

# SCIENTIFIC THOUGHT

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## **COMPARE AND CONTRAST THE COMMON LAW TRADITION WITH THE CIVIL LAW TRADITION**

### *Annotation*

*The aim of this short essay is to compare and contrast the two highly powerful legal traditions, being now a fundamental part of contemporary business world: the Common Law and the Civil Law.*

*The historical background, general characteristics and basic advantages and disadvantages of those legal traditions are described respectively.*

**Key Words:** *legal tradition, the Common Law, the Civil Law, legal system, theory of law, economic growth, international law.*

«A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective».

*John Merryman, Professor of Law* [1, p. 1] [1, c. 1]

The two major legal systems were disseminated from Europe throughout the world - the English Common law system, and a number of variants of the Civil law system. The United States, England and the Commonwealth countries (formerly part of the British Empire), belong to the common law tradition; Continental Europe, including Central European countries, Latin America, most countries of Africa, including Ethiopia and many countries in Asia, including Japan and South Korea, are part of the civil law "legal tradition" [2, p. 1]. At the same time, as a result of their French origins, Quebec in Canada, Louisiana in the United States and Puerto-Rico (US) have adopted and followed the civil law tradition [3, p. 1; 2, p. 3].

There are many other legal traditions in today's world such as Islamic law (Shari'ah), Hindu law, Pre-Colonial legal traditions in Africa and the Americas [4, p. 3] and Socialist legal tradition [5, p. 66], developed originally in the Soviet Union.

The Common law evolved in England from the 11<sup>th</sup> century and was later adopted in the USA, Canada, Australia, New Zealand and other countries of the British Commonwealth.

As Scully [6, p. 3] pointed out, the English common law tradition can be traced to the Norman conquest of 1066 A.D. and a case casuistry beginning with the "Year Books" in the 13th century. As Daniell [7, p. 58] noted, the "Year Books" is the brief observations of cases heard in the Court where used by Counsel as precedents in arguing later cases and by judges when deciding them. This is the root of main principle of Common law well known as "stare decisis" doctrine (Latin phrase - "let it [the decision] stand) [8]. The principle is that earlier judicial decisions,

usually of the higher court, made in similar case, should be followed in the subsequent cases, i.e. that precedent should be respected [9, p. 819].

In addition, as the Court of appeals of the State of Kansas suggests, the Common law is "judge-made" rules and can properly be modified by judicial decisions (Noon v. Chalet, No 91,095, Kan., [10]). Furthermore, the common law, by definition, is "the body of law derived from judicial decisions, rather than from statutes or constitutions" [11, p. 293].

The Civil law is the product of Roman law, which was codified by Justinian in the "Corpus Juris Civilis", "barbarized" by the invaders of Europe, yet preserved by the Roman Catholic Church through its canon law during the Middle Ages, rediscovered and redefined after the Middle Ages, supplemented by the "law merchant", and subsequently reinvented and codified by the modern nation states of Europe [3, p. 1]. As August [12, p. 50] notes, two national codes have had such widespread and lasting influence that they are now regarded as the very basis of the modern Civil law. Both the French Civil Code of 1804 and the German Civil Code of 1896 were models for most of the other contemporary civil codes.

According to Tetley [13], the Civil law is highly systematised and structured and relies on declarations of broad, general principles, often ignoring the details. However, as David and Brierley [14, p. 26] pointed out, the Civil law is a particular mode of conception, expression and application of the law, and transcends legislative policies that change with the times in the various periods of the history of a people.

In whole, as Merryman and Clark [15, p. 389] suggest, the Civil law is a science, and that

the task of the legal scientist is to analyse and elaborate principles which can be derived from a careful study of positive legislation into a harmonious systematic structure.

Common law and civil law legal traditions contribute to similar social objectives (individualism, liberalism and personal rights) and have been united in one single law family, the “Western law” family, because of this functional similarity [14, p. 25]. However, the way in which this two main legal traditions spread is completely different.

As August [12, p. 54] suggests, the Civil law is encapsulated in convenient codes and it deals primarily with private law that is of little threat to the local political system. On the other hand, the Common law is a matrix of case law and statutes; it uses jury system and the doctrine of supremacy [12, p. 53] to limit the actions of the government; and it encompasses a complex terminology. The General characteristics of the two major legal systems are shown below in Table 1.

Also, as Scully [6, p. 1] suggests, the Common law stands in contrast to the Civil law in two major ways:

- Common law arose spontaneously and evolves continuously, while civil law is based on a specific code that does not depend on prior legal tradition.

- The interpretation of common law is in the hands of the judiciary, while the interpretation of civil law is ultimately in the hands of the legislature.

All of the above have a significant influence in international legal environment which provides a framework for international business activity (international trade and investment in

goods, services and technology) [5, p. 12]. The purpose of this short comparison is to highlight some important differences between the two major law traditions in relation to business law and not covering all those differences.

The theory of law and finance argues that the common law system provides a better framework for financial development and economic growth than the civil law tradition [16]. According to Mahoney [17], the countries whose legal systems are arisen from the common law tradition provide exceptional investor protection which related both with more developed financial markets and faster economic growth. The judges who played a principal role in common law tradition were deeply concerned with protecting property and contract rights. By contrast, the scholars who shaped the civil law were anxious with creating a strong, centralized executive to pursue collective goals. In addition, as Ergungor [18] suggests, the common law courts are more effective in resolving conflicts than civil law courts because they are freer to create and interpret the law when the statutes are incomplete and do not address a practical situation. Although the common law examines the suits more strictly in narrow way, the civil law - as wide as possible.

The most comprehensive analysis of differences between the common law and civil law approach to international business is conducted by Professor Caslav Pejovic in remarkable article «Civil Law and Common Law: Two Different Paths Leading to the Same Goal» [9] which based on several decades of his academic research and practical experience in navigating among differing legal systems [19, p: 843]. The main issues of this *magnum opus* are shown below:

**Table 1**

**General characteristics of the two major legal systems**  
(adapted from August [12, p. 55])

	<b>Common Law</b>	<b>Civil Law</b>
Ideological basis	Natural law	Positive law; laissez-faire economics
Status of law	Superior to government	Independent of government
Legal rules	Based on specific circumstances	Based on general principles
Content	Private law; Public law	Private law
Basic source	Case law	Codes
Most influenced by	Judges	Law writers
Reasoning	Inductive	Deductive
Procedure	Adversarial	Inquisitorial
Fact finder	Jury	Judge
Use of case law as precedent	Required	Respected
Constitutional review by	Regular courts (no written constitution in England)	Special agency or category of courts
Review of government agencies	Regular courts	Special agency or category of courts

*a) Consideration and Causa*

In common law, a contract has no binding effect unless supported by consideration. The doctrine of consideration essentially means that a contract must be supported by something of value, such as the promise of a party to provide goods or services, or a promise to pay for goods or services. On the other hand, in civil law a contract cannot exist without a lawful cause. Cause is the reason why a party enters a contract and undertakes to perform contractual obligations [9, p. 821].

*b) Contracts for the Benefit of Third Parties and the Doctrine of Privity of Contract*

In civil law, the parties to a contract may agree that contractual rights can be transferred to a third party. The right, of course, cannot be forced upon the third party; if the third party rejects the right acquired under the contract, the right is deemed not to have been acquired. Common law does not recognize contracts for the benefit of third parties. Instead, the doctrine of privity of contract applies, which effectively prevents stipulations in favor of third parties. According to this doctrine, a contract cannot impose obligations on, or give rights to, anyone other than contracting parties [9, p. 822].

*c) Revocation of the Offer*

In comparative law there are differences concerning the possibility to revoke an offer. In the common law, an offer may always be revoked or varied, in principle, until the moment when it was accepted. This applies even to firm offers which expressly state that they are irrevocable. In Civil law, in principle, an offer has binding character and can't be revoked after being given. Depending on the offer's content, the offeree is bound by the offer for the period specified there-

in, or if this period is not specified, then for a reasonable period. The offer will be considered as revoked if it was not accepted, or it was not accepted within specified period [9, p. 822].

*d) Force Majeure and Frustration of Contract*

*Force majeure* means unforeseen and unexpected event outside the control of the parties which makes impossible performance of the contract. The consequence of *force majeure* is exclusion of liability of a party for non-performance of the contract. Under the Common law doctrine of impossibility, a party to a contract is relieved of the duty to perform when performance has become impossible or totally impracticable without his or her fault. The effect of frustration is that the contract is considered terminated at the time of frustrating event and no party is liable for damages. Differently from civil law, in the common law *force majeure* does not have a precisely defined meaning. The parties have to specify in the contract events of *force majeure* that will exclude their liability for non-performance. That is why the *force majeure* clauses in common law are often very long and comprehensive trying to cover as many *force majeure* events as possible [9, p. 823].

*e) Trust*

Trust is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of designated beneficiaries. In principle, the trustee has the legal right and the beneficiary the equitable right. The trustee is the holder of the legal title to property and he may exercise all the powers with respect to property that a legal owner has, but without right to enjoy the benefits of owner-

ship. On the other hand, the beneficiary has no legal title to property, but he is entitled to enjoy the assets belonging to the trust. The trust is not a contract but it is created through a unilateral declaration of will made by the owner of property (settlor). The trust, as it is understood under the common law, does not exist in civil law. Instead civil law uses various legal institutions (*fiducia, fondation, Treuhand*) which can serve some of the functions the trust has in common law [9, p. 828].

*f) Mortgage and Hypotheque*

The civil law *hypothèque* differs from the common law mortgage particularly that it confers on the *hypothecary* creditor no immediate right to possession of the property, but only a right against the proceeds of sale of the property after enforcement of the right in judicial proceedings. The common law mortgage, on the other hand, gives an immediate right of property to the mortgagee, who can take possession of the property by a simple notice, without the necessity of taking suit, as well as a right of foreclosure at law [9, p. 828].

*g) Procedural law*

Common law procedure is usually called «adversarial», which means that the judge acts as neutral arbiter between the parties in dispute as they each put forward their case. The role of judge is not to find the ultimate truth. The judge's main task is to oversee the proceedings and to ensure that all aspects of the procedure are respected. The judge does not himself interrogate the witnesses, but his task is to ensure that the questions the parties put to the witnesses are relevant to the case. At the end, the judge should decide the case according to the more convincing of the competing presentations. Civil law procedure is usually

called «inquisitorial», because the judge examines the witnesses, and the parties in dispute practically have no right of cross-examination. Compared to common law, the judge in civil law plays a more active role in the proceedings, e.g. by questioning witnesses and formulating issues. The judge plays the main role in establishing the material truth on the basis of available evidence. The judge has a task not merely to decide the case according to the stronger of the competing presentations, but to ascertain the definite truth and then to make a just decision [9, p. 830].

Furthermore, as Tetley [20] notes, there are other important differences between common law and civil law, such as follows:

*a) Conflict of laws*

In common law, «conflict of laws» includes choice of law, choice of jurisdiction and recognition of foreign judgments. In civil law, the appropriate translation is «private international law» (as opposed to internal law) because conflict of laws merely governs choice of law rules [20, p. 28].

*b) Forum non conveniens*

*Forum non conveniens* is the common law principle whereby a court, which has jurisdiction to hear a claim, refuses to do so, because it believes another court of another State also has jurisdiction to hear the claim and can better render justice in the circumstances. This principle was unknown to civil law courts, which are often required by the constitutions of their respective countries to hear an action, although they may suspend it [20, p. 29].

Nevertheless, the process of unification and harmonization of law, especially in the fields of international law started since the end of 19<sup>th</sup> and the beginning of 20<sup>th</sup> century [9, p. 836]. This

process involved reducing differences between various legal systems. The binding force of precedents, as one of the main distinctive features of common law, is not as unique to the common law as it may seem, because of the actual influence the case law has on the courts in all legal systems. In some civil law countries the decisions of supreme courts have been made binding by statute. Even in the countries where the decisions of higher courts are not formally binding, they are likely to be followed by lower courts. On the other hand, the rigidity of the *stare decisis* doctrine has been softened by a number of changes in the common law countries, including the famous Practice Statement by the House of Lords, which declared that it

considered itself no longer formally bound by its own precedents [9, p. 837].

Additionally, adaptation of international treaties, conventions and uniform rules containing elements of both the civil law and the common law, such as Vienna Sales Convention (1980) [21, p. 835] and UNIDROIT Principles for International Commercial Contracts [22] are other examples of unification.

In conclusion, it is possible to say that nowadays there are more similarities than differences between these two legal systems. Despite very different legal cultures, processes, and institutions, common law and civil law have displayed a remarkable convergence in their treatment of most legal issues [9, p. 839].

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