

***Conference: Effective Techniques for Teaching About Other Cultures and Legal Systems***

***Panel: Teaching Techniques for Cross Teaching and the Question of Difference in Teaching About Other Legal Systems***

***Defining a Legal System***

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To effectively teach about other legal systems requires a common understanding of the basic unit of analysis – the legal system.<sup>2</sup>

A legal system consists of a set of norms, rules, and institutions that regulate the behavior of a distinct population. Thus, a legal system requires three elements: norms, rules, and institutions. Each element is not sufficient on its own to establish a legal system. But each element is necessary for a legal system to exist. While most legal systems regulate human behavior, some systems regulate states, nongovernmental organizations, and corporations.

*Norms* express principles of conduct. They are the basic values of the underlying population. Norms can be grounded on religious beliefs and, at one time, most legal systems had such a foundation. Today, most legal systems are based on secular values although prominent exceptions exist (e.g., *sharia* law, canon law, indigenous law). Norms typically delineate conduct in binary terms so that specific conduct is viewed as

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<sup>2</sup> See generally Catherine Valcke, *Comparative Law as Comparative Jurisprudence: The Comparability of Legal Systems*, 52 AM. J. COMP. L. 713 (2004); William Ewald, *The Jurisprudential Approach to Comparative Law: A Field Guide to “Rats,”* 46 AM. J. COMP. L. 701 (1998); John C. Reitz, *How To Do Comparative Law*, 46 AM. J. COMP. L. 617 (1998).

either right or wrong. Perhaps the most seminal norm in any legal system is respect for the rule of law. Quite simply, no legal system can function without a norm that recognizes and affirms its own existence. Other common norms that exist in most legal systems include respect for human life, prohibitions on causing bodily harm, and prohibitions on stealing.

*Rules* represent a codification of the underlying norms. Such codification can be written or unwritten. Rules can appear in statutes and administrative regulations, treaties and related instruments, and legal documents. In many legal systems, rules are also found in court decisions. But rules need not be written. They can appear in the customary practices of the underlying population, including rituals, ceremonies, or prayers. They can exist in oral traditions, handed down through generations. Not all norms are codified in rules, however. Some norms never attain such status. The codification of a norm indicates it has attained sufficient acceptance by the underlying population to justify its formalization.

*Institutions* are the mechanisms through which rules are enforced. Institutions perform a variety of functions. They can monitor compliance, mediate disputes, and impose sanctions for rule violations. Law enforcement mechanisms (e.g., courts, judges, lawyers) are perhaps the most common form of institutions. These institutions typically enforce the rules through a hierarchical enforcement mechanism that imposes punishment through civil and criminal penalties. Another common institution is the military. But institutions need not take such traditional forms nor do they need to function through coercive enforcement mechanisms. Institutions can include family units, tribal elders, and community groups. They can take the form of indigenous justice systems.

Institutions can also enforce the rules in various ways, including shame, peer pressure, moral suasion, or other non-hierarchical enforcement mechanisms. These mechanisms rely on reputation and reciprocity to achieve rule enforcement. Most legal systems rely on a variety of methods to enforce the rules. Significantly, a hierarchical enforcement mechanism is not an essential feature of a legal system.

A robust legal system typically contains a set of well established norms accepted by a large majority of the underlying population along with a dense network of rules and institutions that operate on multiple levels. If norms are contested, the legal system may lose its coherence. If the rules lack formalization or the institutions prove ineffective, the legal system may cease to exist.

This definition of legal system presents a rigorous yet flexible approach for comparative studies. It recognizes the essential features that must exist in any legal system. Yet, it is flexible enough to be broadly applicable to a wide range of legal systems, from the classic models in common law and civil law systems to the contested status of the international legal system or the uniqueness of the *Roma* system.<sup>3</sup>

Historically, common law and civil law systems received extensive study by comparative scholars. Indeed, comparative law textbooks long focused on these legal systems to the exclusion or marginalization of other systems. Focusing on Western notions of law caused scholars to overlook the richness and diversity that existed in the legal world. Norms need not be Western to represent legitimate values. Rules need not

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<sup>3</sup> See, e.g., William J. Aceves, *Symposium Introduction: The Tattered Tapestry of International Law*, 29 PEPP. L. REV. 1 (2001); Walter O. Weyrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case of the "Gypsies,"* 103 YALE L.J. 323 (1993).

be written to support their legitimacy. Institutions need not rely on hierarchical enforcement mechanisms to impose sanctions for rule violations.

To engage in effective comparative studies, scholars must first develop a common understanding of the underlying unit of analysis. Defining a legal system as a set of norms, rules, and institutions can thus provide clarity to our efforts.