# COMMON LAW AND CIVIL LAW: THE MAJOR TRADITIONS OF THE WESTERN LEGAL CULTURE

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***Abstract**: The purpose of the present paper is to examine the defining traits of the two highly influential traditions of Western law, namely Common Law and Civil Law. They are an integral part of the Western legal culture, as the various systems of law which are part of it are generally described as belonging either to one or the other. At the same time, this identification implies an adherence to a certain view on law, which reveals a specific set of rules, principles, and institutions. But most importantly, the theoretical and practical aspects concerning the Western legal traditions place the discussion in a cultural context: in order to thoroughly understand the contemporary legal configurations of different states, one must bear in mind the distinctive historical and cultural evolution of the Western world, which has shaped the development of these two great traditions over the centuries.*

***Keywords**: common law, civil law, legal traditions, legal culture, systems of law, comparative law.*

## 1. INTRODUCTION

The *common law* (or *Anglo-American law*) and the *civil law* (also known as the *Romano-Germanic* or *continental law*) represent the two major legal traditions of the Western world.

They are part of the legal *culture* as both law and legal systems are, broadly speaking, 'cultural products' [3], ultimately reflecting a well-established set of values, which can be perceived in all social manifestations, starting from the organization of the judiciary and ending with the individuals' everyday lives. Moreover, it has been stated that 'one cannot understand the role of law in society without understanding something of legal cultures' [7].

Throughout the past centuries, the language and law of different European states represented the primary cultural products to be exported. These came into contact with the languages and laws of the farthest places and they would either coexist with the local languages and laws or make them disappear. Due to the recent revolution in the fields of transport and information, this longstanding process has intensified, taking the form of globalization [11].

As Merryman and Pérez-Perdomo [12] rightly argue, the concepts of *legal tradition* and *legal system* have quite different meanings. Thus, a legal system is 'an operating set of legal institutions, procedures and rules'; according to this definition, all states have a distinct legal system. On the other hand, it is a well-known fact that, for instance, England, New Zealand and the United States of America belong to the 'common law' tradition, just as France, Germany, Italy, Switzerland, Argentina, Brazil or Romania are members of the 'civil law' family, but this does not imply that they have identical legal institutions, procedures or rules. The distinction can be taken even further, both on the national level, as in the case of the United States, where there is one federal and fifty state legal systems, and on the international level, organizations such as the United Nations or the European Union having created their own systems of law.

The role of the legal tradition is highly relevant as it 'relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective' [12]. Thus, the macrocosm of a legal culture can be highlighted.

## 2. CLASSIFICATIONS OF THE NATIONAL SYSTEMS OF LAW

The scholarship studying the different systems of law is called comparative law. The comparatist approaches in this field of knowledge have attempted to group the national systems of law, according to different criteria, into larger categories called families of law, major systems of law or types of law. Here is a synopsis of these classifications [5].

According to the community of principles, sources and legal language, René David identifies the following families of law: the Romano-Germanic law, the common law, the socialist law, as well as the traditional and religious systems of law. This classification is widely accepted.

Some authors, such as F.S. Canizares, propose a tripartite taxonomy, reducing the aforementioned families of law to three types: Western, socialist and religious.

In accordance with the Marxist theory, which lays emphasis on the class factor, there are four types of law: slave-owning, feudal, bourgeois and socialist law.

Following the historic evolution of law, there is the incipient law, the antique law, the medieval law, the modern law and, finally, the contemporary law.

From among the various criteria suggested in the literature, Peter de Cruz [6] adopts the one proposed by Zweigert and Kötz in *An Introduction to Comparative Law* (1977, 1998). The quoted writers consider that the 'juristic style' is the determining test according to which the legal systems can be classified, this being established according to the following factors: the historical background and development of the system, the characteristic mode of thought, the distinguishing institutions, the types of acknowledged legal sources and the way it relates to them, as well as its ideology.

## 3. THE COMMON LAW TRADITION

The common law tradition relies on three pillars: Common Law, Equity and Statute [2].

An important inference from the previous statement is that the phrase '*common law*' can be used in two senses: on the one hand, it refers to the major legal tradition governing England and the majority of its former colonies and, on the other hand, it refers to the jurisprudence of the courts and to the law formed by the court decisions (in the latter meaning, it is a synonym for '*case law*').

Historically speaking, before 1000 A.D., a conglomerate of norms of different origins coexisted on the British territory, namely Germanic norms, as well as Roman and canonic law, introduced in 664 A.D. As a result of the Norman Conquest (1066), the law of the conquerors was imposed on these heterogeneous practices. The unification of law in Great Britain was the direct result of the political unification accomplished by William the Conqueror. Therefore, this unified law was called 'common law' as opposed to the laws that had been in force before [11].

The *judicial precedent* is a key element in common law systems, binding the courts to consider previously decided cases. If such a precedent does not exist, the judge will rule according to the general principles of law and so, the precedent is created for future decisions. Thus, the common law tradition lays great emphasis on the so-called 'judge-made law' (using a phrase coined by Bentham) [10, 14], the guiding principle being that 'it is unfair to treat similar facts differently on different occasions' [2].

The type of reasoning used by judges of the common law tradition is inductive, '(…) deriving general principles or rules of law from precedent or a series of specific decisions and extracting an applicable rule, which is then applied to a particular case' [1], as opposed to the deductive method employed in the civil law legal systems, where the judge has to analyze the rules and general principles of law inscribed in codes or other laws in order to reach a specific decision.

Consequently, the decisions pronounced by the courts are mandatory not only for the parties, but also for the other courts. This is expressed by the principle of *stare decisis*, i.e. 'to stand by what has been decided'. Concerning this aspect, the following distinction must be made: a judgement consists of two parts, namely the principle of law on

which the decision is based (*ratio decidendi*) and other incidental observations added by the judge in order to clarify the decision (*obiter dictum*, literally meaning 'something said by the way, in passing'). It is only the former part of the judgement that is binding, the other having a merely persuasive purpose. Moreover, the *ratio decidendi* does not represent the decision itself (which must be obeyed by the parties), but only that part of it which is binding in later cases [14].

There is also a hierarchy of precedents: the lower courts must follow the decisions of the higher courts (in a descending order, the hierarchy of courts in England is the following: the House of Lords, the Court of Appeal and the High Court of Justice) [10, 14].

*Equity* is equally important for the common law tradition, having a supplementary status, since, as the name suggests, it aims at achieving justice and fairness by avoiding a rigid application of common law. Both equity and common law have been applied by the same courts since 1875, and if the two happen to contradict each other, equity shall prevail [2]. The rules developed by the courts to govern the application of equity are named 'maxims' of equity. Here are a few examples: '*Equity will not suffer a wrong to be without a remedy*' (that is, equity intervenes only in the absence of a common law remedy), '*Equity follows the law*' (the equitable remedy must not be contrary to the law, i.e. equity does not take the place of the common law), '*He who comes to equity must come with clean hands*' (any party who acts unfairly shall not be granted an equitable remedy), '*Equitable remedies are discretionary*' (only the court has the power to decide, after analyzing the circumstances of the case, whether to grant the remedy or not), and so on [14].

*Statute law* is the law enacted by the Parliament. The Parliament exerts the legislative power, passing the laws, and it is the role of the judiciary to apply them to individual cases, but not before undertaking a process of *statutory interpretation* through which the meaning intended by the legislator is sought [14, 2].

The common law tradition can be traced in almost all the countries of the Commonwealth, with several exceptions, as there can be observed from the following enumeration [2]: most of the United Kingdom (excluding Scotland), Ireland, the United States of America (federal law and the law of forty-nine states, except Louisiana), Canada (except Quebec, which belongs to the civil law system, its legal system being inspired by the French law), Australia, New Zealand, India (except Goa, whose law is inspired from the Portuguese civil law system), Pakistan, Hong Kong, and so on.

There are also mixed systems, such as that of South Africa, which is based both on the Roman-Dutch law and on the English common law, or of Nigeria, incorporating, besides English common law, Islamic and traditional law [for a comprehensive list of the legal systems of the world, see *The CIA World Factbook*, Field Listing – Legal System, https://www.cia.gov].

## 4. THE CIVIL LAW TRADITION

The civil law tradition consists of the following national legal systems: the French legal system, together with those related to it, namely the Italian, Spanish, Portuguese, Belgian, Romanian, the legal systems of Latin America, some of Asia and Africa, as well as the German legal system. Both the French and the German law have common roots in the Roman law. Moreover, this great tradition is also based on the Germanic customary law, which has influenced, in its turn, the French legal practices standing at the basis of the Napoleonic codifications. Hence, the label 'Romano-Germanic' law [5].

Still regarding terminology, the phrase 'civil law' stems from the tripartite division of private law in ancient Rome, introduced by Gaius, more exactly from the term *jus civile* (or *jus quiritum*), a highly formalist system, whose norms applied solely to Roman citizens; the other two systems of law were *jus gentium*, applying to the contacts between Romans and foreigners, and *jus naturae*, a system of law deemed valid for all peoples and in all times [6, 13].

One of the chief features which distinguish the civil law tradition from that of the common

law is *codification*, deriving from Emperor Justianian's *Corpus Juris Civilis*. In the continental law tradition, written law is prevalent, as opposed to the law created by judicial decisions, as in the common law tradition. This characteristic provides a greater degree of systematization of the legal branches, but, at the same time, the legal provisions are less flexible as opposed to the common law systems. Although codes are also seen in common law systems, such as the United States, '(…) the underlying ideology – the conception of what a code is and of the functions it should perform in the legal process – is not the same' [12]. The quoted authors exemplify this statement by analyzing the underlying motivations behind the French Civil Code of Napoleon (1804) and the German Civil Code (1896), both of them aiming at a solid separation of powers between the legislative and the judicial and, at the same time, seeking to create a complete, unitary piece of legislation in order to support the unity of the state. In contrast, the codes of the common law systems – as, for instance, the California Civil Code or the Uniform Commercial Code adopted in the American jurisdiction – stem not only from a different ideology, but also from a different cultural reality: on the one hand, they are not based on the idea of completeness and, on the other hand, they do not reject the previous laws, but rather try to improve them. 'Thus the conservative tendencies of the common law tradition stand in marked contrast to the ideology of revolution from which the spirit of civil law codification emerged' [12].

The long-standing dichotomy *private law – public law* represents another trait of the civil law systems (although this theory has a tradition dating back to Roman law – here it is worth to mention Ulpian's famous remark: '*publicum jus est quod ad statum rei Romanae spectat, privatum quod ad singularum utilitatem*', i.e. public law deals with the organisation of the Roman state, while private law applies only to the relations among individuals [13] – it has been criticized by authors like H. Kelsen, a leading exponent of legal positivism, or L. Duguit). The former category comprises branches such as civil law or commercial law, while the latter includes, among others, constitutional, criminal, financial, or administrative law. In Romania, for instance, both criminal and civil procedures are considered part of the public law, although in some countries civil procedure is regarded as belonging to the private law. There are also mixed legal branches (as labor law, for example) [1, 5].

Even though this division might seem clear-cut, the different branches of law belonging to the public or to the private law are interconnected in many ways [5]. In other words, the rapports between individuals, which are specific to private law, depend on those established between the sovereign power and the individuals, the latter being part of public law [11].

Different criteria have been suggested in the legal literature to stand at the basis of this distinction between public law and private law [5]: the nature of the protected interest (a general one, in the case of public law and an individual one, in the case of private law); the legal form or the way in which the protection of rights is assured (*ex officio* or at the request of the involved parties, respectively); or the organic criterion, according to which public law refers to those who govern, while private law is targeted at the governed.

Although the common law systems also acknowledge that private law governs the relations between private citizens and corporations, whereas in public law relations the State is one of the parties at all times, the distinction has far less practical significance than in the civil law systems, where there are generally specialized courts dealing with the two types of law [6].

## 5. OTHER DIFFERENTIATING ASPECTS BETWEEN THE TRADITIONS OF COMMON LAW AND CIVIL LAW

Apart from the aspects which have already been mentioned, and which, by delineating the profiles of the two traditions, set them apart at the same time, there are several others issues to be discussed.

The fact that case law is a valuable source of law in the Anglo-American legal tradition

determines a different role for the common law judge, as compared to the judge belonging to the civil law tradition: while the former contributes to the creation of law, the latter only applies the law [1]. Nevertheless, when reaching a decision for a particular case, the civil law judge would consult relevant jurisprudence and doctrine on the matter.

The independence of the judiciary is a key principle in both traditions due to the fact that they are considered 'the upholders of the rule of law' [14]. A judge must be independent from the executive power and from the parties.

Also, a judge's career follows different stages in each of the two traditions. In England, for instance, judgeship is considered a highly prestigious status and this perception is supported by the fact that, as a rule, only the most brilliant jurists become members of this profession [10].

Another noteworthy area is the legal process. Both the civil and the criminal procedures are conducted in accordance with specific provisions.

One of the main differences between the two traditions is the existence of a jury in the case of common law jurisdictions (this tradition remains strong especially in the United States, as there is a constitutional right to a jury even in civil cases [12]), whereas in civil law systems, this is uncommon. However, it has been observed that the role of the jury in the English legal system has started to decline in recent years [14].

The judge belonging to the civil law tradition manifests an active role throughout all stages of the process until he/ she is ready to give the solution, as opposed to its common law counterpart; in common law proceedings, the lawyers generally dominate the courtroom.

Concerning civil procedure, as it has accurately been asserted, 'just as civil law is the heart of the substantive law in the civil law tradition, so civil procedure is the heart of procedural law' [12]. Compared with the civil trial specific to common law countries, which takes place as a unique event, civil procedure in the continental law unfolds as a series of court sessions, during which many actions are taken: at the beginning, preliminary issues are discussed; then follow hearings, written communications, testimonies, the proposing and presenting of other evidence, and so on [1]. Comparatists speak about the 'concentration' of the trial in common law systems, a feature which the civil law countries are trying more and more to implement nowadays [12].

Pertaining to criminal procedure, the notions of *adversarial or accusatorial* and *inquisitorial* justice correspond to the two legal traditions under consideration. Thus, the criminal trial in common law systems is preponderantly accusatorial, while, in civil law countries, criminal proceedings are mainly inquisitorial. However, there is an ongoing trend for the inquisitorial systems to borrow accusatorial elements and the other way round. Thus, no legal system relies completely on one of these approaches. The Netherlands is considered probably the most inquisitorial of the West European countries, while the English/ Welsh system is deemed to be the most accusatorial [9].

Since the complexity of this subject exceeds the aim of the present paper, a sketch of the conventional images of both models will suffice. The classical inquisitorial model takes place as follows: the criminal investigation is conducted by a supposedly neutral judicial officer and the competence for determining the guilt or innocence of the defendant belongs to a judge or a panel of judges, having full access to the investigation file (or dossier). The proceedings at trial are overseen by a presiding judge, without a jury. The rights of the defendant are not as clearly emphasized as in the accusatorial trial, in the latter case the presumption of innocence, the right to an attorney, or the right to silence playing an essential part. The inquisitorial trial may not be continuous and can last for an excessive period of time. In the accusatorial model, the police investigation is non-neutral and aims at collecting evidence. The trial is held before an independent and impartial judge or jury with no previous information about the case or dossier. The proceedings are continuous and are conducted according to the principle of morality; there is a 'trial by combat', where the attorneys attempt at deconstructing the arguments of the opposing party [4].

Both models include both strengths and shortcomings [4]. In the inquisitorial trial, the magistrate relies on the resources of the state to uncover the truth, but there is a rather rigid approach to the case.

The accusatorial model has the benefit of safeguarding the rights of the parties, but its main disadvantage results from the virtual inequality between the prosecuting and the defending parties, the former generally being more resourceful.

## 6. CONCLUSIONS

Even though the common law and the civil law traditions have developed distinctive rules, principles, and institutions, there are more and more interactions between the two, each of them being inspired by the other.

The scholars agree upon the following issue: in the context of globalization and, regionally speaking, facing the new challenges generated by the European Union and the European Court of Human Rights, the processes of adaptation and unification are likely to evolve. This is why, at the present time, a thorough study of law is bound to include the comparative method.

Moreover, in order to keep the positive law into perspective, lawmakers also ought to take into account the features of different systems of law when drafting normative acts.

Finally, by investigating these two great legal traditions, which stand at the core of the Western legal culture, one attains a deeper understanding of the configuration of the diverse national legal systems. Thus, the affiliation of a certain system of law to either common law or civil law is not at random, but rather results from a specific complex of cultural factors.

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