

PHILOSOPHIES AND SYSTEMS OF LAW

Aaron Schwabach

Thomas Jefferson School of Law, San Diego, CA, USA

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Summary

This article provides an overview of the world's major legal traditions. All human societies require mechanisms for rule-making, rule enforcement and dispute resolution, and all human societies more complex than the smallest hunter-gatherer bands require some formalized system of law to embody these mechanisms. Over time divergent legal traditions have developed.

Most of the countries of Europe adopted legal systems based on the law of the Roman Empire. These legal systems and those derived from them are collectively grouped in the *civil law* tradition. A few northern European countries were sufficiently distant from Rome that the influence of Roman law on their legal development was minimal. One of these, England, developed a system of *common law* that became disproportionately important after British colonialism dispersed it throughout the world.

In addition to these two major European traditions, there are several important non-European traditions, including the Islamic tradition. The article concludes with some observations on the comparison of these various traditions and the systems within them.

1. Introduction: What does it Mean to Compare Legal Systems?

All human societies are faced with the problem of regulating human behavior. This problem has three components. First, rules must be made. Second, those rules must be enforced through the identification and imposition of penalties upon those who commit infractions. Third, disputes arising as to the application of the rules must be resolved.

The structures that have been created to perform these three functions are as diverse as the human societies that have created them. All have one thing in common, though --

the process by which these functions are carried out, which is often known as “law,” although the term “law” is also often used to refer to the third function alone.

The making of rules is the legislative, or rule-making, function. There are many different ways in which this function may be carried out, and countries are characterized as, for example, democracies, dictatorships, monarchies, or oligarchies based upon the particular way in which the rule-making function is performed. Within this division numerous subcategories may exist. For example, constitutional monarchies, federative republics and parliamentary democracies may all be classified as “democracies,” although the details of the legislative process in each may be quite different.

The study and categorization of states by the nature of their rule-making processes, however, is not usually considered the study of comparative law but the study of comparative government, although there is at least one exception: The common law system is distinguished from the civil law system (and from most other systems of law) by the unusually high degree of involvement of the judiciary, a structure ordinarily charged primarily with dispute-resolution responsibilities, in the rule-making process.

Similarly, a variety of structures exist to carry out the enforcement of restrictions imposed on the behavior of a society’s members through the rule-making process. The study of these structures generally falls more within the realm of political science than of law. To speak of “comparative law” is usually to speak of comparing the structures different states have evolved to perform the function of dispute resolution, with some attention to the rule-making process and a smaller degree of attention to the enforcement process.

2. Philosophies of Law, Legal Traditions and Legal Systems

Law is inextricably tied to a society’s ideas of morality, and legal systems are thus closely tied to philosophical systems. Most of the world’s people live under legal systems that are essentially secular, based on abstract ideas of right and wrong rather than specific religious dictates. The two most widely dispersed systems are the common law, found in most of the English-speaking world, and the civil law, found in most of the rest of the world. Both types of systems have some roots in religious systems, but as applied today they are largely or entirely secular.

Purely religious systems of law are rare in today’s world. The best-known example is probably the Islamic system of law, or Shari’a, found in varying degrees in the legal systems of several countries. However, systems that include a substantial religious element are found in a variety of countries, from India to Israel, as well as in many of the countries of the Islamic world.

It is common to speak of national legal systems that share a philosophical and historical heritage with those of other countries as belonging to a particular legal tradition. Prominent legal traditions today include the civil law tradition, the common law tradition, the Islamic tradition, and the socialist tradition. The socialist tradition, an offshoot of the civil law tradition, is currently on the wane, as countries that have abandoned socialism return to the civil law tradition or adopt other legal traditions. The

civil law system is thus spreading throughout the formerly socialist world. The Islamic tradition is also being widely received. Other emerging states, with legal systems based on the civil law tradition, are showing the common law influence of the American, Australian, British and Canadian legal experts who have helped those states to restructure their legal systems after socialism.

The common law and civil law traditions attained their wide dispersal largely as a result of European colonialism and imperialism. Today legal traditions continue to be dispersed throughout the world, but are rarely imposed by force. Especially in newly emerging states, legal traditions (as distinct from laws) are often adopted either in response to popular demand or after careful consideration by the government of the match between the traditions and the society. Thus countries may choose to bring themselves within the Islamic, civil law, common law or indigenous traditions, or may – as many do – pick and choose, creating new systems that are a hybrid of existing traditions.

(The world's major legal traditions are examined in more detail in the three chapters within this theme: See *Western Philosophies of Law: The Civil Law*; *Western Philosophies of Law: The Common Law*; and *Non-Western Philosophies of Law*.)

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Biographical Sketch

Aaron Schwabach is a Professor of Law at Thomas Jefferson School of Law in San Diego, California.

Professor Schwabach previously taught at the University of Miami School of Law and Gonzaga University School of Law. He is the author of three books and numerous articles on international law, especially international environmental law. Professor Schwabach earned his B.A. at Antioch University in Yellow Springs, Ohio, and his J.D. at the University of California at Berkeley (Boalt Hall).

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