

Common Law System

(English Legal System)

Different Legal Systems in the World

- A- Common Law System
(English Legal System)
- B- Civil Law System
(Continental System-Romano-Germanic Family)
- Other Systems
 - *Sui generis* systems
 - Mixed systems

Common Law System

- historically in England---
mostly because of the result of decisions and activities of the Royal Courts of justice following the Norman Conquest (11th Century).
- Most of the English-speaking countries---not all of them---are considered as countries **having this system**

General Characteristics

- Common Law is an unwritten law.-----formulated mainly by judges.
- Main aim is to find and provide pragmatic solution to particular specific trial/problems
- **not** to seek a general rule of conduct or general principles law for the future
- It is **more concrete** and **less abstract** if you compare it with Civil Law System.
- It is mainly a public law system.
- The basis for Common Law System is English Law

History of English Common Law

- **During Anglo-Saxon times:**
 - **no experience** --transformed mostly because of the **social needs**.
 - **Local customs** dominant until the 11th Century---customs varied from place to place ---no common law for whole of England.
 - **The Anglo-Saxon** system of keeping the peace (system of security)--was based on **Borh**---
 - This was a police organization which required every male to belong to a group of ten or more persons under a headman.
 - All persons in the group were **mutually responsible** for the offences of the others and were bound to bring the offender before the court if called upon.
 - The group would back up this **pledge (promise)** by paying the fines of its members if they were found guilty of violating customary law.
 - **borh system was replaced after 1066** by the related but distinct and **non-voluntary system** called "**frankpledge**" system.

History of English Common Law

- Before the 11th century—

there was no strong central government and the King (with his council) ruled loosely and controlled his kingdom inefficiently-----Royal justice was difficult to obtain.

- Following the 11th Century—

Normans period started when William of Normandy gained the Crown of England 1066)

Normans Period

- 1- They stopped the rebellious groups and they changed the form of administration and caused a strong centralized administrative body----**King's Council** (*Curia Regis*)---barons + bishops + and other important figures of the Kingdom.
- 2- New military and centralized feudal system:
 - King---owner of all land
 - Lords, barons, bishops----tenant or sub-tenant
 - To swear an oath of allegiance----Royal control
- 3-Separation of lay courts and church (clerical) courts
- 4- For important cases for the continuation of peace in England----the King exercised “high justice” exceptionally.
 - King's Court--- or King's Council-----called “**Curia Regis**”

History of English Common Law

- Curia regis performed legislative, executive and judicial functions together
 - a court for the most important personalities and disputes.--
--It was **not open to ordinary citizens**
 - From the **13th Century**-----some parts of Curia Regis was **transformed into Royal Courts** which were located at Westminster
 - limitations on the power of Curia Regis deriving from the “**prerogatives** of the local feudal barons”

History of Common Law

- **Royal courts had the power to intervene** in the domain of barons exceptionally.
 - Matters related to royal finance
 - Problems of respecting ownership and possession of land
 - Serious criminal matters affecting the peace of the kingdom
- Royal Courts were paid fee—
caused eagerness to hear more and more cases
- differences between the procedures applied in royal courts and in local courts
 - Procedure in local courts was arbitrary and outdated
 - Royal courts had instruments such as calling (summon) witnesses and enforcing their judgments

History of Common Law

- As a result----Royal courts became the only court of justice in England
- But until the 19th Century---to bring a case before a Royal Court was not a “right” for citizens but it was a favor that can be granted by the Royal authority:
 - a citizen had to brought a request to the Chancellor (judge)
 - asked from him to deliver a “writ”-(an order issued by a court or by an administrative body--Mahkeme emri-mahkeme ilami)
 - Writs were entitling and enabling the royal courts to accept and analyze the issue following the payment of required fees

History of Common Law

- not only an authorization for a citizen to bring a case----but also a kind of order given by the king to his officer to enforce the decision
- The writ entitled the defendant and plaintiff to attend the royal courts at Westminster on a certain date

Plaintiff: for civil cases----a person who brings the case to the court.

Defendant: for civil cases----the person against whom the claim is brought into the court.

Accused person: In criminal cases--
--- the person against whom the claim is brought into the court.

Person injured: In criminal cases----
- a person who brings the case to the court.

History of English Common Law

- Royal judges were **granting better justice**----when they visit a county court (shires became county after the Norman conquest)-----they had **to determine the customs applicable** to the local court.-----royal judges than **applied the law** that discovered from the inhabitants.
- 12 and 13th Centuries----the introduction of **juries**.-----juries were made up of local people who knew the **facts** of the local cases and the **relevant local custom**
- Jury decides on the facts of the case, the judge determines the law (**values of the society + randomly selected**)
 - (Exceptionally in France as well only on criminal cases)
 - Canada → only for serious crimes
 - England and Wales → → criminal cases and a few civil cases
 - Most → US → both civil and criminal cases

History of Common Law

- another important practice grew up---the principle of *stare decisis (Rule of Precedent)*.
 - Maintain what has been decided and don't alter the established----The principal that the precedent decisions are to be followed by the courts
 - whenever a new problem of law came to be decided---a rule was formed ----and this rule was followed subsequently by all other judges
 - Law become more predictable and more certain
 - As a result of this----the **common law of England** was formed and it was called like that because-----it was the law common to all parts of England (following 1707 UK).

History of Common Law

- Writs: procedural steps **occupied** a crucial **importance** → Substance was ignored and the main aim was to achieve solutions to disputes by procedures
- In contrast to the Romano-Germanic family----- common law system did not attempt to find justice.
- Supremacy was given to the matters of procedure in English law

Writ

- For every civil wrong and cause of action-----there was a separate writ.—

A writ was purchased from the main royal office.

- A plaintiff applied for the writ most suitable to his claim.-----If there was no writ suitable to a civil claim-----the plaintiff was at a severe disadvantage.
- If the plaintiff selected the wrong kind of writ-----the common law judges would throw out the case and **refrain from** inquiring into its merits.
- Creating new writs was prohibited at the **beginning**.-----As a result certain wrongs went un-remedied-----**merely because** they did not fall within the limits of an existing writ.

History of English Common Law

- Because of the **dominance of procedure** in English law → (remember writs) it was difficult for the Common Law System to meet the changing needs of the English society. Day by day it was paralyzed.--number of “just solutions” declined.
- From the 14th Century---persons **obtaining unjust solutions** from the Royal Courts or shocked by these solutions--**appealed to the King** and invited him to intervene

History of English Common Law

- Such appeals became **institutionalized** and **established** set of rules separately from the Common law system.-----power and authority of the King was delegated to the chancellor to judge these case on **behalf of the King**----thus these events led to the **emergence of the “Court of Chancery”**.
- Judgments of the chancellor were based on the “equity of the cases” and this approach created the **“principle of equity”** or **“the equity doctrine”**----which can be considered as corrections (and additions) to the principles applied by the royal courts.
- Existence of common law and equity law in **17th Century** was the **main feature** of English law
- **a dual system of law**-----Common law formed the main body while the function of equity law was to complete and correct the Common Law.

English Legal System

- In Romano-Germanic Family there was and there is a distinction between **public law** and **private law**-----But in **English law** distinction is occurred not between these laws but between **“Common law”** and **“equity law”**
- Main principle: **“equity follows the law”**---means common law.
- Since the 19th Century common law and equity law have been both administered by the same courts

Common Law

- But still there are **two different procedures** for “equity” and “common law”—

Equity

Over a period of time the common law became a very rigid system of law and in many cases it was impossible to obtain justice from the courts. The main defects of the common law were as follows:

- The common law failed to keep pace with the needs of an increasingly complex society. The writ system was slow to respond to new types of action. If a suitable writ was not available, an injured party could not obtain a remedy, no matter how just his claim.
- The writ system was very complicated, but trivial mistakes could defeat a claim.
- The only remedy available in the common law courts was an award of damages. This was not always a suitable or adequate remedy.
- Men of wealth and power could overawe a court, and there were complaints of bribery and intimidation of jurors.

Common Law

- But still there are two different procedures for “equity” and “common law”—

It became the practice of aggrieved citizens to petition the king for assistance. As the volume of petitions increased, the king passed them to the Curia Regis and a committee was set up to hear the petitions.

By the 15th century the Chancellor had started to hear petitions on his own and the Court of Chancery was established. The body of rules applied by the court was called **equity**.

The early Chancellors were drawn from the ranks of the clergy and their decisions reflected their ecclesiastical background. They examined the consciences of the parties and then ordered what was fair and just.

each Chancellor acted as he thought best. Decisions varied from Chancellor to Chancellor and this resulted in a great deal of uncertainty for petitioners. Chancellors began to follow previous decisions and a large body of fixed rules grew up.

Court of Chancery were often at odds with those made in the common law courts. This proved a source of conflict until the start of the 17th century when James I ruled that, in cases of conflict, equity was to prevail. For several centuries the English legal system continued to develop with two distinct sets of rules administered in separate courts.

“equity” and “common law”— the main difference between the two is related with the branches they include

for example

1 Recognition of new rights. The common law did not recognise the concept of the trust. A trust arises where a settlor (S) conveys property to a trustee (T)

2 Introduction of new remedies. The new equitable rights were enforced by means of new equitable remedies. In the field of contract law, the Court of Chancery developed such remedies as the injunction, specific performance, rescission and rectification

➡. These remedies were not available as of right like common law remedies: they were discretionary. The Court of Chancery could refuse to grant an equitable remedy if, for example, the claimant had himself acted unfairly.

Part 1 Introduction to law Differences between the common law and equity

<i>Common law</i>	<i>Equity</i>
Developed by circuit judges from English customary law applying the principle of <i>stare decisis</i>	Developed by Chancellors, in dealing with petitions addressed to the King from citizens complaining about the rigidity of the common law
Complete system of law	Complements the common law, but could not replace it
Does not recognise the existence of equity	Acknowledges the common law and tries to provide an alternative solution
Upholds rights irrespective of the motives or intentions of the parties	Originally, a court of conscience which ordered the parties to do what was just and fair. These principles are contained in equitable maxims, e.g. 'He who seeks equity must do equity' and 'Delay defeats equity'
Remedies available as of right	Discretionary remedies

Sources of English Law

Primary Sources

- 1-court decisions (“common law” and “equity law”)
- 2-legislation

Subsidiary Sources

- 3-custom
- 4-legal writing (doctrine)
- English law is basically a “case law”.-----a **judge-made law**.-----
Main source is court decisions

- In all countries there is distinction between “**superior courts**” and “all other courts”. All other courts---are called as “**lower courts**” or “**inferior courts**”
- Superior courts contribute the development of common law and equity.----**superior courts create the legal rules**
- In England----rules set by court decisions **must** be followed by other courts.-----normally common law system is a judge-made system and judges have a basic obligation to respect the “**judicial precedent**”—example-instances----they should respect the previous court decisions and this is called “**the rule of precedent**”

Sources of English Law

- Advantages of case-law approach:
 - Certainty
 - Predictability
 - Uniformity
- Disadvantages of case-law approach:
 - Binding force of the precedence limits the discretion of the judge
 - Sometimes inconsistent rules are developed and come into conflict
 - Law reports---legal rules are difficult to learn and apply

Sources of English Law

- To overcome clear conflict---superior courts may, on appeal:
 - **Overrule a decision**: Appeal court decides a similar case on the basis of a different rule---previous rule is said to be overruled.
 - **Reverse a decision (reversal)**: Appeal court reverses a decision given in a lower court---related to the same case--- -but this time in favor of another party.
 - **Disapprove a decision (disapproval)**: Appeal court expresses doubt about the validity of a previous rule, but does not expressly overrule it. It applies another rule.

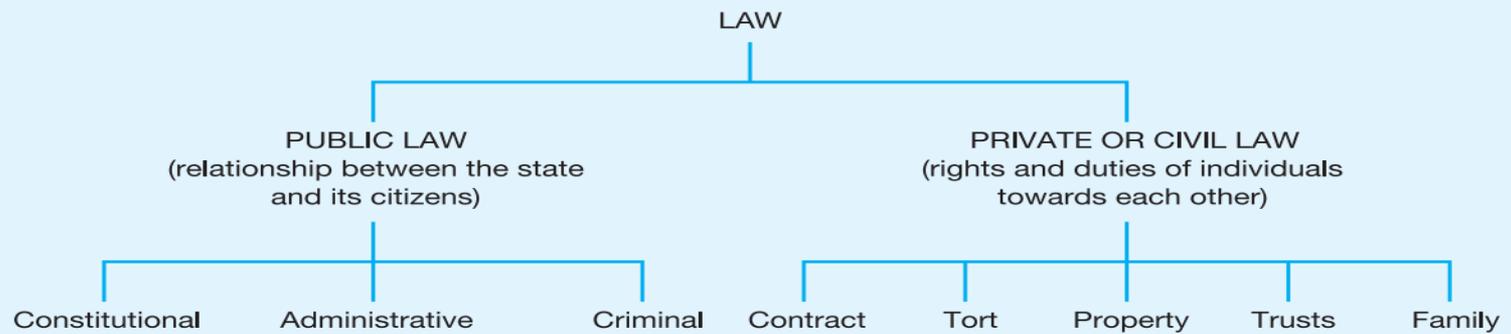
Sources of English Law

- In UK:
 - All Courts are bound by all decisions of;
 - House of Lords (Now Supreme Court of the UK-2009) (UK Welsh Scotland Northern Ireland). Not anymore House of Lords
 - Court of Appeal (Civil Division and Criminal Division)
- Second Source: **Legislation**
 - British Parliament: House of Lords & House of Commons
 - Main legislative source----Acts of Parliament/Statutes
 - Delegated legislation/subordinate legislation

Sources of English Law

- No written constitution in UK (it has uncodified constitution) , but;
 - Some set of **laws and principles** enacted by Parliament or judicial decisions and international treaties.
 - They guarantee **fundamental rights and freedoms** of individuals----limit the arbitrary exercise of power by the executive organ (1215-Magna Carta)
 - Parliamentary sovereignty

Part 1 Introduction to law **The distinction between public and private law**



The differences between criminal and civil law

The nature of law

	Criminal law	Civil law
Concerns	Offences against the state	Disputes between private individuals
Purpose of the action	To preserve order in the community by punishing offenders and deterring others	To remedy the wrong which has been suffered
The parties	A prosecutor prosecutes a defendant Prosecutions are brought in the name of the Crown, signified by R for Rex (King) or Regina (Queen) Case title: R v Smith	A claimant sues a defendant Case title: <i>Jones v Patel</i>
Where the action is heard	The criminal courts, i.e. magistrates' court or Crown Court	The civil courts, i.e. county court or High Court
Standard and burden of proof	The prosecutor must prove his case beyond a reasonable doubt	The claimant must establish his case on the balance of probabilities
Decision	A defendant may be convicted if he is guilty and acquitted if he is innocent	A defendant may be found liable or not liable
Sanctions	Imprisonment, fine, community order	Damages, injunction, specific performance, rescission
Examples	Murder, theft, driving with excess alcohol, engaging in an unfair commercial practice	Contract, tort, trusts, property law

Magna Carta Libertatum (1215)

- “Great Charter” “Great Liberation Charter”
- From King John to Barons and the Church
- Limiting the powers of the King/acceptance of rule of law by the King (to observe the rule)
- Article 39 is very important: **“No freeman shall be captured or imprisoned ...exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land. “**

Sources of English Law

- Classical theory in English legislation
 - Precondition for a rule in a statute to become part of common law
 - Should be interpreted and applied by courts first
 - In the past---legislative rules were transformed into court decisions and thus become applicable in English system
 - II WW
 - Effect of EU membership

Sources of English Law

- **Custom:**
 - Normally custom is a usage/repeating practice which has gained the force of law
 - Inferior to legislation and court decisions
 - Statute 1275----- “A customary rule becomes legally binding if it dates back from immemorial time” (1189)-----
 - to prove the custom has existed as far back as living memory can go...
 - this is not the case for other common law countries
 - Most of the customary rules have been transformed into “legislative acts” or “judicial decisions”

Sources of English Law

- **Legal Writing (Doctrine)**
 - In contrast to the Continental System...
 - Quotation may be used for supporting element of a judgment
 - We can say---to some extent the legal writing have contributed the development of common law
 - But this source does not directly create legal rules.

Some basic principles of legal liability

It is a basic function of the law to set out the circumstances in which a person may be required to answer for his actions. Legal liability describes a situation where a person is legally responsible for a breach of an obligation imposed by the law. Such obligations may arise from the operation of either the civil or criminal law. The activities of business organisations are subject to a wide range of potential liability. So, before we consider the law governing the formation, operation and dissolution of business organisations, we must first examine in outline the nature and scope of legal liability for wrongful acts.

Civil liability The areas of civil liability which have the greatest impact on businesses are liability in contract and tort.

Contractual liability

Contractual liability arises when two or more persons enter into a legally enforceable agreement with each other. The law of contract is concerned with determining which agreements are binding, the nature and extent of the obligations freely undertaken by the parties and the legal consequences of breaking contractual promises.

Every type of business transaction, from buying and selling goods and services to employing staff, is governed by the law of contract.

Tortious liability

A tort consists of the breach of a duty imposed by the law. The law of tort seeks to compensate the victims of certain forms of harmful conduct by an award of damages or to prevent harm occurring by granting an injunction. Examples of torts include negligence, nuisance, trespass, defamation (libel and slander) and conversion.

Criminal liability

A crime is an offence against the state. The consequences of a criminal conviction are not confined to the punishment inflicted by the court. For example, if a person is convicted of theft, his name will probably appear in the local papers causing shame and embarrassment and he may even lose his job. The sanctions are so severe that the criminal law normally requires an element of moral fault on the part of the offender. Thus, the prosecution must establish two essential requirements: *actus reus* (prohibited act) and *mens rea* (guilty mind). For most criminal offences, both elements must be present to create criminal liability.

Law of property

The law of property is concerned with the rights which may arise in relation to anything that can be owned. Thus, property covers land, goods and intangible rights such as debts, patents or the goodwill of a business.

1 Ownership. Ownership describes the greatest rights that a person can have in relation to property. An owner enjoys the fullest powers of use and disposal over the property allowed by law. The owner of this book, for example, has the right to read it, lend it to a friend, hire it out, pledge it as security for a loan, or even tear it into shreds. An owner does not enjoy absolute rights; restrictions may be imposed to protect the rights of other members of the community. The ownership of a house does not entitle the occupants to hold frequent wild parties to the annoyance of neighbours.

2 Possession. Possession consists of two elements: physical control and the intention to exclude others. For example, you have possession of the watch you are wearing, the clothes in your wardrobe at home and your car which is parked while you are at work. Ownership and possession often go hand in hand, but may be divorced. The viewer of a hired TV enjoys possession of the set, but ownership remains with the TV rental firm. If your house is burgled, you remain the owner of the stolen property, but the burglar obtains (unlawful) possession.

Self-test questions/activities

- 1 What is law and why is it necessary?
- 2 Explain the difference between the following pairs:
 - (a) public law and private law;
 - (b) civil law and criminal law;
 - (c) contract and tort;
 - (d) common law and equity;
 - (e) ownership and possession.
- 3 Consider the following legal actions and indicate whether civil or criminal proceedings would result:
 - (a) Ann decides to divorce her husband, Barry, after 10 years of marriage;
 - (b) Colin is given a parking ticket by a traffic warden for parking on double yellow lines;
 - (c) Diane returns a faulty steam iron to the shop where she bought it, but the shop manager refuses to give her a refund;
 - (d) Eamonn drives at 50 mph on a stretch of road where there is a 30 mph limit. He fails to see Fiona, who is crossing the road. She is knocked down and sustains severe injuries;
 - (e) Graham takes a copy of *Business Law* from the reference section of the library, with the intention of returning it when he has finished his first assignment. He finds the book so valuable that he decides to keep it;
 - (f) Hazel returns to England after working abroad for three years. While abroad, she rented her flat to Ian. She now gives him notice to quit, but he refuses to move out.

Specimen examination questions

1 Explain why equity developed and how it differs from the common law.

What is the present relationship between the two systems?

2 David, a farmer, supplies organic free range eggs on a regular basis to the Peak Park Hotel and Country Club. David's hens, and the eggs they produce, have become infected with salmonella. The hotel uses the infected raw eggs to prepare a mayonnaise for Ian and Janet's wedding reception. Many of the guests are taken ill after the reception and Sybil, Janet's 90-year-old grandmother, dies.

(a) Identify the different types of legal proceedings which might arise from these facts.

(b) For each type of legal action you have identified in (a), discuss the nature of the legal liability and the purpose or objective of taking legal action.

3 'The prosecution in a criminal case must prove both *mens rea* and *actus reus* to establish the defendant's guilt, unless it is a crime of strict liability.'

Explain and discuss.