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The Transformation of Civil Lawyers

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For the past five years a colleague and I have been coordinating a study of the comparative sociology of legal professions by a group of some thirty lawyers and social scientists. We began our study by developing a common inventory of information we wanted to obtain, and by enlisting scholars to prepare reports on seven common law countries (the United States, England and Wales, Scotland, Canada, Australia, New Zealand and India) and eleven civil law countries (Germany, Norway, the Netherlands, France, Belgium, Switzerland, Spain, Italy, Japan, Brazil and Venezuela).[1] Few third-world countries and no socialist or Islamic countries were included.[2]

This article considers whether the categories of common law and civil law systems are useful for a comparative sociology of legal professions. To a sociologist, other divisions might seem more fruitful: the size or character of the economy, the extent of state involvement in economic life, the character of the state (e.g., whether it is unitary or federal), the degree of cultural homogeneity or diversity, etc. Yet there are two reasons why common and civil law professions might be expected to differ. The first is historical: through colonialism, conquest, economic penetration, and educational and intellectual exchange, European countries have influenced the legal professions of other coun-

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1. These reports will be published by the University of California Press in three volumes, the first in the spring of 1988, with the other two following at six month intervals. LAWYERS IN SOCIETY (R. Abel & P. Lewis ed. 1988-89). Because assertions of fact in this article are supported by these reports, there are no citations to additional sources.

2. Lacking external funding, we had to rely on indigenous scholars willing to prepare the national reports using their own resources. In addition to preparation of such reports, we commissioned papers on comparative methods, lawyers and revolution, theories of representation, lawyers and the state, the new class, corporatism, the expansion of higher education and the feminization of the profession.

tries. The second reason is potentially more interesting: the legal professions in civil and common law systems may significantly have been shaped and differentiated by other characteristics of the legal system, such as the sources of legal authority or the ideology of law, or by factors such as the structure of the polity and the nature of educational institutions.

Perhaps because none of the members of our working group is primarily a comparative lawyer, our efforts to answer these questions taught us lessons about comparative methods that are probably familiar to most comparative lawyers. First, we realized that the unit of analysis that we had taken for granted—the legal profession—is essentially a common law folk concept. Common lawyers (i.e., those in common law countries) tend to view their legal profession as a unitary category; the core is private practitioners who share a formal credential awarded by educational or governmental institutions, and who mediate between state power and private individuals or corporations. But many of those who obtain such a formal credential in civil law countries have little further contact with the legal system. Even those who mediate between the state and civil society are divided into the magistracy, civil servants, employees in commerce and industry, and private practitioners—subgroups that tend to resemble each other in size and status and whose members' career choices are fairly irrevocable. Other important actors within civil law systems, such as notaries, bailiffs or legal advisors, may not even possess the same credential.

Second, we were also forced to acknowledge that the theory of professions guiding our data collection and analysis was drawn from the peculiar experience of common law countries. Building on the work of two sociologists, Eliot Freidson and Magali Sarfatti Larson,[3] we defined professions as occupational categories within the division of labor that produce services and pursue the "professional project,"[4] seeking to control the market for those services by regulating the production *of* and *by* producers, both to enhance the economic well-being of members and to elevate their social standing. Although we found this theory capable of illuminating much about the behavior of private practitioners, it was far less apposite for understanding the majority of

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3. *See* E. FREIDSON, PROFESSION OF MEDICINE (1970); M. LARSON, THE RISE OF PROFESSIONALISM (1977).

4. *See, e.g.*, M. LARSON, *supra* note 3, at 49-52.

the profession in civil law countries—those who are employed in either the private sector (as house counsel) or the public sector (as judges, prosecutors, public attorneys, civil servants and law teachers).

Given their insulation from market forces, many civil lawyers have been relatively unconcerned with the "professional project," which preoccupied English solicitors in the mid-nineteenth century and American lawyers in the late nineteenth and early twentieth centuries. The "professional project" explains much about the mode of qualification, the structures of production, the nature of self-regulation, and the forms of professional association. For example, whereas common lawyers traditionally entered the profession through apprenticeship, the university has always been at the center of the certification process for civil lawyers.[5] Because so many of their graduates do not practice law, civil law faculties have offered a liberal rather than a professional education (even though many instructors practice full time). While common law professions initiated qualifying examinations, and still write and grade them in many countries, a university degree is sufficient in some civil law countries, and where it is not, the state rather than the profession administers any further examinations.

Even though civil lawyers appear to differ from those in common law countries in that entry into the profession is regulated by the university and the state rather than by the profession itself, civil law countries also differ significantly among themselves in the nature and stringency of entry control. Until recently, only a tiny and privileged fraction of the relevant age cohort attended the university in civil law countries. Today, many civil law faculties admit all secondary school graduates. By contrast, entry into the university, and especially into law faculties, is highly competitive in most common law countries. On the other hand, there is considerable attrition among those who matriculate in civil law countries—whether from lack of interest, economic difficulties or inability to pass university examinations—whereas virtually all university law students in common law countries graduate.[6]

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5. Apprenticeship, where it exists, is nowhere as significant as it once was in all common law countries and as it remains in England. Where it is mandatory, places are ensured for all law graduates, who often are paid quite generously.

6. Some civil law countries, such as Spain, require no further examinations after graduation. Japan falls at the opposite extreme: only the two percent who pass the entry

In civil law countries where neither the university nor the state examination poses a significant barrier, entrants may still have difficulty establishing a viable practice. Most new practitioners in common law countries spend several years as employees in law firms; but employment may be inconsistent with civil law conceptions of a liberal profession. Consequently, new civil law practitioners must have connections which enable them either to obtain clients or to find space in the office of an established lawyer who will refer excess work.

The greatest difference between common and civil law professions may be the distribution of qualified lawyers between private practice and public or private employment. But even within private practice there are major differences. Private practitioners in common law countries generally enjoy higher social status and income than employed lawyers; the reverse tends to be true in civil law countries. Perhaps because they are less central to the profession, private practitioners in civil law countries maintain a highly conservative notion of their proper role. Therefore, although solo practice has declined everywhere in the common law world (particularly in England, where it now represents only about ten percent of private practitioners), it remains the ideal among civil lawyers. Also, although civil lawyers may share office space and other expenses, partnerships are far less common. And while virtually all common law practitioners (except barristers) begin their careers as employees—a quarter of American private practitioners and nearly forty percent of English solicitors in private practice are employed today—employment remains the exception among civil lawyers and often deprives the lawyer of rights of audience.

Advocacy still is the staple of private practice in civil law countries, whereas common lawyers (other than specialist advocates) long ago sought to expand their role as counselors. Consequently, civil lawyers have been displaced by other occupational categories, such as *conseils juridiques* in France. Likewise, caseloads tend to be low, and most lawyers remain generalists.

In countries where supply control is particularly weak, such as Italy, Spain, Venezuela and Brazil, many lawyers either cannot live on their professional incomes or live very poorly. There is hardly any practice structure in the civil law world that re-

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examination for the Institute of Legal Training and Research may become private practitioners, judges or prosecutors.

sembles the large law firm, which is so prominent in the United States, England, Canada and Australia (although counterparts can be found in Latin American countries, whose economies are dominated by United States multinationals). Instead, large private and public enterprises rely on legally qualified employees for advice.

Just as civil law practitioners have retained a more conservative conception of their role, they have also intervened more actively to control production *by* producers. First, they have sought to strengthen their monopoly: extending it to legal advice, excluding employed lawyers from advocacy, and seeking to incorporate counselors into the private profession. Second, they have tried to dampen competition among private practitioners by limiting the number of advocates in the highest court, restricting advocates to a single local jurisdiction, and restraining self-promotion efforts.

When common law professions have suffered the erosion of their control over the production *of* and *by* producers, they have often tried to stimulate demand through private advertising and public subsidies. Most civil law professions have been more cautious about doing so. None has engaged in collective advertising or liberalized the prohibition against individual advertising, and few have expanded the range of services they offer. Although private insurance defrays much of the cost of legal services in Germany, few civil law professions derive significant income from publicly subsidized legal aid programs. Some of the reasons for this are extrinsic to the legal system: the low rates of divorce in the Catholic countries of southern Europe and Latin America and the prominent role of private associations, such as the church, trade unions and political parties, in providing a wide range of social services, including legal advice and representation. But other factors are closely associated with the legal system: the fear among civil law practitioners that they would lose both independence and symbolic capital by participating in state-funded legal aid programs, and the existence of public attorneys already charged with responsibility for protecting the public interest and representing particularly vulnerable populations. The principal exception to this generalization is the Netherlands, which established in 1957 what has remained the largest legal aid program (per capita) of any civil law country. It

may not be coincidental that the number of jurists also began to increase earlier in the Netherlands than elsewhere.[7]

Because the majority of civil lawyers are unconcerned with controlling the market for private practitioners, it is not surprising that their professional associations differ significantly from those in common law countries. Common law professional associations are generally voluntary and unofficial, while civil law associations are compulsory and official. Common law associations are coterminous with the political jurisdiction; civil law associations are local, generally an adjunct of the court. Common law associations enjoy disciplinary powers, but civil law associations may share such authority with other institutions. And while common law associations often take positions on contentious issues, civil law associations generally shun the political arena.

Thus, in answer to the question originally posed—whether the categories of common law and civil law systems are useful for a comparative sociology of legal professions—it appears that the separate histories and environments of common and civil law professions have produced significant differences between them. However, legal professions everywhere have undergone major changes in the last two or three decades. Have these changes led to greater divergence or are they beginning to produce some convergence?

In both civil and common law worlds the number of lawyers, which had remained roughly constant in relation to population for most of the twentieth century, has been rising rapidly for the last twenty years. In the common law world, university training has supplemented and to some extent supplanted apprenticeship since World War II (a change that occurred fifty years earlier in the United States). In all advanced industrialized countries there has been an enormous expansion of university education. In some civil law countries the state has responded by limiting entry. For example, Norway has placed a cap on law faculty enrollments, and France has required a difficult examination for admission to the institute for professional training. Thus, there has been some convergence in both the mode of entry and the proportion of undergraduates studying law.

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7. The number of jurists in the Netherlands grew by more than two-thirds between 1930 and 1947 (notwithstanding the depression and the war), by an additional third between 1947 and 1960, and by more than one-half in the next decade.

Much of the growth in virtually all countries represents the entry of significant numbers of women for the first time.[8] This dramatic change is a function not only of the feminist movement but also of the shift from apprenticeship to academic training in common law countries and of the expansion of universities everywhere. However, even though women are now forty percent or more of entrants in all countries except Japan, they remain underrepresented in elite positions (such as large firm partners in common law countries or notaries in some civil law countries) and overrepresented in others (such as government and legal aid lawyers in the United States and the lower judiciary in civil law countries). Rapid growth has also rendered all professions (except the Japanese) more youthful and thus perhaps more open to innovation. But in no country has there been significant entry by people from working-class backgrounds, despite the shift from apprenticeship to the university and the expansion of universities. Indeed, the entry of women has narrowed the class backgrounds of new lawyers.

This growth has also affected the distribution of lawyers in practice settings. In the common law world, the increased role of the state in the economy has created additional positions for lawyers in both public and private employment. Moreover, the increasing production of law graduates compels many of them to seek such positions, which they previously shunned in favor of private practice. In the civil law world, governments have been unable or unwilling to expand the civil service or the magistracy fast enough to absorb the rising number of law graduates, who therefore have swollen the ranks of private practitioners and employees in industry. Within private practice, recent common law graduates who are unable to find jobs in law firms are turning to solo practice, while the civil law world seems to be relaxing its ideological antipathy to law firms, which are growing in size and employing new entrants.

In both worlds, professional associations have encountered increasing difficulties in reconciling their dual roles as guardian of the public interest and promoter of the well-being of their members. The civil law world (most notably France and Italy) has witnessed the emergence of national voluntary associations, which have adopted a syndicalist form and aggressively championed their members' interests. Common lawyers have attacked

8. This too occurred at least a decade earlier in the Netherlands.

their own professional associations for being insufficiently vigorous in controlling competition and for failing to raise the level of legal aid payments. The more disaffected of these lawyers have formed dissident caucuses or rival associations. At the same time, external critics have argued that the professional association is too self-interested to engage in discipline or administer the legal aid scheme. Thus, there seems to be a simultaneous increase in both state regulation and syndicalist agitation.

The legal professions in the common law world and the civil law world will undoubtedly retain their distinct identities. Academic legal education continues to play a different role in the two systems. Judges, prosecutors, and civil servants have varying responsibilities and attract different types of recruits. Business enterprises secure legal advice in differing ways, and professional associations preserve different structures. Howeyer, forces operating across national boundaries are gradually eroding the imprint of the particular historical experience in the two systems. Higher education has expanded throughout both systems; women have entered the labor force; finance, commerce and industry have become more concentrated and more international; the state has come to play a larger role within the economy; and efforts have been made to render access to law somewhat more equal. Just as national cultures, languages, polities and economies have lost some of their distinctiveness, so national legal professions have grown more similar, yet still far from identical.