

# Contemporary Legal Cultures: Civil Law



## Selected meanings of the term "Roman law"

- 1) the law of Rome – from the beginnings of the City to the death of Justinian in AD 565.
- 2) Romanistic elements in the later history of law
- 3) *ius commune* – the common law of Europe from the 12th to the 18th century
- 4) *usus modernus pandectarum* and pandectism of the 18th-19th century
- 5) Academic study of Roman law
- 6) The romanist tradition, broadly understood

# Corpus Iuris Civilis (6th Century )

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

# Institutions

- An initial textbook for the study of the Justinian law (4 vol.)
- Had the force of an Act
- Its classifications were based on Gaius's *Institutions* (*personae, res, actiones*)
- citations: I. 1 (volume), 2 (title), 3 (paragraph)
- Abstract presentation, no casuistry

# Digesta seu Pandectae

- A compilation of fragments of writings by 39 jurists (mainly lawyers from the classical period, 3 from the republican period and 2 post-classical)
- The original texts were subjected to revision in order to adapt the work to the law that was in effect at the Justinians time
- 50 volumes; citation: D. 1 (vol.), 2 (title), 3 (fragment), 4 (paragraph)

# Codex repetitae praelectionis

- A collection of imperial constitutions from Hadrian to Justinian
- 4,600 legal acts
- 12 volumes (vol. 2-8 concern private law)
- Citations: C. 1 (vol.), 2 (title), 3 (constitutions chronologically), 4 (paragraph)

# Novelae

- Constitutions issued in 535-582
- Several private compilations:
  - *Epitome Juliani* (124 novelae from 535-540)
  - *Authenticum* (134 novelae from 535-556)
  - Greek compilation (168 novelae of Justinian and his successors, Justin II and Tiberius II)



D. 1,1,1

Ulpian quoting Celsius from the 2nd century:

(...) *ius est ars boni et aequi.*

Law is the art of [applying the principles of]  
the good and the just.

- ***Dura lex, sed lex*** (ad D. 40,9,12,1) – The law is harsh, but it is the law.
- ***Summum ius, summa iniuria*** (Cic.off. 1,33) – Supreme justice, supreme injustice.
- ***Male nostro iure uti non debemus*** (Gai 1,53) – We ought not to abuse our legal rights.

- ***Non omne quod licet honestum est*** (D. 50,17,144 pr)
  - Not everything that is permitted is honest.
- ***Hominum causa omne ius constitutum sit*** (D. 1,5,2)
  - All law should be made for the sake of men.

# 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

## **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

Compare common law /civil law

## **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