Comparison of Civil Law and Common Law in Australia and Surrounding Countries

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Article

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Abstract.

This study aims to determine the legal system can be interpreted in two ways. First, the legal system is defined as a unit of components or elements (sub-systems) as follows: material law-formal law and civil law-public law. Included in this view are those who see the legal system as a unity between various laws and regulations with legal principles. Second, the legal system is defined as a unity of components: legal structure, legal substance, and legal culture. Eric L Richard, an expert in global business law, divides the main legal systems into six legal families: Civil law, Common law, Islamic law, Socialist law, Sub Sahara Africa, and Far east. This research is a qualitative research with a historical juridical approach that describes the legal history of how civil law and common law apply in various countries. By collecting data in the library supported by primary and secondary data according to the chosen topic. In general, based on how law is produced and implemented, there are two legal systems known in the world, namely, civil law and common law. The two legal systems have their own history and differences.

1. Introduction

The civil law legal system or also known as the Continental European legal system is a legal system characterized by the existence of various systematic codified (collected) provisions which will be further interpreted by judges in their application[1]. This legal system is referred to as Roman law because the Continental European legal system originated from the codification of laws used during the Roman Empire, precisely during the reign of Emperor Justinian who ruled Rome in the 5th century between 527 and 565 AD[2].

Main principles or basic principlesThe civil law legal system is that the law has binding power because it is a regulation in the form of a law that is systematically arranged in codification. Legal certainty is the goal of law. Legal certainty can be realized if all human behavior in social life is regulated by written regulations, such as laws. In this legal system, there is a famous adage which reads "there is no law other than the law". In other words, the law is always identified with the law[3].

[1] Dworkin, Ronald, 1981a, "What is Equality? Part 1: Equality of Welfare,"Philosophy and Public Affairs 10, pp. 185-246, reprinted in: R. Dworkin, Sovereign Virtue. The Theory and Practice of Equality, Cambridge: Harvard University Press 2000, p.11-64.

[2] Gribnau, H. 2010. Equality, Legal Certainty and Tax Legislation in the Netherlands – Fundamental Legal Principles as Checks on Legislative Power: A Case Study

[3] Howe, John. 2010. Centre for Employment and Labour Relations Law The University of Melbourne, The

Countries that base their legal systems on civil law codified are[4]: Albania, Austria, Netherlands, Belgium, Bulgaria, Brazil, Chile, Czech Republic, Denmark, Dominican Republic, Ecuador, Estonia, Finland, Guatemala, Haiti, Hungary, Indonesia, Italy (based on Roman legal system codified, with elements of the Napoleonic code of law), Japan (follows European legal system[5], with British-American influence), Germany, Colombia, Croatia, Latvia (mainly influenced by Germany, partly influenced by Russian and Soviet legal systems), Lithuania (partly influenced by Russian and Soviet legal systems), Luxembourg, Macau (based on Portugal's legal system based on mainland European traditions, which in turn was influenced by Germany, also influenced by The legal system in China), Malta (Originally based on Roman law and eventually progressed to the Rohan Code of Laws, Codex Napoleon with the influence of the Italian legal system. However common law Britain is also the source of the Maltese legal system, namely Public law, Mexico, Norway, Panama, France, Peru, Poland, Portugal, Russia, Slovakia, Spanish, Sweden[6], Switzerland, Thailand, Republic of China (Taiwan), People's Republic of China (based on Civil law system; drawn from Soviet and mainland European civil law principles), Vietnamese (communist legal theory and French civil law), and Greece (based on the codified Roman legal system)[7].

2. Research Methods

This research is a qualitative research with a historical juridical approach that describes the legal history of how civil law and common law apply in various countries. By collecting data in the library supported by primary and secondary data according to the chosen topic[8].

3. Results and Discussion

3.1. Understanding the Common Law System

Common Law legal system or Unwritten Law (unwritten law) or the Anglo-Saxon system is a legal system based on jurisprudence, namely the decisions of previous

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Broad Idea Of Labour Law: Industrial Policy, Labour Market Regulation And Decent Work, Working Paper No. 49 November 2010, Center for Employment and Labor Relation Law, Melbourne Law School, ISSN1321-9235.

[4] Watsons, Alan. 2009. Comparative Law and Legal Change. The Cambridge Law Journal, Vol. 37, No. 2, 2009, p. 313-336

[5] Meyers, Chris. 2004. Wrongful Beneficence: Exploitation and Third World Sweatshops, 35 J. SOC. PHIL. 319, 319 (2004).

[6] Roe, Mark, Political Preconditions to Separating Ownership from Corporate Control, Stanford Law Review, LIII (2000), 539–606.

[7] J. J. Burgers & Valderrama, Monsquera I. J. 2010. Fairness: A Dire International Tax Standard with No Meaning?, p. 770. See to Jones, Naomi., Bromley, Catherine., Creegan, Chris., Kinsella, Rachel., see to Dobbie, Fiona and Ormston, Rachel. 2010. with Alison Park and Miranda Phillips, Building understanding of fairness, equality and good relations, Equality and Human Rights Commission Research report 53, National, p.263 and Centre for Social Research and Scottish Centre for Social Research, Manchester: Spring 2010. ISBN 978 1 84206 266 1, p.29.

[8] Michelman, Frank. 2007. Constitutional Authorship, Constitutionalism: Philosophical Foundations, supra note 4, at 64.

judges which then become the basis for the decisions of subsequent judges.

The common law system existed in the Anglo Saxon countries and began its growth in England in the Middle Ages. This system is based on the principle that in addition to laws made by parliament (called statute law) there are other regulations which are common law[9]. This common law is not in the form of codified rules (included in a law book such as a civil code), but is a collection of decisions which in the past have been formulated by judges. So, in fact the judge also helped create the law with his decision. This is what is called case law or judge-made law[10].

Countries that apply this legal system include Ireland, England, Australia, New Zealand, South Africa, Canada (except Quebec Province) and the United States (although the state of Louisiana uses this legal system in conjunction with Napoleon's Continental European legal system). There are several countries that have mixed legal systems with Common Law, such as Pakistan, India and Nigeria, which apply mostly Anglo-Saxon legal systems, but also apply customary law and religious law.

The sources of the common law (Anglo Saxon) legal system are[11]:

- Custom
  It is the oldest source of law, because it was born of and derives from part of Roman law. This custom grew and developed from the customs of the Anglo Saxon tribes who lived in the Middle Ages. In the 14th century custom law will give birth to common law and then replaced by precedent.
- Legislation
  It is a law that is enacted through parliament. These laws are called statutes. Prior to the 15th century, legislation was not a source of law in England, because at that time laws were issued by the king and the Grand Council (consisting of prominent nobility and city rulers, and around the 14th century an overhaul was carried out which became known as the parliament.
- Case-Law
  It is all customary law that develops in society not through parliament, but is carried out by judges, so it is known as judge made law. Every judge's decision is a precedent for future judges so that the precedent doctrine is born until now.

3.2. History of the Civil Law System

Before the 13th century no one could provide clarity about what laws were applicable in Europe, it was only after the Roman empire which consisted of intellectuals began to try to create a legal system that began with the use of customary law or common tradition (western legal tradition).) prevailing in society[12].

[9] Canivet, Guy. 2003. The Interrelationship Between Common Law and Civil Law, Louisiana Law Review, Volume 63, Number 4, Summer 2003, p 937- 944.
[10] Orucu, Esin. 2008. What is a Mixed Legal System: Exclusion or Expansion", Electronic Journal of Comparative Law, Vol.12, No.1,May 2008, p. 2. See to Pagano, Marco, and Paolo Volpin, The Political Economy of Corporate Governance, CEPR Discussion Paper No. 2682, 2001.
[11] Ibid.
[12] Coleman, Jules L. 2001. The Practice Of Principle 206-07 (2001); JOSEPH RAZ, The Rule of Law and its Virtue, in The Authority Of Law 210, 213 see to Dahan, Yossi., Lerner, Hanna and Sivan, Faina Milman. 2013. Shared Responsibility and the International Labour Organization, Michigan Journal of International

In the 13th century, there was a development of the Romano-German legal system (The Romano Germanic System of Law) which originated from the codification of law in force in the Roman Empire during the reign of Emperor Justinian in the 5th century BC.

The following are some of the incubation stages of the Roman-German legal system which is usually called Civil Law (Latin: ius Civile), namely as follows[13]:

- An incubation period that began during the 13th century, in which there began to be efforts to find legal rules that developed in the customary law of society, but at that time these efforts did not go well because there were still things to be completed from customary law of the community. Another reason was the disappearance of customary law in Continental Europe due to the Roman occupation and the assumption that Roman law was better than their own law, so that a legal reception was held.
- This second period, began with reforms and Roman law in studies in universities. This period is an important and major period in the development of this legal system in the future.
- For five centuries this system dominated the development of law through the writings of jurists (la doctrine) and their experience in the field of law. At the same time, schools of law and doctrine have begun to be developed which are being used in a legal regulation.
- Eventually the Romano-Germanic legal system developed in Europe and countries outside Europe, although at different times and in different ways from each country.

3.3. History of the Common Law System

The Common Law system developed in most parts of the UK as a result of the activities of the courts in the UK, so that the law formed is not the result of parliament but is based on a legal case (low is not based on act of parliament but on case law) which is the guideline of judges in deciding a case (judge made law) through the decisions of these judges can be realized legal certainty, so that the principles and rules of law are formed into general binding rules. In addition to judges' decisions, the Common Law system also recognizes customs, written rules, laws, and state administrative regulations. It's just that all of that is not structured in a systematic and hierarchical form like the Continental European legal system (Civil Law system). The birth of this common law system began with the arrival of William (conqueror) from Normandy (France) who landed in England in 1066 and succeeded in establishing himself as the sole ruler of England, at that time people's lives were only based on diverse laws called Anglo Saxons (between German, Scandinavian law). The Conqueror Willian (Norman Conqueror) has provided a very meaningful legal history for England, because these conditions have led to the end of the period of customary law and the beginning of the formation of a system of feudalism and a legal system that will be

Law, Volume 34, Issue 4, 34 Mich.J. Int'l L. 675.

[13] Dainow, Joseph. 1966-1967. The Civil Law And The Common Law: Some Points Of Comparison. The American Journal Of Comparative Law, Vol. 15, No. 3, p. 419-435.

enforced throughout England. The formation of the legal system began with the unification of administrative law and property law which resulted in a centralized government and land throughout England became the property of the king.

When Civil Law, which is essentially a legislated law system, was introduced to England in the sixth century, the British rejected the use of the Civil Law system, because it would only destroy a life that had been based on tradition for hundreds of years. England is an excellent example of how a nation consciously chooses its own way of ruling[14].

3.4. Differences Between the Civil Law System and the Common Law System

The following are the differences between the Civil Law legal system and the Common Law legal system[15]:

- In terms of legal sources:
  - The civil law legal system originates from laws formed by legslatives (statutes), legal regulations, habits (customs) that live and are accepted as law by the community.
  - The common law legal system is sourced from judges' decisions/court decisions/jurisprudence (judicial decisions), written legal regulations (laws), administrative regulations and customs
- In terms of legal codification:
  - The civil law legal system has legal codification (included in a law book).
  - The common law legal system has no codification, but is a collection of decisions that have been formulated in the past by judges, where the judge as a law (la voix de la loi) only needs to explain what law applies in dealing with a case. specific to him.
- In terms of the form of justice:
  - The Civil Law legal system recognizes the administrative justice system which has become modern because of studies conducted by universities and no institution is needed to correct the rules.
  - The Common Law legal system only recognizes one court for all types of cases which is developed through the practice of legal procedures and requires an institution to correct it, namely the equity institution. This institution provides the possibility to elaborate on the existing rules in order to reduce tension.
- In the case of a judge's decision:
  - In the Civil Law legal system, the judge's decision is not considered as a rule or source of law. Often to strengthen their decision, the judge will also mention the decision of the judge who has given a decision in a similar case. These decisions are called jurisprudence. But the basis for the decision is still a certain article from the law book.

[14] Shapiro, Scott J. 2001. On Hart's Way Out, in HART'S POSTSCRIPT 149, 153 (Jules Coleman ed., 2001).
[15] Waldron, Jeremy. 2011. Planning for Legality, Michigan Law Review, Volume 169, Issue 6, Article 3, 2011, New York University School of Law., p.265

  - In the common law legal system there must be a previous judge's decision on the same type of case and absolutely must be followed[16].
- In terms of the judge's view:
  - In the civil law legal system, judges' views are less technical and not isolated from certain cases.
  - In the common law legal system, the judge's view is more technical and focused on a particular case.
- In terms of the role of judges:
  - In the civil law legal system, judges are not free to create new laws because judges only play a role in establishing and interpreting existing regulations based on the authority they have. Deliberate law-making by judges is generally impossible. In France for example, where the codification of law has been in place since the time of the Napolians, judges are strictly prohibited from creating case law. Judges must adjudicate cases only based on the legal regulations contained in the codification. This is what in law is referred to as the flow of statutory positivism or Legalism, which argues that the law is the only source of law. However, if the legal regulations in the codification do not appear to regulate the case submitted to the court, then the judge may give his own decision; but the decision does not bind the judges who later face a similar case (so there is no precedent). Here judges are more free than in countries without codification of law, in the sense that judges are not bound by precedent. And if there is a case that is submitted which turns out to be not regulated in a written regulation, the judge does not need to follow the previous precedent in giving his decision. In addition, judges in countries with codification systems are now also freer, because they, through the interpretation of old laws, can apply them to cases arising from new legal developments, so that in 1919 a decision of the Supreme Court in the Netherlands was equated. with the legislation of an entirely new civil code. Of course all of this does not reduce the authority of the legislature to amend previous judges' decisions with a law, even though those decisions are respected by even prominent judges; or to change a legal regulation. All of this is within the framework of the legislative body's authority to act in accordance with what has been determined by the constitution.
  - In the common law legal system, judges are tasked with interpreting and establishing regulations, creating new legal rules governing the life of the community, creating new legal principles that are useful as a guide for judges in deciding cases. This is what is called case law or judge-made law. According to CF Strong, the principle of judge-made law is based on precedent, i.e. the decisions of the previous judges are binding on subsequent judges in similar cases, although the variation of these decisions also depends on time. So, the previous decision is actually only a guideline. However, it can be considered that the judge by his decision has essentially created the law, even though this is completely different from the law made by the legislature. The British legal expert, AVDicey, in this connection said that: “the power of judges is essentially legislative

[16] Tetley, William. 2000. Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified). Louisiana Law Review. Volume 60 Number 3, Spring

(essentially legislative authorily of judges); while the eminent American judge OW Holmes argued that; judges act as legislators and rightfully so (judges do and must legislate). This case law principle is an important characteristic that we encounter in countries with a common law system, because in these countries there is no codification of law in the Code. judges act as legislators and rightfully so (judges do and must legislate). This case law principle is an important characteristic that we encounter in countries with a common law system, because in these countries there is no codification of law in the Code. judges act as legislators and rightfully so (judges do and must legislate). This case law principle is an important characteristic that we encounter in countries with a common law system, because in these countries there is no codification of law in the Code[17].

- In terms of category:
  - In the civil law legal system, the legal structure, legal system, and legal categorization are based on the law of liability. the structure is also open to change
  - In the Common Law legal system, the fundamental categorization is unknown. The Anglo Saxon legal system is based on very concrete rules.
- In terms of legal development:
  - In the civil law legal system, law is developed through science/university.
  - In the common law legal system, law is developed through practice.

4. Conclusion

Based on how law is produced and implemented, there are two legal systems known in the world, namely: Civil law and Common law. The civil law legal system is a legal system with the characteristics of various provisions being systematically codified (collected) which will be further interpreted by judges in their application. While the common law legal system is a legal system based on jurisprudence, namely the decisions of previous judges which then become the basis for the decisions of subsequent judges. Thus, there are some fundamental differences between the two legal systems.

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[2] Centre for Social Research and Scottish Centre for Social Research, Manchester: Spring 2010. ISBN 978 1 84206 266 1, p.29.

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[17] Van Jaarsveld, Fourie and Olivier, Principles and Practice of Labour Law (2004) par 51. (Van Jaarsveld, Fourie and Olivier Principles.)

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[11] Meyers, Chris. 2004. Wrongful Beneficence: Exploitation and Third World Sweatshops, 35 J. SOC. PHIL. 319, 319 (2004).
[12] Michelman, Frank. 2007. Constitutional Authorship, Constitutionalism: Philosophical Foundations, supra note 4, at 64.
[13] Orucu, Esin. 2008. What is a Mixed Legal System: Exclusion or Expansion", Electronic Journal of Comparative Law, Vol.12, No.1,May 2008, p. 2.
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[16] Shapiro, Scott J. 2001. On Hart's Way Out, in HART'S POSTSCRIPT 149, 153 (Jules Coleman ed., 2001).
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