JUDGES, LEGISLATORS AND PROFESSORS

CHAPTERS IN EUROPEAN LEGAL HISTORY

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THE MASTERY OF THE LAW: JUDGES, LEGISLATORS AND PROFESSORS

SOME FACTS

The historical facts are not difficult to summarise. Various European countries have seen the control of the law pass through various hands, i.e. those of the judiciary, the legislature, or the schools. This is not to say, of course, that there were periods or countries where one such controlled the law exclusively: there has always been some case law, some legislation and some writing about legal matters. Only the fully feudalised era of say the tenth and eleventh centuries on the continent was almost totally devoid of legislation and legal learning. Certain periods and countries, however, have witnessed so marked a preponderance of one of these groups of people that it could be considered the essential 'maker of the law'. Thus it is clear that the common law was judge-made, that medieval and modern Roman law (which could be called the neo-Roman law of western Europe) was professor-made and that an enormous mass of French revolutionary law was legislator-made.

The reader will notice that there is here a connection with the traditional theory of the 'sources of the law'. These, as every undergraduate knows, are custom (as fixed and formulated by judgments), legislation and jurisprudence. However, 'custom' and 'case law', 'legislation' and 'jurisprudence' will not be treated as abstract intellectual entities, but investigated as the voices of certain groups of

people expressing particular social and political forces in society. Thus, where most history books are content to describe the ascending role of legislation or the declining role of case law at certain periods in certain places, here the following questions will be asked: who were these legislators and who were these judges, what did they stand for and what was their contribution to the political power-game that is endemic in every society? Instead of seeing 'sources' vying with each other, people, pressure groups and classes will be seen struggling with each other for power: controlling the law is the way to control society. Some readers may find that this is flogging a dead horse, yet the traditional law books invariably discuss the respective importance of the 'sources' of the law, without asking who the people are who use, or manipulate such 'sources'. Here is an example of the way many lawyers see the struggle of influence in abstract terms taken from a well known work by W. Friedmann, who writes the following concerning the Savigny-Thibaut controversy (see above): 'Behind the practical issue of codification stood the larger issues of reason against tradition, history against renovation, creative and deliberate human action against the organic growth of institutions.'[1] And Roscoe Pound treated the common law as if it were a person who triumphed over a variety of enemies. These were the jurisdiction of the Church in the twelfth century, and the Renaissance, the Reformation and the threat of a German style 'Reception' in the sixteenth. The seventeenth century established the doctrine of the supremacy of the law, which was developed to its ultimate logical conclusion in America in the early nineteenth century.[2] Professor Hanbury, the eleventh holder of the Vinerian Chair at Oxford, also viewed English history as a combat between common law and civil law and stressed the important 'part played by Blackstone's *Commentaries* in the final victory of

the English common law and equity over the civil law as arbiters of the destiny of the English legal system'.[3] So many triumphant battles fought by a system of law! Why this abstract anthropomorphism, instead of asking the identity of the people who fought these battles and used the common law to protect their interests? Who has ever seen a legal system fight and triumph over its enemies? When Professor Lawson, in an otherwise most remarkable book, talks of 'certain forces at work', he does not mention them by name and speaks in terms of mysterious 'types of mind' rather than of people and social groups: 'There are', he writes, 'certain forces at work in the civil law which are not usually present in the common law and which have produced a type of mind favourable to codification and these factors and type of mind are perhaps more important than codes.' He goes on to say that the history of precedent differs in the civil and the common law and rather obscurely concludes: 'this historical difference is related to the presence or absence of the forces making for the introduction of codes'.[4] Here the task will be to try and find out which concrete forces were agitating for legislation and codification at well defined moments of history and with what precise social aims in mind.

But first a summary of the main facts. In Italy, where the learned law and legal learning originated, the professors who held the key to the true understanding of the *Corpus Juris* were pre-eminent from the twelfth century to the end of the *ancien régime* and the advent of modern codes. In England, from the second half of the twelfth century down to the great reforms of the nineteenth, the judges made and controlled the common law, regarding legislation as an interference and a nuisance and bothering very little about jurisprudence. In Germany customary law as 'found' by local and regional benches ruled supreme in the Middle

Ages, to be replaced from the sixteenth century down to the Civil Code of 1900 by the dominance of the learned jurists, protectors and expositors of Justinian's holy book. In France the judiciary, the legislature and the authors have lived for most of the time in a peculiar state of equilibrium, neither ever completely dominating the others. Of course, custom as defined and fixed by the French courts was important, but a mass of customary law was also fixed and given force of law by the monarchy. This same monarchy was the supreme legislator and from Philip II Augustus onwards there was a steady stream of ordinances, which became really considerable from the sixteenth century onwards and sometimes resulted – in the days of Louis XIV and Louis XV – in partial codifications of lasting value. However, this royal legislation had to be registered by the Parlement of Paris before it became law and, although the king had the last word, his government had to take the 'remonstrances' of his eminent judges into account. Nor was the contribution of the jurists negligible. From the twelfth century onwards, when Roman law teaching started in Montpellier, there was no century without some leading jurist working on Roman law or customary law or both, and some of their writings – those of Charles Dumoulin, Jean Domat and Robert Joseph Pothier – had a direct impact on the *Code Civil* of 1804: jurisprudence was always something to be reckoned with in French legal history. In the Dutch republic we find yet another situation. Here, unlike in France, medieval customary law had not been fixed in writing and promulgated or 'homologated', nor was there any extensive legislation, certainly not at the general level of the whole republic of the United Netherlands, which was too federal for that. So the vacuum was filled by jurists, first and foremost amongst whom was Hugo Grotius, who created a new legal system out of an

amalgam of old Dutch customary elements and the learned law of the civilians. This brain-child was appropriately called Roman-Dutch law. It was never proclaimed or given legal status, certainly not in the whole of the republic which lacked the central authority to do this, but not even in the province of Holland: it received its recognition merely because of its intrinsic qualities and its acceptance by practising lawyers and judges.

This extraordinary diversity, these striking changes from one country to the next, all within the western world, are surely a phenomenon that raises many questions, and none more intriguing than why it all happened. What was the factor that caused such amazing shifts in the position of judges, legislators and professors within this single orbit? It is to this question that attention will now be turned and certain hypotheses formulated and checked against the facts.

EXPLANATIONS: THE 'NATIONAL SPIRIT'?

A first answer, and possibly the one that comes to mind most easily, is to blame this legal divergence on the diversity of Europe's nationalities. The answer would then be that the situation differs from country to country because the character of the people, the national spirit or genius, is so varied: every nation has its own character and this produces a different national approach in legal matters as in so many others. To take a more concrete example, the Germans had a theoretical bent and the English were pragmatists, which led in one case to a law based on the *Corpus* and dominated by professors, and in the other to a law based on precedents and dominated by judges. There are, however, some strong objections to this view. Nobody will deny that Germany has produced some great theoreti-

cal philosophers, but it is equally true that the Germans have proved themselves to be great technical inventors and gifted organisers with a thoroughly pragmatic approach. Besides, might not the pragmatic and the theoretical approach be consequences instead of causes? Are law and government the fruits of the national character, or is it the other way round? The latter view was expressed by no less an author than J. J. Rousseau, who wrote: 'Il est certain que les peuples sont, à la longue, ce que le gouvernement les fait être', i.e. the nations in the long run are what their governments make them.[5] If a legal bible and the learning built upon it are the basis of one's legal system, one's legal approach is bound to be bookish and theoretical. The cornerstone of modern German law was the *Corpus Juris* and its medieval continuation, because of a political decision that had nothing to do with national character. There was no special affinity between the law of the civilians and the 'spirit' of the German nation; the Germans were looking for a unifying legal element at a moment when they made their last attempt at political unity for four centuries. Up until the end of the Middle Ages, the Germans had shown no special aptitude for, or interest in, Roman law. The latter was quite patently the preserve of the Italians, who ran Roman and canon law as they ran the Church. It has been estimated that the medio-Roman law was produced by some 90% Italians and 6% Frenchmen, while Spaniards, Germans and Englishmen took about 1% each. It is striking how these 'national characteristics' appear to change with the times. The Italians lost their leading role in jurisprudence in modern times and Germany, whose medieval contribution had been inconspicuous, became prominent then, and in the nineteenth century even took the lead, so that all Europe had to learn German to read the great legal historians and Pandectists.

EXPLANATIONS: AUTHORITARIAN ROMAN LAW AND DEMOCRATIC ENGLAND?

A second hypothesis could be adopted to try to approach the problem from a different angle, that of some innate political bias of Roman law and certain ingrained national traditions. To put the hypothesis in less Sibylline terms: the idea would be that England and her law and constitution are democratic, while the continental tradition is undemocratic, authoritarian and absolutist, hence the success of Roman law (which, certainly since the days of the Dominate, was autocratic) on the Continent and its failure in England. Or putting it more briefly: 'democratic England rejected the authoritarianism of Roman law'. Many great historians, as is well known, have held the view that the civil law is incompatible with freedom. One quotation, from nobody less than Bishop Stubbs, the great Oxford medievalist of the nineteenth century, will suffice here. He wrote in a letter to the historian J. R. Green: 'The civil law ... has been one of the greatest obstacles to national development in Europe and a most pliant tool of oppression. I suppose that no nation using the civil law has ever made its way to freedom: whilst whenever it has been introduced the extinction of popular liberties has followed sooner or later.'[6] Let us check one by one the two points in our hypothesis. Is Roman law authoritarian? Is the English legal tradition democratic?

The first question is easily answered. Roman law at the time of Justinian had been imbued with oriental despotism for several centuries. The Empire was over-centralised and over-autocratic. The principles expressed in the famous phrases 'princeps legibus solutus' and 'quod principi placuit legis habet vigorem'[7] are eloquent enough, and so is

the theory of the *lex regia*, i.e. that in the past the Roman people had transferred their sovereignty irrevocably to their rulers. In the law of the imperial state, there is no trace of direct or indirect democracy. Certainly not in the late imperial Senate which was packed with the emperor's cronies and given to endless acclamations and exclamations such as 'Hail Caesar, through you we hold our honours, through you our property, through you everything'.[8]

The second question, as to whether the common law tradition is democratic, is more difficult to answer and I propose to have a separate look at various elements. Originally, and long afterwards, the common law was concerned with the feudal class of free tenants, for it dealt with the central question of feudalism: who ought to hold what from whom and for what service? Feudal law was not familiar with the Roman idea of absolute property rights, but was produced by the two-pronged idea that one held something (the real element) from somebody with whom one had established a special relationship (the personal element). This original English – or rather Anglo-Norman – common law was the law of a knightly class, and the royal court's main preoccupation was to keep peace between the king's military forces and to settle their disputes in a judicial way rather than have them at each other's throats over quarrels for land. Smallholders and burgesses had little to do with it and the unfree – in the twelfth and thirteenth centuries still a sizeable proportion of the population – were completely ignored, except for the writ of naifty, taken out by a lord who wanted the return of his runaway serf. It is clear, therefore, that the common law was not democratic in origin, but it was not autocratic either, since it was based on feudal custom, to which the vassalitic nexus was central. This relation was not based on one-sided subjection but on a free contract which created mutual

rights and duties. Even the king, the head of the feudal pyramid, had duties towards his men, had to respect their rights and was always obliged to take their counsel. If he did not, the tenants' *jus resistendi* came into play, and that this was not mere theory was well demonstrated in the days of King John. So this law of the military elite, the custom of the landowners, was neither authoritarian nor democratic, but oligarchic.

What was the political structure of historic England? As far as the king was a feudal overlord it was bound to be oligarchic, but as far as the king was a ruler, placed over his subjects by God's grace, it was monarchic and autocratic. This dual nature of medieval kingship, the *monarchie féodale*, to quote the title of C. Petit-Dutaillis' famous work, belonged to its very essence, and it is not surprising therefore that in the course of history one finds the two elements, the autocratic and the feudal, vying with each other. From the Conqueror to King John, the monarchic, authoritarian element prevailed (except for the interlude under King Stephen), but John overplayed his hand and the insurrection at the end of his reign ushered in a period of baronial revolts, while the rise of Parliament in the fourteenth and fifteenth centuries led to a condominium that owed more to the feudal than to the autocratic tradition – it was, of course, also influenced by new European ideas about representative forms of government. The late medieval parliament could in no way be described as democratic, since it represented only electors – in so far as it was elected – who belonged to the landed gentry and the urban leadership. In the sixteenth century autocracy had the upper hand again, but the oligarchy won the day in the seventeenth, and ruled supreme until the rise of democracy in the twentieth. The old theorists liked to represent the English constitution as a happy combination of monarchy,

aristocracy and democracy, in which the aristocratic element was the House of Lords and the democratic the House of Commons,[9] but it takes a lot of goodwill to see the representatives of the gentry and the ruling burgesses as a democratic element – a measure of goodwill which they could expect from their contemporaries, but is too much to ask from the more critical readers in our own day and age.

What about legislation in historic England? Was that democratic? The answer must be negative. The general public had no part in the legislative process. There was no referendum and even the more 'democratic' chamber of Parliament could by no stretch of imagination be considered to represent 'the people': not only did nobody below the 40 shilling freehold have the vote, but also the Lords, right through the nineteenth century, were always ready to scotch any democratic extravagances of the other House. Legislation was the task not of the people, but of the king in Parliament. And in the development of the common law it was less important than the patient work of the judges who were weaving its timeless and seamless web.

Was this 'judgment-finding' in the common-law courts and the other central organs of justice democratic? Again the answer on the whole must be negative, although some doors were ajar for ordinary people. Certainly in the English judicial tradition there was nothing like the mass assemblies of the Athenian democracy. Popular justice like the people's courts on the agora was unknown. Nor were the judges ever elected by the people. They were appointed from the ranks of successful serjeants at law, an intellectual elite who had gone through many years of training and success at the bar and whose recruitment was at certain times limited by law to the sons of the aristocracy and the gentry. There was, however, a popular element in the jury (even though it was limited to landholders), for the judges

had to put the important question of fact to them, at least in the common law courts, and this had to be done in terms that were understandable to the layman and free from the esoteric jargon that judges and serjeants used among themselves. Another democratic element was the openness of the proceedings, although it should not be forgotten that the dealings of the court were held in a very strange language – a medieval provincial French dialect – and were therefore quite inaccessible to all except a few dozen initiated. Also the very high cost of litigation to this day has been a severe hurdle for those who decide to take their case to law. Nor was justice easily accessible in geographical terms because of the excessive centralisation of the courts and their activities in London – one of the complaints the Puritan reformers wanted to tackle. Another criterion of the democratic nature of a legal system is, of course, its cognoscibility. On this point, the common law scored very badly, for it was and is uncodified, buried in a 'myriad of precedent, that wilderness of single instances',[10] and even worse, in the bosom of the judges who guarded the unwritten fundamental principles of the common law, against which not even clearly formulated statutes stood a chance – a situation remindful of the Roman patriciate who kept the *formulae* of the law secret. Might the justices of the peace have provided a democratic element? Hardly, since these traditional rulers of the countryside, administrators as well as judges, who dominated rural England until the elected County councils were introduced in the second half of the nineteenth century, were unpaid servants of the state, who, by this very fact, had to be recruited from the well-to-do leisured class (as the magistrates still are to some extent today), so that their oligarchic character is pronounced and evident. The conclusion must be that the profile of the historic common law

and its administration is clearly aristocratic or oligarchic, but not democratic.[11]

There was under Cromwell a short but highly significant period when a conscious attempt was made to democratise English law and a commission was set up to that end under the guidance of a famous common lawyer, Sir Matthew Hale (died 1676).[12] The Hale Commission, sitting in revolutionary times and keen on getting down to sweeping reform (at least some members were), launched into outspoken criticism of the existing state of affairs and made drastic plans for change, which included the following. The Commission found that the law was a hodge-podge, too vast to be known, self-contradictory, irrational and absurd, of difficult access and couched in barbaric language – hence the demand for formulation in 'plain English'. The Commission obviously liked plain speech as much as plain English and the lawyers who served and perpetuated this defective law shared its condemnation: they were 'vermin' and a plague on their land, 'this poor nation'.

There were not only recriminations, but also precise demands for reforms, which have a very modern ring. The abolition of tithes was requested (John Selden had shown that they were not imposed by divine right) and also the decentralisation of justice. Strong local courts were to be established and such county judicatures were to be staffed by elected laymen. Legal aid was to be organised for the poor, the illegible court hand was to disappear, as was imprisonment for debt, and civil as opposed to ecclesiastical marriage was to be introduced. It is interesting to reflect that today, more than three hundred years later, tithes have not yet been abolished (although the Office of Tithes will in fact take them all out of circulation one day), decentralisation has recently taken some timid steps forward, imprisonment for debt was abolished in the

nineteenth century (except in certain specific circumstances) and quite recently civil marriages in England have become more numerous than church weddings. The momentous demand that the law should be codified, with no scope being left for judicial interpretation, and that (as has been mentioned before) the 'great volumes of law would come reduced into the volume of a pocket book' so that there would be 'one plain, complete and methodical treatise or abridgment of the whole common and statute law to which all cases might be referred', was the voice of one clamouring in the desert.

Although in the long run some of these desiderata were realised to some extent, in the seventeenth century nothing came of them. Some people would say that this was because of shortage of time. But that certainly cannot be the reason, if one realises what sweeping reforms the French Revolution brought about in the same time-span of about ten years: when the political will is there, old institutions crumble as in a whirlwind and new improvisations arise every day. Other factors worked against the Puritans for it was not even as if the Restoration had to sweep away so many changes, since little had been realised in the years when the reformers were in power. Some of these other factors are not difficult to pinpoint: the leading lawyers (even in the reforming commission) did not want legal business, that from time immemorial had been conducted in London, to be transferred to the provinces, which would make their lives very uncomfortable indeed, while the well-to-do burghers, who were possibly the core of the Puritan movement, were afraid that a legal revolution might easily be the harbinger of a social revolution. They had not fought absolutism and defended their property against random taxation to see it fall into the hands of Levellers and Diggers.[13] The conclusion must be that the

common law was oligarchic rather than democratic, so that our second hypothesis must also be given up, for even if Roman law was autocratic, English law was not democratic, except during short and untypical episodes.

Before formulating a third hypothesis, I would like to come back to the autocratic character of Roman law, because I feel this contention is not so straightforward and obvious as it looks at first sight. That the Empire was an absolutist monarchy is clear enough, but the disturbing thing for the historian is that the success of Roman law did not automatically and necessarily lead to autocracy (and here I take issue with Stubbs). Is it not striking that the country where Roman law exerted the greatest influence in the centuries after its 'rebirth', northern Italy, was the country *par excellence* of the free cities and of the most advanced experiments in democratic government, especially in Florence, and that nowhere else was the autocratic power of the neo-Roman empire of the Ottonians, the Salians and the Hohenstaufen so utterly rejected?

To understand this one must penetrate somewhat deeper into the medieval way of using and citing venerable texts – and also, of course, realise that political institutions are the result of struggles for power and not of quotations from learned authors. The *Corpus Juris*, because of the medieval habit of citing phrases out of context, could be used in favour of representative forms of government as well as autocratic rule: in other words the *Corpus* could be bent in several directions. For example, it is true that Justinian said that the emperor's pleasure was law, but he also said, in a famous phrase, 'quod omnes tangit ab omnibus approbetur'. What better slogan could one wish to defend democracy, direct or indirect, than the line 'what concerns all, should be approved by all'? So public affairs, i.e. everything concerning the whole community, must be put to the test of

the approval of the whole community, or at least its chosen representatives! The snag with this much used quotation was that in the *Corpus Juris* it was not concerned with affairs of state at all, but with an institution of private law, the organisation of tutelage and more particularly the need to obtain the approval of all tutors for certain acts in the administration of the goods of a minor. It was also because the *Corpus* could be bent in several directions that the Italian lawyers could offer their services to emperors as well as communal governments (more about this in Chapter 4).

Before moving on to the third hypothesis, a last problem in connection with democratic law should be mentioned, i.e. the role of Greek law. It is a question that has received little attention from the legal historians – the one conspicuous exception being Professor Troje – although it forms one of the most intriguing aspects of European legal history.[14] Perhaps it has received so little attention because it concerns something that has not played any part in that history, and historians are understandably more inclined to write about what happened than what did not. Nevertheless, the absence of persons or institutions in certain periods, if one comes to think about it, can be amazing and significant. The absence, certainly in the Middle Ages but to some extent afterwards also, of western interest in Greek law, and especially the law of the Athenian democracy, is most intriguing. Language was not a barrier, for Greek scientific and philosophical texts were made available in Latin translations from the Arabic and later directly from the originals. Nor was it for lack of interest in Greek thinking, on the contrary: western scholars in successive waves have been fascinated by the treasures of the Hellenic and Hellenistic past. The causes of this blind eye for Greek legal thought and practice are not easy to assess and

deserve further research, but the following circumstances must have played a role.

There was no single collection in which the flower of Greek legal thought was brought together comparable to the *Corpus Juris* which made an inventory of all the best in Roman legal writing and was the starting point for the teaching of the glossators. Information on Greek law must be gathered from scattered rhetorical, historical and philosophical writings. The Romans were born soldiers and engineers, lawyers and administrators; in the intellectual field the law was their great legacy to the world. The Greeks certainly had interesting things to say about legal matters, and their experiments with democracy were highly remarkable, but their greatest contributions were elsewhere, in the arts and speculative thought.

Roman public law was useful to the rising monarchies of the later Middle Ages, because it was monocratic and authoritarian. It was also anti-feudal, not, of course, in the sense of a conscious attack on feudalism, which was unknown in Antiquity, but because its basic idea that all power derived from one central source was the antithesis of the dispersion of power over numerous centres, which was a conspicuous element of feudal society as it developed in Europe after the fall of the Frankish Empire. Roman law was a source of inspiration and a purveyor of ideas and arguments for modern states, each of which liked to proclaim itself 'an empire', as England did under Henry VIII.[15] The law of the Athenian democracy held no attraction for European monarchs.

The common law, essentially oligarchic and feudal, was incompatible with Roman law, but was equally incompatible with Greek democratic premises. It is not surprising therefore that England resisted the lure of Roman law,

notably in the sixteenth and seventeenth centuries, when some royal sympathy for the civil law was noticeable and when the civilians tended to be royalist, as the common lawyers tended to be parliamentarians. Had Greek law been known in Europe, the Puritans might have derived some inspiration from it, but this was not the case.[16]

The links between Roman law and continental absolutism are clear, and have sometimes been demonstrated with brutal clarity, as when Duke Charles the Bold conquered the Prince-bishopric of Liège *manu militari* and abolished its old customs to replace them by Roman law.[17] It is not surprising therefore that the attack on the *ancien régime* in the eighteenth century went hand in hand with an attack on Roman law, and attempts to create an original modern law in the shape of the 'law of reason'. Again it is worthy of notice that Greek law was not thrown into the great intellectual battles of the time. Its tone was possibly too popular for the professors, top civil servants and enlightened monarchs who were responsible for the successes of natural law. It stands to reason that the monocratic papal Church, supported by sycophantic jurists who did not hesitate to write 'papa Deus est', was greatly in sympathy with, and supported by, the centralism and monocracy of the *Corpus Juris*. The government of the Church was the first to espouse civilian doctrine and to undergo the highest degree of romanisation. It fought against feudalism – the bitter Investiture Struggle was directed at the feudal order as it had grown up in the preceding two centuries – and there was nothing that could give it the slightest interest in the law of the Athenians: the monarchic element left no room for democracy, least of all the direct democracy of the agora.

EXPLANATIONS: POLITICAL HISTORY

Thus we come to the third hypothesis in the search for an explanation for the different impact on European law of judges, legislators and scholars. However, before building up a theory for Europe, it might be prudent to try one out for the two countries mentioned especially at the outset of this discussion, England and Germany. As far as these two countries are concerned, my view is that the prominent role of the judges in the former and of the jurists in the latter was a direct consequence of the political history and the different institutions of the two countries. In other words attention should be focused on the structure of the state and the foundations of public law, resulting from these countries' different histories, as the ultimate explanation of the contrasting role of their judges and law teachers.

I believe that the eminent role of German jurisprudence from about 1500 onwards was the consequence of the following circumstances. In the first place the lawgiver was weak, in a country without an effective national monarchy or parliament: after the death of Frederick II and the *Interregnum* the kingdom had dissolved and political life had shifted from the nation to a mosaic of principalities and free towns. The judiciary was also weak, as there was no generally recognised, guiding bench for the whole country (the first attempt came with the *Reichskammergericht* of 1495), but only a mosaic of regional or local benches, enjoying a limited authority. Some prestigious urban courts, such as the *Schöppenstuhl* of Magdeburg, enjoyed a great following in large areas, but never came anywhere near a national impact. This dual weakness, and the disparity of innumerable archaic and unwritten local customs led to the 'Reception' of the 'common written laws', in an attempt to modernise the law in one great leap

forward. The direct and unavoidable consequence of the introduction of the *Corpus Juris* and its medieval accretions – a bulky body of learned books in Latin – was to hand over the law and its study and administration to the only ones who were trained to read, understand and explain Bartolus and Baldus, i.e. the cohort of learned lawyers with university degrees, led by the professors of Roman law: they henceforth held the key to legal science. It was fatal, for if the law is locked up in sacred books, it is the scholars who can read and understand them who are masters of the law; this was as true of Roman law and the civilians as of the Talmud and talmudic scholars. Established in the sixteenth, this situation lasted to the end of the nineteenth century.

Obversely I believe that the pre-eminence of English judges was the result of the following data. The law was not in the first place based on any one learned 'Holy Writ', hence it did not fall into the hands of a guild of scholarly jurists who had sole access to its bookish sources.[18] The central lawgiver, though a constitutional element to be reckoned with, often remained inactive. The legislation of even such a powerful king as Henry II is contained in a few printed pages of Stubbs's collection[19] and the first king since the Conquest to have a systematic legislative policy was Edward I; after him Parliament legislated in a haphazard way until the following great outburst under the Tudors. There was no comprehensive and continuous stream of legislation and, as is well known, the common law was firmly established before the days of Edward I. By contrast there was the strength and the continuity of the central courts, created by the monarchy, competent in first instance for a wide variety of cases arising over the whole kingdom. They acted with royal power behind them and were occupied by professionals who relentlessly continued to administer justice and to shape the law of the land even

through the Wars of the Roses – in a regular stream of judgments. These royal judges, whose pronouncements were authoritative throughout the land, shaped the common law in co-operation with serjeants and barristers and were at the same time its guardians. In England the law was what the judge said it was, in modern Germany the law was what the professor said it was.

After this introductory glance at Germany and England, it might be interesting to pursue the hypothesis further and extend it to other major countries. This may refute or confirm the idea that the relative importance of judges, lawgivers and professors depended directly on the political history and the constitutional structure of their respective countries. Before undertaking this historical-comparative inquest, we might – by way of a *captatio benevolentiae* for lawyers who are not usually drawn to historical speculation – have a quick glance at the present-day powers of our trinity. Very briefly the picture is as follows.

The lawgiver is dominant and all powerful in socialist, totalitarian regimes, where learned jurists count for little and the judiciary has to look over its shoulder at what the party wants. In western Europe, outside England, the codes and laws are in principle predominant, but case law is far from negligible, the judges are independent, and the great jurists exercise considerable authority.

The judiciary plays a leading role in England. It is the land of precedents instead of codes and even in those fields which are now covered by legislation, the judges still exercise a considerable freedom of interpretation of statutes according to the old rules of construction and in the light of the fundamental principles of the common law and of reason. The reader should be reminded of what has already been said about the exclusion theory and the modern construction of statutes, in case he should be

inclined to underrate the creative contribution of present-day English judges. Nor is the latter's invention limited to the construction of statutes. The most daring judges formulate theories which are based neither on statute nor on precedent and give protection to weak citizens purely on grounds of equity. A most striking example was offered by Lord Denning's notion of 'the married woman's equity', which allowed him to protect a deserted wife, who allegedly had an equity to remain in the house after the husband left her and could not be thrown out by building societies or banks or anyone else. This doctrine which, according to Lord Wilberforce, had no basis in law and was one of Lord Denning's 'great inventions', was run by the latter in the Court of Appeal for a number of years, until it came to the House of Lords, which had to reject it as long as the law was left unchanged by the legislature (which eventually changed the law in the sense of Lord Denning's ideas).[20] In the United States the role of the judges is paramount since they (and not only those of the Supreme Court) are the ultimate arbiters of the constitutionality of the laws.

The law faculties have little influence in socialist countries,[21] but jurists who are party functionaries can make themselves felt insofar as the party intervenes in the work of the judiciary. In the countries of what René David calls the 'Roman-Germanic family', the legal scholars, who are almost invariably professors (authors of multi-volume *Commentaires* or *Traités*, sometimes called 'élémentaire', which looks facetious on a work in ten volumes), exercise a potent influence on generations of students, barristers and judges. Some are also advisers in the *conseil d'état*, where the drafting of statutes is performed or controlled, and thus influence legislation in a direct way. In the common law countries the ideas, theories and books of learned jurists

and professors are not so numerous or voluminous, and they have little influence on the legislature and even less on the senior judges. A recent study has shown that the Law Lords in England, the highest judicial authority in the United Kingdom, seldom read theoretical works or professional criticism of their judgments in the specialised journals; not a single Law Lord said that he wrote with academics in mind, nor do they interact on a regular basis with them. Hence it is not surprising that only two of the active Law Lords indicated that they had ever consulted or written to an academic when in doubt in a case; on the contrary, some Law Lords indicated that they did not pay much attention to academic comment in any event.[22] In the United States the fact that some judges are elected (though this is not the case with federal judges) may occasionally lead them, even when they are law graduates, to take more notice of popular reactions than of learned opinion. However, it is well known that the leading law schools are a factor of importance in America's legal development.

It may seem odd at first sight that both in England and the Soviet Union, which are otherwise miles apart, the law faculties have so little influence. The explanation must be that in England case law and in the Soviet Union codes and statutes are so paramount that neither leaves much room for the influence of jurists.

Let us add some historical depth to this picture and ask the same question not with the present day in mind, but the historical situation. The answers will be straightforward and familiar to every legal historian.

Judge-made law is a common-law tradition. It withstood the zeal of codifiers and modernisers of the nineteenth century.

Professor-made law was clearly predominant, as has already been pointed out, in northern Italy in the second

Middle Ages, in modern Germany from the sixteenth to the nineteenth century and in Holland from the days of Grotius to the introduction of the French codes.

Lawgivers' law was clearly predominant in revolutionary and nineteenth-century France. The same applies to Belgium in the nineteenth century and one of the most famous apostles of the Exegetical School, which dominated doctrine in France and Belgium, was a professor in the University of Ghent, François Laurent (died 1887). This School drew its name from the Greek term *exegesis* which means exposition and interpretation, in particular of the scriptures. The eponymous school was so called because it reduced legal teaching and writing to an exact and literal explanation of the text of the sacred Napoleonic codes. It is not surprising that the term 'exegesis', originally associated with bible studies, was applied to this School, since it believed in a limited number of holy books containing the law and nothing but the law. There was no law outside the codes and no law before it: the School was totally unhistoric. Professor Bugnet (died 1866) was heard to say that he did not teach civil law but only the Napoleonic code, as in the Middle Ages professors in the medical faculties did not teach anatomy but Galenus.[23] Not only did nothing exist before the codes, but nothing after them either. Napoleon had forbidden commentaries on them because these would soon take the place of his texts: hence all the faculty had to do was to provide a correct reading and precise understanding of the *ipsissima verba* of the codes. As to the judges, their creative contribution to the development of the law had been rudely curtailed or even eliminated, when the Revolution reduced them to the passive role of the famous '*bouches de la loi*', a sort of automata that produced the texts of the law applicable to any given case, merely repeating what the legislator had said. In certain phases the

Revolution had gone even further: not content with condemning the judges to a passive role, it attempted to get rid of them altogether, especially of the appointed professionals. Judges were made elective and no qualification was required. Furthermore it was hoped that the conciliatory phase, which was made obligatory, would eliminate real litigation. This was a temporary aberration which was ended by Napoleon, who reintroduced appointed and professional judges.[24]

What caused this enthusiasm for lawgivers' law, shared by revolutionary radicals, Napoleon and learned professors of Laurent's sort? What motivated their aversion to ageless custom, judge-made law and the creative role of jurisprudence? Factors of very different origins – some intellectual, some political – played their part. Legal science, which for centuries had consisted of writings based on Roman law, was bound to go out of favour as Roman law itself came in for ever sharper criticism in the Age of Enlightenment. The Humanists had unwittingly prepared the ground by showing that Roman law, far from being a timeless, God-given model for all nations and all periods, was only the human product of a particular society at a given period in history and had therefore no absolute, 'revealed' authority. Why, so the reasoning went in the eighteenth century, should the law of an extinct civilisation be the universal norm for modern Europe – the *moderni* surpassed the *antiqui*! Modern Europe appealed to the authority of something even more universal than the Roman Empire, human reason itself, the basis of natural law. The political reality also changed. In the Middle Ages universalism, however unrealistic it may now seem, was very much alive. The dream of a universal empire embracing all Christian nations was ever present in political thinking, and even led Dante to write in favour of the

Roman-German Empire. In modern times, certainly after the treaties of Westphalia, that dream both of a universal Church and of a neo-Roman universal empire was dead. There was no power that encompassed, or could pretend or dream of encompassing, the peoples of Europe: national sovereignty had come to stay. But Roman law had nothing to offer these new nations. It knew no kingdoms, let alone sovereign nation states: it knew the universal empire and, on the local level, the *poleis* and the *municipia*. Therefore a law of nations had to be invented without Roman law, which is where natural law came in. It was initially a system of public international law, based on what seemed reasonable in a community of civilised nations. But the jurists who formulated this *Vernunftrecht*, and wrote most books about it, thought the best way of getting it introduced into real life was through legislation. Either legislation by enlightened monarchs, which most of them favoured, or legislation by revolutionary assemblies. Meanwhile, the 'law of reason' was in the eighteenth century a powerful tool against obscurantism, old-fashioned, Roman-law-based pedantry and all the evils of the *ancien régime*. The old social structure was criticised in the name of reason and eventually demolished. One has only to read the *cahiers de doléances* or the revolutionary codes of the last decade of the eighteenth century to be convinced. All this was natural enough – what is amazing is that this enormous enthusiasm for natural law gave way in the nineteenth century to silent disdain. The last thing Laurent wished to hear of was natural law – in which article of the *Code Civil* was that mentioned? The reasons for this sudden disgrace of natural law, which was brought about in a couple of years, merit special attention. They are not to be found in some new intellectual fashion, but in great social changes operated by the French Revolution and the regime of Napoleon.

Natural law had been the weapon of the eighteenth-century bourgeoisie against absolutism and its allies, the learned apostles of Roman law. But at the time of the great Napoleonic codes the bourgeoisie, having survived the storm of the Terror of 1792–94, obtained what it wanted: freedom of commerce, equality, the confiscation of Church lands and their entry into the market, and the rule of the legislator. Thus the great 'bourgeois peace' of the nineteenth century was established.[25] The last thing the new dominant class wanted was some fancy idea about a natural law which might endanger the codes. They were the firm legal foundations of the new world of entrepreneurs and financiers that flourished in the century of Louis Philippe, Napoleon III and Louis Adolphe Thiers. The 'law of reason' is the natural weapon of the dissatisfied and as the new burghers were satisfied and in power, they had no need for anything remotely seditious. On the contrary, a school of law that had no other ambition than the literal explanation of the sacrosanct codes was most welcome. Certainly, there was a new group of people in the nineteenth century, the industrial proletariat, and one might have expected them to look for help from natural law against the existing order. This did not happen and, on the Continent, many turned to the new, nineteenth-century ideology of marxism. What attracted them was, *inter alia*, the latter's frontal attack on property, something the eighteenth-century bourgeoisie had fought hard to safeguard, especially against the whims of autocracy. Also the natural-law philosophy was very static, whereas marxism, like hegelianism, was more in tune with the nineteenth century and its belief in dynamic evolution and dialectic, unending change.

Having surveyed the respective roles of case law, legislation and jurisprudence in a number of historic phases and

countries, it is time to return to the third and principal hypothesis about the dominant factor behind them, the key to so much variety on the European scene. The discussion is limited to Europe from the twelfth century onwards, because in the 'first Middle Ages' the problem is irrelevant, as that was a primitive phase in which there was neither legislation nor jurisprudence and hardly any conserved case law. Everything was custom, very partially and occasionally put down in writing, and the story only begins when the crust of this primeval custom was broken by conscious efforts to push Europe forward among the civilisations which then existed around the Mediterranean Sea and along the Atlantic and North Sea coasts. I shall therefore take several leading countries and analyse the main lines of their legal history in order to see whether a political hypothesis is valid. The starting point is the dominant importance of the political situation in any given country: a strong unified state creates the conditions for a leading role to be played by a national legislator and powerful central courts, whereas whenever the state is discredited or weak, the absence of strong and prestigious legislative and judicial organs creates a vacuum that is filled by jurists, legal doctrine and professors of law.

England is the oldest unified nation-state or national monarchy in Europe, going back if not to the days of Alfred the Great, then certainly to the kings of the first half of the tenth century who reconquered the Danelaw. This Old-English state was the best administered in its time. When the national monarchies on the Continent were suffering in various degrees from the break-up of administration, which started at the end of the Carolingian period, the English monarchy built up a solid system of local government. It invented the royal writ, imitated on the Continent, and this writ ran throughout the country. The Normans took over

this solid monarchy with its nationwide impact. They added the military element of continental feudalism, but were able enough to prevent it from disrupting the country's unity. Henry II, the first Plantagenet king, was the founder of a corps of royal judges, who were competent in first instance for the whole country for a limited but expanding number of actions or writs. Their substantive law was feudal custom, their procedure was based on the writs and the jury. The law they, with the king himself, developed, became known as the common law of England, to distinguish it from local and regional customs, which continued to be applied by local courts. Before the end of Henry II's reign the first treatise on this common law and its courts, known as Glanvill, was written. Soon three distinct royal courts, all engaged in building up this new common law, were in operation, the Court of Common Pleas, fixed at Westminster,[26] the bench *coram rege*, travelling with the king and not fixed until the fourteenth century, and the Court of Exchequer, sitting at Westminster. Thus around 1200 a common law for the whole country was well established; the importance of this fact can best be realised if one remembers that France did not reach the stage of one code of laws for the whole realm until the years immediately following the Revolution of 1789. Once it was installed, the Court of Common Pleas never looked back, it sat in astounding continuity right down to the reforms of the nineteenth century and may be said to survive in the present-day High Court. This stability gave it extraordinary power, for it knew no ups and downs; as royal court it shared the prestige of the crown and could count on the might of the state for the execution of its judgments. It knew no rivals, although some courts arose to supplement its activities, either for good (the Court of Chancery) or temporarily (the Star Chamber, abolished under Crom-

well). Round these judges, few but eminent, the Order of Serjeants at Law, a corporation of senior advocates, grew up, grouping the best legal brains, who were trained in the orbit of the central courts and from whose ranks the senior judges were recruited.[27] It was supported by impressive logistics, in the form of official enrolments and unofficial reports of cases. There was nothing like it in Europe; not even the Rota Romana was in any way comparable to it as far as its impact on the law was concerned.

England also had a great tradition of national legislation (the bench could not decide and create everything and judges always knew that adjudication and not legislation was their task), but it knew notable ups and downs and proceeded in fits and starts, unlike the majestic flow of the deliberations of the courts. One sign of the greatness of the Old-English monarchy is to be found in its impressive series of dooms, monuments of legislation or registration of existing rules, unique in Europe. However, after the catastrophe of 1066 this magnificent series came to an abrupt end. The Normans were no legislators, nor were the Plantagenets (in spite of some short texts under Henry II) and one has to wait, as has been seen, until the first ten years of 'the English Justinian', i.e. the years 1272–82, for a revival of the old tradition of national legislation. The parliaments of the Tudor age produced a considerable amount of important legislation, much of it originating with the royal government. In the eighteenth century a good deal passed through Parliament, but it was rather incoherent and the result of private members' initiatives: the government was not interested and was happy to let the courts develop important areas of law through the creation of precedents. The Reform of Parliament in 1832 changed all that and there arose, for about forty years, a body of coherent and important legislation that led to a great

overhaul of English legal institutions which was inspired by the government. Legislative zeal cooled down around 1875 and was not revived until after the Second World War. For many centuries the idea dominated in legal circles that it was really best to leave the common law alone: statutes were not to be passed unless absolutely necessary and legislation was deemed too drastic a remedy. Adaptation was better than change and could be left to the courts, which were more able to deal with awkward precedents than one would think at first sight.[28] Lord Radcliffe, who played a leading role in the 1950s and 1960s, was outspoken about the need for the judge to act occasionally as a legislator, but advised that this should not be done too openly; he also expressed the view that 'getting round' an awkward precedent should not be beyond the intellectual possibility of a judge who really tried.[29] How loth some lawyers are to resort to legislation is amusingly highlighted by an anecdote reported by Roscoe Pound about a leader of the American bar who made provision in his will for a professorship in a law school, whose incumbent should teach the gospel of the futility of legislation:[30] it is not only English judges whose attitude 'is, at least in part and at times, caused by a certain mistrust and fear of statute law'.[31] The picture that emerges is basically one of the creation and development of the common law by powerful and ever-present royal courts, with legislation stepping in from time to time when something so drastic was required that it was really beyond the capacity of the judges.

This left little or no room for a class of professional jurists to exert their influence on the nation's life, and the tale of their impact on the law is therefore rather short. Glanvill, mentioned above, described the royal courts' practice which was grouped round a number of writs, mostly dealing with aspects of land tenure. The substance

and the wording of his Latin treatise are thoroughly feudal and Anglo-Norman (much the same law had been growing up on both sides of the Channel, under a common prince). Here and there one hears a distant echo of Roman law, as if he was acquainted with some striking phrases of Justinian's *Institutes*; copies of the *Corpus* were available in England at the time, nor was civilian teaching unknown there and some Englishmen studied civil law on the Continent. Bracton's much larger treatise was in a different category. Not only had the number of available writs expanded but Bracton's analysis was also more detailed, and he made a conscious effort to link English development with the European currents of legal scholarship; in other words he was acquainted with Roman law, in particular Azo's *Summa Codicis*, and tried to fit it into what was by then a purely English and insular common law, since Normandy had been lost to the French crown and was gradually brought into line with French, Roman-inspired practice. Bracton's great attempt at a comprehensive theoretical exposition of the common law with the help of the *Corpus Juris* was important: it showed that the common law was reasonable and possessed internal coherence. However, it did not really fit the needs of the Profession, which was dominated by the practice of the courts and did not want theoretical *summae*, but information about cases, precedents and above all pleas, i.e. what the serjeants at law had proffered and what the judges had accepted or rejected, and why.

This could be found in the typical books of the following centuries, the Year-Books (and later the Law Reports). Judges and serjeants also needed to have the register of writs at hand, telling them what writs were available for what causes and how they worked. Whereas this *registrum brevium* followed the order of the writs, another influen-

tial, and intensely practical work, Littleton's *On Tenures*, consisted of the presentation of a great variety of land holdings, and the respective writs by which they were protected. Thus even there, where substantive law seemed to be the starting point, actions were seen to be essential. Right followed action and not the other way round.

The next ambitious attempt to present a coherent picture of English law was made in the *Reports* and *Institutes* of Sir Edward Coke, a series of works purporting to give a complete survey of English law. It was immensely erudite and full of precedents culled from medieval texts.[32] Coke reminds one of du Cange, a seventeenth-century French scholar who seems to have read every available scrap of medieval text – the work of several lifetimes of ordinary mortals – in order to extract information about the exact meaning of medieval Latin terms (the product of his zeal was an enormous dictionary of medieval Latin which he wrote single-handed).

In the *Commentaries* of Blackstone, the sun of the old common law, soon to be attacked, vilified and ridiculed by one of his pupils, Jeremy Bentham, shone in its final glory. Bentham wanted reform and codification, but he had no political leverage to bring them about. His pupil Brougham had friends in the right places and with him the great modernisation of England's judicial machinery began. Bentham had attacked the common law as 'mock law', 'sham law' and 'quasi-law' and had found the exercise of the judicial function an example of 'power everywhere arbitrary'. Some authors have tried to refute Bentham by pointing out that the system of precedent has produced a body of rules as determinate as any statutory rule and only liable to be altered by statute. However, this is not completely true since precedents have been known to be reversed and, less dramatically, to be circumvented by some

fine distinction (see the remark of Lord Radcliffe quoted in note 29).[33] With Bentham, age and authority, judicial oracles or history carried no weight: only utility counted. He also cared for democracy, hence the demand that the law should be cognoscible and certain, i.e. codified.

Bentham was perhaps more a pamphleteer and agitator than a scholar. The most truly erudite jurist of the nineteenth century was John Austin (died 1859). He was an exceptional figure, not only as a theoretical jurist, but also because he was the first great lawyer in England since Bracton to be well acquainted with, and influenced by, continental doctrine: he studied in Germany and admired that country. There was not much that England could do with a theoretical lawyer in the first half of the nineteenth century: his doctrinal training had not prepared him for the bar, where he was unsuccessful. The only use the country could find for someone deeply interested in jurisprudence was a chair in a university and Austin not unnaturally became professor of Jurisprudence in London. However, hardly any students turned up for his abstractions and generalisations, so he gave up his chair – he was, after all, trying to revive the speculative study of law at a time when 'jurisprudence was a word which stunk in the nostrils of a practising barrister'[34] – and did some work on the Commission for the Modernisation of Criminal Law, where he was unhappy. It shows what little use society had for this learned jurist that nothing better could be found for him than a membership of a commission of enquiry into the state of Malta! Austin and his ideals could not have lived in a less appropriate time and place, for what he wanted was to turn legal studies into a science, emulating the universal validity of the study of the laws of physics. Like his friend Bentham, he believed in codification and rejected history as a dustbin of human follies; in other words he adored what

the legal establishment most cordially detested, and detested what they most deeply revered. In the present century the general reverence for the judiciary was even encouraged by the academic lawyers, whose task it should be to examine the trend of case law with scholarly criticism. Sir William S. Holdsworth (died 1944), famous jurist and legal historian, felt, for example, that 'the law teacher ought not to encourage criticisms of the judiciary in an age of scepticism'.[35] If it is possible to discuss seriously whether English lawyers 'place the courts at the centre of their legal universe', or accept that Parliament is 'the real sun around which the law revolves',[36] nobody would put jurisprudence anywhere near the centre – a pale moon, reflecting the wisdom of the bench might be its appropriate place in this cosmology.

No greater contrast could be imagined than that between the English and the Italian development. In the latter, well into the nineteenth century, there was a total lack of political unity. In the south there was a feudal kingdom, in the centre the papal state and in the north the *regnum Italiae*, ruled by the Roman emperor-German king and incorporated in his empire. However, royal authority was combated there from the second half of the eleventh century onwards, and at the latest after the death of Frederick II (died 1250) even the fiction or the dream of an effective monarchical rule was given up. Northern Italy was to all intents and purposes divided into a number of urban republics, which slowly developed into modern principalities under the sway of rulers of the type of Machiavelli's *Principe*. The consequences for the legal life of the country were foreseeable: no central high court of justice, which could have developed a national law. Only local and regional courts, without real prestige (except possibly the Court at Naples for southern Italy) or the logistical means

to build up a great tradition of case law existed. There was, of course, no question of a national lawgiver: legislation was purely local or at best provincial, with the ephemeral significance of provincial institutions devoid of real prestige or power, subjected to the petty power-game of local notables. Legislation there was in abundance but it was occasional, changeable and devoid of real interest. The vacuum caused by this state of affairs was filled by the learned lawyers, trained in the study of the *Corpus Juris*, which dwarfed the native law books by its sheer quality. Soon these jurists were drawn into litigation, where their science and the prestige of their imperial law were solid weapons. They were also called upon to harmonise local statutes or to devise a doctrine for the conflicts between them – the origin of modern international private law. One of their main occupations became the counselling of local courts, and collections of these *consilia* circulated and were widely quoted. Thus the general picture was the antithesis of England: the role of the professors, imbued with Roman and medio-Roman law, was all pervading, while case law and legislation were of negligible importance.[37]

In Germany too the political picture was that of a very divided country. There also unity failed to be established – or rather re-established – until the second half of the nineteenth century and there also the break-up was final after the death of Frederick II. Although a nominal and symbolic figurehead of the 'Germanies' continued to be recognised, political life had withdrawn to the ecclesiastical and lay principalities and the imperial and free cities. The consequences are easy to guess: absence of a central bench with a truly national impact, but a pleiad of local and regional courts, which sometimes managed to enjoy a real prestige, but never outside certain regional boundaries. There was, with the possible exception of a series of

Landfrieden, no central legislation: local custom was paramount and seldom put in writing, let alone promulgated with the force of law. A great attempt to overcome these deficiencies was made in the heady days of European Humanism as part of Emperor Maximilian's efforts to recreate some unity in Germany. This entailed both abolishing medieval customs, in order to put in their place, as the new law of the kingdom, 'the common written laws' – Roman and canon law – and the foundation, in 1495, of the Court of the Imperial Chamber or *Reichskammergericht* as the creation not of the emperor, but of the empire and its estates. The aim was to form a court of appeal for the whole country and to watch over the application of the new learned law. Originally the court consisted half of learned jurists and half of knights, but by the middle of the sixteenth century all were to be jurists. The victory of Roman law was real, although not absolute: local traditions, particularly in Saxony, put up a staunch resistance. The success of the new High Court of Justice was less satisfactory: the jealousy of various principalities was such that they obtained exemption from its jurisdiction by securing privileges *de non appellando* and *de non evocando*. Nevertheless, the victory of the *Corpus Juris* caused the breakthrough of the professors who taught and explained it, of the barristers who quoted from it and of the local registrars or pensionaries who had obtained a law degree and advised the local courts (which were largely occupied by non-jurists) what line of the *Corpus* should be applied and which doctor's opinion – Bartolus's or Baldus's – should be preferred.

The great codes of the Enlightenment, although inspired by the lofty ideas of the School of Natural Law, very often had to rely on the old trusted Roman law when it came to the detailed rules, particularly in matters of contract. Hence

they in fact, although not in theory, kept a good deal of Roman law alive and the postponement of a pure German civil code till 1900 meant that throughout the nineteenth century Roman law and its high priests kept the upper hand. As a truly national parliament and a truly national High Court did not arise before the unification in the days of Bismarck, the jurists dominated legal life for four centuries, even to the point, as we have seen, of telling the judges what sentences to give.

The Republic of the United Provinces was, as the name indicates, a federal state and, as federal states go, it belonged to the weaker type, i.e. the federal organs were not very developed or powerful – something the United States consciously avoided when it drafted its own constitution. The central political organ *par excellence*, the Estates General, far from being a truly national parliament, was no more than a meeting of the deputies from the provincial estates, where real power lay. In these circumstances it was only normal that there was neither central legislation for the whole republic (and little in the separate provinces), nor any 'homologation' of the old customs at the command of the central government. Of course, there could be no central court of appeal either. The High Court of Holland and Zealand had a certain prestige – and only then because Holland and Zealand were by far the richest and most influential regions – outside these two provinces, but no legal authority. In these circumstances Hugo Grotius founded Roman-Dutch law, which gained a great following and, since it was mostly based on Roman law, gave the learned jurists a clear advantage over all other elements in the legal life of the Republic. This was one of the reasons why Dutch jurists and Dutch universities had a European audience and played such a considerable and original part in the rise of modern jurisprudence. All this

gave Dutch law a distinctly learned flavour, with a high degree of attention to theory and speculation, which it has conserved to the present day, in spite of the Napoleonic codifications which were introduced.

France became a unitary nation-state long before Germany and Italy, but long after England. This time-lag was caused by the collapse of the French monarchy in the tenth and eleventh centuries, when the Old-English state was organising itself. The kingdom of France was divided into autonomous principalities and, in a second wave of decomposition, into castellanies: micro-states with diameters of between five and ten kilometres, grouped round a feudal overlord and his castle. The reaction started in the twelfth century (when the English King Henry II ruled over more French land than the king of France) and in some four centuries the monarchy established political unity in the old western part of Charlemagne's realm. The emergence of a strong monarchy led, around the middle of the thirteenth century, to the establishment of a central royal court, the Parlement of Paris, with jurisdiction over all France. This court enjoyed great power and prestige and its members were professionals who had university degrees in Roman law. It was, however, rather different from the English central courts in that it was mainly a court of appeal and exercised no jurisdiction in first instance, except over certain important persons and matters. Also it had to apply the customs of the region whence the appeals came so that, although it exercised some unifying influence, it did not produce a common law for the whole kingdom. Legally, the kingdom remained divided, for whereas in the southern part, roughly about one third of the country, Bolognese law quickly took the place of the old Roman customary law, in the northern two-thirds local customs of Germanic and feudal origin prevailed. The revitalised monarch of the

twelfth century became aware, albeit very tentatively, of its legislative duties and royal legislation never disappeared again during the following centuries. It was not so extensive as its English counterpart, at least during the Middle Ages, but became important from the sixteenth century onwards and especially under Louis XIV and Louis XV: parts of their *ordonnances* passed into Napoleon's codes. In contrast with England, French legislation remained the responsibility of the king and his collaborators, not the national representative assemblies or *Etats généraux*. The lack of legal unity also meant that, even as late as the eighteenth century, some important ordinances could not be given validity for the whole country: there were separate ordinances on wills, for example, for the north and the south in 1735. Finally the French monarchy, from the mid-fifteenth century onwards, put a royal stamp on the division of the country by ordering the 'homologation' (i.e. the recording and promulgating as law) of numerous local customs. This 'homologation' was a strange phenomenon, a hybrid, for on the one hand it was customary law registered and fixed in writing, but on the other legislation, for those texts were given force of law and no other customary rule could prevail against them. The 'homologated' customs had in fact lost some of the essential characteristics of customs, i.e. that they live in people's consciousness, come and go and evolve with changing ways of life and modes of thought: custom is flexible, the written text of a 'custom' issued as the sole law is not.[38] Legal science in those circumstances stood a good chance. Legislation was never so comprehensive as to dispense with what the jurists had to say (that would only come with the codes and the Exegetic School), and the Parlements, that of Paris and its provincial offshoots, far from developing a common law, had to administer various customs. Nevertheless the members of those

Parlements had all been trained by studying Roman law – no customary law was taught in the universities until the seventeenth century – and some of this learning inevitably rubbed off on the law of the land. Furthermore, the authors who, from the thirteenth century onwards, wrote expositions of, and commentaries on, various regional customs were scholars who had learned their trade in the school of Roman law and again, the method, the terminology and even some of the substance of Roman law rubbed off on their *coutumiers*. There was therefore ample scope for learned jurists in France.

In the south, where Germanic occupation had been thin and a Roman law of sorts had always lived on, the seed of Bologna fell on fertile soil and civilian professors and universities already flourished in the twelfth century. In the thirteenth, when Orleans started on its illustrious career as a law university of international repute, professors such as Pierre de Belleperche and Jacques de Revigny were no mere epigones of the Italian glossators, but made an original contribution to the study of Roman law, and French jurists played a major role in the humanist movement, Cujas being the greatest among them.

From the thirteenth century onwards in the north there was a continuous stream of learned jurists who wrote commentaries on customary law, using the tools of the Roman law schools, whose *alumni* they were. Nevertheless, unlike in Germany, there was no wholesale 'reception' of Roman law in France. This may seem surprising, considering the fact that it would only have meant extending to the whole of France a system that already prevailed in the south. The resistance to Roman law, led by such luminaries as Charles Dumoulin, was politically inspired. Roman law was felt to be imperial law (*Kaiserrecht*) and imperial law meant the law of Germany and of the Emperor Charles V,

who was almost constantly at war with France. To build up a truly national law, using French customs and particularly that of Paris as a starting point, was felt to be a more dignified solution. The overall impression is of a country where neither judiciary, nor legislature nor scholars enjoyed a clear cut preponderance, but all three contributed in equal measure. This tallied with political reality. The French monarchy was strong enough to found the Parlement of Paris and to adopt Roman-canonical procedure, but not nearly strong enough to impose one common law for the whole country. Again, this monarchy was forceful enough to produce a good deal of legislation, but not to overrule local customs, which were even given official status, thus preserving legal diversity. There were national representative assemblies, but because of strong local political traditions they were powerful only in times of weakness of the crown, so that they could not develop into a national lawgiver. The defence of the country's freedoms did not lie in the hands of the *Etats généraux*, but of the Parlements, which often and obstinately resisted new royal legislation.[39] The schools on the other hand, having to compete with powerful Parlements and active royal legislators, could never dominate the scene. Nevertheless they were a force in the land. They taught the Roman law that became the norm in southern France and were the teachers of the judges even in the north. They also gave authoritative interpretations of the official *coutumes* and subjected them to such cogent criticism that the government issued, for example, a revised edition of the Custom of Paris after Charles Dumoulin had criticised the first version. From Dumoulin to Pothier a line of great jurists, familiar with customary and Roman law and with royal legislation, was striving towards a valid system of law for the whole of France, the *droit commun français*: doctrine achieved what

legislation could not. The quality of their work explains their influence, even outside French frontiers: Pothier was quoted by Blackstone and by nineteenth-century English judges.

The state of equilibrium which has been described prevailed, of course, only until 1789. The Revolution disturbed it deeply, by placing statutes and codes at the absolute pinnacle, reducing the judges to a secondary role and simply abolishing the law faculties. Blind veneration for the law and even the letter of the law dominated the nineteenth century. The twentieth has seen the return to a better equilibrium: the codes still prevail on principle, but the courts enjoy a freedom of interpretation unheard of in the previous century. Professors also have become more daring in their teaching and take into account not only the letter of the law, but its sense and the social necessities of the age.

After this rapid survey of five countries it seems justifiable to conclude that the political development of the various European nations was largely responsible for the respective importance of the judiciary, the legislature and the law faculties in the shaping of the law. This implies that legal history is part of political history and poses the question of how it accords with the more traditional view that 'legal history is part of cultural history'.[40] Whether legal history is concerned with the development of ideas or the clash of interests has been a moot point for generations[41] and cannot be entered into here, even summarily. Nobody, of course, maintains that the general cultural atmosphere has left legal development untouched, nor does anyone believe that the rise of monarchy, aristocracy or democracy made no impact on the lawyers and their books. Nevertheless, some historians believe that the power-struggle is paramount and that lawyers are forced to think

within a framework established by extraneous events, while others maintain that the rise and refinement of legal concepts are an autonomous flow that majestically goes on along lines of their own intellectual perfection taking little notice of the great political upheavals and their clamouring protagonists. All I hope for is that these observations throw some new light on the historic impact of political and institutional factors on European legal development.

There remains, however, one legal system to be mentioned – not of a country but of a corporation – canon law. How do the law and the constitution of the Church fit in with this hypothesis? It will soon become clear that the Church is a very interesting case *sui generis*. For in the Church – and one is thinking here of the great formative period of the canon law, from Gratian (*c.* 1140) to Boniface VIII (died 1303) – the role of legal science and the jurist was paramount, although there was a strong central authority vested in the pope, who was a great and continuous source of legislation. Numerous constitutions and, above all, thousands of decretals issued from the Lateran Palace to uphold and develop the law of the Church, a model of organisation for many states. This same pope and his curia, later the Rota Romana, were also the supreme judges: thousands of cases went to Rome, some in first instance but most in appeal, to be judged there or committed to papal judges delegate in their countries of origin. And yet there can be no doubt that the faculties of canon law played a very great role in the development of ecclesiastical law to a science and that their commentaries on canons and decretals were authoritative. In addition the court held by the bishop's official (who was always a university graduate) became, from about 1200 onwards, the normal place for handling litigation in first instance. How then could jurists be so important in a society where central authority –

lawgiver and judge – was preponderant? The idea that the jurist's importance is universally related to the weakness of the central authority does not seem to be valid here. This is indeed so, for the simple reason that in the Church the central lawgiver and the learned jurist were one and the same person. From Alexander III onwards throughout the classic age of canon law, great papal lawgivers – Alexander III, Innocent III, Innocent IV, Boniface VIII – were also great jurists. The Church was the one society where scholars became rulers: no medieval king, however intelligent, was a university graduate, but numerous popes were and the great lawgivers especially had obtained their degrees in law at a university and written authoritative commentaries or *summae* on canon law before obtaining the papal tiara. In no other society did bright law graduates become supreme: they might become the councillors of rulers, the assistants of lawgivers – like the famous legists around Philip IV the Fair – but they did not become crowned heads. In the Church scholars acquired power, fulfilling in a way the platonic ideal of the philosopher-king. The reason, of course, is that the Church is no nation-state, although the similarities in administration, adjudication, legislation and fiscal organisation might lead one to forget this. The power structure of the Church is not based on a territory and feudal land, but on religion, as defined and revealed in the Holy Books. It is a community of believers held together by faith, not of inhabitants of a particular territory, even though much of its public law came from the Roman Empire, the greatest state the world had ever seen. The raison d'être of the Church, whatever the techniques of its organisation, are the Holy Books and their religion, even though there were periods when administration seemed to oust theology. Hence the role of scholars, who understand the holy precepts, is bound to be important: they hold the

key of the meaning of Holy Writ. This is valid in the first place for theologians, but also for lawyers, for the Holy Books contain norms of behaviour as well as truths. The particular role of the papal lawgiver originated with the Gregorian reform and the rise of the papal theocracy: since the reforming papacy had the ambition to transform Christianity, popes had to be great legislators. Gregory VII found many practices – malpractices in his eyes – which had been established by custom, and the only way to attack custom is to legislate: i.e. to abolish 'bad customs' and issue new rules. Thus Gregory's distrust of custom. But custom often appears in the form of case law, hence the weak role of the latter in the classic period of the twelfth and thirteenth centuries. Justinian's rule 'legibus, non exemplis judicandum est'[42] served that period very well. This explains the remarkable fact that although there was very extensive judicial activity in Rome and in the courts of archbishops and bishops, case law in the form of collections of judgments was of secondary importance. It is only at a late stage that the systematic collection and publication of the sentences of the Rota Romana got under way.[43] The classical period of the canon law was the era of the jurists-lawgivers, the scholars on the throne. Formally speaking their constitutions and decretals were legislative acts, but their substance was the doctrine of the schools: it was scholars' law, based on the teaching of the universities, where the future popes had been students and professors. This regime of the professorial lawgiver was unique in Europe – the nearest equivalent would be certain lawyer-dominated modern parliaments from the American and French revolutions onwards.