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A Study of Interpretation in the Civil Law

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A STUDY OF INTERPRETATION IN THE CIVIL LAW

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I

Pound has indicated that comprehensively law connotes legal precepts, received legal ideals or ideological aims, and professional legal method or process.[1] Historically the interpretation of law in the main has been professional, such power being exercised by means of juristic ideas pertaining to legal method.

Hence Coke referred to the "artificial reason" of the English common law; and Windscheid said that the legal method of the Roman law was not a science, but an "art" (*Kunst*), which had to be learned through experience as well as through theory.[2]

Past attempts to defeat such esoteric control of law have not been permanently successful. Hobbes' criticism of Coke's concept of the role of professional method in English law is now forgotten, though he maintained that English law is not "(as Sr. *Ed. Coke* makes it,) an *Artificiall perfection of Reason, gotten by long study, observation, and experience,* (as his was.)" [3]

Indeed, even texts, such as the French Civil Code, which may have been formulated to avoid esoteric control, have nevertheless yielded to professional domination realized by means of professional legal method. The justification and necessity for the French Civil Code had been developed by the Encyclopaedists during the period before the French Revolution. These enlightened thinkers held that the lawmaker was the supreme educator of a rational society. They justified codification mechanistically because rational laws would educate the persons living in civil society and thereby would establish rational civil society, which in turn would govern through its rational public opinion.

Hegel perceived that this advanced outlook of the Encyclopaedists derived from the Protestant Reformation. He wrote:

> "French philosophy does away with the lay or outside position in regard alike to politics, religion and philosophy. . . . What the philosophers brought forward and maintained . . . was, speaking generally, that men should no longer be in the position of laymen, either with regard to religion or to law; so that in religious matters there should not be a hierarchy, a limited and selected number of priests, and in the same way that there should not be in legal matters an exclusive caste and society (not even a class of professional lawyers). . . . Thus, in another form they completed the Reformation that Luther began." [4]

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1. Pound, *The Theory of Judicial Decision,* 36 HARV. L. REV. 641, 802, 940 (1923); POUND, OUTLINES OF LECTURES ON JURISPRUDENCE 76 (5th ed. 1943).
2. 1 WINDSCHEID, LEHRBUCH DES PANDEKTENRECHTS 98 (9th ed., Kipp, 1906).
3. HOBBES, LEVIATHAN 193 (Cambridge ed. 1904).
4. 3 HEGEL, LECTURES ON THE HISTORY OF PHILOSOPHY 379 *et seq.* (Haldane and Simson's transl. 1896).

However, the history of the French Civil Code has largely been a history of professional control; and the relationship between the being of the code and French Encyclopaedism has been obliterated. Hence the French Civil Code has been absorbed within the history of the *Rechtsstaat.*

Indeed, modern interest in legal method perhaps may be said to begin with Savigny, the leader of the German Historical School, who had set himself the task of arresting the power and influence of the French Civil Code. Savigny comprehensively organized and systematized the materials of the Roman law pertaining to legal method, including interpretation and the closing of *lacunae* or gaps.[5] Even if the force of criticism of Savigny's work is recognized, the writings of this theorist of the German Historical School remain a valid introduction to the dogmatic or unhistorical study of the legal method of Roman and civil law.

II

As Hegel indicated, the Encyclopaedists confronted basic problems with their mechanistic conception of the educating lawmaker in a rational civil society, which in turn rules through its public opinion. The theory of these advanced thinkers has, therefore, received the full brunt of counterattack and countertheory. It has been perceived that the illumination of the enlightened and enlightening codes and laws, with which the Encyclopaedists hoped to overcome feudalism, might be extingnished or dimmed by interposing the power of esoteric professional legal method, so as to dominate the interpretation of the enlightened and enlightening texts. The justification or criticism of the role and power of legal method is, therefore, part of the long and complicated general history of ideology and philosophy.

Perhaps the outline of the postwar development, designed to strengthen and to justify the authority of legal method within the civil law, is already emerging in the theory of Existentialism, the history of which by no means is disengaged from the history of general European fascist theory, as the jurist Gurvitch, himself a Phenomenologist, has said.[6] Bochenski says that Kierkegaard turned sharply against Hegelian philosophy because of its "publicness" or "openness" (*"Oeffenlichkeit"*);[7] and Bobbio, the Italian jurist whose *L'Analogia Nella Logica del Diritto*[8] deserves translation into English, for this reason attacks Existentialism as a philosophy which is secretive and

5. 1. SAVIGNY, TRAITÉ DE DROIT ROMAIN 201-323 (Guenoux' transl. 1840).

6. Gurvitch, in WAHL, A SHORT HISTORY OF EXISTENTIALISM 38 (Williams and Maron's transl. 1949); see also GRENE, DREADFUL FREEDOM 38 (1948); LEFEBVRE, L'EXISTENTIALISME 212 (1946). See HAESAERT, THEORIE GÉNÉRALE DU DROIT 236 (1948).

7. BOCHENSKI, EUROPÄISCHE PHILOSOPHIE DER GEGENWART 160 (1947); see also LEFEBVRE, L'EXISTENTIALISME 115 (1946). See Kunz, *Latin-American Philosophy of Law in the Twentieth Century,* 24 N.Y.U.L.Q. REV. 473, 503 (1949).

8. (1938).

impenetrable or "hermetic." Concerning the Existentialist, Bobbio says that

> "From beneath reality he conjures up, like a modern magician,[9] another reality—an infra-reality, as is that of psycho-analysis, or a super-reality, as is that of Jaspers—of which reality, *our* reality, is only the sign that is to be interpreted. Starting from this secret conception of being, every form of decadent culture leads eventually to esoterism. Indeed, one of the inevitable manifestations of esoterism is *Hermeticism,* which is esoterism in its purely extrinsic and verbal aspect . . . there is no doubt that the philosophy of existence is a Hermetic philosophy. . . . When I speak of Hermeticism . . . I mean that the obscurity of existentialism is not fortuitous but intended, and intended because it is necessary. To the existentialist even clarity . . . is an illuministic prejudice. . . ." [10]

Hence the code, which the lawmaker or authentic power of the state has created out of its own *projet,* is, so to speak, for the Existentialist only the *projet* (*"Ent-wurf (pro-jet)"*) by which the Existentialist jurist creates himself and his power.[11]

The reception of Existentialist legal theory, thus implicitly criticized by Bobbio, has already been initiated in the United States; for the most powerful and most sustained Latin-American legal theory, representing Existentialism, Existentialist tendencies and similar movements, which have permeated western hemispheric civil law thought, has been translated into English.[12]

III

Because professional control of both Anglo-American and civil law has been maintained by means of esoteric legal method, thus excluding the validity of lay interpretation, both Anglo-American and civilian legal regimes, which for centuries have developed separately from each other, possess dissimilar legal methods, including methods of interpretation, with the result that the jurists of one system have been in a lay position in regard to the legal method and content of the other. This perhaps has been overlooked by contemporary theorists of the unity or unification of law into so-called Western or world law. Even Austin's elementary discussion of Romanist interpretation and of the closing of gaps in a Romanist system has not enjoyed the influence it deserves in the Anglo-American legal world merely as an abstract or unhistorical *précis* of such legal method.

Nevertheless, there are forces in the history of contemporary American law which compel study and understanding of the legal method of Roman and

9. Lefebvre speaks of *"l'existentialisme magique"* of Kierkegaard and Nietzsche and *"la métaphysique du Grand Guignol"* of Heidegger. LEFEBVRE, L'EXISTENTIALISME 109, 143, 184 (1946).

10. BOBBIO, THE PHILOSOPHY OF DECADENTISM 19 (Moore's transl. 1948).

11. BOCHENSKI, EUROPÄISCHE PHILOSOPHIE DER GEGENWART 174 (1947). Grene says that the stress of Existentialism is "on the project by which the individual creates himself." GRENE, DREADFUL FREEDOM 63 (1948).

12. LATIN-AMERICAN LEGAL PHILOSOPHY (1948). Felix Kaufman, who died in New York just before Christmas 1949, hovers over this volume. See LARENZ, RECHTS- UND STAATSPHILOSOPHIE DER GEGENWART 51 (1931).

civil law. The increasing importance of codification in internal American law, adumbrated by the formulation of the uniform laws, of the restatements of law and of the impending uniform commercial code, the *lex* Llewellyn, direct attention to the history and theories of interpretation in Roman and civil law, which has been codified for centuries at a time.[13]

Furthermore, on the external side Americans have been confronting codification. Most countries and areas occupied by the United States or involved with the United States have codified legal systems.[14] There has been American activity in the codification of international law. The Harvard *projets* in international law reflect the development which also produced the restatements of internal law. The codification of private international law in Latin-America, the code Bustamante, has not been without notice in this country.

Moreover, the institution of the new international law, based on the Charter of the United Nations and other fundamental international agreements and understandings, requires more adequate theories of interpretation of such consensual acts than have obtained in Anglo-American common law or under a regime of customary international law.[15] Indeed, even customary international law possibly will be codified. In order to meet the responsibilities of the new situation in international law, resulting from the coequality of the forces creating the new international law, Anglo-American jurists should, therefore, study civilian theories of interpretation. At the very least, Anglo-American jurists are compelled to understand and to recognize that civilian theories of interpretation are a force within the United Nations and under the new international law in general. For instance, the Nuernberg Charter, permitting sanctions against the major war criminals of the European Axis states, was the legal act of the United States and the United Kingdom, both presupposing Anglo-American common law method of interpretation, and of the Soviet Union and France, both presupposing civilian conceptions of interpretation.[16] The creation of the Nuernberg Charter and Tribunal, therefore, showed the necessity and possibility of co-operation among jurists representing historically differentiated, but coequal, professional theories of interpretation of legal texts.[17]

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13. See Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367 (1934).

14. See Franklin, *The Legal System of Occupied Germany* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES: ESSAYS IN HONOR OF ROSCOE POUND 262 (Sayre ed. 1947); Franklin, *On the Teaching of Advanced Foreign Civilians in American Law Schools*, to appear in J. LEGAL EDUC.

15. Franklin, *Lessons For the Codification of International Law From the History of National Codification*, forthcoming in TULANE LAW SCHOOL CENTENNIAL ESSAYS ON THE FUTURE OF CODIFICATION.

16. See Franklin, *Studies of the Nuernberg Charter and the Opinion of the Tribunal*, prepared in Secretariat of United Nations (MS) (1948); see also Trainine, *Le Tribunal Militaire International et le Procès de Nurcmberg*, REVUE INTERNATIONALE DE DROIT PENAL 263, 267 (1946); DONNEDIEU DE VABRES, LE PROCÈS DE NUREMBERG 210-20 (1948).

17. Franklin, *An Examination of the Legality of the North Atlantic Treaty Under the*

IV

But the problem of understanding the legal method, including the process of interpretation, of either Anglo-American common law or civil law, is not solved by making a transition from one abstract esoteric legal method to the other abstract esoteric legal method. Nor is the problem satisfied merely by intensive subjective practical activity by the jurist. Windscheid's suggestion that Romanist legal method could be mastered through "experience" and Coke's emphasis on the role of "long study, observation and experience," do not really adequately state the task involved in mastering the legal method of either Anglo-American common law or civil law.

This criticism seems justified because there is no one legal method within a given legal system, but a succession of legal methods, each arising from concrete and determined historical situations. Hence the vocation of the jurist is to master the involvements within a particular social history which give rise to the historical sequence or unfolding of legal methods, to grasp the problems of legal development which are thus presented, and to study the particular legal devices, methods or techniques by which old legal-social forces may be overthrown, new forces consecrated, new forces deepened and projected and in time overthrown or weakened. Obviously, this requires that the jurist possess the highest level of understanding and mastery of social and legal history if he is to understand the movements of legal method. This means that the understanding of legal method, Anglo-American or Romanist, is fettered if it is abstract and analytical instead of concrete and historical. A process, which, on appearance, seems esoteric and a thing in itself, is essentially a professional hegemony reflecting the development of social history, without, however, reducing to or dissolving into social history.

This means that, in reflecting a concrete historical situation, legal method, including the process of interpretation, may maintain or deepen legality or overcome or weaken legality. In the latter case the mission of legal method may be described as paralegal, in that determinations are made overcoming or weakening the legal force of existing law, although such determinations purport to yield to the authority of the existing law.[18] Hence it seems necessary to discriminate between genuine interpretation, based on legality or fidelity to the force of the text, and spurious interpretation, by which the legal force of the text is overcome under the guise of submission to legality. For example, Thanassis Aghnides, of Greece, justified spurious interpretation early in the history of the General Assembly of the United Nations, saying that since it was virtually impossible to amend the Charter

New International Law, 9 LAW. GUILD REV. 36, 39 (1949); see REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945, v (Dep't of State Pub. 3080, 1949).

18. Franklin, *The Roman Origin and the American Justification of the Tribunitial or Veto Power in the Charter of the United Nations,* 22 TULANE L. REV. 24, 42 (1947).

"to do away with the veto . . . the only practical way seemed to be 'through the twin processes of interpretation and the creation, over a long period of time, of a more liberal jurisprudence [*i.e.*, body of instances or cases].'" [19] However, such spurious interpretation of texts only represents an elementary type of paralegal method. Roman praetorian law or Roman equity, by which the praetor overcame the legal force of the Twelve Tables, was a more complex instance of paralegality. Here the praetor even created a rival legal system, Roman equity, which in effect overcame the obsolete legal system, even though equity purported to yield to the authority of that obsolete system, which declared or presupposed its own hegemony, its own self-sufficiency, its own plenitude.

V

On the other hand, the historic vocation of Roman juristic method may be to maintain, to defend and to deepen legality. The process of deepening legality represents a brilliant accomplishment of Romanist legal method. Here the text itself is developed beyond its genuine textual meaning to control determinations beyond such meaning. Hence Austin distinguished between extensive interpretation, which may be genuine interpretation, and analogical development of the text to control new situations,[20] although such distinction is disputed.[21] This method of determination, by which a text controls situations for which it was not explicitly intended, is markedly different from the classical legal method of the Anglo-American common law which tends to resort to judicial decision when the legislative text falls short. The Romanist method, which treats the text both as law and as the source of law, which recognizes potentiality within actuality, and being as becoming, is a tremendous resource during a period of rapid social transformation through the formulation of new texts.

The Romanist lawmaking or authentic power[22] may be sensitive to the potentiality that its text may be thus deepened under the impact of social development. Indeed, such development of particular texts may be ordered.[23] However, Article 2 of the Louisiana Civil Code, inspired by the French *projet* of the Year VIII, recognizes the general potential force of the entire civil

19. N.Y. Times, Oct. 31, 1946, p. 13, col. 2.

20. 2 AUSTIN, LECTURES ON JURISPRUDENCE 1029 (4th ed., Campbell, 1879); see LENHOFF, COMMENTS, CASES AND OTHER MATERIALS ON LEGISLATION 922 (1949).

21. See BOBBIO, L'ANALOGIA NELLA LOGICA DEL DIRITTO 139 (1938); VASSALLI, LIMITI DEL DIVIETO D'ANALOGIA IN MATERIA PENALE 4 (1942). On the importance of this controversy, see DE SEMO, ISTITUZIONI DI DIRITTO PRIVATO 73 (1946).

22. On techniques of codification, see ANGELESCO, LA TECHNIQUE LÉGISLATIVE EN MATIÈRE DE CODIFICATION CIVILE (1930) [reviewed by Morrison, in 9 TULANE L. REV. 471 (1935)]; 3 GÉNY, SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF (1921); RAY, ESSAI SUR LA STRUCTURE LOGIQUE DU CODE CIVIL FRANÇAIS (1926).

23. See Oertmann, *Interests and Concepts in Legal Science* in THE JURISPRUDENCE OF INTERESTS 29, 71 (Schoch ed. and transl. 1948).

code,[24] saying that "its provisions generally relate not to solitary or singular cases, but to what passes in the ordinary course of affairs." Hence, when the Louisiana lawmaking power wishes to exclude or limit the analogical force of a text, it explicitly designates it as *ius singulare,* and hopes thereby to preclude its analogical possibilities.[25] For instance, the Louisiana lawmaking power attempts to maintain the coequality of unsecured creditors, as formulated in the code, by saying in Article 3185 that, "Privilege can be claimed only for those debts to which it is expressly granted in this Code."

The text of Article 21 of the Louisiana Civil Code also justifies the development of texts by analogy.[26] In an Eighteenth Century formulation, also received from the French *projet* of the Year VIII, it is stipulated that "In all civil matters,[27] where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent." Because it is cast in the mold of metaphysical natural law, this article may not receive the attention it deserves as a text permitting analogical development of the civil code. Nevertheless, if the text of Article 21 of the Louisiana Civil Code is stripped of its metaphysical form, it discloses a logical problem which Hegel has discussed. In effect, Hegel suggests that analogical development is justified only if such unfolding reflects the potentialities of the actual or positive text, thus making explicit what has become historically implicit in the existing legal determination. "Analogy," Hegel says,

> "is the instinct of reason, creating an anticipation that this or that characteristic, which experience has discovered, has its root in the inner nature or kind of an object, and arguing on the faith of that anticipation. Analogy, it should be added, may be superficial or it may be thorough. It would certainly be a very bad analogy to argue that since the man Caius is a scholar, and Titius also is a man, Titius probably will be a scholar too: and it would be bad because a man's learning is not an unconditional consequence of his manhood." [28]

Hence Hegel condemns what he calls "empty and external analogies."

Hegel's consideration of analogy makes it possible to accept the force of Article 21 without yielding to the metaphysical natural law starting point from which it purports to derive. This is because the submission to "equity" or "natural law and reason," ordered by Article 21, and because the fidelity to "inner nature" demanded by Hegel, as prerequisites for the analogical development of legal texts, mean that the development of such texts is justified

24. Franklin, *Equity in Louisiana: The Role of Article 21,* 9 TULANE L. REV. 485, 501 (1935).

25. ROTONDI, ISTITUZIONI DI DIRITTO PRIVATO 73 (5th ed. 1945); Franklin, *supra* note 24, at 501; Oertmann, *supra* note 23, at 71.

26. Austin, *op. cit. supra* note 20; Franklin, *supra* note 24, at 495.

27. On the exclusion of analogy in Louisiana criminal law, see Morrow, *The Louisiana Criminal Code of 1942—Opportunities Lost and Challenges Yet Unanswered,* 17 TULANE L. REV. 1, 8 (1942).

28. 1 HEGEL, LOGIC 325 (Wallace's transl. 1892).

only if such development reflects or deepens the policy and aims of the lawmaking or authentic power.

This Aristotelian-Hegelian limitation connotes that purpose or ideological aims, the end of law as received from internal social history, to which Pound has made reference as an element of law,[29] determine whether an analogy justifiably has the force of law. Hence it may be suggested that such a text as Article 5 of the Law of 1922, introducing the Civil Code of R.S.F.S.R. (which says that "Extensive interpretation of the R.S.F.S.R. Civil Code is permitted only in case it is required for the protection of the interests of the workers' and peasants' State and of the working masses") [30] is the lineal descendant of Article 21 of the Louisiana Civil Code, even though neither the style of formulation nor the social orders concerned are the same. On the other hand, Article 1 of the Swiss Civil Code, which, in its hierarchy of sources for the closing of gaps in the code, says that the judge may "pronounce in accordance with the rules which he would establish if he were to legislate," perhaps may have broken with the full force of this tradition which is most fruitful during a period of fresh legislation.

VI

The history of Roman and civilian legal method is the history of a succession of legal methods, reflecting determinate social history, rather than as the history of abstract legal method or of legal method in itself, has other aspects. It is essential to refer here to the role of legal method in the control or administration of abstract universals, including general clauses, standards, elastic clauses, etc. This is a vital area of law, not only because modern codes are increasingly formulated as abstract universals, but because there is a strong tendency in all modern lawmaking to "flee" to abstract universals. Furthermore, basic parts of the Constitution of the United States, for instance, the Fourteenth Amendment, have been formulated as abstract universals.

The role of the abstract universal in law was developed in Roman law, and because such unhistorical formulations reflect the influence of Stoicism (and perhaps of Eleaticism) on Roman law, it, therefore, seems proper to speak of the role of the abstract universal as the Stoic element in law.

The importance of the Stoic element in legal formulation is that such texts tolerate legal development, contradiction, flexibility and restlessness beneath the apparent motionless, placidity and calmness of such unhistorical universals. Such texts in themselves may resist varying professional processes only insofar as they are not absolutely abstract universals.

Hegel's general criticism of Stoicism may initiate consideration of the

29. Pound, *supra* note 1.
30. 2 GSOVSKI, SOVIET CIVIL LAW 9 (1949).

problem of the Stoic element in law, insofar as the Stoic element establishes and maintains professional hegemony over law by means of legal method.

Hegel writes of the Stoics:

> "Because the universal law of right reason is alone to be taken as the standard of action, there is no longer any really absolutely fixed determination. . . . Thus in as far as an ultimate deciding criterion of that which is good cannot be set up, the principle being destitute of determination, the ultimate decision rests with the subject. Just as before this it was the oracle that decided, at the commencement of this profounder inwardness the subject was given the power of deciding as to what is right. For since Socrates' time the determination of what was right by the standard of customary morality had ceased in Athens to be ultimate; hence with the Stoics all external determination falls away, and the power of decision can only be placed in the subject as such, which in the last instance determines from itself as conscience. Although much that is elevated and edifying may find its support here, an actual determination is still wanting. . . ." [31]

However, Hegel has not pushed himself to the foundation of his problem. What Hegel regards as subjective, as determination by conscience, may be professional activity ultimately reflecting internal development within a particular social history. Hence a Stoic text, formulating an absolutely abstract universal, may merely be the appearance of law, whereas the law may, in reality, be found in the involvements of social history, as reflected professionally. However, it is the Stoic element which is promulgated as having the force of law, although it is the force of internal social history, which may be secretive and cunning, that is ultimately the law. Thus, for instance, German fascism took over and veered the German Civil Code of 1900 by infusing National Socialist ideological aims into the existing general clauses of the civil code.[32]

VII

In Roman and civil law the process of legal method may defend legality (*e.g.*, by genuine interpretation), deepen legality (*e.g.*, development by analogy), or overcome legality by paralegal activity (*e.g.*, by spurious interpretation, equity, etc.). Moreover, as the degree of professional power exercised through the administration of abstract universals or generals is determined by the absoluteness of the text of such abstract universals, a vast and flexible subsurface (*"le wonderland"*) competence, exercised through legal method, may be thereby confided or created.

From this general history the problem emerges of creating means of main-

31. 2 HEGEL, LECTURES ON THE HISTORY OF PHILOSOPHY 267 (Haldane and Simson's trans. 1896).

32. Franklin, *supra* note 14; Andrejew, *Prof. Mitchell Franklin o Perspektywie Odbudowy Niemieckiej Praworzadnosci,* 4 PANSTWO I PRAWO 1. 100 (1949).

Because it created a self-determined congressional hegemony, the fifth section of the Fourteenth Amendment, stipulating that "Congress shall have power to enforce this article by appropriate legislation," should have excluded professional control of the amendment, in which the Stoic element is very prominent. Franklin, *The Foundations and Meaning of the Slaughterhouse Cases,* 18 TULANE L. REV. 1, 218 (1943). See Chase, C. J. in Caesar Griffin's Case, 11 Fed. Cas. 7, No. 5,815 (C.C. Va. 1869).

taining the hegemony of the authentic power while at the same time recognizing the legitimacy of professional legal method, directed toward either legal or paralegal determinations.

Roman law and civil law have attempted at least twice to resolve this contradiction by appropriately recognizing or receiving within the professional process itself all the social forces historically capable of participating in the authentic power.

Thus, early in the history of the Roman republic the plebeians were strong enough to wrest from the patrician class recognition of the legal coequality and cosovereignty of the two forces within the Roman state. Hence the patricians acknowledged the legal power of the tribunes of the plebeians appropriately to concur with or to veto the patrician administration of justice (*intercessio*).[33] Because of this self-determined negative power of *intercessio* by the plebeian tribunes, the administration of Roman republican justice was based on the appropriate unanimity or concurrence of the coequal and cosovereign social classes.

The tribunitial power was admitted during the period of the formulation of the XII Tables, which was an episode in the history of the rivalry of the two social forces, and which constituted a victory for the plebeians, who wanted a code. Therefore, it has been speculated whether the subsequent paralegal development of Roman equity or praetorian law, which overcame the force of the XII Tables, was also based on the appropriate concurrence of both patrician and plebeian forces acting in the administration of justice.

The resemblance between the idea of the Roman tribunitial power and that of the collegial Anglo-American jury system was pointed out in the United States about a century ago.[34] Jury activity not only is based on the principle of concurrence, but the theory of the choice of American jurors implicitly seems to recognize the participation of the appropriate social forces concerned.[35]

Moreover, it has been suggested that the unanimity principle of the Charter of the United Nations, which accords the negative or veto power to each of the five permanent members of the Security Council, was partly inspired and received from Roman legal history, probably because the Roman conception of the tribunitial power was so influential during the American struggles over democracy and over slavery.[36] Because the principle of concurrence in the Charter of the United Nations and in the new international law so clearly relates not only to formulation, but also to the interpretation

33. Franklin, *supra* note 18.
34. 1 THE WORKS OF JOHN C. CALHOUN 65 (1854).
35. See Patton v. Mississippi, 332 U.S. 463, 68 Sup. Ct. 184, 92 L. Ed. 76, 1 A.L.R.2d 1286 (1947); Franklin, *Problems Relating to the Influence of the Roman Idea of the Veto Power in the History of Law*, 22 TULANE L. REV. 443, 444 (1948).
36. Franklin, *supra* note 18.

and administration of legal texts, including abstract universals, it should be described as the principle of concurrence in permanence.[37]

During the French Revolution the problem of the relationship of authentic power to professional power based on legal method was also urgently considered. The Tribunal of Cassation, established in 1790, almost fifteen years before the civil code was introduced, was conceived as an arm of the legislative power, and served as a weapon of the revolution against feudal legal ideas. The Tribunal of Cassation, acting from above, was enabled to confirm or to negate judicial activity of the courts which expressly contravened the text of a law (*loi*).[38] In thus defending the text of the law from the *jurisprudence,* that is, from the course of decision by the courts, it was believed that the revolution was protected.

The cassatory power of the French Tribunal of Cassation thus seems to reflect the enlightened and rational ideas of the Encyclopaedists whom Hegel so warmly supported. Moreover, it shows that the influence of Montesquieu in France was not then the same as in the United States. Montesquieu, who was ultimately excluded from Encyclopaedism, has in the United States nevertheless enjoyed the role of constitutional and legal theorist, justifying the separation of the making of law from the interpretation of law, that is, the separation of authentic from professional power. However, it may be surmised that because of the creation of the cassatory power, Montesquieu was understood in France, not as a legal theorist, but as a social historian, so that his conception of the separation of state power was then accepted as a conception of separation of social forces.

Although the cassatory power of French law descended from the tribunitial power of Roman republican law, the original French theory of the cassatory power probably has not influenced American legal history as much as has the Roman conception of tribunitial power.

However, Edward Livingston's scheme by which the judiciary periodically reported to the legislature for inspection of its activity and determinations under the Romanist Louisiana Civil Code[39] may have been inspired by the French idea of cassation. Livingston's scheme, which coincided with similar thinking by Bentham, has been cautiously applauded recently by an American judge.[40]

It is rather interesting that section 25 of the original Judiciary Act of 1789[41] seems to have accepted the cassatory principle, although the text ac-

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37. Franklin, *supra* note 17, at 38.
38. Franklin, *supra* note 35, at 447, 449.
39. Franklin, *Concerning the Historic Importance of Edward Livingston,* 11 TULANE L. REV. 163, 199 (1937).
40. FRANK, COURTS ON TRIAL 290-91 (1949).
41. 1 STAT. 85 (1789).

quired the force of law about a year, before the institution of the French Tribunal of Cassation. Section 25 created means of recourse to the Supreme Court of the United States in regard to judicial determinations by state courts which in various ways had decided "against" the validity or constitutionality of federal legislation. The effect was that the Supreme Court of the United States had the power to concur with or to veto attacks by the states on federal legislative activity. This seems a tribunitial or cassatory power.