Spanish Private Law from an International Perspective

1. Comparative law and legal systems in the world. The Spanish legal system

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A preliminary note on legal English terminology

Different meanings of the term "civil law"

- law applicable to Roman citizens (*ius civilis*).
- legal systems whose law derived from the Roman Empire.
- synonym for "private law", including civil law *strictu sensu* and commercial law.
- law related to the subjects covered by civil codes and their auxiliary statutes (contract law, property law, family law, torts, inheritance law).

Exercises

- Wyatt, R., *Check your English vocabulary for Law,* A & G. Black Publishers, Ltd., London: pp.1-2. ISBN:100713675926
- Lindner, A.K. & Firth, M., *Introduction to International Legal English,* Cambridge University Press, 2008, pp.8-11 &13-16. ISBN: 9780521718998

Comparative law

What is comparative law?

•It is the study of the differences and similarities between the law of different countries.

•Intellectual activity that started in Paris in 1900 (the year of the World Exhibition). Comparative law has developed continuously since then. Its importance has increased enormously because of internationalism, economic globalization and democratization.

Comparative law

Comparative Law can be done on a large scale or on a smaller scale

- **Microcomparison**: has to do with specific legal institutions or problems, the rules used to solve actual problems or particular conflicts of interests.
- **Macrocomparison**: has to do with the spirit and style of different legal systems, the methods of thought and procedures they use.

Comparative law

Neighboring areas of legal science

- **Private international law**: substantive rules & conflict rules covering relationships between individuals in an international context.
- **Public international law**: rules & principles of general application dealing with the conduct of states and of intergovernmental organizations
- **Legal history**: studies legal systems consecutive in time; how law has evolved and why it changed.
- **Sociology of the law**: aims to discover the casual relationships between law and society.

Comparative law

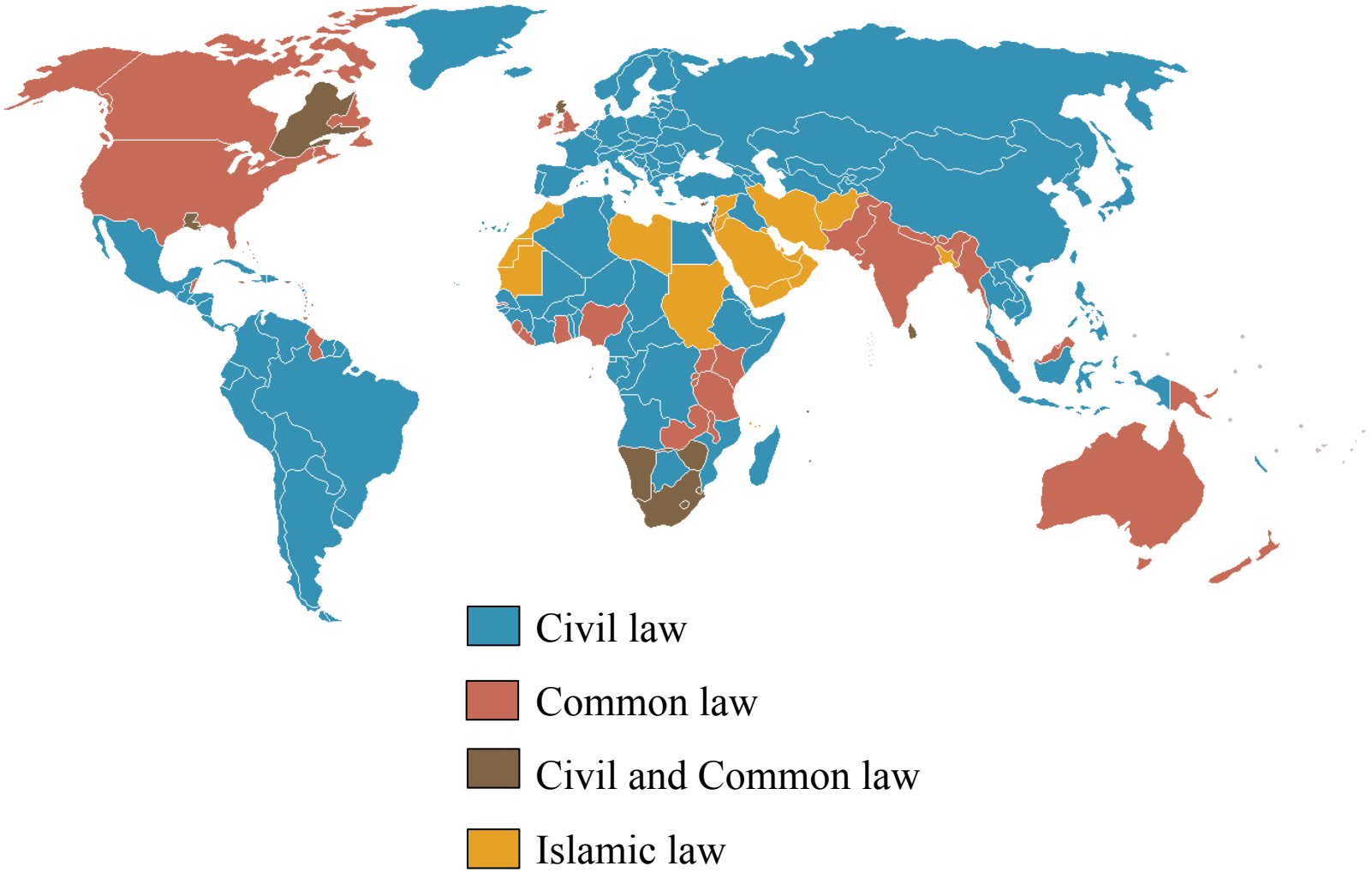
What are the functions of comparative law?

- Knowledge
- Taxonomy of legal systems
- To help to develop good translation tools
- To help to interpret national, international & supranational law
- To help to apply foreign law correctly
- Finding *de lege ferenda* solutions (law reform)
- Harmonization and unification of the law

World legal families / systems

- **Arminjon, Nolde, and Wolff** (substance criterion): French, German, Scandinavian, English, Russian, Islamic, Hindu
- **René David** (idology criterion & legal technique): western (Romano-Germanic & Anglo-Saxon), socialist, Islamic, Hindu, Chinese
- **Zweigert and Kötz** (combination of different criteria: *historical development*, mode of thought in legal matters, *distinctive institutions*, *legal sources* & ideology): Roman, German, Nordic, Common law, Religious family (Jewish, Islamic, Hindu), Laws of the far East (China & Japan)

World Legal Systems

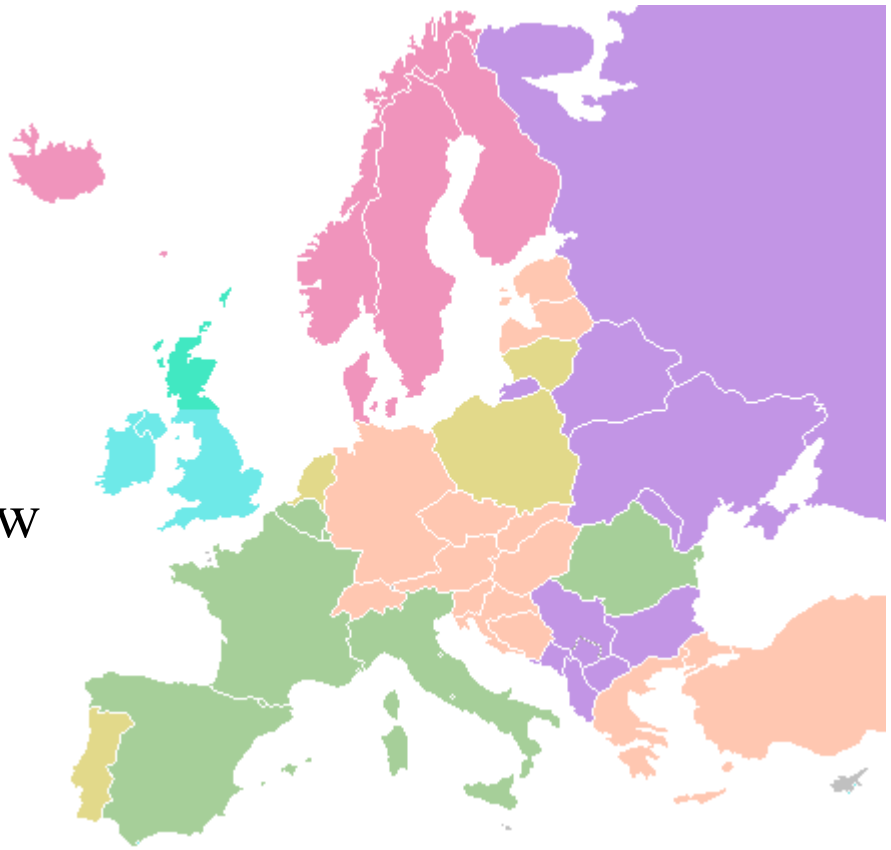


European legal families / systems

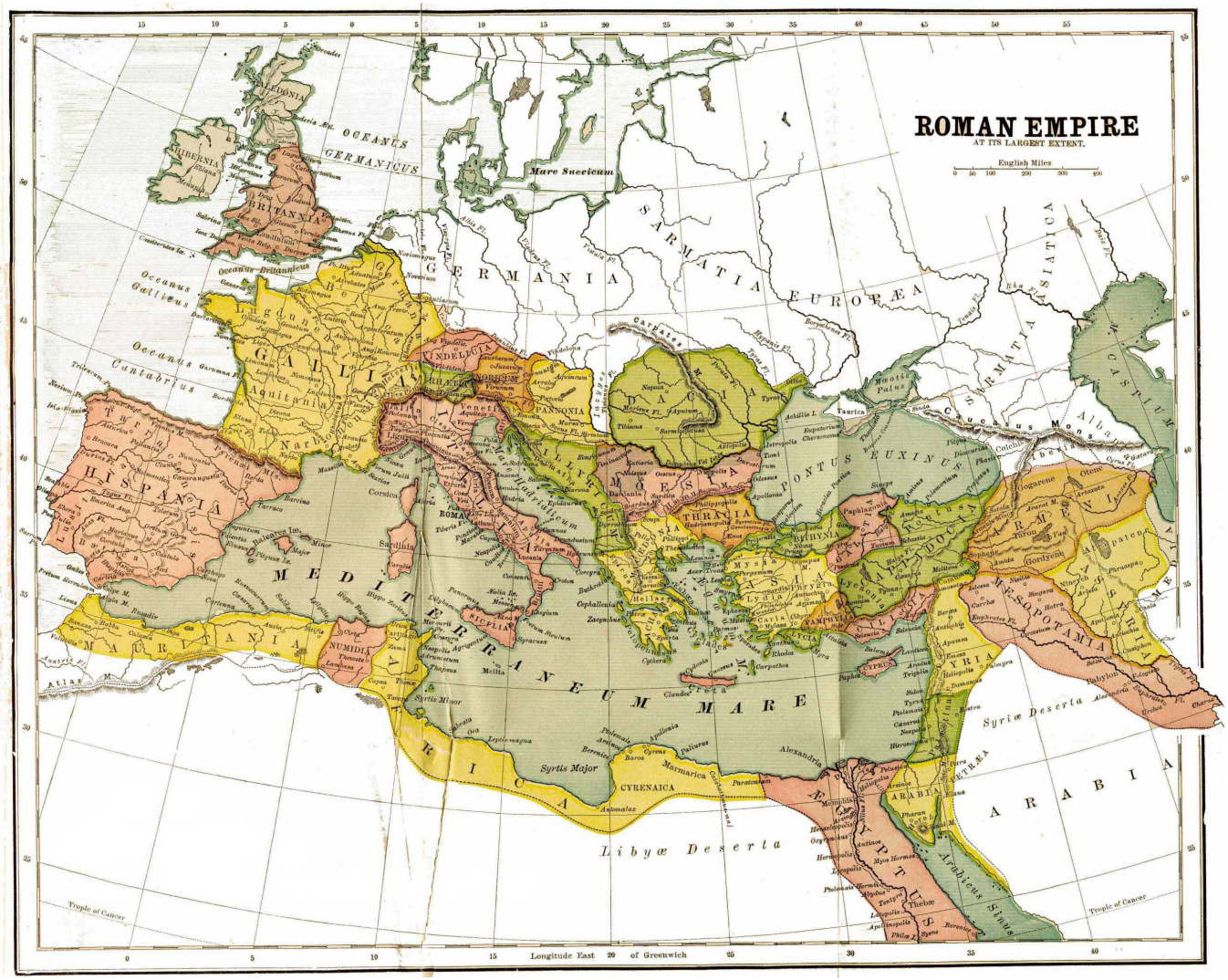
- **Romano-Germanic family (civil law family):** derives from Roman law
  - **French-romanistic systems:** used the Napoleonic civil code (1804) as a model to codify their law (Italy, Portugal, Spain)
  - **Germanic systems:** used the German civil code (BGB-1896) as a model (Austria, Croatia, Switzerland, Greece)
  - **Scandinavian systems:** based on the Old German customary law; did not create a civil code, like the *Code Civil* or the BGB (Denmark, Norway, Sweden)
- **Common law family:** original common law of England and derivative common law countries (Ireland)
- **Mixed legal systems**: combined features of Roman law and common law (Scotland)

European legal families/systems

- Anglo-Saxon Law
- Franco-Latin Law
- Germanic Law
- Franco-Latin/Germanic Law
- Russian Law
- Scandinavian Law

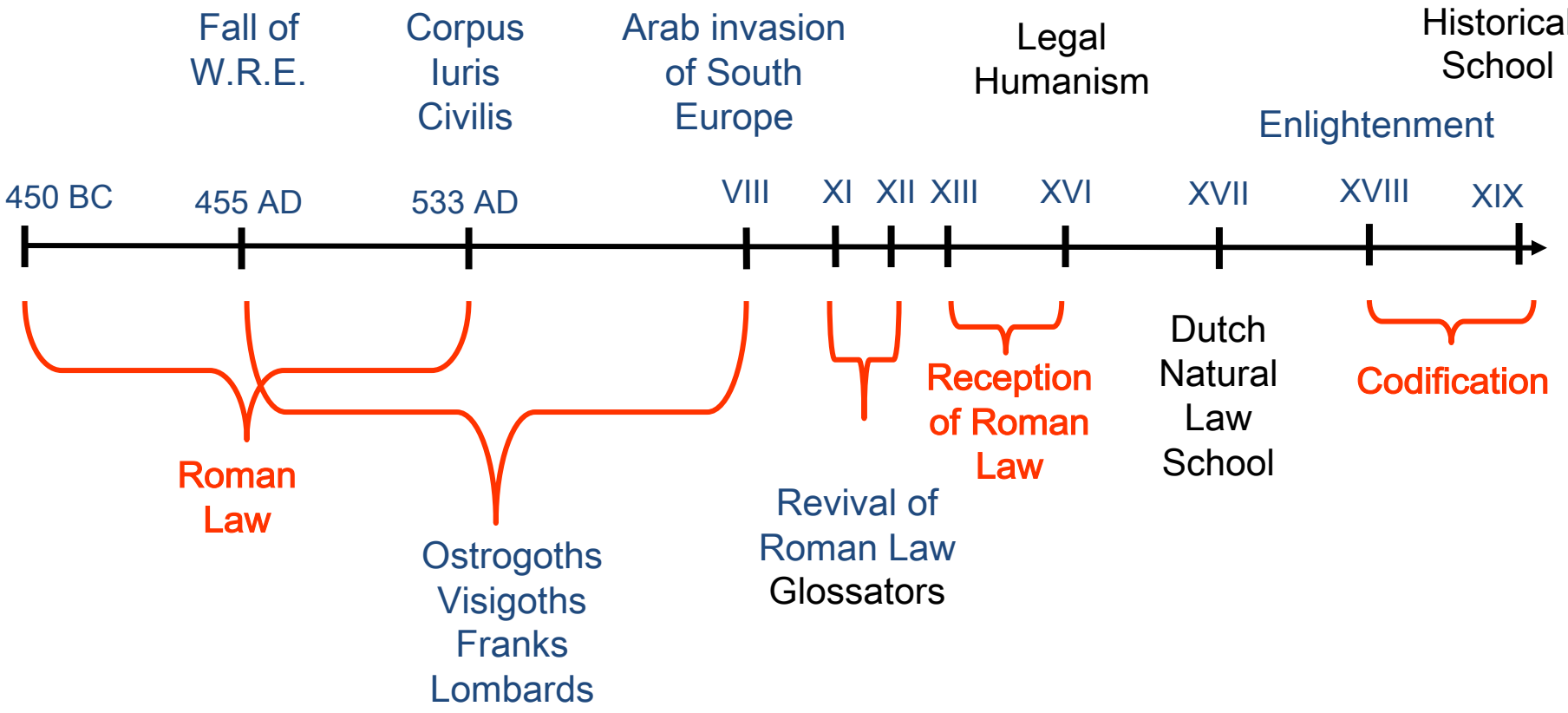


Roman Empire in 150 AD



By George R. Crooks [Public domain], via Wikimedia Commons

Civil Law evolution



Civil Law evolution

Historical development of European private law

- Roman Law was the law that was in effect throughout the age of antiquity in the City of Rome and later throughout the Roman Empire
- Romanist systems are not directly based on Roman law. Instead, they are derived from the European *Ius Commune*, which is essentially Roman Law as it was interpreted and reshaped by medieval jurists (revival and reception of Roman Law)

Historical development of European private law

Why did England never have a comprehensive reception of Roman law?

- The English legal system was more developed than its continental counterparts by the time Roman law was rediscovered in the rest of Europe.
- Roman law was associated with the Holy Roman Empire and the Roman Catholic Church.
- The closed organization and political influence of English lawyers devoted to the maintenance of common law on grounds of principle and profit.
- The insufficient Romanization of England during the existence of the Empire Roman and consequently poor knowledge of the Latin language.
- The physical distance between England and Italy where rediscovery of the *Corpus Iuris Civilis* started in the 11th century.
- Etcetera.

Historical development of European private law

English law came into contact with Roman law

- Roman law was taught in Oxford and Canterbury by Italian professors (12th century)
- Some English scholars who studied Roman law on the Continent had a considerable influence on the development of certain areas of the law
- Roman-canon law was applied by the ecclesiastical courts which had jurisdiction over matrimonial affairs and successions
- “Law merchant” was based on international practices, strongly influenced by Roman law
- Etcetera

Historical development of European private law

What does Codification mean?

The process of collecting and classifying pre-existing rules in a new and coherent system. Codes cover a broad range of topics and use general terms (Civil code, commercial code, penal code…)

Historical development of European private law

Why did Codes appear in Continental Europe in the 19th century?

- To put an end to legal uncertainty and disparity
- To replace outmoded rules
- For the parliament to be the exclusive lawmakers

Historical development of European private law

CODE CIVIL (1804)

- Ideological product of the winners of the French revolution: promotes with fervour legal ideals and values.
- Appeared at the beginning of the Industrial Revolution.
- The French Code was written for the people: easy to understand.
- Widely imitated around the world. In Europe: Spain, Italy (1865), Belgium, the Netherlands, Portugal (1867).

BGB (1900)

- The result of the work of the School of the German scholars of the 19th century: a thorough text.
- Appeared at the end of the Industrial Revolution: reflects developments that occurred after 1804.
- The German Code was written to be applied by highly trained experts: complicated structure.
- Not so widely imitated. In Europe: influence on second generation codes: Italy (1942), Greece (1940), Portugal (1966).

Historical development of European private law

What did Codes never arise in England and Scandinavian countries?

- Given the practical sense and the collective interests, English lawyers could not tolerate the thought of replacing the Common law with a written Code.

- In Scandinavian countries, Codes exist on specific topics (like in the USA), but the idea of codifying the whole of private law has never really been followed thanks to the realism of the Scandinavian lawyers and their sound sense of what is useful and necessary in practice.

Civil law systems: sources of law

PRIMARY SOURCES

- **Written Law**
  - Constitution
  - Codes
  - Statutes
    - Organic statutes
    - Ordinary statutes
    - Executive decrees
  - Administrative regulations
  - Local ordinances
  - International Treaties
- **Customs**

SECONDARY SOURCES

- **General Principles**
- **Legal doctrine**
- **Case law**

Sources of law: Spanish/Italian law

Spanish Civil Code, art.1:

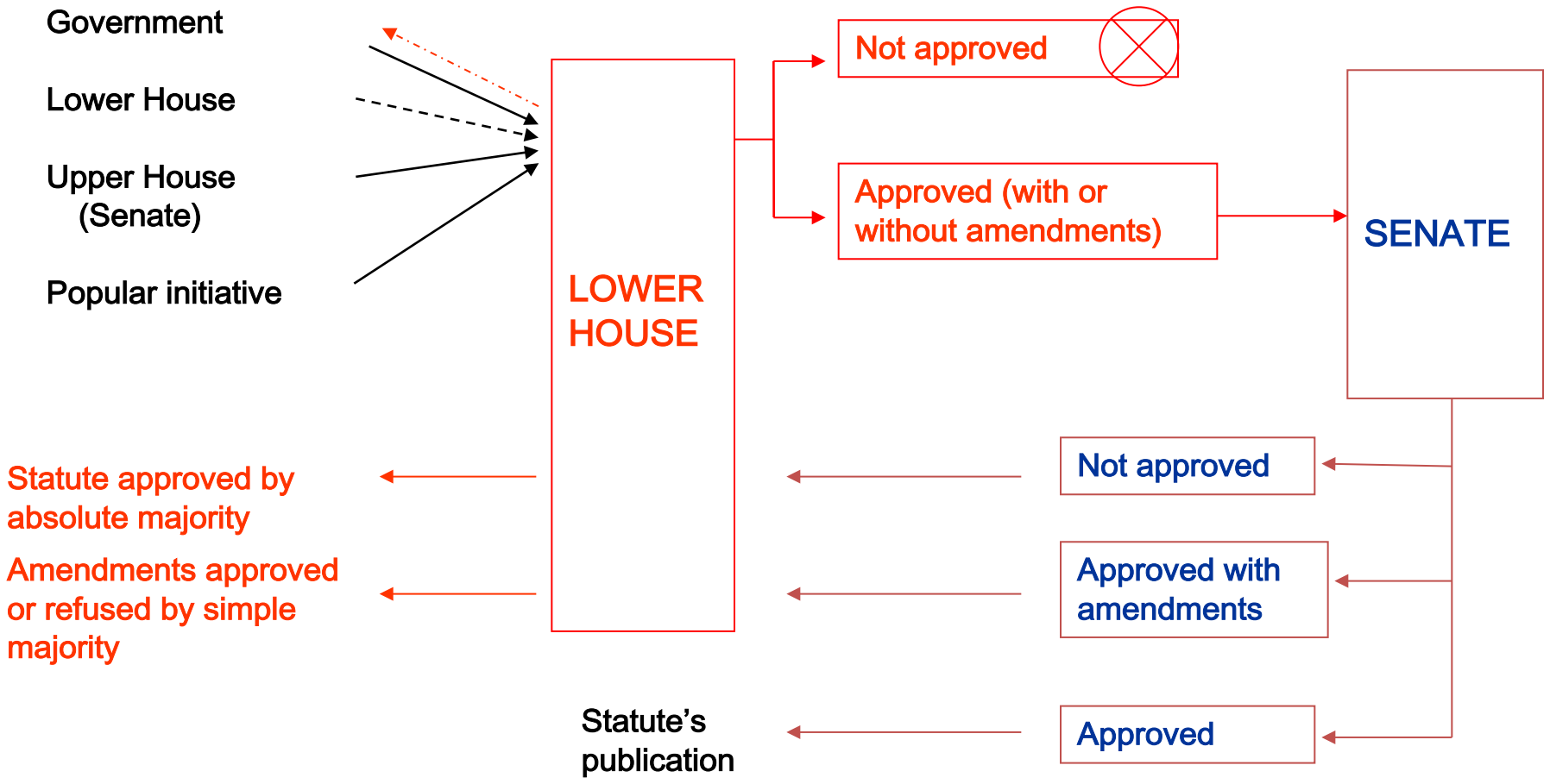
1. *The sources of the Spanish legal order are statutes, custom, and the general principles of the law.*
2. *Provisions that contradict those at a superior level lack validity.*
3. *Custom only controls where there is no applicable statute, and then it must not be contrary to morals or public policy and it must be proven.*
4. *General principles of law are applicable where there is no statute or custom.*
5. *Case law complements the legal order with doctrine that the Supreme Court establishes, by reiteration, to interpret and apply statutes, custom, and general principles of law.*
6. *Judges and courts have the absolute duty to decide the matters in issue in each case, abiding by the established system of sources of law.*

Italian Civil Code, art.1: The sources of law are:

- *Statutes*
- *Regulations*
- *Customs*

Art. 8: "When subjects are regulated by statute or regulation, customs are only effective if they are called by those statutes or regulations.
Art.12.2 "When there is no precise provision to solve a problem, provisions created for similar situations or analogous subjects shall be used; if there is still doubt about the problem, the decision shall be made in accordance with the general principles of law".

Civil law systems: legislative procedure



Common law systems: sources of law

PRIMARY SOURCES

- Case law. (*Principle of stare decisis:* *a decision made by a superior court is a binding precedent which an inferior court cannot change)*

SECONDARY SOURCES

- Written law
- Legal doctrine

Convergence of trends

CIVIL LAW SYSTEMS

- In practice, the judgments of the highest courts are followed by the lower courts
- Judge-made law in some areas, especially where provisions of the code are very limited
- Decodification process

COMMON LAW SYSTEMS

- Introduction of some flexibility in the doctrine of *stare decisis*
- Increasing written law
- Collection of pre-existing common law rules in codes

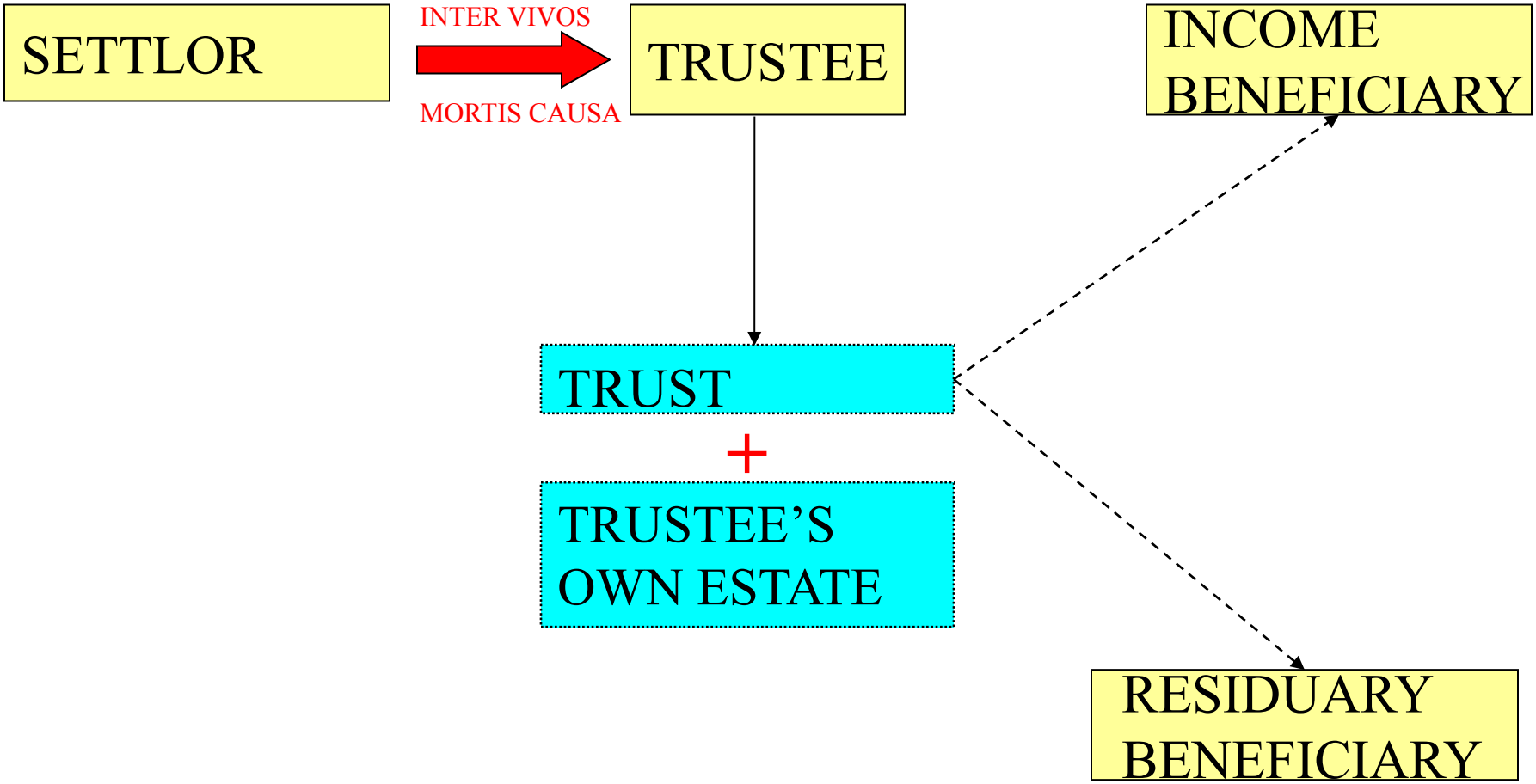
Exercises

- Wyatt, R., *Check your English vocabulary for Law,* A & G. Black Publishers, Ltd., London: pp.48-49. ISBN:100713675926
- Lindner, A.K. & Firth, M., *Introduction to International Legal English,* Cambridge University Press, 2008, pp.106-108. ISBN: 9780521718998

A common law distinctive institution: trusts

- **Definition:** A legal relationship that arises when property is transferred voluntarily to a person called the trustee who is in charge of the administration of the property for the benefit of the beneficiary.
- **Settlor:** person who creates the trust by transferring the property (real or personal) "in trust" to the trustee.
- **Trustee**: person who holds the title to the trust property for the benefit of the designated beneficiaries. The trustee is required to administer the trust property solely in the interest of the beneficiaries and following the settlor's instructions.
- **Beneficiary(ies)**: person(s) for whose benefit the trust property is held. Income beneficiaries will receive trust income. Residuary beneficiaries receive the trust corpus (trust assets) upon termination of the trust.

Trust structure



Some reasons for the creation of a family trust

- To provide property management
- To postpone the transfer of property after death
- To save estate tax
- To preserve government benefits
- To protect children from a first marriage
- To protect the beneficiary from his creditors

Property management

The trust can be created……

- **To transfer the burdens of the management of the settlor's assets to someone else (a natural or a legal person)**

- **As a disability planning tool**
  - To administer the settlor's properties if the settlor becomes incompetent
  - To provide for a relative's incapacity or for their lack of financial maturity

Postpone the transfer of property after death

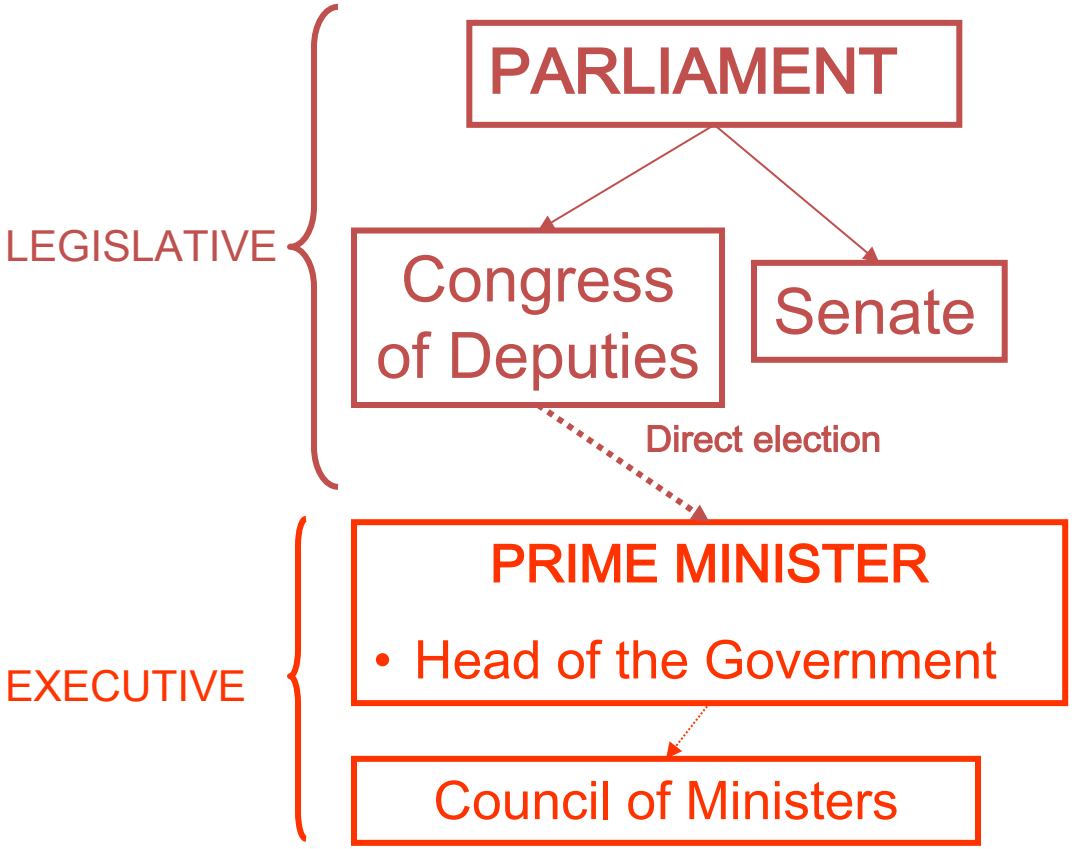
The trust can be created……

- **To decide when the settlor's assets should be distributed to the children, following the settlor's death**
  - The trustee can manage and control the trust property, according to the settlor's instructions, long after the beneficiary reaches adulthood (18 years old).
  - The parents (settlors) can delay vesting in the residuary beneficiary until the beneficiary turns 25, 30 or any other age the parents deem appropriate.

Why do trusts not exist in European civil law jurisdictions?

- **It is impossible for them to be adopted by civil law jurisdictions. The so-called "civil law obstacles"**
  - Ownership is considered an exclusive right which cannot be fragmented
  - The owner's properties must be available to satisfy claims from any of his/her creditors
- **They are not necessary. There are other trust-like institutions, for example:**
  - Fiduciary contracts, mandate contracts, life support contracts, for obtaining property management, for you or another person.
  - Fideicommissary substitutions for postponing the transfer of property after death.

Form of Government - SPAIN



PARLIAMENTARY MONARCHY

- Parliament elected by the people
- Prime Minister elected by the Congress of Deputies
- Council of Ministers elected by the Prime Minister
- Hereditary monarchy. The King has no executive powers

KING

- Head of the State

Spanish territorial organization

- Autonomous Comunities: 17 + 2 autonomous cities (Ceuta and Melilla)
- Provinces: 50 including the Balearic Islands and the Canary Islands
- Municipalities (smaller than counties): 8000

Autonomous communities

Andalucia *(Andalucía)*
Aragon (*Aragón*)
Principality of Asturias (*Principado de Asturias*)
Balearic Islands (*Islas Baleares*)
Basque Country (*País Vasco*)
Canary Islands (*Islas Canarias*)
Cantabria
Castille-La Mancha (*Castilla-La Mancha*)
Castille-Leon (*Castilla y León*)
Catalonia (*Cataluña*)
Extremadura
Galicia (*Galicia*)
La Rioja
Madrid
Murcia
Navarre (*Navarra*)
Valencia (*Comunidad Valenciana*)

Spanish territorial organization

- **State of Autonomies**: a state formally unitary, because only the central government holds sovereignty, but in fact functioning as a Federation of Autonomous Communities
  - Legislative autonomy
  - Executive autonomy
  - Judiciary organized territorially, but no judicial autonomy
- **Confederation**: association of sovereign states for common action in relation to other states
- **Federal system**: a system of government in which power is constitutionally divided between a central authority and constituent political units (states or provinces). The smaller political units surrender some of their political power to the central government, relying on the central government to act for the common good. The two levels of government are interdependent, and share sovereignty

Spanish territorial organization
(Art.149 Spanish Constitution: Distribution of legal power)

National government: nationality, international affairs; defence; justice; criminal, commercial, and labour legislation; merchant shipping; civil aviation; foreign trade and tariffs; economic planning; finances, public safety, ….

- **Civil legislation, without prejudice to the preservation, modification and development by the Autonomous Communities of their own civil law (foral or special) whenever it exists, and traditional charts (…). (Art. 149.8 SC)**

Autonomous communities: "Matters not expressly assigned to the State by this Constitution may fall under the jurisdiction of the Autonomous Communities by virtue of their Statutes of Autonomy. Jurisdiction on matters not claimed by Statutes of Autonomy shall fall within the State jurisdiction (…)". (Art. 149 *in fine* SC)