"Civil Law systems are by definition fully codified legal systems"

Civil law also referred to, as "Continental", "Romano-Germanic" or "Romanist law[1]", is the predominant system of law in the world. It has its roots in Roman law, Canon law and the Enlightenment and was originally formed during the 13th century in continental Europe. Codification was a "socio-historical phenomenon"[2] resulting from "the natural fulfilment of the universities' ideas and endeavours over the centuries"[3]. The legal systems in numerous civil law countries are based around one or several codes of law, which set out the main principles that guide the law. The most famous examples are the French Civil Code, although the German Bürgerliches Gesetzbuch and the Swiss Civil code are also landmark events in legal history. Throughout the 20th century, the tendency towards decodification and recodification has substantially transformed the content and structure of the civil codes.[4]

In this day and age, there is "hardly any civil code that does not derive, either directly or indirectly from either the French Civil Code of 1804 or the German Civil Code of 1896[5]". Nonetheless, there are "mixed" jurisdictions, i.e. Scotland and South Africa, which borrow certain elements from the Common law and only to some extent retain their membership in the Romano-Germanic family. Scandinavia on the other hand, does not have a general classification and has been classified on either system.

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[1] M. Glendon, "History, Culture and Distribution", *Comparative Legal Traditions in a Nutshell*, (1982), 13.
[2] ANTONIO HERNANDEZ GIL, FORMALISMO, ANTIFORMALISMO Y CODIFICACION, 23 (1970).
[3] David & Brierley, "Title I, Historical Formation", *Major Legal Systems in the World Today*, 3rd ed, (1985), 63.
[4] JORGE BASADRE, HISTORIA DEL DERECHO PERUANO 323 (4th ed., Librería Studium 1988.
[5] M. Vranken, "Codes and Codification", Fundamentals *of European Civil Law*, (1997), 35.

The fundamental division in all civil law systems is that between public and private law[6]. Generally speaking, public law includes at least "constitutional law, administrative law and criminal law: while private law includes at least civil law and commercial law"[7]. It is primarily in the field of administrative law that the distinctive characteristics have developed which are thought to set public law apart form private law in the civil law systems. The most obvious and of greatest significance is the "uncodified state of administrative law[8]".

Legislation outside the civil codes has, first and foremost, undermined the constitutional function of the codes by establishing a new and competing set of premises. This has resulted in what Schlesinger has frames as, "no highly developed legal system in existence today that is either wholly codified or wholly uncodified".[9]

During the 20th century, in response to social and economic changes, civil codes faced decodification when special legislation removed large areas of law from the coverage of the civil codes creating new areas of law that differed ideologically and methodologically from the original structure of the civil codes. The growth of judge made-law has produced decodification. Civil law courts have created "doctrines" and "the applicable law" by interpreting or by developing new judge-made rules in order to adapt the codes to new conditions, to fill gaps, to clarify ambiguities, and to deal with incompleteness[10]. Prominent examples of judgemade law in the civil law tradition include initially: the law of torts under the French. Of further great significance is

[6] M. Glendon, "Chapter V, Rules", *Comparative Legal Traditions in a Nutshell*, (1982), 105.
[7] M. Glendon, "Chapter V, Rules", *Comparative Legal Traditions in a Nutshell*, (1982), 105.
[8] M. Glendon, "Chapter V, Rules", *Comparative Legal Traditions in a Nutshell*, (1982), 105.
[9] FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS 51 (Rudolf B. Schlesinger ed., 1968)
[10] Natalino Irti, *L'età della decodificazione*, *in* DIRITTO E SOCIETA 613 (1978); NATALINO IRTI, LA EDAD DE LA DESCODIFICACION (Editorial Bosh ed., 1992);

Article 4 of the French Civil Code, which "forbids a judge, to refuse to decide a case, on the pretext that the law is silent, unclear or incomplete[11]".

The German Civil Code, promulgated in 1896, has, unlike codes that came into force earlier, a "general part". This feature of the BGB is the result of the highly dogmatic teaching of German universities in the 19th century, which has completely changed the German ius commune. With regard to precedent, German theorists believe that "a line of cases can create a rule of customary law which is then binding as such[12]". Moreover, in Spain, the doctrines of "abuse of law", "good faith", "clause rebus sic sanctibus", "venire contra factum propium" and "the general doctrine of precontract" where created by the Spanish courts since the early 20th century.

In addition, before the Family Civil Law Reform of 1981, civil codes were made void through means of a judicial process that determined their constitutionality. As a result, Spain has "not completely unified its civil law[13]": even if the rules of the Spanish Civil Code have instituted a "common law", there subsist nevertheless special regional laws in different parts of Spain, i.e. Catalonia where the national Code does not apply to matters covered by local customary laws[14]". By reference to the Spanish civil Code "deficiencies in the law shall be completed by reference to general principles of law[15]".

The Swiss code can be classified as the most opposing system with regard to the assumption that a civil system is by definition a full codified legal system.

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[11] M. Glendon, "Chapter IV, Rules, Division of Law", *Comparative Legal Traditions in a Nutshell*, (1982), 128.
[12] M. Glendon, "Chapter IV, Rules, Division of Law", *Comparative Legal Traditions in a Nutshell*, (1982), 134.
[13] [13] David & Brierley, "Title II, Structure of the Law", *Major Legal Systems in the World Today*, 3rd ed, (1985), 89.
[14] M. Glendon, "Chapter IV, Rules, Division of Law", *Comparative Legal Traditions in a Nutshell*, (1982), 122.
[15] M. Glendon, "Chapter VI, Sources of Law", *Comparative Legal Traditions in a Nutshell*, (1982), 131.

The Swiss Civil Code has an express rule for cases where there is a gap in the legislation formulating that "the judge must decide as tough he were the legislator and, in the process may look to usage and decided cases[16]".

The new European constitutions provided the establishment of special tribunals with the power of judicial review (i.e., the Austrian, German and Italian Constitutional Courts, the Spanish Constitutional Tribunal, and the French Constitutional Council). The European Court of Justice, established, in theory, on civil law principles, is, in practice, increasingly recognising the benefits of establishing a body of case law.

To bring to a close, comparative law has facilitated to rectify the error that as the French jurists of the 19th century might have thought that their codes were, "the perfect of reason[17]" outlining that civil law is not by definition fully codified. According to Glendon, "the dynamics of the legal change have worked primarily through a movement away from the civil codes and through code revision, constitutional law, harmonization of law within the European Community, and the acceptance through treaties and conventions of a variety of supranational legal norms."[18]

[16] David and Brierley, "Title III, Sources of Law", *Major Legal Systems in the World Today*, 3rd ed, (1985), 134.
[17] David and Brierley, "Title III, Sources of Law", *Major Legal Systems in the World Today*, 3rd ed, (1985), 106.
[18] M. Glendon, "Chapter IV, Rules, Division of Law", *Comparative Legal Traditions in a Nutshell*, (1982), 125.