CIVIL LAW, COMMON LAW AND THE SCANDINAVIANS

BY

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"To generalize is to omit."
Holmes*

1. ARE YOU FOR OR AGAINST THE KING OF ENGLAND?

In March 1918 the Eastern front had all but faded away. In order to infuse some fresh life into it the British then sent an expeditionary force to Murmansk and Archangel, which tried to make its way down to the theatre of war. It was a time of utter confusion. In January, the Bolsheviks had accepted the Finnish declaration of independence. On March 3rd, they had made a separate peace with the Germans. At the same time the Bolsheviks were fighting the "White" Russians who, consequently, were viewed by the British as their allies in the struggle against the Germans. The Finnish declaration of independence, however, was followed by the proclamation of a Finnish Workers' Republic. Russian troops remaining in Finland supported this republic against the White Finnish authorities. The Germans balanced the British presence by helping the White Finns with troops. In addition, the Karelians, having decided in January to unite with independent Finland, were fighting the Bolsheviks who tried to put down the rebellion. The Karelians were aided by White Finnish troops. The British expeditionary force, penetrating southwards through Eastern Karelia's sanguinary wilderness, amidst the fighting Finns, Karelians and Russians of various colourings, had difficulty in finding the black-and-white World War I simplification of matters. There is a story to the effect that the British commander then issued an order requiring that everybody found in the path of the British troops should be made to answer the simple question: "Are you for or against the King of England?"

This paper is based on a lecture delivered in my course on Roman and Comparative Law at New York University Law School during the Summer Term 1968.

*_Connell_ v. _Herring-Hall-Marvin Safe Co._, 208 U.S. 267, at 273 (1908).

2. COMMON LAW AND CIVIL LAW

Whenever Scandinavian legal scholars venture into the Anglo-American world they encounter a similar question which is equally difficult to answer: Is Scandinavian law a Civil Law system or a Common Law system?[1] This question reflects a craving for simplicity in a complicated world which is just as desperate and just as necessary as the one put by the English in the Karelian wilderness. Let us look into the problem.

The Common Law–Civil Law dichotomy reflects a classification of legal systems. What grounds, then, are acceptable in classifying legal systems?

Two things characterize today's comparative lawyers: they apply a global perspective rather than a regional one, and they abstain from the mere quantifying of the immediate rule similarities and rule dissimilarities that formerly held the day. With their new points of departure they are fairly well agreed that, in the main, one has to view the matter from a genetical point of view and that emphasis must be placed on the central parts of the law.[2]

These views I share, but I should like to expand on one of them, the importance of the genetical factor. Legal history has, of course, a value in itself and makes comparative-law materials more manageable. Some are prone to believe, however, that it matters little in practical life and will suggest that simple rule similarities and dissimilarities matter more and that functional similarities and dissimilarities matter most of all. I see it otherwise. My belief in the importance of the genetical factor is based on the observation that it tends to control our ways of thinking. This control is greater than many would believe simply because legal training teaches us not only what to do but also, and even more so, what not to do. The result of this is to block some of our ways of thinking and lead us to proceed along others. Odd ways of making mental associations make legal judgment difficult. Legal training works to stop such odd ideas: they are branded as

[1] T. Eckhoff, *Rettsvesen og Rettsvitenskap i U.S.A.*, Oslo 1953, pp. 34 ff.

[2] 1 Arminjon, Nolde & Wolff, *Traité de droit comparé*, Paris 1950, p. 47, no. 19. Similarly Zweigert, "Zur Lehre von den Rechtskreisen", in *XXth Century Comparative and Conflicts Law. Legal Essays in Honor of Hessel E. Yntema*, Leyden 1961, pp. 45, 48; and Malmström, "Rättsordningarnas system", in *Festskrift till Håkan Nial*, Stockholm 1966, pp. 394 ff., republished in this vol. as The System of Legal Systems", pp. 136 ff.

"impossible", "unsound" or "unacceptable to the courts". But when we scratch the surface and try to see why lawyers in this or that jurisdiction think, to such a large extent, along similar lines and consequently enjoy powers of legal judgment and prognosis, we surprisingly often find the explanation to be that they were taught law in this way simply because their teachers had been taught law in the same way, and so on for many generations back. In the process other ways of thinking got blocked.

The principles inherent in the modern approach are not always easy to apply. On this point, too, I should like to expand slightly before proceeding. The principles lead us into broad generalizations. First, it is well to remember that to accept the description of a legal system is to accept a generalization. No doubt, many things go on in the local courts, not to mention everyday practice, which never reach the pages of textbooks or even case reports.[3] Yet, unless we rely on the generalizations of the printed page we have difficulty arriving at a comprehensive view of a legal system at all.[4] Secondly, it is no easy matter to say what is the central part of the law. My own main field of study has been Private Law. The genetical perspective allows me to see a grouping in families which perhaps can be substantiated nowhere today except in this field. The grouping may not hold true in such fields as criminal law, procedural law, constitutional law or administrative law. When it comes to grouping, however, I do not find these branches to be so central to the legal system as private law is. In legal matters, what was once a common heritage

[3] Recent scholarship has shown that this is true even in the American sphere where after all, most people agree, case reporting has advanced farthest. On the erratic nature of some American case reporting, see A. D. Vestal, "Reported Federal District Court Opinions, Fiscal 1962;", 4 *Houston L. Rev.* 185 (1966); *idem,* "Reported Opinions of the Federal District Courts: Analysis and Suggestions", 52 *Iowa L. Rev.* 379 (1966); *idem,*"Survey of Federal District Court Opinions: West Publishing Company Reports", 20 *Sw.L.J.* 63 (1966). Cf. M. Wood, "Selective Publication of Case Law", 39 *So.Calif.L.Rev.* 608 (1966). Adjudication at grass-roots level in England was always much neglected as compared with what happened in the Westminster courts. Cf. Brian Abel-Smith & Robert Stevens, *Lawyers and the Courts,* London 1967, p. vi. How much of the law lies hidden in the short notices in fine print in the back portion of the Swedish Supreme Court Reporter series we only can guess until systematic study reveals it. Cf. Beckman, "Precedents and the Construction of Statutes", 7 *Scandinavian Studies in Law* 9, at p. 19 f. (1963).

[4] Let me add that the rather distant observation post of the comparativist makes me favour generalizations made by people on the spot. Furthermore, the smaller the format of the book, the broader the generalizations the author has to make. My belief in these ideas may to some extent explain my selection of support material in the footnotes.

of substance and meaning[5] has often been eroded by, or swept away in the stream of events. During the last two centuries this has happened to a greater extent in other fields than in private law: the common heritage has given way to new legal structures, adapted to a radically changed society. As countries have passed through the same societal transitions, these structures have migrated from one country to the other.[6] The pattern of transplants may well form new groupings. If these can be set aside as less central, it is simply because they have failed to generate traditions of the deep-rooted, subconscious kind which are so important in private law. It is for these reasons that I believe private law to contain the most central parts of the law and accept the grouping of legal systems which it suggests.

Is it then defensible to differentiate among the legal systems of the Western world, categorizing them as either Common Law systems or Civil Law systems?

English lawyers certainly do. Kiralfy says boldly that "most of the world is governed in some form by either the civil law or the common law".[7] The great Scot,[8] Lord Cooper of Culross, uses the only slightly more cautious formula that "the legal systems of the modern world ... tend to fall into one or the other of two great categories, (a) the Anglo-American or common law systems, and

[5] The sway of Roman law over constitutional law and political theory is not easily dismissed. Impressive studies have appeared showing its impact through the writings of Glossators and Commentators (see, e.g., M. P. Gilmore, *Argument from Roman Law in Political Thought 1200–1600,* Cambridge, Mass., 1941 (Harvard Historical Monographs XV) and the compilation volumes *Bartolo da Sassoferrato—Studi e documenti per il VI centenario,* Milan 1962, in particular W. Ullmann's article "De Bartoli sententia: concilium repraesentat mentem populi", vol. 2, pp. 705 ff.). For later evidence, see Franklin, "Concerning the Influence of Roman Law on the Formulation of the Constitution of the United States", 38 *Tul.L.Rev.* 621 (1964). The last outburst of this Romanizing tendency was seen in the Napoleonic era. See, e.g., "Senatus-Consulte Qui Proclame Napoleon Bonaparte Premier Consul à vie, du 14 Thermidor an 10", On 19th-century developments, see Jolowicz, "Political Implications of Roman Law", 22 *Tul.L.Rev.* 62 (1947), at p. 70. As to criminal law and procedural law, Roman Law long held sway by means of Canon Law. In Sweden Professor Stig Jägerskiöld has taught us what importance Roman law has also had in such fields as criminal and international law: see his article "Origins of International Law", in *Legal Essays—A Tribute to Frede Castberg,* Halden 1963, pp. 241 ff.

[6] Notable instances of English influence on Continental law are discussed in Grünhut, "English Law and the History of Continental Legislation", 20 *Journal of Comparative Legislation and International Law,* 3rd series, Part IV, pp. 165–82 (1938).

[7] Kiralfy, "English Law", in *An Introduction to Legal Systems* (ed. J. Duncan & M. Derrett), London 1968, p. 157.

[8] Lord Justice General and Lord President of the Court of Sessions (Scotland).

(b) the Roman, civilian or Franco-German systems".[9] To the British, however, this categorization came most naturally, because they could never beg the question. Their own legislature, the Queen and the Houses of Parliament, and their own highest court, the House of Lords, were both called upon to serve, simultaneously, their own English law and, with due consideration of its individuality, the Scottish law which laid claim to be a direct or indirect importation from Roman law. They found it no easier to beg the question in the periods of colonial expansion when French and Dutch colonies suddenly switched masters and the British found themselves saddled with the administration of a justice that was certainly not English but in which many and important sources of law seemed to be common. The categorization which thus reflected a practical reality in the British world empire, certainly did not impress itself in the same way upon people on the Continent. Today,[1] however, even Continental people generally agree on the same point.[2] England has now for such a long time been identified with something insular, isolated from the rest of Europe, that from the genetical point of view and in so far as private law is concerned it has seemed quite reasonable to differentiate between what has developed under the British administration of justice and what took place elsewhere in Europe and under the reign of the Continental powers.

Accepting the dichotomy, one has to find the distinguishing criteria. At the same time, however, in order to do justice to the idea of grouping in families, one must keep a better look-out for uniting family features than for differences between family members when searching for the distinguishing criteria. Only with these at hand can we approach the borderline case. I would sug-

[9] T. M. Cooper, "The Common and the Civil Law—A Scot's View", 63 *Harv.L.Rev.* 468 (1950), also published in *Selected Papers,* Edinburgh 1957, pp. 201 ff.

[1] Cf. Rabel, "Civil Law and Common Law", in 3 *Gesammelte Aufsätze* (hrsg. Hans G. Leser), Tübingen 1967, pp. 312–27, at 312 f.; originally published in 10 *La L.Rev.* 431 ff. (1950).

[2] Treillard, "Common Law et Roman Law", 19 *Revue juridique et économique du Sud-Ouest* 217 (1967) (also published in *Mélanges offerts à Jean Brethe de la Gressaye),* finds it "incontestable". David, *Les grands systèmes de droit contemporains, (*Dalloz) 1964, pp. 18 ff., distinguishes between "famille romano-germanique" and "famille de la common law", English edition David & Brierly, *Major Legal Systems in the World Today,* London 1968. Malmström, *op. cit.,* p. 400, see *supra,* p. 182, criticizes the attempts to find a distinction of primary importance between the Roman- and the German-orientated legal systems.

gest that the following three criteria,[3] or variations of them, have been the dominant ones in the general exchange of views: (1) the inspiration, (2) the degree of codification, and (3) the profession of the leading personalities in the evolution of the law.

It is commonly said[4] that the Common Law has grown from native Germanic and feudal roots, while the rest of the law in Europe can be traced back to Roman law in a more or less direct line. This is a very popular and very venerable idea. The English expression "Civil Law", indeed, is believed to reflect the adjective "civilis" in *Corpus Juris Civilis*,[5] the name of the set of books which the Emperor Justinian enacted as law for all peoples in the 6th century A.D.[6] The somewhat aggressive thesis that the Common Law had quite different roots from those of the Civil Law was, broadly speaking, lacking in scholarly foundations until towards the latter half of the 19th century, when the English started to explore their legal history in earnest.[7] It was Sir Henry Maine

[3] The omission of such topics as the doctrines of precedent and of statutory interpretation is intentional: I believe them to be overrated as means of distinction. As to Supreme Court decisions, the views vary between countries normally grouped together as Civil-Law countries no less than between one of them and a Common-Law country. See, e.g., Folke Schmidt, *The Ratio Decidendi—A Comparative Study of a French, a German and an American Supreme Court Decision,* Uppsala 1965 (*Acta Instituti Upsaliensis Jurisprudentiae Comparativae* VI). Similarly in the interpretation of statutes, I see more differences between interpreting aging statutes (such as the Code Napoléon of 1804 and the Austrian Civil Code of 1811:*ABGB*) and interpreting new ones (perhaps under the aggressive supervision of the legislators who made them), than between interpreting statutes in Civil-Law and in Common-Law jurisdictions. The perspective in this field is too often distorted by the attention attracted by the German *BGB* of 1896 and the methods of interpretation which are necessitated by its particular build-up. See Folke Schmidt, "The German Abstract Approach to Law. Comments on the System of the Bürgerliches Gesetzbuch", 9 *Scandinavian studies in Law* 131 (1965). When Anglo-American statutes are at issue, many central problems of interpretation seem to have more to do with the technique of writing the statutes than with statutory interpretation as such; see Rabel, *op. cit.* p. 320, see *supra,* p. 185. See also Rheinstein, "Comparative Law and Legal Systems", in *International Encyclopedia of the Social Sciences* (McMillan & Co. & Free Press 1968), *verbo* Legal Systems, p. 204, at p. 208.

[4] Nicholas, *An Introduction to Roman Law,* Oxford 1962, p. 2; Kiralfy, *op. cit.* p. 157, see *supra,* p. 184.

[5] David, *op. cit.* p. 19 note 1, see *supra,* p. 185.

[6] This name, however, is not Roman *per se*; it was created during the Renaissance. See H. J. Wolff, *Roman Law. An Historical Introduction,* Norman (Okl.) 1951, p. 163.

[7] It is well to remember that F. W. Maitland's inaugural lecture, when he was appointed Downing Professor of Laws of England at Cambridge in 1888, was entitled "Why the History of English Law is not Written" (1 *The Collected Papers of Frederic William Maitland* (ed. by H. A. L. Fisher, Cambridge U.P.) 1911, pp. 480 ff.).

who declared the Romans and the Normans to be the great architects of legal progress.

It has often been claimed that the Common Law is by nature uncodified, while the opposite is true about the Civil Law system. Lévy-Ullmann spoke in 1921 of the difference between the "pays de coutume"—as is customary in regard to English law, case law is included in the notion of "coutume"[8]—and the "pays de droit écrit".[9] It is but a variation of this theme to assert that Common Law is based on case law while Civil Law is built on statute law.[1]

Finally, it is also often suggested that the deeper difference between the Common Law and the Civil Law is to be found in the fact that the former is the creation of judges while the latter springs from the pens of professors.[2]

At first sight, this type of argumentation seems untenable. If one sticks to *genetics,* it will soon be found that essential parts of the Continental laws have non-Roman roots.[3] This is the case with land law, with marital property law, with the major parts of commercial law (e.g. the ones dealing with assignments, com-

[8] Salmond, *Jurisprudence,* 8th ed., p. 226: "The Common Law of England has long ceased to be customary law and become a body of case law instead."

[9] Lévy-Ullmann, "Observations générales", in *Les transformations du droit ... Livre du cinquantenaire de la Société de législation comparée,* tome I, Paris 1922, pp. 81 ff., at p. 86.

[1] As early as the 13th century Bracton pointed out that English judges could develop the law by their decisions, whereas Justinian forbade Roman judges to do this (see *Codex* 7. 45. 13). Kiralfy, *op. cit.,* p. 163, see *supra,* p. 184, finds English Common Law to constitute "a classic system of case law or judge-made law". He also points out, at p. 166, that the drive towards codification on the Continent resulted from desires for unification of the national law. Unification of law having already been achieved by the courts in England there was no equivalent drive towards codification.

[2] Rabel, *op. cit.,* p. 314, see *supra,* p. 185: our heroes, such as Sir Edward Coke, Lord Chancellor Hardwicke, Lord Mansfield, or Chief Justice Marshall, Story, and Holmes, were judges, and Azo, Bartolus, Donellus, Dumoulin, Savigny, and Jhering were professors." G. O. W. Mueller, 16 *Am.J.Comp.L.* 247 (1968): "the difference is—and has been since the days of the Roman *jurisconsulti*—that the civil law has experienced the ordering hand of the scholar, so that it has become organized and systematized, while the common law still retains much of its pragmatic judge-made qualities with a remarkable resistance toward any comprehensive ordering". Rheinstein, "Common Law and Civil Law: An Elementary Comparison", 22 *Rev.jur. U.P.R.* 90, at 101 (1952–53): "The Civil Law, on the other hand, is markedly professorial." Cf. H. F.J Jolowicz, "Academic Elements in Roman Law", 48 *L.Q.R.* 171 (1932). Kiralfy, *op. cit.,* p. 167, see *supra* p. 184: "academic jurists enjoy little authority in English law. There is no distinct stream of academic doctrine as a source of law." W. A. Robson, *Civilisation and the Growth of Law,* London 1935, p. 254: "It is scarcely too much to say that jurisprudence hardly exists in Great Britain."

[3] It is only fair to point out that this *caveat* is indeed impressed upon the reader in the book by Nicholas, referred to in note 4, p. 186, *supra,* see p. 52.

mercial paper, agency and corporations) to mention only a few. On the other hand, it has often been noted that the inner relationship between English law and classical Roman law is stronger than that existing between classical Roman law and its modern Civilian counterparts.[4] Again, on taking a closer look at the contrast between *codified and non-codified law,* this basis for distinction would seem to be equally untenable. It should be recalled that most[5] parts of German law were uncodified before 1900 and most parts of French law before 1804. It is, furthermore, difficult to imagine that Common Law would cease to be Common Law in those cases where it has been codified.[6] As far as case law is concerned it is quite apparent that the case reporter systems on the Continent are no less extensive and no less frequently employed than their counterparts in England and the United States.[7] Finally, the contrasting of *judges and professors* also seems to be untenable. The leading role attributed to the Common Law judges is, evidently, a function of the leading role given to the Royal judges at Westminster. The fact that judges elsewhere did not achieve the same importance is essentially only a reflection of the absence in those countries of equally centralized administrations of justice. But this difference has disappeared centuries ago. The administration of justice in each Civil Law state is just as centralized and unitary as it was in early English history. On the other hand, the administration of the Common Law today has disintegrated into an impressive number of independent jurisdictions, each with its separate court system. The situation of professors is pretty much the same as that of judges. On the one hand, the Civilian professors did not always succeed in influencing the Civilian judges. "Cuiacius and Donellus wrote for the German Romanists of the nineteenth century rather than for the contemporary judges, who remained unimpressed. Savigny's historical school has immensely influenced the march of scientific pro-

[4] Pringsheim, "Inner Relationship Between English and Roman Law", 5 *Cambr.L.J.* 347 (1935); Buckland & McNair, *Roman Law and Common Law,* 2nd ed. by F. Lawson, Cambridge 1952, p. xix.

[5] Reservation must be made, of course, for the several, more or less local codifications, such as the Prussian *Allgemeines Landrecht,* 1794, and the Bavarian *Codex Maximilianeus,* 1756.

[6] Cf. M. E. Lang, *Codification in the British Empire and America,* Amsterdam 1924; and A. L. Diamond, "Codification of the Law of Contract", *Mod.L.Rev.* 31–361 ff. (1968); Hahlo, "Here Lies the Common Law—Rest in Peace", 30 *Mod.L.Rev.* 241 (1967).

[7] David & de Vries, *The French Legal System,* New York 1958, pp. 113 ff.

gress, but had no impact on the courts of his time."[8] On the other hand, the influence of professors in the Common Law countries has risen steadily, particularly since the Second World War. The influence exercised by the professors at so-called National Law Schools in the United States is now hardly less than that exercised by French and German professors.[9] The rising appreciation of the steady outpouring of academic literature in England corroborates this impression, although the number of non-English names[1] may lend support to the idea that there has been an influx of Continental thinking.

3. DEEPENING THE PERSPECTIVE: CIVIL LAW

Superficial observation may thus lead to the impression that the difference between Common Law and Civil Law is based on views which are, if not altogether untenable, at least manifestly exaggerated. Indeed, one Scandinavian writer has recently concluded that apart from a certain emotional bias there is "no justification for the view that Continental law of today is more Roman than is English law".[2] Personally, however, I am satisfied if I find a true contrast between Common and Civil Law in such things as characteristics of judicial organization, traditional concepts, habits of legislators and lawyers, and methods of fact-finding and enforcement.[3] Indeed, I believe with Rheinstein that "the community of the civil-law systems consists more in a unity of formal technique than of content".[4] I am convinced that the cleavage will be found if one cares to penetrate the surface and go deeper into the matter. One will then find the differences which will be helpful in deciding the borderline cases.

As far as I can see,[5] the kernel of the difference resides in the

[8] Rabel, *op. cit.*, p. 315, see *supra*, p. 185. He continues: "When I first entered judicial practice, my superior, an old judge, warned me that I must completely forget my university training, and in confirmation showed me every week what he considered to be the entirely useless effusions of the current law journals."

[9] Rheinstein, *op. cit.*, p. 102, see *supra*, p. 187.

[1] E.g. Daube, Friedmann, Grünhut, Kahn-Freund, Lauterpacht, Lipstein Mannheim, Radzinowicz, Schmitthoff, Schulz, Schwarzenberger, Stoljar, Wolff.

[2] Gomard, "Civil Law, Common Law and Scandinavian Law", 5 *Scandinavian Studies in Law* 33 (1961). It should be added that Gomard's major difficulty was that he knew of "no way of measuring the influence of one legal system upon another".

[3] Cf. Rabel, *op. cit.*, p. 327, see *supra*, p. 185.

[4] Rheninstein, *op. cit.* p. 93, see *supra*, p. 187.

[5] On this point I wish to acknowledge my indebtedness as to inspiration to the writings of Koschaker and Rheinstein.

Roman books which were rediscovered in Bologna during the 11th century A.D. What was then discovered, the *Digest,* is mainly a collection of views on given cases expressed by the Roman jurists. Consequently, it is not a codification in any modern sense.[6] Rather, it displays many features which are also characteristic of English case reports of the type which are the foundation of the Common Law. Indeed, Buckland has said that "the Digest is essentially a casebook, though a disorderly one".[7] The Roman books were, however, received in quite another way than were the English case reports. When the Romans handed down their books to posterity, a challenge was handed down at the same time. This challenge was how to master (these were the days before the computer) the materials in the Roman books. *Constitutio Tanta,* the act promulgating the *Digest,* says that the work had meant the bringing together of the contents of nearly 2000 (Roman)[8] books. The challenge then was to reduce these materials to something that, at least in its essentials, could be learned at the universities. This was done, originally, by the innumerable *Summae* which appeared throughout the Middle Ages and later: mastering the law meant simplifying it by systematization. Only the simplified system was adapted to the needs and capabilities of the universities, and only in this form was it in harmony with the later Natural-Law approach with its built-in call for simplification. Codification entered this process as the once-believed optimum in simplification, a device for putting the law within the reach of the laity also. Even assuming that this was a mistake as to the potential of codification, as many critics argue, it certainly was a great step towards the goal of mastery-made-simple. Just as essential, the art of codification was attended by the art of construing and applying a code: the Civilians learned how to work with a code as well as how to write one.

There were two important offshoots of this basic approach which tended to reinforce it. Both would seem still to characterize what is termed the Civilian legal systems.

[6] "Code" is the English rendering of Latin "codex" which means in general simply a book. It also acquired, however, the special meaning of a collection of "constitutions", as in the *Codex Justinianus.* Modern usage has conferred still another meaning upon the word "code". It is not only a collection but must somehow be systematic too. Cf. Nicholas, *op. cit.,* p. 39, note. 2, see *supra,* p. 186.

[7] 1931 *Journal of the Society of Public Teachers of Law* 24.

[8] By Justinian's time, the Roman book could even be a bound book in the form we now know it. Cf. H. J. Wolff, *Roman Law. An Historical Introduction,* p. 140.

One is the *drive towards simplicity and consistency.* Inconsistencies are not tolerated; systematically they are levelled out. The main instrument here appears to be the construction of a conceptual apparatus. Some of the cornerstones in this building already existed in Roman days.[9] The major part of the work, however, was for natural reasons carried out in later times. The abundance of materials necessitated, if a sufficient degree of simplification was to be attained, the grading of the various texts as to importance. Some of them were simply forgotten: they were the stones that the builders rejected. Others attained the status of a *locus ordinarius.*[1] Modern superstructures were added later on: in spite of their Latin names, these structures often reflect concepts and principles never thought of by the Romans.[2] The Latin terminology was, and remained, the lawyers' common tools. It was not until the lowering of standards of Latin education in modern times that this natural community disappeared and the flow of ideas ran slower, if indeed it did not come to a complete standstill. It is now the task of comparative law, in so far as it can, to take over the burden of communication.

The other characteristic offshoot, which has lately attracted attention,[3] is the *civil service.* The success of the medieval universities was largely due to the desire of emperors, popes and kings to raise men capable of serving them in public office.[4] In this respect a university education in law was universally (in the geographically limited sense of the word prevailing in medieval

[9] Q. Mucius Scaevola was the first to arrange the Civil Law *generatim,* we are informed by Pomponius (see *Dig.* 1.2.2.41), and Scaevola's systematics included some main distinctions between the law of inheritance, the law of persons, the law of things, and the law of obligations by which he still rules many a Civilian lawyer from his grave. See Schulz, *History of Roman Legal Science,* Oxford 1946, pp. 64, 95.

[1] "By *loci ordinarii* the schoolman of the law understood those passages in the *Corpus Juris* to which were attached, by fixed convention, the exhaustive discussion of any given problem of the law." 1 *Continental Legal History Series* (Boston 1912), p. 390 § 32 (containing a slightly revised rendering in English of R. Stintzing, *Geschichte der deutschen Rechtswissenschaft,* 2 vols., Munich & Leipzig 1880–84, ch. 4, 1–9). As to the adventures of some Civil-Law texts, see H. F. Jolowicz, "The Stone that the Builders Rejected", 12 *Seminar* 34 (1954).

[2] See H. F. Jolowicz, 12 *Seminar* 34 (1954).

[3] See Rheinstein, *op. cit.,* p. 103, see *supra,* p. 187.

[4] Schweinburg, *Law Training in Continental Europe—Its Principles and Public Function,* New York 1945, pp. 14 f.: "Continental universities and—integrated with them from the very beginning—the law faculties were founded by the sovereign of their country. ... In some instances ... the assigned task of the new university embraced from the outset the procurement of qualified

times) useful and universally appreciated.[5] This feature of universality is particularly important when compared with the legal education offered in England. The lawyers' guild was the backbone and the basis of the Common Law. The English legal education was an apprenticeship in law offices—to some extent supervised by the Westminster courts.[6] Their language was Nor-

officials for the service of the founding sovereign ... identical with the country's public administration. Many universities thus reared from their very beginning prospective public officials and civil servants. In the period of enlightened despotism, ... even those universities which had of old been founded as autonomous seats of pure scholarly learning were resolutely transformed by their sovereigns into institutions for the training of public administrators. ... New universities, when founded, were given the task of training public officials as their dominant if not exclusive purpose." P. 43: "We must remember that Continental governments envisage their law faculties largely as training grounds for administrative civil servants."—Cf., however, what Carl J. Friedrich has to say as to the subject of *cameralia* as the required training of Prussian and Austrian 17th- and 18th-century public officials in his article "The Continental Tradition of Training Administrators in Law and Jurisprudence", 1939 *Journal of Modern History* 129–48. After referring to the Enlightenment and the French Revolution, he says at p. 134: "But both developments leave the judiciary not as an exponent of the common lawyer's conception of a government of laws but as the regulating mechanism within the official hierarchy. The judicial reforms of enlightened monarchs in the middle of the eighteenth century completed the building of the modern bureaucratic state by absorbing the judiciary." Note recently Rheinstein, 74 *Yale L.J.* 1331, at 1334 (1965).

[5] The idea of a universally valid education, however, was not originally inherent in the term "university" (Latin *universitas* simply meant some kind of corporation: to the Glossators it was synonymous with *corpus, collegium* and *societas*). This idea was rather attached to the notion of *studium generale* or *studium universale* and the setting up of such a *studium* was a matter of privilege. Such a privilege could be obtained from the Roman Emperor or from the Pope: in such a case the student's studies were completed with the award of *facultas ubique legendi* (or *docendi*). This *facultas* again included the right to teach at every other *studium generale,* which meant that it was a truly international degree. When kings extended the privilege to some city which had realized that the university's attraction for foreign students meant money for its burghers, they would try to get the Pope or the Emperor to endorse it. In order to get "studium generale non solum respectu regni sed respectu universae ecclesiae" it was necessary "ut pontificis interveneat auctoritas". See Sällström, *Bologna och Norden,* Lund 1957 (*Bibliotheca historica lundensis* V), pp. 15 ff., at p. 30.

[6] On the schools of the common lawyers, the Inns of Court, see Harding, *A Social History of English Law,* (Penguin ed.) 1966, pp. 185 ff. Harding concludes (p. 189) that "it was the location of the courts at Westminster which took legal education out of the orbit of the universities and simultaneously away from the influence of Roman-Canon Law". For an appreciation of the importance of the lawyers' guilds in England in the context of its legal evolution, see Koschaker, *Europa und das römische Recht,* 4th ed. Munich & Berlin 1966, pp. 172 ff. See further T. F. T. Plucknett, *A Concise History of the Common Law,* 5th ed. London 1956, pp. 215 ff., and H. Cohen, *A History of the English Bar and Attornatus to 1450,* London 1929, pp. 423 ff.

man French.[7] But Norman French had definite shortcomings as a vehicle of human thought. Indeed, as time went by, it was hardly understood even at Westminster. But the Latin of the universities teaching Civil and Canon Law was understood all over Europe by the educated. No wonder that the graduates of the law faculties, trained in Civil or Canon Law, rapidly rose to important positions in public life.[8] Among these positions was included, as time went by, the position of the judge. The judicial office thereby acquired a bureaucratic colouring which still remains.[9] Normally, it is a career magistracy; often it offers the first opportunities to law graduates to gain their early view of applied law. It has been said in reference to the apprenticeship system of this kind, known in Germany as the "Referendar" system, that, "as far as training can determine the result, it would surely seem that a lawyer so trained would be less likely to forget, in serving his clients, his higher duty to justice and the common good".[1] To put it another way, to these judges it comes naturally to view the legal process as part of a greater societal process, indeed as one of the instruments by which the sovereign governs. Consequently, even the judicial supremacy must rest with the sovereign.[2] It was equally natural to see to it that the administration of justice was not drowned in exorbitant litigation costs: justice should be available

[7] Law-French got into the new Parliament and statute rolls at the end of the 13th century and did not entirely disappear from them till the early 18th century. See Harding, *op. cit.*, p. 205, see *supra*, p. 192.

[8] Cf. Schweinburg, *op. cit.*, p. 120, see *supra*, p. 191: "Austrian and German Law faculties ... have, moreover, always been strongly entrenched in the position of forming the only road to the higher public service." Folke Schmidt points out one consequence of this, the integration between the public official and the State, which leads to the Continental concept of the state official: "The official was a representative of the State, and it has sometimes been said that the hierarchy of officials with the monarch or the State president at the top *made* the State." See his *Rapport général* in 2 *Actes du 6e Congrès International de Droit du Travail et de la Sécurité Sociale*, Stockholm 1966, p. 58.

[9] Cf. Schweinburg, *op. cit.*, pp. 16 f., see *supra*, p. 191.

[1] Munroe Smith, *Legal Education in Europe*, Chicago (Callaghan and Co.) 1928, p. 7.

[2] Schweinburg, *op. cit., supra* p. 191, points to the fact that "the ordinary courts in most Continental jurisdictions are not entitled to disregard or override statutes because they conflict with the constitution or with other statutes. All that the judges are empowered to do is to examine whether a legislative law has been properly promulgated or not. If properly promulgated it is absolutely binding for the judge. Not even decrees or ordinances that conflict with the constitution or with other statutes can he disregard or void." P. 44. See further J. W. Jones, *Historical Introduction to the Theory of Law*, Oxford 1940, pp. 119 ff.

at a reasonable price. All in all, the leading idea came to be to limit the role of the judiciary in order to keep the law under control. The government should remain in command and the law should be manageable for teaching purposes.

4. DEEPENING THE PERSPECTIVE: COMMON LAW

In all these respects the Common Law is in complete contrast to the Civil Law.

The Common Law was the pride of the Westminster courts. It had developed in the hands of the medieval judges. These were regarded as servants of the Crown and the powers they exercised were not necessarily confined to such as would today be regarded as judicial.[3] But eventually, when English society broke down in the turmoil of the 17th century,[4] they came to overshadow the English kings who had created their judicial offices.[5] Even as against Parliament, the English courts now found some measure of independence,[6] and their intimacy with the lawyers' guilds[7] helped to secure their position. Indeed, seeing that the kings had stepped out of their way, that Parliament bowed to them and that the lawyers worshipped them, it is hard to overstate the strength of the position held by the English courts. Most of this attitude of judicial sovereignty was inherited, in the course of time, by the

[3] Cf. Harding, *op. cit.* pp. 168 ff., see *supra,* p. 192: Hanbury, *English Courts of Law,* 2nd ed., Oxford U.P. (Home University Library no. 194), p. 166.

[4] See, e.g., Harding, *op. cit.,* pp. 265 ff., see *supra,* p. 192.

[5] The Common Lawyers were natural leaders of a Parliament falling out with the Crown. For an account of law, history and the English Revolution, see Harding, *op. cit.,* pp. 250 ff., see *supra,* p. 192.

[6] That *Magna Carta* could also be used against Parliament, Sir Edward Coke showed in *Dr Bonham's Case* (8 Rep. 118), where he declared that the Common Law would on occasion control an act of Parliament if the latter were contrary to common right and reason, and adjudge it to be utterly void. The accepted view is, however, that Coke did not mean to advocate any right to judicial review: see T. F. T. Plucknett, "Bonham's Case and Judicial Review", 40 *Harv.L.Rev.* 30 (1926); S. E. Thorne, "Dr Bonham's Case", 54 *L.Q.R.* 543 (1938); and J. W. Gough, *Fundamental Law in English Constitutional History,* 1955, pp. 30 ff., at p. 32.

[7] When towards the end of the 13th century the judges ceased to be drawn from the clerks of the court, a single legal career was established, leading an able student up through advocacy to the bench. Not only were the judges thus drawn from the ranks of the barristers, but they could also supervise the Inns of Court in certain respects. See Harding, *op. cit.,* pp. 182, 287, see *supra,* p. 192; 2 Holdsworth, *History of English Law,* 4th ed. 1936, pp. 484 ff., vol. 5 3rd ed. 1945, pp. 340 ff., vol. 6, 2nd ed. 1937, pp. 431 f., 477 f. Cf. Koschaker, *op. cit.,* pp. 172 f., see *supra,* p. 192.

American courts. There, what has been lacking in support on the side of tradition has been made up for by the appeal of the separation-of-powers doctrine.

All attempts, Civilian-inspired or not,[8] to reduce the sovereign position of the Anglo-American courts have failed. Experiments in codification, i.e. attempts to deprive the courts of their strongest weapon, their power (however unacknowledged) to make the Common Law, seldom proved successful. The reason was generally the unsympathetic attitude of judges and lawyers. As the lawyers reacted adversely to legislators' attempts to govern legal development, much of the technique of working a code was also lost. Case law, at times, could thwart the effect of a statute from the very outset.[9] Furthermore, a disposition for giving the statutes an inflexible construction made them age much faster than would presumably have been the case under Civilian traditions.

No wonder that the Anglo-American judges could attract the admiration of their colleagues in foreign countries. The Germans went as far as to speak of a "Richterkönigtum".

In this atmosphere, however, it is evident that an analysis of legal evolution in Anglo-American countries must take into account the fundamental importance of the *courtroom perspective.* It must always be borne in mind that legal evolution was seen and is still largely seen the way the judge sees it. In this perspective, a dominating position is easily given to procedural law. Certainly, this is often the key to Anglo-American legal riddles: the issue is seen as a problem of adjective, not substantive law. A striking example of this turn of mind is found in the legality principle. Ever since the time of Sir Edward Coke, the common lawyers have preferred to view it as a procedural problem, the problem of "due process".[1] The Fourteenth Amendment to the American Constitution, 1868, has made "due process of law" the dominant catchword in the American debate on the problems of judicial review.[2]

[8] Cf. Max Radin, "The Rivalry of Common Law and Civil Law Ideas in the American Colonies", in 2 *Law: A Century of Progress* 404; Stein, "Attraction of the Civil Law in Post-Revolutionary America", 52 *Va.L.Rev.* 403 (1966); Pound, "The Influence of French Law in America", 3 *Ill.L.Rev.* 354.

[9] Harding, *op. cit.*, pp. 231 f., see *supra*, p. 192.

[1] *The Second Part of the Institutes of the Laws of England,* vol. 1, London 1797, pp. 49 f.

[2] Corwin, "The Supreme Court and the Fourteenth Amendment", 7 *Mich.L.Rev.* 642 (1909); *idem,* "The Doctrine of Due Process of Law Before the Civil War", 24 *Harv.L.Rev.* 366 ff., 460 ff. (1910–11).

The courtroom perspective may assume added importance because many judges have no other perspective to apply. Regularly since the 14th century judges in England have been recruited from the ranks of the barristers, who have not been required to have any university education in law at all.[3] Their legal education has been received in a system of lawyers' guilds. The effects of the American system are not very different, even if conditions of legal education are quite different. It has been questioned whether law schools belong in the modern university any more than do fencing schools.[4] The law taught at most American law schools is intended to produce attorneys, not civil servants.[5] Judges are often elected, and even those who are not elected get their appointments as a reward for political services.[6] You cannot train for an American judicial career. There is no civil service in the European sense:[7] indeed, to be a state or federal employee is seldom regarded as a sign of personal success.

[4] See note 6 p. 192, *supra*. M. Zander, *Lawyers and the Public Interest*, London 1968, pp. 23 ff. The law taught at Cambridge and at Oxford was Roman (Civil) law, at first with Canon law, later exclusively. Although Blackstone gave his first lectures on English law as Vinerian Professor at Oxford in 1753, it was not until after 1858 that English law was regularly taught at the older English universities, and even at present it is believed that a fair proportion of the university law students do not go on to practise law. See C. J. Hamson, "The Academic Teaching and Learning of the Law", in *The Jubilee Lectures of the Faculty of Law, University of Sheffield,* London 1960, pp. 3 ff. J. F. Wilson says: "Of some 1000 students who left law school in 1963, slightly more than 50% proceeded to enter articles with a solicitor in private practice, a further 5% took up articles in local government, and approximately 10% went to the Bar." ("A Survey of Legal Education in the United Kingdom", 9 *Journal of the Society of Public Teachers of Law* 1, at 54–55 (1966).)

[4] Thorstein Veblen, *The Higher Learning in America,* 1918, reprinted in *American Century Series,* Sagamore Press, New York 1957, p. 155.

[5] Esther Lucile Brown, Preface to Schweinburg, *op. cit.,* p. 5 see *supra,* p. 191: "In the United States the law school has not only focused its attention almost exclusively upon preparation for the private practice of law, but society has come to think of that function as alone appropriate to the law school." See also Rheinstein, "Law Faculties and Law Schools: A Comparison of Law Education in the United States and Germany", 1938 *Wisconsin Law Review* 1; R. Valeur, *L'enseignment du droit en France et aux Etats-Unis,* Bibl. de l'Institut de droit comparé de Lyon, vol. 23, Paris 1928.

[6] American society was saddled with a system of elected judges in the early years of the 19th century. This system still remains, although somewhat modified by the so-called Missouri plan, under which judges are appointed by the Governor of the State from names proposed by a panel set up for that purpose. For further details, see Griswold, *Law and Lawyers in the United States* (The Hamlyn Lectures, 16th Series), London 1964, p. 26. As to the system of appointment to judicial office in England, see the description in Megarry, *Lawyer and Litigant in England* (The Hamlyn Lectures, 14th Series), London 1962, pp. 117 ff.; cf. Hanbury, *op. cit.,* pp. 163 ff., see *supra,* p. 194.

[7] The difference between the Anglo-American civil service system and its Continental counterpart is discussed in Schmidt, "Public officials as a separate

In attempting to show the differences that result from applying the courtroom perspective rather than the civil-service perspective it will perhaps be helpful if some mention is made of the price which is paid for Common Law ways.[8] One aspect—perhaps the most important one—is the very price of justice. When legal evolution is viewed less as a means of governing relations between people than as a courtroom game,[9] the inevitable result is that the costs of this game are matters somewhat remote from the centre of interest. The advance of capitalism may have contributed to the long-prevailing indifference on this point. The law of sales offers an example. According to Civilian traditions, the contract of sale typically refers to such things as a Dutch master, a horse or a bottle of Moselle. For commercial dealings there is a separate commercial law. But in Common Law, the law of sales has largely been hammered out as the law for big business.[1] To the extent that litigation costs served as a deterrent there was of course hardly need for any other type of law.

One further aspect of the price to be paid for the Common Law should be mentioned. There is an institutional cost involved. Common Law, says Kiralfy, "is peculiarly intractable if transplanted into any country with a differing legal background, and requires a simultaneous transfusion of English legal training and professional institutions".[2] One example is the library cost. There is some evidence suggesting that reception of Common Law pre-

category of employees", *Rapport général,* in 2 *Actes du 6e Congrès International de Droit du Travail et de la Sécurité Sociale,* Stockholm 1966, pp. 55, cf. 59 f. Perhaps one should add to his explanations the very late abandonment of the idea that government was property and that the concept of office was part of this idea of "property" in government. Cf. Jenks, *A Short History of English Law,* 4th ed. London 1928, pp. 26 f.

[8] Among recent critical evaluations of the English Common-Law system may be mentioned Brian Abel-Smith & Robert Stevens, *The Lawyers and the Courts. A Sociological Study of the English Legal System 1750–1965,* London 1967, and M. Zander, *Lawyers and the Public Interest,* London 1968.

[9] On the "sporting theory of justice", see, e.g., R. Pound, *The Spirit of the Common Law,* Francestown (N.H.) 1921, pp. 124 ff.; T. Eckhoff, *op. cit.,* p. 93, see *supra,* p. 182.

[1] While it is true that some distinction between obligations imposed on persons who deal in goods in the course of business and obligations imposed on other persons was recognized even in Anglo-American legislation (see, e.g., sec. 14 of the English Sale of Goods Act, 1893, and in the United States, now, the Uniform Commercial Code (1955) which contains different rules for dealings between "merchants", defined in § 2–104 (1), and for other dealings), the problems of the everyday consumer generally attracted little interest. The Common Law was content to take care of his business by having recourse to sanctity of contract and duty to take care. Cf. Borrie & Diamond, *The Consumer, Society and the Law* (Penguin ed.) 1964, pp. 280 f.

[2] Kiralfy, *op. cit.,* p. 157, see *supra,* p. 184.

supposes that each district court, or at least each appellate court, will have access to a complete English law-reporting system.[3]

The considerable popular support enjoyed by Common Law can probably be explained by the jury system. This has an admirable ability to lead people to place confidence in the courts. Neither the courts nor their legal system can be all that bad, since all the people are involved in their processes![4]

5. THE SCANDINAVIANS

In an article written some years ago, Professor Gomard of the University of Copenhagen comments on the question of the place of the Scandinavians in the dichotomy between Civil Law and Common Law. His view was that "no intelligible answer can be given to that question,"[5] and that "the question whether Scandinavian law is a civil- or a common-law system is not meaningful".[6] This view I cannot share. To me the question seems, in the proper context, easy to answer.

Let us start with the *Roman Law inspiration*. This element has hardly been less evident among Scandinavians than on the European Continent generally.[7] It has, however, long been fashionable among Scandinavians to belittle this inspiration or even deny its existence altogether.[8] Perhaps this attitude origin-

[3] Cf. Sedler, "The Development of Legal Systems: The Ethiopian Experience", 53 *Iowa L.Rev.* 562, at 577 f. and 629 with note 310 (1967).

[4] For a full discussion of the role and effect of the jury, see, e.g., W. R. Cornish, *The Jury,* London 1968.

[5] Gomard, "Civil Law, Common Law and Scandinavian Law", 5 *Scandinavian Studies in Law* 27 (1961). A first version of the article appeared in *New York University Institute of Comparative Law. First Conference Copenhagen* (published by NYU Law Association in Scandinavia) (no date), pp. 7–14.

[6] Gomard, *op. cit.,* p. 33.

[7] In particular if compared, e.g., with the situation in Northern France.

[8] See references to the Swedish and Danish literature of the late 19th and early 20th century in Jägerskiöld, *Studier rörande receptionen av främmande rätt i Sverige under den yngre landslagens tid,* Lund 1963, pp. 25 ff. See also Chydenius, "The Swedish Lawbook of 1734: An Early Germanic Codification", 20 *L.Q.R.* 377 (1904): "The process called 'reception', by which the Roman law at the end of the middle ages disseised the native law of Germany, did not reach the Scandinavian countries." Some more recent dicta: H. Munch-Petersen, "Main Features of Scandinavian Law", 43 *L.Q.R.* 366 (1927): "Roman Law in Scandinavia ... has never been accepted as current law." Pontoppidan, 9 *Am.J.Comp.L.* 344: "Roman law was never 'received' in Scandinavia." Gomard, *op. cit.,* p. 34, see *supra,* note 5: "Roman law was never

ated in the split in Germany between Germanists and Romanists which followed in the wake of the Historical School and which was deplored by Koschaker as a dubious and unhealthy consequence of that school.[9] I am inclined to believe, however, that the attitude also was an imitation of the contemporary English position.[1] In the great days of the British world empire, around the turn of the century, British writers were unwilling to admit that English law was built on borrowings from other countries.[2] For them, only *native* law sources could be in harmony with the *native* strength which had built the Empire; and native sources meant the Common Law! This was the time when the message of the great qualities of the Common Law was spread by the great British legal historians;[3] and this was the time when maritime lawyers of all nations generally bought the idea that English maritime law—a fantastic conglomerate of the old European Law Merchant with a coating of Common Law terminology, all admirably adapted to changing technical conditions[4]—testified to the capabilities of the English Common Law. Certainly, it would not be surprising if some, indeed most, Scandinavians nourished the idea that it was somehow a sign of distinction to resemble the successful British in not having foreign borrowings in their legal systems. There was even a temptation to point to borrowings in English law *from* Scandinavian law.[5] Modern scholarship has shown conclusively, however, that this denial of foreign elements was an enormous overstatement. In particular, the remarkable

accepted in Denmark as the law of the land or as a supplement of the national law." Lødrup, "Norwegian Law: A Comparison with Common Law", 6 *St. Louis University Law Journal* 520 (1961): "if Norwegian law is classified as 'civil law' and thereby declared to be based on Roman law, the labeling is simply incorrect".

[9] Koschaker, *op. cit.*, p. 156, see *supra*, p. 192.

[1] H. Munch-Petersen, *op. cit.*, p. 366, see *supra*, p. 198: "Indeed, in many other directions Scandinavian Law offers points of similarity with that of Great Britain and America, in that it has been essentially national in feeling and having been evolved independently of Roman Law."

[2] Macmillan, "Two Ways of Thinking" (The Rede Lecture, Cambridge 1934), states openly that "it came to be the fashion to disclaim any debt whatever on the part of the law of England to Roman law", in *Law and Other Things*, Cambridge 1937, pp. 76 ff., at p. 80.

[3] When F. Pollock delivered the Carpentier Lectures at Columbia University in New York in 1911, he chose as his title "The Genius of the Common Law" (published by Columbia University Press, New York, 1912).

[4] Cf. my work *Air Charter—A Study in Legal Development*, (Norstedts) Stockholm 1961, pp. 170–74.

[5] de Montmorency, "Danish Influences on English Law and Character", 40 *L.Q.R.* 324 (1924); cf. Eek, "Evolution et structure du droit scandinave", 14 *Revue hellénique de droit international* 33 f. (1961).

discoveries by Professor Jägerskiöld[6] of the 17th-century memoranda from the deliberations of the Svea Court of Appeals in Sweden have given us an insight into the reception process for which there would seem to exist no counterpart abroad. Today, it cannot be maintained in conscience that in this respect Swedish legal development displays any major deviation from the general European pattern, granted, of course, that Sweden (like many other European nations)[7] never arrived at the formal recognition of Roman Law which is found in the Reichskammergerichtsordnung of 1495.

When it comes to the less direct importations of Civilian ideas which stem from the radiation of French law during the 19th century[8] and of German law during the early 20th century,[9] I cannot recall that any writer has seriously denied them. On the contrary, the borrowings and the inspirations were freely recognized.[1] No doubt, the interest of Scandinavian lawyers has lately

[6] See Jägerskiöld "Roman Influences on Swedish Case Law in the 17th Century", 11 *Scandinavian Studies in Law* 175 (1967); cf. Sture Petrén, "The Reform of the Swedish Judiciary under Gustavus Adolphus", in *Essays in Legal History in Honor of Felix Frankfurter,* 1966, pp. 263 ff. Similar results as to Danish (and Norwegian) law are suggested by T. Nielsen, *Studier over ældre dansk Formueretspraksis,* Copenhagen 1951. See also *Danish and Norwegian Law—A General Survey* (ed. by the Danish Committee on Comparative Law), Copenhagen 1963, p. 11. In spite of some Norwegian denials of Roman law influences, a foreign observer such as G. O. W. Mueller is unwilling to grant more than that Norwegian law "stayed somewhat aloof of the Roman law influences which had reshaped the law of the continent proper": see preface to Andenaes, *The General Part of the Criminal Law of Norway* (transl. by T. P. Ogle) (Publications of the Comparative Criminal Law Project New York University, vol. 3), South Hackensack & London 1965, p. x.

[7] Even the British admit today that Roman law, "combined with canon law (itself penetrated by Roman-law ideas) and mercantile law of continental origin ... has probably had more influence than is sometimes admitted": Kiralfy, *op. cit.,* p. 168, see *supra,* p. 184; Harding, *op. cit.,* p. 239, see *supra,* p. 192.

[8] E. g. Marks von Würtemberg, "Blick på den svenska lagstiftningen alltifrån 1800-talets början", in *Minnesskrift ägnad 1734 års lag,* Stockholm 1934, pp. 163 ff.

[9] See, e.g., my book *Om ansvaret för fel i lejt gods,* Stockholm 1966, pp. 22 f.; cf. Folke Schmidt, "Model, Intention, Fault", 4 *Scandinavian Studies in Law* 177, at 181 (1960). Even in Norway, where maritime trade relations might suggest closer ties with England, there was little to upset the traditional flow of ideas. Such Norwegian legal scholars as Fr. Stang, Hagerup and Getz all pursued studies at Continental universities, avoiding England. It is apparent that the reasons were not only the unrewarding conditions of English academic legal studies.

[1] In particular the political Liberals in Sweden were under the French spell. S. A. Hedin (1834–1905), one of the leading Liberal firebrands, was known for his desire to have his coffin wrapped in the French flag.

focused more on the British and the Americans,[2] but this interest happens to coincide in a remarkable way with the outcome of the two world wars and has produced little impact on actual legislation.[3] The change has probably more to do with the radiation of the big and successful than with essentials of legal life.

Let us now turn to that offshoot of Roman Law inspiration, *codification.*

It is not true to say that Scandinavian law has no codes. All the Scandinavian countries have the ancient comprehensive codes of the 17th and 18th centuries,[4] and Sweden has gone far to revive its code of 1734 by replacing old materials with complete new parts: there is a Marriage Part ("Balk") of 1920, a Procedure Part of 1942, a Part on Parents and Children of 1949, a Successions Part of 1958, and a Part on Crimes of 1962; and there are more to come.[5] Finland has here followed suit. The fact that no such formal revival has taken place in Norway (or Denmark) should not obscure the fact that, as it has been put by Mr. Justice T. Leivestad, 'the general development in Norwegian Law no doubt tends towards a fragmentary codification of all our law".[6]

What is different from the Continental codes is rather the somewhat unsystematic build-up of the codes.[7] There is no General Part of the type that has been customary on the Continent since the late 18th century. This difference may be more

[2] Cf. Eek, *op. cit.*, p. 43, see *supra,* p. 199.

[3] Among the most important acquisitions transplanted from English law is the institution of *stoppage in transitu,* to be found in § 39 of the Scandinavian Uniform Sale of Goods Act (1905–1906). H. Munch-Petersen, *op. cit.*, p. 370, see *supra,* p. 198, suggests that what he calls the "undue influence" clause in § 31 of the Scandinavian Uniform Contracts Act (1915–1918) is another of these transplants. In spite of his following (Skaveng, "Some Salient Traits of the History and Development of Scandinavian Law", 6 *Seminar* 60, at 70 (1948), Swedish lawyers would probably be inclined rather to point to the *Bürgerliches Gesetzbuch* § 138 as the pattern upon which at least the Swedish version was modelled.

[4] See. e.g., Chydenius, "The Swedish Lawbook of 1734: An Early Germanic Codification", 20 *L.Q.R.* 377 (1904), and Leivestad, "Custom as a Type of Law in Norway", 54 *L.Q.R.* 95, 266, at 98 (1938).

[5] In English, however, these statutory texts are normally referred to as separate Codes, e.g. the Marriage Code, the Code of Judicial Procedure, the Penal Code.

[6] At the time he wrote this, however, it appears that Leivestad was merely a student of jurisprudence in Oxford. *Op. cit.*, p. 105, see *supra,* note 4.

[7] Folke Schmidt, "The German Abstract Approach to Law", 9 *Scandinavian Studies in Law* 131, at 151 f. (1965), compares the methods of arranging statutory material in Sweden and in Germany. On the modern attempts at codification in Scandinavia, see Eek *op. cit.* pp. 38 f. see *supra* p. 199; and *Danish and Norwegian Law—A General Survey,* Copenhagen 1963, p. 10.

apparent than real, however, because it is precisely in the field of basic legal ideas, the "science of law",[8] that one finds that "the actual influence which German law undoubtedly has exercised upon the Scandinavian law is apparent".[9] "One of the peculiarities which the Scandinavian countries—Norway and Denmark in particular—share with Germany is that the *Theory of Law* has played so great a role in making and developing our law."[1] "These scientific rulings have often formed the basic foundation of subsequent codification."[2]

Turning now to the criterion of the *civil service,* we find an even stronger indication of Civilian affiliation. Indeed, the doctrine of separation of powers would seem to be the only platform offered to the Nordic courts from which can be exercised anything remotely similar to the impressive powers which are traditionally coupled with the Westminster and the American courts. Although local nuances can be seen, Scandinavian courts have indeed been quite reluctant to interfere with the work of the legislatures.[3] What has been, and still is, characteristic of the Scandinavian judicial career is, on the contrary, the integration be-

[8] On this "science" as a creative law-making force, cf. Kahn-Freund, *Comparative Law as an Academic Subject,* Oxford 1965, pp. 18 f.

[9] H. Munch-Petersen, *op. cit.,* see *supra,* p. 198. But compare *Danish and Norwegian Law—A General Survey,* Copenhagen 1963, p. 11.

[1] H. Munch-Petersen, *loc. cit.*

[2] H. Munch-Petersen, *op. cit.,* p. 367.

[3] Herlitz, "Critical Points of the Rule of Law as Understood in the Nordic Countries", in *Civibus et rei publicae. Festskrift till Georg Andrén* (Acta Academiae Regiae Scientiarum Upsaliensis 8), Uppsala 1960, p. 162, at p. 174, summarizes the situation as follows: "In Norway the courts judge on the constitutionality of statutes and it is not unusual that a statute is overruled. In Denmark and probably in Sweden they have the same power but they have always used it extremely cautiously; in fact a statute has never been overruled. It seems to be a critical point that the constitution is not in the same way protected in Finland." Cf. *Danish and Norwegian Law—A General Survey,* Copenhagen 1963, p. 13. That even the Norwegians use their power with considerable restraint may be seen in the study by Torgersen, "The Role of the Supreme Court in the Norwegian Political System", (in *Judicial Decision-Making,* ed. Glendon Schubert, International Yearbook of Political Behaviour Research, vol. 4, Free Press of Glencoe, 1963, pp. 221 ff.), who states, at p. 241, in reference to the introduction of parliamentarism in Norway, the parodox "that the idea of the court as a censoring device was not invented [originally, the Norweigan Constitution of 1814 was interpreted to confer no powers of judicial review on the courts] until its power to fulfil this function had been eliminated". See also Leivestad, *op. cit.,* pp. 275–7, see *supra,* p. 201; and generally T. Eckhoff, "Impartiality, Separation of Powers, and Judicial Independence", 9 *Scandinavian Studies in Law* (1965): C. A. Nørgaard, "The Principle of Equality in Danish Administrative Law", 11 *Scandinavian Studies in Law* 241 (1967); Saario, "Control of the Constitutionality of Laws in Finland", 12 *Am.J.Comp.L.* 194 (1963).

tween the judicial office and the general civil service. In Sweden, the Svea Court of Appeals once used to be referred to, colloquially, as the Staff College of the civil service.[4] Even in Norway, where the judges can be recruited from all groups of lawyers, many of them are former government officials.[5] Everywhere it is normal to appoint to judicial office[6] men who have drafted statutes in the service of the Royal Ministries. It is but a corollary thereto that judges view themselves as the servants of the executive and legislative branches combined (parliamentarism blurs the difference between these branches) rather than as forming a corps appointed to serve as a check upon these powers. Furthermore, much of the judiciary is a career magistracy and the resulting unified system, as well noted by Megarry, reinforces the civil service mentality: "a junior magistrate who decided cases against the police or the government might find, or suspect, that his personal file at the Ministry would contain entries ensuring that his promotion would be retarded".[7]

Indeed, among the general public—to the extent that one can get any idea of what the general public thinks by the mere reading of a heavily political press—there is much suspicion against an independent judiciary. Evidently, it is realized that such a judiciary, if left unfettered, could easily jeopardize the success of many a piece of legislation. In Sweden, hopes have been expressed, darkly, that judges will not be so unwise as to risk their authority by taking positions unpopular with the ruling majority.[8] All in

[4] Cf. Sture Petrén, *op. cit.*, pp. 270 f., see *supra*, p. 200.

[5] Lødrup, *op. cit.*, p. 525, see *supra*, p. 199; T. Eckhoff, *op. cit.*, p. 35, see *supra*, p. 202.

[6] In Sweden-Finland, judicial offices were held, from 1680 onwards, by full-time professionals appointed by the Crown: Blomstedt, "A Historical Background of the Finnish Legal System", in *The Finnish Legal System*, (Publications of the Union of Finnish Lawyers) Helsinki 1966, p. 13. An elaborate discussion of the matter will be found in his article, "From Elected Magnates to State-Appointed Professionals—Aspects of the History of the Finnish Judiciary", *supra*, p. 9.

[7] Megarry, *op. cit.*, p. 125, see *supra*, p. 196. Indeed, the Swedish junior magistrate is characterized by Gillis Wetter, *Styles of Appellate Judicial Opinions*, Leyden 1960, p. 49, as "an intellectually somewhat subdued administrator, with a strong spirit of officialdom ingrained in his attitude to life".

[8] For instance by Undén (then Swedish Minister of Foreign Affairs) in his article "Några ord om domstolskontroll över lagars grundlagsenlighet" 1956 *Sv.J.T.* 260, at 263. When the Supreme Court of Sweden, by a split vote (15–9) in plenary session, in the Reserve Officers' Case (1954 N.J.A. 532), overruled a governmental ordinance for breach of constitutional principles, Parliament is believed to have demonstrated its powers under art. 103 of the Constitution of 1809 to remove Supreme Court justices without impeachment by entering some black ballots in the voting of the parliamentary "Opinionsnämnd",

all, contemporary political life reflects a general view that the judiciary may not carry out any policy of its own but must identify itself with the policy of the ruling majority. In this the Scandinavian attitude merely reflects what has been normal on the Continent. The principle after the French Revolution was not to allow the judges any leeway, lest they be tempted to put the clock back,[9] and it is believed to be the normal Continental mentality of public servants, deeply ingrained in them, to be "strongly prone to obey the commands of abstract authority rather than to stand on civil liberties and respect for the individual".[1] There is very little difference to be seen when we compare the Scandinavians with the Continentals, but there is an enormous difference if comparison is made with the Anglo-Saxons.

If one combines the factors now reviewed, there would seem to be no room for any doubt that Scandinavian law belongs to the Civilian bloc. The weight of the correspondence in the central respects just discussed seems indeed to be so considerable that it is hard to see any merit in the claim that Scandinavian law should at least be accorded some kind of privileged, intermediate status, somewhere between Common and Civil Law.[2]

which exercises these powers of removal. On the local Swedish level, the switch to political elections of the lay assessors ("nämndemän") who sit on the bench with the professional judges in the courts of first instance, a switch which took place in the late 1950s, has not contributed to relieve the Swedish magistracy from political pressure. In this atmosphere it is not surprising that recent proposals by political firebrands in Sweden to move politics into the civil service generally have met with a very lame opposition. In Denmark, where the adoption of a new Constitution in 1953 brought new fuel to the old controversy, views adverse to judicial review were expressed in Parliament by Mr Haekkerup, then Minister of the Interior (March 1966). He said that it was nowhere stated in the Constitution that the courts could overrule a statute, and to let them do it as a kind of self-supporting measure was one hundred per cent undemocratic! Parliament, he said, was the supreme institution of the Danish Constitution. *Folketingstidende* 1965–66 col. 4203.

[9] See, e.g., Cooper, "Impossible Conditions in Roman and Modern Law: A Summary Review", 16 *Tul.L.Rev.* 433, at 440 (1942).

[1] Schweinburg, *op. cit.*, p. 17, see *supra*, p. 191.

[2] Previous statements in this matter range between two opposites. There are those who, like Eek (*op. cit.*, p. 38, see *supra*, p. 199), claim that Scandinavian law forms "un troisième système", or, like Pontoppidan ("A Mature Experiment: The Scandinavian Experience", 9 *Am.J.Comp.L.* 344, at 345 (1960)) "that the Scandinavian countries cannot be counted among the so-called civil law countries". Others see great differences both ways: in *Danish and Norweigan Law—A General Survey*, Copenhagen 1963, at p. 68, it is said: "Danish-Norwegian Law is part neither of the 'common law' nor of the 'civil law' system", and Müller-Freienfels finds that Scandinavian law "cannot easily be classified according to a civil law—common law dichotomy" ("Unification of Family Law", 16 *Am.J.Comp.L.* 175, at 177 (1968)). Others, again, see affinity both ways: Folke Schmidt finds it to "have much in com-

It appears that in our Nordic hearts we are "against the King of England".

mon both with systems based on Roman law and with those based on common law" (Preface to 1 *Scandinavian Studies in Law* 5 (1957)). Others again, and in my opinion they are closer to the mark, recognize, like G. O. W. Mueller, that the legal ties of Scandinavian law, "like its geography, are much closer to Central Europe than to England and America" (*op. cit.*, p. x, see *supra*, p. 200), although they may, like Rheinstein, favour Scandinavian law with a separate identity to allow a clearer recognition of its special character (*op. cit.*, pp. 95 f., see *supra*, p. 187). I agree with Rheinstein when he grants that "the differences between the several families of the Civil Law group are so considerable that it might be justified to regard the Nordic laws as another, though peculiarly different, family of the civil law group" (*ibid.*), but I fail to see that what is peculiar to that family is not sufficiently taken care of within the group when what is peculiar to modern (Western) Germany, as contrasted to modern France, is sufficiently taken care of in that way.