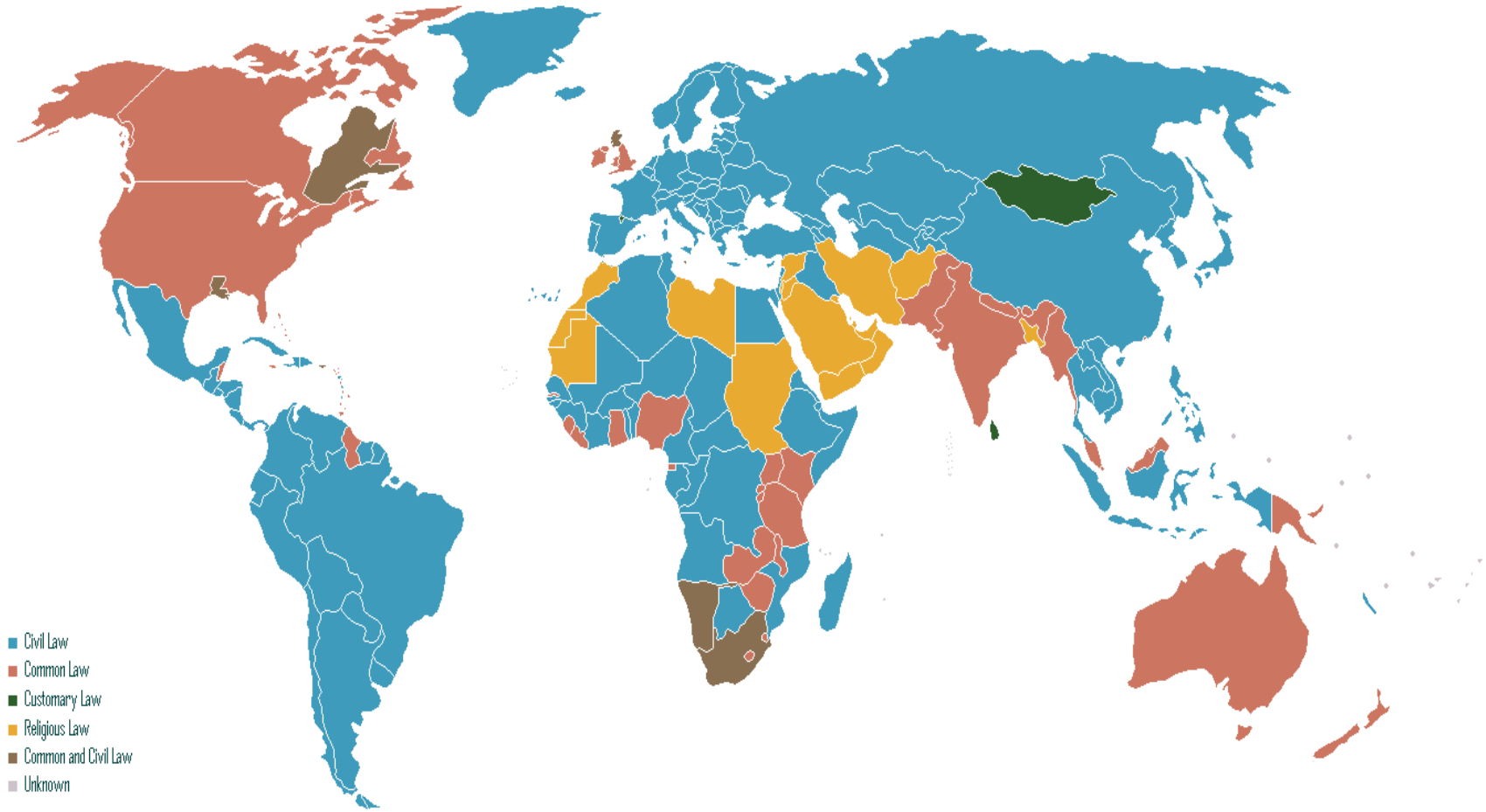
Contemporary Legal Cultures: Common Law

Legal Systems of the World



COMMON LAW (Anglo-Saxon law)

- developed in England in the 11th century – UK, Ireland, USA (except Louisiana), Canada (except Quebec), Australia, India, Hong Kong
- Sources of common law:
  a) ancient customs,
  b) judicial precedents (previous court rulings)
  c) enacted laws
- does not provide general principles, but court rulings

In the English legal system, legal technique is not interested in interpreting statutory texts or analyzing concrete problems so as to fit them into the system conceptually. The English legal system is principally interested in precedents and types of case. The English legal system is devoted to the careful and realistic discussion of live problem. The English legal system seeks deal with concrete and historical terms than think systematically or in abstract.

The well-known expression of the American judge Holmes: ``the life of the law has not been logic; it has been experience`` is true of other systems. But this expression was created for the Anglo-American legal system. Some legal systems are more consciously tied to their past than others, more attached to traditional forms of legal thinking despite social and economic changes. No country has clung as firmly as England to its own style of law throughout the centuries.

There is a common factor that goes through the British and American legal system: both systems give recognition to judge-made laws. Both systems also show a high degree of stability.

The British legal system has maintained itself without major interruption since 11th century while the American legal system has survived since 17th century. Yet each system maintains its own unique historical origin and development.

That is why we need to consider the origin of the British legal system, the unique features of the British legal system, the role of equity in the British legal system, whether Roman law influenced the British legal system and examines the factors that accounted for the 19th century legal reform in England.

Common law vs customary law

- Sources of creation (mos maiorum vs judical development)
- Area of effect (local vs national)
- Number of legal systems (many vs one)
- Sources of recognitions (unwritten vs written)

Role of statuatory law in common law systems

- Contract, case law and default rules in legislation
- Limited role
- No general codification
- Exceptions: insurance and commercial law

- formal, written law of a country or state
  = enacted law = codified law
- written and enacted by its legislative
  authority (Parliament)
- originally enacted by the monarch Parliament's powers grew, monarch's powers diminished taken over by Parliament
- has precedence over the common law (statute law remedy has a priority) – can overrule any custom or judicial precedent, delegated legislation or previous Act of Parliament
- statutes are organised in topical arrangements called CODES (e.g. Commercial Code, Criminal Code etc.) or STATUTE BOOKS

3 stages of creation of Common Law system in England

- Creation of fundations (1100-1400)
- Refusal for reception of Roman Law (1400-1600)
- Transformation of Common Law into Global system (after 1700) – Mansfield, Blackstone

Before Common Law

- England organised in small kingdoms (Wessex, Essex, Mercia ect)
- Law written in constitution of kings, based on Roman law
- Invasion of Normans, unification of country under single ruler
- Creation of unified system of courts (King Courts, local Sheriff courts, feudal courts, ecclesiastical courts)
- New English – from Old English, French and Latin
- Important texts: Domesday Book (taxation register) , De Legibus Angliae (unification of local English laws), Magna Charta Liberatum

The origin of common law

- Norman conquest (1066):

- The customs of the Saxons weren't abolished immediately

- Many innovations were introduced

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CREATION OF A FEUDAL SYSTEM

The land was allocated to feudal vassals of the king and was created a chain of feudal relationships

- In the middle of 11th century, William I succeeded to create a tight, integrated, rather simply organized feudal system. He made himself the supreme feudal overlord. He took land from his opponents. He distributed land to his supporters in return for rendering services so that his political power would tilt towards the center. The most influential barons were relegated to the peripheries to protect the borders against the hostile Scots Welsh.
- The invaders place tax laws and implementing institution in place. Fiscal reasons also justified the increasing intervention by the central royal administration in civil and criminal law to protect the biggest land owning class. The Royal courts emerged. The royal courts applied more modern and progressive rules. These progressive rules gradually led to the disappearance of local laws. The prestige and authority of the royal judges increased.

Feudal system

King

Tenants in chief

(lords or members of aristocracy)

Intermediate tenants

Tenants in demesne

(who actually occupied the property)

- England very early enjoyed a unified law. England created the common law in the 14th century. This was not develop in France until 19th or in Germany until 19th and even then only in theory of the Pandectists School. Thus, there never existed in England one of the essential factors behind the idea of codification. These factors on the Continent were the practical need to unify the law as well as on the philosophy of the Enlightenment and the thinking of natural lawyers. Roman and England gave judicial protection to rights only if the plaintiff could obtain a particular document of claim.
- The very similar ways in which litigation was initiated in English and Roman law led legal practitioners in Rome and England to think not so much in terms of rights. Legal practitioners in England and Roman system thought in terms of types of action. Roman law and medieval common law were both dominated by procedural thinking. In both systems, the rules of substantive law emerged later from procedural law.

- The origin of the idea of judge-made law can be traced back to the time when the king himself presided as judge, earning for himself the title of, "Dispenser of Justice" or "The Fountain of Justice. In England, although the kings gave up the practice of presiding as Chief Judge very early, the courts always followed the king in his travels throughout the country, until the Magna Carta in 1215 enacted that the Royal Courts should be fixed in one particular place for the convenience of the public.
- Case law grew up in England because of the accident of the early English judges being Normans. They were foreigners to England. They were bound together by an esprit de corps. The binding element made early judges in England respect each other's decisions, especially when these decisions dealt with matters, which were strange and unfamiliar to them. In England, the Norman judges when they used to meet at the Temple discussed their cases, and started the practice of following each other's decisions. Once the Bar discovered that the best argument in favor of a particular case was the decision of a brother judge in a similar case, they began to take notes of cases by these judges. And in that manner law reporting came into existence. Law reporting became an established practice in this manner.
- And now the opinions of one judge are regarded as an authority binding on the other judges. The growth of case law in England was also accelerated by the reaction that set in against the reception of Roman law. On the continent, particularly in countries like Germany and France, the indigenous or local law was found to be unsatisfactory as society progressed. And whenever a complex case came up, to which the local law could supply no remedy, it was the practice of the judge to apply Roman law.

Administration of justice

- First *justice* the royal judges went out to provincial town and applied everywhere the common law of Westminster both in criminal and in civil cases

- From the XIII century creation of the *Courts of Westminster* to apply the common law

Courts of Westminster

- Exchequer

(for the administration of the royal treasury)

- King’s Bench

(for criminal matters and for any case which concerned the monarchy)

- Common pleas

(for matters of civil property and, in general, civil claims)

The system of the writs

Writ = a written order in the king's name, issued by the king's writing office (chancery) at the instance of the complainant

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Ordering the defendant to appear in the royal courts to see justice done

If a plaintiff wished to have justice he would need a writ to enable to do it

WRITS

For every complaint → a specific writ:

1. The plaintiff had to ask for the right writ
2. If the plaintiff asked for the wrong writ he wouldn't have justice

Ex: - writ of right: for a proprietary action

- writ of convenant: for breach of contract

GREAT FORMALISM

WRITS

GREAT RELEVANCE: in common law there is a right where there is a writ to enforce it

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Remedies precede rights

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Creation of new writs → creation of new rights

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Great developement of common law

CRISIS OF WRITS

Problems:

- formalism: who chose the wrong writ lost the action
- Expensiveness: who hadn’t enough money couldn’t obtain justice
- The centralization of justice and the growing power of royal courts reduced the power of the Lords → strong opposition

Magna Charta (1215)

- The first step of the opposition of the Lords
- A fundamental document in English history which is the starting point for the protection of freedoms in English structure
- Required the king:
  - renounce certain rights
  - respect some legal procedures
  - accept that his will would be bound by the law

Magna Charta

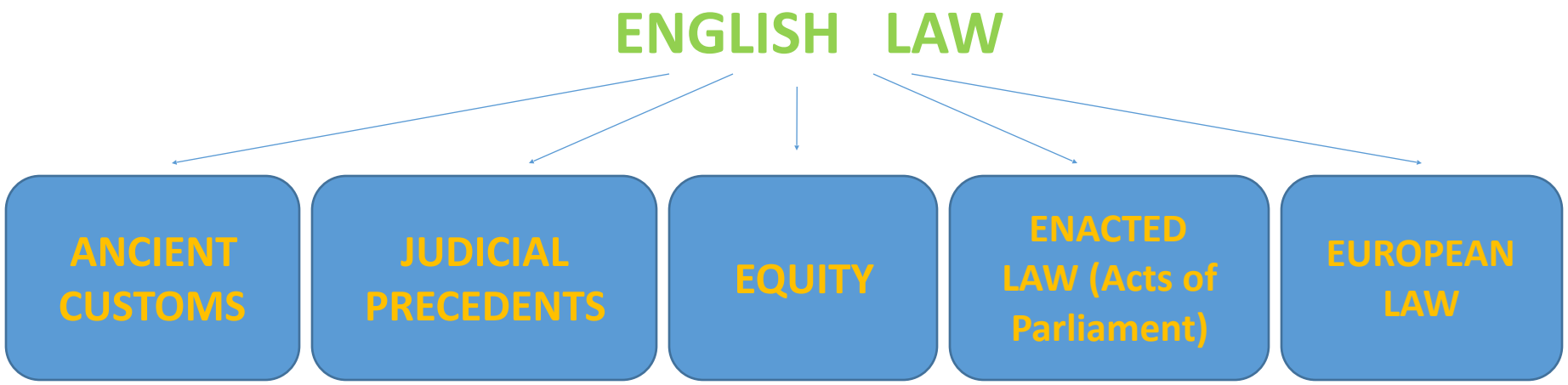
- Fundamental clauses:

39. *No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.*

60. *Moreover, all these aforesaid customs and liberties, the observances of which we have granted in our kingdom as far as pertains to us towards our men, shall be observed b all of our kingdom, as well clergy as laymen, as far as pertains to them towards their men.*

Sources of English law

- English legal system = common law legal system
- English law – no unified structure



CUSTOM = unwritten law established by long use

JUDICIAL PRECEDENT = a legal decision in a previous case which is considered as an authoritative rule or pattern in future similar or analogous cases

ENACTED LAW = written law made by Parliament or another legislative body

COMMON LAW and EQUITY

- two parallel systems of justice which exist side by side in English law

COMMON LAW (as a source of law)

- part of law formulated, developed and administered by the old common law courts; based on the common customs of the country - UNWRITTEN

EQUITY

- grew up from the practice of medieval Lord Chancellors; administered by the Court of Chancery (Lord Chancellors were not bound by judicial precedents of common law cvourts)
- purpose – to add to or supplement common-law rules in cases where these were too rigid to give justice (litigants were dissatisfied withe the remedies of common law courts)
- gradually became more rigid; 1873 – fused with common law; since then administered by the same courts
- now – an indistinguishable part of English law

Common law	Equity
The branch of English law elaborated since the Norman conquest in 1066	The branch of English law that developed since XV century
Based on the system of writs	Emerged in opposition to the system of writs
Developed by the Courts of Westminster	Developed by the Chancery Court
Characterized by strong formalism	Not based on strict formalities

Towards the end of the 14th century, the legal creativity of the royal court gradually began to decrease. It became clear that the procedure of those courts was in many respects too crude. The procedure was also rather formalistic and that the applicable law was too rigid and incomplete. Cases were being lost because of technical errors. Cases were lost because witnesses had been bribed. Cases were lost also because of the opponent's political influence.

Thus, in 14th century parties who had lost a lawsuit in the king's courts on one of the grounds or who could not obtain appropriate writ petitioned the king for an order compelling his adversary to do as morality and good conscience required. The king entertained such petitions through the Chancellor. The decisions he made developed into complex special rules called "equity". The purpose of the hearing before the Chancellor was to discover whether, as the petitioner complained, the defendant had behaved in a way contrary to morals and good conscience.

Equity is not meant a group of maxims of fairness. Equity is a part of substantive law distinguished from the rest by the fact that it was developed by the decisions of a particular court, the Court of Chancellor. The rules of Equity did not openly contradict those of the common law. The rules of equity did not seek to replace the common law. Instead, equity supplements to the common law. Equity is often extremely important; and sometimes goes so far as effectively to neutralize the common law rule. Equity was not a system but common law was or is.

Education and development of law

In the 14th century, the nature of English law and the course of its development were fundamentally affected. The main factor for such development was the fact that very early in its history, there arose a class of jurists who organized themselves in a kind of guild and so exercised a very great influence. In the continent, legal education has always been the task of universities. Legal education in the continent was rather theoretical and remote from practice.

In England, legal education was the monopoly of the Inns of laws throughout the whole middle Age and until the 19thc. In these circumstances, legal education would tend to be primarily practical and the device of a professional skill than a scholarly science. The Inns shaped court procedures through moot courts, court proceedings, character shaping, disciplinary power, etc.

Beginning from the 13th c, there had been a tendency to choose the judges of the royal courts from the ranks of lawyers without any intervention by the kings. The character of English law has unquestionably been deeply marked by the fact that the leading lawyers have never been professors or officials but legal practitioners. They lived, judges and barristers alike, in the closest social and professional contact at the central seat of the major courts. They were strongly organized in powerful professional bodies. The Inns of Court not only saw to the recruitment of new lawyers and admitted them to the profession but also had a monopoly over their legal education.

England and Roman Law

For two reasons England never received Roman law in comprehensive way: **The closed organization, the professional solidarity, and the political influence** which the class of English lawyers, who were devoted to the maintenance of the common law on grounds of principle and profit alike, had built up over three centuries. These lawyers censoriously threw all their weight behind parliament, the eventual victor in the political battle, of the time. The common law became a mighty weapon in the hands of the parliamentary party in the struggle against the absolutist prerogatives of the king, for in its long history it had developed a certain tenacity, its very cumbersome and formalistic technique serving to make it less vulnerable to direct above.

After a bitter struggle in the course of the 17th century, all threats to the survival of the common law as the supreme law of land disappeared and a long period of internal peace began. In this period, the English Bar produced a whole series of eminent judges under whom common law and equity developed peacefully, adapting themselves to the needs of a country whereas industry and trade, both internal and external, increasingly grew in importance with agriculture.

Equity = the complex of the rules, originally created to mitigate the strictness of common law, developed in the Court of Chancery

It was characterized:

- By the informality of the procedure (the action started by an informal procedure that could be written or oral; then the chancellor called the respondent with a ‘writ of subpoena’ common for all the procedures);
- The trial was very fast and informal (the chancellor collected evidences; heard the parties and the witnesses and then took the decisions);
- The decisions were taken on the basis of rules initially inspired to moral and catholic principles, on *aequitas;*
- The chancellor gave orders *in personam* (to do or not to do something) to purify the respondent’s coscience

The contrast between Common law and Equity

1. At the beginning = *equity followed the law* = the equity solutions were not in contrast with common law
2. By the time begun a strong contrast between common law and equity = different solutions in the two fields of jurusdiction

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Who had lost in a common law procedure often advocated the equity courts that frequently reversed the decision

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It was inacceptable for the Westminster's judges and a strong contrast started

Reforms of English legal system

After the defeat of Napoleon, England's external position was one of the unprecedented strength. But internally, the 19th century started with a period of serious political and social crises. The center of economic activity had moved to trade and industry. Workers had increasingly migrated to the cities but both houses of parliament were still composed of extremely conservative aristocrats, bishops, and landed gentry. The continent of Europe impoverished by Napoleon's wars, offered a very poor market outlet for English industry, so that the number of unemployed grew alarmingly and wages dropped. Starvation and strikes spread. The forces of progress in England began to realize that political and social reforms were inevitable if a revolution was to be avoided. A statute issued in 1831 gave the middle classes a share of political power for the first time.

In the 19th century, as a result of the influences of Bentham and his followers, many laws were issued. Such legal reforms included the alteration of the court jurisdictions, changes in court procedures, change in the law of civil procedure and to a lesser degree, the substantive law consolidation at the common law and abolition of the writ system. But no complete codification was made. Bentham and his school believed that legislation was the only way to achieve legal certainty and to bring the law into a simpler and generally comprehensible form.

Restrictions on Judges' ability to make law; Judges and courts can only make law if:

- a case is brought before them.

- If there is no previous binding decision already established by a higher court in the same hierarchy (novel case)

Judge's ability to make law

Judges can only make law when:

- When they are deciding on a new issue (novel case) brought before them or when a previous principle of law requires expansion to apply to a new situation. eg the first time a case of negligence was brought to court it was a novel case and it created the common law of negligence. Further cases over time have developed that common law.

- Statutory interpretation- interpreting the words in acts of parliament. eg in the Brislan case the court had to interpret the words 'other like services' or in the Franklin Dam case they had to interpret the words 'external affairs'. The interpretation given forms precedent.

Doctrine of Precedent

The judges look at past decisions to guide them; they look at the reasons behind the decision in past cases for guidance when deciding new cases.

When a new situation arises and is decided on a precedent is created.

What is a precedent?

A precedent is the reasoning behind a court decision that establishes a principle or rule of law that must be followed by other courts lower in the same court hierarchy when deciding future cases that are similar.

The main reasons for applying precedent is to create consistency and predictability within the legal system, as like cases are decided in a like manner.

This in turn gives us confidence in our legal system and we feel justice is being done.

- Precedent is the reason for the decision (the ratio decidendi).
- Precedents can only be made when a judge alone is hearing a case. The Judge makes the decision and gives the reasons for that decision; the reason for the decision is then binding on lower courts in the same hierarchy.
- For this reason precedent is usually made by courts which hear appeals (as there is no jury). ; ie the High court, the Court of Appeal and the Supreme Court.

- A jury decision cannot create a precedent as juries do not give reasons for their decisions.

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