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# COMMENTARIES

## A CIVIL LAW LAWYER LOOKS AT A COMMON LAW LAWYER'S VIEWS ON CIVIL LAW: JOHN HENRY MERRYMAN'S "THE CIVIL LAW TRADITION"

*Jacob Dolinger\**

### I. INTRODUCTION

Since 1969 when it originally appeared, Professor John Merryman's book, "The Civil Law Tradition — An Introduction to the Legal Systems of Western Europe and Latin America,"<sup>1</sup> has gone through various printings and a second edition has recently been published. The book is a welcome challenge for a deeper comparative analysis of both the civil law and common law traditions, and for a better understanding between scholars from both legal traditions about their legal philosophies and the functioning of their legal systems.

Scholars reviewing Professor Merryman's book<sup>2</sup> have noticed a subtle bias against the civil law tradition. One scholar perceived a "somewhat prejudiced stance when [Professor Merryman] comes to comparisons between the Civil Law and Common Law Traditions."<sup>3</sup> Professor Merryman frequently refers to

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1. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION — AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (1969) [hereinafter JOHN HENRY MERRYMAN].

2. Arthur Taylor von Mehren, *Book Review*, 83 HARV. L. REV. 1954 (1970) [hereinafter von Mehren]; Robert O. Homes Jr., *The Civil Law Tradition*, 16 LOYOLA L. REV. 247 (1969-70) [hereinafter Homes]; Mary Ann Glendon, *Book Review*, 19 AMER. J. COMP. L. 156 (1971) [hereinafter Glendon]. J.F., *Book Notice*, 34 AM. J. COMP. L. 821 (1986).

3. Homes, *supra* note 2, at 249. Indeed, some of the author's students in his Fall

vast differences between the two legal traditions, especially in the area of equity and in regards to the position and importance of scholars and judges. Closer examination, however, shows that civil law and the common law are quite similar in both aspects: equity is practiced in the civil law jurisdictions and the interchange between scholars and judges in both legal traditions is nearly the same. With reference to *stare decisis* and the role of judges in civil law countries, Professor Merryman's position is indeed puzzling. At several points within the book, he contradicts his own assertion that the theory of *stare decisis* is not accepted in the civil law countries. It is perhaps in his discussion of *stare decisis* that his own bias most clearly emerges.

This Commentary will concentrate on Professor Merryman's positions on three subjects: (1) *Stare decisis*; (2) Equity; (3) Scholars and Judges. On the third subject, the fresh inspiration of Judge Richard Posner's most recent book on Judge Cardozo illuminates the relationship between scholars and judges in common law countries. This relationship, as will be seen, is equally applicable to judges and scholars in civil law countries.<sup>4</sup>

## II. STARE DECISIS

In civil law countries, Professor Merryman maintains that the doctrine of *stare decisis* is not considered:

For now it need only be said that the familiar common law doctrine of *stare decisis* — i.e. the doctrine that similar cases should be decided similarly — is obviously inconsistent with the separation of powers as formulated in civil law countries, and is therefore rejected by the civil law tradition. Judicial decisions are not law.<sup>5</sup>

Indeed, Professor Merryman maintains that the repudiation of *stare decisis* is one of several factors that "tend to diminish the judge and to glorify the legislator."<sup>6</sup>

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1990 Comparative Law Seminar at Brooklyn Law School also detected a bias against the civil law.

4. Professor Merryman also contends that scholars of the civil law world focus their attention on pure legal phenomena and values, that their scholarship is uninterested in extralegal data, that the theories of the social sciences are excluded as nonlegal, that even history is excluded. JOHN HENRY MERRYMAN, *supra* note 1, at 69, 86, 91. This contention deserves careful analysis, which the author leaves for another occasion.

5. JOHN HENRY MERRYMAN, *supra* note 1, at 24.

6. JOHN HENRY MERRYMAN, *supra* note 1, at 59. Professor Merryman states:

[l]egislative positivism, the dogma of the separation of powers, the ideology of

Professor Merryman's claim that the theory of *stare decisis* is not accepted in civil law countries has been contested by Professor Mary Ann Glendon:

[Professor Merryman] identifies *stare decisis* with the notion that like cases ought to be decided alike. If this is what *stare decisis* means, then it is difficult to say, as Merryman does, that it has been rejected by any legal tradition, including that of the civil law . . . the idea that like cases ought to be decided alike, which underlies the doctrine of *stare decisis* is as much an elementary principle of fairness (as well as economy) that one expects to, and does, find it nearly everywhere we find institutions that can reasonably be called courts.<sup>7</sup>

Professor Merryman's claim that the theory of *stare decisis* is not considered in civil law is contradicted by the judicial practice of many civil law countries. Indeed, the tradition that similar cases should be decided similarly has its origins in the Roman empire. Charles Maynz, the famous historian of Roman law, contends that the collection of the "*edicta magistratuum*" (the edicts of Roman magistrates) became in practice more important than the Law of the Twelve Tables and of the subsequent laws.<sup>8</sup> Indeed, the role of permanent court decisions goes back to the Romans who proclaimed "*rerum perpetuo similiter judicatorum auctoritatem*" (the authority of the things judged perpetually in a similar way), and "*judex ab auctoritate rerum perpetuo similiter judicatorum non facile recedere debet*" (the judge should not easily abandon (or distance himself) from the authority of cases constantly decided in a similar way).<sup>9</sup> In *Corpus Juris Civilis* it is written: "*Ius praetorium est quod praetores introduxeront adjuvandi vel supplendi vel corrigendi juris civilis gratia propter utilitatem publicam*"<sup>10</sup> (the pretorian law is the one that magistrates introduced to confirm, supplement and correct the civil law, with a view to the public interest).<sup>11</sup> In her book review,<sup>12</sup> Professor Glendon refers to the

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codification, the attitude toward interpretation of statutes, the peculiar emphasis on certainty, the denial of inherent equitable power in the judge, and the rejection of the doctrine of *stare decisis* — all these tend to diminish the judge and to glorify the legislator.

*Id.*

7. See Glendon, *supra* note 2, at 157-58.

8. CHARLES MAYNZ, 1 *ÉLÉMENTS DE DROIT ROMAIN* 93-100 (2d ed. 1856).

9. *Id.* at 105.

10. 1 *Digesta of Justinian*, Book 1, de iustitia 7-1 (Theodore Mommsen, et al. eds.).

11. In fact, some Roman Emperors were not satisfied with the independence of mag-

French *jurisprudence constante* (constant jurisprudence) and to the equivalent German *ständige Rechtsprechung*.

In the Middle Ages, there were alternative phases of prevalence, sometimes the *legum doctores* (the scholars of the law)<sup>13</sup> would prevail, and at other times, courts' decisions prevailed as the authentic interpreters of the law.<sup>14</sup>

In the Modern Age of Law, beginning with the Napoleonic Code, the French Civil Code of 1804, there was a clear acknowledgement of the incompleteness of statutes. (Napoleon was opposed to commentaries on this code, but this was one of his lost battles, as scholars and judges have interpreted, amplified, restricted, humanized, and modernized the code, adapting it to different times and diversified circumstances.) The distinguished United States comparatist Professor Arthur Taylor von Mehren, in his review of Professor Merryman's book, makes the following remark:

It is open to question . . . whether the drafters of the French Civil Code accepted the view that "it was possible to draft . . . systematic legislation" that would be complete, coherent, and clear "to such a degree that the function of the judge would be limited to selecting the applicable provision of the code and giving it its obvious significance in the context of the case." The four jurists charged with drafting the Civil Code prepared a *Discours préliminaire* to explain their approach. The *Discours* contains the following passage:

"A code, however complete it may appear, is no sooner promulgated than a thousand unexpected questions are presented to the judge. Because the laws, once written, remain as they were written. Man, on the contrary, never remains the same, he changes constantly; and this change, which never stops, and the effects of which are so di-

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istrates. (It seems to happen time and again.) Francesco Degni reports that Emperors Adrianus, Teodosius II, and Valentinianus III ordered that judges should follow the opinions of the jurisconsults. The writings of Papinianus, Ulpianus, Paulus, Gaius, and Modestinus would have to be followed. In cases of dissidence, Papinianus' opinion would prevail. FRANCESCO DEGNI, *L'INTERPRETAZIONE DELLA LEGE* 117-18 (1909). The situation got worse with Emperors Constantinus and Justinianus who established that only the Emperor himself would have the power to interpret the law. Francesco Degni contends that in reality, despite the imperial prohibitions, jurisprudence continued to exercise an important role, if not as a primary source of law, at least as a source of interpretation of the law. *Id.*

12. See Glendon, *supra* note 2, at 157.

13. Their opinions were known as the *communis opinio doctorum*.

14. CARLOS MAXIMILIANO, *HERMENÊUTICA E APLICAÇÃO DO DIREITO* 177 (10th ed. 1988) [hereinafter CARLOS MAXIMILIANO].

versely modified by circumstances, produces at every instant some new combination, some new fact, some new result."<sup>15</sup>

Indeed, Professor von Mehren points out that judges in France and Germany are now becoming more active: "judges in [these] civil law countries . . . are playing an increasingly creative role in spite of the theoretical and traditional obstacles to which Professor Merryman points."<sup>16</sup>

Portalis' *Discours Préliminaire* is also appropriate to consider, since it stated that the French Civil Code had left a great variety of matters to the discretion of the judge with respect to plaintiff's cause of action and defendant's motives of excuse. Such motives include good and bad faith, equity, *force majeure*, moral, *bonos mores*, ingratitude, negligence, lack of care, illicit object, impossible object, illicit or immoral end, serious offense, criminal intent, and many other expressions and concepts.<sup>17</sup> Indeed, the same discretion is permitted in the German civil code, which refers to many cases of *Treu un Glauben*, good faith and loyalty and other conceptual requirements that are left to the court's discretion.<sup>18</sup>

The last decade of the nineteenth century marks an extraordinary movement of intellectual liberty in face of the codes and a search for other sources besides the strict letter of the law. In France, under the influence of François Geny, with his "*Méthode d'Interprétation et Sources en Droit Privé Positif*" (Methods of Interpretation and Sources in Positive Private Law), the school of *Libre Recherche* (free research) was formed. In Germany, Austria, and Switzerland the theory of Eugen Ehrlich helped to establish the school of *Richtigesrecht* (the right, or just law) as well as the *Freie Rechtsfindung* (the free law research). Geny's and Ehrlich's propositions also influenced the civil law system of various European and Latin American countries. The ideas of Ehrlich materialized most clearly in the civil code of Switzerland which provides in its first article that:

This Code governs all questions of law which come within the

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15. See von Mehren, *supra* note 2, at 1955 (quoting from Portalis, Tronchet, Bigot-Préaménen & Maleville, *Discours Préliminaire*, in I J. LOCRÉ, *LA LÉGISLATION DE LA FRANCE* 251, 258 (1987)).

16. See von Mehren, *supra* note 2, at 1956.

17. See CARLOS MAXIMILIANO, *supra* note 14, at 62.

18. CARLOS MAXIMILIANO, *supra* note 14, at 62.

letter or spirit of any of its provisions.

If the Code does not furnish an applicable provision the judge shall decide in accordance with customary law, and failing that, according to the rule which he would establish as legislator.

In this he shall be guided by approved legal doctrine and judicial tradition.

Reaching further than Geny and Ehrlich, in 1906 Herman Kantorowicz published *Der Kampf um die Rechtswissenschaft*. Whereas Geny and Ehrlich advocated that the judge should be allowed to create where the legislator has been silent,<sup>19</sup> Kantorowicz stated that the judge should search for the *richtiges Recht* (the just law) wherever he may find it, in or out of the law, and even in spite of the law.<sup>20</sup> Kantorowicz recommended that the judge should not worry about the legal texts and should preferably look for inspiration in sociological data and follow the determinism of the phenomena, keeping to observation and experience, and taking as his guides the voice of his feeling, of his professional tact, of his legal conscience.<sup>21</sup>

In France, the great scholar Marcel Planiol stated that the judge had to interpret the code not only by searching for what the legislator wanted, but also for what the legislator would have wished if they would have foreseen the specific case.<sup>22</sup> Planiol's follower and collaborator, Georges Ripert, noted that if the civil code has kept its value one and half centuries after it has been approved, it is because it contains many general rules that the courts were able to vivify by applying them.<sup>23</sup>

In Spain, Valverde Y Valverde wrote in his 1909 treatise on the Spanish civil law<sup>24</sup> that courts should be left free to interpret the law in such a way as to adapt the legal norm to the reality, in order to allow law to progress. Article one of the Spanish Civil Code, as revised in 1974, stipulates that "the sources of the Spanish legal system are the written law, custom and the general

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19. Meaning to judge *proeter legem* (instead of the law).

20. Meaning *proeter legem* and also *contra legem* (against the law).

21. CARLOS MAXIMILIANO, *supra* note 14, at 73.

22. PLANIOL, 1 TREATISE ON THE CIVIL LAW No. 204, 221 (7th ed. 1915-18) (translated into English by the Louisiana State Law Institute (12th ed. 1939)).

23. "Si le Code Civil garde toute sa valeur un siècle et demi après sa promulgation, c'est qu'il contient beaucoup de règles générales que la jurisprudence a pu vivifier en les appliquant." GEORGE S. RIPERT, *LES FORCES CRÉATRICES DU DROIT* 393-94 (1955).

24. VALVERDE Y VALVERDE, 1 TRATADO DE DERECHO CIVIL ESPAÑOL 88 (1909) [hereinafter VALVERDE].

principles of law," and adds in section six that:

Judicial decisions shall complement the legal order with such doctrine (doctrina) as the *Supreme Court* shall repeatedly establish in interpreting and applying the written law, custom and the general principles of law.

In Mexico, Justice and Professor Rafael Rojinas Villegas explains that when the legal rule is obscure or doubtful, jurisprudence takes on to do a creative legal work. Therefore, this legal work is considered a formal source of law, because in the act of interpreting the law it may introduce new elements that will vivify and enrich the legal order.<sup>25</sup>

In Brazil, the Law of Introduction to the Civil Code<sup>26</sup> contains the following rules:

Article 4 — When the law does not cover the point involved the court is to decide the case in accordance with analogy, customs and general principles of law.

Article 5 — In the application of the law the judge shall bear in mind the social goals and requirements of the public welfare.<sup>27</sup>

Brazilian courts have exceptionally adjudicated *contra legem* (against the law), mainly in matters of family law. Specifically on the subject of paternity investigation, the law had forbidden an investigation of a relation that would result in proving an adulterous liaison of the mother. Nonetheless, this has been expressly allowed by the Brazilian Supreme Court.<sup>28</sup>

Another decision *contra legem* refused to apply section three of article seven of the Law of Introduction to the Civil Code, which provides: "if the parties have a different domicile at the time of the marriage, the law of the first marital domicile

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25. RAFAEL ROJINAS VILLEGAS, INTRODUCCIÓN AL ESTUDIO DEL DERECHO 413 (1967) (cited in FERNANDO PINTO, JURISPRUDÊNCIA FONTE FORMAL DO DIREITO BRASILEIRO 73 (1977) [hereinafter PINTO, JURISPRUDÊNCIA]).

26. The Law of Introduction to the Brazilian Civil Code governs the effectiveness of law, its sources, and sets forth the rules of private international law. PAUL GRIFFITH GARLAND, BILATERAL STUDIES IN PRIVATE INTERNATIONAL LAW, AMERICAN-BRAZILIAN 111 (1959).

27. *Id.*

28. JOÃO CARLOS PESTANA DE AGUIAR, 4 COMENTÁRIOS AO CÓDIGO DE PROCESSO CIVIL 32 (1974). On French *contra legem* decisions see Friedrich Juenger, *American and European Conflict Law*, 30 AM. J. COMP. L. 117, 125-26 (1982). In Germany the Soraya case is an illustration of a *contra legem* decision. See RUDOLF B. SCHLESINGER, ET AL., COMPARATIVE LAW — CASES — TEXT — MATERIALS 641 (1988) [hereinafter SCHLESINGER, ET AL.].



will govern the cases of the invalidity of the marriage.”<sup>29</sup> Nonetheless, the Supreme Court refused to recognize a United States judgment that annulled a marriage of a Brazilian woman to a North American man which was valid according to Brazilian law, the place where it had been celebrated, but was not valid according to United States law, the place of the couple’s domicile after the wedding. Justice Luiz Gallotti claimed that a wedding’s validity can only be viewed through the law which ruled it at the time of its celebration. “The rule of Article 7 § 3 of the Law of Introduction is illogical and cannot be enforced.”<sup>30</sup>

In Brazil, discrepant interpretations of the same law by different State Courts of Justice are taken up to the *Superior Tribunal de Justiça* through a special appeal, so this high federal court can unify jurisprudence amongst the states.<sup>31</sup> When the Supreme Court repeatedly decides a certain legal matter in a consistent way, it includes the essence of this decision in a “SUMULA,” which becomes accepted caselaw in all courts of the country.<sup>32</sup>

One of Brazil’s most brilliant legal minds, Santiago Dantas stated in 1942:

Nothing is more flexible than law as it follows the transformations of life; legal life is a process of permanent dynamics. We have learned in the study of Roman law how political, economical, social and religious circumstances effect changes on the legal rules. Therefore the tendency of dogmatism to inflexibility must be corrected by the constant employment of the historical method.<sup>33</sup>

Santiago Dantas added that “a legal rule can remain for centu-

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29. See *supra* note 26.

30. See PINTO, *JURISPRUDÊNCIA*, *supra* note 25, at 72 (1977); FERNANDO PINTO, *SENTENÇAS ESTRANGEIRAS* 489 (1978).

31. Constituição da República Federal do Brasil, art. 105(III)(C) (Constitution of the Federal Republic of Brazil (1988)).

32. See Keith S. Rosenn, *Civil Procedure in Brazil*, 34 AMER. J. COMP. L. 487, 513-14 (1986). Sumula number 286 is a good illustration; it states: “An extraordinary appeal (*writ of certiorari*) based on jurisprudential conflict is not accepted when the Supreme Court has already determined its position in the same manner as the appealed decision has.” (SÚMULA DA JURISPRUDÊNCIA PREDOMINANTE DO SUPREMO TRIBUNAL FEDERAL 91 (1988)). Concerning the relevance of judicial decisions in Brazil as in various other civil law countries, see SCHLESINGER, ET. AL., *supra* note 28, at 597-99, 603-04, 607, 635-36, 643-44, 656.

33. SANTIAGO DANTAS, 1 PROGRAMA DE DIREITO CIVIL 30 (1977). Professor Dantas’ statement was made to his students at the University of Brazil School of Law (today The Federal University of Rio de Janeiro).

ries, but it means today something different from what it signified in the past, thanks to the evolution of the technical precepts that are contained in the rule and that change throughout times.”<sup>34</sup>

Comparatists say that a considerable convergence has been taking place this century between common law and civil law. While common law countries have been giving more and more room to statutory law,<sup>35</sup> civil law countries have been emphasizing the importance of case law. Actually, civil law contains from its very origin as much respect for courts’ decisions as common law.

Professor Merryman has two different, contradictory ways of describing the role of judges in the civil law world, descriptions that are relevant to the question of who creates the law and consequently who will have influence on whether *stare decisis* is or is not accepted. At one point, he says that the “net image is of the judge as an operator of a machine designed and built by legislators . . . [h]is function is a mechanical one . . . [t]he civil law judge thus plays a substantially more modest role than the judge in the common law tradition.”<sup>36</sup> Professor Merryman also states that “[j]udicial service is a bureaucratic career; the judge is a functionary, a civil servant; the judicial function is narrow, mechanical, and uncreative.”<sup>37</sup>

However, at other points Professor Merryman recognizes that although civil law basically does not entail a creative power for the judge, by force of circumstances and due to the impossibility that codes can be complete, judges end up making law. Professor Merryman writes:

Likewise the dogma that a code can be complete and coherent fails to survive even a cursory glance at the jurisprudence (the civil law term for judicial decisions). The books are full of decisions in which the court has had to fill gaps in the legislative scheme and reconcile apparently conflicting statutes. Although the text of a statute remains unchanged, its meaning and application often change in response to social pressures, and new problems arise that are not even touched on by any existing legislation. The ideal of certainty in the law becomes unattainable in the face of the uncertainty that exists in fact, where

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34. *Id.* at 77-78.

35. See SCHLESINGER, ET AL., *supra* note 28, at 581-82.

36. JOHN HENRY MERRYMAN, *supra* note 1, at 38.

37. JOHN HENRY MERRYMAN, *supra* note 1, at 39.

determination of the rights of parties frequently must await the results of litigation. The judge is not, in practice, relieved by clear, complete, coherent, prescient legislation from the necessity of interpreting and applying statutes. Like the common law judge, he is engaged in a vital, complex, and difficult process. He must apply statutes that are seldom, if ever, clear in the context of the case, however clear they may seem to be in the abstract. He must fill gaps and resolve conflicts in the legislative scheme. He must adapt the law to changing conditions. The code is not self-evident in application, particularly to the thoughtful judge.<sup>38</sup>

Similarly, Professor Merryman further states:

Since in all jurisdictions the judge is required to decide the case before him and cannot give up on the ground that the law is unclear, judges continually make law in civil law jurisdictions. Given inadequate legislative direction on the one hand, and the command to decide the case, in any event, on the other, they improvise. The judge may try to show how his decision proceeds logically from the rule stated by the legislature. Even when a judge believes this to be the case, however, he is still making law. In nations with old codes, the cumulative effect of this kind of judicial lawmaking is particularly obvious. In France, for example, where the Code Napoléon is still in force, the law of torts is almost entirely the product of judicial decisions based on a few very general provisions of the code.<sup>39</sup>

Indeed, Professor Merryman acknowledges that civil law judges are influenced by prior decisions.

Although there is no formal rule of *stare decisis* the practice is for judges to be influenced by prior decisions. Judicial decisions are regularly published in most civil law jurisdictions. A lawyer preparing a case searches for cases on point and uses them in his argument; and the judge deciding a case often refers to prior cases. Whatever the ideology of the revolution may say about the value of precedent, the fact is that courts do not act very differently toward reported decisions in civil law jurisdictions than do courts in the United States.<sup>40</sup>

Civil law countries have long accorded decisional law a place within their legal system. Indeed, Professor Merryman periodi-

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38. JOHN HENRY MERRYMAN, *supra* note 1, at 44.

39. JOHN HENRY MERRYMAN, *supra* note 1, at 89.

40. JOHN HENRY MERRYMAN, *supra* note 1, at 48.

cally acknowledges this fact. Yet by insisting that *stare decisis* has no role in civil law countries — despite his statements to the contrary — Professor Merryman is not only self-contradictory but also reveals a bias against the civil law.<sup>41</sup>

### III. EQUITY AND JUSTICE

Professor Merryman contends that civil law judges are also denied the power to temper the rigor of a rule, that all nonlegal considerations must be excluded from the law in the interest of certainty, and that considerations of justice must be excluded for the same reason. “Hard cases, unjust decisions, unrealistic decisions, are regrettable, but they are the price one has to pay for certainty.”<sup>42</sup>

In fact, it is Professor Merryman who is unrealistic and actually unjust with the judicial system of at least one-half of western civilization. He is equally mistaken when he says the legal scientist is “not interested in the ends of law, in such ultimate values as justice,” that he is “only concerned with purely legal values, resulting in a highly artificial body of doctrine that is deliberately insulated from what is going on outside, in the rest of the culture.”<sup>43</sup> In contradiction to Professor Merryman’s belief that justice is never considered, great importance has been ascribed by numerous scholars to the application of equity in civil law.

Portalis, when presenting the French Civil Code, spoke of the need to apply equity, and repeated the old Roman dictum, *Jus es ars boni et aequi*, (law is the art of the good and the equitable). Civil law, which essentially stems from Roman law, was influenced by Greek philosophy and also by canonic doctrine. All three contained the principle of equity.<sup>44</sup>

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41. In Professor Merryman’s review of Professor Gino Gorla’s book *Diritto Comparato e Diritto Commune Europeo*, 31 AMER. J. COMP. L. 358, 360 (1983), he stated:

The growing recognition among European lawyers that courts make law is a sign that after two centuries normalcy is returning. The importance of this interpretation is clear: Gorla reassures the civil lawyer who knows what the courts (and lawyers) do but fears that it is somehow wrong for them to do it. He tells them that its normal, that it is what courts do and have always done, even in Europe.”

42. JOHN HENRY MERRYMAN, *supra* note 1, at 88.

43. JOHN HENRY MERRYMAN, *supra* note 1, at 69.

44. On Equity in Roman Law and Canon Law, see Craig M. Lawson, *The Family Affinities of Common-Law and Civil-Law Legal Systems*, 6 HASTINGS INT’L & COMP. L. REV. 85, 97 (1982) [hereinafter Lawson].

For instance, the great Athenian philosopher Aristotle stated that:

The same thing, then, is just and equitable, and while both are good, the equitable is superior. What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission — to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice — not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law, so that a decree is needed . . .<sup>45</sup>

Similarly, Cicero pronounced *Summum jus, summa injuria* (the rigor of the law is the greatest injury), and therefore one should apply equity. This principle was incorporated in Roman law and has strongly influenced the whole civil law world. In the doctrine of the Church, Aquinas states:

Now it happens often that the observance of some point of law conduces to the common good in the majority of instances, and yet, in some cases, is very hurtful. Since then the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Therefore if a case arises in which the observance of that law would be hurtful to the general welfare, it should not be observed.<sup>46</sup>

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45. ARISTOTLE, THE WORKS OF ARISTOTLE, VOL. II: NICOMACHEAN ETHICS BOOK V, 10, 1137b (ROBERT MAYNARD HUTCHINS AND MORTIMER J. ADLER eds., GREAT BOOKS OF THE WESTERN WORLD/ENCYCLOPAEDIA BRITANNICA).

46. T. AQUINAS, SUMMA THEOLOGICA, Part I of Second Part, Q. 96, art. 6 (Daniel J.

In the same vein Aquinas continues: "As stated above, precepts admit of dispensation when there occurs a particular case in which, if the letter of the law be observed, the intention of the lawgiver is frustrated."<sup>47</sup>

Modern civilian authors dedicate great care to the subject of equity. The Belgian Chaim Perelman wrote that:

The recourse to equity is thus a recourse to the judge as against the law: We appeal to the judge's sense of equity whenever a precedent followed to the letter, or a law rigorously applied in conformity with the rule of justice, leads to unjust consequences. We can cite three reasons for this: First as alluded to by Aristotle, there is the obligation to apply the law to an unusual case not foreseen by the legislator; the second comes into play when external conditions, such as devaluation of currency or a war or a catastrophe, so modify the conditions of a contract that its strict execution would gravely injure one of the parties; thirdly, the evolution of moral sentiment may result in the fact that certain distinctions neglected by legislators or judges, become essential in the present evaluation of the facts.<sup>48</sup>

Perelman develops the idea of equity through articles four, eleven, and 1382 of the French Civil Code.<sup>49</sup> The Belgian author goes further and says:

The role of equity in the application of the law does not permit us to affirm that in order for a decision to be just, it is necessary and sufficient for the decision to conform to the Rule of Justice. The Rule of Justice tells us only that an act is *formally* just if it treats one member of a fixed category in the same way that all members of that category are to be treated. Such an act is formally just because it is in conformity with the conclusion of a judicial syllogism. But equity may take precedent over security, and the desire to avoid unjust consequences may lead a judge to reinterpret the law, to modify the conditions of its application. Even if we deny the judge the right to legislate, we are obliged under our system to leave to him his power to interpret. Thanks to the use that he will make of it, the judge will be able, in certain cases, to go beyond the traditional interpretation and to correct the application of the law from mere

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Sullivan ed.).

47. *Id.* at Q. 100, art. 8.

48. CHAIM PERELMAN, *JUSTICE* 27-28 (1967).

49. *Id.* at 28-30.

conformity to the Rule of Justice . . .<sup>50</sup>

Perelman's statement speaks for the whole civil law world.

Although the Brazilian Civil Code has no rule allowing the judge to base his decision on equity, articles four and five of the Law of Introduction to the Civil Code contain stipulations that give courts considerable liberty of interpretation.<sup>51</sup>

Professor Craig Lawson notes that Blackstone quoted Grotius, who spoke of the cases which "*the law imperfectly limits, but should in the judgment of a good man, permit.*"<sup>52</sup>

Although Professor Merryman believes otherwise, equity and the civil law are not inapposite.

#### IV. SCHOLARS AND JUDGES

The civil law scholar is also analyzed. According to Professor Merryman, the scholar is the real protagonist of the civil law. Scholars influence legislators, executives, administrators, judges, and lawyers; they mold the civil law tradition, and legislators and judges accept their idea of what law is. A scholar's<sup>53</sup> books

50. *Id.* at 31-32. See also R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 151 (1985).

51. See *supra* note 26 and accompanying text.

52. See Lawson, *supra* note 44, at 97.

53. As an author and professor of law in one of the most prestigious Brazilian law schools, the author of this Article might perhaps accept the authority that Professor Merryman bestows on the civil law scholars. But to do so would amount to accepting a fiction.

Undoubtedly, doctrine has considerable importance in the civil law system; but doctrine also has an important partner in jurisprudence. The author's text book on private international law, J. DOLINGER, *MANUAL DE DIREITO INTERNACIONAL PRIVADO* (1986), relies to a great extent on court decisions. Similarly, all Brazilian text books, treatises, monographs, doctorate dissertations, and articles in all fields of law rely on court decisions. Moreover, legal practitioners in Brazil refer constantly to the decisions of Brazilian Courts. (On the reciprocal influence between doctrine and jurisprudence, see A. Lowenfeld, *Conflict of Laws English Style, Review Essay*, 37 AM. J. COMP. L. 353, 354 (1989), quoting Lord Scarman who wrote: "what Dicey said on a point mattered as much to the judges who made the case law as did their case law to the editor of Dicey.")

Two United States Supreme Court decisions demonstrate how scholarly opinions are as important as case-law both in the common law and in the civil law systems. In *Hilton v. Guyot*, 159 U.S. 113, 163 (1895), the Court stated that in order to ascertain what the law is, "courts must obtain such aid as they can from judicial decisions, *from the works of jurists and commentators*, and from the acts and usages of civilized nations" (emphasis added).

Almost a century later, in *Eastern Airlines, Inc. v. Rose Marie Floyd*, 59 U.S.L.W. 4307, 4310 (1991) the Court stated that "[i]n 1929, as in the present day, lawyers trained in French civil law would rely on the following principal sources of French law: (1) legislation, (2) *judicial decisions*, and (3) scholarly writing." (emphasis added).

and articles say what the law is.<sup>54</sup>

Numerous great civil law jurists have been both scholar and judge. Indeed, the same phenomena occurs in the common law. Nonetheless, Professor Merryman maintains that: "[t]he great names of the civil law are not those of judges (who knows the name of a civil law judge?) but those of legislators (Justinian, Napoleon) and scholars (Gaius, Irenaeus, Bartolus, Mancini, Domat, Pothier, Savigny, and a host of other nineteenth-century and twentieth-century European and Latin American scholars)."<sup>55</sup> Professor Merryman puts scholars and judges into two different categories, quite apart from each other. In fact, Professor Merryman's strict classification is incorrect.

Roman magistrates, as previously noted,<sup>56</sup> were significant participants in the formation of Roman Law. In the Middle Ages the judge/scholar figure also appears. For instance, Bertrand d'Argentré, a sixteenth century French magistrate in Bretagne, wrote "*De statutis personalibus e realibus*" (of personal and real laws) in which he defended a radical territorialistic approach to the problem of conflicting laws: the laws of Bretagne could only be applied in its territory, because where sovereignty ends, jurisdiction is finished ( *finita potestas, finitae jurisdictio et cognitio*). For the same reason foreign laws should not be applied in Bretagne. D'Argentré was the first judge to distinguish between personal and real rules (the former concerning persons, the latter concerning goods), and to point to a third category, the mixed rules, where the personal and the real meet. D'Argentré suggested that the same rules that applied to goods apply to this third category. D'Argentré's ideas were accepted by the Dutch jurist Ulrich Huber, who in turn inspired Joseph Story.<sup>57</sup> In fact, Huber was also both a scholar and magistrate.<sup>58</sup>

In the twentieth century, in France Marc Ancel was both a

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One illustration of English courts' reliance on scholars is *Cie Tunisienne de Navigation S.A. v. Cie d'Armement Maritime S.A.*, [1971] A.C. 572, where the highest British tribunal refers to Cheshire, Dicey and Morris, and Martin Wolf, three prominent scholars in private international law, as to the question of whether the choice of a place for arbitration necessarily implies the choice of law of that forum.

54. JOHN HENRY MERRYMAN, *supra* note 1, at 63-64.

55. JOHN HENRY MERRYMAN, *supra* note 1, at 38.

56. See *supra* notes 8-11 and accompanying text.

57. Professor Russel L. Weintraub, "Why Comparative and International Law is Important in Domestic Litigation," presentation to the Brooklyn Law School Faculty (Nov. 7, 1990).

58. See James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP. L. 73; 74-75 (1990).



scholar and member of the Cour de Cassation. In Italy — so dear to Professor Merryman — Constantino Mortati, Aldo Sandulli, and Livio Paladin, were members of the constitutional court known for their scholarship in public law, especially constitutional law. In addition, the Italian Virgilio Andreoli was both a member of the Constitutional Court and a respected university professor.

In Germany, Heinrich Besse, Adolph Grass, Hugo von Wal-lis, Fritz Bauch, and Heinrich Nagel were all scholars and judges at the same time. Konrad Hesse was both judge of the constitutional court as well as the most renowned constitutional scholar in Germany. In Spain, Juan Montero Aroca was both judge in Valencia and the most important scholar of Spanish civil procedure.

Some of the most eminent Justices of the Brazilian Supreme Court were also legal scholars. Pedro Lessa wrote a classic text on the judicial power.<sup>59</sup> Carlos Maximiliano authored a magnificent commentary on the 1891 Brazilian constitution<sup>60</sup> as well as a classical book on exegesis.<sup>61</sup> Indeed, Lessa's and Maximiliano's writings have reinforced their reputations as great judges. Similarly, Justice Rodrigo Otavio's reputation as a judge was enhanced because he was a great authority on private international law. The same is true of Justice Eduardo Espínola, who published on various fields of law. More recently, Justices of the Brazilian Supreme Court Orosimbo Nonato<sup>62</sup> and Hahneman Guimarães, who were both scholars and professors, published important works. Indeed, they were considered among the most prominent Brazilian Justices of all times.

Many other Brazilian Justices and Judges served on the bench as well as with their pens for the greater glory of law and justice. Justice José Carlos Moreira Alves, who currently serves

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59. PEDRO LESSA, *DO PODER JUDICIÁRIO* (1915).

60. CARLOS MAXIMILIANO, *COMENTÁRIOS À CONSTITUIÇÃO BRASILEIRA* (1918). This book is followed by various subsequent enlarged editions.

61. See CARLOS MAXIMILIANO, *supra* note 14. This book is presently in its 10th edition.

62. Orosimbo Nonato published a two-volume book on Obligations (*CURSO DE OBRIGAÇÕES*) and a three-volume book on Wills (*ESTUDOS SOBRE SUCESSÃO TESTAMENTÁRIA* (1957)).

In May 1941, when he took his seat in the Brazilian Supreme Court, Orosimbo Nonato spoke of the judge as "not being a mechanical applicator of the written law; his real function is to adapt the abstract text to the vibrant and sometime dramatic realities that occur in litigation; he is a substitute legislator, and many time the forerunner of statutory reforms." 87 *REVISTA FORENSE*, 262, 264 (1941).

on the Brazilian Supreme Court and is a professor at the University of São Paulo, has published very important books on Roman civil law.<sup>63</sup> At the Law School of the State University of Rio de Janeiro Professor José Carlos Barbosa Moreira is the foremost Brazilian authority on civil procedure. He is a prolific author who has published in various international journals. Professor Moreira sits on the Court of Justice of the State of Rio de Janeiro where he commands the greatest respect from his peers. Several other professors at the Rio de Janeiro State University Law School sit on federal and state courts.<sup>64</sup> Similarly, law professors at the University of São Paulo sit on the Court of Justice of that State.

In the United States, a considerable number of scholars have sat on the bench. Professor Calvin Woodard, in his review of "The Problems of Jurisprudence" written by former professor and current Judge Richard Posner states that, "[a] remarkable high proportion of our most influential writers on jurisprudence — from Chancellor James Kent and Justice Joseph Story in the early nineteenth century to Justices Oliver Wendell Holmes and Benjamin Cardozo and Judges Learned Hand and Jerome Frank — have sat on the bench."<sup>65</sup> In fact, some of those magistrates did not write only on jurisprudence. Justice Story became famous for his writings on constitutional law and on conflict of laws. Indeed, according to Albert Venn Dicey's introduction to his classical "Conflict of Law" book, published at the close of the nineteenth century, Friedrich Carl von Savigny and Justice Joseph Story were the greatest scholars in private international law.<sup>66</sup>

Judge Posner certainly deserves the reputation of a good writer and a brilliant intelligence. His book "Cardozo: a Study in Reputation," is full of important psychological, sociological, political, communitarian, and, of course, jurisprudential and legal insights. Cardozo gets a penetrating analysis:

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63. See, e.g., JOSÉ CARLOS MOREIRA ALVES, 2 POSSE (1991); DIREITO ROMANO (1971); DA ALIENAÇÃO FIDUCIÁRIA EM GARANTIA (2d ed. 1979); A RETROVENDA (2d ed. 1987); among other publications.

64. Professor Luiz Fernando Whittaker Tavares da Cunha, prominent author of Constitutional law, sits on the Court of Justice of the State of Rio de Janeiro.

65. Calvin Woodard, *N.Y. Times Book Review*, Sept. 9, 1990, at 15 (reviewing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)).

66. DICEY & MORRIS, *CONFLICT OF LAWS* (11th ed. 1987). In the biographical note to the eighth edition, J.H.C.M. states that Dicey wrote that "between the two, Story was the greater authority."

Cardozo's extralegal writings, in particular, "The Nature of the Judicial Process," enhanced his standing in the legal profession and continues to do so. Having written the first and still the best-known demystified statement of a judge's philosophy of adjudication, Cardozo was expected to be an outstanding judge. A lawyer could, of course, be a fine scholar and a mediocre judge (some would find this combination exemplified in the career of Felix Frankfurter). But we know that Cardozo was not a mediocre judge — that he was in fact outstanding — and this both lends authority to his statement of his judicial philosophy and enables the statement to reinforce his judicial reputation.<sup>67</sup>

In fact, Judge Posner conducted computer research to determine the number of times, since 1982, that certain names are referred to in law reviews, articles, book reviews, and student notes. In one of the various charts organized by Judge Posner, he lists the names of the most quoted United States magistrates, legal scholars, and scholars in other fields (Aristotle and Kant also appear). The chart demonstrates that in the common law system of the United States, judges *and* scholars are authority.<sup>68</sup>

On the other hand, the Supreme Court refers to law reviews and law journals frequently. Since the beginning of 1989 the Court cited law reviews and law journals 173 times.<sup>69</sup> Similarly, scholars frequently quote from magistrates. This evidence supports the conclusion that in the United States there is a very rich interchange between scholars and courts.

Despite this rich interchange, Judge Posner acknowledges a difference between judges and academics in the United States.

[I]t is a mistake to suppose that the best judge is the judge who most resembles the best law professor or that the best judicial opinion is the one that most closely resembles an excellent law review article. Judges do not work under conditions that enable them to produce opinions of high academic quality; so a judge having academic aspirations for his opinions is likely to be a flop. The subject matter jurisdictions of most major American courts is too broad to enable specialization, especially in a court where opinions are assigned by rotation or

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67. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 129-30 (1990) [hereinafter R. POSNER].

68. *Id.* at 78.

69. This research was conducted by the author and Professor Paul Finkelman at Brooklyn Law School in the Fall of 1990.

other random process; so the judges are bound to know less about each field than the professors in those fields know. Furthermore, the length of time available for preparing an opinion is too short to enable research, discussion, and reflection of academic depth and intensity. And like Cardozo, most judges are appointed from practice, which means they had either explicitly or implicitly rejected an academic career years earlier. In any event, few legal academics have been successful who did not become academics early in their legal careers, and we therefore should not expect lawyers appointed to the bench after many years of practice to write judicial opinions of high academic quality even if they had been frustrated academics all those years. Then too the audience for judicial opinions is not primarily an academic one. Finally, the judge who wants to be effective is constrained for the most part to operate incrementally, respecting distinctions, precedents, traditions, and whatnot that make the professor justifiably impatient. For all these reasons we should not expect a high order either of intellectual creativity or of analytical rigor in even the best judicial opinions.<sup>70</sup>

What Posner describes is similar to this author's experiences in Brazil: the exact same dichotomy, the same distinctions, and the exact same free critical analysis of court's decisions by scholars is practiced in Brazil, as well as in the other civil law system countries. However, this does not diminish the importance and the relevance of court opinions, which make law in the United States and civil law countries. Regardless of Professor Merryman's description of civil law scholars' absolute command of the law,<sup>71</sup> there is endless interchange between the judges and scholars in both legal traditions.

Within civil law and common law countries, judges and scholars have profited richly from each other's insights. In addition, civil law and common law nations from time immemorial have learned from other nations and adopted rules they understood and approved of. For instance, an article by this author titled "The Influence of American Constitutional Law on the Brazilian Legal System,"<sup>72</sup> shows how the framers of the 1891 Brazilian Constitution, the country's first republican Magna Carta, were inspired by the United States Constitution. More-

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70. R. POSNER, *supra* note 67, at 133.

71. JOHN HENRY MERRYMAN, *supra* note 1, at 69, 86 and 91.

72. See J. Dolinger, *The Influence of American Constitutional Law on the Brazilian Legal System*, 38 AMER. J. COMP. L. 803 (1990).

over, later Brazilian constitutions, including the last one in 1988, have kept this tradition. The influence of the United States system on Brazil has materialized in all fields of public law, not only in constitutional law, but also in administrative law, in tax law, and in securities regulation.<sup>73</sup> A considerable amount of Brazilian Federal Supreme Court decisions and doctrinal texts quote extensively from United States scholarly works and from the United States Supreme Court decisions. The article shows how Brazil has followed the European legal culture,<sup>74</sup> mainly French, Italian, and German in private law and how in public law, Brazil has primarily followed the legal principles and the governmental structure created by the combined efforts of the great scholars and the learned judges of the United States.

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73. Professor Norman Poser of Brooklyn Law School spent some time in Brazil and was able to observe and then to publish a very accurate picture of an emerging sector in Brazilian finance. Norman Poser, *Securities Regulation in Developing Countries: The Brazilian Experience*, 52 VA. L. REV. 1283 (1960).

74. On European legal culture we were all recently awarded with a most scholarly essay by Franz Wieacker, Professor Emeritus of Roman Law, Civil Law, and Private Law History at the University of Göttingen in Germany, "Foundations of European Legal Culture," which was translated from German into English by Professor Edgar Bodenheimer and published in 38 AMER. J. COMP. L. 1 (1990). Professor Bodenheimer extended his work by annotating the essay with rich footnotes that comment and clarify some "highly condensed statements and summaries of developments that non-Europeans scholars might not easily understand," as the eminent professor of the University of California at Davis points out in his introductory note. *Id.* at 1. Some of the subjects addressed in this presentation to the Brooklyn Law School Faculty are dealt with in Professor Wieacker/Bodenheimer's work with great historical precision, such as the important role of equity in Roman law and its influence on the Anglo-Saxon orbit, *id.* at 6 n.6, and in canon law, *id.* at 23 n.28.