

Common law

MISHAL HUSAIN: In England the legal system is based on common law. Over the centuries English judges have unified and developed laws using a system of precedent and established practice. By contrast in the rest of Europe, civil law forms the basis of most legal systems. Civil systems generally feature a code setting out basic rights and duties and in some cases can be traced right back to Roman law.

In 2004 the BBC's Unreliable Evidence set out to explore the differences between the two systems. Here's presenter Clive Anderson introducing his panel of experts.

CLIVE ANDERSON: To discuss laws common and uncommon, civil and uncivil, I am joined by Conrad Schiemann, one of the English judges at the European Court of Justice. Hugh Mercer is a barrister specialising in EU competition law, public and private international law. He has appeared in cases involving the European Commission. Professor Basil Markesinis who has joined us on this programme before is a leading expert on comparative law. Professor John Bell is another distinguished academic expert, currently professor of law at Pembroke College, Cambridge. Well, a distinguished panel. Professor Markesinis, how would an ordinary person, maybe an ordinary litigant recognise the difference between a court with a historical basis as a civil law or the common law?

PROFESSOR BASIL MARKESINIS: I would have put it in this way, the oracles of the law, the people who tell us what the law is are in the continental European systems are the academics and the universities, and in the common law system are the practitioners and the judges. And that's a very important difference because academics go for system and logic and structure and theory, and they therefore tend to be system builders. Whereas our lawyers are practitioners. They look for the problems and they try to find the right remedies. So they are problem solvers.

CLIVE ANDERSON: What sort of analogy would be drawn there between the way perhaps a town or a city might develop in England, using old roads and gradually building up as opposed to one, a new town which was laid out on a grid pattern.

PROFESSOR BASIL MARKESINIS: Yes, I think it's true to say that our system has developed incrementally without the kind of sort of structure that the European systems had from the beginning largely for the reasons you said. The inheritance of Roman law. But these differences are being attenuated in practice and gradually I think we're all moving together. There's a give and take, we are adapting to their ideas and they are taking many of ours.

CLIVE ANDERSON: Can I just talk to Professor John Bell at the moment. Now I've mentioned that under the civil law system greater respect is given to academic lawyers. Do you look forward to your views as a professor of law having more weight possibly with English judges as they approach their judging?

PROFESSOR JOHN BELL: Well certainly some English lawyers are having considerable weight with English judges already. And I think the pattern in what are called civil law systems is actually quite variable. In the areas that I specialise in which are administrative law and public law, most European systems are actually judge made in developed principles often the main doctrinal writers are practitioners and not academics.

CLIVE ANDERSON: So there's a distinction there?

PROFESSOR JOHN BELL: So that, so that - that blurs the distinction. I think it depends very much on the branch of law that you're operating. In private law that has tended to be developed from Roman law. Those principles were taught first in the universities and then exported to the practitioners. In public law which is the base for the European Convention on Human Rights and also in constitutional law which relates as much to the European Union as well, there are influences very much from the practitioners, and there's a debate between the practitioners and the academics which

is a very fruitful one. So I think what is happening already is that within the civil law systems there is much more of a mix than perhaps is characterised by the stereotypes that we often use.

CLIVE ANDERSON: Well Hugh Mercer is a practitioner in this area of the law and is anxious to say something.

HUGH MERCER: : If one looks at the European Court of Justice where of course Judge Schiemann sits, this court since, particularly since 1973 has built up what is equivalent to a common law system. A system built up on decided case law. Influenced by academics but academic writers possibly don't have quite the same force as they would in the standard civil law system. A case which came to mind was the Trans Oceanic Paint case, one of the early cases on the right to be heard. The European Commission had taken a decision granting an exemption to a company with a particular condition attached to the exemption. And the company concerned had not been consulted on the content of the condition. And Advocate General Warner, the British advocate general of the time looked at the different systems, found the French and Belgian and Italian systems essentially lacking on this point, and lifted the [LD alder impartum?] rule from English law and then applied that as a rule of community law.