



Understanding Judicial Discretion: A Comparative Study of judge's legal reasoning in Civil Law and Common Law Jurisdictions

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Abstract. *This article examines the concept of judicial discretion within the two primary legal systems: Civil Law and Common Law. Judicial discretion is often perceived as the freedom granted to judges in decision-making, impacting the integrity and consistency of judicial rulings. Consequently, this study endeavors to bridge this gap by exploring how judicial discretion and judges' legal reasoning function in these dual legal systems. Employing a comparative qualitative method, this research includes data analysis from both legal frameworks. The result indicates that civil and common law judges possess similar levels of discretion. Although in common law, precedents bolster judicial discretion, it does not necessarily influence judicial decisions. This situation is particularly evident in the current climate, where judges face pressures to consider social and cultural norms, especially in an era of globalization and legal reform. This study contributes to understanding how judicial discretion operates across various legal traditions and its effect on justice enforcement.*

Keywords: judicial discretion, legal reasoning, civil law, common law.

I. Introduction

Midst a complex global society, courts often face the challenge of interpreting rapidly evolving laws. Judicial discretion is one of a judge's most debated and scrutinized qualities. Discretion is judges' liberty in making decisions or discerning the relevant facts in specific cases. While this discretion provides flexibility, it also calls into question the integrity and consistency of judicial decisions [1]. Common law and civil law are the two principles of legal systems worldwide. These systems have distinct historical roots, traditions, and methods in their approach to legal reasoning and the application of law. In the Civil Law system, decisions are based on written legal codes. Conversely, in the Common Law system, decisions rely on precedents, namely prior rulings made by other judges [2].

One underexplored area is the application of judicial discretion within the context of judges' legal reasoning in these two legal systems. This studying will not only provide deeper insight into how decisions are formulated but also how laws are comprehended and interpreted in practice. In the past decade, numerous countries operating under civil or common law systems have undergone constitutional changes, judicial reforms, or both. This evolution has sparked questions regarding how judges should consider laws, precedents, and social norms in decision-making [3]. Have such reforms altered the way judges think or rationalize their decisions? And if so, are these changes uniform across jurisdictions, or do they vary between civil and common law systems?

Additionally, in the globalization era, judicial systems are under increasing pressure to understand and accommodate the norms and values of other legal frameworks, particularly in cases with international stakeholders. In this milieu, grasping how judicial discretion functions across diverse jurisdictions and within various legal traditions is becoming critically important. However, there is a noticeable deficiency in the literature that compares explicitly and examines the operation of judicial discretion and judges' legal reasoning within the civil law

and common law systems. Although some studies have delved into this subject within certain jurisdictions, there is a lack of research offering an exhaustive comparative analysis.

Consequently, this study endeavors to bridge this gap by investigating how judicial discretion and judges' legal reasoning function within these legal systems. It aims to impart valuable insights into the judiciary's workings, the decision-making process, and how law is translated into justice in practice.

The main topic of this essay is when and how judges can make laws through their rulings. In this regard, researchers examine how the legal idea of discretion fits into the application and interpretation of the law, and in the event that the option for the judicial power to fulfill this authority. Additionally, the ways in which judicial discretion differs from legislative and administrative discretion are considered. Understanding the application and interpretation of the law as an exercise of judicial discretion is a crucial component in helping us understand how judges in common law and civil law systems formulate the law. This logic will enable us to identify key components of a trend observed in Latin American nations like Brazil and its recently enacted Civil Procedure Code, which emphasizes the importation of common law techniques to boost judicial power and address social needs.[9]

II. METHOD

To gain a comprehensive understanding of judicial discretion in the legal reasoning of judges within civil law and common law jurisdictions, this study employs a comparative qualitative approach, wherein data extracted from scholarly journal articles is analyzed. The results from both legal jurisdictions are compared to identify commonalities and disparities in exercising judicial discretion.

III. RESULTS AND DISCUSSION

The recognition of the need for legal regulations to prevent capricious actions by decision-makers has grown over time. An exemplary case can be traced back to the reign of Emperor Justinian in Ancient Rome in 533 AD. During this time, judges were strictly prohibited from interpreting laws and were required to rely on established criteria when faced with ambiguity. With the passage of time and the rise of liberalism, notably in France following the revolution, these dynamics continued. The establishment of the "référé légal" institution in 1790 aimed at forming the Court of Cassation to prevent deviations by judges from the laws, considered an infringement on the Legislative Power's bounds and a threat to the separation of powers within the burgeoning Rule of Law state. Laws enacted during the early revolutionary period forbade judges from interpreting laws, albeit only in specific instances. However, this approach was seen as a judicial regression, a view that persisted into the 19th century when Robespierre's ideas began to dominate, signaling a conceptual shift. Robespierre asserted that past jurisprudence was no longer pertinent and needed abandonment. This reflected liberalism's influence in shaping the republic, leading to legislative dominance over the judiciary [4].

Consequently, the emergence of "retained interpretation" referred to the radical view that regarded any form of legal interpretation by the judiciary as a threat. This was based on the notion that lawmakers, as the setters of standards, had the exclusive right to interpretation, a perspective propelled by political aspirations prioritizing subordination and reliant on political decisions emphasizing legislative dominance over the judiciary, indicative of a crisis in judicial independence. Only in the 20th century, while the Rule of Law was implemented, judicial discretion was introduced into the Roman continental legal system. This underscored the role of autonomous judges in discerning and adjudicating, with the obligation to ensure necessity, proportionality, and fairness in law enforcement. Embedded in the social contract, this expectation recognizes that legal practice is a structured process and should not be absolute [4].

Ultimately, courts began to be afforded more leeway in interpreting written laws, a shift mirrored in the judicial practices of countries with civil law systems, including Argentina, Switzerland, Mexico, Peru, Brazil, and Italy. Even in the Netherlands, where there has been an extensive codification of civil law, judicial discretion continues to be recognized and exercised. Similarly, in France, a specific provision in the civil code allows judges to engage more profoundly with legal texts, particularly in cases where the text is ambiguous or incomplete [5].

In the civil law system, the judge's role, as outlined by John Henry Merryman, is closely related to the circumstances present during Justinian's codification process, essentially limiting judges' latitude in creating law beyond what is established by authority. In this context, MacLean identifies three structural factors leading to confined judicial discretion in interpreting codified law. The first is the perception that legal codification is exhaustive, diminishing the necessity for further interpretation. The second factor is the imposition of penalties on judges who dare to issue rulings contrary to existing laws. Lastly, there is a lack of innovation from judges in case handling due to excessive caseloads. Nonetheless, judges often interpret the law to align it with the realities of the cases at hand, potentially evolving the existing written statutes.

As global society advances, the legal realm has faced numerous challenges in adapting to and accommodating diverse legal norms and traditions. One critical area in contemporary legal debates revolves around judicial discretion and how judges employ it across various legal systems. Firstly, we must understand why judicial discretion is so pivotal. As articulated by Juan A. Cruz Parceró [3], judicial discretion affords judges the latitude in decision-making. However, with this freedom comes questions concerning the integrity and consistency of judicial rulings. It challenges the extent to which judges' decisions are influenced by their interpretation of the law rather than a consistent and fair application.

Then, grasping the fundamental distinctions between Civil and Common law is crucial. Rene Brouwer points out that in Civil law, judges' decisions are more grounded in statutory law. In contrast, in Common law, previous decisions (precedents) play a significant role [2]. This raises the question: Are judges under Common law more inclined to exercise their discretion than their counterparts under Civil law? On another front, globalization has forged new challenges for the legal realm. Judges must consider norms and values from other legal systems in some instances. This scenario elevates the role of judicial discretion to critical levels, as judges navigate between stringent application of the law and acknowledging the broader social and cultural contexts. This study delves into how judges exercise their discretion in administering law and justice within two distinct legal systems, namely civil law and common law. We compare the application of judicial discretion in these systems to comprehend how such discretion influences the ultimate outcomes of cases and impacts the fairness of the legal system.

It's essential to recognize that the common-law system comprises the application of legal rules, legal principles and judicial precedents from which they are derived. These decisions must be applied to all subsequent cases to establish uniformity, consistency, and certainty. A judge does not possess the liberty to disregard these rulings, as it could be argued that these determinations are not as clear-cut and prudent as those the judge would formulate independently [2].

Holger Spamann's research offers valuable insights indicating that horizontal precedents do not influence common law judges in their judicial decisions. Specifically, Holger's findings were confined to samples from India and the USA. Precedent has exerted significant influence and determined the outcomes of numerous cases in the real world. Lower courts abide by the vertical precedents set by higher courts in a functional judicial organization. In addition, the stability of a court's composition—or that of a court panel—encourages adherence to precedents. For instance, since the U.S. Supreme Court ruled in *Obergefell v. Hodges* (2015) and lower courts that had previously ruled otherwise have all adhered to the precedent that same-sex marriage is constitutionally protected in the United States. This includes the Supreme Court. However, potential reversals from lower courts and ongoing judicial preferences in higher courts threaten this deference (unless their composition changes substantially). Vertical precedents, established by higher authoritative courts, have little impact on the decisions of federal judges regarding state law issues when they operate outside of this hierarchy (e.g., State Supreme Courts). The demonstration of deference to precedent is limited to circumstances such as the *Obergefell* case. *Obergefell v. Hodges* referenced more than a hundred precedents from different courts, some of which were older than a century, but none of them were applicable. According to the findings of Holger's research, precedents have a negligible impact on decisions in such circumstances. [6].

In resolving legal disputes, English lawyers typically reference previous analogous cases, considering the relevant facts and decisions made. They regard details concerning individuals, locations, timing, and the like as relatively insignificant unless compelling reasons suggest otherwise. They aim to discern the rationale behind prior rulings, often called the "ratio decidendi" of the decisions. Once a ratio is identified, it can be applied to the current case. When the court presents two comparable ratios, frequently plural, English solicitors opt for the more appropriate option, even though both are legally binding. An additional obstacle that frequently confounds continental attorneys is that, in appellate cases, the decisions are frequently composed of the evaluations of three or more judges, each delivering their assessment of the case. To determine these ratios, it is not imperative to consider every opinion put forth; only the binding majority opinions hold relevance. Decisions rendered in the

UK Supreme Court during the appeals process frequently incorporate five or seven opinions, giving rise to the possibility of five or seven sets of *ratio decidendi*. [2].

As a civil law country, discretion in Indonesia is a tool to bridge inconsistencies between Law Number 7 of 1989 and Law Number 7 of 1989. The basis for judges' discretion in assessing relative competence is their liberty to employ legal reasoning (*ijtihad*). According to Arkoun, *Ijtihad* is a scholarly endeavor to clarify ambiguous matters in service of the Islamic community's progress. Using *ijtihad*, Islamic law is updated to ensure that it remains in harmony with the dynamics of society. In the interim, *ijtihad* permits judges to address various societal issues brought about by technological and social progress while adhering to legal principles. This *ijtihad* includes judges' discretion when determining the relative competence of those presiding over divorce cases. Divorce matters may be adjudicated in the court with jurisdiction over the wife's place of residence, regardless of whether she vacates the marital residence without her husband's consent. The objective is to attain expeditious, transparent, and economical justice, by the regulations outlined in Law No. 48 of 2009 concerning Judicial Power and Law No. 7 of 1989 concerning Religious Courts, amended by Law No. 50 of 2009. [7].

A top-down or deductive principle is utilized in the civil law tradition to resolve legal disputes by applying pertinent rules derived from systematic law to the specific case under consideration. The framework employed in this instance conforms to Aristotle's notion of practical syllogism, in which the principal proposition is the applicable ruling. Simultaneously, the facts function as a secondary proposition, establishing the foundation for the deduced conclusion. How the French Supreme Court applies its jurisprudence exemplifies this methodology. The Court often articulates its judgments in a single sentence, where the major generally refers only to an article of the rules. At the same time, the facts are considered the minor proposition used to deduce the case's outcome. However, occasionally, the court needs to articulate the general formulation of the significant proposition. Within this tradition, liberal interpretation methods have been cultivated to operationalize abstract concepts, facilitating interpreting and applying legal rules in concrete cases [2].

Within the civil law context, it's found that a judge can only convict a defendant if they possess a firm conviction that the defendant committed the crime, and at least two pieces of credible evidence are required to support this conviction. These consist of (Articles 183-4 of the Criminal Procedure Code): the defendant's statements; documentary or physical evidence; indications, which may be interpreted loosely as "indirect evidence,"; and witness or expert witness testimony. When called upon to offer professional opinions or interpretations of facts, evidence, and the law, expert witnesses are generally not tasked with evaluating the perpetrator's mental state, character, or behavior, nor do they analyze the nature of the action or punishment to be rendered. During the trial phase, the defendant's right to remain silent is restricted. As per the provisions outlined in Article 175 of the Criminal Procedure Code, in cases where a defendant declines or refuses to respond to inquiries, the presiding judge may exert pressure on them to comply. Moreover, in situations involving numerous defendants, this entitlement is occasionally limited by separating trials, in which the testimony of one defendant may potentially incriminate another. Defendants retain additional rights, such as the right to legal representation (Article 54) and the ability to compel experts and witnesses to testify to support their defense.(Article 65) [8].

After hearing, the panel of judges adjourns the session to deliberate internally to determine the verdict and sentence, along with their supporting reasons, by Articles 182 (3) and (5) of the Criminal Procedure Code. Contrary to the Prosecution, the court does not have standard guidelines for sentencing, neither narrative nor numerical. There are only generic policies regarding handling specific cases in the context of sentencing, or for certain types of violations, the details of which will be discussed further in the following chapter. During deliberation, the presiding judge seeks opinions from other judges on the panel, sequentially from the youngest to the most senior. While unanimity is sought among the judges, a majority decision is prioritized. In the absence of a majority vote, the option that is most advantageous for the defendant is selected (Article 182(6)(b)), which includes deliberations concerning the nature or magnitude of the sentence imposed. However, in practice, some judges operate differently, calculating an average of all proposed sentences from all judges (duration of imprisonment or total fines), and then dividing the total number by the number of judges on the panel. This method carries disproportionate benefits, as the presiding judge, with the final say during sentencing, can propose an extreme penalty, skewing the outcome in their favor.

Furthermore, the voice of the presiding judge can be more dominant than others in the patrimonial atmosphere often present in the Indonesian judiciary. After the verdict and sentence are decided, the session resumes, and the decision is announced in an open courtroom. Subsequently, the court is obligated to draft a written judgment containing the following (Article 197 (1)): c. the charges as they appear in the indictment; d. a concise explanation and justification of the evidence and facts, circumstances, or context supporting the judgment; e. the legal demand as stated in the prosecution's letter; f. the legal provisions that govern the judgment, encompassing

aggravating and mitigating circumstances. Most District Court decisions are succinct, measuring between 10 and 25 pages in length (except for severe cases like murder).

A synopsis of the charges and evidence presented during the trial, along with an assessment of whether the evidence adequately substantiates the defendant's sentence, is typically included in most verdicts. As delineated in subsequent chapters, the legal reasoning employed to support the decisions is frequently quite constrained. A checklist of aggravating and mitigating circumstances is provided, and the sentencing objectives, which justify the applied penalties, are rarely cited in decision-making. Specific court rulings generally follow the same pattern, although they may vary in length. For illustration, decisions by the Anti-Corruption Court are usually more detailed, as they often involve more parties, witnesses, and evidence. Decisions by the High Court and the Supreme Court tend to be more concise than those of lower courts. They often repeat and copy the contents of the charges, the previous court's decisions, and appeal requests, and briefly include reasons and decisions [8]. As part of deterrence efforts, it is also necessary to regulate the existence of legal instruments to recover state economic losses by broadening the definition of replacement money, which can be applied to the entire value of state economic losses incurred by perpetrators. [10]

IV. CONCLUSION

The findings showed a similarity in how judges in these two legal systems perceive their role in achieving justice. However, a deeper understanding is necessary regarding how judges exercise their discretion across various legal frameworks and how this influences the outcomes of cases and the legal system as a whole. This research offers valuable insights into how judges within distinct legal systems apply their discretion and the subsequent impact on case outcomes and perceptions of fairness within the legal structures. The results of this study can serve to enhance legal practices and legal education by fostering a greater understanding of judicial decision-making processes and their potential effects on case outcomes and the equity of the legal system.

V. References

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