**6. MAJOR LEGAL SYSTEMS**

**Questions to the text**:

1. Characterize briefly continental legal system (civil law).

2. Characterize briefly Common law system.

3. Characterize mixed legal systems

4. Characterize briefly Islamic law.

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.

**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.

**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.

**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.