Introduction to Common Law

Families of legal systems

- Civil Law
- Common Law
- Mixed (Civil and Common Law elements.)
- Religious or customary law
  - (e.g., Islamic law, Hindu law.)

What do the terms “civil law” and “common law” mean?

Civil law
- Can mean –
  - Legal system based on Roman law (like in Turkey)
  - A particular branch of law (Medeni Hukuku) in that system
  - The law of civil or private rights, as opposed to criminal law or administrative law (in the common law system)

Common law
- Can mean –
  - Legal system based on English customary law
  - Unwritten, judge-made law (within that system.)

• In this course, when I say “common law” and “civil law” I will usually be talking about the different kinds of legal systems.

Civil law vs. Common law

Civil law
- Based on Roman law
- Law considered a “science”
- Comprehensive codes
- (Traditionally) no equivalent of “common law” or precedent. (In modern civil law, decisions of certain courts are binding precedents.)
- No jury, judge decides facts and law.

Common law
- Developed from English traditional law
- Law is practical, not scientific
- Statutes don’t cover everything (but they cover more than they used to.)
- Unwritten “common law” from prior court decisions (precedent)
- Jury system

The two systems have influenced each other, so they are not as different as they used to be

Examples of influence of common on civil law
- Precedent (for decisions of high courts.)
- Participation of ordinary citizens in deciding guilt (“mixed courts”)
- Elements of adversarial procedure (such as cross examination.)

Examples of influence of civil on common law
- More complete “codes” (especially in criminal law.)
- Decision of private law cases by judges.
Differences in Procedure

Civil law = Inquisitorial System (especially in criminal law)
Common law = Adversarial System

Inquisitorial system
- Especially in criminal cases, a search for the truth by an impartial officer of the state is the best method.
- It is important that the judicial officer, judge or prosecutor, does not care whether a conviction results or not.

Adversarial system
- The truth comes out when two parties vigorously defend their version of the facts from legally equal positions before a neutral and unprejudiced judge.
- Parties, rather than state agencies, control the investigation and judges do not participate actively in the search for truth.

Inquisitorial system
- Evidence for a criminal trial in an inquisitorial system will be in a dossier in documentary form, which forms the principle basis for the decision of the trial court.

Adversarial system
- Oral delivery of evidence by first hand witnesses at the trial
- Cross-examination of witnesses to test this evidence
- Importance of letting the fact finder (jury or judge) see the demeanor of the witnesses.

The jury
- Traditionally, cases in common law are decided by a jury.
- Juries are drawn from a random selection of ordinary people who live in the jurisdiction.
- In criminal cases they decide on guilt (but not sentence.)
- In civil (private law) cases they decide on liability and on damages (though the judge may change the damage award.)

Evidence
- Since cases have traditionally been decided by people without any legal training, it is important to make sure that they only hear reliable, relevant evidence.
- This is why the rules of evidence are so important, and so much more complicated, in common law countries.

In most modern common law systems, juries are used for criminal law cases only. (The United States is an exception – the right to a jury in civil cases is written into the constitution.)

Even in criminal cases, juries are now used only for more serious crimes in many countries.
**ACTORS IN COMMON LAW**

**Civil Law Legal Actors**
- The legal scholar does the “basic thinking” for the legal system.
- Legislatures seek completeness and clarity in areas in which the legal scholars have suggested that codes are defective or incomplete.
- Civil-law judges, in theory, are the “operators” of a system designed by scholars and built by legislators.

**Common Law Legal Actors**
- Academic legal scholars relatively unimportant.
- Judges write the decisions that guide the development of the law.
- Legislators do not generally create complete codes. For some areas of law, there are no statutes, only the “common law” found in previous decisions.

**Judges**

**Civil law**
- Judges are civil servants
- Judges enter their profession after law school
- As a judge becomes more experienced, he/she may be promoted within the judiciary to higher courts

**Common law**
- Judges politically appointed or elected.
- No direct entry. Judges appointed from among experienced lawyers
- Once appointed to a court, a judge stays there, unless appointed or elected to a higher court

**Legal Education**

**Civil law**
- Undergraduate
- Courses in many countries focus on learning general legal principles
- Students learn law from books by legal scholars
- Mostly lecture

**Common law**
- Often post-graduate
- More focus on skills and problem solving
- Learn mostly from reading cases (especially US)
- Instructors lecture, but students called on to analyze cases in class
Court Structure

Civil law
• Separate specialized court systems with separate high courts.

Common law
• More generalist courts, with ultimate review by a single high court.

A Typical State System (California)
• There are 58 separate trial courts, called “superior courts,” one for each county.
• There are six courts of appeal, which cover different geographical areas within the state, just like the 12 circuit courts do in the federal system.
• Note that there are no specialized courts—all three court levels hear civil and criminal cases.

Structure of the English Court System

Reasoning in Common Law Systems

CIVIL LAW
• Mostly deductive reasoning
  – Proceeding from stated general principles or rules of law contained in the legal codes to a solution in a specific case

COMMON LAW
• More use of inductive reasoning (reasoning by analogy)
  – Deriving general principles or rules of law from a specific decision, or a series of specific decisions, extracting an applicable rule, and then applying it to a particular case.

Precedent: A common law judicial decision has 2 Effects:

• An end (perhaps only temporary) is put to the controversy before the court.
  – This is the same as in civil law systems.

• A “precedent” that will control the disposition of later cases in which the same issue or issues arise.

The principle of precedent, or *stare decisis*, combines two propositions:

1. Hierarchy: The lower court *must* accept the position held on any given issue by its hierarchical superior.
   • In theory, this isn’t true in civil law countries.

2. Courts are bound by their *own previous decisions*. 
• Imagine the following situation:
  – You are the younger of two siblings.
  – One night when your brother was 15 years old, he
    stayed out with his friends until 12:00 p.m. on a
    school night.
  – Your parents were very angry, and told him that he
    could not stay out past 10:00 p.m. on school nights.
  – They told him that they were making this rule because
    they want him to do well in school, which he can’t do
    if he is tired.

• When you turn 15, they tell you that you have
  to be home by 9:00.
• What do you say to them?

• Assume that they agree with you and set your
  curfew to 10:00 p.m. on school nights.

• One day, you decide to sign up for a private
  English course. However, the only course that
  you can find which is at your level is from
  8:00-9:30, which means that you won’t be
  able to get home until 10:30.

• Your parents tell you that you can’t go,
  because you will be getting back too late.
• What could you say to them in order to
  convince them to change their minds?