The World's Legal Systems

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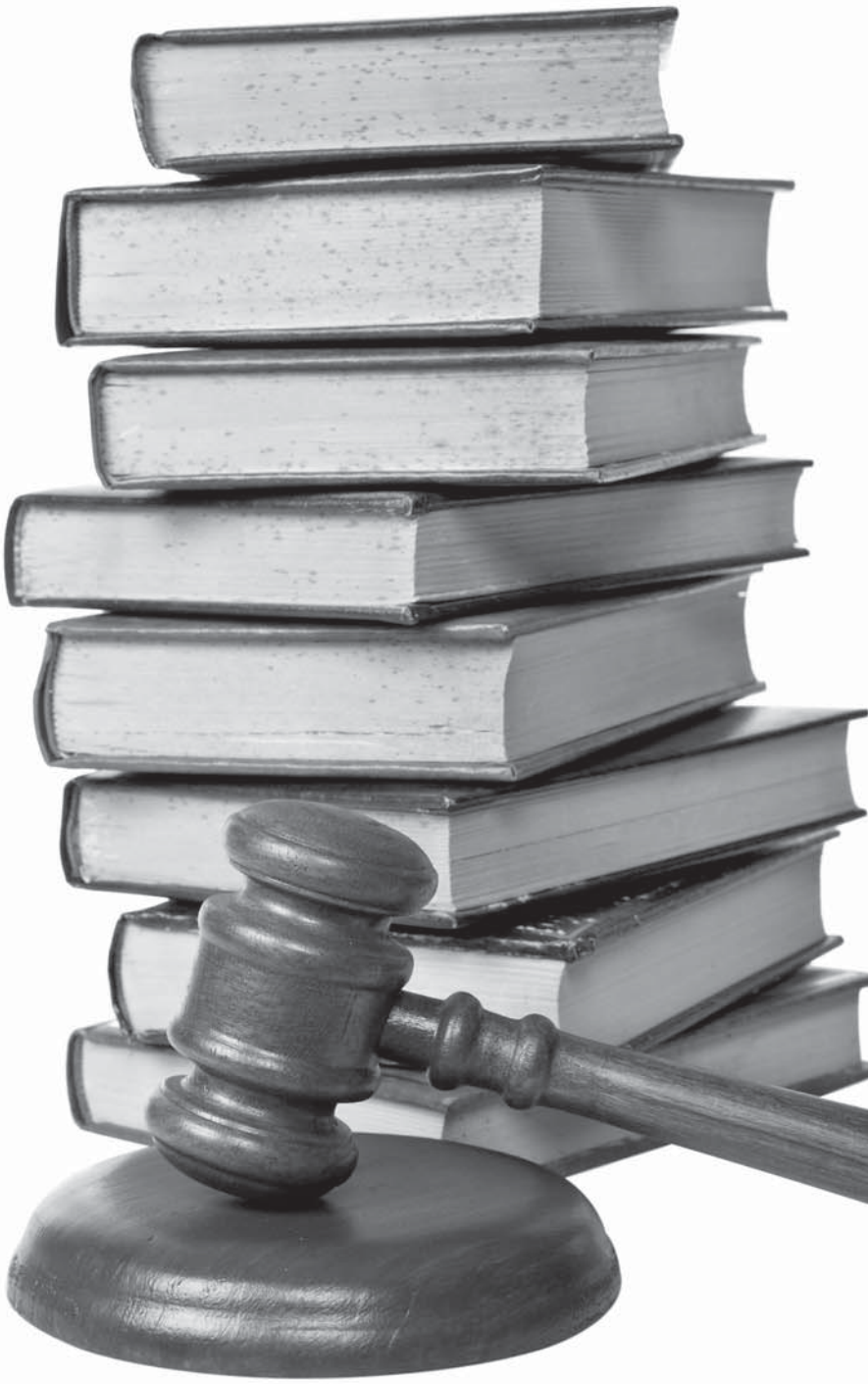

Introduction

The need for understanding world legal systems arises from increasing global travel, social and economic development, telecommunications, and trade. When people from different nations interact, it is useful to have at least a basic knowledge of the legal systems which govern them because law reflects culture and belief. It is necessary to place our Western tradition into perspective because it is not shared throughout the world.

No two nations have identical legal systems, but they do have systems which belong to legal families. This article describes these categories of legal systems, as well as their characteristics and variations.

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Legislatures

A legislature, in whatever form, whether called Parliament, Legislative Assembly, Diet (as in Europe and Japan), or Congress, is common to all world legal systems. It is a body of representatives assembled to create legislation, usually public law (such as criminal) or regulatory law (such as taxation and environmental protection). The legislation is in the form of a statute or act of the legislature – a legal document from the government commanding or prohibiting something. This is always a written law, and it applies only to the geographical territory of the legislature that enacts it.

These public regulations are concerned with the relationship between the state and its citizens, in the public interest. Today all legal systems use legislatures as the main source of this public law. However, the existence of a legislature, which is found in most countries, does not mean that it is democratic.

Disputes between citizens, such as debts, property claims, contracts, domestic relations, and negligence, are regulated by private law. It is this system of private law which is the principal subject of this article – the other main source of law apart from the legislature. As we will see, the issue reduces to the source of the private law, whether that source is a general code, judges, or a religious oracle. These private law systems pre-date legislation as a source of law by hundreds of years. This is because relations and disputes between people emerged prior to the modern concept of the state and its comprehensive regulation of activity in the public interest. Public law from legislatures and private law from other sources combine to make up the entire legal system of a country.

The source of common law, therefore, is the judiciary. A millennium ago, the monarch sent his representatives out into the countryside every few years to settle disputes that had arisen between his subjects. These representatives, forerunners to judges (even early Canadian judges were only qualified by land ownership), returned to London to discuss and record their rulings. The principles espoused in these decisions were followed over the years.

Civil Law System

We start with the largest legal system. In A.D. 533-34, emperor Justinian codified the Roman law into the *Corpus Juris Civilis*, the forerunner to the extensive civil law system. While the academic study of Roman law did not start until the 11th century, basic concepts in modern civil law of contract, delict (negligence), possession, and ownership all show Roman influence. Other doctrines relating to matrimonial property, wills and estates, and acquisition of land ownership came later.

The *Corpus Juris Civilis* influenced legal thought and techniques, including attitudes to legal rules, legal classifications, courts, and precedent in civil law jurisdictions at the expense of local customary (practised) law. The academic jurist had high prestige compared to a judge, and there were no juries. Precedent – law-making by previous judicial decisions – plays a very limited role in a civil law system. Civil judges take an active role in the courtroom, questioning parties and lawyers to determine the facts in the inquisitorial style.

Having descended from the law of the Roman Empire, these coherent private laws and procedures embodied in *Codes* are found in most European countries and most of Asia, South America, and Africa. Most countries follow a civil system of law as civil codes have proven easy to copy.

For example, in 1804 Napoleon enacted the France's *Code Civil*. Since corruption in the legal system contributed to the French revolution, Napoleon demanded the *Code* be written in simple language and be made accessible to all persons to whom it applied. Even today, France and Québec's civil codes are written in plain, brief language that the average lay person can understand and apply immediately to life. This *Code* was significantly influential due to Napoleon's charisma, the extensive French colonial empire and ongoing conquests and annexation of territories such as Belgium and Luxembourg, the ease with which this *Code* could be transmitted, the absence of a credible rival code, and its high quality. Some have suggested that this *Code* was Napoleon's greatest legacy, as it had been for Justinian. Even in North America, the French *Code Civil* caught on. The *Louisiana Code* of 1808 was modelled on it, as is the current *Code Civil du Québec*.

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detail. It forms the foundation for civil codes in Thailand, China, Japan, Eastern Europe, and Greece.

Civil judges do not create legal principles to fill gaps in the law. Instead, the gaps in statutes are assumed to be covered by existing code so they apply code provisions to decide each case. Exhaustive legal reasoning and case references are not found in civil law decisions. The civil judge interprets and applies the legislation and code using principles laid out, not by judges, but by legal scholars outside the court where the operative maxim is "legal rules do not originate in judicial decisions."The finding of a single judge on a single case does not comprise the consensus for new law. The civil law system uses codes rather than judges to declare the law. While in practice similar facts are decided in similar ways by civil judges, the source of the law is not the judges themselves and their previous decisions, but instead it is the letter and spirit of the written codes and the legal scholars who have analyzed them.

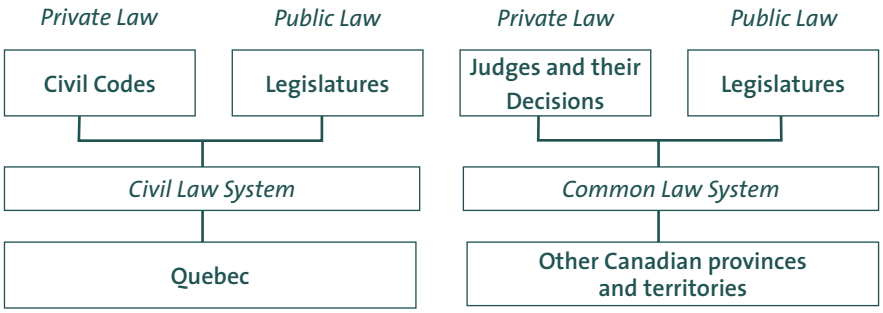
Common Law System

The common law system dates from the introduction of feudalism after the Norman conquest of England in 1066. Traditional courts replaced the power of barons and sought to develop a unified, common law – a law common to the entire territory: the King's law. As the body of judicial decisions grew and became permanently recorded on paper, the rule of precedent (*stare decisis*, which means "to stand decided") ensured consistency. Similar cases saw similar outcomes and the system offered predictability for future disputes.

The common law system continues to develop case by case through reasoned court decisions. Gaps in the law, where there is no legislation, are filled by new judicial principle in each case if not already covered by existing precedent. The common law judge does not consult an official codified text before rendering judgment but draws instead upon precedents established by other earlier judicial decisions. Legal scholars write treatises and commentaries on the common law. While these command the respect of the legal profession, they do not constitute law, and judges are not compelled to follow them when deciding cases. The source of common law, therefore, is the judiciary.

Common law judges serve to interpret legislation and fill in the gaps in the law where there is no legislation. They choose to answer only the narrowest issue which will dispense with the case before them. They rely on lawyers in an adversarial system to present the full case to them. They will not generally raise or decide issues that the parties themselves did not ask them to decide.

Every court is bound by the decisions of all higher courts which have jurisdiction in the province. While this rule of hierarchy can be simply stated,



the common law is continuously developing and renewing itself. Previous cases are reviewed and commented upon. Legal rules and principles are refined, sometimes re-worked, or scrapped altogether in favour of new ones. For example, there is more sensitivity today toward gender and diversity and rapid social and technological change. Re-evaluation of former decisions adds flexibility to the common law.

The common law system crossed the Atlantic with the English language and customs, and it served as the legal system for the fledgling North American colonial settlements. The common law system, as a system of law as well as much of the substantive precedent, was adopted in English Canada, the United States, Australia, New Zealand, and other former colonies of the United Kingdom. As such, it is one of the major legal systems in the world. British common law and some statutes were received and applied in the eastern half of Canada around the middle of the 1800s and from 1870 in western Canada.

Modern Convergence of Common and Civil Law

Today the civil and common law legal systems share many basic ideas, terminologies, and legal constructs as a result of the value they place on liberalism. As Western societies equally value indi-

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vidual autonomy, privacy, and human rights, and as their economic interdependence grows, their legal systems and laws have merged closer. On matters of the Rule of Law and what laws are required to serve the needs of modern society, differences in legal structure are only of minor importance.

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Codification is the hallmark of civil law, but some common law jurisdictions, from time to time, will "codify" their law. However, few of those are drafted or interpreted in the broad and flexible fashion of a civil code. The rare civil law system (such as that of South Africa) is not codified. The general, accessible language and style of the civil code is often followed in constitutional documents. For example, the Canadian *Charter of Rights and Freedoms* is written in the style of a civil code rather than regular legislation. Both systems today employ both case law and codified law. The difference remains in the extent of codification and the manner of use of codes and precedent.

The legal system in Quebec is a hybrid of English common law and French civil law. Scotland and the state of Louisiana are other examples of jurisdictions which combine the two systems. The *Civil Code of Quebec* codifies Quebec's private law, but its public law and court system are based on common law. The unifying Supreme Court of Canada is represented by judges from both systems, and in that Court, all judges sit in deliberation of all cases from both systems. Ultimately, the law may not be as different as the approach to arriving at outcomes: one involved in a car accident, or dismissed from one's job, or inheriting an estate in Montreal is likely to obtain a similar outcome to one involved in the same events in Saskatoon.

Another example of this convergence of systems in Quebec is the training and selection of judges. The legal profession reflects the system in which it operates. Civil law separates the professions of lawyer and judge where each is trained differently and is qualified as lawyer or judge, as the case may be, immediately upon graduation. In the common law system, as well as in Quebec, judges are trained as lawyers and appointed from the profession of lawyers.

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Islamic Law

Sharia, the law of the *Quran*, is the primary source of Islamic law. The proven principles of the *hadiths* – collections of words and deeds of Muhammad – and reasoned positions on issues not dealt with in *Sharia* comprise the Islamic jurisprudence called *fiqh,* which is a secondary source of Islamic law.

Primary and secondary sources are distinguished by the infallible knowledge preserved in holy writings and the fallible interpretations of man. Two centuries after Muhammad's death, more than one million *hadiths* were circulating, and their validity required verification. Muslim scholars follow a disciplined process of tracking the history of the *hadith,* its reporter, and its consistency with the *Quran.*

The *Quran* and valid *hadiths* are interpreted according to the schools of *fiqh* – the *madhhabs.* Communities which apply *Sharia s*ubscribe to one of these schools. There are four Sunni and two Shia *madhhabs* of divergent ideology. An interpretation of *Sharia* will be authenticated if it meets the standards of a school.

Fiqh covers all major legal aspects and has a taxonomy similar to that used in common and civil law systems. Approved interpretations of *Sharia* exhibit a tilt toward precedent which renders the law systematic and consistent. Unlike Western democracies, government based on strict Islamic *Sharia* does not accept any statutory or constitutional limit to its power. It derives its power from the highest spiritual authority and remains above any human law.

For a model of Islamic law we can look to Saudi Arabia. Its constitution was enacted in 1992, the first article of which declared Islam the state religion and established the *Quran* and *Sunnah* – the deeds of Muhammad – as the constitution. Iran and Sudan also have legal systems based on Islamic law. Most

other nations in the Muslim world have legal systems that incorporate Islamic law as customary law in the framework of common or civil law. Islamic law has recently increased in influence and is the third most global legal system.

Customary Law

Customary law, lacking coercive state authority, solely governs very few societies today. More common are systems of law which incorporate customary law within another system, such as through the recognition of locally based tribal or community courts or through recognition of customary laws as binding in official courts. These types of systems can be found in Africa, Asia, and in Canadian Aboriginal self-government law.

Chinese Legal System

The Chinese legal system was dismantled by the cultural revolution of the 1960s and 1970s. The constitution of 1982 sets out basic rights and, noticeably, duties of citizens. Progress toward a modified market economy and the increase in foreign investment motivates much of China's law-making. Markets and investment cannot be maintained without a reliable legal structure. The constitution was amended in 1993 and again in 2004 to reflect this, but state ownership remains the central theme.

There has also been movement toward the Rule of Law in criminal matters. China's legal system follows the civil law tradition, but codification of commercial laws has been based on Western legal norms.

Conclusion

Legal systems are the product of history and culture. One might conjecture that legal development in China and much of the Middle East is a response to Western influence. The Chinese system models Western systems consistent with trade and economic development. In the Middle East, on the other hand, development of Islamic law may in part be explained as a resistance to Western influence. Canada stands in the enviable and unusual position of being governed by both civil and common law - the two great world legal systems.

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