

## **NOTES CORNER**

- Notes on Jurisprudence: Early Legal Positivism
- Notes on Legal History

## NOTES ON JURISPRUDENCE

### Early Legal Positivism: Bentham & Austin

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#### Introduction

Legal Positivism developed in reaction to Natural Law theories and it distinguished itself as a movement after breaking away from the Natural law system of theorising. The difference between the two schools of jurisprudence lies in the fact that Legal Positivists, like any other type of Positivists (be they Sociological, Logical or Philosophical Positivists) tend to prefer to focus on the “real, observable world and its actual existence”<sup>1</sup> and to be able to produce a study of law that examines and describes the nature of systems of rules in contrast to the Natural Law theorists who tended to consider questions how laws can be made just or ethical.<sup>2</sup> In short, Positivism seeks to pursue the study of Jurisprudence solely from an analytical angle, thus concentrating on the question “what is law?” rather than take a normative approach as most Natural Lawyers are said to do. To this end, all Legal Positivists try to generalise common features of stable systems of rules to explain what law is in reality.

Although there are numerous Positivists and quite a few Positivist theories of Law, there are three dominant theories which embody this school of Jurisprudence. The first group includes the Early Positivists, Bentham and Austin, who propounded analytical positivism in the early Command Theories of Law. The second theory is the Positivist theory (or Concept of Law) of H.L.A. Hart which was described as the ruling theory of law by Ronald E. Dworkin and the third one is the Pure Theory of Law of Hans Kelsen.

All three theories share many features in common in that they react to natural law theories and they tend to encourage the study of law to focus on the study of human laws (which are a result of human endeavours) so as to avoid the lack of clarity they all feel natural law theories suffer from. All three sub-schools also hold that any link between laws and morals is arbitrary and at-

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<sup>1</sup> J. Penner, D. Schiff and R. Nobles, Introduction to Jurisprudence and Legal Theory: Commentary and Materials (2000) Lexis

Nexis UK, London, p. 92

<sup>2</sup> For a discussion on Natural Law Theories, see E. Nalbandian, “Notes on Jurisprudence: Natural Law Theories”, 1 Mizan Law Review, No. 1, June 2007, p. 167-178

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tributable to linguistic expression. Thus, this theory intends that the two notions should be kept separate. Finally, they all assert that what human law is and what it ought to be are different questions (which for the positivists is the main reason why natural law is unclear).

Similarities aside though, each Positivist theory of law is distinct in its approach and emphasises different areas as being key to the true understanding of what law is. It is for this reason that the following notes will describe the Early Positivist theory of Law as introduced by Jeremy Bentham and developed by John Austin (Bentham's disciple) in the 19<sup>th</sup> Century and its possible criticisms which have since then been expressed by various critiques including later Positivists.

### 1. Background of Early Legal Positivism

In the 19<sup>th</sup> Century, perhaps one of the most influential figures in English law was Blackstone, who was conservative in his thinking. As such, his answer to the difficult question "what is law?" was steeped in praise for the common law system which in his view was based on reason and natural law. Bentham found Blackstone's theories unconvincing and in his many writings, pointed out the deficiencies in Blackstone's writings and lectures as well as those in the theories of Social Contractarians and other proponents of Natural Law theories. His main argument at this time was that Natural Law theories did not provide any objective guide to what was moral or immoral or good or bad in deciding what law was valid or invalid. Bentham argued that what constituted morality in these theories could in fact also be understood as being subjective, culturally determined standards of common likes and dislikes<sup>3</sup>. But his true opposition to Blackstone emanated from the fact that Blackstone explained that English law was based on natural law and praised it for the same reason. In Bentham's view, however, this was incorrect for a variety of reasons but mostly, Bentham (who was a reformist and thus was inclined to be more critical of the system) seemed opposed to all the praise of the English Law system. This, according to Bentham, is due to the confusion between what the law is and what it ought to be, which he blamed on the influence of Natural Law thinking.<sup>4</sup>

Bentham felt that this conservatism in legal thinking hindered reform and he held that law should be criticised, improved and reformed. Thus, he broke away from the general trend of the theories of his time and he introduced a

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<sup>3</sup> Supra note 1 and lectures by the authors of the book (Richard Nobles and David Schiff, London School of Economics and Political Science, 2004-2005)

<sup>4</sup> J.W. Harris, *Legal Philosophies*, (1997) 2<sup>nd</sup> Ed. Lexis Nexis UK, London, p. 28

new approach in jurisprudential thinking by suggesting that law must be defined in terms of facts. For him the important facts included among others, the political facts of power,<sup>5</sup> human commands/prescriptions and the system of coercion. To do so, he suggested that any definition of law needed to focus on at least eight very important issues in law, including;

1. The source – the person(s) whose will the law expresses or who created the law
2. Subjects – the person or things to which the law applies
3. Objects – the acts to which the law applies
4. Extent – the range of the law’s application in terms of the persons whose conducts are regulated by the law.
5. Aspects – the various ways in which the will of the sovereign (expressed in the law) may apply to the objects (as in [3] above) of the law
6. Force – the sanctions which the law relies upon for compliance
7. Expression – the various ways in which the wishes of the sovereign are made known (the way law is published etc.)
8. Remedial appendages – any such other laws which are created and published in order to clarify the requirements of the principal law.

Once these elements were identified, Bentham then believed that the questions “what is good law?” could be answered based on ideas of utility whereby the good laws are those which maximise happiness/pleasure and the minimisation of pain/misery. But he pointed out that these could be done only after the question “what is law?” had been fully dealt with at the factual level.

Although Bentham is clearly the founder of the Command/Imperative theory of law (as named due to the idea that the factual ideas of the will of the sovereign as expressed in the law), his work about the nature of law was not widely known due to the fact that they were not published. Thus it fell to his disciple, John Austin, to develop/make known this legal theory in the 19<sup>th</sup> Century.

## **2. John Austin and the Command Theory of Law**

John Austin was a disciple of Bentham’s as he was both a positivist and a utilitarian. Hence, Austin’s work was largely based on Bentham’s work and Austin’s classification of law and criticisms of his view of law are indeed necessary for a full understanding of the 19<sup>th</sup> Century Early Positivist Theory of Law.

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<sup>5</sup> E. Christodoulidis, L. Farmer and S. Veitch, *Jurisprudence: Themes and Concepts*, (2007) Routledge Cavendish UK, p. 12

Austin, like Bentham was a definitionist. He wanted to clarify what law was and what it was not and it was Austin who made the distinction between the terms (which he coined) ‘analytical jurisprudence’ – which involves looking at the basic facts of the law, its origins etc – and ‘normative jurisprudence’ – the question of the goodness of law. For Austin, like Bentham, the important part of the study was the analytical question. Another similarity between Austin and Bentham is that both jurists believed that the same factual issues (namely of power and sovereignty<sup>6</sup> as well as sanctions<sup>7</sup>) were key to the understanding of the law, as it is.

Austin first sets out to clarify the idea that people with power set down rules for others who obey them to govern their actions. In other words, Austin suggests that law is ‘a rule laid down for the guidance of an intelligent being by an intelligent being having power over him’<sup>8</sup> and this is done so in the form of a command. In short, laws can be understood in Austinian terms as commands from/by the sovereign. So everything that is law must be a command. But Austin points out that all commands are not law necessarily as some commands may lack the generality that will enable them to become a law. Hence, Austin’s theory holds that a command that is directed specifically is a command, but a command directed generally and over time is law.

Austin then goes on to discuss the fact that in the English language (as in some others) many concepts can be labelled as “law” - but these do not necessarily qualify as law as a lawyer, judge and other members of the legal profession would understand it. The word “law” is therefore according to Austin, vastly misused and not sufficiently considered. For example, Austin raised the idea of “laws of Science” or “laws of God” as well as “human laws” to indicate this. Austin, systematically approached this issue and classified laws into different types to focus his study on something quite specific. He firstly distinguishes the concept of the laws of God. These are God’s laws to regulate humans and so Austin called this ‘laws properly so called’ and indicated that this is not something to be considered in a theory which attempts to understand human laws.

In Austin’s theory, human laws are treated in distinct categories: firstly, laws strictly so called (positive law where rules are backed by sanctions and the laws are set by men for men) and laws not strictly so called (laws which have no sanctions by the State attached). This latter category was also labelled as “positive morality”. The laws strictly so called are then also divided into two: 1) laws set by men for men as political superiors to political inferiors

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<sup>6</sup> Ibid

<sup>7</sup> Supra note 4

<sup>8</sup> Supra note 1

and 2) laws set by men for men in pursuance of political rights (contracts, tort, property) which are not commands and are not as important or essential as the first type of law set by men for men and he tags these types of laws as being “Expository matter”. All other usages of the word “law” such as “laws of science” are said to be laws by analogy.

To summarise; Austin’s understanding of human laws can include three general types of law:

- Penal law: Command+Sanction
- Expository matter: lots of appendage type laws that develop over time but are not as essential as penal law: such as Family Law, Contract Law etc.
- Permissive Law or Positive Morality which includes International law etc. which are closer to being laws by analogy then they are actual laws

Ultimately, the focus of Austin’s theory is such that his conception of the law that needs to be studied can be and regularly is reduced into one very famous quote:

*“Law is a Command of a Sovereign backed by a Sanction.”*

This quote indicates the three elements that are key to the understanding of law in Austin’s terms: firstly the concept of the Sovereign, then the concept of the Command and finally, the role of Sanctions in law.

### **2.1 - The Sovereign**

The sovereign is the source of law in a society and thus is the most important figure that needs to be understood. Without a sovereign there can be no law as human laws are a result of human endeavour and the endeavour of the human truly refers to the sovereign’s endeavours. As such, Austin describes the sovereign as a person or an institutions that is factually determinate (in other words can be clearly and easily identified) and is a common political superior. As the common political superior, this sovereign must also be someone or something that is habitually obeyed by the majority of the members of a society who must also not be in habitual obedience to anyone or anything else. Finally, Austin makes it a requirement that the sovereign should be legally illimitable and indivisible and the sole source of legal authority in any given society.

### **2.2 - Commands**

A Sovereign as a source of law can only make the laws he/she/they/it wants in the form of a command. Hence, Austin states that the sovereign’s will is

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expressed in the form of a command which is an imperative statement establishing the sovereign's wishes. The command is different from an order in that (as already mentioned above) Austin specifies that commands must be generally applicable and must not be specific. It is also a specific expression of will or type of order as anything that is a command in Austinian terms must have a sanction attached to it should the command not be obeyed.

### **2.3 - Sanctions**

A sanction is in Austin's terms "even the smallest evil..." which can be any harm or pain which is part of the threat in the command of the sovereign. This is an important part of law as it provides the motivation for the subjects to obey the sovereign's commands and a disincentive for the majority of the society to disobey the law. As such, Austin describes the sanction as having to have possibility of application as this is a key part of the law in the event of a breach. The sanctions can include damages, remedies, compensation, maintenance costs or other types of punishments which are imposed on by actual bodies founded as institutions to enforce the law.

### **3. Discussion**

According to Austin, laws only exist in independent communities that have identified political sovereign who is a person or a group whose commands are habitually obeyed in the community and who does not obey anybody else. For Austin, the sovereign who issues commands etc. is the Parliament which is the representative of the people. Furthermore for Austin, the legal sovereign is the political sovereign as this is the one body that has the power to promulgate its own laws and have them enforced except for the one exception where Austin includes judge-made-law as part of law in the sense that the sovereign delegates authority to judges to make law. It can and should be appreciated that Austin's theory is comprehensible and systematic.

Be that as it may, Austin's theory also suffers from various weaknesses (mainly the problem that the theory does not adequately explain the important features of modern legal system) that many critiques have explored. A most detailed study among the dominant criticisms of Austin's work (indirectly) can be found in H.L.A. Hart's "The Concept of Law" (1961). Hart's project was to create a 20<sup>th</sup> Century Positivist theory and his attempt was not to specifically criticise Austin's theory. Rather, Hart's attempt was to deal with the general problems all Imperative law theorists raised in describing the law in the most simple terms. The reason why a lot of it seems like a criticism of Austin is due to the fact that Hart regarded Austin's theory as the

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“most thorough attempt to analyse the concept of law in terms of apparently simple elements”<sup>9</sup>.

The following criticisms will thus be structured along the lines of summaries of the second and third chapters of Hart’s “The Concept of Law” with additional points of criticisms where they exist from other sources furnishing the body of criticisms, where Hart has not done so.

### **3.1 - The Problem of the Continuity of the Legislative Authority**

Austin has described a hierarchical system of law with a sovereign who is factually identifiable and whose commands are habitually obeyed. However, the problem with this idea is that it is not clear who the sovereign is (necessarily) in cases where the sovereign changes for example as Austin’s description of the sovereign does not actually make it clear how legislative authority continues from one person to the next or one institution to the next. For example, where a ruling sovereign passes away and a new one inherits the position or if there are elections and a new parliament is elected, there is no allowance for an instance where the bulk of the population will obey the new sovereign. This is as Austin only discusses “habitual” obedience, i.e. an obedience that has always been part of the behaviour of the bulk of the society. This makes it such that questions will arise as to whether the population is going to have to continue being in habitual obedience to the older/preceding ruler (who, if dead, can no longer pronounce his commands) or will there have to be a new habit of obedience established for the new sovereign, who until he/it is habitually obeyed will not be a sovereign and thus will not have any legal legislative authority as he/she/it is not a sovereign. Hence, in Austin’s theory, allegiance to legislative authority seems to have gaps, which is a very serious weakness.

### **3.2 - The Problem of the Persistence of Law**

As laws tend to be viewed by Austinians as commands of a determinate sovereign and thus all laws exist and are valid due to the authority and existence of this specific sovereign. Imagine that the sovereign that created this command/law has passed away or passed on, the questions arises as to whether the laws continue to exist considering the ones who commanded them no longer does. Austin suggests that the new sovereign affords the older laws his/her/its tacit consent and the laws will persist. However, in a systematically positivistic system, the new sovereign (which is not clear can exist due to the problem stated in 3.1 above) has to actually make a command as to the

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<sup>9</sup> H.L.A. Hart, *The Concept of Law*, 2nd Ed., Clarendon Law Series, Oxford University Press, 1994, p.18

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existence of such a tacit consent. This, however, will be a problem because in most legal systems, the persistence of law is presumed by custom without requiring new sovereigns to go through a process of validating older laws as it is assumed that they are valid.

### **3.3 - The Problem of the Illimitability of the Sovereign**

Hart points out that a sovereign as per Austin is not bound by any law or to any other sovereign. In short, a sovereign is illimitable in his/her/its power and Hart argues that in any Parliamentary system (and even in most monarchic systems) this theory of the scope of law cannot work as even the law-makers are bound by some laws. Although Hart did not develop the next argument that is going to be made in this paragraph, it is worth noting under this heading. Sovereigns tend to be bound at least by the rules which make up constitutions. Austin disregards constitutional law as law not properly so called but in so doing, makes a mistake as constitutional rules all clarify that legislators are subject to the law and this is in fact an important feature of legislative authority.

### **3.4 - The Problem of the Variety of Laws**

According to Hart and Kelsen, Austin's failure to recognise various types of laws is a fatal blow to his theory. For example, Kelsen argues that contract law can be made to fit with an imperative law model and yet, Austin considers this type of law as expository matter. Hart on the other hand went further and said that there are many varied areas of laws and on a conceptual point of view each type has a different way of being defined and applied. He goes on to then point out that Austin's penal code as being imperative system is not complete or even desirable. Hart's view is that Austin is wrong to point that a law is not in effect until a sanction is in place and he further shows that there is a difference between following a habit and having legal obligations emanating from legal rules.

### **3.5 - The Treatment of International Law as Positive Morality as a Problem**

This was not an issue Hart raised but quite similar to the issue of constitutional law as discussed above. Like constitutional law, for Austin, international law is a matter of positive morality and thus International Law is not law. Austin's reason for this statement was based on the idea that there is no determinate sovereign that can make the commands that make international law. He also does not recognise custom as a source of law which also makes it impossible in his conception of law to recognise international law as law.

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However, in practice, laws can be said to exist and be valid in the international arena based on customs and treaties.

### **3.6 - The Problem of the Indivisibility of the Sovereign/ Legislative Authority**

Another criticism Hart did not raise but is growing in importance, focuses on the issue that the sovereign has to be indivisible. This idea does not work in states with federalist governments such as the U.S.A etc. or in other parliamentary democracies that have devolved power in a bid to decentralise authority in law-making (see devolution in the United Kingdom). Quite often in such systems there are multiple law-making bodies and this type of system cannot be reflected in the view of the central and indivisible sovereign as described by Austin.

### **3.7 - The Problem of the Generality of Commands that are Law**

Austin allows for judicial law making based on the idea of delegated authority however, Austin has not considered the fact that this idea contradicts the nature of judgements in judicial law making which tend to be more specific rather than general when ordering individuals by law to act or forebear from acting in a certain way. Despite the fact that this is a specific command, this is still a law in this case.

### **Concluding Note**

In spite of Hart's (and other) criticisms levelled against Austin's theory, this theory has had quite wide-ranging influence on the works of numerous influential jurists, including the works of Hart. Austin's theory is indeed an important part of the study of legal theories and it is one of the most systematic and thorough analyses of law. Furthermore, this theory is not without its supporters. The fact that there are numerous criticisms to be made about this theory does not mean that it is all wrong. Needless to say, certain elements of the theory have influenced or are part of other theories including (arguably) Hart's theory of law. \_\_\_\_\_ ■

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# JEAN MAILLET'S LECTURES ON LEGAL HISTORY

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Mainly abridged (with omissions) from Professor Jean Maillet's transcribed lectures entitled "*History of Legal Institutions*", 1964

*Elias N. Stebek\**

## 1. Conceptions with regard to the objective of legal history

Three conceptions are held by scholars with regard to the conception and significance of legal history and legal traditions.

### 1.1- The Historical Conception

According to the historical conception, the study of legal history can bring about a better understanding about past societies. However, there is some unwillingness to study ancient laws as if they are currently enforced.

Historians of legal institutions can of course specialize in this field of study, but this doesn't usually appeal to the law student "who wishes to study the law for itself and not as a means of understanding ancient societies".

### 1.2- The Sociological Conception

This conception contends that studying the law of past societies extends towards the study of the relationship of the law with political, economic, social and other factors, because they are interrelated and have constant and sustained interaction.

This approach is indeed rich and profound, and it studies legal history and legal traditions from a wider perspective. It may also raise various philosophical issues. At deeper analysis and comparison, similarities and concordances between legal traditions of past societies and interactions between the various elements of society are generally observed. Yet, the interaction of the various elements of society and their impact cannot be explained with scientific assertion.

This sociological or philosophical approach to legal history suits departments of sociology and philosophy rather than schools of law. And, if it is to be studied by law students, it has to be reserved to advanced students in view of the abstract nature of the analysis and the complex issues involved.

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### 1.3- The Technical Conception

The technical conception forwards the principle that the purpose of studying legal history ought to be modest, and that its objective must be to gather the legal problems and understand the legal reasons why certain solutions were chosen and justified. This conception is of course narrow and tends to consider law as an isolated element of social organization. This conception could have *three* interpretations.

a) *The utilitarian interpretation*

According to this interpretation, the technical conception facilitates the search in the past “for the origin of present laws and enables us to understand the latter.” Supporters of the utilitarian interpretation believe that “we cannot study modern laws without searching out their legal roots in the past”.

b) *The “mineral” interpretation*

Adherents of this interpretation strive to “draw up a list or inventory of the various solutions to particular problems” found and used in past systems and choose the best for our current problems. But, legal material or solution of the past may be “ill-fitted to present needs, however well-suited it was to past needs”.

c) *The “ideal” aspiration*

Some jurists aspire to draw from the past “a rational and perfect system of law or at least a logical and coherent legal construction, a kind of legal masterpiece having a universal value.” However, “since law must be adjusted to economic, social, political and other factors” it is difficult to create a universal system of law, on the basis of History of Law.

#### Professor Maillet's conclusion

“In conclusion, we may say that the three conceptions of the History of Legal Institutions ... however interesting, do not fit the requirements for teaching this subject in a law school, with the possible exception of the third conception in its first interpretation, namely, as a means for explaining the source and origin of modern laws, of comparing them with the most valuable laws of the past, and learning something about the changing and relative nature of law. This is what we may call the ‘*utilitarian conception*’ of History of Law since it does not aim at extra-legal ends.”

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## 2. Early History of Law up to Code Napoleon

### 2.1- The transition from empirical to rational system of law

“As soon as a society reaches a certain level of civilization, its internal life becomes so complex that it cannot get on with a purely empirical system of law, and then the society resorts to rational methods and to a scientific approach and so develops a theoretical conception of law as a science. At such a time, specialists in law begin to appear along with a legal literature. Training in law begins to take place with the development of law schools and the exposition of the law becomes rational and scientific.” ...

### 2.2- Mesopotamian or Babylonian law

#### *Stage 1*

Archeologists have discovered fragments of short codes in south of modern Iraq that date back to 3 Millennium B.C. They are of little interest to modern jurists since they are brief and fragmentary. There were frequent civil wars in Mesopotamia (the Babylonian Empire) during this period.

#### *Stage 2*

The first real code in the history of law (Code Hammurabi) appeared in the Babylonian Empire around 1750 B.C.

#### *Stage 3*

Despite change of empires thereafter, the only new document of interest was Code of the *Hittites*.

### 2.3- Greek law

- Greek civilization reached its climax during 5<sup>th</sup> century B.C.
  - Greek civilization created a system of public and private life based on the great principles of liberty, individualism and liberalism.
  - But the Greeks were unable to create elaborate system of private law, although public (constitutional) law was elaborately developed.
  - Ancient Greeks lagged in private law in contrast to their achievements in science, philosophy and the arts due to the following reasons:
    - a) *Political and geographical factor*: There was never one Greek nation but independent city states that did not require elaborate private laws;
    - b) *The psychological and intellectual make-up*: Ancient Greeks were more interested in philosophy, politics and the arts. They were philosophers of law and not technicians of law. Their concern was in fair balance between the function of government and the rights of the citizens. Private law took secondary place.
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- c) *The institutional and technical failure:* the Greek system of procedure and interpretation of law was not favourable to the development of a highly theoretical system due to the following reasons:
- There were no specialized or trained judges;
  - Judgments were pronounced according to ethics and equity;
  - Teaching of law was considered unnecessary;
  - There was no record of judgments.

#### **2.4- Roman law**

This law was characterized by the fullness of its philosophical basis and its solid theoretical base.

##### *Stage 1: Old Roman Law*

Rome was a small city from its earliest period (around 7<sup>th</sup> century B.C.) to the emergence of the Roman Empire. The law of this period known as The XII Tables (that was inscribed on stone around 450 B.C.) was primitive.

##### *Stage 2: The classical period*

The period known as *Pax Romana* (from 2<sup>nd</sup> century B.C. to 2<sup>nd</sup> Century A.D.) was a period of expansion, order and prosperity. The development of Roman law was at its peak.

##### *Stage 3: Code Justinian*

The climax declined due to prolonged wars and unrest and particularly after Rome fell in 476 A.D. However, the Eastern Roman Empire survived with its capital at Byzantium (Constantinople). Roman Law also survived and lived its second period in the eastern part. This new peak was reached under Emperor Justinian in the 6<sup>th</sup> Century when Roman law was codified (528 to 533 A.D.). The city of Byzantium (currently Istanbul) and its Empire retained the legacy of Roman Law until the Turks invaded it in 1453.

#### **The static nature of Roman law**

The Romans were in large degree traditionalists. Their method of changing the law was that of creating exceptions to old principles to adjust them to the new needs of a changing society. In effect, Roman law prevailed for centuries. Code Hammurabi also stayed static for one thousand years. Thus the nature of law in ancient societies remained stable, unlike modern laws which, after the French revolution have shown deep reaching changes. The French Revolution in ten years changed French law more profoundly than it had been changed in the preceding ten centuries.

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## 2.5- Old French law

During the centuries after the fall of the Western Roman Empire, old French law underwent through the following three periods:

### *Period one*

From the 5<sup>th</sup> to 10<sup>th</sup> century, the Franks (barbarian German tribes who settled in what was later called France), were primitive people with rudimentary customary laws. Their laws were *empirical* which merely regulated ordinary everyday needs.

### *Period two*

From the 11<sup>th</sup> up to the 15<sup>th</sup> century, there was lack of political and social unity. Authority of local landowners prevailed and the monarchy was weak. As a result, there was lack of unity in law. There were several systems of law, none of which was highly developed.

### *Period three*

Absolute monarchy reigned for about three centuries before the French Revolution. The two features of this period were unification and centralization. However, unification was not fully achieved. Thus local legal systems were retained and meanwhile, new systems and rules of law aiming at unification developed. This made the legal system in France more intricate than before.

## 2.6- Laws of the French Revolution

The 1789 French revolution and the events that ensued brought about general changes in French society, which penetrated into every field. The bourgeois moderate revolution lasted from 1789 to 1792 followed by fierce popular revolution (1792 to 1794). The bourgeois revolution was then resumed from 1794 to 1799. During these years, French law was deeply modified. Yet, neither codification nor unification of the law was achieved during the decade.

## 2.7- The French Codes (Code Napoleon)

The revolutionaries could not establish the social system of their dream and vision. Nor could the old system be retained. Napoleon filled the power vacuum and came to power. Codification began (in 1801) during Napoleon's reign, and was finalized in 1811. The French Civil Code was enacted in 1804. Moreover, the Code of Commerce (1808), Code of Criminal Procedure (1808), and the Penal Code (1811) were subsequently enacted. The change in French law during the twenty two years from 1789 to 1811 was greater than the change it had during the preceding thirteen or fourteen centuries.

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### 3. Religious conceptions with regard to the origin of the law

#### 3.1- General feature of ancient laws

Ancient laws were considered as a part of religion. Legal rules were believed to be disclosed by gods and were mostly enforced by spiritual leaders such as priests) by means of penalties and sanctions. The law was believed to have “divine origin.” The top of the stele on which Code Hammurabi is inscribed shows the representation of Emperor Hammurabi receiving the Code from a seated god.

In Ancient Greece, the law was (until the later centuries) personified by the two goddesses Dike and Themis. And Roman law (at its earliest stage) was thought to have been disclosed by a nymph.

#### 3.2- Babylonian law (The religious conception)

Hammurabi, who prepared the Code, might have believed that he had a divine inspiration, or he might not have had such a belief. However, Babylonians believed that the Code was an object of divine inspiration. The system was both autocratic and theocratic. The emperor (even where he usurped power through coup d’etat) was considered as a representative of god.

“ ... (I)n early times obedience was only to the tribal heads. When cities arose, the concepts of solidarity and self-discipline had not developed and so the ruler, in order to get authority over these people, had to anchor it in religious conception. It was considered to be god-given and so incapable of being challenged.”

The religious conception of Babylonian law had two features:

##### *The empirical character of Babylonian law*

The rules were simple and direct; and there were neither general principles nor legal literature. The rules were particular and were meant to specific circumstances. This was so because law was believed to be a set of rules disclosed by god and not worked out by man’s reason or logic, there was no need for an elaborate justification; the law contained its own justification from divine source”.

##### *The stability of the law*

Babylonian law “endured for a millennium without change ... because it was considered to be god-given or inspired and the gods did not change the law and the gods did not change: to change the law would in some sense be an affront to the will of the gods.”

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#### 4. The philosophical conception of Ancient Greek law

Before the beginning of cities (10<sup>th</sup> to 6<sup>th</sup> century B.C.), Ancient Greeks conceived their laws as having a religious origin. In due course of time, the philosophical conception with regard to the origin of the law gradually developed and the notion of the law was divided into the concepts of *Dike* (the eternal natural order that is the expression of divine will) and *Themis* (the advice from gods to rulers on the higher principles of the law of nature).

The political changes of the 7<sup>th</sup> Century B.C. in the most advanced cities such as Athens led to the enactment of new legal rules. Thereafter, it was impossible to retain the religious conception of law because it was clearly observed that the new laws were written down by human beings pursuant the compromise made between the popular classes and the aristocracy. Thus the concept of laws as human rules, referred to as *Nomoi* emerged.

##### *Dike*

*In the abstract sense*, Dike refers to the general order of the world, the eternal order, which is the expression of the divine will to which human decisions and rules must conform. The natural order was believed to be the ideal model for human society. It was thus equated to rights and justice, and was personified as a goddess. *In its concrete sense*, “Dike was the judicial process through which human justice strove to meet and express the commandments” of the eternal natural world order.

##### *Themis*

Themis was more precise than Dike. “*In its abstract sense*, Themis adds a philosophical meaning to the religious concept of Dike. It refers to the higher principles on which the advice given by the gods rested”. And, “*In its concrete sense*, Themis refers to the advice given to the request made by rulers to the gods.”

##### *Nomos: Function of Nomos*

As stated earlier, Nomos were conceived as human rules. The *function* of Nomos (the law) was to regulate relations between individuals (private law) and relations of government with individuals (public law) with the view of guaranteeing “all the fundamental values of Greek society; the democratic order; the city, liberty and equality”. According to Ancient Greeks, civilized people are subject to “the sovereignty of the law”.

##### **The Nature of Nomos (the law)**

The Greeks believed that such law draws its power from nature itself, i.e. from the general order of the world. “The Greeks distinguished two

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levels of organization: the organization of the city and the organization of the world". In the abstract sense, *Nomos* "referred to the whole of unwritten norms which derive from nature itself." And, in the concrete sense, it referred to every legal rule whatever its form.

On the basis of these conceptions, positive laws (i.e. laws enacted by human beings) should be in conformity with natural law. "The Greeks conceived two kinds of laws (two *nomoi*): the positive law of the city, and the philosophical *nomos* or natural law."

With regard to the issue whether positive law (same as natural law) is eternal, unchanging and universal, the Greeks held that "positive law was variable and apt to change", because of changes in the will of the legislatures and due to the "changing needs of the society." Yet, ancient Greeks devised mechanisms and procedures to keep *nomos* stable by restraining the tendency to change.

A special process was required for the creation of the law, according to which the project had to be approved by the *Boule* (City Council) before it was submitted to the popular assembly. A committee called "*Nomothetai*" (makers of the law) could alone propose new changes. The effects "were bad, since it was impossible for a city such as Athens, which was constantly growing and becoming more complex, to live under a strict, immutable law."

#### **Jean Maillet's concluding remarks on Greek law (Excerpt)**

"We can see that the Greek philosophers failed in one part of their task in the field of the conception of law: they failed to translate the universal principles (*nomos*) into the positive law of their cities: private law remained undeveloped. But the Greek philosophers achieved great success in the other branch of their search: they established the relation to exist between positive law and justice: they constructed the concept of natural law: they taught us that law is not pure technique – but that it refers to philosophical principles which are far above technique."

"It was left for the Romans to complete the task. They were no philosophers: they were however excellent technicians; and so with these latter talents the completion of the task of development of private law could be accomplished for the ancient world."

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## 5. The ethical conception of Ancient Roman law

Initially, Ancient Romans had a religious conception with regard to the origin of law. The revolt of the lower classes in the 5<sup>th</sup> Century B.C. brought about fundamental changes, and new laws were written in 450 B.C. These new laws that are referred to as the *Twelve Tables* were apparently written by men; and in effect, the religious conception of law could not thereafter retain its influence.

For centuries, the empirical laws in the XII Tables were adequate. The laws were brief and unelaborated. But, the emergence and expansion of the Roman Empire rendered the empirical system of law inadequate. From the “*quantitative point of view*”, there were a tremendous number of statutes, decisions, opinions, etc., and from the “*qualitative point of view*”, Roman law began to be “based on scientific reasoning handled by authorities and experts with care.” Controversies in support of different jurist opinions and theories developed.

“In the wake of these changes, Roman law changed from an *empirical* system of law to an *ethical, moral and universal* conception of law. Here we must distinguish the fact that while the Romans had a technical conception of law, namely, each rule of their law was justified by logical reasons, reached through specific methods of reasoning, analyzed by the applications of technical concepts to the problems, and formulated in technical terms, yet this technical approach did not divert them from ethical approach.”

The ethical approach developed on two levels. The *first level* pertains to the law itself. With regard to the definition and analysis of law, the Romans believed that law is related to justice. For example, Ulpianus (late 2<sup>nd</sup> Century and early 3<sup>rd</sup> Century A.D.) emphasized “on the moral sense of law, not on its technical sense.” And, he defined justice as “the constant and perpetual desire to give to everyone that to which he is entitled.”

“To take another example, Celsus, who lived in the 2<sup>nd</sup> century A.D., wrote that law is the art of knowing what is *good* and *just*”. Law as an art was regarded as technical or scientific means i.e., a technical skill and tool that is handled by experts. And as regards its ultimate source, it was sought from what is “*good* and *just*”.

At the *second level* of the development of the technical approach, the “Romans borrowed from the Greeks the notion of natural law ... (and equated ethics with natural law”.

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## 6. The empirical conception of Old French law

(Jean Maillet, Excerpts with some omissions)

“In the centuries which followed the collapse of Roman law in Western Europe, no new conceptions arose. The new societies limited themselves to laying down particular rules to meet particular needs as they arose. It was only at the end of the period of Old French law ... that the question of the nature of law begins to be asked again. And so for nearly ten centuries the question was not posed.

**Middle Ages:** (5<sup>th</sup> until the later 15<sup>th</sup> century)

“The law was purely empirical not only in France but throughout Europe; the rules were simple: there were no theoretical conceptions; the ends were immediate and practical. For example, feudal law had special pragmatic rules but there was no theory or conception of feudalism. In addition, during this period the rules themselves were not precise: we would call them general customary rules. For these reasons, we can see that when Roman law reappeared in Europe, it was not to be understood in the sense in which the Romans knew it, as an ethical system, but it was seen rather as a mine or depositary out of which the new societies could extract practical solutions to particular problems.

“The only exception to these remarks was the *canon law*, which governed a large portion of ... marriage and divorce, testaments and contracts. This canon law was inspired not only by practical needs but by higher principles (religious precepts of Christianity) as well. However, the canon lawyers were satisfied to say that law was the operation of divine precepts, grounded in Christianity, and they did not seek to build general theory of law.” ...

**The latter period of Old French Law**

“From the 16<sup>th</sup> to the 18<sup>th</sup> centuries, change took place in the old French law in certain ways: lawyers began to think in theoretical terms about law; they had to comment upon customary laws in order to improve them; they had to attempt to merge numerous customary laws ...; they had to shape from time to time a new law based on the royal edicts and statutes; and they had to study Roman law in order to combine it with French law. These tasks were numerous and difficult and they kept the French lawyers so busy that they had little time to think about the ends and nature of law.

“The result of this evolution was that French law was much improved, but only from the technical point of view. In the theory of law, there was almost no advance during this period. ... Nevertheless ... the work of the lawyers during this period prepared the way for later lawyers to turn to the question of theoretical analysis of law. ...”

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## 7. The ideological conception of law during the French Revolution

(Jean Maillet, Excerpts with some omissions)

“The French Revolution used law as a vehicle for political and social purposes and illustrated that law is finally a technical tool apt to serve various ends. The French Revolution ... brought profound and general changes in French society. In order to accomplish these changes, it used the methods of revolutionary action, war propaganda and law. It used law as a means for the overthrow of the old society and for the building of a new one. Thus we see that the end of law was for them not actually a technical one but rather an *ideological* one.

“... There are certain parts of the law in any society which are more directly governed by *technical concepts* and which depend upon legal logic rather than upon *sociological ideas*; and these do not vary with each change in ideology.

“To take some examples of sociological content: the question whether the heirs of the deceased are designated by the law itself or by the deceased in his testament is a sociological one: it involves the individual’s right to dispose of his own goods. The question of the general rules according to which the heirs are designated by the law is also a sociological one.

“To take some examples of technical content: the question of the forms by which the deceased may make his testament is a technical one. The law of contracts is almost entirely technical. On the other hand ... family law is purely sociological.

... “During the brief period of the French Revolution, attempt was made to adjust both the technical level and the sociological content of the law to the changed times and ideas. Several drafts of *general* codes were prepared during this period but it was too large a task and they were not effective.

“... The French Revolution was primarily interested in legal problems having political and ideological involvements, and therefore we speak of their conception of law as an ‘ideological’ one. As we remarked earlier, the period of the French Revolution having made the ideological changes required by that revolution, the next period of Napoleon and the Codes could concentrate on the technical concept of law.

“Thus at the close of the French Revolution, the problem which remained for Napoleon was to change the technical parts of law which had not been touched by the revolution and to put into definitive technical form the ideological concepts of the revolution.”

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## 8. The technical conception in the Codes enacted by Napoleon

(Jean Maillet, Excerpts with omissions)

“The problem confronting Napoleon and the draftsmen was that of stabilizing the law, since French law was now ripe for systematization. In accomplishing this, they had the task of reaching the best technical solutions for problems arising in the field of individual relations, of sharpening the technical devices afforded by law, and of conforming its solutions to the requirements of technical science and to legal logic itself. Thus for the first time, law (became) independent of other fields and (became) an autonomous art or science.

“... On the one hand, the awareness was retained that law is not completely independent of morals, but it is no longer governed by the moral requirements. ... On the other hand, awareness is retained that law must meet the sociological needs of society. But in the period in which Napoleon worked, the societal framework had been overhauled and fixed so that the task of law was now that of maintaining a general accord between the contents of law and the basic principles of societal organization established for western society. Therefore, law could now concentrate on technical problems, since the ideological problems had then been settled. ...”

### Conclusion

“... If we wish to understand a system of law, we must note its content, its methods, its origins and its ends. But if we wish to know its deeper nature (nature of the law) we look to its origins and its ends.” The following diagram sums up the points that are highlighted above: \_\_\_\_\_■

Laws	Content	Method	Origins
Babylonian Law	Rough and unelaborated	Pragmatic (Empirical)	Religious
Ancient Greek Law	Rough and unelaborated	Pragmatic (Empirical)	Philosophical
Roman Law	Law	Scientific	Ethical
Old French Law	Rough and unelaborated	Pragmatic (Empirical)	Practice (Empirical)
French Revolution	Law	Scientific	Ideological
Napoleonic Code	Law	Scientific	Technical