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OIKEUSTURVA JA HALLINTO
LEGAL PROTECTION AND ADMINISTRATION

YMPÄRISTÖ JA YHTEISKUNTA
ENVIRONMENT AND SOCIETY

R. C. Van Caenegem

Historical Considerations on the Role of Judges in Europe and America

It would seem that there are two diametrically opposed approaches to the role of judges, that of the English common law and that of the continental civil law – the two extremes in my spectrum.

I shall first present the English idea of judges as the ”oracles of the law”, quoting the title of a famous book by J. R. Dawson, *The Oracles of the Law* (Ann Arbor, 1968). Sir Edward Coke, who had an encyclopedic knowledge of the common law, incurred King James I's displeasure because, in the king's words, he was ”held too great an oracle amongst the people”[1] and Blackstone, in the following century, spoke of judges as ”the depositories of the law, the living oracles”[2]. Here the judge is like the Pythian priestess of Apollo in Delphi who under divine inspiration delivered the oracles, which were authoritative if not always unequivocal. Here the Bench develops and creates the common law, which is rightly called judge-made law. I can refer to pronouncements by the famous Lord Denning, who clearly believed that the law is what the judge says it is. Or, in his own words, ”No one can tell what the law is until the courts decide it. The judges do every day make law, though it is almost heresy to say so”[3]. The judgments of the Bench are closely argued in learned concurring and dissenting opinions, made known under their authors' names. This is the approach of English

[1] *W. Holdsworth*: Some Makers of English Law, Cambridge, 1938, p. 46.

[2] *J. P. Dawson*: The Oracles of the Law, Ann Arbor, 168, p. XI.

[3] *R. Stevens*: Law and Politics. The House of Lords as a Judicial Body, 1800–1976, London, 1979, p. 490. In the same vein Lord Denning stresses the eminent trustworthiness of the judiciary. In an interview broadcast by the B.B.C. on 7 November 1982 and conducted by David Jessel he maintained: ”Someone has got to be trusted, as I said, I think as long as you have the judges, upright, independent of any government or Parliament, and ready to do what is right and just, I think trust the judges because that is another important part of our constitution.”

common law, one of the great world-wide legal systems of our time, whose expansion across the continents was recently studied in a truly encyclopedic book by the Australian judge McPherson[4].

In England the judges have to operate under the law, because of the "supremacy of Parliament", so that there are limits to their creativity ("judicial activism"). On a famous occasion Lord Denning had invented a construction to protect deserted wives which was rejected by the Law Lords as being a bridge too far. He had ventured on to territory that belonged to the lawgiver who, as a matter of fact, later adopted his approach as being based on equitable grounds, and introduced legislation accordingly. Lord Denning was one of the great progressive English judges of the twentieth century, whose influence was particularly strong because of his long tenure. He was an Appellate Judge for thirty-five years, most of that time – from 1962 to 1982 – as Master of the Rolls, *i.e.* head of the Court of Appeal. He believed in judicial activism and felt that justice was a law above the law. "Judges in our society", he said, "could remake the body of the law they administer into what they may approve as a shape of greater justice"[5]. And again: "If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all that he legitimately can to avoid that rule – or even to change it – so as to do justice. He need not wait for legislation to intervene, because that can never be of any help in the instant case"[6]. In other words, Lord Denning believed in law reform by judicial decision. However, not everybody shared his faith in the judge as quasi-legislator and, unfortunately for him, the Law Lords were among his opponents. This meant that the House of Lords, a superior jurisdiction to Lord Denning's Court of Appeal, could overrule his sometimes bold decisions, and did so repeatedly. This happened, *inter alia*, to one of his boldest and most famous inventions, the "deserted wife's equity" (1962), such a striking example of the interplay of the Bench and the legislator that it deserves to be briefly presented here.

The problem confronting Lord Denning on appeal concerned the right of the innocent wife, whose husband deserted her for another woman, to stay

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4 *B. H. McPherson*: The Reception of English Law Abroad, Brisbane, 2007.

5 Quoted by Lord Devlin in the Foreword to *J. L. Jowell – J. P. W. B. McAuslan* (eds): Lord Denning: the Judge and the Law, London, 1984, p. VII.

6 Quoted by *A. W. B. Simpson*: Lord Denning as Jurist, in: Jowell and McAuslan, op. cit., pp. 448–449.

on in the matrimonial home, even though her unfaithful husband was the sole proprietor or had sold the house or mortgaged it to a bank. A judge at first instance had decided that the husband, being the legitimate owner, had a right to evict his wife (possibly even to go and live there with his mistress). Lord Denning felt that this would be an injustice and decided that the deserted wife could remain in possession. He argued that in this case equity overruled the strict norm of the law: legal historians will remember how in the Middle Ages the Court of Chancery – a court of equity – had originated in order to redress an injustice caused by the common law. Eventually, in 1964, the problem reached the House of Lords (in *National Provincial Bank v Hastings Car Mart Ltd*) which, in 1965, unanimously decided for the Bank that had appealed against Lord Denning's judgment. The Lords held that a deserted wife had no equity to remain in the matrimonial home as against anyone to whom the husband sold or charged it. If the husband remained himself as sole owner of the house, with title vested in him, he could not himself turn her out, but others could: the wife had a personal right as against her husband, but she had no equity – no right at all – against anyone else. Thus the Lords overruled all Denning's cases of long standing[7]. Fortunately for deserted wives this was not the end. The Lords' decision led to so much pressure for legislation to reverse it that Parliament took up the cause and the law was amended in Lord Denning's sense. Justice was done by the lawmaker where the judiciary – or at least its highest branch – had feared to tread. Redress was achieved by the Matrimonial Homes Act 1967, which made clear that a deserted wife had a right to stay in the matrimonial home. It also demonstrated the influence of the judges on Law Reform[8].

The sovereignty of Parliament means that whereas English judges can review administrative acts, judicial review of the constitutionality of laws is denied them. It is, remarkably enough, in the main offshoot of English common law, the law of the United States of America, that judges do have the power to strike down federal and state laws that go against the Constitution. Although this power now seems quite un-English, it has paradoxically historical roots in England. I refer, of course, to the famous dictum of Sir Edward Coke in *Dr. Bonham's Case* that "when an Act of Parliament is

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[7] *Lord Denning*: The Due Process of Law, London, 1980, pp. 218–219.

[8] See the detailed account in *Denning,* op. cit., pp. 205–224.

against common right or reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void" (1610)[9]. American judicial review is based on the fact that the country has a written constitution, which is – so far – unknown and unwanted in Great Britain, specifically because that country prefers the supreme power to be in the hands of elected politicians rather than of unelected judges. I remember attending an eloquent and profound lecture at Oxford in 1989 given to an attentive but unconvinced audience by Mr. Justice Brennan of the U.S. Supreme Court under the title *Why Britain needs a written Constitution*. American judicial review, inaugurated by the famous *Marbury v. Madison* case of 1803, was based on the not unreasonable premise that every citizen, even the elected lawgiver, must act under the fundamental law of the land, and that judges are in the best position to decide on cases of doubtful interpretation[10]. Thus America reached the extreme logical position in the common law tradition of judicial power. It can, however, be argued that taking a sound principle to its extreme may lead to absurd consequences. This is, I feel, what happened when in the debate about the constitutionality of capital punishment, one judge had to decide on the fate of hundreds of condemned people on death row.

Allow me to enter into more detail here. Some time after *Roe v. Wade*, the liberal judges on the U.S. Supreme Court thought that the time might be ripe to rid their country of capital punishment by declaring it unconstitutional. They argued that the death penalty was a cruel and unusual punishment and as such banned by the Eighth Amendment (1791). They had a point, as many people will agree that putting someone to death – even a convicted criminal – is a cruel and unusual sanction. The difficulty was, however, that the Founding Fathers in no way intended to ban capital punishment, which in the eighteenth century was generally practised, and clearly

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[9] I cannot enter here into the recent discussion around the interpretation of the case, as reopened by *Ian Williams*: Dr. Bonham's Case and 'Void' Statutes, in: The Journal of Legal History, vol. 27, 2006, pp. 111–128.

[10] It is well known that even before 1803 judicial review was advocated in America and clearly enunciated, for example, in the *Federalist Papers*, where we read that "no legislative act, contrary to the Constitution, can be valid". It is, however less generally realized "that already in the 1760's in France the Physiocrats had clearly stated that judges, before enforcing the laws, ought to satisfy themselves that the laws… conformed with the dictates of the natural laws of the social order and of justice" (Charles de Butré in 1768 and Pierre Samuel Dupont de Nemours in 1767, quoted by *J. M. Kelly*: A short History of Western Legal Theory, Oxford, 1992, pp. 279–280).

accepted as legitimate by a stipulation in the Fifth Amendment (1791). Some judges consequently argued that the ”original intent” of the constitutional lawgiver should be respected and the abolition of capital punishment could in no way be based on the text of the fundamental law (the ”textualists” or ”intentionalists”). The other side, led by Mr. Justice Brennan, argued that the court ought to interpret the text of the law in the light of the ”evolving standards of decency” of our own time and not according to the values and mentality of a bygone age. The liberals lost the battle, but it was a close thing: the judges on the U.S. Supreme Court almost managed to outwit the numerous legislatures that had put capital punishment on their statute books. Four learned judges giving a particular interpretation to four words of the Constitution almost changed the course of legal history. After a long suspension the final decision came when in 1985 Warren McCleskey's appeal reached the Supreme Court, which decided in October 1986 to uphold capital punishment (after more appeals McCleskey was executed on 25 September 1991)[11]. That was the common law.

At the other extreme of my spectrum, my second point, stands the conviction that the law is what the legislator says it is, and the judges are mere mouthpieces, automatons through whose mouths the law, *i.e.* the lawgiver, speaks. In every sentence the judge is obliged to refer to the article of the Code or subsequent laws or royal decrees upon which he based his sentence: he is merely the *bouche de la loi*[12].

This was the attitude of the French revolutionaries, who dreaded that conservative courts might, as the old *Parlements* had done, thwart the zeal of the politicians who controlled the representative assemblies and in particular the Convention, which was parliament and government combined. The one historic power to overcome the conservatism of the Bench was the

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[11] This may be the right place to draw attention to a recent book on the role of judges by the President of the Supreme Court of Israel (*Aharon Barak*: The Judge in a Democracy, Princeton and Oxford, 2006) and to its extensive review by the former Professor of Comparative Law in Cambridge, *J. A. Jolowicz* (European Review, 15, 2007, pp. 265–268). Barak, a judge as well as a professor of law, believes that within the sphere of the common law, the Bench is a senior partner and he is sceptical about respecting the original intent of the legislator: the judge should give the statute a dynamic meaning, bridging the gap between law and society. He argues that the judge should search for the ”objective” purpose of the statute, which means ”not a guess or conjecture about the original intent of the legislature”.

[12] *Montesquieu*: Esprit des loix, XI, 6 : «Les juges de la nation ne sont que la bouche qui prononce les paroles de la loi, des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur».

lawgiver. Hence the club of the *Nomophiles* in revolutionary Paris and their appeal to restrict the judges and to turn them into mechanical *bouches de la loi*, hence also Napoleon's edict against commentaries on his codes[13]. This revolutionary and Napoleonic attitude was, as is well known, continued by the professors of the nineteenth-century *École de l'exégèse*, who did not teach the law but the code.

So far I have been talking about two contestants for control of the law, the judge and the lawgiver. There is, however, a "third man" involved, to whom we shall now turn our attention. I mean, of course, the legal scholar, the number three in the triumvirate of judges, legislators and professors[14]. There is indeed such a thing as professor-made law, comparable with its well known judge-made and legislator-made counterparts. The Law Faculties have for centuries influenced the practice of the courts, since judges and barristers have sat *ad pedes magistrorum* and there drank the milk of legal wisdom and set their first steps on the road to eminence in their respective fields. And long after their student days they still consulted some famous *Traité élémentaire de droit civil*, written by one of their illustrious law teachers. The latter's alumni who became politicians and lawgivers also took their lessons to heart, and let us not forget that lawyers have for a long time been the single largest group in our modern parliaments.

But there is more to it than that. The professors not only influenced judges and lawmakers, they literally created law themselves. I remind the reader of the *ius commune*, the product of the medieval Schools, and of the *Bürgerliches Gesetzbuch* that, although formally proclaimed by Parliament, was essentially the product of the pandectists, the School of German professors who brought Roman and neo-Roman law finally to its systematic perfection.

In all these cases the scholars inspired the kings or parliaments to give their teaching the authority of the law: the Faculties themselves had no power to do so. There is, however, one remarkable exception here: I refer to the great medieval popes who had been scholars before they sat on St. Peter's throne and became legislators for the Roman Church[15]. As they were

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[13] No judge should be allowed to interpret the law, which was *un terrible droit*, according to J. J. Garat-Mailla in the *Tribunat* in 1801 (*K. M. Schönfeld*: Montesquieu en "la bouche de la loi"), Leiden 1979, p. 74.

[14] For a detailed analysis see *R. C. Van Caenegem*: Judges, Legislators and Professors. Chapters in European legal history, Cambridge, 1987 (Goodhart Lectures 1984–1985).

[15] I remind you of Alexander III, Innocent III and IV, Gregory IX and Boniface VIII.

also supreme judges, we have here a unique combination of the lawgiver, the judge and the scholar in one person. Here at last it was *la doctrine au pouvoir*.

My Parisian colleague and eminent canonist, Professor Anne Lefebvre-Teillard, has recently devoted an excellent paper to this phenomenon under the title *L'autorité de la doctrine en droit canonique classique*[16]. The author, who studies the "classic age" of canon law, *i.e.* from Gratian to the end of the fourteenth century, explains that the great professors of that period based their authority on the "holy texts" they quoted in their lessons[17], but also on the logical quality of their teaching. Their commentaries and interpretations demanded respect *non ratione imperii, sed imperio rationis*. The impact of the Schools on the courts was so strong that John Andrews († 1348) thought that judges who did not follow the *communis opinio doctorum* ought to be disciplined. It is true that in the following century the *rota romana*, speaking for the pope, acquired an authority superior to that of the doctors, but then that court was itself packed with eminent jurists.

From what I have just said it should be clear that the impact of the scholars was comparable to that of the judges and the lawgivers: they were equal competitors in the struggle for control of the law. One qualification is, however, in order here: my picture applies only to the Continent of Europe, not to the land of the common law. In England, until quite recently, no judges had obtained a degree in a Law Faculty, for the simple reason that until the second half of the nineteenth century there were no such Faculties, and even afterwards future solicitors, barristers and judges did not study law at University – it was only after the Second World War that obtaining a law degree at university became *id quod plerumque fit*. As to the members of Parliament in Westminster, the holders of a law degree are *rari nantes in gurgite vasto*. The prestige of law professors is consequently low, *inter alia*, because the common law's approach is non-theoretical[18]. When in 1826 John Austin, a great theoretical jurist and acquainted with German doctrine,

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[16] In Revue d'histoire des facultés de droit et de la science juridique, 27, 2007, pp. 443–457.

[17] Simple material access to those sacred texts was, in an age that knew no paperbacks, a costly privilege: as Professor Lefebvre-Teillard points out, it took a year and a half to produce a single copy of Gratian's authoritative, and admittedly voluminous, collection.

[18] When in 1984–1985 I lived in Cambridge as Goodhart Professor of Legal Science, people would come up to me and ask in a puzzled way "what is legal science" – clearly an unfamiliar notion!

became professor of Jurisprudence in London, so few students turned up that in 1833 he gave up his chair and was eventually put on a commission of enquiry into the state of Malta[19]. This does not mean that legal scholarship is unimportant in England. On the contrary, it is of the highest order and enjoys universal prestige, but it is to be found in the learned and closely reasoned opinions produced by the Bench.

We have seen how behind the three traditional sources of the law – legislation, case law and doctrine – three powers in the state are vying for control: politicians, judges and professors. Conflict between the Crown (government and Parliament) and the Bench is endemic. As two competing powers at the head of the state is not a satisfactory situation, various solutions have been tried. One way was to have the king himself as the highest judge: one person combining the two functions precluded all possible conflicts of interest. We all remember stories of St. Louis sitting in judgment under the oak tree of Vincennes. We have all heard of the king being the *lex animata*. Nor was this a medieval peculiarity, for modern Europe witnessed the same situation. We know how Frederick the Great of Prussia did not hesitate to reprimand judges who had failed in their duty and to use his personal *Machtspruch* against their *Rechtspruch* (we remember the tragic fate of Hans Hermann von Katte who was sent to prison by the judiciary, to the displeasure of King Frederick William I who, as supreme judge of the nation, pronounced the death sentence on the young man, who was duly executed on 6 November 1730). In the same vein Adolf Hitler, in a famous Reichstag speech in 1934, justified the killings in the "night of the long knives" by proclaiming himself "des deutschen Volkes oberster Gerichtsherr".

In the same line of thinking the king could dismiss recalcitrant judges, who were considered servants of the Crown. Thus chief Justice Markham of the King's Bench was dismissed in 1469 because he refused to betray the law and find someone guilty of treason[20]. And thus, on a more famous occasion, King James I dismissed Sir Edward Coke. In nineteenth-century France a change of regime could lead to a thorough shake-up of the Bench, as

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[19] See the recent contribution by *M. Senn*: Legal education in England and the German historical school of law in the nineteenth century, in A. Lewis et al. (eds), Law in the City. Proceedings of the Seventeenth British Legal History Conference, London, 2005, Dublin and Portland, OR, 2007, pp. 249–261. The author maintains, as against Peter Stein, that the influence of Savigny's School was limited, and that no real and full reception took place.

[20] *Holdsworth*, op. cit., p. 56.

happened some years after the fall of the *Second Empire*. As soon as the Third Republic was firmly established, in the period 1879–1883, a real *révolution judiciaire* took place. It was more than an ordinary *épuration* or *chasse à l'homme*, such as successive regimes had witnessed ever since the Revolution, when "undesirable" judges, who had been on the wrong side of the political spectrum, were dismissed[21].

As to our own time, you will have followed with great interest the events in Pakistan where on 9 March 2007 President Pervez Musharraf suspended chief justice Iftikhar Mohammed Chaudhry who was, however, on 20 July 2007 exonerated and reinstated by the High Court of Pakistan, whose President he is: a striking illustration of the ancient tug-of-war between the executive and the Bench, which modern liberal democracies have overcome by guaranteeing the independence of the judges.

But what about the tug-of-war between learned jurists and the "powers that be"? We have already seen how judges could be dismissed by disgruntled kings, but the same thing could happen to scholars. Let me remind you of the famous *Göttinger Sieben*, the seven professors in the University of Göttingen who in 1837 signed a declaration of loyalty to the liberal constitution of the realm, which King Ernest Augustus had autocratically abolished. The seven were dismissed and two of them were even banished for treacherous and revolutionary behaviour (the reader will be comforted to hear that they all were later given chairs elsewhere).

Modern dictators found the law and learned lawyers a nuisance. Stalin sent two of the authors of the constitution of 1936 to their death and Hitler's Party had early on demanded (art. 19 of the Party programme of 1920) the replacement of Roman law by a German community law – a declaration of war on the *Professorenrecht* of the *Bürgerliches Gesetzbuch*. Consequently, in June 1933, five months after Hitler's appointment as Chancellor, the Academy for German Law was founded and given the task of drafting a *Volksgesetzbuch*: "people's law" was to replace "lawyers' law". The learned members of the Academy were led by Dr. Hans Frank, whose respect for basic legal values was eventually to lead him into conflict with the regime, so much so that in the summer of 1942 he gave lectures at the universities of Berlin, Vienna, Munich and Heidelberg protesting against the excesses of the regime and stressing that "without the law society was impossible".

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[21] We follow here *J.-P. Royer*: Histoire de la Justice en France, Paris, 2001, pp. 616–622 and 629–642.

The dictator's reaction was immediate and Dr. Frank was dismissed from his post as President of the Academy. His successor, Otto Thierack, explained to the academicians that "the creation of the law was no science and no purpose in itself, but a task of political leadership and ordering": in a conflict with political leaders the scholars were the underdog and they should realize it, just as the nineteenth-century judges[22]. Had not the professors of the *École de l'Exégèse* been the self-professed slaves of Napoleon's Code?[23]

The chance of a king being a jurist was very slim. Alfonso X the Learned (ruled 1252–1284), who issued the *Siete Partidas* for the kingdom of Castile, comes to mind; his "lawbook" looks rather like a textbook – in the vernacular – of Roman law. However, Alfonso, possibly the most learned of all medieval kings, was no trained lawyer.

One has to turn to the Church to find a succession of leaders who were also jurists or had even been professors of law before becoming pope. May I remind you of Alexander III, the first glossator of Gratian's *Decretum*, author, before 1148, of a *Summa* on canon law, and professor at Bologna? And of Innocent III, who studied theology in Paris and law in Bologna, and who ordered the *Compilatio III*[a] with his decretals of the period 1198–1210? And of Innocent IV, Bolognese professor and author, *inter alia*, of an extensive *Lectura* on canon law, written c. 1251, during his pontificate (1243–1254)?

Allow me now to focus on a particular aspect of the role of the jurists, i.e. their legitimation. On what is their claim to be the leading lights for judges and lawgivers based? The medieval "founding fathers" of the *ius commune* had a clear and convincing case, as they were the high priests who knew the secrets of the holy lawbook of Emperor Justinian. It enjoyed absolute authority, just as other texts from Antiquity which medieval people so deeply venerated, so that the scholars who had fathomed its meaning and unravelled its mysteries enjoyed great prestige. The jurists of the School of Natural Law were similarly influential, because their teaching was based on

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[22] See on all this *R. C. Van Caenegem*: European Law in the Past and the Future. Unity and Diversity over Two Millennia, Cambridge, 2002, pp. 100–102.

[23] Today the judges are slaves no more. "Case law indeed, today, is fully recognised as a formal source of the law in the sense that judges indeed 'make' law and not only find and apply it" (*G. Martyn*: The Judge and the Formal Sources of Law in the Low Countries (19th–20th centuries): From "Slave" to "Master"?, in: W. H. Bryson and S. Dauchy (eds), Ratio Decidendi. Guiding Principles of Judicial Decisions. I: Case Law, Berlin, 2006, p. 214 (Comparative Studies in Continental and Anglo-American Legal History, 25/1).

reason and was rightly called the *Vernunftrecht*. I refer here to Hugo Grotius, whose work on Roman-Dutch law became authoritative in the law-courts of Holland and South Africa, without ever being promulgated by a legislator. The trouble with the law of reason was that not everyone agrees as to what is rational and what is not. There was here no "holy book" which one could quote, as one quoted the *Corpus Iuris*.

The problem becomes even more intricate and the uncertainty even greater when we meet the romantic notion of the *Volksgeist* as the mainspring of the law of the nation. And when I mention the *Volksgeist* (the "spirit of the nation")[24], I, of course, have to discuss Friedrich Carl von Savigny (1778–1861). This celebrated jurist was a great romanist and civilist, author of *Das Recht des Besitzes* (1803), the *Geschichte des Römischen Rechts im Mittelalter* (6 vols., 1815–1831) and the *System des heutigen römischen Rechts* (8 vols., 1840–1849), on the strength of which he can be called the fountainhead of the German pandectists of the second half of the nineteenth century. In 1810 Savigny was given the chair of Roman law at the new University of Berlin. He acted as a judge in various capacities and was one of the top administrators of the kingdom of Prussia and close to the monarchy. He seemed predestined to devote his life to the professorial *ius commune* and *usus modernus* as the natural foundations of the future law of his country.

It comes therefore as a surprise that, instead, he advocated the national spirit (which he initially called *Bewusstsein des Volkes* and only later, in 1840, *Volksgeist*) as the mainspring of the legal consciousness of the people[25]. The law – one recognizes the ideas of Herder and Hegel – was but one of the manifestations of the central cultural element, the *Volksgeist*. This law, produced by the nation, grew organically in the course of the centuries and was the fruit of history. As such it was the opposite of arbitrary legislation issued by overbearing rulers, particularly in the form of sweeping codification. The spirit of the German people was preferable to the will of a French emperor who had crowned himself.

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[24] An earlier term for the *Volksgeist* was the *Nationalgeist*, which F. C. von Moser had borrowed in 1761 from a translation of C. A. Helvétius's *esprit de la nation*. *Volksgeist* as a variant of *Nationalgeist* was introduced by J. H. Campe in 1794 (See Handwörterbuch der deutschen Rechtsgeschichte, V, 1998, col. 189–190).

[25] Georg Friedrich Puchta (1798–1846) was the first to give, under the influence of Hegel and Schelling, a legal content to the terms *Volksgeist*, *Volksseele* or *Volksüberzeugung*.

It is on this terrain that we discover Savigny's political motivation: he was a German patriot and a conservative nobleman who abhorred the French Revolution and all its works, especially the egalitarian *Code Napoléon*. It was during his country's conflict with France that Savigny's stance was forcefully expressed. Law being the product of history, it was understandable that Savigny, together with G. F. Puchta, founded the *Historische Rechtsschule*, the first volume of the *Zeitschrift für geschichtliche Rechtswissenschaft* appearing in 1815. Around that time, in 1814, he published his famous onslaught on codification, the *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (a response to A. F. Thibaut's plea for a German civil code). Savigny condemned the code as an anorganic arbitrary product and extolled the *Bewusstsein des Volkes* as the source of the law, which is nourished by the life of the nation: as in its language, culture and religion, the national character manifested itself in the law. Savigny's interest in Germany's heritage meant that he is a figure-head for the germanists as well as the romanists.

Having extolled the law of the people, Savigny faced the question as to what future there was for legal scholarship. If German *Volksrecht* prevailed over Roman *Juristenrecht*, what was the role of aristocratic jurists, steeped in the *Corpus Iuris*, like Savigny himself? It is obvious that the great romanist had worked himself into a dilemma, and all that because of a hazy concept such as the *Volksgeist*, which to modern jurists – like Georg Jellinek – is a mere "phantom". Politics had led to some strange twists in Savigny's thinking or, as Allen put it, he "had much ado to remain consistent with his own principles"[26]. He found a solution in his belief that the elite of jurists had the technical knowledge to refine and elaborate the rules of conduct of the people, which they represented: as culture became more complex, various classes had to fulfil various specialized tasks. Thus a nobleman and scholar could be the spokesman and representative of his – to some extent still illiterate – countrymen. It was in his criticism of Thibaut that Savigny had explained that the law originated organically and necessarily from the quiet strength of the people, finding its source in the *gemeinsame Ueberzeugung des Volkes*[27].

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[26] *C. K. Allen*: Law in the Making, Oxford, 1964, p. 89.

[27] *P. Caroni*: Savigny und die Kodifikation, in: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, 82, 1969, pp. 133–134.

I intend now to leave the safe field of facts and dates for the more hazardous terrain of speculation. Having described what happened, I now intend to pose the question why it happened, assuming that things do not – or not all – happen because they had to happen. Question marks could be placed behind any number of the events in my exposé, but I will limit myself here to a single one: why did England become the land of judge-made, Germany of professor-made, and France of lawmaker-made law? There is no need to expatiate on the role of judges in the fatherland of the common law, and it is equally well-known that the *Bürgerliches Gesetzbuch* is fundamentally based on the fruits of the Pandectist School. As to post-Ancien Régime France, the Revolution, distrustful of the old *Parlements*, was keen, as we have seen, on restricting the judges, whereas Napoleon forbade the jurists to write commentaries on his codes, all of which left the legislator in sole control (or so he hoped). Moreover, the old Law Faculties had been abolished in 1793 and replaced in 1804 by strictly controlled *écoles spéciales de droit*, technical colleges where there was no place for the *idéologues*, so detested by Napoleon.

In order to find out why the law of these three European countries, which had so much else in common, took such different roads, we must, of course, consult history (there is no need to waste time on the ”national genius” or other *Volksgeist*-like phantoms). The history books show that in the early Middle Ages the three countries shared the same customary law. The ensuing separation was brought about by three political moves with far-reaching consequences.

In twelfth-century England, where a strong monarchy ruled over an old unified and well structured land, King Henry II’s government embarked on a thorough modernization of the law and the courts. An elite of professional royal judges, sitting at Westminster or travelling around the country, administered a new system of prompt redress for an ever growing number of complaints and using a rational mode of proof. This law applied equally to the whole of England, so that it was a truly ”common law”. It operated with native procedures, *i.e.* the royal writs and the jury, and owed little or nothing to Roman law. Already at the end of Henry II’s reign it had taken such definite shape and become so embedded in the life of the nation that it was described in an authoritative lawbook known as Glanvill. This English common law, administered by a small group of highly professional judges, was to flourish for many centuries, which is why it is still fundamentally judge-made.

In the thirteenth century Roman law, as discovered, taught and glossed in the twelfth, began to influence legal practice on the Continent, at first in the Church courts, then in the higher courts of the kingdoms. It also influenced royal legislation. Following the lead of Bologna, numerous Law Faculties instructed growing numbers of jurists in Roman law. The impact of this *ius commune* became so considerable that towards the end of the fifteenth century the German Empire introduced it as its national law - a momentous political decision which necessarily led, in Dawson's phrase, to the "triumph of the learned men"[28], who alone were familiar with the intricacies of Roman law and its glosses, treatises and disputations, which is why German law is professor-made. It is therefore quite rightly that Professor Ewoud Hondius in a recent article went so far as to call Germany, legally speaking, a "professor-dominated society" (*Professorengesellschaft*), quoting a professor, Claus-Wilhelm Canaris, a judge, Lord Denning, and the leading author of the *Code civil*, Jean Portalis, as outstanding representatives (*Urbilder*) of their respective countries.[29]

Around the time of the German *Rezeption* France took a different road. The government decreed the homologation of the ancient regional customs, so that the country, in contrast to England and Germany, lived on with the old diversity of *coutumes* and during the Ancien Régime never achieved the unification of French law (in spite of some partial codifications). The breakthrough came with the Revolution which, as we have seen, led to the downfall of judges and learned commentators and the triumph of the lawgiver and his civil and criminal codes.

I do not pretend to have the one and only answer to my question about causality, but I hope to have uncovered one of the – no doubt numerous – possible approaches to this historical problem. More specifically, I hope to have shown that the tortuous paths of the law belong to political as well as cultural history.

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[28] *Dawson*, op. cit., p. 196.

[29] *E. Hondius*: *Die Errungenschaften der deutschen Zivilrechtswissenschaft: ein Blick aus dem Ausland*, in: A. Heldrich et al. (eds), Festschrift für Claus-Wilhelm Canaris, I, Munich, 2007, pp. 1136–1137.