Foreword

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At the beginning of my legal career as a young law student in New Zealand, I recall absorbing – almost by osmosis – a number of received wisdoms about the binary distinctions between common law and civil law traditions and systems. In law school lectures and tutorials and via my reading, I learned in a structured, explicit way about the common law’s shared focus on legislation and judge-made law, the centrality of the doctrine of precedent, the importance of the role of judges and judicial discretion, hierarchies of courts and the adversarial system. In a less structured way, in bits and pieces, I formed a nebulous impression of Civil Law systems as being characterised by: comprehensive Codes; a quite different, non-discretionary role for Civil Law judges; the absence of binding precedent; and inquisitorial as opposed to adversarial processes.

Yet, as I absorbed this conventional wisdom, I also recall experiencing a kind of cognitive dissonance. Even allowing for considerable cultural and historical differences between various Civil Law and Common Law jurisdictions, at the level of *logic*, how could these stark binaries be entirely accurate?

Take for instance the popular notion that Civil Codes are complete, and judges’ roles are only to apply, rather than interpret, develop or create new law to cover circumstances not contemplated by the Code. So much of what I was learning as a law student in the Common Law tradition, and also as a philosophy student with an interest in the philosophy of language, was about the slipperiness of human language. Legislative drafters take exceptional care to choose clear words, but even with the greatest care, frequently there remains space for ambiguity between competing possible interpretations of collections of words and syntax.

HLA Hart famously argued that even a seemingly clear rule, necessarily expressed via some set of words, will have not only a core, clear meaning, and core set of situations to which it applies, but also a penumbra of uncertainty. A rule prohibiting vehicles in the park will clearly prohibit cars and trucks, but determining whether it also bans roller skates or children’s tricycles from entering the park may be uncertain, and will depend on a more complex and creative process of interpretation. This penumbra of uncertainty is due to the nature of language, intention and meaning. Hart came from a Common Law perspective, and wrote in English. But the features of language and meaning that he discussed are true of any language. Surely ambiguities of language, which necessitate complex, active interpretation and gap filling must arise in any legal system. So, how could the stark assertion that civil law judges mechanically and uncreatively apply Civil Codes, exercising no discretion, capture the full picture?

Merryman’s book, had I encountered it at the time, could have helped me to navigate and resolve a good deal of this cognitive dissonance. The challenge for any introductory text is to make complex material accessible and understandable, while at the same time avoiding oversimplification. My early rudimentary understandings of the civil law tradition that I have just described were drawn not from a text, but from the general atmosphere of law school discussions and off-handed comparisons. However, they illustrate the difficulty and importance of ensuring accessibility while avoiding oversimplification. My early notions about the Civil Law were accessible and understandable in the sense that I was able as a non-expert fairly passively to pick up and retain the ideas. But it is no great compliment to say that my understandings were “sticky.” After all, my sticky understandings of the distinctions between Common Law and Civil Law traditions were oversimplified and reductive. This oversimplification was unfortunate for at least two reasons. First, my oversimplified picture of how Civil Law systems operate was inaccurate. Furthermore, due to my oversimplified understanding of the Civil Law tradition, comparing my pictures of the two traditions did little to deepen or enhance my understanding of the way that the Common Law operates.

Merryman’s book strikes a sophisticated analytical balance. It highlights themes of similarity and difference between civil law and common law traditions in a way that is understandable and “sticky”, but it also complicates and pierces those generalisations. The book’s generalisations make it accessible to non-expert readers, and help them to recognise meaningful patterns. This means it is comprehensible and “sticky.” But by also explaining the exceptions to those generalisations, the book avoids presenting a reductive or oversimplified picture of the differences and similarities between the Common Law and Civil Law traditions. If I had read it as a young law student, it would have been a highly effective antidote to my caricaturish understandings of Civil Law at the time.

Not only is Merryman’s text a Civil Law primer, it is also an introduction to comparative ways of thinking about legal systems more generally. Positive laws and legal systems are human artefacts rather than natural kinds, just as a chair or a table is a human artefact rather than something that appears fully formed and independent from human intervention. When thinking about the particular legal system with which one is most familiar, it can be easy to take for granted, and even to cease to “see,” its particular forms and conventions. For a common lawyer, the doctrine of precedent and the authority of judges to develop case law may appear to be necessary building blocks of a legal system. However, just because the common law is structured in particular ways does not mean it is necessary that that be so, or that it could not have been otherwise.

Learning about other systems of law can help to uncover one’s unconscious assumptions and blindspots about one’s own legal system. If a person has only ever seen red chairs, then showing her a blue chair, or yellow chair with green spots will help her to see that chairs need not be red after all. It might also prompt her to ask other questions such as, why are red chairs red? Who decided that they should be that colour? What are the consequences of having yellow spotty chairs as opposed to red chairs? And what does any of this mean for tables?

This book does not just describe the similarities and differences between the general ways in which Civil Law and Common Law systems operates in practice. It analyses and explains the distinct histories, ideologies and folklore that underlie these similarities and differences. That is, even though civil law codes are no more immune to gaps and ambiguity than common law legislation, the stories that Civil Lawyers and Common Lawyers tell themselves about these gaps are very different.

If this were a book about chairs, it would not simply observe that some chairs are red and some chairs are green. It would also ask about the history of access to red and green paint, whether red paint is called “red” or “brick” or “pink” or simply “chair coloured.” It would explain that in the case of two red chairs that seem at first glance to be quite similar, there might be very different histories and ideologies behind the choices to paint each of them red, and the stories each owner tells about her red chair.

Of course, this is not a book about chairs, but about the Civil Law tradition. The distinctions between common law and civil law traditions are not only at the substantive or descriptive level, but more profoundly, at the level of the ideologies, folklore and historical accidents underlying the content of the law.

Merryman’s success in balancing accessibility and complexity can be seen by the numerous reprints, new editions and translations of this book in the nearly fifty years since it was first published. This translation makes this comparative law classic available to Chinese language readers.