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1952

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Max Rheinstein, "Common Law and Civil Law: An Elementary Comparison," 22 Revista jurídica de la Universidad de Puerto Rico 90 (1952).

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COMMON LAW AND CIVIL LAW: AN ELEMENTARY COMPARISON

MAX RHEINSTEIN*

For every Puerto Rican lawyer, it is elementary knowledge that the difference betwen the legal systems of his own beautiful island and the continental United States of America exemplifies to some measure that difference which exists between the Western world's two great legal systems, the Civil Law and the Common Law. In an article dedicated to the University of Puerto Rico on the occasion of the 50th anniversary of its foundation, it may thus not be inappropriate for one who has had occasion to become acquainted with both legal systems to express some of the ideas about their similarities and differences as they have come to present themselves to him after many years of observation. But let us first try to define what we shall mean by those two terms, Common Law and Civil Law.

Foreign law, to a state court in the continental United States is not only the law of a foreign country but also of any sister state in the Union. However, their laws are foreign more in name than in substance and almost the same statement can be made with respect to the laws of most parts of the British Commonwealth of Nations. A well trained American lawyer will not find it difficult to find his way in the law of England, of Ontario, Victoria, the Bahamas or Nigeria. He is familiar not only with the language in which the laws, cases and law books are written, but he will also feel at home in the general legal atmosphere. For good reason, most American states admit to

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the bar "on motion" and without an examination any lawyer who has had his training and a certain practical experience in any jurisdiction in which the Common Law prevails. Properly, too, this privilege does not extend to a lawyer who has had his training and practice exclusively in the "Civil Law". Common Law and Civil Law, these are the two categories within which all, or almost all, of the legal systems of the modern world may be grouped. Both groups are respectively characterized by their origin.

The Common Law group contains those laws which are derived from that law that was administered by the one set of central courts of His Majesty The King of England. Backed by the strong central power of the king and supported by a centrally organized legal profession ,these royal courts of Westminster succeeded first in overshadowing and finally all but dimishing the innumerable local, ecclesiastical, commercial and other special courts of England, and in thus establishing as the common law of the realm that set of traditions, practices, precedents, rules, concepts and modes of thought and argumentation that had been developed in the centuries-long cooperation of the organized bar of these courts and their judges, who themselves originated from, and forever remained closely connected with, that bar. Having thus established themselves as the courts or court, and their law as the law of England, their law was carried to the four corners of the earth by those English lawyers who invariably followed the English settlers wherever they went in their colonizing ventures. Whatever may have been the law by which the early colonists of New England or other parts of the North American Continent regulated their community affairs, at the time of the Revolution English Common Law was firmly established as the law of the thirteen colonies and later states, and with the subsequent expansion of their union the realm of Common Law has been extended over the entire continental United States, with the sole, but somewhat uncertain exception of Louisiana, as well as over part of the American insular possesions. Other English settlers or conquerors have brought the Common Law to the major part of Canada, to Australia and New Zealand and to the major part of the British possessions in Africa, in Central and South Ame-

rica as well as in Asia, including the regions now constituting the new Dominions of India and Pakistan and the new Republic of Burma. However, in its oriental regions, the Common Law does not have the same scope of application as in the West. Matters of personal status have remained under the domination of the religious laws and the Common Law is the law of procedure and of business ,finance and industry. If we count these oriental regions as Common Law countries, we can say that at present the Common Law is holding sway over a territory of a total population of about 300 million.

While the Common Law is characterized by its having been centered in one set of the courts and its organized bar, the Civil Law has been centered around a book and a set of universities. The book is the Corpus Iuris Civilis, the codification or, better, the compilation, of the Roman Law undertaken in the days of the very decomposition of the Roman Empire by its very latest protagonist, the Byzantine emperor Justinian (527-565 A.D.). Long forgotten, the Corpus Iuris was rediscovered in the 12th century by the legal scholars of the University of Bologna, whose law school was developed into the center of European legal learning by several subsequent generations of outstanding personalities. Yet, the Roman law which was rediscovered by these Bolognese scholars and, by them and their successors in other places, expounded and adapted to the needs of change and changing times, was not in force as such in any place. Since it was not the law of a powerful court it could not, like the English Common Law, suppress and eliminate, but only influence and supplement, the local laws of continental Europe. An ever increasing number of administrators of the numerous princely states, large, medium, small and minuscule, of judges, notaries and advocates, grew up to be trained at the universities in the Roman Law or the *Usus Modernus Pandectarum,* but in actual practice they had to apply the Roman law techniques to innumerable local and other customs of varying Germanic origin, to village and borough customs, practices of the law merchant, ecclesiastical canons and local statutes of the most different kinds. With the consolidation of the national states the demand for national legal unification was satisfied with those great national codifications whose line begins with the

Prussian Code of 1794 and whose high points are marked by the French Civil Code of 1804, the German Civil Code of 1896 and the Swiss Civil Code of 1907.

While all those laws which are derived from the Common Law of England have in common not only one particular method of thought and argumentation but also, as far as statutes have not interfered, a body of rules, principles and maxims, the community of the Civil Law systems consists more in a unity of formal technique than of content. If the codified laws of the several Civil Law countries are in many respects similar to each other not only in form but also in substance, such latter similarity is due not so much to any common conservation of Roman law rules as to the fact that the similarity of conditions in modern countries has in that process of complete overhauling which, together with national unification characterizes codification, produced similar solutions, as well as to the further fact that two or three codes have evidently served as models for other countries. Through French arms the Napoleonic codification was carried to Belgium, Luxenmbourg and those parts of Poland which in Napoleonic days had been constituted as the Grand Duchy of Warsaw. The outstanding qualities and the immense prestige of this codification resulted in its imitation in the Netherlands (1835), Italy (1869), (replaced by the Code of 1942), Roumania (1864), (replaced by the Code of 1939), Spain (1888), Portugal (1867), and partly through these latter countries, to practically all the republics of Latin-America, in many of which ideas of different origin, foreign and autochthonous, became also influential, however. The territories of this group, which also contains th vast regions of the French, Belgian, Dutch, Portuguese and formerly Italian colonial empires, as well as the formerly French regions of Quebec, and, though to a limited extent, Louisiana, the former Spanish regions of Puerto Rico and Philippine Republic, and some Levantine countries, especially Egypt, are sometimes spoken of as constituting the realm of the Romance laws. Far-reaching similarities exist within this group not only among the civil codes, but also with respect to procedure and to general traditions and modes of legal thought. French legal literature still constitutes a common, although often, small base of legal learn-

ing and lawyers from the various parts of this group of countries can converse with, and understand, each other almost as easily as lawyers from different common law jurisdictions. The little word "almost" should not be overloked, however. Italian and, let us say, Dutch or Mexican law, not to speak of Louisiana or Brazil, are farther apart from one another than, let us say, the laws of Illinois and New Zealand. They all may still be regarded as in some sense belonging together when they are contrasted with those laws which are sometimes said to constitute the Germanic group. The common basis of these laws is the theoretical learning that was developed in the universities of Central Europe in the 18th and 19th centuries, especially the so-called Pandectist School. It influenced not only the form but, in varying combinations with local and modern ideas, also the substance of four great codifications, viz. the already mentioned Prussian Code of 1794, which has now been superseded by the German Code of 1896, the Austrian Code of 1811 and the Swiss Code of 1907. The Prussian Code has had a certain influence in Argentina, the Austrian Code has expanded from beyond the formerly Austrian territory into parts of the Balkans, the German Code was taken over almost literally in Japan and, together with French influences, was instrumental in the modernization and codification of the law of China, and of decisive influence in the recent codification of the law of Greece. The Swiss Code has been taken over almost literally in Turkey and, together with German and French ideas, has been influential in the modern codification of Brazil.

As a third type within the major group of the Civil Law one may regard the law of the Soviet Union. In its social, economic and political content, it is, of course, thoroughly different from the laws of liberal countries, both capitalist and socialist. Soviet lawyers will also viogorously deny that their law has anything in common with that of the bourgeois world. However, not even the Bolshevik Revolution was able completely to break the traditions of legal thought which had been developed in Czarist Russia in the course of that Westernization which had been begun by Peter the Great and continued by Catherine II and her successors. The conceptual tools of Soviet legal thought, even in the socialized sector of the economy,

are those of the general Civil Law heritage, and the Civil Codes of the several Union Republics are but condensed versions of a Czarist draft code that had been prepared upon the basis of common European traditions.

There remains a fourth group of Civil Law countries, viz. the Union of South Africa and the Dominion of Ceylon. Both were once Dutch colonies and in both the basic features of the legal systems are still determined by the so- called Roman-Dutch law, i.e. that thoroughly transformed version of Roman law which was elaborated by the Dutch jurists of the 17th and early 18th centuries as a common supplement to the divers customs of the several provinces of the United Netherlands. A peculiar position is also occupied by Hungary and the formerly Hungarian parts of Czechoslovakia, where there is still in effect a largely uncodified law the form and substance of which are decisively determined by the general Central European learning of the 19th century. Finally, there is Scotland, where the Common Law of England has never been oficially introduced, but where, similar to Louisiana, Common Law techniques have considerably modified that combination of Scottish customs and Civil Law learning which had moulded the peculiar system of Scotch law.

Our brief survey has covered almost the entire world. Everywhere we find legal systems which can be counted as belonging to either the Common Law or the Civil Law group. Differences are considerable, however, within each of these groups, and in the vast regions of the Near and Middle East of Africa and Oceania, both the Civil and the Common Law are not more than a more or less superficial layer superimposed upon a base of such highly developed religious laws as those of the Hindus, the Mohammedans or the Jews, or of tribal laws of more or less primitive native populations.

One small group of countries cannot be reckoned among either one of the two great groups, viz. those of Scandinavia (Sweden, Norway, Denmark, Finland and Iceland). Their laws of Germanic origin have experienced some influence of Roman law thought and learning, they have undergone some partial codification, but they have preserved a peculiar character of their own, both in their traditions and in their remark-

ably progressive modern legislation. The differences between the several families of the Civil Law group are so considerable that it might be justified to regard the Nordic laws as another, though peculiarly different, family of the Civil Law group. Their special character is more clearly recognized, however, when they are regarded as a separate group of their own.

II

The differences within the Civil Law group are so considerable that it is not easy to find any characteristics which they might have in common when they are all compared with the Common Law group.

Many observers have seen the main difference between the two systems in the roles assigned to precedent. In Common Law doctrine precedent is binding, in Civil Law theory the judge is not so bound and is assumed to decide every case upon the basis of his own, independently arrived interpretation of the statute. Actually the role of precedent is quite similar in both systems. Every law student is familiar with the manifold techniques, especially that of distinguishing, by which a Common Law judge can get around an inconvenient precedent. In Civil Law countries several factors impel the courts to pay considerably more attention to precedent than the theory presupposes. The judges of lower courts know that their decisions can be appealed to a higher court and that supreme court judges are unlikely to change a position they have once taken, especially when that position has found expression in a "jurisprudence constante", i.e. a line of consistent supreme court decisions. Where the judges are government appointed career men, as ey are almost everywhere —a conspicuous exception is constituted by Switzerland— they also know that too many reversals do not look too good on their personal records, which form the basis for promotion; and, after all, every career judge hopes one day to find himself on the coveted bench of the supreme court. Furthermore, simply following precedent saves intellectual labor. Judges are too busy in every single case to engage in an independent interpretation of the law. Finally, and perhaps of the greatest importance, orderly social life, especially the business life of

a credit economy, requires legal stability and predictability. The public must know what the law is and consistent disregard of precedent would be socially intolerable. For all these reasons, precedent is being followed with a regularity which is not much different from that found in Common Law countries and cases are cited by Civil Law lawyers and judges almost as frequently as here. In some countries the role of precedent has even been formally institutionalized. If one Section of the German Supreme Court has once decided a question in one way, no other Section may decide it differently until the problem has been placed before a meeting of representatives of all sections of the Court. Similar provisions exist in Austria and in other places, but not in France, where upon a revesal by the supreme court, the Court of Cassation, the intermediate appellate court to which the case is remanded, is free to disregard the opinion of the supreme court and is bound by it only after a second reversal which, in such a case, must be pronounced by a full meeting of all supreme court judges. Needless to say, that such a refusal to abide by a supreme court holding is of rare occurrence. In Germany, on the other hand, it has been held that a lawyer becomes liable to his client when in his handling of the client's affairs he has overlooked an important supreme court decision. A more radical recognition of the factual role of precedent can hardly be imagined. Yet, in spite of this far-reaching role of precedent, the Civil Law doctrine of the lack of binding force of precedent is not entirely without consequences. It is somewhat easier for a Civil Law court to get away from a precedent recognized to be erroneous or to break away even from a *jurisprudence constante* where new social conditions require a change. It can and does happen that a supreme court reverses itself, or even that a humble trial judge defies the Supreme Court. Only, if he does so, he better fortify his decision with an opinion so elaborate and comelling that he convinces not only the community of the legal profession, but also, the supreme court.

The degree to which precedent is actually followed, is not the same in all Civil Law countries. It depends on local attitudes and traditions and also, to a perhaps decisive extent, upon the technical state of law reporting and indexing. Where

cases are extensively reported and well indexed as in Germany or France, the likelihood of an actual practice of *stare decisis* is greater than in a country like Spain, where it is not easy to find the case in point. In the United States, too, precedent could hardly be followed without the tools provided by the West Publishing Company and its competitors.

Another difference is allegedly found in the different roles of, and attitudes toward, statute law. A Common Law lawyer still regards the law as basically unwritten and the statutes as constituting but a patch upon the body of the unwritten common law which would be able to yield a solution for every conceivable controversy even though there were no statute law at all. That attitude, which also implies that statutes in derogation of the common law be interpreted narrowly, is still the one usually professed by common law lawyers. For the civilian, statute law plays a different role. Starting with the democratic idea of the separation of powers he holds that the citizen cannot be bound by any rules other than those formally enacted by the duly elected representatives of the people and that there can, therefore, not exist any law outside the formally enacted statute. Hence, a statutory basis must be found for every decision and, if necessary, the statute, especially a code, must be made to yield an answer through the processes of extensive interpretation and analogy. Yet, significant though this different attitude towards the written law is, its importance must not be exaggerated. It could not differentiate the civil law from the common law before the modern codification and the rise of democratic ideas, and the notion of the all-comprehensiveness of the statute law does still not exist in the countries of e uncodified Roman-Dutch, Hungarian and Scotch law. Besides, even in the classical countries of the Civil Law, Italy, France and Germany, large parts of the law, especially of administrative laws, are uncodified judge-made law of a type quite similar to that of the Common Law. The occurrence of "judge-made law" has not been limited to Common Law countries. It played a considerable role in Civil Law jurisdictions in pre-Code days, it persists for the uncodified branches of the law, and at times, especially recent ones, it has repeatedly assumed the task of

informally changing a formally unchanged written law through the process of shifting interpretation. The courts had to assume, and have assumed this task whenever a legislature has turned out to be incapable of bringing about changes which were imperatively demanded by social conditions. When the French Parliament remained inactive in spite of a rising popular demand that liability for automobile accidents be made stricter than the liability for negligence generally established in the Civil Code, the Court of Cassation, in a series of sensational decisions of the early 1900s, "discovered" a statutory basis for strict liability in a Section of the Code in which nobody had been able to find it during the preceding one-hundred years. When the German Reichstag found itself stymied with respect to the popular clamor for relief for those whose savings had been lost through the Great Inflation following World War I, it suddenly decreed that debtors were not completely discharged when they had paid their debts in valueless currency, basing this new rule upon an old section of the Civil Code which prevailing opinion had so far held to be insufficient for such a revolutionary innovation. In the United States judges have to be creative because the legislatures, especially those of the states, are ill suited to take care of all, or even all major needs for legal change. In some European countries, especially in Central Europe, an alert staff of the Ministry of Justice is keeping track of needs for legal change and is constantly feeding to the legislature the appropriate drafts. As long as this cooperation between Ministry of Justice and legislature is functioning well, the legislature will be jealous of the judiciary and the law-creating powers of the latter will be kept within the narrowest bounds. These powers have to, and do, expand, however, as soon as the law-making agencies relax or fall down upon their job. This same interrelation can be observed in Common Law countries.

Due to the greater activity and alertness of the English Parliament, the law-creative powers of the judiciary are generally regarded to be narrower in England than in the United States. With the growth of such institutionalized watchdogs of current legislative needs as the New York Law Revision

Commission or the Louisiana Law Institute, it can be predicted that the creative role of the legislature will increase at the expense of the bench. To some extent the allocation of law creative powers between a legislature and judiciary is also dependent on their relative political complexions. In the United States the judiciary has for long periods been more conservative than the legislatures. Utilizing the techniques of narrow statutory interpretation and judicial control of constitutionality of legislation, the judiciary has sought to restrain the radicalism shown by the legislatures in their unsystematic and haphazard activities, simultaneously providing some compensation through a more cautious process of judicial law-making. By prevailing opinion among "liberals" this situation was consistently decried and criticized. More recently it seems, however, as if liberal reformers placed more trust than in the legislatures in the once criticized courts, especially when they are staffed with the products of liberal college and law school teachers. The relative roles of legislature and judiciary have thus been shifting in both Common Law and Civil Law countries. While at present in many Civil Law countries the role of the legislature is more important than that of the judiciary, the difference is not so much one between Common Law and Civil Law as one conditioned by varied and varying constitutional and political circumstances.

What are then essential differences between Civil Law and Common Law? They consist, first of all, in those features which are due to an important difference in the historical growth of the two systems. The Common Law, it has already been observed, grew up as the law of *one* strong court of one strongly centralized country. Its creators were the judges of that court, supported by the strongely organized legal profession that came to be attached to it. It was the law that was actually in force in England and that was created, expounded and administered by judges. The Civil Law, or at least its common core, was not a law administered by judges but one expounded by professors. It grew up not in a court but in universities, and in the form in which it was taught there it was not in actual effect anywhere. Thus, the Common Law developed as a case law, casuistic, often incoherent, fre-

quently inconsistent in terminology, cautiously moving from step to step by trial and error, but close to life, with a strong sense of reality and a flavor of judicial individuality. The Civil Law, on the other hand, is markedly professorial. Professors are teachers and writers. They are concerned with lucidity, clarity of exposition and with consistency of structure and terminology. But their cloistered and sheltered existence also results in a certain remoteness from life. All these traits can be observed in their product, the Civil Law, especially in its older stages. However, that difference between a law centered around judges and one centered around professors is no longer so profound as it once was in the past. Professorial influence has been declining in Civil Law and rising in Common Law countries, especially in the United States. In Europe, professorial influence has been curbed by the rise of nationalism and the concomitant legal isolation of the several nations. For centuries the science of the Civil Law had a universal character. The same Roman Law was expounded at the universities of all countries. This universal character was heightened by the community of Latin as the *lingua franca* of the scholars and by the free movement of the professors from university to university. The use of the vernacular, the national codifications and, quite particularly, the establishment of national supreme courts in the place of the innumerable local courts of last resort have put an end to the ancient universality of legal learning. Thus, shortly after the unification and codification of the law of France, a French professor could say: "I do not teach the Civil Law but the Code Napoleón." The same fate befell the legal learning of all Civil Law "code countries". Today, there does no longer exist *one* science of Civil Law; there are as many legal sciences as there are countries and in each of them the case law of the respective supreme court has come to occupy a pre-eminent place. True, learned treatises and articles are still influential in judicial practice and of central importance in legal education. But while enlightment and information is still sought and found in learned treaties, there has come to the fore another type of writing which is now playing the greatest role in the everyday practice of the courts and the

lawyers, *viz. the annotated* editions of the codes and statutes. Everywhere in Civil Law countries the law is thus no longer so decisively shaped by the scholars. The judicial influence has been on the rise and also the influence of those members of the high civil service who are leaving their mark not only as statutory draftsmen but also as highly authoritative annotators to the statutes drafted by them.

The exactly opposite development can be observed in the Common Law countries, especially the United States. Judicial influence was at its zenith as long as the Common Law was the law of one set of courts. Today, the Royal Courts of Westminster are only one set of Common Law courts among many. The Common Law would long have fallen apart into fifty or more related systems if its exposition and development had been left entirely to the courts. As long as there existed in Europe a multiplicity of small local courts of last resort, the unity of the Civil Law was preserved through the universities. This same task has now fallen to the law schools of the Common Law countries, especially the United States. Irrespective of location, the American law schools do not so much teach the local law but American law, just as American law is treated as a whole in the law reviews, the great treatises, or the Restatement. Slowly, but definitely, the professorial influence has been rising in American law. In constitutional law, where the entire national scene is dominated by one great court, the great names are still those of Marshall, Holmes, Brandeis, or Cardozo. In the ordinary Common Law, the scene is dominated by men like Ames, Wigmore, Williston, Bogert, Beale, or W. W. Cook. The last two names, to which others might easily be added, indicate the enormous influence which has been exercized by professors in the field of conflict of laws. If professorial influence has been decisive, it has been there, and it has not always been fortunate. But whatever views one may take of the gradual shift from almost exclusive judicial to increasingly important scholarly influence, its existence is undeniable and it has become indispensable to prevent American law from falling apart. The result is that American law is becoming more systematic, more consistent, and more precise in its terminology. Any glance at

the Restatement will illustrate this phenomenon. Very fortunately, so far at least, American law has not lost its closeness to life. Its long history and continued growth as a case law has also not yet been obliterated. It is conspicious in every one of its branches, but least, perhaps, in the conflict of laws.

The traditional consistency of the Civil Law is due not only to its professorial origin, but, during the last one-hundred and fifty years or so, also to the very active role that has been played in its development by governments and their bureaucratic civil servants. Where legislative needs are constantly watched and laws drafted by highly trained governmental specialists more inner consistency can be achieved than in a law that grows haphazardly from case to case. There are many problems which but rarely come to judicial decision at all and in innumerable cases the outcome is determined not so much by judicial considerations of long range consistency as by the accidental circumstances of personality, the equities of an individual case, or advocatorial skill. Thus it happen that we have one set of cases insisting on strict compliance with the statutory formalities of a will or the creditor-protecting device of formal administration proceedings, and another set of cases opening easy avenues of evasion; or that we insist on prohibiting bigamy and simultaneously establish an almost irrefutable presumption of the dissolution of a prior marriage; or that we establish narrow statutory grounds for divorce and simultaneously tolerate the Reno divorce. The illustrations could easily be multiplied. *Sapienti sat.* Here we have a real difference to the Civil Law, at least as it exists in the modern nations of Europe. Once a certain policy has been decided upon, it is carried through with consistency, and judicial attempts at frustrating legislative policies are quickly stopped by new legislation initiated by the Civil Service.

The very active role of legislation has also resulted in a considerable degre of modernity of present-day Civil Law. Repeatedly in its long history, the Civil Law has been completely overhauled. After one thousand years of development, the law of the Roman Empire was adapted in the 6th century A.D. to the needs of his day by Justinian. Obsolete rules and institutions were formally eliminated and new laws were for-

mulated to take care of the needs of a new age. A similar process, only this time unofficially, was carried through by the Glossators and especially the Commentators, who adapted the Corpus Juris to the requirements of their times. Finally, the modern codifications again constituted the taking of an inventory. Obsolete law was relegated to the place where it belongs, the museum of legal antiquities, and new ideas of the 19th or 20th century found legislative expression. True, the conceptual framework of the codes is still to a large extent that of Roman law, but in their contents the codes reflect the policies and ideas of the modern age. When the German Civil Code took effect at midnight of 31 December 1899, the entire old law, as far as it related to topics covered by the Code, lost its force and was replaced by the brand-new law of the Code. "One stroke of the law-giver's pen, and whole libraries are turned into waste paper."

Nothing comparable has ever happened in the history of the Common Law. Never has there occurred such a radical break with the past. Certainly, old law is constantly overruled or repealed. But never has there been any general overhauling. In consequence, the Common Law has been carrying with it the growth of centuries. It is a law well adapted to modern needs, but it has achieved this end more through gradual adaptation of ancient institutions than through radical elimination and new creation. It has been carrying its long history with it. There is implied in that fact a certain romantic flavor of aesthetic attractiveness, but also an occasional discrepancy between the legal rules and the needs they are to serve. The, so to speak, historical character of the Common Law, is also responsible for another of its characteristic traits. The royal courts at Westminster were not easily accesible to the common man; they were the courts of the great men of the realm, and the law developed by them was a law especially adapted to the needs of great men of a landowning aristocracy and later of big business and finance. The little man's problems but seldom reached these courts whose very costs could but deter him. Important branches of the Common Law, even in the United States, still bear that imprint of their past. The law of real property, especially of landlord

and tenant, the law of trusts, of administrations of decedents' estates, of matrimonial property and, above all, the law of procedure, are all worked out with admirable adaptation for the needs of men of substance. Whether they are always suited to the needs of other classes, especially the lower middle class, may wellbe doubted. In modern Civil Law countries, especially those of Central Europe, the governmental bureaucracy has shown great solicitude for the legal needs of the middle classes, both rural and urban, from which its members have so largely been recruited and upon which gövernmental power was essentially based in the 19th century. For various reasons this solicitude was extended in the 20th century to the proletariat, whose interests and legal needs were sought to be safeguarded in a far reaching policy of, sometimes paternalistic, legislation which has left a conspicuos mark on the 20th century codes. In Common Law countries, including the United States, it has not always been easy for poorly organized, or totally unorganized groups to influence legislation: Laws as to illegitimate children, for instance, are unsatisfactory in so many states largely because nobody could speak for them until professional organizations of social workers have become interested in them in recent years. Illustration could again be multiplied, but, again, *sapienti sat.*

Finally several important divergencies between the two systems are due to differences in the organization of the administration of justice. The Civil Law countries have never known anything corresponding to the separation of Equity from Law, and they have never known the civil jury. On the other hand, they have developed a separation from private law of commercial law and, in recent times also of of labor law. The duality of court systems, remedies and rights which has resulted in Common Law countries from the separation of equity from law had at one time a certain parallel in the duality of *ius civile and ius honorarium* of republican and classical Roman law. It has long been a thing of the past and nothing corresponding to the duality of interests law and in equity can be found in modern Civil Law. On the other hand, Civil Law countries have not so totally suppressed as it was the case in Common Law countries those

special courts to which merchants resorted throughout the Middle Ages for the settlement of controversies among themselves in accordance with the Law Merchant, the common law of commerce all over Europe. True, modern commercial courts are no longer established by autonomous guilds or other organizations of merchants, but are state courts as all other courts are. But they are staffed differently from the ordinary courts, viz. with merchants representing various lines of business and sitting either, as in Germany, together with a prosional judge as presiding judge, or, as in France, alone and subject only to the appellate review by higher courts staffed exclusively with professional judges. A court so composed can be trusted to be familiar with the customs and usages of trade and with the special problems of business. In earlier times the commercial courts applied a system of laws which, being remarkably uniform throughout Europe, was correspondingly different from the ordinary local laws. A vestige of this former state of affairs has been preserved in the existence of separate commercial codes in almost all of the Civil Law countries. However, it is no longer much different from the general private law. The differences have been reduced to a protection of commercial *bona fide* purchasers which is even stronger than that afforded other *bona fide* purchasers, which, in turn, goes far beyond that of the Common Law; and there are also a few mitigations of those general rules corresponding to our statute of frauds and a greater tendency in commercial transactions to regard time as of the essence of contract. In the main, however, the situation is simply so that the law of those transactions which constitute the special domain of commerce as well as that of partnership and profit corporations as well as that of merchant shipping is treated in separate commercial rather than general civil codes and courts.

In recent decades a similar development has taken place in labor law. Its modern rules are contained in separate statutes, which in some countries, for instance France, have been consolidated in special labor codes. Cases arising under those laws are tried and decided in special labor courts which are staffed together with professional judges, with represen-

tatives of employees and employers and which thus are possessed of special experience. In Germany and some other countries this separation exists not only in the trial court stage but all the way up to the top of the judicial hierarchy, so that the supreme labor court is a body separate from the general supreme court. Indeed, practically in all Civil Law countries the jurisdiction of the "general" supreme court is less comprehensive than in those of the Common Law. Problems of administrative law are handled in separate administrative courts which sometimes constitute not only one but several independent hierarchies, so that there may be a whole set of supreme courts, each having final jurisdiction in its peculiar field of jurisdiction. Common Law observers have occasionally misunderstood this phenomenon. At one time its purpose may have been that of guaranteeing to the executive a certain influence which it cannot exercise in the ordinary courts, i.e. the courts administering the bulk of civil legislation and the criminal law. Today, the main purpose is that of insuring expert judicial knowledge for the handling of cases in which such special expert knowledge is regarded as essential.

In Common Law countries the existence of the civil jury in cases at law has profoundly influenced not only the structure of the procedural but also of the substantive law. Our law of torts, especially that of negligence, is not so much a body of rules for the immediate decision of cases as for indicating to the court in what situation it ought, or ought not, to leave the decision with the jury. The necessity of elaborating rules for the control of the jury by the judge has resulted in certain fields of the law in a refinement of the rules which goes much in the corresponding fields of the Civil Law. Furthermore, the jury system has resulted in the establishment of an elaborate law of evidence to which modern Civil Law knows hardly a counterpart.

Obviously, our brief attempt at discovering at least the most significant differences between the two principal legal systems of the modern world cannot go beyond statements of a very general, nay, even of an over-generalizing character.

Yet if we are to see the forest, we must not try to describe the trees.