

Analyzing the Differences Between the Common Law and Civil Law System

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Abstract

The modern world is composed of a diverse set of legal systems including: civil law, common law, customary law, pluralistic or mixed law, and religious law. As a result of colonization the two legal systems used predominantly are the civil law and common law systems. The common law system arose from the British Empire and the civil law system has its origins in Roman law and the Napoleonic era. Naturally, both systems come with their differences, the fundamental one being that one is reliant on judge-made law and the other relies heavily on codes. As both systems are so popularly utilized, the pluralistic system (used in Scotland, for example), is a combination of both these systems. All these aspects will be further discussed within this essay, including the advantages and disadvantages that arise from the systems.



The Origin of the Two Legal Systems

Civil law has its origins in Roman legal tradition in the sixth century CE, and its model can be found in the monumental collection of Roman law that was commissioned by the Emperor Justinian. It is commonly used in countries that were former Spanish, Portuguese, French, Dutch, or German protectorates or colonies, basically most European countries and covers around 60% of the world.¹ This however includes a large portion of Central and South America as well as East Asian countries. Common law on the other hand was named this as it was 'common' to all the king's courts across England. Following the Norman Conquest in the year 1066, the common law system arose in the practices of the courts of the English kings. The British Empire then shared this legal system with countries they proceeded to colonize, quite a few of which still follow this system to date.² India is such an example.

Civil Law

This law has some influence from canon law, whose origins are in Ancient Greece, and is generally augmented or modified by each country's local culture or customs, i.e., federal and state laws like in Germany. This law focuses on the promotion of cooperation between human beings and now because of secularization over the years concentrates more on individual freedom.

The civil law system is a thorough system that consists of rules and principles that are generally arranged in codes and can be accessed with ease. It is a categorized system with a tendency to favor order and cooperation and is based on a dynamic and logical taxonomy that was developed from Roman law and is then evidenced in the structure of said codes.³ There is also room for adaptability as the civil codes lack excessive detail and rather contain vague clauses with the capacity for change. It is primarily a legislative system, however there is scope for the judiciary to modify the rules based

¹ *Key Features of Common Law or Civil Law Systems*, The World Bank, (May 25, 2021), www.ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law.

² *History of the Judiciary*, Courts and Tribunals Judiciary, www.judiciary.uk/about-the-judiciary/history-of-the-judiciary.

³ *Civil Law vs. Common Law*, Diffen, www.diffen.com/difference/Civil_Law_vs_Common_Law.

on social changes and the ever changing world by ways of creative jurisprudence and interpretation.⁴

In civil law countries, with regards to lawyers and their reasoning, they tend to favor a more abstract form of reasoning. They are more heavily reliant on logic than practicality.

Common Law

Common law is heavily reliant on precedent or judge-made law. Judicial decisions are binding. Rules of law are created, formed, and shaped after a court has heard cases and written opinions. Precedent is in reference to a court decision that is to be considered as an authority to decide subsequent cases that involve comparable facts or corresponding legal issues, and this is usually substantiated by a series of prior decisions. Hence, after a particular disputed legal issue has been decided upon, there is a high likelihood that cases that follow that present the same issue will use the rule of law produced or use the ratio decidendi as support for or to decide the outcome of that case. This doctrine is also known as stare decisis also known as ‘let the decision stand.’⁵ It is important to consider the fact that precedents vary within different jurisdictions and cannot be used interchangeably. Precedents that have been created in one jurisdiction are not legally binding in other jurisdictions. Legal reasoning is an important aspect in arguing for a particular outcome for the case and the general procedure attorneys use is referred to as the IRAC method. This stands for Issue, Rule, Analysis, and Conclusion.⁶ This is because common law tends to favor concrete and pragmatic reasoning. A solution is considered to be good if it is reasonable in the circumstances, if it seems like it is reaching a good compromise or if it seems to lead to consequences that are seen to be tolerable.

⁴ *What is the Civil Law?*, LSU Law, www.law.lsu.edu/clo/civil-law-online/what-is-the-civil-law/.

⁵ *Precedent*, Legal Information Institute, www.law.cornell.edu/wex/precedent.

⁶ Terence Lau and Lisa Johnson, *Business and the Legal and Ethical Environment*, Ch. 1.2.

There are also differentiations among the various common-law systems, such as, some countries use the jury less regularly and most countries do not allow their judiciaries to declare any legislative acts to be unconstitutional.

Contrasting the Two Systems

The main difference between the civil law system and the common law system is that civil focuses heavily on legislation and statutes and specific codes (civil code) as mentioned previously, whereas the common law system is heavily reliant on precedent and judge-made law. These judicial decisions are legally binding, however in civil law, only legislative enactments are to be considered legally binding and there is very little scope for any judge-made law in several civil courts.

There is also a difference in how you can become a judge. In countries that follow a civil law system, you can be a judge at quite a young age. This is because the procedure for appointment is via a traditional career and are considered civil servants. Just as any other civil servant, entry to the judicial career is dependent on the passing of an exam, and once it is passed, you can make your way up the judiciary. However, in common law countries, this process is a bit different. The way judges are appointed is much more varied, but it generally tends to depend more on professional experience or sometimes even elections. So, if a candidate for a judge has accumulated a lot of experience it shows wisdom and can then continue the pathway of becoming a judge.

Another contrast that is prevalent with these systems is the way the legal proceedings or judicial procedure is structured. The common law system is usually associated with the adversarial model, whereas the civil law system is usually associated with the inquisitorial procedure or model. The inquisitorial process is basically an official inquiry to determine the truth to investigate what truly happened, when a matter is brought to a judge. The adversarial procedure, on the other hand, the judge plays the role of a referee between two opposing parties in a more competitive process. The judge's main role here is then to ensure that the rules are followed, that there is due process, and that each party gets a chance to present their case.

Keeping this in mind, let us analyze these two systems in more depth with reference to the United Kingdom. Within the United Kingdom itself, each country has its own legal system. Common law is prevalent in England and Wales, whereas Scotland has its own bi-juridical legal system consisting of a mixture of common and civil law. Both legal systems' elements are present in Scotland and its roots can be traced back to several historical sources. The Scottish legal system recognizes four sources of law: custom, legal precedent, legislation, and specific academic writings. Scotland can be considered to have a 'mixed jurisdiction' where the legal system consists of historically distinct elements however the same legal institutions. It has a diversity of origins: Roman law, English Common Law, feudal law, statutes, and Canon law.⁷

Advantages and Disadvantages of Both Legal Systems

An advantage of following the common law system is that because of precedence, there is a level of confidence individuals can have of what will happen in the case brought to court, if a similar case has already been heard or tried before. However, this does raise the issue of if there is an unusual unique case then there is nothing preventing the judge from creating a new law to apply to your case which creates room for a lot of uncertainty.

A benefit that arises from following the civil law system is that the individual in question can only be judged by the laws that were formally written down in front of the person at the time. However, on the other hand, there can be no assurance that a judge will interpret the code in the same way while judging your case as was done in previous cases. So, if an individual went in with the confidence that they should win the case, just because previous similar cases did, there is still no guarantee that the outcome will be the same. Another advantage could be that as it applies the principle of legality more suitably, that any individual is fully aware of the consequences that could arise or that they could be faced with because of their actions by referring to the written law. Another drawback of this system, however, is that it remains relatively static. Judges are not allowed to interfere in any way and cannot give wider interpretations either. They are only ever allowed to apply the written law, that too with a limited margin of appreciation. This can bring about

⁷James E. Pfander and Daniel D. Birk, *Article III and the Scottish Judiciary*, 124, Harvard Law Review, 1653 (2011).

injustices, especially as times are changing. This system also gives a substantial amount of power to legislators and not an adequate amount to judges.

Consequences Behind Having Different Legal Systems in the World – A Broader Global Perspective

Having various legal systems around the world can be beneficial as each country has autonomy on the way their government works and how their country is run. However, this can raise a lot of questions and inconsistency. As a result of globalization, the ‘expat’ life is becoming much more prominent. People are constantly moving around from country to country which leads to a constantly changing legal system. This does not seem to be as big of a deal in reference to legal systems such as the common law system or the civil law system. However, when you branch out from those two for a second, look at religious legal systems such as sharia law. Since sharia law is based on the Quran, matters that are considered to be legal in countries that follow the common law system could be considered illegal in countries that follow sharia law. An example of this would be gambling. Gambling is prohibited by the Quran, whereas in the UK under the Gambling Act 2005⁸, it is legal for the residents of the country to gamble. Another example of this would be the consumption of alcohol. Alcohol is prohibited by certain texts of the Quran as it is categorized to be unlawful and considered to be impure. Conversely, under the rules and regulations in the United Kingdom, individuals can drink at an age as young as 16 (if accompanied by an adult), or otherwise at 18.

However, this system causes aspiring lawyers to choose the country they want to work in at quite an early stage in their career. This is not necessarily due to differing legal systems but more due to jurisdiction. However, changing legal systems is most definitely a more difficult process than transferring jurisdiction to be able to work in a specific country. As the legal saying goes, *lex loci*, which is the law of the land, an individual is realistically locked into the jurisdiction that they are trained in as the law differs from country to country.

⁸ UK Gambling Act, 2005 (2005 c 19).

Conclusion

It can be concurred that the reason behind several legal systems existing to date is mainly because of colonization and the widespread of knowledge passed on. However, each country has their own twist to the legal system based on their local customs and culture, the roots however, stay the same. Both systems, civil and common law, have their advantages and their disadvantages. With common law, there is a high chance a similar case has been tried before, which can be used to aid either party. With civil law, as this is not the case, all that needs to be considered are the written laws placed in front of the individual with no reliance on past cases, allowing for disparities to arise between cases of a similar caliber. The variance in legal systems can cause uncertainties for individuals who are constantly migrating, however as a result of our history changing the way the systems work would be impossible.

