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The importance of reforming civil law in formerly socialist legal systems

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ABSTRACT

The modern civil law emerged from many centuries of development. In the 18th and 19th centuries European civil law based on Roman law foundations carried forward the concept of the individual citizen at the heart of the liberal revolutions. New conceptions of the role of the state and the development of national civil codes re-orientated this conception. The Soviet socialist legal model resonated faith in 'top-down' state control while at best tolerating a socialist version of the civil law. Today, internationally the philosophical characteristics and legal rights of the individual citizen are explicated in public law and the role of civil law is to provide the institutions, doctrines and transactions of civil society and commercial law.

A distinguishing feature of the civil law is its enforceability horizontally in society directly against those who fail in their responsibilities and does not depend on authority acting 'top-down' within the public law realm. There are advantages to society and the state in fostering direct horizontal enforcement. Without pro-active reform socialist and formerly socialist legal systems have restricted capacity to gain these advantages. This is not an argument against the importance of constitutionalism, human rights protection and anti-corruption initiatives – the civil law provides an essential juristic background to public regulation and a direct method of remediating loss occasioned by unlawful action.

1. Introduction

In this paper functions of the civil law in society are explored. I will trace civil law jurisprudence across historical phases that have tested it and at times displayed great animosity to it.

We will see that one aspect of the theory of civil law has proven highly advantageous in a modern legal system, both socialist and western liberal legal systems. That is the capacity of civil law to institute accountability horizontally within the legal system, allowing enforcement of its norms directly between private citizens, supplementing public law processes, in consumer protection for example, at a time when regulation is critiqued and regulatory law enforcement budgets are intensely scrutinised.

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This feature of the civil law is largely taken for granted, however, we will explore debates about private law enforcement, including social and governmental advantages, in two areas of law that emerged in the 20th century and are still taking shape, competition law and environmental law, in order to identify the advantages of this approach.

We will also consider reforms required to harness this capacity of civil justice to achieve these broader social and governmental benefits, especially the importance for the civil law and its administration to achieve and maintain: (i) principles that reflect modern ethical concerns, (ii) broad access to civil justice, and (iii) independent adjudication of civil justice claims and enforcement of adjudication outcomes.

2. When the civil law was the centre of law's universe

The modern civil law emerged from many centuries of legal development. In the 18th and 19th centuries, European civil law based on Roman law foundations carried forward the concept of the individual citizen at the heart of the liberal revolutions. This topic can only be reviewed here but was recently examined in depth (Raff & Taitslin, 2012, pp.158–164).

The great Renaissance and Enlightenment developments in European legal systems were stimulated by rediscovery of classical Roman law (Dulckeit, Schwarz & Waldstein, 1989, 303–9) and focussed intently on the civil law (generally, Tigar & Levy, 1977). However, while Roman law had distinguished between the *ius privatum* [private law] and the *ius publicum* [public law], the law of medieval Europe did not draw a coherent distinction, a point well illustrated by the conflation of sovereignty, lordship [*seigneury*] and *ownership* within feudal systems of land tenure. The Commentators, foremost Bartolus (1314–57) and Baldus (1327–1400), essentially synthesised the Roman law with contemporary medieval conditions. The Humanists of the 16th century, such as Donellus (1527–1591), argued that the nature of feudal law was alien to classical Roman law, attempting to free the Roman notion of *dominium* as indivisible ownership from medieval customary feudal divided ownership and the serfdom implicit in it (Stein, 1999, pp.78–82).The 17th century saw modern natural law theory emerge as a revolutionary universal world view beyond the historical particularities of Roman law and was still shaping law during the drafting of the German Civil Code (Raff, 2003, Chp. 3). The intellectual tradition of the exponents of natural law was nevertheless deeply rooted in Roman law scholarship. The Classical natural law generally claimed religious justification. Modern natural law, by contrast is denoted by movement toward secular explanations of its principles, discovered through reason in the nature of the universe and the nature of human existence within it (Weber, 1954, p. 288; Habermas, 1973).

For the towering figures of Enlightenment jurisprudence, Hugo Grotius (Grotius, 1926, 1925), Samuel Pufendorf (Pufendorf, 1964) and Christian Wolff (Raff, 2003, 130; Winiger, 1992, p. 179), the civil law was the central concern of modern natural law, although by the 18th century Wolff could already see that the state had responsibilities through its bureaucracy for health, education and labour protection, in addition to external and internal security (Clark, 2007, p. 240). Accordingly, the great codifications of the 18th and 19th centuries, the first European code in the modern style, the Bavarian *Codex Maximilianeus Bavaricus civilis* of 1756, the Prussian *Allgemeine Landrecht für die preußischen Staaten* of 1794, the French *Code Civil* of 1804, the Austrian *Allgemeine bürgerliche Gesetzbuch für die deutschen Erblände* of 1811 and even the German *Bürgerliches Gesetzbuch*, enacted in 1896 but taking effect on 1 January 1900 (the first day of the 20th century by German reckoning), perpetuated a modern natural law conception of the individual within a civil law built largely around Roman law as the legal description of the citizen within society. It is true that until the French *Code Civil* the codes were drafted with faith in the 'naturalness' of the right of kings and the nobility to rule and to retain their estates, and the divine right of monarchs and the natural rights of the aristocracy were still strong points of reference at the Congress of Vienna (1814–1815) (Zamoyski, 2007), in contrast the French *Code Civil* sought to implement the natural rights of the individual asserted in revolution – this distinction may be sheeted back to the social and historical positions of their authors. The *Code Civil* was nevertheless entirely a Code of the civil or private law. The Code was however conceived in connection with the *Declaration of the Rights of Man and Citizen*: for example, the definition of property in Art 544 of the Code followed the conception in the Declaration, setting forth a liberal modern natural law unitary concept of ownership. However, the role of the civil law in depicting the place of the individual in a broader natural law world view receded as the role of the public law and foremost constitutions advanced, following the *Declaration of the Rights of Man and Citizen*, in expressing the rights of individuals.

3. The public law conception of the citizen in society

Even if the French *Declaration of the Rights of Man and Citizen* did not precipitate the demise of the civil law cosmology of the individual, as claimed by Jellinek (Jellinek, 1901), we can see with hindsight that it foreshadowed a long-term trend that continued with liberal declarations of civil rights in the United States constitutional Bill of Rights of 1791 and the Frankfurt Constitution of 1849. The philosophical characteristics and the rights of the individual citizen were now to be explicated in public law; specifically, constitutional statements of civil rights and human rights law. This movement connected to 19th century development at the theoretical level as a new level of contemporary theorisation and critique emerged, reaching beyond the traditional conception of the legal discipline and into the emergent fields of sociology and political economy, contrasting the approaches of natural law thinkers, liberalism and the Historical School – Savigny, for example, acknowledged the state but did not consider its structure and functions could be the stuff of legal science, only private law could be