A Comparison of Legal Systems

Legal norms cannot be fully understood without some knowledge of their sources, their political, social and economic purposes; the milieu in which they operate; the rule of the legal profession; the operation of the court system.”

M.A. Glendon

I. A word about legal systems and traditions: Civil Law, Common Law, Religious Law, Chinese Law, Tribal Law, Customary Law, Socialist Law, Mixed Systems

II. Civil law and common law: A comparison of systems.

A. Civil law legal system

1. Examples: Germany, France, Spain, Portugal, Italy, Austria Switzerland, The Netherlands, Greece, Latin America, parts of Africa, Japan

2. Historical roots in Roman Law: 1000 years of legal tradition.

   a. The Twelve Tables (450 B.C).

   b. Emperor Justinian’s compilation of Roman law: Corpus Juris Civilis (6th Century A.D.).

   c. Revival of Roman law in the 11th Century at the University of Bologna.

3. Characteristics of a civil law system.

   a. Main source of law is legislation compiled into comprehensive, structured codes.

   b. Methodical, interrelated approach to codes is an essential element of legal analysis.

   c. Importance of commentaries by legal scholars.
d. Case law is generally not a binding source of law. (Exception in Germany: decisions of the Constitutional Court)

e. Trial process differs from that of a common law system.

f. The judge plays an active role at trial in the development of evidence and questioning of witnesses.

g. There are often separate court systems for administrative, labor, criminal, civil and constitutional matters.

B. Common law legal system.

1. Examples: England and Wales, USA, Canada, Australia, New Zealand, India, Nigeria, Kenya, Zambia, Singapore, Malaysia and Hong Kong.

2. Historical roots in England

   a. The development of law differed from the process on the Continent.

   b. No reception of Roman Law.

   c. After the Norman Conquest in 1066, the “common law” as applied by the Royal Courts had a unifying, nation-building aspect to it.

   d. Judges and case decisions played a major role in the development of the law.

   e. More practical training of lawyers; no university training until the 18th century.

   f. Use of juries.
3. Characteristics of a common law system.

a. Judicial decisions are an important and recognized source of law.
   - Concept of precedent.
   - Case law analysis important.

b. Legislation is often referred to as “codes”, but differs from the structured, comprehensive codes of civil law jurisdictions.

c. Judges play a more important role than legal scholars in the development of the law.

d. The trial process is the adversary system and the parties’ lawyers control the development of evidence and questioning of witnesses. The judge’s role is often compared to that of a referee. (Keep in mind, however, the judge always decides matters of law and in non-jury cases, also disputed factual issues.)

e. The frequent use of juries to determine disputed factual matters in criminal and civil trials.

f. There are no separate court systems for administrative, labor, criminal, civil or constitutional matters.
III. Civil law vs. common law: “in a nutshell”.

A. Practical differences between the civil law and the common law legal systems.

1. Case law vs. structured codes.

2. Importance of scholarly opinion in civil law systems vs. judge’s role in developing the law in common law systems.

3. Court access: Civil law jurisdictions often have separated administrative, labor, criminal and civil courts. Not usually the case in common law systems.

4. The trial process and the role of the judge therein differ greatly. The judge plays a more active role in evidence development in civil law systems.

5. Juries exist in common law systems and make determinations of fact.

B. Convergence of the legal systems.