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COURSE NOTES

LAW 132

Comparative Legal History and Systems

Legal Families, Methods and the Botswana Legal System

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NOTE TO STUDENTS

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2025 Edition ♦ University of Botswana LLB

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PART I

INTRODUCTION TO COMPARATIVE LAW

Definition, Functions, Method and Origins

1. Defining Comparative Law

Comparative law is one of the most contested areas of legal scholarship -- there is no single universally accepted definition of what comparative law is, what it does, or even whether it constitutes a distinct discipline within the legal academy. Despite this, comparative law has emerged as an indispensable tool for understanding legal systems in their broader historical, social, and political context.

DEFINITION: Comparative Law

The systematic study, analysis, and comparison of different legal systems, legal families, and legal institutions across jurisdictions, with the aim of identifying similarities, differences, and patterns of convergence or divergence, and of gaining a deeper understanding of one's own legal system and of law as a universal social phenomenon.

Comparative law is not simply the study of foreign law. The mere acquisition of knowledge about a foreign legal system does not constitute comparative law. What distinguishes comparative law from the study of foreign law is the **comparative dimension** -- the systematic juxtaposition of two or more legal systems for the purpose of deriving insights that could not be obtained by studying either system in isolation.

W.J. Kamba, "Comparative Law: A Theoretical Framework" (1974) -- Kamba argues that comparative law is best understood as a method rather than a distinct branch of substantive law. On this view, comparative law is a technique of legal analysis that can be applied to any area of law. The comparative method involves: identifying a legal problem or phenomenon; selecting the legal systems to be compared; analysing the solutions offered by each system; and drawing conclusions about the similarities, differences, and underlying reasons therefor.

2. Comparative Law and Other Disciplines

Comparative law does not exist in isolation. It has important relationships with several other legal and non-legal disciplines:

- **Public International Law** -- comparative law and public international law are closely related. Public international law governs the relations between sovereign states, and an

understanding of the legal systems of different states is essential for the development and interpretation of international legal norms. Comparative law contributes to the development of international law by identifying common legal principles across legal systems that may form the basis of customary international law.

- **Legal History** -- comparative law and legal history share a common interest in the evolution of legal institutions and concepts over time. Legal history examines how legal systems have developed in particular historical contexts, while comparative law uses historical analysis to understand why different legal systems have developed differently. The historical foundations of legal systems are central to understanding their current characteristics.
- **Legal Theory and Jurisprudence** -- comparative law raises fundamental questions about the nature of law that engage directly with jurisprudential inquiry: Is law a universal phenomenon or is it culturally specific? Can legal concepts be meaningfully transplanted from one legal system to another? What is the relationship between law and society?
- **Sociology of Law** -- comparative law and the sociology of law share an interest in understanding how law operates in society. Comparative lawyers increasingly recognise that law cannot be understood in isolation from its social, economic, cultural, and political context.
- **Private International Law (Conflict of Laws)** -- private international law determines which legal system applies in cases with connections to more than one jurisdiction. An understanding of comparative law is essential for the proper application of private international law rules.

3. Functions of Comparative Law

Comparative law serves a variety of important functions, both theoretical and practical:

3.1 Better Understanding of One's Own Legal System

The most fundamental function of comparative law is to deepen one's understanding of one's own legal system by examining it in the light of alternative approaches. By comparing the solutions that different legal systems offer to the same legal problem, a comparative lawyer gains insights into the strengths and weaknesses of their own system that would not be apparent from an internal perspective alone. As Zweigert and Kotz observe, comparative law is the "school of the law" -- it expands the lawyer's intellectual horizons and enriches legal thinking.

3.2 Law Reform and Legal Development

Comparative law is an invaluable tool for legislators and law reformers. When a legal system faces a new problem or seeks to reform an existing rule, the experience of other legal systems that have confronted the same problem can provide valuable guidance. Many significant legal reforms in Botswana and other African states have been informed by comparative analysis of other legal systems. The Botswana Law Reform Commission, for example, regularly draws on comparative legal research in formulating reform proposals.

3.3 Harmonisation and Unification of Law

At the regional and international level, comparative law is an essential tool for the harmonisation and unification of law. Regional organisations such as the Southern African Development Community (SADC) and continental bodies such as the African Union seek to harmonise the laws of member states in various areas. This process requires comparative analysis to identify areas of convergence and divergence and to develop common legal standards.

3.4 Understanding of Foreign Legal Systems

In an increasingly globalised world, lawyers, businesses, and governments regularly need to understand and operate within foreign legal systems. Comparative law provides the tools and frameworks necessary for the systematic understanding of foreign legal systems.

3.5 Resolution of Private International Law Problems

Where a legal dispute has connections to more than one legal system, private international law rules determine which legal system applies. The proper application of these rules requires an understanding of the foreign legal system whose law may apply -- an understanding that comparative law provides.

3.6 Academic and Scientific Understanding of Law

Comparative law contributes to the scientific study of law as a social and cultural phenomenon. By examining law across different systems and cultures, comparative lawyers gain insights into the universal and the particular in law -- into what is common to all legal systems and what is specific to particular legal traditions.

4. The Comparative Method

The comparative method is the systematic approach employed in comparative legal research. Unlike natural sciences, law does not lend itself to experimental methods. The comparative method provides an alternative means of testing legal propositions and identifying patterns across legal systems.

EJ Eberle, "The Method and Role of Comparative Law" (2009) -- Eberle identifies several methodological approaches in comparative law:

- **Functional Method** -- the most widely used approach in comparative law. It proceeds from the premise that every society faces the same fundamental social problems and that every legal system must provide solutions to those problems. The functional comparativist asks: what is the function performed by a particular legal rule or institution in one system, and how is the same function performed in other systems? By focusing on function rather than form, the functional method enables meaningful comparison across legal systems with very different structures and concepts.
- **Structural Method** -- focuses on the structure and organisation of legal systems rather than on the functional equivalents of specific rules. This method examines the architecture of

legal systems -- how they are organised, what sources of law they recognise, how courts are structured -- and compares these structural features across systems.

- **Historical and Evolutionary Method** -- traces the historical development of legal rules and institutions and compares the evolutionary trajectories of different legal systems. This method is particularly valuable for understanding how legal systems have come to be as they are.
- **Cultural Method** -- emphasises the cultural context of law and argues that legal rules and institutions can only be properly understood within the cultural matrix in which they operate. Comparative lawyers using this method pay close attention to the social, historical, and cultural contexts that shape legal development.

EXAM NOTE

Students must be able to explain each methodological approach, identify its strengths and weaknesses, and explain which approach is most relevant to the comparative analysis of the Botswana legal system. The functional method is the most widely used in academic comparative law and is the most likely to be examined.

5. Origins of Comparative Law

The origins of comparative law as a systematic academic discipline are generally traced to the late nineteenth century, specifically to the First International Congress of Comparative Law held in Paris in 1900. This congress, associated with the scholars Edouard Lambert and Raymond Saleilles, is conventionally regarded as the founding moment of comparative law as a modern academic discipline.

However, comparative legal thinking has a much longer history:

- **Ancient Greece** -- Aristotle famously collected and compared the constitutions of 158 Greek city-states in preparation for his *Politics*. This is one of the earliest systematic exercises in comparative law.
- **Roman Law** -- Roman jurists were aware of and occasionally drew upon the laws of other peoples in developing Roman law, particularly in areas such as the law of nations (*ius gentium*).
- **18th and 19th century** -- Montesquieu's *The Spirit of the Laws* (1748) is a landmark in comparative legal thought, relating law to climate, culture, and social organisation. The Historical School of Jurisprudence (Savigny) and the development of legal positivism in the 19th century stimulated comparative legal thinking.
- **1900 Paris Congress** -- the First International Congress of Comparative Law marked the institutionalisation of comparative law as an academic discipline. Lambert and Saleilles articulated the ambitious goal of using comparative law to identify a universal common law of civilised nations.

- **20th century developments** -- the 20th century saw the development of the major methodological frameworks of comparative law (functional, structural, cultural) and the emergence of regional and international comparative law projects, including the unification of private law through bodies such as UNIDROIT.

PART II

MAJOR WORLD LEGAL SYSTEMS

Classification, English Common Law, Civil Law, Religious, Customary and Mixed Systems

1. Classification of Legal Systems -- Legal Families

The classification of legal systems into legal families is one of the central projects of comparative law. A legal family (or legal tradition) is a group of legal systems that share common historical origins, sources of law, fundamental concepts and principles, and methodological approaches.

The most influential classification of legal systems was proposed by Zweigert and Kotz in their *Introduction to Comparative Law*. They identify the following principal legal families:

Legal Family	Principal Systems	Key Features
Romano-Germanic (Civil Law)	France, Germany, Italy, Spain, Belgium, most of continental Europe and Latin America	Written codes; comprehensive codification; systematic structure; strong role of legal academics; inquisitorial procedure
Common Law	England, USA, Australia, Canada, India, most former British colonies	Judge-made law; precedent (stare decisis); adversarial procedure; equity; no comprehensive codification
Religious Legal Systems	Islamic law (Sharia); Jewish law (Halakha); Canon Law	Divine origin; religious texts as primary source; law and religion inseparable; personal law system
Socialist Legal Systems (historical)	Former USSR, Eastern European states (pre-1989)	State ownership; law as instrument of socialist state; no private law in the Western sense
Mixed Systems	South Africa, Botswana, Scotland, Quebec, Louisiana, Sri Lanka	Combination of two or more legal traditions; typically Civil Law and Common Law

J. Husa, "The Future of Legal Families" (2016) -- Husa argues that the traditional classification of legal families is under pressure from globalisation, legal transplants, and the increasing convergence of legal systems. He suggests that the boundaries between legal families are becoming more porous and that new forms of legal pluralism and hybridity are emerging that challenge established classification schemes.

J. Husa, "Classification of Legal Families Today. Is it time for a memorial hymn?" (2004) -- Husa questions whether the traditional legal family classification retains its utility in the contemporary comparative law context. He argues that while legal families remain useful heuristic devices, they should not be treated as rigid, impermeable categories. Legal systems are dynamic and evolving, and classification must accommodate this dynamism.

2. English Common Law

2.1 Historical Development of English Common Law

The English common law is one of the most influential legal systems in the world. It has spread through British colonialism to cover approximately one third of the world's population, including Botswana, and has profoundly shaped the legal systems of the United States, Canada, Australia, India, and many other countries.

The historical development of the English common law can be divided into the following principal periods:

2.1.1 The Pre-Conquest Period (Before 1066)

Before the Norman Conquest of 1066, England was governed by a patchwork of local customs and tribal laws. There was no unified national legal system. The Germanic tribes that had settled England after the withdrawal of Roman authority brought their own customary laws, and these varied significantly from region to region. The Anglo-Saxon kings gradually extended royal authority and began to develop a more unified system of law through the promulgation of codes and the exercise of royal jurisdiction.

2.1.2 The Norman Conquest and the Development of the Common Law (1066-1485)

The Norman Conquest of 1066 was the decisive event in the formation of the English common law. William the Conqueror established a strong centralised monarchy and began the process of extending royal jurisdiction throughout the country. The following developments were central to the formation of the common law:

- **The Royal Courts** -- William and his successors established a system of royal courts that gradually displaced the local customary courts. The three principal common law courts were the Court of King's Bench (criminal and some civil matters), the Court of Common Pleas (civil matters between subjects), and the Court of Exchequer (revenue matters). These courts developed a body of law -- the "common law" -- that was common to the whole of England, replacing the diverse local customs.
- **The Writ System** -- the royal courts operated through a system of writs -- formal orders issued in the name of the king directing a defendant to appear before the court or to perform a specified act. The plaintiff had to fit their case within an existing form of writ to access the royal courts. This writ system was highly technical and formalistic and ultimately became a significant constraint on the development of the common law.
- **The Itinerant Justices** -- the Crown sent judges on circuit (eyre) throughout the country to hear cases and administer royal justice. This practice was crucial in developing a law common to the whole of England and in displacing local custom.
- **The Year Books** -- from the 13th century, law reporters began to record the proceedings of the royal courts. These Year Books are the earliest form of law reporting and the foundation

of the common law doctrine of precedent.

2.1.3 The Development of Equity (15th-17th centuries)

The rigidity of the common law writ system gave rise to significant injustice in cases where the strict application of common law rules produced harsh or unjust results. Petitioners unable to obtain justice in the common law courts began to appeal directly to the King's conscience, and these petitions were referred to the Lord Chancellor. The Lord Chancellor's court -- the Court of Chancery -- developed a body of rules and principles known as **equity** to supplement and mitigate the rigours of the common law.

Equity operated on the basis of conscience and fairness. It recognised rights and remedies -- such as the trust, specific performance, and injunctions -- that the common law did not provide. The relationship between common law and equity was not always harmonious, and the competition between the common law courts and the Court of Chancery was a major feature of English legal history in the 16th and 17th centuries. The Judicature Acts 1873-1875 fused the administration of law and equity in a single court system, though the substantive distinction between legal and equitable rights was preserved.

2.1.4 The Modern Period (17th century to the present)

The modern period of English legal history is characterised by the growing importance of legislation as a source of law, the codification of certain areas of the common law, and the increasing influence of European law (during the UK's membership of the European Union). The common law continues to develop through judicial decisions, though the pace of judge-made law has slowed as Parliament has become the primary law-making institution.

2.2 Characteristic Features of the Common Law

The common law system is characterised by a distinctive set of features that distinguish it from the Civil law system and other legal traditions:

- **Judge-made law** -- the common law developed primarily through the decisions of courts rather than through comprehensive legislative codes. Judges do not merely apply pre-existing rules but actively create law through their decisions. Judicial creativity is a defining characteristic of the common law.
- **The Doctrine of Precedent (Stare Decisis)** -- courts in a common law system are bound to follow the decisions of superior courts in cases involving the same or substantially similar facts and legal issues. This doctrine of binding precedent gives the common law its characteristic continuity and predictability. The ratio decidendi (the reason for the decision) of a superior court is binding on lower courts, while obiter dicta (observations made in passing) are merely persuasive.
- **Adversarial Procedure** -- common law systems employ an adversarial model of procedure in which the parties to a dispute -- represented by their lawyers -- present their cases to a neutral judge or jury. The judge plays a passive role, acting as an impartial umpire

between the parties rather than actively investigating the facts. This contrasts with the inquisitorial procedure of Civil law systems.

- **The Jury System** -- the common law historically developed an extensive role for lay juries in both criminal and civil proceedings. The jury system is regarded as a fundamental guarantee of individual liberty against the power of the state. While the jury's role in civil proceedings has been significantly reduced in most common law jurisdictions, it remains central to criminal proceedings in England, the United States, and other common law countries.
- **The Trust** -- the trust is a uniquely common law institution developed in equity. It allows property to be held by one person (the trustee) for the benefit of another (the beneficiary). The trust has no direct equivalent in Civil law systems and is one of the most significant contributions of the common law tradition to the global legal order.
- **No Comprehensive Codification** -- unlike Civil law systems, the common law has not been comprehensively codified into a systematic body of written rules. While particular areas of the common law have been codified by statute (such as the Sale of Goods Act), the general law remains in the form of accumulated judicial decisions rather than a comprehensive code.
- **The Distinction Between Law and Equity** -- the historical development of equity as a separate body of law alongside the common law is a distinctive feature of the common law tradition. This dual system of law and equity has given the common law a flexibility and richness of remedies that Civil law systems have had to develop by other means.

2.3 Sources of English Common Law

The sources of law in a common law system include the following, ranked in order of authority:

- **Legislation (Statute Law)** -- Acts of Parliament are the supreme source of law in England. Parliament is sovereign and its legislation prevails over all other sources of law, including the common law. In Botswana, Acts of Parliament similarly prevail over the common law.
- **Case Law (Judicial Precedent)** -- the accumulated body of judicial decisions constitutes the common law. The decisions of superior courts are binding on lower courts through the doctrine of stare decisis. Case law is the distinctive and defining source of law in common law systems.
- **Equity** -- the body of rules and principles developed by the Court of Chancery to supplement the common law. Equity operates through the conscience of the court and provides remedies not available at common law.
- **Custom** -- established local customs that have been recognised and applied by courts may have the force of law, though the role of custom as a source of common law has diminished significantly in the modern era.

- **Academic Writing** -- while less authoritative than in Civil law systems, the writings of distinguished legal scholars are increasingly cited and relied upon by courts in common law jurisdictions as persuasive authority.

2.4 The Structure of English Courts

The English court system is hierarchical, with the doctrine of precedent reflecting this hierarchy. The principal courts in the English court system (post-2005 reforms) are:

Court	Jurisdiction	Precedent
Supreme Court of the United Kingdom	Final appellate court for civil and criminal matters throughout the UK	Binds all courts below; not strictly bound by own decisions (Practice Statement 1966)
Court of Appeal	Hears appeals from the High Court and Crown Court	Bound by Supreme Court; generally bound by own decisions (Young v Bristol Aeroplane)
High Court	First instance and appellate jurisdiction in civil matters	Bound by Court of Appeal and Supreme Court; not strictly bound by other High Court decisions
Crown Court	First instance jurisdiction in serious criminal matters; appeals from Magistrates' Courts	Bound by appellate courts
Magistrates' Courts	First instance jurisdiction in minor criminal and some civil matters	Bound by all superior courts
County Courts	First instance jurisdiction in civil matters below High Court threshold	Bound by all superior courts

2.5 Legal Personnel in the Common Law System

The legal profession in England is characterised by a traditional division between:

- **Barristers** -- specialist advocates who have rights of audience in all courts and who are instructed by solicitors on behalf of clients. Barristers are members of the Inns of Court and

are called to the Bar. Senior barristers may apply to be appointed Queen's (or King's) Counsel (QC/KC).

- **Solicitors** -- general legal practitioners who deal directly with clients, draft legal documents, conduct conveyancing, and instruct barristers. Solicitors now have rights of audience in most courts. They are regulated by the Solicitors Regulation Authority.
- **Judges** -- appointed from the ranks of senior barristers and solicitors. Judges are independent of the executive and legislature and hold office during good behaviour. The independence of the judiciary is a fundamental constitutional principle.
- **Magistrates** -- lay justices of the peace who sit in the Magistrates' Courts and deal with the vast majority of criminal cases. Magistrates are not legally qualified but are trained and advised by a qualified legal advisor (the court clerk).

BOTSWANA NOTE

The Botswana legal profession follows the common law model. Legal practitioners in Botswana are regulated by the Legal Practitioners Act 1996 and the Law Society of Botswana. Unlike England, Botswana does not maintain a formal division between barristers and solicitors -- all admitted legal practitioners may appear as advocates in all courts.

3. The Romano-Germanic Legal System (Civil Law)

3.1 Historical Development of Roman Law and the Civil Law System

The Romano-Germanic legal system -- commonly known as the Civil law system -- is the most widely distributed legal system in the world. It governs more countries and more people than any other legal system. It is the dominant legal tradition in continental Europe, Latin America, most of Africa (outside the former British colonies), and significant parts of Asia.

The Civil law system has its roots in Roman law, particularly in the great codification of Roman law ordered by the Byzantine Emperor Justinian I in the 6th century AD.

3.1.1 Roman Law -- From the Twelve Tables to the Corpus Juris Civilis

Roman law underwent several major phases of development:

- **The Twelve Tables (450 BC)** -- the earliest codification of Roman law, inscribed on twelve bronze tablets and displayed publicly in the Roman Forum. The Twelve Tables represent the first systematic attempt to reduce Roman customary law to written form and to make it accessible to all citizens. They covered areas of private law including property, succession, and obligations.
- **The Classical Period (1st-3rd centuries AD)** -- the golden age of Roman legal development. The great Roman jurists of this period -- Gaius, Papinian, Ulpian, and Paul -- produced a vast body of legal writing of extraordinary sophistication. Roman law developed into a highly technical and conceptually refined system, with a comprehensive law of obligations (contract and delict), property, and persons.
- **The Post-Classical Period (3rd-6th centuries AD)** -- the decline of the Western Roman Empire and the growing complexity of Roman law led to a period of vulgarisation and simplification.
- **Justinian's Corpus Juris Civilis (529-534 AD)** -- the most important event in the history of Western law. Emperor Justinian I of the Eastern Roman Empire commissioned a comprehensive compilation and codification of all Roman law. The result was the **Corpus Juris Civilis**, comprising four parts:
 - (i) **The Codex** -- a compilation of imperial constitutions (legislation).
 - (ii) **The Digest (Pandects)** -- an anthology of extracts from the writings of the classical Roman jurists, organised systematically. The Digest is the most important and influential part of the Corpus.
 - (iii) **The Institutes** -- a student's introduction to Roman law, modelled on Gaius's earlier Institutes.
 - (iv) **The Novels (Novellae)** -- Justinian's own new legislation, enacted after the completion of the Codex.

KEY REFERENCE

FW Dingley, "The Corpus Juris Civilis: A Guide to its History and Use" (2016) -- Dingley provides a comprehensive account of the Corpus Juris Civilis, its historical development, its reception in medieval Europe, and its enduring influence on the legal systems of the Civil law tradition. The Corpus Juris Civilis is the foundational text of the entire Civil law tradition and its study is indispensable for understanding any Civil law system.

3.1.2 The Reception of Roman Law in Medieval Europe

After the fall of the Western Roman Empire, Roman law did not disappear but survived in simplified and vulgarised forms in the territories that had been part of the empire. The decisive event in the revival of Roman law in Europe was the rediscovery of Justinian's Digest at the University of Bologna in the late 11th century.

The University of Bologna became the first European university and the centre of Roman law scholarship. The **Glossators** (11th-13th centuries) -- so named because they wrote explanatory notes (glossae) in the margins of the Digest -- systematically studied and explained the Digest. The greatest of the Glossators was Accursius, whose *Glossa Ordinaria* (c. 1250) became the standard commentary on the Corpus Juris Civilis.

The **Commentators (Post-Glossators)** (14th-15th centuries) went beyond mere explanation and sought to apply Roman law principles to the contemporary social and legal conditions of medieval Italy. The most important Commentators were Bartolus of Saxoferrato and Baldus de Ubaldis. The Commentators' method of applying Roman law principles to contemporary problems is regarded as the foundation of the modern Civil law approach to legal reasoning.

The **Reception of Roman Law** refers to the process by which Roman law (in the form of the Corpus Juris Civilis as elaborated by the Glossators and Commentators) was received into and applied by the legal systems of continental Europe from the 12th century onwards. This reception was driven by the practical utility of Roman law as a sophisticated and comprehensive system of private law. By the 16th century, Roman law had been received throughout most of continental Europe and had become the foundation of the emerging national legal systems.

3.1.3 The Development of National Codifications

The Enlightenment of the 17th and 18th centuries brought a new approach to law -- the desire for clear, rational, systematically organised legal codes that could be understood by all citizens and applied uniformly throughout a territory. This led to the great national codifications of the 18th and 19th centuries:

- **The Prussian General Code (Allgemeines Landrecht, 1794)** -- one of the earliest comprehensive national codes, combining Enlightenment rationalism with elements of Roman law and local custom.

- **The French Civil Code (Code Napoleon, 1804)** -- the most influential of all modern Civil law codes. Enacted under Napoleon Bonaparte, the Code Civil systematically organised the private law of France into a clear, accessible, and comprehensive code. It covered persons, family law, property, and obligations. The Code Napoleon became the model for civil codes throughout Europe, Latin America, and much of Africa, and its influence continues to be felt in legal systems across the world.
- **The German Civil Code (Bürgerliches Gesetzbuch, BGB, 1900)** -- arguably the most technically sophisticated of all civil codes, the BGB was the product of decades of scholarly work by the German Historical School of Jurisprudence. Its systematic structure and precise conceptual framework have been enormously influential in the development of comparative private law.

3.2 Characteristic Features of the Civil Law System

AJGM Sanders, "The Characteristic Features of the Civil Law" (1981) -- Sanders identifies the following as the principal characteristic features of the Civil law system, which distinguish it from the common law:

- **Written Codes** -- the Civil law system is characterised by comprehensive written codes that systematically organise and state the law in abstract, general principles. These codes are intended to provide a complete, coherent, and accessible statement of the law in a particular area. The code is the primary source of law, and the judge's task is to apply the code to the facts of the case.
- **Systematic and Deductive Reasoning** -- Civil law lawyers reason from general principles to specific cases, applying the abstract principles of the code to the facts at hand. This deductive method contrasts with the inductive, case-by-case reasoning characteristic of common law. The Civil lawyer begins with the rule in the code and works downward to the specific case.
- **The Dominant Role of Legal Academics** -- in Civil law systems, legal scholars (academics) play a far more prominent role in the development of law than in common law systems. Academic doctrine (*doctrina*) is a formal source of law and is frequently cited by courts. The great German, French, and Italian legal scholars have been instrumental in shaping the development of their national legal systems.
- **Inquisitorial Procedure** -- Civil law systems employ an inquisitorial model of civil and criminal procedure in which the judge plays an active role in investigating the facts of the case, questioning witnesses, and directing the proceedings. This contrasts with the adversarial model of common law procedure.
- **No Strict Doctrine of Precedent** -- unlike common law systems, Civil law systems do not recognise a strict doctrine of binding precedent. While courts in Civil law systems do in practice follow earlier decisions, they are not legally bound to do so. The primary authority is the code, not the court decision.

- **The Division Between Public and Private Law** -- Civil law systems make a fundamental and systematic distinction between public law (governing the relationship between the state and individuals) and private law (governing relationships between private parties). This division is institutionalised in separate court hierarchies (administrative courts for public law matters, civil courts for private law matters) and in separate codes.
- **Comprehensive Codification** -- the aspiration of the Civil law system is to reduce the law to a complete, coherent, and accessible code that can be read and understood by all citizens. While no code is fully comprehensive, this aspiration has shaped the character of Civil law systems.

3.3 Sources of Law in a Civil Law System

The sources of law in a Civil law system, in order of formal authority, are:

- **Legislation (Statute and Code)** -- the primary and supreme source of law. The code is the central legislative instrument and is the first point of reference for any legal question.
- **Custom** -- in some Civil law systems, established custom may supplement the code where the code is silent. The French and Swiss civil codes expressly recognise custom as a supplementary source of law.
- **Academic Doctrine (Doctrine)** -- the writings of legal scholars carry significant formal authority in Civil law systems and are regularly cited by courts as sources of law.
- **Jurisprudence (Case Law)** -- while not formally binding (there is no strict doctrine of precedent), the accumulated decisions of higher courts (*jurisprudence*) are in practice highly influential and are treated with great respect by lower courts.
- **General Principles of Law** -- where the code is silent and no other source applies, courts may apply general principles of law derived from the spirit of the code or from natural law.

3.4 The Structure of Courts in a Civil Law System

Civil law court systems are typically organised into two parallel hierarchies: one for private law matters (ordinary courts) and one for public law and administrative matters (administrative courts). This dual court structure reflects the fundamental Civil law distinction between public and private law.

The typical Civil law court structure (using France as an example):

- **Cour de Cassation** -- the supreme court for private law matters. It does not re-examine facts but reviews questions of law to ensure the uniform application of the code.
- **Courts of Appeal (Cours d'appel)** -- intermediate appellate courts that review both facts and law.
- **Courts of First Instance (Tribunaux)** -- courts of original jurisdiction in civil and criminal matters.

- **Conseil d'Etat** -- the supreme administrative court, which hears cases involving the state and public bodies. This court has no equivalent in the common law system (though the English courts now exercise an analogous judicial review jurisdiction).

3.5 Legal Personnel in Civil Law Systems

Legal personnel in Civil law systems typically include:

- **Judges (Magistrats)** -- in many Civil law systems, judges are career civil servants who enter the judiciary directly after a period of judicial training, rather than being appointed from the senior ranks of the legal profession as in common law systems. This produces a different judicial culture -- Civil law judges tend to be younger and more anonymous than their common law counterparts.
- **Advocates (Avocats)** -- legal practitioners who represent clients in court. In most Civil law systems, the distinction between barristers and solicitors does not exist; the avocat performs both advocacy and advisory functions.
- **Notaries (Notaires)** -- a uniquely Civil law institution, the notary is a specialised legal professional who drafts and authenticates formal legal documents (such as contracts for the sale of land, wills, and company constitutions) and gives them public faith. Notaries have no direct equivalent in the common law system.
- **Legal Academics (Professeurs)** -- as noted above, legal academics play a far more prominent role in Civil law systems than in common law systems, contributing to the development of law through their scholarly writings.

4. Religious Legal Systems -- Islamic Law

4.1 Introduction to Religious Legal Systems

Religious legal systems are legal systems whose rules and principles are derived from or are authorised by divine revelation or religious tradition. The most significant religious legal systems from a comparative perspective are Islamic law (Sharia), Jewish law (Halakha), and Canon law (the law of the Catholic Church). Of these, Islamic law is by far the most significant for comparative purposes, given its continued application as the governing law in many countries and its influence on the personal law of Muslims in many jurisdictions including Botswana.

4.2 Islamic Law (Sharia)

DEFINITION: Islamic Law (Sharia)

The body of religious law derived from the religious precepts of Islam, particularly the Quran and the Hadith (the sayings and practices of the Prophet Muhammad). Sharia is not merely a legal system but a comprehensive moral and religious code governing all aspects of a Muslim's life, including worship, personal conduct, family relations, commercial transactions, and criminal matters.

S Abdel-Wahab, "Meaning and Structure of Law in Islam" (1962) -- Abdel-Wahab identifies the following key features of Islamic law:

- **Divine Origin** -- Islamic law is regarded as the direct expression of the will of God (Allah). It is not a human creation but a divine revelation. This gives Sharia a character fundamentally different from secular legal systems, in which law is a product of human will and social agreement.
- **Comprehensive Scope** -- Islamic law does not recognise the Western distinction between law and religion, or between law and morality. Sharia governs all aspects of human life -- religious, moral, and legal -- as a unified whole.
- **Personal Law System** -- historically, Islamic law was applied as a personal law -- it applied to Muslims regardless of where they lived, not to all inhabitants of a territory. This personal law character distinguishes Sharia from the territorial character of Western legal systems.
- **Immutability and Ijtihad** -- the core principles of Sharia, as derived from the Quran and Hadith, are regarded as immutable and not subject to human modification. However, the interpretation and application of these principles in new circumstances is an ongoing process known as *ijtihad* (independent legal reasoning).

4.2.1 Sources of Islamic Law

The principal sources of Islamic law, in order of authority, are:

- **The Quran** -- the holy scripture of Islam, regarded as the direct word of God as revealed to the Prophet Muhammad. The Quran contains approximately 500 verses with direct legal significance, covering matters such as family law, criminal law, evidence, and commercial transactions.
- **The Sunna (Hadith)** -- the sayings, actions, and tacit approvals of the Prophet Muhammad as recorded in the Hadith literature. The Sunna supplements and elaborates upon the Quran and is the second most important source of Islamic law.
- **Ijma (Consensus)** -- the consensus of the Muslim community or of Islamic legal scholars on a point of law. Where the Quran and Sunna are silent or ambiguous, the consensus of qualified scholars may provide authoritative guidance.
- **Qiyas (Analogical Reasoning)** -- the extension of a Quranic or Sunnaic ruling to a new situation by analogy, based on a common underlying reason. Qiyas is the principal method of legal reasoning in Islamic jurisprudence.

4.2.2 Schools of Islamic Law

There are four principal Sunni schools of Islamic law (*madhabs*):

- **Hanafi** -- the largest school, dominant in Turkey, Pakistan, India, and Central Asia. Known for its flexibility and use of analogical reasoning.
- **Maliki** -- dominant in North and West Africa. Gives significant weight to the practice of Medina.
- **Shafi'i** -- dominant in East Africa, Southeast Asia, and parts of the Middle East.
- **Hanbali** -- the most conservative school, dominant in Saudi Arabia and Qatar.

G MiBadr, "Islamic Law: Its Relation to Other Legal Systems" (1978) -- MiBadr examines the relationship between Islamic law and the Civil law and Common law systems, arguing that the Islamic legal tradition has made significant contributions to the development of international law and commercial law. He notes areas of convergence between Islamic law and Western legal systems, particularly in the areas of contract and commercial law, as well as fundamental divergences in areas such as family law, inheritance, and criminal law.

5. Traditional and Indigenous Legal Systems -- African Customary Law

5.1 Introduction

Traditional and indigenous legal systems are the legal rules, institutions, and processes that have been developed by particular communities over long periods of time, typically without formal legislative enactment. They are embedded in the culture, practices, and values of the communities from which they emerge. African customary law is the most significant example of a traditional legal system for the purposes of LAW 132, given the central role that customary law plays in the Botswana legal system.

5.2 Characteristics of African Customary Law

AJGM Sanders, "The Characteristic Features of Southern African Law" (1981) and "How customary is African customary law?" (1987) -- Sanders identifies the following as characteristic features of African customary legal systems:

- **Orality** -- African customary law is primarily transmitted and maintained through oral tradition, memory, and practice rather than through formal written instruments. This gives customary law its dynamic and adaptive character but also makes it difficult to ascertain with precision.
- **Communalism** -- the community and the extended family are the primary units of social and legal organisation in African customary law. The individual is conceived of as embedded in a network of communal relationships and obligations, rather than as an autonomous rights-bearing subject. This communal orientation contrasts fundamentally with the individualism of Western legal systems.
- **Consensus-Oriented** -- customary law dispute resolution processes aim primarily at reconciliation and the restoration of social harmony rather than at the adversarial determination of winners and losers. The goal is to restore the relationship between the parties, not merely to determine legal rights.
- **Functional Overlap** -- in traditional African societies, the same institution (typically the chief or council of elders) may exercise what Western law would classify as legislative, executive, and judicial functions simultaneously. The separation of powers is not a feature of traditional African governance.
- **Flexibility and Adaptability** -- African customary law is inherently dynamic and adaptable to changing social circumstances. Unlike formal statute law, customary law can evolve organically in response to changes in social conditions without the need for formal legislative action.
- **Religious and Moral Dimension** -- in many African societies, law, religion, and morality are not clearly separated. Legal norms may have a religious dimension, and their violation

may be regarded as an offence against the ancestors or against the spiritual order of the community.

S Roberts, "Introduction: Some Notes on 'African Customary Law'" (1984) -- Roberts cautions against treating African customary law as a monolithic system. He emphasises the extraordinary diversity of customary legal traditions across the African continent and warns against the tendency of colonial and post-colonial legal systems to reduce this diversity to a single, simplified "customary law."

CRITICAL NOTE

AA Oba, *"The Future of Customary Law in Africa"* -- Oba argues that African customary law faces significant challenges in the post-colonial era, including the tension between customary norms and constitutional human rights guarantees, the increasing influence of Western legal concepts, and the difficulty of maintaining customary institutions in the context of urbanisation and social change. At the same time, he argues that customary law retains significant vitality and social relevance in many African communities and that its dismissal or marginalisation would be a profound injustice to African peoples.

5.3 The Repugnancy Proviso

In colonial Africa, the application of customary law was subject to the **repugnancy proviso** -- the rule that customary law would be applied by colonial courts only insofar as it was not repugnant to justice, morality, or good conscience. This proviso reflected the colonial view that African customary law was inferior to European law and required supervision and correction. The repugnancy proviso gave colonial courts wide powers to refuse to apply customary rules they considered objectionable.

In post-colonial Botswana, the repugnancy proviso has been retained in Section 2 of the Customary Law Act, which provides that customary law shall not be applied if it is incompatible with the provisions of any written law or contrary to morality, humanity, or natural justice. This provision must now be read in the light of the constitutional guarantee of equality and the principle of constitutional supremacy established in *AG v Dow* [1992] BLR 119 (CA) and *Ramantele v Mmusi* CACGB-104-12.

6. Mixed Legal Systems -- Roman-Dutch Law

6.1 What is a Mixed Legal System?

E Oruku, "What is a Mixed Legal System: Exclusion or Expansion?" (2008) -- Oruku defines a mixed legal system as a legal system that combines elements from two or more distinct legal traditions in a systematic and enduring way. Mixed systems are not merely systems that have been influenced by foreign law -- virtually all legal systems have been influenced by foreign law to some degree. A mixed system is one in which the mixture is substantial and constitutive of the system's identity.

DEFINITION: Mixed Legal System

A legal system that systematically and permanently combines elements from two or more distinct legal traditions, typically the Civil law (Romano-Germanic) and Common law traditions. The mixture is not superficial or incidental but is fundamental to the character and identity of the legal system.

Examples of mixed legal systems include:

- **South Africa** -- combines Roman-Dutch law (the common law) with English common law and increasingly with African customary law under the constitutional framework.
- **Botswana** -- combines Roman-Dutch law and English common law with Tswana customary law.
- **Scotland** -- combines Scots law (derived from the Civil law) with English common law.
- **Quebec (Canada)** -- combines French Civil law with English common law.
- **Louisiana (USA)** -- combines French and Spanish Civil law with American common law.
- **Sri Lanka** -- combines Roman-Dutch law with English common law and customary law.

6.2 Roman-Dutch Law

Roman-Dutch law is the mixed legal system that developed in the Netherlands in the 17th and 18th centuries through the combination of classical Roman law (as contained in the Corpus Juris Civilis and elaborated by the humanist jurists of the 16th century) with Dutch customary law and the writings of Dutch jurists. Roman-Dutch law is the foundation of the common law of Botswana, South Africa, Zimbabwe, Namibia, Lesotho, and Swaziland.

6.2.1 Development of Roman-Dutch Law in the Netherlands

The key figures in the development of Roman-Dutch law include:

- **Hugo Grotius (1583-1645)** -- regarded as the father of Roman-Dutch law and one of the greatest jurists in history. His *Inleiding tot de Hollandsche Rechtsgeleerdheid* (Introduction to

Dutch Jurisprudence, 1631) was the first systematic account of Dutch law as a mixed system of Roman law and local custom.

- **Johannes Voet (1647-1713)** -- his *Commentarius ad Pandectas* is the most comprehensive commentary on Roman-Dutch law and remains influential to this day in South Africa and Botswana.
- **Simon van Leeuwen (1625-1682)** -- author of *Het Rooms-Hollands Recht* (Roman-Dutch Law), a major source of Roman-Dutch law.

6.2.2 Reception of Roman-Dutch Law in Southern Africa

Roman-Dutch law was transplanted to the Cape of Good Hope by Dutch settlers in 1652 and spread from there to the territories that later became South Africa, Botswana, Zimbabwe, Namibia, Lesotho, and Swaziland. The mechanism of reception varied:

- At the Cape, Roman-Dutch law was introduced as the law of the colonial administration and became the general private law of the colony.
- In Bechuanaland (later Botswana), Roman-Dutch law was introduced indirectly through the administrative connection with the Cape Colony.
- English common law was introduced alongside Roman-Dutch law through the growing influence of English administration, particularly in procedural and commercial matters.

B Lenel, "The History of South African Law and its Roman-Dutch Roots" (2002) -- Lenel traces the development of Roman-Dutch law from its origins in the Netherlands through its reception in the Cape Colony and its development into the modern South African (and by extension, Botswana) common law.

EXAM NOTE

Students must be able to explain: (1) the origins of Roman-Dutch law in the Netherlands; (2) the key jurists who developed it; (3) the mechanism of its reception in Southern Africa; and (4) its relationship to English common law in the Botswana legal system. The case of Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd [1996] BLR 190 (CA) confirms that Roman-Dutch law is the common law of Botswana.

7. The Development of the Botswana Legal System

7.1 Pre-Colonial Period -- Indigenous Tswana Law and Practice

Prior to the establishment of the Bechuanaland Protectorate in 1885, the territory now known as Botswana was inhabited by the Tswana peoples, organised into a number of chiefdoms. Each chiefdom was governed by its own customary law and traditional institutions. The pre-colonial legal order had the following characteristics:

- **Orality** -- Tswana law was unwritten and transmitted orally through practice, tradition, and the decisions of the chief and elders.
- **The Kgosi (Chief)** -- the chief exercised combined legislative, executive, and judicial authority. The chief's word was law, and the chief's court (kgotla) was the principal forum for dispute resolution.
- **The Kgotla** -- the community assembly that served as the forum for public deliberation, dispute resolution, and the announcement of the chief's decisions. The kgotla was open to adult male members of the community and embodied the principle of participatory governance.
- **Communal Land Tenure** -- land was held communally under the trusteeship of the chief on behalf of the community. Individual members of the community had rights of use and occupation but not ownership in the Western sense.
- **Emphasis on Reconciliation** -- the primary goal of Tswana dispute resolution was to restore harmony between the parties and to reintegrate the wrongdoer into the community, rather than to punish or to determine abstract legal rights.

IS Malila, "Codified law and the changing normative context of disputes in traditional settings in Botswana" (2015) -- Malila examines how the codification of customary law and the introduction of formal court systems has transformed the context in which customary disputes are resolved in Botswana, often at the expense of traditional reconciliation-oriented processes.

7.2 Colonial Period -- The Reception of English Common Law and Roman-Dutch Law

The Bechuanaland Protectorate was established by Britain on 31 March 1885, initially as a buffer against Boer and German expansion. The establishment of the Protectorate initiated a process of legal transformation that fundamentally reshaped the legal order of the territory.

7.2.1 Introduction of Roman-Dutch Law

As the Protectorate was administered from the Cape Colony, Roman-Dutch law -- the common law of the Cape -- was introduced as the general law of the Protectorate. The Proclamation of 1891 formally applied the law of the Cape Colony to Bechuanaland, thereby introducing Roman-Dutch law as the common law.

JH Pain, "The Reception of English and Roman-Dutch Law in Africa" (1978) -- Pain examines the mechanisms by which English common law and Roman-Dutch law were received into Bechuanaland, Lesotho, and Swaziland, and analyses the relationship between these introduced legal systems and the pre-existing indigenous legal orders.

7.2.2 Introduction of English Common Law

English common law was introduced alongside Roman-Dutch law through:

- The High Commissioner's Proclamations, which introduced English law in specific areas such as criminal procedure and evidence.
- The direct application of English statutes and English judicial decisions by the courts of the Protectorate.
- The growing influence of English legal education on the lawyers who practised in the Protectorate.

7.2.3 The Dual Legal System

The colonial administration created a dual legal system in which:

- Formal law (Roman-Dutch and English law) applied to Europeans and to matters involving the colonial administration.
- Customary law continued to apply to indigenous Africans in personal and family matters, subject to the repugnancy proviso.

AJGM Sanders, "The internal conflict of Laws in Botswana" (1985) -- Sanders examines the tension between the formal law and customary law in Botswana and analyses the rules governing which system of law applies in any given case -- what is sometimes called the "internal conflict of laws."

A Aguda, "Legal Development in Botswana from 1885 to 1966" (1973) -- Aguda traces the development of the Botswana legal system from the establishment of the Protectorate to independence, documenting the gradual extension of formal law and the changing role of customary law during this period.

7.3 Post-Independence Period

Botswana achieved independence on 30 September 1966. The Constitution of Botswana 1966 established the legal framework of the new state and entrenched the plural legal system that had developed during the colonial period.

CM Fombad, "Botswana and the Dynamics of Legal Modernisation within a Dual English Common Law/Roman-Dutch Law Legal Heritage" (2005) -- Fombad provides a comprehensive analysis of the development of the Botswana legal system in the post-independence period, examining the interaction between the common law heritage, customary law, and the transformative requirements of constitutional democracy. He identifies the following key features

of the post-independence Botswana legal system:

- **Constitutional Supremacy** -- the Constitution of Botswana 1966 is the supreme law. All other law -- including the common law, customary law, and statute law -- must conform to the Constitution.
- **Legal Pluralism** -- the Botswana legal system is characterised by the coexistence of formal law (the Constitution, statute, Roman-Dutch and English common law) and customary law. This plurality creates both richness and tension in the legal order.
- **The Influence of English Law** -- English law continues to exercise a significant influence on the development of Botswana law, particularly in procedural law, constitutional law, and commercial law. Botswana courts frequently cite English cases as persuasive authority.
- **The Development of an Indigenous Botswana Jurisprudence** -- the Botswana courts have increasingly developed their own jurisprudence, rooted in the specific constitutional and social context of Botswana. The landmark cases of *AG v Dow* [1992] BLR 119 and *Motshediemang v AG* [2019] 4 BLR 143 are examples of the development of a distinctly Botswana constitutional jurisprudence.

IS Malila, "Reconciling Plural Legal Systems: Between Justice and Social Disorder in Botswana" (2010) -- Malila examines the challenges of managing legal pluralism in Botswana, arguing that the coexistence of formal law and customary law creates both opportunities for justice and risks of social disorder, particularly where the two systems produce conflicting results.

7.4 The Hierarchy of Sources of Law in Botswana

Rank	Source	Authority
1	The Constitution of Botswana 1966	Supreme law; all other law must conform
2	Acts of Parliament (Statute Law)	Prevails over common law and customary law within constitutional limits
3	Subsidiary Legislation	Valid only within the scope of the enabling Act
4	Roman-Dutch Common Law	The general law of Botswana; applies where no statute covers the matter
5	English Common Law	Applied in areas where Roman-Dutch law is silent or inadequate, particularly in procedural and commercial matters
6	Customary Law	Applied in personal and family matters between persons subject to customary law, subject to the repugnancy proviso and constitutional supremacy
7	International Law	Used as an interpretive aid; requires incorporation by legislation to form part of domestic law

PART III

COMPARISON OF SPECIFIC ISSUES

Civil Law and Common Law; Islamic Law, Civil Law and Common Law Compared

1. Civil Law and Common Law Compared

J Dainow, "The Civil Law and the Common Law: Some Points of Comparison" (1966-1967) -- Dainow provides a systematic comparison of the Civil law and Common law systems across a range of dimensions. His analysis identifies the following principal points of comparison:

Dimension	Civil Law	Common Law
Primary Source of Law	Comprehensive written code; legislation is supreme	Judge-made case law; doctrine of precedent; legislation increasingly important
Role of Judges	Apply the code; limited law-making role; career civil servants	Active law-makers through precedent; appointed from senior practitioners
Role of Legal Academics	Central; doctrine is a formal source of law	Persuasive but not formally authoritative
Method of Legal Reasoning	Deductive: from general principle to specific case	Inductive: from specific cases to general principles
Procedural Model	Inquisitorial: judge actively investigates	Adversarial: parties present their cases; judge as umpire
Role of Juries	Minimal or non-existent	Central in criminal cases; historically important in civil cases
Public/Private Law Divide	Fundamental; separate court hierarchies	Less rigid; public law administered by ordinary courts
Doctrine of Precedent	Not formally binding; courts follow earlier decisions in practice	Formally binding; stare decisis is a cornerstone of the system

Equity	No separate system of equity	Historically separate; now fused administratively but not substantively
Codification	Comprehensive; systematic codes cover all areas of law	Partial; specific areas codified but no general civil code

C Pejovic, "Civil Law and Common Law: Two Different Paths Leading to the Same Goal" (2001) -- Pejovic argues that despite the fundamental structural differences between Civil law and Common law systems, both ultimately serve the same social functions -- the regulation of human conduct, the resolution of disputes, and the protection of rights. He argues that the differences between the systems are less significant than they appear and that there is a growing convergence between Civil law and Common law systems in the modern era, driven by globalisation, the harmonisation of international private law, and the increasing importance of human rights law.

CONVERGENCE THESIS

The convergence thesis -- the argument that Civil law and Common law systems are becoming more similar over time -- is one of the most debated questions in contemporary comparative law. Convergence theorists point to the increasing importance of legislation in common law systems, the growing influence of case law in Civil law systems, and the emergence of supranational legal orders (such as EU law) that draw on both traditions. Critics argue that deep structural and cultural differences between the systems remain and that apparent convergence is often superficial.

2. Islamic Law, Civil Law and Common Law Compared

AM Jandrab, "Comparison of Legal Systems: Islamic Law System, Civil Law, and Common Law" (2018) -- Jandrab provides a three-way comparison of Islamic law, Civil law, and Common law across a range of dimensions:

Dimension	Islamic Law	Civil Law	Common Law
Source of Authority	Divine (Quran, Sunna, Ijma, Qiyas)	Human legislation (codes); Roman law heritage	Human legislation and judicial precedent
Relationship of Law and Morality	Inseparable; law is a subset of divine morality	Distinct; law and morality are separate	Distinct; law and morality are separate

Codification	Partially codified in modern states; classical sources are primary	Comprehensively codified	Not comprehensively codified
Role of Judges	Apply divine law; limited creativity in classical theory	Apply the code; moderate creativity	Active law-creators through precedent
Family Law	Governed by Sharia; polygamy permitted; gender-differentiated	Secular; monogamy; gender equality	Secular; monogamy; gender equality
Criminal Law	Hudud offences (fixed Quranic penalties); Ta'zir (discretionary)	Secular criminal codes	Secular criminal codes
Procedure	Varied; inquisitorial elements dominant	Inquisitorial	Adversarial

3. Academic Reading List

3.1 Prescribed Text

- PhJ Thomas; CG Van der Merwe and BC Stoop, *Historical Foundation of South African Private Law* (Durban: LexisNexis, 2000). This is the primary text for the course.

3.2 Other References

- M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006).
- K Zweigert and H Kötz, *Introduction to Comparative Law* (3rd ed, Oxford: Clarendon Press, 1998).
- CM Fombad, *Botswana Legal System* (2nd ed, Durban: LexisNexis, 2013).
- HR Hahlo and E Kahn, *The South African Legal System and its Background* (Cape Town: Juta & Co, 1968).

3.3 Journal Articles -- Part I: Introduction

- WJ Kamba, "Comparative Law: A Theoretical Framework" (1974) 23(3) *International and Comparative Law Quarterly* 485.
- EJ Eberle, "The Method and Role of Comparative Law" (2009) 8(3) *Washington University Global Studies Law Review* 451.
- B Sinani and K Shanto, "Methods and Functions of Comparative Law" (2013) *Acta Universitatis Danubius* 25.
- CN Okeke, "Comparative Law in Africa: Methodologies and Concepts" (2015) *Book Chapters by GGU Law Authors*, Book 26.

3.4 Journal Articles -- Part II: Legal Systems

- J Husa, "The Future of Legal Families" (2016) *Oxford Handbooks Online*.
- J Husa, "Classification of Legal Families Today. Is it time for a memorial hymn?" (2004) 56(1) *Revue internationale de droit compare* 11.
- PhJ Thomas; CG Van der Merwe and BC Stoop, *Historical Foundation of South African Private Law* (2000) 79-91 [English Common Law], 15-59 [Civil Law], 63-73 [Roman-Dutch Law].
- FW Dingley, "The Corpus Juris Civilis: A Guide to its History and Use" (2016) 35(4) *Legal Reference Services Quarterly* 231.
- AJGM Sanders, "The Characteristic Features of the Civil Law" (1981) 14(2) *Comparative and International Law Journal of Southern Africa* 196.
- S Abdel-Wahab, "Meaning and Structure of Law in Islam" (1962) 16 *Vanderbilt Law Review* 115.

- G MiBadr, "Islamic Law: Its Relation to Other Legal Systems" (1978) 26(2) American Journal of Comparative Law 187.
- S Roberts, "Introduction: Some Notes on African Customary Law" (1984) 28(1/2) Journal of African Law 1.
- AA Oba, "The Future of Customary Law in Africa" (Cambridge University Press, 2011).
- AJGM Sanders, "How customary is African customary law?" (1987) XX CILSA 406.
- R Atuguba, "Customary Law Revivalism: Seven Phases in the Evolution of Customary Law in Sub-Saharan Africa."
- E Oruku, "What is a Mixed Legal System: Exclusion or Expansion?" (2008) 12(1) Electronic Journal of Comparative Law 1.
- B Lenel, "The History of South African Law and its Roman-Dutch Roots" (2002).

3.5 Journal Articles -- Botswana Legal System

- CM Fombad, "Botswana and the Dynamics of Legal Modernisation within a Dual English Common Law/Roman-Dutch Law Legal Heritage" (2005) 13 African Journal of International and Comparative Law 7.
- JH Pain, "The Reception of English and Roman-Dutch Law in Africa with Reference to Botswana, Lesotho and Swaziland" (1978) 11(2) Comparative and International Law Journal of Southern Africa 137.
- AJGM Sanders, "The Internal Conflict of Laws in Botswana" (1985) 17 Botswana Notes and Records 77.
- A Aguda, "Legal Development in Botswana from 1885 to 1966" (1973) 5 Botswana Notes and Records 52.
- IS Malila, "Codified Law and the Changing Normative Context of Disputes in Traditional Settings in Botswana" (2015) 49(2) Canadian Journal of African Studies 267.
- IS Malila, "Reconciling Plural Legal Systems: Between Justice and Social Disorder in Botswana" (2010) 42 Botswana Notes and Records 71.

3.6 Journal Articles -- Part III: Comparison

- J Dainow, "The Civil Law and the Common Law: Some Points of Comparison" (1966-1967) 15(3) American Journal of Comparative Law 419.
- C Pejovic, "Civil Law and Common Law: Two Different Paths Leading to the Same Goal" (2001) 32 Victoria University of Wellington Law Review 817.
- AM Jandrab, "Comparison of Legal Systems: Islamic Law System, Civil Law, and Common Law" (2018) 5(2-1) UMRAN -- International Journal of Islamic and Civilizational Studies 1.

**NOTE TO
STUDENTS**

These notes cover the full LAW 132 course outline across Parts I, II, and III. All prescribed reading material has been incorporated and explained in the notes. Students are strongly encouraged to read the prescribed text (Thomas, Van der Merwe and Stoop) and the prescribed journal articles alongside these notes. LAW 132 complements LAW 131 (Introduction to Law) and students should read the two sets of notes together for maximum benefit.