, the physical separation also provided for in the *Code civil*. This allowed cohabitation to end without dissolution (and so prevented remarriage). Finally, the church recognized the nullity of marriage, which an ecclesiastical judge could declare on the ground of a defect in consent or other *impedimentum dirimens* (subsisting prior marriage, kinship, and so on).

Even in the most Catholic of times and places, there was a contrasting secular conception of marriage, which emphasized its social, family and property consequences, as well as its feudal and dynastic ones. This view was hostile to marriages concluded (often secretly) without the consent of relatives, because they directly threatened schemes of alliance between families and fortunes. In periods of staunch Catholicity this view, which was peculiar to the higher feudal and urban circles, could not prevail against the church, but it could express itself by civil and criminal sanctions against spouses who had married without parental consent. In the Middle Ages these sanctions consisted mainly in disinheriting the spouses or condemning the husband for abduction. In France in modern times the secular courts extended their competence to matrimonial cases, and the secular authorities also imposed rigorous regulations, traces of which are still to be found in the *Code civil*. A French *Ordonnance* of 1566 provided for the disherison of children under twenty-five who had married without parental consent. The *Ordonnance* of Blois of 1579 punished abduction, and case law treated

[31] These formalities were also generally taken up in protestant Europe, including the Republic of the United Provinces, although with some modifications. In France, the king did not wish them to be published as they were, but they were none the less introduced in 1579 by the *Ordonnance* of Blois.

a marriage concluded without parental consent as abduction. (The comedies of Molière clearly illustrate how parental, especially paternal, influence still determined children's marriages, even when they had reached majority.) Pothier considered that a marriage concluded without parental consent between spouses under twenty-five was void, and that if the spouses were under thirty the lack of parental consent would involve disherison. In the Netherlands, even in the Middle Ages municipal ordinances set out civil and criminal sanctions against those guilty of seduction, that is marriage without parental consent. In 1540 Charles V ordained that a man under twenty-five or a woman under twenty who married without parental consent lost all the advantages of the surviving spouse. By contrast, in canon law the consent of parents was not a condition at all. The *Code civil* of 1804 demanded paternal consent for men under twenty-five and women under twenty-one. Once beyond this age, children were still subject to the procedure of the *acte respectueux* ('respectful act'), which obliged them to seek their parents' advice; in case of refusal, the marriage could be concluded after a certain number of repetitions of the *acte respectueux*; see articles 152 and 153 of the *Code civil*.

The secular conception did not prevail until the age of Enlightenment, which was hostile to the exaggerated role played by the church and attacked church views on various matters. At the end of the eighteenth century, some countries introduced the option of purely civil marriage without any religious content. In the Austrian Netherlands, Joseph II abolished the jurisdiction of the church courts in matrimonial cases by edict of 28 September 1784: from now on marriage was considered a civil contract, and not in any way subject to the canons of the church.[32] The French Revolution enshrined this principle in its constitution of 1791, using the same terms as Joseph II had done in 1784: 'The law considers marriage as a civil contract only.' In the system of the *Code civil*, marriage was a solemn civil act, and only an officer of the civil state was competent

[32] Art. 1: 'Since marriage is considered as a civil contract, and the civil rights and bonds resulting from it derive their existence, force and determination entirely and uniquely from civil authority, jurisdiction over and decision of the various matters relating to it, and all that depends on it, ought to be the exclusive province of the civil courts. We therefore prohibit any ecclesiastical judge, on pain of absolute nullity, from assuming jurisdiction in any manner . . .' It is clear that religious marriage remained the norm among the population at large; here it is purely a question of jurisdiction in the event of disputes. The current position, which prohibits religious marriage taking place before civil marriage, dates from the nineteenth century (art. 16 of the Belgian Constitution).

to unite the spouses in the name of the law. Yet the vast majority of the people remained attached to religious marriage: only civil marriage had legal consequences, however, and religious marriage had now always to be concluded after civil marriage, if at all. At the same time the church prohibition on divorce was abrogated. Here the Revolution was very radical: by the statute of 20 September 1792 it authorized divorce (which was to be pronounced by a court) either by mutual consent or on a number of other recognized grounds. When this legislation came into force, the number of divorces rose considerably; in some years the ratio between divorces and marriages was as much as one to three.[33] When revolutionary zeal had abated, the legislator took a few steps backward. But in spite of some restrictions, divorce was maintained, by mutual consent or for the reasons set out in articles 229 to 232 of the *Code civil* (adultery, serious cruelty or injury, conviction of an infaming crime).[34]

FINAL CONSIDERATIONS

91 Historical research has succeeded in exploding the myths about law. It has destroyed old, time-honoured conceptions of law: that law is a body of rules decreed by an omniscient God and inscribed in the heart of man; or the product of wise decisions by venerable (but perhaps mythological)[35] ancestors; or a system deduced from the nature of society by men guided by reason. Historical criticism shows that the evolution of law has mostly not been a question of quality (*Qualitätsfrage*),[36] but instead the result of a struggle for power between particular interests, an *Interessenjurisprudenz*.[37] To advance

[33] A. H. Huussen, 'Le droit du mariage au cours de la Révolution française', *Revue d'histoire du droit* 47 (1979), 9–52, 99–127.

[34] Arts. 229–30 are among the clearest instances of discrimination, since they provide that a husband can demand divorce on the ground of his wife's adultery, while his wife can only do so if she has found her husband with his concubine in the matrimonial home. This discrimination was abolished in Belgium by art. 45 of the statute of 28 October 1974. In France, so far as divorce on grounds of adultery is concerned, the discrimination was removed by the statute of 27 July 1884 and the ordinance of 12 April 1945.

[35] Many medieval law books, much later than the great legislator Charlemagne, were still attributed to him, e.g. the supposed 'loi Charlemagne' of Liège.

[36] The term is used by P. Koschaker, *Europa und das römische Recht* (Munich, 1947), 138, of the adoption of foreign legal systems.

[37] The term of Rudolf von Jhering and his school (see above, section 76). Cf. also the notion of Bentham, according to which all statutes have or ought to have the aim of augmenting the total happiness of the community, which means that law is (or ought to be) dictated by what best serves the community: Gerbenzon and Algra, *Voortgangh*, 260.

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beyond the traditional, rather naive conceptions is undeniably to deepen and enrich our understanding of the true factors involved in legal evolution. Law is a changing social structure, which is superimposed on society; it is affected by fundamental changes within society, and it is largely the instrument of, as well as the product of, those in power.

Yet lawyers ask themselves if this is an end of the matter, or whether some importance should not still be attached to permanent fundamental principles, which do not just depend on political circumstance or the actions of interested groups; in other words, whether there is a fixed star in the legal firmament. Even, for example, if the laws of Nuremberg had – formally – the force of law, they were undeniably the source of injustice. This reflexion leads to the desire for a body of stable rules, above and beyond changing statutes, and able to serve as a touchstone for assessing the validity of statutes – such, perhaps, as the constitutions and declarations of the rights of man. Lawyers also ask themselves not just about the role of law but about their own role in society. Here too historical research has played a demystifying role. It has shown that lawyers have often stood beside those who were powerful and well able to obtain the services of lawyers to plead their cases, compose their statutes or legitimate their claims. The point bears further examination. But at present the overwhelming impression is that the fee-earning lawyer has been a more frequent phenomenon than the revolutionary lawyer who stood up to those in power and defended the cause of the weak and the oppressed.[38] In law, then, the answers to two questions are among the most pressing demands of our time: what are the fundamental laws with which statutes ought to conform? How can we ensure that judges and advocates are independent and always ready to defend the law? Legal history allows these questions to be faced with the aid of human experience accumulated over several centuries.

[38] But we must beware of generalization. There were many judges who resisted considerable political pressure, by foreign occupiers among others, and many advocates who felt constrained to take the part of the oppressed, such as the young advocate Ernest Staes, the hero of the popular novel of that name by the Flemish author Anton Bergmann (*d.* 1874): his first victory was his successful intervention in favour of a worker who was about to fall foul of art. 1781 of the *Code civil* (see above, section 6).