

COMMON LAW AND CIVIL LAW

CIVIL AND COMMON LEGAL TRADITIONS

Systems of law vary around the world. Two very common legal systems are the civil law and the common law. Often, the use of one system over another has to do with the history of the country or region in question. For example, France uses civil law and England uses common law; as a result, Quebec uses civil law because it was colonized by France, while the other Canadian provinces and territories use common law because they were colonized by England.

Civil Law

The term “civil law” can have two meanings. First, it can mean matters of private law, such as personal injury, contract cases or other legal disputes between private individuals. This is distinct from criminal law. Second, it can mean a legal system based on a civil code, such as the *Civil Code of Quebec*. This is the type of civil law being discussed here.

The civil law system is the oldest and most dominant legal system in the world, and originates from the ancient Roman system. In a civil law system, governments create complete codes of law. These are continuously updated to keep a recent account of matters that can and cannot come before courts. Therefore, government legislation is the primary source of law in a civil law system.

Common Law

The common law system dates back to the Norman Conquest in 1066. The law is developed through court decisions, rather than through legislative statutes alone. While legislation exists, it is interpreted by courts. Judges’ decisions as to the meaning and application of legislation then become the law. Therefore, the common law is flexible for changing circumstances and cases.

The common law system is premised on a concept called *stare decisis*. The term originates from the Latin phrase “*Stare decisis et non quieta movere*”, which translates as “to stand by decisions and not disturb the undisturbed”. Decisions in the common law are called ‘precedents’, and they guide judges in making future decisions in similar cases. Thus, courts are obliged to follow precedents and not disturb established law. If, however, a later dispute is factually distinct from the previous case, judges can distinguish between the cases and create a new precedent based on the new facts.

The concept of *stare decisis* is premised on the hierarchy of courts. The decisions of higher courts are binding on all lower court judges. For example, decisions by the Supreme Court of Canada are binding on all judges in all lower courts in Canada. Decisions of Provincial Courts of Appeal bind all the judges in that province. Superior Court decisions bind lower trial court judges. Judges are not bound by decisions of other judges of their own court.

Those decisions are persuasive but not binding. When judges create new law by interpreting legislation, they can override the literal reading of the legislation itself. However, the common law is still subject to the *Constitution Act*. Judicial decisions must be consistent with the *Constitution* and the *Canadian Charter of Rights and Freedoms*. Often, the legislature will respond to judicial decisions by amending or enacting new law in accordance with the court decisions or in order to ‘fill gaps’ in judge-made law.

THE ROLE OF JUDGES AND JURIES

Civil Law

In civil law jurisdictions, because of the focus on formal, written laws, judges decide cases primarily based on the applicable code. Juries are not generally involved. Judges may refer to prior court decisions, but they do so only to achieve consistency, and not because of a legal requirement to follow other judicial decisions. In place of juries, civil courts allow a very inquisitorial style by their judges. The judges question witnesses and are much more involved in the development of the evidence.

Common Law

The common law system may involve both judges and juries in trials. In Canada, any person being tried for a crime that carries a sentence of five years or more is entitled to a trial by jury.

When both judge and the jury are used, they have distinct roles in the common law trial. Judges play the role of a legal advisor, instructing the jury as to relevant laws and ensuring that the trial is run fairly. When the arguments have been completed, the judge advises the jury as to the laws it must consider and how to treat the evidence it has heard. The jury’s task is to assess the evidence and arguments and make decisions about the facts of the case. The jury then makes the ultimate verdict as to guilty or not guilty, and liable or not liable.

Outside of criminal law, jury trials are relatively rare in Canada. In the absence of a jury, the judge takes on both roles – trier of fact and of law – and makes decisions about liability, guilt and legal remedies independently.

SYSTEMS OF LAW IN CANADA

All of the provinces and territories, except Quebec, follow the common law. The *Quebec Act* of 1774 made Canada a bijural country, which means it has two types of law. Outside of Quebec, private law is governed by the common law, and in Quebec, private law is governed by the French *Code Napoléon*. Both in and outside of Quebec, public law – constitutional, administrative and criminal matters - are subject to the common law system. Today, the *Civil Code of Quebec* governs private law in Quebec by providing a comprehensive set of rules to deal with disputes between people in the province.

SYSTEMS OF LAW OUTSIDE OF CANADA

The civil law system is the most common system in the world. Among others, it is the system used in most of Europe, South America, Africa, and Russia and China. The common law system, on the other hand, is prevalent in England, as well as countries that are former colonies of the British Empire. Examples of such countries include the United States, Australia, India, Hong Kong, Pakistan, Ghana, South Africa, and Zimbabwe.

DISCUSSION QUESTIONS

1. What is the main difference between common and civil law?
2. In which system is 'precedent' an important concept?
3. Why has Canada developed as a "bijural" nation?
4. Would the common or civil law govern a personal injury case in Saskatchewan?
5. Would the common or civil law govern a constitutional case in Quebec?
6. Which country would you expect to have a common law system – New Zealand or Mexico?
7. Explain the concept of *stare decisis* and its role in the common law.
8. How does the trial process differ in a common law and a civil law system?
9. Discuss the potential for tension between the legislature and the courts in the common law system.
10. Imagine you are being tried for a crime. Would you prefer to have your guilt or innocence determined by a judge or jury? Draw from what you have learned in this handout in your answer.