TITLE III

SOURCES OF LAW

75. Difficulties of the subject

It is difficult to present the theory of the sources of law as practised in the Romano-Germanic family. The original Roman law ideas on the subject are no longer observed and Roman law does not provide the common basis of approach. There are many laws within this family and each of them, when compared with the others, has its own originality. Moreover, even within each system of national law, the subject is complex and often provokes discussion. The way in which the solution to a given question is found may differ according to the branch of law considered, and may further depend to some extent on the mentality and personal views of each jurist. In addition, the theory of sources varies from one historical period to another, because it is related to the preponderant philosophical tendencies of the time to which people adhere consciously or unconsciously.

76. Theory and reality

Enacted law or legislation, considered lato sensu, is apparently the primary, almost exclusive, source of law today in countries of the Romano-Germanic family. They are, to borrow the terminology of an earlier period, countries of written law. In the search for legal rules and solutions jurists look first of all to the legislative or regulatory texts emanating from the principal legislative body or governmental or administrative authorities. Their task seems to be essentially one of discovering, by means of varied methods of interpretation, the solution which in each case corresponds to the intention of the legislators. Jurisconsulta sine lege loquens erubescit, as was formerly said in Germany. According to this analysis, other possible elements occupy a place subordinate to and of lesser importance than legislation, the source of law par excellence.
No matter how current this analysis may be, it is, in fact, very far removed from reality. Such a doctrine, as summed up by the above description, may well have been the ideal of a certain school of thought dominant in nineteenth-century France, but it has never been fully accepted as a matter of legal practice. Even in theory it is now increasingly admitted that the absolute sovereignty of legislation is a fiction in the Romano-Germanic family and that there is room for other and very important sources of law.

To confuse law and legislation, and to see in legislation the exclusive source of the law, is in fact contrary to the whole Romano-Germanic tradition. The universities, through whose teachings its legal concepts were moulded, may have based themselves on Roman legislative texts, but we know to what extent they distorted them; and the courts, especially the French parlements, which had such a considerable influence upon the evolution of national legal systems, made little, indeed only exceptional, use of legislation as we understand it. Moreover, until the nineteenth century, the universities were not interested in what were to become the national legislations. It is true that from the seventeenth century the School of Natural Law demanded that legislative authority sanction those rules which had been doctrinally elaborated on postulates derived from nature and reason, but in recommending the new technique of codification it never intended to say that law and legislation were to be identified, or that the study of legislation alone might lead to an understanding of law. Only later was there confusion on this point; it suffices to read the admirable Discours préliminaire du Code civil by Portalis (1746–1807), one of the principal architects of French codification, to dispel it.

77. Persistence of the tradition

A thorough revolution would have been necessary to reject the traditional concept that law is something other than legislation. Law, the quest of all men of good will and more especially of jurists, cannot be sought exclusively in written texts; its definition and very nature would change if it were no longer regarded as the expression of what is just, but simply as the will of those who gov-
ern. Such a revolution did take place in the Soviet Union and the people's democracies; in other countries this has not occurred.

Following codification, a positivist theory which held that legislation was henceforth the exclusive source of the law certainly appeared to triumph generally in different countries of the Romano-Germanic world. Specialists in various branches of the law too often continue to present this absolutist doctrine to students as still being the received view. As a result, in many countries, and especially in those of the Common law tradition, this explanation is often taken as an accurate description of the state of things in the Romano-Germanic family. In truth, a position much less dogmatic has been adopted by most jurists. The doctrine of Natural Law is today enjoying a revival.\(^2\) The adherents of positivism have themselves abandoned the myth of legislation, such as it was entertained in the nineteenth century; they now recognise the creative role of the judge; no one thinks any longer that legislation is the sole source of law or that a purely logical process of interpretation of legislation can, in all cases, lead to the required legal solution.\(^3\)

The countries of the Romano-Germanic family now have constitutions, codes and much enacted or statute law, whereas formerly the legal rules had to be sought in less systematised series of documents which more often than not had no official character. This change in legal technique is unquestionably of the utmost importance; the law has been accommodated to the needs of modern society through the removal of much of the useless variations and dangerous uncertainty which too often destroyed the authority of the former law in the era prior to codification. At a time when our ideas about justice were being re-examined because of profound changes in economics and technology, legislators came to play a greater part in the enunciation of the law. It is a long way from this admission, however, to a complete repudiation of our traditional idea of law, such as would be implied by an acceptance of a dogma of absolute state sovereignty.

The French jurists of the nineteenth century may have thought that their codes were, as Coke said of the Common law, "the per-

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\(^3\) Bobbie (N.), "Sur le positivisme juridique" in Mélanges Paul Roubier (1961), pp. 53–73.
fect of reason” and that henceforth the surest means of arriving at a just solution, or of knowing the law, was simply to perform the exegesis of these codes. Jurists of other countries may have had the same feeling when they in turn adopted codes. This supposed coincidence between law, which is justice, and legislation, which is the will of the legislators, did indeed enjoy acceptance at one time. Comparative law helps to rectify this error. We see Soviet jurists, for example, who advocate that law be identified with the omnipotence of the state, denouncing jurists of the Romano-Germanic tradition for the hypocrisy with which the latter purport to apply legislation whereas, in reality, they often deform it to serve the political interests of the bourgeois class in power. Again, comparative law shows how American or English jurists are surprised to discover that continental legislative provisions are not the capricious commands of a sovereign which must be executed to the letter and that codes, closely related to doctrinal works, are very often the simple framework within which a creative activity in the search for just solutions is carried on.

78. Technique and policy of decided cases

It is still true today that the courts and jurists of the Romano-Germanic family are not at ease unless they can invoke one or more texts of enacted law to justify or support the legal solution which they recommend. It may sometimes even be necessary to demonstrate that a legislative provision has been violated for the court to be seized at all or for there to be recourse to a higher court. This attitude and such provisions may create the impressions that the law and statutory texts are still considered to be one and the same in the Romano-Germanic world.

However, to have an exact view of things, consideration must be given to the way in which these legislative texts are interpreted, solicited and, sometimes, neutralised. The French courts, even after the Napoleonic codification, never restricted themselves merely to applying legislative texts, but their contribution to the development of the law throughout the nineteenth century remained in obscurity. The new social conditions at the beginning of this century required a bolder, more open approach. The centennial celebration of the Code civil gave an opportunity to the highest French judicial magistrate of the time, Ballot-Beaupré
(1836–1917), first president of the *Cour de cassation*, to proclaim, even before there was doctrinal acceptance of the idea, that decided cases (*jurisprudence*) had advanced "by the Civil Code, beyond the Civil Code" just as, at an earlier period, the law had progressed "by Roman law, beyond Roman law." The whole of administrative law as constructed by the French *Conseil d'Etat* is another example of the creative role of judicial decisions.

The idea of law such as it was understood for centuries in European universities has not been abandoned. The legislators certainly can, and indeed must, aid in defining the law, but law itself is something more than legislation. It is not to be confused with the will of legislators; it can only be discovered by the combined efforts of all jurists and especially of those involved in judicial administration. Today, the relative place of legislative and doctrinal sources, compared to what it was under the French *ancien droit*, may be reversed; nonetheless, in conformity with tradition, Romano-Germanic laws remain a system that can be described as a jurist’s law (*Juristenrecht*). Legislation has become the principal though certainly not the only means of knowing the law, but it only has meaning when taken in conjunction with other elements. In France, Germany and Italy today, as in the past, the law can only be known through a search in which the legislators and all jurists participate. Even though the fact may be hidden by legal technique, the law is made up of other important sources in addition to enacted law.

79. Unity of western law

In the final analysis, a similar attitude exists in countries of both the Romano-Germanic family and those of the Common law, because in all of them the idea of law is linked to the search for what is just. As will be seen, the principal difference between them is that whereas in the Romano-Germanic family these solutions are sought by a technique which considers first of all legislation, in the Common law family the same results are sought by a technique which first considers judicial decisions. Consequently, a different analysis of the *legal rule* results. It is conceived as legislative and doctrinal in Romano-Germanic family and as judicial in Common

law countries. With such a difference in approach, however, it
does not follow that there is a difference in the nature of law itself
as understood in each—for law, in a vast “western” family called
“bourgeois” by Soviet authors, is conceived in the same way and
is, precisely, to be opposed to the idea of law as prevailing in the
“socialist” family.

It must now be determined how the legislators and administra-
tive authorities by enacting and prescribing general provisions, and
how judges and jurists by interpreting the law and appealing to
other sources, specifically shape solutions in the Romano-
Germanic family. The following subjects\textsuperscript{5} will be successively
examined: the role of legislation, custom, decided cases, doctrinal
or legal writing and certain general or super- eminent principles.

\textsuperscript{5} Cf. David (R.) and Kindred (M.), \textit{French Law} (1972) where all these questions are exam-
ined more particularly in the context of French law. For German law, Fromont (M.) and Rieg
CHAPTER I

LEGISLATION

80. Present primacy of legislation

Under modern conditions, and for philosophical and political reasons, it is generally thought in countries of the Romano-Germanic family that the best means for achieving justice, the mission of law, is for jurists to rely upon the provisions of enacted law. This tendency predominated in the nineteenth century when nearly all the member-states of the Romano-Germanic family accepted codes and drew up written constitutions. It has been reinforced in our own time with the triumph of the idea of planned economies and the increased role of the state in all areas. The struggle for progress and the reign of law remains the task of all jurists, but in this work the role of legislators is preponderant at the present time. This attitude is in agreement with democratic principles; it is also justified by the fact that state and administrative bodies are, without doubt, best placed to coordinate the different sectors of social activity and to determine where the common interest lies. Finally, legislation, because of the rigours of drafting involved, appears to be the best means of enunciating the rules needed at a time when the complexity of social relations demands that precision and clarity be paramount.

In countries of the Romano-Germanic world, the provisions of law issuing from legislative or administrative bodies, which jurists are to interpret and apply in order to discover the solution to a problem, exist in the form of a hierarchy.

81. Constitutional rules

At the summit of this hierarchy are constitutions or constitutional laws. All countries of the Romano-Germanic family have written constitutions, the provisions of which are acknowledged to enjoy a special prestige. In some countries this prestige is above all
a political one; the constitutional provisions may have been adopted or may be modified according to special procedures, but in law they have no more authority than ordinarily enacted laws. In other countries, however, the constitutional provisions are legally something more than that; their special authority is revealed by the fact that a means of controlling the constitutionality of other laws is established, although the manner and character of such control may vary.¹

There is, at the present time, a distinct tendency to heighten the value of constitutional rules by giving them a status in fact greater than that enjoyed by ordinary legislation. The Constitution of the Federal Republic of Germany declares that “The Legislative Branch is bound to respect legislation and the law. If no other means are available, every German has the right to resist the efforts of any person attempting to subvert this order.”² New efforts have been made generally throughout the family to find ways to guarantee the constitution and, as in the United States, to establish the principle of a judicial control of the constitutionality of ordinary legislation. The most noticeable developments have occurred in Germany and Italy, in response to the fact that in both countries earlier governments had made a mockery of democratic principles and fundamental human rights. In both countries the courts have on numerous occasions set aside laws that violated fundamental rights (Grundrechte, diritti fondamentali) laid down in the declaration of rights included in the constitution.

Judicial control of the constitutionality of legislation while less far reaching has been accepted in many other countries as well. The authority exercising this control, and the means of doing so, vary from one country to another. In Japan and some countries of Latin America³ it is open to the judge, as in the United States, to find that a statute is unconstitutional and to refuse, therefore, under the control of the Supreme Court, to apply it. In European

² Fundamental Law (Grundgesetz) of the F.R.G., art. 20, paras. 3 & 4.
³ Argentina, Bolivia, Brazil, Columbia, Mexico, Venezuela. But judicial review in Chile, Cuba, Haiti, Panama and Uruguay is exercised only by their supreme courts. Only Ecuador, Peru and possibly the Dominican Republic (whose constitution is silent on the subject) deny the possibility of judicial review.
and African countries, on the other hand, the power to declare legislation unconstitutional is attributed to a specially created court. Such is the case in Germany, Austria, Italy, Monaco, Turkey and Cyprus. Here the ordinary courts, if they entertain a doubt about the constitutionality of some statute can only adjourn the proceedings and transmit the matter to the constitutional court. In some countries (Germany, Columbia, Cuba, Panama, Venezuela), it is also open to certain authorities, or even private persons, to test the constitutionality of some law independently of any actual litigation. This avenue is not available in the United States.

In assessing the importance in practice of the judicial control of constitutionality, one must be mindful of the circumstances in which it operates. Its significance is limited if the constitution it is intended to protect can be easily amended or if its application can be suspended by executive authority. These factors considerably reduce the real thrust of judicial control in many African, Latin and South American countries; it is worth noting that even in Germany the "fundamental law" has been amended 27 times since its enactment in 1949 and 1970. Account must also be taken of the psychology of judges and the hesitation they may feel before exercising their power of declaring a law constitutionally invalid. This is the reason why, in Japan, judicial control is used less than it is in the United States even though, on this point, in theory at least, there is no difference between the two legal systems. In Sweden, Denmark and Norway, legal writers agree that in theory the courts can refuse to apply a law found unconstitutional but no example of this having happened can be cited.

In other countries of the family it is not open at all to the courts to strike down a statute as unconstitutional. This is the case in the Netherlands and in France. The French courts were deterred from doing so for largely historical reasons. A change in approach seems, however, discernible in the decisions of the Conseil constitutionnel since it was created in 1958. The Conseil can only be seized in such matters however by a number of high state officials (or a group of 60 members of the legislature), outside any actual

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litigation, and before the statute comes into force. It is not at all therefore the equivalent of the constitutional courts found in Germany or Italy. In Switzerland the control exercised by the federal court bears only upon the conformity of laws of the cantons to federal law and does not extend to the constitutionality of federal law itself.

82. Treaties

A place similar to constitutional law is attributed to international treaties and conventions, although here again the practice varies from one country to another. Some constitutions declare that international treaties enjoy an authority superior to any enacted law, and this is the case in France and in the Netherlands. Here the question arises whether a law enacted after the coming into force of the treaty and incompatible with it will be applied. The Conseil constitutionnel in France decided that it had no jurisdiction to prevent such a law from coming into force; the Conseil d'Etat declined to exercise judicial control in such a case. The Cour de Cassation, on the other hand, did not pronounce upon the precise point because it was able to find, upon an interpretation of the texts, that the new law did not conflict with the treaty. The same attitude is found in the German courts where treaties as such are assimilated to ordinary statutes even though the Fundamental Law states that “the general principles of international law” have an authority superior to ordinary legislation. The interpretation of a particular treaty may of course fall within the purview of a supranational body, in which case the national courts may be required to divest themselves of the question of their interpretation. This is the case for example when a question of construction arises in connection with the treaties of Paris (1951) and Rome (1957) which created the various European “communities.”

83. Codes

Within the class of ordinary legislation, some laws are called codes. Originally, in an historical context, the term designated a

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5 The case dealt with the European Convention on Human Rights which proclaims a number of principles similar to those in the American Constitution.
collection of distinct enactments—the codes of Theodosius and Justinian were no more than this. In the nineteenth century, this name was given to compilations which sought to lay down the principles of a modern *ius commune* and which, though formally declared to apply in only one state, aspired to have universal application. This type of compilation was thus distinguished from those rules, inspired by considerations of convenience rather than justice, which would continue to exist within each nation.\(^7\) The terminology is, however, not as precise today as it once was; the word *code* is now used to refer to compilations which attempt to gather together and systematically organise the regulation on any special subject.

First of all, then, it must be observed that nearly all countries of the Romano-Germanic family, throughout the nineteenth and twentieth centuries, have adopted the formula of codification; and further that these codifications have all adopted the same organisational framework as that established in France, between 1804 and 1811, by the five Napoleonic Codes.\(^8\)

The only exception to this general pattern to note, in Europe, is made up of the Nordic countries. A single code was promulgated in each of them: in Denmark in 1683, in Norway in 1687, and in 1734 for both Sweden and Finland. These codes, very much earlier than the Napoleonic Codes, deal with the whole of the law, as did the later Prussian *Allgemeines Landrecht* (1794) and the Russian *Svod Zakonov* (1832). A divergent evolution has taken place since in the two groups of Nordic countries. In Denmark, Norway and Iceland the codes no longer exist; their different parts have been abrogated and replaced by statutes that have not been integrated into the former codes. In Sweden and Finland, on the contrary, the Code of 1734, the nine parts of which in Sweden are curiously called “beams” (*Balk*), continues to be cited as such. Draft codes, especially a civil code and a commercial code, have been considered at different times for some of these countries or for all of

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\(^7\) The idea that a code is a body of permanent law is best illustrated by the case of Portugal where the enactment of a constitutional law is required in order to authorise an amendment to the code.

\(^8\) However, the word code (*Gesetzbuch*) is not used in German-speaking countries with respect to the “Ordinances of Procedure” (*Zivilprozessordnung, Strafprozessordnung*). Procedure is a subject too linked to matters of judicial administration, too imprinted with national peculiarities, to be regulated by “codes.” The same scruple was felt in Spain (*where there exists only a ley de enjuiciamiento civil*), but not in the countries of Latin America.
them together but, whether arising from private or official initiatives, they have until now never been completed, nor is it likely they will be in the near future. The collaboration which has taken place between Nordic countries will indeed be much more difficult to bring about with respect to complete and comprehensive codes than in the case of more specialised statutes.\(^9\)

The recent tendency, referred to above, to draw up “codes” in respect of subjects in which no attempt is made to articulate the principles of a “common law,” has created a new diversity within the Romano-Germanic family. The “administrative codes,” promulgated in France since 1945, for example, their subject matter being wholly regulatory in character, exhibit a very pronounced national character. It may well be, however, that a number of systematic reforms accomplished in some countries may serve as models for others which will adopt, as Italy did, a code on maritime shipping or, as in the case of Belgium, a judicial code. Perhaps the real question to ask at the present time is whether the moment is not now near when European codes should be adopted within the framework of the European Economic Community (or even perhaps in a larger context) in order to defeat a new but nonetheless observable European provincialism.

84. Codes and statutes

The existence of codes in the Romano-Germanic family of law raises a further question. Do the generality of subjects which they cover, the anticipated permanence of their application and, above all, their mission of universal application, not require that they be considered differently from ordinary statutes with which they coexist in any given country? Does it not have to be acknowledged that they possess a special authority and that they therefore must be made subject to principles of interpretation other than those applicable to “ordinary” legislation? It is in fact common for legal writers to deprecate new laws and to seek to restrain their application by qualifying them as “special” statutes or exceptional legislation.

This attitude and this distinction can find some historical justification if it be true, as it has been suggested here, that codes were

laws which endeavoured to express a European common law transcending any particular national characteristics. However, national laws or customs, whatever their fortuitous character, have never been considered, in respect of their application and interpretation, as inferior to the principles of this common law. And it is proper that this tradition be maintained. Apart from cases where the legislators may have enacted expressly to the contrary, codes do not enjoy any special pre-eminence over those laws or statutes that have not been incorporated therein. When interpreted by jurists, codes and statutes are treated on exactly the same basis. This is especially the case today since the original idea of the code—that is, a repository expressing the European *ius commune*—has been largely forgotten: many statutes are called codes which in no way purport to be the expression of universal and abiding principles of justice. However, in the case of the older and most prestigious codes, it may very well be that their value is in practice superior to that of other laws: there is a natural tendency to attach a greater respect to their established principles because they have been, for many years, the object of a more detailed study and for this reason they are generally taken to have been more wisely framed than ordinary statutes are.

85. Regulations and decrees

Besides statutes in the strict sense, the “written law” of the countries of the Romano-Germanic family today includes a multitude of different rules and regulations emanating from authorities other than the legislative organ. These can be separated into two major categories.

First, there are those regulations promulgated for the implementation of statutes. Their existence, and even their multiplication, have raised no problems of a policy nature. It is evident that in a modern state, the “legislators” themselves cannot provide all the necessary regulations which are, in their detail, increasingly complex. All that can be expected of them, at least in many areas, is a statement of principle and more or less general rules. For the more detailed regulations required, it is necessary to depend upon the activity of administrative authorities. This is done by providing for the implementation of regulations and by delegating the power to make such regulations to administrative authorities. For some
time the principal problem appeared to be the control of these administrative authorities and in particular what form of control would guarantee the supremacy of statutory law and the conformity of regulatory provisions made by such administrative bodies in its application. Was this control to be exercised by all the courts (as in Germany) or reserved to special administrative tribunals (as in France)? Under what conditions was it to operate?

At the present time, there is some tendency to formulate a new relationship between legislative provisions and regulatory acts, and this by means of a new interpretation of the basic principle of the separation of powers. The feeling had arisen in some countries that the principle had been incorrectly applied and that the balance of powers which the principle attempts to put into operation had not been fully realised—the legislative branch, in appearance at least, had become all-powerful. In reality it would be more accurate to say that it had simply become overburdened and was discharging its legislative tasks unsatisfactorily. The executive branch, entrusted with the direction of administrative agencies, has enjoyed very considerable autonomy, and has often been called upon to initiate measures, by way of decree, that escape any control by the legislative branch. The French Constitution of 1958, apart from any political factors, can be considered as having given effect, in law, to the idea that the French Parlement was only to have those powers it was in fact able to exercise. Consequently, it restricted the scope of statute to certain areas; the legislators can only draw up fundamental principles in certain specific fields. Alongside the legislative power, exercised by the Parlement, the new French Constitution thus recognised the existence of a regulatory power not subordinate to the executive power but which, by its nature, was to be autonomous. The new principle put by the French Constitution has now raised a number of important questions relating to the distinctions to be drawn between the spheres of statute and regulation which the Conseil constitutionnel has been called upon to resolve. In return it has had the advantage of assuring the submission to a high court, the Conseil d'Etat, of a whole series of rules which, formerly, when enacted by the French legislature, escaped any such surveillance.

of each department.

All petitions shall have been made, and the other place
of the department, between the town in which the pro-
ject of General and Financial determination, on the
right, shall be presented to the President of the
chamber, which in each of the other departments,
represented by one day for every one hundred thousand
population! in each of the other departments,
be the seat of government, one day after the pro-
technically, the moment at which they are filed.

The population shall be assessed in every part of the
province, by the first council.

The laws are executed through the whole

CHAPTER 1.

ARTICLE 1.

The laws are executed through the whole

PRELIMINARY TITLE.

PREAMBLES CIVIL CODE.

Code Napoléon, translated by a partner of the Inner Temple, circa 1849.
TITLE II

SOURCES OF SOCIALIST LAW

181. Introduction

By sources of law, Soviet jurists mean first and foremost the economic infrastructure which, according to Marxist teaching, both conditions and determines the legal system of any country. In this sense, then, the fundamental source of Soviet law is composed of two factors: the collectivisation of the means of production and the establishment in the U.S.S.R. of the proletarian dictatorship. The techniques by which legal rules are developed or defined in any given place or at any time are, in Soviet doctrine, sources of law in only a secondary sense. While taking into account the country's economic and political structure, it is the study of these technical matters that will be undertaken here, with a view to determining the role played by legislation, decided cases and other factors in the development of law in the U.S.S.R.
ARTICLE 8. The socialist state:

a) carries out the will of the working people and
--channels the efforts of the nation in the construction of socialism;
--maintains and defends the integrity and the sovereignty of the country;
--guarantees the liberty and the full dignity of man, the enjoyment of his rights, the exercise and fulfillment of his duties and the integral development of his personality;
--consolidates the ideology and the rules of living together and of conduct proper to a society free from the exploitation of man by man;
--protects the constructive work of the people and the property and riches of the socialist nation;
--directs in a planned way the national economy;
--assures the educational, scientific, technical and cultural progress of the country;

b) as the power of the people and for the people, guarantees
--that every man or woman who is able to work have the opportunity to have a job with which to contribute to the good of society and to the satisfaction of individual needs;
that no disabled person be left without adequate means of subsistence;

that no sick person be left without medical care;

that no child be left without schooling, food and clothing;

that no young person be left without the opportunity to study;

that no one be left without access to studies, culture and sports;

c) works so that no family be left without a comfortable place to live.

ARTICLE 9. The Constitution and the laws of the socialist state are the juridical expression of the socialist production relations and of the interests and the will of the working people.

All state organs, their leaders, officials and employees function within the limits of their respective competency and are under the obligation to strictly observe socialist legality and to look after the respect of the same within the whole context of society.

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ARTICLE 19. In the Republic of Cuba rules the socialist principle of "from each according to his ability, to each according to his work."

The law establishes the regulations which guarantee the effective fulfillment of this principle.

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ARTICLE 23. The state guarantees the right to personal ownership of earnings and savings derived from one's own work, of the dwelling to which one has legal title and of the other possessions and objects which serve to satisfy one's material and cultural needs.

Likewise, the state guarantees the right of citizens to ownership of their personal or family work tools, as long as these tools are not employed in the exploiting the work of others.
CHAPTER 1

CHINESE LAW

482. Cosmic order and harmony

The traditional Chinese concept of the social order, which had developed until the nineteenth century apart from any foreign influence, is completely different from that of the West. The fundamental idea (distinct from any religious dogma) is that there is a cosmic order of things involving a reciprocal interaction between heaven, earth and men.¹ Heaven and earth observe invariable rules in their movement, but men are masters of their own acts; and according to the way in which men behave, there will be order or disorder in the world.

The harmony upon which world balance and man's happiness depend has two aspects. It is first of all a harmony between men and nature. Human behaviour must be co-ordinated with the order of nature. To avoid epidemics, poor crops, floods, earthquakes and other natural disasters, one must take into account the cycle of the seasons, the position of the stars and other events of nature when proceedings to various acts of public and private life. Persons in authority must set the example of lives conforming to the order of nature; that indeed is their essential role. Virtue and morality are thus more important in administrators than any technical expertise.

The second harmonious relationship that must exist is that between men. The ideas of conciliation and consensus must be primary in social relations. All condemnations, sanctions, majority decisions must be avoided. Contestations and disputes must be dissolved rather than resolved or decided; the solution proposed must

be freely accepted by each because he considers it to be just; no one, therefore, should come away with the feeling that he has lost face. Education and persuasion, not authority or force, must prevail.

483. Minor role of law

This way of thinking leads the Chinese to view unfavourably our western idea of law, with all of its abstraction and strictness. Man must not assert his rights since his duty is to co-operate in the work of reconciliation and, if need be, renounce his position in the interest of all. Jurists are not trusted; they are likely, in referring to abstract rules, to create obstacles on the path to seeking solutions through compromise; whether they wish it or not, they thus encourage blameworthy behaviour that is contrary to society's interests. Any solution must, above all, and apart from legal considerations, be in agreement with equity and feelings of human sentiment. Damages awarded, for example, must be such that they do not reduce the author of some wrong, or his family, to a state of misery.

Legislation, therefore, is not the normal instrument for resolving disputes among men. It may occasionally have a useful role to play, in so far as it suggests models of conduct or holds out threats to those who pursue anti-social conduct, but there is no question that anyone should observe the letter of the law and much discretion must be used in the handling and application of laws. The ideal is that laws never be applied and that the courts never render decisions.

In the traditional Chinese concept law is not excluded but it plays only a minor role. Law, we are told, is good for barbarians\(^2\): for those who have no concern for morality or society, for incorrig-

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\(^2\) Even the word "law" (droit), as R. Dekkers observes, evokes a certain rigidity; justice, in its symbolic representation, is blindfolded and does not see the parties.


\(^4\) According to legend, law (fa) was invented by a barbarous tribe (the Miao) in the time of the prophet Shun (23rd century B.C.) and God later exterminated them: cf. Bodde (O.) and Morris (C.), Law in Imperial China (1967).
ible criminals, other peoples or foreigners who do not share the values of Chinese civilisation. The Chinese, on the other hand, normally live outside or apart from the law. They don’t seek out whatever rules the law contains or claim their day in court, but settle their disputes and regulate their dealings with others according to their own idea of what is proper, without assertion of their rights and with conciliation and harmony as goals in mind. The reestablishment of harmony is made easier because of the fact that the education of all concerned naturally prompts them to seek the reasons for conflicts in their own deficiencies, carelessness or blunders rather than to attribute them to the bad faith or fault of an adversary. Typical of this point is the attitude of the civil servant who, observing difficulties in his department, would confess to the emperor or even commit suicide and thus stimulate citizens into asking themselves whether they weren’t those really responsible.\(^5\) In such an atmosphere, where each is ready to recognise his faults, it is easy to lead people into making concessions and to accept the intervention of a mediator. This acceptance may, however, be more forced than voluntary, given the fear of public opinion.

This aversion for law was traditionally enhanced by a range of factors, among which figures prominently the poor organisation—perhaps intentional but, in any event, blithely accepted by the ruling powers—of judicial administration.\(^6\) The official called upon to judge a dispute was removed from the litigants: not legally trained, recruited as a matter of principle from another province, he was not familiar with either the dialect or the custom of the region in which he acts. The clerks with which the pleader has to deal were corrupt and purposely prolonged the litigation from which they drew fees; the litigant was subjected to countless humiliations and

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\(^6\) The great 7th century Emperor K’ang Hsi is reported to have openly said, as cited by S. Van de Sprenkel, *Legal Institutions in Manchu China* (1962), p. 77: “Law suits would tend to increase to a frightful amount. if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice. As man is apt to delude himself concerning his own interests, contests would then be interminable, and the half of the Empire would not suffice to settle the lawsuits of the other half. I desire, therefore, that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate.”
the outcome of the trial was, in all events, very doubtful. According to popular maxims, "of ten reasons for which a magistrate may decide a case, nine are unknown to the public" and "a case won is money lost." Everything discouraged the Chinese from using the courts and encouraged the use of extrajudicial techniques for the settling of disputes.  

484. Confucianism: primacy of rites

The form of social order which for centuries represented the ideal in China was that proposed by Confucianism. According to the teachings of Confucius (551–479 B.C.), the fundamental social unit is the family, organised in a hierarchy under the almost absolute authority of its head. Public bodies and the state itself were patterned along the same model and refrained from interfering in the many aspects of social life reserved to the family. In communities and collectivities of various kinds, the individual's duty was to live according to the rite or "style of life" which fell to each according to his status. The observance of these rites, as laid down by custom, was, in China, the principle that took the place of law.

In such an essentially static concept of society, the ideas of filial piety, of submission to one's superiors and the prohibition of any type of excess or revolt were fundamental principles. The exercise of authority was, however, not arbitrary; it too was carried out in respect for rites and tempered by a morality which required that explanations precede any command, that arbitration precede judgment and that warning precede punishment.  

China existed for many centuries according to these precepts and without any form of organised legal profession. Justice was rendered by administrators acceding to their functions without any study of law who relied upon the advice of scribes belonging to an hereditary caste. Those who were trained in the law were only consulted clandestinely. No legal doctrine ever developed and no doctrinal writer established a name for himself in the long history of China.

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8 Tsien (T. H.), loc. cit. p. 432.
485. The legalists

While the validity of these principles was contested, the movement was highly exceptional. In the third century B.C., during a turbulent period of Chinese history, the school of legalists, basing itself on the idea of man's natural tendency towards bad behaviour, repudiated traditional theory and emphasised the need to obey prescriptions of law (government by law) rather than relying on the virtues of rulers (government by men). The legalists' theories, as expounded in the works of Han-Fei-tzu (d. 233 B.C.) stated the need for permanent laws which would be known by servants of the state and to which individuals would, without exception, be subject. On the whole, these theories express a concept of legislation (loi) and law (droit) very close to the western idea. J. Escarra\(^9\) observed that the theories of Han-Fei-tzu seem to express ideas so common with us that they appear to be somewhat "naive." These theories have remained however completely foreign to the Chinese mentality in general. They were too radical a departure from accepted thinking, and the legalists had only a passing success. They did not gain any general acceptance in China for the notion of permanent rules and the concept of sovereign law.

Re-established as a favoured philosophy during the Han dynasty (206 B.C.), Confucianism has ever since dominated Chinese thought. The Mongols, it is true, to show their scorn for it in the thirteenth century, ranked the Confucian scholars in the tenth and lowest social caste along with beggars and prostitutes, but this official attitude had no lasting effect. Confucian thought has prevailed right up to the twentieth century and law has never appeared important to the Chinese who have followed other paths in their search for justice. Legislation was never anything but complementary in their social order, based as it was upon the notion of a social statut.\(^10\) To study what in the West would be called Chinese private law, one must thus look to Chinese custom.\(^11\) The Chinese codes, which appeared in the Han dynasty, contain only administrative or criminal matters, and private law only figures in


\(^10\) T'ung-tsu Ch'ü, *Law and Society in Traditional China* (1961) states that law exists in order to maintain each person's status within the family rather than to determine what is right and what is wrong.

so far as customary rules may carry criminal sanctions.\textsuperscript{12} A person wishing to obtain state intervention in a matter of "private law" thus had to accuse the other party of a crime. But public opinion might well condemn even this behaviour and the complainant himself risked punishment in the event that he failed to establish the accusation.

486. Codification

The ideal of a society without law appeared to be put into question following the Revolution of 1911. The desire to be freed of western domination led the Chinese to adopt a series of codes manifestly based on western models: a Civil Code in 1929–1931 (encompassing private and commercial law), a Code of Civil Procedure in 1932 and a Land Code in 1930.\textsuperscript{13} In appearances, therefore, Chinese law has been Europeanised and can be ranked within the family of laws deriving from the Romanist tradition. In China, as in Europe, there is no lack of persons interested in the theoretical study of law.

487. Persistence of traditional ideas

Behind this façade, however, traditional concepts have persisted and, several exceptions apart, have continued to dominate the realities of Chinese life. The work of a few men wishing to westernise their country could not possibly have resulted in the sudden transformation of Chinese mentality or accustom the people and jurists of China, in only a few years, to the Romanist concept of law which itself had developed only after a thousand years in the hands of the Christian jurists of the West. The Chinese codes and

\textsuperscript{12} The early codes have been lost. The oldest in existence, that of the T'ang dynasty, dates from the 7th century A.D. The later codes adopt its plan according to which there are two parts: criminal law (lü) and administrative measures (ling). The code in force at the fall of the Empire, the 《T'ou Ch'ing lu-li code, was first published in 1646. The first part contained 457 basic rules (lü), complemented or amended by about 1800 other rules (li). The whole was grouped under six titles according to whichever one of the six imperial administrative offices they were relevant. Complete editions of the Code contain glosses, a commentary and examples serving as illustrations of the text. Cf. McAleavy, \textit{op. cit.} pp. 119–122. An abbreviated version was published in French by G. Boulais, \textit{Manuel du Code chinois} (1924); and P. L. F. Philastre, \textit{Le code annamite} (2nd ed., 1909).

\textsuperscript{13} These codes are still in force in Formosa. As to Hong Kong, annexed by the English in 1843, where they were never in force, cf. McAleavy (H.), "Chinese Law in Hong Kong: The Choice of Sources" in Anderson (J. N. D.) ed., \textit{Changing Law in Developing Countries} (1963), pp. 258–269.
laws were traditionally only applied to the extent that they corresponded to the popular ideas of equity and propriety. When they conflicted with tradition they were in fact ignored. In the early period, no resort was had to the courts, either because one was unaware of one’s rights or because there was a wish to avoid the disapproval of society. Social relationships continued to be governed in this way, as they were in the past. If, in exceptional cases, one did go before the courts, the Chinese judges still decided according to the standards set by Confucius rather than by an application of the rules of written law. They would for example refuse to evict a poor tenant who had committed no fault if the landlord were well-off and not in need of the premises; they granted delays to borrowers in embarrassed circumstances if their creditors were rich. And, as feared, the enactment of new codes resulted in an increased number of trials and this, to the Chinese, was a sign of decadence. Even the most advanced thinkers considered a return to the principles of Confucius to be desirable.14

488. Communist China

China became a people’s republic on October 1, 1949, as a result of the Communist Party victory under Mao-Tse-Tung (1893–1976). Like the U.S.S.R., it has from that date adhered to Marxist-Leninist teaching.

The U.S.S.R. and European people’s republics have willingly resigned themselves, in a transitional phase, to accept the principle of social legality. For centuries, in these countries, law has had a primary role; there is, then, no great embarrassment in relying upon the technique of law as the most effective means for building and organising a new egalitarian and classless society. In China, on the contrary, the principle of law is detracted; it represents for the Chinese nothing more than a brief period of their history, an episode of the western imperialism of which they are now free.15

China is also more ready than the U.S.S.R. to emphasise moral development and civic education among its citizens even though the link formerly established between social harmony and the natural order is no longer recognised.

489. First years: the Soviet model

The "common programme" of 1949 abolished in one stroke all existing laws, decrees and courts (s.17). It was thus urgent to rebuild the framework of society with all speed.

In the first years following the arrival of the communists in power, it appeared that, as in the Soviet Union, the primacy of law and legislation would be (reluctantly) accepted because in them, it was thought, lay the quickest and most effective means for totally transforming society and preparing for the advent of communism. A series of fundamental laws was adopted from 1949 onwards, in line with the Soviet model for this social reorganisation. A people's Supreme Court was created to direct the work of all the new courts and a Prokuratura was also established, which seemed to proclaim the triumph of the principle of legality. Major legislation was enacted in 1950 (on marriage, land reform, unions) and in 1951 (provisional organisation of the judicial system, repression of counter-revolutionaries). A codification commission was created within the central government and began the work of drafting codes in 1950.

In the absence of a sufficient legally experienced personnel, the operation of these new institutions encountered very great difficulty. The police and public security forces often assumed tasks properly belonging to the courts; special courts functioned in the place of ordinarily competent people's courts which were sometimes controlled by the soviets. The Prokuratura, in the absence of legislation, was barely able to organise itself and hardly knew what to do. The principle of legality was thus established only with difficulty and, in 1952–1953, attacks were launched against it and the separation of law and politics, the principles of the independence of the judiciary and equality before the law, against the formalism and non-retroactivity of legislation, and against such concepts as *nulla poena sine lege* and the limitation of actions.

The Soviet model nevertheless appears to have been followed in the end and the principle of socialist legality to have become established. The 1954 Constitution based on the Soviet Constitution of

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16 A major purge was carried out during 1952–53 in the judiciary; about 80 per cent. of the judges who had served under the previous regime (6,000 out of 28,000) were eliminated and 6,500 new judges were named from among the "activists."
MUSLIM LAW

422. The close link between law and religion

Unlike the laws studied earlier, Muslim law is not an independent branch of knowledge or learning. It is only one of the facets of Islamic religion itself. This religion includes first of all a theology which establishes dogma and states exactly what a Muslim must believe, and it also includes the shar' (or shari'a) which lays down rules of behaviour for believers. The shar' or shari'a—literally "the way to follow"—constitutes what can be called Muslim law. It specifies how the Muslim should conduct himself in accordance with his religion, without making any distinction in principle between duties towards others (civil obligations, alms-giving) and those towards God (prayers, fasting, etc.). It is therefore centred on the idea of man's obligations or duties rather than on any rights he might have. The real sanction for these obligations is the state of sin into which the believer neglecting them will fall. For this reason, Muslim law often shows very little interest in civil sanctions attached to the violation of its prescribed rules. For the same reason, the law is only applicable to dealings between Muslims. The religious principle upon which it is based gives way when non-Muslims are involved.

The fundamental principle of Islam is that of an essentially theocratic society, in which the state is only of value as the servant of revealed religion. Instead of simply proclaiming moral principles or articles of dogma to which Muslim communities would

1 The transliteration of Arabic words in general observes that employed by Schacht (I.), An Introduction to Islamic Law (1961) and Coulson (N.J.), A History of Islamic Law (1961).
2 Compare Ulpian's definition (D. I. 10. 2, De poenit. et pur.), Jurisprudentia est dominium aequae, benigna, et salutis in humana ratione verum hominum, patrisque aequum societatis.
3 The laws of the East, Hindu and Jewish law are all based on the same fundamental idea of Storberg (N.), "Law and Morals in Jewish Jurisprudence," 75 Harv. J. Rev., p. 306 (1961).
have to make their laws conform. Muslim jurists and theologians have built up a complete and detailed law on the basis of divine revelation—the law of an ideal society which one day will be established in a world entirely subject to Islamic religion. Muslim law can only be really understood by someone with a minimum general knowledge of Islamic religion and the civilisation to which it is so closely connected. At the same time, no student of Islam can afford to ignore Muslim law. Like Judaism, Islam is essentially a religion of the law. "Islamic Law," writes H. A. R. Gibb, "was the most far-reaching and effective agent in moulding the social order and the community life of the Muslim peoples...[the moral authority of the Law...held the social fabric of Islam compact and secure through all the fluctuations of political fortune.” Its influence has been felt in almost all aspects of social and economic life as well as in all branches of literature. And according to Bergsträsser, it is "the epitome of the true Muslim spirit, the most decisive expression of Islamic thought, the nucleus of Islam."

423. The law’s structure

The science of Muslim law, fiqh (or fiqh), is generally divided into two major parts. One is the "roots," the doctrine of the sources (usul) which explains by what methodology or procedure and on what basis the body of rules making up the shari'a or Divine Law was established. The other is the doctrine of the "branches" (furu'), containing the systematic elaboration of the basic categories and rules of Muslim law. In its organisation, classifications, and ideas Muslim law is altogether original compared to the systems of law studied so far. These differences in organisation, however, will not be emphasised here and we shall limit ourselves to presenting a brief survey of the theory of the sources of Muslim law. It will then be seen just how adaptable to the conditions of the modern world, in spite of its apparent inflexibility, Muslim law really is. Finally, a general description of the laws of various contemporary Muslim nations will be given.

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1. On the conditions in which this law was developed, cf. Schacht (J.), An Introduction to Islamic Law (1964), pp. 6-11.


IMMUTABLE BASIS OF MUSLIM LAW

424. Various sources of law

There are four sources of Muslim law: the Koran (Qur'án), the sacred book of Islam; the Sunna, the traditional or model behaviour of the Prophet, God's Messenger; the ijmá' or consensus of scholars of the Muslim community; and the kiyās (or qiyās), juristic reasoning by analogy.

425. The Koran and the Sunna

Muslim civilisation, and therefore its law, are based on the Koran, the sacred book of Islam, which is the collection of Allah's revelations to the last of his prophets and messengers, Muhammad (570–632). The Koran is unquestionably the primary source of Muslim law. It is clear however that its juridical provisions are inadequate as a statement of Muslim personal relations and some of the basic institutions of Islam are not even mentioned in it.

The Sunna contains the way of life and conduct of the Prophet, whose example serves as a guide for believers. It is made up of the collected traditions, or hadith, of the acts and statements of Muhammad handed down through an uninterrupted chain of intermediaries. In the ninth century A.D., two great doctors of Islam, Al-Bukāri (810–870) and the Muslim (820–875), undertook detailed research and verification of the traditions in order to establish the authentic hadith of the Prophet. Their work and that of others in the same period laid the solid foundation of the Muslim faith, even though it is now admitted that some of the hadith collected are of questionable authenticity in so far as their connection with Muhammad is concerned.

With the help of analogical reasoning, it is usually possible to discover from the rules of the fikh the required solution in any particular case. On the other hand, one cannot hope to adapt Muslim law by this means to the needs of a modern society. The doctors of Islam are not however concerned with this. "The fikh is not intended to reflect reality; rather, it is like a beacon guiding the faithful towards the religious ideal, and often this is in a direction in which they are not progressing. The idea of adapting the fikh to contemporary conditions is completely foreign to the system."
431. Rejection of other sources

For this reason Islam regards with suspicion, and generally condemns, forms of reasoning which enable the law to evolve. In particular, Muslim law has refused to admit that a legal solution might be based on a believer's personal opinion or individual reasoning (ra'y). Because Muslim law is based on religious tenets, is divinely inspired and essentially non-rational, the support which derives from reason or equity would be insufficient to make such individual reasoning authoritative.

432. Characteristics of Muslim law

A few additional observations must be made about the theory of sources of Muslim law described above.

Certain characteristics of Muslim law are explained by the fact that as a science it was formed and stabilised during the Middle Ages: thus the archaic nature of some of its institutions, its case-by-case outlook, and its lack of systematisation. This is not however the most important factor. The essential point is the complete originality of Muslim law, by its very nature, in the light of the other legal systems in general and of Canon law in particular.

Its originality derives generally from the fact that the Muslim legal system is based on the Koran, a book of revelation, and as a system it must therefore be considered entirely independent of all others which do not have the same source. Any particular resemblance to solutions in other systems can be no more than pure coincidence according to the orthodox Muslim view, because there can never be any question of Muslim law having borrowed from a foreign system of thought. On the other hand, the influence of Muslim law on the laws of Europe appears to have been almost negligible.

433. Comparison with Canon law

Muslim law is also original when compared with the Canon law of Christianity. Like Canon law, it is the law of a church in the original sense (ecclesia): that of a community of faithful. But apart
from this similarity there are very fundamental differences. Muslim law, down to its finest detail, is an integral part of Islamic religion and of the revelation that it represents. Consequently, no authority in the world is qualified to change it. Not to obey Muslim law is a sin leading to punishment in another world; he who disputes a solution of Muslim law is a heretic and thereby excludes himself from the community of Islam. Finally, a Muslim's life in society is only governed by the rules of his religion, of which Muslim law is an integral part. In all these ways Muslim law differs from the Canon law of Christian society. The spread of Christianity originally took place in a highly civilised society where law enjoyed great prestige. It proclaimed new dogmas and moral principles, but it was not interested in the actual organisation of society. “My kingdom is not of this world,” said Christ. And the Gospels confirmed the validity of secular principles: “Render unto Caesar the things which are Caesar's” (Matt. XXII, 21). Not only did the Catholic Church feel it unnecessary to develop a Christian law to take the place of Roman law; it did not consider itself authorised to do so. Neither Saint Paul (d. 67 a.d.) nor Saint Augustine (354-430) attempted to develop a Christian law; in fact they advocated the decline of law through the use of arbitration and the observance of brotherly love. Canon law was not a complete legal system designed to replace Roman law. It complemented Roman law or other “private” laws, never anything more, and regulated subjects not covered by these laws such as Church organisation, the sacraments, and canonical procedure. In addition, Canon law is in no sense a revealed law. Although it is most certainly based on the revealed principles of Christian faith and morality, it is the work of man and not the Word of God. The Christian who violates its rules is not necessarily subject to punishment in the next world. As long as the immutable principles of dogma are respected, ecclesiastical authorities are allowed to make changes to improve or adapt it to particular circumstances of time and place. The Church of Rome itself has different Canon

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13 Similarly, the Koran repeatedly emphasises the merits of forgiveness and the remittance or abandonment of claims. However, a more realistic attitude finally prevailed in the Islamic, as in the Christian, world. Schacht (J.), Esquisse d'une histoire du droit musulman (1933), p. 13.

14 Before the Church States disappeared in 1870, there had always been a private law distinct from Canon law. The same holds true today in the Vatican City State.
law codes for adherents to the Latin or Eastern rites. Christian Canon laws have developed enormously over the centuries and continue to do so at the present time.

Under these conditions, Roman law was able to spread throughout the West without conflicting with the Christian religion. Roman law was taught in most of the universities approved by papal bulls. The situation, quite obviously, is totally different in Muslim countries where the law is part of the revealed Islamic religion. The establishment of a purely secular law in these countries is inconceivable. Here the orthodox view excludes any law which does not strictly conform to the rules of the shari'a.

434. Inadaptability of fikhl to modern society

Since its development was arrested in the tenth century, the fikhl as a body of law is manifestly incapable of adapting to modern societies. It does not anticipate certain institutions seemingly necessary in these societies. While many of its rules were probably quite adequate in their own time, today they seem outmoded and sometimes even shocking. The inability of the fikhl to adapt to modern ideas and conditions has thus created a problem, particularly in those countries with a Muslim majority which have abandoned their passive attitude and have looked since the last century to western nations as a model, attracted not only by their material prosperity but by their political ideas and moral concepts as well. Can Muslim countries modernise themselves without rejecting tradition? And what role can the fikhl continue to play in these new societies?