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The Role of Judicial Decisions and Doctrine in Civil Law and Mixed Jurisdictions, edited by Joseph Dainow

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THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS. Edited by Joseph Dainow. Baton Rouge: Louisiana State University Press, 1974. Pp. xvii, 350. $16.00.

It is common knowledge that the main difference between the civil and the common law systems is the question of the authority of the judicial decision as a source of law. Common law was built on precedent, civil law on statutes. Precedent, and only precedent, was cited in the past as authority in common law countries, while statutes supplied authority in the countries under civil law.

At present, the difference between the two systems is no longer as sharp as before. The doctrine of stare decisis is now less rigid not only in this country, but since 1966 in England as well.[1] Decisions of common law courts are based now not only on precedent but, increasingly, on statutes as well.

This book presents a closer examination of the developing significance and use of judicial decisions and doctrinal writings in civil law. It consists of 13 essays written by 14 authors: 12 professors and 2 judges. The core of the collection comprises papers presented at three annual seminars (1970–1972) developed by the Institute of Civil Law Studies of the Louisiana State University Law School and attended by a group of Louisiana appellate judges. Since the book originated in a state of "mixed jurisdiction," the majority of papers deal with judicial process in states with "mixed" legal systems, such as Louisiana, Quebec, Scotland, South Africa, and Israel. Only representative civil law countries were selected for detailed treatment: France, Germany, Italy, and Mexico. Each essay is a contribution to the literature on legal sources and on judicial process in civil law countries and in mixed jurisdictions. Taken together, the articles present an almost complete treatise on the subject.

However, the value of the collection might have been enhanced had contributions on Swiss, Austrian, and perhaps Puerto Rican law been included. The Austrian issue deserves special attention, since Austria is the country which expressly excludes previous judicial decisions as a source of law by the clear provision of article 12 of the Civil Code of

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[1] Stone, *1966 and All That! Loosing the Chains of Precedent*, 69 COLUM. L. REV. 1162 (1969).

1811 (still in force).[2]

The contributions of the authors contain a wealth of relevant information. Mindful of differences between separate systems, one can nevertheless find some common features. All legal systems covered by the book provide for publication of at least selected judicial decisions. In more recent times abstracts and indexes of decisions are prepared and published in order to alleviate the problems of access and use. However, nowhere are judicial decisions disregarded more by lawyers and judges. The authority of decisions depends on the place of a given court in the judicial hierarchy of the country, the number of judges participating in the decision, the kind of case, the date of decision, and more often than not on the existence of a continuous line of similar decisions, as opposed to one single decision binding under common law.

For a variety of reasons, fully explained by the various authors, the decision of a higher court is in most cases followed by lower courts. For a change of decision in the court of last resort an elaborate procedure is required, involving a kind of super-panel of supreme court justices. This is the case in the French system, under which—perhaps ironically—the Court of Cassation never cites previous decisions. No civil law system expressly grants binding force to judicial decisions; lawyers and judges look first to statutes to find the solution. But judicial decisions are consulted and followed as a means of interpreting obscure statutory provisions, as a method of filling gaps in legislation, and even as a way of modifying or expanding antiquated statutory provisions to fit changing social conditions.[3]

The problem of the role of doctrinal writings in the judicial process in the civil law system is explained by history, beginning with Roman law, where the writings of some Roman jurisconsults were recognized as sources of law. The lower status of the judge in civil law systems is also responsible for a more elevated status of prominent legal writers. In the absence of legal digests, Shepard citators, and the like in civil countries, lawyers and judges turn by necessity to annotated editions of the code, as well as to systematic legal treatises and monographs prepared by professors.

Legal writings alone are never direct sources of law, although they may assist in legal interpretation. They have persuasive authority, and may be of greatest authority in those areas where there is no established

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[2] ALLGEMEINES BÜRGERLICHES GESETZBUCH art. 12 (Austria). Decisions issued in individual cases and opinions handed down by courts in particular litigations never have the force of law; thus they cannot be extended to other cases or other persons.

[3] In this connection, *see* R. SCHLESINGER, COMPARATIVE LAW 410–47 (3d ed. 1970).

jurisprudence. Persistent doctrinal writings may influence courts to deviate from the line of precedents. Of course, some systems do not permit citations of opinions of living writers. Professor John Merryman's[4] article, *The Italian Legal Style III: Interpretation,* points out, for example, that Italian courts are forbidden by law to cite in their opinions works of legal writers (p. 165). But in fact, "doctrine dominates the Italian legal process. Realistically speaking, the law in Italy is to a large extent what the scholars say it is." (p. 166) Professor David Walker,[5] in *Judicial Decisions and Doctrine in Scots Law,* singles out the so-called "institutional writers" who wrote "books of authority" and not mere textbooks. He cites the published address of Lord Normand: "Stair, Erskine and Bell are cited daily in the courts, and the court will pay as much respect to them as to a judgment of the House of Lords." (p. 216) "They are as Domat and Pothier were to pre-Code French law, as Voet to Roman-Dutch law, as Coke and Blackstone to English law, and as Kent and Story to American law. Their influence on the growth and development of the law has been enormous." (p. 216)

Special attention is due to the situation in mixed jurisdictions where common law and civil law "interpenetrate." Judges, increasingly trained in the common law, frequently use common law interpretation methods in civil law cases. In addition, more copious common law legal literature and better case collections and information retrieval contribute to the fact that common law slowly and gradually prevails in mixed jurisdictions. Even so, the authors stress the fact that the practice of civil law in a mixed jurisdiction also has some advantages. For example, Louisiana courts do not hesitate to overrule bad precedents: Louisiana courts follow "the essentially civilian judicial technique of never letting today become either the slave of yesterday or the tyrant of tomorrow."[6]

Authors of papers dealing with the law prevailing in Israel, G. Tedeschi[7] and Y. S. Zemach,[8] *Codification and Case Law in Israel,* and U. Yadin,[9] *Judicial Lawmaking in Israel,* offer a fascinating story of the transformation of that basically civil law territory under Turkish law (over strongly infiltrating English common law during the British mandate) into a civil law country under statutory rule 25 years after

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[4] Professor of Law, Stanford University.

[5] Regius Professor of Law, University of Glasgow.

[6] Daggett, Dainow, Hébert & McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana,* 12 TUL. L. REV. 12, 22-24 (1937).

[7] Professor of Civil Law, Hebrew University of Jerusalem.

[8] Lecturer in Law, Hebrew University of Jerusalem.

[9] Deputy Minister of Justice and Professor of Law, Hebrew University of Jerusalem.

independence. According to Tedeschi and Zemach, "Recently, in 1972, an Israeli law was enacted repealing any legal provision under which a law or its provisions may be construed in accordance with the English law or with English canons of legal interpretation" (p. 286).

The German law is represented by the translation of a portion of a book by Karl Larenz,[10] *The Open Legal Development: Germany.* The selection and translation are excellent, but the reasons given for omission of author's footnotes, that "they refer to German cases and statutes not generally available and not helpful to a reader who is unfamiliar with German law" (p. 133), do not seem convincing. Larenz's contribution is the only one published stripped of its learned appurtenances.[11]

Several essays tend to come independently to the conclusion reached almost 20 years earlier by the great German scholar, Josef Esser: "The greater closeness of both systems [civil and common] manifests itself in the accelerated passing of continental judicature from deductive reasoning to the solution of cases of newly discovered problems, and in the increased use by Anglo-American practice of legal concepts as basis for construction."[12]

The book includes also a selective bibliography of writings on the role of judicial decisions and doctrine in the sphere of civil law in France, Germany, Switzerland, Austria, and Italy, with a few items about Belgium, the Netherlands, and Spain. The bibliography is meticulously compiled by the leading contemporary legal bibliographer and expert in comparative law, Charles Szladits.[13]

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[10] Professor of Law, University of Munich.

[11] See J. DAWSON, THE ORACLES OF THE LAW (1968) for a criticism of this practice.

[12] J. ESSER, GRUNDSATZ UND NORM IN DER RICHTERLICHEN FORTBILDUNG DES PRIVATRECHTS 223 (1956) (translation by reviewer).

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