McGILL LAW JOURNAL
REVUE DE DROIT DE McGILL
Montréal
Volume 32 1987 *No 2*

Persuasive Authority

H. Patrick Glenu*

The concept of binding, national law is a recent one, which has provoked fierce opposition in those countries (notably the United Kingdom, the United States, France and Germany) having most closely adhered to it. Elsewhere in the world, as in Canada, the concept of persuasive authority continues to play an important role and is used to justify extensive use of foreign, non-binding sources. The author examines the historical origins of the concept of persuasive authority and argues for its continuing relevance as a necessary means of relief from the instrumentalism of contemporary national law-making, whether judicial or legislative in form. The process of reception of law in Europe and North America is examined, as well as the continuing receptivity of European and North American jurisdictions to the citation of foreign authority. Recent trends of Canadian judicial decision-making are examined and remarks are offered as to the role of national doctrinal writing.

L'idée d'un droit positif national est d'origine récente et a provoqué des réactions sévères dans les pays (notamment la France, l'Allemagne, le Royaume-Uni et les États-Unis) l'ayant adoptée dans sa forme la plus radicale. Ailleurs dans le monde, et au Canada, la notion d'autorité persuasive continue à jouer un rôle important et mène à un emploi très répandu de sources non-nationales et non-obligatoires. L'auteur examine les origines historiques de la notion d'autorité persuasive et plaide en faveur de sa pertinence actuelle à titre de remède essentiel contre l'instrumentalisme des sources nationales de droit, qu'elles soient législatives ou judiciaires. La réception du droit en Europe et en Amérique du nord est étudiée, aussi bien que la réceptivité contemporaine des juridictions européennes et américaines à l'emploi des sources étrangères. Certaines tendances récentes de la jurisprudence canadienne sont mises en lumière et le rôle de la doctrine nationale est discuté.

*Of the Faculty of Law, McGill University. This article was presented as the Canadian Report on the subject "Doctrine as a Source of the International Unification of Law" to the XIIth International Congress of Comparative Law, Sydney/Melbourne, Australia, August 1986. The author is grateful for the financial assistance of the Social Sciences and Humanities Research Council of Canada and for the use of the research facilities of the Swiss Institute of Comparative Law, Lausanne.

Synopsis

* * *

Introduction

The nineteenth and twentieth centuries have been dominated in Western legal thought by the concept of binding law, in the sense of formally articulated rules of an obligatory character in force within a defined territory. The sanction of State-controlled force has been closely associated with this concept of law. Theoretical legal discussion has been directed principally to the justification and articulation of binding law (positivism, codification, precedent), or to its inadequacies ("mechanical" jurisprudence, *libre recherche scientifique*, *Freirecht*, "realism", "critical" legal studies). The polarized character of theoretical discussion explains why weaknesses in the concept of binding law are frequently translated into allegations of arbitrariness in the exercise of legal authority. If the individual is not bound, in the contemporary sense, he is arbitrarily free, whether judge, lawyer or

citizen. Contemporary versions of natural law have failed to establish a middle ground in this debate. They are seen, probably correctly, as *droit positif manqué*, competing sets of rules or principles capable of formal enactment, if not already lurking in the detail of contemporary regulation. It is evident, however, that most theoretical discussion of law originates from jurisdictions in which the concept of binding law has been adopted in its most radical form. In the United Kingdom, France, Germany and the United States (the principal exporters of law and legal theory), law is a binding and exclusively national phenomenon and even the formal sources within these nations are given hierarchical rankings. In some cases, indeed, there is said to be only one formal source of binding law and the completeness of this source is implicit, if not explicit, in national debate. The notion of persuasive authority — authority which attracts adherence as opposed to obliging it — is largely absent from everyday judicial and legal practice in these countries, though in some cases, most notably in the United States and West Germany, a measure of formal recognition may be given to national doctrinal writing.

In the rest of the civil and common law world there is less adherence to such a radically formal concept of law. Whatever official teaching may proclaim (itself borrowed from a metropolitan jurisdiction), the notion of persuasive authority is here often of greater importance than that of binding law and is used to justify extensive use of non-binding and non-national sources of law. The patterns of judicial and legal practice have been fundamental in this regard and a radically formal concept of binding law has been shown to be of little consequence in the face of professional resistance. As Rabel observed, with tongue-in-cheek, a 'happier, naïve uncertainty'[1] has prevailed, uninfluenced by methodological extremes and largely unexplored in theoretical writing. It is perhaps even more curious that contemporary debate as to the nature of law has ignored the pre-nineteenth century experience of France, the pre-twentieth century experience of England and Germany, and the pre-1850 experience of the United States. As historical work increasingly indicates, these jurisdictions all borrowed heavily from foreign models and the notion of English, French, German or American law is today in large measure a summation of that which has been gathered from many sources, in those countries, by way of persuasive authority. In short, the notion of persuasive authority is deserving of far greater attention than it has recently received. It has been, and remains, a dominant legal concept in the world.

Use of persuasive authority is not necessarily incompatible with the concept of binding law. Persuasive authority may play a very minor and

[1]E. Rabel, "Aufgabe und Notwendigkeit der Rechtsvergleichung" in H.G. Leser, ed., *Ernst Rabel: Gesammelte Aufsätze*, vol. 3 (Tübingen: Mohr, 1967) 1 at 15.

suppletive role, one which may even be recognized and authorized by posited, national texts. In the measure, however, that the use of persuasive authority fluctuates according to the needs of practice, or becomes a principal source of law even in the face of binding law, its use is indicative of a certain freedom of appreciation on the part of those charged with the application of law, a freedom in the choice of sources of law. It does not follow, however, that adherence to non-binding, persuasive authority must be taxed as arbitrary, since choice of an external authority which effectively persuades is perhaps the only true alternative to arbitrary conduct, in many cases more effective than adherence to binding, but unpersuasive, law. Indeed, once it is perceived that each decision by a legal official involves personal choice and can never be purely mechanical in character, adherence to binding law may itself be perceived as highly arbitrary, in the absence of any elements of persuasion. This is the principal message of decontructionist schools of legal thought, which have been most active in those jurisdictions having most closely embraced the concept of binding law. Adherence to persuasive authority is therefore a highly sophisticated alternative to notions of binding law and mechanical jurisprudence on the one hand and arbitrary personal licence on the other. It should be understood, however, that the notion of persuasive authority presently lacks formal definition, in spite of its practical importance. In particular, it is not possible to state the measure of correlation between the persuasiveness of an authority and the particular result which it would mandate in a given case. It may be that there is no correlation whatsoever and that the persuasiveness of authority is dictated by considerations which are themselves largely neutral in terms of the content of norms. Authority could thereby be persuasive regardless of what it said, and persuasion would be entirely distinct from the satisfaction of particular wants and needs.

It is because persuasive authority is such a well-known but imprecise concept that it is appropriate to study its development and use before advancing any larger conclusions as to its nature. This study must begin with the process of reception of law, since reception is the obvious instance of adherence, on a large scale, to persuasive authority. One of the main themes of this paper is that reception of law has occurred, to a greater or lesser degree, in the development of all national legal systems of the Western tradition, that it has been an indispensable element in what we know today as law, and that it has occurred invariably in the primary stages of the development of a legal tradition or field of law.[2] If this is correct, the study

[2]Arminjon, Nolde & Wolff make the broader assertion that with the possible exception of Islamic jurisdictions (and this today remains questionable) there are no pure legal systems in the world: see P. Arminjon, B. Nolde & M. Wolff, *Traité de droit comparé*, vol. 1 (Paris: L.G.D.J., 1950) at 49. The mixed character of all jurisdictions is camouflaged today, however, by State

of reception must be followed by the study of that which follows reception, notably the subsequent treatment of persuasive authority, and it is appropriate to refer to this entire ensuing process, in all legal systems, as the continuation of law. This paper will therefore be divided into two parts: the reception of law and the continuation of law.

I. The Reception of Law

In Canada the concept of reception has been closely associated with the colonial period and it is an indication of the significance of binding law in this period that reception itself has been made the object of binding rules. Reception may also occur, however, in the absence of legislative or judicial rules which purport to dictate its measure and in such a case it appears more clearly as local adherence to a model of law exterual in some manner to the adhering group. A reception in a colonial structure also represents, however, local adherence to an external model of law, since in the absence of adherence or acquiescence there can be no reception, only ongoing struggle. The Canadian experience of 1763-1774 is some evidence of this, as will be seen.[3] It is therefore inappropriate to consider reception as either imposed, following conquest, or voluntary, since all reception which occurs is necessarily voluntary. It is still possible to distinguish amongst receptions, however, since some are effected in a spirit of deliberate alliance with an external source of law, while others are effected with no particular sense of alliance but in order to draw constructive domestic advantage from the useful characteristics of the external model. The Canadian receptions of law have been clearly of the first type — reception as alliance. Other receptions, with which useful comparisons can be made, are of the second type — reception as construction.

A. Reception as Alliance

1. In Europe

The earliest reception we know as such was that of Europe[4] and the law received was that of Rome, removed both in time and space from the receiving groups of people. Roman law was received, and became in some

institutions, by taxonomic comparative law methodology which establishes distinct "families" of law and by nationalist historiography which emphasizes that which may be distinctive in national legal systems. To say that all jurisdictions are mixed is not to accede, however, to environmentalist or diffusionist theories of cultural variety or to engage in any way in causal explanations of the phenomenon.

[3]See below, text accompanying notes 23-25.

[4]For the persistence of Hellenistic laws throughout the Roman Empire, however, see E. Rabel, "On Comparative Research in Legal History and Modern Law" in *Ernst Rabel: Gesammelte*

measure a common law of Europe, both because it was perceived as written reason[5] and because of political loyalties to earlier Rome, as in the south of France, or to a newer and Holy Roman Empire, as in Germany. Reception was thus an act of alliance to an external, rational source of law and to a political ideal, past or present. Where political loyalty diminished, as in Northern France and England, the extent of reception was reduced, but it occurred nevertheless, most completely in the form of canonical law, where there was loyalty to a universal Church,[6] and in other matters to provide organizing concepts for local law. Roman law was an active influence in England in the two centuries following the Conquest, before being largely relegated to Oxford and Cambridge by the growing influence of the Inns of Court. Bracton was a Romanist, and *novel disseisin* was derived from a Roman form of action.[7] In northern France the influence of Roman law was so great as to be considered seditious and its teaching was banned in Paris in the thirteenth century.[8] In neither case, however, did the ancient learning disappear and it was to reappear in both English and French legal history. In the phrase of Goethe, it was a "diving duck", which always resurfaced, alive.

We think of reception today as a process of adoption of that which is foreign, but for the European participants in the process of reception this was probably not the case. Roman law was not adopted; it was simply there. It was not foreign law; it was living law, and there were no national boundaries to impede adherence to it. In the language of Hart, the "internal point of view" directed immediate allegiance to Roman law, in the absence of any formally enacted rules requiring allegiance and in the absence of any

---

Aufsätze, supra, note 1, 247 at 250-51; and for a more complete statement of the Greek influence on Roman jurists, R.A. Bauman, "Comparative Law in Ancient Times" in A.E.-S. Tay, ed., *Law and Australian Legal Thinking in the 1980's* (Sydney: Organising Comm. of the 12th Int. Congress of Comparative Law, 1986) 99. For the concept of reception within ancient Greece itself, see K. Assimakopoulous, "Comparative Law in History" (Greek report to the XIIth International Congress of Comparative Law, Sydney/Melbourne, Australia, 18-27 August 1986) at 2 [forthcoming in Revue hellénique de droit international].

[5]For the history of the expression see A. Guzman, *Ratio Scripta*, Ius Commune, vol. 14 (Frankfurt: Vittoria Klosterman, 1981).

[6]For England, see F. Pollock & F.W. Maitland, *The History of English Law*, vol. 1 (Cambridge: Cambridge University Press, 1968) at 112-25 and 131-35, notably at 115 ("there was a *ius commune*, a common law, of the universal church").

[7]See T.F.T. Plucknett, *A Concise History of the Common Law*, 5th ed. (London: Butterworth & Co., 1956) at 261, 296 and 298. The glosses of Vacarius were "reverently received" through his teaching in England in the 12th century and the arguments of the youthful Lanfranc of Pavia, the Conqueror's "right-hand man", derived their force "from the supposition that the dooms of King Liutprand and the institutes of Justinian are or ought to be harmonious": Pollock & Maitland, *supra*, note 6 at 118 and 77, respectively. Already in the 7th century the "Roman example" had served in the preparation of the laws of Aethelbert, or so we are told: see J.H. Baker, *An Introduction to English Legal History*, 2d ed. (London: Butterworths, 1979) at 2. For historiographical resistance to the concept in England, however, see *infra*, note 63.

[8]The Faculty of Law of Paris remained, however, a centre for the teaching of canon law.

close territorial connection to it.[9] As we have seen, this was partly due to political loyalty,[10] but the process involved more than that. It involved as well a commitment to a particular, rational view of law, a view of law which placed it beyond definitive enactment or stipulation and rather in an ongoing, imperfect process of enquiry. This view of law prevailed both on the Continent and in England and is well reflected in the literature of the eleventh to fifteenth centuries. This literature frequently consisted of questions, with attempts at reasoned responses, as a result of which there slowly accumulated a record of reasoned responses to such questions in necessarily tentative form. This was the "common erudition" of the common law, the *communis opinio doctorum* of the civil law. It would have been wrong to *deduce* anything from such erudition, since deduction implies a firmer point of departure than the questions and their answers would provide. Tentative, common reflection would, however, permit the resolution of individual cases and the common erudition of the profession could therefore adequately serve the needs of practice, while constantly developing. There were of course great differences in the expression of this literature on the Continent and in England. On the Continent the literature was vast, the work of the *dottores* impressive and the teaching centered in the Universities.[11] In England, there was Bracton and, centuries later, Littleton, both supplemented by the oral, questioning tradition of the Inns of Court.[12] On both sides of the Channel, however, authority was not posited but sought, and literature was the record of search and not resolution. Cases were not reported on the Continent; in England their reporting was sketchy and imperfect ("... and so to judgment"), in spite of the growing prestige of the English judiciary. There were few problems with the "mass" of the law.

This view of law is necessarily open to persuasive authority. Aid is sought where it may be found, and there are no formal limits to the search.

---

[9]H.L.A. Hart, *The Concept of Law* (London: Oxford University Press, 1961) at 55-57, 86-88 and 99-101. Hart states, however, that it would "be wrong to say that statements of validity 'mean' that the system is generally efficacious", giving as examples the teaching of Roman law "as if" the system were still efficacious and the clinging by a White Russian to the criteria of legal validity of Tsarist Russia. This statement underestimates the importance of the internal point of view in creating the efficacy of a legal system.

[10]See above, text accompanying note 6.

[11]For a recent statement of the development of the literature of the *ius commune* see C. Mouly, "Le droit peut-il favoriser l'intégration européenne?" (1985) 37 R.I.D.C. 895 (with references).

[12]For the early English literature see, most recently, J.H. Baker, "English Law and the Renaissance" (1985) 44 C.L.J. 46 at 51-53 and 56-58 (also pointing out the phenomenon of judicial *indecisions* in England, a refusal to decide in the absence of persuasive authority); A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 48 U. Chi. L. Rev. 632, 634, 635 and 641-51 (also noting the importance of collections of maxims of the law).

A common language such as Latin may provide further foundations for intellectual alliance. Reception in such a case is simply the record of successful search for persuasive authority, adherence to that which was sought and in some measure found. There are other consequences, however, of such an open-ended and tolerant view of the sources of law. In the first place, such a view recognizes that there may be no allegedly rational source of law which is persuasive, or, to put it another way, that there is no reason for departing from that which already exists. This view of law is therefore tolerant of local custom as well as of ancient, and perhaps foreign, literature. The existence of a *ius commune* rooted in theoretical literature is thus entirely compatible with the existence of local custom, expressive of local particularity in a clear, unambiguous fashion. The law of Continental Europe prior to the codifications was composed of countless local sets of custom, supplemented to greater or lesser degree by the universal learning.[13] The common law of England, itself tolerant of local particularity, could set aside the universal learning in sufficient measure to constitute itself as a separate tradition, though Equity, the *lex mercatoria* and the law of admiralty remained suppletive sources of academic and Continental origin. Reception as alliance is therefore not an extreme phenomenon. There is no enforced uniformity and there may indeed be no uniformity. There is, however, an ongoing commitment to better ideas, wherever they may be found.

A further consequence of this view of law is that its most concrete expression is found in the act of judgment. There is no single, binding source of law and the law in a given case is that which is decided to be the law, for that case. The law of that case is, however, nothing more than that, and it has already been noted that both in England and on the Continent there was great laxity (from a contemporary perspective) in the deciding and reporting of cases.[14] The act of judgment was a necessary evil, perhaps incapable of definitive justification, and to be avoided if at all possible. The right of action emerged with great difficulty (in England only in the nineteenth century), legal representation was discouraged, the maintenance of litigation was sanctioned, and notions of lack of standing and mootness were implicit barriers to judgment. Given the lack of a single, binding source of law the role of the judge was inevitably important, but the judges did not purport to make law, any more than anyone else would purport to make

[13]Hence the most famous of Continental choice of law maxims, *Stadtrecht bricht Landrecht, Landrecht bricht Gemeinrecht* (city laws have priority over regional laws, regional laws have priority over the common law). For the tolerance of the reception in Scotland toward local custom see J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge: Cambridge University Press, 1957) at 88-89.

[14]See above, text accompanying note 12.

law, and it was radically contrary to this view of law to seek any expansion of the judicial role.[15] Ideally, rationality would become evident to all, and law as enforcement would wither away.[16]

2. In North America

Reception of Roman law occurred in the absence of national or state barriers and was an informal process. Reception of the common law and of other European laws occurred later, at a time of emergent state structures, and the process of reception was more complex and more formal. Later receptions share, however, the essential characteristics of the reception of Roman law. They represent expressions of loyalty to a political ideal and to an external source of law perceived as rational.

Reception of French law in New France was in itself a complex phenomenon. In the early period of "diversity", settlers adhered to the law they knew, frequently the customary law of their region of origin in France. We know, for example, that Champlain's will was drawn in 1635 in a form recognized by the Custom of Saintonge, his region of origin in the south of France. A system of personality of laws proved no more satisfactory in the New World, however, than in the Old, and from the mid-seventeenth century there were major efforts being made towards unification. Three separate phenomena are evident in this process of creating a *ius commune* of New France, the territory of which covered much of North America. The first is the choice of a single French customary law to regulate proprietary relations in the colony. Now, customary law is not usually chosen, in an explicit sense; it is rather said to develop, in a fashion indigenous to the group to which it will apply. There were, however, many groups in New France and explicit choice was necessary amongst competing customs. The choice eventually fell upon the Custom of Paris, itself applicable in a very large part of the territory of France, and noteworthy for having been cast in written form on two occasions, in 1510 and 1580, in an attempt to improve its formulation. As early as 1640 the Custom of Paris was being used for concessions of land on the island of Montreal; by 1664, when its introduction was formalized by Royal Edict "*pour éviter la diversité*", there appears to have been little resistance in principle. What was chosen, and acceded to, was the most

[15]The general acceptance of this view of law rendered any separation of powers superfluous, since even the Crown would seek external, rational solutions in the administration of justice. The independence of the judiciary emerges with the notion of a law-*making* power, to which a law-*applying* power, the executive, is subservient. The disinterested search for justice then becomes the exclusive domain of the Bench.

[16]For the repugnant character of litigation in the Roman, Chinese and early common law traditions, see R. David, *Le droit comparé: Droits d'hier, droits de demain* (Paris: Economica, 1982) at 90-91.

developed set of rules in property matters known to the French population. There is a rationality of customs as well as of doctrine[17] and adherence to the Custom of Paris was not only an act of alliance with France, it was an act of recognition of the persuasive authority of those particular customary rules.

The second phenomenon is the use of other sources of French and Roman law to supplement the received custom. Customary law was incomplete. In ecclesiastical, commercial and procedural matters other sources were required and here, as in France, the ancient, written learning came to prevail in whatever form it could be made available in the New World. There appears to be little doubt that the Royal Ordonnances of the seventeenth and early eighteenth centuries in matters of procedure, commerce, maritime law, gifts and wills were applied in the New World, even absent proof in all cases of formal adoption by local authorities.[18] Alliance with France was once again demonstrated, as well as approval and admiration of French legal thought, whatever its formal manner of expression.

The third phenomenon in the reception of French law in New France also has its parallel in the process of reception in Europe. In neither case was reception complete, in the sense of received law obliterating local particularity. In New France, as in Old France, law was received only if there was reason for doing so, and law considered for reception in the colony was scrutinized and adapted where it was considered necessary. Approximately one-tenth of the articles of the Custom of Paris were expressly altered in the period 1664-1760,[19] the *Code Louis* of civil procedure was received only after modifications were made to accommodate local circumstance,[20] the law of marriage was altered to facilitate celebration[21] and other "traits originaux"[22] emerged over time. The *ius commune* of New France was thus a deliberate adherence to as much as possible of the *ius commune* of Old France, but the process of adaptation was a constant and necessary one, whatever the degree of uniformity sought to be achieved. External, persuasive authority does not always persuade. The decision to adhere to it is as capable of detailed and explicit justification as the decision not to adhere to it. The extent of the reception is a function of the extent of loyalty to

---

[17]See C. Levi-Strauss, *La pensée sauvage* (Paris: Plon, 1962).

[18]See J.-G. Castel, *The Civil Law System of the Province of Quebec* (Toronto: Butterworths, 1962) at 18.

[19]See A. Morel, *Histoire du droit* (Montréal: Librairie de l'Université de Montréal, 1974) at 46.

[20]See Castel, *supra*, note 18 at 15.

[21]See J. Boucher, "L'acculturation juridique dans l'histoire du droit de la famille au Québec" (1967) 21 Rev. jur. et polit., indép. et coop. 174 at 178-81.

[22]R. Besnier, Book Review of *Justice et justiciables: La procédure civile à la prévôté de Québec, 1667-1759* by J.A. Dickinson (1983) 61 Rev. hist. dr. fr. et étr. 429 at 429.

the political ideal (here a continuing attachment to the metropolitain jurisdiction of France) and the extent to which the external authority effectively persuades. The colonial period is not simple because it is colonial, and neither the passage of time, nor the relative paucity of the record, nor contemporary nationalism should be allowed to blunt our appreciation of it.

With the arrival of the English the potential sources of Quebec law became even more diverse. The second half of the eighteenth century is a remarkable period in North American legal history, since for decades there was sustained and informed (though at times bitter) public debate as to the sources of law. Political loyalties in the colony of Quebec were divided and there was intense, comparative discussion as to the intrinsic merits of particular fields of English or French law.[23] What was known as "English" or "French" law was of course itself a mix of varying sources, yet the national traditions had emerged with sufficient clarity to attract loyalty, in a time of emerging nationalisms. There were many anomalies, not the least of which was the struggle of English-speaking merchants to introduce "English" commercial law, perhaps the least "English" of all fields of the common law.[24] As in England and France, the result of the process in Quebec was a mix of sources. Imposition of English law in its entirety was manifestly unacceptable to the population; a more discriminating "fusion of horizons" was required. Quebec is today known as a "mixed" jurisdiction, in the sense that the civil and common law are in constant contact with one another. Yet this concept of a "mixed" or impure jurisdiction is a very recent concept,[25] for reasons which will be seen, and the mixture of sources which occurred in Quebec in the eighteenth century was in the tradition of both civil and common law alliances to persuasive external authority.

Reception of English law into the common law colonies of British North America was also a complex process, since there were differences from col-

---

[23]See, *e.g.*, the comparisons of English, classical Roman, vulgar Roman and French customary law relating to freedom of willing noted in A. Morel, "Un exemple de contact entre deux systèmes juridiques: le droit successoral du Québec" (1963-64) Ann. U. de Poitiers, Nouv. sér. 1; and for the debate on the respective merits of French and English criminal law, see A. Morel, "La réception du droit criminel anglais au Québec (1760-1892)" (1978) 13 R.J.T. 449; J.L.J. Edwards, "The Advent of English (Not French) Criminal Law and Procedure into Canada — A Close Call in 1774" (1984) 26 Crim. L.Q. 464.

[24]For the derivation of the Statute of Frauds from the Ordinance of Moulins of 1566 see E. Rabel, "The Statute of Frauds and Comparative Legal History" (1947) 63 L.Q.R. 174, and for further use of the *lex mercatoria* in the seventeenth and eighteenth centuries, continuing thereby a tradition dating from prior to the Conquest, see below, text accompanying note 42.

[25]See in particular M. Tancelin, "Contributions du Québec à la recherche des causes du déclin ou de l'éclipse du *jus commune*" (1983) 207 Il Foro Italiano 3.

ony to colony, and since statutory rules of reception were frequently enacted.[26] We see once again, however, the main features of reception as alliance. Most evident is the political loyalty of the small groups of settlers to an external, political ideal — here the British Crown and Empire. This loyalty, it should be recalled, was not simply a vague sense of warmth to distant tradition. In many cases it was an act of great political courage, accomplished through agonizing debate, violence, and physical uprooting. North America of the eighteenth century was no place for the timorous, and hard choices had to be made. There is little to indicate that loyalty was the way of facility.[27] In addition to political loyalty, however, it is also evident that English law was revered as an ideal law. Murdoch in Nova Scotia wrote his *Epitome of the Laws of Nova Scotia* "in humble imitation of the Commentaries of Blackstone"[28] and in the pattern of reception in principle of all English law, whether statute or common law, there is a global appreciation of the worth of English legal thought.

The fervour of Loyalist commitment did not eliminate, however, other characteristics of reception as alliance. Reception of the English common law yielded to local statute, as the clearest evidence of local particularity. Local statutes also generally prevailed over English statutes, since English statute law was received only as it existed on a given date of reception and only Imperial legislation made expressly applicable to a colony prevailed over local enactment.[29] Both English statute law and English common law, moreover, were received where it was "suitable" to do so, and the "suitability" requirement is the most evident sign of the ongoing phenomenon of evaluation of individual external laws in the reception process.[30] Reception in common law Canada, as in Europe and New France, was not accomplished through binding, uniform law. It was accomplished through tolerant persuasion, and the authority which persuaded left much room for local particularity. Once the non-binding character of reception is perceived,

---

[26]For the process in each jurisdiction see J.E. Cote, "The Reception of English Law" (1977) 15 Alta L. Rev. 29.

[27]For the ongoing choice of law debate in nineteenth-century Upper Canada see D.H. Flaherty, "Writing Canadian Legal History: An Introduction" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 1 (Toronto: University of Toronto Press, 1981) 3 at 24.

[28]B. Murdoch, *Epitome of the Laws of Nova Scotia*, vol. 1 (Halifax: Joseph Howe, 1832) at v.

[29]See gencrally W.R. Jackett, "Foundations of Canadian Law in History and Theory" in O.E. Lang, ed., *Contemporary Problems of Public Law in Canada* (Toronto: University of Toronto Press, 1968) 3 at 10-11; T.G. Barnes, "'As Near as May be Agreeable to the Laws of this Kingdom': Legal Birthright and Legal Baggage at Chebucto, 1749" (1984) 8 Dal. L.J. 1 at 6-14 (emphasizing also the particularity of each colonial experience).

[30]The "suitability" of English statutes is the object of litigation even in Ontario, which omitted the common law requirement of "suitability" from its reception legislation.

it is possible as well to perceive the highly original character of all legal decisions in the reception process. Choice is necessary between an idealized form of law and its rules on the one hand (and most would today recognize some latitude in this field of choice) and on the other hand the constraints and even norms of local, familiar existence. It is a further indication of the contemporary influence of binding law, and nationalism, that many writers have considered the work of colonial legal authorities in pejorative terms. Words such as "derivative" and "slavish" have been employed, usually by those seeking a different form of alliance, though more recent and informed statements appear to begin to restore the balance.[31]

A final remark may be made by way of comparison between early Continental receptions by way of alliance and those of the seventeenth through nineteenth centuries in North America. On the Continent the commitment to a universal, rational source of law necessarily implied a measure of reticence in the legal process. Since the law was there, it was not to be made, and since human expressions of law were at best tentative, there was no justification for expansion of the judicial process. As will be seen, this attitude prevailed as well in much of North America and continues to prevail, but there was the further circumstance, of context, that life in the early North American colonies required very little by way of formal, articulated law. In the early years the major challenge was of survival and conditions of social life thereafter were often far from complex. In New France conciliation and equity were dominant in dispute resolution until the eighteenth century;[32] in the colony of Nova Scotia in 1749 the first court beyond the governor and council was composed of lay judges.[33] In such circumstances one does not spend valuable time inventing new law; any law will do, and frequently none at all.

B. Reception as Construction

Receptions in the early periods of European and North American society have thus frequently been by way of alliance, through commitment both to external sources of law and to overarching political institutions. It

[31]See, *e.g.*, D.G. Bell, Book Review of *Law in a Colonial Society: The Nova Scotia Experience* by P.B. Waite, S. Oxner & T. Barnes, eds (1985) 34 U.N.B. L.J. 179 (the "infinitely complex issue" of reception of English law in Nova Scotia); W.G. Morrow, "An Historical Examination of Alberta's Legal System — The First Seventy-Five Years" (1981) 19 Alta L. Rev. 148 at 151-52 (on the ingenuity of introducing divorce into twentieth-century Alberta through reliance on a mid-nineteenth-century English statute); D. Howes, "Property, God and Nature in the Thought of Sir John Beverley Robinson" (1985) 30 McGill L.J. 365 at 370-71 (on the creativity of denying oneself "creative power" in the actual disposition of cases).

[32]See E.F. Surveyer, "La procédure civile au Canada jusqu'à 1679" in *Canadian Historical Association Annual Report, 1932* (Ottawa: F.A. Acland, 1932) 29 at 35.

[33]See Barnes, *supra*, note 29 at 22.

is perfectly conceivable, however, that foreign law be received in the absence of any spirit of alliance simply because it is perceived by the receiving group as useful or desirable. Here the process of reception is more discriminating and particularized and it is perhaps more accurate to speak of "borrowing" of particular foreign laws than of reception in general. This process will appear familiar to contemporary readers, accustomed to praise of the virtues of comparative law in the law reform process and to exhortations to remain critically receptive towards foreign experience. This type of reception is more likely to occur in the absence of overarching political institutions, since the political dimension of reception as alliance will then be absent, and it is the case that this form of reception has occurred principally since the emergence of the Nation State and the decline of larger forms of political structure. Reception as construction also implies, however, a significant shift in the underlying view of law, since there is here no commitment to idealized forms of law and their original sources, but rather a present will to choose amongst foreign models of law for constructive purposes. The reasons for this shift will be examined later, since they have consequences much greater for the process of continuation of law than for that of its reception. It is first necessary to examine, however, how persuasive authority has been used in the process of reception as construction.

1. In Europe

The most visible examples of reception as construction are the European codifications of the nineteenth century, notably those of France and Germany, as a result of which, in the language of Professor Carbonnier, Roman law in particular fields was "decanted" into national receptacles and lost its identity as Roman law.[34] The codification movement, which eventually triumphed completely on the Continent, was opposed most vigorously by Savigny, in the name of what is known today as historical jurisprudence, that is, the need for law to evolve naturally as an expression of popular will, free of artificial legislative intervention.[35] Savigny's preferred source of law, however, was not indigenous custom, but the Roman law which had been received in Germany as a *ius commune* and which he sought to present as

[34]J. Carbonnier, "Usus hodiernus pandectarum" in R. Graveson *et al.*, eds, *Festschrift für Imre Zajtay* (Tübingen: J.C.B. Mohr, 1982) 107 at 110. For the mix of sources of the Napoleonic Code see G. Marty, "Les apports du droit comparé au droit civil" in *Livre du centenaire de la Société de législation comparée* (Paris: L.G.D.J., 1969) 91 at 92.

[35]F.K. von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* [1814], reprint (Hildesheim: Georg Olms Verlagsbuchhandlung, 1967). Savigny viciously criticized the French codification and it is quite probable that his opposition in turn provoked the initiatives of Bentham in favour of the codification movement. On the nineteenth-century debate see D.R. Kelley, *Historians and the Law in Post-Revolutionary France* (Princeton, N.J.: Princeton University Press, 1984) c. 6 ("The German Impulse").

a living expression of German law, hence the title of his major work, *The System of Contemporary Roman Law.*[36] Savigny's universalism failed to carry the day, however, in the nineteenth century, and the constructive borrowing which typified the codification process became widely used in other fields of law as national legislators, drawing support from the new science of comparative legislation, ransacked foreign statute books in their efforts to provide definitive solutions.[37] Legislation was not the only instrument of constructive reception, however, and both judges, as in eighteenth-century Italy,[38] and treatise writers, as in seventeenth-century France,[39] incorporated foreign models into their construction of domestic case law and national doctrine.

In England, in spite of the efforts of Bentham, constructive reception through legislation was of less importance. England resisted not only the codification movement but in considerable measure the entire pressure for legislative reform of the law, and the nineteenth century saw precedent emerge as a scientifically acceptable competitor to legislation, as a formal source of law.[40] The acceptance of judicial decisions as a source of national, positive law opened the possibility of definitive incorporation of foreign models of law into English law, through judicial fiat, in particular fields. Blackstone partially prepared the way for this, in writing his constructive commentaries on the national law of England through the means of Roman legal classifications,[41] which thereby became recognized in English law. The most significant constructive reception occurred in the field of private law, as English judges and writers regularly incorporated Roman and French learning into the English law of contract, restitution and property. This process began at least with Holt in the eighteenth century, if not earlier, and

---

[36]F.K. von Savigny, *System des heutigen Römischen Rechts*, 8 vols [1840-56], reprint (Aalen, Germany: Scientia Verlag und Antiquariat Kurt Schilling, 1975).

[37]For borrowing by France of English, German and Swedish institutions see M. Ancel, *Utilité et méthodes du droit comparé* (Neuchâtel: Ides et Calendes, 1971) at 61; R. Rodière, "Le renouvellement du droit commercial français par le droit comparé" in *Livre du centenaire de la Société de législation comparée, supra*, note 34, 109 at 111-17; Marty, *supra*, note 34 at 100-3.

[38]See generally G. Gorla, *Diritto comparato e diritto commune europeo* (Milan: Giuffrè, 1981) at 543-617.

[39]For the influence of the Roman model even on the institutions of the French state, notably in administrative law and through the influence of doctrinal writers, see J.-L. Mestre, *Introduction historique au droit administratif français* (Paris: Presses Universitaires de France, 1985) at 160-61.

[40]For the emergence of the notion of precedent in English law, see J.P. Dawson, *The Oracles of the Law* (Ann Arbor: University of Michigan Law School, 1968) at 80-99.

[41]See J.W. Cairns, "Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State" (1984) 4 Oxford J. Legal Stud. 318, notably at 350-51.

reached its culmination with the treatise writers of the nineteenth century.[42] The result was law of unquestionably mixed origins, but which presented itself to the world as English law. The law received no longer existed as persuasive authority in English law; it *was* English law. Neither political nor intellectual alliance to the outside world remained.

2. In North America

The phenomenon of reception as construction is most evident in North America in the law of the United States and occurred both with respect to the common law of England and the civil law. We know the common law was received in the United States, though the extent of reception prior to the Revolution is largely a matter of speculation. The manner of reception was different, however, from that which occurred later in the northern British colonies, since it was widely recognized that the colonies later to form the United States were inhabited by European settlers at the time of British acquisition, with the result that English law was not automatically received, but had to be explicitly introduced.[43] The reverse was held to be the case in what is now common law Canada, whatever the historical accuracy of such a position, with the result that reception in the latter case occurred as a matter of principle and absent legislative decree. Reception statutes in British North America thus stated the common law; reception statutes in the United States themselves effected reception, and it is symptomatic of the difference in perspective that there was much repeal and re-enactment of English legislation in the United States,[44] while to the north English legislation once introduced continued to exist as received English law. The notion of suitability thus was a test for exclusion of English law in Canada, a test for adoption of it in the United States.[45] Nor was English case law

[42]See, for examples of judicial borrowing in England in the eighteenth and nineteenth centuries, notably from Pothier, F.A. Anglin, "Some Differences Between the Law of Quebec and the Law as Administered in the Other Provinces of Canada" (1923) 1 Can. Bar Rev. 33 at 33-36; and for the influence of nineteenth-century treatise writers, A.W.B. Simpson, "Innovation in Nineteenth Century Contract Law" (1975) 91 L.Q.R. 247. For restitution, see P. Birks, "English and Roman Learning in *Moses* v. *Macferlan*" (1984) 37 Curr. Leg. Problems 1; P. Birks & G. McLeod, "The Implied Contract Theory of Quasi-Contract: Civilian Opinion Current in the Century before Blackstone" (1986) 6 Oxford J. Legal Stud. 46; in matters of property see B. Rudden, "Comparative Law in England" in W.E. Butler & V.N. Kudriavtsev, eds, *Comparative Law and Legal Systems: Historical and Socio-Legal Perspectives* (New York: Oceana, 1985) 79 at 81-83. Plucknett informs us, however, of a "Reception" of Italian mercantile law as early as the fifteenth century and that Coke sought to "capture" (the process is one of constructive reception) mercantile law for the common lawyers: see Plucknett, *supra*, note 7 at 663.

[43]See E.G. Brown, *British Statutes in American Law 1776-1836* (Ann Arbor: University of Michigan Law School, 1964) at 12-22.

[44]*Ibid.* at 24-41.

[45]In particular, for the efforts of Jefferson to use those parts of English law suitable to local circumstances in revising the laws of Virginia, see *ibid.* at 36-37.

received in the United States on a different footing from English legislation; where its use was not prohibited, as in the colonies of New Jersey, Kentucky and Pennsylvania for brief periods in the early nineteenth century, it was received in function of its utility and rapidly declined in importance with the multiplication of local reports.[46]

Since English law was received in the United States in function of its utility, it was entirely appropriate for United States lawyers to canvass other foreign laws as potential models in the process of constructive reception. French and Roman law were ideal candidates in this process because of their prestige and breadth, and they provided useful counterweights to an English law, perhaps too familiar. The influence of the civil law in nineteenth century America is today not widely known, but it is richly documented and manifested itself both in everyday practice before the courts and in the writing of major treatises such as those of Story and Kent.[47] The influence of the civil law appears to have peaked in the period 1820-1830; thereafter the use of civilian persuasive authority declined. The process of constructive reception, in the United States as in Europe, thus allowed new bindings to be installed on old works.

Reception, of whatever kind, was therefore common to the jurisdictions of the western legal traditions. There has been no *tabula rasa* in the creation of national legal traditions. We have since lost sight in some measure, however, both of the commonality of the reception process and of the common elements of law in the process. How this has occurred is the story of the continuation of law.

II. The Continuation of Law

To the extent that persuasive authority continues to attract allegiance following reception it is possible to conclude that the reception has been by way of alliance and that law continues to be understood as an ongoing enquiry with no possible source of law being formally excluded. To the extent, however, that reception marks the end of the use of persuasive authority and its replacement by binding law, it is possible to conclude that the reception has been a constructive one and that law is thereafter under-

[46]*Ibid.* at 41.

[47]For bibliographies, see Arminjon, Nolde & Wolff, *supra*, note 2 at 59; D.R. Coquillette, "Legal Ideology and Incorporation I: The English Civilian Writers, 1523-1607" (1981) 61 B.U.L. Rev. 1 at 5; *adde* P. Stein, "The Attraction of the Civil Law in Post-Revolutionary America" (1966) 52 Va. L. Rev. 403; W.H. Bryson, "The Use of Roman Law in Virginia Courts" (1984) 28 Am.J. Leg. Hist. 135; M.H. Hoeflich, "Roman and Civil Law in American Legal Education and Research Prior to 1930: A Preliminary Survey" (1984) U. Ill. L. Rev. 719; M. Hoeflich, "John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer" (1985) 29 Am.J. Leg. Hist. 36; and for civilian influence on U.S. codification, R. Batiza, "Sources of the Field of Civil Code: The Civil Law Influences on a Common Law Code" (1986) 60 Tul. L. Rev. 799.

stood as a purely domestic or national response to problems of social order. It is therefore necessary to consider the continuation of law either in terms of law as national response or law as enquiry.

A. Law as National Response

Reception as construction occurred through three centuries, the seventeenth through the nineteenth, as a result both of a decline in overarching political institutions and of a shift in the underlying view of law, a shift away from universal and idealized statements of law and towards present construction of law, through reception or otherwise. Reception as construction is thus but a part of a much larger phenomenon, and it is normal that the process which led to reception as construction should also play a role in the continuation of law, following reception. It is impossible to describe adequately all of the forces at work in this process, but major ones can be identified, both within and without the legal order.

Lawyers, first of all, had become accustomed to working with written texts and the "rage for order" manifested itself over the centuries in efforts to improve the texts, a phenomenon which occurred, as has been seen, even with respect to customary law.[48] Texts constantly improved, over centuries, become points of departure for human reflection. They are taken as given, and into the ancient process of questioning is thus introduced a new stability, a reason for greater confidence in the search for justice. It appears possible to deduce from a given; formal, present reasoning will guarantee the result, within the given cadre. The tendency of the profession to thus accept its own learning as a point of departure was reinforced by wider intellectual currents. Philosophical idealism and philosophical nominalism gained currency and the old ideal of a harmonious, objective universe which human society could emulate, through constant reflection, was seriously challenged. Old texts can be taken as given, since there is no proof of anything beyond the texts. They represent the present *summum* of human rationality and may be taken as a base in the further elaboration of human norms. In sixteenth-century France, Cujas taught the particularity of Roman law; its relation to the society from which it grew, while seeking to establish new and rationalist foundations of law, in part derived from Roman teaching. It became accepted that law was made in the past, in particular times and places by particular people, and better law can therefore be made in the future, building on past and foreign experience. The new, human rationality is therefore linked to the idea of particularity; the rationally inspired law of the future will be the best law for the time and the place, and the jetti-

[48]See above, text accompanying note 17.

soning of the external, universal order thus confers respectability on the idea of deliberately making law which is local in character.

These large currents of opinion coincide with more specific legal developments. On the Continent the courts have been open to litigants for centuries, with no necessity for a royal writ of authorization, and lawyers have ceased to think procedurally, of how to proceed fairly towards a decision which itself may be ultimately unjustifiable, in favour of thinking in terms of substantive law, of how to justify a decision which litigants are considered to have a right to obtain. Substantive law is implemented through the notion of subjective rights, and people have to be told, with precision and authority, and in their own language, what it is they have as subjects of rights. In an age of science, lawyers have already begun to value precision over doubt and the way is open, as will be seen, for truly scientific statements of substantive law. English law, overturning the writ system in the nineteenth century, thus turned inevitably to existing statements of substantive law as a means of effecting its transition from procedural to substantive norms.

The Nation State is the natural forum for making local, substantive, precise law and is the ideal instrument for seeking to ensure compliance with it. The Nation State is thus essential to the contemporary concept of binding law. It is less evident, though equally true, that binding law is essential to the Nation State, since it is through the creation of uniform, national law that contemporary States in large measure define their existence. England owed its existence largely to the Channel and its common law initially was a very tolerant and suppletive one. Elsewhere more affirmative statements of national law were required, in the surge of nineteenth-century *Risorgimento* nationalism. Paradoxically, it is with national unifications of law that the unity of Western law is lost, but the process involved more than simply trading a larger unity for several smaller ones. The displaced *ius commune* was a suppletive one; it prevailed everywhere, in the measure permitted by local circumstance. The new, unified national laws were not suppletive; they were binding, and purported to obliterate local particularity. A larger unity tolerant of local diversity was thus replaced by competing unities, each intolerant of particularity. A common cause in the search for a higher reason was replaced by diverse and largely uncompromising statements of ultimate reason. Today there are pleas on the one hand for greater recognition of local particularity[49] and objections to efforts to

[49]See, *e.g.*, J.H. Merryman, "On the Convergence (and Divergence) of the Civil Law and Common Law" in M. Cappelletti, ed., *New Perspectives for a Common Law of Europe* (Florence: European University Institute, 1978) 195 at 214 and 231; and more generally K.D. McRae, "The Plural Society and the Western Political Tradition" (1979) 12 Can. J. Pol. Sc. 675 (arguing against unity enforced in the name of humanist rationality).

effect a further unification of law.[50] These statements are opposed, however, to only one form of uniformity of law, that which is uncompromising in the name of reason. A uniformity of law which compromises with local circumstance, which supplements rather than binds, does not call forth the same objections.

State law is necessarily binding law, however, because it serves the purpose of the State itself. A State may be seen to destroy itself in destroying its instruments of national control. Binding law is necessarily purposive law, in the sense that it serves a purpose, of binding, beyond that of simple dispute resolution and with the notion of binding law the notion of law itself has changed. There is no longer reticent use of law in the difficult task of justifying individual decisions; there is also a need for as much law as is necessary to ensure national unity and law is made by the State in order to effect this larger political purpose of demarcation. The mass of the law increases. Moreover, since law now serves the purpose of the State it comes to be controlled and authorized by the State and a formal and binding theory of the sources of law develops, excluding all but the State itself, and its officers, as sources of law. The exclusion of doctrine as a source of law dates from the nineteenth century; the antipathy to foreign sources of law follows automatically and in some cases was the object of formal, binding enactment.[51] The idea gains currency that the extent of borrowing of foreign authority is a simple function of the adequacy of local sources,[52] and that local sources *can* be adequate if enough law is produced suitable to local conditions. The process of making law is glorified, both by lawyers and by nationalists. Law becomes a matter of national pride, an intellectual ornament, a means of cultural influence.

The process of forging distinctive national laws is thus a shared process, with both common and distinctive elements. The common element is doctrinal writing, which confers great intellectual distinction on the law-making

[50]See, *e.g.*, J.W. Cairns, "Comparative Law, Unification and Scholarly Creation of a New *Ius Commune*" (1981) 32 Northern Ireland L.Q. 272 at 282. For present difficulties in the legislative unification of legal rules see R. David, *supra*, note 16 at 307, 321 and 322; P. Behrens, "Voraussetzungen und Grenzen der Rechtsfortbildung durch Rechtsvereinheitlichung" (1986) 50 RabelsZ 19; and for the particular problem of national delegations seeking to ensure the constructive reception of national rules in international uniform law, see C.W.A. Timmermans, "Die europäische Rechtsangleichung im Gesellschaftsrecht" (1984) 48 RabelsZ 1.

[51]See, *e.g.*, the prohibition of citation of foreign laws or authorities in the nineteenth-century Swiss Civil Codes of the Cantons of Vaud, Neuchâtel and Aargau, discussed in E. Huber, *System und Geschichte des Schweizerischen Privatrechtes*, vol. 1 (Basel: Detloff's, 1886) at 65.

[52]For an explicit statement in this sense see H.-W. Daig, "Zu Rechtsvergleichung und Methodenlehre im Europäischen Gemeinschaftsrecht", in *Festschrift für Konrad Zweigert* (Tübingen: Mohr, 1981) 395 at 399 (also warning of the danger to local structures posed by resort to "exogenous" concepts).

process and provides the structure and breadth essential to the concept of the completeness of national norms. Pothier and Domat are the major figures in eighteenth-century France, Puchta and Windscheid their counterparts in nineteenth-century Germany. In the common law world Story and Kent in the United States provide inspiration to others, while writers such as Pollock and Anson re-invigorate in some measure an English tradition long overshadowed by the work of the Bench. These writers are cosmopolitain, learned and confident. They take as given that which has gone before them;[53] they incorporate foreign models freely into their theoretical constructions; they write in terms of substantive, national law;[54] and the treatise of national law becomes a dominant form of literary, legal expression.[55] As procedure is to become the "handmaiden" of substantive law, however, so must the work of the writers be necessarily subservient to more formal, authorized sources of law, since the writers, lacking position in the hierarchy of the State, have no power to impose the law they create. They cannot bind and therefore must be excluded from the law-making process.[56]

The different nations then produce different sources of binding law. On the Continent the judiciary is weak, fragmented and, in the case of France, in disgrace. Judicial evolution is in any event too slow for nineteenth-century nation-building and the codifications multiply, to clarify the *ius commune*, but in national form. The *ancien droit* is abrogated; decisional law is denigrated; the French Court of Cassation refuses to hear of *cassation* for violation of Roman texts.[57] The exegetical school in France regards the Code as a monument, *un achèvement* of the rationalist process, worthy of its exclusive attention, and the commentaries and national treatises build once again on this new point of departure.[58] The notion becomes current that the richness of French texts and doctrine precludes resort to foreign law[59]

---

[53]Already Coke in the seventeenth century wrote *on* Littleton, and for the similar shift in method, away from questioning to deduction, on the Continent from the fifteenth century: see Mouly, *supra*, note 11, at 927-30. Professor Baker situates the crucial period in English legal history as that between 1490 and 1540: Baker, *supra*, note 12 at 46.

[54]Plucknett, *supra*, note 7 at 289, describes the treatise as "the triumph of substance over form", *i.e.*, subjective rights over procedure.

[55]See generally, on the "rise and fall" of the legal treatise, Simpson, *supra*, note 12; and for the development of Institutes as statements of national law, see Cairns, *supra*, note 41.

[56]See F. Gény, *Méthode d'interprêtation et sources en droit privé positif*, vol. 2 (Paris: L.G.D.J., 1919) at 54.

[57]See Carbonnier, *supra*, note 34 at 109-10.

[58]See generally P. Rémy, "Eloge de l'exégèse" (1982) 7 R.R.J. 254, reprinted in (1985) 1 Droits 115 [hereinafter cited to Droits] (distinguishing 20th-century scientific positivism from the rationalist tradition of the exegetical school). This movement did not lessen legal controversy within France iself, where the *chaos d'idées claires* continued unabated, but substantially reduced the number of permissible authorities used in legal and judicial practice.

[59]See the explicit statement to this effect in Marty, *supra*, note 34 at 104.

and French legal science, for the first time in its history, turns resolutely inwards to secular authority. In Germany the process is largely the same. The *Kommentar* is the preferred form of literature; it is recognized that there is no more *communis opinio doctorum*; constructive reception rarely occurs in the post-codification law-making process; and judicial references to foreign law are highly exceptional.[60] Roman law is, however, more widely known and taught than in France, as an historical phenomenon, and the exclusion of doctrine as a source of law does not prevent the citation of even contemporary writers as representative of dominant opinion (*herrschende Meinung*), on unresolved points of law. The doctrine cited, however, is national doctrine.

In the common law world legislative reform of the law and codification were the objects of vigorous debate in the seventeenth and nineteenth centuries. Coke, however, carried the day and his glorification of the common law both excluded comprehensive codification and largely eliminated residual pockets of civilian and Roman learning in the English legal system.[61] Case reporting became progressively more sophisticated as a source of human authority and its mass by the nineteenth century was adequate for the construction of a formal theory of binding precedent. Judges thus became formal sources of substantive, national law, and any lacunae or imperfections in the judicial process could be filled by national legislation. English authors could be cited, if dead,[62] and the function of the treatise writer, as on the Continent, became that of the fleshing out of the national law, given its authentic, national sources. Some authors, such as Dicey and Chalmers, did so in the form of codes, black-letter rules, and it has been said by a contemporary English legal historian that the aim of authors of standard English treatises is today "to avoid incursions into both history and other legal traditions", presenting English law as "capable of standing alone", while "only occasionally relievf ing] their insularity with references to other common law jurisdictions" and "hardly ever stepp[ing] outside the common law world"; in so doing "they conceal the historical origin of much of what

[60]For a recent statement of the German perspective see J. Kropholler, "Die Wissenschaft als Quelle der internationalen Rechtsvereinheitlichung" (1986) 85 ZVglRWiss at 143 and 145.

[61]See, for the decline of the English civilians, whose domain was largely that of Chancery and Admiralty, Coquillette, *supra*, note 47; and for the "rationalisation" of the Inns of Court, see Baker, *supra*, note 12. As to the incorporation of the law merchant, see J.H. Baker, "The Law Merchant and the Common Law Before 1700" (1979) 38 C.L.J. 295.

[62]On the rule, and its slow decline, see Lord Denning, "The Universities and Law Reform" (1949) 1 J. Soc. Pub. Teachers of Law 258; B. Laskin, *The British Tradition in Canadian Law* (London: Stevens & Sons, 1969) at 95. By the mid-1970's approximately one-tenth of English cases refer to doctrinal writing, but only one quarter of this is to living authors. See W. Gray, "To What Extent Are Judicial Decisions and Legal Writings Sources of Law?" in *Rapports généraux au IXe Congrès international de Droit comparé* (Bruxelles: Bruylant, 1977) 31 at 45. Cf. the Canadian position: see below, text accompanying notes 109 and 119.

they transmit as homespun law."[63] The national character of judicial decisions is, moreover, easily accepted by codified jurisdictions as a somewhat primitive version of their own law-making process.[64] The notion of a national legal tradition is thereby given a major identifying characteristic and "families" of law are defined largely in terms of legislative or judicial sources of national law, though there is continuing unease as to the accuracy of such a criterion of classification.

In the United States the process most closely paralleled that of England, but there were tendencies towards Continental models as well. Gilmore has described post-revolutionary United States lawyers as "convinced eighteenth-century rationalists" in the French tradition[65] and this commitment to the *mos gallicus* manifested itself in the constructive reception of French sources, in codification of some state laws, and in a much stricter form of precedent (using *per curiam* decisions) than that which prevailed in England. Whatever further measure of instrumentalism was present in the use of law by United States lawyers, law was thus an important instrument in the process of constructing a distinctive Nation State. The process occurred with remarkable speed; by the mid-nineteenth century, legal thinking in the United States tipped towards the deductive, as had French, German and English legal thinking before it. The post-1850 period is known in United States law as one of "formalism" in the sense that decisions were capable of justification through a formal process of reasoning from given, national (though largely borrowed) sources. As in Europe, United States legal science then becomes that of demonstrating the plenitude of local law, and even in his lifetime Story (who contributed largely to the process) complained of the emerging mass of United States law and of its "perpetually receding farther and farther from the common standard".[66] He recommended the "habits of generalization" but happily did not live to see the measure of rejection of his advice, as twentieth-century United States authors produced the "ultimate treatises" of national law, such as those of Williston,[67] Corbin[68]

[63]Simpson, *supra*, note 42 at 256-57. For earlier forms of nationalist legal historiography in England, linked to the concept of the primacy of the common law as derived from immemorial custom unaffected by foreign incorporations and even the Conquest (and thus a key conceptual instrument against Royal authority), see Pocock, *supra*, note 13, notably c. 5 (indicating the contribution of Spelman to appreciation of the mixed sources of English law).

[64]For case law being "as strongly national as legislation", see recently H.-J. Puttfarken, "Droit commun législatif und die Einheit der Profession: Eine ketzerishe Reflexion zur Rechtsvereinheitlichung" (1981) 45 RabelsZ 91 at 96.

[65]G. Gilmore, *The Ages of American Law* (New Haven: Yale University Press, 1977) at 10.

[66]J. Story, "Address to the Suffolk Bar" (1829) 1 Am. Jur. 1 at 13-14, cited in Stein, *supra*, note 47 at 416-17.

[67]S. Williston, *A Treatise on the Law of Contracts*, vols 1-18, 3d ed. by W.H.E. Jaeger (New York: Lawyer's Co-operative, 1957-78).

[68]A.L. Corbin, *Corbin on Contracts*, vols 1-8 (St. Paul, Minn.: West, 1950-63).

and Scott,[69] enormous collections of particular, positive rules, authenticated by references to staggering quantities of reported, national decisions. *Corbin on Contracts* is subtitled as *A* Comprehensive *Treatise on the* Working *Rules of Contract Law* [emphasis added] but its 500-odd page table of cases is surpassed by that of Williston, which in its third edition lists the names of decisions for 1120 pages. "And so to judgment" is a forgotten phrase. A French theory of law is joined to an English judicial model and hundreds of thousands of United States law students are introduced to the science of discovering the *creativity* of the judicial process, through intense and exegetical examination of national decisions. A century later, their resistance to the process is but a part of the larger problems being encountered by the notion of law as national response.

By the second half of the twentieth century the notion of law as national response had yielded an enormous mass of particular rules. While nineteenth-century codifications had sought the most universal forms of expression (hence their exportability) and their principal purpose was that of national unification, the newer rules were infused with detailed and varying purposes, and the notion of the goal or purpose of law became current. Jhering wrote *Der Zweck im Recht* in 1877[70] and crystallized an intellectual drift which began with Cujas' discovery of the particularity of law and led, through Montesquieu, to increasing fascination with the detail of its particularity, with possible relations between the richness of social life and the nature of norms produced in a particular society. The combination of heightened empirical awareness with an accepted ability to rationally make law thus led to an increase in the use of law. From the given of established norms, new norms could re-direct social activity in increasing particularity according to the will of the maker of the norm, and the new empirical sciences could both predict the need for new forms of regulation and reflect the efficacy of that which already existed. The new mass of law thus reflects the varying and detailed purposes of successive, national makers of law in a manner apparently particular to each society. Law has lost not only its reticence but its breadth, and with the realization of the subjectivity and particularity of the new law comes its fall from grace, in certain jurisdictions at least. Enormous energies are spent demonstrating the evident, that the act of judgment, the act of giving life to law, is an individual decision and that the multiplication of rules in itself cannot control the act of decision cannot effectively bind. The forms of national reaction are well known and are listed in the first paragraph of this paper. Curiously, however, the de-

[69]A.W. Scott, *The Law of Trusts*, vols 1-6, 3d ed. (Boston: Little, Brown, 1967).

[70]R. Jhering, *Law as a Means to an End*, Modern Legal Philosophy Series, vol. 5, trans. I. Husik (Boston: Boston Book, 1913).

constructionist movement does not result in a call for less law, but for more. In a massive and contradictory *fuite en avant*, those in disagreement with current decisions castigate the process as "mechanical" and call for greater awareness of social "reality" and still greater particularity in the utterance of national norms. The solution to law which cannot control social conduct[71] is more law; above all law which conforms to the purposes of reformers and which reaches to the particular effects they seek.

Again, the national reactions to law as national response take different forms, but they all share in the process of demonstrating the inadequacy of existing sources of law while calling for more law, and more particular law. In some cases severe counter-reactions are provoked. On the Continent the early movements of deconstruction (*Freirecht, libre recherche scientifique*) were followed initially by an increase in commitment to the legislative text, and the formalism of the mid-twentieth century recalled that of the nineteenth. Today, however, resignation has set in, and expressions of the twilight of comprehensive legislation multiply.[72] For some, the necessary consequence is a return to judge-made law and the role of the Continental judiciary is today in ascendance.[73] The judiciary is associated with the earlier *ius commune* as a suppletive and tolerant means of realisation of law. Nostalgia is here dangerous, however, since the Continental judiciary is not what it was from the twelfth to the fourteenth centuries and the notion of judicial law-making is today as widely accepted as that of legislative law-making. Indeed, it is within the Continental judiciary that the movement of revolt against legislative forms of law and in favour of a newer, enlarged and more particular form of law has taken its most evident form. Many Continental judges now explicitly seek to use their judicial office as a means of restructuring society and their organizations call for an enlarged judicial role (both on the Bench and in public debate) and an enlarged perspective on law and society.[74] More making of law is urged, of a more particular kind, as a means of implementing the purposes of those calling for more law. Doctrinal writing would have its role to play in this process and already an "enlarged" commentary on the German Civil Code is being produced,

---

[71]"Realism" is the accepted term for this view, when what is meant is scepticism, and by no means the "realism" of the philosophical tradition.

[72]See, *e.g.*, Mouly, *supra*, note 11 at 936 on "the failure of legislative organization of society"; Puttfarken, *supra*, note 64 at 97 on the "wavering" character of contemporary legislation in West Germany; and the articles in (1986) 4 Droits, devoted to the subject *crises dans le droit*.

[73]See Mouly, *ibid.* at 936; Puttfarken, *ibid.* at 97; and more generally A. Pouille, *Le pouvoir judiciaire et les tribunaux* (Paris: Masson, 1985); J. Esser, *Grundsatz und Norm in der Richterlichen Fortbildung des Privatrechts* (Tübingen: Mohr, 1956).

[74]See generally G.F. Mancini, "Politics and the Judges — The European Perspective" (1980) 43 Mod. L. Rev. 1; and for reaction within the judiciary itself, see H.P. Glenn, "Limitations on Judicial Freedom of Speech in West Germany and Switzerland" (1985) 34 I.C.L.Q. 159.

though the authors acknowledge with refreshing candour that the identification of social tendencies and social consequences will not reduce the difficulty of the decision-making process.[75] The resurgence of a movement for the unification of European law is a further indication of disenchantment with national oracles of law, though there is doubt as to whether a new European legislative unity is either desirable or possible.[76] In France an eloquent plea has been made for the contemporary use of Roman law — "Oh! une réception discrète, mesurée — nous avons déjà tant de textes. ... Plutôt des gorgées de droit prises de temps en temps, selon la soif, à l'antique fontaine."[77]

In the common law world it is the national, law-making judiciary which is the principal target of deconstruction. The politics of the judiciary is a general theme in the United Kingdom[78] and in the United States, where the institutional security of the English judge is married to the constructivism of the French rationalists, the combination is said to represent "the arrogation of unlimited power by the judges".[79] Again, there is some transfer of affection amongst formal sources of law and legislation is urged by many as a scientific and legitimate alternative to traditional case law, usually without regard to its current effectiveness abroad.[80] Reaction to national law is thus most severe in the United States, where confidence in both judicial and legislative sources has led to more law than can ever be read, let alone known. The plethora of law, and its evident subjectivity and relativity, then leads to more severe reactions than the simple scepticism of the early twentieth century. Since it is impossible to know all the law being made,[81] and since in any event new law is merely a statement of purpose by a present member of the State hierarchy, which cannot bind, there is no real impediment to seeking to make law oneself, in the sense of statements of personal purpose in legal form in a particular field of endeavour in which some expertise may be claimed. The style of legal education contributes to this process, as the multiplicity of positive sources leads to more and more detailed study of them in narrower and narrower fields of activity. The (relatively) modest task of producing "ultimate treatises" of national law is

[75]R. Wassermann, ed., *Reihe Alternativkommentare: Kommentar zum Bürgerlichen Gesetzbuch*, vol. 2 (Neuwied: Verlag Luchterhand, 1980) at vii.

[76]See generally Mouly, *supra*, note 11; H. Kötz, "Rechtsvereinheitlichung — Nutzen, Kosten, Methoden, Ziele" (1986) 50 RabelsZ 1.

[77]Carbonnier, *supra*, note 34 at 107.

[78]J.A. Griffith, *The Politics of the Judiciary*, 2d ed. (London: Fontana, 1981).

[79]Gilmore, *supra*, note 65 at 35. The United States Supreme Court is, however, presently reducing its visibility and blurring the significance of its decisions.

[80]Remarkably, even the process of choice of law has recently become the object of much legislative intervention in the United Kingdom.

[81]The growth of legal research firms to assist *lawyers* in finding the law is the best indication of the extent of this problem.

largely abandoned, in favour of more vigorous personal statements, usually in law reviews.[82] It has been said that legal writers in the United States have therefore become largely preoccupied with giving "an account of what is happening amongst themselves"[83] and accusations of narcissism, personal bias and self-interest are now common coin in United States legal discourse, to the regret of those who look to United States law as a model. This national implosion is similar to others, however, in that the scepticism towards existing law is not so much productive of a call for less law (though this also occurs) as of a larger movement in favour of more law; this is again the law of the reformers and in the particular detail they favour in the field they have come to know. The fascination with law affects even those dedicated to its elimination and "enlarged" doctrine emerges in United States legal academic thought as the means of implementing detailed projects of personal reform, as it has amongst the European judiciary.

These national reactions to national law, however, represent more than the personal sensibilities of increasingly vocal academics. On the Continent they affect in the most immediate fashion the functioning of tribunals, as the engaged judiciary is itself challenged by litigants, state officials and other members of the judiciary. In all the States of national law, moreover, law itself as a collective and objective enterprise comes to be challenged and threatened. In the language of Professor Berman: "It is impossible not to sense the social disintegration, the breakdown of communities that has taken place ... . What has this to do with law? A great deal."[84] This sense of the decline of law is not, however, universal, since the continuation of law is not limited to law in the form of national response. The notion of law as enquiry presents a continuing, and even dominant, though largely unproclaimed, alternative.

B. Law as Enquiry

Outside the jurisdictions which have contributed most affirmatively to the Western legal tradition there has been less confidence in the notion of law as national response. To be more precise, there has been less confidence

[82]On the multiplication of specialized law reviews as an indication of decline in fundamental legal thought, see C. Atias, *Epistémologie juridique* (Paris: Presses universitaires de France, 1985) at 71.

[83]C. Stone, "From a Language Perspective" (1981) 90 Yale L.J. 1149 at 1151; and for U.S. legal academics declining in utility since they "write primarily for other academics", R. Cramton, "Laws unto Themselves" *Times Literary Supplement* (22 November 1985) 1329 at 1330; for self-conscious footnoting of indebtedness to colleagues as an effort towards visibility in a crowded field, see A. Hunt, "The Theory of Critical Legal Studies" (1986) 6 Oxford J. Legal Stud. 1 at 2.

[84]H.J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983) at vi.

in national response as law, and this hesitation as to the adequacy of local sources is seen in continuing loyalty to overarching political structures, or to the memory of them, and in adherence to foreign models of law idealized as rational. As Roman law was thus revered in Europe, so have Roman, French, German, English and American law come to be revered in much of the rest of the world and come to represent ongoing sources of law in other States. The law of these other States is thus not composed exclusively of binding State law and the use of extranational persuasive authority is, as has been said,[85] indicative of freedom in the choice of law on the part of legal officers. To the extent that the law used by these officers is not definitely made and imposed upon them but is rather chosen by them in an ongoing process, the underlying notion of law is that of enquiry. There is never a closing of sources, never a declaration of satisfaction with existing knowledge, never a pure process of deduction from a single given, never an entire commitment to an exclusive paradigm of law. In general, there is also less assurance as to the role of law and the ongoing commitment to external sources is therefore accompanied by a certain reticence as to the extension of legislative or judicial jurisdiction. The remainder of this paper will set out the Canadian experience with the notion of law as enquiry, as a means of continuation of law, but it is important to emphasize how widespread this view of law is in the contemporary world. Thus there is much practical use of English law in the Commonwealth, of United States law in countries with similar constitutions, of French or German law in countries with derived codifications, and the list could be lengthened. There are directions of loyalty, but the fundamental characteristic of the phenomenon is the openness to even a single extranational source. Of course there is much contemporary nationalism and there are many calls for original, national jurisprudence (for purposes of political demarcation), but the practice of much of the world of law is to remain continuingly receptive (and not once and "critically" receptive) to extranational legal experience. Where loyalty to a single, foreign source is taxed as derivative, moreover, it is frequently done in order to effect a change in alliance (as from English to French law, or English to American law). Here, as in the process of reception itself, accusations of the derivative or unoriginal character of reliance on foreign models neglect the wider field of choice which such models present and the original character of all realisations of law.[86]

It should also be noted that the concept of law as enquiry was the dominant concept of law in all jurisdictions of the Western legal tradition until the constructive receptions of the seventeenth through nineteenth centuries. The English common law developed as an island in the Romanist

[85]See the introduction to this article.

[86]See above, text accompanying note 31.

sea, as a local and customary exception to the universal learning, but it has co-existed with Continental forms of law (in Chancery, Admiralty and commercial law) for much of its existence. The customary laws of France and Germany did not displace Roman law until the nineteenth and twentieth-century codifications. Receptions in these jurisdictions were thus in large measure ongoing receptions; the continuation of law was through enquiry amongst the range of domestic and allied sources. This was so because it was not thought that law could be made; since it could not be made it could not be made complete; and domestic law could never be taken as entirely occupying the range of choice. Law as enquiry is thus the dominant concept, both in space and in time, in the continuation of Western law.

In the contemporary world the notion of law as enquiry has had to accommodate the existence of the State and the utterance of norms by officers of the State. It is in the nature of persuasive authority, however, to tolerate assertions of local particularity. This has been seen in discussing the reception of Roman law in Europe.[87] Contemporary State law is thus entirely compatible with the notions of persuasive authority and law as enquiry, in the sense that State law is taken as displacing but never entirely eliminating extranational sources. National, positive law is the equivalent of the local custom of an earlier era and takes its place within an existing field of persuasive authority. Law thus precedes the State and continues to surround it.

In Canada the continuation of law, following reception, has been marked by continuing political loyalty to England and France and by a newer North American loyalty to the United States. Loyalties to England and France persisted after the acquisition of independence by Canada in the early twentieth century; loyalty to the United States has developed largely since that time. Political loyalties have been accompanied by appreciation and admiration of English, French and American legal thought and the essential elements of reception as alliance have thus been equally present in the continuation of law. The Canadian Nation State thus emerged slowly and the slow construction of its "vertical mosaic" has not eliminated an "internal point of view" on the part of its citizens which is accommodating to extranational institutions. There has never been a formal "adoption" of contemporary English, French or American law in Canada; each of them is simply there. They are not seen as radically "foreign" laws; they represent living law which may be useful in the practical process of dispute resolution. There have, however, been discernible differences in attitude towards persuasive authority in the last two centuries of Canadian legal history.

[87]See above, text accompanying note 13.

The nineteenth century in Canada was one of openness to foreign models of law and the natural affinity of Canadian lawyers to look to the law of a metropolitan jurisdiction, in a spirit of alliance, was reinforced by views then current of constructive borrowing. France had borrowed in its codification; England and the United States had embarked upon a major process of incorporation of civil law into their national systems of precedent; there was a flow of translations of major works across the boundaries of legal "families". In Nova Scotia, Murdoch praised the utility of American and Roman law in ameliorating local institutions;[88] in what is now Ontario a certain flamboyance of judicial style became evident ("We are about to define the position of multitudes by whom a country is being peopled");[89] and law libraries provided an eclectic range of common and civil law authority.[90] In the colony of Lower Canada the mix of sources was even greater[91] and de Tocqueville, arriving from the newly unified Nation State of France, now totally engrossed in its own legislative texts, expressed dismay at the mixture of language and traditions in the court practice of Quebec.[92] In the Supreme Court of Canada, newly-created in 1875, United States cases numbered ten to twenty-five per cent of those cited to the Court[93] and the Court displayed clear tendencies towards imposition of a rationally inspired, uniform Canadian law, in large measure borrowed from abroad. With the adoption of the *Civil Code of Lower Canada* in 1866 and the formal enunciation by the Supreme Court of the binding character upon itself of its own decisions in 1909,[94] the instruments of formal positivism were put in place. This was the time for closing the door to persuasive authority and the building of complete, distinctive and unifying sets of local law. As England, France and the United States had terminated their constructive receptions

[88]See B. Murdoch, *supra*, note 28 at 6, 16-17 and 35. See also B. Murdoch, "An Essay on the Origin and Sources of the Law of Nova Scotia: Read on Saturday 29 August, 1863" (1984) 8(3) Dal. L.J. 187 at 191.

[89]See R.C.B. Risk, "Sir William R. Meredith C.J.O.: The Search for Authority" (1983) 7 Dal. L.J. 713 at 724, citing Chancellor Blake in *O'Keefe* v. *Taylor* (1851), 2 Grant's Ch. 95.

[90]See G.B. Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 Law & Hist. Rev. 1.

[91]J.E.C. Brierley, "Quebec's Civil Law Codification: Viewed and Reviewed" (1968) 14 McGill L.J. 521.

[92]See A. de Tocqueville, *Oeuvres complètes: Voyages en Sicile et aux États Unis*, t. 5, vol. 1, 2d ed. by J.-P. Mayer (Paris: Gallimard, 1957) at 212-13. The tradition of central imposition of uniformity in the name of reason is also evident in matters of language and de Tocqueville found that the resident *avocats* "manquent particulièrement de distinction parlant français avec l'accent normand des classes moyennes".

[93]J.M. MacIntyre, "The Use of American Cases in Canadian Courts" (1966) U.B.C. L. Rev. 478 at 486: "certainly there was no hesitation in citing them, and their parentage was not considered important."

[94]*Stuart* v. *Bank of Montreal* (1909), 41 S.C.R. 516, aff'd for different reasons (1910), [1911] A.C. 120, 80 L.J.P.C. 75 (P.C.).The rule has been abandoned since the 1970's, paralleling similar developments in the United Kingdom.

and turned to the detailed elaboration of national, binding law, so could other jurisdictions complete the process of nation-building through law, isolating themselves from extranational sources which would dilute the image of law as a distinctive product of the Nation State.

Since the last years of the nineteenth century there has thus been considerable sentiment in Canada in favour of the concept of national, binding law. This could be said to be a highly derivative phenomenon, but the decision to be as original as others is probably as capable of individual justification as the decision not to be as original as others. Whatever the ultimate in originality, the use of law for national purposes was vigorously urged, nowhere more so than in Quebec, where a culturally distinct population was often said to require a distinctive law as a means of cultural demarcation and even cultural survival. This sentiment had contributed in some measure to the codification process itself in Quebec, but became more vigorous in the twentieth century. It was said that "[c]'est par sa façon d'exprimer le Droit qu'une nation manifeste en partie son originalité",[95] and a more contemporary visitor from France has praised, with superb disdain for the entire history of Quebec law, the "originalité et pureté qui sont des pièces maîtresses de la civilisation juridique du Canada d'expression et de pensée françaises."[96] The political sentiment in favour of eulisting law in support of cultural particularity has manifested itself clearly in Quebec legislative activity and in studied indifference to feeble efforts towards Canadian legislative uniformity.[97] The claims of Quebec nationalism on law have thus been most evident, as elsewhere, in legislation, but they have manifested themselves as well in antagonism towards those foreign sources, here of the common law, which are judged incompatible with civilian tradition.

The same general statement may be made, though with somewhat less force, of the effect of nationalist thought on law in the Canadian common law provinces. Horace Read argued in the 1950's for "Canadian judges developing Canadian law to meet Canadian needs",[98] and this insistence on particularity inspired both legislative activity and hostility to (selected) foreign sources. Read was arguing against the use of English precedent, but a decline in the use of other foreign sources had already occurred. Resistance

[95]A. Perrault, *Pour la défense de nos lois françaises* (Montréal: Action française, 1919) at 8.

[96]P. Azard, "Le problème des sources du droit civil dans la province de Québec" (1966) 44 Can. Bar Rev. 417 at 418. See also P. Azard, "Le Droit Québécois, pièce maîtresse de la civilisation canadienne française" (1963) 5 C. de D. 7.

[97]A distinguished Quebec jurist has thus remarked laconically that "l'uniformisation du droit n'est pas un mal en soi", reflecting the universal ambivalence, if not hostility, to still wider forms of uniformity imposed in a binding fashion in the name of reason: A. Mayrand, "Le droit comparé et la pensée juridique canadienne" (1957) 17 R. du B. 1 at 2.

[98]H. Read, "The Judicial Process in Common Law Canada" (1959) 37 Can. Bar Rev. 265 at 268.

to the citation of United States case law had in some cases been explicitly stated by the judiciary[99] and nineteenth-century use of civil law authorities largely disappeared, even for constructive purposes. The particularity of provincial legislation became an increasing source of conflicts of laws and there was as little enthusiasm in common law Canada as elsewhere for imposed legislative uniformity.[100] Even where there was borrowing of uniform United States legislation a process of constructive reception occurred, with domestic "improvement" in each province of the foreign model, and uniform foreign law became distinctive and diverse domestic law.[101] There was, in short, some confidence in the ability to make as much law as was necessary.

While nationalist legal thought was thus clearly present in twentieth-century Canada, there were major intellectual obstacles to its dominance. Diverse political loyalties continued to exist and while these were often sharply focussed on England or on France, or to a lesser but increasing extent on the United States, each of them was an external loyalty, a denial of the power of the domestic Nation State to command exclusive allegiance. In the case of loyalty to England there has been criticism by nationalists of a "colonial" mentality, since contemporary attitudes could be seen as a continuation of abandoned colonial structures, but the intellectual *démarche* is the same here as in cases of loyalty to France or the United States, where formal colonial structures are largely forgotten or have never existed. Such nations are not perceived as "foreign"; there is rather a sharing in their intellectual tradition and a commitment to that tradition, as there was a sharing in and commitment to the intellectual legal tradition of Rome. This sense of personal sharing in the experience of others is more dangerous to constructive and exclusive nation-building than a diffused universalism; it provides a specific object of external loyalty, an obvious illustration of the mixed character of national construction, and a means of integrating foreign law into daily legal practice.

---

[99]See the judgment of Ritchie J. in *R.* v. *Miller* (1976), [1977] 2 S.C.R. 680 at 706, 63 D.L.R. (3d) 193, 31 C.C.C. (2d) 177; see also MacIntyre, *supra*, note 93; Note, "The Use of American Legal Literature" (1943) 21 Can. Bar Rev. 57 at 57, commenting on "a prejudice, commencing in the law schools and extending to the courtroom, against the use of American authorities and texts."

[100]On the failure of Canadian efforts towards provincial legislative uniformity, see E.E. Palmer, "Federalism and Uniformity of Laws: The Canadian Experience" (1965) 30 Law and Contemp. Problems 250; R.C.C. Cuming, "Harmonization of Law in Canada: An Overview" in R.C.C. Cuming, co-ord., *Perspectives on the Harmonization of Law in Canada* (Toronto: University of Toronto Press, 1985) 1 at 35.

[101]J.S. Ziegel & R.C.C. Cuming, "The Modernization of Canadian Personal Property Security Law" (1981) 31 U.T.L.J. 249 at 251.

In legal matters there were more precise obstacles to the construction of a purely national law. In Quebec the codification process did not purport to be complete and the *Civil Code* itself did not command exclusive attention, as did the Napoleonic Code. The *ancien droit* was not entirely abrogated, but only in cases of duplication or inconsistency with the *Civil Code*, which could therefore be supplemented by other sources of law.[102] Nor were judicial decisions prohibited as a source of law, and it has been observed that "the codification of the Quebec laws seems rather like a half-measure, typical of compromise",[103] though such a codification is perhaps more representative of the codification process in general than that accomplished through radical elimination of other sources of law, as occurred in France.[104] In common law Canada a similar indication of the necessarily incomplete character of local law existed in the "declaratory theory" of the common law, acted upon explicitly or implicitly by judges of the common law throughout most of its history. The declaratory theory teaches that judges do not make law but only declare pre-existing law, here a transnational common law the content of which may be derived from decisions of the courts of any common law jurisdiction. The difficulty of identifying a fixed source of such a pre-existing law, outside of the judiciary itself, resulted in ridicule being heaped upon this theory in an age of national legal construction, binding precedent and radical scientific positivism, particularly in jurisdictions fully committed to the national law-making process. In common law Canada, however, the notion of binding precedent had to maintain a precarious coexistence with the declaratory theory, said in 1968 to be "the theory of our system of law" and reformulated to mean more simply that the "common law is a developing system in the sense that there is a continuing process of development and exposition of rules."[105] Seen in this light the declaratory theory is simply a denial of the existence of a single, binding source of law and the assertion of an ongoing process of enquiry in which the most persuasive authority is sought, regardless of its origin, for the resolution of a given case. It is a warning not to take single institutions, or authors, too seriously. They are called upon to decide cases or enact norms or give opinions, but the search for law is too important for any potential external source to be eliminated *a priori*. The law is never definitively given; it is always to be sought, in the endlessly original process of resolution of individual disputes through law. In France, after two centuries of inspired and

---

[102]Art. 2712 *C.C.L.C.*

[103]M.A. Tancelin, "Introduction" in F.P. Walton, *The Scope and Interpretation of the Civil Code of Lower Canada*, new ed. by M.A. Tancelin (Toronto: Butterworth, 1980) 1 at 27.

[104]The Swiss Civil Code, designed to achieve national uniformity, nevertheless provided for the opting out of many of its provisions on the part of particular cantons.

[105]Jackett, *supra*, note 29 at 29.

brilliant legislation, voluminous beyond description, the declaratory theory of law is receiving renewed attention. It has recently been stated: "Le droit est variable et diffus. Il est donc une matière à découvrir et non pas à créer."[106]

In Quebec the view that domestic law is necessarily incomplete has led to reliance on French law in matters of private law, on the common law (from England, Canada and the United States) in matters of public law and some (contested) use of sources outside their own "family", as where the common law is used in private law matters (reversing the pattern of the use of civil law in common law jurisdictions in the nineteenth century). It has been observed, correctly it is felt, that this is done because the judge "se sent beaucoup plus sûr de lui, ayant comme appui la continuité jurisprudentielle étrangère plutôt que ses seules propres ressources d'exégèse du texte",[107] echoing Professor Coing's statement that the development of law in Europe was characterized by a process of interpretation of the *ius commune* rather than by pursuit of original constructions.[108] A recent study[109] of citation patterns in Quebec courts thus indicated the following use of domestic and foreign sources, listed in order of frequency of citation: Quebec decisions (129 citations), French authors (117),[110] common law decisions, with no indication of country of origin (79), Quebec authors (29), French decisions (25) and common law authors (13). Approximately sixty percent of citations are therefore to non-indigenous sources, and there is clear appreciation of the merits of civilian academic writing and common law judicial opinions. While there is sometimes fierce controversy as to the merits

[106]C. Mouly, "La doctrine, source d'unification internationale du droit" (1986) 38 R.I.D.C. 351 at 364; and see J.-M. Varaut, "Le droit commun de l'Europe" Gaz. Pal., 19-20 September 1986, Doct.9: "le droit est antérieur à la règle de droit et la déborde de partout"; C. Atias, "Une crise de légitimité seconde" (1986) 4 Droits 21 at 32: "le droit n'est pas une construction mais une réalité à découvrir"; and more generally see the work of M. Villey, notably *Philosophie du droit: Définitions et fins du droit*, vol. 3, 3d ed. (Paris: Dalloz, 1982) and *Leçons d'histoire de la philosophie du droit*, 2d ed. (Paris: Dalloz, 1962).

[107]J.-L. Baudouin, "Le Code civil québécois: crise de croissance ou crise de vieillesse" (1966) 44 Can. Bar Rev. 391 at 406.

[108]H. Coing, *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol. 1 (Munich: C.H. Beck'sche Verlagsbuchhandlung, 1973) at v.

[109]P.-G. Jobin, "Les réactions de la doctrine à la création du droit civil québécois par les juges: les débuts d'une affaire de famille" (1980) 21 C. de D. 257 at 270.

[110]These authors are frequently those of the nineteenth century exegetical school, concerned with elaboration of the purportedly universal significance of the Napoleonic Code, and less frequently modern French authors who have immersed themselves in more partieular and positive expressions of French law. On the decline of the exegetical authors in France and their continuing citation in Quebec, compare Rémy, *supra*, note 58 at 255 and Tancelin, *supra*, note 103 at 15.

of particular sources in relation to individual questions,[111] the relatively free exchange of persuasive authority has not led to radical uniformity or the elimination of an autonomous body of Quebec law. One of the staunchest defenders of the autonomy of Quebec civil law, Mr Justice Mignault, was able to conclude at the end of his career in 1938 that "[i]l n'y a pas eu immixtion ou absorption de l'un au profit de l'autre [système]",[112] and similar sentiments have been expressed recently.[113]

In common law Canada, adherence to a declaratory theory of law produced a continuing reception of English and Commonwealth case law, and the decline of scientific positivism in the second half of the twentieth century has seen a reopening towards other foreign sources. The commitment to English law has been so strong as to be expressed in terms of obligation,[114] though it is evident, as in the process of reception, that there is a constant process of screening and evaluation.[115] A widely used introductory textbook to law justifies these phenomena on the ground that it is "closer to the truth to regard the law as a continuing process of attempting to solve the problems of a changing society, than as a set of rules ...".[116] The refusal to accept local decisions as definitive has prevented any real notion of distinctive provincial case law from developing, while ensuring interprovincial circulation of decisional law. The main beneficiary of the reopening in favour of a wider range of foreign sources has been United States law, accessible in terms of language, concepts and publishing patterns, and the recent adoption in Canada of a charter of rights has already resulted in increased use of United

[111]See, *e.g.*, P.-A. Crépeau, "La responsabilité civile de l'établissement hospitalier en droit civil canadien" (1981) 26 McGill L.J. 673 at 694-95, on the question of whether a plaintiff may opt for a delictual cause of action in spite of a pre-existing contractual relation with the defendant, relying on French sources in preference to those of other civil law jurisdictions and the common law, as being more compatible with the structure of Quebec codification, largely that of the Napoleonic Code.

[112]P.B. Mignault, "Les rapports entre le droit civil et la 'common law' au Canada, spécialement dans la province de Québec" in *Introduction à l'étude du droit comparé: Recueil d'études en l'honneur d'Edouard Lambert*, vol. 2 (Paris: Librairie de la Société Anonyme du Recueil Sirey, 1938) 88 at 93.

[113]J.-L. Baudouin, "The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec" in J. Dainow, ed., *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* (Baton Rouge: Louisiana State University Press, 1974) 1 at 9; J.-L. Baudouin, "L'interprétation du Code civil québécois par la Cour suprême du Canada" (1975) 53 Can. Bar Rev. 715 at 736.

[114]See, *e.g.*, *R.* v. *Carrière* (1955), 17 W.W.R. 317, 113 C.C.C. 11 (B.C.S.C.) (British Columbia judge "constrained" to follow post-reception U.K. case law).

[115]For instances of rejection of U.K. case law, see Read, *supra*, note 98 at 277-78 and 289, and for a more recent judicial statement of the danger of excessive reliance on English judgments see *Yepremiam* v. *Scarborough General Hospital* (1980) 28 O.R. (2d) 494 at 515, 110 D.L.R. (3d) 513 (C.A.).

[116]S.M. Waddams, *Introduction to the Study of Law* (Toronto: Carswell, 1979) at 5.

States decisions in constitutional law. Even prior to these constitutional changes, it had been said that a contemporary reception of United States law in common law Canada was underway, as generations of Canadian law teachers received graduate training in United States law schools and returned to teach that which they had come to most admire in United States law. A criticism of this reception has been voiced to the effect that it "often was not apparent to those who were responsible for it ... [and that it] has not been subjected up to date to any really critical examination and discussion",[117] and loyalty to United States law thus encounters, though less frequently, the same type of resistance as that earlier expressed by nationalist writers with regard to Canadian reliance on English law. There is less resistance, however, to use of a broad range of persuasive authority than to the exclusive reliance on the law of a single foreign country. That the process of enquiry is not necessarily limited to a given "family" of law was illustrated recently by a decision of the Ontario Court of Appeal, which referred to the laws of England, Australia, New Zealand, West Germany, Israel and Switzerland.[118]

The recent practice of the Supreme Court of Canada, increasingly a public law court, is also indicative of a reopening towards non-formal sources of law. From the late 1950's to the late 1970's references to doctrine and foreign law tripled in frequency in the judgments of the Court,[119] and in 1985 a formal rubric was added to the official Supreme Court Reports to indicate the specific doctrinal sources which had been cited. An analysis of a recent volume of the reports of the Court[120] indicated the following frequency of citation of doctrinal writing: Canadian authors (63), United Kingdom authors (29), United States authors (24), French authors (9), Australasian authors (7), other (2); while the frequency of citation of decisions was as follows: Canadian decisions (367), United Kingdom decisions (110), United States decisions (45), Australasian decisions (14), French decisions (2), other (4). The Court has therefore substantially broadened its frame of enquiry while embarking on the perilous task of judicial review of legislation.

---

[117]E. McWhinney, "New Frontiers in Jurisprudence in Canada" (1958) 10 J. Leg. Ed. 331 at 333-34.

[118]*R.* v. *Morgentaler* (1985), 52 O.R. (2d) 353, 22 D.L.R. (4th) 641, 48 C.R. (3d) 1; and see, for use of international human rights law in Canadian constitutional law, J. Woehrling, "Le rôle du droit comparé dans la jurisprndence des droits de la personne — Rapport canadien" in A. de Mestral *et al.*, eds, *The Limitation of Human Rights in Comparative Constitutional Law* (Cowansville, Qué.: Yvon Blais, 1986) 449 (with further references).

[119]See D. Casswell, "Doctrine and Foreign Law in the Supreme Court of Canada: A Quantitative Analysis" (1981) 2 Sup. Ct L. Rev. 435 at 442. This study excluded decisions of U.K. courts from its definition of "foreign" law. In the late 1970's the judgments of the Supreme Court referred to foreign law and doctrine approximately 1.5 times per judgment and textbooks counted for approximately one third of these references: *supra* at 442 and 445.

[120][1985] 1 S.C.R.

While law as national response has been closely linked to massive doctrinal statements of national law, either as a base for subsequent law-making by State institutions or as a means of elaborating State law, the notion of law as enquiry is largely incompatible with such a dominant role for national legal writing. Since external sources will continue to be used, there is no possibility of definitive, local works entirely occupying a field, no possibility of single doctrinal statements being taken as necessarily given in subsequent elaboration of law. Canadian doctrinal writing in its entirety has been modest in comparison with French, English, German or United States writing, as has been the doctrinal writing of the rest of the Western world. This relative modesty is certainly due in part to relatively fewer resources, but it is also due to the different perspective on law which prevails in Canada and elsewhere. One does not set out to write a definitive statement of law because definitive statements of law should not be written. This does not prevent doctrinal writing and high individual achievements are possible (Accursius and Bracton are known today), but there is an inherent check on the deliberate construction of monolithic works and monumental academic reputations. Since the judges do not presume to make law, neither should the academics, and both regard with necessary scepticism the increasing mass of legislation. Paradoxically, the citing of academic writing by courts can be therefore much freer than in jurisdictions where the academic contribution has been greater. Having established the foundations for formal State law, doctrine was excluded as a source of law in the nineteenth century in jurisdictions having espoused most radically the concept of law as national response. Where academic writing never undertook such a massive task, it never created the conditions of its own exclusion, and remains a working participant in the dialectical, ongoing process of enquiry. The treatise of national law has thus not occupied a major place in the history of Canadian law and while there have been occasional, vigorous statements in favour of distinctive, national doctrine and even enlarged and instrumentalist national doctrine, these have not received wide support in either the professional or legal academic community. Persuasive authority from abroad is always to be welcomed, and alliances are as essential for the continuation of law as for its reception.

Conclusion

The nationalization of law has made it vulnerable. Its sources become too close, too particular, too subjective. In seeking to bind it fails to persuade and resistance becomes easier to justify than adherence. Opponents to laws made by the State are excluded from the world of law and are driven to attack it. Multiplying the sources of law, however, means multiplying the sources of legal dialogue. Law is less precise but more communal and there are more possibilities of persuasion and adherence to law, and eventually

of eliminating it. Decisions are less conclusive, other sources may later prevail, and broader forms of agreement become possible, tolerant of differences now seen as minor and perhaps transient. The use of persuasive authority is thus essential to law itself and uniformity of law comes not through imposition but persuasion, in the daily world of legal practice. This was the first message of Gaius, in the *Institutes*, in stating that peoples are governed both by law which is particular to them and by law which is common to humanity.[121] In the measure that enquiry after universal law is abandoned, there is a danger of abandonment of law, and an urgent call has thus recently been made "to overcome ... the identification of all our law with national law and of all our legal history with national legal history."[122] Law is so challenged, however, only in those jurisdictions which have taken the risk of leading, and forming, the Western legal tradition. They have given law to the rest of the world, and it is only fitting that the rest of the world give law back to them, and that each give law back to the others.

---

[121]Inst. Gaius 1.1: *Ommes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum iure utuntur.*

[122]Berman, *supra*, note 84 at vi.