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Nicoletta Bersier
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Common Law – Civil Law

The Great Divide?

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Preface

The idea for this volume originated in the aftermath of a panel organized by the editors at the XXIX World Congress of the International Association for the Philosophy of Law and Social Philosophy (IVR) in Lucerne in the summer of 2019. Befitting the rather broad topic of the panel "Common Law – Civil Law: The Great Divide" a variety of proposals were submitted by scholars from all over the world. Accordingly, the papers presented in Lucerne, ranging from historical questions to theoretical and comparative aspects, covered far more than the problems discussed over and over in the past.

The fresh approaches and the diverse accounts we had the privilege to discuss in Lucerne convinced us that it would be useful to pursue the topic further and to invite still more friends and colleagues from around the globe to join the conversation. We were pleased that so many of them accepted our invitation and are even more pleased to present the result of our joint efforts in this volume.

We would like to thank Springer's "Law and Philosophy Library" for including the volume in the series and Abdus Salam Mazumder of Springer International for diligently looking after the volume and the editors. Patrik Rako and Raphael Ulbing kindly assisted in revising the manuscripts. We are grateful for their support.

Finally, we would like to thank the contributors to this volume for sharing their ideas and perspectives, thus significantly enhancing our understanding of the idiosyncrasies and commonalities of common law and civil law systems. We hope that our readers will benefit from their insights just as much as we did.

Geneva, Switzerland — Nicoletta Bersier
Graz, Austria — Christoph Bezemek
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July 2021

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Introduction

Nicoletta Bersier, Christoph Bezemek, and Frederick Schauer

Common law and civil law are typically presented as antagonistic players on a field claimed by different legal systems: the former being based on precedent set by judges in deciding cases before them, the latter being founded on a set of rules expected to govern the decisions of those serving as a mouthpiece in applying them. Perceived in this manner, common law and civil law differ as to the (main) source (s) of law, about who is to create, about who is (merely) to draw from them, about whether the law works itself pure each step of the way or whether the law's purity may only be tarnished when confronted with a contingent set of facts.

These differences have deep roots in (legal) history, roots that allow us to trace them back to distinct traditions. Still, it is questionable whether the ideal-types presented above are in any relevant sense accurate when assessing the way these systems work. After all: International and supranational legal systems indifferent to national peculiarities seem to level the playing field. A normative understanding of constitutions seems to grant ever-greater authority to apex court decisions based on thinly worded maxims in countries that adhere to the civil law tradition. The challenges contemporary regulation faces seem to ask for ever-more detailed statutes governing the decisions of judges in the common law tradition.

These and similar observations ask for a structural re-assessment of the role of judges, the power of precedent, the limits of legislation and other features often thought to be so different in common and civil law systems.

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The volume at hand is dedicated to this reassessment.

It is—roughly—divided into three sections. The first of which focuses on theoretical questions associated with the 'great divide' suggested in the volume's subtitle.

Here, in a first chapter, Frederick Schauer embarks on a quest for the data that supports jurisprudential theory. Focusing on the structure of common law and civil law systems, Schauer contrasts the claims underlying legal pluralism and general jurisprudence; thus exploring the question as to whether generalizations in legal theory are, in fact, possible.

Christoph Bezemek, in a second chapter, focuses on the often-quoted image of the (common) law "working itself" pure. Is the purity thus assumed, he asks, a goal to be achieved or a regulative ideal that drives and shapes the law? In addressing this question, Bezemek pays close attention to the historical context in which the image first came to use and argues that this context continues to be relevant for our understanding to this day.

A third chapter, written by Stefan Arnold, defends the thesis that Dworkin's and Brandom's theories of law's normativity are powerful not only with respect to common law, but also with respect to civil law. Arnold discusses Dworkin's view of the law as a chain novel against the backdrop of Brandom's concept of discursive practice of law, which is characterised by mutual recognition as a social and normative attitude. Both, Dworkin's chain novel and Brandom's normative fine structure, he argues, are equally fruitful for our understanding of civil law.

Nicoletta Bersier, in a fourth chapter, focuses on the differences between common law and civil law in treating the concept of authority. In doing so, her contribution pays particular attention to the work of Roscoe Pound and, based on it, a critical reflection of the similarities and differences between common law and civil law systems.

Concluding the first section, Michael Potacs, in a fifth chapter, addresses the question as to whether the hierarchical structure of legal orders may be described more appropriately using a tree diagram than the model of a pyramid of norms. Developing his views against the backdrop of the differences between civil law and common law, Potacs answers in the negative.

A second section deals with problems of interpretation and adjudication. In chapter six Alessio Sardo explores the relation between and the complementarity of originalism and positivism, which—even though dominant models in the US and in Europe respectively—have never been an object of comprehensive comparison. Sardo's contribution aspires to fill, in part, that gap. Focusing on methodological issues he suggests that, in principle, originalism and positivism overlap and, to a very considerable extent, might complement each other.

In chapter seven, Ana Margarida Simões Gaudêncio argues that the diverse structures presented by civil law and common law systems share a partially common tradition in what concerns the methodological relevance of judicial jurisprudence. Thus conferring a specific normatively constitutive meaning to the roles played by *Juristenrecht*, and, within it, *Richterrecht*, in adjudication. Establishing a dialogue between common law and civil law systems, her contribution proposes an

understanding of judicial jurisprudence not only as an effective source of law, but also as a methodologically constitutive juridical criterion.

In the final chapter of the second section Patricio Nazareno argues that comparative legal scholarship about judging typically focuses on institutional disparities among legal systems while downplaying ideological differences. His contribution has the opposite emphasis. It explores some traits of the ideological conception of judging typically associated with the American culture so as to show that remarkable differences in the judicial practice between systems may actually persist regardless of the similarities on the institutional plane.

The third and final section offers a glance at different traditions of scholarship and of law itself. In chapter nine Alexander Somek's contribution focuses on the important differences between the cultures of legal scholarship and legal education in the US and in countries belonging the civil law tradition. While North American legal academia, as Somek argues, has proudly transcended the horizon of mere doctrine and embraced a variety of interdisciplinary approaches, the civil law tradition appears to be still committed to the "science of law". In the context of the latter, Somek concludes, the moment of transcendence is the preserve of the philosophy of law.

Focusing on a particular national legal system, in chapter ten, Han Liu asks the question of whether China is to be considered a member of the civil law or of the common law tradition. The answer he develops, using historical, theoretical doctrinal and comparative analysis, is, that it is neither. Chinese law, Liu argues, is still a mélange of the socialist tradition and Western elements, including both continental and Anglo-American ones, tinged with ancient factors.

The volume is concluded by Lars Vinx' contribution which takes us to the level of international law, discussing Dworkin's last publication, 'A New Philosophy for International Law.' According to Vinx Dworkin failed to vindicate the continuing relevance of the question as to the existence of international law; a question which, as Vinx argues, Kelsen's theory of international law is better placed to answer than Dworkin's interpretative conception.

While each of these contributions is important in its own right, taken as a whole the volume indeed teaches us valuable lessons as to the similarities and differences between civil law and common law systems, oftentimes with rather remarkable results that challenge our received wisdom and enhance our understanding. Then again, sporadically, the contributions collected in this volume confirm believes we have held for quite some time. In both cases, they significantly deepen our knowledge of 'the great divide', its roots, its effects and its challenges. Thus, the volume at hand adds to our understanding of civil law as well as of common law systems: historically, structurally, and doctrinally.

Civil Law, Common Law, and the Data of Jurisprudence

Frederick Schauer

Abstract Philosophical or theoretical analysis of the nature of some phenomenon requires identifying the phenomenon whose nature is at issue. Thus, if we are seeking to understand the nature of law itself, or even, as some would put it, the nature of the concept of law, we need to have some idea of something in the world that we are examining. That is, we need to start with the *data* that supports jurisprudential theory. So-called legal pluralists claim that existing legal systems are so diverse that no useful theoretical generalizations are possible. Others claim that the features of law wherever and whenever it exists are so consistent that such generalizations are indeed possible. This essay explores these questions, with a focus on whether the differences between civil and common law legal systems are, or are not, so great as to impede jurisprudential inquiry.

1 Introduction: A Methodological Foreword

What is a legal theory a theory of? Of law, obviously. But that obvious and correct answer is also circular. What we seek when we seek a theory of law is the explanation of some phenomenon. Saying that the phenomenon we seek to explain is law gets us nowhere, because that approach just takes us back to the question of what law is, which is where we started, and what it is that we seek to explain. We require, therefore, a non-circular and non-question-begging answer to the question is just what phenomenon or phenomena a theory of law is attempting to describe, explain, justify, or criticize.

We avoid the problem of circularity by pointing to something in the world whose existence we want to theorize about, and whose definition is independent of what we are seeking a theory of. A theory of art might be, for example, a theory of the kinds of

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objects that one finds in museums and that are sold at galleries of a certain type.[1] A theory of sport would start with the kinds of activities that are widely considered to be sports, and are labeled as such, for example, football, basketball, and skiing. And once we have, even if tentatively, come up with a theory of sport, we can use that theory to decide whether certain other activities—chess, dog shows, and Sunday hiking, for example—do or do not qualify. But whether it be art, or sport, or anything else, we need to start with certain exemplars. We then attempt to determine what features of those exemplars make them exemplars of something, and then we can address whether those features are necessary, and whether those features, necessary or not, are present for certain kinds of activities or objects.

All of this is to say that the task of theorizing requires data. And the data are, commonly, or perhaps necessarily, the things whose existence we wish to explain or describe. When we seek a theoretical account of law, therefore, we need initially, to locate certain exemplars of law and then proceed to see what the features of those exemplars are, and why we think those features are important. That is, why are trying to understand why these exemplars are exemplars of the phenomenon we are looking to understand, why they might not be exemplars of something else, and why other things that might be exemplars of something else are not exemplars of the phenomenon on which we are focusing. Moreover, once we have identified the features of the exemplars that make them exemplars of the thing we are theorizing about, we may discover that we need to discard some of the exemplars. The process, with a loose analogy to Ronald Dworkin's description of the relationship between fit and justification (Dworkin 1977, 1986), and with an even looser analogy to Rawlsian reflective equilibrium (Rawls 1971), aims to explain the data whose existence is the impetus for theorizing (Postema 2018).

When we seek to explain a social phenomenon, typically have in mind a group or category of acts, events, institutions, objects, or something, and not just one of them. Yes, we might seek to understand why Judge Smith on January 15, 2013, found John Jones guilty of the crime of murder for murdering Susan Brown and sentenced Jones to twenty years in prison. But however useful it may be at times to understand and explain such singular acts, more commonly we are concerned with categories of acts, etc. And law appears to be one of these non-singular acts or institutions.

It would be tempting to explain such groups as "generics," but we need to be careful here. A recent and rich philosophical literature has focused on generics, seeking to explain, to use an example from the philosopher Sarah-Jane Leslie (Leslie 2008), why it is correct to say that mosquitoes cause malaria, even though most of them do not, and why it is incorrect to say, and here the example is mine, that Yugos and Trabants are reliable, even though most of them are. But even though generic

[1] With respect to art, one influential theory of art is substantially institutional, or sociological, maintaining that art is, to oversimplify, what artists, critics, and other members of a certain community ("Artworld") simply do (Danto 1964, 1981; Dickie 1969, 1993). And although there are institutional theories of law (Del Mar and Bankowski 2009; MacCormick 2007; MacCormick and Weinberger 1986), most of them become less circular by including some conception of the normative and, occasionally, some conception of the coercive.

statements differ from universal statements, and even though what is or is not a proper generic statement varies with the background facts (and that is why saying that mosquitoes cause malaria is a good generic statement, and why saying that Yugos are reliable cars is not, even though the percentage of reliable Yugos is higher than the percentage of malaria-causing mosquitoes) (Schauer 2003), the idea of a generic presupposes some similarity, with generics being the words that capture the grouping that the linguistic community has already decided bears an underlying similarity. In other words, a generic reflects but does not explain a grouping, or a category. And where the category is not a natural kind such as water or gold, just what it is that makes all of some number of things members of the same artifactual category is precisely what needs explaining. It is not surprising that George Lakoff's *Women, Fire, and Dangerous Things* (Lakoff 1987) was written by a linguist, because it is language that embodies what it is that some linguistic culture deems relevantly similar. But the task—or at least one task—of legal philosophy is to explain why, for example, statutes, constitutions, lawyers, the police, and judges are members of the same category *law*, while football, linguine, etiquette, and screwdrivers are not. And for that task merely identifying the conclusion, while a good start, is not nearly enough.

2 The Challenge of Legal Pluralism

Once we understand that a theory of anything is typically, even if not necessarily, a theory of a group of things, then we can turn to the question of what group of things a theory of law purports to explain. But here things get more difficult. Plainly there can be a theory of the French law of marriage and divorce, or the American law of freedom of the press, or the Ecuadorian law of murder, but that is not what a theory of law purports to do. First, it purports to encompass multiple topics and multiple forms. And, second, it purports to be trans-jurisdictional. So, although there might be a theory of Italian law, or a trans-jurisdictional theory of the law of negotiable instruments, both of these are too narrow, the former because it is too jurisdictionally narrow and the latter because it is too topically narrow. What we seek is something more, and on both dimensions.

The traditional theory of law—the kind of theory usually riding under the banner of *general jurisprudence*—suffers from no such narrowness. At its broadest, it seeks to offer an account of the nature of law in all possible legal systems in all possible worlds (Raz 2009a, p. 214; Raz 2009b, p. 91). Joseph Raz (Raz 1975, p. 159), Scott Shapiro (Shapiro 2011, pp. 395–398), and Leslie Green (Green 2016), for example, emphasize the way in which their theories of law apply even to societies of angels—that is, hypothetical societies of good people desirous of compliance with the law and desirous of social cooperation. A fortiori, the accounts of Raz, Shapiro, and others in their tradition apply to all actual societies, and so too for the accounts of law offered from a broadly positivist standpoint by Hans Kelsen (Kelsen 1967) and from a broadly natural law one by John Finnis (Finnis 1980). And the same applies as well

to Jules Coleman (Coleman 2001), Julie Dickson (Dickson 2001), Wil Waluchow (1994), and all of the other practitioners of contemporary analytic general jurisprudence.[2] For them, the phenomenon to be explained is law, period, wherever and whenever it appears.

In response to these claims about the project of general jurisprudence, or what might more accurately be labeled universal jurisprudence, one of the strong objections is the objection from legal pluralism. For legal pluralists, with William Twining (Twining 2009) and Brian Tamanaha (Tamanaha 2017, 2018) among the more prominent names in the English-language literature, the diversity of legal systems over time and across space, from antiquity to the present, and from industrialized societies to ones that are far less so (often unfortunately mis-labeled as "primitive"), is so great that there simply cannot be a general jurisprudence. Just as there cannot be a nontrivial theory of the combination of football, giraffes, and dentistry because the three are so diverse and have so little in common, so too there cannot be a theory of the systems of social control of Germany, North Korea, and the Inuit in pre--European-settlement Canada. These systems and the cultures in which they exist are just too diverse, say the pluralists, and the same holds with all of the modern institutions that might almost coincidentally happen to bear the label "law" or happen to be thought by some people as law.

The pluralist challenge is not just that different systems and different cultures have different concepts of law. That much is acknowledged by those who practice general conceptual jurisprudence, and by Joseph Raz explicitly (Raz 2005). Nevertheless, Raz insists, *our* concept of law is universal, not in the sense that every culture has the same concept of law, but that our concept of law is what enables us to identify law everywhere, and not just here. Our concept of law is thus in one sense provincial, but in another sense universal. Consequently, our culture having one universal concept of law is compatible with there being very different legal systems in different societies.

The pluralist response at this point would acknowledge that a single concept of law could recognize the very different embodiments of that concept in different cultures, but would point out that when the embodiments are so varied as to preclude illuminating generalizations, any concept of law that includes all of them is, still, destined to failure. If there is nothing interestingly similar about the forms of social organization and control across the world's cultures, now and then, the search for a useful single concept of law, even one situated within a particular culture while looking outward at all possible cultures in all possible worlds, nevertheless remains doomed.

[2] As will be explained presently, I intentionally exclude Ronald Dworkin (1977; Dworkin 1986) and H.L.A. Hart (2012) from this list.

3 Narrowing the Inquiry

Perhaps recognizing the force of the pluralist challenge, both H.L.A. Hart and Ronald Dworkin, along with Joseph Raz the most influential of twentieth-century English-language analytic legal philosophers, acknowledged that their goals, although far more than jurisdiction- or country-specific, were at least somewhat limited in scope. Hart, who in his posthumous "Postscript" to *The Concept of Law* (Hart 2012, pp. 238–276) insisted that his project was entirely descriptive, long maintained that what he was describing and analyzing was the operation of law as it existed in modern municipal legal systems, and not law wherever and whenever it might appear (Hart 2012, pp. 82–91). And so too with Ronald Dworkin, whose narrower scope, more or less contiguous with Hart (Dworkin 1986, 2006) was one that Raz described as "parochial" (Chou 2010). And even outside the modern positivist tradition, Lon Fuller's account of law, obviously an account imbued with moral considerations, was also limited to modern state law (Zipursky 2013).

Hart, Dworkin, and Fuller, among many others, can thus be understood as limiting the geographic and temporal range of their theorizing, and in that sense to have offered a partial accommodation to the pluralist challenge. But the universe of modern municipal legal systems, even though not including those of antiquity, of less industrialized societies, and of non-state regulatory systems, still encompasses a vast number of legal systems. The question, then, is whether it is possible (or desirable) to offer general theoretical accounts of the nature of law in even that somewhat narrower universe.

4 On the Diversity of Legal Families

The dialectic between the pluralists, on the one hand, and Hart, Fuller, and Dworkin, among others, on the other hand, allows us to refine the inquiry. Are Hart, Fuller, and Dworkin correct in supposing that we can engage in useful theoretical inquiry, and thus in useful theoretical generalizations, about modern municipal legal systems? Or, to focus the inquiry even more, about law and legal systems in modern industrialized secular societies with secular legal systems.

At this point, the distinction among legal families (or legal traditions) becomes central. And although some of the contemporary scholarship on the relationship between law and economic development tends to divide the world's secular legal systems into those derived from English common law, from French law, from German law, and from Scandinavian law (La Porta et al. 1998; La Porta et al. 2008), for present purposes we can simplify by just dividing the world's secular municipal industrialized legal systems into common law and civil law systems. And if we do so, the question before us is whether it is possible to generalize about law across these two large legal families or legal traditions, or whether, to the contrary,

the possibility of generalizing across the common law/civil law divide is precluded by the size of the differences between the systems on either side of that divide.

The first question to be asked is whether the divide is as great as I have just intimated. And what makes this question important is the extent to which the idea of *convergence*, a major theme in contemporary comparative law (Cappelletti 1971; Schlesinger 1995; Zweigert and Kötz 1998), accurately describes the extent of the current contrast between common law and civil law legal systems.

In examining this question, it might be useful to start with the conventional caricature of the differences between common law and civil law. According to this caricature, which like most caricatures has at least some foundations in reality, the civil law is a system dominated by a code of highly detailed legal rules, those rules being sufficiently detailed and sufficiently alert to the vagaries of human behavior that the rules are designed to deal with virtually all forms of human behavior and all forms of human conflict. Only rarely would a situation arise that was not covered by the rules, and thus the judge—as adjudicator and not simply as enforcer—is a relatively insignificant figure.

If we wanted to attach a name to this model of a legal system, the name we might choose would be Napoleon, whose image of a well-functioning legal system did not depart very much from the caricature just provided (Abi-Saab 2017, p. 217). And although modern-day descendants of the Napoleonic Code depart substantially from what Napoleon originally had in mind, Napoleon's vision stands as a useful articulation of one form of what we might think of as the civil law ideal.

Even better than Napoleon as a model for the civil law ideal type would be Jeremy Bentham, albeit perhaps ironically. Ironically because Bentham not only came from a common law country, but also was the son of a lawyer in a common law country and was himself trained as a lawyer in the same common law country. But Bentham, one of history's great haters, hated the common law, believing it to be largely a conspiracy of lawyers and judges—Judge & Co.—aimed at making the law excessively complex (Rosenblum 1978; Postema, 1986; Schauer 2015, pp. 11–15). That complexity, Bentham believed, required lawyers for its interpretation and judges for its adjudication, and thus the rise and perpetuation of the Judge & Co. conspiracy was motivated by a desire of lawyers to increase their income by creating a need for their services and a desire of judges to increase their power by leaving the content of the law largely to judicial interpretation.

As a result of these beliefs, Bentham became, even more than Napoleon, and even earlier than Napoleon, a vigorous proponent of highly detailed codes of law that would regulate all of the human behavior that needed regulating (Alfange 1969), and that would anticipate and resolve all imaginable uncertainties and conflicts, thus making judges largely superfluous and lawyers essentially unnecessary. Indeed, Bentham's presumably serious proposal that it be illegal to give legal advice for money (Bentham 1838) was based on his belief that such a prohibition would remove the incentive for Parliament to make unnecessarily complex laws, laws whose complexity benefited lawyers and judges but no one else.

If Napoleon and Bentham represent the caricature at one pole of a dichotomy, then the other pole is represented by a "pure" common law model, one in which all or