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THE DEVELOPMENT OF THE CONTINENTAL RULE *THROUGH*  
LAW

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*Note: This will be the third chapter in a forthcoming book on the Rule of Law, Economic Development, and Corporate Governance. The first chapter will introduce the book's themes and theses, the second (already on SSRN) gives the history of the development of the English concept of the Rule of Law, and this chapter discusses the development of the similar civil law concept, the Rule through law, otherwise known as Rechtsstaat.*

### **Chapter 3: The Development of the Continental Rule *through* Law** **Nadia E. Nedzel, J.D., LL.M.**

England's common law institutions and hence its rule of law developed in ways consistent with Anglo-Saxon/English culture: focused on individual liberty, equality of application, limited government, separation of powers, and set legal procedure. Similarly, it has been said of the civilian tradition that “[C]ar il n'existe pas de rupture entre le passé et le présent: la vie passée des institutions a façonné leurs caractères actuels” ([B]ecause there is no such thing as a rupture between the past and the present: governmental institutions' past lives have formed their current characters).<sup>1</sup> Nevertheless, while one can recognize the past in the present with regard to continental law, it has changed significantly over time.

In contrast with the common law's maintenance of its Germanic roots, the civilian legal tradition turned away from its Germanic traditions towards ancient Greek and Roman conceptions about politics, law, and philosophy. The major components of the civil law's intellectual heritage include Greek philosophy, Roman law, and Catholic Christian law (i.e. 'canon law'), all of which were ever present and constantly reinterpreted over the centuries.<sup>1</sup> While the civil law adopted (and adapted) a number of things from the English legal system, including separation of powers, post-industrial-revolution commercial law, and the jury (to a very limited extent), the civilian tradition never developed or adopted a conception of the rule **of** law. What it developed was the concept of rule **through** law or *rechtsstaat*.<sup>2</sup> The concepts are similar, but they differ significantly in their underlying views of the relationship between citizen and government and the source of the right to liberty.<sup>3</sup> While both value liberty and equality, they differ in which value should be prioritized, how those values should be protected, and how government and law should be structured – the common law traditionally values liberty over equality and focuses on managing conflict, while the civilian tradition (for understandable historical reasons) emphasizes equality and community over liberty and posits that experts should create laws that prevent or resolve conflict.<sup>4</sup>

In contrast to the limited powers that the English expected from their government, modern continental governments consciously adopted (or re-adopted) as part of written constitutions the concept that the government's responsibility is to make law, rule in accordance with that written law, provide for citizens, and possibly improve both them and their lives. As with the previous chapter, this one will begin with a short history of the development of the (generic European) civilian legal system, followed by insights and descriptions of the nature of this rule through law, otherwise known as *Rechtsstaat*.

#### **I. Ancient Greek and Roman Law and Philosophy**

For the ancient Greeks, law was a general feature of the universe. The ancients did not distinguish between the laws of physics and the laws of human society – both were immutable features of the universe. Law was an immutable feature of the universe that was objective and external to humankind. The responsibility of humans was to (a) discover the content of the law and (b) to conform human behaviour to the law.

Plato, along with his teacher, Socrates, and his student, Aristotle, are regarded as the founders of Western mathematics, science, and philosophy. Plato and Aristotle developed a philosophy about the nature and foundation of law, and they developed principles that still form the basis of all civilian juridical thought: the concept of positive legislation and the use of deductive reasoning.<sup>5</sup>

In his last work, *The Laws*, Plato discussed the primacy of law as necessary for the good order of the city, emphasizing that those laws must be consistent with higher values, respect the will of the gods, and be developed with intelligence and reason. Ideally, Plato believed, a specially educated elite should discover and apply the law. This elite should live a communal life style and not possess private property so that they could make decisions objectively, based on the collective common good rather than private interests.

Plato, Aristotle, and later Cicero all posited that the community's function or goal was to make people good, and law was discoverable through reason. The individual was not important, law's purpose was the ultimate collective good of the community. This became a clear model for Christian canon and later natural law: in the middle ages, the community of Catholic clerics was considered to be a specially educated (both intellectually and morally) elite who lived a communal life style, possessed no personal private property, and thought only of the collective common good, as ordained by God. As the state gradually became more secular in nature, the natural law thinkers of the Renaissance similarly posited that law should be promulgated by specially educated legal scholars who would ensure that it remained coherent and deductively organized. Civil law still relies heavily on legal scholars in the development of law.

### *Greek Roots Shared by Civil and Common Law*

Starting with Plato and inspired by the Pythagoreans' love of geometry, law was conceived as a closed and comprehensive deductive system that could theoretically be reduced to a few axioms from which all subsequent legal principles could be logically or rationally deduced. To this day, in both common law and civil law, Aristotle's syllogism (also known as the mathematical concept of transitivity) forms the basis of all legal arguments, whether common law or civil law:

- A. All men are mortal,
- B. Socrates is a man,
- C. Therefore, Socrates is Mortal.

If A. (the major premise) and B. (the minor premise) are true, then C. (the conclusion) must follow. As used in law, A. is the statement of law, B. are the facts to be applied to the law, and C. is the conclusion. To use as an example a case the author worked on under United States law, a U.S. federal statute proclaimed that "the use or carrying of a firearm in connection with a drug trafficking crime is itself a crime." Mr. Gonzales was arrested while dealing drugs and

admitted both that he was dealing and that he had a gun in his boot at the time of his arrest; nevertheless, he argued he was not guilty of the behaviour criminalized by the statute. A civilian attorney might first check to see if there is any legislation defining the terms, and then simply verify that each element of the crime is present in Mr. Gonzales's factual situation: 1. He was dealing drugs, 2. he had a gun with him at the time, so C. he should be found guilty of this crime. The issue with this analysis is that it does not deal with the question of whether he "used" or "carried" the gun and if the phrase "in connect with" changes the analysis. Assuming the civilian attorney perceives that this is an issue, he will probably research a treatise written by a law professor to see how those two terms are defined. His decision could go either way, depending on what he found and personal opinion: if he believes that storing a gun in a boot is not "carrying" the gun while dealing, he might conclude that Gonzales is not guilty.

A common law attorney's reasoning is more detailed because it involves both deductive and inductive elements.<sup>6</sup> She would research to see if the terms are defined judicially. As it turns out, they were: "Use" included shooting, hitting with the gun, or brandishing it; "Carrying" was defined as "more than mere possession, the gun must be under the defendant's dominion and control." Comparing this to the given facts, Mr. Gonzales was not using the gun, but it is still not clear whether he was "carrying" it.

At this point, the common law attorney uses two more tools: purposive interpretation and analogy. Looking at the statute and possibly researching legislative history, she would reason that the purpose and underlying policy of the statute is to discourage drug dealers from carrying guns because they tend to use them to enforce their deals, resulting in more shootings, injuries, and death. Researching cases, she would find that carrying does not include instances where the gun was in a closet at the defendant's home while he was out dealing drugs; however, it did apply where the defendant was sitting on the gun while dealing drugs at his kitchen table. Comparing these factual situations to Mr. Gonzales's, it becomes clear that his situation is more like the sitting-on-the-gun case than like the gun-in-the-closet case because he could reach it quickly if someone tried to rob him of drugs or money. Consequently, Mr Gonzales with the gun in his boot is just as guilty as the other defendant with the gun under his 'butt.'

Civil law systems vary widely, while attorneys in some civil law systems might research 'jurisprudence' (i.e. judicial decisions) for further interpretation of a statute, civilian decisions are not as detailed as common law and rarely include specific detailed facts, so analogy to other decisions is not likely to be used. Common law and civil law both employ deductive reasoning in addressing legal problems, but the civilian tradition goes beyond that to apply deductive organization to the content and definition of law itself, while the common law does not.<sup>2</sup>

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<sup>2</sup> In addition to sharing elements of legal methodology, Greek roots can also be seen in both the rule of law and *rechtsstaat*. The Athenian concept *isonomia* referred to a state where the laws were equal for both noblemen and baseborn, and was contrasted with the arbitrary rule of tyrants.<sup>2</sup> Aristotle condemns democracy where everything is determined by a majority vote and not by a law, because "for, where government is not in the laws, then there is no free state, for the law ought to be supreme over all things."<sup>2</sup> Hayek asserted that he found evidence that the modern use of the phrase 'government by law and not by men' derives directly from this statement of Aristotle's.

While the concepts of equal application of the laws and the supremacy of law can both be traced back to Ancient Greece, with enormous respect for Hayek, a single statement made by

The general consensus of historians is that the ancients (both Greek and Roman) did not know liberty in the sense of individual liberty. When the concept of liberty was used in ancient Greece or Rome, it was almost exclusively in the context of whether or not the city-state had been conquered by an outside force.

### *Aristotle's Teleology*

Like his teacher, Plato, Aristotle posited that every entity in the universe has a built-in status/goal or *telos*. Human beings achieve their *telos* by playing their appropriate social roles – a pauper could not become a prince because that was not his appointed role. The universe was considered to be one great chain of being based on static status. A number of consequences follow from this. First, civilian thought tries to organize law into such a hierarchy, while common law finds that to be neither possible nor particularly helpful.

For Aristotle, the greatest and all-subsuming institution was the state (*polis*); and it was the state's duty to make men good. The state imposed strict religious, social, and political discipline on its members, which it considered only by status as slave, free, citizen, or alien. It is but a short step from here to the medieval Catholic view, as articulated by Thomas Aquinas, that the greatest and all-subsuming institution was the Church and that it was the duty of the Church and the state to make men good -- practices ranging from confession to the burning of heretics were understood to restore humans to their true *telos*, the achievement of eternal salvation in the next life.

### *Roman Law and Philosophy*

The Roman conception of law was more nuanced than the Greek. The *jurisconsults* (Roman legal specialists) further developed the deductive, logical methodology that characterizes modern civilian legal theory.<sup>7</sup> Their method, like that of the Greek philosophers, consisted of defining legal concepts with precision, analyzing them rigorously in terms of the functions they served, and then classifying them into an ordered hierarchy.<sup>8</sup> The Romans did not feel the need to keep a record of specific decisions as precedents or as a record of judicial decisions. In fact, judicial decisions were unimportant because each case was decided anew directly from the laws of the state. To this day (though it varies widely), civilian legal systems are generally characterized by their view that individual judicial decisions are unimportant for all save the parties involved, though they may consider trends in decisions as indicative of persuasive jurisprudence.

In the sixth century, Roman Emperor Justinian I (a Christian) wanted to create a compendium of law to the future exclusion of all other sources and ordered the preparation of a *digest* of Roman Law.<sup>9</sup> The result, the *Corpus Juris Civilis*, was issued in 529 AD.<sup>10</sup> The Western empire officially fell in 476, due to invasion by Germanic tribes and financial problems, so while Justinian's code applied to Byzantine portion of the Roman Empire, he was unable to introduce it to the Western Empire. *Justinian's Digest*, as it is now known, was lost to the West until it was rediscovered and reintroduced during the twelfth century at the University of Bologna. Aristotle's work was similarly reintroduced in the following century and influenced the

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one philosopher does not demonstrate that it was an influential part of the legal culture or common expectation.

development of both Roman and canon law significantly. Modern civil law codes still show traits that are characteristic of both sources: a focus on private law, systematic classification and arrangement of subject matter, and an almost mathematical approach in handling legal concepts.<sup>11</sup>

## **II. The Germanic Tribes**

Each of the Germanic tribes (Visigoth, Frankish, Lombards, Normans, Burgundians) that invaded the Western Roman Empire had their own laws, but they shared some commonalities.<sup>12</sup> Family units formed closely knit clans and held property in common. Wills were unknown, and women had no individual rights. Private reprisal was a legitimate response to any personal offense, and trials (though rare) were mostly conducted on the basis of combat (England preferred ordeal). Nevertheless, while they had some commonalities, legal customs differed significantly among the various tribes. The incursions of many migrants from different Germanic tribes in the fifth and sixth centuries brought complex legal and administrative problems: often the conquering rulers were a minority in control of territories with vastly more numerous native populations and a multiplicity of different laws and customs.

The tribes that settled in Europe as allies of the Roman Empire were in principle subordinate to the emperor. At the end of the fifth century, Gaul was divided into a multiplicity of smaller kingdoms with different traditions. Gallic tribes were ruled by a warrior-chief who imposed his military power and passed his authority on to his descendants. The warrior-chief exercised all property rights over his kingdom and expected absolute loyalty from his subjects. In return, he protected them, dispensed justice, and granted them a share of the spoils when he conquered other kingdoms.<sup>13</sup> As Tacitus described it, the law employed by these Germanic tribes was customary, unwritten, and communally established. Legal proceedings were conducted similarly. Thus, law was based on a collective as the originator of rules.<sup>14</sup>

The Gallic tribes were quickly assimilated by the Frankish kingdoms, i.e. tribes who migrated from northern Germany in the second to fifth centuries and settled there, amalgamating both Roman and Germanic (Gallic) traditions. They usually allowed Roman law to be retained for the use of the local native populace (especially with regard to private law matters), and some kings even drafted their own Roman-influenced codes.<sup>15</sup> In other instances, they used the personal principle, which meant that a member of a particular tribe was subject to the customary law of his ethnic group of origin. This meant that more than one system of law could apply in the same territory, and it quickly became difficult to determine both which law should apply and what, exactly, that law was. Consequently, the impractical personal principle was replaced by canon law as various ethnic groups became intermingled and Christianized. Canon law, which was almost entirely based on Roman law, was given priority because of the power and strength of the Church, which enjoyed a virtual monopoly over education, including legal education.<sup>16</sup>

## **III. Growth of the Catholic Church and the Holy Roman Empire**

The establishment of Christianity in the last centuries of the Roman empire profoundly influenced European cultural values, law, and legal institutions.<sup>17</sup> Emperor Theodosius declared the Catholic religion to be the only religion recognised and admitted within the empire in 380 (140 years before Justinian's Digest). Rome, which had been polytheistic, became a theocracy. Some of the substantive legal changes include making marriage insoluble, the requirement that

loans be repaid without interest, and rejection of retaliation as a justified response to an offense (though the latter took a long while to actually be enforced).

The last Roman Emperors incorporated the church into Rome's bureaucratic machinery, appointing a bishop for every province, and an archbishop for each diocese, and assigning judicial and administrative as well as spiritual duties to these church officials. The Catholic Church therefore grew increasingly important –after two centuries of ferocious persecution and less than a century of toleration, it became the Roman Empire's official religion.

Between 476 and 800, many bishops clung on to the secular administrative and judicial power they had gained during the waning of the western Roman Empire.<sup>18</sup> The Church claimed jurisdiction over any disputes involving the clergy, and also claimed jurisdiction over disputes involving marriage, family law, and serious sins – the latter category grew significantly over time as the Church tried to extend its influence. Furthermore, the Church developed a tradition of monasticism, discipline, and both manual and intellectual labor. It developed its own law and legal system, issuing legislation in the form of decretals (by the popes) and *canones* (by the universal councils). Both forms of law were compiled and ultimately became referred to collectively as *canon law*. Monks and priests transcribed thousands of manuscripts of Greek and Roman texts by hand (the printing press had not yet been invented),<sup>19</sup> and were often the only literate population. They monopolised schooling, writing, and the knowledge and use of Latin, and kings began to depend on them to help with the administration of their kingdoms.

Pope Gregory I (elected in 590) and other popes' alliance with Frankish kings allowed them to expand the Church's influence and bureaucracy and strengthen the papacy's power in a complicated reciprocal relationship.<sup>20</sup> The Frankish kings needed the clergy's co-operation in order to administer their empires. In return for its help, the church obligated the kings to protect the church and its property and suppress paganism – the king was the secular guardian of the Church and could involve himself in ecclesiastical matters in order to promote the faith. While this benefitted the church, it also threatened its autonomy.<sup>21</sup> The same could be said in reverse: that having clergy in control of their administrations threatened the king's power, so they tried to control who the Church appointed to their bishoprics.

In the 8<sup>th</sup> Century, Frankish king Charles Martel (Charlemagne), the first Carolingian king, conquered most of western Europe, including modern-day France, Germany, Italy, Austria, Switzerland, Benelux, and Hungary, forcibly converting large populations to Christianity. Pope Leo II subsequently crowned Charlemagne Emperor of the Holy Roman Empire in 800 A.D. – in an effort to show the Eastern remnants of the Roman Empire that the West had an emperor of equal standing (and to exert control over Charlemagne).

Charlemagne did not see it that way – he and his son Louis the Pious saw the coronation as a simple liturgical act recognizing that God had appointed him emperor – i.e. he believed he ruled by divine right. In theory, his status was above that of other Catholic kings, but in practice, an Emperor of Rome was only as strong as his army and various alliances made him. The title "Holy Roman Empire" lasted until 1850 (more on this later), though the empire started to lose its power early on when it was divided into three parts after Louis the Pious. Nevertheless, Charlemagne and Louis strengthened the unity of the church and disseminated the faith, spreading the church's influence though-out the Carolingian empire.

With the rediscovery and translation of Ancient Greek texts, thirteenth century Catholic priest Thomas Aquinas combined Aristotle's theories on science and philosophy with his Christian



faith, and Catholic jurisprudential theory has generally followed those principles since then.<sup>22</sup>The Catholic Church's Catechism still cites Aquinas in defining law as "an ordinance of reason for the common good, promulgated by the one who is in charge of the community."<sup>23</sup>According to Aquinas's *Summa Theologica*, human law is influenced by natural law (the eternal law of God discovered by human reason), but adapted to particular local circumstances.<sup>24</sup> Thus, Aquinas (much like Aristotle) believed the world was teleological, that law was created by the government or governmental elites, and that it should be based on deductive reasoning. He saw little separation between church and state, leading to the theory of the two swords: the duality between king and pope, between the secular and the spiritual.<sup>25</sup> Though it has long since lost the battle over secular rule, the Catholic church still regards itself as having the oldest existing legal system in Europe.

#### IV. Feudal and Seigniorial Legal and Governmental Systems

##### *Feudalism*

Charlemagne's governing habits grew into the feudal tradition. He established the custom that laws could be made at a central or higher level and imposed on the populace rather than be made by the folk themselves.<sup>26</sup> Consequently, local and regional rulers became the source of law rather than the people themselves. The tribal law-making assemblies disappeared, as did the conception of the law of the people, to be replaced by the conception that law was issued by a ruler and imposed on the people.

Charlemagne wanted to secure his power over the leading members of his empire (nobility, landowners, administrators, warriors), so he varied the Frankish tradition of discharging his obligation to provide maintenance for his vassals: rather than giving property to those who had won battles for him, he loaned it to them.<sup>27</sup> They would swear an oath of fidelity and in return would be given the use of a *beneficium* of land (a *fiefdom*), in exchange for military, legal, and tax-collecting duties.<sup>28</sup> A count's military duty was to defend his fiefdom against external attack with the assistance of his own men (knights and vassals) and freemen and support his liege when called upon to do so with either military service or by paying so that someone could serve in his stead. His legal duties included collecting taxes and presiding over the local court or *mallos*, applying local customary law.

Charlemagne used this scheme across his empire. This feudal contract was personal in nature, so it did not give the king any direct claims on the vassals of his vassals – as it was later said, 'my vassal's vassal is NOT my vassal.' As long as the king was a strong ruler such as Charlemagne, this system worked to his advantage by supporting central authority and providing necessary finances for a large, well-trained cavalry.

This changed radically in the ninth and tenth centuries, because whenever a king showed weakness, his chief vassals started to find ways to increase their own power. The pledge of fealty to the liege faded, and the feudal contract became primarily a basis for holding office and land as fiefs became hereditary and vassals began to enter into feudal compacts with more than one liege at the same time.<sup>29</sup> The relationship began to work against kings' centralized power as the leading vassals neglected their duties and instead built up power in and around their fiefs.<sup>30</sup> Consequently, between 888 and 930, what had been Charlemagne's empire fragmented further. His successors ceded control to counts and dukes who defended their smaller territories from invading incursions.

By the eleventh century, in what eventually became Germany, instead of a centrally organized legal system, though the local lord pronounced judgments, customary law was largely administered and developed by law-finders (*Schöffen*) who determined what the law was from the inherited body of law of the ethnic group and advised the lord.<sup>31</sup> In practice, the law that was applied was inconsistent and coloured by the lord or *Schöffen*'s personal prejudices. When people chose to go to the Church to decide disputes, canon law applied. Even in twelfth century France, local customary law generally applied in local courts. On the occasions when an injured party actually resorted to the court, judicial procedures were hardly more than authorized vendettas. For example, the municipal charter of Artois stipulated that the reprisal for wilful murder was to assign the guilty man's property to his lord, and his person to the kinsmen of his victim so that they could execute him.<sup>32</sup>

#### *Seigniorial System – serfdom*

The purpose of the feudal system was military and administrative, but the seigniorial system which operated alongside of it was based on economics. The Roman elite had withdrawn from towns and established rural estates with large numbers of slaves tilling the ground.<sup>33</sup> The Germanic conquerors left this system intact, but under the influence of both feudalism and Christianity, the slaves obtained more rights and became serfs. At the same time, free farmers relinquished ownership of their land and freedom in favour of local lords—and most of them fell into serfdom as well, though they kept tenure over their land. Serfs would be allowed to farm the land over which they had tenure in exchange for a fixed, annual tribute owed to their lord. They often had other rights as well: they could harvest a certain amount of hay from the common meadow, a certain amount of wood from the forest, and had the right to use a house as well. There were two kinds of serfs, some were held in bondage only as long as they held on to their tenure. They were required to work the lord's own lands for a certain number of days and pay a small tax to reflect their serfdom. If they gave up the tenure, they became free again and could leave the manor. Those serfs who were descendants of slaves were bound not just to the land, but also to the lord and could not leave the manor without the lord's consent.<sup>34</sup>

## **V. The Growth of the *Ius Commune*: i.e. the (Re-)Discovery of Roman Law**

Three discoveries brought tremendous changes to 13-16<sup>th</sup> Century European society: the rediscovery of Roman law, the discovery, conquering, and colonization of the Western Hemisphere, and the invention of the printing press. This time period was just as foundational for the development of *Rechtsstaat* on the Continent as it was for the development of the rule of law in England, and while the two traditions borrowed elements back and forth, underlying philosophical, social, and cultural differences not only remained, but also led these two related legal systems in different directions.

#### *The (Re)birth of Justinian's Digest and fall of Feudalism*

However or where-ever it was rediscovered, by the beginning of the twelfth century, the University at Bologna was teaching Justinian's *Digest* to students from all over Europe, and it remained the capital of civilian legal education up until the thirteenth century.<sup>35</sup> This body of

law became known as the *ius commune*, or common law of the continent, meaning that it was the shared body of law. The *ius commune* was not by any means the exclusive source of law nor was it consistently applied, in contrast to England's common law. Nevertheless, after Bologna, other cities added universities because of the high demand for trained jurists.<sup>36</sup> Thousands upon thousands of young men throughout Europe studied Roman law for several years at a time far from home at great personal and financial expense.<sup>37</sup> Within a hundred years of the founding of the University of Bologna,

trained lawyers seemed to have taken over the Western church and clergymen at every level -- from country rectors, rural deans, cathedral canons, archdeacons, bishops, archbishops, cardinals, even popes -- belonged to their ranks.<sup>38</sup>

Lawyers who had completed a course of training in Roman law began to call themselves "Doctor of Laws" by 1200, as opposed to the title "Master of Decrees" which indicated a lawyer who had completed a course of study in canon law.<sup>39</sup>

The reasons for the great demand for Roman-law trained jurists were complicated. Some legal scholars posit that Roman law was perceived as intellectually superior to local law,<sup>40</sup> or that it filled large gaps in local legal systems.<sup>41</sup> Still others posit that the Holy Roman Emperors considered themselves heirs of the Romans, but were in fact weak, and saw the adoption of Roman law as further legitimation of their claim to power; or that a demand for those who could write statutes in Latin developed, or that the new "inquisitorial" trial developed by the church was perceived as more efficient, or that courts could take advantage of the university professors' training in law to help them decide cases.<sup>42</sup>

A number of scholars agree that European kings rather than the Holy Roman Emperors spread the demand because they saw Roman law as a way to increase their prestige and fortify their power over their populace (by displacing custom), and because it increased their power against the church, the Emperor, and the counts below.<sup>43</sup> The Digest affirms in a number of provisions that an emperor or king has complete law-making power, thus providing authority for absolute monarchy: "*Quot principi placuit legis habet vigorem*" ("what the prince likes has the force of law")<sup>44</sup> The new jurists amalgamated components of Roman law, Germanic, Christian, and feudal traditions to develop a doctrine that was music to the sovereigns' ears: a myth of kingship, which enabled kings to regain authority as divinely-appointed and absolute rulers. Along with the myth of kingship, the canonical model of hierarchical organization of justice helped centralize power, as well as feudal law, along with war and marital alliances that were the basic state-building tools. Before 1200, princes only had feudal powers to assert authority because the power of the liege was limited to those who swore an oath to him. Furthermore, that oath obligated the lord towards the vassal, and the prince could not claim that he had any specially-ordained birth-right. This all changed after 1200, as kings began to claim royal rights and prerogatives relating to defence of the realm, taxation, minting of money, conscription, and high justice.<sup>45</sup>

This new definition of kingship led to the expansion, centralization, and bureaucratisation of government as these divinely-sanctioned kings needed councillors to administer their kingdoms, and those councillors were mostly jurists and clergy who were appointed and paid by the king. Because they lacked a noble background or personal power base, they were often completely dependent on him for political power and social standing. Thus, in France, the *noblesse de robe* gradually supplanted the *noblesse d'épée*. The first such jurists were from ordinary walks of life, and so the study of law became popular as a pathway to success. As it

became more important, the field eventually became dominated by noblemen – though it still remained a pathway to prosperity. Gradually, not only powerful families, great churches, and wealthy monasteries turned to the revived Roman law and new legal techniques for dispute resolution, but so did craftsmen, the minor clergy, county communities, and peasants from small villages – if they were able to pay for the services of a professional jurist.<sup>46</sup>

Roman law spread quickly first in Italy, and from there unevenly across continental Europe. In Germany, the separate development of local and commercial laws continued until about 1500, after which Roman law was adopted to such an extent that it almost completely overwhelmed German customary law. The Germanic concept that the law belonged to the people and was discovered by assembly no longer existed.<sup>47</sup> Southern France adopted Roman law before Northern France did, but even in Northern France, Roman law was used where the local ‘*coutume*’ did not apply.

As before, Church courts, which used written Roman procedural law as well as some Roman substantive law, provided reasonably certain dispute resolution and remained a popular legal forum. If a question concerning a legal dispute was phrased in such a way as to introduce an element of concern to the church, a church could then claim jurisdiction – for example, an offending clause in a contract could be presented as a sinful question that needed resolution by a church court. Nevertheless, there was no centralized judicial system in Continental Europe, no homogeneous culture, and no singular and internally-consistent single source of law, as there was in England.

Because the sources of the *Corpus Juris Civilis* were archaic and incomplete even when rediscovered in the twelfth century, legal scholars began to write explanations in the margins of the texts. Over time, these glossators’ explanations and adaptations to current questions became longer and longer, often framed as a series of hypothetical questions and containing arguments on both sides in order to reach a practical understanding.<sup>48</sup> Just like the personal principle, this initial glossators’ method quickly became bulky and unworkable. Inspired by Aristotle’s syllogism, prominent jurists at Orleans abandoned the gloss in favor of shorter, better developed and less literal commentary that tried to reorganize the incomplete portions of the digest into its original order and make greater sense of them.

### *The Discovery of the Western Hemisphere and fall of Feudalism*

Spain’s conquering and colonization of the Western Hemisphere brought an influx of gold and silver, which immediate wealth not only strengthened Spain as a world power, but also fed into the fall of feudalism and rise of mercantilism as other kings sought to follow Spain’s lead, (as will be discussed in more detail in subsequent chapters).<sup>49</sup> As a result, the entire focus of society changed. The scholasticism of the twelfth and thirteenth century glossators gave way to humanism. The humanists rejected the narrow pedantry of medieval scholastics and aimed to create a literate citizenry better able to engage in civic life. They believed that the ability to write with eloquence and clarity was fundamental and led to virtuous, prudent civic actions, and the proper subjects to study were grammar, rhetoric, history, poetry, and moral philosophy. Legal humanists disdained the glossators work, regarding it as a malignant cancer on the text of the *ius commune*. However, they still believed that practical instruction for most of political and social life could still best be found in Greek and Roman sources.<sup>50</sup>

By the middle of the fifteenth century, the increasing availability of books furthered the significant societal changes that were already taking place. Johannes Guttenburg, a goldsmith

living in the then loosely-allied states of the Holy Roman Empire, invented the printing press in 1440. The first book he printed was the Bible, so those who could read Latin could now read it for themselves. The mechanization of printing enabled mass production of books and spread to over two hundred European cities within several decades. By 1500, printing presses had produced more than two million volumes. The vastly increased flow of information helped the Humanist movement's aim to spread literacy and acted as a catalyst for societal changes, including the decline of both feudalism and the Catholic Church. By 1481, the Netherlands had printing shops in 21 cities and towns, while Italy and Germany each had shops in about 40 towns at that time. Printing presses were also active in Venice, Paris, Krakow, and London. Scholars have estimated that by 1500, there were 1000 printing presses in operation in Western Europe, and 8 million books had been printed.<sup>51</sup>

While the focus in law remained on deductive thought and teleology, the humanists further developed two concepts that fed into the societal changes 1) the state's independence from the church, and 2) the belief that there must be some political entity or some sovereign power such as a king who has the final word from which there is no appeal, and that there can only be one sovereign.<sup>52</sup> The biggest societal, governmental, and legal changes, however, were brought by the Protestant Reformation and the turmoil wrought by a combination of religious intolerance and war. Two of the most influential humanists in whose thoughts about the then-current state of the Church and society one can see the forthcoming changes to be brought by the Protestant Reformation and from there to the Enlightenment movement were Sir Thomas More and Desiderius Erasmus Roterodamus ("Erasmus").

#### *Sir Thomas More*

Sir Thomas More (1478-1535) was an English author, statesman, lawyer, and social philosopher. Educated in law at Lincoln's Inn, he told his Dutch friend Erasmus that he wanted to become a monk. As a staunch Catholic, not only did he object to the Protestant Reformation (which was then in its infancy), but as counsellor to Henry VIII, he also opposed the King's separation from the Church, refused to acknowledge the annulment of Henry VIII's marriage to Catherine of Aragon, and refused to acknowledge him as head of the Anglican Church. The latter led to his being tried and convicted of treason and beheaded.

More's *Utopia* was written and published in the Netherlands by Erasmus in 1516. It was unknown in England until 1551 (16 years after his death), and thus much more influential on the Continent than in his home country. A novel about a fictional country, Book I scathingly criticized feudalism as having caused friction among European states, contrasting it with the description in Book II of the perfectly orderly and reasonable arrangements of the fictional Utopia. Utopia had no lawyers (because the law was so simple), and little need for them because all social gatherings were in public view, so participants would feel pressured to behave well. Additionally, there was no private ownership in Utopia, men and women were educated alike, and (but for atheism), all religions were tolerated. While Book I's criticisms fuelled the fall of feudalism, *Utopia* displays the classic heritage of the humanists with its concept of a perfect society, gave a vision of the religious toleration that later became dominant in European culture, and it led to a belief that political and social institutions as well as human beings can be moulded to conform with a utopian ideal. More's vision of the perfect society is almost a preview of Karl Marx's vision.

#### *Desiderius Erasmus Roterodamus ("Erasmus")*

Erasmus (1466-1536) was a humanist, theologian, social critic, and Catholic priest who met and befriended Thomas More at Cambridge's Queen's College. He prepared a new version of the New Testament and supported religious toleration, piety, and respect for the Pope's authority. Erasmus, like most humanists, was convinced that a king's proper function was to rule benevolently, encourage goodness in his subjects, act honourably and sincerely, and behave as a servant to his people, as shown in his work written for the young King Charles of Spain, *Institutio Principis Christiani* (1516) (The Education of a Christian Prince). This work contrasted with Niccolò Machiavelli's *The Prince*, published three years earlier, in which Machiavelli argued that the state does not exist to promote its citizens' goodness, and though it is good to be loved, it is better for a ruler to be feared. The purpose of the state is to survive and expand, and a prince is good insofar as he makes that happen.

While Machiavelli's view was innovative, Erasmus's conception of a good ruler was standard for the times. Nevertheless, his description of the proper relationship between the individual and religion was new and foresaw Protestant individualism. He urged the individual to model his or her life on Christ's example and commune directly with Christ, abandoning the whole façade of what he saw as the false piety of the medieval Catholic Church with its obsession with religious images, the cult of saints, pilgrimages, fasting, recital of prayers in Latin, and preoccupation with ceremony and ritual.<sup>53</sup> He idealized the literate individual who immersed himself in the sacred texts and who carried his own responsibility for finding Christ in his or her life. This focus on individual responsibility became a traditional Protestant theme, as opposed to Catholic obedience to the Church's higher power. This view spread so rapidly that sixteenth century Franciscans came to say that "Erasmus laid the eggs that Luther hatched."

## VI. Martin Luther, the Protestant Reformation, and Absolute Monarchy

While the printing press, the rediscovery of Justinian's Digest, and the discovery of the Western Hemisphere certainly brought changes to Europe, some of the most significant changes were brought by the Reformation. Just as the feudal period can be characterized by the rise of Christianity, the Renaissance can be distinguished by the fall of feudalism and the increasing secularization of law and government. Martin Luther published and allegedly posted 95 complaints against the Catholic church on the door of the Wittenburg Castle Church in 1517. Within weeks, they were translated from Latin into German, copied, printed, and distributed across Germany and from there spread throughout northern Europe. Luther objected to the Church's selling of indulgences, claimed that the papacy was evil, regarded the Bible as the only source of divinely revealed knowledge from God, and translated the Bible from Latin into the vernacular, thus making it more accessible.

While Erasmus agreed with much of Luther's criticism, he declined Luther's invitation to leave the Church and was afraid that the Protestants' beliefs would lead to revolution and war.<sup>54</sup> Erasmus's fears proved to be justified. The devastating religious and political wars that followed lasted through most of the seventeenth century.

In 1521, Charles V, Holy Roman Emperor and devout Catholic, condemned Luther and burned his books.<sup>55</sup> The subsequent violence began in Germany in 1524-1525 (part of the now loosely-allied Hapsburg-ruled Holy Roman Empire), led by the more radical of Luther's followers: peasants objected to both the Church and their loss of feudal rights and increased taxes. The

revolt spread from Germany to Switzerland and Austria. It was stopped by various princes at a cost of approximately 100,000 lives, but only temporarily.

Charles V (1519-1556) was King of Spain, King of Italy, King of Germany, Archduke of Austria. His domain also included parts of Central Europe, large parts of the Americas and Asia. The one thing Charles V never had was peace: in addition to fighting Lutheranism, he also repelled Ottoman Emperor Suleiman's attack on Vienna, he fought attacks by French kings Francois I and Henry II, and he even warred with the Pope. Tired of fighting and low on money, in 1555, Charles V signed the Peace of Augsburg, agreeing that the 224 rulers of German states could choose the religion (Lutheranism or Catholicism) of their choice and compel their subjects to follow it.

While Charles V eventually gave up trying to prevent the rise of Lutheranism in Germany, he and his son and successor Phillip II thought they could defeat the spread of another protestant faith, Calvinism, in the Netherlands.<sup>56</sup> However, neither father nor son understood the strength of the Netherlands's provincial institutions, its economy, or the difference in culture between the northern and southern parts of the Netherlands: The northern part ultimately became Protestant and Dutch-speaking Holland, while the south became Catholic and French-speaking Brussels.<sup>57</sup> Nor did they realize that the Reformation was so widespread through all segments of society that that there was no possibility of suppressing it.

Apparently tired of fighting, Charles V abdicated in 1556 and retreated to a monastery. His empire was then divided into two: his Catholic brother Ferdinand II ruled Austria, while his fervently Catholic son, Philip II, ruled Spain, the Spanish Netherlands (what was to become Belgium, Luxembourg, and Holland), parts of Italy, and other overseas holdings. In 1559 Phillip picked up where his father left off. Charles had imposed heavy new taxes, recruiting, billeting, and provisions on the Dutch provinces in order to fund his wars with France. Phillip taxed them so heavily that it caused starvation and tried again to repress Protestantism by means of an inquisition-like Council of Troubles (known by the Dutch as the Council of Blood) which sentenced thousands to death for heresy (8,950 were tried, 1,000 executed).<sup>58</sup>

The resulting Dutch Revolt, led initially by wealthy nobleman and *Stadholder* William the Silent, started the 80-years' war (1568-1648). Protestant German kings provided the Dutch with funding, and Protestant Elizabeth I of England provided some troops -- earning Philip's enmity and leading eventually to the attack on England by the Spanish Armada. Wins, losses, and tragedy followed, until the Netherlands declared itself independent in 1581 when a confederation of Dutch states, by means of its medieval parliamentary assembly, declared itself free from Hapsburg control. The delegates or regents of the resulting governing body, the *States General*, were not elected, but chosen by small groups of magistrates who governed the various cities.<sup>59</sup>

Spain's ability to conduct the 80-year war in the Netherlands (1568-1648) was affected by its participation in the 30-year war in Central Europe (1618-1648), which began when the Peace of Augsburg failed. It was the last war of the Reformation, but also the worst. It began in what is now the Czech Republic, when the Protestant populace revolted against Catholic Emperor Ferdinand II -- the populace refused to follow the dictates of the Peace of Augsburg wherein the local king got to dictate religion. Most of the rest of Europe joined in on one side or another in efforts to defend one religion or the other and seize territory from either Ferdinand or Philip. The conflict ended not with anyone's victory, but with exhaustion and the Peace of Westphalia. By the end of the 30 years' war, Europe was devastated by 8 million fatalities caused by

violence, famine, and plague.

The religious and political changes of 30 years' war brought similar changes in the universities. In Germany, scholars developed different legal models which interpreted the constitution of the Holy Roman Empire differently, began to rethink how knowledge was organized, and separated the study of politics from that of jurisprudence.<sup>60</sup> The biggest changes to legal thought began in the Dutch Republic, which flourished despite its 80-years' war.

### *The Rise of the Dutch Republic and Natural Law*

The Dutch Reformation was different from that of Germany, Switzerland, Britain, and Scandinavia because it rose from the bottom upwards instead of spreading from government (i.e. from the King) downward.<sup>61</sup> The Catholic Church was already so weakened by the early sixteenth century that its very survival was doubtful in Holland: there were few bishops, most of them belonged to leading noble families, and even they were dissatisfied politically with the Papacy. Clergymen were poorly trained, often absent, and rarely kept their vows of celibacy and abstinence.<sup>62</sup> Consequently, although it had a lot of wealth in the Netherlands, the Church had lost the populace's respect. The clergy was widely and openly criticised, and not just by Erasmus.<sup>63</sup> Early sixteenth century society had been transformed by humanism, the spread of books, and the education and piety that both brought.<sup>64</sup> By the 1520s and 1530s, humanism had revolutionized the *rederijkerskamer* (amateur theatre societies), changing the prior Catholic-oriented pious miracle and mystery plays into morality plays heavily permeated with Protestant ideas.<sup>65</sup> Calvinism, originally founded by Frenchman John Calvin, reached Holland in the 1540s and the new values fed into the Dutch republic's economy.

### *Calvinism & the Seeds of Capitalism*

The Dutch values of individuality and hard work grew out of the Calvinist religion. John Calvin's *Institutes of the Christian Religion* taught that there were some 'outward signs' of God's preference and hence one's eventual fate such as particular skills, success in business, etc. In the course of its development, Calvinism morphed this into the idea that an individual should prove his or her faith through worldly activity. This led to the concept of work as a "calling," i.e. something one did as an outward expression of faith, as opposed to simply doing it for money:

[O]ne's duty in a calling, is what is most characteristic of the social ethic of capitalistic culture and is in a sense the fundamental basis of it. It is an obligation which the individual is supposed to feel and does feel towards the content of his professional activity, no matter in what it consists, in particular no matter whether it appears on the surface as a utilization of his personal powers. Or only of his material possessions (as capital).<sup>66</sup>

### *Absolute Monarchy*

The weakening of the Catholic Church and feudal law, accompanied by the spread of Roman law removed the prior restraints on centralized government, leading to the rise of a number of seventeenth- and eighteenth-century European kings who claimed that they were divinely ordained and had absolute authority in their countries, above and beyond any laws or popular assemblies. The claim may or may not have been true --some historians claim that in fact, kings never actually had absolute authority because their powers were limited by both their ministers and their pocketbooks<sup>67</sup>-- but the fact remains that many European kings *claimed* they had such



authority.

Among the most notable absolute monarchs were Phillip II of Spain; Louis XIV of France (who famously stated “*L’État, c’est Moi!*”); the *Kongeloven* (King’s Law) of Denmark-Norway (1665) which declared that the Monarch would be “considered the most perfect & supreme person on the Earth by all his subjects”; Frederick William of Brandenburg-Prussia; Tsars Peter I and Catherine II of Russia – and of course, James I and Charles I of England (who were disabused of that notion either by Parliament or by execution, respectively).

A ruler is considered absolute if he does not have to follow the dictates of a popular assembly, if she can arbitrarily declare and enforce new laws, and if he or she can raise taxes without approval of another body. Neither James I nor Charles I could do these things, but the other monarchs listed above certainly could. Cardinal Richelieu of France (Cardinal under Louis XIII) had vowed to make royal power supreme in France, and Louis XIV was able to build on his foundation by 1) outlawing Huguenots’ (French Calvinists’) power to maintain fortifications and armies (as well as persecuting and expelling them to Acadia, Canada), 2) demolishing castles belonging to lesser nobles, and 3) requiring those nobles to move into Versailles (at great expense to themselves). It was under these kings’ centralized rule that many of the great nation-states of Europe rose, along with the growth of a new vision of centralized law.

## VII. Natural Law

The individualism of the Protestant religions and the concept of the separation between church and state brought by the Reformation and the continuing wars also brought a new view of law, as canon law and the Roman *ius commune* gave way to a conception of a law as developed by man, directly or indirectly under God’s influence.

### 1. School of Salamanca

The Natural Law movement gradually disassociated continental law from Catholicism and even from Christianity—but it did not actually rid civil law of the substantive Roman law concepts it had absorbed from the *ius commune*. It began, ironically, in Spain with the School of Salamanca with theologians who were followers of St. Thomas Aquinas.<sup>68</sup> Their aim was to describe the natural world and mankind’s place in it in realistic terms. They divided law into three broad categories: 1. The divine or eternal law, a set of norms used by God at the creation; 2. The natural law, an innate and Eternal Law consisting of a body of self-evident principles implanted by God at the creation into the minds of all mankind, and accessible to reason; and 3. Human (or positive or civil) law which had ultimately to be derived from the natural law, or at least not contradict it. Suárez asserted that human beings have a social nature bestowed upon them by God, and this includes the potential to make laws. However, when a political society is formed, the authority of the state is not of divine but of human origin; therefore, its nature is chosen by the people involved, and their natural legislative power is thus given to the ruler, thus justifying absolute monarchy and putting the focus on legislative law rather than judicial law.<sup>69</sup> The natural law movement then passed from Spain to the Dutch Republic.

### 2. Descartes and Cartesian philosophy

French philosopher, mathematician, and scientist René Descartes (1596-1650) spent 20 years in the Dutch Republic (1629-1649). While the roots of his philosophy had precedents in Aristotelianism, he is regarded as the father of analytical geometry, was highly influential in philosophy and the philosophy of science, and he laid the foundation for 17<sup>th</sup> Century rationalism, enabling the growth of natural law in *Discours de la Methode* in 1637. Descartes

was educated first in math and physics, and then earned his License in Canon and *ius commune* law, only to abandon law shortly thereafter. He moved to the Dutch Republic in 1628, where he remained.

In the *Discours*, Descartes' aim was to arrive at a fundamental set of principles that one can know as true without any doubt as a firm foundation for genuine knowledge, using thought only and not relying on the senses or perception. His belief was that deduction from first principles is the only reliable method of attaining knowledge. Thus, his work opposed the empiricist school of Hobbes, Locke, and Hume who believed experience is the best method of gaining knowledge, particularly with social institutions. This remains a primary underlying philosophical difference between civil law and common law—the former relies on deduction from first principles, the latter on experience. Though he may have rejected Aristotle's appeal to final ends, Descartes' thought was very much in keeping with the Platonist deductive tradition, and predicated on a teleology of thought, if not of mankind. His 'Cartesian' Method became the fundamental approach used by all hard science, and from there spread to 'new' sciences – such as the continental science of law.<sup>70</sup>

During this time of upheaval, a number of German and Dutch jurists re-examined Justinian's compilations. Influenced by natural law and Decartes, and with the aim of developing a scientific and systematic study of law, their work eventually led to the Pandectist school of the nineteenth century Germany, and from there to legal positivism. The most widely influential among German jurists was Samuel Pufendorf (1632-1694), while the most influential Dutch jurist was Hugo Grotius (1583-1645) whose work in philosophy, political theory, law, and associated fields was studied widely in Europe during the seventeenth century and long afterwards, including by Hobbes and Locke. He is best known, however, for his work in natural law theory and morality.

### 3. *Natural Law in Holland & Germany: Grotius & Pufendorf*

Hugo Grotius was the first to attempt to reduce Roman-Dutch civil law to a system in his *Introduction to the Jurisprudence of Holland*. Grotius may have been the first to attempt a civil code, but that was not even the most impressive work of his very exciting life. Best known today for his contributions to natural law theory and as the founder of international law, Hugo Grotius (1583-1645) was highly influential in philosophy, political theory, law, and associated fields on the continent during the seventeenth century and long afterwards.

Grotius was such a child prodigy that at fifteen he accompanied Johann van Oldenbarnevelt (lawyer, statesman, and William the Silent's associate) on an embassy to France to ask for protection from Spain. While in France, he earned a law degree from the University of Orleans and established a law practice on his return to the Hague. Grotius didn't particularly enjoy practicing law (he complained about tedium and obstreperous clients, which included both Oldenbarnevelt and Prince Maurice, William's successor), and he closed his firm when he was made Attorney General of three Dutch states in 1607.

Grotius, Oldenbarnevelt, and William the Silent supported religious toleration and therefore were 'Remonstrants.'<sup>71</sup> The Contra-Remonstrants, another Calvinist sect, were very much against religious toleration, and staged a coup on August 29, 1618, overthrowing the States General, and arresting and executing Oldenbarnevelt. Grotius was sentenced to life imprisonment. While Grotius was allowed to correspond with outsiders, receive books and

writing materials, and even wrote his work on Roman Dutch law while in Dutch prison, he became concerned that the Contra-Remonstrant authorities might decide to execute him. Consequently, in March 1621, Grotius hid in a large trunk his wife had used to ship books to him. His wife then shipped the trunk out of the prison, with Grotius in it.

Grotius fled to Paris, where he stayed for 23 years.<sup>72</sup> During that time, he considered issues such as religious toleration, the separation of morality from theology, and sovereignty. He began by accepting many of the ideas that were just beginning to be posited: the impossibility of reaching a universal consensus on ethical and religious matters, and the importance of maintaining a powerful state which could prevent this lack of consensus from turning into civil war.<sup>73</sup>

Grotius venerated Erasmus but took his theories about law several steps further away from the canonist tradition and towards Cartesian reasoning. Grotius rejected both *ius commune* and canon law<sup>74</sup> and defined Natural law as: “the Rule and Dictate of Right Reason, showing the Moral Deformity or Moral Necessity there is in any Act. . . .”<sup>75</sup> The source of the natural law, according to Grotius, is the compatibility of actions with our essences as rational and social beings, and proceeds from the essential traits implanted in man. To Grotius, therefore, the source of right reason was ultimately God.<sup>76</sup> Thus, for Grotius, just as the Reformation made man responsible for reading the Bible for himself, it also put the onus of law on man, not God or the Church. The fundamental normative principles are the human desire for self-preservation and the need for society. These two properties inform each other – the desire for self-preservation is limited by the social impulse; and the social impulse is limited by the drive for self-preservation.

Grotius accounted for what he saw as the functional legal necessities for social existence, whether for an individual or for a state. In particular, he argued that the need (the ‘right’) for self-preservation and protection of property are the foundations of social life.<sup>77</sup> Grotius’s development of natural law theory and separation of the law of man from the law of God does not mean, however, that he argued for limited government. In fact, he endorsed absolute power, but for an unusual reasons – he believed that Man had the right to enslave himself without reserving any rights for himself, and therefore an entire people could do the same.<sup>78</sup>

Samuel Pufendorf was the first German law professor to hold a chair in Natural Law. His work clearly shows the Cartesian influence and drive for ‘scientification’ of law. He published “*Two Books of the Elements of Universal Jurisprudence*” in 1660, in which he applied a ‘pure synthetic method’ to describe a scientific theory of human action.<sup>79</sup> He formulated a project for an exact science of morals and jurisprudence. Like Grotius, he accepted human sociability as the first principle of natural law, but at the same time posited that human beings are inclined to hurt each other. He deduced that human beings live as free and equal persons and can therefore govern their relations and pursue their happiness outside the sphere of political society, but because they are too disorderly to live peacefully, they need government. He transformed natural law theory into an academic subject with questions, arguments, and literary genres. He also thought the entirety of natural law should be deduced before establishing a sovereign power in an effort to protect law’s independence from politics.

Pufendorf’s work was regarded as more secular than Grotius’s, but what ultimately gave continuity to the natural law tradition and separated it from the prior age of *ius commune* was not any particular assumptions about Christianity, power, property, society, or constitutions, but instead a shared understanding that the concept of practical knowledge should be replaced with conceptualized, theoretical experience. Human conduct would be described and governed by

formal rationality and private law would be developed into a rational and secularized system.<sup>80</sup>

At the beginning of the seventeenth century, politics was considered to be a civil virtue, one of the five intellectual abilities of the Aristotelian tradition, with the aim to govern the good behaviour of citizens in the public sphere.<sup>81</sup> By the eighteenth century, however, it split into two separate studies: the theoretical science of public law, based on general principles and rational thought, and the practice of politics, defined as an “art of state” or the means to make government effective, irrespective of whether those means are moral or immoral. To be a ‘true’ science, universal public law had to identify the basic conditions for rights, law, and legitimate action, but the only possible source of order within a civil society now appeared to be the state, “which therefore had to be conceived as the first and fundamental premise for any theory of law describing itself as scientific: “law was no longer thinkable without the state.”<sup>82</sup> In other words, in a world of chicken and eggs, under this rationalistic argument, you had to have the chicken (the state), before you could have law – this contrasts with the common law conception that law pre-dates and pre-exists the state.

#### 4. France & Natural (Private) Law: Domat & Pothier

While the *ius commune* was received in the South of France as ‘written law,’ law in Northern France remained fragmented as customary unwritten law. Between 1454 and 1590, French kings tried to consolidate law by requiring that local customary law be reduced to writing, thus bringing the various sources of law under the control of royal authority.<sup>83</sup> The most famous of the resulting compilations was the *Coutume de Paris*. Nevertheless, attempts to establish a common unified law failed until after the French Revolution. Unlike their German and Dutch colleagues, French jurists were not particularly interested in theoretical questions at the time, and few achieved fame – but for Domat and Pothier, who are regarded as the founders of the French Civil Code.

Domat (1625-1696) a prominent crown prosecutor and minister, was given a pension by Louis XIV in 1683 which allowed him to concentrate on scholarship and finish his most famous work, *Les Lois Civiles Dans Leur Ordre Naturel* (1689). The ‘natural’ order in his work is the same as that in most French-derived Civil Codes: 1. Family law; 2. Property law; and 3. Obligations (Contracts and other legal relationships). In his Preface, Domat described Justinian’s Digest as disorganized and fragmented, and found it to be a mystery why a Christian nation should respect laws made by ‘infidels.’<sup>84</sup> His explanation was that Roman jurists ‘envisaged all situations which occurred in the society of men that gave way to disputes, and that therefore their secular experience and observation of social reality serve as the foundation of the “science of law.” In other words, the entirety of law can be conceived and reduced to written law, but that it is only the Christian religion that really shows the natural law – those “first principles that God has established for the foundations of the society of man.”<sup>85</sup> He then explains that the purpose of his project is to give some order to Roman law. Thus, Domat not only tied Roman law, Christianity, and deductive logic together, he also provided a bridge from the theory of natural law to a practical realization of it.

Robert-Joseph Pothier (1699-1772), like his father and grandfather before him, was a Judge in the Presidial Court of Orléans. His study, the *Pandectae justinianae in novum ordinem digestae* not only puts Justinian’s Digest into a new order (as did Domat’s), it also explains in greater detail than Domat’s work how the French (specifically the *Coutumes d’ Orléans and Paris*) and Roman law complemented each other. For Pothier, as for Domat, law was a science built up from experience over the centuries. He did not propose a hierarchy of the sources of

French law and avoided discussing various theoretical controversies of the time: whether the tenants of customary law should be used or not, the borderline between morality and law, and whether a social contract was the foundation of civilised society.

### **VIII. The French Enlightenment: Rousseau, Bentham, Robespierre, and Public Law**

“The medieval world pattern, deriving from Greek logic and the Christian story, was fashioned by the church which for centuries imposed its authority upon the isolated and anarchic society of western Europe.”<sup>86</sup> In this climate, it was assumed to be a fact that God the Father created the world and man in six days, that man had disobeyed and fell from perfect grace into sin and error, but had been saved by Christ’s sacrifice. The *Philosophes* of the French Enlightenment denounced Christian philosophy, but nevertheless still showed that the foundation of their thought still lay in Greek logic and the Christian story: they demolished St. Augustine’s Heavenly City, only to “rebuild it with more up-to-date materials.”<sup>87</sup> In place of God, their guest of honour was nature and natural law. In the eighteenth-century European climate of opinion, whatever question one had, nature was the answer: “the ideas, the customs, the institutions of men, if ever they are to attain perfection, must obviously be in accord with those laws which ‘nature reveals at all times, to all men.’”<sup>88</sup> Having denatured God, the disciples of the Newtonian philosophy deified nature,<sup>89</sup> and the atheistic French *philosophes* such as Helvétius and Holbach deified Reason.<sup>90</sup>

The cultural and legal changes that started in the Renaissance blossomed into the Eighteenth Century’s Enlightenment.<sup>91</sup> A new historical consciousness emerged, seeing itself as an era of a clear and new vision of man and his relationship to the world around him. The 17<sup>th</sup> century saw the beginning of secularization in the Reformation, of course, but also due to adoption of the Cartesian view and a societal transfer of faith from religion to a belief in the new scientific reasoning.<sup>92</sup> Thus, there were constant metaphoric associations with light or science throughout the 18<sup>th</sup> century, and a new view of fields as diverse as religion, art, literature, society, politics, and law.<sup>93</sup> In terms of law, the continental Enlightenment focused on defining how universal public law and especially private law related to the state or how to reduce them to a legislative consequence of the state.<sup>94</sup>

In terms of law and politics, this new collective consciousness gradually led to an age of politicisation, a view of politics as the proper concern of everyone, not merely a spreading critique of absolute monarchy. It included a complex and secular raising of awareness, both theoretical and practical, concerning what was perceived as the common destiny of human existence and a perceived necessity that everyone be involved.<sup>95</sup> It also led to an understanding of the Law as legislated law created by and enforced by the State, and a view that history was universal and progressive, so that the ‘inherited plurality of the legal histories of the individuals, corporate entities, jurisdictions, legal objects, and law sources’ was moving in a positive direction. Thus, the Natural Law movement and the *Philosophes* believed that law was universal and invariably led to legal process towards liberty and equality for all, above and beyond the particular histories of various nation-states.

#### *Criticism of the Myth of Justinianism*

As those in the age of continental Enlightenment saw it, the existing legal systems were both irrational and dysfunctional because they lacked an autonomous, centralised, and unitary organized structure that could guarantee an absolutely uniform and equal administration of the

law.<sup>96</sup> Overlapping administrative authorities (feudal, military, ecclesiastical, fiscal, local, royal) existed in each territory without clearly delineated functions. Nor was the judicial system systematized – no consistent procedures, no consistent legal authority, overlapping jurisdiction, all of which led not only to unequal and even contradictory decisions, but also to frequent jurisdictional fights between courts. The lack of rational order among administrative authorities itself contributed to both the proliferation and duration of lawsuits, involving an excess of useless formalities in procedures that were of obscure Roman-Canon origin – all of which was exacerbated by “the sophisticated and lucrative ingenuity of solicitors and attorneys.” If there is one constant universal among attorneys both then and now, it is the habit of using (and mis-using) procedures to benefit their clients and themselves!

In accord with Domat and Pothier, the rationalist 18<sup>th</sup> Century saw defects in the *Corpus Iuris Civilis*. It was no longer seen as “the perfect model of natural law” because it lacked systematic coherence. Its deference to aristocrats did not lead to equal application of the law, and many of its laws were historically anachronistic. Thus, though they were not about to jettison Roman law in its entirety, the *Corpus Iuris* no longer suited the new times, new customs, and new constitutions. To jurists steeped in Cartesian Rationalism and Aristotelian teleology, it lacked any kind of rationality, internal order, or internal coherence. What was wanted for this new age was the Law of Reason and clear and uniform legislation by the State,<sup>97</sup> in addition to a coherent and consistent judicial system.

In addition to objecting to the substantive law, Enlightenment jurists and scholars objected to the courts’ abuse of the power of judicial interpretation, though they should have objected more vociferously to the way in which judges were appointed and their lack of qualifications, especially in France: many of them inherited their positions, their predecessors’ corruption, and were accountable to no one. The *philosophes* had a naïve, simplistic view of the judicial function as mere mechanical work of automatic inclusion, as well as a conviction that state sovereignty consisted solely of legislative power.<sup>98</sup> This conviction became the predominant view of those continentals who regarded themselves as civilised rationalists. They demanded that judges’ interpretation of a law should be singular and consistent – a mere mechanistic application of appropriate law to given facts. This view was naïve for a number of reasons. For example, where the law is not clear or where there is no applicable law, the only thing a judge can do is to use interpretive methodology, analogize, or extrapolate from existing law. The lack of success of attempts to limit judicial interpretative freedom did not ameliorate the Enlightenment’s naïve belief in a possible absolute juridical control of the law over factual diversity and changing social realities. As governments became populist-based, the view of the legislative body as the embodiment of absolute sovereignty replaced absolute monarchy.

#### *Montesquieu, Bentham, and Rousseau’s General Will*

In addition to presenting England’s habit of separation of powers as a cornerstone of a functioning legal system, Montesquieu’s *Spirit of the Laws* (1748) argued that each country’s socio-cultural background, as well as its physical and natural conditions leads to a rational logic of laws for that country, so that transplanting law from one country to another successfully was “*un très grand hazard*.” (a great risk)<sup>99</sup> He was somewhat correct with regard to separation of powers, as shown when post-Revolutionary France misunderstood it as complete separation of functionality, rather the complicated, historically-derived system that had developed in England. Nevertheless, he thought that Private Law could be systematically encoded and then legislated to comport specifically with each country’s idiosyncrasies.<sup>100</sup> His views were rejected by the *Philosophes* who insisted that his argument was too tied to factual specifics of individual cultures, and he should have focused only on “constant and universal principles of

human nature.”<sup>101</sup> Jeremy Bentham went a step further than Montesquieu’s detractors and argued that such private law, as it was fundamentally universal, **could** be both logically and rationally organized and then universalized so that it could be adopted by all countries.<sup>102</sup> After the Revolution, this line of thought bore fruit in the form of Napoleon’s *Projet*, from there to the Swiss, Austrian, and German Civil Codes, and from there around the world. However, it wasn’t just the concept of an organized system of private law that spread, it was also the underlying legal and social philosophies of the Enlightenment that spread, and the primary influence on that philosophy was Rousseau’s.

### *Jean Jacques Rousseau & the French Revolution*

John Locke predicated the foundation of society on a theory of implied consent and a theory of property ownership based on the investment of labor. Rousseau absolutely rejected this and saw the process of civilization as progressive moral degeneration caused by materialism. In his view of the state of nature, man was no better off and no worse off than other animals, had developed a love of family, and was unlikely to war with others<sup>103</sup>-- up until the invention of property ownership:

THE first man who, having enclosed a piece of ground, bethought himself of saying This is mine, and found people simple enough to believe him, was the real founder of civil society. From how many crimes, wars and murders, from how many horrors and misfortunes might not any one have saved mankind, . . . [had he not forgotten] . . . that the fruits of the earth belong to us all, and the earth itself to nobody."

And:

But from the moment one man began to stand in need of the help of another; from the moment it appeared advantageous to any one man to have enough provisions for two, equality disappeared, property was introduced, work became indispensable, and vast forests became smiling fields, which man had to water with the sweat of his brow, and where slavery and misery were soon seen to germinate and grow up with the crops.

Unlike the Scottish Enlightenment of Locke, Smith, and Hume, Rousseau believed that society was founded by violence and domination by the strong over the weak, and he disliked the industrial revolution, arguing that it undermined personal integrity as well as community. Of flexible religious belief (he switched from Protestant to Catholic and back, depending on his residential need at the time), to Rousseau, the only authoritative, positive natural law would be that created by the General Will or *Volonté Générale*.

The General Will, a concept for which he became famous, is a sort of community spirit, a form of association which defends and protects the person and the goods of each, and while each person unites with all, he remains as free as he was before joining this community, to which he has given himself absolutely and completely.<sup>104</sup> In Rousseau’s system, the laws developed would be those principles that a democratic subject would agree should be binding, provided he was imbued with an understanding of what would bring the greatest happiness to the greatest number of people.

Rousseau assumed that all people are capable of ascertaining what a common good should be, and that thus properly viewed, they would reach a unanimous decision that thus expresses the General Will. While they can be deceived, he thought that people are naturally good and will aim at justice if they focus on and follow the General Will rather than following their own personal interests or the interests of some sub-group or faction to which they belong. He believed that the power to make laws (i.e. sovereignty) should be in the hands of the people, ideally decided on by direct democracy in an assembly rather than via a representative Parliament. Once decided-on, law (i.e. the embodiment of the General Will) would be implemented and enforced by magistrates. While the concept of the General Will is central to Rousseau's theory of political legitimacy, it was and is unfortunately abstract, obtuse, and controversial. It's also predicated on the belief that one can develop an entire society of people who put their personal interests aside in favour of a single group-interest. And it runs counter to Plato's experience that direct democracies are inherently unstable, as mobs can be manipulated by tyrants – e.g. Robespierre and the French Reign of Terror.

*The French Revolution, Napoleon's Code, and L'État de Droit*

France in the late eighteenth century was the most populous country in Europe, with 28 million people, and an increasing middle class or *bourgeoisie*. The causes of the French Revolution included wide-spread dissatisfaction with the rigid class structure or 'estates.' The first two estates, the nobility and the clergy, enjoyed many legal privileges, including being exempt from taxation. By the late 1780s, the largest sector, the third estate (consisting of everyone else, and amounting to 98% of the population) shouldered the burden of a number of taxes. France owed a great deal of debt owing to the expenses of two wars: The Seven Years war against England, and the American Revolution, which Louis XVI supported at great expense.<sup>105</sup>

The bourgeoisie wanted more power, while the peasants wanted the vestiges of feudalism abolished. Grain, on which the vast majority of the population depended, was periodically in short supply due to variations in harvest. While there had been a corrupt governmental system in place to redistribute and supplement grain when needed, the ministry decided to forgo that system and attempted laissez-faire, which resulted in people stockpiling grain and causing worse problems. In addition to periodic hunger and starvation, much of the growing middle class were exposed to and adopted Enlightenment ideals through coffee houses, literary salons, masonic lodges, and scientific academies, to say nothing of books and pamphlets. They believed in the Cartesian philosophy that society should be based on reason rather than tradition, Rousseauian General Will, and Enlightenment ideals (liberty, equality, fraternity), and they were faced with the fact that the United States, for whose liberty France paid so much, was based on very similar ideals. Consequently, Louis XVI, his ministers, and the nobility were widely unpopular in the Third Estate.

In 1789, Louis XIV convened the Estates General for the first time in 175 years, in order to get approval to levy a new land tax against the nobility as well as the third estate and thus pay down the accumulated debt. The nobility objected. The representatives of Third Estate, whose interests were traditionally vetoed by the other two estates, also objected, demanding more voting power than they traditionally had as they were the ones who always had to pay taxes. Louis's response was to shut down the Estates General, but the Third Estate refused to disband until a Constitution was in place. To that end, they removed themselves to a tennis court, called themselves the "National Assembly," took an oath to stand firm, and wrote the 1789 *Declaration of the Rights of Man*.



Although the French Declaration of 1789 was patterned after the American Declaration of Independence, it had some significant differences: the 1789 French Declaration of the Rights of Man and Citizen, the foundational document of the Revolution, proclaimed rights that the French had never previously possessed. Rather than protecting individuals from tyranny and guaranteeing the rights they traditionally had, the Declaration was grounded in the fear that individuals and factions (“particularistic minorities”) would disrupt the General Will.<sup>106</sup>

The French revolutionaries feared stagnation, not the concentration of power, and they believed that checks and balances would thwart the radical steps needed to restructure their society – the Revolutionaries wanted to transform France politically, legally, and socially, overthrow the nation’s governmental institutions, and break with a thousand years of history.<sup>107</sup> Most of the 1789 Declaration’s articles show the influence of both French and Scottish Enlightenment values: equality, liberty, property, security in one’s person, freedom of speech, freedom of religion, presumption of innocence, the right to a fair trial, etc. Two articles are of particular interest, one because it shows Montesquieu’s influence, and the other because it shows Rousseau’s. Montesquieu’s influence is seen in the desire for consistent application of law and separation of powers described in Article 16. Article 6 shows Rousseau’s General Will and the declaration of equality:

**6.** Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.

While France had recently granted freedom of speech, most of the other rights described were generally non-existent at that time. The French wanted to remake their entire society into one that was egalitarian, free, and community-centered, hence the revolutionary cry of “*Liberté, Egalité, et Fraternité!*”

The Bastille was stormed shortly after the Declaration was signed, on July 14. Anarchy and violence followed. By 1793, when Louis XVI was executed, France was losing a war with Prussia and surrounded by hostile armies. The more moderate Girondins in the New Assembly were defeated by the more extreme and revolutionary Montagnards, who included Robespierre and the Jacobins. The National Assembly, led by Robespierre, decided to tax the rich, provide assistance to the poor and disabled, control prices, make education both free and compulsory, and they paid for some of this by confiscating and selling the property of those nobles who had emigrated. These measures provoked violent reactions that further destabilized the country.

Robespierre, declaring that the Jacobins’ will was the General Will, regarded himself to be a principled egalitarian republican obligated to remake France by doing away with corruption as well as all vestiges of the former regime (the *ancien regime*). He declared that anyone who did not agree with him was a traitor, which led to the arrest of at least 300,000 suspected traitors, 17,000 of whom were sentenced to death and executed while more died in prisons or were killed without trial. The Reign of Terror finally ended in 1794 when Robespierre himself was executed. Napoleon, a young general, defeated the last of the Royalist forces, thus ending the civil war, and was put in power in 1795, as the head of the new government – the Directory, and the third kind of popular government proposed in the space of 5 years.

*My glory is not that I won forty battles and dictated the law to kings... Waterloo wipes out the memory of all my victories... But what will be wiped out by nothing and will live forever is my Civil Code."*

Napoleon Bonaparte

The Revolution had brought drastic changes to French society. If the concerns of 1789-1795 were liberty, equality, and fraternity, the concerns of 1795-1804 were the restoration of authority. Although attempts had been made to homologate French law since Louis XI (1500-1566), French law remained fragmented, dominated by Roman law in the south, and customary law in the north. As Voltaire described it, "a traveler in France changes his law almost as often as he changes horses." After the Revolution, there was an even greater need for unified law in order to strengthen the country and create order.

The 1791 National Assembly had declared that a code of Civil Laws common for the entire realm would be drafted and put into place, but although it was started several times, it was not completed during the Revolution. In 1799, Napoleon appointed four prominent jurists to draft an initial code. To his credit, politics did not play into Napoleon's appointments. He appointed Tronchet, the 73-year old president of the *Cour de Cassation*,<sup>3</sup> as leader. Tronchet, who had Royalist tendencies, had defended Louis XVI at the trial that led to his execution. Portalis was knowledgeable in Roman law, a Provençal and legal philosopher who had been imprisoned during the Revolution. Bigot de Préameneu from Rennes was a mild supporter of the Revolution who had hidden during the Terror, and Malleville was a practitioner from Bordeaux and later a judge with the *Cour de Cassation*. Thus, the group was balanced between judges (Tronchet and Bigot) and practitioners (Portalis and Malleville), and also balanced between Roman-law training (Portalis and Malleville) and *coutume*-training (Bigot and Tronchet).<sup>108</sup>

The group met 87 times (Napoleon himself attending almost half of the meetings) and completed the *Projet* in 1801 by using Domat and Pothier's organization of family law, property law, and obligations, and using substantive law from the *Corpus Juris Civilis*, the *Coutume de Paris*, and other sources, organized in a deductive and coherent fashion, and written in elegantly and simply so that it could be easily read and applied in many situations. The draft was sent around to four different governmental bodies, and faced obstacles in all, but Napoleon was determined, and it was ratified in 1804. While it included egalitarianism and invoked freedom of person, freedom of contract, and the inviolability of private property, it was a compromise in that it was neither reactionary nor revolutionary, and it also compromised between the customary law of the north and the Roman law of the south.<sup>109</sup> In keeping with Enlightenment, Benthamite, and natural law ideals, it was (and is) simple, democratic, and accessible. Napoleon himself exported it to Belgium, Luxemburg, and parts of Germany and Italy as he conquered them, but it was so well received that within the next century, most of Europe and Latin America had either adapted a version of it or drafted their own.

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<sup>3</sup> The *Cour de Cassation* is France's court of last resort. While it was created during the Revolution, it inherited the French King's Privy Council tradition, which had the power to void decisions that violated the law, though given the rigid separation of function under the French doctrine of separation of powers, it is not allowed to void the work of the legislature, and so has no power of judicial review. That power was granted to the *Conseil Constitutionnel*, which was created by the Constitution of the Fifth Republic in 1958.

The influence of the French Civil Code cannot be overemphasized. It has been said that in accord with the purely rational and deductive method of Rousseau and the 18<sup>th</sup> Century Philosophes, the Civil Code of 1804

. . . was considered by its authors and even, for a long time, by jurists charged with interpreting it, a sacred book revealing, for men from all ages and all countries, definitive justice. The law of all civilized peoples, instead of being founded in the experience of history and observation of reality, should be, after all, nothing but the logical development of principles consecrated by the Code.<sup>110</sup>

The reason it was so popular is that it is clear, concise, well-organized, easily-read, and imbued with the spirit of equity and equality.<sup>4</sup> Thus, Napoleon was able to establish, at least in part, one of the pre-requisites for the rule of law: an accessible body of laws regarded by the public as having been properly promulgated. However, this body of laws was limited to private law – the structure of the family, succession, the ownership of land, contracts, and controversies between private parties. Focused primarily on the sovereignty of the individual and the sanctity of ownership (particularly land), it was impervious to changes brought by time such as women’s suffrage, the rise of various kinds of business entities, and changes to governmental economic policy (particularly the movement towards socialism).<sup>111</sup> By the 1920’s, it was outdated even in France as Natural Law was no longer popular and positivism had taken hold. Although it has been updated since (though still focused on individualism and property ownership), it still does not regulate the relationship between the citizen and government, which continental tradition now defines as public law.

### *L’État de Droit: The Legal State in France*

The Hayek/Dicey/Oakshott concept of the rule of law as referring to the restraint of the exercise of political power might have roots in ancient Greece, but the concept itself is peculiar to the Anglo-American legal system.<sup>112</sup> France lacked an expression with a similar meaning until the beginning of the twentieth century when Léon Duguit introduced *L’État de Droit*, the literal translation of the German term *Rechtsstaat*, into French legal doctrine. The literal translation into English of both terms is *Rule Through Law*, not *Rule Of Law*. Duguit’s introduction did not have any affect, and it was left to Raymond Carré de Malberg to try to adapt the principle to French doctrine in the 1920s. The meaning of the German term, popularized by Robert von Mohl in the mid nineteenth century, has varied widely. Since 1949 it has been prominent in Germany’s Basic Law, and is considered to be a principle to which all state activity must conform, including separation of powers, judicial review, the principle of legality, fair procedures, legal certainty, the principle of proportionality, etc. Semantically, however, it remains subject to skepticism and criticism because the combination of “*rechts*” (rights) and “*staat*” (state) is regarded by some as redundant.<sup>113</sup>

Similarly, the term *L’État de Droit* can seem unnecessary to a Frenchman<sup>114</sup> – ‘of COURSE the state has laws, it IS the law . . . .’ The concept that the French government should be governed by law is included in the 1789 Declaration of Rights (“Any society in which the guaranty of rights is not assured of the separation of power established has no Constitution”, Art XVI), but

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<sup>4</sup> The Author has studied Louisiana’s Code in its entirety, is in fact barred in Louisiana, and teaches both common law contracts and Louisiana obligations and sales law.

the Declaration of Rights has not always been regarded as setting out enforceable law. The term *République* has a number of meanings, not just popular government, but also the 1789 principles. Rousseau even used the term to describe every State governed by law: “Tout *État régi par des lois*.”<sup>115</sup> Montesquieu described the term *État* itself as “a society where you have laws” (*Une société où il y a des lois*.)<sup>116</sup> Furthermore, constitutionalism itself is a problem for France – Revolutionary France went through five constitutions in fifteen years, significantly diminishing both the practical and the symbolic importance of the concept.<sup>117</sup> Before 1814, France went through a constitutional monarchy, a radical republic, a moderation of that republic, a dictatorship, and finally a restoration of the monarchy (until it was toppled in 1848). Even after that, it has had 3 successive constitutions. It has been governed under the Constitution of the Fifth Republic since 1958.

In addition to semantic problems and constitutional weaknesses, the concept of limited government has never had the same importance it has had in England or the United States. In both the U.K. and the U.S., there has been a long history of concern about curbing governmental power. The French Revolution was directed against the king, of course, but primarily against oppression by both remaining feudal concepts and the power and privileges of the Clergy and the Aristocracy, all of whom were protected by the courts.<sup>118</sup> In building its new state, France’s Enlightenment Philosophy promoted the abolition of the old feudal power and their replacement by a new coherent legal order based on Cartesian reasoning, including a transfer of absolute sovereignty from the monarch to an abstract entity. Ultimately, that abstract entity was the Nation – the citizens of France. As Emmanuel Sieyès described with regard to the first constitution (1791), the people are in fact the Nation, and they, through their representatives, have the power to adopt a constitution and rule the country – the State itself is just an artifice, a machine animated by law that is the expression of the General Will.<sup>119</sup> Sieyès’s pamphlet, *Qu’est-ce que Le Tiers État* (What is the Third Estate ?) became the Revolution’s manifesto. He envisioned a nation consisting only of the Third Estate, and that because they would possess one single democratic will, they would therefore deliberate and legislate purposefully and effectively.<sup>120</sup>

In theory, the French Nation might have retained the right to change the Constitution, but in practice, *L’État de Droit* has been consistently identified with the supremacy of Parliament and legislation, not the supremacy of any single Constitution. In Rousseau’s view, legislated law is sacrosanct as it is the expression of the general will and is thus infallible. Consequently, it must be applied as written. It was regarded as inconceivable that any legislated law could in any way infringe upon citizens’ liberties because it is, after all, the expression of the general will.<sup>121</sup>

In the United States, any court of general jurisdiction and any Federal court can hear claims that a law is unconstitutional. This concept is known as judicial review and has been adopted to some extent in many other countries. The concept of judicial review has never been fully accepted in France because of the pre-revolutionary abuses promulgated by judge-made law, which habitually overturned new legislation. Consequently, the French have traditionally rejected a ‘*gouvernement des juges*,’ rejecting the concept of a judicial body having the power to modify the general will as a distortion of the democratic process.<sup>122</sup> Two administrative bodies, however, have developed that serve a similar purpose. Napoleon’s *Conseil d’État*, which was created in the tradition of Louis XIV’s *Conseil d’État privé, finances et direction*, gradually emerged as a respected administrative court and guardian of human rights. Its primary purpose is to advise the executive branch on whether proposed legislation is consistent with law and it also serves as the court of last resort for administrative issues.

Initially the *Conseil d'État* supervised only formal and procedural requirements of administrative measures, and likely shielded the use of administrative prerogative from judicial scrutiny – something Dicey objected to. However, by the end of the twentieth century, it has gradually developed a coherent body of rules of administrative law relying ultimately on the protection of a number of substantive rights consistent with the 1789 Declaration and the Preamble to the 1946 Constitution of the Fourth Republic such as equality before the law, freedom of thought and opinion, and the non-retroactivity of administrative acts. The *Conseil d'État's* review is of proposed law only, not legislation that has already been enacted by Parliament, to make sure that it is consistent with higher sources of law. It operates as a check on the actions of the executive, and it acts as a supreme court for decisions originating from any of eight appellate administrative courts.

A similar function is served by the *Conseil Constitutionnel* that was created by the Constitution of the Fifth Republic. France experienced another governmental crisis in the spring of 1958, with the result that *Général* Charles de Gaulle was invited to form a government. One of the first things de Gaulle did was to draft a new Constitution, because the Fourth Republic had granted so much power to the legislature and so little to the president, that as de Gaulle complained, he would need an Act of Parliament to move a horse trough in Paris.<sup>123</sup>

Under de Gaulle's drafting directions, the Fifth Republic significantly strengthened the Presidency, while the Prime Minister's role became secondary; it accords significant rule-making power to the Executive branch, and it created the *Conseil Constitutionnel*. The *Conseil Constitutionnel* was initially created to make sure that Parliament did not encroach on the Executive's (new) law-making powers; however, it has since increased its importance via strict constitutional review of proposed legislation – a significant departure from Rousseau's view of legislation as sacrosanct. In a 1971 landmark decision, *Liberté d'Association*,<sup>124</sup> the *Conseil Constitutionnel* held that a law enacted by Parliament was unconstitutional and voided it on the basis of the fundamental rights provisions in the 1789 Declaration and the 1946 Preamble, thus elevating the two texts to legally binding status. While the case established the Constitutional Council's power to review legislation pursuant to constitutional standards, the only parties who could bring such a petition were the President of the Republic, the Prime Minister, and the Presidents of the two chambers of Parliament. A 1974 reform enlarged that to include any group of at least 60 parliamentary representatives, but it still excludes individuals from bringing suit, and it is still limited to review of legislation before it comes into force.

Once legislation is in force in France, it is still part of the general will, and as such, sacrosanct in the eyes of either the *Conseil Constitutionnel* or the *Conseil d'État*. The anomalous result is that when an individual believes an enacted law has harmed him and is unconstitutional, the only way to attack it is to bring a suit before the European Court of Human Rights, claiming that it violates the E.U. Convention on Human Rights, which would supersede National law.

## **IX. Germany & *Rechtsstaat***

### *From Holy Roman Empire to State*

From 1680 until 1789, what is now Germany consisted largely of a number of small kingdoms, sometimes referred to as “gingerbread principalities” that were part of the Holy Roman Empire. In general, they were ruled by absolutist overlords, clergy, and municipal oligarchs who were

likely to conduct wars against both each other and the emperor. Their economies were based primarily on agriculture, and remnants of the seigniorial system remained in place. Gradually, however, rulers' views and the serfs' situation changed.

#### *Frederick II of Prussia: Enlightened Absolutism*

The largest and most important of the Germanic principalities were Austria and Prussia, but all of them followed the absolutist model, some having more enlightened monarchs than others. In the mid eighteenth century (1740-1786), Frederick II (The Great) (1712-1786) rose to power in Prussia and developed it into a military force. An absolute monarch and military genius, he nevertheless considered himself the "first servant of the state." Though his country only had 2.24 million people, his army consisted of 80,000 well-trained, disciplined, and well-armed soldiers, which he doubled by 1770, and which took up 86% of his budget.<sup>125</sup> While he embraced some French Enlightenment ideas, he was pragmatic, frugal with his court, and he ridiculed the French court's extravagance. He centralized control, reformed the judicial system to allow non-nobles to become judges and other civil servants, made it more efficient, abolished torture, and had various legal codes drafted.

Frederick II welcomed Voltaire into Prussia (for a time) but was dismissive of Rousseau's philosophy. He adopted some of the Enlightenment's liberal theories, including religious toleration, freedom of speech, and separation of powers (i.e. an independent judiciary). However, his reasons for doing so were pragmatic rather than moralistic: religious tolerance was in the interest of the state because he did not want to lose taxpayers,<sup>126</sup> he was too busy to be a judge as well as an executive, and it has been said of him that he could safely disregard politicians' criticisms and satirists' witticisms because he was supported by a very large army.<sup>127</sup> He also made significant economic improvements: he encouraged industrial entrepreneurs and immigration of diverse skilled artisans (but for Polish Catholics) and abolished serfdom in 1762. Nevertheless, he was determined that the middle class would not acquire aristocrats' property, as the Prussian aristocracy was his reservoir for army officers. Ruthless in international relations, he grabbed land from both Austria and Poland and he broke treaties with France on two separate occasions. Frederick II believed that a ruler should control finance, the inner administration of his government, foreign policy, and the army, and that his goal must be to strengthen his state and increase its power.<sup>128</sup>

#### *Immanuel Kant*

The greatest German Enlightenment thinker, Immanuel Kant (1724-1804), developed his ideas in light of what he observed of Frederick II's rule (they were contemporaries), including the underpinnings of modern *Rechtsstaat*. Kant defined the principle of right (*Recht*) as the sum total of those conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom.<sup>129</sup> Consequently, one cannot enforce either morality or religion out of respect for individual autonomy. Furthermore, neither government nor other people should use others only as a means to an end. He also believed that if a citizen is deterred from seeking his personal welfare in any way he chooses which is consistent with the freedom of others, the vitality of business and hence the strength of the whole economy are held in check.

Kant believed that a republic (i.e. constitutional, representative democracy) was the best form of government, that legislative and executive powers should be separated, and he wanted legal freedom and equality.<sup>130</sup> He said of republics that they were the only instance where law is autonomous and not annexed to any particular person. He disliked enlightened absolutism because life, freedom and property depend on the whims of a single person, and because he

believed that Frederick's positive changes were not motivated by morality. Of Frederick II, he quipped "At least he *said* he was merely the highest servant of the state."

While he did not like enlightened absolutism, Kant rejected direct democracy as well, describing it as a despotic executive power through which all citizens may make decisions about (and sometimes against) the individual without his consent. In terms of how changes in governmental structure should be realized, Kant believed in gradual top-down reforms in order to avoid both the anarchy that France experienced and stagnation. He believed that states would and should reform themselves gradually from time to time, pursuing evolution instead of revolution, and that while the people did not have a right to revolution, they did have the right to criticize a ruler's injustice.<sup>131</sup> According to Kant, a judge is only the voice of the law because the act of judging is just a simple syllogism, consistent with the French understanding of the judiciary's role.<sup>132</sup> Thus, though he disliked the structure of the British government and would not have agreed with the idea of courts creating law, his views were more consistent with Locke's narrative of liberty and autonomy and Smith's views on economics than Rousseau's equality narrative and dislike of industrialization.

### *Effect of the Enlightenment on Gingerbread Principalities*

In general, the Enlightenment palliated, reformed, and improved the future German states, but did not either change its absolutist governments or further national consolidation. Because of the example set by the French Revolution, Germans generally did not adopt French rationalism, nor were they attracted to the empiricism of the Scottish Enlightenment. Many believed that absolute government was the only effective instrument for achieving general good.

Frederick II led the way for the kings and princes of the 'gingerbread principalities' to adopt more modern ways, however, those ways differed from both France and England – and some princes headed in other directions. For example, Württemberg's Charles Eugene and Hess-Kassel's Frederick II licentiousness impoverished their subjects to the extent that their soldiers became British mercenaries (and fought against General Washington in the U.S. Revolution). The French Revolution and its Reign of Terror justifiably concerned all the German states, especially when the French revolutionaries demanded that Austria disarm and abandon all alliances directed against France, and then declared war against both Austria and Prussia. The German view of the Enlightenment was different. It was not entranced by popular government and instead held on to absolutism – though that gradually became enlightened absolutism.

### *Nationalization – a slow process*

Napoleon finally unified Germany by conquering or inducing most of the 36 German principalities in 1803 to join a Confederation of the Rhine, followed by conquering both Austria and Prussia in 1806. Thus ended the Holy Roman Empire. As Voltaire quipped, it may not have been either holy or Roman or an empire, but whatever it was, it had survived for more than a thousand years after Charlemagne's coronation.

After ten years of French domination, nationalization seemed possible after Napoleon was defeated in 1812, and the principalities sent delegates to the 1815 Congress of Vienna towards that end. Though the Congress failed to create a central government, the principalities moved towards economic integration and liberalism: one after another, each of the southern states wrote and ratified constitutions between 1818 and 1820. A compulsory education law passed in 1820 spread literacy, and liberal ideas continued to spread via the gradual growth of civil

associations, freedom of speech, and a middle class. The freeing of serfs and allowing them to purchase land usually meant that the nobility (who had money) bought the land, while the impoverished serfs cultivated it, moved to the cities, emigrated to the United States, or if they did buy it, owed heavy payments to local aristocracy.

The desires of the restless masses of various groups that resulted from these changes contrasted with those who benefited from enlightened absolutism, which included the nobility, the upper bureaucracy, and the established church. These conservative groups argued that paper constitutions could not determine the relationship between individual and government and that human motivation was not simply based on reason. They wanted an enduring government built on traditional institutions, believing that only a strong government would have the authority to protect workers against exploitation, protect the religious, and resist anarchy.

The 1840s brought economic depression, crop failures, and famine, leading to the Revolution of 1848. Frederick William IV of Prussia crushed the Revolution and formed a new Prussian Union, splitting the German principalities into two competing confederacies: the German Confederacy and the Prussian Union. The Prussian Union had a King and a complicated electoral system, while the German Confederacy, still rigidly absolutist, had industry and foreign trade -- until a market crash in 1857.

#### *Otto Von Bismarck*

Otto Von Bismarck (1815-1898) was appointed Minister-President of the Prussian Union in 1862, holding the position until 1890. He defeated the German Confederation and formed the North German Confederation in 1867, and then added South German states in 1871, unifying Germany, calling it the German Empire, and calling himself Imperial Chancellor. Bismarck removed impediments to economic growth, encouraged internal migration, and put the currency on a gold standard. Between 1870 and 1890, the German Empire experienced rapid economic expansion and by 1914, it was an industrial giant with 857 new companies and wide-spread stock investment.

Bismarck put a written constitution in place and took definite steps to centralize law. His 1871 constitution created a bifurcated parliament consisting of a lower house, the *Reichstag* of 397 popular representatives, and the upper house, the *Bundesrat*, consisting of representatives from the German Empire's 25 states. As Prime Minister and head of Parliament, he wanted parliamentary institutions that would not undermine his authority.

In 1879, a new Courts Act introduced a decentralized system of courts as a preliminary step in the harmonization of law in Germany. At the time, most of the states were still rural in nature, and led by land-owning elite or Junkers – the class of which Bismarck was a member. Bismarck regarded codification as important, and even central to the unification of the German states.<sup>133</sup> Under his watch, a number of codes were enacted in a short period of time because law professors and theoreticians had been working on unification of law for a long time, but the most important, the German Civil Code (*Bürgerliches Gesetzbuch* or “BGB”) was only adopted twenty years later, in 1896 and came into force in 1900. It remains the basis of German civil law and is— like the French Civil Code – highly influential around the world. Austria, Switzerland, Hungary, Greece, Japan, Turkey, Brazil, Mexico, and Peru as well as a number of eastern bloc countries’ civil codes have been based on or influenced by the BGB.

#### **BGB**



In contrast with Bismark's desire for codification, one of the reasons it took Germany so long to codify its law was due to the influence of German Pandectists Carl von Savigny (1779-1861) and Rodolf von Jhering (1818-1892). Friedrich Carl von Savigny (1779-1861) was a scholar of Roman law, an advisor to German courts, and tutor of the crown prince. He argued against a unified civil code because he believed it would be influenced by natural law, which he found both arrogant and shallow. He believed that one should avoid hollow abstractions, and that law is a part of national life and cannot be arbitrarily imposed without regard to the culture involved. Thus, he was against Bentham's legal portability concept and suspicious of codification and disliked France's abstract, natural-law based Civil Code. Savigny founded the German 'historical' school of law, arguing that law was a product of its culture and epoch, and to claim that it transcends history is an illegitimate abstraction.

Rodolf von Jhering (1818-1892), another highly influential law professor and Roman law scholar, similarly rejected natural law as well as codification, but for entirely different reasons. Jhering's opinion was that German law was outdated and was the 'most backward legal system in Western Europe.' Furthermore, he criticized German legal scholars as focused on either legal history or the philosophy of law, paying no attention to practical needs. He saw Savigny's emphasis on history as entrenching absolutism and thought that it was a fiction that the law of a mature system could represent the culture's *Volksgeist* (spirit of the people). Thus, he agreed with Heinrich Heine's quip that at that point in the nineteenth century, "Britain ruled the seas, France the land, while Germany ruled the clouds." Von Jhering's philosophy of law was that law evolves through human endeavors. Thus, man makes law. It was neither always there, nor did it come into existence by itself. The purpose of rules is merely the survival of mankind. His views led into legal positivism, meaning the concept that law is what the legislature says it is. While he believed that law should be logical and rational, he did not believe that all laws could be logically deduced. He argued for the 'socialization of law,' denouncing what he saw as the abuses of capitalism: "Unlimited freedom of trade is a license for extortion, a letter of marque for robbers and pirates."

### *Codification*

Codification of Germany's civil law began in 1874 and took 22 years to complete because it involved a balance between the historicists' incorporation of local and customary law and the positivists' concerns for unification and nationalism. It also involved pragmatic considerations and an almost obsessive concern that every possible contingency be included.

The first draft of the BGB reflected the then-prevailing Kantian ideology of individualism. Individual freedom (the "autonomy of the will") was regarded as paramount and is still an important concept in the Code, though initially it was pursued to such an extent that it led to very obtuse application of Roman legal principles.<sup>134</sup> Additionally, it depended on an extremely abstract Pandectist arrangement of Roman laws and principles. When the first draft faced heavy criticism, a second Commission was formed. It was given only a short period of time and instructed to redraft, not remake. Because the Commission was led by lawyers and because it was under intense pressure not to spoil the 'unity' of the Code, the redraft was still obtuse. The Code was then submitted to process in both the Reichstag and the Bundesrat, again resulting in only a few changes before it was adopted. The BGB has since been amended many times. It is very coherent logically and well-organized, but it remains long, obtuse, and difficult for anyone other than an attorney to navigate.

### *Positivism and the BGB*

Under positivist influence, the function of the German courts and the judiciary was gradually

reduced from complete freedom to simple application of the law and nothing more, as in France: courts were and are still required to apply the clear principles of law neutrally and not to engage in law-making, though this principle was relaxed during the Weimar Republic and courts began to regain some of the power to interpret that they had previously lost. Although all of the German Codes are highly technical and very detailed, courts have adapted them to apply to new situations, especially during the First World War. During this time, courts curtailed some individual rights (such as free speech and freedom to assemble). When it became clear that the BGB favored stronger parties over weaker ones, laws protecting workers' jobs and security benefits were introduced.<sup>135</sup> Additionally, the BGB had no provision for remaking contracts where obligations had become unreasonable due to hyperinflation. The solution was to expand the scope of good faith. The concept of *Culpa in Contrahendo* remains much broader under German law than in other civilian jurisdictions.<sup>136</sup>

### ***Rechtsstaat***

*Rechtsstaat* predates *L'État de Droit* – and the BGB -- by more than one hundred years. Immanuel Kant (1724-1804) is regarded as the spiritual father of *Rechtsstaat* (though he did not use the term) because he defined the state as the union of a multitude of men under laws that are grounded in reason and which protect freedom for all, equality, and individual autonomy. It is, to him, the opposite of the state of nature where we all kill each other,<sup>137</sup> and he believed that individual liberty is inalienable (the opposite of Grotius's position).<sup>138</sup> He held that government was obligated not to interfere with individual liberty and was obligated to protect individuals from interference by others. The essential, to Kant (though he may have privately preferred indirect popular government) was not so much who governed, not the form of government, but how government was conducted. As long as positive law respected the primary principle of liberty and equality of the individual, any form of government was acceptable.<sup>139</sup> Separation of powers was discussed, both vertical (Kant) and horizontal (Montesquieu).<sup>140</sup> Consequently, Kant's *Rechtsstaat* was based on the primacy of liberty and limited government and is consistent with the Rule of Law, but that was to change, especially after the 1848 Revolution.

#### *Early Rechtsstaat – from Enlightened Despotism to Bismark*

The term *Rechtsstaat* was first used in 1789 by Johan Wilhelm Placidus, popularized by Robert von Mohl in 1844,<sup>141</sup> and is regarded as a public law concept. Von Mohl's concept differed from Kant's in that he promoted freedom through the state: the state was to comply with the law and its purpose was to promote an individual's complete development. Thus, in contrast with Kant's negative rights and limited government, Von Mohl's *Rechtsstaat* was premised on positive rights and no limitations on governmental authority, but because the state is founded on the social contract, the state's function is to preserve an individual's natural rights.<sup>142</sup> Mohl postulated that the state exists only to serve the interests of the people, and it (the state) has the right to pursue only reasonable ends, and a state is a state only if it has a constitution that guarantees the rights of man and organizes power – the only kind of *Staat* is the *Rechtsstaat*.<sup>143</sup> While the term was employed in treatises on subjects such as constitutional monarchy, it was pretty much absent from texts on positive law and thus was used only to a limited extent in the late eighteenth and early nineteenth centuries.<sup>144</sup> At the time, Bismark derided the term *Rechtsstaat* as “an artificial expression invented by Mohl, which no one has yet satisfactorily

defined as a political spirit, and thus no translation exists.”<sup>145</sup>

### *Rechtsstaat's Rise*

The use of the term *Rechtsstaat* exploded due largely to the writings of G. Jellinek and R. von Jhering. As one familiar with Germany's political and legal history might expect, this development represented a compromise between liberal doctrine and authoritarian ideology. The *Rechtsstaat* of the later nineteenth century was defined by three concepts: the theory of the state's self-limitation, the theory of subjective rights, and the theory of the primacy of law.”

Under the theory of the state's self-limitation (or “auto-limitation) and the primacy of law, there is no external limitation on a sovereign state's power, but a state should restrain itself in accordance with its own law either because of pressure exerted from the outside by its polity or by ‘mature civilized people’ within the government.<sup>146</sup> Jellinek developed this theory after analyzing the behavior of Hanover King Ernst Augustus (1771-1851)(who had been raised in England as a member of the English nobility). On acceding to the Hanover throne in 1837, Ernst Augustus suspended a new constitution on the grounds that his consent had not been asked before its adoption and it did not meet the kingdom's needs. Nevertheless, he upheld all laws passed under it and restored the earlier 1819 constitution. Jellinek later used him as an illustration of the concept of self-limitation of the state supported by both positive law and natural law.<sup>147</sup>

Georg Jellinek's (1851-1911) theories influenced his friend and colleague Max Weber as well as Carré de Malberg. He believed that law should be looked at from two different perspectives of equal importance: 1. Its positivist nature, and 2. Its philosophical and social nature.<sup>148</sup> He posited that initially the state was a simple ‘fact’ that appeared at some moment in history. In itself, it was only a force, a power of domination by some over others. Humanity was condemned therefore to suffer the worst kind of tyranny, if a new element had not evolved. On its own volition, the state began to change, it gave itself a law: it limited itself and limited its power, becoming a juridical person. Thanks to this self-limitation, it stopped being a simple physical force and became an ethical force. The state's own volition raised it above the previous unlimited violence to the rank of a juridical will that is limited with regard to other personalities, and this juridical will is nothing other than *Rechtsstaat*. His somewhat anthropomorphic notion of the will of the state was at the time very original.

The second concept of 19<sup>th</sup> Century *Rechtsstaat*, the theory of “subjective public rights” provided that it was the state that established individual rights by means of its authority as sovereign and legislator, and that those individual rights were respected by the state under the theory of auto-limitation.<sup>149</sup> The substance of the individual rights should be those of the French revolutionaries – liberty, equality, fraternity – and did not include any right of resistance to the state. Jhering argued that the state had supreme power, but was obligated to limit itself, and it, as a juridical person, created individual rights through legislation. Individual rights were not of a pre-political origin, as in Locke's contractualism, nor of a religious nature, nor based on a transcendent and universalist natural law.

### *Positivism and Formalism*

Despite the theoretical development of the theories of auto-limitation and subjective public rights, after the 1848 revolution failed, *Rechtsstaat* slid decisively -- but slowly-- towards pure formalism.<sup>150</sup> With an authoritarian monarchy (Bismarck) in place, Germans stopped pursuing political liberty as a positive legal concept. The theorists, however were still hard at work.

Though *Rechtsstaat* slid towards positivism, there was no single monolithic understanding of it, in part because German thinkers were still torn between monarchical authoritarianism and liberal constitutionalism. Friedrich Julius Stahl promoted it as a Christian-inspired natural law concept.<sup>151</sup> Jhering argued that the state had supreme power, but was obligated to limit itself, and it, as a juridical person, created individual rights through legislation. Bähr argued that it meant the state should be subject to the courts just as individuals were. Gerber and Laband argued for legal positivism (that the law is what the legislature says it is). Jellinck argued for methodological dualism, and Austrian Hans Kelsen argued his pure theory of law – he insisted that pure law be distinguished from morality, and that all legal systems should have a declared *Gründnorm*, a master value from which all laws can be deduced. He later agreed that even the Führer could declare the *Gründnorm*.

Picking up on Kelsen’s pure law theory, Adam Müller completely gutted *Rechtsstaat* from any tie to liberalism. He stated that the legal state must be a state of law: it must define precisely the limits of its own actions as well as the extent of its citizens’ liberty, which it must guarantee. When it comes to ethical ideas, it should not impose its own ideas, and should stick solely to law. Under this understanding, *Rechtsstaat* became a way of establishing the legitimacy of government and the legitimacy of legislation rather than a way of establishing rights, in other words, under positivism, it evolved to a purely descriptive concept.

The heart of the movement towards positivist theory and its gutting of the liberal components of *Rechtsstaat*, however, was the effort to ‘depoliticize’ it, led by Stahl. Neutrality required an objective and scientific methodology, which was opposed to the old school of natural law.<sup>152</sup> As Kelsen said, only the formal is objective, and the more formal the methodology, the more objective it is. This new positivist methodology dissociated law from any metaphysic, political or ideological connection. The concept of *Rechtsstaat* was similarly reinterpreted and became part of this movement that called itself “natural-law formalism” which argued that all of the normative exigencies of natural law, in accord with positive law, are essentially institutional order and procedure. The foundation of law, meaning the objectives of the state such as the rights of man result from the resolution of institutional questions.

#### *Kelsen*

Hans Kelsen (1881-1973) distinguished himself by systematically criticizing the then-accepted theories on *Rechtsstaat*.<sup>153</sup> His theory denouncing the post-natural law theories was at the same time a disenchantment in *Rechtsstaat* and a new view of it. For him, *Rechtsstaat* did not imply any specific concepts – a strict positivist, he saw the State as a King Midas who transforms everything he touches into law, so every State is a *Rechtsstaat*. Every state should be considered a legal state, to the extent which it has an order that constrains human behavior and this order of constraint, however it is produced, democratically or autocratically, is derived from a hypothetical Grundnorm. If one were to reintroduce the post-natural law theories, i.e. political values, that would eradicate the science of law according to Kelsen.

By the end of the nineteenth century and the early twentieth, with the wholesale adoption of positivism, the concept lost all ties to the practice of law -- it was hardly mentioned even in the indexes of legal treatises and manuals, was regarded as outdated, based on pseudoscientific categories of the past. regarded as a ‘magic box’ from which a jurist could obtain any legal principle or claim desired. In this iteration, even Hitler’s Third Reich was a *Rechtsstaat*, because it followed its own laws and was thus a state based on order.

#### *Weimar Constitution and State Paternalism*

The Weimar Constitution of August 11, 1919, proclaimed that the German Empire is a republic, and the power of the state emanates from the people, and derived legitimacy from the will of the people as expressed directly via popular referendums on both constitutional and legislative issues, and also indirectly through their elected representatives on the *Reichstag* and the president.<sup>154</sup> The Constitution announced fundamental rights and obligations, listing an extremely rich declaration of rights that reflected both the liberal heritage of the nineteenth century and integrated socio-economic rights of the progressive era. It was also notable for the large extent to which the state involved itself in individual relations, especially with regard to labor relations, social insurance, housing and health laws, all of which were inconsistent with the individualistic BGB.<sup>155</sup>

Unfortunately, hardly had it been installed when extremists on both the left and the right denounced it. For some, the Weimar Republic was too radical, and for others not radical enough. Some, nostalgic about the prior monarchy, refused to identify with a constitutional order that opened the doors to the masses, the majority, and the working class, believing that it was a race to the bottom, and that the country would be run by those who would attack their economic privileges and destroy the civilizing force of culture. Consistent with legal positivism's demand that law be separated from moral values, the constitution was silent on the form and aims political parties could adopt. It allowed the existence of parties whose aims were to overturn the constitutional order. Basic rights were listed but were expressed in terms of principles rather than inviolable rights.<sup>156</sup> The provision for a no-confidence vote set the bar too low, meaning that the government was dissolved frequently, and it gave the President the both the power to dissolve the Reichstag and the power to dismiss chancellors. Most subversive, as it turned out, was Article 42, which gave the President the power to defend the German people by taking any step necessary to restore order.

Furthermore, Germany suffered from a long-lasting economic crisis, caused by a combination of stiff reparations payments following World War 1 and bad economic decisions that led to hyperinflation: in early 1922, the mark was worth approximately 320 marks per dollar, but by December, the mark was worth only 7,400 marks per dollar. In living terms, in 1914, before the war, a loaf of bread cost the equivalent of 13 cents. But by the end of September, it cost the equivalent of \$2 million. Intellectuals tried many times to extort people not to cede to the siren song of Nazism, but in vain, even the responsible "burghers" abandoned the public sphere to an authoritarian power who they thought would maintain public order and guarantee security. The German electorate leaned more and more to the extreme right, and the vote by the Reichstag to give full power to Hitler (by an irregular procedure) was only the final act in a long process of scuttling the Weimar Republic. Nevertheless, the Weimar period had an effect on questions underlying the nature of *Rechtsstaat* as it is currently configured. For example, was there a conflict between the principles of liberty and equality and the principle of the people's sovereignty? Does the existence of the General Will support the individual guarantees of *Rechtsstaat*?

#### *Post World War II: The Revival of Rechtsstaat*

After World War II, *Rechtsstaat* was reclaimed and enshrined by Germany's federal constitutional court as a foundational principle that undergirds the 1949 constitution, termed the German Basic (or Fundamental) Law or *Grundgesetz für die Bundesrepublik Deutschland*.<sup>157</sup>

In reaching this decision, the court found that there are foundational principles of German law that are not expressed, or not sufficiently expressed in its written law, including the Basic Law.

<sup>158</sup>The *Karlsruhe* Court found *Rechtsstaat*, in terms of limitations on government, mentioned

or referred-to in four sections of the Basic Law:

20 al.3: The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

1 al.3: The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

19 al.4: Should any person's rights be violated by public authority, he may have recourse to the courts. . . .

28 al.1: The constitutional order in the *Länder* must conform to the principles of a republican, democratic and social state governed by the "*Rechtsstaat*" within the meaning of this Basic Law.

*Rechtsstaat* now consists of two components: the formal *Rechtsstaat* which focuses on formal guarantees of supremacy of law and checks on state power, and the substantive *Rechtsstaat* which guarantees fundamental values such as basic rights. Substantive includes principles such as the separation of powers, judicial review (conducted by the *Bundesverfassungsgericht*, the German Constitutional Court), legal certainty, proportionality, and procedural rights.<sup>159</sup>

The current German *Rechtsstaat* has eliminated the concept of auto-limitation as well as the concept that it is the legislature that grants individual rights. Article I of the Basic Law now postulates that it is the Government's duty to protect individual rights:

Human dignity is inviolable, to respect it and protect it is the duty of all state authority. Inalienable human rights are the basis of peace and, the extent of those rights is countered by duties a citizen owes the government and society.

There remains, however, tension between individual liberties and the German Basic Law's socialist values, even as demonstrated in Article 1's reference to a citizen's duties. Furthermore, the Basic Law is replete with references to dignity, which as an abstract principle needs to be fleshed-out.

### *Dignity*

A fundamental value of the German Basic law is the value-positive norm of dignity that radiates throughout the constitutional order as is mentioned in Articles 2 through 19. This concept is alien to the American constitution, which is value-neutral based on liberty grounded in personal choice.<sup>160</sup> Article I's reference to the dignity of man shows a deliberate reference to Kant's view that human beings must be valued for themselves.<sup>161</sup> In the Life Imprisonment Case, the Constitutional Court described it as follows:

It is contrary to human dignity to make the individual the mere tool (*bloßes Objekt*) of the state. The principle that "each person must always be an end in himself" applies unreservedly to all areas of law; the intrinsic dignity of the person consists in acknowledging him as an independent personality.

....

The constitutional principles of the Basic Law embrace the respect and protection of human dignity. The free human person and his dignity are the highest values of the constitutional order. The state in all of its forms is obliged to respect and defend it. This is based on the conception of man as a spiritual-moral being endowed with the freedom to determine and develop himself.<sup>162</sup>

Proponents of *Rechtsstaat* posit that this concept has “transformed” the fundamental rights of the Basic Law from “mere ‘negative’ principles” that limit state action to positive values that obligate governmental authorities to consider fundamental rights at all times and create the best conditions possible under the circumstances for their effective enjoyment.<sup>163</sup> In addition to the concept of positive rights, *Rechtsstaat* contains another concept alien to the Anglo-American Conception: the understanding that individual rights are offset by an individual’s duties to the community as well as the conception that a state owes a number of benefits to the individual.

### *Duties*

The Basic law refers not only to dignity, but also to an understanding that individual rights are off-set by an individual’s duties to a social community.<sup>164</sup> The Constitutional Court, in *Mephisto*, explained that a person is not merely an isolated and self-regarding individual, but is related to and bound by the community. The Basic Law presupposes a relationship between the individual such that an individual is both dependent on and committed to the community, without infringement on his individual value. Thus, the Government must both guarantee and nurture a person’s individuality and dignity, but within the constraints of social solidarity and responsibility. Individual choice is bound by community, norms of civility, and a sense of responsibility.

The requirement that the Federal Republic be a social state (Arts 20 al.1 and 28 al1 GG) requires that the state be extensively involved in social welfare to provide social welfare benefits that remedy social inequality and protect the socially weak and “balance or correct the unfortunate effects of a market economy.”<sup>165</sup> This principle is often connected with *Rechtsstaat* and acts as a specific mandate to the legislature, a rule of interpretation for the executive, and a guide to the courts for the construction of laws. It however, does not provide the citizen with enforceable subjective rights,<sup>166</sup> and thus the rights stemming from this are unclear and remain problematic.<sup>167</sup>

Furthermore, the concepts of the duty to a social community as well as the mandate that the state be extensively involved in social welfare presuppose a conception of General Will to which the individual must subject himself as well as an enterprise association – an understanding that the State has a pre-ordained goal. These related concepts are alien to the Anglo-American original conception of the rule of law as presupposing a civil association.

### *Conclusion*

Modern Rechtsstaat has allegedly shed its cloak of legal positivism and returned to its Kantian roots. However, by aligning itself with socialism and positing that individuals owe duties to the state, it has not actually done that. Instead, it has picked up a hitchhiker in the form of Rousseau. Ever happy to move to a new area, he has brought his concept of the General Will. Thus, German individual rights are accompanied by duties, and the government must support something as abstract as ‘individual dignity.’ While it provides a number of social welfare benefits and has adopted legal remedies for infringement that individuals can bring suit against governmental over-reaching, those benefits are accompanied by very high tax burdens, social instruction on what one can and cannot say, and more limitations on individual liberty.

## X. Differences with England

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<sup>1</sup> JEAN-LOUIS THIREAU, *INTRODUCTION HISTORIQUE AU DROIT* 11 (3d ed. 2009) (trans author)

<sup>2</sup> Antonio Padoa-Schioppa, *A History of Law in Europe: From the Early Middle Ages to the Twentieth Century* xii (Cambridge 2017)

<sup>3</sup> Padoa-Schioppa at 496 (But P-S did not fully understand that English right to liberty pre-existed the 1689 Bill of Rights)

<sup>4</sup> Nicholas Capaldi & Gordon Lloyd, *Liberty and Equality in Political Economy: From Locke versus Rousseau to the Present* (Edward Elgar Publishing 2016).

<sup>5</sup> Thireau at 35.

<sup>6</sup> Nadia E. Nedzel, *Legal Reasoning, Research, and Writing for International Graduate Students* (4<sup>th</sup> ed. 2016).

<sup>7</sup> Thireau at 76-77

<sup>8</sup> *Id.* at 77.

<sup>9</sup> Padoa-Schioppa at 8.

<sup>10</sup> Thireau at 91

<sup>11</sup> Padoa-Schioppa at 9.

<sup>12</sup> *Id.* at 24-26.

<sup>13</sup> Thireau at 97-98.

<sup>14</sup> Nigel Foster & Satish Sule, *German Legal System and Laws* 10 (Oxford U. Press 4<sup>th</sup> ed. 2010)

<sup>15</sup> Foster & Sule at 11.

<sup>16</sup> Foster and Sule at 11-12.

<sup>17</sup> Padoa-Schioppa at 12

<sup>18</sup> Lesaffer at 184.

<sup>19</sup> *Id.* at 21-22.

<sup>20</sup> Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* 142-143 (Cambridge 2009)



- <sup>21</sup> Lesaffer at 143.
- <sup>22</sup> Dr. Edward Peters, J.D. , J.C.D, Ref. Sig. Ap. Canonlaw.info”Home Page”.
- <sup>23</sup> In Brief §1976. *Catechism of the Catholic Church* (USCCB Publishing). ISBN 9781574557251. “*Summa Theologica* I-II, 90, 4”; Lesffer at 225.
- <sup>24</sup> *Summa Theologica* q91, a3, p.21
- <sup>25</sup> Lesaffer at 144.
- <sup>26</sup> Foster & Sule at 13.
- <sup>27</sup> Lesaffer at 151.
- <sup>28</sup> Jean Dunbabin, *France in the Making 843-1180 6-7* (Oxford 2000); Lesaffer at 152.
- <sup>29</sup> Id. at 154-55
- <sup>30</sup> Id. at 155.
- <sup>31</sup> Foster & Sule at 15.
- <sup>32</sup> MARC BLOCH, *FEUDAL SOCIETY* 128 (trans. L.A. Manyon)(1961)
- <sup>33</sup> Id.
- <sup>34</sup> Id. at 156.
- <sup>35</sup> Foster & Sule at 17.
- <sup>36</sup> Id. at 151.
- <sup>37</sup> Lesaffer at 270.
- <sup>38</sup> James A. Brundage, *The Rise of the Professional Jurist in the Thirteenth Century*, 20 *Syracuse J. Int’l L. & Com.* 185, 185 (1994).
- <sup>39</sup> Id at 188
- <sup>40</sup> Mary Ann Glendon, Paolo G. Carozza, & Colin B. Picker, *Comparative Legal Traditions* 25 (3d ed. 2007).
- <sup>41</sup> Henry Mather, *The Medieval Revival of Roman Law: Implications for Contemporary Legal Education*, 41 *Cath. L. R.* 323, 335 (2002).
- <sup>42</sup> William Ewald, *Roman Foundations of European Law* (1994), available on line at [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2235&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2235&context=faculty_scholarship).
- <sup>43</sup> Lesaffer at 230-31.
- <sup>44</sup> Padoa-Schioppa at 121. See also Thireau at 156.
- <sup>45</sup> Lesaffer at 230-31.
- <sup>46</sup> Padoa-Schioppa at 75
- <sup>47</sup> Foster & Sule at 18-19
- <sup>48</sup> Thireau at 138
- <sup>49</sup> Thireau at 155.
- <sup>50</sup> J.D. Burns, ed., *The Cambridge History of Political Thought: 1450-1700*, 9-13 (1991).
- <sup>51</sup> E.L. Eisenstein, *The Printing Revolution in Early Modern Europe* 13-17 (Cambridge 1993).
- <sup>52</sup> Thireau at 155.
- <sup>53</sup> Israel at 46-47.
- <sup>54</sup> *Letter of September 6, 1524*, 10 *COLLECTED WORKS OF ERASMUS* 380 (U. of Toronto Press. 1992. ISBN 0-8020-5976-7).
- <sup>55</sup> Israel at 79, 82
- <sup>56</sup> Johathan I. Israel, *The Dutch Republic: Its Rise, Greatness, and Fall 1477-1806* 72-82. (Oxvord 1995).
- <sup>57</sup> Israel at 72.
- <sup>58</sup> Israel at 155-179.
- <sup>59</sup> Israel at 213.
- <sup>60</sup> Ed. Damiano Canale, Paolo Grossi, Hasso Hofmann, *A History of the philosophy of Law in the Civil Law World, 1600-1900* vol. 9 3 (Springer 2009).
- <sup>61</sup> Israel at 74.
- <sup>62</sup> Israel at 76.
- <sup>63</sup> Israel at 78.
- <sup>64</sup> See Israel at 77.
- <sup>65</sup> Israel at 124.
- <sup>66</sup> Max Weber,
- <sup>67</sup> See e.g. Thireau, William J. Bouwsma, in Michael S. Kimmel, *Absolutism and its Discontents: State & Society in 17<sup>th</sup> Century France & England*; Roger Mellam, *Power & Faction in Louis XIV’s France* (1991)
- <sup>68</sup> Anthony Pagden, “The School of Salamanca” in the *Oxford Handbook of the History of Political Philosophy* 247-248 (2011), last visited on Feb 5, 2019, available at <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199238804.001.0001/oxfordhb-9780199238804-e-15>.
- <sup>69</sup> <http://www.acton.org> - Francisco Suarez (1548 - 1617) - The Acton Institute - Microsoft Internet Explorer

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<sup>70</sup> Maximiliano Hernández Marcos, Conceptual Aspects of Legal Enlightenment in Europe 70-71, in vol. 9 A History of the Philosophy of Law in the Civil Law World, 1600-1900 74 (Springer 2009)(Enrico Pattaro, Ed. In Chief)

<sup>71</sup> Israel 440.

<sup>72</sup> Tuck at 501.

<sup>73</sup> Id at 502.

<sup>74</sup> Grotius, De Iure Praedae, MS, p 5: 1950, 1, p 7 (quoted in Tuck at 505).

<sup>75</sup> Israel 440

<sup>76</sup> See id. at 515.

<sup>77</sup> Id. at 516.

<sup>78</sup> Id. at 520, quoting *De Jure Belli* 1.3.8:1738, p64.

<sup>79</sup> Merio Scattola, Scientia Iuris and Ius Naturae: The Jurisprudence of the Holy Roman Empire in the Seventeenth and Eighteenth Centuries, in vol. 9 A History of the Philosophy of Law in the Civil Law World, 1600-1900 16 (Springer 2009)(Enrico Pattaro, Ed. In Chief)

<sup>80</sup> Scattola at 22.

<sup>81</sup> Scattola at 12.

<sup>82</sup> Scattola at 15.

<sup>83</sup> Jean-Louis Halpérin, French Legal Science in the 17<sup>th</sup> and 18<sup>th</sup> Centuries: To the Limits of the Theory of Law 43, 43 , in vol. 9 A History of the Philosophy of Law in the Civil Law World, 1600-1900 16 (Springer 2009)(Enrico Pattaro, Ed. In Chief)

<sup>84</sup> Halperin at 51

<sup>85</sup> Id p 53 citing D. 1, 1, 10

<sup>86</sup> Carl L. Becker, The Heavenly City of the Eighteenth Century Philosophers 7 (Yale U. Press 1932).

<sup>87</sup> Becker at 31.

<sup>88</sup> Becker at 53, quoting Voltaire, *Oeuvres* XXV, 560.

<sup>89</sup> Becker at 63.

<sup>90</sup> Becker at 75.

<sup>91</sup> Maximiliano Hernández Marcos, Conceptual Aspects of Legal Enlightenment in Europe 70-71, in vol. 9 A History of the Philosophy of Law in the Civil Law World, 1600-1900 16 (Springer 2009)(Enrico Pattaro, Ed. In Chief)

<sup>92</sup> Id. at 74

<sup>93</sup> Marcos at 74.

<sup>94</sup> Marcos at 69.

<sup>95</sup> Marcos at 76.

<sup>96</sup> Id. at 84.

<sup>97</sup> Marcos at 80.

<sup>98</sup> Id. at 89-90

<sup>99</sup> Baron de Montesquieu, *De l'Esprit des Loix* vol i bk. 1, ch. 3, 26. See J.W.F. Allison, A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law at 12-23 (discussing Montesquieu & Dicey & the difficulties of legal transplant, especially in public law)(Oxford 1994).

<sup>100</sup> Marco at 83.

<sup>101</sup> Becker at 101.

<sup>102</sup> Marco at 83.

<sup>103</sup> Jean Jacques Rousseau, Discourse on Inequality Part 1 (1754), available at <https://www.aub.edu.lb/fas/cvsp/Documents/DiscourseonInequality.pdf879500092.pdf>

<sup>104</sup> Jean Jacques Rousseau, *The Social Contract* 24 (1762). (trans. and ed. Donald A. Cress 1987), discussed in Edward James Kolla, *Sovereignty, International Law, and the French Revolution* 16-2, 75 n119, 186 (Cambridge U. Press 2017)

<sup>105</sup> Edward James Kolla, *Sovereignty, International Law, and the French Revolution* 27(Cambridge U. Press 2017)

<sup>106</sup> Nadia E. Nedzel, Rule of Law v. Legal State

<sup>107</sup> Nedzel ROL v LS at fn21

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<sup>109</sup> Rodolfo Batiza, The French Revolution and Codification, Comment on the Enlightenment, The French Revolution, and the Napoleonic Codes, 18 Valparaiso U. L Rev 675, 680-81 (1984).

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- <sup>117</sup> Constitution of 3 September 1791; Constitution of 24 June 1793; Constitution of 26 August 1795; Constitution of 13 December 1799; Constitution of 18 May 1804.
- <sup>118</sup> Puch at 8.
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- <sup>131</sup> Heuschling at 62.
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