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LEGAL SYSTEMS

THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA. By John Henry Merryman. Stanford University Press, 1969. Pp. ix, 172.

*Reviewed by Mary Ann Glendon**

Addressed to the general reader, this book sets out to describe "what it is that binds together the legal systems of Western Europe and Latin America, and that distinguishes them from the legal systems of the Anglo-American world" (p. vii). The reader is cautioned in the Preface that the book will not describe any specific national system, and indeed, if the discussion seems not to be representative of what he may know of two major civil law systems, the French and the German, this is because these systems are "atypical" of the civil law.[1] Thus prepared, one may wonder at the outset whether the discussion will not be too general to be of use even to the non-professional reader seeking information about the civil law.

The difficulty of any task such as that undertaken by Professor Merryman is that of providing a meaningful overview without falling into deceptive and useless generalization; sketching with a few strokes of the pen a good likeness, rather than a caricature. On the whole, his picture of what the civil law systems have in common appears to have been drawn with a sure hand. He seems to have been adept at winnowing out the "grain of truth" which Ehrenzweig says lies within the usual myths concerning the common and civil law systems.[2]

Unfortunately the mere statement of these myths, even though subsequently qualified, can mislead the reader or student into exaggerating their significance. For example, in the chapter on Sources of Law, we find the following unequivocal statement:

> The familiar common law doctrine of *stare decisis*—i.e. the doctrine that similar cases should be decided similarly—is obviously inconsistent with the separation of powers as formulated in civil law countries and is therefore, rejected by the civil law tradition. Judicial decisions are not law. (p. 24).

This myth is repeated at pages 25 and 37 and only three chapters later are we permitted to glimpse the grain of truth that:

> Although there is no formal rule of *stare decisis*, the practice is for judges to be influenced by prior decisions. . . . The fact is that courts do not act very differently toward reported decisions

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1. (Pp. vii-viii). An "archetypal" civil law system is thought by the author to be the Italian (p. 60), to which he has devoted considerable study. See Cappelletti, Merryman, and Perillo, *The Italian Legal System: An Introduction* (1967), and *The Italian Civil Code*, translated by Beltramo, Longo, and Merryman (1969).

2. 1 *Comparative Jurisprudence* (Unpublished Syllabus, 1968).

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in civil law jurisdictions than do courts in the United States. (p. 48).

This information may come too late to correct the impression made by the earlier statements and may tend to obscure a complex problem which is already troublesome for students of comparative law. Furthermore, even though a widely held belief that cases are not a source of law must have an important effect on the way the legal system works, it seems doubtful whether this belief is as widely held in civil law countries as the author suggests. We are told the book is about the way "the common run of lawyers" generally think rather than about the opinions of legal scholars whom the author charitably assumes to be in the vanguard (p. viii). Yet though a poll among these lawyers might elicit a Pavlovian response that case law is not a source of law, what civil law lawyer, looking up a code provision, would fail to read the case notes below to see if the section had been applied before in a case like his, no matter what he had been told in law school?

As for legal scholars, it is now quite common, at least in French treatises, for case law to be reckoned with under the heading "sources of law" which traditionally dealt only with legislative enactments, decrees, and custom.[3] In the German treatises, and in older French works, a judicial holding which has been constantly reaffirmed (*jurisprudence constante* or *ständige Rechtsprechung*) is treated in the discussion of sources of law as a form of custom.[4] Thus, it seems that the myth concerning the role of cases in the legal process may have been overstated in the first place, though perspective is restored in later discussion.

There is another respect in which the quoted statement on the role of cases seems misleading. As the author defines *stare decisis*, it seems incorrect to say that it is rejected even in theory by the civil law tradition. He identifies *stare decisis* with the notion that like cases ought to be decided alike. If this is what *stare decisis* means, then it is difficult to say, as Merryman does, that it has been rejected by any legal tradition, including that of the civil law.

However, if *stare decisis* is, as common law lawyers widely suppose it to be, a doctrine that the determination of a point of law by a court will generally be followed by the same court and courts of the same rank and will be binding upon a court of lower rank in the same jurisdiction in a subsequent case where the same point is at issue,[5] then it is of course, correct to say that *stare decisis* is generally not accepted by the civil law. But the idea that like cases ought to be de-

3. See 1 Mazeaud, *Leçons de Droit Civil* 127 (Juglart ed. 1967); 1 Ripert et Boulanger, *Traité de Droit Civil* 99 (1956); 1 Weill, *Droit Civil* 144 (1968). Carbonnier treats decisions of courts as authority *de facto*, 1 *Droit Civil* 119 (8th ed. 1969).

4. See 1 Enneccerus, *Allgemeiner Teil des Bürgerlichen Rechts* 273 (Nipperdey 15th ed. 1959) and 1 Cohn, *Manual of German Law* 5 (2d ed. 1968).

5. This leaves aside the peculiar *stare decisis* problem in our federal system of the binding effect of state law decisions by state courts upon federal courts regardless of rank.

cided alike, which underlies the doctrine of *stare decisis*,[6] is such an elementary principle of fairness (as well as economy) that one expects to, and does, find it nearly everywhere we find institutions that can reasonably be called courts.[7]

To suggest that the civil law rejects this doctrine underlying *stare decisis* implies that the civil law systems lack certainty and predictability and that the common law alone is committed to the idea that like cases ought to be decided alike. A more precise definition of *stare decisis* would have indicated that it is only a mechanism for ensuring predictability in the system and would have prepared the reader for a consideration of the civil law methods of achieving this aim.

Problems such as this are probably unavoidable, given the task the author has set himself. Yet if one tries to retrace the path through the Bramble Bush and become an amateur rather than an *amateur* of comparative law, it seems that Professor Merryman's little book is not only readable—a feat in itself—but often insightful and provocative in its treatment of the folklore and practice of the civil law. It is insightful especially with respect to the often overlooked or underrated Pelagian element and "exaggerated rationalism" in the intellectual influences upon the French civil code. (p.29). It is provocative in its treatment of criminal law, demolishing in passing the common law folklore that insists the presumption of innocence is unique to Anglo-American law, and providing an interesting starting point for discussion by citing, apparently with approval, a judgment that civilian criminal proceedings are more likely to distinguish the guilty from the innocent than those of the common law. (p.139).

The question remains of how much insight the description of an archetypal system provides into those which are actually functioning in the various civil law countries. Plato to the contrary notwithstanding, approaching the understanding of working systems by way of a paradigm is probably not the best way, at least for a law student, to begin the study of comparative or foreign law. Rather, the student ought to be fearful of generalities and to find his way to such insights as are possible by seeing a legal system at work on a particular problem.

It may be that the real need for and the utility of a book such as this lies with the students of other disciplines to whom it is in part addressed. A lively introduction to civil law thinking with its histori-

6. See the discussion headed "Note on the Reasons Supporting a General Practice of Adherence to Prior Holdings . . . A Tentative Formulation of the Bases of the Doctrine of *Stare Decisis*," in Hart and Sacks, *The Legal Process* 587-88 (Tentative Ed. 1958).

7. See Llewellyn, "Case Law," 2 *Enc. Soc. Sci.* 249 (1932). In his study of Busoga law courts, *Law Without Precedent* (1969) at p. 19, Professor Fallers recounts that Busoga judges, while they recognize no duty to follow precedents and never refer to previously decided cases, reply when asked, "that, of course, they decide cases as they have been decided in the past, but that they are quite uninterested in, and unable to discuss, the process by which this is accomplished; that it is accomplished, they simply regard as self-evident."

cal, political, and social dimensions, may serve as an invitation or lure to interdisciplinary studies which might, to use Portalis' phrase about the Code Napoleon, turn out to be "fertile in consequence" for lawyers, philosophers, social and political scientists, and historians alike.