UNIVERSITY OF RWANDA
COLLEGE OF ARTS AND SOCIAL SCIENCES; SCHOOL OF LAW
COMPARATIVE LEGAL TRADITIONS (MAJOR LEGAL SYSTEMS);

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LLB I

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Objectives of the module:

- to understand major legal systems (Civil Law ; Common Law and Islamic legal systems)
- to understand the evolution of civil law and common law traditions as the major legal traditions
- to understand general principles underlying civil law and common law traditions
- to understand their significance in the evolution of Rwandan legal system
- to acquire confidence in moving across legal systems
- To understand the Rwandan legal system and its evolution in pre-colonial; colonial and post colonial period

Learning outcomes

- After completion of this module, students should be able to understand the :
- Comparative law and its methods
- Evolution of civil law and common law traditions
- The principles underlying civil law and common law traditions
- Influence of civil law , common law and customary law traditions in the evolution of Rwandan law
- Status of Rwandan legal system in pre-colonial, colonial and post colonial period

Methodology:

- Participatory method : students asking questions and responding to lecturer’s questions
- Combination of lectures, students 'assignments presentations, and student research and study, involving the use of the library and internet resources.

- **Evaluation :**

➢ CATS & Assignments in groups / 50

➢ Final exam /50

INDICATIVE CONTENT

- **UNIT 1.** Major legal Traditions
- **Topic 1.** Introduction and Theoretical approach to comparative Law
- **Topic 2.** Historical Development of different legal systems (traditions)
- **Topic 3.** Principles or features underlying major legal systems
- **Topic 4.** Comparison of civil law and common law

Indicative content continued

- **UNIT 2**. RWANDAN LEGAL SYSTEM
- **Topic 1.** Rwandan legal system during the pre-colonial period
- **Topic 2.** Status of Rwandan legal system during the colonial period
- **Topic 3.** Evolution of Rwanda law in the period after genocide against Tutsi
- **Topic 4.** Status of current Rwandan legal system

UNIT 1. Major legal systems

Topic 1. Introduction and theoretical approaches to comparative law

1.1. Introduction

- Comparative law is like travelling
- Studies other people's normative practices and ideas
- Vision of a well-ordered community and the instruments and institutions designed to establish and sustain such order
- Comparative legal studies as an inspiration to the students

- Comparative law focuses on legal systems
- Encourages an understanding of some of the fundamental aspects of different legal systems
- **1.2. Theoretical approaches to comparative law**
- **-Definition:**
- Not a body of law made up of rules
- has no core subject content and is not a separate law subject

- It is more accurately a way/method *(functional method; structural method; historical method; analytical method; the law in context method and the common core method)* of looking at law using the process of comparison
- **Law scholars have defined comparative law as the scholarly study of the similarities and differences between the legal systems of different jurisdictions like the civil law and common law.**
- study of the resemblances and differences between different legal systems

- De Cruz suggests that comparative law describes: "*The systematic study of particular legal traditions and legal rules on a comparative basis*"
- It aims at looking at law to make the legal system examined, understandable to those who do not share the culture and the experience
- Broadens the understanding of a legal order,

- Its philosophical, historical and sociological perspectives it reflects
- Some aspects may be unique and others universal
- Understanding the elements that are unique requires a more extensive understanding of the law and the society

- the historical development of a system, its general institutional arrangements – especially those with responsibility for the administration of justice, the approach to legal reasoning and the authorities underlying this, and the general characteristics and tendencies of procedural arrangements are important in comparative law

- **Kahn Freund** points out that:
- *"Under similar social, economic and cultural pressures in similar societies the law is apt to change by means of sometimes radically different legal techniques. The ends are determined by society, the means by legal tradition … (This applies to judicial as well as legislative law making"*.

- Function of the law in fulfilling the social perspectives
- In English common law (cavalier vs Pope 1906 AC428) the court refused to extent the obligation to tenant's family
- But in Germany the contract is made in a favor of the third party wife and the children can have a direct action against the landlord (Para 328 BGB of the Civil Code

1.3.The purpose of comparative law

- Early comparative study was almost a matter of necessity to do comparison as different legal systems met each other or co-existed within a country. (Quebec – civil law; USA- Louisiana- civil law system
- Later it was the study of foreign legal systems with a view to finding out more about these systems in order to foster international relations
- As changes and technology appeared in society, comparative legal method was seen as a way of resolving new problems through experience of legal systems dealing with the same problems

- Lawyers not to be confined to their legal system due to the globalization and shrinking boundaries by clients and business concerns
- Law reform commissions looking at different legal systems to explore the appropriate avenues to be taken
- Judges in one system referring to the judicial reasoning of judges in a different system
- But it may also be done from a legal system of the same family (Austria and Canada)

Topic 2. Historical development of different legal systems

- The law of any system is based on legal tradition
- Legal history and comparative law have close links
- Using comparative method implies understanding the history of a particular legal system

2.1. HISTORICAL DEVELOPMENT OF THE MAJOR SYSTEMS

- In a narrow sense " legal systems" are the legal rules and institutions of a country
- In a broader sense, a "legal system" also includes a certain legal tradition or philosophy, as well as techniques or procedures
- Civil law system is in broader sense; Australian legal system in a narrow sense; as part of common law system

- Legal system with (USA) or not with political structure (Islamic law, Jewish law)
- The “parent systems” by David & Brierley as the major legal systems of the world, and include within this category the very broad legal families of “ civil law “, “common law ” and socialist law. Approved by JH Merryman in his book “ The civil law tradition, 1985”

2.1.1.THE ROMAN LEGAL SYSTEM

2.1.1.1.History & Sources of Roman law

Introduction

- Ancient Roman law: 8- 3BC century;
- Classical Roman law: 2 BC –3 AD century;
- the Law of the Late Roman empire: 4th to 6th Century AD
- **It is also possible to study Roman law following the**:
- Roman kingdom (753 BC-509 BC);
- Roman Republic (508 BC- 27 BC);
- Roman Empire (27 BC until 6 century).
- Both methods will be used.

- **Sources of law during the Roman Kingdom**

- **Customs:** ius non scriptum (not written down) mainly regarding to the family (creation-structure and operation) e.g marriage-rights and duty of family members; Position of *paterfamilias*. Or *mancipatio* in Roman property law
- **Royal decrees:** leges regiae with direct binding force as law and with religious character ; prescriptive (correct and good behaviour) and condemnatory (*retaliation-parricidium*)

- **Sources of Law during the Roman Republic**

A. Legislation

1. The law of Twelve Tables

- The Twelve Tables: First code of law
- Adoption in 450 BC (the first ten tables) and in 449 BC (the last two tables)
- originates from the conflicts of orders or struggle of orders: patricians(upper class) and plebeians(lower class).
- Privileged noble patricians and plebeians

- **Aim:** to provide equal rights of citizens(claims of plebeians)
- It covered various public and private law fields such as inheritance, criminal law, constitutional matters, etc.
- **Plebeians:** General body of Roman citizens distinct from the privileged aristocracy who made up the assemblies.
- **Patricians** – elite families or aristocracy who made up the members of the Roman Senate.
- **Consul** – highest elected Roman official acting as both civil and military magistrate
- **Tribune** – official of the Plebeian assembly and magistrate to protect the peoples rights.

2. Other laws enacted by Assemblies

Eg: - the Lex Aquilia of 286 BC, which may be regarded as the root of modern tort law

- Lex Canuleia (445 BC; which allowed the marriage - ius connubii - between patricians and plebeians),

There were many assemblies:

- The *comitia centuriata: important of the assemblies ; it elected high ranking magistrates ; it enacted Twelve Tables*
- The *comitia curiata: Oldest assembly with minor role in legislation only conferring powers on superior magistrates*
- The *comitia tributa:* handled routine legislation and elected lesser magistrates
- The *concilium plebis (*the usual organ for the passing of laws in the later Republic as its presidents, the tribunes, had more time for, and interest in, legislation than the consuls)

3. Senatus Consulta

The Senate's directives, *Senatus consulta*, carried great persuasive weight, but were not legally binding unless they had been incorporated into a resolution of the Roman Legal System by an assembly or an edict of the magistrates

B. Edicts of magistrates

- High-ranking magistrates had the *ius edicendi*, the right to issue edicts, i.e. legally binding directives within their appropriate sphere of jurisdiction.

- The edicts of the praetors (magistrate in charge of administration of justice) can be fairly said to have revolutionized Roman civil law in the late Republic, forming a body of law later described as the *ius honorarium*, i.e the law laid down by magistrates.
- Urban Praetor or *praetor peregrinus (Provincial praetors did not have this role)*
- The *ius honorarium* is law created by these praetors through **their role in litigation** and **their right to issue edicts**.

1. **Litigation**

- With regards to his role in litigation, the praetor could supplement the civil law.
- The praetor would ‘aid’ the civil law by granting more convenient and effective remedies for the enforcement of civil law claims.
- He could also correct the *jus civile*

2. **Issuing Edicts**

C**. Interpretation of pontiffs**

- Their advice on the meaning and applicability of the law constituted interpretation and thus subsidiary source of law.

D. Work of jurists (jurisconsults)

- Writing legal literature
- Advice

- **Sources of Law during the Roman empire**

. Classical period

- first two and a half centuries AD, some of the earlier sources of law (particularly the legislative assemblies and the praetorian edicts) gradually lost their importance, whilst other sources, e.g., juristic *interpretatio* and imperial decrees, became very prominent.

A. Legislation

1. Republican assemblies
2. Senate : primary organ of legislation in the early empire

3. Imperial decrees

- ***Edicta:*** *in common with high-ranking magistrates, had the power to issue edicts*
- ***Decreta:*** *Decreta were judicial decisions of the emperor*
- ***Mandata:*** *were administrative instructions from the Emperor*
- ***Rescripta:*** *Rescripta were written replies from the Emperor to questions or petitions addressed to him.*

B. **Edicts of Magistrates:** the power to supplement the *jus civile* declined.

C. Classical jurists

They greatly contributed to the evolution of law during this period through three ways:

- **Advising:** Giving advice (*responsa)* to judges, magistrates, private citizens and litigants continued, especially in the early classical period
- **Teaching :** Legal education in the era of the classical jurists broadly followed the traditions established by the Republican jurists
- **Writing:** The character of classical legal writing was primarily casuistic, i.e. involving extensive discussion of cases, both actual and hypothetical

Post classical period

- The three centuries between the end of the classical period and the publication of Justinian's codification can be viewed as a period of decline in the history of Roman law.
- There was a great deal of legislation, necessitated by the vast changes occurring in the late Empire.
- For example, the conversion of Rome to Christianity resulted in a mass of new laws that defined the powers of the Church.
- Legislation by the Emperor became the sole source of law, and the importance of the jurists waned (Diminished).
- The intellectual spirit of the classical period was largely missing

Sources

- **Works of Jurists:** intellectual spirit of classical period waned.
- **Post-classical legislation-imperial decrees**
- Factors that influenced legal development
  - Ecclesiastic rules
  - Eastern customs
  - Barbarian codes

"**Vulgarization"** is the term which has sometimes been used to describe the influence of Christianity, Eastern custom and the barbarian codes on Roman law in the post-classical era.

Justinian's codification (Corpus iuris civilis)

The main stages of the codification comprised:

- **the *Codex vetus (old code):*** This first stage consisted of a compilation of all extant (existing) imperial legislation
- **the *Digest or Pandect:*** It consisted of a compilation of juristic literature, mainly of the late classical period
- **the *Institutes:*** an introductory textbook for students

Substantive Roman Law

- *Public law - Private Law*
- *Written v unwritten*
- *Jus civile*
- *Jus gentium*
- *Jus natural*
- *Jus commune and singular law*

Law of Persons and Family

- **Natural person and juristic person**

Art 9 Law nº 71/2024 of 26/06/2024 governing persons and family states about the commencement of legal personality . It reads :

"A person's legal personality starts at birth. The legal personality is the foundation of civil rights"

- **Legal personality starts from birth to death(pple)**
- **Unborn child could have rights on condition he/she is born alive**

In Rwanda:

The art 10 of the Law nº 71/2024 of 26/06/2024 governing persons and family states about civil rights of a conceived child

- A conceived child is entitled to civil rights recognized for every person, provided he/she is born alive.
- A child, simply by virtue of being conceived is deemed to have been born whenever its interests so dictate.

Three factors determining the status of a person

- The status of Freedom (*status libertatis*)
- Roman Citizenship (Status civitatis)
- Family relationship

The status of Freedom (*status libertatis)*

- Freeman
- Slave

Roman Citizenship

- Full citizenship and Limited citizenship
- Roman citizens enjoyed these rights:

➢ ***Jus conubii*** of the roman citizen consisted in the capacity to contract a marriage with *manus* or the *jus matrimoniorum* of the *jus civile;* that is a marriage by virtue of which the wife and the children of the marriage became members of the husband's household.

➢ **Jus *commercii*** *:* This was the right of making contracts and acquiring, holding and transferring property of all kinds according to the *Jus Civile.*

➢ ***Jus suffragii*** *:* This was the right of voting in the popular assemblies.

➢ ***jus honorum*** *:* This was the right of eligibility to all public offices, civil, military and sacred.

Family Relationship

Family organisation:

Small family; headed by paterfamilias

Gens: Romans, apart from belonging to a family would also belong to a *gens*, which is perhaps best described as a clan and had its law (ius gentium)

Curia: Group of gens and then later tribes

City: 8th century tribes formed the city of Rome

Family Status

- The family status was determined by the following:

- Marriage
- Family and patria potestas
- Filiation
- Adoption
- Guardianship and curatorship
- Roman family law is divided into three parts corresponding to three forms of family power : (1) the law of marriage, (2) the law of patria potestas: governing the paternal power or relation of parent and child and (3) the law of guardianship or tutorial power governing the relation of guardian and ward.

Law of Marriage

- **Def**: union between a male and female
- Disqualification
- Slaves
- **Minors**(below 12 females and 14 males):

➢ A woman prosecuted for adultery unless acquitted

➢ A female slave manumitted by her master for the purpose of marrying him, could not marry anyone but him.

➢ **Relatives:** collaterals within the third degree could not marry. In Rwanda: Direct lineal kinship is prohibited. In addition, marriage between persons in collateral kinship up to the seventh degree is prohibited.

Conditions :

- **The ius conubii** (the right to conclude legal roman marriage). Apart from slaves and other condemned persons, all free men had this right to marriage.
- **Age**: the man had to be above the age of puberty(14 years) and the girl had to be marriageable(12 years). In Rwanda, For marriage it is 21 years old **Article 197, par 1: Age of majority :** The age of majority is eighteen (18) years, unless provided otherwise by this Law or other laws. A person having attained that age, is fully qualified for all acts involving civil life. However, intending spouse with 18 years old may be allowed to get legally married if he/she requests it to the civil status officer at the District level with reasonable grounds art 197,par 2

- **Consent of the fathers** (pater familias). There should be consent of both pater familias. The consent of the parents is not required in Rwandan law. The only consent of the future spouses, together with other requirements, is sufficient to conclude legal marriage under rwandan law.
- **Consensus:** An agreement that they wish to conclude a valid and lawful marriage and not simply enter into a concubinate(concubinatus) or similar temporarily relationship.

- ***Two types of marriage:***
- *Cum manu:* wife ceased to belong to her family
- *Sine manu:* the wife continued to belong to her family and remained under the authority of her father
- Termination of marriage: death, loss of citizenship and divorce(not formal)

Law of Patria Potestas

- These include the wife, children and further descendants including legitimized and adopted children and slaves or any other person dependant on the paterfamilias. The *paterfamilias* has a virtually unlimited power over his dependants
- The term *paterfamilias* does not necessarily mean the actual father or head of a family. It was a generic (common) name for an independent person

Filiation

- Filiation is the relationship between a child and his/her father or mother.

➢ **Blood filiation**

- **Legitimate child:** legal roman marriage
- **Natural child:** Concubinatus (child born out of wedlock)
- **Illegitimate child**: extramarital relationship
- Legitimization was possible by marriage, presentation to curia, imperial legislation,

- **artificial filiation(adoption**)

- ***Adrogatio:*** the relationship of the adopted person and his former family was totally discontinued.
- ***Adoptio:*** In *adoptio* the adopted continued his connection with his former family

- **Rwandan law refers to**

➢ **Simple adoption**: maintaining filiation ties with the adoptee's family of origin.

➢ **Full adoption:** Full adoption is a form of adoption that completely severs filiation ties with the adoptee's family of origin.

Guardianship and curatorship

- Guardianship for minor: 12 years
- Ordered By testament, by law and by court
- **Curatorship: I**nsane persons (Cura furiosi) and prodigals. In **Rwanda, known as Guardianship of an adult with mental disability**
- **Guardianship of woman: not applicable in Rwanda**

Roman Property Law

- **The right of ownership**

- **usus** (the right to use the thing),
- **fructus** (the right to enjoy the fruits from the property),
- **abusus** (the right to dispose of the thing, this include selling it, destroying it

- **Limitation to this right:**

➢ others' rights

➢ Public interest

➢ Co-ownership

➢ Transfer: " no one could transfer more rights than he had himself

Accessory real rights

- **Mortgage and pledge**: They result from a contract between the creditor and the debtor and are the securities for payment of the debt (they are called real securities)
- The person did not have full power over the thing but could enjoy some rights over the thing
- **Usus:**
- **Fructus:**
- **Servitude:**
- **Superficie:** Long term lease
- **Emphytheosis**: Long term lease(49 years for foreign investors and 99 years for rwandan. For land rights

Roman law of obligations

Sources of obligations:

- Contracts
- Quasi contracts
- Tort
- Quasi -tort

- **A. Contracts**
- **Consensual versus real contracts**

- **Consensual:** The only consent is enough
- **Real contracts:** These were contracts where apart from the consensus between parties, the formal basis of obligation was the thing (*res* whence the name real) delivered or rendered

Real contracts

- ***Mutuum*** **(loan for consumption) – found in Rwanda**
- ***Commodatum*** **(loan for use): found in rwanda**
- ***Depositum*** **(deposit)** : possibility if onerous deposit in Rwandan law
- *Pignus* (pledge): difference: involvement of the court

Consensual contracts (*contractus consensu*)

- ***Mandatum* (mandate): intuitu personae. In principle free different from today.**
- Contract of sale of thing in commercium, certain
- Price certain and precise
- Warrant against hidden defects and eviction
- ***Locatio conductio* (letting and hiring or lease)**

Quasi-contracts

. **Unauthorised administration (negotiorum gestio)**

- an instution which exists when one person (*negotiorum gestor*) managed the affairs of another person (*the dominus negotii*) without having been asked to do so.
- Duty to reimburse the expenses

Undue payment

- A special personal action was available for reclaiming that which had been paid by the plaintiff without being due

Unjustified enrichment

- That quasi contract is called "*unjustified enrichment*" which means that one person has been enriched without cause at the expense of another person who has been impoverished. This quasi-contract was created by the "Cour de Cassation Francaise" in the *Boudier* case.

Tortious obligations

- Delict (tort): Tort was any act that causes damage to another person or his property.
- Quasi-delict (quasi-tort): imprudence
- The effects were the same
- Article 258-261 of the CCBIII provides for a number of tort principles derived from Roman law (specifically lex aquilia) but added some improvements and more precisions.

Law of Succession

- There were two forms of successions in Roman law:
- Testate succession (testamentary succession)
- Intestate succession (succession *ab intestat)*

Evolution of civil law and common law traditions

- **The significance of Roman law in the formation of Romano- Germanic legal system**
- **Survival of Roman law and Revival of Roman law**
- ***Survival of Roman law***

➢ The Roman law was however the influence of Germanic customs to the point where historians speak of the laws during this period as either: “Romanised customary laws” or “barbarised Roman laws

➢ It was also influenced by canon law

➢ **Briefly:** The Roman law survived besides Germanic customs and canon law until 10th century (law of middle ages)

- ***Revival of Roman law***

- The revival of Roman law started in 11th century due to political, economic and cultural transformation
- Bologna University (Italy) has been the first to study and teach the corpus juris civilis and it become the principle legal center in Europe
- Glossators and commentators played a key role of its comprehension and adaptation
- Reception of Roman law in Europe: jus commune of Europe
- 17th century: many european states started the codification and jus commune became the basis for all codes

Significance of Roman law in the evolution of French Law

- **Reception of roman law before Napoleonic era**

✓ North and Center: pays de droit coutumier(customary law)

✓ South: Pays de droit ecrit (written law)

✓ Territoriality of laws versus personality of laws

✓ Nationality of law

- **Napoleon Code**

✓ For unification of laws

✓ Adoption of the French Civil Code: 21st March 1804

Formation of civil law

- It mainly originates from the Napoleon code and Corpus Juris civilis
- Conquest (Belgium, Netherlands, parts of Poland, Italy and west part of German)
- Inspiration (many European countries were inspired by the code due to its flexinility, clarity and persuasive nature)
- Colonisation (in the colonized countries by France)
- German code contributed to its formation to a small extent
- The system is known as Civil law system, Romano- Germanic legal system (or sometimes continental legal system).
- Briefly Civil law tradition is the system of law that emerged in continental Europe beginning in the Middle Ages and is based on codified laws drawn from customs, ancient Roman law (*corpus juris civilis*) as well as canon law.

- **Canon law** – the body of laws that govern the Catholic Church and its members, deriving from the decrees and rules (“canons”) made by the pope and ecclesiastical councils.
- **Corpus iuris civilis** – meaning “body of civil laws,” the name given to the compilation of Roman law ordered by the Byzantine emperor Justinian I in 529 CE.

Evolution of common law

- **Origin and development of common law**

- Norman conquest: 1066 (the year of defeat of the king of England Harold I BY Willian Duke of Normandy at the battle of Hastings who became William I- or William the Conqueror)
- Royal courts
- Courts of equity, etc
- Expanded by Colonisation and occupation
- Briefly, Common law is the system of law that emerged in England beginning in the Middle Ages and is based on precedents rather than codified law. However, acts and statutes are also considered as primary source of law in Common law countries.
- **Equity –** in English common law tradition, equity means a body of legal principles that emerged to supplement the common law when the strict rules of its application would limit or prevent a just outcome.
- **Precedent –** a judicial decision in a court case that may serve as an authoritative example in future similar cases.
- The governing principle is " stare decisis"(let the decision stand) which "to stand by things decided. This means that a case brought before the Court will be handled in the same way as previous similar decided case. The outcome should be the same for similar cases.

Islamic Legal System

- Derived from the birth of Mohammad the Prophet 622 AD
- This legal system emerged in a region where a number of laws already existed including Roman Law and Jewish law
- Most of the population in the middle east was nomadic and had gone with their oral and personal law
- The Koran was the starting point for the law from which flowed other sources

- The Shari'a or pathways

- Sunnah: comments made by the prophet himself on the Qur'an (inspiration from God, manners and words said by the prophet, it obliged the Muslims to behave like Muhammad in everything he did
- *Hadith* which are the traditions or statements followe and passed on
- Doctrinal consensus on *hadith* emerges as *ijma*
- Qyas which represent types of reasoning used

- To explain things by analogy : if Coran prevents muslims from drinking alcohol this involves that it prohibited to take , drink all drugs)

- The resolution of dispute in islamic law is undertaken by a *qadi* who has to find the law and is helped in the process by Mufti and his opinion is called Fatwah
- These fatwah have , in many cases been collected and incorporated into doctrinal work
- The structure of islamic law is very different from other legal system. There are no appeal courts

- *Imam* who is a prayer leader or the muezzin who calls the faithful to prayer
- Much law is consensual and private and not formalized
- Legislation vs the broad principles of Koran and Shari 'a
- The growth of Islam as a religion raises issues of compatibility between islamic legal thought and other forms of legal system, particularly in areas of private law
- In non islamic countries , the recognition given to islamic law is variable. In some it is given formal status for certain matters e.g marriage

TOPIC 3. Principles or features underlying major legal systems

1. **Sources of law**

- **In Civil law, sources of law are as follows:**

➢ **Primary sources of Law :** Legislations- Customs . In a particular way, there are also case law that follows legislation where civil law countries recognize case law/ jurisprudence in the domestic laws

➢ **Secondary sources of law :** General principles of law – Doctrine- Jurisprudence like constant jurisprudence (*Jurisprudence constante*) in France

Source of law (con't)

- In principle, there is no binding precedent in France Law but decisions rendered by important courts have become more or less alike case law with a persuasive force – Equity
- While in common law, the primary sources of law are Precedent and custom
- Then there are conventions- Royal prerogatives and legislations- Equity

Doctrine of stare decisis in common law : Stare decis is an abbreviation of the sentence : *" stare decisis et non quieta movere" e.g stick to decisions*

- The doctrine of stare decisis has two components: a vertical and horizontal one
- **The vertical component** says that judges of lower courts are strictly bound to precedent decisions of higher courts , even if the lower court considers the decision is not right. However, the inferior judges are free to express their opinion that they consider the binding precedent as wrong and they can also suggest an appeal
- **The horizontal component** of the doctrine of stare decisis , precedents are binding not only for lower courts , but also for current decisions of he court that rendered the precedent

Although the judges are bound to the result of the precedent, they do not have to stick to the reasons given in the precedent case

- A precedent is binding until it is overruled by a decision of a higher court or until it is overridden through a statute.
- A higher court can also reconsider or overrule its own previous decision
- Important to note that there is no written rule which can be found in any common law country that orders or enforces the binding effect of precedents. Only British laws judges are bound to decisions of the European Court of justice

- However, common law judges do not have to apply precedent if they point out the alleged precedent is significantly different from the current case and therefore is not binding. This process is called " ***Distinguishing"*** and is based on two (2) reasons :

- ***when there is no similarity between the current case and the precedent (e.g the precedent is about another area of law and the judge denies the analogy)***
- ***The judge satisfies himself and that it turns out that the fact of the cases are significantly different***

- Indeed , " ***through want of care " or " judgement per incuriam "*** does not have to be followed by precedent
- ***Per incuriam*** refers to a judgement of a court which has been decided without reference to a statutory provision or earlier decision which would have been relevant and binding. However, lower courts are free to depart from an earlier judgement of a superior court where that ealier judgement was ***deicided per incuriam***

- In civil law countries, some countries are bound by the decisions of the higher courts as well : e.g in Germany, the decisions of the Federal constitutional courts are binding (par 31 subsection I of the FCC): all decisions of the Federal Constitutional Courts are binding for all German Federal and Provincial Constitutional Bodies and for all courts and authorities . Another example is for Rwanda:
- Article 47 par 6 of the Organic Law N^{o} 03/2012/ OL of 13/06/2012, determining the organization, functioning and jurisdiction of the Supreme Court states: *"Judgements and decisions of the Supreme Court shall be binding on all other courts of the country. Since this law has been repealed , does it mean that SC judgements do no longer have the same authority?* ***Cfr Chief justice instructions of 25th March 2021; cfr RS/INCONST/SPEC 00002/2019/SC***

2.Codification

- **In civil law** most of legal rules and principles are codified in codes. Therefore, countries that apply civil law have comprehensive legal codes whereas in general, **common law** is uncodified. However, in common law they can convert and consolidate case law and enacted statute into statute law.
- **Concerning the style of drafting laws**, Civil law codes and statutes are **concise (short and clear)** (le style français), while common law statutes are **precise (exact and accurate)** (le style anglaise)

3.**Legal reasoning**

- In civil law , the legal reasoning is **deductive legal reasoning** that consists, for the judge to look into pre-established general principles and legal rules to a specific solution.
- Whereas common law judges apply **inductive legal reasoning** that consists in deriving general principles or legal rules from precedent or a series of specific decisions and extract an applicable decision.

4.**Court structure and role of the judge**

- In common law, judicial system may be drawn as a pyramid with the highest court at the top
- Whereas in civil law, judicial system would be represented as a set of two or more distinct structures with no bridge between them
- In civil law, the judge plays an active role in finding out the truth. He asks questions to the parties and even initiate to conduct investigation to the field. There is no cross examination of witnesses and each party who wants to ask a question must do it through the judge. **This is inquisitorial system**.

- Whereas a common law judge plays a passive role as a referee of the proceedings . The role of gathering evidence is left to the lawyers and parties. There is **cross examination** in **chief** and **cross examination of witnesses**. It is an **adversarial system**.

TOPIC 4. Comparison of civil law and common law

Differences	Civil law	Common law
➢	Influence of corpus juris civilis, Napoleonic code Germanic customs	only some dvp in rules and principles
➢	codification codes of abu-ndance of legal topics of private law	separate statutes codes often re-flect the rules of law enunciated in judicia decisions

➢ equitable principles and remedies in a code as part of the overall system	dvp of equity law to soften the often harsh effects of judi cial precedent
➢ judicial precedent negligible	precedents are preminent
➢ reasoning process is deductive, proceeding from stated gral pples or	judges apply inductive reaso- ning, deriving

- or rules of law contained in the legal codes to a specific solu tion

grall pples or rules of law from prece- dent or a series of specific decisions and extracting an applicable decision

➢ integrated court system with courts of grall jurisdiction

specialty court court system

- trial process: trials involve an extended process with a series of successive hearings and consultation for the presentation and consideration of evidence

single event trial

- Role of the judge:

active (inquisitorial system)

less active in the dvp of the law

the role of the judge as the manager of the trial (and refe-ree of the la wyers acting in adversary role) is secondary to that of the lawyers active in the dvp of the law

- common law judge
- in contrast is able to
- search creatively for
- an answer to a question
- or issue among many
- potentially applicable
- judicial precedent

- In the civil law tradition, the judiciary is usul ly part of the civil service of the cou

In contrast, common law judges are generally selec ted as part of the politic al process for a specific judicial post that they

- country hold for life or for
- a recent law gra- a specified term,
- duate selects the with no system of
- judiciary as a career advancement
- and then follows to higher courts
- a prescribed career as a reward for
- path, first attending service
- a special training
- institution for judges
- and then acting as a
- judge in a particular

- geographical area

and particular court system as assigned by the institutional body resposible for administration of the judicial branch, often the ministry of justice

Similarities

- **International arbitration :** Common Law and Civil law nowadays converge in international commercial arbitration
- Appointing a private arbitrator instead of a state court has an advantage relating either to time and costs
- Like in common law, the discovery proceedings escalate into cost intensive and time consuming

- Another advantage of arbitration , unlike the court proceedings, is linked to the confidentiality because it is not accessible to the public
- Indeed, it is up to the parties to agree on rules for arbitration (the place of arbitration, arbitrator, the language of the case etc)
- This may however, create a direct clash between common law and civil law in the field of international arbitration in case one party belongs to a different system than the other

- There are a lot of international agreements that provide rules with relation to international arbitration
- New York Convention (Convention on the Recognition and Enforcement of Foreign arbitration Awards) since 1958 and in effect since 1959 , initiated by the United Nations ; UNCITRAL (United Nations Commission in international Trade Law (General Assembly of UN 1996 to promote progressive harmonization and unification of the law of international trade)

- **UNIDROIT Principles of international commercial contracts : (International Institute for the Unification of Private Law)**
- It deals with principles of international commercial contracts and their comments
- The first version was finished in 1994 and the drafters took into account of both common law and civil law
- In 2004, a second extended version was published
- Then the 2010; 2016 editions etc……

- The versions set general rules for international commercial contracts that will be applied once parties have agreed on that (*the lex mercatoria*)
- This means when contractual parties have not any other law to govern their contract
- They may be used to interpret or supplement domestic law
- They may be used to interpret or supplement international uniform law instruments
- They may serve as a model for national or international legislators

- These rules serve as a guidelines to practitioners in both common law and civil law systems and constitute a point of intersection between both.
- **The legal system of Quebec :** This system deserves to be mentioned as it constitutes a point of intersection between the two legal systems (common law and civil law)
- Following its history, as a former French Colony, Private law in Quebec is civilian whereas other areas of law such as criminal law or constitutional law where Quebec and the rest Canada applies common law system.

- Both the common law and the civil law are equally authoritative and recognized source of law the law of property and civil rights in Canada
- When an enactment contains both civil law and common law terminology or a terminology that has different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning in other Provinces

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