

THE CONTEMPORARY
CIVIL LAW TRADITION:
EUROPE, LATIN AMERICA,
AND EAST ASIA

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The Contemporary Civil Law Tradition: Europe, Latin America, and East Asia

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MATTHEW  BENDER

Dedication

For Len, Sam, and Bruce

— J.H.M.

For Marilee and Lee, Susanna, Eliina, Liisa, and David

— D.S.C.

To Karin and Jorin, Star, and Brook

— J.O.H.

Preface

The contemporary civil law tradition encompasses a rich variety of national legal systems more widespread geographically and with more people living under its domain than any other legal tradition. In presenting the civil law tradition, we have two principal aims for this book. First, we strive to describe and analyze what is similar among the civil law nations covered here so that it would be appropriate to classify all of them within the same tradition or legal family. Second, we introduce details about what is different among the 13 civil law nations we investigate on at least two levels. These two levels may involve similarities as well as differences. One dimension presents civil law countries by continent, taking each group in the historical order in which they developed or adopted the civil law system: Europe, Latin America, and East Asia. The other dimension compares the individual national legal systems within each continent: France, Germany, Italy, and Spain; Argentina, Brazil, Colombia, and Mexico; and Indonesia, Japan, Korea, Taiwan, and Thailand.

We carry out this task with 15 thematic chapters (and a final epilogue chapter) presenting notes we have written, book and journal excerpts, statistical tables of current and historical data, and material from codes, statutes, regulations, and court cases. We have designed the volume for use in law schools and political science departments with general courses in comparative law or civil law systems, as well as specific courses covering a region — Europe, Latin America, or East Asia — or even those tailored toward an individual country, such as France, Germany, Mexico, or Japan.

The 15 chapters cover the following:

1. Introduction to Comparative Law and the Civil Law System
2. Legal Structures of Lawmaking
3. Administrative Organization and Administrative Law
4. Legal Pluralism
5. Federalism and Subnational Legal Systems
6. Courts, Judges, and Prosecutors
7. Constitutional Courts and Constitutional Review
8. Judicial Review of Administrative Acts
9. Legal Education
10. The Legal Professions
11. The Sources of Law, Its Interpretation, and Judicial Precedent
12. Civil Procedure
13. Criminal Justice
14. Legal Science and the Private Law Codes
15. Substantive Private Law: Property and Contract

The first version of this course book grew out of John Henry Merryman's comparative

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law writing, principally *The Civil Law Tradition* (1969).^a John Merryman and David S. Clark authored that first edition; it was entitled *Comparative Law: Western European and Latin American Legal Systems* (1978). The volume emphasized the two regions in the world that in the early post-World War II period most interested comparative law scholars. It used excerpts from primary legal materials, statistical data, and representative scholarly writing to illustrate the development of the civil law tradition, variations within that tradition, and contemporary civil law systems.

In 1994, John O. Haley joined Merryman and Clark with a successor edition to the course book: *The Civil Law Tradition: Europe, Latin America, and East Asia*. It was a successor edition rather than a second edition because, although it continued to instruct in the basics of the civil law tradition, it added the dynamic region of East Asia and presented material that reflected the truly fundamental changes that had occurred in the relationships among the world's major legal systems during the intervening 16 years.

In 2010, another 16 years after the successor volume, the complexity of contemporary civil law legal systems in Europe, Latin America, and East Asia, coupled with the expanded diversity and richness of published source material and critical inquiry, led us to divide the topics that had occupied one volume and present those and additional issues in two reformulated volumes. The first book, *Comparative Law: Historical Development of the Civil Law Tradition in Europe, Latin America, and East Asia* (2010), addressed the historical use of law and legal systems. We examined the origin and development of the component parts of the civil law tradition within Western Europe and its spread to Latin America and to East Asia, both of which already had sophisticated civilizations with legal norms and institutions. We detailed differences and similarities among and within regions and presented developments up to the early twentieth century.

The current companion volume, entitled *The Contemporary Civil Law Tradition: Europe, Latin America, and East Asia*, as reported above, analyzes current trends in civil law countries and representative variations within national legal systems. A distinguishing feature of both the historical and contemporary volumes is their relative de-emphasis of rules and related doctrine and greater attention to the intellectual history and culture, structure, professional actors, and processes that are characteristic of civil law systems. This expresses our view that it is seldom the rules of law that are truly significant or interesting about a foreign legal system; it is the social, political, economic, cultural, and intellectual climate, the institutional structures, the roles played by legal professionals, and the procedures characteristic of the legal system that are instructive. Often the rules of law look very much like those in the United States or other common law nations — indeed, this is more and more true among the Western, capitalist nations that dominate the legal landscape of Europe, Latin America, and East Asia. As with United States law, finding the rule is often less of a problem than knowing what to do with it; it is the difficult business of understanding the contemporary legal system, within which the rules exist and operate, that we have tried to illuminate. The Note on Comparative Law in Chapter 1, preceding Section A, summarizes the approach we take among the 15 chapters in this book.

We have included only selected footnotes from reprinted excerpts. To aid anyone referring to the original source of a judicial opinion or excerpted article or book, we cite footnotes, when retained, by the numbers of the original. For additional information that

^a JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (1969).

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we provide to illuminate excerpted material or in original notes, the footnotes have letters.

In earlier prefaces (1978, 1994, 2010), we acknowledged our indebtedness to the generations of scholars throughout the world whose wisdom and industry are embodied in the literature of comparative law and legal history. We are all products of the intellectual history of our discipline. We also there expressed our thanks to particular individuals who provided ideas, reference support, research or secretarial assistance, and general stimulating conversation that aided our endeavors. We reaffirm our gratitude here.

For this volume, Professor Merryman is deeply indebted to his student, co-author, and fellow venturer in comparative law scholarship, Professor David S. Clark. Professor Clark is grateful to the Willamette University law library director, Ann C. Kitchel, and access services manager, Galin Brown, for their helpful book purchases and interlibrary loan assistance and to the College of Law for a summer research grant that facilitated completion of this book. Professor Haley owes special thanks to comparative law librarian, Catherine Deane, as well as the director and other members of the library staff at Vanderbilt University, where he taught for five years during which this volume was in preparation. He is equally indebted to the students from over a dozen countries and five continents in addition to the United States, who added exceptional perspectives and insights in courses using draft chapters of these materials that he taught at Vanderbilt, the University of Washington, as well as the National University of Singapore.

John Henry Merryman died peacefully on August 5, 2015, at his home near Stanford University, California, at the age of 95. We, the co-authors, mourn his passing; the comparative law community will miss his wisdom and wit.

John Henry Merryman
David S. Clark
John O. Haley

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