

Different meanings of "free access to law": Civil law and common law comparisons

Graham Greenleaf AM

*Professor of Law & Information Systems, UNSW
Australia, and Co-Director, Australasian Legal
Information Institute (AustLII)*

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Overview

1. Where is free access to legal information?
2. The civil law and common law 'traditions'
3. Differences in free access practices
 - (A) National practices
 - (B) Multi-State practices
 - (C) Practices of FALM members
4. Factors helping explain these differences
 - (A) Common law traditions
 - (B) Civil law traditions
5. Effect on the Free Access to Law Movement (FALM)
 - (A) FALM's membership
 - (B) Free access to law principles
6. Conclusions: How should FALM respond?

Where is free access to legal information found?

- Q1: Where is at least 'minimal free access' to law found?
 - 1995 – 'almost nowhere' (5 years after gopher/www)
 - Only present in a handful of countries – the age of privatisation
 - 2015 – 'almost everywhere' (after 25 years)
 - Only absent in a handful of countries – usually state-provided
- Q2: Beyond this superficial success, do differences exist?
 - This paper explores *one* possible source of difference:
 - Do 'civil law countries' and 'common law countries' differ in what they mean by 'free access to law'?

Civil law / Common law ‘traditions’

- Why explore the common law / civil law distinction?
 - Still the most important difference between countries’ legal systems
 - Majority of countries have either strong influences of civil law (120/230?) or common law (80/230?)
 - Primarily due to influence of colonialism (incl. Roman)
- What differences *might* we find?
 - It makes no difference to the *existence* of basic free access to law
 - The only differences will be in the *type(s)* of free access found
- Comparative lawyers refer to ‘traditions’, not families
 - Means a major influence (non-exclusive) in a country’s legal system
 - All such categorisations are only approximations

Civil law / Common law 'traditions'
One rough approximation



Pink = UK common law; **Red** = US common law;
Blue = civil law; **Light blue** = socialist + civil law;
Grey = mixed; **Yellow** = other

Comparison of archetypes (and therefore misleading)

	Civil Law	Common Law
Codes	<i>Comprehensive – no gaps Few in number</i>	<i>Even if exist, not comprehensive Many other statutes</i>
Cases	<i>Do not interpret codes, only apply them Do not create separate areas of law</i>	<i>Interpret statutes, or codes Interpretations are part of law Create separate areas of law</i>
Scholarship	<i>Doctrine is essential to interpretation of codes</i>	<i>Scholarship is at best influential, usually ignored</i>
Separation of powers	<i>Rigid</i>	<i>Important but not essential</i>
Nationalism	<i>Only sources of law are national See references at end of slides</i>	<i>International influences through case law</i>

Look at 3 areas of differences in free access practices,
comparing common law and civil law countries

(A) National practices

(B) Multi-State practices

(C) Practices of FALM members

Differences in

(A) National free access practices

- COMMON LAW JURISDICTIONS

- Globally about 80 jurisdictions (70/10: UK/US influenced)
- Both legislation and case law is generally freely available
 - A single State-run service rarely provides both (Sri Lanka; Kenya)
- Civil Society bodies are significant online legal republishers
 - In over 40/80 jurisdictions; and usually provide both;
 - Based in academia, legal profession, trusts
 - Sometimes comparable to the State in extent of use of their services;
- Civil society bodies rarely have a major involvement in research to improve State-operated legal services
- **Result:** The 'LII model' of civil society republishers of law is typical

Some civil-society-based LIIs from common law countries



Differences in

(A) National free access practices

- CIVIL LAW JURISDICTIONS

- Globally, at least 120/230 jurisdictions
- Almost all have State-run free access services
 - typically, separate services for legislation or cases
 - some provide both (eg France, Austria)
- Civil society bodies rarely republish legislation and/or case law
- Civil society bodies (academic) are typically involved in research to improve State-provided services
 - eg ITTIG, Florence; CRSFID, Bologna; IDT, Barcelona; JaLII, Japan
- **Result:** Civil society typically involved through research to improve State systems, not republication

Differences in

(B) Multi-State free access practices

- COMMON LAW JURISDICTIONS
- Citation standards have emerged from civil society LIs
 - No official multi-jurisdictional citation standard for case law
 - no official attempts at international cooperation
 - but publishers of case law from 300+ courts in at least 30 countries use the same ‘neutral’ citation standard
 - started in Australian courts; ‘internationalised’ by AustLII use; officially adopted in the UK , Singapore, Malaysia etc
 - AustLII’s [LawCite](#) is a multi-national citator (4.7M citations) for many (not all) UK-based common law countries
 - No multi-jurisdiction legislation identifiers/ standards

Differences in

(B) Multi-State free access practices

- Multi-state portals have come from civil society LIIs
 - No ‘official’ multi-jurisdictional portals for common law States or courts, nor any attempts to start them
 - PacLII, SafLII, AfricanLII and BAILII are regional LII portals
 - [CommonLII](#) provides *access to* 1430 databases on 10 LIIs in FALM, from at least 40/70 (English) common law jurisdictions; was ‘endorsed’ by a CHOGM communique

Differences in

(B) Multi-State free access practices

- CIVIL LAW JURISDICTIONS

- In Europe multi-State tools are emerging
 - European Case Law Identifier [ECLI](#) (-case citations) – limited uptake by States as yet; fully in Netherlands, Finland (retrospectively), Slovenia, Slovakia (prospectively); trials by ECJ, EPO, France, some others
 - Akoma Ntoso – legislative/parliamentary/caselaw XML standards; basis of [OASIS](#)’ [Legal XML](#) LegalDocumentML
 - European Legislation Identifier [ELI](#) (legislation citations) and [LegiVoc](#) (thesaurus) – emerging tools
- **Result:** Much ‘legal semantic web’ research by both Civil Society and State bodies, and growing multi-jurisdictional implementation

Differences in

(B): Multi-State free access practices

- Few Civil Society portals for civil law regions
 - African Law Library (ALL) includes some content from all civil law African countries
 - No portals for Europe, Latin America or Asia
- But many 'official' multi-jurisdictional portals
 - European-wide systems: numerous but limited
 - Some on national laws: N-Lex (EU Comm, 2006-); EU Supreme Courts Case Portal (2006-); Codices (CoE Venice Commission); JURE (EurLex)
 - Others on EU law: EurLex; DEC.NAT (2007); JuriFast (ACA)

Differences in

(B) Multi-State free access practices (cont.)

Civil Law: 'official' multi-jurisdictional portals (continued)

- Portals outside Europe are increasing
 - [JURICAF](#) (for L' [AHJUCAF](#) - Francophone Supreme Court association) centralised full text search of over 800,000 decisions from 43 francophone countries;
 - [Legis-PALOP](#) - 6 Portuguese-speaking countries (5 in Africa + Timor-Leste); 50,000 items off free access legislation (other items low cost).
 - Ibero-American portals for 21 Spanish/Portuguese-speaking countries ([COMJIB](#) e-Justice; [Judiciary](#)) developing - but few texts as yet
- Conclusions (multi-State official systems)
 - Multi-country official civil law portals increasingly occur in the civil law world, but are unknown in the common law world
 - The quality of these portals (search facilities, speed etc) is very variable.



La jurisprudence francophone des cours suprêmes

Rechercher

[recherche avancée](#)

Rechercher parmi 889 504 décisions provenant de 43 pays et institutions francophones

Belgique (4 887)	Bénin (2 612)	Bulgarie (22)
Burkina Faso (283)	Burundi (25)	Cambodge (64)
Cameroun (18)	Canada (4 503)	CEDEAO (2)
CEMAC (19)	Congo (16)	Congo démocratique (15)
Conseil de l'Europe (6 311)	Côte d'Ivoire (7)	France (825 033)
Gabon (13)	Guinée (78)	Haïti (62)
Hongrie (3)	Liban (16)	Luxembourg (288)
Madagascar (3 422)	Mali (757)	Maroc (3 054)
Mauritanie (5)	Monaco (6)	Niger (2 432)
OHADA (4)	Organisation des États américains (3)	Pologne (8)
République Tchèque (59)	Roumanie (424)	Rwanda (4)
Sao Tomé et Príncipe (4)	Sénégal (1 588)	Suisse (32 940)
Tchad (499)	Togo (6)	Tunisie (4)
UEMOA (1)	Union Africaine (1)	Vietnam (3)

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Legislação anterior a 1975	4762
Jurisprudência	5539
Doutrina e Documentos	1748
Thesaurus	4464

TEXTO CONSTITUCIONAL

	Angola
	Cabo Verde
	Guiné-Bissau
	Moçambique
	São Tomé e Príncipe

Mapa



Utilizador

Palavra-chave

Entrar

Recuperar palavra-chave

1ª Vez - Registe-se

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Differences in (C): Practices of FALM members



Differences in

(C) Practices of FALM members

- 70% of 56 FALM members are from common law countries
 - Almost all of these are significant republishers of primary legal information.
- Very few FALM member from civil law countries are significant republishers of primary legal information
 - Exceptions include members from Mexico, France, Ethiopia
 - Their other roles are not well-enough understood or defined in FALM documentation
- Conclusion: FALM members' roles differ substantially between common law and civil law countries

Why such significant differences?

(A) Common law history

1. Case law and the system of precedent was essential from its origins
2. Private parties published case law, not the State; did so until the Internet;
3. Legislation was not 'the law', and often meaningless in the absence of case law; useful publication required both; LIs publish both, and interlink
4. The State published legislation – but usually did it badly.
5. The common law was inherently international (in practice in the colonies, and in theory even in the UK), without need for State cooperation
 - Ability to access foreign cases was important
 - Common use of English facilitated internationalisation

Why such significant differences?

(A) Common law history (cont.)

6. Pre-Internet, most legal system participants would have assumed and accepted the key publishing role of private publishers, and that it included non-profits
7. From 1970-1995, across common law countries, computerised provision of legal information had very little success:
8. In some countries (eg Australia) the State was granting commercial monopolies in online legal information (80s/90s)
9. By 1995 in many common law countries, a strong 'free the law' reaction had developed and was favourable to civil society 'LLIs'

Why such significant differences?

(B) Civil law histories

1. Court decisions traditionally were not 'law';
 - some Codes attempted to ban interpretation;
 - republication of decisions (and interconnection with statutes) was therefore of less interest
2. 'Doctrine' interpreting statutes much more important
 - But usually only available commercially: very strong relationships between publishers and academics/law schools
3. 'Legal science' approach of many law schools
 - Pursuit of socio-economic objectives less important
 - (Re-)publication does not fit; technical research might
4. Lesser pre-Internet role for civil society publication

Why such significant differences?

(B) Civil law histories (cont)

5. Nation-state emphasis, not internationalism
 - Multiple languages limited internationalism
 - Internationalism through influence of doctrine (German and other) and influence of key Codes, not through case law
6. Tradition of State-published Codes important: early 'free the law'
7. 1975-95 greater success of State legal information systems (Bing): but not free
8. By 1995 no strong anti-State reaction, nor obvious leaders

Effect of these differences on the Free Access to Law Movement (FALM)

1. All 'early adopters' of free access in 1992-5 were in common law countries,
 2. They were led by civil society LILs, not the State
 3. All founding FALM members (2002), and drafters of the Declaration, were from common law countries
 4. The Declaration's principles assumed that free access was almost entirely to do with 'the right to republish'
- **Result:** All aspects of FALM were deeply rooted in common law approaches, and did not fully reflect civil law approaches.

Early development of free access to law principles reinforced this bias

Six influential statements of 'free access' principles up to 2012:

1. The example of the LII (Cornell) & Lexum (1992-5)
2. AustLII's demands on official providers (1995)
3. FALM's Declaration on Free Access to Law (2002)
 - 1-3 all focused on republication as the basis of free access
 - 3. defined LIIs as 'Publish[ing] via the internet public legal information originating from more than one public body'
4. The Hague Conference 'Guiding Principles' (2008)
 - More balanced, reflecting many of the aims of civil society bodies in civil law countries. Included in FALM Declaration, but only by reference (2012).
 - Requires State to ensure free access, by providing it, or by allowing republication.
5. Law.Gov principles for repositories (2010)
6. UELMA - Uniform Electronic Legal Materials Act (2011)
 - 5&6 (from USA) have broader perspectives than free access

Conclusions:

How should FALM respond?

1. Include broader goals explicitly in the Declaration

- Include more explicit goals to reflect the aims of the Hague, Law.gov and UELMA statements
- Reduce the emphasis on ‘republication’ and ‘LIIs’
- Broader membership criteria can then reflect these goals

2. Seek a broader membership

- From civil law countries
- From public sector bodies
- From research and standards organisations

3. Consider change to an ‘association’, if no longer a ‘movement’?

4. Aim for explicit political/legal recognition of its goals

- By regions (EU partly achieved), treaties (Hague Conv.) or the UN

References & Thanks

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- Vranken *Western Legal Traditions* (Federation, 2015)
- Greenleaf, Mowbray & Chung ['The meaning of free access to legal information: A 20 year evolution'](#) (2013) *Journal of Open Access to Law*
- Thanks to Marc van Opijnen, Giovanni Sartor, Ginevra Peruginelli and Pompeu Casanovas for valuable comments