AN INTRODUCTION TO THE COMMON LAW

PHILIPPS-UNIVERSITÄT MARBURG, 2025

Introductory

In our first class, a brief lecture on the common-law system and its differences, real or imaginary, from Continental systems will be given, followed by a brief explanation of all the topics listed below. Students must attend either class on Monday 20 October (not both!) – either 9 a.m. to 12 noon or 2 p.m. to 5 p.m. (all times in this course are *s.t.*).

At that class, all students will then be required to choose one topic from those below – in a group of two students per topic.

Students will then deliver a presentation (*Referat*) on the topic chosen in English in any one of the four remaining classes : 5 to 8 p.m. on Wednesday 22 October, 9 a.m. to 12 noon or 2 to 5 p.m. on Thursday 23 October or 9 a.m. to 12 noon on Friday 24 October.

The presentation should last for about fifteen to twenty minutes. Each topic is available to only one group per class. Please bring any visual aids in paper form, with twelve or so copies.

Building on what you have learnt in this course – and once you have seen that you can read legal materials in English – there are many web sites where you can continue your learning by yourself, or find out about a legal system where you thinking of studying or working.

As well as just googling whatever you are after, you can find much information via this web site : http://www.worldlii.org/

That page contains links to various national sources of freely available statutes and cases. Austlii is the Australian site; Bailii is the British one; Canlii is the Canadian one; and so on.

"lii" stands for "Legal Information Institute".

Topics for discussion in class

A. CRIMINAL LAW

1. The *mens rea* in murder

Murder is the most serious offence. In these two cases, the English and Australian Courts differed about the *mens rea* (*subjektiver Tatbestand*) required of a defendant in a murder case. Australia's top Judge said some rude things about the English decision. The U.K. Parliament agreed with him!

Director of Public Prosecutions v. *Smith* [1961] AC 290, 323-335
Parker v. *R* (1963) 111 CLR 610, 632f
Criminal Justice Act 1967 (U.K.) ss* 8, 106

Questions to consider :

What was the law laid down in *Smith*?
Did the High Court of Australia agree with the House of Lords?
What did s 8 of the Act do? Does s 8 confirm the decision in *Smith* or reverse it?
Does s 8 of the Act, which is in Part I of the Act, apply in Scotland and Northern Ireland?

2. Can a man rape his wife?

In this case the English Courts – represented by the House of Lords, which was then a judicial body as well as a legislative one – changed the law, which had previously failed to recognise the idea that a man could be guilty of raping his wife.

R v. *"R."* [1992] 1 AC 599, 612-623, available at :
http://www.bailii.org/uk/cases/UKHL/1990/9.html

Questions to consider :

What was the law of England before this case?
What was the law of England after it?
What was the significance of the word "unlawful" in s 1 (1) of the *Sexual Offences (Amendment) Act* 1976 (U.K.)?
Most people nowadays would agree that a man should be criminally liable for raping his wife – but should the law on this point have been changed by House of Lords, as part of the Court system, as distinct from the democratically elected legislature?
When was a similar change was made in German law, and how?

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* Sections. These equate to §§.

3. The jury system

The jury system is perhaps the best-known difference between the English-speaking systems and those of the Continent (although some Continental countries such as Austria have juries, while not all English-speaking countries do). Juries are very much more difficult to organise than Judges and also do not give reasons for their verdicts, which is a serious deficiency. On the other hand, juries ensure public participation in the law; enhance the public acceptance of verdicts; bring common sense to the law in judging questions such as what reasonable care or self-defence is; usually contain one or more people whose life experiences are similar to those of accused persons, whereas those of Judges may not be; and ensure that decisions are not given by Judges who have heard the same old stories from accused persons thousands of times already and have grown cynical.

"N.H." v. *Director of Public Prosecutions (South Australia)* (2016) 260 CLR 546; [2016] HCA 33, available at : http://www.austlii.edu.au/au/cases/cth/HCA/2016/33.html – judgment of French C.J., Kiefel and Bell JJ. only

Questions to consider :

What are the German equivalents of murder and manslaughter?
What happened after the jury delivered its verdict?
What principles of law apply when a jury delivers its verdict in open Court?
When does the law of South Australia require a unanimous verdict?
Why could the error in the verdict not be corrected?

4. Provocation and its statutory replacement

At common law provocation was a partial defence to murder – provocation did not result in a verdict of not guilty of everything, but rather reduced a case of murder to manslaughter. (There is a comparable, although different idea in § 213 StGB.) It has always been difficult to define how much provocation is necessary to enable the reduction from murder to manslaughter to occur, and how relevant the accused's characteristics are in this task. For example, racial taunts may have a much greater effect on black people. Is it relevant that the accused has particular characteristics in assessing the amount of provocation that was involved? What if one of the accused's characteristics is a low tolerance for provocation?! After all, we do not want to reduce murder to manslaughter for unimportant reasons and we do expect people to have a basic minimum of self-control and not kill their fellow human beings too readily!

R v. *Rejmanski* [2018] 1 WLR 2721; [2018] 1 Cr App R 18; [2017] EWCA Crim 2061, available at :
http://www.bailii.org/ew/cases/EWCA/Crim/2017/2061.html – read only to para. 82

Questions to consider :

What were the facts of the cases?
Why did the issue of provocation – or its statutory replacement in ss 54 and 55 of the *Coroners and Justice Act* 2009 (U.K.) – arise?
Are an accused's personal characteristics relevant to deciding whether the partial defence succeeded?
Why did both appeals fail in this case?
Do you think that it is a good idea to have a defence of provocation?

B. PUBLIC LAW

5. Conventions

In this Canadian case, the Canadian Parliament proposed to convert the Canadian Constitution (the *British North America Act* 1867) from a statute of the British Parliament to a local enactment. This was known as "patriation". In order to do this, the Canadian Parliament had to send a request ("address") to Her Majesty The Queen, and the question was whether the provinces (*Länder*) of Canada had to agree to this, as they had done for many other constitutional amendments in the past.

There was no written law requiring the consent of the provinces, but the provinces claimed that there was a "constitutional convention" requiring their agreement. A constitutional convention is a rule of constitutional law that everyone follows even though it is not formally binding law – like the Lindau Agreement.

Read only pp. 874 – 910 (judgment of Martland, Ritchie, Dickson, Beetz, Chouinard and Lamer JJ.).

Reference re *a Resolution to amend the Constitution* [1981] 1 SCR 753, available at : http://www.canlii.org/en/ca/scc/doc/1981/1981canlii25/1981canlii25.html

Questions to consider :

What are constitutional conventions?
Give an example of a convention involving the powers of the monarch (now His Majesty The King).
How are conventions different from "hard" legal rules?
How can we tell whether a convention exists?
Can you think of any other convention-like practices in German constitutional life?

6. Brexit and the prorogation of Parliament

In 2019, during the extended period of uncertainty about the manner of the U.K.'s exit from the European Union, the Prime Minister, Boris Johnston, had Parliament prorogued by Her Majesty

The Queen for a period of about five weeks. Prorogation[†] is suspension of Parliament imposed by the Crown. In a surprising turn of events, the Supreme Court of the United Kingdom held this action invalid.

R (on the application of Miller) v. *Prime Minister; Cherry* v. *Advocate-General for Scotland* [2020] AC 373; [2019] UKSC 41, available at :
https://www.supremecourt.uk/cases/docs/uksc-2019-0192-judgment.pdf

Questions to consider :

What is the difference between prorogation and dissolution, on the one hand, and prorogation and adjourning, on the other?
What were the government's reasons for advising Her Majesty to prorogue Parliament?
What was the source of the power to prorogue Parliament and how is it normally exercised?
Why did the Court conclude that the exercise of the power to prorogue (not its mere existence) was justiciable?
What were the Court's main reasons for holding the prorogation invalid?

7. House of Lords reform – the legislative House

This topic is about the plans to replace the upper House of the British Parliament, currently consisting of wholly unelected members, with a more democratic body. The House of Lords currently consists of certain Archbishops and Bishops of the Church of England (the Lords Spiritual), about ninety hereditary lords (*Erbadel*) and the rest, who are appointed lords for life only without inheritance. This seems indefensible in the modern age, and a reform is often advocated. But what should a reformed upper House look like?

House of Lords Act 1999 (U.K.), available at :
http://www.bailii.org/uk/legis/num_act/1999/ukpga_19990034_en_1.html
The House of Lords : Reform, Cm 7027 (2007), available at :
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228891/7027.pdf – chapters 3, 6, 7
The Governance of Britain, Cm 7170 (2007), available at :
http://www.official-documents.gov.uk/document/cm71/7170/7170.pdf – pp. 41-42

Questions to consider :

What reforms of the House of Lords as a legislative body have occurred so far?
What were the government's plans for the reform of the House of Lords?
Do you agree with them?

[†] The noun "prorogation" is pronounced "pro-row-GAY-shun"; the verb is "to prorogue", pronounced "pro-ROAG". These words have no meaning in English beyond their use in parliamentary law and are unfamiliar to most native speakers. Those with some knowledge of French will be familiar with them, however.
You may recall that England was conquered by some French-speaking people of Scandinavian origin in 1066 – the Norman Conquest. For two or three centuries thereafter French was the language of the ruling classes in England; English was considered to be a peasant language, and the law was conducted in Latin and French. It was not until the *Proceedings in Courts of Justice Act* 1730 (G.B.) that Law French was finally expelled from the legal system. There are still many traces of Law French in our legal language. The word "Parliament" itself, a place for talking, is another example.

8. Federalism

The classical issue in any federal structure is : which level of government can enact which legislation? Below is a simple example involving company laws from Australia.

New South Wales v. *Commonwealth ("The Incorporation Case")* (1990) 169 CLR 482; [1990] HCA 2, available at :
http://www.austlii.edu.au/au/cases/cth/HCA/1990/2.html

Questions to consider :

What was the issue that the Court had to decide?‡
What provision of the Australian Constitution did it have to decide it under?
What was its decision?
How did it justify its decision with reference to the history and the language of the Constitution?
Do you agree with the majority judgment or the dissenting Judge?

9. Human rights in the U.K. – the European influence

In the following case the question was whether the Supreme Court of the United Kingdom (formerly the House of Lords) should overrule previous case law because it seemed to be out of line with European case law. The issue was whether a person suspected of committing a crime should have a lawyer present from the moment at which he or she is taken into the custody of the police.

Cadder v. *H.M. Advocate* [2010] 1 WLR 2601; [2010] UKSC 43, available at :
https://www.supremecourt.uk/cases/docs/uksc-2010-0022-judgment.pdf

Questions to consider :

What were the facts of the case?
What did the Supreme Court decide about the need for a lawyer to be present and why?
Did the Supreme Court seem happy with the ruling it felt obliged to make?
What do you think the law should be?

10. Federalism in the United States of America

Like the *Bundestag*, the American federal Congress has only the limited powers set out in the Federal Constitution; the remainder is with the States. One of the federal powers is 'To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes'. This is known as the "commerce clause". In this case the surprising view was put forward that this power might authorise legislation aimed at preventing violence against women. The opposite opinion prevailed and the law was held invalid, but only by five votes to four. Read the opinion of the Court and of Justice Souter (pp. 601 - 655) and see who you agree with.

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‡ The issue arose under s 51 (xx) of the Australian Constitution, which you can find at :
http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/link.aspx?_id=AFF6CA564BC3465AA325E73053DED4AA&_z=z#chapter-01_part-05_51

United States v. *Morrison* (2000) 529 US 598; 146 L Ed (2nd) 658; 120 S Ct 1740, available at :
https://casetext.com/case/us-v-morrison

Questions to consider :

What in outline were the facts of the case?
Which of the two judgments do you find more convincing?

11. American constitutional law – the Bill of Rights

This case concerns an attempt by a group of people to ensure that only white people lived in their neighbourhood – no blacks or Asians. They did so by a private contract among themselves. The Supreme Court of the United States held this invalid, but its reasons for doing so are controversial. However, the "state action doctrine" enunciated by the Court remains good law today.

Shelley v. *Kraemer* (1948) 334 US 1, available at :
http://www.worldlii.org/us/cases/federal/USSC/1948/63.html§

Questions to consider :

What part of the Fourteenth Amendment was in issue in the case?
Why did the Court hold that the agreement to exclude non-whites was invalid?
Do you agree with the Court's view on the *Drittwirkung* (horizontal effect) of provisions about rights in the private law?
How would a similar problem be solved in German law?

C. CIVIL LAW

12. Incorporation of terms into contracts

These two cases are two classic English "ticket cases" which every student studies in Contract Law. One of them seems to contradict the other, but with a small degree of skill they can be harmonised.

Parker v. *South Eastern Railway Co.* (1877) 2 CPD 416**
Thornton v. *Shoe Lane Parking* [1971] 2 QB 163

§ You will also need to find the text of the Fourteenth Amendment, which is too long to reproduce here. It can easily be found by googling it.

** In this case you will come across the old, pre-decimal system of currency. There were twelve pence (singular "penny"; abbreviated *d*) in the shilling (*s*) and twenty shillings in the pound (*l* or £). The abbreviations are taken from Latin.

Questions to consider :

What, in short, were the facts?
What rules of law do the cases lay down?
How does *Thornton* deal with *Parker*? (Is *Parker* still good law?)

13. Frustration in contract law[††]

This series of three English cases is also a classic series in contract law. It shows the development of the doctrine of frustration (*Wegfall der Geschäftsgrundlage*) in the case law. At first the Courts denied that there was any such thing, but in 1863 they changed their minds. Parliament was able find time to round off the process of change even amidst the hustle and bustle of events in 1943.

Paradine v. *Jane* (1647) 82 ER 897
Taylor v. *Caldwell* (1863) 122 ER 309
Krell v. *Henry* [1903] 2 KB 740
Law Reform (Frustrated Contracts) Act 1943 (U.K.)

Questions to consider :

How was the doctrine of frustration introduced into English law?
How does it work?
What does the Act do?

14. Negligence

Negligence is the most important tort (*unerlaubte Handlung*). In this case, a new situation came before Australia's highest Court. A woman got drunk in a pub and was run over when going home; she claimed that the pub should have given her less to drink and also ensured her safety while she was on the way home, even after she had left the pub, because it knew she was very drunk when she left. There was no case law on whether the pub's conduct in these circumstances constituted negligence. The Court therefore had to decide whether the defendant was liable or not in the tort of negligence using first principles.

Cole v. *South Tweed Heads Rugby League Football Club* (2004) 217 CLR 469; [2004] HCA 29, available at :
http://www.austlii.edu.au/au/cases/cth/high_ct/2004/29.html

[††] I am indebted to Dr Toni Esposito, LL.M. (Adel.), for the excellent suggestion of including this topic.

Questions to consider :

What (in outline) were the facts of the case?
What was the order of the Court?
Who won the case?
Who were the dissenting Judges?
Who formed the majority?
What difference existed among the majority Judges?
Whom do you agree with?

15. Another case in negligence

Another new situation that came before the High Court of Australia involved people who were suspected of child abuse. Having been cleared of the charges, the suspects sued the investigators claiming that a "duty of care" was owed to them by the investigators during the investigation of the allegations. A duty of care must exist if there is to be liability in negligence.

Sullivan v. *Moody* (2001) 207 CLR 562; [2001] HCA 59, available at :
http://www.austlii.edu.au/au/cases/cth/HCA/2001/59.html

Questions to consider :
Why did no duty of care exist?
Is there a precise formula or a comprehensive test for determining when it does exist?
What would be wrong with asking what is fair, just and reasonable?

16. More negligence – remoteness

Negligence is easily the most important tort nowadays. In this case, from Canada, the plaintiff saw a fly in a bottle of water he was about to drink and developed psychological problems as a result. He sued in negligence. He won on all the issues in the case, except one - so he failed.

Mustapha v. *Culligan of Canada* [2008] 2 SCR 114, available at :
https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/4637/index.do

Questions to consider :

On what issues in this case did the plaintiff win, and on which one did he lose?
Why did he lose?
What non-Canadian cases did the Supreme Court of Canada mention in its judgment? (This question will require a bit of thought – and perhaps a bit of googling – on your part. But you have a very short and easy case, so this harder question makes up for that!)

17. Law and Equity

In this English case, the plaintiffs were feeling annoyed by the constant intrusion of cricket balls on to their property. They sued for damages (a sum in money) and also an injunction (an order that the cricket should no longer be played). They got damages, but not the injunction.

The case also features one of Lord Denning's most beloved judgments.

Miller v. *Jackson* [1977] QB 966, available at :
http://www.bailii.org/ew/cases/EWCA/Civ/1977/6.html

Questions to consider :

What (in outline) were the facts of the case?
How did the approach of Lord Denning M.R.[‡‡] and that of Geoffrey Lane L.J.[§§] to the precedents differ?
Whom do you agree with?
Why the plaintiffs not get the injunction they wanted, although some legal right of theirs must have been infringed or else they would not have got damages?
Does the judgment of Lord Denning M.R. read like one that a German Judge might write?

18. A mixed jurisdiction : South Africa

This is a topic for anyone who might be thinking of going to South Africa for work or study. South African law is a mixed system combining elements of the common law and the Roman-Dutch law.

Fagan, "Roman-Dutch Law in its South African Historical Context" in Zimmerman/Visser (eds.), *Southern Cross : Civil Law and Common Law in South Africa* (Clarendon, Oxford 1996)

Questions to consider :

Why is the basis of the South African common law not the common law of England?
What historical forces have shaped this outcome?
What is the broad and narrow view of the relationship of South African law to other Continental systems? (pp. 42-44)
In what fields does the English common law operate in South Africa? (pp. 56-57)

19. The common law in the United States of America

The famous decision about to be cited deals with the status of the common law within the United States of America. Is there one common law for the whole country, or one common law per State, making fifty versions of the common law in all?

Erie Railroad v. *Tompkins* (1938) 304 US 64, available at :
https://caselaw.findlaw.com/us-supreme-court/304/64.html

[‡‡] Pronounced as follows : "Lord Denning, the Master of the Rolls". For short : "Lord Denning".
[§§] Pronounced : "Lord Justice Geoffrey Lane".

Questions to consider :

What were the facts of the case and what is diversity jurisdiction?
Why was *Swift* overruled?
Is there a federal common law?
Or does each State rather have its own common law?

D. THE JUDICIAL PROCESS

20. *Stare decisis* (the doctrine of precedent)

This case dealt with a frequent issue in commercial law, that of a "covenant in restraint of trade", that is, a contract in which one party has agreed not to compete with the other party. The case is also interesting, however, because Lord Denning M.R. found himself confronted by a decision of the (judicial) House of Lords which he did not like but was, in theory, bound to follow. Watch him escape.

Fellowes & Son v. *Fisher* [1976] QB 122

Questions to consider :

Why was the interlocutory injunction (*einstweilige Verfügung*) refused?
What conflicts appeared to exist in the case law relating to the granting of interlocutory injunctions?
Why did Lord Denning M.R. not dare to suggest that the House of Lords decision was *per incuriam* (by mistake)?
How did their Lordships in *Fellowes* reconcile the apparent conflicts in the case law?

21. The role of the Judge : adversarial and inquisitorial systems

In Continental systems such as the German, the Judge mostly conducts the questioning of the witnesses and runs the case (the so-called inquisitorial system). In the common law, the parties take on this task, and the Judge is mostly silent (the adversarial system).

Jones v. *National Coal Board* [1957] 2 QB 55
Australian Law Reform Commission, *Managing Justice : A Review of the Federal Civil Justice System* (A.L.R.C. 89, 2000), pp. 100-117
Ambos, "International Criminal Procedure : 'Adversarial', 'Inquisitorial' or Mixed?" (2003) 3 Int Crim Law Rev 1 – pages 1-20 only

Questions to consider :

What was the mistake made by the Judge in *Jones*?
What strengths and what weaknesses exist in the adversarial and inquisitorial systems?
What sort of system do the international criminal Courts use?

22. Judges making law

The rule of English law, until the 1990s, was that money paid under a mistake of law (as distinct from a mistake of fact) could not be recovered back under the law of unjust enrichment (*ungerechtfertigte Bereicherung*). In the case about to be considered, the highest English Court, then the House of Lords, changed this rule. It is a very long decision. Read only the speech of Lord Goff of Chieveley down to, but not including, the heading, 'Issue 3 – Does section 32 (1) (c) of the *Limitation Act* 1980 apply to mistakes of law?'.

Kleinwort Benson v. *Lincoln City Council* [1999] 2 AC 349, available at :
http://www.bailii.org/uk/cases/UKHL/1998/38.html

Questions to consider :

What use was made by his Lordship of decisions from other common-law countries?
What use was made by his Lordship of the law of Germany and other European nations?
Why did his Lordship not think it right to wait for Parliament to change the law?[***]
What is the declaratory theory of law?
To what extent, and why, did his Lordship reject the declaratory theory of law in coming to the view that the payment made in this case was made under a mistake of law?
Assuming that his Lordship is right to say that 'a declaratory theory of judicial decision applies in Germany', do you agree that the declaratory theory is a fiction in German law also?

Dr iur. *Greg Taylor*, LL.M., F.R.Hist.Soc.
Honorary Professor, Philipps-Universität Marburg
Honorary Professor, R.M.I.T. University, Melbourne
greg.taylor@rmit.edu.au
Whatsapp : +61 415 141 722

[***] His Lordship's reasons are given in the paragraph beginning 'Conclusion on the first issue'. His Lordship's references to 'the House' are references to the House of Lords as – then – the highest Court in the English legal system, not to the legislature.