

The Passionate Shepherd

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'Civil law systems', 'civilian systems' and 'the civil law' are general terms used to denote those jurisdictions belonging to the Western world which are neither part of the Anglo-American common law tradition nor 'mixed' legal systems, ie systems combining civilian and common law elements. The civilian tradition comprises all European jurisdictions apart from English, Scots and Irish law, as well as Central and Latin American systems, and some African and Asian jurisdictions which modelled their law on Western lines.

Sometimes the civilian systems are also called 'Romano-Germanic' jurisdictions. This points to the fact that the civil law tradition is fairly heterogeneous. Thus civilian lawyers hardly use the term 'civil law systems'; instead they distinguish three legal families. The 'Romanist' family comprises the legal systems which were strongly influenced by French law. The 'Germanic' family includes the jurisdictions which were decisively shaped by German law. The 'Nordic' legal family encompasses the Scandinavian systems. Even within one and the same family, civilian systems often differ substantially as to the outcome of similar cases and as to their more general outlook.

But despite their significant differences, civil law systems share a distinctive heritage based on antique Roman law and its peculiar interaction in the Middle Ages with local, mainly Germanic, customs and with canon law, ie the law of the Roman Catholic church. The sources of Roman and canon law were studied, ordered, refined, and taught by medieval jurists in the first universities in Northern Italy to which students flocked from all over Europe. These students returned to their home countries and served as judges, advisors and administrators for secular and spiritual rulers. By virtue of their common background they shared the knowledge of a common legal language, a common body of law and legal literature, and a common method of rationalizing and organizing legal materials.

Romano-canon law was thus received in the different European territories and became the 'common law', or *ius commune*, of Continental Europe. This process of 'reception' was not only due to the qualitative superiority of the *ius commune* to the local laws and customs. It also rested on the inherent authority of Roman law as ancient 'written reason'. Moreover, it was facilitated by the absence of centralized court systems and strong legal professions which might have resisted the implementation of a foreign law.

Nowhere did the *ius commune* wholly supersede the local laws. It mixed and fused with them to different degrees. Thus the intensity and the extent of the reception varied considerably between different parts of Europe. It was, for instance, particularly strong in Germany where it fitted in well with the claim of the rulers of the Holy Roman Empire to be successors of the Roman Caesars. During the sixteenth and seventeenth centuries other local variants of the *ius commune* emerged, such as 'Romano-Dutch law'. Factors contributing to this development were the schism of the church and the increased use of the vernacular languages, but most importantly the rise of the modern nation state together with the corresponding idea that sovereign rulers should exert their will through legislation applicable throughout their territory and with the creation of powerful national court hierarchies.

Thus, ultimately, the unity of the *ius commune* was substantially weakened and national legal traditions with different substantive and procedural laws, national legal literatures and national court systems prevailed. Like the reception of Romano-canon law, the

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nationalization of European laws advanced at different speeds and with varying force in different jurisdictions, depending on how quickly legal unity was achieved in different countries.

In France, for instance, the law was unified and the court system centralized immediately after the revolution. The early nineteenth century saw five major codifications governing general private law, commercial law, civil procedure, criminal law, and criminal procedure. As a consequence of the Napoleonic wars, this model was imposed on Belgium, Luxembourg, the Netherlands, some parts of Italy and Poland and the western regions of Germany and Switzerland. But the new French legislation held wider cultural attractions. With its clarity, rationality, elegance of style, and its determination to break the fetters of aristocratic feudalism, church power, and restrictions on commerce, it seemed to embody the ideals of the enlightenment and commended itself to legislators in Portugal, Spain, and the emerging nations in Central and Latin America. The development of this Romanist family was facilitated by the similarities of the Romance languages.

German legislation and its court hierarchy were only unified in the last third of the nineteenth century. This period also saw the enactment of five codes covering the same subject matters as the earlier French codifications. However, they differed both in substance and in style from the French model because they drew heavily on nineteenth century German legal scholarship, which had continued to refine the *ius commune*. The German codes and German legal scholarship made a strong impact on Austrian, Swiss, and Greek law. They influenced the Eastern European laws and, indirectly, the law of Turkey, which adopted large parts of Swiss law. The Germanic approach to law also had a bearing on Italian and Dutch law reforms in the twentieth century.

In Scandinavia, the influence of the *ius commune* had never been as strong as in other parts of the Continent. Moreover, strong and centralized states with major codifications developed there at a relatively early stage. Today, they differ from other European countries because of their emphasis on social welfarism. Nevertheless, the inclusion of the Nordic family in the civil law tradition can be justified by the fact that throughout the nineteenth and twentieth centuries, German legal thinking exerted a strong influence in Scandinavia.

Despite the diversity of civil law systems, there are a number of characteristic features setting them apart from the non-Western traditions, such as Islamic law, Hindu law, Chinese law, Japanese law and many other legal systems in Africa and Asia which are largely based on customary law. All civil law systems are secular and capitalist. They rely almost exclusively on written sources of law. Their conception of law is rationalist and state-centred. Law is seen as a means of settling disputes authoritatively, and its administration and enforcement is primarily dealt with by professional lawyers. Civil law systems are based on the rule of law in the sense that government authority is constrained by legal rules and procedures. They accord great importance to personal autonomy and individuality and acknowledge some form of human rights.

All these characteristics are shared by the common law systems, so it might be argued that the civil law and the common law together constitute a single Western legal tradition. Indeed, most comparative lawyers agree that the traditional distinction between the two traditions tends to diminish. Some have even argued that it is outdated. Nevertheless, the

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civilian systems are linked by a number of features related to their common historical origin. These relate mainly to the relative importance of the sources of law and of the groups of persons responsible for their development.

Whilst legislation is today the principal source of law in both traditions, common law jurisdictions have larger areas of law which are primarily based on case law. Such areas exist in civilian systems as well, such as French administrative law or German employment law, but they are more exceptional. Furthermore, the paradigm case of legislation in the civil law is that of codification. The civilian codes have the ambition to make comprehensive provision for an entire area of law, such as private law, or for a major branch of it, such as consumer law, and to supersede all pre-existing law in that area. Statutes in common law systems have a much narrower ambit and are usually meant to fit into the existing case law.

Civilian systems have traditionally denied that judges make law. Case law is still not accepted as a binding source of law, so there is no system of precedent as in Britain. Today, civilians are more conscious of the law-making function of the judiciary, and they accord strong persuasive authority to court decisions, but the force of precedent is still weaker than in the common law. Neither do they confer special prestige on their judges.

In the civil law tradition, the central actor of the legal system is the legal scholar. Under the *ius commune*, in the absence of powerful national legislators and courts, they were responsible for systematizing and updating the ancient Roman law. Law professors were also influential in creating major codes and, later, in interpreting, criticising, and developing them. Their enhanced position is also due to the fact, in contrast to the position in England, that legal education on the Continent has always been the preserve of the universities rather than of the professions. A scholarly approach therefore shapes the mindset of all future lawyers. As a consequence, civilians tend to be less pragmatic than common lawyers. They pay less attention to facts of particular cases and think and rather argue in abstract categories and systematic contexts. However, these differences in legal reasoning are also diminishing.