

Tangl

English for Lawyers and Law Students

With a Short Introduction to the US Legal
System

3., aktualisierte Auflage

Linde
international

I. Important Differentiations

Civil Law versus Common Law (Legal Systems)

Civil or civilian law (as opposed to Common Law) is based on Roman law, especially the *Corpus Juris Civilis* of Emperor *Justinian*, as later developed through the Middle Ages by medieval legal scholars. Modern systems are descendants of the 19th century codification movement, during which the most important codes came into existence. The **Austrian Civil Code** was completed in 1811. Around this time civil law incorporated many ideas associated with the Enlightenment.

Today people use the term “Common Law” to denote the system of law that developed in England and was imported into countries influenced by the English. Civil law, on the other hand, is also sometimes known as “Continental European Law” although it is practiced around the world, such as in Latin America, Japan and most former colonies of continental European countries, but also in Quebec (Canada) and Louisiana (USA).

In the civil law system the primary source of law is a **code**, whereas Common Law rules are developed based on **court rulings**, (thereby also referred to as **case law**). The general principle of a case law system is that similar cases with similar facts should be solved by using the rules created in former similar (so called **precedent**) cases.

Still, the difference between civil law and Common Law lies less in the mere fact of **codification** than in the **methodological approach** to codes and statutes. Since **legislation** is seen as the primary source of law in civil law countries, courts base their judgments on statutes from which solutions in particular cases are derived. Therefore, courts reason extensively on the basis of general legal principles or draw analogies from statutory provisions to fill gaps. By contrast, in the **Common Law** system **cases** are the primary source of law, while statutes are interpreted narrowly. Consequently, judges have an enormous role in shaping the law.

It is often said that Common Law opinions are much longer and contain elaborate reasoning, whereas legal opinions in civil law countries are usually very short and formal in nature. But this is not the case in all civil law countries, since there are notable differences between the various **legal methodologies** used. In fact, in German-speaking countries court opinions are sometimes as long as American ones and often discuss prior cases and academic writing extensively. There are, however, certain **sociological differences**: civil law **judges** are usually trained and promoted separately from attorneys, whereas Common Law judges are regularly selected from accomplished and reputable attorneys. Also, the influence of academic writing by **law professors** on case law tends to be much greater in civil law countries. Civil and Common Law systems also differ considerably in courtroom procedure. While Common law functions as an adversarial system (contest

I. Important Differentiations

between two opposing parties before a **judge who moderates**), the civil law judge plays a **more active role** in determining the facts of the case. Also, civil law systems rely much more on written than on oral argument.

SIMPLY

Civil law is primarily contrasted against Common Law, which is the legal system in England, the US and other countries influenced by the English. The **distinguishing characteristics of the civil and Common Law systems** lie in the **sources of law** and the **procedure used in courts**: civil law is a law enacted by a nation or state for its own jurisdiction; it is a codified system of law setting out a comprehensive system of rules that are applied and interpreted by judges. In the Common Law system the primary sources of law are **judicial decisions**. These opinions contain legal principles that can be applied to solve future cases.

Discuss

Which other meaning of civil law do you know?

Explain the main differences between civil and Common Law!

How do the careers of civil law judges differ from their Common Law counterparts?

Is the role of a civil law judge different from the role of the Common Law judge?

Are there any advantages / disadvantages of the civil law judicial design?

Concepts

branches of government

most governments (such as the US government) can be divided into three separate branches: legislative, executive and judicial branch, whereby each branch has its own responsibilities (making, executing and interpreting the law).

case law

in Common Law systems, higher court decisions are binding on lower courts in cases with similar facts and similar legal issues. This concept of *stare decisis* (see below) means that lower courts are bound to appellate cases. The law based on judicial decision and precedent rather than on statutes (case law) is distinguished from “statutory law,” which is the statutes and codes (laws) enacted by legislative bodies.

civil law

as opposed to Common Law: body of laws and legal concepts derived from old Roman laws which differ from (Angloamerican) Common Law; *also*: generic term for non-criminal law.

code

systematic and comprehensive (written) compilation of laws, rules or regulations, which are classified according to subject matter. The process of collecting and restating the law is known as “codification”.

Common Law

the system of deciding cases referring to former (precedent) cases, which originated in England and was later adopted in the US. Today, many Common Law principles have been transformed into statutes with modern variations.

Court of Equity

originally, in English Common Law and in several states there were separate courts (some called “chancery courts”) which handled lawsuits and petitions dealing with various non-monetary claims. The judicial remedies (“equitable remedies”) developed by these courts provided flexible responses to changing social conditions allowing courts to use their discretion. Nowadays, most Courts of Equity have merged with courts of law.

judiciary

the judicial branch of government.

legal methodology

the system of methods followed in a particular (*here*: legal) discipline; an organized set of procedures and guidelines (method, *modus operandi*, approach). Sometimes, methodologies include a step-by-step “cookbook”-approach for carrying out the procedure.

legislative act

an act passed by a legislative body.

legislative enactment / legislation

lawmaking; the preparation and enactment of laws by a legislative body.

precedent

an appellate court decision which establishes a legal rule (authority) and is therefore cited as an example to resolve similar questions of law in later cases. The principle that a lower court must follow a precedent is called *stare decisis* (see below).

provision (of law)

a statute often has various provisions (articles, clauses).

stare decisis [ster-ē-di-sī-səs]

Latin for “to stand by a decision”; it expresses the (Common Law) doctrine that lower courts are bound by higher court decisions (precedents) on a legal question which was raised by the lower court. A trial court judge must not ignore the precedent until the appellate court changes the rule.

statute

written law enacted by state legislature; local statutes or laws are usually called “ordinances.” Regulations, rulings, opinions, executive orders and proclamations are not statutes.

NOTE THE DIFFERENCE

justice:	1. justness, fairness	2. judge
judiciary:	1. judicial system	2. the bench (= all judges)
jurisprudence:	1. legal philosophy	2. decisions of the courts
jurisdiction:	legal authority/power	

Vocabulary

article	Paragraph
binding precedent	bindender Präzedenzfall
codification	Kodifizierung
to enact a law, to pass a law	ein Gesetz erlassen, verordnen
equitable	billig, billigkeitsgerichtlich
to establish a precedent	einen Präzedenzfall schaffen
executive order	Durchführungsverordnung
to follow a precedent	einem Präzedenzfall folgen
judiciary	Justiz, Justizgewalt, Rechtssystem
jurisdiction	Zuständigkeit, Gerichtsbarkeit, auch: Rechtsprechung
jurisprudence	Rechtswissenschaft, Jurisprudenz, Rechtslehre
ordinance	Anordnung, Verordnung
to overrule a precedent	einen Präzedenzfall außer Kraft setzen, aufheben
precedent (case)	Präzedenzfall
provision	here: Klausel
remedy	Abhilfe, Mittel, Rechtsmittel
to resolve	lösen, beseitigen, aufklären
sources of law	Rechtsquellen
stare decisis	Grundsatz der Bindung an Vorentscheidungen
using equitable discretion	nach billigem Ermessen

Substantive Law versus Procedural Law

The question of whether a law is procedural or substantive is often a difficult one to answer. In the criminal context one could say that substantive laws define which acts are criminal and the punishment for violating them, whereas procedural laws regulate the steps by which the guilt or innocence of someone who is accused of a crime is determined.

In general, procedural law comprises the rules by which a court operates and in doing so determines what happens in legal proceedings. The rules are designed to ensure a fair and consistent application of *due process*/fundamental justice to all cases that come before a court. Substantive law, on the other hand, is the statutory or written law that governs the rights and obligations of those who are subject to it. Lawyers often **distinguish procedural law from substantive law** by referring the latter to the actual claims and de-