

MACCABAEAN LECTURE IN JURISPRUDENCE

The Quest for a Systematic Civil Law

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WE TAKE IT FOR GRANTED that law, whatever its tradition, forms some kind of system. When the research funding mechanisms of this Academy were reorganised recently, law was located by the Humanities Research Board, without any apparent dissent, in a category labelled ‘systems of thought and belief’. All modern laws are systems in the sense that they form bodies of norms, with certain features and with recognised ways of making them and changing them.¹

My concern today is not with whether law is a system but with how far it has been expected also to be systematic. Whether or not we think that our law should be both a system and also systematic depends to some extent on how we conceive of law in general. If law is seen as essentially the product of legislation, express statutory provisions, they will have to be placed in some kind of order. Putting statutory provisions in order does not necessarily lead to a systematic structure but, if there is an order, it will be subjected to criticism and reform and improvement, and sooner or later it is likely to move towards systematisation. If, on the other hand, law is not put into authoritative texts, it is much more difficult to systematise it, if only because it is less clear what has to be the subject of the systematisation.

One of the obvious characteristics which distinguish the English

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¹ H. L. A. Hart, *The Concept of Law* (Oxford, 1961), pp. 90 ff., holds that the unofficial rules of a small community ‘will not form a system’, until they are supplemented by other rules of recognition, change and adjudication; it is the combination of the primary rules of obligation with these secondary rules which creates a system.

common law, on the one hand, from the continental civil law, on the other, is that the civil law is systematic and codified, whereas the common law is not. I propose to consider how the modern civil law acquired this feature. It is sometimes suggested that it derived its highly systematic form from the Roman law, which was the source of much of its substance. We tend to associate systematic order with codes and modern codes are associated with systematic order. In one of his famous, slightly inaccurate, aphorisms, Sir Henry Maine said that Roman law in antiquity ‘begins, as it ends, with a Code’.² Maine was referring to the Twelve Tables in the fifth century BC and the compilation of Emperor Justinian in the sixth century AD. So my first question is, Did the Roman law of antiquity have some inbuilt tendency to be systematic?

I

The unwritten customary law existing at the time of the foundation of the Roman Republic was subjected to an authoritative written statement in the Twelve Tables. We know a great deal about the contents of the Twelve Tables from later quotations, but we do not know the precise order in which they were arranged.³ The order in which the surviving fragments are printed in modern collections is a nineteenth-century creation, mainly of German scholars. They could not believe that topics which, from their perspective, were clearly related to each other, were not treated together by the compilers of the Twelve Tables. Their order is certainly far from the original order. We do know that the collection began with the procedural rules for beginning a legal action by summoning one’s opponent before the magistrate and ended with personal execution of the judgment at the end of a trial. In between these procedural poles there seems to have been a jumble of rules relating to private law, public law and sacral law. As Maine correctly observed, the importance of the Twelve Tables was that they gave publicity to the law. ‘Their value did not consist in any approach to symmetrical classifications, or to terseness and clearness of expression, but in their

² *Ancient Law*, ch. 1 (Everyman’s Library, London, 1972), p. 1.

³ A. A. Schiller, *Roman Law: Mechanisms of Development* (1978), p. 148, following M. Lauria, *Ius romanum*, I.1 (Naples, 1963), pp. 21 ff. See now M. H. Crawford, *Roman Statutes* (London, 1996), II. pp. 564 ff.

publicity, and in the knowledge which they furnished to everybody, as to what he was to do and what not to do'.⁴

It is likely that the order laid down in the Twelve Tables was that used later in the praetor's edict, the statement of the various remedies available to Roman litigants, and it is still discernible in Justinian's Digest, nearly a millenium after it appeared. It was essentially problematic in the sense that it brought together a series of problems of recurring practical importance and new solutions were just inserted where they were most convenient and accessible. Thus a traditional order, in which substantive rules of conduct were sandwiched between procedural rules, persisted throughout Roman law in antiquity.

In the period at the end of the Republic and the early empire, however, steps were taken to prepare the categories of legal phenomena, without which no move towards possible systematisation was possible. By this time professional jurists had appeared, who specialised in the technicalities of the law. Under the influence of Greek thought, these jurists began cautiously to organise their material into categories. The ambit of law, which constituted the area of concern for these jurists, was greatly reduced from the wide range of matters covered by the Twelve Tables. Now it was confined to the civil law, and the civil law, law for citizens, was essentially private law, the law governing the relations between one citizen and another. Sacral law, constitutional law and to a large extent criminal law had been 'factored out' of the jurists' concern. These latter topics were inevitably affected by political considerations but the jurists were able to establish the convention that the civil law that concerned private citizens was exclusively their concern and that politicians, including the emperors, had nothing to gain by interfering with it.

So the jurists began cautiously to classify the private law material into categories. At the beginning of the first century BC, Quintus Mucius Scaevola wrote a treatise on the civil law, which did not seek to impose an external logical order on the material but rather to bring out the categories which were immanent in the law.⁵ He began with wills, legacies and intestate succession, which formed about one quarter of the whole work. Succession on death was the area of private law in which most disputes arose. It was central to the traditional social order,

⁴ *Ancient Law*, p. 9.

⁵ P. Stein, 'The Development of the Institutional System', in *Studies in Justinian's Institutes in memory of J. A. C. Thomas*, ed. P. G. Stein and A. D. E. Lewis (London, 1983), p. 152.

based on the family, and, through the institution of heirs, ensured the survival of the family from one generation to another. So inheritance was given pride of place. Various aspects of property, ownership, possession and acquiring ownership through long possession, were also treated together. But, apart from inheritance and property, Mucius seems to have arranged other topics loosely in the order of the Twelve Tables.

Mucius's arrangement was criticised by Cicero who considered it half-baked and insufficiently scientific.⁶ Cicero pointed out that music, geometry, astronomy and grammar had also once consisted of disparate elements; but they had been classified systematically and consequently had attained the status of a science. Cicero took it for granted that civil law too was a complete and coherent body of principles and rules, which were waiting to be identified, if only a jurist with the requisite training in dialectic would tackle the task. Such a jurist should divide the whole civil law into a few general classes and clarify the particular scope of each category. According to Aulus Gellius,⁷ Cicero wrote a treatise on how to turn the civil law into a science but it could hardly have been regarded by the jurists as valuable, since no trace of it has survived. Cicero had only a superficial knowledge of the law and he did not grasp that the civil law was not a finite set of data awaiting systematic treatment but an ever-expanding network of solutions to actual problems, and that as long as it was still developing, there was merit in leaving it open-ended.

By the mid first century AD, there are clear signs that the basic categories of the civil law were becoming recognised. For example, in Mucius's scheme, the various civil wrongs, such as theft of property and damage to property, were treated separately but now they are brought together.⁸ This indicated the recognition of a category of delict, or tort. About the same time, also, it was noticed that various forms of personal obligation, by which a debtor voluntarily bound himself to a creditor, all had a similar source. The obligatory bond between debtor and creditor was created in different ways, according to the type of transaction, but they were all voluntary and all derived ultimately from an agreement between the parties.⁹ So the category of contract emerged.

⁶ *De Oratore*, I.42.190.

⁷ *Noctes Atticae*, I.22.7.

⁸ In the scheme of Masurius Sabinus, Stein, *op. cit.*, above, n.5, p. 153.

⁹ Sextus Pedius, cited by Ulpian, D.2.14.1.3.

By the beginning of the second century AD, most of the standard categories of the civil law, property, inheritance, contract and delict had come into being.

The stage was now set for a systematic arrangement of these categories. Legal practitioners, however, felt no need for such an arrangement. In the second century AD, the heyday of the classical period of Roman law, the professional literature of the civil law consisted mainly of commentaries on the praetor's edict or commentaries on the familiar treatises, such as that of Mucius. They were works whose order was familiar to all practitioners and enabled them to find what they were looking for with ease. Why alter it? It was left to an obscure academic lawyer of the late second century AD, called Gaius, to introduce a systematic order in his *Institutes*.¹⁰ His aim was not to help practitioners but to make the subject more intelligible to his students.

Being a good teacher, Gaius followed the best educational precepts, which held that, in view of the difficulty of maintaining the attention of students, every subject should be divided into not more than three parts. So Gaius announced that all law was divided into three categories, persons, things and actions. These categories were for the most part descriptive. The first, that of persons, covered the different types of person of whom the law takes account and their various capacities, such as slaves and freemen, citizen and non-citizen. The third category, that of actions, was an innovation; it did not deal with the procedure but with different types of legal action and their respective characteristics. Previously actions had been discussed in relation to their subject matter, property actions with physical things, contractual actions with the various contracts. Now actions as a whole were seen to have certain defining features.

It was the second category, things, which had to bear the weight of Gaius's system. At this point Gaius was at his most original. Hitherto a thing was considered to be something physical, but Gaius extended the category by recognising incorporeal things, as well as physical things. This allowed him to classify inheritances, which were collectivities of things, and obligations as incorporeal things. They were things because they had a quantifiable money value. An obligation was an asset in the hands of a creditor, who could sue the debtor and force him to pay him money. So it was a thing, like a horse or land.

¹⁰ Stein, *op. cit.*, above, n.5, pp. 154 ff.

Finally Gaius held that there were two sources of obligations — not only the traditional contractual obligations but also those based on wrongdoing, delictual obligations. He saw that a theft of your property or damage to your property put you in a position *vis-à-vis* the delinquent that was essentially similar to that of a creditor against his debtor in contract.

Gaius's institutional system was destined in the distant future to have enormous influence, but for well over a millenium it was relatively ignored. It was followed in Roman academic circles but not by the legal profession. In Rome, as later in England, academic lawyers did not enjoy the prestige accorded to their practising colleagues. The professional jurists would have agreed with George Bernard Shaw's dictum: 'he who can, does; he who cannot, teaches'.¹¹

In the sixth century, the Emperor Justinian ordered the compilation of his *Corpus iuris civilis*. He gave detailed instructions to the compilers about what they should include but he failed to prescribe the order in which they were to present it. The largest part is the Digest, an anthology of fragments from the works of the classical jurists and consisting mainly of discussions of cases. Essentially the order of the Digest is the traditional order of the Twelve Tables and the praetorian edict, beginning with legal actions. The second part of the compilation, the Code, consists of extracts from imperial legislation. The topics are arranged in the order of earlier collections of such material, which is itself a variant of the order of the praetor's edict. The Digest and Code were very bulky; sixty-two books in all. It was only because he had pity on students, who could hardly be offered all this material without help, that Justinian also included in his compilation an edited version of Gaius's Institutes, in four books, alongside the Digest and Code.

In Justinian's Institutes the treatment of obligations is different from that in Gaius's Institutes.¹² He widened the scope of the category by including various personal duties, which derived neither from voluntary agreement (contracts) nor from wrongdoing (delicts). Thus the mutual duties of co-owners of property, which had previously been part of the law of physical things, were now held to be obligations. So was the duty

¹¹ *Sub nom.* John Tanner, *Maxims for Revolutionists*, in the 'Revolutionist's Handbook and Pocket Companion', appended to *Man and Superman* (1903), cited from Limited Editions, New York, 1962, where it is a separate pamphlet, p. 50.

¹² Stein, *op. cit.*, above, n.5, pp. 159 ff.

of the heir of a testator to pay legacies, which had been part of the law of inheritance. They were personal duties, owed by one person to another, and whatever their source, they were now transferred to obligations. They loosely resembled contracts but were not based on an agreement between the parties, so they were put in a new sub-category, called quasi-contracts. In order to maintain symmetry, a fourth sub-category of obligations, namely quasi-delicts, was then added, to balance quasi-contracts.

Obligations in this enlarged category could no longer be viewed primarily as the creditor's assets, items of property, as Gaius had seen them. An obligation now seemed to be more the cause of a personal action by one person against another. So Justinian effectively transferred obligations from the law of things to the law of actions. Both the Digest and the Code contained titles treating obligations and actions together.

When he presented his compilation to his subjects, Justinian assured them that it contained all that was necessary for solving any legal problem. The bulk of the material was contained in the Digest and Code and neither was marked by any attempt at a systematic presentation in Cicero's sense. Students might need to use the brief systematic version of the Institutes. Once they had grown up as lawyers, however, Justinian clearly expected them to discard it and see the law in all its magnificent complexity. The conclusion must therefore be that, although the Roman academic jurists worked out the categories which were necessary for a systematic presentation of the civil law, at no period did its principal exponents consider such a presentation to be important.

II

When the study of the Roman civil law was revived in the twelfth century, the medieval civil lawyers had such a reverence for the word of Justinian that they never ventured to criticise the lack of order in the various parts of the *Corpus iuris*. They made heroic efforts to show rational connections between one text and another and to identify principles and concepts which could be regarded as latent in the texts, but Justinian's order remained sacred. It was not until the humanist movement in sixteenth-century France that serious efforts were made to

find a rational order for the civil law.¹³ For the first time the content of Justinian's law was separated from its form, for the humanist systematisers combined enormous respect for the substance of Roman law, with complete disregard for the way it was presented. There were some who used Justinian's texts to show that law was incapable of being presented as a science but most legal humanists were confident that they could at last implement Cicero's ideal of a 'civil law reduced to a science.'

These humanists were almost all Huguenots and there is a parallel between their attempt to strip Christian doctrine of its accretion of commentary and return to the basics of holy scripture and their efforts to recover the fundamental elements of Roman law, which had been submerged by the commentaries of the medieval glossators and commentators. They were seen as trampling on the works of the medieval commentators, who obscured those elements. Once the fundamentals had been identified, one should be able to use logic to deduce particular conclusions from them.

The manifesto of the humanist legal systematisers was Duarenus's *Epistula de ratione docendi discendi iuris*, published in 1544. Duarenus castigated the tedious methods of instruction that were traditional in faculties of law and argued that one should begin with what is universal and more familiar to us and proceed down to what is particular. What then is the basic purpose of all law? A Digest text (D.1.1.10) states that the end of law is 'to live honestly, avoid harm to others' and '*ius suum cuique tribuere*,' to render to each person his own *ius*. In Latin and all major European languages, except English, the same word *ius*, *droit*, *diritto*, *Recht*, is used to describe both the objective law, for example the law of obligations, and also a right appertaining to an individual, for example a creditor's right against his debtor. It is only in English that one has to choose which word, law or right, is more appropriate in a particular context. The humanists fulfilled a tendency, which can be observed already in medieval law, to understand the word *ius* as

¹³ P. Stein, 'Legal Humanism and Legal Science', *Tijdschrift v. Rechtsgeschiedenis* 54 (1986), 297 ff. (= Stein, *The Character and Influence of the Roman Civil Law: Historical Essays* (London, 1988), pp. 91 ff.); A. London Fell, *Origins of Legislative Sovereignty and the Legislative State*, I and II (Königstein, 1983), on J. Corasius, *De iure civili in artem redigendo*, and his use of the Aristotelian four causes; V. Piano Mortari, 'Dialettica e Giurisprudenza: studio sui trattati di dialettica legale del sec. XVI', *Annali di Storia del diritto*, I (1957), 293 ff and 'Considerazioni sugli scritti programmatici dei giuristi del secolo XVI', *Studia et Documenta Historiae et Iuris*, 21 (1955), 276 ff. (= Piano Mortari, *Diritto Logica Metodo nel secolo XVI* (Naples, 1978), pp. 115 ff. and 267 ff).

subjective right rather than objective law.¹⁴ So they understood Justinian's text to say that the end of all law was to render to each his rights. So if civil law was a science, it should take the form of a systematic presentation of the private rights of citizens.

Among the jurists who actually sought to arrange the whole contents of Justinian's law in a rational order, the most influential were Franciscus Connanus and Hugo Donellus. Both started from the Institutional system, which, 1300 years after Gaius devised it, at last came into its own. Their model was not, however, Gaius's original Institutes, the text of which was discovered only in 1816, but Justinian's Institutes. After all Justinian himself had described his Institutes as containing the first elements of the whole science of law (*totius legitimae scientiae prima elementa*, Inst. pref.).

Connanus began with the institutional division of persons, things and actions.¹⁵ This arrangement is rational, he thought, insofar as it deals with the different capacities of persons and different types of things, for example movable and immovable, but it ceases to be rational when it deals with actions. He noted that, under the head of actions, Justinian did not treat of legal procedure but did include his broadened category of obligations. He inferred that the category of actions should not be confined to legal proceedings but should include all human actions that might have legal consequences. So actions should logically include marriages, which had traditionally been dealt with under persons, and also inheritances, which had previously been categorised under things. This accords with what Connanus insisted was a legal logic based on the natural order of things. Actions are what people do.

Connanus's ideas were developed by the seventeenth century German scholar Johannes Althusius.¹⁶ Law is concerned with all kinds of dealing between parties, which he called *negotia*, transactions. One must distinguish the persons involved in such dealings and their subject matter (things) and then the main types of transaction, such as voluntary and involuntary transactions. Then one descends to a lower level of

¹⁴ H. Coing, *Zur Geschichte des Privatrechtssystems* (Frankfurt, 1962), pp. 42 ff.

¹⁵ V. Piano Mortari, 'La sistematica come ideale umanistico nell'opera di Francesco Connanus', *La Storia del diritto nel quadro delle discipline storiche: Atti I Cong. int. Soci. ital. per la Storia del diritto* (1966), pp. 521 ff. (= *Diritto Logica Metodo* cit, above, n.13, pp. 303 ff.); C. Bergfeld, *F. Connan: ein Systematiker des römischen Rechts* (Cologne/Graz, 1968).

¹⁶ *Dicaeologicae libri tres, totum et universum ius quo utimur methodice complectantes* (Frankfurt, 1617); M. Villey, *La formation de la pensée juridique moderne* (Paris, 1968), pp. 588 ff.

abstraction, in which one meets the legal institutions that regulate voluntary transactions intended to have legal consequences, such as the various forms of ownership and the various forms of obligation. Althusius's notion of *negotium* was the ancestor of one of the civil law concepts most baffling to common lawyers, namely the *Rechtsgeschäft* or *acte juridique*, which includes every transaction that has legal consequences, from a marriage to a will.

Less radical than that of Connanus was the scheme of Donellus.¹⁷ He applied himself to identifying the rational structure underlying Justinian's law, which he assumed to be logical, even if it did not appear so on the surface. When the Romans spoke of civil law, he pointed out, they meant private law, the subject of the institutional scheme, and the aim of private law was to render to each what is his right.

In analysing the institutional scheme, Donellus concentrated first on the meaning of actions. He rejected Connanus's interpretation and observed that, if one looked at all the texts dispassionately, it was clear that for the Roman jurists, action meant essentially a legal proceeding. To bracket actions with obligations, as Justinian appeared to do, was wrong. If the introductory part of actions were really obligations, then every legal action would have to derive from an obligation and there would be no room for actions asserting ownership in property, to which Justinian gave particular prominence. The true reason that obligations come before actions is quite simply that one must know what one is claiming before one can bring an action. So civil law consists in identifying first, what right belongs to each individual, and secondly, the procedural means of obtaining that right.

Donellus insisted that any rational treatment of civil law must reflect this distinction between the substantive law of rights and the law of civil procedure. It is therefore illogical to begin the treatment of the civil law, as the compilers of Justinian's Digest did, with an account of courts and actions. The individual's rights properly include both rights which we enjoy as freemen, such as life and liberty, and our property rights over external things. There are also rights based on what another person is bound to do for us, that is, obligations. Although these are not truly and properly ours in the sense that our good name or our house is ours, yet they are still rights belonging to us. Donellus set out the whole

¹⁷ P. Stein, 'Donellus and the origins of the modern civil law', *Mélanges Félix Wubbe* (Fribourg, 1993), pp. 439 ff.

civil law in twenty-eight books of Commentaries, of which he devotes the first sixteen to substantive law and the remaining twelve to civil procedure, which now became a subject quite distinct from the civil law.

Donellus's separation of substantive law and procedure meant that there was now no place for actions in the tripartite institutional system. Law was concerned with rights, not with remedies. The seventeenth-century writers on natural law, in stressing the axiomatic and universal character of natural law rules, popularised the idea that natural law was similar to mathematics. As he contemplated law, said the Dutch writer Hugo Grotius, he had sought to 'abstract his mind from every particular fact, in the way that mathematicians consider their figures abstracted from bodies'.¹⁸ In searching for rules that had the certainty of a mathematical proposition, Grotius looked for rules of natural law which were recognised by all civilised peoples. When he set them out, however, they looked very like the familiar rules of Roman law, purged of their antiquarian features. In his treatise on the law of Holland, he followed the institutional arrangement of the civil law, but without the category of actions. In order to maintain the division into three categories, he divided the law into persons, things and obligations, which now became a category of its own.

With the growth of absolutism on the Continent, the medieval doctrine that much of the law in practice was essentially custom gave way to the idea that all law was essentially legislation. Benevolent despots could by comprehensive statute law instruct their subjects how to behave, with a view to providing them with a programme for the good life. As a result, the emphasis of legal analysis switched from legal rights to legal duties. The classical model was now Cicero's treatise *De officiis* ('On Duties'), which had been a popular handbook since the spread of printing in the late fifteenth century. The seventeenth-century equivalent of Cicero's work on duties was Samuel Pufendorf's 'On the duty of man and of the citizen according to natural law';¹⁹ it was equally popular.

Pufendorf retained the Roman civil law categories but abandoned the Institutional arrangement in favour of a system based on Christian

¹⁸ *De iure Belli ac Pacis* (Paris, 1625), proleg., sec.58.

¹⁹ *De officio hominis et civis iuxta legem naturalem lib. II* (Lund, 1673); P. Stein, 'From Pufendorf to Adam Smith: The Natural Law Tradition in Scotland', *Europäisches Rechtsdenken in Geschichte und Gegenwart: Festschrift H. Coing* (Munich, 1982), I, pp. 667 ff. (= Stein, *Character and Influence*, cit., above n.13, pp. 381 ff.).

first principles. Dealing first with man's duties as a man, Pufendorf held that by creating man a social and rational being, God made a natural law for him. This law was expressed in the Gospel injunctions to love God and to love one's neighbour as oneself. Man, as a man, has therefore three kinds of duties: those owed to God, those owed to himself and those owed to others. From the time of St Augustine, Christian theologians had developed the doctrine of ordered love, according to which to love one's neighbour as oneself implied that one had a duty to oneself, which was as strong as one's duty to one's neighbour. Before we can be in a position to help others, we must see that our own essential interests are safeguarded. This is the cardinal virtue of prudence, expressed in the popular maxim, 'charity begins at home'.

These three basic duties form the first principles from which all specific duties of man must logically follow. Law is not concerned with one's duties to God or to oneself but with duties owed to others. The first of these is the obligation that arises when a man gives his word to another. Giving one's word provides the binding force for all voluntary transactions. Then comes the duty to respect property and the contracts which concern property, such as sale. When he turns to man as a citizen, Pufendorf deals with the various associations to which man belongs, ranging from his membership of the family-household, at one extreme, to the State, at the other. The relationships deriving from the family are those of husband and wife, parent and child, and master and servant. In a pre-industrial society, servants were considered more as family than as subjects of a contract of employment.

Pufendorf's scheme was merely a sketch but it set a trend. A feature of the geometrical order, based on duties rather than rights, was that the category of obligations now moved forward in the order and came immediately after persons. Obligations have been the joker in the pack of civil law categories.²⁰ Gaius originally placed them in the category of things, then Justinian tied them to actions, then, with the expulsion of actions from the system, obligations became an independent category and now, with the stress on duties, they became attached to persons.

The most important follower of the geometrical natural order was Jean Domat in his book *Les lois civiles dans leur ordre naturel*.²¹

²⁰ P. Stein, 'The Changing Place of Obligations in the Private Law System', *La sistematica giuridica: storia, teoria e problemi attuali* (Rome, 1991), pp. 141 ff.

²¹ Vol. 1, Paris, 1689.

Domat insisted that law must follow mathematics in moving from what is obvious and familiar to what is less obvious. In regard to relationships outside the family, he began with the principles that Roman law considered axiomatic, such as that one should live honestly, avoid harm to others and render to each his rights. They were general rules applicable throughout the law. He then dealt with different kinds of persons and different kinds of things and came to duties. They are grouped into two great categories, which he calls 'engagements' and 'successions'. The first protects society in its present condition and the second safeguards society in the future. Domat's engagements is an expanded category of obligations. Indeed it includes not only contracts and delicts but all kinds of transactions, such as those which Althusius called *negotia*, with the exception of inheritance transactions. Thus a modification of the ownership of property, by the creation of a life interest (usufruct) or a right of way (servitude), was traditionally part of the law of things, but Domat treated it under the head of engagements. The category also covered security and prescription. When the English translation of Domat's book was published in 1722, the translator explained that it contained 'all the fundamental maxims of law and equity, which must be the same in all countries'.²²

In the eighteenth century, attention turned from the arrangement of the system as a whole to the internal arrangement of the main categories. The rational method of the natural lawyers was still applied, whereby the general principles applicable to that branch of law were set out first, particular rules followed and cases showing their application in practice were included as illustrations of the working of the principles. The *Treatise on Obligations* of Robert Joseph Pothier of Orleans, which appeared in 1761, became the model for legal treatises in all western languages. It was largely concerned with contracts, whose principles were set out so persuasively that Sir William Jones in England wrote that 'the greatest portion of [them] is law at Westminster as well as Orleans'.²³

Until the eighteenth century, argument about systematisation of the civil law was confined to the writings of scholars. Now it became a matter of high politics. The dominant view, at least on the continent, was that the duty of the sovereign law-maker was to provide his subjects with the best kind of law in the best possible form, and that

²² W. Strahan, *The Civil Laws in their Natural Order* (London, 1722), p. vi.

²³ *Essay on Bailments* (London, 1781), p. 29.

form was an enacted code, organised according to the best principles. Indeed in the eighteenth century, it was widely believed that one might identify a 'right' order. In the forty-fourth chapter of the *Decline and Fall*, Edward Gibbon describes Justinian's compilation and observes that the Institutes, Digest and Code are each based on a different plan. 'Among the various combinations of ideas, it is difficult to assign any reasonable preference; but as the order of Justinian is different in his three works, it is possible that all may be wrong; and it is certain that two cannot be right'.²⁴

The two codes of civil law which have stood the test of time are the French *Code civil* of 1804 and the German *Bürgerliches Gesetzbuch* of 1900. The French code is loosely based on the Institutional system, while the German code is organised on the geometrical natural system. The *Code civil* is divided into three books of very uneven size, the first covering persons and the second things. The third book, which is twice the size of the other two put together, ostensibly deals with methods of acquiring things, and largely reproduces Domat's category of engagements, since it covers both obligations and modifications of ownership. The compilers of the French code seem to have paid more attention to the internal arrangement of the individual sections than to the system as a whole, and much of the part dealing with obligations was lifted directly from Pothier.

The German *BGB*, a century later, is more elaborate, and reflects the intense discussions of nineteenth-century German Pandect science. It is divided into five books. The first is the General Part, which deals with general rules concerning persons and things and the rules common to all kinds of legal transactions. It places great emphasis on the notion of *Rechtsgeschäft*, the *negotium* of Althusius. Book 2 is concerned with obligations, Book 3 with physical things, Book 4 with family law (now quite separate from persons) and Book 5 with inheritances.

In nineteenth-century England the movement for the codification of English private law, urged by Jeremy Bentham, had little success, but during the course of the century, the continental ideals of systematisation were adopted by English treatise writers.²⁵ Traditionally English doctrinal writers who wanted to set out the common law systematically, from Bracton in the thirteenth century to Blackstone in the eighteenth,

²⁴ Edinburgh, 1811 ed., VIII, p. 39.

²⁵ A. W. B. Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Form of Legal Literature', *University of Chicago Law Review* 48 (1981), 632 ff.

can do is to wait for a judicial decision or press for legislation to put his ideas in statutory form.

III

I conclude with a glance at the situation today. The drive for a systematic civil law impressed a particular type of reasoning on the continental civil law. Since the general acceptance of the systematic model through codification, civil law reasoning has been, at least in theory, deductive. The relevant article of the code, expressed in general terms, constitutes the major premiss of a syllogism, the facts of the particular case to be decided are the minor premiss and the conclusion is the application of the code article to the facts. This form of reasoning leads the civil lawyer to imagine that there can be only one right answer to any legal problem. Disagreement on the application of the code to the facts of the case must be the result of faulty logic by somebody. Civil law judges do not generally give dissenting opinions and every judgment is the judgment of the whole court rather than of the individual members.

A problem for the continental civil law, as systematised in codes, is that its scope is fixed and cannot be extended except with great difficulty. In effect the ambit of the civil law has been confined to the categories stated by Gaius in the second century AD. Although these categories have been constantly rearranged in an attempt to make the civil law more scientific, new categories have not been incorporated into the system. This is partly because from the time of the *Code civil*, commercial law was treated separately in a code of its own. The traditional categories of the civil law system have increasingly become less important than they used to be to the man in the street. His contact with the law is often most likely to be in consumer affairs, or labour law, which are outwith the scope of the civil law.

In the second half of the twentieth century the codes in some civil law countries have been seen as straight-jackets and there have been moves for what is called 'decodification'. This is not an expression of the abandonment of codes but an admission that the law should deal less in the abstract categories of the traditional schemes and more with topics familiar to ordinary people. Much greater emphasis has been put on case-law and as a result the continental civil law has lost some of

its vaunted clarity and simplicity. But the systematic ideal, embodied in the codes, is planted too deep to be shifted.

Meanwhile, in England, lawyers have become increasingly preoccupied with the complexity and formlessness of the law. One of the declared aims of establishing the Law Commission thirty years ago was to reduce the complexity of the common law by making it more systematic. English law deals with the various branches of private law in discrete boxes, family law, land law, contracts, torts, succession, with little or no indication of how the boxes fit together into a coherent whole. In general the common lawyers have followed the Roman lawyers in leaving it to academic lawyers to counteract these centrifugal tendencies, for example, by making tentative use of the notion of obligation to show the connection between contracts and torts.

There is general agreement with the Law Commission's aim to make English law more accessible and more intelligible. The recent experience of civil law countries seeking to modernise their codes has not encouraged a demand for the preparation of a single code of English private law. But much attention has been focused on systematising particular areas of law rather in the style of the nineteenth-century treatise writers. Such an effort is in fact necessary, if only to deal with the possibility of the harmonisation of private law within the European Community. For any such harmonisation is bound to be in the civil law form of law applicable in the majority of Member States, whatever its substance.

Already in 1989 the European Parliament resolved to move towards the harmonisation of the private laws of the Member States. In particular a single contract law for all Member States is seen as essential for the effective working of the internal market, and that has been the first target.²⁷ The European Parliament has recognised with approval the work of the so-called Lando Commission,²⁸ which consists of academic lawyers from all the Member States, and enjoys financial support from the Community. In May, 1995 the Lando Commission produced the first part of the 'The Principles of European Contract Law'. The Unidroit Institute in Rome published its own 'Principles of International Commercial Contracts' in 1994 and at least one other group is also working on an alternative European contract code. Inevitably the arrangement

²⁷ R. Zimmermann, 'Die "Principles of European Contract Law"', Teil I', *Zeitschrift für Europäisches Privatrecht* (1995), p. 731.

²⁸ Resolution of 6 May 1994.

adopted in these projects is influenced by the systematic civil law model. It is important that English lawyers continue to participate fully in this work. I suggest that it is only if we understand some of the historical background of systematisation, which I have tried to sketch, that we shall be able to meet this challenge.