

# Contemporary Legal Cultures: Civil Law

# Corpus Iuris Civilis (6th Century )

- Codex Vetus (12) (previous: Codex Gregorianus, Codex Hermogenianus)
- Digesta (50)
- Institutiones
- Novellae

# Reception of Roman Law

## Medieval law schools and scholars

- ✦ Glossators (11<sup>th</sup> – 13<sup>th</sup> Cent.)
  - ◆ Bologna discovery of Justinian's CJC
  - ◆ Annotations to text of CJC / scholastic method
  - ◆ Accursius (1182-1259)
  
- ✦ Commentators (14<sup>th</sup> – 15<sup>th</sup> Cent.)
  - ◆ Primarily in Italy (mos italicus)
  - ◆ Bartolus de Sassoferrato (1314-1357)
  - ◆ Practical adaptation, not exegesis
  
- ✦ Humanists (16 – 17<sup>th</sup> Cent.)
  - ◆ Return to classical Roman roots (mos gallicus)
  - ◆ Influenced by natural law school

# Medieval Developments

- Changes in commerce
- The Glossators of Bologna → features
- Evolution: jurists as teachers
- The “gloss” technique: changes made in the Corpus Juris Civilis
- Accursious: the “Great Gloss” (1230)
- Law at universities: Bologna

- Canon Law
  - Influence of the church
  - Organization
  - Scholarly writings
- Law Merchant
  - Commercial relations → fairs and markets...
  - Maritime activities
    - \* Consolato Del Mare: Barcelona (14<sup>th</sup> Century)

# Influences leading to a Codification Process

- Practice of written laws spreads during the fourteenth and fifteenth centuries.
- Humanism
  - origins in France.
  - ferment of ideas.
  - birth of the concept of the nation state and strong central governments.

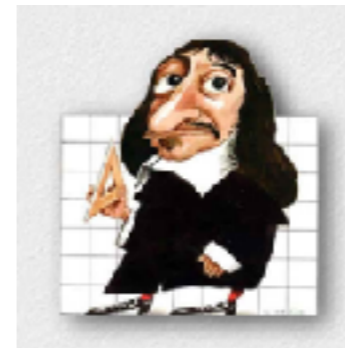
- Natural law

- Hugo de Groot



- \* writings about universal concept of law that would transcend national boundaries and be independent from other systems of law.

- Samuel Pufendorf and Christopher Wolff



- \* writings influenced by scientific methods of Galileo and Descartes.

- Logical deduction → experience and observation.

- Enlightenment
  - French Revolution.
  - Importance of reason as a liberating force in intellectual life.
  - Influence of legal philosophy.
  - Egalitarian ideals.





# The Codification Process in France and Germany

- the French Code
  - Napoleon named four practitioners who had studied their predecessor.
  - *Code Civil des Français*.
    - \* 6 articles which announce general principles of law.
    - \* Book I: civil rights, status of persons, marriage, divorce and paternity.

- Book II: covers real and personal property.

- Book III: contain provisions on rights of succession, contracts, and obligations.

- influences

  - \* basic structure → *Justinian's Corpus Juris Civilis.*

  - \* overall design → *Declaration of the Rights of Man.*

- The German Code

- product of codification process in 3 states: Bavaria, Prussia and Austria.
- presence of commissions made up of legal scholars.
- *Bürgerliches Gesetzbuch* created in 1896 and put into effect in 1900.

- \* Book I - General parts:

- . natural and juristic persons.
- . definition of things.
- . classification of legal acts.
- . prescriptive periods.

\* Book II - The law of obligations

. creation and discharge of obligations.

. contracts.

. law of delict.

\* Book III - The law of real and personal property.

. ownership.

. possession of property.

. servitudes on property.

. securities.

\* Book IV - Family law

. marriage.

. other relationships within the family.

## **Civil law - characteristics**

- Roman-influenced
- University-taught, professor-inspired
- Formed across continent (ius commune / Latin)
- Distrust of judicial power

## **Dichotomies**

- Public law vs. private law
- Civil law vs. commercial law

# **What is commercial law?**

## **Roman law unsuitable for commercial disputes**

Limits on freedom of contract, acting through agents  
Protection of debtors / usury rules  
Slow procedure

## **Medieval customary law (law merchant)**

Developed by guilds and corporations  
“traveled” with merchant (choice of law)  
Guild (later merchants) elect own judges  
Procedure: like arbitration

# **National commercial law**

Civil law rules based on law merchant

Freedom of contract, alienability

Ex aequo et bono: According to what is right and good.

Separate commercial code / courts (public choice)

English common law

Absorbs law merchant in 17<sup>th</sup> and 18<sup>th</sup> Centuries

Negotiable instruments

Inductive, practical, non-scholastic

# Civil law

- In civil law countries the norms *of private law are* divided into two groups – civil law and commercial law;
- Civil law - applies to everyone, basic provisions can be found in civil codes;
- Commercial law- concerns specific groups of persons and/or specific types or activities , *in most civil law countries the norms of commercial law have been codified in separate commercial codes*;
- The term 'private law' is often used to designate civil law(in fact, the terms 'private law' and 'civil law' are often used interchangeably).



# Civil law includes:

- The law of persons (governs the status of individuals and legal entities, includes legal rules relating to names, domicile, civil status, capacity and protection of persons under legal incapacities of various sorts);
- Family law (regulates formation of marriages, legal effects of marriage, termination of marriage by divorce, separation, and annulment; family support obligations);
- Marital property law (norms establishing and regulating so-called 'legal regime' i.e. the system that governs the property relations of all spouses who do not choose an alternative regime by way of entering marriage contract: also, norms that concern procedure for entering and altering marriage contracts);

# And:

- Property law (distinction between movable and immovable property (in common law: personal and real property), protection of the right of the ownership, etc.);
- Succession law (rules of disposition of property upon death by will or by intestate inheritance);
- The law of obligations (covers all acts or situations which can give rise to rights or claims, divided into three parts: the law of contracts, the law of tort (delict) and the law of unjust enrichment).

# Most famous civil codes

- French Civil Code (“Code Civil” or “Code Napoleon”). 1804.
  - Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch –ABGB). 1811
- Código Civil (Spain) – originally approved July 24 1889,
- German Civil Code (Bürgerlichen Gesetzbuches - BGB). 1900
  - Italian Civil Code (Codice Civile). 1942.
- Swiss Civil Code (Zivilgesetzbuch – ZGB). 1907/1912

# Civil law: codified vs unmodified

- RSA and Scotland
- role of jurisprudence
- link with colonising powers?
- Blackstone Institutions

# Court Structure

- Differences Common Law – Civil Law
  - Civil-law countries → several separate court system coexist. Courts immune from jurisdiction of other courts.

- Ordinary Courts

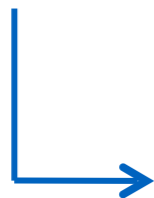
- adjudicates the majority of civil and criminal cases.

- apply law found in the civil, commercial and penal codes.

- Administrative courts

- specialized courts or sections to deal with administrative cases.

- independent jurisdiction from 'ordinary courts': rules specifically designed for administrative cases



Problems when deciding the proper court for a case

# Legal Actors

- Legal Scholars → “basic thinking”
- The Legislature → supplement and update codes
- Judges → “operators” with a simple and narrow role
- Legal Education and Lawyers
  - Undergraduate education in law.
  - Choice among several branches.
    - \* Private practice (advocate, notary).
    - \* Government lawyers (public prosecutor, lawyer for government).
    - \* Judges.

# Comparison of Civil-Law and Common-Law Systems (I)

- *Corpus Juris Civilis* influence
  - Civil-Law → significant
  - Common-Law → modest
- Codification Process
  - Civil-Law → comprehensive codes from single drafting event.
  - Common-Law → codes reflecting rules of enunciated judicial decisions.



# Comparison of Civil-Law and Common-Law Systems (II)

- **Equity law** (no comparable law)
  - Civil-Law → originated in Rome to be applied to non-Roman peoples
    - Common-Law → originated in England to soften the rigor of Common-Law
- **Creation of law: role of judicial decisions**
  - Civil-Law → negligible
    - Common-Law → supreme prominence

# Comparison of Civil-Law and Common-Law Systems (III)

- Manner of legal reasoning
  - Civil-Law → Deductive
  - Common-Law → Inductive
- Structure of Courts
  - Civil-Law → Integrated Court system
  - Common-Law → Specialty Court system
- Trial process
  - Civil-Law → Extended process
  - Common-Law → Single-event trial

# Comparison of Civil-Law and Common-Law Systems (IV)

- Judges

- Role in trials.

- \* Civil-Law → elevated role

- \* Common-Law → «referee»

- Judicial attitudes.

- \* Civil-Law → mere appliers of the law

- \* Common-Law → search creatively for an answer

- Selection and training.

- \* Civil-Law → a part of the civil service

- \* Common-Law → selected from a political process

# Comparison of Civil-Law and Common-Law Systems (V)

- Legal training      Civil process
  - Civil-Law → undergraduate
  - Common-Law → post-graduate

## Compare of Civil-Law and Common-Law Systems (VI)

### **Process of national unification**

Common law: unifying force in England (1066)

Civil law: codes (citizens') on Continent (1804)

### **Check on judicial arbitrariness**

Common law: jury, stare decisis

Civil law: written legislative law / ancien regime

### **Unification actors**

Common law: bench and bar

Civil law: university-taught writers / professors

# System characteristics

- written constitution
- only legislative enactments are considered binding
- specific courts
- less freedom of contracts
- role of the jurisprudence
- flexibility vs fairness ?
- role of judge/ attorney
- role of legal argument (style of legal reasoning)
- model of civil procedure
- selection of judges
- status of judges