# Philosophy of law[edit]

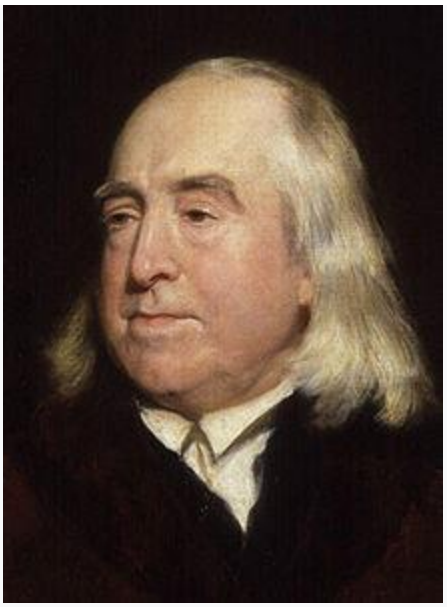
*Main articles: Philosophy of law and Jurisprudence*

> But what, after all, is a law? [...] When I say that the object of laws is always general, I mean that law considers subjects en masse and actions in the abstract, and never a particular person or action. [...] On this view, we at once see that it can no longer be asked whose business it is to make laws, since they are acts of the general will; nor whether the prince is above the law, since he is a member of the State; nor whether the law can be unjust, since no one is unjust to himself; nor how we can be both free and subject to the laws, since they are but registers of our wills.
>
> Jean-Jacques Rousseau, *The Social Contract*, II, 6.[29]

The philosophy of law is commonly known as jurisprudence. Normative jurisprudence asks "what should law be?", while analytic jurisprudence asks "what is law?" John Austin's utilitarian answer was that law is "commands, backed by threat of sanctions, from a sovereign, to whom people have a habit of obedience".[30] Natural lawyers on the other side, such as Jean-Jacques Rousseau, argue that law reflects essentially moral and unchangeable laws of nature. The concept of "natural law" emerged in ancient Greek philosophy concurrently and in connection with the notion of justice, and re-entered the mainstream of Western culture through the writings of Thomas Aquinas, notably his *Treatise on Law*.

Hugo Grotius, the founder of a purely rationalistic system of natural law, argued that law arises from both a social impulse—as Aristotle had indicated—and reason.[31] Immanuel Kant believed a moral imperative requires laws "be chosen as though they should hold as universal laws of nature".[32] Jeremy Bentham and his student Austin, following David Hume, believed that this conflated the "is" and what "ought to be" problem. Bentham and Austin argued for law's positivism; that real law is entirely separate from "morality".[33] Kant was also criticised by Friedrich Nietzsche, who rejected the principle of equality, and believed that law emanates from the will to power, and cannot be labeled as "moral" or "immoral".[34][35][36]

In 1934, the Austrian philosopher Hans Kelsen continued the positivist tradition in his book the *Pure Theory of Law*.[37] Kelsen believed that although law is separate from morality, it is endowed with "normativity", meaning we ought to obey it. While laws are positive "is" statements (e.g. the fine for reversing on a highway *is* €500); law tells us what we "should" do. Thus, each legal system can be hypothesised to have a basic norm (*Grundnorm*) instructing us to obey. Kelsen's major opponent, Carl Schmitt, rejected both positivism and the idea of the rule of law because he did not accept the primacy of abstract normative principles over concrete political positions and decisions.[38] Therefore, Schmitt advocated a jurisprudence of the exception (state of emergency), which denied that legal norms could encompass all of the political experience.[39]



Bentham's utilitarian theories remained dominant in law until the 20th century.

Later in the 20th century, H. L. A. Hart attacked Austin for his simplifications and Kelsen for his fictions in *The Concept of Law*.[40] Hart argued law is a system of rules, divided into primary (rules of conduct) and secondary ones (rules addressed to officials to administer primary rules). Secondary rules are further divided into rules of adjudication (to resolve legal disputes), rules of change (allowing laws to be varied) and the rule of recognition (allowing laws to be identified as valid). Two of Hart's students continued the debate: In his book *Law's Empire*, Ronald Dworkin attacked Hart and the positivists for their refusal to treat law as a moral issue. Dworkin argues that law is an "interpretive concept",[41] that requires judges to find the best fitting and most just solution to a legal dispute, given their constitutional traditions. Joseph Raz, on the other hand, defended the positivist outlook and criticised Hart's "soft social thesis" approach in *The Authority of Law*.[42] Raz argues that law is authority, identifiable purely through social sources and without reference to moral reasoning. In his view, any categorisation of rules beyond their role as authoritative instruments in mediation are best left to sociology, rather than jurisprudence.[43]

## What is the law?[edit]

*Main article: Analytical jurisprudence*

There have been several attempts to produce "a universally acceptable definition of law". In 1972, Baron Hampstead suggested that no such definition could be produced.[44] McCoubrey and White said that the question "what is law?" has no simple answer.[45] Glanville Williams said that the meaning of the word "law" depends on the context in which that word is used. He said that, for example, "early customary law" and "municipal law" were contexts where the word "law" had two different and irreconcilable meanings.[46] Thurman Arnold said that it is obvious that it is impossible to define the word "law" and that it is also equally obvious that the struggle to define that word should not ever be abandoned.[47] It is possible to take the view that there is no need to define the word "law" (e.g. "let's forget about generalities and get down to cases").[48]

One definition is that law is a system of rules and guidelines which are enforced through social institutions to govern behaviour.[2] In *The Concept of Law* Hart argued law is a "system of rules";[49] Austin said law was "the command of a sovereign, backed by the threat of a sanction";[30] Dworkin describes law as an "interpretive concept" to achieve justice in his text titled *Law's Empire*;[41] and Raz argues law is an "authority" to mediate people's interests.[42] Holmes said, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I

mean by the law."[50] In his *Treatise on Law* Aquinas argues that law is a rational ordering of things which concern the common good that is promulgated by whoever is charged with the care of the community.[51] This definition has both positivist and naturalist elements.[52]

## History[edit]

*Main article: Legal history*

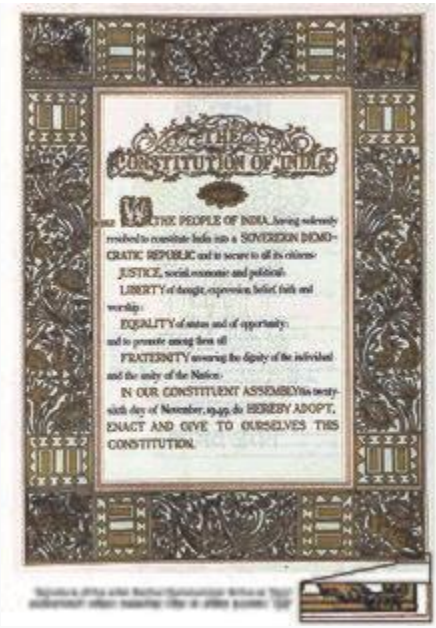
King Hammurabi is revealed the code of laws by the Mesopotamian sun god Shamash, also revered as the god of justice.

The history of law links closely to the development of civilization. Ancient Egyptian law, dating as far back as 3000 BC, was based on the concept of Ma'at and characterised by tradition, rhetorical speech, social equality and impartiality.[53][54][55] By the 22nd century BC, the ancient Sumerian ruler Ur-Nammu had formulated the first law code, which consisted of casuistic statements ("if … then ..."). Around 1760 BC, King Hammurabi further developed Babylonian law, by codifying and inscribing it in stone. Hammurabi placed several copies of his law code throughout the kingdom of Babylon as stelae, for the entire public to see; this became known as the Codex Hammurabi. The most intact copy of these stelae was discovered in the 19th century by British Assyriologists, and has since been fully transliterated and translated into various languages, including English, Italian, German, and French.[56]

The Old Testament dates back to 1280 BC and takes the form of moral imperatives as recommendations for a good society. The small Greek city-state, ancient Athens, from about the 8th century BC was the first society to be based on broad inclusion of its citizenry, excluding women and the slave class. However, Athens had no legal science or single word for "law",[57] relying instead on the three-way distinction between divine law (*thémis*), human decree (*nomos*) and custom (*díkē*).[58] Yet Ancient Greek law contained major constitutional innovations in the development of democracy.[59]

Roman law was heavily influenced by Greek philosophy, but its detailed rules were developed by professional jurists and were highly sophisticated.[60][61] Over the centuries between the rise and decline of the Roman Empire, law was adapted to cope with the changing social situations and underwent major codification under Theodosius II and Justinian I.[62] Although codes were replaced by custom and case law during the Early Middle Ages, Roman law was rediscovered around the 11th century when medieval legal scholars began to research Roman codes and adapt their

concepts to the canon law, giving birth to the *jus commune*. Latin legal maxims (called brocards) were compiled for guidance. In medieval England, royal courts developed a body of precedent which later became the common law. A Europe-wide Law Merchant was formed so that merchants could trade with common standards of practice rather than with the many splintered facets of local laws. The Law Merchant, a precursor to modern commercial law, emphasised the freedom to contract and alienability of property.[63] As nationalism grew in the 18th and 19th centuries, the Law Merchant was incorporated into countries' local law under new civil codes. The Napoleonic and German Codes became the most influential. In contrast to English common law, which consists of enormous tomes of case law, codes in small books are easy to export and easy for judges to apply. However, today there are signs that civil and common law are converging.[64] EU law is codified in treaties, but develops through *de facto* precedent laid down by the European Court of Justice.[65]




The Constitution of India is the longest written constitution for a country, containing 444 articles, 12 schedules, numerous amendments and 117,369 words.

Ancient India and China represent distinct traditions of law, and have historically had independent schools of legal theory and practice. The *Arthashastra*, probably compiled around 100 AD (although it contains older material), and the *Manusmriti* (c. 100–300 AD) were foundational treatises in India, and comprise texts considered authoritative legal guidance.[66] Manu's central philosophy was tolerance and pluralism, and was cited across Southeast Asia.[67] During the Muslim conquests in the Indian subcontinent, sharia was established by the Muslim sultanates and empires, most notably Mughal Empire's Fatawa-e-Alamgiri, compiled by emperor Aurangzeb and various scholars of Islam.[68][69] After British colonialism, the Hindu tradition, along with Islamic law, was supplanted by the common law when India became part of the British Empire.[70] Malaysia, Brunei, Singapore and Hong Kong also adopted the common law. The eastern Asia legal tradition reflects a unique blend of secular and religious influences.[71] Japan was the first country to begin modernising its legal system along western lines, by importing parts of the French, but mostly the German Civil Code.[72] This partly reflected Germany's status as a rising power in the late 19th century. Similarly, traditional Chinese law gave way to westernisation towards the final years of the Qing Dynasty in the form of six private law codes based mainly on the Japanese model of German law.[73] Today Taiwanese law retains the closest affinity to the codifications from that period, because of the split between Chiang Kai-shek's nationalists, who fled there, and Mao Zedong's communists who won control of the mainland in 1949. The current legal infrastructure in the People's

Republic of China was heavily influenced by Soviet Socialist law, which essentially inflates administrative law at the expense of private law rights.[74] Due to rapid industrialisation, today China is undergoing a process of reform, at least in terms of economic, if not social and political, rights. A new contract code in 1999 represented a move away from administrative domination.[75] Furthermore, after negotiations lasting fifteen years, in 2001 China joined the World Trade Organization.[76]

# Legal systems[edit]

*Main articles: List of national legal systems and Comparative law*

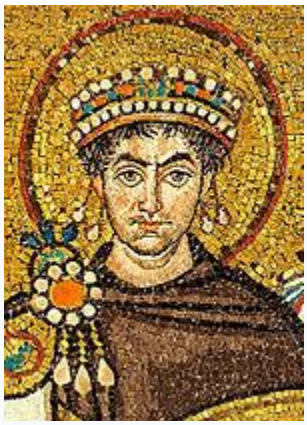

Colour-coded map of the legal systems around the world, showing civil, common law, religious, customary and mixed legal systems.[77] Common law systems are shaded pink, and civil law systems are shaded blue/turquoise.

In general, legal systems can be split between civil law and common law systems.[78] Modern scholars argue that the significance of this distinction has progressively declined; the numerous legal transplants, typical of modern law, result in the sharing by modern legal systems of many features traditionally considered typical of either common law or civil law.[64][79] The term "civil law", referring to the civilian legal system originating in continental Europe, should not be confused with "civil law" in the sense of the common law topics distinct from criminal law and public law.

The third type of legal system—accepted by some countries without separation of church and state—is religious law, based on scriptures. The specific system that a country is ruled by is often determined by its history, connections with other countries, or its adherence to international standards. The sources that jurisdictions adopt as authoritatively binding are the defining features of any legal system. Yet classification is a matter of form rather than substance since similar rules often prevail.

## Civil law[edit]

*Main article: Civil law (legal system)*



Emperor Justinian (527–565) of the Byzantine Empire who ordered the codification of Corpus Juris Civilis.

CODE CIVIL

DES FRANÇAIS.

TITRE PRÉLIMINAIRE.

DE LA PUBLICATION, DES EFFETS ET DE L'APPLICATION DES LOIS EN GÉNÉRAL.

ARTICLE 1.er

LES lois sont exécutoires dans tout le territoire français, en vertu de la promulgation qui en est faite par le PREMIER CONSUL.

Elles seront exécutées dans chaque partie de la République, du moment où la promulgation en pourra être connue.

La promulgation faite par le PREMIER CONSUL sera réputée connue dans le département où siégera le Gouvernement, un jour après celui de la promulgation; et dans chacun des autres départemens, après l'expiration du même délai, augmenté d'autant de jours qu'il y aura de fois dix myriamètres [environ vingt lieues anciennes] entre la ville où la

A

First page of the 1804 edition of the Napoleonic Code.

Civil law is the legal system used in most countries around the world today. In civil law the sources recognised as authoritative are, primarily, legislation—especially codifications in constitutions or statutes passed by government—and custom.[80] Codifications date back millennia, with one early example being the Babylonian *Codex Hammurabi*. Modern civil law systems essentially derive from legal codes issued by Byzantine Emperor Justinian I in the 6th century, which were rediscovered by 11th century Italy.[81] Roman law in the days of the Roman Republic and Empire was heavily procedural, and lacked a professional legal class.[82] Instead a lay magistrate, *iudex*, was chosen to adjudicate. Decisions were not published in any systematic way, so any case law that developed was disguised and almost unrecognised.[83] Each case was to be decided afresh from the laws of the State, which mirrors the (theoretical) unimportance of judges' decisions for future cases in civil law systems today. From 529–534 AD the Byzantine Emperor Justinian I codified and consolidated Roman law up until that point, so that what remained was one-twentieth of the mass of legal texts from before.[84] This became known as the *Corpus Juris Civilis*. As one legal historian wrote, "Justinian consciously looked back to the golden age of Roman law and aimed to restore it to the peak it had reached three centuries before."[85] The Justinian Code remained in force in the East until the fall of the Byzantine Empire. Western Europe, meanwhile, relied on a mix of the Theodosian Code and Germanic customary law until the Justinian Code was rediscovered in the 11th century, and scholars at the University of Bologna used it to interpret their own laws.[86] Civil law codifications

based closely on Roman law, alongside some influences from religious laws such as canon law, continued to spread throughout Europe until the Enlightenment; then, in the 19th century, both France, with the *Code Civil*, and Germany, with the *Bürgerliches Gesetzbuch*, modernised their legal codes. Both these codes influenced heavily not only the law systems of the countries in continental Europe (e.g. Greece), but also the Japanese and Korean legal traditions.[87][88] Today, countries that have civil law systems range from Russia and Turkey to most of Central and Latin America.[89]

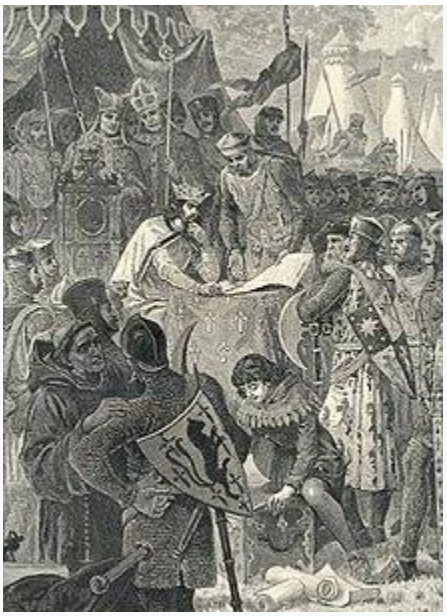
### Socialist law[edit]

*Main article: Socialist law*

"Socialist law" refers to the legal systems in socialist and formerly socialist states such as the former Soviet Union and the People's Republic of China.[90] Academic opinion is divided on whether it is a separate system from civil law, given major deviations based on Marxist-Leninist ideology, such as subordinating the judiciary to the executive ruling party.[90][91][92]

## Common law and equity[edit]

*Main article: Common law*



King John of England signs Magna Carta

In common law legal systems, decisions by courts are explicitly acknowledged as "law" on equal footing with statutes adopted through the legislative process and with regulations issued by the executive branch. The "doctrine of precedent", or *stare decisis* (Latin for "to stand by decisions") means that decisions by higher courts bind lower courts, and future decisions of the same court, to assure that similar cases reach similar results. In contrast, in "civil law" systems, legislative statutes are typically more detailed, and judicial decisions are shorter and less detailed, because the judge or barrister is only writing to decide the single case, rather than to set out reasoning that will guide future courts.

Common law originated from England and has been inherited by almost every country once tied to the British Empire (except Malta, Scotland, the U.S. state of Louisiana, and the Canadian province of Quebec). In medieval England, the Norman conquest the law varied-shire-to-shire, based on disparate tribal customs. The concept of a "common law" developed during the reign of Henry II during the late 12th century, when Henry appointed judges that had authority to create an institutionalised and unified system of law "common" to the country. The next major step in the

evolution of the common law came when King John was forced by his barons to sign a document limiting his authority to pass laws. This "great charter" or *Magna Carta* of 1215 also required that the King's entourage of judges hold their courts and judgments at "a certain place" rather than dispensing autocratic justice in unpredictable places about the country.[93] A concentrated and elite group of judges acquired a dominant role in law-making under this system, and compared to its European counterparts the English judiciary became highly centralised. In 1297, for instance, while the highest court in France had fifty-one judges, the English Court of Common Pleas had five.[94] This powerful and tight-knit judiciary gave rise to a systematised process of developing common law.[95]

However, the system became overly systematised—overly rigid and inflexible. As a result, as time went on, increasing numbers of citizens petitioned the King to override the common law, and on the King's behalf the Lord Chancellor gave judgment to do what was equitable in a case. From the time of Sir Thomas More, the first lawyer to be appointed as Lord Chancellor, a systematic body of equity grew up alongside the rigid common law, and developed its own Court of Chancery. At first, equity was often criticised as erratic, that it varied according to the length of the Chancellor's foot.[96] Over time, courts of equity developed solid principles, especially under Lord Eldon.[97] In the 19th century in England, and in 1937 in the U.S., the two systems were merged.

In developing the common law, academic writings have always played an important part, both to collect overarching principles from dispersed case law, and to argue for change. William Blackstone, from around 1760, was the first scholar to collect, describe, and teach the common law.[98] But merely in describing, scholars who sought explanations and underlying structures slowly changed the way the law actually worked.[99]

## Religious law[edit]

*Main article: Religious law*

Religious law is explicitly based on religious precepts. Examples include the Jewish Halakha and Islamic Sharia—both of which translate as the "path to follow"—while Christian canon law also survives in some church communities. Often the implication of religion for law is unalterability, because the word of God cannot be amended or legislated against by judges or governments.[100] However, a thorough and detailed legal system generally requires human elaboration. For instance, the Quran has some law, and it acts as a source of further law through interpretation,[101] *Qiyas* (reasoning by analogy), *Ijma* (consensus) and precedent. This is mainly contained in a body of law and jurisprudence known as Sharia and Fiqh respectively. Another example is the Torah or Old Testament, in the Pentateuch or Five Books of Moses. This contains the basic code of Jewish law, which some Israeli communities choose to use. The Halakha is a code of Jewish law that summarizes some of the Talmud's interpretations. Nevertheless, Israeli law allows litigants to use religious laws only if they choose. Canon law is only in use by members of the Catholic Church, the Eastern Orthodox Church and the Anglican Communion.

### Canon law[edit]

*Main article: Canon law*


The *Corpus Juris Canonici*, the fundamental collection of canon law for over 750 years.

Canon law (from Greek *kanon*, a 'straight measuring rod, ruler') is a set of ordinances and regulations made by ecclesiastical authority (Church leadership), for the government of a Christian organisation or church and its members. It is the internal ecclesiastical law governing the Catholic Church (both the Latin Church and the Eastern Catholic Churches), the Eastern Orthodox and Oriental Orthodox churches, and the individual national churches within the Anglican Communion.[102] The way that such church law is legislated, interpreted and at times adjudicated varies widely among these three bodies of churches. In all three traditions, a canon was originally[103] a rule adopted by a church council; these canons formed the foundation of canon law.

The Catholic Church has the oldest continuously functioning legal system in the western world,[104][105] predating the evolution of modern European civil law and common law systems. The 1983 Code of Canon Law governs the Latin Church *sui juris*. The Eastern Catholic Churches, which developed different disciplines and practices, are governed by the *Code of Canons of the Eastern Churches*.[106] The canon law of the Catholic Church influenced the common law during the medieval period[107] through its preservation of Roman law doctrine such as the presumption of innocence.[108]