THE SOURCES OF SPANISH CIVIL LAW
A COMPARATIVE STUDY

by

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Introduction*

A great comparative lawyer has said that in order to study a foreign system of law one must first familiarise oneself with the sources of that law.[1] For this reason the writer has attempted in this essay to state as shortly and simply as the difficulties of the subject permit the sources of both Spanish and English law, in the belief that such an exposition will best serve the promotion of interest among the lawyers of Spain and England in each others system of law. It is doubtful whether the majority of academic lawyers, let alone the practitioners, of the one of our two countries have an adequate knowledge of the sources which the law of the other derives. Without such a knowledge detailed consideration of this or that particular institution in Spanish or English law would seem to be merely idle. It is not without significance that the first volume ot the series of studies of Spanish private law undertaken by the Toulouse Institute of Comparative Law should have been devoted to the sources of that law.[2]

The intended publication of this essay in both Spain and England, while well calculated to rouse the desired interest in each other's law, set the writer a difficult task. For, faced by this double audience he risks his remarks appearing trite by turns to Spanish and English lawyer alike.

1. David, *Cours de droit civil comparé* (Paris, 1949-1950), 6.
2. Sabadie, *Sources du droit civil espagnol* (Toulouse, 1926).

* This essay was written before the enactment of the Compilation of the Catalan Civil Law (1960) that changes the legal Situation of Catalonia and many asserts on "Foral Laws".

Pray let each remember that the account of the sources of his own law is intented primarily for his foreign colleague, that he reads it, as it were, over the other's shoulder. The Spanish reader may perhaps find an unexpected interest in what is said of Spanish law from the fact that that an English lawyer must necessarily approach any continental system of law from a novel angle and with an entirely different legal training.

On the threshold of this topic one is faced with a problem of definition: what is meant by a source of law? The term has various meanings, to distinguish which jurists often add to the word source some limiting epithet such as formal, material, literary, primary, historical, even legal. Usually however, sources are described as either formal or material. The formal source is that which gives a rule of law its validity, the material source is that which supplies the matter or content of the particular rule. Material sources are obviously diffuse and hard to classify, for they include such factors as the innate consciousness of a people, religious beliefs, commercial usages, importations from Roman and foreign systems, in short, all the countless influences which go to make national law a mirror of national character. The formal sources, on the other hand, are the means by which laws are made or come into existence, or as a French text-book expresses it: "Les différentes manières dont les règles juridiques sont établies" adding "La règle juridique procède d'une autorité qui a le droit de la créer et d'en imposer l'observation. C'est cette autorité qui est la source du droit."[3] Unlike the material sources, the formal sources of law are usually few in number and precisely defined: it is of these that the term "source of law" will be used in this essay.

The following discussion falls naturally into two parts. The first will be prefaced by a short outline of the legal history of Spain. A system of law has no significance *in vacuo*: it can only be understood in relation to the historical background of the nation which has created it. It may be said that this is not the place to embark on Spanish history. But if this enquiry into Spanish law is to be understood properly some acquaintance with Spanish history will be needed. This acquaintance cannot be presupposed in an English jurist.[4] The historical matter will be confined, how-

3. PLANIOL-RIPERT, *Traité élémentaire de droit civil*, t. I (Paris, 5th ed., 1950), 48.

4. A writer on comparative law is always set the problem of deciding how much knowledge he may presume in his readers concerning the history and culture of the nation whose law he wishes to examine. In this instance the writer has been guided by his own experience and confesses to an almost complete ignorance of Spanish history at the

ever, to the minimum necessary for an understanding within its historical perspective of the legal discussion which is to follow.

The second part of the essay will be concerned with an orthodox account of the sources of English law.[5] Finally, some conclusions of a comparative nature will be put forward regarding the theory of sources in the two systems.

PART ONE

SECTION ONE: LEGAL HISTORY OF SPAIN

From the time of its conquest from Carthage until the break-up of the Roman World in the 5th century the Spanish peninsular formed part of the Roman Empire and was governed by Roman law. With Rome's decline Spain was overrun by invading Visigoths of Germanic origin who brought with them their own Germanic institutions. But the Hispano-Roman culture was not completely swept away:[6] on the contrary, the conquered population was allowed to retain its own law and in 506 the Visigoth Alaric II collected this law into a code which is usually known as the Breviary of Alaric. Containing much pre-Justinian Roman law it was accepted in Spain [7] as a text-book of Roman law until the Corpus Iuris Civilis penetred to Spain some seven centuries later after its rediscovery by the Civilians of Bologna. The Visigoths themselves continued to live under their own customary law of which two codes were made, that of Euric in the 5th century and that of Leovigild in the 6th century. Thus con-

outset of his research into this subject. He ventures to think that this experience is not unique amongst English lawyers.

5. In this part the problem of sketching the historical background will be treated in a different way: by taking the sources of English law in order of historical importance, it is hoped that the pattern of English history, both political and legal, will be made sufficiently apparent. Moreover, it is thought that the Spanish reader may well possess already an adequate conception of the general outlines of English history and English law; for continental legal training is more broadly based than that of the English law school, courses on comparative law figure in many foreign, curricula, and the professionalism and insularity which characterise the English lawyer are discouraged.

6. Compare the almost complete disappearance of the less firmly established Roman-British culture in the face of the Anglo-Saxon invaders.

7. And far beyond into the Midi of France, where it became the *droit écrit* in contradistinction to the *droit coutumier* of the Germanised northern regions of France: see SHERMAN: *Roman Law in the Modern World* (3rd edition, 1937, New York), vol. I, 225-226; DAVID. *Cours de droit civil comparé* (Paris, 1949-1950) 356.

queror and conquered lived side by side, each subject to his own personal law.

In the course of the next two centuries the conversion of the Visigoths from Arian heresy to orthodox Christianity [8] and their gradual intermarriage with the conquered population effected a virtual fusion of the two peoples. [9] This social amalgamation was reflected in the *Fuero Juzgo,* a new edition of the Code of Leovigild replacing both that code and the Breviary of Alaric. Dating from the close of the 7th century this *fuero* or charter was written in Latin and contained twelve books divided into fifty-four titles and five hundred and seventy-six laws. In these laws Germanic and Roman elements were combined and the whole *fuero* was made binding upon Visigoth and Hispano -Roman alike.

The Fuero Juzgo is the first document in Spanish legal history. It marks the legal unification of the empire of Toledo and was to survive the Arabs invasions of the next century to re-emerge after the Christian reconquest as the basis of the later Spanish law.[10]

At this juncture one may emphasise a striking feature of Spanish law which has been perpetuated to the present day. Alongside the Fuero Juzgo which represented what one may term the "common law" of Spain there were also in existence for particular districts and municipalities local *fueros* or charters which gave to their particular area [11] a separate system of law by the conferring of especial legal privileges, such *fueros* having been either granted by the emperors of Toledo or merely assumed to themselves by the more independant localities. In the sphere of civil law

8. The Church was henceforth to play an influential part in Spanish history: its Councils of clergy actively advised the King on state affairs, and it was from these Councils that a representative assembly of all three estates of the realm (clergy, nobles and commoners) was to envolve —Les Cortes: David, op. cit., 357-358, 366. Canon law too remains an important element in Spanish law; infra. p. 35.

9. ROGET: *Sources et domaine d'application du droit civil espagnol* (Bulletin de la Société de legislation comparée, 1925, Paris), 233 and authorities there cited.

10. "In the 14th century the Fuero Juzgo was still preserved as law in Castile and even late in the 18th century it was held to be in force. In fact the Fuero Juzgo was not entirely annulled until the 19th century codification and unification of Spanish law. Moreover, many rules of the Fuero Juzgo still persist in the present Spanish Civil Code." (SHERMAN, op. cit., 270-271). One may add that in those regions which have preserved their own systems of civil law the Fuero Juzgo still retains a subsidiary authority, although much overlaid by later compilations.

11. There were also *fueros* which were not local but granted to a particular class of society e.g. the Fuero Viejo, dating from 1212 which gave certain privileges to the nobility of Castile.

a number of these enclaves into the supremacy of the common law are still present in Spain today notwithstanding the creation of the modern state and the promulgation of the Civil Code. This localisation of laws is closely connected with the tendency towards political separatism which is a recurrent theme in Spanish history. Prior to the Arab invasions of the 8th century a number of these "foral laws"[12] had developed alongside the common law expressed in the Fuero Juzgo.

The loosely-knit Spanish state, centred upon the rulers of Toledo, fell an easy prey to the Arab invaders from Africa. The whole peninsular was overrun in the first half of the 8th century with the exception of certain geographically impregnable areas in the mountains of the north and north-west where a number of small Christian states survived, notably Leon, Navarre, Castile and Aragon. These states were to be the springboard for the Christian reconquest.

But this reconquest was to be preceded by five centuries of Moslem hegemony in the greater part of the peninsular. Like the Visigoths the new invaders left to the conquered Christians the right to continue under their own law and religion. But whereas the tolerance of the Visigoths was inspired by political expediency the Arab attitude sprang from religious exclusiveness: the infidels could not share in the laws of Islam but must make shift with their existing laws. Once more the system of personality of laws prevailed in Spain but the personal application of the law now rested upon the individual's religion. Between Moslem and Christian no unifications of law was possible. Most of the vanquished remained Cristian and continued to live under their own law as it was befere the invasions, that is, the law of the Fuero Juzgo save where modified or excluded by a local *fuero*.

The hegemony of Islam broke in the 11th century with the end of the supremacy of the town of Cordoba; Moslem Spain then split into

12. Spanish writers contrast the *derecho foral* with the *derecho commun*. French writers on Spanish law have coined the term *droits foraux* to denote the local laws based upon the *fueros* of the various localities (see discussion of these terms in ROGET *op. cit.*, 270-271). It is proposed to follow the French example and to use the term "foral law" as the antithesis to "common law". *Derecho foral* is a preferable expression to *fuero* since the latter retains the original notion of charter, whereas a large part of the content of the various foral laws is not due to any charter, but consists rather of the enactments of the separate legislatures of the foral provinces. Many of the more important provinces retained their legislative autonomy even after the unification of Spain under the Royal House of Castile (see *infra*, p. 8).

separate states which were reduced piecemeal by the Christian kingdoms of the north. Of these kingdoms Castile and Aragon were the most important and the union of their two ruling houses by the marriage of Ferdinan and Isabella in 1469, followed by the conquest of Moslem Granada in 1492 [13] and the annexation of Navarre en 1512, brought about the unification of Spain under the royal house of Castile.

But this unification did not bring unity of law. After the Moorish invasions the law in the unconquered Christian Kingdoms had continued to evolve with an increasing tendency towards localisation into regional *fueros* as a natural consequence of the disappearance of the central authority at Toledo. [14] With the gradual reconquest of the Moslem territories during the 12th to 15th centuries the legal stagnation of the rest of Spain of Spain was ended. Spain became a conglomeration of Kingdoms and principalities, each with its own legislature and its own Law. The enactements of these local Parliaments now become the most considerable element in the various foral laws. This plurality of legislatures was not ended by the political unification of Spain under the Royal House of Castile, for several of the more important provinces still retained their legislative powers until the Decree of Nueva Planta of 1716 supressed the independent legislature.[15] The New Plan of Philippe V made the Cortes of Castile the sole legislature of Spain.

Meanwhile, in Italy, the rediscovery of the Roman law of Justinian had taken place and the unifying influence of its study began to spread into Spain in the 12th and 13th centuries. In the now development in in favour of legal unity Castile is to play the leading role, not only because of that Kingdom's political supremacy over its rivals but due also to the

13. In this same yaer the Genoese Columbus discovered America on an expedition financed by Ferdinand and Isabella. This investment was to yield to Spain a rich harvest. And America was to recesive in return the Spanish language and its law.

14. Numerous *fueros* were granted by princelings and feudal lords to the townships and districts under their dominion: the greater contents of such *fueros* related to matters of public law in regulating the feudal relationship beetween vassals and overlord. From the 12th century however numerous provisions of private law are found in the *fueros*.

15. Thus, as late as 1704, the Catalan Parliament *(Corts)* enacted for Catalonia an extensive compilation of previous written and customary law: this compilation is known as Constitucions i altres drets de Catalunya and forms the core of the modern foral law of Catalonia. In 1716 Catalonia was submitted to the Same as "status" as Castle, fading away a regime of legislative autonomy whitin a personal union that foreshadowed in an interesting way the union of the Commonwealth through the person of the British Sovereign.

greater vitality of its law. This vitality may partly be traced to the energy of Alfonso X (1252-1284), dubbed the Wise.[16] Due to his inspiration Castilian law was destined to become the common law of Spain; but the path to this common law was to be long and hard: indeed the final goal is still unattained today. Two compilations of Alfonso the Wise reflect this new influence of the revised Roman law, the object of both being to replace the various *fueros* within his own Kingdom of Castile by a uniform code of laws.

His first compilation was the Fuero Real of 1255, a collection and harmonisation of the various *fueros* of Castile. It is not clear whether this was ever enforced as law because Alfonso was already at work on a new and greater compilation, the Siete Partidas (Seven Parts). If the Fuero Real was a restatement of Germanic Customary law, the Seven Parts was founded upon the revived Roman law. Issued in 1265 it was in advance of its time and was probably not enforced as law until re-affirmed in 1348 in the Ordinance of Alcala.

The importance of the Seven Parts in subsequent legal history cannot be over-emphasised. In Castile it sought to replace the conflicting *fueros* with a uniform code. Roman law was blended with customary law into a scientific whole. The work itself, as its name indicates, was divided into seven parts and sub-divided into 182 titles and 2479 laws, many of which reproduced verbatim the law of Justinian. But opposition was too strong for the complete suppression af the local *fueros*: the Ordinance of Alcala which gave to the Seven Parts legal force only made it binding in the absence of a conflicting provision of the *fueros*: it was to be a supplementary cody only and did not, as Alphonso intended, replace the *fueros*. Outside Castile the Seven Parts enjoyed a great prestige and was often invoked in the absence of a suitable provision of the local *fuero*. Throughout Spain the work marked rhe reception of Roman law and with that reception the recognition of a unified law as the ideal to which Spain must progress. But in Spain the reception had special difficulties to surmount. To mention the two principal, firstly, the Fuero Juzgo, the regional and municipal *fueros*, and the Fuero Real, all were strongly imbued with Germanic customary law which consorted ill with the revived Roman law. Secondly, legal unity requires political unity and the subordination of medieeval Spain

16. He has also been called the Spanish Justinian: SHERMAN, *op. cit.*, 276. The "English Justinian", Edward I, was his contemporary (1272-1307).

to the Kings of Castile did not end the strong separatist tendency — "innate schismatism" or "temperamental particularism" one distinguished writer has called it [17] — which is a thread to be clearly traced through the complicated web of Spanish history. Yet the Seven Parts was to provide the basis for the Civil Code of 1889 which is the nearest that Spain has approached to the ideal of a unified law. Moreover, in those provinces which kept their foral law after 1889, it may still retain subsidiary force, in so far as not rendered obsolete through passage of time.

After the Seven Parts, Castile produced other significant compilations. The union of Ferdinand and Isabella was fruitful in legislation and the jurist Montalvo produced with the approval of Isabella his Ordinances [18] in or about 1484 which collected together most of the enactements relating both to private and public law published since the Ordinance of Alcala. In 1505 the Laws of Toro were promulgated to resolve some of the points of conflict between Roman and customary law which had been left unresolved by the Seven Parts.

The Hapsburg rulers of Spain in the 16th century were prolific legislators and this made necessary a new collection of Castilian law. This emerged in 1567 as the Nueva Recopilación of Philip II. A voluminous compilation, it embraced all enactments since the time of the Fuero Real and the Seven Parts together with most of the Ordinances of Montalvo and the Laws of Toro. But it would be incorrect to regard it as a codification of Castilian law: it lacked any scientific arrangement, stated no principles, and failed to repeal the earlier compilations or the local *fueros,* thus merely adding to the existing confusion. It was, however, the last serious attempt at legal reform before Spain passed into the next two centuries of legal decadence and national eclipse.

For during the 17th and 18th centuries the only activity in private law was the production of successive editions of the Nueva Recopilación.[19] National and international vicissitudes diverted attention from legal problems: the first half of the 18th century witnessed the internecine wars of succession and at the century's close the power of Spain declined further when the dynastic ambitions of Napoleon made the

17. E. ALLISON PEERS: *Spanish History,* article in "Chamber Encyclopedia" (1950).

18. Whether this should be regarded as a legislative exactment or simply as a doctrinal work is not clear: indeed David questions whether so hard and fast a line can be drawn between *la loi* and *la doctrine* as modern French theory maintains; *op. cit.,* 380.

19. SHERMAN, *op. cit.,* 284, footnote 98.

peninsular the battleground of Europe. In the sphere of public law, however, various decrees[20] of Philip V issued between the years 1707 and 1716 are important as they abolished the foral public laws of Catalonia, Majorca, Aragon and Valencia: Valencia also lost its foral private law;[21] the foral laws were in all these cases replaced by the law of Castile. In effect, after the decree of Nueva Planta of 1716, all the provinces of Spain lost such legislative autonomy as they had retained till that date: *la ley* could no longer create foral law.[22]

With the advent of the 19th century the example of France gave new impetus to the work of codification and unification of private law, although Spain was to be long vexed and diverted by the political problems of adapting monarchy to the needs of modern society, of resolving the class struggle in the industrial areas, and of combating the separatist tendency of Catalonia. But already in 1805 the Nueva Recopilacion and its later editions had been reshaped into the Novisima Recopilacion which was law not only for Castile but also for Spain generally where not inconsistent with the foral laws. Its value, however, was diminished by its failure to repeal the earlier collections, especially the Seven Parts and the Nueva Recopilación; yet anther collection was added to the confused mass of Spanish law.[23] In 1830 a Code of Commerce appeared which, as in France, drew a sharp distinction between commercial law and civil law. Civil procedure too was the subject of various codifying statutes.[24] Finally, the codification of private law was completed by the Civil Code of 1889.

But codification did not bring unification: the separatist tendencies of certain provinces were too strong. In these provinces the new Civil

20. SANCHEZ: *Curso de Historia del Derecho, Introducción y Fuentes* (8th ed., 1952, Madrid) 168-170; SHERMAN, *op. cit.*, 287.

21. But Valencia still has a special court *(Tribunal de las Aguas)* which sits in the porch of the cathedral to decide disputes concerning the use of water for irrigation in the area of Valencia *(la huerta de Valencia)*: this is a purely customary jurisdiction.

22. From 1932 to 1938 Catalonia had a Parliament of its own capable of legislating for that province, but this institution and its enactments were swept away by the new regime.

23. DAVID *(op. cit.* 385) likened the Novísima Recopilación to the preparatory collation of the French law by Pothier.

24. The law of ciivl procedure is now contained in a statute of 1881 amended in 1888. The judicial organisation of Spain is governed by a statute of 1870 amended in 1882: under this organisation one hierarchy of courts exists for both common law and foral law provinces: *infra.* p. 23. See also DAVID, *op. cit.*, 409.

Code was largely inoperative, the separate foral law being retained for most matters of civil law. The 1889 legislation did in its terms envisage an eventual codification of each foral law into an appendix to the Civil Code, but only one such appendix has yet been compiled, that of Aragon in 1925.[25] Thus modern Spain does not possess a unified civil law. Except in the provinces having their own foral laws, the Civil Code is applicable: this means that thirty-nine provinces enjoy the advantages of a common law derived mainly from the law of Castile. The other ten provinces, which contain some of the most important regions of Spain from the point of view of population, commerce and industry, are divided between no less than five foral laws,[26] which have to be sought in the confusion of earlier enactments and customs of the particular province, helped out by reference to canon law, Roman law and in some cases pre-1889 Castilian law. Only if the foral law is still unable to provide any ruling on the point at issue can one turn as a last resort to the Civil Code itself. In short, the codification of civil law [27] was limited to Castile but the codified Castilian law was at the same time elevated from being a foral law into becoming a common law of Spain, a trend which had already become apparent with the political supremacy of Castile centuries before.[28]

SECTION TWO: SOURCES OF SPANISH CIVIL LAW

The preceding sketch of Spanish legal history has indicated the distinction which exists in matters of civil law between the common law and the various foral laws. In discussing the sources of civil law it will be convenient to deal with the foral laws separately from the common law. It is proposed to examine first the sources of the common law, and then to consider more briefly the sources of the foral laws.

25. The writer understands that an appendix is now projected for Catalan civil law. Hostility to this project is somewhat appeased by the conservative content of the appendix which will make no major change in the foral law nor in the order of its sources (*infra*, p. 34).

26. Namely, those of Catalonia, Aragon, Navarre, Biscay and the Balearic Islands.

27. By this term is denoted the residuum of private law after excluding civil procedure and public law generally, legal unity has been attained.

28. But in the five regions mentioned in note 21 above this "common law" is subservient to the regional foral law.

Derecho común

Article 6 of the Civil Code consists of two paragraphs. The first states that the court which refuses to reach a decision because of the silence, obscurity or insufficiency of the Law *(las leyes)* incurs a legal liability. The second paragraph explains how the judge is to escape from this dilemma: "When there is no statute *(ley)* exactly applicable to the issue in question, one shall apply the custom of the place *(la costumbre del lugar)* and, in default, the general principles of the law *(los principios generales de derecho)*". It is on these texts that the following discussion must be based.

La ley. — The two paragraphs read in conjunction show that the primary source of law remains *la ley*: in this the Code remains loyal to Spanish traditions and the principles of the modern civilians. Only in the absence of a provision of *la ley* can one turn to the two "extra-legal" subsidiary sources indicated in the Code, namely, local custom and the general principles of the law. Of what does *la ley* consist? It is made up of three elements: the Civil Code itself; certain enactments prior to the Code; enactments subsequent to the Code.

The Civil Code promulgated in 1889 neither was then nor is now a complete statement of the civil law of Spain. Apart from the foral laws, which Article 12 left intact, the Code also failed to abrogate all the previous enactments relating to civil law. Article 1976 does contain a general abrogation of all statutes, usages and customs constituting the civil law,[29] for all matters dealt with by the Code, but concludes with this exception: "This declaration does not apply to the statutes which this Code expressly maintains". Thus, two classes of previous legislation are preserved from repeal by terms of Article 1976: first, those statutes which govern matters not dealt with by the Code: for example, the Law of 1881 relating to hypothecs;[30] and secondly, those enactments which the Code expressly maintains: for example the Law of Civil Procedure of 3 February, 1881, which is expressly reserved in numerous articles of the Code; again, by Articles 46 and 75 the rules of the canon law of the Church

29. Cf. in French law Article 7 of the Law of ventose an XII.
30. Now replaced by the Ley Hipotecaria of 1946.

are to continue to regulare the celebration of canonic marriage and questions of separation and nullity arising from such marriage.

Besides such antecedent provisions of statute and canon law,[31] the civil law contained in the original Code has been supplemented and modified by many subsequent statutes during the last six decades.[32] All these three elements together make up *la ley*, to which the judge must first turn for the answer to the legal problem before him.

The Costumbre. — It is a truism of legal writing that the legislator can never provide in his laws for all the possible legal problems which the judge will have to meet and attempt to solve. It is equally true that most systems of law demand of the judge that he reach a decision, notwithstanding the absence of legislative provision. Spanish law does so in Article 6, but indicates the supplementary sources to which the judge must turn for his solution, namely, the custom of the place, and, in the last resort, the general principles of the law.

Custom is therefore the second source of Spanish law. This will not surprise those familiar with the history of the law. The Fuero Juzgo by blending together Roman law and Germanic custom gave to custom at an early date a dignity which it never attained in France. The development of foral laws and their recognition gave continued emphasis to custom. The Code of 1889, although anxious to limit the activity of custom, did not succeed in abolishing it as a source of law, and even those limitations which the Code did impose *de iure* could not diminish its importance *de facto*.

The recognition of custom as a source of law is in the tradition of the Seven Parts which in turn reproduced the Roman law.[33] Article 5 of the Civil Code contrasts, however, with the Roman law in refusing to

31. For a complete list of the antecedent legislation which survived the code, see MANRESA: *Comentarios al Código Civil,* at Article 6.

32. Some important modifications include the reform of intestate succession (Royal Decret of 13 january, 1928); the reduction of the age of majority from 25 to 21 (Law of 13 december, 1943); new provisions concerning absence — made necessary by the civil war (Law of 8 september, 1939); among supplementary legislation one may cite the Ley of Hipoteca Mobiliaria of 5 december, 1941, and the important Ley de Arrendamientos Urbanos, 1946 (superseding many of the provisions of the Civil Code in the case of urban dwellings).

33. See *Digest* 1.2.2.3. and 1.3.32.1; Institutes 1.2.11. See also discussion in BUCKLAND AND MCNAIR: *Roman Law and Common Law* (Cambridge, 2nd ed., 1952), 15-18.

acknowledge that a law may be nullified by non-user or contrary practice. Here the Code differs from the Seven Parts which recognised three forms of custom: custom *secundum* legem which arose where particular application of the law was doubtful, the custom then interpreting and applying the law while keeping within its bounds; custom *praeter legem* ("outside the law") where there was no law applicable to the matter; and custom *contra legem.* The combined effect of Articles 5 and 6 is to restrict the role of custom as a source of law to local custom *praeter legem.* Custom contrary to the law is expressly abolished by Article 5 whilst custom according to the law is impliedly abolished by Article 6. In practice, however, as David points out,[34] contrary custom can make any law a dead letter and force the legislator to mould his subsequent enactments in conformity with the will of the people. To what extent we accept this argument will depend on the view which we take of law: is it what the state commands and the courts enforce, or is it rather what the people recognise as having obligatory force? The conflicting views have been forcibly stated in the recent Hamlyn lectures of Professor Goodhart,[35] but to enter this controversy is outside the scope of the present essay and beyond the ability of the writer: suffice it to recognise the *de facto* existence of custom contrary to the law. Nor can one dispense with custom *secundum legem.* A law, however unambigous and all-embracing in its drafting, cannot hope to meet every possible case that may arise: those who seek to apply the law must then interpret it and in their interpretations they will try to be consistent. Again, custom *secundum legem* is invoked necessarily to decide the meaning of every word which a law employs:[36] even if the legislator defines certain words he can only do so by the use of other words. Finally, Article 6 itself does not close the door to general custom: a general custom *praeter legem* may always be invoked as the local custom of a particular province.[37] There is indeed today something artificial and unreal in this emphasis by the Code on local custom:[38] in 1889 the foral laws would serve to call attention to

34. *Op. cit.,* 413. Also custom *contra legem* is recognised by Article 12 in its preserving the foral laws, "written *or customary*". See DAVID, *op. cit.,* 416.

35. Now printed as *English Law and Moral Law* (Stevens, 1953).

36. DAVID, *op. cit.,* 412.

37. SABADIE, *op. cit.,* 70.

38. Many other articles in the Civil Code allude to *la costumbre del lugar* e.g. Art. 485 (right of usufructuary of a wood to make charcoal), Art. 570 (right of way for cattle), Arts. 590-591 (rights regarding buildings and trees in proximity to boundaries),

custom in its relationship to a particular locality, but in modern society custom is much more important in relation to groups within society such as merchants, bankers, notaries, whose members are found in every locality.[39]

The Code does not prescribe the conditions which the local custom must satisfy before the judge may accept it as a rule of law and employ it for the solution of the case before him. It has been left to the jurists and the judges themselves to evolve the following conditions:[40]

1. The custom must be based upon a certain amount of repetition, that is, the same legal question must have been solved in the same way a number of times.
2. The solutions must have displayed a uniformity.
3. The solutions must have been spread over a sufficient period of time.
4. The person making and acting upon the solutions must have done so with the intention of acting justly.
5. The custom must be proved with certainty.

In short, the Spanish law requires a custom to exhibit the five characteristics of repetition, uniformity, continuity, just intent and certanty: the parallel with English law is striking although not exact.[41]

The Principios Generales de Derecho. — In the absence of a provi-

Art. 902 (right of executors of deceased to conduct the funeral rites in accordance with deceased's will or, in default, the custom of the place), Art. 1.287 (in interpretation of contracts, custom of the place can be invokd to resolve an obscurity).

39. Cf. in English law the custom of merchants and the practice of conveyancers. Mercantile customs *(usos del comercio)* are recognised as law by the Spanish Commercial Code of 1885 (Article 2), which states that such customs shall govern acts of commerce in default of a provision in the Code; also the Ley de Ordenación Bancaria, 1927, has set up a Board of Bankers *(Consejo Superior Bancario)* to determine banking customs.

40. SABADIE, *op. cit.*, 71.

41. A further parallel with the English law is that much local custom in Spain relates to customary rights in the nature of the English easment or profit-à-prendre, such as the cutting of wood, the fetching of water, the pasturing of cattle, and rights of way. It is interesting to note that most cases where a local custom has been invoked before the English courts have been concerned with similar matters, e.g. *Willingale v. Maitland* (1866) L. R. 3 Eq. 103 (right to lop branches), *Weekly v. Wildman* (1698) I Ld. Raym. 405 (right to fetch water from a spring), *Grinstead v. Marlowe* (1792) 4 Term Rep. 717 (unsuccesful attempt to claim by custom a right of pasture), *Brocklebank v. Thompson* (1903) 2 Ch. 344 (right of way over land to church): see generally Cheshire: Modern Law of Real Property (7th ed., 1954) 510-515. Also *infra*, p. 37 et seq.

sion of *la ley* or of a local custom Article 6 directs the judge to apply the general principles of the law *(los principios generales de Derecho)*. The examination of this expression will reveal the originality of the Spanish theory of sources and provide an interesting comparison with English law.

Where both legislation and custom yield no appropriate rule, the judge, unless of course the system of law allows him to abdicate his function, has then to play a creative role. The degree of freedom permitted to him in this creative activity varies from system to system. In French law, for instance, the *droit écrit* sets out no theory of sources and the judge is left with neither guide nor restraint to evolve a new rule. In post-revolutionary Russia the judge was directed, where he had to create a new rule, to do so according to "the revolutionary conscience".[42] The Swiss Code requires the judge to decide the case by applying the rule which he would have selected if he had been the legislator.[43] English law, as we shall see, in theory denies to the judge any creative rôle since the Common Law of England is an inexhaustible reservoir of principles one of which can always be adapted to the case in hand. Spanish law, by Article 6, gives the judge some guidance: he must apply the general principles of the law.

The interpretation of this expression has exited much controversy and its very lack of precision may well have been intentional on the part of the draftsmen of the Code.[44] If the judge was always to appear to decide according to the law, than a sufficiently broad residuary source had to be indicated by Article 6 within the haven of which he could always anchor his decision, however subjective that decision may in fact have been. But vague though the expression be, it is generally accepted that the general principles of the law are not synonymous with the ab-

42. The decree of 27 november 1917 (S.U.R. 1917-50) mentioned as additional source of law the "revolutionary conscience and consciousness of justice". See SCHLESINGER, *Soviet Legal Theory* (1945), 63.

43. See WILLIAMS, *Swiss Civil Code* (1923), 34 et seq., and Version (1925), where Section 1 is translated: "The law must be applied in all cases which come within the letter or the spirit of any of its provisions. Where no provision is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator. Herein he must be guided by approved legal doctrine and case law." By approved legal doctrine is meant that the French term *la doctrine* and not *la doctrina legal* of Spanish law: *op. cit.*, 61-64.

44. DAVID, *op. cit.*, 440.

stract rules of natural justice — those ideal principles to which the imperfect rules of every national law strive unsuccessfully to conform.[45] The Code is not invoking natural justice to bridge the lacunae in Spanish *ley* and *costumbre*: rather it is appealing to those principles which are implicit in Spanish law and of which the written law and the customs are the external and incomplete expression. One draws upon these principles to frame a statute or to establish a custom, but the principles remain still unexhausted and still incompletely expressed.

The most acute awareness of these underlying principles will be found in the judge. By reason of his training, by his experience of the practical problems of life which law seeks to resolve, and by his manipulation and interpretation of the legislation entrusted to him to help in their solution, the judge is in a better position than politician or professor to become imbued with the spirit and awareness of those principles. We find therefore that the general principles of the law to which the Code refers are today largely, but no tcompletely, identified with the case-law of the courts. Or, more precisely, a general principle of the law must be evidenced by a particular number of decisions in the same sense emanating from a particular court. The current of decisions bears the technical name of legal doctrine *(la doctrina legal)*.

The notion of legal doctrine was not new in 1889.[46] A decree of 4th November 1838,[47] had permitted appeal on cassation to the Supreme Court *(Tribunal Supremo)* for violation of *la doctrina legal*.[48] It did not however define this term: this definition was left to be worked out in subsequent decisions of the Supreme Court itself. What the French call *la doctrine,* that is, the opinions of learned commentators and academic

45. SABADIE, *op. cit.,* 73-74.

46. See generally HERZOG, *Le Droit Jurisprudentiel et le Tribunal Suprême en Espagne* (Toulouse, 1942), 122-231 *(La Notion de Doctrine Légale)*.

47. HERZOG, *op. cit.,* 106: the same decree required the Supreme Court to state the reasons for its decisions. For the object of this decree see below.

48. The Spanish Supreme Court has adopted a technique of appeal different from the French *Cour de Cassation*. The latter is a true court of cassation since it *breaks* the decision of the court below without substituting its own decision: instead there is a *renvoi,* not to the court first seized but to another court of like jurisdiction. The Supreme Court not only quashes the decision of the court below but also substitutes its own decision of the case. An exception is where the appeal is on the ground of fault of procedure, as distinct from violation of *la ley* or *la doctrina legal:* for fault of procedure the Supreme Court quashes and sends back the case to the lower court. See HERZOG, *op. cit.,* 396-399. Compare the English procedure by way of "Case Stated".

writers, was distinguished from *la doctrina legal* in a decision of 10th December, 1894: such opinions, however eminent their authors, could not found an appeal on cassation. Rather the law of 1838 intended what in France is described as *la jurisprudence,* the case-law of the courts.

At first, legal doctrine comprised the case-law of all the courts, whether courts of first instance *(juzgados de primera instancia),* courts of appeal *(audiencias territoriales,* of which there are several each hearing appeals from the courts of first instance within a certain area), or the Supreme Court (which is a single court with four chambers or divisions hearing appeals on cassation from the courts of appeal and possessing jurisdiction throughout Spain).[49] But the scope of legal doctrine was progressively narrowed down until it only applied to the case-law of the Supreme Court itself.[50] Moreover, a single decision of the court was not sufficient to create a legal doctrine:[51] it required at least two similar decisions to constitute a legal doctrine, any breach of which thereafter by an inferior court would give rise to recourse on cassation to the Supreme Court. The notion of legal doctrine has not been more precisely defined than this, so that the Supreme Court has been able to avoid the pitfall into which in England both the House of Lords and the Court of Appeal have fallen in becoming bound by their own previous decisions. A single decision does not found a legal doctrine: so much is certain; but what number will found a doctrine has never been categorically decided.[52] In general, two similar decisions suffice, but the Supreme Court is free to reject a would-be doctrine on no matter how many decisions it has been based. In practice, however, it rarely does so. Thus, the Spanish theory of legal doctrine occupies a position somewhere mid-way between the English doctrine of precedent and the French notion of *la jurisprudence constante.*

Is it then to this legal doctrine that the Code is referring when its

49. Besides these courts having general jurisdiction for all matters of common law, there are also special courts with limited jurisdiction: these include the municipal judges *(jueces municipales)* who hear petty cases, *tribunales de marino* for maritime cases, and *tribunales provinciales de lo contencioso-administrativo,* which are local administrative courts of first instance comparable to the former *conseils de préfecture* in France; appeal from these *tribunales provinciales* goes to the Supreme Court which thus combines the *op. cit.,* 422 and HERZOG, *op. cit.,* 270 et s.

50. Case of 13 June 1867, cited by DAVID, *op. cit.,* 427.

51. See cases cited in HERZOG, *op. cit.,* 116.

52. HERZOG, *op. cit.,* 117.

Article 6 speaks of the general principles of the law? Here we encounter one of the great enigmas of Spanish law: why did the draftsmen of the Code make no mention of legal doctrine in their enumeration of the sources of Spanish law? To answer this question it is suggested [53] that a distinction must be made between the theory of sources of law and the method of controlling the application of that theory. Legal doctrine is not part of the theory of sources but a method of controlling its application. This will require expansion.

Article 6 tells the judge to apply the legislative provision to the case before him. If there be no relevant statute-law, he must then apply the local custom, if any. In default of a local custom, he must apply the general principles of the law. But in his use of this last source, he must be checked from disturbing the certainty of the law and this is done by the technique of recourse in cassation for breach of a legal doctrine, a method which had been introduced prior to the Code for the very reason of introducing more certainty into judicial decisions in the face of the then confused state of *la ley*.[54] Where the judge has to create he may still create freely; but where a legal doctrine has already been formed, he is no longer free to disregard this doctrine: he must observe it or run the risk of his decision being upset on cassation. Legal doctrine in this way brings uniformity into the application of the general principles of the law, yet uniformity of error is avoided by the flexibility of the conception the law to a new set of facts does not bind future judges faced by the same facts. Nor indeed do two mistaken applications, although the likelihood of mistake is then less and so the Supreme Court is the more likely to accept the decisions as constituting a legal doctrine; *a fortiori*, if there be three similar decisions.

When the judge has a true task of creation, that is, when there is no statute, no custom, and no legal doctrine applicable to the case before him, his decision is not open to cassation by the Supreme Court. For recourse in cassation only lies for breach of *la ley* or *la doctrina legal*.[55]

53. By DAVID, *op. cit.*
54. See note 20 above.
55. By Article 1691 of the Law of Civil Procedure of 1881, two other grounds for cassation exist, namely, violation *(quebrantamiento)* of the essential forms of the process *(juicio)*, and certain types of misconduct by private arbitrators *(amigables componedores)*: neither, however, are in point here where we are considering error in *judicando* rather than error in *procendendo*. For a general discussion of the technique of cassation, see HERZOG, *op. cit.*, 321-480 *(La Souveraineté juridictionelle du Tribunal Suprême)*.

In its application of this section of the Law of Civil Procedure, the Supreme Court has rejected any appeal which sought to disturb the creative decision on the grounds that it conflicted with vague notions of justice and morality. The appellant must base his case on a reference either to the precise provisions of *la ley* which allegedly has been infringed, or to the previous decisions constituting the legal doctrine which he claims to have been disregarded by the trial judge. If he alleges the decision is contrary to a general principle of the law, he must cite the provisions of *la ley* or the legal doctrine from which this principle emerges.[56]

Here the apparent contrast with French law is very marked. Whatever may be the force in fact of a *jurisprudence constante,* appeal to the French *Cour de Cassation* must always be based on an alleged infringement of a provision of *la loi* and never upon a breach of *la jurisprudence.*[57] But the contrast may be more apparent than real,[58] the connection of the decision appealed against to the text infringed being often tenuous in the extreme. Similarly, the writer believes that Spanish law is much closer to English law in its treatment of case-law than many jurists have realised. Allowing for the different technique of appeals and disregarding the self-binding character of the decisions of the Court of Appeal and the House of Lords, English law takes a very similar view of judicial

56. E. g. case of 10 January 1941, cited by HERZOG, *op. cit.*, 436. Herzog joins Sabadie in criticism of this restrictive attitude of the Supreme Court which means that the court is unable to control by cassation the decision by a lower court based on a general principle of the law unless it can be shown to conflict with (a) a provision of *la ley,* (b) a legal doctrine or (c) a general principle already enshrined in (a) or (b) — "cercle vicieux" indeed (Sabadie, *op. cit.*, 76): see generally HERZOG, *op. cit.*, 434-438. This seems to produce a paradox: the trial court can invoke a general principle only in default of *ley* or doctrine: the cassation court can invoke a general principle only in the presence of *ley* or doctrine to support it; that is, the conditions for applying a general principle in order to *reach* a decision are the exact opposite to those for applying a general principle to *break* a decision. In the Supreme Court the paradox is resolved by the fact that the cassation court in breaking one decision also reaches a new decision: this new decision that the trial court infringed a general principle necessarily carries with it a positive application of that same principle in favour of the appellant. Thus any application of a general principle by the Supreme Court is both negative (in breaking the decision of the lower Court) and positive (in substituting the new decision) the conditions for the negative application, namely citation of *ley* or doctrine evidencing the general principle, are inseparable from those for the positive application. The paradox persists, however, in the case of the trial court, although probably obscured by the practice of never pleading a general principle without citation of *ley* or doctrine in its support.

57. See CUCHE, *Précis de Procédure Civile* (Dalloz, 10th ed., 1951), 421 et s.

58. See HERZOG, *op. cit.*, 222.

decisions to that found in Spanish law. For we find in Spain the Supreme Court treating legal doctrines as rules of law which must be observed and punishing their non-observance by cassation. In English law we find that a single decision of a High Court judge is "persuasive authority" for a fellow judge and that it will not lightly be disregarded. A line of similar decisions by judges of first instance has even greater authority, although still not absolutely binding. It is only when one considers the absolute authority of the decisions of the Court of Appeal and the House of Lords that a real difference is discernible: the Spanish Supreme Court may reject a legal doctrine which it feels no longer to be just, whereas the Court of Appeal and the House of Lords are bound to follow their own past decisions even against their present inclinations and however ill these decisions now conform with changed social or other conditions: examples abound of such reluctant bondage to precedent. The Spanish Supreme Court is more fortunate in being able to conduct its own reform of legal doctrine: the English courts have to await the time and pleasure of Parliament.[59]

Is then legal doctrine a source of law? It is submitted that it is not: it is rather an outward expression of their inner principles of Spanish law. These principles, which are constant, are a source of law, for Article 6 so says, but their expression in concrete cases — *la doctrina legal* — may always change and so this doctrine is not a source of law, for a source cannot change. Rather we must describe legal doctrine as a *material* source: it tells us what is the present content of the law; and it tells us authoritatively since the Supreme Court treats its breach as no less a cause for cassation than a breach of *la ley*. The Civil Code made no alteration with regard to legal doctrine: Article 6 neither elevated it into a source *de iure*, nor reduced its authority *de facto*. Instead the article refers to the general principles of the law: legal doctrine should be treated as a manifestation of these principles but as a manifestation which is neither complete (for a judge may still innovate in the absence of any

59. HERZOG, *op. cit.*, 207-231, has a valuable comparative study of case-law in the French, English and Spanish systems. In his view the Spanish legal doctrine must be allied with the French *jurisprudence constante* and contrasted with the English binding precedent, because the English precedent may be absolutely binding whereas the French *jurisprudence* never is (at 228).

statute, custom or legal doctrine) nor immutable (for the Supreme Court may reject an established legal doctrine if it so choose).[60]

Spanish jurists themselves are divided as to the effect of Article 6 on legal doctrine.[61] The majority admit that legal doctrine has a certain influence in fact but assert that the Code now prevents it from having the least authority in law. The Supreme Court does not concur in this wiew for, as we have seen, it breaks any decision infringing a legal doctrine. Manresa has a more subtle solution: "Although the article does not say so, we consider that after local custom and before the general principles of the law one has to apply the case-law of the courts".[62] He supports this contention by two texts: first, the third additional provision of the Code which provides for its decennial review in the light (inter alia) of the decisions of the Supreme Court; secondly, Article 1691 of the Law of Civil Procedure which provides the recourse in cassation discussed above in the case of a breach of legal doctrine. Professor Herzog argues that Manresa's theory rests on a misunderstanding of the texts and a misconception of the general spirit of the Code. Yet Manresa would seem to have analysed correctly the process of reasoning which the judges themselves in practice adopt. The Spanish jurist Dualde puts yet a third point of view: Article 6 was intended to deprive case-law of its role as a subsidiary source of law but attempt failed because the creation of rules of law is a social phenomenon outside the legislator's control.[63] So too Demofilo de Buen: the interpretation given by the Supreme Court to the general principles of the law assimilates them to legal doctrine and, as a result, case-law has remained a source of law under another name. "In reality", concludes de Buen, "although there has been a change of name, the situation has not changed with the Civil Code".[64]

Between these conflicting views, if indeed they do conflict, an English writer hesitates to arbitrate. The view which this essay ventures to put forward may be summarised thus:

After statute and custom, the Spanish theory of sources expressed in Article 6 indicates the general principles of the law. These principles will

60. DAVID, *op. cit.*, 431.

61. See HERZOG, *op. cit.*, 191-198.

62. MANRESA, *Código Civil,* t. 1, p. 84, cited by HERZOG, *op. cit.*, 191.

63. DUALDE, *Una revolución en la lógica del derecho* (Barcelona, 1933), 274 et seq., cited by HERZOG, *op. cit.*, 196.

64. DEMÓFILO DE BUEN, *Introducción al estudio del Derecho civil,* 333-334, cited by HERZOG, *op. cit.*, 200.

often be found expressed in *la doctrina legal* of the Suprem Court: this doctrine the judge must follow or his decision is likely to be quashed on cassation. In the absence of legal doctrine covering the point at issue the judge must look elsewhere for a manifestation of the general principles which are to guide his creative activity: to legal maxims,[65] to analogy, to rules of other systems of law akin to his own, to the writings of jurist and commentators, and, above all, to his own judicial instinct and sense of justice. But these miscellaneous elements, like legal doctrina, are not sources of law: they are no more than exemplifications of the underlying principles of Spanish law. The vagueness of Article 6 has at least the merit of completeness: the judge is not left to reach his decision *in vacuo;* he can always bring his creative decision within the infinite embrace of the third source, *los principios generales de derecho.*

DERECHOS FORALES

The various foral civil laws were not deprived of their authority on the promulgation of the Civil Code. Article 12 [66] states that the provinces and territories in which there is a foral law will keep it for the present in its integrity without the present rules of law, whether written or customary, under going any alteration by reason of the publication of the Code: the Code will only be applied as supplementary law in the absence of dispositions of the foral laws of these provinces and territories. The same article, however, in its first paragraph provides for the universal application throughout Spain (in both common law and foral law provinces) of the provisions of the Code relating to three particular matters. These are:

1. Dispositions relative to the effect of legislation.[67]
2. Dispositions concerning the doctrine of status and the general rules for the application of each status.[68]
3. Dispositions concerning marriage.[69]

It is clear why the first group of dispositions must be given universal application. Both relate rather to matters of public than private law:

65. These *aforismos* have no legal authority but are widely invoked in the absence of positive law: one may compare the "maxims of Equity" in English law.
66. Article 12, paragraph 2.
67. Viz. Articles 1-5, and 16.
68. Viz. Articles 9, 10 and 11.
69. Title 4, Book 1.

intolerable confusion would be caused if an enactment of the central legislature were given a different effect in different parts of Spain or if different forms of marriage prevailed in different provinces.

The seccond group of dispositions is concerned with the rules of conflict of laws. In Spain, unlike in England, conflicts of laws may arise both internally and externally. Little need be said of the external conflicts, in which Spain follows other continental systems in adopting the criterion of nationality rather than of domicile in determining personal status. More interesting for our purpose are the internal conflicts. Such a conflict may arise either between the common law and a foral law or or between one foral law and another. The determination of these internal conflicts is governed by exactly the same rules as those for external conflicts:[70] thus, a conflict between Spanish common law and Catalan law is resolved in the same way as one between Spanish law and English law. Within Spain itself we can observe the phenomenon of a unified private international law. That it is unified is due to the Code imposing throughout Spain the common law rules for status and its application and removing these matters from the domain of the foral laws.[71]

Except in the three matters discussed, the Code plays only a secondary role in the foral provinces. In these provinces the appropriate foral law will govern as before 1889: only if the question is not covered by any provision of the foral law is reference to the Code then permissible.

That the Code intended no alteration in the sources of the foral laws is indicated by the reference in Article 12 to the preservation of each foral

70. Article 14: "In conformity with the dispositions of Article 12, the rules established in Articles 9, 10 and 11 concerning the persons and property of Spaniards in foreign countries and of foreigners in Spain are applicable to the persons, acts, and property of Spaniards in the Provinces or territories which have a different civil law". But to determine the personal law of the *de cujus* in an internal conflict, it is clearly impossible to adopt the criterion of nationality, which is invoked in cases of external conflict. Instead Article 15 supplies an elaborate solution of this problem of *la dependencia regional:* see SABADIE, *op. cit.*, 37-39, especially his description of *la vecindad,* a kind of inter-provincial naturalisation.

71. It follows that within Spain one does not encounter the problems of classification and *renvoi,* which arise from a disunity of competing national systems of private international law. Nor does the antithesis of common law and foral laws create any problem of jurisdiction since both are administered by the same set of courts. Problems of jurisdiction which do arise spring from the limited territorial competence of certain of the lower courts. Thus, in inter-regional conflicts the problems is essentially that of the choice of law.

law in its integrity without alteration of its rules, written or customary.[72] The characteristic of every foral law was its derivation from written on the one hand and custom on the other. The written law would be made up of the enactments of the foral Parliament and official compilations of previous *fueros*, laws, and customs, many of great antiquity: this written law might apply to the whole foral area or to particular localities within that area: thus, there was a general law applicable to all Catalonia and a especial local law for certain parts of Catalonia, notably Barcelona, which ousted or modified the general law. Besides the written law (general or local) there was a mass of unwritten customary law. In addition, each foral law supplemented its written and customary law by reference to various subsidiary sources.[73] Finally, as an ultimate source, Article 12 brings in the Civil Code itself.[74]

By way of illustration of the complexity of the sources of foral law one may again cite the instance of Catalonia. After 1889 the sources of Catalan law are, in the order in which they must be applied:

1. The universal provisions of the Civil Code.[75]
2. Other legislation of general application to all Spain.[76]
3. Catalan civil law [77] comprising three elements:

72. This view is upheld by the Catalan jurist BORRELL I SOLER in his *Derecho civil vigente en Cataluña* (Barcelona, 1944, I. 14). Another distinguished Catalan, F. DE SOLÀ CAÑIZARES, cites Borrell i Soler with approval, pointing out that Article 6 is contrary to the order of sources in Catalan law: see *Le Droit Civil Catalan,* "Revue Internationale de Droit Comparé" (Paris 1953), 76. The writer is much indebted to this article for its illuminating outline of Catalan civil law.

73. Thus, any lacuna in Catalan written or customary civil law will be filled, where possible, by a provision sought, first, in the canon law, and, secondly, in the Roman law (*infra* p. 35).

74. In Aragon and the Balearic Isles the Code is elevated by Article 13 to the position of first and sole supplementary source. In the case of Aragon this is because that foral law prior to 1889 used as its primary subsidiary source the law of Castile. The Balearic Isles, however, had looked to Catalan law and Roman law to supplement their foral law, so that their inclusion within Article 13 appears due to the desire of their representatives at the time of the Code to secure some simplification of the supplementary sources of their law, and, possibly, to fear and jealousy of neighbouring Catalonia.

75. *Supra*, p. 32.

76. i.e. Legislation subsequent to the Decree of Nueva Planta (1716) and prior to 1889, so far as not superseded by the Civil Code, and also legislation subsequent to the Civil Code itself.

77. See generally F. DE SOLÀ *(op. cit)* for details of the more important peculiarities of this civil law.

(1) the general written law contained in *Les Constitucions i altres drets de Catalunya* of 1704;

(2) The customary law;[78]

(3) the local law of certain regions of Catalonia.[79]

4. The canon law as firts supplementary law.[80]

5. The Roman civil law as second supplementary law.[81]

6. The Civil Code (other than those provisions included in 1. above) as final suplementary source.

It is not surprising that French writers on Spanish law comment unfavourably on this complexity and criticise the slow unification of the foral laws with the common law.[82] Although little progress towards unification of the written law has been made since 1889, advances have been made elsewhere by the work of the Supreme Court, which through its jurisdiction of cassation is steadily evolving a body of legal doctrine applicable to all Spain. Of course, the court must take heed of an express provision of the foral law. But where foral law is obscure or where there is any doubt whether a provision of the foral law is available, then the Supreme Court has not been slow to have recourse to the Civil Code, and where the Code itself provides no solution it has invoked the general principles of the law pursuant to Article 6, principles which it vill be remembered must be evidenced either by *la ley* or by legal doctrine formed from its own previous decisions. This activity has not gone without criticism from the foral lawyers who see in it a slow but sure undermining of the foral law itself.[83] For, as David says, the foral law tends to be progressively reduced to unimportant matters which involve local custom or which do not admit an appeal to the Supreme Court.

78. According to Catalan jurists, custom may exclude a provision of written law (except the universal provisions of the Civil Code or other laws of universal application). Here is an important difference from the theory of sources set out by Article 6, which adds point to the contention that this Article has no application to foral law: see F DE SOLÀ, *op. cit.*, 81.

79. F. DE SOLÀ *(op. cit,* 81) mentions Barcelona, Tortosa, Gerona, and Vall d'Aran.

80. Not the new Canonic Code of 1918, but the body of the canon law in force immediately prior to 1918.

81. i.e. the Latin text of the Corpus Iuris Civilis.

82. The present writer does not altogether share the French view-point; see *infra* p.

83. In 1932 *el Tribunal de Cassació de Catalunya* was set up for this very reason but it was abolished in 1938. An interesting comparison might be made with the effect of the case law of the House of Lords upon Scots Law: see T. B. SMITH, *Doctrines of Judicial Precedent in Scots Law* (Edinburgh, 1952), *passim.*

PART TWO. — SOURCES OF ENGLISH LAW

The legal history of England is usually begun with the Norman Conquest of 1066 and the accession to the Throne of William, Duke of Normandy, a strong ruler determined to weld his newly-won Kingdom into an indestructible whole. It was, however, his grandson, Henry II (1154-1189) who recognised the important role which law could play in building together his realm: under him royal decrees and royal justice began to supersede the local jurisdictions and local customs. But this story can be found elswhere [84] and there it is proposed to pass at once to a consideration of the four sources of English law, custom, common law,[85] equity and statute-law, this being the order in which each source has been most active in shaping English law. A chronological treatment may well be adopted since English law lacks any pivotal date such as 1889 in Spanish law or 1789 in French law.

CUSTOM [86]

Anglo-Saxon law was largely a matter of local courts administering a system of local customary law. It was against such a customary background that the royal judges built the common law. The emergence of this common law has been regarded by some jurists as the expression of the common or general customs of the realm of England.[87] We shall

84. See HOLDSWORTH's monumental *History of English Law* (3rd ed., 1922) Vol. 1, or, in smaller compass, PLUCKNETT, *Concise History of the Common Law* (4th ed., 1948).
85. In a special sense considered later.
86. See ALLEN, *Law in the Making* (5th ed., 1951), 61 et seq., for a full discussion of custom as a source of English Law. An interesting short account is in POLLOCK, *First Book of Jurisprudence* (5th ed., 1923), 280-290.
87. This "declaratory theory" is expressed by Blackstone in 1765 (*Commentaries*, i, p. 73) in the following terms:
"And thus much for the first grand and chief corner-stone of the laws of England which is, general and immemorial custom, or common law from time to time declared in the decisions of the courts of justice."
Lévy-Ullman (*The English Legal Tradition*, London, 1935, p. 53) comments:
"In the Classical period of English law, that is, in Blackstone's time, general immemorial custom was only a pious fiction. Ever since the 13th century there had been superimposed, like a new geological stratum, the slowly accumulating mass of Common Law decisions. This mass was, indeed, not independant of the older tradition, but linked with it, as the author of the Commentaries points out. Yet, in essence, it constituted a new element."

examine this notion when discussing the common law. Be that as it may, the growth of the common law administered in the royal courts meant the virtual disappearance of general custom as a source of law. The common law had superseded all such general customs or else incorporated them within its own principles.[88]

The custom which remained, and still remains, a source of law is particular custom. The courts have evolved certain requirements which the particular custom must fulfil to be recognised as creating a rule of law. These are:[89]

1. It must be particular, that is, confined to a particular locality.[90]
2. It must not conflict with any fundamental principle of the common law.
3. It must have existed from time immemorial, which by convention is put at 1189. There are, however, certain presumptions which make this requirement less difficult to prove than at first sight appears.
4. It must have been continuously observed and peaceably enjoyed as of right.[91]
5. It must be certain.
6. It must not conflict with other established customs.
7. It must be reasonable.[92]

General custom, as distinct from particular custom, may exceptionally create a rule of law. The requirement of time immemorial is not then

88. ALLEN (*op. cit.*, 124): "A custom applying to all the King's subjects is not truly a custom at all in the legal sense for, as Coke says (Litt. 110b), 'that is the common law'."

89. Fully discussed in ALLEN (*loc. cit.*).

90. Or to a particular class of persons, e.g. merchants, but in this case existence from time immemorial is not insisted upon: see PATON, *Jurisprudence* (2nd ed., 1951) p. 148-9, who suggests the customs of merchants should now be considered, not particular, but general customs, and so "part of the law of the land". The writer agrees with this view and has treated mercantile usage as a general custom: see *infra*. 39.

91. I.e. the public which is affected by the custom must regard it as obligatory, not as merely facultative: what ALLEN (*op. cit.*, 131) terms the *opinio necessitatis*.

92. The importance of local customs is, in practice, slight. Many local peculiarities relating to succession and land-tenure were abolished by the reform of the law of property in 1922-1925. Most modern cases involving local custom concern rights over land: see supra p. 20, n. 13, and cases there cited. Also customs in particular trades or districts may often be embodied as implied terms with contracts: e.g. *Wigglesworth v Dallison* (1778) 1 Doug. 201; POLLOCK (*op. cit.*, 290) suggests in would be better to speak in this instance of "usages" rather than of custom, for "we have here to do with a canon of interpretation, not with a distinct source of law". As to the so-called customs of merchants, see infra.

possible since general custom of such antiquity will already have passed into the common law. Where general custom may still operate is in the field of mercantile usage. Originally, English law treated the usage of merchants as a particular custom restricted to the merchant class and to became part of the ordinary law, administered in the ordinary courts.[93] New usages may still today pass into the law as and when they become established. Thus, the law relating to negotiable instruments is the product of the last 250 years or so and is still capable of expansion[94] This suggests that the English conception of the common law is of something dynamic, not static. This conception must now be examined.

Common Law

This term is the more baffling to foreign jurists through being used in various senses. Of these senses the most important are two, one wide, one narrow. In the wide sense it indicates the body of law enshrined in the decisions of the judges (case-law) and is contrasted with the pronouncements of the legislature (statute-law). In the narrow sense it denotes only that part of the judge-made law which emanated from the courts of common law as distinct from the rules of equity evolved in the courts of equity. We will begin by taking the term in the wide sense.

The royal judges who went out into a countryside of local custom and vague unwritten legal traditions began to build up in their royal courts rules of law[95] To what extent these rules were declaratory of the traditions of the country or a kind of lowest common denominator of the local customs is not known. It is felt by some that the judges may have innovated to a considerable extent during this formative period.[96]. Whate-

93. People talk of the custom of merchants. This word custom is apt to mislead our ideas. The Custom of Merchants, se far as the law regards it, is the Custom of England. We should not confound general customs with special or local customs". — *Edie v East India Co.* (1761) 1 W. Bl. 295 per Sir Michael Foster. Cf. Goodhart, *English Law and Moral Law* (1953), 118: "It is noteworthy that the Law Merchant was not created by the State, but was taken over by the Courts long after it had been firmly established".

94. See *Goodwin v Robarts* (1875) LR10 Ex. 337; *Edelstein v Schuler* (1902) 2KB 144 much of the law of negotiable instruments has now been consolidated into statutes, notably the Bills of Exchange Act, 1882.

95. For a description of the circuit system of itinerant judges, see Lévy-Ullmann, *op. cit.* 48-51. See this same author (59-72) for an excellent account of the procedural skeletcn of "writs" upon which the body of the common law was built.

96. See Pollock, *op. cit*, 254-257; also Buckland & McNair, *Roman Law and Common Law* (2nd ed., 1952), 15.

ver the material out of which they formed their decisions, the uniformity of these decisions and their emanation from a small body of judges were the principal factors in establishing those rules and principles which we call the common law. "In substance the common law may be said to have been a new law created by the royal courts in the 12th and 13th centuries. Many of the materials with which the royal judges worked can, or course, be traced to the law of Anglo-Saxon England or pre-Conquest Normandy, but these materials they built into a new building with additions of but these materials they built into a new building with additions of their own, and so far as they were indebted in their achievement to anything beyond their own abilities it was to the law of Rome rather than to any other that the credit must go".[97] The inspiration of Roman law came through the canon law, many of the judges being ecclesiastics, but this Roman influence was never particularly strong.[98]

Due to their prestige, to their superior procedure,[99] and to the calculated policy of the King, more and more work was removed the various local courts into the royal courts. In dealing with the cases before them the judges in the courts of common law tended to follow their own previous decisions. In the course of the centuries this practice hardened into the inflexible doctrine of precedent, the account of which must be postponed until something has been said of the growth of equity.

EQUITY [100]

Common law in its narrow significance is contrasted with equity. The restricted growth of the common law under the system of units, the excessive formalism of its procedure, these and other factors led to the King beig addressed petitions from his humble subjects begging him to mitigate the rigours of the common law and to do justice in their particular hard case. Such a petition might properly be adressed to the King over the head of his judges because of the notion that the King was the fount of justice and, as such, possessed of a residuary jurisdiction outside that delegated by him to his judges.

97. RODELIFFE and CROSA, *English Legal System* (2nd ed., 1946), 15.
98. See ALLEN, *op. cit.*, 255 et seq.
99. Especially trial by jury.
100. See generally MAITLAND, *Equity* (1936); HANBURY, *Modern Equity* (6th ed. 1952).

The petitions would be delivered to the Lord Chancellor in his role of *Keeper of the King's Conscience.*[101] In time the Chancellor himself determined the merits of each petition and established his own court, the Court of Chancery, in which to try the case brought to him on petition. In this way there arose a rival system to that of the common law, possessing its own court, its own procedure, its own remedies, and its own rapidly growing case-law. This rivalry was eventually resolved in the reform of the 19th century by the merger of the two sets of courts into the one Supreme Court of Judicature.[102] But by that date serious conflict had become rare due to the rival courts each having abrogated to themselves certain provinces of the law as within thier own special jurisdiction.[103] Equity, like the praetorian law of Rome, was in the nature of an additional body of rules supplementary to those of the common law: it offered remedies over and above those available at common law; it protected and enforced rights which were not recognised at common law; it also gave superior methods of procedure.

Equity then is how English lawyers describe collectively the rules of law formulated by the courts [104] of equity. It is possible to speak of rules for despite the origin of equitable jurisdiction in the desire to escape from inflexible rules to a less rigid, more perfect justice, it was not long before equity too began to follow its own previous decisions. By the time the reforms came both equity and common law were in the common grip of the doctrine precedent.

PRECEDENT

The same instinct which produces custom produces a doctrine like that of precedent: *via tuta via trita.* It is not possible to do more here than state the modern form of this doctrine and indicate its controversial elements. The history of its evolution may be found elsewhere.[105]

101. The mediaeval Chancellor was, in Maitland's phrase, the Kings's secretary of state for all departments; until the 16th century the office was almost invariably held by a high dignitary of the church, who would naturally be expert in matters of conscience.

102. A process completed by the Judicature Acts, 1873-75.

103. "We ought to think of the relation between common law and equity, not as that between two conflicting systems, but as that between code and supplement, that between text and gloss." (MAITLAND, *op. cit.*, Lecture XII.)

104. There were other courts, besides Chancery, which exercised equitable jurisdiction.

105. Notably, ALLEN, *op. cit.* 154-227. For a short account of the theory of precedent, see PATON, *Jurisprudence* (2nd ed., 1951), S.44.

The decision of a case by a judge not only is binding on the litigants but it may also have authority over judges seized of similar cases in the future. It is the second aspect of the force of the decision which is involved in the doctrine of precedent. Three questions have to be answered: first, what degree of authority does the earlier case (or "precedent") have in subsequent cases? Secondly, what is the legal principle embodied in the precedent? Thirdly, what determines whether a subsequent case is similar and so to be governed by that principle?

As to the first question, a decision of a higher court is binding absolutely on a lower court if seized of a similar case: [106] thus, a High Court judge will be bound by a decision of the Court of Appeal, and the Court of Appeal will be bound by the House of Lords. Furthermore, the Court of Appeal and the House of Lords are absolutely bound by their own decisions.[107] Other courts (e.g. High Court, County Courts, Court of Criminal Appeal, Judicial Committee of the Privy Council) are not absolutely bound to follow their own previous decisions: such decisions are only persuasive authority, not lightly to be departed from.

But when one speaks of a precedent as an authority,[108] it is only the legal principle on which the first case was decided which is an authority in the later case. The court has, therefore, to resolve the second question, namely, what is the legal principle the judge in the earlier case invoked to reach his decision: this principle is known as the *ratio decidendi*. Because in his judgement the judge will have set out a reasoned justification of his decision, the reader of the report of the earlier case will be able

106. In England there is a hierarchy of civil courts headed by the House of Lords as the ultimate appellate jurisdiction. Beneath the House of Lords is the Court of Appeal which hears appeals from (i) the various divisions of the High Court sitting in London and (ii) the numerous Country Courts which sit in provincial centres to decide the smaller civil cases. The criminal courts form a different hierarchy, although this too the House of Lords at its head.

107. This principle was not finally established until 1898 for the House of Lords (*by London Street Tramways Co. v L. C. C.* (1898) AC375) and 1944 for the Court of Appeal (by *Young v Bristol Aeroplane Co.* (1944) KB718). But *Young's Case* recognised certain exceptions to the application of the principle in the Court of Appeal, and Dr. Allen (*op. cit.* 234 et seq.) shows that the present system still admits of considerable flexibility. See also R. N. Gooderson in 10 "Cambridge Law Journal" (1950) 432.

108. Thus Dr. Allen, *op. cit.*, 241: "Any judgement of any court is authoritative only as to that part of it, called the *ratio decidendi,* which is considered to have been necessary to the decision of the actual issue between the litigants. It is for the court, of whatever degree, which is called upon to consider precedent, to determine what the true *ratio decidendi* was".

to see the process of reasoning adopted therein. Often indeed the judge will formally state his reasons for his decision: must the later sudents of the case accept the judge's own formulation of the *ratio decidendi,* or can they extract their own ratio decidendi? Controversy rages over this point. In the orthodox view, one accepts as the true *ratio decidendi* the principle which the judge himself propounds, so far as this principle is necessary for the decision.[109]

The third task facing the court is to decide whether their case is similar to or "on all fours" with the earlier case. What facts did the judge consider relevant in reaching his decision? Are those same relevant facts present in the instant case? Are there no additional facts to enable the case to be "distinguished" from the earlier one and the court to escape in this way from the authority of the precedent? Again, much has been written on the art [110] of distinguishing, for it is a necessary part of the judicial process in England: the colour of a man's eyes will not normally be a relevant fact, but whether he has one or two may be.[111]

If there is no precedent nor statutory provision applicable to the case before him, the judge has to create [112] a new rule of law in order to reach a decision. In this work of creation he will be guided by his judicial training and experience; he will use analogy; he will consider the solutions of other systems of law; he will pay heed to public policy.[113] But the

109. A proposition of law which is unnecessary for the decision is termed an *obiter dictum.* For an attack on the orthodox view see GOODHART: *The Ratio Decidendi of a Case,* "Essays in Jurisprudence and the Common Law" (Cambridge 1937).

110. "There is no trick of method which can rigorously determine the *ratio* — the interpretation of precedent is an art rather than a science." PATON, *op. cit.,* 162.

111. See *Paris v Stepney Metropolitan Borough Council* (1951) AC367, where the House of Lords found the defendant council had been negligent in not providing goggles for their *one-eyed* workman, such one-eyedness being a material fact in the decision.

112. See ALLAN, *op. cit.,* 277: "Hence arise those cases 'of first impression' which are by no means uncommon in the courts, even at this day when so many permutations and combinations of circumstances have been considered and recorded. To what, then, do the judges turn? To those principles of reason, morality, and social utility which are the fountain-head not only of English law but of all law". Later Dr. Allan speaks of the judge employing "that kind of natural justice or common sense which he has absorbed from the study of the law and which he believes to be consistent with the general principles of English jurisprudence" (*op. cit.* 285). Again (at 341): "But even in these cases (of first impression) the judge decides upon considerations which his technical training lead him to believe are consistent with general principles of English law". This is an interesting echo of Article 6 of the Spanish Civil Code.

113. See DENNING, *The Changing Law* (1953), preface vii, where the learned Lord Justice states: "In theory the judges do not make law. They only expound it. But as no-one

eventual decision will be his own, and for the future it will itself become a precedent and part of the common law. For the common law, its principles never having been exhaustively translated into a code, is still capable of growth.[114]

STATUTE-LAW

Of the fourth and last source of English law a foreign jurist need be told very little. Legislation or statute-law has come to the fore as a source of law in the last hundred years or so. In the sphere of commercial law a partial, though piece-meal, codification has been effected: witness the Bills of Exchange Act, 1882, Factors Act, 1889, Partnership Act, 1890, Sale of Goods Act, 1893, and various acts relating to bankruptcy and company law; in the main these acts merely restate the pre-existing law, largely judge-made. The law of property, especially property in land, was drastically revised in 1925 in a number of important statutes. Since the war of 1939-1945 a great flood of legislation has flowed from Parliament: most of this is concerned with public law,[115] but private law too has been affected.

An important function of statute-law is to open a way out of we impasse into which the doctrine of precedent may lead. Once the House of Lords, as the highest court in England (and Scotland too), has reached a decision, that decision is ever binding upon it and all lower courts. But with the development of society the decision may become undesirable, even manifestly unjust. Legislation has then to be introduced to change the law.[116] The supremacy of the legislature enables Parliament to overrule the offending decision of the judiciary, but even without express

knows what the law is until the judges expound it, it follows that they make it". Cf. ALLAN, *op. cit.*, 286: "Although (the judge) is making a definite contribution to the law, he is not importing an entirely novel element into it".

114. See EVERSHED, *Current Legal Problems*, 1953, p. 2: "A rule of law not enshrined in any statute has within it at least some capacity of continual growth and development. But when a statute has been passed defining and replacing the old rule, the question is one not so much of discerning the true principle behind the rule but of construing the precise language of the statute".

115. "The great bulk of legislation is concerned with public law. It is for the most part of a social or administrative character, defining the reciprocal duties of State and individuals, rather than the duties of individuals *inter se*." (ALLEN, *op. cit.*, 289).

116. Recent examples are Law Reform (Frustrated Contracts) Act, 1943; Law Reform (Contributory Negligence) Act, 1945; Law Reform (Personal Injuries) Act, 1948; Law Reform (Miscellaneous Provisions) Act, 1949.

statutory reform, where a judge is faced by a conflict between a precedent and legislative provision, he must follow the latter.

Summary

English law is derived from four sources: custom, common law, equity, and statute-law. The first source consists, in the main, of particular or local customs, which will be recognised as having legal force by the courts only if they satisfy certain strict requirements. Common law and equity still remain distinct branches of law in the mind of the English lawyer, although since 1875 the rules of each branch are applied in all the couts. Together they form a system of judge-made law which, unlike in continental law, is no series of glosses on a code but a coherent and self-contained body of rules.[117] This judge-made law is made self-consistent by the doctrine of precedent. Finally, statute-law is increasingly at work in a time of social revolution both in framing new public law and in speedily adopting the private law to keep pace with the changing times. Moreover, legislation is periodically needed to cut the gordian knot which the doctrine of precedent may tie about the decisions of the House of Lords.[118]

117. See David, *Traité élémentaire de droit civil comparé* (Paris, 1950), 278: "Pour les Anglais, la source essentielle du droit, c'est la jurisprudence: le juriste anglais part du principe qu'en consultant les arrêts rendus par les Cours anglaises, il trouvera toujours, inévitablement, un principe, une règle de droit, à l'aide de laquelle il pourra résoudre la contestation à lui soumise".

118. There are, of course, other influences which affect the content of English law, although one cannot dignify them with the title of sources. The writings of jurists need only be mentioned here. If the writings are of great antiquity they are treated as evidence of the law which they set out. Again, some great jurists of the less remote past, like Blackstone, have so long been regarded as authoritative statements of the law that their views are treated with very great respect. The writings of modern jurists, if of sufficient importance, may be invoked by a judge when faced with a new problem. It is not usual, however, to describe these writings as a source since they have no authority *de iure:* the judge may ignore them. But jurists, ancient and modern alike, by text-book and commentary, have done much to systematise and improve the knowledge of the law scattered in the reported cases and the subject of piece-meal legislation. With regard to such "unauthoritative" sources, see Salmond: Jurisprudence (10th ed.) 151 et seq. Cf. Allen, *op. cit.*, 252 et seq. Dr. Allen maintains that "the difference between the authoritative and the so called 'persuasive' sources is one of degree, not of kind". But, with great respect, a differences of degree often makes a world of difference *in law*.

CONCLUSIONS

From a comparison of the theory of sources in the laws of Spain and England, six main conclusions emerge:

1. The pre-eminent source in Spanish law is, and seems always to have been, *la ley*: the other sources are what the French term *extra-légal* and only of secondary authority. In English law, the judge-made rules of common law and equity constitute the principal authority and form a more or less coherent system. The authority, however, of statute-law is higher *de iure* due to the constitutional theory of the supremacy of Parliament. But despite the superior authority of *la ley* in English law, English legal thinking preserves its traditional approach, which is to regard precedent as the normal source of legal norms whereas legislation remains something exceptional, confined to isolated topics, and the object of restrictive interpretation. Judge-made law is the great reservoir from which English law is derived. Spanish lawyers look to a text the Code and various other enactments provide this text for their civil law.

2. In the absence of a provision of *la ley*, a Spanish judge applies the local custom, if there be any, and in default the general principles of the law. These principles are treated as largely identical with the legal doctrine of the Supreme Court. This legal doctrine occupies an intermediate position between the strict English doctrine of precedent and the flexible French theory of *la jurisprudence constante*. The English judge, on the other hand, whose mind will have turned first to his precedents and thence to the statute-book, faced by a lack of provision covering the case before him, will produce a new rule by analogy to the existing rules or by any other means his judicial training approves.

3. Custom plays a part in both systems, being recognised as a source of law in certain circumstances, but its role in English law is very restricted and it is rarely before the courts: in the Spanish system custom is more active.

4. The historical division between common law and equity has no counter-part in Spanish law. There, besides the distinction *ratione loci* made within the civil law between civil law, a triple division *ratione materiae* is also made between civil law, commercial law, an administrative law. In English law all three matters are largely dealt with in the same courts. Only in administrative law is there a growing tendency for admi-

nistrative matters to be removed from the jurisdiction of the ordinary civil courts.

5. The legal unity of England with its centralised system of superior courts and its universally applicable legislation and judge-made law contrast markedly with the legal disunity of Spain where foral laws exist alonside the common law. Yet if one take the larger political unit of the United Kingdom, legal unity is at once lost: Scotland enjoys its own legal system and Northern Ireland has its own legislature. The British Isles indeed include a number of foral laws: Scotland, Northern Ireland, the Isle of Man, and the Channel Isles all have a measure of legal autonomy. If we take a still larger unit such as the Commonwealth the legal diversity becomes almost indescribable. It is only within the geographical area of England and Wales that the common lawyers may properly boast of their legal unity.

6. Conscious of the different legal systems which combine in the political unity of the United Kingdom or of the Commonwealth, an English observer of the Spanish scene may question the *a priori* arguments which most French writers advance in criticising the continuance of the foral laws in Spain. North of the Border, England has its own Catalonia, but English lawyers recognise that it is best for the Scots to continue to live under the legal system which is natural to them and which they have shaped through centuries of experience to reflect the peculiar characteristics of the Scottish people. Until two peoples are sufficiently blended into a harmonious whole, an artificial unity of law has little to commend it and may well violate the culture and traditions of one or both peoples. Better far to tolerate diversiy of law within the political unity than to endanger that unity by seeking legal unification prematurely. The arguments so strongly advanced by French writers on the basis of French experience seem less forceful and less self-evident to an English or Scots lawyer. In Spain today the trend in favour of the statutory unification of the various laws seems to have been reversed; instead, preference is given to the slower process of seeking to reduce and eventually to eliminate the foral laws through the legal doctrine of the Supreme Court. This process well deserves the attention of English lawyers, whose interest in one of the great legal systems of the world will, it is hoped, have been stimulated by this short account of the Spanish theory of sources.