LAW: What are we talking about?
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1. LAW: AN INTRODUCTION TO ESSENTIAL CONCEPTS

"Law is order; Good law is order'; Aristotle (350 B.C.)

"Better a diamond with a flaw then a pebble without it"; Confucius (500 B.C.)

1.1 What is law?

Consider the following statements:

- "A body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects" (Oxford Dictionary)

- On jury trial:
  "A jury consists of twelve persons chosen to decide who has the better lawyers" (R. Frost)

- Human Rights: globally applicable principles "above" all other law granting to all humans "second citizenship" (K. Annan)

- Sports- and other self imposed organic rules (e.g. Charter & Bylaws of a Corporation) are also law

- Codes of Conduct on corporate governance are "soft law"

- Laws grew out or accepted (religious, ethical and tribal) custom (whether or not codified); custom continues to be an independent source of law both nationally and internationally

- Justice: is "good order" or "properly ordering"; arguably "good laws" are also (but not merely) driven by justice (as defined by the relevant community)

In summary: laws are rules of behaviour adopted by communities and enforced by them; the quality of the legal system is in Western tradition seen as paramount to the success of a community. But law can not be understood without cultural, historical or even anthropological context.

- Consider e.g. mixed systems (some of which are based on Dutch "common law"), old customary law (e.g. Scotland and Scandinavia), Marxist law (which promulgated "Western" rules but subjected them to policy). China increasingly codifies "the Western way" without abandoning the supremacy of the Party and Islamic law continues to apply in certain countries, mostly in respect of family law. Hindu law has a very old history but now only applies as codified to Hindus in family related matters. In Africa tribal custom continues to play in a great role in personal matters.

1.2 How did law come about

- Most law (but possibly not Chinese law) started as "revelation" i.e. with a theocratic or "cosmic" source as explained by prophets, God-kings, sacred texts or wise men;

- Secular law is law now sourced to the "sovereignty held by the people" rather then a deputee of the deity (whether pope, priest, prophet, king or emperor); secular law refers a "man made" process (whether or not democratic) rather then a religious one;

- Today religious law is mostly limited in scope to personal and family matters (including in Islamic countries) or abrogated;

- In Western thought the "duty" or "conscience" or "tribal obligation" as source of "organisational power" was replaced by "the law";

- Constitutions purport to organise political power and most importantly limit its exercise by providing citizens with "unalienable" rights; human rights in essence do the same by "curbing" the rights of sovereigns in respect of all humans (including their own subjects); the "raison d'état" (the right of sovereign to do as he pleases in the interest of all), is limited by those rights.

- Unitary, federal and confederal statehood in substance means that there are

    - a single authority, or
    - several authorities but with federal primacy, only the federation being sovereign, or
    - several authorities (without federal primacy) "conceding" power to a central authority; all have sovereignty at least in certain respects.

P.S. (i): the EU is "new" concept; it combines unitary, federal and confederal features giving rise to the concept of "post-sovereignty"; its "constituencies" (those appointing political agents) are states, citizens and (and to limited extent) regions.

(ii) the UK is also a special case: it has no written constitution, 4 legal systems and regional parliaments and a UK Parliament which can decide everything (except as limited by the European Treaties).

1.3 Arguably only two encompassing systems remain in the world: common law and civil law

- Civil law is based on codification (533 A. D., the Codex Justinianus, emperor of Byzantium) of Rome legal practise over at least 700 years; the Codex was "rediscovered" in Bologna (in the 11th century) and spread through continental Europe; it was "exported" in part through colonisation (in parts of Africa and the Americas) and by voluntary adoption in much of Asia and the Middle East (e.g. Japan, Russia, China). There are two major versions: the French and the German. When voluntary adoption took place the German version prevailed in Asia; with the end of sovietisation new EU Members countries reverted to their old "continental" tradition and modernized of course with the adoption of the "acquis communautaire" (see below).

- Common law was born of Saxon and Norman law and custom (starting at the same time as the 11th century rediscovery of Roman law) and developed by judges and barristers, mostly in London. It is a law developed by "legal experts". It was exported solely through colonization and exists only in English (except for some Latin and dead French).

- The historical difference between the two systems is that (i) under common law the judge "lays down the law" subject to following "precedent" set by a higher court (and ultimately the House of Lords) and (ii) under civil law the law is "laid down" in a code, i.e. a consistent and detailed set of rules purporting to settle all disputes, the judge being "merely" a fact finder and a professional "civil servant" controlling the proceedings and "administering" the law. To a civil lawyer, creating law is a power reserved for parliament.

- Accordingly common law tends to be casuistic, incremental, at times chaotic and "difficult to find" but very pragmatic and flexible; civil law stresses structure, system and coherence…..but is also less adaptable.

I have attached a conceptual analysis of the difference between the systems with an "excursion" into US law.

1.4 The reality of today's law making

Most new law today, even in common law countries, is "statutory" or "codified" law (e.g. securities laws, corporate law…). Reportedly 80% of all business law in the EU is EU law (or law mandated by it). Any new EU member must adopt "lock, stock and barrel" the "acquis communautaire" i.e. the common body of law and regulations applicable throughout the EU.

Today, in England (Scotland having a separate system, a continental system which evolved from Roman law) and the UK most law is now enacted by Parliament, as on the continent, and much of it is of similar nature.

While for historical reasons judges in the UK have much more prestige (and are better paid), in respect of most matters pertaining to business law, their role is now also to "administer the law" rather then "finding" it. Although "the rule of precedent", does not apply on the continent, the reality is of course that especially higher court rulings carry great weight. If e.g. a supreme court has ruled decisively on a principle, a lower count disagreeing on the subject is very likely to reversed in appeal. Lawyers will thus of course study previous cases very carefully and avail themselves of them.

This development is furthered by the ever greater reach of the law and accordingly the complexity which the law is supposed to have anticipated when codified, often an illusory objective. The reality is that also civil law judges are increasingly called upon the supplement, "liberally interpret" or even bend legal rules which did not or do not anymore "serve justice". Further in most countries counts must test new law against higher norms, notably EU law, the European Convention on Human Rights and national constitution. Notably, discrimination is an important tool for courts to squash national legislation. Needless to say, judgments of European Courts and even of other national courts are relied upon, especially if the codified law is the same or similar (e.g. corporate law or VAT). It is very common now to seek "authoritative precedent" with another legal system then one's own.

The above is not surprising. It only mirrors what happens in the US where corporate, banking, insurance, environmental divorce and contract law are state law, which means that there are 50 systems in place. There also precedent is sought in other state jurisdictions.

By necessity, since virgin ground was broken, European law (e.g. in respect of Antitrust), had to be formulated in terms of "principle" (broad or vague if you prefer) which accorded much room to European courts to develop legal interpretation ("de facto laying down the law") not unlike under common law. To some extent "common law attitudes" migrated to the civil law systems.

Of course human and societal needs are largely comparable at least in the developed world and legal systems often address them with similar results but through different legal avenues. An example is the protection of minors. Under common law a trustee is appointed who becomes the owner-in-trust of the minor's property and who must act exclusively in the interest of the minor. Under civil law the minor continues to own the property but only his "guardian" can administer it or sell it under the control of ultimately the court.

I do emphatically deny that different legal "families" have little bearing on the matter. They do. My only purpose is to show that under different legal systems often (but certainly not always) the "road to be travelled" is different but the "arrival point" is comparable.

1.5 International Law

Given the huge body of international law applicable in most of the world, quite arguably all countries in the world have become "post-sovereign", if not technically (as discussed below) at least in reality.

With the end, at least in the West, of theocracy (which supported an "overriding" set of "revealed" rules creating a community of believers, also entitled to (often illusory) protection from their ruler), the basic concept in international law was sovereignty.

Sovereignty initially meant that the ruler could do whatever he pleased him or her (the "raison d'état") and that other sovereigns should abstain from intervening, even e.g. in case the sovereign massmurdered his own citizens. The only exception was "just war", whatever that may mean.

Sovereignty, domestically, was increasingly curbed by "liberties" and ultimately by constitutions…. until through the process of democratisation sovereignty was transferred from the ruler (who usually claimed divine descendance or approval) to the people. Rather then "subjects" people then became "citizens" 'i.e. the collective holders of sovereignty. The idea is not new as the Greek and Roman republics did evidence; it took the end of theocracy to make it work in modern times …occasionally.

Of course the essence of the above is only made true in reality if the law is administered by a non-politicized executive and most importantly enforced by independent courts (also against the State).

Relations between sovereigns were and still are ruled by Treaty, i.e. a contract between sovereigns "Pacta sunt servanda" is the operative rule, i.e. as long as a Treaty has not been terminated (which any sovereign can do), its content must be respected. Treaties in order to be valid must be approved by the authority that has ultimate say about those matters in each of the sovereign countries which is a party to the treaty (usually parliament).

The enormous legal revolution since the Second World War is that now clearly under International Law sovereigns are now also deemed to be subject to rules in their dealings with each other as well as with respect to their own citizens, even in the absence of treaties. In short human rights limit the "raison d'état", the idea that sovereigns are not subject to the same ethical rules as citizens and that there are limits to sacrificing individual rights on the altar of the collective good.

This purports to limit the rights of sovereigns in respect of at least certain dealings with all humans, whether or not citizens. Notably UN resolutions have stated the obligation of other sovereigns to intervene where e.g. genocide is conducted (hence the UN peace missions).

Technically all treaty obligation (including those incurred through UN Treaties), do not grant rights to individual citizens, who can not enforce their rights through an independent court system (which does not exist). Attempts to do so through national court systems (e.g. in Belgium) have proved impracticable. In substance (with exceptions) e.g. Belgian courts have only jurisdiction if the event happened in Belgium or if a Belgian citizen was involved.

There are two major exceptions to the above.

The first exception is Europe and the EU, as discussed below.

The second is the International Criminal Court established in the Hague under the Rome Treaty, pursuant to which "an independent international court" was established in order to prosecute and punish" crimes against humanity. In substance all Treaty countries have agreed to help investigating and to extradite persons allegedly involved in such crimes, even if none of their citizens had any involvement. The Treaty also permits tracking money extorted of bribes obtained by e.g. dictators who used to find asylum with "friendly" regimes.

It will not surprise you that universal human rights are just "in the starting blocks" as far as actual enforcement goes, in large parts of the world.
But this is a "global revolution" affecting all and in particular multinational business, as discussed below.

1.6 Treaty law relevant to the conduct of Business

There are literally tens of thousands of treaties, bilateral and multilateral, which "network" sovereigns on a global basis. Let me just list a few organisations:

- the UN
- UNESCO
- the International Labour Organisation (ILO)
- the WTO
- the OECD
- the EBRD
- the IMF
- the WHO

International Treaties pertain e.g. to the following business subjects

- social and economic rights
- environmental issues
- trade
- transportation
- taxation
- intellectual property
- labour law
- corporate law
- access to justice
- travel
- privacy
- health

It is accordingly disingenuous to pretend that the "absolute and heroic defence of constitutional sovereignty" of any nation is anything else then an exercise in futility and irrelevance. As an example, the UK can withdraw from the EU (or any other treaty) at any time. It is doubtfull it would survive such withdrawal economically or politically.

We shall address below how regulating by treaty is increasingly cumbersome, slow and inefficient.

2. THE ESSENTIALS OF EU LAW

First consider this English quote

"… [EU] law now reaches into almost every aspect of law, both public and private… [Understanding] …. the fundamentals […] are essential for every [English] working lawyer". (Fairhurst, Law of the European Union, p.1)

2.1 "Never war again"?

While the official agenda of the EU is "integration", the political purpose ("an ever closer union") was to create interdependence at a level of "intimacy", which would make another (European) war inconceivable. There is constant debate between those who wish to limit the scope of integration to economic policy and those who seek wider, especially political aims (e.g. defence and foreign policy).

To the generation of my parents (and even mine) notably the close alliance between the archenemies of the past which France and Germany were, is nothing but a political miracle.

Still, looking from the outside, say Africa or Asia, it must seem paradoxical that the part of the world which invented fascism, marxism, colonisation, religious warfare, racism, genocide… at a scale beyond belief, would now be exporting (see below) a model of peaceful integration and cooperation to the rest of the world. Some have stated that rather then "a place" Europe today is an idea, a model of "multilateralism and integration combined".

2.2 How does EU law come about?

2.2.1 Some essential and "different" features

The EU is in many ways a "new legal animal" and accordingly EU law is breaking new ground. Let me summarize some of these features:

- the EU is a voluntary union of sovereigns who abandoned part of their sovereignty as provided by treaty;
- power is shared between states (acting through the Counsel of Ministers) and the people (represented in the European Parliament), with the power gradually shifting from one to the other;
- the EU has an "executive"), called the European Commission;
- the European Court has the final say about interpreting EU law (but not on other matters as the US Supreme Court);
- the EU provides enforceable civil, political, social and economic rights to all EU citizens alike (directly or indirectly);
- and the EU i.e. capable of enforcing obligations through the courts on all Member States, i.e. making member state sovereigns behave in accordance with their undertakings; this is unique!

In all those respects the EU is an "institutional" response to the "globalisation mismatch", the realisation that the "networked" and "raplex" global community needs more then treaties in order to govern itself properly.

It is essential that, in certain respects (e.g. monetary union and immigration) the EU allows for "twin tracking" (géométrie variable" in French) permitting the member states who wish to integrate more quickly, to do so (thereby setting precedent and elaborating proper systems).

Perhaps it is useful to distinguish between treaties, negotiated by diplomats, EU directives, negotiated by (elected) Ministers and approved by (European wide) elected members of the European Parliament, the E.P.), and the EU's executive (nominated by national governments but to be approved by the E.P.) which acts through regulation, individual decision and recommendations within the confines established by the Council and the E.P.

The Commission is also in charge of enforcing EU Law in respect of member states, corporations and citizens, if necessary through the European Court. Most EU law however is enforced by courts of Member States; EU law is (also) the law of every Member State.

The criticism about "the democratic deficit" of the EU is largely false given the fact that (i) the Council consists of nationally elected politicians and (ii) the E.P. is gradually obtaining more say in the legal process and on the Commission (including the power to budget and to remove its members, which it threatened to do so once, whereupon the Commission resigned).
Although the Treaty does not specifically state this, EU law takes precedence over national law (provided it stays within the bounds assigned to it), which principle has been accepted and confirmed by national courts, including the House of Lords (which acts as the supreme British court).

2.2.2 Direct effect

In substance EU law requires national law makers to adapt national law to the EU directives, in short to integrate EU law into say French law. This begs the following question: what happens if a country fails do to so?

Without attempting to explain the differences between regulations, council and commission directives and the like, in general "enforcement" of EU law is achieved in a variety of ways: (i) either by making the rule directly applicable to all (including corporations and individuals) at which point it is suitable for enforcement by any court or (ii) by providing for a member state failing to act as required, to pay damages caused by that failing to citizens and corporations of (ii) by providing for the Court to condemn the member state failing to act (and to make it pay up politically and financially).

2.2.3 Basic principles of EU law

The essential "modus operandi" of EU law may summarized as follows:

- the principle of certainty refers to clarity and non-retroactivity of rule making;
- the principle of equality between all EU citizens (which includes "corporate" citizens) and prohibitions of discrimination on any grounds, including of course national citizenship;
- the principle of natural justice in respect of e.g. the right to a fair hearing, the right to counsel…
- the principle of proportionality requiring that the measure imposed may not reach beyond the goals for which it is enacted;
- the principle of subsidiarity requiring that decisions should be made at the lowest effective level (e.g. at Member State level)

In addition to the EU treaties, the European Court, acknowledged that sources of EU law include the European Convention on Human Rights (which joins many non-EU states), the (EU) Charter of Fundamental Rights (Nice, 2000) which overlaps in part with the Convention and the constitutional traditions of the Member States (including the English "unwritten" constitution).

2.2.4 Brief summary of EU law content affecting business conduct

The body of EU law is huge and affects practically every aspect of "doing business in Europe".

The essentials include the following, in very broad terms which of course can not include but "hints" in respect of the limitations on those rights (as transitional arrangements in respect of new Member States):

(i) EU citizenship is granted to all citizens of Member States, which includes the right to move, work and reside to or in all of the EU without being discriminated on account of nationality; e.g. an EU citizen must not be charged higher fees for attending university in Belgium then a Belgian and must be granted the same social assistance. This is also the reason why, where entry from an EU country is subject to security policies as for the UK and Ireland and in respect of all air travel, there is a single "line" for nationals and EU citizens alike.

(ii) Free movement of workers permits EU citizens to take-up employment anywhere in the EU and prohibits discrimination on account of national origin. This e.g. includes full access to the national social security system and these rights extend to spouses and dependents who are not EU citizens. Of course, member states which require their nationals to obtain identity cards may require EU citizens to obtain residence permits (registration) but must issue same upon verification of EU citizenship.

(iii) The above also includes equal access to employment, housing, education and social rights (with a major "public service" exception). For example France was condemned for not extending large family train fare reductions to an Italian citizen. Training (including free training when available to nationals) can not be restricted for EU citizens.

(iv) In broad terms (and subject to restrictions) EU citizens (whether individuals or corporations) are free to establish anywhere in the EU themselves as self-employed persons, including by way of branches or subsidiaries. Limitations or restrictions may be imposed by Member States on account of public policy, security of health. However the Court will test very seriously whether the restriction is really needed or merely consist of an indirect discrimination against non-nationals. E.g. an Italian prohibition on betting on sports (which competed with the state monopoly) was held to be illegal. A Dutchman gained access to a Belgian bar, which was reserved for Belgians until then. Belgium was also condemned for making life insurance premiums deductible only if paid to a Belgian insurer. The "mutual recognition of diplomas" paved the way for freedom of establishment of the traditional regulated professions (law, accountancy, banking etc.). A special directive was adopted for lawyers who may establish under their home title in another Member State and must be given a "fast track" to requalification in the home state. Another case pertained to a Belgian football coach whom a French association tried to prevent to train a French team.

(v) The services Directives purports to "free" the market for services by facilitating cross border services and setting up cross border presence, by way of branching or subsidiaries. The Directives list a large number of restrictions (purportedly protecting consumers of those services), which will become illegal (on account of being protectionist in reality). Obviously when establishing in a cross-border fashion, local law (like labour law) must be observed. The Directives list a large number of exceptions to the freeing of the market for services, in essence in order not to thwart the socio-economic functions of the Member State (or the Region) in respect of health, security and the like.

(vi) Given the enormous differences between member state social security (especially pension) rights, it is important to ensure that "migrant" workers may "take with them" their entitlements built up in different EU jurisdictions, which is the purpose of art. 42 of the E. C. Treaty.

(vii) Under the Schengen Agreement (which includes almost all EU continental Member States and some non EU members like Switzerland) controls over individuals at the land frontiers are eliminated. The UK and Ireland have not acceded to this Agreement.

(viii) As in the US, the "federalising authority" of the EU was for a long time mostly based on the aim of achieving an "internal market" i.e. full economic integration of the EU including the abolition of internal border charges and fiscal barriers of "charges with an equivalent effect" (i.e. indirect facilitation of domestic endeavours or protectionism). The field is huge but the following examples may be instructive.

France claimed that its taxation of cars (fiscal horsepower) was not discriminatory. The very complex system was designed to ensure that no French cars would be subject to the highest tax rate ensuring French manufacturers a competitive advantage over (mostly German) competitors. The system was struck down (and not just once), as being incompatible with EU law. Similarly a "Buy Irish" campaign (subsidised by the Irish government) was struck down. The UK was condemned for preventing the import from Germany of "inflatable dolls" on the basis of obscenity…since UK manufactured alternatives were quite available. German "purity laws" for beer were struck down as incompatible. The UK tried unsuccessfully to keep French Christmas Turkeys from competing with locals for the 1981 season….. Protectionist measures vary from the obscene to the ridiculous.

While patent rights are protected, territorial subdivisions of the EU by the patentor are not. Once patented goods are "in circulation" exclusive distributor and licensing rights are not permitted to contravene "single market" rules. The rules can thus be and are invoked by corporate players.

Further under the famous "Cassis de Dijon" ruling (which Germany argued had insufficient alcohol content to be marketed there), any product lawfully marketed in any Member State must be free to be marketed in any other Member State. Hence the need to harmonize consumer protection and regulation throughout the EU. Similarly France tried to restrict the sale of German Edam (a Dutch cheese originally named for a town in Holland)… on account of insufficient fat content. The Court decided that consumer information…. in respect of the lower fat content would suffice to protect it! Similar procedures were conducted with respect to apple vinegar (some claimed vinegar require a wine base), cube shaped margarine containers (distinguishing it from butter), beer additives, mail order medical drugs, movies…. The Court did sustain the Irish requirement for a Dutch teacher who would do chemistry or so to know Gaelic (a language which not even the Irish know). The world is not perfect.

(ix) The new "Lamfallucy" approach to "harmonisation" of legal rules and regulations will be discussed during the session on financial law.

(x) Integration at the EU level also implies a "level playing field" in respect of competition, a field of itself. Hence regulations in respect of State Monopolies (e.g. postal systems, energy utilities, tobacco monopolies…), state undertakings (e.g. railway systems), state aids (which are forbidden except on limited grounds and in certain poorer regions, as monitored by the Commission). The most massive jurisprudence of the Court pertains to art. 81 and 82 of the Treaty (prohibiting agreements restricting trade and abusive practises of "dominant" market players) and the control of large mergers with an EU wide effect affecting competition. These rules very much affects e.g. all types of M & A agreements, patents, trademarks, franchising, cooperative arrangements between competitors (including professional organisations) and limit non-compete covenants (for individuals and corporations) to de facto 3 years.

Famous cases include United Brands (turning on whether bananas are a separate market or part of a larger "fruit" market), Tretra-pak, Michelin, Hoffman-La Roche, Heineken, Microsoft…. The commission imposes huge fines and non-compliance by corporates of the above have been frequent "career breakers" for CEO's. Fines can be as high as 10% of turnover.

Violations, in addition to fines, may lead to nullity of the arrangement and damages to the aggrieved parties.

Morning raids (where the company's offices are closed off by a band of civil servants taking all relevant files) by the commission have become (in) famous and of course programs to protect corporations (compliance programs) …. an industry by themselves.

3. THE GLOBAL LEGAL SCENE

3.1 Please join me on a roller coaster ride through legal history

P.S. I have attached short papers summarizing my limited readings on African, Hindu, Chinese and Islamic law

1. The oldest "surviving" legal system is Hindu law; it is suggested that Greek legal thought may have been "kick-started" by Hindu law;
2. Chinese and Roman law started at about the same time, (about 200 B.C.) apparently independently;
3. Common law: a "lawyers law" started with the Norman conquest (11th century);
4. Civil law's history may be traced to India, Greece, Rome, Byzantium, Russia, Bologna, Europe, Japan, and China…. It's major global impact came from Napoleontic codification; a major system exporter was Germany (but also e.g. Switzerland did it's bit)
5. US law: its "common law" was different from the start from English "common" law and the 50 state laws are derived from the initial "sovereignty" of the 13 founding states;
6. South American law: the codes went via France to Spain and Portugal to the Americas;
7. German and Swiss law: the French code was adapted to customary law stemming from Germanic tribal law (on which the English common law was based);
8. African laws: are distinctive as a consequence of different belief systems and did thrive even during colonisation;
9. Modern Chinese law(s) imported civil law though Japan (which got it from Germany which got it from France) before turning Marxist (i.e. Soviet) and is now reverting to capitalist "best practises";
10. Islamic law has centuries of jurisprudence (including secular legalists belie present prejudice;
11. Hindu law is the ultimate ancestor of all our systems reportedly. What better way then to close this ride with this statement from the classic Hindu period "which says it all" (500 to 1100 AD).

"A court is not a court if there are no elders. [i.e. tradition]
Elders are no elders if there is no Dharma [individual and collective conscience]
Dharma is not Dharma unless there is truth.
Truth is not truth unless it is mixed with reason".

3.2 Please join me in exploding myths: consider the following "truths" which most Western lawyers would "proclaim" and which are totally or partially wrong, I believe.

1. There are only 2 Western "surviving" legal systems;
2. Other systems have been or will be replaced by the above …. as development progresses; the others have "run out";
3. Natural law (God made law) has run its course; secular law is the "end of history" for the law;
4. The "victory" of Western law is due to secularisation which it invented;
5. There is "unity" in Islamic, Western, Hindu law (or other) law…and that is dangerous;
6. Western law has been "imposed" on the rest of the world;
7. With colonisation "native" laws have been abrogated;
8. The "common law" is or was common to the common law countries;
9. In "civil law countries" jurisprudence (court decisions) are only marginally relevant to "lawmaking";

10. In "common law countries" statutory law (codification) is only marginally relevant to "lawmaking;
11. In modern lawmaking only "positive law" (i.e. that coming from legitimate sources") is relevant; there is no room for older or softer sources of law like custom or usage or tradition, or religious values;
12. In the absence of a global government there is no global law;
13. Only EU countries are "post sovereign";
14. The only conceivable legitimation of law is a democratically elected parliament and government appointed by it.;
15. Only skilled and trained lawyer-judges can apply the law;
16. EU law is needlessly complex, we are in need of full "harmonisation";
17. Harmonisation is the natural outcome of globalisation, which erodes sovereignty;
18. The objectives of "harmony", "justice", (religious or ethical) values have been replaced by "order", "efficiency" and facilitation of economic goals;
19. The world has no common legal history or values (hence the "clash of civilisations");
20. Natural law has disappeared;
21. Human rights are and always will be as defined in the UN Treaties (or in the Bill of Right or in the European Convention or in the Soviet Constitution or in the unwritten English constitution or in [please complete with your system];
22. The triumph of civilisation consists of sovereignty (self-determination) combined with individual human rights;
23. When establishing abroad as a corporation the only compliance of relevance is local law.

3.3 **My readings have produced the following tentative conclusions in respect of which I will happily submit to superior intelligence or judgment, given the vastness of the subject.**

1. Globally "law" is "exploded" into
   - that pertaining to "business" (e.g. commercial contracting, corporations, securities, tax, accounting, regulation, environment, employment, industrial property, international commerce)
   - that relating to personal matters (e.g. matrimonial law, divorce, guardianship, personal property, traditional contracts)

2. In respect of the "traditional territory", rather than globalising, the trend is to greater diversity even within the territory of sovereigns nations (notwithstanding a search for simplifying harmonisation) either on a regional basis (territorial) or on a community basis (cultural grouping with collective rights) or both.
   Internationally, by way of treaties or unilaterally, facilitation is sought with respect to conflict of systems on account of cross (legal) border situations. This is the area covered by "international private law" which includes "conflict of laws". A classic example is how to handle the consequences of a divorce between spouses married as nationals of country A who have moved with their children to country B where the court is called upon to resolve the dispute. The issues pertain to grounds for divorce, guardianship of children, alimony, rights to the estate belonging to the spouses (i.e. matrimonial law) and e.g. polygamy (especially in Asia and in Islamic countries). Note that the Romans already had different "levels" of marriage, one of the temporary and less "requiring" kind, the other "patrician" level more conform of what we see in Western law (in theory rather then in practise).

3. In respect of business law (i.e. laws specifically geared to the regulation, governance or behaviour of business), the effect of globalisation and "global governance" (to be distinguished from a "global government") my analysis differs, depending on the field.

   Very broadly generalising I would attempt to summarize as follows:

(i) There is great "movement" driven by e.g. the NGO's, certain governments (especially the EU), the UN, "enlightened" business associations (the world Economic Forum, the Globally Responsible Leadership Initiative, the OECD, the EBRD), international and national "civil society" organisations, "ethical investment funds", the International Labour Organisation, (the ILO") and the internationally organized trade unions, to hold Multinational Corporation (MNC'S) internationally accountable "irrespective of local law" if the norm is clearly below the level of acceptable behaviour or "international custom".
This is driven by: (i) a rising genuine concern for e.g. "global social and economic rights", harmonious development, bridging poverty gaps, peace and environmental concerns and (ii) increasing concerns about "unfair competition" from countries (and companies operating there) who simply will not act responsibly. This concerns grow in intensity when countries (like China) turn into "substantial competitors" and their populations raise above "absolute poverty" in short when their competitive power becomes threatening!
The above affects e.g. environment, mass tort (e.g. Bhopal), employment conditions, discriminatory practises, risk management structures(i.e. the capacity to hide behind the "corporate veil of a local subsidiary), bribery and it feeds the acceptance of Corporate Governance, Corporate Social Responsibility and Ethical Codes at both company level or at collective or industry levels (e.g. the OECD codes), in short international corporate accountability. This also supports the extension of national court enforcement e.g. of corporate crime committed abroad (e.g. bribery of foreign civil servants or politicians).

Generally the above is also driven by "activist" shareholder groups, the increasing scarcity of human talent and the financial effect of media attention to incidents (or scandals), e.g. in the Nike case, not to speak of the cases where in the home jurisdiction actual crime can be alleged (e.g. the Total, Boac, Siemens and VW cases). International Reputation, according to a vote taken (by the attending CEO's) at the World Economic Forum, accounts for 40% of corporate market value.

(ii) There are clearly fields in respect of which globalisation results in "global rules" imposed by Treaty which in certain cases are institutionally administered with conflict resolution procedures. The obvious example is the World Trade Organisation. The basic assumption is that "free global trading" is good for everybody…. which is obviously wrong. There are winners and losers in globalised trade, whether one reason in terms of countries of groups of people. But "autarchy" (i.e. being self sufficient on a country basis) does not work either, as India has painfully experienced.

(iii) There are legal fields which are globalising under the pressure of "global finance market practise". If large financing is sought sometimes inside one's "home jurisdiction" and quite certainly internationally, chances are "the law of the contract" will be English (not UK) "common law" (or NY law). Business hates uncertainty. English law provides more certainty and intelligibility in respect of finance and is administered by a highly respected, independent and efficient court system, which is less costly then that in the US.

Please note that mostly, this is a law freely "chosen by the parties", in part on account of the "forum" (i.e. court system) which will apply it.

(iv) Opposite to the above, there are fields where parties can not choose the law applicable to the situation at hand, because that field is "ring fenced" by "public policy" of the sovereign who governs that territory. The obvious examples are labour law, zoning law and the like. These fields are "territorial". The mere fact of "being there" submits a business to such laws.

(v) There are fields which are so "cultural" that while pressure to conform to "global" norms is real, effects are limited and "the jury is still out" whether profound "harmonization" or convergence to similar standards will occur.

In respect of corporate governance, for many years it was claimed that the world would "converge naturally" towards superior US corporate governance standards, driven by the prominence of US source risk capital.

Enron, the rise of London, MIFID…… there are many reasons why this myth has been buried. Today it is rather the UK governance codes which are internationally influential.

Governance however is about the exercise of power …. a very cultural activity. The variations between country and corporate models will be the subject of separate session.

(vi) Finally there is an enormous body of business law which is "public law" i.e. the rules through which a sovereign or a regional authority regulates, taxes, directs or prevents business activity, e.g. antitrust law, securities laws, social security, environmental law, prevention of business crime (like bribery, discrimination) and consumer protection.

While in this respect there is quite a body of Multilateral Treaty and UN inspiration, guidance or, in certain cases, verifiable and concrete commitment (e.g. Kyoto Protocol), there is a globalisation of sorts through the "voluntary adoption" of "international best practises". Examples of this are to be found even in the fields which are "the ultimate redoubt of sovereigns", like tax and securities laws. Inventing a system is horribly complicated. So countries having to do so (like Russia) look elsewhere for guidance or at times import foreign legal systems "lock, stock and barrel"..

4. EU and European law are of a separate nature dealt with above.

5. The EU is clearly leading the world in terms of regulation (which will be the subject of a separate session), exporting its "proven systems" of multilateral rule making (e.g. to Northern Africa), pursuant to its "neighbourhood policy", but also in respect of e.g. accounting (possibly to the US). The EU simply is the biggest market in the world… and accordingly business can not but adapt to its requirements (e.g. in respect of health and safety consumer standards) as REACH.

6. For a variety of reasons today both in the UK and the US most law is statutory (codified) law and in "civil law countries" the importance of "jurisprudence" (i.e. court decisions and legal authors) is increasing. Some think that therefore the two "great western traditions" are "converging". Yet, I can not help but to see English and continental legal minds to "function" differently…. for a while …. a great while.

7. Even within Western systems, supposedly based "only" on (legitimated) "positive law", there is a lot of room for "non-positive" sources of law, including international or local custom, codes of conduct, treaty law which technically is not applicable… not to speak about "tribal", "native" or "religious" law in large parts of the world.

   As one author comments "Positivist Western lawyers may be the last of a dying breed: that of the colonisers".

4. Some conclusions

Beyond technicity there is an enormous body of "common legal legacy", shared myth and belief systems and, perhaps most importantly, an increasing "feel" that global requirements, needs and concerns need to be addressed. Further, it is felt that the "national sovereigns" can not be left alone (and often can not be trusted) to get the job done.
International business seeking only compliance at the lowest cost (often at the least regulated location) may pay the much higher cost of losing the loyalty of its best people, its customers, its financiers and ultimately it's shareholders. This will be taken up further in the session "Law and Ethics".

Schedule A: Comparing civil and common law

1. Conceptual comparison between common law and civil law

English Common law	Civil law
Differences in the judicial system	
- more intensive use of juries: facts are for the jury, judges "set" law	- judges: determine fact and law
- appellate limited to review whether law was properly applied	- full appeal's review
- community involvement through jury	- professionals decide
- elaborate rules of evidence (complex and expensive trials)	- principles interpreted by professional judges; much more at liberty in respect of evidence: less expensive and less complex
- one court system	- e.g. labour and administrative courts in addition to usual courts
- "rule of precedent", "stare decisis", judges make the law	- codification, judges apply the law
- legislature source of only public law	- legislature source of all law
- laws are detailed & complex; they deal with specifics	- laws are structured and principle based
- courts are the source of constitutional rights (in the UK: no written constitution)	- only legislature is source of constitutional rights; unwritten constitution is inconceivable
- highly balanced and reasoned decisions and dissenting views	- single authority; no dissenting views
- higher complexity to find the law	- lower complexity to find the law: read the Code
- "rule of precedent" is mandatory	- higher court jurisprudence is influential in practice; but any court can decide on its own (but at the risk of being reversed)

2. Comparing US and English law

US	England
- US courts overrule more casily asEnglish; common law accepted being adapted to different "colonial situations"	- more rigidity but "revolution" as a consequence of "superior" EU law
- parliament can not change constitution by normal process	- parliament can change everything (except EU law) and "changing a man into a woman"
- US is federal system; California law is US law	- unitary system …. but only for England and Wales; Scottish law is not English nor UK law
- US attempted codification (UCC) in order to address complexity by way of restatements of common law into "best practise" codes	- the UK never did attempt codification; English law is much closer to the original common law concept
- legal scholarship is very influential	- scholarship is less influential – judges set the law

3. English law and French law: comparing history

English law	French law
- law is made by judges	- law is made by parliament
- Roman codifications (555 B.C.) less important	- Roman codification very important
- Saxon and Norman (Germanic) usage is basis	- Codex Justinianus and "multiple customary laws" ("coûtumes) are basis of Napoleontic codes
- the case at hand, incremental, pragmatic, tactical; only cross the bridge when needed	- abstractions, systems, coherence, strategic, conceptual
- "one" law common to all of England (Norman Conquest")	- law fragmented (cities and counties) until pendula swung with Napoleontic code (1803) to unification through codification
- English law is law dominated by judges and lawyers: high prestige and respect for the law	- law is based on political authority; lower prestige of legal practioners and lesser respect for the law (see also China)
- great continuity	- political change brings discontinuity and ultimately codification (19th Century) (which is a political process); several "republics" with huge changes in public governance including recent swing to "presidential system" US style
- discovery of the law is practioner led	- discovery of the law is university led

4. US Law: some other distinctions with English or EU law

- **US and English**

- US did not only have English settlers: many civil legal traditions influenced US common law: diversity of sources was much greater
- 13 initial "common wealths" constitutionally "received" English common law, which therefore became dominant
- different conditions; no split profession
- 13 different states and "abhorrence" of centralized power
- more relaxed view of "stare decicis" driven by the need to adapt to different conditions
- from "finding" natural law to policy making (Justice Holmes): legal realism
- law schools rather then apprenticeship (English tradition)
- need to address complexity from different legislations (federal system)
- statutory law (i.e. codified law) is now dominant in the US except for tort, personal injury and contract law (N.Y. law); common law is not any more dominant in the US (e.g. family law and divorce law are statutory law)
- state courts always must verify whether statutory law is conform to US constitution

- **EU and US law**

- consumer protection: US still relies on very expensive mass tort approach: Europeans (including UK) rely on criminal law, administrative courts and welfare systems which reduces needs for massive and expensive legislation
- economic efficiency as ultimate criterian for US legal policy
- in the EU harmony and values are more balanced with efficiency
- residual authority is with the States; limited powers to the US Federal Government
- US states retain more legislative power then EU member states in respect of business law (e.g. banking, insurance, environment, collective bargaining)
- Compare "integration" (as the EU "constitutional catch" and "interstate commerce" in the US")

OTHER LEGAL SYSTEMS **Schedule B**

Introduction to "other legal systems"

I trained and practised as a Western continental civil law corporate lawyer. One does not get to be more "positivist" (i.e. a "captive" of statutory, written and explicit law) then that.

Of course, in International (Public) law one is, as a positivist, left with a void: there are not statutes nor parliaments to rely on.

Many of my Asian, African but also Russian students expressed their bewilderment at this Western "legal system" which they saw as something to be reckoned with (rather a bit like chop sticks for Westerners eating Chinese) but hardly a centrepiece of corporate strategic thinking.

I was told basically (i) that I assumed a basic understanding of what law is, which, at best, is present only in Western minds and (ii) that my rendition was disrespectful of other systems which are "just as good" and "perhaps more just".

I spent the month of August writing this paper and on trying to understand how different other legal thinking may be and to get a better understanding of how "custom" shapes law and increasingly corporate (and other) behaviour. I have no illusions about having been able but to scratch but an infinitely thin part of the surface…. but yet I thought that sharing with you my "thin grasp" might help widening views on how culture (and therefore law) shapes thinking.

A list of books will be provided, for those of you who would wish to pursue the enquiry. It is not an easy travel, I warn you.

As a parting shot, I was privileged to meet privately the Chinese Minister of justice some 10 years ago then as chairman of my firm which applied for a licence to practise in Shanghai. I will always remember his wisdom which I can summarise as follows: "We simply can not afford the luxury of Western style, let alone American, legal protection. We have many other priorities…. like food". This is the other side of the coin which from our Western observatory we do not easily comprehend.

Your comments, especially about your own system are very welcome.

Louis-Henri Verbeke

Islamic law

Consider the following statements:

"Law is dictated by God itself; it is superior to any other [manmade] rule and it is binding over all the globe".

"Positive [i.e. manmade] rules violating natural law must be struck down".

"Religious law became state law. It took the West 1400 years to change that …. in part. Many EU countries still have state religions. Her gracious Majesty is still the head of the Anglican Church.

You may be forgiven to think that the first two above statements were made by Islamic scholars or imams. They were made by respectively Blackstone, the "ultimate" 18th century English jurist who influenced the US constitution greatly (and who was "adamantly" anti-catholic on account of Catholics seeing the Pope as the ultimate religious authority rather then the King) and Cicero, the greatest lawyer and advocate in Western history… and who wrote, pled and conducted the affairs of state in or around 1th century B.C. Cicero was a staunch and at times heroic say republican or conservative; he was and still is an authority.

The third last statement is merely factual, I believe and by your servant. Constantine the Great made Christianity a state religion in the early 4th century B.C. and unleashed centuries of religious warfare first amongst Christians (against the Arians, the first of a long list of "herities", which may in part account for the "loss" of North Africa to Islam), then with Islam and then again amongst Christians (the religious wars following Reformation). According to Gibson (the author of "The rise and fall of the Roman Empire"), this signified the end of the rather relaxed state of affairs on religion in the Roman Empire and ultimately its demise. Arguably, it would take the West a thousand years or so to recover.

Another great jurist Hugo De Groot or Grotius, a Dutchman claimed that we all are holders of natural rights (and obligations) derived from the (old) Testament. He paid dearly under the Calvinist regime of the moment who felt this was not reconcilable with predestination.

So the idea of natural law is a very old one dating back to Hindu times probably and still proclaimed today especially in International Law (where there is no parliamentary source of positive law). Today, we call it "Human Rights".

My limited readings on Islamic law, which of course I can do as little justice as other systems, have yielded the following.

Of course the basis of Islamic law is the Koran as revealed by the prophet…. but it was influenced by the very ancient "summa" of Arab law, tribal customs of people living in extreme conditions and "properly" weary of abusing their environment and, it is claimed, therefore prudently conservative.
History of Islamic law shows enormous plurality and adaptation to different cultures (Persian and Hindu notably) and a long history of jurisprudence and legal philosophy supplementing revelation (not unlike the history of English common law). Quite arguably, I understand, the first "secular" legal thinking (after China) was Islamic and predates Western thinking on the subject several hundred years.

Islamic systems also drew of course on Jewish and Christian (especially Byzantine) thinking and knew many codification efforts. Islam produced many schools of law and the role of jurists is seen as central.

It is still a subject of historical debate why this superior "Arab" Renaissance (300 years before the Western one) appears to have run out of steam.

Ataturk's Turkey used law as a social "reengineering tool in the 19th century by importing "lock, stock and barrel" Western "best legal practises". It is debatable whether this effectively changed "the real law" outside the main cities.

The 19th century (but also present times), very prudently, brought codification on the basis of Western civil systems, sometimes voluntarily or as a consequence of conquest or colonisation or under globalisation pressures. Some countries, like Algeria, were influenced by French "Jacobine" and by Marxist thinking, as I have been able to observe a rather deadly mix.

The main difference with Western law is of course the "discontinuity" which "Enlightment" or secularisation caused in Western thinking (which the Chinese reportedly invented 2200 years ago).

I am told that Islamic jurists see themselves as "fallible" interpreters of God's will, which I gladly contrast with the addiction of many Western jurists to the search for a unique, perfect, harmonised and global system.

African Law

Is has been a "classic" dogma of historians that history starts at the time at which written sources are available. African law at least that of sub Saharan Africa, is therefore supposed to be "prehistorical" and not a proper subject for legal historians.

I am told the above is patently untrue, not only because with modern science (anthropology, genetics, etc…) we often know more about prehistoric cultures then supposedly historic ones but also because written history… is that of the victors.
Many Africans claim that they were actually better governed before "colonial or historic times" (although admittedly communities tended to be small). Africans also claim "historical" Egypt, much of Islam, Alexandria…. and St-Augustine as their own. Rightly so.

Quite simply, there are no societies without law, whether or not it was written down. The Gauls did not write it down; it was passed on orally by Druids. Western reading of African law, very arguably, is "Procrustean", for the Greek who rather shortened the legs of his guest then lengthening their bed. African law evolved much like German tribal law from which English common law derived.

Of course no part of the world was more abused first by Arabs then by Europeans and it is still collectively the poorest continent.

One author contrast African thinking with Western concepts as follows. Westerners naturally define themselves in reference to Socrates ("Know yourself") or Descartes "Je pense donc je suis" (I think, so I am). The western "I am because I am" would be replaced in Africa by "I am because we are". With global environmental challenges upon us, this is a valuable insight.

I am told that black Africa had centres of legal learning on Islamic law, and still has them e.g. in Timbuktu.

But most of our present understanding on black African law comes from anthropology which I understand teaches us the following.

African law was geared to make social groupings endure. Rather then Judeo/Christian thinking that God created "human mastery and ownership" of the world, Africans reportedly saw man as part of nature and to quite an extent subjected to it. A Western is entitled to kill an animal for food, he owns it, an African is grateful for the gift and most honour the prey is kin to him.

I am told private ownership, with family law the centre piece of Western legal thinking, is different. Ownership in African law reaches back to the past, includes the present and looks forward to the future again, a very modern concept in our times of environmental awareness.
Ownership is more group oriented and marriages are seen as alliances, not unlike the practise of Western aristocracy. This "collective" view is based more on obligations (to the past and to the future) then on individual rights (as defined in UN and European conventions on the subject). It is understandable that "our" definition of human rights is criticized from this corner.

The importance of "ancestors" (as in Chinese and early Roman law) makes for the belief that far from law being the appendage of experts, it is know by all and "finding" its requires no particular skill or training (contrary to Druidic law which was transferred by very long and intensive training) and that this legal culture purports to leave fewer gaps between legal truth and actual fact.

Another preconception is that African legal systems were abolished upon colonisation. For all their other wrongs, generally the colonisers did not impose their legal systems. The English "muddled" through (and imported … the Indian Penal Code, which I understand is still used in parts of the

world). The French specifically did not bring their civil code. The Belgian Colonial Charter forbade to impose Belgian law. All used (and controlled) local customary rulers and "courts" and continued to administer on the basis of the law they found.

Post colonial times required all states to "build" a modern system…. besides its traditional system. Africa thus became the heir of Islamic, Hindu, civil, common law, and roman-dutch concepts, in addition to its indigenous ones, in some cases with a dose of Marxist influences at least until recently.

Scholars state that there is much work to do in order to understand how deeply and truly the "imported" concepts affect the black African relationship with e.g. justice, social rights, dignity, accountability and, especially as many writings show, public governance which is widely seen as one of the main causes of Africa's less developed state.

Chinese law

To Westerners there is perhaps no other culture more difficult to understand then Chinese culture. Given the massive amount of written sources, in addition, there are few excuses for Western misunderstandings.

At least according to some the reason is that, while there are many nations which are multi-religious (like India), there are few where individuals are multi-religious. I am told that as consequence Chinese "naturally" accept that there is no single source of truth (as in Christian or Islamic tradition) and accordingly law is not accorded "divine" origin. Law is not "natural" (in the sense that humans would we "wired" for it) nor "global" (in the sense of being common to human kind). Accordingly in Chinese history there would never have been in respect of law making any express reliance on religion.

If this understanding is correct this would make China about the only "secular" legal system" from scratch" and the Chinese would have "embraced the French Revolution" 2000 years before it took place. This should teach Eurocentric (or American) lawyers a measure of humility.

The above would mean that in essence (leaving for a while Confucian ethics apart) law is nothing but a particular exercise in politics, the exercise of the power to order society by the sovereign. It would also explain (to a degree) why Marxism (which also subordinates law and individual rights to the collective interest) found fertile ground. Finally it would make the Chinese the ultimate positivists (since in Western tradition "natural law" and "higher then human" sources still influences thinking, be it now in the form of "human rights").

Some scholars assert that early Chinese legists assumed that human nature was "initially evil" and that accordingly "a single law enforced by severe penalties is worth more for the maintenance of order than al the words of all the sages" (Henski, p. 496), which contrast with basic "harmonic" assumptions in other systems.

I should add that any of the above is debated. Notably some claim that analysts confuse "religion" with "revelation"; while there is little of the latter that does not exclude the previous and accordingly Chinese "secular" traditions have more of a religious foundation then scholars "wish" to admit (as can be argued in respect of Western secularism).

Much of the discussions appear to turn on the age old question whether Confucianism is a religion or a system of morality. I shall not endeavour to suggest any answer to this one! Let me only add that "reducing" Chinese law to the influence of Confucianism (which at later stages was in part codified) does not "do right" to the many other idea systems that influenced it like Buddhism and Taoism… which are rather opposite to the supposedly "positivist" Chinese tradition. Some argues that Chinese legal concepts also balance higher principle (natural law), idealistic reliance on individual self control (like Hindu law), ancestor warship (the Roman way?) and ordering through punishment and that accordingly Chinese thinking is not of a different nature then other legal systems.

I can not but give up at this point, except for sharing my suspicion that many widely held assumptions are based on simplifications. As usual, something that is complex is seen not to exist. Simply put formal codification over 2000 years coexisted (and still coexists) with customary at least ethically inspired traditions, and gave rise to imperial courts of law as will as a legalist school of thought However Chinese legist contrary to Western ones probably always assumed that law was subservient to politics.

Of course the secular tradition would help to support that when Chinese change systems (which they seem to do quite often), they do not violate "sacred societal principles". Rather, they seek better

political practises and better economics. The French Revolution meant that the people would brake a 1000 year old chain of "sacred" kings who were source of law. This was not just politics but also braking with religion, hence the concept of "Enlightenment". Politics and religion were part of the European system. French presidents still try to act "kingly". The ultimate honour today for a British (or commonwealth) lawyer is still to be named Q.C. or (Queen Counsel).

Above philosophical asides apart I am told Chinese statutory law can be traced back to about 200 B.C. (the same period at which (non mythical) Rome law started) which in terms of longevity, makes it second only to Hindu law. Roman law lasted about 1800 years (until the fall of Byzantium).

In addition Confucian ethics in China and elsewhere made for uncodified systems of norms and values which I am told that they are inherently pluralistic;

Further, in the early 20th century China (voluntarily) imported Western style codification (through Japan which imported from Germany which adapted from the Napoleontic French Code), then developed a socialist system (in part inspired by Soviet Russia) before "modernizing" and kick-starting capitalism recently. This evidences a willingness "to switch" systems probably unique in the world.
The above principle (law is politics) would explain traditional Chinese abhorrence for formal litigation and the practise of evading the law, but also provide a basis for a separate "Chinese" road to a modern legal system. In some ways it makes me think of the American "realist" school of thought which rejected the old English hypothesis of judges "finding" natural law. In the absence of such a hypothesis, there is a lesser basis for accepting natural law's successor: human rights (except of course if provided under positive law, as in the US through The Bill of Rights). It would appear to be one of China's major challenges.

I would not be genuine if I did not comment that with Western eyes, the "lack of supremacy of the law" and the apparently limited independence of courts, are seen as profoundly troublesome. Increasingly e.g. in respect of copy rights or consumer protection; China is accused of not playing by the rules.

Ultimately Western thinking, through secularism, emphasises government not just "for the people" but also "by the people". The latter some claim is not supported by Confucianism and its historical footprint. However this may be true, China is reshaping itself at a speed which to all is incredible. We shall have to wait and see how a distinctly Chinese legal shape might take form.

Hindu Law

I confess to a particular sympathy for the subject of Hindu (as opposed to Indian) law, in part because of my relatives and friends from India, no doubt, but also because of this very Western "awe" for ancient written sources which, scholars argue, make Hindu law the source of Greek and hence Western legal thinking.

This sympathy is however "confused" by the difficulty in rendering in two short pages a system which perdured (including during British times) for 3500 years.

It is argued that Hindu law dates back to early codification in Vedic law at about 1500 B.C., although this claim is contested.

Contrary to Judeo-Christian and Islamic thought "Hindu Order" did not develop into monotheism, because it refers to an unknown force on which the ancient Hindu's agreed… to disagree, a rather modernistic concept I would suggest, as it provides as basis for pluralistic thinking and does away with the temptation of "unique truth" which monotheistic religions at least imply, and historically, have tried to impose.

Anybody who has attended a Hindu wedding can not but be charmed by the beauty of the ritual… but also by the "relaxed" attitude of those attending (in part required by the length of the proceedings).

I am told that in "classical times" (500 B.C. to 200 A.D.) the central concept is "Dharma", the obligation to submit to the laws that govern the universe and to direct one's life as a consequence in a self controlled fashion. It is both religious and secular, holistic if you prefer.

As referred to above "pluralism" (also in respect of what Dharma means) remained "vibrant" and belies prejudice that Hindu society was stratified and stifled (much like prejudice about Islam). Hindu law, I am told, refuses to lay down absolute principles as "Thou shall not kill", quite realistically, I would submit. Law is essentially relative. Also contrary to Christianity and Islam revelation did not claim a single source but multiple ones.

Of course, this idealistic (Westerners would say Aristotelian) views needed to be balanced with "a little help to maintain order", i.e. punishment and deterrence (or the threat of same). Creating the concept of "assisted self control" and eventually formal dispute settlement imposed by rulers, which I am told we should see as removal of doubt on what Dharma means and a search for truth (which is of course unobtainable).

From 1100 B.C. more legal scholastic texts appear dealing more specifically with "secular" problems.

Hindu law is also particular because it survived Muslim and English "colonisation". Both colonizers were wise enough to allow for pluralism and did not impose their laws on their Hindu subjects. The personal law of the Hindus remained Hindu law, although it did become subservient of course.

I can not resist the urge to cite this very English provision in the East-India Charter of 1668 which read that the [Company] was to "enact laws consonant to reason and not […] contrary to and as near as may be agreeable to English law" (which, being common law, accepted to change in accordance with different circumstances). But notwithstanding this, the principle was established quickly that Islamic and Hindu law were to remain applicable in all personal law matters and that English law was not to be introduced, except of course in respect of public and criminal law.

The English attempted to codify and unify law in the early 19th century, and included Hindu, English and civil law concepts (the governor being Scottish). The efforts, otherwise largely unsuccessful, resulted in an Indian Penal Code which is still applicable and was exported to parts of Africa.

English legal zeal and the reality on the (Hindu) terrain made for a rather "messy" legal order (which some would claim exists to this day), reflective of common law's rather relaxed views on systemized thinking. Pragmatic the English used "native" expects on Hindu and Muslim law as assessors to the courts, helping them to "find" the law. Reportedly, given the totally different concepts, this made for a "problematic construct" which one author describes as a "hybrid monstruosity".

It led to a split between "official law" based on many sources and "living law" for Hindus (and Muslims), a different world… and armies of lawyers fighting in courts rather than in armed battle.

India's legal inheritance on independence was thus of a terrifying complexity and post-colonial India turned to legislation and a codification of sorts as a source of law, rather then precedent. It allows for Muslim, Christian, Persian and Jewish law to govern personal law (as well as secular options). As Turkey, India tried to use the law as a nation building tool. Reportedly if failed, because of the innate pluralism of Hindu thinking

Present Indian law makes liberally room for custom as a source of law and explicitly acknowledges that custom varies according to "local area, tribe, community, group or family".

Hindu law simply assumes (contrary to especially US law) that the law can not do the whole job of ordering society and leavers much room to the individual and community self control to deal with conflict. It has been described as "soft positivism".

Sympathy must of course not obscure a recent dictum of the Indian Supreme Court, expressing "serious concern" for the "rule of law" in India, as reported by the FT (Sept. 6, 2007 p.11). For a country "that never tires of describing itself as the world's largest democracy…" this is a "calamitous warning [which] has come none too soon". The FT reports enormous corruption in the legal system and the emergence of a two tier justice system. Recently similar claims were made in South Korea. Reportedly the World Bank ranked India 173rd of 175 countries for contract enforcement.

The 60 years of India as a democratic and constitutional country is an "epic" achievement, but as a consequence, the F.T. says, of the judicial crisis, that achievement is a risk.

Please note that Russia, China and India share comparable positions in the Corruption Perception Index.

An example: contract law: the concept of consideration

Promise: a case: I promise to sell my house to this class:

- am I bound?
- price: unclear
- evidence
- protection against rashness
- marking legal consequence
- marginal value and unfairness

US law: Statute of Frauds
Consideration to tenuous
Writing