VII
The Law of Reason

The legal tradition can be substantially affected by a general intellectual trend, such as humanism. Since law exists in the world of affairs as well as in the realm of ideas, the intellectual trend may have very practical, possibly unexpected, effects on the growth of the law. Thus, legal humanism largely brought about the intellectual and academic respectability of contemporary local law and was the prime cause of the widespread emergence at that time of institutes of local law, though the appearance of such institutes was, at some period or other, virtually inevitable.

Civil law systems are particularly open to philosophical influence, relative to common law systems. The reason is twofold. To begin with, Justinian's *Institutes,* backed by the remainder of the *Corpus juris,* and local institutes provide a simple account of the law and enable philosophers to feel that they know the law and what it is about, and that they can discuss it comfortably. Leibnitz is the obvious example. But also individual parts of Hegel's *Naturrecht und Staatswissenschaft in Grundrisse* show his knowledge of Roman law concepts, and the Introduction declares Hegel's familiarity with works such as J. G. Heineccius; *Antiquitatum Romanorum jurisprudentiam illustrantium syntagma,* and Gustav Hugo, *Lehrbuch der Geschichte des römischen Rechts.* In addition, the institutes with their obvious system are appealing to philosophers, not least because the clear defects in the system tempt them to offer improvements. In contrast, the common law with its mass of cases and its lack of system or theory, especially until the nineteenth century, is largely impen-

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etrable to anyone not trained specifically in the common law.[1] Of the few great English philosophers who were interested in law, among whom perhaps Thomas Hobbes deserves pride of place, Bacon was himself a lawyer, and Bentham was implacably hostile to the common law.

Second, doctrinal advances in civil law systems, particularly before codification, lie largely in the hands of academics, whereas in common law countries they lie largely in the hands of judges. In general, one would expect university professors to be more interested in the overall systematic, philosophical, and structural side of law than are judges chosen mainly from among successful practitioners. Moreover, in their daily living, academics are in more contact with professional philosophers. Above all, however, the nature of the available source of legal development affects the degree of philosophical penetration, and here the academic treatise is ideal for setting out law based on a philosophical system. In contrast, a judge has to decide the case before him, one case at a time. However deeply held and carefully considered his philosophical views may be, he cannot usually set out the whole law in terms of them.

Thus, to speak broadly, the civil law is rather open to philosophical influence. Over a period of centuries natural law is a perennial, if not always the predominant, theory of law. Natural law appears in many guises; as the law of God, the law of reason, the law of living in harmony with nature, and so on. But the various forms of the developed theory have in common that they provide an external standard by which existing territorial law can be evaluated. It is largely from this that they derive the immense strength of their emotional appeal. Above all, theories of natural law are intended to have a practical effect—to influence legal reform or to persuade to obedience or disobedience of the territorial law.

So far as post-Justinianian civil law is concerned, natural law is endemic. This is not the result of the quality of Roman juristic thinking on the subject, which in fact remained rather unsophisticated and not worthy of Cicero, far less of the Greek philosophers.[2] The Roman jurists were always far too much concerned with explicating the practical living law to give natural law much more than lip service. Few texts in the *Corpus juris civilis* even mention natural law, such as

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1. Yet in the twentieth century English philosophers have sometimes displayed more interest in the common law. Linguistic philosophers and common lawyers have a joint interest in interpretation and the meaning of words. Those interested in the philosophy of action are often intrigued by the untoward acts and legal rules uncovered in the courts of law and unraveled by the judges.

2. See *de leg.* 1.17–37; 2.8–15; *de re pub.* 3.21, 32–34; *de harusp. resp.* 32; the pseudo-Platonic dialogue, *Minos;* Plato, *Crito;* Aristotle, *Nichomachaean Ethics,* book 5.

> D.12.6.64 (Tryphoninus, *Disputations,* book 7). If a master paid the debt he owed a slave to him after he had freed him, then even if the former master had believed himself liable to some action he can nonetheless not recover, because he recognized a natural debt: for just as freedom is part of natural law and slavery was introduced by the law of nations (*ius gentium*) so the question of whether there is a debt or not a debt is, for the action called *condictio,* to be interpreted naturally.[3]

The term *ius gentium,* which appears here and in many other texts, seems best translated by "law of nations." The Romans normally used the term with regard to legal rules that they considered were found in all societies. Long after Roman times the term came to have the sense of "public international law." One of the few other texts mentioning natural law is:

> D. 50.17.206 (Pomponius, *Various Readings,* book 9). By the law of nature it is fair that no one can be made richer by the loss and injury to another.

But leverage was given to natural law to penetrate civil law by the prominent position of a short treatment of it at the beginning of both the *Institutes* and the *Digest.* Thus in the *Institutes:*

> 1.2.pr. Natural law is that which nature instills in all animals. For this law is not peculiar to humankind but is shared by all animals which are born on land or in the air or sea. From it derives that association of man and woman that we call marriage; so also the procreation and rearing of issue; for we see that animals also are imbued with experience of this law. 1. Civil law and the law of nations, however, are distinguished in this way. All peoples who are governed by laws and customs use law which is in part particular to themselves, in part common to all men: the law which each people has established for itself is particular to that state and is styled civil law as being peculiarly of that state: but what natural reason has established among all men is observed equally by all nations and is

3. Other texts are *J.*1.2pr, 11; 2.1pr, 1,11,18,19,37,40,41; *D.*1.8.2; 1.8.3; 9.2.50; 16.3.31pr; 23.2.14.2; 43.18.2; 44.7.59.

designated *ius gentium* or the law of nations, being that which all nations obey. Hence the Roman people observe partly their own particular law, partly that which is common to all peoples. Which is which, we shall explain whenever it is desirable to do so. 2. However, civil law derives its name from each individual state, for example, Athens: for one would commit no error in calling the laws of Solon and Draco the civil law of Athens. In like manner, the law observed by the Roman people is termed Roman civil law or the law of *Quirites*, being applicable to *Quirites*—the Romans being called *Quirites* after Quirinus. However, whenever we do not add the name of a state, we are talking of our own (i.e. Roman) law; in the same way that, when we speak of "the poet" without adding his name, the Greek will understand that it is the great Homer, while we know it is Vergil. The law of nations, on the other hand, is common to all humankind. For, through force of circumstances and human needs, peoples have developed certain measures for themselves: wars have arisen with subsequent captivity and slavery—which is contrary to natural law (for, by natural law, originally, all men were born free). From the law of nations also come virtually all the contracts, such as sale, hire, partnership, deposit, loan and countless others.[4]

And in the *Digest:*

1.1.1.3 (Ulpian, *Institutes*, book 1) Natural law is that which nature taught all animals: for that law is not particular to humankind, but is common to all animals that are born in the land or in the sea and to birds. Hence comes the union of male and female that we call marriage, hence the procreation and bringing up of children. For we see that the other animals, even the wild beasts, are marked by knowledge of this law. 4. The law of nations (*ius gentium*) is that which all peoples use. It is easy to understand that it falls short of natural law since the latter is common to all animals, the former only to men among themselves.

2. (Pomponius, *Manual*). As, for example, religion towards god; or that we obey our parents and country.

3. (Florentinus, *Institutes*, book one) Or that we repel violence and wrong; for it is by virtue of this law that whatever a person did for the protection of his body is judged to be lawfully done by him;

4. *Institutes*, trans. J. A. C. Thomas, p. 4.

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and since nature has created a kind of relationship among us, it follows that it is sinfully wrong for man to ambush man.

So far as substantive law is concerned, this discussion of natural law is not very meaningful. The usage is clearly at variance with the two texts of the *Digest* previously quoted, as indeed with others in both the *Digest* and *Institutes*. But these texts provide a starting point for later civilians. For example, one of the earliest glossators, Rogerius, of whom a gloss can be dated to 1158, writes in his *Questions on the Institutes,* 1.2.1:

We come next to natural law, the law of nations and the civil law. It should be noted here that the term "natural" law is multifarious. What is common to all animals is called "natural" as if from animal nature, as in this title. Further, what is common only to all men is called "natural" law from human nature, in which sense the law of nations (*ius gentium*) is called natural. Thus we say natural law teaches us to revere God and worship him and to keep faith in a promise. Another sense of "natural" law is the fairest law (*ius equissimum*), by which meaning even civil law can be called natural law. In this sense it is by "natural" law that minors who have suffered loss are to be restored to their previous position, that is those who were deceived by fraud or error, as in D.2.14.1pr, D.4.4.1pr and J.2.1pr, etc.[5]

Some of the inspiration for Rogerius' treatment here of the *Institutes* clearly derives from the *Digest* texts 1.1.1., 1.1.2, and 1.1.3.[6]

In the texts of the *Corpus juris* there is an awareness that the rules of positive law, of the *ius gentium* or *ius civile,* may conflict with those of natural law, but no indication of any weight being attributed to the latter. Indeed, J.1.2.3 reports that slavery is contrary to natural law, but certainly slavery existed as part of the established law.[7] At most the Roman texts suggest that an existing rule could be made to appear more authoritative by a reference to natural law or that, where the law was not quite settled, an argument for a particular decision might be drawn from natural law.[8] This extremely limited role of natural law is in marked contrast to its power in the pseudo-Platonic dialogue *Minos* or in Christian

5. See Hermann Kantorowicz, *Studies in the Glossators of the Roman Law* (Cambridge, Cambridge University Press, 1938), pp. 271ff; cf. the *Glossa magna.*
6. Cf. Kantorowicz, *Glossators*, p. 134.
7. Cf. D.1.5.4.1.
8. *J.*2.1.1. etc; *D.*12.6.64.

philosophers and theologians such as Francisco Suárez and, above all, Thomas Aquinas.

At least a respectable role was bound to be played by natural law in the subsequent civil law tradition. The opening passages of the *Institutes* and *Digest* meant that there was a place for discussing the nature of natural law; the power of the churches, canon law, and the opinions of philosophers meant that natural law doctrines would be one important focus for law reform; legal variations as they occurred from place to place and from time to time meant that at least occasionally justifications would be drawn from natural law. That what natural law was was a question to which different writers could give different answers was something that would only marginally diminish the influence of the idea of natural law.

But in actual fact, natural law was mightily to expand its influence in the seventeenth and eighteenth centuries, to such an extent that it must be regarded as a vital factor, separate from the *Corpus juris,* in the modern civil law tradition. The problem is to explain how radically different doctrines, on topics such as acquisition of ownership, formation of contract, paternal power, and the notion of marriage, could come into the tradition of private law largely determined by the authority of the *Corpus Juris.* Such an explosion could scarcely occur through the medium of writings on Roman law or local law: the changes in law are too numerous, the authority of the law is too different, and the reforms are too drastic. Nor could many of the doctrines be taken over directly from canon law, though admittedly canon law played its part; the doctrine of the Roman Catholic Church was too often denied, and even where papal dogma was accepted, papal authority need not be.[9]

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The sudden upsurge of importance of natural law for the civil law dates above all to the seventeenth century. No overall satisfactory explanation can be drawn from religious, political, or economic factors. One cannot associate the trend with any increase in the authority of the Catholic Church; on the contrary, the upswing occurs after the Reformation and is particularly noticeable in Protestant countries. But one also cannot attribute the swing to a reaction against the Catholic Church; in fact, the natural law doctrines at this time frequently owe much, whether acknowledged or not, to such Catholic scholastic theologians as Aquinas, Francisco de Victoria, and Suárez. Nor does a close examination of the doctrines reveal a general bias in favor of or against any particular form

9. See Introduction by J. L. Barton to his edition of *St. Germain's Doctor and Student* (London, Selden Society, 1974).

of government, whether monarchy, republic, or oligarchy. One could not expect any, since the doctrines frequently develop from centuries of discussion by many jurists living under different regimes. Some doctrines, particularly those relating to contract, could facilitate commerce, but this by no means applies to all; nor were all the doctrines favouring commerce developed at a time of commercial growth, nor were they necessarily accepted as the law of a particular territory at such a time.

Of more significance was, first, the decline in authority of the *Corpus juris* with the advent of legal humanism and the growing acceptance of the respectability of local law. Natural law at this time represents in part an attempt to find a new authority for law which would justify at least some of the practical changes from Roman law, especially those that had not yet occurred or been accepted but seemed desirable. Second, and more significant, the natural law of the period is one aspect of the general intellectual movement known as the Enlightenment. With cause, Franz Wieacker calls the natural law of this time "the law of reason."[10] This law of reason can be crudely characterized as the law that may rationally and logically be derived from an understanding of the needs of man recognized to be above all a social animal. But the law of reason is almost the earliest manifestation of the philosophical, as distinct from the scientific, Enlightenment. The law of reason cannot be dismissed as an offshoot of the Enlightenment. The law of reason, indeed, owes much to preceding philosophy, in particular to the late Scholasticism of above all Spanish theologians and canon lawyers. Among the most influential were Cajetan, Covarruvias, Lessius, Molina, and Soto.[11] The issue here is to explain how a secular law of reason, with such forebears, could arise and penetrate the civil law tradition.

The force and upsurge of natural law in the early seventeenth century is in part due to general philosophical trends, but only in part. The vital factor is the always unexpected presence of a human genius, in this case Hugo Grotius, who cites but may not have read all the late Scholastic writers just mentioned. The presence of a second, slightly later, and very different genius, Leibniz, was finally to ensure the incorporation of the law of reason into territorial, namely local positive law: particularly into Prussia in the *Allgemeines Landrecht für die Preussischen Staaten.*

Grotius was not the first jurist outside of the main Scholastic tradition who wrote on the law of nature. There are, for example, Johann Ol-

10. *Privatrechtsgeschichte,* p. 249.

11. See e.g. *La seconda scolastica nella formazione del diritto privato moderno,* ed. P. Grossi (Milan, Giuffrè, 1973).

dendorp (1486 ?–1567) and Johannes Althusius (1557–1638).[12] These two writers do not set up a system of natural law that is independent of divine revelation. For instance, in his *Eisagoge seu elementaria introductio ad studium iuris et aequitatis* (1539), Oldendorp, *inter alia*, investigates the question why law seems so obscure compared with other arts, and he seeks to define natural law, law of nations (*ius gentium*), and civil law. At the end of title two, which is dedicated to establishing the meaning of "natural law," he says that the formulas of the laws or natural awareness are to be found "in the divine tablets," by which formulation he means the Ten Commandments. In the *epilogus* he asks how one can know whether rules of the law of nations or of civil law have been rightly received; and he answers that one must have recourse to the Ten Commandments. Almost one-half of the book is dedicated to showing that the Ten Commandments, which are natural law, are very much in harmony with Roman law and, in particular, with the Twelve Tables, the Roman codification of the fifth century B.C.

It would have been no easy matter to insert much natural law into works devoted to Roman or territorial law, a view confirmed by Grotius' *Inleidinge tot de Hollandsche rechtsgeleertheyd*. This work makes the typical enlightenment reference to mathematics in connection with the different senses of justice[13] and says much about natural law—a discussion largely deriving from Scholasticism—in the preliminary chapter 2 of book 1, "On the Distinction and Operation of Laws." But thereafter, in the actual discussion of the law of Holland, natural law is scarcely more prominent than it is in Justinian's *Institutes*.[14] The idea of natural law is used largely as authority for an explanation of the existing law, not to urge reform. In some senses the most interesting text of the *Inleidinge* in this context is 2.5.2:

> To acquire ownership by consent of the former owner it appears to be enough by the law of nature that the former owner should manifest his will that the ownership should pass and that this should be accepted by the other as a surely acquired right; and, acceptance following thereon, no more seems to be required. But the civil law having more power over each person's property than the owner himself, seeking to prevent all unconsidered alienations and to save people from regrets, has decreed that the first owner must put the

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12. See e.g. Wieacker, *Privatrechtsgeschichte*, pp. 283ff.
13. 1.1.11 referring to 1.1.9,10.
14. Cf. Grotius 2.3.2,3; 2.5.2,3; 3.1.15,19,21.

> second in actual possession; this is called delivery or transfer: therefore, mere agreement cannot now make anyone owner or secure his title: likewise, no property can be made inalienable by contract, though by last will it may be. The same civil law has also not thought it enough to limit alienation as described, but has further decreed that the delivery should proceed from some cause, whether based upon benevolence, as gift, or upon contract, as sale, exchange and the like: which cause is called the title to the thing.[15]

Here it is emphasized that natural law is different from civil law—which in this context is the law of Holland—and yet the law described here as the civil law was also in force at Rome; and Justinian's *Institutes* 2.1.40 specifically describe the Roman rules as existing at natural law. But significantly, Grotius does not seek to change the local law; rather he justifies it, or at least explains it. The passage of Justinian's *Institutes* almost encourages contradiction:

> At natural law, we also acquire things by delivery (*traditio*), for nothing is more consonant with natural equity than that the will of an owner wishing to transfer his thing to another should be ratified. Accordingly, of whatever kind a corporeal thing may be, it can be handed over and, if this be done by its owner, alienated.[16]

Thus, the justification for the statement that ownership is acquired by delivery says nothing to the point about physical delivery but argues purely from the will of the owner wishing to transfer his thing. Moreover, the corresponding passage of the *Digest*, D.41.1.9.3, attributes the rule to the *ius gentium*, not to *ius naturale*. The text of Grotius, then, does not seem to be a pointer to an invasion of the civil law tradition by natural law. Its importance in this context is mainly its lack of significance.

Furthermore, a direct line of influence does not exist between Grotius' views on natural law on the one hand and the political and economic conditions of the time and Grotius' involvement in them on the other. There is a temptation to make such a claim, but it must be resisted. This systematic account of natural law in a private law context is found in Grotius, *De iure belli ac pacis*, which was first published in 1625. Scholars accept that the work derives in large measure from his earlier

15. *Jurisprudence of Holland by Hugo Grotius*, trans. R. W. Lee (Oxford, Clarendon Press, 1926), I, 93ff.
16. *Institutes*, trans. Thomas, p. 72.

Commentarius de jure praedae, which actually was not published until 1868 but the writing of which was completed in 1605. And the *Commentarius* owes its being to a prize case of 1604 in which Grotius was involved. It has even been suggested that Grotius wrote the *Commentarius* at the direct instigation of the Dutch East India Company.[17] But it would be a mistake to claim that Grotius' systematic treatment of natural law in the area of private law—which is where an invasion of the civil law tradition by natural law occurs—owes much directly to Grotius' involvement in individual legal cases, to the economic expansion of the Dutch East India Company, and to the corresponding political interests. This systematic treatment occupies book 2 of the *De jure belli ac pacis,* and there is nothing akin to it in the *Commentarius.* For the *Commentarius* it would also have been irrelevant, and it does not even fit neatly within *De jure belli ac pacis.* The connection of book 2, which is about as long as the other two books together, with any theme of war and peace or with the law between states is extremely tenuous, to the extent that more than once the suggestion has been made that the work is composite and that Grotius put together two independent manuscripts of his, one from the *Commentarius,* the other on natural law.[18]

The quality and the success of *De jure belli ac pacis* are both outstanding. A century and three-quarters later Sir James Mackintosh claimed that the work of Grotius "is perhaps the most complete that the world has yet owed, at so early a stage in the progress of any science, to the genius and learning of one man."[19] By the year 1700 there were already twenty-six editions in Latin of *De jure belli ac pacis;* translations had appeared in Dutch by 1626, English by 1654, French by 1687, and German by 1707.[20] Not only were there numerous editions of this work with learned commentaries by scholars of the stature of Jean Barbeyrac, but there were also institutes of natural and international law of which the contents were expressly drawn from *De jure belli ac pacis.* The *Institutiones iuris naturalis gentium et publici* of the Dutchman J. Klenckius, which went into several editions in the second half of the seventeenth century, is an example. In 1661 a chair of the law of nature and of nations was created at Heidelberg for Samuel Pufendorf specifically to comment on and elaborate the teachings of Grotius. The work had a multifaceted success, since the chair was in the philosophical, not the law, faculty. Grotius' book was, in fact, to establish a close and long-lived, but not otherwise immediately obvious, connection between international law, the law of nature, and legal philosophy. In 1707 the chair of public law and the law of nature and nations was founded at Edinburgh University; the professor was long responsible for teaching international law, though now the chair is considered to be for legal philosophy.[21] Even in present-day Germany there is still in many universities a close tie between the teaching of international law and of legal philosophy. It would seem that a work solely setting out natural law arguments for substantive private law should have had more difficulty in penetrating the civil law tradition because it would have appeared remote from legal reality. The success here of natural law is due to the overall success of *De jure belli ac pacis,* which would never have been so great had the work not been so important for international law.

Grotius sets out his general view of natural law in the prolegomena. Man is a very superior animal, one of whose characteristics is an impelling desire for society, not society of any sort but peaceful and organized society according to the measure of his intelligence. It is not a universal truth that every animal is impelled by nature to seek only its own good (§6). Man, moreover, alone among animals, is endowed with the faculty of knowing and of acting in accordance with general principles (§7). The maintenance of the social order which is consonant with human nature is the source of law: hence come the legal obligations to abstain from anything that is another's, to restore to another anything of his that one has plus any gain one has received from it, to fulfill promises, to make good a loss suffered through one's own fault, and hence also the inflicting of punishment in accordance with deserts (§8). A more extended meaning of the term "law" flows from the above; as man has the power of discrimination, to act contrary to this discrimination is to act contrary to the law of nature (§9). To the exercise of such discrimination belongs the rational allotment to each individual or social group of that which is properly theirs; such as preference at times to the more wise over the less wise, to a kinsman and not to a stranger, to a poor man not to a wealthy man (§10).

All the foregoing, claims Grotius, would have some validity even if it

17. See e.g. A. Nussbaum, *Concise History of the Law of Nations,* 2nd ed. (New York, Macmillan, 1954), p. 102; cf. J. B. Scott, in *De jure belli ac pacis,* Classics of International Law (Oxford, Clarendon Press, 1925), II, xx.

18. See Nussbaum, *Concise History,* pp. 107ff.

19. *A Discourse on the Study of the Law of Nature and Nations* (Edinburgh, Clark, 1835), pp. 13f (first published in 1799); quoted by Scott, in *De jure belli ac pacis,* II, xliii.

20. See J. ter Meulen and P. J. J. Diermanse, *Bibliographie des écrits imprimés de Hugo Grotius* (The Hague, Nijhoff, 1950), pp. 222ff.

21. At least in theory; the chair has at times been treated as a sinecure. For the development of chairs on the model of that for Pufendorf see Tarello, *Ideologie,* pp. 90f.

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is conceded—which it cannot, without great wickedness—that there is no God, or that men's affairs are of no concern to Him. The opposite of this view, namely the understanding that God exists, has been implanted in man, partly by reason, partly by tradition, and is confirmed by many proofs. Thus, all people must all render obedience to God their creator (§11). The free will of God is thus another source of law (§12). Again, to obey pacts is part of the law of nature, and this source of law gives rise to bodies of municipal law, since those who have associated with a group have subjected themselves to a man or men (§15). The principles of natural law, being always the same, they can easily be systematized, whereas elements of positive law are outside systematic treatment since they often undergo change and are different in different places.[22]

This theoretical discussion of the nature of law is carried further by Grotius in the body of the work, particularly at 1.1.2–1.1.15. At 1.1.10, for example, Grotius claims that the law of nature is unchangeable even in the sense that it cannot be altered by God. And again, some things are in accordance with this law not in a proper sense but "by reduction"; that is, the law of nature is not contrary to them. Presumably Grotius means here, as in prolegomena §15, that when established municipal law is not directly derivable from natural law but is not contrary to it, then it is in a secondary sense natural law "by reduction".

This theoretical foundation justifies the individual legal rules. Grotius does not set out either the Roman rules or local rules but by the use of reason attempts to deduce what the rules should be according to the law of nature. One example of the method is his account of contracts in book 2, chapter 12. Of simple acts, some are mere acts of kindness, others involve a mutual obligation (II). Of these acts that are reciprocal, some separate the parties, others produce a community of interests. The Romans rightly divide the former into three classes: I give that you may give; I do that you may do; I do that you may give. The Romans omitted from this classification the specific named contracts, not so much because they have a name but because their more frequent use gave them a certain force and character. But the law of nature ignores these distinctions (III). The law of nature requires that there be equality in contracts, and the party who receives less acquires a right of action from the inequality (VIII). Thus, a person making a contract ought to point out to the other any faults in the thing concerned in the transaction, but he need not disclose circumstances that have no direct connection with the thing (IX).

22. The terminology used here is adopted from the translation of F. W. Kelsey, in *De jure belli ac pacis*, II.

Equality is also required with respect to freedom of choice; no fear should be unjustly inspired for the sake of making a contract (X). Likewise, except in the case of beneficence, there should be careful observance that the exchange of considerations be equally balanced (XI). Finally, there should be equality in the subject matter of the contract, so that if subsequently an inequality, even one not due to the fault of a party, be spotted, it should be made good. The Romans properly established this rule not to apply to every inequality, since otherwise there would be a great many law suits, but it applies above one-half of the just price (XII). The most natural measure of the value of a thing is the need of it. But this is not the only measure. Desire, for instance for luxuries, sets a measure, and the most necessary things are of less value because they are abundant. The view of the jurist Paul is acceptable that the prices of things are not fixed by the desire or the use of individuals but by common estimation (XIV).

In the preceding chapter on promises, Grotius had already made other relevant points. For instance, the first requisite in a promise is the use of reason; hence the promises of lunatics, idiots, and children are void. But the promises of minors and women are not void since they have judgment, though it is rather weak. The time when a boy begins to exercise reason cannot be absolutely fixed but must be assumed from his daily behavior. Various states fix the commencement of capacity at different times, but this has nothing in common with natural law except that it is natural that the individual local rule be observed in the places where it is in force.

These particular points are part of a systematic and comprehensive treatment in which Grotius seeks to build up a structure of private law founded neither on Roman law nor on revealed religion. Certainly arguments are at times drawn from Roman law or religion, and either may even be cited occasionally as if it were of some authority. But the final product is far removed from the *Corpus juris*. Thus, quite gone is the Roman concentration on the individual contracts such as sale or stipulation, each with its emphasis on its own requirements. Instead, the omnium gatherum attributed to Paul—with the omission here of "I give that you may do"—comes to the fore although it has little prominence in the *Corpus juris* and was never part of the Roman contractual system. Formalities of contracting have disappeared, and the stress is on agreement. Even more striking is the emphasis on the equality of the agreement, including the equality of the prestation. Not only was the role of enorm lesion limited to sale in the *Corpus juris*, where it appears only in the *Code*, but many of the individual contracts such as stipulation are

unilateral in form and theory, though in practice they might be balanced by a second stipulation.

In view of the nature of *De iure belli ac pacis,* the basic divisions, even as they relate to private law, are very different from those of Justinian's *Institutes.* Thus, instead of a division of contracts into the four genera each with its species, contractual obligation is treated in three chapters, 11–13, of book 2—on promises, contracts, and oaths.[23] Again, the overall arrangement is by no means the same as that of the *Institutes.* For instance, the first seven chapters of the book are titled: "The Causes of War: First, Defense of Self and Property," "Of Things Which Belong to Men in Common," "Of Original Acquisition of Things, with Special Reference to the Sea and Rivers," "On Assumed Abandonment of Ownership and Occupation Consequent Thereon: and Wherein This Differs from Ownership by Usucaption and by Prescription," "On the Original Acquisition of Rights over Persons: Herein Are Treated the Rights of Parents, Marriage, Associations, and the Rights over Subjects and Slaves," "On Secondary Acquisition of Property by the Act of Man: also Alienation of Sovereignty and of the Attributes of Sovereignty," and "On Derivative Acquisition of Property Which Takes Place in Accordance with Law: and Herein, Intestate Succession."

Though Grotius' main intention was undoubtedly different, the *De jure belli ac pacis* opened up the serious possibility of drastic reform of private law, of a system based not on Roman law but reason. The book presented an inspiration as well as a challenge. With hindsight, given the references to natural law in the *Corpus juris,* the general philosophical Enlightenment, and the genius of a Grotius expressed in a work such as *De jure belli ac pacis,* it would have been astonishing if natural law as the law of reason had not had a considerable effect on substantive private law. With the same hindsight, one can reasonably predict three aspects of the role of natural law. Inevitability of outcome is not being claimed here, but rather the likelihood of occurrences that actually did happen. This approach is similar to that of Thomas F. Torrance without the theological overtones.[24] In his view law, like everything in the universe, is neither a matter of chance nor determined: that a development is rational does not mean it is necessary. Thus, when a change has occurred, it is possible

23. Then come three chapters, on promises, contracts, and oaths of those who hold sovereign power; on treaties and sponsions; and on interpretation.

24. See his "Juridical Law and Physical Law: Toward a Realist Foundation for Human Law," in a forthcoming book edited by A. McCall Smith and T. Carty (Edinburgh, Scottish Academic Press, 1982); and his *Divine and Contingent Order* (New York, Oxford University Press, 1980).

to show that it was rational and caused, but it is not possible to predict the changes that will occur, since such changes are "contingent."

The first prediction is that natural law doctrines would have a peculiarly strong effect in Germany. Roman law had a particularly important role in Germany; hence any reaction against it, to be successful, also had to be of great force. Dissatisfaction with the sway of the *Corpus juris* is evident from the institutes of Germanic law. There was, even apart from natural law, going to be a battle over the role of Roman Law. Apart from its intrinsic charms, natural law was a weapon to be used, since it offered a new, nonforeign authority. Even where a rule of the *Corpus juris* and what could be deduced for natural law were the same, the legal proposition could now be maintained without invoking Roman texts. Natural Law could equally be invoked in favor of a rule of German law. More to the point, however, natural law both "in a proper sense" and "by reduction" could offer a solution to an otherwise intractable problem every time there was a conflict between the *Corpus juris* and Germanic law: it would present itself as authority, moreover as a very rational and attractive authority, one outside of the conflict of rules, and of a higher ethical and philosophical standing.

The second prediction is that natural law, as it entered the sphere of practical private law, would be tamed. Courts enforce existing and established law. To have any practical impact, natural law doctrines would have to appear consonant with the law as seen by the courts and as taught in the universities. With regard to the latter, books would emerge setting out Roman law, Romano-German law, and natural law together, or reconciling Roman law with natural law. Books of both kinds are numerous. One example, remarkable only for its range, is D. H. Kemmerich (1677–1745), *Accessiones institutionum juris civilis ex jure naturae et gentium Romano et Germanico cum primis saxonico communi et electorali ad methodum quidem institutionum justinianearum, sed suppletis harum defectibus, et materiis juris in ordinem redactis, concinnatae, in usum academiae et fori* ("Additions to the Institutes of Civil Law from the Law of Nature and Nations, from Roman and German Law, (Especially Saxon, *ius commune* and Electoral) According to the Method of the Justinianian *Institutes* but with the Defects Corrected and the Legal Materials Brought into Order, Harmonized, and for the Use of Universities and the Law Court"). In addition, books on natural law itself that treat it as in any sense law that was or could come to be the law of a territory will bring it more into line with Roman law. This is true of the work of the second great natural lawyer of the period, Samuel Pufendorf (1632–1694), who sought to give a detailed practical content to the subject. His

De iure naturae et gentium (of 1672) abounds in reference to Roman law sources where that system is regarded as authoritative.

The third prediction is that there would be attempts to establish a new, systematic arrangement of legal topics. Justinian's *Institutes* with all their advantages of structure could not be said to be firmly established on a basis obvious to reason. Grotius' *De jure belli ac pacis* already indicates the need felt for a different arrangement there. Another case in point is the Dedication by Elie Luzac to his 1772 edition in French of Christian Wolff, *Institutiones juris naturae et gentium,* which had been first published in 1750. The Dedication gains in significance because Luzac, not being the author of the *Institutiones,* had no personal axe to grind, and because in general he was not an intellect of the first rank. Having objected *inter alia* that the *Digest* and *Code* contain few general principles, and these without noticeable order, he continues: "I believe . . . that the *Institutes* of Justinian could have provided some sort of remedy if they had been composed in a more natural and more methodical order, if the definitions had always been exact and illuminating . . . But despite that, I do not see that one can conclude that it is pointless to work for the perfection of law, and that the study of Roman law cannot contribute to this." The implication is that in the context of natural law attempts should be made to find a methodical arrangement of law; this methodical arrangement, suggests Luzac, does not exist in Justinian's *Institutes,* but a study of Roman law and particularly of Justinian's *Institutes* could help in discovering the perfect arrangement. Wolff's arrangement derives basically from that of Pufendorf; and in its turn it was to serve as the structural model for the *Allgemeines Landrecht für die Preussischen Staaten.*[25]

Wolff's *Institutiones* are in four parts. Part 1, "On the Law of Nature in General, and Duties Toward Oneself, Toward Others and Toward God," deals with general obligations and duties. Part 2, "On Ownership, and Rights and Obligations Arising Therefrom," contains a treatment of the acquisition of property, individual contracts, quasi-contracts, and other matters. Part 3, "On Empire, and Obligations and Rights Arising Therefrom," is in two sections. Section one, "On Private Empire," deals with marriage, relatives, paternal power, and succession. Section two is "On Public Empire or the Law of the State." Part 4 is "On the Law of Nations."[26]

25. See also Koschaker, *Europa,* pp. 245ff; Tarello, *Ideologie,* pp. 94ff, 98ff, 104ff.
26. See Tarello, *Ideologie,* pp. 110ff.

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VIII
Successful Modern Codification

In developed Western systems of law there is habitually to be found a drive toward codification.[1] The drive is not always powerful, nor is it always well directed, and it may meet emphatic opposition. The drive may be official or unofficial; it may be realistic, idealistic, or even cosmetic. Consequently it is probably not very meaningful to inquire into the circumstances in which codification is demanded.

Moreover, what may be envisaged as a code can vary enormously, even within the Western tradition. At one end of the scale are the short and succinct Roman Twelve Tables of the fifth century B.C., which do not set out the law comprehensively within the sphere of law treated.[2] For the inclusion of a clause in that code, there apparently had to be a particular reason, such as innovation, in addition to the mere fact of stating the law. At the other end of the scale is Justinian's *Corpus juris civilis,* which is enormous. Collections of statutes in force, where the individual obsolete clauses are omitted, may also be included within this category, as likewise the *Corpus juris canonici.* Moreover, collections of legal materials, which may well be classified as codes, have studded the development of law in Spain. Consequently, without a very detailed preliminary classifi-

1. For a recent expression of this drive see A. Watson, "Two-Tier Law—A New Approach to Law-Making," *International and Comparative Law Quarterly,* 1978, pp. 552ff.
2. See e.g. A. Watson, *Rome of the XII Tables* (Princeton, Princeton University Press, 1975).

cation, it would not be possible to investigate the circumstances of successful official codification in past ages.[3]

An investigation is possible, however, into the circumstances of successful modern Western codification, because of the similarities of these codes. By "code" is meant here primarily a written work that is intended to set out authoritatively at least the principles and basic rules of a wide field of law, such as the whole of private law, commercial law, or criminal law, or of criminal or civil procedure. Such codes are extremely numerous. Their introduction contains two implications.

First, since they are of necessity official, they require considerable political backing or at least consent. Thus, political factors are inevitably important for codification, and the political circumstances must be right at the moment of introduction. In view of the fact that codification has been very common in modern times, it must be that either very differing political conditions favor or at least allow codification, or the necessary political conditions are a common occurrence. One would expect greater political involvement for the earlier of the modern codes.

Second, virtually all modern civil law systems are codified. South Africa is perhaps the main exception, although most scholars would classify it as a "mixed" system. But codification, especially of private law, is relatively rare in common law countries. Law is not codified in the United Kingdom, Ireland, Canada (outside of civil law Quebec), Australia, New Zealand, and in general in the United States. Some codes were prepared for Anglo-India, and others are found in the United States, particularly in the West, most notably California. The contrast in this regard between civil law systems and common law systems is so great that much effort is expended by comparative lawyers to rebut the fallacy that the difference between the two types is that the former are codified and the latter are not.[4] Yet if codification is such a feature of civil law systems as distinct from common law systems, then there must be something inherent in the civil law tradition, whether with regard to the legal profession, the substantive law, the structure of the system, or attitudes to law, that favors codification. One cannot attribute the successful predilection for codification to political factors overall, because then it would be incomprehen-

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3. See e.g. J. Vanderlinden, *Le concept du code en Europe occidentale du XIIIe au XIXe siecle: essai de définition* (Brussels, Université Libre de Bruxelles, 1967); S. A. Bayitch, "Codification in Modern Times," in *Civil Law in the Modern World*, ed. A. N. Yiannopoulos (Baton Rouge, Louisiana State University Press, 1965), pp. 161ff; F. H. Lawson, "A Common Law Lawyer Looks at Codification," in *Many Laws* (Amsterdam, North-Holland, 1977), 1, 43ff.

4. Cf. Lawson, *Common Lawyer*, pp. 47ff.

sible that the factors were not present to the same extent in the countries of the common law tradition. Likewise, the extent to which the division codified-noncodified corresponds to civil law-common law systems means that one can exclude as the determining factor the prevalent social or economic conditions, other than possibly the social or economic conditions of the lawyers.

Successful modern codification leads to four subsidiary conclusions about legal development. First, successful codification was not simply the response to a felt need for it in the sense that the greater the complexity of the law and the difficulty in finding the law, the greater the demand for simplification, hence codification. Certainly, one strong impulse toward codification has frequently been the complexity and amount of the existing law. According to Suetonius, Julius Caesar formed the project "to reduce the civil law to fixed limits, and from the enormous and prolix mass of laws to place only the best and necessary in a few volumes."[5] As a motive for his *Digest*, Justinian alleges that "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."[6] The publication regulations (*Publikationsprotokol*) of March 20, 1791, of the *Allgemeines Landrecht für die Preussischen Staaten* declare "that the whole law will be produced in a coherent order, in the language of the nation and presented in a generally understandable way so that any inhabitant of the state, whose natural capacities have been trained through education even only to a moderate standard, may be himself able to read the laws in accordance with which he should conduct his dealings and be judged, to understand them and in future cases be attentive to their provisions."[7]

However great was the difficulty of finding and understanding the law in continental countries, it can scarcely have been greater than in England, where the law was not systematized, even after the appearance of Blackstone's *Commentaries on the Laws of England* in 1765–1769, where different courts enforced common law and equity, where local custom remained important, and where much law was hidden in inaccessible law reports. Yet English law was not codified, nor was there ever much chance of it.

5. *Divus Iulius* 44.2.

6. *C. Deo Auctore*, 1.

7. Cf. the prefatory remarks of Franz I of Austria to the *ABGB* of 1811 that the law should be in an understandable language and in an orderly collection.

Second, the introduction of "original" codes, namely those prepared fresh without deriving in structure and content from an existing code, is not sufficiently explained by social upheaval or complexity, as Frederick H. Lawson argues: "All the original codes have been in countries which have just undergone a revolution and wish to recast their law quickly from top to bottom, or in countries which had in the past suffered from a diversity of legal systems or had just found themselves in that position because they have incorporated new territories or had come into existence by a union of territories governed by different laws. One or the other of these factors must be at work if the lawyers of a country are willing to undergo the immense trouble and inconvenience of transforming their law and learning it afresh."[8] Lawson is right in stressing the difficulty of successfully preparing and introducing an original code.[9] But he does not take sufficient account of the eighteenth century codifications in Bavaria, which he describes as "too old-fashioned to fit into the movement" of codification.[10] Work on codification in Bavaria was in fact begun in 1750, and the code of criminal law, *Codex iuris Bavarici criminalis,* was issued in 1751; of procedure, *Codex iuris Bavarici judicialis,* in 1753; and of private law, *Codex Maximilianeus Bavaricus civilis,* in 1756. Historically this codification is undoubtedly part of the general movement and was inspired by initiatives already taken in Prussia. Moreover, the Bavarian civil code is thoroughly modern in its arrangement. Above all, whether the Bavarian codification was or was not old-fashioned is irrelevant, for the codes are original, despite the fact that neither of the factors postulated by Lawson for the appearance of an original code was present to any important extent. Furthermore, the emphasis on social upheaval does not explain why there was no really successful codification in the United States after the Revolution or the Civil War. The power of the individual states of the Union cannot have precluded codification, for Germany, which introduced the *Bürgerliches Gesetzbuch,* was and still is a federation; and other countries, notably Switzerland, that have civil codes are also federal. Still another federation that has codes is Mexico, but here the individual states have each their own civil codes.

Third, the introduction or nonintroduction of a code in a particular territory cannot be attributed to the power or persuasiveness of one individual. Thus, no doubt Napoleon's energy and power counted for much

8. *Common Lawyer,* p. 49.

9. Cf. Watson, "Two-Tier Law," p. 574.

10. *Common Lawyer,* p. 48n13. See also A. T. von Mehren and J. R. Gordley, *Civil Law System,* 2nd ed. (Boston, Toronto, Little Brown, 1977), pp. 59f.

in the promulgation of the *Code civil,* but in the French Revolution there had already been attempts at codifying the law. Despite all his persuasiveness, learning, and political power, Friedrich von Savigny could, at the most, greatly delay the preparation of a code for Germany, most noticeably by his *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft,* first published in 1814. And in non-civil law countries, Jeremy Bentham could not move the English to codification, nor could David Dudley Field move the Americans in the populous East.

Finally, even for civil law countries, systematic codification of private law is a relatively modern phenomenon. The earliest codification is that of Bavaria in 1756. In any account of codification as a phenomenon related more to civil law than to common law systems, this matter of dating also requires explanation. The success of codification in the civil law systems and its relative failure in common law systems is explained primarily by general factors in the legal systems themselves.[11] The distinctive element of civil law systems is the acceptance, past or present, of the *Corpus juris* or part of it as authoritative. This acceptance has profound consequences for the legal system, apart even from the acceptance of individual legal rules. But these consequences do not appear immediately or all at the same time. They include an academic and systematic, as distinct from a practical and pragmatic, emphasis on law. Roman law dominates legal education, and particular prominence falls on Justinian's *Institutes,* because it is both the fundamental book for beginners and is the authoritative attempt to give a systematic structure to law. When the insufficiency of Roman law for contemporary needs becomes apparent and respectable to notice, books on local law then emerge. These books are of various kinds and of different scope. But Justinian's *Institutes* show that it is possible to set out the basic rules of even a complex system in a comprehensive and organized way. This leads to a desire likewise to set out in one work the basic rules of a local system. Almost inevitably, these books model themselves in length and arrangement on Justinian's *Institutes,* though with variations. The role of Justinian's *Institutes* in legal education increases the influence of such local institutes vis-à-vis other books on contemporary law. In addition, a system in which the *Corpus juris* is authoritative is more open than is a common law system to the influence of powerful general intellectual currents, such as the Enlightenment. A great boost was given to natural law's capacity to influence private law

11. The position is very different where codification may be imposed by an absolute autocrat like Ataturk in Turkey, or by a foreign conqueror, or is intended for a territory where there is no deeply established legal tradition.

by the genius of Hugo Grotius. The Enlightenment led to the belief that law can be established on the basis of reason, and this intellectual impetus toward reform, married with the civil law tradition, led on to official codes of law. With the coming of institutes of local law and of natural law, the civil law tradition became more receptive to the idea of codification. Justinian's *Institutes* show that it is possible for a brief outline of the law to have legislative effect. But successful codification in the civil law tradition, at least in the forms that the codification takes, has to wait for the emergence of institutes of local law.

Proof that codification can be regarded as the natural product of the civil law tradition is two fold. First, no explanation, other than one based on legal tradition itself, can account for codification flourishing in civil law systems to a degree unknown in common law systems. "Many of the most civilized modern societies have felt the need to codify their laws. One can say that it is a periodical necessity for societies"—so begins the message of the executive to the Congress in Chile, proposing approval of the Chilean civil code in 1855. But these "most civilized modern societies" are in the main only those of the civil law tradition. The second proof is the similarity between institutes, whether of Justinian or local law on the one hand and of civil codes on the other. Many oddities of construction of modern codes can be explained only by reference to these institutes. More particularly, modern scholars profess to see two different "families" among civil law systems or two branches of the civil law "family," one deriving from the Germanic sphere of influence, the other from the Latin or, more particularly, the French. This distinction is best explained in terms of the preceding civil law tradition, the juristic reaction to it, and the penetration of it by natural law.

In Bavaria, the impetus to the three codes of the 1750s came from the cabinet order of December 30, 1746, of Frederick the Great of Prussia to his chancellor, Samuel Cocceji, and their intention was to unify the territorial law and to settle legal disputes of the *ius commune.*[12] The civil code, *Codex Maximilianeus Bavaricus civilis,* had only subsidiary validity, because the previous statutes continued in force. It is divided into four parts which follow the order of Justinian's *Institutes.* Thus, the first part consists of eight chapters, covering the nature of law and justice, kinds of laws, rights and duties of persons with regard to their status,

12. See e.g. Conrad, *Rechtsgeschichte,* II, 386f; Wieacker, *Privatrechtsgeschichte,* pp. 326f. The so-called *Codex Ferdinandeo-Leopoldino-Josephino-Carolinus* for the hereditary Kingdom of Bohemia and other territories is not a code but a collection of privileges, rescripts, and other statutory or quasi-statutory material, collected by J. J. Weingarten and published in 1720.

family status, paternal power, marriage, guardianship, and bondage. The second part has eleven chapters on the rights and duties relating to property in general, ownership, acquisition of ownership, prescription, possession, real security, servitudes in general, praedial servitudes, usufruct, tiends, and services due from country dwellers. The third part has twelve chapters on succession, the last on intestate succession. The fourth part has eighteen chapters on agreements in general, real contracts, consensual contracts especially sale, right of preemption, hire, emphyteusis, partnership, mandate, verbal contracts including personal security, literal contract, innominate contracts, quasi-contracts, performance, other forms of discharge of obligation, wrongdoing and the obligation arising therefrom, defamation and injury (*iniuria*), and feudal law. The contents in general correspond closely to those of Justinian's *Institutes* but, following the pattern established by so many institutes of local law, procedure and crimes are omitted. The substantive rules also show great Roman influence. The influence of natural law, however, is particularly noticeable in the use of a clear, matter-of-fact German and in the legal decisions often based on Reason.

The Prussian codification took almost a century to reach fulfillment, and it provides a clear insight into the growing influence of natural law.[13] At the beginning of the eighteenth century the numerous and scattered Brandenburg territories involved a multiplicity and diversity of laws. Frederick William the First's desire to bring these laws together appeared immediately after his accession in his edict of June 21, 1713, §156, and the cabinet order of June 18, 1714, to the law faculty in Halle. "Sound reason" was to be taken into account in the consolidation program, and the natural lawyer Christian Thomasius was to direct the project. Thomasius' fundamental objections blocked the plan.

The next step came from the initiative of the Enlightenment philosopher Frederick the Great, who was much influenced by Voltaire and Montesquieu. Frederick had as collaborator his Chancellor Cocceji, who is usually rated as a student of the *usus modernus* but must also be counted as a natural lawyer. Thus, his doctoral dissertation was on natural law, and he produced the *Grotius illustratus* (1744), which contains not only the apparatus of the most distinguished commentators, especially of his father, on *De jure belli ac pacis* but also twelve introductory essays. The cabinet order of December 30, 1746, to Cocceji formally requests that the law have rationality and clarity and be based as to sub-

13. See Conrad, *Rechtsgeschichte,* II, 387ff; Wieacker, *Privatrechtsgeschichte,* pp. 327ff; Tarello, *Ideologie,* pp. 252ff, 290ff, 312ff.

stance in natural reason and the constitutions of the various territorial parts. Here there is emphasis both on natural law by itself, and on natural law by reduction, namely local private law that is not contrary to the law of nature. This approach to natural law goes back to Thomasius as well as Grotius, though Montesquieu is a more direct influence on Frederick. The program was called "Das Project des *Corpus juris Fredericiani*, d.h. S.M. in der Vernunft und Landesverfassungen gegründetes Landrecht, worin das Römische Recht in eine natürliche Ordnung und richtiges Systema nach denen dreyen Objectis juris gebracht (The Project for the *Corpus juris Fredericiani*, That is, the Territorial Law of His Majesty, Founded on Reason and the Territorial Constitutions, in Which Roman Law Is Brought into a Natural Order and Right System in Accordance with the Three Objects of Law)" and was published in Halle in 1749–1751. This was simply *ius commune* arranged in the order of Justinian's *Institutes*. Because of the Seven Years' War it was never put into effect.

The move toward codification began again in 1779 under the influence of C. von Carmer, G. Suarez and E. F. Klein, all three learned in natural law. The cabinet order of April 14, 1780, for an *Allgemeines Landrecht*, a common law for the Prussian territories, demanded the implementation of natural law with completeness and exhaustiveness and the resolution of doubts not by the judge but by the legislative commission. The draft was published in 1789, and a prize for suggested improvement was offered to "philosophical jurists" even of other parts of Germany, and to the Prussian governments and estates of the realm. Many suggestions from philosophers and members of the general public were carefully examined by Suarez from 1787–1790, and the final version, the *Allgemeines Landrecht für die Preussischen Staaten*, was published in 1789–1792. Political difficulties delayed its coming into effect until 1794. It remained in force in the old Prussian territories until January 1, 1900, and was introduced in 1814 into the Westphalian territories then united with Prussia, though not into the new Rhineland territories.

This codification is above all of natural law rather than of civil law. The stress on law as education reinforces this fact. Historical natural law is presented as able to give the right concrete decision even in the smallest detail, an approach that goes back to Christian Wolff. The codification contains all the law, criminal, public, and commercial as well as private. The structure also derives from natural law ideas, largely from Wolff and ultimately from Pufendorf. The introduction on laws in general and the first eight sections of the first part, on persons and related rights, things and related rights, transactions and resultant rights, declarations of intention, contracts, rights and duties that result from illicit acts, custody and possession, and ownership, sound like a "general part" and are called in fact "General Truths."[14] Then comes the law of things, which here means the property rights of individuals. The provisions, arranged organically, involve direct methods of acquiring ownership; indirect methods, including the law of obligations; acquisition of ownership on account of death, or law of succession; retention and loss of ownership; common ownership; and real and personal rights to things.[15] The basic divisions in the second part on "unions" or "associations" are rights that establish household standing, namely family law, family property law, the law of the kin; laws relating to the various estates in the state; and rights and duties of the state against its citizens, namely constitutional and administrative law.

The *Allgemeines Landrecht* marks a high point of legal culture. But it remains without direct descendants for a number of complex reasons. First, it was very much rooted in its place and age, in Prussian and Enlightenment absolutism. Its very wealth of detail thus worked against its being copied elsewhere. Second, its modern use of German restricted its impact outside German-speaking territories.[16] Third, the French *Code civil* of 1804, constructed on very different principles, was destined for enormous success—partly because it was much shorter and more abstract, therefore less tied to one place and time; partly because it followed a pattern derived from Roman law and hence was more widely acceptable in civil law countries generally; partly because Napoleonic victories imposed it on many parts of Europe; and partly because of the subsequent prestige of France. Likewise, the Austrian code of 1811 reverted to a construction modeled on Justinian's *Institutes*. The influence of the *Corpus juris* was not to be easily ousted. Fourth, academic lawyers, always powerful in the civil law tradition, often resented the *Allgemeines Landrecht*, largely because of its enormous detail and also because it left little scope for initiative by judge and jurist. Friedrich von Savigny called it "a filthy work in form and content," and more recently Wolfgang Kun-

14. See e.g. A. B. Schwarz, "Zur Entstehung des modernen Pandektensystems," *ZSS* 42 (1921): 605; Tarello, *Ideologie*, pp. 316ff.

15. Cf. Wieacker, *Privatrechtsgeschichte*, p. 332.

16. A French translation by various hands appeared at Paris in 1798–1799: *Code général pour les états prussiens* (Imprimerie de la République). Even earlier translations had appeared of Frederick the Great's *Project:* into French, with no date or place, by A. A. de C.; into English from the French, anonymously, in 1761 at Edinburgh.

kel called it "a monstrous anti-intellectual undertaking."[17] It may not be accidental that much of this hostility has come from enthusiasts for Roman law.

The codification movement in Austria began around the middle of the eighteenth century and encompassed private law, criminal law, and procedure.[18] The intention was to unify the territorial law and to settle legal disputes of the *ius commune*. The first tangible success was in criminal law, with the codification of Maria Theresa, the *Constitutio criminalis Theresiana* of 1768, which was replaced in 1787 by that of Joseph II, the *Allgemeines Gesetz über Verbrechen und derselben Bestrafung*. Both criminal codes are products of the Enlightenment.[19] Procedure was codified, appropriately for the period, in the *Allgemeine Gerichtsordnung Josephs II* of 1781.

More difficult was the codification of private law, which went through various stages. At first the predominant aim was to unify the territorial laws, but later greatest weight was attributed to giving a new form to the law in force. A commission was established at Brünn in 1753 to make a code, then called *Codex Theresianus juris civilis*, of unified private law for the hereditary Austrian territories, namely Austria, Styria, the Tyrol, Vorderösterreich (territories in western Europe outside of Austria), Bohemia, Moravia, and Silesia, based on a choice of the most natural and fairest rules, filled out by general natural law and the law of nations. The first draft was replaced by a second which was put together by a commission at Vienna. This second draft, which filled eight folios, was arranged in the order of Justinian's *Institutes*. The draft was rejected by the empress because of its prolixity and lack of clarity, and a new commission was set up in 1772. The code was to be short, unambiguous, marked by simplicity and "natural equity," in contrast to the detail and *ius commune* traditionalism of the previous drafts.

A first part, dealing with marriage and succession, was published in 1786 as the *Josephinisches Gesetzbuch*. A new high commission was set up under Martini, a natural lawyer, in 1790, and a very short draft in three parts, heavily influenced by Roman law, was produced in 1796. In 1797 a slightly modified version, known as the *Westgalizisches Gesetzbuch*, was introduced as an experiment in the recently annexed West Galicia, and then later in East Galicia. Opinions were sought from provinces, university faculties, and commissions of knights. A further commission was set up whose expert adviser and intellectual leader was F. von Zeiller, who had been first a pupil of Martini, then his successor as professor of natural and Roman law, before entering government service in 1794. The commission eventually, after drawing up another draft based on the *Westgalizisches Gesetzbuch*, published in 1811 the *Allgemeines Bürgerliches Gesetzbuch* (*ABGB*), which came into force on January 1, 1812. In the permission to publish, the emperor declared that the code was issued "In the consideration that, to provide citizens with complete tranquillity in the secure enjoyment of their private rights, the civil laws should be determined in accordance not only with the general principles of justice, but also with the particular circumstances of the inhabitants, made known in a language intelligible to them and kept steadily in the memory by means of a reasonable collection." The *ABGB* brought unity of law within Austria; and its operation was eventually introduced in Austrian territories outside of the German hereditary lands.

17. Savigny to Arnim, 1816, in A. Stoll, *F. C. von Savigny* (Berlin, Heymann, 1929), II, no. 319; Kunkel review of Wieacker, *Privatrechtsgeschichte*, 1st ed., *ZSS* 71 (1954): 534. In contrast, Wieacker thinks highly of the codification: *Privatrechtsgeschichte*, pp. 333f.

18. See e.g. Conrad, *Rechtsgeschichte*, II, 391ff; Wieacker, *Privatrechtsgeschichte*, pp. 335ff; Tarello, *Ideologie*, pp. 332ff.

19. See e.g. Conrad, *Rechtsgeschichte*, II, 441ff.

The *ABGB* is thoroughly modern in its construction. It has an introduction and three parts. The introduction, §§1–14 is on civil laws generally. Here "laws" (*Gesetze*) means officially pronounced rules, namely code provisions or statutes. It is declared in §10 that custom can be taken into account only when it is referred to by a law, and in §12 that judicial decisions never have the force of a law and cannot be extended to other cases or to other persons. However much inspired by natural law this codification may be, the idea of natural law does not appear *prima facie* in the finished work. Natural law is not expressly mentioned in the Introduction. There is no definition of it nor, more surprisingly, is there a general definition of law. What does appear, at §1, is a definition of civil law, where *Recht*, "law," can mean either "law" in the sense of the Roman *ius* or "right" in the sense of what is correct or proper. The definition reads: "The totality of laws [*Gesetze*, statute-law or Roman *leges*] by which the private rights and duties of the inhabitants of the State are fixed with regard to one another, constitutes the civil law." This is a far cry from the so-called *Ur-Entwurf*, "original draft," of 1797, as shown by the first nine sections of the first part of that earlier work:

> §1. Law [or right] is everything which is good in itself, which contains or brings out some good in its relations and consequences, and contributes to the general well-being.
>
> §2. Out of that which is right [or law] are drawn the rules which

should serve man as a plumb line in his acting and refraining from acting.

§3. In addition, the word law [or right] is also taken in a double sense; by it one understands the rule itself that prescribes what is right [or law], and also the natural freedom or the authority to transact that every person has when he arranges his transactions in accordance with these rules.

§4. Rights [or laws] and duties are either based solely on the nature of man, and then they are called natural and innate rights [or laws] and duties, or they are based on a particular society, and then they are called positive rights [or laws] and duties, that is, having arisen by dint of social life.

§5. Persons who join with one another in accordance with fixed principles in order to reach a common end are called a society.

§6. The state is a society that is united and bound under a common sovereign in order to achieve a final appropriate and unalterable goal determined by man's nature.

§7. This final goal is above all the general well being of the state, that is, the security of the persons, of property, and all the remaining rights of its members.

§8. The sovereign of the state issues the prescriptions or rules necessary to achieve this final goal, and they are called statutes.

§9. The aggregate of these statutes, by which reciprocal rights and duties of the inhabitants of the state among themselves are determined, constitute its own civil private law. This private law is contained in the present code.[20]

Of the *ABGB* itself the first part is the law of persons and has four major divisions: the rights relating to status, marriage law, rights between parents and children, and guardianship and curatorship. The second part, the law of property, has an introduction on things and their legal distinctions, then two major subdivisions. The first concerns corporeal things and includes possession, right of ownership, acquisition of ownership, real security, servitudes, succession testate and intestate, and common ownership and other property rights. The other subdivision treats personal property rights, contracts and legal transactions generally, gifts, the individual contracts (including marriage settlements), and delict. The third part deals with rules that are common to the law of persons and of things: surety and guaranty, modification and termination

20. See *Der Ur-Entwurf und die Berathungs-Protokolle des oesterreichischen allgemeinen bürgerlichen Gesetzbuches*, ed. J. Osner (Vienna, Holder, 1889), vol. 1.

of rights and obligations, and prescription. The parts are of unequal length, the second part being considerably more than twice as large as the first and third put together.

The form of the *ABGB* is very Roman. In length, as in general arrangement, the whole work is reminiscent of Justinian's *Institutes*. Both have in common the sequence: sources, persons, property, testate succession, intestate succession, contracts, delicts. The *ABGB* has no sign of the natural law influenced structure of a "general part" and of property preceding persons. Again the scope of the ABGB is restricted to that of Justinian's *Institutes*. It contains only private law and, at that, significantly leaves out commercial law. From the contents of the *Institutes* the *ABGB*, like other books of local law, leaves out both criminal law and procedure.

Austrian law, as presented by the *ABGB*, is also very Roman in its contents. For example, Austria is one of the few jurisdictions to retain three classes of persons who, because of their age, lack full capacity: children under 7, children under 14 (*Unmündige* or *impuberes*), and minors under 21. One further characteristic of the code, resulting from the concern to make the code of use to nonexperts, is the frequency of cross-references and of paternalistic advice. Thus, §580 reads: "A testator, who cannot write, must, in addition to observing the formalities set out in the preceding article, place his mark, instead of his signature, with his own hand, and that in presence of all three witnesses. To facilitate lasting proof as to the identity of the testator it is also prudent that one of the witnesses should add the name of the testator, indicating that he has signed for him."[21] This characteristic, along with others, such as the extremely brief treatment of delict that is normal in a civil code, are indications of enduring natural law influence.

In France, the *Institution au droit français* of Argou, which was first published in 1692 and had reached its eleventh edition by 1787, was similar in construction to Napoleon's *Code civil*.[22] But the honor of determining the arrangement of the *Code civil* is now often given to a book which until recently was little known, François Bourjon's *Le Droit commun de la France et la coutume de Paris reduits en principes, tirés des loix, des ordonnances, des arrets des jurisconsultes et des auteurs, et mis dans l'ordre d'un commentaire complet et méthodique sur cette coutume: contenant dans cet ordre, les usages du châtelet sur les liquidations, les*

21. See e.g. §578.

22. See e.g. Conrad, *Rechtsgeschichte*, II, 394ff; Wieacker, *Privatrechtsgeschichte*, pp. 339ff; *General Survey*, pp. 251ff; A.-J. Arnaud, *Les origines doctrinales du code civil français* (Paris, Pichon & Durand-Auzias, 1969).

comptes, les partages, les substitutions, les dîmes, et toutes autres matieres, first published in 1743, whose third and final edition appeared in 1773.[23] A comparison by André-Jean Arnaud of the provisions of Bourjon, *Droit commun,* and of the *Code civil* shows that the three books of the *Code* correspond closely in arrangement to the first three books of Bourjon. This is most easily seen in the major arrangement. Thus in both cases the title of the first book is "Des personnes (persons)"; for the second book, Bourjon has "Des biens (things)," the *Code* has "Des biens et des differentes modifications de la proprieté (things and the various modifications of ownership)"; for the third, Bourjon has "Comment les biens s'acquierent (the acquisition of things)," the *Code* has "Des differentes manières dont on acquiert la propriété (the different ways of acquiring ownership)." Although Bourjon's work is in six books, the contents of the last three fit into the general structure of the *Code civil.*

Arnaud also makes a direct comparison of contents: the feudal matters in Bourjon do not appear in the *Code civil,* since feudal incidences and distinctions had been abolished; whereas in addition to what is in Bourjon, the *Code* contains only one title (I.8) on adoption, a subject that was introduced into French law by Napoleon; one (II.2) on property; and one (III.3) on the general theory of contract.[24] For Arnaud, the omission from Bourjon of a theory of property and a general theory of obligations indicates that he is still bound to the letter of the Custom of Paris. The omissions also indicate the lack of the influence of doctrines of natural law. Although the three books of the *Code civil* correspond closely to the first three books of Bourjon, nonetheless the actual arrangement of the individual provisions of the *Code civil* seems rather closer to the arrangement of the chapters of the four books of Argou. Given the enormous popularity of Argou, as evidenced by the number of editions, this cannot be a matter for surprise.

The movement in France for codification had begun long before the rise of Napoleon. Charles VII's *ordinance* of 1454 at Montil-les-Tours marks the beginning of the undertaking to write down the various regional customs. Then the mandate of Louis XI to the bailiwick of Sens in 1481 represents in one view the intention to consolidate and unify customary law.[25] This unification of customs was also the ideal of Charles

23. See Arnaud, *Origines doctrinales,* pp. 159ff; R. Martinage-Baranger, *Bourjon et le code civil* (Lille, Klincksieck, 1971).

24. One example of the influence of Bourjon is the formulation of the *Code civil* (art. 2279), "En fait de meubles possession vaut titre."

25. See e.g. *General Survey,* p. 279; Vanderlinden, *Concept du code,* p. 26. For the mandate see R. Gandilhon, "L'unification des coutumes sous Louis XI," *Revue historique,* 1944, pp. 322f; cf. Vanderlinden, *Concept du code,* pp. 286f.

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Dumoulin. In 1576 the States-General, meeting at Blois, expressed itself in favor of codifying both royal legislation and customary law. The task was entrusted in 1579 to Brissonius, but only with regard to legislation. The result was the *Code du roi Henri III,* published in 1587 but never promulgated, since Henri died in 1589. Under Louis XIV, Colbert again brought forward the idea of codification, but success was limited to certain great ordinances: of civil procedure (1667), waters and forests (1660), criminal procedure (1670), commerce (1673), and maritime law (1681). Lamoignon (1617–1677), who was chief president of the court of the parlement, set out as a code in a private work the principles of customary law, and the Chancellor D'Aguesseau (1668–1751) was responsible for three great ordinances that were in effect codifications of wills, gifts, and entails and were influential for the *Code Napoléon.*

With the coming of the French Revolution, the Constituent Assembly voted on October 5, 1790, that a general code should be prepared, and this promise was renewed in the first written constitution of France in 1791. The Constituent Assembly had no time to see to the preparation of the code, nor indeed really had the Legislative Assembly. But the Convention in 1793 ordered its legislative committee to present a draft code within one month, and this order was complied with. In the month of August of that year Cambacérès presented his plan for an exceptionally short code containing only 695 articles. In a speech delivered on the occasion Cambacérès declared that civil legislation should be "an edifice simple in its structure, but majestic through its proportions; great through its very simplicity, and so much the more solid in that not being built on the moving sand of systems, it will arise on the firm earth of the laws of nature and on the virgin soil of the Republic." He declared it was a chimerical hope to have a code that would provide for all cases and accepted the view that many laws made a bad republic.[26] Revolutionary though this plan was, it was not sufficiently so for the Convention, which rejected it. The Convention, which had expressed contempt for both Roman law and the customs and wished for a code that was simple, democratic, and accessible to every citizen, voted for a committee of philosophers to prepare a new draft. Nothing came of this plan, and Cambacérès presented a new, even shorter draft, of 297 articles, after the fall of Robespierre. Little likewise came of this plan. Again, under the Directory which commissioned a civil code, Cambacérès presented a third draft, but this also came to nothing.

Napoleon as first consul appointed a committee of four on August

26. See P. Fenet, *Recueil complet des travaux préparatoires du code civil* (Paris, Ducessois, 1827), I, 2f.

13, 1800, to draft a civil code. The members were Tronchet, president of the Court of Cassation; Bigot du Préameneux, government commissioner in that court; Malleville, a judge in the same court; and above all, Portalis, government commissioner in the Prize Court. Thus, all the members were practical lawyers and not academics. Each member prepared a part, and the draft was completed in four months. It was then presented for comments to the Court of Cassation and the Court of Appeal. After considerable political opposition in the Tribunate, where the code was declared a servile imitation of Roman law and the customs, and the purging of the Tribunate by Napoleon, the draft civil code was enacted by thirty-six laws between March 1803 and March 1804.[27]

This most influential of all civil codes is in the tradition of Justinian's *Institutes* and the institutes of local law. To some extent, the attractiveness of the *Code civil* is to be attributed to the familiarity of its arrangement. Ambroise Colin and Henri Capitant explain the absence from the *Code civil* of the general part that is found in some more modern codes, such as that of Germany and Brazil, by the essentially practical character that the draftsmen wished to give the code; thus, the code regulated different kinds of incapacity (of a married woman, minor or interdicted person) without presenting a general theory of incapacity.[28] But this explanation is unhistorical. The absence of a general part in the *Code civil* and its presence in the German *Bürgerliches Gesetzbuch* (*BGB*) is the direct consequence of the existing legal tradition. French juristic writings before the *Code civil* contain nothing akin to the general part; German juristic writings before the *BGB* do. So, indeed, does the civil code of Saxony, the *Bürgerliches Gesetzbuch für das Königreich Sachsen*, which came into force in 1865 and of which the draft, the "Entwurf," was published in 1853. The gradual development of a general part, which has been traced by A. B. Schwartz, owes much to the natural law tradition which despite Montesquieu and the French revolutionaries had never really penetrated the French legal tradition.[29] The French legal tradition was still very much that of civil law as distinct from natural law. It is true that the codification movement in the eighteenth century was directly inspired by natural law, that the revolutionaries spoke of natural law, and that the Declaration of the Rights of Man of 1789 is very much a product of the law of nature. But the issue is more complicated than that.[30] There is, independently of natural law, a strong tendency toward codification of private law. Thus, before the Enlightenment, Dumoulin in France had already expressed the ideal of a short, unified compilation of customary law. In addition, the writers of local institutes had pointed the way for a codification that was not based on natural law, though this contribution has been generally ignored.[31]

The basic structure of the *Code civil* is that of the institutional tradition; and it can even be described as unnatural. Thus, unlike the *Code civil*, natural law codes stress the importance of the state for human society and emphasize the legal relationship between the individual and the state. Other omissions from the *Code* are inexplicable on any notion of a law of reason. The most striking of these omissions is commercial law, which became the object of its own code, the *Code de commerce*, which came into effect on January 1, 1808. On any normal understanding, commercial law is a part of private law, the law between citizens. And the incorporation of commercial law into the *Code civil* would have been particularly easy, given the existence of what was in effect a code of commercial law in Colbert's ordinance of March 1673, which was followed in 1681 by a similar ordinance for mercantile law. Moreover, the hostility of the revolutionaries to the commercial class ought logically to have brought about the disappearance of any separate commercial law and the incorporation of rules appropriate to all transactions and classes of the people in the *Code civil*.[32] The explanation for the omission of commercial law from the code is simply that commercial law was not thought of as "civil law," and the explanation for that is that commercial law formed its own distinct legal tradition, had no obvious forerunners to

27. The code was published under the title *Code civil des Français*, but the name was officially changed in 1807 to *Code Napoléon*. The original title was resumed in 1814 and 1830, but the accepted title since 1870 is *Code civil*. For convenience, the code as it was enacted is usually termed *Code Napoléon*.

28. *Traité de droit civil*, remodeled by L. Julliot de la Morandière (Paris, Dalloz, 1957), I, 131.

29. "Zur Entstehung."

30. Zweigert and Kötz, *Introduction*, p. 80, stress that, as compared with the earlier versions, the final *Code* was less a product of natural law and that, as it took shape, the value of historical continuity was increasingly recognized.

31. See e.g. Zweigert and Kötz, *Introduction*, p. 73; Brissaud, *General Survey*, pp. 251ff; Colin and Capitant, *Traité*, pp. 116ff; Wieacker, *Privatrechtsgeschichte*, pp. 339ff; Conrad, *Rechtsgeschichte*, pp. 394ff. K. Sójka-Zielińska, "Le droit romain, et l'idée de codification du droit privé au siècle des lumières," in *Le Droit romain et sa réception en Europe*, ed. H. Kupiszewski and W. Wolodkiewicz (Warsaw, Université de Varsovie, 1978), pp. 181ff, does stress the hostility toward Roman law expressed by some natural lawyers and emphasizes that this hostility was tempered, especially during the course of codification; but no word is said about the role of Justinian's *Institutes* and of local institutes in framing the modern codes.

32. See e.g. J. Hamel and G. Lagarde, *Traité de droit commercial* (Paris, Dalloz, 1954), I, 30.

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which it could be attached in Roman law, and above all was not to be found in Justinian's *Institutes* and hence not in the institutes of French law. The same explanation applies to the same omission from the Austrian *ABGB* and the German *BGB*.

The claim that the modern codification movement in France or elsewhere resulted from natural law is further undermined by the fact that codification is primarily a phenomenon of the civil law tradition and is rare in the common law. More specifically, there was no successful common law codification in the heyday of natural law. These facts make sense only on the assumption that, however important natural law may have been, the civil law tradition was also basic for codification. The fact that natural law theories were never so prominent in the common law world as they were in that of the civil law is irrelevant, since in spheres other than law the common law countries played a full part in the Enlightenment.

Admittedly natural law had to some extent penetrated French law, but this was in the typical form that may be designated "pre-Grotian" and which was in addition much Romanized. Thus, Jean Domat (1625–1696) in the preface to *Les loix civiles dans leur ordre naturel* observes that in the works of Roman law one can admire the light that God gave the infidels "whom he wished to make use of to compose a science of natural law." He insists that though other rules have been necessary where natural law did not determine precisely what was just, Roman law contains few of these arbitrary rules and consists almost entirely of natural law. Henri-François D'Aguesseau (1668–1751) advises the beginning law student first, to choose to examine the most common matters where it is easiest to see the first rules of natural law that distinguish Roman jurisprudence from all others and, second, to choose as guide that person, namely Domat, who treated such subjects most methodically and always with the intention of reducing them to this "primitive law which should be as common to all nations as justice itself."[33] Thus, D'Aguesseau holds that the principles of natural law are most evident in Roman law and that these principles are most clearly brought out by Domat. For his part, Robert Joseph Pothier (1699–1772), who frequently cites Hugo Grotius, Jean Barbeyrac, and Samuel Pufendorf, nevertheless seems much closer to the tradition of Thomas Aquinas, on whom he also relies, and of the canonists generally. For example, in the preliminary article of his *Traité des obligations,* he observes, "The *obligation* which is purely *natural,* which is a *bond of equity alone,* is also, though in a less proper sense, a *perfect obligation* since it gives the person toward whom it is contracted the right to demand its accomplishment, if not in the exterior forum, at least in the forum of conscience; whereas an imperfect obligation does not give this right." This remark leads Jean-Joseph Bugnet to note, "Pothier too often distinguishes the exterior forum and the interior forum (or the forum of conscience)."

33. *Quatrième instruction sur l'étude et les exercises qui peuvent préparer aux fonctions d'avocat du roi* (Paris, 1787), I, 389.

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The French *Code civil* is certainly not of pure Roman descent, in either substance or form. The *Code* rather represents the civil law tradition as it had developed in France. Its form is a development from the institutes of French law; and its substance is a mixture of Roman and customary law, with Roman law predominant in contracts, both in the general provisions and in the specific contracts, and in ownership. Although one must not ignore the contributions of customary law, royal ordinances, and revolutionary laws, one must not play down the contribution of Roman law, as in Jean Brissaud's remark: "There were two general currents of law at the time of the unification of the French law: the Roman spirit and the Customary traditions. It was the latter that prevailed."[34]

One curious event reveals the actual strength of the Roman spirit in the *Code.* The influence of French law came to Italy with the French armies in 1796, and the *Code civil* in Italian translation was promulgated as law in the Kingdom of Italy in 1806. By a vice-regal decree of November 15, 1808, this code was always to be taught in conjunction with Roman law.[35] Indeed, the chairs of Roman civil law were to be converted into chairs of the Code Napoleon Compared with Roman law. The idea that such a comparison was possible as well as desirable implies a belief in the continuing importance of Roman law and, more significantly, in the predominance of Roman law principles in the *Codice civile di Napoleone il Grande.* Indeed, this belief in the predominance of Roman law principles was at times spelled out. Thus, in his edition of the *Codice,* Onofrio Taglioni remarks: "All the peoples of Europe have tried hard and long to form their own legislation; but in the end the greater part of them have recognized that the law of Rome suited them, and they have, therefore, embraced it. Although the successive variation of circumstances and time, with which every people have been involved, made them feel the need to make some change, no change of circumstances or time has ever demonstrated the need to alter the principles. This sole ar-

34. *General Survey,* p. 286.

35. This requirement is set out more clearly in the decree of October 11, 1811, tit. 2, §18.

gument is enough to show that it [Roman law] is better than all the others. In fact it could not be otherwise since it is the cumulation of wisdom of the wisest two nations [Greece and Rome] that the world has ever seen. Nonetheless there are those who could wish to condemn this law to oblivion as not being, they say, fitted to our time, to our customs. . . The *Codice civile* conforms for the most part to these Roman legal rules, a fact which their superficial readers would deny: most of the time, moreover, the *Codice* necessarily presupposes the knowledge of Roman law principles, without which it would not be understood in the way that it should be."[36] However chauvinistically proud of Roman law Taglioni may have been and however one-sided his view, these remarks could not have been made by any learned man, as Taglioni certainly was, unless the *Code civil* was largely a product, in substance as in form, of the Roman law tradition. More to the point, if there had not been a heavy reliance on Roman principles in the *Code*, he could not have made the direct comparison, article by article, with the corresponding and contrasting Roman texts, though not every article permits such comparison.

The French *Code civil* did not stand by itself in that country but was rapidly followed by the *Code de procédure civile*, the *Code de commerce*, the *Code de procédure pénale*, and the *Code pénal*. These codes are very inferior to the *Code civil* both in drafting and in the quality of the rules. Brissaud explains the inferiority primarily by the fact that the authors of these codes had few or no models to follow, whereas for the drafting of the *Code civil* much of the work had been done in advance by earlier generations of jurists.[37] Surprisingly Brissaud fails to identify more precisely the models that existed for the drafting of the *Code civil* or to explain why models existed for that code but not for the others.

The question arises why the force of Roman law for the structure and principles of modern codes, especially for the *Code civil*, has been underestimated, and why the role of natural law and, for France, of the customs has been overestimated. This underestimation of the Roman law contribution is surprising, since the force of the Roman law that has been neglected is obvious. Any explanation must be couched in psychological terms.

One of the most striking features of a code is that it marks a new beginning. In most countries, a basic idea is that all preceding law is abrogated by a code; one cannot go back historically beyond the code to

36. *Codice civile di Napoleone il Grande col confronto delle leggi romane* (Milan, Sonzogno, 1809), I, pp. V, IX.

37. *General Survey*, p. 293.

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interpret its provisions. In many ways this is a very proper and reasonable attitude and, on one level, makes for simplicity and clarity in the law. But jurists, faced with questions of interpretation, have a tendency to rely on authority, which means in the context of a new code to look at the preceding law. The success of the code as the whole law, which lawyers presumably desire, depends on eradicating this tendency; hence the strenuous effort made both consciously and unconsciously to distance the code from its historical roots. It is in this light that the remark of Bugnet, one of the early commentators, should be seen: "I know nothing of civil law; I teach only the *Code Napoléon*."

But why is the Roman law influence in particular underplayed? The answer is that the danger feared in the interpretation of the *Code* comes particularly from Roman law. Roman law principles and structure have been and even now remain so much a part of the educational tradition that it is easier to envisage recourse to that system rather than to natural law or the customs for arguments as to interpretation, especially since the formulation of Roman law principles has been so much more precise. Because the danger of recourse to arguments from Roman law is greatest, its role in forming the *Code* must be underemphasized. This argument is reinforced by David Daube, a jurist and linguist. When Daube, who does not read Bulgarian, received a book in that language on Roman law, he consoled himself with the thought that the book probably contained little that was new. What one cannot easily understand, he observes, one depreciates.[38] In a similar way, when one fears the continuing influence of something, one depreciates past reliance on it. This tendency helps explain why succeeding generations continue to downplay the importance of Roman Law for the formation of the *Code*. Roman law continues to be taught for its own sake and enjoys high prestige. In general in civil law countries there is less teaching of other history of law before codification and virtually none of natural law, and the scholar of present-day law is expected to know more about Roman law than about other legal history or natural law. In practice, however, most writers on modern law have only the sketchiest knowledge of Roman law. To acquire enough knowledge to make full use of Roman law requires much effort; hence it is simpler and more satisfactory not to recognize the utility of the knowledge and to downgrade the contribution of Roman law.

Finally, emphasis should again be placed on the striking importance of Roman law in the *Code civil*. Before codification, France was excep-

38. "Fashions and Idiosyncracies in the Exposition of the Roman Law of Property," *Theories of Property*, ed. A. Parel and T. Flanagan (Waterloo, Canada, 1978), p. 43.

tional in continental Europe for the extent to which the *Corpus juris* was not authoritative in the northern "pays de droit coutumier". Given the relative weakness of the civil law tradition in northern France, it is not surprising that, atypically, all the draftsmen of the *Code civil* were active in practice and were not academic lawyers. Moreover, the main source for the substantive law in the *Code* is Pothier (1699–1772), who had written extensively on the customs, as well as on obligations, and who had been so dissatisfied with the arrangement of texts inside each *Digest* title that he prepared his own edition with a different arrangement.[39] In view of this background and of the rationalist element of the Revolution, the great extent of Roman law influence in arrangement and substance is particularly significant.

The modern codification movement can be divided historically in two parts, the first terminating with the codes of France and Austria, and the second beginning with the spread of the French *Code civil* and with codes derived from it. The rationale for this division is not just the prevalence after the break of the use of the *Code civil* in territories for which it was not designed, and of numerous codes even outside Europe that are heavily indebted to the *Code civil* in form and content. It is also that in this period the original codes of, say, Chile, but more especially of Germany and Switzerland, are framed in a full awareness of the existence and operation of earlier codes. The distinction must not be exaggerated. The draftsmen of earlier codes, too, were aware of foreign precedents, but now it is as if a critical mass of excellent codes has become available as a quarry. Legislators and draftsmen from this point on have three choices. First, they can accept an existing code in its entirety or with minimal changes. Second, they can prepare a national code in the light of an existing foreign code that provides the basic model for substance and structure. Third, with experience of the advantages and disadvantages, theoretical and practical, of foreign codes, the legislators and draftsmen can determine to produce their own "original" code. Such a code always involves a response, favorable or unfavorable, to existing great codes.

This second phase of codification has two peculiarities. First, a marked feature of the civil law tradition before codification is that it is international in character, in judicial decisions and juristic writings alike. With the advent of codification, that feature undergoes change, though it

39. See the eloge pronounced upon his death by the king's advocate, Le Trosne, in Pothier *Treatise on the Law of Obligations*, trans. W. D. Evans (London, Strachan, 1806), I, 1ff.

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does not necessarily disappear. After the first few codes are produced, the adoption of a national code itself is an act of comparative law.

Second, one of the most impressive features of this phase is the reception of the *Code civil*. Although this reception is prominent even in countries that previously were outside of the sphere of French legal interest, such as much of Latin America, the reception nonetheless occurs only in civil law countries. However easy it might have been there to accept a code that contained many rules deriving from French customary law and which were novel for the adopting territory, nonetheless the *Code civil* did not prevail in countries of the common law. Whatever explanation may be offered, the contrast is instructive for any understanding of the role of legal tradition in legal growth.

The first steps in the reception of the French *Code civil* were the direct result of Napoleon's conquests.[40] Belgium was incorporated into France in 1797, and the *Code civil* automatically came into force in 1804, remained in force despite Napoleon's fall, and so remains. The Netherlands, despite their neutrality, were forced more and more into the French sphere of influence, and in 1806 the Dutch were forced to accept Napoleon's brother Louis as king. In 1809 Napoleon compelled them to accept a version of the *Code civil* that was slightly altered to take account of some Dutch legal practices. In 1810 Napoleon annexed the Netherlands, and the original *Code civil* was introduced. After Napoleon's fall, Belgium and the Netherlands were united. The *Code civil* was to remain in force until a fresh code could be issued, but Belgium separated in 1830, and a new Dutch commission was appointed, whose proposed code, the *Burgerlijk Wetboek*, came into force in 1838. The *Burgerlijk Wetboek* is itself strongly based on the *Code civil*, and indeed the majority of provisions are straight translations. There are, however, changes in structure. This code is in four books. The first deals with persons, and a significant change is that matrimonial property appears here sandwiched between marriage and divorce, whereas in the *Code civil* the subject is treated in book 3. Book 2 concerns things, including—unlike the *code civil*—succession. Book 3 concerns obligations, and book 4 is proof and prescription. Procedure and commercial law are excluded, as they are from the *Code civil*. In contrast to Justinian's *Institutes*, book 4 is much shorter than the others. Since 1947 a very different Dutch code has been in active

40. See Zweigert and Kötz, *Introduction*, pp. 89ff. See also J. Gaudemet, "Les transferts de droit," *L'année sociologique* 27 (1976): 48ff; R. Piret, "Le Code Napoléon en Belgique de 1804 à 1954," *Revue internationale de droit comparé* 6 (1954): 753ff.

preparation, and parts of it are already in force. The code includes commercial law, in which regard it is in line with a current trend.

In Italy, too, with the exception of Sicily and Sardinia, Napoleon's conquest introduced the *Code civil* with a few necessary changes. French law, in fact, was influential even before the promulgation of the *Code civil*. For instance, a *Projet* was produced for the Roman Republic in 1798, and this was very much influenced by the French *Projet* of 1796.[41] The *Codice civile di Napoleone il Grande* was repealed almost everywhere in 1814. Italy was then again a land of many independent territories, which began to produce their own civil codes, all of them based on the *Code civil*. Lombardy and the Veneto, being under Austrian rule, were subject to the *ABGB*. Italy became a unified kingdom in 1861, and since the individual civil codes were based on the *Code civil*, it was no difficult matter to frame an Italian civil code, heavily indebted to the *Code civil*, which was enacted in 1865. Plans for a reformed code existed in the 1920s and 1930s, but a new approach was devised in 1939: a code was to be prepared that would comprehend not only traditional private law but all the possible personal and professional relationships of the citizen. The new *Codice civile* of six books came into force in 1942, and it also deals with commercial law, with book 4 concerning labor law.

Napoleon's conquests meant that in Germany also the *Code civil* came into operation in the Rhineland in 1804, and later in Westphalia, Baden, Frankfurt, Danzig, Hamburg, and Bremen. After Napoleon's defeat the *Code civil* remained in force in the Rhineland, and in a translation called the *Badisches Landrecht* it was the law of Baden. Likewise in Switzerland in the cantons of Geneva and the Bernese Jura the *Code civil* applied from 1804 as the result of conquest. The *Code civil* served as the model for the civil code of cantons in western Switzerland: Vaud (1819), Fribourg (1834–1850), Ticino (1837), Neuchatel (1854–1855), and Valais (1855). These codes survived until 1912.

In Europe even countries unconquered by Napoleon felt the power of the *Code civil*. The Rumanian civil code above all was simply a translation. In Spain, a commercial code based on Napoleon's *Code de commerce* was issued in 1829, and a modernized version appeared in 1885. The Spanish *Código civil* appeared only in 1889 and in substance owes much to the *Code civil*, especially with regard to obligations, though much of family law and succession is native to Spain. The structure has original features. After a preliminary title the *Código civil* divides into

41. *Projet du code civil de la république romaine*, intro. F. Ranieri (Frankfurt am Main, Klostermann, 1976).

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four books. Book 1 is "Persons"; book 2 is "Things, Ownership, and its Modifications"; book 3 is "The Different Ways of Acquiring Property," namely occupation of unowned property, gift, and succession; and book 4 is "Obligations and Contract". Spanish law has had a complicated legal history, in that law in Spain, as elsewhere in western Europe, underwent a Reception of Roman law while retaining vigorous indigenous elements. Different kingdoms of Spain had their own laws, which remained important and were not all displaced by the code. In fact, of the *Código civil* only the general introductory provisions on statutes and private international law and the sections on matrimonial law applied throughout Spain. Where the fueral system, a system based on local charters and customs, prevailed, the *Código civil* had only subsidiary effects in other matters. The fueral laws are now being codified.

Portugal, too, adopted in 1833 a commercial code based on that of France, and this was replaced in 1888. The Portuguese civil code of 1867, though heavily influenced by the *Code civil*, is less dependent on it than other codes of the nineteenth century. A new Portuguese civil code of 1967 still excludes commercial law and labor law.

France was also until recently the holder of a great colonial empire, and into the colonial territories, most noticeably in sub-Saharan Africa, the *Code civil* and the *Code de commerce* were introduced, though sometimes with modifications. These codes did not apply to "French citizens of local status" who were subject to African customary law or to Islamic law if they were Muslims. The various systems of law were dealt with in separate courts. Since the former colonies have become independent, they have been remodeling their law, using French techniques and French terminology. In Algeria the two main French codes were introduced in 1834, while Tunisia in 1906 and Morocco in 1913 received a *Code des obligations et des contrats*, which was largely a modified version of the appropriate sections of the French codes.[42] French influence still dominates in these areas. For political reasons French law also dominated these fields of law in Egypt and Lebanon.

In North America Louisiana, which was ceded by France to the United States in 1803, adopted a civil code in 1808. The main direct sources for the substantive provisions and even more for the structure of this code were the French *Projet de code civil* of 1800 and the *Code civil*

42. But N. J. Coulson argues that the 1906 code "rested squarely on Islamic sources, and was designed simply to achieve uniformity and certainty in the application of the law." *History of Islamic Law* (Edinburgh, Edinburgh University Press, 1964), p. 157.

itself.[43] The Louisiana code did not include commercial law. New codes were issued in 1825 and again in 1870.

Codification in Quebec was noticeably later. France had lost Quebec to Britain in 1759, but the previously existing law of Quebec continued to be used. This law consisted of the Custom of Paris, the ordinances in force within the jurisdiction of the Parlement of Paris before 1663, the decisions of the King's Council (*Arrêts du conseil de roi*), and the ordinances published between 1663 and 1763 which were registered by the Superior Council. A statute was passed in 1857 providing for codification, and the *Civil Code of Lower Canada*, now known as the *Code civil de la province de Québec*, came into effect in 1866. The draftsmen were not instructed to modify the law but to codify the existing rules, and article 2613 provides that the old law is abrogated where the code contains provisions that have expressly or impliedly that effect or where the old law is inconsistent with any provision. Hence not all of the old law is abrogated. The first three books of this code are modeled on the *Code civil*, but a fourth book deals with commercial law. As the instructions to the draftsmen would suggest, the Custom of Paris and the writings of Pothier are more influential than the *Code civil* for the substance, and the common law also leaves its mark.

Most remarkable of all has been the success of the *Code civil* in Central and South America where the French never had much territorial control. The legal systems in force were civil law in character as a result of the domination of Spain and Portugal. The various states achieved their independence in the nineteenth century and, one after the other, adopted civil codes all heavily influenced by the French code. Thus, the Dominican Republic accepted the *Code civil* in French in 1845 and had it translated into Spanish only in 1884. The civil code of Haiti (1825) and that of Bolivia (1845) were little more than translations. The Chilean civil code of 1855 was much more original but still clearly deriving from the French model, and in its turn it was adopted by Ecuador (1860), Colombia (1871), and several Central American states. The main model of the Argentinian civil code of 1869 was still the *Code civil*, but much use was made of French writers and the Chilean code. Argentina had promulgated a commercial code a decade earlier.

Earliest of all in this context is an older Haitian code, the *Code Henry*, issued in February 1812 for King Henry of Haiti in the first year

43. There was once doubt whether the draftsmen had access to the *Code civil* and it is now disputed whether the code should be regarded as "Spanish" in substance or "French." See H. W. Baade, "Marriage Contracts in French and Spanish Louisiana: A Study in 'Notarial Jurisprudence,'" *Tulane Law Review* 53 (1978): 1ff.

of his reign and the ninth of the island's independence. The preamble to the king's edict states that the Haitian nation was ruled by laws made for a people which did not have its genius, customs, and character; that different successive governments in the island sought to remedy the lack by a large number of particular decrees; that the nation had long demanded laws appropriate to its customs and climate; and that the king's first thought on mounting the throne was to procure this benefit for his people. The *Code Henry* is very original in its conception and contains a number of individual laws, each of which is, in effect, a separate code. Thus, the first and largest is the *Loi civile*, the civil law. The code is divided not into books but into thirty-four titles, in a familiar order: publication of laws, enjoyment and loss of civil rights, acts of the civil state, domicile, persons, things, ownership, real rights less than ownership, acquisition of property (especially succession), gifts, contracts in general, quasi-contract, delict, quasi-delict, particular contracts, and prescription. Separate laws, just as is expected of separate codes, deal with commerce, civil procedure, crimes, and criminal procedure; and there are further particular laws, such as the prize law, agricultural law, military law and military legal procedure. Thus, despite its originality, the code fits squarely within the civil law tradition.

The enormous success abroad of the *Code civil* and the advent of many other codes demonstrate that civil law systems were ready for codification. One explanation for the success of the *Code civil* is that the newly liberated countries of Central and South America needed some model, and that Spanish law was out of the question since Spain had been the previous colonial power. But a better explanation is availability. Thus, after Napoleon's downfall the newly liberated Belgium, Geneva, Bernese Jura, and the Rhineland all retained the *Code civil*, and Italy and the Netherlands issued fresh codes directly descending from the *Code civil*. Since the Second World War, the dominant influence on the structure of the law in the former French colonies of sub-Saharan Africa has again been French law. The sole essential and the most important factor in any large-scale voluntary reception of foreign law is thus the accessibility of the foreign law. As Zweigert and Kötz note in the context of South and Central America, "the only available model was the French Civil Code.[44]

44. See e.g. Zweigert and Kötz, *Introduction*, pp. 106. On p. 91 they stress the seductive thesis of Paul Koschaker that "reception occurs when the law being received is in a position of power, at least intellectually and culturally, as being the law of a country which still enjoys political power or did so until so recently that its strength and culture are still clearly remembered." But cf. Watson, *Society and Legal Change*, pp. 98f.