MAJOR LEGAL SYSTEMS

Municipal legal systems can be divided roughly into two groups. First, there are the common law systems, the group to which the law of England, the law of the United States, Australia, New Zealand and for the most part the law of Canada belong. Second, there are the civil law systems, including the law of the Czech Republic, France, Germany and other European countries, of Latin America, etc.

Historically, there are the socialist legal systems" of the Soviet Union and of the Eastern European countries (including former Czechoslovakia). Now they belong to the civil law group. Lastly, there is a group of oriental legal systems which include the traditional laws of China, Japan, India and Islamic countries.

Civil law

Civil law, or continental law, is the predominant system of law in the world, with its origins in Roman law, and sets out a comprehensive system of rules, usually codified that are applied and interpreted by judges. Modern systems are descendants of the nineteenth century codification movement, during which the most important codes (most prominently the Napoleonic Code and the Bürgerliches Gesetzbuch - BGB) came into existence.

However, codification is not an essential characteristic of a civil law system. For example, the civil law systems of Scotland and South Africa are not codified, and the civil law systems of Scandinavian countries remain largely not codified. The civil law system is contrasted with the common law originating in England and generally adopted by those countries of the world with a history as British territories or colonies.

As a body of laws comprising the official legal system of a nation or state, especially in reference to the rights and privileges of private citizens, civil law becomes the necessary law in which freedom and necessity are unified. Civil law is a legal tradition which is the base of the law in the majority of countries of the world, especially in continental Europe and Russia, but also in Quebec (Canada), Louisiana (U.S.), Puerto Rico (a U.S. territory), Japan, Latin America, and most former colonies of continental European countries. The Scottish legal system is usually considered to be a mixed system in that Scottish law has a basis in Roman law, combining features of both uncodified and Civil law systems. In western and southwestern parts of the U.S., laws in such diverse areas as divorce and water rights show the influence of their Iberian civil law heritage, being based on distinctly different principles from the laws of the northeastern states colonized by settlers with English common law roots.

The civil law is based on Roman law, especially the Corpus Juris Civilis of Emperor Justinian, as later developed through the Middle Ages by medieval legal scholars. The acceptance of Roman law had different characteristics in different countries. In some of them its effect resulted from legislative act; that is, it became positive law, whereas in other ones it became accepted by way of its processing by legal theorists.

Consequently, Roman law did not completely dominate in Europe. Roman law was a secondary source, which was applied only as long as local customs and local laws lacked a pertinent provision on a particular matter.

However, local rules were also interpreted primarily according to Roman law (being a common European legal tradition of sorts), resulting in its influencing the main source of law.

A second characteristic, besides Roman law foundations, is the extended codification of the adopted Roman law, namely its inclusion into civil codes. The concept of codification developed especially during the seventeenth and eighteenth century, as an expression of both Natural Law and the ideas of the Enlightenment. The political ideal of that era was expressed by the concepts of democracy, protection of property, and the rule of law. That ideal required the creation of certainty of law, through the recording of law and through its uniformity. Thus, the aforementioned mix of Roman law and customary and local law ceased to exist, and the road opened for law codification, which could contribute to the aims of the above mentioned political ideal.

Another factor that contributed to codification was that the notion of the national state, which was born during the nineteenth century, required the recording of the law that would be applicable to that state.

Certainly, there was also reaction to the aim of law codification. The proponents of codification regarded it as conducive to certainty, unity, and systematic recording of the law; whereas its opponents claimed that codification would result in the ossification of the law.

Despite resistance, the codification of European private laws moved forward. The French Napoleonic Code of 1804, the German civil code of 1896 and the Swiss civil code of 1907 were the most influential national civil codes.

Because Germany was a rising power in the late nineteenth century, when many Asian nations were introducing civil law, the German Civil Code became the basis for their legal systems. Thus, japan and South Korea operate under civil law. In China, the German Civil Code was introduced in the later years of the Qing Dynasty and formed the basis of the law of the Peoples' Republic of China, which remains in force.

Civil law served as the foundation for socialist law used in Communist countries, with major modifications and additions from Marxist-Leninist ideology. For example, while civil law systems have traditionally put great pains in defining the notion of private property, how it may be acquired, transferred, or lost, Socialist law systems provide for most property to be owned by the state or by agricultural cooperatives, and have special courts and laws for state enterprises**.**

The term "civil law" as applied to a legal tradition actually originates in English -speaking countries, where it was used to group all non-English legal traditions together and contrast them to the English common law. However, since continental European traditions are by no means uniform, scholars of comparative law usually subdivide civil law into four distinct groups:

- French civil law: In France, the Benelux countries, Italy, Spain, and former colonies of those countries;
- German civil law: In Germany, Austria, Switzerland, Greece, Portugal, Turkey, japan, South Korea, and the Republic of China;
- Scandinavian civil law: In Denmark, Norway, and Sweden. Finland, and Iceland inherited the system from their neighbors;
- Chinese law is a mixture of civil law and socialist law.

Portugal, Brazil, and Italy have evolved from French to German influence, as their nineteenth century civil codes were close to the Napoleonic Code and their twentieth century civil codes are much closer to the German Bürgerliches Gesetzbuch. Legal culture and law schools have also come nearer to the German system. 'The law in these countries is often said to be of a hybrid nature.

The Dutch law, or at least the Dutch civil code, cannot be easily placed in one of the mentioned groups either, and it has itself influenced the modern private law of other countries. The Russian civil code is in part a translation of the Dutch one.

3.2. Common law

Common law originally developed under the inquisitorial system in England from judicial decisions that were based on tradition, custom, and precedent. Such forms of legal institutions and culture bear resemblance to those which existed historically in continental Europe and other societies where precedent and custom have at times played a substantial role in the legal process, including Germanic law recorded in Roman historical chronicles. 'The form of reasoning used in common law is known as case-based reasoning.

Before the institutional stability imposed on England by William the Conqueror in 1066, English residents, like those of many other societies, particularly the Germanic cultures of continental Europe, were governed by unwritten local customs that varied from community to community and were enforced in often arbitrary fashion. For example, courts generally consisted of informal public assemblies that weighed conflicting claims in a case and, if unable to reach a decision, might require an accused to test guilt or innocence by carrying a red-hot iron or snatching a stone from a cauldron of boiling water or some other "test" of veracity (trial by ordeal). If the defendant's wound healed within a prescribed period, he was set free as innocent; if not, execution usually followed.

In 1154, Henry 11 became the first Plantagenet king. Among many achievements, Henry institutionalized common law by creating a unified system of law "common" to the country through incorporating and elevating local custom to the national, ending local control and peculiarities, eliminating arbitrary remedies, and reinstating a jury system of citizens sworn on oath to investigate reliable criminal accusations and civil claims. 'The jury reached its verdict through evaluating common local knowledge, not necessity through the presentation of evidence, a distinguishing factor from today's civil and criminal court systems.

Henry 1I developed the practice of sending judges from his own central court to hear the various disputes throughout the country. His judges would resolve disputes on an ad hoc basis according to what they interpreted the customs to be. 'The king's judges would then return to London and often discuss their cases and the decisions they made with the other judges. 'These decisions would be recorded and filed. In time, a rule, known as stare decisis (also commonly known as precedent) developed, which is where a judge would be bound to follow the decision of an earlier judge; he was required to adopt the earlier judge's interpretation of the law and apply the same principles promulgated by that earlier judge, that is, if the two cases had similar facts to one another. By this system of precedent the pre-Norman system of

disparate local customs was replaced by an elaborate and consistent system of laws that was common throughout the whole country, hence the name **"common law".**

Thus, in English legal history, judicially-developed "common law" became the uniform authority throughout the realm several centuries before Parliament acquired the power to make laws.

What makes the common law so fascinating, compared to Parliamentary law, is that while parliamentary laws are written in a definitive. distinct, formal, and accessible document, known as an Act of Parliament, common laws in contrast are not strictly written definitively anywhere. 'Thus, to identify a rule of the common law one must review the various relevant decisions of judges and interpret their judgments, which can often be long and ambiguous. Fortunately, there are a host of excellent legal text books written by experts which explain in clear terms what the common law is understood to be at the time.

As early as the fifteenth century, it became the practice that litigants who felt they had been cheated by the common law system would petition the King in person. For example, they might argue that an award of damages Cat common law) was not sufficient redress for a trespasser occupying their land, and instead request that the trespasser be evicted. At this time the principle of Equity was born. 'The system of equity was administered by the Lord Chancellor in the courts of Chancery. By their nature, equity and law were frequently in conflict and litigation would frequently continue for years as one court countermanded the other, even though it was established by the seventeenth century that equity should prevail. In England, courts of law and equity were combined by the Judicature Acts of 1873 and 1875, with equity being supreme in case of conflict.

The common law constitutes the basis of the legal systems of: England, Wales, Northern Ireland, Ireland, United States (except Louisiana), Canada (except Quebec), Australia, New Zealand, South Africa, India, Israel, Sri Lanka, Malaysia, Brunei, Pakistan, Singapore, Malta, Hong Kong, and many other generally English-speaking countries or Commonwealth countries. Essentially, every country which had been colonized at some time by Britain uses common law except those that had been colonized by other nations, such as Quebec (which follows French law to some extent) and South Africa (which follows Roman Dutch law), where the prior civil law system was retained to respect the civil rights of the local colonists. India's system of common law is also a mixture of English law and the local Hindu law.

In a common law jurisdiction, several stages of research and analysis are required to determine what "the law is" in a given situation. First, one must ascertain the facts. Then. one must locate any relevant statutes and cases. Then one must extract the principles. analogies and statements by various courts of what they consider important to determine how the next court is likely to rule on the facts of the present case. Later decisions and decisions of higher courts or legislatures carry more weight than earlier cases and those of lower courts. Finally, one integrates all the lines drawn and reasons given, and determines what "the law is." Then, one applies that law to the facts.

The common law is more flexible than statutory law. First, common law courts are not absolutely bound by precedent, but can (when extraordinary good reason is shown) reinterpret and revise the law, without legislative intervention,

to adapt to new trends in political, legal and social philosophy. Second, the common law evolves through a series of gradual steps, that gradually works out all the details, so that over a decade or more, the law can change substantially but without a sharp break, thereby reducing disruptive effects. In contrast, the legislative process is very difficult to get started: legislatures do not act until a situation is totally intolerable. Because of this, legislative changes tend to be large and disruptive (either positively or negatively).
In common law legal systems, the common law is crucial to understanding almost all important areas of law. For example, in England and Wales and in most states of the United States, the basic laws of contracts, torts and property do not exist in statute, but only in common law (though there may be isolated modifications enacted by statute).

In almost all areas of the law (even those where there is a statutory framework, such as contracts for the sale of goods, or the criminal law) other written laws generally give only terse statements of general principle, and the fine boundaries and definitions exist only in *the* common law. To find out what the precise law is that applies to a particular set of facts, one has to locate precedential decisions on the topic, and reason from those decisions by analogy.

In common law jurisdictions, legislatures operate under the assumption that statutes will be interpreted against the backdrop of the pre-existing common law case law and custom, and so may leave a number of things unsaid. For example, in most U.S. states, the criminal statutes are primarily codification of pre-existing common law. In reliance on this assumption. modern statutes often leave a number of terms and fine distinctions unstated - for example, a statute might be very brief, leaving the precise definition of terms un stated, under the assumption that these fine distinctions will be inherited from pre-existing common law.

3.3. Mixed legal systems

South Africa, Louisiana, Quebec, Scotland or Israel are so-called *mixed jurisdictions* or mixed legal systems - both terms are either used interchangeably or the former being part of the latter." Traditionally, mixed legal *sys* tems have three key attributes:

• Fusion of Civil and Common law - some type of amalgam of common law and civil law elements.

• Adequacy of Civil and Common law elements - contributions of both civil law and common law have to be substantial and recognizable as such to the legal community.

• Structural division of Common law and Civil law - key characteristics of all mixed jurisdictions is that private law seems to be dominant by civil law elements, whereas public law consists basically of common law elements. Many mixed jurisdictions are former French colonies strongly influenced by the French Code Civil. Later, these colonies fell into British hands. The British, however, normally did not touch the already existing law, but naturally introduced their system of administration.

The traditional definition of mixed legal systems is more and more challenged. The growing awareness of non-western law that does not fit the typical common law - civil law divide, has made comparative law research focus on alternative ways to define mixed legal systems. As with the question

of classification in general, legal traditions have been considered as a defining criteria.

3.4. Islamic law

Islamic law is the religious law forming part of the Islamic tradition. It is derived from the religious precepts of Islam, particularly the Quran and the Hadith. In Arabic, the term shariah refers to God's immutable divine law and is contrasted with fiqh, which refers to its human scholarly interpretations. The manner of its application in modern times has been a subject of dispute between Muslim traditionalists and reformists.

Traditional theory of Islamic jurisprudence recognizes four sources of sharia: the Quran, sunnah (authentic hadith), ijma (juridical consensus) and qiyas (analogical reasoning).

In Islam, the Quran is considered to be the most sacred source of law. Classical jurists held its textual integrity to be beyond doubt on account of it having been handed down by many people in each generation, which is known as "recurrence" or "concurrent transmission': Only several hundred verses of the Quran have direct legal relevance, and they are concentrated in a few specific areas such as inheritance, though other passages have been used as a source for general principles whose legal ramifications were elaborated by other means.

Sunnah (the body of hadith) provides more detailed and practical legal guidance, but it was recognized early on that not all of them were authentic. Early Islamic scholars developed a methodology for evaluating their authenticity by assessing trustworthiness of the individuals listed in their transmission chains. These criteria narrowed down the vast corpus of prophetic traditions to several thousand "sound" hadiths, which were collected in several canonical compilations. The hadiths which enjoyed concurrent transmission were deemed unquestionably authentic; however, the vast majority of hadiths were handed down by only one or a few transmitters and were therefore seen to yield only probable knowledge. The uncertainty was further compounded by ambiguity of the language contained in some hadiths and Quranic passages. Disagreements on the relative merits and interpretation of the textual sources allowed legal scholars considerable leeway in formulating alternative rulings.

Consensus (ijma) could in principle elevate a ruling based on probable evidence to absolute certainty. This classical doctrine drew its authority from a series of hadiths stating that the Islamic community could never agree on an error. This form of consensus was technically defined as agreement of all competent jurists in any particular generation, acting as representatives of the community. However, the practical difficulty of obtaining and ascertaining such an agreement meant that it had little impact on legal development. A more pragmatic form of consensus, which could be determined by consulting works of prominent jurists, was used to confirm a ruling so that it could not be reopened for further discussion. The cases for which there was a consensus account for less than 1 percent of the body of classical jurisprudence.

Qiyas is used to derive a ruling for a situation not addressed in the scripture by analogy with a scripturally based rule. In a classic example, the Quranic prohibition of drinking wine is extended to all intoxicating substances, on the basis of the "cause" shared by these situations, which in this

case is identified to be intoxication. Since the cause of a rule may not be apparent, its selection commonly occasioned controversy and extensive debate. Shia jurisprudence does not recognize the use of qiyas, but relies on reason in its place.

Different legal schools (of which the most prominent are Hanafi, Maliki, Shafii, Hanbali and Jafari) developed methodologies for deriving sharia rulings from scriptural sources using a process known as ijtihad.

The classical process of ijtihad combined these generally recognized principles with other methods, which were not adopted by ail legal schools, such as istihsan (juristic preference), istislah (consideration of public interest) and istishab (presumption of continuity). A jurist who is qualified to practice ijtihad is known as a mujtahid. The use of independent reasoning to arrive at a ruling is contrasted with taqlid (imitation), which refers to following the rulings of a mujtahid. By the beginning of the 10th century, development of Sunni jurisprudence prompted leading jurists to state that the main legal questions had been addressed and the scope of ijtihad was gradually restricted. From the 18'" century on, leading Muslim reformers began calling for abandonment of taqlid and renewed emphasis on ijtihad, which they saw as a return to the Vitality of early Islamic jurisprudence.

Traditional jurisprudence distinguishes two principal branches of law, ibadat (rituals) and **muamalat** (social relations), which together comprise a wide range of topics. Its rulings assign actions to one of five categories: mandatory, recommended, neutral, abhorred, and prohibited. Thus, some areas of sharia overlap with the Western notion of law while others correspond more broadly to living life in accordance with God's will.

Historically, sharia was interpreted by independent jurists (muftis). Their legal opinions (fatwas) were taken into account by ruler-appointed judges who presided over qadi's courts, and by mazalim courts, which were controlled by the ruler's council and administered criminal law. Ottoman rulers achieved additional control over the legal system by promulgating their own legal code and turning muftis into state employees. Non-Muslim (dhimmi) communities had legal autonomy, except in cases of interconfessional disputes, which fell under jurisdiction of qadi's courts.

In the modern era, sharia-based criminal laws were Widely replaced by statutes inspired by European models. Judicial procedures and legal education in the Muslim world were likewise brought in line with European practice. While the constitutions of most Muslim-majority states contain references to sharia, its classical rules were largely retained only in personal status (family) laws. Legislative bodies which codified these laws sought to modernize them without abandoning their foundations in traditional jurisprudence. The Islamic revival of the late 20th century brought along calls by Islamist movements for full implementation of sharia, including reinstatement of corporal punishments, such as stoning. In some cases, this resulted in traditionalist legal reform, while other countries witnessed juridical reinterpretation of sharia advocated by progressive reformers.

The role of sharia has become a contested topic around the world. Attempts to impose it on non-Muslims have caused intercommunal violence in Nigeria and may have contributed to the breakup of Sudan. Some Muslim-minority countries in Asia, Africa and Europe recognize the use of sharia-based family laws for their Muslim populations. There are ongoing

debates as to whether sharia is compatible with secular forms of government, human rights, freedom of thought and women's rights.