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A RE-EXAMINATION OF THE RELATIONS BETWEEN ENGLISH, AMERICAN AND CONTINENTAL JURISPRUDENCE

A STUDY OF THE RELATIONS BETWEEN SOCIAL IDEALS AND LEGAL TECHNIQUE

A comparison between the two trends of legal thinking, method and practice which, in a very generalizing way, are described as Anglo-American and Continental jurisprudence, is certainly a matter of great importance. Legal theory cannot achieve its principal object, self reflection, without rising beyond the limitations of one sided legal training; the practitioner, when confronted with a conflict of laws, often has to compare nations and institutions of different legal systems; a workable system of international law must blend the methods and outlook of different national legal systems. Last, not least, the present world crisis and struggle compels us to take stock of the assistance or obstacles which the different legal systems may present to international reconstruction.

Between English and American law there are many and even fundamental differences. So there are between the principal Continental systems. Nevertheless it is possible to oppose in a broad sense Continental and Anglo-American law to each other. Historical development emphasizes the outward difference. English law, through geographical circumstances and the continuity of political and social evaluation, has largely developed on a line of its own, and in its turn formed the basis of American legal evolution. Although American law has become increasingly independent in its actual system of law as well as in the approach to legal problems, the common basis of both systems, the common law of England and a judicial organization working on a precedent system, still preserves a fundamental unity which is evidenced by the persuasive authority enjoyed by decisions of one country in the other, and by the permanent

exchange of legal ideas. On the other hand all continental codifications, most of them less than half a century old, owe their inspiration to the principle of the Napoleonic codes; they are largely influenced by the reception of Roman law, and thus by a common background of legal notions and institutions as well as by similar conceptions of law making and law interpretation. Moreover there has been much conscious imitation and mutual influence between the various Continental codifications. The oldest of the present day civil codes, the French Civil Code, has been kept in tune with the more modern codifications through the breadth of its principles as well as the creative work of the French judiciary.

The differences of principle between the English and American systems of law, as they stand to-day, might be summarised as follows :

1. The supreme law in the United States is a written law, the American Constitution, which prevails over any ordinary statute. There is no supreme law in England where the law making power of Parliament is unlimited.

2. Through the frequent need for interpretation of the Constitution, American judges have been faced much more than English judges with vital problems of public policy, in particular the conflict between vested right and social state policy. Such matters, as Lord Macnaghten observed in the *Nordenfelt Case*,[1] do not fit well into the precedent system. The precedent problem has also gained a different aspect in American law through the flood of precedents from a Federal and 48 state jurisdictions, which gave a much greater choice to the judge. Finally, the rapid economic expansion of the United States, compared with the gradual evolution in England, made the strict attachment to precedent an even more difficult proposition. All these influences together may account for the very different aspect the precedent problem has gained in the United States as distinguished from England. American judges may be conservative, as the majority of the Supreme Court, which for many decades consistently opposed and invalidated social legislation in the name of natural law, or progressive, as the minority on that Court and many other American judges, but in either case the attitude towards the binding force of precedent is a much freer one than in English law. The difference has

[1] *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company*, [1894] A.C. 535.

been analysed by Professor Goodhart.[2] But his view of the English position must be read subject to the very noticeable change which has since taken place. Perhaps *Donoghue* v. *Stevenson*[3] may be taken as a turning point.

3. The need for systematization of the law has been felt earlier and more urgently in the United States, owing to the mass of legal material which threatened to become unmanageable. Apart from a certain number of actual codifications in different states, the unofficial codification of the different branches of law has proceeded far. Subject to these differences, one may still speak of "Anglo-American Jurisprudence".

The principal factors which have tended to direct the development of Anglo-American and Continental law into different channels are partly of a technical character, that is, related to the structure of the law, partly of a sociological character, that is, deriving from the function and scope attributed to the law by the social order.

It is the technical side which has hitherto been almost exclusively emphasized by jurists. We may classify the principal factors alleged to bring out these differences as follows :

1. Continential jurisprudence has been decisively influenced by the recepton of Roman law, Anglo-American law has not. Instead it is largely the product of gradual historical growth and therefore still shows considerable elments of feudalism. It is for this reason that Scottish law might be ranked with Continental rather than with the English system, because of the affinity in legal method and theory.

2. All Continental systems are essentially codified; Anglo-American law is still based on the common law.

3. From this follows a different approach to problems of legal interpretation. Judicial decisions in Continental systems are no primary source of law, but only a gloss on the law. On the other hand, in Anglo-American law, precedent is one of the principal sources of law.

4. It is connected with the contrast of inductive and deductive approach that Continental systems, proceeding from general rules to individual decisions, establish general legal principles, whereas Anglo-American law centres round a decision of individual problems and builds up the principle, from case to case. Such principles as there are, developed from a gradual adjustment to practical requirement.

[2] ESSAYS IN JURISPRUDENCE AND COMMON LAW, pp. 50 *ff.*
[3] [1932] A.C. 562.

5. As a corollary to this difference in legal development Anglo-American legal thinking gives a predominant place to the law courts, where Continental jurisprudence thinks of law, not only in terms of litigation but largely in terms of its general function.

6. The dualism of common law and equity in Anglo-American law is unknown to Continental systems where equity is a principle of interpretation applied to any legal question, but not a special body of law.

7. All Continental systems distinguish in substance and procedure between private law and administrative law. The former deals with legal relations between subjects, as equals, the latter with legal relations between public authority of all types and the subject.[4] Anglo-American law rejects that distinction and adheres to the principle of the equality of all before the law.

8. The more abstract and generalising approach to law of Continental jurisprudence has been conducive to the development of legal philosophy, whereas the pragmatic and empiricist character of Anglo-American law has had the opposite effect. Hence the preeminence in Anglo-American law of the analytical school of jurisprudence, compared with the infinite variety of Continental legal theories.

Now an examination of these principle points of difference reveals that they have either been very much exaggerated in the first place or have recently lost much of such importance as they may once have had. Moreover, a comparative consideration of Scottish law might well help to form a bridge between the systems and methods of Anglo-American and Continental jurisprudence. For Scottish law, while being linked to English law through centuries of political union and common life, as well as by a common supreme court of appeal, the House of Lords—which always contains a proportion of Scottish judges—has developed from sources and on lines very different from English law, and exhibits many characteristic features of Continental law. The following seem to be the principal reasons:

1. Scottish law, like Continental law, has been directly influenced by Roman law, which is even now referred to as a principal source.

2. Scottish legal education has been directed, much more than English legal education, towards the study of other systems

[4] Public authority comprises the state itself, local authorities and other bodies entrusted with the exercise of public functions.

and been influenced by study at continental universities, particularly between the 16th and 18th centuries.

3. The Scottish intellect is much more inclined toward abstract and systematic thinking than the English intellect.

4. Scottish law knows no separate administration of equity. As regards at least four of the above mentioned principal points of difference, Scottish law must therefore be ranked with Continental rather than English Jurisprudence.

Legal Concepts.

A comparison of legal notions and institutions seems to show that the contrasts are still strongest in the law of property. Roman and Continental laws distinguish between moveable and immoveable property according to the nature of the object; Anglo-American law distinguishes between personal and real property, according to the action by which the property could be recovered. It is a relic of feudalism that there is theoretically no full private ownership of land in Anglo-American law, although in England the distinction has lost what practical importance it still had, by the Real Property legislation of 1925.[5] Of some practical importance however is the possibility of different degrees of property in Anglo-American law. A 995 year lease is a type of property although less comprehensive than full ownership. Again, ownership is divided between the trustee and the beneficiary under a trust. This is impossible in Continental law where the *fiducia*, necessitated by modern company developments, can only be explained as a type of agency, or as a personal obligation.

The Anglo-American difference between various degrees of property (and the inclusion of a long term lease as a type of property in particular) on one hand, and the Continental differentiation between property and limited rights in a *res aliena*, on the other hand, is responsible for many substantial technical differences. Mortgages in the form of sub-leases are of course unknown to a system which does not have a long term lease as a form of ownership. But such differences have ceased to be of major importance, in the same degree as the long term lease had ceased to represent feudal tenancy in more than a purely formal sense. Moreover, the reduction of a mortgagee from a nominal owner of the mortgaged land to the

[5] *Cf.* American Law Institute's Restatement of Property: *Freehold Interests.*

owner of a right in a mortgagor's land, and the introduction of the charge as an alternative form of mortgage have substantially approximated English law to the current Continental legal forms in real property.[6]

To be sure, English and American conveyancing still differs in hundreds of great and small technicalities from conveyancing in Continental countries. Many of these differences are either derived from professional tradition or are a survival of feudal institutions. On the whole, they refer to technicalities of conveyancing and succession rather than to fundamentals. The general introduction of a land register on continental lines would substantially reduce differences and assimilate the principles of conveyancing. The great success of the limited introduction of the land register shows that the opposition against its general adoption is due not to legal reasons put to political and professional opposition. Scottish law has long known a land register. As early as the 15th and 16th centuries, the Scottish Parliament recognized the need for an authentic register of all rights in land, and notaries kept protocol books in which they entered notes of sasines and instruments. A complete system of land registration has long been in operation.[7]

As for the rules of succession, such difference as they still represent as compared with continental systems is of the same order as that created by the trust. The devolution of property to an administrator of the estate entrusted with its administration and distribution for the benefit of others is unknown to continental systems as is the whole institution of trust. Maitland relates that Gierke told him once: "I do not understand your trust." Most continental lawyers will sympathize with Gierke. The dualism of legal and equitable ownership has a certain parallel in Roman law, but not in modern continental systems. The use made of the institution not only in the law of property but as substitute for corporate legal personalities reveals a considerable difference in legal thinking, of which Maitland has given us a brilliant and profound account.[8]

Broadly speaking, behind this difference is the contrast between a conception of rights and duties in terms of individuals against a conception of abstract entities. The Anglo-American lawyer does not conceive of an endowment fund or a charity

[6] In American law the position is not uniform. In the majority of states the property owner retains the legal title, in a minority the mortgagee acquires it: (lien theories and title theories).

[7] See The Land Registry Act, 1808.

[8] SELECTED ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY: *Trust and Corporation.*

or an institution devoted to certain purposes as of something with an existence and personality of its own. He thinks of the property behind it and allocates rights and duties to certain persons according to their share in the administration and enjoyment of such property. The continental lawyer on the other hand has no difficulty in elevating such institutions to independent existence, and here for once we may truly discern a difference of temperament and approach to legal problems, of more than superficial importance. If recent developments, particularly the increasing importance of holding companies, have produced a considerable discussion of the Treuhand concept, it could not assume the same function as in English and American law, it could only be conceived as a type of agency. This difference of approach, which reveals itself in many other aspects of the law, is responsible for the difference in the conception of corporate personality in Continental and Anglo-American systems. In accordance with the greater scope given to corporate personality (but also with the greater inclination to philosophical speculation) the Continent, and Germany in particular, has produced a great variety of theories of juristic personality, while English and American law, without giving much attention to theory, has been content with the fiction theory as a working proposition. Maitland disturbed this state of affairs when he made known and advocated Gierke's organic theory. The other German theories were so much linked up with the existence of impersonal juristic personalities, like charities, that they were without interest to Anglo-American lawyers.

More deeply, however, than by those theoretical discussons, English and American law have been affected by modern economic developments common to all industrialized countries. Gierke's theory was based upon Germanic village communities, medieval guilds and similar truly corporate entities. But such a theory hardly fits the modern holding company, the one-man company and the thousand of juristic persons which have no corporate life whatsoever. Again, the fiction theory cannot answer the need, felt in all modern societies alike, of "piercing the veil" of juristic personality and looking at the purposes which it pursues. The result is that those who administer the law, whether as judges, as revenue authorities, as administrators, on the Continent and in the United States (England slowly following suit) had to discard all known theories of corporate personality, and to relativise the conception of juristic personality, respecting it for some purposes, disregarding it for

others, in accordance with the nature of the problems before them: the frustration of tax evasion, the consideration of the real purpose of a transaction as against its legal form etc. German and American law, for example, have gone very similar ways to solve this problem, despite the difference of legal systems and conceptions of corporate personality.[9] Thus, in this matter, as in so many others, new social problems have obliterated old technical distinctions.

In criminal law the many differences of terminology and historical development have not been able to obscure the similarity of social and legal problems which face the different systems. A comparative study of the problems of *mens rea*, attempted crime, of criminal negligence, of the distinction between criminal law in the old sense and the modern administrative criminal law—the latter largely laid down in statutes concerned with social administration and based on very different principles from the other body of criminal law—reveals an astonishing similarity of legal problems, although the actual solutions by various systems may, of course, differ.

Family law is a matter intimately connected with historical traditions, with social habits and institutions of a country, and many differences still exist in that field among the various countries. But such differences do not arise essentially from a contrast between Continental and Anglo-American jurisprudence. The principal institutions of family life, like the monogamous marriage, the relations between parents and children, guardianship, adoption and the legal autonomy of married women are now essentially common to all countries within the sphere of western civilization.

Such fundamental differences as exist, are based first on religious principles, notably the attitude towards divorce adopted in Roman Catholic countries on one hand, and non-Catholic countries on the other; in the second place, conflicts in matters of family law arise from the conflict between domicile and nationality as determining principles in different countries.[10]

It is not surprising that the law of contract and commerce should exhibit the most striking similarity between the two groups of systems; for this is only a natural consequence of

[9] *Cf.* Wolff, 54 L.Q.R. 494.

[10] The countries of the British Empire and the U.S.A., where many different states and legal systems live under a common political allegiance, choose domicile as a principal point of contact by which to judge relations of family status. Continental countries, unitary in character, choose nationality. The difference is of a political rather than of a technical legal character.

the assimilating effect which conditions of trade and industry in modern life have had upon those legal institutions which are most closely concerned with them. Certain institutions of commerce have always been largely international. This is true of maritime law in particular, and this is one part of English law upon which Roman law has had a direct influence. It is from that branch of the law that Lord Mansfield took many of the principles by which he hoped to reform and modernize English law.[11] An institution like salvage has been universally known for many centuries, and in that matter English and American law adopt, like Continental law, the principles of *negotiorum gestio* which they otherwise reject. Negotiable instruments are essentially international institutions, and if both Britain and the United States have refused to participate in the international codification of the law for bills of exchange, the reason is not a fundamentally different conception of the function of the bill of exchange but a difference in a number of points of positive law, over which no compromise could be obtained.[12] Similar considerations apply to the international codification of sale of goods. The laws of England and the United States on one hand and of Continental countries on the other certainly differ in important points of positive law,[13] but this does not affect the growing similarity of the principles by which the sale of goods is dominated in all these countries. Much as the terminology may differ, such fundamental problems as mutuality of obligations, the passing of risk from vendor to purchaser, breach of contract, impossibility of performance etc., arise in a substantially similar way in all countries.

Much has been made of the alleged difference between the Continental cause and the Anglo-American consideration. No doubt at one time—when consideration was taken seriously as an element of contract, and not subject to the innumerable exceptions and qualifications which today make it mainly a matter of concern for the student of law—the difference was

[11] The Maritime Law (Convention) Act of 1932 and the Carriage by Air Act of 1932 are examples of International Conventions in matters of international commerce which have bridged a difference between the systems; in the case of these Conventions, by an adaptation of English law to the Continental law of apportionment in cases of contributory negligence.

[12] The main differences relate to acquisition of title through forgery, the position of holders in due course and bearer bills, apart from many questions of formalities. See Gutteridge, British Year Book of International Law, 1931, p. 13.

[13] In particular on the question when the contract is completed, i.e., on the theory of offer and acceptance complicated by the doctrine of consideration, and the question of remedies for breach of contract, interpellation, specific performance. See Gutteridge, British Year Book of International Law, 1933, p. 86.

considerable. Anglo-American law, for the valid making of a contract, requires something additional to the consent of the parties, but today the difference is certainly one of rather small proportions. Stripped of all details it amounts to no more than this:

In contracts not made under seal, English and American law require consideration, whereas Continental systems do not require evidence of a valid cause. They presume a contract to be complete, when there is consensus between the parties. If there is absence or failure of *causa*, and one party has performed, this party may recover on the ground of unjust enrichment. The same however is true in English and American law in all those cases—summed up in Continental systems as lack or failure of *causa*—which support an action for recovery on the ground of mistake, failure of consideration etc. The notion of *causa* is more comprehensive, but that is a difference of degree rather than of kind. The only further difference is that a good *causa* is a little wider than a good consideration, since it includes a moral cause (such as gratitude) whereas consideration does not.[14] Even these remaining points of difference would be eliminated by an adoption of the Report of the English Law Revision Committee which suggests that consideration should be reduced to a matter of evidence in oral contracts (writing replacing consideration), and that moral consideration should be recognized as valid in law. This, it may be noted, brings English law back to the ideas of Lord Mansfield, who, in the second half of the eighteenth century, strove, in this and in many other matters, to bring English law closer to those parts of other systems, which, especially in the light of international commercial experience, seemed to express generally recognized principles.[15] Had Lord Mansfield's attempt been successful, the gulf between Continental and Anglo-American systems would, probably, never have reached any considerable proportions.

Again Scottish law has always been closer to Continental than to English law. In Scottish law, an obligation may arise from mere consent, without consideration. The undertaking to keep an offer open without consideration for example is binding in Scottish, void in English law.[16] The principles of restitution are based on *causa*, not on consideration, in Scottish

[14] For details, see Friedmann, 16 Can. Bar Rev. 261 *et seq.*
[15] *Cf.* 1 Modern L. Rev. 99 *et seq.*
[16] Contrast *Littlejohn* v. *Hawden* (1882), 20 Scot. L.R. 5, with *Dickinson* v. *Dodd* (1876), 2 Ch. D. 463. *Cf.* GLOAG AND HENDERSON, INTRODUCTION TO SCOTTISH LAW, p. 36.

law.[17] Scottish law has, accordingly, recognized the principles of unjust enrichment and *negotiorum gestio*, which English law has not, or at least, only very incompletely, done.[18]

The most interesting point of comparison is perhaps the law of tort. At a primitive stage of legal development, delict and crime are closely akin and even indistinct. Intimately connected as both are with the habits of the people, they strongly express national or racial characteristics. As in criminal law, the problems of modern society have, however, brought about an amazing measure of similarity in the development of delictual liability. At the present time, between Anglo-American systems on one hand, and Continental ones on the other, there is still a substantial divergence in form, but a very much smaller one in substance.

In all modern Continental codes we find a general principle of delictual liability, usually considerably developed by creative judicial interpretation.[19] English and American law, on the other hand, have started from certain specific actions in tort, which were gradually extended, by means of the Statute of Westminster *de simili casu*, by numerous judicial fictions,—a prominent instrument of legal development in English legal history—and occasionally, as in the case of *Pasley* v *Freeman*[20] or *Rylands* v *Fletcher*[21] by the creation of a new action.

Until recently, there could, however, be no doubt that no action in English or American law could be based on a general principle of liability. But the situation is rapidly changing, owing to a number of factors, of which the most important one is probably the unprecedented development of the action of negligence—a result of modern traffic and other social conditions. Negligence is framed in general terms, and this tort has tainted an increasing number of other tort actions dealing with similar situations, in particular the torts of *Ryland* v. *Fletcher*, nuisance, those based on the keeping of animals, fire, or other dangerous things, and trespass committed on or off the highway.[22] Eminent authors, like Sir F. Pollock, Professor Winfield, Dr. Stallybrass,[23]

[17] *Cantiare San Rocco* v. *Clyde Shipbuilding Co.*, [1924] A.C. 226.

[18] BELL, PRINCIPLES, par. 535.

[19] Art. 1382 Code Civil; Art. 823 German BGB; Art. 41 Swiss Obligationenrecht; Art. 1151 Ital. Codice Civile. *Cf.* Walton, 49 L.Q.R. 70 et seq.

[20] 3 T.R. 51.

[21] (1868), L.R. 3 H.L. 330.

[22] For details compare Winfield, 4 Camb. L.J. 194; Friedmann, 1 Modern L. Rev. 39.

[23] As editor of Sir J. Salmond's Law of Torts. Salmond, himself, at an earlier period took the opposite line. *Cf.* also Goodhart, 2 Modern L. Rev. 1.

as well as distinguished judges, and in particular the House of Lords, in recent years formulate general principles of tortious liability, in the process of steady extension which this branch of the law has undergone more than any other, in adaptation to new social requirements. As for American law, it has led English law in that process, and it is sufficient to refer to the American Restatement on the law of tort, or to the American decisions which have exercised a considerable influence upon the framing of the principle of *Donoghue* v. *Stevenson*[24] and of *Haynes* v. *Harwood*.[25] English and American law are at least on the way towards the establishment of a general principle of delictual liability for unlawful interference with a protected interest, and the more modern actions in tort are being extended so as to justify such a principle, at least to a considerable extent, although at present with a great amount of overlapping. As to the type of protected interest, a comparison between the principles of Continental codifications and Anglo-American law reveals that protection centres, in all alike, around life, liberty, honour and the basic property rights. To the latter are being added, by statutory reforms or judicial interpretation, quasi-proprietary rights, like copyright, patents etc.

As for the principle underlying liability, the groups of both systems have moved along similar lines, owing to ethical and social influences common to the whole of western civilization. For the 19th century, liability in tort was essentially the penalty of fault to be found in the individual tortfeasor. Practical necessities forced all systems alike not only to seek evidence of fault in conduct rather than a state of mind, but increasingly to shift emphasis, in the law of tort, from moral blame to social responsibility. Thus, in Germany, in addition to the general principle of tortious liability for wanton or careless injury to person or property, special statutes have created strict liability for motor car drivers, keepers of animals etc., and similar statutes or judicial developments are to be found in all modern legal systems. French courts have imposed strict liability on the motor car keeper through an extensive interpretation of Arts. 1382, 1383 Code Civil. In English law there are the Workmen's Compensation Acts, the numerous statutory duties imposed upon employers, and many other strict obligations. But more significant perhaps is the gradual change in the basic meaning of tortious responsibility, and above all an extension of the conception of negligence which makes it hardly

[24] [1932] A.C. 562.
[25] [1935] 1 K.B. 146.

distinguishable from strict liability. Thus the development, in French law, of responsibility for "le risque creé," in English law, of the manufacturer's liability under *Donoghue* v. *Stevenson* (following American precedents, cf. American Restatement of the Law of Torts, Negligence, s. 395), the extension of the conception of "things dangerous in themselves" in accordance with the infinite potentialities of the use of things through modern science, of liability in nuisance, in *Rylands* v. *Fletcher*, and many other factors, the more detailed study of which pertains to the law of tort, all point to an increasing importance of social control rather than moral turpitude as the outstanding though not the exclusive principle, of tortious liability under modern conditions. Since the reasons for this are common to all countries which have factories, motor cars, aeroplanes, millions of working people without other capital than their working skill, and altogether industrial conditions which leave less and less free choice to the average individual, the law has had to be adapted to these new tasks whatever its technical structure. Consequently, in this branch of the law, the difference between Anglo-American and Continental systems is rapidly shrinking. Less affected by these developments[26] is that group of torts which deals with wrongs to possession and property, and is, in essence, a part of the law of property.[27] This part of the law of tort loses every day in quantitative importance compared with that part which reflects the changing needs of modern society.

It would, of course, require a very detailed study, beyond the scope of this article, to follow up in detail the various legal developments, statutory and judicial, within the different systems of law. But the foregoing observations may have been sufficient to vindicate the suggestion — important for the comparative study of law—that historical and technical differences in the structure of different systems of law have to be studied against their sociological background. The largest differences surviving from the very different origins of the Anglo-American and Continental systems of law appear to be in land law—because of its commercial immobility[28] and historical association with feudalism—and in family law, to the extent that religious, ethical and social principles and habits still influence it. They

[26] Except for trespass on and off the highway which is assimilated to negligence.

[27] *Cf.* POLLOCK, TORTS, p. 51.

[28] Which is rapidly disappearing as land is commercialized. This may account for the recent criticism of the rule in *Cavalier* v. *Pope*, [1906] A.C. 428.

become weaker where the influence of international commerce (mercantile law, contract) or the parallel pressure of social developments is weightier than technical legal differences.

Code Law and Case Law

At first sight, the difference between a codified and a code law system appears fundamental. A code states the law comprehensively, in general principles, and the finding of the law in an individual case is deductive, an application of general principles to particular facts. A case law system, on the other hand, develops tentatively, and truly casually; the principles crystallise slowly from decisions in particular cases, and the method of law finding proceeds inductively from the particular to the general.

These differences are, however, at the present day, far more apparent than real. From different starting points, both continental and Anglo-American administration of justice has moved towards a common goal. Again we can only summarise the principal developments :

After the distinct failure of some attempts at codification, notably the Prussian Allgemeine Landrecht, which hoped to solve all conceivable problems by thousands of minute provisions on every contingency, modern codes have preferred to state the law in general principles and to leave the solution of particular cases to the intelligence of those administering the law, and the formative influence of public opinion. In no other way could the Code Civil have survived 130 years of unparallelled social and economic revolution. The result has been, in all Continental countries, an amazing amount of judge-made law, which has supplemented and, sometimes virtually superseded the provisions of the Code. Prominent examples, which could, however, be multiplied hundredfold, are, in France, the development of a law of unfair competition from the general clause for delectual liability in arts. 1382, 1383 C.C., the imposition of strict liability upon the keeper of a motor car, through an ingenious combination of two articles of the Code Civil which was, of course, in no way premeditated by the legislator, and the creation of the principle of strict liability as a counterpart of industrial control, a principle analogous to the rule in *Rylands* v. *Fletcher*, but much more broadly conceived, so much so that French legislation on workmen's compensation and

accidents caused by civil aeroplanes only had to adopt the judicial rule.[29]

For Germany, we might quote two examples of judicial law making of outstanding social and political importance. The one is the development of the principle of revaluation after the post-war inflation by the German Supreme Court from a general clause of the Civil Code (sec. 242) which directs obligations to be fulfilled in accordance with good faith. The other, in a field only partially codified, industrial and labour law, is the doctrine of the "Betriebsrisike," according to which employers and workmen as forming a "working community" (Betriebsgemeinschaft) shared the risk of interruption of work caused by general strike and other circumstances outside the control of the employer, and the workmen therefore lost their claim to wages. This creation of the Supreme Labour Court partly anticipated the National Socialist conception of labour. Moreover, large parts of the law, notably the Droit Administratif in France, are not codified and therefore entirely of judicial creation. The Conseil d'Etat has constructed the whole imposing edifice of French administrative law. Apart from such major judicial creations, there are countless examples of judicial interpretation of statutes, in all continental countries, which gave the statutory provision a meaning either not forseen by or openly antagonistic to the opinions prevailing at the time of the Code, but in accordance with modern social developments or trends of public opinion. This attitude finds striking expression in Art. 1, Swiss Civil Code, which directs the judge to decide as if he were a legislator, when he finds himself faced with a definite gap in the statute.

If there has thus been an ever increasing scope for creative judicial activity on the Continent, despite the codification of most, if not of all Continental law, there has, of course, never been a theory of precedent analogous to the Anglo-American one. Courts may reverse their own opinions, or even dissent from a superior court in a new cause. The elasticity resulting from this method of social experimenting, of "trial and error", has been praised by Anglo-American lawyers critical of their own system.[30] But again, in practice the continuity of precedent is much more marked than in theory. First, there are provisions in some countries, as in Germany, which secure uniformity of principle in the Supreme Court, by prescribing a plenary deci-

[29] For details, see Walton, 49 L.Q.R. 70 *et seq.*
[30] *Cf.* Goodhart, 50 L.Q.R. p. 40 *et seq.*

sion in case of dissent between different sections of the Supreme Court. But above all, there is the factual authority enjoyed by decisions of the higher courts, the futility of lower courts insisting on principles certain to be rejected on appeal, even if they feel strongly on the matter, and the reluctance of junior judges,—in an elaborate hierarchy of judicial promotion—to jeopardize their chances by obstinacy. The need for a minimum degree of certainty in litigation is as urgent on the Continent as anywhere else, and consistency of judicial authority is a fact although one lacking in theoretical foundation. There is no theoretical objection in a court giving up a principle which it recognizes as untenable. But this is, for human reasons as much as for any other, a rare occurence, and in most cases, on the Continent as in England or the United States, statutory reform must remedy major legal evils.

Both the slavish obedience of Continental judges to codes, and their freedom from precedent are largely a myth. In truth, while there is greater freedom towards the provisions of codes, there is also much greater respect for judicial authority than imagined by most Anglo-American lawyers.

In Anglo-American law, the theoretical propositions are just the reverse. The judge is supposed to be essentially unfettered by statute, but hemmed by precedent. Is he a king or a slave? Strangely conflicting opinions are held on this point on the Continent. Some Continental jurists have looked with envy upon the freedom with which the Anglo-American judge, unfettered by the dead letter of the law, can mete out justice in the individual case,[31] while others deplore the dead hand of an interminable string of antiquated precedents unfit to master new problems.[32] But among Anglo-American lawyers themselves opinions are highly conflicting. If the judge applies the law, and does not make it, as current opinion has it, how can non-statutory law today be as fundamentally different even from that of a hundred years ago as it undoubtedly is? If the judge does, in fact make new law, how does he do it? Is it according to well-established legal principles, or is it, as the American realists suggest, by an extra-legal choice between conflicting precedents, based upon political social or other non-legal factors?

Again, we shall have to assess the powerful influences which have altered the position in the Anglo-American legal system in recent years, which have mitigated the rigour of precedent

[31] *Cf.* Adickes, Richterkonigtum.
[32] *Cf.* Gerland, Engl. Gerichtsverfassung.

in so far as it fetters legal development, and, on the other hand, have shifted the relative strength of statutory and case-made law.

In England and the United States, the outlook on law is very much more tainted by the autonomous training and tradition of the legal profession than on the Continent, where legal training is state controlled. It is probably this fact which explains the disproportionate preponderance that case-made law still has, in Anglo-American legal teaching, over statute law. Yet the number of decisions based on statutory interpretation, in comparison with common law decisions, increases from month to month. Revenue law, workmen's compensation, transport- and traffic regulations, Insurance Acts, housing statutes, local government legislation not to speak of war legislation, these and other statutory matters provide the majority of decisions: and in criminal law, even if we disregard the fact that all the main common law crimes are now codified, new statutory offences occupy more and more of the judicial work. On the basis of a statistical comparison, there would today be little in the alleged contrast between the Continental and the Anglo-American position. The difference, such as it is, has two reasons: First, many statutes are not codifications, nor comprehensive regulations, but merely remedy one specific defect, and leave the common law otherwise intact. Typical examples are the English statutes on gaming and the statutory reforms in the law of tort.

Second, and more important, is a widespread judicial attitude which regards statutory legislation as interference and accordingly pays comparatively small attention to the problems of statute law. This attitude has been responsible for an incongruous and unfortunate rule which has made judicial interpretation of statutes binding as precedent and thus transplanted the common law principle into an alien soil. This in itself has largely prevented English statute law from becoming a field for "trial and error". Statutes have often become petrified at an early stage of their career; thus the provisions of the English Workmen's Compensations Acts have been obscured by a thick mass of judicial precedent. Graver than this is probably a widespread manner of approach to statutory interpretation in a spirit of mistrust and often in ignorance of the social purpose. Many jurists have discerned an unfortunate tendency in judicial decisions to interpret statutes not in the light of the legislative purpose but in the light of the common law which it aimed at

reforming.[33] This danger of looking backward rather than forward has been so fully analysed elsewhere that no detailed discussion is needed here. In recent years, however, as the increasing social importance of statutory legislation becomes more obvious, and judges realise that the only alternative to a sympathetic interpretation is a further displacement of the common law courts, a change of attitude is noticeable. Observations such as those made by Lord Wright in *Rose* v. *Ford*[34] and of Scott L. J. in *The Eurymedon*[35] are characteristic of the understanding which many if not all modern English judges have — of a more progressive approach to the interpretation of statutes.[36] Were the negative attitude to prevail, the result would be a further increase in the tendency of modern statutes to substitute quasi-judicial administrative bodies for the law courts.

A second fact, which incidentally militates against generalisation about an Anglo-American as distinguished from a Continental judicial method, is the fact that the American position, because of the existence of a written constitution as a supreme law of the country, is rather different from the English one. American judges, in the Supreme Court of the United States in particular, refer all law to a supreme written law. The difference between them and their continental brethren is that their supreme statute is framed in the widest possible terms, in the terms of fundamental rights, which gives the American as distinguished from the English courts the greatest possible freedom in making a law of their own, while calling it interpretation of the constitution. Whereas continental judges apply detailed statutory provisions, and English judges since Lord Coke have not attempted to supersede statute by a higher law, the American constitution has enabled the Supreme Court to combine an almost unfettered legislative function—although one of a negative character—with the appeal to the written law, probably a dangerous combination. In no other way could a law court have so influenced the social life of a country as the Supreme Court has done.

On the other hand, this position has made American judges aware of the problems of statutory interpretation. The attitude of American judges, in theory and practice, towards precedent is, on the whole, much more elastic than that of English judges.

[33] *Cf.* Jennings, 1 Modern L. Rev. 111; Laski, Report of Committee on Ministers' Powers, 1932.

[34] [1937] A.C. 816.

[35] [1938] 1 All E.R. 122.

[36] The more positive attitude of American courts towards statutes is emphasized by Simpson, 4 Modern L. Rev. 127.

Professor Goodhart[37] has collected numerous judicial and other pronouncements, which rank from the moderate proposition of abandoning precedent when conditions have vitally changed[38] to the proposition that the whole principle of *stare decisis* should be abandoned.[39] All these propositions go further than even the boldest statements made in English law. In practice precedents are followed in the great majority of cases, but the uncontrollable flood of precedent makes the choice of the judge, in fact, very great.

As continental judges have freed themselves from a mechanical and literal interpretation of the statutes and have become aware of their share in the creation of law, so English and American judges are freeing themselves to a remarkable degree from the worst aspects of the binding force of precedent. Again the increasing pressure of new social problems have compelled judges to find ways of overcoming precedents, the application to which would be too contrary to modern conceptions of justice. Sir William Holdsworth has pointed out[40] that English judges have never followed precedents as slavishly as recent text books on jurisprudence have made it out. Current conceptions of the binding force of precedent are largely influenced by the positivism predominant in the 19th century, which produced in all countries an exaggerated theory of the judge as someone who applies the law in accordance with principles of legal logic and does nothing else.[41] That also fitted in with the strict doctrine of the separation of powers. Both in England and the United States several factors have contributed to a very substantial change in outlook and method. In the United States a social fact, namely the rapidity of industrial expansion, and a technical fact, namely the immense number of precedents, produced by the Federal as well as by 48 different state jurisdictions, made the old doctrine difficult to maintain. A product of these influences is the realist movement in jurisprudence which in its more extremist spokesmen discards the doctrine of precedent altogether and sees judicial decision as a result of a number of political, economic, psychological and other non-legal influences. In England the traditional approach is being modified more gradually, and without much theory. The doctrine of precedent still holds good for the great majority of cases. But in the

[37] ESSAYS ON JURISPRUDENCE, p. 50 *et seq.*
[38] See CARDOZO, NATURE OF THE JUDICIAL PROCESS, pp. 149 *ff.*
[39] See WIGMORE, PROBLEMS OF LAW, p. 79.
[40] 50 L.Q.R. 180.
[41] For an illustration of that method in commercial cases, see Chorley, 3 Modern L. Rev. 272 *et seq.*

higher courts at least the movement towards greater mobility is undeniable. Both sides of the question are illustrated by the recent development of the doctrine of common employment, which the House of Lords has been unable to abolish, despite its desire to do so, but contrived to limit as much as possible without openly flouting precedent.[42] Other interesting examples are the development of the manufacturer's liability in *Donoghue* v. *Stevenson* in spite of the former doctrine that a contractual liability between A and B prevented non-contractual liability between A and C, or the cautious development of a doctrine of unjust enrichment, in spite of the authority of *Sinclair* v. *Brougham*[43] and in one case at least,[44] in direct contradiction to that authority.

The means of thus developing law in spite of precedent vary. Comparatively seldom is there an open acknowledgment that law is made; the more frequent technique is that of distinguishing precedents on the facts,[45] of considering certain parts of irreconcilable judgments as mere dicta, or simply ignoring certain precedents which are not too well known and would be inconvenient.[46] Nevertheless, there are still numerous examples of precedents which only statutory reform can overrule, but the position of the English and even more of the American judge, like that of the continental judge, if it is nothing like the sovereign position of an unfettered maker of law, is nothing like as slavish as is often pretended.

During the height of the positivist and analytical approach to jurisprudence, judges in all countries, whatever their system, were inclined to minimise their creative function. Under the impact of new social problems and the number of new unsolved cases which defy exhaustive regulation by legislation, judges under both types of legal system became aware of their creative function. This new attitude finds its theoretical expression in the sociological theories of law which developed almost simultaneously on the continent and in America.[47]

[42] *Cf. Radcliffe* v. *Ribble*, 55 T.L.R. 459; *Wilson & Clyde Coal Co.* v. *English*, 53 T.L.R 544.

[43] [1914] A.C. 548.

[44] *Craven-Ellis* v. *Cannons*, [1936] 2 K.B. 403.

[45] *Cf.* Lord Atkin's judgment in *Donoghue* v. *Stevenson*, [1932] A.C. 562.

[46] See *supra*, note 44.

[47] We might here mention a further difference, which has provoked considerable discussion, in the principles of statutory interpretation. English law forbids the judicial consideration of "Travaux préparatoires", which is well recognized in continental systems. In the United States this rule has been virtually abandoned, and references to the parliamentary history not only of the Constitution but of ordinary statutes are very frequent. Cf. *Factor* v. *Laubenheimer*, American Journal of International Law, 1934

Abstract Principles and Concrete Decision

There remains, more than any actual difference in the position of judges, a certain difference in the mental background. English and American judges, even when they make law and new principles, think more from case to case, where the continental judge thinks of a general principle. There is probably a difference of political tradition behind it. English judges, and American judges in so far as they have developed English law, can look back on an uninterrupted development of many hundred years. They have been able to build the law up slowly, from case to case and until recently in terms of forms of action rather than substantive principles. The latter only began to emerge slowly, at an advanced stage of development, when the growing mass of precedent became unmanageable and modern conditions demanded clearer and more rational principles. This whole development would have been unthinkable without the continuity of political and social evolution which no continental country has enjoyed. Consequently, deliberate lawmaking, the assertion of legislative authority, especially when as a result of revolution it took the place of the former, produced different methods of legal thinking, and a much greater emphasis on principles. If there is much fancy and exaggeration in the popular contrast drawn between the abstract and theoretical approach of continental lawyers and the common sense empirical approach of Anglo-American lawyers—it would be impossible but equally one-sided to prove the opposite—there is just a certain amount of truth in it, or at least there was.

For there is no doubt that, as continental administration of justice has become more concerned with the justice of the individual case, so Anglo-American legal development has moved towards the formulation of broader principles. American law, stimulated by the increasing flood of precedents, has led English law, particularly through the highly important series of Restatements which, although no official codification, systematize the

p. 149. But the English rule too is not quite as absolute as appeared on the face of it. *Heydon's* case (1584) enumerates among the four points to be considered in the interpretation of statutes the mischief for which the common law did not provide and the true reason of the remedy that parliament has appointed. The difference between such statutory motives and purposes on one hand and parliamentary history on the other is often extremely artificial, as has been noticed for example in *Home* v. *Guy* (1877), 5 Ch. D. 905. See also Allen, Law in the Making p. 406. English lawyers do not appear to apply the theory to international treaties or indeed to any case decided by international tribunals which often take preparatory material into consideration. The English rule has been severely criticized by leading English lawyers, such as Professors Gutteridge, H. A. Smith, Lauterpacht, Sir M. Amos.

law in a manner analogous to continental codification. A number of American states have actually codified their law. The increasing influence of law teachers upon legal development in the United States has reinforced this tendency. To mention one example, the law of quasi-contract owes its scientific existence to Professor Keener's treatise published in 1893. Moreover a considerable proportion of high judges and law officials is now chosen from among academic lawyers. In England too the trend towards systematisation is unmistakable. It is evident in all branches of the law, but most noticeable perhaps in the law of tort. This is particularly interesting because that branch of the law is neither codified nor to any considerable extent regulated by statute. English law courts in recent years have been able to develop that increasingly important branch of the law largely, if not entirely, in accordance with social need, and have thereby avoided a flood of statutory interference. They have achieved this by abandoning procedural thinking and formulating broad principles of delictual liability. The work of such judges as Lord Blackburn, Lord Moulton, Lord Macnaghten, Lord Atkin and Lord Wright is well known. In accordance with this, there has been a great increase in the influence of legal text books which, like those of Salmond, Pollock and Winfield, have attempted to extract principles from the mass of forms of actions and precedents. English courts of law, and the House of Lords in particular, have been wise enough to see that any other attitude would only have increased the domination of Parliamentary legislation in a sphere always dominated by the law court. The result is that, much as concrete problems and solutions still differ, there is now much more similarity of principle and approach between the continental and Anglo-American systems than formerly.

The comparison between the respective merits of the two methods is seldom untainted by hasty generalization based on inadequate knowledge of the practical working of the one or the other system, and even more by prejudice, professional or nationalist. It will be difficult to deny that, in modern circumstances, development of law through precedent is slow, costly, cumbrous, and often reactionary. It is therefore less suitable for a time of fast changes and restlessness such as ours. It is also dependent upon a continuity and steadiness of social conditions which may not last. Perhaps no one but British judges could have worked it in such a way as to make it withstand, at least partially, the onslaught of centuries. Present day judges find that the only way of preserving a system is to take a bold

attitude towards antiquated precedents, and to form the law in terms of broad principles. Even so, it may be doubted how much longer development of law through precedent will withstand the increasing pressure of social change. From year to year the sphere left to it diminishes in proportion, even if it tries to engraft itself upon statutory interpretation.

Be that as it may, it is certain that during the all too brief period when Anglo-American and continental lawyers co-operated in the development of international law by judicial decisions the alleged contrast of their systems never proved a substantial obstacle, while the different judicial temperament and methods of approach seem to have blended happily.

The emphasis, in English and American legal training and teaching, upon case law is responsible for one difference of considerable importance. Anglo-American legal thinking centres round the decision of cases, as if the legal life of the country were entirely or predominantly reflected in litigation. The theories and definitions of law of Salmond and Gray, of Holmes and the realist movement, all think of law essentially as what is laid down by the courts. Legal education in both countries is overwhelmingly a study of cases or of statutes in the light of their judicial interpretation. This has grave consequences. For example, the law of contract as taught in England has only remote resemblance to the law of contract as it exists in the millions of transport, insurance, landlord and tenant, hire and purchase, employment and apprenticeship agreements, where terms are overwhelmingly standardized, and where the adjustment of the individual minds, which looms so large in text books, has little place. The huge majority of these contracts never come before the courts, nor do more than a very small fraction of the industrial agreements controlling production, prices, and labour. Even if it is said that all these contracts, as well as the by-laws of corporations, etc., are law only in so far as they would be sanctioned by the courts, the fact is that, since they hardly ever come before the courts, the theory of law remains untouched by them, and the time lag between social development and legal education is thus increased.

It may be attributed to the same cause that something like family law is not systematically taught in English and American law. What is known is mainly the law of divorce, that part of family life which comes before the courts, but which happily does not reflect the essential part of family life. All continental codes on the other hand contain a section on

family law which comprehensively regulates the main aspects of family life. We have here undoubtedly a difference caused by the fact that one system thinks in terms of cases, the other in terms of rules laid down in statutes. However, the realist movement and others seem to prepare the way for a different approach to law in the Anglo-American legal system. The realist movement began by analysing judicial decisions and attacking what is alleged to be the fallacy of certainty of the law. But a functional approach to law was bound to move beyond the judicial focus and investigate the law in its total reality, inside and outside the courts.[48]

Dualism of Law and Equity

The development of the law through the dualism of common law and equity is undoubtedly a characteristic feature of Anglo-American systems, but the specific aspect which it has given to Anglo-American legal development is mainly a matter of history. From the time when equity hardened into a body of fixed legal rules supplementing the common law, the difference between the two branches of the law became mainly a matter of technique and professional tradition. The distinction between the chancery Bar and the common law Bar is still jealously maintained. But no lawyer could afford to ignore either of the two branches, since such matters as the law of real property and the law of contract simply cannot be understood to-day without a knowledge of both systems. The insistence upon the continued separation of the two branches by the legal profession, even after the Judicature Acts, has, however, had a retarding effect upon the development of certain parts of the law. A prominent example is the law of quasi-contract, in which Lord Mansfield attempted to fuse legal and equitable principles. Professional conservatism killed his attempt, or at least delayed it until the present day. By overcoming this conservatism, American law was able to develop this part of the law to very much greater importance. However, the separation of law and equity is now more a matter of professional etiquette than a matter of vital importance in either English or American law, while a number of American states have actually abolished the difference altogether.

Continental systems do not know such dualism, and equity means, as it did for Aristotle, the application of equitable

[48] Cf. Llewellyn, in Essays on Research in the Social Sciences, pp. 96–7; F. Cohen, in 1 Modern L. Rev. at p. 24.

principles to correct and mitigate the harshness of legal rules. This, of course, is also known to Anglo-American law, but under a different name. What continental systems do to-day, by the insertion of certain general clauses designed to ensure a broadminded and equitable interpretation of statutory provisions against a too formalistic interpretation, was known to English law in the past as the "Equity of a Statute".[49] To-day the word equity in that sense is not used so much as such formulas as "fair and reasonable", "what reasonable men would do", or sometimes "in accordance with natural justice". At the height of positivism, Lord Sumner scornfully rejected as out of date "that vague jurisprudence sometimes attractively styled justice between man and man".[50] He used this phrase in rejecting a principle of unjust enrichment. But only a quarter of a century later, Lord Sumner's younger brethren seemed to think differently of that vague jurisprudence. The cautious recognition of such a principle is contained in such cases as *Craven Ellis* v. *Cannons*,[51] *Brooks Wharf* v. *Goodman*,[52] and others, while it is openly advocated by a number of authors, among them Lord Wright and Professor Winfield.

Equity however is applied in many other cases. A few out of hundreds of examples are the mitigation of the strict rule of *Cutter* v. *Powell* and *Forman* v. *Liddlesdale* on quantum meruit in the case of *Dakin* v. *Lee*,[53] or the mitigation of the rule that contributory negligence is a good defence to breach of a statutory duty in cases of workmen working under pressure.[54] In these decisions equity is applied in exactly the same way as by continental judges. Nor would any modern administration of justice be conceivable without the application of equity. It means nothing else but the application of considerations of fairness and justice against the letter of the law. The binding force of precedent excludes it for English and American judges to some extent, but not much more than that. Scottish law understands equity essentially in the continental sense. Stair[55] defines it as :

[49] Plowden's recommendation, that "it is a good way, when you peruse a statute to suppose that a law maker is present . . . and then you must give yourself such an answer as you imagine he would have done if he had been present . . . and if the law-maker would have followed the equity, notwithstanding the words of the law, you may safely do the like", anticipates modern continental codes although it goes further than they do. *Cf.* ALLEN, op. cit., p. 373.

[50] See *Baylis* v. *Bishop of London*, [1913] Ch. 127.

[51] [1936] 2 K.B. 403.

[52] [1937] 1 K.B. 534.

[53] [1916] 1 K.B. 566.

[54] *Caswell* v. *Powell Duffryn Assoc. Collieries*, 55 T.L.R. 1004.

[55] INSTITUTES, iv, 3.

> the moderation of the extremity of written law and the whole law of the rational nature, for otherwise it could not possibly give remedies to the rigour and extremity of positive law in all cases.

This definition comprises both the Aristotelian definition of equity and the natural law ideal, which has influenced Scottish legal thinking considerably.[56]

There is no separate court of equity in Scotland. The Court of Session exercises equitable jurisdiction as a Nobile Officium which is directly deduced from Roman Law and the office of the Praetor.[57] It enables the Court to grant remedies similar to those developed by English equity courts. By means of its Nobile Officium, the Court of Session has also developed a law of trusts. But apart from these and other specific equitable developments, the Court has the general function of administering all law in the light of equity, which is characteristic of the continental understanding of that term.[58]

Private Law and Administrative Law

Since the work of Dicey, the contrast between continental systems which distinguish between administrative law and private law and have a separate system of law courts for each, and the Anglo-American system which only knows one law and one system of law, is familiar to Anglo-American lawyers. No doubt, at one time this gave expression to a profound diversity in the attitude taken by the two groups of legal systems towards the relations between authority and individual. The English system of equality of all before the law expressed the inherent Anglo-Saxon mistrust against a special law which might give privileges to public authorities against a private citizen. But it is commonplace to-day that this difference, so eloquently stated by Dicey, is in substance essentially a matter of the past, and that even in his own time it was only partly true. Dicey's doctrine has been so often criticized by jurists and constitutional lawyers,[59] that no more than a general reference is needed. There is to-day a vast body of administrative law both in Britain and the United States, but it has not yet been given a definite place in the legal system as has been

[56] *Cf.* Lorimer's Institutes of Law. Lord Mansfield, the greatest judicial exponent of natural law, was a Scots lawyer.

[57] Stair, *op. cit.*

[58] *Cf.* Encyclopaedia of Laws of Scotland, article "Equity", pp. 274–9.

[59] Cf. Allen, Law in the Making, 440 *et seq;* Wade, in Introduction to Dicey, Law of the Constitution, 9th ed.; Jennings, Law and the Constitution.

done with administrative law in many continental countries. It consists of the increasing mass of Statutes, Orders, Regulations, which deal with local government, social insurance and other social legislation, powers delegated to Ministers, ministerial committees, Marketing Boards, special tribunals and, last but not least, the growing number of public authorities which are independent corporations in form but fulfil a public function in fact, whether under complete government control, or with a certain amount of independence. Such bodies as the British Broadcasting Corporation, the Agricultural Marketing Boards, or, in the United States, the Interstate Commerce Commission, the National Labour Relations Board, the Federal Power Commission and hundreds of others are, in fact, bodies whose status is governed by public law, and which would on the continent, come under administrative jurisdiction.

Such system of administrative jurisdiction has been developed to great magnitude, but in a haphazard manner, both in Great Britain and the United States. Numerous statutes, supplemented by Orders in Council, ministerial and other regulations, substitute, for the common law courts, different types of administrative tribunals, although in many cases the executive authorities themselves act as judges. In the United States the controlling power of the Supreme Court, as guardian of the constitution and the fundamental rights of the citizen, makes it more difficult for such developments to go to the length of a curtailment of individual liberties. In Great Britain, the power to do so is confined to the orders which the law courts may issue in case of an administrative authority or tribunal having acted *ultra vires* or against the principles of natural justice. These developments are, of course, subject to fluctuation, but the one thing that is certain is that in Anglo-American law a system of public law is in development and steadily gaining in importance at the expense of private law. In spite of the great differences in the constitutional position of Great Britain and the United States, the principal problems and conflicts arising from the growth of an administrative law appear to be largely the same.

In both countries a deeply-engrained individualism, expressed in one country in the constitution, in the other in the "rule of law", struggles against a growing mass of administrative rulings and authorities, whose activities are not subject to control by the ordinary courts. This individualism is reinforced by legal conservatism and professional legal interests. In both countries

the fundamental problem is how to balance the guarantees against official arbitrariness with the need for greater administrative activity and authority which results from the growing function of the state in the regulation of social life. The principal difficulty in subjecting administration to some legal control seems to concentrate in the problem of finding some independent organ for control of abuse, without giving it a roving commission to enter the field of administration proper.[60]

This very problem has been the principal concern of the Conseil d'Etat[61] and other continental administrative tribunals. But it is equally clear that the fundamental issue in all countries is not a technical, but a political one. No "scientific" administrative law can mitigate this fact. In the United States, for example, the fight against administrative liberty is largely the fight of Anti-New Dealers against the New Deal. And National Socialism has made the distinction of legal and administrative justice in Germany irrelevant.

The reason is again one which transcends the technical differences between legal systems. It is, above all, the increasing measure of public control over the life of the community, over more and more matters which were formerly left to private activity, which in all countries creates an ever-increasing body of public law. The climax is reached in a country like Soviet Russia, where all essential social activities are controlled by the state. Accordingly Soviet lawyers can argue that in a socialised state all law becomes administration, and law, as understood in Western countries, disappears.[62] An intermediate position exists in all other countries where the increase of state control over economic, social, cultural, and other matters creates a corresponding demand of legal relations largely different from the relations or notions of private law. Those countries which have a well-established system of public and administrative law find it easier to fit new relations of public law into the legal system. On the other hand, in a country like Nazi Germany, the difference between public and private law disappears because all law become subject to political order and any legal guarantee of individual right disappears. In the Anglo-American world a

[60] *Cf.* Report of English Committee on Ministers' Powers, 1932, and the report of the American Bar Association Special Committee on Administrative Law and of the President's Committee on Administrative Management. These were examined and compared by Jaffe, in 52 Harv. L. Rev. 1201, and see further, Landis, in 53 Harv. L. Rev. 1017; and for England, see the writers quoted in note 59, *supra*.

[61] *Cf.* Alibert, 3 Modern L. Rev. 257.

[62] PASHUKANIS, ALLGEMEINE STAATSLEHRE AND MARXISMUS, 1927.

rapidly growing body of public law waits for a proper place in the legal system. But there is certainly little if any difference of principle left as between continental countries on the one hand and Anglo-American countries on the other.

It is only a logical consequence of what has been said before that the often quoted contrast between the empiricist character of Anglo-American law and the abstract character of continental law is to-day largely a myth. When the conditions under which a society lives are in rapid transformation, lawyers like everyone else are compelled to reflect about the foundations of law. That produces legal theory. The increasing interest and participation of Anglo-American legal scientists in legal theory is therfore hardly surprising. When lawyers woke up from the complacency of positivist jurisprudence, towards the turn of the century, sociological theories and theories advocating a freer and more creative function of the judge developed almost simultaneously on the continent and in the United States. Again the teaching of jurists like Hegel, Stammler, Kelsen, Duguit and others have become widely known, and exercised considerable influence on legal thinking in countries living under the Anglo-American system.

From the discussion of every one of the principal factors which in the past have been alleged to constitute vital differences between continental and Anglo-American jurisprudence certain conclusions become obvious. Broadly speaking, the differences between the systems have either been eliminated, or have lost in significance to the same extent to which common social and political developments have affected countries living under the different systems of law, and as the need to face these problems has overshadowed the difference in legal technique. This teaches us one lesson which lawyers, in times of tranquility and stability, are only too apt to forget: that law is a servant of politics. The basis of every legal system depends upon the principles which govern the social order of the country or countries in which it operates. The fact that countries like Britain and Germany both developed into highly industrialized and densely populated countries, was bound eventually to have a bigger effect upon their law than the differences in legal tradition and technique, which undoubtedly existed. Notwithstanding differences in legal system they, like all other countries affected by the same developments, were compelled to produce an immense new body of social legislation, to increase administrative functions and authority, to make judges aware of the social and economic

significance of the issues before them; they all had to create a new body of law based on social responsibility rather than individual fault, they had to protect the workmen against the dangers of modern industrial labour, the public against the risks of modern traffic, the consumer against the dangers of modern mass products. Undoubtedly differences in legal tradition and technique have done much to make these developments occur with different speed and often in different form. For example, continental countries have less objection to full-fledged new legislation, whereas under the Anglo-American system courts and Parliament are rivals in the legislative process. But these differences are more and more becoming secondary in importance. Nor is it surprising that on the whole Anglo-American law should move more towards continental methods rather than visa versa. In meeting new social problems, continental countries were technically at an advantage because their legal systems are more the product of modern times and conditions. With the exception of the Napoleonic codes which — young in Anglo-American legal eyes — make up for their comparative age by the breadth of their principles, all continental codifications are from the latter half of the last or from the present century. They were conceived and framed in awarences of the modern need for rationalization of the law, and of the social significance of legal principles and administration of justice. Small wonder therefore, that our discussion reveals a strong movement of Anglo-American legal development towards the continental technique. It has not been our object here to go into actual legal reforms which bear out that thesis. But it is interesting to note that all the reports of the English Law Revision Committee, for example, have recommended changes in the law which would bring English law close to continental systems (*cf.* the reports on consideration, contributory negligence, joint tortfeasors). The introduction of a land register, the gradual recognition of a principle of unjust enrichment, the more friendly attitude taken by the law towards help extended to fellow citizens, all these examples point in the same direction. It is certainly true of the general tendencies in legal development: of the movement from thinking in terms of procedure to thinking in terms of legal principles, of the increasing weight of statute law in relation to non-statutory law, of the growth of administrative law, of the increasing interest in the theory of law. Anglo-American legal traditions, professional particularities and characteristics of race and temperament, have certainly given this development a form largely

different from the continental one. But the increasing pressure of social and economic conditions is bound to reduce the importance of these factors in the law, as it has done in other walks of life.

Our whole discussion so far would tend to show that the world of the western hemisphere and those countries influenced by it would become more and more ripe for an internationalization and unification of law. Yet we all know that they are further from such a state of affairs than ever. At the very same time when a community of social and economic developments was about to bridge the principal gaps between different groups of legal systems, a new cleavage, deeper than the difference of historical tradition and technique has ever been, was created through the rise of new political ideologies which upset the very basis of law. The differences between a case law and a codified system, and most of the other differences which we have traced in this chapter, however important they may seem to the lawyer, are comparatively insignificant to the public at large. These differences in the past have not prevented the development of similar principles of social justice. Such principles as the fundamental rights of the individual to life, liberty and property, of the separation of powers as a constitutional principle, of the independence of judges, were established in the nineteenth century in all principal countries of the western world whatever their system. But the troubles of the world which emerged from the war of 1914, and the rise of modern totalitarian dictatorship in particular, have reopened the vital struggle between basic political and social values, which as has been shown elsewhere, underlies the whole history of legal thought, especially the struggle between authority and liberty. Until recently, Britain and the U.S.A. shared with France, Germany, Italy and many smaller countries, provisions for the protection of the individual against arbitrary imprisonment, for the trial of everyone before an impartial law court, for the separation of administrative and judicial authority, for the protection of property against unlawful seizure, for the freedom of association and organization, for certain rights of family life, for equality before the law notwithstanding differences of race and religion, and numerous other provisions which would secure the basic relations between the state and the citizen. It was on the basis of such community of values than an international law, however imperfect, could develop. For example, it is a recognized principle of international law that a state can claim redress on

behalf of the citizen who has suffered from a "denial of justice". This was possible only because certain principles of administration of justice were tacitly recognized by all nations.[53]

But this community of values has disappeared, and the new gulf thus created cannot be bridged as could the differences of legal technique. The example of modern Fascist countries shows that, compared with principles of politics and corresponding conceptions of justice, legal technique becomes rather irrelevant. In Nationalist Socialist Germany, for example, it matters little whether law is made by cases or by statute; for both statutory provisions and precedents can at any time be overruled by political expediency. Thus German courts have dissolved marriages between Jews and Aryans, although the Civil Code contains no provision therefor. The difference between administrative law and private law becomes irrelevant when the Gestapo has unlimited power to interfere in any sphere of public or private life, to arrest and kill people without any trial; and the law courts have declared themselves incompetent to question any such acts of the Gestapo. The political and social struggle which at present rages in the world is naturally reflected in the law. For every system of law is based on principles of justice, and these depend on ethical, political and social values. Differences of technique, temperament and race would always find expression in the administration of law, however far the process of internationalization might have gone, as long as there remained differences between British and French, between Germans and Spaniards, etc. But while such differences enrich co-operation where fundamental principles and values are shared, no similarity of race, temperament, tradition, legal history, etc., could ever bridge the gulf which fundamental antagonism in the aims and ends of life creates.

Divergence of Systems and International Law

Both the cardinal factors which our enquiry has attempted to bring out—the dwindling of technical divergences between Anglo-American and Continental jurisprudence and the opening up of the new and deeper gulf between different legal systems according to the political principles underlying them — are strikingly illustrated by the development of international law since 1914. When the post-war wave of increased international collaboration, centering around the work of the League of

[53] For details, *cf.* Friedmann, in 2 Modern L. Rev. 194.

Nations, the International Labour Office, the Permanent Court of International Justice, and laid down in numerous bilateral and multilateral treaties, brought about vastly increased legal contacts between different groups of legal systems, it was found that the differences between the Anglo-American and the Continental systems of jurisprudence hardly if ever impeded legal collaboration. But when the political and social revolutions of Russia, Italy, Germany and Japan produced a radical change in the principles of justice underlying the administration of justice in these countries, the resulting split destroyed the basis of international collaboration and law between the countries differing on those principles.

On the whole, international law, as it stood when the war of 1914 broke out, was not too much concerned with questions of municipal law. It was essentially a system of inter-state relations, and its rules confined to legal forms of a kind which are possible between states regardless of their internal social and legal structure. Recent developments have, however, revealed a much greater connection between internal and international law, for a twofold reason: In the first place, international law was based, partly expressly, partly tacitly, upon a community of fundamental legal values, the disappearance of which made the continuing functioning of international law largely impossible. In the second place, the steady increase of state control over formerly private matters produced a corresponding growth of public at the expense of private law, and thus a parallel problem in the international sphere.[64] The modern world has found substantial unity in the technique of social life. Legal figures, formulas and constructions are essentially a matter of social technique, and the post-war extension of international law shows that this fact prevailed over the traditional differences between Anglo-American and Continental jurisprudence. But the struggle between rival conceptions and aims of life is as vital as ever, and legal technique, as industrial technique, is but the servant of the will which directs it.

The first proposition, that certain legal principles and formulas can be applied in international law as common to all countries, both under the Anglo-American and the Continental systems of law, may be illustrated by the use made of four legal formulas of great importance in modern law: international law, despite its aloofness in principle from internal law, must

[64] *Cf.* Friedmann, in 2 Modern L. Rev. 194; British Year Book of Int. Law, 1938, 118 *et seq.*

resort to principles which it finds to be of general application, whenever an international issue cannot be clearly solved by resort to custom or treaty, or the latter themselves refer to such general principles.

1. *Clausula rebus sic stantibus.*[65]—We are not concerned here with the notorious and mischievous use made of this formula as a pretext for the breaking of contractual obligations and full freedom of action. Although discredited in this way, the principle has a place in every important system of law, and in an international society which recognizes the rule of law in principle, and seeks for a legal formula to direct the permanent change of conditions of society into lawful channels, it has certainly an important function to fulfil. It is interesting to note how the various great legal systems, Continental and Anglo-American, have developed the principle, under different names, and under partly different incentives. English and American law have developed the doctrine of frustration of contract in cases of supervening impossibility of performance, from the foundations laid in *Taylor* v. *Caldwell,*[66] and finding the explanation either in a fictitious implied will of the parties, or in the objective fact of a vital change in circumstances. German law courts have built up a similar doctrine from certain provisions of the Civil Code as to impossibility of performance, and the general clause directing judges to interpret contracts in accordance with *bona fides.* From this the German Supreme Court developed the whole doctrine of revaluation of obligations discharged during the German inflation. In France, it fell to the Conseil d'Etat, in its development of administrative law, to create the doctrine of improvision, subsequently embodied in several statutes, which expresses the same principle (while certain general clauses in the Code Civil lead to similar results). The doctrine of revision of contracts in accordance with this principle is also well known to Italian law. The Permanent Court of International Justice therefore had little difficulty in applying the principle as one of general law in the *French-Swiss Zones* case.[67]

2. The Anglo-American principle of estoppel expresses the idea that in law a person cannot deny the effect created by his own conduct upon other parties. The principle is often

[65] See article 36 of the Statute of the Permanent Court of International Justice. On the following matters, see in particular, LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW; THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY.

[66] (1863), 3 B. & S. 826.

[67] Series A/B, No. 46.

supposed to be a characteristic feature of Anglo-American law, but, in fact, the same principle is well known to Continental systems as a type of *exceptio doli* (*venire contractum proprium*).[68]

3. One of the concrete manifestations of natural law, to Roman lawyers, was the principle of unjust enrichment. It found expression in the various contradictions, certain rules as to the peculium, and in the maxim: *Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem* (D. 50, 17, 206). All continental systems have embodied the principle in some form (*e.g.*, specific provisions in the German, Swiss, Italian, Spanish, Russian Codes, and an almost identical development by French courts).[69] It is a principle particularly suitable for the solution of many problems where specific provisions fail, embodying as it does the rather elementary principle that none should enrich himself at another person's expense without lawful cause.

Positivist lawyers in England and the United States have, in the past, prided themselves on the fact that such a principle was unknown to English and American law. It can, however, be strongly argued that this is, in fact, not the case.[70] The various actions for money had and received, for *quantum meruit*, and, in equity, certain principles of constructive trusts and of restitution of property have always been based on the idea of unjust benefit, although, until recently, without any systematic cohesion. American law, however, following the investigations of Keener, Ames and others, has more boldly developed from the same beginnings a general rule very similar to the Continental one. English law has gone a considerable way towards the same goal, by a number of judicial decisions and authoritative advocacy of such a principle by Lord Wright, Professor Winfield and others. The Anglo-German Mixed Arbitral Tribunal has repeatedly applied the principle as one of international law, and so did the award in the Lena Goldfield case of 1930. In all these cases, distinguished English lawyers were parties to the judgments.

4. The principle of "abuse of rights" has recently attracted much attention, in legislation as well as in legal practice and theory, as one particularly suited to give expression to social duty in the exercise of private right. It is a very elastic principle and can, according to the political background, be stretched

[68] *Cf.* RESTATEMENT ON RESTITUTION, sec. 1.
[69] *Cf.* David and Gutteridge, in 5 Camb. L.J. 223 *ff.*
[70] For detailed investigation, see Friedmann, in 16 Can. Bar Rev. 243, 365.

so as to nullify private right. It is contained in the law of countries with so widely different a social background as Pre-Nazi Germany, Soviet Russia, democratic France and others. The absence of such a principle in English law has been based, above all, on the decision in *Bradford* v. *Pickles*.[71] That decision, like others of the same period, no doubt gave strong expression to the then prevailing individualism of the common law. The decision is certainly still good law, and it stands in sharp contrast to leading French decisions in similar cases; but the tendency expressed in *Bradford* v. *Pickles*, in the *Mogul* case,[72] decided about the same time, and others, to give the widest possible freedom to the *homo economicus*, as long as he does not use means specifically condemned by the law, is certainly weakening. Recent decisions on nuisance[73] have made the malicious use of the right of property the test of nuisance, and the whole development in the law of tort points to the strengthening of social responsibility as a concomitant to the use of property. The question at which point the use of property ceases to be lawful, is essentially a matter of current social morality and public policy, much more than one of technical legal structure. In so far as Anglo-American law differs from Continental systems, it is because of a difference in social policy. In many parts of the law, the individualistic attitude of the older common law is rapidly vanishing (nuisance, rescue cases, responsibility of employers and manufacturers).

The Permanent Court of International Justice (*e.g.* Judgment No. 7) and other international tribunals have repeatedly applied the doctrine of abuse of rights.[74] In international law the principle would have a specially wide scope of application, as long as states are left free to act as they like, unless specifically restricted. The more fully the extent of the use of individual rights is regulated, the less need there will be for the application of the general principle of abuse of right. Be that as it may, the principle is bound to be applied by any system which wishes to restrict individualism. And the weight of academic legal opinion in England seems to agree on the inclusion of the principle as part of a modern administration of justice.

But while the steady assimilation of general legal principles paved the way for a broader basis of international law, on the underlying principles of justice the cleavage has, for the time

[71] [1895] A.C. 589.
[72] [1892] A.C. 25.
[73] *E.g. Christie* v. *Davey*, [1893] 1 Ch. 316; *Emmett* v. *Hollywood Silver Fox Farm*, [1936] 2 K.B. 468.
[74] *Cf.* LAUTERPACHT, *op. cit., supra*, note 65.

being, become unbridgeable. In innumerable ways, the working of international law presupposes agreement on these principles. If states are to submit to a judgment on "denial of justice" to a foreigner, they must be able to agree as to the fundamental principles of justice, of fair trial, lack of arbitrariness, etc. If they are to conclude an extradition treaty, they must agree on the definition of a political crime. If they are to be bound by common rules of neutrality, they must have commensurable systems of state control over private trade, lest there be complete absence of equality of treatment. If they are to be parties to an international Labour Convention, they must agree on labour standards, and so forth.[75] Underlying it is the broad principle that, apart from purely technical matters such as postal conventions, international law—the more so, as more and more matters come under public control—demands broad similarity of social values. The existence of such similarity has made intense international collaboration in all fields possible for countries like Great Britain and France, despite the different structure of their legal systems. The absence of such a community made, in the past, any legal collaboration other than on technical matters impossible between countries like Nazi Germany and democratic France, despite the similarity of their legal systems.

Conclusions

The specialization of social functions, the growth of nationalism and the comparative stability of social conditions in the 19th century, encouraged the development of a legal professionalism, positivist in outlook and inclined to overestimate legal technique as compared with social ideals which positivist and analytical training neglected.

The world crisis of political and social ideals compels the lawyer to shake off his exaggerated preoccupation with legal technique.

Legal technique is the servant, not the master, nor is it self-contained.

The present study has, it is hoped, shown that there are no vital technical obstacles in the way of an understanding between English, American and Continental jurisprudence.

The reconstruction of international society will necessitate a far-reaching readjustment of international legal relations. It is vital to realize the supremacy of legal ideals over legal technique.

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[75] *Cf.* the classification in 2 Modern L. Rev. 208.