not for the mostly impoverished Chinese, goods are extremely cheap (Yuan being the currency - 5,22 Yuan = US $1 in August 1992). The Chinese people accept that the influence of Western (American) society will bring with it concomitant social problems experienced in the United States, for example, juvenile delinquency and a higher crime rate.

HUMAN RIGHTS

Human rights remain a fundamental problem in China. It is my belief, however, (shared by all the Americans with whom I spoke) that economic upliftment and improvement of human rights are but two sides of the same coin. I maintain that it is short-sighted on the part of the West (especially the United States) to make economic aid and technical assistance conditional upon the improvement of human rights. The latter will automatically follow when economic conditions improve. One may just hope that both will follow as soon as possible.

The certainty of the extraordinary

"We call it extraordinary, but in truth it is not an extraordinary storm which happens once in a century, or in fifty or twenty years; on the contrary it would be extraordinary if it did not happen. There is a French saying 'that there is nothing so certain as that which is unexpected'. In like manner, there is nothing so certain as that something extraordinary will happen now and then."

– Per Baron Bramwell in *Ruck v Williams* (1858) 3 H & N 308 at 308–19, 157 ER 488 at 493

There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."

– Lord Hardwicke quoted in Lord Denning *The Due Process of Law* (1980) 3

From codification to constitution: on the changes of paradigm in German legal history of the twentieth century*

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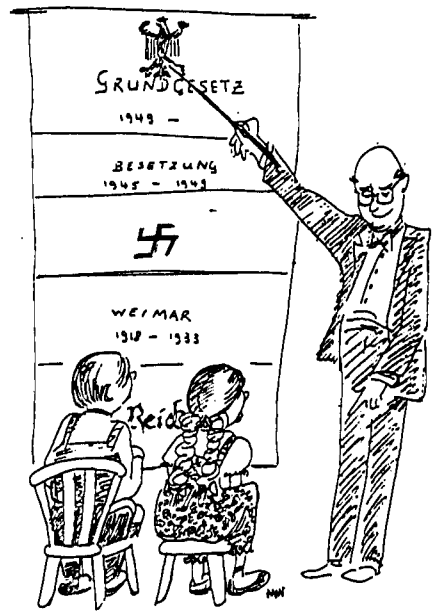

1 INTRODUCTION

This article consists of three parts. In the first part, I shall deal with the question of how the legal development in Germany since 1900 should be divided up into periods, examining this question from the point of view of the rule of law or idea of the *Rechtsstaat*. The second part is an attempt to explain what we mean by a legal paradigm or model or *Leitbild*; this part then will analyse the change of model in the Weimar Republic. The third part is concerned with the early Federal Republic and with a series of events which indicate how quickly and fundamentally the Bonn Constitution has become the model for the Federal Republic's legal system. In a brief final passage the question shall be raised whether European law, that is the law of the European Community, has or some day will have the function of *Leitbild*.

2 THE PERIODISATION OF GERMAN HISTORY AND THE IDEA OF LAW

The topic of discussion is the change of paradigm in German legal history of the twentieth century. In order to approach this topic we have to consider the general problem of how to divide legal history into periods, and in particular recent German legal history covering roughly the last 120 years, that is from 1870 to the present. A brief glance at the historical events that have taken place

* Paper read at the law faculty of the Unversity of South Africa on 1992–04–01.

during this time shows that we can divide these 120 years into very distinct periods. If we follow political history and its periodisation we arrive at five or six clear historical periods.

First, there is the empire from 1871 to 1918, covering almost fifty years. It was followed by the fifteen years of the Weimar Republic from 1918 to 1933, the twelve years of the Nazi era from 1933 to 1945, and the occupation from 1945 to 1949. After 1949 it is a matter not only of temporal but also of spatial differentiation since we have to take into account that after 1949 the legal development in the German Federal Republic and in the German Democratic Republic took entirely separate courses. It was only in 1990 that this separate development came to an end. Hence, we are dealing with six periods of German history since 1871.

It seems reasonable, then, for the legal historian to adopt this division from political history and apply it to his subject. However, this should not be a case of simply copying political historiography and political periodisation. The legal historian has rather to accentuate the specific content, the special principle which distinguishes legal history from general history. He has to bring out what is characteristic of legal history.

What characterises legal history and distinguishes it from all other history, of course, is the "idea of law". What would be more natural than to take the idea of law as a criterion in terms of which legal history is to be viewed? Curiously enough, no legal or constitutional historian, at least not in Germany, has yet examined the problem of the periodisation of legal history from the point of view of how near or how far a period has stood in relation to the idea of law. Of course, the idea of law is not a static phenomenon. Through the millennia and in different cultures it changes in shape and appearance. The idea of law may also go through various stages from general to specific. In some periods it may coincide with a general and diffuse idea of justice. In other periods it will relate to certain conditions and data, thus gaining more concrete, specific features. In the latter case, the idea of law may express itself as a definite concept. This is the case when we look at recent German history.

In the legal development since the eighteenth century we see the idea of law embodied in the concept of the *Rechtsstaat*. The concept of the *Rechtsstaat*, however, is not only an expression of the idea of law but it merges with another idea, the idea of state. It may be said that in the concept of the *Rechtsstaat* two ideas meet: on the one hand the concept of the "rule of law", which appeared in Europe in the seventeenth century as the opposite to the "rule of men", and on the other hand the concept of the state as an entity embracing the people who live in it and, at the same time, transcending them. In other words, the concept of the *Rechtsstaat* always involves the question of the relationship between state and law, a question which has not left us since the time Hegel unfolded the idea of State in the philosophy of history and of law. The concept of the *Rechtsstaat* has also, of course, gone through various changes; for our purpose, however, suffice it to say that the idea of the *Rechtsstaat* aims at orientating the state's actions towards norms and institutions which will protect the freedom of the state's citizens.

If we examine the periods and chapters of recent German history from the perspective of a *Rechtsstaat* concept, the fundamental differences become immediately clear, the wheat separates from the chaff, and the unavoidable breaks in the continuity of German history become obvious. From the perspective of the *Rechtsstaat*, the periods of recent history could not turn out to be more contrasting. We find periods during which the concept of the *Rechtsstaat* shone brightly, but there are also times when it was suppressed and extinguished, more particularly during the Nazi era. Rule of law was a touchstone first and foremost for the Nazi state. We need not go into further detail on how the Nazi regime and the Nazi jurists – (I mention only Carl Schmitt) – from the very beginning mocked the idea of the *Rechtsstaat*, how very soon the *Rechtsstaat's* protection of institutions and form was attacked, eroded and disintegrated, how any definition, without which the concept of the *Rechtsstaat* cannot survive, was completely at the mercy of the *Führer* and his *Partei* and bureaucratic apparatuses. Although there were some enclaves within the National Socialist state which adhered to the idea of law, these enclaves were vulnerable to political intervention at any time and therefore liable to be destroyed at any time. Nothing bearing the name of law was spared. The legal system was in part and as a whole at the mercy of informal and arbitrary cancellation and was valid only on an *ad hoc* and provisional basis. The logical consequence of the manifestations of the Nazi regime was that there was no longer any law, and there were no longer any legal principles or untouchable legal positions. Entirely different principles triumphed, namely the principle of power and that of political expediency. These principles of power and expediency actually formed the fundamental norm by which the Nazi regime and the Nazi system functioned. This fundamental norm also determined whether the older law was still valid or not. The older laws, the codifications of the nineteenth century, especially the *Bürgerliches Gesetzbuch* (*BGB*) of 1896 could only remain in force to the extent that they did not conflict with the purpose of power and to which their use was politically opportune. New regulations were enacted or older ones reinterpreted, whenever the so-called *völkische* conception of law demanded. From the point of view of the *Rechtsstaat* the twelve years of the Nazi era was a negative period, a period of nothingness, and it is only in this sense that we can treat this period as a chapter of German legal history. As a negative period it contrasts irreconcilably with the other periods which were committed to the concept of the *Rechtsstaat*: The Bismarck-Wilhelmian Empire, the Weimar Republic and the Bonn Republic. In other words, all continuity was destroyed by the conflict between rule of law and political expediency in the service of power. (We can give no further attention here to the years of occupation since they have not yet been examined closely enough from the aspect of rule of law; and as far as the legal development in the former German Democratic Republic is concerned we do not yet have the distance needed for an assessment.)

3 CODIFICATION AS LEGAL PARADIGM

Let us turn then to the positive periods in terms of the rule of law (by this we mean the periods which subjected themselves to the demands of the rule of law and thereby also to the idea of law). Only these periods deserve the legal historian's full commitment and perhaps also his care and affection. When we look at the development of the German legal system in the periods formed by the rule of law, following the great lines from the last third of the 19th century to the present, we may notice a significant difference in the fundamental orientation of our law, a crucial change of *Leitbild* or paradigm. This

change may be summarised in the formula of the change from codification to constitution.

What the paradigm contains in our case – what the fundamental orientation, the model of a legal system means – is best seen in the examples of the great legal systems outside Germany. Each of these systems has sources of law or strata of law by which it reorientates itself again and again and in which it finds its identity. Let us look first at English law. English law relies constantly upon the great tradition of common law, the tradition of a body of norms formed by judges over the centuries. It is symbolised by famous and charismatic judges, the most eminent being Edward Coke who defied the king and defended the sovereignty of the common law against the monarchy. Another example is the United States of America. In the United States the Federal Constitution of 1787-1791 and its amendments represent until today the incontestable document in which both federal and state law have their ultimate foothold. Yet another example is France: for the French the Declaration of Human and Civil Rights of 1789 and Napoleon's *Code civil* of 1804 signify the central elements of their legal system, central elements whose spirit never seems to age and which account for the remarkable spread of French law all over the world.

And the Germans? The Germans have tried many times and in different ways to give identity to their legal system. There were efforts made by philosophy of law, by jurisprudence and by constitutional law, but all of these efforts failed. As far as philosophy of law is concerned, we refer mainly to Hegel's philosophy of state and of law; for jurisprudence we have to mention Savigny's historical school; and in terms of constitutional law we think of the Frankfurt National Convention's draft for a constitution of 1849. Great though all these phenomena were in themselves, characteristic though they were for German legal development in the nineteenth century, none was able to establish an identity of the law for the Germans. Only later was an identity comparable with the other great legal systems we have just mentioned, moulded slowly and step by step, in the form of the codification drawn up in the last third of the nineteenth century.

Let us then consider this codification, and look at the flood of codes which reshaped almost every section of the German legal system. In this regard a beginning had already been made in the old German confederation with the *Allgemeines deutsches Handelsgesetzbuch* of 1861 which in contract law implemented the concept of economic liberalism. The second law, now already in the *Norddeutscher Bund*, was the Trade Ordinance of 1869, which was once described as the general proclamation of a free economic order. Then followed the Criminal Code, shaped by liberal views, proclaimed in 1870 and in 1871 transformed into a law of the just-founded empire. The *Reichsjustizgesetze* of 1877 may be called the peak of the manifestation of the concept of the *Rechtsstaat*, consisting of the Constitution of Courts Act, the Code of Criminal Procedure and the Code of Civil Procedure. Thus, a great *corpus* of laws had been created, but contemporaries still found it to be fragmentary. A uniform civil code was still missing.

The civil code was regarded as the core, the centrepiece of codification. What was the reason for this? The reason lay in certain circumstances of legal history and of politics. As far as the reasons inherent in legal history are concerned we have to remember that in Germany jurisprudence was still considered the decisive factor in shaping the law. Now, jurisprudence saw Roman law and the way it presented itself in the Digests, as the ideal model for a rational unfolding of law and as the emanation of the reason of law itself. The Digests, however, contained almost exclusively civil law, *bürgerliches Recht*. The second historical factor was the French *Code civil* of 1804, the reputation of which impressed and encouraged the German jurists and which also consisted of civil law.

As far as political reasons were concerned, the conviction that a civil code would be the missing centrepiece of codification had to do with the fate of German liberalism. Political liberalism in the nineteenth century had set itself two goals: the unification of Germany and a liberal constitution for the new empire. The first goal, unification, was achieved, but liberalism was not reflected in Bismarck's constitution. Thus, codification became a kind of compensation for the liberals: codification would bring about what the constitution did not. It is on this basis that the efforts to keep non-liberal thinking out of the new codes and especially out of the future *BGB* should be understood. In this regard, of course, the *BGB* was too late when it was proclaimed in 1896, since by then political and economic liberalism had already been on the wane for two decades. Nonetheless the *BGB* still remained a point of reference for some time towards which the legal system orientated itself. After all, the *BGB* reflected the idea of political unity and drew its legitimacy from it. Moreover, the *BGB* was formally a product of legislature, but materially, it remained a product of jurisprudence. Hence, it still fed on the great reputation of nineteenth century jurisprudence. But even if we take into account all these legitimising factors, it would only be a matter of time before the orientational function of the *BGB* and of the other codes ceased.

All in all, the codes embodied the liberal spirit, politically and economically. In the first decades of the new century, however, liberalism had to struggle for survival. The idea of individual self-determination and autonomy had already been blurred in the empire and became altogether distorted after the existential horrors of World War I. Even if liberalism was able to keep some ideas alive and integrate them into the Weimar Constitution of 1919, it was threatened by other great political forces. The function of the codification as a point of reference and identification was undermined. The moment for this function to end was approaching.

It is usually impossible to identify the transition from one paradigm or model to another with an exact moment in time. But, in our case, we are able to determine the exact moment when the role of codification as a point of reference ceased and a new model took its place. This replacement of one by the other occurred neither in legislation nor in legal doctrine: it happened within the practice of the *Reichsgericht*, the highest court in the field of private law at that time.

4 A CHANGE OF LEGAL PARADIGM: FROM CODIFICATION TO CONSTITUTION

Hence, we turn to the practice of the *Reichsgericht*.[1] In order to understand the decisions in which we can observe the reorientation, we have to look at the circumstances of this period – especially at the economic conditions that brought about the decisions. The second half of

1 Cf Nörr *Zwischen den Mühlsteinen* (1988) par 1 5; par 4 2; par 10.

the year 1923 saw the peak of inflation. Only one figure need to be mentioned to gain an idea of the economic impact of this inflation: the value of one US-dollar in Reichsmark. On the day before the currency reform in November 1923 one US-dollar was 4.2 billion Mark, an astronomical figure that defies imagination. Inflation always works for the debtor and against the creditor. However, the hyperinflation of 1923 was a catastrophe for creditors who had put their savings into saving accounts or invested them in bonds, mortgages and the like in order to finance their pensions with the interest. That was why this inflation led to considerable social tensions and political accusations. Particularly the middle classes who traditionally relied on private pension schemes were adversely affected. Quite naturally, the people turned to the legislator and demanded that their claims be revalorised (or at least that debtors be prohibited from paying back their debts as long as the currency problem was not resolved).

But the legislator did not act. The main reason for this was historical, dating back to the Great War and to Germany's way of financing this war. A war may be financed by taxation and by borrowing. While Great Britain, for example, used both these instruments to a similar extent, Germany had decided to rely almost exclusively on loans, that is loans from its own population. Therefore the *Reich* itself was the biggest debtor and was not interested in revalorising debts of any kind.

In this situation the victims of inflation pinned all their hopes on the courts. At first, the courts were hesitant because they wanted to respect the traditional separation of powers: problems of currency were those of parliament rather than of the courts. But in November 1923 the *Reichsgericht* threw caution to the winds and passed the famous decision on revalorisation[2] which is probably politically the most weighty decision in the 75-year-long history of the *Reichsgericht*.[3] The problem of inflation and revalorisation of claims including mortgages stems from the principle of nominalism which, as in other countries, was stated in currency legislation. Hence, the *Reichsgericht* faced the task of somehow cancelling the pertinent laws. It had to find a norm that would turn out to be stronger than the principle of nominalism in currency legislation. The norm was found in the code, more specifically in the regulation of paragraph 242 *BGB* according to which the debtor has to preserve good faith when he fulfils his obligation. The impact of this norm transcends the *BGB*; it belongs to the central norms of the code to which the whole legal system knows itself to be committed. The *Reichsgericht* argued that the mortgage-debtor violated the norm of good faith when he referred to the currency regulation because the legislature could not have envisaged such a sharp decline of currency when it enacted the currency laws. So, the *Reichsgericht* orientated its decision towards the codification: the codification's impact as a model on the entire legal system was still so strong that it could be employed to correct legislation itself even in a field such as currency legislation, which in modern economics is one of the classical domains of the legislator.

In its decision the *Reichsgericht* did not revalorise claims according to any fixed percentage but took into consideration the special circumstances of the individual case. It demanded that revalorisation should be effected from case to case, considering the interests of both parties. Despite this casuistic caution the government started to think about enacting a statute that would prohibit the courts from continuing to revalorise claims. When these deliberations became public they triggered off a remarkable and unique process in the history of the German judiciary. A club of judges at the *Reichsgericht* whose board included some very active judges, made a public announcement in the form of a petition to the government. The statement made in January 1924 by the judges denounced the statute as a *Machtspruch* of the legislator. The judges chose the word *Machtspruch* since it reminded one of the contrast between *Machtspruch* and *Rechtspruch* and hinted at intervention akin to that of an absolute monarch. To such a *Machtspruch*, the judges said, they would not submit. A statute prohibiting the courts from revalorising claims would be considered and dismissed either in accordance with the rule of good faith or according to the rule of good morals, (the latter being a second *Generalklausel* belonging to the pivotal norms of the *BGB* in paragraphs 138 and 826). In this statement the model of codification was still so influential that it could be set against the sovereign authority. Some judges of the highest court explicitly and publicly refused to obey enacted law any longer.

These judges had, however, gone too far. Above all, they had not bothered to consider whether their colleagues at the *Reichsgericht* agreed with their announcement to dismiss the proposed statute. The public announcement to dismiss the proposed statute were disavowed by judgments of the *Reichsgericht* in the very same month in a case in which the validity of a statute was in question. The lawyers of the one party had obviously made use of the judges' announcement and demanded of the *Reichsgericht* that the statute should be declared null and void because it violated good morals and good faith. But the *Senat* (a division of the court) dismissed this argument and declared that a judge had absolutely no authorisation to cancel a statute that had been enacted in due form simply on account of its contents.[4] The *Senat* could not have snubbed its colleagues of the judges' club more bluntly. Not long after this the full court confirmed this verdict[5] and it now became clear that the *Reichsgericht* was no longer willing to measure laws by the general clauses of the codification.

But the problem of revalorisation remained. In the following weeks the legislator abstained from enacting a ban on revalorisations: it decided rather to introduce a schematic revalorisation for certain claims. Mortgages were also included among such claims. Initially they were revalorised at a rate of 15% but later legislation set the rate at 25%. The creditors, however, were disappointed by the low rate and appealed against the legislation. The *Reichsgericht* was soon in a position to consider the appeals.[6] It took the standards for considering whether the statute was valid or not from the constitution. We need not

2 *RGZ* 107 78 (Vol 107 of the Decisions of the *Reichsgericht* 78).

3 It was also a decision that helped to overcome a deep crisis within the legal system. For if law allows a debtor – as in the case of mortgages – to provide himself with property of lasting value by using someone else's money and then allows the same debtor to pay back the credit in pieces of paper for which the creditor cannot even buy a slice of bread, then the law has lost its meaning as law. The *Reichsgericht* had to deal with just such a case of mortgage.

4 *RGZ* 107 317.

5 *RGZ* 107 325.

6 *RGZ* 107 370; *RGZ* 111 320.

quote the articles of the Weimar Constitution that the *Reichsgericht* referred to; for us it is crucial that the constitution and not the codification was used as the yardstick. The *Reichsgericht* emphasised the right of judicial review, that is, it emphasised the authority of the courts to examine whether laws were in accord with the constitution or not. Laws had to conform to the basic rights but no longer to the standards of the codification. Thus the *Reichsgericht* carried out the change in orientation. The old model of codification was replaced by the new model of constitution; the codification had to give way to the constitution: a step that could have led to a new identity for the entire legal system.

Thus we have seen that the beginning of the reorientation of the legal system can be fixed quite exactly in terms of time and subject matter. However, this only applies to the beginning: the decisions of the *Reichsgericht* do not constitute the whole legal system and the change to a new model does not happen overnight. Yet, the remaining years of the Weimar Republic were too short and troubled to extend the reorientation that had been initiated by the courts to the legal system as a whole. The great economic and political crisis that began in 1930 and three years later led to the Nazi regime also involved the constitution. During the Nazi regime the constitution was nothing but a piece of paper: in its contempt for all forms of the law the Nazi regime did not even consider it necessary to abolish the Weimar constitution formally.

5 CONSTITUTION AND THE BASIC LAW AS LEITBILD

The announcement of the Basic Law in 1949 can therefore be regarded as a completely new beginning as far as the constitution was concerned. Things were different, however, with regard to the codification which – at least as far as its outward shape was concerned – had survived the Nazi regime. The question whether the newly founded Bonn Republic would seek its legal identity in the codification or in the Basic Law could very well have re-emerged. This, however, was not to be, or in any case, not for very long. Within a few years the Basic Law became the point of reference for the Bonn legal system and in this function superseded the codification – for good, it seems.

This process can be gleaned from several phenomena; we may restrict ourselves to three. The first one leads to the question of hierarchy among the supreme courts of the Federal Republic. According to the Basic Law interpretation and development of the codification is entrusted to the High Court of Justice, the *Bundesgerichtshof* (*BGH*); the constitution is entrusted to the Constitutional Court, the *Bundesverfassungsgericht*. Thus, the jurisdiction of the two courts was separated. In 1951, parliament introduced a new legal remedy, the *Verfassungsbeschwerde* (constitutional complaint) against violations of basic rights. This new legal remedy broke down the boundary between the two jurisdictions because the acceptance of a constitutional complaint presupposed that the plaintiff had exhausted the regular stages of appeal in the courts of justice.[7] With this regulation appeal to the Constitutional Court became the highest of all stages of appeal, thereby superseding the one that served the codification. Even though the Constitutional Court only examines violations of basic rights, it is no longer equal but superior to the courts to which the codification was entrusted, including the *BGH*.

The second indication of the legal system's orientation towards the Basic Law leads us, one year later, to the question of the position and rank of the courts within the state's organisation.[8] Originally, *all* federal courts were assigned to the Ministry of Justice, that is, not only the High Court of Justice, the Federal Labour Court et cetera, but also the Constitutional Court. This was in accordance with the Parliamentary principle. The result of this, among others, was that the Constitutional Court did not have its own budget. This was harshly criticised by its members. The spokesman for the critics was Gerhard Leibholz, one of the most important German constitutional jurists of our century. Leibholz witnessed the elevation of the constitution in the Weimar Republic to which the Reichsgericht's jurisdiction gave rise. His own work on the principle of equality had supported this process. After 1933 he had to emigrate to England but he returned after the war. He wrote a report on behalf of the Constitutional Court in which he emphasised the difference in status between the Courts. The report was to become famous and turned out to be very effective; the Constitutional Court was elevated from being merely an institution within the administration of justice to a constitutional organ, an organ that held the same rank as the Federal Parliament, the Federal Government, et cetera. This change of the Constitutional Court's status also gave rise to the principle that interpretation of the codifications should always be subjected to interpretation of the constitution.

The third indication which reveals the orientation of the legal system towards the constitution leads us into substantive law. We mentioned the general clauses of the codification above, that is, the principle of good faith and good morals. We commented on their function as correctives. However, the general clauses also functioned as a pivotal instrument for the development of law. Whenever new facts emerged, the general clauses which by nature represent blank forms could be filled with new contents; hence, new norms could be developed by the courts. Of course, the question of the source from which the new norms should be taken, arose. One usually turned to the values of the codification and of the codes themselves to extract from them the standards for the development of law. In this respect a crucial change occurred. Certain constitutional jurists founded the doctrine that the general clauses are the link between the codification and the basic rights of the constitution.[9] The doctrine also holds that the relationship between individuals ought to be measured to a certain extent by the standards of the basic rights. Whereas, according to the traditional view, the basic rights only served to protect the citizen against the power of the state, now they also served to protect one citizen against the other. The Constitutional Court adopted this theory in 1958.[10] In this way, the constitution – through the general clauses of the codification – found its way into the codification itself, and right into its roots of growth at that.

In connection with this, the so-called objective order of values of the basic rights was developed as a principle that should extend over the whole legal

7 Par 90 (2) of the *Bundesverfassungsgerichtsgesetz*.

8 Cf Laufer *Verfassungsgerichtsbarkeit un politischer Prozeß* (1968).

9 So-called *Dritwirkung der Grundrechte*.

10 *BVerfGE* 7 198 (Vol 7 of the Decisions of the *Bundesverfassungsgericht* 198).

system. This re-definition went hand in hand with a monopolisation since all the standards were now taken from the Basic Law. However, the fact that the codification also contained fundamental normative criteria or elementary notions of order was hardly noticed any more. Thus, the way was blocked for a theory which would have linked the fundamental principles of our legal system not only to the basic rights but also to the foundational ideas of the codification.

6 EUROPEAN LAW AS LEITBILD

As a result we have to record that the change of orientation from codification to constitution seems to have taken place definitely and irreversibly. The Basic Law has secured its position; the era of the codification as *Leitbild* of the legal system seems to be over. But before finishing the lecture I would like to raise the question whether the era of the Basic Law might one day come to an end, too. Is there, within the framework of the European integration, a new model developing, a model towards which the German and the other countries' legal systems will orientate themselves one day? We cannot yet answer this question definitely. On the European level the prerequisites for such a reorientation are not yet given. First, from our point of view, European law has not been developed enough; it is fragmentary and diffuse; it is an aggregate of norms rather than an internally coherent system. Secondly, it is still the idea of economy which supplies the crucial impulses on the way to a common Europe; important though economic prosperity is, it is not enough to create a European identity, neither for the citizen nor for the nation as a whole. Thirdly, there is the problem of the sovereign. What is meant by this becomes clear from a glance at the various European and American legal systems. In all these systems the models or paradigms have been determined and born by the sovereign authority of the particular epochs. Today, only the people can be the sovereign; but what will constitute the direct and unambiguous legitimation of European law which the principle of democracy requires?

Even though all these obstacles may one day be overcome, it is still hard to imagine a European law that will serve as a model for the legal system in all parts of Europe and will replace the models of each national legal system. For the meaning and intensity of the individual traditions of law are not the same in all European states. Of course, by hinting at the differences between the national traditions of law one first of all thinks of England. Common law which in continental terms roughly performs the tasks of both the constitution and private law, is older than the models of all the other European legal systems. For England this is extraordinarily important; when we talk about the elements that make up the identity of the English nation, common law is not the last to be reckoned with. May we, in order to make things clearer, compare common law with the English crown – with the queen? It is striking that both common law and the crown have had the same historical fate. Before the two World Wars the common law and the crown ruled an empire; today both are the symbols of a country whose voice is heard with great respect in the concert of nations. Will the future development leave common law and the queen nothing more than governors or prefects of a European province? Such a degradation of the role of common law, its replacement as a fundamental model and/or paradigm by a European law seems unimaginable at the moment. Would the consequence be that with regard to the basic orientation of law, a Europe of two speeds, to use a well-known metaphor, will emerge? Such a development seems impossible to us: either the European law becomes the model for the legal system of all parts of Europe or it becomes the model for none. Tensions and ambivalences could otherwise arise which would contradict the very nature of a legal system and destroy its coherence and its core. I therefore wish to conclude that the Bonn Constitution (from now on the all-German Constitution) will remain the *Leitbild* of the legal system for a long time and that the end of this role cannot be foreseen today.

PITHY QUOTES

Of the professions it may be said that soldiers are becoming too popular, parsons too lazy, physicians too mercenary, and lawyers too powerful

– Charles Calbe Colton

Law is the crystallisation of the habit and thought of society

– Thomas Woodrow Wilson

Laws were made to be broken

– Christopher North in *Noctes Ambrosianae* 24.