LAW AND JUSTICE IN HONG KONG

PRINCIPLES OF THE LEGAL SYSTEM

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DUO

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1. Introduction

1.001 It is generally known that Hong Kong continues its common law tradition, but fewer may realise that the common law has been in operation in Hong Kong for over 180 years. Hong Kong's common law system is therefore well-established, and is a system that the people of Hong Kong and the international community are familiar with and trust. This system is set to endure, as is the "One Country, Two Systems" framework which represents a fundamental long-term state policy. The defining characteristics of Hong Kong's common law system are clear: neutral and impartial judges, an adversarial mode of litigation, the presumption of innocence, the guarantee of due process, the standard of proof beyond reasonable doubt, and equality before the law. These are just a few of the fundamental principles entrenched in Hong Kong's justice system. In our common law system, the legal principles that guide and inform decisions are just as important as the decisions themselves. Like courts in other well-established common law jurisdictions, our courts apply these principles consistently across all areas of law.[1]

Chief Justice Andrew Cheung of the
Hong Kong Court of Final Appeal (2025)

1.002 The essence of the Hong Kong legal system can be summed up in one short passage, but a whole book is needed to exemplify what that essence means. This introductory chapter provides a comparative foundation for the study of the legal system of the Hong Kong Special Administrative Region of the People's Republic of China. Comparative law, as a scholarly discipline, entails a systematic examination of entire legal systems or specific statutes, regulations, judicial decisions, and customary practices to elucidate their similarities and divergences. It explores how legal solutions are adapted, transplanted, embraced, or repudiated across diverse jurisdictions or social collectives. Furthermore, it addresses the methodological complexities of analysing distinct legal systems, families, and traditions, fostering a deeper understanding of their interplay and evolution.[2] By the end of this chapter, the readers should be able to:

(1) identify the key differences between the three legal traditions that are most relevant to the study of Hong Kong law, namely, the civilian law (also known as 'civil law'), common law and socialist legal traditions, in descending order in terms of the size of the populations subject to them;

(2) appreciate the distinctive features of Hong Kong law; and

(3) understand the various ways to classify law in the Hong Kong legal system.

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[1] A Cheung, 'The 8th IBA Asia Pacific Regional Forum Biennial Conference: Vibrant Asia – Land of Opportunity and Promise' (20 February 2025).

[2] S Ragone and G Smorto, *Comparative Law: A Very Short Introduction* (Oxford University Press, 2023) 3–4.

2. Comparative Legal Traditions

(a) Laws, legal systems and legal traditions

1.003 Law is a universal social phenomenon. Human law owes its existence to institutions and the persons inside them who discharge responsibilities to serve the common good of a community.[3] It is addressed to the members of that community for purposes of regulating their conduct.[4] Legal norms are everywhere.[5] Nothing appears to lie beyond the reach of law.[6] Across all times and places, the law has punished murder, compensated injury, ordered economic exchange, regulated marriage and inheritance, exacted repayment of debtors and provided for the maintenance of children.[7] *Jus gentium*, the 'law of peoples' that transcends nations down through the centuries, contains principles that underpin legislative and adjudicatory institutions, rights of property, rights to make and enforce contracts and so on.[8] Law is nowadays perceived by many to be 'what makes contemporary society possible', though 'in their everyday lives, people seldom think about how [law] actually works'.[9] Most everyday activities, from major events like renting a home or getting married to routine purchases and rules about what we can or cannot do, have a legal aspect. Thus, studying law is fundamentally about understanding life itself.[10] Modern states resort to law first to categorise people and things and their activities and then to prescribe relations between them, the better to maintain 'discipline, hierarchy, and centralized control'.[11] Ordinary folks turn to the law for a variety of reasons, including to seek redress and fairness in case of intrusions by the state.[12] Laws that address contemporary challenges such as environmental degradation[13] and artificial intelligence have mushroomed.[14] Law can be said to have 'two practical purposes':[15]

> [F]irst to require, forbid or penalise forms of conduct between citizen and citizen, and citizen and state; secondly, to provide formal rules for classes of human activity whose fulfilment would otherwise be confused, uncertain or ineffective.

1.004 The legal system differs from other human systems in its comprehensiveness of scope and coerciveness of authority. 'System' may refer to 'an array of interconnected

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3 J Finnis, 'The Nature of Law' in J Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press, 2020) 38, 57.

4 J Rawls, *A Theory of Justice* (Harvard University Press, 1999) 207.

5 J Holland and J Webb, *Learning Legal Rules* (Oxford University Press, 10th ed, 2019) 3.

6 R Wacks, *Law: A Very Short Introduction* (Oxford University Press, 3rd ed, 2023) 2.

7 F Pirie, *The Rule of Laws: A 4,000-Year Quest to Order the World* (Basic Books, 2021) 449.

8 J Finnis, 'The Nature of Law' in J Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press, 2020) 38, 49.

9 B van Rooij and A Fine, *The Behavioral Code: The Hidden Ways the Law Makes Us Better … or Worse* (Beacon Press, 2021) 5.

10 R Sandberg, *A Historical Introduction to English Law: Genesis of the Common Law* (Cambridge University Press, 2023).

11 F Pirie, *The Rule of Laws: A 4,000-Year Quest to Order the World* (Basic Books, 2021) 450.

12 *Ibid*.

13 See, EC Ip, 'An Emergent Planetary Health Law' (2023) 72 *International and Comparative Law Quarterly* 1047.

14 R Wacks, *Law: A Very Short Introduction* (Oxford University Press, 3rd ed, 2023) 2.

15 J Laws, *The Common Law Constitution* (Cambridge University Press, 2014) xiii.

…wherein, bounded in space and time, that forms a collective whole'.[16] A legal system can be understood as a system of institutions that 'makes, executes, and resolves disputes in a jurisdiction'.[17] Law necessarily belongs to a legal system if it is going to work. 'A legal system has two components: "a set of laws" and "a set of persons, institutions and practices" to put the former into action.'[19] It is distinguished from other human systems like the family by its coerciveness, publicness and comprehensiveness in the sense of claiming final authority over a wide range of activities within a well-defined territorial ambit.[20] Legal systems generally establish courts and tribunals to adjudicate disputes concerning rights and obligations and to enforce sanctions.[21] Fairly sophisticated legal systems independently sprang up in varied parts of the world such as Mesopotamia, Egypt, the Indus Valley, China, Peru and Meso-America some 5,000 years ago. These systems empowered centralising monarchical regimes, with religious support, to exert control over surrounding regions, manage irrigation works and public edifices, regulate trade and wage wars.[22]

1.005 The civilian law, common law and socialist legal traditions are the three great legal traditions of the world. 'Legal tradition' may be understood as referring to 'deeply rooted legal phenomena of the past which have been transmitted over time'.[23] The main jurisdictions in the civilian tradition include Brazil, France, Germany, Indonesia and Russia. This legal tradition significantly shaped the legal systems of all contemporary jurisdictions in East Asia except Hong Kong. It is rivalled only by the common law tradition, which in its several versions governs one-third of the population of the world.[24] Major common law jurisdictions include Australia, Canada, England, India and the United States. The socialist legal tradition, which still holds sway over about a quarter of the world's population, notwithstanding the dissolution of the Soviet Union, remains in force in Mainland China, Cuba, Laos, North Korea and Vietnam.[25]

1.006 These three are the most relevant to the study of Hong Kong law, but of course they are not the only influential legal traditions extant. Other well-established traditions — Catholic canon law, Hindu law, Islamic law, Talmudic law, Scandinavian law, Confucian law — continue to exert a far-reaching influence over many parts of the world.[26] Nevertheless, despite important variations, most contemporary legal systems owe their most fundamental features to either the common law or the civilian tradition.

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16 MS Patterson, MK Lemke and J Nelon, 'Complex Systems in a Nutshell: Foundational Concepts for Population Health' in Y Apostolopoulos, KH Lich and MK Lemke (eds), *Complex Systems and Population Health: A Primer* (Oxford University Press, 2020) 19, 20.

17 S Slorach, J Embley, P Goodchild and C Shephard, *Legal Systems and Skills* (Oxford University Press, 4th ed, 2020) 68.

18 J Raz, *The Concept of a Legal System* (Oxford University Press, 2nd ed, 1980) 1.

19 J Finnis, 'The Nature of Law' in J Tasioulas (ed), *The Cambridge Companion to the Philosophy of Law* (Cambridge University Press, 2020) 38, 42.

20 J Rawls, *A Theory of Justice* (Harvard University Press, 1999) 207.

21 S Hershovitz, *Law is a Moral Practice* (Harvard University Press, 2023) 148.

22 BZ Tamanaha, *A Realistic Theory of Law* (Cambridge University Press, 2017) 93.

23 M Siems, *Comparative Law* (Cambridge University Press, 3rd ed, 2022) 126.

24 P Darbyshire, *Darbyshire on the English Legal System* (Sweet & Maxwell, 13th ed, 2020) 10.

25 See, WE Partlett and EC Ip, 'Is Socialist Law Really Dead?' (2016) 48 *New York University Journal of International Law and Politics* 463.

26 See, S Ragone and G Smorto, *Comparative Law: A Very Short Introduction* (Oxford University Press, 2023) 39; J du Plessis, 'Comparative Law and the Study of Mixed Legal System' in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2nd ed, 2019) 474.

Former colonies generally received their legal systems from their former colonial ma
ers; no former British colony has ever adopted a civilian system, or any Continen
European colony a common law one.[27]

(b) The civilian law tradition

1.007 Consider first the Romano-Germanic civilian (also known as the civil law) tradition
Its outstanding features include the pre-eminence of codes of law, the inquisitor
model of litigation and the influence exercised by legal academics ('jurists') over the
interpretation of law, though none of the above should be understood literally in any
way that would 'caricature' civilian law.[28] Civilian law has a rich history and heritage
traceable back to the civil law of the Roman Empire. The stereotype that the medieval
era was lawless is inaccurate; law 'occupied a central and privileged place' in Europe
at that time.[29] 'Secular and religious authorities alike proclaimed justice and equity as
their highest social ideals', and a 'deep respect for law and legal procedure cut across
geographical and chronological boundaries', so that 'popes and kings vied to claim the
exalted title of lawgiver'.[30]

1.008 Trade and commerce flourished in the 11th–13th centuries, particularly in Italian city-
states like Venice and Genoa. Medieval laws proved inadequate for the increasingly
complex commercial landscape. Conversely, the ancient Roman civil law (*ius civile* in
Latin), rooted in the Romans' extensive trading practices, offered a robust framework
with a sophisticated body of contract law, notably the law of sale.[31] With the 'Latin
renaissance' of the High Middle Ages, long after Roman law had ceased to be the
living law of Rome,[32] scholars of the 'universities of study' in places like Paris and
Bologna, born in the eleventh to thirteenth centuries, set out to develop a law that
would be autonomous from the canon law of the Church, yet superior in rationality to
the patchwork of prevailing local custom. They founded their efforts upon the redis-
covered *Corpus Juris Civilis* (Body of Civil Law), comprising the Digest or Pandects,
a compilation of nearly one million words extracted from juristic writings spanning
the first century BC to the third century AD,[33] commissioned in the sixth century by
Eastern Roman Emperor Justinian the Great (r. 527–565). Early modern jurists on
the Continent took literally such Roman legal maxims as that the prince is *legibus
solutus* (absolved from the laws), and that *quod principi placuit legis habet vigorem*
(what pleases the prince has the force of law) as justifying political authority. This

[27] A few former British colonies like South Africa and Sri Lanka have developed 'mixed' systems that combine elements of civilian law with common law. See, DM Klerman, PG Mahoney, H Spamann and MI Weinstein, 'Legal Origin or Colonial History?' (2011) 3 *Journal of Legal Analysis* 379, 385.

[28] ML Volcansek, *Comparative Judicial Politics* (Rowman & Littlefield, 2019) 28.

[29] RM Karras, J Kaye and EA Matter, 'Preface' in RM Karras, J Kaye and EA Matter (eds), *Law and the Illicit in Medieval Europe* (University of Pennsylvania Press, 2008) xi.

[30] *Ibid*.

[31] C Chu, 'Legal Bilingualism in Medieval Europe and Hong Kong' (2024) 54 HKLJ 587, 588–589.

[32] AG Chloros, 'Common Law, Civil Law and Socialist Law: Three Leading Systems of the World, Three Kinds of Legal Thought' (1978) 9 *Cambrian Law Review* 11, 15.

[33] D Ibbetson, 'Introduction' in C Humfress, D Ibbetson and P Olivelle (eds), *The Cambridge Comparative History of Ancient Law* (Cambridge University Press, 2024) 1, 19.

interpretation was as welcome to the old feudal kingdoms as to the new 'Westphalian states' that were striving to recover from the traumatic Thirty Years War (1618–1648) and keen on 'unifying their territories and limiting the power of local lords and judges'.[34]

1.009 Civilian jurists aspire to 'scientific rigour' comparable to that of the natural sciences. In the course of expounding the civilian legacy, European jurists conceived the law as an abstract, sophisticated body of precepts entwined with the study of logic and philosophy.[35] Lawyers on the Continent think of the civilian law as 'clear, unambiguous, homogenous, and knowable', superior to the 'plurality of laws' and 'infinite number of ways in which they could be interpreted' that were deemed to typify law before 'the age of the great nineteenth-century codes'.[36] '[C]ompelled by the peculiar history and the rationalist dogmas of the French Revolution', they adopted 'a systematic, hierarchical theory' of sources of law, which in a 'very technical' manner recognises only statutes, regulations and custom as law in descending order of authority. 'A statute prevails over a contrary resolution'; 'a statute and a regulation prevail over an inconsistent custom' and 'the importance of custom as a source of law is slight and decreasing'.[37]

1.010 The nineteenth century featured ambitious programmes of codification in civilian law countries, which hardly touched England and Wales. The trend towards codification was 'a signal part' of the European Enlightenment, which was driven by a desire to clarify and rationalise the law within a legal system that is 'simple and manageable'.[38] France went so far as to decree that from the moment its new code entered into effect, every other source of law, even Roman and customary laws, would cease to exist concerning all matters covered by the new code.[39] It has been argued that sweeping codifications reflected 'massive intervention by the state authorities in framing the relationships between [legal] persons' so as 'to impose the monopoly of state legislation'.[40]

1.011 The civilian tradition, like its common law counterpart, spread to all corners of the world via colonialism and conquest. The study of Roman law and its refinement culminated in the magisterial codification, which was the Napoleonic Code of 1804.[41] It was carried across the Continent by Napoleon's invasions into Belgium, Italy, Luxembourg, the Low Countries and Rhenish provinces and Poland, and its influence was felt in Portugal, Spain and some cantons of Switzerland as well.[42] In the ensuing era of imperialist expansion, France disseminated her legal influence to the

[34] F Pirie, *The Rule of Laws: A 4,000-Year Quest to Order the World* (Basic Books, 2021) 335.

[35] R Zimmermann, 'Roman Law in the Modern World' in D Johnston (ed), *The Cambridge Companion to Roman Law* (Cambridge University Press, 2015) 452, 458–459.

[36] M Bellomo, *The Common Legal Past of Europe 1000–1800* (The Catholic University of America Press, 2nd ed, 1995) 29.

[37] JH Merryman and R Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 4th ed, 2019) 24–26.

[38] PJ du Plessis, *Borkowski's Textbook on Roman Law* (Oxford University Press, 6th ed, 2020) 379.

[39] A Padoa-Schioppa, *A History of Law in Europe: From the Early Middle Ages to the Twentieth Century* (Cambridge University Press, 2017) 477.

[40] JL Halpérin, 'The Age of Codification and Legal Modernization' in H Pihlajamäki, MD Dubber and M Godfrey (eds), *The Oxford Handbook of European Legal History* (Oxford University Press, 2018) 907, 912.

[41] C Anderson, *Roman Law* (Dundee University Press, 2009) 115.

[42] R La Porta, F Lopez-de-Silanes and A Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46 *Journal of Economic Literature* 285, 289–291.

New East, to North and sub-Saharan Africa, Indochina, Oceania and the French Caribbean Islands. The Russian Empire adopted and modified the French Civil Code as its own. The German Empire, building on Roman and French models, enacted the German Commercial Code in 1897, the influence of which radiated to Austria, China, Czechoslovakia, Greece, Hungary, Italy, Japan, Korea, Switzerland, Yugoslavia and certain constituent states of the former Soviet Union.

1.012 Case law is not a formal source of law in the civilian tradition. A 'code jurisdiction'[43] like Italy made such a strict separation of legislative and judicial powers as to justify rejection of court decisions as a source of law, for to recognise the doctrine of binding precedent would make legislators of judges. 'Lawmaking is one thing; interpretation and application of laws are quite another'.[44] The civilian tradition conceives the judges as career civil servants, not jurists in their own right, recognised for professional achievement. The 'career judiciary' in the typical civilian jurisdiction is a system in which judges make their entire careers, joining at a young age, even right out of law school; whereas in a 'recognition judiciary', judges are appointed to the bench later in life in recognition of independent careers in private or government practice.[45] Civilian jurisdictions typically erect judicial training institutes to indoctrinate fresh graduates who have elected to make a career in the judiciary. This reinforces the unique identity of judges as a civil service of their own. Common law jurisdictions do not have judicial training as such; thus, appointment to superior courts is not predicated on previous experience on inferior courts. John Henry Merryman and Rogelio Perez-Perdomo remarked on the popular image of judges in the civilian law world as that of 'operators of a machine designed and built by legislators', rather than that of 'cultural heroes or parental figures'.[46]

1.013 The inquisitorial model of litigation is predominant in the civilian tradition. This model originated in ancient Rome, was developed in medieval ecclesiastical courts and spread across Europe under the influence of canon law of the Catholic Church and of the rise of the modern state in the sixteenth century.[47] The objective of the inquisitorial trial is for the court to 'find out the truth about the facts of the case' through proactive investigation of evidence not limited to that adduced by the parties to the case.[48] The inquisitorial judge becomes 'an active participant in the preparation for trials', and he[49] 'may determine that further information will be required to resolve the dispute'.[50] Despite susceptibility to 'notorious abuses', the inquisitorial

[43] MA Livingston, PG Monateri and F Parisi, *The Italian Legal System: An Introduction* (Stanford University Press, 2nd ed, 2015) 192.

[44] *Ibid.*, 180.

[45] N Garoupa and T Ginsburg, 'Hybrid Judicial Career Structures: Reputation versus Legal Tradition' (2011) 3 *Journal of Legal Analysis* 411, 411–413.

[46] JH Merryman and R Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 4th ed, 2019) 36.

[47] *Ibid.*, 149.

[48] AHY Chen, *The Changing Legal Orders in Hong Kong and Mainland China* (City University of Hong Kong Press, 2021) 253.

[49] Interpretation and General Clauses Ordinance (Cap.1), s.7(1): 'Words and expressions importing the masculine gender include the feminine and neuter genders'.

[50] J Herring, *Legal Ethics* (Oxford University Press, 3rd ed, 2023) 317.

system did aspire to an ideal of justice as administered in accordance with professional learning and the common good.[51] In fact, the Romano-Germanic civilian law tradition received most of its criminal law principles and practices from medieval canon law; examples include concepts of guilt and the principle of *ne bis in idem* ('not twice about the same [crime]'), which prohibits multiple punishments for the same offence.[52]

1.014 The legal system of Macau — a mere 60 kilometres from Hong Kong — is a good illustration of important characteristics of the civilian tradition. Like Hong Kong, Macau is a former Western dependency with a multicultural identity,[53] now a Special Administrative Region of the People's Republic of China located on the northern end of the South China Sea, bordering Guangdong Province.[54] Administered by the Portuguese between the sixteenth and twentieth centuries, it is the only East Asian jurisdiction that was under colonial rule by a Continental European power.[55] Today it is home to the world's largest casinos.[56] The civilian tradition's fingerprints are all over the legal system of Macau,[57] whose legal culture and legislation are 'directly linked' to Germany's, France's, Portugal's and other Lusophone jurisdictions' such as Brazil.[58]

1.015 Consider the meaning of 'law' in Macau. In the legal system of the Macao Special Administrative Region of the People's Republic of China,[59] 'law' is synonymous with 'written legislation' for most purposes. The *Lei Básica de Macau* (Macao Basic Law) of 1993,[60] in art.8, affirms only codified sources of law: the *Lei Básica* itself affirms, 'laws, decrees, administrative regulations and other normative acts'. Nowhere is case law or customary law mentioned. It has been said that art.8 'plainly reflects the

[51] A Cassese and P Gaeta, *Cassese's International Criminal Law* (Oxford University Press, 3rd ed, 2013) 330.

[52] P Landau, 'The Spirit of Canon Law' in A Winroth and JC Wei (eds), *The Cambridge History of Medieval Canon Law* (Cambridge University Press, 2022) 573, 580–581.

[53] See, CA Mendes, 'Macau in China's Relations with the Lusophone World' (2014) 57 *Brazilian Journal of International Politics* 225.

[54] See, AHY Chen and PY Lo, 'The Constitutional Orders of "One Country, Two Systems": A Comparative Study of the Visible and Invisible Bases of Constitutional Review and Proportionality Analysis in the Chinese Special Administrative Regions of Hong Kong and Macau' in R Dixon and A Stone (eds), *The Invisible Constitution in Comparative Perspective* (Cambridge University Press, 2018) 230.

[55] EC Ip, *Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special Administrative Regions* (Cambridge University Press, 2019) 27.

[56] SS Lo, 'Hong Kong' in WA Joseph (ed), *Politics in China: An Introduction* (Oxford University Press, 3rd ed, 2019) 517, 520–521.

[57] IC Ferreira, 'The Macau SAR Legal System — Is the EU Law a Source of Inspiration for Macau Lawmakers?' in JAF Godinho (eds), *Studies on Macau, Civil, Commercial, Constitutional and Criminal Law* (LexisNexis, 2010) 39, 48.

[58] D de Castro Halis, '"Post-Colonial" Legal Interpretation in Macau, China: Between European and Chinese Influences' in S Miyazawa, W Ji, H Fukurai, KW Chan and M Vanhullebusch (eds), *East Asia's Renewed Respect for the Rule of Law in the 21st Century: The Future of Legal and Judicial Landscapes in East Asia* (Brill, 2015) 77.

[59] AJ Moody, *Macau's Languages in Society and Education: Planning in a Multilingual Ecology* (Springer, 2021) 21: 'While both variants [of Macau's name: "Macau" and "Macao"] appear in English words, there may be a slight preference for the *-au* variants as an English spelling … [whereas] the *-ao* spelling is the one and only way to represent diphthong in the [People's Republic of China's] roman transcription system that is used with Putonghua, the pinyin transcription'.

[60] Lei Básica da Região Administrativa Especial de Macau da República Popular da China (Adopted by the 1st Session of the 8th National People's Congress on 31 March 1993).

different fonts of law between the common and civil law legal systems',[60] when compared with its identically numbered counterpart in the Hong Kong Basic Law,[61] which recognises 'the common law, rules of equity, ordinances, subordinate legislation and customary law' as sources of law.

1.016 Consider the codes of Macau. Codes in the civilian tradition are 'comprehensive statements of the law and replace all previous enactments', interpreted '[u]sing general abstract principles' 'according to their logical meaning, not past experience, jurisprudence, or doctrine'.[62] There are currently six major codes: the Civil Code, Civil Procedure Code, Criminal Code, Criminal Procedure Code, Commercial Code and Administrative Procedure Code. They contain abstract general rules and principles whence solutions to concrete cases are to be deduced. Most of the Codes strongly resemble those in force in Portugal, although some, like the Commercial Code, draw on the Italian Civil Code.[63] European Union law, which shares certain 'common values and legal roots' with Macau, has 'proved to be an important source of legal analyses and rationale' to Macau's Legislative Assembly both before and after the resumption of the exercise of Chinese sovereignty.[65] The Civil Code of Macau of 1999, which contains 2,161 clauses,[66] was inspired by the Civil Code of Portugal of 1966, which in turn took as its foundation the highly successful Civil Code of Germany (*Bürgerliches Gesetzbuch*).[67] In arts.2 and 3, respectively, the Code decreed that no custom is legally admissible without approval from legislation, and that no court may judge in accordance with equity unless it is permitted by a provision in legislation. Consequently, court judgments and customary law are relatively unimportant in Macau; neither has the status of a formal source of law. In art.1, the Civil Code of Macau proclaims three principles:

> (1) Legislations are an immediate source of law.
>
> (2) All generic provisions enacted by competent organs of the territory of Macau, and of State organs within the limits of their legislative competence in relation to Macau, shall be considered as legislations.
>
> (3) International agreements applicable in Macau shall prevail over ordinary legislations.

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60 J Buhi, *Global Constitutional Narratives of Autonomous Regions: The Constitutional History of Macau* (Routledge, 2021) 180.

61 See, EC Ip, 'Comparative Constitutional Politics in the Chinese Special Administrative Regions of Hong Kong and Macau' in M De Visser, EH Ballin, G van der Schyff and M Stremler (eds), *European Yearbook of Constitutional Law 2020* (Springer and TMC Asser Press, 2021) 101.

62 T Herzog, *A Short History of European Law: The Last Two and a Half Millennia* (Harvard University Press, 2018) 221.

63 JAF Godinho, *Macau Business Law and Legal System* (LexisNexis, 2007) 10.

64 IC Ferreira, 'The Macau SAR Legal System — Is the EU Law a Source of Inspiration for Macau Lawmakers?' in JAF Godinho (eds), *Studies on Macau, Civil, Commercial, Constitutional and Criminal Law* (LexisNexis, 2010) 39, 66.

65 JAF Godinho and P Cardinal, 'Macau's Court of Final Appeal' in SNM Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014) 608, 609.

66 LA DiMatteo, *International Business Law and the Legal Environment: A Transactional Approach* (Routledge, 2017) 294.

Macau has a system of courts made up of career judges. This refers to judges who are hired at a young age and spend the rest of their legal careers in the judicial bureaucratic hierarchy.[68] A Judicial Council, another civilian law institution, is responsible for overseeing and disciplining judges under the chairmanship of the President of the *Tribunal de Última Instância*.[69] Judges and prosecutors in Macau must undergo a legally required two-year training regimen offered by the Legal and Judicial Training Centre, an autonomous public institution.[70] 1.017

Judges of Macau have no legal obligation to follow rulings issued previously by any court in the judicial hierarchy. Judges tend to consider their decisions as nothing but products of an 'abstract and logical technical process'.[71] That said, Portuguese court decisions are invoked in Macau's courts, the transfer of sovereignty notwithstanding. Also, the *Tribunal de Última Instância* (Court of Final Appeal) may deploy a special procedure, 'fixation of jurisprudence', in certain situations to make the output of the entire legal system uniform on a given issue. Occasionally, the Macau courts may turn for assistance to academic jurists whose writings are collectively known as *doutrina* (doctrine). 1.018

Macau and Hong Kong diverge over their public prosecutors' relation to the executive branch of government. Typical of civilian jurisdictions, and unlike the common law practice of Hong Kong, where the Prosecutions Division of the Department of Justice makes part of the Executive Authorities, the *Ministério Público de Macau* or Office of the Public Prosecutor of Macau, headed by a Procurator General, forms an autonomous part of the judicial branch. 1.019

(c) The common law tradition

Consider next the common law tradition, to which Hong Kong belongs. The term 'common law' is used every day to refer to the case law that judges develop through adjudication. Common law systems typically feature the requirement of oral proceedings, the use of juries, the doctrine of binding precedent and the difficulty for appellate courts to re-establish the facts.[72] For Antonio Padoa-Schioppa, the 'fundamental differences' of the common law tradition from its Romano-Germanic civilian law counterpart include the absence of extensive codification of law, the lack of a clear distinction between public and private laws and between substantive and procedural laws, the eminence of senior judges and the use of the adversarial or accusatorial model of litigation.[73] 1.020

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67 N Garoupa and T Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press, 2015) 43.

68 Macao Yearbook Editorial Committee, *Macao Yearbook 2024* (Government Information Bureau of the Macao Special Administrative Region, 2025) 166–167.

69 Ibid., 173.

70 D de Castro Halis, '"Post-Colonial" Legal Interpretation in Macau, China: Between European and Chinese Influences' in S Miyazawa, W Ji, H Fukurai, KW Chan and M Vanhullebusch (eds), *East Asia's Renewed Respect for the Rule of Law in the 21st Century: The Future of Legal and Judicial Landscapes in East Asia* (Brill, 2015) 68, 78.

71 M Siems, *Comparative Law* (Cambridge University Press, 3rd ed, 2022) 58.

72 A Padoa-Schioppa, *A History of Law in Europe: From the Early Middle Ages to the Twentieth Century* (Cambridge University Press, 2017) 212.

1.021 The common law tradition is more than case law. The common law has been [illegible] stood as the 'unwritten law' derived from the 'set of usages, practices, and [illegible] that have evolved from time immemorial',[74] understood as roughly 1,000 years [illegible] originally in England and then on every inhabited continent.[76] It lays claim to [illegible] prescription, ongoing adaptability, correct principle and reason and conformity [illegible] to society and social consent; it is rational and principled and descended from [illegible] immemorial.[77] There is now considerable diversity in the common law systems sprang directly or [illegible] nowadays widely recognised that, whilst all common law systems sprang directly or [illegible] indirectly from England, the common law is no longer monolithic and may differ from [illegible] one jurisdiction to another.[79] The 'main exception' to the development of the common [illegible] law outside the British Commonwealth is the United States — 'being the only colony [illegible] to have had a less than amicable breach with Great Britain, resulting in a complete [illegible] formal severance of its legal system from that of England'.[80]

1.022 The term 'common law' may mean different things in different contexts. The term is usually employed in three ways (see Table 1).[81] More fundamentally, the common law tradition can be taken as a distinct set of unwritten 'attitudes, methods, procedures, general principles'[82] (or *lex non scripta* in Latin)[83] that originated from '[t]he traditional unwritten law of England based on custom and usage',[84] versus all other legal traditions. In Hong Kong, according to Sir Anthony Mason, formerly Chief Justice of Australia who served as a non-permanent judge of the Court of Final Appeal from 1997 to 2015, the common law 'stands for a set of concepts, interests, and values which it has protected during the course of its long history [which] include the rule of law, judicial independence, access to the courts, the separation of powers, and the liberty of the individual, freedom of expression, freedom of association, no detention or imprisonment without lawful authority and natural justice, to mention but a few of them'.[85] It sees rights, for instance, as inherent in the person, not derived from the Sovereign, and law as an inherent limitation on sovereignty itself.[86]

[74] M Loughlin, *The British Constitution: A Very Short Introduction* (Oxford University Press, 2nd ed, 2023) 19.
[75] DLA Barker, *Law Made Simple* (Routledge, 14th ed, 2020) 5.
[76] S Hall, *Ho & Hall's Hong Kong Contract Law* (LexisNexis, 4th ed, 2017) 50.
[77] BZ Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, 2006) 32.
[78] See, Michael Arnheim, *Anglo-American Law: A Comparison* (Talbot Publishing, 2019).
[79] See, *Kensland Realty Ltd v Tai Tang and Chong* (2008) 11 HKCFAR 237, 295 (McHugh NPJ).
[80] LA DiMatteo and M Hogg, 'Introduction: British and American Perspectives' in LA DiMatteo and M Hogg (eds), *Comparative Contract Law: British and American Perspectives* (Oxford University Press, 2016) 2.
[81] S Gallagher, *Equity and Trusts in Hong Kong: Doctrines, Remedies and Institutions* (Sweet & Maxwell, 2nd ed, 2020) 7.
[82] P Wesley-Smith, 'The Reception of English Law in Hong Kong' (1988) 18 HKLJ 183, 216.
[83] See, MD Walters, 'The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 *The University of Toronto Law Journal* 91.
[84] S Gallagher, *Equity and Trusts in Hong Kong: Doctrines, Remedies and Institutions* (Sweet & Maxwell, 2nd ed, 2020) 771.
[85] A Mason, 'The Role of the Common Law in Hong Kong' in J Young and R Lee (eds), *The Common Law Lecture Series 2005* (University of Hong Kong, 2006), 1.
[86] PC Magalhães, 'Explaining the Constitutionalization of Social Rights: Portuguese Hypotheses and a Cross-National Test' in DJ Galligan and M Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 432, 444.

Table 1 The Common Law in Three Senses

The Common Law System versus the Civilian Law System	A type of legal system originating from English common law as opposed to other types of legal system (eg the French civilian law tradition)
The Common Law as Case Law versus Legislation	Legal principles emanating from judgments delivered by the superior courts of record based on the rules of common law and of equity, as opposed to legislation enacted by the legislature
The Common Law as Law versus Equity	A branch of case law principles known as the 'rules of the common law' or simply 'law', as opposed to another branch of case law principles known as the 'rules of equity'

1.023 The common law tradition embodies the fundamental principles of reason, fairness and the presumption of liberty as respected by the community. These three principles are means by which a constitutional balance is struck between the rule of law and state power.[87] Think of the law as a form of technology, which enables the state to exercise its coercive power without resorting to an excessive and unsustainable degree of arbitrary violence.[88] The rule of law embodies an aspiration to employ this technology in a manner that is both judicious and tolerable.[89] Liberty is the core animating value of common law reason.[90] Without reason or fairness, 'the law would be arbitrary, capricious and unjust'; without the presumption of liberty, 'the power of the state would then be arbitrary, and tyranny is always — nearly always — the consequence of arbitrary power'.[91] This legal tradition is therefore not merely a list of dos and don'ts but a way of life under which '[t]he people's sense of law and justice … precedes the political constitution'.[92] Its paradigmatic source is not the Sovereign's command but the reason of the community; it exalts assent over authority, the community over the state and moral force over material coercion.[93] It is a commonplace that the common law should be 'the surest sanctuary that a man can take, and the strongest fortress to protect the weakest of all',[94] and that judges should 'construe the law as liberally as possible in favour of liberty'.[95] Consider the landmark decision of Lord Mansfield CJ in *Somerset v Stewart*,[96] which abolished slavery at common law in England and Wales four years before the independence of the United States:

[87] J Laws, *The Constitutional Balance* (Hart Publishing, 2021) 66.
[88] AZ Huq, *The Rule of Law: A Very Short Introduction* (Oxford University Press, 2024) 109.
[89] *Ibid.*
[90] M Foran, 'A Great Forgetting: Common Law, Natural Law and the Human Rights Act' in R Johnson and YY Zhu (eds), *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart Publishing, 2023) 77, 83.
[91] J Laws, 'The Rule of Law: The Presumption of Liberty and Justice' (2017) 22 *Judicial Review* 365, 368–369.
[92] DJ Galligan, 'Ally or Enemy, Friend or Foe' in DJ Galligan (ed), *The Courts and the People: Friend or Foe?* (Hart Publishing, 2021) 223, 238.
[93] JR Stoner, *Common-Law Liberty: Rethinking American Constitutionalism* (University Press of Kansas, 2003) 5.
[94] W Penn, *The Excellent Privilege of Liberty and Property: Being a Reprint and Facsmile of the First American Edition of Magna Charta* (The Lawbook Exchange, 2005 [1686]) 64; ML Barr, *Romanticism and the Rule of Law: Coleridge, Blake, and the Autonomous Reader* (Springer, 2021) 3.
[95] *Opinion on The Writ of Habeas Corpus* (1758) Wilmot 77, 121–2 (Sir John Eardley Wilmot CJCP).
[96] (1772) Lofft 1, 98 ER 499, 509.

> The state of slavery is of such a nature, that it is incapable of being now introduced by Courts of Justice upon mere reasoning or inferences from any principles, natural or political; it must take its life from positive law; the origin of which can in no country or age be traced back to any other source: immemorial usage preserves the memory of positive law long after all traces of the occasion, reason, authority and time of its introduction are lost; and in a case so odious as the condition of slaves must be taken strictly, the power claimed by the return was never in use here; no master was ever allowed to take a slave by force to be sold abroad because he had deserted from his service, or for any other reason whatever? We cannot say the cause set forth by the return is allowed or approved by the laws of this Kingdom, therefore the man must be discharged.

1.024 Consider the place of legislation within the common law tradition. The common law 'provides the foundation of law in every jurisdiction in which it applies'.[97] The very rule that statute supersedes inconsistent case law is in itself a rule of common law which, moreover, only emerged in the seventeenth century.[98] Statutes are to be drafted and interpreted consistently with deep-rooted common law principles.[99] There was no general attempt to codify law into sweeping statutory codes. Lord Burrows, Justice of the Supreme Court of the United Kingdom, observed as follows, while still a legal academic:

> Statutes [in the common law tradition] are seen as supplementing or removing the common law but it is the common law that provides the residual gapless law where there is no statute…. This contrasts with civilian systems where a statutory code is seen as providing the basic gapless law.[100]

1.025 'Case law' and 'common law' are not entirely synonymous concepts. The interchangeableness of the terms 'case law' and 'common law' is largely due to the high-profile activity of courts in common law systems to declare and modify the meaning of the common law and of statutes through case law.[101] Sir William Blackstone, a former Justice of the Court of King's Bench and the first Vinerian Professor of English Law at the University of Oxford, in his seminal *Commentaries on the Laws of England*, wrote that 'the [common] law, and the opinion of the judge, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law'.[102] '[T]he decisions of courts of justice' are not the common law itself but, more accurately, 'the evidence of what is common law'.[103] Indeed, if all judicial

[97] S Hall, *Foundations of International Law* (LexisNexis, 3rd ed, 2016) 180.
[98] See, E Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Hart Publishing, 2006).
[99] TRS Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1995) 115 *Law Quarterly Review* 221, 241–242.
[100] A Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018) 45.
[101] M Elliott and R Thomas, *Public Law* (Oxford University Press, 5th ed, 2024) 15.
[102] W Blackstone, *Commentaries on the Laws of England Volume 1* (Clarendon Press, 1765) 71.
[103] *Ibid*. Judges are obligated to apply common law principles in the unpredictable and complex conditions of daily life. However, judges, in all sincerity, may issue contrasting, even contradictory, decisions on the same matter.

> opinions were identical to the common law itself, then the common law would easily become internally inconsistent, as two incoherent judgments would become equally valid law at the same time.[104] The common law is not just 'judge-made law', but it is that body of a community's customary practices which the courts recognise as furnishing norms for the resolution of legal disputes, supplemented where necessary by a process of practical reasoning drawing heavily on analogy and universally recognised general principles of law'.[105] This process has built the legal cornerstones of modern society, including tort law, which protects against personal injury; property law, which defines ownership; contract law, which supports trade; commercial law, which aids complex business deals; and criminal law, which punishes harmful actions.[106]

1.026 Consider the distinct emphases of the common law method. Case law, originally developed by royal judges in England, embodies the rules of the common law and equity. In *R v Bembridge*,[107] the great jurist Lord Mansfield CJ likewise opined: 'The law does not consist of particular cases but of general principles, which are illustrated and explained by these cases'. Contrary to the civilian law tradition, judicial reasoning in a common law jurisdiction is said to take a 'bottom up'[108] or 'democratic' approach, under which judges begin with 'generally acknowledged actual instances of the thing referred to'[109] and deliver decisions that emerge from legal arguments 'tested openly in a participatory process'.[110] Legal principles are ascertained, clarified and developed through the medium of cumulative case law precedents and traditions that should never be uncritically received by judges. The common law method has four main emphases:

(1) Evolution — rules of the common law evolve through the doctrine of precedent.

(2) Experiment — working hypotheses discarded if they are not robust.

(3) History — emphasis on continuity with the past.

(4) Distillation — the modification and adjustment of the common law to meet new conditions.[111]

1.027 Through these four emphases, the common law continues to self-correct itself, digesting societal change and adapting its principles accordingly.[112] This legal tradition has 'deep historical dimensions and is not the product of a conscious revolutionary attempt

[104] B Zamulinski, 'Rehabilitating the Declaratory Theory of the Common Law' (2014) 2 *Journal of Law and Court* 171, 179.
[105] S Hall, *Foundations of International Law* (LexisNexis, 3rd ed, 2016) 180.
[106] J Hasnas, *Common Law Liberalism: A New Theory of the Libertarian Society* (Oxford University Press, 2024) 268.
[107] (1783) 3 Doug KB 327, 332.
[108] P Darbyshire, *Darbyshire on the English Legal System* (Sweet & Maxwell, 13th ed, 2020) 15.
[109] AJ Connolly, 'Philosophical and Judicial Thinking about Moral Concepts: Cane's Critique of Philosophical Method 20 Years On' in J Goudkamp, M Lunney and L McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Hart Publishing, 2022) 305, 320.
[110] M McConville and L Marsh, *The Myth of Judicial Independence* (Oxford University Press, 2020) 179.
[111] J Laws, *The Constitutional Balance* (Hart Publishing, 2021) 58.
[112] *Ibid*, 65.

to make or to restate the applicable law at a moment in history'.[113] It is 'not a museum of antiquities, but a living and active law'.[114] It adapts itself to changes of society, yet always within limits and without obliterating the past.[115] The common law 'is not and cannot be the creature of a single moment'; it 'reflects and moderates the temper of the people as age succeeds age'; it 'builds on the experience of ordinary struggles' and it 'stands for no grand theory of anything, but it is endlessly creative'.[116] Concretely put, the common law doctrine of precedent enables us to keep the law up to date while maintaining an appropriate measure of certainty and continuity.[117]

1.028 Adversarial or accusatorial trial at common law entails the adversaries to the case to confront each other with witnesses, evidence and arguments, laid largely unaided before a passive judge-umpire. The adversarial model had origins in ancient Greece and Rome, and came of age in England. It conceptualises litigation as 'a contest between the parties (whether prosecutor and accused or plaintiff and defendant), who themselves or through their lawyers provide to the court the evidence that supports their case and define the legal issues to be argued before the court. The court's function is no more than that of an umpire for the purpose of deciding which side wins and which side loses in the case'.[118] There is moreover a strong assumption in adversarial or accusatorial litigation that 'providing live oral evidence is the best way of arriving at the fact'.[119] In *Jones v National Coal Board*,[120] Denning LJ expounded the key characteristics and underlying rationale of adversarial proceedings:

> In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries … If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal'

1.029 The quality of a legal system that prioritises the adversarial model of litigation thus depends not just on the quality of trial judges but also on the integrity and ability of counsel who are expected to present their cases fearlessly and independently before the courts.[121] In *Re Simpson QC*,[122] the Court of First Instance (Poon ACJHC) noticed:

> In our adversarial system, our courts rely on the Bar's independence in presenting the case and advancing arguments with impartiality and honesty, and with

[113] JH Merryman and R Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 4th ed, 2019) 26.
[114] F Pollock, *The Genius of the Common Law* (Columbia University Press, 1912) 110.
[115] DA Strauss, *The Living Constitution* (Oxford University Press, 2010) 3.
[116] J Laws, *The Common Law Constitution* (Cambridge University Press, 2014) xv.
[117] K Bokhary, *The Constitutional Crocodile* (Sweet & Maxwell, 2021) 47.
[118] AHY Chen, *The Changing Legal Orders in Hong Kong and Mainland China* (City University of Hong Kong Press, 2021) 254.
[119] A Gillespie and S Weare, *The English Legal System* (Oxford University Press, 8th ed, 2021) 16.
[120] [1957] 2 QB 55, 63–65.
[121] M McConville and L Marsh, *The Myth of Judicial Independence* (Oxford University Press, 2020) 178.
[122] [2019] 5 HKLRD 441, 450.

> force and vigour. Our judges act in the confidence that when barristers press a point, especially a difficult or novel one, they are guided by the best tradition of the Bar to act professionally, fairly and impartially; and that while fighting for their clients' best interests, they would not sacrifice their professionalism and impartiality. It enables the courts to arrive at a decision on facts or ascertain the applicable legal principles or even develop the law with the best assistance from counsel offered impartially without fear, favour, prejudice or bias. This is crucial to the court's process of developing the common law.

(d) The socialist legal tradition

1.030 Consider the ideological underpinnings of the socialist legal tradition. Marxism, a body of economic, social and political thought that derives from the German philosophers Karl Marx and Friedrich Engels, teaches that the state, including its legal system, will eventually 'wither away' after capitalism and class differences have been eliminated by Communist revolution.[123] Marxist legal theory primarily sought to critique the rule of law, the cornerstone of liberal political philosophy, conventionally understood.[124] Socialist law, rooted in Marxism-Leninism, a sharpening of Marxism by the Russian revolutionary Vladimir Lenin, who was instrumental in establishing the Soviet Union, conceives the 'socialist state' erected by the Revolution as a mere stage transitional to Communism.[125] It is concretised in a codified constitution and suitable legislation that consolidates the Communist Party's 'vanguard role' in a system of 'democratic centralism'.[126] The pervasive influence of a Marxist-Leninist party across state, society, and economy enables it to enforce its security policies through strategic appointments, promotions, and incentives in major enterprises and social institutions, including universities.[127]

1.031 The first socialist legal system arose in 1917 with the Russian Soviet Federative Socialist Republic, whence it spread to all the Soviet Socialist Republics that constituted the Soviet Union and then to other socialist states that were to make up the 'Communist Bloc'; *viz*, Albania, Bulgaria, China, Cuba, Czechoslovakia, East Germany, Hungary, North Korea, Poland, Rumania, Vietnam and Yugoslavia.[128] According to Pēteris Stučka, the founding Chairman of the Supreme Court of Soviet Russia, the 'determinative element' of socialist law is 'the interest of the ruling class', namely, the working class, and the typical socialist legal system is 'supported and safeguarded against violation by the organization of the dominant class, ie by the state'.[129]

[123] SE Barkan, *Law and Society: An Introduction* (Routledge, 2009) 68; see, G Fischer, '… The State Begins to Wither Away …': Notes on the Interpretation of the Paris Commune by Bakunin, Marx, Engels and Lenin' (1979) 25 *Australian Journal of Politics & History* 29.
[124] S Wang, *Law as an Instrument: Sources of Chinese Law for Authoritarian Legality* (Cambridge University Press, 2023) 170.
[125] NS Boi, *Constitutional Change in the Contemporary Socialist World* (Oxford University Press, 2020) 66–67.
[126] *Ibid.*
[127] M Pei, *The Sentinel State: Surveillance and the Survival of Dictatorship in China* (Harvard University Press, 2024) 19.
[128] NS Boi, *Constitutional Change in the Contemporary Socialist World* (Oxford University Press, 2020) 66–67.
[129] P Stučka, *Selected Writings on Soviet Law and Marxism* (ME Sharpe, 1988) 27.