

# COMMON LAW V. CIVIL LAW SYSTEMS

By Judge Peter J. Messitte

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*Judicial independence is a hallmark of the American legal system. As a co-equal branch of government, the judiciary -- to a remarkable degree -- operates free of control by the executive and legislative branches, deciding cases impartially, uninfluenced by popular opinion. The American people respect their courts and judges, even if they sometimes criticize them. In this contrast of common v. civil law, U.S. District Court Judge Peter Messitte (Maryland), considers some basic aspects of both systems and explains how the American common law system compares with that of civil law.*

The two principal legal systems in the world today are those of civil law and common law. Continental Europe, Latin America, most of Africa and many Central European and Asian nations are part of the civil law system; the United States, along with England and other countries once part of the British Empire, belong to the common law system.

The civil law system has its roots in ancient Roman law, updated in the 6th century A.D. by the Emperor Justinian and adapted in later times by French and German jurists.

The common law system began developing in England almost a millennium ago. By the time England's Parliament was established, its royal judges had already begun basing their decisions on law "common" to the realm. A body of decisions was accumulating. Able lawyers assisted the process. On the European continent, Justinian's resurrected law-books and the legal system of the Catholic Church played critical roles in harmonizing a thousand local laws. England, in the midst of constructing a flexible legal system of its own, was less influenced by these sources. It never embraced the sentiment of the French Revolution that the power of judges should be curbed, that they should be strictly limited to applying the law such as the legislature might declare.

Thus, British colonists in America were steeped in this tradition. Indeed, among the grievances enumerated in the American Declaration of Independence were that the English king had deprived the colonists of the rights of Englishmen, that he had made colonial judges "dependent on his will alone for the tenure of their offices" and that he had denied the people "the benefits of Trial by Jury."

After the American Revolution, English common law was enthusiastically embraced by the newly independent American states. In the more than 200 years since that time, the common law in America has seen many changes -- economic, political and social -- and has become a system distinctive both in its techniques and its style of adjudication.

How does America's common law system compare with that of civil law?

## **"Judge-made" Law**

It is often said that the common law system consists of unwritten "judge-made" law while the civil law system is composed of written codes. For the most part, law in the United States today is "made" by the legislative branch. To some extent, however, the judge-made law analogy is true.

Historically, much law in the American common law system has been created by judicial decisions, especially in such important areas as the law of property, contracts and torts -- what in civil law countries would be known as "private delicts." Civil law countries, in contrast, have adopted comprehensive civil codes covering such topics as persons, things, obligations and inheritance, as well as penal codes, codes of procedure and codes covering such matters as commercial law.

But it would be incorrect to say that common law is unwritten law. The judicial decisions that have interpreted the law have, in fact, been written and have always been accessible. From the earliest times -- Magna Carta is a good example -- there has been "legislation," what in civil law systems would be called "enacted law." In the United States, this includes constitutions (both federal and state) as well as enactments by Congress and state legislatures.

In addition, at both the federal and state levels, much law has in fact been codified. At the federal level, for example, there is an internal revenue code. State legislatures have adopted uniform codes in such areas as penal and commercial law. There are also uniform rules of civil and criminal procedure which, although typically adopted by the highest courts of the federal and state systems, are ultimately ratified by the legislatures. Still, it must be noted that many statutes and rules simply codify the results reached by common or "case" law. Judicial decisions interpreting constitutions and legislative enactments also become sources of the law themselves, so in the end the basic perception that the American system is one of judge-made law remains valid.

At the same time, not all law in civil law countries is codified in the sense that it is organized into a comprehensive organic, whole statement of the law on a given subject. Sometimes individual statutes are enacted to deal with specific issues without being codified. These simply exist alongside the more comprehensive civil or penal codes of the system. And while decisions of the higher courts in a civil law jurisdiction may not have the binding force of law in succeeding cases (as they do in a common law system), the fact is that in many civil law countries lower courts tend to follow the decisions of higher courts in the system because of their persuasive argumentation. Nevertheless, a judge in the civil law system is not legally bound by the previous decision of a higher court in an identical or similar case and is quite free to ignore the decision altogether.

### **The Concept of Precedent**

In the United States, judicial decisions do have the force of law and must be respected by the public, by lawyers and of course, by the courts themselves. This is what is signified by the "concept of precedent," as expressed in the Latin phrase *stare decisis* -- "let it [the decision] stand." The decisions of a higher court in the same jurisdiction as a lower court must be respected in the same or similar cases decided by the lower court.

This tradition, inherited by the United States from England, is based on several policy considerations. These include predictability of results, the desire to treat equally everyone who faces the same or similar legal problems, the advantages to be gained when an issue is decided that affects all subsequent cases and respect for the accumulated wisdom of lawyers and judges in the past. But it is also understood that primary responsibility for making law belongs to the legislative authority; judges are expected to interpret the law, at most filling in gaps when constitutions or statutes are ambiguous or silent.

Thus, there are important limiting features to the concept of precedent. First and foremost, a court decision will only bind a lower court if the court rendering the decision is higher in the same line of authority. For example, a decision of the U.S. Supreme Court on a matter of constitutional or ordinary federal law will bind all U.S. courts everywhere because all courts are lower and in the same line of authority as the Supreme Court in such matters. But decisions of one of the several U.S. Courts of Appeals -- the intermediate federal appeals courts -- will only bind federal trial courts within their respective regions. Decisions of a state supreme court on the meaning of a state law where that court sits will be binding everywhere, so long as the state court's decisions do not conflict with constitutional or federal statutory law.

American judges tend to be very cautious in their decision-making. As a rule, they only entertain actual cases or controversies brought by litigants whose interests are in some way directly affected. In addition, judges usually decide cases on the narrowest possible grounds, avoiding, for example, constitutional issues when cases may be disposed of on non-constitutional grounds. Then, too, the "law" that judges state is only so much of their decision as is absolutely necessary to decide the case. Any other pronouncement on the law is unofficial.

Another important limiting feature of the concept of precedent is that the later case must be the same or closely related to the previous one. Unless the facts are identical or substantially similar, the later court will be able to distinguish the earlier case and not be bound by it.

The highest court of a jurisdiction, e.g., the U.S. Supreme Court for the United States or a state supreme court within its own state, can overrule a precedent even where the facts of the later case are identical or substantially similar to the earlier case. In 1954, for example, in the famous school integration of [\*Brown v. Board of Education\*](#), the U.S. Supreme Court overruled an analogous decision it had rendered in 1896.

But such direct over-ruling is not common. What is more likely is that the high court, by distinguishing later cases over time, will move away from an earlier precedent which has become undesirable. But for the most part, the long standing precedents of the high courts remain.

## **An Organized Law**

Where does one go to find the law in America? It might be supposed that with both enacted law and judicial decisions comprising the law, the search would be difficult. But the task in fact is relatively easy. Even though much American law is not codified, it still has been systematized and organized by subject matter. Legal encyclopedias and treatises written by learned professors and practitioners set out the law in logical sequence, typically providing historical perspectives as well. These books of authority contain references to the principles and specific rules of law in a given branch of law, as well as citations to relevant statutes and judicial decisions. Accessing statutes in "codebooks" and cases in bound volumes called court reports, and nowadays accessing both by computer, is a relatively straightforward undertaking.

But it also bears noting that in the common law system, treatise writers do not have the same importance that they do in the civil law system. In civil law countries, such authorities are sometimes considered sources of law, looked to for the development of the doctrine relative to a given subject matter. Their statements are given considerable weight by civil law judges. In the United States, in contrast, doctrine developed by treatise writers lacks binding force, although it may be cited for its persuasive effect.

## **Common Law v. Civil Law**

Apart from these features, there are a number of institutions associated with the common law system not usually found in civil law systems. Principal among these is the jury which, at the option of the litigants, functions in both civil and criminal cases. The jury is a group of citizens, traditionally 12 in number, summoned at random to determine the facts in a lawsuit. When a trial by jury is held, the judge will instruct the jury on the law, but it remains for the jury to decide the facts. This means that ordinary citizens will decide which party will prevail in a civil case, and whether, in a criminal case, the accused is guilty or innocent of the charge against him or her.

The institution of the jury has had an important shaping effect on the common law. Because jurors are brought in on a temporary basis to resolve factual issues, common law trials are usually concentrated events, sometimes only a matter of days (although occasionally possibly weeks or months in duration). Emphasis is on the oral testimony of witnesses, although documents also are presented as evidence. Lawyers have responsibility for preparing the case; the trial judge performs no investigation of the case prior to trial. Lawyers, acting as adversaries, take the lead in questioning the witnesses at trial, while the judge acts essentially as a referee. Testimony is recorded verbatim by a court reporter or

electronically.

The trial court, which is the "court of first instance" (i.e., where the case is first heard) in the American system, is where the factual record of the case is made. Generally speaking, appeals courts confine their review of the lower court record to errors of law, not of fact. No new evidence is received on appeal.

All this stands in marked contrast to what is usually found in civil law systems, where jury trials are for the most part unknown. In a given case, instead of a single continuous trial, a series of court hearings may be held over an extended period. Documents play a more important role than witness testimony. The judge actively investigates the case and also conducts the questioning of the witnesses. Instead of a verbatim record of the proceedings, the judge's notes and findings of fact comprise the record. Appeals may be taken both on the facts and the law, and the appeals court can and, sometimes does open the record to receive new evidence.

Despite their differences, both the common and civil law systems have as their goal the just, speedy and inexpensive determination of disputes.

U.S. courts have become particularly sensitive in recent years for the need to continuously reappraise their processes in order to improve the quality of justice. As a consequence of these efforts, there are many other aspects of court activity in the U.S. These range from alternate dispute resolution mechanisms (including arbitration and mediation) to such procedural devices as default and summary judgment, used by judges to decide cases at an early stage without having to proceed to a formal trial.

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[Click here](#) to look at the concept of *judicial review*.

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