

COMPARATIVE LAW:
HISTORICAL
DEVELOPMENT OF THE
CIVIL LAW TRADITION IN
EUROPE, LATIN AMERICA,
AND EAST ASIA

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COMPARATIVE LAW: HISTORICAL DEVELOPMENT OF THE CIVIL LAW TRADITION IN EUROPE, LATIN AMERICA, AND EAST ASIA

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MATTHEW  BENDER

Dedication

To Nancy—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

Comparative law as an organized discipline involves a significant overlap with legal history and legal philosophy. This book reflects that reality. We have designed the volume for use in law schools and history and political science departments with introductory courses in comparative law or civil law systems, as well as in European or world legal history. The comparative dimension appears in the book's title, since we explore the origins of law and legal systems in Europe, Latin America, and East Asia. The concept of *tradition* draws on John Henry Merryman's classic development of a multi-disciplinary, historical approach to the study of law. As he wrote in 1969:

A legal tradition . . . is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression.*

The first version of this course book grew out of Merryman's comparative law writing. As with his *The Civil Law Tradition* (1969), John Henry Merryman and David S. Clark, *Comparative Law: Western European and Latin American Legal Systems* (1978) 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 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 reflected the truly fundamental changes that had occurred in the relationships among the world's major legal systems during the intervening 16 years.

First, it was time to recognize and deal with the contribution of the civil law tradition to contemporary national systems in East Asia. The interests of jurists—lawyers, judges, and scholars—by the 1990s went well beyond Europe and Latin America. Japan, whose legal system clearly displays the influence of German and French law, was the principal example. It was a major economic power exercising substantial *de facto* authority in world affairs. Japanese institutional influence was particularly strong in Taiwan and South Korea, two of East Asia's most dynamic emerging industrial democracies. Two other non-socialist East Asian nations had received the civil law either through self-selection as an independent state (Thailand) or under Dutch colonial rule (Indonesia). At the beginning of the twentieth century, China retained its traditional; imperial legal system. The process of westernizing legal reforms there did not begin until after the republican era commenced in 1912. For Americans engaged in business and governmental affairs, familiarity with the legal systems of East Asia had acquired increasing practical value as East Asian nations achieved greater economic and political power.

* JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 2 (1969).

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Second, an enlarged European Union—then with 16 members—served 375 million persons and continued to integrate politically and to prosper economically. With this success the European Union, along with Japan and the new industrial nations of East Asia and the United States, had become the principal players in world affairs. The original six member states to the core European Community within the European Union, like the other continental countries of Western Europe, are civil law nations. These six designed the supranational laws and institutions according to their own ideas about law. Although the United Kingdom and Ireland are today common law members, a thorough background in the civil law tradition is necessary to understand Community and Union law.

Third, with the end of Soviet Union socialism, socialist law itself went into decline. In most of the former socialist nations, socialist law was little more than a superstructure of socialist concepts imposed on a civil law foundation. Nations once considered “lost” to the European civil law returned to it. The civil law world once again included both Eastern and Western Europe. Socialist political systems remained in place in Latin America only in Cuba and in East Asia in the People’s Republic of China, North Korea, and Vietnam.

Fourth, with the economic and political rise of the European Union and the industrial democracies of East Asia, accompanied by the relative decline of the former Soviet Union and the United States, one also could not ignore the increased presence of Latin America, with a 1994 population of 484 million, in what was a new multi-polar world. Brazil then had the tenth largest economy in the world, while Mexico ranked fifteenth.

In 2010, another 16 years after the successor volume, we present this edition that we hope provides a useful approach to instruct students and lawyers in the changing landscape of the civil law world. Of the four factors that affected our subject in 1994, all continue to influence the pattern of world power distribution. East Asia, in particular with the rise of the People’s Republic of China, is more important than ever. The European Union now has 27 members with a total member-state population of 495 million. China over the past two decades has become less socialist in its law and absorbed more features of the civil law. In Latin America, Brazil’s economy has grown to become the world’s ninth largest with increasing influence on developing nations.

While maintaining the same geographical focus, the increased complexity of the individual national legal systems within the three regions and the substantial proliferation of new scholarship in comparative law and legal history have convinced us to divide the course book into two volumes. This volume, entitled *Comparative Law: Historical Development of the Civil Law Tradition in Europe, Latin America, and East Asia*, addresses the historical use of law and legal systems, differences and similarities among and within regions, and how the form of Western law known as the civil law spread from Europe to Latin America and to East Asia. We present these developments up to the early twentieth century. A companion volume, entitled *The Contemporary Civil Law Tradition: Europe, Latin America, and East Asia* will report on current trends in civil law countries and representative variations within national legal systems.

The aim of this book is, with its historical perspective, to introduce the student to the family of legal systems common to Europe, Latin America, and East Asia. Throughout we provide readings that explain what binds together countries that participate in the world’s oldest, most widely distributed, and most influential legal tradition. At the same time, we use materials from or about specific historical regions to illustrate the many

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fascinating variations that exist within the civil law tradition. The principal regions utilized for this purpose cover the area that became the nations of France, Germany, Italy, and Spain within Europe; Brazil, Mexico, and Peru within Latin America; and China (and Taiwan), Indonesia, Japan, Korea, and Thailand in East Asia.

A distinguishing feature of this and its companion volume is their relative de-emphasis of rules and related doctrine and greater attention to the intellectual history, structure, professional actors, and processes that are characteristic of civil law systems. In Chapter 2, “Litigating Cases with Foreign Parties or Foreign Law Issues in American Courts,” we do focus on rules, but from a cultural perspective to illustrate how difficult it is even for professionals—lawyers and judges—trained in one legal tradition and national law accurately to understand law from another country and particularly from another legal tradition. Elsewhere throughout these volumes, we quite deliberately put the emphasis on other matters. 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 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 our own—indeed, this is more and more true among the Western, capitalist nations, whether common law or civil law, 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 legal system, within which the rules exist and operate, that we have tried to illuminate.

The Table of Contents sets out in detail one plan for the course. Chapter 1 introduces the discipline of comparative law, its scope, origins, objectives, and methods. In addition, in Section D, we present an important contemporary use—nation building or law and development—and suggest its limitations. Even an instructor using the volume to teach legal history could use Sections A and F to survey the world’s legal traditions and consider an example of Roman law to interpret the law of a U.S. state.

Chapter 2 on litigation (which one could omit in a legal history class) is fascinating to law students who can observe the practical use of foreign law in resolving important disputes and appreciate the difficulties involved. Chapters 3, 4, and 6 trace the complex development of the civil law in Europe over more than 2,000 years. They occupy the most pages and are the heart of the course. The materials are challenging, but provide the basic conceptual tools for understanding contemporary law. Chapter 5 presents the variation that exists in Latin America, first describing what we know about indigenous law in the great empires that predated European colonialism. Chapter 7 does the same for East Asia, where Western incursion occurred later than in Latin America.

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

In earlier prefaces (1978, 1994), 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.

Preface

For this volume, Professor Clark is indebted to Professor Antonio Gidi who provided detailed suggestions for improving this edition, most of which we incorporated. Clark is also grateful to the Willamette University law library director, Richard Breen, and circulation 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 his assistant, Nancy C. Cummings, as well as the directors and staffs of the law libraries of both Washington University in St. Louis and the University of Washington. We all appreciate the months of work by Nancy Cummings in gathering the many reprint permissions needed to conclude the volume.

John Henry Merryman

David S. Clark

John O. Haley

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