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 (11th – 13th Cent.)
- Bologna discovery of Justinian’s CJC
- Annotations to text of CJC / scholastic method
- Accursius (1182-1259)

Commentators (14th – 15th Cent.)
- Primarily in Italy (mos italicus)
- Bartolus de Sassoferrato (1314-1357)
- Practical adaptation, not exegesis

Humanists (16 – 17th 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
- Accursius: the “Great Gloss” (1230)
- Law at universities: Bologna
• Canon Law
  - Influence of the church
  - Organization
  - Scholarly writings

• Law Merchant
  - Commercial relations \(\rightarrow\) fairs and markets…
  - Maritime activities
    * Consolato Del Mare: Barcelona (14\textsuperscript{th} 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 $\rightarrow$ 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 17th and 18th 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
- Codigo 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 $\rightarrow$ originated in Rome to be applied to non-Roman peoples
  - Common-Law $\rightarrow$ originated in England to soften the rigor of Common-Law

- **Creation of law: role of judicial decisions**
  - Civil-Law $\rightarrow$ negligible
  - Common-Law $\rightarrow$ 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-Law → undergraduate
  - Common-Law → post-graduate

Civil process
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