

I. Comparative Law Method
A. Introduction

Legal systems of the world

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World distribution of major legal traditions

The four major **legal systems of the world** today consist of civil law, common law, customary law, and religious law. However, each country often develops variations on each system or incorporates many other features into the system.

Civil law

Civil law is the most widespread system of law in the world. It is also known as *European Continental law*. Its principal characteristic is that private law has been based on Roman law.

Countries that base their legal system on a codified civil law include:

Country	Description
 Albania	The Civil Code of the Republic of Albania, 1991 really[1]
 Angola	Based on Portuguese civil law
 Argentina	The Spanish legal tradition had a great influence on the Civil Code of Argentina, basically a work of the Argentinean jurist Dalmacio Vélez Sársfield, who dedicated five years of his life on this task. The Civil Code came into effect on January 1, 1871. Beyond the influence of the Spanish legal tradition, the Argentinian Civil Code was also inspired by the Draft of the Brazilian Civil Code, the Draft of the Spanish Civil Code of 1851, the Napoleonic code, and the Chilean Civil Code. The sources of this Civil Code also include various theoretical legal works, mainly of the great French jurists of the 19th century. It was the first Civil Law that consciously adopted as its cornerstone the distinction between i. rights from obligations and ii. real property rights, thus distancing itself from the French model. The Argentinian Civil Code is also in effect in Paraguay, as per a

Paraguayan law of 1880.

During the second half of the 20th century, the German legal theory became increasingly influential in Argentina.

 Armenia

 Aruba

 Austria

 Azerbaijan

 Belarus

 Belgium

 Benin

 Bolivia

 Bosnia and Herzegovina

 Brazil

 Bulgaria

 Cambodia

 Cape Verde

 Central African Republic

Based on Dutch civil law

The Allgemeines bürgerliches Gesetzbuch (ABGB) of 1811

Influenced by the Napoleonic Code

Influenced by the Napoleonic Code

Derived from the Portuguese civil law

Based on Portuguese civil law

The Spanish legal tradition exercised an especially great influence on the civil code of Chile. On its turn, the Chilean civil code influenced to a large degree the drafting of the civil codes of other Latin-American states. For instance, the codes of Ecuador (1861) and Colombia (1873) constituted faithful reproductions of the Chilean code, but for very few exceptions. The compiler of the Civil Code of Chile, Andrés Bello, worked for its completion for almost thirty (30) years (!), using elements, of the Spanish law on the one hand, and of other Western laws, especially of the French one, on the other. Indeed, it is noted that he consulted and used all of the codes that had been issued till then, starting from the era of Justinian.

 Chile

The Civil Code came into effect on January 1, 1857. Its technique is regarded as perfect; it is distinguished for the clarity, logic, and cohesiveness of its provisions. As mentioned by Arminjon, Nolde, and Wolff ('Traite de droit comparé', Paris, 1950-1952) Andrés Bello may be regarded as one of the great legislators of mankind. The influence of the Napoleonic code is great; it is observed however that e.g. in many provisions of property law, the solutions of the French *code civil* were put aside in favor of pure Roman law.

 Colombia

 Costa Rica

 Croatia

 Cuba

 Czech Republic

 Denmark

 Dominican Republic

Civil code introduced in 1873. Nearly faithful reproduction of the Chilean civil code

Influenced by the Napoleonic Code

 Ecuador	Civil code introduced in 1861. Nearly faithful reproduction of the Chilean civil code
 El Salvador	
 Estonia	
 Finland	
 France	Based on the Napoleonic code (<i>code civil</i> of 1804)
 Georgia	
 Germany	The Bürgerliches Gesetzbuch of 1900
	The Greek civil code of 1946, highly influenced by the German civil code of 1900 (Bürgerliches Gesetzbuch); the Greek civil code replaced the Byzantine-Roman civil law in effect in Greece since its independence (Νομική Διάταξη της Ανατολικής Χέρσου Ελλάδος, Legal Provision of Eastern Mainland Greece, November 1821: 'Οι Κοινωνικοί Νόμοι των Αειμνήστων Χριστιανών Αυτοκρατόρων της Ελλάδος μόνοι ισχύουσι κατά το παρόν εις την Ανατολικήν Χέρσον Ελλάδα', 'The Social [i.e. Civil] Laws of the Dear Departed Christian Emperors of Greece [referring to the Byzantine Emperors] alone are in effect at present in Eastern Mainland Greece')
 Greece	
 Guatemala	
 Haiti	Influenced by the Napoleonic Code
 Honduras	
 Hungary	
 Iceland	
 Italy	Based on codified Roman law, with elements of the Napoleonic civil code; civil code of 1942 replaced the original one of 1865
 Japan	Modeled after European (primarily German) civil law system. Japanese civil code of 1895.
 Latvia	Largely influenced by Germany, medium influences from Russian and Soviet law.
 Lebanon	Modeled after French civil law
 Lithuania	Modeled after Dutch civil law
 Luxembourg	Influenced by the Napoleonic Code
 Macau (China)	Based on the Portuguese strand of the continental tradition, itself much influenced by Germany; also influenced by the law of the PRC
 Mexico	
 Netherlands	Influenced by the Napoleonic Code
 Norway	
 Panama	
 Paraguay	The Argentinean Civil Code is also in effect in Paraguay, as per a Paraguayan law of 1880.
 Peru	
 Poland	The Polish Civil Code in force since 1965.
 Portugal	Influenced by the Napoleonic Code
 Romania	Based on the Napoleonic Code
 Russia	

 Slovakia

 Spain

 Sweden

 Switzerland

 Turkey

 Slovakia

 Uruguay

 Vatican City

 Vietnam

Influenced by the Napoleonic Code

As all Scandinavian legal systems, it is distinguished for its traditional character and as well as for the fact that it did not adopt elements of Roman law. It is indeed worth mentioning that it assimilated very few elements of foreign laws whatsoever. It is also interesting that the Napoleonic code had no influence in codification of law in Scandinavia. The historical basis of the law of Sweden, just as for all Nordic countries, is the Old German law. Codification of the law started in Sweden during the 18th century, preceding the codifications of most other European countries. However, neither Sweden, nor any other Nordic state created a civil code of the kind of the *code civil* or the BGB

The Zivilgesetzbuch of 1908 and 1912 (obligations; fifth book)

Modeled after the Swiss civil law (Zivilgesetzbuch) of 1907; this has been a conscious choice of Kemal Ataturk, the founder of the modern Turkish state, in order to abolish the Islamic law (Sharia), aiming at westernizing the country

Communist legal theory and French civil law

Common law

Country	Description
 Antigua and Barbuda	based on English common law
 Australia	based on English common law
 Bahamas	based on English common law
 Barbados	based on English common law
 Belize	based on English common law
 Canada	based on English common law, except in  Quebec, where civil law system based on French law prevails
 Dominica	based on English common law
 Fiji	based on English common law
 Grenada	based on English common law
 Republic of Ireland	based on English common law
 Jamaica	based on English common law
 Kiribati	based on English common law
 Marshall Islands	based on U.S. Law
 Nauru	based on English common law
 New Zealand	based on English common law
 Palau	based on U.S. Law
 Saint Kitts and Nevis	based on English common law
 Saint Vincent and the Grenadines	based on English common law

 Tonga	based on English common law
 Trinidad and Tobago	based on English common law
 Tuvalu	based on English common law
 Uganda	based on English common law
 United Kingdom	 English law (also includes  Wales) and  Northern Irish law is primarily common law, with early Roman and some modern continental influences.  Scotland has its own unique system, Scots law, based on civil law, and generally regarded as mixed
 United States	Federal court system based on English common law; each state has its own unique legal system, of which all but one ( Louisiana's, which is based on the Napoleonic Code) is based on English common law

Customary law

Country	Description
 Andorra	Courts apply the customary laws of Andorra, supplemented with Roman law and customary Catalan law. ^[1]
 Mongolia	

Religious law

This list is incomplete; you can help by expanding it.

-  Afghanistan
-  Iran
-  Saudi Arabia
-  Sudan

Mixed (or pluralistic) systems

Civil law and common law

This list is incomplete; you can help by expanding it.

Country	Description
 Botswana	South African law (a mixed system) transferred <i>uno acto</i> through a proclamation of reception
 Cyprus	Based on English common law (Cyprus was a British colony 1878-1960), with admixtures of French and Greek civil and public law, Italian civil law, Indian contract law, Greek Orthodox canon law, Muslim religious law, and Ottoman civil law.
 Guyana	
 Israel	Originally (1948) based on English common law; in the process, influenced by German civil law—for instance, between 1962 and 1981, the Knesset issued twenty (20) wide-ranging laws, which were clearly influenced by European continental law, and were in the form of codes
 Louisiana (U.S.)	Based on the French Napoleonic Code; the modern legal system of the state of Louisiana has its origin in the Louisiana Purchase (i.e. the sale of

Louisiana—not coterminous with the present eponymous state—by Napoleon to the United States of America in 1803), while federal laws (based on common law) are in effect in Louisiana as well.

Initially based on Roman Law and eventually progressed to the Code de Rohan, Code Napoleon with influences from Italian Civil Law. British Common Law however is also a source of Maltese Law, most notably in Public Law

 Malta

 Mauritius

 Namibia

South African law (a mixed system) transferred *uno acto* through a proclamation of reception

 Philippines

Based on Spanish law; influenced by U.S. common law after 1898 (victory of the U.S. over Spain in the Spanish-American war of 1898 and cession of Philippines to the U.S.)

 Puerto Rico (U.S.)

Based on Spanish law; influenced by U.S. common law after 1898 (victory of the U.S. over Spain in the Spanish-American war of 1898 and cession of Puerto Rico to the U.S.)

 Quebec (Canada)

After the defeat of the French in the battle at the Plains of Abraham, the British allowed them to keep their language (French), their religion (Roman Catholicism), and their legal system (civil law). However, as Quebec is part of the Canadian Confederation, English-based laws applied at the federal level are in effect in Quebec also.

 Saint Lucia

 Scotland (UK)

Scotland obtained a structurally mixed system by way of its merger with England through the Act of Union in 1707. Public law and public institutions became common, but both countries retained their own private laws—England kept its common law, while Scotland kept the Scots law, of Roman and Dutch origin.

 Seychelles

 South Africa

An amalgam of English common law and Roman-Dutch civil law

 Swaziland

South African law (a mixed system) transferred *uno acto* through a proclamation of reception

 Thailand

Civil law, common law, and customary law

Country

Description

 Cameroon

 Lesotho

South African law (a mixed system) transferred *uno acto* through a proclamation of reception

 Sri Lanka

 Vanuatu

 Zimbabwe

South African law (a mixed system) transferred *uno acto* through a proclamation of reception

Civil law and customary law

Country

Description

 Burkina Faso

 Burundi

 Chad

 People's Republic of China

based on civil law system; derived from Soviet and continental civil code legal principles.

 Republic of the Congo

 Democratic Republic of the Congo

 Cote d'Ivoire

 Equatorial Guinea

 Ethiopia

 Gabon

 Guinea

 Guinea-Bissau

Civil law, customary law, and Muslim law

Country	Description
 Djibouti	
 Eritrea	
 Indonesia	

Civil law and Sharia law

Country	Description
 Algeria	
 Comoros	
 Egypt	
 Morocco	Based on Islamic law and French and Spanish civil law system

Common law and customary law

Country	Description
 Bhutan	
 Ghana	
 Hong Kong (China)	principally based on English common law

Common law, customary law, and Sharia law

Country	Description
 Brunei	
 Gambia	
 India	based on English common law, separate personal law codes apply to Muslims, Christians, and Hindus

Common law and Sharia law

Country	Description
 Bahrain	
 Bangladesh	
 Oman	
 Pakistan	based on English Common Law, some Islamic Law applications in inheritance. Tribal Law in FATA
 Qatar	
 Singapore	based on English common law

1. <http://www.state.gov/r/pa/ei/bgn/3164.htm>

- Moustaira Elina N., *Comparative Law: University Courses (in Greek)*, Ant. N. Sakkoulas Publishers, Athens, 2004, ISBN 960-15-1267-5
- Moustaira Elina N., *Milestones in the Course of Comparative Law: Thesis and Antithesis (in Greek)*, Ant. N. Sakkoulas Publishers, Athens, 2003, ISBN 960-15-1097-4

Common law

From Wikipedia, the free encyclopedia

The **common law** forms a major part of the law of those countries of the world with a history as British territories or colonies. It is notable for its inclusion of extensive non-statutory law reflecting precedent derived from centuries of judgments by working jurists.

There are three important connotations to the term.

- **Common law as opposed to statutory law and regulatory law:** The first connotation differentiates the authority that promulgated a particular proposition of law. For example, in most areas of law in most jurisdictions in the United States, there are "statutes" enacted by a legislature, "regulations" promulgated by executive branch agencies pursuant to a delegation of rule-making authority from a legislature, and "common law" decisions issued by courts (or quasi-judicial tribunals within agencies). This first connotation can be further differentiated, into (a) laws that arise purely from the common law without express statutory authority, for example, most of the criminal law, contract law, and procedural law before the 20th century, and (b) decisions that discuss and decide the fine boundaries and distinctions in statutes and regulations. See statutory law and non-statutory law.
- **Common law as opposed to civil law:** The second connotation differentiates "common law" jurisdictions (most of which descend from the English legal system) that place great weight on such common law decisions, from "civil law" or "code" jurisdictions (many of

which descend from the Napoleonic code in which the weight accorded judicial precedent is much less).

- **Law as opposed to equity:** The third differentiates "common law" (or just "law") from "equity". Before 1873, England had two parallel court systems, courts of "law" that could only award money damages and recognised only the legal owner of property, and courts of "equity" that recognised trusts of property and could issue injunctions (orders to do or stop doing something). Although the separate courts were merged long ago in most jurisdictions, or at least all courts were permitted to apply both law and equity (though under potentially different laws of procedure), the distinction between law and equity remains important in (a) categorising and prioritising rights to property, (b) determining whether the Seventh Amendment's guarantee of a jury trial applies (a determination of a fact necessary to resolution of a "law" claim) or whether the issue can only be decided by a judge (issues of equity), and (c) in the principles that apply to the grant of equitable remedies by the courts.

Many important areas of law are governed primarily by common law. For example, in England and Wales and in most states of the United States, the basic law of contracts and torts does not exist in statute, but only in common law that is modifiable by statute. In almost all areas of the law, statutes may give only terse statements of general principle, but the fine boundaries and definitions exist only in the common law. To find out what the law is, one has to locate precedential decisions on the topic, and reason from those decisions by analogy.

History of the common law

Common law originally developed under the inquisitorial system in England from judicial decisions that were based in tradition, custom, and precedent. Such forms of legal institutions and culture bear resemblance to those which existed historically in continental Europe and other societies where precedent and custom have at times played a substantial role in the legal process, including Germanic law recorded in Roman historical chronicles. The form of reasoning used in common law is known as casuistry or case-based reasoning. The common law, as applied in civil cases (as distinct from criminal cases), was devised as a means of compensating someone for wrongful acts known as torts, including both intentional torts and torts caused by negligence, and as developing the body of law recognizing and regulating contracts. The type of procedure practised in common law courts is known as the adversarial system; this is also a development of the common law.

Before the institutional stability imposed on England by William the Conqueror in 1066, English residents, like those of many other societies, particularly the Germanic cultures of continental Europe, were governed by unwritten local customs that varied from community to community and were enforced in often arbitrary fashion. For example, courts generally consisted of informal public assemblies that weighed conflicting claims in a case and, if unable to reach a decision, might require an accused to test guilt or innocence by carrying a red-hot iron or snatching a stone from a cauldron of boiling water or some other "test" of veracity (trial by ordeal). If the defendant's wound healed within a prescribed period, he was set free as innocent; if not, execution usually followed.

In 1154, Henry II became the first Plantagenet king. Among many achievements, Henry institutionalized common law by creating a unified system of law "common" to the country through incorporating and elevating local custom to the national, ending local control and peculiarities, eliminating arbitrary remedies, and reinstating a jury system of citizens sworn on oath to investigate reliable criminal accusations and civil claims. The jury reached its verdict through evaluating common local knowledge, not necessarily through the presentation of evidence, a distinguishing factor from today's civil and criminal court systems.

Henry II's creation of a powerful and unified court system, which curbed somewhat the power of canonical (church) courts, brought him (and England) into conflict with the church, most famously, with Thomas Becket, the Archbishop of Canterbury. Things were resolved eventually, at least for a time, in Henry's favour when a group of his henchmen murdered Becket. For its part, the Church soon canonized Becket as a saint.

Thus, in English legal history, judicially-developed "common law" became the uniform authority throughout the realm several centuries before Parliament acquired the power to make laws.

As early as the 15th century, it became the practice that litigants who felt they had been cheated by the common-law system would petition the King in person. For example, they might argue that an award of damages (at common law) was not sufficient redress for a trespasser occupying their land, and instead request that the trespasser be evicted. From this developed the system of equity, administered by the Lord Chancellor, in the courts of chancery. By their nature, equity and law were frequently in conflict and litigation would frequently continue for years as one court countermanded the other, even though it was established by the 17th century that equity should prevail. A famous example is the fictional case of Jarndyce and Jarndyce in *Bleak House*, by Charles Dickens.

In England, courts of law and equity were combined by the Judicature Acts of 1873 and 1875, with equity being supreme in case of conflict.

In the United States, parallel systems of law (providing money damages) and equity (fashioning a remedy to fit the situation, including injunctive relief) survived well into the 20th century in many jurisdictions. The United States federal courts procedurally separated law and equity until they were combined by the Federal Rules of Civil Procedure in 1938 - the same judges could hear either kind of case, but a given case could only pursue causes in law or in equity, under two separate sets of procedural rules. This became problematic when a given case required both money damages and injunctive relief.

Delaware still has separate courts of law and equity, and in many states there are separate divisions for law and equity within one court.

Common law legal systems

The common law constitutes the basis of the legal systems of: England and Wales, Northern Ireland, the Republic of Ireland, federal law in the United States and the states' laws (except Louisiana), federal law in Canada and the provinces' laws (except Quebec civil law), Australia, New Zealand, South Africa, India, Sri Lanka, Malaysia, Brunei, Pakistan, Singapore, Malta, Hong Kong, and many other generally English-speaking countries or Commonwealth countries. Essentially, every country which has been colonised at some time by Britain uses common law except those that had been colonized by other nations, such as Quebec (which follows French law to some extent) and South Africa (which follows Roman Dutch law), where the prior civil law system was retained to respect the civil rights of the local colonists. India's system of common law is also a mixture of English law and the local Hindu law.

The main alternative to the common law system is the civil law system, which is used in Continental Europe, and most of the rest of the world. The former Soviet Bloc and other Socialist countries used a Socialist law system.

The opposition between civil law and common law legal systems has become increasingly blurred, with the growing importance of jurisprudence (almost like case law but in name) in civil law countries, and the growing importance of statute law and codes in common law countries (for example, in matters of criminal law, commercial law (the Uniform Commercial Code in the early

1960's) and procedure (the Federal Rules of Civil Procedure in the 1930's and the Federal Rules of Evidence in the 1970's)).

Scotland is often said to use the civil law system but in fact it has a unique system that combines elements of an uncodified civil law dating back to the Corpus Juris Civilis with an element of common law long predating the Treaty of Union with England in 1707. Scots common law differs in that the use of *precedents* is subject to the courts seeking to discover the principle which justifies a law rather than to search for an example as a *precedent* and that the principles of natural justice and fairness have always formed a source of Scots Law. Comparable pluralistic legal systems operate in Quebec, Louisiana and South Africa. These systems are referred to as mixed legal systems.

The U.S. state of California has a system based on common law, but it has codified the law in the manner of the civil law jurisdictions. The reason for the enactment of the codes in California in the nineteenth century was to replace a pre-existing system based on Spanish civil law with a system based on common law, similar to that in most other states. California and a number of other Western states, however, have retained the concept of community property derived from civil law. The California courts have treated portions of the codes as an extension of the common-law tradition, subject to judicial development in the same manner as judge-made common law. (Most notably, in the case *Li v. Yellow Cab Co.*, 13 Cal.3d 804 (1975), the California Supreme Court adopted the principle of comparative negligence in the face of a California Civil Code provision codifying the traditional common-law doctrine of contributory negligence.)

The state of New York, which also has a civil law history from its Dutch colonial days, also began a codification of its laws in the 19th century. The only part of this codification process that was considered complete is known as the Field Code applying to civil procedure. The original colony of New Netherlands was settled by the Dutch and the law was also Dutch. When the British captured pre-existing colonies they continued to allow the local settlers to keep their civil law. However, the Dutch settlers revolted against the English and the colony was recaptured by the Dutch. When the English finally regained control of New Netherlands -- as a punishment unique in the history of the British Empire -- they forced the English common law upon all the colonists, including the Dutch. This was problematic as the patroon system of land holding, based on the feudal system and civil law, continued to operate in the colony until it was abolished in the mid-nineteenth century. The influence of Roman Dutch law continued in the colony well into the late nineteenth century. The codification of a law of general obligations shows how remnants of the civil law tradition in New York continued on from the Dutch days.

The United States federal government (as opposed to the states) has a variant on a common law system. The courts only act as interpreters of statutes and the constitution (to elaborate and precisely define the broad language, connotation 1(a) above), but, unlike state courts, do not act as an independent source of common law (connotation 1(b) above). *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law."). However, there are still some situations where United States federal courts may be permitted to create federal common law rules; see e.g. *International News Service v. Associated Press*, 248 U.S. 215 (1918) (creating a cause of action for misappropriation of "hot news" that lacks any statutory grounding, but that is one of the handful of federal common law actions that survives today), see also *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (giving federal courts the authority to fashion common law rules with respect to issues of federal power, in this case negotiable instruments backed by the federal government).

Basic principles of common law

Statutes which reflect English common law are understood always to be interpreted in light of the common law tradition, and so may leave a number of things unsaid because they are already understood from the point of view of pre-existing case law and custom. This can readily be seen

in the area of criminal law, which while remaining largely governed by the common law in England, has been entirely codified in many U.S. states. Codification is the process where a statute is passed with the intention of restating the common law position in a single document rather than creating new offences, so the common law remains relevant to their interpretation. This is why even today American law schools teach the common law of crime as practised in England in 1750, since the colonies (and subsequently the states) deviated from the common law as practised in England only after that date.

By contrast to the statutory codifications of common law, some laws are purely statutory, and may create a new cause of action beyond the common law. An example is the tort of wrongful death, which allows certain persons, usually a spouse, child or estate, to sue for damages on behalf of the deceased. There is no such tort in English common law; thus, any jurisdiction that lacks a wrongful death statute will not allow a lawsuit for the wrongful death of a loved one. Where a wrongful death statute exists, the compensation or other remedy available is limited to the remedy specified in the statute (typically, an upper limit on the amount of damages). Courts generally interpret statutes that create new causes of action narrowly -- that is, limited to their precise terms -- because the courts generally recognize the legislature as being supreme in deciding the reach of judge-made law unless such statute should violate some "second order" constitutional law provision (compare judicial activism).

Where a tort is rooted in common law, then all damages traditionally recognized historically for that tort may be sued for, whether or not there is mention of those damages in the current statutory law. For instance, a person who sustains bodily injury through the negligence of another may sue for medical costs, pain, suffering, loss of earnings or earning capacity, mental and/or emotional distress, loss of quality of life, disfigurement, and more. These damages need not be set forth in statute as they already exist in the tradition of common law. However, without a wrongful death statute, most of them are extinguished upon death.

Works on the common law

The definitive historical treatise on the common law is *Commentaries on the Laws of England*, written by Sir William Blackstone and first published in 1765 - 1769. Since 1979 a facsimile edition of that first edition has been available in four paper-bound volumes. Today it has been superseded in the English part of the United Kingdom by Halsbury's Laws of England that covers both common and statutory English law.

While he was still on the Massachusetts Supreme Judicial Court, and before being named to the U.S. Supreme Court, Justice Oliver Wendell Holmes Jr. published a short volume called *The Common Law* which remains a classic in the field.

In the United States, Restatements of various subject matter areas (Contracts, Torts, Judgments, etc.), edited by the American Law Institute, collect the common law for the area. The ALI Restatements are often cited by American courts and lawyers for propositions of uncodified common law, and are considered highly-persuasive authority, just below binding precedential decisions. The Corpus Juris Secundum is an encyclopedia whose main content is a compendium of the common law and its variations throughout the various state jurisdictions.

Scots *common law* covers matters including murder and theft, and has sources in custom, in legal writings and previous court decisions. The legal writings used are called *Institutional Texts* and come mostly from the 17th, 18th and 19th centuries. Examples include Craig, *Jus Feudale* (1655) and Stair, *The Institutions of the Law of Scotland* (1681).

Civil law (legal system)

From Wikipedia, the free encyclopedia

Civil law is the predominant system of law in the world, with its origins in Roman law, and sets out a comprehensive system of rules, usually codified, that are applied and interpreted by judges. However, modern systems are descendants of the 19th century codification movement, during which the most important codes (most prominently the Napoleonic Code and the BGB) came into existence. As discussed in detail below, the civil law systems of Scotland and South Africa are uncoded, and the civil law systems of Scandinavian countries remain largely uncoded.

Overview

Civil or *civilian* law is a legal tradition which is the base of the law in the majority of countries of the world, especially in continental Europe and the former Soviet Union, but also in Quebec (Canada), Louisiana (USA), Puerto Rico (a U.S. territory), Japan, Latin America, and most former colonies of continental European countries. The Scottish legal system is usually considered to be a mixed system in that Scots law has a basis in Roman law, combining features of both uncoded and Civil law systems. In western and southwestern parts of the US, laws in such diverse areas as divorce and water rights show the influence of their Iberian civil law heritage, being based on distinctly different principles from the laws of the northeastern states colonized by settlers with English common-law roots.

History

The civil law is based on Roman law, especially the *Corpus Juris Civilis* of Emperor Justinian, as later developed through the Middle Ages by mediæval legal scholars.

The acceptance of Roman law had different characteristics in different countries. In some of them its effect resulted from legislative act, i.e. it became positive law, whereas in other ones it became accepted by way of its processing by legal theorists.

Consequently, Roman law did not completely dominate in Europe. Roman law was a secondary source, that was applied only as long as local customs and local laws lacked a pertinent provision on a particular matter. However, local rules too were interpreted primarily according to Roman law (it being a common European legal tradition of sorts), resulting in its influencing the main source of law also.

A second characteristic, beyond Roman law foundations, is the extended codification of the adopted Roman law, i.e. its inclusion into civil codes.

The concept of codification developed especially during the 17th and 18th century, as an expression of both Natural Law and the ideas of the Enlightenment. The political ideal of that era was expressed by the concepts of democracy, protection of property, and of the rule of law. That ideal required the creation of certainty of law, through the recording of law and through its uniformity. So, the aforementioned mix of Roman law and customary and local law ceased to exist, and the road opened for law codification, which could contribute to the aims of the above mentioned political ideal.

Another reason that contributed to codification was that the notion of the nation state, which was born during the 19th century, required the recording of the law that would be applicable to that state.

Certainly, there was also reaction to the aim of law codification. The proponents of codification regarded it as conducive to certainty, unity, and systematic recording of the law; whereas its opponents claimed that codification would result in the ossification of the law.

At the end, despite whatever resistance to codification, the codification of European private laws moved forward. The French Napoleonic Code (*code civil*) of 1804, the German civil code (Bürgerliches Gesetzbuch) of 1900, and the Swiss codes were the most influential national civil codes.

Because Germany was a rising power in the late 19th century, when many Asian nations were introducing civil law, the German Civil Code became the basis for the legal systems of Japan and South Korea. In China, the German Civil Code was introduced in the later years of the Qing Dynasty and formed the basis of the law of the Republic of China, which remains in force in Taiwan.

Some authors consider civil law to have served as the foundation for socialist law used in Communist countries, which in this view would basically be civil law with the addition of Marxist-Leninist ideas.

Civil versus common law

Civil law is primarily contrasted against common law, which is the legal system developed among Anglo-Saxon people, especially in England.

The original difference is that, historically, common law was law developed by custom, beginning before there were any written laws and continuing to be applied by courts after there were written laws, too, whereas civil law developed out of the Roman law of Justinian's *Corpus Juris Civilis* (*Corpus Iuris Civilis*).

In later times, civil law became codified as *droit coutumier* or customary law that were local compilations of legal principles recognized as normative. Sparked by the age of enlightenment, attempts to codify private law began during the second half of the 18th century (see civil code), but civil codes with a lasting influence were promulgated only after the French Revolution, in jurisdictions such as France (with its Napoleonic Code), Austria (see ABGB), Quebec (see Civil Code of Quebec), Spain (Código Civil), the Netherlands and Germany (see Bürgerliches Gesetzbuch). However, codification is by no means a defining characteristic of a civil law system, as e.g. the civil law systems of Scandinavian countries remain largely uncodified, whereas common law jurisdictions have frequently codified parts of their laws, e.g. in the U.S. Uniform Commercial Code. There are also mixed systems, such as the laws of Scotland, Louisiana, Quebec, Namibia and South Africa.

Thus, the difference between civil law and common law lies not just in the mere fact of codification, but in the methodological approach to codes and statutes. In civil law countries, legislation is seen as the primary source of law. By default, courts thus base their judgments on the provisions of codes and statutes, from which solutions in particular cases are to be derived. Courts thus have to reason extensively on the basis of general rules and principles of the code, often drawing analogies from statutory provisions to fill lacunae and to achieve coherence. By contrast, in the common law system, cases are the primary source of law, while statutes are only seen as incursions into the common law and thus interpreted narrowly.

The underlying principle of separation of powers is seen somewhat differently in civil law and common law countries. In some common law countries, especially the United States, judges are seen as balancing the power of the other branches of government. By contrast, the original idea of separation of powers in France was to assign different roles to legislation and to judges, with

the latter only applying the law (the judge as *la bouche de la loi*; 'the mouth of the law'). This translates into the fact that many civil law jurisdictions reject the formalistic notion of binding precedent (although paying due consideration to settled case-law), and that certain civil law systems are based upon the inquisitorial system rather than the adversarial system.

There are other notable differences between the legal methodologies of various civil law countries. For example, it is often said that common law opinions are much longer and contain elaborate reasoning, whereas legal opinions in civil law countries are usually very short and formal in nature. This is in principle true in France, where judges cite only legislation, but not prior case law. (However, this does not mean that judges do not consider it when drafting opinions.) By contrast, court opinions in German-speaking countries can be as long as English ones, and normally discuss prior cases and academic writing extensively.

There are, however, certain sociological differences. Civil law judges are usually trained and promoted separately from advocates, whereas common law judges are usually selected from accomplished and reputable advocates. Also, the influence of articles by legal academics on case law tends to be much greater in civil law countries.

Criminal procedure

Civil and common law system also differ considerably in criminal procedure. In general, the judge in a civil law system plays a more active role in determining the facts of the case. Most civil law countries investigate major crimes using a so-called inquisitorial system. Also, civil law systems rely much more on written argument than oral argument.

Subgroups

The term "civil law" as applied to a legal tradition actually originates in English-speaking countries, where it was used to lump all non-English legal traditions together and contrast them to the English common law. However, since continental European traditions are by no means uniform, scholars of comparative law and economists promoting the legal origins theory usually subdivide civil law into three distinct groups:

- French civil law: in France, the Benelux countries, Italy, Spain, Portugal and former colonies of those countries;
- German civil law: in Germany, Austria, Switzerland, Greece, Turkey, Japan, South Korea and the Republic of Taiwan;
- Scandinavian civil law: in Denmark, Sweden, Finland, Norway and Iceland.
- Chinese law is a mixture of civil law and socialist law.

Portugal, Brazil and Italy have evolved from French to German influence, as their 19th century civil codes were close to the Napoleonic Code and their 20th century civil codes are much closer to the German *Bürgerliches Gesetzbuch*. Legal culture and law schools have also come near to the German system. The other law in these countries is often said to be of a hybrid nature.

The Dutch law or at least the Dutch civil code cannot be easily placed in one of the mentioned groups either, and it has itself influenced the modern private law of other countries. The present Russian civil code is in part a translation of the Dutch one.

Economic implications

According to the legal origins theory promoted by some economists, civil law countries tend to emphasize social stability, while common law countries focus on the rights of an individual. In this theory, this has considerable effect on different countries' economic development.

Excerpts from

**"FROM LEROTHOLI TO LANDO: SOME EXAMPLES OF COMPARATIVE LAW
METHODOLOGY"**

53 Am. J. Comp. L. 261 (2005)

Vernon Valentine Palmer

Thomas Pickles Professor of Law and Director of European Legal Studies, Tulane Law School. [This essay is respectfully dedicated to Xavier Blanc-Jouvan, one of the most illustrious figures in the world of droit compare].

"Thinking without comparison is unthinkable. And, in the absence of comparison, so is all scientific thought and scientific research."

-- Guy E. Swanson

"I have the unfortunate peculiarity of comparing everything that comes my way, the domestic with the foreign, or the present with the past."

-- Rudolf von Jhering

"[A] comparative approach to law becomes an attempt . . . to formulate the presuppositions, the preoccupations, and the frames of action characteristic of one sort of legal sensibility in terms of those characteristic of another."

-- Clifford Geertz

Introduction

Methodological discussions, it has been said, are a good cure for insomnia. Of course any number of legal topics have been known to cure that disorder, so clearly excitement is not the best measure of a subject's true importance. Today the importance of methodology to comparative law is indisputable and crucial, and recent years have witnessed an intense and lively debate over new directions in comparative law. These discussions have been keeping many thoughtful lawyers awake even though some may have been merely dozing.

The need to compare and differentiate phenomena seems to pervade all forms of human decision-making and may be indispensable to the development of human intelligence and judgment. This holds true not merely for lawyers, but for architects, physicians, biologists, sociologists, and others. All lawyers are comparatists in a natural sense, as when they make distinctions, draw deductions or look for a case in point. There is an innate process which has much in common with the procedures of comparative law. Common lawyers compare cases and cross-reference them very carefully. The case method is essentially a comparative method based on similarity, analogy and differentiation. Civilians do not reason so differently. Once they have compared the facts of a case with codal texts and previous jurisprudential applications, they subsume the facts to the code or jurisprudence through an act of categorization. Should the code

be silent on a specific point, analogies are developed from related texts. The civilians give constant attention to similarity and contrast in legal rules and facts in issue. Thus the ordinary methods of the civilian or common lawyer are grounded in comparison, and perhaps comparative law is in one sense an extension of the natural approach to legal questions generally.

"Comparative law," however, is a discipline which incorporates the idea of comparison into its name and this alone suggests that its method is somehow special or distinguishable from what comes naturally. Indeed the impression that the comparative law method involves something special is strengthened by traditional statements that comparative law is only a method and not a substantive body of knowledge. If that were true, we would have to admit that we have for a long time sadly neglected the supposed essence of our subject. Some of the most widely read books on comparative law have virtually nothing to say about methodology and, perhaps in consequence, the rank and file may be described as naïve and unaware of methodological questions and issues. They have been led to assume that comparative law can be carried out with the same thinking process that lawyers ordinarily use. Could it be that the ingrained and unconscious methods of lawyers imbued with their own legal culture--whether common law, civil law, mixed system, or other--furnish, by default, the implicit model for comparative law? Unfortunately, this natural paradigm seems rather prevalent.

Before continuing further, however, I need to clarify how I am using the word method. As an abstract matter, comparative law has but one method--to compare and contrast norms, institutions, cultures, attitudes, methodologies, and even entire legal systems. But in practice the word is applied more concretely. Method is now identified by the "techniques" by which comparisons are carried out. These techniques have thereby acquired the status of separate methods: thus we have historical, functional, evolutionary, structural, thematic, empirical and statistical comparisons, and all of these can be carried out from a micro or macro point of view. The possibilities are endless. In this paper I will not resist this proliferation, but I may question the assertion, sometimes advanced, that one of these techniques or methods (functionalism) has precedence over the others. I will also argue that some of the strategies discussed in recent scholarship are unrealistic and unattainable standards--even for scholars--and should be viewed skeptically. In my view, they usually overlook the comparative law needs of the legislatures, reform commissions, and judges and seem entirely unworkable at the practical level where comparative law must expand its base. These considerations lead me to suggest a more pragmatic and inclusive view of method than scholarly colleagues have advanced, one which takes into consideration the costs and benefits to different users and recognizes that the methods of scholars may be inappropriate to legal reformers and law appliers.

This plea for a more pragmatic and inclusive approach is stimulated by several background concerns. Mainstream comparative lawyers (and I regard myself as one) seem to be caught in the pincers of three developments, each pulling in a different direction. The first of these I would describe as the underdeveloped and emaciated state of our discipline in the everyday practical world. One of our constant goals must be to strengthen and expand the role of comparative law in the practical world. Basil Markesinis has rightly noted that comparative law continues to be, "a subject in search of an audience." In England and the United States particularly, it needs to acquire a recognized position within the profession and the courts, to become the method of legal institutions, and to emerge from its cloistered existence in the academy. Yet to move into the courtroom and into the halls of the legislature will require methods which are not only enlightening, but feasible and nonthreatening. If the profession is to recognize the "value added" of comparative law, then the additional burdens which it imposes will have to be considered cost-justified. There are potentially high costs in acquiring and analyzing information about foreign law, and these increase dramatically under complex methodologies. So realism demands that even simple methods, which it has long been fashionable to disdain--such as purely textual comparisons, or questionnaires devised to gather foreign-law data, or simple juxtapositions of materials without elaboration or comment--could all have legitimacy and value in practical forms of legal research.

A related challenge emanates from within mainstream comparative law. It began in the early twentieth century with the insight that the focus of comparative law must be upon the law in

action, not merely the law on the books. This might be viewed as a call for deeper research into legal sources and the social context around legal rules, with the difference however that this was still a lawyer's context not an anthropologist's, and involved none of the epistemological scepticism of the postmodernists. Reaching the "law in action" is still a scientific ideal of mainstream comparative law, but one is never quite sure how high the cognitive bar has been set. If the phrase means the level of research described by Ernst Rabel and Max Rheinstein, it has rarely been realized even by its proponents, and in light of the practical concerns expressed above, cannot be the universal standard for all of comparative law.

The third pincer is the "postmodern critique" which already dominates scholarship in the fields of philosophy, anthropology, and law and society. This critique has now become fairly influential within comparative law as well. It essentially contends that each legal culture is a unique, culturally contingent product which is incommensurable and untranslatable except through a deep understanding of the surrounding social context. Thus a comparativist's claims to understand another country's law can only be validated through an elaboration of its context, or as Clifford Geertz writes, through formulating "the presuppositions, the preoccupations, and the frames of action characteristic of one legal sensibility." This has been aptly described as "a nearly insurmountable methodological hurdle for the comparative legal scholar." For Anne Peters and Heiner Schwenke, it casts "fundamental doubts" on the utility and possibility of comparative law. "Context" lies beyond the positive law in which lawyers are trained and the benefit of contextual comparisons will depend upon the purpose of the investigation as well as the cost of acquiring this information and expertise. Indeed, the western legal tradition to a large degree prizes concepts and generalizations abstracted from the contexts they regulate and values general concepts which perform the greatest number of tasks. When a comparatist seeks to compare the "structural" and "contextual" background to the rules under comparison, he or she must in effect reconstruct their socio-economic origins, and his or her notion of context will tend to be considerably narrower than the background which the legal anthropologist or legal sociologist has in mind. Thus, the challenge of the postmodern critique could be called that of making context manageable and of developing an organic method which incorporates both law and social underpinnings into the same comparative act.

What emerges from the interplay of these developments is that the practical goal of expanding the base is somewhat paralyzed by the academic discussion, particularly by its tone. The general message from academic circles--and here I only generalize and do not intend to refer to any particular colleague's view--is that comparative law is a difficult and forbidding field reserved for a special few. As portrayed, it always requires total immersion and deep preparation in specific foreign languages and cultures before being attempted; the foreign system should always be seen from the inside and in socio-cultural context; and those who engage in something less are in essence practicing cognitive control over their readers and deluding themselves in the process. To avoid ethnocentricity and superficiality, the researcher must always delve beyond judicial decisions, doctrinal writings and the black letter law of code and statute and reach into the ill-defined region of "deeper structures" where law perhaps meets philosophy, sociology, and social culture.

Of course there is everything praiseworthy about acquiring greater knowledge, even perfect knowledge of the compared object, nevertheless the question is how these standards can be fulfilled by law reformers and law appliers, not to mention academics themselves. I believe these strictures are in part based upon unrealistic assumptions which threaten to make the comparative law enterprise quite impractical. They establish standards of research that are generally unattainable, which means that no project is worth beginning, or if it was begun or accomplished, will not be safe from rigorous critique. And this critique only increases comparative law's reputation for being exotic and forbidding. One wonders how many have been deterred from undertaking comparative law by the demands which have been evoked in the name of legal method.

In this essay I wish to reconsider a number of these questions and to suggest the need for a more pragmatic and inclusive view of comparative law methodology. I cannot pretend that the analysis is systematic or complete, nor am I sure that it is not soporific. As an organizing

device and to provide a context for reflection, I will present four case studies of comparative method ranging from efforts to grasp the meaning of customary law in Africa to the techniques employed by the Lando Commission in drafting Principles of European Contract Law. I hope to demonstrate a quite unoriginal thesis, that good method is a function of variables, that method should be adapted to the purposes of the project and the individual circumstances of those who pursue it, and that a multiplicity of methods has been a source of enrichment in the best comparative work.

Conclusion

In this essay I have argued that there is not, and indeed cannot be, a single exclusive method that comparative law research should follow. The tasks of teaching, research, law reform, or historical investigation are too varied and contingent to be achieved by a single approach. It would be a serious blow if all matters had to be analyzed from one angle or perspective, or treated with the same detail and depth, or prepared to the same degree or in the same way. I believe that there is a sliding scale of methods and the best approach will always be adapted in terms of the specific purposes of the research, the subjective abilities of the researcher, and the affordability of the costs. We cannot say a priori that one method is always better than another until we know these variables. I have also attempted to show that prescriptions about method must carefully distinguish the principal user groups, for the complex methods of scholars may be unworkable in the practical world where comparisons must be cost-justified. The message from Mount Olympus must not be that comparative law is always forbidding and difficult. It must be accessible and its methods must be flexible.

*For complete text of this article, see 53 Am. J. Comp. L. 261 (2005)