

NOTES CORNER

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NOTES ON JURISPRUDENCE

Positivism Continued: Kelsen's Pure Theory of Law

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Arguably, the most influential legal theory of the 20th Century in Continental Europe seems to be Hans Kelsen's "*pure theory of law*." It is solidly in the line of the positivist tradition running from Hume, through Bentham and Austin to establish a 20th century ultimate positivism developed from before 1918 up to and beyond 1970's. This theory's literature began to develop before 1918, when Kelsen was examining the Austrian Constitution (which he would later be involved in rewriting) and it continued until the 1990's. However, the 1967 text of "*The Pure Theory of Law*" is the text that the following notes rely on for the purposes of studying this theory.

Kelsen's theory of law is referred to as "*Pure Theory of law*" because he believed that any explanation of the nature of law had to exclude all other elements such as sociology, politics and other disciplines. Kelsen also excluded any possibility of morality being involved in the question of legal validity. It is this dual exclusion that inspired another 20th Century jurist, Joseph Raz, to consider Kelsen's theory as being "doubly pure".

Hence, it is possible to summarise that:

- a) The premise of Kelsen's theory is anti-natural law. All natural law theories assume a dualism of *what the law is* and *what the law ought to be*. Kelsen rejected this dualism. However, he was very concerned about law and morals and his theory had to explain these so as not to mix the two concepts.
- b) Kelsen believed that law is self-defining, and it should not be described politically, sociologically etc. For Kelsen, law is free of the impurities of other disciplines. This is a defect that Kelsen noticed

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in Hart's and Austin's theory as these approaches, according to Kelsen, are non-scientific and unduly mixed with a lot of other elements.

In short, what Kelsen tried to do for law is what the sciences do to understand nature's physical elements. Kelsen adopted an "objective/ descriptive" approach. His theory looks at the "science of law" which would describe conduct as legal or illegal or making statements about legal rights and duties as objectively as possible. By definition, Kelsen meant what legal and illegal actions are and what they entail in the form of understanding delicts (actions which require sanctions) and sanctions (ought statements to the officials requiring them to apply sanctions).

These for Kelsen were issues of effective administration of coercion in a jurisdiction and did not raise issues of morality coming into it. Kelsen believed that taking this approach made sense as law is created by man, for man, and thus one has to study how law is humanly made and used. To this end, he formulated his theory as a system with several component parts linked together.

1. Law as the primary norm that stipulates a sanction as a direction to officials

For Kelsen, a norm is a description of law. So the question is what is a norm? A norm is an "ought" statement or a statement that depicts a standard which includes imperative concepts which tells the officials of law that "if X happens (delict), then Y ought to apply a (sanction)" whereby Y is the official and he or she has to apply the necessary sanction. Kelsen wrote his theory primarily in German, and it is incorrect to assume that he used the word "ought" in the same way as the natural lawyers (writing in English) or even Austin used it.

For Kelsen, norms can also take the form of permissions and authorisations such as using propositions "should", "may", "can". Every type of such propositions functions as a measure of human behaviour to determine the legal origins of the actions scientifically and objectively. Hence, in Kelsen's theory, "ought" statements come from de-psychologised acts of will which can be objectively understood. In contrast, Austin believed that 'ought' statements come from the sovereign.

Consider the example of the contrast of the gunman vs. the taxman scenarios where both parties take money from a number of people. According to Hart's descriptive subjectivism they are both doing the same thing. But in their objective meaning, the gunman's actions measure against the norms of law as illegal whereas, the Tax Office has an "ought" permission to take tax money

from others. The latter is a legal action as it is authorised. Hence law must be understood according to the objective meaning of commands as measured against other norms.

Kelsen does not deny the existence of human commands but instead argues that one has to study norm “commands” objectively against other norms and it is the conditions under which the commands are issued that makes the command a law. In other words, what makes a particular act legal is the existence of a legal norm in respect of which the act is carried out with other norms in the background authorising and permitting other acts that validate the required action stated in the primary norms.

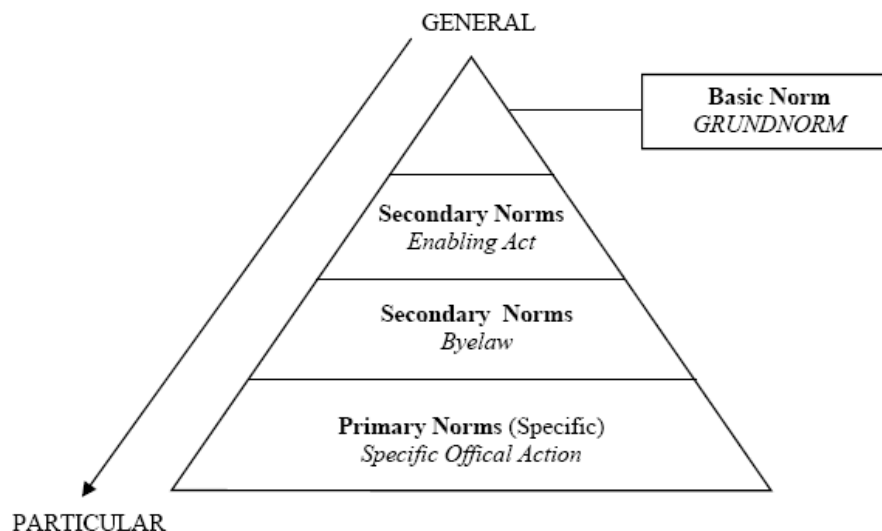
2. Law as a system of norms which are self-organising (Of Hierarchies and Validity)

Commands become a law where laws as norms exist in a system which are self-organising in a hierarchical system. This part of Kelsen’s theory is not dissimilar from H.L.A. Hart’s theory of *secondary rules* which validate the *primary rules*. In this respect, Kelsen introduces his *pure theory* which considers law as a system of norms which are self-organising such that higher norms validate lower norms and that lower norms furthermore are imputed by higher norms. In effect, the whole sphere of legal norms is self-referential.

According to Kelsen, norms cannot exist by themselves in the legal system as one norm depends on another, higher authorising norm. So every norm has to be related to other legal norms which are in turn related to higher legal norms. Such chain of norms therefore creates a hierarchy of norms with the *Primary Norms* at the bottom of the triangular/pyramid structure. The next level of norms constitute the *Dependent* or *Secondary Norms* which give validity to the bottom of the triangle, i.e. the primary norms.

Other higher Dependent Norms give validity to the lower Dependent Norms but this is not an infinite system and there is an apex end point. This apex end point is at the top of the hierarchy. It is known as the “*grundnorm*” or the “*basic norm*”. The links between all the norms can be understood as validating forces between the norms.

The diagram below illustrates this hierarchy in the shape of a pyramid. From the top down. The norms become general (at the top) to specific (at the bottom). Thus the higher norms will be dealing with issues such as how law is created. And, the administration of justice at the bottom level specifies certain actions in specific cases with each norm gaining legal validity from another, higher norm.



Hence, according to Kelsen all norms originate from primary norms which derive their power from sanction while they derive their validity from higher norms. All primary norms are linked to two types of sanction:

- a) Transcendental: this is an assumed sanction whereby there is no necessarily physical or even imminent or present punishment.
- b) Social and Physical sanctions: this is an imminent sanction from stigmas to other forms of punishments which are authorised by primary norms.

Primary norms are concerned with authorising bodies to apply sanctions while citizens are not directly addressed by the norms and therefore are incidental to this part of the theory. In a bid to keep his theory pure, Kelsen did not consider citizens except as subjects who may cause the official actions which require the hierarchy of legal norms to be in place.

The next level is that of the dependent norms that can either take the forms of byelaws expressing the primary norms or enabling acts that also express the primary norm.

Finally, at the top of the pyramid, there is the *basic norm* or the *Grundnorm* which gives the whole system its validity while putting a logical and finite end to the hierarchy. This is a presupposed (on account of the actual activity of the officials applying the primary norms) and transcendental concept

which goes beyond facts and can be termed as a legal necessity as it is understood that if a norm exists, its validity is presupposed and hence, as the validity can only flow from a higher norm down to a lower norm, then the higher norms exist which in turn derive their validity from other higher norms until the culmination of a valid *Grundnorm*. Hence, the existence of a *Grundnorm* depends on the fact that the primary norms are consistently and regularly applied by the officials while on the other hand, the *Grundnorm* ultimately gives legal validity to the whole system.

To sum up, it is possible to note that while the validity of norms depends on higher norms, the validity of the *Grundnorm* depends on the efficacious application of the lower norms. So to establish whether the *Grundnorm* works, what needs to be seen is whether the directions given to the officials as per the primary norms are applied. This is where the discussion of Kelsen starts and must logically end thereby indicating the circular nature of Kelsen's arguments.

3. Can a norm exist if it is not effective?

Kelsen devised a system whereby the test of legal validity was efficacy and from the discussion above it becomes obvious that a norm cannot exist if it is not effective. Efficacy for Kelsen can be judged by two criteria. The first criterion is to see whether the rules that can be deduced from legal norms are obeyed.

And the second criterion is whether the primary norm stipulates certain actions that the officials must take if the rule to be complied with is not obeyed. If there is a break-down or a revolution, most people start to ignore the norms, and therefore, they are no longer effective. What happens is that the norms are no longer effective and therefore, no longer valid and thus the *Grundnorm* will have to change to accommodate this allowing for a new set of legal norms to be created.

An illustration can be made by a hypothetical case whereby a rule can be deduced saying "Do not do X" as inferred from the norms that "if Y does X, then (an official) ought to..." If a large proportion of the population commits the crime X, and furthermore, if the officials of the society do not enact what they ought to as per the norm, the norm (in Kelsen's view) is no longer valid, and it can no longer apply and will have to be replaced. The only way to replace this is if the *Grundnorm* changes to accommodate the situation. According to Kelsen, if the officials of a state no longer (efficiently and effectively) apply the primary norms, then the *Grundnorm* of the state is no longer valid and has to change.

4. Criticisms of Kelsen's pure theory

Although Kelsen's theory is a respected theory of law, it suffers from several major defects. Its exclusive emphasis on the elements of law without considering other elements such as politics, morality and questions of justice leaves a significant gap in the theory because law does not exist in a vacuum. Critics of Kelsen believe that this theory is an exercise in logic, and that there is lack of reality in his theory thereby rendering it insufficient to understand the whole implications of legal systems and laws.

Furthermore, Kelsen's emphasis on the role of officials in the system of law unduly focuses on the issue of law enforcement. In effect, it ignores the ordinary citizen's role in the state as well as their interests in the development of law. For Kelsen, the common citizens have little to do with the law other than acting in the ways which justify the application of sanctions by the officials. This is an unnecessarily one-sided view of the law which only looks at the external, coercive element of the law while disregarding the fact that laws can also bind citizens to act or to forebear to act in certain ways. Moreover, Kelsen, (in rejecting the subjective meaning of acts) ignores a very important point in Hart's theory that citizens also obey the law out of a sense of duty. This is an aspect of citizens' interaction with law which Kelsen has ignored completely.

Kelsen's theory holds that, legal norms can exist only in a system which is on the whole efficacious and that such a system is comprised of a hierarchy of valid legal norms, which again predicates upon a valid basic norm in such a manner that validity is based on efficacy. Efficacy is also described as meaning the regular and effective application of sanctions by officials and does not at all deal with issues such as the legitimacy of the law-making authority. This may therefore imply that anyone who is capable of usurping power in a given society can then enforce his new power by applying sanctions efficaciously which then results in the 'legitimate' change of the basic norm. This is a problematic feature of the theory as it seems to legitimize revolutions and power usurption *ex-post facto* by allowing claims of legitimacy due to a change in basic norms.

Finally, the identification of the basic norm in any society is an extremely problematic exercise because its pre-supposed and transcendental nature makes it ambiguous. This renders the whole system of validation unclear because the top-most validifying norm is nearly impossible to identify or explain. This failure may have the effect of proving that the concept that holds Kelsen's theory together is its weakest link, which has the effect of weakening the whole theory.

In conclusion, it is to be noted that Kelsen (like Austin) is not only a positivist, but also an Imperative theorist. Hence, some of the criticisms regarding Austin can also be forwarded in relation to Kelsen's theory. Imperative positivists hold the view that sanctions (in one way or another) constitute a necessary part of all valid law. The existence of a large body of laws which do not require sanctions (power-conferring laws etc.) proves that this is an incorrect view.

Moreover, imperative theories of positivism emphasize the separation between law and morality. However, the link between law and morality while unclear, can be said to exist especially in light of questions of justice and as equity. Morality can also be involved in citizens' "sense of obligation" to obey the law, at times, irrespective of sanctions. —————■

N.B- For notes on Austin, see Elise G. Nalbandian "Notes on Jurisprudence: Early Legal Positivism: Bentham and Austin" Mizan Law Review Volume 2, No. 1, page 147

ZWEIGERT AND KÖTZ ON WEST EUROPEAN LEGAL TRADITIONS

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1. Classification of Legal Traditions

1.1- Purpose of classification

The grouping of legal systems into legal families is made *primarily* “for taxonomic purposes with a view to arranging mass of legal systems in a comprehensible order.” The first purpose of classification of legal families is thus *technical*. In other words, classification facilitates a better understanding and comprehension of the study of past and present legal systems/ traditions.

The *second* purpose is to enable current legal systems to borrow legal materials and mechanisms of solving legal problems from past or modern legal systems/ traditions they are affiliated to. Such materials can serve as *authority* in the interpretation and development of a contemporary legal system provided that due consideration is made to new realities and current needs.

1.2- Tests or criteria of classification

In the course of identifying tests of classification, we need not examine every difference between legal systems. Only important or essential differentiating qualities are regarded as hallmarks of the classification. The following factors are crucial for the style of a legal system or legal family:

- historical background and development,
- predominant and characteristic mode of thought in legal matters,
- distinctive institutions,
- the kind of legal sources a legal system acknowledges and the way it handles them, and,
- ideology.

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- a) **Historical development** is one of the factors which determine the style of modern legal systems. The common law is perhaps the clearest example of this. Yet, it is not easy to group the legal systems of Continental Europe (i.e Europe other than the United Kingdom) on the basis of this factor.
 - b) Another test in the classification of legal systems is **a distinctive mode of legal thinking**. The *Germanic* and *Romanistic* families are marked by a tendency to use abstract legal norms, to have a well articulated system containing well-defined areas of the law. Looking at the salient features of the Anglo-Saxon legal family enables us to realize how distinctive these stylistic elements are. These differences in style correspond with the differences in the Continental and English mentalities, attributable to different historical developments, especially those of an intellectual order. If we may generalize, the Continental European tends to making plans, to regulating things in advance, and therefore, in terms of the law, to drawing up rules and systematizing them. He/she approaches life with fixed ideas, and operates deductively. The Englishman, on the other hand, inclines to improvising and towards delay in making a decision until he has to. Theorizing has little appeal; and so he is not given to abstract rules of law. The Englishman is content with case-law as opposed to enacted statutes and codes of law. But recently, the attitudes of Common Law and Continental law have been drawing closer. On the Continent, lawyers have begun to treat '*jurisprudence constante*' of the courts as an independent source of law. At the same time, the need for large-scale planning and ordering of social affairs has forced Anglo-American law into using abstract norms and statutes.
 - c) **Certain legal institutions** are so unique that they lend a **distinctive** style to a legal system. For instance, the institutions which gave the socialist systems their distinctive style would include the different kinds of ownership, the peculiarities of contract in a planned economy... and many others.
 - d) The style of legal systems is also marked by the choice of **sources of law** which are recognized by the legal system and by the methods of interpreting and handling them in connection with the court machinery and rules of procedure.
 - e) Finally, **the ideology of a legal system**, in the sense of political or economic doctrines or religious belief, may have a distinctive effect on its style. This is manifest in the case of the religious legal systems and of the socialist systems. The legal ideologies of the Anglo-Saxon, Germanic, Romanistic, and Nordic families are essentially similar; and it is because of other elements in their styles that they must be distinguished.
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To conclude, these are the *stylistic factors* which enable us to identify the families of legal systems. But, the weight to be given to each of these factors varies according to the circumstances. *Ideology* is an effective ground for distinguishing the religious and socialist systems, but does not help us to separate the legal families of the West. There it is *history, mode of thought and distinctive institutions* which distinguish legal families. *Sources of law* are distinguishing features of Islamic and Hindu law and also help us to divide the Anglo Saxon from the continental legal families, but we cannot use them as a basis for distinguishing between the Romanistic, Germanic and Nordic families.

1.3- Classification within the Romanistic-Germanic civil law tradition

The term 'civil (continental) law seems to be too broad, and we can reclassify civil law tradition into:

- the Romanistic legal family comprising the French, Italian and other legal systems that have through reception promulgated laws that significantly share the content, style and features of the French Codes,
- the Germanic legal family, that includes Germany, Austria, Switzerland, etc., and,
- the Nordic legal family that includes the legal systems of Northern Europe.

Sections 2 and 3, here-below, highlight the first two legal families of the civil law tradition (i.e. the *French* and *Germanic* Civil Codes); and Section 4 forwards an overview of the English common law legal tradition.

2-History and features of the French Civil Code

2.1- French private law until the eighteenth century

The Romans had introduced their law in Gaul as they did in all the provinces they conquered. Even after the fall of Rome in 476 A.D, Roman law did not lose its validity in parts of France where it continued to serve as the law of the non-Germanic people. In 506, Alaric II, king of the Visigoths, passed a statute that contributed to the survival of some knowledge of French law in the Southern part of France.

In the North, the incursion of the Franks and the establishment of the Frankish state did largely oust Roman law, because the Franks brought with them their own developed customary laws of Germanic origin which were later crystallized as statutes. In the 10th and 11th centuries, the Frankish state broke

up into many different systems, and a number of law books were written in the 13th century. Yet, the customary laws of Northern France depended mainly on oral tradition of various localities and thus gave rise to the proliferation of different customary laws thereby creating a great legal uncertainty.

In 1454, Charles VII ordained that customs of various territories be written down and those which were already recorded be drafted anew with the cooperation of a royal committee of experts. The task of recording the customs took longer than expected and was resumed several times in the decades and centuries that followed.

In spite of prolonged efforts towards writing down customs, only the major ones were recorded. The mere task of writing down the major customary laws paved the path towards the gradual recording of the common customary laws (*droit coutimier commun*). However, the problem of legal uncertainty was not yet resolved.

As French kings consolidated their power, the creation of unitary private law common to the whole of France became indispensable. Series of jurists played a vital role in the development of the foundation for the emergence of a common private law for the whole of France. In the Seventeenth and eighteenth centuries, we find works of jurists which were indeed useful materials and models for the draftsmen of the later generations.

These efforts took a long time to materialize, and France was very far from having a unified private law on the eve of the 1789 Revolution. The wide difference between the written laws of the south (*drot écrit*) and the customary laws of the North subsisted. Although important customs of the North were written down, the documents rather revealed the difference between the customs of the various localities rather than their unity and coherence. The following ironic remarks of Voltaire were made during such period of legal uncertainty and extreme legal diversity:

“Is it not an absurd and terrible thing that what is true in one village is false in another? What kind of barbarism is it that citizens must live under different laws? ... When you travel in this kingdom, you change legal systems as often as you change horses.”

The idea of unified French private law had become a leading theme of French jurisprudence and there was the intellectual basis for the unification of the law, both in theory and in practice. And, ultimately, the impetus of the French Revolution and the corresponding subjective factors such as the authority of Napoleon Bonaparte and his prompt decision making style turned the idea of unified French law into a reality.

2.2- French private law during the revolution

The French Revolution (1789 to 1799) thoroughly altered the traditional social, economic and political order thereby rooting out the absolute monarchy, the feudal regime of land, the tie between the crown and the clergy, the country's traditional division, the court system, the tax system and the various institutions of the former regime. No longer were citizens required to deal with the intermediary status groups of the former regime, but directly with the state itself.

Legislation was instrumental toward freedom of citizens from the traditional authority of feudal, church, guild and other status groups, and laws targeted at the entitlement of citizens with equal rights. In pursuit of these aims, hectic and radical legislation of private law was made during the years of the revolution.

The legislation of the French Revolution brought about far reaching social transformation. In 1791, the decrees of the Constituent Assembly abolished all feudal servitudes and differences (based on age and gender) which had existed in the law of successions. In 1793, the National Convention devised various restrictions against the transfer of ownership in the direct line so that descendants could inherit equal share from the property of ascendants.

In the realm of family law, the paternal rights of the father over adults were abolished. The requirement of paternal consent to marriage was reduced to a minimum. The freedom of divorce was extremely widened. The Central Register of Civil Status was introduced. Illegitimate children recognized by their parents were declared to be equal to legitimate children, save that 'adulterine children' (i.e. children at the time of whose conception either parent was married to a third party), could not have more than one-third of the inheritance of a legitimate child.

The Constituent Assembly had also decreed that 'a code of civil law common to the whole kingdom will be drawn up.' The first draft was rejected in 1793 for being too detailed although it had only 697 articles. A simpler and more philosophical version was recommended.

The following year, the drafter (Cambacérés) offered a second draft with only 297 articles, but the National convention found it too sparse and terse. Cambacérés produced a third draft in 1796. The legislative organ of the Directorate was undertaking a protracted discussion over the draft when it was interrupted by the coming into power of Napoleon in 1799. It was Napoleon's Codes which ultimately brought these efforts and aspirations towards fruition.

2.3- The enactment of the *Code civil* of 1804

Things moved briskly after Napoleon took over power. Napoleon appointed a commission of four prominent experienced professionals to draft the Civil Code. Many of the extreme positions of the laws enacted during the revolution were abandoned by the more composed draftsmen. The draft was submitted (in sections) to the Tribunal that had the power to adopt or to reject it. But the Tribunal rejected the very first draft out of envy and suspicion to Napoleon rather than reasons of substance.

Napoleon withdrew the whole legislative proposal stating that the calm setting and consensus required for the adoption of the Civil Code had not yet been acquired. Then he purged members of the Tribunal who were hostile to him. After a year, the legislative process was resumed and in 1803 and 1804 thirty-six separate statutes were passed and were finally consolidated by the Law of March 31, 1804 as '*Code Civil de Français*.' Years after his downfall, Napoleon remarked that:

“It was not in winning 40 (forty) battles that my real glory lies, for all those victories will be eclipsed by Waterloo. But my *Code civil* will not be forgotten. It will live forever.”

2.4- Essential features of the French Civil Code

a) Accommodation of revolutionary principles and tradition

One of the major features of the *Code civil* was the accommodation of the gains of the revolution and longstanding traditions and customs. The French Civil Code of 1804 was generated by the spirit of the French Revolution (1789 to 1799) which sought to eradicate feudal institutions of the past and institute in their place the natural law values of property, freedom of contract, family, and family inheritance. The Civil Code of 1804 embodied the results of a long historical development by blending the traditional legal institutions from the written law (*droit écrit*) of the Southern France, influenced by Roman law, and the customary law of the North influenced by Germanic-Frankish customary law.

This north-south division should not be overstated because both laws shared many elements and features in common. Moreover, the reception of Roman law in the South was not dogmatic reception because various laws of Roman law origin were adopted on the basis of their inherent merit and depending on their conformity with customs and values of French society.

The Civil Code retained the great achievements of the revolution and is also based on a large number of traditional institutions. The principle of equal

division of estates upon succession, the complete secularization of marriage, the total abolition of feudal servitudes and many other principles that represent the gains of the revolution were embodied in the Code.

However, the Code abandoned or qualified rules that were extremely radical. For example, divorce was made possible, but the 1804 French Civil Code used many complex rules of procedure which severely restricted the possibility of divorce by mutual consent. The freedom to dispose of one's property on death or in life had been largely abolished during the revolution in the aim of parceling out landed estates; but was reintroduced in the Code though only to a much lesser degree than the German or Anglo-American legal systems.

During the French revolution, the requirement of parental consent to marriage was considered as restricting an adult's freedom to marry. But the *Code civil* required parental consent for marriage of a man under the age of 25 and a woman under the age of 21. At 25, a man was allowed to marry without parental consent, but only if he had sought their consent three times by issuing a 'respectful request' at monthly intervals. For a man over thirty (30), a single request (*sommation*) was sufficient.

Another retrogressive step taken by the *Code civil* was in the domain of matrimonial life. The revolutionary principle of the equality of citizens had been applied between spouses, and thus Cambacérés had in his First Draft proposed that 'the rights of spouses in the administration of their property are equal. Every legal right which sells, binds, burdens or pledges the property of either spouse requires the consent of both.'

But in his Third Draft, Cambacérés abandoned this position and, as the *Code civil* was later to do, the draft gave the right to administer the property to the husband alone. It was believed that the principle of equality should control social relationships, but in the matrimonial sphere, the precedence of the husband was taken as the natural order, and it was believed that to deny it would lead to quarrel and destroy the pleasures of domestic life.

Similar distinction was made in the case of divorce. The *Code civil* allowed the husband to demand divorce by proving the wife's adultery, while a wife could demand divorce only where the husband has kept his mistress in the matrimonial home. According to Portalis, one of the draftsmen of *Code civil*, "the infidelity of a wife bespeaks greater vice and has more dangerous consequences than that of a husband."

b) Accommodation of written laws and customary laws

Another major feature of the *Code civil* is its accommodation of the written law of the southern part of France and the customary laws of the North. Por-

talis wrote:

‘We have made a compromise, if such an expression may be used, between the *droit écrit* (written law) and the customs, whenever we have been able to reconcile their provisions or to modify each in the light of the other, without infringing the unity of the system or causing widespread dissatisfaction.’

The written law (*droit écrit*) was nearly pure Roman law with regard to contract law, the law of neighbours, the law of wills, and the system of dowry. Customary rules, and in particular the customs of Paris, won principally in family law and the law of inheritance. Acquisitive prescription in good faith (Article 2279, *Code civil*) is in line with German legal thinking.

c) *The influence of natural law*

The tenet of the natural law theory is that there are autonomous principles of nature, quite independent of religious belief, from which one can infer a system of legal rules which, if given intelligible form according to a plan, can act as the basis of an orderly, reasonable, and moral life in society. The early version of the *Code civil* was strongly and directly influenced by the revolution, and largely dominated by this idea of natural law. But the influence of natural law diminished as the Code progressed.

The idea and conception of the *Code civil* are products of the natural law of the Eighteenth Century Enlightenment, but the value of historical continuity was increasingly recognized as it took practical shape. To many contemporaries, the Code seemed to be a ‘reaction against the revolution’, but succeeding generations who witnessed its extraordinary influence have acclaimed its ‘*spirit of moderation and wisdom.*’

d) *Compressed legislative style rather than extreme details*

At the initial phase of the principle of separation of powers, doctrinaire adherents of the principle advocated that the legislative ought to enact laws that are clear and detailed so that judges should have no power at all to develop the laws but apply them (as they are) without room for arbitrary judgments.

For example, the decree that introduced the Land Law of Prussia forbade judges ‘to indulge in any arbitrary deviation, however slight, from the clear and express terms of the laws, whether on the ground of allegedly logical reasoning or under the pretext of an interpretation based on the supposed aim and purpose of the statute.’ The statute with its 17,000 (seventeen thousand) odd paragraphs often amuses us today by the detail into which it had descended, but the intention was to give the judge a precise answer to every

question with a view to rendering interpretation, as far as possible, unnecessary.

In this regard, the draftsmen of the *Code civil* adopted a more sensible course. The drafting committee believed that the function of the legislator was to set up *general rules*; and its interference in questions of interpretation affecting the affairs of individuals would be undignified, time-consuming and would also prolong lawsuits. Consequently, Article 4 of the *Code civil* renders a judge responsible if he refuses to make a decision 'on the ground that the law is silent or obscure or inadequate.'

The *Code civil* avoids the danger of being too detailed. The draftsmen clearly realized that even the most ingenious legislator could not foresee and determine every potential problem in human relations which might arise and they believed that room should be left for judicial decision to make the law applicable to unforeseen individual cases and to enable laws adapt to changing circumstances.

The best example of the compressed legislative style of the *Code civil* is found in Articles 1382 to 1386. These five paragraphs cover the entire French law of extra-contractual liability. These rules are two hundred years old, and are still in force, almost unaltered in spite of all the economic and technological changes which have taken place.

In fact, the draftsmen of the *Code civil* went too far in the degree of compression. For instance, the General Civil Code of Austria and the German Civil Code have, respectively, 40 and 31 paragraphs on the same subject matter of torts.

e) Other features of the Code civil

Although the French Civil Code has many virtues, it has shortcomings such as technical inaccuracies and rooms for interpretation that could have been avoided. There are terms that are inexact, incomplete or ambiguous. Such terms lack the terminological exactitude which the German Civil Code has.

Moreover, it must be noted that the ideal man in the minds of the draftsmen is not the ordinary man, the artisan or the day labourer, but the man of property, who was considered as the responsible man of judgment and reason, knowledgeable about affairs and familiar with the law. The Code thus guaranteed the freedom of the class engaged in economic activities, and in property, especially landed property. Freedom of contract is therefore the principle which dominates the law of obligations in the *Code civil*, restricted as little as possible by mandatory rules of law.

2.5- Adaptation of the *Code civil* to change

When one considers the economic, social and political changes that have occurred since the time of Napoleon, one may well ask how the Code managed to remain in force in France until today. It is through legislation of special statutes, judicial interpretation and legal writing that the *Code civil* has managed to adapt to socio-economic changes.

a) *Legislation of special statutes*

In many areas, especially in family and inheritance law, the legislator has kept the Code in line with socio-economic changes by altering its text through special statutes. The position of the married woman has been improved and the right of children born outside wedlock has been recognized. Moreover the extremely wide freedom of contract embodied in the *Code civil* has been subject to due elaboration and regulation (through special statutes) where the unregulated free play of contractual autonomy led to consequences that seemed unacceptable to new social values and needs.

b) *Judicial interpretation*

The courts (jurisprudence) have also played a significant role in adjusting the rules of the *Code civil* to modern requirements. For instance, on the basis of the rule of Article 1384 of the *Code civil*, French courts have developed the *law of accident compensation* that match with the special dangers of the modern world and its advanced technology. In labour law, the courts, strongly supported by the legislature, have developed rules of social protection of workmen and employees. As in Germany, labour law has been able to gradually develop as an independent area of law outside the *Code civil*. Although Article 544 of the *Code civil* allows an owner to deal with his property as he chooses, French courts have developed the doctrine of *abuse of rights* to limit the rights of owner of property. These illustrate the key role played by courts in adopting the *Code civil* to social change.

c) *Doctrinal interpretation*

As the Civil Code aged, legal writing (doctrine) became increasingly significant in the development of French private law. In the years immediately following the enactment of the Code, doctrinal literature merely expounded the text of the Code grammatically and logically, and ignored judicial decisions. But, towards the end of the nineteenth century, doctrinal writing and legal materials encouraged the judge to construe the Code not simply logically and systematically, but in light of the requirements of society as it developed, the actual usages and practices in the relevant area of commerce, and also the results of the researches of sociologists and comparative lawyers.

With the help of legislation, judicial decision and doctrinal writing, the *Code civil* has been able to adapt itself to new changes and requirements. There have frequently been demands and efforts for a thorough overhaul of the Code; but it has not yet materialized. And, after numerous efforts towards overall reform of the *Code civil*, the French legislator has duly focused on the partial reform of the Code in certain spheres that require amendment.

3- History and features of the German Civil Code

3.1- Factors that led to vast reception of Roman law

Germany came in contact with Roman law around the middle of the 15th century; but the reception of Roman law was much greater in Germany than in France. Central power was weakened in Germany, and this lack of tight centralization of imperial power and the strength of the principalities were very conducive to the reception of Roman law. There was no common German judicial system and fraternity of German lawyers that could oppose or delay the reception of Roman law.

By contrast, the legal methods developed by German law became increasingly unsuited to the needs of time. German customary laws allowed the judge to make decision on the basis of traditional legal knowledge, practical wisdom, experience and practicality, and from an intuitive perception of what best answered the objective and concrete facts of the case.

But such method of finding law based on tradition seemed increasingly incongruous as the social and economic circumstances of the later Middle Ages became more complex, variegated and developed. There was thus a legal vacuum, and in effect, Roman law flowed in because it offered a whole range of concepts and methods of thinking. Moreover, Roman law was not considered as foreign law because the Holy Roman Empire ruled by Germans was the successor of the Roman Empire.

3.2- The impact of the 17th century Enlightenment

The Enlightenment brought about a 'decisive change' in the intellectual climate of Europe. It sought to free the individual from his medieval shackles to rational criticism, and to make it possible for individuals to create a new view of the world on the basis of reason. This intellectual movement had immense effects on law. In Germany, it gave lawyers a standpoint of historically conditioned detail, and helped to purge obsolete legal institutions and put the law in a new systematic order.

One particular product of the enlightenment was the idea of *codification*, the idea that the diverse and unmanageable traditional law could be replaced by

comprehensive legislation, consciously planned on a rational and transparent order. In France, the ideas of the Enlightenment and the law of reason took the form of direct political action and led to the Revolution of 1789. In Germany, however, the law of reason broke loose from its roots in general philosophy and became a system of principles of private law to be taught and learnt.

The greatest systematizers (Puffendorf and others) utilized rigorous logical-mathematical deduction and inferred rules of increasing particularity from the most general principles of the law of reason and made the law appear an artful and articulated system, orderly and comprehensible. The intellectual constructions of the law of reason had no direct influence in German legal practice, but the German princes and their high officials, brought up in the spirit of the Enlightenment were influenced by these ideas and they became the intellectual stimulus of reform.

In France, the ideal of legal reform was the product of a passion for freedom by a large class of citizens. But in Germany the reform came from the altruistic paternalism of enlightened authorities eager to perform their duty.

3.3- Codification in the 18th century

The first code of this period was written in 1754 by the Bavarian Chancellor, Kreittmayr. The Code indicated the legislator's belief in reason for it solved long-contested questions in a reasonable manner and was drafted in a clear and pointed German. The most important codification of the period was the General Land Law for the Prussian territories of Germany from 1794 to the coming into force of the German Civil Code of 1900.

The project towards the codification of the Civil Code began on the initiative of Frederick II. The draft embodied the spirit of law of reason and Frederick's brand of enlightened absolutism. Its structure reflected Puffendorf's system who saw men as having a 'double nature' as an individual and as part of a larger group in society. The Code was not designed to alter society but to portray it faithfully, completely, and objectively so that it states where everyone stood in the state complex.

3.4- The emergence of the Historical School of Law

Around the beginning of the 19th century, the spirit of reform of the enlightenment and the philosophy of rationalism gave way to the desire to regulate (in detail) the actions and relations of individuals. The *Romantic Movement* uncovered the elemental irrational powers in human life, and *optimistic rationalism* gradually grew weaker.

It was at such an epoch that the German Historical School of Law arose with Savigny (1779-1861). The Enlightenment had the view that the legal order is a deliberately planned and purposive creation of an official legislator guided by reason. In contrast, the Historical School of Law (Savigny and his followers) saw law as a historically determined product of civilization, having its roots deep in the spirit of the people and maturing through a long process. The school considered law as a product not of the formative reason of a particular legislator, but as an organic growth of the 'inner secret powers' of the 'spirit of the people' working through history.

After the fall of Napoleon, the Restoration in Europe and the dynasticism of the various German rulers rendered democratic integration of the whole of Germany unlikely. The idea of a unified German Civil Code as the one advocated by Thibaut (a professor in Heidelberg) was severely opposed by Savigny, on the ground that the time was not yet ripe for the production of a unified civil code.

Thibaut proposed to replace the intolerable diversity of the German territorial laws by a general German civil code on the pattern of the French Civil Code, and he believed that this would lay the basis for the political unification of Germany. On the other hand, Savigny's view was that legislation being inorganic and unscientific, was not the right way to create a common German law and would do violence to the traditions it opposed. What was needed in Savigny's view was a thorough absorption and cultivation of the legal material as it had grown through time, a task he would entrust to an 'organically progressive legal science which would be common to the whole nation'.

3.5- The *Pandectist* School of Law

In actual practice, Savigny and his followers turned exclusively to Roman law in its original form. Such idealization of Roman law led Savigny and his followers to the unhistorical view that the legal forms and institutions created by Romans possessed a sort of eternal validity. Savigny and his followers addressed themselves to systematizing, ordering and integrating the concepts of Roman laws.

The Historical School of law thus produced the *Pandectist School* whose only aim was the dogmatic and systematic study of Roman material. For *Pandectists*, the legal system was a closed order of institutions, ideas and principles developed from Roman law. They believed that one only had to apply logical or 'scientific' methods in order to reach at the solution of any legal problem. As a result, the application of law became a mere technical process, a sort of mathematics obeying only the 'logical necessity' of abstract concepts and having nothing to do with practical reason, with social value

judgments, or with ethical, religious, economic or policy considerations. The German method of legal thinking as manifested by remote theorizing professors and the lack of organized and powerful class of practicing lawyers was conducive to the emergence and development of *Pandecticism*.

However, the *Pandectist* school could at least produce a method of studying law which was common to the whole of Germany and had brought about interpretation at the theoretical level. Set of clearly distinguished concepts which contributed to the technical sophistication of the German Civil Code were created, but the *Pandectists* did not bother to seek out the real forces in legal life, and did not seek ethical, practical or social justification for their principles.

3.6- Codification of unified German private law

The law of negotiable instruments was unified in 1848, and the General German Commercial Code was enacted in 1861. Both enactments were gradually adopted word by word by all German states. In 1865, a draft of the law of obligations was produced by a team of famous professors and judges. The draft served as a model for later drafts.

After Bismarck's efforts led to the unification of Germany in 1871, laws were enacted to unify the judicial system, civil procedure and bankruptcy. In 1874, a commission (*The First Commission*) was appointed to produce a draft code of German private law. The draft was published in 1887, along with its supporting 'Motive'.

There was a strong criticism against the draft's unduly scholastic structure largely attributable to the abstract conceptualism of the Pandectist School. It was also criticized for the legal jargon in which it was drafted. It was accurate and precise at the cost of clarity and comprehensibility. The third point of criticism was the draft's complicated system of cross-referencing.

With regard to content, it was criticized for bypassing many vital legal traditions of Germanic origin and for ousting the traditional ethical obligations and the relationship of trust in family and society in favour of extreme impersonal individualism. Moreover, it was criticized for its emphasis on freedom of contract which favoured the socially stronger and propertied classes.

The Second Commission was formed in 1890 and its changes were insufficient. In substance, only 'a few drops of socialist oil' were added to the First Draft. The second draft was published in 1895 and was adopted in 1896 after minor alterations. Only the Social Democrats voted against it. The entry into force of the German Civil Code was set for January 1, 1900 at the Emperor's

personal request with the hope that the new century would have a brilliant start marked by unified private law for Germany.

3.7- Features of the German Civil Code of 1900

Codes of law either consolidate the results of *reconstruction of society* or reinforce the *status quo*. The former codes are inspired by ideas and models of society in the context of *contemporary* and prospective realities. The latter codes, by contrast, are created at a time of relative social and political stability, and in effect, their spirit is often retrospective and reflective, seeking to maintain a situation favourable to the establishment. The German Civil Code is one of such rather conservative codes.

For the German Civil Code, the typical citizen is not the small artisan or factory worker, but rather the higher and propertied class with freedom of contract and freedom of competition who is also entitled to take steps to protect itself from harm. This is so, because the Civil Code merely regulated and articulated the economic and social realities as they actually existed under Bismarck's united Germany.

In language, method, structure and concepts, the German Civil Code is deep and exact, but abstract. It is not addressed to the citizen, but to the professional lawyer. Repetition is avoided by cross-referencing that requires skills. Yet, it lacks the elegance and the compactness of the French Civil Code. Its advantage is that its exact and technical provisions are not as ambiguous as their matching provisions in the French Civil Code. The German Civil Code is highly appreciated for its intellectual merits due to its profound theoretical foundation and level of academic excellence. Many codes have thus to a larger or smaller extent benefited from the Code.

3.8- Adaptation of the Code to social change

The legislator and courts alike have been able to qualify and limit the liberal (*laissez faire*) principles of law of contract whenever they allowed one party to threaten those basic conditions of decent life which the state of today must guarantee to its citizens. Important areas of the law *outside* the Code (such as labour law) have been created by the legislator and these laws are largely independent of the German Civil Code.

The rigorous individualism of the original contract law of the German Civil Code has been qualified by means of devices developed by the courts. For example, the general clause that requires everyone to perform a contract '*in a manner required by good faith*' has proved a splendid device for adapting the law of contract to the changed social and moral attitudes of society. Judicial

decisions may manifest the risk of being undirected and variable. Yet, some degree of certainty has been created through doctrinal writing and interpretation.

The *tort law* of the German Civil Code still rests on the principle of fault. However, special statutes have been able to update tort liabilities that arise out of fault and other tort liabilities that had not been envisaged by the Code. In Family law, the conservative and patriarchal stipulations of the Code in favour of the husband and other outdated provisions have been brought in line with altered social and economic circumstances through legislation.

Yet, courts bear the task of fitting the original text of the Code to modern demands. In France, it was the gaps and technical imperfections of the *Code civil* which gave the judges the opportunity to develop the law. But the courts in Germany have relied mainly in the *general clauses*, embodied in Articles 138, 157, 242 and 826 of the German Civil Code. The general clauses have operated as a kind of safety valve, without which the rigid and precise terms of the German Civil Code might have exploded under the pressure of social change.

4. The development and features of English common law

N.B. Although various principles, concepts and rules that have developed in the common law tradition have been embodied in our codes, Ethiopia's legal system (other than the laws of procedure) has pursued the civil law tradition. The abridged notes hereunder are thus duly shorter than the notes on the civil law tradition. Other sources have been used to substantiate the abridged notes from (Zweigert and Kötz's) *Introduction to Comparative Law*, pp. 187-211.

4.1- The beginning of English legal history

A crude and empirical legal heritage (some of which was in written form) existed under Anglo-Saxon kings, especially since the reign of Alfred the Great (871 to 900 A.D). Yet, English Common Law actually begins since 1066, after the Normans conquered the British Isles. William I and his successors established a tight, integrated and simply organized *feudal* system, with the King as the supreme feudal overlord. An effective central royal authority was organized with the absolute power of the king, who (among other powers) claimed the role of "dispenser of justice" or "fountain of justice".

William I divided all land among some 1,500 (one thousand and five hundred) of his most important followers, in return to which they had to take an oath of *fealty* (faithfulness) and perform specified services or pay sums of

money. The tax system was restructured by William I himself, and all property holdings were inscribed in the Domesday Book of 1086.

The most important taxpayers were the biggest land owners. The taxes paid were thoroughly checked by the *Curia Regis*, a council consisting of the King and his advisers. Under Henry I (1110 to 1131) there developed out of the *Curia Regis*, a Supreme Treasury- *the Exchequer* which gradually took on the character of a court as it decided all legal questions connected with taxes.

Fiscal reasons also entailed increasing intervention by the central royal administration in civil and criminal law. The *Curia Regis* had interest in private legal disputes over large estates. Thus the king took exclusive jurisdiction over serious crimes, and royal justice developed in the twelfth and thirteenth centuries. Although the kings gave up the practice of presiding as chief Judge very early, the courts always followed the King in his travels throughout the country, until the *Magna Carta* in 1215 enacted that the Royal Courts should be fixed in one particular place for the convenience of the public.

4.2- The emergence and development of case law

Case law grew up in England mainly because the early English judges were Normans. They were foreigners to England and they were bound together by an *Esprit de corps* (team or group spirit, or strong feeling of shared beliefs and values) which made them respect each other's decisions, especially when these decisions dealt with matters which were strange and unfamiliar to them. *Esprit de corps* involves feeling of fraternity, pride and honour in the group to which one belongs. The Norman judges had a strong sense of brotherhood and discussed their cases when they met and started the practice of following each others decisions.

Where the best argument in favour of a particular case was the decision of a brother judge in a similar case, they began to take notes of cases and in that manner law reporting came into existence. Law reporting became an established practice in this manner, and this enhanced the development of *case law*, i.e., looking for legal rules and principles from preceding judgments.

The growth of case law in England was also accelerated by the reaction that set it against the reception of Roman law. Local laws were found to be unsatisfactory with the advance of civilization, and the remedy of introducing Roman law was attempted. But English lawyers and judges resorted to the fiction that "there was no legal problem that could not be solved by the application of customary laws, and that every judge carried about in his brains a complete body of such law of amplitude sufficient to furnish principles which would apply to conceivable combination of circumstances".

Maine points out that It is possible that the judges were influenced by Roman law principles, and that they borrowed from Roman law, but they did not rest the authority of their pronouncements on either the Roman law or *Ipse Dixit* (i.e. on what is asserted but unproved), but on the fiction that their judgments indicated the custom of the land. It was always as indicating the custom of England, and not as an authority, that these decisions were acted upon and followed during the 13th and the 14th centuries.

Soon however, this fiction was dropped, and decisions began to be followed for the sole reason that they came from judges who were delegates of the King entrusted by the King himself to administer justice. During the time of James I, official reporters were first appointed, and case reports facilitated and enhanced the development of case law.

4.3- The development of permanent courts and the decline of local rules of law

Permanent central courts developed gradually out of the *Curia Regis*. The courts were staffed by professional judges, and fixed at Westminster. Their jurisdiction was established by 1300 and lasted unaltered into the 17th century. In addition to the Court of Exchequer, there were the Courts of Common pleas with jurisdiction over normal lawsuits between private individuals and with the power to supervise and review traditional lower courts, which had been run since 1066 by royal officers called sheriffs. There was also the Court of the King's Bench which dealt with matters of particular political importance. Moreover, the King sent 'traveling justices' into the provinces with increasing frequency from the 12th century onwards.

In the centuries that followed, these developments led to the centralization of justice and to the unification of English law. The jurisdiction of local borough and feudal courts gradually diminished. The local rules of law were not abrogated but gradually faded into insignificance in contrast to the law applied by the royal judges. Thus England, at such early stage, enjoyed a *unified law*, called for this reason '*common law*', and there never existed in England the problem of legal uncertainty, a factor that rendered codification expedient in France and Germany.

4.4- The definition of '*common law*' and its positive role against absolutism

'*Common law*' refers to that part of the law which was created by the King's courts of England as opposed to '*statute law*' which comprises the enactments of Parliament. '*Common law*' is also different from '*Equity*'. The latter does not refer to a group of maxims of fairness, but a part of substantive

law distinguished from the rest by the fact that it was developed by the decision of a particular court, i.e. the Court of Chancery.

Unlike statute law, an absolute monarch cannot take common law into his grips and enact common law as per his instant whims and desires. This is because common law takes decades and centuries to emerge and develop. And it has the tendency to bring forth very strong strata of stakeholders including practicing lawyers, judges and others, who due to the complexity and quantity of case law materials incline to enjoy the monopoly of the profession with its corresponding challenges and opportunities.

English lawyers were devoted to the maintenance of common law. Thus lawyers consistently supported the Parliament in its struggle against the Crown. In the 16th and 17th centuries, various monarchs attempted to establish an absolute monarchy by imposing an absolutist legal system under the pretext of enacting Roman law which could support the political claim that whatever pleased the King had the force of law.

Ultimately, however, common law prevailed and was considered as a mighty weapon in the hands of the parliamentary party in the struggle against the absolutist prerogatives of the king. In its long history, common law had developed certain tenacity, and its cumbrous and formalistic technique had enabled it to challenge direct attack from above. Ever since, the Englishmen have thought of the Common Law as being the essential guarantee of freedom thereby serving as protection against the arbitrary inroads of absolute authority.

4.5- Blackstone's Commentaries on Laws of England

Until the 18th Century, all the great lawyers were practitioners and almost always important judges. But in the 18th century, William Blackstone (1732 – 1782), a lawyer who, after a moderate career as a barrister became Professor in Oxford, had a lasting influence in English law. Blackstone's fame rests in his *Commentaries in the Laws of England*, a four-volume systematic portrayal, based on the whole of English law and criminal law. The commentaries were published in 1765– 1769 and were considered as the leading treatise on the common law of England

The commentaries are believed to have rendered English law more comprehensible because English case law had grown more confused. The Commentaries were not as conceptually sophisticated and profound as the ones that were written by continental lawyers. Yet, Blackstone's accomplishment was a big step in the systematic exposition of English common law.

4.6- Utilitarianism –versus- sociological jurisprudence

During the 19th century, Jeremy Bentham (1748–1832), the leader of the Utilitarian School contended that the rules of Common Law are based on historical accident rather than rational design, and that they were obstacles on the way of major reform towards “*the greatest good for the greatest number of people*”. He also criticized the traditionalism of the conservative practitioners. Bentham promoted legal reform which he thought could only be achieved through codification.

Bentham’s reformist views had influence in altering the court structure and inducing reforms in the law of civil procedure and to some extent, in certain areas of substantive law. His efforts had also influenced the US legal system, until the (20th century during which) schools of Sociological Jurisprudence, Realism and others became predominant in their influence against extensive codification. _____■
