

PART I: METHODOLOGY

General Overview

- Law functions not just as law but as educational tool and symbol (Constitution in new country)
- **Law must be understood in context**, and in light of fact that most of world has no contact with it (Laura Nader docu, importance of anthropologist's lens)
- Different traditions must be approached with a dialogue, not a notion that one is better or that one is lacking
- Participative observation is important: we are not separate from the subject but part of it
- Macro-comparatist (major systems compared) vs. micro-comparatist (particular legal issue)
- International Law: public (among states) and private (applying conflicts of international nature)
- Separating international & comparative law in today's world is a mistake
- History (Schlessinger docu):
 - 17th C. Brussels, *ius commune*: comparative law was routine, foreign laws were tools to understand own laws. Integrative approach.
 - Late 18th C: codification, national individuality, contrastive approach (diffs. emphasized)
 - Modern era: search for common core, return to integrative approach
- Usually, the hegemonic discourse is about displaying greatness of one's tradition, ignorance of the unknown
- Context of reception must be viewed with sensitivity to ideological differences and differences in the way the law will function (they may not have libraries, lawyers do different things)
- Now Western lawyers who were previously part of context of production are bowing to American lawyers and are in context of reception

Common Core of Legal Systems

- Returns to Natural Law tradition, 14th/15th-19th C. Europe, Montesquieu
- Born from early 20th Century encyclopedic tradition: Leibnitz, Wigmore, *International Encyclopedia*
- 1950s: common core was attempt to select samples, to be scientific
- Law in action: despite differences in written law there are many similarities in real life of the law/what is actually happening. Schlessinger, 1950s legal realism. Comparatist dismantles idea that law as it appears = law as it is. Negates the assumption that law is not related to other social aspects, deflates notion of professionalism as starting point: it is just a method of dealing with social intercourses/conflicts.
- Notion that it represents a few legal systems may be fake Western-centric objectivity, especially since many in context of reception adopt Western theory to aim to please
- ICJ uses the common core as source of law when no treaties or customs exist
- It's also a world vision, though not objective!
- Today it's a scholarly tradition: CC project in Europe, ALI's restatement, Laura Nader documentary on differences btwn. Talean and American systems
- Once we find common core we ask why it exists:
 - idea of common sense, that this is why we come to the same answers
 - legal transplants
- Difficulties: still different attitudes between common and civil law scholars, different histories, structure of courts, use of scholarly tradition as referent for lawyers
- U.S. law was born as academic enterprise in 1870s under formalist times (doctrines from which you could deduce); 1920s-70s (when CC was born) American Legal Realism said experience was life of the law; 1970s-present postrealism wants return to legal predictability; modern critical studies say realism didn't go far enough and law is still instrument of oppression and hegemony

Legal Formants

- Sacco: law is a product of components that together produce rules of law; we must view them separately. Schlessinger said common core methodology works when examined in light of these.
- Law in action: The result (e.g., you will recover)
- Descriptive formants: what lawyers use as doctrinal basis for their analysis (tort law, contract law). Societies may have none of these in common but still a common core in terms of law in action.
 - statutory provisions, case law, scholarly writings
- Meta-legal formants: the context, including philosophical (is it a very adversary system likely to allow recovery? Does it allow punitives?). Gives complete picture. Finally the self-perception of lawyers is a meta-legal formant, the idea of our own legal coherence/rationale.
- Example: if comparing malpractice laws of US and France you must examine all 3 levels

Legal Transplants

- Hot debate in the 70s: is the law something society invents (creationist paradigm) or something we borrow despite our identity investments and concepts of sovereignty? Is law independent of society and explained by transplants, or a reflection of society (e.g. legal systems develop to fit capitalist model)?
- Mattei argues that the truth is in the middle – transplants are everywhere, no system is entirely original
- Alan Watson, 1974 book: law is product of transplants, most of which were transplants of prestige: neutral, voluntary exchange, one country admired the other
 - Roman law adopted by wandering German tribes, Turkey importing Swiss law to show progress
 - critique: does prestige = progress? Often transplant was one of admiration only at elite level (Ethiopia copying French law in 1950s)
- Transplant by force occurs by power or military strength
 - napoleon bringing code to conquered provinces, colonial laws
- Hybrid transplants when transplant was originally by force but evolves when maintained in post-colonial setting to one of prestige
- Conditional legal transplants: either you adopt our system or you will be shut out from legal community, a type of blackmail
 - early 20th C., law transported from West into China and Japan
 - groups such as IMP promoting models of law
- Import/export of law: Western countries competing to import their laws to former Soviet bloc after fall of the wall to create system most favorable to them. Law is a commodity that can be transferred with little interest in repercussions of transfer
 - language: use of this new terminology shows law no longer as living, breathing transplant but more of a technology
 - critique: we must look at context of reception, at why our ideas don't work everywhere
- Legal transplants enriched by notions of legal formants to understand why failures occurred
 - politics and religion are part of law in many countries, in West we think they should be separate but maybe that's not our reality either
 - in many places law is symbolic – e.g. Iraq will reject law from occupying forces simply because of its origin
- Specific areas of inquiry often show that some concepts (e.g. declaratory judgments) were transplants
- Recent transplants allow us to look at tradition from which they came for details and interpretive devices (how do Germans carry out declaratory judgments?)

Three tools of comparative inquiry: legal pluralism, law and development, taxonomy

Legal Pluralism

- Cultural notion of legality: law comes from way people behave and not rules imposed from above
- Somalia: law of nomadic peoples, English rule, Italian rule, French rule, Islamic population, Socialist/Soviet influence. Today it is based on personal status (citizens “carry the law” with them).
- Israel: Islamic, English C/L, Hebrew scholarship, European laws, US law recently. In some areas state has more power; in others pluralism is powerful in determining legal development.
- France: tension between Jacobian idea that state is all-powerful and controls vs. pluralistic approach acknowledging influence of Islamic religion (rule about scarf-wearing is as strong as the authority of our law)
- In some societies multiple influences can co-exist peacefully: Macao’s nonviolent story

Law and Development

- Post-WWII plan in Europe, used by Eisenhower in Africa, Asia, Latin America; flourished in 60s and 70s as legal aid; 90s fall of Berlin wall lead to self-congratulatory mood in the West
- Notion that by importing our law to others we “cut out” the development process and get them to the “top”
- Failed due to lack of understanding of legal pluralism (e.g. law and politic inexorably linked in Col War times) and of our own laws. In ethnically divided societies it’s disastrous: one group suppresses the others, negotiation and dialogue broken by centralized structure. We must let go of notion of arriving with a solution.
- Honest efforts vs. imperialist attempts
- Originally carried out by comparatists with limited financial resources
- Current efforts are from international institutions, e.g. IMF and World Bank; often carried out by govts. wanting to sink their teeth in countries

Taxonomy and Classification

- Quintessential work of early comparative inquiry – law is science, classifiable into taxonomic schemes; actual measurement not possible b/c there is no scale to weigh similarities and differences
 - 1950s: fundamental ethno-centric text of Rene David divided legal traditions into Romano-Germanic (what we call civil law, focus on FR and DE), Common Law, Socialist Law (Russia and China grouped b/c of political component which was more important than legal, emphasis on Russia), Other (Islamic, Hindu, etc. – implication that there were the people “without law”)
 - Two German scholars’ division: German-speaking civil law; French civil law (including Latin America); Scandinavian law (considered close to Soviet law, which disappeared as category of its own and was considered “reverted” to the civil tradition because those were its roots – 1918-68 seen as unfortunate parentheses)
 - Changes in 80s and 90s: Common and civil law converging in West; decolonization made colonial law different from motherland law; fall of Socialist law in Cent Europe/Russia; dramatic changes in Chinese law. Common law, civil law and “other” not sufficient, hence modern triangle.
- MODERN TRIANGLE: moving away from ethnocentric taxonomies and self-perceptions of Western lawyers, understanding the (supposed) major divorces that inform our legal system.
 - Rule of religious law: a particular religious legal formant becomes hegemonic and main players are ultimately legitimized by religious authority. In Islamic law the perception is that there was no divorce as far as sources of law – Koran as legal text. Saudi Arabia is clearly religious legal system though political process and law also play a big role. In the West law and religion developed always as separate, with separate texts (Bible and Justinian code); this self-perceived secularism is an artificial construct.
 - Rule of political law: Law as functional to the political vision of the leader – politics come first. Soviet countries; post-Communist Russia; China’s instrumental use of law to reach policy goals; Allende’s Chile; Cuba. In West divorce between law and politics began in 17th

- C. England when King forbidden to participate in court decision; self-perception that Western lawyer and politician are different, lawyer as “specialized” professional.
- Rule of professional law as Western tradition: professionalism of lawyers is shared in the West and overshadows even common/civil law dichotomy
- In reality no system fits perfectly in the modern triangle above. Also these tools of classification need to be dynamic (look at post 9/11 changes politicizing U.S. law)
- Some scholars say pluralism should be its own category: Common law vs. Civil law vs. Pluralist traditions. This is problematic because pluralism is everywhere.
- Subalternative studies: study of post-colonial contexts as experiences of similar patterns to point out transplants’ chances of success
- Failure of law and development movement as result of poor taxonomy: in Latin America in the 60s, we tried to get rid of their formalist and import our instrumentalism, to train them as social engineers. We misunderstood their formalism which worked to shield individuals from authoritarian government. Political law was huge influence but we tried to inject our ideology.

PART II: COMMON LAW VS. CIVIL LAW

Overview

- They are the building blocks of notions of legality everywhere in part due to global institutions such as UN, WTO, IMF; The State is not the only source of law: big international firms and big economic actors influence legal development
- There is a huge cross-fertilization between them (case law in civil, scholarship in C/L)
- Relative pattern of influence shifted; civil was once considered central context of production worldwide; now C/L is
- Almost everywhere the sovereign (State) controls the system by creating a hierarchy but this hierarchy is compromised by other sources of law: in C/L by role of judges, in civil by the scholars
- Pluralism existed in both traditions, and desire to control the law is always there and responded to this: in civil law through codification and in C/L through judicator acts

History and Sources of Law

Civil law

Glossa>>Bartolus>>Humanists>>Dutch>>Natural Law>>Napoleonic Code (theoretical>>practical>>academic>>practical>>natural law>>codification)

- Self-perception of civil lawyer as heir to Roman law. Tradition began with long phase of no code and *ius commune*, authority of authors interpreting Roman law. 500BC-500 AD Roman law was in place
 - iudex was one-man jury layman who decided factual issue
 - praetor was appointed politician to whom you raised complaint, he chose you a iudex and gave iudex formula/instructions
 - jurists were rich boys who advised praetor on how to boil it down to a formula, they began grouping together
 - law evolved as collection of advice given to praetors by jurists
- Roman law was therefore big mess, Justinian appointed committee to fix it and in 533 *Corpus Iuris Civilis* compiled with staggering number of jurists’ opinions. “From now on this is the law!” It was never adopted (ironic b/c of its influence). Revolutionary - first recognition that political power was making law, that law was a production and not all natural, that law is separate from us – very very Western.
 - Institutions by Gaius: intro to law
 - Digest: specific factual opinions by jurists
 - Codex: statutes/decrees

- Novellae; pocket parts
- CIJ lost, then 1000 discovered in Pisa in time of huge economic transformation. Universities began opening and teaching law based on it.
 - Glossators commented on text, very textual/literal, they were simply “elucidating its meaning.” Were building new legal order and injecting Roman law in it, eventually culminated in *magna glossa*.
- Criticism that Glossators were too theoretical and not practical (no tools for newly flourishing society) gave birth to Bartolus and practical jurists.
- 15th C. Humanism said Bartolus was polluter of beauty of Roman law (Lesson: Lawyers need legitimacy and to be tuned to modern trends; Bartolus fell b/c not an intellectual).
- Natural Law: rationalist (law comes from human nature and universal notions) and deist (comes from God)
- Also influential were Canon Law, Law Merchant (professional system by merchants for merchants, had own courts) and Local Customs.
- 1804 age of codification: Napoleonic, then others. Combines natural law and sovereignty, theory and practice. One doc to reflect all laws. Scholars had to reinvent themselves as commentators of this text.
 - Code was ambiguous and lacunae-filled; lots of space for interpretation
 - Codification in spread to Holland Belgium, Spain, Italy (1865)
 - Germany did not codify first b/c not politically united, then b/c Romanticism and Historicism (law must be flexible to desire of people, historic evolution). Savigny says law expressed itself through will of people as expressed by jurist (arrogant!) and finally codified in 1897.
- Reached South America through Spanish and Portugese colonialism; Africa through Napoleonic code, former Soviet Union through French tradition, far east through imports of Japan and China in early 20th Century, Indonesia through Dutch
- Codes are initial sources of law but other statutes, constitution, scholarship and sometimes case law equally important sources of law. Judges are paid by government, are civil servants. Judicial authority less important than scholarly, prob. b/c of role of judges and professional prestige of scholars and lawyers.
- Scholars: elite few are experts on particular areas. Scholars are appointed by gov procedure but through a centralized check; are granted tenure so have some independence but there is still deference to the government. Reinforces the way the elite reproduces itself. No hierarchy among scholars poses a problem with predictability (same prob in Islamic law).

Common law

- Self-perceived legitimacy through long chain of jurists.
- Feudal origin William the Conqueror 1066: his tenants had right to make law in their property and William’s court had limited J over disputes among them. Later expanded to J over tax matters (exchequer), among tenants, and about anything against king’s peace (king’s court and common pleas). Barons (tenants) organized as parliament were resisting expansion of king’s J into these central courts – tension
- People had to buy writs to get into king’s court, in 1285 king’s courts estopped from creating new ones and law “froze” so Ps only had recourse in certain categories, and C/L developed as system of creativity.
- For remedies that were not damages (e.g. specific performance) people would petition king for jurisdiction of exception and king handled this with chancellors trained in Canon law, and chancery courts developed by 15th C. This was the main function of civil and Roman law – cross-fertilization.
- Myth of unity of C/L courts: we had Common Law Courts, Equity Courts, Local Courts, Mercantile Courts and Other specialized little courts.

- Desire for order lead to reform of system: judicator acts of 1870 creating SC of original J and courts of appeal.
 - Gov. did not want House of Lords, who was in a sense hearing appeals when men complained and asked for new laws, to have dual role of legislators and courts of law.
 - Created SC of Judicator w/original J over everything (King's Bench, Family and Chancery divisions) and Court of Appeals for all appeals.
 - Other reasons for Acts: maybe b/c judges were academics; maybe b/c "we always did things this way;" maybe b/c of Euro codification and scholars like Bentham, arguing that C/L developed as *ex post facto* codification, that Blackstone's claims he was discerning a law that was "out there" were bullshit
 - 1890 judicial committee of Law Lords created; can't interfere with HOL political meetings and HOL politicians can't interfere with courts.
- Expanded to Wales, Ireland, Scotland and eventually U.S. Has developed unbroken on continuum. Later expanded through British empire (Africa, Hong Kong) and American post-WWII hegemony and lasted in some places despite de-colonization. American law expanded into little areas of Latin American law, Israel, Africa.
- Case law is main source, but note Constitution is supreme law.
- GOVERNMENT IS CHECKED BY COURTS OF LAW: Courts were traditionally allies of parliament and not King, defending people's rights.
- Idea that ultimately all checks can be ignored at hands of executive – e.g. 9/11 laws

Islamic Law

- Sources = Koran, Sunna (divided into Hadith and ??) and Shari'a (means path to the water, e.g. course to essential element)
- Fiq is massive volume of legal knowledge, bigger than anything in Europe, contains part "rituals" and part "laws"
- Quadis are learned clergymen; quadi literature are volumes of their stories and biographies, enormously conscious discussions about stuff like the role of precedents.
- Fatwas were specialized legal advisors who went before quadi in absence of practical attorneys' advice; much like experts
- Mufti were religious scholars
- Quanun/Kanun is another word for law?, opposed to Sharia like Loi is to Droit. An attempt to canonize Islamic jurisprudence by desire to impose an order (also seen in production of Turkish *Megelle* in mid-19th Century).
- Idea that law has 2 manifestations: the political law (desire of sovereign) and law as tradition. TENSION BETWEEN LAW OF SCHOLARS AND LAW OF STATE is present in all traditions we studies.
- Supreme Sharaitic Court in Pakistan works as constitutional court by checking Kanun and Sharia to see if repugnant to Islamic tradition. Development of Sharia as product of culture.
- Beware of stereotype that all that goes on are injustices, stoning, etc.
- Unwillingness to consider external influences, e.g. Taliban

Note that tradition is not automatic – comes from bottom up, not just from sovereignty. Distinction between civil and C/L is a CULTURAL matter. Almost everywhere the sovereign (State) controls the system by creating a hierarchy.

- In re Shoop: Just b/c Philippines are under US law does not make them a C/L tradition; rather a thorough analysis of legal formants is necessary, the framework and attitude of interpretation are what count – the LAW IN ACTION.
- Puerto Rico: PR more of a civil law tradition despite US sovereignty, prob. for linguistic and cultural reasons
- Car crash case: no statute so he cites scholars, typical of civil lawyer

- Demerara Turf Club: Auction case debating whether bid or invitation to bid is offer. British Guyana never codified b/c colony before Dutch codification, thus this is great indicator of what civil law used to be, big role of scholars. Also shows problem when scholars conflict, need for prediction in system (reason for codification).
- Bank of Lisbon: Roman law is always out there as source of law

Mixed legal systems experienced both traditions: Scotland, Quebec, Louisiana, Puerto Rico, South Africa, Israel. Seen as laboratories of research by comparatists; important to negate those who insist on strong divide between the 2 systems.

Codification

- Codes are particularly important, very broad statutes. Basic starting point of civil lawyer but on par with any other statute and certainly not only source of law.
- Arose out of need for predictability (b/c too much conflict in scholarly opinion, but ended up creating complexity. Basic requirements for codifying:
 - strong centralized authority: stronghold allows legality to be caged. Without it legal formants freely compete and codification does this violence.
 - highly developed local legal culture: so it is original and relevant to social needs. Without it you have a code of importation – a transplant which is not seed for development of a local culture.
- Scholars began to swallow codes and interpret them as they wished – this rapport is earmark of civil law tradition. Importance of distance from text: in face of new politically forceful text the jurist is shy and bows down; if text old then more creativity allowed.
- Very nationalized – countries claiming own identities, in own languages. Product of culture. Thus civil tradition very diverse.

Case Law

- Although not much pure case law left b/c of statutes, it's main source of analysis/mode of thinking of C/L lawyer
- Myth that judge is neutral and independent, esp. with Con law.
- Incredible power given to courts – rules of Civ Pro are perfect example as courts make own procedural law
- **Stare Decisis in C/L**: born during judicator acts 1870s. Before judges tended to follow precedent just b/c it's a good idea, not b/c they had to.
 - vertical (you must follow courts above) and horizontal (you must follow your own decisions)
 - hierarchical or top-down notion (new, after 1873) of respect for authority; legitimization over time
 - contrary to idea of difference (competition between courts) that was pervasive in English law
 - surface: bound by your circuit but not others; this is v. bureaucratic but in reality courts often overrule precedent
 - reality: it's self-legitimizing for judges (“I am just following the law” or “in 20 days someone will cite me” or “I am actually *making* law” – Cardozo and legal realism); it's used very often in dissents (“You should not have departed from precedent”). Judges have many ways of departing from precedent even in their own jurisdictions – the skill of the C/L lawyer! De facto the doctrine is rhetorical, does not work. SC has perhaps always been court of innovation, House of Lords however never changed mind until 1966 when they issued practice statement saying from now on we will depart from precedent (and at this point they were already strongly legitimized; sort of same as why SC can do what it wants)
 - in civil tradition there is also some hierarchical structure – judicial pyramid with SC on top (idea from Montesquieu)
 - works only within strict political legitimization boundaries

- style and length of opinions very important: the SC's verbose opinions further legitimize them/assert "objectivity."
- **Stare Decisis in Civil Law**: Under strictly positivistic notion it does not exist. However this is bullshit, and the notion must be examined within the dynamic of the court system. It clearly exists in public law and at constitutional level.
 - increasing importance of consistency and reliability in civil law countries
 - courts like WTO and ICJ operating on some sort of SD notion (not technically though)
 - lawyers still not good at analogizing/distinguishing; if anything they cite holdings

Organization of Justice

- There is some hierarchy of courts in civil tradition (judicial pyramid with SC on top), but the organization of courts is not uniform
- There are common patterns in civil law tradition
 - ECJ, tribunals, etc: destroying idea of State-centered courts
 - In US SC has huge role outside our state boundaries
- France: Private Law (droit civil)
 - relation between individuals (historically law has been defined here)
 - Court de cassation → Court D'appel → Tribunal (tribunal d'instance and de grande instance for more important cases and some appeals from tribunal d'instance)
 - CDC could only "casser" or check if improper decision at court d'appel, could say you're wrong and send it back, no power to decide. Very limited reasoning in their decisions, bureaucratic and more like an order than an opinion. Official and given by court as bureaucratic entity and not by judge as personified.
 - quasi stare decisis in form of "jurisprudence constante:" when CDC repeatedly decides a certain way the principle becomes almost binding.
 - French Rev did not want judges to have too much power; result of this system is that they had much less power as result of post-Napoleonic reform
- France: Public Law
 - relation between individuals and state (relations of hierarchy, more modern notion)
 - modern: citizens have power to go to top for redress; challenges based on lack of jurisdiction (wrong guy gave decision), abuse of power (public admin. gives you decision for ulterior motives), violation of law (governing the procedure), proportionality (administration decision is unreasonable).
 - conseil d'etat are helpers of the president and hear these cases; they also propose law and advise re administration of State. Over time it's become top court of public law.
 - no codification: it's a case law system and there is SD in effect with admin. (lower) courts following precedents of conseil d'etat. This vertically eventually lead to horizontal SD as well. However the conseil is not bound by its precedent – it doesn't depart from it dramatically, but when it does it's a landmark decision.
 - no chairs of public law at universities historically
 - The model is highly functional and embedded in a strong state ideology and thus easy to follow – **is this public or private law?**
- Germany: Private Law
 - Supreme Court → Court of Appeals → 2 courts of original J (for less and more important matters)
 - No formal *stare decisis* – court considers opinions above but can interpret code freshly. Lines of decision may not be binding *de iure* but *de facto* they have a pretty influential case law system.
 - Style of opinions can be long at times (halfway between French and US model) but is still given by bureaucratic entity
 - Lawyers pay attention to cases and cite them with nicknames

- Judicial interpretation is a source of law in some ways
 - Style of decision (how it dresses itself) determines how influential it will be
- Germany: Public Law
 - 4 hierarchies: Tax courts, Welfare courts, General Public/Admin courts and Labor law courts, each with entry level, intermediate and supreme courts with panels to handle conflicts internally. This takes power away from judges as it is diffused
 - Messy borders among the courts and as to who gets J over what compels lawyers to turn a lot to scholars
 - This system requires too much manpower to be highly followed, just in Austria Switzerland and Scandinavia

Constitutional Adjudication

- Constitutional courts are becoming part of the global legal system – they exist in Central and Eastern Europe and transitional contexts or new rule of law systems in Asia.
- Model originated in Prussian code of 1790, which provided that judges has to go back to the sovereign for interpretation. Idea that all they did was apply, and could not give meaning to words.
- Similar construction in European law where judges do not decide tricky issues, but stay the case and send to ECJ for interpretation. This model always suggests some underlying issue with the legitimacy of the judiciary.
- Ordinary judiciary v. constitutional court explains sociology of judges. Supreme courts have so much authority that lower courts tend to yield to their interpretations. The constitutional judge in some places can opine as an individual, and is not just part of a panel.
- France: Constitutional Adjudication
 - A statute is framed by parliament and enacted by president after approval by assemblee nationale (under 1958 constitution this is a limited number of statutes). Right before promulgation it can be challenged before Conseil Constitutionnel (body of prestigious members of conseil d’etat, “cemetery of elephants”). *Ex ante* remedy with presumption of legitimacy – an advisory opinion different from our system of standing.
 - The CC may say a statute is valid under a certain interpretation only and ordinary judge is bound by stare decisis.
 - Once statute is in books it is “sealed,” judges must apply it and cannot second-guess political authority.
 - Critique: it is hard to anticipate how a statute will end up being applied, shows that civil lawyers do not tend to think like case lawyers.
 - The reality is that adjudication does happen, just in a different way: Although review of statutes ex post is impossible, some things are not “statutes” and thus allow you to get review, e.g. code of civil procedure is a “regulation” and can be challenged on one of three bases for challenging public law. For example you can say it violated the law, and that the law violated was the Constitution, and then bring it to the conseil d’etat. Also, ordinary judges can interpret formal statutes to harmonize with constitution, they just can’t come out and say they are unconstitutional.
 - Sees constitution as functional instrument and not untouchable text: there statutes are new and very politicized, so constitutional decision-making is more reserved that it is here. Here the laws we are questioning were enacted a long time ago and court is eliminating something obsolete. **Not sure I agree with all of this.**
 - This model is not successful worldwide; has been followed by Chile and Pakistan
- Germany: Constitutional Adjudication
 - In 1948 as post-WW2 compromise the German constitution as rigid construct was created and Constitutional court followed suit – thus it was a transplant of sorts from the U.S. (this also happened in Japan, Italy and Austria)

- Constitutional adjudication is a law-making power, giving judges power to make law, which was very resisted in civil law countries. The compromise was to have courts not staffed by judges but by masters of legal profession – well-respected professors or prestigious attorneys.
- This highly elite judiciary resembles C/L model of highly professionalized judicial personnel.
 - however they do not have Article III right to tenure (cannot renew terms) b/c (1) reluctance for too strong influence on Constitutional dynamic and (2) job will not necessarily impact sources of law b/c not law-making
- Constitutional court very unlike French; it adjudicates actual cases (*ex post* model)
- Procedure: cases go to the court for a variety of reasons:
 - ex ante or Constitutional challenge: advisory opinion, law challenged after promulgation and before implementation
 - incidental adjudication: issue arises in process of another suit, litigant asks judge to review a law's constitutionality. Judge determines if the contention has merit and if the statute's constitutionality would affect outcome of the specific litigation. If so he stays procedure and sends to constitutional court. The court then interprets it a certain way and says that with that interpretation the statute is constitutional, and the judge applies it. The ordinary judiciary interprets the law itself and the constitutional court decides only its constitutionality – this can create conflict.
 - direct complaint/constitutional complaint: can be brought by an individual provided she has exhausted all other means
- Difference with US: no certiorari, court must hear the complaint. there is a bar between people and the CC in Germany (except for direct complaint) so law is less likely to develop and modernize, and SC is less of a political actor
 - mattei says the law is more alive in US system where it is in context of living litigation, but isn't it that way in German?
 - if you bring direct complaint do they have to re-open your case below?
- Cases are legitimized as sources of law b/c published
- Spread throughout civil countries – Latin America, Middle East, Japan
 - In Italy there is no direct complaint so adjudication is more conservative b/c conservative judges may find no issue; lag between public consciousness and recognition by court (usually when lower judges are younger there is less of a gap).
 - In Japan it's a hybrid with our system: no CC but only the SC can decide constitutional issues

European Law

(these are the E.C. Institutions, a.k.a. E.U. post 1993. Political bodies of the future)

European Commission

I

Court of Justice –European Parliament

- huge, directly elected body

I

Council of Ministers – European Council

- highest political authority, law making plus broad policy making

General

- E.C. Treaty was developed as expansion of post-WW2 Coal & Steel treaty – has kept some obsolete institutional settling and thus does not work so well
- Parliament elected by direct vote to represent people, born out of need for DEMOCRATIC LEGITIMACY

- 1993 E.C. expanded beyond economic borders to include political union; progressively enlarged over years
- European Commission is admin body, day-to-day matters, made of commissioners w/individual spheres of responsibility. Complicated issues of equilibrium w/states giving up power but wanting to keep control
- Council of Ministers is the actual governing and lawmaking body, one per state. Now have complicated alchemy of qualified majority vote w/some states getting more votes
 - Institutional integration much higher than actual cultural integration
 - Accession to EU: countries have to change legal systems to look like the IMF likes, rewrite their laws
 - Not yet agreed on Constitution
- European Parliament is not grouped by state but by political affiliation. Has role in legislation and voting (gives “confidence votes” to commission)
- European Court of Human Rights is signed by all EU countries as requirement for entry; its law is binding on them and binding on ECJ, which in turn influences all EU countries. ECJ and ECHR cooperate in production of law
- This system then gets superimposed on an already complex scheme: conseil d’etat, cour de cassation – this creates more practical scheme for COMPARISON of substantive law (which in the US gets used less often)
- Legislation presented to council of ministers who decides on a form (which can be more or less binding):
 - regulation is STRONG and hard to get b/c intrusive: abrogates all other laws on the subject
 - directive lets members change their law to get to a certain goal – allows the individual to survive, systems reach uniformity through their own processes
 - recommendation is an influential but not binding policy statement; countries follow it to look good. This “soft law” is more binding on weak than on strong.
 - decisions have force of law towards individuals (e.g. farmers must pay for cow vets)
- ECJ ensures states’ legal systems develop coherently by checking against Euro framework (they get referral of new laws from national judges); extensive amount of admin. law emerging; checks balance of power. No system of courts throughout Europe like fed. courts here however.

ECJ

- works similarly to the way a constitutional court would elsewhere: has J so long as national courts would refer J to it; lower courts have discretion as to whether to refer cases to the ECJ or to interpret European law themselves
- the European court must apply European law if it is directly binding (like Supremacy Clause); questions as to content or manner of application allow them to stay the matter and refer to ECJ. The lower courts are not bound to transfer matters to ECJ, but the top courts of each state are bound to refer to ECJ for reasons of uniformity of decision
 - in reality, this does not always happen: French cour de cassation came up with theory of Acte Claire, which refuses to hand an issue to the ECJ when they consider an interpretation to be clear. This methodology has spread throughout Europe and is even accepted by the ECJ (b/c of their overload). SO INTERPRETATION IS NATIONAL AND ONLY CRITICAL ISSUES GET REFERRED TO ECJ
- Choice of law questions: it is questionable whether directives are directly binding. The ECJ considers them part of the law as long as not ambiguous (clear, justifiable objectives)
 - in the case of ambiguity the ECJ handles the Q, gives meaning to the directive and thereafter may sanction the member state for not having adopted the directive in its system
 - see *Francovich v. Italy* case, in which ECJ sanctioned Italy for not implementing a directive
- Decisions of ECJ are binding – thus *stare decisis* exists in European law b/c a lot of the techniques of interpretation come from the common law system. The ECJ enhances the influence of common law tradition in European culture despite the fact that civil law dominates continental Europe.

- Concern in the 80s that the common law was the endangered species in Europe – but upon global examination we see that it is not true b/c the ECJ is the strong actor in law-making in Europe. Even direct legislation in Europe is incremental – not covering broad areas of law. When legislation is so piecemeal the ECJ has an increasingly important role – comparatively speaking the growth of the ECJ is introducing a strong element of common law into Europe
- The traditional sources of civil law – scholars and codification – are so weak, whereas the court is so powerful. This reproduces the dynamic of the early English common law.
 - Legal scholarship has been absent from the European landscape on a European level – there is a lot of scholarship in local languages about the European law, but the community of scholars Europe-wide is lacking, so there is no strong source of law expressing its vision over that of the court → that’s why it is so much more of a judge-made system.
 - This is also due to linguistic forces: diffusion of English as lingua franca – languages are vehicles of law, and in reality European law is becoming more Anglified in terminology, etc.
 - Parliament has asked for a broader code but has been unable to achieve this due to its limited power

Codification and style of legislation

- Codification is style of legislation by broad principles, under ambition of universalism. As a result civil codes give a general framework of the law, and are all ambitious codes of principles
- At the European level there is no code. Why?
 - some say there is no jurisdiction: Europe is not created to have a uniform legislation. This is somewhat unfounded (Mattei says stupid), because the EU is really about the creation of a “common market plus.” The market is the minimum point of arrival, the rest is a political/social dimension. Thus the production of a common European private law would work towards this end by regulating the basic institutions of market through tort, contract law, etc.
 - lack of strong political desire for codification: you need strongly legitimized institutions claiming power, such as work of Napoleon and Mussolini in claiming authority and subsequently codifying. In Europe today there is no such symbol of the ruler as ultimate authority – no strengths capable of claiming control over the legal system. Instead the individual traditions are much stronger.
 - even if such political power were feasible, codification may be “down-graded” and seen as a pseudo-technological necessity. In the foreseeable future the code may happen but it must be presented as non-political. Its strategies of legitimization will be different – perhaps it will be seen as a natural point of arrival in the evolution of European jurisprudence. In Europe the pro-code actors are the IMF, big firms, etc., so the code would be presented as consequence of technological evolution.
 - resistance from local legal traditions: even though they all have codes that operate on a common semantic level, they are all deeply different structurally:
 - general part: should the code have an introductory chapter explaining/introducing? The general part of the German code is the passion of the German jurist, because they have broad definitions in the beginning into which various legal acts may fit – e.g. marriage and forming a corporation. This will not work absent immense linguistic precision, which is the way the BGB is written. The problem with diffusing this idea of law as geometry is that it will crumble in the context of a less linguistically precise, categorical culture (German approach was criticized as too formalistic and precision-based and not sufficiently founded in reality). It is a form of objectivising reality for the German lawyer which is rejected by other European countries – such as France – who see the law as sociological and not so geometric:
 - Jural Act: Manifestations of will reaching an ultimate legal result. Can be unilateral (only one person produces willful decision – e.g. a testament) or

bilateral (e.g. contracts, where a manifestation of will – the offer – must be matched by another – the acceptance) or multilateral (a corporation – intent must be declared by all parties forming the company). In the general part these are described in terms of their component parts.

- Jural Fact: the involuntary things that cause legal responsibility independent of individuals' wills, e.g. torts, all criminal law
 - French civil code of 1804: in contrast with the German it is imprecise and full of lacunae, but the French claim this is a good thing b/c it leaves room for the development of other legal formants.
 - Swiss code of 1910: extremely modern and advanced b/c it developed idea that the law is not mathematical, which at the time was a very minoritarian approach, in direct contrast with the BGB framework.
 - Italian code of 1942: breaks with German formalism but more precise than the French – a hybrid of sorts
 - Scandinavian code: pragmatic approach to law, attorneys use case law often like American lawyers and the code is secondary
- Idea that European Civil Code should be launched: initially the idea was resisted (1989, 1994), but in 1996 the Dutch during their reign wanted this to materialize. Convened conference at the Hague to discuss the matter.
 - Dutch wanted to implement the code they had just developed, Germans said everyone loved BGB and general part should be translated, French said the Napoleonic code is old and well respected, Italians said codes should be neither too old or too new and theirs was perfect
- Another big conference was convened last year with a big sociological shift. Parochialism was gone, the difference was that everyone was speaking the language of the common law. There was no longer the idea of codification as a traditional artifact. The proposed models were all models that were not traditional civilian solutions but closer to the C/L. Shift from chauvinistic scholars rooted in nationalism to a new generation brainwashed by globalization and competing to offer “advanced solutions” to the problem of codification.
 - optional code the state can enforce or not enforce like the UCC
 - focus on commercial law – again from the UCC
 - idea that we should not codify and instead draft a restatement

Summary: Codification has lost its political stake, has been made technological and the idea of abandoning the tradition in favor of something new has crept in. Whether or not codification will happen it will certainly be very different than its highly symbolic and political predecessors (political ideology was embedded in the civil codes, esp. the German code, French code, Mexican code of the 50s full of leftist socialist rhetoric, Swiss code, Italian code informed by fascist regime)

Mercantile Code: This realm of law was adopted to the needs and practices of merchants and much less formalistic than other codes. French and Germans have their own commercial codes.

- civil code, commercial code, criminal code, code of civil procedure and code of criminal procedure make up many Civil Law traditions
- the idea of a specialized mercantile code was challenged beginning with the Swiss for 2 reasons: (1) political objection that the law should be equal for everybody and not favorable to a particular social class; and (2) social change: originally merchants had their own system because they knew how to read and write while the remainder or civil codes existed for the illiterate, but at the time of the Swiss illiteracy was no longer a problem and the codes were thus over-formal, and a commercial-like code with more freedom of contract, freedom of form, default law and less rigid models would be appropriate.
- they produced a civil code and a code of obligations, which covered economic transactions.

- Italy broke from tradition of 2 codes in 1942 and has just the civil code which contained the commercial
- Now there is a resurgence of commercial ideology

The Legal Profession in Civil law and C/L

- The main actors in both systems are professionals
- In the US the practice is very homogeneous and dominated by the attorney in private practice. Some are later recruited to become prosecutors or judges but the prototype is the private attorney. Model of unified legal profession – not common elsewhere
- England: judges are also appointed from private practice but the practice is not unified. Post-law school attorneys may choose barrister or solicitor.
 - Traditionally the barrister was the nobler/more prestigious actor and solicitor was lower-ranking; barristers trained in chambers of another barrister and trained at inns of courts. From the inns of courts you are called to the bar, and then moved to the bench to become a judge → continuous professional line representing highly selective career path. Internal breeding of legal profession
 - Barristers do not have direct relationship with their clients – they have been symbolically used to keep the legal profession noble or separate from the laypeople. Thus barristers spoke only to judges. They did not demand fees or talk about money; this detached attitude about money contributed to symbolic nobility of the profession. These days they do and can sue for money, but the notion of their sanctity is still in place. QC, queen's counsel, is denotation for very senior barristers who can then charge more money.
 - Solicitors are the people who meet with clients, discuss the case with them and appoint a barrister based on people he knows. He then explains the case to the barrister. Notion that they are somehow secondary to barristers – even significance of their name implies inferiority/negativity
 - No relationship between barrister and solicitor – they are seen as having separate spheres. Solicitor does not mess with province of court.
 - Inns of courts were a huge center of intellectual life, so many people attended anyway for educational purposes despite not necessarily going on to practice law.
- Recent changes in English system: nowadays they all go to law school. This created more equality between the groups.
 - 1990 Legal Services Act changed the system to eliminate barristers' monopolies under Thatcher. Today solicitors can also become judges; barristers no longer monopolize higher courts. Today you can become either one, more traditional people seem to move towards barrister
 - The difference remains that barristers do not talk to clients
 - Today barristers are litigating the more serious criminal matters and the solicitors the pettier stuff
- Civil Law tradition: Not the same kind of brethren relationship between judges and attorneys – they are perceived as different kinds of beast with different education, ideas, selection.
 - Different careers: judicial is public and bureaucratic and people rarely leave for private practice, the bar is more geared towards money and those people never become judges.
 - Judicial career requires extra training post law school – you take an exam to become a civil servant and then become a civil servant after training
 - Prosecutors are considered also civil servants and judges in some sense – they are much more similar to judges and are colleagues. Often they take the same exam.
 - Differences within the private profession:
 - Certain countries have a divided profession with different jobs and monopolies, e.g. France. Lawyers are divided into avoué and avocat. One writes and the other talks – the avoué prepares the papers and the avocat goes to court and argues. Today the

avoué still enjoys monopoly in cour d'appel, where you must have an avoué litigate your case. The avoué is only licensed to a court in his specific district and cannot go elsewhere. It is the oldest position and was once inheritable/transferrable as a property right. Finally there is a specialized lawyer for the cour de cassation and conseil d'état, and at the c.d.c. he has special function in distinguishing Qs of law from Qs of fact – because the court itself only has jurisdiction to hear appeals. Therefore in a reasonably complex case the average litigant would need 3 attorneys. The conseil juridique is a cheaper service for non-litigation matters

- Others have unified profession with one private attorney license, etc., e.g. Germany. Civil countries go with one of these two models, the German being the dominant in non-European countries (Latin America, etc.). The Rechtenwalt is the main guy. Germany also has good legal aid system; these attorneys are compensated by the state
- The notary is a third actor in the civil law tradition (no relation to US notary public). They do a lot of formalized written activity e.g. formation of corporations, real property transactions, etc. Their acts are considered public acts and have strong legal force. They cannot be attorneys and don't want to be because it is so much more lucrative and stressful. Note that he is a dangerous figure in the case of very corrupt systems, but this is not common in the civil tradition
- Divided professions are the outcome of complex historical factors, such as the development of specialized monopolies which people then fight to defend.

Differences in Civil Procedure

- The language spoken by these different actors; the system informs their self-perception and is crucial in understanding their social role
- The jury is the key to understanding differences between civil countries and C/L: The law of evidence exists as the outcome of the common law system because we have juries and the laws serve to help figure out what they should and should not see. Even those countries that no longer have a jury still have the procedural particularities resulting from it.
- Development of jury system in C/L: somewhat of a mystery. The original role of the jury was to ascertain how rich or poor a certain guy was for the purposes of whether taxes could be extracted from him – born of financial necessity. In 11th C the centralization of the system in England was a result of fiscal necessity: collecting taxes owed to the king.
- Ordeals were procedures for trying facts in England and Europe up to the 13th C. in the context of regular litigation. It was a means for ascertaining facts based on “judgment of god.” You create cumbersome procedures (leaving a guy naked overnight in water; if he survives he is innocent). The BOP was therefore crucial – many times people would refuse to take the ordeal.
- Birth of jury system in England: In 1285 the system of trial by ordeal was de-legitimized when the church said priests could no longer participate in this system; the judgment of God no longer worked. This created the divide between civil and common law. In England, the jury became a means of trying facts for certain writs, beginning with writ of trespass and gradually extending to all writs at common law
- Trial by inquisition in Europe: Replaced the ordeal, based on fundamental idea of “confession.” Persuasion was used by means of psychological practices eventually including ritualized torture. Model based on secrecy of system, activism of judge and fundamental notion of confession. This spread through European continent b/c it was modern and efficient, and advanced compared to previous models. This system does not require professional element (judge) and lay element (jury) – only needs an activist judge and his clerk writing down what happened. Cheaper than jury system.
- Development of pretrial phase pleadings, etc. is result of jury system, because you have to get all these guys in one room at once and only want them to have to deal with deciding one issue. Procedure is divided between pretrial (preparatory) and trial (decision). On the other hand in the civil tradition the judge can do things at whatever pace he wants – there is no need to organize the “day in

court” because the decision-maker can take his time. The pretrial phase does not exist in civil law – it’s a process, a continuum.

- Distrust for jury created all sorts of procedural laws, so jury decided with no bias based only on what’s in front of it. All the exclusionary rules are based on idea that jurors have no ability to separate the relevant from irrelevant (b/c they’re not lawyers)
- Stare decisis is also a result of this
- These procedural differences happened by accident of history and jury system; modern convergences (activist judge in C/L, no juries in England, juries in Spain and Russia) are irrelevant, as these procedural differences remain embedded in our legal systems.
- Judges in civil tradition he is looking for the truth, responsible for finding the facts; he is an activist and asks questions to parties. In C/L he is an impartial tennis umpire.

Civil Procedure: Distinction between system that has one decision-maker (judge) and two (judge and jury) is relevant to a variety of aspects of procedure

Jurisdiction:

- in C/L service of process creates J b/c it is a symbolic arrest; in civil law there is a fundamental idea that J pre-exists and service has nothing to do with it.
- J in civil countries is based on contacts; service has to do with notice and is not basis for J.
- In international litigation civil countries tend to not recognize judgments based on J predicated on service. Therefore a forum-shopping concern is the rules and principles according to which they will recognize judgments.
- The first inquiry is to find whether there is a treaty linking the two Js because the treaty governs if it exists and the issue is then interpreting it.
 - 1968 Brussels convention: ban on exorbitant J within E.U. These countries agreed not to exercise exorbitant bases of J against those countries. However it does not apply to US so exorbitant bases are only excluded as far as countries involved in the convention
 - 1968 Brussels convention: full faith and credit for all judgments within E.U. so any E.U. court will grant FF+C to another EU court’s judgment. So all treaty countries will recognize an exorbitant assertion of J against an American even if that basis is not recognized in those particular countries.
- If no treaty exists then comparative inquiry is useful to determine if J B will recognize judgment of J A based on principles – every court will apply its own principles in deciding whether to recognize the other’s decision. It’s a sort of de novo review – if ground used in lit. fails in the new country they may find some other way.
- J based on service in US would probably not be recognized in a civil country. On the flip-side in Germany J can be generally based on property ownership regardless of nature or amount of suit, but it may not be recognized here, where quasi in rem limits the court’s J to damages arising from the particular piece of property. We will say that the German court does not have J beyond limits of value of the defendant’s property.
- There is a common core of principles for jurisdiction: domicile, real property in place in which it sits, contract (where signed or where executed), place in which tortious act occurred, place where effects of tort occurred.
- Problems arise in the gaps between what is recognized by different cultures. Exorbitant bases of J have no genuine connection with forum – e.g. service, general J in Holocaust litigation, property granting J independently from location of litigated events.
 - Property: Americans think it’s not a significant contact. Jean-Claude Killy case - 1968 Olympic champion has a love affair with a woman from which a baby was born; he said it was not his and didn’t want to support it and litigation ensued. She sued in Austrian court and he objected; she then predicated J on a pair of underwear he had

left behind in Austria, which according to Austrian law is fine b/c there is no need of value of property to be proportional to the litigation.

- Service of Process: Civil countries think service is a violation of DP (most dramatically, airplane service cases considered weird by civilian standards).
- J based on P's residence: basis of extraordinary J first established in France and in line with their snobbery and imperialism, has been recognized a lot – in Italy, Africa and other places influenced by French law. France has moved away from it a bit but it's still a model of exorbitant J that would not be recognized in US or other civil countries following German model.
- Note that you may want to sue in country C and then try to have judgment recognized in country B

Service

- In comparative law it has some aspects of J and others that have nothing to do with it
- C/L tradition and US in particular consider trial the big dramatic event and the preparation is more of a private business. Litigation is thus privatized until trial. In civil law from the very beginning until the end we are at trial (notion of continuity) and everything has to be official from pretrial phases onwards. This is born from Roman canonic procedure. Thus service must be performed by an official, not privately. In civil traditions it is part of sovereign powers of state, that only they can perform, and Americans attempting service by their own means have even been arrested for violating this sovereignty. Civil systems jealously guard their sovereignty in this matter.
- Service has no genuine connection with the events litigated; this is why exorbitant methods of J are so problematic

Notice

- French native suing US native based on French's domicile (exorbitant): J is properly asserted but failure to serve may be enough to defeat the judgment. In this case the French judge plays a proactive role in determining whether proper notice was given.
- Notification au parquet: The parquet office prosecutes cases in criminal law matters and also in private law matters b/c he can intervene "in the interest of the law" as a party to the litigation, not just an amicus. In international litigation the French plaintiff can notify the parquet in lieu of serving the D and the parquet then genuinely attempts to serve the D. From P's perspective the clock starts running when you notify the parquet and runs danger of creating default judgments against people who have no clue they're being sued.
- The Hague Service Convention: applies to international litigation and governs service, created channels by which parties can sue each other although they reside in different states. Each country signatory to it must have an office in its territory in charge of taking care of service. The issue arose before US SC as to whether this was the only way to serve or whether countries can use their own methods as well and SC decided it was one channel but not the only one. If it is not exclusive in the US then by reciprocity it's not exclusive in Europe and French could still use the parquet, and this interpretation defies the very purpose of the treaty.

Discovery

- Reason US courts of law are such popular venues to litigate international cases
- Notion of private discovery rejected by civilians b/c notion of DP includes ideas about privacy rights of a D, whereas here it is a very plaintiff-oriented notion. In Europe American-style discovery is known as "fishing expedition:" you have a vague idea someone did something wrong, then look through all his stuff and build your case based on your findings.

- General: US law is more pro-plaintiff, whereas civilian procedure is more pro-defendant, and in a sense presumption of innocence extends to civil cases and there is a desire to protect the rights and privacy of the individual. Despite this there is some recent convergence:
 - Recently, a pro-D movement has sprung up in the US by bid companies that do not appreciate being sued; we see a convergence of sorts. Furthermore cases are no longer going to trial and we see a lot of ADR, so the pro-P paradigm is crumbling even here
 - There is a sentiment in civil law countries that they should have more discovery and it's getting a little stronger
- Intrusive discovery is seen as a continuation of abusive Roman canonistic procedure by civilians. The inquisition was extremely intrusive means of obtaining information from the D and this technique was deeply resented at the time of Codification/Enlightenment reforms and seen as barbaric.
- The fact that our discovery comes from canon law is a type of long-stretched transplant. English courts of equity had discovery procedure taken from canon law – used very inquisitory models, and became the model of procedure used by the Americans in Fed. R. Civ. Pro. Our rules come straight from canon law, in terms of the initial gathering of evidence.
 - In the U.S. evidence is used twice, first during discovery and later at trial.
- Pretrial phase is spread out in the US but in civil countries it is the judge who asks questions to the witnesses – no cross-examination, surprise witnesses, no excitement. It is bureaucratic procedure with attorneys playing a role that is much more marginal. Also justice is much cheaper in Europe.
- Mattei has problems with expert witness issues (appointed by parties here, by court in civil law countries), party testimony (in civil countries you assume they will lie and therefore don't want to put them under oath), Rule 11 (de facto it has no real effect here where a semi-meritorious case deserves to get in; in Europe a non-meritorious case is not going to go anywhere), with use of J just to get discovery

Civil Procedure in civil law countries – Hague Convention

- Hague Convention governs controversial matters such as service and evidence. The latter governs matters such as gathering of evidence abroad, which touches on civilian sanctity of discovery matters.
- Questioning of civilian witnesses without verbatim record: if you attempt to introduce the clerk's summary/minutes in the US they will be excluded as hearsay
- Conversely, Euros don't allow US private parties to question witnesses, as it must be done by the state. The Americans could use letters rogatory to ask the court to carry out the interrogation but the problem is that they would then not meet our verbatim standards
- Hague Convention: centralized office through which you can apply to obtain evidence according to the rules of a certain foreign country; officer will allow verbatim questioning of witnesses in his presence – this resolves a variety of conflicts mentioned above. But it does not govern everybody. It also limits fishing expeditions – gathering of docs by 3rd parties. It has article 16 declaration allowing countries to opt out of gathering of evidence when in hands of third parties, and almost all signatories choose this option – so it is still a contentious area

Model of Civilian Civil Procedure

- instructing judge is in charge of gathering evidence for dossier, questioning of witnesses, etc; meets periodically with parties
- when the dossier is complete he transfers to the panel that eventually decides
- simplified procedure has one guy running the whole show from beginning to end
- notion of free evaluation of evidence – judge has broad discretion, but he must justify in writing why he makes his decision. The intellectual process of evaluation itself in some countries is an appealable, legal question.
- appeals are reviewed de novo, but they can choose to re-examine some of the evidence and not all of it. You can introduce new evidence but it is somewhat limited.

- the parties are not under oath and the entire trial phase is informal, with young attorneys
- the judge is in charge of this phase and looks for the truth, the attorneys facilitate liaison between him and the client
 - Here the relationship is different, the judge is the one with seniority and therefore it's the judge who keeps the attorney in check. Very related to our functions in society. In civilian countries the judge is not senior to you but just opted for another career- so it's natural for attorneys to keep judge in check.
 - On appeal it's like the attorney is asking the second judge to do a better job than the first guy
 - By the time you're at the cassation level, you either have a specialized attorney (France w/special bar) or some issue of fact still makes its way into the picture (e.g. Italy). It is hard to shift out of intellectual framework of fact and law to simply one of law
- UNDERLYING THIS IS THE DEEPLY-ROOTED NOTION OF STATE SOVEREIGNTY OVER THE PROCESS, IDEA THAT THE STATE'S OFFICIAL STAMP OF APPROVAL IS SACRED. Striking hearsay, for example, makes little sense if the statement was made to an official.

Criminal Procedure in the Civil Law

- Same sociology applies to the trial experience – same courts, same institutional setting
- TENSION IS BASED ON NOTIONS OF TRUTH
- However this model (informal, spread out, free evaluation) is resented as not offering sufficient guarantees. Idea that a little but more of formalistic professionalism would be good – b/c the stakes are higher and gov and judge might have same interests
- JUDGE'S SEARCH FOR TRUTH: idea that judge is looking for facts that elucidate the truth objectively. The parties have a vested interest in winning the case and therefore we do not put them under oath. They are giving their theory – their partisan reconstruction. They are not giving the truth. This can only be found by a neutral, independent objective third party, and we give that role to the judge, and we have 3 opportunities for this because of the appeals. These meetings are open to the parties (goes back to inquisition). Judge is involved with the facts. Ontological notion of truth – naïve.
- C/L, ADVERSARY MODEL/"truth" emerges from dialectic between parties. Here it is a dispute resolution model, and the judge is not involved in the finding of fact. Once he gets the facts, his job is to apply the law. His role is a hugely important one as a source of law but he is very absent from the facts themselves. Criminal law is a private dispute resolution model between prosecution and defense – when defense pleads guilty the machinery is stopped. This is an end of sorts – to come to a deal that both parties like. This is the “truth”: what emerges from this dialectic.
- In civil countries the search for truth carries on independent of the confession: you can confess to the police or to the court. This is not a way to reach the truth however – the judge still has to determine if it is “true.” It is not objective, comes from one party, and he might have many reasons to confess that have little to do with the truth. Thus the machinery is not stopped by a confession but the judge still works to get the truth. This comes from a clear reaction against inquisition.
- In civil countries the prosecutor is like a judge, but not impartial. He is bound by a duty to look for the truth – so he should also bring in the exculpatory evidence.
 - The trial is not split into trial for accused and trial for prosecution, nor are the witnesses for one side or the other.
 - Defendant represented by an attorney, prosecutor on the other side (who is a judge and not an attorney, an impartial officer interested in the truth).
 - The judge is the decisionmaker, in some cases the judge is a panel made of 4 laypeople and 2 professional judges (in serious cases). They decide over everything (facts, decision, sentencing).
 - The prosecutor in some senses is a very close friend of the judge (more than the attorney) and is under a duty to help the judge to ascertain the truth – HE HAS A DUTY TO LOOK FOR BOTH INCULPATORY AND EXCULPATORY EVIDENCE.

- Defendant can talk with prosecutor and tell him if he thinks someone else did it, can ask them to investigate these matters. Formerly he was supervised by a supervising judge.
- This close relationship is dangerous. The prosecutor is a judge with no impartiality and an attorney with no passion – this is old maxim. Hybrid figure. But his professional connection is more with the judge and it is likely that he can gain a conviction.
- Victims can have their own lawyers and sue for their civil damages (in the US different standards of evidence preclude these from being tried at once – this is because of our different notions of the truth. If we were really looking for ‘truth’ then separating the trials and sets of remedies makes no sense)
- Advantages: Victims can participate in the trial, presenting their side of the story and trying to get a conviction. There is much more discovery b/c prosecutor builds case in open way and the defense knows what is going to happen by the time the trial comes around. D has by then multiple opps to confront his accuser, to force prosecutor to show his hand – thus limited role of surprise. System is structured to give D incentive to talk.
- In C/L prosecutor is a party to the litigation with his own stake in the case: putting people behind bars. And the defense has one aim: to keep him out of jail.
 - Formally they are on the same ground, but de facto the prosecution has significantly more resources and there is gross inequality for most defendants. Neither side cares about the truth.
 - Plea bargaining is final evidence of this fact. He has no duty to look for exculpatory evidence (if he finds some he should theoretically drop the prosecution). Self-interested, partisan actors with jury in the middle supervised by judge. Formal equality and bifurcated decision-making.
 - Main disadvantage is this imbalance of power between the sides.
 - The right to remain silent: on the defense side the accused has little incentive to talk
- Holistic comparison of both systems – from moment of arrest to moment of incarceration – yields less of a drastic difference according to Mattei
 - everything before tryability is secret and out of the hands of the parties in C/L whereas in civil law it is open
- Clearly the trend is away from inquisitorial model towards the adversary. A number of civilian systems have introduced reforms building in some aspects of our model of criminal procedure.
 - 1988 Italy moved to new code of crim pro – la procedura all’Americana – in which aspects of our system such as plea bargaining have been important. The jury however has not been important. There is a clear bifurcation between pretrial and trial, instructing judge abolished, prosecutor freed from some obligation to look for truth, parties have been granted some more rights to directly confront witnesses, there is cross-examination in some form.
 - Guatemala changes
 - Chile changes in 2003
 - Spain and Russia introduced juries
 - Argentina – Cordoba and Buenos Aires introduced systems in 1999 with plea bargaining
 - France has recently introduced plea bargaining procedures
- Why? These countries perceived American model as more advanced, civilized, etc. Image of law in aftermath of WW2 given by the Warren court as grandiose, but perhaps they do not know that 98 percent of cases end up in plea bargaining, prosecutor is so powerful and strong over little defendant. If you take away the reality of the system then it may be a good one, but we have to remember reality. Criminal procedure image based on a few landmark cases – and this informed the Americanization. Perhaps also motivated because our system is cheaper – eliminated a lot of trials.
- New divergences are happening within the civil law – they are all taking little pieces of America. A lot is changing rapidly.

Review Session notes

Sources of International Law

- International custom: *ius gens/ius cogens* – binding b/c it is above the states themselves. Possibly stronger than sources of positive law b/c the system is fragmented b/c of lack of centralization of power, of one sovereign. Therefore custom has much more legitimacy/power.
- Treaties may become part of the law of the US b/c they have penetrated by means of *ius cogens*

Legal Formants

- Challenge to positivistic, Westphalian notion that law stems from sovereignty handed down by the state – at odds with the LAW IN FACT, which is based on a bottom-up system
- The real life of the law is that individuals produce law themselves: judges, scholars, legislators, regulators, attorneys. The creation of the legal order works by empowering these actors.
- Different agendas, different opinions, etc. create different formants – it is the AGGREGATE of their behavior in practice that produces the law. Law is a dynamic product of these actors.
- To unveil the “law” in a system: (1) find the statute; (2) find the case law rule, which may differ from the statute; (3) look at position of scholars. Common core research then requires looking at what the law says, what happens in practice and the reason for this
- The law in practice works from the bottom up in a dynamic between the machinery of the state and the ideas of law that stem from below (from the actors in power and the diffusion of law). Law can come from so many social practices that our theory is in fact limiting – it is just a way for lawyers to handle complexity, but it doesn’t work.
- While legal formants are a construction of the self, pluralism is a construction of the other (see Africa). Many legal anthropologists now believe the law is not just a product of the professional actors, but of the lay people.

Common Core

- Functionalism penetrates the legal discourse – despite different paths we eventually reach the same solution.
- It is also a source of international law; looking at international law within a hierarchical framework is ineffective, because it is still the domain of de-centralization and non-hierarchy.
- The search for common core is an historical exercise – not necessarily a normative principle

Opinions

- In civil tradition verdicts are handed down as follows: at trial the court writes its finding which almost never gets published; on appeal both facts and law are reviewed de novo and judge writes her opinion explaining why she upholds or reverses (showing due re-consideration) and there will also be a scholarly commentary; at supreme court the focus is only on the law and the court’s opinion talks not just to the parties but to everyone, because part of its role is the uniform interpretation of the laws.
- At the SC level we see differences
 - Cour de cassation does not explain much (*entendu que ...*) and its opinion gets published.
 - Germans interpret more thoroughly, with more detail in discussion of points of law
 - France is heavily statutorized system, and codes have great weight as sources of law. Some already legitimized as statutes. Some contain scholarly contribution/commentary
 - In Germany case law has increased dramatically in its role due to this rise in decision-making and we can thus see a decline in the scholar in favor of the judge, though scholars are still important as commentators.

Development of Sources of Law

- Bentham critique of US system as *ex post facto* – the way we punish our dogs

- In Italy the Parmalat case is an example of a case of first impression in which the judge has access to a variety of scholarship b/c it was a hot topic. In cases that may not be as compelling the literature is less readily available