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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.

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### 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 & Taitlin, 2012, pp.158–164).

The great Renaissance and Enlightenment developments in European legal systems were stimulated by rediscovery of classical Roman law (Dulceit, 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 [*seigneurie*] 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

(Reimann, 1990, p. 857). The theory of Ihering and other modern theorists took the conception of the state into a whole new dimension.

Rudolf Ihering advanced a view of law as an institution with the social purpose of supporting the functioning of society (Ihering, 1913, VIII. 2, p. 188). While Humboldt, Mill and their liberal contemporaries shared a modern natural law view that the state and society could be built up from the standpoint of the individual, Ihering considered that we also exist for others – society also has a claim upon us to further its purposes as it has helped to further our own (Ihering, 1913, VIII. 13, pp. 399–401). Ihering also advocated the state's monopoly over the right to coerce, the authority to make the rules that regulate it, the law (Ihering, 1913, VIII. 9, pp. 233–238), and the bi-laterally binding force of law in a state under the rule of law [*Rechtsstaat*],<sup>1</sup> implying subordination of the state authority itself to the laws it has issued (Ihering, 1913, VIII. 11, p. 267). Ihering did not see the private law as a self-sufficient domain (Ihering, 1913, VIII. 15, p. 420). In 19th century Germany the notion of the state under rule of law developed in response to the need for stronger underpinning of the protection of civil and private law rights. Robert von Mohl developed his contribution to the concept of the rule of law state in reaction against the police state (Dietze, 1973, p. 20). Mohl presumed, at least in the early years, the existence of a self-defined sphere for private law and advocated for the *Rechtsstaat* as providing order in which people may live together (Von Mohl, 1841).

Jellinek contrasted two views of the relationship between the state and the individual in his work *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern History* (Jellinek, 1901) which was first published in 1895: first, that the rights of the individual are the product of state concession and permission, which followed from the idea of state omnipotence, and, secondly, that the state not only engenders the rights of the individual but also leaves to the individual that measure of liberty that it does not itself require to limit in the interests of the whole. Individual liberty was thus recognised merely as *self-limitation* by the state (Jellinek, 1922). In *Allgemeine Staatslehre* [*General Theory of State*], the first edition of which was published in 1900, Jellinek discerned a trend in the direction of socialisation and centralisation [*Verstaatlichung*], in which the state was taking other spheres of individual human activity (Jellinek, 1922, p. 261). Jellinek stated that all private rights are related to the public law claim for recognition and protection and when the whole of the civil law is legislated into codes, private law itself is based in public law (Jellinek, 1922, p. 385). Jellinek is remembered today for his recognition of civil rights as individual rights to freedom, such as freedom of conscience, expression and association, as a sphere free of state intervention. However, this sphere of freedom emerges from his work almost as an afterthought in a broader theory of an expanded if not exalted state. Recognition of the individual now depended on the existence of individual public rights. Civil status was to be determined by recognition of an individual as a member of the state (Jellinek, 1922, pp. 419–421). The state was to remain under the rule of law as a state limited by its laws. The self-binding *rule of law state*, advanced by Ihering and Jellinek, was intended to combat arbitrariness in the public law, not its dominance. Thus the decline of the natural law vision and the significance of the civil law were perpetuated. Redefinition of the respective provinces and roles of public law and civil law continued with the work of Duguit and contemporaries (Duguit, 1918, 1921, 1968; Raff & Taitlin, 2012, pp. 174–175).

#### 4. Emergence of a Soviet legal model and the abolition of the civil law

Although Marxist critique had contributed to the 1917 October Revolution, it provided no plan for a Marxist program of reform – this fell to the revolutionaries (Raff & Taitlin, 2012, 2014). Would there be a legal system? What shape should a socialist legal system take? The question of the direction to be taken with respect to the future of law would be torn between two themes that emerged in competition from the works of Marx and Engels. In one direction was the vision of a future socialist classless society with no state or law (Marx & Engels, 1975, p. 151), as the end point of social evolution and thus the end of history, where socialist economic laws would suffice. In the other direction, planning would be at the heart of a socialist economy, implying a centralised economy. The contradiction was reconciled by the idea of a period of transition toward a classless society where there would be no need for law and the state. In this period, the means of production would become state property and industry would be centralised in the hand of the state (Engels, 1959, pp. 386–387; Engels, 1978, Vol. 10, pp. 288–300). The second direction, the centralist view of the socialist state and its law as tools of socialisation, followed the pro-state view considered progressive in Europe in the late 19th and early 20th centuries, explored above. Public Law approaches were portrayed as the way of the future and following progressive European theorists like Jellinek (1922), Renner (1949) and Menger (Reich, 1972, pp. 50–66, pp. 73–75) the state was adulated as the portal to a new era of human civilisation.

Immediately following the Russian revolution steps were taken to abolish market exchange, private property and pre-revolutionary law. The civil law was targeted systematically for abolition in favour of central planning, top-down public law systems and the economic laws of a socialist system. The Soviet Union virtually erased the civil law by the end of the era of War Communism. The opportunity for citizens to challenge each other within society on a legal basis was replaced by vertical claims and responsibilities in the public sphere. If the law in general was to fall away in the course of social evolution to a higher plane, the civil law was to be systematically abolished with utmost urgency. The role of the civil law in

<sup>1</sup> The German constitutional concept of *Rechtsstaat* is translated in this paper as a 'state under the rule of law', or simply 'rule of law state'. On Ihering's concept of *Rechtsstaat* : see Ihering (1913), at VIII. 11, p. 289, pp. 290–1, p. 305, p. 315.

maintaining the interests of the oppressive Tsarist government, and the upper classes it supported, obscured distinction of the higher theoretical place of the civil law as a horizontal system that required citizens to take responsibility for their private actions toward each other, from the changeable content of its principles. Social law, as the antithesis of private law, embodied the scientific progress of the era, bringing reform of family law and employment law, creating vertical responsibilities of the socialist state to the individual and the individual to the socialist state as surrogate for a future broader communist society. The orientation of the civil law to individual rights would no longer be appropriate in a collective society.

The New Economic Policy [NEP] (1921) was introduced to deal with urgent economic crisis. With it came an idea of socialist civil law, manifested in the *Civil Code of 1922* (RSFSR). It was justified as civil law for the transitional period, and the question remained of *when bourgeois* civil law would wither away with the state and law in general, not if this would take place. When the economic crisis had passed, the socialisation agenda continued with collectivisation under Stalin. The civil law faded from relevance besides the rule of the Party and in view of the contraction of civil activity to which it would apply. Although the *Civil Code of 1922* remained on the law books, during the Stalin years it was of no practical relevance. However, practical problems emerged in the horizontal relations of state enterprises, collectives and agencies, in response to which Stuchka developed his two-sector theory of socialist law (Stuchka, 1988; Reich, 1972; Raff & Taitslin, 2012). The paradigm emerging under central planning in the 1930s thus featured (i) socialist economic law, building on aspects of administrative law that applied to relations between state enterprises, and (ii) narrowly defined economic relations between citizens.

A new Soviet legal theory emerged in the late 1930s, coinciding with the Stalin Constitution of 1936, emphasising the doctrine of the unity of state ownership and opening a new role for socialist civil law. The cause of developing a socialist civil law was taken up by Stalin's Justice Minister, Vyshinskii, implicitly conceding the need for civil law even under top-down central planning and state ownership of the means of production. The new conception of Soviet civil law led to the Soviet *Principles of Civil Legislation of 1961*, which formed the basis of the *Civil Code of the RSFSR of 1964* and were disseminated widely in the socialist legal systems. The Soviet model of socialist civil law that emerged from this reform process was, however, less diverse than models found in the legal systems of some other members of the socialist legal family (Zweigert & Kötz, 1977, Vol. 1, pp. 300–317 – not repeated in later editions), such as the Civil Code of Poland of 1964 (Raff, 2010) and that of the German Democratic Republic of 1975 (Raff & Taitslin, 2009). The civil law deficit in the Soviet legal model remains a challenge to countries that adopted it, in Asia and in Europe, in their efforts to liberalise their economies, or to remodel socialist law, according to their national agendas (Raff & Taitslin, 2014).

## 5. What we expect of civil law today – economic and juristic functions

The vital role of the civil law today is to provide the foundations for legal institutions, doctrines and transactions at the basis of civil society and commercial law while balancing private rights with legal obligations and responsibilities. Horizontal enforceability is a distinguishing feature of the civil law allowing direct action against those who fail in their civil law obligations and responsibilities – it does not depend on a report being made to and acted upon 'top-down' by a public authority within the public law realm. There are significant advantages to the state and society generally in fostering direct horizontal enforcement.

Academic commentators rarely articulate these points about the civil law, and they appear simply to be taken for granted in the day-to-day operation of the legal system. I am not suggesting that there is an "either-or" policy choice to be made between a civil law approach and public regulation. I am not arguing against the importance of constitutionalism or the roles of human rights protection, anti-corruption and other agencies of the *integrity branch* of government, a term coined by Ackerman (Ackerman, 2000, pp. 691–694; Burton & Williams, 2012). On the contrary, my point is that civil law provides a juristic background to public regulation and a direct method of remediating loss occasioned by unlawful action. Civil law remedies are relevant to the protection of human rights and penetration of corrupt practices, providing a web of disincentives to unlawful action and adding depth to public regulation. These points are illustrated clearly in discussion of the advantages of direct horizontal law enforcement in two areas of law that emerged in the latter half of the 20th century: they are the private enforcement of competition law and environmental law.

### 5.1. Private enforcement of competition law

Buxbaum (2007) has outlined the objectives of the private enforcement of U.S. Antitrust Law (*Sherman Act, 1890 and Clayton Act, 1914*). Provision for private enforcement has remained essentially the same since it was moved with some further reforms to the Clayton Act in 1914. The reforms included allowing a civil plaintiff to rely on the factual findings made in prior civil or criminal action undertaken by the government, known as "follow-on actions" (15 U.S.C. § 16(a)) and introduction of equitable rights of action for private claimants. Australian trade practices law has also embraced private enforcement (Brunton, 1990). Buxbaum raised this issue in the course of discussing the 2005 Green Paper of the European Commission on the enforcement of the European Union anti-trust rules (European Community, 2005a, 2005b). The objectives of private enforcement identified by Buxbaum (2007, pp. 43–44) are:

- i. allowing private parties injured by antitrust violations to claim compensation directly from the wrongdoer.
- ii. depriving wrongdoers of the benefits of their unlawful conduct.

- iii. deterring future violations.
- iv. punishing wrongdoers – 15 USC § 15 (a) provides for recovery of threefold damages by civil litigants.
- v. a role for private claims in harnessing the “self-policing capacity of business”, thus assigning private actions a public enforcement role as well, and preserving public resources for the prosecution of the most serious violations when government might not have the resources necessary to uncover, investigate, and prosecute all violations of the law.<sup>2</sup>
- vi. ensuring some level of enforcement in cases where public regulators might not otherwise act, because of lack of independence or lack of resources (Buxbaum, 2007, p. 50).

In respect of points (iii) deterring future violations and (iv) punishing wrongdoers, these objectives are not conventionally attributed to the civil law and may be explained by the semi-regulatory nature of antitrust law. However, substituting the concept of *disincentive* for that of deterrence, we can see relevance in these points for the civil law as well, particularly when the disincentive follows from using legal liability as a tool for forcing the internalisation of external costs imposed on society or the environment: a point illustrated in the next section.

## 5.2. *Private enforcement of environmental law*

Civil liability for environmental harm illustrates the potential advantages of horizontal legal liability to force internalisation of the broader costs of civil misbehaviour in the cost of production. In turn, civil and commercial actors who do comply with the law are better able to succeed in competition with those who do not fulfil their legal responsibilities by forcing them to accept liability for the consequences. The rule of law is thus achieved more broadly at lower social cost. This approach reverses the “race to the bottom” that naked market forces set in train. One classical illustration of the “race to the bottom” is provided by a new industry negotiating lower environmental standards in exchange for locating in the relevant jurisdiction, rather than a neighbouring state, which might in turn offer yet lower standards in order to attract the new industry.

Market approaches to environmental challenges have limitations for a range of reasons. Markets have limited usefulness in gauging the worth of disutility, that cannot be monetised (Calabresi & Melamed, 1972, 1094 n. 11; Raff, 1999). Markets are multi-lateral relationships between human beings for the exchange of wealth and goods, assets and services. They are thus inherently anthropocentric. Effective environmental law and ethics, on the other hand, require solutions that are effective from the point of view of all organisms in an ecosystem. On this point participants in a market can never have perfect or even certain knowledge (Calabresi & Melamed, 1972, p. 1095), so for this reason too market forces alone cannot ensure the health of ecosystems. Economic instruments reflect human economic relationships and cannot be expected alone to suffice. The use of economic instruments in a market situation must thus be very sophisticated and supported by other regulatory measures. Especially important are measures that support information gathering and publication, such as reliable eco-labelling of products and the environmental impact assessment of projects, so that other human actors in the market can make effective choices, and so that potential market failure can be detected at an early stage.

The need for civil law standards of environmental quality, backed by public law environmental protection legislation, is thus fundamental.

Particular problems are found with respect to the need for all actors in a market to internalise their environmental costs. The total value of an environment is not easily commoditised. If it can be done at all, the cost of remediation of a degraded environment is difficult to foresee and is far in excess of the cost of preventing the degradation in the first place. Scientists estimate that a degraded environment can be remediated by humans to only a fraction of the diversity of the undamaged environment. The use of *legal liability* alone as a disincentive to environmental abuse in a market situation is therefore attended by problems. These include:

- the polluter might not recognise the existence or extent of the potential problem,
- the polluter might not have the resources to pay for remediation and simply disappear into insolvency, and
- the environmental value might never be regained in any case.

In this situation of a very imperfect market, in which most of the costs cannot even be monetised, the law must operate to induce the party who can most cheaply avoid the social and environmental costs, the prospective polluter, to do this, in addition to advancing collective solutions (Calabresi & Melamed, 1972, p. 1097). Not surprisingly, this is the internationally accepted position. Principle 16 of the U.N.C.E.D. *Rio Declaration on Environment and Development* provides –

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that *the polluter should, in principle, bear the cost of pollution*, with due regard to the public interest and without distorting international trade and investment.

<sup>2</sup> In this connection, Buxbaum relates (Buxbaum, 2007, 43 n. 9 and 44) that the U.S. Congress was aware the U.S. government would not have the necessary resources to uncover, investigate, and prosecute all violations of the anti-trust laws and, indeed, no budgetary appropriations had been made for public enforcement at the time when the *Sherman Act* was enacted.

The polluter-pays principle is a long-standing, fundamental plank of European Environmental Law (de Sadeleer, 2014). The rights of nature, outside human conceptions of imperfect markets, have been recognised internationally since before the U.N. *World Charter for Nature*:

*Convinced that:* (a) Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action,...

These approaches thus signal (i) a public law dimension in which private citizens may enforce environment protection legislation directly against each other, and (ii) facilitating private action in the civil law to restrain behaviour that places at-risk environmental, property and personal security and to recover remediation and compensation directly when damage has been caused. Naturally public environmental protection authorities must continue to be resourced to enforce the legislation in the interests of the public and of the environment. However, breach of environmental protection legislation should be a ground of private claim for an injunction or civil monetary damages, as well as a ground of criminal prosecution. The *German Civil Code* provides in § 906 for example that the occurrence of a nuisance will be taken to be established for civil law purposes if a breach of the *Federal Pollution Statute* can be shown.

The objective is to use potential and actual *legal liability* to compel internalisation of environmental externalities from the view of human environmental interests as well as natural organisms in ecosystems that do not have the ability to initiate prosecution or commence litigation.

One reason frequently offered for not broadening access to civil law remedies is that control must be maintained over who is to be subject to legal liability. This objection fuels perceptions of cronyism – that government departments, mates of the government and pet projects get an easy time under environmental and planning law through the exercise of administrative discretions. If these perceptions were well founded, it would plainly be at odds with the principle of *rule of law*. This situation would undermine confidence in the public administration and raise the objection that selective enforcement is anti-competitive. It would certainly be anti-competitive with respect to operators who do not enjoy “special status”.

If one manufacturer is operating within environmental law, and thus has internalised environmental costs, it, before anyone else, must be entitled to take on competitors who are taking a free ride by breaking the law with respect to the environment. This is self-evident. Analogous examples include rights to restrain misuse of trademarks and business names, and other designations, and thus prevent shoddy operators taking a free ride on established commercial goodwill. In Australia, there is no restriction on who may take action against such “misleading or deceptive conduct” in the course of trade and commerce, prohibited by s. 52 of the *Trade Practices Act 1974* (Cth.). Community and private sector legal action can make law enforcement more cost-effective for the government. The scenario of private actors seeking to surpass each other in environmental protection is, of course, a pleasing one.

## 6. Reforming civil justice to achieve social and governmental benefits

To achieve these broader social and governmental benefits, it is important for civil justice administration to achieve and maintain:

- principles that reflect current ethical concerns,
- broad access to civil justice, and
- independent adjudication of civil justice claims and enforcement of adjudication outcomes.

These are explored below.

### 6.1. Principles that reflect current ethical concerns

When it does not reflect contemporary ethical concerns, the civil law risks social disrepute, as we saw above with respect to the Russian revolution. This is an on-going problem in common law systems because of the slow pace at which the common law revises its principles in light of social expectations. It is particularly evident with respect to principles of tort concerning environmental damage. The relevant common law principles were formulated during the Industrial Revolution with the protection of property rights in mind: leaning more toward protection of the right to emit pollution from property rather than preserving clean environments on one's own property, let alone the interests of other organisms in the environment. Recognition of the right to a healthy environment and the need for integrity of ecosystems has thus led to the development of environmental protection legislation to fill the gap. This has been recognised by the courts. In *Cambridge Water Co. v. Eastern Counties Leather Plc.* The English House of Lords concluded that innocent neighbours must bear loss which polluters could not reasonably foresee at the time when they released their damaging materials, even if other damage, such as serious injury to personnel working in the polluting factory, could reasonably have been foreseen (Lord Goff of Chieveley, *House of Lords, at (1994) 2 A.C. 264, 292*). Groundwater extracted by the plaintiff water utility was unfit for human consumption due to spillage of organochlorines at the defendant's factory, located some two kilometres away. In the

course of judgment Lord Goff articulated a systemic limitation of common law method that, if correct, prevents adoption of more advanced environmental protection norms:

The protection and preservation of the environment is now perceived as being of crucial importance to the future of mankind; and public bodies, both national and international, are taking significant steps towards the establishment of legislation which will promote the protection of the environment . . . But it does not follow from these developments that a common law principle, such as the rule in *Rylands v Fletcher*, should be developed or rendered more strict to provide for liability in respect of such pollution. On the contrary, given that so much well-informed and carefully structured legislation is now being put in place for this purpose, there is less need for the courts to develop a common law principle to achieve the same end, and indeed it may well be undesirable that they should do so (Lord Goff of Chieveley, *House of Lords, at (1994)* 2 A.C. 264, 305).

The result is that common law fashioned largely in the course of the 19th century industrial revolution continues to favour the industrial landowner until environmental protection legislation can be put in place. However, in turn the common law courts interpret reforming environmental protection legislation so far as possible to preserve the common law private rights of the landowner it seeks to regulate. The case of *Protean (Holdings) Ltd. V. Environment Protection Authority* provides an example of reforming environmental protection legislation being deliberately interpreted by a court in a way that minimised regulatory impact on the holder of private proprietary rights (Supreme Court of Victoria [1977] V.R. 51; Raff, 2003, p. 2).

Codified systems appear better positioned to adapt. I have referred above to the connection made between civil law liability for environmental pollution in § 906 of the *German Civil Code* and anti-pollution standards set out in environmental protection legislation. The German *Environmental Liability Statute* established in § 6 strict liability for environmental damage, with a legal presumption that a site capable of creating the damage that actually occurred has created the damage, and there is no restriction on private parties litigating directly to recover compensation on the basis of this liability. Another example of the civil law reflecting contemporary ethical concerns is provided by the 1990 *animal rights amendment* of the *German Civil Code*, which introduced § 90a providing:

Animals are not things. They are protected through particular legislation. To them, the provisions in force for things are to be applied correspondingly, so far as nothing is otherwise specified.

This provision is supplemented by a new sentence added to the main definition of “ownership” in § 903:

*Powers of the Owner* The owner of a thing can, so far as not contrary to law or the rights of third parties, deal with the thing at discretion and exclude others from every use or misuse of it. The owner of an animal has to observe the particular provisions for the protection of animals in the exercise of his powers.

Although this amendment is often criticised as weak and tokenistic within Germany, it is impossible to imagine common law systems, by refinement of common law principle in the course of superior courts deciding cases, removing animals from the basic civil conception of an object of property and importing into the civil law a requirement that animal welfare standards must be observed when the owner exercises his or her discretions with respect to the property. The primary example that I have drawn above in support of horizontal effects, the private enforcement of competition law, is of course drawn from a common law system but the relevant cause of action is found in legislation.

Where the civil law fails to reflect current ethical concerns its capacity to support appropriate horizontal law enforcement through private litigation is undermined.

## 6.2. *Broad access to civil justice*

One significant obstacle is the question of legal costs. Clearly, if legal costs are beyond the reach of the general population, horizontal enforcement of basic legal norms through the courts becomes the preserve of the commercial world and the wealthy. In this respect as well, codified systems appear to have an advantage. Further research on this point is clearly needed, however in an informal gathering at the Max Planck Institute for Comparative and International Private Law in Hamburg in 2011 foreign researchers working in the Institute were asked with respect to a specific scenario conceived in the law of succession to estimate the lowest claim they would consider justified in litigating as a private party in the state supreme courts of their countries, taking into account usual risks and assuming three parties to the litigation. All of the researchers from Common Law systems reported limits that were considerably higher than all of the Civil Law systems. There was a dramatic difference between Victoria, Australia, at US\$ 8 million and Germany at US\$30,000. As noted, this should be explored in a properly structured study, in which the sources of expense could be identified, such as civil procedure, legal indeterminacy, legal professional costs of a divided legal profession (solicitors and barristers) and court inefficiencies. There is an enormous challenge in determining valid measures for the comparison, and one must admire scholarly attempts to do so (Henssler, 2014).

In the United States potential costs in civil litigation are balanced to some extent by the availability of representative and class actions and contingency fees, where legal costs are paid to one's lawyer only if one is successful.

### 6.3. Independent adjudication of civil justice claims and enforcement of adjudication outcomes

For the civil law to provide the foundation for horizontal enforcement, private litigants must be confident about the independence and objectivity of the judges deciding their cases. Processes for the enforcement of court judgments must also be independent and objective.

## 7. Conclusion

In this paper, I have reviewed the history and philosophy of civil law to identify its persistent themes and its potential roles in the 21st century. Modern natural law of the post-Enlightenment period embodied philosophical ideas of the place of the individual citizen in human society and the universe more broadly which were taken up in theories of the civil law and civil law codification; a role that today we see in constitutional and human rights law.

In the 19th century, progressive theorists expressed confidence in the modern state as a force with the capacity to usher in a new era of human civilisation regulated by public law. The Bolshevik revolutionaries followed this direction, doubtless to an extreme extent, and, with views of the civil law as objectionable individualistic *bourgeois* law, sought to abolish the civil law in favour of ‘top-down’ enforcement processes. However, even within the planned economy under socialism it was found that the system lacked horizontal accountability between state-owned enterprises, collectives and agencies, leading to the development of socialist civil law. Following this revival the socialist legal systems nevertheless remained subject to a deficit with respect to institutions, doctrines and principles of civil law. The need to rectify this deficit should be noted when setting priorities for the reform of socialist legal systems.

With liberalisation of economies and down-sizing of government emerging as a worldwide trend in the 1980s and 1990s it has been recognised that a persistent feature of the civil law, the horizontal enforcement of its norms directly between private parties, brings great advantages. It can supplement public law processes, at a time of scepticism about regulatory approaches and intense scrutiny of law enforcement budgets. This feature of the civil law is largely taken for granted and rarely the specific subject of commentary. However, in at least two relatively new areas of law considerable commentary has been directed to identifying the advantages, including broader social and governmental advantages that follow from private law enforcement: those areas are competition law and environmental law. We saw (Buxbaum, 2007) that those advantages were:

- private parties may claim compensation for damages and injury directly from the wrongdoer,
- wrongdoers are deprived of the benefits of their unlawful conduct,
- disincentives to future violations are set up and through the internalisation of costs, formerly externalised to other parties or the environment, private actors who are working within legal standards can compete more equally,
- the “self-policing capacity of business” is harnessed, thus assigning private actions a public enforcement role as well, and preserving public resources for the prosecution of the most serious violations,
- preserving some level of enforcement even in cases where public regulators might not otherwise act; for example, because of low policy priorities or lack of independence, distance from the dispute or resources.

We also noted that in order to harness this capacity of civil justice to achieve these broader social and governmental benefits, it is important for the civil law and its administration to maintain (i) legal principles that reflect modern ethical concerns, (ii) broad access to civil justice, and (iii) judicial independence in the adjudication of civil justice claims and the enforcement of adjudication outcomes.

In this way, reform of civil law institutions and principles contributes to the achievement of rule of law. The priority and resourcing accorded to reform of the civil law in socialist and formerly socialist legal systems needs to be re-assessed in view of the historical and systemic deficits experienced in this respect by these systems.

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