

# Civil Law Studies



Civil Law Studies:  
An Indian Perspective

Edited by

Anthony D'Souza and Carmo D'Souza

**CAMBRIDGE**  
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**P U B L I S H I N G**

Civil Law Studies: An Indian Perspective, Edited by Anthony D'Souza and Carmo D'Souza

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## FOREWORD

PROF. (DR.) N.R. MADHAVA MENON

India is a country full of diversities of people, cultures, laws and systems of social organization. As an ancient civilization which has continuously welcomed and assimilated people from all parts of the globe, it reflects their customs, traditions, faiths and beliefs in all its diversity. When India attained the status of a Republic after 300 years of colonial rule, it opted to remain a secular nation, allowing all citizens full and equal freedom to practice the religion of their choice and be governed by their personal laws in relation to marriage, separation, inheritance, succession and related matters. Of course, customs contrary to the guaranteed basic human rights were modified either by the communities themselves, or by state intervention. A Uniform Civil Code is made part of State policy, to be evolved in the course of time when the people concerned are prepared to accept the change.

While the erstwhile French settlements in Pondicherry and elsewhere proclaim their allegiance to the French Civil Code, the former Portuguese settlements in Goa, Daman and Diu are deeply attached with the Portuguese Civil Code. The sizeable section of Muslim citizens, numbering over 150 million, follow the tenets of Islam and practice the dictates of Shariat in family relations. Similarly, the various sects of

## Foreword

significant part of the life of Goan people. The book is a compilation of several articles, some of which are contributed by scholars from Lisbon and elsewhere. The chief editor of the book is Dr. Carmo D'Souza, a senior Faculty member of Salgaocar College. He deserves all appreciation for this wonderful effort in comparative law scholarship, which is yet not popular with legal academies, largely because of inability to access materials in foreign languages.

I have always advocated the establishment of a Centre for Portuguese Law in Salgaocar College, in partnership with Lisbon University and with the patronage of the Portuguese Consulate in Goa and the Government. The Indian legal community can interact with their counterparts in certain South American countries, notably Brazil, if we study the legal systems of Portugal, Spain and other civil law countries. The Government of Goa will be well advised to support this project with a regular grant and liberal scholarships for students and teachers. The Goan Bar Association should also cultivate practice of Portuguese law among the young entrants to the Bar as it governs a sector of Goans within and beyond the Christian community. It is interesting to read from Prof. Carmo's introductory essay how the Civil Law Centre came to be initiated in the Salgaocar College by a chance visit of a Portuguese academic wanting to develop academic links and exchange of ideas on Comparative Law. The Law Faculty of the University of Lisbon nurtured the vision and kept the idea alive. It is now for the management of the Salgaocar College and the authorities in the Goa Government to institutionalise the vision and open the window to the laws of the Continent.

This book offers an overview of the Civil Law System in all its dimensions, particularly in relation to India. The chapter on Family Laws provides a great deal of information on the rich variety of complex sets of existing customs and traditions which must be a fascinating area of study for comparative lawyers. Equally, the chapter on Continental Criminal Law is interesting to those concerned with reforms in criminal justice administration, allowing them to learn from the experiences of those outside the Common Law world.

The proposed Centre should undertake to selectively translate into English important Statutes and Commentaries from Portuguese legal system to promote research among Indian scholars. A collection of all relevant Portuguese laws and books should be assembled and there should be a system to replenish the collection with new legal publications from that

country. Facilities for study of Portuguese language should also be arranged. Students should be able to study for a semester in a Portuguese University in the course of their degree, with arrangement for transfer of credits. A Chair in Portuguese Law should be set up, under which leading lawyers, judges and law teachers from Portugal should be invited for short periods to promote research and teaching. I hope, with the publication of this volume, initiatives in this direction will be undertaken to make Salgaocar College a major centre for comparative legal studies. I also hope that another Chair will be endowed in Roman Law, the mother of many European legal systems. It was once a compulsory subject for law students in India.

I offer all my best wishes for this initiative in popularizing Portuguese legal studies and Civil Law Systems among the Indian legal community. Let us hope that very soon we will have a Centre for Comparative Law at Salgaocar College, Goa, providing leadership in comparative law studies and research in India.



## ACKNOWLEDGEMENTS

*Civil Law Studies: An Indian Perspective* is a compilation of articles contributed in response to an appeal made by us to the Faculties of Law at the Universities of Lisbon and Coimbra, as well as various selected scholars from India. The book was conceived when members of the Faculty of Law, University of Lisbon conducted a six-week course in Civil Law, referred to as Lecture Series 2008, at V. M. Salgaocar College of Law, from mid-January to the end of February. Their thought-provoking lectures raised questions as to how a Civil Law Course could benefit Indian academics and students.

We are grateful to all the contributors listed at the end of the book, who have readily sent their articles to this project. We are also grateful to all those who, as part of the publicity for our project, forwarded the e-mail appealing for contributions to their friends and acquaintances. We also thank those who sent us their encouraging messages and advice.

We would like to thank in a special way Prof. (Dr.) N.R. Madhava Menon for the encouraging foreword. This was a difficult task considering the wide range of articles included in the book. He took pains to examine parts of the material before writing his innovative ideas, in spite of his busy schedule. If Comparative Civil Law Studies does gain ground in India it will be due to the vision of this great Indian educator.

Our special thanks to Fundacao Oriente for financial assistance to the present project.

Anthony D'Souza  
Carmo D'Souza  
Porbavaddo, Calangute, Goa , India  
January, 2009.



**PART I:**  
**CIVIL LAW**

# CIVIL LAW STUDIES: AN INDIAN PERSPECTIVE

CARMO D'SOUZA

## Introduction

The Civil Law System is based on Roman Law, especially the *Corpus Juris* of Emperor Justinian. This body of law was further developed by medieval scholars and later accepted in various countries of Europe. In some of these countries, it influenced their legislative acts and thus became the positive law of the place. In other countries, Roman Law was processed by legal theorists and thus became accepted in those societies<sup>1</sup>.

Section A of the present article advocates a Civil Law Centre based in Goa for the following reasons: (a) Goa's historical past connections with the Civil Law System ensure a better infrastructure for such a centre, (b) The availability of resources in terms of documents, including those of the transition phase, is valuable and useful for comparative research, and (c) The oral experiences of the bench, bar and bureaucracy in Goa who worked under the two systems need to be collected and researched. The second part of the article deals with Civil Law Studies from a pan-Indian perspective, as India seeks to find its rightful place in the community of nations.

## A: Advocating Civil Law Studies in Goa

The Portuguese conquered Goa in 1510<sup>2</sup>. In the course of time, along with the Portuguese conquerors, the Civil Law System entered the territory. In the initial period after the Portuguese entry, their rule merely extended to

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<sup>1</sup> [http://en.wikipedia.org/wiki/Civil\\_law\\_\(legal\\_system\)](http://en.wikipedia.org/wiki/Civil_law_(legal_system)), visited on 25 June 2008 at 11. a.m.

<sup>2</sup> Goa then referred to the Old Conquests, as distinguished from the New Conquests which came under Portuguese control much later.

the territory of the Old Conquests,<sup>3</sup> comprising the areas formerly known as Tiswadi, Bardez and Salcette. Within a few decades, the Portuguese extended their laws and legal institutions, with some reservations, to these conquered territories. However, by and large, Portuguese law, legal institutions and legal culture took root in the Old Conquests. With the addition of the New Conquests in the mid eighteenth century, and especially as a result of changes in diplomacy, concessions were made in favour of the non-Christian population as regarded their customary laws and legal institutions<sup>4</sup>. Later, beginning with the Provisional Judicial Organization of 1836, a uniform judicial structure was envisaged for the Old and New Conquests as regards the administration of justice<sup>5</sup>. By subsequent judicial reforms, in the New Conquests as well as the Old, the Portuguese structures for administration of justice were firmly established. Those reforms eventually did away with all kinds of indigenous institutions for the administration of justice.<sup>6</sup> By the mid nineteenth century, Portuguese laws operated throughout the whole territory of Goa except in the area of Personal Customary Laws for non-Christians residing in the New Conquests<sup>7</sup>. This concession to the inhabitants of the New Conquests was extended to the non-Christian inhabitants of the Old Conquests by the legal provision on Usages and Customs of Gentile Hindus of Goa (1880)<sup>8</sup>. Similar laws existed for the non-Christian communities of Daman and Diu<sup>9</sup>. Thus at the end of the nineteenth century, all the non-Christians of Goa, irrespective of whether they resided in the Old or New Conquests were to be governed in respect of their personal law by their Uses and Customs<sup>10</sup>. This position remained largely unchanged till December 1961, when the Portuguese left Goa. Thus prior to Liberation, the Civil Law System existed in Goa in the substantial and

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<sup>3</sup> The Island of Goa, to which was soon added Bardez and Salcette. Practically, their hold extended to the Old Conquests. The New Conquests came later, in the mid eighteenth century. Goa is today composed of Old Conquests and New Conquests. The Old Conquests today consist of Talukas of Ilhas, Bardez, Salcette and Marmagoa.

<sup>4</sup> Carmo D'Souza, *Legal System in Goa*, Vol. I, (Goa: Agnelo D'Souza, 1994) pp. 36–43

<sup>5</sup> *Ibid*, pp. 121–124.

<sup>6</sup> *Ibid*, pp. 120–126. These areas are also worthy of research.

<sup>7</sup> Carmo D'Souza, *Legal System in Goa*, Vol II, (Goa: Agnelo D'Souza, 1995) pp.203–13

<sup>8</sup> M. .S. Usgaocar, *Family Laws of Goa, Daman and Diu*, Vol I, 3<sup>rd</sup> ed. (Goa: Vela Associates, 2004) pp. 141–162. See also D'Souza 1994, Vol II, pp.211–13

<sup>9</sup> Usgaocar 2004, pp. 163–193

<sup>10</sup> This step was a reversal to the earlier Portuguese policies.

procedural area except in restricted field of personal laws with respect to the non Christian population of Goa<sup>11</sup>. Civil Law culture also prevailed among the administration, the bar and the bench.

In the post-Liberation period, the prevailing Civil Law System was preserved for a brief term until changes were effected<sup>12</sup>. During this period a unique transition system<sup>13</sup> prevailed with the bar and the bench adjusting to an inevitable switch. Some aspects of the transition period are reflected in the Official Bulletin<sup>14</sup> of the period, which are available for research. However, information regarding Bar and Bench culture, must be collected from oral sources. In a short time, the judges and lawyers trained in Portuguese legal and judicial culture become acquainted with and involved in the Anglo-Indian Common Law culture.

After Liberation, the Portuguese Codes and other laws were replaced by Indian counterparts, especially through the Laws Regulation (1962) and Laws Regulation (1963)<sup>15</sup>. As regards the judiciary, Criminal Courts were introduced by the Goa, Daman and Diu (Separation of judicial and executive functions) Order 1963. It came into force on 1 November 1963<sup>16</sup>. It was necessary to introduce criminal jurisdiction and laws without delay, even before civil courts had been enabled to function. The Regulation of 1963, which came into force on 16 December 1963, instituted the Judicial Commissioners' Court in the place of the *Relacao de Goa*<sup>17</sup>. Later the Legislative Assembly of Goa, Daman and Diu enacted the Goa, Daman and Diu Civil Courts Act, 1965, which introduced the District Court and Civil Courts in place of the earlier ones. It transferred proceedings before the *Comarca* and *Julgado* courts to the newly

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<sup>11</sup> There existed the laws of Mazanias (Hindu Temples), the law of village communities which contained indigenous element. These areas, with their foundations on traditional customary law but substantially modified with Civil Law concepts, are worthy of further research.

<sup>12</sup> D'Souza 1994, pp.254–257

<sup>13</sup> The system was unique because of the dynamics of the transition, themselves a fascinating subject of study, which depended on a multiplicity of factors: historical, geographical, etc.

<sup>14</sup> Bulletins of the period, sometimes printed bilingually in Portuguese and English, give insight into aspects of Civil and Common Law. It is significant to note differences even in drafting style.

<sup>15</sup> D'Souza 1994, pp. 257–259 and 261–262.

<sup>16</sup> D'Souza 1994 p. 158, especially footnote 14. For Sessions and criminal courts see p. 158.

<sup>17</sup> *Ibid*, pp. 159–164.

established Civil Courts<sup>18</sup>. With the introduction of new administrative, legislative and judicial institutions, the respective cultures too flowed into those areas. It is interesting to note that many functionaries, lawyers and judges from the old system were absorbed in the new Common Law system and adapted themselves to its legal, judicial and administrative culture. Goa still currently has some personnel among its bureaucrats, bar and bench who are acquainted with both systems; their valuable experiences are a treasure-house for Comparative Law studies, especially in the twenty-first century as Civil Law and Common Law are attempting to find a common ground.

### **Civil Law Research and Goa**

Goa, due to its historical heritage, has a vast potential to become a Civil Law Research Centre. Goa possesses a vast amount of documentation on the subject, much of which is yet to be unearthed and evaluated. It has experience in the Civil Law System which continued till the Portuguese left the Indian shores. In fact, over the last four decades and more, Goa has imbibed Common Law culture as thoroughly as any other part of India. The case law<sup>19</sup> and number of public interest litigations (PIL)<sup>20</sup> emanating from Goa courts are an indicator of this fact. It is desirable also to have comparative study of the legal systems in Goa and Pondichery as they existed under the erstwhile Portuguese and French regimes respectively, as it may provide insights into the dynamics of the Civil Law system in these two small corners of Western and Eastern India. Such research will require the cooperation of scholars from Goa and Pondichery. It will also require the cooperation of Portuguese and French legal scholars as well as certain documentation which is available in Lisbon and perhaps Paris. Setting a Civil Law Centre in Goa with the objective of research would be a valuable contribution to the studies on Legal Systems. This is a need of the modern world, with scholars looking for solutions in Comparative Studies between Civil and Common Law Systems.

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<sup>18</sup> Ibid, pp. 165–170

<sup>19</sup> There are several dissertations of LL.M. students of Goa University at V. M. Salgaocar Law College analyzing the various case laws emerging from the Courts situated in the territory of Goa.

<sup>20</sup> The PIL is an interesting device created by courts in India which would be a fruitful subject of research for Continental scholars.

## **Doutor Santos' Vision for Goa**

The late Prof. Doutor Antonio Marques dos Santos, on a tourist visit to Goa, shared his vision for cooperation between the University of Lisbon and the Law Colleges in Goa with the faculty of V. M. Salgaocar College of Law. His ideas were further concretized when he later visited Goa as a part of a team of Portuguese experts who had come to address a conference on Civil Law at Hotel Cidade in Goa. On that occasion, he brought with him a substantial collection of books as a gift to V. M. Salgaocar College of Law from the Faculty of Law of the University of Lisbon. Later, when I informed him of my intended presence in Paris for the celebrations of the 500th Anniversary of the Discovery of Sea Route, he insisted that for the sake of strengthening cooperation between Goa and Lisbon, I should fly from Paris to Lisbon. He organized a Conference so that I could address the University of Lisbon on the Evolution of Portuguese Law in Goa<sup>21</sup>. On that occasion he insisted that we should work towards consolidating the vision of cooperation between the two institutions. Later I met him again on my three further trips to Lisbon, but he was disappointed that no further progress had been made. He died with his dream unfulfilled.

It was left to Prof. Doutor Dario Vicente, as head of the Institute of Judicial Cooperation of the Faculty of Law of the University of Lisbon to begin practical efforts towards such initiative. After initial communication, Doutor Dario Vicente dispatched to Goa a team consisting of Prof. Doutor Loureiro Bastos and Prof. Doutor Duarte Pinheiro, to investigate the feasibility of cooperation between Lisbon and Goa, in March 2007. As a consequence of this visit, by the end of August 2007 a Memorandum of Association had been signed between V. M. Salgaocar College of Law and the Faculty of Law of the University of Lisbon. As part of the agreement, the first Civil Law Lecture Series was successfully held at V. M. Salgaocar College of Law from mid-January to the end of February 2007. A team of eminent professors, consisting of Prof. Doutor Ascencao, Prof. Doutor Fausto Quadros, Prof. Doutor Dario Moura Vicente, Dr. Lino Leitao, Prof. Doutor Loureiro Bastos and Prof. Doutor Duarte Pinheiro, delivered the lectures, on different aspects of Civil Law.

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<sup>21</sup> *Evolucao do Direito Portuges em Goa*, Revista da Faculdade de Direito da Universidade de Lisboa, Volume XL, No. 1 e 2, Coimbra Editora, 1999

## **Civil Law Studies: An Indian Perspective**

In this globalizing world there is a need to develop Civil Law Studies from India's perspective. The present book has the objective of boosting research in the area of Comparative Studies between the Civil Law System and the Common Law system in India, as the country also has a vast experience of Common Law. Following are the specific objectives of the present publication.

- To foster awareness of the Civil Law System and its intricacies among the bar, bench and academia in India.
- To provide reference material for postgraduate diploma courses on Civil Law which may be planned in the near future in India.
- To promote research in Civil Law Studies in India.
- To promote research into comparative studies between Common Law as prevailing in India and the Civil Law as found in Portugal.
- To highlight the documents, books and material available in Goa relating to the Civil Law System.
- To promote research into the vast practical experience existing amidst the bar and the bench in Goa on the dynamics of both the Civil Law and Common Law Systems.
- To bring about cooperation between legal scholars from Europe and India in the field of Civil Law Studies.
- To motivate participants of the Civil Law courses held in 2008 at V. M. Salgaocar College of Law to contribute articles for journals and publications.

### **Contents of this Book**

The title of this book, *Civil Law Studies: An Indian Perspective*, implies that it has: (a) an eye on India's past Civil Law heritage, especially as experienced in erstwhile Portuguese and French possessions; (b) an eye on the present remnants of Civil Law in those places, varied and modified by the prevalent Common Law culture; (c) an eye on Common Law culture developed in those territories after their integration in the Indian Union; and lastly (d) an eye on the future prospects of developing Civil Law Studies in India, having in mind the country's prospects in the New World Order. Given India has developed a unique Common Law culture under English influence, it may now be important for the country, in the context

of harmonization of law in a globalising world, to carry out research on its legal system on the basis of a knowledge of civil law culture.

The book is divided into seven parts with two appendices. The first part, on Civil Law, consists of three articles which discuss the civil law and common law systems and the relation between the two, as well as containing a critical appraisal of their traditions. The second part deals with law in a globalizing world and contains articles by leading academics from Faculties of Law in Lisbon, Coimbra and India, as well as participants in civil law course in Goa. The third part, labelled as “criminal law,” raises issues on the existing English inheritance of the adversary criminal justice system in India and looks for solutions to problems faced, if any, in the light of experiences in European countries. The articles have been compiled in the light of the Justice Malimath Committee Report on Administration of Criminal Justice in India, which advocates examination of the inquisitorial aspects of continental law for possible inclusion in India’s accusatorial system. The fourth part is devoted to contracts, in two articles critically comparing contracts under the continental and common law systems. The fifth part refers to Family Laws<sup>22</sup>, comprising a critical study of Indian Family Law, which, due to its complexities is very useful from a research perspective in understanding systems of family laws worldwide. These articles will provide rich insights into the complexities of family laws of India to scholars worldwide, and motivate comparative research with Western laws. The sixth part, on the legal profession, contains one article which critically reviews the culture which has developed in the legal profession in India, making appropriate suggestions. This article may help researchers to explore on similar lines the legal culture in the Continental System. The last part is devoted to the legal history of Goa, in order to advocate research in that field as an aid to understanding the legal system. The legal history of Goa is fascinating as it experienced the Continental legal system during the Portuguese regime, and was later absorbed into the common law tradition, but not before passing through a transition phase. This transition phase has given unique experiences to those then occupying positions in the judiciary, the bar or the administration.

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<sup>22</sup> Family law in India as prescribed for Law courses in Goa University also includes the family laws Goa (based on some remnants of laws on family matters such as marriage, divorce etc. dating from the Portuguese period).

## Civil Law Study Centres

Cunha Goansalves' landmark contribution to Portuguese jurisprudence, in the form of his voluminous work on the Civil Code, is something for Goa and India to boast about. It is necessary to unearth such treasures. It is also a contemporary need that academics in India produce high-quality doctrinal books exploring the boundaries of jurisprudence and pushing the frontiers of law further with their analysis, especially as the globalizing world faces new problems. Indian scholars cannot depend merely on case law developed with the aid of bar and bench, but must engage in thought-provoking discussion and research. The case law approach is commendable, but it must be also supplemented with doctrinal writings in a process similar to that of Continental Europe. There is in fact a lack of authoritative books produced by academics in India. It is hoped that the present book, with the contributions of some outstanding members of bar, bench and academia, will go a long way to give a boost to high-quality, authoritative, doctrinal publications in India. It is also hoped that the book will provide a boost to Civil Law and Comparative Studies in India. India has developed a high standard of its own jurisprudence post-Independence, based on the common law system. As India is preparing to occupy its rightful space in the world community, it is necessary that it be at least well-acquainted with the civil law system, as well as comparative studies between the two systems. Other legal systems too, including the Hindu system, should be of interest to Indian scholars, at least for research purposes. Today India can become an educational destination for the future, and in that case Civil Law Institutes based in Goa, Pondicherry and other parts of India will attract researchers from across the globe. India has many unique legal experiences, as demonstrated by some articles found in this book, which will delight European scholars.

## Conclusion

India has inherited the English legal culture, but post-Independence Anglo-Indian jurisprudence has carved a niche for itself. On the other hand, it has a unique continental heritage in the small pockets of Goa and Pondicherry and adjoining territories<sup>23</sup>. This is a treasure house where the Continental system existed and then, through a process of transition, moved into the common law system. This area contains a wealth of research material; much of it in oral form amidst judges, lawyers and

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<sup>23</sup> Territories associated with Goa and Pondicherry during the colonial period.

bureaucrats, capable of addressing issues around harmonization of law in a globalizing world. As India prepares to find its rightful place in the global community, it is necessary that its scholars carry out research into civil law systems in order to find solutions to the new global problems. It is of advantage to India to plunge itself into civil law studies and research.

# CIVIL LAW CODES: PRESUMPTIONS AND PRETENSIONS

MARIAN PINHEIRO<sup>1</sup>

Legal systems across the globe can be generally divided into two groups, civil law and common law systems. Most countries that have been formerly under British law have adopted the common law system. Many others have come to adopt civil law systems based on Roman law, especially the *corpus juris civilis* of Emperor Justinian. Historically, this was as a result of the domination of Rome over most of Europe, and later European influence over Asian and African countries.

The legal concept of codification dates back to ancient Babylon, where the code of Hammurabi was prevalent. The idea of codification is an offshoot of the conception of the nation-state, wherein the existence of a nation presupposed the existence of a recorded law applicable to that state. Codification, it was believed, brought conductivity to the legal system with the unified recording of the laws. The Napoleonic Code of the 19<sup>th</sup> century and the German Code of the 20<sup>th</sup> century are illustrative of this concept of the preeminence of the idea of the nation-state. Codification by itself is not the only defining factor of a civil law system. For example, some of the Scandinavian countries have a large part of their civil law uncodified.

The distinction between civil law and common law goes beyond the mere fact of codification and is rather dependent on the methodological approach taken to courts and statutes. In civil law countries as in common law countries, legislation is seen as a primary source of law. However, in the absence of legislation, courts by default base their judgments on the provisions of the code. To do this, the courts have to reason extensively on the basis of the general principles, often drawing analogies from statutory

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<sup>1</sup> The writer is the Principal of V.M.Salgaocar College of law, Miramar, Panaji, Goa.

provisions to fill in lacunae and achieve coherence. In the common law system, in addition to the legislation, the courts have recourse to earlier decided cases as a primary source. It is for this reason that the judgments of common law courts are often much longer and contain more elaborate reasoning.

The more interesting distinction is in respect to criminal procedure, wherein the civil law system could be considered as a variant of the inquisitorial system rather than the adversarial system. The concept of presumption of innocence in the common law system has, of course, resulted in a very low percentage of convictions. Justice Malimath in his recommendations for reformation of the Indian criminal justice system to some extent recommended the adoption or incorporation of such a system in the Indian Criminal Procedure Code. He has referred more specifically to the inclusion of the duty of the court to search for truth. Section 311 of the Criminal Procedure Code provides for courts to have the power to summon material witnesses, or examine persons present. Thus the quest for truth is a fundamental duty of every court. Justice Malimath recommends that the judge should take a pro-active role during the trial and give directions to the investigating officers and prosecution agencies in order to unearth the truth.

The obvious distinguishing feature of a civil law system is the presence of a written code of law, a code which is a systematic and comprehensive compilation of legal rules and principles. The code is intended to act as a blueprint of social regulation which attempts to guide individuals through society from birth to death. The role of judges in a civil law system differs considerably from that of a judge in a common law system. When different facts or new considerations arise, common law judges are free to depart from an existing precedent and establish new law. Civil law judges view themselves as administrators of the code, and for them there is only one correct solution to a specific legal problem. Therefore, the judges are not expected to use judicial discretion or to apply their own interpretation to the case. The judges therefore being administrators of the court actively supervise the collection of evidence, examine witnesses in private, cross-examine opposing party witnesses, etc., in their search for truth. This process of truth-finding at times even eliminates the need for a trial. In the common law system, where the law could be derived from custom and precedent, the precedent by itself is law, whereas in the civil law, the judges merely administer law which is created by legislators and supplemented by advice of legal scholars. There is a need to explore and

expound the necessity for a systematic study of the civil law system in a country like India where the system is predominantly based on common law. The fundamental issue of judges' role and involvement in the justice delivery system, especially criminal jurisdiction, is worthy of consideration. Considering the failings that exist in the present criminal justice system, such as undue delay in the completion of the adjudicative process, the extremely low rates of convictions, and the tendency of key witnesses to change their statements, there can be no doubt that the criminal justice system needs to be reformed. But whether it should be reformed in such a manner as to adopt the existing practices in civil law systems needs further consideration.

Similarly, in the area of private law, there is of course lack of uniformity as to the personal laws of citizens. Though Article 44 of the Constitution unequivocally recommends adoption of a uniform civil code, being placed in Chapter IV of the Constitution, the enforceability of such a constitutional mandate has remained little more than a distant mirage for India. The apex court, on its part, has been vocal and persuasive to the extent possible to it. The Shah Bano Begum case of 1985 was one earlier illustration wherein, while interpreting the right to maintenance of a wife under Section 125 of the Criminal Procedure Code, the court observed that Article 44 (3) of the Constitution has remained a dead letter. Later, in the Sarla Mudgal case, while dealing with the issue of a Hindu husband embracing Islam for a second marriage, Justice Kuldeep Singh was quick to point out that there is an urgent need for a uniform civil code to avoid travesty of law, as happened in this case. The latest of the Supreme Court's interventions to promote a common civil code was in July 2003, when a Christian priest pointed out that Section 118 of the Indian Succession Act is discriminatory against Christians. The three judges deciding the issue unanimously struck down the relevant law as unconstitutional and called for a speedier implementation of Article 44 specifically to promote national integration.

The non-implementation of this hypothetical uniform civil code has been a cause of division between majority and minority communities and of course an opportunity to politicise the issue. The question of a common civil code has caused unbridgeable differences of opinion among the various communities. India, unlike many of its Western counterpart, is multi-cultural, multi-lingual and multi-religious. The task of incorporating the aspirations, views and ideas of all the resident communities may make such a code voluminous.

The only option available may be to enact an optional common civil code which any one, or either of the parties to a marriage, can opt to adopt. The ultimate goal would be, if ever possible, to enact a comprehensive civil code capable of being uniformly applied to all citizens. It is to be noted that even the basic document of the Indian legal system—namely the Constitution of India—has been amended ninety-four times to date, and is likely to be amended many more times in the immediate future.

Legislation of such nature, if made optional in its applicability, should necessarily have incentives for its wide acceptance, or there should be strong and effective disincentives for its non-acceptance. What kind of incentives/disincentives could be incorporated for legislation of this nature? Would such incentives/disincentives be beyond the scope and purpose of the legislation itself? Would it be legally acceptable and justifiable to create incentives in legislation, if created, and how long should such incentives be effective? In addition to these problems, there are certain other fundamental questions as to the quality of justice. Is the civil law system more suited to deliver better quality justice than the common law system? Is not the common law system more akin to social and contextual justice delivery? In a dynamic population, is not socially contextual justice more relevant and suitable than standardized justice? The emergence of the system of PILs to correct public wrongs and malpractice is something that would never have been thought of in a civil law system, where the scope of interpretation is always limited and restricted. Do countries with civil law systems have better-administrated justice; or can it be said that the civil law system is more people/litigant friendly?

There is of course a greater political concern while enacting such unifying legislation. Will such legislation be considered retroactive? The legislature are more likely to imprint their own personal concerns and localized issues upon the system produced. All such influences will certainly dilute and may negate the very idea of uniformity.

Common civil code or no civil code, justice should take precedence. The integrity of a nation should never be at stake. Duties and values need to be stressed in any legal system if it is to sustain itself.

# THE CIVIL LAW AND COMMON LAW TRADITIONS: AN APPRAISAL

KIM COUTO<sup>1</sup>

The dominant legal traditions today are the Civil Law system prevalent in most of Europe, Central and South America, on the one hand; and the Common Law tradition, largely found in England and America, on the other. This article is an attempt to compare and contrast these two major systems extant, with their own peculiarities, across the globe today. The two systems being different from each other in various aspects, the result is that the judges within these two systems have their own distinctive approaches. This paper examines some of the major differences existing in the two systems.

There is no virtue so truly great and god-like as justice<sup>2</sup>. Indeed, every human being yearns for justice. The volumes that have been written and spoken about this expression suggest the innate power and richness the concept holds. It is hardly surprising therefore, that the yearning for justice is universal, cutting across barriers of age, race, religion, culture, nationality, language, and economic or even social status.

The concept of justice can best be understood against the background of injustice. An injustice is a tormenting, hurting and unforgettable experience. Whilst injustice brings pain, anguish and despair, justice brings peace, happiness, hope and progress to the society and to the individual in particular. That is why Justice Brennan was so right when he said, “Nothing rankles more in the human heart than a brooding sense of injustice<sup>3</sup>”.

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<sup>2</sup> Joseph Addison. <http://www.best-quotes-poems.com/justice-quotes.html>.

<sup>3</sup> Justice Brennan of the Supreme Court of the U.S.A., in a speech delivered to the Legal Aid Society of New York.

Conceptualized as giving each man his due, justice has always occupied pride of place in every man's heart. An independent and honorable judiciary therefore becomes the sine qua non for the administration of justice in society. Confronted with the question of how to resolve disputes among its members, many societies preferred designating individuals to resolve disputes in accordance with established norms and customs over a private system of revenge for dispute resolution. These individuals have been usually leaders who are expected to exercise their judgment in a fair and impartial manner. Like the deity in the temple of justice, they hold in their hands a person's life, liberty, property, reputation, marriage, home, and happiness, all of which are sacred and valued. A judge thus hears the pleas and petitions of those before him, resolves their problem, and ensures that justice is done impartially, without fear or favour.

Though judges all over the world perform substantially the same functions, the similarity ends there. Judges in civil law countries are markedly different in background and their outlook differs considerably from their counterparts in the common law systems of the world. Both of these, and the legal system within which they work, assume much significance in distinctly shaping the law in their respective spheres.

### **The Civil Law System—meaning and origin**

The civil law system, often referred to as 'Continental Law', is frequently used to mean a legal system largely drawn from the Roman Law. Distinguishable from the common law of the Anglo-Saxons in England, it is the predominant system of law in Europe, spreading throughout the length and breadth of the continent. The origins of the Civil Law tradition are traceable to the Law of the Twelve Tables which dates from the middle of the 5th century BC. Though not a law code in the modern sense of the word, it contained specific provisions in the form of norms, designed to change the then existing customary law. With the passage of time, the formalism of the law of the State of Rome, or *jus civile*, was diluted by the introduction of more flexible principles in the form of *jus gentium*, largely a creation of the wisdom of the Roman praetors and magistrates. A praetor was not a legislator and did not technically create new law when he issued his edicts. In fact, however, the results of his rulings came to enjoy legal protection and were in effect often the source of new legal rules. It is significant to note that a Praetor's successor was not bound by the edicts of his predecessor. Nonetheless, he did take rules from edicts of his predecessor that had proved to be useful. In this way, the praetoric law