

WESTERN PHILOSOPHIES OF LAW: THE CIVIL LAW

Samuel W. Bettwy

Thomas Jefferson School of Law, San Diego, California, USA

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Summary

The word “civil” has different meanings in different contexts. When speaking of “civil law” as distinguished from “common law,” civil law is, simply stated, the law that has evolved from Roman law, which culminated with Justinian’s compilation of the *Corpus Juris Civilis* in AD 529. If asked for a shorthand, practical definition of civil law, most non-civil law lawyers today would likely respond that “civil law” refers to the law of a jurisdiction in which legal relationships are primarily regulated by codes and in which court decisions have little or no binding effect in subsequent cases (no doctrine of *stare decisis*).

Indeed, when faced with a legal question, a lawyer practicing in a civil law jurisdiction would first consult codified law to find the applicable controlling law. Court decisions, where available, might assist the civil law lawyer in interpreting the codified law, but the decisions themselves would probably not constitute controlling law.

Civil law countries today include many countries in Asia, including Japan and South Korea, countries of Africa, including Ethiopia, the Latin American countries, and most European countries, most notably France and Germany. The United States and the United Kingdom and its commonwealth countries are common law, not civil law, countries. However, because of their French origins, Quebec in Canada, and Louisiana in the United States have adopted and followed the civil law tradition.

The following is a discussion of primary features that distinguish a civil law jurisdiction from non-civil law jurisdictions: the form of government, the organization of law and the courts, the authority of the courts, and the conduct of civil and criminal litigation.

1. Evolution of Civil Law

Today's civil law is the product of Roman law, which was codified by Justinian, "barbarized" by the invaders of Europe, yet preserved by the Roman Catholic Church through its canon law during the Middle Ages. After the Middle Ages, it was rediscovered and redefined as the *jus commune*, supplemented by the "law merchant," and reinvented and codified by the modern nation states of Europe.

Roman law can be traced through several distinct periods from the Twelve Tables (451 BC) until the *Corpus Juris Civilis* of the Byzantine emperor Justinian (AD 534). In common usage, however, the term "Roman law" refers to the *Corpus Juris Civilis*, which has had the greatest influence on the development of civil law. Of the four parts of the *Corpus Juris Civilis* (the Institutes, Digest, Code, and Novels), the Digest has had the greatest influence on the evolution of the substance of civil law, especially in the areas of personal status, torts, unjust enrichment, contracts and remedies. The Byzantine approach to the codification of law is considered to have been an excessive attempt to regulate by statute. It might be noted that the modern German code (1896) has been criticized for the same excessiveness.

The *Corpus Juris Civilis* fell into disuse after the invasions of the so-called barbarians, the Lombards, Slavs and Arabs. This period of disuse, corresponding with the Middle Ages from the fifth to the tenth centuries, is marked by a period of localism and the introduction of Germanic customary laws. Thus, Roman law is said to have been "barbarized" during the Middle Ages.

Roman law nonetheless managed to survive its neglect during the Middle Ages through the continued application of canon law, which was itself a reflection of Roman law. Before the fall of the Roman Empire to the invaders, the Roman Catholic Church had exerted a great deal of secular as well as spiritual influence. In the process, it had borrowed legal concepts from Roman law and vice versa. During the Middle Ages, canon law had the effect of maintaining a degree of order and uniformity amidst diversity, localism and crudeness of procedures (e.g., trial by ordeal).

Around AD 1050, a period of "re-awakening" in Europe marked the end of the Middle Ages. Jurists "rediscovered" Roman law, namely the compilations of Justinian, especially his Digest. Scholars known as "glossators," and later as "commentators," interpreted the compilations and generated an influential body of literature that came to be known as the *jus commune* or "common law" of Europe.

From the fifteenth century onwards, the *jus commune* was "received" or introduced throughout Germany and steadily developed through the universities and the courts until the nineteenth century. The *jus commune* was increasingly influential as diverse local customary laws became incompatible with the rise of nationalism and the consolidation of royal power. During this period, canon law continued to develop alongside the "revived" Roman law.

A third area of law, the "law merchant," developed after the Middle Ages to govern business transactions, due to a rapid expansion of trade and commercial centers.

Merchants developed their own system of laws to supplement or improve upon those provided by Roman law, especially concerning the enforceability of contracts.

With the rise of nationalism in the seventeenth and eighteenth centuries, scholars moved away from the *jus commune* toward a search for the universal law of nature. These scholars believed that the mind, through reason, could project the solution to future controversies in a systematic and comprehensive manner.

The first modern codification of laws occurred in the Scandinavian countries in the seventeenth and eighteenth centuries. However, their attempts are not considered successful. Rather, the subsequent codifications by France (1804) and Germany (1896) became models for modern civil codes. Other codifications during this “age of codification” include those of Switzerland, Prussia, Saxony, the Netherlands, and Spain. As a result, the *jus commune* was displaced.

With the revolution of 1789, France became the first modern continental nation, ripe for the introduction of a national, systematized and comprehensive legal system. The French code of 1804 was written very quickly, so the authors relied on the substance of the *jus commune*, royal ordinances and customary law, though they filtered it with their own reasoning. The organization of the French code (*Code Civil de Français* or Napoleonic Code) was modeled after Justinian’s Institutes. It is comprised of five basic codes, the civil, penal, commercial, civil procedure and criminal procedure codes.

The French code has been significantly influential. Napoleon imposed it in the conquered territories of Italy, Poland and the low countries. It was also “received” or imported by Quebec in Canada and by Louisiana in the US. Napoleon referred to the French code as the greatest of his achievements: “One Waterloo wipes out all memory, but my civil code will live forever.”

The modern codes were not mere restatements of existing law. The authors were guided by an intellectual, political and social revolution that rejected the feudal past. Codifications were the product of revolutionary thinking and the rise of the nation-state, so the links to the past were tenuous. As a result, the codes were characterized by protection of private property, enforcement of contracts, and security of the autonomous patriarchal family. Some noteworthy innovations contained in the French code include divorce by mutual assent and adoption.

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Biographical Sketch

Samuel W. Bettwy, J. D., Special Assistant US Attorney; is Adjunct Professor of Law, Thomas Jefferson School of Law, San Diego, CA, US.

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