

Tutorial

[Law](#), [Common Law](#)



TUTORIAL 1. Compare and contrast civil legal system and common legal system

Legal system is a legal framework which relates to the rules set by the government of a state to the citizen.

DIFFERENCES | CIVIL LEGAL SYSTEM | COMMON LEGAL SYSTEM |

Origins | -Arbitrary (berubah2)- origin in Roman law, as codified in the Corpus Juris Civilis of Justinian, and as subsequently developed mainly in Continental Europe | -Evolutionary-the legal tradition, which evolved in England from the 11th Century onwards. | **Definition |** -A legal system inspired by Roman law and whose primary feature is that laws are codified into collections. | -comprising ancient customs, judicial precedents and enacted law and so called because it was made common to the whole of England and Wales after the Norman Conquest 1066. Prior to this time there was no common system of law.-The part of English law based on rules developed by the royal courts during the first 3 centuries after the Norman Conquest 1066 (Oxford Dictionary of law) | **Other Names |** Continental law, Romano Germanic law, neo-Romano law | Anglo-American law , English law , Judge-made law | **Sources of law |** Statutes/legislation- civil law codes and statutes are mostly concise and do not provide definitions but state principles in broad, general phrases | Case law, Statutes/legislation- common law codifying statutes provide detailed definitions and each rule sets out lengthy enumerations of specific applications or exceptions | **Codification** (The codification process derived from the Corpus Juris Civilis) | -have comprehensive codes, often developed from a single drafting event.-the codes cover an abundance of legal topics, sometimes treating separately private law, criminal law and commercial law. g : Codex, Digesta and Pandectae, institutiones | -Have statutes, sometimes collected into codes.

they have been derived more from an ad hoc process over many years .- rules developed through the judicial decision-making process | Existence of equity | There is no comparable equity law in civil-law countries. The system orientation of the codes would not permit the growth of another branch of law outside the framework of the system. | Equity law developed in England as a legal method to soften the often harsh effects of judicial precedent or legislation; to establish different procedures that might be required for a particular issue in the interests of fairness when common law remedies were not available or could not ensure a just result in a particular case; and to deal with new problems that called for different remedies than the common law provided. | The Principle of Precedents and Stare Decisis* | civil law judges may be primarily bound to codes and reason | -the method of common law to analyze previous court decisions, to find a general principle in each of them and to transfer these principles to a current dispute that need to be decided.-are bound by precedents rendered by higher courts. According to that, common law has a more hierarchical structure | Function of doctrine | - provide all practitioners, including the courts, with a guideline for handling and deciding of specific future cases by developing basic rules and principles from the numerous legal treatises | -modest function of doctrine in common law to find differences and similarities in decided cases and to extract specific rules from decided cases | Trial format | Inquisitorial/collaborative | Accusatorial/confrontational/adversarial | Role of judicial decision | -Has been negligible (diabaikan)-possibly as a result of Justinian's dictum.-civil law judges look to code provisions to resolve a case | -precedent has been elevated (ditinggikan) to a position of supreme prominence (kepentingan)-

common law judges reach for casebooks to find the solution to an issue in a case. | The role of the judge | -actively involved in the proceedings either in civil or criminal cases.-investigate and determine the facts of the case-questioning the witnesses | -sits and determines the case.-all facts of the case will be noted by the judge. | Proceedings | Use of argument & debate : | | Modest & restricted | Extensive (meluas) & fundamental | | Style of legal reasoning : | | deductive | Inductive | | Trial Emphasis on : | | Factual certainty | Procedural correctness | | Evidentiary rules: | | None (all evidence considered) | Formal and restrictive | Presumption of accused parties | The accused is presumed guilty unless he can prove otherwise beyond a reasonable doubt. | The accused is presumed innocent until proven guilty. | Plea Bargaining | -not allowed | Allowed-an accused can mitigate on his sentence | Court Structure | - following the tradition of separate codes for separate areas of law, favour specialty court systems and specialty courts to deal with constitutional law, administrative law and commercial law and civil or private law. | -favour integrated (gabung) court systems with the courts of general jurisdiction available to adjudicate criminal and most types of civil cases, including those constitutional law, administrative law and commercial law. | Lawyers | Judges dominate trials-judges assumes the role of principal interrogator of witnesses, resulting in a concomitant derogation of the role of lawyers during the trial-lawyer's role is to advise and inform | Control courtroom-prime player s in the process, introducing evidence and interrogating witnesses.-debate and oppose | Judicial attitudes | - Creative-judges able to search for an answer to a question or issue among many potentially applicable judicial precedents.-the role of legal scholarship is

country. Only systems of courts and local laws based on ancestral customs - no transport, communications were available to the few, people never travelled more than few miles from their homes, no law books. -not possible for the whole country to be ruled according to a single set of laws. A) KING OWNED ALL THE LAND -the barons, lords, bishops and freemen held of his as tenants and sub-tenants -they were compelled to swear an oath of allegiance to the king himself A) KING OWNED ALL THE LAND -the barons, lords, bishops and freemen held of his as tenants and sub-tenants -they were compelled to swear an oath of allegiance to the king himself -He took over the most efficiently governed Kingdom in Europe and he enforced its system of central or national government. -Trying to provide some central system of justice-it was only by making laws which had to obey and which could be enforced throughout the land-exercise real power and control over all his subjects. Changes made by William a) claimed to become the owner of every inch of English soil b) established the feudal system of land tenure (tempoh pemegangan), under which all persons who possessed land did so merely tenants or sub-tenants (pnyewa) of the king c) Separation of lay court and church court d) established a strong central government and a national judicial system e) introduced General Eyre. -He took over the most efficiently governed Kingdom in Europe and he enforced its system of central or national government. -Trying to provide some central system of justice-it was only by making laws which had to obey and which could be enforced throughout the land-exercise real power and control over all his subjects. Changes made by William f) claimed to become the owner of every inch of English soil g) established the feudal system of land tenure (tempoh

pemegangan), under which all persons who possessed land did so merely tenants or sub-tenants (pnyewa) of the king h) Separation of lay court and church court i) established a strong central government and a national judicial system j) introduced General Eyre. William the Conqueror William the Conqueror Norman Conquest 1066 Norman Conquest 1066 B) THE FEUDAL SYSTEM Feudalism- a set of legal and military customs in medieval Europe that flourished between 9th and 15th century. -a system for ordering society around relationships derived from the holding of land in exchange for service and behaviour. 1-all land belonged to absolutely the Crown 2-all persons holding land did so merely as tenants of the Crown. 3-tenants paid for their occupation of land by rendering services to the Crown and its government e. g by providing and equipping soldiers 4-sub-tenants rendered(memberikan) similar feudal services to their immediate landlords e. g tilling the landlord's fields. 5-feudatories holding land directly from the king were called tenants in chief (lords and barons) which was the precursor (pelopor) of the king's council. B) THE FEUDAL SYSTEM Feudalism- a set of legal and military customs in medieval Europe that flourished between 9th and 15th century. - a system for ordering society around relationships derived from the holding of land in exchange for service and behaviour. 1-all land belonged to absolutely the Crown 2-all persons holding land did so merely as tenants of the Crown. 3-tenants paid for their occupation of land by rendering services to the Crown and its government e. g by providing and equipping soldiers 4-sub-tenants rendered(memberikan) similar feudal services to their immediate landlords e. g tilling the landlord's fields. 5-feudatories holding land directly from the king were called tenants in chief (lords and barons)

which was the precursor (pelopor) of the king's council. 25 Sept 1066- Harold's army had been badly depleted in the English victory at the Battle of Stamford Bridge in Northern England over the army of King Harold III of Norway. 28 Sept 1066-The Norman Conquest of England began with the invasion of England by William, Duke of Normandy. 14 Oct 1066- Battle of Hastings, defeating King Harold II of England. William won and he was known as William the Conqueror. 25 Sept 1066- Harold's army had been badly depleted in the English victory at the Battle of Stamford Bridge in Northern England over the army of King Harold III of Norway. 28 Sept 1066-The Norman Conquest of England began with the invasion of England by William, Duke of Normandy. 14 Oct 1066- Battle of Hastings, defeating King Harold II of England. William won and he was known as William the Conqueror. D) STRONG CENTRAL GOVERNMENT -King's council (Curia Regis) was set up. Here, foregathered the barons, lords, bishops and other important figures of the kingdom and whose advice and wisdom the monarch relied. King as the fountain of Justice. D) STRONG CENTRAL GOVERNMENT -King's council (Curia Regis) was set up. Here, foregathered the barons, lords, bishops and other important figures of the kingdom and whose advice and wisdom the monarch relied. King as the fountain of Justice. C) SEPARATION OF LAY (common) COURTS & CHURCH (Ecclesiastical) COURTS -Bishops and clergy to be tried in the church court -church (canon) law was to be applied there in. C) SEPARATION OF LAY (common) COURTS & CHURCH (Ecclesiastical) COURTS -Bishops and clergy to be tried in the church court -church (canon) law was to be applied there in. E) GENERAL EYRE Reason of introducing * There was no common law to the people. * to achieve the uniformity of law,

making it common law. thus, he introduced General Eyre Definition -A form of central control whereby representatives (circuit /itinerant judges) of the king were sent out (operated) from Westminster (in London) to all parts of the country. Function : to check the local administration in the shires(country areas in England) e. g > collection of taxes and dues and decide on disputes

However, General Eyre became judicial rather than administrative — were then called the Justices in Eyre. Procedure of making law * these ‘ itinerant justices’ returned to Westminster * -they were able to discuss various customs of different parts of the country * -By a process of sifting, reject unreasonable ones and accept those that seemed rational, to form a consistent body of rules. * During this process (around 2 centuries), principles of stare decisis (‘ let the decision stand’) grew up. * Whenever a new problem of law came to be decided, the decision formed a rule to be followed in all similar cases, making the law more predictable. * 1250- a ‘ common law’ had been produced, that ruled the whole country. NOTES :

NOTES : 3. Explain defects of common law a) The writ system To begin an action in a royal court, * A plaintiff had to obtain a writ i. e a written command issued by the Lord Chancellor in the King’s name, ordering the defendant to appear in court and show cause why the plaintiff should not be given the relief he claimed. * A writ was a sealed letter issued in the name of the king and it would order some person to do whatever was specified in the writ. * The writ was purchased from the main royal offices, the Chancery but the problem is the price of writ where not everybody are available to afford it. * The writ was filled up by the plaintiff or the clerk at the chancellor office, so he must be very careful because there was no lawyer would give an

advice regarding on how to write a writ and its types. If there was a small error in the writ, it will be thrown out of the court (will not be entertain) *

Writ was very limited at that time. * There was many different writs but if there was no appropriate writ to cover the type of claim- there could be no remedy. The rule was : no writ, no remedy (ubi remedium, ibi jus) Create new writ at a price. * For every civil wrong or cause of action, there was a separate writ. * Examples of writ : 1- Writ of trespass 2- Writ of debt 3- Writ of detinue (detinue alleged that the defendant detained an article or chattel from the plaintiff and would not return it)-ambik brg kpnyaan org * Writ only deal with direct cases-the writ for trespass to land. Therefore, the plaintiff had to select the particular writ which he considered fitted the facts of his case. * Indirect act- diminishing the enjoyment of someone's property through acts of nuisance such as excessive noise/pollution from excessive smoke or intolerable odour. * The office tried to help the litigants and try to come up with new writ but the parliament is not agreed because it will interfere their power. Provision of Oxford 1258 -as the result, it cause dissatisfaction among the people who have good claim. Statute of Westminster 1285 -give power to chancery office to create new writ in similar case (in consimili casu) -can adjust and modify the existing writ of the similar case. * Restricted type of remedy that could be rewarded. For civil wrong, the only remedy offered was damages-hardly an adequate compensation. The common law could not, for example compel a person to perform his obligation/desist him from continuing with the wrongful act. Plaintiff- could not obtain remedied they desired. * Example : in a case of trespass to land, where perhaps the defendant had built onto his neighbour's

land, the building would still be there and the plaintiff would have lost the use of that part of his land. In such a situation the plaintiff would probably prefer to have the building removed rather than be given money in compensation.

4. What is common law? Oxford Dictionary : -The part of English law based on rules developed by the royal courts during the first 3 centuries after the Norman Conquest 1066 General Principles of English Law by PWD Redmond and Peter Shears : - comprising ancient customs, judicial precedents and enacted law and so called because it was made common to the whole of England and Wales after the Norman Conquest 1066. Prior to this time there was no common system of law. The English Legal System by Jacqueline Martin: * The law developed by the early judges to form a ‘common’ law for the country to distinguished it from the local laws used to prior to the Norman Conquest. * The law which has continued to be developed by the judges through the doctrine of judicial precedent distinguished it from the laws made by legislative body, such as Acts of Parliament or delegated legislation. * The law operated in the common law courts before the reorganisation of the courts in 1873-75 distinguished it from equity in which the decision made in the Chancery courts. Common law vs Civil law -Common law originated from England, spread by the British to other countries known as English Legal System, while civil law is from Roman law. Common law | Statute law | -unwritten law-judge made law/case law-can be amended-judges bound to follow the precedence | -legislation-made by Parliament-Cannot simply be changed/amended-properly written/codified | Common law vs Customary law Common-applicable to everybody, customary-applicable to certain group of people Common law vs common

law in other countries CL-law applicable in England only. CLOC-common law applied in the countries that British conquered and mixed with other laws. 5.

Explain the Equity EQUITY BEGAN BECAUSE OF THE DEFECTS IN COMMON LAW -Litigants had to fit their circumstances to one of the available types of writs: if the case did not fall within one of those types, there was no way of bringing the case to the common law court. -Common law court-rigid, offered only one remedy(damages) which was not always an adequate solution to every problem. -Although the law was adequate to meet the case, justice might not always be obtainable in the common law courts because of the greatness of one of the parties , often be in a position to overawe the court itself. * Many people were unable to seek redress for wrongs to common law courts. * The petitions from persons unable to obtain justice in courts were sent to the King as ‘ fountain of justice’. These petitions were sometimes examined by the King and his Council and the relief was granted or refused. * These petitions were commonly passed to the Chancellor, the king’s chief minister, as the king did not want to spend time considering them. The Chancellor was thought as ‘ keeper of the king’s conscience’. This was because the Chancellor based his decisions on principles of natural justice and fairness, making a decision on what seemed right in the particular case rather than strict following of previous precedents. * Soon, litigants began to petition the Chancellor himself. * The petitions were usually in the form of allegations that : * The common law was defective. * The remedy of the common law, namely damages, was not always a satisfactory relief. * The defendant was too powerful: men of wealth and power in the country could overawe(mnimbulkn rasa kagum) a court. * The court lacked jurisdiction to

decide certain cases, e. g. where foreign merchants were suitors (penuntut).

* In general sense, equity means fairness. In English Law, equity means that body of rules, originally enforced by the court of Chancery. It can be described as a gloss (supplement) on the common law, filling in the gaps, softening the strict rules of the common law and making the English legal system more complete. * By 1474, the Chancellor had begun to make decisions on the cases on his own authority, rather than as a substitute for the king. This was the beginning the Court of Chancery. PROCEDURE IN THE COURT OF CHANCERY * Litigants appeared before the Chancellor, who would question them and deliver a verdict based on his own moral view of the question. * The court could insist that relevant documents be disclosed, as well as questioning parties in person. * UNLIKE the common law courts which did not admit oral evidence until the 16th century, and had no way of extracting the truth from litigants. * To ensure that the decisions were 'fair', the Chancellor used new procedures such as subpoenas, which ordered a witness to attend court or risk imprisonment for refusing to obey the Chancellor's order. * The Court of Chancery could provide whatever remedy best suited the case-the decree of specific performance, injunction and etc. These remedies were able to compensate plaintiffs more fully than common law remedy. THE MAIN EQUITABLE REMEDIES * INJUNCTION-An order of the court in the form of a decree compelling the defendant in a case to cease from doing certain acts. (an order to prevent someone from doing something). When the court orders one of the parties to do something, it is called a mandatory injunction; where the order is refrain from doing something, it is called a prohibitory injunction. Injunctions are used today in

all sorts of situations. Example: In *Kennaway v Thompson* (1980) the court granted an injunction restricting the times when power boats could be raced on a lake. An injunction can also be granted to protect on party's rights while waiting for the case to be heard. This is called an interlocutory injunction. Basically, an injunction will only be ordered if it is felt that, during that the parties have to wait for the case to be heard, one party would suffer irreparable harm which could not be put right by an award of damages at the end of the case. * SPECIFIC PERFORMANCE- An order compelling a party to an agreement to carry out his promise or is guilty for contempt(mghina) of court. (an order that a contract should be carry out as agreed) Example : A & B make an agreement, but B refuse to pay, then A complain to the court so that B fulfil what have been agreed earlier. * RESCISSION OF CONTRACT- To restore parties to a contract to their pre-contract status quo. Example : In some instances, you are entitled to a rescission period that begins immediately after you agree to a contract. The rescission period normally lasts for a number of days and the contract does not technically take effect until the rescission period has ended. You can rescind the contract at any time during the rescission period by signing a rescission document. When you do this, you cancel the contractual agreement and neither party is bound by the terms of the contract. The agreement effectively becomes null and void. -If the contract involved buying goods was rescinded, the buyer would have return the goods to the seller and the seller would have return the purchase price to the buyer. * RECTIFICATION-An order altering the words of a written document which has failed truly to express the intention of the parties to it. Example : mistakes done accidentally by either

advocators or lawyers or councils. Bring the case to court to correct the word. * **EQUITABLE MAXIMS / MAXIMS OF EQUITY** Although both the common law and equity lay down rules developed from the precedents, equity also created maxims which had to be satisfied before equitable rules could be applied. These maxims were designed to ensure that decisions were morally fair. The following are some of them : ‘ He who comes to equity must come with clean hands’ -This means that plaintiffs who have themselves been in the wrong in some way will not be granted an equitable remedy. In other words, if you ask for help about the actions of someone else but have acted wrongly, then you do not have clean hands and you may not receive the help you seek. For example, if you desire your tenant to vacate, you must have not violated the tenant's rights. However, the requirement of clean hands does not mean that a " bad person" cannot obtain the aid of equity. " Equity does not demand that its suitors shall have led blameless lives." *Loughran v. Loughran*, 292 U. S. 215, 229 (1934) (Brandeis, J.). The defense of unclean hands only applies if there is a nexus between the applicant's wrongful act and the rights he wishes to enforce. Example : In *D & C Builders v Rees* (1966), a small building firm did some work on the house of a couple named Rees. The bill came to £ 732, of which the Rees’ had already paid £250. When the builders asked for the balance of £482, the Rees’ announced that the work was defective, and they were only prepared to pay £300. As the builders were in serious financial difficulties (as the Rees’ knew), they reluctantly accepted the £300 ‘ in completion of the account’. The decision to accept the money would not normally be binding in contract law, and afterwards the builders sued the Rees for the outstanding amount. The Rees

claimed that the court should apply the doctrine of equitable estoppel, which can make promises binding when they would normally not be. However, Lord Denning refused to apply the doctrine, on the grounds that the Rees had taken unfair advantage of the builders' financial difficulties, and therefore had not come 'with clean hands'. 'He who seeks equity must do equity' - Anyone who seeks equitable relief must be prepared to act fairly towards their opponent. To receive equitable relief, the party must be willing to complete all of their own obligations as well. The applicant to a court of equity is as subject to the power of that court as the defendant. Example : In *Chappell v Times Newspapers Ltd (1975)*, newspaper employees who had been threatened that they would be sacked unless they stopped their strike action applied for an injunction to prevent their employers from carrying out the threat. The court held that in order to be awarded the remedy, the strikers should undertake that they would withdraw their strike action if the injunction was granted. Since they refused to do this, the injunction was refused. 'Equity follows the law' -Equity will not allow a remedy that is contrary to law. The court of Chancery never claimed to override the courts of common law. In *Story on Equity* third English edition 1920 page 34," where a rule, either of the common or the statute law is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it." it is only when there is some important circumstance disregarded by the common law rules that equity interferes. As per Cardozo in *Graf v. Hope Building Corporation*, 254 N. Y 1 at 9 (1930), "Equity works as a supplement for law and does not supersede the prevailing law." 'Equity acts

in personam' -In England, there was a distinction in the type of adjudicatory jurisdiction of the courts and the chancery. Courts of law had jurisdiction over property, and their coercive power arose out of their ability to adjust ownership rights. Courts of equity had power over individuals. Their coercive power was the ability, on authority of the crown, to hold a violator in contempt, and take away his or her freedom (or money) until he obeyed. This distinction helped preserve a separation of powers between the two courts. Nevertheless, courts of equity also developed a doctrine that an applicant must assert a " property interest." This was a limitation on their own power to issue relief. It does not mean that the courts of equity had taken jurisdiction over property. Rather, it required that the applicant be asserting a right of some significance, as opposed to emotional and dignitary interests. ' Equity will not suffer a wrong to be without a remedy' -When seeking an equitable relief, the one that has been wronged has the stronger hand. The stronger hand is the one that has the capacity to ask for a legal remedy (judicial relief). In equity, this form of remedy is usually one of specific performance or an injunction (injunctive relief). These are superior remedies to those administered at common law such as damages. The Latin legal maxim is ubi jus ibi remedium (" where there is a right, there must be a remedy"), sometimes cited as ubi jus ibi remediam. The maxim is necessarily subordinate to positive principles and cannot be applied either to subvert established rules of law or to give the courts a jurisdiction hitherto unknown, and it is only in a general not in a literal sense that maxim has force. Case law dealing with this maxim is include Ashby v White and Bivens v. Six Unknown Named Agents, 403 U. S. 388 (1971). The principle was key in the

decision of *Marbury v. Madison*, wherein it was necessary to establish that Marbury had a right to his commission in the first place in order for Chief Justice Marshall to make his more wide-ranging decision. ‘Delay defeats equity’ -Where a plaintiff takes an unreasonably long time to bring an action, equitable remedies will not be available. The unreasonableness of any delay will be a matter of fact to be assessed in view of the circumstances in each case. Example : In *Leaf v International Galleries* (1950) the plaintiff bought a painting of Salisbury Cathedral described (innocently) by the seller as a genuine Constable. Five years later, the buyer discovered that it was nothing of the sort, and claimed the equitable remedy of rescission, but the court held that the delay had been too long. ‘Equity looks to the intention and not the form’ -This was applied in the case of *Berry v Berry* (1929) where a deed was held to have been altered by a simple contract. Under common law rules, a deed could only be altered by another deed, but equity decided that as the other parties had intended to alter the deed, it would be fair to take into account that intention rather than the fact that they got the formalities wrong. *These maxims (there are several others) mean that where a plaintiff’s case relies on a rule of equity, rather than a rule of common law, that rule can only be applied if the maxims are satisfied-unlike common law rules which have no such limitations.

CONFLICT BETWEEN EQUITY AND COMMON LAW * The two systems of common law and equity operated quite separately, so it was not surprising that this overlapping of the two systems led to the conflicts between them. One of the main problems was that the common law courts would make order in favour of one party and the Court of Chancery an order in favour of the other party. * *Earl’s Oxford Case* C. L

courts — Lord Chief Justice Coke Court of Chancery-Lord of Chancellor Ellesmere The Oxford colleges sold the lease (pajakan) of a land named Covent Garden for 50 years to the Earl of Oxford on £ 15 per year. In Elizabeth Statue stated that the prevention of any kind of college/school/church land from being sold. Therefore, the lease contract was void (xsah). Decision of C. L court — College has the right to sell the land. Decision of Court of Chancery — Individual have right to own the land they had bought. Conclusion : * The conflict was finally resolved in the Earl of Oxford's case (1615) when the King ruled that equity should prevail; in other words, the decision made in the Chancery court was the one which must be followed by the parties. This ruling made the position of equity stronger and same rule was subsequently included in section 25 of Judicature Act 1873. * By the end of 15th century, the Chancellor had set up his own court and dealt with petitions with relief. The Chancellor was not bound by the writ system or the technical and formal rules of the common law, and considered petitions on the basis of conscience and right * Later, the history of equity in the 19th century was notable for the delays which occurred in settling disputes, and the confusion over jurisdiction. * Half 19th century was a period of Judicature Act 1873-75. These Acts set up a new structure of courts known as the Supreme Court of Judicature. * The Acts laid down 4 important principles : * Equity and common law should be in future being administered side by side in all courts. * Where there is conflict between a rule of equity and a rule of common law with reference to the same matter, the rule of equity should prevail. * Evidence could be given in court orally. * Rules of the Supreme Court of Judicature were to be formulated with regard to procedural

matters. * The final results of the acts was the fusion of the administration of both common law and equity. * All courts could henceforward common law remedies, e. g damages and grant the special equitable remedies. NOTES

NOTES