THE CIVIL LAW AND THE COMMON LAW

THERE are sundry bodies of law in the world and it may be that in some places, as in Russia, others are coming into being; but the civil law and the common law are not only the two systems which are flourishing best at the present time, but the two systems which, so far as we can now see, are fated to divide the world between them. Perhaps some day there will be a union of the two in some favored land now on the firing line of the Saxon and Latin civilizations; certainly there are modifications of the one by the other in progressive countries even now; nevertheless, for the present we must think of them as different if not opposing systems.

It is, however, not easy to define their differences. Every system of law must cover substantially the same subjects, although in a different way. Certain it is that these two systems of law both originated in the Aryan stock, and that the early Roman law, from which the civil law is derived, presents strong analogies to the primitive Germanic customs from which the common law is descended. There is one striking difference in the original elements to which less attention is paid than is deserved. The Roman law, like the Greek before it, in its origin is based upon the *gens* system, that is, upon the system of kindred groups which have expanded beyond the immediate family, while on the other hand the German races when they come within the ken of history have groups of kindred, to be sure, but kindred which does not make up any closed *gens*. In other words, at the formative period, when it settled in its historic home, the Latin stock was still based upon the gentile system, while the Germanic, probably on account of more extensive wanderings, was passing from the kindred group to the group based upon locality. Particularly was this true in England, probably because the appropriation of Britain by the Anglo-Saxons was more gradual than is recognized in the legend of Hengist and Horsa. Fundamentally, of course, the racial

differences must go back to climatic and topographical causes; the Latin dwelling in the south, in a warmer climate, and in touch with African and Asiatic races, could not but have peculiarities which would differentiate its customs and afterwards its law from those of the Germanic race inhabiting northern marshes and foggy climates.

A prejudice has arisen in Anglo-Saxon countries against the civil law because it is declared in Justinian's Digest that the will of the Prince has the force of law, *quod principi placuit legis habet vigorem*,[1] — a maxim which could not arise among the liberty-loving English. So far as private rights are concerned, that part of law which is contained within the modern civil codes, this prejudice is without foundation. The civil law prevails in Louisiana, and no one will think of the people of that state as having less freedom than elsewhere in America. The civil law has been received in Germany, and, whatever may be thought of recent German methods, this reception was by people of the same stock as the Anglo-Saxons and has not interfered with the construction of an admirable body of private law. No less a pro-Saxon than Frederic W. Maitland praises the German Civil Code of 1900 as one of the great achievements of history.[2] And the example of Scotland is conclusive. The Scotch, whether in politics, business or religion, hardly have superiors in the world. Macaulay declares that everywhere the Scotch, like oil in water, are bound to rise to the top. The Scotch from historical reasons have been in close touch with the French and adopted a variation of the continental civil law, but certainly without prejudice to any of their national characteristics. Indeed the civil law has proved a fine training school for common lawyers. Not to recall old examples like Glanville and Bracton in England, the greatest of all Chief Justices, Lord Mansfield, not only received his early education in Scotch schools, but at Oxford and Lincoln's Inn was a devoted student of the French civil law and of the foundation of it all, the Digest. To this was due not only his enforcement of the legal principles for

[1] DIGEST, I, 4, bk. 1, § 1, Ulpian. Ulpian shocks the modern lawyer, used to a different use of the word, by saying that a mere letter of the emperor is commonly called a *constitution*.

[2] 3 COLLECTED PAPERS, 474, 484.

which Junius attacked him, but the analytic manner of handling the common law itself.[3]

For purposes of comparison we must have some marshalling of principles, some basis of contrast. Blackstone and Gaius agree that law concerns itself with persons, property and procedure, although they treat these titles very differently.[4] Never did Maine say a truer thing than when he declared that substantive law is secreted by procedure, for the only way rights get to be recognized is when they come in conflict and therefore must be adjusted by some tribunal, primitive or civilized. Originally, as Holmes has shown us, procedure consisted in the seizure of person or property, and the civil law still preserves evidences of this, particularly in some interdicts.[5] This is the regulation of a man's *status* by the officials of the state, which has grown to be the successor of the group system to which all men belonged. This was true of the common law also, but the development of the common law has been more radical in the direction of recognition of the individual, that is, of personality as distinguished from property. It is quite true that the English law has adopted the injunction from the canon law, which is a variation of the civil law; nevertheless, such procedure is an adoption, — a very proper adoption, — but nevertheless a making over for common law purposes of something originally alien to it. It is very true that liens, as we shall see, were in primitive times used in all forms of law, and that there is a growing tendency towards their increase at common law; nevertheless, they are essentially a part of civil law procedure as we know it now, having their immediate origin probably in admiralty. The long war between the common law and admiralty is familiar to all, and admiralty comes down not so much from the Romans as from the Rhodians and Phoenicians. On the other hand, the common law has modified civil law procedure through the gen-

[3] See CAMPBELL, LIVES OF THE CHIEF JUSTICES, chap. XXX. Buller discusses Mansfield in Lickbarrow *v.* Mason, 2 T. R. 63 (1787).

[4] GAIUS, INST. I, 8. BLACKSTONE, COMMENTARIES, chap. I.

[5] GAIUS, INST. IV, 137; DIGEST, XLIII; CODE NAPOLEON, art. 489. At common law lunacy proceedings present an analogy. Injunctions come from interdicts, but many relate to property. For early French procedure see A. ESMEIN, HIST. DE LA PROCEDURE CRIMINELLE, LES JURISDICTIONS, etc., and HOLMES, THE COMMON LAW, chap. I.

eral adoption in civilized countries of the jury system, originating in England, and carrying with it the law of evidence, which has never been well developed in civil law countries. Pleadings, that is, the allegations by plaintiff and defendant, have been modified more at common law than at civil law, and a code has introduced very many analogies to the chancery and civil law methods of presenting the ultimate facts in controversy. It appears remarkable that the Anglo-Americans have adopted a code of procedure even if they do not always so designate their practice acts and rigid rules of court; they, on the other hand, prefer a digest of cases to a civil code. But this is only seemingly strange. Procedure has always and in all races been codified, although the code may be oral. Law began with procedure and began when formality was the refuge of peoples wishing to advance from brute force. Codifying principles is a very different thing.

The essential difference of the civil and the common law, however, is in the domain of substantive law, the rules of private conduct, — now, as Austin tells us, prescribed by the state, but having a long evolution in custom before the state was dreamed of. It began no doubt with *status*, which Herbert Spencer thinks of as a regimentation of persons, a fixing of people in ranks and places which cannot be changed, and resembling the *genera* and species of the natural world. If law is concerned with persons and property, and *status* is the first method of grouping their relations, nevertheless other titles have developed in course of time. The usual civil law division of all rights and relations is that well taught by Windscheid, and it is hardly capable of improvement.[6] Law, according to this great teacher, is concerned with persons and family on the one side, and with property and obligations on the other side, with successions between the two and partaking of the nature of each. It is quite true that the Roman idea of obligation, the *vinculum*

[6] 1 PANDEKTENRECHT, introduction. It was Ihering's opposition to Windscheid which prevented the German Civil Code from being even more Roman than it is. May it be permitted to one who has studied also under Wundt, James McCosh and John B. Minor, and has read after Dwight, Ames and Langdell to record the conviction that Windscheid of Leipzig was the greatest of all teachers?

juris,[7] which makes the relation of man to man and covers all forms of relation, is merely artificial. It joins together in unholy wedlock such opposite conceptions as agreement and disagreement, contract and tort. Nevertheless, it has become so fundamental that we may as well use this fivefold classification. We shall consider the likenesses and unlikenesses of the two systems therefore under the five heads of persons, family, successions, property and obligations.

Taking up, therefore, first the title of persons, expressed in Roman law by the word *caput*, we find that in civil law countries one comes of age at twenty-five, while in Anglo-Saxon countries he becomes of age at twenty-one, — and twenty-one has become the rule of civil law Porto Rico. Remembering that the civil law field is the south of Europe and equatorial America, we should expect the absolute converse, for naturally the human physique develops more rapidly in warm countries. We should have expected that the majority about the Mediterranean would be twenty-one and in colder England and the United States would be twenty-five years of age. The reason for this rule we shall see possibly under another head. Another distinction is that the civil law favors partnership to a greater degree than the common law. Possibly the most striking form of partnership about the Mediterranean and allied countries is that of *sociedad en comandita*, where one man furnishes a fixed amount of capital and the other is the actual manager. Not that limited partnerships are unknown to the common law, but the prevalent form of business association for a century past is that of corporations. This like much else was a civil law institution, perhaps going back to the colleges of priests of ancient times; but those after all were brotherhoods, with mutual rights and duties, while the corporation is the acme of individuality. Mankind must associate together, for man is a social being; but the common law countries have outgrown association of kindred as such. They have developed individualism to its extreme, and when Saxons associate, as they must, they leave all similarity to the family behind. The corporation is an association in which there is individual liability only up to a fixed amount, and corporations are probably now accomplishing four-fifths of the busi-

[7] SOHM, INSTITUTES OF ROMAN LAW, Ledlie's trans., 2 ed., 107, 164.

ness labor of the civilized world; certainly this is true in commonlaw countries.

Both systems have outgrown slavery, — itself originally a part of family law, — and both still know agency; but it is under the civil law that agency specially prevails, as *mandatum* in different forms. To such an extent is this title carried that one might almost say there is no one who attends to his own business; on the other hand, at common law, while the agent exists, he acts in the name of the principal and the maxim of *respondeat superior* makes the principal the real party to every transaction. At Rome the agent acted for himself only, and even now a civil law responsibility is confined to the few definite heads of father, master and the like.[8]

The reason for these and many other distinctions probably lies in what we know of the origin of the family. Bryce tells us that family law is the principal feature of the civil law systems. Nevertheless, one of its most striking features, the marital partnership, is quite clearly of Germanic origin.[9] At Rome the wife brought a dowry, *dos*, to the husband as her contribution to family expenses, and gradually there grew up the custom of gifts on his part of equal value. Under the French *Coûtumes* and in modern civil law as it developed whatever the husband owned before marriage remained his own and whatever the wife owned before marriage remained her own, with contractual exceptions relating to dower and dowry.[10] On the other hand, what was earned by husband and wife during the existence of the marriage was and is a joint property, divisible at the end of the marriage. This is known in the French law as *acquêt*, in the Spanish as *gananciales*. Obviously during a long married life these earnings will be of great value to the parties concerned and they give rise to a considerable body of legal rules.

It may be doubted, however, whether this subject is strictly a branch of partnership law; it contains elements of social duty as well, and is connected at least as much with *status* as it is with contract. Sir Henry Maine teaches that legal progress is

[8] CODE NAPOLEON, art. 384. SOHM, *loc. cit.*, 233.

[9] CODE NAPOLEON, art. 1388, 1399–1539. Peter J. Hamilton, "Germanic and Moorish Elements of the Spanish Civil Law," 30 HARV. L. REV. 303.

[10] SPANISH CIVIL CODE, art. 1315.

from *status* to contract, that is, broadly speaking, from kinship to individualism.[11] This is very largely true at common law, but it may be doubted whether it is true at civil law, where there has been evolution not so much from one to the other as development of each of them. In Anglo-Saxon countries the family after the children become of age is rather a personal than a legal relation, for migratory instincts and customs have reduced kinship almost to a shadow, dear as kindred may be in special cases. At civil law a person bears the name not only of his father, but of his mother, and there may be a shrewd conjecture that this harks back not to a time of matriarchy, but to a time of polygamy far anterior to the Moorish *barraganias*.[12]

Other signs point in the same direction. Thus, there is a marked distinction between the two systems of law in regard to the legitimacy of children. The Civil Code recognizes not only the half kin, as does the common law, but also illegitimate kinship, and this not as anything rare, but as something common. There are even a number of kinds of illegitimacy, each carrying a different result; in family settlements in court illegitimate children frequently inherit, although after the legitimate children, with no sense of shame or inferiority.[13]

On the other hand, at common law the short and ugly word for an illegitimate child is bastard. In the eye of the law he has no father and is said to be *filius nullius*. The question at once arises in the mind as to whether this is not cruelty; it certainly works a hardship upon innocent offspring. On the other hand, the important question also arises as to the good of the community at large as distinguished from that of these children in particular. Does or does not the civil law rule amount to favoring illegitimate children? Does it or not tend to encourage illegitimacy? If it does, it tends to break up the sanctity of the family, and under any system of civilized law the family is the basis of society. Morality cannot be made a form under modern conditions or governed by emotion. Perhaps these questions will be answered or at least regarded differently

[11] ANCIENT LAW, chap. V.

[12] Hamilton, "Germanic and Moorish Elements of the Spanish Civil Law," 30 HARV. L. REV., 303, 314.

[13] SPANISH CIVIL CODE, art. 119–141, 840–847, 939–945.

under the two systems of law because of the different points of view of the races involved. There is one curious feature of family life prevalent under the civil law only, — the family council, prominent in the Code Napoleon.[14] Some inklings of this are found in the Roman Digest, but it seems from the *Coûtumes* to have had Germanic antecedents. It has been omitted from the Porto Rican version of the Spanish Code, and under the common law its functions are provided for by probate or orphans' courts. In this connection it should be noted that divorce is not favored in civil law countries, while it is one of the crying evils in the American states. It is individualism run mad, preferred in a matter of state importance to state interests themselves. Whether modern Latin literature does not show other means of accomplishing the same egoistic results without formal divorce, however, is a social rather than a legal question.

It would seem then that the underlying distinction between the two systems is the individualism of the common law and the importance of kindred in the civil law. The same thing appears in the title of Succession. Under the Romans an estate, *hereditas*, remained intact as a *universitas*. Both Gaius and Julian call it *successio in universum*.[15] This was undermined in practice by the use of wills, which was a Roman invention. Nevertheless, the scope of the will of a man having children was always very limited, — in Spain one-third of his property,— and to this day a parent cannot deprive children of their shares, defined by law, in the estate he leaves. It is even called a *légitime*.[16] On the other hand, the Anglo-Saxons have taken the Latin invention of the will and pushed it to extremes. An American father can totally disinherit any or all of his children and will his property as he desires. In point of fact, however, this is sometimes obviated by the jury trying the case; for the jury has the right to declare undue influence and thus invalidate an unnatural will. In England they effect entailment by means of trusts either at marriage or otherwise during lifetime and better avoid jury interference.

Taking the further title of property, we find the same princi-

[14] CODE NAPOLEON, art. 142, 361, 405, 454, 478. See SOHM, *loc. cit.*, 502.
[15] DIGEST JUST., L, 16 & 17.
[16] SPANISH CIVIL CODE, art. 808.

ple running through. In civil law countries property is held together to a much greater extent than in the United States. An undivided interest of a tenth or even a hundredth is not at all uncommon, and passes freely from hand to hand. Cities and other communities have large interests held for the common use of the people, and the paternal character of the state government on the continent of Europe represents the same principle carried into politics. And there is not only such community interest in lands, but the right to use another man's land has received an extension at civil law which was unknown in England until Lord Holt intentionally adopted the whole system of bailments from the civil into the common law.[17] A more active individual life in England made more important the property which one handles for himself, and there arose the distinction of realty and personalty, which is much less apparent on the continent. The Romans distinguished a farm, *res nec mancipi*, from other property because until Hannibal came they constituted a farming community; but they and the legal systems descended from theirs have had almost the same forms of conveyance for all classes of property, executed before a notary who is practically a judicial officer, still representing the public in his formalities.[18]

It is in the title of obligations that Sohm and others declare the Roman law to have made its greatest contributions to civilization. Obligations embrace torts as well as contracts, and, although it originated with wrongs, the civil law says little on the subject of torts or negligence, while they are growing subjects in the hands of the common lawyers.[19] Even here the idea of kinship comes to the surface, for at civil law from the time of the Romans the standard of care which should be exercised is that of a good father of a family, *paterfamilias*. On the other hand, the standard at common law is that of the average man. Practically the two standards are not unlike, but this is because modern conditions are tending to make a good father of a family pretty much the same as the average member of a community; but the term and in some places the practice points back to this old kinship feature.

[17] Coggs *v.* Bernard, 2 Ld. Raym. 909 (1703). [18] SOHM, *loc. cit.*, 39, 43, 47.
[19] SOHM, *loc. cit.*, 107.

In the same way the Spanish commentator Manresa points out that in the modern codes the Germanic idea of intention finds its place under the head of contracts.[20] Nevertheless this is an invasion. The civil law, built into shape as it was under Greek influences after the creative period of the Romans had come to an end, put in maxims and principles like the church creeds of the same centuries, is based upon form; and formality is still the keynote of civil law countries and their civilization. There is no Statute of Frauds in the civil law. Everything must be according to certain fixed rules, whose phraseology is much more accurate than in the common law. Thus the title sales is represented by purchase and sale. The French have their own words for different forms of contract, but the Spaniards, who much more resemble the Romans, still preserve the Roman terms, sometimes slightly changed. Thus we find *commodatum*, *depositum*, *mandato*, *censo*, *emphyteusis*, as well as that oldest of all contracts, *antichresis*.[21] *Antichresis* has a Greek form, and is found in the *Corpus Juris* of Justinian as well as in the Code Napoleon, but it flourished, if it did not originate, upon the Euphrates and is preserved in the Babylonian bricks.[22] It is that form of contract by which a lender takes the property of the borrower and holds it until he works out the debt from the profits. It is one of the many indications that originally debt was by no means a personal obligation, and is an illustration of the principle pointed out by Holmes that things were the basis of human relations quite as much as persons. Thus the earlier form of loan was *nexum*, a quasi-sale, not individual as in *mutuum*. The use of collateral, therefore, did not originate with modern banks, for this *vadium vivum* long antedates the *vadium mortuum* which has become shortened into *mortgage*. *Antichresis* and holding a debtor or his family in jail are two forms of the same proceeding.

This is all a reminder of the primeval tendency towards form, a survival of the old love of ceremony and its symbolism, which Herbert Spencer has shown us played so great a part in

[20] COMENTARIOS AL CÓDIGO CIVIL ESPAÑOL, art. 1258, 1262. The forms of contract are discussed under art. 1254.

[21] SPANISH CIVIL CODE, book IV.

[22] JOHNS, BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS, 262.

primitive times.[23] Another phase of it in the civil law system is that which attaches privileges or liens to what at common law are ordinary debts. At common law the debts of a decedent are paid in a certain order, and these priorities are fixed by law. At civil law, however, all the debts which a man can owe while living also have privileges or liens attached to them, each declared by law, — as to this day in the French, Spanish and other codes, with elaborate provisions as to priorities and how to enforce them.[24] The Civil Code in its late chapters thus carries almost a kind of bankruptcy law. The common law tendency has been away from all symbolic acts and priorities except as fixed by contract, or surviving from the necessity of the case in admiralty, which is a system to itself. The freedom of contract is not so much a maxim as the basis of the common law.

One of the striking features of common law development is the coming of consideration into the idea of contract. It is commonly, but as Holmes shows incorrectly, stated as *quid pro quo*, and its different method of statement is the touchstone of different schools of common lawyers. At all events consideration is an essential part of common law contracts and it is unknown to the civil law. It is quite true that both in the French and Spanish codes [25] there is an element which is sometimes translated consideration. Thus under the Spanish Civil Code there is no contract unless the following requisites exist: (1) the consent of the contracting parties, (2) a definite object which may be the subject of the contract, (3) the "cause" for the obligation which may be established.[26] In the Porto Rican and War Department versions "cause" is in some sections translated "consideration," but in point of fact it does not mean consideration, but something in the nature of category or classification. It is a survival of the forms of contract recognized by the Roman law and is in effect saying there can be no contract except those kinds recognized by law. Originally this meant

[23] 2 SOCIOLOGY, 3 (Appleton).

[24] CODE NAPOLEON, art. 2204. SPANISH CIVIL CODE, art. 1921, 1926.

[25] SPANISH CIVIL CODE, art. 1261, 1274. See translation for War Dept., 1900 Hs. Doc. no. 1484.

[26] SPANISH CIVIL CODE, art. 1261.

stipulation, literal contract, and the like; now when the work of the praetor makes contract synonymous with agreement it is merely a survival of an old formality.

There are of course more differences than can be mentioned in a paper.[27]

On the whole, therefore, we find that the civil law and the common law are expressions on the legal side of the racial if not climatic tendencies of the peoples concerned, and especially of those tendencies at the formative period of their histories. Men and women about the Mediterranean lived and still live in a warmer air and under a brighter sun than those in cold and foggy England and in Saxon America which has been colonized from it and received its institutions from it. The southern peoples were and are more social, more voluble, and enjoy life better than those of the north. They see more of nature and the nature which they see is more beautiful. Perhaps one may say that to them beauty is the predominant thing in life, almost a *summum bonum*. The best known of the Latins are the French, and the French are really more Greek in temperament than Roman. Despite the Spanish Unamuno's protest, it was a true instinct which has induced the Central and South Americans to adopt the title "Latin American" as indicating their civilization, for Latin goes back of all differences to the ancient common origin. Indeed Greek would be almost a better title than Latin, for the Greek love of beauty dominates all the southern races in Europe and America. The Anglo-Saxons on the other hand have from insular and climatic conditions been driven in upon themselves and their development has been internal, in homes and in individual institutions. The distinction between the two civilizations has been touched by José Enrique Rodó of Uruguay in one of his brilliant es-

[27] Perhaps years ago the common lawyer smiled to see prescription at the end of the Civil Code and treated not so much as a limitation of actions as a means of acquiring title; but the common law now has the same notion. There is still the difference that the common law does not regard good faith as at all necessary to the acquisition while the civil law does. Indeed, the fundamental work of the praetor was in the emphasis he laid on *bona fides*, and it has outlasted the praetor. The Anglo-Americans, on the other hand, know it best through courts of equity, and equity has come through the canon law from the Roman.

says, — marred unfortunately, like so much Latin American, by *Yanquiphobia*. He says truly, although not meaning it as a compliment, that the essence of the Anglo-Saxon nature is found in the Puritan, with his sense of duty growing out of his very individualism. And this distinction would seem to be true, although there are many Latin Americans who have no real sense of beauty and have let formality displace the Greek sense of grace and order which dominated the work done at Constantinople as it dominated everything else subjected to Greek influences, whether in church or society. And on the other hand there would be in North America many exceptions to the rule that duty underlies our civilization, and there may be revolts against such a characterization. Nevertheless the distinction thus indicated is correct. Beauty makes a smaller appeal to the Anglo-Saxons, and their greatest teachers not less now than in the time of Carlyle and Emerson impress duty as supreme, whether in peace or war. Doubtless both qualities, beauty and duty, exist in each civilization; nevertheless the emphasis in the south is upon beauty, and in the north upon duty. In the south there is more of formality and finish, and sometimes a reliance rather upon form than upon substance, polish rather than reality, in law as well as in other features of civilization; in the north there is greater individualism and personal activity, with more attention to end than to means, and not always inspired by duty. Law is the expression of the rules by which civilization governs itself, and it must be that in law as elsewhere will be found the fundamental differences of peoples. Here then it may be that we find the underlying cause of the difference between the civil law and the common law.

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