

THE EUROPEAN NATURAL LAW CODES: THE AGE OF REASON AND THE POWERS OF GOVERNMENT

HORST KLAUS LÜCKE*

Law is universal reason, supreme reason based on the very nature of things. Legislation is, or ought only to be, law reduced to positive rules, to specific precepts.¹

This article will focus upon the codification movement in Europe as it unfolded in Prussia, Austria and France in the 18th and early 19th centuries. Natural law as it was understood by the philosophers and lawyers of the Enlightenment gave impetus to the codification and simplification of legal systems, particularly as they affected private relations. The codification movement is one of the few philosophical theories ever to have been translated into practical law and politics. The rulers, particularly Frederick the Great of Prussia, and Joseph II and Leopold II of Austria, embraced these aims not only because they aspired to join the ranks of great historical lawmakers but also because they saw the power of reason as a new political principle superior to those that had gone before. American and French revolutionaries gave effect to an equality principle which was radical by the standards of the time and which became one of the cornerstones of the Code Civil of 1804. With Napoléon Bonaparte, the codification story began to be dominated by centralism, nationalism and imperialism.

I INTRODUCTION

A *The state of the law before codification*

When the *Corpus Juris* was rediscovered in Italy in the early years of the second millennium, law students from all over Europe streamed to Italian law schools to learn about the law of Justinian. The reception of the *Corpus Juris* did not mean, as some may have hoped, that it would result in clear and understandable statements of rights and responsibilities. Most of the *Corpus Juris* was in Latin so that even those who were literate in their own language needed professional help to find out what it meant. Some of the early glosses and commentaries attracted a wide following among lawyers.² Although these works helped clarify the meaning of the *Corpus Juris* and also developed it further in some respects, they failed to make it accessible to ordinary people. Moreover, a wealth of scholarly writing accumulated over time which generated its own forms of uncertainty. French writers mocked court processes as unwieldy and being decided ultimately by a throw of the judicial dice³ and Edward

* Honorary Professor, University of Queensland; Professor Emeritus, University of Adelaide. The author is grateful to Dr Jonathan Crowe for many useful suggestions for improvement.

¹ ‘*Le droit est la raison universelle, la suprême raison fondée sur la nature même des choses. Les lois sont ou ne doivent être que le droit réduit en règles positives, en préceptes particuliers.*’ – *Discours Préliminaire du Premier Projet de Code Civil.* – Canadian Department of Justice, *Preliminary Address on the First Draft of the Civil Code* (12 April 2012) <<http://www.justice.gc.ca/eng/pi/icg-gci/code/page02.html>>.

² The Great Gloss of Accursius, written in about 1250, and the works of Bartolus de Sassoferrato (1314–1357) were widely used.

³ François Rabelais, *Gargantua and his son Pantagruel* (T Urquhart of Comarty and P A Motteux trans, Forgotten Books, 2008) 360.

Coke, a keen student of Roman law,⁴ likened the civilian legal scene to a ‘sea full of waves’.⁵ As a result, legal advice was expensive and unreliable and litigation protracted and its results unpredictable. A frequent criticism of the *Corpus Juris* was that there was no system behind its compilation and that it had been written for a past and very different age.⁶

Even if the *Corpus Juris* had been the perfection of reason, it still would not have met the legal needs of the age. In France, Roman law was received only in the southern regions, the *pays de droit écrit*, whilst local customs continued in the northern part, the *pays de coutumes*.⁷ The *pays de coutumes* were not the only European regions in which local customs and other local laws were in force. Roman law was a subsidiary source of law. It applied only in the absence of local laws, including local customs which were based on oral traditions and thus of uncertain import. At the beginning of the 16th century, French courts still used the *enquête par turbe* (enquiry of the people) to ascertain local custom: local residents were asked to explain its content and meaning.⁸

B Early attempts at codification

In 1454 Charles VII of France issued an Ordinance requesting the codification of regional customs,⁹ the most important of which was the custom of Paris. Eventually these early codifications were superseded by the Code Civil of 1804. In Prussia a Cabinet Order of 14 April 1780 ordered *inter alia* that provincial oral traditions were to be codified, but only one such code was ever enacted.¹⁰ The *Prussian Code of 1794*¹¹ (ALR) stated in Introd § 3:¹²

⁴ H K Lücke, ‘Statutes and the intention of the lawmaker as the ultimate guide to their applicability: history and prospects’ [2010] *Supreme Court History Program Yearbook* 1, 5.

⁵ ‘Upon the text of the civil law, there be so many glosses and interpretations, and again upon those so many commentaries, and all these written by doctors of equal degree and authority and therein so many diversities of opinions, as they do rather increase than resolve doubts, and uncertainties, and the professors of that noble science say, that it is like a sea full of waves.’ – Edward Coke, *Institutes of the Lawes of England* (1634) 2 Co Inst A PROEME, last paragraph.

⁶ ‘The object of the criticism of the Jus Commune was the Corpus Juris itself as well as the legal practice of the time. This criticism begins with the humanism of the sixteenth century, which discovered the historical relativity of Justinian’s law and concomitantly the gap that separated Justinian’s legislation from the factual conditions of sixteenth century Europe.’ – H Coing, ‘An intellectual history of European codification in the eighteenth and nineteenth centuries’ in S.J Stoljar (ed), *Problems of Codification* (Australian National University Press, 1978) 16, 17.

⁷ For an explanation of the boundary between the two regions, see J P Dawson, ‘The codification of the French customs’ (1940) 38 *Michigan Law Review* 765, 766.

⁸ Ibid, 767.

⁹ Ibid, 770.

¹⁰ The *Code for East Prussia* of 1801/02. See H Hattenhauer, *Allgemeines Landrecht für die Preußischen Staaten von 1794* (Frankfurt & Berlin, 1970) 30. A second edition of this book, published in Neuwied in 1994, is unfortunately not available in Australia.

¹¹ The German title, *Das Allgemeine Landrecht für die Preußischen Staaten*, is untranslatable. The usual German abbreviation (ALR) will be used here.

¹² *Gewohnheitsrechte und Observanzen, welche in den Provinzen und einzelnen Gemeinden gesetzliche Kraft haben sollen, müssen den Provinzial-Gesetzbüchern einverleibt seyn.* The ALR consists of an introduction (Introd) and two Parts (I & II), which are subdivided into Titles. Individual provisions in the introduction and in the various Titles have numbered paragraphs (§).

Customary laws and observances which are intended to have the force of law in provinces and individual communities will have the force of law only if they have been incorporated in provincial codes (*Gesetzbüchern*).

The Estates of two of the provinces, the Electoral and New Margraviates of Brandenburg (*Kurmark* and *Neumark*), fearing the loss of their remaining privileges, argued that Roman law was their law, that it should be codified and thus made to prevail over the ALR. In 1798 such attempts to retain local legal autonomy were prohibited, thus giving the ALR almost universal force in Prussia.¹³

Country-wide codification also commenced in Europe during the Middle Ages. It was the Digest, the second part of the *Corpus Juris*, mostly concerned with private law, which had attracted most of the scholarly attention, and so it is not surprising that early codifications covered only relations between individuals. The idea that relations between rulers and their subjects also required large bodies of law belonged to a much later development.

In 1614 Sir Francis Bacon, then Attorney-General in England, proposed (unsuccessfully) that the common law be codified.¹⁴ Even though Jeremy Bentham was one of the most effective advocates of codification, the movement never gained much traction in Britain. The attempt to place the codification of the law of contract on the agenda of the English and Scottish Law Commissions in 1965 ended in failure.¹⁵

The need for unification and simplification of all the law of France was felt much earlier and more strongly than it was felt in the strife-torn Holy Roman Empire. In 1665 Louis XIV of France charged a commission with the task of codifying the law, but success was only partial: ordinances covering admiralty, procedure, criminal law and commercial law were enacted. In the 18th century brief codes on donations and succession were added but attempts to codify all the private law foundered on the opposition of the *parlements* (provincial courts and parliaments) which feared for their privileges.¹⁶

In the 18th century codification was given added impetus by philosophical factors which played a role separate from and additional to the simple desire for legal certainty. The codification movement was propelled by ancient learning about the law of nature as transformed in the age of reason. European rulers like Frederick II (the Great) of Prussia (1740–1786), Joseph II (1780–1790) and Leopold II (1790–1794), both of Austria, and Catherine II (the Great) of Russia (1762–1796) fell under the spell of the philosophers of natural law.

¹³ Hattenhauer, above n 10, 30.

¹⁴ *A proposition to His Majesty by Sir Francis Bacon, Knight, His Majesty's Attorney General, and one of his Privy Council, Touching the Compiling and Amendment of the Laws of England*. – Roscoe Pound, 'Codification in Anglo-American law' in Bernard Schwartz (ed), *The Code Napoleon and the Common-Law World* (New York University Press, 1956) 267.

¹⁵ H K Lücke, 'The common law: judicial impartiality and judge-made law' (1982) 98 *Law Quarterly Review* 29, 30–3.

¹⁶ André Tunc, 'The grand outlines of the Code' in Schwartz, above n 14, 20–1.

II CODIFICATION AND THE LAW OF NATURE

A *The law of nature*

The ancestry of the law of nature goes back to the ancient world.¹⁷ In the 19th century it is usually taken to have been superseded by legal positivism, a belief in the exclusivity of enacted law which still dominates the thinking of many lawyers.¹⁸ On the Continent the revival of natural law began after WW II. In 1947 the German jurist Gustav Radbruch, whose positivist convictions had been shaken by the atrocities perpetrated by the Nazi regime, sometimes committed under the umbrella of formally created law, converted to natural law.¹⁹ Prominent writers spoke of the perpetual return of natural law²⁰ and harked back to the age of Thomas Aquinas for a philosophy of law superior to legal positivism.²¹ German authors discussed the question whether provisions of the Constitution might be invalid because of incompatibility with an unwritten higher law.²² In the common law world Ronald Dworkin's work shook the foundations of legal positivism.²³ Since then John Finnis and other writers have launched impressive revivals of natural law thinking.²⁴

In St German's 16th century comparative treatise the Doctor of Divinity mentions four kinds of law:²⁵

¹⁷ For a brief survey of the history of natural law thinking during the last few centuries, see Christopher Adair-Totef, 'Ernst Troeltsch and the philosophical history of natural law' (2005) 13(4) *British Journal for the History of Philosophy* 733–4.

¹⁸ One of the most effective spokesmen of legal positivism in the common law world was Herbert Hart – see H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994). 'Enacted law' is here used in the broad sense which includes judge-made law.

¹⁹ 'Positivism with its conviction that "law equals legislation" truly rendered the German legal profession defenceless when confronted by arbitrary and criminal laws.' (*Der Positivismus hat in der Tat mit seiner Überzeugung „Gesetz ist Gesetz“ den deutschen Juristenstand wehrlos gemacht gegen Gesetze willkürlichen und verbrecherischen Inhalts.*) – Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht' (1946) *Süddeutsche Juristenzeitung* 105. This essay, in which Radbruch explained his change of position, is regarded as one of the most influential legal-philosophical writings of the 20th Century. For an English translation, see (2006) 26(1) *Oxford Journal of Legal Studies* 1–11. See also Stanley L Paulson, 'On the background and significance of Gustav Radbruch's post-war papers' – *ibid* 17–40. The author is grateful to his Adelaide colleague, Cornelia Koch, for these references.

²⁰ Heinrich Rommen, *Die ewige Wiederkehr des Naturrechts* (The perpetual return of natural law) (München, 1947). The author had published a book with the same title in Leipzig in 1936.

²¹ H Welzel, *Naturrecht und materiale Gerechtigkeit* (Natural law and substantive justice) (Göttingen, 1951).

²² Heinrich Amadeus Wolff, *Ungeschriebenes Verfassungsrecht unter dem Grundgesetz* (Unwritten constitutional law under the Basic Law) (Tübingen, 2000) 124 *et seq*. The German Constitutional Court has since explained that the multiplicity of the various schools of natural law prevents any practical possibility of using it as a measuring stick for the validity of constitutional provisions – *BVerfGE* (Reports of the Decisions of the Constitutional Court) vol 10, 59.

²³ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978).

²⁴ John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011).

²⁵ TFT Plucknett and JL Barton, *St German's doctor and student* (Selden Society, 1974) vol 91, 7. The passage has been converted into modern English. The passage is based on Thomas Aquinas, *Summa Theologiae*, Q 91 (2008) <<http://www.newadvent.org/summa/2091.htm>>.

The first is the law eternal ... The second is the law of nature of reasonable creatures, the which, as I have heard say, is called by them that be learned in the law of England, the law of reason. The third is the law of God. The fourth is the law of man.

In this passage the law of nature (which will be used here as synonymous with natural law) seems to rank above positive law. Hugo Grotius, one of the leading scholars of the ‘northern natural law school’,²⁶ felt free to set aside rules of Roman law and put in their place legal solutions which he derived from the law of nature. To give just one example: As he understood Roman law, a promise once made is irrevocable in order to allow the promisee to decide at leisure whether to accept. This, so he argued, is incompatible with the much weightier law of nature which decrees that a promise does not acquire its binding force until it has been accepted.²⁷

... the acceptance of [a promise] is no less necessary than when a transfer of ownership is made; ... [Some consider] that the act of promising is alone sufficient. However, the Roman law ... forbids the revocation of the promise, in order that the acceptance may be possible at any time. This effect does not follow from the law of nature but merely from the civil law.²⁸

As Gordley has shown, the doctrines the natural lawyers developed became the great organising principles for both civilian and common law systems.²⁹

At times Grotius conveys the impression that there are specific rules and principles somewhere which are ideally suited to mankind and can be substituted whenever the positive law falls short. Had this been correct, none of the great codifications would have been needed.³⁰ The broad postulates of the natural law movement may be inferable from a non-positive source like God’s will, the nature of man or the nature of things, but once found, they must be fitted into the social, geographical and political context in which they are intended to perform their work.³¹ A commitment to the demands of natural law is only a first step; thereafter much work remains to give effect to them in practice. The German term ‘*Quellrecht*’ (fount of law) draws a neat and useful distinction between principles which are meant to inform and inspire the articulation of positive rules and those rules themselves. Only the latter, not the former are fit to be applied syllogistically. The credit for articulating this important distinction, elaborated in considerable detail by Finnis, may belong to St Thomas Aquinas.³²

B *The law of nature and the codemakers*

Over the centuries theories concerning the law of nature were elaborated by many of the world’s most renowned theologians and philosophers. As Strakosch has said:

²⁶ James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford University Press, 1991) 4.

²⁷ Hugo Grotius, *De Jure Belli et Pacis Libri Tres*, Vol 2 (Francis W. Kelsy trans, Clarendon Press, 1925) 338. For further detail, see H K Lücke, ‘Simultaneity and successiveness in contracting’ (2007) 15 *European Review of Private Law* 27–57.

²⁸ Gordley has given as further examples the modification of provisions of Roman law concerning *causa*, defects and destruction of goods, duress, fraud, gifts, just price, mistake and implied terms – Gordley, above n 26, 261. For an account of other areas of the private law, see James Gordley, *Foundations of Private Law. Property, tort, contract, unjust enrichment* (Oxford University Press, 2006).

²⁹ Gordley, above n 28.

³⁰ See above, n 27.

³¹ Finnis, above n 24, 281–90, particularly the simple example on p 285.

³² Ibid, particularly p 284.

‘the concept of natural law is as wide as the sea.’³³ It is not the purpose of this essay to analyse this massive body of literature.³⁴ A few superficial observations must suffice. There is no doubt that St German was wrong when he suggested that the difference between the law of nature and the law of reason is simply one of terminology. There is little doubt that the old learning of the law of nature underwent a metamorphosis in the 17th and 18th centuries. Before descending to a simpler level of the subject, a very plausible observation of Wieacker’s must suffice to give the reader at least a glimpse into the complex history of the subject:³⁵

The distinctive feature of the modern Law of Reason is ... the fact that it is methodically emancipated from moral theology and raised to the level of an independent temporal social ethic, an emancipation only possible because the great schism in the church freed natural law from dependence on one particular confession.

Academic study was not the life mission of the European rulers who initiated large-scale codification, so it is not surprising that they gleaned their ideas from readily accessible sources. Foremost among the great popularisers of natural law was Voltaire with his easily readable and amusing writings. He is often mentioned in the same breath with great Enlightenment figures like Montesquieu, John Locke and Jean-Jacques Rousseau whose works and ideas influenced the leaders of the American and the French Revolutions. Although he was not as profound a thinker as these, no writer had greater influence upon some of the leading monarchs of the 18th century.

III THE PRUSSIAN CODE OF 1794 (ALR)

A *Frederick the Great, natural law and the Enlightenment*

Frederick II of Prussia was a man of many parts.³⁶ From 1736, when still Crown Prince, he determined to attain, as his English biographer has explained,

mastership, discipleship, in Art and Philosophy; ... enlightening and fortifying himself with clear knowledge, clear belief, on all sides; and acquiring some spiritual panoply in which to front the coming practicalities of life.³⁷

³³ Henry Strakosh, ‘Natural law: an aspect of its function in history’ (1960) *The Indian Yearbook of International Affairs* 3, quoting E Wolf, *Das Problem der Naturrechtslehre. Versuch einer Orientierung* (2nd ed, Karlsruhe, 1959).

³⁴ There is probably no better general survey than the one provided by F Wieacker, *A History of Private Law in Europe with particular reference to Germany (1908 – 1994)* (Tony Weir trans, Oxford University Press, 1995) 199–256. For an attempt to explain the gradual emergence of ‘natural law’ and ‘natural rights’ from the ‘laws of nature’ as conceived by medieval philosophers and theologians, see Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (Continuum, 2005).

³⁵ Ibid, 210–1. It is arguable that the seeds for the secularisation of natural law are already present in Thomas Aquinas, *Summa Theologiae*, Q 91, for Aquinas draws a distinction between the revealed law of God and natural law (the law of reason) – above, n 25.

³⁶ Preferring French to German, he published political tracts and poetry in that language. He was an accomplished flautist and composed flute music which is still very pleasing to the ear. He was, of course, also a great military leader.

³⁷ Thomas Carlyle, *History of Friedrich II of Prussia. Frederick the Great* (London, 1858–1865) Chapter II, para 1. <<http://onlinebooks.library.upenn.edu/webbin/gutbook/lookup?num=2110>>.

He studied contemporary views concerning natural law and reason by reading some of the writings of Christian Thomasius, Gottfried Wilhelm Leibniz and particularly Christian Wolff.³⁸ Later in his reign, Frederick was also influenced by the philosophy of John Locke.³⁹ He conducted an extensive correspondence with Voltaire, seeking on one occasion to acquaint Voltaire with the theories of his favourite philosopher, Christian Wolff⁴⁰ who has been called the populariser of rationalism.⁴¹ From 1726–1729 Voltaire had been in England and had studied governmental arrangements there. He advocated religious tolerance, the abolition of literary censorship and of slavery, freedom of trade, reform of legal systems and generally individual freedom⁴² and his views strongly influenced the young prince.⁴³

Samuel Pufendorf was yet another major influence. Thomasius had studied his works as a student⁴⁴ and Christian Wolff had studied in Jena where Pufendorf's influence was strong.⁴⁵ Pufendorf was the first to have held a Chair in natural law.⁴⁶ His major work (*De Jure Naturae et Gentium*, eight volumes) was published in 1672⁴⁷

³⁸ *Meyers Lexikon* vol 4 (7th ed, Leipzig, 1926) 1206.

³⁹ Ibid. See also Rainer Specht, *John Locke* (München, 2nd ed, 2007) 166–7.

⁴⁰ On 8 August 1736 Frederick wrote to Voltaire: 'This taste for Philosophy manifested in your writings, induces me to send you a translated Copy of the *Accusation and defence of M. Wolf*, the most celebrated Philosopher of our days; ... I am about getting a Translation made of [his] *Treatise on God, the Soul, and the World* ... I will send it you when it is finished; and I am sure that the force of evidence in all his propositions, and their close geometrical sequence, will strike you.' – On 26 August 1736 Voltaire replied: 'I cannot sufficiently thank your Royal Highness for the gift of that little Book about Monsieur Wolf. ... And how beautiful it will be, to send me his chief Book, as you have the kindness to promise!' – Carlyle, above n 37, Chapter II. From 1740–1748 Wolff composed an eight volume work on the *Law of Nature*. – Matt Hettche, 'Christian Wolff' (3 July 2006) *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/entries/wolff-christian/>>.

⁴¹ '... he had been able to give a popular expression to [the basic belief of the enlightenment, to] its ideals and its hopes. ... He became the populariser of rationalism and gave it its politically formative power. He ... was believed to have finally superseded Aristotle and to have inaugurated ... an entirely new era of human thought.' – H E Strakosch, *State Absolutism and the Rule of Law* (Sydney University Press, 1967) 118–9. Grete Klingenstein has called Strakosch's book 'one of the most important contributions in English to the history of Enlightened Absolutism in Austria and Europe'. – (1975) 11 *Austrian History Yearbook* 279, 282.

One reason for Wolff's popularity was that he wrote many of his works in German – See, above n 40.

⁴² 'Our religion is without a doubt the most ridiculous, the most absurd, and the most bloody to ever have infected the world.' – (*La nôtre [religion] est sans contredit la plus ridicule, la plus absurde, et la plus sanguinaire qui ait jamais infecté le monde.*) – *Oeuvres complètes de Voltaire* vol 7, 184.

⁴³ 'Voltaire was at this time, and continued all his days, Friedrich's chief Thinker in the world; unofficially, the chief Preacher, Prophet and Priest of this Working King ... Friedrich considers him as plainly supreme in speculative intellect ...' – Carlyle, above n 37, Chapter II.

⁴⁴ Wieacker, above n 34, 251.

⁴⁵ Ibid, 253.

⁴⁶ His first academic position was an associate professorship in Heidelberg which allowed him to pursue his interest in natural law. His post there was designated 'international law and philology', but Pufendorf later described it as a chair in natural law. – Leonard Krieger, *The Politics of Discretion: Pufendorf and the Acceptance of Natural Law* (Chicago University Press, 1965) 19–21. In 1667 he was appointed to a chair of natural and international law at the newly founded University in Lund, Sweden (*Academia Carolina*, renamed Lund University in the 19th century) – ibid, at 21.

⁴⁷ Samuel Pufendorf, *De jure naturae et gentium, libri octo* (1672), Johann Nikolaus Hertius and Jean Barbeyrac (eds), (5th ed, Frankfurt & Leipzig, 1759).

and was translated into eight languages; 40 editions appeared in later years.⁴⁸ In 1673 Pufendorf summed up his theory of natural law in a manual of two volumes which was published in Latin, French, English and German and saw more than 100 editions.⁴⁹ He was a prolific author on jurisprudential subjects.⁵⁰ An English translation of *De Jure Naturae et Gentium*, published in London in 1749⁵¹ made a major impact upon the common law; Blackstone based his account of the principles of statutory interpretation on Pufendorf, unfortunately without sufficient acknowledgement.⁵² Many European universities established chairs of natural law and Pufendorf's major work became the leading student textbook for more than a century.⁵³

Even if Frederick did not make a direct study of Pufendorf's philosophy, he was influenced by Pufendorf's views through his philosophical mentors. Moreover, Carl Gottlieb Suarez, the chief architect of Frederick's Code, based the whole structure of the Code on ideas which Pufendorf had developed.⁵⁴ Perhaps even more importantly, Pufendorf had been at the centre of the shift from a religious to a secular understanding of natural law,⁵⁵ a feat which would have appealed to Frederick who was a skeptic in religious matters.

Montesquieu's '*De l'esprit des lois*',⁵⁶ famous in all of Europe,⁵⁷ also influenced Frederick. Soon after its publication in 1748 he read a paper on Montesquieu to the Prussian Academy of Sciences⁵⁸ and in 1749 he published a tract concerning the philosophical foundations of legislation⁵⁹ in which he suggested that laws should be 'adapted to our local customs in a simple and meaningful way',⁶⁰ which matches Montesquieu's demand for plain legislative language and for the adaptation of codes to the special circumstances of the jurisdiction for which they are intended.⁶¹

⁴⁸ A Ruhnke, *Die Ursprünge des deutschen Rechtsstaates im 17. Jahrhundert* (Thesis, University of Rostock, undated) 30 <<http://www.andre-ruhnke.de/Eigenes/Data/Rechtsstaat.pdf>>.

⁴⁹ *De officio hominis et civis iuxta legem naturalem libri duo* (On the duty of man and citizen according to natural law) (1682). For publication details, see <<http://www.constitution.org/puf/puf-dut.htm>>.

⁵⁰ An incomplete list of nearly 70 of his books, some historical rather than jurisprudential, appears in Michael Siedler, 'Pufendorf's Moral and Political Philosophy' (3 September 2010) *Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu/entries/pufendorf-moral/>>.

⁵¹ Samuel Pufendorf, *Of the Laws of Nature and Nations: or a general system of the most important principles of morality, jurisprudence and politics in eight books* (1672); (Basil Kennet trans, 5th ed, London, 1749).

⁵² Vogenauer has given an account of Blackstone's adoption of Pufendorf's principles – see Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent. Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen* (The interpretation of statutes in England and on the Continent. A comparative study of judicial jurisprudence and its historical foundations) (2001) 772–4.

⁵³ Krieger, above n 46, 22.

⁵⁴ Wieacker, above n 34, 264. Michaels has suggested that Suarez had been a student of Pufendorf's. However, Pufendorf died in 1694 and Suarez commenced his studies in 1762 – R Michaels, 'The mirage of non-state governance' [2010] 31 *Utah Law Review* 35, 22.

⁵⁵ Wieacker, above n 34, 244.

⁵⁶ Montesquieu, *The Spirit of the Laws* (Thomas Nugent trans, Hafner Publishing, 1949).

⁵⁷ The book saw 22 editions; Montesquieu's postulate that the three powers of government should be strictly separated to safeguard human freedom was to be very influential, particularly in the United States.

⁵⁸ Wieacker, above n 34, 261.

⁵⁹ *Dissertation sur les raisons d'établir ou d'abroger les lois.* – Hattenhauer, above n 10, 12.

⁶⁰ '... in einfacher und sinnreicher Weise den heimischen Gebräuchen angepasst sein.' – The passage is quoted in Hattenhauer, above n 10, 12.

⁶¹ 'What makes Montesquieu's theories, as developed in his *Esprit des Lois* (1748), of significance in this context is that they are based on the fundamental insight that any

Montesquieu preferred the monarchical to the republican form of government, but his distaste for undue concentrations of power had caused him to demand that power should be shared between the King and the ‘intermediate, subordinate, and dependent powers, [particularly] that of the nobility’.⁶² Depriving the Estates of their power he saw as the corruption of the principle of monarchy.⁶³ Frederick is unlikely to have had much use for such suggestions. In the Kingdom which he inherited from his father, Frederick William I,⁶⁴ the powers of the Estates had already been emasculated. Many of these powers, particularly the power to impose taxation, had been gradually transferred from the Estates to the monarch.⁶⁵ The aristocracy, at first opposed to these centralising tendencies, had been persuaded to exchange their political clout for guarantees of their property interests, in particular their large knightly manorial estates (*Rittergüter*), and for a monopoly of service as officers in the Prussian army, growing in size and efficiency.⁶⁶ Although there had been much tension between Frederick and his father, nothing suggests that he resented the centralised state and the powerful military which his father had bequeathed to him.

The fate of the Stuarts in England in the 17th century had shaken the very foundations of kingship. James I had invoked the law of nature for his claim that kings ‘sit upon GOD his (*sic*) throne in this earth’,⁶⁷ and had advised the subjects of a wicked king to pray ‘with sobbes and tears to God . . . for his amendment . . . eschewing and flying his fury without resistance’.⁶⁸ Philosophers who claimed that in reason and according to the law of nature a father is the head of his family and the King the natural head of his people⁶⁹ hardly made the doctrine of the divine right of kings more convincing. A new doctrine was needed. In 1740, the year in which Frederick ascended the throne (on 31 May 1740), Voltaire arranged for Frederick’s tract, *Anti-Machiavel*, to be published in The Hague. It affirmed that a ruler is the first servant of his people, in duty bound to promote their health, prosperity and general well-being, a thesis straight from the rulebook of the natural law philosophers. Frederick’s switch to a secular understanding of kingship was a stroke of genius. A period of religious division

legislation must be adapted to the character of the cultural and economic development of the society for which it is designed. This notion makes it possible to bridge the gulf between the abstract postulates we find in the theories of Locke and his followers on the one hand, and the actual social state reached by European societies in the eighteenth century on the other.’ – Coing, above n 6, 18.

⁶² Montesquieu, above n 56, 15–6; see also p xxiv (introduction by Neumann).

⁶³ Ibid, Chapter VIII 6.

⁶⁴ Known in Germany as the ‘soldier king’ (*Soldatenkönig*).

⁶⁵ The development is very clearly explained in an anonymous, well documented internet contribution entitled ‘*Militär und preußischer Adel in der ersten Hälfte des 18. Jahrhunderts*’ (The military and the Prussian nobility in the first half of the 18th century) see – <<http://ggrs.com/essays/preussen.html>>. See also: Horst Möller, *Aufklärung und Demokratie: historische Studien zur politischen Vernunft* (Oldenburg, 2003) 87–111.

⁶⁶ *Der Vater: Friedrich Wilhelm I. – Der Soldatenkönig* (19 January 2011) <<http://www.friedrich-der-grosse.net/friedrich-wilhelm-i->>.

⁶⁷ *The trew law of free monarchies: or the Reciproock and mutuall duetie betwixt a free King, and his naturall Subjects* <<http://as.clayton.edu/gmcnamar/seventeenth%20century/trew%20law.pdf>> 261. He also announced: ‘By the Law of Nature the King becomes a naturall Father to all his Lieges at his Coronation.’ – ibid, 262.

⁶⁸ Ibid, 268.

⁶⁹ Sir Robert Filmer, *Patriarcha or the natural power of kings* – the book was written before the author’s death in 1653 and published in 1680. Filmer took to task writers like Francisco Suarez and other Jesuits who had affirmed the God-given right of the people to overthrow tyrannical monarchs.

and deadly conflict had been followed by the exuberant belief in the power of reason.⁷⁰ Frederick's new approach provided the monarchy with a secular *raison d'être*, greatly superior to the fading doctrine of the divine right of kings, invoked by earlier monarchs to give their rule a religious foundation.

The doctrine propounded in *Anti-Machiavel* even provided some justification for ample royal power, for without that the new and benign responsibilities of monarchy might be difficult to discharge. If the ALR, inspired by Frederick, is any indication, the King did not believe in Montesquieu's separation of powers.⁷¹ Part II, Title 13 bestows upon the Head of State (*Oberhaupt des Staates*) the right to legislate,⁷² the right to impose taxes,⁷³ and the right to wage war.⁷⁴ Part II, Title 17 § 18 vests judicial power in the Head of State as inalienable (*unveräußerlich*),⁷⁵ and § 44 gives the King immunity from legal process (unless he consents to being sued).⁷⁶ There is no provision dealing specifically with executive power, but that was included in the general right to govern which is also vested in the King.⁷⁷ The very phrase 'enlightened absolutism'⁷⁸ might be taken to imply that reason was an effective and was to be the only restraint upon royal power. No such inference could have been in the minds of the *dramatis personae* of the period, for the very phrase was unknown to them; it was coined by German historians in the 1870s.⁷⁹

⁷⁰ *Freudenrausch der Aufklärung* ('intoxication of the Enlightenment') – Strakosch, above n 41, 121.

⁷¹ Frederick died in 1786 and the ALR was enacted by his successor, Frederick William II.

⁷² II 13 § 6. The right to enact laws and police regulations, to repeal them, and to issue declarations about them with the force of law is a right of Majesty. (*Das Recht, Gesetze und allgemeine Polizeiverordnungen zu geben, dieselben wieder aufzuheben, und Erklärungen darüber mit gesetzlicher Kraft zu ertheilen, ist ein Majestätsrecht.*)

⁷³ II 13 § 15. The right to impose taxes upon private property, upon persons, upon products of their trade, or upon consumption in order to meet the needs of the state is a right of Majesty. (*Das Recht, zur Bestreitung der Staatsbedürfnisse, das Privatvermögen, die Personen, ihre Gewerbe Produkte, oder Consumption mit Abgaben zu belegen, ist ein Majestätsrecht.*) See also the following provision: II 13 § 14. To ensure that the Head of State is able to fulfil his duties and meet the costs incurred thereby, he will have a certain income and usable rights. (*Damit das Oberhaupt des Staats die ihm obliegenden Pflichten erfüllen, und die dazu erforderlichen Kosten bestreiten könne, sind ihm gewisse Einkünfte und nutzbare Rechte beygelegt.*)

⁷⁴ Under the heading 'Rights of Majesty' (*Majestätsrechte*) II 13 § 5 prescribes: 'To defend the state against external enemies; to conduct war; to make peace; to form alliances and treaties with foreign states, these functions are the exclusive preserve of the Head of State.' (*Die Vertheidigung des Staats gegen auswärtige Feinde anzuordnen; Kriege zu führen; Frieden zu schließen; Bündnisse und Verträge mit fremden Staaten zu errichten, kommt allein dem Oberhaupt des Staats zu.*)

⁷⁵ II 17 § 18. The general and highest judicial power in the State is vested in the Head of State, and is, as a right of sovereignty, inalienable. (*Die allgemeine und höchste Gerichtsbarkeit im Staate gebührt dem Oberhaupte desselben, und ist, als ein Hoheitsrecht, unveräußerlich.*)

⁷⁶ II 17 § 44. The highest judge (*Gerichtsherr*) is not subject to judicial process in his own courts against his will. (*Der Gerichtsherr kann wider seinen Willen in seinen eigenen Gerichten nicht belangt werden.*)

⁷⁷ II 13 § 1. All the rights and duties combined of the state vis-a-vis its citizens and other protected persons are vested in the ruler of the state. (*Alle Rechte und Pflichten des Staates gegen seine Bürger und Schutzverwandten vereinigen sich in dem Oberhaupt desselben.*)

⁷⁸ The concept – invented by German historians in the 1870s – remains controversial among scholars – C Ingraio, 'The problem of Enlightened Absolutism and the German states' (1986) 58 *Journal of Modern History* (Supplement: *Politics and Society in the Holy Roman Empire, 1500-1806*) S161–S180.

⁷⁹ *Ibid.*, S161–S162.

B Political action

Once in power, Frederick began to put his liberal convictions into practice, choosing officials who were in sympathy with them and urging them to learn about the foundations of his philosophy.⁸⁰ Torture in trials for witchcraft had already been virtually abolished by Frederick's father in 1714⁸¹ and there had been no such further trials in Prussia thereafter. Voltaire had opposed the use of torture in criminal investigations and only three days after his ascension, Frederick ordered his Justice Minister to cease using torture 'except in cases of mass murder'.⁸² Even this qualification was removed when torture was abolished in Prussia by law in 1754.⁸³

Throughout his reign, the King remained tolerant towards religious minorities like Catholics and Huguenots. In a letter written in 1740 he stated:⁸⁴

All religions are equal and good, provided only that the people who profess them are honest; if Turks and heathens were to come and populate the state, we would build mosques and churches for them.

Related to freedom of religion are freedom of conscience and freedom of artistic expression. Early in his reign, Frederick instructed one of his ministers⁸⁵ to stop censoring the non-political content of newspapers, making Prussia the first continental country to have introduced limited freedom of the press.⁸⁶

All these measures showed Frederick's determination to carry liberal policies into practice. However, not one of them rivalled, in political and legal significance, the order the King gave to his Grand Chancellor, Samuel von Cocceji, in 1746 to reform the Prussian justice system⁸⁷ and to draw up a legal code 'based solely upon reason and the constitutions of the provinces'.⁸⁸ The draft code, which was also to replace the

⁸⁰ Meyers, above n 38, 1206.

⁸¹ See Wikipedia, 'Folter' (15 April 2012) <<http://de.wikipedia.org/wiki/Folter>>.

⁸² '... bei großen Mordtaten, wo viele Menschen ums Leben gebracht worden sind' (... in cases of mass murder which have cost numerous people their lives). – see Wikipedia, 'Friedrich II' (15 April 2012) <[http://de.wikipedia.org/wiki/Friedrich_II._\(Preu%C3%9Fen\)](http://de.wikipedia.org/wiki/Friedrich_II._(Preu%C3%9Fen))>. See also J Zopfs, *Gemeinrechtliches Strafrecht und Strafverfahren* (2001–2002) <<http://www.jura.uni-mainz.de/zopfs/Dateien/indizienbeweis.pdf>>. Frederick might have been influenced by the doctoral dissertation of one of his favourite philosophers, Christian Thomasius, which was entitled: *Über die notwendige Verbannung der Folter aus den Gerichten der Christenheit* (Concerning the need to ban torture from the courts of Christendom) – see Wikipedia, above n 81.

⁸³ Torture was abolished in Sweden in 1722, in Denmark in 1770, in Russia in 1774, in Austria in 1776, in France in 1780, in the Netherlands in 1798, in Bavaria 1806, in Württemberg in 1809, in Spain in 1808, in Norway in 1819, in Portugal in 1826 and in the Swiss cantons progressively during the first half of the 19th century.

⁸⁴ *Alle Religionen seindt gleich und guht, wan nuhr die Leute, so sie profesieren, erliche Leute seindt, und wen Türken und Heiden kähmen und wolten das Land pöbplieren [populate], so wollen wier sie Mosqueen und Kirchen bauen* – see Wikipedia, above n 82. Every German schoolchild remembers the King's early pronouncement: 'Everyone shall be free to seek salvation according to his own fashion.' (*Jeder soll nach seiner Façon selig werden*).

⁸⁵ Heinrich von Podewils.

⁸⁶ Friedrich II. (Preußen), above, n 82. Carl Gottlieb Suarez, the chief draftsman of Frederick's Code, is said to have described censorship as an attack on 'one of the first and natural rights of human beings'. – R J Goldstein, *The War for the Public Mind: Political Censorship in Nineteenth-Century Europe* (Westport CT, 2000) 39.

⁸⁷ Samuel von Cocceji (2003) <http://www.preussen.de/de/geschichte/1713_friedrich_wilhelm_i./samuel_von_cocceji.html>.

⁸⁸ Hattenhauer, above n 10, 11.

‘Roman law which is written in Latin and compiled without any order or system’ was submitted in 1751; it was a disappointment to Frederick for it did little more than arrange the existing *jus commune* (Roman law as modified) in accordance with the scheme of Justinian’s Institutes.⁸⁹ Further work on the code was impeded by Frederick’s wars⁹⁰ and also by the opposition of the Estates which feared for their remaining privileges. Work resumed in the late 1770s.

The natural law movement demanded equality before the law. However, 17th and 18th century philosophers often owed their livelihood to European rulers. The etiquette of the time called, not for brash claims like ‘all men are created equal’, but for expressions of fawning respect for one’s betters. Stating, as Pufendorf did, that all men are equal in the state of nature⁹¹ was acceptable, as long as one did not insist that the right to equality had been carried over into the actual feudal societies. As John Locke said: ‘. . . men, when they enter into society, give up the equality . . . they had in the state of nature, into the hands of the society . . .’⁹² His demand that there must be ‘one rule for rich and poor, for the favourite at Court, and the countryman at plough’,⁹³ was open to the interpretation that equal treatment within an existing unequal structure was intended, not a radical dismantling of that structure.

Montesquieu solved the problem by confining equality (with general frugality as its unavoidable consequence) to republican and democratic forms of government as the central principle,⁹⁴ and by expressing a preference for monarchical government which he saw as dominated by the principle of honour.⁹⁵

A limited kind of equality was acceptable in Frederick’s Prussia. As the King stated in 1779:⁹⁶

Judges must apply natural equity without regard to person and status. . . . Judges who commit injustice are worse and more dangerous than a pack of thieves and merit double penalties.

His Introduction to the ALR embodied this kind of equality: ‘The laws of the state bind all its members, regardless of status, rank or gender’ (Introd § 22).⁹⁷ Suarez

⁸⁹ Wieacker, above n 34, 261.

⁹⁰ Prussia and Austria fought wars in 1740–1741, 1744–1745 and 1756–1763 (the Seven Years War).

⁹¹ *Ut omnes homines pro aequalibus naturaliter habeantur* – quoted in Michael Kleinsang, *Das Konzept der bürgerlichen Gesellschaft bei Ernst Ferdinand Klein: Einstellungen zum Naturrecht, Eigentum, Staat und Gesetzgebung in Preussen 1780–1810* (Frankfurt a M, 1998) 167. For a whole chapter by Pufendorf on equality, see the *Online Library of Liberty* (2012).

<http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=888&chapter=66082&layout=html&Itemid=27>.

‘. . . in the condition of meer Nature . . . all men are equall.’ – Thomas Hobbes, *Leviathan* (London & NY, 1914) 79, see also p 63.

⁹² John Locke, *Two Treatises on Government* (Thomas Cook ed, 1947) Section 131.

⁹³ *Ibid*, Section 142.

⁹⁴ Montesquieu, above n 56, 41–6.

⁹⁵ *Ibid*, 53–6.

⁹⁶ *Wo die Justiz-Collegia nicht mit der Justiz ohne alles Ansehen der Person und des Standes gerade durch gehen, sondern die natürliche Billigkeit bei Seite setzen, so sollen sie es mit [mir] zu thun kriegen. Denn ein Justiz-Collegium, das Ungerechtigkeiten ausübt, ist gefährlicher und schlimmer, wie eine Diebesbande . . . und meritir[t] eine doppelte Bestrafung.* – see Wikipedia, ‘Müller-Arnold-Fall’ (15 April 2012) <<http://de.wikipedia.org/wiki/M%C3%BCller-Arnold-Fall>>.

⁹⁷ *Die Gesetze des Staats verbinden alle Mitglieder desselben, ohne Unterschied des Standes, Ranges und Geschlechts.*

thought that he might be able to go just a little further and included in his draft Introduction a § 9:⁹⁸

Particular favours, privileges, and exceptions from legal provisions granted by the Ruler (*Landesherr*) take effect only to the extent that they do not diminish the particular rights of a third party.

Whether this draft provision was ever approved by Frederick is not known. He died in 1786, eight years before the enactment of the ALR. His successor, Frederick William II, might have wondered whether the provision was meant to limit legislative as well as executive action and he vetoed its inclusion in the ALR.

C Legal limits of royal power?

During Frederick's reign the question whether his *Anti-Machiavel* doctrine implied the need for at least some legal limits to be imposed upon the plenitude of royal power was an open issue. Suarez appears to have thought so and Frederick might well have agreed although his successor, Frederick William II, and his new advisers were no friends of the Enlightenment or of natural law and were opposed to any diminution of royal power.

1 Machtsprüche

European rulers had asserted the power to intervene in the judicial process at least since the 15th century⁹⁹ and had often replaced judicial verdicts of which they disapproved with royal verdicts of their own (*Machtsprüche*).¹⁰⁰ One is reminded of the appearance of King James I of England in the Star Chamber and his unfortunate pronouncement:¹⁰¹

Kings are properly Judges and judgment properly belongs to them from God: for Kings sit in the throne of God, and thence all judgment is derived.

The *Müller Arnold* case of 1779, one of the most famous cases of this kind, concerned litigation between a Miller Arnold and Count von Schmettau, the miller's landlord, about the operation of Arnold's mill. The courts found for the Count and the King concluded, possibly quite wrongly, that the judges had been bribed. The *Machtspruch* tradition favoured his right to intervene. He disliked lawyers and was quick to suspect foul play, so he reversed the judgment of the *Kammergericht*, the highest Prussian court, sacked his Justice Minister and a number of local officials, and imprisoned the judges he deemed responsible.

The right to issue *Machtsprüche* was utterly incompatible with judicial independence, perhaps the most essential aspect of Montesquieu's separation of powers.

⁹⁸ *Besondere Landesherrliche Begünstigungen, Privilegien, und Ausnahmen von gesetzlichen Vorschriften, sind nur inso weit gültig, als dadurch das besondere Recht eines Dritten nicht beeinträchtigt wird.* – A Schwennicke, *Die Entstehung der Einleitung des Preußischen Allgemeinen Landrechts von 1794* (The development of the introduction to the ALR) (Frankfurt a M, 1993) 295.

⁹⁹ H Erwin, *Machtsprüche: das herrscherliche Gestaltungsrecht „ex plenitudine potestatis“ in der frühen Neuzeit* (Royal Verdicts: The Prerogative of the Ruler During the Early Modern Period) (Cologne, 2009) 24.

¹⁰⁰ For an extensive account, see *ibid.*

¹⁰¹ Catherine Drinker Bowen, *The Lion and the Throne, The life and times of Sir Edward Coke* (1552–1634) (Boston, Toronto & London, 1985) 374–5.

In general Frederick was opposed to royal interference with the course of justice. Whether the *Müller Arnold* case had changed his outlook is not clear. He acted on at least one of Montesquieu's postulates, viz that judges must apply the law as written and refrain from adding to it or subtracting from it by interpretation.¹⁰² In 1780 Frederick ordered that legislative ambiguities be resolved in future not by judges but by a state interpretation commission.¹⁰³ Whatever the King's outlook, Suarez continued to believe in judicial independence and included in his draft of the Introduction to the ALR the following:¹⁰⁴

Introduct § 6. Royal verdicts (*Machtsprüche*), or such orders of the higher Power, which are issued in adversarial situations without legal investigation have no effect upon either rights or obligations (draft only).

The provision was excised on the order of Frederick William II.

2 *Unjust laws*

Lex injusta non est lex (an unjust law is not a law) was a much-quoted phrase in the literature of natural law although, as John Finnis has shown,¹⁰⁵ its meaning in the history of jurisprudence and philosophy is uncertain, particularly if one gives due attention, as Finnis does, to the moral dimension. Suarez might have focused less on the moral issues raised by the term 'unjust' and more on delicate problems of phraseology: calling a law issued by the King 'null and void' would have been offensive, so an alternative like 'does not have the authority to bind'¹⁰⁶ must have seemed more suitable. Suarez knew how to declare a decision made by the King ineffectual for he chose 'has no effect upon either rights or obligations' in the context of royal verdicts.¹⁰⁷

The draft Introduction to the new code contained three provisions which seemed to have been designed to keep the legislative power of the King within the confines prescribed by natural law as Suarez understood it. The first of these embodies the theory of the social contract:¹⁰⁸

Introduct § 77. The welfare of the state in general, and of its residents in particular, is the purpose of the association of citizens, and the general aim of the laws (draft only).¹⁰⁹

This might have been inspired by John Locke who argued that the aim of the social contract is to secure the lives, the liberties and the property (all three of which

¹⁰² Montesquieu, above n 56, Book XI (*Of the laws which establish political liberty, with regard to the constitution*).

¹⁰³ For detail, see Lücke, Statutes, above n 4, 1, 2.

¹⁰⁴ *Machtsprüche, oder solche Verfügungen der obern Gewalt, welche in streitigen Fällen, ohne rechtliche Erkenntniß, ertheilt worden sind, bewirken weder Rechte noch Verbindlichkeiten*. The draft provision is quoted in Schwennicke, above n 98.

¹⁰⁵ Finnis, above n 24, 351–68.

¹⁰⁶ *Ibid*, 360.

¹⁰⁷ See his draft of Introduct § 6 – above at n 104.

¹⁰⁸ These provisions are also to be found in Schwennicke, above n 98, 297. See also Hattenhauer, above n 10, 29. Unfortunately Hattenhauer has not included the actual wording of these draft provisions in his introduction.

¹⁰⁹ *Das Wohl des Staats überhaupt, und seiner Einwohner insbesondere, ist der Zweck der bürgerlichen Vereinigung, und das allgemeine Ziel der Gesetze*. – Schwennicke, above n 98, 296.

Locke included in ‘property’) of society.¹¹⁰ The pursuit of this aim, according to yet a further draft provision, is the principal duty of the Head of State:

Introd § 78. The Head of State, whose duty it is to promote the general welfare, is entitled to guide and determine the outward conduct of all the residents (draft only).¹¹¹

When encountering the expression ‘welfare’ (*Wohlfahrt*), one must remember that the 18th century knew nothing of the modern welfare state. ‘Welfare’ is simply equated with the protection of lives, rights, liberties and property. The Head of State is given considerable discretion in choosing the means of carrying out his duty.

Several provisions which promoted religious tolerance survived the royal veto:

The beliefs residents of the state hold of God and of things divine, their faith, and their internal worship, cannot be made the subject of strict laws (II 11 § 1).¹¹² Every resident in the state is entitled to unqualified freedom of faith and conscience (II 11 § 2).¹¹³ Neither churches nor their parishioners are allowed to persecute or insult other churches or their parishioners (II 11 § 37).¹¹⁴

Finally, the third and most crucial draft provision seeks to secure natural rights and freedoms from unnecessary royal interference:

Introd § 79. Laws and regulations must not limit the natural freedom and the rights of citizens to a greater extent than is required by the common ultimate purpose (draft only).¹¹⁵

Is a law which goes beyond such limits null and void or still valid? If Sir Edward Coke thought that the common law would strike down legislation which was beyond reason,¹¹⁶ should the law of nature not have the same effect? John Locke saw the passing of arbitrary legislation which infringes peoples’ rights as beyond power.¹¹⁷ However, Suarez could not risk royal displeasure by rudely declaring royal legislation ‘null and void’. Even the more tactful version (‘without effect upon either rights or

¹¹⁰ Locke, above n 92, Chapter IX (Of the Ends of Political Society and Government), particularly sections 123 & 124.

¹¹¹ *Das Oberhaupt des Staats, welchem die Pflichten zur Beförderung des gemeinschaftlichen Wohls obliegen, ist, die äussern Handlungen aller Einwohner, diesem Zweck gemäss, zu leiten, und zu bestimmen berechtigt.* – Schwennicke, above n 98, 296–7.

¹¹² *Die Begriffe der Einwohner des Staats von Gott und göttlichen Dingen, der Glaube, und der innere Gottesdienst, können kein Gegenstand von Zwangsgesetzen seyn.*

¹¹³ *Jedem Einwohner in Staate muß eine vollkommene Glaubens- und Gewissensfreiheit gestattet werden.*

¹¹⁴ *Kirchengesellschaften dürfen so wenig, als einzelne Mitglieder derselben, einander verfolgen oder beleidigen.*

¹¹⁵ *Die Gesetze und Verordnungen dürfen die natürliche Freyheit und Rechte der Bürger nicht weiter einschränken, als es der gemeinsame Endzweck erfordert.* – Schwennicke, above n 98, 297.

¹¹⁶ *Bonham’s case* (1610) 8 Co Rep 113b; for further references, see Vogenauer, above, n 52, 742 n 436.

¹¹⁷ ‘These are the bounds which the trust that is put in them by the society and the law of God and Nature have set to the legislative power of every commonwealth, in all forms of government.’ – Locke, above n 92, Chapter IX (Of the Ends of Political Society and Government), particularly sections § 142. Locke formulated his four limitations of power somewhat differently from Suarez. His third limitation (no taxation without the consent of the governed) was not part of the continental legal tradition and is not mentioned by Suarez. Locke’s second limitation (laws ought to be designed for no other end ultimately but the good of the people) is the most all-encompassing and is similar to Suarez’s Introd § 79.

obligations') which he tried to employ in relation to certain royal verdicts¹¹⁸ must have struck him as too bold in the context of legislation, so he left the legal consequences of a transgression of Introd § 79 unstated and ambiguous.

One can glimpse in Introd § 79 the beginnings of constitutional government. However, even if it had been enacted, Prussian judges could hardly have used it as a platform for judicial review of legislation. They were hardly Lions under the Throne. At any rate, the King had deprived them of the power to resolve legislative ambiguities and had vested it in a state interpretation commission.¹¹⁹

When the draft provisions of §§ 77–79 were attacked as reflecting the French Constitution of 1792, Suarez pointed out that they had been drafted much earlier and contained only that 'which distinguished Prussia's monarchs from despots which they have never aspired to be'.¹²⁰ Such arguments were of no avail. Like the provision prohibiting *Machtsprüche*, the draft provisions were seen as undue restrictions of the royal prerogative and were excluded on the orders of Frederick William II and his advisers. We do not know whether Frederick would have allowed these provisions to stand. Had they been enacted, they might in the end have denied unjust laws the status of positive law, thus opening the door to constitutional government in Prussia. The history of the Continent might (just possibly) have taken a less disastrous course.¹²¹

3 Natural law and Part I of the ALR

Not all the credit for the ALR should go to Suarez, although he was the most important and most productive draftsman. He worked under the Justice Minister, Johann Heinrich Casimir von Carmer (appointed in 1779) and was ably assisted by a number of officials. The most important of these was Ernst Ferdinand Klein. The devotion of Suarez and Klein to the ideals of the Enlightenment is shown by their membership of the so-called Wednesday Society in Berlin. At its meetings papers on topics such as 'Freedom and Property' were presented and debated.¹²² Suarez's manuscript of the lectures he gave to the Crown Prince, later Frederick William III, in 1791 and 1792 is still extant and shows his skill in explaining the philosophy underlying his legislative activities in readily understandable form.¹²³

The industry and energy expended on the great code by Suarez and his helpers was enormous, but so much of it was later overtaken by developments that the ALR has been called 'the testament of the *ancien régime*'. Nevertheless, much of it remains of value. Introd § 75, for example, deserves to be included in modern constitutions:¹²⁴

The state is obliged to compensate a person who is forced to sacrifice his particular rights and advantages in the interest of the public welfare.

When I studied law in Cologne in the early 1950s, my teachers argued that this valuable principle should be treated as still part of the law.

The ALR, as enacted in 1794, consists of two parts. The first codifies the private law and the second reflects the structure of Prussian society and the guiding principles of Government. Following Pufendorf, family law is accommodated in Part II, for it is

¹¹⁸ See his draft of Introd § 6 – above at n 104.

¹¹⁹ Lücke, above n 4, 2.

¹²⁰ K Wippermann, 'Suarez, Karl Gottlieb' in *Allgemeine Deutsche Biographie* v 37 (Munich, 1894) 247, 254. See also Hattenhauer, above n 10, 29.

¹²¹ Ingrao, above n 78, S161–S180.

¹²² Hattenhauer, above n 10, 18.

¹²³ Ibid.

¹²⁴ *Dagegen ist der Staat demjenigen, welcher seine besonderen Rechte und Vortheile dem Wohle des gemeinen Wesens aufzuopfern genötigt wird, zu entschädigen gehalten.*

considered the first and most basic of the groupings which make up Prussian society. This is followed by titles on corporations and municipalities, the Estates of the peasants, the townsfolk, the nobility and the churches and monasteries. To some extent interspersed with these are titles on the rights and duties of public servants and of the state. Further, there are titles dealing with the education system, charitable organisations, guardianship, roads, rivers and the sea shore. The final title contains the Prussian criminal law.

Hattenhauer has called the ALR the ‘basic law of freedom, comparable with the other great constitutional documents of the period’.¹²⁵ Suarez and his colleagues hoped that the rulers would not interfere with a part of the legal system which regulated only relations between individuals. Thus, they accommodated many of the provisions intended to defend the freedom of the individual in Part I which deals with private law.

No undertaking may limit freedom of conscience (I 4 § 9).¹²⁶ Rights only arise from human conduct if it is free and laws can only regulate free outward conduct (I 3 § 1).¹²⁷

Only outward and free conduct may be regulated by law (I 3 § 2).¹²⁸

The phrase ‘outward conduct’ (*äussere Handlungen*) is full of significance. It implies that the King is not to be entitled to seek to control the thoughts, beliefs and convictions of his subjects. Further significant freedom rights are as follows:

No one may force another to act or limit another’s freedom in some other way without a special legal justification for doing so (I 3 § 26).¹²⁹ No one may force another to refrain from certain conduct only on the ground that the conduct would be harmful to that other (I 3 § 27).¹³⁰ The State may force a person to sell his property only if the public welfare requires it (I 11 § 4).¹³¹

Provisions in Title 6 (I 6 §§ 45–49) carry the implication that the illegal orders of superiors are not strictly binding, although there are specific provisions concerning compensation. Two examples will have to suffice:

If a person has carried out unwittingly an illegal order, he may claim compensation from the one who has given it (I 6 § 48).¹³² Whoever has exceeded the limits of an order is liable to make good the damage which has resulted therefrom (I 6 § 49).¹³³

Some provisions to protect rights and valuable interests are also to be found in the Introduction and in Part II. Parents may not force their children into an unwanted marriage (II 2 § 119).¹³⁴ Slavery is outlawed in Prussia and no Prussian is allowed to

¹²⁵ *So wird das ALR zum Grundgesetz der Freiheit – insoweit durchaus den großen Verfassungsurkunden seiner Zeit vergleichbar.* – Hattenhauer, above n 10, 31.

¹²⁶ *Gewissensfreiheit kann durch keine Willenserklärung eingeschränkt werden.*

¹²⁷ *Sollen aus Handlungen Rechte entstehen, so müssen die Handlungen frey sein.*

¹²⁸ *Nur äußere freye Handlungen können durch Gesetz bestimmt werden.*

¹²⁹ *Niemand darf den Andern etwas zu thun zwingen, oder sonst dessen Freyheit zu handeln einschränken, dem nicht ein besonderes Recht dazu gebührt.*

¹³⁰ *Niemand darf den Andern etwas zu unterlassen, blos aus dem Grunde zwingen, weil der Handelnde dadurch sich selbst schaden würde.* I 3 § 28 & 29 specify legally circumscribed exceptions.

¹³¹ *Auch der Staat ist jemanden zum Verkaufe seiner Sache zu zwingen nur alsdann berechtigt, wenn es zum Wohl des gemeinen Wesens nothwendig ist.*

¹³² *Dem, der aus Unwissenheit einen gesetzwidrigen Befehl ausgerichtet hat, bleibt der Regreß gegen den Befehlenden vorbehalten.*

¹³³ *Wer die Gränzen des erhaltenen Befehls überschreitet, macht sich allemal zum Ersatz des dadurch entstandnen Schadens verantwortlich.*

¹³⁴ *Aeltern können ihre Kinder zur Wahl eines künftigen Ehegatten nicht zwingen.*

sell himself into slavery (II 5 §§ 196 & 197).¹³⁵ Unfortunately these last-named provisions did not abolish the institution of serfdom (*Leibeigenschaft*) which was widespread, particularly in the eastern parts of Prussia.¹³⁶ Frederick described the institution as ‘barbaric’ (*eine barbarische Unsitte*) but yielded to the Junkers, conceding that genuine abolition would ruin the country’s agriculture.¹³⁷ The ALR, reflecting the King’s view by denouncing ‘the former kind of serfdom, a kind of personal slavery’,¹³⁸ substituted a reformed version which gave serfs a range of rights but retained within certain limits the passing of the status from parents to their children and the Junkers’ right to discipline ‘lazy, disorderly and obstinate’¹³⁹ servants by physical punishment. The Prussian serfs had to wait until 11 November 1810 (*Martinitag*) for their final liberation.¹⁴⁰

Despite the unavoidable compromises forced upon the draftsmen by the political realities of their time, the ALR is a true child of the natural law tradition and of the Enlightenment.

IV THE AUSTRIAN GENERAL CIVIL CODE OF 1811

A Joseph II of Austria

The Holy Roman Empire existed legally until Francis II relinquished the crown in 1806, having assumed the title ‘Emperor of Austria’ in 1804. In 1765 Joseph became Emperor of the Holy Roman Empire on the death of his father and also co-regent of the Austrian provinces with his mother, Maria Theresa. She must have been interested in the theory of natural law, for she asked its leading Austrian academic exponent, Karl Anton von Martini, to instruct her sons Joseph, Leopold, Ferdinand and Maximilian and her daughter Caroline, later to become Queen of Naples. Martini was Professor of natural law and Roman law in the University of Vienna from 1754 until 1782.¹⁴¹ His theory of natural law was reflected in his work *De lege naturali positiones* (1767), published in German as *Lehrbegriff des Naturrechts* (The educational concept of natural law) (1797). He insisted that natural law should be kept free of theological influences and based solely on philosophical ideas. He attacked abuses and prejudices, opposed torture, defended the integrity of the ordinary courts,¹⁴² and argued that the death penalty should be reserved for the most serious cases.

¹³⁵ *Sklaverey soll in den königlichen Staaten nicht geduldet werden* (II 5 § 196). *Kein Königlicher Unterthan kann und darf sich zur Sklaverey verpflichten* (II 5 § 197).

¹³⁶ In East Prussia 55% of all farmers were serfs – Thomas Nipperdey, *Deutsche Geschichte 1800–1866, Bürgerwelt und starker Staat* (German history – the people and a strong state) (1998) 43.

¹³⁷ K Wiegrefe, ‘Der kleine König’ in (2011) *Der Spiegel* Nr 45/7.11.11, 72, 83.

¹³⁸ ... *die ehemalige Leibeigenschaft, eine Art der persönlichen Sklaverei* – II 7 § 148.

¹³⁹ *Faules, unordentliches und widerspenstiges Gesinde* – II 7 § 227.

¹⁴⁰ Nipperdey, above n 136, 43.

¹⁴¹ H von Zwiedineck-Südenhorst, ‘Martini, Karl Anton Freiherr von’ in *Allgemeine Deutsche Biographie*, edited by the Historische Kommission bei der Bayerischen Akademie der Wissenschaften, volume 20 (1884), p 510–2, Digitale Volltext-Ausgabe in Wikisource, URL: <http://de.wikisource.org/w/index.php?title=ADB:Martini,_Karl_Anton_Freiherr_von&oldid=1682782>.

¹⁴² A group of Austrian Jacobin plotters had been arrested in Hungary and Austria. The new Emperor, Francis II, who succeeded Leopold II in 1794, at first accepted the police recommendation that the trial be conducted by a specially established commission. There would have been no appeal and heavier penalties. Martini, who was Vice-President of the *Oberste Justizstelle* brought all his influence to bear to have the plotters tried in the ordinary

Joseph may not have made as thorough a study of natural law and Enlightenment thinking as Frederick had done, but what he lacked in depth he made up in single-mindedness and conviction. At a private meeting with Frederick in 1769 and a further such meeting in 1770, his philosophical and political convictions would have been confirmed.¹⁴³ After the first of these encounters, Frederick described him as ‘ambitious, and as capable of setting the world on fire’.¹⁴⁴

As Emperor he had almost no political influence outside Austria and his influence as co-regent was limited by his mother’s dominance.¹⁴⁵ On the death of his mother in 1780, he became the sole Ruler of Austria. Maria Theresa had believed in compromise, so that Joseph inherited a realm in which power was still shared between the Ruler and the Estates, especially the nobility and the Catholic Church. He concluded from his understanding of the Enlightenment that he was obliged to force its precepts on his subjects whatever their own preferences. He has been called a ‘revolutionary on the throne of Habsburg’.¹⁴⁶ Strakosch has summed up his political program as follows:¹⁴⁷

The common good was the good of all ... clearly recognizable in the light of reason [and] the state was [its] only possible guardian ... consequently it was the primary function of government to subject every activity within the social order ... to the direction of the state. The justification of a fully authoritarian régime was seen in the fact that it did not spring from the will of the sovereign but was in full conformity with reason.

He saw the aim of his legislation to be to abolish ‘every vestige of privileged status’ and subjected the nobility and the Church, the artisans and the peasantry ... to a common and unitary law, administered by the state’.¹⁴⁸ Martini was a moderate and should therefore not be held responsible for the radicalism of Joseph II. It would be interesting to know what Martini had had to say about the principle of equality. Joseph II seems to have believed in it passionately, judging by his policies, except insofar as it affected his own exalted position. His realm was a patchwork of diverse provinces inhabited by Austrian Germans, Hungarians, Slovenes, Poles, Czechs, Slovaks, Ruthenians, Romanians, Croats, Italians and Serbs and yet he insisted on centralising all the power of the state in himself. At one stage the draft of a civil code which he had inherited from his mother contained a provision which stated that the sole source of the binding force of the law was the sovereign power of the monarch.¹⁴⁹ Like Frederick he published the occasional pamphlet, some characteristically dealing with obedience to him.¹⁵⁰

Joseph sought to advance the natural law agenda as he saw it. Torture was abolished in Austria in 1776¹⁵¹ and the death penalty in 1784. Joseph believed in freedom of conscience as the guiding principle and greatly restricted censorship.¹⁵² He

courts. The *Oberste Justizstelle* combined the functions of a Ministry of Justice with certain judicial responsibilities – Strakosch, above n 41, 39–40, 182–5.

¹⁴³ The meetings are said to have taken place in Neisse and in Mährisch-Neustadt respectively.

¹⁴⁴ Wikipedia, *Joseph II, Holy Roman Emperor* (16 June 2012) <http://en.wikipedia.org/wiki/Joseph_II,_Holy_Roman_Emperor>.

¹⁴⁵ Ibid.

¹⁴⁶ Strakosch, above n 41, 103.

¹⁴⁷ Ibid, 123.

¹⁴⁸ Ibid, 124.

¹⁴⁹ The provision was removed later under Francis II as too radical – ibid, 189.

¹⁵⁰ ‘Of the obligations of subjects towards their sovereign’ – ibid, 144.

¹⁵¹ See Wikipedia, above n 81.

¹⁵² Strakosch, above n 41, has told the story in some detail (at 142–7), citing O Sashegyi, *Zensur und Geistesfreiheit unter Joseph II*, *Studia Historica Academiae Scientiarum Hungaricae*

was anxious to relieve the peasantry of feudal burdens, and to remove restrictions on trade and knowledge. He believed in religious toleration but also in some limits, for he saw the Catholic Church as an obstacle, standing between him and peoples' freedom to act and to think as they wished. Consequently, censorship continued for Catholic publications with doctrines restrictive of the power of princes (such as one which allowed the Pope to depose them). Religious books belonging to monasteries which Joseph abolished were destroyed as 'useless prayer books and devotional books and other theological nonsense'.¹⁵³ He ordained that preachers were to instruct their flocks in the need for obedience to their Sovereign. He abolished long-established religious public holidays to increase productivity.¹⁵⁴ Considering that even the poorer population spent too much money on funerals he ordered that people would in future be buried in sacks.¹⁵⁵ It was a case of rationality having gone mad.

His rudeness was legendary. When he had opened an imperial domain near Vienna to the general public and aristocrats complained that they now no longer had a convenient meeting place, he responded that they would be by themselves if they assembled in the vault where the Habsburg Emperors were buried.¹⁵⁶

Towards the end of his reign, large parts of his people were in almost open revolt. His attempts to centralise the power of the state had only limited success. Nevertheless, Strakosch considers that his radical policies saved Austria from the upheavals which occurred in France.¹⁵⁷

B *The Codex Theresianus*

Wieacker has pointed out the remarkable parallels between the Prussian and the Austrian codification stories.¹⁵⁸ In both countries progress was slow. In both countries the natural lawyers attempted without much success to impose limits upon the powers of the Rulers. Work on a draft code of private law had started in 1753 when Maria Theresa, anxious to create a uniform law for all the hereditary Austrian lands,¹⁵⁹ appointed the Brünn Commission, replaced by a 'Commission of Compilation' three years later, to draft a code of private law in the German language. Natural law was already an influence, for the Brünn Commission was to be guided by 'the rules of reason and of natural law' and by the most equitable parts of the existing provincial laws. The first draft, the *Codex Theresianus*, completed in 1766, contained statements such as 'the state of liberty is given to all men by nature' and 'liberty is a natural faculty to do what one chooses, unless restrained by force or by law'.¹⁶⁰ The draft was considered to be far too long and was rejected by the Council of State in 1771.

Johann Bernhard Horten, one of Martini's former students, was asked to revise and shorten the draft code.¹⁶¹ In 1773, at about the time at which Horton began his work, Martini himself was appointed as a member of the Commission of Compilation and began to play an increasingly important role in the task of codifying the private

(Budapest, 1958). See the review by C A Macartney in (1960) 75 *The English Historical Review* 359.

¹⁵³ Strakosch, above n 41, 144.

¹⁵⁴ See Wikipedia, above, n 144.

¹⁵⁵ Strakosch, above n 41, 148–9.

¹⁵⁶ Ibid, 125, n 3.

¹⁵⁷ 'Joseph's government had in fact spared Austria the horrors of civil war and a collapse of order.' – *ibid*, 104.

¹⁵⁸ Wieacker, above n 34, 266.

¹⁵⁹ The Austrian possessions were a patchwork; they included *inter alia* Austria, Styria, the Tyrol, Bohemia, Moravia and Silesia – *Ibid*, 267.

¹⁶⁰ Strakosch, above n 41, 66.

¹⁶¹ *Ibid*, 65.

law. It seems likely that Horten consulted him frequently. Under Joseph, Martini was given numerous government assignments, the most substantial having been the drafting of a criminal code. Because of the growing turbulence in Austrian politics little progress was made with the task of advancing work on the completion of the code. However, the first part of Horton's draft was enacted by Joseph II in 1787 and became known as the Josephine Code (*das Josephinische Gesetzbuch*). One of its effects was to substitute state regulation for much of the Catholic law on marriage.¹⁶²

In 1790 Leopold II, like his late brother Joseph an Enlightenment monarch (1790–1792), disbanded the old Commission of Compilation and established a new codification commission (*die Hofkommission in Gesetzgebungssachen*) with Martini as its President.¹⁶³ After the provinces and the universities had been consulted, another draft, now largely Martini's work, was submitted to Leopold's successor, Francis II, in May 1794. One can only imagine Martini's disappointment when it was decided to subject the latest version of the code to a further revision by a new Commission of Revision (*Revisionshofkommission*) in which another of Martini's former students, Joseph von Sonnenfels, was to play a leading role.¹⁶⁴

C Martini's 'principles of public order'

The 'principles of public order' which Martini had included became very controversial. In 1797, when the great Code was still in preparation, a new law was required for Western Galicia, a recently acquired Austrian province. Martini's draft was the only completed version and on 13 February 1797 it became law there under the title West Galician Civil Code (*Westgalizisches Bürgerliches Gesetzbuch*).¹⁶⁵ In September of the same year it was extended to Eastern Galicia. The controversial provisions were still included. They constitute the philosophy of the natural lawyers of the period in a nutshell. They also show their political timidity when faced with the power of monarchy.¹⁶⁶

¹⁶² Gerd Kleinheyer, 'Wandlungen der elterlichen Gewalt zwischen dem 16. und 19. Jahrhundert, dargestellt am Beispiel des elterlichen Ehekonsensrechts' (Changes of parental rights from 16th to 19th century, exemplified by parental consent as a precondition to marriage) in Otto Sandrock (ed), *Festschrift für Günther Beitzke zum 70. Geburtstag am 26. April 1979* (Walter De Gruyter, Berlin, NY, 1979) 235, 241.

¹⁶³ Strakosch, above n 41, 186.

¹⁶⁴ Ibid, 188.

¹⁶⁵ The code is available online – see <<http://www.koeblergerhard.de/Fontes/WestgalizischesGesetzbuch1797.htm>>.

¹⁶⁶ The first nine paragraphs of the West Galician Civil Code read as follows:

§ 1. Law is all that which is good in itself, which contains something good according to its circumstances and consequences and which contributes to general wellbeing.

§ 2. From the body of law there emerge those rules which give guidance to people for their conduct and which prescribe their duties.

§ 3. 'Law' has two meanings: one is the rule which prescribes lawful conduct, the other the natural freedom or the permission to act which everyone has if he fits his conduct into the framework of the rules.

§ 4. Rights and duties either flow from human nature in which case they are called natural or inborn rights and duties, or they are based on a particular society in which case they are called positive rights and duties, *ie* those which have arisen by virtue of the life of the society.

§ 5. Associations of people who have united in accordance with certain rules in order to achieve a particular purpose are called community.

§ 6. The state is a community united and bound together under a common ruler to achieve an ultimate goal unchangeable and adapted to the nature of man.

§ 7. This ultimate goal is the general welfare of the state, *ie* personal safety, property and all the other rights of its members.

It would be surprising if Martini had not dealt in some detail with the mythical 'state of nature' in his books on natural law. However, in these provisions the state of nature is only hinted at when Martini speaks of 'natural freedom or the permission to act'. However, the social contract is an indispensable part of this set of provisions. As Wieacker has said:¹⁶⁷

If natural law is to ... present itself as a philosophy of a given order, it has to use suprapositive postulates. The solution adopted by Western thinkers has been to take as its model or symbol the idea of an original *social contract*.

Martini endorsed yet another and perhaps more plausible source of supra-positive law: the 'nature of man'. A systematic arrangement of Martini's provisions might read as follows:

Communities are associations of people who have united in accordance with certain rules in order to achieve a particular purpose (§ 5). The State is such a community, united and bound together under a common ruler to achieve an ultimate goal (§ 6). This ultimate goal, adapted to the nature of man and therefore unchangeable, is the general welfare of the state, *ie* the protection of the personal safety, property and of all the other rights of its members (§§ 6 & 7). Rights and duties are of two kinds: (1) those which are natural or inborn, flow from human nature and are unchangeable, *ie* they cannot be changed by a positive law and (2) those which are positive in the sense that they flow from the life of the particular society and are articulated by the ruler as prescriptions and rules, called laws, which are required to

§ 8. The prescriptions and rules required to attain this final goal are issued by the ruler; they are called laws.

§ 9. The totality of all the laws which determine the mutual rights and duties of the inhabitants of a state inter se constitute its civil/private law. The private law for West Galicia is contained in this law book.

The original German reads as follows:

§ 1. *Recht ist alles, was an sich selbst gut ist, was nach seinen Verhältnissen und Folgen etwas Gutes enthält, oder hervorbringt, und zur allgemeinen Wohlfahrt beiträgt.*

§ 2. *Aus dem, was Recht ist, werden die Regeln ausgehoben, welche dem Menschen in seinem Thun und Lassen zur Richtschnur dienen sollen, und ihm seine Pflichten vorschreiben.*

§ 3. *Das Wort Recht wird außer dem noch in einem zweifachen Sinne genommen; man versteht darunter sowohl die Regel selbst, welche, was Rechtens ist, vorschreibt, als auch die natürliche Freiheit, oder das Befugniß zu handeln, welche jeder Mensch hat, wenn er seine Handlungen nach diesen Regeln einrichtet.*

§ 4. *Rechte und Pflichten gründen sich entweder in der Natur des Menschen allein, und dann heissen sie natürliche und angeborene Rechte und Pflichten, oder sie gründen sich auf eine bestimmte Gesellschaft, und dann werden sie positive, das ist vermög des gesellschaftlichen Lebens entstandene Rechte und Pflichten genannt.*

§ 5. *Menschen, die sich mit einander vereinigen, um nach gewissen Vorschriften einen gemeinschaftlichen Zweck zu erreichen, heissen eine Gesellschaft.*

§ 6. *Der Staat ist eine Gesellschaft, die zur Erreichung eines bestimmten der Natur des Menschen angemessenen und unveränderlichen Endzweckes unter einem gemeinschaftlichen Oberhaupte vereinigt und verbunden ist.*

§ 7. *Dieser Endzweck ist überhaupt die allgemeine Wohlfahrt des Staates, das ist die Sicherheit der Personen, des Eigenthums und aller übrigen Rechte seiner Mitglieder.*

§ 8. *Die zur Erreichung dieses Endzweckes nothwendigen Vorschriften oder Regeln giebt das Oberhaupt des Staates, und sie heissen Gesetze.*

§ 9. *Der Inbegriff aller Gesetze, wodurch die wechselseitigen Rechte und Pflichten der Einwohner des Staates unter sich bestimmt werden, macht das bürgerliche Privatrecht desselben aus. Dieses Privatrecht ist für Westgalizien im gegenwärtigen Gesetzbuche enthalten.*

¹⁶⁷ Wieacker, above n 34, 211.

attain the ultimate goal of the State (§§ 4, 7 & 8). Rules which give guidance to people for their conduct and which prescribe their duties emerge from the whole body of the law (§ 2). Positive rules enacted by the ruler may be good or bad. They are good only when they contain something good according to the circumstances and consequences and when they contribute to general wellbeing (§ 1). The totality of all the laws which determine the mutual rights and duties of the inhabitants of a state *inter se* constitute its private law. The private law for West Galicia is contained in this law book (§ 9).

These propositions leave open a politically fundamentally important question: are bad laws null and void or still valid? If the former, who is to have the constitutional and political power of defiance? Contemporaries may have been blinded to these implications by the power of majesty. Had they been extended from Galicia to all of Austria, they might have opened the door to constitutional government by just a crack. However, that was not to be.

D *The completion of the Austrian code*

During the debates in the Commission of Revision Martini would have spoken with all the weight of his enormous prestige. Opposing him must have caused embarrassment to other members. Nevertheless, Sonnenfels, though committed to natural law, expressed the view that Martini's principles of public order were misplaced in a code of private law and should find their place in a code of public law which he offered to draft and promote. Other members of the Commission spoke of 'dangerous ideas of the [social contract] which they could engender in the minds of common and unlearned men',¹⁶⁸ obviously fearing that the French Revolution might spill over into Austria. As a result, Martini's principles were excluded from the draft code. Sonnenfels's code of public law never came into being.

Martini, 'embittered beyond words against the Commission of Revision and its sabotage of his work' retired from his position as its President somewhat later.¹⁶⁹ Under the guidance of Franz Edler von Zeiller, another of Martini's students, work continued and the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch* – ABGB) was enacted in 1811, nearly 60 years after Maria Theresa first gave the order for it to be prepared. Paragraph 1 of the Code defines 'civil law' (*bürgerliches Recht*) as the 'totality of the legal provisions which specify the private rights and duties of the inhabitants of the state'.¹⁷⁰ It is comparable to Part I of the ALR, except that the ABGB also covers matrimonial law and the law of parents and children.¹⁷¹ There is no trace of the attempt Martini made with his 'principles of public order' to stray into areas which one would now consider to be the province of constitutional law. The ABGB is still in force although there were large-scale revisions of 1914, 1915 and 1916 which absorbed much of the substance of the German Civil Code of 1900.

To give only one example of its many provisions: § 7 is of particular interest because of the refusal of the common law courts to apply legislative provisions by analogy.¹⁷²

¹⁶⁸ Strakosch, above n 41, 190.

¹⁶⁹ Ibid, 191.

¹⁷⁰ § 1. *Der Inbegriff der Gesetze, wodurch die Privat-Rechte und Pflichten der Einwohner des Staates unter sich bestimmt werden, macht das bürgerliche Recht in demselben aus.*

¹⁷¹ The ABGB deals with the usual areas of private law, contract, tort, property law, family and succession, although it does so in an arrangement and under headings which strike a common lawyer as unfamiliar.

¹⁷² § 7. *Läßt sich ein Rechtsfall weder aus den Worten, noch aus dem natürlichen Sinne eines Gesetzes entscheiden, so muß auf ähnliche, in den Gesetzen bestimmt entschiedene Fälle, und auf die Gründe anderer damit verwandten Gesetze Rücksicht genommen werden. Bleibt der Rechtsfall noch zweifelhaft, so muß solcher mit Hinsicht auf die sorgfältig gesammelten*

§ 7. If a case cannot be decided by applying the words or the natural meaning of a statute, one must take into consideration similar cases which are dealt with in other statutes in a definite manner and the reasons behind such statutes. If a doubt remains, the case must be decided by applying natural legal principles, having given mature consideration to the carefully gathered circumstances.

Barta has analysed this and many other provisions of the Code which were drafted by Martini, survived the revisions and became part of the law of Austria.¹⁷³ Even though Martini's principles of public order were lost, there is much which remains a monument to his high legal intelligence and his skill as a draftsman.

V CODIFICATION IN THE AGE OF IMPERIALISM: THE FRENCH CODE CIVIL OF 1804

A Napoléon Bonaparte

Napoléon Bonaparte's rise in France occurred after the political situation had undergone the fundamental change wrought by the French Revolution. The equality principle of the natural law movement, radicalised by Rousseau, had blown apart the *ancien régime*. The aristocracy had been reduced to *citoyen* status if not murdered, the clergy had been treated little better. Regional *parlements* had been dissolved and the guilds and merchant corporations abolished, putting an end to guild domination of the government and making way for freedom of trade.¹⁷⁴ The revolutionary Government committed itself repeatedly to the creation of a code of private law.¹⁷⁵ Jean-Jacques-Régis de Cambacérès, a nobleman and well-established jurist who had supported the revolution, was entrusted with this task, but his three drafts submitted to the National Assembly were all rejected.

Napoléon, who had become the first consul in 1799, was determined to see a private law code established efficiently and quickly. In 1800 he appointed a commission of four to draw up a code of private law. Cambacérès's work must have been useful to the Commission of 1800, but the members of the commission were Jean Étienne Marie Portalis, Government Commissioner in the Prize Court, and three judges of the Court of Cassation, François Denis Tronchet, Félix-Julien-Jean Bigot de Préameneu and Jacques de Maleville. Their work resulted in the enactment of the Code Civil of 1804. Napoléon was the driving force behind the completion of the task within such a short span of time. The Code Civil is often considered to be one of the great natural law codes. One wonders whether such a claim is fully supported by the known facts.

Like all educated Frenchmen, Napoléon would have had some understanding of the philosophical currents of his time. He is said to have had an interest in natural law. He was a great admirer of Frederick the Great and, as a young artillery officer, is said to have found inspiration in the works of Rousseau.¹⁷⁶ He was opposed to torture.¹⁷⁷

und reiflich erwogenen Umstände nach den natürlichen Rechtsgrundsätzen entschieden werden.

¹⁷³ See Barta's comprehensive lecture: H Barta, *Karl Anton von Martinis bleibende Bedeutung für die österreichische und europäische Rechtswissenschaft* (Karl Anton von Martini's enduring significance for Austrian and European legal science) (2000) 2.

¹⁷⁴ W J Derenberg, 'The Code and unfair competition' in Schwartz, above n 14, 177, 178.

¹⁷⁵ 'The Convention in 1793 and 1794, and the *Directoire* in 1796 all promised the French people that they would draw up a code . . .' – Tunc, above n 16, 21.

¹⁷⁶ 'Politics in Napoleon's time.' See http://www.pbs.org/empires/napoleon/n_politic/frenchrev/page_1.html.

One wonders whether he was greatly motivated by the high ideals of the natural law movement. He was a mathematician and a great political and military strategist and approached even the most popular ideas with skepticism. Having read Rousseau's *Discourse on the Origin of Inequality*, he is said to have declared it to be nonsense.

Historically, since the days of Grotius, natural law had been closely associated with the developing discipline of international law which was designed to impose some controls on warfare. Napoléon hardly showed much restraint in international affairs. He inaugurated the age of imperialism and, as his conquest of much of Europe progressed, the Code Civil, also known as the Code Napoléon, became yet another instrument of his imperialist designs.¹⁷⁸ Natural law may not have been forgotten, but very different motivations overshadowed it.

B *Napoléon's lawyers*

The Commissioners who designed the code still spoke the language of natural law. Under the heading 'Law and legislation in general', Portalis stated in the famous Preliminary Address on the First Draft of the Civil Code:¹⁷⁹

Law is universal reason, supreme reason based on the very nature of things. Legislation is, or ought only to be, law reduced to positive rules, to specific precepts. ... Reason, as it governs all men for all time, is called natural law ... That which is not contrary to the laws is lawful. ... The judiciary, established to apply laws, needs to be guided in this application by certain rules. We have outlined them. They are such that the private reason of no man can ever prevail over the law, which embodies public reason.

However, unlike Suarez and Martini, the Commissioners made no attempt to limit the power of the political authorities. Moreover, if their work was guided by ideas of natural law, that was limited to matters of family law. Napoléon wanted the code and wanted it quickly, so the commissioners found it convenient to rely, for the remainder of the code, on the magisterial expositions of existing French law to be found in the works of great French 18th century writers, particularly Robert Joseph Pothier, whose works were largely based on Roman law.

Further, the lasting fame of Portalis is not founded on his adherence to natural law but on his advocacy of a drafting style which was radically different from that adopted by the authors of the ALR. Frederick the Great famously remarked that laws needed to be short, but his draftsmen hardly took this to heart – the ALR has about 19,000 paragraphs! Drafting styles as an issue were not high on the agenda of 18th century natural lawyers. For Portalis such problems took centre stage. He identified the central

¹⁷⁷ During his successful Egyptian campaign in 1798 he ordered his troops no longer to use whipping to extract secrets, explaining that it was not only contrary to reason and humanity but also useless, for under torture people would say anything which they believed the interrogator wanted to hear whether true or not. – Wikipedia, *Cesare Beccaria* (13 June 2012) <http://en.wikipedia.org/wiki/Cesare_Beccaria>.

¹⁷⁸ J Limpens, 'Territorial expansion to the Code' in Schwartz, above n 14, 92, 107.

¹⁷⁹ *Le droit est la raison universelle, la suprême raison fondée sur la nature même des choses. Les lois sont ou ne doivent être que le droit réduit en règles positives, en préceptes particuliers. ... La raison, en tant qu'elle gouverne indéfiniment tous les hommes, s'appelle droit naturel. ... Ce qui n'est pas contraire aux lois, est licite. ... Le pouvoir judiciaire, établi pour appliquer les lois, a besoin d'être dirigé, dans cette application, par certaines règles. Nous les avons tracées : elles sont telles, que la raison particulière d'aucun homme ne puisse jamais prévaloir sur la loi, raison publique.*

issue faced by codifiers in the elegant language of the Preliminary Address as follows:¹⁸⁰

How does one arrest the passing of time? How can one oppose the course of events or the imperceptible change of custom? How can one know and calculate in advance things which only experience can reveal? Can foresight ever extend to things our mind cannot grasp?

From these facts of life Portalis drew the following conclusion for the drafting of the code:¹⁸¹

Many things are therefore necessarily left to the authority of custom, to the discussion of learned men, to the arbitration of judges. The function of the statute is to set down, in broad terms, the general maxims of the law, to establish principles rich in consequences, and not to deal with the particulars of the questions that may arise on every subject. It is left to the magistrate and the jurisconsult, fully alive to the overall spirit of laws, to guide their application.

This amounts to a rejection of Montesquieu's demand for strict adherence to the legislative letter.¹⁸² According to Montesquieu a Judge was to be nothing more than a 'mouth that pronounces the words of the law'; Judges should be 'mere passive beings, incapable of moderating either its force or rigor',¹⁸³ to ensure that they would not behave 'with violence and oppression'.¹⁸⁴ These passages appear under the heading 'Of the Constitution of England'. That and the apparent link of these passages with the separation of powers may be why the English judges of the early 19th century took them so seriously, leading common law legal systems into the cul-de-sac of literalism and their parliaments to an obsession with excessively explicit detail in the drafting of statutes.¹⁸⁵ It was not understood that Montesquieu was not really extolling the virtues of the British Constitution but taking aim at the arbitrariness of the judges of the French *ancien régime*. As André Tunc has pointed out, the population had little confidence in royal judges:¹⁸⁶

On the eve of the Revolution the dictum was still valid: God save us from the equity of the courts – *Dieu nous protège de l'équité des Parlements!*

¹⁸⁰ *Comment enchaîner l'action du temps? Comment s'opposer au cours des événements ou à la pente insensible des mœurs? Comment connaître et calculer d'avance, ce que l'expérience seule peut nous révéler? La prévoyance peut-elle jamais étendre à des objets que la pensée ne peut atteindre?*

¹⁸¹ *Une foule de choses sont donc nécessairement abandonnées à l'empire de l'usage, à la discussion des hommes instruits, à l'arbitrage des juges. L'office de la loi est de fixer, par de grandes vues, les maximes générales du droit; d'établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière. C'est au magistrat et au jurisconsulte, pénétrés de l'esprit général des lois, à en diriger l'application.*

¹⁸² Montesquieu, above n 56, 75.

¹⁸³ Ibid, 159.

¹⁸⁴ Ibid 152.

¹⁸⁵ Lücke, Statutes, above n 4, 1, 12–4.

¹⁸⁶ Tunc, above n 16, 19. For a detailed account, see Vernon V Palmer, 'From embrace to banishment: A study of judicial equity in France' (1999) 47 *American Journal of Comparative Law* 277–302. See also John P Dawson, *The Oracles of the Law* (Ann Arbor, 1968) 263–373.

Montesquieu might well have had personal experience of these failings of the system which he helped to administer, for he had been the President of the Court of Appeal in Bordeaux from 1716 until 1726.¹⁸⁷

Portalis's call for *principes féconds en conséquences* and for flexibility of interpretation, were found so convincing in continental Europe that a prescription not to adhere too closely to the literal meaning of legal instruments like that to be found in § 133 of the German Civil Code¹⁸⁸ has virtually become the legal equivalent of the Hippocratic oath.

Napoléon wanted the code and he wanted it with obstinacy.¹⁸⁹ The Commission worked under his watchful eye. As Limpens has said:¹⁹⁰

The draftsmen of the Code knew that their text would pass under the eyes of a man of great intelligence, but a man foreign to their profession. ... Tronchet and Portalis drew it up under the impression that their first reader would be Napoleon Bonaparte.

Portalis and his fellow commissioners, Tronchet, Bigot-Préameneu and Maleville, were able to complete an excellent first draft within three to four months, distinguished by the brevity, clarity and elegance of its language. They were in the fortunate position of being able to place much reliance upon the works of French writers. Legal humanism had been a French affair and as early as in the 16th century French academics had achieved some historical mastery of the Roman law.¹⁹¹ Eighteenth century writers such as Domat and Pothier had summed up brilliantly the law in force in France in their time and many of the rules and principles they expounded were taken over by the Commissioners, often *verbatim*. This greatly facilitated the drafting of the Code.

The Code Civil has some excellent qualities. The French Revolution had freed French legislation of the inequalities of the *ancien régime* and the Code was imbued with the spirit of the Revolution: *liberté, égalité et fraternité*; there were no privileges for any particular class in society. The language of the Code Civil was elegant, simple and readily understandable. Compared with the ALR it avoided casuistry and was very brief, consisting of no more than 2281 articles compared with the 19,000 of the ALR.

C The Code Civil and French imperialism

The legislative bodies of the French State held 123 meetings to discuss the Code and Napoléon himself presided over 55 of these. When the Legislative Assembly, having rejected the first title of the Code, was about to reject the second, Napoléon, passionately committed to his Code, sent the following message:¹⁹²

Legislators, the government has decided to withdraw the legal drafts of the Code Civil. It regretfully finds itself compelled to defer until another time the laws which the Nation awaits with interest, but is convinced that the time has not yet arrived when that

¹⁸⁷ Montesquieu, above n 56, xi.

¹⁸⁸ 'In interpreting a declaration of intention, the true will shall be ascertained and one should not adhere too closely to the declaration' (*Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften*). See also art 1156 of the Code Civil.

¹⁸⁹ Limpens, above n 178, 92, 105.

¹⁹⁰ Ibid, quoting M. Le Roux.

¹⁹¹ In 1583 Dionysius Gothofredus had published a complete critical edition of the *Corpus Juris*. See, Denis Godefroy (2012) *Online Encyclopedia*. <http://encyclopedia.jrank.org/DEM_DIO/DENIS_GODEFROY_Dionysius_Gothof.html>.

¹⁹² Tom Holmberg, *The Civil Code: An Overview* (September 2002) <http://www.napoleon-series.org/research/government/code/c_code2.html>.

calmness and unity of purpose which they require can be employed in these important discussions.

Napoléon then reformed the Legislative Assembly by removing his enemies, thus ensuring the smooth passage of the Code. When a prisoner on Saint Helena, he wrote:¹⁹³

My glory is not to have won forty battles, for Waterloo's defeat will blot out the memory of as many victories. But nothing can blot out my Civil Code. That will live eternally.

Napoléon's imperialist design was to unite Europe under French rule and to establish his Code as a uniform legal system there:¹⁹⁴

I want to raise the glory of the French name so high that it becomes the envy of all nations. I should like to see the day when, with the help of divine guidance, a Frenchman travelling throughout Europe could always find himself at home.

Napoléon introduced the Code into those parts of Europe over which he exercised virtual control: Belgium, Luxembourg (both still retain it), Monaco, the German territories on the western side of the Rhine and other parts of Germany (including Baden, Westphalia and the Hanseatic Territories). Italy consisted of numerous states, all dominated by Napoléon's armies, and each one of these adopted the Code in due course: Genoa, Lombardy, Venice, Lucca, Piombina, Guastalla, Marches and Ligations, Tuscany, Naples and the Papal States.¹⁹⁵

These qualities of the Code explain why, after Napoléon's downfall in 1814, the triumphant march of the Code continued. Further Italian codes which were substantial re-enactments of the Code Napoléon were enacted in the two Sicilies, Parma, Modena and the Sardinian states. When Italy was united in 1861 the civil law was unified by the simple device of adopting a code closely modelled upon the French example. Romania adopted the Code. The Portuguese and Spanish codes used the Code Napoléon as a precedent, even though they drafted their own more freely.

In the Americas, Louisiana had been a French possession until 1762, then became Spanish then French again and was purchased from Napoleon by the US in 1804. Its French heritage resulted in two successive codes (1809 and 1825) which bear a close resemblance to the Code Civil.¹⁹⁶ Certain aspects of the Quebec Code of 1866 were inspired by the Code Civil, although it is primarily based on the custom of Paris.

In South America the Code Civil was extremely influential, notably in Bolivia, Chile, Uruguay and the Argentine. The German Civil Code of 1900 caused French influence in South America to diminish. Other countries in which the French legal tradition became an important influence are Japan and China, Turkey, Egypt, the Lebanon and Syria.

Limpens argues that only a code can achieve such tremendous penetration outside its own boundaries:¹⁹⁷

¹⁹³ Ibid.

¹⁹⁴ Limpens, above n 178, 92, 107.

¹⁹⁵ Limpens's contribution contains an account of the adoption of the Code in countries other than France. – see Limpens, above n 178, 92–109.

¹⁹⁶ Louisiana is not a true code state, for the case law tradition has superseded much of the Code in practice.

¹⁹⁷ Limpens, above n 178, 92, 103.

One can hardly imagine a body of case law such as the English common law, for example, seeking expansion. ... a foreigner can absorb a code, [but] how can he be able, suddenly, even to understand the swarming diversities of a judicial tradition?

The learned author seems to have overlooked the spread of the common law,¹⁹⁸ a process of legal transplantation no less impressive than is the emigration of the Code Civil to other lands and legal cultures.

VI CONCLUSION

It was implicit in the work of Suarez and Martini that natural law was above kings and princes whose role was reduced to mere agents, in duty bound to translate the requirements of natural law into the needed positive rules. Had such views been made explicit too clearly, their authors might have suffered more than the mere rejection of their proposals. In fact a confrontation with royal power never occurred. Martini's 'principles of public order'¹⁹⁹ foundered on the fear of their revolutionary potential and on the refusal of purists like Sonnenfels to mix private and public law. Suarez's attempt to write much the same principles into the ALR failed because Frederick William II refused to see his powers diminished.

To regard Suarez and Martini as martyrs of the natural law movement may be an exaggeration, but so is calling the sacking of a Prime Minister an 'assassination'. They gambled for high stakes and lost. Suarez was forced to give up his most cherished provisions and to draft many changes which ran counter to his deepest convictions. Martini achieved a pyrrhic victory with his West Galician Civil Code, but when his principles failed to gain entry into the Austrian General Civil Code he felt forced to retire from public life with a sense of deep disappointment.

The master principle of the natural lawyers was of great constitutional and political significance. Herbert Hart's 'rule of recognition' underpins and renders legitimate laws generated within a legal system.²⁰⁰ Some such rules of recognition are quasi-procedural in the sense that it is not the substantive quality of enacted or otherwise created law, but its origin and the mode of its creation which provide the test of its legitimacy. An example is the maxim in the *Corpus Juris* which vests all state power in a single individual²⁰¹ or the democratic principle which declares the will of the majority to be the ultimate test. The ALR vested most of the powers of government in the King;²⁰² Joseph II pursued with great energy the aim of achieving much the same status in Austria but there was nothing like the ALR which would have recognised formally the absoluteness of his governmental power.

Having been trained in the categories of positivism, one would be inclined to regard the (substantive) master principle of 18th century natural lawyers as merely a limitation of otherwise unchallenged governmental powers. This would be to misunderstand the true message of natural law: its master principle was nothing less than the fundamental and unchanging core of all law and thus a complete rule of recognition in itself. Portalis gave expression to this view with characteristic clarity and insight when, under the heading 'Law and legislation in general', he defined law as 'universal reason, supreme reason based on the very nature of things' and legislation as

¹⁹⁸ B H McPherson, *The Reception of English Law Abroad* (Brisbane, 2007).

¹⁹⁹ See the provisions quoted in n 166 and the following brief summary.

²⁰⁰ Hart, above n 18. The concept is elaborated throughout the book; see particularly Chapter VI.

²⁰¹ *Quod principi placuit, legis habet vigorem* (what pleases the Emperor has the power of law) – *Digest* 1.4.1. See also the following related statement: *princeps legibus solutus est* (the Emperor is above the law) – *Digest* 1.3.31.

²⁰² Above, at nn 72–77.

‘law reduced to positive rules, to specific precepts’.²⁰³ At about the time when Portalis penned these words in France, Lord Ellenborough CJ announced in the Court of King’s Bench that ‘the law of humanity . . . is anterior to all positive laws’.²⁰⁴

Despite these hopeful beginnings, the 19th century was hardly a golden age of natural law. Considerations derived from the supposed state of nature were understandably viewed with scepticism and the so-called ‘social contract’ was not only of doubtful meaning but also politically suspect. Even if these components are discounted, what remains of natural law is still of enduring value and has left important legacies. In continental Europe it inaugurated the change from the awkward mixture of customary and received Roman law to the simplification and codification of large legal fields. On the other hand, civil law countries failed at first to balance the growing powers of central governments with an adequate emphasis on the rights of the individual. It is in this last-named respect that common law countries succeeded in various ways.

Had common law judicial lawmaking been recognised at the time, natural lawyers would have wanted their principles to be extended to the judiciary. Common law judges, having gained the necessary independence, began in fact to act as guardians of individual rights. In due course they developed what Spigelman has called the ‘common law bill of rights’.²⁰⁵ In Australia the significance of such common law rights was first articulated in the High Court by O’Connor J in *Potter v Minahan*.²⁰⁶

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

It has since been oft repeated²⁰⁷ and has been called the ‘principle of legality’.²⁰⁸ It is understood by most common law judges as a principle which does no more than spell out the true intention of Parliament. As Spigelman has said: ‘the rights of Englishmen live on in the law of statutory interpretation’.²⁰⁹ However, a common law judge as highly respected as Lord Robin Cooke has assigned to these rights a role which may, in extreme cases, trump the power of Parliament.²¹⁰ Even without this minority view, the principle of legality has proved a powerful protection for human rights.

The United Kingdom, New Zealand and two Australian jurisdictions, the ACT and Victoria, have considered the principle of legality to be insufficient and have enacted human rights legislation with statutory catalogues of rights.²¹¹ The courts in

²⁰³ Above n 179.

²⁰⁴ *R v Inhabitants of Eastbourne* (1803) East103, 107.

²⁰⁵ James Spigelman, *Statutory Interpretation and Human Rights: The McPherson Lecture Series* (St Lucia, Qld, 2008) 3. For a list of such rights suggested by Spigelman, see *ibid*, 27–9. See also the somewhat different list which appears in DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis, 6th ed, 2006) Chapter 5.

²⁰⁶ (1908) 7 CLR 277, 304.

²⁰⁷ See, eg, *Al-Kateb v Godwin* (2004) CLR 562, 577, *per* Gleeson CJ.

²⁰⁸ See *Momcilovic v The Queen* [2011] HCA 34, 42–46, *per* French CJ.

²⁰⁹ Spigelman, above n 205, 23.

²¹⁰ For detail, see G Huscroft, ‘Romance, Realism, and the Legitimacy of Implied Rights’ 30(1) (2011) *University of Queensland Law Journal* 35, 42.

²¹¹ The *Human Rights Act* 1998 (United Kingdom), the *Bill of Rights Act* 1990 (New Zealand), the *Charter of Human Rights and Responsibilities Act* 2006 (Victoria) and the *Human Rights Act* 2004 (Australian Capital Territory). In the United Kingdom this enactment was at least

the United Kingdom have come close to giving the *Human Rights Act 1998* a quasi-constitutional operation.²¹² One reason for these statutory developments might have been that the open-ended nature of a judicially developed rights catalogue, considered by some the chief advantage of the common law,²¹³ was considered too uncertain.

It would be bold indeed to give the natural law movement all the credit for the principle of legality, for it can be traced all the way to Magna Carta. The rebellious barons at Runnymede were hardly motivated by a philosophical tradition. However, the struggle against the divine right of kings at least strengthened the idea that the king's subjects possessed rights not laid down in legislation,²¹⁴ and philosophers like John Locke who linked these 'rights of Englishmen' with natural law deserve credit for this important aspect of the common law.

The impressive legacy of natural law in the common law pales in comparison with that left in constitutions and in international conventions. As John Locke explained, the principles of natural law as he had formulated them should be applied not only to monarchies but to 'all forms of government'.²¹⁵ When Suarez and Martini were developing their legislative proposals, the essence of the natural law message was spelled out in the American Declaration of Independence of 1776, intended to inaugurate a new republic. It was further elaborated in the Declaration of the Rights of Man and of the Citizen ('the natural, inalienable and sacred human rights') adopted by the French National Constituent Assembly in 1789 and again enacted in 1793. The American founding fathers gave constitutional status to principles intended to protect personal liberty. *Marbury v Madison*²¹⁶ showed that *lex injusta non est lex* was to be applied to laws which infringed the Constitution, including constitutionally entrenched rights. Many countries of various political structures have followed the American example and have written catalogues of fundamental constitutional rights into their constitutions. Some have established special constitutional courts to ensure enforcement.

When Sonnenfels objected to Martini's attempt to use the private law as a vector to infuse the high principle of natural law into the Austrian legal system, he could not have foreseen that more than a century later some legal systems would in fact give natural law in the form of human rights a place within the province of private law. The West German Basic Law (*Grundgesetz*) of 1949 contains a catalogue of basic rights

partly prompted by considerations derived from the European Convention of Human Rights of 1950.

²¹² See the decision of the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; The Australian High Court has not followed this line of reasoning – see *Momcilovic v The Queen* [2011] HCA 34.

²¹³ 'The authors of the Australian Constitution ... made no attempt to define the rights which secure the freedom of the individual. They knew that legal definitions can result in words becoming more important than ideas. They knew that the definition of human rights also involves some limitation being placed upon them – for in the long run words need to be interpreted. The alternative is to express them in such vague and general terms that the discipline which is needed for effective government and for a well-ordered community can no longer be exercised.' – Robert Menzies, *The Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (London, 1967) 52.

²¹⁴ 'The new position in the state which Parliament and the Law, represented by the lawyers, had reached, needed a theoretical basis. Inevitably, one had to find such a basis in a kind of divine or natural right of the subject, for the rights of the ruler, which derived from the idea of the divine right of kings, one could only oppose with the assertion of a counter-right, which could claim an equally good sanction.' – William Holdsworth, *A History of English Law* (London, 1922–1972) vol 6, 283.

²¹⁵ Above n 117.

²¹⁶ (1803) 5 US 556.

enforceable against the government. German writers and courts began to wonder why the values embodied in these rights should not also be given a role in private relations. The German Constitutional Court answered this question in the affirmative in the famous *Lüth* decision of 15 January 1958.²¹⁷ Since then, a range of judicially created privacy principles have become part of German private law.²¹⁸ The German example has influenced the creation of the South African Constitution. Section 8 (2) reads as follows:

A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

This brief account would not be complete without a mention of the international sphere. The General Assembly of the United Nations adopted the Universal Declaration of Human Rights on 10 December 1948. This was followed by many more international conventions intended to protect human rights in particular areas.²¹⁹

The theory of natural law has been much maligned. Jeremy Bentham, one of the great masters of the art of unrestrained invective, condemned ‘natural rights’, and presumably with it all of natural law, as ‘simple nonsense’.²²⁰ John Austin’s similar observation²²¹ earned him John Finnis’s charge of ‘methodological obtuseness’.²²² However that may be, it is undeniable that the theory of natural law has had a major impact upon the world’s legal systems.

²¹⁷ The Court was guided to an affirmative answer by the great importance of the right to freedom of speech which was stated as follows: ‘Of all the human rights, one of the most prominent and important is the right to freedom of expression, the most direct manifestation of the human personality. No liberal/democratic state can exist without it, for it is the indispensable basis for the kind of continuous ... disputation, the clash of opinions, which represents its life blood. In a certain sense it is the foundation of all freedom, “the matrix, the indispensable precondition for nearly every other form of freedom” (Cardozo J).’ – (1958) 7 *BVerfGE (Decisions of Federal Constitutional Court)* 198, 230.

²¹⁸ One finds a similar approach to the protection of human rights within the sphere of private law in the Civil Code of the Philippines. Article 32 contains a catalogue of 16 traditional human rights which flesh out a broad principle which requires respect for ‘the dignity, personality, privacy and peace of mind of others’. – F R P Romero, ‘The Philippines’ in *International Encyclopedia of Comparative Law* vol 1, P–132, P–137 (Tübingen, 1996).

²¹⁹ For detail, see Human Rights Web, ‘A Summary of the United Nations Agreements on Human Rights’ (25 January 1997) <<http://www.hrweb.org/legal/undocs.html>>.

²²⁰ ‘natural rights [are] simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts’. See William Sweet, ‘Jeremy Bentham’ (23 December 2008) *Internet Encyclopedia of Philosophy* <<http://www.iep.utm.edu/bentham>>.

²²¹ ‘... to say that human laws which conflict with the divine law are not binding, that is to say, are not laws, is to talk stark nonsense.’ – John Austin, *The Province of Jurisprudence Determined* (H L A Hart ed, London, 1954) 185.

²²² Finnis, above n 24, 355.