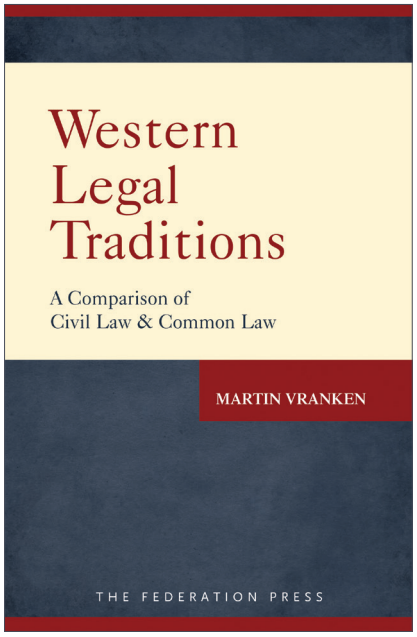
Western Legal Traditions: A Comparison of Civil Law & Common Law

By Martin Vranken | The Federation Press | 2015



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Although the grand title to the book suggests a vast and broad ranging exploration of the rule of law in Western society, such is not the focus of this small volume. *Western Legal Traditions: A Comparison of Civil Law & Common Law* nonetheless sets an ambitious task for itself: to examine, by use of the comparative legal method, the differing legal solutions to selected legal problems in their broader historical, economic, political and social contexts by focussing on the differing responses to those problems. No doubt such an approach is a more manageable task, likely borne from the author's own experience having had his legal training in a civil law system, but now teaching, as an associate professor of law at Melbourne University, in a common law system.

In this more discrete, although not unambitious task, the book mostly succeeds. The length of the book alone (less than 200pp) indicates that it is not an encyclopaedic analysis of the civil and common law traditions. Nonetheless, the book serves as a useful introduction to students, legal researchers and others with an interest in the history and method of law. Each chapter usefully provides a list of further reading material.

Although the book is of limited utility for a legal practitioner in her or his day-to-day practice, it serves as a useful opportunity to step back from the 'coalface' to view the place of law in its broader context and to think about certain assumptions and attitudes that inhere in differing legal principles and legal systems.

A striking example of this can be seen in the extent of the scope of a person's duty of care to avoid harm to others. Under civil law systems, such as under the French *Code Civil*, the obligation to be careful to avoid harm to others has been formulated by the legislature in absolute terms. In principle, it is a legal duty owed to the world at large. At common law, a legal duty to be careful is a relative concept, being a duty the scope of which is limited to one's legal 'neighbour'. Both approaches shed light on the broader question of the relationship between the state and the individual; the state in common law systems is clearly less regulatory and avoids placing what it regards as excessive burdens on its members.

Another difference is the focus of fact-finding in the common law system, on which an inductive case-by-case approach to the development of the law depends. By contrast, in the civil system, involving a deductive 'top down' approach applying broad and far reaching obligations contained in a code, facts (or more accurately fact-finding) are less important given the generality of the civil and criminal codes.

The book is structured in three parts. Part A (chapters 1 to 3), is the most abstract and theoretical of the book. It outlines the core concepts and themes necessary for a comparative method, including the approach to comparative law, and the key principles of a civil law (the role of codes and codification generally) and common law (the doctrine of precedent, concepts of *ratio decidendi* and *obiter dicta* and so on). The chapters on the key features of the civil law and common law systems are, generally, dealt with simply and efficiently. The chapter on the common law also contains a useful description of the court hierarchy in Australia. However, the chapter does not engage (or does so superficially) with the complexities involved in the exercise of federal jurisdiction by those different courts, being dealt with glibly by the statement that the way in which a subject matter of a dispute attracts jurisdiction, in practice, 'defies logic' (p32). While it may be said that questions of federal jurisdiction can at times be less than straightforward and indeed complex[1] owing to Australian Constitutional arrangements, it is not illogical.

Part B (chapters 4 to 9), deals with the 'Law in Action', looking at the legal solutions to certain problems in substantive law areas, including tort law, court procedure, good faith in contract

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law and labour law. This is the most interesting part of the book, especially the chapter on court procedure. The chapter demonstrates most starkly the profound differences in the common law and civil law systems, most notably where a judge (in curial proceedings) remains impartial in the common law system, as opposed to in the civil law system where a judge may be involved in the investigation of matters leading up to a hearing. Not surprisingly in a system where judge-made law is less important, the role of a judge is viewed differently too. According to Vranken the key actor in the civil law tradition is the professor (rather than the judge) whose legal scholarship elaborates on the meaning of civil law doctrine (and upon which the codes were originally based). Accordingly legal scholarship has a far more important role in judicial decision-making in the civil law system.

Part C (chapters 10 and 11) deals with European Union law. Although interesting, this is perhaps the least relevant part of the book for an Australian audience. While the European Union represents a significant and remarkable development in the law and politics of supranational integration, it is also, arguably, *sui generis*, given the relative commonality of political philosophy and unity of political purpose that led to the creation of the EU. The same cannot be said for the Asia-Pacific region of which Australia is a part. That the operation and institutional make-up of the EU had its genesis in the civil law roots of the founding countries makes it an even less fruitful model for any supranational institutional developments in our region. This part of the book clearly reflects the author's background and academic training, however, more work needs to be done to explain its relationship to the civil and common law traditions and its relevance to Anglo-Australian law.

Reviewed by Radhika Withana

Endnotes

1. For a particularly good example of the complexities involved in attracting federal jurisdiction, see: *Mok v Director of Public Prosecutions* (NSW) [2015] NSWCA 98.

Australian Consumer Law

By Adrian Coorey | LexisNexis Butterworths | 2015

The new text by Adrian Coorey, *Australian Consumer Law*, is a significant contribution to an area of law that is of increasing significance in Australia. The Australian Consumer Law (ACL) which is contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (the Act) establishes a national law concerning consumer protection and fair trading and contains some of the most frequently litigated provisions in all of Australia's courts.

Mr Coorey has over a decade of experience both as a practitioner and as an academic in the fields of competition and consumer law and his experience is reflected in a text that will be useful to practitioners, academics and students alike.

... this book is more comprehensive than other texts on the market that cover competition as well as consumer law or simply annotate the ACL.

With its sole focus on the ACL, this book is more comprehensive than other texts on the market that cover competition as well as consumer law or simply annotate the ACL.

The depth of analysis contained in this text will appeal to both practitioners unfamiliar with the ACL as well as to experienced consumer protection