Types of Legal Systems

Tribal and Common Law

I. Differing Types of legal Systems (the focus of Chs. 4-7)
   A. Social Systems for Social Control of Behaviors:
      1. Simple societies rely on customary law to regulate behavior – e.g.,
         American Indian tribes
      2. More elaborate, political societies developed more explicit, codified,
         systematic Formal legal systems which follow several general patterns
         or “types”
   B. Major types of Legal systems:
      1. Tribal Law (covered in class – not in the textbook)
      2. Common Law
      3. Civil Law (note the dual use of the term “civil law”)
      4. Islamic Law
      5. Socialist Law (covered in class – not in the textbook)
      & Mixed systems (combinations of above)

II. Tribal law (or “customary law”)
   A. Represents the most basic and universal form of law
      1. Based in local custom, kinship, and mythology
      2. Tribal justice = organic feature of tribal life and belief system
         a. Informal and unwritten
         b. Enacted as an integral part of carrying daily life
         c. Enforced through informal means → communal rather than political
   B. Tribal law is effective where:
      1. Society is based on shared kinship and “blood relations”
      2. Community shares a single ideology or world-view
      3. Community has consensus on moral values and behavioral rules
      4. Society has simple economic and social structure
   C. Tribal Law is less effective (and likely to replaced) in modern settings with:
      1. Social, political, and economic diversity
      2. Ideological diversity and dissensus on moral values and norms
      3. Kinship is de-emphasized or made irrelevant
      4. Political structure are formalized and bureaucratic
   D. Note that tribal law is often incorporated into more formalized (mixed)
      systems in an amalgam of the different forms

III. Focus next on the Common Law System (our own)
   A. Orienting questions:
      1. What is it (as a distinctive legal system)?
      2. How did it develop? (Where did it come from?)
      3. What are its distinctive and notable features (that distinguish it from
         other types of legal systems)?
   B. Common Law = English law
      1. Developed in England over a 1000 year period (plus a few more years)
      2. Spread throughout the world by colonization (where it was cloned and
         adapted to a variety of local versions)
3. Common law development reflects the unique political history of Britain
   a. was only nominally united into a single state before 11th century
   b. composed of a variety of tribal groups from successive invasions from Europe (mostly Germanic & Scandinavian)
   c. Laws consisted largely of local practices with only a few general laws in common across tribal groups

5. Three Important names in development of Common Law
   a. Alfred (the Great) -> created *dome-book* (first written compilation of English law)
   b. William the Conqueror -> brought England under centralized political control (after the Norman conquest in 1066)
      - Although local laws were still mostly local practices & customs
   c. Henry II (the consolidator) -> brought England under a unitary legal system
      - use of traveling judges to unify and incorporate local systems into one single systems of laws
      - reliance on judgments that incorporated local customs but adapted them into a single law system through judicial decisions

6. Subsequent developments in the Common Law (in England)
   a. continued reliance on common practices that persisted & evolved
   b. some active attempts by rulers to modify and change the system
      - alternative courts (Chancery Courts & the Equity system)
      - increased codification by legislature in enacting formal statutes
      - influences to change from Continental (European) systems
   c. Conflicts between Canon (church) law and state (secular) law

7. Exportation of Common Law to the Colonies
   a. Local political circumstances & histories shaped how these looked
   b. Mixing of Common Law with local legal systems (e.g., with tribal law in Africa; with civil law in places with established civil law systems – South Africa; New York)

C. **Summary of the important features of the Common Law tradition**
   1. Strong activist role of judges
   2. Case-based --> reliance on precedents and case-based decisions
   3. General consistency with customary law
   4. Smaller role for legislature in making and administering law
   5. Strong focus on procedure (and argumentation)
   6. Separation of Public law
   7. Use of citizen juries: *Grand jury & Petit jury*
   8. Adversarial trial process
      - Lawyers for each side make their case by argumentation and presentation
      - Each side is subject is subject to challenge by the other
      - Judges remain neutral & detached from the argumentation
      - Process is aimed at procedural fairness rather than truth-seeking
   9. Separation of Public law and Private law
a. **Criminal Law** = public injustices
   - harms or wrongs against the community & the state
   - prosecuted by the state and recitification goes to the state
   - includes: violent crime, property crimes, moral crimes

b. **Civil Law** = private injustices
   - harms or wrongs between private parties and persons
   - prosecuted by victim of the wrong (plaintiff) and rectification goes to the victim (plaintiff)
   - includes: Torts, Contracts, and Property disputes
   - **Note: a very different use of the term “Civil Law” than in European legal systems** (covered next week)

D. Development of the Common Law in the United States

1. Colonial adoption of English Law
   a. Automatic use of common law as the “received procedure”
   b. Differences occurred between colonies in who settled there and why --> shaped how closely they followed English procedures
   c. Increasing conflict between England and colonies generated antagonism toward English customs (including the legal system)
   d. Suspicion toward judges and lawyers

2. After the American Revolution
   a. Desire to create new system but stuck with the old English system as its foundation (states adopted “articles of Reception”)
   b. Assertion that Public (criminal) Law should be more statutory and explicit – less judge-determined (Private law remained mostly cased-based)
   c. Note: the U.S. Constitution is rather vague about justice system --> little specification of the substantive law or legal procedures
      - Assertion of basic legal rights = after-the-fact “add-on”
      - Bill of Rights = first 10 amendments to the constitution

3. Development of the justice system in the United States
   a. Initial specification of legal system was vague – based on English common law as starting point (until otherwise changed)
   b. U.S. as a nation-state was formed as a confederation of semi-sovereign states with a weak central federal government
   c. The U.S. constitution was not written and ratified until more than a decade after the official formation of the nation
      - Used the “Articles of Confederation” for the first 10 years
   d. Initial disagreement on the political structure of U.S. as a nation
      - Federalist perspective (Hamilton & Adams)
      - Democratic-Republican perspective (Jefferson & Madison)
   e. Each state created its own legal system (similar to each other but not identical; some stuck more closely to English law)
   g. The constitution & statutes only created an **outline** of a legal system and its procedures
- The actual details developed by judicial interpretation on a case-by-case basis
- Marbury v. Madison (1803) --> key case that established judicial authority for U.S. Supreme Court

4. The eventual modern structure of the legal system in the U.S.?
   a. Reproduces much (but not all) of English system
      - the specific structures and offices look fairly different
      - but underlying principles are very similar
      - English legal principles still counted as legal precedents in U.S. legal decisions
      - Structure of court systems reflect local histories & adaptations
   b. Greater codification of law in U.S. but:
      - Still strong judicial role in interpreting & applying laws
      - Strong reliance on precedents established by prior decisions
      - Extensive use of juries (Grand Jury and Petit Jury)
      - Adversarial trials and procedures
   c. Decentralized system of justice
      1) Leave it up to each state to construct its own legal system to have authority over justice in that state
         - actually 50 different state systems administered separately
         - State justice systems are set up similarly but not identically
         - Each has authority over intra-state events (within that state)
         - Federal has authority over inter-state and national events
      2) 20th century trend toward increased centralization/federalization
         - Make the federal constitution binding on state systems
         - Bring more crimes under federal jurisdiction
         - Bring more state activities under federal funding control
      3) Note some recent backlash against increased federalization
         - “Tea Party” movement is one expression
   d. Development of additional forms of public law
      1) Regulatory law
      2) Administrative law

E. Common Law Systems around the world:
   1. Great Britain – England, Wales, Ireland, Northern Ireland, & Scotland (partially)
   2. Former British Colonies:
      a. United States
      b. Canada
      c. Australia and New Zealand
      d. India
      e. Asia (Pakistan, Singapore, Malaysia, Bangladesh, Samoa, etc.)
      f. African nations (2 dozen = former British colonies)
      g. Hong Kong
      h. West Indies & Caribbean islands
      i. Middle East (Israel, Egypt, Jordan, Kuwait, etc.)