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THE 3rd INTERNATIONAL CONFERENCE AND CALL FOR PAPER

"Legal Development in Various Countries"

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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THE HISTORICAL DEVELOPMENT OF THE FRENCH LEGALSYSTEM

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A. Introduction

The history of the French legal system, as part of the Civil Law, has been gradually formed since the Ancien Regime.[1] The rupture resulting from the Revolution of 1789 and the institution of the Napoleonic Code of 1804 marked a decisive turning point in the history of law in France, with the gradual abolition of numerous institutions of medieval and modern origin.[2] Under the Ancien Régime, French law did not apply uniformly throughout the territory, since it differed from one province to another.[3]In the south, Roman law was applied, and in the north a multitude of customs were used. The Current French law is the combined product of several laws such as the a) Roman law;b) German law;c) Customary law;d) Canon law, e) the Law of absolute monarchy; and d) the Revolutionary law.

1. The Roman Law

The Roman law is considered as one of the first legal systems of history. It is not derived from custom: the civil law of the Romans being both unwritten (= customs) and written. It does not originate from religion.[4]Roman law refers to the law enacted in the Roman Republic and the Roman Empire. Because of its centuries-old influence and its integration into the European legal order, the expression is used to designate the legal technique resulting from this Romanist tradition.The Roman law was practiced in the southern provinces of France until 1789. The Roman law not only refers to the legal system of ancient Rome, but also to the laws that were applied throughout western Europe until the end of the eighteenth century.Even the Anglo-Saxon common law has a debt to Roman law, although it appears to have less influence on the English legal system than on the legal systems of the European continent. The influence of Roman law is felt by the richness of legal terminology, such as the rule of *precedent*, *culpa in contrahendo*[5] or the rule *pacta sunt servanda.* Paradoxically, the countries of Eastern Europe, long under the influence of the Byzantine Empire, from which the *Corpus juriscivilis* is derived, are not significantly influenced by Roman law.

2. The German Law

Knowledge of the early Germanic period is derived mainly from the observations of tribal life contained in Julius Caesar's Gallic War and Tacitus' Germania. The first written collections

[1] The Ancien Régime society is a mode of social organization which prevailed in France from the sixteenth to the eighteenth century.
[2] Jean Bart, Histoire du droit, Dalloz, 1999.
[3] Olivier Guillot, Albert Rigaudière, Yves Sassier, Pouvoirs et institutions dans la France médiévale, t. II, 2003, Armand Collin, pp. 203-206.
[4] Bruno Schmidlin, Droit privé romain I Helbing Lichtenhahn (Bâle), 2012, p. 67
[5] Art. 311 of the German Bürgerliches Gesetzbuch.

of Germanic law are the so-called Leges Barbarorum, which date from the 5th century until the 9th century. They are written in Latin and show Roman influence by their use of the technical terms of Roman law.For all of the Germanic peoples, law (West German, reht and êwa; High German, wizzôd; North German, lagh, from which the English word law is derived) was basically not something laid down by a central authority, such as the king, but rather the custom of a particular nation (tribe). It was essentially unwritten, being derived from popular practices, and was not sharply distinguished from morality; it was personal in the sense that it applied only to those who belonged to the nation. Thus each man followed his own law. The Leges Barbarorum, then, were not legislation in the modern sense but rather the records of customs that were first collected and then declared as law.

3. Customary Law

In France, Customary law was essentially the law of the medieval period which lasted under the Ancien Regime, when custom was the principal source of law.[6]Its provisions were imposed in the relations between people, forms of possession or use of land, feudal rights, rights and prerogatives of different communities in political matters, Civil and criminal law, the law of elections and succession, marriage rights and obligations, waters and forests, judicial proceedings. These practices and rules which do not correspond to a normative right have never been codified, despite several attempts. Currently, there still is a customary (or "special") civil status for some people in Wallis –et–Futuna, Mayotte or Nouvelle Caledonia.[7]This particular status is mentioned in article 75 of the French Constitution and is called "personal status".[8]In France, local customs were subject to collections, then codification, and even reformations, published as *lettres patantes* after a public inquiry and the convocation of a provincial assembly. In fact, only the right of persons and goods was affected by these codifications (private law).[9] Since the creation of the Constituant Assembly in 1789, customary law now has only a limited rolein the French legal system.

4. Canon Law

The canon law of the Catholic Church (Latin: jus canonicum)[10] is the system of laws and legal principles made and enforced by the hierarchical authorities of the Church to regulate its external organization and government and to order and direct the activities of Catholics toward the mission of the Church.[11] It was the first modern Western legal system and is the oldest continuously functioning legal system in the West.[12]The term "canon law" (jus canonicum) was only regularly used from the twelfth century onwards.[13]

5. The Law of Absolute Monarchy

[6] Nicolas Offenstadt, Grégory Dufaud, Hervé Mazurel, Les mots de l'historien [archive], Presses univ. du Mirail, 2005, p. 9
[7] Régis Lafargue, La coutume judiciaire en Nouvelle-Calédonie. Aux sources d'un droit commun coutumier, Presses universitaires d'Aix-Marseille, 2003, 307 p.
[8] Se Article 75of the French Constitution.
[9] Henry Solus, Traité de la condition des indigènes en droit privé, Paris, Sirey, 1927.
[10] Black's Law Dictionary, 5th Edition, pg. 771: "Jus canonicum".
[11] Della Rocca, Manual of Canon Law, pg. 3
[12] Berman, Harold J. Law and Revolution, pg. 86 & pg. 115
[13] Ibid. p. 202

The law of absolute monarchy was affirmed by the great ordinances of Louis XIV., Louis XV. And Louis XVI.This legal system imerged during a monarchical political system in which the power of the king, the emperor or any other authority is legitimized by the will of a divinity whether its election is natural or civil, direct or indirect. With the theory of royalty of divine right, the kings of France receive their authority directly from God, without the intermediary of the church, so that this divine power can not be limited either by a moral authority or by a moral authority. social contract with the people. It is on this notion that French monarchical absolutism is founded.[14] However, in 1789, the French Revolution began andd the French people decided to put an end to what they called social injustice by empowering the Assemblee Nationale as the sole law making body. This marks the end of the absolute monarchy in France. Imitating the British system, the Constitutional Mocharchy was put in place, which lasted until 10 August 1792, when King Louis XVI was imprisoned and suspended from his duties. The Republic was proclaimed on 22 September 1792.

6. The Revolutionary Law.

The French Revolution (from 5 May 1789 to 9 November 1799) led to important changes in private law, marking the beginning of a short period known as Droit Intermediaire (Intermediate Law).[15] After the events of the Terror, the need for renewal of the law resulted in the three projects of civil code (1793, 1794, 1796). The coup d'etat led by Sieyes and Bonaparte enabled this project to be validated between 1800 and 1804. The revolution took place in two stages: it first transformed the Kingdom of France into a constitutional monarchy, then finally into the First Republic, putting an end to a society of orders and ancient privileges. The changes brought about by the revolution included all new political forms, the declaration of the rights of man and citizen of 1789 proclaiming the equality of the citizens before the law, the fundamental freedoms and the sovereignty of the Nation, able to be governed by elected representatives .

All these elements have helped to form the legislation which governs France today.

B. Sources of the French law

French law is based on the fundamental texts such as:

1. The Constitution

The current constitution that governs France is Constitution of the Fifth Republic enacted in 1958. It consists of the preamble of the 1946 Constitution (inspired by the Declaration of the Rights of Man and Citizen), the constitutional text itself and the decisions of the Constitutional Council.

2. International Treaties

[14] Philippe Némo, Histoire des idées politiques, PUF, 41 p.

[15]Intermediate Law refers to the law in force in France between 1789 and 1804, during the French Revolution and the Consulate. The word intermediary was chosen to evoke the idea of a transition period between the Old Law and the system based on the Civil Code.

French legal development has further been greatly affected by its participation in the legislation of the European Union (since its creation in 1957).Once ratified by Parliament or by referendum, international treaties have binding force superior to a law and constitution.The Constitutional Council has indicated that International and European Treaties are the highest norms. Therefore, the Constitution must be reviewed if it is contrary to any Treaty prior to their ratification.

3. Lois (Laws)

French laws are made up of all the legislative texts. There are several kinds of laws: constitutional laws (which modify the constitution), organic laws (which specify and apply articles of the constitution), ordinary laws adopted at the parliament.

4. Decree

The drafting and promulgation of a Decreeare the responsibility of the executive branch: the decrees are signed by the President of the Republic and the Prime Minister (they are often the "implementing decrees" of a law).

5. Ordonnance(Ordinance)

After a favorable opinion of the Council of State and with the assent of the President of the Republic, the ordinance is adopted in the Council of Ministers and has the force of law.

6. Arrêté (Order)

The sources of the *Arrete*may be ministerial, prefectural or municipal in hierarchical. It is a practical decision. According to its source, it applies to a geographically delimited territory.

7. Jurisprudence

These are texts emanating from the courts of justice which the magistrates rely on to settle certain disputes. These texts may be an interpretation of the law or an answer given to a situation characterized by a legal vacuum. They constitute a reference for deciding.[16]

8. The doctrine

A Doctrine is a set of analyzes and studies of legal concepts, concrete cases or facts of society that can help the magistrate in his decision-making.

9. Custom

Custom is a set of habits and reactions to practical situations born outside the justice system but with a broad consensus among the judicial authorities that have endorsed them and eventually generalized them over time.[17]

[16]Druffin-Bricca et Henry 2009, p. 110-112
[17]Druffin-Bricca et Henry 2009, p. 104

C. Characteristics of the French Legal system

French law can be divided into two main categories: private law ("droit privé") and public law ("droit public"). Private law governs relationships between individuals,[18] which includes:

- Civil law (droit civil). This branch refers to the field of private law in common law systems. This branch encompasses the fields of inheritance law, civil law, family law, property law, and contract law.
- Commercial law ("droit commercial")
- Employment law ("droit du travail")

Public law defines the structure and the workings of the government as well as relationships between the state and individuals. It includes, in particular:

- criminal law ("droit pénal")
- administrative law ("droit administratif")
- constitutional law ("droit constitutionnel")

D. French Court System

The courts in France are divided into two parts - judicial courts (dealing with criminal and civil laws), and administrative courts. Public law is applied in the administrative courts (*tribunaux administratifs*). The highest of the judiciary courts is the Supreme Court of Appeals (*Cour de cassation*). The Constitutional Council (Conseil Constitutionel) on the other hand oversees review of statutes before they are enacted. It also oversees national elections and answers questions from citizens regarding the constitutionality of laws. The *Conseil constitutionnel* is made up of nine memberswho serve non-renewable terms of nine years. Three are appointed by the president, three by the head of the National Assembly, and three by the head of the Senate.[19]Civil law tradition contrasts with the English common law tradition that makes no separation of the court and in which judges rely on precedents to resolve cases. However, the French *Etat de Droit* shares much in common with its American counterpart as it rests on a constitution. In France, the constitution is also the first of laws, and the judges have the same right to take it as the ground of their decisions.[20]Unlike the American model of a rigid constitution, the French Constitution has always been flexible.France,like Britain, has long beenhostile tothe idea of authorizingthe Judiciaryto check on the Parliament (Judicial Review) which is representative of the people.[21]

E. Conclusion

The historical development of the French Legal System dates as far back as before the Ancien Regime. it origins includes Roman Law, German law, Customary law, Canon law, the

[18]Cornu, Gérard (2014). VocabulaireJuridique (in French) (10 ed.). Paris: PUF.

[19]F. L. Morton, Judicial Review in France: A Comparative Analysis

[20]Read Alexis De Tocqueville (1835), *Democracy in America*. p. 191

[21]Francois Borella (2008), *Elements de droit constitutionel. Paris presses de Sciences* Po.p.78

Law of absolute monarchy, and the Revolutionary law.As a Civil Law country, the sources of law in France are: the Block of Constitution, international treaties, legislation, Decree, Ordonnace, Order, Jurisprudence, Doctrine and Custom. Although is a Civil Law country, it shares a few similarities with common law countries, e.g., the existence of a constitution as the supreme law like in America and the supremacy of the parliament as in the UK.

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