BOOK REVIEWS

THE CIVIL LAW TRADITION

By John Henry Merryman, Stanford University Press, Stanford, California, 1969, 172 pp.

This very readable account of the origin, development and philosophy of the civil law tradition should engage the interest of every Louisiana lawyer and law student. Although the Louisiana Civil Code is never mentioned specifically, the book provides numerous insights to enrich the lawyer's understanding of the Code and Louisiana's place in the legal tradition and culture from which it springs.

The "Civil Law Tradition," says the author, is something very different from the particular legal systems of any of the civil law jurisdictions which share that tradition. Each legal *system* has its own characteristic set of legal institutions, procedures and rules; whereas the Civil Law *Tradition* is a "set of deeply rooted, historically conditioned attitudes about the nature of law" which transcends all national boundaries and exerts a pervasive and unifying force in all the countries which share the tradition. With its civil code, Louisiana certainly shares (in its own peculiar fashion) in the Tradition, together with the majority of the nations of the modern world.

Merryman's account is lucid and enlightening. Abstruse ideas are stated with economy and clarity, and in reasonable and practical perspective. In his preface, the author says that he attempts to speak to the general reader, the nonlawyer who may be interested in learning someting about the legal side of European and Latin American culture, as well as to lawyers who have had no real introduction to comparative law. Despite the attempt, the book would probably pose real difficulties for those who have had no acquaintance with the law; however, the author has definitely come up with a style which makes the book readily accessible to lawyers and law students; it has a high-level sort of popular appeal which makes it quite engaging. The Louisiana lawyer or law student who concludes from Merryman's preface that he has nothing to learn will probably be overestimating his legal training and underestimating Merryman. If he pursues the book, he should

find profit to be gained from the exposition of the background of the Civil Law and from the comparisons so cleverly drawn between the Civil Law and Common Law Traditions.

The book should be of special interest to the teachers and students of Louisiana's four law schools. The former may find particular pleasure in the author's appraisal of their own role: "The teacher-scholar," he says, "is the real protagonist of the civil law tradition. The civil law is a law of the professors."[1] On the other hand, judges may find less pleasure in pondering the traditional image in the civil law tradition "of the judge as an operator of a machine designed and built by legislators. His function is a mechanical one."[2] History, says Merryman, bears him out: "The great names of the civil law are not those of judges (who knows the name of a civil law judge?) but those of legislators (Justinian, Napoleon) and scholars (Gaius, Irnerius, Bartolus, Mancini, Doneat, Pothier, Savigny * * *)."[3]

The first chapter describes briefly the three major legal traditions in the contemporary world: civil law, common law and socialist law. The following three chapters, together with chapter 10, follow the development of the civil law tradition from its primary sources: Roman civil law, canon law, the commercial law which grew in Italy in the late middle ages, the emergence of the modern nation-states, the French Revolution, and the theoretical work and codifications of influential civil law scholars in Germany in the 1800's. Along the way, the author discusses the place of civil law codes, judges and courts, lawyers and scholars in the tradition. The procedural approaches (in both "civil" and criminal matters) typical of the civil law tradition are highlighted. Throughout the work, the author sketches what might be called a "personality" of the Civil Law Tradition; the heart of this phase of the work is found in chapters entitled "The Legal Process," "Legal Categories," "Legal Science" and "The General Part".

A Louisiana lawyer with the determination to pursue this material is likely to find himself being introduced for the first time to the Civil Law to the policies and attitudes underlying the Civil Code and to basic Civil Law concepts and methods which find no expression as such in the Code. For example, the Code obviously

1. Merryman, The Civil Law Tradition 60 (1969).
2. *Id.* at 38.
3. *Id.*

has nothing to say of the role of judges or scholars, the conduct of trials, or the work of practicing attorneys in the civil law world. The book gives background in these matters and in doing so imparts new insight into the Civil Code itself and its true place in the legal process. The description of judicial careers in civil law shows them to be significantly different from the patterns to which we are accustomed in the United States, even in Louisiana; but the differences are inherent, says Merryman, in the Civil Law Tradition.

There is more to civil law tradition than a civil code. In fact, one of the biggest surprises the Louisiana lawyer is likely to encounter here is the conclusion that a code as such is not the primary or even a necessary element of a civil law system. The impression emerges that Louisiana's civil law tradition (whose only strong roots are in its acceptance or "receipt" of the format of the Code Napoleon from France) is but a pale imitation of the real thing (a condition, readers may find, which Mr. Merryman might not be too quick to deplore).

A deficiency in the work, as far as serious scholars are concerned, is the lack of any footnotes or references to the author's authorities. This, however, is part of the author's scheme and should be a blessing to the average lawyer who has neither the time nor the inspiration to question or pursue Merryman's conclusions. There is appended to the work a select list of materials for further reading.

Some may find fault with Merryman for what appears to be a somewhat prejudiced stance when he comes to comparisons between the Civil Law and Common Law Traditions. If one were to personify his description of the traits of the common law one might call forth the image of a face, as it were, of common lines, broad mouth, and kindly even humorous eyes with a tendency, perhaps, to a confused and vague expression. The Civil Law is presented, one imagines, not as a face at all, but in the outline of a single eye, intelligent, piercing, dispassionate. The Civil Law is, to Merryman, more German than French, more professor ("it smells of the lamp") that honest judge, too "correct" to be true, too abstract to be fully responsive to human needs. Chilling support for this view is presented in chapter 11, "The General Part," in which the author quotes from a typical scholarly treatise on the Civil Law, which Louisiana students will find all too familiar.

On the whole, despite his initial pronouncement that "the question of superiority [between the two traditions] is really beside the point,"[4] the author seems too ready to favor common law approaches over civil law methods whenever he contrasts the two. Chapter eight of the book, "Certainty and Equity," serves as an example of this. "Certainty" in the abstract, a valid and important goal in all legal systems, has been over emphasized (says Merryman) by the civil law and has come to be a "kind of supreme value, an unquestioned dogma," another symptom of the civil law's tendency to make law "judge-proof."[5] Certainty has been insured, he says, by the inflexible rules laid down in the civil codes and by the injunction against any "law-making" by judges (a corrollary of the civil law's rejection of the principle of *stare decisis* which is so much a part of the common law tradition). But such certainty, it is said, has been obtained at the expense of flexibility, and judges in the Civil Law Tradition are less free than their common law brethren to rule with fairness where equity demands a departure from a general rule of law. While the civil law does not recognize inherent equitable powers in its judges, common law does, and equity, says Merryman, serves to temper the goal of "certainty" with fairness in the particular case.

The appraisal seems too pat. *Stare decisis* operates to limit common law judges much more than the general principles laid down in most articles in civil law codes. The common law's maxim "hard cases make bad law" serves as a warning of the consequences which can accrue when a common law judge tampers with his law for the sake of sympathy for particular litigants. Besides, as everyone knows, judges (in whatever tradition they preside) have a flair for flexing the facts (*i.e.*, the official statement of the facts) rather than the law when their reach for fairness and a just result exceeds the grasp of the law's sometimes too harsh principles. Equity is not the cleaver it is made out to be, either. In fact, it would seem that the general pronouncements found in most codal articles provide a greater degree of flexibility to civil law judges than is to be found in the stratified principles of equity which, under the application of *stare decisis*, have become as inflexible as any other rules of the common law. The latitude given the courts by such articles as 2315 of the Louisiana Civil Code is nothing less than a *carte blanche* from the legislature for the courts to fashion their own tort law from the ground up. Merryman recognizes the place of articles similar to 2315 in the codes of other civil law jurisdictions and in the end comes the long

way round to admitting that there isn't, after all, very much difference in results between the two approaches.

After all is said and done, the most important distinction between the common law and the civil law processes may "not lie in what courts in fact do, but in what the dominent folklore tells them they do"[4] a conclusion which is Mr. Merryman's way of saying that the lawyers, judges, legislators and scholars in the two traditions really don't accomplish anything drastically different, they just think they do. But how men think of their actions has a strange way of affecting the action; thinking can make it so. And the roles which the participants in the law play, the methods and attitudes with which they approach the problems of justice in their particular melieu, affect and mold the law and the legal processes in which they work. The real value of Merryman's book may lie, not in its description of what the two traditions do, but in its account of the attitudes and beliefs which they tend to foster about themselves. It is well worth the effort to discover how close the common law and the civil law traditions are, and yet how far apart, too. And there should be no more pleasant and profitable way to learn than from Mr. Merryman.

*Robert O. Homes, Jr.**

COMMUNITY PROPERTY RIGHTS IN LIFE INSURANCE

By S. Samuel Scoville, The National Underwriter Company, 420 East Fourth Street, Cincinati, Ohio, 1969, xii, 202 pp.

"Errata and Later Developments" received in January 1970 by purchasers of Community Property Rights in Life Insurance has saved this book from being utterly useless if not dangerous to the unwary Louisiana lawyer. The *later developments* were legislative changes in section numbers of the Texas Family Code, but all *errata* are to the chapter on Louisiana law. With some care and close reference to the *errata* the Louisiana chapter now can be employed as a helpful summary of cases and statutes and a

4. *Id.* at 3.
5. *Id.* at 50.
6. *Id.* at 49.

* Assistant United States Attorney, Eastern District of Louisiana; Editor, Loyola Law Review, 1965-1966.