Chapter 8
Codification and the Rise of Modern Civil Law

8.1 The Codification Movement

In the seventeenth and eighteenth centuries, the rise of nationalism and the consolidation of royal power in Europe entailed an increased interest in the development of national law and thereby precipitated the movement towards codification. The demand that law should be reduced to a code arose from two interrelated factors: the necessities to establish legal unity within the boundaries of a nation-state, and develop a rational, systematised and comprehensive legal system adapted to the conditions of the times.[1] The School of Natural Law had a rationalist approach to institutional reform and emphasized comprehensive legal system building. Thus, it provided the ideological and methodological basis to launch the codification movement. The unification of national law through codification engendered the eventual displacement of the *ius commune* and thus Roman law ceased to exist as a direct source of law. But as the drafters of the codes greatly relied on the *ius commune*, elements of Roman law were incorporated in different ways and to varying degrees into the legal systems of Continental Europe. The first national codes designed to achieve legal unity within one kingdom were compiled in Denmark (1683) and Sweden (1734). The process of codification continued in the late eighteenth and

[1] Charles-Louis de Secondat, Baron de la Brède et de Montesquieu (1689-1755), taught that laws will only meet the demands of reason if they are capable of accommodating the diverse needs of individual national populations. According to him, laws should be adapted "to the people for whom they are framed, to the nature and principle of each government, to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives… [Laws] should have relation to the degree of liberty the constitution will bear, to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs…. [Laws] have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered." (*De l'esprit des lois,* Book 1, Ch. 3.) Montesquieu's ideas captured attention throughout the areas where the *ius commune* prevailed in the eighteenth century.

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early nineteenth centuries with the introduction of codes in Bavaria (*Codex Maximilianeus Bavaricus*, 1756),[2] Prussia (*Allgemeines Landrecht für die Preussischen Staaten*, 1794) and Austria (*Allgemeines Bürgerliches Gesetzbuch*, 1811). The natural law philosophy exercised a strong influence on both the contents and structure of these codes. However, the most important codificatory event of this period was Napoleon's enactment in 1804 of the French Civil Code (*Code civil des francais*).

8.1.1 The Codification of Civil Law in France

At the time of the French Revolution (1789) there prevailed in France two great bodies of law: the customary law in the North with Germanic origins that was deeply influenced, and in some areas replaced, by Roman law; and the written law of the South based on Roman law. At the same time, royal ordinances applied throughout the country.[3] Although a considerable degree of uniformity had been attained within each of these systems, there still existed considerable regional differences within each of the main territorial divisions. The French Revolution ushered in a new phase in French history, underpinned by new philosophical ideas concerning law and its role in society. The Revolution was generally hostile towards the past and treated both Roman law and customary law with suspicion. Frequent demands were voiced by the deputies of the National Convention for the construction of a code of law that would be simple, democratic and accessible to every citizen and whose principles would be derived from reason alone.[4] In the eyes of the revolutionaries, the main elements that had to be eliminated were the feudal system and the control of most of the land by few people; social, political and economic inequalities; and royal and Church despotism. The revolutionary legislation thus abolished feudal rights, the procedural privileges of the clergy and nobility, and most future interests in property; confiscated the estates of the Church; abolished the division of people into social classes; removed the civil disabilities of women, illegitimate children and aliens; and secularized marriage.[5] However, the post-revolutionary period featured a sharp reaction against the excesses of the

[2] Although this code formally replaced the *ius commune* as a source of law, the *ius commune* continued to apply as a subsidiary source, as the creator of the code Wiguläus Xaver Alois von Kreittmayr recognized.

[3] The private law that existed at the time of the French Revolution is referred to as *ancien droit*. It was characterized by four chief features: the special role of the Catholic Church in legal matters, especially in the field of the law of marriage; inequality, as a person's position in the eyes of the law varied according to the class to which he belonged; the priority accorded to the social group or the community vis-à-vis the individual; and the special importance attached to landed property.

[4] The Constitution of 1791 stated that a civil code was to be drafted with laws that should be "simple, clear and common to the entire kingdom."

[5] The new revolutionary legislation was introduced in Italy following the arrival of the French armies in 1796 and the establishment of several Italian republics and, later, vassal kingdoms.

Revolution and this is reflected in the law of that period.[6] Thus, the legislation of Napoleon retained much of the old law and only some aspects were apparently influenced by revolutionary ideas. The most important changes occurred in the area of the law of property, where there is no trace of feudal institutions (such as tenure). In other areas of the law, such as family law, we notice a clear departure from revolutionary ideas and legislation.

The French Civil Code of 1804 was drafted by a commission of four eminent jurists: Tronchet, the President of the Court of Cassation and former defence counsel for King Louis XVI; Portalis, a lawyer and provincial administrator at Aix-en-Provence and a close supporter of Napoleon; Bigot de Préameneau, government commissioner for the *Tribunal de cassation* and former lawyer at the Parliament in Rennes; and Maleville, formerly a lawyer at the Parliament in Bordeaux and, later, judge at the Court of Cassation.[7] The chief aim of the commissioners was to fuse the Roman and customary laws into one coherent system that would also embody those ideas of the Revolution that were still approved by public opinion.[8] The three ideological pillars of the Code were private property, freedom of contract and the patriarchal family. The position adopted was that the primary role of the state was to protect private property, secure the enforcement of legally formed contracts and warrant the autonomy of the family. With respect to private property, the Code consolidated the rejection of feudalism and its institutions achieved by the French Revolution. Through private law devices, such as the imposition of limitations on the freedom of testation, the drafters of the Code sought to break up the estates of the once powerful landowners. The formal division of the Code into three parts—Persons, Property and the Different Ways of Acquiring Property—was similar to that adopted by the drafters of Justinian's Institutes. Each part or book is divided into titles, such as Enjoyment and Loss of Civil Rights, Marriage, Divorce, Domicile and Adoptions. These are subdivided into chapters and, in several instances, into sections. Book One covers matters such as marriage, divorce, the status of minors, guardianship and domicile; Book Two deals with property, usufruct and servitudes; and Book Three includes diverse matters such as wills and intestate succession, donations, contracts, torts, matrimonial property settlements, sale, lease, partnership, mortgages, special contracts and such like. Certain parts of the Code (such as that addressing the law of contracts) were to a great extent based on the Roman or

[6] With respect to legal development, the period 1789-1796 is sometimes referred to as intermediate period (*droit intermédiaire*). For a closer look see in general C. Petit (ed), *Derecho Privado y Revolución Burguesa* (Madrid 1990).

[7] Portalis, who presented the drafting intentions in the *Discours préliminaire*, was in overall charge. On Portalis' contribution see M. A. Plesser, *Jean Étienne Marie Portalis und der Code civil* (Berlin 1997); M. Long & C. Monier, *Portalis: l'esprit de justice* (Paris 1997).

[8] The first draft of the Code was ready within four months and included a preliminary book entitled *Du droit et des lois* (of law and legislation) inspired by the ideas of the Natural Law School. The draft was assessed by the Court of Cassation and debated in length by the Council of State in 102 sessions, 57 of which were chaired by Napoleon himself.

written law of Southern France, while other parts (such as family law and the law of succession) reflect a stronger influence from the North French customary law of Germanic origin.

The drafters of the Code recognized that a legislator could not foresee all the possible applications of a basic legal principle. Therefore, they opted for the flexibility of general rules rather than for detailed provisions. As Portalis commented, "we have avoided the dangerous ambition to regulate and foresee everything... The function of the law is to determine in broad outline the general maxims of justice, to establish principles rich in implications, and not to descend into the details of the questions that can arise in each subject."[9] From this point of view, he identified the main tasks of judges in a codified system of law as being to clarify the meaning of the legal rules in the various circumstances that are submitted to them; to elucidate any obscure facets of the law and to fill its gaps; and to adjust the law to the evolution of society and, to the best extent possible, utilize the existing texts to avoid any potential inadequacy of the law in the face of contemporary problems.

The new code, an expression of the power of the middle class, represented both a substantial and formal departure from the preceding system of law, which it was designed to replace. Even the many pre-revolutionary rules and institutions incorporated into the code were deemed effective only because of their reenactment as part of the new legislation. However, despite the formal rupture with the *ius commune*, the code was of necessity built up of culturally familiar concepts, institutions and ways of thinking about law derived from the preceding system. Thus, much of the earlier legal tradition, with a new ideological basis, was carried over into the code.

The importance of Napoleon's Code is attributed to not only the fact that it fostered legal unity within France, but also the fact that it was adopted, imitated or adapted by many countries throughout the world. This was partly due to its clarity, simplicity and elegance that rendered it a convenient article of exportation and partly due to France's influence in the nineteenth century.

8.1.2 The Codification of Civil Law in Germany

In Germany, the French Civil Code attracted a great deal of attention and parts of the country adopted this law as Napoleon extended his rule over Europe. However, the rise of German nationalism during the wars of independence compelled many scholars to express the need for the introduction of one uniform code for Germany to unite the country under one modern system of law and precipitate the process of its political unification. In 1814, A. F. J. Thibaut (1772–1840), a professor of Roman law at Heidelberg University, declared this view in a pamphlet entitled 'On

[9] See A. von Mehren and J. Gordley, *The Civil Law System*, 2nd ed. (Boston 1977), 54.

the Necessity for a General Civil Code for Germany'.[10] Thibaut, a representative of the natural law movement, claimed that the existing French, Prussian and Austrian civil codes could serve as useful models for the German draftsmen. Thibaut's proposals encountered strong opposition from the members of the Historical School,[11] headed by the influential jurist Friedrich Carl von Savigny (1779–1861).[12] Savigny elaborated his thesis in a pamphlet entitled 'On the Vocation of our Times for Legislation and Legal Science'.[13] He asserted that law was similar to language, ethics and literature in that it was a product of the history and culture of a people, and existed as a manifestation of national consciousness (*Volksgeist*)—it could not be derived from abstract principles of natural law by logical means alone.[14] From this point of view, Savigny argued that the introduction of a German Code should be postponed until both the historical circumstances that moulded the law in Germany were fully understood and the needs of the present environment were properly assessed. A perplexing question that Savigny had to answer was how to reconcile the idea that the law emanated from the people with the fact that the Roman law operating in Germany was an alien importation. Savigny responded in the following manner: at a certain stage in a nation's development, the creation of law by the people became an overly complex and technical process and further development necessitated the establishment of a professionally trained class of

[10] A. F. J. Thibaut, "Rezension über August Wilhelm Rehberg, *Ueber den Code Napoléon und dessen Einführung in Deutschland* (1814)" in *Heidelbergische Jahrbücher der Litteratur*, 7 (1814) at 1-32; and see: *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (Heidelberg 1814).

[11] The rise of the Historical School was one manifestation of the general reaction to the rationalism of the School of Natural Law and the political philosophy associated with the French Revolution and the regime of Napoleon. Savigny officially founded the School in 1815, together with his Berlin colleague Karl Friedrich Eichhorn (1781-1854). They edited the programmatic journal of the School, the *Zeitschrift für geschichtliche Rechtswissenschaft* – the predecessor of the modern *Savigny-Zeitschrift*.

[12] Savigny was born in Frankfurt am Main and became professor in Marburg University in 1803. After a brief period in Landshut (predecessor of the University of Munich), he became one of the founders of the University of Berlin (1810), where he taught until 1842. Furthermore, he was named counselor of the state (*Staatsrat*) in 1829 and held the position of legislative minister in the Prussian cabinet from 1842 to 1848. Notwithstanding his impressive professional career, Savigny's reputation is mainly derived from his academic achievements and the influence they had on 19th century German legal and political thought. The focus of his work was Roman law, as preserved in the codification of Justinian. From 1815 to 1831, he dedicated himself to an extensive and in-depth study of Roman law in the Middle Ages with the view to elucidating the process through which Roman law formed the basis of European legal culture. In his work special attention is given to the contribution of the glossators of the twelfth and thirteenth centuries to the reception of Roman law as the common law of Continental Europe.

[13] F. C. von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg 1814).

[14] Savigny argued that natural law cannot be imposed upon a people the way the "fathomless arrogance and completely unenlightened drive for education" of natural law legislators had suggested. He believed that the term *Volk* ideally refers to a community united culturally and intellectually by a common education.

lawyers and jurists. In Germany, this stage was reached in the fifteenth century and the jurists who were responsible for the reception of Roman law during that period were true exponents of the German national spirit. Thus, Roman law, as organically received law, is part of German legal history and contemporary legal life; at the same time, it supplies the connecting link between German law and European legal culture in general.

The early proposals for codification were abandoned due to the influence of the Historical School and, perhaps more importantly, the lack of an effective central government. At the same time, scholarly attention shifted from the largely ahistorical natural law approach to the historical examination of the two main sources of the law that applied in Germany, namely Roman law and Germanic law, in order to develop a true science of law. A group of scholars focused on the study of Germanic law, whilst others (including Savigny) concentrated on the study of Roman law and explored beyond the *ius commune* into the *Corpus Iuris Civilis* and other ancient sources. The latter jurists set themselves the task of studying Roman law to expose its 'latent system', which could be adapted to the needs and conditions of their own society. In executing this task, these jurists (designated Pandectists) elevated the study of the *Corpus Iuris Civilis* and especially the Digest to its highest level and produced an elaborate and highly systematic body of law (*Pandektenrecht*) for nineteenth century Germany. Leading representatives of the Pandectists were Georg Puchta, Adolf Friedrich Rudorff, Ernst Immanuel Bekker, Alois Brinz, Heinrich Dernburg, Rudolf von Ihering and Bernhard Windscheid.[15] They produced an elaborate and highly systematic body of law (*Pandektenrecht*) for nineteenth century Germany.

Although the Pandectist movement emerged from the Historical School, it ultimately adopted a rather ahistorical and primarily doctrinaire approach to law. The Pandectists adopted this approach believing in the superiority and eternal validity of Roman law. Their chief objective was to construct a legal system where all particular rules could be derived from and classified under a set of clearly formulated juridical categories and abstract propositions. In this respect, law is approached as a form of logic, a coherent assembly where everything can be reduced to general principles, concepts and conceptual categories. Extra-legal

[15] In this connection, the contribution of Puchta (1798-1846) and Windscheid (1817-1892) deserves special mention. Puchta emphasized the academic nature of law and the central role of the jurist in the law-making process at the final stage of the legal development of a people. He drew attention to the study of law as a coherent logical system built from interrelated concepts existing on a purely intellectual level. As the norms of positive law emerge principally through logical deductions from concepts, the legitimacy of legal rules is the result of logical-systematic correctness and rationality. In his works *Lehrbuch der Pandekten* and *Cursus Institutionum*, Puchta applied those ideas to the study of Roman law. Windscheid's *Lehrbuch des Pandektenrechts* (1862), which also applied the systematic approach of the Pandectists to the study of Roman law, had an extraordinarily large circulation in Germany (a seventh edition, revised by the author, appeared in 1891) and became an essential text throughout Continental Europe. Besides its use as a student textbook, the work was highly significant for legal practice in Germany and served as a guide to the drafters of the German Civil Code of 1900 (Windscheid himself played a leading role in the codification as a member of the first commission from 1880 to 1883).

evaluations do not matter, as propositions of law cannot be considered, let alone justified, from an extra-legal point of view. The Pandectists' conception of law as a logical system (*sistema iuris*), distinct from the social, religious, political and economic domains, had a strong impact not only on legal theorists but also on judges: it gave social, ethical, political and economic neutrality to the logical processes that led to specific judicial decisions. In the area of legislation, this approach to law has entailed the use of a technical and abstract language. It also led to a high level of precision in selecting the relevant terms and phrases whose meaning remains fixed throughout the text of the law.

The process of abstraction and generalization is natural and indeed inevitable, if the law is to consist in anything other than a collection of practical rules and solutions to actual problems. However, it involves the danger that once a general rule is formulated it tends to dominate legal life rather than adapt itself to it. The legal genius of the Romans was displayed in their ability not only to create abstract propositions through an analysis of their law, but also to create sufficient flexibility in the abstractions to enable their synthesis into new rules and principles when change was needed. The Roman jurists never made the mistake of over-valuing their abstractions. In contrast, the German jurists became fascinated with the concepts themselves and came to reject as logically unthinkable any change that involved a conflict with the concepts they had formulated. This attitude was particularly dangerous, since the Roman abstractions were formulated as summaries of their own development whilst the German Romanist scholars wished to transpose them to the completely different context of nineteenth century Germany. It was unavoidable that the Pandectists, consciously or unconsciously, considerably distorted the Roman law concepts they revised. Above all, their master concept that law exists to further the realization of the individual will was derived from Hegelian philosophy rather than Roman jurisprudence. The most rigorous attack on the methods of the German legal scholars came from the ranks of the Pandectists themselves in the person of R. Ihering.[16] Ihering asserted that "our Romanistic theory must abandon the delusion that it is a system of legal mathematics, without any higher aim than a correct reckoning with conceptions."[17] Nevertheless, the preoccupation of the Pandectists with the formulation of abstract concepts continued throughout the nineteenth century and their approach played an important part in the process towards the codification of the civil law in Germany.

[16] Rudolf von Ihering (1818-1892) held the position of professor in Basel, Rostock, Kiel, Giessen, Vienna and Göttingen. Among his most significant works are: *Der Geist des römischen Rechts* (1852–1865); *Jurisprudenz des täglichen Lebens* (1870); *Der Kampf ums Recht* (1872); *Der Zweck im Recht* (1877–1883); and *Scherz und Ernst in der Jurisprudenz* (1884).

[17] Quoted in M. Smith, *A General View of European Legal History and Other Papers* (New York 1927) at 135. Ihering is regarded as an early representative of jurisprudential trends that emerged as a reaction to the formalism and extreme conceptualism of the Pandectist School, such as *Zweckjurisprudenz*, focusing on the purposes that legal rules and institutions serve, and *Interessenjurisprudenz*, focusing on societal interests as the chief subject-matter of law. These schools of thought were the precursors of legal realism and the sociology of law.

While the Pandectists conceded a central role to the free will of the individual as a participant in law, the jurists of the Germanistic branch of the Historical School emphasized the social aspects of law, giving primacy to collectivism and cooperativism over individualism. This approach was most distinctly represented by Otto von Gierke (1841–1921), who was appointed professor in Berlin in 1887. Other leading exponents of the Germanistic branch were Karl Friedrich Eichhorn, Jakob Grimm, Georg Beseler and Emil Brunner. These jurists erected from the scattered and fragmentary expressions of Germanic legal thought embodied in the legislation and judicial decisions of the German states, and from the history of Germanic legal institutions, a distinct system of law, and strongly championed its principles against those of the Pandectists.

While these historical and theoretical controversies were raging, the political unification of Germany occurred under Chancellor Bismarck and the Second Reich was founded in 1871. However, legal unity did not immediately follow political unity. Throughout the nineteenth century, Germany remained divided into three major areas with respect to private law. The left bank of the river Rhine had been annexed by France in 1794. In this part of the country and other territories under French control, the French Civil Code was in force. Despite the theories of the Historical School, this Code was well received and successfully applied. Prussia and Saxony were territories with codified law, the latter having adopted a Code in 1863. The remainder of Germany was the land of the Roman-canonical law of the Pandectists, modified by particular regional and municipal statutes and customs. But these divisions were clearly no longer tolerable and a commission of 11 members was appointed in 1874 to draft a civil code for the whole of Germany.[18] The code emerged from a 20-year process that involved two drafts.[19] The first draft was published in 1887 and it provoked strong criticism from Germanist scholars who objected to the fact that the work was composed almost entirely from the Roman element of the law. The critics also denounced the abstruse language of the work and its remoteness from everyday social and economic life.[20] In response to these criticisms, a second commission composed of ten permanent members (university professors, lawyers, state officials and professional experts from commerce and industry) and 12 non-permanent ones was appointed by the government to redraft

[18] The work of the commission began in 1881 and ended at the close of 1887, when the first draft code was submitted to the chancellor. The chairman of the commission was H. E. Pape, until 1878 president of the Imperial Commercial Court (*Reichsoberlandesgericht*), the highest federal tribunal at the time. Its most prominent members were B. Windscheid and G. Planck (1824-1910), the future president of the Imperial Court of Justice (*Reichsgericht*).

[19] A significant step on the way to the legal unification of Germany was the establishment in 1879 of the *Reichsgericht* (Imperial Court of Justice) as a national supreme court for the entire German empire.

[20] Otto von Gierke, a jurist of rare learning and ability, and a strong believer in the social superiority of Germanic over Roman legal ideas, composed a book entitled "The Draft of a Civil Code and the German Law," which is the clearest and most eloquent summing up of the various objections brought against the proposed Code.

the code in 1890. This second draft, as modified by the Council of State (*Bundesrat*) and a commission of 21 members of the parliament (*Reichstag*), became law on 14th July 1896 with effect from 1st January 1900.

The German Civil Code, the *Bürgerliches Gesetzbuch* or BGB., is marked by two outstanding characteristics: its highly systematic structure and its conceptualism. In both these respects, it owes a great deal to the work of the German Pandectists of the nineteenth century. The Code is divided into five books. The first book contains the general principles of the entire civil law, i.e. the principles that have general application to all legal relations except when special rules are provided. It includes provisions relating to persons (both natural and legal); the nature and classification of things and juristic acts; acting capacity; offer and acceptance; agency and ratification; limitation and prescription; and private means of redressing wrongs and securing rights. The second book is devoted to the law of obligations (*Schuldrecht*), which is concerned with the legal relation between particular subjects of rights. The third book contains the law of property (*Sachenrecht*) that addresses the rights of persons over things by describing the content, acquisition, loss and protection of real rights. The fourth book covers family law (*Familienrecht*) and is divided into two parts: the first part regulates personal relationships in the family; the second regulates the property relationships of family members. Finally, the fifth book deals with the law of succession (*Erbrecht*) that regulates the succession to the rights and liabilities of a deceased person. As already noted, the influence of the Pandectists is reflected in the Code's systematic consistency, succinctness and conceptual clarity. However, the work is not designed to be intelligible to the layman; it is codified jurists' law for jurists, only to be read and understood by them. This did not pose a problem for judges and legal practitioners, who were familiar with the style and methods of the Pandectists through their university legal training.

Notwithstanding their important differences with respect to style and structure, the German and French Civil Codes have a great deal in common. Both codes drew heavily on common sources of law—the *ius commune* and their respective national laws. The influence of the *ius commune* derived from Roman law is particularly evident in the field of the law of obligations, as well as in the way the materials are structured and systematized. On the other hand, native sources of law appear to have exercised a considerable influence in the areas of family law and the law of succession. Moreover, the two codes have a common ideological basis as both are grounded on nineteenth century liberalism and are permeated by the notions of individual autonomy, freedom of contract and private property. As many changes in society transpired during the period of a hundred years that separates the two codes, the German Civil Code is in some respects more advanced or up-to-date than the French one. For example, several important provisions of the German Code recognize that certain private rights are related to certain social obligations and that a subjective right can be misused or abused. In the field of family law, the authority of husbands and fathers is less absolute than in the French Code and the definition of family is not as broad as that adopted by the latter code. Moreover, women have more power in relation to their own property matters. Certain aspects of contract

and tort law reflect the effects of the increasing complexity of commercial relationships as well as the advances of industrialization.

In the period following the enactment of the Civil Code, German scholars focused mainly on the task of rendering the Code applicable in practice. This entailed explaining its difficult text, and elucidating and developing its concepts and principles. During the same period, the reaction against the excessive formalism and conceptualism of the Pandectists grew stronger. After the First World War, German legal science began to discard the methods of the Pandectists. While preserving the Pandectists' genius in formulating general concepts, German jurists started to place more emphasis on the examination of detailed facts and the operation of legal principles in concrete factual situations. This process was interrupted, however, by the rise of National Socialism in the post-WWI period and the decline of liberal democratic ideas in Germany. Nevertheless, these new ways to conceptualize the law—associated with legal realism and the sociology of law—entered legal thinking in America and other countries, and exercised a strong influence on the development of legal thought in the twentieth century.

8.2 The Civil Law Tradition

Legal scholars use the term 'civil law systems' to describe the legal systems of all those nations predominantly within the historical tradition derived from Roman law as transmitted to Continental Europe through the *Corpus Iuris Civilis* of Emperor Justinian.[21] In the foregoing discussion we have traced the long and intricate process of amalgamation of Roman, Germanic and other bodies of law that form the substance of modern civil law systems. The material also noted the effect thereon of historical developments, cultural factors and the exigencies of legal practice. This process culminated in the codification of civil law in Europe. The codes constitute a new point of departure in the development of the civil law, but its history obviously does not end with their enactment. In the years following the publication of the codes, the dynamics of legal change have worked primarily through special legislation and judicial interpretation, as well as through code revision, constitutional law and the harmonization of law at a European or regional

[21] The theme of legal tradition focuses attention on the notion that law and the understanding of law involve much more than the description and analysis of statutes and judicial decisions. Law cannot be fully understood unless it is placed in a broad historical, socio-economic, political, psychological and ideological context. As J. H. Merryman explains, a legal tradition is not simply a body of rules governing social life; it embraces "deeply rooted, historically conditioned attitudes about the nature of law, the role of law in society and the polity, the proper organization and operation of a legal system, and about the way law is, or should be made, applied, studied, perfected and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective". *The Civil Law Tradition: an Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed. (Stanford, Calif. 1985), 2.

level. Legislatures in civil law countries responded to changes in society and the economy by excising large areas of the law from the domain of the civil codes. They also created entirely new areas of law that fall outside the scope of the codes, such as employment law, insurance law, competition law, and landlord and tenant law. Furthermore, legislatures endeavoured to update the civil codes by modifying their texts. Both the French and German codes have been amended several times since their introduction. In general, code revision has been more extensive in the area of family law than in any other areas. Many family law reforms were precipitated by constitutional provisions introduced after the Second World War and by international conventions promoting new ideas of equality and liberty that were at variance with the patriarchal family law of the civil codes. In other areas of the law, legislatures have often encountered difficulty in forging the necessary changes within the structure of the civil codes. To deal with this problem, legislatures have resorted to the introduction of special statutes outside the codes—statutes that could more easily be amended as socio-economic conditions change.

While legislatures created and developed bodies of law outside the sphere of the civil codes, the courts have introduced new rules through the interpretation of the codes' provisions. This judicial adaptation of the codes to new social and economic conditions has produced a new body of law, which is based on the expansion through interpretation of the existing legislative texts. In some civil law countries, such as France, this process has been facilitated by the structural characteristics of the civil code—its gaps, ambiguities and incompleteness. The drafters of the French Civil Code never imagined or anticipated the litigation-producing aspects of modern life such as industrial and traffic accidents, telecommunications, the photographic reproduction of images and mass circulation of publications. Thus, it is no surprise that in essence the modern French law of torts is almost entirely judge-made. Regarding the later codes, such as the German Code, the judicial adaptation of the civil law to changing social and economic conditions was facilitated by the inclusion in the codes of 'general clauses'—provisions that deliberately leave a large measure of discretion to judges. Although traditional civil law theory denies that judges make law or that judicial decisions can be a source of law, contemporary civil law systems are more openly recognizing the unavoidable dependence of legislation on the judges and administrators who interpret and apply it.

8.2.1 Geographic Distribution of the Civil Law

As previously noted, the historical origins and development of a legal system is a factor that sets that system apart as a member of the civil law family.[22] Upon closer

[22] Contemporary comparative legal scholarship has an extensive tradition of categorizing systems of law into legal families of kinship and descent. The division of legal systems into families fosters the comparative study of law as it allows one to examine legal systems from the viewpoint of their

examination, history is also a factor that explains the internal differentiation within the civil law. It is thus unsurprising that contemporary comparative law scholars identify sub-categories of legal systems within the civil law family, with the Romanistic-Latin or French and the Germanic systems forming two secondary groupings or sub-families.[23] The distinctive French and German legal codifications and juristic styles each exerted a far-reaching influence worldwide, and to some extent their influences overlapped. Indeed, one might argue that the 'typical' civil law systems today are not those of France and Germany, but rather those systems that have undergone a combined influence of both. Nevertheless, in the post-codification period, French law and German legal science have constituted the two main tributaries to the civil law tradition.

The Romanistic-Latin or French group of countries and territorial units share a private law that follows the Napoleonic Civil Code of 1804. In the course of the Napoleonic conquests and the subsequent political and administrative reshaping of many European countries the French Civil Code was introduced into the western regions of Germany, the low countries, Italy, Spain and other parts of Europe. Then, during the colonial age, France extended her legal influence far beyond Continental Europe to parts of the Middle East, Northern and sub-Saharan Africa, Indochina, Oceania, French Guiana and the French Caribbean islands. But the influence of French law both outlived and went beyond the Napoleonic conquests and French colonialism. To this day, the French Civil Code remains in effect, with revisions, in Belgium and Luxemburg. Moreover, the *Code Civil* had a major influence on the Netherlands Civil Code of 1838 (whose spirit has naturally influenced the new civil code of the Netherlands enacted in 1992); the law codes of the Italian federal states prior to 1860 and the first *Codice Civile* of 1865[24]; the Portuguese Civil Code of 1867 (replaced in 1967); the Spanish Civil Code of 1889; the Romanian Civil Code of 1864; and some of the Swiss cantonal codes.[25] Furthermore, when the Spanish and Portuguese empires in Latin America disintegrated in the nineteenth century, it was mainly to the French Civil Code that the legislatures of the newly independent nations of Central and South America looked for inspiration. This is unsurprising, as the language and concepts of the French code were already familiar because of their affinities with the legal institutions and practices that had been introduced by the Spanish and the Portuguese. Moreover, French culture and the French revolutionary heritage were greatly admired in Latin American countries and Napoleon's personality served as an example to many of the early statesmen of these

general characteristics, style or orientation. Apart from its practical importance, the division of legal systems into broader families has great value to legal theory, as it requires a more spherical or comprehensive knowledge of law as a general social phenomenon.

[23] Consider on this matter R. David and J. Brierley, *Major Legal Systems in the World Today*, 3rd ed. (London 1985), 35; K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 2nd ed. (Oxford 1987), 68-75.

[24] See on this C. Ghisalberti, *Unità nazionale e unificazione giuridica in Italia* (Bari 1979), 223.

[25] Even after the Congress of Vienna (1815), the French Civil Code remained in effect in German territories on the left bank of River Rhine and also in parts of the Prussian Rhine Province.

countries.[26] The French legal tradition continues to exist in territories that were first colonized by France but later on taken over by Great Britain or another power with a common law legal system, such as the province of Québec in Canada and the state of Louisiana in the United States of America.[27] With respect to countries that once belonged to the French colonial empire,[28] the current influence of French law varies, depending on the hold of French culture in these countries and the impact of local customs and legal traditions, especially Islamic law.[29]

The Germanic legal family consists of countries that have adopted or are influenced by the German Civil Code and the German Pandectist scholarship (*Pandektenwissenschaft*) that preceded it. Although the German Civil Code appeared on the scene relatively late in the codification era and its highly technical language and complicated structure rendered its direct transplantation difficult, it did play a significant part in the codification of civil law in a number of countries,

[26] The Mexican state of Oaxaca promulgated the first Latin American civil code in 1827, following the French *Code Civil*. Bolivia enacted a civil law code in 1830, also modeled on the French Code. This code remained in force until a new code, based on the Italian Civil Code of 1942, was introduced in 1975. The Chilean Civil Code of 1855 was strongly influenced by the French Civil Code, although its principal drafter, Andrés Bello, was also familiar with the work of the German Historical School. Bello's *Código Civil* was adopted by Ecuador (1860), Colombia (1873), Nicaragua (1867), Honduras (1880) and El Salvador (1859), and had an impact on the relevant Venezuelan (1862) and Uruguayan (1868) legislation. The Argentinean Civil Code of 1871 (adopted by Paraguay in 1876) and the Brazilian Civil Code of 1916 (completed by Clóvis Beviláqua in 1899) also reflect the concurrent influences of the Napoleonic Civil Code, French nineteenth century jurisprudence and the German Historical School. See in general C. Stoetzer, *El pensamiento político en la América española durante el período de la emancipación (1789 - 1825)* (Madrid 1966); A. Guzmán Brito, *La codificación civil en Iberoamérica*, Siglos XIX y XX (Santiago, Editorial Jurídica de Chile, 2000).

[27] Although the local population in some of these territories was initially promised that they could retain their French-inspired law, Anglo-American law gradually gained greater importance, largely due to the isolation from legal developments in France, the introduction of numerous English-inspired legal amendments and the transition to English as the language of the courts and the everyday language of the population. This is particularly the case with respect to the US state of Louisiana, where the position of both the French language and French law has become significantly weakened. On the other hand, the legal system of the Canadian province of Québec, where French language continues to be used by the overwhelming majority of the population, has significant legal resources of its own, based on the French legal heritage, which have made it resistant to common-law influence.

[28] This group includes Morocco, Algeria and Tunisia in North Africa; Senegal, Togo, Ivory Coast, the Republic of Congo, Cameroon, Guinea, Gabon, Benin and Burkina Faso in West Africa; Mauritania, Mali, Niger, the Central African Republic and Chad in Central Africa; Madagascar and Djibouti in Eastern Africa; as well as the former Belgian colonies of Congo and Rwanda and Burundi. The language of legal education in such countries is French and many members of the local 'legal elites' have been trained in France.

[29] In combination with Islamic law, French-inspired civil law and jurisprudence remain influential in most North African countries as well as in many Middle Eastern countries.

such as Italy,[30] Greece,[31] Portugal[32] and Japan.[33] Either via Japan or directly, the German civil law influence also spread to Korea,[34] Thailand and partly also China.[35] Furthermore, the legal science that preceded and accompanied the German Code has had considerable influence on legal theory and doctrine in several countries in Central and Eastern Europe, particularly in Austria, Hungary, Switzerland, and the former Yugoslavia. The Austrian General Civil Code of 1811 (*Allgemeines Bürgerliches Gesetzbuch*, or ABGB), also influenced by Roman law, was the product of the Age of Enlightenment and bore the stamp of the School of Natural Law. The German legal influence, especially that of the Historical School, on the Code has been apparent in connection with different legal reforms during the early part of the twentieth century.[36] German legal science had a strong impact in other territories of the Habsburg Empire, especially Hungary, where it led to three civil code drafts (1900, 1911–1915 and 1928). Although none of these drafts attained the status of law, they nevertheless played an important part in judicial practice.[37] The Swiss Civil Code (*Zivilgesetzbuch*) of 1907, drafted by the jurist Eugen Huber, drew upon German and, to a lesser extent, French sources,

[30] The BGB was drawn upon by the drafters of the Italian Civil Code of 1942.

[31] The Greek Civil Code of 1940, which came into effect in 1946, was shaped substantially according to the German model.

[32] The drafters of the Portuguese Civil Code of 1967 closely followed the system of the BGB, although individual provisions also reflect French and Italian legal influences.

[33] The Japanese Civil Code of 1898 drew heavily on the first draft of the German Civil Code, but also embodied elements from French and English law. On the codification of civil law in Japan see A. Ishikawa & I. Leetsch, *Das japanische BGB in deutscher Sprache* (Cologne 1985); H. P. Marutschke, *Einführung in das japanische Recht* (Munich 2009).

[34] The Korean Civil Code, enacted in 1960, was drafted by jurists who had studied at universities in Japan and Germany. See Cho, K-C, *Koreanisches Bürgerliches Gesetzbuch* (Frankfurt 1980).

[35] German legal science and the various forerunners of the German Civil Code (e.g. the Dresden Draft and the Saxon Civil Code), as well as the BGB itself exerted a strong influence on Chinese jurists. This influence is reflected in the Civil Code of 1930, parts of which are still applicable in Taiwan.

[36] Many of the ideas of the German Civil Code found their way into Austrian civil law via the so-called Third Partial Amendment, concerning largely the law of obligations, which came into effect in 1916.

[37] Even the first codifications of the civil law in the Soviet Union in the 1920s exhibit similarities to the German Civil Code. Both via Soviet Union and directly, German jurisprudence influenced the legal systems in formerly socialist countries in Central and Eastern Europe. German legal science had a particularly strong influence in the Baltic states of Lithuania, Latvia and Estonia, where a system of private law written by F. von Bunge, a professor at the University of Dorpat in Estonia, in the late nineteenth century was adopted by the independent states in 1918. In the period following WWII, the civil law influence in Central and Eastern Europe subsided when socialist countries adopted new civil codes. Although these code embodied several traditional civil law features, the fundamentally different public law plus significant private law reforms caused most contemporary comparative law scholars to classify the relevant legal systems as part of a new, socialist, legal family. With the demise of the socialist regimes, however, Central and East European nations are once again showing strong affinities to the civil law family.

but was adapted to Swiss circumstances and incorporated significant contemporary reforms.[38]

Civil law survives in so-called 'mixed' or 'hybrid' legal systems, i.e. systems that historically represent a mixture of legal traditions from two or more families of law, such as the civil and common law systems of Quebec, Louisiana, South Africa (Dutch and English influence), Scotland,[39] Puerto Rico and the Philippines.[40] Civil law is also one of the diverse elements in the complex legal systems prevailing in many countries in Asia, such as China, Sri Lanka, Indonesia, Taiwan, Laos, Vietnam and Cambodia.

As the civil law has evolved and entered into combination with other legal elements, its impact has been attenuated. In the aftermath of codification and national law movements, an extraordinary growth of legislative activity was stimulated by the need to modernize the state and address novel problems generated by socio-economic, political and technological developments. Contemporary law-making and law reform are distinguished by a sort of eclecticism. In searching for legal solutions to new problems common to diverse societies, legislatures have been less concerned with provenance than with the promise of new approaches and ideas.[41] The exchange of ideas and models among different legal systems (especially among civil law and common law systems) is gaining momentum and, within the European continent in particular, there is a move towards legal convergence in many areas. At the same time, lawmakers tend to pay more attention to the diversity in society and are more pragmatic in their approach, in contrast with the drafters of the early law codes, who usually upheld one model of behaviour for all people. Thus, private law reform in Europe today is usually preceded by extensive research on contemporary socio-economic conditions and public attitudes. Outside the continent of Europe, the cradle of the civil law, the received European legal norms and institutions never entirely penetrated social life, nor did they ever fully displaced customary and religious norm systems. In light of the above, it is unsurprising that there is probably as much diversity among the responses of civil law systems to legal problems as there is between civil law and common law

[38] In 1926, the Swiss Civil Code was adopted, almost word for word, as the Civil Code of the newly formed Republic of Turkey.

[39] The private law of Scotland still reflects a Roman law influence, although contract law, under the influence of the House of Lords jurisprudence, has borrowed much from English law. It should be noted that in Scotland, just like in South Africa, Roman-based civil law survived in uncodified form.

[40] K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, 2nd ed. (Oxford 1987), 74. Civil law is also one of the many elements in the legal systems of Israel and Lebanon.

[41] This tendency is evident, for example, in the new Dutch Civil Code, which came into effect in 1992. In carrying out their work, the Dutch drafters relied not only on a variety of Continental European models, but also on models adopted from common law jurisdictions, as well as on relevant international and transnational conventions and treaties.

countries. It is thus appropriate to ask: what, if anything, besides historical origins, links the civil law systems together and, at the same time, sets the civil law tradition apart from other legal traditions today?

8.2.2 Defining Characteristics of Civil Law Systems

One should point out at the outset that it is very difficult to list the defining characteristics of the civil law family of legal systems without resorting to generalizations that would require lengthy qualifications in order for them to be meaningful. In part, the problem is caused by the relatively high level of abstraction that the concept of legal family involves, as well as by the fact that its use as a classification device does not pay sufficient attention to the changes that accompany the individual systems' evolution. According to Zweigert and Kötz,[42] the ultimate distinguishing feature of legal families is their 'style' (*Rechtsstil*), a multi-faceted notion shaped by the interaction of five factors: (a) history; (b) mode of legal thinking; (c) legal institutions; (d) sources of law; and (e) ideology. All these factors are relevant, albeit to varying degrees, to identifying what sets the civil law apart from other legal families, and in particular the common law family.

As the narrative in this book makes clear, history is a factor that unmistakably sets the civil law tradition apart from other legal traditions. When we refer to the civil law systems as belonging to a single legal family, we are calling attention to the fact that, despite the considerable national differences among themselves, they are characterized by a fundamental unity. The most obvious element of unity is naturally provided by the fact that they are all derived from the same sources, and that they have classified their legal institutions in accordance with a commonly accepted scheme that existed prior to their own development and that, at some stage in their evolution, they took over and made their own. But, as already noted, history is also a factor for the internal differentiation within the civil law, accounting for the fact that the various members of the civil law family may be less homogenous than their common law counterparts.

A characteristic feature of civil law pertains to the mode of legal thinking that it displays. In civil law systems a tendency exists to use abstract terms and, more generally, to employ a conceptual approach to legal problems. Legal norms determine certain patterns of behaviour without regarding the concrete circumstances of particular cases. They are characterized by a kind of optimal generality: they are not too general (as too general norms would complicate the application of law), but general enough for application in certain situations. As a consequence, legal reasoning in civil law countries is basically deductive. Deductive reasoning proceeds from a broad norm or principle expressed in general terms; this is followed by

[42] *An Introduction to Comparative Law*, 2nd ed. (Oxford 1987), 68 ff.

a consideration of the facts of the particular case and the application of the principle to these facts with a view to arriving at a conclusion. Legal reasoning in civil law has a top-down structure, moving from the general to the more specific. By employing this kind of reasoning, the civil law lawyer may present a legal argument as if there is only one right answer to any legal problem. In this respect, any disagreement over the application of the law to the facts is blamed on the presence of faulty logic. This explains why civil law judges do not usually offer dissenting opinions. Every judgment, even in cases decided on appeal, is the judgment of the court as a whole. Under the deductive approach of the civil law, the value of case law is limited as court decisions are viewed as particular illustrations of, or specific exceptions to, the law as embodied in a general norm or principle. In this respect, the material of law may be construed to form an independent, closed system where, at least in theory, all sorts of questions could or should be answered by interpreting existing legal norms.[43] The law in civil law is regarded as 'found' rather than 'made' in each individual case through the application of deductive reasoning or, if necessary, reasoning *per analogiam* or *a contrario*.[44]

Related to the above is the intellectualism and conceptualism that generally characterize civil law thinking—especially German law and the systems it influenced. In civil law systems the study of law is still regarded as a predominantly intellectual pursuit, whilst the practical application of law effectively occupies a secondary place. Notwithstanding the increasing emphasis on the practical implications of the law in recent years, the law in these systems is generally approached as a science, a form of logic, a coherent assembly where everything can be reduced to principles, concepts and categories. In the area of legislation, this approach to law has entailed the use of a technical and abstract language and the formulation of norms with a scope broad enough to cover a wide range of cases. It also led to a high level of precision in selecting the relevant terms and phrases whose meaning remains fixed throughout the text of the law. With respect to the study of law,

[43] See on this R. David & J.E,C. Brierley, *Major Legal Systems in the World Today*, 3rd ed. (London 1985), 360-61.

[44] By contrast, in common law systems what is authoritative is what is decided. Law in such systems is seen as open-ended in the sense that new extensions to existing rules can be revealed at any time by the courts. The common law, when viewed through the eyes of a civil law jurist, does not approach law as a science but simply as a method for making distinctions. It is by identifying and distinguishing past cases that the common law lawyer 'discovers' the applicable legal rule in the case at hand. From a civil law viewpoint, this inductive process of discovery in the common law may result in the formulation of a new rule. To the common law lawyer, on the other hand, the deductive approach of the civil law lawyer seems to reverse the natural form of legal reasoning. The common law lawyer adopts as his starting-point the examination of the facts with a view to identifying the precise legal issue raised by the case and the legal rules that should be applied. He does not view law as a set of given rules that can be applied with inexorable logic. When a common law lawyer queries the nature of a case he contemplates facts with a view to identifying the material circumstances of the case and showing that these fall within the scope of one rule rather than another. By contrast, when a civil law lawyer explores the nature of a case, he refers to the legal issues defined in a general and abstract way.

this approach means that one cannot rely on case study alone if one wishes to grasp the essence of the civil law. The study of cases in civil law systems is intended to only illustrate how the law operates in practice, but its essence will necessarily remain abstract. Unlike the common law lawyer, who distinguishes cases on their facts, the civil law lawyer searches for the general principles of law that underpin court decisions.[45] The contrast between the civil law and the common law is traditionally presented as that between case or judge-made law and the essentially doctrinal law of the legal scholars. A great deal of the differences between the two systems are, in one way or another, connected with this contrast between the procedural and the theoretical origin of legal norms. It is therefore unsurprising that legal scholars and academics in civil law countries generally enjoy more prestige than judges, for the duty of the civil law judge is to apply the written law whose meaning is discovered largely through the work of academic scholars. One might say that in civil law the legal scholar is the senior while the judge is the junior partner in the legal process.[46] In modern civil law systems, where court decisions play an increasingly important role in shaping the law, an ever-vigilant academic community observes, reviews and critiques the courts to ensure that any shaping or re-shaping of the law remains a controlled activity. Furthermore, academic scholars continue the tradition of writing textbooks and treatises in their area of expertise. Their works provide the basic source of legal knowledge that is imparted, in an authoritative way, from the scholars to their students and to those entering the legal profession. As the civil law emphasizes the transmission of legal knowledge and as there is so much knowledge to be transmitted, legal instruction in universities takes the form of general overviews of or introductions to the various fields of the law. In

[45] As C. D. Gonthier has remarked, the civil law is distinguished from the common law by "a difference in intellectual approach, in the quest and ordering of [legal] knowledge. Each approach reflects one of the modes of functioning of the human intellect, that is, on the one hand, the empirical mode based on specific instances from which one may eventually draw rules and even identify principles and, on the other, the theoretical approach based on established principles from which concrete consequences and applications are drawn." "Some Comments on the Common Law and the Civil Law in Canada: Influences, Parallel Developments and Borrowings", (1993) 21 *Canadian Business Law Journal* 323.

[46] The authority of academic writers in civil law countries can also be explained historically. As previously observed, when the texts of Justinian's legislation were rediscovered in medieval Europe, they appeared so complicated and difficult to understand that it was left to academic scholars (the glossators and the commentators) to decipher and explain them. As a result, the works of academic commentators acquired as much authority as the texts themselves. Judges also came to greatly rely on legal scholars for information and guidance concerning the interpretation and application of the law. By the end of the sixteenth century it was a common practice for judges in Germany and other Continental European countries to refer the record of a difficult case to a university law faculty and to adopt the faculty's collective opinion on questions of law. This practice, which prevailed until the nineteenth century, resulted in the accumulation of an extensive body of legal doctrine. When systematized in reports and treatises the scholarly opinions rendered in actual cases were regarded as a kind of case law and an authoritative source of legal interpretations. See J. P. Dawson, *The Oracles of the Law* (Ann Arbor 1968), 231.

civil law systems the principal source of legal knowledge has always been the textbook, rather than the casebook.

In civil law the tendency prevails to draw a clear distinction between substantive law and legal procedure. This distinction has its historical origins in the work of the humanist jurists of the sixteenth century, who tended to view the law not so much as a body of objective rules but, rather, as a system of subjective rights. In this respect, legal procedure is viewed as a mechanism for enforcing these rights. Whenever substantive law recognizes a right, the law of procedure, as an accessory to substantive law, must provide an appropriate remedy. This shift from law as rules to law as rights was partly due to the fact that in Latin and in all European languages the word for 'substantive law' and the word for right is the same: *ius, droit, diritto, Recht*.[47] In the domain of legal procedure civil law systems generally follow a more dogmatic and formalistic approach to law in contrast to the more empirical approach of the common law. Furthermore, there is a relatively greater scope for an inquisitorial approach to litigation, as opposed to the adversarial approach of the common law.[48] The civil law places greater responsibility on the judge for the investigation of the facts, whilst the common law leaves the parties to gather and produce the factual material on which adjudication depends. One might say that the civil law model of legal procedure is construed to display a preference for 'centripetal' decision-making, determinative rules and a rigid ordering of authority. It also attaches greater importance to written testimony in the form of official documents and reports.[49] However, the usual contrast between the civil law inquisitorial and the common law adversarial mode of trial should not be overstated. As J. Langbein, commenting on German and American procedures, has remarked, "apart from fact-gathering... the lawyers for the parties play major and broadly comparable roles in both the German and American systems. Both are adversary systems of civil procedure. There as here, the lawyers advance partisan positions from first pleadings to final arguments. German litigators suggest legal theories and lines of factual inquiry, they superintend and supplement judicial examination of witnesses, they urge inferences from fact, they discuss and distinguish precedent,

[47] In the common law system, on the other hand, legal development focused on remedies rather than rights, on forms of action rather than causes of action. As often said, it was with writs and not with rights that the older English law was concerned. The difference is mainly one of emphasis, but it has the important practical consequence that the agent who controls the grant of remedies also controls the development of the law, for by creating new forms of action or extending existing forms to deal with new facts that agent could in fact create new rights.

[48] Under the adversarial system of legal procedure, the facts emerge through a formal context between the parties, while the judge acts as an impartial umpire. In the inquisitorial system, on the other hand, the truth is revealed by an inquiry into the facts conducted by the judge.

[49] According to M. Damaska, the relatively greater emphasis on certainty in the civil law model of legal procedure is traced to the influence of the rationalist School of Natural Law and in particular the rationalist desire to impose a relatively simple order on the complexities of life. See "Structures of Authority and Comparative Criminal Procedure", (1975) 84 *Yale Law Journal*, 480.

they interpret statutes, and they formulate views of the law that further the interests of their clients". According to this commentator, the chief difference between German and American litigators is that the former are mostly 'law adversaries', while the latter are 'law-and-fact adversaries'.[50]

The civil law has its own distinctive legal institutions. Reference may be made, for example, to the institutions of cause, oblique action, abuse of right, the *actio de in rem verso* and *negotiorum gestio* of the Romanistic sub-family. With respect to the Germanic sub-family one could mention institutions such as the abstract real contract, the *clausulae generales*, the concept of the legal act, the notion of unjust enrichment, the doctrine of the collapse of the foundations of a transaction and liability based on *culpa in contrahendo*. One should point out in this connection that the presence of identical legal terms in different legal families does not necessarily imply that such terms are construed in the same manner. For instance, a term that is used in both civil law and common law systems which has different meanings is 'equity.' Although civil law codes contain several references to it,[51] equity is not clearly defined but civil law judges use the concept whenever they do not wish to follow a formal or rigid interpretation of a legal principle. In English law, on the other hand, the term 'equity' is understood to refer to the body of law that evolved separately from the body of law created by the common law courts.[52] Other examples of identical legal terms that operate in different ways in different systems are those of possession and mistake, which are given different juridical meanings in French and English law.

For largely historical reasons, private law (the law governing relations between private citizens) has had a dominant role in the development of legal institutions, concepts and principles in civil law systems. This is manifested by the fact that the classification of civil law systems focuses on the law canvassed by the civil codes, namely private law.[53] Other branches of law, such as public law (the body of rules concerned with the relationship between public bodies and the resolution of disputes in which the state is a party), developed later, largely on the basis of concepts and principles replicated from private law. A characteristic feature of modern civil law is the sharp distinction drawn between private law and public law. Although this distinction is also recognized in common law countries,[54] in civil law systems it

[50] "The German Advance in Civil Procedure", (1985) 52 *U. Chi. L. Rev*., 823-824.

[51] See e.g. Arts 565 and 1135 of the French Civil Code.

[52] As previously observed, in England the rules of equity were shaped by the Courts of Chancery, which became known as the 'courts of equity.'

[53] As in civil law systems legal relationships are to a large extent organized by forms derived from Roman private law, one might say that the conceptual system of Roman law constitutes a kind of pre-knowledge and a important common denominator (*tertium comparationis*) for these systems.

[54] In common law the difference between private and public law is traditionally regarded as a matter pertaining to the type of remedies available when one of the parties to a dispute is a public body. In other words, the common law is seen as indivisible in the sense that it applies to both the

has far greater practical implications since, derived from it, there are two different hierarchies of courts dealing with each of these categories of law.[55]

The sources of law furnish another criterion for distinguishing between legal families. In civil law systems statutory law (legal codes, statutes, decrees and ordinances) have precedence over custom and judicial decisions. An obvious feature of modern civil law is that it is based on the codification of the law. Codification denotes an authoritative statement of the whole law in a coherent and systematic way. As we saw earlier, the tradition of codification is a product of the rationalist tendencies that prevailed in European political philosophy during the eighteenth and nineteenth centuries. Its roots, however, can be traced to the great codification of Roman law by Emperor Justinian in the sixth century AD. One can trace to Justinian the idea that the code overrides all other legal sources, offering a fresh beginning to the law. In contemporary civil law systems, law codes are integrated documents consisting of comprehensive and systematically stated provisions complemented by subsequent legislation. They govern all major branches of law, including civil law, civil procedure, criminal law, criminal procedure and general commercial law. Even though in civil law systems judicial decisions are studied in order to uncover trends, especially in areas in which there is sparse legislation,[56] court decisions have in principle no binding effect on lower courts. However, despite the absence of any formal doctrine of *stare decisis*, there is a strong tendency on the part of civil law judges to follow precedents, in particular those of the higher courts. In light of this one might say that in practice the difference between *stare decisis* (binding precedent) and what is referred to in France as *jurisprudence constante* (the persuasiveness of judicial trend) is constantly being narrowed down.

Ideology is the least useful criterion when distinguishing between civil law and common law, the other major legal family within the Western legal tradition. The

government and the individual citizen, and the same courts deal with matters of both private and public law. The idea of a separate system of public law was developed in England in the latter half of the twentieth century and is associated with the development of the action for judicial review, which is the method for challenging the decisions of public bodies.

[55] It should be noted in this connection that in civil law systems the term 'civil law' is also used to denote the substantive body of private law in contradistinction to commercial law, which is not regulated by a civil code. Commercial law is treated as a distinct body of law that is usually contained in a separate code and administered by a separate court system. It governs, among other things, companies, partnerships, negotiable instruments, trademarks, patents and bankruptcy. In common law systems, on the other hand, no distinction is drawn between civil law and commercial law, the latter being defined in English law as that part of the civil (as opposed to criminal) law that is concerned with rights and duties arising from the supply of goods and services in the way of trade.

[56] Consider, e.g., the administrative practice of the Conseil d'Etat – the supreme administrative court of France.

essence of the philosophical, political, economic and cultural foundations of law in both legal families is too similar for it to be otherwise.[57]

8.2.3 *Concluding Remarks*

Although the oldest legal tradition in the Western world, civil law continues to evolve. In the course of its development it has spawned different sub-traditions and has exported its ideology and legal ideas throughout the world. Furthermore, it has influenced the law of the European Community in structure, style of reasoning and ethos and continues to play an important part in the process of harmonisation of law in Europe. Few would deny that the civil law is gradually converging with the common law, at least to the extent of its growing reliance on case law. Moreover, as already noted, law-making in civil law countries is characterized by a degree of eclecticism: law drafters often look beyond the borders of their own legal family when investigating possible solutions to current legal problems.[58] As the exchange of ideas among civil law, common law and other legal systems gains momentum, some of the differences separating these systems tend to wither away. Nevertheless, significant differences remain. At its heart, civil law remains very much a unique tradition in its own right by virtue of, among other things, its predominant forms of legal reasoning and argumentation, ideas concerning the divisions of law and the organization of justice, reliance on elaborations of statutory and codified precepts,

[57] From a purely juristic point of view there exists a system of civil law and a system of common law, but no system of Western law. But if law is seen as an expression of a particular type of civilization, as a condition for a particular form of social organization based on a particular conception of justice, the phrase 'Western law' expresses the fundamental unity that exists between the civil and common law systems. The observer who views law from the perspective of a political scientist, a political philosopher or a sociologist, will discern the basic connections between the civil law and the common law systems: both systems are underpinned by rationalism, individualism and the liberal conception of social order; in both systems the ideal is a society governed by the 'rule of law'; finally, both systems attach primary importance to the autonomy of law, i.e. the understanding of law as conceptually distinct from custom, morality, religion or politics.

[58] According to U. Mattei, the reception of foreign legal rules is usually the end result of a competition where each legal system provides different rules for the resolution of a specific problem. In a market of a legal culture where rule suppliers are concerned with satisfying demand, ultimately the most efficient rule will be the winner. From the viewpoint of a particular legal system, 'efficient' is whatever makes the legal system work better by lowering transaction costs. Mattei's approach, which represents an example of the more recent trend to combine comparative law and economics, may be taken to constitute a narrower version of functionalism focusing not on social functions in general but on a particular function, namely the efficiency of a legal rule or institution in economic terms. See U. Mattei, "Efficiency in Legal Transplants: An Essay in Comparative Law and Economics", (1994) 14 *International Review of Law and Economics*, 3 ff. U. Mattei and F. Pulitini, "A Competitive Model of Legal Rules", in A. Breton et al (eds), *The Competitive State*, (Dordrecht 1991) 207 ff.

and approaches to legal scholarship and education. The changes in the legal universe that have been taking place in the last few decades, associated with the ongoing tendencies of globalization and regional integration, make it difficult for us to predict how the civil law tradition will evolve or how it will be described by future observers. However, we can be reasonably certain that this oldest and most influential of the Western legal traditions has entered a new phase of development and that it will continue to adapt itself to the challenges of an ever-changing world.