

University of Salford

Study paper

The Civil Law tradition

The Portuguese legal system

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1. Introduction to the Civil Law tradition

It is traditionally accepted that there are four families of Legal systems: the civil law, the common law, Islamic law and socialist law. The last is a system where socialist principles are incorporated in substantive law and the third is a system where religious principles gain strength of law. We will not discuss the validity or merit of this classification.

We will only point out that we have not been able to find a harmonized criterion enabling the researcher to include in the same classification all of those realities. The criterion that finds a socialist legal system will most probably find a social democrat one and so on: it looks for the incorporation in substantive law of political principles.

The same can be said about the criterion that finds an Islamic system: it looks for the influence or incorporation of religious principles in the law of the country. This criterion would probably find Christian systems, Jewish systems and so on.

The remaining families, civil law and the common law, seem to distinguished by a criterion that looks in the first place to the problematic of the role of the courts and its implications on the choice and hierarchy of the sources of law. A system where the courts have all the power to decide whatever in their view is necessary so that justice be made, let us say, a pure jurisdictional system, will necessarily give preference and precedence to unwritten laws and judicial precedent. A system where judiciary is considered as the gramophone, who plays the tune the legislator has written, will give preference and precedence to written and codified laws.

This extreme duality is based upon two extreme positions about what the law is and what is its primary aim: the concept of justice. The first system will search for justice for the people brought before the court, by finding a fair decision. The second will consider fair to apply the law that people know, even if in a given situation, equity wise that decision proves to be unfair. In short, the first system considers that fairness equals justice and the second considers that legal certainty equals justice.

Either way, whatever the choice may be about the system's methodology in pursuing justice, there is always one question to be answered: what is justice, regardless of justice being equal to fairness or legal certainty. The answer to this problem lays on the

philosophical grounding of the society to whom the legal system belongs: if it is a religious grounding, than justice will be whatever the divine commandments determine, if it is a political grounding justice will be whatever ideological principles underlying.

Ultimately, this means that the traditional categories of socialist and Islamic systems, in fact, belong to an all different classification of the legal systems, the one based on the criterion of the nature of the principles of justice that inspire the law-making and the law application process.

Both criteria may be combined and then there may be, theoretically, courts based systems of a religious nature as well as ideological ones and the same may happen with the legislative body's system.

Against this view, it may be argued that there is no such thing as a Christian legal system, for instance. This is arguable. What is accepted to be the Western civilisation is also accepted to be a model of society inspired in the Jewish-Christian principles and those principles inspire and determine what in Western societies is considered justice. How those principles are to be fulfilled, the methodology to achieve them, that is where the choice of the system is relevant. However, much of this is a problem of Legal Philosophy and falls out of the scope of this paper. Let us retain that we reject the traditional idea of four legal systems families and accept two, under the methodology criterion. Those two families are traditionally designated by common law and civil law. Let us focus on the latter.

The designation civil law stands for a legal system where the role of the courts in the law making process is diminished, where specialized bodies are responsible for the law making process, where preference is given to codified laws and where legal certainty is an essential part of justice performance.

It is widely accepted that this type of system exists in Continental Europe, Latin and Central America and most of Africa and Asia.



Figure 1 - Legal systems in the world, Faculty of Law, University of Ottawa, <http://www.uottawa.ca/world-legal-systems/eng-monde.htm>

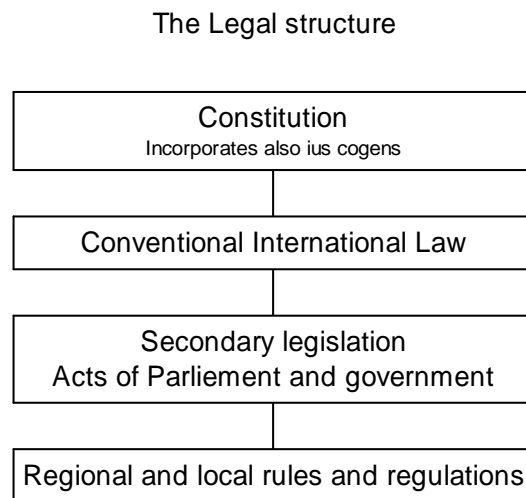
The civil law system has a strong influence from Roman *ius civile*. Disputes are settled by reference to written legal codes arrived at through legislation: the judge is bound by the provisions of the written law; its decision states the applicable provision from the code or from a relevant, and the judgment is based upon that provision. This is the case of the Portuguese Legal System.

This paper will look at the Sources of Portuguese law, the Portuguese Court system and the legal interpretation.

2. The sources of Portuguese Law

2.1 Introduction

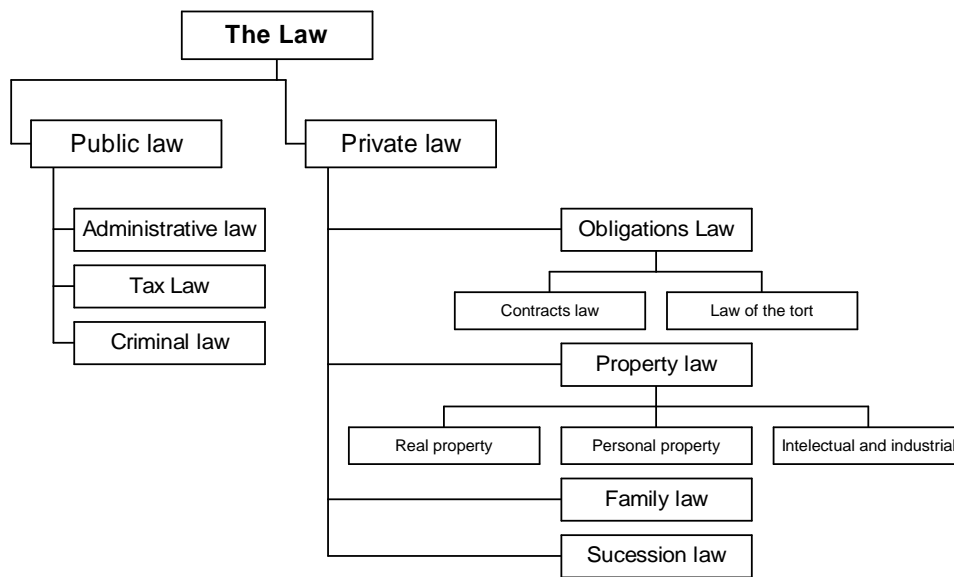
The Portuguese Civil Law is based in a structured codified laws array, where the Constitution is the backbone. This array is very much organized in a normative way, and a legal pyramid, such as Kelsen's, with the Constitution on top, is its best representation. This sort of structure delivers to each rule its grounded authority and, at the same time, limits its scope.



In spite of its name, the civil law systems have a basic distinction between what is called the public law and the private law. The criterion to distinguish these two categories is the nature of the intervention of the state in the legal relation the rule is meant to regulate. If the state intervenes in the relationship (is part of) vested in its *ius imperii*, that legal relation is a public one and the rule(s) applying will belong to Public Law. If the state does not intervene, or does so, without its *ius imperii*, then the legal relation belongs to private law.

Public law includes Administrative, Tax and Criminal law. Private law includes the Law of obligations (Contracts and tort), Property law, Family and Succession law.

Portuguese Legal system



The backbone of the Portuguese substantive law is the Portuguese Civil Code. This is especially true for Private law, but, to some extent, that is the case of Public law as well. Most of the basic legal concepts upon which the system is build are laid there. Such is the case of the enumeration of the sources of law: articles 1 to 5 are dedicated to this subject.

The system gives clear supremacy to the law, defined in clear and narrow terms: law is a generic rule enacted by any body with legislative powers. Those bodies are, according to the Portuguese Constitution, the Parliament (AR – Assembleia da República), the Government, the regional Assemblies in Azores and Madeira regions and, to some extent, local assemblies and councils. In brief, law in this sense, may be designated as legislation. Courts decisions are not a source of law. The one clear exception is the case of the decisions of the Constitutional Court. The custom is not an immediate source of law. It is only accepted as an ancillary source and only when legislation itself admits it. Equity may only be used when the legislation so determines.

2.2 Legislation

Much of the Portuguese legislation, either substantive or adjective, is confined to Codes. The first and most important is the Civil Code. This code is organized in books. The first book includes rules about the sources of law, legal interpretation, jurisdictional conflicts and juridical relations. The latter includes rules about the personality, both for

physical and legal persons, and rules about juridical facts. The second book contains the Law of obligations, which, in a civil law system includes both the contracts, and the tort law. The third book deals with the concept and contents of the property and connected rights. The fourth books include family law and the fifth book the succession law.

Portuguese Codes:

a) Substantive law

Civil code

Commercial code

Commercial society code

Cooperative code

Financial market code

Advertising code

Industrial property code

Criminal code

Road code

Notary code

b) Adjective (procedural) law

Civil process code

Work process code

Criminal process code

Administrative process code

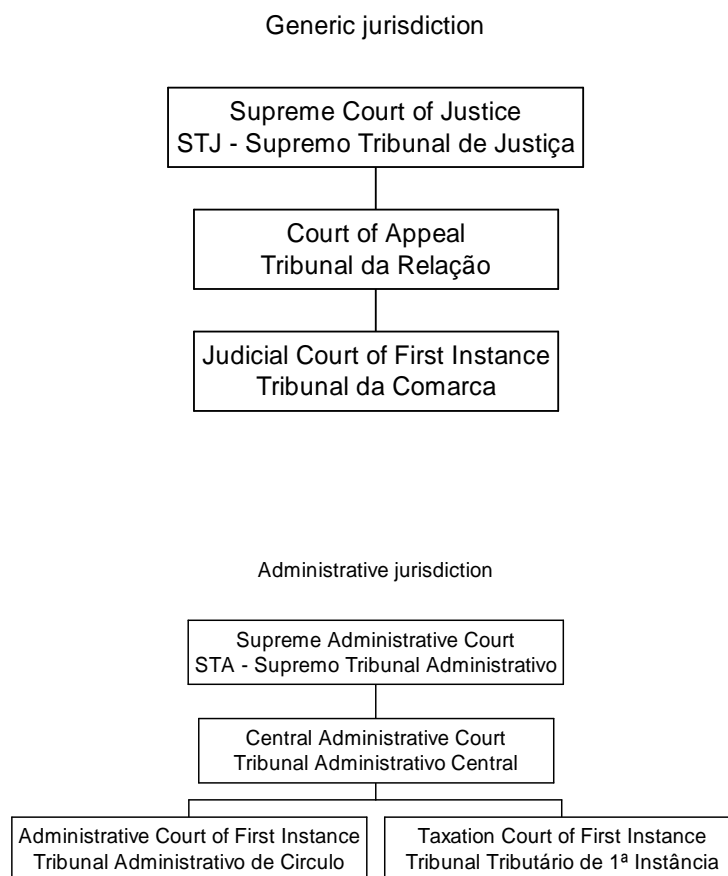
c) Other codes

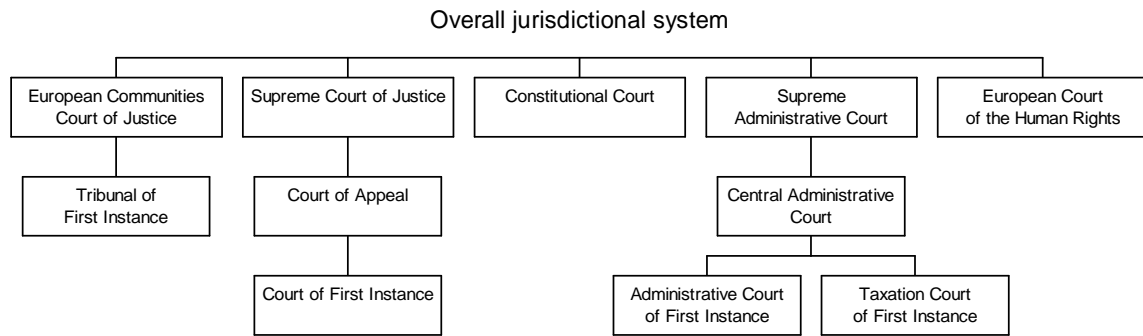
All taxes have one code. In addition, Notary and register activities have codes. Many activities and or contracts have informal codes named legal framework: Insurance, Banking, Bar, Engineering, Architect, Medical doctor, Real estate brokering, Lease, etc.

3. The Portuguese Court system

3.1 Jurisdictional organization

The Portuguese court system is divided into two main fields of jurisdiction: judicial and administrative. The first covers all areas of Private law plus Criminal law. The second covers all aspects of Administrative and taxation law. Both jurisdictions have three levels. There is a third high level jurisdiction called the Constitutional Court.





3.2 Territorial organization

National territory is divided into 4 judicial sections, 55 judicial circuits and 233 districts. The Supreme Court of Justice, the Constitutional Court, The Supreme Administrative Court and the Central Administrative Court have jurisdiction over the whole territory.

3.3 Specialized courts

Within the structure of the judicial courts (generic jurisdiction), there are a number of specialized courts, at the level of the first instance: criminal instruction, family, children, industrial, commerce, maritime and the execution of sentences.

4. Statutory interpretation

Legal interpretation aims to clarify the range of the factual situations and of the consequences included. Legal interpretation uses several elements. The first is the literal or grammatical element, i.e., the text of the law. The second element is the systematic element, i.e., the place, in a given legal order, where the rule is included; this element is particularly useful to broaden or narrow the range of the rule: if a rule determines that a contract must be concluded in writing and this rule is included in a law applying to the lease contract, one cannot conclude that all contracts must be concluded in writing; the command shall apply only to the foreseen contracts. The third element is the teleological one, which is used to correct the results of the application of the previous elements in light of the aims and goals of the rule and of its very existence. There is a

fourth element, the historical, that places the law in the context of the moment when it was written, through the readings of any ancillary or preparatory materials (Neves 1993).

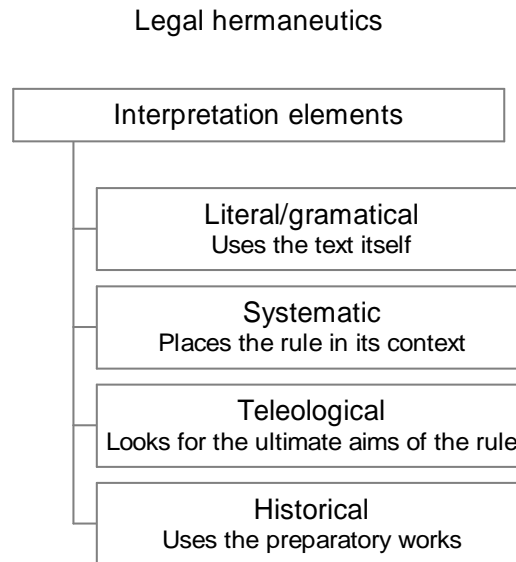


Diagram 1 - Legal hermeneutics

Legal interpretation is also used to answer legal omissions. The result is that legal interpretation may be analogical or extensive. The first happens when a general rule is applied to a similar uncovered factual situation and the second when a special rule is applied to a similar uncovered factual situation. Some rules however, such as some criminal rules, must be subject of restrictive interpretation, thus preventing the two previously described situations (Neves 1993).

Analogical and extensive interpretation deal with three concepts: legal omission, generic rule and special rule. Legal omission happens when the law does not foresee a given factual situation. In such a situation, the interpreter may search for a general rule with a similar factual description and apply it analogically. General rules, however, may be limited in scope by a special rule, i. e., when a small change in the facts will determine a different solution. In such case, if the facts are closer to the description in this special rule, then the interpreter may apply the special rule by extensive interpretation.

5. Further reading

de Cruz, P., (1999) Comparative Law in a Changing World, Cavendish

Glendon, M. et al. (1999), Comparative Legal Traditions in a Nutshell (2nd Ed), West Group, St Paul

Merryman, J. (1985), The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America, Stanford University Press

Neves, A. (1993), Metodologia Juridica, Universidade de Coimbra

Telles, I. (1998), Introdução ao estudo do Direito, AAFDL, Lisbon