Comparative Law and Economics

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Chapter 9

Second Area Study:
Tort Law in Less Developed Countries

The spread of law and economics is one of the most important examples of methodological legal transplants in Western law.¹ From its conception in the United States, this approach has reached other common law countries, such as Canada and England, as well as a number of European civil law jurisdictions, including Germany, Holland, and Italy.² The recent creation of the Latin American Association of Law and Economics is evidence of the continuous appeal of this approach in very different legal systems. Scholars have noticed this phenomenon and are now trying to explain the reasons for its popularity.³

The aim of this chapter is to proceed one step forward in understanding whether and to what extent law and economics has a future in approaching, both from a positive and from a normative point of view, legal systems of the so-called Third World countries,⁴ that is, those outside the Western legal tradition.⁵ On one hand, I will show how we might avoid the problems of cultural imperialism such as those that affected the American law and development movement in the 1960s


³. See ibid.; Mattei, supra note 1.


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and 1970s, eventually causing its failure. On the other hand, I will try to enrich our understanding of law and economics by applying it to legal systems very different from those in which it has so far flourished.

This chapter will proceed in the following way: First, I will resolve some general issues of comparative law and economics. Then, from an economic perspective, I will explain what characteristics make Western law homogeneous, in order to have a clear picture of which legal systems we are considering. Next, I will discuss some of the assumptions of law and economics that may limit the possibility of successfully transplanting this method outside of the Western legal system. In an application of law and economics outside of the Western legal tradition, I will discuss environmental tort law in some African and Latin American countries. Finally, I will offer some general thoughts regarding the suitability of comparative law and economics for the analysis of less developed countries.

A Framework for Classifying the Legal Traditions of the World

As I mentioned in chapter 8, the Eastern European revolution of 1989 signaled the fall of the legal family classifications most widely accepted among comparative law scholars. For purposes of general classification, even if nuances were not absent, the legal systems in the world were divided into civil law, common law, Socialist law, and religious or traditional law. Today, Socialist law has practically disappeared in Eastern Europe, Africa, and Latin America, with the notable exception of Cuba. In Asia, Socialist law is still an important part of the legal systems of China, North Korea, and Vietnam, but the feeling has always been that these legal cultures were better classified as within the so-called traditional law families.

After the fall of Socialist law, some methodological revolutions have led to a rethinking of a few common assumptions. The more sophisticated comparative literature has challenged the rigid distinc-


tion between common law and civil law, instead proposing that these two families of legal systems be grouped within the so-called Western legal tradition. This proposal is largely justified by major phenomena of convergence and of legal transplants between civil law and common law countries. Furthermore, comparativists became aware of the fact that legal systems are not monolithic institutions but very dynamic entities composed of a plurality of layers that may be influenced by one or more of the other legal families. For example, many Latin American countries, including Mexico, are influenced mostly by the civil law in the domain of private law, while American law influences the domain of their public law.

The need to rethink the common classifications of legal systems is clear as far as religious or traditional law is concerned. In this context, it became clear, on the one hand, that the evolution of legal systems in the growing area of market transactions has limited its role in narrower areas such as family law, real property (including successions), and possibly criminal and tort law. Japan is a good illustration of this phenomenon. On the other hand, many Islamic countries became increasingly aware and defensive of their cultural and religious identities. Thus, Islamic law may be expected to become increasingly influential in the domain of transnational legal practice.

The community of comparative lawyers is now discussing possible new schemes of classification. For the sake of this chapter, it is sufficient to maintain that the Western legal tradition can be considered roughly homogeneous in its economic, political, and legal-cultural assumptions. In particular, from an economic perspective, the systems of the Western legal tradition are mixed, with a large, well-developed private sector (market) and a variably sized public sector. The political systems of the Western legal tradition consist of multiparty democracies with important ideological divisions (e.g., as to the extent of the market and of the public sector), but not on the fundamental mixed

nature of the economic systems. From a legal point of view, the Western legal tradition shares the assumption that the legal process is different, and should remain different, from the political process. The former tends to be neutral, while the latter is based on partisan ideologies. Moreover, the societies composing the Western legal tradition all agree that law and religion have different domains—that lawyers and priests have different jobs, the former being concerned with social institutions, the latter with the intimate aspect of individual beliefs.

This very schematic picture gives us a rough map of the systems belonging to this family. Such systems consist of most of the Western European nations, the United States, Canada, Australia, and New Zealand. With the exception of Japan, the states in this family constitute all of the leading economic powers of the world.¹⁰

_Law and Economics: The Product of a Leading Legal Culture_

In the 1950s, the United States supplanted France and Germany as the leading legal system within the Western legal tradition.¹¹ Legal solutions, doctrines, and institutions developed in U.S. law are today copied and considered for purposes of importation more often than those developed in any other legal system in the world. Since the Western legal tradition is the leading legal tradition worldwide, American scholars are today the most influential in the world. Such leadership is clear in the process of privatization in Eastern law as well as in China, where American advisors play a major role. Even outside of organized efforts of legal cooperation, the impact of American law outside of Western law is clear. Japan, once again, illustrates this point.

An explanation in economic terms would be tempting. The United States is the leading economic power in the world. It is only natural that it should become also the leading legal power. It is obvious, as has always been the case in legal history, that economic leadership carries some legal leadership. China and Japan, just to give two obvious exam-

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¹⁰ For the classic map of the world legal systems and for a treasure of bibliographical footnotes see R. B. Schlesinger, H. Baade, M. Damaska, and P. Herzog, *Comparative Law: Cases, Text, and Materials* 315 (5th ed. 1988); Schlesinger et al., supra note 7, 63.

ples, were “persuaded” to enact Western codes of law in order to attract investments from Western powers late in the nineteenth century. Economic leadership, however, falls short from a persuasive explanation of the dynamic of legal leadership. If such were the case we should be prepared to argue that more advanced economic powers always exert legal influence on less advanced ones. But Japanese law does not have any influence outside of its geographic region. And English law, even when England was the leading political and economic empire, never influenced the law outside of its (broad) political boundaries.

To summarize, economic leadership is neither necessary nor sufficient for legal leadership. Legal leadership has to do with legal culture as much as with economic power. Intellectual leadership cannot be imposed by means of political or economic influence. It must be willingly accepted by the legal cultures of the influenced countries.

If we focus on less developed countries, this phenomenon may explain the failure of the law and development movement, resisted by a Latin American legal culture that rejected attempts to be “modernized” by a jurisprudential system foreign to its tradition. More important for our purposes, this may be the key to understanding the prestige and the possible future influence that law and economics may have outside of the Western legal tradition.

Most less developed countries do not share either one or both of the basic legal assumptions of the rule of law as understood by the more developed countries that compose the Western legal tradition. In many countries (as in some of the least developed African and Latin American countries) the political process and the legal process overlap. In others (as in most African, Islamic, and Asian Countries) the domain of law and that of religious beliefs overlap.

Western Assumptions of Law and Economics and Non-Western Values

Two fundamental assumptions underlie economic reasoning. The first one may be referred to as the “rationality” assumption. Economic theory is concerned with the rational maximizing of behavior under conditions of scarcity. The second assumption may be referred to as the

13. See also supra chapters 2 and 3.
"individualistic" assumption, which assumes that individuals are the best judges of their own preferences.

These two foundational assumptions, together with an assumption of negligible transaction costs, lead to a consequence that is sometimes defined as the positive Coase theorem: individuals tend to bargain between themselves to achieve efficient results. These two basic assumptions seem to be sufficiently unbiased ideologically to allow the economic argument also to claim a role in approaching non-Western legal systems. To be sure, outside of the Western legal tradition we find that a larger role is played by nonindividual-centered perspectives.

As is well known, markets in conditions of extreme scarcity, as in certain less developed countries, usually operate in communities that have homogenous value systems. In communities in which transactions take place between close groups of individuals, these shared cultural values constitute a background for the market transaction. In such contexts (e.g., in a small rural community marketplace) it may be argued that the positive Coase theorem is undermined by the lack of both an individual-centered approach and a utility-maximizing attitude. Assuming this observation to be true, we may argue that once the small nonindividual-centered approach interacts with the needs of a larger less homogeneous community, law and economics immediately faces familiar problems.

A well-established line of scholarship offers evidence of the kind of problems that law and economics may help to tackle in scholars' work on poor communities in less developed countries, from Africa to

16. For classic examples see P. Bohannan, Justice and judgment among the TIV (1968); M. Deng, Tradition and Modernization: A Challenge for Law among the Dinka of the Sudan (1971).
17. See I. M. D. Little, Economic Development: Theory, Policy, and International Relations (1982), who focuses on how, in developing countries, part of the economy operates under a paternalistic or quasi-feudal regime. The same point is made by Lewis in his classic model of development, in which it is stressed that in the agricultural sector (crucial for the analysis of property rights) there is no objective of maximizing profits and the distribution is according to conventional norms rather than marginal products. See W. A. Lewis, Economic Development with Unlimited Supplies of Labor, 22 Manchester Sch. Econ. & Soc. Stud. 139–91 (1954).
18. See the works of Jean-Maurice Verdier, those of Michel Alliott, and in particular, P. Vennettier, Les villes d'Afrique Tropicale (1976).
South America. The work of Cooter on Papua New Guinea,\(^{19}\) shows that one need not approach the nightmare of megacommunities to find similar problems and a role for law and economics as a tool of understanding.

Sometimes, the market and its intrinsically individualistic approach is seen as value corrupting. Law and economics, as all Western products, may then be charged with the responsibility for this corruption. Of course, good law and economics has nothing to say on these objections based on ethnocentrism. We may only observe that it is not responsible for the (more or less conscious) choices of a community to endorse capitalism as the goal of its development. Since comparative law and economics, like comparative law, is a descriptive, rather than a normative, discipline, its utility cannot be challenged on this ground.\(^{20}\) As for the normative ground, let us suspend our judgment until the conclusion of this chapter. We may already say very clearly at the outset, however, that it is the responsibility of law and economics scholars not to use their expertise as an ideological tool of market-oriented conservative propaganda. Such risks of abuse, of course, have nothing to do with true scholarship or with the quality of law and economics. Just as a tool may be used for a bad purpose, this bad use does not reflect on the ability of the tool to be used for good purposes.

As law and economics scholars we gladly learn from legal anthropologists the best tools to understand the nonmarket forces behind the development of each society.\(^{21}\) However, law and economics claim a role whenever we can find a market no matter what the stage of development of the society of interest.

This last observation also responds to another possible objection, the alleged impossibility of extending law and economics outside of the Western legal tradition. As is very well known to comparative lawyers, a number of legal systems in the world, most notably the Chinese and the Japanese, are based on a set of values rooted in the Confucian tradition.

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20. See Mattel, supra note 1.

21. For the kind of problems studied by legal anthropologists and for some methodological insights that should be kept present also by law and economics scholarship see L. Nader, *The Anthropological Study of Law*, 67 Am. Anthropologist 3 (1967). This article is reprinted in P. Sack (ed.), *Law and Anthropology* (1992), where many other pertinent materials may be found too.
tion, in which the idea of obligation is much stronger than that of right. In such systems, the assumptions of bargaining in one's self-interest may be misplaced. Rather than dwelling on theoretical discussions, we may here point out that law and economics is already playing an important role in Japanese legal studies with the work of Mark Ramseyer and that a number of Japanese scholars are specializing in an increasingly successful way the application of law and economics to their own legal system. As for China, the impact of law and economics scholarship in the process of privatization has yet to be seen, but judging from the number and the success of translations, it looks like it is regarded as a very interesting approach. On top of everything, we may say that, from the individualistic assumption, it is possible to analyze in terms of efficiency any kind of legal and social institution, including those that do not share it. How to use the results of this analysis is not a problem that should worry law and economics scholars.

**Law and Economics of Development: A Change of Paradigm**

A large literature, both Anglophone and Francophone, may be found on law and development. And a clear tension can be seen between law and development scholarship, on one side, and some anthropological literature, on the other. From the latter perspective the very idea of development can be seen as ethnocentric. It assumes the existence of a single path of development that is already followed by the so-called developed countries and that the developing countries should follow as well. According to the critics of law and development, developing countries may be considered as rooted in a different set of values and assumptions, foreign to the idea of a development in the tradition of capitalism. A typical example is the inalienability rule that governs land law in a number of non-Western societies. This rule, inefficient from an economic perspective, is explained as protective of future gen-

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22. See authors supra note 12.

23. The same can hold true as far as Islamic and Hindu law are concerned. On the latter, with its focus on Karma, by which contentment does not come from the object of desire, see P. N. Sen, *General Principles of Hindu Jurisprudence* (1984); on the former, with its focus on the notions of sharing, caring, brotherhood, and solidarity (all of which are foreign to the individualistic assumptions of law and economics), see C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988).

erations in a direction much more environmentally friendly than an efficient market of land. This line of thought, followed by a number of legal anthropologists, is in turn challenged as conservationist and archaeological.

Indeed, reading this debate within a law and economics paradigm may suggest that it is somewhat sterile because of its inherently normative ground. In resisting the normative dimension, we are ready to admit a shortcoming of economic efficiency as an instrument of policy analysis. In its technical form it does not have anything to say on the intergenerational ground. The mentioned fundamental assumption of economic efficiency requires a living maximizing market actor. It is, however, true that law and economics has in the course of time somewhat watered down the technical concept of efficiency making advisable the introduction of the intergenerational dimension in its analysis. Whether it is possible to do so outside of paternalistic concerns is indeed a different question.

The law and development debate, however, can still be focused by inserting it within an evolutionary paradigm of a kind that has long been familiar to the law and economics literature. Since law and economics scholarship is familiar with discussing possible evolutions of law in the direction of economic efficiency, it is very well equipped to assume that a legal system (and more broadly a social order) can never be considered fully developed. Considering certain countries as already developed assumes the possibility of their having already reached this goal. This static concept of law and society is deeply foreign to the dynamic conception of the legal and social order, which is shared both by law and economics and by comparative law literature. From the efficiency point of view all legal and social systems may therefore be considered developing. The distinction is not whether they are “developed” or “developing” but what stage of development they have reached and which pattern of development they are following.


26. See the works of Vilfredo Pareto and Kaldor Hicks; see also U. Mattei, Efficiency as Equity: Further Steps in Comparative Law and Economics, 18 Hastings Int’l & Comp. L. Rev. 157 (1994).

27. Professor Eide has remarked in discussing this work that if a resource is subject to a tragedy of the commons problem and will not last if overexploited, the price system may still reflect the concerns of sensible parents for their children and therefore those of the present generation for the next. Efficiency, then, may have something to say in this perspective.
If we follow this line of thought, we may observe without hypocrisy that the capitalistic Western path of development leads in imposing itself as leading on the world. This does not mean that it is the only possible way or that it is the best one.\textsuperscript{28}

Comparative law and economics, as a value-skeptical and descriptive line of scholarship, does not assume that a group of systems may teach one another unilaterally. Rather, comparative law and economics invests all of its efforts to see what systems may learn from each other in an interactive way. Western law has provided a historical experience of problem solving in the complex economic society that, like all human experiences, has its pros and its cons, its costs and its benefits. If a legal, economic, or social system is for whatever reason (mostly for reasons of worldwide interaction) called today to face problems that other systems have faced years, decades, or centuries before, it benefits from knowing how problems were (or were not) solved in those different social contexts. This is, of course, independent from where the society is found, in the North or in the South, in the East or in the West. Perhaps Italy may inquire how France has handled efficiently the problem of car accident compensation (faced in France a few years earlier), or perhaps the United States may inquire how Lesotho has tackled efficiently the problem of uninsured judgment-proof drivers, by including activity levels in a tort system, using a tax on the gas to finance a victim compensation fund.

\textit{Law And Economics of Development: Avoiding Some Mistakes}

It is well known in economics of development theory that the different countries belonging to the so-called Third World represent different or very different social, cultural, and economic realities. They share similar fundamental social and economic problems, however. Such problems are those of poverty (extreme under development), which scholars tend to analyze using different parameters. Some parameters are economic. A principle one is, of course, the very low internal gross national product. A second one is the high level of unequal distribution of wealth. A third one is the low and sometimes insufficient amount of calories consumed per day.

In conditions of extreme poverty that are experienced in many countries of the so-called Third World, the low life expectancy is a consequence of these economic problems and of some of the social ones that are also used to define underdevelopment. Among these social factors are the very poor level of health care, the high degree of illiteracy, the poor conditions of housing, the percentage of housing having access to current water, and the uncontrolled rate of demographic growth. The solution to these problems and the satisfaction of the needs that flow from them are regarded by the economics of development literature as desirable, whatever the values of a given society may be: "If the growth of Western societies may be challenged as too much materialist, the development concerned with these fundamental needs is universally pursued."  

According to the kind of parameter that is used, of course, we may well see that no countries in the world have experienced complete development (e.g., homelessness remains a problem in the United States, health care in southern Italy), which confirms the utility of a dynamic approach such as that taken by law and economics. This observation should inject a degree of humility sufficient to avoid the kind of mistakes that have previously characterized the American law and development movement. This movement, aimed at facilitating the "modernization" of the legal systems of the Latin American countries, ended up in an ethnocentric, ahistorical, and rather clumsy attempt to propagate U.S. concepts of law and jurisprudence in countries unwilling to receive them. There may be a real risk today of seeing the same pattern repeated with the massive consultation in foreign less developed countries by law and economics scholars poorly equipped to understand the local diversity. Nonetheless the worldwide cultural leadership and prestige of American legal culture can make an important difference, many times supplying legal advice and aid in a relatively competitive market of foreign experts (in which scholars from the European Union are active as well).

32. Gardner, supra note 6.
33. See Snyder, supra note 6.
34. See Ajani, supra note 7.
If it is true that some problems of development are common in all societies, it is equally true that the differences cannot be disregarded. In our attempt to apply law and economics to problems of development, we may therefore avoid the simplistic application of its "first-generation style," but we should try to develop law and economics according to the context in which it is applied. This approach is also shared by the more sophisticated structuralist economics of development scholars.\(^{35}\) This line of thought tries to avoid the mechanic application of Western economic models (neoclassical and Marxist) that characterizes the growth of the economic of development literature from its birth in the late forties to throughout the eighties.\(^{36}\)

The idea that there is only one path to development and that this way is traced by Western developed countries has been elaborated in its most famous form by Walter Rostow,\(^{37}\) who has traced the phases of development. According to his manifesto, five steps of development can be traced: (1) the traditional society, (2) the preparation to take off, (3) the takeoff, (4) the path toward ripeness, (5) the stage of mass consumption.

Such theory has of course been challenged in many ways.\(^{38}\) For our purposes, it may be regarded as the most dangerous enemy of a successful application of law and economics to development problems. On


\(^{36}\) The first generation may be regarded as highly optimistic and working in the neoclassical tradition; Rosenstein Rodan, Albert Hirshman, Gunnar Myrdal, and Walter Rostow are the best-known names. The reaction mostly based on Marxist paradigms is linked to the names of Paul Baran, Samir Amin, André Gunder Frank, and F. H. Cardozo. For a brief introduction see C. Bell, *Development Economics*, in J. Eatwell et al., *The New Palgrave: Economic Development* (1989). For a recent analysis see S. Goglio, *Dall' Organizzazione allo Sviluppo* (1994).


one hand, it gives strengths to the sort of ideological objections that are still foreclosing the final success of law and economics within legal scholarship. On the other hand, it is one of those generalizations that, transferred in the domain of the legal system, ends up disregarding all the most important structural differences. Legal development, to the contrary, should be seen as a path moving one legal system in the direction of efficiency; but the way to reach efficiency and the path that is (or is not) followed may change and be differentiated from one system to another.

To reach positive results in applying law and economics to the process of development we must take full account of the high degree of diversity between the legal systems that we wish to analyze. This is true, of course, also when we apply economic analysis to the Western legal tradition, but it is even more true when we push our intellectual adventure outside of it. Some analysis in terms of law and economics may well be relatively easily transplanted from the common law to the Western civil law systems, since the economic and cultural substratum is rather homogeneous. Law and economics tools are equally useful to the analysis of less developed legal systems where the social and economic structure is not homogenous with that of Western countries. Of course, once this effort is made, law and economics is enormously enriched by this contact with a different reality that may offer a very interesting ground for testing its theories.

The structuralist economics of development has moved beyond both neoclassic and Marxian analysis (the so-called dependency analysis) by taking account of the "rigidity" of the structure of Third World countries. In so doing, these scholars³⁹ have renounced heavy reliance on price theory and have moved to the paradigms of the new institutional economics developed by North and Williamson. In this chapter, I advance our analysis by challenging the assumption of such rigidity and showing that if observed from the legal system point of view, these societies, rather than being static, are dynamic in a different way. This difference is very clear to the best legal scholarship devoted to Africa, South America, and Asia. It parallels important notions developed by economic development scholarship: dualism, inarticulation, and distortion.

Taking Account of the Structure of the Law in Less Developed Countries: A Challenge for Law and Economics

A simple observation is that in many of the so-called Third World countries two economic systems coexist: a traditional one, typically that of a rural society, and a modern one with industries, banks, plantations, and so on. This state of affairs is known as dualism. The two parallel economies, one of which is scarcely monetarized, exhibit inarticulation, that is, they have little interaction with each other, the second sometimes being “an enclave controlled by foreign countries.” When the two interact, the modern one, rather than proving beneficial to the traditional one, ends up corrupting it by exporting values and consumption habits (particularly those of the rich part of the population), which is disastrous for a less developed country. This phenomenon, known as distortion, has been observed also by legal scholars, since it is particularly clear in the domain of legal (and political) institutions.

In a society with a weak state and a corresponding underdeveloped legal system, exchange relations are conducted primarily through social institutions other than competitive markets. Relational principles might apply not just to private ordering such as contract but also to all levels of governmental, legal, and personal affairs. These alternative relational social institutions have been characterized as multiplex relations, patron-client relations, customary law or folk law, legal pluralism, semiautonomous social fields, face and favor, and so on.

Another way of putting it is to observe, as it has been done in some French and Italian scholarship, the stratified nature of such legal systems and analyze the relationship taking place between such different layers of the law. In such an analysis, law and economics can be an important tool.


42. See J. Kaufman Win, How to Make Poor Countries Rich and How to Enrich Our Poor, 77 Iowa L. Rev. 920 (1992).

To do so, however, we should consider that not all the layers of a stratified legal system are like clothes that can be worn or removed as we like. Indeed, very few of them are. Once a layer has taken root, it can very rarely be removed completely. It would be impossible for the French or the Italian legal systems to decide overnight to become common law systems. This is because the degree of resistance of the civil law tradition is very strong in France and Italy.

In stratified legal systems, not all the layers of legal systems have a degree of resistance comparable to that of the civil law tradition in France or that of the common law tradition in England. In less developed countries, the modern layer of the legal system (common law or civil law) does not constitute a tradition. Modern layers are not rooted, because of the phenomenon of "dualism" to which economics of development scholars refer. In other words, while a layer of the legal system can be changed (Sudan's shift from common law to civil law and then to Islamic law is a good example), a legal tradition cannot be changed, unless it is changed in a very incremental way, by means of an "invisible hand" process. In other words, while certain layers of the legal systems may be faced with a political choice (Mexico's option to follow certain provisions of the Russian Civil Code is an example), others may not. Put simply, a legal tradition is not a choice.

The challenge to less developed countries is to develop a legal tradition adaptable to the needs of modernization without merely acting on the layers of the law received from more developed countries. In this perspective, law and economics may help to solve the legal resultant of the economic problems of dualism, inarticulation, and distortion.

In taking full account of economic dualism, we may observe that at the level of legal institutions we face not mere dualism but pluralism. We may also add that legal layers are interdependent and affect each other within an imperfect competitive relationship. Such a competitive relationship is made imperfect by localized areas of monopoly whose boarders are very fluid. In areas such as family law, for example, non-modern law may claim a traditional monopoly that is challenged by Western values, such as those concerning the role of women in society. In other areas, such as business law, the opposite relationship may hold

true. Western conceptions of fair and efficient business organization may be challenged outside of the scope of official legality, by traditional less efficient practices. In economic terms, such interdependency creates externalities of a kind possibly closer to the pecuniary rather than to the technological. The result is that all the layers of the legal system are transformed by the existence of all the other, either in nature (by the process of putting customary law in writing) or in scope (by claimed monopoly of the state in many areas and consequent reduction of the scope of customary law).

Law and economics may show the comparative efficiency of each layer to solve a given legal problem. By so doing, it may favor the interaction between different layers and may prevent the distortions that the imposition of the modern layer on more traditional ones may create.

In a market affected by dualism, pecuniary externalities, and very deep disproportion in power relationships, there may be an argument for deep-pocket redistributive solutions. The core assumption of most theories of economic development (particularly the Marxian dependency theory) is that the formal market negatively affects the informal. Maintaining this assumption, we can see that the law has a role, so far not implemented, in reversing the direction of externalities. Consequently, the legal rules governing the formal economy to work efficiently in a Third World context should be framed in a way to allow the informal economy to compete and flourish, taking advantage of the existence of the formal one.

Of course, legal rules that create positive externalities (in favor of the weaker market) are seen as inefficient in traditional economic theory. In the less developed countries, however, they may perform that minimal redistributive effect that is indispensable for being able to exploit the benefits of a market economy.

This interdependence effect, whose impact on the legal systems is very visible, allows us to go a step beyond the structuralist approach by observing that, rather than structural immobility, we only face different degrees of resistance to change. This different degree of resistance

46. See Brasseul, supra note 29, for the need of an initial redistribution to make the economy start.
introduces different levels of transaction costs that foreclose the incremental evolution of the legal system toward efficiency.

Law and economics is in the best position to see that, in many areas, the transaction costs of substituting modern solutions to traditional ones are just too high. It may consequently advise that limited or very limited resources are better allocated in alternative ways rather than in trying to solve cultural problems by means of enacted (modern) law. A good example from this point of view is the attempt—ethnocentric, hypocritical, and inefficient—to ban the consumption and production of coca leaves in Latin America. Another example would be the ban of polygamy, or even of other practices such as female circumcision in African countries. Law and economics can show that such problems should be approached within a soft framework, by allowing local culture to ripen and to handle problems in an informed way.47

The previous observations also help approach in a more sophisticated way problems of inarticulation and distortion. The layered nature of the legal order and the mentioned externality problems aid in understanding that efficiency would increase by substituting communication (market transactions) to interdependence (externalities). This means that the overall efficiency of the legal system would improve if the different layers communicate with each other. Since the different layers of the legal systems are represented by different decision makers (judges, both modern and traditional; legal scholars; politicians; religious and moral authorities), an efficient way to allocate resources would be to invest in creating a common legal culture that lowers transaction costs of communication.

It is clear from law and economics, moreover, that the modern layer of the legal system should not act as if there were a legal vacuum whenever a given problem does not find a solution in (or at least a provision of) enacted law. Any intervention in the legal order that does not take full account of the plurality of centers of supply of legal rules is bound to fail, just as would a market supplier that established his or her prices without taking into consideration the existence of market competition.

47. Resources should be then allocated to favor informed choices (e.g., informing on the risks of female circumcision or on the availability and costs of contraception) and not coercion. The only way to do so outside of the temptation of ethnocentrism is to invest in local culture.
Efficient Tort Law in Some African and Latin American Countries

Tort law may offer a good ground to test law and economics in less developed countries for a number of different reasons. First, this area of private law offers a good test of the real consistency of the barriers that divide common law and civil law from each other and from the legal systems outside of the Western legal tradition. Legal scholarship on tort is indeed focused on the same set of problems everywhere: the foundation of liability, the role of negligence and strict liability, causation, justifications, and remoteness of damage. The function of tort law is also approached within a relatively homogeneous framework: compensation (over vs. under), deterrence (over vs. under), punishment, and the relationship with other systems of compensation and welfare.

Second, tort law offers an excellent position to understand the relationship between the market and the institutional framework in a given legal system. As is well known, the scope of tort law is broad and covers the area between property rules (contract) and inalienability (crime). In all social structures, when consent cannot be given and when society does not want to ban a given activity you will find what we call “tort law.” Tort law therefore always faces both problems of punitive justice (typical of criminal law) and problems of contractual justice. Of course, it has also been enriched by this variety of different interests, which leads it to be considered by Guido Calabresi, one of the founding fathers of law and economics, as the law of the mixed society. In other words, no legal system can purely rely on the market, nor can one purely rely on regulation.

Another reason, strictly related to the former one, is that tort law is an area of private law with a potentially high impact on the economic system. A full-fledged system of tort is a powerful means of internalization. Consequently, a market actor receives incentives to operate in a market with poorly developed tort law rather than in a market in which tort law is well established. In a situation in which parallel mar-

kets are available (e.g., in different countries or in formal and informal markets) the lack of tort law may make one market more attractive than the other. This observation can be confirmed by looking at the harsh debate that preceded the directive on products liability in the European Union. But this also means that tort law may be used as an incentive for investors to operate in one market (e.g., the informal) rather than in the other.

The Western Path of Tort Development

Focusing on tort law in our analysis of less developed legal systems allows us to make an important and usually neglected point: the last two hundred years of the evolution of Western societies has been a story of developing countries, a story in which tort law has played a rather important role.

In Western societies in the early part of this last two hundred years, tort law has been characterized, on one hand, by its subsidiarity, marginality, and unclear distinction from criminal law. On the other hand, tort law has been deeply rooted in the principle that “[t]he people generally profit by individual activity. As action cannot be avoided and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.”

Hence the general principle of our law is that loss from accidents must lie where it falls, and this principle is not affected by the fact that a human being is the instrument of misfortune. Unless my act is of a nature that threatens others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences than to make me do the same thing if I had fallen on him in a fit or to compel me to insure him against lightning.

Shifting to the plaintiff the burden (and the risks) of proving negligence, judges (in common law) and legislators (in civil law) were apparently limiting the impact and the extension of tort law in the economic system. The introduction of a negligence system was, however, a big step forward in the direction of internalization of social costs, if

51. Ibid.
we compare it with pre-nineteenth-century law. It was an efficient first step in reducing unequal regimes of liability. Some activities, indeed, were subject to strict liability,52 while others were sheltered from all liability: the discontinuity was clear. So, rather than talking about a shield offered to rising capitalism (subsidy theory),53 it is more realistic54 to see how courts, legislators, and professors all around the Western legal tradition were simply not used to reasoning in terms of allocating losses. They were confined by the rules of property and contact law (based on regimes of strict liability), and they were therefore passing from one extreme to the other.

In tort, the choice was not, as it is today in more developed systems, between strict liability and negligence (the latter sheltering the rise of capitalism). The choice was between negligence and nonliability. In cases in which injuries to workers were created by unsafe products, it was the principle of fault that started to impose a duty of self-control completely unknown before. Until the birth of negligence, it was impossible to recover damages at law, except in the violation of clearly specified property rights (everywhere protected by rules of strict liability such as trespass in common law and actio negatoria in civil law).55 In the early period of “modern” tort law (through the nineteenth century) some protected interests were identified (life, physical integrity, property) and the decision making was focused on the existence or nonexistence of a negligent violation of such protected interests. Liability arose only when the victim was affected in one of these legal interests.

When the economic systems began to rely on massive industrial production and consumption and on extended motor vehicle circulation, and when the growth of urbanization and the increase of the population became explosive, the probability of accidents occurring obvi-


55. See B. Markesinis, Liability for Unintentional Harm in the Civil Law and in the Common Law (1983).
ously increased at a very high rate. The challenges faced by tort law increased too. A tension arose between the old structure of tort law, sufficient for a less developed society, and the new complex society. The focus of more advanced tort doctrine, both in common law and in civil law, became compensation. The choice was no longer between liability (based on negligence) and nonliability. It became one of either negligence or strict liability.

Although this development process was common, it followed different paths in different legal cultures. In common law systems, the leading agents of tort law development have been the courts, which have been particularly reactive to the pressures with which the complex society was confronting them. In many fields, statutes followed many decades after the changes imposed by judge-made case law. In civil law systems, the burden of legal change has been carried almost completely by legal scholars, who eventually were able to persuade legislators to enact new statutes.56

Tort Law in Africa

In some less developed countries, tort law so far has not been exposed to a social and economic pressure comparable to that faced in Western societies. In other developing countries more advanced in introducing a capitalistic economy (e.g., South America), the pressure is quite heavy. Everywhere, however, tort law already shows a rather complex evolution.

In an analysis of Africa, we must start from a structural observation of crucial importance, the described phenomenon of legal stratification. This phenomenon can be observed at two different levels.

First, the legal system of an African country is made of legal layers imposed one on the other in the course of history. Religious law (usually the Islamic Sharia)57 is superimposed to the previous layer of local customary law. Colonial law, rooted either in the common law or in the

56. Think, for an example, to the leading cases that marked the path of product liability: MacPherson v. Buick Motor, 111 N.E. 1050 (N.Y. 1916); Donoghue v. Stevenson, 1932 App. Cas. 562 (H.L.); Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944). Compare them with the path followed by European civil law systems. In the latter the very different and sometimes contradictory way followed by national courts has long been bearable only thanks to scholarly efforts of rationalization. Eventually, such scholarly efforts have been successful also at the European Union level leading the enactment of a directive.

civil law, is superimposed on top of both of these previous layers. On the top of everything, the law of the modern independent state (sometimes Socialist) creates a new layer. No legal order has effective power to substitute previous layers. Between the layers of a pluralist legal system the same phenomenon of competition that we have observed at play between the sources (or formants) of the law in Western legal systems is found. In non-Western societies the phenomenon is only more visible.

Second, most of the time even the customary informal legal system results from a historical process of superimposition and integration of different components. What is commonly referred to as the customary layer is usually made of a large plurality of customs that reacted with each other in the course of the historical events experienced by the local population. Even if the absence of written sources makes it difficult to know the details of the history of the different ethnic groups, we know that in most of Africa they have experienced migrations, conquests, and invasions after which the customs of the both the victors and the defeated groups have been changed by mutual influence. This is of course neither a structurally different nor a less complex phenomenon if compared with what happened in Europe with the clash of different legal cultures.

In the process of stratification, the legal system that is imposed on another does not cancel the old legal order but cohabits with it, officially or unofficially. Sometimes it restricts the area of application of the old law; sometimes it modifies it and/or is in turn modified by it. This coexistence of different legal orders creates a remarkable legal pluralism that characterizes in different ways the totality of African states.

Sometimes pluralism is recognized and different law is applied in accordance to its respective status (e.g., in colonial law). Sometimes the


different domain of application depends on the nature of the legal transaction (e.g., in family law customary, business law modern). Other times states declare a unified option. The state attempts to disregard or to ban traditional law (this approach is typical of Socialist Africa). Even in these systems, however, customary law flourishes de facto as soon as the state does not invest enough resources to oppose its operation and offer an alternative option. The same phenomenon happens as far as the organization of justice is concerned.\footnote{62} The judicial system is usually unified, but within it different tribunals apply different law (state law, customary law, Islamic law). The legal culture of the judge and even the process of selection may change according to the law that is to be applied.

All of this, of course, is crucially important to an understanding of African tort law. This topic is organized by modern law following the Western model. Modern tort law, either common law or civil law oriented, is applied today by courts when they are staffed with judges trained in modern law. However, it has fallen short from undermining the strong power over interpersonal conflicts that is still in the hands of customary law. And we should not forget that the function of conflict solving plays a very important role in the social life of the African group.

The solution of a legal dispute, even when clearly belonging to the local chief, is a collective enterprise with the active participation of the whole community. Everybody has the right and the duty to participate in the process and to propose solutions to the conflict. Of course, the last word belongs to the chief, and the most authoritative points of view are those of the elderly. However, consent of the whole community is still the main legitimization of the decision. Analogously, the general blame of the community for the wrong and the fear of supernatural retaliation forces the guilty to accept the sanction even when it easily could be avoided, because of the absence of an effective modern enfor-
ing machinery. Ultimately the judicial process is aimed at the reestablishment of the social peace in order to avoid feuds. Consequent to this approach is the high level of flexibility typical of customary law. What may appear as a violation of a rule may sometimes be the establishment of a new one, accepted and promoted by the community, because of its enhanced sensibility to its present needs.

Particularly interesting are the rules by which the harm is made good. Most of the time compensation (blood money) is paid to the kinship of the victim from that of the wrongdoer, not from the wrongdoer himself. This shows the function of customary tort law as an instrument of peacekeeping and offers an efficient tool to spread the loss crucial in an economy of subsistence.63

African tort law, to conclude, shows the following characteristics: (1) stratification, (2) legal pluralism, (3) variations in the Western legal traditions considered, (4) marked differentiation from one sector of liability to the other, (5) absence of dialogue between the different sources of the law (tradition, judges, legislators), and (6) a very limited role for legal scholars.64

_Tort Law in Latin America_

The legal tradition in Latin America is also far from being unitary, both from one state to the other (e.g., in Brazil and Argentina) and within the same state. This last “modular” tradition is particularly clear in Mexico, whose public law is largely influenced by U.S. law, while private law is rooted in the Romanist tradition.65 Also in private law, however, the common law influences are not lacking, as is easy to perceive “with regard to the adoption of the express trust by a number of Central and South American countries.”66

Latin American private law derives in large measure from Spanish and Portuguese law. The conquistadores, despite their systematic exploitation of the new territories, also transferred their institutions

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64. On this point, see M. Guadagni, _Legal Scholarship in Africa_ (1989).

65. See Schlesinger et al., supra note 7, at 500 n. 7.

66. Ibid., at 315.
and their legal tradition to the New World. The European colonization, however, has not completely displaced the legal tradition of the indigenous populations (the Aztecs, Mayas, Incas, etc.).

Even today these customary traditions maintain a certain importance, particularly to the people of Inca and of Aztec heritage and to the most marginalized part of the population. Consequently, in the small villages in the internal area of the continent and in the suburbs of the big towns, social life is often organized according to a legal custom that has nothing to do with the formal authoritative and learned law of the state, that which is taught in the universities according to the long-established civil law tradition. As it has been said, a large portion of the Latin American population lives according to a "derecho informal que no necesita de abogados ni jueces" [informal law that requires neither attorneys nor judges].

On the layer of customary law, the Spaniards, the Portuguese, and other Europeans have established their law and legal institutions. Also in Latin America we find therefore a phenomenon of legal stratification, the second layer being the civil law (Spanish and Portuguese) as applied during the colonial experience. The third layer was produced in the course of the nineteenth century when—having defeated the colonial domination—Latin American countries started to codify. In this context, codification has not introduced substantial breaches with the past. It has been a substantial development from the previous colonial experience based on the civil law tradition.

The modern Latin American state—with a much longer tradition of independence than in Africa—has then enacted a remarkable amount of "political law" (special statutes) following, according to local history, Socialist revolutions or authoritarian involutions. This political layer, varying according to the social contingencies and emergencies, possibly constitutes a common characteristic of less developed

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countries in Africa, Asia, and Latin America, and of the systems in transition toward a market economy in Eastern Europe.\textsuperscript{71}

Another important characteristic of Latin American law is worth mentioning: the weak role in framing the law of the judicial system particularly in those countries in which express provisions prohibit case law.\textsuperscript{72} Such prohibitions, on one hand, seem to confirm the impatience of the political law in front of a more stable and incremental framework such as that developed by judicial law.\textsuperscript{73} On the other hand, they may be "[significant obstacles standing in the way of adapting Latin American legal systems to present days needs and conditions."\textsuperscript{74} It must be observed that the role of checks on political law and the overall creation of an ordered legal framework is assumed in Latin America by legal scholarship. Among the sources of nonenacted law this is possibly the most influential.\textsuperscript{75}

Coming to tort law, the most important aspect to be mentioned is the clear distinction of this area from that of criminal law.\textsuperscript{76} The latter is, as it is very well known, the branch of the legal system more exposed to

\textsuperscript{71} This idea is developed in Mattel, supra note 7.

\textsuperscript{72} See Schlesinger et al., supra note 7, at 651; for its rather respectful attitudes in front of legal scholarship see J. H. Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 16, 60 (2d ed. 1985); P. Berstain, El Derecho y el Hecho: Law and the Reality in the Mexican Criminal Justice System, 8 Chicano L. R. 45 (1985); Hager, supra note 62.

\textsuperscript{73} On the centralist and authoritarian character of Latin American states and for a critique of the control that political institutions have exercised and sometimes still exert on the legal system see C. Veliz, The Centralist Tradition in Latin America (1980); R. Biles, Position of the Judiciary in the Political Systems of Argentina and Mexico, 8 Am. Lawyer 287 (1976); L. Cabrera, History of the Mexican Judiciary, 11 Miami L. Quart 439 (1957); D. S. Palmer, Peru: The Authoritarian Tradition (1980); S. B. Macdonald, Latin America, in A. Katz (ed.), Legal Traditions and Systems: An International Handbook 213 (1986), where courts of Brazil, Venezuela, and Mexico are considered stronger than those in other Latin American countries. See also J. Herget and J. Camil, An Introduction to the Mexican Legal System (1978).

\textsuperscript{74} See B. Kozolchyk, Fairness in Anglo and Latin American Commercial Adjudication, 2 B. C. Int'l & Comp. L. Rev. 219 (1979).

\textsuperscript{75} With regard to the constitutional or statutory provisions that in some countries of Latin America allow a certain number of successive decisions expressing the same view on the same point of law to have the force of controlling precedent see, as to the Brazilian "Sumula," K. S. Rosen, Civil Procedure in Brazil, 34 Am. J. Comp. L. 487, 513 (1986); as to Argentina, G. R. Carrio, Judge Made Law under the Civil Code, 41 La. L. Rev. 993, 1002 (1981); as to the Mexican system, W. Wagner, Federal States and Their Judiciary 118 (1959).

\textsuperscript{76} See Stoll, s.v. "torts," in 11 The International Encyclopedia of Comparative Law 2, 8–55; For a general survey of tort law in Latin America see A. Ramon-Dominguez, Le
political pressure and more useful for political purposes. Tort law, therefore, remains confined to the solution of less important social conflicts, while criminal law ends up becoming the only branch concerned with the protection of many interests that in other systems are taken care of by civil liability. This choice of public policy in favor of criminal law sometimes creates overprotection and, in many other cases, underprotection.77

Law and Economics and the Challenge of Environmental Protection in Africa and Latin America

Comparative law and economics can be seen as a powerful problem-solving discipline. It can focus a social problem and evaluate, in terms of economic efficiency, the institutional reactions to it. We may therefore try to apply it out of its familiar Western context, on one of the most important problems of this century: the environmental harm.

It is often repeated that one of the most serious problems in the twentieth century is the generation of wastes that spoil our waterways, taint our crops with deadly substances, and cause cancers, birth defects, occupational diseases, and environmental contamination. We all live in a shrinking global environment, and no one can any longer treat cavalierly the environment of foreign countries by assuming that what happens halfway around the world has no impact on us. Environmental problems will eventually affect each and everyone of us.

The economic analysis of law has long been clear of the “nonaccidental” perspective that characterizes environmental tort law and of the consequent problems of causation and evaluation of the harm.78 On one hand, pollution may be an incremental day-by-day problem involving a multiplicity of actors, rather than being a one-shot accident caused by one determined wrongdoer with one determined victim. On the other hand, even when pollution follows on a given act, its consequences are likely to be spread over time and space.

The problem of allocating liability and costs of environmental


77. See Tunc, s.v. “torts,” in 11 The International Encyclopedia of Comparative Law 1, intro.

78. See F. I. Michelman, Pollution as a Tort: A Non-Accidental Perspective on Calabresi’s Costs, 80 Yale L. J. 647 (1971).
harm can be tackled in many different ways. The Western legal tradition offers a variety of approaches. On one hand we find an administrative-centered command and control regulation enforced by criminal sanctions,\textsuperscript{79} which may be regarded as an \textit{ex ante} discipline. On the other hand, tort law is handled \textit{ex post} by the court system. A mix of these two approaches is possibly the most efficient solution. In particular, the command and control approach is not the best solution for the cases in which the timing between the production of new risks for the environment and the causation of damages is little. It is also sometimes rigid, and it may be difficult for regulators to differentiate efficiently the class of different behaviors that it wishes to regulate.

Tort law, however, is not able to reach its own goals if it is applied alone to environmental harm: litigation and administrative costs are usually high; there may be phenomena of discontinuity in the anticipated costs faced by the enterprise. In short, where pollution is zero, liability is zero; but when pollution is infinitesimal, liability may be then complete. Also when this is not the case because a market-share liability system is adopted, it remains extremely difficult to choose the efficient course of private behavior. The optimal strategy, which some enterprises will follow, is to save by reducing precaution costs. Here, the savings that any one enterprise achieves could be substantial, and the loss that it creates will be borne not exclusively by it but by other enterprises operating in that field.\textsuperscript{80} An obvious “tragedy of the commons” problem is involved. Moreover, even relying on insurance can be both inefficient and unsuited to the goals of tort law. Since the system is based on standard terms there is an automatic tendency to make premiums uniform for the various participants to the same activity. There is therefore no incentive for the single participant to use more efficient precautions with the consequent failure of the deterrence potentiality of the system.\textsuperscript{81}

Law and economics, grounded as it is in American legal culture,


seems rather sure to recommend the court system as the best way to approach environmental problems. Taking a comparative perspective, however, we know that the institutional framework of American law is not an independent variable for the success of its reception. Outside of American law, law and economics has a good chance to enrich its map of new approaches by abandoning a rather parochial attitude and thinking about the institutional peculiarities of the system it wishes to analyze.

Let us then consider African law first. In Africa, most of the time we will find much weakness in judicial and other state institutions. Such institutions cannot be constantly effective on the social organization. This is to say in our perspective that the layer of modern law cannot govern environmental problems in an efficient way. However, even if a layer does not tackle a problem efficiently, we may still be able to find the proper solution elsewhere. It may be observed, then, that customary law with its decentralized impact on the territory may be looked at with renewed interest. Collective property rights are usually structured within an inalienability rule in favor of future generations and are patrolled by local chiefs. They appear, therefore, to many scholars as projected in the future and as creating an environ-


ment protected by their own nature. We may add that property rights violations find on the customary level remedies focused on reestablishing social order and enforced by a high level of social stigma that can ensure their deterrence role. Customary law, therefore, may be suitable to guarantee a rather efficient level of environmental protection at least against smaller injuries.

In Latin America, in contrast, customary law is weak and today rather marginal. Courts also seem to be weak and not in a position to affect long-term dynamics of social behavior. In this context, the efficient institutional solution should be looked for in the interplay between the two strong agencies of lawmaking: scholars and administrative bodies. Such interplay may provide a regulatory scheme that balances the needs of present-day efficiency with the necessity to preserve unborn market actors. The opportunity of applying regulatory instruments is sometimes suggested also by law and economics scholars whenever—as it often happens in Latin America—the government is in a better position to assess the risk, when private parties may not be able to provide compensation for the full amount of the harm, and when private parties will likely escape suit for the harm they produced.85

In Latin America, as is not the case in Africa, the high level of legal scholarship and its leading role among the framers of the law as well as its strong appeal on political centers of power should be considered. Law and economics offers a method particularly suitable for legal scholars in its dialogue with regulatory agencies. This is particularly important because regulation is traditionally in the domain of public law where American-inspired models are already at work. Latin American law and economics scholars may be called upon to propose solutions at the best institutional level of regulation, by considering the federal level where it exists or in any case the option between the local or the national level.

**The Proper Role of Modern Tort Law in Less Developed Countries**

Even at the cost of being considered ethnocentric, I would not suggest that we abandon Western tort law in tackling environmental problems

85. See Shavell, supra note 81, at 357.
in less developed countries. The reasons are, however, different in the
two realities I have considered.

African customary law, because of its intrinsic localism and
because of its limited receptivity in front of the technological expertise,
does not seem to be able to approach adequately the macroproblems of
environmental externalities. In Latin America, however, it is likely
that an efficiency-centered analysis shows that tort law, rather than reg-
ulation, could still be the best solution to microenvironmental prob-
lems. There is a problem of effective enforcement of judicial decisions—
in Africa much more than in Latin America—but its solution should
probably be found in rethinking the allocation of Western aid in favor
of legal education for the birth of a local legal culture and conscious-

In developing countries, where the modern layer of the law is not
a tradition in itself and can therefore be chosen, law and economics
suggests bypassing the historical phase that in (developing) Western
countries preceded the expansion of the legal notion of negligence. At
the time, as we have seen, a vast amount of rising industrial activities
were allowed to externalize their costs, with appalling consequences on
the environment.

Considering the phenomenon of dualism (with a formal and an
informal market), and the massive presence of Western market actors,
the efficient solution could probably be based on a dichotomy of tort
law models. If the goal is to favor the growth of local enterprises that
play their role on the informal market, and not to sterilize the beneficial
effects of foreign investment, a balanced tort law must use both strict
liability and negligence rules.

In the short and middle run more friendly negligence law rules
focused on a level of care positioned to guarantee the efficient level of
precaution is probably recommendable for damage created by local
entrepreneurs: such a level should consider the foreseeability of the
harm for a less equipped market actor. Strict liability, possibly

86. For some examples of local statutes tackling pollution see A. Adekunle, Statute
87. See M. Bussani, Tort Law and Development Law: The Case of Ethiopia and Eritrea, in
E. Grande (ed.), Transplants, Innovation, and Tradition in the Horn of Africa: Family, Property,
and State (1995). See also Mattei, supra note 60.
88. See G. Krzeczunowicz, Formation and Effects of Contracts in Ethiopian Law (1983);
H. De Soto, El Otro Sendero (1986); [Eng. trans. The Other Path (1989)].
89. See Bussani, supra note 54.
focused on a market-share mechanism, may, however, be the most efficient rule to apply to Western investors and to public-owned local corporations. True, damages are difficult to account and strict liability is not traditionally recommended in such cases.90 However, it would be sufficient to overestimate rather than underestimate them, introducing by so doing a subsidy effect on the informal economy. Strict liability may furthermore be justified by the traditional deep-pocket argument.

In such a scenario, law and economics scholarship should carefully consider an insurance regime able to reflect the needs of weaker market actors. In a context in which the insurance market is not perfectly competitive, local enterprises should be allowed to purchase third-party insurance policies with low maximums. This should favor, by means of low premium rates, the diffusion of third-party insurances also at this level. Stronger market actors may also find incentives to purchase first-party insurance, since they may be affected by the low level of compensation for harm created by weaker market actors (insured on the third party).91

An Efficient International Environmental Tort Law?

A different perspective on which law and economics may have something to say is the necessity to approach environmental problems in a transnational dimension. At this level, the scarcity of concrete results is bewildering.

So far the international community has adopted around two hundred environmental agreements covering atmospheric, marine, and land pollution; protection of wildlife; and preservation of shared global resources.92 Most of such agreements were reached after the environmental emergencies of the seventies. While some have been rather satisfactory, others remained largely rhetoric.

Law and economics may give some insights on the efficient solution of international problems such as the need to enhance monitoring and verification, create more systematic funding, better use international institutions, create more supplemental regimes such as those

90. See Cooter and Ulen, supra note 14.
92. UNEP, Register of International Treatises and Other Agreements in the Field of Environment, Doc. UNEP\GC.16\Inf.4 (1991).
related to liability and compensation, and improve the effectiveness of international agreements by means of improving local and international judicial institutions.\textsuperscript{93}

Just to give some of those insights, and without pretense whatsoever of being complete, I mention the following: Law and economics suggests the use of incentives rather than authority to reach social goals. Incentives should be given, therefore, to favor local groups (associations, trade unions, and agricultural communities) that work as private environmental attorney generals.\textsuperscript{94} International organizations should be banned from giving aid to countries that do not respect international standards of environmental protection and/or should be forced to grant aid that favors—directly or indirectly—sustainable environmental protection. Decentralized enforcement could be given to the aforementioned groups.

More specifically on tort law, the need to obtain fast and sufficient compensation to restore the environment should be pursued by making the international organizations and the local state jointly liable. The residual base of liability (if the actors cannot be considered liable on other ground) should be the inefficient level of investment in monitoring the environmental quality.\textsuperscript{95}

\textbf{Conclusions}

As do most contributions of law and economics, this chapter shifted many times from the positive to the normative ground. In conclusion, I should therefore say something about what law and economics cannot (and should not) do in the context of developing countries.

A common feature of the legal systems of less developed countries, as we have seen, is the less clear distinction between the legal process and the political process. In a context like this, of course, the possible ideological biases that are sometimes observed in some of the normative applications of law and economics may become particularly dangerous. Law and economics should not constitute an intellectual cover-up for conservative or liberalistic political programs. This point is

\textsuperscript{93} See K\textsc{ampala} D\textsc{eclaration}: E\textsc{nv}ironment, B\textsc{lue} P\textsc{rint} for S\textsc{ustainable} D\textsc{evelopment}, 1 Focus on Environment (1993); see also Murphy, supra note 80, at 744.

\textsuperscript{94} J. A. S. M\textsc{usisi}, R\textsc{eflections} on the L\textsc{egal} S\text{uperstructure} G\text{overning} E\text{nvironment} P\text{rotection} in U\text{ganda}, in B\textsc{acker} et\textsc{al.}, supra note 83, at 57.

\textsuperscript{95} Compare Murphy, supra note 80, at 74; C. D. S\textsc{tone}, B\text{eyond} R\textsc{io}: I\text{s}uring against G\text{lobal} W\text{arming}, 86 A\text{m.} J. Int'l L. 445, 457 (1992).
crucially important in the Latin American context, in which Chicago-style reception of political economy sometimes reaches sufficient political power to be applied.

As we have seen, law and economics does not recommend unbalanced economic liberalism or endorse it as its political ideology. It does not abstractly prefer a free market to economic regulation. When it recommends the free market it is for reasons other than political ideology.

Although law and economics offers a powerful tool of policy analysis, it remains a value-skeptical and politically neutral branch of legal scholarship. This neutrality is the only source of legitimization for lawyers and should be preserved. Given the difficulty to remain neutral on policy issues, it is usually dangerous to use scholarly arguments in normative analysis. Political choices are never neutral and should not be treated as if they were. When neutrality is lost, scholarly arguments become the hidden value judgments of covert legislators. The danger increases when such value judgments are able to reach sufficient power to be imposed on all of society.

Midway between the normative and the positive ground, law and economics may help the legal systems of the less developed countries to become conscious of a similarity of problems and of legal dynamics within the difference of their own local peculiarities. Whether this characteristic of legal pluralism shared by the countries of the South is going to become a legal tradition is not for comparative law and economics to say. We may, however, say that the degree of resistance of a legal system to legal transplants coming from similar traditions is lower. By learning from each other, less developed legal systems may eventually be able to develop original solutions for an efficient and different path.

To conclude on a positive ground, comparative law and economics recognizes the continuum nature of the development process. Less developed countries offer clearer evidence of the composed nature of the legal order. So far, traditional law and economics has worked assuming a unitary legal framework. Such unity does not exist in the United States, nor does it exist anywhere. This is why law and economics has so much to gain from being applied to less developed countries where this phenomenon usually neglected in economic analysis is so much more clear. Such countries indeed offer an extraordinary ground for testing efficiency theories.
Natural Law and Contemporary Public Policy

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Tort Reform

Patrick J. Kelley

The public debate over tort reform has degenerated into a shouting match between two special-interest groups—manufacturers and doctors on the one side versus plaintiff personal injury lawyers on the other. In all the hullabaloo, the real purpose of tort liability—to redress private wrongs—has been obscured and its continued achievement has been threatened. A natural law analysis that insists on the primacy of that purpose may shed some disinterested light on this vital issue and help us to identify the real solutions to the real problems in the tort liability system.

Tort reform seems to have become a perennial issue in our politics. The Republican Contract with America contained a tort reform provision, and Bob Dole made tort reform an issue in his 1996 presidential campaign. President Clinton’s reelection has for now darkened the prospects of tort reform at the federal level, but the issue is still alive and well at the state level: major tort reform bills were enacted in 1995 in Texas and Illinois, and tort reform bills continue to be introduced in state legislatures, even though the Illinois act was voided by that state’s highest court.

The continuing public debate over tort reform has taken a nasty turn, with both sides resorting to name calling, horror stories, and partisan appeals. The ordinary voter, observing such heated debate over such seemingly complicated questions of law and the judicial system, may be confused. What is all the fuss about? What is at stake? Why is the debate so heated and so partisan? What is the right thing to do?

In the following pages, I shall try to answer these questions. I begin by examining the current debate over tort reform and isolating the unanswered question underlying that debate: What is the purpose of tort liability? Modern natural law analysis may help us to discover an objective, defensible answer to that question: John Finnis’s focal case methodology applied to the tort liability system provides an answer that will then enable us to identify
the real problems with our tort liability system and the real solutions to those problems. This analysis suggests that both sides in the current partisan debate over tort reform are wrong: the antireformers are wrong to oppose all significant reforms, and most of the particular reforms urged by the reformers would make things worse.

**Tort Law and the Current Debate over Tort Reform**

The law of torts determines when one who caused injury to another will be ordered to compensate the injured plaintiff for the harm done. A “tort” is the wrongful conduct causing injury for which the courts order compensation to be paid. Torts come in many different flavors: if I punch you in the nose, that’s a tort; if I slander your good name and damage your reputation, that’s a tort; if I negligently drive my car and run you down, that’s a tort.

For most torts, one may obtain insurance that will pay off all or part of any liability one may subsequently incur. The sale of liability insurance for torts causing personal physical injury is big business. Spurred in large part by common concerns about the high cost of liability insurance, a coalition of businesses, doctors and doctors’ associations, public agencies, and trade associations formed the American Tort Reform Association [ATRA]. The ATRA, together with its spin-off state tort reform associations, has been a strong lobbying group for tort reforms intended to lower the costs of the tort liability system.

Leading the fight against tort reform has been the American Trial Lawyers’ Association (ATLA), a professional association of plaintiffs’ attorneys. Together with individual plaintiffs’ attorneys and some consumer groups, the ATLA has steadfastly lobbied against tort reform at both the state and federal levels.

**Politics and Tort Reform**

The individuals involved in any particular accidental injury leading to a tort claim, both plaintiff and defendant, are ever-changing and unlikely to have had any prior experience with the tort liability system. ATRA and ATLA, the two major combatants in the tort reform debate, however, represent repeat players with special financial interests in the operation of the tort liability system. These two opposing interest groups have enlisted their natural political allies in the fight. The issue has become highly partisan, with Republicans, by and large, supporting tort reform and Democrats, by and large, opposing it. This highly-charged partisanship was the reason a
harsh reform bill was enacted in Illinois immediately after the Republicans gained control of both houses of the legislature in 1994. The bill was a payback for plaintiffs’ attorneys’ massive support for Democrats and a thank-you for doctors’ and business support of Republicans.

Since the issue has slipped out of the genteel debates of the academy and into the tougher arena of politics, the arguments on both sides have become less and less subtle.

**American Tort Reform Association**

The American Tort Reform Association claims as its “Bible” a book by Peter Huber called *Liability: The Legal Revolution and Its Consequences.*\(^1\) Huber has a doctorate in mechanical engineering from M.I.T. and a law degree from Harvard. The form of many of his arguments is that of a mathematical proof. His writing style, however, is populist and polemical. Reading Huber is like reading Descartes reincarnated as P.J. O’Rourke. Huber argues that the tort liability system has been transformed over the last thirty years by the adoption of more and more plaintiff-favoring substantive and procedural rules. The new rules were embraced by judges influenced by the theories of the academic “founders” of modern tort liability, who saw the tort liability system as a means to promote safety, compensate the injured, and spread catastrophic individual losses over a large group dissipating the large loss by passing it on in the form of tiny individual costs to each member of the group. The mechanisms for spreading losses were liability insurance and the market.

This proplaintiff system, Huber argues, has resulted in a litigation explosion that in fact imposes a huge tort liability “tax” on all of us in increased costs of goods and services. He says that tort liability costs $80 billion each year in direct costs and an additional $300 billion in indirect liability-avoidance costs for things like unnecessary medical tests ordered only to protect physicians from potential liabilities.

Huber argues that the changes are self-defeating. Ironically, the tort liability system decreases safety by imposing heavy costs and risks on those (such as emergency room doctors) charged with helping us avoid harm and by discouraging innovations that might lead to safer products or services. Ironically, too, the tort liability system is dreadfully poor at spreading losses. For one thing, the tort liability tax is unfairly regressive, as everyone pays about the same but the injured rich recover more in damage awards for lost wages than the injured poor; for another, it is grossly inefficient, with less
than 50 percent of the total amount paid into the system going to compensate the injured.

Along the way, Huber tells horror story after horror story of tort liability imposed by misguided juries when the defendant was not at fault or the plaintiff’s own foolishness was the cause of the harm.

The ATRA’s literature is also awash in horror stories. The older woman who “recovered millions when she burned herself with hot McDonald’s coffee” has become the poster child of the tort reform movement.

The American Tort Reform Association’s primary goal seems to be to reduce the costs of the tort liability system. It proposes a six-point reform agenda:

1. Abolish joint liability
2. Abolish the collateral source rule
3. Limit punitive damages
4. Cap or otherwise limit recovery for noneconomic losses
5. Reform the substantive law of product liability so that the standards are clear and compliance possible.
6. Reform medical liability law to include caps on noneconomic damages, limits on attorneys’ contingency fees, periodic payment of future costs and elimination of the collateral source rule.

All except the fifth proposal are aimed directly at reducing the overall costs of the tort liability system.

**American Trial Lawyers Association**

Plaintiffs’ attorneys, through the American Trial Lawyers Association, have fought back. They attack the factual assumptions underlying the tort reform movement. There is no litigation explosion, they argue. Further, they contend that the costs of the tort liability system are wildly overstated by the tort reformers. And they argue that the jury is the common-sense, common people bulwark of our civil liberties. They point out that jurors are just ordinary people; they are not the overly compassionate boobs the tort reformers make them out to be.

The plaintiffs’ attorneys argue positively that the tort liability system as it is now achieves two important social goals. First, it achieves justice by holding wrongdoers accountable for their wrongs and by providing compensation for those they have wronged. Second, it prevents injuries by forcing wrongdoers to change their dangerous behavior. This twofold positive ar-
argument for the tort liability system was adopted by ATLA after focus
groups, polls, and consultants showed them that these were the most effec-
tive positive arguments for the tort liability system.

The ATLA, too, has its horror stories, of innocent victims, horribly
injured by grossly negligent defendants, who cannot obtain full compen-
sation for their injuries because of harsh limitations on tort recovery, adopted
by compliant legislatures urged on by the tort reform lobby. A favorite story
of theirs is the tort reform lobbyist in Indiana who helped persuade the
Indiana legislature to impose a stringent cap on recovery for total damages
in medical malpractice cases. He was subsequently the victim of medical
malpractice himself and was barred from adequate recovery for his loss by
the very limit he had previously lobbied for. He now rue the day he argued
for tort reform.

Of course, each side in this public debate has noticed that the other
side has a special economic interest in the outcome. “Greedy-plaintiffs-at-
torneys” is one word in the tort reformers’ dictionary. The trial lawyers, on
the other hand, continually point out that tort reform is the project of rich
doctors and manufacturers, or, as they sometimes call them, “organized
tortfeasors,” or “the Wrongdoers of America, Inc.”

The Underlying Question: What is the Practical Point
of Tort Liability?

The Question

As men and women of good will, intent on identifying and promoting the
common good, what are we to make of this debate? Is there some objective,
independent ground on which to stand that will enable us to evaluate the
arguments on both sides? I believe there is, but in order to reach that ground
we must first identify the underlying question at issue here.

As a preliminary matter, it may be helpful to focus on the primary goal
of the tort reformers: to reduce the costs of the tort liability system, which
they say are excessive. One might ask, “Why not abolish tort liability
altogether? That would reduce the costs of the system to zero.” The answer
to that question, of course, is that by eliminating tort liability completely we
would lose completely the benefits— the contribution to the common
good—that tort liability provides. That answer leads us to other questions:
What is the purpose or practical point of tort liability, how does the
achievement of that purpose affect the common good, and is it worth the
cost?
We can put the same question another way. Arguments about excessive costs and unacceptable consequences can be judged only from the standpoint of the practical point or purpose of the tort liability system and its relative importance compared to other shared social purposes. If the purpose of tort liability is to spread the costs of accidents, increased claims frequency and consequent increased overall costs of the system may not in itself be a problem, since greater use of the system to spread the costs of injuries would be seen as desirable. The real problem then would be the system’s inefficiency as a loss-spreading mechanism. Alternatively, if the purpose of tort liability is to hold wrongdoers accountable by forcing them to compensate those they have wronged, the system’s inefficiency as a loss-spreading mechanism is irrelevant.

The basic theoretical problem, then, is to determine the practical point or basic purpose of tort liability. And here we find that the purpose of tort liability is a hotly contested question in the academy and in the courts. A number of competing answers have been given:

- Some say the purpose is to impose the costs of injuries on the enterprise inevitably causing those injuries.
- Some say the purpose is to spread large losses over a broad base so that everyone pays a little bit and no one has to bear a huge loss alone.
- Some say the purpose is to encourage the efficient allocation of resources to accident prevention.
- Some say the purpose is to deter dangerous conduct.
- Some say the purpose is to redress wrongs.
- Some, taking refuge in eclecticism, say the purpose is to do a number of different things, including all or most of the things others say it is to do.

How can we hope to answer this question when the experts themselves do not agree on the answers and give such a bewildering variety of answers?

**The Natural Law Answer**

It is precisely here that natural law theory may be of help, in the form of the social science methodology elaborated by John Finnis in his book *Natural Law and Natural Rights*. Finnis argues that we are privy to inside information about human institutions and practices. To determine the practical
point of human institutions and practices, we should take the internal point of view of one concerned to act within that institution.

The descriptive theory developed from that point of view will contain an irreducibly normative component because a reasonable person talking about human institutions, practices, and interactions cannot leave out their most important parts, which are human purposes, goals, and judgments of practical reasonableness. Once one includes these, any coherent description must include a critical evaluation. The better the evaluation, the better the description.

An analogy proposed by Lon Fuller\(^3\) may be helpful. Any coherent description of a boy trying to open a clam must include several evaluative judgments, including the judgment that he is trying to open a clam, a judgment about whether the method he is using is a good way of opening claims, and a judgment about whether he has succeeded. In describing the boy’s conduct, one who is good at opening clams and who has talked to the boy will have a decided advantage, for that skill and that experience make it more likely that one will make correctly the evaluative judgments called for by the descriptive enterprise.

**The Practical Purpose of Tort Liability** To determine the practical point or purpose of tort liability, then, we should take the internal point of view of one with a view to acting within the tort liability system, employ basic principles of practical reasonableness, focus on the fundamental realities of the system, and take into account recurring explanations of its purpose by those whose actions and practices constitute it.\(^4\)

The first bedrock fact that any tort theory must take into account is the ordinary form of tort liability—a judicial judgment ordering the defendant to pay the plaintiff a specified amount of money, which is called the award of “damages” or “money damages.” The amount awarded is determined by measuring the loss or harm to the plaintiff caused by defendant’s conduct. The announced aim of the damage award is to “make the plaintiff whole”—to have the defendant pay what will restore the plaintiff to the position he was in before the tort. Judges have repeatedly justified this measure of damages by explaining that it is called for by the purpose of compensatory damages. That purpose, they say, is to redress the wrong that the defendant has done to the plaintiff.

The recurrent explanation that the purpose of the ordinary tort remedy is to redress a wrong is consistent with the bedrock terminology of torts as well. “Trespass,” the name of the earliest tort form of action at common law, originally meant simply “a wrong.” The word “tort” itself originally
meant crooked, twisted—wrong. Courts and commentators often use the term “injury” as an element in all torts in the sense of the Latin “injuria,” which originally meant a wrong or wrongful.

One final bedrock fact about the operation of the tort liability system is consistent with this recurring explanation. Tort actions are brought by one private individual against another private individual for a remedy that transfers money just between them. The government provides only the method of adjudicating the claim and the means of enforcing the remedy. This is a more limited role than the government’s role in criminal actions, which are brought by the government and seek fines paid to the government or imprisonment in government-run jails. The more limited governmental involvement in tort cases tends to confirm the private nature of the wrongs redressed by tort actions.

The ordinary tort remedy of compensatory damages, its traditional justification, and the terminology and operation of the tort liability system, then, all suggest that the practical point of tort liability, from the internal point of view, is to redress private wrongs. It remains to be seen whether this hypothesized purpose can pass the test of practical reasonableness, and whether it is still the practical point of tort liability or merely a historical curiosity.

**Practical Reasonableness** To apply the test of practical reasonableness, one must first ask why the political community would want to provide a mechanism for redressing private wrongs, which seem to concern only two private individuals within the community. To answer that question, one must discover the practical point of the political community itself. John Finnis has argued that the purpose of a political community is to achieve the “common good,” understood as “a set of material and other conditions [including forms of collaboration and coordination] which enables the members of a community to attain for themselves reasonable objectives. . . .” If we accept that as the goal of a political community, we can see the tort liability system as one of those conditions that comprise or promote the common good. The following analysis of the relationship between tort liability and the common good tends to bear this out.

In any community, individuals coordinate their activities with the activities of others according to established patterns of behavior. These patterns of coordination enable members of the community to pursue their goals without interference by other members pursuing theirs. The coordinating behavior may be positive (action) or negative (refraining from action). For example, we drive on the right-hand side of the street, and we refrain
from hunting animals in town with rifles. These patterns may have de-
veloped through governmental edict, custom, or moral teaching. Once a pat-
tern of coordination is accepted, members of the community rely on it in
determining their own conduct, and they expect other members of the
community with whom they come in contact to follow the pattern as well.

If Alice coordinates her activities with Joe in accordance with these
expectations, and Joe acts contrary to those expectations in a way that
injures Alice, Alice feels wronged. Joe drives on the left-hand side of the
street, for example, and crashes into Alice. Joe hunts squirrels in town with
a high-powered rifle, for another example, and accidentally shoots Alice.

Why does Alice feel wronged? At the most basic level, the answer is
simple. Alice acted as she did in the expectation that Joe and others like him
would follow the accepted pattern. She acted according to patterns of
conduct that would coordinate with his if he acted in accordance with that
expectation. At a deeper level, we can say that Alice feels wronged because
Joe has not respected her claim that, in his decision making and activity, he
should give due consideration to her interest in the pursuit of her own
concerns. He has failed to recognize her standing claim to respect for her
personal worth and dignity. One has dignity not as an abstract, universal
human being but as a particular person with a unique identity, formed in
part by historical and social conditions. So respecting Alice’s dignity means
respecting the choices she makes in accordance with her expectations about
the conduct of others in light of their community’s accepted patterns of
coordination.

When Alice brings to court her claim that Joe wronged her, then, we
can see that the claim contains both intensely personal and broadly social
components. It is personal because Alice claims Joe wronged her by failing
to respect her standing claim to respect for her personal dignity, in a way
that resulted in serious personal harm to her. It is broadly social because the
way Joe injured Alice was by ignoring a social rule she had relied on in
coordinating her conduct with others in the community. In light of the
personal and social components in a plaintiff’s claim to have been wronged,
we can see a number of reasons why a community would provide a mecha-
nism for adjudicating and redressing claims of private injustice.

First, if we look on the judicial judgment as a response to Alice’s claim
of a personal wrong, we can see that the judicial judgment that Joe wronged
Alice and must now redress the wrong vindicates Alice’s claim to respect for
her personal dignity. It reaffirms her worth as a respected member of the
community. Moreover, that judgment provides Alice with a good that she
could not obtain on her own: justice in the form of a court order, backed by
the power of the state, requiring Joe to act justly toward her now by restoring what he has unfairly deprived her of.

Second, if we look at the relationship between the judicial judgment and the social component in Alice’s claim, we can see that the community, in redressing the wrong to Alice, also promotes the common good by reaffirming the social convention that Alice relied on. If the formal representative of the political community refused to redress this claimed wrong, Alice and others in the community might place less reliance on this pattern of coordination in the future, thereby limiting the range of activities that could be coordinated effectively. Alice and others like her might limit their reliance on this pattern of coordination to exchanges with people they know for sure accept this practice. Granting redress reaffirms both the community itself and the community standards shared by Joe and Alice.

A political community’s failure to redress serious private injustice could rupture that community. Alice might band together with others to enforce her claim against Joe for redress of a wrong. Thus, if Alice belonged to the Red group, and Joe to the Green group, she might complain to the Reds of Joe’s action. They might then proceed to exact retribution or coerced compensation from Joe or his group. A political community’s refusal to recognize and redress claims of private injustice may thus threaten the continued existence of the political community itself.

The purely personal and the broadly social components of Alice’s claim of wrong combine to point to additional reasons why the community should provide a method of adjudicating and redressing claims of private injustice. The community may thereby provide a satisfactory resolution to a dispute. It will be satisfactory insofar as the court has considered the plaintiff’s claim of wrong seriously, as a claim of personal injustice, and has authoritatively determined the merits of that claim on its own terms, as a claim that the defendant wronged the plaintiff by breaching a social convention that the plaintiff rightfully relied on in coordinating her conduct with the defendant’s.

Moreover, in resolving disputes in this way, the courts will be “doing justice.” Judicial action on behalf of the community will vindicate those innocent of a wrong and require those guilty of a wrong to act justly to redress it. The community thus both promotes and achieves justice through its judicial institutions. It thereby demonstrates the community’s commitment to justice and reaffirms a vision of community in which people treat each other justly.

The hypothesized practical point of tort liability therefore seems to pass the test of practical reasonableness.
This explanation of tort liability in terms of corrective justice described the common law of torts almost perfectly until the system was redescribed in consequentialist public policy terms by various theorists, beginning in 1881 with Oliver Wendell Holmes in his *The Common Law*. Although the core of tort law can still be understood in corrective justice terms, courts influenced by the newer consequentialist theories have adopted some rules and procedures that are neither justified nor justifiable in corrective justice terms. This, of course, is now blurred by the plaintiffs' lawyers represented by ATLA, who now seek to defend all of current tort law by appeals to corrective justice principles, but were happy to urge the adoption of strict liability rules based on the trendy modern consequentialist theories of loss spreading or optimal cost avoidance back in the heyday of liability expansion.

**Other Answers are Inadequate**

The mixed status of current tort law, however, raises a difficult question. In exploring possible changes in tort liability, why should we privilege the corrective justice purpose over other purposes currently embodied in parts of tort law? The answer, I think, is this. The basic elements of the tort liability system [*private individual sues another private individual seeking money damages fully compensating harm done by wrongdoing defendant*] seem to have been developed specifically to redress private wrongs. The system as a whole is well-suited to achieving that purpose. Not surprisingly, then, it is not well-suited to achieving other purposes that it was not originally developed to accomplish. Ironically, consequentialist redescriptions of the tort liability system will therefore fail the practical reasonableness test of efficiency in achieving the end sought. We can see this, I believe, by examining the two most prominent consequentialist theories—loss spreading and deterrence—to see how efficiently the tort liability system achieves those goals.

**Loss Spreading**

Turning to the loss-spreading purpose first, I ask you to imagine what you would say to someone you had charged with designing a system for spreading the losses from injuries over a broad base, who came up with the tort liability system. The exchange might well remind you of a George Burns–Gracie Allen routine.

*George:*  **Let me get this straight—you propose to spread the burden of injury from the individual to a large number of people, who each contribute small amounts, by requiring each injured individual to bring a law suit against the person whose faulty conduct caused his injury?**
Gracie: That’s right.
George: But wouldn’t that just shift the loss to the other individual, not spread the loss?
Gracie: It would, though, if defendants have liability insurance.
George: But what if they don’t?
Gracie: We’ll make them.
George: Even so, it can’t effectively shift losses because everyone injured by someone else doesn’t sue.
Gracie: They should.
George: And, anyway, there are a lot of injuries where there will be no one to sue—like if someone slips in their own bathtub.
Gracie: I hadn’t thought of that. Maybe they could sue the bathtub maker.
George: And if this is a loss-spreading system, how come the injured rich get to spread more loss than the injured poor? If they each own a car, their liability premiums will be the same, but the rich guy gets to recover his lost earnings of $250,000 a year, while the poor guy gets only his $10,000 a year.
Gracie: I hadn’t thought of that.
George: And why should we spread noneconomic losses at all? This will send insurance costs up, and accentuate the difference between those who are lucky enough to be hurt by someone else’s faulty conduct and those who can’t blame someone else.
Gracie: I hadn’t thought of that, either. Let’s limit or abolish noneconomic damages.
George: And, if we’re just trying to spread losses, why require that the defendant have been at fault at all? As long as his conduct caused the harm and he’s likely to be insured, he ought to pay.
Gracie: That’s a good idea. Let’s change the liability rules so that “strict liability” applies—if an insured defendant causes plaintiff harm, let’s impose liability. Why, maybe we could change the rules so the only thing that counts is that the defendant is insured. Maybe we shouldn’t insist that he caused plaintiff’s harm at all?
George: Aren’t you going a little too far? Wouldn’t this be done better by government social insurance against all injuries?
Gracie: That would smack of socialism. And the people of this country won’t vote for something that looks like socialism.
George: Is that why you’ve tried to hijack the tort liability system—to turn it into a socialized injury system, limited as that system might be?
Gracie: Now, let’s not get personal.
George: Say “good night,” Gracie.

Deterrence Your response might be less harsh to one you had charged with designing a system for deterring dangerous conduct who came
up with the tort liability system. That is so because the coordination-reinforcement rationale for correcting wrongs can, by squinting just a little, be seen as a deterrent purpose. There is a significant difference, however, in that the safety rule is not a judicial rule, but a social convention. It is followed by people in the community not primarily because of the threat of legal sanction for violation, but out of a general commitment to social safety mechanisms and a desire to avoid harm, do the right thing, and avoid social opprobrium. Nevertheless, there is a series of harsh questions you would undoubtedly ask.

Q. How can the threat of tort liability deter dangerous conduct when it is not imposed every time one acts, dangerously, but only if someone is injured by that conduct and if the injured person decides to sue?

A. There is deterrence here because any one can foresee that if a person acts dangerously and harm follows, he will be held liable if the plaintiff sues.

Q. That would work only if the law clearly defines ahead of time what conduct will and what conduct will not lead to liability. But liability standards (particularly negligence standards) are not that fixed, definite, and certain.

A. The law, to become more effective in its deterrence function, should always be transforming itself into fixed, definite, and certain rules. This is what Holmes called the process of specification.

Q. But why isn’t the criminal law much more effective as a deterrent? In the criminal law, punishment doesn’t depend on actual harm and the choice of the injured party to sue. Why fiddle around with a system that can never be as fully effective a deterrent as another existing system?

A. I hadn’t thought of that.

The same kind of efficiency argument could be made against each of the other currently popular consequentialist purposes—enterprise liability and optimal cost avoider. That would still leave us with the following question. What’s the matter with the “eclectic purposes” answer? We seem to have a set of purposes for tort liability, including correcting wrongs, spreading losses, and deterring dangerous conduct, which all mutually limit each other. The courts attempt to pursue purpose X up to the point where that pursuit clashes with the pursuit of purpose Y, where the existence and extent of a conflict significant enough to limit the pursuit of X is partly a matter of fact and partly
a matter of judgment. That seems, after all, to be what courts do throughout the common law. The common law can be seen as a series of judicial decisions over time made on the basis of a set of mutually limiting principles and policies. For example, courts enforce the freely chosen, mutual obligations of contract except when to do so would be to reward a wrongdoer.

To answer this question, we need to look more carefully at the working of the common law. The mutually limiting principles of the common law are different than the proposed mutually limiting purposes in tort law because traditional common law reasoning was based on an understood basic purpose; the competing, limiting principles were harmonized and made coherent by deference to that basic purpose. In the example given, the principle of contract enforcement is reconciled with the limiting principle that "the wrongdoer should not profit from his own wrongdoing" by the fundamental purpose to redress private wrongs. Courts ordinarily require the party breaching a contract to compensate the contracting party wronged by the breach, but when the party who claims to have been wronged has also done wrong and would be rewarded for it if courts allowed him to recover in a breach of contract action, the basic principle of corrective justice requires the courts to bar recovery.

Why can't we do the same thing with the competing consequentialist policy goals of tort law? Couldn't we resolve the conflicts by reference to an overarching principle? Unfortunately, this resolution is impossible. The clashes between separate intermediate policies cannot be reconciled by reference to the overarching general principle because that overarching principle is incoherent. One cannot simply "maximize desirable consequences" because there are a number of separate and distinct desirable goods for human beings, which are incommensurable. The problem is compounded, not resolved, if one throws in as an intermediate, mutually limiting principle, among a set of purely consequentialist policy goals, the previously overarching one of providing redress for wrongs. The problem is this: Once you assume that it, too, is just a consequences-based justification, then the incommensurability problem kicks in for it as well.

**Criteria for Tort Reform**

The analysis so far seems to support the following conclusions.

- There are sound reasons to retain a tort liability system aimed at redressing private injustices understood as injurious breaches of the community's safety coordination norms.
Attempts to modify the tort liability system to achieve consequentialist goals are unsupportable. The basic features of the tort liability system make its use to achieve these other purposes inefficient. Moreover, use of the tort liability system to achieve consequentialist goals threatens positive injustice in two ways. To achieve a consequentialist goal, the courts may use the tort liability system, which was designed to redress wrongs, to impose liability on one who has done no wrong. Conversely, courts bent on achieving consequentialist goals may refuse to redress a private injustice or refuse to redress it fully within a system whose basic understood purpose is to redress wrongs.

With these conclusions in mind, we can look at the current tort liability system to see what needs reforming, using this composite criterion. What rules and processes threaten positive injustice either by imposing liability where there is no wrongdoing or by refusing to redress or refusing to redress fully a private injustice?

If we look at the horror stories each side tells in the debate aimed at the popular audience, this criterion is confirmed. The tort reformers tell stories of cases where liability is imposed although there is no wrongdoing. Antireformers tell stories of cases where there is clearly a wrong and the tort reform rules preclude the courts from righting that wrong or righting it fully.

Through their horror stories, both sides appeal to the public’s understanding of the basic corrective justice purpose of the tort liability system. The tort reformers tell stories about defendants held liable who have done no wrong because we all believe that tort liability should be imposed only to redress a private injustice. One who has done no wrong, but has innocently caused harm, can therefore legitimately expect to be free from liability. To impose liability anyway violates that legitimate expectation and constitutes a positive injustice to the innocent defendant. The antireformers tell stories of seriously injured victims of wrongdoing who are precluded from adequate compensation for their injuries by harsh tort reform rules because we all believe that tort liability should fully redress a private injustice. One who has been seriously wronged can legitimately expect to obtain adequate redress for the wrong through the courts. To deny full compensation for the wrong, on consequentialist grounds unrelated to any corrective justice principle, violates that legitimate expectation and constitutes a positive injustice to the seriously wronged plaintiff.

The twofold criterion, confirmed by the horror stories of both sides in the debate, simply asks to what extent our tort liability system deviates from
its original corrective justice purpose either positively, by imposing tort liability where there was no wrong to redress, or negatively, by failing to adequately redress a serious wrong. An alternative way of identifying the substantive rules, procedural rules, and outcomes that violate one or the other parts of the twofold test is to identify those rules, procedures, and outcomes that implement one of the proposed consequentialist purposes of tort liability at the expense of the original corrective justice purpose.

**The Real Problems with Tort Liability: Rules that May Impose Tort Liability on One Who Has Done No Wrong**

It makes sense to start, then, with the modern substantive law of personal injury torts. Since the consequentialist theories have had little influence on the branch of tort law dealing with intentional infliction of physical harm, we may focus on the two categories of unintended torts—negligent infliction of personal injury and “strict liability” torts.

**Cost–benefit Tests of Negligence**

The standard for determining whether a defendant was negligent is whether he failed to act as an ordinary reasonable person would have acted under the circumstances. This standard, ordinarily applied by the community-representing jury, was, at the beginning of the development of negligence law, a good way to invoke and apply the community’s accepted safety conventions in determining whether the defendant wronged the plaintiff. The standard was not explicit in its invocation of preexisting community safety conventions, however, and its vagueness on that question provided room for a consequentialist redescription of the standard in purely cost–benefit terms. This was done first by Henry Taylor Terry in 1915 and most famously by Judge Learned Hand in the famous *Carroll Towing Co.* case. Hand said that a defendant was negligent if the burden of taking precautions against a foreseeable risk of harm from the defendant’s conduct was less than the foreseeable probability of harm multiplied by the foreseeable gravity of the harm threatened by the defendant’s conduct \[B<P\times L].\]

The *Carroll Towing Co.* test leaves out preexisting community conventions and their related expectations altogether. It seems to authorize the court to hold a defendant liable who complied with all the community’s prevailing safety conventions, based on a determination that the defendant should have acted differently because the judge, after the fact, determines that the burden of taking precautions was less than the foreseeable prob-
ability multiplied by the foreseeable gravity of harm. The *Carroll Towing Co.* test thus seems to be a standing invitation to courts to commit a positive injustice by imposing tort liability, on consequentialist grounds, on one who had not wronged the plaintiff.

In most negligence cases, the question of negligence is decided by the jury under instructions that state the negligence standard in terms of the conduct of the ordinary reasonable person. On occasion, however, the *Carroll Towing Co.* test has led courts to declare that conduct consistent with the prevailing community conventions was nevertheless negligent because it failed the court’s retroactive risk–benefit test. These cases are admittedly rare, but the *Carroll Towing Co.* test is undesirable nonetheless because it serves as a continuing temptation to judges to legislate retroactively applicable safety standards not previously adopted by the community.

**Comparative Negligence**

The horror stories told by the tort reformers point us toward the most problematic rule in modern negligence law. Over and over, the tort reformers tell stories of plaintiffs who foolishly endangered their own safety, but were nevertheless allowed to recover millions of dollars for the harm they brought on themselves. The McDonald’s hot coffee case leads their list, but they cite many, many more.

Under the old common law rules, the plaintiffs in most of these cases would have been barred from recovering anything for their injuries because they were contributory negligent. The plaintiffs in the tort reformers’ horror stories were allowed to recover, however, because the plaintiff’s contributory negligence is no longer a complete defense under modern negligence law; the plaintiff’s negligence merely reduces the recoverable damages by the percentage the plaintiff’s negligence bears to the total fault of all those whose wrongful conduct contributed to cause the plaintiff’s injury. The plaintiff’s contributory negligence is thus “compared” to the defendants’ negligence, and the new rule is called “comparative negligence” or “comparative fault.”

Lawyers, law professors, and judges are virtually unanimous in preferring the comparative negligence rule to the old contributory negligence rule. Almost every state has changed from the old contributory negligence rule to some form of comparative negligence. Could they be wrong? An analysis of the history of comparative negligence theory and a reexamination of the old contributory negligence rule suggests that the tort reformers’ horror stories are in fact pointing to a serious flaw in the comparative negligence rule.
Contributory Negligence

Contributory negligence is the failure of the plaintiff to act as an ordinary reasonable person would have acted to avoid harm to oneself, when that failure contributes to cause that harm concurrently with the defendant's negligence. Under traditional negligence law, contributory negligence was a complete defense to a plaintiff's claim. The original utilitarian deterrence theorists explained the contributory negligence defense in a chillingly simple way: Since the purpose of tort law is to prevent harm by deterring dangerous behavior, the contributory negligence rule was justified as a means of deterring the plaintiff from engaging in conduct posing foreseeable danger to oneself. From the standpoint of tort law's deterrent purpose, then, the negligent defendant and the contributorily negligent plaintiff were equally "at fault," because the conduct of each threatened foreseeable harm, even though the ultimate harm threatened by the plaintiff's conduct was to no one but himself.

The deterrence rationale for contributory negligence was undercut from two directions. First, common sense kept intervening to suggest that in the circumstances posited by the utilitarian view, the defendant has wronged the plaintiff, but the plaintiff has wronged no one. Only the most rigidly ideological utilitarian can maintain that the plaintiff's conduct was just as bad as the defendant's, or that they were even comparable.

Second, the deterrence rationale itself was called into question. It was argued that, in order for the contributory negligence rule to have any deterrent effect on the plaintiff's conduct, the plaintiff would have to foresee the risk of harm to himself from such conduct and a subsequent inability to recover damages from the defendant for that harm. But since one must foresee the risk of injury before one can foresee the inability to recover for injury, the legal inability to recover damages would seem to add little additional deterrent. The foreseen threat of actual physical harm should be sufficient deterrence.

Under straight or modified deterrence theories, then, contributory negligence became an unwelcome defense. Under a straight deterrence theory, the possible defense of contributory negligence reduced the threat of liability for the defendant's negligence and hence reduced the deterrent effect of primary negligence liability. In more sophisticated optimal cost avoider theories, the contributory negligence defense was unwelcome because it haphazardly interfered with the allocation of accident costs to the optimal cost avoider. And, of course, under modern utilitarian theories based not on deterrence but on maximizing utility by spreading the cost of
accidents through the optimum insurer, the contributory negligence defense is anathema as well, for it necessarily impairs the desired allocation of costs to insured defendants.

All the attacks on the contributory negligence defense assumed its only possible purpose was deterrence, as the early utilitarian deterrence theorists had said. An analysis of the early development of contributory negligence before the utilitarian redescription, however, may serve to rehabilitate the much-maligned defense by showing its real point, which had little to do with deterrence.

One of the first cases in the development of the contributory negligence defense was *Proctor v Harris*, an 1830 case decided by a jury upon instructions by Chief Justice Tindal of the Court of Common Pleas. In that case, a pubkeeper had opened the flap door in the sidewalk over his cellar to let in a butt of beer, at night, with only the street lamps to light the opening. The plaintiff, a pedestrian, fell in and was injured. In instructing the jury, Chief Justice Tindal said:

> The question is, whether a proper degree of caution was used by the defendant. He was not bound to resort to every mode of security that could be surmised, but he was bound to use such a degree of care as would prevent a reasonable person, acting with an ordinary degree of care, from receiving any injury. The public have a right to walk along these footpaths with ordinary security.\(^{11}\)

**Reciprocity**  Chief Justice Tindal’s formulation captures an important feature of most community patterns of coordination—their reciprocity. We act in certain ways to coordinate our conduct with that of others based on what we expect them to do. They, in turn, act based on what they expect us to do. Ordinarily, then, if we act in a way that would not cause harm to others acting as we can expect them to act, we have acted properly. The contributory negligence formula in *Proctor* focused the jury’s attention generally on the reciprocal expectations that had to be taken into account in determining whether the pubkeeper wronged the pedestrian. The jury would have to apply that general formula to the reciprocal expectations associated with the accepted patterns of conduct in that community. A finding of contributory negligence could be seen as one way of finding that defendant did not wrong the plaintiff in the first place, given the reciprocal expectations about each other’s conduct derived from the generally established patterns of coordination in that community.

This assumes, of course, that the content of the defendant’s duty to those using the sidewalk is to protect from physical harm those using the
sidewalk in the normal, expected way. Some social rules, however, are intended to protect even those acting abnormally. One would conclude from this analysis that in cases in which that kind of rule is breached the contributory negligence rule would not apply, since the content of the defendant’s duty would not depend on the expectation that people in the plaintiff’s position would act normally. The second leading case on contributory negligence from the early nineteenth century supports this conclusion.

In Davies v Mann, decided in 1842 by the Court of the Exchequer, the plaintiff owned a donkey, which he turned out into the public highway with its forefeet fettered. It was grazing by the side of the road when the defendant’s wagon came down a slight rise at a fast pace, knocked the donkey down, and ran over it, causing its death. At trial in an action in case for negligence, the trial court instructed the jury:

that though the act of the plaintiff, in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages travelling along it, might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant...13

Baron Parke of the Exchequer upheld the jury instruction here and found no inconsistency with the contributory negligence rule, stating “for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief.”

How are we to understand Davies v Mann? In Davies, the plaintiff claimed that the defendant’s servant was driving too fast to stop within the assured clear distance ahead. That conduct breached a general community rule of the road intended to protect all who venture on the highway, however they get there. The rule protects those there illegally, as well as those who through negligence are unable to get out of the road quickly. Since the defendant breached a social rule intended to protect the plaintiff even if the plaintiff acted negligently, the defendant’s general wrongful conduct was also a specific wrong to the plaintiff.

A theoretical explanation of the contributory negligence defense consistent with its original thrust, then, would understand contributory negligence as one method of determining whether the defendant had wronged the plaintiff in the first place. If the defendant acted in a way that would not harm those following the generally-expected course of conduct, and the defendant did not breach a social rule intended to protect those acting abnormally, the plaintiff’s failure to follow the generally-expected course is
deemed "contributory negligence." The contributory negligence label means just that the defendant did not wrong the plaintiff in those cases where the specific content of the defendant's duty to the plaintiff is defined by reference to the plaintiff's expected conduct. When the defendant is expected only to act so as to avoid harm to others in the plaintiff's position acting normally, the plaintiff's abnormal behavior is contributory negligence.

As Davies v Mann so clearly illustrates, however, contributory negligence as a defense should be strictly limited to those instances in which the social rule the defendant is accused of breaking defines the specific content of the defendant's duty by reference to the plaintiff's expected conduct. When the defendant breaches a social rule whose content is not fixed by reciprocal expectations, the contributory negligence defense should not apply if careless folks like the plaintiff are within the class the fixed rule was intended to protect.

**Fact-Specific Judgment** The proper application of the original contributory negligence rule, therefore, depended on a subtle judgment about the content and purpose of the coordinating conventions at stake. And that judgment is very fact-specific.

Ironically, the facts that most people don't know about the McDonald's hot coffee case may well take that case outside the scope of the original contributory negligence rule. The initial response of most of us to the McDonald's case is to assume it was not McDonald's fault because everyone knows it's the responsibility of the consumer to make sure she doesn't spill hot coffee on herself. That's our community's applicable coordination norm. But people follow that norm in light of a background understanding that the risk of carelessness in handling a cup of hot coffee from a fast-food place is the minor discomfort of wet clothes and the minor sting of moderately hot water.

The evidence in the McDonald's case, though, showed that McDonald's deliberately decided to serve its coffee at scalding hot temperatures between 180 and 190 degrees, while other fast-food outlets served their coffee at temperatures between 150 and 160 degrees.\(^{14}\) Testimony at trial established that it takes less than three seconds to produce a third-degree burn at 190 degrees, and about twenty seconds at 160 degrees. The eighty-one-year-old plaintiff in the case suffered severe third degree burns on her groin and buttocks when she spilled the coffee. McDonald's had been warned repeatedly before this injury that its coffee caused third-degree burns, but it kept its standard coffee temperature at between 180 and 190 degrees nonetheless.
A reasonable jury deliberating on these facts could conclude that the ordinary coordination norm was a trap for the unwary, who would have no idea of the significant, unusual danger posed by McDonald's coffee, and that McDonald's should not be able to hide behind a coordination norm developed for cooler coffee, which most of us would agree is not applicable here.

**Consequentialist Developments in Strict Liability for Defective Products**

The modern law of strict liability for harm caused by defective products began in a sensible enough way. In cases where a defendant who was in the business of selling products of a certain kind sold a plaintiff one of those products, the courts had long recognized that the plaintiff-buyer relied on the seller to provide a product that was fit for its ordinary intended use and that was, therefore, reasonably safe for its intended use. If the product was not reasonably safe for its intended use, and it caused harm to the plaintiff-purchaser, the defendant-seller had wronged the plaintiff-purchaser. The courts allowed the plaintiff-purchaser to recover damages in such cases, on the technical legal theory that the defendant-seller had breached an implied warranty of merchantability.

The courts gradually came to recognize that, in our modern mass-marketing economy, the purchaser often relies more on the manufacturer of the product than on his immediate seller. If you buy a Buick or a Maytag, you rely on Buick or Maytag to make sure that the product is reasonably safe for its intended use. Furthermore, the ultimate user of the product may not even have bought it herself, but, just as much as any purchaser, may also have relied on the manufacturer to make a reasonably safe product.

For a while, courts thought of allowing contractual claims against the manufacturer for breach of an implied warranty of merchantability to the ultimate purchaser or the ultimate user, even though there was no direct contract between the ultimate purchaser or the ultimate user and the manufacturer. Justice Traynor of the California Supreme Court and Professor William Prosser, leading tort gurus of the twentieth century, recommended that it would be simpler and cleaner to treat these claims as tort claims rather than contract claims.

*Voila*, the modern tort of strict liability for harm caused by a defective product was born. A manufacturer would be held strictly liable for the resulting physical harm if it sold a product in a defective condition unreasonably dangerous to the ultimate user or consumer. Consistent with the
implied warranty history of this cause of action and the reliance theory on which the claim of wrong was based, the proposed test to determine whether a product was in a defective condition was whether it was as safe as the ordinary consumer reasonably expected it to be.

**Alternative Tests for Product Liability**

Influenced by the alternative consequentialist justifications for strict product liability, like enterprise liability, loss spreading, and optimal cost avoider theories, however, some courts elaborated alternative tests for determining whether a product was in a defective condition unreasonably dangerous to the user or consumer. Some said the test was whether a reasonably prudent manufacturer, with constructive knowledge of the particular danger posed by the design of the product, would nevertheless have manufactured and sold the product as designed.

Within this group of courts, some said the manufacturer should be held to the knowledge of the danger available at the time the product was sold; others said the manufacturer should be held to the knowledge of the danger available at the time of trial. Both sets of courts assumed that the ordinary reasonable manufacturer would make a cost–benefit analysis à la Carroll Towing Co. to determine whether to sell a product whose design posed a particular kind of risk of harm.

Other courts would dispense with the hypothetical ordinary reasonable manufacturer altogether, and simply ask whether the risk of harm posed by the product as designed outweighed the benefits from the product as designed.

All these alternatives to the consumer expectation test of defect threaten to impose liability on manufacturers who have done no wrong because they manufactured and sold a product that was as safe as users and consumers reasonably expected it to be. Just like the Carroll Towing Co. test for negligence, these tests are an open invitation to courts or juries to impose liability in cases where they determine, after the fact, that the product as designed should never have been sold because in their judgment the retroactively determined risks outweighed the benefits. So, courts have held that a product may be held to be defective even though it was a useful product with no alternative feasible safer design. And one court has even held that a manufacturer had a duty to warn users, at the time of sale, of a subsequently discovered danger that the manufacturer could not possibly have known about at the time it sold the product.

Some courts have abolished or undermined other doctrines originally
associated with the implied-warranty basis for strict liability for defective products. Thus, consumer misuse of a product early on in the strict liability development would preclude liability, because a reasonable consumer would not expect the product to be safe for a use it was not intended for. For example, everyone should know that plastic-handled screwdrivers are not intended for use as chisels. Someone using a screwdriver to pry two nailed boards apart by hammering on the plastic handle, therefore, could not reasonably expect the screwdriver to be safe for that use. If he is hurt when the plastic handle breaks and a sliver of plastic lodges in his eye, he has not been wronged by the manufacturer. Courts influenced by consequentialist theories, however, have said that consumer misuse does not bar the consumer’s claim if the misuse was reasonably foreseeable. A manufacturer may be liable if its product was not reasonably safe for a foreseeable misuse.

Similarly, courts have refused to apply the traditional defense of implied assumption of risk in strict product liability cases. A user, knowing the specific danger posed by the product, who voluntarily proceeds to use the product anyway may still recover for harm caused by the known danger because many courts just fold implied assumption of risk into the comparative fault mix and apply the comparative fault rule to strict product liability.

Applying the comparative fault rule to strict product liability cases creates two other problems. Consistent with the consumer expectations standard, Professor William Prosser and his influential Restatement (Second) of Torts argued that the plaintiff’s failure to take steps to discover or guard against a defect in the product should not bar the plaintiff’s strict liability claim. This is sensible under the reliance rationale for strict tort liability. If the consumer can rely on the product to be reasonably safe for its intended use, a reasonable consumer would not take steps to test the safety of the product or to take precautions against potential dangers the product might pose. By treating all contributory negligence as comparative fault, however, recent strict liability cases run the risk that the plaintiff’s failure to test for product dangers or to guard against potential product dangers may reduce the plaintiff’s recovery in a case in which the product failed to meet the consumer’s reasonable expectations of safety. Second, clearly unreasonable conduct on the part of the plaintiff may not bar the plaintiff’s recovery, even though the manufacturer could reasonably expect that no one would act that way while using its product and the plaintiff could not reasonably expect the product to be safe while he was acting in that way.
The Real Problems with Tort Liability: Inequalities in Jury Awards

There seem to be at least two significant problems with juries as triers of fact in tort cases. First, juries consistently award more money to plaintiffs who sue impersonal "deep pocket" defendants such as corporations or government entities. Second, when a lawsuit is brought in state court, it is filed in the state court for a particular county. The case is then tried to a jury composed of residents of that county. The juries in a few counties in this country—including Madison and St. Clair counties in Illinois, and Lowndes County, Alabama—are notoriously friendly to plaintiffs' claims and are thought to be more likely than juries in other counties to impose liability on defendants and to return large damage awards. Consequently, tort claims that one might assume should have been brought in another county wind up in those "plaintiff's heavens" because of liberal venue rules that allow plaintiffs to sue business defendants in any county in which they do business.

Deep Pockets Effect

The Rand Corporation study of jury verdicts in Chicago\(^6\) provided solid statistical evidence of the existence of the first problem. For the period from 1960 through 1979, the Rand team studied over 9,000 reported jury verdicts. They determined the level of injury in each case, ranking injuries on a scale from slight to very serious. The "deep pockets" effect was persistent over moderate and very serious injuries, but the effect was greater for very serious injury cases. A very seriously injured plaintiff could expect to receive almost three times as much against a government defendant as against an individual defendant. Against corporate defendants, the very seriously injured plaintiff collected awards that ran an astounding four times higher than awards against individual defendants. At less severe injury levels, the "deep pockets" effect was not this large. Even the moderately injured plaintiff received a larger award when he sued a "deep pockets" defendant, however, with awards running as much as 50 percent higher.

Plaintiffs' Heaven

As far as I know, there have not been comparable scientific studies comparing awards in counties that all trial lawyers perceive as "plaintiffs' heavens." The anecdotal evidence, however, is persuasive, as is the size and efficiency of the plaintiffs' personal injury practices of the leading trial lawyers in those
counties. The following excerpt from John A. Jenkins’ book, The Litigators: Inside the Powerful World of America’s High-Stakes Trial Lawyers, explains how Madison and St. Clair counties in Illinois came to be known as plaintiffs’ heavens:

Fortuities of law, geography and commerce long ago made the area, in [a leading local attorney’s] words, “just an ideal place to have lawsuits,” and in [a leading Chicago attorney’s words], “a mecca for litigation in the Midwest.”

Federal statutes enacted in 1910 and 1915 gave injured rail and barge workers the right to file suit anywhere the defendant railroad or barge company did business. Because both counties were major rail and barge centers—more than a dozen railroads had lines there, and the Illinois and Missouri rivers joined the Mississippi nearby—and because there was a high concentration of unionized blue-collar workers from whom to draw potentially proplaintiff jurors, the area’s courts routinely produced huge verdicts for injured rail and barge workers.

“If you’re hurt in California and that railroad passes through here, this is where you can file suit,” [a leading local plaintiff’s attorney] gleefully explained. “Railroading is hazardous work, so the types of injuries are always bad—legs off, arms off, deaths. A good lawyer, big defendants and sympathetic, working-man-type juries—all that laid the foundation for this area.”

In 1982, the St. Louis Post-Dispatch reported that more than a thousand rail and barge lawsuits had been filed in the two counties during the prior two years alone and that, on the basis of a random sample of those cases, 80 percent involved accidents that had occurred elsewhere. Business was so good in the two counties that four hometown lawyers . . . were members of the trial lawyers’ most elite million-dollar club, the Inner Circle of Advocates.

[Cases from all over the Middle West are funneled into the courts in Madison and St. Clair counties. For example, a local attorney] who represented the barge workers’ National Maritime Union, got injury cases from up and down the Mississippi as well as from all the rivers flowing into it. By making [the] local courts the venue of choice for virtually all of their important cases, [the local plaintiffs’ lawyers] were “forum shopping,” a perfectly legal practice as long as the court allowed it.

The Real Problems with Tort Liability: Tort Reforms that Preclude Full Compensation for Serious Wrongs

One of the aims of the organized tort reformers is to reduce the overall costs of the tort liability system—in their words, to lower the “tort liability tax” imposed on all of us. Some of the cost-reducing reforms they support, however, would impair the ability of the courts to require a wrongdoer to compensate fully one who was seriously injured by the wrong. The two
planks in their national platform that most seriously threaten this kind of injustice are their proposal to cap recovery for noneconomic losses and their proposal to abolish joint liability of joint tortfeasors.

**Caps on Damages for Noneconomic Loss**

The early common law of tort allowed recovery of money damages for the physical injury itself and all its harmful consequences. The physical injury included the physical harm itself (a broken hip, say, and the limp caused by the broken hip), pain and suffering, and physical disfigurement. All these could be proved at trial based on a general pleading of physical injury, so they were called "general damages." A plaintiff could recover for the economic consequences of these physical injuries, including lost wages while recovering from the broken hip, medical expenses in treating the broken hip, and lost future wages predicted because of the broken hip. Those consequent economic losses had to be specially pleaded in order to be compensated. Hence, consequent economic losses were called "special damages." The primacy given to the physical injury by the traditional distinction between general and special damages reflected the common-law courts' understanding that the primary wrong the defendant's wrongful conduct had done was the physical injury itself.

**Pain and Suffering**  Modern writers who elaborated economic utilitarian theories of tort liability like loss spreading, enterprise liability, or optimal cost avoidance necessarily inverted the implicit ordering of the common law. Under the loss-spreading theory, there was little reason to spread noneconomic losses, and compensating for pain and suffering could not be supported in the enterprise liability or optimal cost avoider theories. The academic tort reformers seeking to remake tort law along consequentialist, utilitarian principles almost unanimously recommended abolition or reduction of damages for noneconomic losses.

Ironically, the current tort reformers, who oppose extension of tort liability without fault under those consequentialist reforms, have adopted some of the arguments against damages for noneconomic losses that were originally developed by those earlier reformers. Pain and suffering cannot be translated accurately into dollars and cents, they say. Jurors have no objective guidelines, so verdicts involving large dollar amounts for pain and suffering may simply reflect jurors' emotional reactions to the plaintiff's injury, they say. An injured plaintiff who recovers all of his economic losses is fully compensated, they say. Large awards for noneconomic losses inflate the cost of the
tort liability system unnecessarily and increase the tort liability tax unnecessarily, they say.

The most effective counterarguments start by directing our attention to a very seriously injured plaintiff. Imagine a young child, seriously burned in a fire caused by a defendant’s negligence. Assume she has third-degree burns over 60 percent of her body. After she is compensated for the economic consequences of this terrible injury—lost earning capacity, past and future medical expenses—is she fully compensated for the wrong? What about the terrible, recurring pain and suffering, the horrible disfigurement, the permanent physical impairments? Is $250,000 or $500,000 sufficient compensation for a lifetime of pain, suffering, disfigurement, and disability visited on this young girl by the defendant’s negligence? Of course not.

This argument reminds us in a dramatic way that pain and suffering, disfigurement, and physical disability are real losses, affecting the plaintiff’s well-being in important ways, which are not just reducible to their economic consequences. When these real losses are caused by a defendant’s wrongdoing, the wrong cannot be adequately redressed unless the defendant pays for these losses, too. The fact that a jury cannot refer to any markets to translate the pain and suffering, disfigurement, and disability into dollars and cents does not mean that these are not real losses that should be compensated as fully as we can by an award of money damages.

The Problems with Damages Caps The tort reformers ordinarily do not argue for total abolition of noneconomic damages; they support caps on recoverable noneconomic losses—usually $250,000, at times $500,000. Caps on damages for noneconomic losses are peculiarly unfair ways to reduce the overall costs of tort liability, for the cap applies only to the most seriously injured plaintiff—to those like the horribly burned little girl we have been thinking about, whose noneconomic losses would exceed the arbitrary cap. Caps say that the less seriously injured plaintiffs can recover fully for all their losses, but the most seriously injured cannot. Caps tell the courts that, because we want to reduce the overall costs of tort liability, they can fully redress less serious wrongs but they cannot fully redress the most serious wrongs. It would be like telling doctors that, because we want to reduce the overall costs of medical care, they cannot treat their most seriously ill patients.

Elimination of Joint Liability

At common law, joint tortfeasors were “jointly and severally” liable for their joint torts. What does this mean? Think of the following example.
Alice drives her car at 70 miles per hour south toward an intersection and fails to keep a careful lookout ahead of her. Barney, headed north, is stopped at the intersection, waiting to turn left. Just after the car ahead of Alice’s car passes him, Barney pulls left, directly in front of Alice, although there was not a safe interval to do so. The cars crash because Alice was driving too fast and failed to keep a proper lookout, and because Barney turned left in front of Alice’s car when there was not enough room to safely make the turn in front of oncoming traffic. Carmen, a passenger asleep in the passenger seat beside Barney, is seriously injured in the crash.

Under traditional tort law, Alice and Barney are joint tortfeasors because each was negligent and the negligence of each was a cause of the indivisible injury to Carmen. They were therefore “jointly” liable to Carmen. Carmen may join them as defendants in a single tort action against them both and recover a judgment against both of them jointly. But each is also “severally” liable for the entire amount. Carmen could enforce the joint judgment against just Alice, or against just Barney, although she could recover the full amount only once. Because each tortfeasor is both jointly and severally liable, moreover, Carmen could sue just one of them and recover fully against just one of them.

**Contribution among Joint Tortfeasors** Besides the joint and several liability of joint tortfeasors, the second important common-law rule was that there was no contribution among joint tortfeasors. If Carmen obtained a judgment against Alice and Barney jointly but recovered the full amount of the judgment from Alice alone, Alice could not force Barney to reimburse her for any of the amount she had to pay. Similarly, if Carmen sued Alice only and obtained a judgment against Alice, Alice could not then force Barney to reimburse her for any of the amount she paid to Carmen.

In almost all states, the old common-law rule prohibiting contribution among joint tortfeasors has been changed. A joint tortfeasor required to pay all of a judgment may now claim contribution from a joint tortfeasor. The amount of contribution differs in different states. Some states require contribution based on equal shares; other states require contribution based on the jury’s determination of the joint tortfeasors’ comparative fault. In the equal-shares states, Alice could force Barney to pay her half the amount she paid to Carmen. In comparative fault contribution states, the jury would be called on to determine the percentage of total fault contributed by each defendant. In this case, let’s assume the jury determined that Alice’s negligence was 60 percent of the total fault and Barney’s negligence was 40 percent of the total fault. If Carmen enforced the entire judgment against
Alice could then force Barney to reimburse her for 40 percent of the total judgment, based on the comparative fault contribution rule.

**Proportionate Fault** The tort reformers now argue that it makes no sense to retain joint liability after adoption of comparative fault contribution rules. Each defendant should be liable only for the amount of liability equal to that defendant’s proportionate fault. That is only fair, they argue; one defendant should not have to pay for the liability that is proportionately attributable to another defendant. Stated more simply, and misleadingly, the tort reformers argue that this violates the principle of proportionate liability embodied in the comparative fault contribution rule, which they say is “the concept that a party is responsible only for the damages caused by his own negligence.” Moreover, the reformers argue, retention of joint liability after the adoption of comparative fault contribution leads to unfair results. An ATRA “Issues Brief” argues as follows:

A Wisconsin case illustrates the rule’s unfairness. An uninsured driver of a car with faulty brakes struck and killed a six year old boy at a school crossing, despite a stop sign and a crossing guard. Plaintiff argued that the accident might have been avoided if the crossing guard, instead of signaling the car to stop, had attempted to get the child out of the car’s path. The city, as the crossing guard’s employer, was found to be simply one percent at fault. Yet because it was the only solvent party, the city had to pay 100%, the full amount of damages. *(Zimmer v. City of Milwaukee)*

The argument by the ATRA here loads the deck in favor of their conclusion. Given the limited facts they give, the obvious conclusion of the reader is that the city was not negligent at all and that no reasonable jury could conclude that the city was negligent. If that is so, the problem in the case is not the joint liability rule but the failure of the trial court to direct a verdict in favor of the city. Even if the reader assumes the city was negligent, the statement of the case says that the jury found the city’s negligence was only 1 percent of the total fault, so it seems unfair for the city to be stuck with the whole judgment.

But this assumes that the jury’s allocation of percentages of total fault relates to some objective reality. A moment’s reflection, however, suggests that that is not true. If there was evidence from which the jury could find that the crossing guard failed to act reasonably to protect the six-year-old boy (such as motioning the child to cross in the face of an oncoming car that had not stopped), then the guard wronged the poor child, who had relied
on him to protect him at the crossing. The jury’s 1 percent–99 percent allocation as between the driver and the city does not have any relevance to the question of whether the city should have to pay the whole amount on the insolvency of the driver. If the guard was really negligent and really wronged the child, why should the child’s survivors, harmed by the child’s death, have to bear the risk of insolvency of the other tortfeasor?

Furthermore, the ATRA’s statement of the “proportionate liability” principle is deliberately inaccurate. At common law, tortfeasors were jointly liable only if the wrongdoing of each was a cause of an indivisible injury to the plaintiff. You can see this in the Alice-Barney-Carmen hypothetical, where Carmen’s entire injury was caused by Alice’s negligence, as well as by Barney’s. The proportionate liability principle embodied in the comparative fault contribution rule is not based on responsibility proportionate to the percentage of the harm actually caused, but on the percentage that one defendant’s “fault” bears to the “total fault of all defendants” after it is determined that each defendant’s fault caused all the harm.

The ATRA example works polemically because the reader is given no facts from which to conclude that the city was at fault at all. A better test to determine whether the ATRA’s proposed rule of “several liability only” is fair is the Alice-Barney-Carmen hypothetical. Assume again that the jury determines that Alice’s negligence was 60 percent of the total fault and that Barney’s negligence was 40 percent of the total fault.

Assume further that Alice is insolvent. Under the “several-liability-only” rule, Carmen could recover only 40 percent of her damages, against Barney. Put another way, the “several-liability-only” rule puts the risk of a defendant’s insolvency on the injured plaintiff and removes that risk from the other wrongdoing defendant, where the common law had placed it. This does not seem fair. The “several-liability-only” rule protects a wrongdoer from the responsibility to compensate fully for all the harm his wrong has caused; it precludes the courts from fully redressing a private injustice.

Conclusion: An Alternative Tort Reform Agenda

The preceding survey of tort law using the criteria derived from an analysis of the practical point of tort liability suggests that there are real problems with our tort liability system. The horror stories used by each side in the current nasty debate over tort liability point to the real possibilities for injustice in our tort liability system: the imposition of tort liability on one who has not wronged the plaintiff, and the inability of courts fully to redress a real and grievous wrong because of misguided tort reforms.
The analysis of the real problems in our tort liability system leads to the following alternative tort reform agenda.

1. We should root out cost–benefit tests from our understanding of the negligence standard and explicitly adopt a test that refers to the community’s previously adopted safety conventions.

2. We should eliminate the modern comparative negligence rules and return to an earlier contributory negligence rule that sensibly barred a plaintiff’s recovery when the safety convention applicable to a defendant’s conduct required him to act in a way that would prevent harm to those themselves acting as he could expect them to act.

3. We should root out cost–benefit tests of defect in strict liability for defective products and return to the original implied warranty model to determine whether a manufacturer wronged a user or consumer by manufacturing a product that was not as safe for its intended use as one could reasonably expect.

4. We should delimit and reinvigorate the role of the jury in tort cases:
   (a) We should develop jury instructions that clearly tell jurors what we want them to decide in negligence, contributory negligence, and strict product liability cases. These instructions should tell them how these questions relate to facts about existing social coordination conventions and their correlative individual expectations.
   (b) We should attempt to equalize damage awards in similar cases to eliminate the inequalities based on the defendant’s identity. This could be done by enacting a schedule of recoverable damages for specific injuries or by making damage questions legal issues to be decided by the judge or by instituting a system of itemized damage verdicts, reported by a jury verdict reporter system, that could be used by judges in ruling on remittitur and additur motions.
   (c) We should cut down on outside business in “Plaintiffs’ heavens” by tightening up venue rules.
   (d) We should tighten judicial control over jury decision making by more rigorous use of summary judgment and directed verdict procedures. This should be possible once we have eliminated some of the confusion invited by the current uninformative formulations of tort standards.
This tort reform agenda would clarify and preserve the original purpose of tort law, which was to redress private wrongs. Incidentally, this reform agenda responds to the horror stories told by both sides in the current debate over tort reform. This is not surprising. Those horror stories are told to get ordinary people on your side, and the common sense of ordinary people coincides with the truly perennial philosophy of natural law.

NOTES

2. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).
3. Lon Fuller, Human Purpose and Natural Law, 3 Nat.L. Forum 68 (1958).
5. John Finnis, Natural Law and Natural Rights at 155.
15. 2 Restatement of the Law of Torts 2d, Sec 402a, comment n, at 356 (1965).
18. Id. At 375–76
19. ATRA, Issue, Brief, Joint and Several Liability Reform (undated).
20. Id.
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CHAPTER 18

COMPARATIVE LAW AND THE ISLAMIC
(MIDDLE EASTERN)
LEGAL CULTURE

CHIBLI MALLAT

Beirut*

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Yale Law School for their most helpful comments on the draft of this chapter. All shortcomings
naturally remain mine.
I. Islamic Law and Civilization: The Comparative Framework

In a posthumous publication on 'Law and Justice' in the Islamic world, Joseph Schacht (d. 1969), the leading twentieth-century Western scholar in the field, underlined the unique importance of law in defining Muslim (or Islamic) civilization:

The sacred law of Islam, the Shari'a, occupies a central place in Muslim society, and its history runs parallel with the history of Islamic civilization. It has often been said that Islamic law represents the core and kernel of Islam itself and, certainly, religious law is incomparably more important in the religion of Islam than theology. As recently as 1959, the then rector of al-Azhar University, Shaykh Mahmud Shaltut, published a book entitled 'Islam, a faith and a law' (al-Islam, 'aqida wa-shari'a), and by far the greater part of its pages is devoted to an exposé of the religious law of Islam, down to some technicalities, whereas the statement of the Islamic faith occupies less than one-tenth of the whole. It seems that in the eyes of this high Islamic dignitary the essential bond that unites the Muslims is not so much a common simple creed as a common way of life, a common ideal of society. The development of all religious sciences, and therefore of a considerable part of intellectual life in Islam, takes its rhythm from the development of religious law. Even in modern times, the main intellectual effort of the Muslims as Muslims is aimed not at proving the truth of Islamic dogma but at justifying the validity of Islamic law as they understand it.¹

While this statement is true with respect to the fourteen-century-long history of Muslim civilization (the Muslim calendar starts at CE 622, the year of the Prophet Muhammad’s flight from his home town Mecca to the neighbouring city of Medina), the period between World War I and the early 1970s was anything but a moment of glory for the shari'a, 'the sacred law of Islam'.² Most of Islamic law as it had come down over the centuries was displaced by Western-style legislation. With the exception of ritual observances, few Muslims were conducting any of their legal business in open reference to shari'a precepts, and the place of religious law receded considerably in the Muslim world. Politically, the rise of socialist ideologies was rightly considered by Muslim religious leaders to represent a clear and present threat to their way of life. It undermined what little power they retained in their communities: except for rules bearing on marriage, divorce, inheritance, and family life generally, few laws in the various modern nation-states

¹ Joseph Schacht, 'Law and Justice', in The Cambridge Encyclopedia of Islam (vol 2, 1974), 539. Note that in the following text and footnotes, references are to both the Christian and the Muslim calendars. Where only one date is mentioned, it refers to the CE (Christian or Common Era); where two dates are listed, the first gives the year according to the Muslim calendar, the second according to the Christian (Common) calendar.

² Shari'a or sharī'ah are used as generic terms for Islamic law. Fiqh is the classical term. Qanun is used nowadays for positive law, as well as more specifically for statute law.
were rooted in the millennium-deep legal tradition of the shari'a. The classical jurists of the law, imams, sheikhs, muftis, fuqaha', mujtahids, and 'ulama, when they survived, dispensed knowledge which, to the chagrin of such religious leaders as the Azhar sheikh Mahmud Shaltut, had little impact on the daily transactions of the citizen. The degrees they granted did not even entitle their holders to become lawyers or judges. Islamic law and Islamic law-trained lawyers remained peripheral to public life.

The revolution in Iran, led by Islamic jurists, changed the scene. In 1979, the world awoke to the victory of the shari'a's exponents, who had toppled one of the most powerful regimes in the Middle East. Iranian revolutionaries rallied behind the call for 'the rule of the (Islamic) jurist' (in Persian, velayat-e faqih), as the most famous pamphlet of Ayat Allah Ruhullah Khumaini (d. 1989) came to be known. The advent of Islamic government (another title of the same pamphlet) in Tehran followed an Islamic renaissance across the Shi'i world that had started in response to the rise of communism amongst the more deprived sectors of Muslim societies. Islamic law had 'regained the high ground in disciplines which had seemed only a few decades ago beyond its pale: constitution, economics and banking'. By the beginning of the twenty-first century, the shari'a was back at centre stage of the political life of most countries with a sizeable Muslim majority. The advocates of its relevance and implementation challenged the established legal order across the world, including a Western world which, for the first time in its history, had large, and increasingly self-assertive Muslim communities in its midst. The more radical proponents of the return to the shari'a focused the world's attention on their agenda with the violence unleashed in New York on 11 September, 2001. While the revolution in Iran was arguably Shi'i (the second largest community in a Muslim world that is predominantly Sunni—there are some 1.2 billion Muslims, with about a billion Sunnis and 200 million Shi'i), the call for the establishment of Islamic states, defined as states observing Islamic law, had by then become universal among Muslims.

In this context, comparative law is an essential component of the contemporary Muslim world, because the enactment and interpretation of all 'modern' legislation in every Muslim country is subject to scrutiny for its compatibility with Islamic law. Between the quasi-total displacement of the shari'a and its vigorous return, almost every legal issue has become comparative. This pervasive comparative aspect

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3 An imam is a leader of the prayer, as well as generally the leader of the community, including the eponym of a law school. In the Shi'i tradition, he is also one of the recognized historic leaders who took on the mantle of the Prophet through his daughter Fatima. Sheikh (or shaykh) is also generically a respected community leader. A mufti is a jurist who issues fatwas, normally non-binding legal opinions. Mujtahid is a generic term for jurist, as is 'alim, plural 'ulama (literally scholar) or faqih, fuqaha' (expert on fiqh).

4 Ayat Allah (literally sign of God), known as Ayatollah in the west, refers to a religious 'degree' achieved by a scholar in the Shi'i hierarchy.

of the shari'a is complicated by the fact that a historical axis brings an immense cultural perspective to the field that goes well beyond law to encompass religion, arts, literature, and sciences, all under the rubric of Islamic 'civilization'.

In fact, Islamic law is only a small, discrete component of a larger frame of reference within Islamic culture. The civilization built by Muslims prided itself also on military prowess. Consider the early period of the Conquest that brought it all the way to Poitiers in the eighth century, the protracted and ultimately successful battle against the Crusaders, and the European military expansion of the Ottoman Empire which twice brought Islam to the gates of Vienna. On the other hand, Islamic art and architecture have given the world monuments of exquisite refinement, from the Taj Mahal in India to the Alhambra in Spain, and, in literature, texts from the tenth and eleventh centuries, such as Mutanabbî's (d. 965) Diwan (collection of poetry), or Firdawsi's (d. 1020) epic poem of Shahnameh, are considered world-class writings and are revered to this day as the most impressive literary legacy in the Arab and Persian-Iranian worlds.

That said, Islamic law is increasingly all-encompassing and, in fact, is equivalent to the rule of law in the modern state. Every aspect of life is regulated by (Islamic) law. Indeed, every subject in the thematic area of the present Handbook could include a specific section on the ways Islamic law deals with it. Such is the wealth of material in the field that it has branched out in recent years into disciplines, including environmental law and economics, where no identifiable corpus of law could previously be found.

Before comparing the Islamic nomocracy and the rule-of-law states in modern democracies, it is helpful to draw certain distinctions. One consideration has to do with the arbitrariness that prevailed in many parts of the Islamic world during its history. Not only would an attempt to apply the model of a modern democracy to pre-modern times in the Middle East or South East Asia constitute a grave anachronism, but the absence of a central power structure in many countries where Islam was the predominant religion meant that the operation of the law in those lands was enormously complex. There was simply no unifying and exclusive power at the top to bring all its strands together. Perhaps Islamic law, in historical perspective, can best be described through the metaphor of the French philosophers Deleuze and Guattari, as Mille Plateaux, a 'thousand plains' where various levels and intensities of authority and legitimacy operate. 6

Besides constituting a special type of nomocracy and operating at a multi-level order in society, Islamic law is also unique in that it represents a personal rather than a territorial, system of law. It thus stands in sharp contrast to the post-Westphalian order that dominates the rest of the world. This characteristic,

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which is typical of any religious-based social order, is also typically Middle Eastern. The application of law to a person on the basis of religious affiliation is an increasingly important source of tension in the world order, one that is based on personal, or communitarian, law, as opposed to the territorial law that dominates the rest of the world. This contrast is possibly the most pervasive and divisive issue that arises when regarding the different legal systems and cultures at play from a comparative perspective.

From a historical perspective, Islamic law consistently elicits an array of autonomous references. Looking at its uninterrupted flow since the Muslim revelation in the seventh century, the shari'a appears as the common law in the region and beyond, reaching Mauritania and West Africa on its western fringes and Indonesia to the east. Beyond its textual differences with other major legal systems, the shari'a is increasingly studied for its immense diversity across history. In the early period, the Qur'anic text, the hadiths (aphorisms attributed to the Prophet) and the sira-maghazi literature (the sira consists of biographical accounts of the Prophet, the maghazi of the early conquests), were all elaborated upon in many legal genres after the death of the Prophet Muhammad (d. 632). Added to this legacy were the classical age books of doctrine (fiqh), the customary rules, the case law available from extant archival courts, the literature on the art of judgments, the fatwas (individual legal opinions), formularies, deeds and contracts, the statute law (qanun) since the fifteenth century, as well as the relevant histories and literature at large, such as chronicles or belles lettres. Recent scholarship brings all these genres within the purview of Islamic law. This has led to profound changes in the appreciation of the concept of sources, the development of law and its interpretation, the phenomenon of the Islamic legal 'schools' or madhhabs (there are four central Sunni schools—Shafi'i, Hanafi, Maliki, Hanbali—and one main Shi'i school, called Ja'fari), all the way to the emergence of codified national laws in the nineteenth and twentieth centuries.\(^7\)

Before addressing public and private legal disciplines where the shari'a has become relevant once again, we should note some important avenues which will not be followed in this chapter.

First, as the title indicates, the focus is on the Middle East rather than on the much larger Muslim world. This chapter generally covers jurisdictions extending from Mauritania in the west to Pakistan in the east. It does not include India, which has a large Muslim minority of over 150 million, or Indonesia, which has the largest Muslim population in the world (about 200 million). Occasionally, we look at Israel even though it is not a Muslim country, because some of its public law reflects a 'personal legal pattern' that is parallel to that of Islam.

In terms of method, several options for approaching the field in a comparative

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\(^7\) The footnotes in this chapter have been restricted to a minimum and seek to offer a representative sample of the large variety of classical and modern sources available in the field.
manner could be fruitfully adopted. We could, for example, carefully examine
Islamic law as it exists in various nation-states. We shall not pursue such a course
here for several reasons. First, it would amount to no more than a survey of the
black-letter legal developments in each jurisdiction. Second, it would simply result
in the description of judicial systems that are overwhelmingly Western in form, as
is the case regarding the hierarchy of courts, the right of appeal, and the profes-
sional lawyers who represent litigants exactly as they would in the West. Finally, the
shari'a appears to have minimal influence over statutes and codes of Western
inspiration in practically all fields except matters of personal status. Instead of a
jurisdiction-by-jurisdiction approach, therefore, this chapter examines the rule of
law *lato sensu*, from the angle of the legal professions in the classical and modern
age (Section II), to be followed by some comparative reflections in public and
private law (Section III).

II. THE RULE OF LAW IN THE PRISM
OF THE LEGAL PROFESSION

Looking at the legal profession, or the ensemble of professions for which law is a
full-time bread-winning activity, offers a particularly useful way to assess the rule
of law in society. On the contemporary side, practical experience trumps any
amount of scholarly writing. Books on the legal profession are even less common
in Islamic countries than in European or American jurisdictions. While one occasion-
ally finds memoirs by the odd lawyer or judge written in the 'life in the law' style,
legal practice tends to be dwarfed by the political imprint of the author. On the
classical side, in contrast, a unique Islamic genre known as *adab al-qadi* (literally
manners, or literature, of the judge) features manuals left by judges that show how
they viewed their job and exercised their responsibilities. One finds here an
unusual paradox: more pointed material on the 'real' life of the law exists in the
classical age than in the modern world.

1. The Classical Legacy

In order to ascertain patterns in the authority of the law as it operated in the classical
age, we use here the manual for judges of Ibn Abi al-Dam, a judge (*qadi*) who lived in
Syria from 583 to 642/1244, together with some material from the classical age as
reflected in archival sources. We know little about the judge himself, but his book
on adab al-qadi offers some remarkable comments on the profession. The manual is particularly important in light of its extraordinary documentation speaking against the infamous image of Kadi-Justice, which remains associated with an idea of 'Oriental despotism' dominant in the Western perception of the Islamic 'Middle Ages'.

'Oriental despotism', as it appears in Karl Wittfogel's seminal book, describes societies where arbitrariness prevails due to a mode of economic production dominated by the scarcity of water. In these societies, the state assumes a dominant role which, in the end, destroys individual autonomy for the sake of organizing water resources. Wittfogel extends the concept far beyond the Middle East to encompass totalitarian states such as China and the then Soviet Union, but it is the original Near Eastern model of the 'hydraulic state' that stands at the core of his argument. Such absoluteness, steeped in the characteristic absence of the rule of law and the dominance of a behemoth state, mirrors Max Weber's image of the qadi dispensing arbitrary justice under the proverbial tree. Extant qadi manuals and archives of courts recently researched belie both negative images.

Ibn Abi al-Dam's manual is long and detailed. Conceived to guide both judges and lawyers, it covers the essentials a practitioner on the bench or on the court floor would need to know. This book, like others in the same vein, offers a comprehensive image of the world of judges and litigants at the time. The exposé is eminently practical: 'What we have mentioned in this book is common in the court of the judges as between litigants...'. Although some of the issues are elusive and may be somewhat complicated for a modern reader, it is clear that the book was intended as an aid for practising jurists. It is divided into six long chapters which the author presents in the introduction to the work, and is interspersed with models and case studies covering the appointment of judges, court set-up, trials and procedures, the taking of testimony, relations among judges, and typical contracts and formularies. The outline of the book, presented in the introduction, is repeated at the end of Book 5:

This then is the concluding word on the nature of judgeship, the rules and art of judges, what they must do, what they may do, what is forbidden to them and what is abhorred, the rules of trial and evidence, the trial sessions and the conduct of litigation between the parties, testimonies and the like, judicial referrals from the sitting qadi to other judges.

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8 Muhammad 'Ata (ed), Shihab al-Din Ibn Abi al-Dam, Kitab adab al-qada' (1987). Full references are omitted in the present chapter, but detailed annotation can be found in Mallat, (2004) 52 AJCL 209, 233–40 (section on 'Qadi literature').
9 Karl Wittfogel, Oriental Despotism (1957).
10 See for instance the book by another famous Shafi'i, al-Mawardi (d. 450/1058), M. Sirhan (ed), Adab al-qadi (2 vols, 1971). Comprehensive fiqh treatises invariably include long books on adab al-qadi, for instance in vol 16 of Saraikhil's (d. c1090) Mabsut for the Hanafis (Al-Mabsut was published at the turn of the twentieth century in Cairo in 30 vols), and vol 14 of Muhammad Hasan al-Najafi (d. 1266/1849), Jawahir al-kalame (Beirut edn, 1992), for the Shi'i Ja'faris. (Jawahir al-Kalam published in 15 vols).
The book is eminently didactic. It is ‘especially intended for the lawyers who have set themselves out to defend their clients’, and it offers explanations on various ‘common practical issues’. This focus is important. It shows that a specialization had occurred over the years, and that a ‘profession’ of legal counsel-representatives was alive and well at the time of Ibn Abi al-Dam. It also suggests that, at one point, lawyers constituted ‘a profession’ in classical Islam, though not a recognized ‘corporation’. On the other hand, judgments we have from the eleventh/seventeenth-century Tripoli (Syria) court show that most litigation was carried out either by the parties themselves, or by family representatives, rather than by paid professional lawyers. This was also clearly the case in other parts of the Ottoman Empire, as substantiated by scholarship covering Turkish courts in the first part of the seventeenth century, but not in the Syria-Egypt of Ibn Abi al-Dam’s thirteenth century.11 Although this disparity calls for a reassessment of the ebb and flow in the advocacy profession through an immense stretch of Islamic/Middle Eastern history, Ibn Abi al-Dam’s manual is nevertheless important for the wealth of material it offers the practitioner in terms of both procedure and substance.

It is actually possible to revise the whole field of Islamic law from the perspective of the practitioner as it appears in qadi literature, and this revision is supported by the emergence of a series of court reports which had until recently remained in closed or unknown archives.12 In this literature, we find not only the natural intermingling of sources, a phenomenon not unique to the Islamic tradition though perhaps more pronounced there than elsewhere, but also delightful evidence of the social mores of the time, viewed in the context of court proceedings. For instance, we have in Ibn Abi al-Dam evidence of widespread lies in court, the taking of oaths by all kinds of people with various religious backgrounds, including those one would identify today as agnostics or atheists, and warnings from the judge against the propensity of court scribes to write at length. For all these problems, the judge tries to offer solutions.

This description of justice in the courtroom raises the question of how Kadi-Justiz13 should be viewed in an age when people were convinced, with some legitimacy, that the rule and authority of the law in their world was far superior to that in any other conceivable contemporaneous society. A complete answer would require investigation into the state of adjudication in thirteenth-century China or India, but it is certain that Ibn Abi al-Dam did not give much thought to possible

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12 We have translated in full one of these judgments (n 6 at 213–15), ‘The Franjiyyeh case’, original Arabic in ‘Umar Tadmuri, Frédéric Ma’tuq and Khaled Ziadah (eds), Watha’eq al-makhama al-shariyya bi-Tarabulus (Documents of the shari’ court of Tripoli, Lebanon, full facsimile of the 1666–7 register) (1982), 153.
examples from systems outside the boundaries of a Muslim world that was rather
closely knit in terms of legal scholarship and interaction.

That provincialism, however, is not present in the world of modern-day qadis,
whether they studied French law in Egypt, Morocco, or Lebanon, Egyptian or US
law in the Gulf, or indeed just their traditional fiqh texts. Their societies have all
come under severe scrutiny regarding the rule of law as perceived under today's
standards, and they themselves know perfectly well what judicial review and a truly
independent judiciary mean. Unlike Ibn Abi al-Dam, however, contemporary judges
are understandably defensive about their own authority. In light of the systematic
adversity endured under authoritarian governments across the Muslim world since
national independence was achieved by most countries in the 1950s, a subdued
profession of judges and lawyers keeps hauling the Sisyphian-rock of the rule of
law, while governments fight it directly, stonewall its decisions, stack the judicial
system, or simply replace the rule of law with rule by law. It is telling that we do not
have manuals such as Ibn Abi al-Dam's in the twentieth century. In the absence of
such reflections from the bench, we shall now illustrate the fight for the rule of
(Islamic) law on the contemporary scene from a legal practitioner's perspective.

2. The Contemporary Scene

In Democracy and the Rule of Law, a wide-ranging volume on the rule of law from a
comparative and multi-disciplinary perspective, the editors concluded their intro-
ductive remarks by reflecting on 'the preconditions that make the rule of law
possible'. These include 'a functioning, independent judicial system [as] a key
element in the maintenance of civil society and the possibility of non-military
settlement of disputes'. Although one might lose sight of this underlying truth,
the judge is the main repository of adjudication, and this accounts for the centrality
of 'the judge as metaphor' for the stability and fairness of all contemporary soci-
eties. While the stability of some pre-modern societies does not necessarily con-
form to that metaphor—for instance, judges and courts seem far less important
in pre-modern East Asia or Central Africa—this is not the case in the classical
Arab-Muslim world where the importance of the judge, and the law in general, can
hardly be doubted. Ibn Abi al-Dam's manual for judges and attorneys offers an
important contrast to the everyday life of his successors in the modern Arab world.

The judge, as opposed to other legal professionals, is central in the Arab-Islamic
tradition. Amongst the many professions connected in some way to the law—the

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15 Ibid.
16 Chibli Mallat, Democracy in America (in Arabic, 2001), 147, developing a concept coined by
Anthony Kronman.
main three being law teacher, lawyer, and judge—the metaphor of the judge is the most compelling because decision-making about matters of importance to parties in conflict rests with him. As Anthony Kronman has noted,

[T]he priority of the judicial form of dispute resolution is a function of the fact that it is judges who must ultimately define the authority that mediators, arbitrators, and special masters exercise—not the other way around—and so long as this remains true, judges and the work they do are bound to retain the position of dominant importance they have occupied in our [US] legal culture from the start.  

This is not unique to the American context. The judge as metaphor is a universal image, at least in civilizations where law is recognized as an autonomous, if not separate, discipline.

In reflecting on the better part of two decades of the rule of law in the Middle East, one must look past many false starts and discouraged hopes. Sobering conclusions must be drawn about the effectiveness of the judge and the court over which he presides as a means of keeping peace among litigants in the contemporary Muslim world. Looking at the ‘noblest’ dimension of judgiship—constitutional review—there is the disconcerting example of Egypt.

In 1980, for the first time in Egypt’s history, a Supreme Constitutional Court began operating as an institution, with a recognizable leadership, serious case-law, and judicial checks on executive and legislative acts. At last, citizens were seeing some of their fundamental rights recognized and defended in court.

A quarter of a century later, accumulated case-law is now available. It testifies to a good day for the Supreme Constitutional Court. Unfortunately, the Court today acts less and less as a decisive voice in the Egyptian public place. In other countries in the region, the drive towards constitutional review has continued and expanded, but the latest experiment in establishing judicial review of laws under the constitution collapsed soon after it had begun in the mid-1990s in Lebanon.

Constitutional review has also been attempted in Iran and Israel, but the results have been equally disappointing. In the least known experiment, that of Iran, review of legislation and electoral processes, which had formally started in 1979, was undermined by the members of the Council of Guardians (shura-ye negahbar, roughly equivalent to the French Constitutional Council) over the following two decades. The Council acted outside its proper authority to prevent a reformist president and Parliament from yielding to the popular demand for freedom and participation. The most recent victim of once high expectations is the Israeli Supreme Court, which has not only proved incapable of responding to legitimate demands for minimal protection by the non-Jewish minority in Israel, but has also managed to write into law the authoritarian behaviour of the executive branch in ways that neither international standards nor natural law can condone. Considering

the decades-long battle between Palestinians and Israelis, this collapse does not come as a surprise, and few would be shocked by the retreat of law in the face of open and sometimes systematic violence on both sides.

Similar failures appear across the Arab and Muslim world. In Algeria, the Constitutional Council and the courts at large are meaningless in an environment of daily ruthlessness by both the military government and the Islamic extremist groups. In Yemen, the reliance on the judiciary collapsed after the civil war in 1994.

The name of the game has therefore been changed from the rule of law to rule by law, and the problem is not merely the undermining of constitutional review. Lack of independent judicial review operates at all levels, and it is mainly a function of a lack of free political representation. The disappointment in this area is strongest for rule-of-law advocates who have become frustrated that their call for democracy has gone unheeded. This was a universal call which they had hoped would extend throughout the Middle East after the collapse of the Berlin Wall and the democratization of many parts of the world.

Muslim states remain, by and large, notable exceptions to the rise of democracy across the planet. Beyond the understandable dejection resulting from the collapse of legal and democratic processes across the world of Islam, the loss of faith in the judiciary underlines the graver dimension of this downward trend. Hopes have been raised only to be betrayed, and the executive power has systematically and skilfully stacked the top judiciary with people whose allegiance is not to independence, but to their patrons. This has not been limited to public prosecutors or their equivalents in the various institutions constituting the criminal arm of the state. It extends to the supreme court judges within each jurisdiction and to judgeships down the ladder. Reversing that process may take years. Meanwhile, the authority of the law is undermined in its most ‘central and decisive branch of the profession as a whole’, judgeship.18

Undermined judges have so widely become the norm that the whole legal profession is forced to reconsider its bread-winning activities and its daily dedication in an existential manner. While faith in the authority and fairness of the law may re-emerge in response to the sudden courage of one court or the occasional heroic judge, the reality of arbitrariness and executive fiat is daunting. As a result, practitioners fight a disheartening (and so far losing) battle to protect the authority of the law, in the hope that one day a John Marshall-like judicial phoenix will rise. Such a figure will have to escape the safety nets devised by executive power, be it by stealth through the ruse of reason (see Hegel’s Philosophy of History), or, also in a Hegelian metaphor, by the necessity of the ‘rule of law-State’, understood as the ultimate historical embodiment of the Spirit (see Hegel’s Philosophy of Law).

Meanwhile, other soothing considerations operate to mitigate daily disappointments on a number of temporal and spatial lines. Some are monetary, when the

18 Ibid 318.
use of law is managed to enhance the lawyer's financial well-being with some crafty commercial settlements. Some are geographic, both horizontal and vertical. Horizontally, loss of faith on the Egyptian stage, for example, is redeemed with a sudden opening in Bahrain, in Morocco, or even in Indonesia. This goes beyond the Muslim world. Since notions of universal jurisdiction have been pursued on the European and other Western stages, vindication of rights can also be sought in new contexts, such as in the International Criminal Court and other instances of universal jurisdiction, in an experience which is halting yet hopeful.

Vertically, the judiciary offers occasional successes to the cause of individual human rights. The successful fight for the right to a passport in Morocco, the failure of blasphemy cases in Yemen and Lebanon, the occasional check on the executive in Egypt, and the first Katzir ruling in Israel, all paint a judicial picture that is not entirely dark. In the first case, a plaintiff whose right to a passport had been stonewalled for years by the administration was vindicated by a decision of the Supreme Court.19 In Yemen and Lebanon, courts were able to undermine complaints against authors and singers accused of blasphemy; with the result that, after years of harassment, the accused were deemed innocent.20 In Egypt, the Court of Cassation eventually quashed the abusive jailing of the leading dissident Saadeddin Ibrahim, but only after he had spent two years in prison.21 In Israel, the Supreme Court acknowledged the right of non-Jews to rent a flat in a compound owned, like 90 per cent of the land, by a Jewish public authority.22 Unfortunately, these cases rarely become benchmarks, and the rule of law soon relapses to the ultimate discouragement of the legal profession as well as the public at large.

The rule of law often takes one step back for every two steps forward, but the pattern over the past four decades has more often been inverted, so that one step forward is followed by two steps back. Cycles being what they are, it is logically possible that a legal 'critical mass' might suddenly revitalize the rule of law in a given jurisdiction. Alternatively, and perhaps more likely, systematic degradation of the law and legal process may unleash violence. The resulting downward spiral could reach cataclysmic proportions, the harbingers of which one saw in Halabja, Iraq, on 16 March 1988, when some 5,000 villagers were gassed to death by their

20 In Yemen, _al-'Udi_ case, Supreme Court, Criminal and Military division, 7 May 1992, reported in (1995) 2 _Islamic Law and Society_ 87–91; in Lebanon, the singer Marcel Khalifeh was acquitted on 14 December 1999 of blasphemy for using passages from the Qur'an in a song. Full report carried by the daily _al-Nahar_ (Beirut), 15 December 1999.
21 Decision of the Egyptian Court of Cassation, 18 March 2003, dismissing accusations of using foreign funds to 'discredit the reputation of Egypt'. A comment on the case before that final decision can be found in Curtis Doebbler, _The Rule of Law v. Staying in Power: The State of Egypt v. Saad_
own government, and in New York on 11 September, 2001, when militants claiming Islamic legitimacy killed 3,000 people in a blatant crime against humanity.

What might, in a brighter alternative, constitute a critical mass that would allow the rule of law to blossom? Looking at the failed cases and failed states of the recent and not-so-recent past, how is it possible to avoid disaster and secure those critical junctures where the machine of justice regularly breaks down?

As a rule of thumb, the elusive answer might best be sought in those countries where the rule of law functions reasonably well—for example, in the UK, Sweden, or New Zealand. There, the people lawyering feel that the adjudication of cases is based almost entirely on legal and judicial independence and fairness, with the remaining uncontrolled factors being ‘politics’, luck, quality of legal representation, and an ‘X’ factor, sometimes referred to as the ‘length of the judge’s foot’. In the Muslim world, by and large, the picture is exactly the opposite, with law stricto sensu comprising perhaps no more than 20 per cent of the factors underlying a judicial decision. The remaining factors are a combination of will-power, corruption, and executive intervention. When lawyers finally believe their cases will be decided more by law than by politics, then the threshold for confidence in the system will be close at hand. In the Middle East, we are far from that mid-range percentile. If British or French lawyers felt that half of their cases were decided mostly by politics, they would not feel proud of their ‘rule of law’ or ‘Etat de droit’ societies.

Another way of looking at law’s authority considers the judge less as a metaphor than as a professional recruit. This perspective focuses on the judiciary’s composition, education, and background, and these factors vary widely in the Islamic/Middle Eastern world. In most countries of the Middle East, the legal system follows a French model in which a career in the judiciary is embarked on early in life. The candidate attends a special magistrates’ school between the ages of 25 and 30, and slowly ascends the ladder of judicial accomplishment and authority until retirement at around age 65. In Saudi Arabia, Iran, and Yemen, one finds this French system married to a strong reliance on the traditional ‘ulama, but the judiciary in all three countries is a mixture of the traditional and the ‘modern’. Additionally, the ministries of justice tend to supplement the bench with appointees from outside the hierarchy of the French model, partly due to the lack of qualified people, but more disconcertingly in efforts to stack the courts with judges who have a particular political point of view. The result is a judiciary that is structurally flawed from a societal perspective. Joining the profession is not prestigious enough to attract the most qualified candidates because the judiciary is not perceived as being sufficiently independent from executive power. A critical criterion will be met in the Arab-Muslim world when the best lawyers begin actively seeking judicial appointments. Unlike Britain and the United States, where judicial positions stand as the crowning jewel in a legal career, few successful attorneys in the Arab-Muslim world are prepared to give up their legal practice for a position in the judiciary.
Perhaps the sole exceptions to this rule are the very top judicial positions—heads of cassation courts and constitutional councils as end-of-career honorific titles.

Alternatively, and until some more scientific indicators are developed, the rule of law can be gauged through the perception of the courts from the outside—from the perspective of the litigant and his or her lay surroundings. Ultimately, law produces a good, however intangible, which is ‘justice’ from a macroeconomic viewpoint, and ‘the fair and firm settlement of a dispute’ in a microeconomic perspective. In both cases, the ‘judicial product’ is an alternative to the sometimes violent self-help that would otherwise ensue.

The performance of that function—producing justice and hence peace—is deficient across the Arab-Muslim region. Naturally, this problem is not limited to the judiciary. All the branches of the legal profession—judges, lawyers, and law professors—are subject to various forms of degradation, and that degradation varies in intensity depending on the nature of the cases addressed. More demanding expectations operate on the higher level, which may be called ‘constitutional’ for short. Here the typical cases concern freedom of expression, fairness of the electoral process, accountability for abuse of power, protection of the marketplace from executive corruption (including confiscation of property and the forcing of commissions on state contracts), and finally, the accountability of top officials for war crimes and crimes against humanity. The quality of decisions reached in these cases varies considerably. The conclusions reached by George Sfeir in a comprehensive survey of Arab legal systems summarize the problem at hand:

If one were to apply Mellwin’s criteria, that the essential quality of constitutionalism has been the legal limitation on government, the excessive authority of the Executive and the personality of power with which it is commonly identified represent, together with judicial review, the two main problems of constitutionalism in the Arab states.23

Worse, rule by law, rather than the rule of law, is increasingly the name of the game. The result is the manipulation of ‘due process’ to advance clearly illegitimate goals of government. Examples of rule by law run a wide gamut. Sometimes they seem trivial: a note under a hotel door signed by ‘the secret services (mukhabarat)’ asking the guest to vacate the room within two hours because it is needed for some high-level delegation visiting the country. Sometimes they are grave: the closure of a television station in Lebanon because it was alleged to have violated electoral advertising rules in a recent political campaign, concurrent with a decision of the Constitutional Council appointing a candidate who received 2 per cent of the vote to the parliamentary seat under dispute.
III. Public and Private Law: Select Comparative Issues

While the contemporary scene appears discouraging, the search for the rule of law and democracy continues. Decency in the public place as well as honest, courageous leaders—whether legal scholars, attorneys, or judges—are recognized and saluted. Assessment of these developments is best left to the sociologists and political scientists. We shall turn now to a survey of some of the important legal fields in public and private law.

The thread running through the following comparative argument—that 'Middle Eastern (or Islamic) law is distinct in terms of style'—derives from the classic Introduction to Comparative Law by Konrad Zweigert and Hein Kötz.24 For this argument to hold, it must go beyond Kadi-Justiz and constitutional law to include contracts, torts, and family law. Before delving into these central private law disciplines, we need a brief review of administrative and criminal law, as well as procedure and property, from a comparative perspective.

Administrative law is an important element in the daily life of the citizen in any country. Across the Muslim world, a French-style administrative court is the rule. The lack of effective judicial checks on administrative courts makes their power overwhelming in modern-day Islam, and the fact that the state was a far more imposing factor for citizens in the heyday of classical Islam does not minimize the importance of this conclusion.

From a comparative perspective, Middle Eastern criminal law is both tedious in its straightforward copying of Western-style codes and elusive in terms of the exact interaction between traditional legal theories and contemporary societies. The recent revival by some excessive governments of classical law practices such as cutting off the thief’s hand, beheading the murderer or rapist, and stoning an adulterer, is intolerable as well as untenable in any twenty-first-century society. Such practices have been resurrected as part of a provocative political message and, for that reason, it is difficult to make any constructive comments about them. Criminal law is important and may be more alluring than other legal fields from a historical perspective, especially with respect to countries that continue to apply tribal or communal traditions. However, the field is understudied, and sociological and anthropological work may well produce more interesting and informative results than purely legal study. All in all, there is too little by way of an ‘Islamic/Middle Eastern style’ in contemporary criminal law to warrant a more developed discussion.

Understanding procedure requires considerable practical experience with a number of legal systems across the Muslim world. A collaborative effort at the bar association or university level may someday flesh out this important subject but, at present, it is difficult to draw any conclusions or propose any theories about the character of legal procedure in the Muslim world.

Property law also demands practical experience because the law as it appears in the statutes is quite different from the law as it is applied in everyday life. One characteristic found in many Middle Eastern countries is the dominant position of the Cadastre (Arabic sijill 'iqari). The Cadastre derives from an Australian system developed around 1860 to scientifically map the newly colonized continent. It was slowly introduced in the Near and Middle East to bring stability and order to legal ownership of land and has no known antecedent in the laws of the region.

Turning now to three core legal disciplines, we shall examine the degree to which a specific Islamic/Middle Eastern style can be identified from a comparative perspective in constitutional law, obligations arising from contracts and torts, and family law.

1. Constitutions: Personal versus Territorial Models

Since 1992, all countries in the modern Muslim world, including the Kingdom of Saudi Arabia, have adopted constitutions or basic laws. Useful comparisons regarding the place of Islam in these constitutions were recently carried out, especially with regard to such basic questions as ‘the reference to Islam in the constitutional text’. When looking at comparative public law, it is more interesting to compare the Westphalian ‘territorial model’ of nation-states with what we can describe as the Islamic ‘personal model’, in which the application of law to an individual depends more on membership in a given religious sect than on citizenship in a nationally defined territory. The system of nation-states is well entrenched in all Muslim countries with sizeable Muslim populations, but it does not function well. Here, comparative law yields a powerful contrast: the overarching system of Islamic law as a ‘personal model’ versus the dominant system of Western law described as a ‘territorial model’.

Although this distinction became fashionable after the publication of Samuel Huntington’s Clash of Civilizations (1996), it requires an initial caveat: the comparison is uneven by nature, especially for lawyers. The depiction of a clash between two world patterns may have broad-brush merits, but it breaks down when we look

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at the details. In the first place, the concept of civilization is vague. Second, Islamic law is based in a religion and several countries with a Muslim majority seem to have little in common despite a shared religion. Third, while the dominant subject on the international scene remains the nation-state, Tunisia, Nigeria, and Indonesia hardly appear as a common legal bloc. Conversely, 'Western civilization' is rarely defined in terms of religion, even though the concept of 'a Judaeo-Christian culture' has been stretched considerably since Nietzsche's devastating critiques in *Genealogy of Morals* (1887) and *Beyond Good and Evil* (1886).

That said, law in the modern nation-state is eminently territorial: within a country's boundaries, there is one legal system that is, by definition, exclusive. All citizens in the state are bound by that system, and they become bound by the system of an adjacent country as soon as they cross an international border. In contrast, the classical divide in Islamic law between *dar al-harb* and *dar al-silm* or *dar al-islam*—the war territory as opposed to the peace territory—creates relationships and obligations that tend to be far more personal than territorial. Thus, a citizen's legal relationships follow her wherever she goes. While this is not completely unknown to an American or a French national who may, for example, be bound by the tax laws of her country anywhere in the world, personal law is not the dominant consideration when travelling abroad.

While this sort of generalization may seem trite or over-broad, it is valid and useful as it relates to the issue of personal law versus territorial law in the context of a typical Middle Eastern constitutional system and arguably beyond as in Pakistan, India, Malaysia, and now Europe (because of the emerging and self-defining Muslim communities there). This issue may also be framed as communitarian versus territorial federalism and it is at the root of the difficulty confronting nation-states in the Muslim world. Three pressing constitutional examples from the beginning of the twenty-first century illustrate the difficulties surrounding this issue.

Lebanon is a good example with which to begin. Its population is divided more or less evenly between Christians and Muslims. The Lebanese Constitution, originally passed in 1926, is now the dean of the constitutions in the region. Its longevity is due in part to its recognition and formalization of an important structural characteristic of Lebanese society derogatorily known as sectarianism or communitarianism (*confessionalisme* in French, *ta'ifiyya* in Arabic). It often appears in the political science literature as 'consiociationalism' and describes a relationship between the citizen and the state that is not an immediate or direct one; it is filtered, or mediated, by the citizen's community. In Lebanon, eighteen or so sects make up the country resulting in a complicated set of constituencies. These may be simplified by considering a general line separating Muslims and Christians and, further, the no less powerful lines separating Muslim Sunnis, Muslim Shi'is, and Christian Maronites, the three larger communities in the country. In this setting, communitarian privilege derives from the personal scheme harking to the *shari'a* as the millennium-guiding model: a person is Muslim or Christian or Jewish before she is
Lebanese, French, or Saudi. The great historian of tenth- to thirteenth-century Egypt, Samuel Goitein, describes this model as ‘medieval religious democracy ... Law in those days was personal rather than territorial’.26

Although communitarianism is at odds with the concept of the equality of citizens as individuals, it can be viewed as a positive step toward the Western goal of individualized justice. However frustrating to the Western constitutionalist, one should approach communitarianism positively. As in Egypt or Morocco in the classical age, the system in Lebanon is not necessarily inappropriate; people who question it may find reasons to reconsider it in the worldwide debate over the emerging Iraqi Constitution. It is a correct assumption, widely held and well-founded, that the government in Iraq cannot be stable (ie fair) if the Sunni community is not represented in the decision-making process. This is actually the Lebanese constitutional litmus test: regardless of how a community may be perceived, it nevertheless retains its constitutional right to be represented in government. Nor is this concept exclusively Lebanese. It has deep roots in the Near East. In Karl Marx’s words, the puzzling nature of Near or Middle Eastern history is that it has always taken the appearance of religion.27 The Lebanese Constitution thus offers a blueprint of the personal, as opposed to the territorial, model for the rest of the region.

It may not be out of place to discuss Palestine and Israel as a negative counter-example. In Israel, a discrete, insular, and historically victimized minority of Israeli Arabs, representing a fifth of the population, has never had significant executive representation in Israel’s government. Under a Lebanese-style constitution, non-Jewish Israelis would be entitled to five central cabinet posts out of twenty. The issue of legal protection and representation for the indigenous Palestinian (mainly Muslim) community, which lies at the root of a century-old conflict, is the same issue facing Christians and Muslims in Lebanon, or Shi’is and Sunnis in Iraq, except that the two groups in Israel are Jews and non-Jews. In the legal and sociological study of Israel, ‘Jewishness’ is deemed to be the defining characteristic of the country, in the same way that ‘Muslimness’ would be emphasized in Iran or Pakistan. Because of the obvious historic legacy of the Holocaust, this is an issue that is overwhelmingly seen as the essence of Israel as a state.

Throughout the history of the State of Israel, the central legal question has always been: ‘Who is a Jew?’ It figures prominently in the current debate regarding the latest waves of immigrants from Ethiopia and Russia and, for Christians and Muslims directly affected by the emergence of Israel, it is central because its answer, by definition, places them outside the legal order of a state defined by its Jewishness.

In particular, three groups of non-Jews have been impacted by this structural discrimination. First, those who were evicted from their homes when Israel was formed, and never allowed to return, simply do not exist in the eyes of Israeli law. They are the refugees of 1948, defined by Israeli law as perpetual and irrevocable ‘absentees’. Second, those who were subjected to occupation beginning in 1967 have experienced a four-decade long domination coupled with slow and relentless expropriation of their land. And third, there is the one-tenth of the native population that was not evicted in 1948. These ‘Israeli Arabs’ (or, more properly, ‘Palestinian Israelis’) grew to number about a million by the turn of the twenty-first century. While their constitutional participation is guaranteed by an absolute right to vote, the Jewishness of the State of Israel has meant that their participation in the government or judiciary has remained tightly constrained by a combination of harsh legal rules and overt discrimination.

One now better understands Lebanon’s constitutional structure as defining what might be called a ‘counterconstitutional’ model, that is, counter to the one dominant in the West since Montesquieu and the Federalist Papers. In the spring of 2001, drafts of the 1926 Lebanese Constitution were released, and they are sobering. Two texts stand in apparent contradiction. In Art 7 of the draft constitution, all citizens are declared equal, just as would be expected in any Western country. In Art 95, however, the communities are designated as legal agents or intermediaries for those very citizens. This has not changed almost a century later, except that the present Art 95 has established parity between Christians and Muslims in Parliament, moving away from multiples of the six–five formula (six Christians to five Muslim MPs) that prevailed until the so-called Taef Agreement in 1989 and the Amendments which that Agreement introduced in the text of the Constitution a year later.

In fact, Lebanese constitutionalism predates 1926. The earliest extant prototype of the Lebanese Constitution, a text that goes back to 1836, established municipal councils, that is, representation plus executive power, in the major cities (then Sidon and less prominently Beirut), on the basis of parity between the number of Christian and Muslim councillors. By any historical measure, parity in representation between Muslims and Christians from 1836 to 2005 is significant, but that model may also be seen in the so-called Ottoman Millet system, which is itself rooted in the medieval religious democracy portrayed by Goffe. Therefore, any effort to enhance individual equality by jettisoning communitarianism may be both unwarranted and impracticable, regardless of any advantages it may offer.

Federalism offers one way forward, as may be seen in Muslim countries such as Nigeria and Malaysia where the federal model has increasingly taken root. The problem is that federalism, at least as it has been implemented to date, is inevitably territorial. For instance, in the United States, with federalism following territory (and history), one has senators from Rhode Island and California coexisting happily
as equals. California uses the fact that it has a greater population to disadvantage Rhode Island in other ways, but the territorial model remains the rule. When it comes to the executive branch, the majority of votes tends to bring the person chosen by the majority of people to the presidency, with individual Californians and Rhode Islanders counting almost equally at the polls.

At this point, the challenge of adapting federalism as it appears in Western democracies to Middle Eastern communitarian states becomes clear. Federalism, to be meaningful, would have to allow corrective representation of communities standing in lieu of states, and this is by and large a non-territorial scheme.

It is also a difficult scheme to implement. Populations are interwoven and people move about. While a majority may dominate a given territory, cities and the trend towards urbanization, a universal sociological trait by the end of the twentieth century, tend to blur the boundaries between groups. Rarely if ever is there territorial ‘purity’, and this compounds the problem because communitarian federalism requires territories that are homogeneous. Homogeneous territories are not readily available in most of the Muslim world, and when they are, it may be the result of forms of ethnic cleansing that no one wants to validate in law. Even when territories appear to be homogeneous in terms of their population, they are subject to shifting fluid borders, as one can see at the turn of the twenty-first century in Kirkuk between Arab and Kurdish Iraqis, in Jerusalem between Jews and non-Jews (or Israelis and Palestinians, or Muslims and non-Muslims), and in Southern Beirut between Shi‘i and non-Shi‘i Lebanese.

The central problem for federalism in Iraq, Lebanon, or Israel is also thornier than elsewhere in the world. The issue tends not to be separation of powers in three branches of government, but the fight in the centre over executive power. Executive power is a difficult issue by nature. As Robespierre noted 200 years ago, you cannot have executive power if you have only part of it. Executive power requires, by definition, one chief executive chosen by universal suffrage; one chief executive whose power to rule is granted by the majority.

There is no readily available answer to this conundrum, although various possible solutions, such as the presidential triumvirate of Iraq that emerged in 2004, are being examined and tested. Such power-sharing solutions tend to become bewildering and unduly complex for the pervasive quotas they encourage, and multi-religious and multi-ethnic mosaics should not be allowed to cloud one’s moral principles on basic equality among citizens. The problem is the essential dualism of the region. To put the issue simply, it appears that each individual’s allegiance in all the countries of the Muslim world is dual in law. A person operates nationally, as a constitutional citizen in a Habermas way, but also relates to public affairs through religious or sectarian affiliation, which makes the (religious)
2. Contracts and Torts: Defining an Islamic Style

Like many pre-modern legal systems, classical Islamic law did not include a comprehensive theory of obligations and contracts. The formation of the law as a distinct discipline, with the rise of the long treatises of fiqh after the ninth century in a common-law style of jurisprudential accretions, meant that a comprehensive system had to wait for the modern period. Only in the middle of the twentieth century did individual authors from Egypt and the Levant (notably 'Abdul-Razzaq al-Sanhuri, d. 1971, and Subhi Mahmasani, d. 1986) develop an integrated theory of obligations and contracts in well-constructed treatises.28 This coincided with or followed the effective codification of the law of contracts, some of it in the form of private restatements, but most by legislation. The codification of the law of obligations was achieved in most countries in the late nineteenth and early twentieth centuries.

A decisive change in the legal systems of the Muslim world took place when the expansion of colonial rule spread the French Napoleonic Code through the world. At that time, the Muslim tradition, then vesting in the Ottoman Empire and to a lesser extent in Persia (later Iran), began seriously to consider the codification of the law of obligations.

The result was the celebrated Majalla (Ottoman Mecelle), enacted between 1869 and 1876, which in turn became the model for widespread codification of the law of contracts in the Muslim world. Codification of the Islamic law of obligations then took place in North Africa (Tunisian Majalla of 1906, Moroccan Code of 1912) and in the private compilations of the Egyptian scholar Muhammad Qadri Basha (flourished late nineteenth century) and his Saudi colleague Ahmad ibn 'Abd Allah al-Qari (d. 1940). In Iran, a similar process, completed in the mid-1930s, produced the Iranian Civil Code. In other countries of the Muslim world, especially in those under British or Dutch influence (India, Pakistan, Indonesia), legislation was more piecemeal and tended to be less attentive to the Islamic legacy.

Another major phase of the codification of the law of contracts was completed when the Egyptian Civil Code was enacted in 1949, under the impressive editorship of 'Abd al-Razzaq al-Sanhuri. The Egyptian Civil Code was the model for the Syrian, Kuwaiti, and Libyan contract codes. In Egypt, Sanhuri was careful to incorporate both fiqh principles and Egyptian case-law precedents, but the language he and his fellow drafters used featured a comparative element that diluted the more classical terminology of the Ottoman Majalla. Later civil codes (in Jordan, a new code was passed in 1976; in Kuwait in 1980; in the United Arab Emirates in 1985; and in the unified Yemen in 1990) paid more attention to fiqh terminology, following the Iraqi

28 'Abd al-Razzaq al-Sanhuri, Masader al-haqq fil-fiqh al-islami (Sources of law in Islamic fiqh), (6 vols, 1954–9); Subhi Mahmasani, Al-Nazariyya al-‘amma il-mujibat wal-‘uqud fish-shari'a al-islamiyya (General theory of obligations and contracts) (2 vols, 1948).
Civil Code of 1953, which appeared to be a compromise between Sanhuri's code and the Majalla. There are jurisdictions such as Saudi Arabia where a unified civil code has not yet been enacted and the law must still be ascertained in light of the common law represented by classical fiqh. However, most countries have preferred the simplicity of an integrated text for the law of obligations and contracts.

This area has been the locus of the most heated debate over the comparative dimension of positive law in the modern Islamic/Middle Eastern world, and it continues to incite polemics across the region. Before the Civil Code, the Ottoman Majalla had successfully combined the format of the Napoleonic codes with both the structure and vocabulary of classical Islamic law. Despite declared efforts by Sanhuri that 'we did not leave a single sound provision of the shari'a which we could have included in this legislation without doing so', the Civil Code of Egypt has been repeatedly attacked for its alleged ignorance of the classical Islamic law of obligations. Recent scholarship ranges from support for the view that the Code is generally 'not Islamic' to a reading of the corpus as hybrid, and even eclectic. Sanhuri himself does not deny this eclecticism. In fact, he declared the need for Egyptian law to rise to universalism 'in order to pay its own tribute to humanity for the advancement of law in the world, that is what the doctrine calls comparative law'. Our own conclusion on this never-ending debate regarding the debt of the Egyptian (and many other Arab) codes to Islamic law highlights vocabulary and structure over substance. The codifiers of the Majalla were far more interested in their own tradition as Islamic lawyers than in any foreign system. Sanhuri's scholarly upbringing, on the other hand, was wider, but his enrichment of the Code with foreign and comparative material diluted the Islamic flavour that might otherwise have been evident in its arrangement and terminology.

What are the rules of obligations in the Islamic tradition? In the classical system, the general law of a contract falls under the twin headings of Qur'anic injunctions and fiqh principles. Qur'anic injunctions require contracts to be entered into and applied in good faith, to be preferably in writing, and to avoid including riba (interest, usury, though the definition of riba remains controversial to date). At

30 Bérard Botiveau, Loi Islamique et Droit dans les Sociétés Arabes (1983), 150.
33 Developed in Mallat, Droit Civil au Moyen-Orient: Essai de Théorie Générale (forthcoming).
best, the principles of contract law in the Qur’an are sketchy. The classical law of
obligations as developed in the jurists’ work was elaborated upon over the sub-
sequent centuries in the texts that form the large corpus of *fiqh*. There is, however,
no book devoted to contracts in general in the great treatises of *fiqh*. The core
model is the contract of sale, upon which a number of other less important contracts
are modelled. While these are sometimes discussed in minute detail, they lack the
clear sense of structure required by the modern age. Contractual models can also
be found in the literature of *shurut* (literally, ‘conditions’). *Shurut* are legal formulas
developed by notary-publics and judges. They varied over time and geographical
area and were followed by judges and legal specialists in the course of their
practices.

The place of the Islamic legal tradition in the modern period becomes evident in
the survival of some of its more specific rules of contract. For instance, Article 3 of
the Ottoman *Majalla* specifies that ‘in matter of contract, intention and meaning
have priority over wording and syntax’. This establishes the importance of intent
over formal expression, and it is derived from a saying ascribed to the Prophet that
acts derive from intent. Similarly, many jurisdictions in the Middle East have
introduced the principle of the unity of *majalis al-*’*aqd* (‘the contractual session’),
which classical jurists define as an integrated session of negotiation for the contract,
limited in time and place. The theory is described by the Hanafi jurist Kasani
(d. AH 587/1191 CE) as ‘offer and acceptance in the same session: if the session varies,
the contract does not take place’.34 While the term is common in several modern
Muslim jurisdictions, contracts on future things and variations on the obligations
in more complex cases have forced some flexibility on both the codes and the
courts alike.

Contracts, when valid, are binding. Flaws of form and consent are known in
Islamic law and their treatment does not differ in any major way from the civil and
common law systems. Some tenets of the classical theory have been revived to
allow revision of a contract when some of the obligations have become too onerous
on one of the parties. This principle has been formalized in several codes, notably
in Egypt and Iraq, but revision of a contract that has become too onerous on the
debtor has been generally restricted in the decisions of contemporary Muslim
jurisdictions.

The law of torts offers a useful illustration of modern law’s failure to bring the
traditional and the modern together.

There is a significant difference in the comparative genesis of contracts and torts.
The law of contracts, even if only recently systematized, is readily identifiable in
classical works where it is elaborated upon with great sophistication and acumen
by the jurists of the high classical age. In the modern Islamic world of contract law,

34 ‘Ala’ al-Din al-Kasani (d.1191), *Bada’ee al-sana’ee fi tartib al-shara’e* (7 vols, Cairo edn, 1328/1910),
vol 5, 136.
these jurists’ successors have managed to bridge the gap in legislation, in doctrine, and in the court. While some efforts have been more successful than others, the law as found in the Majalla and its equivalents across the Muslim world offers the best example of a genuine achievement in terms of preserving the classical aquis while adapting it for application in the modern world. Where codification was less successful in a country like Egypt for the aggiornamento of classical law, it was more an issue of style than of content.

In a field such as torts, however, the gap between the classical and the modern is structurally resistant to adaptation. Just as there was no theory of contracts in classical Islamic law, there was no readily recognizable theory of torts. But the problem is not one of systematization and there is a comprehensive compendium of torts written by one classical author.35 The problem is that compensation resulting from a tort is not treated as sui generis in classical law. The victim of a tort is entitled to compensation much as the debtor is entitled to compensation as the victim of the other party’s breach of the contract. The principle is that ‘any tort must be compensated’.36 This prevents the operation of negligence as found in the common law system, or faute in the civil law system. The victim is entitled to compensation on a strict liability basis, irrespective of the other party’s negligence or fault.

Some codes sought to incorporate the classical system and one will find an attempt to include the shari’a’s tort system in the Civil Code of Jordan. Article 256 establishes the principle of no-fault liability: ‘Any damage caused to another engages the responsibility of its author, irrespective of discernment’. The problem is that courts are unwilling to apply that principle because judges remain attached to the concept of ‘faute’. In a recent decision of the Cassation Court in Jordan, the application of the no-fault system recognized in principle by the Code was simply rejected: ‘Responsibility in tort rests on three pillars: fault, damage and the causality relation between the fault and the damage’.37 This formulation is typical of a jurist imbued by the celebrated interpretation of Art 1382 of the French Civil Code.

3. Family Law: The Search for Gender Equality

Family law is best understood from the point of view of legislative reform and the position of women in the legal system. Mirroring what Alexis de Toqueville called

36 al-darar yuzal, Ottoman Majalla art 20.
the ‘age of equality’, the development of family law across the Muslim world has been driven by legislative efforts to increase equality between men and women, set against an overwhelmingly non-egalitarian classical age.

Like most other pre-modern societies, the classical Islamic age was fundamentally impervious to gender equality. Classical law systematically relegated women to a status we perceive nowadays as inferior or secondary to men. In most family-related laws, a woman was entitled to only a fraction of the rights recognized for her male counterpart. What follows is a discussion of the central rights pertaining to women that are addressed in classical law.

Marriage

Only the woman who has reached majority and has already been married (that is, divorced or widowed) can get married without first ‘consulting’ her guardian. In most other cases, the male guardian chooses for her, and he may ‘overcome’ any resistance she has to his choice.

The Muslim husband can take up to four wives and can marry a non-Muslim woman belonging to one of the other world religions. The Muslim woman can only marry or be married to one man, and he must be Muslim.

While married, the wife owes obedience to her husband. If she violates one or more of the numerous duties that apply to wives, she is placed in the penalized position of disobedience, nushuq. Nushuq is exclusively associated with women.

Termination of marriage

In the law of separation, repudiation, talaq, is the prerogative of the husband. This is a unilateral right which is not granted to the wife.

Upon termination of marriage, classical Islamic law does not recognize ‘alimony’ or ‘ancillary relief’ as an entitlement of the repudiated or divorced wife. Under classical law, the end of marriage stops any payment of maintenance to the wife by the husband in the absence of children. When there are children, any money which the husband may pay to his divorced wife is directly connected to her status as caretaker of the broken marriage’s children. Although the right to ‘ancillary relief’ does not strictly pertain to the sphere of equality, it has become a key indicator of women’s rights in contemporary Muslim societies.

Custody

Custody of a child is entrusted to either the mother or father, depending on age and sex. Young children tend to be placed in the mother’s care, but the father takes custody of them when they reach a given age. The father has an overall right to guide the child’s education as he is considered ‘the head’ of the family and its ultimate guardian, even after divorce. There is therefore a difference between custody and guardianship, and the father is invariably the guardian of the child after separation, even if the mother is granted the right to custody up to a certain age.
Succession

The law of succession is characterized by a few cardinal principles. The first principle governs *ab intestatio* inheritance through a refined and complex system of arithmetic equations derived from the Qur’an. According to those equations, women—whether wives, mothers, or daughters—receive half of the share prescribed for the corresponding men in the family structure (husbands, fathers, sons). The relevant formula is repeated twice in the Qur’an: ‘To the male twice the share of the female’.38

Upon the death of the husband, in the simplest figures, the surviving wife receives one-quarter of the estate if there are no children, and one-eighth if there are. Upon the death of the wife, the husband receives one-half and one-quarter in the corresponding scheme. In the presence of a brother, the daughter never receives more than half of his share. The share of father and mother is more complicated, but the mother never receives more than her husband’s share in Sunni law, though there are cases when she might inherit the same amount he does.

The second principle, ‘no will for more than one third of the estate’,39 means that *ab intestatio* inheritance governs at least two-thirds of the deceased’s property.

The third cardinal principle, which is limited to Sunnis, prohibits a will in favour of an heir receiving a share in the estate under the following rule: ‘No bequest in favour of an heir’.40 The combination of these limitations on free wills and the rigid system of *ab intestatio* rules renders variations of the Qur’anic rules of succession extremely limited.

At this very general level, Shi‘i law includes an important variation on the Sunni system. In the Sunni law of succession, the importance of *‘asaba*, or male agnates, is paramount. This concept, arguably a calque of the Syro-Roman Code of the fifth century of the Christian Era, stands in contrast to an equally ancient Persian legacy. That legacy seems to be at the root of the Shi‘i rejection of the agnates as the repository of succession law. Sunni law establishes the entitlement of the male kin, however distant from the deceased, to such part of the estate as might not have been distributed under the Qur’anic shares. This portion can be significant,41 and it is crucial for inheritance when considered from the perspective of equality between men and women.

The Sunni principle of ‘the remainder to the agnates’ is bluntly rejected in Shi‘i law by the rule of ‘nothing to the agnates’, which is ‘graphically expressed

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38 Qur’an, iv, 11; iv, 176.
39 ‘*Al-wasiyya bith-thulth, wal-thulth kathir* (and the third is too much)’. Bukhari (d. 256/870), Sahih (9 vols, Cairo edn, 1576 AH), iv, 4.
40 *La wasiyya li-warith*. Ibid.
41 In an extreme instance, a man dies leaving his wife and a distant cousin on the male side of the family. The widow gets one-eighth and the cousin the remaining seven-eighths. For examples and further illustrations, including on the influence of ancient Syro-Roman and Persian legal systems, see Mallat, (2003) 51 AJCL 708 ff.
in the dictum of the Shi‘i Imam Ja‘far al-Sadeq (d. 147/165): ‘As for the ‘asaba (the agnates), dust in their teeth’. The consequences can be significant, as the Shi‘i system can turn out to be much more favourable to a daughter than the Sunni system. For instance, if a deceased father leaves one daughter and no son, the Shi‘i system allows her, as the father’s closest kin, to receive his entire estate. The Sunni system, on the other hand, restricts the daughter’s share to the portion established in the Qur’ān—one-half. The remainder goes to the nearest male kin. So if the deceased is survived by an agnatic uncle or cousin, however distant, the remaining half goes in its entirety to that relative. There is no way for the Sunni father to increase his daughter’s share by will because of the second and third principles mentioned above (no bequest to an heir, and no bequest for more than a third). The difference between the two systems has prompted a number of causes célèbres in which prominent male Muslims changed their allegiance from Sunni to Shi‘i law in order to take advantage of the Shi‘i inheritance rules.

It is important to note that this advantage in Shi‘i succession law only marginally advances the cause of gender equality because it applies only in the absence of a son. Whether in Sunni or Shi‘i law, if the daughter has a brother, the Qur’ānic rule of half the share applies so that she receives merely half of what her brother inherits. Thus, in both Shi‘i and Sunni law, the woman (daughter, sister, wife, or mother) tends to receive less than her counterpart on the male side of the family.

Variations in the law of succession can lead to further systemic inequalities. This occurs most notably in the mut‘a or temporary marriage for the Shi‘is, and the slave law of the classical age, which introduces elements of unequal treatment between the male and female slaves. If slavery as a legal category has all but disappeared in the twenty-first century, temporary marriage, an institution open to men only, is still known in a large country like Shi‘i Iran. It allows a married or single man to contract mut‘a for a stipulated amount of time—it could be several years or a few hours—with any number of women he may wish. Once the ‘contractual time’ has lapsed, the mut‘a marriage is automatically dissolved. A married woman cannot contract mut‘a, and, in theory, a virgin woman who is single is also barred from contracting mut‘a.

Overall, the woman is clearly disadvantaged at law. None the less, it should be noted that the absence of equality can actually benefit married women in two fairly narrow respects. The first benefit involves the payment of the dowry on the occasion of or after the marriage. Unlike the ‘Western’ dower (which the wife brings

42 Al-Hurr al-‘Amili (d. 1104/1693), Wasa‘el al-Shi‘a, xxvi, 85 (al-mal lil-aqra‘ wal-‘asaba fi fisih al-turab: property to the closest relative, and dust in the mouth of the agnates).
from her family property upon marriage), the mahr, the sum of money paid by the bridegroom to his wife upon marriage, is owed by the husband to his wife. In return, there is no dower owed by the wife to the husband. The second benefit arises from the husband’s duty to provide maintenance and non-monetary forms of protection during marriage. A husband is required to pay his wife’s usual expenses as well as those of the household as a whole. Even if the wife has considerable means, the classical age did not impose on her any duty of reciprocal treatment towards her husband. These ‘benefits’ are another illustration of the difference between the classical and modern outlooks. Again, we must guard against projecting our contemporary notions of gender equality backwards into the past.

The rise of women’s awareness and their struggle for equal rights has forced the legal system to take into account the demands of ‘the age of equality’ for men and women, and both legislation and the courts have tried, with varying degrees of success, to close the legal gender gap. Codification of family law started towards the end of World War I and continues to date. The pattern of reform, with little variation, has affected the core of the rights discussed above without confronting the issue head-on with a principle of equality. While men and women are sometimes formally declared equal, in constitutions or in family acts, the core principles and institutions of the classical age are never formally jettisoned. Even in exceptional instances such as the family code of South Yemen during its ‘socialist egalitarian’ period, family law retained the hallmarks of the classical inequalitarian system.

The current reform effort can be illustrated, in matters of marriage, divorce, and custody, by the latest such effort, enacted in Morocco in 2004. This reform consists of a list of amendments to the family code of Morocco known as the Mudawwana. Here, the central rights of classical law have been modified as follows.

Marriage

Women and men are ‘consecrated’ equal in the law, and the family is placed ‘under the joint responsibility of the spouses’. The age of marriage for women is raised to 18, which makes male guardian control over them inapplicable. ‘Obedience’ to husbands is no longer required, so nushuz becomes irrelevant. Polygamy remains possible in theory, but it is subject to so many procedural constraints that it becomes extremely difficult in practice. The first wife can make it a condition of her marriage that the husband shall not marry another wife, and both the first and a subsequent wife must be informed about the polygamous situation. Their express assent is required for the husband to get married again. In addition, a judge oversees the capacity of the husband to be ‘fair’ to his wives and to the children of a subsequent marriage, should the husband contract several marriages with the consent of all the wives. As a consequence, polygamy is both discouraged and controlled. In Morocco, as in other Muslim countries, it has therefore become rare.
Termination of marriage

Repudiation, *talaq*, gives the right to divorce to both spouses, and repudiation can no longer be exercised unilaterally. In addition, repudiation can no longer be made verbally and must take place under the control of a judge. Dissolution of marriage is made possible for the two spouses by the 2004 Amendments, again under judicial control.

Upon termination of marriage, the judge is asked to control the distribution of assets in a way that takes into account the rights of the divorced woman. While 'alimony' is not a recognized right, the law grants the divorced wife and her children the right to the marriage home. A separate regime for assets tends to protect the wife from the husband taking over her property; but assets acquired during marital life are subject to redistribution under the control of the judge, who may grant them in part or in totality to the divorced wife.

Custody

Custody of a child no longer depends on age and sex. The right to custody over a child is the mother's as a matter of principle, then the father's, until the child reaches the age of 15, whereupon the child can choose the guardian. No longer is the father, as 'head of the family', the automatic guardian of the child, and the distinction between custody and guardianship in the classical law has become effectively moot. Nor does the wife lose her right to custody if she remarries or relocates. Morocco now includes open reference to international conventions on the rights of children. In addition, the 2004 Amendments significantly enhanced the rights of children born out of wedlock.

These amendments to the marriage, divorce, and custody laws offer a paradigmatic example of family law reform across the Arab and Muslim world over the past half-century. Many similar egalitarian dispositions can be found in other jurisdictions. But there is virtually no egalitarian or corrective trend in the case of succession. The Moroccan amendments on that score are restricted to allowing grandchildren issuing from the deceased person's daughter to inherit in the same way as grandchildren issuing from the deceased person's son. Beyond that, equality between men and women in succession law is not acknowledged in any Muslim jurisdiction. The last attempt to establish equality in inheritance, enacted in Iraq in 1959, was reversed in an amendment passed four years later.43

IV. EPILOGUE

In his *Summa* on Mediterranean society as seen through the Cairo Geniza documents of the tenth to thirteenth centuries, Samuel Goitein includes a notable passage:

At the root of all this was the concept that law was personal and not territorial. An individual was judged according to the law of his religious community, or even religious ‘school’ or sect, rather than that of the territory in which he happened to be. Perhaps it would be even more exact to say that, with the exception of some local statutes, promulgated and abrogated from time to time, the states as such did not possess any law.44

A millennium and a half after the Islamic revelation, unrest and violence associated with the Islamic/Middle Eastern world make one wonder, from a comparative perspective, whether West and East are not on a collision course precisely because of their diametrically opposed concepts of law. On the Western side, law is associated with nation-states and their territory; on the Islamic/Middle Eastern side, law is dominated by the personal dimension, defined on the basis of religion and even sect within that religion.

It may be a broad generalization, but at the turn of the twenty-first century, one can only acknowledge the failure of the rule of law in the modern Islamic/Middle Eastern world, in terms both of the protection it should offer the individual and of the control of government under a working constitution.

In the field of obligations and family law, a pattern of differences, if not of confrontation, seems to have prevailed, albeit with the occasional success of a Code such as the Ottoman *Majalla*. But even in the field of contracts and torts, separate systems of superimposed (or intermingled) laws make it difficult to achieve coherence and stability: the Islamic legal system starts with no-fault compensation, and then makes exceptions to the principle for both contracts and torts. This is the reverse of the Western system, where the individual’s responsibility needs to be proven as starting-point. Civil codes in the modern Middle East have had difficulty accommodating both approaches simultaneously. Courts tend to abide by the Western system without adjusting its standards to the millennium-deep Islamic tradition.

In family law, social pressure and an increasing search for equality between men and women have improved the classical system, which was inherently inegalitarian. However, the success is neither total nor uniform, and the contradictory systems of Western and Islamic law remain apparent in the field’s most recent legislative reform.

For the comparatist reader, this chapter may not answer legitimate questions

44 Goitein (n 16) (1967) vol 1. 66.
pertaining to the classification of Islamic law as 'religious' or 'sacred', or the question of foreign influence or transplants, among others. But with the pronounced ascendance of Islamic law as the defining feature of militant Muslim states and groups since the revolution in Iran, the personal/territorial dichotomy may ultimately prove more important than any traditional classification familiar to comparative jurisprudence. Meanwhile, the comparative tradition remains strong: legislatures hardly ever pass a law without first examining foreign precedents and examples, whether they come from France, as in the case of amendments to civil or criminal law, or from a neighbouring Arab/Muslim state, as in the case of family law. Even judges are affected by the increasingly international and global nature of legal matters, and the Supreme Constitutional Court of Egypt does not shy away from citing long excerpts drawn from cases decided by the US Supremec Court. Within this worldwide phenomenon of growing attention to foreign and comparative law, the Islamic law tradition itself is increasingly drawn into the discussion. As a result, the comparative experience is enriched even though this often makes debates more acrimonious than they are in less tension-ridden contexts.

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CHAPTER 19

COMPARATIVE LAW AND AFRICAN CUSTOMARY LAW

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Cape Town

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I. Customary Law in Comparative Studies

Customary law grows out of the social practices which a given jural community has come to accept as obligatory. It is a pervasive normative order, providing the regulatory framework for spheres of human activity as diverse as the family, the neighbourhood, the business of merchant banking, or international diplomacy. Because custom is so diverse and so wide-ranging, it is clearly impossible to consider all possible systems. Instead, this chapter looks only at the customary laws of sub-Saharan Africa.

In certain legal systems, custom has been elevated to a position of honour, respected by courts and law-makers as a national tradition; the laws of Maoris in New Zealand and Aboriginals in Australia are recent examples. For the most part, however, lawyers pay custom little attention. It will be no surprise then, to discover that customary law is a latecomer to the discipline of comparative law. Even René David, whose vision was more expansive than most, subsumed custom under civil, common, and socialist law, systems which he regarded as the world’s main legal families.¹

The main reason for this neglect would seem to lie in the fact that lawyers take as their model for law the system that evolved in Europe. On this understanding, they believe that the primary sources of law are those endorsed by the state—legislation and precedent—and not the potentially anarchic social practices of local communities. Hence, legal scholars everywhere tend to regard custom as a somewhat primitive regime, one less worthy of study than ‘law’.

The history of comparative law has, in fact, been markedly eurocentric. It was only in the fifteenth and sixteenth centuries that lawyers in Europe started looking to the wider world. Initially, their interest was sparked by the conquest of the Americas and the opening of trade routes to the East, events which aroused a taste

for the exotic and a self-conscious reflection on European culture. Attention was drawn to the indigenous laws of sub-Saharan Africa only very much later, once the scramble for colonies was over, and the colonial powers were confronted with the problem of governing their possessions.

Eventually, all the European administrations had to recognize the unwritten laws of their subject peoples for the simple reason that they suffered chronic shortages of personnel and finance. Because lawyers lacked the skills necessary to determine the content of these laws, however, the job was relegated to anthropologists. Thus, as will be apparent below, the study of custom has been dominated by social anthropology.

In so far as comparative lawyers were prepared to consider customary law, they dwelt on the substance of the rules. By dint of liberal generalizations, they provided accounts of the law governing marriage, succession, land tenure, and so on, on the assumption that they were describing features typical of African life and thought. According to this approach, although differences in detail were to be noted, the many indigenous laws of the Continent could be treated as a single entity.

While it is, of course, true that common socio-economic conditions do work to produce similar legal forms, the economies and cultures of Africa were far from being uniform. Broad similarities no doubt existed, as they do in any ‘family’ of laws, but African societies were continually changing, in response to forces both internal and external, and these changes were occurring at different rates and in different places. Even if resources had been available, no one could have kept abreast of the infinite variations and fluctuations. Moreover, because customary laws are confined to small, more or less self-contained, communities, they are not immediately accessible to outsiders. Hence the great problem with customary law: ascertaining the rules.

From what has been said thus far, it will be evident that no comprehensive account can be given of the substance of sub-Saharan customary laws. This chapter is therefore concerned, instead, with matters of form and development, namely, the preservation of the law in an oral tradition and how it has been influenced by certain social, economic, and political structures. This focus requires, in turn, that particular attention be paid to factors influencing the production of texts on customary law. Because information on the subject is, for most people, available only in books, and because so many of these books are now criticized for being out of date and lacking in objectivity, readers must be made aware of how changes in the theories of jurisprudence and anthropology have affected the authors’ ideas and preconceptions.
II. The Colonial Encounter

The European powers had a curious relationship with their African colonies, one that has been described as an unhappy blend of tyranny and paternalism. Because all major decisions were made by absentee sovereigns, far removed from the sites of implementation, relations between rulers and subjects were, at best, a 'working misunderstanding'. Even today, this phrase would be an apt description of customary law.

The first written accounts of the subject were produced by outsiders, initially the teachers of Islam and, later, officers of colonial government. With hindsight, it now seems inevitable that these works would be biased, occasionally in favour of Africa, but mostly against. Some writers were captivated by qualities that had been lost in their own cultural histories—the nobility of warrior nations, such as the Ashanti, Herero, and Zulu, or the primordial purity of cattle-keepers, such as the Khoekhoe, Masai, and Nuer—but, by and large, most of those reporting on Africa saw only barbarism and backwardness.

The following account of customary marriage is typical. Survivors of a seventeenth-century Portuguese shipwreck on the coast of South Africa remarked, disparagingly, that:

[t]he women bring no dowry in marriage, on the contrary the husband pays the bride's father with cattle, and they become as slaves to their husbands... The kings have four, five, and seven wives. The women do all the work, planting and tilling the earth with sticks to prepare it for their grain. Cows are what they chiefly value.

Even much later, at the opening of the twentieth century, a British court could declare that indigenous land tenure in Zimbabwe was incompatible with 'the legal ideas of civilized society'. The Ndebele knew only precarious possession, not ownership, the sine qua non of civilization. (The consequences, of course, were serious: whatever lands were not 'owned', were open to British occupation.)

By its very nature, customary law stood condemned. As a pre-legal order, custom was said to be no more than mindless conformity to tradition. Hence, an early anthropologist could claim that: 'nobody dreams of breaking the social

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3 See e.g. François le Vaillant, *Voyages de M. le Vaillant dans l'Intérieur de l'Afrique par le Cap de Bonne-Espérance dans les années 1780–85* (1790).
5 Cited in George McCall Theal, *Records of South-Eastern Africa* (vol VIII, 1898–1903), 205.
6 *Re Southern Rhodesia* [1919] AC 211 (PC) at 233–4.
rules. Custom is King, nay tyrant in primitive society. Implicit in this view was a particular conception of the ‘primitive’ mind: ‘spontaneous, traditional, personal, commonly known, corporate, relatively unchanging . . .’. Derogatory adjectives abounded: primitive society was irrational, emotional, incapable of objectivity or individual thought. By contrast, the laws of Europe stood for all that was rational and impartial. Backed by the structures of organized state, they were instrumentalities, which could be used to achieve reasoned and predetermined ends.

During the nineteenth century, positivism reached its height in Europe, and, from a positivist perspective, rules derived from custom could not be a truly ‘legal’ order. According to Austin, whose teaching left a long-lasting impression on British jurisprudence, law ‘properly so called’ emanated from the commands of a sovereign. Because the decentralized polities of Africa did not comply with European ideas of statehood, they could not be considered sovereign, and, in consequence, they could have no law. As a body of habits, conventions, or moral standards, customary law was not fit for legal analysis. Rather, it was consigned to the study of anthropologists, whose interests lay in whatever was alien or secondary.

Colonialism has imprinted its values on custom, and these have proved difficult to shake. Throughout Africa, European laws, whether French, English, Portuguese, Belgian, or Roman-Dutch, have constituted the basic laws of the land. Customary laws were applied only as matters of exception. This situation still pertains. In consequence, European law stands as the comparator for customary law, as the ideal to which custom is always expected to conform.

III. The Transformation into Western Forms

For the sake of the orderly administration of justice, however, the colonial powers had to overcome their misgivings about customary law. Because they lacked the resources needed to impose their laws on large and potentially hostile populations, they were forced to compromise and recognize indigenous laws—provided, however, that these laws were suitably ‘civilized’. Thus, courts could refuse to apply

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9 Robert Marett, Antroplogy (1912), 183.
11 The British principle, established in Campbell v Hall (1774) 1 Cowper 204 at 209, was in fact similar to that applied elsewhere in Africa. For general accounts of the administration of justice in the colonies, see Lord Hailey, African Survey (1945), ch 7 and Jeswald Salacuse, An Introduction to Law in French-Speaking Africa (vol IV, 1969), 43 ff.
customary law if they found it incompatible with natural justice, equity, morality, or public policy. While the exact terms of these provisions varied from colony to colony, the general idea remained the same: the fundamental rights and freedoms of Europe were to be the basis of the colonial legal order.\(^\text{12}\)

1. The Reduction of Oral Traditions to Writing

Politically, the decision to recognize customary law was fraught with difficulties. So, too, was its application. With a few exceptions,\(^\text{13}\) customary law existed in oral form only. Although an absence of writing was clearly no problem for indigenous tribunals, it presented a formidable challenge to the Western idea of justice, which was predicated on an assumption that courts applied a fixed and certain code of rules known to the whole population in advance.

Colonial courts could, of course, treat the unwritten laws of Africa in the same way as the customs with which all systems of European law were already familiar. This approach required an evidentiary fiction that the customary rule was a matter of fact, to be proved by calling witnesses in each case in which it was alleged.\(^\text{14}\) When custom was the rule rather than the exception, however, courts could not operate on this basis. Not only was the need to determine rules on a case-by-case basis simply too time-consuming, but the potential for change and local variation undermined the overall values of colonial justice, which considered certainty and uniformity essential. Hence, in order to overcome the problem of proof and to provide the courts with a single authoritative set of rules, the business began of reducing oral custom to writing.

In anglophone Africa, one of the first official projects was launched in the mid-nineteenth century, when the colonial administration of Natal drafted a code of Zulu laws. Shortly thereafter, the Cape administration established commissions of inquiry to gather information on the customary laws of Basutoland and the Transkeian Territories. Independent texts also proliferated. A famous example, considered a model of its type, was Isaac Schapera's *Handbook of Tswana Law and Custom* (1938), which was commissioned by the administration of the Bechuanaland Protectorate. Even the post-colonial period saw the production of restatements of customary law, notably, those undertaken by the School of Oriental and African Studies at London University.

\(^{12}\) In the post-colonial period, the human rights movement has provided a similar, supervening code of values: Thomas W. Bennett, *Human Rights and African Customary Law* (1995), ch 1.

\(^{13}\) In some cases, local customs had been incorporated into Islamic law, which was then written down. In Madagascar, the Merina began to codify their customary laws from 1828 onwards, mainly in order to stave off colonization by France.

\(^{14}\) Moreover, whoever alleged a custom had to establish that it was reasonable, certain, and had existed from 'time immemorial': *Angu v Attaah* (1916) Gold Coast Privy Council Judgments (1874–1928), 43.
All of these works were driven by a belief that the written word is of greater authority and durability than the spoken word. The authors paid little attention to the effect that writing was having on the data recorded. It was commonly believed that, through the pen, readers acquired unhindered access to the information being described. In reality, however, the reduction of oral law to writing effects a change not only to form but also to content.\(^{15}\)

2. The Nature of Oral Law

Oral laws are vague and indeterminate. Because the creator is usually an anonymous being, lost in the past, there is no possibility of referring back to an authoritative original. What is more, when people talk about this law, they present new accounts, each one being only a partial representation of the original, since it is limited to what the speaker can remember. The way in which information is expressed is then influenced by the occasion for talking and the composition of the audience. Whether consciously or otherwise, speakers place 'on their materials personal interpretations. So it happens that, as an item of information is passed from one generation to the next, it is continually being recreated.\(^{16}\)

In any organized social order, however, the applicable rules must be sufficiently stable and certain if they are to function effectively. In oral cultures, these requirements are met by the use of various social and stylistic controls on speech. First, in order to keep information alive, it is repeated on all possible occasions (which results in a conservative, rather than an experimental, attitude to knowledge). Second, only certain people are allowed to speak, and then only at particular times. The social conventions of Africa, for example, generally allow only senior males to expound the law, and then only on the occasion of formal trials or council meetings. Third, stylistic devices give speech a fixed framework, which serves as a useful aid to memory. Myths and proverbs provide commonly understood genres for presenting rules. Assonance, alliteration, and rhythm contribute to the creation of pithy maxims, such as mekgwa le melao (customs and laws) and morena ke morena ka batho (a chief is a chief by the people).\(^{17}\) Hence, although oral laws do not appear as systematic abstractions, they are nevertheless formulaic and structured.

Oral communication does not lend itself to conveying a long chain of abstract reasoning. Instead, the language tends to be conversational, and, as a result, consists of short sentences, a readily understandable vocabulary, and many deictic markers, which serve to link information to its social context. Oral cultures therefore rely


\(^{16}\) Jan Vansina, Oral Tradition, A Study in Historical Methodology (1965), 76.

\(^{17}\) Isaac Schapera, 'Tswana Legal Maxims', (1966) 36 Africa 121 ff.
heavily on the mnemonics of physical objects and topographical features. Rights to land, for instance, are marked by trees, streams, hills, and gullies, and by the location of ancestral graves. The existence of a marriage may be determined by the presence of livestock as bridewealth, and a wife’s status in the family may be visibly fixed by the position of her house in a homestead.

3. The Effects of Writing

When an oral tradition is written down, the rules are inevitably transformed. On a macro-scale, it is immediately apparent that highly localized customs tend to be generalized and applied in a range of new situations. As authors accept international boundaries, rather than particular social groups, for defining the limits of the subject, customary laws expand to fill the states and provinces created by colonialism.

Together with generalization comes system. Laws preserved in an oral tradition lack precision and definition. Such rules are difficult to differentiate, and, without differentiation, it is impossible to begin the job of classification into different types. If rules cannot be classified, they cannot be organized into a system, and, without system, redundancies and contradictions are bound to occur. (It is no accident that logical coherence is a cardinal value of written rather than oral law.) In fact, it might be said that oral versions of customary law are not systems at all. They are better described as repertoires, or loose collections of similar, though varying, types of norm, from which discerning judges select whichever rule best suits the needs of a particular case.18

Another consequence of writing is specialization, and hence legal science. Writing makes possible sustained reflection and abstract analysis, conditions that favour the development of a specialist profession. In oral cultures, however, it would be unusual to find a particular group of people dedicated to the application, interpretation, or making of the law. Thus, in Africa, customary law was never regarded as an esoteric discipline, beyond the reach of ordinary people. Every adult male was expected to be familiar with the laws of the community, and thus competent to argue them in court.

Writing has effects even more profound, however, than the creation of system and science. In almost every case, it involves translation from a vernacular into a European language. Although this process is generally regarded as little more than a matter of form, it has significant implications for content.

This proposition is most vividly illustrated by the search for an appropriate European word to denote the common African rule that a husband is obliged to give livestock or some other form of consideration (here termed ‘bridewealth’) to his

wife’s family in order to conclude a marriage. In the lusophone and francophone colonies, the seemingly obvious choice was found in the word ‘dowry’, which is a familiar practice in Mediterranean countries. Notwithstanding associations with marriage, however, dowry and bridewealth have little in common. The most obvious difference lies in the identity of the duty-bearer: dowry is a payment by the wife’s guardian to the groom, whereas bridewealth requires payment by the groom.

In anglophone colonies, the giving of livestock is often termed ‘brideprice’, because the husband appears to be paying a purchase price for his wife’s services.¹⁹ Due in large part to this interpretation, colonial governments disapproved of the practice, and, in certain countries, the courts refused to enforce bridewealth agreements on the ground that they were repugnant to ‘general principles of civilization’. Although wives are never treated as slaves or chattels under customary law, and the courts’ interpretation was eventually discredited as a complete fallacy, colonial policy had, in effect, ‘bastardised almost the entire Native population . . . deprived practically every Native father of guardianship or other rights to his children . . . [and] destroyed any equitable claim to property’.²⁰

The very use of a noun to describe bridewealth obscures the fact that certain vernaculars use verbs, thereby suggesting a sense of process rather than a material object or a completed event. As fieldwork on the Tshidi people in Botswana showed, customary marriages are not defined by the performance of single acts or ceremonies. Instead, the Tshidi regard marriage as a process.²¹ It begins with a series of meetings between senior representatives of the bride and groom’s families, at which the parties settle the terms and conditions of the union.²² When agreement is reached on the amount of livestock or cash to be paid, the Tshidi allow the future husband to take up residence with the bride’s family, where he may start cohabiting with his wife. After a period of time, the couple moves to the husband’s homestead, and the bridewealth is formally handed over. Although payment of the full amount is usually delayed, the wife’s guardian has justification for demanding more with the birth of each child. Not until all marital obligations are fulfilled, however, can a couple be considered fully married.

The above example illustrates another significant feature of nearly all systems of customary law: jural relationships are determined without reference to outside authority. Marriages are concluded by the families concerned. In the absence of serious disagreement between the families, there is no need to involve outsiders,


²⁰ (1923) 1 Native Appeal Court (Natal & Transvaal) 1.


and the parties are free to waive or re-negotiate the applicable rules. It follows that customary law is always ‘adaptable, and situational’,\textsuperscript{23} qualities which contribute to a sense of process and transaction rather than one of irrevocable acts and events.

4. Legal Terminology

A major reason why writers on customary law so often use inappropriate translations is a predisposition to use Western legal terminology. All too often, the authors of early texts were officials in the colonial courts or administration. Partly because of their training and partly because the rules were written with the needs of practising lawyers in mind, Western concepts were used to describe the data. This tendency is most obvious in titles: chapters in textbooks are headed with terms familiar to Western legal systems, such as marriage, succession, property, contract, crime, and delict.

The use of these specifically legal terms was not always inadvertent, however, because certain authors believed in the universality of legal concepts. Gluckman, one of the great theorists on customary law, is a case in point. He argued that the concept of ownership exists in all cultures; it is merely manifested by different words. Max Gluckman could therefore say that the Barotse word \textit{bung’a} should be translated by the English term ‘ownership’.\textsuperscript{24}

Today, few people would support this argument without major qualifications. It takes no great linguistic insight to realize that terms and concepts are historically and culturally specific. In other words, words have no metalinguistic meanings. Once we accept that the concept of ownership is generated by a particular culture, then it is clear that the English word cannot be expected to give an accurate reflection of how proprietary relationships are regulated in Africa.

Paul Bohannan was a decided opponent of Gluckman’s approach. He argued for the use of vernacular terminology, saying that this was the only way to understand the nuances of African thought systems. By implication, he accepted the unique quality of all cultures,\textsuperscript{25} and, in his own work, \textit{Justice and Judgment among the Tiv} (1957), Bohannan was able to expose the distinctive character of indigenous institutions to great effect. Given the dominance of European languages in all official contexts in Africa, however, vernaculars have seldom been used.


\textsuperscript{25} Bohannan was influenced by the Whorf-Sapir school of ethno-linguistics, which maintained that language users were predisposed to think in categories which had been encoded in their vocabulary and grammar.
The use of European terms and concepts has operated, at many levels, to transform indigenous laws into something more amenable to a Western way of thinking. When colonial authors wrote about family relationships, for example, they tended to discount the rights and duties of family members inter se as irrelevant to a legal text. Notwithstanding the fact that these rights and duties form a critical component of customary law, they were demoted to mere morality or convention.\textsuperscript{26}

Western lawyers have also found it difficult to accept the fundamentally asymmetrical nature of African legal relations. For instance, in customary law, the powers of the head of a household are general and diffuse. He is expected to judge disputes fairly, to provide his subordinates with food and shelter, and to make appropriate decisions on their behalf. However, in keeping with the image of a wise care-giver, customary law emphasizes responsibility, not rights and powers.\textsuperscript{27}

The same sense of asymmetry is true of laws about children. Claims for support—at least in the past—were less significant than a child’s responsibilities to contribute to the welfare of the family, whether by bringing in bridewealth or by providing labour in the fields.\textsuperscript{28} These duties persist, whatever the age of the child. Indeed, the idea of any member of a family enjoying special rights (as is implied by the best interests of the child rule in Western systems of law) is at odds with the African legal tradition. Nevertheless, texts on customary law tend to gloss over the emphasis on responsibility. Instead, authors describe the law in terms of rights and duties, a framework which better suits the Western demand for balanced legal relations.

\textbf{IV. The Development of Legal Anthropology}

Social anthropology has always been a major source of information about customary law. Not only did anthropologists have the job of gathering data,\textsuperscript{29} but they were also responsible for much of the theory on the subject. As a result, shifts in thinking have had a strong influence on perceptions of customary law and the ways in which it has been studied.

\textsuperscript{26} See Martin Chanock, Law, Custom and Social Order (1985), chs 10 and 11.

\textsuperscript{27} This emphasis was considered sufficiently important to warrant a special chapter on duties in the African Charter on Human and People’s Rights (1982), ch 2.


\textsuperscript{29} They were described as the ‘intelligence department’ of colonial government: Robert Rattray, Ashanti (1923), 8.
1. Evolutionism

The term ‘anthropological jurisprudence’ was coined in 1886 by the German jurist, Albert H. Post, but it is Sir Henry Maine who has the reputation of being the ‘founding father’, largely because of his book *Ancient Law* (1861). Anthropologists of the mid-nineteenth century—many of whom also happened to be lawyers and active contributors to the discipline of comparative law—had already extrapolated the theory of biological evolution to human society. In an application of evolutionism to law, Maine argued that all legal systems progressed through clear and inescapable stages, from a lower, primitive, to a higher, more civilized, state. By comparing various archaic systems—Roman, Hindu, English, and Celtic—he claimed to have detected universal patterns in the development of legal institutions.

While evolutionism was responsible for many thought-provoking ideas about the relationship between law and society, the method was highly questionable. One problem was a lack of empirical data to back up the theory. Another was an implicitly ethnocentric bias, for evolutionism rested on a belief that European society represented the apex of all social change, a belief conveniently endorsed by the racism endemic in European colonialism. However, in spite of its shortcomings, evolutionism proved extremely persuasive, and, long after it had been discredited in anthropology, it continued to influence policy-making in the colonial administration, not to mention the thinking of many writers on customary law.

2. Functionalism

In the 1920s, the emergence of the rival theory of functionalism began to challenge evolutionism. Exotic data were no longer to be explained by comparison with notionally superior, Western cultural systems, but rather with reference to the native systems themselves. It followed that, if the meaning of an item of information was to be properly understood, then that item had to be considered in relation to all other items in the culture under study. The practice of giving bridewealth, for example, was no longer viewed from a European perspective—which might suggest the purchase of a wife—but rather from the perspective of a participant in the system. From this angle, the institution appeared less as a social evil and more as a means for protecting wives and providing them with a public measure of their reputation.30

A separate branch of functionalism grew out of the work of a group of British anthropologists working mainly in Africa, notably, Radcliffe-Brown, Evans-Pritchard, and Gluckman. They were concerned with the network of relations and

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30 Hence, John Soga, *The Ama-Xosa* (1931), 274–5 described lobolo as ‘the Bantu woman’s charter of liberty’.
institutions which together constituted the structure of society, and the way in which these institutions functioned to maintain a stable and harmonious unit. Structural-functionalism heralded a period of great activity in legal anthropology. At that time, the policy of indirect rule was the established dogma of colonial government, and authorities were in urgent need of more and better information about their subjects. Research projects therefore received generous government sponsorship, and the number of ethnographies grew accordingly.\footnote{See Adam Kuper, *Anthropology and Anthropologists* (1983).}

Gluckman can still be considered one of the chief theorists on customary law. From his research among the Barotse, a people in the south-western area of Zambia, he used both evolutionism and structural-functionalism to produce a series of provocative ideas about legal development. In formulating these ideas, Gluckman attributed a decisive influence to the structures of Barotse society.\footnote{See Gluckman (n 24), 4–5.}

This society was composed of small, self-contained settlements, each inhabited by one or more closely related families, who supported themselves from subsistence agriculture. The people produced little beyond what they could consume, and, from a restricted range of material goods, it followed that everyone had a similar standard of living. There could be no distinct class, marked by wealth and power.

‘Tribal’ societies, such as the Barotse, were described as ‘status dominated’. This term means that the imperatives of material support and reproduction were realized through the performance of duties attached to an individual’s status within a family system. Thus, kin (and neighbours) were responsible for performing such critical tasks as rearing children, caring for the sick, and propitiating the ancestors. Rights and duties derived from contract were of peripheral importance. Hence, Gluckman could confirm Maine’s famous dictum that the progress of society was ‘a movement from Status to Contract’.

On the basis of the ‘tribal’ nature of Barotse society, Gluckman constructed a theory about property and social relations in customary law. He observed that, because rights to property were constantly being overridden by the support claims of kin, no individual could ‘own’ food, cattle, or land absolutely. Admittedly, this proposition is also partially true of Western societies, for a parent’s responsibility towards children requires the constant provision of food, shelter, and support, and parents who fail to discharge these duties are liable to legal action. An individual’s right to property, in other words, is superseded by duties to the family.

Similarities between Western and customary law end at this point, however, because, in the Western world, an individual’s survival is never totally dependent on the support of kin. Instead, adults are expected to earn their living from relationships formed by contracts in the labour market, and their economic security is underwritten by ownership of their acquisitions. In Africa, on the other hand, the duties arising out of social relationships always take precedence. Gluckman
therefore says that '[p]roperty law in tribal society defines not so much rights of persons over things, as obligations owed between persons in respect of things'.33

Customary conceptions of property were conditioned not only by the nature of social relationships but also by a critical economic factor: scarcity. Whenever goods are freely available, they have little economic importance; access and control then require no legal protection. Regulation becomes necessary only when there is competition for resources. It is at this stage that the law begins to focus on the individual’s right to property rather than relations with other people. This development was confirmed by a study of customary-law rights to land in two Malagasy cultures.34 The Merina, whose agriculture was based on a shortage of land but an abundance of labour, especially slave labour, conceived of proprietary rights as a person’s right to his land. The Zafimaniry, on the other hand, had an abundance of land but a shortage of labour. Their law emphasized the relationship between persons; the land was a secondary consideration.

Regular trade is the final determinant of a fully-fledged concept of ownership. Before its advent, economically valuable property tends to attract many highly specific rights, each of which may potentially vest in a different person. Commerce can flourish, however, only when these goods are loosened from the specific rights of particular interest holders so that they can circulate freely in the market. Once every commodity bears an easily measurable exchange value relative to all others, ownership emerges.

This highly abstract concept can be applied to any type of commodity, and it can be made available to any trader. Ownership has the distinctive feature, especially in civilian systems of law, of being ‘absolute’, a quality which implies the concentration of all entitlements in one person—usually the possessor—who, in consequence, is free to use and dispose of property at will.

In summary, and following Gluckman’s theory, since most systems of customary law are rooted in a pre-trade era, proprietary rights to such economically important property as land and livestock can be distinguished from the Western concept of ownership by the fact that customary law allows a number of specific interests to vest in various different holders. The typically capitalist legal system, by contrast, allows a collection of interests to vest in a single holder.35

Wills appeared at the same time as ownership. Because customary law had less concern with property than with support obligations, death raised no particular questions about the disposal of the deceased’s assets. Instead, the issue was one of succession, namely, the transmission of the deceased’s duties of support, together with concomitant powers of control over the family estate, to a suitable heir.

33 Gluckman (n 24), 163.
systems of Western law, on the other hand, because individuals owned their property and were free to decide how it should be used and disposed of during their lifetimes, the same power extended to disposal on death. Wills were therefore believed to be the best and the most natural way of transferring property to the next generation.

Contract is yet another institution associated with property. In the pre-colonial period, with the exception of certain cultures in West Africa, commerce in sub-Saharan Africa was neither regular nor general. In consequence, few systems of customary law had any clear concept of contract. This is not say, however, that contract-like institutions were lacking.

Promises, for instance, were taken very seriously. In fact, European observers remarked that pledges had a sacramental quality, which was signified by the performance of rituals. A typical example would be a pact of brotherhood, which was sworn by members of age sets as part of their initiation. The importance ascribed to such pledges can be explained by the effect they had on the parties’ relationship: they established long-term bonds, equivalent to those of close kin.

Gift-giving was also a great feature of African cultures, but it, too, bore little resemblance to a contractual relationship, because it lacked a specifically economic purpose. Instead, gifts were given by people already bound to one another as kin or close friends in order to strengthen relationships or discharge the obligations attached to them.

Barter was also common. Households in most parts of Africa were self-sufficient subsistence units, but they might well produce surpluses which could then be bartered in order to procure some particularly sought-after product. Unlike gift-giving, barter did not imply a prior social relationship. Once the transfer of goods had occurred, the parties had no further obligations towards one other.

Gluckman studied equivalent relationships among the Barotse.36 The undertakings which interested him were in the nature of partnerships. They involved specialist hunters and craftsmen, who traded their products with the local farmers. After a series of transactions between the same parties, a pledge of friendship would ensue. Thereafter, the relationship ceased to be predominantly economic, as each partner strove to outdo the other in generosity. In this way, a series of isolated transactions between two strangers would be recast as a deeper and more complex relationship between kinfolk, a transformation which was usually signified by the parties’ adopting kinship nomenclature. They would now talk about one another as ‘brothers’, with the implication that fraternal standards of behaviour were expected.

These partnerships were still not the same as commercial contracts. On the one hand, their purpose soon ceased to be purely economic, and, on the other, a bare promise was not considered binding. Gluckman noted that Barotse courts were prepared to enforce agreements only when property had been conveyed or

36 Gluckman (n 24), ch 4.
when the parties had performed some formality specific to the transaction, such as the clapping of hands or the drinking of palm wine. Although the purpose of these preliminaries was obviously to provide evidence of a serious intent, more was at stake, because, even if both parties clearly wanted a binding agreement, the courts would not hold them to it unless they had observed the formalities. Gluckman concluded that Barotse law endorsed Maine’s thesis that, in early legal systems, contract consisted of incomplete conveyances of property.37

V. THE SHIFT TO PROCESS AND DISPUTES

1. Acephalous and State Societies

Anthropologists working in the structural-functionalist tradition tended to follow one of two approaches. The first, led by Radcliffe-Brown, concerned itself with rules and the maintenance of order in society. As might be expected, such a concern meshed readily with Western legal scholarship, which also regarded rules as the key element of any social order.38 The research methods and interests of this branch of anthropology therefore complemented the needs of colonial lawyers and administrators.39 The second approach was derived from Bronislaw Malinowski’s concern with mechanisms of social control. From the 1960s onwards, a group of writers, dissatisfied with the preoccupation with order and rules, turned instead to consider disputes.40

In what became a classic work on the comparison of legal cultures, *Justice and Judgment among the Tiv* (1957), Bohannan revealed how differently the British and Tiv in Nigeria viewed the function of rules in disputes. From the British perspective, courts were there to apply rules to facts, whereas, from the Tiv perspective, the *jir* (a more inclusive institution, since it embraced both courts and family councils) was there to counteract breaches of social norms.

The Tiv expected the *jir* to settle disputes in order to restore social harmony. A settlement might be achieved by application of rules to facts or by the elders

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performing an appropriate ritual. The Tiv saw no significant difference between these interventions. Bohannan therefore concluded that the Tiv would not have shared the British idea that customary law consisted of a body of known and certain rules. Rather, the Tiv believed that there was a right answer to any dispute, and that the task of a jir was simply to find that answer.

Bohannan’s work suggested that, if legal cultures in Africa were to be properly understood, the focus should be shifted from rules to the methods and procedures for dealing with disputes. Indeed, as this idea took root, it became apparent that a concern with rules is a specifically Western cultural value.41

Through the study of process, it also appeared that adjudication, although a procedure central to the Western concept of justice, is only one of a variety of different methods for settling disputes. Customary courts, for instance, are less likely to adjudicate, in the sense of pronouncing one party right and the other wrong. They are more likely to seek compromise solutions, often a simple reconciliation of the parties. In fact, for a time, it was assumed that reconciliation was the dominant value of litigation in Africa. While this view was later shown to be something of an exaggeration, customary courts in Africa are still less likely than their Western counterparts simply to apply rules to facts in order to achieve win-or-lose solutions.

The interest in process did more than merely shift the attention of legal anthropology away from rules and adjudication. It also involved the study of power, and hence politics. A considerable body of literature was then directed at explaining how political and social institutions influenced methods of dealing with disputes.

The small-scale, close-knit nature of so many African societies obviously influenced the manner in which disputes were settled. Of particular interest was the degree of political centralization, and, for this purpose, anthropologists distinguished between accephalous and state societies.42 Although now considered too categorical and too eurocentric, this dichotomy still proves useful as a general analytical framework.

In state societies, rulers could rely on organized force to sanction their commands and prerogatives. Such societies were therefore likely to have a permanent judicial system, in the sense of an organ of government dedicated to hearing disputes both between subjects and between the state and its subjects. In accephalous societies, on the other hand, although tribunals of a sort existed, they did not have the backing of organized force to carry out their decisions.

Where a society had no supra-familial authority, the only method for dealing with disputes was self-help. Aggrieved parties then had the option of resorting to an outright contest of strength (although ritualized procedures usually mitigated the damaging effect of physical violence) or a process of negotiation.43 In either

41 Simon Roberts, Order and Dispute (1979), 45–7.
42 See Myer Fortes and Edward Evans–Pritchard (eds), African Political Systems (1940), Introduction.
43 Bohannan (n 38), ‘Introduction’ poses the two poles of conflict resolution, namely, law and violence. See, too, Roberts (n 41), ch 9.
case, rules were of little relevance to the final outcome. The dispute would be settled either by superior physical prowess or the arts of persuasion.\footnote{See Peter Gulliver, Social Control in an African Society (1963), 397 and ‘Negotiations as a Mode of Dispute Settlement: Towards a General Model’, (1973) 7 Law & Society Review 667 ff, Lloyd Fallers, Law without Precedent (1969), 11–12 and Ian Hamnett (ed.), Social Anthropology and Law (1977), 15.}

In centralized societies, on the other hand, the state can compel parties to submit their disputes to its courts. Hence, the less power at the state’s disposal the more likely that a tribunal’s jurisdiction will depend on voluntary submission, in which case it can do no more than persuade the parties to accept a compromise solution.\footnote{See Peter Gulliver, Disputes and Negotiations (1979), 271.} When a tribunal has the backing of police, a sheriff, and prison service, however, it can compel submission, and the disputants will be forced to accept whatever judgment is handed down. In order to legitimate its exercise of power, however, state courts must comply with a code of predetermined rules. Impartial application of these rules on terms of strict equality is therefore the basis of adjudication.

Acephalous and state societies were ideal types, seldom realized in their pure forms. Nevertheless, the political structures typical of most parts of Africa suggest that courts would be more inclined to mediate or arbitrate than to adjudicate. In a classic study of dispute settlement in rural Zimbabwe, for example, Johan Holleman showed that the people of the small community in question would not consider the strict and impartial application of rules to be ‘justice’. Rather, the law served as ‘a broad and flexible basis for discussion’. It was never considered ‘inviolable and imperative’. The satisfactory solutions to problems lay in a process of persuasion, with an emphasis on the spirit of give and take.\footnote{Johan Holleman, Issues in African Law (1974), 18.}

2. The Importance of Social Relationships

This study was borne out by Gluckman’s work on the Barotse.\footnote{Gluckman (n 40).} Because Barotse social structure consisted of intricate networks of status obligations, relationships were highly complex. It followed that disputes were equally complex. What might seem a petty quarrel about the infringement of a mere courtesy could well be the surface manifestation of a simmering conflict, fuelled by years of grievance. Moreover, because relationships were so intimate, disputes between kin generated intense emotion, and were quite likely to erupt into public displays of anger. In these circumstances, Barotse courts were expected to untangle all the complaints with a view to convincing the disputants that they ought to sink their differences so that social harmony could be restored.

The litigants’ relationship has an important bearing not only on the nature...
of a hearing but also on the type of rules applied, a point John Comaroff and Simon Roberts demonstrated in their study of courts in Botswana. The authors showed that the broad notion of customary law embraced both general and specific rules. The former were associated with disputes about relationships, while the latter were associated with particular rights or values. If a dispute was about a specific value, as might arise between persons associated for a limited purpose, such as a loan of cattle, specific rules were invoked, and strict procedures had to be followed. On the other hand, if a dispute was about a generalized relationship, such as a father and son arguing over the duty of filial support, the obligations would be equally general, and the court’s aim more likely to effect a reconciliation.

The nature of the dispute and the parties’ relationship also had a marked influence on the scope of the hearing. When disputes flared up between close kin, the court made no attempt to pare down the facts to fit a predetermined normative category. In other words, it did not insist on the parties defining the nature of the claim before the trial began. What is more, during the hearing, the court did not extract certain issues from the complex of facts out of which the dispute arose as being ‘relevant’. Hence, the dispute was defined by the parties’ relationship rather than a legal category.

In fact, the very measure of an effective court in Africa is its willingness to engage in a thorough inquiry. The latitude allowed, however, is qualified by the court’s overall purpose. The more distant the parties’ relationship, the more likely that the court’s purpose will be straightforward adjudication, and thus the less detailed the investigation. Hence, if a person suffers injury at the hands of a stranger, the inquiry is aimed at simply assessing compensation, and a strict procedure is followed. Conversely, where a court seeks to reconcile the parties, the immediate ‘legal’ issues that might have precipitated litigation have little significance for the eventual outcome. The court must consider the parties’ full relationship over a long period of time.

3. Wrongdoing in Customary Law

These considerations have a direct bearing on the treatment of wrong-doing in customary law. In societies lacking centralized structures of power and authority, no absolute distinction can be drawn between private wrongs and public crimes. Hence, unlike Western systems of law, which are careful to classify offences as crimes or delicts, customary law deems any act or omission wrongful, if it is in breach of a general duty to avoid doing something which might reflect on the reputation of others, harm their persons, or damage their property.

48 Comaroff and Roberts (n 18), 115–17. 49 See Gluckman (n 24), ch 7.
According to popular wisdom in the colonial service, which (predictably) can be traced back to Maine, Africans dealt with wrong-doing on the basis of collective responsibility, an inquisitorial procedure, strict liability, and a ‘thirst for vengeance’. 50 None of these propositions does justice to the reality. The first, collective responsibility, can only be understood in the context of property management. When property is administered by the most senior member of a family, individuals have no means of satisfying their debts. Whatever liabilities they incur have therefore to be satisfied from the family estate. The fact that the tortfeasor does not personally make reparation gives the impression that responsibility is collective.

As for the idea of inquisitorial procedure, it was often said that customary courts presume guilt and that judges question defendants on an assumption that they are lying. 51 This portrayal was also something of a misconception. In Western systems, plaintiffs bear the onus of proving their rights, but, in Africa, where the emphasis falls on duty rather than right, the onus is not so clearly located. Because defendants must avoid harming others, once the fact of damage is established, the likely offender has to convince the court that he or she had no responsibility for its cause.

The connection between damage and an offender cannot always be determined through observable facts, for many offences are committed secretly. Through a belief that the ancestors, spirits, or witches have the power to influence events in the physical world, however, misfortune may be attributed to an individual’s breach of rules of good conduct, without any specific evidence of factual causation. If sickness suddenly spreads among the cattle, for example, the reason might lie in a family’s failure to propitiate its ancestors. Similarly, if a person is killed by lightning, although the physical cause of death is quite obvious, the malign activities of a witch may explain why that particular person had to die at that particular time. 52

Because it is impossible to prove a factual connection between the agent and the misfortune, a court has to draw inferences from evidence indicative of the practice of witchcraft. This evidence includes bearing the stigmata of a witch, such as warts, blemishes, and other physical abnormalities, an unnatural association with animal familiars, or, even more telling, the culprit’s aberrant and antisocial behaviour. Thus, although witchcraft is usually invoked as an explanation for extraordinary misfortunes, it is pertinent only if the misfortune was preceded by bad relationships within small, close-knit communities.

In everyday inquiries, motive, intention, and negligence may seem irrelevant. If liability is collective, and, if reparation is the aim of a trial, then it is true that a tortfeasor’s state of mind can be of little importance. But more thoughtful writers

51 See Gluckman (n 40), 94–7 and (n 24), 10–11.
52 See Edward Evans-Pritchard, Witchcraft, Oracles and Magic among the Azande (1937), esp 63–83.
on customary law produced much evidence, especially in cases of witchcraft, to show that state of mind might be critical to an inquiry.

In fact, Gluckman showed that the idea of strict liability had to be understood within the context of particular social relationships. Western systems of law can be distinguished by an assessment of *mens rea* independently of the parties' relationship or the nature of an offence. In Africa, however, the closer the relationship between the wrongdoer and the aggrieved party, the more likely that fault will be investigated. Within a family, for example, motive and intention are highly relevant to the process of reconciliation.

Finally, the 'thirst for vengeance' is, in reality, restricted to politically decentralized societies, such as that of the Nuer in Sudan, who are often taken to be archetypically acephalous. With the Nuer, a wrong against one family entitles it to seek retribution from the offender's family. Unless a compromise can be agreed upon, a sense of unrequited wrong leads to a feud, which might persist from one generation to the next. Even Nuer families, however, usually decide to negotiate, and, if it can be shown that a killing was accidental, compensation may be accepted instead of blood.53

VI. DECOLONIZATION AND ITS AFTERMATH

1. Decolonization

In the 1960s and 1970s, the study of disputes came to dominate legal anthropology, an emphasis which led to a concentration on the pathological at the expense of the ordered and the everyday.54 An even more serious problem, however, was the ahistorical approach typical of all functionalism. Anthropologists had tended to neglect the socio-economic upheavals caused by colonization.55

Independence from colonial rule, and the awakening of a new national consciousness, provided the occasion for a major change of attitude towards customary law. African writers, such as the distinguished Nigerian judge, T. O. Elias, in his work *The Nature of African Customary Law* (1956), were at pains to show that customary law was every bit the equal of European law. It was now claimed as an

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African cultural heritage, in line with the doctrine of négritude, and thus worthy of serious attention and respect.

In spite of a rediscovered sense of pride and self-confidence, however, the newly independent states generally resisted the temptation to Africanize their legal systems. Custom was all too often seen as an obstacle to the two great imperatives of the age: national unity and modernization.

Because customary law stood for an ethnic diversity, it was at odds with the principle of equality and the drive to forge a new national identity. Customary law also connoted a rural conservatism. Because its source of legitimacy lay in tradition, custom was not an appropriate medium for producing goal-oriented enactments, and hence could not function as an instrument for achieving predetermined ends. Custom was perceived as a restraint on action rather than a catalyst for new patterns of behaviour. In short, customary law was considered antithetical to contemporary ideas of social change and individual initiative.

The response of certain states, especially those which had inherited a civil-law regime, was either to exclude customary law from the national legal system or to restrict its scope of operation. According to the former approach, which was epitomized by the codification projects in Ivory Coast and Ethiopia, the entire legal system had to be rewritten in order to meet the demands of a modern state.

René David, drafter of the Ethiopian civil code, thought that custom varied too much from place to place, was too unstable, and lacked a true juridical character. He said that Ethiopia was in no position to wait for centuries until the legal system had evolved to the required level. Instead, ‘ready-made’ laws were to be imported from Europe. For this reason, ‘ce n’est pas d’une évolution, que le pays a besoin, c’est d’une révolution’.

A less radical approach was to draft new laws based on European models, but moulded to fit the contours of traditional custom. The Malagasy codification project was an example. Here the legislature decided that the nation should be given ‘une législation unifiée, adaptée aux usages des différentes populations de Madagascar et acceptées par elles’. For instance, in a telling blend of tradition and modernity, the code preserved the customary practice of misintaka (which is common to most parts of Africa), whereby a wife may return to her natal family if her husband is not performing his marital duties. Although misintaka had been condemned by the colonial authorities for violating the marital consortium, it was now reinterpreted as desirable, because it conformed to the principle of female independence.

59 Resolution of the Malagasy Legislative Assembly, 2 June 1959.
2. Disillusionment and Marxist Theory

However, neither the francophone codes nor the many other legal reforms enacted in post-independent African states fully achieved their goals. Inspiration for legal change tended to come from urban elites, and, as a result, had little support from the majority of the population. Hence, by the 1970s, it was evident that the bold attempts to transform African society were not succeeding, and customary law still held sway. Concern about this state of affairs, and dissatisfaction with the answers provided by orthodox scholarship, prompted new directions in research.

Closer collaboration between lawyers and sociologists opened one avenue of inquiry; changes in anthropology opened another. The static vision of society implicit in structural-functionalism (and legal positivism) had yielded curiously one-dimensional results. In the 1980s, a new generation of anthropologists, inspired by theoretical Marxism, brought both history and the political economy directly into their work.

Francis Snyder's *Capitalism and Legal Change* (1981) was shaped by these concerns. From his work in the Casamance region of Senegal, the author set out to explain both change in customary institutions and their extraordinary degree of persistence. He based his explanation on the interaction of a dominant capitalist mode of production and one or more indigenous, pre-capitalist modes. Customary law was clearly embedded in the subordinate, pre-capitalist mode, but it had been transformed to serve interests that were dictated, ultimately, by world capitalism. Indigenous institutions of marriage and family, for instance, provided long-term support for migrant labourers who were forced to work for mines, industries, and farms in the capitalist enclave. The persistence of customary law therefore worked to the advantage of capitalist enterprise, because it served to subsidize low wages and provide workers with a refuge in times of unemployment, sickness, or old age.62

3. Ideological Functions of Customary Law: Culture and Tradition

Apart from explaining the persistence of customary law, neo-Marxist theory prompted inquiry into the ideological dimension of professional and academic writing. Anthropologists had long criticized jurisprudence for its subservience to state interests, but now they turned their attention inwards to their own work.63 Were anthropological representations of data as objective as the writers claimed?

63 James Clifford and George Marcus (eds), *Writing Culture* (1986).
How did ethnographies contribute to the maintenance of government and its policies?

The critique targeted culture and tradition, two concepts which functioned to define the very subject-matter of anthropology, and, indirectly, customary law. Laws were deemed co-extensive with cultures, and the notion of custom implied a normative order legitimated by tradition. A re-examination of these concepts therefore had profound implications for understanding customary law and its position in modern legal systems.

Culture was a particular casualty. As the new school of anthropology demonstrated, culture had never been of much value in explaining the workings of society. In fact, when called upon to account for the lives of people suffering poverty and oppression, which was the fate of most people living in developing countries, it seemed quite meaningless. Culture nevertheless served useful political functions. In South Africa under apartheid, for example, the government had divided the population into separate ‘cultural’ units, simultaneously depriving them of the benefits of national citizenship, on the ground that it was doing no more than realizing their right to cultural self-determination.

As the political manipulation of culture was exposed, legal anthropology began discarding ideas previously considered part and parcel of the concept, namely, that cultures were pure, discrete units, consisting of fixed values, norms, and institutions. Hence, today, culture is regarded as a much more porous concept, as a repertoire of signs culled from a group’s beliefs, values, laws, artefacts, and behaviour, whereby members of the group can distinguish themselves from members of other groups. Once these possibilities were accepted, it followed that customary law, a prime manifestation of culture, also had to be regarded as both permeable and malleable.

Researchers are now far more willing to acknowledge the diversity of forces active in the creation of customary law. For example, since the eleventh century, from origins in the Sahel, disciples of Islam had taken the Shari’a deep into Africa, with obvious implications for the customary laws of the converts. It was not so obvious, however, how to label the result. While it could be said that the laws of such peoples as the Hausa and Wolof had been Islamicized, it could equally be said that they had Africanized Islamic law. Christianity had produced similar effects, and raised similar questions: had customary marriages been Christianized or had the so-called independent African churches Africanized Christian marriage?

Both culture and custom are intimately linked to tradition, an institution which functions to give people a sense of continuity and security in circumstances

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64 See Eugeen Roosens, Creating Ethnicity (1989), 12.
65 At the heart of any analysis of culture is power. In their struggles to gain power, both groups and individuals exploit culture as a resource to build hegemonic relationships. See Mandy Lazarus-Black and Susan Hirsch (eds), Contested States (1994), 9–13.
of disruptive social change. As far as culture is concerned, tradition connotes the means whereby thoughts, values, and institutions are transmitted from one generation to the next. As far as custom is concerned, it connotes a basis of legitimacy.

The social practices on which all custom rests are, in the nature of things, continually changing. The volatility of this normative order is balanced, however, by a belief that the rules are derived from the past, a belief which gives legitimacy to the novel and unexpected. Hence, the paradox: while forgotten rules of customary law are constantly sinking into oblivion and new rules are rising to take their place, it is always understood that the new is old and deserving of respect.66

These propositions were borne out by Sally Falk Moore’s study of the Chagga, a people who live on the slopes of Mount Kilimanjaro in Tanzania. Falk Moore showed that, with the introduction of coffee as a cash crop, and a steady decrease in the amount of land available for agriculture, rights of access had to be reformulated to meet changed social and economic conditions. Although the rules at the time of the study were certainly not those of the pre-colonial past, the people still regarded them as traditional customary law.67

It becomes apparent from such studies that tradition, like culture, is a resource to which people appeal in struggles for power. Colonial, and then post-colonial, governments reconstituted existing institutions to achieve new policies, but then returned these same institutions to the people as if they were unchanged. In this process, ‘history was denied and tradition created instead’.68 The people subjected to these changes also invoked tradition, however, partly to resist the imposition of new laws and partly to make sense of new situations.

Acknowledgement of human agency in the creation of culture and tradition has had a profound effect on our understanding of customary law. A noticeable scepticism pervades the attitude to earlier literature, for readers are now aware that authors give particular representations of their subjects, ones shaped by contemporary intellectual trends and the authors’ own interests. Such is the level of doubt that the term customary law is now frequently qualified to signal its degree of legitimacy.

Especially suspect is ‘official’ customary law. This version is found in texts used by the state judiciary and official administration. Because it appears in the form of statutes, codes, restatements, and precedents, it is most likely to have strayed from an authentic tradition, and, in fact, may well have been produced by government to serve some ulterior purpose. Academic versions of customary law are also available, but they, too, are not considered totally reliable, given the theoretical and other preoccupations of the authors.

66 Michael Clanchy, From Memory to Written Record (1979), 233.
68 Peter Fitzpatrick, ‘Is it Simple to be a Marxist in Legal Anthropology?’ (1985) 48 Modern LR 479.
Scholars, and even courts and law-makers would now be ready to concede that the only truly authentic version of customary law is the 'living law', which is the law in fact being observed by its subjects. By definition, however, this law is not directly available to outsiders. It may still be adduced in court by way of evidence, but the procedure is costly and time-consuming. Hence, the unhappy situation, that, for better or for worse, people needing to refer to customary law are usually forced to make do with official or academic versions.

VII. LEGAL PLURALISM

1. Centralism and the Pluralist Critique

The dichotomy between official and living law forms the basis of legal pluralism, a perspective that now dominates the study of customary law. Pluralism grew out of a profound sense of dissatisfaction with legal positivism, which, in pluralist terms, is called 'legal centralism'.

Centralism assumes that the state has a monopoly of all legal institutions. It follows that legal and non-legal norms must be clearly distinguished and that legal norms have an overriding authority. Centralism also assumes the logical coherence of the legal system, and, perhaps most important, it accepts the main tenets of legal liberalism, namely, that state institutions operate according to strict principles of equality and neutrality: all individuals are equal before the law, and, to reach decisions, courts must impartially apply rules to the facts.

Over the years, however, anthropological fieldwork had produced abundant evidence to show that none of these assumptions was being realized in fact. The reach of the state was not nearly as extensive as centralism might suggest. To the contrary, research showed that, in everyday life, the formal legal system was often treated as a secondary, not a primary, source of regulation. Moreover, courts, especially those in states with poorly developed infrastructures, seldom realized the requirements of impartiality and equal treatment. Instead, fieldwork showed a multiplicity of different normative regimes in operation: the law being applied in the courts and the various other laws associated with distinctive social units.

In 1986, John Griffiths set out to debunk legal centralism, and to proclaim the

manifesto of legal pluralism. He denounced centralism as a myth and an ideal, and he rejected, as pure ideology, the proposition that ‘law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions’. Admittedly, both colonial and post-colonial states formally recognized the operation of indigenous systems of law, but Griffiths described this phenomenon as ‘weak’ pluralism. He said that it was no more than legal centralism in a different guise, for the state, in its discretion, had decided whether to take cognizance of these subordinate systems.

In place of weak legal pluralism, Griffiths advocated what he called the ‘strong’ variety, namely, a frank acceptance of the fact that people’s lives were regulated by various independent but related legal orders, each valid in its own terms. Griffiths’s proposal was an elaboration of earlier works, notably, Eugen Ehrlich, _Fundamental Principles of the Sociology of Law_ (1936), Leopold Pospisil, _Anthropology of Law_ (1971), and Sally Falk Moore, _Law as Process_ (1973). Ehrlich had claimed that true, ‘living law’ was the actual conduct of people in associations, such as factories, religious communities, or political parties. Pospisil had viewed society as a constellation of groups and sub-groups, the higher groups containing the subordinate, and each group distinguished by its own legal order. For her part, Moore claimed that law emerged from semi-autonomous social fields, each of which was ‘defined ... by the fact that it can generate rules and coerce or induce compliance to them’.

From these works, Griffiths extracted a common theme: that the unofficial normative orders operating within discrete social groups were as valid for the subjects as state law. Hence, unlike the former weak legal pluralism, strong pluralism regards all law-like behaviour as worthy of study. Griffiths’s contention rested on what he said was the self-evident fact that people within semi-autonomous social fields actually observe the normative orders of those fields, often in contravention of state law. To say that the state has exclusive jurisdiction over social life is, therefore, to endorse an ideology, since the claim is not borne out by the reality.

The keystone of legal pluralism is the semi-autonomous social field, a concept developed by Sally Falk Moore. It can be defined as any social entity, whether village, family, church, or workplace, with the capacity to create rules and induce compliance. Because individuals may simultaneously be members of two or even more semi-autonomous social fields, they ‘will be subject to concurrent and

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72 See the accounts by John Gilissen (ed), _Le Pluralisme Juridique_ (1971) and M. B. Hooker, _Legal Pluralism_ (1975).

73 Moore (n 67), 57.
contradictory obligations. For legal pluralists, this situation is to be expected, because pluralism is always present whenever two or more normative orders overlap.

This potential for overlap is significant in two respects. In the first place, it implies that individuals located at the intersections of semi-autonomous social fields have choices as to which rules they will invoke and abide by. In the second place, it suggests that social fields do not function in isolation but in interaction. Those responsible for applying a particular normative order will be constantly influenced by other norms, either formally, as when judges in state courts acknowledge new rules of customary law, or informally, as when customary tribunals take account of state laws.

Legal pluralism insists that we pay careful attention to the way people behave, because it is only from actual behaviour that a ‘true’ version of the law can be discovered. Seen in these terms, much of the customary law applied in the higher courts is of dubious validity. It is at this point that legal pluralism converges with the critique of culture and tradition, because both acknowledge the need to distinguish the living from the official versions of customary law.

2. The Value of Pluralist Research

Legal anthropologists were quick to adopt Griffiths’s thesis, which they hailed as a key to ‘reconceptualising the relationship between law and society’. Pluralism has therefore exerted a considerable influence on research into customary law. A good example is the work being done by Women and Law in Southern Africa (WLSA), a private NGO which is conducting a series of studies in several southern African states to discover how women are affected by the interaction of official and living law.

WLSA employs an eclectic range of data-gathering techniques. Its preferred method is a ‘grounded process’, which can be described, in an appropriately African image, as that of the ‘dung beetle’. Thus, WLSA researchers start their work with the subject’s ‘lived reality’, namely, his or her perceptions of rules and courts, and how tribunals deal with problems. Careful attention is paid to the intersections of semi-autonomous social fields, together with structures of gender, generation, and culture to show how overlapping normative orders affect individual


\[75\] Another excellent example is Anne Griffiths, In the Shadow of Marriage (1997), a book derived from the author’s fieldwork on property claims made by women of the Bakwena group in Botswana.

\[76\] See Agneta Weis Bentzon, Anne Hellum, and Julie Stewart (eds), Pursuing Grounded Theory in Law (1998), 178 ff.
choice. Like other, similar research agencies, WLSA favours an action-oriented approach, whereby field workers actively assist vulnerable groups, especially women, to improve their position in law and society.

WLSA's work on succession is an excellent example of its approach. The project revealed that well-meant legislative reforms were not necessarily being implemented in people's lives. Hence, although heirs might be entitled, under statutory rules, to specific fractions of an estate, social practice dictated that the surviving spouse simply took over the whole estate.77 Predictably, WLSA reported a divergence between the approaches of higher and lower courts towards customary law. The lower courts, including those of traditional rulers, responded to perceived social needs regardless of the strict rule, whereas higher courts applied only the official version of customary law. Hence, although the original purpose of customary law was to create an environment conducive to the care and protection of a deceased's family, the law applied by the higher courts very often had the opposite effect.

WLSA also noted the emergence of new rules of succession, which go unmentioned in the upper courts. Throughout southern Africa, it is an accepted rule of official customary law that only males can succeed as heirs. According to this strongly patriarchal system, the heir is supposed to succeed to the deceased's status and obligations in order to care for the widow and the deceased's immediate dependants. WLSA research, however, revealed strikingly different patterns of practice.

The position of widows, for instance, is both better and worse than is apparent in the official version. On the one hand, they are generally involved in family decisions about the estate, and heirs regularly consult them. Moreover, widows, especially those with young children to raise, often take control of their husbands' lands and movable assets in order to secure maintenance of the surviving family unit. On the other hand, it is also true that widows regularly suffer at the hands of the deceased's male relatives, who readily exploit their patriarchal privileges to seize whatever property they can find in the estate.

WLSA research has shown dramatic departures from the principle of primogeniture, which has always been assumed to be a cardinal rule of customary law in southern Africa. The oldest son may still inherit the largest portion of the estate, on the ground that he has responsibilities for maintaining the family, but other children also take a share. Moreover, several field studies have shown that last-born sons inherit the family homestead. The practice of ultimogeniture is based on the fact that the oldest son is normally the first to marry, leave home, and start a new family. The youngest son is left behind to assume responsibility for his parents in their old age. Inheritance of the family land and house gives him both the means and the incentive to do so.

Litigants naturally make the most of the opportunities offered by contradictory laws. Throughout Africa, society is in a state of constant change, and WLSA shows how people invoke either the old or the new orders, depending on which affords the greater advantage. Courts and state officials, too, are alive to the differences between the official and unofficial systems, and, to a limited extent, they are prepared to use the one to modify the other.

Reservations about legal pluralism have only recently begun to emerge. First, pluralists, like the functionalists before them, took it for granted that their perspective would be more objective than what had gone before. In common with others who insist on empirical observation, they seemed to think that they had emancipated themselves from all value systems. In fact, however, pluralist writing—following a long tradition in anthropology—shows a predisposition to favour the underdog.

Second, legal pluralists refuted any hierarchy in their units of study—the semi-autonomous social fields—and by implication in the normative orders of those units. This stance followed from the argument that the state is not in exclusive control of law. Although the pluralist viewpoint is understandable, it obscures the fact that state law can and often does exert a considerable power, which in many situations will prove to be decisive. Thus, treating state law as a superior order is certainly not blind obedience to ideology.

Third, and related to the last point, is the assumption in pluralism that all normative orders are equally valid. While the pluralists' original intention was to rescue indigenous and other normative orders from a position of inferiority, they have succeeded in elevating mere social practice to the same status as law. The logical consequence is, paradoxically, to deny customary law much of its current status. If it enjoys a rank equal to that of the normative orders observed in factories or the banking industry, then it loses its value as an African cultural heritage.

3. Customary Law in a Pluralist Age

Over the last twenty or so years, research into customary law has declined—most texts are produced in and with reference to southern Africa, especially South Africa—and many of the new works have turned from the task of recording law to the job of reflecting critically on existing texts. Indeed, awareness of the ambiguity of customary law has made study of the subject much more difficult than in the heyday of the functionalist ethnographies in the 1950s and 1960s.

Customary law can no longer be treated as if it were a neatly contained system, locked in a rural tradition. Instead, field workers must take account of the normative systems developing in Africa’s sprawling urban areas, where approximately 40 per cent of the sub-continent’s population now lives. The heterogeneity of this unit of study implies the need to take account of the many forces shaping people’s lives, whether work, religion, new forms of residence, or HIV/AIDS. Urban thinking and behaviour have, in turn, exerted an influence far beyond the confines of towns and cities, as urban dwellers commute to families in the country.

What is more, throughout Africa, reforming governments have contrived to change people’s lives. Bills of rights are probably the most dramatic example, although family relationships regulated by customary law were usually shielded from their effects. None the less, reform legislation is challenging entrenched traditions, notably the privileges enjoyed by senior males and traditional rulers. The social effects of these laws vary considerably, however, and not always in ways that legislators would like.

Because written laws are now the basis of all African legal systems, the survival of customary law is coming to depend increasingly on its being recorded. The process of documenting custom generally requires at least three shifts of register. The first is a shift from everyday to legal terminology. The second is a change of language, because most texts are written with a view to use in courts and organs of state, where the use of European languages still prevails. (An attempt in Tanzania to use only Swahili eventually had to be partially abandoned.) The third is a shift from a loose repertoire of rules to a structured system.

Each of these changes entails a move farther away from the living law. Hence, the mere fact of writing about customary law constitutes the creation of a new and somewhat artificial product. It must be accepted, however, that this construct is the outsider’s only access to the subject.

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VIII. Legal Anthropology in Comparative Law

Lawyers have dictated the scope of comparative legal research, and, with characteristic conservatism, the normative orders they selected for comparison have been remarkably similar. Custom poses a much more challenging venture.

Customary laws operate most effectively in close-knit, homogeneous communities, whose members share common values and goals. Both the nature of these rules (and the methods developed for their study) stand in sharp contrast
with the laws typical of heterogeneous societies. Hence, study of custom requires a radical shift in thinking.

In the first place, law existing only in oral tradition has features which distinguish it markedly from written laws, notably, a lack of system and a high degree of particularity (whereby laws are linked to specific peoples, events, or places). In the second place, the relatively weak degree of political control in customary communities precludes any notion of central authority over juristic acts. Legal relations are classically transactional and open-ended. As a result, law—the corpus of abstract rules—carries far less importance than processes for dealing with dispute.

Breaking into the tight-knit communities of custom, with their unwritten, and sometimes even unspoken, laws is far from simple, and it is certainly not possible using the traditional methods of legal research. Instead, the techniques developed by legal anthropology are essential. Moreover, because of its long association with marginal social groups and because its method demands direct questioning of informants and on-the-spot observation, anthropology has much to teach the conventional lawyer about the efficacy of the law. The legal practitioner’s view is formed by statements in legal texts and pronouncements in court rooms. Legal anthropology, however, and, in particular, legal pluralism give the recipient’s rather than the law-giver’s point of view. This grass-roots perspective reveals the law as observed by its subjects, and the ways in which rules and processes are manipulated.

What is more, the anthropologist’s interest in methods of social control and in the ideological functions of law have produced new perspectives on key concepts, in the case of customary law, culture, and tradition. Thus, anthropology would ask us to question closely the implications of ascribing the qualities of a distinct culture or tradition to a particular body of rules. Who ascribes these qualities and why? How does a cultural tradition strengthen the validity of a rule?

Once comparative lawyers are prepared to consider the social basis of law, then legal anthropology becomes an invaluable adjunct to their research. Indeed, the intimate connection between the two disciplines is not something new: Oliver Wendell Holmes remarked that ‘[i]t is perfectly proper to regard and study the law simply as a great anthropological document’.79

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