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Foundations of European Legal Culture

Author(s): Franz Wieacker and Edgar Bodenheimer

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FRANZ WIEACKER

*Foundations of European Legal Culture*

TRANSLATED AND ANNOTATED BY EDGAR BODENHEIMER  
TRANSLATOR'S PREFATORY NOTE

In my opinion, not only human beings but also creations of the human mind have a right to receive just treatment. My colleague and friend, Friedrich K. Juenger, was the first to suggest that just treatment of Franz Wieacker's essay *Voraussetzungen europäischer Rechtskultur* requires translation into a language spoken or understood in many parts of the world. I agree fully with him. I am also grateful for his valuable recommendations concerning improvements of my translation.

Franz Wieacker is Professor Emeritus of Roman Law, Civil Law, and Private Law History at the University of Göttingen, West Germany. He presented a preliminary version of the paper here translated at the 11th World Congress on Philosophy of Law and Social Philosophy, held at Helsinki in August 1983.\* He delivered the final version at an annual meeting of his university, which took place on Ascension Day 1985 in a monastery church at Bursfelde near Göttingen. It was published in a series of pamphlets entitled "Bursfelder Universitätsreden."

I have translated the lecture into English with the author's permission. I have also prepared a set of footnotes, which comment upon some highly condensed statements and summaries of developments that non-European scholars might not easily understand.

Edgar Bodenheimer

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EDGAR BODENHEIMER is Professor of Law Emeritus, University of California, Davis.

\* See *Plenary Main Papers and Commentaries* published by the Congress, pp. 159-185 (1983).

One who wishes to speak about a theme as general—almost pretentious in its generality—as that of “Foundations of European Legal Culture,” is bound to be on his guard, especially within the walls of this venerable monastery church, against a certain temptation. In the *studium*<sup>1</sup> that, for some decades already, has followed the Ascension Day religious service at Bursfelde, it cannot be the aim of the secular speaker from the lay community to present a rousing or exhortatory “festive sermon.” Thus you will not hear a smug celebratory song, praise or glorification of the advance of our Western legal culture—such as used to resound in our ears often, perhaps all too often, in self-forgetful years, even as late as the fifties.

Of late, to be sure, we are apt to hear rather different notes. But, once again, caution is called for. In response to decolonization and self-assertive demands of a Third World, disheartened conscience-probing and self-examination came to be voiced all over Europe. Especially in our country, a stifling sense of guilt and even self-hatred has spread. The unanimity of accusations leveled by the world community (such as probably no other major nation of this continent has ever heard), the downfall of the old state of all Germans and the struggle for a new identity have engendered a distrust of all law emanating from the government, which is often carried to its complete rejection and its denunciation as a false façade erected by a power structure that seeks its own advantage.

We cannot overcome these extreme positions by appeasement or a mere compromise that favors less extreme positions. What may help us is a return to the roots of the antinomy: namely, the insight that all human law, being the work of humans, is condemned to reflect the misery as well as the greatness of human endeavor.

The *misery* of human law reveals itself as soon as we realize the need to resort to compulsion, sanction, and punishment, in other words the very elements of positive law that stand accused today as “repressive.” It also shows up in the insufficient fulfillment of personal expectations and needs, as well as in the personal consciousness of the merely formal justice of general norms. Last but not least, it is apparent in the replacement of freely granted human help and charity by a tight-lipped apportionment of goods and social benefits. Such features call to our mind Luther’s understanding of positive law as an ordering of needs and self-preservation: established or permitted by God, in order to counteract the external depravity of man resulting from hard-heartedness; and undoubtedly the posi-

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1. By *studium* is meant a scholarly paper, presented by a faculty member of the University of Göttingen following the annual Ascension Day religious service in a monastery church at Bursfelde.

tive law also exhibits elements of the very same human hard-heartedness that made such law necessary in the first place.

The *greatness* of human law, on the other hand, consists in this: as long as it deserves this name, it endeavors to approach that (worldly) justice which satisfies the desire of human beings for justice: a longing that exists even in sectarian distortions of the quest for justice or in the common human failing that we, first of all, always demand justice for ourselves rather than for others or, for that matter, against ourselves. Even here there is a yearning for a better fatherland, to which Pascal's "dethroned King" will return one day and in which human beings, at some future time, will become what they were originally destined to become.

In the face of matters of such magnitude, a statement about the foundations of our legal culture can do no more than to perform, as modestly and truthfully as possible, the duty of a chronicler. Such a modest purport need not, however, imply a failure to take positions. On the contrary: how can one talk about legal culture if speaker and listener do not share a common prior understanding concerning "law," which perhaps may have to be made more precise or to be corrected. The core of the phenomenon "law" is evident to all of us. Legal orders are societal systems of rules<sup>2</sup> and as such two-faced by

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2. The view of law as being, first and foremost, a system of rules is widely accepted in Continental Europe, including the countries of the Eastern bloc. It also underlies the writings of influential English legal philosophers, such as Bentham, Austin, and H.L.A. Hart. In the United States, this conception of law has in the twentieth century met with an uneven acceptance. The so-called "realist" movement, which flourished in the 1930s and the 1940s, expressed skepticism regarding the pragmatic importance of the rule element in the adjudicatory process. Karl Llewellyn stated in an early work that "the theory that rules decide cases seems to have fooled not only library-ridden recluses, but judges." "The Constitution as an Institution," 34 *Colum. L. Rev.* 1, at 7 (1934). Although this statement appeared in an article dealing with the Constitution, he extended it to private law; this position, in a different formulation, also formed the keynote of his influential book *The Bramble Bush* (1930). Yet in his later writings, Llewellyn moved away from this extreme position, declaring that the rule part of law as "one hugely developed part" of the institution, but not the whole of it." 62 *Harv. L. Rev.* 1286, at 1291 (1949).

Jerome Frank maintained a far-reaching judicial nominalism, arguing that "No one knows the law about any case or with respect to any given situation, transaction, or event, until there has been a specific decision (judgment, order, or decree) with regard thereto." "Are Judges Human?" 80 *U. Pa. L. Rev.* 17, at 41 (1931). Stressing the impact of emotions, prejudices, and intuitive hunches on judicial decisionmaking, his book *Law and the Modern Mind* (1930) assigned a but marginal role to legal rules. After his appointment to the federal bench, however, Frank accorded greater weight to rules; still he asserted that the benefits of legal rules were in many instances frustrated by the errors, uncertainties, and irrational factors pervading the judicial fact-finding process. According to Frank, a rule applied to an erroneously found set of facts is of little value. *Courts on Trial*, especially Chs. III-V, X, XIX (1949).

The rule skepticism underlying much of American legal-realist literature has, in recent decades, been revived by the Critical Legal Studies movement. Although the numerous adherents of the movement often hold different views on specific issues,

nature: they require external enforcement, i.e., use of coercion, but also inner acceptance by the people, without which, in the long run, external legal compulsion will not work. In its external power structure, the force of law is surpassed only by the unmitigated violence of civil strife or war as *ultima ratio regis*; in its internal aspect only by the religions (as long as they still enjoy life and vitality), or by ideologies (not merely proclaimed but believed-in) which drive human beings irresistibly (even against their own interests or their very survival) toward evil or good. Accordingly, when we talk about a legal culture, we do not conjure up something very pure and delicate, something, so to speak, that is to be savored with refinement; rather we have in mind nothing more than an understanding of human affairs, ability to deal with concepts, and fundamental value judgments that underlie, at a given time, the historical legal systems or groups of legal systems. (Yet we need not deny that the preservation of legal culture in the more fastidious, refined sense remains indeed the most beautiful fruit and the highest goal of all human social coexistence.)

## II.

European legal culture is not alone in the world. Presence and future remind Europeans daily that they have no monopoly on legal culture. There exists so far no planetary legal culture, but numerous new and old, frequently quite ancient, legal cultures have existed outside of our continent. Besides our own (which becomes intelligible as a cultural entity only in contrast to the others), there are especially the following:

On the one side, the legal and social systems of other, chiefly Asiatic high cultures, among them, as the ones reaching farthest in time and space, those of the Islamic world, India, and China. These, above all, present a challenge to Europeans to become conscious of the peculiar nature and the limitations of their own conception of law. Thus Europeans encounter in Ancient China a model that, at least originally, did not (in contrast to Europe) isolate the province of law from other societal sanction systems (that is, public morality);<sup>3</sup> and they encounter in Islam a closer link between the inter-

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they are in general agreement on the proposition that law (or at least American law in this period of its history) is indeterminate, frequently inconsistent, and colored by ideological differences among judges. While they might concede that law in the books is primarily a system of rules, they argue that this system offers little guidance to judges charged with the task of deciding concrete controversies. See the "Critical Legal Studies Symposium," 36 *Stan. L. Rev.* 1, especially at 206-207, 577-578 (1984).

3. According to Confucian tradition, the conduct of persons is, to a great extent, judged not by legal permissions and prohibitions, but by principles of social morality. These principles favor reconciliation and compromise over contentious disputation.

personal ("secular") law and revealed religious texts than is possible in Europe since the days when legal scholarship emerged at Bologna. (This is true also with respect to the ancient Jewish conception of law which, however, by virtue of the birth of Jesus as a Jew and, at the same time, in the Roman Empire, has been tied so closely and durably to European legal culture that we cannot regard it as the law of another continent.)

On the other hand, there are the laws of early tribal cultures and other societies called (with doubtful justification) "fragmented" or "segmented."<sup>4</sup> For the legal historian they represent (as do the archaic stages of ancient and European law) valuable materials for a general and comparative legal anthropology; to us they pose difficult questions of acculturation, to which we shall return later.

Thus, in this broad frame of reference, we shall discuss our own legal culture, which we call European, or more precisely, the Atlantic-European. It includes, first of all, the whole continent in the geographic sense: between the seas in the north and the Mediterranean, between the Atlantic and the Ural Mountains. It includes further the European settlements in North America, as well as large parts of Central and South America, Northern Asia (Siberia), Australia, New Zealand, and the far south of Africa. A worldwide zone of influence in the non-European world adjoins this domain. In Japan and Turkey this influence led to a full reception; beyond this it is particularly effective in the Asian countries of the Commonwealth, above all in India, but also in the Islamic countries of North Africa, in Southeast Asia and China, as well as in many new nations, especially of French-speaking black Africa.

But is it really possible to conceive of our own legal culture, so delineated, as a unitary one? The talk about "European legal culture" naturally assumes that, notwithstanding many historical, sociological, and ideological differences, that culture forms a close historical and existential unit, a distinct entity that contrasts with all other developed, or tribal, cultures. This is indeed true; but we should not accept this assertion too lightly.

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Yielding ground to an adversary in order to obtain a settlement is deemed morally preferable to a stubborn insistence on one's rights. This attitude explains the Chinese preference for mediation over litigation. According to the Confucian view, a lawsuit disrupts the harmony desirable in human affairs; therefore the best solution of most disputes is achieved through the services of mediators using moral persuasion. In court proceedings, too, a sharp separation of legal and moral considerations was frowned upon. Much of this philosophy has survived in the People's Republic of China, although in very recent times some turn toward Western ideas of law can be observed.

4. The author may have in mind confederations of village communities with divergences (but perhaps not significant ones) in the customary laws of individual communities.

Continental Europeans (such as Frenchmen, Italians, Central-Europeans both in and outside the German-language area) are tempted, in view of the old common tradition of the Roman *jus commune* and the Latin Church's *jus utrumque*,<sup>5</sup> and the shared experiences of humanism, enlightenment, and modern codifications, to identify their own narrower legal orbit with the totality of European legal culture. In reality, however, we have to add two areas of, at best, equal importance: first, the Anglo-American common law in Great Britain, the United States, and large parts of the British Commonwealth and, second, the contemporary socialist legal orders of Eastern and Central Europe.

1. The relationship of the Anglo-Saxon legal orders to those of the European continent poses relatively easy questions. To be sure— notwithstanding the far-reaching congruence of social structures, economic systems, and basic social values—the common law often deviates substantially from the continental legal style in matters such as organization of courts, judicial procedures, the theory of legal sources and the manner of judicial argumentation; also, these peculiarities (as a look at television shows) have had a much stronger effect on the Anglo-Saxon way of life than the more abstract and rational legal doctrine and the bureaucratic administration of justice on the continent has had on our lifestyle. Yet it is obvious that the legal systems of the common law represent the peculiarly European cultural context just as definitely as those of the continent, not only because of the similar ways of life but also because of the longstanding commonality of the crucial religious, ideological, philosophical and scientific foundations.

In particular, we should bear in mind that the common law and equity of the Anglo-Saxon orbit have shared, since the early part of the High Middle Ages, the tradition of the European *jus commune* and *jus utrumque*.<sup>6</sup> Since the beginning of the Modern Age, decisive impulses shaping the continental constitutional development were

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5. From the end of the 11th century, successive generations of scholars, and especially the Glossators and Commentators at the University of Bologna, fashioned a neo-Roman law. That law, based on Justinian's *Corpus Juris Civilis*, they adapted to the needs of their time, creating a European *jus commune* which prevailed—at least as a subsidiary law supplementing the local law—throughout most of the European countries and became the foundation of European legal culture.

The term *jus utrumque* refers to the combination of secular, neo-Roman law and the canon law of the Roman Catholic Church applied by the ecclesiastical courts of Europe. See Rudolf Schlesinger, Hans Baade, Mirjan Damaska, and Peter Herzog, *Comparative Law* 270-272, 259 (5th ed. 1988); Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* 72, 79, 82, 134 (2d ed. 1967).

6. This statement might surprise some English and American legal historians, at least insofar as it refers to the common law. Can it be said that the common law actions framed in the Chancery of the English king stemmed from the same tradition that produced the continental system of *actiones* derived from Justinian's

received from England and the United States. As far as the theory of fundamental human rights and liberties and the guarantees of procedural due process are concerned, these matters require just as little discussion as the contemporary influence of the common law on conflict of laws and the progressing unification of the law of obligations.<sup>7</sup> Beyond that, the Anglo-Saxon orbit, from Hobbes and Locke over Adam Smith, John Austin, Bentham, and J. Stuart Mill up to the contemporary Anglo-American theory of law and society, has time and again provided decisive contributions to the European discussion of fundamental principles.

2. More problematic are the questions posed by the relationship to the new socialist legal orders of Eastern Europe. The central European countries of the Eastern bloc (Czechoslovakia, Hungary, and Poland) have a long tradition of affiliation with the Latin Church, the Roman law, and the occidental political system, and they belonged to the sphere of Austrian legislative power. The crucial

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*Corpus Juris Civilis* and adapted by the Glossators and Commentators in medieval Italy (see supra n. 5)?

One similarity between common law and *jus commune* lies in the fact that both are non-codified bodies of law. The part of Justinian's *Corpus Juris* that was revived by the Bolognese scholars was the Digest, which for the most part did not consist of concisely formulated rules of law like a modern code, but shared the more casuistic character of the common law forms of action by linking a legal consequence to a concrete fact pattern. Furthermore, William the Conqueror's legal adviser, Lanfranc, had been trained in Italy in the civil law, the king's chancellors were ecclesiastics familiar with the canon law, and the same was true of many judges in the common law courts. The early textbooks of the common law written by Glanvil and Bracton—particularly the latter one—were strongly influenced by Roman law concepts. Bracton had thoroughly studied the works of the Bolognese glossator Azo (see *Select Passages from the Works of Bracton and Azo*, F.W. Maitland ed. 1895). With respect to equity, it has never been doubted that principles of the *jus utrumque*, combining canon and Roman law components, influenced its evolution under the ecclesiastical chancellors. As Holdsworth noted, "the influence of the civil and canon law is perhaps the most important of all the external influences which have shaped the development of English law." William Holdsworth, *2 A History of English Law* 146 (4th ed. 1936). See also id. at 140-141, 176-177, 202-206, 267-268.

7. An example of the contemporary influence of the common law on the European law of conflicts is the ready acceptance of the principle articulated in the *Second Restatement of Conflicts* (a private codification), according to which the law of the state that has the most significant relationship with the parties and the transaction should control. This principle has been enshrined in the conflicts codifications of Austria, Switzerland, and Hungary, and also in the 1980 E.E.C. Convention on the Law Applicable to Contractual Obligations (Art. 4). Also, as Alfred von Overbeck has pointed out, European judges have sometimes relied on the Restatement Second as though it were an official code. Overbeck, "Cours général de droit international privé," 176 *Récueil des Cours* 28 (1982-III).

It is also a fact that Anglo-American legal doctrines have influenced the progressive unification of the law of obligations. This is true particularly for the 1980 Vienna Convention on the International Sale of Goods, which has been ratified by a large number of nations. Furthermore, it should be mentioned that Art. 85 of the European Economic Community Treaty, dealing with anticompetitive practices, incorporates the principles of American antitrust law.



problem is the law of the Soviet Union (and its federated republics) and of Southeastern Europe. It cannot, however, be questioned that Russia and the Balkans belong to Europe, as it is here understood, not merely in a geographic sense. The basis for this affiliation was already established by the religious, cultural, and political ties with the East Roman Empire, the Greek Church, and the Byzantine version of Roman law—although the peculiarities of these links engendered major differences with the legal and political conceptions established in the West by the Carolingian Empire and the Roman Church. In the late seventeenth century, Peter the Great's enlightenment caused Russia to turn toward the constitutional and legal organization of Western Europe. In the course of the nineteenth century, a similar turn toward the French and Central European constitutional and legal organization brought about the final liberation of the Balkan nations from Turkish rule.

It is true that the victory of Leninist Marxism in the October Revolution and, a generation later, the expansion of the Soviet sphere of domination to Central Europe as a consequence of World War II have fundamentally changed the face of Eastern Europe. Nevertheless, this does not signify a turning away from the shared continental European relationships forged by history and fate. One reason is that Marxian doctrine itself arose out of a peculiarly occidental theory of society, namely, the splitting off of dialectical materialism from the heritage of Hegel and from the reaction to the specifically West European industrial society of early capitalism. (Less importantly, as regards the judicial organization, formal rules of procedure, and the principle of legalism, the socialist legal systems resemble those of Western Europe, especially the continental ones.) There does remain, of course, the essential difference in the basic societal value judgments, the social and economic systems, and in the divergent conceptions of law that follow from Marxist-Leninist theory; it is not mere rhetoric to say, however, that these very differences are evidence of the precarious *concordia discors*<sup>8</sup> of European experience seen as a whole.

After setting these perimeters, our actual theme, i.e., to ascertain the common elements of this enormous geographical and historical complex of relationships, remains an almost indefensible venture. If at all, it could, strictly speaking, succeed only by demonstrating common and invariables constants in each consecutive epoch of European legal history. The synchronal, so-to-speak

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8. This is probably a reference to the work of Gratian, an Italian monk, entitled *Concordia Discordantium Canonum*; later it came to be known as "Gratian's Decree" (*Decretum Gratiani*), and it became the best-known book on canon law. One important objective of the work was to trace contradictions found in the sources of canon law and to reconcile them, if possible, by some form of synthesis.

horizontal, thrust of the intended synthesis must be preceded by a diachronous, vertical thrust corresponding to these epochs. Obviously, this initial, analytical survey can, within the limits of this paper, only be a sketch; I shall present it largely by relying on the basic ideas underlying my book *Privatrechtsgeschichte der Neuzeit* (1967).<sup>9</sup>

### III.

By way of simplification, but without making a *tour de force*, we can distinguish four major epochs:

1. The early Middle Ages provided our legal culture with the vital impulses and, with the help of the surviving civilizing elements of late antiquity, with the basic techniques of law and administration.<sup>10</sup>

After the collapse of the West Roman Empire, an ethnically highly complex population faced the task of surviving and slowly rebuilding the structures of state and government beyond those of a particular region. The heirs of Rome as well as the romanized Iberians, Celts, Illyrians, and the Germans who had entered the soil of the Empire had abandoned the high classical culture of the Roman law (as well as its classicistic revival in the Byzantine East). Replacing it were, in addition to the ethnic traditions of this population, above all the remnants of legal texts, drafting practices, and law-applying techniques that had withstood the cultural regression and are

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9. Wieacker's book on *Private Law History of Modern Times* (2d ed. 1967) depicts the evolution of private law on the continent of Europe, with references to divergences and similarities found in the English common law. Special emphasis is given to the history of private law in Germany. Wieacker's account is not limited to what is commonly called "The Modern Age," i.e., the period extending from the beginning of the 16th century to the present. The first hundred pages contain a concise and illuminating treatment of medieval developments in secular and ecclesiastical law. The discussion proceeds on a broad-gauged philosophical level; it accentuates the jurisprudential ideas underlying the evolution of European law, such as tradition, the law-of-reason movement, humanism, positivism, welfare state reformism etc., rather than the more technical aspects of particular legal institutions.

10. Harold J. Berman's work *Law and Revolution: The Formation of the Western Legal Tradition* (1983) takes the position that distinctly Western conceptions of law and methodological techniques came to life in the 11th and 12th centuries as a result of a "papal revolution" initiated by Pope Gregory VII. Berman also maintains that the canon law of the Catholic Church represents the first modern-type system of law. The book, which is full of interesting observations about the history of Western legal thought, appears to play down (although it does by no means ignore) the powerful influence which classical Roman law (in the form transmitted chiefly by Justinian's *Corpus Juris Civilis*) has had on European legal developments, including the canon law.

Wieacker would probably fully approve of Berman's observation that "All Western legal systems—the English, the French, the German, the Italian, the Polish, the Hungarian, and others (including, since the 19th century, the Russian)—have common historical roots, from which they derive not only a common terminology and common techniques but also common concepts, common principles, and common values." (p. 539).

now usually referred to as "vulgar law."<sup>11</sup> A certain compensation for this decay of the Roman orbit and, together with it, of a legal system characterized by a highly developed intellectual discipline and conceptualist refinement was provided by a revitalization of legal life itself. New personal forces stirred beneath the crust of the early Byzantine autocratic state that had crumbled in the West. The absolutist regime of coercion, which had oppressed the subjects after the destruction of the ancient municipal and civic liberties of antiquity, often yielded to the formation of new cooperative associations; impersonal offices were replaced by the personal relation of fealty. Law was no longer but the command of a distant central agency; it became part of a living tradition. The objective law, which Roman absolutism had manipulated in an almost capricious fashion,<sup>12</sup> was

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11. Vulgar law was a deteriorated, but still serviceable, variety of classical Roman law. It flourished especially in the Western part of the Roman Empire, beginning approximately with the reign of the Emperor Constantine (306-337 A.D.). It grew out of the daily arrangements and customs of the people and the practices of the courts, and it formed a complement to imperial legislation. The West Roman vulgar law was for the first time expounded in detail by professor Ernst Levy; a summary of its principal characteristics is found in Levy's *West Roman Vulgar Law: The Law of Property* 1-17 (1951).

This cruder form of law reflected the decline of Roman civilization. Averse to carefully elaborated concepts, it did not measure up to the standards of classical jurisprudence in artistic form and logical organization. For example, it ignored or obfuscated basic distinctions drawn by the classical Roman jurists, as that between ownership and possession, title and limited ownership, the contractual and the proprietary aspects of a sale.

Nonetheless, despite its lack of technical refinement the West Roman Vulgar law was not altogether devoid of merit. Not infrequently it dispensed a somewhat coarse but earthy sort of equity. The vulgar law was naturalistic, often governed by sentiment rather than analytic logic, and not at all methodical. Consequently it was closer to the perceptions of the common man than the classical law, and the lower classes of society often fared better under it than under the complex and sophisticated classical law. The classical law had been an instrument handled by a legal aristocracy which was very much preoccupied with the estates and property transactions of wealthy people. See Wieacker, "Vulgarismus und Klassizismus im Recht der Spätantike," in *Vom Römischen Recht* 222 (2d ed. 1961).

It was principally the vulgar law that was received and amalgamated with their own legal institutions by the Germanic tribes who invaded and occupied large parts of the Roman Empire in the fourth and fifth centuries A.D.

12. Justinian's *Institutes* contain the statement "*quod principi placuit, legis habet vigorem*" (What pleases the princeps has the force of law). Inst. I.2.6. This statement would seem to suggest that the princeps—or later the emperor—could override any law enacted by the Roman popular assembly or the Senate. But during the period of the Principate (27 B.C. to 284 A.D.), the emperor could not at will disregard the enactments of representative bodies. Only from the time of the Dominate, i.e., the absolute monarchy starting with the emperor Diocletian did laws enacted by the emperor become the sole form of legislation. See Max Kaser, *Römische Rechtsgeschichte* 150 (2d ed. 1967). In Justinian's Digest, the statement "*princeps legibus solutus est*" (the princeps is absolved from the laws, D.I.31) is ascribed to the jurist Ulpian, who wrote during the late Principate. This statement suggests that the head of the state could with impunity violate the laws he made. Prior to Diocletian, the emperors were not prone to make use of this power. See Hans J. Wolff, *Roman Law: An Historical Introduction* 87-88 (1951).

replaced by concrete entitlements that were less susceptible to tampering. The former freedom of the urban resident or *civis Romanus* was replaced with diverse corporate freedoms; in lieu of the dead or moribund centralized judicial organization laymen adjudicated. We should not forget that these compensations for the barbarization that followed the breakdown of urban civilization in the West were rather modest; they nevertheless enriched the image of the law with new and auspicious features.

The reconstruction of civilization and of societal organization beyond the regional level would, however, have been impossible without the survival of the Roman heritage. Through painstaking "learning processes" the Roman people and the recently romanized migratory tribes were ultimately acculturated. In place of the former imperial Roman administration, the *Latin Church* became increasingly the successor organization of the imperial governmental agencies and a makeshift shelter for cultural continuity. In four ways the Church promoted these learning processes:

(1) In preserving the elementary level of the rich classical system of education, the *trivium*, the Church, by maintaining the use of writing, documentation, filing and accounting, provided the substructure required for governmental organization. It thereby forged continuous supraregional links for the Western European territories that were no longer in communication with one another and constantly threatened from outside.

(2) Primarily because of the Church, the notions of official power and jurisdiction were preserved, notions that the Byzantine absolutism, following the separation of military and civilian power, had exalted to the point of hypertrophy. This conception of office differed from the Germanic idea of a personal relation between the king and his followers, in which there was no room for fixed competences and departmental powers.

(3) The same is true for the notion of *statute*. The Germanic, and later also the Slavic nations and tribes originally did not conceive of law as a command of state power but rather as a traditional order of living. Therefore they had to resort to the conceptual framework of the late Roman Empire to explain the idea of enacted law. From Rome they learned that law is not only lived tradition but also an emanation of power and human will. At that time the foundation was laid for the peculiar legalism of European legal culture, which has endured in the form of the statutory positivism of our days.

(4) Beyond competence and statute, a new and higher view of law entered the consciousness of early Western culture with the help of Christianity and the Church: the conviction that beyond

lived tradition and the command of local rulers there exists a *universal ecumenical* law above the local traditions and enactments. This idea was nourished in its inception by the reality of an empire whose boundaries were coextensive with the *orbis terrarum*. It found, however, a spiritual basis by the identification of this universal law with the world law of the Stoics and, beyond that, by fitting it into a supernatural *ius divinum*.<sup>13</sup> Christianity now related all secular law (not just Roman law) to a supernatural value, in the light of which it had to justify itself time and again. Ever since Augustine had thought of the *civitas terrena* as a reflection as well as an antithesis of the *civitas Dei*,<sup>14</sup> legal metaphysics, understood as the search for an ideal law of nature, became a major theme of occidental legal culture. This perspective alone accounts for the notion of a European *ius commune* which has remained active throughout the history of European legal thought and is capable of resuscitation at any time.

2. By creating an autonomous legal science, the classical high Middle Ages fashioned a secular, juridical subsystem and mastered it intellectually. This system came to dominate life in Europe and by the end of the late medieval period had spread over the entire western and central European continent. In closest connection and coordination herewith, the church followed a similar route by transforming itself into a legal church with an articulated legal system, the canon law, and its own judicial organization.

The "learning processes" of the early Middle Ages had not as yet brought about a new, peculiar European "identity." In some respects the pre-Carolingian political establishments especially looked like provinces of the extinct empire and the surviving Christian ecumene, rather than like new creations that had appropriated an old heritage by their own free choice. Their relation to the culture of antiquity was marked by continuity and study, not by initiative and renaissance.

Only since the 11th century did the European identity begin to

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13. Thomist philosophy defined the divine law (*lex divina*) as that revealed by God through the Holy Scriptures and recorded in the Old and New Testaments. According to medieval church doctrine, as expounded by St. Thomas Aquinas, a positive law infringing upon the basic precepts of the divine law (which included the Ten Commandments) lacked binding force. See Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of the Law* 24-26 (Rev. Ed. 1974).

14. According to St. Augustine (354-430 A.D.) human nature, at the time of the fall, became vitiated by original sin. The good elements of human nature were not eradicated, but they became vulnerable and easily thwarted by evil predispositions. The secular commonwealth (*civitas terrena*) was a reflection of the divine commonwealth (*civitas Dei*) to the extent that human law and conduct were in unison with God's will. It was antithetical to the *civitas Dei* insofar as human law and conduct were not in consonance with the *lex aeterna* (eternal law).

manifest itself in the field of the law by virtue of a genuine renaissance of Roman law. This astonishing event was based on the coincidence of rapid economic and cultural advances in Italy and Southern France with the rise of a new Rome-ideology, emanating from an intellectual elite of the clergy. In the religious realm this ideology took shape in the ecclesiastic community of the Cluny reform, in the secular area in the *renovatio* and *translatio imperii*<sup>15</sup> of the Salic and Staufen emperors. The counterpart in intellectual culture was the establishment of the first European philosophy to be emancipated from interpretation of the Scriptures. It took the two forms of an independent (idealistic or nominalistic) epistemology and an elaboration of an intellectual technique of argumentation, conceptualization, and logical derivation of scientific propositions.

Ideology and intellectual technique also were necessary for the well-nigh explosive renaissance of (classical) Roman law at the end of the 11th century, which found its first representative expression in the *studium civile* at Bologna. In the field of the law, the intellectual rediscovery of classical Roman jurisprudence in the form of Justinian's Pandects is the manifestation of the first genuine renaissance in Europe; from it emerged European legal science which shaped the contents of most continental European legal systems. The legitimation for the outright recognition of Roman law was furnished by the Rome-idea in its three forms: the curial one of the reformist popes, the imperial one of the Emperors' jurists, and the municipal one of the rising Italian city republics. Its social and economic precondition was the formation of a city-centered economic society with a (limited) freedom of transregional commercial and financial exchange.

What concerns us here particularly is the transference of the processes of cognition, discussion, argumentation and conceptualization offered by the new philosophy to the inexhaustible treasure trove of classical law preserved in Justinian's law books. The fathers of the new legal science at Bologna thus discovered a new intellectual world. They encountered the highest sublimation of juridical thinking that the intrinsically practical discipline of law has ever attained, and it is one of the European miracles that, with the help of the new intellectual tools, these jurists learned to respond to the old texts with an equally refined understanding. In this fashion they became the first (professional) jurists of Western civilization.<sup>16</sup>

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15. This statement probably refers to the fact that the emperors of the medieval Holy Roman Empire regarded themselves as the legitimate successors of the Roman emperors of antiquity and the "renovators" of their political goals.

16. The revival of classical Roman law (as distinguished from the vulgarized Roman law that was absorbed by the Germanic conquerors of the Western Roman Empire) in the Italian law schools, especially at Bologna, was of immense significance

In the practical world this meant that these jurists were able to claim for themselves competence to decide vital conflicts of public and social life without recourse to force or peremptory command, or within the constraints of custom and tradition, or pursuant to the dictate of unquestionable texts, or in consonance with unexamined religious or moral tenets, but rather by reasoned analysis of a specific legal problem, in terms of the prevailing scientific doctrine of their time (scholasticism). Thus, from now on there existed, apart from the vital forces and power structures, and in addition to the spiritual authority of the Scriptures, the Church fathers, and contemporary theology, a third, independent institution that claimed the power to decide disputes between individuals, as well as between corporate and public authorities according to a rule based on reason. To this day, the jurists' insistence on legality, i.e., on a professionalized regime of law, has, in principle, formed part of European legal culture. Compared to other civilizations, ours is characterized and distinguished precisely by this very claim.<sup>17</sup> If we view the various stages of history as steps toward increasing rationality,<sup>18</sup> the intellectualization of law by the glossators of the high Middle Ages and the commentators the late Middle Ages was the first and largest step in this direction.

The actual implementation, as part of European reality, of this scheme of thought, unheard of in its novelty, was, of course, conditioned by larger cultural and socio-historical processes. The new decisional techniques did not remain the privilege of a select happy few. On the contrary, in the following centuries the Italian, French, and ultimately all continental faculties of law, from Salamanca to Cracow and Uppsala, trained entire contingents of young jurists, who later took back to their home countries the technical monopoly of knowledge for purposes of diplomacy, administration, adjudication, and drafting.<sup>19</sup> By damming up the violent resolution of public

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for the rise of European culture, including legal culture, in the 11th century. This was true especially with respect to the highly developed Roman law of obligations (including contractual obligations) and property. It was felt that these two branches of the law contained many features representing a sort of "timeless reason." There is some plausibility in this assumption when it is considered that in our time the Soviet law of obligations and property bears a great deal of similarity to the West European law notwithstanding the differences in the social and economic systems.

17. Countries originally outside the expanded orbit of European legal culture, such as India and—very recently—China, appear to be moving in the same direction of rationalization and professionalization of the law. In India, a traditional but reformed Hindu law still plays an important role in certain sectors of the legal system. See René David and James Brierly, *Major Systems in the World Today* 484-515 (3rd ed. 1985).

18. It is obvious, of course, that these gains in rationality have been interrupted and temporarily nullified in periods of revolutionary and counterrevolutionary violence and terror.

19. The German term "*Notariat*" designates a branch of the legal profession con-

conflicts, primarily by means of diplomatic, administrative, and fiscal activities in the service of Church, Empire, national states, and territories and free cities of the Empire, and by eliminating the irrational elements from adjudication, these jurists created the most important preconditions for the future growth of commerce, production, material culture and, last but not least, for new possibilities of life in the service of the spirit.

3. The early phase of the Modern Age, until the end of the *ancien régime* in 1789, perfected upon these foundations the conceptualization and systematization of law by using methodological tools of a new age dedicated to mathematics and the natural sciences; at the same time, aligned with the law-of-reason movement and the enlightenment, the demand for rationality also became victorious in the realm of political and social reality.

Because of the decline of the former universal powers of Curia and Empire, the disintegration of the *corpus christianum* due to religious schisms, the rise of national or (in Germany and Italy) territorial states, and, last but not least, because of the transatlantic colonization, the question of a new legitimation of international law, constitutional law, and ultimately even private law presented itself to this era. The response of European thought was a progressive intellectual and conceptual incorporation of the positive materials of the law into a "natural system," the law of reason. The law of reason amounts to a systematization of that ancient tradition which, as *ius naturale*, has all along provided the background for ancient Roman and medieval jurisprudence. Brought into being by the epistemology of humanistic Platonism, this new natural law had not as yet, at the time of the Spanish scholastics, Althusius and Grotius, abandoned that old traditional connection. But in its second systematic phase from Hobbes to Christian Wolff, its postulates began to shift from tradition and authority to reason (*deductio*) and empirical observation (*observatio*). The general foundation for this development had been, since Hobbes and Pufendorf, the critical method established by the *Discours* of Descartes and the notion of general laws of nature developed in Galileo's *Discorsi*.

The far-reaching consequences of this intellectual revolution persist until the present. Following the collapse of religious unity in Europe, the law of reason first provided a new supradenominational (though not necessarily secularized) foundation for law. To that extent it became the creator of a new civil religion. For the rising nations, territorial states, and city republics it supplied two models, each representing one of the two prevailing types of new European

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cerned with the drafting and official authentication of documents. On the civil-law notary generally see Schlesinger et al., *supra* n. 5 at 18-21.



states: on the one hand, the absolute states ruled by a prince found in Western and Central Europe and extending as far as Denmark; on the other hand, the oligarchic republics (ruled either in monarchical fashion or by the estates) as in the *Generalstaaten*,<sup>20</sup> in England after the Glorious Revolution,<sup>21</sup> but also in Sweden, Poland, at times in Hungary, as well as in the large German coastal cities. In this republican version the law of reason offered a new justification for popular sovereignty; it portrayed the historical prerogatives of the estates as individual liberties of the citizens and thereby prepared the ground for the modern constitutional state. In the absolute states ruled by the princes, on the other hand, which repressed or stifled the prerogatives of the estates, the law of reason emphasized the centralizing and rationalizing, but also the reformist features of the modern age—reformist because the law of reason as a self-contained system of natural and civic rights and duties enabled an enlightened absolutism to embark on the first planned undertakings and reforms of governments in North and Central Italy, in Prussia and Austria and, under new historical conditions, in Napoleonic France.

4. The Modern Age, from 1789 until today, moving at an ever increasing speed, is characterized by the definite collapse of Western legal metaphysics, the industrial revolution, the rise and crises of the bourgeois pioneer and entrepreneurial society, and finally the complete political and social integration of the Fourth Estate, as shown by the replacement of the “bourgeois” by the “social” law-state (*Rechtsstaat*). With all of this, our age confronts European legal culture once again, and in a more radical fashion than ever, with the question of new legitimations for law and the relation between the formal legal system and social justice and security in the industrial society of our time.

Contrary to first appearances, the beginning of this epoch was

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20. The term “Generalstaaten” (States-General) refers to the governmental organization of the Netherlands after the liberation from Spain in the 17th century. It denotes the assemblies of the representatives elected in the seven provinces of the then Republic. These representatives acted on behalf of the Republic in its dealings with foreign countries.

21. The phrase “Glorious Revolution” is a somewhat misleading term referring to the deposition in 1689 of King James II in a bloodless coup and the accession to the British throne of William of Orange and his wife Mary. Their rule led to the promulgation of a Bill of Rights and the gradual establishment of a parliamentary monarchy.

The true English revolution, which resulted in a far-reaching overhauling of the social and economic system, was the Puritan Revolution beginning in 1642 under the leadership of Oliver Cromwell. Its outcome, after two civil wars, was the abolition of the monarchy and the establishment of a republican Commonwealth. (The monarchy was restored in 1660.) The Puritan Revolution eliminated or weakened many institutions of feudalism and strengthened the social position of the merchants, artisans, and middle-class gentry.

marked by the effectuation of the tendencies that surfaced in the late enlightenment. This is true because the French Revolution, at the zenith of *volonté générale* (i.e., the revolutionary state identified with the nation) asserted full powers over the individual rights of citizens.<sup>22</sup> But once the nation, by curbing populist and egalitarian impulses, had ultimately identified itself with the *bourgeoisie*, identified by property and education, the great revolution first developed into the liberal constitutional state. This state left the economy and private law to the bourgeois entrepreneurial society as an open preserve, renouncing for the time being the attempt of guaranteeing social solidarity by a redistribution of goods. Since, however, such a society of entrepreneurs pushes for a modern and uniform private and procedural law, the European constitutional state made a full use of the legislative monopoly established at the time of enlightened absolutism. As a result, this new legislative positivism stripped the law of reason of its substance, but perpetuated it as a systematic supportive skeleton for the new codes of the bourgeois constitutional state.<sup>23</sup>

Only later did fundamental new approaches appear, which make up the basic theme of contemporary legal culture. I refer to the demise, in legal theory, of substantive natural law and its successors, the idealistic legal philosophies, especially in Germany; and in

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22. As is well known, the leaders of the French Revolution were strongly influenced by the political philosophy of Jean Jacques Rousseau. Central to Rousseau's philosophy was the concept of *volonté générale* (general will). He identified it, not with the will of the citizens motivated by self-interest, but with the true common good of the political community. Because of his generally optimistic view of human nature, Rousseau believed that the common good could be realized by majority decisions made by the whole people. (The popular referendum system is used in many cantons of his native country Switzerland.) He was certain that these decisions would preserve individual rights; but since his view of the *volonté générale* did not envisage any independent guarantees of these rights, the full power of disposition over these rights rested with the sovereign people. This was the position taken during the French Revolution.

23. The "law of reason" was a legal-philosophical movement of the 17th and 18th centuries that undertook to deduce general rules or principles of law from the rational part of human nature. One of the most influential representatives of the movement was Samuel Pufendorf (1632-1694), a German law professor. Pufendorf derived natural law from both the self-assertive and the social side of human nature. The former demands recognition of an individual's right to life, safety, and property; the latter requires that human beings shall not injure each other. From a combination of these principles Pufendorf extracted a number of more specific legal concepts, all of them, in his opinion, dictated by reason and morality.

Legal positivism rejected the derivation of binding legal norms from axioms of reason and morality. It grounded the obligatory force of law chiefly on sovereign will and command. As Wieacker points out, legal positivism retained certain organizational features and system-building conceptions which had formed part of the efforts of the natural-law philosophers, especially those of Pufendorf and Christian Wolff. These systematizing and conceptualizing endeavors also influenced the structure, arrangement, choice of headings, and terminology of the codifications growing out of the law-of-reason movement and, beyond this, of later European codes of law.

societal reality the question provoked by the Industrial Revolution of a just distribution of goods and of social security, more briefly: the problem of solidarity in society as a whole. At issue was how to compensate for the deficit in social equality considering the economic freedom of action which the victory of the Third Estate in the French Revolution and in the liberal constitutional state had brought about.

In order to understand these developments fully, one needs to bear in mind the increasing helplessness of jurisprudence and the judicial process in the face of modern ideological and social forces. As noted before, the law of reason as a substantive legitimation of law had become a victim of Rousseau's *volonté générale* and Kant's epistemology;<sup>24</sup> yet its function as a model for systematizing and rationalizing positive law had not been discarded. In consequence what remained was a jurisprudential formalism that lacked the intrinsic support of a substantive idea of justice. To be sure, as Roman and medieval jurisprudence demonstrate, in stagnating societies positive law can remain functional for quite some time, provided it rests on a broad consensus of the dominant classes. In the 19th century, however, such consensus was confronted with the growing dynamics of the Industrial Revolution and the expectations of justice on the part of the rising working class. For this reason, juristic formalism faced for the first time the question—which had been pushed aside by positivism—of the extralegal societal values that legitimate the formal rules of law and their application.

The broad spectrum of answers to this question can only be dealt with here in a sketchy fashion. It ranges from Jeremy Bentham's utilitarianism and Jhering's purpose-in-law doctrine to the "modern school of criminal law," to the free-law movement, and to the contemporary jurisprudence of interests or value-oriented jurisprudence; from American and Scandinavian realism to the most powerful and momentous version of the answer, the socialist and, more particularly, the Marxist critique of law. Behind these critical

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24. In Rousseau's system, the law of reason was absorbed by the *volonté générale*, understood as the genuine communitarian interest. See supra n. 22. The rights that the law of reason derived from the nature of human beings were put at the disposition of popular majorities, for they rather than postulates of reason bestowed legitimacy on legal rules.

According to Kant's epistemological approach, the law-of-reason philosophers committed an error in attempting to deduce the existence of rights and duties requiring recognition by the law from certain empirical traits and inclinations of human beings. Knowledge of human nature, Kant thought, cannot discover laws that can claim self-evident necessity. Only pure reason, operating in an a priori fashion, can discover such laws. According to Kant, a law must hold good for all cases and not be subject to exceptions, whereas supposed "laws" based on psychological or sociological observations are contingent and variable. The epistemology of Kant thus differs markedly from the cognitive method used by the law-of-reason philosophers.

approaches there stood the broader ideologies of economic utilitarianism, mechanistic monism, and Social Darwinism. The ultimate background was provided by the unprecedented success of the applied natural sciences which, in light of their increasing mastery and taming of natural forces also opened up the possibility of controlling social behavior, and even the psychic sphere, by social techniques and strategies.

For a long time positivism, because of its indifference toward the practical problems of justice, reacted naively and helplessly to this assault. But helpless silence could not prevent political realities from imprinting on legislation and judicial action, usually by virtue of an unconscious consensus and sometimes even involuntarily, the mark of the social state. As a result, the principle of societal solidarity, which has been legitimized and constitutionally guaranteed and implemented in the form of basic social rights, has been effectuated in relation to the weaker members of society by a "network of social guarantees." In practice, this principle has increasingly gained priority over the older ideological discussion concerning the political structure of contractual or property relationships, the disposition over the means of production or other economic assets generally.<sup>25</sup> The silent or self-evident manner in which this principle, or at least the hope for it, has asserted itself throughout the world, even in ancient tribal cultures, shows the compelling necessity and irreversibility of the process; it is at the same time an admonition to lawyers and ideologues not to forget for one moment the expectations of justice held by simple people of all classes, tongues, regions, and colors.

#### IV.

If, following this survey of historical eras, I attempt to determine the *invariables* in the historical evolution that give our legal

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25. This statement applies more obviously to continental Europe than to the common-law countries. In all or most nations of Western Europe socioeconomic rights, such as old-age pensions, national health insurance, unemployment insurance, right to paid vacations, are considered to have a rank equal with individual rights, such as rights of contract, property, and free speech. In Eastern Europe social and economic rights have enjoyed a more secure protection than individual rights.

In England, and especially in the United States, a movement arose in the 1980s which, influenced by the classical economists and the philosophy of John Locke, argues that the protection of contractual and property rights is, together with the maintenance of order, the primary task of government. For a brief survey, see Bodenheimer, "Cardozo's Views on Law and Adjudication Revisited," 22 *U. C. Davis L. Rev.* 1095, at 1103-1106 (1989). Some partisans of this movement deny the status of "rights" to the socioeconomic benefits mentioned above; they view them as governmental bounties, subject to termination or curtailment at will. These ideas have met with some sympathetic response. Thus, the administration of Ronald Reagan has curtailed social programs, and some United States Supreme Court decisions have increased the protection of contract and property rights. A wholesale return to libertarian policies has not, however, occurred.

culture its peculiar character, I can only provide a first draft of such a synopsis. With this reservation, I designate the following essential constants of European legal culture: its *personalism*, its *legalism*, and its *intellectualism*. For the time being, these are only labels that do not gain in clarity if, in colloquial language, we speak of orientation toward the individual instead of personalism, speak of thinking in terms of legal enactments instead of legalism, speak of a basic tendency to comprehend legal phenomena in the framework of scientific thought instead of intellectualism. What matters is to clarify the meaning of these broad key terms as much as possible; if it should prove impossible to fill them with content and illustrations, my undertaking to show "the foundations of European legal culture" (a risky one in any case) would have foundered. I wish to add that none of these three tendencies is altogether alien to any developed view of the law in civilized mankind, and that they determine the peculiar character of our legal culture only in their interplay and relative weight.

1. Most difficult to comprehend and to document—like most general searches for an "image of man"—is the *personalistic* trait, i.e., the primacy of the individual as subject, end, and intellectual point of reference in the idea of law. Often invoked as the hallmark of a "timeless Europeanism" from Homer over the Ionian thinkers to Descartes and Kant, that characteristic is, in the first place, a rather general and indeterminate turn of phrase. If it is at all permissible to attach such a general attribute of mankind to a particular historical culture, then the following appears to be characteristic of ours: in the realm of cognition the separation in principle of perceiving subject and perceived object, in the world in which we live the conception of human relations as a "vis-à-vis," rather than a "with one another" or "together"—both in contrast to a stronger fusion of persons and objects, of I and We in other high civilizations and in most tribal cultures.<sup>26</sup>

Perhaps this personalism is as a vital heritage rooted in the free civic state of the ancient *polis* and in the associations formed by the migratory peoples of late antiquity and the early Middle Ages. The experience of a personal deity has added depth and ethical strength

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26. Some may object to this statement on the ground that the communitarian spirit, the feeling of social "belonging" was highly developed in Europe during most of the Middle Ages. It is true, for example, that the medieval guild system was based on mutual aid and the furtherance of common vocational interests. On the other hand, the principle Wieacker calls "personalism" was clearly implicit in the rejection of collective responsibility by the medieval church and state, and in Christianity's belief in the value of the individual soul. In some early societies, an assault injuring or killing a member of a group (such as a sib or clan) obligated the group to administer retribution to the entire family or sib of the perpetrator. Such forms of group responsibility were largely unknown in European legal culture.

to this vital attitude: first in the classical religions, then, much more powerfully, in the experience of one personal God in Judaism and Christianity, inasmuch as in those religions the relationship of the human being to the absolute was experienced as the relation of an "I" to a demanding and giving "Thou," in other words, of one person to another—in contrast to the merging of an individual with a suprapersonal whole, as, for example (as we are told without claiming expert knowledge), in the Indian Nirvana and Chinese Tao. From this personal connection of an individual with a demanding and giving opposite followed, as a unique feature, the ultimate freedom of decision, and thus personal responsibility: the powerful and at the same time duty-bound. *liberum arbitrium*, which manifests itself in the active response to the demands of another: as in deliberately availing oneself of a proffered salvation and also in willing and working in this world.

The best evidence of this basic relationship may well be its impact upon the conception of law. This impact is so strong that it was able to outlast the belief in a personal God—as in Deism or in the materialistic philosophies practiced in antiquity and in more recent epochs of Western history. It is only here that law becomes a network of interpersonal relationships of "ought," "can," or "may," i.e., of interaction, to fellow-citizens. Freedom and self-determination (instead of "magical" or collective constraints) in the ordering of legal relationships (whether by contract or legal norms), duty and culpability (instead of fate or doom) and thus accountability for crimes and torts: both have formed the Western idea of law developed from antiquity. They have shaped, above all, the notion of private law (which only here has become truly independent) as a bundle of subjective entitlements among responsible persons, as well as the evolution of criminal law from strict liability to culpability.

It bears brief mention that these seemingly vague statements about the religious origin of the personalistic conception of law are corroborated by concrete data of legal history: thus, for example, the major breakthrough of Greek and then early Roman law from the magic guilt based on consanguinity, the miasma by virtue of mere causation in case of even accidental homicide, to wilful, premeditated murder, as proclaimed by Apollo in the *Oresteia* of Aeschylus; and, more generally, in the genesis of liability for fault in both of the antique legal systems and, again, in the medieval canonist theory of delictual and contractual liability; and finally in converting the ancient Roman magic *fides* into the ethical principle of *bona fides*, and in characterizing subjective rights as "emanations of the individual will." The latter notion is rooted the law of reason and in the philosophical idealism of the early nineteenth century.

In the framework of such a conception, self-determination and

responsibility necessarily complement each other. This has caused a persistent ambivalence between egotistic self-assertion and solidary responsibility for others. The constant tension between individualistic theories of liberty and altruistic teachings about duty, which thus furnished the basis for all legal theorizing in Europe, is expressed, in exemplary fashion, in the legend of classical natural law, which limits the primordial freedom of the original condition by a social contract that—sometimes as free consensus, sometimes as a contract of subjection or domination—establishes the social responsibility of individuals. Since then, the continuous dialogue between theories of freedom and responsibility has remained the guiding theme of all European legal and political philosophy.<sup>27</sup>

The ramifications of this basic pattern for the European understanding of law are immense. With respect to the relationship of the individual to the state, the theories of freedom have, in succession, helped to establish the following: the ancient freedoms of the estates; the freedom of conscience, born of religious struggles, first of the new churches and later also of the individual person; the secularized economic liberty and later also the political liberty of the rising bourgeoisie, and finally the fundamental rights of the individual enshrined in modern constitutions. The social contract or pact of domination, on the other hand, successively legitimated the following: the sovereignty of the absolute monarch (with its acknowledged responsibility for peace, security, and even the “happiness” of his subjects), the democratic people’s sovereignty of the *volonté générale*, and finally the unlimited control of socialist society over the distribution of goods, opportunities to work, and the education of its subjects.

The same tension between property rights and contractual au-

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27. The dialogue between individual rights theory and public interest thinking (presupposing a notion of public responsibility of individuals) is reflected in the decisions of the United States Supreme Court that balance constitutional rights, especially contract and property rights, against the “police power” of the states, i.e., the power to promote public safety, health, morals, and the general welfare. The most important of these decisions were handed down in the 1930s. See Lawrence Tribe, *American Constitutional Law* 574-588 (2d ed. 1988). In more recent times, the police power concept has been infrequently invoked by the Court.

Some authors of a liberal persuasion, such as John Rawls and Ronald Dworkin, believe in a maximum protection of individual rights and tend to equate the public interest (with some exceptions perhaps) with the sum total of private interests. Dworkin has said, for example, “if someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so.” Ronald Dworkin, *Taking Rights Seriously* 269 (1977).

The last few years have seen the revival of a political philosophy dating back to the founding of the Republic which, in contrast to liberalism, is usually denominated “republicanism.” This philosophy recognizes the existence of an autonomous public interest, independent of the sum of individual interests. See Horwitz, “Republicanism and Liberalism in American Political Thought,” 29 *Wm. & Mary L. Rev.* 57 (1987); Symposium on Republicanism, 97 *Yale L.J.* 1493 (1988).

tonomy on the one hand, and the social restrictions on private rights and their exercise on the other is apparent in the private law of modern economic societies. Today, the resulting antinomy between liberal and social *Rechtsstaat* poses one of the fundamental constitutional problems in Western and Central Europe. But this tension only confirms the extent to which individual freedom and social duty (to use catchwords: individualism and socialism) are two sides of the same coin: a specifically Western personalism.

2. It is easier to elucidate the second feature of our legal culture, its *legalism*. By this we mean not merely (and not even especially) the monopoly of the modern governmental legislator to create and change the law (which on the European continent did not come about until the 18th century), but more generally the need to base decisions about social relationships and conflicts on a general rule of law, whose validity and acceptance does not depend on any extrinsic (moral, social, or political) value or purpose.<sup>28</sup> The precondition of this exclusive power of the legal rule was the separation, characteristic for Roman as well as European professional jurisprudence, of the legal system from other social rules and sections (such as religious tenets, moral imperatives, custom, and convention). This separation can be traced back, essentially, to the growth of a specific professional administration of justice in ancient Rome (which proba-

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28. This statement, unless it is understood in the context of subsequent qualifications, lends itself to misinterpretation. First of all, Thomist as well as classical natural law theory (Grotius, Pufendorf, Locke) did not entirely divorce the validity of a legal rule from certain moral goals lying outside of it. It was agreed that in cases of a truly outrageous violation of a moral or religious command by a legal prescription, the latter was not binding and entitled those subject to it to passive or (in some situations) even active resistance. Wieacker does not ignore this fact. He points out subsequently that during the entire European legal history "drastic correctives" have served as an antidote to formalized rule-bound justice. For example, he mentions the position taken by the canon law to the effect that legal rules are subject to equitable exceptions in appropriate cases. He also refers to the "countercurrents" against legalism during the period of the law of reason. Thus, Wieacker does not view legalism as a universally observed principle of European legal culture.

Secondly, Wieacker uses the term "legalism" in a broad sense. He does not identify legalism with literal or "plain meaning" interpretation of legal sources. His statement that legalism separates law from the moral or social purposes existing "outside" of it does not exclude construction of statutes in the light of their social objectives. Wieacker also acknowledges the existence of binding nonformal guides to judicial decisionmaking based on *bona fides*, the "nature of things," or accepted norms of the culture. See Wieacker, "Gesetz und Richterkunst," in 2 *Ausgewählte Schriften* 41-58 (1983).

What Wieacker appears to have in mind is that positive legal norms (which form the primary basis of judicial decisions) possess a certain degree of independence from the surrounding social and economic conditions. Their autonomy (which, as Wieacker concedes, is partial only) furnishes some guarantee that lawsuits will be decided, not on the basis of irrational sentiments or purely subjective beliefs, but on the authority of sources that impart to the judicial process some measure of objectivity, detachment, and predictability. Understood in this sense, legalism can be viewed as a pillar of European legal culture.



bly derives from the expert functions performed by the ancient Roman *pontifices*) and the legacy of this jurisprudence to European legal science. In more recent times, it was reestablished and intensified by the separation of morals and law since the end of the 17th century (Thomasius and Kant) and ultimately led to the jurisprudential formalism of the 19th century and the statutory positivism of the modern constitutional state.

Thus, this separation is the root of that legalism which conceives of social duties, rights, and privileges as objectified legal relationships, removed, in principle, from arbitrariness as well as from mercy, from the *caritas* of interhuman empathy as well as the expediencies of a particular case. It is this legalism, if we see it correctly, which—apart from the scientific mastery of natural forces—most distinguishes European civilization from that of other high cultures, in which law emanates from an accepted social ethic as it did in classical China, or from revealed religious texts as in Judaism and Islam. Notwithstanding the evident weaknesses and dangers of such a separation of law from the living world of social values and purposes (for which professional jurists have always been criticized), legalism has bestowed upon Europe an immeasurable gain in rationality in the external world. Beyond the “legitimation by means of process” (N. Luhmann), legalism has unburdened social conflicts from force, emotions, interests, and prejudices which (contrary to accusations often heard today) has more frequently produced emancipatory rather than repressive results. As against public authorities, legalism assures the individual of greater legal certainty, and in criminal and civil procedure it has always signified freedom from the arbitrariness of irrational forms of proof and proceedings, and later, above all, greater strategic equality in litigation.

In private law, legalism led (to use the celebrated formula of Sumner Maine) “from status to contract,” i.e., it accorded individuals the private autonomy to control his personal and property sphere, free from historical restrictions. More generally, legalism was the first and sole ideology to guarantee the equality of human beings before God or nature (though other highly developed cultures also derived equality from the fact that humans are children of God, or by hypothesizing the identity of everything that lives). It has thereby converted historical rights and privileges into general freedoms of citizens and ultimately into universal human rights.

Finally, legalism made possible the modern welfare state, in that it alone transformed the responsibility of society (taken for granted in the religious cultures of India, Judaism, and Islam) to help the indigent (over and above voluntary charitable activities such as alms, labors of love, and beneficent contributions) into a statutory network of social services that by now enjoys constitu-

tional protection in the form of fundamental social rights. Regrets about the loss of spontaneity that characterizes personal generosity and about the atrophy of voluntary *caritas* because of administered assistance cannot possibly becloud the realization of the advantages that our legal culture has gained. Let us hope that they will also rebound to the benefit of a future world.

These achievements of legalism did, however, come at a high price. The stringent demands it makes on rationality produce a continual tension with other fundamental postulates of justice. In legalistic systems one is painfully aware of the antinomies of generalized and individualized justice, legal certainty and material justice, equality before the law and inequality of the starting opportunities. These antinomies must, on principle, be decided in favor of the first-mentioned rational values. For this reason, throughout ancient and European legal history drastic corrections of formalized rule-bound justice became necessary: in Rome the discretionary powers of the praetor, in the Middle Ages the *aequitas canonica* (originating in the *forum internum* and then externalized), in the age of the abstract law of reason the pragmatic and decisionist countercurrents; in modern statutory positivism the general clauses and the judicial balancing of interests.

3. The third constant of European legal culture, *intellectualism*, relates to the peculiar way in which the phenomenon of law is understood; it is closely connected with the specific structures and traditions of the European thinking. I refer to the tendency to grasp all phenomena by means of general epistemological methods. This basic tendency cannot be adequately understood as mere generalization or abstraction. It is more properly conceived as an idealism, provided that we strip this concept of its common linguistic meaning of an unselfish pursuit of suprapersonal goals and restrict it to epistemological idealism; or else as intellectualism, if we disregard the common linguistic usage that connects the term with a social attitude characterized by the priority given to the theoretical activity of the mind (as in "the intellectual," "intelligentsia"). What we have in mind is that *amor intellectualis* which, again and again, drove European legal thinking in the direction of thematization, conceptualization, and contradiction-free consistency of empirical legal materials.

In the last instance, this third tendency signifies the enduring contribution of Greek philosophy to the constants of our legal culture. It dates back to the conviction of the Eleates and of Platonism about the necessary connection, even identity, of cognitive thinking and the object of cognition—and the urge it engendered to "ideate," i.e., to perceive an unchanging essence behind the bustle of empiri-

cal appearances.<sup>29</sup> Just as it would have been impossible for the occident to devise theologies, philosophical systems, mathematics, and the rigorous natural sciences without this impulse, it also ultimately transformed the originally quite practical and mundane acts of making and applying law into a systematic science.

As a figure of formal thinking, this influence taught the Roman jurists and their legitimate heirs, the European jurists, the formation of concepts and the starting points for a general systematization of legal phenomena; beginning with the early period of the modern age it has produced the integrated systems of the law of reason and thus prepared the ground for the great modern codes. Its ultimate triumphs were these very codifications, the doctrinal systems of modern private-law science and finally, the current revision of general legal theory by means of the contemporary theory of science.

The most important things, however, have not as yet been said. This third aspect is not restricted to the formal ordering of legal science. Greek intellectualism shaped the future to an even greater extent by articulating, conceptually and systematically, specific demands on justice in the form of a general idea of justice. In its general version (its mathematicalized division into "arithmetic" and "geometric" justice is not altogether accidental),<sup>30</sup> this idea has played a decisive role in the ideologizing of the quest for justice (a propensity characteristic for Europe): it is its blessing as well as its curse that the issue of justice has been transmuted from a matter of correct public conduct to one of intellectually cognizable judgments about truth. To be sure, in its result this ideologization has for the

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29. The twentieth-century philosophical movement called "phenomenology" may be regarded, to some extent at least, as a revival of Platonism. It was founded by Edmund Husserl and has attained a sizable following, especially in Western Europe and Latin America. Phenomenology endeavors to grasp the "essence," i.e., the ideal, intelligible, enduring qualities of the objects of our consciousness (phenomena) with the help of intuitive vision. Phenomenology criticizes positivism on the ground that it limits the possibility of cognition to objects perceived by our senses. Nicolai Hartmann, in his work *Das Problem des Geistigen Seins* (3rd. ed. 1962), pointed out that in addition to sensual objects there exists a world of mental (noetic) being that includes the realm of values. This means, for example, that the concept of justice has an "essence" transcending the subjective reactions of individuals.

30. The mathematical demonstration of justice goes back to Aristotle, who distinguished between two kinds of justice: distributive and corrective. Distributive justice is concerned with the distribution of honors, wealth, and other goods among the members of the community. It is a form of "geometrical" justice in the sense that it must be thought of in terms of proportions between shares, rather than in terms of numbers. Proportional justice gives to each person that which he is entitled to in accordance with his ability and achievements. Corrective justice, on the other hand, is concerned with the righting of wrongs. If a contract is breached, a tort has been committed, or an unjust enrichment has occurred, corrective justice seeks to provide compensation to the injured party, operating with the arithmetical devices of addition and subtraction. An unjustified gain, for example, is subtracted from the assets of the wrongdoer and added to the assets of the wronged person. See Aristotle, *Nicomachean Ethics*, BK. V, II.12 to IV 14 (H. Rackham transl. 1947).

most part operated as a progressive, that is to say, as an equalizing and emancipatory element of European legal development. Abstract justice supplied the keynote when historical prerogatives and privileges were supplanted by civil and ultimately human rights. It did so likewise when enlightened absolutism and its progeny, the democratic *volonté générale*, encroached upon the vested rights of individuals. Today, abstract justice raises its voice, even more generally, in favor of the material equality before the law, and no longer concedes legal relevance to natural, historical, or social distinctions. In the critical legal literature of our time the ideology of general justice retains its emancipatory and egalitarian dynamism in the demand to compensate for the inequality of social starting opportunities at the expense of formal equality before the law: as, for example, by redistribution of the social product, by confiscatory progressive taxation, or by educational policies.<sup>31</sup> As in the case of other antinomies found in an idea-oriented legal culture, the tension between stabilizing rationality and tendentially progressive justice remains a task that must be mastered and performed every day.

## V.

We conclude with questions that lead us back from the preceding abstractions to problems of the present that, I suppose, concern everyone of us. Do the traits of our legal culture outlined here have a chance to become part of a future planetary legal culture? To answer the question one must, first of all, bear in mind the highly complex conditions of our time.

In the era of colonization, European legal systems (especially the English, French, and Dutch) were exported to non-European nations. After decolonization, some of the nations, upon attaining independence, retained that law (including its respective doctrinal apparatus and training procedures) by their own volition—similar to the way in which the peoples of the early Middle Ages retained the Roman law of late antiquity. The extent to which, in the face of this development, these nations will maintain or resuscitate their own legal tradition is a challenging problem which, however, will not be discussed here and cannot be decided by us Europeans.

Similar questions are posed for the non-European high cultures of Eastern Asia, India, and the Islamic orbit, which have either remained free of (direct) colonial domination or have retained their own, frequently religious, law in spite of it. These countries, too, after acquiring full independence or at least asserting their own iden-

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31. An example of "educational policies" in this context would be the establishment of special classes limited to members of disadvantaged groups and designed to improve their "starting chances" in society.

tity, have often favored the reception or retention of judicial systems, modes of procedure, and codifications. That is true, first and foremost of Japan and, after its secularization, Turkey, as well as of the first Chinese Republic after 1912, Thailand, and some other countries of the Near or Far East.

In both instances, it is often noticeable that national emancipatory movements were directed not only against the European colonial masters but, at the same time, against their own former social and hierarchical structures, and that in both instances these movements operated with the legalistic and rational apparatus of European constitutional doctrines and legal techniques. In situations in which this emancipation took social-revolutionary forms, the model of socialist law from Eastern Europe was, of course, preferred.<sup>32</sup> Where, however, colonial rule disappeared at an early time and without prolonged revolutionary wars of liberation, as, for example, in India and some English- or French-speaking states in Africa or the South Pacific, the inclination prevailed until now to retain Western European judicial systems and the substantive law applied by them—even if only because of the need to create a uniform political consciousness within the new boundaries (that often were determined by colonial history). Here again a prognosis as to the lasting effect would be not only pretentious but also illusory.

The crux of the problem, however, does not so much lie in these technical and regional receptions, but rather in the question which contributions, if any, European legal culture as outlined will impart to a future common world—a world whose large reserves of vitality today is challenged in equal measure by the perplexing confrontation with the Atlantic-European civilization and, at the same time, by the hope for a unique national self-realization. This situation is reflected in the paradox, just touched upon, that the identity of many young Third World nations has to articulate itself with the help of the very techniques of political rule, administration, and law borrowed from Europe. Once this is accepted as a necessity, such borrowing would, in the long run, be obviously meaningless unless these nations respect a minimum of those external modes of behavior and internalized attitudes that are at the root of European legal orders. If they do not accept this, one can no longer speak of a future planetary mission for our own legal culture, and the Europeans

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32. As did China in the early period of Communist rule. After the Sino-Soviet rupture in 1960, however, China decided to pursue a path toward communism different from that followed in the USSR. In recent years, the reconstruction of the Russian economic system by Gorbachev brought about a greater measure of affinity between Russian and Chinese solutions, including attitudes toward law. The events of 1989 have, however, cast a cloud on Chinese legal trends.

would have to leave the further course of events, with appropriate humility, to an uncertain future.

Yet, so far most non-European nations have in fact opted in favor of the human rights conventions and thereby for the basic inventory of individual and social rights first legally articulated in Europe; more specifically, they have embraced human dignity, personal freedom, and protection against arbitrariness, active political rights, especially freedom of voting, equality before the law, and society's responsibility for the social and economic conditions of its members. The realization of these postulates, as we have tried to show, has always been tied to the safeguarding of these rights by means of predictable legality and law-governed procedures in independent courts.

There are good reasons for hoping that the fundamental decision of these nations is more than lip service before international organizations by whatever politicians happen to be in power. For without application of these principles—and if only because of their population problems, this is true especially for many countries of the Third World—neither a bare existence nor a tolerable minimum standard of worthwhile existence is thinkable. This prognosis is not an expression of European arrogance vis-à-vis the equally valuable historical achievements of non-European high cultures and even tribal cultures. It only voices the apprehension that those venerable traditions alone cannot (as little as they did in Europe) guarantee a decent survival of the complex societies of the future, a survival all peoples of this sorely tried and damaged world are hoping for.