A Global Story: Origins of the Right to Legal Counsel

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ABSTRACT

Shakespeare's Henry VI famously includes the line – "let's kill all the lawyers." While debate remains exactly what this line meant, it speaks to the fundamental role which lawyers play in the Western legal system, especially when defendants are accused of a crime. This article examines the creation of this role in legal traditions across space and time as manifested in diverse religious and cultural environments. The role of a legal advocate originated in continental Europe – based upon Canon law and Ancient Greek and Roman practices – far earlier than in England. While the formal role of a "lawyer" was unknown in non-western legal systems until relatively recently, Jewish, Islamic, and Confucian traditions had "legal assistants" who spoke on behalf of the accused. The Common Law, by contrast, did not provide legal counsel to all criminal suspects until the era of the telegraph and the Alamo. Although the relationship between

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participants, methodologies, and sources of authority may differ and evolve across time and space, these traditions are each respective chapters of the global story of law.

INTRODUCTION

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[1] Thus wrote Associate Justice Hugo L. Black of the Supreme Court of the United States in the seminal 1963 decision in *Gideon v. Wainwright*. This holding, written on behalf of a unanimous Supreme Court, emphatically held that the Sixth Amendment to the U.S. Constitution[2] extends the right to counsel even to indigent defendants, through appointment of such counsel by the State. Until this point, counsel was not constitutionally guaranteed in all cases. In fact, "special circumstances" (these included the seriousness of the crime, personal characteristics of the defendant and particular facts of the case) normally needed to be present, before a court could appoint counsel on behalf of a defendant, even in a capital case.[3]

In the six decades since that momentous decision, American society and popular culture have, at least in theory, embraced the holding of *Gideon*. Notwithstanding the increasingly abysmal shape that the public defender system is in, making it increasingly difficult to ensure availability of legal representation to indigent defendants,[4] it is unthinkable today that a person charged with a criminal offense would lack access to either hired or appointed counsel. As Justice Black eloquently stated, "…reason and reflection, require us to recognize that, in our adversary system of criminal justice, any person haled into court…cannot be assured a fair trial unless counsel is provided for him."[5] Following *Gideon*'s holding that the right to appointed counsel applied in noncapital cases,[6] the Supreme Court extended

[1] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[2] U.S. CONST. amend. VI ("**In all criminal prosecutions, the accused shall enjoy the right** to a speedy and public trial…be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and **to have the Assistance of Counsel for his defense**.") (emphasis added).

[3] Powell v. Alabama, 287 U.S. 45, 71 (1932): ("In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and, above all, that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process."). *See generally* Betts v. Brady 316 U.S. 455 (1942).

[4] Memorandum from Lisa Wood, Chair, ABA Standing Committee on Legal Aid and Indigent Defendants to the Finance Committee, Board of Directors, Legal Services Corporation (June 2, 2014), https://www.lsc.gov/sites/default/files/LSC/pdfs/3.%20ABASCLAID%20FY2016%20Budget%20Rec%20%20to%20LSC.pdf

[5] *Gideon*, 372 U.S. at 344.

[6] *Id*.

the obligation of the State to appoint counsel to misdemeanors and other petty offenses.[7] A few years later, it was ruled that defendants could waive this constitutional right, and represent themselves in state criminal proceedings if they so choose.[8]

Yet, as important as it is that the State appoint counsel for indigent defendants, this obligation is but a corollary of the critical essence of the Sixth Amendment – the defendant's right to retain counsel of their choice.[9] And, this latter right – fundamental to ensuring the preservation of all constitutional rights, fairness of the proceedings, and the confidence of the public in the legal system – has been restated by the Supreme Court.[10] Indeed, the right of legal counsel is one of the best known in the world today. Of 194 countries spanning the globe, 159 of them – or *82 percent* – (in theory) recognize the right as fundamental to a fair trial and have enshrined the defendant's right to counsel within their respective national constitutions.[11] However, as fundamental as the right to legal assistance may be in the 21st century, whence do its origins come? While the answer is not exceedingly well-defined in historical terms, an attempt shall be made to flush it out in this article.

Part I of this article examines the origins of the right to counsel in the Western world, split between the common law of England and the continental approach of Europe. Part II looks at the religious approach within the Abrahamic faiths, particularly Judaism and Islam, and Part III examines the history of the right in the Confucianist milieu of East Asia, in China and Japan. Part IV briefly surveys the status of this right at the international level while Part V ends with final thoughts.

THE WESTERN WORLD

Common Law

Although the legal occupation existed as far back as the thirteenth century – at least in England – it remains uncertain whether accused individuals had the right to request legal counsel for assistance in criminal

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[7] Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

[8] Faretta v. California, 422 U.S. 806, 836 (1975).

[9] United States v. Gonzalez-Lopez, 548 U.S. 140, 147-48 (2006) ("The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee.").

[10] Justice Scalia died on February 13, 2016. This reduced the number of Justices to eight. On March 30, 2016, in a 5-3 opinion, the Supreme Court held, "[w]e…emphasize that the constitutional right at issue here is fundamental: '[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire."' Luis v. United States, 578 U.S. 5, 12 (2016) (quoting Caplin v. United States, 491 U. S. 617, 624 (1989)).

[11] *Comparative Constitutions Project*, CONSTITUTE (Jan. 10, 2019), https://www.constituteproject.org/constitutions?lang=en&key=couns&from_year=1900&to_year=2019&status=in_force&status=is_draft.

cases.[12] "The old procedure required of a litigant that he should appear before the court in his own person," Pollock and Maitland observed, "and conduct his own cause in his own words."[13] Why? These two distinguished legal scholars give us two reasons for this directive. First, the very idea of agency was not that old. Second, and more fundamentally, it would not be fair for one litigant to obtain an unfair advantage merely because he hired an advisor well versed in the law.[14] Furthermore, another uniqueness of medieval law was its emphasis on procedure, through writs and forms of action. Every jot and tittle had to be crossed and dotted perfectly, and every writ had to be filed perfectly; otherwise, the complaint would be dismissed.[15] Emphasis on procedure was not initially unique to the Common Law; it existed in Roman law.[16] Indeed, it was present across the European continent through various other "common laws" of various legal systems.[17]

Nonetheless, the major distinction is that English law retained such a heavy emphasis upon procedure for centuries; much longer after the Civil Law had reformed its substantive law. Reform of substantive criminal law in England did not truly arise until the nineteenth (and in some ways even continued on into the early half of the twentieth) century. As Patrick Glenn

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[12] 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I. 211 (2d ed. 1968) ("Before the end of the thirteenth century there already exists a legal profession, a class of men who make money by representing litigants before the courts and giving legal advice. The evolution of this class has been slow, for it has been withstood by certain ancient principles."); *see also* KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 191 (Tony Weir trans., Oxford Univ. Press 3d rev. ed. 1998) ("The nature of English law and the course of its development were fundamentally affected the fact that very early in its history there arose a class of jurists who organized themselves in a guild and so exercised great political influence. Because the King's entourage and the royal courts which gradually emerged from it were all located in London in the early Middle Ages they attracted a large number of persons skilled in law; these were mainly churchmen to begin with, but later included laymen as the knowledge of law spread outside the church. Then, as today, a distinction was drawn between attorneys (*attornati*), experienced men of business who advised the parties on the law, and pleaders (*advocati*), who specialized in the oral presentation of cases before the courts.").

[13] Pollock & Maitland, *supra* note 12.

[14] *Id*. ("…so long as procedure is very formal, so long as the whole fate of a lawsuit depends upon the exact words that the parties utter when they are before the tribunal, it is hardly right that one of them should be represented by an expert who has studied the art of pleading.").

[15] Zweigert & Kötz, *supra* note 12, at 184-85.

[16] *Id.* at 186.

[17] H. PATRICK GLENN, ON COMMON LAWS 42-43 (Oxford Univ. Press 2005) ("The common laws of Europe thus existed in great variety. Ius commune did not exist in singular but in multiple form, as iura communia, and there were vigorous relations not only between the common laws and the particular laws of each of them, but also between the common laws themselves. There were also…common laws which were free of a territorial base, such as canon law or commercial law…The common law which received perhaps the greatest renown was that based upon Roman law, in large measure because it was expressed in a common language, Latin, and because it was the only ius commune taught in a manner which transcended the states which were later to emerge. Yet the ius commune was only one example of a common genus of relational common law, which also included the common law, the droit commun coutumier of what we know today as France, the gemeine Recht of what is today Germany, the derecho commun of the Siete Partidas, as well as what were recognized as regional common laws, such as those of Tuscany or…Naples…Differences amongst the laws which were present, in the same territory, were not seen as conflicts of laws, but as ongoing options… [C]ommon law was the most important instrument for conceptualizing legal relations in Europe for hundreds of years.") (footnote omitted).

observed, "[t]he history of the common law is dominated by questions of jurisdiction, writs, and remedies."[18] In medieval times, four Inns of Court in London – Lincoln's Inn, Gray's Inn, the Inner Temple and the Middle Temple – modeled after monastic institutions and guilds were formed.[19] They prescribed qualifications for the lawyer and had sole power to offer a call to the bar. It remains the case to this day.[20] It must be acknowledged that the *Corpus Juris Civilis* influenced this development as well.[21]

In English law, historical experience led to the (seemingly illogical) rule that criminal defendants accused of petty or misdemeanor offenses could have counsel for their own defense. In stark contrast, those accused of more serious crimes had to wait until the end of the seventeenth century, following much bloodshed, tumult, and political and legal revolutions. This paradoxically absurd situation – petty criminals could have a lawyer or pleader represent them in court but not those facing more serious crimes – perhaps not surprisingly elicited much debate. In 1649 – the very year that King Charles I was executed by regicides led by Oliver Cromwell – Bulstrode Whitelock (Lord Keeper of the Great Seal of England) confessed his bewilderment at this rule. "'I confess, I cannot answer this objection," Whitelock stated, "that for a trespass of [little] value, a man may have a Counsellor at Law to plead for him, but where his life and posterity are concerned, he is not admitted this privilege, and help of lawyers."[22] Whitelock concluded that a "law to reform this, I think would be just, and give right to people.'"[23]

Accordingly, while the legal profession existed by the High Middle Ages, defendants – particularly those accused of serious crimes (high treason and felonies) – were prohibited from invoking a right to counsel. Yet, an intellectual revolution and transformation was occurring, influenced by Enlightenment modes of thought. The first time that the right to counsel was granted to the most serious crime (high treason) was in the aftermath of the Glorious Revolution of 1688, followed by the near simultaneous

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[18] *Id*. at 31.

[19] HUGH H. L. BELLOT, THE INNER AND MIDDLE TEMPLE: LEGAL, LITERARY, AND HISTORIC ASSOCIATIONS 2 (1902).

[20] Clare Rider, *The Inns of Court and Inns of Chancery and Their Records*, THE INNER TEMPLE, https://www.innertemple.org.uk/who-we-are/history/historical-articles/the-inns-of-court-and-inns-of-chancery-and-their-records/ (last visited Oct. 18, 2022) ("It continues to be the inns of court and not the law courts who call suitably qualified practitioners to the Bar, giving them the exclusive right of audience in the superior courts, and, it is the inns who, if necessary, disbar their members for professional misconduct.").

[21] Bellot, *supra* note 19, at 32-33.

[22] LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 322 (1999).

[23] *Id.*

adoption and promulgation of the English Bill of Rights in 1689.[24] Initial parliamentary recognition of the right's importance occurred less than a decade later, in 1696, with the passage of the Treason Act.[25] Notwithstanding this gloried history, English law did not extend to criminal defendants the right to counsel in all felony cases until 1836, when Charles Darwin was completing his voyages aboard the HMS Beagle, Michael Faraday was experimenting with the theory of electro-magnetism, and Davy Crockett fought the Mexicans at the Alamo.

The scholar John Langbein dates the beginning of a "true adversarial system" to this 1696 Act, for it is at this point in the history of the common law that the criminal defendant, albeit only in cases of high treason, was permitted the right to have legal assistance in the proceedings against them. He has observed that from the late 1670s to the middle 1680s (immediately prior to the Glorious Revolution) there were multiple treason trials, and "[t]hese trials – arising from the Popish Plot (1678), the Rye House Plot (1683), and Monmouth's Rebellion (1685) – would prove to be landmark events in the subsequent movement for procedural reform."[26] Accordingly,

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[24] *See* MICHAEL BARONE, OUR FIRST REVOLUTION: THE REMARKABLE BRITISH UPHEAVAL THAT INSPIRED AMERICA'S FOUNDING FATHERS 232-33 (2007) ("The Revolution of 1688-89 turned out to be a bold step forward also for guaranteed liberties…[P]rovisions of the 1689 Bill of Rights were inspirations for the 1791 American Bill of Rights: the Third Amendment provision banning the quartering of troops, the Fourth Amendment ban on unreasonable searches and seizures, the Fifth Amendment protection against self-incrimination, the Sixth Amendment right to jury trial…[Though it may have been a] limited and grudging document…as an affirmative statement of individual rights…the [1689] Bill of Rights broke new ground, ground that would be extended in the New World [to include right to counsel].").

[25] *William III, 1695-6: An Act for regulateing of Tryals in Cases of Treason and Misprision of Treason [Chapter III. Rot. Parl. 7 & 8 Gul. III. pt. 1.nu.3.]*, BRITISH HISTORY ONLINE (last visited May 14, 2025), https://www.british-history.ac.uk/statutes-realm/vol7/pp6-7 ("Whereas nothing is more just and reasonable than that Persons prosecuted for High Treason and Misprision of Treason whereby the Lib[er]ities Lives Honour Estates Bloud and Posterity of the Subjects may bee lost and destroyed should bee justly and equally tried and that Persons accused as Offenders therein should not bee debarred of all just and equal Means for Defence of their Innocencies in such Cases In order thereunto and for the better Regulation of Tryals of Persons prosecuted for High Treason and Misprision of such Treason Bee it enacted by the Kings most Excellent Majestie by and with the Advice and Consent of the Lords Spiritual and Temporal and the Commons in this present Parliament assembled and by the Authority of the same That from and after the Five and twentieth Day of March in the Yeare of our Lord One thousand six hundred ninety six all and every Person and Persons whatsoever that shall bee accused and indicted for High Treason… to enable them and any of them respectively to advise with Counsell thereupon to plead and make their Defence… Person soe accused and indicted arraigned or tryed for any such Treason as aforesaid or for Misprision of such Treason from and after the said time shall bee received and admitted to make his and their full Defence by Counsel learned in the Law and to make any Proof that hee or they can produce by lawfull Witnesse or Witnesses who shall then bee upon Oath for his and their just Defence in that behalfe…"); s*ee also* James R. Phifer, *Law, Politics, and Violence: The Treason Trials Act of 1696*. 12 ALBION: Q. J. CONCERNED WITH BRIT. STUD. 235, 255 (1980).

[26] Langbein discusses the importance of the *Seven Bishops Case*, which occurred in 1688. The Archbishop of Canterbury and six other prelates were prosecuted for seditious libel (not high treason) and thus had the right to legal assistance. The importance of this case rests on that fact, for due to efforts of defense counsel, the prelates were all acquitted by the jury. Langbein acclaims this trial and acquittal as "the event that sealed James [II]'s fate and triggered the Revolution of 1688-89." More significantly, the acquittal of these prelates convinced many of the need for granting a right to counsel, particularly in

the 1696 Act was a first step towards equalizing the field between prosecution and defense,[27] through "allowing the defendant to have access to counsel…in the way that the state prosecuted them. . ."[28] Indeed, "reforms of the 1696 Act – the right to defense counsel, the enhanced pretrial disclosure, the swearing of defense witnesses, and compulsory process for defense witnesses – imitated prosecutorial practice for the purpose of rectifying imbalance."[29]

From our vantage point, it is bewildering that this development took as long as it did in the "adversarial model." After all, the notable feature of this criminal justice system embraces a clash of the parties, with the judge as a neutral arbiter.[30] It seems there were two reasons for this denial. First, a legal fiction had developed that the judge, while seeking the truth would simultaneously protect the defendant and keep his interests in mind, and this fiction remained in force for quite a long time.[31] Second, (perhaps the best

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treason cases, which could – and often did – take the form of outright political persecutions. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 69 (2003).

[27] *See* Amanda L. Tyler, *A "Second Magna Carta": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 NOTRE DAME L. REV. 1949, 1980 (2016) ("…Parliament enacted the Treason Act in 1696. Following on the heels of the Habeas Corpus Act [of 1679], the legislation instituted additional protections for those charged with the crime of high treason. These included the requirement of two witnesses to an overt act, a requirement later imported into the United States Constitution's Treason Clause, and other protections that had not been previously granted to those accused of common law crimes, including the rights to counsel and to compel witnesses for one's defense. *In so doing, the Act marked a major step in inaugurating a revolution in criminal procedure*.") (emphasis added).

[28] Langbein, *supra* note 26 at 85; *See also* Alexander H. Shapiro, *Political Theory and the Growth of Defensive Safeguards in Criminal Procedure: The Origins of the Treason Trials Act of 1696*, 11 L. & HIST. REV. 215 (1993).

[29] Langbein, *supra* note 26 at 102.

[30] *See* ROSCOE POUND, THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, at 14 (1906); JOHN HENRY WIGMORE, SELECT CASES ON THE LAW OF EVIDENCE 726-27 (2d ed. 1913) ("The common law, originating in a community of sports and games, was permeated essentially by the instincts of sportsmanship…On the one hand, it has contributed a sense of fairness, of gentlemanliness, of chivalrous behavior to a worthy adversary, of carrying out a contest on equal and honorable terms. The presumption of innocence, the character rule, the privilege against self-incrimination, and other specific rules (to name those of evidence alone), show the effect of this instinct against taking undue advantage of an adversary…On the other hand, it has contributed to lower the system of administering justice, and in particular of ascertaining truth in litigation, to the level of a mere game of skill or chance. Now one of the cardinal moral assumptions in a contest of skill or chance is that a player need not betray beforehand his strength of resource, and that the opponent cannot complain of being surprised. The accepted laws and moral standards of whist protect the player from exposing his cards before playing them; the owner of the racing-stable keeps as a valuable secret the time made by his horse in the last private trial before the race; and a chess-player's skill consists largely in concealing from his opponent the far-reaching sequence of moves which he has planned. It is this feature of games and sports that has influenced powerfully the policy of the common law in the present aspect.").

[31] Levy, *supra* note 22, at 322 ("Yet the theory of the law was that the court sat to advise the defendant in matters of law, as distinct from matters of fact, in capital cases. It was a theory that had no substance in practice; barely less fictitious was the conflicting theory that the court would permit counsel in the event that doubtful matters of law arose. In practice the defendant was left to make his own defense no matter how ignorant and helpless he was. Even Jeffreys, who rigorously enforced the rule against counsel, openly acknowledged that it worked a severe handicap: 'I think it is a hard case, that a man should have counsel to defend himself for a two-penny-trespass, and his witnesses examined upon oath;

rationale for the ban) was stated by Edward Coke in his famed *Institutes*; "the evidence to convict a prisoner should be so manifest, as it could not be contradicted."[32] In other words, allowing the defendant to have a lawyer, in serious cases, would confuse the jury (and possibly even the judge) and obscure the truth, so they could not be permitted. It is not clear as to why this same rationale did not extend to petty offenses or misdemeanors. After all, permitting the defendant access to counsel in any case, regardless of severity, could lead to manipulation of the proceedings and confuse the finder of fact. Yet, this "inquisitorial" fiction remained for centuries.

While the right to counsel would not fully be extended to all defendants until 1836, long after inquisitorial countries had extended the right, in practice judges attempted to mitigate the harshness of it well before then. It appears that by the middle of the eighteenth century, counsel was quite often permitted to represent defendants accused of felony, 'except address the jury for him.'"[33] This observation was explicitly made by William Blackstone, author of *Commentaries on the Laws of England* – the most influential treatise on the common law – with the possible exception of Coke's *Institutes*. Blackstone's rhetoric echoed that of Whitelock's simple question posted a century earlier.[34]

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but if he steal, commit murder or felony, nay, high treason, where life, estate, honour, and all are concerned, he shall neither have counsel, nor his witnesses examined upon oath: But yet you know as well as I, that the practice of the law is so; and the practice is the law.") (emphasis added). See EDWARD COKE, THE THIRD PART OF THE INSTITUTES: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 137 (1644) ("because for every matter in law ruling upon the fact, the prisoner shall have Councell [sic] learned assigned him.").

[32] Coke, *supra* note 31 ("Also it is lawfully for any man that is in Court, to inform [sic] the Court of any of these matters, lest the Court should err [sic], and the prisoner unjustly for his life proceeded with. And the reason wherefore regularly in case of treason or felony, when the party pleads not guilty, he was to have no counsel, was for two causes. First, for that in case of life, the evidence to convict him should be manifest, as it could not be contradicted. Secondly, the Court ought to see, that the Indictment, Trial [sic], and other Proceedings be good and sufficient in law; otherwise they should by their erroneous judgement attaint the prisoner unjustly.").

[33] Levy, *supra* note 22, at 323.

[34] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 229-30 (Book IV, Oxford University Press 2016) ("A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass? Nor indeed is it strictly speaking a part of our antient law: for the mirrour , having observed the necessity of counsel in civil suits, 'who know how to forward and defend the cause, by the rules of law and customs of the realm,' immediately afterwards subjoins; 'and more necessary are they for defense upon indictments and appeals of felony, than upon other venial causes.' And, to say the truth, the judges themselves are so sensible of this defect in our modern practice, that they seldom scruple to allow a prisoner counsel to stand by him at the bar, and instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact: for as to matters of law, arising on the trial, they are *intitled* to the assistance of counsel.") (footnote omitted).

Continental Law

On the European Continent, the historical development of the right to counsel took a rather different course. In Ancient Athens, law initially dictated that each litigant speak on their own behalf; perhaps this requirement was not so unreasonable in a society "where all citizens participated in the deliberations of the sovereign assembly and were free to address their fellow-citizens on all public questions."[35] Over time, however, a class of orators (individuals trained in the art of rhetoric) developed and "began to compose speeches for clients to be recited as their own."[36] While sixty orators are known to us by name today, the orations which are still extent belong to "the Canon of the Ten Orators.'"[37] Among this distinguished group were the figures of Demosthenes, Antiphon, Lysias, and Isocrates. Of 1700 speeches attributed to them in antiquity, only 130 remain extent.[38] Yet, there remained in Ancient Athens aversion to a standing class of professional lawyers.[39]

"[T]he grandeur that was Rome was actually the grandeur of Roman Law; and the grandeur of the Roman Law was in fact the concerted achievement of the Roman legal profession."[40] There emerged a strong, confident, public-spirited, and quite competent class of professional lawyers.[41] Like Confucian and monotheistic religious traditions, Roman law in the time of the Kings – prior to the Republic – was paternalistic in nature, as several roles were combined in the person of the King:

[T]he King, as father of the whole people, has naturally the right and the duty of punishing those offences which affect the safety of the community…[a]s commander-in-chief it is for him to deal with acts of treason; and as the head of the State religion he must see that heinous offences against the gods are duly expiated. The king conducts the inquiry – *quaestio* – but custom requires him to have the assistance of a council of assessors – *concilium*. It is one of the charges made by Livy against [the last

[35] ROBERT J. BONNER, LAWYERS AND LITIGANTS IN ANCIENT ATHENS: THE GENESIS OF THE LEGAL PROFESSION 1 (1927).

[36] *Id*.

[37] *Id*. at 2.

[38] *Id*. at 4.

[39] Anton-Hermann Chroust, *Legal Profession in Ancient Athen*s, 29 NOTRE DAME L. REV. 339, 356 (1954) ("…[T]hroughout Greek literature we find many exceedingly unfavorable comments about lawyers and public prosecutors, indicating not only that the use of lawyers and public attorneys or prosecutors had become a common practice by the end of the fifth century B.C., but also that this practice had become very unpopular.").

[40] Anton-Hermann Chroust, *Legal Profession in Ancient Republican Rome*, 30 NOTRE DAME L. REV. 97 (1954).

[41] *Id.* at 100.

Roman king] Tarquinius Superbus that he was wont to try capital charges without the assistance of this council.[42]

After the creation of the Roman Republic, trials for capital crimes became extremely vested with procedural protections for the accused. Notably, this included the right to appeal a sentence imposed by the magistrate to the *comitia curiata*,[43] a council of the people, through the process of *provocatio ad populum* (though this right was suspended when a dictator imposed a death sentence and it did not apply to non-citizens). The invocation of *provocatio* mandated that the majority of the people must confirm the sentence (not unlike a jury) of punishment. This constitutionally enshrined right, however much limited in practice, was "always regarded as a great mark of Roman freedom."[44]

During the *judicium populi*, a magistrate would conduct an investigation – known as an *anquisitio* – which would occur over the course of three days, producing evidence for both prosecution and defense. At this point, the *anquisitio* would become an *accusatio*, not unlike an adversarial criminal proceeding, in rudimentary form. The magistrate would present the evidence, known as *quarta accusatio*, to the *comitia*, which had to either pass or reject the bill (*rogatio*). Importantly, and quite unique for such a paternalistic legal system, "the accused can defend himself before the assembly either personally or by his friends, and in the later Republic is generally assisted by *oratores* – pleaders of experience in criminal trials."[45] In the 1st century, during the reign of the Emperor Claudius, advocacy became a formal profession, except remuneration was limited to 10,000 sesterces.[46] The advocate had now received public recognition.[47] Wherever Roman law has gone, the advocate has followed. All of us "owe to ancient Rome the beginnings of the profession that we love and many of the basic principles of the law in whose temple we are votaries."[48]

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[42] Frederick Parker Walton, *Historical Introduction to the Roman Law* 210 (WM. W. Gaunt & Sons 2d ed. 1994).

[43] *Id.* at 211 ("…[A]t an early period the practice of appealing against a capital sentence to the assembly of the people, which under the kings, had been merely a matter of grace, became a constitutional right which the accused was entitled to claim.").

[44] *Id.* at 212.

[45] *Id.* at 213-14.

[46] Jan L. Jacobowitz, *Chaos or Continuity? The Legal Profession: From Antiquity to the Digital Age, the Pandemic, and Beyond*, 23 VAND. J. ENT. & TECH. L. 279, 285 (2021) (footnote omitted).

[47] George L. Canfield, *The Roman Lawyer: A Sketch*, 7 MICH. L. REV. 557, 563 (1909) ("In the time of Cicero, the Roman bar already counted its existence by centuries and had commenced to specialize into classes. There were the procuratores or proctors, who resembled solicitors or attorneys under the English system; the jurisconsults, who seldom came into the actual trial of causes but confined themselves to advice and opinions on the law; and the advocates or 'patroni causarum, who tried cases and were the most conspicuous of all. Among them at this time, of equal reputation and powers, were Cicero, Hortensius, Cato and Julius Caesar; the last would be famous as a lawyer were it not for his later military and political glory.").

[48] Ben W. Palmer, *An Imperishable System: What the World Owes to Roman Law*, 45 A.B.A. J. 1149, 1149 (1959).

This precedent (of allowing the accused an advocate) continued in European history. Formal inquisitions into heretical depravity had initially been established throughout the Middle Ages via papal bull, with its most notorious version operating in Spain and consequently throughout her empire [as well as Portugal]. Indeed, this perpetual search for heresy (which initially targeted Christians of Jewish descent,[49] Protestants, alleged witches, freethinkers and dissidents) lasted for nearly three and a half centuries until 1834,[50] the year slavery was abolished in the British Empire.

A particularly fascinating aspect of inquisitional procedure – at least in its Spanish version – was that those denounced of heresy were permitted the use of legal assistance, though in practice this hardly mattered, for two reasons. First, the accused was not granted the right to confer with counsel until after they had been detained for weeks or months, without knowledge of the charges or evidence against them.[51] Second, even after counsel had been assigned (as the accused rarely had opportunity to choose their own advocate), knowledge of the evidence against them remained limited, and a vigorous defense of the accused could level charges of heresy against the advocate.[52]

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[49] HENRY KAMEN, THE SPANISH INQUISITION: A HISTORICAL REVISION 56 (1997) ("[Trial records] indicate clearly who bore the brunt of the Inquisition: 99.3 percent of those tried by the Barcelona tribunal between 1488 and 1505, and 91.6 percent of those tried by that of Valencia between 1484 and 1530, were conversos of Jewish origin. The tribunal, in other words, was not concerned with heresy in general. It was concerned with only one form of religious deviance: the apparently secret practice of Jewish rites.").

[50] CECIL ROTH, THE SPANISH INQUISITION 252 (1964) ("The Marranos [Jews who (were quite often forcibly) converted to Christianity] had always provided a majority of the victims; and as soon as they disappeared from the scene, the work of the Inquisition became negligible. From the middle of the eighteenth century, it constituted in fact little more than an instrument for the moral policing of the country, terrible by reason of its reputation and its potentialities (still sporadically exercised) for the suppression of religious heterodoxy, political insubordination, and freedom of thought."). Then, Roth concludes with a rhetorical flourish on page 267. *Id.* at 267 ("On July 15th, 1834, notwithstanding the protests of a superannuated minority, the Queen Mother [Maria Cristina] issued an edict finally and definitely abolishing the Holy Office and all its powers, direct and indirect, without reservation or qualification…the essential part of the decree was…summed up in nine words, with commendable brevity, the end to which Spanish liberals had for so long been striving: '*It is declared that the Tribunal of the Inquisition is definitely suppressed*.") (Emphasis original).

[51] Kamen, *supra* note 49, at 193-94 ("One of the peculiarities of inquisitorial procedure which brought hardship and suffering to many, was the refusal to divulge reasons for arrest, so that prisoners went for days and months without knowing why they were in the cells of the tribunal. Instead of accusing the prisoner, the inquisitors approached him and gave three warnings, over a period of weeks, to search his conscience, confess the truth and trust to the mercy of the tribunal. The third warning was accompanied by information that that the prosecutor intended to present an accusation, and that it would be wisest to confess before the charges were laid. The effect of this enforced ignorance was to depress and break down a prisoner…When, after the three warnings, the prosecutor eventually read the articles of accusation, the accused was required to answer charges on the spot, with no time or advocate to help him present his defence…Only after this was permission given to enlist legal help for the defence.").

[52] *Id.* at 194 ("In the earlier years the accused could choose their lawyers freely, but the growing caution of the Holy Office later confined the choice to special lawyers nominated by the tribunal, so that the mid-sixteenth century the prisoners' advocates or *abogados de los presos* were recognized as officials of the Inquisition, dependent upon and working with the inquisitors…This does not mean that [they] did not do their duty conscientiously. But they were hindered by the restrictions of the tribunal and by the subtle and dangerous task of defending the prisoner while condemning his heresy.").

As the "New Instructions" of 1561 made clear, promulgated under Inquisitor-General Fernando de Valdés, the role of the defense counsel was one of utmost fidelity to the Tribunal:

The inquisitor or inquisitors will advise the defendant on how important it is for him to confess the truth. Once they have done so, they will name a lawyer or lawyers from the tribunal for the defendant's defense. . .The defendant will communicate with his lawyer in the presence of either of the inquisitors…Before undertaking the defense, the lawyer will swear to defend him well and faithfully, and to keep secret what he sees and knows…and the lawyer is obliged (as a Christian) to admonish the defendant to confess the truth; and if the lawyer fails to do this, he shall ask for penance. . .If the defendant wishes to continue his confession, the defense lawyer shall leave, because he must not be present.[53]

Thus, while this inquisitorial practice – granting the accused the right to counsel – hardly mattered in practice, as the guilt of the accused was virtually ensured,[54] it marked a more progressive step than contemporary criminal procedure in secular courts, including as we have seen in England.

In France, the *Ancien Régime* adopted inquisitorial procedure through the ordonnances of 1498 and 1539.[55] Under the *Ordonnance Criminelle* of 1670, promulgated during the reign of the Sun King, the accused was explicitly forbidden the right to have legal assistance in criminal proceedings.[56] Indeed, "[i]t endowed France with the clearest and most vigorous expression," observed a criminal law expert nearly nine decades ago, "of the inquisitorial procedure the secular courts in Europe had ever known."[57] Not surprisingly, for the monarch who proclaimed, "l'État c'est

[53] *Gaspar Isidro de Arguello: Instructions of the Holy Office of the Inquisition, Handled Summarily, Both Old and New*, *Part II: The "New Instructions" of 1561*, *in* THE SPANISH INQUISITION: 1478-1614, AN ANTHOLOGY OF SOURCE 225-26 (Lu Ann Homza ed. trans., Hackett Publishing Co. 2006).

[54] CULLEN MURPHY, GOD'S JURY: THE INQUISITION AND THE MAKING OF THE MODERN WORLD 83 (2012)("The Inquisition did not bring a presumed heretic or judaizer to trial unless it was already convinced of the person's guilt. A conviction was virtually guaranteed. And the deck was stacked heavily against the accused. To begin with, the proceedings of the tribunal were secret. The accused did not know, when initially charged, what the specific allegations against him were. He did not know, when presented with evidence, who his denouncers might be. Furthermore, the most persuasive denouncer often turned out to be the denounced person himself, because he confessed. The application of torture in the preliminary stages of an investigation, to determine if a confession might be forthcoming, always loomed as a possibility. In a departure from the Medieval Inquisition, the accused in Spain could be represented by a lawyer, but the gesture was an empty one: the lawyer was given no information. Conviction rates from place to place were uniformly high. During the first half century of the Inquisition in Toledo, for instance, acquittals averaged about two a year. As a practical matter, the main question for a person facing trial was not whether he would be found guilty but what the punishment would be.").

[55] Raymond K. Berg, *Criminal Procedure: France, England, and the United States*, 8 DEPAUL L. REV. 256, 261 (1959).

[56] *Id.* at 261-62.

[57] Morris Ploscowe, *Development of Inquisitorial and Accusatorial Elements in French Procedure*, 23 AM. INST. CRIM. L. & CRIMINOLOGY 372, 375 (1932-1933).

moi," the 1670 Statute was even referred to as the *Code Louis*.[58] Its legacy was to be extraordinarily momentous, as this legal ode to inquisitorial absolutism governed French criminal procedure until the Revolution of 1789. And when that Revolution came, so far-reaching were its political, legal, economic and social reforms that they "shattered the old institutional structures"[59] of the *ancien régime*, while efforts at codification immediately commenced. (e.g. Cambacérès unsuccessfully presented three different draft codes under both the Convention (1792-1795) and the Directory (1795-1799)).[60]

Indeed, prior to Napoleonic codification, no uniform French law existed. Instead, it was a hodge-podge of laws throughout the country that overlapped in jurisdiction, differed in origin, and were contradictory in aspects. As described by the French jurist Jean-Étienne-Marie Portalis:

What a spectacle opened before our eyes! Facing us was only a confused and shapeless mass of foreign and French laws, of general and particular customs, of abrogated and nonabrogated ordinances, of contradictory regulations and conflicting decisions; one encountered nothing but a mysterious labyrinth, and at every moment, the guiding thread escaped us. We were always on the point of getting lost in an immense chaos.[61]

Reform of French law,[62] and in particular criminal procedure, was so central to the Revolution that one of the first acts of the newly constituted "Constitutional Assembly" was to repeal the 1670 *Ordonnance Criminelle*, and replace it with a temporary code of criminal procedure in 1789, followed by a new penal code two years later. The 1789 code of criminal procedure specifically granted criminal defendants a right to have the presence of counsel during examination and further mandated they should have full access to written evidence in their case.[63] In 1791, the French

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[58] Mar Jimeno-Bulnes *American Criminal Procedure in a European Context*, 21 CARDOZO J. INT'L & COMP. L. 409, 422 (2013).

[59] ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 48 (1977).

[60] *Id*. at 48-49; s*ee also French Revolution, Encyclopedia Britannica*, VOL. 9, 909-913, 912 (1972).

[61] Mehran & Gordley, supra note 59, at 14; JOHN W. HEAD, GREAT LEGAL TRADITIONS: CIVIL LAW, COMMON LAW, AND CHINESE LAW IN HISTORCIAL AND OPERATIONAL PERSPECTIVE 94 (2011); Portalis is quoted in 1 P.A. Fenet, *Recueil complet des travaux preparatoires du Code Civil,* xciii (1836).

[62] Marc Ancel, *The Collection of European Penal Codes and the Study of Comparative Law*, 106 PA L. REV. 329, 343 (1958) ("It was in obedience to this movement of ideas that the États generaux of France promised solemnly, in the famous oath of the Jeu de Paume, not to disperse before having given France a Constitution.").

[63] Ploscowe, *supra* note 57, at 376-77 ("The Constitutional Assembly, tackling the question in the fall of 1789, passed a law designed to fill the gap until a general reform of the criminal laws could be completed. The temporary measure was well thought out. It embodied suggestions for improvement which had grown out of the discussions of the previous decades. Existing institutions were left intact, but guarantees for the individual were devised. Henceforth, two adjoints (laymen of good reputation) were required to assist the investigating magistrate in his preliminary operation! preceding the appearance of the accused. When the accused appeared the proceedings were public and contradictory. *The accused was permitted counsel who was present during examination of witnesses and had access to all the documents in the case*.") (second emphasis added).

revolutionaries went even further; they sought to fully overhaul traditional criminal procedure through the wholesale transplantation of English criminal procedure to French soil.[64]

It was not surprising that the 1791 Penal Code – "[t]he only [official] code promulgated by the French Revolution"[65] – had been adopted during this time of intense euphoria, when procedural and penal reform – deeply influenced by Enlightenment values – had been acclaimed throughout the western world.[66] Indeed, revised codes of criminal procedure had emerged throughout Europe (not to mention in the nascent United States with the adoption of their 1791 Bill of Rights) around this time. Revisions ranged from the Bavarian Code of 1751 and the Austrian Criminal Ordinance of 1768 – though they did not change much in practice – to more progressive codes such as the 1767 *Nakaz* ("Instruction") promulgated by Catherine the Great, the 1786 criminal code of Leopold II of Tuscany, and the Prussian *Landrecht* ('General State Laws for the Prussian State Laws') ordered by Frederick II, though he ultimately did not live to see its publication in 1794.[67]

This incredibly transformative attempt to substitute English criminal procedure for its French counterpart proved to be premature, particularly in the face of resistance from both centuries of historical experience,[68] and revolutionary excesses, notably the *legal* execution via guillotine of 16,594 people throughout France and 2,639 in Paris alone in a single year,[69] from June 1793 to July 1794. The excesses of this year, referred as the Reign of Terror, did much to discredit the revolutionary reforms, most notably to the law. As Ploscowe observed, "the reforms of 1791 had been put into effect

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[64] *Id.* at 377 ("Two years later the anticipated general reform was brought about, *consisting of a deliberate sacrifice of all French institutions and a wholesale importation of English criminal procedure*. By the law of September 16-29, 1791, the *lieutenant criminal*, the investigating magistrate who was the dominating figure of the old procedure disappeared along with his active associate, the Prosecuting Attorney. In place of the latter, two officials were created, a Commissaire of the King, charged with the duty of seeing that the laws were enforced, and a Public Accuser who appeared in the trial as Counsel for the accusation. The principal figure in the preliminary proceeding became as in England, a justice of the peace (*juge de paix*), an elective official. He was given the power to issue a warrant summoning the accused to appear before him on complaint made to him of the commission of an offense. When the accused appeared, the Justice of the Peace heard him and witnesses and on the basis of this hearing either ordered the accused held for action by the Grand Jury or dismissed the complaint.").

[65] Ancel, *supra* note 62, at 343.

[66] *French Revolution*, supra note 60, at 910 ("[T]he French Revolution was only one aspect of a much vaster revolution that affected the west and in particular, the Atlantic countries and has suggested the description 'Western' or 'Atlantic' Revolution…Barnave, one of the first leaders of the Revolution in France, indeed had already claimed in his *Introduction à la Révolution française* that there was not, in the strict sense, a 'French Revolution' but a 'European revolution which reached its zenith in France.").

[67] *Id.* at 343-44.

[68] Ploscowe, *supra* note 57, at 377.

[69] Marisa Linton, *The Terror in the French Revolution* (2004), https://web.archive.org/web/20120117152123/http://www.port.ac.uk/special/france1815to2003/chapter1/interviews/filetodownload%2C20545%2Cen.pdf.

because of a desire to safeguard individual liberty. But the excesses of the Revolution caused a reaction in which individual liberty became of less importance than security."[70]

Consequently, we see the next great reform of criminal procedure occur after the collapse of the First French Republic, the Directory, and the installation of Napoleon Bonaparte as Emperor. Known more widely for creating a commission of jurists to codify the Civil Code, which occurred in March 1804,[71] nine months before his coronation when he proclaimed himself Emperor, Napoleon subsequently reformed criminal procedure, through his 1808 *Code d'Instruction Criminelle* (Code of Criminal Instruction, or *CIC*).[72] This Code, which restored the right to counsel for the accused at trial, remained good law – for a century and a half – until the creation of the Fifth Republic in 1958. It stands as a landmark in the annals of criminal procedure, because it was seen as striking a balance between the inquisitorial and adversarial legal systems by mixing elements of the two.[73] It "retained the adversarial elements of the trial stage but re-instated the inquisitorial pre-trial investigation."[74] In other words, "[i]n the proceedings prior to trial, the system of 1670 was to a large extent preserved including a secret investigation by the judge and the *refusal of counsel to the accused*. At the trial, [in contrast] the accusatorial system prevailed with public proceedings, oral evidence and the *defendant's right to counsel*."[75]

Far too often overlooked – especially by legal historians and lawyers in common law countries –, the fundamental importance of the *Code d'Instruction Criminelle* should not be neglected. The *CIC* achieved widespread success and emulation throughout the world through three principal means; first, via imperial imposition during the Napoleonic Empire (even after Napoleon fell from power and several countries had their sovereignty restored, Holland and the Rhineland retained it); second, in a similar vein, through French colonization in large swathes of the globe during the nineteenth and twentieth centuries; but third, and most

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[70] Ploscowe, *supra* note 57, at 378.

[71] H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 143 (4th ed. 2010). "France's codification of private law, under Napoleon in 1804, was the world's first national, systemic, and rational codification of law." *Id.*

[72] Helen Trouille, *A Look at French Criminal Procedure*, CRIM. L. REV., 735, 743 (1994).

[73] Ancel, supra note 62, at 355 ("The Napoleonic codification had seemed to achieve a harmonious balance between the new aspirations and the repressive tendencies of the old law. And the Code of Criminal Procedure of 1808, elaborated this famous *systeme mixte* of retaining the traditional inquisition at the stage of judicial investigation, while giving to the judgment stage the character of public, oral, accusatory procedure taking place before a jury, at least for major offenses, and guaranteeing substantial rights to the defense. This system was clearly in advance of the conceptions of the time; only after 1848 under the impetus of the Revolution which in Paris had just overthrown the July Monarchy, did these trial rights become generally established in Europe.").

[74] Hatchard et al., *Comparative Criminal Procedure*, BRITISH INSTITUTE OF INTERNATIONAL AND COMPARATIVE LAW 19 (1996).

[75] Berg, *supra* note 55, at 283-84 (emphasis added).

importantly, it was viewed in the nineteenth century as a "ready-made 'liberal code' code of procedure which was available at once to replace autocratic forms of criminal justice at times of revolutionary change."[76]

In other words, the *CIC* aimed for the middle path along the spectrum of inquisitorialism. Perhaps the most prominent national codes of criminal procedure that it indelibly influenced in the following decades were the 1865 Italian Code,[77] during that country's *Risorgimento*; the 1877 Code of Bismarckian Germany; the 1882 Spanish Code; and even in the newly established Republic of China, proclaimed by Sun Yat-Sen, following the overthrow of the *Qing* dynasty in 1912.[78] On his deathbed, Napoleon remarked "'[i]t is not in winning 40 battles that my real glory lies, for all those victories will be eclipsed by Waterloo. But my Code civil [and others] will not be forgotten, it will live forever.'"[79] Today, "the Napoleonic Code forms the basis of law in Europe and aspects of it have been adopted by forty countries spanning every continent except Antarctica."[80]

RELIGIOUS TRADITIONS

The term *Non-Western* means legal systems (or families) that claim their law originated either from on high – through divine revelation – or through communal traditions and institutions. Importantly, both reject normativity rooted in positivist law. The first type of legal tradition is of course religious law, primarily the Abrahamic faiths of Judaism, Christianity, and Islam. The second type is predominantly located in East Asia, heavily influenced by Confucian values, deeply distrustful of formal structures, and heir to a communitarian *ethos* that subordinated the individual, and the very concept of rights, to the community and that of duties or obligations to the state.

In stark contrast, the monotheistic legal traditions elevated the individual to a supreme role. Claiming that man (and woman) had been created "in the image of God,"[81] the individual was immediately endowed

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[76] Hatchard et al*., supra* note 74, at 8-9.

[77] In 1930, under the fascist regime of Benito Mussolini, a new Code of Criminal Procedure was drafted. Based on the inquisitorial model, defense attorneys did not play much of a role, particularly in the pre-trial stage but even at trial, where counsel was not allowed to cross-examine witnesses. (C.P.P. art. 448 (1930)). In 1988, Italy drastically revised this code and based it upon the adversarial legal system. *See* Head, *supra* note 61, at 308-09, for more information on these historical changes.

[78] Head, *supra* note 61, at 308-09.

[79] Zweigert & Kötz, *supra* note 12, at 84.

[80] ANDREW ROBERTS, NAPOLEON: A LIFE xxxiv (2014).

[81] In Jewish and Christian tradition, which recognize the divine authority of the Torah or Old Testament, God himself declared this inviolable precept when Adam (the first man) was created Genesis 1:26-27 ("And God said: 'Let us make man in our image/b'tsalmeinu, after our likenesss/kid'muteinu; and let them have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.' And God created man in His image, in the image of God He created him, male and female created He them.") Similarly, the *Hadith* – a compilation of the traditions of the Prophet Muhammad – claim that Allah created Adam in his image.

with certain inalienable rights, and treated as a unique being. This understanding had immense ramifications for law, history, and tradition, particularly vis-à-vis the historical development of procedural protections granted to the accused in criminal proceedings.

Christian (Canon) Law

The Christian tradition does not stress the law nearly as much as either Judaism or Islam. However, this is not to say that the canon law of the Church did not significantly influence the course of legal history, particularly that of criminal law and procedure. The creation of medieval inquisitions into heretical depravity, especially in Iberia, was founded upon the importance of the law of the church, particularly vis-à-vis proper treatment of minorities and other dissident groups.[82]

Though early Church fathers, such as Paul or Augustine have spoken of law,[83] the legal renaissance – which permanently influenced the creation of the continental legal tradition – primarily occurred in the twelfth and thirteenth centuries. "The new society," René David observed, "with the growth of cities and commerce, became conscious once again of the need for law to assure that order and security which would allow progress."[84] This radical change in societal living sparked a revolutionary change in the development of the law, beginning in Italian universities and spreading across Europe.[85] The principal object of academic study was the fifth-century Code of Theodosius II and the *Corpus Juris Civilis*, compiled in Constantinople in the early sixth century, under the aegis of the Byzantine Emperor Justinian, builder of the Hagia Sophia.[86] In addition to the study of this extraordinarily impressive document,[87] which inspired the creation of the Napoleonic Code nearly thirteen centuries later, the Papacy began producing decretals, or "letters answering particular legal questions from all

[82] For an introduction, *see* R.I. MOORE, THE FORMATION OF A PERSECUTING SOCIETY: AUTHORITY AND DEVIANCE IN WESTERN EUROPE 950-1250 (2d ed. 2007). *See generally* DAVID CHRISTIE-MURRAY, A HISTORY OF HERESY (1991); DAVID NIRENBERG, COMMUNITIES OF VIOLENCE: PERSECUTION OF MINORITIES IN THE MIDDLE AGES (1996).

[83] David & Brierley, *infra* note 124 at 36.

[84] *Id.*

[85] Heikki Pihlajamäki & Mia Korpiola, *Medieval Canon Law: The Origins of Modern Criminal Law*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 201 (Markus D. Dubber & Tatjana Hornle eds., Oxford Univ. Press, 2014) ("The twelfth-century development of law was revolutionary…Within a century, Roman law in its scholarly, medieval form spread to France, Spain, and England, and in succeeding centuries to other parts of Europe. Canon law also developed, helping to build up the structure of the Catholic Church, 'the first modern state.'").

[86] Justinian, within a year upon ascending the Byzantine throne in 527 CE, called a commission of learned jurists with the purpose of modernizing the Theodosian Code and others, into a coherent and uniform one. The promulgation of the Justinian Code, the Digest or Pandects, Institutes, and Novels, comprise the Corpus Juris Civilis. It would have fallen into obscurity, had it not been rediscovered in eleventh-century Italy, where it would go on to revolutionize Western legal history. *See also* HANS JULIUS WOLFF, ROMAN LAW: AN HISTORICAL INTRODUCTION (1951) for an informative overview.

[87] Pihlajamäki & Korpiola, *supra* note 85, at 202.

over Europe." These decretals (similar to Jewish and Islamic *responsa*) included new understandings of criminal law and its accompanying procedure. "Although not a Code in the modern sense," notes the scholar R. H. Helmholz, "the Corpus [J]uris Canonici furnished the legal texts [from Church Fathers and Councils,] that were the foundation of legal practice in the public courts…"[88]

Foremost among these developments was the recognition of the increased importance of individualization in all areas of human endeavor.[89] This intellectual change was extremely profound in the realm of criminal law. Indeed, it is to this time period that we can trace the emergence of several doctrines, deemed fundamental to criminal law, such as intent. Furthermore, rudimentary notions of criminal procedure, similar to how we understand it today, began to develop.[90] This time period (the late 12th century) also witnessed the emergence of the lawyer, as universities formally established faculties dedicated to the study of canon law, which churned out a specialized class of legal professionals – expert in the canon law – to study, advise, and teach.[91]

As Mirjan Damaška observed, elementary criminal procedure at this time allowed the criminal suspect the right to legal counsel, though in practice the right was often restricted, particularly in cases of heresy.[92] In 1215, the same year as the Magna Carta, the Fourth Lateran Council met under the aegis of Pope Innocent III. It utilized principles of canon law to dismantle the traditional trial by ordeal, and instituted more rational procedures for criminal proceedings.[93] Throughout the fifteenth and

[88] R. H. Helmholz, *Crime, Compurgation and the Courts of the Medieval Church*, 1 L. & HIST. REV. 1, 4 (1983).

[89] Virpi Mäkinen & Heikki Pihlajamäki, *The Individualization of Crime in Medieval Canon Law*, 65 J. HIST. IDEAS 525, 526 (2004) ("Canon law, making use of the contemporary trend toward increased individualization in theology, philosophy, and Roman law, was developed to meet the church's need to master the situation.").

[90] *Id.*

[91] James Brundage, *The Rise of Professional Canonists and the Development of the ius Commune*, *in* ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE (KA) (1995) 81: 26-63; *see also* Karl Shoemaker, *The Devil at Law in the Middle Ages*, 228 REVUE DE L'HISTOIRE DES RELIGIONS 567, 573–74 (2011) ("Canon lawyers in this era typically earned university degrees in law, sometimes in both canon and civil law, and the successful ones could look forward to a relatively structured career path that included university study, a period of teaching…[and] service as an advocate or counselor…").

[92] *See* Mirjan Damaška, *The Quest for Due Process in the Age of Inquisition*, 60 AM. J. COMPAR. L. 919, 930 (2012) ("It was also widely accepted that natural law allows lawyers (*advocati*) to assist criminal defendants even in the investigation of most serious crimes. Various restrictions were imposed on lawyers, however. For example, they were not allowed to be present during the interrogation of witnesses and defendants, and were not permitted to respond the investigator's questions in lieu of the defendant. Also, only 'honest, upright and learned men' were admitted to act as counsel in criminal matters. ln spite of these restrictions, as we shall soon see, skillful lawyers could sometimes help those few defendants who could afford them. It was only in witchcraft and heresy prosecutions that restrictions on counsel's activity made effective assistance illusory.") (footnote omitted).

[93] *See* Finbarr McAuley, *Canon Law and the End of the Ordeal*, 26 OXFORD J. LEGAL STUD. 473, 476 (2006) ("Contrary to recent suggestions, the procedural revolution which eventually engulfed the ordeal

sixteenth centuries, canon law increased in importance even within common law courts in England. It was cited not just in legal literature but even by common law jurists in cases and year reports by scholars, such as John Fortescue and Christopher St. German.[94]

Canon law recognized the right to counsel within the doctrine of the presumption of innocence:

> "[Of course] [i]t has been true in the past and remains true today that procedural rules are broken and rights violated most often when judges have faced crimes that strike society's most sensitive nerves…[However, it should be observed that] popes issued decretals that specified in great detail the procedural protections that Jews must be given. A letter of Pope Sixtus IV in 1482 mandated that Jews should receive the names of their accusers, should be able to present legitimate exceptions, proofs, and defenses to the court, and if these rights were violated, could appeal to Rome…Several sixteenth-century letters emphasized a Jew's right to a defense, to have an advocate, and to receive money from supporters for a defense in heresy and apostasy trials. As Pope Paul III declared in 1535, 'no one should be deprived of a defense, which is established by the law of nature.' The right to a defense, a lawyer, and the means to conduct a defense was an obvious extension of the rights enshrined by the maxim 'Innocent until Proven Guilty.' By way of contrast, the common law did not recognize the right of a criminal defendant to counsel in treason trials until 1696."[95]

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was more than a drive for greater efficiency in the administration of criminal justice. Like the canonico-theological critique of the ordeal, it was an aspect of the ongoing struggle to define the proper limits of the sacred and the profane which originated in the *Dictatus Papae* of Pope Gregory VII.") (footnote omitted).

[94] *See* David J. Seipp, *The Reception of Canon Law and Civil Law in the Common Law Courts before 1600*, 13 OXFORD J. LEGAL STUD. 388, 392 (1993) ("Over the period from 1400 to 1600, common lawyers came to invoke these other bodies of law in more and different circumstances. Common lawyers also came into more and more frequent contact with the exponents of those other laws, the doctors of civil law and canon law. This increasing interest in the bodies of law shared with continental Europe is one sign that the community of English common lawyers gradually adopted a more sophisticated, cosmopolitan outlook. Their growing acquaintance with the other laws led English common lawyers to engage in more reflective and comparative study of their own law."); *see also* R.H. Helmholz, *Christopher St. German and the Law of Custom*, 70 U. CHI. L. REV. 129, 138–139 (2003) ("[H]ow St. German approached the common law…was very like the method developed in the *ius commune*. However, the parallel could not have been exact – and it was not. This is true because within the continental traditions, particular customs were tested against the laws found in the *Corpus iuris civilis* and the *Corpus iuris canonici*, the basic sources of the *ius commune*…In England, by contrast, there was no *Corpus* of the law to be contrasted with custom. The common law was custom. It was all that existed. Only when particular customs could be set against national custom could the method used by the civilian [continental] commentators be adopted with more exact fidelity.")

[95] Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST 106, 117, 119 (2003).

Ultimately, the enduring influence of canon law rests in the creation of the "inquisitorial model" of criminal justice, which included (at least in theory) the recognition of a right to counsel for criminal suspects. Although it was not always honored in practice, canon law led to the beginnings of a revolution in criminal procedure, centuries before the common law.

Jewish Law

Although Jewish law is based on the written word (along with an oral accompaniment), as are the other two Western monotheistic religions (Christianity and Islam), the Jewish religion also resembles that of traditional China. These include the fusion of law and morality into a single system and greater emphasis on instilling morals through the collective consciousness of the nation. Similar to traditional values in East Asia, particularly China, was the idea of a universalized morality, though it differed in that Judaism posited that morals were the product of divine revelation at Mount Sinai.[96]

It was out of this foundational worldview that the Jewish criminal justice system developed, "in which human punishment and divine retribution function as equal components of a single scheme[,]"[97] which created "three types of relationships between the two realms [morality and law]: morality as a direct source of law; morality as a source of private, higher standards of legal liability; and morality in legal form."[98] In the realm of criminal procedure, Jewish law was consequently so concerned with preventing a conviction of the innocent that it established rigorous protections for the accused, as described by Professors Irene and Yale Rosenberg of the University of Houston:

The rabbinic legal system itself is sui generis and so extreme in protecting both the innocent and the guilty that some argue the safeguards afforded the defendants in criminal cases were merely idealistic and pedagogical, and were never actually implemented or intended to be implemented. Regardless of the validity of this assertion, it is undisputed that the rules constraining the rabbinic courts in criminal cases constitute normative Jewish law.

The various evidentiary, procedural, and substantive barriers to the imposition of punishment by the rabbinic courts amount to a supercharged Bill of Rights. These barriers served to make capital punishment or flogging a rarity. This truth is captured in a Mishnah that discusses whether the

[96] SA.B., *Law and Morality*, *reprinted in* 10 ENCYCLOPEDIA JUDAICA 1480–1484 (Keter Publishing ed., 1972).
[97] *Id*. at 1480.
[98] *Id*. at 1480.

'Bloody Sanhedrin' was a court that had sentenced one person to death within a seven or a seventy-year period.

….

…[T]he substantive, procedural and evidentiary safeguards afforded the defendant are, particularly when viewed in their totality, simply breathtaking.

….

…[I]t is clear that normative Jewish law operative in the rabbinic courts would make that judicial system a criminal defense attorney's dream tribunal and a prosecutor's worst nightmare.[99]

Thus, it is for good reason that Arnold Enker described the Jewish criminal justice system as "unlike any other."[100] He speculates that perhaps the emphasis on procedure arose due to the severe nature of the law's substantive punishment.[101] In this regard, Enker's speculation on the interaction between legal procedure and substance resembles Stuntz's critique of the American legal system.[102] Like Roman law, Chthonic law, and traditional law in East Asia, Jewish law was exceedingly paternalistic in nature. As such, the legal system embraced a form of the inquisitorial model of criminal justice. Authority was vested in the judges to investigate accusations, decide the suspect's innocence or guilt, and if appropriate, to impose punishment accordingly. And yet, Jewish law viewed counsel as a potential hindrance to the discovery of absolute truth.[103] This refusal is not surprising for virtually the same reason that English legal tradition denied counsel to felony defendants – defense counsel could obfuscate the search for and discovery of the truth.

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[99] IRENE MERKER ROSENBERG & YALE L. ROSENBERG, COMPARATIVE AMERICAN AND TALMUDIC CRIMINAL LAW at 11-13 (2016), https://www.law.uh.edu/rosenberg/Comparative-American-and-Talmudic-Criminal-Law.pdf.

[100] Arnold Enker, *Jewish Law*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 269, 273 (Markus D. Dubber & Tatjana Hornle eds., 2014).

[101] *Id*. at 275 ("Unlike most criminal penalties in modern law, death and flogging in Jewish law are not maximum penalties, which the judge may impose in his discretion. … If the [Jewish] court convicts the defendant of a capital crime, it must sentence him to death. …Perhaps, [these procedural protections] are designed to assure that [penalties] are imposed only when they are commensurate with the severity of the offense committed…[and] evidence of guilt is as clear and certain as is possible.").

[102] William J. Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 74-75 (1977) ("It is hard to know what to make of the law of criminal procedure. It plainly prevents some serious wrongs…[but] there are substantial tradeoffs. …The criminal process is much harder to control than courts suppose; it is driven by forces the courts do not, and perhaps cannot, direct. … Some part of what the Fourth, Fifth, and Sixth Amendments protect has probably come at the cost of a criminal justice system that is less focused on the merits and hence more likely to convict innocents, a system that disproportionately targets the poor, and a system that convicts for 'crimes' that cover…more than anyone would wish to punish. The merits of this bargain are at least open to question.").

[103] Dov I. Frimer, *The Role of the Lawyer in Jewish Law*, 1 J. L. & RELIGION 297, 297 (1983) ("[T]he lawyer was a concession, forced upon the Jewish legal system by certain exigencies. At no time was the lawyer viewed as essential to the adjudicative process. If anything, the lawyer was formerly seen as an obstacle to ascertaining truth.").

However, it must be noted that the Talmud,[104] "which is over 5,000 pages…and is contained in over sixty tractates [that] comprises the Sinaitic and rabbinic Oral Law of Judaism[]"[105] allows – and even encourages – those present to plead for the accused before the court. In the Tractate of "Sanhedrin," which deals with law and courts, the sages ruled (4:1) that "[i]n non-capital cases all may argue either in favor of conviction or of acquittal; in capital cases all may argue in favor of acquittal but not all may argue in favor of conviction."[106] Furthermore, it holds that "one who advances an argument for conviction may advance an argument for acquittal, but one who advances an argument for acquittal may not advance an argument for conviction."[107]

In the next chapter (5:4), the Talmud rules that if "one of the disciples said, 'I have something to argue in favor of his acquittal", they bring him up and set him among them and he does not come down from there all day.'"[108] These disciples were the most promising students that judges invited to be present, and who were permitted to voice their opinions, but only on behalf of the defendant in criminal proceedings.[109] Accordingly, within this context, a formal role of legal professionals was not deemed necessary under Halacha.

It appears as though external events essentially forced the creation of this once-detested role. A multitude of persecutions and expulsions forced the adherents of the Jewish religion to flee throughout the globe, thus creating the Jewish Diaspora. This dispersion created the necessity for someone to represent, in civil cases, the plaintiff who might very well be located in a different country, or even continent.[110] In criminal proceedings, it appears as though Jewish courts in Spain – which in a historical anomaly,

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[104] *See* Glenn, *supra* note 71, at 99-100 ("Talmudic law represents one of the oldest, living, legal traditions in the world; after chthonic law, it may be the oldest, depending on one's view of the current status of Hindu law…The Talmudic legal tradition continues, however, with great vitality, and is now also attracting interest from outside itself, in western legal theory.").

[105] Rosenberg & Rosenberg, *supra* note 99, at 1

[106] Joshua Kulp, *Mishnah Sanhedrin 4:1*, SEFARIA, https://www.sefaria.org/Mishnah_Sanhedrin.4.1?ven=Mishnah_Yomit_by_Dr._Joshua_Kulp&lang=bi .

[107] The William Davidson Talmud, *Mishnah Sanhedrin* 32a1, SEFARIA, https://www.sefaria.org/Sanhedrin.32a.2?lang=bi. The discussion in this section also contains the dictum that even the judge must open proceedings – in capital cases – with a statement that supports the defendant.

[108] Joshua Kulp, *Mishnah Sanhedrin 5:4*, SEFARIA, https://www.sefaria.org/Mishnah_Sanhedrin.5.4?ven=Mishnah_Yomit_by_Dr._Joshua_Kulp&lang=bi &with=all&lang2=en.

[109] Frimer, *supra* note 103, at 298. *See also* MAIMONIDES, HILCHOT SANHEDRIN 11:8, *in* MISHNEH TORAH (Eliyahu Touger trans.).

[110] Jacob J. Rabinowitz, *Jewish Law: Its Influence on the Development of Legal Institutions* 271-72 (1956).

had the authority to carry out capital punishment[111] – did not just permit counsel in criminal proceedings but actually provided counsel to indigent defendants, centuries before this concept arose in western legal tradition.[112] (It is furthermore interesting to observe that in the next century, Jews also started to act as legal counsel in secular courts in Spain.)[113]

In modern Jewish courts ("Beth Din," or House of Judgment), which serve as effectively binding arbitration centers for private legal issues, lawyers still do not exist. Instead, the comparable role is a "*toen rabbani*," or counselor,[114] though even this concession is still often regarded as unnecessary, as guidelines continue to emphasize the role judges play in searching for the truth.[115] The "adversarial model" of combatants jousting for supremacy did not fit in with a legal system founded upon divine revelation.[116] Akin to its inquisitorial counterpart in continental Europe, the role of advocates was thus effectively nil. While the role of an official advocate was later accepted – due to historical circumstances – the lawyer does not play a major role in the 21st century Jewish legal system.

Islamic Law

Similar to Judaism, Islam is predicated upon divine revelation of the written word; in the latter case, it occurred in the early seventh century CE in the deserts of the Arabian Peninsula. The prophet – and recipient of this final divine revelation – was Muhammad. He was born in Mecca "in the late sixth century CE (as it then was), about 35 years after the completion of Justinian's Digest and around the time of the writing (not completion) of the

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[111] MARINA RUSTOW, HERESY AND THE POLITICS OF COMMUNITY: THE JEWS OF THE FATIMID CALIPHATE 349 (2008) (Spanish Jewry was "*a special case in part because Jews in Christian Iberia exercised capital jurisdiction, an anomaly in the entire history of the Jews*…[T]his anomaly was an aftereffect of Islamic rule in Al-Andalus: the rulers had granted the Christian population the right to execute heretics and could not deny it to the Jews, and Jewish leaders continued to benefit from the arrangement under Christian rule as well.") (emphasis added).

[112] Frimer, *supra* note 103, at 301-02; Rabbi Isaac Ben Sheshet Perfet, *Responsa HaRivash*, § 235.

[113] Law and Morality*, supra* note *96 at* 1490.

[114] *Layman's Guide to Dinei Torah (Beth Din Arbitration Proceedings)*, 1 BETH DIN OF AM. 8, http://bethdin.org/wp-content/uploads/2015/07/LaymansGuide.pdf (last visited Feb. 13, 2023).

[115] *Id.* at 1, 3-4. *Id*. at 6 ("[U]nder secular arbitration law, you have the right to have a lawyer present if you want one. Sometimes a lawyer can help you organize your case, and help you identify what is important to present to the judges. Nevertheless, unlike secular court, the judges in Beth Din have a much greater responsibility to make sure each side fully presents their case, so a lawyer is not necessary"). Guidelines go on to say that a "lawyer" is there to help organize client's case, so as not to neglect any crucial evidence. Importantly, guidelines explicitly say that "judges are responsible for identifying Jewish law…," not the lawyers. *Id.*

[116] Frimer, *supra* note 103, at 301 ("Whatever positive value there was to be gained through the adversary model of lawyering would, in the long run, be outweighed by the deleterious side-effects of the profession. Together with the belief that the system as structured was more than capable in procuring truth and doing justice…suspicion of the lawyer and the concern over [their] possible negative effect on the judicial process led Jewish jurisprudence…to [initially] reject the incorporation of the advocate role.").

Babylonian Talmud."[117] This milieu into which Islam's prophet was born and grew up in was filled with many legal influences, primarily Roman and talmudic law. The fundamental importance of the Islamic belief in divine revelation of the "recitation," referred to as the Qur'an, – in contrast to western legal thought – cannot be overestimated, as it would have immense importance throughout legal development.[118]

In stark contrast to Christianity, whose two thousand years have been marked by religious schism, "Islam [was] not divided along these same lines, because all devout Muslims adhere to certain core beliefs…[T]he significant division in Islam was over the…rightful leadership of the umma, the community of believers, upon the death of Muhammad." This succession dispute created the divide between Sunni and Shi'ite schools of thought, which lasts until this day.[119]

Islamic law, particularly pertaining to crime, began to develop during a time of colossal territorial expansion during the reigns of the first Caliphs (*Rashidun*), followed by the Umayyad and Abbasid empires, the first ones in Islamic history. Like Jewish law, as aforementioned, and like traditional Chinese law, which we will see, Islam did not distinguish between law and morals.[120] Diverse legal schools arose, such as the Hanafite, Malikite, Shafi'ite, and Hanbalite within the Sunni branch and the Dja'farite school in the Shi'ite branch.[121] Today, the Islamic world spans the globe, from North Africa to Southeast Asia. Yet, Islamic criminal law is only applied in a small number of countries.[122]

[M]ost countries of the Muslim world apply a criminal law that is directly or indirectly influenced by French law. This is the case in some countries of northern Africa as well as Lebanon, Syria, and Iran. Other countries such as Pakistan and Sudan are strongly influenced by the common law and Egyptian criminal law is a mixture of French, Italian,

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[117] Glenn, *supra* note 71, at 181.

[118] Zweigert & Kötz, *supra* note 12, at 304-05 ("Western legal systems generally recognize that the content of law alters as it is adapted to changing needs by the legislator, the judges, and all other social forces which have a part in the creation of law, but Islam starts from the proposition that all existing law comes from ALLAH who at a certain moment in history revealed it to man through his prophet MUHAMMAD. Thus Islamic legal theory cannot accept the historical approach of studying law as a function of the changing conditions of life in a particular society. On the contrary, the law of ALLAH was given to man once and for all: society must adapt itself to the law rather than generate laws of its own as a response to the constantly changing stimulus of the problems of life.").

[119] RICHARD J. TERRILL, WORLD CRIMINAL JUSTICE SYSTEMS: A COMPARATIVE SURVEY 571 (9th ed. 2016).

[120] *Id.* at 581 ("Islamic law established 'the code of life for the Muslim community, covering religious obligations (*ibahat*) as well as social relations (*muamalat*). Thus, law (*fiqh*) plays a more vital role in Islamic society than that played by…secular law in western societies.").

[121] Silvia Tellenbach, *Islamic Criminal Law*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 248, 249 (2015) ("These schools are characterized by the different degrees of importance they attach to the various sources and methods and, as a result of these differences, they often advocate different solutions to legal problems.").

[122] *Id.* at 249.

British, and other influences. Saudi Arabia has never adopted a criminal code (much less one influenced by Western law)…[a]s a rule, even those countries that currently apply Islamic criminal law have a criminal law that has been informed by Western law since the nineteenth century and continues to be significantly informed by Western law today…[123]

Indeed, the widespread influence and imprint of Western law was so profound that Wael Hallaq, an Islamic scholar, proclaimed that "traditional Shar'ia [translated as the "the way"][124] can surely be said to have gone without return."[125] Nowhere is this more visible than in the codification in many Muslim countries of criminal law and procedure, an indelible testament to their status as former French colonies, especially in North Africa and in Syria and Lebanon in the Middle East.[126]

Codification through written codes, based on French models, of criminal law and procedure had four profound effects. First, it attempted to fit the divine rules of the Shari'a within a man-made code, effectively amalgamating substantive Islamic law within secular rules of procedure.[127] Second, it effectively nationalized the Shari'a, as each country wrote their own code, and simultaneously undermined its claim to universal governance, binding on all members of the *umma*, worldwide.[128] Third, the process of codification marked a decline in the traditional union of law and morals,[129] a foundational claim of Islam, and fourth, the status of religious

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[123] *Id.* at 249-50.

[124] RENE DAVID & JOHN C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 421 (1978) ("[The Shar'ia] specifies how the Muslim should conduct himself in accordance with his religion, without making any distinction in principle between duties to others (civil obligations, alms-giving) and those towards God (prayers, fasting, etc.). It is therefore centered on the idea of man's obligations or duties rather than on any rights he might have . . . The fundamental principle of Islam is that of an essentially theocratic society, in which the state is only of value as the servant of revealed religion.").

[125] Wael B. Hallaq, *Can the Shari'a Be Restored?*, *in* ISLAMIC LAW AND THE CHALLENGE OF MODERNITY 42 (Yvonne Yazbeck Haddad & Barbara Freyer Stowasser eds., AltaMira Press 2004).

[126] Aharon Layish, *Islamic Law in the Modern World: Nationalization, Islamization, Reinstatement,* 21 ISLAMIC L. & SOC'Y 276, 280 (2014). For a good overview of the interaction between Islamic and common law in Malaysia, *see* Donald L. Horowitz, *The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change,* 42 AM. J. COMP. L. 233, 233-93 (1994).

[127] *See* Layish, *supra* note 126, at 280 ("Although the actual substance of the codes is based on the Shari'a, the statutory provisions have an autonomous existence that is based on state-imposed sanctions and – if applied in national or state courts – is subject to civil rules of evidence, procedure and interpretation.").

[128] *Id.* ("Codification has contributed to the nationalization of the Shari'a. Statutes are valid only within the framework of individual national-territorial states. Codification results in a complete departure from the *fiqh*[t] . . . Over time, codification inevitably disrupts the Shari'a legal methodology . . . and positive law . . . as consolidated in each of the schools.").

[129] *Id.* ("[A] . . . result of codification is the decline of religio-ethical sanctions as a method for shaping legal norms. A religio-ethical commandment with a sanction in the next world is irrelevant in a statute; it has no legal consequence unless it has been incorporated in criminal legislation.").

jurists, traditionally seen as the authoritative interpreters of the Shari'a, was irreparably damaged – in favor of the secular lawyer.[130]

Accordingly, while many of these codes of criminal procedure in Muslim countries grant (in theory) criminal defendants a right to counsel, and other procedural rights taken for granted within a western system, that does not inform the reader as to the Sharia's position on this right. Although Islamic criminal law granted criminal suspects several procedural protections,[131] it "did not provide a detailed process for criminal procedure in general or the investigative and prosecutorial stages in particular."[132] Among these was the presumption of innocence and the right to a defense.[133] However, as fundamental as these rights – such as informing the defendant of the charges or evidence against them whilst allowing the defendant to speak for himself – were in ensuring justice would be done, they did not explicitly include a right of the defendant to seek legal assistance.

There are two reasons for this development. First, quite similar to the Jewish tradition, the role of a lawyer was not seen as necessary because of the inquisitorial nature of the legal system, which rested on divinely revealed rules and mandated punishments.[134] Second, the formal role of a legal professional, tasked with defending the accused in criminal cases, did not exist prior to the medieval period. Thus, the profession of "lawyer" was unknown in the days of Muhammad,[135] or Moses or Confucius. However, the role of a legal "agent" (*wakil*) did appear in the annals of Islamic jurisprudence.[136] Islamic legal theory generated the concept of "protected

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[130] *Id.* at 280-81 ("[S]ections of the Shari'a that have undergone codification have become the domain of the secular professional lawyer rather than that of the traditional religious scholar. As a result of codification, religious scholars have lost their historic role as the authorized interpreters and exponents of the Shari'a as well as their exclusive monopoly on the formulation of the law . . . as well as by the emergence of a new secular class of lawyers.").

[131] Glenn, *supra* note 17, at 205. Although the term "protection" could probably be interchanged with that of "right," it is necessary to be accurate in discussing these issues. For while Islam (at least in theory) elevates the individual to a status comparable to that in Jewish and Christian (and by extension, Western) traditions, as Glenn observes, "[Islamic] law does not contemplate an individual potestas; in the legal language there is no word corresponding to that of 'right,' in the subjective sense." *Id.*

[132] Terrill, *supra* note 119, at 602.

[133] *Id.* at 603-04 ("Jurists frequently cited the comment the Prophet Muhammad made to Ali when he named him governor of Yemen. "O' Ali, people will appeal to you for justice. If two adversaries come to you for arbitration, do not rule for the one, before you have similarly heard from the other. It is more proper for justice to become evident to you and for you to know who is right." This was often seen as the foundation for a right to defense, by allowing the defendant to speak.).

[134] Terrill, *supra* note 119, at 604 ("While acknowledging that a person had a right to a defense, this did not necessarily mean that he or she had a right to retain counsel. . . . Moreover, it is interesting to note that scholars have suggested that defendants did not often secure legal counsel. The reason for this was that judges consulted with jurists on complex issues in the course of an investigation and trial. As such, it was often felt that there was no need for an independent and disinterested opinion in the matter at hand, because the jurist had often already provided it to the judge.").

[135] Silvia Tellenbach, *Fair Trial Guarantees in Criminal Proceedings Under Islamic, Afghan Constitutional and International Law*, 64 ZAORV 929, 937 (2004), https://www.zaoerv.de/64_2004/64_2004_4_a_929_942.pdf.

[136] Terrill, *supra* note 119, at 609.

interests," guaranteeing the individual freedom of religion, self-preservation, family, etc. Included within this bundle of "protected interests" was the individual's right to some legal assistance to protect their rights.[137]

These agents (*wukala*, plural of *wakil*) were not comparable to licensed attorneys today: "[they] were not members of any professional organization, like a bar association, nor were they required to achieve certain conditions, such as passing an examination, in order to serve in this capacity."[138] Yet, they understood court procedures and could be persuasive.[139] This extension of legal assistance to defendants in criminal proceedings allowed them to retain some measure of dignity. In practice, however, the right was not always observed, for "[a]s is the case with any procedural law, its successful implementation is often totally dependent on a vigilant judiciary [and citizenry]."[140]

The 21st century bears witness to this scenario. The Kingdom of Saudi Arabia – location of Mecca and Medina, the twin cities that gave birth to Islam – retains its status as one of the last Muslim countries supposedly governed by the Shari'a. Nonetheless, while the Kingdom was not formally colonized by a western power, its legal system was still influenced by the West, as other Islamic countries were.[141] This is evident in its procedural law, which is officially governed by two separate, yet parallel, laws: the Law of Procedure before Shari'a Courts and the Law of Criminal Procedure (LCP).[142] A conflict may thus occur. For example, while Article Four of the LCP mandates that "[a]ny accused person shall have the right to seek . . .

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[137] FARHAD MALEKIAN, PRINCIPLES OF ISLAMIC INTERNATIONAL CRIMINAL LAW: A COMPARATIVE SEARCH 377 (2011).

[138] Terrill, *supra* note 119, at 609.

[139] *Id.*

[140] *Id*. at 630.

[141] Sadiq Reza, *Due Process in Islamic Criminal Law*, 46 GEO. WASH. INT'L L REV. 1, 6-7 (2013) ("[I]n pre-modern practice—at least from what we know of the Arab-Ottoman lands—matters of criminal procedure were governed not by jurists and religious doctrine, but by executive authorities and the rules they promulgated. In modern times, some Muslim thinkers have addressed criminal procedure from an Islamic jurisprudential perspective, occasionally identifying pertinent Islamic principles, but more often urging conformity with contemporary standards of international human rights in the criminal process, and in either case with few specifics…As a result, states that claim to practice Islamic criminal law today instead do so mostly according to the rules and principles of the Western-style constitutions and codes of criminal procedure imported in the nineteenth and twentieth centuries.").

[142] Reza, *supra* note 141, at 7-8 ("The opening article of Saudi Arabia's criminal procedure code, enacted in 2002, states that courts hearing criminal cases must apply 'Shari'ah principles, as derived from the Qur'an and *Sunnah*,' along with regulations that comply with the Code and do not contradict 'the provisions of the Qur'an and *Sunnah*.' But what '*sharia*' rules or provisions are intended is not explained, and the Code provisions themselves do not reflect a '*sharia*' provenance.").

assistance of a lawyer . . . during the investigation and trial stages,"[143] many suspects are not informed of this right.[144]

In the end, it took the West centuries to get to this point; it is perhaps unwise to believe that Islamic countries will unhesitatingly adopt the same attitude towards procedural rights that the western legal tradition does, in speed or outlook. While not exactly formulated in the same terminology, the role of a lawyer under the rubric of a legal assistant or advisor conceptually existed in traditional Islamic law long before the Western tradition created and elevated that role to near sacrosanct status.

CONFUCIAN APPROACH

Legal traditions in the Far East arose in different historical and cultural contexts than the Western legal tradition. Foremost among these divergences was emphasis on written law to regulate moral conduct and individual behavior. Thus, "[i]t is agreed in all Western systems, whether of Civil or of Common Law, that the important questions of social life should primarily be regulated by *rules of objective law* rather than simply by conventions or habits or mores."[145] The contrast with the Far East could not be greater in this regard.[146] Primary emphasis in both China and Japan was placed upon preventing disputes between family, community, and society from even arising; if they did, then the feuding parties were urged to seek recourse not in law, but through mediation or private settlement.[147] Harmony under Heaven was the highest objective of traditional Chinese philosophy.[148]

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[143] Law of Criminal Procedure, Royal Decree No. M/39, 28 *Rajab* 1422 A.H. UNIV. OF MINN. HUM. RTS. LIBR. (Oct. 16, 2001), http://hrlibrary.umn.edu/research/saudiarabia/criminal_proceedure.html#:~:text=Article%2039%3A,Bureau%20of%20Investigation%20and%20Prosecution.

[144] Terrill, *supra* note 119, at 631.

[145] Zweigert & Kötz, *supra* note 12, at 287 (emphasis in original).

[146] Glenn, *supra* note 17, at 326 ("Though Confucian legal tradition is similar to that of the west (in its secularity) and to legal traditions which are religiously inspired (in its rejection in principle of formal structures and sanctions), it remains profoundly different from them, precisely because of this combination. It is law which is secular in origin, yet greatly limited, in its formal version, in its reach…In short there is denial everywhere [in East Asia] of a primary role for what is usually known as law.").

[147] Kevin C. Clark, *The Philosophical Underpinning and General Workings of Chinese Mediation Systems: What Lessons Can American Mediators Learn?*, 2 PEPP. DISP. RESOL. L.J. 121, 121-22 (2001) ("An ancient Chinese proverb sums up the view of lawsuits: 'It is better to die of starvation than to become a thief; it is better to be vexed to death than to bring a lawsuit.'…In order to avoid disrespecting one's family and disrupting the social harmony, the people of China had to find a better way of solving disputes. The method that became preferred was mediation.").

[148] Terrill, *supra* note 119, at 527 ("The traditional law [in China] was developed when the country was a feudal society with a patriarchal system that recognized and protected the hierarchical status of people. Thus, equal rights before the law was not recognized as a viable legal principle. The traditional legal system was founded on totalitarian rather than democratic political principles.").

Chinese Tradition

The distinguishing feature of Chinese *ethos* – and by extension that of East Asia – until comparatively recent times was the supreme emphasis on the unity and solidarity of the community or the state. In this way, Chinese tradition was quite similar to the traditional chthonic objective of maintaining social order through resolving disputes without the need for formalist legal structures. In chthonic society, "the present individual is submerged in the past and the wider community, there is no individual power – or potestas – to obtain the object of the individual will. There are no rights."[149] In China, the teachings of the philosopher Confucius ultimately prevailed, notably his emphasis on being a good and productive citizen through widespread societal inculcation of morals and values, fully independent of a legal system. However, that does not mean that Chinese law never formally developed.[150] Indeed, in contrast to the monotheistic religions,[151] incredibly long, detailed, and rational criminal codes were written down millennia ago and implemented in the Empire.[152] During the time of the Qin and Han dynasties, and more recent ones such as the Tang,[153] Ming, and Qing dynasties, they primarily pertained to criminal or administrative law; private law was almost neglected, as Chinese tradition emphasized the interests of the society; it was a public law order.[154]

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[149] Glenn, *supra* note 17, at 75.

[150] Zweigert & Kötz, *supra* note 12, at 290 ("One must not infer from the triumph of Confucianism that China abandoned the use of written law or that as a result of following the unwritten rules of 'li' social life was perfectly free from disruption. Confucian thinkers had to admit that under existing conditions state laws were needed for regulating human conduct, although they had much less value and merit than the 'li.'").

[151] Glenn, *supra* note 71, at 330 ("As a secular, rational philosophy Confucianism also stands opposed to normativity rooted in religion…from a Confucian perspective, religion tends to develop along one of two undesirable paths – either as a complex, written law (Talmudic, Islamic, Hindu traditions) or as a preoccupation with an immortal soul or ephemeral consciousness, to the detriment of daily life and present human relations (Christianity, Buddhism, Taoism, Shintoism).").

[152] "Without claim to transcendent deistic source or divine intervention, the Chinese legal process reflected high regard for rationality and developed into a sophisticated system of fact finding, legal interpretation, documentary proof, and appeals." Haley, *infra* note 174, at 92.

[153] For an in-depth look at criminal procedure in the Tang dynasty, *see* Wallace Johnson & Denis Twitchett, *Criminal Procedure in T'ang China*, *in* 6 ASIA MAJOR, THIRD SERIES 113-46 (1993).

[154] Mark Findlay, *The Challenge for Asian Jurisdictions in the Development of International Criminal Justice*, SING. J. LEGAL STUD. 37, 47 (2010) ("In imperial China, the Tang and the Qing Criminal Codes were notable and sophisticated. The central purposes of these codes were to punish those who violated the rule of order, and the value of good conduct. Leng and Chiu argue that these traditional codes paid less attention to the protection of individual interests, than to the maintenance of social and political order."); *see* Shao-Chuan Leng & Hungdah Chiu, *Criminal Justice in Post-Mao China: Analysis and Documents* 8 (1985). *See also* Haley, *infra* note 174, at 94 ("At no time, however, did the Chinese conceive or express a conceptually coherent set of private law rules.…[T]he Chinese codes, supplementary statutes, edicts, and regulations covered these matters…only to the extent necessary to maintain order and to promote state interests.…Totally alien was any notion of a comprehensive corpus of legal principles, rules, and categories governing private relationships recognized and enforced within a remedial system of rights and duties or formal adjudicatory processes subject to the…control of litigants.").

However, while "all extant examples of legal codes, supplementary statutes, decrees, and edicts share common positivist features and functions,"[155] that was not the normative emphasis of Chinese tradition.[156] Indeed, imperial China lacked any comprehensible notion of an individualist *ethos*; if one existed, certainly it failed to compare to that generated over millennia in the Western tradition. Indeed, once an individual was arrested, any presumption of innocence swiftly vanished, in the eyes of not only the state – which charged the accused – but also in the community at large.[157] Accordingly, prior to Western influence (via imperialism and colonialism in the 19th and 20th centuries), no individualist *ethos* appeared in the East Asian, particularly Chinese, legal tradition.[158]

Consequently, no codes of criminal procedure – that granted rights to the accused, including the right to counsel – appear to have been created before Western contact. If anything, the reverse was true; there were a multitude of official restrictions on procedural protections for the accused.[159] Although the role of legal counselor (*sung-kun*) thus existed, the societal understanding of the role of the lawyer was that of a joke, someone who is simply out to make money at the expense of others.[160] In other words, they were what people derisively label today as an "ambulance chaser."

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[155] Haley, *infra* note 174, at 89.

[156] For a greater discussion of this subject, *see* Geoffrey MacCormack, *The Spirit of Traditional Chinese Law* (1996); Qiang Fang & Roger Des Forges, *Were Chinese Rulers above the Law? Toward a Theory of the Rule of Law in China from Early Times to 1949 CE*, 44 STAN. J. INT'L L. 101 (2008). Glenn, *supra* note 71, at 321-22 ("There is, however, a long tradition of formal law and formal sanction, or fa, in China, though it has played a subordinate role to the li, or persuasion, of the Confucians. In western discussion those who argued the case for fa in China are known as legalists (and sometimes realists) and they have been making the case since before Confucius, at least since the eighth century BC, which was about three centuries before the Twelve Tables [in early Rome] and around the time of the early dharmasutras.").

[157] Sida Liu & Terence C. Halliday, *Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law*, 34 L. & SOC. INQUIRY 911, 920 (2009). ("A more fundamental source of Chinese characteristics comes from a long history of criminal justice that emphasizes substantive law and overlooks procedure. In the traditional Chinese criminal justice system, once a person was arrested he was considered a criminal by the public, and there were few procedural limits on periods of detention, coerced testimony, or trial.").

[158] David & Brierley, *supra* note 124, at 483. ("The desire to be freed of western domination led the Chinese to adopt a series of codes manifestly based on western models…In appearances, therefore, Chinese law has been Europeanized and can be ranked within the family of laws deriving from the Romanist tradition…Behind this façade, however, traditional concepts have persisted and, several exceptions apart, have continued to dominate the realities of Chinese life.").

[159] William P. Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China*, 72 CAL. L. REV. 1180, 1194 (1984) ("These legal guidelines prescribed an inquisitorial mode of adjudication that encompassed little of what we see today as fundamental procedural 'due process.' Persons accused of crimes were not presumed to be innocent; nor were they entitled to notice, either of the law or of their alleged crimes. They were allowed neither to consult legal counselors (known as *sung-kun*) during trial, nor to refuse to answer the magistrate's inquiries. Indeed, magistrates were permitted to apply torture in order to secure confessions. And neither the evidence gathered nor reports prepared by magistrate at trial's end were necessarily made available to the accused.").

[160] Glenn, *supra* note 71, at 142-43 ("Resistance [in Germany to Roman law] was often in the name of the old law, the chthonic law, itself often seen as inspired by God. 'Juristen, böse Christen' went the

The term *sung-kun* (literally, 'litigation cudgel,' but generally translated as 'litigation trickster') was a pejorative one used to describe individuals who earned their livelihood by preparing petitions and other papers for persons involved in legal matters. They generally had no formal legal training but often either had acquired direct experience with legal affairs by virtue of having worked on a magisterial staff or had, at least, been able to educate themselves through study of various specialized private texts on law.…In the absence of an officially recognized legal profession, the *sung-kun* were the principal source of legal advice for the general populace. The official attitude toward *sung-kun* is reflected in an imperial decree of 1820…that calls the *sung-kun* 'rascally fellows [who] entrap people for the sake of profit. They fabricate empty words and heap up false charges….'[161]

Today, this traditional Chinese aversion to formalist legal structures and sanctions, including the use of lawyers, has not gone away.[162] On the contrary, traditional Confucian antipathy to law has been buttressed by nearly seven and a half decades of Communist rule that has further subordinated the role of the individual to the state.[163] Finally, although under the current Criminal Code of Procedure, criminal defendants are permitted (on paper) the right to counsel,[164] deep-seated opposition remains, and procedural guarantees are often not respected, especially the defendant's right to counsel.[165] But this delay should not be shocking. After all, as the

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Germanic, religious, and customary denigration of the new, rationalizing, roman lawyers. In seeking to take the church back to its roots…Luther also attacked the lawyers. '*The real reason you want to be lawyers*,' he said, '*is money. You want to be rich*.' This theme too is still with us.") (emphasis added).

[161] Alford, *supra* note 159, at 1194 n.76. It should be added that, "[t]echnically, it was not against Ch'ing law for a private individual to advise a 'simple and uninformed person…and draw…up an information for him in the legal and…customary manner.'" *Id.* (quoting Ta Tsing Leu Lee, *Being the Fundamental Laws, and a Selection of Statutes, of the Penal Code of China* § 340 (George T. Staunton trans., 1966)).

[162] *See* Chi-Yu Cheng, *The Chinese Theory of Criminal Law*, 39 J. CRIM. L. & CRIMINOLOGY 461 (1949), for a very good overview of Chinese tradition.

[163] Sida Liu & Terence C. Halliday, *Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law*, 34 L. & SOC. INQUIRY 911, 920 (2009) ("A more fundamental source of Chinese characteristics comes from a long history of criminal justice that emphasizes substantive law and overlooks procedure… Reinforced by the Communist ideals of subordinating all procedural fetters to the goal of creating a new society, this long and deep tradition of substantive justice still significantly shapes the legal ideologies of many criminal law enforcement officers, judges, citizens, and even some lawyers."). Findlay, *supra* note 154, at 50 ("[T]he translation of constitutional legality in the form of due process into Chinese criminal justice is a suspect as the state's ideological commitment to communitarianism. 'One-party' state politics is not conducive to accountable justicial power particularly in a tradition of governance such as in China where historically and recently law is not above politics, or constitutional law superior to executive administration.").

[164] Criminal Procedure Law of the People's Republic of China, (adopted by the Standing Comm. Nat'l People's Cong., July 1, 1988, as amended Mar. 14, 2012), ch. IV, arts. 32-47 "Defence and Representation") (detailing the procedural rights defendant has as to counsel).

[165] Alexa Oleson, *You Have a Right to an Attorney. You Have No Chance of Going Free*, FOREIGN POL'Y (June 12, 2015), https://foreignpolicy.com/2015/06/12/zhou-yongkang-attorney-china-xi-jinping/; Terrill, *supra* note 119, at 523 ("[Even with the 2012 revisions] criticisms continue to be leveled at the inability of Chinese defense lawyers to exercise their procedural rights on behalf of their

French scholar Rene David observed, it took the West a thousand years to rediscover, reinterpret, and reapply ancient Roman concepts of law.[166]

Japanese Tradition

"Law in Japan, writes Kawashima Takeyoshi, is like an heirloom samurai sword; it is to be treasured but not used. This simile is apt."[167] Chinese tradition and values indelibly influenced the rest of East Asia, particularly Japan. Nowhere is this more noticeable than in historic attitudes towards the criminal justice system. Indeed, the "earliest codifications of law in Japan, the Code of 702 (Taiho) and Code of 718 (Yo-ro),"[168] occurred not long after the Tang dynasty promulgated its famous code. Like in China, the notion of criminal procedure or individual rights appears to have been unknown prior to first contact with Western ideas and concepts.[169] It was only in 1889, due to the Meiji Restoration of 1868, when Japan began to emulate Western-style reforms, that the first constitution was even adopted.[170] Similar to the French Revolution of 1789, without the terror and bloodshed, the Meiji Restoration profoundly changed the entire terrain of law, tradition, and values of Japanese society. The new legal regime borrowed heavily from Western legal thought, particularly the French.[171] "A penal code and a Code of Criminal Procedure, both based on the French model were enacted in 1882,"[172] prior to the 1889 constitution, which was based on the German model.

These codes "abolished collective guilt and treated all persons as equal while still reflecting traditional attitudes towards authority."[173] Like the French model, they allowed the defense counsel to be at trial, but not at the preliminary investigative stage, which was all-important in this legal

clients…issues frequently cited as a concern are: either the delay in access or the inability of the lawyer to see his client; the lack of access to the prosecutor' case file and evidence…and the harassment of defense lawyers by government officials and the threat…to take away the person's license to practice law.").

[166] David & Brierley, *supra* note 124, at 483 ("The work of a few men wishing to westernize their country could not possibly have resulted in the sudden transformation of Chinese mentality or accustom the people and jurists of China, in only a few years, to the Romanist concept of law which itself had developed only after a thousand years in the hands of the Christian jurists of the West.").

[167] John O. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law without Sanctions*, 8 J. OF JAPANESE STUD. 265 (1982) (quoting Kawashima Takeyoshi, *Nihonjin no Ho-ishiki* (*The Legal Consciousness of the Japanese*) 47 (Iwanami Shoten ed., 1967)).

[168] B. J. George Jr., *Rights of the Criminally Accused*, 53 L. & CONTEMP. PROBS. 71, 72 (1990).

[169] Joseph Sanders, *Courts and Law in Japan*, *in* COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE 315 (1996) ("The Meiji Restoration also marks the beginning of the modern Japanese legal order … Prior to contact with the West [in 1853] the role of law in Japanese society was limited. The Japanese did not define law as an all-inclusive corpus of principles or use judicial discourse to discuss social or political ideas.").

[170] Terrill, *supra* note 119, at 218.

[171] Terrill, *supra* note 119, at 253.

[172] David & Brierley, *supra* note 124, at 497.

[173] David T. Johnson, *Japan's Prosecution System*, 41 CRIME & JUST. 35, 39 (2012).

paradigm. Yet, the adoption of Western codes could not fully undermine Japanese cultural traditions. Foremost among them was the fact that "[h]istorically Japanese culture did not include shared beliefs in universal values nor a dichotomy between 'good' and 'evil.' Despite the influence of universalistic modes of thought…particularistic values remained primary."[174] One's loyalty was to family, clan, or Japan above all else, including such abstract notions as truth or justice.[175] The main *ethos* was that of community, whereby the interests of the one would be subordinated to the needs of the many. As such, no comprehensive corpus of private law truly developed, prior to the Meiji Restoration.[176]

Accordingly, it was only in the post-World War II era, during the American occupation of Japan, when Japanese society and the legal system were thoroughly overhauled once more, that the criminal justice system became less inquisitorial in nature.[177] This change necessitated an increased role for counsel. Article 34 of the post-World War II Constitution, which went into effect in 1947, explicitly states that, "No person shall be arrested…without the immediate privilege of counsel."[178] This is further buttressed by Article 37 of the Constitution and the Code of Criminal Procedure.[179]

Although the right to counsel has traditionally been limited in actual practice,[180] notably through allowing the interrogation of suspects to occur without the presence of counsel,[181] liberalizing reforms have gradually

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[174] JOHN O. HALEY, LAW'S POLITICAL FOUNDATIONS: RIVERS, RIFLES, RICE, AND RELIGION 124 (Wojciech Sadurski ed., 2016).

[175] ROBERT N. BELLAH, TOKUGAWA RELIGION: THE VALUES OF PRE-INDUSTRIAL JAPAN 13 (1970).

[176] Haley, *supra* note 174, at 125.

[177] Sanders, *supra* note 169, at 332 ("The American-led effort directed Japanese criminal law away from its inquisitorial style and toward the adversarial style typical of Anglo-American criminal law. The trial was the centerpiece of the new criminal procedures. The new code abolished the preliminary judge's questioning of the accused. It also established rules against the use of hearsay evidence…a constitutional privilege against self-incrimination…[and] a right to refuse to answer questions…In spite of these provisions Japanese criminal law continues to reflect French and German roots, albeit with a number of unique Japanese features.").

[178] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (The Constitution of Japan), Art. 34.

[179] KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] (Code of Criminal Procedure), Art. 37(3) ("At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State." *See Ch. IV: Counsel and Assistants*, https://wipolex.wipo.int/en/text/214811.

[180] Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 338 (1992) ("Counsel are never permitted to attend interrogation sessions. Moreover, even when the suspect has access to and can afford counsel, the Code of Criminal Procedure permits investigators to impose conditions on meetings between the suspect and counsel. Investigators are not shy about using this authority. According to various estimates, meetings with counsel may be limited to fifteen minutes once every four or five days in complex or difficult cases, and a suspect in detention is unlikely to have much opportunity to meet with counsel until the prosecutors have finalized their case.").

[181] *The Japanese Judicial System*, JAPAN FED'N OF BAR ASS'N, https://www.nichibenren.or.jp/en/about/judicial_system/judicial_system.html (last visited Dec. 26, 2023).

come to the home islands, to take effect [in 2019].[182] After all, it should be kept in mind that "[c]onstitutions [and codes], however, are living things, put into practice with existing conventions, precedents, and beliefs."[183] The creation of law does not occur in a vacuum; neither does the development or growth of a new legal regime, particularly that imposed by an external source. The Japanese criminal justice system has been described as that of a "benevolent paternalism," strikingly similar to the inquisitorial model in the Western continental tradition, chthonic tradition, and non-Western traditions of monotheistic faith and the Far East.[184] This "benevolent paternalism" model is quite similar to the "parental" system as observed by Karl Llewellyn in his study of the Cheyenne Native American tribe in North America.[185] This is not surprising, as arguably all legal traditions are inquisitorial – the difference is merely of degree.

Lastly, it has been noted that the greatest differences between the American and the Japanese criminal justice systems are "the American system places procedural fairness at the center of the process, whereas the Japanese system is more focused on achieving the correct decision[,]"[186] the aim of sentencing in the United States is more punitive in nature, whereas the Japanese focus is rehabilitation[,][187] and the American public places much less trust in government than in Japan.[188]

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[182] *Id.* (These include creating a system of audio and video recording of interrogations by June 2019, in limited circumstances; increasing the scope of court-appointed counsel for indigent defendants to encompass cases where a warrant has been issued to suspects.).

[183] HERBERT P. BIX, HIROHITO AND THE MAKING OF MODERN JAPAN 578 (2000); Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 680 (1994) ("Legal cultures, like languages, can absorb huge amounts of foreign material while preserving a distinctive structure and flavor."). *See also* Sanders, *supra* note 169, at 317 ("The Japanese legal system, like any legal system, can be thought of as having three components: substantive rules of law, a legal structure (the procedures and institutions that apply the law), and a legal consciousness (the values and assumptions about the origin, nature, and function of law in society).").

[184] Foote, *supra* note 180, at 321 ("[T]he Japanese criminal justice system more closely resembles an 'inquisitive' family that insists on keeping tabs on its members and learning everything it can about them if they come under suspicion…The Japanese criminal-justice system is also characterized by the great trust placed in and the broad grants of discretion made to authorities that…[are] regarded as essential attributes of a family-type model. This is the 'paternalistic' side of the model.").

[185] *Id.* at 327-28 ("[T]his benevolent-paternalism model bears a close resemblance to the 'parental' system Karl Llewellyn observed in the criminal justice systems of the Cheyenne and the New Mexican Pueblos. The system Llewellyn depicted countenances, and even encourages, considerable intrusion on the personal integrity of the accused as an essential element of the rehabilitative process.…Llewellyn's parental system is…similar to Japan's criminal-justice system. . .").

[186] Terrill, *supra* note 119, at 255.

[187] *Id.*

[188] *Id.*; *See also* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 33 (2006), for a discussion of legitimacy, active citizen engagement, and overall trust in government, supporting the "hypothesis that behavior is strongly influenced by legitimacy (in this case viewed primarily as support or trust). Citizens with higher levels of support for the authorities are less likely to engage in behavior against the system." Tyler's hypothesis is supported by studies that show Japan's crime rate is much less than other industrialized countries, notably, the United States, France, or Germany. Terrill, *supra* note 119, at 230; Kimihiro Hino & Richard H. Schneider, *Planning for Crime Prevention in Japan*, 39 BUILT ENV'T 114, 115 (2013).

INTERNATIONAL LEVEL

The right to counsel has become a "recognizable feature of every significant international normative instrument charged with protecting human rights."[189] It is in the American Convention on Human Rights, International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the Geneva Conventions, and the European Convention on Human Rights.[190] This right has furthermore not only been recognized by European countries as part of their national constitutions,[191] but even more importantly, has been repeatedly endorsed by the European Court of Human Rights ("European Court") based in Strasbourg, France.[192] Established by the Council of Europe in 1959, this regional judicial body rules on individual applications that allege State violations of their civil and political rights, as set out under the European Convention on Human Rights of 1950 ("Convention").[193] The fundamental right to legal assistance, encompassed under the broader right to a fair trial, is enshrined under Article 6(3)(c) of the Convention.[194] In the landmark decision *Salduz v. Turkey*, the European Court held that this provision - Article 6(3)(c) - requires that suspects charged with a criminal offense be given access to counsel,[195] appointed by the State if necessary,[196] before interrogation of the

[189] This right is enshrined in Art. 8 of American Convention on Human Rights (ACHR); Art. 6 of European Convention on Human Rights (ECHR); Art. 14 of International Covenant on Civil and Political Rights (ICCPR); Art. 10 of Universal Declaration of Human Rights (UDHR); common art. 3 of Geneva Conventions of 12 Aug 1949 and Art. 6 of Additional Protocol II to the Geneva Conventions which contain indispensable judicial guarantees for the protection of right to fair trial during internal armed conflicts; Arts. 96 and 99-108 of Geneva Convention relative to Treatment of Prisoners of War; Arts. 54, 64-74 and 117-126 of the Geneva Convention relative to Protection of Civilian Persons in Time of War during international armed conflicts to all persons, including those arrested for actions during conflict. SARAH J. SUMMERS, FAIR TRIALS: THE EUROPEAN CRIMINAL PROCEDURAL TRADITION AND THE EUROPEAN COURT OF HUMAN RIGHTS 97 n. 1 (2007).

[190] *Id.*

[191] "As a theoretical principle, the right to a fair trial is unilaterally endorsed by every European country and the conviction that their trials are indeed fair explains why states are content to sign treaties proclaiming a common heritage based on the rule of law." *Id.*

[192] Jacqueline S. Hodgson, *From the Domestic to the European: An Empirical Approach to Comparative Custodial Legal Advice*, *in* COMPARATIVE CRIMINAL PROCEDURE 258-279 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016).

[193] Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S 222, Nov. 4, 1950 [hereinafter EHCR].

[194] *Id.* at art. 6(3)(c) ("*Everyone charged with a criminal offence has the…[right] to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*.") (emphasis added).

[195] Salduz v. Turkey, App. No. 36391/02 (Nov. 27, 2008) (17-year-old was interrogated without presence of counsel, confessed and later claimed that his confession was obtained under duress. Although the ECHR held that restriction of access to counsel undoubtedly prejudiced accused's right to fair trial and even subsequent legal assistance and adversarial nature of ensuring proceedings – where the defense could challenge prosecution – could not provide an effective remedy for violation of Articles 6(1) and 6(3), the ECHR gave particular weight to the age of the applicant in this case.).

[196] *See* Poitrimol v. France, 277 Eur. Ct. H.R. (ser. A), ¶ 34 (1993); Demebukov v. Bulgaria, App. No. 68020/01, ¶ 50 (Feb. 28, 2008); *Salduz*, App. No. 36391/02 at ¶ 51 ("The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial.").

suspect commences, unless compelling circumstances exist to justify a denial of this right.[197] And, though such reasons may exist, "such restriction, whatever its justification, must not unduly prejudice the rights of the accused under Article 6."[198]

This legal principle, that evidence obtained during interrogation without presence of legal counsel violates the right to a fair trial, has now been validated *in over 100 subsequent cases*.[199] Not surprisingly, national courts have often resented this supra-judicial review, thus validating the oft-quoted aphorism regarding judicial infallibility by a famous American jurist.[200] Despite any such feelings, when differing interpretations of the ECHR have arisen, national courts ultimately have deferred to the European Court as the final arbiter of the Convention. However, friction predictably remains over these competing claims to judicial supremacy. Perhaps the best example of this continuing tension was the subsequent debate within the United Kingdom between the Scottish High Court and the UK Supreme Court in response to the ECHR's ruling in *Salduz*.

In 2009, the Scottish High Court of Justiciary, in direct contravention of *Salduz*, held in *H.M. Advocate v. McLean* that Arts. 6(1) and 6(3) of the Convention were not violated even though the accused did not have access to counsel when he made self-incriminating statements. On appeal, the UK Supreme Court in *Cadder v. H.M. Advocate* emphasized that the Scottish High Court of Justiciary had appropriately applied domestic legal precedent.[201] Nevertheless, the UK Supreme Court ultimately affirmed the precedent of *Salduz*, acknowledging that the European Court's interpretation of the ECHR retains primacy over a contradictory national one.[202] In response, the Scottish government announced that while it

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[197] *Salduz*, App. No. 36391/02 at ¶ 55.

[198] *Id.*

[199] *Legal Aid in Europe: Minimum Requirements Under International Law*, REFWORLD: GLOBAL L. & POL'Y DATABASE (2015), https://www.refworld.org/reference/research/osi/2015/en/104998 ("Salduz has been followed by over 100 ECtHR rulings against multiple countries, for example: Brusco v France, ECtHR, Judgment of 14 October 2010, at para. 45; Pishchalnikov v Russia, ECtHR, Judgment of 24 September 2009, at paras. 70, 73, 76, 79, 93; Płonka v Poland, ECtHR, Judgment of 31 March 2009, at paras. 35, 37, 40; Shabelnik v Ukraine, ECtHR, Judgment of 19 February 2009, at para. 53; Mađer v Croatia, ECtHR, Judgment of 21 June 2011, at paras. 149 and 154.").

[200] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("[T]here is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. *We are not final because we are infallible, but we are infallible only because we are final*.") (emphasis added).

[201] Cadder v. HM Advoc., [2010] UKSC 43, ¶ 3-4 ("*It is remarkable that, until quite recently, nobody thought that there was anything wrong with this procedure***.** Ever since the statutory power to question a suspect prior to charge was introduced by sections 1 to 3 of the Criminal Justice (Scotland) Act 1980, the system of criminal justice in Scotland has proceeded on the basis that admissions made by a detainee without access to legal advice during his detention are admissible. *The issue is one of law, as the court appreciated in McLean. It must be faced up to, whatever the consequences***.**") (emphasis added).

[202] *Id*. at ¶ 93 ("The procedure under sections 14 and 15 of the 1995 Act is therefore, in this respect, the very converse of what the Grand Chamber holds is required by article 6(1) and (3)(c) of the

vehemently disagreed with *Salduz*, and by implication with the supremacy of the European Court, it would nonetheless comply with the decision.[203] Within the last several years, the European Court of Human Rights extended this right even further.[204]

CONCLUSION

Today, the right to legal assistance is enshrined as a foundational aspect of the right to a fair trial, throughout the world.[205] This deepened understanding of this right exists in multiple legal systems over time and across space, from the western legal tradition – encompassing both common and civil law histories – to non-western legal traditions. These range from modern day courts operated in accordance with Jewish and Islamic religious law to Chinese and Japanese legal systems that have not fully implemented western concepts of criminal procedure, in practice. Indeed, even where non-western legal systems that had no traditional experience with the right to counsel conceded the existence of that role, such as a *toen rabani* or *wakil*, their role differs from that in the West. In some cases, the right – as written on paper – is not readily embraced by the society or ignored in practice as it was antithetical to the native tradition. In China and Japan, the right to counsel was imposed by western occupiers, as it was by many European empires throughout Asia, Africa and the Americas.

Scholars, practitioners, and law students must look to the past to understand how and why these respective developments occurred, for historical, cultural, and intellectual changes do not occur in a vacuum. Comparative legal history helps to explain the origin and development of

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Convention: Salduz v. Turkey (2008) 49 EHRR 421, 437, para 55…*On this matter Strasbourg has spoken: the courts in this country have no real option but to apply the law which it has laid down*.") (emphasis added).

[203] *Swift Action to Change Scots Law*, SCOT. GOV'T (Oct. 26, 2010), https://webarchive.nrscotland.gov.uk/3000/https://www.gov.scot/News/Releases/2010/10/26110602.

[204] Jennifer Babaie, *Case Watch: How Three Recent ECHR Rulings Strengthen Arrest Rights in Europe*, OPEN SOC'Y FOUNDS. (Jan. 6, 2016), https://www.justiceinitiative.org/voices/case-watch-how-three-recent-echr-rulings-strengthen-arrest-rights-europe; Turbylev v. Russ., App. No. 4722, (Oct. 6, 2015), https://hudoc.echr.coe.int/tur?i=003-5191161-6425430 (Confession made during police interview in absence of counsel, following ill-treatment, would not only be excluded from evidence but lack of legal assistance irretrievably prejudiced rights of accused); Dvorski v. Croatia, App. No. 25703/11 (Oct. 20, 2015), https://hudoc.echr.coe.int/eng-press?i=003-5205144-6447221 (Inability to choose counsel undermines right of accused and thus, fairness of the entire proceedings); R.E. v. U.K.the United Kingdom, App No. 62498/11 (Oct. 27, 2015), https://hudoc.echr.coe.int/eng-press?i=003-5209702-6454510 (Surveillance of conversations between accused and his counsel constituted an extraordinary invasion of privacy rights, especially when that information would be shared with others.).

[205] Liu & Halliday, *supra* note 157, at 918-19 ("Since the global norms in the areas of criminal procedure were mostly derived from the Western legal traditions they place paramount importance on the protection of civil and political rights, particularly the procedural rights of the detainees and their assistance by legal counsel. Since the Universal Declaration of Human Rights was proclaimed in 1948, these norms have been embodied and institutionalized in a series of UN declarations, covenants, and principles. By the early 1990s…global norms on lawyer representation of criminal suspects and defendants had been institutionalized. . .").

institutions and concepts. "It shows their growth and changes, their spread into other surroundings and systems, and the transformations they underwent. . .It demonstrates…the dependence…on given conditions and on the type and approach of…individuals charged with the interpretation, preservation, and…elaboration of the laws."[206] We all follow in the paths of those who went before, as will those after us. This global and generational story continues into our time. *Vivit enim, vivetque semper*.[207]

[206] Wolff, *supra* note 86, at 224-25.

[207] This translates to "For he lives and will live forever." This is expressed in a surviving letter by Pliny the Younger, a lawyer, magistrate, and author in Ancient Rome of the 1st and early 2nd Century CE. Pliny The Younger, *The Letters of Pliny*, LOEB CLASSICAL LIBR. 82-83 (1969), https://www.loebclassics.com/view/pliny_younger-letters/1969/pb_LCL055.83.xml. Like humans, the legacy of the Law forever lives on despite the changes it goes through across the generations.