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RODRIGO SADI

## Legal Education and the Civil Law System

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## I. INTRODUCTION

The approach to legal education in a civil law country is substantially different from that in a common law country.<sup>1</sup> This article will provide common law lawyers and students with an overview of how civil law attorneys learn to think about the law. To do so, certain caveats must be made.

First, what may generally be true in one civil law country will not necessarily be true in another.<sup>2</sup> Students from different countries under civil law systems, such as Mexico, France, and Brazil,<sup>3</sup> among others, may learn the law through different methods. Second, although explaining or learning civil law requires addressing its general theory and historical background, that alone is insufficient to demonstrate how the civil law lawyer learns to think about the law. A general discussion of theory and history lacks practical examples that best demonstrate this. Whenever possible, therefore, this article refers to practical examples that draw from the author's personal experience learning and practicing law in both civil and common law jurisdictions—specifically, in Brazil and in the United States.

Part II of this article gives a brief historical background on specific works of early civil law jurisdictions that still influence current legal education and methodology that law schools apply. This background helps explain why civil law students perceive and study the law in a certain manner. Part III explores how this historical background provides the basis for the fundamental differences between civil and common law systems. Part IV addresses the learning process of law students in a civil law country and describes how the historical works of early civil law jurisdictions continue to shape legal education in civil law countries. Finally, Part V notes the need for an international legal education for both civil and common law lawyers and describes how a civil law lawyer may develop an international perspective on the law.

## II. CIVIL LAW: A BRIEF BACKGROUND

The roots of civil law can be traced back to Roman law, which was the common source for the development of two prominent civil law jurisdictions, France and Germany.<sup>4</sup> Accordingly, this section provides a brief historical background on works of early Roman, French, and German civil law from which certain tenets that continue to influence legal education today can be extracted. In general terms, these

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1. Mary C. Daly, *What Every Lawyer Needs to Know About the Civil Law System*, 1998 PROF. LAW. (SYMP. ISSUE) 37, 43.
  2. *Id.* at 39.
  3. *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html> (last visited Jan. 5, 2018).
  4. Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L., 419, 420–21 (1966).

tenets are: (i) civil law is largely codified;<sup>5</sup> (ii) legal scholars are usually responsible for creating, writing, and interpreting the law;<sup>6</sup> and (iii) civil law rules are prioritized.<sup>7</sup>

*A. Roman Law: Codification and Interpretation of the Law*

Roman law in the early years of the Roman Republic was administered under the authority of two magistrates.<sup>8</sup> These magistrates would issue edicts that provided general rules applicable to certain fact patterns taken from conflicts brought to them for resolution.<sup>9</sup> As the magistrates were replaced, new magistrates would maintain significant portions of previous edicts, preserving a sense of continuity and stability.<sup>10</sup> These edicts formed laws that legal scholars, the *jurisconsults*, interpreted and used to provide legal advice to private parties and even magistrates themselves.<sup>11</sup>

Besides introducing the concept of *jurisconsults*, Roman law's other contribution to contemporary civil law is known as the *Body of Civil Law* (*Corpus Iuris Civilis*), adopted between 533 and 536 CE.<sup>12</sup> Although this collection of works is sometimes referred to as the *Justinian Code* because it was prepared at Emperor Justinian I's instigation, the *Code* is only one part of the *Body of Civil Law*, which is comprised of four separate works.<sup>13</sup> The *Digest* (533 CE) summarized all of the classical jurists' writings on law and justice up to that point in time.<sup>14</sup> The *Code* (534 CE) compiled the actual laws of the empire, citing legislation and pronouncements.<sup>15</sup> The *Institutes* (535 CE) was a smaller work, intended as a textbook for law students, that summarized and categorized sections of the *Digest*.<sup>16</sup> In 536 CE, Roman legal scholars wrote a fourth work, the *Novella*, which was not part of Justinian's project.<sup>17</sup> Justinian did not allow commentaries on his code,<sup>18</sup> but this prohibition proved

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5. Robert A. Pascal, *Louisiana Civil Law and Its Study*, 60 LA. L. REV. 1, 2 (1999).
  6. UNIV. OF CAL., BERKELEY, SCH. OF LAW, THE COMMON LAW AND CIVIL LAW TRADITIONS 1 (2010), <https://www.law.berkeley.edu/library/robbins/pdf/CommonLawCivilLawTraditions.pdf>.
  7. *See infra* Section II.C.
  8. CHARLES SUMNER LOBINGIER, THE EVOLUTION OF THE ROMAN LAW: FROM BEFORE THE TWELVE TABLES TO THE CORPUS JURIS 110 (2d ed. 1923).
  9. *Id.* at 113.
  10. *Id.*
  11. *Id.* at 116.
  12. UNIV. OF CAL., BERKELEY, SCH. OF LAW, ROMAN LEGAL TRADITION AND THE COMPILATION OF JUSTINIAN 3 (2007), <https://www.law.berkeley.edu/library/robbins/pdf/RomanLegalTradition.pdf>.
  13. *Id.*
  14. *Id.*
  15. *Id.*
  16. *Id.*
  17. *Id.* The *Novella* was created to update the *Code* with new laws that the emperor enacted after 534 CE in his attempt to correct inaccuracies of the previous works. *Id.*
  18. GUY CARLETON LEE, HISTORICAL JURISPRUDENCE: AN INTRODUCTION TO THE SYSTEMATIC STUDY OF THE DEVELOPMENT OF LAW 296 (2d ed. 1922).

impossible to maintain due to the ineffectiveness of simply restating the code when teaching the law.<sup>19</sup> Ultimately, Roman law paved the way to civil law's tradition of codifying customs and rules under one body of work and having legal scholars comment and clarify the law for judges, practitioners, and students.<sup>20</sup>

*B. French Law: Codification of Rights and Principles*

Before the French Civil Code was adopted, the French people lived in a state of uncertainty with regard to the application of the law.<sup>21</sup> While in nearby England the rules of stare decisis and determination of facts by a jury were the norm, the French were subject to the equity of the courts, which applied arbitrary and confusing laws based on localized customs.<sup>22</sup> Rather than incorporate common law rules, the French decided to adopt a written law, which was to be worded clearly and simply to allow all subjects to know their rights.<sup>23</sup> Louis XIV, in 1665, appointed a commission for codification that resulted in the *Great Ordinances of Colbert*, which dealt with admiralty, adjective, criminal, and commercial law.<sup>24</sup> Between 1731 and 1747, Chancellor Henri François d'Aguesseau also undertook codification of the law and obtained three ordinances on donations, successions, and substitutions.<sup>25</sup> However, it was the Council of State, established by Napoleon Bonaparte and comprised of men trained in both statutory and customary law, that would draft a new national law in light of the French Revolution. This law became the Napoleonic Code (French Civil Code).<sup>26</sup>

The French Civil Code, adopted in 1804, united all of French civil law into one body of work. It repealed previous sources of law, such as Roman law, the ordinances, and general customary law, which were now covered by the new code.<sup>27</sup> The French Civil Code served as a statement on the ideals of the French Revolution and contained innovative content, such as provisions reflecting the principles of freedom and equality of all citizens and inviolability of property.<sup>28</sup> It also organized the law into

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19. Tony Honoré, *Justinian's Codification: Some Reflections*, 25 BRACON L.J. 29, 30 (1993) (Eng.) (“Lectures . . . could not be effective if they consisted simply of repeating the text or giving a literal translation of it.”).

20. UNIV. OF CAL., BERKELEY, SCH. OF LAW, *supra* note 6, at 2.

21. André Tunc, *The Grand Outlines of the Code*, in THE CODE NAPOLEON AND THE COMMON-LAW WORLD 19, 19 (Bernard Schwartz ed., 1956).

22. *Id.* at 19–20.

23. René Cassin, *Codification and National Unity*, in THE CODE NAPOLEON AND THE COMMON-LAW WORLD, *supra* note 21, at 46, 47–48.

24. Tunc, *supra* note 21, at 20.

25. *Id.* at 20–21.

26. Cassin, *supra* note 23, at 48.

27. *Id.*

28. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 687 (2000).

categories (Persons, Property, and Acquisition of Property).<sup>29</sup> The code was based on reason rather than common-sense morality, and as a body of law, its provisions were deemed valid only if they did not contradict the principles under which the code was formed.<sup>30</sup> Furthermore, Napoleon intended his code to be clear, complete, and coherent.<sup>31</sup> In his mind, his code should have been free of commentaries, but, as was the case with Justinian's code, the role of legal scholars in the interpretation of the codified law was too strong to be hindered.<sup>32</sup> Ultimately, not only did the French Civil Code further reinforce the tenets of codification of the law and interpretation of codes by legal scholars, but it also introduced the idea that codified rules should abide by certain principles.<sup>33</sup>

*C. German Law: Hierarchy of Laws*

In the early nineteenth century, Germany had not yet unified and faced the intolerable condition of having separate sets of laws ruling different geographic areas.<sup>34</sup> In the east, the laws were German, set forth by the Prussian code known as *Allgemeines Landrecht*; in the center, the laws were mostly influenced by early Roman law and customs; and in the west, the laws were influenced by the French Civil Code, which gave rise to a set of incohesive laws in both French and German.<sup>35</sup> The militarily-charged environment of the time eventually brought about a sentiment of German nationality that created a path for the adoption of a national law.<sup>36</sup> In 1874, a commission was created to prepare a national civil code.<sup>37</sup> Well-known legal scholars of the time spent several years writing proposed rules for particular areas of law entrusted to them.<sup>38</sup> After their work was presented to the public and additional review was conducted, the German Civil Code was eventually adopted and took effect on January 1, 1900.<sup>39</sup>

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29. CODE CIVIL [C. CIV.] [CIVIL CODE] (Fr.).

30. Tetley, *supra* note 28.

31. Ivan Sammut, *Interpreting the Law in a Mixed Jurisdiction: The Professor vs. the Judge—Peers or Rivals*, 62 LOY. L. REV. 777, 793 (2016).

32. *Id.* at 792–93.

33. Cassin, *supra* note 23, at 49.

34. William W. Smithers, *Introduction to THE CIVIL CODE OF THE GERMAN EMPIRE*, at xi, xxxviii–xxxix (Walter Loewy trans., 1909).

35. *Id.* at xxxviii.

36. *Id.* at xli.

37. *Id.* at xxxvi.

38. *Id.* at xli–xlii.

39. *Id.* at xlii–xliii.

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Certain philosophical theories of contemporary civil law can also be traced back to German legal scholars.<sup>40</sup> In 1934, in his book *Pure Theory of Law*,<sup>41</sup> Hans Kelsen presented an important theory describing how laws interact with each other in a hierarchical system.<sup>42</sup> Under his theory, there is one law from which all others derive and with which they may not conflict. For example, a constitution<sup>43</sup> is at the top of a hierarchy of material norms<sup>44</sup> in a national juridical order.<sup>45</sup> The next level of norm would be a law derived from the constitution.<sup>46</sup> This hierarchical model is helpful considering it is typical for the legislative branch of a civil law country to enact numerous laws which judges and lawyers then apply.<sup>47</sup> The civil law system's tenet of an order of priority is, therefore, of paramount importance because such order allows scholars, lawyers, and judges to understand which laws take precedence, and within the laws, which rules should prevail.

### III. THE CIVIL LAW SYSTEM AND THE COMMON LAW SYSTEM

With a basic background of the civil law tenets, the differences and similarities between civil and common law systems are better understood. For illustrative purposes, this section offers practical examples using the United States, a common law system, and Brazil, a civil law system.

#### A. Sources of Law

A legal system is defined as “an operating set of legal institutions, procedures, and rules.”<sup>48</sup> The main difference between the civil and common law systems is their reliance on different sources of law as the basis for those operating rules.<sup>49</sup> In the

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40. See generally Edwin M. Borchard, *Jurisprudence in Germany*, 12 COLUM. L. REV. 301 (1912) (discussing German contributions to jurisprudence and legal philosophy).

41. Earl Snyder, *Hans Kelsen's Pure Theory of Law*, 12 HOW. L.J. 110, 110 (1966).

42. *Id.* at 119.

43. Such constitution may be written or unwritten, as in the United States or Britain, respectively. *Id.*

44. *Id.* at 118. Kelsen defines a norm as “a rule stating that an individual ought to behave in a certain way, but not asserting that such behavior is the actual will of anyone.” *Id.* Material norms indicate an imperative and “can either directly impose a specific action, or define a goal or object to strive towards.” SOCIAL AND LEGAL NORMS 74 (Matthias Baier ed., Routledge 2016) (2013).

45. Snyder, *supra* note 41, at 119.

46. *Id.*

47. Brazil, for example, as of December 29, 2016, had passed over 10,000 laws, many of which are further detailed in Decrees. Of those laws, 8,950 were passed from 1991 through 2016. See 2016 – Decretos [Decrees], BRAZ., <http://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/decretos1/2016-decretos#wrapper> (last visited Jan. 5, 2018). Furthermore, the Brazilian Civil Code (official name of Law No. 10.406 of January 10, 2002) has 2,046 articles, not counting those articles' paragraphs, items, and sub-items. CÓDIGO CIVIL [C.C.] [CIVIL CODE] (Braz.).

48. Tetley, *supra* note 28, at 681.

49. S.B., *What is the Difference Between Common and Civil Law?*, ECONOMIST (July 17, 2013), <https://www.economist.com/blogs/economist-explains/2013/07/economist-explains-10>.

United States, for example, opinions that judges render in a court serve as a primary source of the law.<sup>50</sup> When deciding a case, a judge will, through deduction, either apply a previous rule, limit or extend such rule in scope based on the specific facts before the court, or render an opinion using a new rule that takes into account facts and circumstances not previously considered by the court.<sup>51</sup> Moreover, to avoid conflicting rulings pertaining to the same or substantially similar facts, U.S. judges abide by the doctrine of *stare decisis*, which binds lower courts to follow decisions rendered by higher courts.<sup>52</sup>

Civil law, on the other hand, relies heavily on legal principles,<sup>53</sup> which legal scholars address in their doctrinal work.<sup>54</sup> A civil law attorney's reliance on doctrinal work may be traced back to the Roman *jurisconsults*, the French commentators to the French Civil Code, and the German legal scholars who created the German Civil Code.<sup>55</sup> Regardless of how clearly worded written law may be, history has shown that codified law is too vague to be restated without the assistance of scholarly commentaries or explanations.<sup>56</sup> Furthermore, as a civil law jurisdiction becomes more complex, the number of laws and rules increases; with this, the possibility that new rules could be legally imprecise or even conflict with previous rules also increases.<sup>57</sup> It is imperative for civil law jurisdictions, therefore, that legal scholars provide solutions to conflicts that may arise due to the large number of codes, laws, and rules that are not always consistent with one another.

The fact that civil law statutes are thought to be concise, while common law statutes are deemed to be precise,<sup>58</sup> might explain the need for scholarly interpretation of imprecise or conflicting civil law statutes. Civil law statutes are deemed concise because they are intended to be exhaustive and refer to general principles in as few words as possible.<sup>59</sup> Accordingly, civil lawmakers should construe a statute broadly and refrain from attempting to address all possible inaccuracies of a statute.<sup>60</sup> Scholarly commentary on the law will not only resolve any imprecisions, but also

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50. Tetley, *supra* note 28, at 701.

51. *See id.*

52. *Id.* at 702.

53. *Id.*

54. *See* Dainow, *supra* note 4, at 428. "Doctrines" are scholarly works that provide general explanations of legal principles and their history, functions, and domains of application, as well their effects on certain rights and obligations. *See id.*

55. Sammut, *supra* note 31, at 792.

56. *See id.* at 792–93.

57. Brazilian legislators, for example, passed over 6,000 laws since 1988, when the current Brazilian Constitution was enacted. *See Leis Ordinárias [Common Laws]*, BRAZ., <http://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/leis-ordinarias> (last visited Jan. 5, 2018). From 1958 to 1988, legislators passed only about half the number of laws as they have since 1988. *See id.*

58. Tetley, *supra* note 28, at 702.

59. *Id.* at 703.

60. *Id.*

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convey different interpretations of the statutes, one of which will likely prevail over the others.<sup>61</sup> Ultimately, although some uncertainty is inevitable in civil law statutes, these uncertainties are resolved in scholarly works.<sup>62</sup> On the other hand, common law statutes are precise because they are intended to be read restrictively.<sup>63</sup> Common law statutes address only a specific part of the law because they are to be applied by the courts to specific facts.<sup>64</sup> The statutes provide instructions for particular fact patterns, and therefore, any deviation from those fact patterns gives rise to uncertainty, which in turn will be resolved by the courts.<sup>65</sup>

This is not to say that civil law lawyers do not also look to case law to elucidate a legal issue.<sup>66</sup> Although civil and common law systems may prioritize different sources of law, the systems have similar sources, such as statutes (written law), doctrine or treatises (interpretation of the law), case law, and customs.<sup>67</sup> In fact, in Brazil, trial lawyers are encouraged to invoke favorable precedent when arguing a case before a judge.<sup>68</sup> Judges will apply the law to a case to make a decision, but will not use the law to create a rule.<sup>69</sup> Furthermore, written civil law judgments are stylistically more formal than common law judgments,<sup>70</sup> and in Brazil, must actually comply with certain statutory requirements to be valid and binding.<sup>71</sup>

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61. *Id.* at 701.

62. *Id.*

63. *Id.* at 703–04.

64. *Id.* at 704.

65. *Id.* at 702–04.

66. *See id.* at 702.

67. World Bank Grp., *Key Features of Common Law or Civil Law Systems*, PPIRC, <https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law> (last updated Sept. 6, 2016).

68. *See* Daly, *supra* note 1, at 38. In Brazil, lower court judges generally abide by higher courts' rulings, up to the Brazilian Superior Court of Justice, which is responsible for all civil and criminal matters not subject to a special court or under constitutional law, and to the Brazilian Supreme Court, which presides over constitutional matters. Ana Gabriela Verotti Farah, *Overview of the Legal System in Brazil*, BRAZ. BUS., <http://thebrazilbusiness.com/article/overview-of-the-legal-system-in-brazil> (last updated Oct. 14, 2013).

69. Tetley, *supra* note 28, at 701.

70. *Id.* at 702. “The method of writing judgments is also different. Common Law judgments extensively expose the facts, compare or distinguish them from the facts of previous cases, and decide the specific legal rule relevant to the facts. In contrast, Civil Law decisions first identify the legal principles that may be relevant, then verify if the facts support their application.” DEBORAH CAO, *TRANSLATING LAW* 29 (Susan Bassnett & Edwin Gentzler eds., 2007). Thus, only the facts relevant to the advanced principle need to be stated.

71. CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CODE OF CIVIL PROCEDURE] art. 489 (Braz.). Under Article 489 of the Brazilian Code of Civil Procedure, a judgment (referred to as a “sentence”) shall contain the following parts: (i) the report, which shall contain the names of the parties, the identification of the case, a summary of the claim and of the answer, and a description of the main procedural developments of the case; (ii) the arguments, in which the judge shall analyze the legal and factual issues arising out of the case; and (iii) the disposition, in which the judge will resolve the main questions presented to him

### B. Roles of Professors and Judges

In civil law countries, professors are vital to resolving uncertainty in the law because they create the scholarly works that interpret the law and take active roles in teaching the law to students, practitioners, and even judges.<sup>72</sup> Professors in civil law countries are not always dedicated exclusively to academic study. In Brazil, for example, professors continue to practice law while they teach.<sup>73</sup> Moreover, Brazilian professors come from different areas of practice.<sup>74</sup> Many are lawyers in private practice, and a number hold public office in positions such as judges, public defenders, or prosecutors.<sup>75</sup> Under Brazilian law, there is neither hierarchy nor subordination between lawyers, judges, and members of the prosecutor's office.<sup>76</sup> To become a judge, a lawyer must have at least three years of experience practicing law<sup>77</sup> and must pass state examinations.<sup>78</sup> If approved, she is appointed as a substitute judge in a small town.<sup>79</sup> In time, a judge may gain enough experience to advance into bigger cities or higher courts.<sup>80</sup> However, in Brazil, judges generally are viewed as "faceless civil servants," unlike in a common law country, where judges are "cultural heroes" and play a prominent role in resolving conflicts that appear before them.<sup>81</sup>

## IV. LEGAL EDUCATION IN A CIVIL LAW COUNTRY

The differences between civil and common law systems also impact school environment and teaching methodology.<sup>82</sup> Besides differences in curricula and the duration of law school, the "thinking process" taught to students in a civil law country differs from that in a common law country.<sup>83</sup> Again, Brazil and the United States are used as practical examples.

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by the parties. *Id.* Article 489 further explains that, among other exceptions, a judgment will not be deemed to valid if a judge (a) presents undetermined legal concepts, or (b) cites a statute without explaining its relationship to the case. *Id.*

72. Sammut, *supra* note 31, at 792–94.

73. Nadia de Araujo, *The Status of Brazilian Legal Education*, 51 J. LEGAL EDUC. 325, 329 (2001).

74. *See id.*

75. *See id.*

76. Lei No. 8.906, de 4 de Julho de 1994, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 5.7.1994, art. 6 (Braz.).

77. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 93, Item I (Braz.). Legal practice includes certain legal work not necessarily performed by a lawyer. A law clerk who is a graduate of law school and holds a Bachelor's Degree may be eligible to sit for state examinations.

78. *Id.*

79. *Id.*

80. *Id.*

81. Sammut, *supra* note 31, at 796.

82. Philip M. Genty, *Overcoming Cultural Blindness in International Clinical Collaboration: The Divide Between Civil and Common Law Cultures and Its Implications for Clinical Education*, 15 CLINICAL L. REV. 131, 139–40 (2008).

83. *Id.* at 141.

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### *A. Law School Environment and Learning the Law*

In civil law countries, a law degree is commonly equivalent to a U.S. undergraduate degree.<sup>84</sup> In Brazil, law school immediately follows high school,<sup>85</sup> while in the United States, students are generally required to obtain an undergraduate degree before law school.<sup>86</sup> As a result, the student body in a U.S. law school includes students who have the benefit of training in various substantive areas.<sup>87</sup>

Students attend law school for a longer period of time in civil law countries than in common law countries.<sup>88</sup> In Brazil, for instance, law school consists of five years of study.<sup>89</sup> Most of the curriculum is comprised of required courses, and students only take elective courses toward the end of their law school tenure.<sup>90</sup> Furthermore, since Brazilian law students have not usually obtained a prior undergraduate degree, the first and second years of law school frequently focus on what U.S. students may know as liberal arts.<sup>91</sup> They take mandatory classes in philosophy, sociology, and general theory of government, which are taught in a manner to guide students' understanding of the legal system.<sup>92</sup> During those first years, civil law students are taught the philosophical and sociological background that acts as the framework for civil law system principles.<sup>93</sup> This method is rooted in the continued influence of the French Civil Code in civil law, which imbued the system with a tradition of creating legal rules based on principles.<sup>94</sup>

Civil law students learn the law through an overview of the entire jurisdiction's legal system.<sup>95</sup> Law students are kept at a distance from specific facts of the cases they study and learn to understand the law as a framework for methods and principles translated into statutes that communicate hierarchically.<sup>96</sup> Once students are instructed on the principles and framework of the civil law system, they are then introduced to the country's main body of laws, which in Brazil are the Constitution and Brazilian

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84. Daly, *supra* note 1.

85. Piyali Syam, *Major Differences Between the Brazilian and U.S. Legal Systems*, WASH. U.L. (Feb. 28, 2014), <https://onlinelaw.wustl.edu/blog/major-differences-brazilian-u-s-legal-systems/>.

86. *Id.*; Daly, *supra* note 1, at 42.

87. Daly, *supra* note 1, at 42.

88. Syam, *supra* note 85 (indicating that it takes roughly five years to earn a law degree in a civil law country such as Brazil).

89. *Id.*; Araujo, *supra* note 73, at 328.

90. *See* Resolução No. 9, de 29 de Setembro de 2004, D.O.U. de 1.10.2004 (Braz.).

91. Araujo, *supra* note 73, at 328.

92. Resolução No. 9, de 29 de Setembro de 2004 (Braz.).

93. *Id.*

94. Tetley, *supra* note 28, at 701–02.

95. Daly, *supra* note 1.

96. *Id.* at 43–44.

Civil Code.<sup>97</sup> Pursuant to Kelsen's theory on the hierarchy of laws, Brazilian civil law students read and interpret the Constitution as the country's main source of law and rules.<sup>98</sup> This learning process is different from what U.S. law students experience, since the U.S. learning process is heavily based on the case law method.<sup>99</sup>

Furthermore, considering the exhaustive nature of civil law and civil statutes, civil law students take certain mandatory subjects, such as civil law<sup>100</sup> and civil procedure, for the entire duration of law school.<sup>101</sup> Similar to how law students studying the Justinian Code used the *Institutes* to understand the *Digest*, modern civil law students use doctrines as manuals when reading through statutes.<sup>102</sup> Pursuant to the Justinian Code, as well as the French and German Civil Codes, most civil law statutes continue to be categorized.<sup>103</sup> The doctrines usually follow the order and structure of the codes and summarize and explain the principles and rules encoded into statutes.<sup>104</sup>

The classroom environment is also noticeably different.<sup>105</sup> In civil law jurisdictions, professors employ a lecture method to introduce their students to the framework of a specific area of law, and within that area, a specific subject.<sup>106</sup> Professors give students theoretical examples and deal mostly with classificatory summaries of the law.<sup>107</sup> The Socratic method, commonly used in law schools in the United States, is rarely used in Brazil.<sup>108</sup> Accordingly, Brazilian law students are not usually burdened with worrisome thoughts of being cold-called during class.<sup>109</sup>

Another significant difference is that the Brazilian Ministry of Education requires all students to obtain some level of practical experience by means of an

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97. See *Legal Research Guide: Brazil*, LIBR. CONGRESS, <https://www.loc.gov/law/help/legal-research-guide/brazil.php> (last updated June 9, 2015).

98. Nick Oberheiden, *The Law of Brazil*, OBERHEIDEN L. GROUP PLLC, <http://www.lawofbrazil.com/> (last visited Jan. 5, 2018).

99. Dainow, *supra* note 4, at 428.

100. As a course, civil law combines subjects that U.S. lawyers may know as contracts, torts, family law, and real and personal property, among others.

101. Araujo, *supra* note 73, at 327.

102. See Tetley, *supra* note 28, at 701.

103. UNIV. OF CAL., BERKELEY, SCH. OF LAW, *supra* note 6.

104. Tetley, *supra* note 28, at 701–03.

105. Daly, *supra* note 1, at 44.

106. *Id.*

107. *Id.*

108. *Id.*

109. See Araujo, *supra* note 73, at 328. While the Socratic Method has traditionally been the teaching method of choice for U.S. law schools, some schools are more strict in its application than others. See Ilana Kowarski, *Choose a Law School Based on Teaching Style*, U.S. NEWS & WORLD REP. (Oct. 6, 2016, 9:30 AM), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2016-10-06/choose-a-law-school-based-on-teaching-style>.

internship in their chosen profession before graduating.<sup>110</sup> These internships may not exceed thirty hours per week.<sup>111</sup> This has translated into a widely accepted practice of expecting law students to begin working as interns during their early law school years and to continue to do so throughout their studies.<sup>112</sup> The internships, which may require six to eight hours per day from students, severely limit the amount of time available to review classroom materials.<sup>113</sup> This differs from the experience of U.S. law students, who more commonly work during the summer months in between school years.

*B. Becoming a Lawyer: The Bar Exam*

The final hurdle to becoming a lawyer in both the United States and Brazil is passing a bar exam to be allowed to practice.<sup>114</sup> In both jurisdictions, legal practitioners in the public and private sectors are required to pass a bar exam.<sup>115</sup> In Brazil, only lawyers are allowed to render legal advice; legal acts practiced by nonlawyers are deemed null and void.<sup>116</sup>

The Brazilian Bar Exam is a national exam taken by all law school graduates regardless of the state in which they are located.<sup>117</sup> The exam consists of two phases: Part I and Part II.<sup>118</sup> Part I is a multiple-choice section, comprised of eighty questions, that addresses all legal subjects studied in law school, including ethics and professional responsibility.<sup>119</sup> The examinee must correctly answer at least half of those questions to proceed to Part II, which is typically administered one month later.<sup>120</sup> In Part II, the examinee must choose a specific area of the law on which to focus and be tested.<sup>121</sup> Part II consists of a practical exercise (usually drafting an action in defense

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110. Lei No. 11.788, de 25 de Setembro de 2008, D.O.U. de 26.9.2008 (Braz.).

111. *Id.*

112. DANIELA GABBAY ET AL., CORPORATE LAW FIRMS: THE BRAZILIAN CASE 18 (2016), <https://clp.law.harvard.edu/assets/Panel-1-Corporate-Law-Firms-in-Brazil.pdf>.

113. See Rebeca Duran, *How to Become a Lawyer in Brazil*, BRAZ. BUS., <http://thebrazilbusiness.com/article/how-to-become-a-lawyer-in-brazil> (last updated Feb. 6, 2014).

114. *Id.*

115. *See id.*

116. See Neil Montgomery & Eduardo Ludmer, *Regulation of the Legal Profession in Brazil*, PRAC. L. (Jan. 1, 2017), <https://uk.practicallaw.thomsonreuters.com/8-637-9911?transitionType=Default&contextData=sc.Default>.

117. Duran, *supra* note 113.

118. *Id.*

119. *Bar Examination*, OLIVEIRA LAW., <https://oliveiralawyers.com/about-brazil/lawyer-brazil/bar-examination/> (last visited Jan. 5, 2018).

120. *Id.*

121. *Id.* This does not mean that the examinee must work in that area of the law after graduating, but only that the examinee is given the freedom to choose the area of the law with which she feels most comfortable. *See id.*

of a client's rights in a legal proceeding) and four essay questions.<sup>122</sup> If the examinee fails Part II, she is given a chance to retake it without retaking Part I.<sup>123</sup> If the examinee fails her second attempt at Part II, however, she will have to take both Part I and Part II again.<sup>124</sup> In contrast, the bar exam in the United States varies by state, unless the state administers the Uniform Bar Exam (UBE).<sup>125</sup> The UBE has two parts, similar to the Brazilian exam: one part consisting of multiple-choice questions (MBE),<sup>126</sup> and another part composed of essay questions (MEE).<sup>127</sup> Also like Brazil's bar exam, the MBE contains a practical performance section (MPT), which tests examinees on practical issues.<sup>128</sup> Unlike Brazil, the UBE is taken over two successive days (rather than a month apart) and tests all subjects of the law (instead of one specific subject).<sup>129</sup> Furthermore, Brazilian examinees are not required to know state-specific law,<sup>130</sup> which is not the case for U.S. examinees that sit for exams in states that do not administer the UBE.<sup>131</sup>

The roles of the bar associations in each jurisdiction may also vary slightly. In Brazil, the bar association is organized at the federal level with state sections,<sup>132</sup> and

122. *Id.*

123. CONSELHO FEDERAL DA ORDEM DOS ADVOGADOS DO BRASIL, XXIII EXAME DE ORDEM UNIFICADO: EDITAL DE ABERTURA 9 (2017), [http://www.oab.org.br/arquivos/2017.2%20\(XXIII%20EOU\)%20-%2030\\_05\\_17.pdf](http://www.oab.org.br/arquivos/2017.2%20(XXIII%20EOU)%20-%2030_05_17.pdf).

124. The passage rates for the Brazilian Bar Exam vary greatly, but are always on the low side. FGV PROJETOS, EXAME DE ORDEM EM NÚMEROS 44 (2013), [http://fgvprojetos.fgv.br/sites/fgvprojetos.fgv.br/files/exame\\_de\\_ordem\\_em\\_numeros.pdf](http://fgvprojetos.fgv.br/sites/fgvprojetos.fgv.br/files/exame_de_ordem_em_numeros.pdf). The results of a study conducted by the Brazilian Bar Association and Fundação Getúlio Vargas (the institution that prepares the exam) that considered exams administered from 2010 to 2013 showed passage rates varied from as low as 11.1% to as high as 27.2%. *Id.* at 7, 14, 44. Although this article does not purport to analyze bar exam results or compare the results of different jurisdictions, it is interesting to note that the average national passage rates in the United States are higher. CHAD W. BUCKENDAHL, ACS VENTURES, CONDUCTING A STANDARD SETTING STUDY FOR THE CALIFORNIA BAR EXAM 19 (2017), <http://apps.calbar.ca.gov/cbe/docs/agendaItem/Public/agendaitem1000001929.pdf>. From 2007 to 2016, U.S. national passage rates ranged from 58% to 71%. *Id.* While in Brazil the passage rates oscillate, in the United States, there has been a downward trend since 2014. *Id.*

125. *Uniform Bar Examination*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/ube/> (last visited Jan. 5, 2018).

126. *Multistate Bar Examination*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/mbe/> (last visited Jan. 5, 2018).

127. *Multistate Essay Examination*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/mee/> (last visited Jan. 5, 2018).

128. *Multistate Performance Test*, NAT'L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/mpt/> (last visited Jan. 5, 2018).

129. NAT'L CONFERENCE OF BAR EXAM'RS, UNDERSTANDING THE UNIFORM BAR EXAMINATION 3–4, 10 (2017), <http://www.ncbex.org/pdfviewer/?file=http%3A%2F%2Fwww.ncbex.org%2Fdmsdocument%2F209>.

130. *See* CONSELHO FEDERAL DA ORDEM DOS ADVOGADOS DO BRASIL, *supra* note 123, at 10.

131. Kelly Swan Taylor, *The Uniform Bar Exam: An Unclear Hurdle to Licensure*, AM. B. ASS'N (Aug. 1, 2016), <https://abaforlawstudents.com/2016/08/01/uniform-bar-exam-unclear-hurdle-licensure/>.

132. LATHAM & WATKINS, A SURVEY OF PRO BONO PRACTICES AND OPPORTUNITIES IN 84 JURISDICTIONS 93 (2016), <https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/A-Survey-of-Pro-Bono-Practices-and-Opportunities.pdf>.

## LEGAL EDUCATION AND THE CIVIL LAW SYSTEM

lawyers are required to be registered with the association.<sup>133</sup> A similar structure can be found in states like Florida, in which lawyers must be registered with the Florida Bar.<sup>134</sup> In other states, however, there is a difference between being a member of a bar association and being admitted to the bar. In New York, for example, lawyers are registered before the courts<sup>135</sup> and can voluntarily join national, state, and city bar associations.<sup>136</sup>

### V. INTERNATIONAL LEGAL EDUCATION

Legal practitioners in both civil and common law jurisdictions must adapt to the increased interconnectedness of the world order.<sup>137</sup> Knowledge of the workings of both systems, while more clearly indispensable for a cross-border transactional lawyer, has become increasingly necessary for both civil and common law practitioners in areas such as litigation, tax, and criminal law, among others. The globalized marketplace currently requires lawyers to be able to assist foreign and national clients alike.<sup>138</sup>

Dealing with a foreign client involves cultural adaptation and language proficiency, both of which are important for clear and effective communication with that client. Further, communicating with a foreign lawyer requires some knowledge of the legal system under which that lawyer practices, since certain legal concepts simply do not translate. Absent such knowledge, U.S. and Brazilian lawyers, for example, will have difficulty working together because the rules in civil and common

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133. *Id.*

134. FLA. CONST. art. V, § 15. (granting the Supreme Court of Florida exclusive jurisdiction to regulate the admission to practice law and the discipline of admitted attorneys).

135. N.Y. JUD. LAW § 468-a (McKinney 2017) (requiring biennial registration of all attorneys admitted in the State of New York, whether they are residents or non-residents, active or retired, or practicing law in New York or anywhere else).

136. See *About the American Bar Association*, AM. B. ASS'N, [https://www.americanbar.org/about\\_the\\_aba.html](https://www.americanbar.org/about_the_aba.html) (last visited Jan. 5, 2018); *About Us*, N.Y.C.B., <http://www.nycbar.org/about> (last visited Jan. 5, 2018); *Contact Us*, N.Y. ST. B. ASS'N, <http://www.nysba.org/contact/> (last visited Jan. 5, 2018).

137. See Toni M. Fine, *The Globalization of Legal Education in the United States*, 2 EUR. J.L. REFORM 567, 573–74 (2000) (Eng.).

[T]here is much to be gained from looking beyond the confines of one's own domestic legal system. Hopefully, studying international law also conveys to students an appreciation for the different meanings of 'law' and raises questions of authority, legitimacy, and acceptance. Studying law conveys the idea that there may be more than one way to address a particular legal problem. Approaches to grappling with and resolving legal problems reflect the traditions and cultures of members of a given society. Perhaps more importantly, they shed light on how legal scholars in that society think. Studying transactional law introduces students to questions of legal pluralism, as they reconsider the state's claims of exclusivity over law-making power and juxtapose it with cultural pluralism and emerging transnational legal practices . . . .

*Id.* at 574 (quoting Adelle Blackett, *Globalization and Its Ambiguities: Implications for Law School Curricular Reform*, 37 COLUM. J. TRANSNAT'L L. 57, 67 (1998)).

138. *Id.* at 568.

law systems are conceptually different.<sup>139</sup> Consequently, although complete legal training in both legal systems is a gargantuan task, lawyers should still learn the basics of another system to understand a foreign colleague's thought process.<sup>140</sup> Ultimately, it is no longer acceptable for a legal system—and lawyers within it—to be viewed in isolation.

Civil law lawyers may have the upper hand in this respect. Most civil law jurisdictions trace their legal roots back to early Roman, French, and German civil law. Thus, not only are civil law lawyers taught using similar methodologies, but also many principles and concepts more readily translate from one civil law jurisdiction to another.<sup>141</sup> As a result, a Brazilian lawyer may find it easier to grasp Italian, French, or German legal concepts than U.S. legal concepts. Also, having started their legal studies soon after graduating from high school, civil law lawyers may be more inclined to pursue a post-graduate degree studying the common law system, even if they do not intend to pursue an academic career. This is because graduating from law school is considered a first step for lawyers who intend to pursue an academic career or produce scholarly work, such as doctrine or commentaries to a code.<sup>142</sup> A certificate or degree in common law, therefore, may not seem as burdensome to a civil law lawyer as, for example, a postgraduate degree might seem to a common law lawyer (who, if in the United States, likely has spent at least seven years in higher education before becoming a lawyer).<sup>143</sup> Moreover, common law countries, such as the United States and United Kingdom, provide civil law lawyers with ample opportunity to study the common law system either through summer programs or full-time LL.M. programs (usually nine to twelve months long), both of which are designed specifically for foreign lawyers.<sup>144</sup>

Furthermore, having been familiarized with the common law system, a foreign lawyer with an LL.M. degree from a law school accredited by the American Bar

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139. See Fernando Orrantia, *Conceptual Differences Between the Civil Law System and the Common Law System*, 19 Sw. U. L. Rev. 1161, 1166 (1990).

140. See Fine, *supra* note 137, at 601.

At the very least, law schools in the [United States] should include in their required curricula a basic course, comparative or otherwise, on civil law. No lawyer in today's marketplace should be unaware of the fundamental differences between the civil law and common law systems, and the implications of each system that may be relevant to transnational law practice.

*Id.*

141. See Orrantia, *supra* note 139, at 1161–62.

142. See Araujo, *supra* note 73. Civil law countries usually adopt the European model for post-graduate degrees: a master's degree, a doctorate degree, and, in some cases, a post-doctorate degree. See *Postgraduate*, SMARTSTUDENT, <https://smartstudent.co.za/postgraduate/> (last visited Jan. 5, 2018) (S. Afr.). In Brazil, a specified number of professors at a university are required to have either a master's degree or doctorate degree. Araujo, *supra* note 73.

143. See Orrantia, *supra* note 139, at 1164.

144. Law Sch. Admission Council, *About the LL.M. Degree*, LSAC, <https://www.lsac.org/llm/degree/key-facts> (last visited Jan. 5, 2018).

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Association may also be eligible to sit for the bar exam in certain states, such as New York<sup>145</sup> and California.<sup>146</sup> Perhaps the most beneficial aspect of pursuing academic and professional experience in the civil and common law systems is that it will provide a dually trained lawyer with the notion that the two systems may actually be seen as complementary, from both a methodological approach to law and a professional perspective.

Arguably, a dually trained lawyer pairs the common law lawyer's dexterity in pinpointing issues with the civil law lawyer's knowledge of or ability to envision the rules that resolve such issues. Methodologically, therefore, if in common law a lawyer learns how to identify an issue, and in civil law, the rule, then knowledge of both would make for a well-rounded lawyer. From a professional perspective, legal practice today is largely global.<sup>147</sup> A lawyer who understands both the civil and common law systems will be better equipped to navigate through the different expectations of foreign clients. She will also be prepared to address, understand, and communicate a legal issue to a foreign colleague based on the rules and accepted legal practices of that colleague's respective jurisdiction.

## VI. CONCLUSION

Legal education in civil law countries employs theories and methodologies that date back to Roman times.<sup>148</sup> In essence, a civil law lawyer is taught to perceive the law based on a framework of rules derived from principles that are the bedrock of that lawyer's respective society.<sup>149</sup> Such a lawyer is trained to know and use rules for the solution of a case.<sup>150</sup> This is dramatically different than what a common law lawyer is taught. Legal education in common law countries focuses primarily on teaching law students to pinpoint issues based on dissected facts, and later, provide a solution to those issues.<sup>151</sup> Neither system is better than the other. Each is the result of centuries of evolving legal practices in different societies and geographic areas

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145. N.Y. STATE BD. OF LAW EXAM'RS, PRESS RELEASE (2017), [https://www.nybarexam.org/Press/Press\\_Release\\_Feb2017.pdf](https://www.nybarexam.org/Press/Press_Release_Feb2017.pdf). For the February 2017 bar examination administered by New York State Board of Law Examiners, "there were 1,792 foreign-educated candidates who sat for the bar examination . . . , which accounts for 43% of all candidates who sat for the examination. The passing rate for all foreign-educated candidates was 34%, an increase of 4% from last year." *Id.*

146. NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 12 (2017), <http://www.ncbex.org/pubs/bar-admissions-guide/2017/mobile/index.html#p=24>.

147. Daly, *supra* note 1, at 37–38.

148. Luz Estella Nagle, *Maximizing Legal Education: The International Component*, 29 STETSON L. REV. 1091, 1092 (2000).

149. Philippe Bruno, *The Common Law from a Civil Lawyer's Perspective*, in INTRODUCTION TO FOREIGN LEGAL SYSTEMS 1, 2 (Richard A. Danner & Marie-Louise H. Bernal eds., 1994).

150. Dainow, *supra* note 4, at 428–29.

151. *Id.*

around the world<sup>152</sup> and should be interpreted pursuant to its functions in the jurisdictions that adopt it. In today's interconnected world, lawyers should strive to attain as much knowledge of different legal systems as possible. It is undeniable that a lawyer's practice is built on experience, and any additional knowledge of discrete legal systems will necessarily make for better practitioners.

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152. *Id.* at 420–23.