

THE CIVIL LAW TRADITION

An Introduction to the Legal Systems of Western Europe
and Latin America

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law countries; this necessarily involves the transfer of some lawmaking power from the legislature to the people, and further weakens the position of the legislature as the sole source of law. The growth of international and supranational organizations, and the trend in Europe and Latin America toward the transfer of some sovereignty to such organizations, further weakens the traditional theory.

These and other modern tendencies have been noted by scholars, who often recognize their implications for the orthodox theory of sources of law, but they do not seriously impair the more generally prevailing view of what law is. To the average judge, lawyer, or law student in France or Argentina, the traditional theory of sources of law represents the basic truth. It is a part of his ideology.

In the common law world, on the other hand, a world less compelled by the peculiar history and the rationalist dogmas of the French Revolution, quite different attitudes prevail. The common law of England, an unsystematic accretion of statutes, judicial decisions, and customary practices, is thought of as the major source of law. It has deep historic dimensions and is not the product of a conscious revolutionary attempt to make or to restate the applicable law at a moment in history. There is no systematic, hierarchical theory of sources of law: legislation, of course, is law, but so are other things, including judicial decisions. In formal terms the relative authority of statutes, regulations, and judicial decisions might run in roughly that order, but in practice such formulations tend to lose their neatness and their importance. Common lawyers tend to be much less rigorous about such matters than civil lawyers. The attitudes that led France to adopt the metric system, decimal currency, legal codes, and a rigid theory of sources of law, all in the space of a few years, are still basically alien to the common law tradition.

CODES AND CODIFICATION

ONE OFTEN hears it said, sometimes by people who should know better, that civil law systems are codified statutory systems, whereas the common law is uncoded and is based in large part on judicial decisions. The purpose of this chapter is to indicate the extent to which this observation oversimplifies and misrepresents, and at the same time the extent to which it expresses an important set of basic differences between the two legal traditions.

The distinction between legislative and judicial production of law can be misleading. There is probably at least as much legislation in force in a typical American state as there is in a typical European or Latin American nation. As in a civil law nation, legislation validly enacted in the United States is the law, which the judges are expected to interpret and apply in the spirit in which it was enacted. The authority of legislation is superior to that of judicial decisions; statutes supersede contrary judicial decisions (constitutional questions aside), but not vice versa. The amount of legislation and the degree of authority of legislation are not useful criteria for distinguishing civil law systems from common law systems.

Nor is the existence of something called a code a distinguishing criterion. California has more codes than any civil law nation, but California is not a civil law jurisdiction. Codes do exist in most civil law systems, but bodies of systematic legislation covering broad areas of the law and indistinguishable in appearance from European or Latin American codes also exist in a number of common law nations. Conversely, a civil law system need not have codes. Hungary and Greece were civil law countries even before they enacted their civil codes: Hungarian civil law was uncoded until Hungary became a socialist state, and Greece enacted its first civil code after World War II. The code form is not a distinctive identifying mark of a civil law system.

If, however, one thinks of codification not as a form but as the ex-

pression of an ideology, and if one tries to understand that ideology and why it achieves expression in code form, then one can see how it makes sense to talk about codes in comparative law. It is true that California has a number of what are called codes, as do some other states in the United States, and that the Uniform Commercial Code has been adopted in most American jurisdictions. However, although these look like the codes in civil law countries, the underlying ideology—the conception of what a code is and of the functions it should perform in the legal process—is not the same. There is an entirely different ideology of codification at work in the civil law world.

It will be recalled that Justinian, when he promulgated the *Corpus Juris Civilis*, sought to abolish all prior law. Certain elements of the prior legal order were, however, included in the *Corpus Juris Civilis* itself, and were consequently preserved when he promulgated it. Similarly, the French, when they codified their law, repealed all prior law in the areas covered by the codes. Any principles of prior law that were incorporated in the codes received their validity not from their previous existence, but from their incorporation and reenactment in codified form. Justinian and the French codifiers sought to destroy prior law for different but analogous reasons: Justinian sought to reestablish the purer law of an earlier time, the French to establish an entirely new legal order. In both cases, the aims were essentially utopian. Let us look more closely at the utopia of the French codification.

The ideology of the French codification accurately reflects the ideology of the French Revolution. For example, one reason for the attempt to repeal all prior law, and thus limit the effect of law to new legislation, was statism—the glorification of the nation-state. A law that had its origins in an earlier time, before the creation of the state, violated this statist ideal. So did a law that had its origin outside the state—in a European common law, for instance. The nationalism of the time was also an important factor. Much of the prerevolutionary law in France was European rather than French in origin (the *jus commune*), and was consequently offensive to the rising spirit of French nationalism. At the same time, much that was French (the *coutumes* of the northern regions in particular) now appeared as the

logical object of preservation and glorification. The drive toward a centralized state made it important to bring some unity out of the diversity of legal systems and materials in the French regions. The secular natural law ideal of one law applicable to all Frenchmen pointed the same way.

The rampant rationalism of the time also had an important effect on French codification. Only an exaggerated rationalism can explain the belief that history could be abolished by a repealing statute. Such an attitude is implicit also in the hypothesis that an entirely new legal system, incorporating only certain desirable aspects of the generally undesirable prior legal system, could be created and substituted for the old system. The assumption was that reasoning from basic premises established by the thinkers of the secular natural law school, one could derive a legal system that would meet the needs of the new society and the new government. The legal scholars of the time were, of course, trained in an earlier period, and they found their working legal conceptions, institutions, and processes in the old law. Those who participated in drafting the French codes consequently incorporated a good deal of the prior law and legal learning into them. In this way some continuity with the prior legal culture was retained. This tempered the legal consequences of the French Revolution, but it did not entirely avoid them. For several decades after the enactment of the Code Napoléon (the French Civil Code of 1804), the fiction was stoutly maintained by a large group of French jurists that history was irrelevant to interpretation and application of the code.

As in many Utopias, one of the objectives of the Revolution was to make lawyers unnecessary. There was a desire for a legal system that was simple, nontechnical, and straightforward—one in which the professionalism and the tendency toward technicality and complication commonly blamed on lawyers could be avoided. One way to do this was to state the law clearly and in a straightforward fashion, so that the ordinary citizen could read the law and understand what his rights and obligations were, without having to consult lawyers and go to court. Thus the French Civil Code of 1804 was envisioned as a kind of popular book that could be put on the shelf next to the family Bible.

It would be a handbook for the citizen, clearly organized and stated in straightforward language, that would allow citizens to determine their legal rights and obligations by themselves.

The emphasis on complete separation of powers, with all lawmaking power lodged in a representative legislature, required that the judiciary be denied lawmaking power. Experience with the prerevolutionary courts had made the French wary of judicial lawmaking disguised as interpretation of laws. Therefore some writers argued that judges should be denied even the power to interpret legislation. (The history of this attitude and its subsequent relaxation are described in Chapter VII.) At the same time, however, the judge had to decide every case that came before him. The premises of secular natural law required that justice be available to all Frenchmen; there could be no area for judicial selection or discretion in the exercise of jurisdiction.

But if the legislature alone could make laws and the judiciary could only apply them (or, at a later time, interpret and apply them), such legislation had to be complete, coherent, and clear. If a judge were required to decide a case for which there was no legislative provision, he would in effect make law and thus violate the principle of rigid separation of powers. Hence it was necessary that the legislature draft a code without gaps. Similarly, if there were conflicting provisions in the code, the judge would make law by choosing one rather than another as more applicable to the situation. Hence there could be no conflicting provisions. Finally, if a judge were allowed to decide what meaning to give to an ambiguous provision or an obscure statement, he would again be making law. Hence the code had to be clear.

If insistence on a sharp separation of legislative from judicial power dictated that the codes be complete, coherent, and clear, the prevailing spirit of optimistic rationalism persuaded those in its spell that it was possible to draft complete systematic legislation that would have those characteristics to such a degree that the function of the judge would be limited to selecting the applicable provision of the code and giving it its obvious significance in the context of the case. Actually, the Code Napoléon is not the most extreme example of this type of codification. That dubious honor falls to the Prussian Landrecht of 1794, enacted under Frederick the Great and containing some sixteen thousand de-

tailed provisions setting out precise rules to govern specific "fact situations." The French civil code was drafted by experienced and intelligent jurists who were familiar with the rather spectacular failure of the Prussian attempt to spell it all out. Indeed, if we read the comments of Jean-Etienne-Marie Portalis, one of the most influential of the compilers of the code, we find a constant realistic concern to avoid the extremes of rationalist ideology. Portalis shows us that the code builds on much prerevolutionary law and legal scholarship; and he remarks that the provisions of the code are best thought of as principles or maxims, "*féconds en conséquences*," to be developed and applied by judges and other jurists.

This kind of professional realism was, however, easily and quickly submerged by the rhetoric of the Revolution and by the excesses of the prevailing rationalism. The code became a victim of the revolutionary ideology, and was uniformly treated as though it were a conscious expression of that ideology, both in France and in the many nations in other parts of the world that were heavily influenced by the French Revolution. Some of the problems that this has created for civil lawyers will be discussed in subsequent chapters.

In contrast to the essentially revolutionary, rationalistic, and non-technical character of the Code Napoléon, the German Civil Code of 1896 (effective in 1900) was historically oriented, scientific, and professional. A large share of the credit (or blame) for the differences between the German and the French civil codes is owed to Friedrich Karl von Savigny, one of the most famous names in the history of the civil law tradition.

The idea of codification aroused widespread interest in Germany and other parts of Europe and in Latin America during the first part of the nineteenth century. The French code was widely admired and copied, and in the course of time it was proposed that Germany follow France's lead. Savigny prevented this by persuasively arguing a thesis that became very influential in Germany among a group of legal scholars generally referred to as "the historical school." His basic thesis was that it would be wrong for Germany to attempt to devise a civil code by reasoning from principles of secular natural law. In his view, the law of a people was a historically determined product of that

people's development. Consequently, a thorough study of the existing German law and of its historical development was a necessary prelude to proper codification. Since the Roman civil law as interpreted by the medieval Italian scholars had been formally received in Germany some centuries before, a thorough historical study of German law would require a historical study of Roman law and old Germanic law as well as of more recent elements of the contemporary German legal system. Under the influence of Savigny and others of the historical school, many German scholars turned their energies to the intensive study of legal history.

Savigny's idea was that by thoroughly studying the German legal system in its historical context legal scholars would be able to draw from it those historically derived principles that were an essential part of it. These essential features of the law could then be individually studied, studied in relation to other such principles, and eventually systematically restated. The result would be a reconstruction of the historically derived German legal system according to its basic principles and features. This, in turn, would provide the necessary basis for the codification of German law.

The components of the German legal system, in their historical context, came to be thought of by certain successors of Savigny as something like natural data. Just as natural data in biology, chemistry, or physics could be studied in order to determine the more general principles of which they were specific manifestations, so the data of German law could be studied in order to identify and extract from them those inherent principles of the German legal order of which they were specific expressions. Hence the proposed reconstruction of the German legal system was to be a *scientific* reconstruction. (This conception is discussed at greater length in Chapter X.) Finally, the Germans were convinced that it was neither desirable nor possible to rid the world of lawyers. The idea that the law should be clearly and simply stated so that it could be correctly understood and applied by the popular reader was expressly rejected. The German view was that lawyers would be needed, that they would engage in interpreting and applying the law, and that consequently the code they prepared should be responsive to the needs of those trained in the law.

Consequently, the German Civil Code of 1896 is the opposite of revolutionary. It was not intended to abolish prior law and substitute a new legal system; on the contrary, the idea was to codify those principles of German law that would emerge from careful historical study of the German legal system. Instead of trying to discover true principles of law from assumptions about man's nature, as the French did under the influence of secular natural law, the Germans sought to find fundamental principles of German law by scientific study of the data of German law: the existing German legal system in historical context. Rather than a textbook for the layman, the German civil code was thought of as a tool to be used primarily by professionals of the law.

Does this mean that the German civil code and the French civil code are totally dissimilar? It does not. There are differences, and they are important, but some overriding similarities remain. The Germans, like the French, have incorporated a sharp separation of powers into their system of law and government. It is the function of the legislator to make law, and the judge must be prevented from doing so. While displaying a more sophisticated awareness of the difficulty of making a code complete, coherent, and clear, the Germans nevertheless sought to do exactly that, and for the same basic reasons that motivated the French. The German code also served a unifying function, providing a single body of law for the recently unified nation. And like the French code, it thus supported the emergence of the monolithic nation-state.

An entirely different set of ideals and assumptions is associated with the California Civil Code, or with the Uniform Commercial Code as adopted in any American jurisdiction. Even though such codes may look very much like a French or a German code, they are not based on the same ideology, and they do not express anything like the same cultural reality. Where such codes exist, they make no pretense of completeness. The judge is not compelled to find a basis for deciding a given case within the code. Usually, moreover, such codes are not rejections of the past; they do not purport to abolish all prior law in their field, but rather to perfect it and, except where it conflicts with their specific present purposes, to supplement it. Where some

provision of a code or other statute appears to be in possible conflict with a deeply rooted rule of the common law, the tendency will be to interpret the code provision in such a way as to evade the conflict. "Statutes in derogation of the common law," according to a famous judicial quotation, "are strictly construed."

Thus the conservative tendencies of the common law tradition stand in marked contrast to the ideology of revolution from which the spirit of civil law codification emerged. It is this ideology, rather than the form of codification, that helps to bind civil law nations together in a common legal tradition. Like the work of the Glossators and Commentators, which was received together with the *Corpus Juris Civilis* in Europe, the work of the European legal scholars has been adopted, together with the form of European codification, in the civil law nations of Latin America, Asia, and Africa. This work, and the ideology it embodies, is of prime importance to an understanding of the civil law tradition.

JUDGES

WE IN THE common law world know what a judge is. He is a culture hero, even something of a father figure. Many of the great names of the common law are those of judges: Coke, Mansfield, Marshall, Story, Holmes, Brandeis, Cardozo. We know that our legal tradition was originally created and has grown and developed in the hands of judges, reasoning closely from case to case and building a body of law that binds subsequent judges, through the doctrine of *stare decisis*, to decide similar cases similarly. We know that there is an abundance of legislation in force, and we recognize that there is a legislative function. But to us the common law means the law created and molded by the judges, and we still think (often quite inaccurately) of legislation as serving a kind of supplementary function. We are accustomed, in the common law world, to judicial review of administrative action, and in the United States the power of judges to hold legislation invalid if unconstitutional is accepted without serious question. We know that our judges exercise very broad interpretative powers, even where the applicable statute or administrative action is found to be legally valid. We do not like to use such dramatic phrases as "judicial supremacy" but when pushed to it we admit that this is a fair description of the common law system, particularly in the United States.

We also know where our judges come from. We know that they attend law school and then have successful careers either in private practice or in government, frequently as district attorneys. They are appointed or elected to judicial positions on the basis of a variety of factors, including success in practice, their reputation among their fellow lawyers, and political influence. Appointment or election to the bench comes as a kind of crowning achievement relatively late in life. It is a form of recognition that brings respect and prestige. The judge is well paid, and if he is among the higher judicial echelons, he will