

NON-WESTERN PHILOSOPHIES OF LAW

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Summary

This article provides an overview of the world's major legal traditions apart from the two commonly described as "Western" – the common law and civil law 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. In the days before European colonialism, divergent legal traditions evolved in the Americas, Asia and Africa.

European colonial rule and influence brought the two major European legal traditions to most of the world. In some areas these traditions have wholly supplanted indigenous traditions, while in other areas mixed systems have evolved. In some areas the European traditions never took root or have since been supplanted by the resurgence of pre-colonial traditions.

This article explores examples of each of these. In much of the Islamic world, systems incorporating elements of Islamic and European traditions exist. In other countries, though, the Islamic law, *shari'a*, provides the sole legal tradition, or nearly so. In India, much of Africa and some parts of Latin America, indigenous legal traditions exist side by side with European traditions. In India, for example, matters concerning family law and property ownership are determined by the laws of the various religious communities. In many countries in Africa traditional law often governs such matters; in some countries the role of traditional law at the community level is formally recognized by the national government, while in others it results from the incomplete spread of the national government's European-derived system. In Latin America the role of traditional law is smaller and more often visible through its influence on national legal systems than as a separate tradition. In East Asia, as well, the legal systems are mostly

derived from European systems, but countries in the region have added to and developed those systems.

1. Introduction

To some extent the title of this article is inaccurate. The very word “Western” is a vestige of colonialism, and reflects archaic and outmoded concepts. “Western” is commonly used to refer to legal and social systems having their origin in Europe, particularly Western Europe. At one time, when such systems were confined to Europe, the designation made a certain amount of sense. Europe is essentially a large peninsula tacked on to the western end of Asia, inhabited by numerous warring tribes with a history of episode after episode of warfare, genocide and internecine conflict.

Perhaps as a result of this intense competition for national, tribal and individual survival, Europe was the first of the world’s regions to industrialize on a large scale. During the late pre-industrial and industrial periods, European nation-states, most notably Spain, Portugal, Britain and France, managed to conquer most of the world by a combination of military force, trade, subterfuge and diplomacy. As a result most of the world is now to some degree “Westernized,” as are most of the world’s legal systems.

Among the less important colonial legacies is a vocabulary of now geographically meaningless terms such as “Western.” To the inhabitants of North and South America, for example, it makes no sense to refer to East Asia as “the Far East,” or even as “the East.” China, Japan, Singapore and Australia lie to the west of Canada, the United States, Ecuador and Peru; it is Europe and Africa that should properly be referred to as “the East.”

Such oddities are not particularly important in themselves, but they are indicative of the distortions wrought by colonialism in all areas of life. Legal systems were one of the many areas of pre-existing cultures to be affected, in degrees ranging from complete replacement of the indigenous system to a mild overlay of European terminology and trappings on an essentially traditional set of structures and functions.

Two European systems of law were exported throughout the world: the English common-law system, and several variants of the civil law system. These are discussed in detail in *Western Philosophies of Law: The Civil Law* and *Western Philosophies of Law: The Common Law*.

Indigenous systems survived in varying degrees throughout the world. In areas such as the continental United States and Canada they were almost entirely supplanted and today their influence is visible, if at all, largely in the practice of Native American courts, and affects only a small segment of the population. Even countries that were themselves never colonized have often adopted legal systems based on the civil law. In most countries traditional legal systems survive only in certain areas of the country (usually rural), in certain areas of law (especially family law and property law), or both. One notable exception is the Shari’a, or Islamic law, which not only survived European colonial rule in many countries but is enjoying a resurgence throughout the Islamic world. Other systems that, like Shari’a, include a substantial religious element are found

in a variety of countries, including India and Israel.

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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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