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The Civil Law and the Common Law: Some Points of Comparison

Introduction

The interest of jurists in legal systems other than their own and in comparative law has been a matter of long tradition. At any rate, during the twentieth century and especially from about thirty years ago, there has been an extraordinary growth of this interest. Now, with the Common Market and all the other expanding programs of international trade and commerce, it is impossible to overemphasize the importance of understanding the nature and function of legal systems of other countries.

In the legal history of Western Europe and of the countries that received their legal systems from these sources, one finds the establishment of the two great legal systems which are often made the basis of comparative law studies. This does not overlook the other legal systems outside of the continental civil law and the common law of the Anglo-Saxon countries. There are of course not only the different legal systems of the Asiatic countries but also within the European continent itself there is the legal system which has long been in effect in the Scandinavian countries, and there are also the more recent developments in the Soviet countries.

All legal systems have the same purpose of regulating and harmonizing the human activity within their respective societies, and in each society the legal system forms part of the culture and civilization as well as of the history and the life of its people. The events of their respective history have led toward certain fundamental similarities and differences in their legal systems. In the countries of Western civilization, the two best-known systems are the civil law and the common law, particularly as exemplified in France and in England.

The concentration in this article on the civil law and the common law is not intended to derogate from the importance and values of other legal systems. At the same time, it must also be recognized that there are many differences, for example, between the laws of France and Germany, as well as between England and the United States. Nevertheless, in each of these two great systems, civil law and common

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law, there are certain characteristics and general attributes that can serve as bases for a general comparison.

There are different ways of trying to explain civil and common law as legal systems. One way might be to examine the elements of resemblance or the points of difference, or even the history of their respective establishment and the methods of their development. A comparison could also be made from the point of view of their social and economic objectives and the methods used to accomplish these ends. All these points of view have a measure of truth, and they should really be appreciated all at once. On the other hand, there are those people who say that there no longer exists any real difference between the civil law and the common law by reason of the parallel developments that have taken place in order to satisfy the same societal needs in general conditions which are similar—the differences which remain being only matters of degree rather than nature. There are also some places in which the civil law and the common law have been functioning together in what may be called a "mixed jurisdiction," like Louisiana, Quebec, Scotland and South Africa. For the present kind of a study, the essential approach is to search for an *understanding* of these two systems, and especially to identify and understand the fundamental differences in their structures, in their methods of thought and in their attitudes towards the law as a legal system.

I. History and Development

A legal system is a living organism; it breathes, it grows, it evolves, it is part of the life of the people for whom it functions. Consequently, the first step in the direction of an understanding of the civil law and of the common law is to glance briefly over their respective history and development.

A. *The civil law*

The term "civil law" is derived from the Latin words *"jus civile,"* by which the Romans designated the laws that only the Roman citizens or *"cives"* were originally privileged to enjoy. For the other people there was the *"jus gentium."* It is sometimes said that the countries of the civil law are those which received their legal system from the Roman law. While this in effect is true, it is only part of the story. Furthermore, this reference to Roman law can be appreciated better in the light of an examination of the nature of its development along with its historical and social evolution during a period of at least one thousand years, from the beginning of the formal written law in the Twelve Tables up to the completion of Justinian's codifications and compilations.

To indicate briefly the salient points which stand out against this background: there was an ancient period with a very narrow legal system which had strict and limited procedural forms. When its insufficiencies caused excessive hardship, there was established the office of the *"praetor,"* whereby liberal influences could make themselves felt and be given concrete application. The strict ancient law, the *"jus civile,"* was tempered and at the same time supplemented by the justice and the equity of the new remedies and procedures developed by the *praetors.*

As public regard grew for the small number of highly skilled jurists, their opinions were often sought for clarification and guidance. The outstanding quality of their achievement brought them and their successors a constantly increasing recognition. In this manner, they served not only as technical interpreters of the written text, but their knowledge and their wisdom also became indispensable elements in the development of the law. In the course of time these jurists came to enjoy the very highest prestige in the law; emperors and magistrates not only sought their consultation and advice but in general followed and adopted their opinions.

During this time, not a matter of years or generations but of centuries, some efforts were made to co-ordinate and group the rules of law; there were also attempts to compile the results of a very large number of actual case decisions, especially the most significant ones.

It was against this background, and to be understood in the light of it, that Emperor Justinian brought together the great jurists of his day and had them compile the body of law that immortalized his name.

During the ensuing centuries and in the Middle Ages, the Roman law was eclipsed in many parts of Europe. However, it reappeared at different times and in various ways, it was modified and reinterpreted, and by the eighteenth and nineteenth centuries it had acquired the profound appreciation of European jurists and scholars. Roman law was at one of the peaks of its prestige when the several political unifications of Western Europe led to the unification of the private law in the national movements of codification, especially in France and in Germany.

The essential characteristics of these legislative codifications fixed the basis and determined the nature of the legal systems of which they were the expression.

B. *The common law*

The common law, as a legal system, is associated with its origin and development in England, where the social and economic and political history as well as the foundation of its law stem from the

feudal system and its incidents. One aspect of this system was that the settlement of disputes was conducted on a purely local level, each region acting independently and without knowledge of what the others were doing. The rights and obligations of individuals flowed from the nature of their personal status within the system.

When the king sought to establish a more important central power, he ran into serious conflict with the local authorities. Nevertheless, in his quality of sovereign judge and source of justice, and to discharge his responsibility for the preservation of peace, he established his own courts with judges who went on circuit throughout the entire country. Even though these were not courts of general jurisdiction, but only competent in certain kinds of cases, they were not well received at first. Suffice it for present purposes to say that the king's courts were the victors in the ensuing struggle for authority. By means of their decisions they created the first uniform rules and the first basis of uniformity in the legal order, by establishing general norms which were common throughout the whole country. It was a form of general law or common law for all parts of the realm; hence the name, common law.

This growth and consolidation of the court system in England took place chronologically much earlier than the evolution of Parliament. After the law-making function of legislation had come into its own importance, there were stages during which there was a deep jealousy on the part of the courts. Since a parliamentary enactment had to be applied by the courts, each statute was by its nature an encroachment on the domain of the common law which embodied the protection of the rights of the people. Whenever the legislation was directly applicable to a particular situation, the courts were obliged to render their decisions in accordance with the text, but whenever any question or doubt could be raised, the statute was given a narrow interpretation so as to minimize its encroachment upon the common law and to preserve a maximum of authority in the courts.

These two historical conflicts, and the way in which they were resolved, provide considerable insight for an understanding of the nature of the common law as a legal system.

A third subject which should be mentioned is the development of the system known as "equity," apart and distinct from "law" but supplementary to it. To make remedies available for harsh situations, to establish new procedures, and in order to meet all sorts of new problems, recourse was had to the authority of the King in his sovereign capacity; he delegated this function to an official called the Chancellor of the Royal Court. In the course of time, this became the Court of Chancery, through which there developed a substantial body of col-

lateral and independent law. Thus, English law consisted at the same time of "law" and "equity."

One can hardly overlook noting the strong resemblance to Roman law, where the praetorian law developed alongside but independently of the *"jus civile."* Furthermore, the more recent movement in England and the United States to combine "law" and "equity" may resemble, more than documentation has thus far established, the definitive consolidations which were eventually effectuated in the Roman law.

It is not entirely unreasonable to consider the English development of equity and its ultimate fusion with law as stages in the evolution of English law through which the Roman law passed many centuries ago. The legal system of the common law is much younger, having had only a few hundreds years of existence. During the first centuries of the history of Roman law, the development was equally pragmatic, based on experience and adjustment; there, also, the sources of law were rather in specific decisions and imperial decrees than in systematic compilations of legislative texts. The first systematic exposition of the Institutes of Gaius in the third century in actuality presented the essence of seven centuries of legal evolution.

The history and the evolution of equity in English law strikingly resemble the development of praetorian justice in Roman law. It may very well be asked whether the common law is not in the process of passing through the stages of development which the civil law experienced long ago, and whether the future of the common law might not in some measure be anticipated in the history of the civil law.

In both the "law" and "equity" branches of the common law, the established body of legal rules came essentially from judicial decisions. According to the declarative (or customary) theory, these decisions were merely the concrete expression or evidence of the common law which, so to speak, had a permanent and universal existence. According to the creative (or judicial) theory, the modern and more frank position is to recognize that the decided cases were the very source and the essence of the law.

II. Legislation and Judicial Decisions

From the foregoing it can be seen that two vital and essential points of reference for a comparison of the sources of positive law in the civil law and the common law are "legislation" and "judicial decisions." To reverse the phrase, in common-law thinking the distinction would be "case law" and "enacted law." It is necessary to examine each of these topics in the two legal systems.

A. *Legislation as the basis of the civil law*

Generally, in civil law jurisdictions the main source or basis of the law is legislation, and large areas are codified in a systematic manner. These codes constitute a very distinctive feature of a Romanist legal system, or the so-called civil law. Although in the form of statutes duly enacted by the proper legislative procedure, these codes are quite different from ordinary statutes.

A civil code is a book which contains the laws that regulate the relationships between individuals. Generally it contains the following topics: persons and the family, things and ownership, successions and donations, matrimonial property regimes, obligations and contracts, civil responsibility, sale, lease, and special contracts, as well as liberative prescription (statute of limitations) and acquisitive prescription (adverse possession). A code is not a list of special rules for particular situations; it is, rather, a body of general principles carefully arranged and closely integrated. A code achieves the highest level of generalization based upon a scientific structure of classification. A code purports to be comprehensive and to encompass the entire subject matter, not in the details but in the principles, and to provide answers for questions which may arise.

The nature of such a code naturally calls for a liberal interpretation in order that it may serve as the basis of decision for new situations. The same method of liberal interpretation likewise prevails for the ordinary statutes in a civil law jurisdiction. There is a great respect and high regard for legislation as the basic source of the law.

A significant feature about legislation in modern civil law is the importance attached to the preparatory works and the draftsmen's comments, as well as the parliamentary discussions in connection with its initial formulation. This is especially true of the codes, and particularly during the earlier periods of their interpretation. Thus, in France the history of the drafts, the observations of the courts, the debates and the changes, were indispensable to the interpretation of the *Code Napoleon.*

B. *Judicial decisions as the basis of the common law*

Looking at the law in England, the picture is a totally different one. During the formative period of English legal history, there was no strong central legislative body, but there were the powerful king's courts.

When a court decided a particular case, its decision was not only the law for those parties, but had to be followed in future cases of the same sort, thereby becoming a part of the general or common law. Thus, the common law, as a body of law, consisted of all the

rules that could be generalized out of judicial decisions. New problems brought new cases, and these enriched the rules of the common law.

Actually, the common law was conceived as being all-inclusive and complete; if a rule had not already been formulated, it was the judge's responsibility to declare it. Thus, judicial decisions were both the source and the proof of the law, pronounced in connection with actual cases.

What gave stability and continuity to this system was the doctrine of "precedent." Once a point had been decided, the same result had to be reached for the same problem; the judge was obliged to "follow" the earlier decision, the precedent. However, since courts are jealous of their prerogatives, the rule of precedent was applied only to the *"ratio decidendi"* or the exact point which was indispensable and necessary to reach a decision. Non-essential points were classified as *"obiter dicta"* and were not binding.

If a new situation resembled a prior case but was not exactly the same, then two possibilities were open to the judge. If he felt that it would be the socially desirable result to have the same solution, he could "apply" the rule of the earlier case. However, if the judge felt the other way, he could "distinguish" the previous decision and leave its application limited to the specific fact situation which it controlled. In extreme situations, a court could brand an earlier case as erroneous and "overrule" it, thereby providing a new precedent for the point involved.

The first two of these techniques, following precedent and applying the rule, assured stability and continuity of the law with the corollary of a reasonable protection of the parties involved and the security of legal relationships. The latter two techniques, distinguishing and overruling, made room for flexibility and permitted adjustment to new conditions.

In the development of the common law, in short, the focal point has been the judge.

C. *Legislation in the common law*

Of course, there is also legislation in the common-law countries. The first striking feature about this legislation is that statutes are usually not formulated in terms of general principles but consist rather of particular rules intended to control certain fact situations specified with considerable detail. Recently there have been some notable exceptions, and it might be asked whether this is the beginning of a movement toward codification.

In considering the place of legislation in the common law, it is necessary to remember the historical fact that the growth of Parlia-

ment was a popular expression to counterbalance the power of the king. For their part, the king and the efficient organization of the king's courts manifested a jealous and sometimes hostile attitude towards Parliament and its increasing power. The judges refused to place any value on legislative history or preparatory works, and they sought by all means to minimize the infringement of their "common law." This resulted in the adoption of very strict methods of statutory interpretation.

In turn, to counteract these restrictive judicial tactics, the drafting of bills for legislative consideration became an art in the expression of succinct detail in order to assure maximum fulfillment of the legislative intent in specific situations.

By way of contrast, in the system of the civil law and of codified law, legislation occupies the most highly respected place as a source of law. The attitude of the courts is not only one of liberal and extensive interpretation of texts. Even in totally new kinds of cases, civil law courts generally look for a legislative text and its underlying principles which they can use in one way or another as a basis for their new decision.

D. *Judicial decisions in the civil law*

It is sometimes said that in civil law jurisdictions the function of the court is merely to apply the written law. This is a very curtailed statement, and it would mean a very narrow judicial function. Actually, when a court applies a law, it has to interpret that law; in the process of interpretation the court may well extend the scope of the law considerably beyond that originally contemplated. By this method of interpretation and by filling in gaps where the written law is silent or insufficient, the civil law court can be considered as "making" law, interstitially.

In this manner, the utilization of prior decisions is mainly on points of interpretation of the written texts, whereas in the common law, the decisions are themselves the source of law and "make" law "from the whole cloth," as it were.

In the civil law system, courts are not bound to follow previous judicial decisions. Each new decision must be grounded on the authority of the legislative text which provides the basis of continuity and stability. This does not preclude the same result in a later case, because the same text and the same reasons lead to the same conclusion. However, there is no binding rule of precedent; each case must be decided on the primary authority of legislation, and the reasons for the decision must be stated. A court may not render a judgment in the nature of a general rule.

In some countries like France and Belgium, the practice has been

consolidated that when a certain point has been consistently decided in the same way by an appreciable number of cases, it becomes *"jurisprudence constante"* and is considered binding in future cases. This serves to stabilize the interpretation of the law.

In addition, after a second *"cassation"* (judgment of lower court annulled and case remanded for retrial) by the highest court of appeal in these two countries, the lower tribunal is obliged to accept the solution indicated.

There is also an increasing tendency among attorneys to cite cases as well as codes and other legislative texts.

Finally, for some topics there are very few legislative provisions, for example, in France, in connection with the civil responsibility for delicts and quasi-delicts. Thus, the elaboration of more detailed rules is necessarily delegated to judicial decisions in particular cases.

E. *Comparative comments*

In comparative studies of civil law and common law, it is sometimes concluded on the basis of the foregoing observations that the net result is approximately the same in both systems. In effect, while the common law starts with a case-law basis it also includes legislative encroachments, and while the civil law starts with a legislative basis, it incorporates developments of case-law. While this is a correct statement, it is fraught with the errors and pitfalls of partial truth.

As sources of positive law, legislation and judicial decisions have their place in both systems, but their relative importance is very different. It is not conducive to an understanding of the civil law and the common law to say that the difference is merely one of degree.

Despite the fact that legislation infiltrates into the common law, and regardless of the increasing importance of judicial decisions in a civil law country, the fundamental difference in the nature of the two systems continues to express itself in many other ways. The statutes in England and judicial law-making in France have not brought about any change in the classification of the respective legal systems. On the contrary, the importance of the difference between the civil law and common law is confirmed by an examination in the two systems of their doctrinal materials, legal education and modes of research, as well as in the organization and functioning of their judicial systems.

III. Doctrinal Materials, Legal Education and Research

As a result of the relative importance of legislation and judicial decisions in the civil law, on the one hand, and in the common law, on the other, there follow a number of other essential consequences,

among which must be mentioned the nature and place of doctrinal materials, legal education and research.

A. *Doctrinal materials*

In civil law countries, the treatises and commentaries of legal writers are generally expressed in the form of systematic expositions and in discussions about broad legal principles. These works formulate general theories about the basic codes and legislation, in relation to the evolution of the legal system as a whole.

In common-law countries, there is not as large a quantity of doctrinal writings, and these are likely to consist of analyses of decided cases with the object of classifying them and distinguishing the rules they represent. The evolution of the law is traced by means of individual points progressively established in a series of judicial decisions. The purpose of these doctrinal writings is thus to compile the decided cases, and then to establish and evaluate their distilled essence. The cases are classified and arranged in a manner which will show up the evolution of the law. As authorities in their pleadings and in their judgments, the attorneys and the judges primarily cite previous cases rather than works of doctrine.

In the civil law, the doctrine is an inherent part of the system and is indispensable to a systematic and analytical understanding of it. The doctrine is not a recognized source of law, but it has exercised a great influence in the development of the law. It molds the minds of students, it gives direction to the work of the practitioners and to the deliberations of the judges, and it guides the legislators towards consistency and systematization.

B. *Legal education*

There is naturally a direct reciprocal influence between the nature of a legal system and the pattern of legal education. The nature of the former promotes the method of the latter, which in turn perpetuates the original character of the system. The program of law studies and the method of legal education establish and fix the fundamental understanding and the mode of thought which condition the individual for his entire professional career.

Legal education for the civil law is centered on legislation, codification and doctrine, on a very high level of abstraction. The great respect for legislation is basic to the judge's approach even when he uses a statute as his starting point for a liberal interpretation of it.

In contrast, legal education for the common law is founded on the primacy of the decided cases; it emphasizes the important role of the king's courts in the development and unification of law, and it

inclines toward a strict interpretation of statutes in order to minimize the legislative encroachment on the judicial prerogative.

Thus, the great names of the civil law are the names of professors who wrote the treatises and created the doctrine, *e.g.,* Bartolus, Domat, Pothier, Savigny, Ihering, Planiol, Capitant, Laurent and Depage. By contrast, the heroes of the common law are the outstanding judges who contributed most to its development, like Coke, Hardwicke, Mansfield, Marshall, Story, Holmes and Brandeis.

In England, the training of young jurists was long considered to be a function and responsibility of the practicing bar; the Inns of Court still provide an indispensable stage in the preparation of barristers. The university role in legal education is relatively recent. On the Continent, the study of law was always a part of the higher education of the universities. In the United States, legal education has been established as a program of university instruction, and there has also been a growing recognition of the doctrinal writings of outstanding law professors.

In the specific courses of study in England and in the United States, the law student finds himself engaged in the discussion of actual and hypothetical practical problems. He learns very carefully the cases which have acquired great importance, and he develops a skill in analyzing judicial decisions in order to identify the narrow holding of a judgment which is entitled to the application of *stare decisis* as a precedent, while at the same time learning to distinguish it from other cases.

In civil law countries, the student starts his study with codes and textbooks. He learns about the Justinian codifications and their influence on his present-day legal system. He is taught general principles and how to think in abstractions. It becomes part of his being to appreciate classification and co-ordination of subject matter, and to take for granted a comprehensiveness of the law as systematic and a whole. It is only recently in countries like France and Belgium that the law student has been required to read some decided cases, and he usually attaches only secondary importance to the judicial decisions. He concentrates on the codes, the treatises, and the notes taken during the formal lectures by his professors.

Of course, the common-law student does not completely ignore law books of general import and philosophical speculation. At the same time, the civil law student now has occasion to come to know and to appreciate certain judicial decisions, especially in the new programs of *"travaux pratiques,"* which often include the study and discussion of actual cases and practical problems. Nevertheless, it is necessary to recognize that the training and formation of the law student are inevitably predicated upon the nature of the legal system.

Thus, we return to the original affirmation that judicial decisions determine the nature of the common law system, while legislation is the basic characteristic of the civil law.

C. *Research*

The same affirmation can be made in connection with the methods of legal research. In the civil law system, inquiry usually begins with the codes and other legislation, then it seeks out the commentators and the treatises, and only in third place do cases come in for consideration and evaluation. Furthermore, without the rule of precedent and the principle of *stare decisis,* prior judicial decisions are not necessarily accepted as weighty authorities. Actually, each new decision rests primarily on the original code or legislative text.

In the common law, as such, research is focused essentially on prior judicial decisions, as a result of the very nature of the system. Of course, legislation is controlling where applicable, and it has to be examined to determine questions of applicability, but here again the judicial interpretations become the binding authority whereas in the civil law tradition, each case is related back essentially to the legislative authority.

Neither in the civil law nor in the common law is the indicated method of research an exclusive one. However, in each system there is a basic approach and method of thought that is distinctive in its emphasis.

IV. Judges and Courts

The differences in the nature of the legal systems of the civil law and the common law also manifest themselves with reference to their respective judges and courts. Of course, the essential objective is everywhere the same: to answer questions of law and to resolve disputes. However, in order to understand the two systems properly, there are disparities which must be recognized and evaluated. For more specific identification of ideas, it is useful to consider five points of reference: the training and recruitment of judges, the method of arriving at decisions, the personalization of opinions or the collegiality of judgments, the manner of writing opinions, and the attitude of the judge in case of silence and insufficiency of the written or established law.

A. *The training and recruitment of judges*

The training and the recruitment of judges and the nature of their tenure are very important factors in determining their modes of

thought, their methods of work and the ways in which they decide cases.

In the common-law countries, there is no particular training for judges apart from the fact that it is necessary to be an attorney or barrister with a number of years of experience and reputation. After having succeeded as a practitioner, one is either appointed by the government, as in England, or elected by the people, as in many American states. The background of his experience in practice conditions his mode of thought and his method of work in discharging his responsibilities as a member of the court. In a legal system based essentially on decided cases, the judges must necessarily be practical, and the elevation of a member of the bar to a seat on the bench is the perfectly natural procedure. It is to be expected that their manner of thinking, working and deciding legal questions should be a continuation of what it was when they were attorneys and barristers.

In certain civil law countries like France, there is a greater difference between the judicial function and the practice of law. The lawyer and the judge both have the same legal education at the university level; after that, however, each individual must make his choice of career, and goes into the practical apprenticeship training for the branch of the legal profession he has selected. Going directly from law study into a judicial association, the future judge approaches the law primarily through the theoretical education which he has received. He finds himself with other people who envision the law in the same way as he does, that is, as a comprehensive body of legal principles coordinated at a high level of generalization and abstraction.

B. *The method of deciding cases*

For their point of departure, civil law judges search the legislation for the controlling principle and the rules which govern the subject; this principle or rule is then applied or interpreted according to the particular facts of the case in dispute. The reasoning process is to go from the general principle to the special case.

On the contrary, common-law judges search in the previous decisions for a similar case, and are guided accordingly. If a statute is involved and the text is clear, the judge abides by its provisions; but if doubt or ambiguity can avoid the statute's applicability, there is again resort to a search of previous decisions for common-law authority as a basis of decision. From another point of view, it can be said that in a common-law country the judge must give effect to a clearly-stated statutory rule, while the judge in a civil law country is sometimes given wide discretionary powers through broadly stated legislation.

Another point of interest is that the common-law jury trial in civil cases left the determination of facts to the jury, so that the judicial

technique of reducing the power of the jury was to broaden the scope of "matters of law" which fell within the judge's power. In the civil law, a jury in civil cases is either very rare or nonexistent, so that the judge is in complete control of all phases of the trial.

All this does not prevent the common-law judge from discussing general principles nor the civil law judge from taking cases into consideration. However, they do so with a difference in point of view and in method that is very significant even in situations which bear substantial resemblance to one another.

C. *The personal or collective character of decisions*

In the continental countries, judges enjoy a desirable prestige and security, but their emoluments are perhaps more modest than elsewhere. By reason of the usual collegial system of their organization and procedure, the judges always remain anonymous; consequently, the bench does not attract the strongest personalities of the profession. In England, Canada, the United States, and other countries of the common law, opinions are identified with their judicial authors; there can be dissenting or concurring opinions, and each judge has the possibility of setting forth his own point of view. In this manner, the personality of a great jurist makes itself felt and appreciated, and such a person makes a substantial contribution to the development of the law.

D. *The manner of writing opinions and decisions*

When it comes to the writing of judicial opinions and decisions in the two systems, the difference is very striking. In the common law, there is first a more or less organized exposition of all the facts that led to the controversy and that furnish the base for the analysis of the legal problem. Then an examination is made of the previous cases which resemble the present one, especially those cases which have been cited by the parties in the litigation. All these have to be analyzed and evaluated in order to determine which are analogous to the case in hand and which are to be distinguished. Finally, the court decides which precedents are in point, and it is on the basis of their authority that the new decision is grounded.

In the civil law, decisions are much shorter; it would seem that the higher the court in the judicial hierarchy, the shorter its judgment. A meager outline of the essentially relevant facts is followed by a succinct statement of the applicable principles and rules of law; then there is the conclusion which results from the application of the law to the facts of the particular case. There is a strict prohibition against the rendition of a judgment in the form of a general ruling. Thus, it

is evident how much the manner of writing opinions reflects the basic mode of thought for legal problems and for their solution.

Again, while the respective judges have different approaches in the selection of relevant authorities, it would not be correct to leave the impression of a complete differentiation between the two systems. On the one hand, the court reports of the common law may well contain important discussion and substantial development of general principles. On the other hand, in civil law countries, the record files of the judge or of the *Ministère Public* often contain all the details and the facts of the dispute. Nevertheless, as already noted in other contexts, the point of departure and the method of approach are altogether different, again reflecting the difference in the nature of the two legal systems.

E. *Silence or insufficiency of the written or established law*

Another important item of difference between the common law and the civil law is found in the attitude of the judge in the event of the silence or insufficiency of the written or established law, the unprovided-for case. This does not present any problem for the common-law judge; he is then entirely within his field if he finds or makes the rule of decision. By contrast, for him the difficulty arises when there is a pertinent legislative text not to his liking; the challenge then is to restrict the scope of its application.

On the other hand, by reason of the legislative basis of the civil law, the judge in this system finds himself in an embarrassing situation when the written law is silent or insufficient on an essential issue. The judge cannot refuse to adjudicate under penalty of being guilty of a denial of justice. The various civil law countries have adopted different formulas to guide and instruct the judges in this respect. Article 1 of the Swiss Civil Code authorizes the judge to render the decision which he would make if he were legislator; in France and in Belgium, he is given only the instruction to adjudicate. Article 21 of the Louisiana Civil Code indicates that the judge must decide equitably according to natural law and reason or accepted usage. In Germany, the tradition is that the judge must fill gaps in the written law; one way of doing this is to make use of customary law as a source of law, or else to resort to general principles.

Whatever the explanation given (to fill in gaps or to effectuate the presumed intent of the parties), or the technique used (interpretation or analogy, recourse to custom or general principles), the civil law judges are not always limited to a mere application of the law; in effect they are obliged to make law. Does this not then have the effect of eliminating the important distinction between the common law and the civil law?

The answer must be in the negative! In the first place, in a Romanist legal system, the written law is the supreme source of law; it is only in the case of silence or insufficiency of the written law that the judge is obliged to be creative. This mode of judicial legislation by the civil law courts represents only the exception, only a very small fraction of the totality of the law; whereas, in the common-law countries, the principal mass and all the residuary areas of the law are what is called "judge-made law" because the essential source of this law is in the decided cases.

In the second place, the common-law judge directly creates the rules of law; this is the significant aspect of his function and of his official authority. When a civil law judge establishes new rules of law, he does so either by virtue of an exceptional legislative delegation or in most instances by virtue of his power of interpretation of the legislative text. In this latter case, it is still in the written law that he seeks the applicable general principles or the bases of a reasoning by analogy.

In the third place, the system and the character of completeness of the codes in civil law countries seriously restrict the scope of this judicial function.

Finally, in the extent to which it is exercised, this creative function of the judicial authority remains marginal and insufficient to change the nature of the legal system.

In summary, the history, the sources and the nature of its development are never effaced from a well-established legal system.

Conclusion

Even though it be admitted that the civil law and the common law started from opposite extremes, it is sometimes said that as a result of the movements each has made in the direction of the other, there is no longer much difference between them. The same social needs, and similar economic and technical conditions, have led to the adoption of similar solutions for their legal problems. If it is true that the results are so close to each other, the methods used to reach them are nevertheless extremely divergent, and the matter is not that simple.

Conversely, neither would it be correct to say that there has been no *rapprochement* between these two great systems. The place and function of legislation and judicial decisions in the civil law, on the one side, and in the common law, on the other, are not so strict as to be mutually exclusive.

Each system possesses strong characteristics of a distinct and comprehensive nature that establish its own individuality. This does not prevent a country having one of these legal systems from borrowing or incorporating some of the traditional features of the other. However, when this happens, the extent of incorporation is relatively so slight

that it does not have the effect of altering the fundamental nature of the system, which remains in the final analysis what it has always been.

The matter of "mixed jurisdictions," where major areas of both civil law and common law have come together into a living continuity, as in Louisiana, Quebec and Scotland, is another topic and one of great interest. However, it is much too extensive for more than mere mention at this time.

It is apparent that the purpose of these comments has not been to reach a relative evaluation of these two great legal systems. In its own ethnic and historical framework, each system has served well the society in which it functions; each has demonstrated its ability to satisfy the social and economic needs of a society in constant change. Each has also maintained a balance between the elements of flexibility and adaptation, on the one hand, while assuring the essential attributes of stability and security, on the other.

In every country, a legal system is a part of the life and the culture of the people for whose needs it has developed. Its evolution, including its susceptibility to outside influences, cannot be dissociated from its own characteristics. This should never be lost from sight; this is what makes for the usefulness of comparative study in a world where international relations and activities are taking an increasingly important place.