Understanding the Civil Law

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Pier Giuseppe Monateri
Sciences Po Paris
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P.G.Monateri
Visiting Professor of Law, SciencesPo, Paris
Member International Academy of Comparative Law, New York

Understanding the Civil Law Tradition

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1. Introduction: What is Civil Law as a Legal Family ?

What we call "Civil Law System" is indeed a family of different legal systems tracing their historical roots to the Roman law.
As such, this family of legal systems is differentiated, today, especially in regard to the other two major legal families existing in contemporary world legal landscape: the common Law legal family and the Sharia of the Islamic legal model. As well as the civil law, the "common law" is a set of highly differentiated systems of law sharing the same origin to be found in the history and development of the English common law. Differently the Muslim Sharia is supposed to be a unique system od principles and rules, based on the Divine revelation contained in the Koran, even if its interpretation may vary very greatly in different jurisdictions, cohabiting, also, with European like codes and modern constitutions, and today is, on the average, applied only to the *status personae*, the personal condition of the subject, as marriage, divorce, inheritance and other related matters.
This given, it is manifest that when we speak of common and civil law, as the two major variants of the Western Legal Tradition, we make reference to the different *legal origins* of modern systems, implying that these differences are still moulding the actual structure of our laws (World Bank, 2003).

2 Historical Background of the Civil Law Origins.

The term "civil Law" is an English term used to translate the *jus civile*, or the proper Roman law as it evolved from classical times to the end of the Empire when it became codified by Justinian, from 529 to 534 AD, in his codes, constituting an ordered collection of a mass of writing known as the *Corpus Juris Civilis,* or *The Body of Civil Law*. The work was planned to be devided into three parts: the *Code* as a compilation of imperial enactments; the *Digest* or *Pandects* composed of *advices* given by older Roman jurists on different points of the law, and deemed to have authority for their learned character; finally the *Institutes* conceived as a textbook for law students at the newly established Law School of the Empire in Beyrouth. Tribonian has been the editor in chief of this massive work, thought to represent the whole of the jurisprudential tradition evolved from early Roman times up to the date of the compilation.
It is important to note two main facts.

First, it is the fact that the Roman Empire at that time was split into two parts and that this compilation was enacted, having force of law, only in the Eastern part of the empire speaking Greek. In this way the Justinian compilation, quite exotically, has been written in latin for an empire speaking Greek, and was never enacted as such in the West, but influenced its legal progress in the strongest possible way. Something which defeats any of our actual understandings of the working of law.

Secondly, this enterprise has marked a total revolution of Roman Law, changing completely its style and its structure. Roughly speaking, classical Roman law was an *oral* law, without codes, but only with pieces of legislation passed by the various political assemblies. There was *not* a formal system of legal education, each one having to learn the law from a practicing lawyer, and especially there were not regular courts of law.

The Roman magistrate directing the trial, the *Praetor*, was a politician, appointed for one year, and controlling only the *form* of actions pleaded before him by the parties. Then, to afford the trial, he had to nominate a *judex*, a "judge" , a layman to be agreed by the parties. In this way he was more an *arbitrator* than a *judge*. Just for this reason the learned opinion of jurists of great reputation played such an important role: they had to advice the *praetor* and the *judex,* as laymen, upon difficult and disputed points of the law. Moreover classical Roman law was ruling *only* Roman citizens, namely only male adults, whose father was already dead, and belonging to Roman families; a very small proportion of the inhabitants of the Empire. Roman law has never been the clue of the Empire: Egypt was ruled by Egyptian law, Greek cities by their own laws and so on. Only in 212 AD emperor Caracalla extended, for fiscal reasons, the citizenship to all the inhabitants of the empire.

This "classical model" evolved, then, slightly overtime into the opposite one, which was finally moulded by Justinian, having a central court of justice at the imperial chancellery, a formal legal education at the law school in Beyrouth, and a fixed system of written sources collected into the *Corpus Juris* and universally applicable to the whole of the empire. By this fact we can say that the finale shape of Roman law, left in inheritance to the middle ages, was exactly the opposite of its beginnings: from an *oral* law, administered by laymen, valid only for the very few, to a written law, administered by professionals, universally valid. It is anyway to remember that all this happened in the East, and *not* in the western part of the empire which remained a patchwork of different laws: old Roman law, canon law, and the various laws of the "German" nations, Goths, Franks and others, which occupied the West. This *eastern* legacy became, anyway, extremely important in the West for theological political reasons linked to the birth and development of a renewed Western Sacred Empire from

Charle Magne, 800 AD, to the establishment of the first modern university in Bologna (1174 AD) and on.
The “great space” of continental Europe became to be shaped in “catholic” terms: the Sacred Empire was to be thought as a single “body”, because eating the same holy communion all his inhabitants shared the same flesh. The compilation made by Justinian became to be regarded as a real “Revelation” of the Law for all mundane affairs not strictly confined to the Church or to be left to morality. Indeed this compilation was the only extant remain of the law, because it was written in bounded volumes of parchments, made to last, whereas all the previous scripts were on papyrus paper, necessitating to be regularly copied to be preserved, and so went quite completely lost in the barbarian west. Besides it was much more comprehensive and well ordered that any existing barbarian compilation of laws.
In this way nobody really enacted the Justinian compilation as positive law in the West, but it was thought to be the *ratio scripta*, the codified reason, of the law of a sacred unitary political body ontologically grounded on the holy communion of all its inhabitants.
This sacred, and universal, as well as *rational* character of the compilation explains why it became the basis of the university teaching of the law at Bologna, the first university established in the West, from which sprang Padoua, Paris, Oxford and Cambridge, where indeed Roman and *not* English law was taught. But the English Kingdom always refused to become a *terra imperialis,* and so always refused to give any practical application to Roman Justinian law. On the continent this common teaching shaped similarly, all over the places, the legal mind of professionals and it was deemed applicable, as a law of reason and last resort, in all cases not patently covered by local legislation.
This legal landscape formed the era of *jus commune* in continental Europe to be broken only by the advent of modern codifications at the end of XVIII century. This also explains, in comparison with the English legal system, the highly intellectual character of civil law: it was a university scholarly law. Besides on the continent the use of writing never went completely abandoned as it almost happened in England. English *jury* trial, as an *oral* pleading, was quite a necessity given the incapacity of the jurors to read documents; whereas the continent could adopt a more sophisticated system of trial, based on documents and administered by clerks.

Civil Law and Modern Codifications : the French Model

As we have seen in the previous paragraph, continental law evolved as a *jus commune* of a common empire, based on a theory of the Justinian compilation both as sacred and as rational. Of course the destiny of this political theological complex was to come to an end

with the growing antagonism of France, Spain and Germany, and especially with the 30 years war (1618-1648) of religion following the protestant reform.
It is out from this war that emerged on the continent the idea of the modern sovereign state. The inter-christian war was not terminable *but* in pure political terms: a sovereign absolute on his territories deciding also the faith of his subjects. This rising of the local princes to the status of absolute independent rulers fractured the catholic space of the empire into different territories with different jurisdictions giving rise, with the peace treaty of Westphalia (1648), to the modern system of inter-state relationships known as International Law. Each new sovereign became like a local, territorial bound, piece of the fractured mirror of the global universal authority of the empire, which was reflecting God's government of the world.
It is quite natural, then, that from a concept of the Sovereign, as an absolute concentration of local political power, emerged the idea that it was in the hand of this sovereign to ordain and establish the laws of his realm; and since the imagery linked to Justinian was still that of him as the template of the lawgiver, the various monarchies tried to follow his model in projecting codes of a comprehensive, universal and rational character for their own domains.
The first project was that of Frederick I of Prussia, then performed by Frederick II, leading to a *Project eines Corporis Juris Fridericiani* (1749–51), drafted by Samuel von Cocceji. The same name of the project is displaying the Justinian ambitions of these modern sovereigns. This project led to the so called A*llgemeines Landrecht,* or *The general laws for the Prussian states* finally codified in 1794 under the supervision of Svarez and Klein, who were under the orders of Frederick the Great. This project is of extreme importance since it represents the idea that the sovereign state can shape society at it wishes, that he has not only the political power of war and peace, but also that of ordering society by legislation. In this way Justinian law which was really a universal legislation served as a template for local legislations of the modern states, breaking the previously prevailing universal conception of space.
Following this German example, Maria Theresa, Empress of Austria decided, about 1770, to charge a committee with the task of preparing a Code of all her lands. After 40 years of preparatory works directed by Karl Anton Freiher von Martini and Franz von Zeiller, this project was enacted in 1811 as the *Allgemeines bürgerliches Gesetzbuch* (ABGB) the Civil Code of the Austrian-Hungarian Empire.
What happened in between was one of the real major breaks in all European political history: the French Revolution. From a legal point of view, the revolution captured the sovereign within the State, making him no longer the possessor of the state, but one if his constitutional organs and finally sentenced the King to death for High Treason, conferring an all-mighty power to the popularly elected legislative assembly. The revolutionary government

went on performing a complete subversion of the existing law, hooting almost the 75% of judges, dissolving the Bar, and closing all the law schools. The new faculties of law were founded, the legal profession was completely reorganised, and a new judiciary was established inventing the modern pyramid of courts we can find in every civil law jurisdiction. It is made of many Tribunals, in quite every district ,to judge on cases of first instance; then of fewer Appellate courts to review their judgments, and finally of one *Cour de Cassation* established to grant a uniform application of the law.

Meanwhile many measures were adopted to grant a legislative unity of the State, and at the end of the revolution, when Napoléon I became emperor, on 21 march 1804 he installed a commission to draft a code and, on the same year, he enacted the French *Code civil,* or *Code Napoléon*, officially the *Code civil des Français*, as a real *liberal constitution* of the civil society.

The whole apparatus to reach this goal was once again derived from Roman templates. After all the revolution was conceived to re-establish a kind of "Roman Republic", giving back to the people all the powers and prerogatives usurped by the kings and the church; and the first title assumed by Napoléon himself was that of First Consul of this polity.

He participated to the most of the discussions in the committee and imposed a literary style to "his" Code inspired by the principles of brevity and clarity, as it was thought to be a code for the commons and not for the specialists. This same code became to be surrounded by a constellation of other codes: the Penal code, the Code of civil procedure, the Code of commerce and the Code of criminal instruction. The civil code was divided into three parts : Persons, Property and "the different ways of acquiring and transferring property", a section mainly devoted to contracts, torts, and unjust enrichment. The code is very liberal considering marriage as a contract, defending property as an absolute right, shaping contract as an agreement based on the free choices of the parties, and considering negligence as the basis of any liability.

In this way France became the real model of any modern codified system, and her codes had an immense impact on the other countries from Italy, Poland, Spain, Greece, to Latin American legal systems, then to Egypt, Syria and many other systems in Africa and in Asia. So to speak France *is* what we have in mind today when we speak of a civil law jurisdiction. Its main feature are codes covering the whole of the legal field, and a judiciary diffused all over the country and organised on the three levels of tribunals, courts of appeal and a central court of cassation.

It is important, here, to underline the pivotal role assumed by legislation confiding to it the power to order society in all its details, because of its revolutionary political role. The center

of gravity of the revolution has been the legislative assembly, and the revolution was mainly a revolution of laws, collapsing all the structures of the Ancien Régime, something which never happened in England, where this ideology of legislation was rejected also by liberals like Edmund Burke, in favour of a "sublime" conception of an oral law and an unwritten constitution as instantiated in judicial decisions. Remembering, anyway, the extremely *elite* nature of the English judiciary having only *one* High Court in London, with an appellate division, submitted to the nine justices of the House of Lords (now called the Supreme Court of United Kingdom). The French arrangement of the judiciary is extremely more diffused: the English Law Lords are nine deciding approximately 60 cases per year; at the Court of Cassation we find more than 150 judges deciding quite 7,000 cases a year.

The most important point is anyway that legislation, and the rational constructivist idea of the possibility for it to *design* society, lies at the basis of the French legal system moulding also the French legal style. Courts are rendering very brief decisions adopting the same style of the code: almost one page long only, whereas an English or American decision can be also 40 or 50 pages long, reporting not only the impersonal view of the court, as a unanimous organ, but all the opinions of minority and majority justices.

There is finally another factor to be remembered and which is normally underscored. Parallel to the general jurisdiction the French system adopted a special Administrative Jurisdiction, confined to cases involving the Public Administration, having its *apex* in a peculiar French institution: the *Conseil d'état*. The very existence of this institution was singled out by authors like Dicey as the major difference between the English and the French system. In this way the common law idea of judicial review of administrative acts is not followed in France. Normal judges have no jurisdiction over state acts: these can be questioned only behind the Administrative Jurisdiction and the Conseil d'état, an organ whic is not only working as a court but also as a counsellor of the administration in producing by-rules and acts. Under this respect no two other systems could be more different.

3. Civil Law and Modern Codifications : the Rise of the German Model

As we have seen Prussia had a code before France, but then the Napoleonic Empire extended French domination all over Europe, transplanting French patterns and methods all across the continent, up to when the French Army was defeated in Russia in 1812. The Germans lived the time between 1812 to the final defeat of Napoéon at Waterloo as an era of *national wars of liberation* against the French. After the Vienna Congress of 1815 Germany was restored but as a constellation of 39 different sovereign states: Prussia, Schleswig-Holstein, Bavaria, and

so on. Anyway its "space" (Reich) was deemed unitary from the standpoint of sharing a common culture, a common language, *and* a common university teaching. So attempts were made for having also a common legislation overpassing the differences between the various states notwithstanding the lack of a political unity.

Thibaut was an author who sponsorized the theory of adopting a German version of the French code. His idea was rejected by the most prominent German law scholar of all times Frederick von Savigny. In an outstanding article (*Von der Beruf unserer Zeit nach die Gesetzgebung und die Rechtwissenschaft*) he traced a parallel between law and language (likely to be derived from the Scottish Enlightment) in order to block the adoption of a foreign legislation. As the language is a complex spontaneous order, so it is the law. Law and language are evolving orders that no single group of human minds have consciously designed nor can control. They are decentrated orders, like markets (Hayek). So it is impossible and hazardous for legislation, as a consciously designed order, to try to mould the whole of society. Society is different from the state, which is one of the many purposive organisations pursuing their goals within society. It follows that the overall order of society cannot be designed, but can only evolve piecemeal.

This theory is rather understandable if we remind that there wasn't a unitary state in Germany, so that effectively there was no possibility for a central authority to mould the law, nor there was any unitary judiciary to promote it. What was unitary in the various German States was the university system. A student could also spend a term in Munich and the next term in Berlin; and what Savigny proposed, after the feelings raised by the very conception of the wars of liberation to build up a newer Germany, was to entrust the development of the law to the legal science (*Rechtwissenschaft*) as practiced by the German *Professoriat*.

If law is like language, and language is a depository of culture, it makes no sense to adopt a foreign law and destroy our culture while engaging in liberation and the making of renewed Germany. Law and language lie in the *Spirit of the people* (*Volksgeist*). Only a scholar can have a good insight over it, because of his learning, and so to be able to produce a well conceived framework of concepts to give it voice, creating a kind of scholarly made law (*Juristenrecht*) different from both judicial made law and from legislation. And, after all, Germany was to be considered as the real heir of the "space" of the Empire (*Reich*), and as such went on, and was going on, elaborating the *jus commune*, the actualised version of the Roman law. This law was not a piece of ancient history in Germany but an *actual* system of living law. In this way Roman law was no more an alien system, but it really became, in many centuries, part of the national spirit. Indeed Savigny's major work was entitled *Der System des Heutiges Roemishen Rechts*, "The System of the Actual Roman Law".

Here we may find a version of the civil law totally opposite to that of the French. Where France claims to be “republican” but she is indeed the continuation of the imperial model of Justinian, entrusting law to legislation, with the possibility of a political design of society, here Germany is representing the ideal of the “classical” Roman law as a law practically *without* legislation, and certainly without codes, slightly evolving through learning, as the great jurists of Rome did *before* Justinian, and as the great lawyers of the *jus commune* did after Bologna. France is claiming a continuity with Roman templates of codification, but Savigny is claiming a deeper and strong continuity where legislation is but an episode of a much more complex story of the civil law tradition.

If we perceive this we can easily spot how codes are an unnecessary feature of a civil law system, and maybe are contrary to its original nature.

Savigny prevailed against Thibaut and Germany went on developing “scientifically” the Roman law. But when, with the war of 1866 against Austria, and of 1870 against France, Germany was unified in the form of the Second Empire, the pressure for having a common legislation became too strong. This pressure could anyway be filtered by the already established institution of the *professoriat* as a real factor of the legal progress. So professors started to work on the idea of making a new code different from the French one and based on the “concepts” used to elaborate their own actualised version of Roman law (*Begriffsjurisprudenz*). Especially Windscheid, a well known author of one of the major textbooks on the *Pandects* paved by his scholarship the way to a first draft of the code in 1888. A committee of 22 members, comprising not only jurists but also representatives of financial interests and of the various ideological currents of the time, compiled a second draft. After significant revisions, the BGB (*BuergerlichesGesetzBuch*, Civil Code) was passed by the Reichstag in 1896. Political authorities gave 4 years to the legal profession to study and learn the new legislation, which was put into effect on January 1, 1900 and has been the central codification of Germany's civil law ever since.

The BGB served as a template for several other civil law jurisdictions, including Portugal, Estonia, Latvia, Japan, Brazil and Greece. It never had, anyway, the same world impact as the French code. What had a tremendous impact all over the cili law countries was German scholarship and the German method strongly influencing Italy, Spain, Latin America, and quite all the jurisdictions that maintained a French like legislation.

So, after all, also Germany became a codified system, and quite all civil law jurisdictions can be deemed to be a “hybrid” of French legislation and German scholarship.

What is peculiar is that the two codes, French and German, are really very different. The German code, especially, possesses a General Part (A*llgemainer Teil*), which does not exist in

the French code. In this General part we can find all the general concepts to be adopted to grasp the specific parts devoted to contracts, torts, and property. This different approach is obviously indebted to the fact that this code has been elaborated by professors, and that they have been able to act as a unitary factor to reach a national goal.
Anyway the Gemans structured the judiciary in quite the same French way, and maintained a sperate Administrative Jurisdiction as in France.

4. Conclusion : The problems of Harmonisation and of Comparison between Common and Civil Law Jurisdictions

All this, the mixing of the French and German patterns, is giving to civil law, considered as a general tradition, her intellectualistic flavour as well as her pro-legislation biased aspect.
When we speak of civil law jurisdictions, we mean systems that : 1) have codes; 2) have a similar and diffused judiciary handling many more cases than a common law jurisdiction; 3) possess a separate - seemingly pro-state biased - administrative jurisdiction, and 4) know a much stronger and active role in legal development of scholars and universities.
Notwithstanding this general image of the civil law, there are some myths to deconstruct about the comparison of civil and common law systems. First of all one is the myth that civil law *is* legislation, and common law *is* a judge made law.
Today, the most of legal matters in common law countries are covered by statutory law. Corporate governance, for instance, is always legislative also in these countries, as it is sale of goods or secured transactions. On the other side it is true that the legislation of the continental codes is very broadly conceived, so that the role of judges in developing the sense of the codes cannot be underestimated. Case law is as important to understand a provision of a civil code as it is to know what the common law is on a certain point.
Secondly, it is not true that legislation is a permanent and overwhelming factor in civil law countries. They lived for centuries without codification, and we may find, as in the case of Savigny, theories of the essence of the civil law which are directly antagonistic to the role of legislation.
Thirdly, it is true that the civil law appears more “conceptualised”, for the role always played by universities in her elaboration, but we cannot overpass the role of theory in the United States. It would be hard to consider American law without considering that each case is based upon a *doctrine*, and that it is much more American scholarship, than state case law, to give a picture and a frame of what this law is, and to influence the rest of the world, as

well as we cannot bypass the role of great law schools in the practical organisation of the elite of the legal profession, their ways of thinking, of elaborating solutions and so on. From a civilian perspective an American piece of legal scholarship is much more based on theory than it is, today, an average civil law writing displaying more erudition and knowledge than intellectual claims.

It is rather to be accepted that both families are a different compound of different factors always acting, sometimes in competitive ways, in the legal history: legislation, judicial decisions, and scholarly writings. The different mixtures of these elements is marking the difference between France and England, but it is marking the difference between England and the United States, also, as it marks a difference between France and Germany.

What is really different in common and civil law is the figure of the judge and the fact of having a separate administrative jurisdiction.

Judges in common law are fewer and decide a much lesser number of cases. This is something in search for an explanation. There are approximately 6,000 judges in France and 600 judges in England. Besides a common law judge is an old member of the Bar (UK) or she is directly appointed by the political power at state or federal level (US). A civil law judge is the winner of a public competition for recruitment. It means that you become judge when you are young, just maybe practicing the law for few years, and then you make a *judicial career* from the last of tribunals to the chair of president of the Court of Cassation, ehereas there is scarcely something as a judicial career in the United States, so few being the case of persons appointed as State or Federal circuit judges then becoming appointed at he Supreme Court. Under this respect the two systems cannot be more divergent. This factor depends heavily on the costs of justice. Civil law is cheaper, and that's also why it is normally longer; but no serious attempt has been made to understand precisely why, and certainly does not depend on Roman origins.

The fact of having a separate administrative jurisdiction is also of extreme relevance. This fact, again, cannot be traced back to the Roman origins of the civil law systems; rather it is a byproduct of political modernity: the rise of an absolute state on the continent, and the absence of a political upheaval similar to French revolution in the common law world.

It is strange to note the following paradox : in common law ordinary jurisdiction is much more politicized in the sense that the judge can be appointed directly by the political power, but the civil law is granting more room for state action by creating an administrative compartment separated from ordinary jurisdiction.

But is the separation of ordinary and administrative jurisdictions connaturate to a civil law tradition ? One could really wonder. For centuries, again, there was not such a separation,

and it is much more likely do be due to the *form* assumed by political power on the continent of Europe than to deep legal structures linked with distant origins.
Finally what is certainly absolutely distant, even today, is the *style* of these two families of laws. There is scarcely any similitude between a French and an American judicial decision, as there is not a common way to handle precedents, and also the modes of interpreting statutes is rather distant. In a sentence we could say that the apparently politically flat world of globalisation in still *striped* , fractured and discontinued by the *legal styles*.
To what extent, if any, these legal styles have an economic impact is a question open to investigation. What it certainly represents is a legal *duality* of the West, and especially of Europe, displaying two different appearances of what we call Justice, rendering any work for harmonisation harder than expected.

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