Vanderbilt Journal of Transnational Law

Volume 2
Issue 1 *Winter 1969*

Article 4

1969

A Comparison of the Roles of American and Civil Law Judges in the Development of the Law

James C. Hair

A COMPARISON OF THE ROLES OF AMERICAN AND CIVIL LAW JUDGES IN THE DEVELOPMENT OF THE LAW*

The traditional distinction between a judge in the Civil Law System and his counterpart in the United States is that the former only applies codified law, while the latter not only applies but also "makes" law through judicial decision. The theory underlying the Civil Law System holds that development of the law is the exclusive province of the legislature and that judges are not to engage in such activity unless the legislature permits it. In France, for example, to ensure that judges do not exceed their authority, the Civil Code prohibits a judge, under threat of criminal sanction, from basing a decision on precedent, so as to prevent the development of general principles of law through judicial decision.[1] A similar prohibition is found in the Austrian General Civil Code of 1811, which expressly states that a case decision is not a source of law and may not be relied upon as precedent.[2] It is provisions such as these which led Dean Pound to label civil law courts "judicial slot machines."[3] The most pronounced differences between the two legal systems is theoretical, since the theory behind the United States system openly acknowledges the impossibility of separating the functions of "applying" and "making" the law, and maintains that the two functions are not only complimentary but also interrelated and interacting.[4] American legal theory even maintains that judges may nullify law created by legislatures if that law is found to be "unconstitutional." Thus, by contrasting the theories behind the two systems the civil law judiciary is depicted as being passive while the American judiciary is depicted as being active.

The respective roles of the judges of the two systems as developers of the law have their foundations in the historical development of the systems and the countries in which they are found. The source of the American legal system is the Common Law of England, a body of principles and rules derived from Anglo-Saxon customs which were recognized, affirmed and enforced by the courts in the early history of England, before the advent of statutory law. It was the early common law judge who recognized and enforced these customs, thereby creating rules of law which, through development of and adherence to the doctrine of stare decisis, prevented judicial arbitrariness, gave continuity to the law, and made possible a legal system based upon uncodified, judge-made law.

---

*The following note was submitted as part of the final examination in the course on comparative law taught by Professor Harold G. Maier.

[1]H. Cachard, The French Civil Code art. 5 (1895); G. Mueller, The French Penal Code art. 127 (1960).

[2]Sections 7 and 12. See R. Schlesinger, Cases and Materials in Comparative Law 317 (1959); Lenhoff, On Interpretative Theories: A Comparative Study in Legislation, 27 Tex. L. Rev. 312, 321 (1949).

[3]R. Pound, The Spirit of the Common Law 170 (1921).

[4]R. Schlesinger, supra note 2, at 311 n. 1; Lipstein, The Doctrine of Precedent in Continental Law with Special Reference to French and German Law, 28 J. Comp. Leg. & Int. L. (2d Ser.) 34 (1946).

Because the common law courts played a leading role in the unification of law in England, and were successful in resisting interferences by Stuart kings, they also became identified with the forces of liberty, which won them the support and respect of the people and enabled them to endure to the present day.[5] Thus, while most of the law in the United States today is in the form of statutes, the traditional role of the judge as a highly respected law-maker remains. The continuance of this role is assured through statutory enactments preserving the general jurisdiction in law and equity which the courts had in England and in the United States before 1789.[6] It is this traditional role which today gives judges in the United States a very high social and professional status.

The Civil Law System was developed in Europe in the late Eighteenth and Nineteenth Centuries when revolutionary breaks with the past in various countries produced forces for unification. During this period the failure of the continental courts to lead in the development and national unification of law, their canonistic inquisitorial procedure, and their failure to create remedies for official oppression caused them to lose popular respect and support.[7] In France the courts became identified with the despised ancien regime and were destroyed with it during the French Revolution. (In Germany the repudiation of the past was not so violent nor so complete as in France.) Throughout Europe, during the period of political unification, the codes became the instruments for national unification of law.[8] Provisions in the various codes reflect each nation's experiences. For example, France's violent repudiation of the past is reflected in the rigid subordination of her judiciary to the law-making authority of the legislature and in the rejection of precedent as a source of law.[9] The subordination of the judiciary and the rejection of precedent rendered unnecessary the doctrine of stare decisis in civil law. The subordination of judges also resulted in their being mere civil servants, a status far below that of American judges.

While the codes theoretically embody "all the law there is," the application of code provisions necessitates interpretation of their meaning, giving civilian judges a practical law-making power,

---

[5] R. Schlesinger, note 2 supra at 179.

[6] §11 of the Judiciary Act of 1789, 1 Stat. 78, 28 U.S.C. § 41(1). See "Cases at Law or in Equity" in The Constitution of the United States of America 452 (1938).

[7] R. Schlesinger, note 2 supra, at 180.

[8] Id., at 181.

[9] While the strictness of adherence to the theory underlying the Civil Law System varies among the nations in which it is found, the French Codes express the general idea common to all of a rejection of precedent as a major source of law and the subordination of the judiciary to the legislature.

even though such power is indirect. Early codifications - e.g., the Prussian Code of 1794 - attempted to provide rules covering all legal problems that might conceivably arise, but by the beginning of the Nineteenth Century it had become clear that this was impossible. Codifiers therefore provided a number of broad, general provisions to assure the flexibility of the law and its adaptability to unanticipated situations.[10] The basic concept underlying codification, however, was that rational men could fashion a written system of law to solve all legal problems. The codes are meant to be essentially an all-inclusive statement of the law — though malleable and subject to change by the legislature as the need arises. Thus, while code provisions, especially the broad, general provisions, require judicial interpretation, the judge looks to the codes as the repository of all judicial powers, remedies, and procedural devices.[11] The codes also contain guides for judges' use in their interpretation and application. For example, consider Section 138 of the German Civil Code:

> (1) A jural act which is contra bonos mores is void. . . .
> (2) In particular a jural act is void whereby a person exploiting the difficulties, indiscretion, or inexperience of another, causes to be promised or granted to himself or to a third party for a consideration, pecuniary advantages which exceed the value of the consideration to such an extent that, having regard to the circumstances, the disproportion is obvious.[12]

This section states a general principle followed by a more specific detailing of acts which are prohibited by the general principle. The inclusion of the specific acts do not rule out application of the general principle to other situations — a judge is free to apply the principle to unspecified circumstances. The specific examples serve only as guides in the interpretation and application of the general principle. This method may be compared to the ejusdem generis rule of statutory construction used by American judges, which requires that general words in a statute be construed to apply only to the kind or class of persons or things specifically mentioned in the statute. Nonetheless, American courts may reach virtually any construction of a statute by using any one of many rules of construction — such as the "rational interpretation," "plain meaning" or "equitable construction" rules — which are available. Certainly civilian judges are not as free as American judges in the interpretation of code provisions. But the fact that code reform has been brought about by the interpretation and supersession of outmoded code provisions through decisional law indicates that civilian judges have more freedom of interpretation than civilian theory would indicate.[13] A civilian judge, just as

---

[10] R. Schlesinger, note 2 supra, at 182 n. 14.
[11] Id. at 176.
[12] Id. at 268, 301-02.
[13] Id. at 265.

his American counterpart, has to choose between conflicting policies underlying the law. In resolving the conflict, and in any interpretation, the civilian judge will seek to give effect to the legislative intent behind the code provisions. He may have to make a value judgment concerning which policy is to be given the greatest weight, but his judgment will be guided by what he thinks the legislature intended. This is no different from the interpretive process used by American judges. The judges of both systems exercise judicial discretion. The difference lies in the source of that discretion. The civilian judge has judicial discretion by virtue of legislative grace; but the American judge has discretion by virtue of his position as a member of a branch of government co-equal with the legislature and by reason of his historic law-making role. Discretion is inherent in his office and is independent of any written law.

The principal judicial method used by civilian judges--the process of analogy--is the method through which most judicial civil law development is brought about. Civilian judges commonly use the process of analogy to derive legal principles from existing provisions of law. In many instances, the process of analogy requires modification of a principle so that it will more satisfactorily resolve the controversy to which it is applied, resulting in the development of a different principle of law. A civilian judge will first look to a particular statute, code section or group of sections to derive a principle with which to resolve the controversy before him. If that does not produce a satisfactory solution, he may then look to the broad principles which permeate the entier code--the "spirit" of the code system.[14] In this process, the civilian judge assumes that all the law is in the code, either expressly or implicitly; he merely "finds" legal principles through analogizing from code provisions. This method is used not only to resolve the common, every-day legal problems, but also to fill gaps between code provisions.[15] The American judge, on the other hand, in theory does not usually find law through the process of analogy. Rather, he "makes" law by deriving a rule for resolving the particular case before him from general principles and rules expressed in prior cases. This judicial method derives from the common law, which is the foundation of American jurisprudence.

The principal civil law method is exemplified by the concept of abuse of rights. In German law, the concept of abuse of rights--that the use of a legal right in such a way as to intentionally harm another is contrary to good morals and "against the law"--was developed by judges from general principles found in the Civil Code. Specifically, it was fashioned out of: (1) Articles

---

[14] Id. at 275-76.

[15] Id. at 276.

826 and 138, which seek to repress acts which are contra boni mores; (2) Article 226, which forbids the exercise of a right solely for the purpose of harming another; and (3) Articles 157 and 242, which require the performance and interpretation of contracts according to the principles of bona fides.[16] This method of developing the law is alien to the common law, and until recent times, was infrequently used by American judges. Nonetheless, the complexities of modern society, which have necessitated the enactment of vast amounts of statutory law to regulate new problems, have brought about an increased use of the process of analogy. This is exemplified by the creation of a "federal common law" based upon existing labor statutes and engendered by § 301 of the Labor-Management Relations Act of 1947.[17] Section 301 provides that suits for the enforcement of collective bargaining agreements may be brought in federal district courts without regard to the requirements of diversity jurisdiction. In Textile Workers Union v. Lincoln Mills[18] the United States Supreme Court held that "the substantive law to apply in suits under §301(a) is federal law, which the courts must fashion from the policy of our national labor laws." This ruling will require federal judges to develop a body of law based upon all relevant federal labor statutes by using a civil law judicial method.

Further reference to the civil law in practice will serve to qualify the impression produced by civilian theory that precedent is unimportant and that civilian judges play a minor role in the development of the law. The abuse of rights illustration, among others, shows that civilian case law plays an important role as persuasive authority and that civilian judges "create" law, though less openly and frequently than American judges. A notable exception to civilian theory is civilian administrative law--a separate body of civil law involving controversies over the validity and propriety of governmental action which was not codified as was private law, but which, in general, consists of statutes applied by a separate set of administrative courts.[19] In France administrative law is almost entirely judge-made, and it was developed in the common law manner.

On rare occasions it has been necessary for civilian judges to create rules of case law contrary to the express terms of code provisions, or to previous interpretations of code provisions. In Germany the authority of judges to abrogate a provision of the written law by a rule of decisional law is openly recognized and supported by authoritative textbooks. For example, in one case a woman brought suit against a close corporation to invalidate a stock subscription and against a minority shareholder

---

[16] Id. at 374-75.

[17] 29 U.S.C. § 185.

[18] 353 U.S. 448 (1957).

[19] R. Schlesinger, note 2 supra at 183.

to cancel a mortgage on land she had transferred to the corporation as consideration for the subscription. The basis of her action was that she had been exploited by the shareholder-defendant, contrary to Section 138 of the German Civil Code, supra. The court rendered judgment for the plaintiff against the shareholder-defendant, holding that she could bring a tort action for damages against him for his exploitation in violation of Section 138. Nevertheless, the court, relying upon a rule of case law, refused to cancel the mortgage or invalidate the subscription. The court held that Section 138 was inapplicable as against the corporate defendant, because a statement of the corporation's capital base, which included plaintiff's land, had been entered in the public registry, upon which the investing public and creditors would rely.[20] Thus, civilian judges may and do use judge-made rules of law, even to override provisions of the written law which, on their face, control the disposition of a case.

A view similar to that of German courts prevails in Switzerland, where the Civil Code expressly states that a judge may decide a case in accordance with prior decisions when the Code does not furnish the solution.[21] The Germans, however, distinguish between such rare instances when case law may be a source of formally binding authority and the usual situation in which prior decisions are persuasive, but not binding, in the interpretation of the written law.[22] In France it is held that case decisions may supplement but not abrogate a rule of written law; but the line between supplementation and abrogation can become indistinct, and in rare instances even French courts have changed a rule of code law through use of judge-made case law. Nevertheless, the French maintain a theoretical distinction between the law of the codes and rules of law which may be created by judicial decision. While the Germans go so far as to base decisions expressly on prior cases, the French base decisions only on code provisions. But in practice the distinction which the French make may be unimportant when one realizes that French tort law is derived from case law giving concrete meaning to broad provisions in the French Civil Code.[23] Thus, case law can operate as precedent even though it is not acknowledged as such by French jurists.

The German case involving exploitation of a minority shareholder, discussed above, provides an example of the difference between the law-making roles of the two systems' judges in the fashioning of legal remedies. While the broad provisions of law, exemplified by Section 138, may be deemed the civil law

---

[20]Opinion of German Reichsgericht in the Matter of Neuergasthof G.M.B.H. v. K (1928), in R. Schlesinger, note 2 supra, at 301.

[21]Article 1, in R. Schlesinger, note 2 supra, at 318.

[22]Id. at 306.

[23]Id. at 307-08.

counterpart of equitable principles in the common law,[24] nowhere in civil law is there any legal basis for the fashioning of remedies according to the needs of the case, which American judges may do in equity. This creative power of American judges has been increased with the merger of law and equity and the widespread availability of equitable remedies in American law. In the Civil Law there is no such flexibility in developing remedies; judges must look to the codes which specify the relief to be given. In the case discussed above, if there had been no creditors or public reliance involved, an American judge would have invalidated the subscription and ordered reconveyance of the plaintiff's land to her. The civilian judge did not even inquire whether any creditors or investors were involved; such considerations were irrelevant. The decision and remedy would have been the same whether actual or potential creditors were involved and whether or not the corporation's capital would actually have been impaired. In the area of legal remedies, the civilian judge does not seem to have even a practical, much less a theoretical, law-making power.

The roles of the judges in the two systems as developers of the law differ substantially in theory, but in practice these roles show much less divergence. In the United States judicial law-making, such as the nullification of a statute enacted by a legislature, is an infrequent occurrence. Most American judges routinely apply statutory or case law rules to the controversies before them without thought of striking out in new legal directions. The distinction between the two systems, then, must not be made in terms of the frequency of judicial attempts to develop the law, although American judges probably do outdistance civilian judges in this respect. The distinction must instead be made in terms of the attitudes with which the judges in the two systems approach legal development. American judges openly create law, and are partners with the legislature in legal development. Civilian judges, on the other hand, are cognizant of their subordination to the legislature, and develop the civil law indirectly, as a result of legislative grace. In both systems, however, substantial legal development is brought about through judicial action.

James C. Hair

---

[24] Id. at 182, n. 14.