

COMPARATIVE LAW

I. OBJECTIVES

- A. Realize the importance of comparative law to an international/operational attorney.
- B. Understand the difference between International Law, Foreign Law, and Comparative Law.
- C. Recognize a general approach for researching comparative law.
- D. Gain familiarity with the differences and similarities between the predominant legal traditions, as well as their geographical distribution.
- E. Understand the distinction between legal *traditions* and legal *systems*.

II. DEFINING COMPARATIVE LAW

- A. What is “law?”
 - 1. From Black’s Law Dictionary:
 - a. “Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force.”
 - b. “That which is laid down, ordained, or established.”
 - c. “The ‘law’ of a state is to be found in its statutory and constitutional enactments, as interpreted by its courts, and, in absence of statute law, in rulings of its courts.”
 - d. “With reference to its origin, ‘law’ is derived from judicial precedents, from legislation, or from custom.”
 - 2. Law may mean or embrace:
 - a. A body of principles, standards, and rules promulgated by government.
 - b. Rules of civil conduct commanding what is right and prohibiting what is wrong.

- c. General rules of human action, taking cognizance only of external acts, enforced by a determinate authority, which authority is human, and among human authorities is that which is paramount in a political society.
 - d. Statutes or enactments of a legislative body.
 - e. Judicial decisions, judgments or decrees.
 - f. Long-established local custom which has the force of law.
 - g. Administrative agency rules and regulations.
- B. What is the purpose of law? This value-laden question is the subject of significant philosophical disagreement.
1. One answer is that the purpose of law is to provide a government of:
 - a. Security: To protect against anarchy.
 - b. Predictability: To allow planning of affairs with confidence in legal consequences.
 - c. Reason: To provide guarantees against official arbitrariness.
 2. Some comparative law scholars refer to four “law jobs”:
 - a. Social control.
 - b. Conflict resolution.
 - c. Adaptation and social change.
 - d. Norm enforcement.
- C. International law governs relations between two or more States, and is comprised of those sources of law noted in Chapter 1 *supra*, including treaty, custom, general principles of law as recognized by civilized nations, in addition to judicial decisions and the teachings of eminent “publicists” .
- D. Foreign law is the domestic law of a foreign State (e.g., the German Civil Code, *Bürgerliche Besetzbuch*).

- E. Comparative law is the study of the similarities and differences between the legal approach of two or more legal traditions (e.g., comparison between the common law and the civil law approaches to criminal procedure), or between the laws of two or more legal systems (e.g., comparison of U.S. criminal code and the German criminal code). Comparative law can be at the theoretical or applied level.
- F. Legal Tradition is a much broader concept than a “legal system,” and may be thought of as a “legal family.” A legal tradition is a deeply rooted, historically conditioned cultural attitude about the nature of law, the role of law in society, and the proper organization of a legal system.
1. Generally, there are seven or eight major legal traditions/families (Common Law, Civil Law, Tribal/customary, Talmudic, Hindu, Islamic, Asian, Socialist). Some scholars would remove the Socialist tradition from the grouping, and others would add groups such as the Scandinavian Tradition.
 2. Common Law tradition is located in England, the U.S., Canada, Australia, South Africa, and New Zealand.
 3. Civil Law traditions are primarily located in Europe and Latin America, though many countries in the Middle East and Africa also maintain civil law legal systems.
 4. Islamic Law exists to varying degrees in legal systems throughout the Middle East, Northern Africa, Southeast Asia, and portions of the Pacific.
 5. Many countries are a mix of traditions.
 6. Even within a legal tradition, there may be much variance between legal systems (e.g., prevalence of jury trials in the U.S. versus the U.K.).
- G. Legal System is an operating set of legal institutions, procedures, and rules. Thus, there are as many legal systems as there are sovereign States in the world.
- H. Theoretical Level of comparative law: how and why certain legal systems are different or alike (e.g., why does the U.S. Constitution focus on freedom of speech, whereas the premier right in the German “Basic Law” is the inviolability of dignity?).
- I. Applied Level of comparative law: how a specific problem can best be solved under the given social and economic circumstances; much richer variety of ideas “than

could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system.”¹

1. How positive law should be altered.
2. How a perceived gap should be filled.
3. What rules should be adopted in an international uniform law.

III. HISTORICAL BACKGROUND AND RELEVANCE OF COMPARATIVE LAW

A. Historical Background of Comparative Law.

1. 18th and 19th Centuries. Rise of sovereignty and the influence of legal positivism; beginning of learned societies for cross-national legal studies and/or comparative law in France, Germany, and England.
2. 1900 – World Exhibition in Paris. Two French Scholars (Edouard Lambert and Raymond Saleilles) organized the 1st International Congress for Comparative Law, with goal of “A Common Law for All Mankind.”
3. 20th Century. Focus on Common Law vs. Civil Law. Comparative Law viewed as a tool for Private International Law (international business and commerce).
4. 21st Century. Focus shifted to other Legal Traditions. Comparative Law applied to Public International Law, and viewed as useful in cross cultural understanding and diplomacy.

B. Relevance of Comparative Law. The modern view is that Comparative Law is useful in cross-cultural understanding and diplomacy (e.g., as an aid to negotiating more meaningful international agreements).

1. For the military international/operational law judge advocate, a comparative law study is a key component of pre-deployment preparation. Not only should the judge advocate have a basic understanding of a host nation’s legal tradition and system to properly advise a commander on planned operations, but in the event that “Rule of Law” and counterinsurgency operations are planned, then a comparative law study is critical.

¹ CONRAD ZWEIGERT AND HEIN KOETZ, INTRODUCTION TO COMPARATIVE LAW 15 (3rd ed., 1998).

- a. “Rule of Law pertains to the fair, competent, and efficient application and fair and effective enforcement of the civil and criminal laws of a society through impartial legal institutions and competent police and corrections systems. This functional area includes judge advocates trained in international law as well as CA specialists in related subjects.” FM 3-05.40, para. 2-8.
- b. “When insurgents are seen as criminals, they lose public support. Using a legal system established in line with local culture and practices to deal with such criminals enhances the Host Nation government’s legitimacy. Soldiers and Marines help establish Host Nation institutions that sustain that legal regime, including police forces, court systems, and penal facilities.” FM 3-24, MCWP 3-33.5, Counterinsurgency, para. 1-131.
- c. Some judge advocate activities in furtherance of Rule of Law operations will include:
 - i. Determine capabilities of the host nation legal system.
 - ii. Review the host nation laws and legal traditions.
 - iii. Advise and assist the host nation development of law consistent with international standards.
 - iv. Evaluate the host nation judicial infrastructure.
 - v. Mentor the host nation judges, magistrates, prosecutors, defense counsel, legal advisors and court administrators.
- d. From a moral perspective, it is problematic for a State to impose a legal system that does not reflect its society’s values. From a practical perspective, the failure of a legal system to become internalized can devastate the official legal infrastructure either because of constant resistance or by requiring the State to rely on its coercive power to resolve more legal disputes than it has the capacity to handle.
- e. Formalist v. Substantive conceptions of the “Rule of Law.”
 - i. Formalist: Focused on the *procedures* for making and enforcing law and the *structure* of the nation’s legal system.
 - ii. Substantive: Focused on the content of the law and protecting certain rights.

- iii. The distinction between “formalist” and “substantive” is a matter of emphasis and priority. Formalist goals are less likely to result in controversy and less likely to threaten the cultural identity.
- 2. Comparative Law is also important at the international level; for example at the International Court of Justice, which is the judicial organ of the United Nations.
 - a. Article 38 of the Statute of the ICJ provides a hierarchy of law which the Court should apply to resolve disputes. The Court shall apply: (a) international conventions establishing rules expressly recognized by the contesting states [i.e., treaties]; (b) international custom, as evidence of a general practice accepted as law [i.e., customary international law]; (c) **the general principles of law, recognized by civilized nations [i.e., as determined through comparative law studies]**; (d) judicial decisions and teachings of most highly qualified publicists of various nations, as subsidiary means for determination of rules of law.
 - b. Article 38 of the Statute of the ICJ is a useful starting point for understanding the relative hierarchy within international law, as well as recognizing the role that comparative law plays in determining what exactly are “the general principles of law, recognized by civilized nations.”

IV. COMPARATIVE METHODOLOGY

A. Comparative Law framework:

- 1. Is it a “social science” or a separate body of knowledge?
 - a. Scholars appear to be arguing over whether the data obtained should be regarded simply as part of the method, or whether they should be regarded as a separate body of knowledge.
 - b. The term “comparative law” can be used to include both the method and the data resulting from its application.
- 2. Macro-comparison v. micro-comparison. Two different species of comparative study. There is no one single method applicable.
 - a. Macro-comparison refers to the study of two or more ENTIRE legal systems.

- b. Micro-comparison refers to the study of topics or aspects of two or more legal systems.
 - 3. The academic aims of Comparative Law include:
 - a. Aiding and informing the legislative process and law reform.
 - b. Understanding the application of foreign law in the courts.
 - c. Contributing to the unification and harmonization of laws.
- B. Comparative Law Methodology and Research Strategy.
1. Identify the problem and state it precisely. The framing of the particular issue is crucial. What is the problem or issue? What is the goal or objective? What should be compared?
 2. Identify the relevant jurisdictions/legal systems (which may be based on the availability of research materials).
 3. Identify the foreign jurisdiction's parent legal family using sources, mode of legal thought, and ideology. Note if it happens to be a "hybrid" system or a system predominantly based on a religious faith.
 4. Find, gather, and organize primary and secondary sources of law and other materials.
 - a. Should give equal attention to historical influence and socio-economic factors.
 - b. Think about hierarchy of sources. Can use law codes, case law, law reports, law and socio-legal journals, and legal periodicals. Also think about using introductory works, and then go to their bibliographies.
 - c. Mandatory Authority: treaties, UN Security Council Resolutions, constitutions, statutes, regulations, etc.
 - d. Persuasive Authority ("Soft Law"): UN General Assembly Resolutions, UN Committee comments/recommendations, Agency Guidelines/Manuals, etc.

- e. Helpful Secondary Resources: Encyclopedias, Research Guides, Yearbooks, etc., which are comparative law texts on specific topics (e.g., comparative criminal law). [Note: A comparative law researcher may want to start with these first to learn the primary sources.]
 - i. Encyclopedias.
 - A. Encyclopedia of Public International Law.
 - B. International Encyclopedia of Laws..
 - ii. Research Guides.
 - A. Foreign Law: Current Sources of Codes and Basic Legislation in Jurisdictions of the World
<http://www.foreignlawguide.com/login.htm>.
 - B. CIA World Factbook:
<https://www.cia.gov/library/publications/the-world-factbook/>
 - C. Defense Language Institute resources (Note: contains both linguistic and extensive cultural information).
 - iii. Yearbooks.
 - A. Yearbook of the United Nations.
 - B. Digest of U.S. Practice in International Law.
 - C. SIPRI Yearbook: Armaments, Disarmament and International Security.
5. Determine similarities and differences. Compare the different approaches, bearing in mind cultural differences and socio-economic factors.
- a. Ask how does the rule/institution *really* operate in practice?
 - b. Are the reasons historical, pragmatic, or cultural? Are they based on religious beliefs, economic practices or certain trade practices, etc?
6. Explain similarities and differences. Includes an analysis of the rationale behind the system's approach to resolving the legal issues being studied.

Analyze the legal principles in terms of their intrinsic meaning rather than according to any Western standards.

- a. Historical Background. Consider the cultural rather than the literal meaning of terms/phrases/concepts.
 - b. Jurisprudential Basis. What purpose does the rule fulfill? What principle, if any, does it support or apply? What practical effects might it have on the parties involved?
 - c. Evolutive (i.e., evolution of legal approaches).
7. Evaluate the results. What are the key cases and legislation? What does the future development of this area of law hold for the jurisdiction?
- a. The comparatist is NOT seeking to be judgmental about legal systems in the sense of whether he or she believes them to be “better” or “worse” than any other given system. Rather, the comparatist is seeking to evaluate the efficacy of a given solution or approach to a legal problem in terms of that particular jurisdiction’s cultural, economic, political and legal background.
 - b. Given a set of priorities, the task is to assess the effectiveness of a solution in terms of achieving those aims and objectives.

C. Comparative Law Pitfalls and Perils.

1. **Pitfall/Peril #1:** Cultural differences between legal systems.
 - a. The same legal ideas and institutions crop up in many different and diverse jurisdictions.
 - b. Law can survive without any close connection to any particular people, period, or place (e.g., Roman law survived, despite radical change in circumstances; Civil law tradition subsists in countries as culturally and geographically diverse as Germany and Paraguay).
 - c. But – every legal system is the product of its history and, very often, its political fortunes.
 - d. You have to look at the “values and attitudes” which bind the system together and which determine the place of the legal system in the culture of the society as a whole.

- i. What kind of training and habits do lawyers and judges have?
 - ii. What do people think of law?
 - iii. Do groups or individuals willingly go in to court?
 - iv. For what purposes do people turn to lawyers?
 - v. For what purpose do people make use of intermediaries?
 - vi. Is there respect for law, government, and tradition?
 - vii. What is the relationship between class structure and the use or non-use of legal institutions?
 - viii. What informal social controls exist in addition to or in place of formal ones?
 - ix. Who prefers which kinds of controls and why?
- e. Note: The study of Asian law, Islamic law, or Hindu law is probably going to require greater cultural attuning from U.S. military judge advocates than studying French or German law.
2. **Pitfall/Peril #2:** The tendency to impose one's own (native) legal conceptions and expectations on the system(s) being compared.
- a. When studying non-Western legal systems and cultures, Westerners must not approach or appraise these systems from their own Western viewpoints or judge them by European or American standards.
 - i. For example, some Western lawyers concluded in the 1970's that China had no legal system because it had no attorneys in the American or European sense, no independent judiciary, no codes, and no system of legal education. But that is like the Western visitor who assumed that there was no "proper" music played in China because he did not see Western instruments in the Chinese concert hall he visited.
 - ii. Had the scholars in the 70's looked for "functional equivalents of legal terms and concepts" and asked by which institutions and which methods are the four "law jobs" being performed, they would have concluded that there is a Chinese legal system, albeit a unique

system that didn't fit into Western conceptions of law or legal systems.

3. **Pitfall/Peril #3:** The difficulties of “comparability.” The military judge advocate needs to be sensitive to the fact that it is difficult to “compare” legal systems that are at different points in their evolution. Without a baseline of similarities there can be misunderstandings.
4. **Pitfall/Peril #4:** The desire to see a common legal pattern in legal systems.
 - a. Do NOT assume that there has been a general or similar pattern of legal development.
 - b. Such an assumption may obscure the discovery of the actual development of the legal system being studied.
5. **Pitfall/Peril #5:** Danger of exclusion and ignorance of extra-legal rules.
 - a. Do not ignore informal customs and practices which operate outside strict law.
 - b. Do not ignore various non-legal phenomena which ultimately influence the state of the law. Obviously this includes revolutions, coup d'états, and wars, but also, radical devaluations of currency, radical changes in government economic and legal policy, widespread unemployment, technological change, nationalistic fervor, and the gaining of independence.
 - c. Historical events in education, industry, and commerce.
 - d. The signing of international treaties that result in the integration of laws that unite the particular system with others, with the inevitable effects on legislation, case law, and even the everyday practice of law (e.g., European Union law).
6. **Pitfall/Peril #6:** Linguistic and terminological problems.
 - a. The **greatest** difficulty and danger of comparative law.
 - b. Physicians, chemists, mathematicians, and musicians have a common vocabulary...but legal terminology is fraught with linguistic traps and potential minefields of misunderstanding.

- c. Even in English speaking countries, the same word or phrase may have different meanings. A legal example in the common law system is *stare decisis* (“let the decision stand”). American and English systems each have adopted this doctrine of precedent. But in America it has never acquired the formalistic authority that it has in England. This is due to our differences in judicial and political structure and hierarchy, the great volume of decisions in America, the conflicting precedents in different jurisdictions, etc.
- d. There are even more difficulties in translating “alien” legal concepts, since an authentic translation often demands more than mere linguistic accuracy. For a translation of a legal term to be meaningful, intimate knowledge is required both of the system being translated as well as of the native system.

V. COMMON LAW TRADITION

- A. Common Law has its origins only in 1066 with the Battle of Hastings and subsequent Norman Conquest.
- B. Common Law characteristics.
 - 1. Law created and molded by judges: Although legislation is binding, until it has been judicially interpreted, laws are sometimes believed to lack the authority which arises with judicial sanctification. Legislation gains greater respect, and perhaps authority, when judicially interpreted.
 - 2. Authority to find legislation invalid or interpret legislation.
 - 3. Lengthy, multiple judicial opinions, many of which are published.
 - 4. Gradual development/”gap-filling” of the law: judicial view that no system possesses a written law governing all conceivable disputes, therefore judges must fill the gaps by creating new law.
- C. Sources of Law.
 - 1. Legislation is paramount, but judicial precedent is fabric of common law.
 - 2. Hierarchy of courts, with lengthy published opinions.
 - a. But “holding of case” vs. “mere obiter dicta.”

- b. Distinguishing precedent that otherwise seems on point.
3. Judicial Independence (some lifetime tenure).
4. Goals: certainty, but also flexibility.
5. Criminal and Civil Trials, including jury trials (typical in U.S., not in UK).

VI. CIVIL LAW TRADITION

A. Background: predominant system worldwide.

1. Spread throughout Western Europe via continental universities as an academic system of law.
2. Spread throughout Central and South America, and parts of Asia and Africa, due to colonialism.
 - a. The French codification occurred at the beginning of the industrial revolution, and the German codification towards the end. Both occurred during the era of colonialism, and contributed to the imposition of the civil law tradition throughout much of the world. As a result, not only are there a significant number of civil law systems in the world, there are an extremely large number of mixed systems that have components of the civil law tradition.
 - b. As a percentage of the world population, civil law systems apply to four times more people than common law systems, and twice as many States (88 Civil Law vs. 42 Common Law States).

B. History.

1. Origins in the Law of the Roman Empire with publication of the XII Tables of Rome in 450 B.C..
2. In approximately 529 A.D., Emperor Justinian sought to rescue Roman law from centuries of deterioration by codifying and simplifying what had grown into an enormous and unwieldy body of law filled with conflict. Emperor Justinian ordered the preparation of *Corpus Juris Civilis (CJC)*, which was a compilation of the multitude of treatises and commentaries. Once the *CJC* was compiled, Emperor Justinian sought to abolish all prior law except that included in *CJC*; he forbade study of the earlier works and even went so far as having many earlier treatises burned.

3. Roman Law was carried into all corners of the Roman Empire, but it was an imposed system and did not take root in most of Europe—it fell into disuse with many cultures reverting back to customary systems after the collapse of the Empire. That isn't to say that there were no remnants of Roman law, and crude variants were adopted by some cultures.
4. Canon Law (Middle Ages): Throughout the middle ages the Canon Law system of the Christian Church remained and evolved replacing some aspects of the government that had collapsed. The Church assumed jurisdiction over certain aspects of family, property, and criminal law, and the Church formed its own tribunals. Canon Law, although Christian, had borrowed heavily from Roman Law, and was influenced by the *CJC*, but over the centuries after the fall of the Empire, it evolved its own sets of rules and procedures that would influence development of the civil law tradition upon the re-emergence of Roman Law in the 10th Century.
5. Commercial Law, developed by Merchant Guilds and Trade Associations: As Europe settled politically, renewed travel and commerce helped foster a desire for predictability and efficient methods of dispute resolution. Scholars began to look once again at the *CJC*. A need arose for a body of law to govern business transactions which the ancient Roman laws did not address well. Merchant guilds and trade associations developed their own rules and tribunals. These procedures became widely practiced and accepted and were deemed “customary law.”
6. 10th Century Revival of Roman Law: With the continued rise of the nation-state in Europe and the re-emergence and spread of Roman Law throughout Europe's centers of learning, Roman Law once again took root, but added elements from Canon and Commercial Law. Legal Scholars, such as St. Thomas Aquinas in the 13th Century, wrote treatises and commentaries that were widely circulated and studied. As the influence of the reemerging law took effect, with allowance for some local or customary augmentation, the concept of “*Jus Commune*”² was born.

C. Competing Modern Traditions:

1. The French Revolutionary Tradition: as a result of the French Revolution and Napoleonic Rule, the French Tradition was codified and established in the French Civil Code of 1804.
 - a. The characteristics of this codification were recognition of a “Separation of Powers,” “Natural Rights,” and “Glorification of the State.”

² That is, the common law (*commune jus*) of all mankind.

- b. The code rejected feudalism and claimed the areas of property, contract, and family law for the citizen.
 - c. The Code was designed to be understandable by the average citizen.
2. The German Scientific Tradition: The German Civil Code of 1896 was based on a *scientific* reconstruction of the legal system.
- a. The underlying thought to the German system was that by studying legal scholars in their historical context, a set of historically verified and essential principles could be discovered. That is, legal scientists can discover inherent principles and relationships just as the physical scientist discovers natural laws from the study of physical data.
 - b. The Code was prepared for those trained in the law, and thus was responsive to the needs of lawyers, not the average citizen.
 - c. Similar to the French, the German system retained a sharp separation of powers.
 - d. The German Civil Law system is distinguished from the French System, due to customary influences on the early German legal scholars who wanted to integrate local custom into the Roman “Jus Commune.”
- D. Civil Law Jurisdictions in General.
- 1. Secular in nature (post-1789).
 - a. Law no longer considered of divine origin.
 - b. Ultimate lawmaking power lay in the State.
 - c. Heavily influenced by 19th Century Liberalism.
 - i. Individual autonomy.
 - ii. Freedom of contract.
 - iii. Respect for private property.
 - 2. Supremacy of the State.

- a. Only statutes enacted by the legislature are law.
 - b. Books and articles written by scholars have a central place in legal traditions
 - i. Trace importance back to Roman *juris consuls*
 - ii. Germany used to send difficult legal issues to law school faculties for discussion, debate, and ultimate decision
 - iii. Contrast with Common Law States.
 - A. Common Law: Know the names and writings of great *jurists* from the past
 - B. Civil Law: Know the names and writings of great *legal scholars* of the past
3. Elements of the Law.
- a. Statutes enacted by a legislature. Five Basic Codes typically found in civil law jurisdictions
 - i. Civil Code.
 - ii. Commercial Code.
 - iii. Code of Civil Procedure.
 - iv. Penal Code.
 - v. Code of Criminal Procedure.
 - b. Legislation promulgated by the executive, by authority delegated from the legislature.
 - c. Custom.
4. Role of the Judge.
- a. Apply the law.

- b. Traditionally no judicial review of acts of the legislature. However, there is a new trend toward Constitutionalism.
 - i. Created special constitutional courts. Not part of the judicial system. Couldn't give judges authority to overrule the legislature
 - ii. France: Constitutional Council
 - c. Judges viewed as functionaries, civil servants, and "Expert clerks": Presented with a fact pattern; couple it with the appropriate legislative provision.
5. The Role of Lawyers.
- a. Judge.
 - b. Public Prosecutor.
 - i. Prosecutor in criminal actions.
 - ii. Represent public interest in judicial proceedings between private individuals.
 - c. Government lawyer.
 - d. Advocate.
 - e. Notary.
 - i. Drafts legal instruments (wills, corporate charters).
 - ii. Authenticates instruments.
 - iii. Public records repository.
 - f. Law-professor/Scholar. Common law is the law of judges; but civil law is the law of the professors.
6. Interpretation of Statutes.
- a. Theoretically: legislature only.

- b. French system:
 - i. Created a new governmental body.
 - ii. Not a part of the judiciary.
 - iii. Power to *quash* incorrect interpretations by the courts.
 - iv. Maintained separation of powers.
 - A. Delegated authority from legislature.
 - B. Upholds legislative supremacy.
 - v. Evolved into a Supreme Court.
 - A. Supreme Court of Cassation.
 - B. Quash and “instruct” lower courts. Reviews issues of law only, not issues of fact.
- c. Interpretation of Unclear Provisions. “In interpreting the statute, no other meaning can be attributed to it than that made clear by the actual significance of the words according to the connections between them, and by the intention of the legislature.”
- d. Civil Law interpretation in the absence of specific law: “If a controversy cannot be decided by a precise provision, consideration is given to provisions that regulate similar cases or analogous matters; if the case still remains in doubt, it is decided according to general principles of the legal order to the state.”

7. Legal Classifications.

- a. Public law.
- b. Private law.
 - i. Civil Law. Persons, the family, inheritance, property, and obligations.

- ii. Commercial Law. In many Civil Law jurisdictions, commercial law has remained its own distinct legal system.
- 8. Jurisdiction of Civil Law Courts.
 - a. “Ordinary” courts.
 - b. Commercial courts.
 - c. Administrative Courts (e.g., Council of State (France)).
- 9. Civil Procedure.
 - a. Trial. Isolated hearings dominated by written communications.
 - b. Hearing judge vs. Adjudicator.
 - c. Attorney’s fees based on an official schedule.
 - d. Appeal.
 - e. Decisions.
- 10. Criminal Procedure.
 - a. Typically three phases:
 - i. Investigative, which the public prosecutor directs.
 - ii. Examining.
 - A. Controlled by the examining judge.
 - B. Primarily written record, prepared by the examining judge.
 - C. Not public.
 - D. Examining judge determines:
 - 1. Crime committed?

2. Accused is perpetrator? If yes, trial.
- iii. Trial.
- A. Presumption of Innocence.
 - B. Jury Trial.
 1. Range of offenses depends on the code.
 2. Size.
 3. Unanimity.

VII. TRIBAL OR CUSTOMARY TRADITION

- A. The Tribal or Customary legal tradition is a relatively new concept, although it describes the oldest of legal traditions. Interestingly, in spite of a multitude of geographic and cultural variables, it is within the customary tradition that scholars have found the most constants.
 1. Indigenous systems. All of the legal traditions have their roots in various customary systems, and were influenced by them.
 2. Modern View: still influential on legal systems in many areas of the world, including many of our modern concepts; typically found in family and property law.
 3. Systems which are largely customary in nature are still active in almost every part of the world. Representative systems can be found throughout the South Pacific, Asia, Africa, Australia, and even in the United States on Native American Reservations—although it must be conceded that they are not purely customary. In fact, it is very difficult to find a pure customary legal system today.
- B. Characteristics:
 1. Oral (vs. written) tradition.
 2. Legal system is seen as an integral “way of life” rather than a distinct system.

3. Council of Elders / Advisors, whose function is to interpret and decide issues within the legal system, even if the group has a Chief or King.
4. Tendency to informal dispute resolution, even in criminal cases, and decision is based on the best interests of the community.
5. Family law characterized by mutual consent and informality.
6. Lacking law of obligation (e.g., no contracts or torts), when issues arise, they are dealt with relatively informally by the community or council of elders.
7. Property Law: the basic ideas are to keep large families together since many members were necessary for the many tasks of daily life, and concepts of property look more towards communal use rather than individual ownership. Customary concepts of property are getting a fresh look as models for environmental laws and regulations in more modern traditions and systems.

VIII. TALMUDIC TRADITION

- A. Talmudic Law is one of the oldest remaining legal traditions (along with the Hindu Tradition).
 1. Written Torah: revelations given to Moses, which were recorded as the first five books (Genesis, Exodus, Leviticus, Numbers, and Deuteronomy) of the Hebrew Bible, approximately 1400 B.C..
 - a. There is an all encompassing concept of “Torah” or revelation that contributes to Talmudic Law.
 - b. The “Written Torah” generated comment and explanation, and the oral tradition of commentary became an expansion on the Torah called the “Oral Torah.”
 2. Mishnah: Oral Torah, approximately 70 B.C. through 200 A.D..
 - a. Oral tradition which generated a written record compiled over time.
 - b. The Mishnah itself generated comment, and this second set of expositions was recorded on two occasions in the Jerusalem and Babylonian Talmuds.
 3. Jerusalem Talmud: approximately 400–500 A.D..

4. Babylonian Talmud: approximately 600–700 A.D..
 5. There are some additional portions of the Talmud found in the Tosefta and Midrashe Halakhah as well. Consider that at the time of the writing of the two Talmud, almost two millennia of legal commentary had passed.
 6. Commentaries and Restatements: During the middle ages, commentaries continued to be promulgated, most notably that of Maimonides (a.k.a. Rabbi Moses Ben Maimon) which is still considered one of the most influential.
 - a. Maimonides (12th Century) was a scholar, physician, and philosopher whose works (legal, religious, medical, and scientific) were influential throughout the Jewish and Arab communities as well as on later European culture and traditions as well. For example, Maimonides had a great influence on St. Thomas Aquinas.
 - b. Responsa: written advice regarding application of Talmudic Law.
- B. Influential on later traditions (e.g., Greek, Roman and Islamic).
- C. General sense of obligation to God and to act towards others in accordance with God's will.

IX. HINDU TRADITION

- A. One of the oldest remaining legal traditions. Hinduism is also a religion, a way of life, which includes much outside of the law (e.g., how to engage in politics).
1. Four books of Veda (= to see), approximately 2000 B.C..
 - a. Revelations essential to Hindu way of life.
 - b. Brahmans taught Vedas from memory, using Sutras, which were chains of verbal maxims.
 2. Sastras = texts/poetry, including law and religious observance (200 B.C. – 400 A.D.).
 3. Commentaries and Digests (700 - 1700 A.D.).

- B. Private/religious works of law without judicial or legislative foundation, applicable to all Hindus worldwide (e.g., India, Pakistan, Burma, Singapore, Malaysia, Tanzania, Uganda, and Kenya).
1. Complex, hierarchical structure of appeals.
 2. Much Hindu teaching outside law books about how to live a life, e.g., politics (arthasutras/arthasastras) and pleasure (kamasutras/kamasastras).
- C. Dharma infuses Hindu law.
1. Dharma = specific, individual sense of obligation to society, to do what is just and what is right (righteousness); it also assigns us a place in life (Varna = caste) and specific obligations in course of living that life.
 - a. The word *dharma* (Sanskrit; "धर्म" in the Devanagari script) or *dhamma* (Pali) is used in most or all philosophies and religions of Indian origin, Dharmic faiths, namely Hinduism (Sanatana Dharma), Buddhism, Jainism, and Sikhism. It occurs first in the Vedas, in its oldest form as dharman. It is difficult to provide a single concise definition for "Dharma"; the word has a complex history and an equivalently complex set of meanings.
 2. One's Dharma and caste are dictated by one's past Karma (good or bad, including past lives).
 - a. In law, there is no 5th class of untouchables, though popular conceptions of untouchables translate into Sudras.
 - b. With the passage of time, caste acquired significance as indicative of social status arising by virtue of birth only.
 - c. The current Indian Constitution prohibits discrimination on the basis of caste, which are made up of Brahmans (teachers), Kshatriya (warriors), Vaishyas (traders), and Sudras (servants).
 3. Failure to comply with Dharma results in accumulating bad Karma, which must be repaid in future lives (e.g., lower caste).

X. ISLAMIC TRADITION

- A. Background.

1. Roots in pre-Islamic Arab society.
 2. Goal was not to establish a new legal order, but to teach people what to do in life.
- B. Definitions.
1. Islam: “Submission or surrender to Allah’s will.”
 2. Qadi: Islamic Judge.
 3. Sharia: “The path to follow God’s Law.”
 4. Fiqh: The science of understanding and interpreting legal rulings (Islamic jurisprudence).
- C. General Principles.
1. No separation of church and State.
 2. Most Muslim States have a bifurcated legal system:
 - a. Civil laws applicable to Muslims and non-Muslims.
 - b. Sharia applicable to Muslims only.
- D. The role of Judges.
1. For serious crimes, there are distinct punishments.
 2. For less serious crimes, judges are free to create new options and ideas to address the issue
 3. Not bound by precedent and rules inherent in the Common Law system. More freedom/latitude than Civil Law judges.
- E. Sharia Law.
1. Holistic approach to guide the individual in most daily matters.

2. Controls all public and private behavior including personal hygiene, diet, sexual conduct, child rearing, prayers, fasting, charity, and other religious matters.
3. Elements of Sharia Law.
 - a. The Qur'an. Primary source. No appeal.
 - b. Sunna.
 - i. Teachings of the Prophet Mohammed not explicitly found in the Qur'an.
 - ii. *Sunna* is recorded in the hadith.
 - iii. *Isnad* is the chain of reporters who produced the hadith.
 - c. Ijma. Consensus of religious scholars (Ulamas) on subjects not found explicitly in the Qur'an or the Sunna.
 - d. Qiyas. New cases or case law (application by analogy).
 - e. Other written works.
 - i. The New Testament.
 - ii. Legal discourses from Civil and Common Law jurisdictions.
4. Classification of *Hadith*.
 - a. According to the reference to a particular authority
 - b. According to the links of *Isnad*—interrupted or uninterrupted.
 - c. According to the number of reporters involved in each stage of *Isnad*.
 - d. According to the nature of the text and *Isnad*.
 - e. Overall Classifications of *Hadith*:
 - i. *Sahih*: Sound. One cannot question the rulings of the Qur'an and *sahih hadith*

- ii. Hasan: Good. The source is known and its reporters are unambiguous.
- iii. Da'if: Weak. Not to the level of hasan, usually because of a discontinuity in the Isnad, or one of the reporters is unreliable.
- iv. Maudu': Fabricated. A hadith whose text goes against the established norms of the Prophet's sayings, or its reporter is a liar.

5. Crimes.

a. *Hadd* Crimes. Crimes against God's Law, the most serious of all crimes.

- i. Found by an exact reference in The Qur'an.
 - A. A Specific act.
 - B. A Specific punishment.
- ii. No plea bargaining.
- iii. No reduced punishment.
- iv. Examples: (* Specific punishment listed in the Qur'an.).
 - A. *Murder.
 - B. *Apostasy from Islam. Making war upon Allah and his messengers.
 - C. *Theft.
 - D. *Adultery.
 - E. Defamation. False accusation of Adultery or Fornication.
 - F. Robbery.
 - G. Alcohol-drinking.
- v. Level of Proof: Confession, or a minimum of two witnesses.

- vi. If any doubt; treat as a *Ta'zir* crime.
- vii. Mitigation.
- b. *Ta'zir* Crimes.
 - i. Crimes against society.
 - ii. *Ta'zir* crimes can be punished if they harm the societal interest.
 - iii. The assumption is that a greater “evil” will be prevented in the future if you punish the offender now.
 - iv. Historically not written down or codified; now set by parliament in some countries (Egypt).
 - v. Absent codification, judges are free to choose punishment they think will help the offender.
 - vi. Examples of crimes:
 - A. Bribery.
 - B. Selling defective products.
 - C. Treason.
 - D. Usury.
 - E. Selling pornography.
 - vii. Examples of punishments:
 - A. Counseling.
 - B. Fines.
 - C. Public or private censure.
 - D. Seizure of property.

- E. Confinement.
 - F. Flogging.
 - c. *Qisas* Crimes.
 - i. A crime of retaliation.
 - ii. Victim (or victim's family) has a right to seek retribution or retaliation.
 - iii. Examples of crimes:
 - A. Murder (Premeditated and non-premeditated).
 - B. Premeditated offense against human life, short of murder.
 - C. Murder by error.
 - D. Offenses by error against humanity, short of murder.
 - iv. Punishments. Sought, in most cases, by the victims family
 - A. *Diya* (Blood money).
 - B. Public execution
 - 1. Traditionally carried out by the victim's family.
 - 2. Now carried out by the government.
 - C. Pardon.
6. Criminal Cases.
 - a. Although all ostensibly are based on the Qur'an, handling of cases can vary between different schools of thought.
 - b. Sunni Legal Schools:
 - i. Hanafi.

- A. The oldest school of law.
 - B. Founded in Iraq around 767.
 - C. The most flexible of the four schools.
 - D. Heavy emphasis on analogy.
 - E. Turkey, Afghanistan, India, and China.
- ii. Maliki.
- A. Founded in Medina around 795.
 - B. Emphasis on the relevance and authority of traditions of the Prophet and first Muslim community at Medina.
 - C. Incorporated local customs and traditions into Sharia.
 - D. North Africa, Upper Egypt, and the Sudan.
- iii. Shafi'i.
- A. Founded around 810.
 - B. Apply prophetic traditions; yet apply a rigorous rational criticism to them.
 - 1. Verify every link in the chain of transmission.
 - 2. Closely scrutinize the transmitters/reporters.
 - C. Lower Egypt, southern India, Indonesia, and Malaysia.
- iv. Hanbali.
- A. Strictly the Qur'an and verifiable tradition of the Prophet.
 - B. Rejected both reason and community consensus as the bases for legal rulings.

C. Saudi Arabia (Wahhabis).

XI. ASIAN TRADITION

A. Overview.

1. Asia has historically included other legal traditions (customary, Talmudic, Islamic, Hindu), and is now picking and choosing from civil and common law sources.
2. Some authors claim the Asian Tradition to be a misnomer today, due to influence of colonization and modernization.³
 - a. Common Law (UK colonies): India, Malaysia, Singapore, and Brunei.
 - b. Civil Law (French and Dutch colonies): Indochina (Burma, Cambodia, Laos, Malaysia, Vietnam), and Indonesia.
 - c. Other Asian States chose to adopt systems based on Civil Law: China, Japan, and Thailand.
 - d. U.S. law also had influence on Philippines and Japan, due to pre- and post-World War II occupation.

B. Characteristics

1. Confucianism, Buddhism, Shintoism, and Taoism all have dim views of formal law.
2. Important issues regulated more by Persuasive, Informal Traditions, and Social Harmony (*Li*) than by Obligatory, Formal Laws, and Sanctions (*Fa*).
3. *Fa* focuses on penal and administrative law.
4. *Li* focuses on everything else (including “non-legal” issues). Belief that business relations are best not reduced to writing and should be seen as ongoing, harmonious relationships of mutual advantage. For example, an exemplary person seeks harmony vs. agreement on immediate detail; a small person does the opposite

³ MARGARET FORDHAM, COMPARATIVE LEGAL TRADITIONS – INTRODUCING THE COMMON LAW TO CIVIL LAWYERS IN ASIA (2006); H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 304, 306 (2000).

5. Emphasis on Informal Dispute Resolution.
6. Legal Maxims:
 - a. “Win a lawsuit and lose a friend.”
 - b. “The more laws are promulgated, the greater the number of thieves.”
 - c. “Litigation ultimately ends in disaster.”

XII. SOCIALIST TRADITION

- A. Overview. Very few comparative law texts still refer to the “socialist tradition,” which has all but died.⁴
- B. Fairly recent tradition, that mostly dissolved with disintegration of legal order of the former Soviet Union.
- C. Only survives in partial form in communist regimes (Cuba, North Korea, and Vietnam).
- D. Public law subsumes traditionally private law fields (e.g., bankruptcy, contracts, property, commercial law, torts).
- E. Intense reliance on formal law, enforced by the communist party, e.g., judicial decisions of “independent” judges are subject to party control and revision.

XIII. COMBINED SYSTEMS

- A. Many countries have combined, or mixed, systems. For example, UK has a Common Law system, as do its former colonies, including the U.S., Canada, and Australia. But the U.S. state of Louisiana is a blend of Civil Law and Common Law, as is the Canadian province of Quebec, both due to the influence of French Civil Law. Most of Eurasia and Central and South America are Civil Law countries, but Guyana is a blend of Common Law and Civil Law due to British rule from 1796 until 1966. Much of the rest of the world is a blend of various legal traditions. Almost all of the Islamic legal systems are a blend of Islamic and either Civil Law, Common Law, or Tribal Law.
- B. Two main categories:

⁴ *Id.*

1. Mixture of civil law and common law systems (e.g., Botswana, Guyana, Lesotho, Namibia, the Philippines, Quebec, Scotland, South Africa, Sri Lanka, Swaziland, and Zimbabwe. Consider also the European Union).
2. Mixture of civil law and Islamic law (Algeria, Egypt, Indonesia, Iran, Iraq, and Syria).

FOR FURTHER READING

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