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## CODIFIED AND JUDGE MADE LAW

The Role of Courts and Legislators in Civil and  
Common Law Systems

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## 1. INTRODUCTION

If the question is asked, what is the difference between, on the one hand, a civil law system, and on the other hand, a common law system, the answer usually given is that the civil law is codified, whereas the common law is formed by case law. Put in this way, the answer, although basically true, is misleading. It suggests on the one hand that in civil law systems the whole law is laid down by legislation and that the decisions of the courts only play a minor role, if they play any role at all; it suggests on the other hand that in the common law, the whole law is derived from decisions of the courts of justice and the legislator has hardly any role to play. Now, every common lawyer knows that this gives a false picture of the actual situation. In all common law jurisdictions, an abundance of statute law exists and in the course of time the legislator has intervened with increasing frequency in order to consolidate, supplement and alter the judge made law. On the other hand, every civil lawyer knows that the view that the whole law can be found in the codes or in supplementary legislative enactments is a fallacy and that the courts, guided by legal doctrine, have developed, supplemented and sometimes even altered the written law. It is not surprising, therefore, that it has been said that the law in the codes has become what the courts have made of it.<sup>1</sup> In the same vein it may be said that the law made by the courts has become what the statutes have left of it.

Both these statements, in their turn, are oversimplifications. Although statutes purport to circumscribe the limits of judicial lawmaking in the fields they cover, they require judicial interpretation in order to be implemented and this leaves room for the judiciary to determine the statutes's scope and its mode of application. On the other hand, although civil law courts may sometimes resort to very liberal and bold techniques of interpretation, they remain basically bound by the provisions of the code and it is not easy for them to evade clear and unequivocal wordings. Both civil and common law systems, therefore, form a mixture of statute law and judge made law; the answer to the question, what constitutes the difference between the two systems, is subject to qualification in this sense that in civil law systems the starting point for legal reasoning is formed by the provisions of the written law, whereas in common law systems this starting point is formed by the decisions of the courts.

Even then, however, further qualifications are needed because this

1. "Le droit est ce que la jurisprudence le fait", DE PAGE, *Traité élémentaire de droit civil belge*, I, 3d (1962) p. 22.

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statement does not, or at least only in varying degrees pertain to all branches of the law. It holds primarily true for the field of so-called private law. In the field of criminal law, in many jurisdictions the common law has been wholly or partially replaced by statute law.<sup>2</sup> With regard to administrative law, on the other hand, in several civil law jurisdictions, notably in France,<sup>3</sup> the courts have developed rules relating to the judicial control over administrative acts, and until recently the legislators have only intervened in this field on a piecemeal basis.

Constitutional law, for its part, is largely determined by considerations of policy that operate independently of the legal nature of the system. The most eloquent illustrations of the difference between the common and civil law systems are, therefore, to be found in the field of private law. Consequently, our attention will remain focussed on that field.

Of course, the question arises how these different approaches can be explained. Which reasons can be advanced for explaining the phenomenon of codification in civil law systems as well as the absence of a similar codification in the common law systems?

The reasons for this difference are mainly historical. We, therefore, have to examine to some extent the history of codification and its achievements as well as the historic development of the common law system.

## 2. THE HISTORY OF CODIFICATION

The map of Europe on the eve of the French Revolution showed a great variety of jurisdictions. Even in France, where at that time a centralized government had firmly established its authority, legislation covering the whole realm was limited to a number of specific topics and a comprehensive body of French law was nonexistent. The various regions, and even towns, applied their own local customs and statutes. In the northern part of France the law was, for the greater part, customary law and the customs varied from province to province. In the southern part the law was, for the greater part, written law and could be traced back to rudimentary codification of what survived from Roman law during the early Middle Ages.<sup>4</sup> This written law was in several respects defective and needed to be

2. See for the U.S., HAY, *An Introduction to United States Law* (1976), p. 190: "Substantive criminal law is, in the main, the statutory law of the States".

3. See DAVID, *Le droit français*, I (1960) pp. 116 & 167: "c'est un droit non-codifié (de formation jurisprudentielle)".

4. The dividing line between the southern "pays de droit écrit" and the northern "pays de droit coutumier" was formed by a line linking Genève with La Rochelle, see DAVID, *op. cit.* p. 5; see on the history of French law generally, the same, pp. 4 et seq; DAVID/BRIERLY, *Major Legal Systems in the World Today*, 2nd (1978) pp. 33 et seq; GILISSEN, *Introduction historique au droit* (1979), *passim*.

clarified and supplemented. Local authorities proceeded to develop it, each in their own way, with the result that despite its common core the application of the law was subject to local variations. The customs in the north of France also presented many gaps and uncertainties and they were often difficult to ascertain because for a long time they remained only known from oral tradition. In the 15th century, therefore, a royal ordinance required them to be reduced to writing and this was realized during the next centuries. The Custom of Paris, the seat of the royal government, gradually gained an overriding authority and used to be invoked in order to construe corresponding provisions in other customs, to fill gaps and to serve as a model for reforms.

Local patriotism was, however, too strong to consent to the abandonment of indigenous customary law. Provincial lawyers upheld their own customs and resisted the intrusion of the Custom of Paris. Therefore, despite the latter's growing influence, the diversity of customary law remained a fact.

Local patriotism also successfully resisted the efforts of the kings to unify the laws of France. As the kings asserted their authority over the realm, they also interfered with the administration of justice. Already, at a relatively early stage, a royal judiciary was organized that assumed jurisdiction over the whole of France. Royal courts, the so-called Parliaments, heard appeals from local courts and also exercised original jurisdiction. Among them the Parliament of Paris ranked foremost.

One of the main tasks of the Parliaments was to survey the application of royal ordinances. However, the Parliaments gradually obtained an independent position. A class of lawyers emerged that gained control over judicial functions and these used to be distributed among members of families that belonged to that class.<sup>5</sup> Legal education became the rule in these families and they developed a strong class conscience based on a conservative outlook. They resisted changes and when during the 17th century the king felt strong enough to curb the powers of local and regional authorities, they sided with the latter in their resistance to the king's efforts. On several occasions Parliaments refused to register royal ordinances as a condition for their implementation within the jurisdiction, on the alleged ground that these ordinances violated general principles of law which were at the basis of the French legal system and to which even the king remained subordinate. Although the struggle between the king and the Parliaments continued during the greater part of the 18th century, in the field of private law the kings gave way. They limited their legislative activity to specific topics in which the need for statutory interference was

5. The resulting venality and heredity of legal offices – which became a firmly established and officially tolerated practice – may look abusive, but it contributed to the independence and the coherence of the judiciary, see DAVID, *Le droit français*, p. 8.

considered to be particularly urgent, but the main body of law was left untouched.<sup>6</sup> Therefore, VOLTAIRE exaggerated but was basically right when he tersely complained that the traveller changed his law as often as he changed horses.

A comparable situation existed in other countries. Germany did not achieve unity until 1871. Until then it remained divided into many separate jurisdictions and a central authority was lacking. Whereas the efforts of the French kings to establish a unitary kingdom were largely crowned with success, the efforts of the German emperors to establish their authority over the whole of the Empire failed. Political and religious circumstances thwarted their designs and they finally abandoned their aspirations at imperial authority. Outside their homeland, they hardly exercised any real power. Similarly, the imperial court destined to serve as a court of appeal for the whole Empire, could only impose its authority on a limited number of regional courts.<sup>7</sup> The various regions and localities applied their own customs and enacted their own statutes. This does not mean, however, that they developed their laws in complete isolation. They often looked to other laws for guidance and examples. Thus, compilations of customary laws in the 12th century and thereafter gained widespread influence over large parts of the country. Statutes enacted in certain commercial towns in the northern part of the Empire served as a model for legislation in other towns and the latter sometimes even sought the advice of the courts in the town of original enactment on questions of interpretation. Nevertheless, laws remained diversified and even within the major countries-Prussia, Austria and Bavaria-uniformity of law was lacking.

In the Netherlands, too, the Provinces although United remained virtually sovereign and the federal organs could hardly act without the Provinces' unanimous consent. These only exceptionally consented to yield legislative power to the federation and as a result the main body of law remained provincial and never became federal. Within the provinces also a variety of laws existed. Customary law was far from uniform within the province itself and towns enacted their proper statutes. In Belgium, on the contrary, a powerful central authority was established, first under Spanish, then under Austrian occupation. However, as far as it was not deemed necessary for the maintenance of peace and order, this authority

6. Where the legislator intervened, he purported to consolidate the law rather than to reform it, see for instance GILISSEN, p. 300, on the Ordinances on Donations and Wills 1731/1735.

7. The reform of 1495, to wit the establishment of an independent supreme court, the so-called "Reichskammergericht", did not substantially alter this situation, see ZWEIGERT/KÖTZ, *Einführung in die Rechtsvergleichung* (1971), p. 163; see on the history of German law generally, the same pp. 161 et seq; WIEACKER, *Privatrechtsgeschichte der Neuzeit*, 2nd (1967) passim.

did not interfere with existing local laws and the diversity of customs and local statutes was not substantially affected by central legislative activity.<sup>8</sup>

Diversity of jurisdictions and lack of political unity also accounted for a variety of customary and statutory laws in other countries, such as Italy and Switzerland. Although the kings of Spain established an almost absolute authority over the whole realm, they could not overcome the strong local attachment to existing customary laws, and although they proclaimed legislation for the whole of Spain, the compilations of regional customs continued to remain the nucleus of Spanish private law.<sup>9</sup>

The French Revolution brought about a profound change in the physonomy of France. It swept away all remnants of feudal regionalism, abolished class distinctions, deprived the nobility of the robe, as the lawyers' class used to be called, of their influence and proclaimed the sovereignty of the people in the most absolute way, not limited by concepts of existing law. On the contrary, the principle of equality required that the law became equal for all citizens of France. A comprehensive, all-embracing codification of the law of France was, therefore, envisaged. Distrust of the judiciary which was identified with the *ancien regime*, contributed to the view that as little room as possible should be left to the courts in interpreting and, as it was feared, thereby distorting the sense of the law. Therefore, the aim should be to draft codes which contained clear and unambiguous rules that could easily be understood by everyone and could be applied without recourse to the subtleties of legal construction. We shall see later that this proved to be a fallacy of which the drafters of the code were well aware when they presented their civil code to the legislature. However, it reflected the attitude of the times.

Similarly, an aversion to the legal profession can be noticed to exist within the German Empire on account of the slowness of proceedings and the supposed corruptness of judges and other officers of the law. Contemporary codifications in some German states also bear witness of this preoccupation. In particular, the Austrian Civil Code purports to be as comprehensible as possible by not only enunciating abstract rules but by also giving concrete examples of their application in the hope that this will enable the layman to grasp their meaning.<sup>10</sup>

The major achievement of the French codification movement was the enactment of the civil code which was pushed by Napoleon himself. It was followed by a commercial code, a criminal code and by codes of civil and

8. See GLISSEN, *op. cit.* pp. 219 et seq.

9. The oldest and best known of these compilations is the so-called "Siete Partidas" (1265); local customs, so-called "fueros" still govern such matters as matrimonial property and succession.

10. After a long history, which started already in the middle of the 18th century, the "Allgemeines Bürgerliches Gesetzbuch (ABGB)" was finally enacted in 1811. It still forms the civil code of Austria, although many parts have been substantially revised.

criminal procedure.<sup>11</sup> As France conquered surrounding countries, these codes were, with certain exceptions, introduced in these countries. Thus, the civil code was introduced in the western parts of the German Empire occupied by France, where it remained in force until it was replaced by the German Civil Code. The code was introduced in the Low Countries and it remained in force in Belgium and Luxemburg, whereas it served as a model for the codification in the Netherlands.<sup>12</sup> It was introduced in Italy where it remained in force until it was replaced by later codifications.<sup>13</sup> The Civil Code constituted the example for codifications in other countries, such as Spain,<sup>14</sup> several Latin American countries, Louisiana and Quebec.<sup>15</sup> Legislation in French overseas territories also, for the greater part, was modelled after the pattern of the codes and the civil code has continued to influence legal developments in Mediterranean, African and Asian countries which were previously under French sway.<sup>16</sup>

The unity of the German Empire was only established in 1871 at the end of the French-Prussian war. The need for uniformity of laws, notably in the field of commerce, had already led to the voluntary adoption by all German states, including Austria, of a uniform commercial code.<sup>17</sup> Codification of all the branches of the law became one of the constitutional goals of the new Empire and resulted in the enactment of the German civil code, the reform of the commercial code and the enactment of a criminal code as well as of codes of civil and criminal procedure.<sup>18</sup> Notably the inauguration of the civil code was hailed as a major achievement in the process of codification and it inspired subsequent codifications as well as reforms of existing codes in several other countries.

An example is formed by the Swiss codes of private law. For constitu-

11. The civil code dates from 1804, the commercial code from 1807, the codes of civil and criminal procedure from 1806 and 1811 respectively, the criminal code from 1810. Except for the code of civil procedure, which has been replaced by a new code (1976), the other codes are still in existence, albeit subject to many revisions.
12. The existing Dutch code was promulgated in 1838; it is actually being renewed.
13. The civil code of 1865 was based on the code civil, but the civil code of 1942 departed from it in several respects.
14. The existing civil code dates from 1889; it is actually under revision.
15. The Quebec code dates from 1866, and is modelled after the French civil code and the Coutume de Paris; actually, a draft of a new civil code forms the subject of discussion, see on the original draft CRÉPEAU, *La réforme du code civil de Quebec*, in 31 *Revue internationale de droit comparé* (1979), pp. 269 et seq.
16. See generally LIMPENS, *Territorial Expansion of the Code*, in *The Code Napoleon and the Common-Law World*, New York University Studies in Comparative Law (1956, reprint 1975), pp. 92 et seq; ZWEIGERT/KÖTZ, *op. cit.* pp. 106 et seq.
17. Adopted in 1861; already in 1848 a uniform law on bills of exchange was adopted.
18. The "Bürgerliches Gesetzbuch (BGB)" was adopted by Parliament in 1896 and entered into force on January 1, 1900. The criminal code was already enacted in 1871, the codes of civil and criminal procedure were enacted in 1877. All these codes, including the commercial code from 1861, have since been partly revised on several occasions.

tional reasons the Swiss first enacted a code of obligations only. Later they enacted a civil code and at the same time reformed their code of obligations, both under the influence of the new German code.<sup>19</sup> The German code constituted the model for the Greek civil code. It inspired the recodification of Italian civil law and it served as a model for the Portuguese recodification.<sup>20</sup> In the Netherlands, both the courts and the legislator have been influenced by German legal concepts in interpreting and reforming existing code provisions. Similarly, the Swiss codes have been a source of inspiration. These codes have been met with unexpected approval when after the Turkish revolution in 1923 the Turkish dictator wanted to westernize the legal system. When informed that the Swiss codes constituted the most modern codification then in existence, he ordered their immediate translation into Turkish and their subsequent enactment. This happened with the result that, except for minor alterations, a codified law of Swiss origin still constitutes the written private law of Turkey.<sup>21</sup>

Outside Europe the German code has influenced, among others, codifications in Latin America and it has served as a model to Far Eastern countries, in particular, Japan, when they decided to reshape their legal system along the pattern of western law.<sup>22</sup>

### 3. THE HISTORY OF THE COMMON LAW SYSTEM

Early English law was as much diversified as the law on the European continent. Each country, each region, was governed by its own customs. However, this gradually changed, notably after the Normans conquered England in 1066. It sounds paradoxical that William the Conqueror, when he still ruled Normandy, was one of the chief opponents of royal authority and successfully resisted all efforts made by the French king to limit the powers of his barons; once King of England he became the champion of royal power and used all means at his disposal to subdue his barons to his rule. One of those means was the exercise of judicial power. A central judiciary was established and the king's courts heard all cases which affected the royal power, in particular those that concerned the king's revenues. William's successors pursued his policy with vacillating but in

19. The original code of obligations dates from 1881; the civil code (German: "Zivilgesetzbuch (ZGB)") entered into force in 1912, and at the same time the code of obligations was partially revised; a full-scale revision of the latter was only completed in 1936.
20. The original Portuguese code (1867) was based on the code civil; in 1967 it was replaced by a new code.
21. The translated and slightly adapted Swiss codes were introduced into Turkey in 1926; they still constitute the official civil law.
22. The Japanese civil code of 1898 follows the pattern of the BGB, but it contains non-German (French, indigenous, and, more recently, American) elements.

the long run successful results. The concept that the king's peace was concerned with all disturbances which occurred within the realm, be it issues between private parties or issues which involved the public authorities, resulted in the assumption by the king's courts of jurisdiction over all kinds of litigations, both in the field of private, criminal and administrative law. Local barons resisted this extension of central judicial power and they tried to uphold as much as possible their own jurisdiction. At one time they seemed to become victorious as they persuaded parliament to impose limitations on the extension of the royal jurisdiction. But this was only a temporary victory and after some time the king's courts continued to extend their jurisdiction over the whole realm at the expense of the jurisdiction of the local courts.<sup>23</sup>

Initially, the judges travelled with the royal court all over the country and heard cases in all places where the court rested for a while. Later, when the royal court was permanently established at Westminster, the judges resided part time in that city and went part time on circuit. They decided cases in accordance with the custom of the locality from where the case emanated. But gradually they started to decide similar cases in a similar way irrespective of differences between the local customs involved. In this way, they framed a uniform law that was applied all over the realm and limited the scope of application of the various customary laws. This uniform law was based on the decisions in individual cases. When a judge decided a case in a certain way, for instance by picking and choosing from the various solutions presented by customary rules the one he considered most suitable to the case, such a decision used to be followed in subsequent cases of a similar nature. Thus, a system of case law based on precedents was developed. Within a couple of centuries after the Norman conquest a system of judge made law had been formed that was applied all over the realm by the royal courts.

Westminster had become the center of lawmaking; a class of lawyers emerged, organized in the inns of court, and these inns also provided for legal education of prospective practitioners.

Judges were recruited from the bar and in the course of time they obtained a strong, independent position. From the 16th century onwards they used to hold office for life.<sup>24</sup>

23. See BAKER, *An Introduction to English Legal History*, 2nd (1979), pp. 1 et seq. The traditional view that the emergence of the common law was wholly the fruit of the Norman conquest, has been modified as a result of recent investigations. The concept of the King's peace appears already to have emerged from the 10th century onwards, and a start towards a common law system was already in the making; but the Normans considerably accelerated the process.

24. See BAKER, *op. cit.* pp. 34 et seq.

When already at an early stage in the history of the common law, the courts of law failed to live up to the expectations of litigants and, whether out of conservatism, fear of innovations or out of undue respect for procedural technicalities which limited their scope of action, fell short of administering the law in a satisfactory way, the King's chief minister, the Chancellor stepped in. He gave relief upon application from aggrieved parties on a case by case basis if he considered this to meet the demands of conscience and fair dealing. Thus a supplementary system of case law, called Equity, emerged, that was developed by the Court of Chancery and provided for justice on the basis of equitable principles in those cases in which common law courts did not grant sufficient relief.<sup>25</sup>

The reasons which, on the European continent, stimulated the desire towards codification were therefore absent in England. Unity of law was achieved through the action of the courts. A class of lawyers had emerged that was trained in the case law method. As a rule, judges had showed themselves capable of coping with the manifold problems presented to them. Whatever criticism could be levelled against specific shortcomings, abuses and excesses, the system as a whole was not seriously challenged.<sup>26</sup> Under these conditions, BENTHAM's project to reduce the whole of the law to written codes, did not materialize in England itself.<sup>27</sup> It was in the United States that his ideas appealed to lawyers.

English colonists introduced the common law in the United States where it was applied as far as applicable to circumstances. It since has been adopted in all states of the Union with the exception of Louisiana. In a number of southern states remnants of Spanish law still survive. Under the impetus of DUDLEY FIELD, who strongly supported BENTHAM's ideas about codification, several states enacted codes of law.<sup>28</sup> However,

25. The supplementary and in some respects concurring jurisdiction of the Equity Court led to conflicts and also resulted in delay, in case questions of both common law and equity were raised, which made it necessary to institute proceedings in either court. Therefore the Judicature Acts 1873/1875 brought much needed relief by abolishing the separate jurisdictions, and amalgamating them in one jurisdiction, that could hear questions of both common law and equity at the same time. In the U.S. too, a merger of jurisdictions took place, and only few States continue to maintain a separate chancery court, see HAY, *op. cit.* p. 4.
26. This does not mean that no partial reforms were needed. Especially from the middle of the 18th century onwards, social change demanded law reform to adapt the system to modern circumstances, see MANCHESTER, *A Modern Legal History of England and Wales 1750-1950* (1980), *passim*.
27. Jeremy BENTHAM (1748-1832) devoted much time of his life to developing schemes for law reform, and urgently advocated a complete, overall codification of the law, see MANCHESTER, *op. cit.* pp. 13-15 & 39-40.
28. David DUDLEY FIELD (1805-1894) practised law at New York. His draft code of civil procedure served as a model for the New York code on the subject. His draft civil code met with approval from several southern States who, on the basis of it, enacted "Field Codes".

these codes do not create codified law in the way European codes do. The latter contain a comprehensive regulation of all pertinent legal relationships to the exclusion of the law as it existed before the enactment of a code. They abolish the previous law and replace it by code provisions. These constitute the primary source of law and are interpreted according to their own merits. The previous law can only serve to illustrate the historic origin of a code provision. Neither can it serve to fill gaps in the code. If the code does not give an express answer to a certain problem, the answer may be found in applying other articles by way of analogy, or in considering various articles with a view to induce from them more general rules from which a solution to the problem can be derived.<sup>29</sup> The American codes, however, are regarded as declaratory of the previous common law. They are interpreted against the background of the common law. They do not abolish that law but, rather, consolidate and restate it. Neither are they “designed to embody the whole law of relations, rights and duties; except in those instances where their language clearly and unequivocally discloses an intention to depart from, alter or abrogate the common law rule concerning a particular subject matter, a section of the code purporting to embody a common law doctrine or rule will be construed in the light of common law decisions on the same subject.”<sup>30</sup> *A fortiori* where the code remains silent, it does not affect at all existing common law.

Therefore, this so-called codification cannot be considered to introduce a system of codified law as was done by the codifications in France, Germany and elsewhere. The basis of the law continues to lie with the court decisions.

The common law spread over the British Commonwealth and is applied in many countries all over the world, not only in countries which still are members of the Commonwealth but also in countries which once belonged to the Commonwealth but since have left it. A large part of the world is therefore governed by a legal system that consists basically of judge made law.<sup>31</sup>

29. See on these aspects TUNC, *The Grand Outlines of the Code*, in *The Code Napoleon and the Common-Law World*, pp. 19 et seq.

30. Quotation from Supreme Court of California in *Estate of Elizalde* (1920), 188 P. 560, 562; 182 Cal. 427, 433; see also ROSCOE POUND, *Codification in Anglo-American Law*, in *The Code Napoleon and the Common-Law World*, pp. 267 et seq. The same applies to modern so-called codes, such as the Uniform Commercial Code, a draft code which has been submitted to all States for introduction into their legislation, and to which each State has given effect to a more or less extent. It has been regarded as supplemented by existing law unless displaced by particular provisions of the code itself, see *The National Shawmut Bank of Boston v. Vera* (Massachusetts 1967), 223 N.E. 2d., 515.

31. See on the expansion of the common law, ZWEIFERT/KÖTZ, *op. cit.* pp. 271 et seq.

#### 4. THE INFLUENCE OF ROMAN LAW

It has often been submitted that another reason for codification of law in continental Europe can be found in the impact of Roman law on the development of the legal systems involved. Now it is true that Roman law has exerted an important and lasting influence on European legal science and that it has also penetrated legal practice with varying degrees of intensity. It may, however, be asked whether the example furnished by Roman law caused the idea of codification to engender or whether the resort to Roman law as a unifying factor was not rather the effect of the lack of uniformity of laws.<sup>32</sup>

After the collapse of the Roman Empire, Roman law did not completely sink into oblivion. It survived in a rudimentary form in the south of France, in parts of Spain and in Italy. It remained in force in the Eastern Roman Empire and lawbooks conserved in monasteries remained an object of study. From the 12th century onwards a new impetus was given to the study of Roman law, as a result of the discovery of extensive legal materials, first among them the compilation of statutes, consultations and commentaries collected under the reign of the emperor Justinian. The most important part of this collection was formed by a digest of legal opinions from outstanding jurists which were clothed with legal authority, and which covered the whole field of private law. These *Digestae* or *Pandectae* expressed the state of the law during the aftermath of the Empire and constituted an invaluable source for the knowledge of so-called post classic Roman law.<sup>33</sup>

The study of the digests was eagerly pursued at the universities of northern Italy and southern France. Soon other universities followed suit and the study of Roman law became the main topic of academic legal education all over Europe. Outside academic circles, however, reactions were mixed. For political reasons, the German emperors sponsored the advancement of Roman law. In their struggle for power, they claimed to be heirs of the Roman emperors and they claimed their empire to be the continuation of the Roman one. In that empire Roman law reigned supreme

32. See, among others, MAILLET, *The Historical Significance of French Codification* in 44 *Tulane Law Review* (1976), pp. 681 et seq., who concludes that historical factors such as the influence of Roman law can be considered as mere favourable conditions for codification, but were not really historical causes nor historical factors directly leading to codification. As the three decisive "substantive" factors of codification in the case of French law he lists, first, the accomplishing of a unification of law, secondly, the providing of a means of modifying the nature of law itself, and thirdly, the altering of the contents of the law.

33. See on the role of Roman law in European legal systems in particular the "classic" study by KOSHAKER, *Europa und das Römische Recht*, 4th (reprint 1966).

and the absolute power of the emperor was founded in that law. This aroused the opposition of the local rulers, who resisted the emperors' claims. Gradually, however, this opposition slackened, especially when the emperors abandoned their claims and acquiesced in their position of nominal rulers.<sup>34</sup> The climate in Germany was favourable towards the reception of Roman law. Local laws were often uncertain and defective. Many customs were not reduced to writing and a rule of evidence was applied in superior courts that required written proof of rules of customary law to be furnished by the party that invoked them. It therefore became often impossible to furnish proof of the existence of a rule of customary law. Moreover, a class of lawyers, as existed in France and England, did not emerge in the German states. Judges used not to be chosen from among practising lawyers, but from among the nobility, the civil service and university professors. They lacked experience in litigation and were more at ease when examining written briefs than when conducting trials or hearing oral argument. Several courts established a practice of asking an opinion from a law faculty before deciding an important or difficult case. In this way, the law faculties could exert influence on the course of the law.<sup>35</sup> These faculties devoted themselves to the study of Roman law and on many occasions they based their opinions on Roman legal texts. They realized, however, that the law as enunciated in the digests was written for a different society than the one in which they lived and that it, therefore, had to undergo some adjustment before it could serve as a basis for a solution to actual legal problems. They, therefore, adapted it to modern circumstances and developed a so-called modern use of the Pandects, a Roman law based on the ancient texts but modernized so as to respond to changed circumstances in human society. This Roman law was gradually accepted as a kind of residuary law which was applied as far as local or regional laws did not provide solutions to legal issues. It became the common law in the major part of the Empire but remained subsidiary and complementary to the laws of the states and the statutes of the towns.<sup>36</sup> It retained this position until the end of the 19th century when it was replaced by the German civil code. Notably during that century German legal science developed this common Roman law into a highly sophisticated legal system. As such, it formed the basis of the German civil code which, first of all with regard to its system, to a lesser extent also with regard to its

34. See on this claim and its abandonment KOSCHAKER, *op. cit.* pp. 38 et seq.

35. See on this "Aktensendung" and the influence of the Law Faculties *idem*, p. 224; on the German court system WIEACKER, *op. cit.* pp. 175 et seq.

36. In some parts of the Empire, however, a compilation of medieval customary law, the so-called "Sachsenspiegel", continued to constitute the common law, and it was only to a slight extent penetrated by Roman law.

contents was greatly influenced by this modern version of Roman law.<sup>37</sup>

Roman law also became the residuary common law within the greater part of Italy. Here, too, legal science adapted it to the societal circumstances of the time. The same holds true for the Netherlands where notably during the 17th century legal scholars created a subsidiary and supplementary system of Roman-Dutch-law.<sup>38</sup> In France, however, lawyers showed reluctance to resort to Roman law as a subsidiary common law. Political reasons also contributed to this attitude. The long aged rivalry between the kings of France and the German emperors made the former reject Roman law as the common law of France when the emperors proclaimed it to be the common law of the German Empire. The tendency to exalt France's sovereign independence was reflected in the emphasis laid on the indigenous nature of French laws and the refutation of any claim by supporters of Roman law that this law could be the law of France.<sup>39</sup> The existence of a strong and experienced legal profession also supported this attitude. Lawyers were capable of finding practical solutions to legal problems and they had no need to solicit the aid of academic opinions.

Nevertheless, Roman law penetrated into France, albeit not directly but only in an indirect way. Legal scholars used Roman law analogies when commenting on customary law, recommended Roman law solutions where customary law appeared to be defective or in need of reform and tried to give a synthesis of the laws of France on the basis of Roman law. When filling gaps in existing customary laws recourse was had to other customs, in particular the Custom of Paris, but where these too did not provide solutions, lawyers and judges had to fall back on natural reason and justice. Many rules of Roman law were considered to give the truest possible expression to this concept and to constitute the so-called written reason that was to be applied by the courts as a residuary body of law. In drafting the civil code its authors drew inspiration from customary law, notably the custom of Paris, but they also consulted the legal writings of Roman-law-inspired authors and adopted solutions proposed by them.<sup>40</sup> Roman law, therefore, forms an additional source of the French civil code but this code is less Roman than its later German counterpart.

37. This so-called "Pandektenwissenschaft" dominated German legal science during the second half of the 19th century.

38. This system still survives in South-Africa, and it also profoundly influenced Scottish law which, despite English intrusions, still remains basically a Roman law-system.

39. See the vigorous affirmation by the 16th century lawyer Guy COQUILLE, that "les coutumes des provinces de France... sont leur vrai droit civil et commun" and that "le droit civil romain n'est pas notre droit commun", in *La Coutume de Nivernais* (re-edited 1864), pp. 11–12.

40. Notably by the writings of DOMAT (1625–1696) and POTHIER (1699–1772); the former gave an exposure of civil law in what he called its natural order ("ordre naturel"), the latter exposed the civil law in a number of treatises ("Traités") in which he frequently refers to Roman law, in particular with regard to the law of obligations.

The concept of natural reason gained considerable importance in legal thinking during the 17th and 18th century. It led to a critical re-examination of Roman law rules in the light of general concepts of reasonableness. Existing rules were re-arranged in a logically constructed system; general principles of legal reason were developed, from which the law was systematically deduced. It was felt that a reasonable exposure of the law could only be achieved if the law were laid down in a comprehensive body of logically arranged rules which expounded its concepts in a clear and unequivocal way. Notably during the 18th century legal science even developed a kind of European common law based on generally acknowledged concepts of natural reason. This law largely remained a scientific phenomenon. It provided a common background for the interpretation of the actual law and for the filling of gaps in it, but it could not put an end to the existing diversity of statutes, customs and ordinances on a local and regional level.<sup>41</sup>

However, these views on natural law had a strong impact on 18th century codifications. They influenced French authors who borrowed concepts from natural law that then found their way into the civil code. They stimulated the revolutionary aim that the law should be equal to all and comprehensible to human reason. They provided strong legal arguments to German princes who wanted to put an end to the variety of laws and customs within their territories. Thus natural reason furnished a theoretical foundation for the practical need of unifying the law.

The rediscovered Roman law also became an object of study at the English universities of Oxford and Cambridge. However, by the time this occurred, the king's courts had firmly established their jurisdiction and the bar was well organized in the inns of court. Legal training was offered by those *inns* and although prospective lawyers may first have visited a university they seem to have done this rather with the aim of completing their general education than for the purpose of pursuing a legal study.<sup>42</sup>

41. Even the common core of the actual law remained far from uniform. Thus, in the introduction to the Prussian code of 1794, the "allgemeines Preussisches Landrecht", existing laws were declared to be henceforth abolished, and this did not only relate to the laws of towns and regions, but also to the two (!) common laws that existed side by side, Roman law and the *Sachsenspiegel*. In the Netherlands, VAN DER KEESEL, *praelectiones iuris hodierni, Theses selectae* (1800, partly re-edited 1939), furnishes an imposing amount of examples of divergencies in the laws governing within the United Provinces. Differences between the rules and customs of the various provinces, and between the statutes of towns and the customary laws of the regions appear to abound. Even a basic common law does not always exist. Thus no common law of inheritance exists in the province of Holland, but in one part of the province the so-called "Aasdomsrecht", in another part the so-called "Schependomsrecht" forms the basic law of succession.

42. Even to-day in England a university degree is not a compulsory requirement for entering the legal profession. In the U.S. on the contrary a law school degree is a condition for admission to the bar examinations.

An apparently comprehensive system of judge made law determined major legal issues all over the country. In these conditions little room was left for the application of Roman law within the case law system. Nevertheless, Roman law exerted a certain influence, first of all on legal doctrine, but also to some extent on legal practice. Authors made comparisons between Roman and English law and in describing the latter they made excursions into the Roman law system.<sup>43</sup> Although traditionally English lawyers have found their law in the cases and not in the treatises, they surely at all times have also consulted the latter. Thus, Roman law became known not only to academicians but also to practitioners. Courts of Equity drew inspiration from Roman law sources, but also common law courts in several instances resorted to Roman law in order to find solutions for controversial issues to which the common law did not provide a clear answer. From the 18th century onwards courts have even quoted with approval Roman law-inspired writings by French authors.<sup>44</sup> A statement to the effect that English law has not been influenced by Roman law, whereas the civil law is based on Roman law, is therefore too sweeping. Neither the one nor the other is entirely true. English law has undergone some influence of Roman law but this influence has only affected parts of the law. It has remained superficial and has been exerted on a piecemeal basis. The influence of Roman law on the civil law has been more intense and systematic and it has affected almost every part of at least private law. However, civil law systems have undergone this influence in varying degrees of intensity, and all of them have preserved, the one to a greater, the other to a lesser extent, elements of indigenous law.<sup>45</sup>

##### 5. CODIFICATION AND THE COURTS

The French Civil Code was destined to replace the previous laws of

43. This continued in modern times, see BUCKLAND & MCNAIR, *Roman Law and Common Law*, 2d, by LAWSON (1965), *passim*.

44. For examples see RINFRET, *The Relations between Civil Law and Common Law, in The Code Napoleon and the Common-Law World*, pp. 378 et seq. and the cases there quoted. See on the Roman law influence on the equitable jurisdiction VANDERBILT, *The Reconciliation of the Civil Law and the Common Law*, *idem* pp. 388 et seq.

45. Another influential factor was presented by canon law. Before the Reformation, this law governed practically the whole of family law all over Europe, and it also influenced other branches of the law, such as the law of contracts and the law of procedure. It continued to form a basis of the law in catholic countries, in particular in matrimonial matters, even where, as in France since 1539, the ecclesiastical courts were deprived of their secular jurisdiction. But also in non-catholic countries it remained influential; thus the laws of the church of England remained chiefly based on concepts of canon law, and ecclesiastical courts continued to exercise secular jurisdiction in matrimonial matters until 1857. As canon law itself was in a large measure inspired by Roman law, it constituted an additional instrument for spreading the latter's influence.

France and to provide a comprehensive survey of the entire civil law. The desire to create a coherent system of rules that corresponded to the logic of the law was characteristic for the Age of Reason. Coupled with the distrust of the judiciary in the *ancien regime*, this led to the view that the code should be self-sufficient and so clearly formulated that the only task left to the judge was to decide which rule he had to apply to the facts of the case; he then had to apply that rule on its face value. Of course, this was a fallacy and the drafters of the civil code, experienced lawyers with a keen eye for the needs of practice, were well aware of it. When they presented their code to the legislative body they gave expression to the view that the code could not provide clear cut solutions for all legal issues, but that it left gaps and uncertainties; consequently the task of the judge was not limited to deciding which rule of the code had to be applied in a given case, but this task also comprised the explaining of obscure rules, the filling of gaps, and the adjustment of rules to unforeseen future developments. The drafters argued that “the needs of society are so varied, the intercourse among humans so active, their interests so multiple and their relationships so extensive that it is impossible for the legislator to foresee everything. The code, however complete it may appear, is no sooner promulgated than a thousand unexpected questions are presented to the judge, because the laws once written remain as they were written, man, on the contrary, never remains the same. He changes constantly and this change, which never stops, and the effects of which are so diversely modified by circumstances, produces at every instance some new combination, some new facts, some new results. The function of the law, therefore, is to fix a broad outline, to lay down the general maxims of law and justice and to establish principles rich in suggestiveness and consequences, but not to descend into the details of the questions that can arise in each subject. It is for the judge and for the lawyer, embodied with the general spirit of laws, to direct their application.”<sup>46</sup>

This task the French courts have accepted and fulfilled. Although they have always continued to show respect for the written law and have given due consideration to the wording of a text, they have not hesitated to construe code provisions whose meaning left room for doubt, to fill gaps and to adapt provisions to changed circumstances. At a certain moment they even had recourse to general principles of law that were not expressly formulated in the code with a view to developing the latter's provisions. Thus, the doctrine of abuse of rights served to develop the law of tort. Especially in this field, the code only fixes a broad outline and lays down certain general maxims of law. The courts took up the challenge and they

46. Discours préliminaire, pronounced by PORTALIS on presenting the draft code to the Legislative Body (1804), quoted from the English translation by VON MEHREN & GORDLEY, *The Civil Law System*, 2d (1977), pp. 54–55.

not only developed out of these few code sections a detailed system of tort law but they also adjusted it to changing demands.<sup>47</sup>

After the entry into force of the German civil code, the courts were also faced with the task of interpreting its provisions. They, too, clarified doubts, filled gaps and adjusted the law to changing circumstances. The German supreme court even expressed the view that “when the written law fails, the judge takes the place of the legislator for the individual case. In such a case,” the court observed, “one often speaks of a gap in the written law, but this form of expression is unfortunate because behind it lies the assumption that the fullness and richness of life was encompassed in a codified law. This is impossible. Every day sees new forms of law. The creative force of life is unending and in all such cases the judge must find the law. All legislation, including the civil code, is in reality patchwork.”<sup>48</sup> A similar concept is expressed in the Swiss civil code (sect.1). If the written law is defective, the judge must have recourse to other means in order to find a solution. A rule of custom may provide the answer, but if not, the judge must act as legislator in the individual case and give the decision he would have reached if he had to legislate in the particular field. His freedom of action is limited only by the bounds set by leading doctrine and tradition.

German courts have, as a rule, given broad and liberal interpretations to the provisions of the civil code. They have made extensive use of general principles of law. For this use they found support in the provisions of the code itself. The German code contains several general clauses which lay down broad principles of an abstract nature, such as the principle of good faith in the interpretation of contracts and in the performance of obligations.<sup>49</sup> The courts have developed these clauses into principles of an overriding nature to which even specific provisions remain subordinate. Therefore, the concept of good faith permeates the whole law of contractual relationships and even allows the courts to interfere with those relationships if this is regarded as necessary. The courts have not even hesitated to modify the terms of a contract with a view to adjusting them to unforeseen circumstances which basically alter the relationship. The French Civil Code, on the contrary, does not contain general clauses which lay down abstract principles of law. Although the courts have sometimes invoked general principles of law, they have as a rule exercised restraint in introducing such principles into the code system. In particular, they have refused to interfere with contractual relationships on the ground

47. See DAVID, *Le droit français*, pp. 174 et seq.

48. Reichgericht 26 May 1922, 51 Jur. Wochenschr. (1922) 910, quoted from VON MEHREN, *op. cit.* p. 1082.

49. Sections 157 & 242 BGB which together constitute the “Generalklausel” on good faith (“Treu und Glauben”), see ZWEIGERT/KÖTZ, *op. cit.* pp. 181 et seq.

of a supposed principle of good faith. When after the first World War money debts expressed in French francs were seriously affected by the course of inflation and the decrease in value of the franc, the courts nevertheless allowed the debtor to discharge his debt by paying the nominal amount of francs he owed. A franc remained a franc and if revaluation of debts was considered to be sound policy, it was up to the legislator to intervene. The same attitude was adopted after the Second World War. On the contrary, under similar circumstances, German courts proceeded to a revaluation of debts expressed in marks. It was held contrary to good faith to allow the debtor to discharge his debt by paying the nominal amount of marks in which it was expressed although this amount represented only a fraction of the actual value of the debt. The burden of inflation should not be borne by the creditor alone but should be shared by the debtor and it was the task of the court to provide for an equitable reapportionment of the loss between both parties.<sup>50</sup>

The Dutch Civil Code is for a large part based on the French Civil Code and is partly inspired by the so-called Roman-Dutch law which was applied as a subsidiary law in the United Provinces of the Netherlands before the French conquest. In construing their code Dutch courts originally showed as much respect for the written text as the French courts did, but gradually they adopted a more liberal attitude. From the end of the 19th century onwards German legal science influenced Dutch legal doctrine and this influence has since been ever-increasing. Authors advocated solutions which were inspired by the provisions of the German code and their interpretation by the courts. Dutch courts followed suit and started to reinterpret code provisions in the light of German and later also Swiss law. Thus, they developed a general principle of good faith in contractual relationships, although they did not go as far as the German courts did and until recently remained reluctant to intervene in contractual relationships to the extent of substantially altering them. As a result, Dutch law is gradually drifting away from its French basis and is turning into a system that is affiliated to German law. This change is effectuated by the courts, guided by legal doctrine.

This tendency is reinforced by the reform of the civil code that was commenced after the last war and is actually approaching its completion. An entirely new code is in the process of being drafted and is going to replace the existing code. Parts of this code have already entered into force, or shall be enacted soon. In a number of cases this code introduces innovations in the existing law, several of which are modelled after German as well as Swiss examples. Many of these innovations are regarded as improvements of existing law. This has induced the courts to anticipate on

50. See for a comparative survey ZWEIGERT/KÖTZ, *op. cit.* II (1969), pp. 221 et seq.; INZITARI, *Geldschulden im Inflationszeitalter*, in 45 *RabelsZ.* (1981), pp. 705 et seq.

their formal enactment and to reinterpret existing code provisions in the light of impending changes, whenever a case was presented which made this possible. In this way, the courts have, under the guise of interpreting provisions of the existing code, virtually given effect to rules which the new draft code embodies.<sup>51</sup>

Codification of the civil law did, therefore, not result in a rigid fixation of that law, but it served as a starting point for a further evolution through the action of the courts of justice. These courts have developed the law in various ways. French courts have perhaps continued to show most deference to the written law. They have laid emphasis on the need for certainty and predictability of the law and they have as much as possible respected the wording of a legal text. Nevertheless, within these self-imposed limits they have developed the law and brought it up to date. German courts have been more inclined to do justice in the individual case, sometimes even at the expense of certainty. They have made extensive use of the possibilities offered by the civil code itself and applied broad principles of equity in deciding concrete issues. Dutch courts have adopted a similar attitude and under the impact of the draft of a new civil code they have used bold methods of interpretation with a view to anticipating the code's introduction. These examples suffice to illustrate the important role that is played by the courts in a codified legal system.

## 6. JUDGE MADE LAW AND THE LEGISLATOR

Just as a codified system cannot develop without courts, a judge made system cannot progress without a legislator. This is illustrated by the evolution of the English legal system. In its early stages, statute law hardly played any part at all. Gradually, the number of statutes increased, and the legislature ever more frequently interfered with the law-making process. Judges regretted this development, and they showed their aversion against statute law by deprecating a statute as an intruding tyrant and praising the common law as a nursing father.<sup>52</sup> Nevertheless an abundance of statute law exists in the English system and to-day nobody denies the necessity as well as the importance of legislative intervention in all fields of the law.<sup>53</sup>

Although the English courts created an apparently comprehensive legal system, they could not give rulings concerning all legal questions, but had

51. See HARTKAMP, *Civil Code Revision in the Netherlands: A Survey of its System and Contents, and its Influence on Dutch Legal Practice*, in 35 *Louisiana Law Review* (1975), pp. 1059 et seq.

52. In *Maleverer v. Redshaw* (1669), 1 Mod. 35; 86 Eng. Rep. 712.

53. See Lord DENNING, *The Discipline of Law* (1979), p. 9: "In almost every case on which you have to advise you will have to interpret a statute".

to wait until an issue was brought into court before being able to lay down the law in the particular field. Moreover, in matters which needed continuous supervision the courts felt unable to provide adequate means. The course of the law as steered by the courts did not always correspond with the views of the political authorities and the latter endeavored to alter this course. A wealth of court decisions in particular fields created uncertainty about the actual state of the law and provoked the desire for consolidating the law in a set of clearly formulated rules. Changed circumstances required modifications in the law and the abolition of outdated precedents; although the courts, by a process of distinguishing subsequent cases from previous ones, introduced a certain amount of flexibility in the system, they on several occasions found themselves unable or proved unwilling to change established law by abandoning a precedent or by limiting its scope of application.<sup>54</sup>

All these reasons led to intervention by the legislator in every branch of the law. Since the middle of the 19th century the frequency of these interventions has greatly increased. In modern society law has acquired the function of stating aims of social and economic policy and organizing their implementation; this social engineering cannot depend on the outcome of litigation but has to be decided in advance by political authorities.<sup>55</sup>

In those systems that are based upon judge made law statute law has, therefore, to a considerable extent penetrated all legal fields. This statute law has interfered with case law. In several common law jurisdictions courts have been reluctant to accept this interference with their traditional law framing; by resorting to techniques of restrictive interpretation they have endeavored to contain the scope of statute law within narrow limits and to uphold, as much as possible, the authority of common law precedents.

English courts have expressed the view that a statute, except for its clear wording to the contrary, must not be construed as altering the existing common law. As far as the intent to depart from the existing law does not clearly appear from the unequivocal language of the text, the statute has to be regarded as declaratory of the law as it stood at the moment of its enact-

54. The technique of distinguishing in case law forms the counterpart of the technique of interpretation in statute law. The main issue is formed by the distinction between those arguments advanced in the precedent invoked which appear to the judge to be decisive for the decision given, and those which have only been added for greater security, without being necessary to reach the decision; only the former ones constitute the "ratio decidendi" and as such have the force of precedent, whereas the latter ones, the "obiter dicta", are not binding in subsequent cases. Besides, the judge can refuse to apply the case invoked as a precedent on the ground that the facts on which it relies are not sufficiently similar to the facts in the case at bar.

55. See on the role of legislation in law reform MANCHESTER, *op. cit.* pp. 10 et seq. and 402 et seq.

ment. The courts felt no need to develop the statute law because they regarded it only as a secondary source of law and their main concern remained with the development of the law from its primary source, the judicial precedents.<sup>56</sup>

This attitude contrasts with the attitude adopted by continental courts in respect of code provisions. To them the code constitutes the primary source of law and it forms the starting point of all future legal development. By a sensible interpretation of the code provisions effect must be given to their purpose. An example may illustrate this difference. In the beginning of the 19th century the English legislator wanted to change the common law rule that no one can pass to a purchaser a better title than he himself possesses. The legislator wanted to protect the purchaser who in good faith acquired goods from a commercial agent to whom these goods were entrusted by the owner, even if the latter had not authorized the agent to transfer title to the goods. It was, therefore, enacted that an unauthorized disposition by a factor passed title to the purchaser in good faith. When a factor without authorization pledged goods the court refused to protect the pledgee, holding that the wording of the statute only envisaged a departure from the common law rule in the case of a sale. The legislator had to intervene anew in order to extend the protection to the pledgee.<sup>57</sup> The Dutch civil code contains a section providing that a lease goes before a sale; in case leased property is being sold, the buyer has to respect the rights of the lessee until the date of expiration of the lease. When title to leased property was passed in another way than as a result of a sale, the purchaser tried to eject the lessee, arguing that the law granted priority to a lease in case of a sale only. The court, however, upheld the lease; it argued that the intention of the legislator was to protect a lessee in all cases of transfer of title to leased property and that the word "sale" in the code section should therefore be extensively interpreted as comprising all transfers of title whether they were based on a sale or on some other transaction.<sup>58</sup>

Impressed by the bulk of statute law actually in force and convinced of the necessity of legislative intervention, English judges show signs of changing their hostile attitude towards statute law and tend to become more cooperative in giving effect to statutes. Recently, judges have, in several instances, abandoned the tradition of a strict construction based on the wording of the statute only and have examined the intention of the

56. Cp. POLLOCK's remark, that "Parliament generally changes the law for the worse, and that the business of the judge is to keep the mischief of its interference within the narrowest possible bounds", *Essays on Jurisprudence and Ethics* (1882), p. 85.

57. See on the history of the Factors Acts HOLDSWORTH, *A History of English Law*, Vol. XIII, p. 382, and Vol. XV, p. 93.

58. Supreme Court ("Hoge Raad") 9 November 1906, W. 8453, on section 1612 Civil Code.

legislator and the purpose of the statute with a view to giving to the latter its maximum effect.<sup>59</sup> This may result in an approach to statutory law to which American judges nowadays are used. As a rule, American judges have felt less inhibitions than English judges did, both in departing from inconvenient precedents and from giving effect to statutes which modified the existing law in a particular field. They have, as a rule, given less weight to the wording of a specific statute and laid more emphasis on the intention of the legislator and the statutory purpose.<sup>60</sup> This is also reflected in the technique of legal drafting. In an English statute the legislator tries to express his intentions as clearly and precisely as possible and enunciates as many as possible specific cases in which the statute has to apply. As a rule, he refrains from making general statements because these may be considered by the court to be too vague to enable it to grasp the precise meaning of the statute. American statutes, however, contain general statements of legal principles that may be compared to the general clauses of, for instance, the German Civil Code. Thus, the Uniform Commercial Code contains rules on the avoidance of contractual terms on the ground of their unconscionability and lays down a general requirement of good faith in the entering into and in the execution of commercial relationships. It is left to the courts to explain the meaning and the scope of these concepts; the comments to the relevant code sections purport to give them guidance in these matters.<sup>61</sup>

The judge made law of the common law system has therefore been in constant need of support from the side of the legislator. Like common law, in the strict sense of the word, needed equity to supply *addenda* and *errata*, statute law has applied the *addenda* and *errata* to the common law in a wider sense. However, the application of the statutes enacted by the legislator has remained dependent on those same courts that moulded this common law. Jealous of their prerogatives, these courts initially endeavored to restrict the interventions of the legislator in what they regarded as their eminent domain and made every effort to keep their law framing work safe from outside interference. Gradually, they changed their attitude and accepted the necessity and the inevitability of legislative intervention in the various branches of the law. Actually, judges show increasing willingness

59. See for examples Lord DENNING, *op. cit.* pp. 9 et seq.

60. Statutes and "codes" also stimulate this attitude. Thus already the Californian and other "Field Codes" proclaimed that they should be liberally construed, and the same applies to the above-mentioned Uniform Commercial Code: although the code continues to be regarded as supplemented by existing law unless the latter is displaced by particular provisions of the code itself, such displacement may not depend on a purely literal construction only, but the code's provisions are to be liberally construed to promote its underlying purposes and policies (sect. 1-102).

61. Sect. 1-203 and 2-302. This example has since been followed in English legislation with the Fair Contract Terms Act 1977, which applies to consumer contracts and empowers the courts to declare void terms which cannot stand the test of reasonableness.

to support the legislator's efforts in adjusting the law to the demands of modern society. This illustrates the important role legislation can play and actually plays in a judge made legal system. And, like the success of a code depends on what the courts make out of it, the effect of statute law largely depends on the extent to which the courts are willing to put liberal constructions upon its provisions. If the courts fail to live up to these challenges, it can be expected that the legislator intervenes anew. Then again the extent to which this intervention achieves its purpose depends on the courts. Therefore, evolution of both a codified and a judge made system of law is characterized by a constant interplay between legislative and judicial action.

## 7. EVALUATION AND CONCLUSION

The difference between common law and civil law approaches has been explained in terms of legal reasoning. The civil lawyer reasons from principle, the common lawyer reasons from precedent. The codes lay down general rules of law and even where they regulate specific legal relationships they determine rights and duties in the abstract without reference to concrete fact situations. It is up to the courts and the practitioners to apply these rules to concrete fact situations and in so doing to adapt them to the circumstances of the particular case. Common law precedents provide a solution to a concrete fact situation. In adopting the same solution in similar fact situations, the judges develop a legal rule which applies in all cases that present a given set of facts. Thus, the French Civil Code proclaims the rule that any act of a person which causes damage to another makes him by whose fault the damage occurred liable to make reparation for the damage. The courts have specified the conditions under which this rule applies and have decided on a case-by-case basis questions such as the nature of the act and the degree of fault required, the link of causation between the act and the damage, the ways in which reparation shall be made and the kinds and amounts of damages that may be awarded. On the other hand, common law courts have, in given fact situations, held a person liable for damages on the ground that he had committed a specific tort by acting in a way that was prejudicial to claimant. From a row of decided cases gradually emerged a rule to the effect that negligent conduct against other people amounted to violation of a duty of care for which a person could be held liable. The courts, therefore finally shaped the rule; in the civil law they specified the conditions for its application, in the common law they determined its general scope.<sup>62</sup>

62. Cp. Lord DENNING in *Chic Fashions (West Wales) Ltd. v. Jones* (1968) 2 QB 299: "They (= the cases) contain no broad statement of principle, but proceed, in our English fashion, from case to case until the principle emerges". See on the differences in the concept of the legal rule DAVID/BRIERLY, *op. cit.* pp. 86 et seq. and 332 et seq.

In the evolution of the civil law legal doctrine has played an important part. Academic concern with Roman law penetrated legal practice. The framers of the codes drew inspiration from legal science, like the writings of 18th century French authors and the writings of 19th century German scholars. Similarly, under the regime of the codes, legal doctrine paved the way for judicial interpretations and adjustments. Thus, the scholarly commentaries on the French Civil Code first elaborated the tort rules. Learned dissertations on the German Civil Code gave impetus to the widespread application of the good faith clause. The reorientation of Dutch civil law was prepared and stimulated by academic criticism of the law as it stood. In the common law, on the other hand, the influence of academic doctrine has often been considered to be negligible. The law was formed by the experience of judges and these received their training in legal practice. The rule that living authors could not be quoted long persisted in English courts. Only certain outstanding treatises obtained judicial approval. In common law systems, judges are held in the highest esteem; in civil law systems, legal scholars rank foremost. In the latter systems, judges tend to remain anonymous, and decisions use to be given in the form of a decision by the court, not in the form of individual opinions.<sup>63</sup> Students become familiar with the names of authors, rather than with those of judges. In common law systems, on the other hand, students tend to become at least as familiar with the names of judges as with those of authors. Court decisions are given in the form of individual opinions, or in the form of a majority opinion to which individual opinions can be joined.<sup>64</sup>

It is submitted that this difference, too, is not so fundamental as it appears at first sight. Although in civil law systems courts are undoubtedly guided by legal doctrine, the decisions of the court are made by the participating judges. With regard to the often conflicting views between legal authors, the judges decide which view shall prevail and which trend shall become the leading one. In several instances the courts have neither adopted nor rejected views expressed by legal doctrine, but just have ignored them and have followed their own inclination in interpreting the relevant provisions of the code. On the other hand, common law courts, even if they do not openly acknowledge it, have been susceptible to doctrinal comments. In some branches of the law, notably the conflict of laws,

63. There are, however, exceptions to the rule, and the rule itself has also been challenged, see for instance the debates at the 1973 annual meeting of the "Nederlandse Juristen Vereniging" (Dutch Lawyers Association), where a majority of members present gave an affirmative answer to the question whether it was desirable that individual members of courts should get the opportunity to make known their dissenting opinions, 103 *Acts* (1973) II, p. 72 (Up till now this has not led to a change in the rule on secrecy of deliberations in Dutch courts).

64. See on the influence of legal doctrine and the role of the lawyers in the various legal systems ZWEIGERT/KÖTZ, *op. cit.* notably pp. 103-106, 178-180 & 239 et seq.

legal doctrine has even made a substantial contribution to the development of case law. In the United States such academic exercises as the Restatements of the law have influenced the courts in various degrees and are a factor that is taken into account when determining the state of the law.<sup>65</sup>

The pros and cons of codified and judge made law have been amply discussed in the past and are still being discussed in the present. One of the arguments advanced is that codification makes the law rigid and inflexible. It has been shown that this is not true and that courts have found ways and means to adapt code provisions to changing circumstances. The same objection has been made against a judge made legal system. This would result in a rigid adherence to precedents. It is clear that this is not true either. Courts have developed techniques of distinguishing by which they have discarded inconvenient precedents in many instances, and notably American courts have felt at liberty to ignore precedents which they regarded as obsolete or as erroneously decided.

The contrary argument has, therefore, also been advanced: leaving the task of laying down the law to the courts would result in uncertainty and invisibility of the law. The answer to this objection is that a rule of precedent, even if loosely formulated, puts a restraint on the courts and that these will not lightly depart from established law. On the other hand, although a code limits the freedom of action of the courts, the latter have managed to cover it with a virtual system of case law. The coherence of such a system cannot be found in a doctrine of precedent, because as a rule civil law courts are neither bound by their own decisions nor by those that emanate from a superior court, but each decision is only binding in the case in which it was given. Nevertheless, courts are inclined to abide by previous decisions and to adopt the reasonings given by superior courts.<sup>66</sup> Notably decisions of supreme courts are highly persuasive and although not formally binding they, nevertheless, can be regarded as leading cases. In the last resort, therefore, the certainty of the law does not depend on the provisions of a code or the strictness of a rule of precedent, but on the wisdom of the judges.

The suggestion that there is an inherent contrast between, on the one

65. The Restatement of the Law was undertaken by the American Law Institute, a private organisation established in 1923. The first volume of the Restatement (on contracts) appeared in 1932. Actually, Restatements exist in almost all fields of private law, often already in a second edition; they compile existing law and try to lay down its common core in rules, see DAVID/BRIERLY, *op. cit.* pp. 404–406; HAY, *op. cit.* pp. 9–10.

66. However, in several countries, notably those with French-inspired systems, the courts as a rule do not show openly that they follow a previous case, and refrain from citing it, see SERENI, *The Code and the Case Law*, in *The Code Napoleon and the Common-Law World*, pp. 55 et seq.

hand, a codified system of law and, on the other hand, a case law system therefore suggests a false conflict. A system of law must be created and developed by the interaction between legislature and judiciary. It must exist both of statute law and of judge made law. The life of a code depends on its judicial interpretation. A case law system would become an old curiosity shop if it was not constantly reinvigorated by statute. Within several common law jurisdictions codification projects have been advanced from time to time. What was aimed at is not so much codification in the civil law sense as rather consolidation of existing case law with a view to bringing light in the often chaotic mass of precedents. Yet this does not exclude simultaneous law reform whenever desirable. In civil law jurisdictions recodification is not only prompted by a desire for law reform, but also by the wish to reformulate code provisions with a view to bringing them in line with the construction put upon them by the courts. And as such, it not only produces as its end result a comprehensive summing up of the law as hitherto developed by the courts, but at the same time it creates a new starting point for those courts in continuing to develop this law.

In the beginning of this century an English lawyer declared, "Judge made law has played its part. To statute law belongs the future. Let us pray for well drawn statutes". When quoting this statement a Dutch scholar added, "Let us also pray for judges such as an old 13th century French textbook describes them: clever men with an independent spirit and who can stand the weight of honors".<sup>67</sup> A legal system that can boast of both is prepared to meet the challenge of modern demands; these require "the purposeful collaboration and the constant interplay between legislators, administrators and courts in the articulation and implementation of social change."<sup>68</sup>

67. MEIJERS, *Case Law and Codified Systems of Private Law* (1951), *Verzamelde Geschriften* (Collected Papers) I, pp. 181 et seq.

68. Quoted from FRIEDMANN, *Law in a Changing Society*, 2d (1972), p. 74.