Inquisitorial Legal Systems: France and Germany

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THE WORLD'S LEGAL SYSTEMS

1. CIVIL LAW
   (i.e. based on Roman law)
   - Scotland
   - Italy
   - Switzerland - Turkey
   - France
   - Spain
   - Portugal - Brazil
   - W. Germany - Codification 1900 BGB - Japan
   - Thailand
   - North America
   - Roman-Dutch Law - South Africa
   - Taiwan
   - Argentina (partly)
   - Bolivia
   - Chile
   - Ecuador
   - El Salvador
   - The Philippines
   - Belgium
   - Holland
   - Former French Africa
   - French Pacific territories
   - United Kingdom (except Scotland) and British colonial territories
     - Canada (except Quebec)
     - U.S.A. (except Louisiana)
     - West Indies
     - Australia
     - New Zealand
     - Fiji, Nauru, etc.
     - India, Pakistan, Bangladesh
     - Malaysia
     - Singapore
     - Former British Colonial Territories - African, Asian, Pacific
     - Israel

2. COMMON LAW
   (i.e. based on English law)
   - U.S.S.R.
   - East European countries
   - China
   - Vietnam
   - Cuba
   - Hanafi (Juristic Preference) - Lebanon, Syria, Iraq
   - Maliki (Public Interest) - Tunisia, Algeria, Morocco
   - Shafi (Logic and Reason) - Egypt, Malaysia, Indonesia
   - Hanbali (Tradition) - Saudi Arabia
   - Customary, mainly as a supplement to formal legal systems in many African, Asian and Pacific countries
   - Scandinavian - Denmark, Finland, Sweden, Norway
   - Jewish - Israel (partly)
   - Hindu - India (partly)
   - Chinese
History of the Civil Law

753 BC  Traditional date of founding of Rome
410 AD  Rome attacked by Goths
476    Last Roman Emperor in West deposed
527-565 Justinian Emperor in East
533    Justinian’s Digest
12th C  Digest rediscovered in Pisa
12th C  Revival of Roman law
        (studied at Bologna and elsewhere)
15th C  Reception of Roman law
        (became basis of law in France, Germany, etc)
19th C  Codification era
1804   French Code Civil
1900   German Bürgerliches Gesetzbuch
The Emperor Justinian (527-565)

Detail of a portrait in the Basilica of San Vitale, Ravenna
The Digest
History of the Civil Law

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The Classic Codes

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Characteristics of Codes in a Civil Law System

• A Code is a fresh start
• A Code is a complete statement of the law
• A Code is capable of universal application
French Civil Code arts 1382-1386 today

1382. Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation.

1383. Each one is liable for the damage which he cause not only by his own act but also by his negligence or imprudence.

1384. (1) He is liable not only for the damage which he caused by his own act, but also for that which is caused by the act of persons for whom he is responsible, or by things which he has in his keeping (garde).
   (2) Law of 7 Nov 1922. …
   (3) Law of 7 Nov 1922. …
   (4) [As amended by Law of 4 Jan 1970] The father and the mother, to the extent that they exercise the right of custody, are jointly liable for damage caused by their minor children living with them.
   (5) Master and principals [are liable] for damage caused by their domestics and employees in the functions for which they have been employed.
   (6) Teachers and artisans [are liable] for damage caused by their pupils and apprentices during the time when they are under their surveillance.
   (7) [Added by Law of 5 April 1937.] …
   (8) [Added by Law of 5 April 1937.] …

1385. The owner of an animal or he who avails himself of it while it is being put to his use is liable for the damage the animal causes, whether the animal was in his keeping or whether it had strayed or escaped.

1386. The owner of a building is liable for the damage caused by its collapse when it happens as a result of default of maintenance or through a defect in its construction.
French Civil Code articles 1382-1386 (as enacted 1804)

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German Civil Code articles 823 and 826

823(I): A person who, wilfully or negligently, unlawfully injures the life, body, freedom, health, property or other right of another is bound to compensate him for any damage arising therefrom.

823(II): The same obligation is placed upon a person who infringes a statute intended for the protection of others. If, according to the provisions of the statute, an infringement of this is possible even without fault, the duty to make compensation arises only in the event of fault.

826: A person who wilfully causes damage to another in a manner contrary to public policy is bound to compensate the other for the damage.
Development of Strict Liability in France

1384. (1) He is liable not only for the damage which he caused by his own act, but also for that which is caused by the act of persons for whom he is responsible, or by things which he has in his keeping (garde).

- **Original interpretation of art 1384(1):**
  *Painvin* (1870) P injured by exploding boiler in laundry. Court said had to prove fault under art 1382.

- **First recognition of liability under art 1384(1):**
  *Teffaine* (1896): Explosion on board steam tug, manufacturer and owner of tug held liable because could prove that was defect in welding of pipe.

- **Limitation to defective things rejected:**
  *Marcault* (1919): Locomotive exploded, damaging P’s stained glass windows. Court held D liable even tho could not prove defect, said true interpretation of art 1384(1) was that liability was imposed for defective guarding of thing.
**Jand’heur (1930)**

Lise Jand’heur injured by truck.

3 possible positions:
- Art 1384(1) does not apply where thing operated by human agency
- Art 1384(1) only applies to damage caused by dangerous things (*Teffaine* Imtn, or sg like it)
- Art 1384(1) applicable.

Held: 3rd position correct – created strict liability for motor vehicle accidents under art 1384(1).

*Jand’heur* illustrates:
- Cour de Cassation procedure
- Teleological interpretation - law ‘always speaking’
- Form of French judgments
ARRÊT

« La Cour; — ... Attendu que la présomption de responsabilité établie par l'article 1384, alinéa 1er du Code civil, à l'encontre de celui qui a sous sa garde la chose inanimée qui a causé un dommage à autrui ne peut être détruite que par la preuve d'un cas fortuit ou de force majeure ou d'une cause étrangère qui ne lui soit pas imputable; qu'il ne suffit pas de prouver qu'il n'a commis aucune faute ou que la cause du fait dommageable est demeurée inconnue; — Attendu que, le 22 avril 1925, un camion automobile appartenant à la Société Aux Galeries belfortaises a renversé et blessé la mineure Lise Jand'heur; que l'arrêt attaqué a refusé d'appliquer le texte susvisé par le motif que l'accident causé par une automobile en mouvement, sous l'impulsion et la direction de l'homme, ne constituait pas, alors qu'aucune preuve n'existe qu'il soit dû à un vice propre de la voiture, le fait de la chose que l'on a sous sa garde, dans les termes de l'article 1384, alinéa 1er, et que, dès lors, la victime était tenue pour obtenir réparation du préjudice d'établir à la charge du conducteur une faute qui lui fût imputable; — Mais attendu que la loi, pour l'application de la présomption qu'elle édicte, ne distingue pas suivant que la chose qui a causé le dommage était ou non actionnée par la main de l'homme; qu'il n'est pas nécessaire qu'elle ait un vice inhérent à sa nature et susceptible de causer le dommage, l'article 1384 rattachant la responsabilité à la garde de la chose, non à la chose elle-même; — D'où il suit qu'en statuant comme il l'a fait, l'arrêt attaqué a interverti l'ordre général de la preuve et violé le texte de loi susvisé; — Par ces motifs, casse... ». 
Development of the Persönlichkeit in Germany

Persönlichkeit (general right in personality, akin to right of privacy) covers:

- Use of something of personal or private nature, eg name, likeness, personality, confidential information
- Putting someone in false light - injuries to honour and dignity
is it covered by “other rights” in art 823(1)?

*Nietzsche* (1908) (attempted posthumous publication of letters of Nietzsche): No.

New Constitution 1950 (Basic Law - GG):

1(1) The dignity of man shall be inviolable.
2(1) Everyone shall have the free development of his personality, in so far as he does not infringe the rights of others or offend against the constitutional order or the moral code.

*Schacht* (1954): Letter by Dr Schacht’s lawyer demanded correction of statements made in newspaper about Dr Schacht, published along with other letters: BGH held that D had infringed ‘gen right of personality’ created by arts 1 and 2 GG.

(1957): BGH held that this was ‘other right’ under art 823(1) BGB.
Damages for interference with Persönlichkeit

BGB art 847:
In the case of injury to body or health, or in the case of deprivation of liberty, the injured party may also demand an equitable compensation in money for the damage which is not a pecuniary loss.

Interference with liberty:
*Herrenreiter* (1958) (use of photo in advertisement for virility pills)

Analogous application:
*Caterina Valente* (1959) (use of name and personality of singer)

Direct application of GG:
*Ginseng* (1961) (law professor representing as extolling aphrodisiac qualities of ginseng)
*Ferhsehensagerin* (1963) (unflattering descriptions of TV announcer)
Current leading case

Princess Caroline of Monaco (1995)

Compare recent cases in England and elsewhere:
- *Campbell v MGM* (Naomi Campbell)
- *Douglas v Hello* (Michael Douglas and Catherine Zeta-Jones)
Lawyers in France and Germany

A unified profession – Avocat (France), Rechtsanwalt (Germany)

But some specialisation
eg Notaire (France), Notar (Germany)

Judges are separate legal profession

Public prosecutors also separate
Ministère publique (France)
Staatsanwalt (Germany)
French and German Criminal Courts

**France**

- Cour d’assises (3 judges, 9 jurors)
- Tribunal correctionel
- Tribunal de Police

Appeal to Cour d’appel

Appeal to Cour de Cassation (Paris)

[Civil equivalents]

**Germany**

- Landgericht (LG)
- Oberlandsgericht (OLG)

Appeal from LG to OLG

Appeal to Bundesgerichtshof (BGH)

[Civil equivalents]
Other courts in France and Germany

France and Germany also have other court systems

Eg administrative courts in France
Deal with
• Administrative legality
• Administrative liability

Rules may be different, eg damages for fatal accidents: *Letisserand* (1961)
Characteristics of adversarial systems

1. Definition of issues and collection of evidence left to parties
2. Judge is impartial supervisor of proceedings
3. Pretrial proceedings designed to ensure that once case reaches trial stage, can be completed in one continuous session
4. Pretrial and trial procedures are adversarial in nature, intended to produce winner, not necessarily to elucidate exact truth.
Characteristics of inquisitorial systems

1. Judge plays leading role in defining issues and supervising collection of evidence.
2. Trial discontinuous, hearings may be spread over long period of time.
3. Procedures seem more likely to elucidate truth.
The Trial of Dr Brach (1959)


- reproduced in John Langbein, *Comparative Criminal Procedure: Germany* (1977)
The common law criminal trial

Police investigation
Preliminary examination (but not in WA)

Trial:
- D charged
- D pleads guilty or not guilty (assume pleads not guilty)
- Jury empanelled
- Prosecution opens case and calls witnesses
- Defence opens case and calls witnesses (D may or may not give evidence)
- Final addresses
- Judge sums up to jury
- Verdict
- Sentence
Distinctive features of civil law criminal trial

1. D not in dock, but standing by self in front
2. Judges and Jury sit together
3. D tells story in own words, not through examination and cross-examination. Court conducts proceedings, not counsel.
4. Previous convictions are known
5. Prosecution conducted by Staatsanwalt (public prosecutor), sits on same level as Judges.
6. D not in custody prior to case, though offence serious.
7. Judges have all facts in front of them, in dossier.
8. D examined first, before witnesses. Witnesses called together, spoken to together, then examined one by one - by court.
9. After Judge has finished examining witnesses, asks Jury, counsel and D whether have any questions.
10. After all major witnesses, court hears evidence as to character.
11. Witnesses called back and sworn together, after giving evidence.
12. Psychiatric evidence given by court witness who doesn’t have to take oath. Instead of experts for each side, have court-appointed experts.
13. After evidence complete, various parties speak:
   - Prosecutor
   - Lawyer representing victim
   - Defence counsel
   - Prosecutor has right of reply
   - D in person has last word
14. No summing up to Jury. Judges and Jury retire together to consider verdict.
15. Court passes sentence and then sums up/delivers judgment
DUNK HER FOR FIVE MINUTES,
IF SHE DROWNS, SHE'S INNOCENT,
IF SHE SURVIVES, SHE MUST BE A WITCH!
Why do these differences exist?

(1) Juries originally summoned to determine facts on basis of their own local knowledge, rule that had to determine case on basis of evidence only came later

(2) Was not until 17th C that was recognised that was clear difference between role of juries and role of witnesses - finally recognised in *Bushell’s Case* (1670) arising out of trial of William Penn and William Mead

(3) Originally pre-trial examination conducted by JP was much more like inquisitorial investigation, conducted in private – until 1848

(4) Common law criminal procedure only assumed modern form once D allowed to be represented by lawyer (mid-18th C)
William Penn and William Mead

Near this Site
WILLIAM PENN and WILLIAM MEAD
were tried in 1670
for preaching to an unlawful assembly,
in Grace Church Street
This tablet commemorates
The courage and endurance of the Jury Thos Vere, Edward Bushell
and ten others who refused to give a verdict against them, although
locked up without food for two nights and were fined for their final
Verdict of Not Guilty
The case of these Jurymen was reviewed on a writ of Habeas Corpus
and Chief Justice Vaughan delivered the opinion of the Court
which established “The Right of Juries to give their Verdict
according to their Convictions”