The idea of codification emerged during the age of enlightenment, when it was believed that all spheres of life could be dealt with in a conclusive system based on human rationality. The first attempts at codification were made in the second half of the 18th century, when the German states of Prussia, Bavaria and Saxony began to codify their laws. The first statute that used this denomination was the Codex Maximilianeus Bavaricus Civilis of 1756 in Bavaria. It was followed, in 1792, by a legal compilation that included civil, penal, and Constitutional law, the Allgemeines Landrecht für die Preussischen Staaten (General National Law for the Prussian States) (promulgated by King Frederick II the Great which never satisfied the standards of the modern law-codification movement\(^1\). In Austria, the first step towards fully-fledged codification were the incomplete Codex Theresianus (compiled between 1753 and 1766), the Josephinian Code (1787) and the complete West Galician Code (enacted as a test in Galicia in 1797). The final Austrian Civil Code (called Allgemeines bürgerliches Gesetzbuch) was only completed in 1811. Meanwhile, the French Napoleonic code\(^2\) (Code Civil) was enacted in 1804 after only a few years of preparation, but it was a child of the French Revolution, which is strongly reflected by its content. The French code was the most influential one and was adopted in many countries standing under French occupation during the Napoleonic Wars, but it has lasting influence much beyond that. In particular, countries such as Italy, the Benelux countries, Spain, Portugal, the Latin American countries, the state of Louisiana in the United States, and all former French colonies base their civil law systems to a strong extent on the Napoleonic Code.


The 19th century saw the emergence of the School of Pandectism, whose work peaked in the German Civil Code (BGB), which was enacted in 1900 in the course of Germany's national unification project, and in the Swiss Civil Code (Zivilgesetzbuch) of 1907. These two codes had a great deal of influence on later codification projects in countries as diverse as Japan and Turkey. In Europe, apart from the common law countries of the British Isles, only Scandinavia remained untouched by the codification movement. The particular tradition of the civil code originally enacted in a country is often thought to have a lasting influence on the methodology employed in legal interpretation. Scholars of comparative law and economists promoting the legal origins theory of (financial) development usually subdivide the countries of the civil law tradition as belonging either to the French, Scandinavian or German group (the latter including Germany, Austria, Switzerland, Liechtenstein, Japan, Taiwan and South Korea).

The first civil code promulgated in America was that of Louisiana of 1804, inspired by the 1800 project of the French civil code, known as the Projet de l'an VIII (project of the 8th year); nevertheless, in 1808 a Digeste de la loi civile was sanctioned. In the United States, codification appears to be widespread at a first glance, but American codifications are actually collections of common law rules and a variety of ad hoc statutes; that is, they do not aspire to complete logical coherence. For example, the California Civil Code largely codifies common law doctrine and is very different in form and content from all other civil codes. In 1825, Haiti promulgated a Code Civil, which was no other than a copy of the Napoleonic one; while Louisiana abolished its Digeste, replacing it with the Code Civil de l'État de la Lousianne during the same year (1825). The Mexican state of Oaxaca promulgated the first Latin American civil code in 1827, copying the French civil code. Later on, in 1830, the civil code of Bolivia, a summarized copy of the French one, was promulgated by por

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Andrés de Santa Cruz. The latest, with some changes, was adopted by Costa Rica in 1841. The Dominican Republic, in 1845, put into force the original Napoleonic code, in French language (a translation in Spanish was published in 1884). In 1852, Peru promulgated its own civil code (based on a project of 1847), which was not a simple copy or imitation of the French one, but presented a more original text based on the Castilian law (of Roman origin) that was previously in force on the Peruvian territory. Chile promulgated its civil code in 1855, an original work in confront with the French code both for the scheme and for the contents (similar to the Castilian law in force in that territory) that was written by Andrés Bello (begun in 1833). This code was integrally adopted by Ecuador in 1858; El Salvador in 1859; Venezuela in 1862 (only during that year); Nicaragua in 1867; Honduras in 1880 (until 1899, and again since 1906); Colombia in 1887; and Panama (after its separation from Colombia in 1903). In 1865, the Canadian province of Quebec promulgated the Code Civil du Bas-Canada (or Civil Code of Lower Canada). Uruguay promulgated its code in 1868 and Argentina in 1869 (work by Dalmacio Vélez Sársfield). Paraguay adopted the Argentine code in 1876, and in 1877 Guatemala adopted the Peruvian code of 1852. In 1904 Nicaragua replaced its civil code of 1867 by adopting the Argentine code. Brazil enacted its civil code in 1916 (project of Clovis Bevilacqua, after rejecting the much superior project by Teixeira de Freitas that was translated by the Argentines to prepare their project), that entered into effect in 1917 (in 2002, the Brazilian Civil Code was replaced by a new text). Brazilian Civil Code of 1916 was considered, by many, as the last code of the 19th century despite being adopted in the 20th century. The reason behind that is that the Brazilian Code of 1916 was the last of the important codes from the era of codifications in the world that had strong liberal influences, and all other codes enacted thereafter were deeply influenced by the social ideals that emerged after World War I and the Soviet Socialist Revolution. European codes and its influence on other continents can be seen from the fact that Panama in 1916 decided to adopt...
the Argentine code, replacing its code of 1903. Many legal systems in Asia are also within the civil law tradition and have enacted a civil code; that is the case of Japan, Korea, Taiwan, the Phillipines and Macau.

The movement for codification, however, has been largely unsuccessful in countries where common law prevails, such as the United States. Despite the argument that the principles of common law are sometimes uncertain and often contradict one another, advocates of the common law assert that civil law makes possibly futile attempts to predict and control the course of developments. In the United States the term code is sometimes also applied to the statutes of a state or of the federal government that have been edited to eliminate duplication and inconsistencies and arranged under appropriate headings. Many states have published official codes of all laws in force, including the common law and statutes as judicially interpreted that have been compiled by code commissions and enacted by legislatures. The U.S. Code (U.S.C.) is the compilation of federal laws. The other important Civil Codes\(^5\) with Year of Enactment are as follows\(^6\):

1. Mesopotamia Code of Hammurabi (ca. 1780 BC)
2. Bavarian Codex Maximilianeus bavaricus civilis (1756)
3. Prussian Allgemeines Landrecht (1792 -- "General Law of the Land": an incredibly casuistic and thus unsuccessful code of 11000 Sections)
5. Austrian \textit{Allgemeines bürgerliches Gesetzbuch} (1812)
7. Serbia \textit{Грађански закони} (Civil Code) written by Jovan Hadžić (1844)

\(^{5}\) Codes written in bold letters are still in force
8. Chile Código Civil (Civil Code) written mostly by Andrés Bello and the base of the codes of Colombia, Ecuador and other Latin American countries. (1855 [1])

9. Quebec or Civil Code of Lower Canada (1865) repealed and replaced by Civil Code of Québec in 1994

10. Spain Código Civil in 1885

11. Japanese Mimpo (1896 (Part I-III) and 1898 (Part IV and V))

12. German Bürgerliches Gesetzbuch (1900)

13. Swiss Zivilgesetzbuch (1907)

14. Italian Codice Civile (1942)

15. Greek Αστικός Κώδικας (Civil Code) (1946)

16. Egyptian (1948)

17. Portuguese Código Civil (1966)

18. Philippines Civil Code of the Philippines (1950) -- replacing the Civil Code of Spain which had been in effect from 1889 to 1949.

19. Netherlands Burgerlijk Wetboek (1838), last major revision in 1992

Further, an attempt is also made to study in detail the four important civil codes of the world namely, Roman Civil Code; Japan Civil Code; German Civil Code and French Civil Code.

3.1 Roman Civil Code

Roman law is the legal system of ancient Rome. Roman law has influenced the development of law in most of Western civilizations. It dealt with matters of succession (or inheritance), obligations (including contracts), property (including slaves), and persons. Most laws were passed by assemblies dominated by the patrician families, though the rulings of magistrates were also important. Later emperors bypassed these forms and issued their own decrees. The interpretations of jurists also came to have the weight of law. Though various attempts were made to gather and simplify existing laws (beginning with the Law of the Twelve Tables), by far

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the most successful effort was that of Justinian I, whose code superseded all previous laws and formed the Roman Empire's legal legacy). Thus, the development of Roman law covers more than one thousand years from the law of the twelve tables (from 449 BC) to the Corpus Juris Civilis of Emperor Justinian I around 530). Roman law as preserved in Justinian's codes became the basis of legal practice in the Byzantine Empire and—later—in continental Europe.

Using the term Roman law in a broader sense, one may say that Roman law is not only the legal system of ancient Rome but the law that was applied throughout most of Europe until the end of the 18th century. In some countries like Germany the practical application of Roman law lasted even longer. For these reasons, many modern civil law systems in Europe and elsewhere are heavily influenced by Roman law. This is especially true in the field of private law. Even the English and North American Common law owes some debt to Roman law although Roman law exercised much less influence on the English legal system than on the legal systems of the continent.

Development of Roman law in antiquity

Romans did not have a tendency towards codified law. That is why the only codifications of Roman law are found at the beginning (Lex Duodecim Tabularum, or Twelve Tables) and at the end (Codex Theodosianus and Justinian's Corpus Juris Civilis) of Roman legal history. In the Archaic period the private law of this time (754 - 201 BC) was old Roman civil law (ius civile Quiritium), which applied only to Roman citizens. It was closely bonded to religion and it was undeveloped with attributes of strict formalism, symbolism and conservatism. It is impossible to give an exact date for the

beginning of the development of Roman law. The first legal text the content of which is known to us in some detail is the law of the twelve tables. It was drafted by a committee of ten men (decemviri legibus scribundis) in the year 449 BC. The fragments which have been preserved show that it was not a law code in the modern sense. It did not aim to provide a complete and coherent system of all applicable rules or to give legal solutions for all possible cases. Rather, the twelve tables contain a number of specific provisions designed to change the customary law already in existence at the time of the enactment. The provisions pertain to all areas of law. However, the largest part seems to have been dedicated to private law and civil procedure.

The important law sources of this time are results of class struggle between patricians and plebeians. As the result of this struggle "Law of twelve tables" has been made. Other laws include Lex Canuleia - 445 BC (which allowed the marriage ius connubii between patricians and plebeians), Leges Licinae Sextiae - 367 BC (made restrictions on possession of public lands -ager publicus-, and also made sure that one of counsuls is plebeian), Lex Ogulnia - 300 BC (plebeians received access to priest posts), and Lex Hortensia - 287 BC (verdicts of plebeian assemblies -plebiscita- now bind all people).

Another important statute from the Republican era is the lex Aquilia of 286 BC, which may be regarded as the root of modern tort law. However, Rome's most important contribution to European legal culture was not the enactment of well-drafted statutes, but the emergence of a class of professional jurists and of a legal science. This was achieved in a gradual process of applying the scientific methods of Greek philosophy to the subject of law—a subject which the Greeks themselves never treated as a science.

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Traditionally, the origins of Roman legal science are connected to Gnaeus Flavius: Flavius is said to have published around the year 300 BC the formularies containing the words which had to be spoken in court in order to begin a legal action. Before the time of Flavius, these formularies are said to have been secret and known only to the priests. Their publication made it possible for non-priests to explore the meaning of these legal texts. Whether or not this story is credible, jurists were active and legal treatises were written in larger numbers the 2nd century BC. Among the famous jurists of the republican period are Quintus Mucius Scaevola who wrote a voluminous treatise on all aspects of the law, which was very influential in later times, and Servius Sulpicius Rufus a friend of Marcus Tullius Cicero. Thus, Rome had developed a very sophisticated legal system and a refined legal culture when the Roman republic was replaced by the monarchical system of the principate in 27 BC.

In the period about 201 to 27 BC, we can see the development of more flexible law to match the needs of the time. In addition to the old and formal ius civile a new juridical class is created: the ius honorarium (so called because praetors were central to the creation of this new body of law and because the Praetorship was an honorary service). With this new law the old formalism is being abandoned and new more flexible principles of ius gentium are used.

The adaptation of law to new needs was given over to juridical practice, to magistrates, and especially to the praetors. A praetor was not a legislator and did not technically create new law when he issued his edicts (magistratum edicta). In fact, however, the results of his rulings enjoyed legal protection (actionem dare) and were in effect often the source of new legal rules. A Praetor’s successor was not bound by the edicts of his predecessor; however, he did take rules from edicts of his predecessor that

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had proved to be useful. In this way a constant content was created that proceeded from edict to edict (*edictum traslatitium*).

Thus, over the course of time, parallel to the civil law and supplementing and correcting it, a new body of praetoric law emerged. In fact, praetoric law was so defined by the famous Roman jurist Papinian (Amilius Papinianus - died at 212 AD): "lus praetorium est quod praetores introduxerunt adiuvandi vel suppleundi vel corrigendi iuris civilis gratia propter utilitatem publicam" ("praetoric law is that law introduced by praetors to supplement or correct civil law for public benefit"). Ultimately, civil law and praetoric law are fused in the Corpus Juris Civilis.

**Classical Roman law**

Roman law in the earliest period known is typically expressed in the Twelve Tables with their marked formalism. The usual early procedure was also stereotyped; it was the *legis actio*, a form of charge and denial the words of which had to be followed exactly by the parties at the risk of losing the suit. Exact knowledge of the words constituting the *legis actiones* was limited to a body of patrician priests, the College of Pontiffs. The reduction of these forms to writing (c.250 B.C.) was a victory for the plebeians and a step in reducing the religious and formal element in the law. Soon the primary source of law became the *lex* (plural *leges*), a statutory enactment that was proposed by a magistrate and accepted by a popular assembly. Among the assemblies empowered to enact *leges* was that of the plebeians.

The first 250 years AD are the period during which Roman law and Roman legal science reached the highest degree of perfection. The law of this period is often referred to as classical Roman law. The literary and practical achievements of the jurists of this period gave Roman law its

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18 Fritz Schulz, "History of Roman Legal Science" Clarendon Press. (1953)
unique shape. The jurists worked in different functions: They gave legal opinions at the request of private parties. They advised the magistrates who were entrusted with the administration of justice, most importantly the praetors. They helped the praetors draft their edicts\textsuperscript{19}, in which they publicly announced at the beginning of their tenure, how they would handle their duties, and the formularies, according to which specific proceedings were conducted. Some jurists also held high judicial and administrative offices themselves.

The jurists also produced all kinds of legal commentaries and treatises. Around 130 the jurist Salvius lulianus drafted a standard form of the praetor’s edict, which was used by all praetors from that time onwards. This edict contained detailed descriptions of all cases, in which the praetor would allow a legal action and in which he would grant a defense. The standard edict thus functioned like a comprehensive law code, even though it did not formally have the force of law. It indicated the requirements for a successful legal claim. The edict therefore became the basis for extensive legal commentaries by later classical jurists like Iulius Paulus and Domitius Ulpianus\textsuperscript{20}.

The new concepts and legal institutions developed by pre-classical and classical jurists are too numerous to mention here. Only a few examples are given here:

- Roman jurists clearly separated the legal right to use a thing (ownership) from the factual ability to use and manipulate the thing (possession). They also found the distinction between contract and tort as sources of legal obligations.

- The standard types of contract (sale, contract for work, hire, contract for services) regulated in most continental codes and the

\textsuperscript{19} http://en.wikipedia.org/wiki/Edict accessed on 24.6.2007
\textsuperscript{20} J. A. Crook, “Law and Life of Rome” Cornell University Press (1984);
characteristics of each of these contracts were developed by Roman jurisprudence.

• The classical jurist Gaius (around 160) invented a system of private law based on the division of all material into personae (persons), res (things) and actiones (legal actions). This system was used for many centuries. It can be recognized in legal treatises like William Blackstone’s Commentaries on the Laws of England and enactments like the French Code civil21.

Post-Classical law Expansion and Development

In the late 3rd century BC Roman law could no longer limit itself to the inhabitants of the republic but was forced to take account of the surrounding non-Roman peoples. Thus, to the jus civile, which governed relations among the Romans and those admitted to Roman status, was added the jus gentium, the law applied in dealings with a foreigner. The jus gentium incorporated much of the highly developed commercial law of the Greek city-states and of other maritime powers. Such provisions, being better adapted to Rome’s expanding economic needs than the unyielding provisions of the jus civile, in time tended to be applied universally.

The development of new principles was especially vigorous after c.100 B.C., an important source being the jus honorarium, i.e., the law of the praetors (chief magistrates). On assuming office the praetor announced the principles, sometimes novel, that would govern his decisions. The praetors also contributed greatly to making practice more flexible. In place of the legis actiones, they often used the formulary system. A formula, like a legis actio, was a device for determining the issue between the parties; but instead of being a mere interchange of prescribed speeches, it provided a structure for discussing the actual dispute. Whichever method was used, when the nature of the dispute was agreed upon, the parties brought their case before the judex, a private functionary, who considered the evidence and gave judgment.

By the middle of the 3rd century the conditions for the flourishing of a refined legal culture had become less favorable. The general political and economic situation deteriorated. The emperors assumed more direct control of all aspects of political life. The political system of the principate, which had retained some features of the republican Constitution began to transform itself into the absolute monarchy of the dominate. The existence of a legal science and of jurists who regarded law as a science, not as an instrument to achieve the political goals set by the absolute monarch did not fit well into the new order of things. The literary production all but ended. Few jurists after the mid-third century are known by name. While legal science and legal education persisted to some extent in the eastern part of the empire, most of the subtleties of classical law came to be disregarded and finally forgotten in the west. Classical law was replaced by so-called vulgar law. Where the writings of classical jurists were still known, they were edited to conform to the new situation.

After the establishment of the empire, the development of law largely passed from the praetors (the practice of issuing new edicts ended (A.D. 125) and from the popular assemblies into the hands of the emperors, sometimes operating through the senate. Various types of imperial enactments called Constitutions were issued in abundance. Legal problems attained great complexity, and the aid of a specially trained class of scholars was enlisted for their solution. Those jurists with a special license from the emperor could write responsa to guide the judges in deciding cases. Most prominent among the jurists was Papinian; his work, with that of Gaius, Modestinus, Paulus, and Ulpian, attained the highest authority. The employment of jurists was a step in making the whole of Roman procedure official; in this process the institution of judex was abolished and the trial placed entirely in the hands of a judge.

By the early 4th century most branches of Roman law were fully developed. The system was generally responsive to legal needs and allowed sufficient variety to meet local customs. A grave disadvantage of the
system, however, was that the vast corpus of legal matter included much that was confused, contradictory, or redundant; reduction to code form was required. The Theodosian Code (438), the earliest attempt, was followed by the Breviary of Alaric (506). Finally the task was accomplished with the culminating work of Roman legal scholarship, the Corpus Juris Civilis (completed 535) under the direction of Tribonian.

After the mid-6th century, Roman law persisted as a part of the Germanic laws and was in effect in the Byzantine Empire. Revival of classical studies during the Renaissance prepared the way for the partial resurrection of Roman law as the modern civil law in a large part of the world. The *jus gentium*\(^{22}\) is perhaps the most widely represented in modern legal systems, for it is the basis of commercial law even in those countries that follow common law. Between 753 B.C. and A.D. 1453, the legal principles, procedures, and institutions of Roman law dominated Western, and parts of Eastern, civilization. The legal systems of Western Europe, with the exception of Great Britain, are based on Roman law and are called civil-law systems. Even the common-law tradition found in the English-speaking world has been influenced by it. In the United States, the common law has been paramount, but Roman law has influenced the law of the state of Louisiana, a former French territory that adopted a French civil-law code.

Roman law began as an attempt to codify a set of legal principles for all citizens. In 450 B.C. the Twelve Tables were erected in the Roman Forum. Set forth in tablets of wood or bronze, the law was put on public display, where it could be invoked by persons seeking remedies for their problems. Though the texts of the tablets have not survived, historians believe they dealt with legal procedures, torts, and family law issues.

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\(^{22}\) *The Jus Gentium* ("Law of nations") was the body of common laws that applied to foreigners, and their dealings with Roman citizens. *The Praetores Peregrini* (sg. *Praetor Peregrinus*) were the individuals who had jurisdiction over cases involving citizens and foreigners.
From 753 to 31 B.C., the Roman republic developed the *jus civile*, or civil law. This law was based on both custom and legislation and applied only to Roman citizens. By the third century B.C., the Romans developed the *jus gentium*, rules of international law that were applied to interactions between Romans and foreigners. Over time the *jus gentium* became a massive compendium of law produced by magistrates and governors. Romans divided the law into *jus scriptum*\(^{23}\), written law, and *jus non scriptum*\(^{24}\), unwritten law. The unwritten law was based on custom and usage, while the written law came from legislation and many types of written sources, including edicts and proclamations issued by magistrates, resolutions of the Roman Senate, laws issued by the emperor, and legal disquisitions of prominent lawyers. Roman law concerned itself with every type of legal issue, including contracts, inheritance of property, family law, business organizations, and criminal acts.\(^{25}\)

Roman law steadily accumulated during the course of the empire, and over time it became contradictory and confusing. In the early sixth century A.D., the Byzantine emperor Justinian I, appointed a commission to examine the body of law and determine what should be kept and what should be discarded. From this effort came the *Corpus Juris Civilis*\(^{26}\), a codification of Roman law that became the chief law book of what remained of the Roman Empire. Some Roman jurists introduced *Jus naturale* as a

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\(^{23}\) The *Jus Scriptum* was the body of statute laws made by the legislature. The laws were known as *leges* (lit. "laws") and *plebiscita* (lit. "plebiscites" [originating in the Plebeian assemblies]). In them, Roman lawyers would include:
- The edicts of magistrates (*magistratum edicta*),
- The conclusions of the Senate (*Senatus consulta*),
- The responses and thoughts of jurists (*responsa prudentium*), and
- The proclamations and beliefs of the emperor (*principum placita*).

\(^{24}\) The *Jus Non Scriptum* was the body of common laws that arose from customary practice and had become binding over time.


\(^{26}\) The *Jus Civile* ("Citizen Law") originally (*Jus civile Quiritium*) was the body of common laws that applied to Roman citizens and the *Praetores Urbani* (sg. *Praetor Urbanus*) were the individuals who had jurisdiction over cases involving citizens.
further category. It encompassed natural law, the body of laws that were considered common to all beings.\footnote{T. Honore, "Emperors and Lawyers" St. Martin's Press (1982)}

The decline of the Roman Empire also led to the diminution of interest in Roman law in Western Europe. The \textit{Corpus} was unknown to western scholars for centuries. During the twelfth century, however, Roman law studies revived in Western Europe. In the late eleventh century, a manuscript containing part of the \textit{Corpus} was discovered in Pisa, Italy. The remainder of the compilation was soon recovered, and schools where Roman law could be studied were established in Bologna, Italy, and then elsewhere in Europe. By the twelfth century, commentaries on the \textit{Corpus Juris Civilis} appeared, and in time men trained in Roman law found posts in secular and ecclesiastical bureaucracies throughout Europe.

As a result, the legal systems of the Catholic Church and of almost every country in Europe were influenced by Roman law. Around the year 1140, the scholar Gratian prepared the \textit{Concordance of Discordant Canons}, or \textit{Decretum}. The \textit{Decretum} was the largest and best-organized compendium of canon (church) law up to that time. Gratian used the \textit{Corpus Juris Civilis} as his model, and later canonists studying the \textit{Decretum} used the same methods that Roman lawyers applied to the \textit{Corpus Juris Civilis}. Many scholars became masters of both Roman and canon law.

In the Roman law \textit{Jus publicum} means public law and \textit{ius privatum} means private law, where public law is to protect the interests of the Roman state while private law should protect individuals. In the Roman law \textit{ius privatum} included personal, property, civil and criminal law; judicial proceeding was private process (\textit{iudicium privatum}); and crimes were private (except the most severe ones that were prosecuted by the state). Public law will only include some areas of private law close to the end of the
Roman state. *Jus publicum* was also used to describe obligatory legal regulations (today called *Jus cogens*). These are regulations that cannot be changed or excluded by party agreement. Those regulations that can be changed are called today *Jus dispositivum*, and they are used when party shares something and are not in opposition.

On the other *Jus singulare* (singular law) is special law for certain groups of people, things, or legal relations (because of which it is an exception from the general principles of the legal system), unlike general, ordinary, law (*Jus commune*). An example of this is the law about wills written by people in the military during a campaign, which are exempt of the solemnities generally required for citizens when writing wills in normal circumstances. To describe person's position in legal system, Romans mostly used the expression *status*. The individual could have been Roman citizen (*status civitatis*) unlike foreigners, or he could have been free (*status libertatis*) unlike slaves, or he could have had certain position in Roman family (*status familiae*) either as head of the family (*pater familias*), or some lower member.28

Among the nations of Western Europe, England, which had already established a viable common-law tradition and a system of royal courts by the time that Roman law became accessible, felt the impact of the revival of Roman law the least. Nevertheless, English law drew upon Roman admiralty law, and the crimes of forgery and libel were based on Roman models. English ecclesiastical courts applied canon law, which was based on Roman law, and the universities of Oxford and Cambridge taught canon and Roman law. Scholars have noted the similarities between the Roman and English actions of trespass, and the equitable method of injunction may have been derived from canon law. Much of western European commercial

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law, which contained Roman law, became part of English law without much change.

The legal systems of most continental European nations owe their basic structures and categories to Roman law. Scholars point to several reasons for this "reception" of Roman law. In some areas such as southern France where remnants of Roman law had survived the collapse of the Roman Empire, the *Corpus Juris Civilis* helped to explain the institutions that were already in existence. More important in ensuring the reception of Roman law were the political principles that it contained. Law that had been produced in a centralized state under a sovereign emperor could be used to buttress the arguments of the European rulers as they struggled to assert their sovereignty over the feudal nobility.

At the same time that many of these rulers were consolidating their power, they were also expanding royal administration. This created new positions in government that often were filled by men with training in Roman law. Such men compiled collections of unwritten customs, drafted statutes, and presided over the courts, all of which provided opportunities for the penetration of Roman law. Roman law did not displace local customs. Instead, its influence was subtle and selective. A compiler of unwritten German customs might arrange the collection according to Roman principles of organization. A royal judge confronted with an issue on which customs of different regions in the kingdom disagreed might turn to Roman law, the only law in many cases that was common to the entire kingdom. Similarly, Roman law could be used when local customs offered no solutions. For example, the Roman law of contracts was particularly influential because European customary law had developed in an agrarian economy and was often inadequate for an economy in which commerce played an increasingly larger role.

After 1600 the reception of Roman law slowed in most countries but did not entirely disappear. In nineteenth-century Europe, the *Corpus Juris Civilis* provided inspiration for several codifications of law, notably the
French Code Napoléon of 1804, the Austrian code of 1811, the German code of 1889, and the Swiss codes of 1889 and 1907. Through these codes, elements of Roman law spread beyond Europe. The Code Napoleon served as a model for codes in Louisiana, Québec, Canada, and most of the countries of Latin America. German law influenced Hungarian, Brazilian, Japanese, and Greek law, and Turkey borrowed from Swiss law. In addition, the law of both Scotland and the Republic of South Africa derives from Roman law. Common-law countries, like the United States, enact statutes and even comprehensive codes, such as the Uniform Commercial Code, while civil-law countries have laws that have been developed by the courts and not enacted through legislation. Roman law itself contained these conflicting impulses of codification and judicial interpretation.

Ancient Rome had no public prosecution service, like the Crown Prosecution Service, so individual citizens had to bring cases themselves, usually for little or no financial reward. However, politicians often brought these cases, as to do so was seen as a public service. Early on, this was done by means of a verbal summons, rather than a written indictment. However, later, cases could be initiated through a written method. After the case was initiated, a judge was appointed and the outcome of the case was decided.

During the republic and until the bureaucratization of Roman judicial procedure, the judge was usually a private person (iudex privatus). He had to be a Roman male citizen. The parties could agree on a judge, or they could appoint one from a list, called album iudicum. They went down the list until they found a judge agreeable to both parties, or if none could be found they had to take the last one on the list. For cases of great public interest, there was a tribunal with 5 judges. First, the parties selected 7 from a list,

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and from those 7 the 5 were chosen randomly. They were called recuperatores. No-one had a legal obligation to judge a case, which was understood to be a burden. However, there was a moral obligation to do so, what was known as "officium". If a citizen refused to be a judge, the censor (magistrate who wrote the census) could exclude him. The judge had great latitude in the way he conducted the litigation. He considered all the evidence and ruled in the way that seemed just. Because the judge was not a jurist or a legal technician, he often consulted a jurist about the technical aspects of the case, but he was not bound by the jurist's reply. At the end of the litigation, if things were not clear to him, he could refuse to give a judgment, by swearing that it wasn't clear. Also, there was a maximum time to issue a judgment, which depended on some technical issues (type of action, etc).

Later on, with the bureaucratization, this procedure disappeared, and was substituted by the so-called "extra ordinem" procedure, also known as cognitory. The whole case was reviewed before a magistrate, in a single phase. The magistrate had obligation to judge and to issue a decision, and the decision could be appealed to a higher magistrate.

**Roman law in the East**

In the Byzantine Empire, the codes of Justinian became the basis of legal practice. Leo III the Isaurian issued a new code, the *Ecloga*, in the early 8th century. In the 9th century, the emperors Basil I and Leo VI the Wise commissioned a combined translation of the Code and the Digest into Greek, which became known as the Basilica. Roman law as preserved in the codes of Justinian and in the Basilica remained the basis of legal practice.

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30 Andrew Borkowski and Paul Du Plessis, "Textbook on Roman law". Oxford University Press, 3rd (ed.)
practice in Greece and in the courts of the Eastern Orthodox Church even after the fall of the Byzantine Empire and the conquest by the Turks\textsuperscript{31}.

**Roman law in the West**

In the west, Justinian's codes were almost immediately forgotten. While the Code and the Institutes remained known (though they had little influence on legal practice in the early Middle Ages), the Digest was completely ignored for several centuries. Around 1070 however, a manuscript of the Digest was rediscovered in Italy. This was done mainly through the works of glossars who wrote their comments between lines (\textit{glossa interlinearis}), or in the form of marginal notes (\textit{glossa marginalis}). From that time, scholars began to study the ancient Roman legal texts and to teach others what they learned from their studies. The center of these studies was Bologna. The law school there gradually developed into one of Europe’s first universities\textsuperscript{32}.

The students, who were taught Roman law in Bologna (and later in many other places) found that many rules of Roman law were better suited to regulate complex economic transactions than the customary rules, which were applicable throughout Europe. For this reason, Roman law, or at least some provisions borrowed from it, began to be re-introduced into legal practice, centuries after the end of the Roman Empire. This process was actively supported by many kings and princes who employed university-trained jurists as counselors and court officials and sought to benefit from rules like the famous \textit{Princeps legibus solutus est} (The sovereign is not bound by the laws). There have been several reasons why Roman law was favored in the Middle Ages. It was because Roman law regulated the legal protection of property and the equality of legal subjects and their wills, and because it prescribed the possibility that the legal subjects could dispose their property through testament.

By the middle of the 16th century, the rediscovered Roman law dominated the legal practice in most European countries. A legal system, in

\textsuperscript{31} http://en.wikipedia.org/wiki/Greek_East accessed on 24.6.2007
which Roman law was mixed with elements of canon law and of Germanic custom, especially feudal law, had emerged. This legal system, which was common to all of continental Europe and Scotland, was known as *Ius Commune*\(^3\). This *Ius Commune* and the legal systems based on it are usually referred to as civil law in English-speaking countries. Only England did not take part in the reception of Roman law. One reason for this is the fact that the English legal system was more developed than its continental counterparts by the time Roman law was rediscovered. Therefore, the practical advantages of Roman law were less obvious to English practitioners than to continental lawyers. Later, the fact that Roman law was associated with the Holy Roman Empire, the Roman Catholic Church and with absolutism made Roman law unacceptable in England. Even so, some concepts from Roman law made their way into the common law. Especially in the early 19th century, English lawyers and judges were willing to borrow rules and ideas from continental jurists and directly from Roman law.

The practical application of Roman law and the era of the European *Ius Commune* came to an end, when national codifications were made. In 1804, the French civil code came into force. In the course of the 19th century, many European states either adopted the French model or drafted their own codes. In Germany, the political situation made the creation of a national code of laws impossible. From the 17th century Roman law, in Germany, has been heavily influenced by domestic (common) law, and it was called *usus modernus Pandectarum*. In some parts of Germany, Roman law continued to be applied until the German civil code (*Bürgerliches Gesetzbuch*) came into force in 1900.

**Roman law today**

Today, Roman law is no longer applied in legal practice, even though the legal systems of some states like South Africa and San Marino and the legal system of the United States state of Louisiana are still based on the old *Ius "}\(^3\) [http://en.wikipedia.org/wiki/Ius_Commune](http://en.wikipedia.org/wiki/Ius_Commune) accessed on 24.6.2007
Commune. However, even where the legal practice is based on a code, many rules deriving from Roman law apply: No code completely broke with the Roman tradition. Rather, the provisions of Roman law were fitted into a more coherent system and expressed in the national language. For this reason, knowledge of Roman law is indispensable to understand the legal systems of today. Thus, Roman law is often still a mandatory subject for law students in civil law jurisdictions. Roman law is still taught in England at a few universities, among them Oxford University, Cambridge University, Exeter University and the University of Bristol34. As steps towards a unification of the private law in the member states of the European Union are being taken, the old *ius Commune*, which was the common basis of legal practice everywhere, but allowed for many local variants, is seen by many as a model.35

The Roman Family Law - The family came first for the Romans, before all other obligations; such as, civil, politic, and military obligations. The family was the vehicle for transmission of moral character. The institution of the Roman family was strengthened by a healthiness, a solidarity, and a spirit of uprightness and self-restraint superior to that of perhaps all other ancient peoples. Roman families were very diverse. The Basis of Roman civil law was the *familia*, a group consisting of a head, the *paterfamilias*, and his descendants in the male line. Free members and slaves, all under the guardianship and control of the *paterfamilias*, were also part of the *familia*. Free members were the wives, unmarried children (biological and adopted) and other dependents. The members of the *familia* had no voice in the *Curiae*, yet they were subject to its decisions and laws, as well as to the decisions made on the family level by the patriarch36.

34 Jill Harries, "Law and Empire in Late Antiquity" Cambridge University Press, (1999)
36 Bradley, Keith R. Discovering the Roman Family, Oxford University Press (1991)
Thus, one of the greatest legacies of Rome is their legal system. The development of Roman law began with the Twelve Tables\textsuperscript{37} in the mid-fifth century B.C. During a period of over 1000 years, the Roman jurists created a rich literature about all aspects of law: property, marriage, guardianship and family, contracts, theft, and inheritance. Roman law laid the foundations for much of Western civil and criminal law\textsuperscript{38}.

### 3.2 Japan Civil Code

Japanese law was historically heavily influenced by Chinese law and developed independently during the Edo period through texts such as *Kujikata Osadamegaki*, but has been largely based on the civil law of Germany since the late 19th century.

The Diet is Japan’s national legislature, responsible for enacting new laws\textsuperscript{39}. Statutory law originates in Japan’s legislature, the National Diet of Japan, with the rubber-stamp approval of the Emperor. Under the current Constitution, the Emperor may not veto or otherwise refuse to approve a law passed by the Diet\textsuperscript{40}. The main body of Japanese statutory law is a collection called the Six Codes (図図 roppō). The six codes referred to are:

1. the Civil Code (民法, 1896)
2. the Commercial Code (商法, 1899)
3. the Criminal Code (刑法, 1907)
4. the Constitution of Japan (日本国憲法, 1946)
5. the Code of Criminal Procedure (刑事訴訟法, 1948)
6. the Code of Civil Procedure (民事訴訟法, 1996)

Legislation in Japan tends to be terse. The statutory volume *Roppō Zensho*, similar in size to a desk dictionary, contains all six codes as well as the other statutes enacted by the Diet.

\textsuperscript{37} See Appendix 1
\textsuperscript{38} http://en.wikisource.org/wiki/Catholic_Encyclopedia_(1913)/Roman_Law accessed on 24.6.2007
\textsuperscript{40} http://en.wikipedia.org/wiki/Japanese_law accessed on 28.6.2007
Administrative guidance
While Japanese government agencies generally issue formal regulations for the implementation of statutes, they have very limited formal regulatory power in the absence of Diet legislation. However, when dealing with businesses, they often issue "directions," "requests," "warnings," "encouragements," and "suggestions," with the implication that noncompliant parties will be obstructed by the agency in the future by receiving poorer quotas or less government aid. The Cold War-era Ministry of International Trade and Industry was especially well-known for this practice, generally known as "administrative guidance" (gyōsei shidō).

While Japan has a civil law system and thus technically no binding value to judicial decisions, the precedents of the Supreme Court and the High Courts are commonly referred to and cited as persuasive precedent. Japanese contract law is based mostly on the Civil Code, which defines the rights and obligations of the parties in general and in certain types of contract, e.g. "mandate contracts", "bailment contracts" etc. Thus, the parties need not restate these statutory presumptions. As a matter of practice, contracts in Japan tend to contain very little detail, with the parties working out complications as they arise. Japanese contract law was heavily influenced by the German BGB and is therefore part of the civil law legal system41.

Japan's tort system sees considerably less activity than tort systems in North America. The principal reason for this is that damages are computed conservatively based on the plaintiff's proven expenses and losses, with only a small additional component for non-economic "pain and suffering". There is no system of pre-trial discovery, thus making it difficult for a plaintiff to establish causation. Because Japan does not use juries, judges decide the outcome of cases, and are usually not easy to sway emotionally. Attorneys' fees are based on the amount of damages sought in

the suit, not the actual damages won. As a result of these factors, many individuals choose not to sue when their odds of winning seem low, and when they do sue, they tend to sue for small amounts of damages.

Like several other civil law states, Japan places a great emphasis on the rights of the tenant, and landlords are generally not allowed to unilaterally terminate leases without "just cause," a very narrowly construed concept. Many landlords are forced to "buy out" their tenants if they wish to demolish buildings to make way for new development: one well-known contemporary instance is the Roppongi Hills complex, which offered several previous tenants special deals on apartments. In many cases, however, tenants' rights are circumvented by concluding leases in the name of the actual tenant's employer.

Despite this emphasis on tenant rights, the government exercises a formidable eminent domain power and can expropriate land for any public purpose as long as reasonable compensation is afforded. This power was famously used in the wake of World War II to dismantle the estates of the defunct peerage system and sell their land to farmers at very cheap rates (one historical reason for agriculture's support of LDP governments). Narita International Airport is another well-known example of eminent domain power in Japan. 42

**Family law in Japan**

Japanese family law is based on European civil law and Chinese Confucian principles. When Japan compiled its first modern legal code as a part of the modernization started in 1868, the traditionalists strongly opposed giving any rights to the inferior members of the hierarchically structured traditional family, within which inferiors owed unconditional obedience to their superiors. As the newly centralized Japanese State was visualized as the Family State with the Emperor as its Head, the controversy had a highly political dimension. This opposition had to be overridden by the immediate

necessity of having a Civil Code as a ground for instigating the removal of unequal treaties which had been imposed by Western Powers. As a result, the first modern family law which came into force in 1898 was a curious compromise between the contradictory values of modern law and the system of ie. During the first decades of this century, a series of attempts were made to have the family law revised to make it compatible with the virtue of obedience to parents and husbands. The solution acceptable to all sides was that there should be a body composed of persons of high prestige which was legally empowered to settle family troubles for the parties. This was the origin of the Japanese Family Court, which is still not entirely free from its paternalistic origins.

The ie (□), or "household," was the basic unit of Japanese law until the end of World War II: most civil and criminal matters were considered to involve families rather than individuals. The "ie" was considered to consist of grandparents, their son and his wife and their children, although even in 1920, 54% of Japanese households already were nuclear families. This system was formally abolished with the 1947 revision of Japanese family law under the influence of the Allied occupation authorities, and Japanese society began a transition to a more Americanized nuclear family system. However, the number of nuclear families only slightly increased until 1980, when it reached 63% and the Confucian principles underlying the ie concept only gradually faded and are still informally followed to some degree by many Japanese people today.

Marriage

Marriage in Japan takes exclusively the form of civil marriage by filing a notification of marriage with the competent Japanese municipal government office. This requirement applies irrespective of the nationality of either spouse.

Only this civil notification constitutes a legal marriage in Japan. Ceremonies performed by religious or fraternal bodies in Japan, while perhaps more meaningful for the couple, are not legal marriages. Consular officers cannot perform marriages.\footnote{http://en.wikipedia.org/wiki/Marriage accessed on 28 June 2007}

Article 731 to 737 of the Japanese Civil Code\footnote{See Appendix 2} set forth the following requirements:

- The male partner must be 18 years of age or older and the female partner must be 16 years of age or older. A person who is under 20 years of age cannot get married in Japan without a parent's approval.
- A woman cannot get married within six months of the dissolution of her previous marriage. According to Japanese law, this is to avoid confusion as to the identification of a child's father if a birth occurs close in time to the end of the marriage.
- Most people related by blood, by adoption or through other marriages cannot get married in Japan. Japanese law requires all foreigners who marry in Japan to first submit a Certificate of Competency to Marry (\textit{Konin Yoken Gubi Shōmeisho}), affirming they are legally free to marry, from their own country's embassy or consulate in Japan.

If either spouse is a Japanese national, the marriage is recorded in a family register, which must be under the family name of one of the spouses. This means that Japanese spouses must assume the same family name following their marriage. However, if one spouse is a foreigner, this rule does not apply, as foreigners cannot have their own entries in a Japanese family register (although they may be recorded as a comment in the register of their spouse).

**Children**

A child born to a married woman is assumed to be the child of her husband, although her husband may file in family court to disavow paternity if the paternity of the child is questioned. If a child is born to an unmarried
woman, or if paternity is disavowed by the mother's husband, the father may later claim paternity through family court proceedings, or the child may file in family court to force his or her father to be recognized as the father.

Children are given the family name of their parents at the time of birth. If the father is unknown at the time of the child’s birth, the child is given the family name of the mother, but may have his or her name changed to the father's family name after the father recognizes paternity.

**Divorce**

There are four types of divorce in Japan:

- Divorce by agreement (kyogi rikon), based on mutual agreement.
- Divorce by mediation in a family court (chotei rikon), completed by applying for mediation by the family court (for cases in which divorce by mutual agreement cannot be reached).
- Divorce by decision of the family court (shimpan rikon), which is divorce completed by family court decision when divorce cannot be established by mediation.
- Divorce by judgment of a district court (saiban rikon). If divorce cannot be established by the family court, then application is made to the district court for a decision (application for arbitration is a prerequisite). Once the case is decided, the court will issue a certified copy and certificate of settlement, to be attached to the Divorce Registration.

Foreign citizens must show evidence that they are able to be divorced in their country of nationality and that the procedures used in Japan are compatible with those of their home country.\(^48\)

Joint custody of children ends upon divorce. In a divorce by agreement, the husband and wife must determine which parent will have custody of each child. In other types of divorce, custody is determined by

the mediator or judge, with a strong preference toward custody by the mother (especially with regard to children born after the divorce).

**Dispute resolution**

Japan has a system of family courts (家族裁判部 katei saibansho) which have jurisdiction in the first instance over all intra-familial disputes, including divorce and child custody. Family courts employ a mediation system.49

### 3.3 German Civil Code

German Bürgerliches Gesetzbuch, is the body of codified private law that went into effect in the German empire in 1900. Though it has been modified, it remains in effect. The code grew out of a desire for a truly national law that would override the often conflicting customs and codes of the various German territories. The Bürgerliches Gesetzbuch (or BGB) is the civil code of Germany.50 In development since 1881, it became effective on January 1, 1900, and was considered a massive and groundbreaking project. The BGB served as a template for the regulations of several other civil law jurisdictions, including mainland China, Japan, South Korea, Taiwan, and Greece.

The introduction in France of the Napoleonic code in 1804 created in Germany a similar desire for obtaining a civil code (despite the opposition of the Historical School of Law of Friedrich Carl von Savigny)51, which would systematize and unify the various heterogeneous laws that were in effect in the country. However, the realization of such an attempt during the life of the German Confederation was difficult, for the appropriate legislative body did not exist.

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However, in 1871, the various German states were united into the German Empire\(^5\). In the beginning, civil law legislative power was held by the individual states, not the Empire (\textit{Reich}) that comprised those states. An amendment to the Constitution passed in 1873 (called "Lex Miquel-Lasker" - referring to the amendment's sponsors, representatives Johannes von Miquel and Eduard Lasker) transferred this legislative authority to the Reich. Various committees were then formed to draft a bill that was to become a civil law codification for the entire country, replacing the civil law systems of the states.

A first draft code, in 1888, did not meet with favour. A second committee of 22 members, comprising not only jurists but also representatives of financial interests and of the various ideological currents of the time, compiled a second draft. After significant revisions, the BGB was passed by the Reich legislature in 1896. It was put into effect on January 1, 1900 and has been the central codification of Germany's civil law ever since\(^5\).

\textbf{Nazi Germany}

In Nazi Germany, there were plans to replace the BGB with a new codification that was planned to be entitled "Volksgesetzbuch" ("people's code"), which was meant to reflect Nazi ideology better than the liberal spirit of the BGB, but those plans did not become reality. However, some general principles of the BGB such as the principle of bona fides (§ 242 BGB, "Treu und Glauben") were used to interpret the BGB in a Nazi-friendly way\(^5\).

\(^5\) http://en.wikipedia.org/wiki/German_Empire accessed on 30.6.2007
Germany since 1945

When Germany was divided into a democratic capitalist state in the West and a socialist state in the East after World War II, the BGB continued to regulate the civil law in both parts of Germany. Step by step, however, the BGB regulations were replaced in East Germany by new laws, beginning with a family code in 1966 and ending with a new civil code (Zivilgesetzbuch) in 1976 and a contract act in 1982. Since Germany's reunification in 1990, the BGB has again been the codification encompassing the civil law of entire Germany.

In western and reunited Germany, the BGB has been amended many times since it came into existence. The most important changes took place in 2002, when the law of obligations, one of the BGB's five main parts, was largely reformed. Besides, the way the courts construe and interpret the regulations of the code have changed in many ways, and continue to evolve and develop. This is particularly due to the high degree of abstraction throughout the code. In recent years lawmakers have tried to bring legislation on certain matters "back into the BGB" which had been ruled in separate acts. For example legislation on renting flats which had been transferred to separate laws like the "Miethöhengesetz" is now once again ruled in the BGB.

The BGB continues to be the centerpiece of the German Civil Law System. Other legislation relies on the principles set out in the BGB. Therefore in the German Commercial Code there are only the special rules for merchant partnerships and limited partnerships as the general rules for partnerships in the BGB also apply. The system of the BGB is a typical concept of the 19th century and has met right from the start many criticisms for its lack of social responsibility. Lawmakers and legal practice have improved the system over the years to adapt the BGB in this respect with more or less success. Recently the influence of EU legislation is quite strong and the BGB has seen many changes due to this. Wide ranging changes to the BGB were implemented following the "Modernisation of the Law of
Obligations" (Schuldrechtsmodernisierung) of the year 2002. The German code is divided into five parts. The first is general, covering concepts of personal rights... No German law has a larger number of Sections: The BGB ends with sec. 2385. Sec. 923 (1) BGB is a perfect hexameter:

"Steht auf der Grenze ein Baum, so gebühren die Früchte und, wenn der Baum gefällt wird, auch der Baum den Nachbarn zu gleichen Teilen" (If a tree stands on the border between two plots of land, the neighbours have equal rights to the fruit thereof and also to the tree, if it is cut down).

Whereas Sec. 923 (3) BGB rhymes:

Diese Vorschriften gelten auch für einen auf der Grenze stehenden Strauch (The foregoing provisions are also valid for bushes standing on the border).

Although several other laws are meant to deal with some specific legal questions which are deemed to be outside the scope of a general civil code, the highly specialised Bienenrecht (law of bees) is found within the property law chapter of the BGB (Sections 961 - 964). This results from the fact those in legal terms in Germany) bees become wild animals as soon as they leave their hive. As wild animals can’t be owned by anyone, the said Sections provide for the former owner to keep his claim over that swarm. But sec. 961-964 is usually described as the least important regulations in German law, with not a single decision of any higher court reported since 1900. The BGB contains five main parts ("books"):

- The General Part ("Allgemeiner Teil"), Sections 1 through 240, comprising regulations that have effect on all the other four parts
- The Law of Obligations ("Recht der Schuldverhältnisse"), Sections 241 through 853, describing the various forms of contracts and other obligations between persons, including tort law
- The Property Law ("Sachenrecht"), Sections 854 through 1296, describing possession, property, other rights persons have relating to

property (movable property and real estate), and how those rights can be transferred.

- The *Family Law* 57("Familienrecht"), Sections 1297 through 1921, describing marriage and other legal relationships among family members.58

- The *Law of Legacies* ("Erbrecht"), providing regulation for what happens to the belongings of deceased persons, including a Law of Wills.

### Family law in Germany

Family law is an area of the law that deals with family-related issues and domestic relations including, but not limited to: the nature of marriage, civil unions, and domestic partnerships; issues arising during marriage, including spousal abuse, legitimacy, adoption, surrogacy, child abuse, and child abduction; the termination of the relationship and ancillary matters including divorce, annulment, property settlements, alimony, and parental responsibility orders (in the United States, child custody and visitation, child support awards). This list is by no means dispositive of the potential issues that come through the family court system. In many jurisdictions in the United States, the family courts see the most crowded dockets. Litigants representative of all social and economic classes are parties within the system. Because the family courts are notoriously under funded 59 and see a relatively large proportion of economically dependent litigants, a common criticism levied is that the system inherently prejudices the needs of these disadvantaged parties.

58 see Appendix 3
59
The Principle of Abstraction

One particularly important and distinguishing element in the system of the BGB is the principle of abstraction \(^{59}\) (in German legal terminology "Abstraktionsprinzip", although the word does not appear anywhere in the code itself), which dominates the entire code and is vital for the understanding of how the BGB treats legal transactions, such as contracts. One example to clarify this: In the system of the BGB, ownership is not transferred by a contract of sale, as in most other jurisdictions. Instead, a contract of sale merely obliges the seller to transfer to the buyer ownership of the thing sold, while the buyer is obliged to pay the stipulated price. The buyer does not automatically gain ownership by virtue of the contract of sale, and the seller does not automatically gain ownership of the money. Section 433 of the BGB explicitly states this obligation of the seller, as well as the buyer's obligation to pay the negotiated price. So, seller and buyer have merely gained reciprocal claims. For transfer of ownership, another contract is necessary which is governed by Sections 929 et seq. Thus, in a simple purchase of goods paid for immediately in cash, German civil law interprets the transaction as (at least) three contracts: the contract of sale itself, obliging the seller to transfer ownership of the product to the buyer and the buyer to pay the price; a contract that transfers ownership of the product to the buyer, fulfilling the seller's obligation; and a contract that transfers ownership of the money (bills and coins) from the buyer to the seller, fulfilling the buyer's obligation. This doesn't mean that contracts in Germany are more complicated to the people involved. In particular, the contracts of everyday life don't differ from those in other countries in their outer appearance. For instance, if someone buys a newspaper at a

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newsstand without saying one single word to the seller, all the three contracts which are mentioned above are fulfilled by conclusive demeanor.

Although the principle of abstraction is not to be found in jurisdictions outside the German one (with the exception of those jurisdictions to which the BGB was exported) and contradicts the usual common-sense interpretation of commercial transactions, it is undisputed among the German legal community. The main advantage of the principle of abstraction is its ability to provide a secure legal construction to nearly any financial transaction however complicated this transaction may be. A good example is the well known retention of title. If someone buys something and pays the purchase price by installments, the system faces two conflicting interests: the buyer wants to have the purchased goods immediately, whereas the vendor wants to secure full payment of the purchase price. With the principle of abstraction the BGB has a simple answer to that: the purchase contract obliges the buyer to pay the full price and requires the vendor to transfer property upon receipt of the last installment. As the obligations and the actual conveyance of ownership are in two different contracts, it is quite simple to secure both parties' interests. The vendor keeps the rights to the property up to the last payment and the buyer is the mere holder of the purchased goods. If he fails to pay in full, the vendor may reclaim his property just like any other owner. Another advantage is that in the case of a defective treaty of sale the ownership remains effective and a resale is not involved. By the rules of unjust enrichment the buyer is obliged to retransfer the ownership if possible or otherwise pay compensation.

3.4 French Civil Code

The Napoleonic Code or Code Napoléon\footnote{http://en.wikipedia.org/wiki/France accessed on 7.7.2007} (originally called the Code civil des Français) was the French civil code, established under Napoléon I. It was drafted rapidly by a commission of four eminent jurists and entered

\footnote{http://en.wikipedia.org/wiki/France accessed on 7.7.2007}
into force on March 21, 1804. Even though the Napoleonic code was not the
first legal code to be established in a European country with a civil legal
system — it was preceded by the Codex Maximilianeus bavaricus civilis
(Bavaria, 1756), the Allgemeines Landrecht (Prussia, 1792) and the West
Galician Code, (Galicia, then part of Austria, 1797) — it is considered the
first successful codification61 and strongly influenced the law of many other
countries. The Code, with its stress on clearly written and accessible law,
was a major step in establishing the rule of law. Historians have called it
"one of the few documents which have influenced the whole world."

History

The Napoleonic Code was based on earlier French laws as well as Roman
law, and followed Justinian's Corpus Juris Civilis62 in dividing civil law into:

i) Personal status;
ii) Property;
iii) Acquisition of property.

Napoleon set out to reform the French legal system in accordance
with the principles of the French Revolution because the old feudal and
royal laws seemed to be confusing and contradictory to the people. Before
the Code, France did not have a single set of laws63; laws depended on
local customs, and often on exemptions, privileges and special charters
granted by the kings or other feudal lords. During the Revolution the
vestiges of feudalism were abolished, and the many different legal systems
used in different parts of France were to be replaced by a single legal code,
whose writing Jean Jacques Régis de Cambacérès had been charged to
lead. However, due to the turmoils of war and unrest, the situation did not
much advance until Napoleon's era ensured more stability and
Cambacérès, then Second Consul under Napoleon, could work in a more
serene manner.

Developing out of the various customs of France, notably the Coutume de Paris, this recodification process was inspired by Justinian's codified Roman law. The development of the Code was a fundamental change in the nature of the civil law legal system; it made laws much clearer. The reaction of the Civil Code and other subsequent codes resulted in considerable debate within France’s legislative bodies.

In ancient régime France, law courts, known as the Parlements, had often taken up a legislative role by judges protesting royal decisions – to protest excesses of royal power or, in some occasions, in order to defend the privileges of the social classes to which the judges belonged. The latter was especially true in the final years before the Revolution. As a result, the French Revolution took a negative view of judges making law. This is reflected in the Napoleonic Code prohibiting judges from passing judgments exceeding the matter that is to be judged, because general rules are the domain of the law, a legislative, not judicial, power. In theory, there is thus no case law in France. However, the courts still had to fill the gaps in the laws and regulations; thus a large body of jurisprudence was born; while there is no rule of stare decisis (binding precedent), the decisions by important courts have become more or less equivalent to case law.

Contents of the Code

The preliminary Article of the Code established certain important provisions regarding to the rule of law. Laws could only be applied if they had been duly promulgated, and if they had been published officially (including provisions for publishing delays, given the means of communication available at the time); thus no secret laws were authorized. It prohibited ex post facto laws (i.e. laws that apply to events that occurred before them). The code also prohibited judges from refusing justice on

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grounds of insufficiency of the law — therefore encouraging them to interpret the law. It, however, prohibited judges from passing general judgments of a legislative value, see above.

With regard to family, the Code established the supremacy of the husband with respect to the wife and children; this was the general legal situation in Europe at the time. It, however, allowed divorce on relatively liberal basis compared to other European countries, including divorce by mutual consent. In the Civil Code Book I and title V to XII and Articles 144 to 515 deal with the family laws.

Thus, France is a civil law system. The most important sources of French law are the five basic codes and the French Constitution. These codes are:

i) Code civil;
ii) Le nouveau code de la procedure civile;
iii) Code de commerce;
iv) Code penal, and
V) Code de procedure penal

These sources, along with custom, are primary sources of law. Persuasive sources of law include jurisprudence (court decisions) and doctrine (legal writings). An important distinction in French law lies between "public law" and "private law." Public law includes questions relating to government, the Constitution, public administration, and criminal law; private law includes questions of justice between private persons or corporations.

Thus, France is a federal parliamentary republic organized into three branches of government, with a strong executive branch. The president appoints the Council of Ministers, which is commonly referred to as the

68 See Appendix 4.
69 (http://www.legifrance.gouv.fr/html/frame_codes1.htm) accessed on 7.7.2007
government. The legislative branch (Parlement) is bicameral, consisting of l'Assemblée nationale (National Assembly) and le Sénat (Senate).  

**Legislation**

The French Parliament (Parlement) has the power to enact laws in the following areas: civil rights, nationality, status, capacity of persons, crimes and criminal procedure, currency, inheritance, and taxation. The power to regulate all other subjects rests with the executive. The Journal Officiel\(^7\) (Official Journal;) publishes laws and executive regulations. Laws are effective upon their publication in the Journal. An unofficial version of the Journal\(^7\) provides searching and indexes from 1996-1998. The Journal Officiel is available in Government Publications\(^7\)-Proposed bills and parliamentary debates are also published in the Journal, and may be helpful in researching legislative history. The Prime Ministers site also details proposed laws.\(^7\) France has had many Constitutions and amendments to its Constitutions. French Constitutional law includes the following documents, which combine to form the current French Constitution: The 1958 Constitution\(^7\), its Preamble [which refers to the Rights of Man and the principle of national sovereignty expressed in the 1789 Declaration\(^7\) and the Preamble to the 1946 Constitution\(^7\).  

Thus, the French legal system is based on the civil law tradition which has at its core five codes. Even though the Napoleonic Code\(^7\) was not the first civil code and did not represent the whole of his empire, it was one of the most influential. It was adopted in many countries occupied by the

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\(^7\) ([http://www.jura.uni-sb.de/france/JORF/](http://www.jura.uni-sb.de/france/JORF/)), accessed on 7.7.2007

\(^7\) Reference at the Wilson Library: Journal officiel de la Republique francaise. Lois et decrets (Paris: s.n.), accessed on 7.7.2007 accessed on 7.7.2007


\(^7\) [http://www.yale.edu/lawweb/avalon/rightsof.htm](http://www.yale.edu/lawweb/avalon/rightsof.htm), accessed on 7.7.2007


French during the Napoleonic Wars and thus formed the basis of the private law systems also of Italy, the Netherlands, Belgium, Spain, Portugal and their former colonies. In the German regions on the left bank of the Rhine (Rhenish Palatinate and Prussian Rhine Province) the Napoleonic code was in use until the introduction of the Bürgerliches Gesetzbuch in 1900 as the first common civil code for the entire German Empire.

Thus, it is clear from the study of the various civil codes in the world, that by enacting such codes an attempt is made to structure the law according to fundamental ethical principles of the countries and also to create a sense of order and simplicity that all members of society can comprehend. Stating the law in simple, precise terms, understandable to the lay person and common for all is the way for acceptance of law and resolution of disputes. Keeping in view the existence of civil codes in the majority of the countries in the world, there is a real need of one such code for all the citizens in a democratic country like India where population includes people belonging to diverse faiths, religions, and castes.