

A Primer on the Civil-Law System

by

James G. Apple
*Chief, Interjudicial Affairs Office
Federal Judicial Center*

and

Robert P. Deyling
*Judicial Fellow
Administrative Office of the U.S. Courts, 1994–1995*

This publication has been prepared and is being published by the Federal Judicial Center at the request of the International Judicial Relations Committee of the Judicial Conference of the United States.

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors and not necessarily those of the Federal Judicial Center.

Contents

Acknowledgments v

Introduction 1

Part I: The History and Development of the Civil-Law System 3

In the Beginning: “All Roads Lead to Rome” 3

Medieval Developments in Italy 6

Canon Law and the Law Merchant 9

Intellectual Developments Leading to the Codification Process 12

The Codification Processes in France and Germany 15

The French Code 15

The German Code 16

The Codes of Chile and Brazil 17

The Development of the Role of Jurists in Modern Systems 19

Part II: The Civil-Law System As It Exists and Functions in the
Modern Era 23

The Public Law–Private Law Dichotomy 23

Court Structure 24

The Legal Process 26

Civil Procedure 26

Criminal Procedure 28

Appellate Procedure 29

Legal Actors: Tradition and Transition 29

Legal Scholars 29

The Legislature 30

Judges 30

Legal Education and Lawyers 30

Transition in the Civil-Law World 31

Part III: The Common Law and a Comparison of the Civil-Law and
Common-Law Systems 33

Origins of the Common-Law System 33

Jurists in the Common-Law System 34

Differences in the Two Systems 35

Conclusion 38

Bibliography 41

Appendix A: Excerpts from the <i>Institutes</i> of Gaius	43
Appendix B: Excerpts from the French Code	47
Appendix C: Excerpts from the German Code	55
Appendix D: Comparison of a Similar Issue of Law Treated by a French Court and a German Court	63

Acknowledgments

The authors acknowledge the contributions of several seminal works on the civil-law system and legal history that contributed to the preparation of this treatise. Much of the factual material and some of the opinions and generalizations about the development of the law in Europe were drawn from *An Introduction to European Legal History* by Olivia F. Robinson, Thomas D. Fergus, and William M. Gordon of the Department of Legal History at the University of Glasgow, and from John P. Dawson's *Oracles of the Law*. Much of the material describing the modern structure and functions of the civil-law system was derived from *The Civil Law Tradition* by John H. Merryman of Stanford University and from *Comparative Legal Traditions* by Mary A. Glendon, Michael W. Gordon, and Christopher Osakwe. Other valuable sources were *Comparative Law: Western European and Latin American Legal Systems*, by John H. Merryman and David S. Clark; and *The Civil Law System*, by Arthur T. von Mehren and James R. Gordley. Additional publications consulted by the authors in the course of the preparation of this manuscript appear in the bibliography. The authors are indebted to all of these scholars.

Introduction

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.

This overview is designed for judges and lawyers who seek to expand their knowledge of the civil-law tradition and who might wish to consider the civil-law system as a source of legal reforms. The scope of this paper is necessarily limited. Each civil-law country has developed its own distinct legal system that draws on the rich history of the civil law, and it is not possible to discuss here such variations in detail. Moreover, this discussion does not attempt, except in a most general way, to deal with the substantive law of the civil-law systems, which can differ markedly between individual countries and also from that of common-law countries. Instead, it focuses on general features that distinguish the civil-law tradition from the common-law tradition. Particular references are made to the civil-law systems of France and Germany and to two systems in Latin America, those of Chile and Brazil, because of their strong influence on many other systems. Those who desire more comprehensive information should consult the sources contained in the bibliography.

Understanding modern civil law requires an understanding of the history of the civil law beginning with the Roman Empire. Therefore, the first section of this treatise discusses civil-law history in some depth. It focuses on Roman law, the adaptation of Roman law during the medieval period, the development of canon law and the law merchant, and the history of codification in Europe. The second section reviews the basic features of the modern-day civil-law tradition, including a summary of the structure of the courts and the adjudication process, as well as the roles of judges, lawyers, and scholars. Finally, the commentary

concludes with a discussion contrasting the civil-law and common-law traditions.

Part I: The History and Development of the Civil-Law System

In the Beginning: “All Roads Lead to Rome”

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.

Jurists—those persons “learned in the law,” or who could be described as legal experts—made fundamental contributions to the development of the Roman legal system.

The civil-law system had its origins in the Roman Republic, before the beginning of the Empire, in the second century B.C. By the end of the Republic, in 27 B.C., a body of legal experts, or jurists, had gained prominence within the legal system, separate and apart from the courts of law (the term *jurist* will be used throughout this discussion to mean a “legal expert” rather than only a judge). These jurists were men from the upper classes of Roman society, interested in the law and in providing counsel about the law as a public service. They provided advice to parties to litigation, to the lay judiciary who presided at trials and judged the facts of a case, and to legal magistrates who instructed the lay judges on issues, procedures, and remedies available in particular cases.

Roman jurists were largely a product of the success of the Roman Empire. Expansion of the Empire led to increased trade with conquered territories and with distant lands with which Rome came into contact. The acquisition of territories brought new people into Rome and other cities of the Empire. These persons did not come under the traditional *jus civile* applicable to Roman citizens, but were nevertheless important to the continued success of the Empire. Such developments created the need for a private law regime to determine and guide relationships between citizens and noncitizens. In this atmosphere, and to meet such needs, the Roman jurist came into being and created for himself a unique role, primarily in the classical period from 150 B.C. to 250 A.D.

Another reason for the development of the Roman jurist related to the nature of the Roman judicial system and its method of disposition of cases. There were

two types of civil judges: the magistrate, or *praetor*, and the judge for the trial, or *judex*. This judiciary was nonprofessional. The praetors and judices seldom had any legal training.

The judicial capacity of the praetor, elected for a one-year term, was limited because his duties consisted of conducting what a modern lawyer would call a pretrial hearing between prospective litigants to define the issues of the controversy. The praetor's source of power was the control of the remedies available to the litigants. The praetors' *edicts*, which were pronouncements about the law, became a primary source of private law, legislation being only a secondary source.

The judex, on the other hand, filled the traditional role of judge during the trial. His appointment was even more limited than that of the praetor. The judex was selected on a strictly ad hoc basis by the litigants for the purpose of presiding over their trial, and then given authority by the praetor to decide only that case. Both praetors and judices needed competent legal advice. They turned to the jurists for that counsel.

Jurists in Rome were not government officers in the modern sense of that phrase, since they had no official powers. Rather, their activities constituted a form of public service, the rewards of which were influence and popularity. They did not take charge of cases or control the course of litigation through the courts. They did not charge for their services and they received no pay from the state, a situation that emphasized the pure public nature of their service. They were, perhaps, the first pro bono lawyers.

In addition to giving advice in individual cases, the jurists assisted the chief praetor (known simply as the Praetor) in drafting the Edict, an annual public proclamation made by the Praetor to state the principles by which he intended to administer his office. The Edict became particularly important for the development of the equity law of Rome, the *jus gentium*, which applied to those persons who could not be classified as indigenous Romans.

Jurists responded to specific questions of law in a document known as a *responsa*. The *responsa* was prepared for both praetors and judices, frequently using the device of the *interpretatio*, in which specific statutory phrases served as the basis for an opinion.

The jurists thus fulfilled two functions as legal advisers. First, they provided written technical advice to judges and others about the state of the law and interpretation of textual material, such as from the Twelve Tables (an early statement of existing law, circa 450 B.C.) or the Edict. Second, they were almost solely responsible, through their *responsa*, for the development of a comprehensive jurisprudence, independent of judicial decisions, to meet the continuing and changing demands of an increasingly pluralistic society.

The short-term, nonprofessional character of the Roman judiciary and its method of case disposal produced another result, important for the later de-

development of civil-law systems: the lack of regard for the value of decisions in individual cases. Since the praetor was appointed for only one year and played a limited role in the resolution of cases, his decisions and rulings in particular cases were not accorded any particular weight or significance. Likewise, there was little respect accorded the decisions of the judex. The judex was appointed to decide only a particular case. The practice of having, in effect, two judges in every case, with the judex selected only for the particular case, represented a split in the judicial process. There was no continuity in litigation, and no chance for the development of legal principles among the various cases presented for resolution. A judicial decision—involving actions by two separate judicial officials—resolved an individual case, and that was the end of the matter.

Thus judicial decisions were never accorded any importance in the Roman legal system. The eminent Roman jurist Gaius (see *infra* page 6) didn't recognize judicial decisions as a basis of Roman law in the preamble to his *Institutes*, written in the second century A.D. And in the sixth century the Emperor Justinian drove the final nail in the coffin of Roman judicial precedent (and judicial precedent in later systems as well) in the encyclopedic work commissioned by him, the *Corpus Juris Civilis*, with the dictum "*non exemplis sed legibus judicandum est*" ("decisions should be rendered in accordance, not with examples, but with the law").¹ The resulting derogation of the value of individual decisions in the judicial process elevated the importance of the jurists and their written opinions. The role of jurists came to be preeminent in classical Rome, to such an extent that it could be validly argued that the Roman private law system was entirely dependent on them.

The practice of the Praetor in issuing the annual Edict at the beginning of his one-year term evolved into merely a reissuance of the one for the previous office holder, with such changes and additions as were desired by the newly elected Praetor. The result was an ever-lengthening document of uneven texture and content. This practice ended during the reign of the Emperor Hadrian (117–138 A.D.), causing the jurists to turn to a new form of legal writing: the treatise, which covered specific aspects of Roman law.

Another practice that helped elevate the role of jurists was Caesar Augustus's practice of "patenting" jurists, by which certain jurists were singled out for recognition. By such recognition the opinions of the patented jurists were accorded special significance and weight. Patented jurists eventually acquired the power of rule making, and their opinions were binding even on the emperor because they had the "force of law." The prestige and importance of the work of

1. John P. Dawson, *Oracles of the Law* 103, 123 (1968); see *The Institutes of Gaius*, Book One, para. 2 (William M. Gordon & Olivia F. Robinson trans., 1988); *Great Jurists of the World* at xxvii (MacDonnell & Manson eds., 1968).

these Roman jurists became so great that they assumed the role of imperial advisers.

Roman law—particularly the written works of these later jurists—had an important influence on history. The written law of Rome had evolved from *responsa* to the legal treatises prepared by the jurists, or *jurisconsults*, as they came to be called. The law underwent further evolution in later periods of the Empire, culminating in a comprehensive statement of private law prepared by the jurist Gaius in the latter half of the second century A.D. Gaius's *Institutes* were an extensive collection of legal principles and rules covering matters ranging from the rights of citizenship and the manumission of slaves to the preservation of estates and the rules of intestate succession. The *Institutes* could be analogized to modern “hornbooks,” in that they were elementary discussions of Roman law designed to educate students, as well as assist practitioners in the resolution of issues in a particular case. An excerpt from the *Institutes* is reproduced in Appendix A.

In the sixth century, the Emperor Justinian ordered the preparation of an even more comprehensive manuscript covering all aspects of Roman law. The *Corpus Juris Civilis* included not only a refinement of Gaius's *Institutes*, but the *Digest* (writings of classical jurists), the *Code* (early imperial legislation), and the *Novels* (Justinian's legislation). The *Corpus Juris Civilis* provided a rich store of legal ideas for contemporary and later students and scholars of the law. It brought together legal treatises and principles of law reflecting diverse viewpoints and arguments. As will be seen later in this discussion, the *Corpus Juris Civilis*, particularly the refined *Institutes*, became the essential building block for the system of law known popularly as the civil-law system, supplying many of its substantive provisions.

Medieval Developments in Italy

From the eleventh to the fifteenth centuries, northern Italy witnessed the rise of a jurist class almost as prominent and significant as its Roman predecessor. During this time the Italian peninsula experienced the rise of Italian city-states and increased commerce and trade between them. These changes were in some ways similar to the changes that occurred in Rome during the classical period. They created the necessity for some system of law to fulfill both the commercial and social needs of the populace. The legal system had to expand beyond local custom and those vestiges of Roman imperial law that were part of whatever local legal system existed. As in Rome, jurists came into being to fill this void; they are now known as the “glossators of Bologna.”

Glossators and their work were significantly different from their earlier Roman counterparts. The purpose of the glossators was not to develop new principles, rules, and procedures to meet the challenges of their particular age, as

had occurred during the early stages of the Roman Empire. Instead, glossators revived the *Corpus Juris Civilis* as a complete system of private law brought intact from the final period of the Empire and adapted the Roman system to the exigencies of medieval Italy. Rather than create law as the Roman jurists did, the glossators interpreted textual material from the *Corpus Juris Civilis* and disseminated those interpretations to other scholars, law students, and lay judges.

A second difference, important to the development of the civil-law system, was the nature of the jurists themselves. In Rome, jurists were private, upper-class citizens performing a public service without pay. In medieval Italy they were primarily teachers, members of the law faculties of the universities, drawn not from the nobility but from the general public. They generally carried the title of doctor. These legal scholars became the midwives in the birth of a new system of law for an emerging Europe.

While the basis for the opinions of early Roman jurists is not readily apparent from their works, it is clear that they were case oriented and not dedicated to building a system of law. In contrast, the Italian glossators emphasized system building and logical form, with *Corpus Juris Civilis* serving as the basis for construction of legal doctrine. Their basic technique was the “gloss,” an interpretation or addition to the text of the *Corpus Juris Civilis*, first made between the lines and later in the margins. They also used some of the substance and argumentative techniques of medieval theology. When the *Corpus Juris Civilis* and theological doctrine could not supply them with the necessary rationale for their opinions, they turned to local custom to fill the void and incorporated it into the system. The reliance on custom was a significant contribution of these jurists, since there is little evidence that Roman jurists appreciated custom as a source of law or took local custom into consideration when preparing their responsa. Significantly, Gaius made no mention of custom in Book One of his *Institutes* when he listed the bases of Roman law.

In some respects, however, there is a close resemblance between the Italian glossators and Roman jurists. Both provided much-needed advice to the untrained lay judges of the day, especially on difficult questions of law. The glossators developed the practice of preparing short legal treatises (*summae*), which had at least a superficial resemblance to the responsa of Roman jurists. They also engaged in their activities as “law finders” or “law givers” without any specific grant of political or civil authority (and possibly without remuneration since they were paid members of the law faculties). In addition, the glossators’ *summae* evolved into complete statements of private law, similar to some of the work of the late-period Roman jurists. The “Great Gloss” of the leading glossator of the period, Accursius, who wrote his classic of medieval legal literature from 1220 to 1260, can be compared to the *Institutes* of Gaius and even Justinian’s *Corpus Juris Civilis* as an attempt to create a

comprehensive statement of the law. The Accursian Gloss totaled over 96,000 commentaries to the entire text of the *Corpus Juris Civilis*. Finally, the medieval Italian glossators, like the Roman jurists, acquired great prestige and contemporary influence.

The abiding influence of the Italian glossators and those who followed—the so-called post-glossators and commentators who further developed and refined legal doctrine under the *Corpus Juris Civilis*—cannot be underestimated. By the middle of the thirteenth century they had not only created law faculties in the universities, but also developed a systematic method of teaching law and a definitive textbook for instruction. They not only paved the way for the reception of Roman law into modern Italy, they were the primary cause for its reception into the modern legal systems in Germany, France, Spain, Switzerland, and other European countries.

The glossators were particularly influential because they were law professors associated with the great universities of medieval Italy, which were the first true universities of Europe and had the first law faculties. The universities employed the glossators as masters who educated students from many parts of Europe. The original glossators were located at the University of Bologna, where the first law school was established. A city of great influence in the medieval world, Bologna was not only a major commercial city in Italy, but was also located at the crossroads of major trade routes. Graduates carried the system of the glossators to their home countries and influenced the development of local legal systems.

The influence of the Italian law faculties was especially strong in Spain. Spanish law students attended the University of Bologna in the early part of the twelfth century, and a university in Salamanca, Spain, was later established under the influence of the one in Palencia, Italy. By 1346 the influx of students from Spain was so great at Bologna that a Spanish college was set up within the university.

The reception of Roman law into Spain, primarily law from the *Corpus Juris Civilis* as refined by the Italian glossators and carried home by Spanish law students and scholars, resulted in the preparation of a comprehensive Spanish digest, the *Codigo de Las Siete Partidas* (The Code of the Seven Parts of the Law). The digest, which used Roman law as its primary source, was prepared by the monarch Alfonso the Learned in the latter part of the thirteenth century. This monumental work was the foundation of Spanish private law until 1889, almost 500 years later, when it was replaced by a code that is still in force, the *Codigo Civil* (Civil Code). The *Codigo de Las Siete Partidas* is of particular importance to the legal systems of Central and South America. It served as the basis for the reception of Roman law into those regions through the exploits of the Spanish conquistadors and the colonization efforts that followed them.

Canon Law and the Law Merchant

Italian law, which influenced the development of law in other European countries, was derived from two sources: Roman law as incorporated in Justinian's *Corpus Juris Civilis*, and customary (local) law. Two developments occurred in the medieval period that greatly affected the content of the substantive law of the civil-law systems: (1) the creation of a comprehensive canon or ecclesiastical law by the Roman Catholic Church, and (2) the maturing of a law merchant, or law covering commercial transactions, as the result of the growth of commercial classes and expansion of commercial activities in European cities and regions.

Throughout Europe, from the twelfth through the sixteenth century, a series of ecclesiastical courts evolved within the Roman church. These courts had a relatively uniform structure, systematic management, and an educated staff of judges trained and skilled in applying a canon law that was primarily concerned with the administration of the church and its rules. This canon law had been developing since the eleventh century, when the Bishop of Worms (Germany) collected scattered rules and regulations of the church into a series of twenty books known as his *Decretum*. From 1130 to 1150, an Italian ecclesiastical jurist, Gratian, along with others produced the *Concordia Discordantium Canonum*, a monumental work that became the basis for almost all canon law. This extensive tract was divided into three parts, anteceding the divisions of some of the early legal codes of European states in the post-medieval period: (1) the nature and sources of law and ecclesiastical offices and conduct; (2) clerical behavior, penal law and procedure, church property, religious orders, marriage, and penance; and (3) sacraments and church doctrine.

Because of the pervasive influence of the church in almost all aspects of medieval European life, the influence of canon law was significant. Like its secular counterpart of the period, canon law was characterized by systematic expositions of the law and scholarly writings about it that formed the bases for the decisions of the ecclesiastical courts and guidance for church officials. Reliance on scholarly collections of rules and principles of law became a norm for developing legal systems in Europe.

The procedures used in the ecclesiastical courts also had an influence on the secular courts of medieval Europe. Feudal courts often preferred trial by battle or ordeal. Ecclesiastical courts developed a reasoned system that involved the reception and consideration of documentary evidence and witness testimony, use of qualified notaries to record proceedings, legal arguments by parties to a case on points of law, and decisions by canonical judges. By embracing such procedures the church made a significant contribution to the role of orderly and systematic methods for the conduct of court proceedings and dispute resolution.

The development in medieval Europe of the law merchant resulted from commercial developments on the Italian peninsula and in other parts of Europe. These developments included (1) the creation and expansion of commercial relations between Italian city-states and between the city-states and other urban centers outside Italy; (2) the growth in maritime commercial activities and the necessity for rules and regulations to govern that commerce; (3) the rise in the number of fairs and markets throughout Europe and the need to regulate commercial transactions in such settings; and (4) the rise of associations of merchants in commercial centers created for purposes of safety of goods in transit, financial security, and speedy resolution of commercial disputes.

The organization of merchants, seafarers, craftsmen, and traders into associations and guilds formed a community of institutions that followed local custom and practice, which in turn provided substance for the body of commercial law that followed. The law merchant also had a Roman law element, because Roman private law had addressed such commercial matters as negotiable instruments and contracts. However, there were significant variations among the commercial laws of different cities and regions. Uniformity of rules throughout Europe was distinctly *not* a characteristic of the law merchant.

Because of the ease and relatively inexpensive nature of transport by sea (compared to that by land) and the consequent increase in its frequency during the economic revival on the Italian peninsula in the eleventh and twelfth centuries, the practice of codifying the rules, practices, and customs of sea transport became common. *Capitulare navium* (Shipping Rules) were first published in Venice in 1205 and republished in expanded form as the *Statuta et Ordinamenta super Navibus* (Statutes and Regulations on Shipping) in 1255. This group of rules and regulations became the maritime code preferred for ports in the Adriatic Sea. In the Kingdom of Naples, the preparation of a maritime code, ultimately consisting of sixty-six chapters in both Latin and Italian, began in the thirteenth century.

A vast assortment of important customs relating to commercial practices for sea transport developed in the Italian cities of Genoa and Pisa, two important commercial centers of the medieval world. These customs greatly influenced the compilation of the most important maritime code of the period, the *Consolato Del Mare* (Consulate of the Sea). Compiled in Barcelona, Spain, and containing over 330 articles, the *Consolato Del Mare* covered such maritime matters as construction of vessels, circumstances requiring assistance to other vessels in distress, general average (a maritime principle for allocating damages), employment of pilots, and privateering. One article, for example, established the legal requirement of a ship to carry a cat to deal with the rats on board. This influential code was translated from the original Catalan (an early western Mediterranean language) into Latin, French, and Italian and was circulated in the early sixteenth century throughout Europe.

On land as on sea, increased intercity commerce and trade led to the creation of rules to deal with trade practices and disputes. The land version of the law merchant, based on the customary practices of traders, had its origin in the markets and fairs held on a comparatively regular basis throughout Europe even before the beginning of the second millennium. Markets were local events held weekly or monthly during the year, while fairs were more regional in nature and held once a year. Extant accounts describe fairs as early as the eighth and ninth centuries in France.

The frequency and extent of markets and fairs required some mechanism for keeping the peace and for dispute resolution. Informal courts for these events were created to fulfill that need. In England these courts were known as “piepowder courts,” the description being a reference to the feet of peddlers and traders, dusty from their travels from fair to fair.² Because the right to conduct a market or fair arose from a grant of authority from a king or prince, the piepowder and similar courts elsewhere in Europe evolved into official commercial courts operating under the authority of the reigning monarch.

Another social phenomena of the era giving impetus to the legal regulation of commerce was the creation and authority of craft guilds within a city or region to regulate and control a particular trade. Municipal commercial courts emerged to handle mercantile cases. The power of the guilds to regulate commerce within a particular craft often resulted in the adoption of municipal statutes governing organization, internal policies, and commercial practices of a particular craft. These municipal statutes were usually based on the customs of the craft guilds that had been periodically recorded, and they became a source of local commercial law.

Other than the municipal statutes designed to serve guilds and guild members, extensive codification of commercial rules, practices, and custom does not seem to have been a practice of the land version of the law merchant, in contrast to the maritime version. Use of precedent may have been a more common feature of land-based transactions. In Frankfurt, Germany, a book of precedents was maintained to assist in the arbitration and resolution of commercial disputes.

The establishment of special commercial courts to deal with trade disputes and trade matters—both in the cities for the benefit of guilds and at markets and fairs—paved the way for the modern practice in some European countries of separating commercial law and procedure from other parts of the law. Commercial law and procedure were assigned to a special commercial code, and special commercial courts were created to administer the commercial law.

², Olivia F. Robinson et al., *An Introduction to European Legal History* 166 (1985). The term “piepowder” is an English derivative of the French phrase “pied poudres” (dusty feet).

Thus the main river of substantive law that developed in medieval Europe and became the basis of modern European law was the result of the convergence of four different streams or tributaries of law. The main tributary was Roman law, primarily contained in Justinian's *Corpus Juris Civilis*, as modified and elaborated by the glossators and commentators in the Italian universities. The other tributaries were customary (local) law, canon law, and the law merchant. Together they came to be known as the *jus commune* (or "common law"—different from the common law of England), common to a whole kingdom and the peoples within it. The *jus commune* as it was established in France, Spain, and other European monarchies was characterized by both continuity and similarity of attitudes about the law (e.g., a bias in favor of systems and codification).

Intellectual Developments Leading to the Codification Process

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. Before discussing the codification process, however, it is necessary to examine briefly the influence of three intellectual movements of the period: "humanism," which grew out of the Renaissance; the "natural law" school, which followed humanism; and finally, the Enlightenment.

Humanism was an intellectual movement that had its origins in sixteenth century France, a time and place of great upheaval. There was a ferment of ideas, politics, culture, religion, and commerce. In politics and religion the decline in the secular influence of the Roman Catholic Church and the waning of the power and authority of the Holy Roman Empire were accompanied by the birth of the concept of the nation-state and an emphasis on strong, central governments. These developments culminated in the creation of the modern European system of states by the signing of the Treaty of Westphalia in 1648, which ended the Thirty Years War and, with it, the Holy Roman Empire. With its emphasis on rational thought and the potential for individual achievement, humanism was inspired by the culture of antiquity—primarily Greece, and to a lesser extent Rome. It encouraged scholarly examination of law, particularly the nature and function of law, and in the process the science of jurisprudence was founded. The school of natural law was an outgrowth of humanism.

The origins of natural law are several, but the writings of Hugo de Groot (better known as Grotius) stand out as the real starting point in the development

of the natural law school. Although Grotius (1583–1645), a Dutchman, is better known as the father of public international law, he attempted, through several seminal writings, especially *De Jure Belli ac Pacis* (On the Law of War and Peace), to develop universal concepts of law that transcended national boundaries and were not dependent on any one legal system. He advocated ideas such as law being based on human experiences and desires, particularly the desire for an orderly and peaceful society and the maintenance of that society based on reason. He argued for a rational approach to the structure of law and the resolution of disputes. He supported the systematic arrangement of legal materials, such as the treatment of property and obligations, and of specific rules within those systematic arrangements. In sum, “Grotius was . . . a starting point for the codifying lawyers of the Enlightenment and a support for an increasingly mercantile society, in which good order and a clearly defined system of rules of property and obligation were seen as highly desirable.”³

Later jurisprudential writers influenced the development of the civil-law and the codification process. Samuel Pufendorf and Christopher Wolff in Germany attempted to build a legal system using the scientific methods of Galileo and Descartes. This approach was characterized by the assertion of axioms from which particular rules were logically deduced and then tested by experience and observation. Scholars in other countries employed less rigorous techniques, but the general approach was the same. In his attempts to build a complete and rational system of law, and to promote law as a “science,” Pufendorf was a particularly influential jurist, not only in Germany but throughout Europe. The practice in modern codes of including introductory articles stating the general principles of law that provide the framework for the subsequent sections can be attributed to his work and influence.

The similarity of approach of the natural law scholars led to the conclusion in one legal history that “codification in the sense of a rationally organized statement of the whole field of law (or of all private law) was only possible after the work of the natural lawyers.”⁴ Of course these scholars had much legal tradition with which to work, including Justinian’s *Institutes*, the glosses of the Italian glossators, the commentaries of the post-glossator period, the collections of ecclesiastical principles that became canon law, and the compilation of commercial customs, rules, and regulations into various manifestations of the law merchant.

The intellectual and social turmoil of the fifteenth, sixteenth, and seventeenth centuries culminated in the eighteenth century in what has come to be known as the Enlightenment. This intellectual movement included the French Revolution and contained the near origins of the modern European codes. The

³. *Id.* at 361.

⁴. *Id.* at 416.

Enlightenment was based on a belief in the fundamental importance of reason as a liberating force in intellectual life and in how society was organized, a belief that grew out of the precepts of the natural law school. In Europe the effects and influence of the Enlightenment provided the final stimulation for the creation of the modern comprehensive codes of the different European states. Legal philosophy, influenced by social philosophy, encouraged legal reform, including new arrangements of legal topics within the unified system. Justinian's *Institutes* offered a convenient starting point for the codification process, because it provided a rational statement of the legal principles and rules on almost the entire range of subjects of private law and was a shared tradition in almost all European legal systems. Finally, the egalitarian ideals of the age required that citizens be knowledgeable on matters of law, so that each citizen could know and understand his or her rights and duties under the law. These ideals in turn encouraged simplification of the rules within a particular code, as well as comprehensive coverage.

Although the codification process ultimately affected all European states to one degree or another (with the exception of England), the leaders in the codification process were France and Germany. Space limitations prevent commentaries on the different codes; however, it is appropriate to examine briefly the codification processes of France and Germany as examples for the European legal systems, and those of two Latin American countries as exemplary of the process in the New World.

The Codification Processes in France and Germany

Codification in the sixteenth century differed from the codification process during the Enlightenment and post-Enlightenment periods of the eighteenth and nineteenth centuries. The former was "codification as a restatement of the law" while the latter involved "a rationally organized statement of the whole field of law." In discussing the later codification processes, an appropriate starting point is France, where Napoleon initiated a codification process at the beginning of the nineteenth century. Not only was Napoleon responsible for the creation of the modern French code, but he was also responsible for its dissemination to and reception in the countries conquered by his armies.⁵

⁵ Napoleon regarded the creation of the *Code Civil* as his greatest achievement, overshadowing even his great military victories. During his exile on St. Helena he remarked, "My true glory is not that I have won forty battles. Waterloo will blow away the memory of these victories. What nothing can blow away and will live eternally is my Civil Code." Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 La. L. Rev. 1073, 1078-79 (1988), and Henri Mazeaud et al., *Leçons de droit civil*, no. 45 (8th ed. 1986).

The French Code

In 1800, Napoleon appointed four senior practitioners of law to develop a comprehensive legal code. These four practitioners were experienced jurists who had studied Grotius, Pufendorf, and the other great writers of the natural law school. The commission held 102 sessions, all in the relatively short period of four years, devoted to drafting the code. The final product was presented to and promptly passed by the French legislative body. This code, officially designated the *Code Civil des Français*, was issued in 1804 in the form of three books with 2,281 articles. Later it came to be known as the *Code Napoléon*, but in its present form is called simply the *Code Civil*.

The following is the basic structure of the *Code Civil*:

- Six articles at the beginning of the first book announce general principles of law, including the publication, effects, and application of the law.
- Subsequent titles in Book I (articles 7–515) deal with civil rights and the status of persons, and with marriage, divorce, and paternity.
- Book II (articles 516–710) covers real and personal property, and the ownership and rights relating to such property.
- Book III (articles 711–2281) contains provisions on rights of succession, contracts, and obligations (the law of obligations covers general principles of obligations, as well as specific contracts, quasi-contracts, delict (tort), security rights, and property rights in marriage).

The basic structure of the code reflects the influence of Justinian's *Corpus Juris Civilis*, while the overall design also conforms to the Declaration of the Rights of Man produced during the French Revolution. The language is simple and clear, since it was designed to be understood by every citizen. It does not deal with procedure, commercial law, or criminal law; those three areas were covered by codes developed later and separately.

The *Code Civil* has been amended and supplemented by later legislation, but has never been completely revised. Because of the simplicity of some of the articles, an extensive body of explanatory case law has developed and is used in court opinions and judgments. A section of the *Code Civil* is contained in Appendix B.

The German Code

Modern Germany ended up with a code that was largely the product of codification processes in three Germanic states: Bavaria, Prussia, and Austria. The three codification processes took place in the eighteenth century and involved the work of commissions made up of legal scholars. The modern code in Germany, still in effect, resulted from the creation of a commission by statute in 1873 to codify German civil law. The result was a comprehensive code, known as the *Bürgerliches Gesetzbuch*, or BGB, approved in 1896 and put into

effect on January 1, 1900. The BGB contains five books, to which various legal subjects are assigned:

- Book I—General parts, including natural and juristic persons, the definition of things, classification of legal acts, and prescriptive periods.
- Book II—The law of obligations, including creation and discharge of obligations, contracts, and the law of delict.
- Book III—The law of real and personal property, including the ownership and possession of property and servitudes on property and securities.
- Book IV—Family law, including marriage and other relationships within the family.
- Book V—The law of succession, including hereditary succession and the rights of heirs, wills, settlements, and requirements of proof relating to inheritance.

Sections of the German code appear in Appendix C.

The Codes of Chile and Brazil

Of particular significance to U.S. judges and lawyers are the civil-law systems in Latin American countries, given their proximity and “American” culture, and the prospect of broader trade and economic relations among the countries of the hemisphere. Spanish law was responsible for the reception of Roman law in Central and South America through the colonizing activities of the conquistadors and those who followed them. This is true even for Brazil, once a colony of Portugal, which was in turn under the control of Spain from 1580 to 1640, a critical time of colonization.

Legal developments in North America also influenced Latin American legal systems, primarily in the area of constitutional theory and practice and the structure of government. Many Latin American countries absorbed the ideas and principles of constitutional government promulgated during the American Revolution and adapted them for their constitutions and public law. But the private law and many of the characteristics of the different systems remained European, sometimes, in the words of one observer, “more European than the Europeans themselves.” Thus the content of civil, commercial, and procedural codes, legal education, the structure of the legal profession, the influence of legal scholars, and the role of the judge in the judicial process in almost all Latin American countries conform very much to the civil-law tradition that evolved in central and western Europe.

The reception of Spanish law into many Latin American countries—and with it, Roman law—was not a well-ordered process. After the Spanish conquests, Spanish law itself became a jumble of codes, legislation, and judicial decisions. All Spanish law was not consolidated into one collection until 1803 with the

publication of a digest, the *Nueva Recopilación*. The appropriateness of the application of the earlier “jumble” to the New World was questionable, because no attempt was made to adapt Spanish law to the exigencies of local situations or to accommodate it with the conditions and the culture of the various countries.

While space does not permit commentary on the codes of all the systems of the twenty-one countries in Central and South America, a review of two of the systems is important. The codification processes in Chile and Brazil are significant because of the great influence of the Chilean code on those of many of other Latin American countries and because of the size and influence of Brazil generally in Latin American affairs and the uniqueness of its situation as a former Portuguese colony.

Modern codification processes in Latin American countries did not really begin until the middle part of the nineteenth century. The process in Chile was started, in the civil-law tradition, by an inspiring jurist, Andres Bello. This remarkable individual immigrated from Venezuela in 1829 and, self-taught in law, became a recognized authority on both Roman and Spanish law, as well as learned in other scholarly disciplines, including philosophy, languages, and literature. Within two years of his arrival in Chile—perhaps recognizing the chaos of the Chilean laws received from Spain—he started drafting, without any grant of authority, a new civil code for his adopted country.

In 1840, the Chilean legislature created a commission to accomplish that same purpose—the commission consisted of five members from the two Chilean legislative bodies. One member of the commission was Bello, who by that time had been elected to the Chilean Senate. He eventually completed, with but modest assistance from his legislative colleagues, an entire new civil code that was given legislative approval in 1856 and went into force in 1857.

The preparation and adoption of the new code in Chile proved to be a watershed event in South and Central America, as it was adopted almost intact by Colombia and Ecuador, and was used as a model for the civil codes of Argentina, Paraguay, Venezuela, El Salvador, and Nicaragua. Even today the Chilean code and the legal system on which it is based are viewed as the most advanced and influential among the Spanish-speaking countries of Central and South America.

Bello, and the commission that sometimes assisted him, drew on a number of sources for the new Chilean code, of which the most prominent were Roman law (primarily from the *Corpus Juris Civilis*), Spanish law (including the *Codigo de Las Siete Partidas* and the glosses on that work by later Spanish jurists), the *Code Civil* of France, other European civil codes (including those of Prussia and Austria), and the treatises and scholarly writings of Spanish and French jurists. One commentator noted the sources of particular parts of the Chilean code: “[T]he provisions respecting easements are based on the French civil code,

aqueduct on the Sardinian code, father and children on Spanish law, and contracts on the works of [French jurist Robert] Pothier.”⁶ The Chilean code, which has undergone major revisions since its mid-nineteenth-century adoption, primarily by later legislation, still remains in force.

The Portuguese brought law and a legal system to Brazil; however, they were Portuguese with a Spanish flavor. While Portugal was united with Spain in the late sixteenth and early seventeenth centuries, Portuguese law underwent a major revision and recompilation. The result was the Ordinances of Philip II (1603), comprehensive legislation covering many aspects of private and criminal law based on Roman law, canon law, customary law, municipal charters and statutes, and early Portuguese legislation. The Ordinances were received in Brazil and were a major component of Brazilian private law until a new civil code was adopted in 1916. The modern codification process began in Brazil in the mid-nineteenth century with the adoption of a penal code in 1830, a code of criminal procedure in 1833, a commercial code in 1850, and the new civil code in 1916.

The Brazilian legal system, for certain cultural and historical reasons, is characterized by legalism (i.e., the regulation of social relations by legislation) and formalism (i.e., the insistence on legal formalities, such as authenticity and verification, for many routine transactions and activities). These two characteristics, perhaps reflecting the temperament of the Brazilian people, have resulted in an obsession with legal codes. In addition to the aforementioned codes dealing with private law, crimes, criminal procedure, and commercial law, Brazil has, among others, a water code, an air code, a mining code, a health code, an industrial property code, a telecommunications code, a traffic code, a tax code, and an electoral code.

The Civil Code of Brazil has been described as the “greatest monument to legal thought and codification in Latin America.” It is similar in structure to the German BGB, being divided into three parts that cover (1) general principles, (2) the law of persons, things, and rights, and (3) the law of family, property, obligations, and succession. It has been amended by legislation since its promulgation, primarily in the area of domestic relations, but it is still in force. The greatest influence on this code’s substantive provisions was the *Code Civil* of France. A new penal code, however, reflects the influence of the contemporary German criminal code.

⁶ John H. Merryman & David S. Clark, *Comparative Law: Western European and Latin American Legal Systems* 213 (1978).

The Development of the Role of Jurists in Modern Systems

As the legal systems of Europe developed, the evolution of the role of jurists in the different countries diverged. In particular, the German model became distinctly different from the French one.

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 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. One commentator described the role of doctrine succinctly:

In civil law countries, the treatises and commentaries of legal writers are generally expressed in systematic expositions and in discussions about broad legal principles. These works formulate general theories about basic codes and legislation, in relation to the evolution of the legal system as a whole. . . . In the civil law, doctrine is an inherent part of the system and is indispensable to a systematic and analytical understanding of it. The doctrine is not a recognized source of law, but it has exercised a great influence in the development of law. It molds the minds of students, it gives direction to the work of the practitioners and to the deliberations of judges, and it guides the legislators towards consistency and systemization.⁷

One example of the role of jurists in modern civil-law systems is the famous Brazilian legal scholar, Pontes de Miranda. In the early and middle parts of the twentieth century, de Miranda wrote many books on Brazilian law that are referred to in Brazilian judicial opinions and used in the drafting of Brazilian legislation. His greatest work, *Treatise on Private Law*, consists of sixty-two volumes of commentary on the civil code. This monumental exposition is the basic reference work for Brazilian lawyers, judges, and legislators on subjects covered in that code.

In the reception of Roman law into Germany and France, the respective developments in the two countries took different paths, at least as far as the

⁷. Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 Am J. Comp. Law 419, 428 (1966–1967).

significance of jurists and doctrine is concerned. In Germany the status of jurists and juridical doctrine, in the manner of Rome, was enhanced, while in France it was diminished.

One of the reasons for the elevation of the role of jurists in Germany was the condition of the sixteenth- and seventeenth-century German courts, staffed by lay judges untrained and unsophisticated in the law. The untrained lay judges required impartial advice, and this situation, in the manner of the *judices* in Rome, led to the practice of the German judges at first merely seeking advice from the law faculties of the universities, then to asking the law faculties for a draft of a decree or judgment in a particular case, and ultimately to the practice of sending an entire file to the professors “for their collective and binding decision.”

Thus the law professors, the academic jurists in Germany, eventually assumed the role of unofficial and unappointed judges. Their views and opinions were incorporated into the private law of the state and became the chief vehicle by which the law was administered. These jurists became the functional equivalents of the patented jurists in Rome, whose opinions had the “force of law.” This situation undoubtedly also affected the status of the judicial decision within the legal system. Since the German professors were writing the decisions according to their own developed doctrine, there was no need to consult judicial precedent when confronted with a particular case. Thus legal precedent had no particular force in the development of the German legal system.

In France, the role and influence of jurists was lessened. The monarchy encouraged legally trained men into the judiciary. The result was that the formally trained judges were not compelled to seek outside legal advice in the manner of their German counterparts. Consequently, French legal scholars and law professors were never able to achieve the standing and power accorded their colleagues in Germany. Most of the leading jurists in France were practicing lawyers and judges. The leading jurists of the pre-Napoleonic period in France, Charles Dumoulin (1500–1566) and Robert Pothier (1699–1772), were not law professors. Dumoulin was an advocate and later “consultant,” and Pothier was a judge for over fifty years of his long professional life. Thus the current French code is the product of practitioners rather than legal scholars of the German tradition.

This contrast in the relative influence of German and French jurists can be illustrated by reference to two appellate cases that are reproduced in Appendix D, one French and one German.⁸ Both cases involve an issue of tort liability of individuals involved in concerted activities. The French decision is cryptic, containing only about 500 words and citing only two sections of the code and no doctrinal treatises. The German decision is longer—about 2,000 words—with a

⁸. These two cases were cited in Merryman & Clark, *supra* note 6, at 628–36.

more lengthy analysis of the issues, and cites not only relevant code provisions, but the writings of at least three German jurists. The two cases are also instructive about the role of precedent in these countries. The French decision contains none, and the German decision only three.

Part II:

The Civil-Law System As It Exists and Functions in the Modern Era

The Public Law–Private Law Dichotomy

The generally accepted way of dividing and classifying the law in the civil-law world is quite different from that to which common-law lawyers are accustomed. The fundamental division in modern civil-law systems is that between “public” and “private” law. To civil lawyers, this distinction is basic, necessary, and self-evident.

Despite the universal recognition of this distinction in the civil-law world, there is no agreement among civil-law lawyers on its theoretical basis (other than perhaps its historical basis—e.g., the *Corpus Juris Civilis*), and no uniformity among countries as to the scope of public and private law. As exemplified in the seventeenth- and eighteenth-century civil codes, private law has been described as “that area of the law in which the sole function of government was the recognition and enforcement of private rights.”⁹ Thus, today private law includes at least the civil and commercial codes. The proper classification of other areas is often disputed. Civil procedure, for example, is treated as public in some countries and as private in others. Labor law, social security, and various topics of government regulation are often referred to as “mixed” public and private areas.

Public law, by contrast, focuses on “the effectuation of the public interest by state action.” Today public law includes at least what a common-law attorney would recognize as constitutional law, administrative law, and criminal law. While public law has its roots in Roman law, it remained largely undeveloped until modern times, when the centralized state and its administrative apparatus began to flourish on the European continent following the Treaty of Westphalia in 1648. As administrative law developed in the nineteenth century, it became obvious to civil-law lawyers that the usual private-law rules that apply to disputes between individuals do not lend themselves easily to resolving disputes involving the state. Moreover, a trend emerged toward some form of review of the legality of state administrative action.

⁹. John H. Merryman, *The Civil Law Tradition* 92 (2d ed. 1985).

Several distinctive characteristics distinguish public from private law. Most important, public law generally is not part of comprehensive civil codes. Instead, public law consists of various statutes, supplemented liberally by judge-made norms, that regulate the organization and function of public authorities and the relationship between public agencies and individual citizens. Public law tends to be more fluid than the civil codes since it may change rapidly in response to political forces.

The public–private distinction dictates many of the basic features of legal practice in civil-law countries. The structure and jurisdiction of the courts in civil-law countries roughly correspond to private- and public-law matters, with private-law issues the province of the “ordinary” courts, and public-law matters addressed in separate “administrative” courts. Legal education and law practice likewise remain divided mainly along public–private lines. A teacher of the private law of property, for example, would be unlikely to attempt to teach about property taxation, land-use regulation, or the constitutional protection of property rights; those topics would be left to a specialist in public law.

Nonetheless, in the twentieth century several factors have led to a rethinking of the strict division between public and private law. These factors include the expanding influence of the common law, the increasing role of government in legal areas traditionally treated as private, a general trend toward written constitutions and acceptance of judicial review, the increased influence of organizations (e.g., trade unions), and the growth of legal fields that defy categorization as public or private.

Court Structure

In contrast to the unified court system typical of common-law countries, several separate court systems often coexist in civil-law countries. A case falling within the jurisdiction of one court generally is immune from jurisdiction in all others. While the typical common-law judicial system may be drawn as a pyramid with the “highest” court at the top, the typical civil-law judicial system would be represented as a set of two or more distinct structures with no bridge between them.

As a general matter, a system of “ordinary” courts, staffed by “ordinary” judges, adjudicates the vast majority of civil and criminal cases. Ordinary courts are the modern-day successors of the various civil courts that existed in Europe during the period of the *jus commune*, before the growth of the modern administrative state. Their jurisdiction has expanded to include matters formerly addressed by the ecclesiastical tribunals, as well as commercial disputes. The ordinary courts apply the law found in the civil, commercial, and penal codes, and in legislation supplementing those codes.

In the French system, the apex of the ordinary court structure is the *Cour de Cassation* (Supreme Court of Cassation). The court reviews, on a discretionary basis, only questions of statutory interpretation. The Court of Cassation is composed of about 100 judges who sit in six rotating specialized panels (five civil and one criminal) and, in certain situations, in combined panels or plenary session.

The first level of French ordinary courts consists of general civil and criminal trial courts and several specialized courts. Cases arising under the commercial code, for example, are first heard in a commercial court in which the panels of part-time judges are businessmen elected by their colleagues. Similarly, employment disputes are heard by a labor court consisting of two elected representatives from labor and management. The labor court first attempts to settle cases by conciliation; if the case proceeds to adjudication, a professional judge sits with the lay panel. Appeals from the trial-level courts proceed to a court of appeal within the territorial jurisdiction of the lower court.

The German model relies on several independent court systems, each with its own supreme court. In addition to the hierarchy of the ordinary (civil and criminal) courts, there are separate systems of labor courts, tax courts, and social security courts. The lower courts generally sit in panels of three professional judges, although commercial matters are heard by a panel of two lay judges and one professional judge. Lay involvement in labor matters also extends to the appellate level, where the judge acts in consultation with labor and management representatives. Final review from all of the German court systems is available in the Federal Constitutional Court, which exercises the power of judicial review.

Latin American court structures vary greatly, with some based on separate national subject-matter courts, and others influenced by the United States's federal-state court system (e.g., Mexico, Brazil).

Apart from the ordinary courts, typical civil-law court systems also include a set of administrative courts that exercise independent jurisdiction. The creation of administrative courts grew out of the strong tradition of separation of powers, a by-product of the French Revolution, that established the legislature as the preeminent source of law. Within that tradition, the judiciary was not viewed as competent to render decisions on the legality of administrative action. In France the need for a review procedure was eventually met through the Council of State, a body that began as advisers to the King and gradually became the central point for review of government conduct. Today, the Council of State—whose members are public administrators with training different from that of the ordinary judiciary—is the principal source of French administrative law. Other countries, including Belgium and Italy, have followed the French model and have allocated similar administrative jurisdiction to their own

councils of state. In Germany and countries that follow its model, special administrative courts have been created.

In theory, ordinary court and administrative court jurisdiction is separate and exclusive, but disputes arise. In France, a special Tribunal of Conflicts decides which is the proper court for a disputed case. In Germany, the court in which the case is filed decides whether it has jurisdiction and may transfer cases over which it declines jurisdiction. A decision refusing jurisdiction is binding in the transferee court. In other countries, such as Italy, the Court of Cassation is the final authority on conflicts of jurisdiction.

Constitutional law poses a special problem for civil-law judicial administration. The recent adoption of written constitutions, for example in Germany and Italy since World War II, illustrates the extent to which the public-private law dichotomy affects court structure and jurisdiction. In those countries, some method of reviewing legislative action for constitutionality was necessary, yet it was clear that this power could not be exercised by the judiciary (i.e., the ordinary judiciary) without violating the doctrine of separation of powers and limiting the supremacy of the legislature.

Just as the development of the modern administrative state led to the creation of a separate jurisdiction to review the legality of administrative actions, in Germany and Italy the solution to the question of judicial review was to establish separate constitutional courts. Civil-law fundamentalists have occasionally argued that these tribunals cannot really be “courts,” since civil-law courts, strictly speaking, merely interpret and apply the law made by the legislature. Nonetheless, this view has yielded in the same way that most observers now regard entities such as the French Council of State as a “court” and its officials as “judges.” Thus, the strong principle of separation of powers and the traditional civil-law limits on judges’ powers continue to apply to the work of the ordinary judiciary. Conversely, the separate administrative and constitutional courts are not thought to violate that principle.

The Legal Process

Civil Procedure

Modern codes of civil procedure stress that judicial proceedings are public and controlled by the parties. Party control, however, is somewhat tempered by the extensive power of the civil-law judge to supervise and shape the fact-finding process and by the role of the public prosecutor in private actions.

In contrast to the progressive unfolding of evidence—under near complete control of the parties—that occurs through the discovery process in the American common-law system, there is no formal civil-law counterpart to discovery. Nor, in most cases, is there any single event that the common-law lawyer would recognize as a trial. Instead, a civil-law civil action is a continuing

series of meetings, hearings, and written communications through which evidence is introduced and evaluated, testimony is taken, and motions are made and decided. Initial pleadings are quite general, and the issues are defined at the direction of the judge as the proceedings progress.

The civil process tends to be conducted primarily in writing, and the concept of a highly concentrated and dramatic “trial” in the common-law sense is not emphasized. Thus, a lawyer who wishes to question a witness must first submit to the judge and opposing counsel “articles of proof” describing the scope of the potential questions. The witness will be questioned at a later hearing at which the judge will typically ask the questions, often framing or reformulating the issues raised in the case. Cross-examination is uncommon. Instead, opposing counsel’s role is to make certain that the record summary of the testimony is complete and correct.

The judge supervises the collection of evidence and preparation of a summary of the record on which a decision will be based. Since there is no “pretrial” phase of the proceeding, the evidence is not “discovered” in the sense understood by common-law lawyers. Instead, the parties submit proposed evidence to the judge in writing or at oral hearings, and the judge delivers rulings concerning the relevance and admissibility of evidence. Admissible evidence is presented, for the first and only time, in the final hearing that constitutes the trial.

Many of the differences between the common-law and civil-law judicial process may be attributed to the absence of the civil jury. While some specialized courts involve lay people in the court’s decision-making process, such “lay judges” are not usually chosen on the basis of their impartiality, as are common-law jurors. Lay judges are generally selected on the basis of experience in the subject matter of the court (e.g., labor law), or as representatives of a particular interest group (e.g., unions or management). Unlike common-law jurors, lay judges usually serve for a continuing term instead of only a single case.

Civil-law procedure does not emphasize the need to have a single-event trial because there is no need to convene a jury to hear the evidence, find the facts, and apply the law to the facts. The absence of the civil jury also helps to explain the relative lack of restrictions on the admissibility of evidence in the civil-law system. Hearsay and opinion evidence is more freely admitted than in common-law systems. Issues of evidentiary weight are left to the judge.

Nonetheless, there are indications that the common-law and civil-law procedures are not as different as they appear. American pretrial discovery, for example, significantly reduces the amount of “surprise” evidence that will come forth at trial. And efficiency concerns have led some civil-law countries, such as Germany, to experiment with more concentrated trials to resolve simple cases. A central difference between the common-law and civil-law systems, according to

one analysis, is that the common-law system “leaves to partisans the work of gathering and producing the factual material upon which adjudication depends.”¹⁰ In contrast, lawyers in the civil-law system mainly act as “law adversaries” (i.e., arguing points of law), and judges more actively control the investigation and fact-finding process. The public prosecutor may also have a role in a civil case (see *infra* page 31).

Criminal Procedure

The typical criminal proceeding in a civil-law court is divided into three phases: the investigative phase, the examining phase, and the trial. In the investigative phase, a government official (generally the public prosecutor) collects evidence and decides whether it is sufficient to warrant formal charges.

During the examining phase, which is primarily conducted in writing, an examining judge completes and reviews the written record and decides whether the case should proceed to trial. At this stage, the defendant may be questioned, but has the right to remain silent and to be represented by counsel. The examining judge plays an active role in the collection of evidence and interrogation of witnesses. As in civil proceedings, however, there is no counterpart to common-law cross-examination.

As a result of the thoroughness of the examining phase, the trial itself differs significantly from a common-law criminal trial. Perhaps the most striking difference is that the record already has been made and is equally available to the defense and the prosecution well in advance of trial. The main function of a criminal trial is to present the case to the trial judge and, in certain cases, the jury, and to allow the lawyers to present oral argument in public.

As noted above, civil-law countries do not have a tradition of jury trials in civil cases. Some countries, however, have introduced the jury trial for serious criminal matters, while others use a combination of lay judges and professional judges in criminal cases.

Appellate Procedure

A primary difference between common-law and civil-law appellate procedure is that intermediate appellate review in the civil-law tradition often involves a de novo review of both the facts and law of the case. Thus, intermediate appellate courts may obtain additional testimony, supervise the collection of new evidence, and seek out expert opinions. In some civil-law systems, appellate review in criminal cases does not involve de novo factual review. In Germany,

¹⁰ John H. Langbein, Restricting Adversary Involvement in the Proof of Fact: Lessons from Continental Civil Procedure, Speech to the American College of Trial Lawyers, September 25, 1984, cited in Mary Ann Glendon et al., *Comparative Legal Traditions* 169 n.2 (1985).

for example, most criminal trial court decisions are subject to appeal only on points of law, and those appeals are heard by an appellate court of last resort.

Appellate courts of last resort, like their common-law counterparts, generally consider only questions of law. Some of these courts follow the French system of “cassation,” in which the court decides only the question of law that has been referred to it, not the case itself. The Court of Cassation may either affirm the lower court decision or remand the case for reconsideration to a different lower court. The remand court is, in theory, free to decide the case the same way as the previous lower court. If that occurs, a second appeal may be taken to the Court of Cassation, which will then sit in plenary session. The court may then issue a dispositive ruling in some cases; in others it must remand the case to a third lower court to issue the judgment. In the German system, the high court may reverse, remand, or modify the lower court decision and enter the judgment itself.

Legal Actors: Tradition and Transition

The division of legal labor in the civil-law world is greatly influenced by the traditional dogma of legal science. This generally accepted legal “folklore,” as Prof. John Merryman refers to it, deeply affects the way legislators, judges, and lawyers work.

Legal Scholars

According to the legal folklore, the legal scholar does the “basic thinking” for the legal system. Indeed, academic lawyers continue to enjoy an honored place in the civil-law tradition. The civil-law codes historically have been greatly influenced by the work of legal scholars, as has been indicated in the earlier historical section of this treatise. Judges and legislatures, as a general matter, look to legal scholars for definitive views on the law. Though legal scholarship is not a formal source of law, the “doctrine” as developed by scholars is highly valued in the civil-law tradition.

The Legislature

The legislature in the civil-law tradition strives to supplement and update the codes in those areas in which the legal scholars have suggested that codes are defective or incomplete. New legislation, therefore, in theory employs the concepts and follows the structure established by the legal scholars and embodied in the earlier codes. Legislatures seek completeness and clarity, attempting to produce laws that are consistent with the tenets of legal science and compatible with the established legal order.

Judges

Judges typically enter judicial service at the lower levels of the judiciary—they enter directly from law school after passing state qualifying examinations. Judicial service is analogous to a career in civil service in the United States, with judges moving up the court hierarchy based on seniority and merit. The standard image of the civil-law judge is one of “a civil servant who performs important but essentially uncreative functions.”¹¹

The judge’s role is a simple and narrow one, limited by strict notions of legislative supremacy. Civil-law judges, in theory, are the “operators” of the system designed by legal scientists and built by legislators. Since there is only one correct solution to a legal problem, according to legal science and the developed doctrine, judicial discretion or interpretation becomes largely unnecessary.

Legal Education and Lawyers

The basic civil-law training is an undergraduate education in law. Courses tend to focus on general legal principles, as opposed to professional skills and problem solving. Such practical skills are acquired, if necessary, through later apprenticeship. Consistent with the tradition of legal science, civil-law students study legal treatises that expound the established principles of the law with little “case-method” analysis. Active class participation is unusual; typically the professor lectures to large classes.

A civil-law student chooses, upon graduation, among the several branches of the legal profession. Since there is little mobility within the profession, the student’s choice is likely to be final. These choices include a career as a judge, a public prosecutor, a government lawyer, an advocate (private practice), or a notary.

In most civil-law countries, private legal practice is roughly divided between the advocate and the notary. The advocate meets with and advises clients, and represents them in court. Advocates generally serve as apprentices to experienced lawyers for several years after law school, and then practice law in small firms or as solo practitioners. Private lawyers are generally governed by mandatory bar associations, which set practice rules and fee schedules.

The civil-law notary serves three basic functions: (1) drafting legal documents such as wills, corporate charters, and contracts; (2) authenticating such documents in legal proceedings; and (3) keeping records on, or providing copies of, authenticated documents (also called “public acts”). Entry to the notary profession generally involves taking a state examination.

¹¹. Merryman, *supra* note 9, at 84.

Government lawyers serve either as public prosecutors or as lawyers for government agencies. The public prosecutor plays a dual role in the civil-law tradition. In addition to preparing the government's case in criminal matters, the prosecutor represents the public interest in some civil cases. On the theory that the parties to a civil case will not provide the judge with a full picture of the facts and law, the prosecutor may intervene to assert the public interest, as opposed to the interest of the state. In some civil-law countries, the public prosecutor is trained as a judge, and may move easily from one position to the other during his or her career.

Transition in the Civil-Law World

As commentators both within and outside the civil-law world have observed, theory and practice are often in tension, and this tension is reflected in the changing roles of the actors in the legal system. Legislative practice often falls short of its objective to provide a clear, systematic legislative prescription for every legal problem that may arise. As a result, judges frequently must interpret vague code sections, and there is a growing body of judge-made law that provides a gloss on the codes. In countries with older code systems, such as France, the effects of judicial interpretation are particularly obvious and far reaching. Thus, in France the law of delict (torts), which is covered only in the most general way by the *Code Civil*, is primarily the product of modern judicial decisions.

Lawyers, in turn, tend to do more than simply peruse the codes for relevant provisions. The decisions of the high courts are regularly published and lawyers cite them in subsequent cases. Likewise, judges rely on prior decisions to support their own case analysis. As in common-law systems, judges look to higher court decisions as final, authoritative rulings on interpretation of statutes, and a de facto system of precedent has taken root.

The civil-law world, then, is in transition. The gap between theory and reality has been aptly summarized by Merryman:

The folklore is clearly losing its power, but until some new, acceptable, coherent view of the legal process appears to replace it, it will continue to occupy the field. It is still the residual model of the legal process, and even scholars who recognize that this model is not working spend more effort trying to perfect its basic design than in trying to design a better model.¹²

¹². Merryman, *supra* note 9, at 37.

Part III:

The Common Law and a Comparison of the Civil-Law and Common-Law Systems

Origins of the Common-Law System

At the time the Italian glossators were at work interpreting and applying the *Corpus Juris Civilis*, and before Accursius started work on his Great Gloss from 1220 to 1260, a new legal system was developing in Britain, in many ways inspired by the institution of the jury system.

Although ancient Greece had a procedure somewhat analogous to the modern jury system, the true origin of that system was in medieval France and was connected with royal power. The system originated with Frankish kings, who from time to time ordered a group of men, “the best and most trustworthy in the district,” to declare, after being sworn in, what lands were owned by the king in the district and what rights he had or ought to have there. This procedure was often used as a substitute for trial by battle or ordeal.

Soon after the conquest of England by William the Conqueror in 1066, the practice of a sworn inquest of neighbors about some issue or problem, usually involving land, was adopted as a feature of government. In fact, the Domesday Book, the record of boundaries of land in England, written between 1081 and 1086, was a compilation of jury verdicts about boundaries. In its first guise in England the jury was a group of persons, usually local citizenry or a body of neighbors, who were summoned by a public official and, after the administration of an oath, were bound to tell the truth “whatever the truth may be” in response to a specific question. The questions that were posed to these juries were not always related to specific disputes between individuals.

The use of juries was not a frequent practice in England until the reign of Henry II, who decided in 1164 that a procedure using juries should be a “normal part of the machinery of justice.” Two years later Henry II mandated a procedure requiring jury trials for persons dispossessed of lands. By the time of King John in the thirteenth century, the right to a jury trial in criminal cases was so pervasive that it was immortalized in 1215 at Runnymede with the signing of the Magna Carta.

Roman law had been carried early to Britain by scholars and teachers trained in the Italian universities. For example, Vacarius, a master at Bologna, settled in

England in the first half of the twelfth century and published a book on Justinian's *Code* and *Digest*. Canon law was the only other law taught at Oxford, and later at Cambridge, and neither canon nor Roman law proved satisfactory for the needs of the new legal system. The arrival and adoption of the jury trial as a mechanism for resolving disputes, the creation of royal courts to dispense justice throughout the realm and a cadre of trained judges to preside over and administer them, and the rising commercial affairs in London resulted in a turning away from Roman and ecclesiastical law. Lawyers and judges in London created a new institution, the inn of court, to train lawyers in adversary practice and the art of advocacy. Other characteristics of the new system gradually emerged over the centuries—the expansion of jury trials to more types of civil cases, reliance by judges on precedent, and inductive reasoning based on precedent to create the substance of the law—and legal norms applicable to all parts of the country helped lay the foundations for a new comprehensive jurisprudence that replaced the old patchwork feudal law of local areas. The common-law system was being born.

Jurists in the Common-Law System

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.”¹³ 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.

¹³. John C. Gray, *The Nature and Sources of the Law* 252 (1909). Gray was particularly hard on common-law juristic writings:

The greater part of most textbooks at the common law, and the whole of many of them, are not devoted to the statement of such opinions [of men learned in the law]; they do not contain or profess any original or independent thinking or conclusions; they are simply collections of statutes and precedents; their merit or demerit lying solely in their good or bad arrangement.

Id. at 247.

On the subject of jurists, Gray commented: “If the common law has been wise in attaching great weight to precedents, it has certainly not held out sufficient welcome to jurists.” *Id.* at 264.

Three generalizations can be made about jurists in the common-law systems: (1) the majority of jurists, at least from a historical standpoint, and practically all the great jurists, have been judges (e.g., Kent, Coke, Blackstone, Mansfield); (2) legal writings of jurists are heavily endowed with reference to cases (e.g., restatement series) and whatever principles or trends in the law can be extracted from case law (using an inductive reasoning process like the Roman jurists', as opposed to the deductive reasoning of the civil law); and (3) treatises and commentaries of jurists actually play a very small role in the judicial decision-making process and the development of law through legislation, and exert little, if any, influence on judges and legislators.

For each of the above generalizations there are exceptions, some notable. Great works of legal literature in the United States that have had a significant impact on the development of certain areas of substantive law include the treatises of Samuel Williston and Arthur Corbin on the law of contracts and John Wigmore on the law of evidence. In addition, the collective work of law professors, judges, and lawyers of the American Law Institute has produced the Restatement of the Law series, which has influenced the development of substantive law in some areas. The series of codes for individual states in the United States known as the Uniform Code series, which stand as a model for individual state legislation, could also be attributed to the collective efforts of jurists.

Having noted these exceptions, it still must be emphasized that the jurists in common-law countries remain relatively unimportant. The tradition is still overwhelmingly case oriented, almost to the complete exclusion of juristic writings, which are rarely consulted by practicing lawyers and not often cited in judicial opinions. The result is that the common law is open-ended and antithetical to system-building of the type found in civil-law countries.

Differences in the Two Systems

Some specific differences between the civil-law and common-law systems have already been identified, and others may have occurred to the reader. A discussion and delineation of some of the major differences between the two systems will perhaps clarify these comparisons and suggest other not so obvious distinctions.

The influence of the *Corpus Juris Civilis* on the civil-law system has been significant and abiding, while its influence on the structure of the common law has been modest. The *Corpus Juris Civilis* furnished many of the substantive rules of law contained in the forerunners of the major legal codes of European countries. Undoubtedly the *Corpus* also influenced the development of at least some of the common-law rules and principles. While Roman law was taught at Oxford before the common-law system emerged in England after the thirteenth

century, the influence of Roman law was not as pervasive as in the civil-law countries.

The codification process, derived from the *Corpus Juris Civilis*, is another distinguishing characteristic of the two systems. Civil-law countries have comprehensive codes, often developed from a single drafting event. The codes cover an abundance of legal topics, sometimes treating separately private law, criminal law, and commercial law. While common-law countries have statutes in those areas, sometimes collected into codes, they have been derived more from an ad hoc process over many years. Moreover, codes of common-law countries very often reflect the rules of law enunciated in judicial decisions (i.e., they are the statutory embodiment of rules developed through the judicial decision-making process).

The existence of integrated, comprehensive codes in civil-law countries and the lack thereof in common-law countries has also resulted in another point of contrast: the existence and growth of equity law. This is ironic in light of the fact that the concept of equity law originated in Rome, at a time when the *jus civile* could not be used to cover situations involving non-Roman peoples coming under the umbrella of the Empire, and for whom some manner of law had to be developed. Equity law developed in England as a legal method to soften the often harsh effects of judicial precedent or legislation; to establish different procedures that might be required for a particular issue in the interests of fairness when common-law remedies were not available or could not ensure a just result in a particular case; and to deal with new problems that called for different remedies than the common law provided. But there is no comparable equity law in civil-law countries; the system orientation of the codes would not permit the growth of another branch of law outside the framework of the system. Equity would disrupt the certainty required in the interests of legal science. Equitable principles and remedies, to the extent they exist in the civil-law tradition, would be built into the structure of the codes as part of the overall system.

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 (possibly as a result of Justinian's dictum, quoted earlier); 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.

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.

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.

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.

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.

Conclusion

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.¹⁴

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.

¹⁴. Woodfin L. Butte, *Stare Decisis, Doctrine, and Jurisprudence in Mexico and Elsewhere*, in *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions* 315 (Joseph Dainow ed. 1974).

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.¹⁵

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.

¹⁵. Merryman & Clark, *supra* note 6, at 389.

Bibliography

- Jean Louis Bergel, *Principal Features and Methods of Codification*, 48 La. L. Rev. 1073 (1988)
- Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 Am. J. Comp. Law 419 (1966–1967)
- Rene David & John E. C. Brierly, *Major Legal Systems in the World Today* (1985)
- John P. Dawson, *Oracles of the Law* (1968)
- John D. M. Derrett, *An Introduction to Legal Systems* (1968)
- Gaius, *Institutes* (William M. Gordon & Olivia F. Robinson trans., 1988)
- Mary Ann Glendon et al., *Comparative Legal Traditions* (1982)
- Konstantinos D. Kerameus, *A Civilian Lawyer Looks at Common-Law Procedure*, 47 La. L. Rev. 493 (1987)
- Hein Kotz, *Taking Civil Codes Less Seriously*, 50 Mod. L. Rev. 1 (1987)
- John H. Merryman, *The Civil Law Tradition* (2d ed. 1985)
- John H. Merryman & David S. Clark, *Comparative Law: Western European and Latin American Legal Systems* (1976)
- Olivia F. Robinson et al., *An Introduction to European Legal History* (2d ed. 1987)
- Martin M. Shapiro, *Courts: A Comparative and Political Analysis* (1981)
- Arthur T. von Mehren, *Law in the United States: A General and Comparative View* (1988)
- Arthur T. von Mehren & James R. Gordley, *The Civil Law System* (2d ed. 1977)

Appendix A

Excerpts from the *Institutes of Gaius*

Reproduced from *The Institutes of Gaius*, translated with an introduction by William M. Gordon & Olivia F. Robinson (1988), with permission of the publishers, Gerald Duckworth and Company Ltd., London.

THE INSTITUTES OF GAIUS—FOUR COMMENTARIES

(asterisks indicate illegible letters in original text)

Law and Its Sources

FROM BOOK ONE

[I On state* and natural law*] 1. All peoples who are governed by laws and customs use law which is partly theirs alone and partly shared by all mankind. The law which each people makes for itself is special to itself. It is called 'state law,' the law peculiar to that state. But the law which natural reason makes for all mankind is applied in the same way everywhere. It is called 'the law of all peoples'* because it is common to every nation. The law of the Roman people is also partly its own and partly common to all mankind. Which parts are which we will explain below. 2. The laws of the Roman people are based upon acts*, plebeian statutes*, resolutions of the Senate*, imperial enactments*, edicts* of those having the right to issue them, and answers given by jurists*. 3. An act is law which the people decide and enact. A plebeian statute is law which the plebeians* decide and enact. Plebeians and people differ in that the people is the whole citizen body, including the patricians*; but the plebeians are the citizens without the patricians. This is why formerly the patricians used to say that they were not bound by plebeian statutes, which were made without their authorization. Subsequently, however, the Hortensian Act was passed providing that plebeian statutes should bind the whole people; and so they were placed on the same level as acts. 4. A resolution of the Senate is law decided and enacted by the Senate; this also has the status of an act, although this point has been questioned. 5. An imperial enactment is law which the Emperor enacts in a decree, edict or letter. It has never been doubted that it has the status of an act, since it is by means of an act that the Emperor himself assumes his imperial

authority. 6. The magistrates of the Roman people have the right to issue edicts. The right is found most fully in the edicts of the two Praetors, Urban* and Peregrine* (whose jurisdiction in the provinces* is exercised by provincial governors) and again in the edicts of the curule aediles (whose jurisdiction in the provinces of the Roman people is exercised by quaestors—quaestors are never posted to the Imperial provinces, and on that account this edict is not published in those provinces). 7. Juristic answers are the opinions and advice of those entrusted with the task of building up the law. If the opinions of all of them agree on a point, what they thus hold has the status of an act; if, however, they disagree, a judge* may follow which opinion he wishes. This is made known in a written reply* of the Emperor* Hadrian.

[II On the division of law] 8. All our law is about persons, things or actions. We turn to persons first.

[III On status] 9. The main classification in the law of persons is this: all men are either free or slaves. 10. Again, among free men, some are free-born while others are freed*. 11. Free-born are those who were born free; freedmen, those who have been manumitted* from lawful slavery. 12. Again, there are three classes of freedmen; for they are either Roman citizens, or Latins* or in the category of capitulated aliens.

. . . .

FROM BOOK THREE

215. The second section of the [Aquilan] Act provides an action against an additional stipulator who grants a verbal release of a debt in fraud of the stipulator, and it gives an action for the value in money of what is involved. 216. Obviously an action in respect of loss was introduced by this section of the Act as well. But the provision was unnecessary because the action on mandate would cover the case; except that under the Act an action lies for double damages against anyone who denies liability.

217. The third section provides for all other loss. If someone wounds a slave or four-footed stock, or if he wounds or kills a quadruped not classed as stock, such as a dog or a wild beast, for instance a bear or a lion, an action lies under this section. This section gives a remedy for loss wrongfully caused to other animals and to all inanimate things. For if anything is burned or damaged or broken, an action is established under this section. The word ‘damaged’—the Latin verb ‘rumpere’—could have covered all these cases, since it is construed to include every kind of spoiling, in Latin ‘corrumpere.’ That word covers not only burning, damaging or breaking but also tearing, squashing, spilling, and every sort of corruption or ruining or making worse. 218. Under this section the person causing loss is obliged to pay the value of the thing in the nearest thirty days, not the year. It is true that the word ‘highest’ is not inserted; and so some

people thought that the judge was free to make his valuation as at the time in the thirty days when the thing was at its highest or when it stood lower. But Sabinus held that the valuation was to be made just as though the word 'highest' had been included. In his view the legislator was content to use the word just in the first section. 219. The conclusion was also reached that the statutory action lies only where someone causes loss by his bodily force. Where people cause loss in other ways actions are given based on the policy of the statute. These policy actions are given against one who shuts up another's slave or animal and it dies of starvation, or drives a draught animal so hard that it is injured, or induces another's slave to climb up a tree or go down a well so that in climbing up or down he falls and is killed or injured. But against this, suppose someone pushes another's slave from a bridge or river-bank into the river and the slave drowns. Here also it is easy to conclude from the fact that he pushed him in, that he has caused the loss by his bodily force.

220. Now, contempt is committed not only when someone is struck with a fist or with clubs, or even flogged, but also when a vocal attack is made on him, when his goods are advertised for sale as a debtor's by someone who knows he owes him nothing, when someone writes a defamatory book or poem about someone, or when someone harasses a lady or a youth; and finally in many other ways. 221. Now, we can be the victim of contempt not only in our own person but also through our children, if they are still within paternal power, and also through our wives, even if they are not in marital subordination to us. And so, for instance, if you commit a contempt against my daughter, who is married to Titius, an action can be brought against you not only for my daughter herself but also for both myself and Titius. 222. The law holds that no contempt can be committed against a slave, but that the delict is committed against the owner through the slave. But we do not suffer contempt in quite the same way as through our wives and children but only where something more gross occurs, manifestly done in contempt of the owner, for example, where one person flogs another's slave. There is a pattern formula* in the Edict for that. There is no pattern formula for the case where someone abuses a slave vocally or strikes him with a fist, nor is one readily given on application to the praetor.

223. Under the Twelve Tables the penalty for this delict was, for a damaged limb, retaliation; for a broken or bruised bone, on the other hand, it was 300 'asses' if a free man's bone had been broken but 150 if it was a slave's; for all other contempts, on the other hand, the penalty established was twenty-five 'asses.' And in those times of great poverty it seemed that these pecuniary penalties were satisfactory enough. 224. But now the law is different. The praetor allows us to put our own value on the contempt and the judge* condemns either for our valuation or for such lesser sum as seems right to him. But as the practice is for the praetor to set the value of an aggravated contempt himself, if he at the same time settles the amount of the defender's special

undertaking* for his appearance in court, we put that same sum as the upper limit in our formula. Although the judge can go lower, out of respect for the praetor's authority he will generally not be so bold as to reduce the judgment below that figure. 225. Contempt, however, can be aggravated: in conduct, as where someone is wounded by another or flogged or struck with clubs; in place, as where he is subjected to a contempt in the theatre or a city square; in person, as where a magistrate suffers a contempt, or a senator at the hands of a common person.

Appendix B

Excerpts from the French Code

Reproduced from *The Civil Law System, An Introduction to the Comparative Study of Law*, by Arthur Taylor von Mehren & James Russell Gordley (1977), with permission from the publisher, Little, Brown and Company, Boston.

Provisions of the Code Relating to Contractual Obligations

A. General Provisions (Articles 1101–1369)

Book III. Of the Different Ways in Which Property Rights Can Be Acquired

Title III. Of Contracts and of Obligations Based on Conventions in General

CHAPTER 1. PRELIMINARY PROVISIONS

Art. 1101. A contract is an agreement by which one or more persons obligate themselves to one or more other persons to give, or to do or not to do, something.

Art. 1102. A contract is synallagmatic or bilateral when the contracting parties assume obligations reciprocally, each to the other.

Art. 1103. It is unilateral when one or more persons are obligated to one or more other persons, and no obligation rests on the latter.

Art. 1104. It is commutative when each party binds himself to give or to do something that is considered the equivalent of what the other party gives him or does for him.

When the equivalent for each of the parties consists in a chance of gain or loss dependent upon an uncertain event, the contract is aleatory.

Art. 1105. A contract of benevolence is one in which one party procures a purely gratuitous advantage for the other.

Art. 1106. An onerous contract obliges each party to give or to do something.

Art. 1107. All contracts, regardless of whether they have a special name, are subject to the general rules set out in this title.

The special rules governing particular contracts are to be found under the titles dealing with each of them; the special rules governing commercial contracts are set out in the laws relating to commerce.

CHAPTER 2. OF THE CONDITIONS ESSENTIAL TO THE VALIDITY OF THE CONVENTIONS

Art. 1108. Four conditions are essential to the validity of an agreement:
the consent of the party who binds himself;
his capacity to contract;
a definite object which forms the subject matter of the agreement;
a licit cause for the obligation.

Section 1. Of Consent

Art. 1109. There is no valid consent if consent was only given because of error, was extorted by force or procured by fraud.

Art. 1110. Error is not a ground for nullity of a convention unless it goes to the very substance of the thing forming the object of the contract.

Error is not a ground for nullity when it only goes to the person with whom one intended to contract unless the identity of the person was a principal reason for the convention.

Art. 1111. The use of force against a person who entered into the obligation is a ground for setting the contract aside, even if the force is exerted by a person other than the one for whose benefit the convention was concluded.

Art. 1112. Force is exerted when the pressure is of such nature as to affect a reasonable person and cause him to fear that his body or fortune is menaced by a considerable and present evil. The age, sex, and background of the persons in question are to be taken into account.

Art. 1113. Force is a ground for setting the contract aside when pressure is exerted against the contracting party, or against his husband or wife, or against his descendants or ancestors.

Art. 1114. Respect for one's father, mother, or other ancestor, where no force is exerted, is not a ground for setting a contract aside.

Art. 1115. A contract can no longer be set aside because of force if, after the pressure ceased, the contract was approved, either expressly or tacitly, or if the time fixed by law for restitution has been allowed to pass.

Art. 1116. Fraud is a ground for setting a convention aside when one party employs an artifice such that the other party clearly would not have entered the contract had it not been employed.

Fraud cannot be presumed, it must be proved.

Art. 1117. A convention entered into because of mistake, force, or fraud is not void; instead an action lies to void the contract or for rescission, in the cases and in the manner explained in Section 7 of Chapter 5 of this Title.

Art. 1118. Lesion vitiates certain, but not all, contracts and these only with respect to certain persons, as is explained in the appropriate section.

Art. 1119. As a general rule, a person cannot obligate himself, nor stipulate in his own name, except for himself.

Art. 1120. However, a person may become obligated for the conduct of another by undertaking that the other shall do something, with the ensuing obligation to pay an indemnity if this other person refuses to undertake such an obligation.

Art. 1121. A person can also stipulate for the benefit of a third party when this is the condition of a stipulation that one makes for his own benefit or of a donation one makes to another. A person who has made such a stipulation cannot revoke it if the third party has declared that he desires to benefit from it.

Art. 1122. A person is considered to have stipulated for himself, for his heirs, and for those deriving rights from him unless the contrary is expressed or results from the nature of the agreement.

Section 2. Of the Capacity of Contracting Parties

Art. 1123. Any person can contract, unless the law declares that he lacks capacity.

Art. 1124. (Law No. 68-5 of 3 January 1968.) The following do not have capacity:

- unemancipated minors;
- those adults protected under the provisions of article 488 of the civil code.

Art. 1125. (Law No. 68-5 of 3 January 1968.) A person having capacity to enter into an agreement cannot attack the agreement on the ground that it was concluded with a minor or a person under a legal disability.

Art. 1125-1. (Law No. 68-5 of 3 January 1968.) One employed in an institution which provides lodging for the elderly or dispenses psychiatric services may not, on pain of invalidity, acquire the goods or rights of an inmate or lease the house occupied by the inmate prior to admission without receipt of special legal authorization to do so.

This article also applies to the spouse, descendants, and ancestors of persons falling within the prohibition.

Section 3. Of the Object and the Subject Matter of Contracts

Art. 1126. The object of every contract is a thing that a party binds himself to give, or that a party binds himself to do or not to do.

Art. 1127. The use or the possession of a thing, as well as the thing itself, can be the object of a contract.

Art. 1128. Only things subject to commercial exchange can be the object of an agreement.

Art. 1129. The object of an obligation must be a thing that is specified at least as to its species.

The amount can be uncertain, so long as it can be determined.

Art. 1130. Things not yet in existence can be the object of an obligation.

However, one cannot renounce a succession that has not yet been opened, nor make any stipulation with respect to such succession even if the consent of the person whose succession is in question is obtained.

Section 4. Of Cause

Art. 1131. An obligation without cause or one based on a false or an illicit cause cannot have any effect.

Art. 1132. An agreement is valid although its cause has not been expressed.

Art. 1133. A cause is illicit when it is prohibited by law or when it is contrary to good morals or to the *ordre public*.

CHAPTER 3. OF THE EFFECTS OF OBLIGATIONS

Section 1. General Provisions

Art. 1134. Agreements lawfully formed take the place of law for those who have made them.

They cannot be revoked except by mutual consent or on grounds allowed by law.

They must be performed in good faith.

Art. 1135. Agreements obligate a party, not only as to what is expressly undertaken, but also as to all the consequences which equity, custom or rules of law give the obligation according to its nature.

Section 2. Of the Obligation to Give

Art. 1136. The obligation to give carries with it the obligation to deliver the thing and to preserve it until delivery, under penalty of damages to be assessed against the obligee.

Art. 1137. The obligation to see to it that something is preserved, regardless of whether the agreement is for the advantage of one of the parties or for their common advantage, requires the person so obligated to use the care of a reasonable man [literally, of a good father of a family].

The scope of this obligation varies for certain contracts whose effects in this connection are explained under the titles relating to them.

Art. 1138. The obligation to deliver a thing is completed by the mere consent of the contracting parties.

It constitutes the obligee owner and places the thing at his risk from the time it should have been delivered, even if a physical delivery has not taken place,

unless the obligor is in default with respect to delivery; in which case the thing remains at the risk of the obligor.

Art. 1139. An obligor is put in default either by a summons, by an equivalent instrument, or by the effect of the agreement when it provides that the obligor shall be in default without any notice and by the simple expiration of a period of time.

Art. 1140. The effects of obligations to give or to deliver realty are regulated in the titles, *Of Sales* and *Of Privileges and Mortgages*.

Art. 1141. If one is obliged to give or to deliver an object which is movable property to two persons in succession, the person put in actual possession is preferred and remains the owner even though his title is later in date, assuming of course the possession is in good faith.

Section 3. Of the Obligation To Do or Not To Do

Art. 1142. Every obligation to do or not to do resolves itself, in case of nonperformance on the part of the obligor, in damages.

Art. 1143. Nevertheless, an obligee has the right to demand that what has been done in violation of the agreement be rectified and he can obtain authorization to rectify it himself at the obligor's expense, without prejudice to payment of damages, if appropriate.

Art. 1144. In case of nonperformance, an obligee may also be authorized to carry out the obligation himself at the obligor's expense.

Art. 1145. If the obligation is to refrain from doing something, a person in violation owes damages by the fact alone of the violation.

Section 4. Of Damages Resulting from the Nonperformance of Obligations

Art. 1146. Damages are not due unless the obligor is in default in performance of his obligation, except, nevertheless, when the thing which the obligor had undertaken to give or to do was not to be given or done before a certain time, which he has allowed to pass.

Art. 1147. An obligor shall be ordered to pay damages for nonperformance of the obligation or for delay in performing it, whenever he fails to establish that nonperformance is due to a foreign cause that cannot be imputed to him, provided, moreover, that there is no bad faith on his part.

Art. 1148. No damages shall be due when the obligor was prevented from giving or doing what he had bound himself to do, or was caused to do what he was not to do by irresistible force or a fortuitous event.

Art. 1149. The damages due the obligee are ordinarily for the loss he has suffered and the gain of which he has been deprived, subject to the exceptions and modifications hereinafter set forth.

Art. 1150. An obligor is only liable for damages that were foreseen or could have been foreseen at the time of contracting, unless his own willful misconduct has prevented performance of the obligation.

Art. 1151. Even if the nonperformance of the contract is brought about by the obligor's willful misconduct, the damages given for the loss suffered by the obligee and for the profit he lost cannot include items not a direct and immediate consequence of the nonperformance of the agreement.

Art. 1152. When the agreement provides that the party who fails to perform shall pay a certain amount as damages, a larger or smaller amount cannot be awarded to the other party.

(Law No. 75-597 of 9 July 1975.) However, the judge may reduce or increase the penalty that has been agreed upon, if it is plainly excessive or ridiculously low. No effect will be given to an agreement to the contrary.

Art. 1153. (Law No. 75-619 of 11 July 1975.) In obligations consisting in the payment of a certain sum, the damages resulting from delay in performing are limited to interest at the legal rate subject to the special rules applying to commerce and to suretyships.

(Ordinance No. 59-148 of 7 January 1959.) Such damages are due without the obligee's being required to prove any loss.

(Law No. 75-619 of 11 July 1975.) They are only due from the day of the demand for payment, except in those cases in which the law itself causes them to run.

(Law of 7 April 1900.) An obligee to whom a procrastinating obligor by his bad faith has caused a loss independent of the delay, may obtain damages in addition to the amount allowed for the delay in payment.

Section 5. Of the Interpretation of Conventions

Art. 1156. In interpreting agreements, one ought to seek the common intention of the contracting parties instead of adhering to the literal meaning of the words.

Art. 1157. When a provision can have two meanings, the interpretation that will render it effective is to be preferred over an interpretation that would deprive it of all effect.

Art. 1158. Terms that can have two meanings are to be taken in the sense most appropriate for the subject matter of the contract.

Art. 1159. Ambiguous provisions are to be interpreted in accordance with the usage of the region in which the contract is concluded.

Art. 1160. Customary clauses are to be read into contracts although they have not been expressly included.

Art. 1161. Each provision of an agreement is to be interpreted as a part of the whole contract.

Art. 1162. In case of doubt, the agreement is to be interpreted against the person who stipulated and in favor of the party assuming the obligation.

Art. 1163. Regardless of how general the terms are, in which an agreement is set out, it only comprehends those things as to which it appears the parties intended to contract.

Art. 1164. When in a contract a case is set out to illustrate the obligation, it is not to be assumed that the parties intended that the obligation not receive the extension to other cases that the law would normally give it.

Section 6. Of the Effects of Conventions with Respect to Third Parties

Art. 1165. Conventions have effects only among the contracting parties, they do not affect third parties adversely, nor do they benefit such parties except in the case contemplated by Article 1121.

Art. 1166. However, creditors can exercise all the rights and actions belonging to their debtors, with the exception of those rights and actions that are strictly personal.

Art. 1167. They can also, in their own name, attack acts done by their debtors in fraud of their rights.

(Law No. 65-570 of 13 July 1965.) However, with respect to the rights established in the titles, *Of Succession* and *Of the Marriage Contract and the Respective Rights of Spouses*, creditors must conform to the rules set out in these titles.

Appendix C

Excerpts from the German Code

Reproduced from *The Civil Law System, An Introduction to the Comparative Study of Law*, by Arthur Taylor von Mehren & James Russell Gordley (1977), with permission from the publisher, Little, Brown and Company, Boston.

Book V. Law of Inheritance

SECTION 2. Provisions of the Code Relating to Contractual Obligations

A. Provisions Contained in Book I, General Principles (Sections 116–157)

Book I. General Principles

[Sections 116–157, comprising Titles 2 and 3 of Section III, Juristic Acts, of this Book are given here.]

TITLE 2. DECLARATION OF INTENTION

§ 116. A declaration of intention is not void when declarant has made a secret of the fact that he does not will what he has declared. The declaration is void if made to a person who is aware of such a mental reservation.

§ 117. If a declaration of intention is made only in pretense, with the connivance of the person to whom it is made, the declaration is void.

If another juristic act is concealed under a pretended transaction, the provisions applicable to concealed juristic acts apply.

§ 118. A declaration of intention, not seriously intended, that is made in the expectation that it will be understood not to be seriously intended, is void.

§ 119. A person who, when making a declaration of intention, was under a mistake as to its purport or did not intend to make a declaration of that purport at all, may avoid the declaration if it appears that he would not have made it with knowledge of the state of affairs and with intelligent appreciation of the case.

A mistake concerning any characteristics of the person or thing that are reached in ordinary dealings as essential is also deemed to be a mistake concerning the purport of the declaration.

§ 120. A declaration of intention that has been incorrectly transmitted by the person or institution employed for its transmission may be avoided under the same conditions as a declaration of intention voidable for mistake under § 119.

§ 121. In the cases provided for by §§ 119 and 120 avoidance must be sought promptly, without culpable delay after the person entitled to avoid has obtained knowledge of the grounds for avoidance. An avoidance as against a person who is not present is deemed to have been effected in due time if the avoidance has been forwarded without delay.

The right of avoidance is barred if thirty years have elapsed since the making of the declaration of intention.

§ 122. If a declaration of intention given to another person is void under § 118 or voidable under §§ 119 and 120, the declarant shall compensate him or any third party for any damage that the other or the third party has sustained by relying upon the validity of the declaration; the damages, nevertheless, shall not exceed the value of the interest that the other or the third party has in the validity of the declaration.

Compensation need not be made if the person injured knew of the ground on which the declaration was void or voidable or should have known, that is, would have known but for his own negligence.

§ 123. A person who has been induced to make a declaration of intention by fraud or unlawfully by force may avoid the declaration.

If a third party was guilty of the fraud, a declaration made to another may be avoided only if the latter knew or ought to have known of the fraud. Insofar as a person, other than the one to whom the declaration was made, has acquired a right directly through the declaration, the declaration may be avoided as against him if he knew or ought to have known of the fraud.

§ 124. A declaration of intention under § 123 may only be avoided within the period of one year.

The period begins to run, in case of fraud, from the moment at which the person entitled to avoid discovers the fraud; in the case of threats, from the moment at which the coercion ceases. The provisions of § 203, par. 2 and §§ 206 and 207, applicable to prescription, apply as nearly as may be to the running of this period.

The right of avoidance is barred if thirty years have elapsed since the making of the declaration of intention.

§ 125. A juristic act that is not in the form prescribed by law is void. A juristic act which is not in the form prescribed by another juristic act is void when a doubt arises as to its effects.

§ 126. If writing is prescribed by law, the document must be signed by the maker in his own name with his own hand or by his mark certified by a court or notary.

In the case of a contract, the signatures of the parties must be made on the same document. If several identical copies of the contract are drawn up, it is sufficient if each party signs the copy intended for the other party.

Notarial authentication may be substituted for writing.

§ 127. The provisions of § 126 also apply, in case of doubt, to writing in a form prescribed by juristic act. Unless a contrary intention appears, it is sufficient if there has been a telegraphic transmission or, in the case of a contract, an exchange of letters; if such a form is selected, authentication in accordance with § 126 may be subsequently required.

§ 127a. The parties to a settlement in court may record their declarations in a protocol pursuant to the Code of Civil Procedure as a substitute for notarial authentication.

§ 128. If notarial authentication of a contract is prescribed by law, it is sufficient if first the offer and later the acceptance of the offer be authenticated by a notary.

§ 129. If public certification of a declaration is prescribed by law, the declaration must be drawn up in writing and the signature of the declarant be certified by a notary. If the declaration is subscribed by the maker with his mark, the certification of the mark prescribed in § 126, par. 1, is necessary and sufficient.

Notarial authentication of the declaration may be substituted for the public certification.

§ 130. A declaration of intention to another, if it is made to another in his absence, is effective at the moment when it reaches him. It does not become effective if a revocation reaches him previously or simultaneously.

The effectiveness of the declaration is not affected by the subsequent death or incapacity of the declarant.

These provisions apply even if the declaration of intention is made to a public authority.

§ 131. If a declaration of intention is made to a person who lacks capacity, it does not become effective before it reaches his statutory agent.

The same rule applies if the declaration of intention is made to a person of limited capacity. If, however, the declaration is only to the legal advantage of the person of limited capacity, or if the statutory agent has given his approval, the declaration becomes effective at the moment when it reaches the person of limited capacity.

§ 132. A declaration of intention is also deemed to have become effective if it has been delivered through the instrumentality of an executive officer of a court. The delivery is made according to the provisions of the Code of Civil Procedure.

If, without negligence, the declarant is in ignorance of the identity of a person to whom the declaration must be made, or if the residence of this person is unknown, the delivery may be effected according to the provisions of the Code of Civil Procedure relating to the public service of a summons. In the former case the Amtsgericht competent to authorize the summons is the one in whose district the declarant has his domicile, or, if he has no domestic domicile, his residence; in the latter case, the Amtsgericht in whose district the person to whom delivery is required to be made last had his domicile, or, if he had no domestic domicile, last had his residence.

§ 133. In the interpretation of a declaration of intention the true intention is to be sought rather than the literal meaning of the expression.

§ 134. A juristic act which is contrary to a statutory prohibition is void, unless a contrary intention appears from the statute.

§ 135. If the disposition of an object is contrary to a statutory prohibition against alienation that aims only at the protection of particular persons, the disposition is inoperative only as to these persons. A disposition effected by means of compulsory execution or distraint is equivalent to a contractual disposition.

The provisions in favor of those who derive rights from a person without title apply as nearly as may be.

§ 136. A prohibition against alienation that is issued by a court or by any other competent authority is equivalent to a statutory prohibition against alienation of the kind specified in § 135.

§ 137. The right to dispose of an alienable right may not be excluded or limited by juristic act. The validity of an obligation not to dispose of such a right is not affected by this provision.

§ 138. A juristic act that is contra bonos mores is void.

A juristic act is also void when a person takes advantage of the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant, or promise of pecuniary advantages for himself or a third party which are obviously disproportionate to the performance given in return.^[1]

§ 139. If part of a juristic act is void, the whole juristic act is void, unless it is to be presumed that it would also have been entered into if the void part had been omitted.

§ 140. If a void juristic act satisfied the requirements of a different juristic act, the latter is valid, if it can be presumed that the parties, knowing of the invalidity of the act, would have so intended.

§ 141. If a void juristic act is confirmed by the person who entered into it, the confirmation is deemed to be a renewed undertaking.

If a void contract is confirmed by the parties, they are mutually bound, in case of doubt, to do what they would have been found to do if the contract had been valid from the beginning.

§ 142. If a voidable juristic act is avoided, it is deemed to have been void from the beginning.

If a person knew or ought to have known of the voidability, and the act is avoided, he is deemed to have known that the juristic act was void.

§ 143. The avoidance is effected by declaration to the party subject to avoidance.

The party subject to avoidance is, in the case of a contract, the other party; in the case provided for by § 1123, par. 2, sentence 2, the person who has acquired a right directly through the contract.

In the case of a unilateral juristic act which must be entered into with another person, that other person is the party subject to avoidance. The same rule applies in the case of a juristic act entered into with either another person or with a public authority, even though the original act was entered into with the authority.

In the case of a unilateral juristic act of any other kind, the person who has acquired a legal advantage directly founded upon the juristic act is the party subject to avoidance. However, if the declaration of intention was required to be made to a public authority, the avoidance may be effected by a declaration to the authority; the authority should communicate the avoidance to those persons who have been directly affected by the juristic act.

§ 144. If a voidable juristic act is confirmed by the person entitled to avoid, it ceases to be voidable.

The confirmation need not be in the form prescribed for the juristic act.

TITLE 3. CONTRACT

§ 145. If a person offers to conclude a contract with another, he is bound by the offer, unless he has stated that he is not bound.

§ 146. An offer ceases to be binding if it is declined to the offeror, or if it is not accepted in due time according to §§ 147 to 149.

§ 147. An offer made to a person who is present may be accepted only there and then. This applies also to an offer made by one person to another on the telephone.

An offer made to a person who is not present may be accepted only within the time the offeror may expect to receive an answer under ordinary circumstances.

§ 148. If the offeror has fixed a period of time for acceptance of the offer, the acceptance may take place only within that period.

§ 149. If an acceptance arrives late, though it has been transmitted to the offeror in such manner that it would ordinarily have arrived in due time, and the offeror knows or should know it has been so transmitted, the offeror shall promptly notify the acceptor of the delay, unless he has already been notified. If the offeror delays in giving such notice, the acceptance is deemed not to have been late.

§ 150. If the acceptance of an offer arrives late, it is deemed to be a new offer.

An acceptance with amplifications, limitations, or other alterations is deemed to be a refusal coupled with a new offer.

§ 151. A contract is concluded by the acceptance of an offer, although the acceptance is not communicated to the offeror, if such a communication is not to be expected according to ordinary usage, or if the offeror has waived it. The moment at which the offer ceases to be binding is determined according to the intention of the offeror to be inferred from the offer or the circumstances.

§ 152. If a contract is notarially authenticated and the parties are not simultaneously present, the contract is, unless otherwise provided, concluded upon authentication of the acceptance as provided for in § 128. The provision of § 151, sentence 2, applies.

§ 153. The conclusion of a contract is not prevented by the death or incapacity, prior to acceptance, of the offeror, unless the intention of the offeror appears to have been otherwise.

§ 154. So long as the parties have not agreed upon all points of a contract upon which agreement is essential, according to the declaration of even one party, the contract is, in case of doubt, not concluded. An understanding concerning particular points is not binding, even if they have been noted down.

If authentication of the contemplated contract has been agreed upon, in case of doubt the contract is not concluded until the authentication has taken place.

§ 155. If the parties to a contract that they regard as concluded have not agreed upon a point which they should have settled, their agreement is valid if it appears they would have contracted even without agreement on this point.

§ 156. At an auction a contract is not concluded until the hammer falls. A bid ceases to be binding if a higher bid is made, or the auction is closed before the hammer falls.

§ 157. Contracts shall be interpreted according to the requirements of good faith, ordinary usage being taken into consideration.

Appendix D

Comparison of a Similar Issue of Law Treated by a French Court and a German Court

Cases are reproduced from *Comparative Law: Western European and Latin American Systems*, by John Henry Merryman & David S. Clark (1978), with permission from the publisher, The Michie Company, Charlottesville, Va.

The issue treated here by a French court and a German court relates to the joint and several liability of multiple persons whose actions may have caused damage to an individual.

LITZINGER v. KINTZLER
Supreme Court of France (Civil Chamber, 2d Division)
Decision of June 5, 1957
1957 D.S. Jur. 493

The Court:—Joinder of the *pourvois* Nos. 1034 Civ. 54 and 1143 Civ. 54 for the reason of their connection with one another.

For the sole reason as to all parts of each of the two *pourvois*:—Whereas it follows from the appealed decision, affirming the decision of the lower court (Dijon, March 3, 1954), that on January 6, 1952, Nicolas, Roger, Cudel, Litzinger, Chauffaut Paul, Chauffaut Jean, and Thiriet had been hunting deer and that Kintzler was a member of the party, that about 4 o'clock the hunting activity had ceased and, that, while the latter had withdrawn from the hunt in order to get back to his home, the other seven hunters agreed upon the firing of a salute to celebrate the end of the hunt, and that Kintzler, being close by, was hit by a shot in his right eye which inflicted upon him an injury depriving him almost completely of the use of that organ; and that it has been stated by one of them that the seven members fired simultaneously, and, according to another of them, the shots went off "like the burst of a machine gun";—Whereas, on the action against

these hunters brought by the victim on the double ground of the articles 1382 and 1384, subsec. 1, civil code, the Court of Appeals laid down, finding them liable jointly and severally, that “the real cause of the accident was the concerted action of the seven hunters engaging in a shooting which did not constitute a normal part of the hunt, under circumstances demonstrating negligence and carelessness imputable to all of them”;—Whereas, thus joint and several liability of these seven defendants has been established sufficiently and justly, and that it is in no way necessary, for the purpose of supporting evidence, to identify from them the originator of the shot which caused the damage; that, indeed, several persons, by engaging themselves in a concerted action, or acting spontaneously under mutual excitement, may involve themselves in a manifestation for which each ought to carry the liability for consequential damage, whether the damage is the effect of a single act in which all have taken part, or of a number of connected acts so coherent as to their concept and performance that they cannot be separated one from another;—Whereas, because of their superfluous character, it is irrelevant that the other reasons, based upon the alleged liability at law for a person with a thing under his guard, are erroneous and open to proper criticism of the *pourvois*, since all the same the appealed decision is legally justified.

For these reasons, reject the “*pourvois*.”

Mr. Camboulives, acting president—Mr. Vidal, *rapporteur*—Mr. Lemoine, *avocat général*—Messrs. Morillot, Alcock and Brouchet, counsel

S.E. v. SCH.

Supreme Court of Germany (Civil Chamber, 6th Division)

Decision of November 15, 1960

33 BGHZ 286 (1961)

1. District Court of Bamberg
2. Court of Appeals of Bamberg

On the night of December 11, the plaintiff was struck and thrown onto the highway by a truck which he was trying to stop, and there he remained lying. About one o'clock he was run over and injured by the defendant, who was driving an

American automobile. It is not known whether or not the plaintiff was run over by trucks or cars other than that car driven by the defendant. This might have been the case, particularly with one car that passed by soon after the American car. The plaintiff's right leg was seriously broken and injured below the knee, and the lower part of the leg had to be amputated.

The plaintiff, admitting his own liability for one-fourth of the damages received, claims recovery from the defendant as a joint tortfeasor, for loss of income and for doctor and hospital expenses, as well as for the pain and suffering sustained, and also for a support pension. The district court held that the plaintiff was entitled to compensation for 75% of the damage received, insofar as that amount was not made good by national insurance. The appeal of the defendant was unsuccessful as was also his action for revision.

From the reasons for the decision:

1. The attacked judgment holds as follows: In any case, the defendant negligently ran over and injured the plaintiff, and he is therefore liable for the damage which he did, even if the plaintiff's leg had been run over by several other vehicles. The defendant at least caused part of the damage when he drove over the right leg, the fracture of which was the only serious injury which the plaintiff showed. Even if he was not the only one who caused this injury, even if one or several others had driven over the plaintiff's right leg, the defendant is liable by virtue of sec. 830, subsec. 1, para. 2 of the Civil Code. The language of this section embraces incidents where the share of the individual in the damage cannot be ascertained. Therefore, it does not matter any longer whether the defendant was or was not the only one who brought about this serious leg injury.

2. In the oral argument before the Supreme Court, it was asserted that sec. 830, subsec. 1, para. 2 of the Civil Code is not applicable in this situation, because this section requires contemporaneousness of several dangerous acts. It was argued that only in the case of simultaneous dangerous acts do there exist the objective criteria necessary to determine which dangerous act brought about the injury; while in cases in which the acts are consecutive in time, then the later act may

not have been dangerous, because the damage may already have been caused by an earlier act.

This interpretation ignores the purpose and scope of sec. 830 1-2. It must be granted, however, that in most litigations the dangerous acts of several wrongdoers have occurred simultaneously or immediately after one other. This happens to be so for the simple reason that generally there is no doubt as to which action caused the damage when the dangerous acts are separated from one another in time. But cases also arise where, despite the time sequence of the dangerous acts, there is doubt as to which acts caused the injury. The fact that the acts follow one upon another will not make sec. 830 1-2 inapplicable as is demonstrated by two cases decided by the *Reichsgericht* and the *Bundesgerichtshof*.

(a) Excitement experienced caused the injured party to have a gall-stone attack. During the evening in question, the plaintiff was stirred up and agitated three separate times: once when the plaintiff was informed by a member of the editorial staff of a newspaper that (though untrue) he was beset by grave financial difficulties; then, again, upon being informed by the editor of another newspaper that they intended to publish this report in their morning edition; and finally by the conduct of the managing director of the latter paper, when he refused to have these untrue newspaper reports retracted. Any of these three incidents could have precipitated the gall-stone attack, but it could not be determined which of these traumatic excitements was responsible for the attack.

The *Reichsgericht* held that sec. 830 1-2 was applicable to this set of facts. The requisites of this section were present when each occurrence had the ability to bring about the injury in accordance with the general rules of causation, and one of them had acted upon the injured party, although it could not be determined which act actually caused the injury. (RGZ 148, 154, 166 with references.)

(b) A house caved in because of lack of care on the part of the roofers, an undertaking involving two men. The one man had made defective concrete rafters and delivered them to the building site. The other had then installed these defective rafters. It could not be determined which act of negligence caused the collapse of the building. The *Bundesgerichtshof* held that both men were liable under sec. 830 1-2, because of the delivery to the site and building into the house was to be

considered one indivisible act in which both men were involved (VII ZR 268/56 March 14, 1957 — LM BGB sec. 830 No. 4).

3. A commentator on the code (Staudinger, Notes 3, 4 and concurring BGB-RGRK Note 9 at sec. 830) suggests that the concept of “participation” in the sense of sec. 830 1-2 exists when someone is run over by one of several in a group of vehicles, such as that of a festival party, but not when the injury is caused by one of several trucks, independent of one another, though using the same street, for in the latter instance we are not dealing with a joint danger but with accidentally consecutive events. If it is then impossible to determine which of the tortfeasors caused the injury, all of the presumptive tortfeasors will be relieved of liability.

The history of the origin of sec. 830 1-2 speaks against the suggested requirement of a joint venture aspect in the subjective sense, namely that the elements of danger shall act jointly and know of one another. Section 714 of the first draft indicates that joint liability exists “when one of the several injuries was not inflicted by the several parties acting together, but the proportions of damages caused by each cannot be determined.” This provision was intended to cover the case at hand, where it is impossible to determine which act caused the damage. (Motive II 738.) To make this principle clear, and not for the purpose of making the change in meaning in the second draft (Protokoll II 606), sec. 753 was stated in the following words: “The same applies (i.e. joint liability) when the several parties have not acted together and it is impossible to determine which individual act caused the damage.” The provision was given its final form by the Drafting Committee, and evidently at this stage of the preparatory work, when questions of formulations were the issue, the provision that joint ventures or actions were not a necessary requisite was excluded (Bydlinski, “Haftung bei alternativer Kausalität,” *Juristische Blätter*, Wien 1959, p. 12). In light of this, the *Reichsgericht* had already pointed out that the concept of “participation” may be intensified by the mutual knowledge of the acts of the other person to the point that there will be an “act committed in common” (sec. 830, subsec. 1, para. 1), and that there may exist a close connection with respect to the place and time even in the absence of such knowledge (RG WarnRspr 1912 No. 387).

4. Thus, neither sec. 830 1-2, nor the practice of the Supreme Court (“Senat”) support the suggested postulates that the imputable wrongful dangerous acts of several persons have to be contemporary and have an internal relation with one another.

(a) The purpose of 830 1-2 is to overcome the requirement that the injured party prove the cause of his injury, when it is impossible to ascertain which of several possible wrongdoers actually caused the damage, or which of several people, not acting in accord, caused what particular part of the injury (RGZ 121, 400, 402 f.). To attain this goal, in favor of the injured, a presumption as to the cause of the injury is used (cf. Wussow, *Unfallhaftpflichtrecht*, 6 ed. TZ 299; Bydlinski, *op. cit.*, p. 13). The reason for this presumption is that the recovery for damages caused by more than one person should not turn on whether the injured party can show with certainty what proportion of damage is attributable to each of the wrongdoers (RG WarnRspr 1912 No. 387). This is particularly necessary because the difficulty existing in proving the cause of the injury was created by the wrongful and imputable acts of the parties involved, and for which each of them is responsible.

The injured party’s difficulty in presenting the needed evidence can also arise, and need equal protection when the wrongdoers acted one after another, just as if they had acted jointly (compare the examples given under 2a and b, *supra*). Granted that a party, acting after another party, is capable of a dangerous act only in case the injury was not caused by the earlier act. However, it is just the doubt as to cause that often remains unresolved, and the purpose of sec. 830 1-2 is specifically to remove this doubt and to put the burden on those persons who committed the wrongful imputable and dangerous acts.

However, it has to be required that the different acts, even if consecutive parts of a course of events, are materially connected with one another with respect to place and time and are also alternative causes of the injury, so that each separate act appears as a part of a unified whole; only if these conditions are met does a “participation” of each wrongdoer in the occurrence of the damage exist. The question of when such a situation actually exists has to be decided in accordance with

the practical common sense of every day life (RG WarnRspr 1908 no. 633).

With respect to such course of events, it is irrelevant, both from the point of view of the external relations and with regard to the protected interest of the injured person whether he is able to produce evidence, that the different wrongful and imputable acts are as those of the members of a hunting party or a group of automobiles, internally linked with one another. The presence or the absence of an internal link is of no concern, whether on the side of the wrongdoers or on the side of the injured person. This is so because the injured party was harmed by a single injurious act, although it appeared as if there were a relationship with other acts, and the plaintiff's burden of proof will not be decreased because the various doers of dangerous acts were not acting jointly and did not know of one another.

(b) Consequently, this Court ("Senat") does require that the concept of participation shall imply neither that the dangerous acts take place simultaneously, nor that there be a subjective link between the several wrongdoers. Rather the concept of participation is directed toward the situation, where several persons, each acting independently, have committed unlawful acts, where one of these acts has, and each of them could have individually caused the resulting harm, where, however, it is impossible to determine the real wrongdoer. This is so, provided that there is an actual course of events where, although independent, the events are uniform and interrelated with respect to place and time, and where the injury is within the sphere of this course of events (BGHZ 25, 274 with references). When the defendant in his appeal refers to the decision of the Court BGHZ 30, 203, he is overlooking the fact that in that case it was ascertained which share of the damage that had been caused by each of the wrongdoers and therefore, indeed, it was impossible to argue the application of sec. 830 1-2. Further, in an extensive opinion—VI ZR 55/59—NJW 1960, 862 No. 4—this Court has already rejected the restrictive construction that sec. 830 1-2 requires an internal relationship between several wrongdoers.

5. Thus, there is no objection to the finding of the Court of Appeals that an actual participation, both in time and space, occurred when at midnight the plaintiff was bodily injured on the highway where he was struck by several motor vehicles,

and at least it is known that the defendant was involved in this injury. Under sec. 830 1-2, the defendant has been given the duty to prove that the loss of the lower part of the leg could not have been caused by him. The Court of Appeals reached the correct result, that the joint liability for damages under 830 1-2 extends to a case, where the proportion of damage caused by each party is not determinable. Since the plaintiff was not able to carry the burden of proof as to who caused the injury, the Court of Appeals did not commit error in holding the defendant, if not liable as an individual according to sec. 823, nevertheless liable under 830 1-2 for the entire damage.