



Panel: Comparative Judicial Practice

Honorable Zou Bihua, Honorable Peter J. Messitte, Honorable Jean-François Thony,
and John Fellas (Moderator)

A Primer on the Civil-Law System (selected excerpts)

By James G. Apple and Robert P. Deyling

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Civil law is the dominant legal tradition today in most of Europe, all of Central and South America, parts of Asia and Africa, and even some discrete areas of the common-law world (e.g., Louisiana, Quebec, and Puerto Rico). Public international law and the law of the European Community are in large part the product of persons trained in the civil-law tradition. Civil law is older, more widely distributed, and in many ways more influential than the common law. Despite the prominence of the civil-law tradition, judges and lawyers trained in the common-law tradition tend to know little about either the history or present-day operation of the civil law. Beyond the most basic generalities—e.g., the common law follows an “adversarial” model while civil law is more “inquisitorial,” civil law is “code-based,” civil-law judges do not interpret the law but instead follow predetermined legal rules—judges and lawyers from the United States seldom have any deeper sense of the civil-law tradition. (p. 1)

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To understand the different civil-law systems as they exist today in European and Latin American countries and elsewhere, one must necessarily begin in antiquity, because the civil law, in all of its variations, has as its bedrock the written law and legal institutions of Rome. Its very name derives from the *jus civile*, the civil law of the Roman Republic and the Roman Empire. (p. 3)

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The practice of relying on various written forms of law, including scholarly

commentaries, doctrinal treatises, and glosses on compilations of legal principles, for the creation of a legal system was well established throughout Europe in the fourteenth and fifteenth centuries. The formal, comprehensive codification of an entire body of law of the type characteristic of modern civil-law systems began primarily in France and Germany. (p. 12)

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The civil codes, based as they are on the *Corpus Juris Civilis*, emphasize form, structure, and the enumeration of both abstract and concrete principles of law within a unified whole. The reasoning process from code provisions is deductive—one arrives at conclusions about specific situations from general principles. The function of the jurists (legal scholars) within and for the civil-law system is to analyze the basic codes and legislation for the formulation of general theories and extract, enumerate, and expound on the principles of law contained in and to be derived from them. The jurists apply deductive reasoning to suggest an appropriate judgment or result in specific cases. Historically their work took the form of treatises and commentaries that became the “doctrine” used by judges in their deliberations about specific cases, lawyers for advice to their clients, and legislators in the preparation of statutes and regulations. (pp. 19–20)

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Jurists of the type prominent in civil-law systems do not exist in the common-law tradition. One commentator summed up the basic distinction between the common-law system and the civil-law system in terms of the role of jurists: “The most striking difference between the civil and the common law lies in the greater relative importance which, in the former system, is attributed to the opinions of jurists as compared with prior decisions of the courts.” There are several reasons for a different role to be played by jurists in common-law countries. One reason, referred to in the above quote, is the elevated importance of judicial precedent. Moreover, since legal precedent guides the development of the common law, there is no need for legal scholars to devise and develop a comprehensive system of law, nor is there need for the methods of legal science to arrive at a

decision in a case. Precedent thus obviated the creation of a body of jurists of the kind found in civil-law countries. (p. 34) (footnote omitted)

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The codification/judicial-decision dichotomy relating to the development of legal principles has given rise to two other distinctions between the systems: the role of judicial decisions in the making of law, and the manner of legal reasoning. In civil-law systems, the role and influence of judicial precedent, at least until more recent times, has been negligible . . .; in the common-law countries, precedent has been elevated to a position of supreme prominence. Civil-law judges or their scholar-advisers initially look to code provisions to resolve a case, while common-law judges instinctively reach for casebooks to find the solution to an issue in a case. (pp. 36–37)

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Comprehensive legal codes forming general frameworks of private, commercial, and criminal law such as exist in the civil-law systems also affect methods of legal reasoning. In the civil-law tradition, the reasoning process is deductive, proceeding from stated general principles or rules of law contained in the legal codes to a specific solution. In common-law countries the process is the reverse—judges apply inductive reasoning, deriving general principles or rules of law from precedent or a series of specific decisions and extracting an applicable rule, which is then applied to a particular case. (p. 37)

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The structures of courts are distinctly different in the two systems. Common-law systems favor integrated court systems with courts of general jurisdiction available to adjudicate criminal and most types of civil cases, including those involving constitutional law, administrative law, and commercial law. Civil-law systems, on the other hand, following the tradition of separate codes for separate areas of law, favor specialty court systems and specialty courts to deal with constitutional law, criminal law, administrative law, commercial law, and civil or private law. (p. 37).

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The trial process is different in the two systems. In the civil-law system, the single-event trial is unknown, and trials involve an extended process with a series of successive hearings and consultations for the presentation and consideration of evidence. There are also procedural differences relating to the role of the judge in the trial process. In civil-law system trials using the inquisitorial process, the role of the judge is elevated—the judge assumes the role of principal interrogator of witnesses, resulting in a concomitant derogation of the role of lawyers during the trial. Conversely, in the common-law system the role of the judge as the manager of the trial (and “referee” of the lawyers acting in an adversary role) is secondary to that of the lawyers, who are the prime players in the process, introducing evidence and interrogating witnesses. The contrasting roles played by the judge in the trial process of the two systems has also resulted in a difference in judicial attitudes. Judges in the civil-law systems view themselves less as being in the business of creating law than as mere appliers of the law (i.e., a more technical, less active role in the development of the law than their common-law counterparts’). In civil-law countries, the judge merely applies the applicable code provisions to a case, with little opportunity for judicial creativity and often with the assistance of legal scholars and legal scholarship. The common-law judge, in contrast, is able to search creatively for an answer to a question or issue among many potentially applicable judicial precedents (pp. 37–38).

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There is a distinct difference in the two systems in the manner in which judges are selected and trained and in their legal education. In the civil-law tradition the judiciary is usually part of the civil service of the country—a recent law graduate selects the judiciary as a career and then follows a prescribed career path, first attending a special training institution for judges, and then acting as a judge in a particular geographical area and particular court system as assigned by the institutional body responsible for the administration of the judicial branch, often the Ministry of Justice. In contrast, common-law judges are generally selected as part of the political process for a specific judicial post that they hold for life or for

a specified term, with no system of advancement to higher courts as a reward for service.

Finally, the tradition of legal training is different in the two systems. In civil-law countries the study of law at a faculty of law follows graduation from high school, with no intermediate education in the liberal arts or other fields of learning, and with little or no exposure to subjects taught in other departments of a university. Thus a student at a faculty of law in a civil-law country rarely has a baccalaureate degree. In contrast, in a common-law country, the study of law is almost always post-graduate. The law student is exposed to other disciplines prior to matriculation in the law school, a situation that has perhaps led to a greater social consciousness among judges and lawyers about the purposes and functions of law and its application—and a greater openness and ability to confront new situations—than exists among their counterparts in civil-law countries. (p. 38)

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Two quotations from two comparative legal treatises should serve to highlight the fundamental differences between the two systems and their two distinct approaches to the law. The first is a commentary on the philosophical posture of common-law lawyers. The second is an observation about legal education in a civil-law system (Brazil).

In the common-law system, “[t]he common law lawyer, by and large, simply doesn’t care whether such a [comprehensive, logical, legal] system exists or not. He is busy deciding cases, with the aid of judicial precedent and with or without the aid of statutory enactment of rules in particular cases. If from this process scholars can begin to see bits and pieces of a system emerging, he is interested in it as a potentially useful tool; but he does not regard the discovery or the development of such a complete and logical

system as essential or even important in his continuing task of achieving justice in an infinite number and variety of individual cases.” In contrast, in a civil-law country, law students are taught “[t]hat law is a science, and that the task of the legal scientist is to analyze and elaborate principles which can be derived from a careful study of positive legislation into a harmonious systematic structure. The components of this system are believed to be purely legal, a set of ultimate truths related by rigorous deductive logic. Hence, the legal scientist’s inquiry is almost exclusively directed towards the legal norm. Though lip service may be paid towards the relevance or utility of facts derived from non-legal disciplines, such as anthropology, sociology, political science, or economics, it is hard for the legal scientist to escape the feeling that consideration of non-legal facts detracts from his search for absolute principles and the true nature of legal institutions.”

As indicated earlier, the distinctions between the two systems have blurred. Common-law countries are adopting some of the characteristics of the civil-law system, while civil-law countries are incorporating features of the common-law tradition into their legal systems. But significant differences remain and are likely to remain, as a result of the history and perceptions about the nature and purpose of law underlying each, one originating over 2,000 years ago and the other emerging in the twelfth century. (pp. 38–39)