

## **“What are the Similarities and differences between the Common Law and Civil Law Systems and is it possible for the two systems to merge into one?”**

Both the Common Law and the Civil Law are significant legal systems. Traditionally, the foundation of the Civil Law is Roman law. However, it seems that the Common Law has slightly been influenced by Roman law. In terms of theoretical structure, the Common Law system has its own characteristics which are completely different from the Civil Law system such as foundation, legal structures, attitudes and procedure; nonetheless, there are some similarities of the actual working of the legal systems. Because of some similarities, it has been questioned whether the two legal systems can be converged in the future. It is argued that the two legal systems cannot harmonize because they are slightly similar whereas they are substantially different. Therefore, this essay will analyze the differences in the theoretical structure and the actual working of the legal system as well as providing examples which have been occurred in both legal systems. These will be followed by, more significantly, a presentation of the reasons why harmonization of the Common Law and the Civil Law would, in reality, be difficult to achieve.

### **I. What are the differences between the Common Law and Civil Law Systems?**

Particularly, theoretically, the two traditions are obviously different from each other in terms of formulations, divisions, legal reasoning, functions, and the functions of judgement.<sup>1</sup> Firstly, the formulation of law is different. The Common Law is the judicial system that the judges have significant role to decide the cases by using the technique of distinguish. According to Schwartz B,<sup>2</sup> most legal rules are laid down by the courts. In contrast, the Civil Law is the legislative system. The role of the civil judges is to follow the laws which are located in the codification rather than the precedents, and also the judges will use the technique of interpretation to decide the case. Secondly, in theory, both systems have completely different divisions. The Common Law divisions are common law and equity. Equity is supplemented the common law by offering compatible remedies in some cases to prevent the common law from being too rigid. In addition, the Common Law does not separate the category as the Civil Law system. Conversely, the Civil Law divisions are public law and private law. The public law consists of

constitutional and administrative law whereas criminal law, contract law, torts, property law, family law, succession, and trusts are included in the category of private law. Thirdly, the logic of the Common Law is clearly dissimilar from the Civil Law. The Common Law reasoning is inductive. The method is to find the general principle which is quite unique. In contrast, the Civil Law is deductive. Fourthly, the function of judges is fairly different. In the Common Law system, the judges must follow the previous case, the precedent; however, the judges have great authority to make the decisions if there is no precedent. Alternatively, in the Civil Law system, the judicial decision is a persuasive authority so the judges do not have power to make its decision beyond the requirements of law.

From these reasons, it can be stated that theoretically, the two traditions are clearly different from each other, so the two systems may not be harmonized.

## II. What are the similarities between the two systems?

The Common Law and the Civil Law are different in conception, function, foundation, legal structure, and attitude which all have effects upon legal process.<sup>3</sup> However, there are some similarities between the two legal families which are demonstrated including Judge made law, Hierarchy, Pragmatism, and Legislation.

### Judge made law

The Civil Law system is code-based and all rules will be found in the Code. Under article 5 of the Civil Code of France,<sup>4</sup> the judges are not empowered to make law and are forbidden from making general rules.<sup>5</sup> According to David Rene, Civil Law in theory is a closed system that the judges have merely authority to find the rules located in a code and to apply in cases.<sup>6</sup> This is distinct from the Common Law system because the Common Law is a system of judge made law. There is now an acceptance that the judges would, in effect, be law making if there is no relevant legislative provision on the matter in question.<sup>7</sup> In the Civil Law, although apparently, all rules are provided in the Code, in reality, some situations, which have never happened before, have no rules to deal with them. For example, if there is a choice of provisions in a code, judges can make law by selecting one rather than another.<sup>8</sup> Thus, it can be said that the judge has made law even though strictly speaking this is denied. An example of this situation under the Civil Code would be article 1384, concerning the meaning of 'strict liability' because it is extremely broad and means that the judges can interpret extensively. For instance, applying article 1384, in the *Desmare* case,<sup>9</sup> John Bell comments that 'The court seems to achieve the desirable state of the law by an imaginative interpretation'.<sup>10</sup> It is stated that 'French Court speak of 'presumption of liability', but this presumption is so difficult to rebut that it is almost identical to the special statutory torts in

Germany based on strict liability'.<sup>11</sup> For instance, regarding the 'construction', the owners are responsible unless they can prove the third party accepted the risk.<sup>12</sup>

It can be argued that if the judges are able to choose the articles and can bring the facts of a case within, the law is to extent made by the judges. However, unlike the Common Law system the judges may in this sense make law, the decisions are not formally binding on the courts. Apparently, the Civil Law judges can make law in practice but theoretically, they are not allowed to perform.

According to Troper and Grzegorezyk,<sup>13</sup> in the actual working of the legal system, the Civil Law accepts the concept of 'a leading case' and this can be seen from one hundred decisions of the Cour de cassation, which are published.<sup>14</sup> Although case laws are not binding on the lower courts, mostly the judges refer to the decisions made by the Cour de cassation, and are in practice followed.<sup>15</sup> In addition, Serverin states that the decision of the court seems to develop into a source of legal norms and support a normative conception of law.<sup>16</sup> As a result, it is obviously seen that the court plays the key role in formulating the decision. It can be seen that in the Civil Law, the theoretical structure is clearly different from the actual working because there are some situations which cause the judges to make law. Consequently, although Civil Law judges do make law and this is similar to the Common Law system, it is rarely stated that way simply because in theory judges are

prohibited to make law in general.

### Hierarchy

Hierarchy is important in the Common Law system because according to the Doctrine of Precedent, the lower courts are bound by the previous decisions of the higher court. It is on the contrary with the Civil Law system according to theory. In reality, it is uncommon that the Civil Law judges in the lower courts will obviously go against the recognized case law of the Cour de cassation. Nevertheless, the Civil Law judges in the lower court may disobey when they believe the Cour de cassation is wrong. If so, however, the Cour de cassation can reverse the decision on appeal. To demonstrate the Cour de cassation is wrong, the judges have to find strong evidence to support this. Because of this, it seems that the lower court in Civil Law may not follow higher courts' decision. In fact, the lower courts may not avoid the higher court's decision when the decision was remitted or conflicted among lower courts.<sup>17</sup> Lawson states that in a different sense the hierarchical organization of courts in the Civil Law country is using judge made law. Increasingly, the tradition is for the lower courts to look at the highest court's decisions. As a result, it seems that the lower courts in the Civil Law are still binding the courts which prevail although theoretically, are not a certainty.

### Pragmatism

According to John Bell, the French civil law is usually criticized as extremely conceptual and the French lawyer seems to be a writer of legal doctrine. The French tradition of sociology is seldom empirical; however, case law or general knowledge is used to demonstrate the social situations or needs. Currently, however, the Civil Law seems to take more pragmatic turn when the judges make a decision in individual cases. According to Rodolfo,<sup>18</sup> truly position is 'French Law is not conceptually driven' because the judges and doctrinal writers operate together to decide the cases. From this statement, it seems that the judges use more direct experience to make their own estimation. Although theoretically, the Civil Law is not pragmatism, in reality, it is applied. It is not only case law or general knowledge which is used to illustrate the social situations but judges are allowed to make law as well.

### Legislation

Legislation plays an important role in the Civil Law system as well as in the Common Law. Once, the legislation was the secondary source; however, nowadays, the legislation is becoming more and more significant and eventually, it becomes a primary source in the Common Law system. The wording of a statute can sometimes be specific enough to leave a common law court with no discretion. As the statutory provisions have priority over case law, this will clearly limit any law making function the judge has.

### III. Is it possible for the two systems to merge into one?

Although theoretically there are many differences between the two legal systems including structures, essential characteristics, and the actual work of judging cases, in reality, there are some similarities such as judge made law, pragmatism, and legislation. Because of these, it has been questioned that in the future whether both systems can harmonize into one system. Since this question has been asked, there are many writers presenting their opinion based on the two legal structures. Some writers state that the two legal systems can be converged; nonetheless, others argue that the two systems cannot be converged. Many arguments put forward about the possibility of converging the Common Law and the Civil Law in the future.

#### ( 1 ) Both legal systems are converging

Some writers state that at present, both the Common Law and the Civil Law are beginning to converge naturally. Rene de Groot<sup>19</sup> indicates that both legal systems have similar rules in many areas. Moreover, H. Patrick Glenn<sup>20</sup> refers to 'a continual rapprochement' between the Civil Law and the Common Law world. Apparently, both of them agree on the rules, concepts, substantive and adjectival law, and institutional bodies. It is not only Glen and Groot but also Basil Markesinis who maintain that both systems are converging. Markesinis argues that 'there is a convergence in the

sources of our law since nowadays case law de facto if not de jure forms a major source of law in both common and civil countries'.<sup>21</sup> As Basil Markesinis has indicated it seems that each system borrows rules concepts and procedural matters. Therefore, it seems that rules, concepts, substantive and adjectival law, and institutional bodies are becoming common to both systems.

### **(2) Two systems cannot be converged**

In the Civil Law system, rules of law are made by legislation. The legal rules have been laid down in the form of a legislative enactment based on the doctrines of legislators and legal scholars rather than on the practice of the courts.<sup>22</sup> In contrast, the Common Law system, most legal rules were originally laid down by courts in connection with specific cases to be decided by themselves.<sup>23</sup> In this important respect, it is argued that the two legal families are broadly dissimilar.<sup>24</sup> According to Legrand, in the Common Law, the cognitive structure diverges from Civil Law.<sup>25</sup> He contends both rules and concepts whether the legislative system or the judicial system is difficult to merge because the concepts may not correspond to each other. Also, the differences in legal culture and legal language between the Civil Law and the Common Law are difficult to comprehend. Hence, in Legrand's view it seems hard to accept that the two legal systems are actually converging because rules and concepts differ merely slightly. More evidence is required in order to support the view that both

systems are converging. Furthermore, Legrand suggests that as a minimum there are two matters including cultures and rules to demonstrate that it is convergence. He also argues that 'once one moves away from rules and concepts, it is no longer at all clear that the Civil Law and Common Law world are converging'.<sup>26</sup> Legrand concludes that the idea of a convergence of legal systems is misleading and Donald Kelley agrees that legal systems are not converging and they will not be converging because of different analysis and mentalities.<sup>27</sup> More importantly, there are many differing issues such as the nature of legal reasoning, the significance of systematization, the character of rules, the roles of facts, and the meaning of rights.

Firstly, the nature of legal reasoning is diverse. Samuel states that the notion of the Common Law lawyer is analogical while the Civil Law reasoning is institutional. Secondly, the significance of systematization, as it is known that naturally Common Law is a pragmatic system which focuses on results rather than methods, functions rather than shapes. Also, the judicial attitude, which is the rules of law, is used to solve problems in particular cases. As stated by Lord Diplock, 'the primary duty of the Court of Appeal is to determine the matter'...<sup>28</sup> Conversely, the Civil Law is a code-based legal system which emphasis on schematic patterns. Thirdly, regarding the character of rules, the Common Law does not provide rules in the texts but rules are produced in the case. Schauer states that the judges will

refer to precedent rather than rules. All these points appear to indicate that the Common Law is distinct from the Civil Law and support the view that the two systems cannot achieve great understanding between each other. Thus, it would be different for the Common Law and the Civil Law to harmonize because of the different legal traditions, foundations, structures, processes, or legal attitudes within each system, which are basically different.

### Conclusion

The two legal systems are absolutely different in the theoretical structures but in reality, the two systems do process some similarities. However, this is inadequate to indicate that ultimately, the Common Law will be merged with the Civil Law although the two systems are coming closer to each other in some particular fields such as judge made law, pragmatism and statute law. This is because the essential characteristics, structures, and attitudes in the Common Law are completely dissimilar from the Civil Law. According to Legrand and other proponents, the two traditions cannot be converged because, as affirmed by Samuel, they are extremely different in legal foundation, concepts, structures, rules, politics, and legal attitudes.<sup>29</sup> As Legrand says 'not only does civilian not think like a common law lawyer, but also he cannot understand how a common law lawyer thinks'.<sup>30</sup>

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