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JUDGE AND JURIST IN THE CIVIL LAW: A HISTORICAL INTERPRETATION*

Peter G. Stein**

All lawyers are familiar with the way different legal traditions develop notions which become part of their traditional mythology, to which everyone pays lip service, but which all recognize have been overtaken by contrasting reality. Very broadly, the official myth in the civil law is that, although academic writings have authority, judicial decisions have none; in practice, however, great attention is paid to the latter.¹ As all law librarians know to their cost, the publication of case

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1. For surveys of the current position in France, see, e.g., H. Mazeaud, L. Mazeaud, J. Mazeaud & J. Chabas, *Leçons de droit civil* 134 (7th ed. 1983); J. Carbonnier, *Droit Civil* 148 (10th ed. 1974), in *The Role of Judicial Decisions and Doctrine in Civil Law and Mixed Jurisdictions* 91 (J. Dainow ed. 1974) [hereinafter cited as *The Role of Judicial Decisions*]; E. de la Marnière, *Éléments de méthodologie juridique* 123 (1976); C. Atias, *Réflexions sur les méthodes de la science du droit*, 1983 D. S. Chron. 145 (arguing for a revival of "controversist" argumentation *pro et contra*). For a comparison of the French and Louisiana methods, see A. Yiannopoulos, *Jurisprudence and Doctrine as Sources of Law in Louisiana and France*, in *The Role of Judicial Decisions*, supra at 69.

In German law the question is treated in a more abstract way. See K. Larenz, *Methodenlehre der Rechtswissenschaft* 350 (4th ed. 1979), in *The Role of Judicial Decisions*, supra at 133; J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (2d ed. 1964); H. Pawslowski, *Methodenlehre für Juristen* (1981). For outside views, see M. Fromont & A. Rieg, *Introduction au droit allemand (République Fédérale)* 208 (1977); R. David, *Le rôle des juristes dans l'élaboration du droit selon la conception traditionnelle du système de droit Romano-Germanique, Vom Deutschen zum Europäischen Recht: Festschrift H. Dölle* 361 (1963). For a valuable historical survey, see E. Döhring, *Geschichte der Deutschen Rechtspflege seit 1500* (1953).

For Italian Law, see M. Cappelletti, J. Merryman & J. Perillo, *The Italian Legal System: An Introduction* 164 (1967).

For a panoramic historical and comparative survey, see W. Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, Vols. 1-5 (1977). For a recent critique, see A. Watson, *Sources of Law, Legal Change and Ambiguity* (1984); and for an analysis by civil law historians and modern jurists, see Legge, *Giudici & Giuristi, Atti del convegno tenuto a Cagliari, Maggio 1981* (Pubblicazioni della Facoltà di Giurisprudenza dell' Università di Cagliari, Vol. 26, 1982).

law reports in civil law countries is a massive industry which reflects this reality. Similarly in the common law, although officially only judicial decisions are authoritative and academic opinions are not, in practice, especially in the United States,² great attention is paid to academic opinions and many published judgments are so replete with citations of academic writings that they look more like law review articles.

Does this mean that the problem I have posed, the relation between judge and jurist in the civil law, with the implication that it is different from their relationship in the common law, is not a real problem at all? Is it just a will o' the wisp puzzle produced by the fetid imagination of an academic pedant? As a legal historian, I believe that legal history provides a key to open real problems, but is this a real problem? I believe it is.

To state the matter in the stark terms that I have done is to mask many nuances and subtle differences in the way case law and academic writings are regarded in the civil law and common law traditions. We must ask whether what we call case law is the same in the civil law as in the common law; whether the function of doctrine is the same in both systems.

When we speak of the civil law, there is a tendency to assume that its characteristic feature is that it is codified, in the sense that the whole law is expressed in a coherent, systematic authoritative form. But the earliest modern codes are little more than two hundred years old, and there are still one or two indisputable civil law systems that are uncodified, notably that of the Republic of San Marino.³

The civil law was developing for at least five hundred years before the codification movement became fashionable in the eighteenth century, i.e., from the re-discovery of the texts of Justinian in twelfth-century Italy. Surely we can presume that it had found its identity before codification became the vogue.

So it is in the pre-code period that I propose to seek the features of the civil law. This period can be divided roughly into two parts, divided at about the year 1500. The first, from 1100 to 1500, saw the rise of the European common law, *ius commune*, and the second, from 1500 to 1800, saw the adaptation of that law by court practice to the needs of nation-states.

2. R. Pound, *The Formative Era of American Law* 138, 159 (1950); cf. Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 *Va. L. Rev.* 403 (1966) (on the need for systematic treatises).

3. P. Stein, *Civil Law Reports and the Case of San Marino*, *Römisches Recht in der europäischen Tradition* 323-38 (Festschrift für Franz Wieacker zum 75 Geburtstag, O. Behrends ed. 1985).

THE PERIOD OF THE IUS COMMUNE

The main feature of medieval law in Europe was its pluralism.⁴ There was no territorial unity of law within the various principalities. Within the same state, there were different sets of laws for different regions; there were also different sets of laws for different social classes: nobles, peasants, merchants. Additionally, there were different sets of laws for different aspects of life: matters of personal injury would be dealt with by courts of lay judges applying traditional unwritten customs; landholding was governed by feudal law; personal status, marriage, and succession to movables were the province of the canon law of the church.

This plethora of overlapping jurisdictions meant that outside the area of the canon law, which was international, the sources of law were a jumble of local customs and statutes, which often did not provide answers in cases of any complexity. As long as the judges were part-time laymen applying traditional custom, they would make up an appropriate rule according to their sense of justice. Increasingly, however, princes created courts with professional judges whose whole work was the administration of justice. In cases of doubt, these judges drew on their university training.

The medieval university saw as its task the transmission of the learning of antiquity, as recorded in recognized books of authority. In theology these were the Bible and the church fathers; in law they were the *Corpus Juris* of Justinian. The main university for law was Bologna, which had two law faculties, one for the canon law of the church and another for Justinian's law, which was beginning to be called civil law, to distinguish it from the canon law. Students flocked to Bologna from all over Europe, and by the thirteenth century there were over a thousand foreign students enrolled. The system developed there became the model for all European universities. The only laws that were worthy of study in a university were those that transcended national boundaries, that were universal in scope, and the only laws that satisfied that criterion were the canon and the civil. All other laws were excluded, even in the English universities of Oxford and Cambridge.⁵

Justinian's texts are not easy to understand. They are about twice the size of the Bible and except for a small part, the Institutes, the arrangement of the material is very confused. The individual rulings and distinctions between cases show enormous subtlety and technical skill, but their sheer bulk and complexity have intimidated many gen-

4. For what follows, see Coing, *The Roman Law as ius commune on the Continent*, 89 L.Q. Rev. 505 (1973).

5. The first chair of English law at an English university was the Vinerian Professorship at Oxford, which was accepted by Blackstone in 1758 after his failure to obtain the Regius Professorship of Civil Law there.

erations of students. The first law professors at Bologna, the so-called glossators, concentrated on pure exegesis: they cross-referenced the whole Corpus of texts, bringing together those dealing with similar topics, reconciling apparent contradictions, summarizing, and so on. They treated the texts themselves as sacred, so that all exposition was limited by the meaning the texts could in totality bear. But the range of those texts was such that somewhere in the Corpus one could find the answer to any conceivable question of law. Accursius synthesized the work of the glossators in his Great Gloss, and when he asserted categorically, "everything is found in the Corpus Juris,"⁶ he did not seem to exaggerate. The glossators introduced the idea that what was important in a legal argument was the support of a text from somewhere in the corpus of authorities; it did not have to be from the context of the argument, for Justinian had stated that his compilation was a complete whole, with no contradictions.

The products of this kind of legal training, the *juristae*, became the meritocrats who were recruited by princes to serve their councils and staff their courts. They naturally analyzed legal issues in the way they had been taught. They applied the appropriate local law to those issues, but they interpreted that law according to the techniques of Roman law, and when they found a gap in the local law they applied the Roman rule. Whatever their national origin, the *juristae* shared the same legal culture, based on the same texts, expounded in the universal language of the educated people, Latin. So also they shared their legal experience. For example, in the thirteenth century the city of Lübeck asked the city of Hamburg what rules were applied in Hamburg to a certain question of maritime law. The Head of the Chancery at Hamburg could not find any specific rules in the Hamburg statute book or custom. But since he was university trained, he translated certain passages from Justinian's Digest into German and sent them to Lübeck, stating that they were the law of Hamburg, and thereafter the Roman rules were followed.⁷ In this way Roman law infiltrated into local laws.

It was not until the fourteenth century that the so-called commentators began consciously to adapt Roman law. The commentators used manuscripts of the Corpus Juris accompanied by Accursius's Gloss and made no distinction between the two. Without the glossators' explanations and cross-references to analogous texts, Justinian's law was incomplete; so the rule was accepted, "What the Gloss does not recognize, the court does not recognize."⁸ As a fifteenth-century commen-

6. G1. *notitia ad D.* 1.1.10.

7. See Coing, *supra* note 4, at 514 (citing H. Reinke, *Frühe Spuren Römischen und Kanonischen Rechts in Niedersachsen*, Festschrift Haff 174, 177 (1950)).

8. *Quicquid non agnoscit glossa nec agnoscit forum.*

tator, Fulgosius, stated: "In court I would rather have the authority of the Gloss on my side than a text; otherwise it will be said: do you think the Gloss has not seen that text and has not understood it as well as you?"⁹ Hence the idea that authoritative juristic comment on a statutory text is itself an authentic source of law.

The commentators, led by Bartolus of Sassoferrato, were faced with problems of the validity of local custom and the conflict between local law and the imperial law of Justinian. The glossators had argued that, if a local custom or statute differed from the Roman law, then the latter, as the imperial law of the whole empire, must prevail, and they cited specific texts to that effect. But local popular feeling, particularly in the fiercely independent Italian city-states, would not tolerate that. Bartolus took a more realistic attitude to the problem than his predecessors.¹⁰

Justinian's Digest and Code did not lay down broad general rules. They dealt with specific cases, and some of them referred to the existence of local customs that did not contradict the general law. Bartolus built up general rules from these particular case rulings. For example, when land was sold, the seller was bound to guarantee the buyer against eviction by a third party, but the form of the security that the seller had to provide was left to the parties, and one text says that this was governed by the custom of the region in which the sale was concluded. Bartolus generalized this ruling, deducing that in legal transactions generally form is governed by local law. But what if the local law contradicted the general law? The custom of Venice held that a testament was valid if signed by three witnesses, but Justinian's law required a minimum of five witnesses.¹¹ Bartolus had to consider whether the Venetian custom was valid.

First, he seeks the reason for the rule that a local custom which infringes the imperial law is held void. It must be because there is a presumption that it is therefore a bad custom. But there were cases in the texts where the emperor allowed such a conflicting custom to exist and in effect granted an implied privilege excepting the custom from the general rule. This shows that it was possible to rebut the presumption that a conflicting custom was bad. But what if the custom grew up after there were emperors who could grant such exceptions? Bartolus argues that the rule of Justinian's law must have invalidated only customs already in existence. So far as later customs are concerned, they can

9. W. Engelmann, *Die Wiedergeburt der Rechtskultur in Italien durch die wissenschaftliche Lehre* 196 (1938).

10. P. Stein, *Bartolus, the Conflict of Laws and the Roman Law*, *Multum non Multa: Festschrift für Kurt Lipstein* 251 (1980).

11. *Code Just.* 6.23.29, 31; cf. *La. Civ. Code art.* 1581.

be valid, provided that the presumption is rebutted that, since they contradict the imperial law, they must be bad. In the instant case, Venetians know their own needs best. If they feel it unreasonable to expect five citizens to stop their business to witness a testament and think they can manage with only three, then such a rule is valid.

In this way Bartolus turned the Roman rule on its head. But it is important to note that in doing so, he observed the conventions of Roman law itself. That law provided the grammar for all arguments of general jurisprudence. Such argument only carried authority if it purported to bring out what was latent in the Roman texts, even if it was not so expressed. So Bartolus and his followers created what was effectively a new law out of the old Roman law, and because of its general acceptance, it was called *ius commune*, the common law of Europe. When, for example, a sixteenth-century Scottish statute refers to "the common law,"¹² it means this law and not the English common law.

The Bartolists tended to treat all law as written law; so, in effect, a local custom was only respected if it had been put into authoritative form such that it could then be subjected to the techniques of textual interpretation developed by the commentators of Roman law.

In a true unwritten customary system, the theory is that the rules themselves are fixed by traditional practice, but no particular verbal formulation of that practice is final or authoritative, so that the rules can continuously be re-formulated to make them fit new circumstances. This is how the English common law is supposed to have developed. The common law attorney feels more comfortable when he can cautiously express an old rule in new words that will make it applicable to a new situation while still keeping it recognizably within its earlier history. On the other hand, he tends to treat a statutory text in the way he treats other formal documents, such as a deed of conveyance or a testament, with scrupulous attention to the language used. As a result, statutes tend to be drafted like conveyances.

12. 1583, cap. 98. This ambiguity in the meaning of the phrase "common law" was possibly exploited by Edward Livingston in an unreported case before Judge J.B. Prevost of the Superior Court of the Territory of Orleans in November 1805 (for the date, G. Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* 225 (1975)). The second organic Act of Congress for the Territory of March 2, 1805 (Statutes at Large II 322, (R. Peters ed. 1854)) incorporated by reference the provisions of the Northwest Ordinance of 1787, which required "judicial proceedings according to the course of the common law," although the Act also specifically excluded rules of succession to property and authorized the continuance of existing local laws not inconsistent with its provisions. Livingston's argument that "common law" should be understood as "common law of Louisiana" and therefore as the Roman Civil law was accepted by the court; W. Hatcher, *Edward Livingston: Jeffersonian Republican and Jacksonian Democrat* 117-19 (1940); cf. C. Hunt, *The Life and Services of Edward Livingston: An Address* 16 (1903).

The civil law attorney, by contrast, is only really at home with written law, that is law formulated in an authoritative text which he can subject to the techniques of interpretation. There were procedures for discovering a custom by inquest, but increasingly the only customs which professional lawyers recognized were those that had been put into written form. Even private compilations that were not officially authorized acquired quasi-official status, and the laws they evidenced survived when other neighbouring customs, which had not been so compiled, disappeared. Thus Saxon law, which was the subject of an official collection by a thirteenth-century knight, the *Sachsenspiegel*,¹³ resisted Romanization when other Germanic customs succumbed. Later, it was the movement to "codify" the French customs in the sixteenth century¹⁴ which ensured their survival to the end of the *ancien régime*.

This tendency of professional judges to prefer written to unwritten law and to turn to academic authority to guide them was strengthened by the procedure they adopted.¹⁵ This was the Romano-canonical procedure, which had been developed in the church courts. It placed the whole case in the hands of professionals, and all lay participation, such as the remission of fact-discovery to a jury, was excluded. As a result, it was no longer necessary to have a "set-piece" trial, with the parties and their respective witnesses confronting each other in oral battle. Instead there would be a series of meetings with all the proceedings recorded in writing. The legal issue emerged as the facts were discovered, and in regard to fact-discovery a different epistemology applied from that of the adversary procedure. Facts were discovered in the absence of the parties and their representatives. Witnesses were not subject to public examination and cross-examination. It was thought that they would be more likely to tell the truth if they were examined in private by a single judge who then committed the evidence he obtained into a written narrative. This narrative was sent to the whole court, which discussed the legal issue that the facts revealed. After the initial proceedings, there was little interaction between bench and bar, and in some countries, such as France, the judgment was given without any reasons for it being declared.

This procedure had two important consequences. First, the parties' advocates had to anticipate what evidence would emerge and what legal

13. See A. Watson, *supra* note 1, at 38. For a detailed account, see Harding, *Regiam Majestatem Among the Medieval Law-Books*, [1984] *Jurid. Rev.* 97, 101.

14. Dawson, *The Codification of the French Customs*, 38 *Mich. L. Rev.* 765 (1939).

15. J. Dawson, *The Oracles of the Law* 273 (1968); R.C. van Caenegem, *International Encyclopedia of Comparative Law* Vol. XVI 2.28; P. Stein, *Safety in Numbers: Sharing of Responsibility for Judicial Decision in Early Modern Europe*, *Diritto e Potere nella Storia Europea* (Atti IV congresso internazionale della società italiana di storia del diritto) 211 (1982); [1982] *Jurid. Rev.* 186; cf. P. Stein, *Legal Institutions: The Development of Dispute Settlement* 34 (1984).

issues it would produce, and as a result their written briefs tended to be dissertations ranging over the whole area of law, with citations directing the court to the best available commentaries. Secondly, the procedure required a much larger number of judges than, for example, a system using juries, since there was more work to be done. Instead of leaving the time-consuming fact-discovery to laymen, the judges had to do it themselves. Furthermore, appeals are not generally possible from the verdict of a lay jury, but all professional decisions are subject to review by a higher court. All courts therefore had many judges and, in accordance with the idea of "safety in numbers," they deliberately emphasized that all decisions were made by the court as a whole and were not the responsibility of individual judges. Thus, the bureaucratic nature of the civil law procedure encouraged judges to disguise their personal contributions.

THE PERIOD OF THE USUS MODERNUS

In the sixteenth century a number of factors appeared which altered the picture with regard both to the role of the courts and to the function of the jurists. On the one hand, the various nation-states began to assert what they called their individual sovereignty. This meant that their supreme courts saw themselves as exponents not of the *ius commune* but of the particular law of the state. They could no longer turn automatically to the Roman law, as adopted by the Bartolists, to fill gaps in the law. The *ius commune* might be received or it might not, depending on the suitability of the rule in question to the needs of the state; and this decision was the courts'.

On the other hand, the academic study of law was affected by the gradual influence of humanist ideas.¹⁶ Humanists were in the first place concerned about the form of law. They showed up Justinian's *Corpus Juris* for what it was, a Byzantine mosaic composed of much more ancient materials, arranged in a confused jumble. The humanists began to rearrange those materials in a more coherent and systematic form. It was at this time that Justinian's Institutes, hitherto regarded as a mere students' nutshell, became the object of special attention as demonstrating how private law could be seen as a system with a relatively

16. M. Villey, *La formation de la pensée juridique moderne* 507 (4th ed. 1975); V. Piano Mortari, *Diritto Logica Metodo nel secolo XVI* (1978); M. Reulos, *L'influence des juristes humanistes sur l'évolution du droit en France (enseignement et pratique) au XVIème siècle et au début du XVIIème siècle*, *La formazione storica del diritto moderno in Europa* (Atti III congresso internazionale della società italiana di storia del diritto) Pt. I 281 (1977).

simple structure.¹⁷ By stressing the rationality of the civil law as a system, the humanists sought to demystify it.

The humanists also exploited the inherent ambiguity which the word for "law" has in every European language except English. They argued that the subject of a legal system is the Latin *ius* or French *droit*, not in the sense of objective rules, but in the sense of subjective rights attaching to individuals powers which they could assert through the legal system. But once the legal system is perceived as a set of subjective rights rather than as a set of rules, there is no place in it for procedural rules. Law must now be distinguished from procedure. Substantive law is concerned with rights and duties, and procedure becomes the subject of adjective law.

Thirdly, the humanists stressed the connection, which had been played down by the Bartolists, between the law of the Roman texts and the circumstances of ancient Roman society at different periods. Their main interest was academic, and they were interested in the legal texts primarily for the light they threw on ancient culture. But by this emphasis on the relation between law and a particular society, the humanists supported the argument that Roman law could not be applied *in toto* in their own time and that each nation receives as much or as little of it as is suitable for it.

These trends did not destroy the *ius commune*, or the Bartolist school which created it, but they introduced new uncertainties into the practice of the civil law. It became more difficult to predict how the professional judges of the national supreme courts would react to the arguments put to them. The problem was not a lack of authorities but rather a superabundance of authorities. The Bartolists tried to overcome this problem by developing the doctrine of "the common opinion of the doctors," the lowest common multiple of juristic opinion on the *ius commune*. What everyone wanted to know, however, was whether the judges would follow that opinion. Practitioners needed a guide to the practice of their particular court, and judges needed to show that their judgments were based not on whims but on accepted principles.

To meet these needs, collections of court decisions began to appear, and a whole new genre of legal literature was born, which the recently discovered art of printing was harnessed to disseminate. Until recently legal historians have overlooked the large number of printed series of civil law reports from the sixteenth to the eighteenth centuries,¹⁸ and

17. P. Stein, *The Fate of the Institutional System*, Huldingsbundel P. van Warmelo 218 (1984).

18. See, e.g., F. Lawson, *A Common Lawyer Looks at the Civil Law* 70 (1955). "Law reports came late in Civil Law countries. Outside France they hardly existed before the last hundred years. In France itself they really date from the Revolution . . ." This is quite untrue. Cf. Stein, *supra* note 3, and the authorities cited therein.

only now are we appreciating their importance. The earliest reports were made by judges who wanted to show that, despite the official secrecy that surrounded their deliberations, their judgments were rational and based on authority. One of the earliest, Georges Louet,¹⁹ a judge of the *Parlement de Paris*, grouped several decisions together with an accompanying explanation that "the reason was such and such" or that "what we can understand from them, is so and so." Whether the reports were made by judges or by advocates, the overriding motive seems to have been to prove that the court in question adopted a consistent practice—consistent with itself and consistent with a proper choice among relevant authorities.

What was the status of this forensic practice? Should it be regarded as a source of law? To justify its existence, the jurists turned to Bartolus and his doctrine of custom. They argued that each state, when it received as much of the *ius commune* as it deemed appropriate for its needs, created a custom. The only body that could declare authoritatively what a state received and what it did not was its supreme court, so that each court by custom created a different variant of the *ius commune*. In this way what had been a common version of Roman Law gave way to Roman-Dutch law, Roman-German law, Roman-Spanish law, and so on.²⁰ Scholars began to make collections of abrogated or rejected laws of the *Corpus Juris*. The evidence was in the reports.

These reports were, of course, a form of case law, but it is a mistake to regard them as having the same function as reported cases in the common law.

In England the king's court superseded local courts much earlier than elsewhere in Europe. The jurisdictions of the feudal courts and even of the the church courts were limited, and in most cases the king's courts offered a common law for every Englishman, wherever he happened to live and whatever his social status. Unlike other customary systems, this law was taught and developed scientifically, not in the English universities, it is true, but in the Inns of Court which effectively functioned as a legal university.

But this law remained in theory unwritten, a set of rules that were gradually revealed as successive generations of judges pulled back the veil under which they had been lurking. They existed, if anywhere, not in the practices of everyday life but in the "bosom of the judges." Because of the procedure which used the jury for fact finding and did

19. J. Dawson, *supra* note 15, at 315.

20. K. Luig, *Der Geltungsgrund des Römischen Rechts im 18 Jahrhundert in Italien, Frankreich und Deutschland*, *La formazione storica*, *supra* note 16, pt. II, at 819; Luig, *The Institutes of National Law in the Seventeenth and Eighteenth Centuries*, [1972] *Jurid. Rev.* 193.

not allow appeals from jury verdicts, the number of English judges was small; they became an elite group who assumed the status of father-figures, the oracles of the law. The law they declared was essentially open-ended. It had no existence as a body of material distinct from what the court decided. Academic treatises were of value only in so far as they reflected what went on in court and discerned the direction that the judges were giving to the growth of legal doctrine. That doctrine was still expressed in terms of remedies rather than rights. What a man could do in law was indicated only in terms of the different forms of action available to him.

Since the common law existed only in the decisions of the judges, they could have been free to develop it as they wanted. To prove their consistency, however, they imposed on themselves the doctrine of *stare decisis*. But this doctrine applied only when the relevant facts of the instant case and the precedent case were the same. As a result, the law reports for common law became increasingly pre-occupied with facts, with the assumption that rules to be derived from the decisions are of limited scope, and with the idea that the judges have a personal responsibility for what they decide, which has much to do with their prestige as individuals.

The civil law, on the other hand, was considered to be contained in recognized texts, whose mysteries were expounded by the commentators. It was a recognized body of law, even when it was not reflected in current court practice. There were "elegant" treatises on pure Roman law as well as "forensic" treatises on the law in action.²¹ It was not the jurists but the judges who were on the defensive; they were expected to prove that their practice, in choosing among the various academic authorities presented to them, was respectable and able to withstand rational scrutiny. What mattered was not so much what they decided but how they approached the legal issue. Thus, civil law reports often did not mention the facts of the case. They functioned as justifications of court practice in light of juristic critique, and they justified decisions by citing the relevant texts and commentators that were utilized to reach them. Since what mattered was what rules the court as a whole adopted, the views of individual judges hardly counted. Civil law judges saw themselves as bureaucrats rather than father-figures, as fungible persons who were readily replaceable.

This deference of the judges to the jurists is well illustrated by a procedure which became wide-spread in Germany, the *Aktenversendung*.²² Many courts adopted the practice of dispatching the record of a case to a university law faculty with a request for its collective opinion

21. Jolowicz, *Utility and Elegance in Civil Law Studies*, 65 L.Q. Rev. 322 (1949).

22. J. Dawson, *supra* note 15, at 200.

on the legal issues involved. The professors were not members of the court and had no formal powers in the matter, but by custom the courts held themselves bound to follow their opinions. It was as if the judges wanted to avoid responsibility for their own decisions and to hide behind the collective and impartial opinions of the law professors. The reports thus emphasized the consistency of the decisions with academic opinions. The decisions "acquired significance only after they had been filtered through the minds of learned authors and assigned a proper place in a setting of organized legal doctrine."²³

In the enterprise of directing the future course of that doctrine, the judges were thus the junior partners to the jurists. This was less marked in France, where the judges of the *Parlements* had political pretensions, than in Germany, but it is generally true. Only the jurists could see the significance of a legal decision in relation to the system as a whole, and increasingly in the seventeenth and eighteenth centuries, the jurists emphasized the presentation of the civil law as rational system whose individual parts fit together into a coherent whole.

CODIFICATION

It was the jurists who thus prepared the ground for the codification movement of the eighteenth century. But that movement was, in part at least, inspired by the layman's suspicion both of jurists and of judges and by a popular desire to weaken the power of both groups.²⁴ The jurists, it was felt, had a vested interest in maintaining the complexity of the sources of law, since only they could indicate the narrow paths between the marshes of conflicting doctrine. The judges, it was believed, exploited the same complexity to justify any decisions they wanted to reach. A code, worded in simple, straight-forward language, would, it was hoped, both eliminate the need for academic commentaries and at the same time reduce the discretionary power of the judges.

Of course the codes did not achieve these laudable aims. The French Civil Code contained several general rules, taken from the jurist Pothier, but omitted Pothier's explanations and illustrations, leaving to the courts their application to particular cases. Before codification the judges had too much discretion because of the profusion and complexity of the law. Now the very simplicity and generality of the code articles left the judges almost equally wide discretion. Portalis, the principal draftsman, could only hope that as long as the judges were "imbued with the spirit" of the code,²⁵ they would apply its articles predictably.

23. *Id.* at 231.

24. P. Stein, *Legal Institutions*, *supra* note 15, at 97.

25. *Discours préliminaire du projet de code civil*, para. 9, in *Loché, La législation civile commerciale et criminelle de la France*, I. 258 (1827).

In form, the codes made a dramatic impact on private law, apparently wiping the slate clean and initiating an entirely fresh start. However, the actual break with the past was less sharp than it appeared. Lawyers realized that the code articles in many respects synthesized the practice of the pre-code period, and they turned to the sources of that period to elucidate the code. The return of *émigré* lawyers after the defeat of Napoleon brought back to the profession many who were not sympathetic with the code's political aims and felt more at home with the old law. Among them was the famous gastronome Savarin,²⁶ who became a judge of the *Cour de cassation* and alleviated the boredom of court work by writing his masterpiece on the Physiology of Taste.

After they got over the initial shock of having all the private law in one compendium, intelligible to a layman, both judge and jurist happily resumed the traditional roles they had performed during the pre-code law, with the jurist as senior partner and the judge as junior partner. Just as the judge had relied on the jurists to guide him when there was too much law, so now he turned to the jurists when there was too little; and the jurists looked back to the traditional learning to provide the missing detail.

The first multi-volume commentary on the code, that of Toullier, began to appear as early as 1811.²⁷ It was a revival of "doctrine," which seemed to have been buried under the weight of codification, and its appearance was greeted by Napoleon, who thought he was done with commentaries, with surprised irritation. Although these commentaries were arranged in the new order, they were full of references to the pre-code sources—but to the juristic commentaries rather than the old reports. The latter were now far less relevant, and tended to be ignored. Reports of new court decisions were, however, collected and published in the old way, and they too stressed continuity with the old law. That this was officially approved is confirmed by the encyclopedic works of Philippe Merlin, *procureur-general* of the *Cour de cassation*. As Dawson puts it: "He was immensely learned in the law of the old *régime* which had supposedly been supplanted," and the court relied on him for guidance through "the great empty spaces around the high superstructure of the Civil Code."²⁸

The codes themselves were regarded as juristic treatises, from which the footnote references had somehow been omitted. Indeed the draftsmen of some later nineteenth-century codes, based on the French model,

26. G. Hardwicke, Jean Anthelme Brillat-Savarin, [1984] *The Law Society's Gazette* 3600.

27. J. Charmant & A. Chausse, *Les interprètes du Code Civil, Le Code Civil 1804-1904: livre du centenaire* 144 (1904).

28. J. Dawson, *supra* note 15, at 383.

such as the Argentine Civil Code of 1869,²⁹ characteristically accompanied their texts with explanatory footnotes and references in the manner of the medieval Gloss. If we fail to view the codes historically, we risk exaggerating the effect of codification on the civil law.

Recently much emphasis has been placed on the importance of procedure and methodology in characterizing a system as civil or common law.³⁰ However, methodology has a much greater impact on a legal system in its formative periods than when its main institutions have been established. We should bear this in mind when considering the situation of the Louisiana Civil Code.

The French Civil Code was drafted in the spirit of the Revolution; it was presented to the world as a new beginning, as marking a clean break with the past. In recently colonial Louisiana, however, the ideology was not the same. Those concerned with the law were hardly in full sympathy with the ideals of the Revolution; they wanted in many respects to maintain the status quo. Fashion and political change demanded an authoritative statement of the law. The first code of 1808 looked like the French Code in style, although it contained some Roman law thought relevant to Louisiana which was not in the French code, such as the rules of public rights on the river banks (articles 452 and 456), the sale of a hope (article 2451), and the action for things thrown onto the street (article 177). In 1817 the Louisiana Supreme Court squashed any radicals who might have thought that their code should be treated as a new beginning by holding that the old law was still in force, unless it was actually inconsistent with the code.³¹

The problem for the developing Louisiana law in the nineteenth century was the absence of jurists who could make it their special concern to monitor the application of the law and keep it on course. There were, of course, capable lawyers such as Edward Livingston, whom my predecessor Sir Henry Maine in 1856 called "the first legal genius of modern times,"³² but, although they drafted legislation, they could not devote the time to the continuous commentaries on its application which were required. Continental commentaries were imported but they gradually became less relevant than they had been in the colonial period. So the commission for the 1825 code back-tracked and added a good deal of detail to flesh out the general rules in the manner of a juristic

29. Wholly drafted by D. Velez Sarsfield; see Carriò, *Judge Made Law Under A Civil Code*, 41 *La. L. Rev.* 993, 995 (1981).

30. Osakwe, *Cogitations on the Civil Law Tradition in Louisiana: Civil Code Revision and Beyond*, 52 *Rev. Jurid. U.P.R.* 179, 187 (1983).

31. *Cottin v. Cottin*, 5 *Mart. (o.s.)* 93, 94 (*La.* 1817); A. Yiannopoulos, *The Civil Code of Louisiana*, in *Louisiana Civil Code* xiii (West ed. 1985).

32. *Roman law and legal education*, *Cambridge Essays* 17 (1856), reprinted in Maine's *Village Communities in the East and West* 330, 360 (enlarged 3d ed. 1876).

commentary. Maine described the Louisiana Civil Code of 1825 as "of all republications of Roman law, the one which appears to us the clearest, the fullest, the most philosophical and the best adapted to the exigencies of modern society."³³

An example is the law of formation of contracts. The French Code, which was followed in the Louisiana Civil Code of 1808, contained nothing about offer and acceptance except a broad rule, derived from Roman law through Pothier, that there must be agreement. Whether or not there is an agreement in a particular case is thus a question of fact, and in principle the French courts are left with wide discretion to find that the parties have agreed or not.³⁴ When perplexed, they can turn to juristic discussions. The Louisiana Civil Code of 1825, however, contains a number of rules about offer and acceptance.³⁵ They are mainly taken from Toullier.³⁶ But these rules look rather like the common law rules relating to the formation of a contract, and that made it easier for judges to turn to those rules for further guidance. After all, jurists such as Sir William Jones were saying that consent is consent the world over and that Pothier's doctrine of contracts was "law at Westminster as well as Orleans."³⁷

The compilers of the Louisiana Civil Code of 1825 not only added more detail, they also included explanatory comment. They made it clear what parts of the old law were no longer in force, and they included explanations of the reasoning behind the matter that was retained. The code was no longer addressed to the ordinary citizen, but to advocates and judges; it had become technical. Left to themselves, the judges

33. *Id.*

34. B. Nicholas, *French Law of Contract* 17, 59 (1982).

35. According to Maine, *supra* note 32, "The most important chapters, including all those on contract, are entirely from his [Livingston's] pen." Cf. C. Hunt, *Life and Services of Edward Livingston*, *supra* note 12, at 26: "His part of the work was largely on the subject of conventional obligations." Since he is the first signatory, Livingston was probably the author of the Preliminary Report of the Code Commissioners dated February 13, 1823, reprinted in *Louisiana Legal Archives I lxxxv-xcv* (1937), which announced that the commissioner working on a Code of Procedure (probably Livingston since he had drafted the 1805 code of practice) was "advanced in several titles of the third book" of the Civil Code.

36. Pascal, *Duration and Revocability of an Offer*, 1 *La. L. Rev.* 182 (1938); Comment, *Contracts By Correspondence in Anglo-American, French and Louisiana Law*, 9 *Tul. L. Rev.* 590, 599 (1935). The relevant passages are Toullier, *Le Droit civil français suivant l'ordre du Code*, Liv. III, Tit. III, chap. II, paras. 24-34. At the end of para. 24, he cites a decision of the Cour de cassation of 4 July 1810, on the question of whether an offer made to several persons can always be accepted by some only and not the others (answer: not if the offeror showed that he only intended to be bound if all the offerees accepted.) Pascal points out that, in regard to certain rules, Toullier cites with approval the Prussian *Allgemeines Landrecht* of 1794.

37. Sir W. Jones, *Essay on the Law of Bailments* 29 (2d ed. 1804).

naturally assumed a more prominent posture. They filled the vacuum left by the absence of jurists and assumed the oracular role of their colleagues in the common law states. The reports began to include judicial dissents which are, in general, alien to the civil law.

The introduction of civil juries was inevitably accompanied by essentially common law procedure and rules of evidence, and they clearly affected the way the law was applied. But they could not of themselves make Louisiana a common law state. After all, in England civil juries were effectively abolished in most cases fifty years ago,³⁸ and after a suitable interval, the law of civil evidence was changed³⁹ so that almost everything is now admissible if the judge considers it relevant. But these changes have not impaired the status of English law as a common law system.

If the use of purely formal criteria is the correct way to characterize a legal system, it should be applicable to public law as well as to private law. But this can lead to odd results. In France the civil code does not apply to any transaction involving the state or its agencies, and the ordinary courts have no jurisdiction in such cases. In the last two centuries, however, the French administrative courts, headed by the *Conseil d'État*, have developed a series of rules which offer protection to the individual against the state and which are the envy of most other countries. There is no code and few statutes in this area; the development of French administrative law has been based almost entirely on case law.⁴⁰ French public lawyers pride themselves on having a different ethos from that of the "privatists;" and their technique recalls that of the common law in its formative period. In the same period in the United States, the Constitution was subjected by the Supreme Court to an elaborate evolutionary exegesis, which in recent decades at least, has been very much influenced by academic discussions and commentaries.⁴¹ The Court's technique with the text of the Constitution recalls that of the civil law rather than that in which the common law has developed. But for all that, France is still a civil law country, and the United States still a common law country.

38. Administration of Justice (Miscellaneous Provisions) Act, 1933 and Rules of Supreme Court, Order 36, restrict the right to trial by jury in civil cases to defamation and similar issues; cf. *Ward v. James* [1966] 1 Q. B. 273.

39. Civil Evidence Act, 1968.

40. L. Brown & J. Garner, *French Administrative Law* (3d ed. 1983); R. David, *French Law: Its Structure, Sources and Methodology* 103 (M. Kindred trans. 1972).

41. The practices of submitting written briefs, especially in appeal cases, and of providing the judges with law clerks to assist in analyzing them, have together created a more academic tone (a kind of *trahison des clercs*?) than that in most other common law countries, where the legal arguments are still presented orally and the judges have no clerks.

Looking at structure and substance rather than procedure and method, I find it difficult to regard a private law that includes predial servitudes, usufructs, redhibition in sale, necessary deposit, mandate, stipulation for a third party, and management of affairs as other than a civil law system.

The point I have tried to make is that, in the absence of jurists performing their traditional watch dog role, the drift towards the common law for over a century and a half after the end of colonial rule was almost inevitable. But recent decades have seen the advent of Louisiana jurists who are ready to monitor court practice, to relate decisions to the rest of the system, and to counteract the tendency of all courts to see their cases in isolation. They can look ahead and generally plot the direction of Louisiana private law as a whole. They cannot reverse the drift away from the civil law overnight, but I believe that if they rise to the challenge, they still have time to do it. But my time is up.

