Otto Kahn-Freund, "Introduction", in *The Institutions of Private Law by Karl Renner*, ed. by Otto Kahn-Freund and transl. by Agnes Schwarzschild (London: Routledge & Kegan Paul, 1949), pp. 8-16.

Positivism is a utopia. The law is neither consistent nor self-sufficient. Whatever theorists may say and whatever he himself may think and say, the judge constantly recurs to an analysis, articulate or inarticulate, of the moral, social, economic function and effect of the rules and principles he applies, and of his own decision. The task of the law-maker and that of the law-finder cannot be kept in water-tight compartments, and judges have always acted and will always act on the celebrated principle of the Swiss Civil Code of 1912 that, in the absence of a statutory or customary norm, the judge must decide "in accordance with the rule he would lay down if he were the legislator".

One cannot, however, dispose of positivism simply by stating that it is a utopia. Like other utopias it has its place in the history of human ideas, a place which is (at least partly) determined by the social and political environment in which it arose. Is it simply a response to the needs of capitalism? Is it the outcome of conditions peculiar to the European Continent?

Every legal system requires an element of ideological unity.

However much one may be aware that the application of the legal norm is, in many cases, a policy-making process, one cannot dispense with a principle which links one decision with another, which raises the judicial act beyond the level of the realm of sheer expediency. Without such a principle the practical lawyer cannot operate, without it the law cannot command the respect of the public. The fiction of logical consistency, however threadbare it may look to the critical eyes of our generation, did once provide this unifying principle. It does so still—up to a point—and it does so both on the Continent and in the common-law jurisdictions of the British Empire and of the United States. There is, however, an important difference between the place which this fiction occupies in continental legal thought and the rôle it plays in the common law world.

In a systematised legal structure such as the *Usus Modernus Pandectarum* and the modern Continental Codes legal institutions such as ownership, sale, marriage, appear as part and parcel of a self-contained logical entity, of an intricate network of major and minor premises. It is the task of the jurist, of the legal scholar, to analyse and re-analyse the normative content of the law, to make the logical network more and more refined and pliable. It is the function of the judge to find his decision with the help of the intellectual tools which the "science of the law" has put at his disposal. Every new factual situation must somehow be fitted into the existing system. That system is comprehensive and without "gaps". It stands firm like a rock, be it even in the midst of a turbulent sea of social change.

The conceptualist school of thought was, on the Continent, the dominant variety of positivism in the 19th century. It postulated the logical consistency of the legal system as a whole. The judicial process, it insisted, is of a strictly deductive nature. The norm which the judge applies is, in its view, incapable of being transformed by the process of application. Hence, the judicial decision itself can in no sense be considered as a source of law. It must justify itself exclusively by the process of deduction from abstract premises on which it is based.

Although this conceptualist doctrine has for many decades been discarded by the majority of continental scholars, it has left as its legacy the fiction of systematic consistency as the primary element of ideological unity in the law.

In this country and in the whole common-law world, the place

of the systematic fiction is taken to a considerable extent by the fiction of historical continuity. Every decision appears in the cloak of a mere application or adaptation of pre-existing "principles" laid down in earlier judicial pronouncements. Where historical continuity and systematic consistency are in conflict, it is the former which prevails, and it prevails even where the question at stake is the interpretation of a statute. If law can be called a science, it is, in this country, an empirical not a speculative science. It is an answer—primarily—to the question: "what was done previously?", not a logical process untrammelled by previous attempts to grapple with a similar situation. The positivist utopia has its place in a systematic as well as in a casuistic legal structure, but, in the latter, the logical fiction will be pushed into the background by the historical fiction.

It is necessary to bear this in mind in reading Renner's analysis. But it is also necessary to remember what are the historical causes and events which account for this difference, and to avoid two all too frequent misapprehensions.

It is not, as is sometimes argued, the codification of the law which gives rise to the idea of systematic consistency. Germany before 1900 was the Mecca of "legal science". It paved the way for the Code which came into force that year, the Code was its fruit, not its root. On the other hand, large parts of Land Law, of Commercial Law, of Administrative Law, and of Criminal Law have been codified in England, but the "principle of precedent" continues to dominate these branches of law to such an extent that the highest Court had occasion to remind the lower instances that there was—after all—a codification.[1] Codification does not necessarily engender "scientific" legal thought (as Bentham erroneously assumed), a code can be survived by the fiction of historical continuity. While, therefore, the inherent connection between conceptual positivism and codification must not be overrated, it must be understood that in Renner's analysis the terms "law" and "written law" are largely synonymous. He does not draw a distinction between "*droit*" and "*loi*", between "*Recht*" and "*Gesetz*". The Austrian Civil Code had been in force for almost a century (since 1811), the German Civil Code had just seen the light of day when he wrote his book. In the background of his thought there was the "*ratio scripta*", Justinian's Corpus Juris. What Renner says about the stability of the norm in the

[1] Lord Herschell in *Bank of England v. Vagliano*, [1891] AC 107, at p. 144.

face of a changing social substratum would not have been said, or not have been said that way, if customary and judge-made law had been within the scope of his analysis. Where the courts are openly recognised as law-making agencies, it is difficult, if not impossible to maintain the fiction that the norm is stable and unaffected by social change. Every case "*primæ impressionis*" is a living refutation of that fiction.[1]

Systematic positivism is, in this country, sometimes associated with the influence of Roman Law. To some extent this too is a misunderstanding. It is quite true that the systematic grouping of positive norms as "legal institutions" and the definition of these institutions (ownership, obligation, sale, hire, pledge, etc.) was one of the great contributions of the Roman mind to human civilisation. It is equally true that, as Ihering has formulated it,[2] it was the Romans who succeeded in "precipitating" legal conceptions out of the multitude of legal norms, and in building up an "alphabet" of legal concepts which is the pre-condition and indispensable tool of scientific legal thought. Nevertheless, no one who has endeavoured to compare the method of the common lawyer with that of the Roman jurist and of the 19th century continental legal scholar can fail to agree with Buckland and McNair[3] "that there is more affinity between the Roman jurist and the common lawyer than there is between the Roman jurist and his modern civilian successor". "Both the common lawyer and the Roman jurist avoid generalisations and, so far as possible, definitions. Their method is intensely casuistic. . . . That is not the method of the Pandectist. For him the law is a set of rules to be deduced from a group of primary principles, the statement of which constitutes the '*Allgemeiner Teil*' of his structure." The conceptual method which implies the "purity" of the norm and which claims to be capable of establishing and enforcing a *judicium finium regundorum* between "norm" and "substratum" is not inherent in Roman Law. It is the heritage of the *Usus Modernus Pandectarum*, of the "Roman common law" influenced by natural law concepts and by Germanic customs and developed on the Continent since the Middle Ages.

Neither codification nor the influence of Roman Law can account for the difference between the Continental and the Anglo-

[1]The only place where judge-made law is mentioned is at p. 199 where, characteristically, the norm appears as adaptable to the substratum.
[2]*Geist des römischen Rechts*, Vol. I, p. 42.
[3]*Roman Law and Common Law*, p. xi.

Saxon types of positivism. The axiom that the law is a logical system, self-sufficient, comprehensive, without "gaps", arose on the Continent as a response to the needs of the growing civil service state. Max Weber has demonstrated how the continental monarchies from the 16th to the 19th centuries availed themselves of the systematised structure of legal conceptions built up by the scholarly expositors of the Roman Law. The rigid frame-work of positive legal concepts made for unity of administration, it also facilitated the smooth operation and the supervision of the administration of the law by a judicial and administrative civil service, a civil service which was scattered over wide areas, but subject to a centralised control. It is not, of course, suggested that the growth of systematic positivism on the Continent can be entirely explained by a simple formula like this. Many factors, the influence of natural law not being the least of them, have contributed to the development of this particular type of what Weber calls the "formal rationality" of the law. It cannot, however, be denied that the social structure of the legal profession on the Continent and, above all, the political structure of the absolute monarchies were the "prime movers" in the creation of this unique phenomenon of a "logical utopia" in the law.

None of the sociological and political factors which, on the Continent, made for systematisation and for the restriction of judicial discretion to a minimum was present in this country, not, at any rate, since the middle of the 17th century.

In this country the unification of the law had been the work of the medieval monarchy operating largely through the common law courts. It is impossible to over-emphasise the historical importance of this fact. What was a problem still to be solved on the Continent at the inception of the capitalist era—the creation of a uniform law—was, in England, an accomplished achievement. Systematisation was very largely unnecessary, because it was not required in order to overcome the chaos of local laws and customs. Of all the important jurisdictions of Europe, England was the only one to emerge from the Middle Ages with a "*common* law". The heritage of feudalism in this country was a unified body of institutions and rules which, while lacking in logic, were nevertheless capable of being intellectually absorbed and—above all—capable of being applied throughout the country. The lawyer did not need the Ariadne thread of systematic thought to

help him to grope his way through a labyrinth of "*Stadtrechte*", of "*coutumes*", etc.

Moreover—and Max Weber's sociological analysis has made this convincingly clear—the thought-processes of the common law can and should be understood as the outcome of the needs and habits of a legal profession organised in gilds and preserving the structure and the power of a medieval vocational body. The modern continental systems were developed in the universities by legal scholars for the use of officials. English law evolved as a series of gild rules for the use and guidance of the members and apprentices of the Inns of Court. It was due to political factors, to the failure of the absolute monarchy in England, to the aristocratic structure of the body politic in the 18th century, that the administration of the law remained in the hands of the lawyers' guilds. With some exaggeration one might say that it was the Revolution of 1688, not the refusal to "receive" Roman Law that, in this country, sealed the fate of systematic legal science in the continental sense.

The common law was developed by that branch of the legal profession whose main interest lies in litigation. It was, until well into the 19th century (and, to a degree, it still is), a series of rules of conduct for practising advocates, a comprehensive answer to the question: "how do I behave in court?" It was a body of practical and technical craft-rules, handed down from master to apprentice, and designed to instruct the advocate in the art of raising and defending claims. This largely accounts for its "empirical", for its casuistic as opposed to the continental logical and systematic method. The craftsman asks: "how has this—or a similar—case been handled before?" He is not very much concerned with the question, whether the answer is capable of being fitted into an abstract system. It is, of course, easy to over-emphasise the contrast between the two methods. Logical deduction was never absent from the thought-processes of English judges and advocates, and precedents have played and are playing an important and rapidly increasing rôle on the Continent.[1] We are merely concerned with a basic difference in outlook and with the historical factors which account for this difference.

The contrast between the methods of thought of university

[1]See for the various types of principles of precedent the analysis by Goodhart, *Essays in Jurisprudence and the Common Law*, pp. 49 sq.

trained and gild trained lawyers may also serve as an explanation for the essentially "remedial" or "procedural" structure of English legal ideas. English law does not pose and answer the question: "what are the legal guarantees for the freedom of the individual from arbitrary arrest?" It is content to ask: "in what circumstances will you, the barrister, be able to obtain for your client a writ of *habeas corpus* or a judgment for damages on the ground of false imprisonment?" From a practical point of view there is no difference between these two types of question. Nevertheless the contrast between the two formulations reveals the gulf between thought processes influenced by natural law and orientated towards a systematic structure of rights and duties, and a method of argument whose primary pre-occupation is with remedies, not with rights, with procedural form, not with juridical substance. It will be seen that the difference in approach to the law of property can and must be explained as a similar divergence in method rather than in practical results. It is not so much in the practical operation of legal institutions as in the intellectual machinery which promotes that operation that systematic and historical positivism, the continental and the Anglo-Saxon methods, are divided.

The foregoing remarks are not intended to give a comprehensive account of the methodological difference between the two types of legal thought, even less to give a full explanation of its causes. What they are designed to demonstrate is that it is not an inherent feature of capitalism as such to give rise to either systematic or historical positivism. That the continental method of approach was not adopted in England, that the principle of precedent (in its English form) did not take root on the Continent, has its social causes. But these causes must be found in the structure of the body politic, not in the economic and social function of legal institutions. The rising middle classes were interested in what Max Weber calls the "calculability of chances". They were inclined to press for a development of the law which permitted their lawyers to predict the outcome of disputes. There is no doubt that the needs of capitalism promoted the "formal rationality" of the law, i.e. the decision of each individual case in accordance with a rational thought process, not in accordance with ethical imperatives, expediency or political maxims. This formal rationality, however, is a common characteristic of systematic and of historical positivism. As long as the judge

proceeds on lines which can be predicted, it is irrelevant to the lawyer's client whether the argument is empirical or speculative, based on precedent or on general principles. "Modern capitalism can equally flourish and show identical traits under legal orders which not only possess widely different norms and legal institutions, but whose ultimate formal principles of structure are as widely divergent from each other as possible."[1] "There is not inherent in capitalism as such any decisive motive for favouring that form of rationalisation of the law which, since the rise of Romanist University education, has remained a characteristic of the continental occident."[2]

The contrast between the continental legal systems and English law lies far more in "ultimate formal principles of structure" than in positive "norms and institutions". The practical results are very often identical, where the lines of reasoning which lead up to them are as divergent as possible. Renner's analysis is concerned with the function of legal institutions, and especially with the adaptation of the property concept to an almost infinite variety of social and economic uses. Whether and to what extent lawyers choose to clothe the practical operation of these institutions in general formulæ is largely irrelevant for an analysis of this kind. English law has never developed a fixed and rounded definition of property, but, from the point of view of a sociological investigation, it matters little whether the owner claims his property by virtue of a *rei vindicatio* arising from the institution of ownership as such or whether he avails himself of an action for conversion or of detinue arising from the right to possession and being in its origin and structure a species of a delictal claim. It is only a question of legal technique whether I ask: "what are the conditions for the acquisition of ownership?" or: "who is the proper plaintiff, who is the proper defendant in an action for conversion?" From the point of view of the function of the institution of property it is irrelevant whether I devise a systematic set of principles culminating in the monumental pronouncement: "*En fait de meubles, la possession vaut titre,*" [3] or whether I am content to say that, as against a defendant who has given value in good faith, the plaintiff is, in certain circumstances, estopped from pleading a title better than that of the defendant's

[1]Max Weber, *Wirtschaft und Gesellschaft*, p. 508.
[2]Ib. p. 509.
[3]Code Civil Art. 2279, there are, of course, in this case, formidable practical differences in detail, which do not affect the point made in the text.

alleged predecessor The difference is very important for those who learn the law and those who teach it. It is equally important for those who apply it. It is of next to no account for those whose interests are involved.

A continental lawyer and an English lawyer engaged in a conversation upon the law of succession on death will find it very difficult to understand the "thought processes" of their partner. The Englishman will take it for granted that there must be a "personal representative", an administrator or executor, who as such has no beneficial interest in the deceased's estate at all, has merely powers and duties, but no rights of enjoyment. He will fail to appreciate what his colleague means when he speaks about an "heir" or "heirs" in whom the estate vests *ipso facto*, who is (or are) liable for the debts of the deceased, and entitled to keep the residue. Nevertheless, if they forget their legal techniques and look at the practical results with the eyes of their clients, they will soon be convinced, that English law—without saying so—embodies the principle of "heirship" no less than French law which defines an "*héritier*" and a "*légataire universel*" or German law which defines an "*Erbe*". Two bankruptcy specialists, one from the Continent and the other from England, will soon discover that it is not very relevant from a practical point of view whether the law gives an abstract definition of insolvency or enumerates a catalogue of types of conduct—known as "acts of bankruptcy"—which indicate an individual's inability to pay his debts.