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The Making of the Civil Law

(pp. 1–38)

I
The Meaning of Civil Law Systems

This essay in comparative law has two main interrelated aims: to illustrate and account for the features of civil law systems that distinguish them from common law systems and, in so doing, to contribute to the understanding of how law develops and is related to surrounding circumstances. A subsidiary aim is to characterize modern civil law systems for the Anglo-American student.

The Western legal tradition is basically unitary, and much the same historical legal elements have gone into the creation of the law of each nation state: Roman law, Germanic customs, canon law, feudal law, and so on. Yet the great bulk of modern Western systems are divided into common law systems that derive from English law, civil law systems that have an important historical connection—though not always easy to define—with Roman law, and mixtures of the two. This truth remains despite, on the one hand, overwhelming joint social and economic circumstances, such as the Industrial Revolution, in civil law and common law countries alike, and on the other hand, disparate political regimes, ranging from democracy to despotism, within a group of systems. As a result, the similarities between any two civil law systems are greater than between any civil law system and any common law system. The similarities between the civil law systems and their differences with common law systems are especially marked in the general structure of the systems, in the classifications and rules of what is traditionally private law, having to do with persons, property, succession, and obligations, and in the law of procedure and rules of evidence. The social, political, economic, and cultural conditions of two civil law countries, say France and Haiti, may be

vastly different, whereas a civil law country and a common law country may otherwise be much alike in their societal, political, and economic circumstances. The very existence within a unitary tradition of well-recognized contrasting types of systems, civil law and common law, indicates that very influential forces are at work shaping national law, but that they are not basically inherent in each nation's general societal, political, or economic background. The aim of this book is to isolate and explain the role of the most important of these forces.

The term "civil law" has a long history with a number of technical or semitechnical meanings. Specifically in Roman law, "civil law," *ius civile,* primarily designated those parts of the law whose applicability was restricted to citizens.[1] The parts of Roman law which were also applicable to foreigners—and which in fact were among the most influential—were termed *ius gentium.* In the Middle Ages especially, "civil law" was used of Roman law and its developments as distinct from canon law. Today the term serves also to mean private law, in contrast with criminal law or military law. But the term "civil law" has a quite specific meaning for comparative lawyers; it is used to denote the systems of Western continental Europe (excluding Scandinavia) and the systems (such as those of Latin America) greatly influenced by them.

What precisely these civil law systems have in common that distinguishes them from other Western systems is not immediately obvious. It is not enough to say that these systems derive from or are heavily influenced by Roman law. They are not all derived from or influenced by Roman law to anything like the same extent. Many positive rules of Roman law were rejected by the draftsmen of the modern codes, and many differences between the substance of Roman law and that of modern codes are of a fundamental nature.[2] Moreover, some integral and important parts of the law of most civil law systems scarcely derived at all from Roman law rules. For instance, matrimonial property regimes were unknown to Roman law, but they have been for centuries and are still a prominent feature of modern civil law systems. Are we to deny these parts the status of civil law? Further, the approach both by judges and by academics to the interpretation of a modern code is necessarily different from that taken in Roman times to juristic writing or the skeletal Edict of the praetor. Again, simply to talk of "derivation" or "heavy influence" might not sufficiently distinguish these systems from, say, English law, since parts of English law too, such as the law of easements and the contract of sale, at various times and to varying degrees were affected by Roman law rules and doctrines.

1. See e.g. *J.*1.2.1, 2.

2. See R. B. Schlesinger, *Comparative Law: Cases—Text—Materials,* 3rd ed. (Mineola, N.Y., Foundation Press, 1970), pp. 230f.

The claim that the main distinction between civil law systems and common law systems is that the former are codified and the latter are not is full of defects.[3] For one thing, the successful codification of the civil law systems is a modern phenomenon. For instance, the French *Code civil*—generally thought of as the earliest of contemporary style codes—came into force in 1804, and no code existed for Greece before the Second World War. Are we to say that the legal systems in these countries were not civil law systems before these dates? Surely not. Again, some German states had a national code, such as Prussia's *Allgemeines Landrecht für die preussischen Staaten* of 1794, and some Rhineland states accepted the *Code civil.* Are we to say that these territories had a civil law system, but other parts of Germany had not, before the *Bürgerliches Gesetzbuch* came into force in 1900? Again surely not. Further, some undoubted common law jurisdictions, notably California, are codified.[4]

F. H. Lawson uses the term "civil law" to designate "the group of laws which are the concern of jurists who have long been known to common lawyers as 'civilians'; that is to say, a group of laws which have been so greatly influenced by Roman law that the classical method of approaching them has been through Roman law."[5] Yet with the decline of Roman law studies in law schools within the common law jurisdictions —and in the United States, for example, Roman law studies have never at any time been very actively pursued—this classical method of approaching civil law systems is becoming less valuable as a test for distinguishing civil law from other systems.

An historical dependence on Roman law is, in fact, the common characteristic of the civil law systems, and this dependence needs to be

3. See e.g. Lawson, *Common Lawyer,* p. 47; Merryman, *Civil Law Tradition,* pp. 27ff.

4. The difficulties in determining the common nature of civil law systems emerge clearly from Von Mehren and Gordley, *The Civil Law System,* 2nd ed. (Boston, Little Brown, 1977), p. 3: "The legal systems of the western world are, for purposes of comparison, frequently divided into two groups: the civil law system, seen in French and German law, and the common law system developed in England. Two points of difference are usually emphasized in comparing the civil and the common laws. First, in the civil law, large areas of private law are codified. Codification is not typical of the common law. Second, the civil law was strongly and variously influenced by Roman law. The Roman law influence on the common law was far less profound and in no way pervasive. These points of difference should not be allowed to obscure the extent to which the civil and the common laws share a common tradition. Both systems were developments within Western European culture; they hold many values in common. Both are products of western civilization."

5. *Common Lawyer,* p. 2.

more exactly specified. Although no magic resides in a definition, one may serve not only to identify an abstract concept and distinguish it from other phenomena, but also to provide a tool for its further analysis.[6] A working definition of a civil law system would be a system in which parts or the whole of Justinian's *Corpus juris civilis* have been in the past or are at present treated as the law of the land or, at the very least, are of direct and highly persuasive force; or else it derives from any such system.

From this definition it follows that in civil law systems the substantive law derives from Roman law in considerable measure, though the distinguishing feature is not the borrowing, direct or indirect, of particular Roman law rules, and thus the similarity or equivalence of modern rules to Roman law is not of decisive importance. It also follows that the mark of civil law systems is not codification. Again the definition provides a test for distinguishing sharply between common law systems and Scandinavian law, on the one hand, and what are commonly regarded as the civil law systems, on the other. However tempting it might be to emphasize Roman law influence in England (and it has been widely understated) or in Scandinavia, no one could claim that Justinian's *Corpus juris* was ever there treated as binding or as directly persuasive.

The working definition also excludes from the notion of a civil law system the law represented by what Ernst Levy calls "the first 'reception' of Roman Law in Germanic States."[7] Thus, though the *Codex Euricianus,* the code produced by Euric, king of the Visigoths, around 475 was apparently heavily influenced by Roman law, it was promulgated more than half a century before Justinian began to reign and owes nothing to his *Corpus juris.* As for the influence of Roman law on Germanic systems then and in the immediately succeeding centuries, great though it was, it is widely believed to have been independent of the Byzantine compilation. The necessity of excluding such systems from the notion of civil law systems is evidence of the working definition's correctness, since they are not normally regarded as civil law systems, and this attitude cannot be explained simply on the basis that they no longer represent living law. Yet it is generally conceded that Roman law influence was great.

The working definition indicates that there may be degrees of "civility." A system that "at present" regards the *Corpus juris* as authoritative is "civilian" in a deeper sense than one that "in the past" treated the *Corpus juris* as part of the law of the land. For most civil law systems the

6. For difficulties with definition in law see e.g. S. J. Shuman, "Jurisprudence and the Analysis of Fundamental Legal Terms," *Journal of Legal Education* 8 (1956): 437ff.

7. See his *Gesammelte Schriften* (Cologne, Graz, Böhlau, 1963), I, 201ff.

decisive moment for change of status is the time of codification of private law. Again, the extent to which the *Corpus juris* was ever authoritative may vary from territory to territory, as may the degree of penetration of the system by the *Corpus juris* before codification occurred.

The effects of accepting the *Corpus juris* as authoritative may not be felt all at once but may emerge and develop over a long period of time. Different systems attain a particular degree of civility at different times. Again, although the fact is not revealed by the definition, the distinguishing marks of a civil law system may be so weakened as a result of the influence of ideology or of an outside system that it seems to need reclassification. This is the case with the systems that are regarded as "mixed," partaking of elements of both common law and civil law. Modern examples of such systems are South Africa (unless it should still be considered a civil law system), Louisiana, Puerto Rico, and Scotland.[8] On the basis of the working definition, the first three of these countries were at least once civil law systems. The same can be said of Scotland. Although there the *Corpus juris* was never the law of the land, it was of highly persuasive authority. Thus in his *Institutions of the Law of Scotland,* which was first published in 1684, Sir George Mackenzie writes (1.1):

> *Civil,* or *Municipal Laws, are the particular laws, and Customes of every Nation,* or *people, who are under one Soveraign Power.*
>
> The *Romans,* having studied with great exactness, the principles of Equity, and Justice. Their Emperor Justinian, did cause digest all their laws into one body, which is now called by most polit Nations, (for its *Excellency*) the *Civil Law;* and as this Civil Law is much respected generally, so it has great influence in *Scotland,* except where Our own express Laws, or Customes, have receded from it. And by the common Law in our Acts of Parliament is meant the Civil Law.

Very much earlier, for different but equally significant purposes, Thoma Craig claimed in his *Ius feudale* (1.2.8): "But we in this kingdom ar bound by the laws of the Romans insofar as they are in harmony with th laws of nature and right reason." This is not the last time that reason an the laws of nature will crop up in connection with Roman law. Crai

8. See B. Beinart, "Codification and Restatement in Uncodified Mixed Jurisdictions *Jewish Law Annual* 2 (1979): 126ff. The legal systems of the socialist countries of Easte Europe were also once civilian. Whether any of them should still be regarded as civil la systems, or as a new kind of mixed systems, or as a distinct family of socialist systems is dispute.

died in 1608 and although the *Ius feudale* was not published until 1655, it was known before and circulated in manuscript among the advocates: indeed, the passage quoted here was also quoted by Sir Thomas Hope in his *Major Practicks,* in which the latest reference seems to be to the year 1633. Hope also cites various Scots statutes of the fifteenth and sixteenth centuries which he believes allowed the direct application of Roman and common law in Scotland (1.1.14). Although Hope is mistaken, it is in the highest degree significant for the influence of Roman law in Scotland that he could be in error on the point.

In its attitude to Roman law Scotland was not atypical. In most of continental Europe outside of Italy and Germany, the *Corpus juris* was of direct and highly persuasive force, but no part of it was the actual law of the land. Thus, the Dutch jurist Groenewegen in his *De legibus abrogatis,* first published in 1649, writes that Roman civil law had been received among many nations, but in some places it enjoyed greater authority, in others less:

> 2. For in France it was not received, nor is it observed except insofar as it is found to rest on reason; and therefore the judges there on taking office do not take an oath that they will observe the Civil Laws of the Emperors. 3. In the Low Countries, however, the Roman Law enjoys much greater authority; since it abounds in supreme reason and equity in all its aspects, it was formerly cited in the courts merely to exemplify justice and equity, but finally it was also received as law, and even now amongst us it as a rule carries the force and authority of law. Hence the States in making laws often make reference to the Roman law as being the common and received law: as for example in the Placaat on intestate succession of 18 December 1599, article 14. Accordingly, the judges of the courts take an oath to observe the Roman laws. 4. But above all others the Frisians adhere most strictly to the Roman law. 5. However, this rule which lays down that the Civil law of the Romans has authority of law in the Low Countries is subject to many exceptions.[9]

He goes on to list the exceptions. This passage reveals that the degree of authority of Roman law might vary not only from country to country but

9. 1. proem. 6, from B. Beinart, *Groenewegen: De legibus abrogatis* (*on Abrogated Laws*) (Johannesburg, Lex-Patria, 1974), I, 7f.

even inside one country, such as the United Provinces. It also shows that the acceptance of the authority of Roman law could be, as indeed it usually was, a gradual process.[10]

In France the position was immensely complicated. The country can be divided in two: the South, called the *pays de droit écrit* ("the country of written law"), where Roman law was the customary law of the land; and the North, *pays de droit coutumier,* where local customs prevailed. The *pays de droit coutumier* occupied about two-thirds of the country. At one stage every barony had its own customs, but by the mid-fifteenth century the number had been reduced to about 60 general customs and 300 special customs of very local application. As Jean Brissaud describes the situation, it "was far from being unity of law; but it was a great step in advance."[11] The multiplicity of customs means that no one statement on the role of Roman law in France can be wholly accurate, but that in general contracts, and indeed the whole field of obligations, were governed by it because the customs contained little on these matters. In other areas of law, reference was constantly made to Roman law, even when it was irrelevant.[12] The jurists of the sixteenth century disputed the authority of Roman law without ever reaching a generally acceptable conclusion. Thus, according to Guy Coquille (1523–1603),

> The Roman Civil Law is not our common law, and has not the force of law in France, but should merely be regarded as Reason. The laws made by the Romans we should call upon to help us when the constitutions and the Ordinances of our Kings or the unwritten general law of France or Customs fail us. "To help us," I say, for convenience and for its Reason, and not because of necessity. In this respect two great personages of our time, who have been successively First President of the Parliament of Paris, Maître Pierre Lizet and Maître Christophe de Thou, were of different opinions. The aforesaid Lizet held that the Roman law was our common law and as far as possible conformed our French law to it, and was reputed to be narrow in his interpretation of the law and to restrain that which was contrary to the Roman law. And the aforesaid de Thou

10. See e.g. R. Feenstra, "Zur Rezeption in den Niederlanden," *L'Europa e il diritto romano,* I, 243ff; B. H. D. Hermesdorf, *Römisches Recht in den Niederlanden,* part V.5.a of *Ius Romanum medii aevi* (Milan, Giuffrè, 1968).

11. In *General Survey,* p. 261.

12. See e.g. J. Brissaud in *General Survey,* p. 208; A. Esmein, *Cours élémentaire d'histoire du droit français,* 15th ed. by R. Genestal (Paris, Sirey, 1925), p. 687.

was of the opinion that the Customs and the law of France were our common law, and called the Roman law only written reason.[13]

The view of Coquille and others, including Charles Dumoulin, was that when a custom was not clear, reference was first made either to neighboring customs or to the Custom of Paris. If no solution was forthcoming, recourse was to be had to Roman law, but as reason, not as binding law.[14]

Since Napoleon's *Code civil,* French law has often been considered the civil law system *par excellence.* Yet before that codification the law of northern France was less of a civil law system or systems than were the laws of the *pays de droit écrit,* of the Netherlands, of Germany, and of Italy. As a result, not all of the consequences that flow from a system's being a civil law system were so pronounced there as in the other territories.[15]

The Reception in Germany is now traditionally divided into the "theoretical Reception" and the "practical Reception."[16] The theoretical Reception, which goes back to the twelfth century, had as its basis the notion that the "Roman Empire of the German Nation" was a continuation of the ancient Roman Empire. Hence Roman law was the law of the land but was subsidiary to later law, which had to take precedence. This Reception was, therefore, not of individual rules but of the *Corpus juris* as a whole.

The practical Reception, which came later and more slowly, extending over the fifteenth and sixteenth centuries, and was very much more complete than in northern France, was the acceptance of Roman rules into judicial practice. Its roots are therefore to be found in the appearance of judges and jurists who had been trained in Roman law. The creation of the Reichskammergericht, the supreme court of the Holy Roman Empire, in 1495 is usually considered a significant event in this Reception since it was enacted that half of the judges had to be *Doctores juris,* that

13. Quoted by Brissaud, *General Survey,* p. 208. See also R. Van Caenegem, *The Birth of the English Common Law* (Cambridge, Cambridge University Press, 1973), p. 13.

14. See e.g. Esmein, *Histoire,* pp. 687ff.

15. For instance, practitioners rather than academics were prominent in the drafting of the *Code civil.* J. P. Dawson, more particularly concerned with judicial decisions, calls the appropriate chapter "the French Deviation" in *The Oracles of the Law* (Ann Arbor, University of Michigan Law School, 1968), pp. 263ff.

16. See e.g. *General Survey,* pp. 336ff; Conrad, *Rechtsgeschichte,* pp. 339ff; Koschaker, *Europa,* pp. 38ff; Wieacker, *Privatrechtsgeschichte,* pp. 124ff; K. Luig, "The Institutes of National Law in the Seventeenth and Eighteenth Centuries," *Juridical Review* 17 (1972): 207ff.

is, jurists trained in Roman law. The practical Reception, therefore, related not to the *Corpus juris* as a whole but to the particular rules and institutions accepted by the courts, and these rules and institutions then became the immediate law of the land and were in no sense subsidiary. Inevitably this practical Reception contained a great deal that was not "straight" Roman law, but Roman law as interpreted and elaborated by the Glossators and other later, particularly Italian, jurists.

To a considerable extent the distinction between the theoretical and the practical Reception was less sharp than might appear—partly because the authority of the *Corpus juris* extended only to the passages that the Italian jurists had glossed, the maxim "Quidquid non agnoscit glossa, non agnoscit curia (What the *Gloss* does not recognize, the court does not recognize)" being followed here, and partly because of the acceptance of the general European concept of a "modern Roman practice," the *usus modernus pandectarum.* Moreover, with the rise of the practical Reception, the theoretical Reception lost some of its force. As Franz Wieacker observes, the creation in the sixteenth century of the "Lotharian Legend," to the effect that the Emperor Lothar of Supplinburg had expressly received Roman law by statute in 1135, is itself an indication that the acceptance of Roman law needed a new legitimation.[17] The complete defeat of the notion of a theoretical Reception is usually associated with Hermann Conring (1606–1681), through his *De origine juris Germanici* of 1643.[18] Not much later, the practical Reception was, if anything, further strengthened by the doctrine of Johann Schilter (1632–1705) that, when a protagonist relied on a glossed text of the *Corpus juris,* the presumption was that the rule was in force unless his opponent showed for the individual situation that either there was no reception or the law had been changed.[19]

Further variations in the Reception occurred in the other territories of Western Europe. The process of Romanization was accordingly gradual, incomplete, and of varying extent. Yet the acceptance of at least part of the *Corpus juris* as authoritative within a territory produced consequences wider than the mere incorporation of particular Roman law rules, and thus the impact of Roman law must be judged not primarily by the extent of surviving rules of pure Roman law, but in the emergence of a civil law system. The existence of important legal rules and notions that

17. *Privatrechtsgeschichte,* p. 145.

18. See Koschaker, *Europa,* pp. 115, 149f; Wieacker, *Privatrechtsgeschichte,* p. 206; *General Survey,* p. 428.

19. See e.g. Wieacker, *Privatrechtsgeschichte,* p. 208.

are to be found in many civil law systems but not in common law systems may, however, also be explained on the basis of the acceptance of Roman law. These consequences do not have exactly the same form everywhere because, apart from other considerations, the extent to which Roman law was authoritative varied from territory to territory. Nonetheless the consequences can be broadly characterized.

According to the working definition, some civil law systems derived from others which had accepted the *Corpus juris* or part of it as authoritative. The outstanding example is Turkey, a state that did not have a civil law system until it took over the code of a civil law country, Switzerland. In such a purely derivative civil law system there is never a time in which the *Corpus juris* or part of it is the law of the land or highly persuasive. Consequently such a system has not passed through all the typical stages of civil law development, and some features of the typical system may remain absent. Above all, the high regard for academic abstract legal education may be slow to develop. Yet there is no sharp division between derivative and other civil law systems; in fact, most derivative systems are so only in part. The most immediate influence is that of the colonial power, such as Spain or Holland, but for a time the *Corpus juris* is at least directly persuasive. This is the case for much of Latin American and for the Republic of South Africa.

The *Corpus juris,* which has had such an influence on civil law systems, dates back to the sixth century.[20] Justinian became coemperor of the Byzantine Empire with his uncle Justin in 527. Later that year, when his uncle died, he became sole emperor. Probably even while Justin had been sole ruler, Justinian was contemplating a legal codification of some kind. He issued a constitution dated February 13, 528, establishing a commission to prepare a new collection, a *Codex,* of imperial constitutions. The word "constitution" here is a general term to include all kinds of imperial enactments. The compilers were given extensive powers to collect the constitutions, to omit any, in whole or in part, that were obsolete or unnecessary, to remove contradictions and repetitions, and even to make alterations in substance. The constitutions were then to be arranged by subject matter in titles, or named sections, and within each title the constitutions were to be given in chronological order. The *Code,* which was published on April 7, 529, has not survived, but it was replaced by a second revised *Code,* which came into effect on December

20. For a standard treatment see Jolowicz and Nicholas, *Historical Introduction,* pp. 478ff. For a radical view see T. Honoré, *Tribonian* (London, Duckworth, 1978); cf. the review by A. Watson, *LQR* 94 (1978): 459ff.

29, 534. The revised *Code,* which has survived and is one of the four constituent elements of what came to be called the *Corpus juris civilis,* is divided into twelve books, subdivided into titles in which the constitutions appear chronologically. The constitutions range in date from Hadrian in the early second century to Justinian himself. A considerable proportion of the texts—2019 as against 2664—come from the time after the Empire became Christian; in fact, the bulk of the Christian rescripts is much greater.

On December 15, 530, the compilation of a collection of juristic texts, the *Digest,* was ordered, and the work came into force on December 30, 533. This massive work, twice the size of the *Code,* is in fifty books, virtually all of which are subdivided into titles. Each title consists of fragments from the writings of jurists who lived between the first century B.C. and the third century A.D. About one-third of the whole work is taken from the jurist and civil servant Ulpian, who was murdered in 223 A.D.; a further one-sixth comes from his contemporary Paul. In the opinion of some modern scholars, one jurist, Hermogenianus, was active in the fourth century, but otherwise no *Digest* text is attributable to any jurist who lived after the third century.[21] The texts of the jurists include statements of principles, discussions of rules, commentary on the scope or interpretation of edicts and statutes, qualifications of other juristic opinion, and the treatment of problem cases, real or hypothetical.

The compilers were instructed to cut out all that was superfluous or imperfect, all contradictions and repetitions, anything that was obsolete, and anything that was already in the *Code.*[22] Contrary, though, to a frequently expressed view the compilers of the *Digest* were not given power to alter the substance of the law or to bring it up to date.[23] Indeed, any such alteration as occurred would have been contrary to the spirit of the instructions. There was very little juristic writing after, say, 235, and there are very few texts from that period in the *Digest.* Changes in the law after that date were almost entirely the result of imperial constitutions. But these constitutions were collected in the *Code,* and the *Digest*

21. On the question of dating see D. Liebs, *Hermogenians iuris epitome* (Göttingen, Vandenhoek & Ruprecht, 1964).

22. C. *Deo auctore* §7, 9–10.

23. A typical exaggeration occurs in Jolowicz and Nicholas, *Historical Introduction,* p. 481: "Full power was given to cut down and alter the texts, and this extended even to the words of ancient *leges* or constitutions which were quoted by the jurists." But C. *Deo auctore* §7 gives power to change quotations from laws and constitutions only where the compilers find they are *non recte scriptum,* "incorrectly set down." It is only to be expected that the decision of the commissioners on the correct reading was to be treated as final.

commissioners were expressly instructed not to repeat in the *Digest* what was contained in the *Code*. Significantly, the commissioners were to exclude from the *Digest* what was obsolete, meaning in large measure the rules that had been replaced by imperial constitutions which were now collected in the *Code*.

This exclusion is one of the major departures of the *Digest* from the *Code*. The difference is not just that the *Digest* is a patchwork made out of juristic commentary and the *Code* a patchwork from imperial laws, or that the *Digest* is composed wholly of pagan originals and, unlike the *Code*, can be regarded as a Christian work only in a limited sense. Even more, the two works stand at different points of legal and social evolution. The *Digest* presents a picture of law and of relevant social conditions as they were in Rome at the height of the empire; insofar as the picture is inexact, this is because of excisions, not of later superimpositions, though some of the alterations of the *Digest* texts do result in the presentation of postclassical law. The *Code*, on the contrary, presents the postclassical world, where Rome was no longer the heart of empire, and early Byzantium. Because of this difference between the two works, in subsequent history the *Code* was at times more emphasized, at other times the *Digest*. The *Corpus juris* could speak with more than one voice.

The third part of the compilation is the *Institutes*, an elementary textbook for first-year students which was planned from 530 and was published on November 21, 533. It is structured on the *Institutes* of Gaius, a work written about 160 A.D., and appears in four books, though unlike Gaius' *Institutes*, the books are further subdivided into titles. The arrangement of topics—sources of law, persons, property, succession, obligations, law of actions—for which the credit should probably be given to Gaius, was the result of planning, and it differs markedly from the arrangement found in the *Digest*, which seems haphazard and is largely the unplanned result of the gradual growth of legal topics as they were rather unsystematically set out annually by the praetor in the later Roman republic and early empire. The absence of a satisfactory arrangement in the *Digest* has long been a matter for unfavorable comment. Like the other parts of the *Corpus juris*, the *Institutes* is statute law.

With the second *Code*, Justinian's work of codifying Roman law was complete. But he continued to legislate, and this subsequent legislation is now known as the *Novels*. No official collection of these constitutions was made, but there is considerable knowledge of three unofficial collections. Most of the constitutions were in Greek, some in both Greek and Latin, but translations of most of them into Latin also appeared. The bulk of the *Novels* relate to public or ecclesiastical affairs, though private

law is by no means absent. Thus, *Novels* 118 and 127 reform the whole law of intestate succession, and *Novel* 22 sets out the Christian marriage law.

Justinian's *Corpus juris* is very different from a modern civil code, even though the subjects treated in modern codes are much the same as those in the *Digest* and *Institutes*. The bulk of the *Corpus juris* is many times greater than that of a modern code. The *Corpus juris* is not unitary but comprises four distinct and different parts, each of which gives a different feel to the substance and, even more, to the systematization of the law. It is in no way surprising that the various parts have had differing effects on the growth of subsequent law and have reached the heights of their prominence at different times. Indeed, the *Corpus juris* was not usually treated in later times as a unit. For instance, in the twelfth and thirteenth centuries and even later, when ordinary or basic lectures were given at universities in the morning and extraordinary ones in the afternoon, the *ordinaria* lectures usually covered what is called the *Digestum vetus*, which included books 1-24, title 2, of the *Digest* and the first nine books of the *Code*. The principal reason for this treatment may lie in the tradition that the *Corpus juris* was recovered only in stages.[24] In any event, the final three books of the *Code* are concerned with administrative law. To judge from the nature and predominance of a type of juristic book of the period, the *Summa codicis*, the *Code* may have been considered more important than the *Digest*.[25] Again, even within a particular work forming a constituent part of the *Corpus juris*, a lack of later interest may be detected by the paucity of juristic comment. For instance, the Romans treated theft primarily as a delict (tort), not a crime, and many of the early medieval manuscripts omit all discussion of theft. Sections written in Greek were ignored, and overall the *Novels* at all times played a very subordinate role.

24. See e.g. Jolowicz and Nicholas, *Historical Introduction*, p. 492.
25. See Watson, *Legal Transplants*, pp. 61ff.

II
The Block Effect of Roman Law

To know a legal system is not just to have learned its rules but to understand how the rules are put together, how the system is structured, how the rules are interpreted. Likewise, to appreciate the effect that a legal system may have on other systems, one must be aware of factors that go beyond the individual rules. Some characteristics of Roman law have long engaged the attention of legal writers of the more speculative kind. As experience has shown, its legal rules and institutions can to an extent unequaled by other major legal systems operate in societies of very different types: in economic systems based on slavery, in feudal societies, and in capitalist countries alike; in states of a variety of political or religious persuasions, including dictatorships, monarchies, oligarchies, and republics, whether pagan, Catholic, Calvinist, or Lutheran. The mobility of Roman law is geographical as well as historical: Roman-based systems are now at home in icy Quebec, tropical Panama, sunny South Africa, as well as in most of Western continental Europe—in water-filled low-lying Holland, arid, mountainous Spain, and in industrial West Germany as previously in pastoral Prussia. What has been borrowed is not always and everywhere the same; important modifications have occurred; but that serves only to emphasize the phenomenon of the "transplantability" of Roman law.

And yet, almost paradoxically, doubt has often been expressed about the quality of Roman legal rules. Not even the most enthusiastic Romanists have always claimed that the legal rules were themselves admirable. Friedrich von Savigny, who did so much to increase understanding of Roman law and its influence, himself declared that admiration of

the positive law should be confined mainly to its theory of contracts; from such admiration he would exclude even the *stipulatio* and "some other superstitions."[1] Astonishingly, this admiration is for a theory of individual contracts, since the Romans never developed a general theory of contract.

One feature of Roman law that is always overlooked is nonetheless of fundamental importance not only for the spread of Roman law influence, but also for the shaping of civil law systems, their rules, systematization, and legal attitudes. Roman law, as it appears in the sources, divides naturally into self-contained and self-referential blocks. This division is found not only in the legal institutions and concepts but also in the four individual parts of Justinian's *Corpus juris civilis*. Transmission has often been of individual blocks, not of Roman law itself. The important unit for transplanting and for affecting the recipient system is the block, not the individual rule.

Although all legal institutions in any developed system can be regarded as blocks, the Roman law blocks are markedly different. To begin with, substantive law is treated in the *Corpus juris* quite separately from procedure.[2] The Roman jurists discuss whether or not an action will lie on particular facts but have no interest in what happens when the case comes to court. If it were not for the survival of book 4 of the elementary *Institutes* of both Gaius and Justinian, in each case primarily dedicated to procedure, it would not be possible to reconstruct in any measure the course of legal proceedings, whether in the archaic, classical, postclassical, or Justinianian periods. Again, the texts ignore the difficulties of proof. The jurists set out a factual situation and declare the legal decision that should flow from the facts. There is normally no indication that in practice the facts may be in dispute, and that sufficient evidence may be lacking.

To a considerable extent, this separation of legal rules from the course of the process derives from the nature of Roman law itself and

1. *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft,* 1st ed. (Heidelberg, Mohr & Zimmer, 1814), p. 27.

2. It is commonly stated that English law and Roman law are much alike in that both are built up around forms of action; see e.g. Lawson, *Common Lawyer,* p. 102. But except in the sense that all legal rights everywhere are rights of action, this position seems wrong. The Roman forms of action themselves and technicalities of pleading were such that they provided no scope for making a significant contribution to the substantive law; see A. Watson, "The Law of Actions and the Development of Substantive Law in the Early Roman Republic," *LQR,* 1973, pp. 387ff. The surviving texts show that the Roman jurists thought above all in terms of rights and rules.

from the conditions of Roman law making. The contract of sale, for example, rested on no statutory or quasi-statutory basis. It seems to have been the creation of the praetor, the elected official or magistrate who had control over the most important civil courts. The praetor annually published an Edict setting out the circumstances in which he would grant various actions and, although no edictal clause set out that an action would lie on a sale, the Edict contained a model formula for the buyer's action and another, similar formula for the seller. That of the buyer read: "Whereas Aulus Agerius bought from Numerius Negidius a slave, the subject of this action, whatever on that account Numerius Negidius ought to give to or do for Aulus Agerius in accordance with good faith, judge condemn Numerius Negidius to Aulus Agerius in that amount; if it does not appear, absolve him." Nothing in the formula can be used to determine the essentials of sale, whether for the existence of the contract there had to be an object sold, whether the price had to be in money, what agreement was necessary; or when the action would lie although the sale was invalid; or the duties of the parties; or the moment of transfer of risk; and so on. The legal rules do not emerge from technicalities of the pleadings or process but, in fact, from juristic discussion of the scope and nature of the contract.

The lowly significance of the actual pleadings and of the action in Roman law likewise appears in many other contexts. For instance, in the *Digest* title on the acquisition of ownership, the actions relating to ownership can scarcely be said to be prominent; the reader has to wait until the twenty-eighth text of the title before one makes its appearance.[3] Again, there was a special procedure, by interdict, to protect possession. But the procedure is not mentioned at all in the main *Digest* title, 41.2., "On the Acquisition or Loss of Possession." Indeed, that title is devoted to setting out the circumstances in which a person acquires, retains, or loses possession. One would never know from it that legal protection does not always go to the present possessor; yet some interdicts protect existing possession, some are for the recovery of lost possession, and still others are to enable someone to possess although he has never had possession. In short, Roman substantive law as it appears in the *Corpus juris* is meant to be understood independently of the forms of process.

Likewise, the blocks of one institution or concept are kept rigorously separate, and even over a long period of time there is often no real movement toward integration or amalgamation. Thus, in a sense, it is entirely right that the Romans never developed a general theory of contract but

3. *D.*41.1.7.10.

only individual types of contract. The block is the individual type. There is no sign that the Romans even groped toward a general theory. It is often wrongly claimed that the introduction of the so-called "innominate contracts," perhaps beginning as early as the first century A.D., was "an enormous advance towards a general theory of contract."[4] The jurist Paul in the second or early third century stated that an action would lie on any agreement of the following four types, provided the plaintiff had fulfilled his side of the bargain. "I give that you give, I give that you do, I do that you give, I do that you do." On this basis an action will lie on any agreement that seeks to impose obligations on both parties, provided that one party has performed his side of the bargain. Although the existence of a remedy in these circumstances fills in gaps in the Roman contractual system and makes the law of contracts much more satisfactory, it is not a step toward a general view or theory of contract. Each individual type of contract, such as stipulation, loan for use, or loan for consumption, sale, hire, or mandate, remains intact with its own *sui generis* body of rules. Though contracts could be distinguished from other branches of the law and though contracts were classified according to the requirements for their formation, as verbal, literal, real, or consensual, yet for a Roman jurist it was unthinkable to write a commentary on the law of contracts or even on the law of a group of contracts, such as the consensual contracts. The same is equally true of other fields, for instance of delicts. Similarly for the Romans there was no such topic as family law; but the various subjects which might be comprehended under that head—husband and wife, parent and child, guardianship, owner and slave—were kept quite distinct. In harmony with this approach, praedial servitudes were treated independently of land ownership.

This block effect is even to be found where a modern scholar might see only one institution. For example, the stipulation was a verbal contract, formed by oral question and answer, which existed from the mid-fifth century B.C. Its validity and the scope of each individual contract depended on the actual words used. In such circumstances implied terms were scarcely recognized in early law. For such a contract Roman law, like some other early systems, considered vital only what actually was said, not the motive for saying it. Hence, if the promisor made a stipulation as the result of fraud on him, the contract remained valid, and he could be successfully sued. Only in the first century B.C. were remedies introduced, the *actio de dolo*, "action for fraud," and the *exceptio doli*, "defense of fraud," and their original scope was apparently restricted

4. A. Watson, *Law of the Ancient Romans* (Dallas, S.M.U. Press, 1970), p. 73.

fraud connected with stipulation or other contract of strict law.[5] Yet these remedies were treated as a separate block or blocks. A fraudulently induced stipulation continued to be valid though its effects could be negatived. Indeed, if an action on the stipulation was brought against the duped promisor, he could successfully resist only if he expressly inserted the special defense of fraud into the pleadings. This remained the law even in the time of Justinian.

With regard to these blocks of substantive law, the most significant fact is that capacity to acquire rights, especially contractual rights, is treated as something quite distinct from the rights themselves. The *Digest* titles on sale, for instance, do not indicate who can validly make the contract. Later nations could therefore "receive" the Roman contract of sale while retaining a quite different notion of capacity to contract.

A characteristic of these blocks is that to a surprising degree they are self-referential. Rarely are arguments drawn by analogy from one block to another—from, say, sale to hire, or from acquisition of possession to acquisition of ownership. Nor in general are arguments used from religion, equity, or utility. Equity and utility are at times cited by jurists, but normally to explain the past acceptance of a rule, not to win approval for a new proposition.[6] Further, for the validity or force of a legal rule, proposition, or institution, no stress is laid on the origins, whether they lie in statute, edict, or juristic doctrine. The fact that the wording of a statute, edict, or even a testament requires interpretation is a different matter. An institution, for example, is treated as existing - it is already there—and its rules and consequences are deduced from its basic nature. This characteristic has obvious advantages for future transmission. The reception of an institution or rule cannot be blocked on the ground that Roman arguments for it were drawn from now outmoded religious, moral, or political ideas, or that it depends on a statute or another institution which was not received.

Again, the Roman sources treat law quite unhistorically. The *Code* does arrange the constitutions within each title in chronological order, but there is otherwise no indication that the passage of time and new ideas have any effect on attitudes to legal rules. Roman jurists cite other jurists as authority with no apparent awareness that some authorities lived centuries earlier than others. Justinian's *Digest,* too, includes texts

5. See Cicero, *De natura deorum* 3.30.74; *D.*4.3.1.2; cf. A. Watson, "*Actio de dolo* and *actiones in factum,*" *ZSS* 78 (1961): 392ff.

6. See e.g. A. Watson, *Law Making in the Later Roman Republic* (Oxford, Clarendon Press, 1974), pp. 173ff.

by jurists of six centuries before, and their opinions are referred to in no way differently from those of their successors. The legal rules thus appear independently of time. With few exceptions, of which Gaius is the most famous, the Roman jurists were uninterested in and unmoved by history.

Whether or not this should be regarded as the almost automatic consequence of the existence of self-contained and self-referential blocks, there was considerable discussion and difference of opinion among the jurists as to the precise scope of each institution and as to the exact reach of its rules. Happily, much of this discussion is retained in Justinian's *Corpus juris,* especially in the *Digest.* A result is that later jurists felt entitled to argue as to what the Roman rules were.[7] A Roman institution might be received as a block, but some of the rules actually approved could be very different from those known at Rome of any period.

For subsequent generations the most striking blocks are the individual parts that together make up the *Corpus juris,* namely the *Digest, Code, Institutes,* and *Novels.* Finally the *Corpus juris* is in large measure devoted to private and criminal law, with public law decidedly secondary. This trait, too, corresponds to the interests of the classical jurists. For later ages the emphasis on private law was increased when, for whatever reason, it became traditional from the glossators onward to treat the last three books of the *Code*—which do concern public law—separately from the first nine. Unlike the first nine, they were not expounded in the university ordinary lectures. In the early printed editions which reflect the manuscript tradition, they are not placed in the same volume as the first nine books but appear along with the neglected *Novels* and with the *Institutes.*

The Reception of these Roman blocks had several consequences for later ages. The first consequence of general importance is that, independent of the quality of the law, Roman law is the perfect vehicle of education in legal rules. The rules of an institution can be discussed, argued over, and developed quite independently of any original setting of the rules in a specific historical, political, social, and economic context. What matters is the block whose general content is clear. It is almost impossible to exaggerate the extent to which Roman juristic discussion apparently excludes nonlegal considerations. Surrounding circumstances that, in a strict black-letter law sense, are legally irrelevant are rigorously excluded.[8] Law and legal rules are seen very much as existing on their own terms, as idea, and not as morality in action, as state control of social

7. See e.g. Koschaker, *Europa,* pp. 63ff.

8. See F. Schulz, *Principles of Roman Law* (Oxford, Clarendon Press, 1936), pp. 19ff.

activity, or as a means of class domination. They are well on the way to pure legal concepts.

Second, blocks can be sensibly discussed apart from any question of their practical availability. In law schools slavery and adoption, for instance, can be—and where Roman law had authority usually were—treated as real institutions with rules and consequences even when they have no existence in actual contemporary society. Thus, the Leyden professor Johannes Voet (1647–1713) in his *Commentarius ad pandectas* gives full treatment to adoption as it was in Roman times, even though he eventually discloses that it no longer exists except in Friesland.[9] For an earlier period the Great Gloss similarly does not reveal that adoption was not then practiced. Again, the commentary first published in 1597 on the obsolete contract of stipulation by the German Johannes Goeddaeus, *Commentarius de contrahenda et committenda stipulatione,* runs to over 1000 pages of text and was not restricted to one edition. When the time becomes ripe for slavery in the West Indies and Latin America—the law of slavery had never entirely disappeared from Spain and Portugal—or for adoption in Napoleonic France, the Roman institutions can move fully formed, though with all necessary or appropriate changes, from the classroom to the plantation and the domestic and political hearth. The individual Roman law blocks can move in and out of existing later law without affecting the basic structure of the Reception or of attitudes to Roman law.

Third, the Reception of Roman law in later states can be by blocks. On the one hand, only what is considered appropriate need be taken. On the other hand, the blocks can be transferred from one field of law to another, from one state to another, and can easily be made to fit the various stages of social development, from slave states to feudalism, capitalism, and postcapitalism.

This consequence is not so paradoxical as it may seem. Part of the explanation is that some blocks are neutral in tone, others are transferable because of a permissible leeway in understanding, and virtually all of the blocks are free from any inherent religious connotation. Equally important, the block structure makes Roman law and systems based on it ideal quarries for law makers, no matter which of the three distinct Western conceptions of justice in law they hold. These three conceptions may be termed the liberal-democratic, the fascist-aristocratic, and the socialist. All three notions of justice take note of the inequalities of people but respond in a different fashion.

9. 1.7, 8.

The liberal-democratic notion of justice applied to law is that persons should be treated as formally equal, that in their standing before the law no distinction should be made between one legal *persona* and another. The conception involves great respect for the individual. As a corollary, the individual is expected to be self-reliant. Inequalities of intelligence and of financial resources, though noted, are treated by the law as irrelevant.

The fascist-aristocratic notion of justice insists that the inequalities of people should be reflected in the law, that persons should be grouped in accordance with their possession of particular attributes, and that a person's rights should depend on his inclusion in the group. Basically this notion of justice is an assertion that superior and inferior persons—however superiority and inferiority are to be determined—should be openly recognized and publicly designated as such.

The socialist notion of justice demands that all persons should in law be treated alike not just formally but in actuality. It observes that where inequalities exist and law does not take them into account, then superior talent or resources gain advantages. This notion of justice insists that these inequalities should either be eliminated—as may be possible with regard to financial resources—or countered by taking individual characteristics into account.

These three notions of justice and law—that law should treat all alike without regard to individual inequalities, that inequalities should be marked out and given support by law, and that inequalities should be eliminated by law—exist in most systems at the same time. But the prominence of the notions varies from time to time and from state to state. The Roman law block structure keeps legal institutions separate from one another and, above all keeps legal capacity and legal personality distinct from concepts such as contract and property. There can be no legal rights without the involvement of a legal person. Legal concepts or blocks change drastically in their effect if, without alteration in the concepts as they appear in laws and books, the capacity of persons, groups, or institutions to be involved in these rights is radically altered. Within the tradition itself altering group capacity for holding rights has always been easy. This separation of legal capacity from, say, contract and property remains a feature of modern civil law systems, perhaps nowhere more clearly than in the *BGB,* German civil code, and in the *Nieuw Burgerlijk Wetboek,* the new Dutch civil code, which is not yet wholly in force. In the Dutch code, for instance, capacity is dealt with in book 3, which concerns the "General Law of the Patrimony," whereas book 6 is

"General Provisions on the Law of Obligations" and book 7 is "Particular Contracts."

The fourth major consequence of the Reception is that the blocks themselves, namely concepts or institutions such as marriage, divorce, paternal power, individual contracts, ownership, possession, praedial servitudes, and testamentary succession, are highly articulated. In making the law and in deciding cases, the jurist tends to think in terms of the individual concepts and not of the overall framework.

Finally, the emphasis on blocks as distinct from one another and from nonlegal societal elements enables legal rules to be considered as existing more fully in their own right, with their own logic and *raison d'être*, independently of conditions in society. This character of Roman law is a basic factor in what Max Weber saw as the eventual "rationality" of European law, namely the ability to predict the legal outcome of a person's behavior.

III
THE FORMAL RATIONALITY OF CIVIL LAW

MAX WEBER characterized European law as having logically formal rationality, whose meaning is explained by D. M. Trubek: "Legal thought is rational to the extent that it relies on some justification that transcends the particular case, and is based on existing, unambiguous rules; formal to the extent that the criteria of decision are intrinsic to the legal system; and logical to the extent that rules or principles are consciously constructed by specialized modes of legal thought which rely on a highly logical systematization, and to the extent that decisions of specific cases are reached by processes of specialized deductive logic proceeding from previously established rules or principles." Consequently court decisions are based on rules that are general, have been previously established, and derive from autonomous legal sources.[1] This formal rationality Weber found above all displayed in German law and rather lacking in English law.

Formal rationality means that the law exists as a system in its own right, but law is not an end in itself. Legal process and legal rules are devices of society to produce effects that are strictly external to the law. This must be borne in mind when talking of the purpose of law, of what it does and what it can do. Thus, the purpose of a revenue law may be said to be to raise money for the government. So it is, but there are other devices, outside of law, which may also raise money for the government. The distinguishing feature of law is that, in the event of dispute, it gives

1. "Max Weber on Law and the Rise of Capitalism," *Wisconsin Law Review*, 1972, p. 730.

rise to the possibility of an institutionalized process which itself has the specific object of inhibiting further unregulated conflict.[2] In the case of the revenue statute, raising money is the end—though there will be other subsequent ends—and law is the means. It is easy to fall into the trap of thinking that for law the process is unimportant compared with justice, freedom, or the regulation of society, and that to emphasize the possibility of the process is to emphasize the trivial. But other means for achieving justice or freedom and for regulating society also exist. Rules count as legal rules only because they allow the possibility of a process. Thus, there is a limitation on law as a means which must always be borne in mind.

The functions of legal rules are numerous; and the ends may be general and remote, such as justice and liberty, or nearer and more particular, such as marital contentment, punishment of the supposedly wicked, and economic prosperity. It is a common phenomenon that in many individual Western law suits the ends, express or implied, that are most envisaged for the legal rules are not met, and yet usually society does not become disturbed. In part the explanation of this phenomenon is the high priority given in the West to legal rules.

The formal rationality of Western civil law systems is very much the result of treating the *Corpus juris civilis* as authoritative. Or in view of the difficulty of substantiating cause and effect, this contention should perhaps be reduced and be limited to the proposition that the form and substance of formal rationality in modern civil law systems can be plausibly explained by historically documented attitudes to the *Corpus juris,* and in this explanation societal factors need have no place.

Among the several legal consequences of making any part of the *Corpus juris* authoritative is, first, that it becomes important to learn the legal rules contained in the *Corpus juris.* Since the *Corpus juris* is composed of written books, and nothing but these, it is the books that have to be studied and the book rules that have to be explicated. The obvious place to learn these rules is in some kind of a school, where the relevant texts can be resolved, and where the shape and content of particular institutions can be analyzed. It is not appropriate to set about learning law that is apparently already contained in books by concentrating attention on what happens in individual court cases. That approach teaches techniques of advocacy and a pragmatic approach to legal problems, but cannot give a systematic training in the legal rules. Where legal rules are believed to exist, are considered important, and are thought to be contained in known books of manageable size, it appears unreasonable to attempt to learn this law predominantly from the haphazard appearance of suits before a court. The books themselves are the prime object of study. The learning of Roman law therefore tends to be through specific, deliberate teaching of the rules, rather than watching the performance of practitioners, and through bodies akin to "universities" rather than institutions such as "Inns of Court," although the equivalent of Inns of Court can have law schools. A barrier of some degree or kind, possibly only of approach or understanding, exists between law learned as rules and law in practice.

2. Watson, *Nature of Law,* esp. pp. 1–47.

The three elements of the codification—the *Code, Digest* and *Institutes*—were originally intended not only to be the law but also to serve as vehicles for instruction in the law in universities. The *Institutes,* in fact, were designed as an elementary textbook. The revival of Roman law after a virtual demise of six centuries only made more important a formal study of these books for a knowledge of Roman law. The *Novels,* though part of the *Corpus juris,* were not part of the codification, and they were not intended for legal education in Byzantium. Nevertheless, with the Reception it would have been appropriate for them to be the object of university teaching, except that they were in Greek, a language little known in the West until the sixteenth century, and had relatively limited importance.

A second consequence of making the *Corpus juris* authoritative is that Roman law is learned at the feet of specifically appointed teachers and not from observing practitioners of all kinds. The teacher may be a part-time practitioner in the courts, a judge, or a consultant, but insofar as he is a teacher, his interests with regard to both status and financial reward do not coincide with those of practicing lawyers or judges. The more seriously a state takes its attachment to Roman law, the more the professors of that subject, in general, regard themselves as being teachers and scholars, increasingly remote from the practitioners. Other things being equal, the drawing power of a Roman law school derives from the scholarly reputation of the professors. One result is that the exposition of Roman law is relatively uninfluenced by the financial and status interests of the practitioners. The more famous and therefore the more influential a professor of Roman law is, the more he is a scholar, uninvolved in the practice of the law.

A third consequence is that the more distinguished a center is for Roman law studies, the more—other things being equal—it draws students from outside, since Roman law from the Middle Ages onward is inherently international in character. Illustrations come from Bologna in

the thirteenth century and Leyden in the seventeenth. This outcome has a multiplying effect, especially where, as is usually the case, the professor's salary bears some relation to his reputation and number of students. Even apart from financial considerations, a professor's ability to attract "foreign" students affects his standing with his colleagues. But the more interested in attracting outside students the professor is, the less his lectures and writings reflect the particularities of his own local jurisdiction, since these particularities are only of limited interest to the "foreign" students. These foreigners usually return home, many of them to become influential in law making in their turn. The Roman law, however, that they were taught is not that which has undergone modifications for their own territory or wholly for their university's territory.

In these circumstances the local students, too, are not hearing Roman law lectures entirely adapted to their jurisdiction. Nor is the professor unaffected. He sees himself as giving lectures on a law that has no national boundaries and is perpetual in time, and he may even become impatient with the concerns of local law and local lawyers. He wishes to expound Roman law as something different both in kind and in quality from other territorial law. This attitude is summed up in the nineteenth century remark of Rudolph von Ihering on the introduction of modern codes: "The formal unity of the science (i.e. of law) as it once existed through the common possession of one and the same law book for the greater part of Europe, that working together of the jurisprudence of very different lands on the same material and the same problem has forever gone with the formal common possession of law; the science is degraded to territorial jurisprudence, the scientific frontiers come together with the political in law. A disheartening, unworthy form for a science."[3] This attitude, like the block effect of Roman law, contributed to the phenomenon of lectures being given even on quite obsolete topics without attention being called to the subject's lack of practicality. Professors of Roman law, too, were peripatetic, often knowing no national frontier. To mention a few Italians, for example, Placentinus, who died in 1192, taught at Montpellier; Azo, who died in 1232, also taught in Provence; Alciatus (1492–1550) was one of the founders of the humanist law school at Bourges; Vacarius taught in England around the middle of the twelfth century; and Alberico Gentile came to teach in Oxford in 1587. The overall effect, once again, is to separate Roman law as taught from local court practice.

3. *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung,* 8th ed. (Leipzig, Breitkopf & Hartel, 1924), I, 14f.

A fourth consequence of making any part of the *Corpus juris* authoritative, at least in such conditions as prevailed all over the Western world until the advent of modern codification, is that Roman law comes to dominate university legal education, with canon law possibly its only rival. The first reason historically for this is the nature of the Roman law sources, which made them better suited for exposition than the existing sources of any other system. On the one hand, the *Institutes,* the textbook for students, showed that systematic exposition was possible both of a whole system of private law and of the individual institutions. The scheme of the *Institutes*—persons, things, and actions; or more fully sources, persons, property, succession, obligations (contracts, quasi-contracts, delicts, quasi-delicts), and actions—is generally satisfactory and indeed greatly influenced the arrangement of many of the systematic works on a local system, such as Hugo Grotius' *Inleidinge tot de hollandsche rechtsgeleertheyd,* first published in 1631, and Sir George MacKenzie's *Institutions of the Law of Scotland,* first published in 1688.[4] The *Digest* and the *Code,* badly arranged as they are both in general and within each title, provide a treasure house, second to none, of legal rules, principles, cases, and argument.[5] The student of the *Digest* is not distracted by details in the text referring to individual circumstances, to social, political, religious, or economic conditions. As the setting out of many problems in the *Magna glossa* or *Great Gloss* shows, teachers were fascinated by the method of a purely legal approach to factual situations. Students could be taught to handle problems solely on the basis of legal rules and to ignore vaguer questions of policy, an approach that is inherently satisfying. Again, for teaching, the Roman law has the inestimable advantages of being finite and easily accessible. Teacher and student alike can confine themselves to the contents of the *Corpus juris.* There is no need to hunt through multifarious writings to piece together the law, to search through bulky manuscript records for a precedent that may or may not be in point, to attempt to establish the existence of a legal custom. The legal issues can be clearly presented. Moreover, the in-

4. *J.*1.2.12.

5. On the inadequate arrangement of the *Digest* and *Code* see the Introduction to Frederick the Great's codification *Project,* §2: "it would have been very desirable, that the sovereigns who have reigned in Germany, had, from the beginning, thought of reducing those laws into the form of a system, etc." Again, Pothier, *Pandectae Justinianeae in novum ordinem digestae* (1749–1752), rearranges Justinian's texts within each title into what Pothier considered a methodical order. Antonius Faber, *Iurisprudentiae Papinianeae scientia* (dedicated in 1607, republished several times), attempts to set out all the rules of Roman law in a scientific way, i.e. following the arrangement of Justinian's *Institutes.*

ternational character of Roman law enhances its academic standing. It is inevitable that much more work is done overall on Roman law than on any territorial system, and this results in a higher standard of juristic sophistication.

Roman law intellectually pulls further and further away from its competitors, thus increasing its attractiveness for teacher and student alike. Consequently there is a neglect of local law in university teaching.[6] Customary law, fundamental though it is, was not taught in French universities until 1689 in the reign of Louis XIV.[7] In Spain, Louis XIV's grandson, Philip V of Castille, who had been educated in France, tried to uproot Roman law, declaring it to be not the law of the land.[8] But the universities continued teaching only Roman and canon law in spite of having been ordered to teach the royal law of Castille. Chairs of Spanish law were created in 1741, but the universities resisted and for some time passively failed to obey the command.[9] Even in a common law country like England, Roman law so dominated university legal education that the first lectures on English law in either Oxford or Cambridge were those of Sir William Blackstone at Oxford in 1758. Sir John Fortescue in chapter 48 of his *De laudibus legum Anglie,* written between 1467 and 1471, claims that English law was not taught in English universities because sciences were taught only in Latin, and English law was written in French, English, and Latin. Blackstone, in the first section of his introduction to the *Commentaries on the Laws of England,* prefers to put the blame for the lack on the clergy, "many of them foreigners." But since the phenomenon is international, not just English, an international explanation is required.

This academic dominance in its turn produces further consequences. Legal writing becomes concentrated on Roman law and canon law. The books may also set out rules of local law, but the treatment of these is usually regarded as of secondary importance. The significance of these works is by no means restricted to university training. They help to bridge the gap between the universities and practice, but they proceed from the university side and increase university influence. There must at times have been a reaction, even downright hostility, from practitioners

6. See e.g. David and Brierly, *Legal Systems,* p. 40.

7. See A. de Curzon, "L'Enseignement du droit français dans les universités de France aux XVII[e] et XVIII[e] siècles, *RHD,* 1919, pp. 208ff, 305ff.

8. Auto acordato por el Consejo en pleno, 4 de diciembre de 1713, auto 1.1.1., agregado a la Rec.; Nov. 3.2.11.

9. See e.g. F. de Castro, *Derecho civil de España,* 2nd ed. (Madrid, Instituto de estudios politicos, 1949), I, 169ff.

and laymen against the influence of this theoretical law, as lacking practical reality and so on. But newcomers to practice from a university training consciously and unconsciously see law in the way known to them. And busy practitioners, seeking the law on a point at issue, look at the works readily accessible to them, which in very many cases are books on Roman law or primarily on Roman law. The practitioner must want to win his case, for the benefit of his client and himself. Even if he disapproves of the emphasis on Roman law, he uses arguments from Roman law when they can be made to support his case.[10] Though there were disputes as to the force of Roman law in northern France in the sixteenth century, the lawyers of the time made continual reference to that system, even when it was irrelevant.[11]

One consequence is that relatively more judges than in common law jurisdictions become authors of legal books. The reason is the inevitable high prestige of legal works and of professors; judges who wish to partake of this prestige feel drawn toward writing. However, the original impetus comes from the academic not the judicial side; hence the writings even by judges tend to fit into a mold prepared by academics. In common law systems, in contrast, legal emphasis is on what the courts do rather than on systematic exposition. All eyes are on the judge, not the academic; hence a common law professor is under less pressure than his civil law colleagues to burst into print. When he does so, he may well prefer, especially in the United States, to produce a case book, a court-oriented work, rather than a systematic piece of scholarship. Textbooks—"horn books" in the derogatory phrase—may even be despised. The great exception for common law countries is constitutional law when there is a written constitution. Thus, treatises on American constitutional law abound, and professors of constitutional law have a high status, not enjoyed by their British counterpart, among their colleagues and students and even among the judges.

Books on Roman law that deal with substantive law say virtually nothing about procedure, partly because in the *Corpus juris* itself technical points of pleading scarcely appear, and partly because the books are designed to achieve a circulation outside a limited jurisdiction, whereas procedure tends to vary from place to place. Local court procedure, like

10. An analogy might be drawn from contemporary Scots law. The opinion is often expressed, even by practitioners, that English law exercises too great an influence on the development of Scots law. But the busy advocate, in the absence of obvious Scots authority or of scholarly discussion, rapidly turns to English textbooks that refer him to English case law. Much English law has come into Scots law via the Court of Session.

11. See Koschaker, *Europa,* pp. 212ff.

local substantive law, existed before the Reception, but it was not replaced by Roman, or modified-Roman, rules because these rules could not be known. What unity came to exist was mainly the result of canon law influence. The end result is in complete contrast to the intertwining of the forms of process and substantive law that are found in English common law.

This restricted interest in procedure passed into many books on local substantive law. Two examples from the seventeenth century are institutes of native law of Holland and of Scotland. Hugo de Groot's *Inleidinge tot de hollandsche rechtsgeleertheyd* was written during his imprisonment in the castle of Loevestein from June 6, 1619, to March 22, 1621; in particular, he seems to have been at work on it during the first six months of 1620. The book has the typical structure of institutes of local law: it is greatly influenced in length, in topics treated, and in order of topics, by Justinian's *Institutes*. But whereas that Byzantine work devoted more than one-half of the fourth and final book to the law of actions, Grotius' *Inleidinge* contains only three books and does not deal expressly with procedure. Even more significant, in each chapter the discussion runs almost exclusively on rules and rights. Only exceptionally is there specific mention of an available action, scarcely even of the actual procedure involved. Grotius' explains his failure to write a book in whole or in part on procedure in a letter dated January 9, 1629, to his brother William, in which he claims that he omitted procedure because this was already the object of a book by Paulus Merula.[12] The work in question is *Synopsis praxeos civilis, Maniere van procederen in dese provincien Hollandt, Zeelandt ende West-Vriesland belanghende civile zaken*, which was first published in 1592. The explanation is scarcely satisfying, partly because nowhere in the *Inleidinge* does Grotius refer to Merula, and partly because a work intended to be comprehensive within its sphere of interest should not omit important matters because they have been treated elsewhere. Brother William himself published an introduction to local procedure in 1654, *Isagoge ad Praxin Fori Batavici*, giving as his reason the fact that his brother and other writers on Dutch law, apart from Merula, omitted the subject.[13]

The other, larger book on native law is James, Lord Stair's *Institutions of the Law of Scotland*. In the version generally known, which either is or derives from the second edition of 1693 that was the last published in Stair's lifetime, the work is divided into four books, of which the

12. See H. de Groot, *Inleidinge tot de Hollandsche rechtsgeleerdheid*, ed. F. Dovring, H. F. W. D. Fischer, and E. M. Meijers (Leiden, University Press, 1952), p. 331.

13. 1.1.1.

fourth and longest is wholly devoted to actions. This version, then, belies the suggestion that local institutes omit procedure. But the first edition of 1681, which divides into two parts, is very different: neither of its parts deals with the law of actions. Appended to the two parts is a short account of actions that is described not as a third part but as a separate work.[14] More important, the *Institutions* was written without the pages on procedure. There is a dual manuscript tradition, one stem dating from around 1662, the other from around 1666.[15] Most of the manuscripts do not contain the book on actions. One that does contains the text of "The forms of process before the Lords of Counsell and Sessions, the author My Lord Stair" written at the beginning of the manuscript text of the *Institutions*.[16] And whereas the stem of this manuscript of the *Institutions* is that of around 1666, "The forms of process" contains a reference to August 30, 1672. There could be no better evidence that Stair's *Institutions* was originally written without a distinct treatment of procedure. This remains true even if other manuscripts should be found to contain "The forms of process" after the *Institutions*. The pages on procedure, when written, were intended as a separate work of very short compass. The eventual full-scale treatment was meant to make the book more directly useful for practice in the courts.[17] Thus, the earliest systematic treatise on Scots law was written without the author's feeling any necessity for a treatment of procedure. This is all the more striking in that the *Institutions* must have been written when Stair was a judge, having been appointed to the Court of Session bench under Cromwell in 1657, reappointed by King Charles II, and made president of that court in 1670. Moreover, he seems not to have received formal legal education, a surprising matter in a civilian.

This downgrading of the importance of procedure in civil law systems, which results from the central role in teaching of the *Corpus juris*,

14. Stair misleadingly claims in the Advertisement to the second edition: "In the former edition I designed the Treatise to be divided into Three parts, as being most congruous to the Subject matter of Jurisprudence." Nor is his description of the contents of the first two parts wholly in harmony with their actual contents.

15. Of the MSS in the National Library of Scotland, those belonging to the 1662 stem are Adv. Ms. 24.2.10, 25.1.8, 25.1.9, 25.1.10, 25.1.11, 25.1.14, 25.4.17, Ms. 3172, 5334, and to the 1666 stem are Adv. Ms. 25.1.5, 25.1.7, 25.1.12, 25.1.13, 25.3.2, 25.3.5, Ms. 3721, 5058, 7116.

16. MS in private collection of Dr. Nicholas Allen. It was written by Robert Baillie of Jerviswood from November 7, 1678, to June 26, 1679.

17. There is a complicated relationship between the alteration of structure for the second edition of Stair's *Institutions* and the first edition of Sir George Mackenzie's *Institutions of the Law of Scotland* published in 1684.

is apparent not just in books of local institutes and not just in point of time until the moment of codification. Procedure has a restricted place in university teaching for some time even after the introduction of a code. For example, the teaching of civil procedure and of criminal procedure was introduced into the curricula of the universities of Poland only in 1950.

There are further relevant consequences of the dominance of Roman law in university legal teaching. For one thing, writings on territorial law, and territorial law itself, come to be heavily influenced by the approach taken to Roman law. For another, the emphasis on the *Institutes* and on the rationality of law lead naturally to codification.

To sum up, when the *Corpus juris* is treated as authoritative, Roman law, regarded as being in force, is taught systematically; the rules of law, especially of substantive law, are emphasized; local variations in law are minimized; the rules are not obscured by consideration of the interest, financial or otherwise, of practitioners; and the law is set out independently of the practical problems which occur in actual cases. The students are taught to look for the decision according to known rules and legal criteria existing inside the system; Roman law methods of thinking pervade parts of the living law constructed on other lines; and procedure is kept separate from substantive law and does not affect its exposition. Even before codification, the law in civil law countries has the logically formal rationality described by Weber.

The distance between this approach to law and that found in a precedent-based system is considerable. In the latter case, procedure and substantive law tend to be intermingled, financial and status considerations of practicing lawyers have more direct effect on the shape of the law, legal rules emerge far less clearly, and legal education, even in universities, tends to emphasize practical court room issues and the legal response to particular detailed sets of facts rather than legal principle. No evidence of this educational emphasis is more telling than the long addiction of American law schools to the so-called "Socratic method" rather than to a scholarly systematic exposition of the law. Otto Kahn-Freund claims that the thought processes of the common law should be understood as the needs and habits of a legal profession organized in guilds, whereas modern continental systems were developed in the universities by legal scholars for the use of officials.[18] But the differences in approach between the two types of system can rather be primarily attributed to the

18. Introduction to K. Renner, *The Institutions of Private Law and their Social Function* (London, Routledge & Kegan Paul, 1949), p. 13.

acceptance in continental countries of Justinian's *Corpus juris* as authoritative. After the initial acceptance, everything else, including the dominant role of the universities in shaping legal thought, would follow. For this process once started, to be explicable, no reference need be made to further societal factors, including the general political structure or the organization of practicing lawyers.[19]

It is not that societal factors were unimportant, only that the overall major development can be attributed to the fact of the *Corpus juris* having been made authoritative. The course of the Reception did vary from territory to territory, both in extent and in time; and in the variations local societal factors did play a considerable role. Scotland at first sight looks aberrant, in that during the decisive period of the Reception there was no sustained university teaching of law and no books on Roman law were produced by Scottish scholars working in Scotland. But the aberration is more apparent than real. During the period in question and until the Napoleonic wars closed Europe to the Scots, it was very much the Scottish tradition to study law abroad—mainly in France before Scotland adopted Protestantism, thereafter in the Netherlands.[20] Such training was expected from intrants to the Faculty of Advocates; and by 1662 the normal procedure for admittance was by examination in the civil, that is, Roman, law.[21] Attempts were made at various times to establish university chairs in law, largely in Roman law. Their failure is for the most part attributed to shortage of funds, Scotland then being a very poor country.[22]

The case of Alexander Cunningham is instructive. He was appointed regent of humanity in the College of Edinburgh in 1679, and of philosophy in 1689. In 1698 he petitioned the parliament for a salary of £200 for six years to enable him to complete a four-volume work on the civil, or Roman, law. The first two volumes were to be a settled text of the *Digest*

19. Hence Kahn-Freund's further observation is mistaken: "It was due to political factors, to the failure of the absolute monarchy in England, to the aristocratic structure of the body politic in the 18th century, that the administration of the law remained in the hands of the lawyers' guilds. With some exaggeration one might say that it was the Revolution of 1688, not the refusal to 'receive' Roman law that, in this country, sealed the fate of systematic legal science in the continental sense."

20. See e.g. D. B. Smith, "Roman Law," in *Sources and Literature of Scots Law*, by various authors (Edinburgh, Stair Society, 1936), pp. 171ff.

21. See *Minute Books of Faculty of Advocates*, ed. J. M. Pinkerton (Edinburgh, Stair Society, 1976), I, ix f.

22. See index heading "Law" in A. Grant, *The Story of the University of Edinburgh* (London, Longman, Greens, 1884); T. B. Smith, "A Meditation on Scottish Universities and the Civil Law," *Tulane Law Review* 33 (1959): 621ff.

plus notes, volume three was to be the "Reconciliations of Opposite Laws," and volume four a "System of the Digests by way of principles and consequences." The response, apparently dictated by bureaucratic considerations, was to make him "Professor of Civil Law in this Kingdom" at an annual salary of £150. He was not expected to teach. Apparently the funds allocated to him were not available, and the work was never completed.[23]

Scotland is anomalous above all in that the university training in law, which was primarily in Roman law, was received abroad and that the Roman law textbooks used were published outside of the kingdom. Still today the Faculty of Advocates has one of the world's great collections of pre-nineteenth century Roman law books. This split between foreign legal education and home legal practice would, in its turn, have effects on the law and on legal writing. There was just no local professor of Roman law, hence no recognized expert who could be turned to for the interpretation of Roman law during the preparation for an actual law suit, and likewise no continuing living presence to reinforce the authority of Roman law among men who had been engaged in practice for years. Similarly, there was no place for the standard type of teaching book found in other jurisdictions, namely a book of Roman law which nevertheless referred to local Scottish variations. Generally, the first indication that a Roman law rule or doctrine was current in Scotland, was acceptable in whole or in part, or was unacceptable was in a decided case and not in a law book. What was lacking was a mediating force between Roman law or professorial law on the one hand and legal practice on the other. In the circumstances references in Stair's *Institutions* to cases are frequent, and precedent appears as a very important source of law: in this the *Institutions* differ markedly from institutes of local law produced for continental countries.[24] Other factors may also have been relevant for

23. See Grant, *Story*, pp. 361f.

24. This does not mean that at the time precedent was regarded more highly as a source of law in Scotland than it was in continental countries; it may indeed have been no greater than in, say, Italy or Germany. In the present state of knowledge of Scottish legal history, precision is not possible. Stair's position on the authority of precedent is not decisive, and it seems to have changed between the 1st and 2nd editions. In the second, after explaining rather tortuously that the judges of the Court of Session do in fact make law, Stair notes (1.1.16): "But there is much difference to be made betwixt a custom by frequent decisions, and a *single* decision, which hath not the like force." The remainder of that sentence in the 1st edition has been excised: "especially if it be invested with many circumstances of fact, but such are more effectual if they be in any abstract point of law"; as well as another sentence: "Their decisions are final and irrevocable, when solemnly done *in foro contradictorio*, and thereby recent custom or practice is established, both by their acts of

Stair's citation of precedent. There was the example of practicks, the older form of Scottish legal literature, which are more or less systematic arrangements of unconnected statements about Scots law, intended for the guidance of practitioners. These statements may be a brief account of a rule in a statute, of a Roman rule, of a rule deriving from a dated precedent, or even of the finding in some particular case where the names of the parties are given in addition to the date of the decision.[25] Moreover, it seems likely that English practice offered Stair another example for the citation of precedent.

Roman law as it appeared in the medieval centuries and later was naturally subject to development and therefore differed markedly in its rules from that known to the Romans. In addition, classical Roman law, what the French call "le droit romain romain," did not exhibit to anything like the same degree the logically formal rationality of modern civil law systems. Certainly classical Roman legal thought relied upon justifications that transcended the particular case; certainly the criteria of decision were intrinsic to the legal system; and certainly rules were constructed by specialized modes of legal thought. But what was missing for the Romans was precisely an authoritative body of writings such as the *Corpus juris*. The impetus toward systematic legal education was therefore lacking. Indeed, during the republic students learned their law not in law schools but in the home of a distinguished jurist by listening to him giving opinions.[26] Even in the empire it is by no means clear that the Sabinian and Proculian "schools" provided formal legal education. For H. F. Jolowicz and Barry Nicholas, it "is quite impossible to suppose that most of the men who are mentioned as heads of the Sabinian and Proculian 'schools,' many of them of consular rank and constantly engaged in public affairs, could have had either the time or the inclination to teach in such establishments." Accordingly, for them the least unsatisfactory conjecture is that the "schools" were more in the nature of aristocratic clubs formed for discussing legal matters and centering around a distinguished jurist.[27]

sederunt and decisions, &c." Thus, by the time of the 2nd edition Stair had a lower opinion of the force of a single decision. Nevertheless, in both editions he habitually cites only one or two cases, rarely more, to support a proposition of law, and these cases in the published reports do not indicate that the judgments were the culmination of a line of decisions.

25. For the last category see Hope, *Major Practicks*, under the heading in each title of "Practical Observationes."

26. See e.g. A. Watson, *Law Making in the Later Roman Republic* (Oxford, Clarendon Press, 1974), pp. 108f.

27. Jolowicz and Nicholas, *Historical Introduction*, p. 380; cf. Thomas, *Textbook*, pp. 45f.

Again, there was no fixed body of material which set out the law in a convenient form. Certainly there were statutes, magisterial edicts, and rescripts of the emperors, but the first were few in number, the second very brief and necessarily to be filled out by interpretation, the third not readily accessible. Essential to an understanding of these, as well as to the fundamental legal development by respected jurists, were the numerous and frequently massive writings of the jurists themselves: thus the commentary of Ulpian on the Edict is in eighty-three books. To find an authoritative statement on a point was not easy. It was not for nothing that the Emperors Theodosius II and Valentinian issued the "Law of Citations" in 426, enacting that the works of the jurists Papinian, Paul, Gaius, Ulpian, and Modestinus—all of them active about two centuries or more before—should be primary authorities; or that Justinian, a century later, declared the need for the *Digest*, because "we find the whole course of our statutes, such as they come down to us from the foundation of the city of Rome and from the days of Romulus, to be in a state of such confusion that they reach to an infinite length and surpass the bounds of all human capacity."[28] Moreover, the classical jurists are famous for their reluctance to lay down general legal propositions.[29]

The thought processes of the classical Roman jurists are commonly assumed to be similar to those of English lawyers.[30] One factor in this similarity is that neither set of lawyers has any authority to rely on which is akin to the *Corpus juris* or to a modern code. They have to argue from one factual situation to another, drawing what guidance they can from earlier discussions, with relatively little help even from statute either in classical Rome or in the heyday of the English judges.

In short, specific consequences flow from a territory's acceptance of the *Corpus juris* as part of the law; and in particular, logically formal rationality—to use terminology associated with Weber—can plausibly be explained as a natural consequence of this acceptance. Related to the view of Weber that logically formal rationality in the law was important for the rise of capitalism in the West is an opinion held by some Marxist scholars, notably C. S. Varga, who draws on Georg Lukács. According to this opinion, bourgeois economic activity is characterized by the desire

28. *CTh.* 1.4.3; *Cor. Deo auctore*, 1.

29. See e.g. Thomas, *Textbook*, p. 49.

30. See e.g. F. Pringsheim, "The Inner Relationship Between English and Roman Law," *Gesammelte Abhandlungen* 1 (Heidelberg, Winter 1961): 76ff; W. W. Buckland and A. D. McNair, *Roman Law and Common Law*, 2nd ed. by F. H. Lawson (Cambridge, Cambridge University Press, 1952), pp. xiii ff. The similarity, however, is exaggerated and owes much to a contrast with continental jurists after the Reception.

for calculability of economic consequences, and hence economy penetrates into law to adjust the structure of law, as well as law's background ideology, to its own needs. According to Lukács, law becomes a sphere of social activity where this calculability of consequences, of profit and loss, is treated in a manner like that usual in economic life; hence positive law develops to the point where its social origin and its conditions of historical development become theoretically more and more devoid of interest compared with its purely practical usefulness. This new demand for calculation is precisely the cause of "the predominance of formally rationalized structures in law." As Varga explains it: "the new function of law directed to the certainty of foresight presupposes the 'technological' transformation of law. Hence its reestablishment in formally rationalized structures which, as mutually interrelated and organized into an in itself coherent system, are expected to serve as an optimum basis for calculation, has become a goal prevailing with ever greater purity."[31]

Varga is nevertheless mistaken. One of the problems which continually worried Weber was that England was undoubtedly a successful capitalist country yet it lacked the calculable, logically formal legal system that he thought necessary for capitalist development. Weber offered three hypotheses in explanation. One possibility was that though the English legal system offered a low degree of calculability, it nonetheless helped capitalism by denying the lower classes justice. Another was that England "achieved capitalistic supremacy among the nations not because but rather in spite of its judicial system." The third possibility was that in England "the development of the law was practically in the hands of the lawyers who, in the service of their capitalist clients, invented suitable forms for the transaction of business, and from whose midst the judges were recruited who were strictly bound to precedent, that means, to calculable schemes."[32] It remains an open question whether any of these hypotheses really serve Weber, but they point up the problem in believing that law follows the economic conditions.[33] It is not just England among modern Western nations that has a relatively low degree of logically formal rationality in its law, but also the United States, Canada, Australia, and indeed all the common law jurisdictions. The dichotomy is between

31. "The Concept of Law in Lukác's Ontology," *Rechtstheorie* 10 (1979): 321ff.

32. *On Law in Economy and Society* (New York, Bedminster, 1968), II, 814; III, 1395.

33. That belief implies that the degree of predictability would vary within a system from one field of law to another, but always in accordance with the importance of the calculability of economic consequences. But then the extent of this same formal rationality of law should show the relative need for calculability in each field from one system to another.

common law systems and civil law systems, that is, between systems of law, not between societies of different economic levels or persuasions. Hence the dichotomy between the two types of system, and therefore the growth of logically formal rationality in law itself, cannot be the result of the general economic conditions within each particular society.

It has often been suggested that the professional organization of the lawyers was what prevented the Reception of Roman law in England. However that may be, it is a long step from that proposition to the claim that the lawyers' professional organization hindered and still hinders the growth of logically formal rationality in England, and in the United States, and in Canada, and in Australia. Between England and the United States is a vast difference in professional organization, in lawyers' involvement with government, in the selection of the judiciary, and even in the kind of legal work done. Moreover, any explanation of the phenomenon along the lines of lawyers' interest and organization would have to show why logically formal rationality came to prevail in civil law systems and was not fatally hindered by lawyers' interests and professional organization, which again can differ widely from country to country.

This opinion is almost exactly opposite to Otto Kahn-Freund's in discussing the contrast between common law and civil law: "To make it articulate (which here too is the first step towards making it innocuous) is a primary task of all those concerned with European legal understanding, but to succeed in this, one must realise that it reflects half a millenium (and probably much more) of social and political history. No amount of planned or unplanned harmonisation can expunge the traces of political and social, as distinct from purely legal, history."[34] Contrary to this opinion, the main differences in common law and civil law systems, which are generally to be found in approaches to law and in structures, are primarily the result of purely legal history.[35]

34. "Common Law and Civil Law—Imaginary and Real Obstacles to Assimilation," in *New Perspectives for a Common Law of Europe*, ed. M. Cappelletti (Leyden, Sijthoff, 1978), p. 163.

35. Weber himself stresses the role of canon law in the rationalizing process, insisting that it was more capable of rationalization, thanks largely to Roman law and to university education, than other religious systems were: *On Law*, pp. 250f. But since canon law applied to England as well as to continental systems and the degree of rationality of law is much less marked in England, it might be more accurate to say that canon law was no obstacle to rationalization.